

## *Contractual Processes between Public Law Partners: Contracts between the State and Local Authorities*

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UDK 35.072.2  
35.071.6

Original scientific paper / Izvorni znanstveni rad

Received / primljeno 9. 11. 2011.

Accepted / prihvaćeno 15. 12. 2012.

The paper is devoted to exploring the contractual relations that exist between public law partners in France especially after the decentralization processes that started in the beginning of the 1980s. It is especially interested in contractual relationship between the central state and local authorities. After introduction, the paper reviews the evolution of contractual relationship between the state and local authorities presenting political justifications, legal foundations as well as administrative areas in which these relations take place in France. These areas include city policy, tourism, cultural development, environment, education, etc. It also deals with the recent extensions and limitations to contracting such as the sovereign priorities of the state, security sector and police activities. It is argued

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that the contract has enabled the operation of administrative systems that would otherwise be blocked. Wherever administrative coordination is insufficient, and when in the absence of effective deconcentration the relationships between services are poorly organized, contracts are useful.

*Key words:* public contracts, central state, local self-government, France

## 1. Introduction

The chosen field of contract pertains to the relationship between private individuals.<sup>1</sup> As contractual practices have been particularly creative, the contract may not only pertain to the relations between private and public entities, but may also govern the relations between public entities. This latter phenomenon is rather old; it has grown further with the economic interventionism of public authorities, and it has again gained ground with the current of decentralization.<sup>2</sup> In the French case, which is strongly marked by the dispersion of municipalities, institutional collaboration was a first cure for this disability, until the demands of collective work entailed the promotion of contractual cooperation between public entities.

It was natural for decentralization to lead to contractual practices. The easing of administrative structures explains the frequency of contract processes, which eventually generated a real craze, and became a preferred conduit for the relationships between public authorities. One must also recognize that the European construction, which is *prima facie* indifferent to the administrative organization of the member States, has more or less encouraged and shaped decentralization. The French State has therefore »acted like the others, has tried new modes of organizing public initiative: decentralization, creation of specialized organizations, contracting ... pro-

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<sup>1</sup> L. Aynés writes (2000: 3): »Contract is the natural mode for the commitment of a person, because it mobilizes the most dignified in them, a will capable of projecting itself into the future and of organizing this future together with that of another person«. P. Bezard adds (2000: 4) in this respect that »one judges the level of the rule of law in a country through the quality of its contractual practice«.

<sup>2</sup> In the beginning of the 20<sup>th</sup> century, a contract between two public persons is a legal curiosity in a context marked by administrative centralization, characterized by its hierarchical structure, its compartmentalization, which encouraged an authoritarian style of relationships.

motion of partnerships ... (because) all over Europe, the recomposition of the State is on the agenda.« (Caillosse, 2006: 483).

Therefore since the early 1980s, particularly in the wake of the decentralization laws, the accelerated development of a type of relationship has emerged that has been described as “contractual” in a more or less rigorous fashion.<sup>3</sup> The acts of 1982-1983 signalled the true beginning of this mode of managing the relationships between the State and local authorities, which are no longer framed in a context of subordination and tutelage (administrative, financial and technical), but of contracting. Local authorities, as legal entities whose jurisdiction, prerogatives and resources were increased, enjoyed a greater freedom of action.

This first decentralizing reform however, was in keeping with an unchanged constitutional context. Although the essence of decentralization was a clear incentive to collaboration,<sup>4</sup> there was no provision to organize systematically the new relationships between the State and local authorities, and between the latter. Since the new impetus for public affairs was the common task to perform, such decentralization laws quite naturally promoted contractual collaboration. Everything happened as if the unchanged constitutional framework, which might have slowed decentralization down, had instead encouraged the procedural creativity of the stakeholders. The more or less contractual formulas for cooperation, through their flexibility and versatility, have rendered possible to overcome the rigidities of the constitutional framework. Thus, the growth of contracting has been continuous and become a major assistance to and modality of decentralization.

It was the inadequacy of unilateral action means and their ineffectiveness in practice that allowed for the development of a contractual economy. In the French public law, the State and local authorities and their administra-

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<sup>3</sup> The phenomenon in itself was not new, as relations between the State and decentralized institutions are not determined solely by laws and regulations. R. Chapus (2001: 435) recalls in this connection that from the late nineteenth century »the link between decentralization and the proliferation of agreements between administrations to ensure the functioning of public services« were perceived, quoting the C.E. decision of 20 January 1899 *Administration des Pompes funèbres* published in the *Recueil Sirey* 1899, 3, 113, with a note by M. Hauriou. Another case can be cited: C.E. Jan. 11, 1905, *Gras*, S 1905.3.102, in connection with an agreement signed on March 29, 1884 between the State and the City of Aix-en-Provence for the operation of that city’s school of music.

<sup>4</sup> The January 7, 1983 Act stipulated that »regions, *départments* and municipalities contribute together with the State to the administration of the national territory, to development and planning«.

tions are certainly vectors of public power, but their action is not restricted to unilateral decisions. As France abandoned the Jacobin model to enter a new mode of territorial organization, the opportunity was granted to local authorities to resort to flexible modes of action. The contract has become the alternative to unilateral administrative decisions, and has emerged as »an instrument capable of overcoming the contradictions between centralization and decentralization«. (Poulet-Gibot Leclerc, 1999: 559).

Moreover, as in any decentralized system, the State must conduct a number of national policies. For this purpose, it must have the adequate means, even if jurisdiction has been transferred. To ensure a minimum of coherence for public initiatives, contracts became the ideal way to maintain or achieve this consistency. Therefore, contracting and decentralization have relied upon one another and could only entertain ever-closer ties.

All European systems have »entered into the era of the »contractual State« ... in respect to both the relationship between administrations and society and to inter-administrative relations« (Auby, 2006: 412–413; see also Harden, 1992; Freeman, 2000: 155). The contracting of administrative actions was not born in France with decentralization. It flourished in the relationship between territorial levels of all the current public systems, in the guise, for instance, of certain »treaties« between the German federation and the Länder,<sup>5</sup> or in the guise of »concordates« signed between the British State and the »devolved« entities such as Scotland, Wales, and Ulster.

The contract has become the watchword of government, and one talks indifferently of contractual public policy or of the contracting of public activities. According to various authors, these expressions, while approximate, are used to describe the relationship between public and private actors or only between public stakeholders. On the one hand, the use of the contract is old but evolving; on the other, it is more innovative but also more problematic, for contracting has achieved an unprecedented degree of generality and complexity in extending to local administration. The »contract curve« that occurred in recent decades has affected the so-called vertical cooperation between local authorities of unequal rank as well as the so-called horizontal cooperation between authorities at the same level. These novel forms of public decision-making are deemed today to warrant for their acceptability. Unlike the conventional administra-

<sup>5</sup> Some of which fall under administrative law and others under constitutional law.

tive activity, public policy refers to more liberal forms, where the contract allows for internal boost to an administration in full mutation and enables the forms of administration to evolve, which leads the State to »make do«or »let do« by external entities. It is this latter form of administration that is embodied in decentralization, given that the contract has been steadily gaining ground in both public management and in the development of legal norms (Public report Conseil d'Etat, 2009).

## 2. The Evolution of Contractual Relationship between the State and Local Authorities

The 20<sup>th</sup> century has heightened the interventionism of public administrations. The State is everywhere and its presence is multifaceted. The extension of its scope of action has imposed the use of contractual relations, and public policies had to find new forms of adjustment and coordination. The collaboration of all stakeholders, public and private, has become a necessity for the daily administrative activities. Beyond an informal collaboration, which is more and more frequently practiced, it has become apparent that general interest objectives are best served by the technique of the contract, which is particularly suitable to secure the cooperation of private stakeholders and administrations. The decentralization laws have accentuated this trend, insofar as the superiority of the State over other public entities is fading, because »national-local dialectic does not account for the more modern and dynamic aspects of administrative action«(Bernard, 1990: 135).

### 2.1. Political Justifications

As early as in 1976, the *Living Together* report, drafted by the Commission for the Development of Local Authorities, observed that »the usefulness of the contracting procedure is indisputable for the adaptation of administrative action to modern life« (Dreyfus, 1997: 208). If a unilateral decision is allowed to be exercised together with the privilege of prior lien, coercion is less and less effective and convincing has become increasingly necessary. This is particularly true for the State in its dealings with local authorities, especially within the context of decentralization and as a result of the constitutional principle of free administration. To this consider-

ation, one should add the observation that local authorities cannot or will not always exercise the responsibilities transferred, while the State does not always have the means, especially the financial means, to substitute itself to the defaulting authorities.

Finally, both the growing submission of the national legal system to the requirements of supranational law and the popularity of liberal ideas have significantly contributed »to inflect the patterns of public intervention« (Caillosse, 2006: 474). There is therefore a generalization of negotiated or concerted practices, combining real contracts with more or less informal commitments, simple protocols for common action to charters, covenants and all kinds of agreements. Later, at the doctrinal level, it has been sought to integrate all these practices into the concept of partnership, which is legally vague, and which itself overlaps with other fashionable concepts such as those of regulation and governance (Hemery, 1998: 347).

It has become clear that to act together there must be a spirit of partnership, that a sense of solidarity was a necessity, that the exercise of power is channelled through openness and the lowering of barriers. The convergence of efforts has become essential because the combination of jurisdictions and funding conditions the optimal achievement of objectives. Any major operation involves the setting up of circles of national, regional, *département*, and inter-municipal solidarity, especially since local authorities have a hybrid nature, both as decentralized entities and as administrative districts serving as the territorial framework for State action at the local level and for its deconcentrated services. Coordination has become essential to clarify responsibilities, increase service efficiency and to optimize the use of public funds. It requires a change in behaviour towards joint action. Local officials are willing to intervene in the State's field of jurisdiction to highlight a priority, and the State itself encourages local partners to join efforts with it in order to meet a national priority (in the field of teaching for example, or that of social action or for the financing of roads).

Therefore, agreements or contracting shape a new type of administrative relations. It is urgent to encourage the clarifications in order to prevent inconsistencies and duplication, including through contracts, even if the contract substantiates the idea that partners are equal, at the risk of weakening the authority of the State. Sometimes the contract itself will have to deviate more or less from the jurisdiction defined by legal provisions, or will have to allow for a more flexible application of regulations. This affects public policies in general, and particularly local economic policy, which is revealing with respect to contracting, where it is seen as a

palliative for legislative or regulatory frameworks unsuited to local needs (Hequard-Theron, 1993: 451).

The contract has become a privileged instrument of administrative action, as it carries along positive values of modernity, participation, attention and responsiveness to the interests of the governed. Deemed more effective, the contract is everywhere, facilitating State interventionism that is the entirely better adapted when consented to. Conversely, the unilateral decision, inherent to the dominant State, has become synonymous with authoritarianism. The traditional unilateral decision, the natural form of public intervention, is therefore being challenged by the contract, which was initially considered as a concession, a marginal form of public action. The contract, which is based on the sharing of the decision-making power, when it brings together public bodies, will focus on the jurisdiction of the parties to the deed. The co-contractors who have responsibility for their respective interests commit in their field of jurisdiction to grant each other genuine rights and obligations in order to achieve a common goal. More specifically, concerning the relationships between the State and local authorities, the advantage of contracting is that it can replace tutelage by a more flexible form of control. As soon as the contract and public initiative could coexist, this practice became rooted in the administrative life and the jurists themselves took on board the notion of »contracting« to describe a lasting and widespread phenomenon.

## 2.2. The Legal Foundations

Before the decentralization laws, contracts between public entities in general were mostly based on mere circulars (Poulet-Gibot Lerlec, 1999: 558). Decentralization laws contain several provisions that encourage local authorities to work together to exercise their jurisdictions, rather than hang on to their own powers. The Law of 7 January 1983 stresses that »the French territory is the common heritage of the nation« (Bernard, 1990: 135).

Freedom of contract as part of the free administration of local government is enshrined in Article 72 of the Constitution and introduced in the French public law as it is in many other countries in Europe and worldwide.<sup>6</sup> Because freedom of administration has contributed to the promotion of

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<sup>6</sup> Thus, in Italian law see Cassese, 2004: 304; in Australian law Cheryl Saunders, 2004 and Seddon, 1995; in Canadian law Garant, 1995: 476.

the constitutional status of contractual freedom of local authorities, a violation thereof would affect the constitutional principle upon which this freedom is based and would incur the censure of the constitutional court.<sup>7</sup> In its Decision of February 19, 1983,<sup>8</sup> the court for the first time accepted the validity of agreements between public entities. Therefore, in respect to the relationship between the State and local authorities, »no principle or rule of constitutional value« bars their respective administrations from harmonizing their actions in order to exercise the powers conferred under the Constitution and the law. As the contracting process was confirmed in principle, its use could only grow in constantly expanding areas.

Moreover, and still in the same decision, the Constitutional Council states that the commitments of the State cannot preclude the exercise of its rights by Parliament. In a later decision, the Constitutional Court said that it is for the lawmaker to determine the fundamental principles of freedom of administration.<sup>9</sup>

Similarly, any law, insofar as it does not establish an obligation to contract for local authorities, is consistent with the constitutional principle of free administration. Finally, the Constitutional Act of March 28, 2003, regarding contracts between local authorities and the problematic notion of »leader«, decides that the law may authorize one of the authorities concerned to organize the terms of their joint action (Article 72 paragraph 5 of the Constitution).

### 2.3. The Areas of Contracting

With the gradual transformation of the role of the State, there are many areas affected by the *contractual wave*. Although the resorting contractual techniques was well seasoned, specifically between the State and municipalities (Flecher-Bourjol, 1979: 309), its use became routine in the 1980s, with decentralization where the contract offers originated both

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<sup>7</sup> Although the State holds a general jurisdiction, local authorities are more widely bound by legal provisions; but the C.E. has ruled (C.E., Section, January 28, 1998, *Société Borg-Warner*), that the provisions of the General Code for Local Authorities that are exceptions to the principle of contractual freedom must be interpreted restrictively. See also Brechon-Moulenes, 1998: 643 and Stirn, 1998: 673.

<sup>8</sup> Regarding a fiscal agreement between the State and the Overseas Territory of New-Caledonia.

<sup>9</sup> Decision of January 26, 1995, regarding the orientation law for territorial planning and development.



from the State as well as from intermediary authorities. Until then, however, contracts between public bodies had not corresponded to an overall policy, and had been concluded on *ad hoc* basis according to public needs and political imperatives. Lacking specific normative frameworks, most of them were defined by circular, but the contracting already implemented in the area of territorial planning was reinforced by European construction. The Law of 7 January 1983 stated in its Article 1 that »local authorities contribute together with the State to the administration and territorial planning, to economic, social, health, culture and science development, as well as to the protection of the environment and the improvement of everyday life«. It even happened that administrative judges or financial judges incited local authorities to contract between themselves, when this was not directly done by the legislature itself.<sup>10</sup>

The extension of the contractual sphere has undergone several stages.

*The contractual economy stage.* It began with the appearance of the quasi-contracts of the Fourth Plan (1962–1965), the conventions of the Fifth Plan (1966–1970), the State-region plan contracts (later project contracts), the plan contracts between the State and town communities then urban communities (Decree of 23 December 1970), development contracts for medium-sized towns (circular of the Ministry of Infrastructure, July 4, 1974), countryside contracts concluded with associations of municipalities to help them in certain rural development operations and to create industrial and handicraft zones (Datar circulars of 11 July 1975 and March 30, 1977). These contracts used as instruments of the State's economic policy had a limited success at the time.

The planning launched in 1947 was based on consultations, then was contractualised in the 1970s, and reformed by the Law of July 29, 1982, which defined the new plan contracts as designed to contribute to the achievement of objectives consistent with those of the national plan. In addition, it stated they may be negotiated and concluded with local authorities, public or private companies. The mechanism of these contracts was dealt with by the Decree of January 21, 1983, which organized the process of plan contracts concluded with the regions during 1984. Such contracts enjoy a special treatment to the extent that the Law has stipulated that any financial assistance from the State should be given by priority through

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<sup>10</sup> Thus, two laws (December 1, 1988 and May 31, 1990) on the Minimum Integration Income and the right to housing have imposed upon the *départements* the duty to contribute financially to the programmes set up by the State.

them in return for commitments by the recipient. However, the plan contract is not a uniform concept as the most important are those between the State and the regions, and their implementation involves the award some 20 to 30 distinct contracts. Thus, the first generation of 22 CPER (1984-1988) were formalized through over 600 special agreements. At the end of the last century, their number reached around one thousand.<sup>11</sup>

After the revival of »the contractual fad« by the framework Law of 25 June 1999 for the Management and Development of the National Territory, the CPER were replaced (since March 6, 2006) by the »project contracts« refocused in turn on the three axes corresponding to the EU Lisbon strategy: competitiveness and attractiveness of the country, promoting sustainable development, and social cohesion. Even though the plan has disappeared, the State-region contracts remain.

The common characteristic of all these contracts is that they implement a national public policy, be it by sectors or specific, in respect to which the State seeks to mobilize local energies. The problem is that such plan contracts can sometimes be used to circumvent the legal division of jurisdictions, leading to the institutionalization of transfer of expenses from the State to local authorities, under pressure from the State and because of the concerns of local officials about the future of the communities for which they are responsible. Nevertheless, the State-region contracts establish genuine partnerships, even if they can turn to outright haggling in some cases, and despite the obfuscation of the distribution of jurisdiction.

*The territorial administration contracting stage.* This began during the decade 1982-1992, which saw the development of contracts between the State and local authorities and between the latter. However, before that, planning and concerns regarding land use had led to a contractual policy that first took over the public policies regarding land use such as urban planning (with the orientation Law for Land Use of December 30, 1967), the city policy with the medium-sized city contracts (between 20,000 and 100,000 inhabitants) whose purpose was to allow cities to implement, with the help of the State, the operations on which the parties had reached an agreement, especially in order to renovate town centres, shopping cen-

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<sup>11</sup> Several waves of CPER had followed, from 1984 to 1998, from 1984 to 1993, then from 1989 to 1993, then from 1994 to 1998. The fourth wave covers the years 2000–2006 (circular of July 1, 1998 *Strategie de l'Etat dans les régions*, of July 31, 1998 *Principes relatifs à l'architecture des contrats*, J.O. of September 13, 1998, p. 14.042 et 13.989).

tres, to create green areas, recreation centres, libraries, museums.<sup>12</sup> What followed were the countryside contracts, based on a Circular of 11 July 1975 and a Ministerial instruction of 23 September 1977, aimed at initiating a policy to revitalize certain declining rural areas, specifically through the creation of industrial or handicraft zones.<sup>13</sup>

These experiments showed that the contracts between public entities were not only possible but also necessary, in all the urgent areas such as social development of neighbourhoods, local economic development, pollution control and the protection of natural resources. Such initiatives, at first isolated, originally organized through circulars and then by decrees, have evolved from the moment when the tutelage relationships established between the State and local authorities evolved, since the State cannot impose anything anymore in a variety of areas related to planning, land development, public facilities, and infrastructure. It can certainly resort to legislation, albeit with the knowledge that both houses of parliament include a large number of parliamentarians with local mandates. Under these conditions, the State is led to use the contractual approach, which, at least in appearance, allows respect of the free administration of local authorities.

The provisions, whether laws or regulations, providing for the use of contracts between the State and local authorities have multiplied in the same way as the State's tutelage evolved. Thus, the Law of 7 January 1982 (Art. 2) stipulated there could be no tutelage by a local authority over another, which further reinforced the use of contracts.

The decentralization laws expressly provided for the use of agreements in two sets of situations. The laws of 2 March 1982 and July 22, 1982, mention the transfer agreements for services and the provision of personnel, because of the transfer of the *département* executive powers from the *Préfet* to the President of the *Conseil Général*, and of the region's executive powers from the *Préfet* to the President of the *Conseil Régional*. Such transfers of jurisdiction were accompanied by a reorganization of local government. There are standard agreements that allow for the equal treatment of the local authorities concerned, even if the formulas proposed are more akin

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<sup>12</sup> These medium-sized town contracts derived from an unpublished instruction of the Ministry for Territorial Planning, of January 7, 1973, and of a Circular of July 7, 1973. Seventy such agreements were signed in seven years.

<sup>13</sup> On this point: Buron, 1996: 510; Marcou et al., 1997; Leruste, 1975; Perpy, 1975: 673; Rolland, 1993: 1315.

to contracts of adhesion.<sup>14</sup> The decentralization laws call for collaboration and encourage the representatives of the State and local executives to exchange the information necessary for the discharge of their tasks. The issue is to lend each other mutual support and to coordinate the operation of the respective administrations in order to reconcile the points of view on the complexity of the cases handled, in a spirit of partnership that works well for citizens who are concerned to see their problems of general interest resolved in the best possible manner, far from jurisdictional squabbles and through the pooling of resources of all kinds.

To implement its urban policy, the State uses the contract to boost projects for global development, social inclusion and everyday life improvement, while channelling local policies around its own goals. Conversely, contracts allow structuring the actions of the various levels of local authorities in the carrying out of their respective jurisdictions around guidelines that are freely negotiated.

The city policy has been one of the most dynamic areas in terms of contracting, based on an inter-ministerial and inter-authority partnership approach. Initiated in the years 1976–1977, it became more precise with decentralization, focusing on finding global solutions of prevention rather than sector-specific ones for social issues<sup>15</sup> and relying heavily on contracts between the State, municipalities and associations. The July 13, 1991 Law on Orientation for the Cities set up city contracts conceived as agreements by which the State and local authorities commit to concerted action to improve living conditions in neighbourhoods experiencing social difficulties (Circular of Prime Minister of 31 December 1998). The policy of the city is a set of policies for urban planning and housing, security, vocational training and social action. It gave rise to several types of contracts: agreements for the social development of neighbourhoods, agreements against crime or for housing rehabilitation, »city habitat«

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<sup>14</sup> The Law of January 7, 1983 dealt with the agreements concluded with the external services of the State. Later on, the Law of August 13, 2004, took up the same formula in order for the transfer of the so-called ATOS personnel (technical agents and specialized workers).

<sup>15</sup> The starting point was Olivier Guichard's report *Vivre ensemble* of November 24, 1976, the creation of the Urban Planning Fund and the first habitat and social life operations, which addressed some 50 problem neighborhoods. The creation of the commission for the social development of neighborhoods (CNDSQ) and the reports by Bonnemaïson (published in 1982, *Face à la délinquance: prévention, répression, solidarité*) and Dubedout (published in 1983, *Ensemble refaire la Ville*).

agreements.<sup>16</sup> In the period 1994–1999, some 220 city contracts were concluded, covering 1,300 neighbourhoods in 750 municipalities. These contracts were renewed by a Circular of 31 December 1998 that extended their duration to 7 years (Chapus, 2001: 437). From the year 2000, these contracts have become the single tool for city policy, for cities of all sizes, covering some 6 million inhabitants (Public report Conseil d'Etat, 2009: 73). The policy for the city, which has contributed to a new urban civilization, poses a double problem to the French system: that of administrative structures and that of the allocation of responsibilities for global public policies called for to address the problems of the city.

Countryside and village contracts, which were the subject of the framework Law for the Management and Development of the Territory of February 4, 1995 and of the Circular of June 7, 2001 which clarified their legal status, aimed at improving local governance by strengthening inter-municipality and modernizing territorial administration (Jegouzo, 1992: 101). Signed between the State and municipalities or public institutions for inter-municipal cooperation, or even the relevant regions and *départements*, the countryside contracts implement a development charter. Under the law, they are of legal significance for the areas under strong urban pressure and not covered by a schedule for territorial coherence (SCOT). Their signing gives rise to a public interest group for local development or to a territorial public institution. For the best possible coordination of countryside contracts and village contracts, the 1995 Law has provided that their simultaneous use is specified by agreement between the parties concerned. These contracts therefore lead to new agreements to coordinate the action of State services in particular areas.

Contracting has taken a remarkable expansion in the field of culture, with cultural charters and the agreements for cultural development. Early in the twentieth century, the State and municipalities passed such agreements. Before decentralization, 27 cultural charters had been signed between 1974 and 1975 (Poulet-Gibot Leclerc, 1999: 559). After decentralization, the first generation agreements (1982–1985) appeared as programmatic platforms involving at least two partners for the same initiatives. They defined the financial obligations of the contracting parties, but vaguely and without reference to a formal reciprocity of commitments, which deprived them of binding force. The second generation of such contracts

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<sup>16</sup> Such agreements bound the State and the municipalities that wanted to harmonize and improve their housing and urban planning policies for three years.

was more consistent with the notion of contract, with reciprocal commitments on funding and the actions planned, which specified the terms of repayment in case of non-performance.<sup>17</sup> Contracting has been systematic in this area, and some 1228 cultural charters were signed between 1982 and 1991.

In the field of tourism, the use of contracts was a means to clarify the exercise of concurrent powers, attributed to both the State and local authorities by the Laws of 7 January 1982 and July 22, 1983. To avoid potential differences of interpretation, it was decided under the Ninth Plan to include a tourism component in the State-region plan contracts describing what belonged to each party. For the duration of this plan, the State and regions signed some 25 contracts for seaside resorts, more than 100 for tourism in rural areas, and over twenty for mountain areas. The Law of 23 December 1992 upheld the principles adopted in this area and saw to a distribution of jurisdiction.

The environment is an important dimension of any public action. Specifically, water policy calls upon the State and local governments at all levels. Because of the limitations of regulatory techniques, states have turned to contractual processes designed to operate as instruments for direct regulation. Such is the case in the United States, Belgium, and Germany among others. France has also made a common practice of regulating contracts in this area, for example with the river contracts (Auby, 2006: 416).

Contract negotiations are the source of the proliferation of cross-funding, sanctioned by the Law of February 6, 1992. Thus, regions offer funding to draw national policies towards their territory, and the State financially supports regional efforts to comply with its guidelines. In practice, this leads to the fact that it is not the law that primarily operates the division of jurisdiction, but the contract. It went that way in the field of academia. Pecuniary difficulties of the State led it to solicit local authorities in the area where the pressure of social demand prevented it from keeping exclusive competences. The Act of July 4, 1990 enabled the State to entrust local authorities with the project management of university buildings by contract. In this case, it was not a transfer of jurisdiction, as was done by

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<sup>17</sup> A non-published circular of September 16, 1988 on cultural development agreements reminds that »as a matter of principle, they only carry a commitment for the year considered«, and that »any financial commitment beyond the framework of the budget year must be tagged with the phrase «subject to the commitment of the relevant funds in the finance law«. See also R.F.D.A., 1995: 697.

the laws of decentralization for school premises, but a possibility offered to the State to entrust to a local authority or to a group of authorities the performance of a specific operation (Dreyfus, 1997: 222).<sup>18</sup>

*The era of widespread contracting.* The contract was introduced in almost every area of administrative action. It is used to create public services,<sup>19</sup> or to set up experiments,<sup>20</sup> and, generally, any allocation and any transfer of jurisdiction most often trigger a contracting process (Pontier, 1994: 64). It has become a »management technique for public affairs« (Richer, 2003: 973 & ff).

A strong growth of contracting is found both between the administrations and society, and within inter-administrative relations. It is used in the relations between public bodies generally, and even within the same public body, at the cost of obvious abuses of language. Thus, the State is using this new type of management for its own internal reform and to spur change within its bureaucracy. The contract expands to the relations within the State, between central and deconcentrated services.<sup>21</sup> One observes the same contractual efflorescence in all the administrative systems comparable to France.<sup>22</sup> Nevertheless, the introduction of logic in the relationships within the same public body remains problematic.

There do not seem to be any limits to the use of the contractual system in respect to the relations between local authorities. The Law of January 7, 1983 provides that they may enter into agreements by which they make their services and means available to each other, in order to facilitate the exercise of their powers (e.g. to develop planning documents). Under the

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<sup>18</sup> One must not confuse this type of contract between the State and a local authority with the contractual relationships established between the State and universities in the guise of four-year contracts. The latter enable to move on from a very bureaucratic management mode to a partnership where local operators are placed before their responsibility to draw their own development projects. See on this point Finance, 2003: 989.

<sup>19</sup> Ordinance of April 24, 1996 on Régional Hospital Agencies, Law of June 25, 1999 on the Local Development G.I.P. (public interest group).

<sup>20</sup> Law of February 27, 2002 on Proximity Democracy.

<sup>21</sup> With the »service contracts« which appeared in 1996 between the Ministry of Justice and the courts, between the Conseil d'Etat and the administrative appeal courts. On this issue, see Aguilla, 2003: 4 & ff.

<sup>22</sup> The »coordination public contracts« of the German law concern contracts concluded between parties on equal footing, and specifically between administrative entities with legal capacity (Maurer, 1994: 368). Such contracts are used by central public authorities to drive the improvement of the services rendered by the administrations that are under them: for instance the »public service agreements« in the United Kingdom (Walsh et al., 1977).

same provisions, inter-municipal development and planning charters can be the basis of agreements with the *département* or region, to implement jointly defined projects or programmes. Regions can conclude inter-regional agreements for the discharge of their powers and enter into contract with any other public (or private) entity to create training centres for apprentices, for example (Art. 6, 29 and 83). The Law of March 2, 1982 allowed the regions to conclude agreements among themselves to exercise their jurisdiction. The Law of February 6, 1992 stipulated that the State might authorize local authorities to develop cross-border cooperation by contract. Finally, the Law of February 4, 1995 authorized a region that is party to several inter-regional agreements to define the powers that can be exercised on its territory by agreement with each of them.

More remarkably still, the *Conseil d'Etat* has ruled that two local authorities could be bound by contract without necessarily realizing it, by taking converging decisions regarding the same issue (C.E., March 20, 1996, *Commune de Saint-Céré*).

### 3. Recent Extensions and Limitations to Contracting

The expansion of contract in the public sphere raises the question of how far public administration can use contracts and what the contractual issues and contents are excluded. Beside the subject matters barred from the contract by the law, there are those that are traditionally resistant to contracting, albeit with certain compromises that lead to the conclusion that the prohibitions are relatively few in the end.

#### 3.1. The Issue of Sovereign Prerogatives

There is no constitutional or statutory list of issues prohibited from contracting, given that administrative law has always limited the room left to contract or supervised its use through the imposition of certain principles and limitations. Government interventions are distributed into different registers, separated by sometimes rather vague borders: there is what befalls the State as a public entity among others, and what comes under the prerogatives of the sovereign State, which by nature has no peer domesti-



cally and no superior abroad, at least in principle.<sup>23</sup> Either because of their nature or on the strength of particular texts, some issues cannot be dealt with by contract.

Among these public duties and sovereign activities that fall outside the possibilities for contracts and delegations, in the name of the principle of equality or for any other reason, are foreign relations, defence, justice, currency, taxation, police missions. Case law, particularly that of the Constitutional Council, had the opportunity to clarify the scope of the prohibitions relating to sovereignty missions.<sup>24</sup> At the domestic level, the *Conseil d'Etat* has also been led to clarify the limits of contracting.<sup>25</sup> At the international level and in respect to the transfer of jurisdiction in favour of a permanent international organization empowered to make decisions and having legal personality, contracts are possible »if they do not violate the essential conditions of exercise of national sovereignty.«<sup>26</sup>

It should be noted in this regard and within the EU framework, that the State cannot invoke its decentralized organization to evade its responsibilities, for it is the State that remains the guarantor for the observance of international commitments. Its internal organization, federal or otherwise, does not authorize it to ignore EU law in its contractual commitments (Public report Conseil d'Etat, 2009: 186).<sup>27</sup>

In reality, it is the mode of exercising jurisdiction (rather than the subject matter concerned) that bars from contracting. Thus, when the Constitution provides that certain matters belong to the field of the law, the legislator cannot refer to an agreement. The Constitutional Council has confirmed this in its Decision of 26 January 1995 on the Orientation Law for Planning and Land Development, allowing local authorities to designate

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<sup>23</sup> J. Bodin in the *Six livres de la République* makes a distinction between the sovereign State and the contracting State, to answer the contractualist theories, which were very influential in the 16<sup>th</sup> century (Portier, 2003: 986).

<sup>24</sup> In the fields of taxation, tuition, health, immigration policy, supervision of inmates and judicial supervision measures (Decisions of February 25, 1992, August 29, 2002, July 2 and November 20, 2003). In respect to private-public partnerships in certain areas, the Constitutional Council has reminded on several occasions that a contract cannot »delegate the discharge of a sovereign mission to a private person«.

<sup>25</sup> Regarding the delineation of the public domain: C.E., June 20, 1975, *Leverrier* and opinion of the Interior Section of the C.E., October 7, 1986. Also: Public Report Conseil d'Etat, 2009: 180.

<sup>26</sup> On these different issues: Delvolve, 2004: 471 & ff.

<sup>27</sup> C.J.E.U., July 18, 2007, *Commission des C.E., c/RFA*; A.J.D.A., 2007: 966.

by agreement one of them as »head agency« to exercise the jurisdiction of several authorities.<sup>28</sup> Similarly, the legislator must respect the regulatory power and cannot substitute an agreement to a regulation.

### 3.2. The Security Sector and Police Activities

Public safety is also a sovereign mission, and it is certainly within the hard core of services that must be managed directly by the State. This is why policing activities are not conceded, and the principle remains that maintaining public order is a duty of public authorities acting through unilateral decisions (Denoix De Saint Marc, 2003: 971; Moreau, 2006: 171 & ff). Administrative case law has never recognized the validity of agreements in respect to the normative jurisdiction of authorities vested with the power of administrative police. Public order cannot be assured otherwise than by way of regulations, and only certain material operations can be entrusted to a delegate.<sup>29</sup> The *Conseil d'Etat* has long established the principle of the prohibition for the police authority to use a contractual technique.<sup>30</sup>

Nevertheless, »in the shadow of dogma, many nuances and exceptions are tolerated« (Moreau, 2006: 171; Petit, 2002: 345). Practices have emerged, which may seem strange in relation to administrative rules, and somewhat enigmatic in terms of conventional principles.

One can remind that, although the administrative police dedicated to keeping the public order cannot be delegated by contract, the Great Municipal Law of 1884 provided for the delegation of jurisdiction to mayors (Art. L 2211 CGCT-1). The prohibition of resorting to contracts for administrative police was also attenuated within the framework of economic interventionism and environment protection. The trend is all the more pronounced inasmuch as Community law has favoured the contractual mode. For instance, on October 8, 1993, an agreement was signed be-

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<sup>28</sup> As it holds jurisdiction to lay down the fundamental principles of the freedom of local administration, the legislator "cannot refer to an agreement ... without defining the powers and responsibilities pertaining to that role". The recent Art 72 of the Constitution, as amended by the Constitutional Law of March 28, 2003, states now that "where the discharge of a power calls for the contribution of several local authorities ... the law may authorize one of them or one of their groupings to organize the mode of their joint action".

<sup>29</sup> For instance, mountain or sea rescue services.

<sup>30</sup> C.E., June 17, 1932, *Ville de Castelnaudary*; and, more recently, C.E., April 1, 1994, *Commune de Menton*, C.E., December 29, 1997, *Commune d'Ostricourt*.

tween the Ministry of Agriculture, the Ministry for Environment and the agricultural unions establishing a »programme for the control of agricultural pollution« and referring to specific contracts for the implementation of this programme (Doussan, 1997: 18 & ff). In fact, the boundary between what is delegable and what is not is moving and has to take into account, for example, the contributions of information technology and communication, particularly with regard to supervision operations.<sup>31</sup> Administrative judges have already accepted the delegation of certain police powers through a beach tenancy agreement between the State and a municipality (C.E., April 5, *Allieu*).

The historical movement of transformation of the police activities into public service activities has been reinforced by the case law of the Constitutional Council, which has held that no constitutional rule precludes the State from entering into agreements with local authorities to harmonize the activities of their respective administrations (Decision of July 19, 1983). The police public service includes both legal and material activities, and the finding has emerged that security can only be effectively achieved by bringing down barriers between jurisdictions. Faced with rising crime and insecurity, the idea of a partnership has come to prevail, the implementation of which naturally refers to contracts.

It was necessary to coordinate the actions of police, justice and the public education systems as early as in the 1970s. Then the Circular dated 27 February 1985 created the action and prevention contracts for urban security (CAPS), in order to implement a local programme of prevention and improvement of urban security. Between 1988 and 1992, security policies were integrated into urban policy to become the crime prevention component of city contracts. In May 1992, a new tool for contractual partnership was established by the local security projects (PLS), whose objective was to improve conditions of the use of police officers on duty in line with the local context. The Circular of 28 October 1997 established the local security contracts, which were become the main instrument of a security policy focused on education for citizenship and on the joint actions of all State services, in association with the different stakeholders, so as to develop a comprehensive treatment of insecurity. Following up on a new Circular of 7 June 1999, the Law of 15 November 2001

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<sup>31</sup> The State and local authorities may wish to develop partnership contracts for the supervision of school canteens, taking into account the private sector's know-how in the field of services. In this area, a more flexible approach to delegation takes hold: T.C., February 17, 1997, *Association du foyer des jeunes travailleurs v. Société Les repas parisiens*.

on Everyday Safety provided a legislative basis for the local security contracts, which were transformed into »local security and crime prevention contracts« (CLSPD ) by another Circular of December 4, 2006 (Public report Conseil d'Etat, 2009: 73). These contracts include a safety diagnosis, a definition of objectives and means of intervention, whilst observing the jurisdiction of the various stakeholders. This is why they were seen as a case of “coproduction” of the safety standard (Roche, 2004: 43). Drawn up by the *préfets*, public prosecutors and mayors, these contracts were intended to develop a community policing in the neighbourhoods where juvenile delinquency was rife and where new means of operation had to be concentrated.

Meanwhile, contracting has gained further ground from the moment it was sought to coordinate the actions of police and Gendarmerie services with those of the municipal police forces created by the Act of April 15, 1999. The instrument of this coordination is an agreement, the conclusion of which between the mayor and the *préfet* is mandatory for municipalities with at least five municipal police officers,<sup>32</sup> and which must observe a standard agreement prepared by decree (24 March 2000 J.O. March 26, 2000, p. 4731). This contract is not geared to the exercise of police jurisdiction, but to the employment of locally available forces, that is to say to the organization of the public police service. Therefore, the freedom to enter this type of agreement is quite limited for municipalities, but this confirms that the contractual method used in the field of security demonstrates that a great change has occurred in the way police powers are now understood.

#### 4. The General Law of Public Administrations’ Contracts Tested through the Contracting Relationship between State and Local Authorities

This type of contract should not be confused with conventional administrative contracts entered into with individuals or with contracts between public non-territorial bodies. The widespread contracting of public activ-

<sup>32</sup> Art. L. 2212-6 of the CGCT. This agreement »states the precise nature and areas of operation of the municipal police officers and sets out the way in which these operations are coordinated with those of the national police and gendarmerie«.

ities backed by the imagination of the legislator surprises the jurists and poses delicate administrative problems in all the countries concerned by the phenomenon. The characterization of these contracts was the subject of many questions, since the term »contract« is used to describe a whole range of new realities both at the concluding and implementation stages of these agreements, and with regard to their characterization. However, the litigation treatment is always determined by the nature of the decision.

#### 4.1. The Singularity of Contracts between Public Bodies

Public bodies have always had opportunities to enter into certain contracts between themselves, including the most common, for instance for the sale of state property. The case law has seen contracts for skill and labour in some types of agreements.<sup>33</sup> The collaboration between the State and municipalities as a rule takes a contractual aspect, particularly since the Law of 7 January 1959. There is no problem when a legal provision provides for and organizes an agreement, but the practice has often preceded legislative evolution and contracts have been concluded outside any legal framework.<sup>34</sup> The application of the general rules of administrative contract law to the agreements between public bodies has proven possible, even if the legal regime they entail differs somewhat from that of a conventional contract, to the extent that consideration of an organic nature plays a bigger role.

However, the contractual policy of the State in respect to local communities, which was illustrated in the years 1960–1970 through the creation of multiple formulas of contractual grants given unilaterally, could call into question the contractual nature of these agreements. The proliferation of contractual formulas defies the traditional law of administrative contracts and forces to question their true nature. Many of the agreements entered into, specifically those governing the discharge of powers by administrative authorities in the organization and operation of public services, are often in contractual form but their contents are sometimes regulatory.

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<sup>33</sup> C.E., October 2, 1968 *Ministre de l'équipement et du logement, commune de Chappelle-Vieille-Forêt et Société auxiliaire de génie civil*.

<sup>34</sup> For instance, between the State and the O.R.T.F. The State has also negotiated agreements in respect to utilities programmes with medium-sized towns (Douence, 1974: 124).

The boundaries between the unilateral decision and the contract are both vague and evolving, and contracts between public entities have long been a misunderstood reality. Some authors want to see mixed decisions in the contracts between public entities, contractual in their form and unilateral in their content. The idea has been advanced to distinguish the contract from the agreement, the latter term to be used to identify something different from the traditional contract.

The contractual process has clearly contradictory potentialities, especially when it produces regulatory effects. The relative effect of the contract may be questioned because of the subject of some agreements. This traditional principle being rejected, the consequences must be drawn, insofar as rights and obligations are created unilaterally for third parties and more generally for the public.<sup>35</sup> The contractual nature of the document stems from its mode of conclusion and governs the respective commitments, but in effect, it is contradicted by the normative scope attached to it, which makes it a source of law *vis-à-vis* third parties. There is an obvious alteration in the concept of contract. The prospect of the contractual decision is modified by the fact that only public entities are parties to the contract. The interests in question are by definition purely public, and the parties only exercise powers under public law. The idea of inequality justified by the public interest, which determines the legal regime applicable to administrative contracts, is no longer valid because each contracting party is supposed to serve the general interest, even if local interest can only bend before the national interest. The particular nature of the parties in question requires adapting the general theory of administrative contracts, which at least implicitly acknowledges that public administration in principle does not contract with private individuals (Poulet-Gigot Leclerc, 1999: 563).

These agreements between public bodies that are inserted into the mould of administrative contracts disrupt it from the inside, insofar as the irreducible element that is free consent, even though it survives, may be restricted. More remarkably still, can there really be a contract where a decision is presented as contractual although it is legally impossible, as is the case when the parties to the agreement do not all enjoy the capacity

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<sup>35</sup> Thus, the »charters« for the regional natural parks, since the Law of January 8, 1993, are documents of a mixed nature, which call for the agreement of the relevant local authorities, but which include prescriptions that are regulatory in character, insofar as these charters are governed by a decree that makes them enforceable in respect to urban planning documents (Jegouzo, 2002: 546).

to contract, for instance in performance contracts entered into between the services of the same public entity or between a central administration and its decentralized services?

All this leads to say that we are indeed in the presence of an action process that is irreducible either to a traditional contract or to a unilateral act. The frequency of this process does not allow construing it as a negligible exception. The number and variety of formulas used between public entities seem to preclude any systematization.

## 4.2. The Contributions of Case Law

The courts have sometimes tried to stop the uncontrolled expansion of the concept of administrative contract (Weil, 1974: 223). They also had to deal with the specific case of agreements between public entities, particularly within the context of decentralization. Case law has considered the question raised by this type of agreement, both in respect to their authentically contractual nature and to the qualification of the contract.<sup>36</sup>

The notion of administrative contract and its definition cannot account for the extension of the contractual field, nor can it constitute a legal framework adapted for its prolific use and the multiple roles assigned to it.<sup>37</sup> Contracts between public entities, although they are real contracts, can pose problems and offer particularities, since it is necessary to establish the exact nature of the documents, the nature of the contracting authority, the legal system applicable, which involves checking the mutual

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<sup>36</sup> The aspect of the submission of administrative contracts to competition will not be considered here as it is dealt with in other papers at the workshop.

<sup>37</sup> For the record, a contract may be an administrative contract:

– by determination of the law (public works contracts, contracts governed by the Code of Public Contracts, partnership agreements);

– when it is entered into with a private person, it is normally a private law contract, except where in addition to the presence of the public party it meets one of the two following conditions: either it includes an exorbitant clause which cannot be found in a private contract, or where it concerns the performance of a public service;

– when it is entered into between two private persons it is in principle a contract under private law, unless one of the contracting parties is acting on behalf of public administration and if, furthermore, the contract meets one of the two alternative conditions mentioned above;

– when concluded between two public entities, the contract is deemed administrative in nature, subject to exceptions, according to the subject-matter of the contract.

intention of the parties, their willingness to be bound by a formal contract, the powers exercised in the relevant subject-matter, and in light of its nature and the texts that govern it (Fatome, Moreau, 1990: 142). In strictly legal terms, it is difficult to treat identically the agreements whose subject matter and functions are so different, often without specific commitments, and which do not always provide sanctions for non-compliance. If we add that the denomination of the contracts may be artificial, it is understandable that the courts are reluctant to admit the existence of actual contracts, since it is on them to qualify the documents submitted to the court. It befalls the administrative judges to lay down the essential principles of the contractual regime entered into by public entities, whilst taking into account the decisions of the Constitutional Court and of the European Community Courts.

Several decisions have helped clarify the situation. While conceding that the contracts between public entities do not differ fundamentally from the other administrative contracts, the case law in this area nevertheless has certain peculiarities (Stirn, 1990: 139; Dreyfus, 2000: 575 & ff).

If at first contracts between public entities have not been subject to any special legal treatment in respect to contracts between public entities and private individuals, their development has led to the awareness of a certain inadequacy of conventional criteria for this type of contracts. Under the decision of the Tribunal of Conflicts of March 21, 1983, *Union des Assurances de Paris*,<sup>38</sup> contracts between public entities are a separate category, since their administrative character is determined by applying a specific rule. In principle they are administrative in nature, and this presumption derives both from the identity of the parties and because such contracts are at the meeting point of two public managements. However, this is only a rebuttable presumption that can be reversed, since the evidence to the contrary may be brought consisting of the demonstration that the subject matter of the contract only generates private law obligations between the parties.<sup>39</sup> This results in some complication of the law, insofar as the

<sup>38</sup> See the decision with the Labetoulle opinion: A.J.D.A., 1983: 356.

<sup>39</sup> Refer to C.E., February 13, 1942, *Commune de Sarlat*. Later, see T.C., May 11, 1990, *Bureau d'aide sociale de Blénod-les-Ponts à Mousson* and October 7, 1991, *Centre Régional des Œuvres Universitaires et Scolaires de Nancy-Metz*. Also, C.E., November 3, 2003, *Union des Groupements d'achats publics* (regarding the supply of ordinary vehicles; R.F.D.A., 2004: 185). However, a contract concluded between two public bodies, one of which is foreign does not fall under the jurisdiction of the administrative court where the foreign law is applicable: C.E., March 30, 2005, *Société civile Professionnelle de médecins, Reichheld et Styrzter*.



organic criterion is valued when the presumption applies, whereas the court reverts to the standard criteria of administrative contracts (including the review of clauses) when the presumption does not apply anymore because of the subject matter of the contract (Chapus, 2001: 546).

Confronted with this type of contract, the court must first verify that the object of the agreement is a public law relationship between the parties; and where the purpose of the agreement is likely to be private law relationships, it will check whether the parties have introduced exorbitant clauses into the document. However, the latter, which are an expression of the idea of public power, or of unequal relationships, bear little sense between public entities.

Doubts that may have arisen as to the contractual nature of relations between public and private persons in economic matters are transformed into genuine puzzlement when it comes to relationships established between public bodies within the framework of urban planning and decentralization. This was verified with regard to plan contracts, city contracts, as well as agreements for the transfer of services, which have fuelled the debate about the nature and effects of contracts between public entities (Pontier, 1985: 331; 1993: 641; 1994a: 162; 1998; 2001: 58; Delvolve, 1994). Every time a new implementation instrument is created, the courts seek to integrate it into the global legal system, taking into account the provisions that may declare inapplicable all or part of the general rules governing administrative contracts, for instance, the authority to manage, sanction or unilaterally terminate them, and the entitlement to financial balance.

That was the case with certain agreements between the State and local authorities, such as the plan contracts, for which the Law of July 29, 1982 provided that the termination by the State could not be done otherwise than in the manner and conditions set forth expressly by the contract. The same applies to agreements for the transfer of services, provided their unilateral modification is prohibited. The explanation of these particularities lies in the intention of clearly stating that public authorities are legally equal, in order to establish collaborative rather than subordinate relationships.

Faced with »contractual inflation«, it is ultimately for the judges to name the agreements correctly.<sup>40</sup> Moreover, they do prohibit themselves from

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<sup>40</sup> It is for them to »stick the right labels on the right bottles« (Public report Conseil d'Etat, 2009: 251).

renaming an unlawful contract into a unilateral decision (C.E., June 23, 1974, *Valet*). For the period prior to 1982, there had been some doubt as to the nature of plan contracts, until the aforementioned Law of 1982, which mentions »mutual commitments« in respect to such contracts, adding that termination is only possible under the terms fixed by the contract, the provisions of which are deemed »contractual clauses«.<sup>41</sup> The legislator has therefore laid down a presumption in respect of State-region plan contracts, although not an irrefutable one. In fact, the role of these provisions is less to make the conclusion of contracts possible, but rather to organize the use of this method and to adjust its effects and mode of operation (Dreyfus, 1997: 25). The judges therefore adhere to the denomination given to the agreement and draw all the consequences, and ignorance of the State-region plan contract may make one party liable in respect to the other contracting party. This is the meaning of the ruling made by the Assembly of the *Conseil d'Etat* on January 8, 1988, *Ministre chargé du Plan et de l'aménagement du territoire c/ Communauté urbaine de Strasbourg*.<sup>42</sup>

Administrative judges adopted the same position regarding agreements for the transfer of services entered into by *préfets* and presidents of the *Conseil Général* to determine the modalities of distribution of services between the State and the *départements* under the Law of 7 January 1983. The *Conseil d'Etat* recognized the contractual nature of agreements for the transfer of services or for the provision of personnel (C.E., March 31, 1989, *Département de la Moselle*, and May 13, 1992, *Commune d'Ivry sur Seine*; R.F.D.A., 1989: 466; R.D.P., 1989: 1171). In the case of these agreements, as in that of State-region plan contracts, the administrative court has seen actual contractual agreements, which are subject to the rules governing administrative contracts, involving the possibility of amendment in the public interest as provided in the agreement, and which may result in the liability of the party failing to meet its obligations in the event of damages. However, at the same time one should note that in this case the court has set aside certain rules applicable to other administrative contracts. The *Conseil d'Etat* has held that when a contract binds public bodies, it may be exposed to an application for annulment by one of the parties, whereas in principle the judge ruling on a contract cannot

<sup>41</sup> Words also used by the law of May 15, 2001.

<sup>42</sup> Which repeals the Prime Minister's decision asking that the town of Grenoble become the site for the creation of the European accelerator of particles, whereas in the plan contract binding the State with the Alsace Region, the application made by Strasbourg should have been supported (R.F.D.A., 1988: 25 & ff).

cancel steps contrary to the contractual terms and must restrict himself to granting a potential compensation. It is therefore far from the usual rule that a judge can annul decisions separable from the contract. In this case, therefore, the *Conseil d'Etat* has deviated from its traditional case law by granting judges the power to annul measures after the conclusion of the contract. It preferred to change the judges' powers, rather than to challenge the contractual classification of agreements for the transfer of services, which is a sign of a »ripple effect for contractual classification« (Fatome, Moreau, 1990: 144).

Even though constitutional and administrative case law has identified some key principles, all ambiguities are not clarified, because on the one hand those who draft and negotiate contracts, including State-region plan contracts, seem themselves in doubt with respect to the nature of these agreements, since the State does not hesitate to postpone the implementation of the contract without the partner having his say, and that, conversely, the region may at some point not fulfil its commitments contained in contract. On the other hand, the Court has revived the debate by saying later that »the plan contract in itself does not imply any direct consequence on the actual implementation of the actions or operations it provides for« (C.E., 25 October 1996, *Association Estuaire Ecologie*). This amounted to emptying the plan contract of its contractual content (A. J.D.A., 1996: 1048; R.F.D.A., 1997: 339; Le Noan, 1997: 441). Although the *Conseil d'Etat* reserves the right to compensation where the damage is clearly established for a local authority, at the same time it discourages potential *ultra vires* applications. Thus the *Conseil d'Etat* declared the State liable for the non-completion of a high speed railway line, distinguishing between agreements which amount to mere declarations of intent and those that entail commitments (C.E., 21 December 2008 *Région du Limousin*).<sup>43</sup> It is only in respect to the actual contracts that third parties can seek the annulment of decisions that are separable (C.E., 19 November 1999, *Fédération Syndicale Force ouvrière des travailleurs des Postes et Télécommunications*). Everything seems to depend on the precision of the

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<sup>43</sup> The ruling notes that actual commitments were made in the agreements pursuant to a State-region contract in respect to a specific project. It mentions anew that the State may unilaterally amend or terminate these agreements for reasons of general interest, but it reminds that compensation is due where the contract has not ruled it out. In this case, the Court has compensated the direct and actual damage related to research studies and external auditing expenses, dismissing any damage related to loss of profits and image (A.J.D.A., 2008: 481). Previously, faced with the violation such contracts, members of Parliament had filed a bill (February 13, 2003) to »secure« the State-region plan contracts.

contract terms and on the presence of formal commitments, on the intention of those negotiating the contract: it is their freedom and their responsibility to ensure that it does not amount to a list of good intentions. It follows that in this field one can be facing either an authentically contractual agreement or a simple »framework contract« (Richer, 2002: 64; Jegouzo, 2002: 551).<sup>44</sup>

### 4.3. Attempts at Clarification

The nature and purpose of the contracts between the State and local authorities have not allowed submitting them to a fully defined legal status. Even if some commentators have wished to see a new form of tutelage in these contracts, the freedom of local government, which is real, does not authorize such amalgamation. The power of unilateral amendment does not have the same scope with public entities, the notion of contractual financial balance is not designed in the same perspective, and the contractual relations between the State and local authorities are freer from the constraints of competition rules than before.<sup>45</sup> The freedom of public en-

<sup>44</sup> The scope of these plan contracts relies mostly on the moral commitments made at the time of signing. The main sanction for non-compliance is purely political and weighs mainly on local officials. The signing of a contract, by its mere inclusion within the framework of a public policy is often State recognition of the value of a local project and it is given preference in public investments. As to the commitments contained in the State-region contracts, their compatibility with the principle of annual budgeting is problematic as capital grants and subsidies may only be granted within the limits set by the Finance Acts. In 1996 and 2005, the State unilaterally decided to postpone the implementation of the following plan contracts by one year, without terminating the ongoing contracts in the form intended. One should also take into account the imprecision of the commitments and the preparatory nature of the plan contract, which calls for project-by-project implementation agreements. Moreover, it is difficult to quantify the direct economic damage caused to a region because of the delay in the completion of a public facility. An implementation to the tune of 80 per cent for plan contracts is considered satisfactory. Refer on this point to (Public report Conseil d'Etat, 2009: 103–104, 140). In budgetary terms, the Law of 1 August 2001 on budget acts has made the »programme« a key concept of financial operations and opened prospects that can help make contractual administration more transparent and more stable (Bouvier, 2001: 876).

<sup>45</sup> A continuous evolution occurred here, specifically with the »Sapin« Law of January 29, 1993 and the Law on Urgent Economic and Financial Measures of December 11, 2001. See also C.E., 20 May 1998, *Communauté de Communes du Piémont de Barr*, which confirms that an agreement between public bodies is in the nature of a public contract. Furthermore, opinion of the C.E., November 8, 1999, in the case *Société Jean Louis Bernard Consultants* (A.J.D.A., 2000: 1066); C.E., October 16, 2000, *Compagnie Méditerranéenne d'exploitation*

tities when they contract between themselves is restricted, which reduces the scope of derogations.

The fact remains that administrative action must be given a framework to prevent it from tipping towards dubious pragmatism. It is true that in the event of disputes between themselves public entities prefer to resort to administrative or political avenues rather than judicial ones. However, this does not solve the issue of the remedies sought by third parties, when judicial intervention cannot be dismissed, especially as the trend towards a rapprochement between contractual litigation and legality litigation continues. Contractual freedom granted to local authorities has changed the situation and it would be anomalous for the State to evade with impunity the commitments upon which local development rests. Therefore, it has become desirable that such agreements include a previously negotiated penalty system, which is to be triggered in case of a dispute the court is to rule upon should no transaction be found (Public report Conseil d'Etat, 2009: 233 & ff).

With the entry into force of the Law of 13 August 2003 on Local Freedoms and Responsibilities (A.J.D.A., 2004: 1960–2012), jurisdictions previously shared between the State and local authorities (especially the regions) have been assigned exclusively to the latter. Certain areas now falling under local authority, such as tourism, commercial development and rural development, are in principle excluded from contracts. Nevertheless, the divestiture of the State is not absolute, even in the fields that have been decentralized. The popularity of the contract persists among local and national political appointees, as well as among administrations. Public initiative can use a variety of contracts: from those establishing cooperation between the State and local authorities, to those whose purpose is to enable optimal performance of the respective jurisdictions, to contracts whose object is a service and to which the Public Procurement Code applies.

Contractual technique is still the best way to reconcile the positions of the various public entities to implement effective policy (Gaudin, Dubois, 2003). Regions, whose existence is constitutionally entrenched, have become the fulcrum around which the cooperation between the State and local governments is organized. The European Union's regional policy and the tendency of EU law to unify rules applied to contracts combine

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*des services d'eau*; C.E., September 5, 2001, *Guiavarc'h* (Moderne, 2003: 293 & ff; Mauge, 2003: 381 & ff).

their impact to make the French system evolve and to stimulate thinking regarding public contracts, for EU law, which is not bound to the organic criterion for administrative contracts, »develops a broad material notion of their subject material, producing a concept of the public contract which is unsettling in France for the traditional legal categories« (Terneyre, 1996: 86).<sup>46</sup>

#### 4.4. Contracting in the Service of Regulation and Governance

Today, both the unilateral decision, which is more and more often negotiated, and the contract, which has lost its clarity, no longer answer their traditional legal characteristics. In France, where the legal route has always been preferred, the contractual tool is a favourite in the relations between the State and local authorities, even though regulation (laws, decrees, orders) is a source of contract law between public persons that is quantitatively more important than the Constitution. Administrative judges »encourage collaboration between public entities while increasing and adapting the review exercised upon such entities« (Costa, 1990: 148). This did not prevent the Conseil d'Etat from drawing the attention of the Government and that of the State and local administrations to the fact that one should not resort to the contract for convenience and in an unjustified manner, with the risk of developing this instrument of a »carry-all« category. The problem for the Court is that it cannot restrict itself to addressing only actual contracts, »consigning all others to the legal void« (Public report Conseil d'Etat, 2009: 252). Even under a false legal denomination, pseudo-contracts can produce effects, including those that the parties expect. Nevertheless, given the craze for so-called contractual forms, lawyers generally cannot escape the question of knowing whether they are in the presence of actual or false contracts. As for public administration, the requirements of its proper operation led it to look beyond the purely legal approach, even if this results in the contract being diluted into such concepts as »contract for public action«, »covenanted public action»

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<sup>46</sup> The report of the C.E. observes in turn that »EU law currently does not acknowledge any other administrative contracts than public tenders, concessions and, although they do not enjoy a specific legal status, partnership contracts« (Public report Conseil d'Etat, 2009: 244), whilst adding that this law gives preference to the material or functional criteria for such contracts, and not to the organic criteria, which remain important within the French conception of administrative contracts.

or »partnership«. Thus, contracts and non-contractual commitments rub shoulders, making their identification difficult. The operational administration acquires all the instruments it deems tailored to its mission, without waiting for developments in case law.

It is the accumulation and combination of different factors that made the law of contracts more complex. In this respect, one should mention the shared jurisdiction between laws and regulations to lay down the legal status of administrative contracts, the interaction of constitutional, administrative and European community case law, the still imperfect match between the national law and European law, the possible reclassification of contracts by national European courts. To this should be added the effects of the contractual freedom granted to local authorities, the inventiveness of the actors of decentralization, the accumulation of new contracts. This is where the fragmented and unstable nature of the contracting phenomenon derives from.

Granted that the administrative contract has not disappeared, but its complexity and subtlety explain the emergence of the concepts such as »public contract«, the status of which is much less accurate, and which became the »archetype of the regulating administration« (Feral, 2006: 535). Everybody uses the word, whether political scientists, sociologists or journalists, and political and administrative vocabulary has also annexed it without regard to the perplexity it causes among jurists. This semantic shift from administrative contract to public contract reflects a revealing trend. Today, one speaks more readily of public policy than of administration, as if the use of the latter word has become offensive. The general interest is the foundation both of the administrative contract as it is of the public contract, even if they are not synonymous. The former is simply employed to designate the legal nature of the contract seen as a whole answering a series of specific criteria, while the latter simply indicates that it is an action undertaken by a public entity (Clamour, 2006: 637), with the understanding that public bodies use a variety of agreements of all kinds, the legal status of which is not standardized.

In fact, the contract »suggests a new type of relationships based on dialogue and the search for consensus rather than on authority« (Chevallier, 2005: 199; Idoux, 2006: 547). It has become a »pledge of acceptability«- for public decision-making, a convenient method for obtaining the recognition of the merits of public authorities' initiatives. It plays a symbolic role of political or social legitimacy, whether nationally or locally, depending on the level of legitimacy of the signatory local authority.

Faced with these developments, public law is slow to redefine its basic concepts, especially that of administrative contract, which undergoes the backlash of converging administrative and constitutional case law. We must add to that the interference of the political games of linguistics. This has led some commentators to say that »the contractual form has gone astray, under the flag of convenience of partnerships« (Gaudemet, 2004, in Caillosse, 2006: 474). The absorption of the contract by the notions of regulation and governance renders possible qualifying as contractual phenomena behaviours or actions that, while putting on the appearance of the contract do not enjoy its legal properties. This semantic confusion can only disappoint when the content and the expected effects do not meet expectations. In this new context, the contract with its important emotional charge becomes the natural form of regulation, »the symbol and the support of negotiation in a complex society ... referring to a new form of governance for society« (Public report Conseil d'Etat, 2009: 250). It no longer simply designates a legal standard deriving from a meeting of minds, but a mere procedural mechanism used to enhance the consent of the partner. It is no more the technically contractual character that matters, but the sociological and political consensual character of the relationship established. This explains the frequency with which the word contract flows from the pen of the legislator or that of the regulatory power. It is considered a remedy for the defects of our public law and its extension reveals a new balance of power between the State and civil society.

All the successive developments of the contract have been related to administrative reform movements, and the link between contract and innovation is verified historically. More recently, contracts have been used to give political power a more liberal appearance, particularly in the relationships between the State and local authorities, because it fits better to the variety of situations, and because it has become a major instrument of the permanent administrative reform and democratization of public policy.

## 5. Conclusion

It is an accepted fact that »acting by contract is a sign of modernity« (Dreyfus, 2000: 575), and now the business model of society is not national and hierarchical anymore. The contract has rendered possible to operate administrative systems that would otherwise be blocked. Where-



ever administrative coordination is insufficient, and when in the absence of effective deconcentration the relationships between services are poorly organized, contracts are useful. This also applies when the legislative reforms follow upon each other, involving all the administrations, although practices are not synchronised – the contract is a way to make legal provisions more effective if their widespread and consistent enforcement is a problem, particularly because of the diversity of local situations. The contract is also a remedy for the institutional divisions and the entanglement of jurisdictions. Europe, for its part, advocates the use of contract as the most suitable legal instrument for the implementation of public policies.<sup>47</sup> The European model of governance strongly permeates all national legislations.

As reality is stronger than doctrine, there was a change of context, a renewal of the ideological framework of public initiative. In order to develop in full, the contract definitely needs a supportive environment and a healthy dose of trust, which cannot be marshalled.<sup>48</sup> As for the contractual processes, their implementation also requires training in negotiation and its techniques.

Decentralization has been seen in Europe and elsewhere as a response to the difficulties of the State. It has been glorified and it has often allowed local authorities to take their revenge on the central government, with the ensuing risk of renewed feudalism.<sup>49</sup> The contracting of public policy has enabled welding together the scattered elements of a public policy that was somewhat distended by decentralization. It has rendered possible to coordinate the various levels of responsibility ranging from the municipalities to the State, avoiding re-centralization and preventing traditional tutelage. Citizens find this in their interest. In this way, they benefit from an effective collaboration between all authorities. It is »the basic principle of democracy, which is made for the service of people and not for the satisfaction of the representatives delegated by the people« (Bernard, 1990:

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<sup>47</sup> The Commission's White Book of July 25, 2001, which addresses European governance, lists several objectives including an improved involvement of the grassroots in the drafting and implementation of policy, the creation of synergy with local networks referring to decentralization and the coordination of activities between partners, and the development of contractual agreements for more efficient policies (White Book, 2001).

<sup>48</sup> For A. Peyrefitte (1998: 638) »trust cannot be imposed by decree ... it is what commands all the rest«.

<sup>49</sup> Feudalism was also based on a contractual relationship. On this deviation risk, see Legendre, 1997: 2001.

138). However, municipalities, *départements* and regions, as well as the EU, are multiple levels of responsibility and have become competitors. As a source of freedom, decentralization is also a source of inequality. This is inherent to decentralization if solidarity mechanisms do not come to correct it. The tense and autonomous withdrawal to local jurisdiction no longer makes sense today.

The recent financial and economic crisis requires a change of the course through the review of the role of the State, placing it »at least for the time being, at the top of the operators likely to resolve the difficulties« (Bouvier, 2010: 5). This crisis drives towards the integration of public operators, relaying general contracting in respect to the State and to local authorities, the central administrations and decentralized services. The objective of all governments, be they central or local, is the common task to achieve, with all the components of the State and society, even at the cost of a mutation of administrative law, and even if the public contract in the broad sense goes beyond the definition that the law gives to the traditional administrative contract. However, any promotion of the contractual process understood in the restricted or broadened sense calls for the restoration of trust in the promises of the State, and for the observance of undertaken commitments.

To sum up, the contract, whatever its purpose and function, is defined in relation to the law and in its relationship with the law. In addition, it remains the preferred tool in the attempt to defuse crisis in emergencies. If one could talk of a new public policy consisting of »governance by contract«, there is always an incompressible component of authority expressed through laws or regulations (Denoix De Saint Marc, 2003: 971; Gaudin, 1999). In countries that have largely decentralized at the regional level such as Spain, Italy or Germany, many areas are no longer subject to national policies. It makes sense to »be cautious about stripping the State of its powers and means of operation« (Marcou, 2003: 985).

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## Annex: Sectoral Typology of Contracts between the State and Local Authorities

Utilities and transport sectors
Waterways agreements
Development and modernization agreements
National roads decommissioning agreements
Agreements for services
Social protection and employment
City-child agreements
New habitat – new families agreements
Childhood contracts
Agreements for the delegation of jurisdiction in the field of vocational training
Agreements against feminine unemployment and for the enhancement of their qualifications
Agreements for the financial support of military restructuring
Rural development
Inter-municipal charters for development and planning
Actions programs for the revitalization of rural environments
Urban development and housing
Agreements for the social development of urban neighbourhoods
Neighbourhood agreements and town-habitat agreements
Insertion-prevention and preventive action agreements
City contracts
Programmed operations for habitat improvement
<i>Département</i> action plans for the housing of economically challenged populations
Research, energy and environment sector
Multi-annual research agreements
Multi-annual framework agreement Energy and raw materials control
River or sea-front contracts
Higher education
University 2000 contracts
Culture and tourism sector
Development agreements
Assets evaluation agreements
City-fine arts agreements
Local contracts for the teaching of art
National stages agreements
Agreements for cinema development
Urban tourism cluster contracts

Source: Dreyfus, 1997: 481–489 (excerpts)

CONTRACTUAL PROCESS BETWEEN PUBLIC LAW  
PARTNERS: CONTRACTS BETWEEN THE STATE  
AND LOCAL AUTHORITIES

*Summary*

*The paper is devoted to exploring the contractual relations that exist between public law partners in France especially after the decentralization processes that started in the beginning of the 1980s. It is especially interested in contractual relationship between the central state and local authorities. After introduction, the paper reviews the evolution of contractual relationship between the state and local authorities presenting political justifications, legal foundations as well as administrative areas in which these relations take place in France. These areas include city policy, tourism, cultural development, environment, education, etc. It also deals with the recent extensions and limitations to contracting such as the sovereign priorities of the state, security sector and police activities. It is argued that the contract has enabled the operation of administrative systems that would otherwise be blocked. Wherever administrative coordination is insufficient, and when in the absence of effective deconcentration the relationships between services are poorly organized, contracts are useful.*

Key words: *public contracts, central state, local self-government, France*



POSTUPAK UGOVARANJA IZMEĐU JAVNOPRAVNIH  
PARTNERA: UGOVORI IZMEĐU DRŽAVE  
I LOKALNIH VLASTI

*Sažetak*

*Rad se bavi ugovornim odnosima između javnopravnih partnera u Francuskoj, osobito nakon početka procesa decentralizacije, koji je započeo 1980-ih. Posebno se osvrće na ugovorne odnose između države i lokalnih vlasti. Nakon uvoda, u radu se daje pregled razvoja ugovornih odnosa između države i lokalnih vlasti te se pokazuje političku opravdanost, pravnu utemeljenost i upravna područja u kojima se spomenuti odnosi ostvaruju u Francuskoj. Ta područja uključuju javne politike koje se tiču gradova, turizma, kulturnog razvoja, okoliša, obrazovanja, itd. Bavi se i nedavnim proširenjima i ograničenjima vezanim za ugovaranje, poput suverenih prerogativa države, sigurnosnog sektora i policijskih poslova. Zaključuje se da je ugovor omogućio rad upravnih sustava koji bi bili blokirani da ga nema. Gdjegod je upravna koordinacija nedovoljna i kadgod su odnosi između različitih službi loše organizirani zbog nepostojanja učinkovite dekoncentracije, ugovori se pokazuju korisnima.*

*Ključne riječi: javni ugovori, središnja država, lokalna samouprava, Francuska*