

THE THEORY OF GOVERNMENT CONTRACTS

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In this article it is proposed to examine the problem of the juridical nature of the government contract. Is it an ordinary contract, governed by the rules of private contract law, or is it a concept apart and distinct from the contract of the private law? Of the three systems which I propose to consider, namely those of France, Britain and the United States, it is only the French which provides a clear answer to this problem, and, for that reason, we shall consider first the more outstanding features of the *contrat administratif*, deferring until later a discussion of the common-law approach.

The two contractual concepts known to French law are those of the *contrat de droit civil* (*droit privé* or *droit commun*) and the *contrat administratif*. The difference does not lie primarily in the identity of the parties, although it is true that there are some indications that at least one of the parties should be a member of the administration.¹ It is the object of the contract and the intent of the parties which is the primary distinguishing feature of the latter type of contract. If the contract does not comply with the rules for the determination of a *contrat administratif*, it is a *contrat de droit civil* and governed by precisely the same rules as any ordinary contract made between private persons. The administration has no greater rights than, and is subject to exactly the same liabilities as, a private person. It is the *contrat administratif*, the contract which is for the performance of a public service and in which the parties have intended that all rights and liabilities should be governed by the specially applicable rules, that is of special interest in a comparative study of government contracts.

Jurists have not always agreed that an administrative contract exists as a separate concept apart from that of the private law contract. Duguit² maintained that the essential elements of a contract were always the same, and that if it conforms to the description of the Code Civil,³ it is a contract, and that if it does not, then it is not a contract. This view is similar to that which is held in connection with contracts in the common law, which will be examined later. Duguit criticised the move towards the recognition of a separate administrative contract which appeared towards the end of the first decade of the twentieth century. Léon Blum had urged the recognition of this in the case of the *Société des Granits de Lille*,⁴ remarking that one had

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¹Jèze, *Les Contrats administratifs*, passim.

²*Traité du Droit Constitutionnel*, 3rd ed.

³Article 1101: An agreement which binds one or more persons towards another or several others, to give, to do, or not to do something.

⁴C.E. July 31, 1912, R. 909.

to look to the nature of the contract as a whole and that rules which would be applicable to some contracts were not necessarily applicable to all of them. Duguit replied:⁵

Léon Blum does not understand that, in its fundamental elements, a contract has always the same characteristics. The contract is a specific juridical concept, and when all the elements are present, there is a contract with the same properties and the same effects. Therefore, if certain contracts are submitted to administrative tribunals for the adjudication of disputes, this can only be because of the objects for which they were made: This is analogous to commercial contracts... Basically, there is no difference between a private contract and an administrative contract.

As will appear later, disputes which arise in connection with *contrats administratifs* are submitted for consideration to the *tribunaux administratifs*. Commercial contracts are submitted, for the convenience of all concerned, to specially constituted commercial courts, and the point which Duguit makes is that no one has suggested that commercial contracts were anything but perfectly ordinary contracts. The reason for their being submitted to special courts is merely that, since these contracts are often extremely technical and perhaps complicated by custom and commercial practice, it is felt more convenient to have the benefit of specially trained judges and experts. In the same way, Duguit maintained that administrative contracts are submitted to administrative courts, not because they are in any way different in nature from private contracts, but merely because it is more convenient to have judges who are specialists in the field of administrative law.

It is clear that, today, the views of Duguit are not generally accepted. The proposition which must be examined is that an administrative contract is not the same as a private contract. Differences lie not only in the procedure which is to be adopted in the case of dispute (for if that were the case, then the view of Duguit would have much to be said for it), but also in the nature of the rights and duties which arise from it. In fact, the nature of the whole substantive law differs. The two contracts are, as concepts, totally distinct.

We must start from the basic principle that, as has already been mentioned, the primary difference between the two types of contracts lies in the inequality of interests which are represented in the *contrat administratif*. In the private contract, each person, as a general rule, seeks only his own interest; one party may prefer money, the other some specific object; one may have something to be done, and the other may have his services to sell. In a public contract, the contractor also represents his own interests, for he will only become a party to the contract if he thinks that it will be, in some way, to his advantage. But the administration, as such, has nothing to gain or lose by entering into such a contract. It represents, not its own interests (indeed, it is difficult to envisage how the administration, as such, can have any interests of its own), but the interests of the public, of society in general. Purchases must be made, government services operated, rents collected, and many other

⁵Op. cit. page 44.

things in order that society may function properly and efficiently. The contract cannot be treated in the same way as a contract between private persons, each of whom is interested, fundamentally, in his own profits. The contractor becomes indirectly, a participant in the performance of some public service, which is especially seen in the contract of *concession*.⁶ The contractor is not, however, a public servant, for he still has his own interests to preserve, nor is he a philanthropist who should not expect to make any profit. But the idea of a public service introduces a concept which is absent in ordinary private law contracts. The whole theory of the law of *contrats administratifs* is based on a balancing of these conflicting interests, of which by far the more important is that of the public. A passage from Jèze neatly sums up the way in which this balance operates:⁷

The contractor is obliged not only to carry out his obligations in the way that one individual must towards another: his obligations must be interpreted as covering all that which is clearly necessary to ensure the smooth and continued running of the public service in which he has agreed to collaborate. On its side, the administration is obliged to compensate him in cases where any extension of the contractor's obligations causes him prejudicial damage, which he cannot reasonably foresee when entering into the contract.

Although it differs from a contract of private law, it is clear that an administrative contract is a contract in the fullest sense of the word, and one must note that it is not necessary that there should be, as in the common law, a single contractual concept. The administrative contract cannot be imposed upon a person without his consent, and, with certain important exceptions, it cannot be altered by either of the parties without the consent of the other. In the case of the *Société d'Entreprises*,⁸ a company had been operating some municipal baths under a contract of *concession* with a *commune*. Owing to some faulty calculation, it found later that, if it could only charge the fees which had been agreed upon as a term of the contract, it would be running at a loss. It sought, therefore, to have the fee which it was under contract to pay to the *commune* reduced. The *Conseil d'Etat* held that this could not be permitted since:

It does not appear that the judge can modify the clauses of the contract, freely accepted by the parties. In the absence of any stipulation providing for the revision of the fee payable, the (contractor) has no grounds for demanding its reduction from the amount fixed by the contract...

This applies to both sides of the contract (apart from the powers of the administration acting in the interests of the public, which will be considered later), and neither can remake a contract which has already been entered into, any more than the administration can impose one upon a contractor in the first place.

⁶A contract somewhat similar to the Government franchise.

⁷*Les Contrats Administratifs*, pp. 14-15.

⁸C.E. January 21, 1944, R. 23.

In what respects, therefore, do *contrats administratifs* differ from contracts of private law? All differences spring from the basic object of the administrative contract. The administration is the guardian of the interests of the public and every contract entered into by it, which is administrative in nature, has, for its objects, the performance of some service in the interests of the public.⁹ But no contract can ever deprive the administration of the power and the duty to take any steps which are necessary for the protection of the public interest. Although, therefore, an administrative contract contains all the terms of the contract, and all the rights and duties which are contractual in nature, the terms of the contract alone are not sufficient to determine all the rights and duties which are imposed upon the parties. An administrative contract is, in fact, a curious combination of contractual rights, duties imposed by law generally upon all contractors with the administration, and regulatory powers of the administration. From the contract, arise the names of the parties, the work to be done, the price to be paid, etc. From the general public law, the contractor may find that he has assumed obligations over and above those set out in the terms of the contract — more work may have to be done or more supplies provided than were agreed upon. From the regulatory powers of the administration arises its right to act in the interests of the public and, where necessary, terminate the contract, direct the mode of performance, or modify the contractual specifications in some way.

In the case of the *Ministre de la Guerre v. Association Coopérative des Ouvriers Pavés*,¹⁰ the contractor had agreed to construct a sewer made out of concrete for the Minister of War. From time to time, the Minister issued directives to the contractor as to the nature and thickness of the concrete which he was to use, and as to the way in which the sewer was to be built. The contractor failed to comply with certain of these directives, and the Conseil d'Etat held that he was liable for breach of contract, even though the contract was silent as to these matters. This power of the administration to direct and control the mode and operation of the performance of a *contrat administratif* is part of the general public law and in no way dependent upon some contractual term to that effect. Any person who enters into a public contract becomes, merely through being in that position, immediately subject to the powers of supervision of the administration. The contract is a prerequisite to the control, but the control is in no way contractual.

The powers of the government to control in this way are inalienable and unconditional and the government cannot restrict them by contract.¹¹

To find the rights and obligations which arise under a *contrat administratif*, we must look elsewhere than solely at the contract itself. This contrasts with the contract of private law, concerning which it is said that legally protected

⁹See *supra*.

¹⁰C.E. August 15, 1927, R. 966.

¹¹The conclusions of M. Romieu, Commissaire du Gouvernement, in 1907 R. 919.

agreements take the place of laws amongst those who have entered into them.¹² In administrative law, however, this maxim has no application.

In every contract involving the performance of some public service, the State does not contract as an ordinary individual. It is not concerned to protect the interests of individuals. It contracts on behalf of a society, of the public, for the necessities of the public service, for the common general interest. Every time it enters into a public contract, it does something more than does a contractor under the Civil Code or the Commercial Code. Because it goes beyond this, one should not apply to it the same rules as one does to an ordinary private law contract. This is logical and this is also the law. Thus is born the idea which is the very root of all modern administrative law, that there is, in public contracts, a different situation from that envisaged by the titles of the Civil Code on obligations, a situation which ought to be subject to entirely different rules...¹³

By far the greatest right which arises in connection with public contracts which are administrative in nature, is that which comes into operation through the administration having, as one of its functions, the guardianship of the public interest. The administration has the sole power of determining when a contract is properly *pour le fonctionnement d'un service public*. Thus, although the contract can only be made, in the first place, with the consent of both parties, the administration can, regardless of the terms of the contract, increase, diminish, or put an end to the obligations of the contractor, by its own unilateral act. This it has power to do when such action would be in the greatest interest of the public, and provided that any increase in the obligations of the contractor shall not be of a substantially different nature from those assumed in the contract. Furthermore, failure on the part of the contractor to comply with these added directions from the administration, results in his committing a breach of contract. Thus, in the case which is often given to illustrate this, if the administration contracts for the supply of provisions for an army camp, it may insist upon more than the contracted amount if this latter proves to be insufficient, less if the amount proves to be excessive, and it may finally stop supplies altogether, if it does not think that the public interest would best be served by a continuance of the contract. This power of unilateral action applies to all administrative contracts, for example, to a contract for construction work,¹⁴ to one for the provision of supplies,¹⁵ and to a *concession* for the running of a public transport system.¹⁶ This right exists in spite of any contractual term to the contrary, where, for example, a *concession* is contracted for a definite number of years and the administration terminates it before the end of that period.

Corresponding to these rights of the administration, are remedies of the contractor which are also extra-contractual in origin. The contractor's chief right against any unilateral action which has been taken by the administration

¹²Les conventions légalement formées tiennent lieu de lois à ceux qui les ont faites.

¹³Conclusions of M. Corneille, Comm. du Gouv. in 1918 R. 246.

¹⁴C.E. April 14, 1948, *Ministère des Armées*, R. 159.

¹⁵C.E. November 14, 1902, *Olmer et Hébert*, R. 665.

¹⁶C.E. March 11, 1910, *Compagnie Générale des Tramways*, S. 1911.III.1.

is the right to be indemnified against any loss which he might have suffered. In the case of the ending or the diminution of his contractual obligations, this right to an indemnity will include not only the expenses which he has incurred in preparing materials for the performance of the contract, but also a sum representing any loss which might have been caused through the termination of the contract.¹⁷ In the case of any extension of the contractual obligations, the indemnity will, of course, cover any added expenses. This is only a part of the general administrative doctrine that no one individual should suffer exceptional loss over and above that which is suffered by the public at large, in the exercise of a public service.¹⁸ This principle does not affect the right of the administration to take unilateral action where this is necessary, provided only that, where appropriate, the contractor is indemnified.

It has already been stated that the administration does not possess unlimited powers of unilateral action in connection with administrative contracts, even if it is willing to offer the contractor an indemnity for his losses. There are some acts which he is perfectly entitled to refuse to perform without becoming liable for a breach of the contract. In every case, the administration must show that the action is for the benefit of the public. That is the very basis of all its powers, and unless this is present, it has no power to modify the contract at all. In the case of *Meurdrac*,¹⁹ a *maire* sought to revoke a *concession* giving an electricity company the right to maintain lamps on the public highway, when he was unable to show that such action was necessary in the interests of the public, and was, in addition, under suspicion of having acted out of malice. It was held that he was unable to do this. In the case of *Morelli*²⁰ the administration was held to be unable to reduce the price which was payable to a contractor for goods supplied when it had already been fixed by the terms of the contract after due deliberation. In the second place, it is to be remembered that the right of the administration to demand extra work only arises when there is already a contract in existence, so that this right is limited to what is reasonable in the circumstances and having due regard to the terms of the original contract. A contractor who has agreed to supply certain materials is not obliged to supply others of a totally different kind. One who has agreed to perform certain work cannot be compelled to do work of a different kind, or beyond a reasonable extra amount.²¹

In addition to this extension of his obligations which might confront a contractor with the administration, over and above those which appear from the contract itself, the contractor is also subject to certain sanctions which are

¹⁷See C.E. August 6, 1924, *Charbonneaux*, R. 804. C.E. January 9, 1924, *Société la Sequanaise foncière et immobilière* R. 36.

¹⁸Hauriou, *Précis El. de Droit Administratif* (11th ed.) seems to suggest that quasi-contract is the basis for all actions for recovery against the administration. See page 336.

¹⁹C.E. January 14, 1910, R. 26.

²⁰C.E. August 7, 1891, D. 1893.III.18.

²¹C.E. November 16, 1928, *Ravier*, R. 1193. C.E. February 8, 1899, *Corre*, R. 181.

only available to the administration and which do not conform to the provisions of the Civil Code. If it is born in mind that it is the prime duty of the administration to ensure the continued operation of the public services, it is not difficult to understand why the French system provides these additional remedies for the administration. The administration may sue for damages for breach of contract, but this might not be sufficient to protect the interests of the public. In any case, this remedy is not, for our purposes at present, of great importance. There is also the practice, which has grown up in recent years, of inserting into the contract a clause, stipulating that, in certain events (usually delay in the performance of the contract), the contractor shall pay to the administration a predetermined sum by way of penalty — a practice which is also common in the United States.

There is no direct method in French law of specifically enforcing promises requiring the performance of certain acts — promises to do as opposed to promises to give — and the courts have sought to achieve the same results by a method known as the *astreinte*. This is an order from the court to the litigant to perform the required act, subject to a penalty fixed by the court for every day or week or other period in which he does not obey the court. This penalty, in theory, accrues to the other party to the suit. However, it is perfectly clear that this penalty is not, in the last resort, recoverable by that other party. Assuming that the defendant has been in default and that a considerable sum has accrued to the plaintiff by way of this penalty, we can nevertheless see that the only way for the plaintiff to recover this sum is by way of an action in court. It is beyond question that even where the plaintiff sues to recover the penalty, he will be awarded only his actual damages, including, where appropriate, damages for other than mere physical loss. In addition, he will still not have been able to enforce the promise made by the other party, so that, in the last resort, his only remedy is one for an action for damages.²² The penalty fixed by the terms of the administrative contract is not in the nature of a mere coercive sanction (as is the *astreinte*), but represents some reasonable attempt to arrive at a figure which the administration anticipates its losses will be. It is a contractual term, upon the fulfilment of which the administration can insist. In the case of *Skouloukos*,²³ the contractor agreed to carry packages on behalf of the government of one of the colonies, and a penalty of 200 francs a day was fixed in the case of delay. The court held that the chief advantage of the penalty clause was that the administration was saved the task of having to prove before the tribunal the actual amount of damages which it had suffered.

²²Esmein, *La Jurisprudence en matière d'Astreintes*, *Revue Trim. de Droit Civil*, 1903, p. 5. Brodeur, *The Injunction in French Jurisprudence*, 14 *Tul. L. Rev.* 211. See the *De Bauffremont case*, D. 1878.II.125.

²³C.E. June 14, 1944, R. 169.

Because of the power which exists for the administration to fix, in advance, a recoverable penalty with fully coercive elements, the Conseil d'Etat has held that the *astreinte* is not a sanction which can be employed against a contractor with the administration. In the case of *Le Loir*,²⁴ the court, speaking through the Commissaire du Gouvernement, held that the *astreinte* was not needed and could, therefore, not be employed where the administration already has the power of fixing a recoverable penalty. One other feature of the *contrat administratif* is thus that a penalty may be recoverable, which is only partially set off by the fact that the contractor will not be subject to an *astreinte*.

The administration also has other coercive powers which are not available to the ordinary private contractor, although they are, to a certain extent, derived from the provisions of the Civil Code. Article 1144 of the Code enacts that:

In the case of non-performance by one party, the other party may be authorised to effect the execution of the contract at the expense of the party in default.

In the administrative law, this becomes what is called the *mise en regie*. This is a remedy which, in view of the others which are available, is not frequently put into operation, but it remains as a threat at least. It is only used in the case of minor contracts, where it provides an efficient way of carrying the contract into effect.²⁵

Lastly, the administration always preserves the right to rescind the contract, a right which needs to be examined more closely. *Resiliation* of the contract has the effect of putting an end to the contract entirely. It is a unilateral act on the part of the administration, and leaves the contractor with no remedies at all, save for work which has already been done, either under the contract or in a quasi-contractual action for *enrichissement sans cause*. It is, therefore, a sanction which the administration can only impose in certain cases. The right of *resiliation* differs from the right of the administration to terminate the contract or modify it by unilateral action where it only exists if it is in the interest of the public that the contract be terminated or modified. It is, in such cases, always open to the contractor to show that the public interest did not demand termination or modification of his contract. But the right of *resiliation* exists independently of any public interest having to be proved. *Resiliation* is a penalty imposed upon the contractor for his default in not performing the contract in the due time or in the proper manner.

In most contracts, as a matter of practice, the contract will contain a clause giving the administration the right to rescind the contract in certain circumstances, and if these circumstances occur, the administration has the right to rescind without recourse to a tribunal. But even where the contract does not contain any term, the right to rescind still exists, but in a slightly different form. The contractor is obliged to perform his obligations in accordance with

²⁴C.E. January 27, 1933, S. 1933.III.132.

²⁵See Duez, *Traité*, 1254.

the terms of the contract and with such directions as the administration may have given him. Where his failure to do so is serious, that is, where there has been a substantial breach of contract — *une faute grave* — the administration may rescind. What is *une faute grave* depends, of course, on the type of contract in question.²⁶ In any case, this right is an importation, with the necessary modifications, from the Civil Code.²⁷

So far, we have been mainly concerned with the rights of the administration in a *contrat administratif* which mainly arise because of considerations of the nature of the public interest which it is the duty of the administration to protect. But these considerations also have some effect upon the peculiar rights of the contractor. These, namely the rights of *imprévision* and *fait du prince*, present striking contrasts with the rules of the civil law concerning contractual remedies. We shall deal firstly with the concept of *imprévision*.²⁸

In the ordinary private law contract, the terms of the contract fix the rights and the obligations of the parties; what one has contracted to do, one must perform, or be held liable for breach of the contract. The theory of *imprévision* may be stated quite simply. Where, in the course of the performance of a contract, economic events arise which would impose upon the contractor a financial burden which would be totally disproportionate to that envisaged when the contract was entered into if the contract had to be performed strictly according to its terms, the contractor has the right to perform the contract and demand from the administration an indemnity for the increased costs in carrying out his obligations. The economic events which arise must be external to the parties to the contract, and must be of such a nature as not to render the contract literally incapable of fulfilment. The contractor has the right to ask the court, either to declare the contract terminated, or to fix new conditions of its fulfilment. The best illustration of this concept is probably the leading case of the *Compagnie du Gaz de Brodeaux*,²⁹ where the company has a *concession* to distribute electricity in the town of Brodeaux at a fixed fee. During the war, the cost of coal rose to such an extent that the company was faced with financial ruin if it had to go on distributing electricity at the old rate. The *Conseil d'Etat* held that it was entitled to an indemnity to compensate it for the increased costs of the raw materials from the administration under the doctrine of *imprévision*.

The economic events which arise in the course of the performance of the contract must be quite exceptional and beyond the contemplation of the parties when they made the contract,³⁰ so that an ordinary price variation would not

²⁶De Laubadère, *Traité*, 800.

²⁷Article 1184: A resolutive condition is implied in all synallagmatic contracts, where one of the two parties does not perform his obligations...

²⁸Pequignot, *Théorie Générale des Contrats Administratifs*, p. 502. De Laubadère, *op. cit.* p. 454. Duez, *op. cit.* p. 572.

²⁹C.E. March 24, 1916, S. 1916.III.17.

³⁰C.E. December 3, 1928, *Fromasol*, in R.D.P. (1921) p. 64.

be ground for invoking the doctrine, whereas the outbreak of war or the devaluation of currency might. In the second place, the events must be extraneous to the two parties. If it is the fault of the contractor, he is nevertheless bound by the contract, whilst if it is the fault of the administration, it might be covered by the doctrine of *fait du prince*, which we are about to consider. Lastly, the events must give rise to a grossly disproportionate financial inequality in the terms of the contract. Mere loss of expected profits will not suffice.³¹ Naturally, the determination of whether all three of these requisites are present is a question of fact in each case, but we are rather more interested in the nature of the concept than in its practical application.

The theory of *imprévision* primarily gives to the contractor a right which his civil law counterpart does not have. It gives him the right to be compensated for having to perform the contract according to its strict letter, and this is, indeed, a marked feature of administrative contracts. But, in addition, it is a right which the administration may also utilise, so as to give it the right to rescind the contract altogether.³² Certainly, in view of the other remedies which are available, it is not often that the administration will have to rely on the doctrine of *imprévision*, since, whenever that would apply, it would have the right to rescind on the grounds of public interest. Enactments of 1935 and 1937³³ affirm the right of the administration to rescind on the ground of *imprévision*, but these do no more than reiterate the already established jurisprudence of the Conseil d'Etat.

The overriding effect of the notion of *imprévision* appears from the decision of *Hospices de Vienne*.³⁴ In that case, the sum fixed by the contract was expressed to be "not subject to revision" for any reason, and there were to be "no rights of that nature" whatsoever. The Conseil d'Etat held, nevertheless, that the contractor was not prevented from asking for compensation under the doctrine of *imprévision*, when the increase in the price of the materials to be used was so large that neither party could have contemplated it when the contract was entered into. One must remember that the primary object of a *contrat administratif* is the performance of a public service of some description, and that the contractor becomes, to some extent, a participant in this service. At the same time, it is one of the cardinal rules of French administrative law that no one individual should suffer damage in the course of the operation of some public service over and above that which is suffered by the public at large. The doctrine of *imprévision* arises through the necessity of ensuring the continued operation of these public services. The contractor is obliged to continue the performance of the contract, but his own interests are protected as far as possible by the award of an indemnity.

³¹C.E. August 8, 1924, *Compagnie de Gaz de Brive*, R. 817.

³²C.E. *Fromasol*, ubi supra, note 31. C.E. 1923, *Compagnie Générale des Automobiles Postales*, S. 1923.III.56. or to demand that the contractor accept a reduced fee.

³³Décret-loi, October 23, 1935 and décret-loi, August 25, 1937.

³⁴C.E. March 10, 1948, R. 124.

The concept of *fait du prince* may also operate to give the contractor, in certain circumstances, a right to an indemnity which the private law contractor does not have. *Fait du prince*, unlike *imprévision*, is an act of one of the parties, namely the administration, which increases the obligations of the contractor and which were not foreseen when the contract was entered into. Furthermore, whereas *imprévision* must result in a complete and disproportionate change of financial circumstances, the *fait du prince* need only result in an increase of any sort in the obligations of the contractor. On the other hand, once the *imprévision* has been proved, the contractor has an absolute right to an indemnity, but in the case of a *fait du prince*, the right to an indemnity only arises in certain cases. It is thus of great importance to distinguish the two different concepts.³⁵

The *fait du prince* is essentially an act of the administration, either the same branch as that which is the contracting party, or a different branch. The concept revolves around the problem of what happens when, in the course of the performance of a contract, the government issues a decree or order which has the effect of increasing the obligations of the contractor. In the common law, which will be examined later, the rule is that there can be no liability for a legislative act, and this is true, in essence, under the French system. For example, where there is a contract specifying that work will be completed for a certain sum, and in the course of the contract, a law is passed which raises the minimum standard of wages so that the contractor does not make his expected profits, he cannot demand an indemnity from the administration.³⁶ The contractor is in no different position from any other employer. The situation is different, however, where the general law which has been passed has such an effect as give rise to a total financial upheaval, for there, the contractor may rely on the doctrine of *imprévision* to recover an indemnity.³⁷

Fait du prince only applies where the regulation which has been issued is such as to have special repercussions on the contractor, for in such a case, it is assumed that the parties intended to contract on the basis of the existing law, and the new regulation increases the obligations of the contractor specifically in his capacity as a government contractor. An indemnity will only be allowed by the courts, if the contractor can show that his position is different from the ordinary private contractor. Thus, in the case of *Bardy*,³⁸ the plaintiff was a supplier of illumination in the town of Bergerac at a fixed fee, and during the course of the operation of the contract, the town passed an ordinance levying a duty on all oil, coke and gas which was used in the town. This resulted in an exceptional increase in the costs of the contractor's obligations, and it was held that he was entitled to an indemnity. Similarly, where

³⁵Duez, *op. cit.* p. 570. De Laubadère, *op. cit.* p. 450.

³⁶C.E. March 4, 1927, *Mercier*, R. 292.

³⁷C.E. February 14, 1936, *Société aux. des services mun.* S. 1936.III.82.

³⁸C.E. December 29, 1905, R. 1019.

a company was under contract to carry passengers and mail from France to Corsica at a fixed rate, and the administration imposed a tax on all such freight. This had the effect of greatly decreasing the profit which the contractor hoped to make.³⁹ Thus, in the case of the *fait du prince*, the underlying principle that no one individual should suffer exceptional loss in the performance of a public service is clearly to be seen. The contract by no means contains all the rights and obligations of the parties, which differs substantively from the corresponding rules of the civil law.

In sharp distinction to the French law, however, the common law has, or so it is said, no separate theory of government contracts. Since Dicey's violent attack upon the *droit administratif*, there has been a tendency to regard administrative law, as it is understood in England and the United States, as being a part of that law which is concerned with remedial devices. The substantive content of administrative law has been taken to be as much of the ordinary private law as are the rules relating to the formation of contracts or the liability in tort. But this is no longer the case. In the first place, the distinction between substantive law and the law of procedure is largely illusory, for there is no law of procedure which does not have its repercussions on the rights and duties of the individual, and regulates his actions. In the second place, there has been a great amount of legislation, particularly in recent years, which in some way or another places the administration, as regards its rights and sometimes as regards its obligations, in a position which differs from that of the individual.

In the law of contract, in particular, the problem is to determine whether the juridical concept of the contract is one and the same, regardless of the identity of the parties or of the objects of the contracts. It is clear that differences lie in the formation of the contract. Special formalities may be necessary. The position of agents differ. The law of quasi-contract differs. In these and other aspects which will be considered shortly, a contract made with the administration may differ from one which is made between two private individuals. But this does not mean that, of necessity, an agreement which is subject to these special rules ceases to come within the juridical concept of the contract. As a preparatory step, in the attempt to discover the juridical nature of a government contract, it is proposed to examine two or three of the unique features which are only to be found in these contracts in the common law.

In the United States, one of the most important features of the law of government contracts is the principle of renegotiation. In spite of the requirements as to publicity, tenders and competitive bidding, it was found that there was considerable difficulty, especially in time of war, in preventing contractors from gaining excessive profits from contracts made with the government. In the time of shortage, or when the government is committed to a national

³⁹C.E. March 20, 1904, *Compagnie Marseillaise de Navigation*, R. 429.

defense program entailing a certain and necessary expenditure of public money, the contractor is placed in an extremely advantageous bargaining position. During the second world war, certain agencies were given the power to inspect the books and records of war contractors, and price adjustment boards were established to secure voluntary adjustments in the contracted price, and even to secure a refund if it was found that the profits which were being made or which had been made, were excessive.⁴⁰ The history of this device extends back to the time of the first world war, but there finally emerged the Renegotiation Act of 1951.⁴¹ This Act established a Board, which has since established Regional Boards, with the function of supervising the renegotiation of certain contracts. The Act of 1951 was finally made applicable to all receipts and accruals up to December 31, 1956. There is every reason to suppose that the principle of renegotiation will be a part of the law of government contracts in the United States for some time to come. It is still in force for accruals up to that date, and the renegotiation clauses of the Act are frequently inserted as a standard term in contracts (especially military contracts) made after that date.

Contracts to which the Act applies are only those made with certain specified agencies, including most, but not all, administrative agencies. Even with contracts made with the specified agencies, there are some exceptions to the applicability of the Act. Some exceptions are mandatory, such as contracts made with foreign governments, and some are permissive, such as, for example, contracts to be performed outside the United States. For those that are specified in the Act, it is enacted that each contract must contain provisions for:⁴²

- (1) The elimination of any excessive profits through renegotiation,
- (2) The repayment of any excessive profits already made or the withholding by the United States of any sum otherwise due,
- (3) Provisions of a similar nature to be inserted in any subcontract made by the contractor.

The procedure adopted by the Board is that:⁴³

Every contractor is required to file an annual report with respect to his receipts or accruals from re-negotiable prime contracts and sub-contracts during the fiscal year... If the Board and the contractor are unable to agree upon the amount of excessive profits, if any, to be refunded by the contractor for such fiscal year, the Board issues and enters an order determining the amount. The order is reviewable in the Tax Court of the United States.

There are many detailed provisions in the Act, but we are more interested in its effect upon the nature of such contracts.

⁴⁰Executive Order, April 10, 1942, No. 9127.

⁴¹50 U.S.C. 1211 et seq.

⁴²Renegotiation Act, (1951), Section 104.

⁴³From the United States Government Organisation Manuel, 1956-57, Washington, sub nom. Renegotiation Board.

The clause providing for the submission of the contract to the Renegotiation Board is, it appears, in the nature of a standard clause to which the contractor must agree, or not contract at all. It becomes, in effect, a term of all such contracts that the contractor agrees not to make any excessive profits from contracts of this variety made with the United States. Where the contractor and the Board can come to some agreement as to the amount which should be repaid or withheld, there is no juridical difficulty, since any contract may be modified by the mutual consent of the two parties. But over and above this, there is the power of the Board to fix, by unilateral action, an amount, any profits in excess of which the contractor must refund or forego. Furthermore, if the contractor does not contest this decision within 90 days after the receipt of such notice in the Tax Court,⁴⁴ the decision of the Board is final. But whether there is an appeal or not, this procedure of the unilateral determination of an excessive profit has considerable affect upon the theory behind government contracts in the United States.

It is quite true, of course, that there is some contractual justification for it. There are what might prove to be two inconsistent clauses in the contract. First, the contractor agrees to provide the government with certain materials or to furnish certain services, and the government agrees to pay him at a fixed rate. Second, the contractor agrees not to make any excessive profits. This latter clause has the effect of declaring that the consideration to be paid by the government must not only be sufficient but that it cannot be more than reasonable, and that any amount in excess of what is reasonable is not recoverable. The renegotiation clause becomes a term which gives one of the parties the right to remake the contract without the consent of the other, and places the contractor in an extremely subordinate position. If such a clause could be considered as rendering a private promise merely illusory, it is unlikely that the courts would uphold a contract of this nature entered into between private persons.⁴⁵

One of the fundamental principles of the common-law contract is that its terms must be certain or capable of being ascertained. Here, it is a question of reasonableness — and the reasonableness is to be determined not by an independent third person but by one of the parties to the contract himself. It is difficult to conceive that such an ambiguous term would be upheld at common law, especially in view of the fact that it is only at the expense of an express and certain term that it has any meaning at all. One does not criticise its value or its necessity, but there is, in the renegotiable contract, a new form of agreement. There is a valid submission by the contractor to the unilateral decisions of the administration. There is unquestionably an element present which differentiates such an agreement from the common-law contract.

⁴⁴Renegotiation Act, Section 108.

⁴⁵*Velic Motor Car Co. v. Kopmeier Motor Co.* (1912) 194 F. 324. Williston, *Contracts* (revised edition) 43.

It is, perhaps, a contract, but can we still rely on our single concept of the contract to cover both these types of agreement?

There is another problem in the matter of government contracts which has recently been settled, in some measure, by an Act of Congress. It has long been the practice to insert into contracts made with the United States government, a clause, the wording of which varies slightly from time to time, but the effect of which was the same. A typical clause of this nature might provide:

All disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to a written appeal by the contractor within 30 days to the Head of the Department concerned or his duly authorised representative, whose decision shall be final and conclusive upon the parties thereto.

The decision of the *United States v. Wunderlich*⁴⁶ was the most recent important case in which this clause has been presented for a ruling before the Supreme Court.

There, the respondents had agreed to build a dam for the United States, and the contract contained a clause similar, in all essential details, to the one set out above. Disputes arose, and the department head decided that the facts were against the respondent. He appealed from this decision to the Court of Claims, which found, as a matter of fact, that the decision of this department head was "arbitrary, capricious and grossly erroneous". The Court reversed the administrative decision, finding that the facts should have been decided for the respondent. From this decision the United States appealed to the Supreme Court, which reversed the decision of the Court below, although it did not purport to disagree with that Court's findings on the nature of the decision of the administrative officer. The Court said:

This Court has consistently upheld the finality of the department head's decision unless it was founded upon fraud, alleged and proved. So fraud is, in essence, the exception... The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract.

This decision must now be taken to have overruled the earlier case of *Needles v. United States*,⁴⁷ in which Whitaker J., in answer to the argument that the clause should be upheld except where fraud was shown, remarked:

Whether or not these actions constitute a breach is not for the contracting officer to decide. Jurisdiction of such controversies is conferred on this court by Congress. Section 145 of the Juridical Code gives an aggrieved contractor the right to sue for breach of his contract. This right cannot be taken from him by the administrative agency with which he deals.

So, whether the decision of the contracting officer was arbitrary or grossly erroneous is immaterial. We are not bound by it, whether it was or not.

⁴⁶342 U.S. 98, (1951).

⁴⁷101 Ct. Cl. 535, p. 624 (1944).

However, the considerable dissatisfaction which the decision of *United States v. Wunderlich*⁴⁸ engendered gave rise to the passing of an Act in 1954, which provided:⁴⁸

[No such provision] shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official... is alleged. Provided, however, that such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence.

This enactment clearly reduces the law to a position half-way between the views of Whitaker J. in *Needles v. United States*⁴⁹ and the views of the Supreme Court in the *Wunderlich* case. It, in effect, restores the decision of the Court of Claims in the latter case in all future cases of a similar nature.

Whether or not this is a sound rule of law is open to question. At present, it is sufficient to note that it is extremely doubtful if such a clause would be upheld in an ordinary private contract. Even arbitration agreements, in which a decision on the facts is submitted to an independent third person, are jealously supervised by the courts.⁵⁰ There are cases which even go so far as to state that an agreement which attempts to make the decision of an arbitrator final and conclusive without appeal to the courts is void as being against public policy.⁵¹ It is assumed that the courts would be even more hesitant to uphold an agreement in a private contract which sought to make the decision of one of the parties final and conclusive. This is yet another indication that the attitude of the courts differs in the case of government contracts from the case of private contracts.

In England, the advent of the welfare state has created problems of a somewhat different nature, which are also reflected in the United States. One point which we may discuss briefly is that which arises in connection with the practice of compulsory contracts, known generally in the United States as condemnation. A compulsory contract means that a person is forced to buy, or sell, or perform some services under contract whether he wishes to or not, and we may say, at the outset, that these are not contracts in any sense of the term. One of the best known examples is the compulsory acquisition of land,⁵² whereby some public authority can acquire the land of a private person for compensation, however unwilling he may be to dispose of it. Other examples are to be found in the compulsory purchase of stock held in nationalised industries, in the compulsory sale of milk and other produce to central marketing agencies for redistribution. It is clear that in all compulsory con-

⁴⁸Public law, No. 354 of 1954.

⁴⁹Supra.

⁵⁰Williston, *Contracts* (1931), 1725. Cheshire & Fifoot, *Contracts* (1952) pp. 282 et seq.

⁵¹*Czarnikow v. Roth, Schmidt & Co.*, [1922] 2 K.B. 478. *Re Wynn's Will's Trust*, [1952] 1 All E.R. 341.

⁵²Town and Country Planning Act, (1947) 10 & 11 Geo. VI, c. 49.

tracts, the fundamental element of all contracts, namely the consent of the contracting party, is absent. Compulsory purchases are rather in the nature of appropriations for public use. The payment of a sort of consideration in no way affects its juridical nature; it still remains a unilateral act of appropriation, however reasonably carried out. We may thus dispense with any further consideration of this phenomenon, since we are only concerned with public contracts properly so called.

Reference has already been made to the practice of inserting standard clauses into government contracts, and, although, of course, this is not a feature which is peculiar to them, it will be of benefit to consider their content in more detail.

In the United States, one of the most common clauses — apart from the “finality” clause which we have already considered, and which has, to a certain extent, been mitigated by Congress — is the termination clause, variations of which are also found in government contracts in England. A typical clause of this nature would provide that:

The [appropriate department head] shall have power to determine the contract at any time, by giving the contractor written notice.

This is a provision which must strike one as being remarkably similar to the inherent power of the French administration to terminate the contract at any time, where the interests of the public demand. Furthermore, and again the result is similar to what the French achieve as a matter of law, there will be provisions which will ensure an indemnity for the contractor if such termination results in damage for him.⁵³

The *changes* clause is also common to both countries, and one may take as an example, the standard clause in a War Department contract of the United States, which provides:

Where the supplies to be furnished are to be specifically manufactured in accordance with drawings and specifications, the contracting officer may, at any time, by a written order... make changes in the drawings or specifications. Changes as to shipment and packing of all supplies may also be made as above provided. If such changes cause an increase or decrease in the amount due under this contract or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly... Nothing provided in this article shall excuse the contractor from proceeding with the contract as changed.

There are, in addition, certain clauses which are required by law to be inserted, which have been discussed under the topics of formalities.

What is so remarkable is that these clauses, together with others which might provide for inspection, the use of approved materials, and many others of a similar nature, have the effect of achieving for the government in the common-law system what, under the French system, is already accorded by the law to the administration in a *contrat administratif*. These clauses are all

⁵³For the French law, see *supra*.

methods in which the government, as one of the contracting parties, manages to protect the public interest, within the terms of the contract. Unfortunately, it does not appear that the courts are willing to recognise the purpose behind standard clauses of this type. In the private standard contract, both sides are, basically, solely interested in protecting their own interests, and the fact that one side is the *dictating party* is partly balanced by the strategy of the courts in construing the contract against that party.⁵⁴ If one ignores the fact that the government is not, as such, an interested party, but is the protector of the much more important welfare of the public as a whole, the indications to the effect that government contracts are to be construed against the government⁵⁵ are somewhat easier to understand. No difference is discernible between the attitude of the courts in this respect and that where they are solely concerned with private persons.⁵⁶ To construe the contract against the dictating party is a means to place the parties, to the best of the capabilities of the courts, upon a more equal footing. This is neither possible, nor desirable, in the case of public contracts. It is true that there are rather vague references in certain English cases to the effect that a public body is limited to the amount which it can spend, and that where it has contracted to perform a duty, the obligation should not be absolute, but should be limited to a reasonable performance of that obligation, having regard to the public character of the contracting party,⁵⁷ in cases where a private contractor would be held to the strict letter of the agreement. But the American cases are quite uncompromising in treating the government, within the framework of the terms of the contract, as being in the same position as a private person.

The administration is, however, not a private person. It has powers and duties which are not accorded to private persons, powers which are necessary for the government of the country. These powers and duties require discretion. The question which has not been answered, or even properly raised, in common-law, administration law, and, more particularly, in the field of government contracts, is where this discretion ends, and the administration should properly

⁵⁴*Wallis v. Pratt*, [1911] A.C. 394. *Andrews v. Singer*, [1934] 1 K.B. 17. Compare *L'Estrange v. Graucob* [1934] 2 K.B. 394. Compare also, Prausnitz, *Standardisation of Commercial Contracts*; Friedman, *Law and Social Change in Contemporary Britain*, chapter three.

⁵⁵This is particularly true of judicial opinion in the United States. *Brand v. Chicago Housing Authority*, 120 F. 2d. 786, (1941). *In Re Construction Materials Corp.*, 18 F. Supp. 509 (1937). *Carstens Packing Co. v. United States*, 62 F. Supp. 524 (1946). Compare *Kemp v. United States*, 38 F. Supp. 568 (1941) in which it is suggested that the contractor with the government should be held to more strict requirements than is the case in private contracts, owing to the regulatory nature of these contracts.

⁵⁶*United States v. Utah, etc. Stage Co.*, 199 U.S. 414 (1905). *Hollerbach v. United States*, 233 U.S. 165 (1913). And see the cases cited in the previous note.

⁵⁷*Kent v. East Suffolk Catchment Board* [1941] A.C. 74. See also, *Smith v. River Douglas Catchment Board* [1949] 2 K.B. 500. *Ranson & Luck v. Surbiton Borough Council* [1949] Ch. 180.

be said to be in the position of a private person. All the devices which have hitherto been discussed — the finality clauses, the termination clauses, construing a contract against the government, treating the administration as a private person, or the relaxation of the strict contractual obligations — are merely somewhat confused means of attempting to blend the more obvious contractual concepts with the more obvious discretionary powers of the administration. The results are these. It is impossible to maintain that the government contract is exactly the same as the private contract with the government as one of the parties, whilst at the same time admitting that the presence of extraneous discretionary powers may override established rules of the common-law contract. On the other hand, it is perfectly clear that the contractual elements are so strong that it cannot be denied that the government contract is some type of contract.

That these discretionary powers must be superior to the contract appears from the case of *Ransom and Luck v. Surbiton Borough Council*⁵⁸ in which a local authority had certain powers accorded to it under a Town and Country Planning Act. It entered into an agreement, by which, in effect, the local authority agreed not to exercise these powers. The Court of Appeal held that, in the absence of authority to do so, a local authority could not contract out of discretionary powers which have been accorded to it, although in the actual case, the Court found that as a fact the agreement was not a contract. Lord Greene, M. R., said:⁵⁹

Is it likely that Parliament... without express words to that effect, would do anything so unusual, so explosive, as to enable a planning authority to do that which all the principles laid down and observed by the courts and the legislature in regard to statutory duties of this kind forbid, namely, to tie its hands and contract out of them?

In other words the opinion of the Court was what the contract is subordinate to administrative discretion of this nature. The point to be considered is how far this principle extends. Is it confined to the exercise of statutory duties or does it cover all administrative powers?

In France, the contract is unquestionably subordinate to the powers which are possessed by the administration. This is to say that, whether or not the contract contains clauses which give the administration powers which are not usually found in the ordinary private law contract, certain powers are still vested in it by virtue of its duty to safeguard the public interest. Where public interest is not an element of a contract — where, for example, the contract contains no *clauses exorbitantes de droit privé* — the contract is an ordinary private law contract in which the administration divests itself of all its administrative characteristics, and is reduced to the same position as a private person. But most public contracts — and this is particularly true of contracts of the central administration, with which we are mainly concerned — are those in which the element of public interest cannot be ignored. These *contrats*

⁵⁸[1949] Ch. 180.

⁵⁹Id. p. 195.

administratifs involve a juridical concept which is a combination of contract and discretion. They are indeed contracts, but there are many rights and duties which arise not from the contract but from general public law.

The common-law contract, however, is not a suitable concept for such an approach. If one starts from the principle that there is only one juridical concept of the contract, there is no machinery whereby the courts can give the government contract any different construction, or hold that it gives rise to any conceptually different rights or obligations, from an ordinary private contract. The result is that the administration, in order to protect the interests of the public, must resort to standard terms and conditions. Within the existing framework of the common law, it is possible that the courts could recognise the duty of the administration to safeguard the interests of the public by some application of the doctrine of public policy. This was attempted in the case of *Ransom and Luck v. Surbiton Borough Council*⁶⁰ and in *The Amphitrite case*.⁶¹ But public policy is a disabling concept and not an enabling concept.⁶² It may be utilised to declare certain contracts or certain terms void, but it cannot be used to permit the administration to take any unilateral action for which it has not contracted.

It will be of some benefit here to consider the different attitudes which exist towards the administration in France and the common law systems. In France, one of the basic principles of the *droit administratif* is that no one individual should suffer any loss or damage over and above that which is suffered by the public as a whole, through any act of the administration. In spite of the existence of the powers of the administration to take certain unilateral action in any *contrat administratif*, the rights of the individual remain protected for one does not start, even unconsciously, with the concept of the non-suability of the administration. It is quite true that, for all administrative matters, disputes will have to be submitted to the *tribunaux administratifs*, but, as will be shown in the chapter on procedure, a *tribunal administratif* cannot be equated to a common-law administrative tribunal. The French *tribunal* is the check which guarantees for the individual his protection against arbitrary unilateral action on the part of the administration. Furthermore, it ensures that adjustments are made, by providing compensatory indemnities, when the acts of the administration, although unilateral, are not arbitrary. The plaintiff's recovery is designed to adjust his losses so that he does not suffer exceptional damages. It is to such a court that all disputes arising from *contrats administratifs* are submitted. This court is not obliged to treat the administration as an ordinary private contractor, but may take notice of both

⁶⁰Supra, note 58.

⁶¹[1921] 3 K.B. 500.

⁶²Friedman, *Legal Theory*, (2nd. ed.) p. 297. Contra, Lloyd, *Public Policy*, 154, in which he supports the case of *Lorenzen v. Lydden* (1942) 2 K.B. 202. But, for criticisms of that case, see Wolff, *Private International Law*, (2nd. ed.) p. 528. And Mann, in 5 Mod. L.R. 262.

the contractual and the discretionary elements of the contract. The whole purpose of the tremendous administrative structure has been to protect the private individual from abuses of the administrative process.

While, basically, there is no machinery in the common law for this approach, there are certain points which should be noticed. We have already referred to *Ransom and Luck v. Surbiton Borough Council*⁶³ for the suggestion that the administration cannot contract out of the exercise of a power given to it by the legislature. Contracts of service with the Crown are said to be subject to an implied term that the Crown shall have power to dismiss at will, even where the employment is for a definite period of time.⁶⁴ This is a term which is said to be implied on the ground of public policy, but it may, apparently, be excluded by an express provision which renders the term incapable of implication. From the judgment of Esher M.R. in *Dunn v. McDonald*,⁶⁵ it appears that a contractual time limit is not sufficient to do this, and that a time limit does not necessarily produce tenure. Where, however, tenure is assured by the contract — as may be done by a contractual term that the plaintiff shall only be dismissed during a period “for cause” — the Crown no longer has the power to dismiss at will. It is, to say the least, a peculiar implied term which overrules a provision as to period of employment on the nebulous distinction between “term” and “tenure”, but it is an even more peculiar provision of public policy which can be contracted out of by one of the parties.

The case of *Rederiaktiebolaget Amphitrite v. The King*⁶⁶ has been subject to much criticism,⁶⁷ and it is difficult to see that this decision was properly based on the fact that there was no contract because any possible contract would be void on the ground that the Crown cannot bind its future executive action, rather than on the fact that there was no agreement which could be called a contract.⁶⁸ But, apart from these considerations, there is much to be said for the view of Rowlatt J., that there is a rule of law which forbids the Crown from being bound by a contract which fetters its future executive action. However unsatisfactory the case may be for the lack of authority cited in its support, the method of reading in implied terms, which, by all the rules of contract law, could not be read in, is no more satisfactory.⁶⁹ This is seen

⁶³[1949] Ch. 180.

⁶⁴*Dunn v. Regina* [1896] 1 Q.B. 116. *Denning v. Secretary of State for India*, 37, T.L.R. 138 (1920).

⁶⁵[1897] 1 Q.B. 555.

⁶⁶[1921] 3 K.B. 500.

⁶⁷Notably by Holdsworth in 45 L.Q.R. 166.

⁶⁸This is the view taken, amongst others, by Denning, J., as he then was, in *Robertson v. Minister of Pensions*, [1929] 1 K.B. 227, p. 231.

⁶⁹The disputed rule as to the fact that a Crown contract is void unless there are adequate appropriations from Parliament has been examined in Chapter One, *supra*. It was submitted that appropriations go to remedy and not to the validity of the contract. The question of reading in such an implied term or condition does not, therefore, arise.

from the case of *Reilly v. Regem*,⁷⁰ in which the petitioner had been appointed under a Canadian statute which provided that the appointments should be for a fixed period of five years. Before that time had expired, the office was terminated and the petitioner dismissed. He claimed for breach of contract. The claim failed since the contract was discharged by operation of law,⁷¹ the office to which the petitioner had been appointed having been abolished by statute. Lord Atkin, however, adverted to the problem of implied conditions giving the Crown the right to determine the employment at will. In the course of his opinion he said:

If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine "for cause", it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded.

If the power to dismiss is included on the ground of public policy, this latter being of the *jus cogitum*, it would follow that it is not competent for the Crown to contract out of its provisions, and a term giving this power would have to be implied regardless of any express conditions. One is left either with the result that it is never possible for the Crown to bind itself to tenure in any case, or with the result that this is a unique form of public policy and that the rules of private contract law cannot be applied to public contracts of service, if not to all public contracts.

Now, occasionally, there are also to be seen allusions to what appears to be similar notions in certain United States cases. In *The West River Bridge Co. v. Dix*,⁷² the plaintiffs were the owners of a bridge which had been held under charter from the State of Vermont. The charter was treated as a contract between the State and the company, but the bridge was compulsorily acquired to be used as a part of a public road. The Supreme Court held that the contract was subject to the right of eminent domain existing in the State.

No state, it is declared, shall pass a law impairing the obligations of contract; yet, with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of promoting and protecting the interests and the welfare of the community at large . . . This power, denominated the eminent domain of the State, is, as its name imports, paramount to all private rights vested under the government and these last are, by necessary implication, held in subordination to this power and must yield in every instance to its proper exercise . . . Into all contracts . . . there enter considerations which arise not out of the literal terms of the contract itself . . . Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the the contract affected by it, but recognizes its obligation in the fullest extent, claiming only the fulfillment of an inseparable and essential condition.⁷³

⁷⁰[1934] A.C. 176.

⁷¹Hence, of course, there was no breach.

⁷²6 How. 507 (1848).

⁷³Id. pp. 531-533.

The same view is taken in the case of the *Contributors to the Pennsylvania Hospital v. Philadelphia*⁷⁴ and the cases there cited.⁷⁵ The right of eminent domain of the State to secure the welfare of that State where necessity demands, and the corresponding right of the Federal Government, is a right which must be taken into consideration in any examination of the theory of public contracts. Similarly, the overriding police powers of the States, while not, of themselves, contractual in nature, may have such effects upon contracts made with a government that they too cannot be ignored.⁷⁶

One may, therefore, well ask if it is possible to say that in the common law, contracts made by the government are but the same, juridically, as private contracts, save that one of the parties is a public corporation or other body. From what has already been said, it is suggested that when questions arise as to the rights and obligations in government contracts, it is apparent that there are considerations which do not arise solely from that contract. The discretionary powers of the administration and its rights to take certain unilateral action appear from time to time in the form of the right of eminent domain, police power, the incapacity of the Crown to be bound by certain contracts, the inability to contract out of certain powers which have been accorded to the administration by statute. This would seem to be the rationale of the opinion expressed in the case of *Ransom and Luck v. Surbiton Borough Council*⁷⁷ by Goddard L.C.J., to the effect that a local authority could not contract out of the exercise of its powers under the Town and Country Planning Acts. In the case of *Stone v. Mississippi*⁷⁸ the State had granted a charter to the plaintiff to operate a lottery but, a year later, had adopted an article in its constitution which forbade the authorisation of lotteries, acting under its police powers to protect the health and morals of the citizens of the State. In holding that the charter was annulled by the new clause in the constitution, the Supreme Court, through Waite J., said:

The question is, therefore, directly presented whether, in view of these facts, the Legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organised with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.⁷⁹

⁷⁴245 U.S. 20 (1917).

⁷⁵See also, Mitchell, *Limitations on the Contractual Liabilities of Public Authorities*, 13 Mod. L.R. 318.

⁷⁶Freund, *Police Powers* (1904) 555 et sqq. Tiedeman, *Limitations of Police Powers*, (1886), pp. 515 et sqq. Mitchell, *Contracts of Public Authorities*, pp. 87 et sqq.

⁷⁷[1949] Ch. 180.

⁷⁸101 U.S. 814, p. 819 (1879).

⁷⁹For a similar statement in English law, see *Birkdale District Electricity Supply Co. v. Southport Corporation* [1926] A.C. p. 364, per Lord Birkenhead.

In both the United States and England, the courts have recognized that there is a power to declare certain contracts or clauses and conditions of contracts void on the ground that they are inconsistent with the nature of the powers of the government.⁸⁰ Here, we can see a realisation that contract and discretion are not capable of being separated in the manner in which the American courts, in particular, have stated that they are. The administration does not cease to act in a public capacity when it enters into a contract with a private person.⁸¹ In this respect, there is little difference in principle between the law in the common-law system and the law in France, although there is a great difference in the degree to which these principles are extended. This is not surprising when it is recognised that the common law has introduced these public law principles into the framework of private law. There is no difficulty involved in the common-law courts invocation of the nebulous principles of public policy to do this, although, as has been suggested above, it is doubtful whether these principles have been correctly applied.

The fundamental difference between the French law and the common law in respect to government contracts lies not in the powers of the courts to declare certain contracts to be void, but in the powers and the rights, extraneous to the contract, of the administration to take positive action unilaterally. The right of the French administration to insist upon the performance of an obligation for which the contractor has not contracted for expressly has, as yet, no counterpart in the common law. By a process of historical growth, French law has given the administration the powers which have been described, after a careful balancing of the interests of the public against the interests of the contractor himself. It cannot be doubted that, in the common law, if the contract did not, by its terms, enable the administration to call for extra work or materials if it was thought to be necessary, the contractor would not be bound to comply with this request. No public policy consideration could be invoked against him and there would be no consideration of what would be in the best interests of the public. However, it is to be noticed that where the courts have invoked the doctrine of public policy, the results are far more detrimental to the contractor. It is in these very cases in which the contractor is left with no remedy at all, since the contract or the offending term is declared void. But it will be well to bear in mind the observation of Lord Moulton in the case of the *Attorney-General v. De Keyser's Royal Hotel*,⁸² in which he said:

⁸⁰The question of whether justice does not demand that a contractor whose contract has been declared void on the ground of public policy should not be entitled to some sort of indemnity or compensation, must also be answered.

⁸¹Compare the application of the rules as to police powers, eminent domain, contracts of service with the Crown, etc.

⁸²[1920] A.C. 508.

It is equitable that the burdens borne for the good of the nation should be distributed over the whole nation and should not be allowed to fall on particular individuals,

an observation which is remarkably reminiscent of the French view of the whole of the law relating to administrative remedies.

The conclusion which is to be drawn from this theoretical discussion is that, at common law, whilst government contracts are contracts in the fullest sense of the word, there are too many peculiar features to these contracts to make a complete assimilation between them and the ordinary contract between private persons. The character of the government as a party to such contracts results in different contractual incidents. Confusion will inevitably arise if the features of government contracts are explained and applied according to the principles and terminology of private law.