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INTRODUCTION

Is the state dead, in retreat, or increasingly significant? Much of the globalization literature disputes these questions.[1] Responses tend to vary according to the discipline invoked and its preexisting assumptions about the state.[2] A legal account of the nation-state, together with an account of how the dominant legal conceptions are shifting, may provide fresh insights into the phenomenon of globalization. This paper focuses on how governments have typically been conceived as legal persons in the Anglo-American tradition and traces how the increasing significance of international treaties and contractual modes of governance has affected those conceptions.

There is no single version of government as a legal entity. The law conceives of government differently depending on the subdiscipline involved. The internally-focused public law subdisciplines of administrative and constitutional law construct government as an entity fragmented by the separation of powers. The externally focused international law subdiscipline constructs government as a whole, unified in the executive. Contract law shares this version of government as a unified legal person dominated by the

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1. *See* SUSAN STRANGE, THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY, at xi (1996) (declaring the United States to be an exception and notes associated and multiple paradoxes such as the increasing desire of ethnic communities to become states); *cf.* LINDA WEISS, THE MYTH OF THE POWERLESS STATE: GOVERNING IN THE GLOBAL ERA 194 (1998) (recording the "phenomenon of state denial" and suggesting that globalists have both overstated and overgeneralised the degree of state powerlessness).

2. As Weiss comments, some of the commentaries reflect the "tendency in social science to ignore or conceptually de-emphasize the state's importance in structuring social relations." WEISS, *supra* note 1, at 3. She suggests "neo-liberal economic philosophy" has contributed to this tendency. *Id.* at 193. Few would contend that "command and control" was ever an accurate *description* of how regulation worked as a social phenomenon. Legal forms of analysis almost always impose an artificial and abstracted account of social relations upon the variety of social relations.

executive. How the government actor is constructed will depend on which legal form of regulation is chosen. As international and contractual versions of government come to dominate, a number of consequences follow. These may even include challenges to the norms which have traditionally operated under constitutional and administrative law frameworks.

This legal account of the state suggests conflicting and paradoxical tendencies. Rather than observing a state that is simply shrinking, we observe the increasing ability of the executive to make binding commitments on behalf of the state; the increasing juridification of such commitments; the relocation of politics and high politics not only to international bodies but also to courts; and a diminution in the ability of governments to respond to local pressures—a diminution in the zone of "public politics," if you will. Governments assert power with the effect of diminishing the ability of future governments to exercise power. Increasingly, there is a trend towards treating nation-states as "states" rather than as merely "governments."

While this paper attempts to generalize about the Anglo-American legal position, it is motivated by the New Zealand experience over the last 18 years. In many ways, that experience may suggest these trends rather more strongly than other western common law systems.[3] New Zealand is a small unitary democracy, with a unicameral Parliament and Westminster system of government. It has embraced neo-liberal economic policy in a more "pure" form than most countries and has actively eschewed "public regulation" for "regulation by private law" (particularly by the law of contract). This has been combined with New Zealand's strong self-perception as a "good international citizen." In 1999, when a coalition government was elected which did not openly espouse neo-liberal policies, it became a real question for the first time in over a decade whether the reforms could be undone and how much they had become embedded both legally and politically.

I. GOVERNMENTS AS LEGAL ENTITIES UNDER THE COMMON LAW

The starting observation is that different areas of the common law tend to conceive differently of the government or state as a legal entity. That is one very important reason why the choice of regulatory instrument matters. There are two instruments of choice in this era of globalization: international

3. While England has been closest to New Zealand legally and constitutionally, Britain's membership in the European Union has profoundly affected its position.

agreements, and contracts for regulation and policy delivery. The way in which "government" is conceived in international and contract law is quite distinct from the way in which "government" has traditionally been conceived in administrative and constitutional law in the common law tradition.

International and contract law both tend to conceive of the government actor as a determinate legal person: a single authority representing all branches of the state and able to make commitments on behalf of the whole. When we imagine the government legal actor in its treaty-making and contractual capacities, we tend to unify the different branches of government in the executive. Crucially, the question of how the executive can bind the other branches is commonly obscured, or subsumed, by traditional notions of the prerogative or by a generous view of contractual capacity. Consequently, the role for public politics is diminished. The political supervision of technocrats by legislatures is reduced, and formerly public processes become private. At the enforcement level, where contract law is concerned, judges are no longer as willing to defer to political actors and high policy as they would be under administrative law methodology.[4] At the same time, international law norms and agreements are becoming increasingly enforceable.

Contract and international law tend in one other important respect to conceive of a unified government legal personality. This determinate artificial legal person who enters international agreements and contracts tends to be viewed as consistent over time, whatever the changes to its membership and ideology. As such, the legal person of the state has a greater capacity to make binding commitments into the future than we would traditionally have contemplated in administrative law and, absent special constitutional procedures, in constitutional law.

Administrative law does not contain a juristic conception of the state. As traditionally conceived, administrative law contains few notions of the "state" at all, let alone as a unified whole. Rather, its central preoccupation is with political rivalries between different parts of the state. It is concerned with regulating the relative powers of tribunals, Ministers, officials, agencies, and courts. Administrative law decisions and scholarship evidence a self-conscious need to justify and legitimate judicial interference with political actors. While

4. Non-justiciable issues and issues of high policy tend to shift to international forums. Immigration and extradition matters, especially those raising security concerns, may be an important exception to this trend. The British cases are discussed by Sir David Williams in his paper in this volume. Sir David Williams, *Globalization and Governance: The Prospects for Democracy*, 10 IND. J. GLOBAL LEGAL STUD. 157 (2002).

contemporary academic controversies tend to focus on what should be the proper justifications for judicial intervention, there is a shared sense of the fundamental importance of articulating such justifications.[5]

Administrative law has sought to achieve a (sometimes delicate) balance between protecting the public from the arbitrary and capricious actions of governments and maintaining a distinct place for politics into which courts should not enter. The "no fettering" rules and limited availability of estoppel demonstrate a concern to preserve the ability of governments to change their minds. In its traditional form, at least, administrative law can be viewed as a product of the anti-statist Anglo-American tradition. There is no "state"—only a very different and temporally contingent creature, "the Government of the day," or, more commonly in the Westminster system, "the Minister responsible for the time being."[6]

There is little of the "state" to be found in the constitutional law of the Westminster tradition either. The Westminster tradition regards the Queen in Parliament as the central repository of legal sovereignty. That is quite different from treating Parliament as synonymous with the state, or Parliament as a juristic person. Constitutional law, of course, varies greatly among common law jurisdictions according to their federal or other arrangements and particular instantiations of the separation of powers.[7] Nevertheless, two important characteristics could be said to be shared by jurisdictions founded in that tradition. First, there is no state, as such, but rather legislative, executive, and judicial branches that compete with each other for power and check each other's excesses to varying degrees.[8] Second, subject to any constitutional limits, each legislature has full (if not exclusive) law-making power—a

5. *See, e.g.*, Paul Craig & Nicholas Bamforth, *Constitutional Analysis, Constitutional Principle and Judicial Review*, 2001 Pub. L. 763 (review article) (discussing the contemporary British controversy about the basis of judicial review); *see also* MARK ELLIOTT, THE CONSTITUTIONAL FOUNDATIONS OF JUDICIAL REVIEW 1-19 (2001).

6. Freedland has remarked in the British context that administrative law is less likely than constitutional law, for example, to think of the government as a unified corporate entity represented by the Crown. Rather, administrative law is more likely to conceive of the state in terms of separate departments functioning as separate entities in the name of the respective Minister. Mark Freedland, *The Crown and the Changing Nature of Government*, *in* THE NATURE OF THE CROWN: A LEGAL AND POLITICAL ANALYSIS 114-15 (Maurice Sunkin & Sebastian Payne eds., 1999). I would go further than he and add international and contract law as points of much greater comparison.

7. *See generally* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000) (discussing the separation of powers in comparative perspective). As will become clear, a functional separation of powers can take place *within* the executive branch.

8. For the view that the separation of powers is more about efficiency than competition, see N.W. Barber, *Prelude to the Separation of Powers*, 60 CAMBRIDGE L.J. 59 (2001).

legislature cannot, without special constitutional agreement, limit the actions of future legislatures. Legislatures too exercise temporally contingent powers.

In common law terms, there is no separate artificial person representing the state for constitutional purposes. The closest approximation to the state in English constitutional law is the Crown. The personality of the natural person King or Queen tended to be fused with the King or Queen's public or constitutional role. The traditional view, as expressed by Sir John Salmond last century, was that the "real personality of the monarch, who is the head of state, has rendered superfluous . . . any attribution of legal personality to the state itself."[9] Controversies about legal personality in constitutional law have tended to revolve around whether the King's ancient immunities applied to the acts of his Ministers and officials.[10] Traditionally, the closer the actions came to being those of the sovereign, the less likely a suit could be brought (unless consent had been given).[11] Attempts to define the "identity" of the sovereign were for the very purpose of avoiding the ordinary consequences of having juristic personality. Sovereign immunity rendered the personality of the state "non-juristic"—not subject to legal processes. The sovereign itself could only waive immunity as an exercise of its grace and favor (in England by means of the petition of right). In the Westminster tradition, the sovereign Crown has tended to be treated as synonymous with the executive even as sovereignty has been regarded as residing in the Queen in Parliament.

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9. P.J. FITZGERALD, SALMOND ON JURISPRUDENCE 321 (12th ed. 1966). He goes on to say: "Most public property is the property of the King . . . public liabilities are those of the King; it is he, and he alone, who owes the principal and interest of the national debt." *Id.* at 321-22.

10. The precise contours of these immunities have been in dispute. Bracton suggested that the King is subject to God and the law "for the law makes the King" but that the King (like any other feudal lord) could not be sued in his own courts. The only redress was to petition the King—redress being a matter of grace and favour. *See* John F. Reinhardt, *The Status of the Crown in the Time of Bracton*, 17 TEMP. U.L.Q. 242, 257 (1943). It is one thing to impute a bad motive to the King for the tortious acts of his servants and quite another to hold an official himself or herself responsible.

11. Perhaps surprisingly, the English common law idea that the "King can do no wrong" was translated in the United States into a relatively strong federal doctrine of sovereign immunity. ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 340 (2nd ed. 2001). The authors question the incorporation of the British doctrines at the federal level. The doctrine is scarcely compatible with Republican government under the United States Constitution. *Id.* State immunity was granted to the states by the eleventh amendment. References to the United States as a juristic person in this context share certain ambiguous features with similar references to the Crown. Most commonly the Crown or United States is used as a synonym for the executive branch of government. However, in rare cases the terms embrace a broader notion of Government as a whole. In the United States this tends to be defined by statute. The Tucker Act 1887, for example, waives sovereign immunity for claims founded "upon the Constitution . . . or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States." Tucker Act 28 U.S.C. § 1491 (1887).

Most of the sovereign's immunities from ordinary suit have now been removed by statute.[12] The removal of immunities in both contract and international law settings is one important factor that brings us to the very problems that are the subject of this paper.[13] Sovereign personality, which was historically defined for negative purposes, has lately come to be used to define the positive state actor.

Broadly speaking, in the common law tradition, constitutional and administrative law tend to conceive of governments in terms of their rival component parts rather than as a unified juristic entity embracing all of these parts. These conceptions also reflect, sometimes in quite pronounced ways, a temporally contingent account of government power. The increasing significance of international treaty law and of contractual modes of governance puts pressure on these domestic public law conceptions. This process of transforming the "Government of the Day" into the "state" in the globalization context is a trend that deserves further attention.

II. INTERNATIONAL LAW

Public law, in the Anglo-American tradition, configures the government differently depending on whether it is acting domestically or externally. International law has always regarded the state as a unified legal person with the capacity to bind itself into the future. Even as Maitland lamented the absence of a "state" tradition so far as British domestic law was concerned, he acknowledged that at least in its international relationships, Great Britain was a state entity—a juristic person, with the ability to borrow money, enter agreements, and the like.[14] In the international sphere, at least, the state has always enjoyed a legal personality distinct from the constituted governmental order.

This difference in how the state is conceived internationally from domestically did not matter much so long as the legal spheres remained distinct. However, the differences between the external version of the government as

12. A *statutory* waiver of immunity itself signals some of the ambiguities that surround the identity of the sovereign in the Anglo-American context. In the Westminster system Parliament came to be considered "sovereign."

13. I have deliberately left tort law out of this analysis on the basis that I believe that obligations voluntarily undertaken pursuant to contract and international treaty law raise concerns that are quite distinct from those obligations imposed on parties by the law.

14. Frederic William Maitland III, *The Crown as Corporation*, *in* COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND III 104-40, 113-15 (H.A.L. Fisher ed., 1983).

legal person and the domestic one have become much more important as the substance of international agreements has changed, as courts have become more involved in supervising their implementation, and as the variety and capacity of enforcement mechanisms has increased. International agreements tended traditionally to be about matters between states—involving war powers, territorial disputes, and the like. However, international agreements no longer purport to deal with matters just between states—they increasingly concern relationships between states and individuals and companies, and relationships between individuals. Trade, finance, environmental, and human rights agreements increasingly impact "behind the border" in areas that were formerly the province of national legislatures.[15]

Of course, the differences between international agreements then and now can be overstated. State-to-state "territorial matters" undoubtedly affect the lives of people in countries at war and indigenous peoples subject to colonization in the most direct way possible. Access to trading blocs, to natural resources and to capital were common reasons for empire. The distinctions are more subtle than is often presented. The colonial era, however, at least held out a promise of eventual national self-determination.

On their own terms, prior to the Second World War, treaties purported to regulate only state-to-state relationships. The explicit scope of such agreements has expanded without any change in what international law requires for a state to make a binding commitment. Any commitment entered into by international agreement is not merely the commitment of the government of the day, but a commitment of the state itself. Additionally, many of these treaties do not contain a process by which states can withdraw, or they hold states bound in a web of agreements.[16]

Notwithstanding the broadened scope of such agreements, international law has not changed in its approach to questions of implementation. As a matter of international law, national law is no excuse for the non-performance of treaty and other commitments.[17] Municipal law cannot be pleaded as a valid justification for an international illegal act. This strong tendency for

15. I am not suggesting that the various international agreements enjoy the same level of impact, or that the compliance mechanisms are of equal force.

16. *See* K.J. Keith, *Sovereignty: A Legal Perspective*, *in* STATE AND SOVEREIGNTY: IS THE STATE IN RETREAT? 83, 97-98 (G. Wood & L. Leland, Jr. eds., 1997).

17. This is subject to the exceptions in Article 46 of the Vienna Convention on the Law of Treaties, May 22, 1969, 1155 U.N.T.S. 331, *available at* http://www.un.org/law/ilc/texts/treatfra.htm; *see also* J.H.H. WEILER, THE CONSTITUTION OF EUROPE 166 (1999).

international law and practice to favor a world order of unitary states has other consequences as treaties gain more direct effect. Federal states enjoy plenary external treaty-making capacity and internal treaty-making power under international law. They also tend to enjoy internal implementing competence, even when this may intrude upon the powers allocated exclusively to member states under the terms of confederation.[18]

When treaties typically involved matters strictly between states, the primary methods of enforcement were international diplomacy and international dispute mechanisms—and enforcement was at the instigation of the political actors. For the most part, domestic law could ignore such agreements—leaving them in the non-justiciable province of prerogative power. Increasingly, though, treaties have begun to regulate relationships between states and individuals and among individuals, and courts have been required to consider these treaty obligations. In terms of available enforcement mechanisms, international law itself has changed; this is the era of enforceability in international law.

International agreements increasingly do not depend on states for their enforcement but may be enforced by individuals and companies, both in international dispute tribunals and in national courts. In this latter respect, the European Community has forged a new international law model. In *Costa v. Enel,*[19] the European Court recognized that some provisions of the Treaty of Rome had a direct effect on the legal relations between member states and their nationals. Individuals could require national courts to protect rights given them by Treaty. In some cases, Treaty provisions have been held to give individuals rights against a private party (horizontal direct effect) and not just against the state itself.[20] Under European Community law, an E.U. directive is binding on all constituent parts of the member states—the executive, the legislature and the judiciary (vertical direct effect).[21] The state is a unity. While the European Community still represents a high watermark of integration and direct

18. For a detailed and helpful analysis of these points see J.H.H. Weiler, *The External Legal Relations of Non-Unitary Actors*, *in* THE CONSTITUTION OF EUROPE, *supra* note 17, at 130-87. He suggests that Canada *may* be an exception. *Id.* at 138-44. The Australian Constitution explicitly gives the federal government the competence to implement legislation if pursuant to external affairs. AUSTL. CONST. ch. 1, pt. V, § 51(xxix). In the United States, *Missouri v. Holland*, 252 U.S. 416, 417 (1920), allowed to the federal government the power of implementation even where such legislation touches on the competences of the states. Weiler comments that political checks and balances and a commitment to federalism have continued to play a significant part in practice. WEILER, *supra* note 17, at 146-47.

19. 1964 E.C.R. 585.

20. *See, e.g.*, Case 43/75, Defrenne v. Societe Anonyme Belge de Navigation Airenne, 1976 E.C.R. 455.

21. *See* Paul Craig, *Once More Into the Breach: The Community, the State, and Damages Liability*, 113 L.Q. Rev. 67 (1997); Case C-188/89, Foster v. British Gas plc 1 E.C.R 3313 (1990).

enforceability, it serves as a model for trade agreements and is perhaps a marker of things to come.

Of course, international law does not have anything to say about how an international obligation must be translated into domestic law in terms of whether it must be incorporated into domestic legislation, whether it is self-executing, or whether it is automatically a part of the domestic law of the jurisdiction enjoying an equal status with legislation. Domestic courts, legislatures, and public politics still have a role to play in this area.[22] The interests served by treaties will vary according to the countries involved. Nor does international law identify which bodies should deliver on treaty or other obligations. While the state enters the primary commitments, in practice, a variety of bodies, including private organizations, carry them out.[23]

Nor does international law have anything directly to say about attempts by legislatures to restrain the executive's treaty-making powers. As is well known, the United States Constitution requires the consent of Senate before the President may enter a Treaty.[24] Famously, too, congressional-executive agreements, such as NAFTA and the WTO (indistinguishable from treaties in terms of their abilities to bind the United States to international obligations), have been entered into by statute, thereby avoiding the special process prescribed by the Constitution.[25] In New Zealand, the traditional view has been that treaties do not become part of domestic law until incorporated. The increasing significance and direct effect of treaties[26] has lead to greater

22. As Paul Craig suggested at the symposium, multilateralism allows more by way of public participation than bilateralism, which tends to repose power even more exclusively in the executive. The role of non-governmental organizations at international forums is discussed elsewhere in this issue. Steve Charnovitz, *The Emergence of Democratic Participation in Global Governance*, 10 IND. J. GLOBAL LEGAL STUD. 45 (2002). Of course, the ability of domestic politics to influence the content of treaties themselves will depend on the power of the country or power bloc concerned.

23. *See, e.g.*, the Draft Articles on Responsibility of the State for Internationally Wrongful Acts 2001, adopted by the International Law Commission, U.N. GAOR, 56th Session, Supp. No. 10, U.N. Doc. A/56/10 (2001). The Draft Articles provide that acts of state may include "the conduct of a person or entity which is not an organ of the State . . . but which is empowered by the law of that State to exercise elements of the governmental authority," acts performed "in the absence or default of the official authorities," and conduct that a state acknowledged or adopted as its own. *Id.*, arts. V, IX, XI.

24. The President "shall have power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the senators present concur." *Id.*, art. II, cl. 2.

25. *See generally* John C. Yoo, *Laws as Treaties? The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001).

26. See, for example, the courts' efforts to give effect to treaties as mandatory relevant factors in the exercise of administrative discretion in the immigration cases of *Tavita v. Minister of Immigration* [1994] 2 N.Z.L.R. 257, and *Puli'uvea v. Removal Review Auth.*, 14 F.R.N.Z. 322 (1996). For examples in the

parliamentary supervision and input into the treaty-making process.[27] Notwithstanding the attempts to increase the legitimacy of these processes, neither of the two major political parties has ever conceded, nor come close to conceding, that legally the executive's plenary power and capacity to enter treaties is in any way diminished. At least for established democracies, however, there is the potential for political checks and balances around these processes.

International law's stance on the external capacities of states to bind nations internally has potentially more serious consequences for developing nations that enter into trading and other agreements before they have established democratic structures. Because there is no necessary connection between statehood and democracy, the dominance of the international agreement as a regulatory instrument achieves even greater significance for such developing countries. There is no general endorsement of a principle of democracy in international law. To be a state requires both that government (or tyrant) actually control the people, and also recognition by other states. These minimal criteria fall far short of a requirement that governments be democratically elected or even enjoy the general support of the people. Indeed, as a matter of practice, "in the mid-1980s only about a third of all the countries of the world could be described as democratic, and a still smaller proportion had longstanding and stable democratic structures."[28] Even in the absence of any basis for a state's authority in terms of the will of the people, international law grants a state sufficient juristic personality to enter commitments binding into the future.

While there is room then for individual governments to increase the legitimacy of their international commitments, this is not a matter with which international law has traditionally been concerned. Unitary states retain primary capacity to make such commitments, and while domestic legal arrangements allow varying methods of implementation of international commitments, international law has been desirous that domestic obstacles to the implementation of international commitments not be used to justify breaches of state obligations. Primary responsibility for breaches of such commitments

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regulatory area see *Sellers v. Maritime Safety Inspector* [1999] 2 N.Z.L.R. 44, and *New Zealand Airline Pilots' Ass'n v. Attorney-General* [1997] 3 N.Z.L.R. 269.

27. *See generally*, Treasa Dunworth, *Public International Law*, 2000 N.Z.L. REV. 217, Treasa Dunworth, *Public International Law*, 2002 N.Z.L. REV. 255; Mai Chen, *A Constitutional Revolution? The Role of the New Zealand Parliament in Treaty-Making*, 19 N.Z.U. L. REV. 448 (2001).

28. James Crawford, *Democracy and the Body of International Law*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 91, 95 (G.H. Fox & B.R. Roth eds., 2000).

remains with the unitary state. Lastly, the ways in which such commitments can be enforced are changing to allow individuals a private Attorney-General type role.

Within public law, the government as legal actor is conceived differently depending on whether it is acting "externally" or "internally." In its external manifestation it takes a state-like character. The state, as juristic person, has plenary power to make commitments on any subject matter. Its commitments "to all the world" transcend governments and bind into the future. Such commitments are binding on the state at international law regardless of domestic resistance to such policies. Treaty commitments are also increasingly enforceable by individuals in domestic courts and other tribunals. Democratic concerns and separation of powers arguments simply do not figure as a matter of international law.

III. CONTRACTS

A second parallel pressure consolidates and reinforces this transformation of the "government of the day" to the "state." This pressure results from the increasing domestic use of contracts by governments to pursue their policies and as a means of regulation. This is the second "regulatory instrument of choice" in the globalized environment. The increasing use by governments of contracts introduces a second dichotomy—the government legal actor is conceived of differently in private law compared with administrative law.

Some administrative law scholars have argued that the use of contracts as a mechanism of regulation potentially increases the accountability of government and contributes to more rational and efficient regulation.[29] On this view, the use of contracts improves and builds upon core administrative law values and methodology. After all, who would deny that it is a good thing for governments to be transparent about their commitments and to fulfill them?

There will, of course, be cases in which these claims made for contracting may be borne out. Other cases, however, demonstrate the important and overlooked differences between administrative law and contract law values. One source of difference is that contract law and administrative law tend to conceive of the government actor differently. Choice of regulatory instrument matters here, too. Three examples may help to illustrate this point. The first involves the use of contract by government in an attempt to embed its

29. Jody Freeman, *Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 549 (2000).

controversial asset sale program past an election. The second also involves contracts entered into during an election campaign, but in this example, the executive has successfully disaggregated itself into separate commercial and regulatory arms in order to obtain greater policy flexibility. The third illustrates the potential for a so-called "regulatory contract" to impose financial and political costs on successor legislatures and administrations, and an unsuccessful attempt to separate the executive's regulatory and commercial functions.

A. Embedding a Policy Program

Whether to privatize Pearson airport in Toronto became a matter of intense political debate between the government and the opposition in the election campaign. The Liberal leader, then in opposition, announced his party's policy that the airport terminals should be leased to a non-profit corporation rather than to a for-profit partnership. With eighteen days to go before the election, the incumbent government sold the airport to a private consortium. Having won the election, the Liberal Government (after an inquiry into the contractual process and price[30]) repudiated the contracts and sought to pass legislation that would have relieved the government of the ordinary contractual measure of damages. The legislation was blocked in the Senate.[31] In the meantime, the partnership successfully sued the government for full compensation in the Ontario Divisional Court.[32]

The Ontario Divisional Court,[33] applying orthodox contract law principles, treated the agreement to sell the airport as binding on Canada as a juristic person. It was irrelevant to the resolution of the contractual issues that the matter was one of high politics, that the government had changed, or that by entering into the agreement during the campaign the outgoing government effectively secured its policies for the future. Of course, the new government could theoretically have passed legislation absolving itself from contractual

30. The successful consortium's major shareholder was founded by a prominent backer of the governing Conservatives leading to allegations of patronage. *See* Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDISC. L.J. 467, 476 (1999).

31. *See generally* Ronald J. Daniels & Michael J. Trebilcock, *Private Provision of Public Infrastructure: An Organizational Analysis of the Next Privatization Frontier*, 46 U. TORONTO L.J. 375, 383-87 (1996).

32. T1T2 Limited Partnership v. Canada, 23 O.R.3d 81 (Ont. Gen. Div. 1995), *aff'd* 24 O.R.3d 546 (Ct. App. 1995).

33. *Id. See generally* Daniels & Trebilcock, *supra* note 31, at 383-87; Patrick J. Monahan, *Is the Pearson Airport Legislation Unconstitutional? The Rule of Law as a Limit on Contract Repudiation by Government*, 33 OSGOODE HALL L.J. 411 (1995).

liability, but it failed in the attempt. The legislation was defeated partly by rule of law arguments: government should be subject to the same law as ordinary persons in its commercial dealings.[34]

The statement that governments should be treated the same as ordinary persons in their commercial dealings begs the central question: Who is the government for these purposes—what kind of legal person is Canada? It is assuredly not an ordinary person, but rather an artificial one. While such an argument purports to rely on a Diceyan notion of the rule of law, Dicey did not himself conceive of the state as a unified entity. He believed that legal sovereignty belonged to the Queen-in-Parliament, and that the Crown's powers had been relinquished to and constrained by Parliament. He denied the existence of the administrative state and saw only natural persons serving official roles.[35]

Contract law imports into the rule of law debate its own conceptions about the determinate characteristics of the legal persons who enter into binding agreements. The implicit assumptions we make about the nature of governments as legal persons are fundamental here. Underlying the rule of law arguments is an unexamined construction of the state as a juristic person. Contract law assumes a unified person for its purposes. Despite the underlying conceptual confusions, the effect of these rule of law arguments is that it will often be much easier for legislatures to repeal legislation than to override contracts by legislation—even when those contracts have been entered into by the political rival of the governing party. Contract law does not recognize such political rivalry—the government is a unified and constant person for

34. *See* Monahan, *supra* note 33.

35. According to Collini, Dicey regarded the common law judges as closest to representing "the august dignity of the State." STEFAN COLLINI, PUBLIC MORALISTS: POLITICAL THOUGHT AND INTELLECTUAL LIFE IN BRITAIN 296 (1991) *quoted in* J. Stapleton, *Dicey and his Legacy*, 16 HIST. OF POL. THOUGHT 234, 239 (1995). Dicey suggested that: "Every official from the Prime Minister down to a constable or collector of taxes is under the same responsibility for every act done without legal justification as any other citizen." ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 2 (10th ed., 1959). The only way to reconcile the two aspects of Dicey's conception—that government is a contest rather than a unity and government actors (determinate persons) should be subject to the ordinary law—is that when Dicey said that officials should be subject to the ordinary law he really intended to refer to natural person officials and he probably had the law of tort exclusively in mind. It was for this reason that Ernest Barker, who was otherwise sympathetic to Dicey's project, rejected his theory as an incomplete solution. Barker thought that legal notions of the state were so oblique as to escape the rule of law. Barker's answer, at least initially, was that the state itself (rather than merely its officials) should be called into account as a "juristic person." E. Barker, *The Rule of Law*, 1 POL. Q. 118, 121 (1914) *quoted in* Stapleton, *supra*, at 243. He later backed away from these views. *See* DAVID RUNCIMAN, PLURALISM AND THE PERSONALITY OF THE STATE 216-18 (1997).

contractual purposes. Once contractual capacity is recognized, that will often be the end of the matter.

B. Separating the Executive's Regulatory and Commercial Functions

The second example, taken from New Zealand, involves similar issues but a different result. *Lumber Specialities v Hodgson* [36] (hereinafter Timberlands) involved a political contest during an election campaign about whether the logging of rare timber should be permitted. The timber in this instance was owned by the government of New Zealand and vested in one of the few remaining unprivatized, state-owned corporations incorporated under the Companies Act 1993. The result in this case was different from that in *Pearson* only because the court treated the regulatory and commercial arms of the government as disaggregated. It treated the government as contractor and the government as regulator as distinct legal entities. This allowed administrative law values to operate, and allowed the new Minister, acting in accordance with the electoral manifesto, to change the policy of his predecessor.

Prior to the election, the then "Shareholding" Minister (as he is described in the relevant legislation) advised the Board that the Government had approved in principle the commencement of commercial beech harvesting. Shortly thereafter, as part of its environmental policy, the Labour party, in opposition, promised in its election manifesto that there would be no new contracts to log the rare native beech. (There were some short-term trial contracts in existence that were shortly to expire.) The manifesto also stated that, if it were to become the government, the Labour party would not honor or pay compensation for any contracts for supply of such timber entered into after the announcement of the policy (10 September 1999). Timberlands notified associates potentially affected by the Labour party's policies. Some time in September (the dates are not clear), the state-owned enterprise entered into a number of contracts to log its beech forests over the next eight years, beginning in seven months' time. These contracts included force majeure clauses that absolved Timberlands from liability if a government policy or direction prevented or restrained it from performing its obligations.

Upon winning the election, the Labour Government immediately changed the statement of corporate intent of the enterprise to take account of the conservation interest and gave it a statutory direction that the harvesting of the

36. [2000] 2 N.Z.L.R. 347.

Crown's beech forests was not to be undertaken. The High Court Judge upheld the new Government's directives as lawfully made, treating them as "high government policy—by the government of the day, and after the due exercise of the democratic process."[37] The Judge confined himself to the question of whether Ministers were lawfully able to change the policy under the terms of the statute. The Minister in a regulatory role could then issue a policy direction to the commercial arm of the executive—the state-owned timber company. It, in turn, was then able to rely on a force majeure clause to escape its contractual commitments. The Judge's public law finding thus allowed the corporation to invoke the force majeure clauses and avoid contractual liability.[38] It was only through a disaggregation of the executive into commercial and regulatory entities that administrative law values could be applied. Much more latitude was allowed the government as regulator than the government as contractor.

The case could well have gone the other way. This separation was taken to exist despite the fact that, formally, the statement of corporate intent is agreed upon between the two entities, and for other purposes (including susceptibility to judicial review), state-owned enterprises have been considered part of the executive branch of government. This duality was noted by Lord Woolf in *New Zealand Maori Council v Attorney-General*, where he remarked that "[a]lthough, under the Act, a state enterprise is structured so that it is separate from the Crown . . . it remains very much the Crown's creature."[39] Such separation as was taken to exist allowed the government to take the role of regulator—influencing matters at arms-length and on general public policy grounds. This is a rather unexpected consequence for those who may have thought that creating corporate entities at arms-length from central government makes control by Ministers more difficult. In fact, such a structural separation can increase the options for government. In this case, the perceived separation enabled both the government and the state-owned enterprise to avoid the usual contractual consequences of the decision.[40] It would be a much more difficult

37. *Id.* at 375.

38. The new Government then promoted legislation to limit compensation to the parties to out of pocket losses under the umbrella West Coast Accord Agreement. While the legislation was in Bill form it was unsuccessfully challenged in the High Court. *See* Westco Lagan Ltd. v. Attorney-General [2001] 1 N.Z.L.R 40, 40-1. Subsequently the legislation was passed and the government made a $120 million grant to the affected region to account for lost jobs and economic activity.

39. New Zealand Maori Council v. Attorney-General [1994] 1 N.Z.L.R. 513, 520; *see also Lumber Specialties* [2000] 2 N.Z.L.R. at 363, ¶ 77.

40. The case of *Petrocorp Exploration Ltd. v. Minister of Energy* [1991] 1 N.Z.L.R. 641, further illustrates the distinction between governments acting as regulators and as contractors. In that case the New Zealand

thing for the government to invoke an equivalent "termination at will" clause in its own favor than for the government to interfere with "another's" contractual obligations on the basis of public policy.[41] A crucial factor in both of these cases, then, is how the juristic personality of the government is conceived. The latter case illustrates the judicial recognition not just of an institutional separation of powers, but also of a functional separation of powers within the executive branch.

C. Fusing the Executive's Regulatory and Commercial Functions

U.S. v. Winstar is an even more extreme example of how important the perceived role of the government actor can be.[42] In that case, the juristic person of the United States was disaggregated for some purposes and not for others. An executive agency entered into a regulatory agreement with a number of savings and loans companies. In exchange for the purchase of ailing savings and loans, the agency offered favourable accounting treatment. Far from resolving the crisis, this tended to exacerbate it. Six years later Congress passed legislation restructuring the industry and prohibiting the bargained-for accounting practice.[43] The savings and loan companies then sued the U.S. government.

The U.S. Supreme Court did not find anything in the contractual agreement that would bind Congress to the terms of the agreement and prevent Congress from changing the law.[44] However, the majority's findings effectively did so

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government was party to a joint venture agreement for the exploration of minerals. It also regulated prospecting and mining by the grant of licenses. The government granted a license to itself with a view to selling it to the Joint Venture. The Court of Appeal took the view that the Minister's contractual obligations as a party to the Joint Venture could not be overridden by the exercise of his self-licensing power for the sole or dominant purpose of promoting the Crown's pecuniary interest. It took the view that the legislation did not mandate the use by the Minister of his regulatory powers for essentially financial reasons to override the prior contractual commitment. The Privy Council, by contrast, distinguished between the Minister acting as an agent of the Crown as grantee, purchaser or seller of a license, in which role his function was analogous to that of any other in the petroleum or mining industry, and the Minister's role as licensing and regulatory authority, in which he had a discretion to decide what was in the public interest. Unlike the Court of Appeal, the Privy Council did not think that this regulatory discretion was fettered in any way by the Joint Venture agreement, and neither were there any duties to disclose to the other party or to consult with them. *See generally id.*

41. *See* Gillian Hadfield, *supra* note 30, at 492-93 (discussing the limitations the U. S. courts have imposed on the application of "termination for convenience clause").

42. United States v. Winstar, 518 U.S. 839 (1996) (The contract clause of the Constitution was not implicated here, as it does not apply to the Federal Government).

43. *See* The Financial Institutions Reform Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (abolishing the Federal Savings and Loan Insurance Corporation).

44. *Winstar*, 518 U.S. at 871.

bind Congress. The Court found that the agency had undertaken to insure Winstar against the risk that Congress might change the law during the amortization period, though there was no express undertaking to that effect.[45] Likening the agreement to a contractual promise that it might rain tomorrow, the Court treated the executive agency as assuming responsibility for an event outside its control.[46] Congress and the executive agency were disaggregated for the purpose of construing the content of the agreement, even though it was the U.S. government as a unified legal entity that had been sued. The different constituent parts of the U.S. government were then re-aggregated for the purpose of finding liability: the U.S. government as a whole was found liable under the contract. However much the nondelegation doctrine may have languished, under U.S. administrative law, executive agencies have never exclusively exercised the spending power. The stakes were so high here—potential liability was estimated to be in the billions—that it is possible if not likely that damages could be the equivalent of an exemption to the new regulation.[47]

It was argued that the United States as contractor is not responsible for the U.S. as lawgiver.[48] The Supreme Court rejected this argument on the basis that the characters of government as regulator and law-giver were fused in this context.[49] The fact that there was some commercial benefit to the government, in terms of its insurance liabilities, vanquished any other distinctions. Moreover, the majority stated that a body's ability to limit its future authority is itself one aspect of sovereignty: the government's capacity to make contracts "is the essence of sovereignty itself."[50] It cited *U.S. v. Bekins* as evidence for this proposition. For the broader purposes of this paper it is useful to reproduce the quotation as a whole:

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45. The majority principal opinion was to the effect that the risk was assumed by the operation of law. *Id.* at 868-69 (stating that the agency insured "the promisee against loss arising from the promised condition's nonoccurrence").

46. *Id.*

47. *Id.* at 881 (The majority principal opinion asserted that the government had not demonstrated that the award of damages would be tantamount to limiting the exercise of the government's authority). *Compare id.* at 930 (Chief Justice Rehnquist disagreed on the basis that "we cannot know whether the damages which could be recovered in latter proceeding would be akin to a rebate of a tax, and therefore the equivalent of an injunction").

48. *Id.* at 894. The Majority did not consider the statute law here to be of "general application"; *cf. id.* at 933.

49. *Id.* at 884. The Majority was also concerned not to create an analytically distinct separate law of regulatory contracts.

50. *Id.*

> It is the essence of sovereignty to make contracts and give consents bearing upon the exertion of governmental power. This is constantly illustrated in the treaties and conventions in the international field in which governments yield their freedom of action in particular matters in order to gain the benefits which accrue from international accord.[51]

The similarities between the construction of the government legal person in international law and in contract law are explicitly recognized here, with a consequent shift in the location of power to the executive. Contract law and international law do indeed share similar conceptions of the government or state as legal person. The principal majority opinion finds that the state can bind its successors by contract and international law even as it concedes elsewhere in the judgment that the legislature cannot so bind by legislation.[52] Could it be that the rule of recognition is changing, so that the executive can make commitments across an expanded range of subject matter in exercise of sovereign power and, in this way, circumvent political accountability?

Once we would have been astonished to discover that sovereignty could reside in an executive agency in this way (an agency that had ceased to exist at the time of the litigation). By what constitutional inversion can an executive agency dictate to its political rival, Congress, in this kind of matter and by operation of the law of contract? What happened to administrative law ideas about the need for political supervision of technocrats? The use of contracts by agencies does not improve on administrative law values here—it tends to supplant them and invert the constitutional order. The more politically contentious the subject matter, the more attractive such contractual means of regulation are likely to be—and all achieved in a far more private process than

51. United States v. Bekins, 304 U.S. 2751, 2752 (1938).

52. *See Winstar*, 518 U.S. at 872. *Compare id.* at 884 n.28 ("noting that the ability to limit a body's future authority is itself an aspect of sovereignty"). *See also* H.L.A. HART, THE CONCEPT OF LAW 145-46 (1961). In THE CONCEPT OF LAW, Hart actually argues that there are two rival conceptions of what the omnipotence of *Parliament* may include for the purposes of determining the limits of sovereignty. The "established" sense Hart refers to is that every single successive Parliament is omnipotent, has continuing sovereignty, and therefore cannot prevent its successors from repealing its legislation. On the rival view, any one Parliament would be omnipotence even to the extent of extinguishing itself. He is examining here rules of recognition in relation to the legislature rather than the executive. Hart concludes that it is established that the legislature cannot bind its successors. *See generally id.*

administrative law would normally allow.[53] Contracts are exempted from the notice and comment procedures in the Administrative Procedure Act.[54]

All three of these cases involved decisions that were likely to have effects for decades to come. An airport, once privatized, is effectively sold forever, or at least for the foreseeable future. There is no real prospect that any western democracy has the will or capacity to renationalize assets in the short or medium term.[55] The trees involved in Timberlands took hundreds of years to grow. The estimated period of amortization in the Winstar case was 40 years. It will be a question of fact whether the amount required by way of contractual damages is so large as to tie the hands of future governments. Governments are universally constrained by the need to reduce their deficits and to maintain or enhance their credit ratings with international agencies.

In each of these cases, controls on executive power in entering the contracts themselves were minimal. Ultra vires tests played little or no part in these disputes. Contractual capacity, like treaty-making capacity, was effectively plenary in each of these cases.[56] Where governments are selling something, whether assets or regulatory favors, there are remarkably few checks on the executive, no appropriation is required,[57] and none of the direct parties have incentives to invoke public processes. Unlike their continental counterparts, countries founded in the Anglo-American common law do not have constitutionally established public processes for the sale of public assets. There is no purposive theory of the state in the Anglo-American tradition.[58]

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53. *See* David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473, 477 (1999).

54. 5 U.S.C. § 553(a)(2) (1994) (exempting from the rule-making procedures as "a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts").

55. The New Zealand government did have to inject a billion dollars into Air New Zealand, the formerly government owned airline, in order to prevent the private airline's insolvency and to maintain the island nation's strategic asset.

56 *Contra* Payne v. Ontario, [2002] O.A.C. 1450, *available at* http://www.ontariocourts.on.ca/decisions/2002/july/payneC38122.htm (July 7, 2002) (concluding that the power to dispose of shares in Ontario Hydro was circumscribed by statute by implication).

57. Public procurement is also subject to little by way of legislative control. The case of *New South Wales v. Bardolph*, 52 C.L.R. 455 (1934) is treated as standard commonwealth authority for the proposition that a vote of appropriation by Parliament or prior legislative approval are not preconditions to the validity of a contract entered into by the executive.

58. *Compare* COSMO GRAHAM & TONY PROSSER, PRIVATIZING PUBLIC ENTERPRISES 75-77 (1991). The preamble to the 1946 Constitution, incorporated into the Constitution of the Fifth Republic (France), for example, makes privatization issues into constitutional questions. The preamble states "All property and enterprises of which the running has, or acquires, the character of a national public service or an actual monopoly are to become public property." *Id.* at 75-76. The authors comment "One can therefore begin to see some of the practical effects of the apparent paradox that a nation with a developed concept of the state

Contract law tends to treat "the government of the day" or rather "the executive" as the "state," notwithstanding its rival constituent parts and the temporally contingent nature of public policy. It conceives of a government as a juristic person exercising a unified will over its constituent parts and over time, and this theory was arrived at without any constitutional agreement about the nature of the state or its purposes.

IV. PREFERRED REGULATORY INSTRUMENTS AND ADMINISTRATIVE LAW

The tendency to reconceive the "government of the day" as the "state" has not been without spillover effects on administrative law itself. It is no coincidence, given these developments, that there is pressure on legitimate expectation doctrine to expand its limited procedural remedies to include substantive ones. Unlike most other administrative law doctrines, legitimate expectation doctrine requires a version of a unified legal entity of the state if it is to have greater impact. In this, it may also reveal its continental origins. Pressures on the doctrine come both from the increasing importance of international human rights law and the increasing use of the regulatory contract by government. There is not space to explore these matters fully here. Instead I shall focus on the details of a single controversial case in order to suggest some of these trends.

The English Court of Appeal case of *R v North and East Devon Health Authority, ex parte Coughlan* illustrates these pressures on administrative law.[59] The case involved the representations or promises made by officials to a determinate class of severely disabled patients that they would be provided with "a home for life" in a particular purpose-built facility. The authorities subsequently changed their minds after public consultation and on a rational basis. The Court of Appeal determined that the promise gave rise to a substantial obligation to allow one of the plaintiffs, Miss Coughlan, to remain in the facility. It found that, under the circumstances, it was for the Court to determine whether there was a sufficient overriding interest to justify departure from what had previously been promised (i.e. the change of mind had to be more than merely rational). This was a major departure from the traditional restraint shown in administrative law cases. Such restraint is usually

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may be more constrained by the related constitutional provisions than the government of a 'stateless' nation." *Id.* at 77.

59. Regina v. N. & E. Devon Health Auth., [2001] Q.B. 213 (Ct. App.).

manifested in two ways: by the courts restricting themselves to procedural remedies rather than substantive ones so as not to fetter lawful executive actions; and by deference to lawful and rational decisionmaking.

The nature of the public authority responsible for the assurances, while a major issue in the first part of the judgment, was glossed over in the second. An official or officials in the Exeter Health Authority (a predecessor to the respondent health authority) had given the initial assurances to Miss Coughlan, who had, in the meantime, mistakenly been assigned to local authority care.[60] Indeed, Lord Woolf seems to suggest that a crucial factor in the decision to close the care facility may have been a mistaken view of which body was legally liable to fund her care.[61] One might have thought that the decision should have been sent back to the National Health Service to be decided on the correct understanding of its legal responsibilities.

The matter of the disputed responsibility for her care is not mentioned again in the second part of the judgment. Instead the Court treats all of these public authorities as "the Crown" (the most state-like form of "the government of the day") for the purpose of identifying the authority by whom the assurances were made.[62] Admittedly, the question of how to conceive of the government or public authority as a juristic person was never in the forefront of the Judges' minds. The influences are much more subtle and are two-fold. In no fewer than six places in Lord Woolf's judgment, he suggests, or quotes passages from other judgments to suggest, that the conduct was equivalent to a breach of contract.[63] Throughout, he emphasizes the similarities between these

60. *Id.* Part of the dispute involved whether the local authority rather than the National Health Service was responsible for patients such as Miss Coughlan given changes in eligibility for and categorization of care. The case decided that the National Health Service remained legally and financially responsible for her care. *Id.* at 851. It was acknowledged that a misunderstanding of the respective liabilities of the local authority (under its social service budget) and the NHS may have been partly responsible for the decision to close down the facility in which she was residing. *Id.* The Court did not have to consider if a local authority could have been held responsible for the undertaking made by an NHS official. *Id.*

61. See *id.* ¶ 49.

62. *See id.* ¶ 61. In each case it was in relation to a decision by a public authority (the Crown) to rescind a representation about how it would treat a member of the public. *Id.*; *see also* SOREN J. SCHØNBERG, LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE LAW 163 (2000). Schønberg concludes rather quickly that the Crown is the equivalent to the state in European law for the purposes of the application of legitimate expectation doctrine. *Id.*; *cf.* John W.F. Allison, *Theoretical and Institutional Underpinnings of a Separate Administrative Law*, *in* THE PROVINCE OF ADMINISTRATIVE LAW 71-89 (Michael Taggart ed., 1997).

63. *See N. & E. Devon Health Auth.*, [2001] Q.B. ¶¶ 54, 59, 69, 72, 86; *cf. id.* ¶ 80 ("The test in public law is fairness, not an adaptation of the law of contract or estoppel.") *Compare* Mount Sinai Hosp. v. Quebec, 106 A.C.W.S.3d 182 (2001) (asserting that the matter must be resolved by contract law principles and suggesting that the change of policy is irrational and amounts to an abuse of power).

representations and a contractual "promise or representation." It was made to a small, identifiable, and closed class of persons; it was relied on; the consequences of honoring the promises were financial only; and monetary compensation alone would not suffice as compensation to Miss Coughlan. These are akin to factors at stake when considering the remedy of specific performance for breach of contract—a remedy which is not usually available against the Crown. The contract law analogy served to reorient the judges' approach from a traditional administrative law one.

The Court did allow that a public authority could withdraw from its promises without consequences in appropriate circumstances. On this issue, the judgment illustrates changes in standards of deference, particularly when international human rights treaties are involved. Where ordinarily the public authority would be allowed a rational change of mind without substantive consequences, in this case the Court subjected that change of mind to a test on the merits. The Court asserted that it could evaluate whether there was a sufficient overriding interest to justify a departure from the promise. It justified this lack of deference on the basis that the importance of the promise to Miss Coughlan was underlined by the Human Rights Act 1998. Article 8(1) of the European Convention of Human Rights and Fundamental Freedoms guarantees the "right to respect for . . . [her] home."[64] The Court clearly indicated that the more substantial the interference with human rights, the more the court will require by way of justification.[65] The public authority will be subject to much stricter scrutiny where international human rights treaties are concerned.[66]

This decision could be applauded as reaching a humane result at a time when concerns for "fiscal responsibility" have tended to dominate public discourse. It could be viewed as part of an emerging "rights-conscious," counter-hegemonic trend in administrative law. Yet in many respects, this is a relatively benign example of the emerging orthodoxy. International treaty commitments and the "contract-like" commitments of officials reduced judicial deference to political actors and were binding on successive governments. Indeed, while many would like to view this case as part of a distinct human rights jurisprudence, that is not strictly accurate in terms of the provenance of such developments. Substantive legitimate expectation jurisprudence comes

64. Convention for Protection of Human Rights and Freedoms, Mar. 9 1953, art. 8(1), Europ. T.S. No. 5, *available at* http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm.

65. *See N. & E. Devon Health Auth.*, [2001] Q.B. ¶¶ 63, 93.

66. *See id.* ¶ 63.

out of E.C. law,[67] and was initially developed in relation to economic and regulatory cases.[68] It would be more accurate to analyze this case as an example of human rights advocates (either consciously or unconsciously) embracing the dominant regulatory instruments and making them work for social as well as economic purposes.[69] The Coughlan reasoning would equally apply whenever a commitment is made to a closed class of individuals or companies, regardless of the political contestability of that policy.[70] Political questions become legal questions. Public politics is turned into judicial politics.

I mention this case to suggest possible developments in administrative law and in the way that it conceives of the state. The threads that can be drawn between legitimate expectation doctrine and the rise of international and contract law instruments as a means of regulation may also help to explain why administrative lawyers have been so divided in their views about the doctrine. Like contract law, legitimate expectation doctrine, as applied in Coughlan, reconfigures classical understandings of the functional separation of powers. The legislature no longer has a monopoly on law-making power, and the executive is no longer restricted to non-justiciable "policy." Representations made by the executive can give rise to enforceable legal rights and responsibilities, the source of that power need not be traced to a delegation from the legislature.[71]

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67. *See generally* Algera v. Common Assembly, [1957] E.C.R. 39. *See also* SCHØNBERG, *supra* note 62. He appeals to the same rule of law values of autonomy and certainty that many of the contract law theorists discuss. (He rejects reliance as an essential factor).

68. The E.C. law is discussed at length in *Regina v. Ministry of Agriculture Fisheries and Food*, [1995] 2 All E.R. 714, 726-28.

69. *See* David Mullan & Antonella Ceddia, *The Impact of Privatization, Deregulation, Outsourcing, and Downsizing on Public Law: A Canadian Perspective*, 10 IND. J. GLOBAL LEGAL STUD. 199 (2002).

70. Hence the discussion by Laws, L.J. in *Regina v. Secretary of State for Educ. and Employment*, [2000] 1 W.L.R. 1115, which attempts to add a gloss to this approach. Laws, L.J. suggests a more traditional view of deference:

> The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. . . . [C]hanges of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy.

Id. at 1131. Laws, L.J. erroneously seems to conclude that promises made to a few identifiable individuals and macro-political promises are mutually exclusive categories.

71. *See* Williams, *supra* note 4, Part II.

CONCLUSION

The law contains no single concept of the state. The way that different areas of law conceive of the government as a legal person can be manipulated to achieve different results. This paper has argued that the dominant regulatory instruments of this era—the international treaty and the regulatory contract—serve to promote a distinct legal conception of the state as a unified juristic person which is constant over time. Under this conception, the legislature yields a great deal of power to the executive. The executive, in certain circumstances, gains the ability effectively to bind both its successors and successive legislatures. This version of the state differs from the way that government has traditionally been conceived by domestic public law in the Anglo-American tradition. Domestic public law has tended to understand governments in terms of their rival component parts rather than as a unified whole. Power has traditionally been conceived in temporally contingent ways. These traditional views are themselves under pressure from international law and contract law in a way that suggests that the constitutional norms may be shifting to give more power to the executive in this era.

The effect of these developments is both legal and political. The legal and political capacities of governments to deliver on electoral mandates and reverse the undertakings of their predecessors will be more constrained. Given the global pressures to reduce deficits and to maintain credit ratings, governments, and especially small governments, will be reluctant to risk damages claims, to gain a reputation as an unreliable contractor, or to renege on trade agreements. That may look like governments becoming smaller and weaker, but only because earlier governments have taken power for themselves to limit their choices for the future—and especially on the formerly sacred and highly partisan turf of economic policy.

Much of the legal academic commentary has focused on the importance of keeping promises, but has ignored the more difficult and more basic question of who the promise maker is and how it should be conceived. The law respects and upholds state undertakings in treaties and contracts: governments must keep their promises. By contrast, the promises made to the electorate are not promises made by governments or the state, but are merely the undertakings of political parties with no legal significance.[72] It is how the government legal

72. In the words of Lord Denning in the *Fares Fare* case "A manifesto issued by a political party—in order to get votes—is not to be taken as gospel. It is not to be regarded as a bond, signed, sealed and delivered. It

actor is conceived that is determinative. The combination of the two prevailing regulatory instruments in this era of globalization tends to put public politics, and domestic public promises, at the margins. In order to maintain a public place for politics—outside of the courts and international forums—we should start by becoming more self-conscious about who we mean when we refer to the state.

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may contain—and often does contain—promises and proposals that are quite unworkable or impossible of attainment." Bromley London Borough Council v. Greater London Council, [1983] 1 AC 768, 776; *see also* Secretary of State for Educ. and Employment, [2000] 1 WLR 1115. For a political scientist's view of electoral mandates see R.G. Mulgan, *The Changing Electoral Mandate, in* M. HOLLAND & J. BOSTON, THE FOURTH LABOUR GOVERNMENT (1990).