Later, the monarchy by divine right proclaimed by the General Estates in 1614 would make these characteristics even stronger. As he received his power from God alone, the king was the representative of God on earth. Bossuet has pictured this attribute very vividly: ''The whole State is in himself, the whole will of the people is contained in his own will. As in God who unites all perfection and virtue, all the power of the particulars is united in the person of the prince.''[7]

The king and the public good. The king was to be highly conscious of the importance of his mission. As early as the twelfth century, when legislating, he made laws ''for the common profit'' of his realm and his people, according to the formula then used in conjunction with another, more widely used although often with different nuances: ''common good.'' The king intends to rule for ''the profit and good state of his people,'' or for ''the pleasure and common profit of our people.'' In the eighteenth century, the term ''common good'' is exceptional; but it is replaced by other notions such as ''good of the people,'' ''good of the public thing,'' or ''public good.'' These terms are to be found in the ordinances and laws of the king, and in his letters and speeches. In the fourteenth century, the national tragedy of the Hundred Years War brought out the importance of these formulas. This long and serious conflict marked a transformation, at the end of which it became obvious that the prince could no longer live from ''his own'' (*i.e.*, from the resources of his domain). Recourse to taxation, the techniques of which were already well known, would take a very different course of action. Taxes could no longer be extraordinary, as they had been in the High Middle Ages; they had to become permanent. The army, which thus far had been composed of the barons and the vassals, in times of great peril and always for temporary and limited missions, followed taxation and became permanent as well. The judicial State turned into the financial State,[8] and taxation became the means to contribute to the public good.

According to the exhaustive explanations of F. Olivier-Martin, all kings of France affirmed their concern for governing in favor of the public thing of the realm.[9] From the sixteenth century on, however, they became inclined to bring it closer to their person. In the royal letters of François I, there are constant references to ''We and the public thing.'' Occasionally, the word ''public thing'' yielded to other terms, different in the image employed, but similar in

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[7] See Olivier-Martin, *supra* note 2, at p. 52, and *Politique tirée de l'écriture sainte*, also quoted by M. Cottret, ''Absolutisme,'' *DAR*, p. 8.

[8] P. Chaunu, ''L'Etat de finance,'' in F. Braudel & E. Labrousse (Eds.), *Histoire économique et sociale de la France, I/1450-1660),* PUF, 1993, pp. 129-191.

[9] See Olivier-Martin, *supra* note 2, at pp. 36-55.

meaning. In the sixteenth century, the word ''crown'' was current. The king himself drew between his person and his crown a line whose trace appears in the new formula of the consecration: ''I shall maintain the sovereignties, the rights and the nobilities of the crown of France, and shall not transfer, or alienate them.''

The king and the State. Under Henri III (1574-1589), a crucial step toward abstraction was made, with the appearance of the word ''State.'' The king, ''a born orator, both seducing and moving,'' conjured the assembly of the General Estates of Blois in 1576, in the midst of the wars of religion, to ''put this realm at peace and to cure the ills affecting the body of the State,'' and he urged them to conclude a good peace, ''for the sake of this State.'' Henri IV followed in the footsteps of Henri III, constantly calling on ''this State . . . this beautiful State.'' When the relatives of Maréchal de Biron, a childhood friend who betrayed him, begged him to forgive him and to give his pardon, Henri IV answered: ''If this was only a matter of personal interest, I would give him pardon in the same manner that I forgive him from my heart, but this a matter for my State as to which I am much obliged.'' Under Louis XIII and Richelieu, the word ''State'' replaced all the ancient formulas. On the ''Day of Dupes,'' November 11, 1630, Louis XIII decided—against the advice of the Queen mother, the most influential Catherine de Médicis—to set aside the religious party that she manipulated, so as to keep Cardinal de Richelieu in power. He concluded with these words: ''I am more obliged to the State.''[10] Louis XIV does not forgo the distinction made by his predecessors between the State and the king. Without ambiguity, he holds that the prince has ''no other fortune to establish than that of his State. . . . When one has the State in view, one works for oneself. The good of the former makes the glory of the latter.'' His most famous words are those he uttered on his deathbed, with his officers surrounding him: ''I am passing away, but the State stays after me.''

In the eighteenth century, the word ''nation'' becomes common, along with that of ''State.'' The term had been used by François I when, imprisoned by the German Emperor Charles V in Madrid, he explained in a letter to the French nobles and sovereign *Parlements* (or courts) that, ''for his honor and that of the nation,'' he preferred a ''fair jail'' to a shameful evasion. At the beginning of the seventeenth century, the Edict on the legitimated princes provided that, in case of no heir from the legitimate royal lineage, it would be up to ''the Nation itself,'' or to ''the State alone,'' to pick a new king. These texts demonstrate that

[10] See Samuel P. Huntington, ''Political Modernization: America vs. Europe,'' 18 *World Politics*, 378, 386 (1965-1966).

all the French kings have always made a clear distinction between their own person and the public thing (commonwealth). This permanent community of interests has been designated by various terms: realm, public thing, crown, State, or nation. The king has always said that he was in charge of it, that he represented it, fully and completely in his own right, and that he was in close union with it. According to F. Olivier-Martin, there was between the king and the public thing, or the State, or the nation, ''both a distinction and a union at the same time,'' just as in a ''marriage,'' he adds subtlety.

2. The Practice

From the servant of God to the servant of the State. The exceptional relation existing between the French king and his people was made possible only through the medium of the consecration. From an historical standpoint, the consecration transformed the physical body of the king into a body politic, in which the king, the public thing (that is, the State) and the nation were joined into one. This is the reason why Louis XIV may once have said: ''*L'État, c'est moi*'' (''The State, it is I''). According to historians, this is a legend, at best a jest.[11] They argue that the ceremony and oaths of the consecration—the promise to do justice to the poor as well as to the wealthy, to keep his people safe from his enemies and adversaries, to maintain the customary status of the ecclesiastical orders of his realm, and to respect the rights and privileges of everyone—demonstrate the improbability that Louis XIV ever said such a thing. The public law of the old regime, they insist, did not confuse the king with the public thing.

In theory, the historians are right: the king and the public thing were perfectly distinguishable. The king was a depository of the public thing; he had the custody of it, and he was expected to administer it for the common good of the realm only. In practice, however, the line between the physical body of the king and the body politic of the public thing became very hard to draw. It eventually became completely blurred and impossible to conceptualize, in particular with the rise of absolutism. At the beginning, in the Middle Ages, the separation between the king and the State derived from the quasi-religious conception of royal functions. The king is, then, regarded as entrusted with a special function and in charge of specific duties; he possesses rights only in

[11] For an explanation, see Olivier-Martin, *supra* note 2, at pp. 45-49. Note however that Tocqueville, *supra* note 1, at p. 83, wrote: '''*L'État, c'est moi*', [Louis XIV] said; and he was right.''

order to fulfill his obligations.[12] This is the religious conception of royalty that expresses itself in the consecration. But, later on, when the consecration ceased to be the ceremony that actually empowered the king with political authority, when the king became proclaimed king just after the death of his predecessor (in line with the famous phrase ''The king is dead! Long live the king!'')—in other words, when the consecration is no longer constitutive, but only declarative of the sacred character of royal power—the king ceases to be a servant of God and turns into a servant of the State, and the State becomes a reality per se.

The intimate relation between the king and the nation. The historian Kantorowicz explained very well the consequences of the quasi-fusion that existed between the king and the nation. In his work *The King's Two Bodies*, he says: ''France [. . .], though fully aware of the different manifestations of individual king and immortal Dignity, eventually interpreted the absolute rulership in such a fashion that the distinctions between personal and supra-personal aspects were blurred or even eliminated.''[13] A decisive step was taken in the seventeenth century, when Bossuet not only asserted that the King was inherently sacred in his person [''As in God, his body holds all perfection and virtue''], but also, just as Hobbes had already argued, insisted on the fact that social order and political unity depended entirely on his existence and came out of his will alone, so that the king became the only source of a genuine public voice [''All the State is in him, his own will contains the will of all people''].[14]

Under absolute monarchy, there was no means, no institution by which a distinction between the State, the nation, and the king could have taken shape. An actual separation between the King as a physical body and the King as body politic was out of reach; the distinction was an idea, not a fact; it existed in the mind, not in reality. As opposed to the English monarchy which very early began to work at a true separation between the king as a physical body and the ''King in Parliament'' as a body politic, French monarchy has faithfully kept the tradition of a fusion between the king and the nation. There has never been in France, the king, on the one side, and the nation, on the other; the king embodies the nation; he is the nation. When after 1615 the General Estates no longer convened, the nation lost all institutional existence, so to speak, except through the royal person.

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[12] Ellul, *supra* note 3, at p. 276.

[13] E. H. Kantorowicz, *The King's Two Bodies, A Study in Medieval Political Theology*, Princeton University Press, 1981, p. 446.

[14] See the analysis made by K. M. Baker, ''Souveraineté,'' *DCRF* (Idées), p. 483, especially p. 486.

The people disappeared as if absorbed by and melted into the King. The trend was accentuated when the legists of the court further argued that the oaths taken at the consecration are made to God, not to the people. And, indeed, the king promised nothing to his people; he pledged himself and is accountable to God only. There is no covenant between the king and his people; the relation between the king and his people is not contractual, but statutory. The king unites in his body the three orders of the realm, and, therefore, the multitude of individual interests existing in the realm. In theory, none of them may be forgotten or ignored since all are represented in the royal person; the king encompasses in his royal person the united power of the many individual people.[15]

The quasi-physical fusion that existed between the king and the nation was institutionalized in a mystic phenomenon by which the king made one body with the nation, which in turn made one body with the king, both being forever united in the State. This is the reason why power, as it is still conceived in France, is regarded as a sovereign power, complete in itself, at the service of the nation, working for the benefit of all. This is far from the concept of power in England or the United States as a power separate from the people, which must be limited to protect the people. In the famous audience of Flagellation (March 3, 1776), the king, Louis XV, when rejecting the claims of the *Parlements* (which claimed to be ''sovereign'' courts of law established in the provinces) to stand as representatives of the people, recalled that he was the supreme guardian of public order and contemptuously concluded: ''My people make one with me and [. . .] the rights and interests of the nation that some dare to think as being separate from the person of the monarch are necessarily united in my hands and rest in my hands only.''[16] On such premises, it was impossible to ever dispute the conformity of royal will to the public good. In laying down an automatic equation between the ideas of the prince and the general interest of the nation, the scholars of the old regime went beyond any rational and demonstrable propositions. They operated on a postulate that they called ''the mystery of the monarchy.'' The royal monarchy demanded from the nation complete obedience, hence, this particular feature of French political culture, as noted by François Furet, ''an adoration of the French for absolute power.''[17]

From the Royal-State to the Nation-State. There is little doubt that the intimate relation existing between the king and the nation was a fountain head

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[15] See M. Cottret, ''Absolutisme,'' *DAR*, p. 8.

[16] On the logic of absolutism, see the analysis of P. Brunet, *Vouloir pour la nation, Le concept de représentation dans la théorie de l'État*, Bruylant / LGDJ, 2004, p. 73.

[17] F. Furet, *La Révolution en débat*, Gallimard, Folio, 1999, p. 55.

for the force of the French monarchy and its decisive contribution to national unity. As early as the sixteenth century, the king's lawyers proudly proclaimed that the French kingdom was ''All-in-one,'' a formula that presaged the absolutist theory of the State, well before it was put into writing by Thomas Hobbes, the English philosopher. Against these absolutist theories, La Boétie wrote an essay, *Discourse on Voluntary Servitude* (1574). A few centuries in advance of his time, this friend of Montaigne convincingly explained how the intimate relation between the king and the nation had made servitude a voluntary bound. His visionary book was aptly dubbed the ''Against one.''[18]

The intimate relation existing between the king and the nation was abolished by article 3 of the Declaration of the Rights of Man and the Citizen (1789): ''The principle of all sovereignty remains in essence in the Nation. No public body, no individual can exercise authority that does not expressly derive from the Nation.'' This text forbids a public body (a legislative assembly) or an individual (a head of State) to claim to personify the nation; they may only represent it. However, even in the Republic, the nation remained what it had been under the monarchy, when it made one body with that of the king. Like the physical body of the king, it is indivisible; it is ''All-in-one.'' Without the French monarchy, without the extraordinary unity that it built around itself, sovereignty would not be what it is today in French public law—a ''national'' sovereignty.[19]

B. THE LAWS *(LOIS)* OF THE KING

1. Legislative Practice

Medieval public law. In the Middle Ages, public law had little depth, being essentially made of ''the fundamental laws of the realm'' that applied to the status of the crown and the royal domain. As to the rest, the king was in the first place a dispenser of justice and only occasionally a lawgiver. Legislative power or, more accurately, what occupied its place, that is, the regulatory power necessary to the public order, was principally seigniorial. The king legislated only on special occasions and on very narrow topics. When, circa 1280, Philippe de Beaumanoir makes a listing of the circumstances under which the king may legislate, he draws a line between peacetime, when the king, by tradition the

[18] E. de La Boétie, *Le discours de la servitude volontaire*, Paris, Payot et Rivages, 2002. See also R. Descimon & A. Guery, ''Justifications: la 'monarchie royale','' (1989) in A. Burguière & J. Revel, *Histoire de la France: La longue durée de l'État* (Jacques Le Goff (Ed.)), Seuil, 2000, p. 253.

[19] See the first paragraph in Chapter 7.

custodian of customs, may not legislate (law being made of customs and traditions), and wartime when, in exceptional circumstances, the king may legislate, displacing old customs and adopting new provisions imposed by necessity. The seigneurs have the same power, on the express condition, however, that they respect the rights of the king. In any case, the new law is legitimate only if it complies with certain formal conditions (the king must deliberate in his council) and substantive requirements (the new law is justified only if it aims at the ''common profit'').

Common belief, at that time, was that law does not change and, indeed, must not change. The best evidence of this belief is to be found in the king's oath during consecration. The essence of the oath is that the king is expected to maintain the rights of everyone—the Church ''in her good freedoms and franchises,'' and the nobles, the plowmen and the merchants ''in their good laws and old customs.'' Common belief held that there is no true law except that which is rooted in the past and anchored in immemorial usages and traditions. The public good consists in maintaining what is in existence. Nothing is more foreign to medieval thought than the contemporary voluntarism in law, made clear in the modern legal language that constantly refers to ''normative production'' or ''legislative production.'' In the Middle Ages, law is not ''made,'' but ''given,'' by traditions, usages, and customs and, ultimately, by God. In the Middle Ages, therefore, law and power were held to be two very separate concepts, the former being above the latter. There was little change over the medieval era. But everything changes with the Renaissance, the Age of Exploration, and the development of the market economy.

The coming into being of modern public law. In the sixteenth century, ideas changed. The royal functions loomed larger; they were no longer limited to defending the realm, maintaining the status quo, and dispensing justice only. New needs surfaced, and a new instrument comes into being to carry them out, the ordinance, a category among the many laws of the king. The laws and ordinances of the king increasingly appear to be instruments for enacting the public good. As early as 1481, the king instructed the local officials that he may make laws and ordinances for the justice and police of the realm.[20] A new domain for modern public law emerges, police power.

In the seventeenth and eighteenth centuries, the term ''police'' is very broadly understood; the scope of police power includes not only public peace, but, more comprehensively, everything that may serve ''the general and

[20] J. P. Dawson, ''The Codification of the French Customs,'' 38 *Mich. L. Rev.* 765, 771, note 15 (1940).

common good of society.'' According to Nicolas Delamare, author of a 1705 treatise on police power that remains a classic in the field, police power encompasses ''religion, discipline, the mores, health, supplies, public peace and security, roads, liberal arts and sciences, commerce, factories and mechanical arts, domestic servitudes, unskilled workers and the poor.''[21] Expanding on Bodin's ideas on the duties of the sovereign in the ''well-ordered Commonwealth,'' Delamare says of police power that ''its unique purpose is to lead man to the utmost felicity he may enjoy in his life''; he explains in further writings: ''Police power includes the universality of the policies necessary to bring about the public good, of the choice and use of the means most fitted to make it real, to develop it and to make it more perfect. It is, so to speak, the science of government over men, to give them some good and to make them become as much as possible what they must be for the general interest of the society.''[22] The Encyclopedia by Diderot and d'Alembert defined police power as ''an art of delivering a convenient and quiet life.''[23] After justice, police power becomes the next domain in which modern public law will grow; it delineates its own *raison d'être* and its boundaries.

As public law grows in importance, the private law-public law distinction takes shape. In the seventeenth century, Jean Domat undertakes a systematic and very Cartesian classification of the law in his great treatise *Les lois civiles dans leur ordre naturel* (1689). Domat, dubbed by Boileau ''the restorer of reason in jurisprudence,'' orders the law of the nation (which he calls national law), like a French garden, by dividing it into two parts: public law, which deals with public peace and government, and private law, which addresses civil law.

Scope of ordinances. The ordinances have a less broad scope than the modern *lois* (statutes). As a rule, they are said to be ''of public law'' and, as such, address mostly matters of justice. The ordinances in matters of criminal justice are numerous.[24] Then, there are the ordinances relating to the policing of

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[21] N. Delamare, *Traité de la police*, Paris, J. & P. Cot, 1705, Book I, p. 1. On the history of the police power, see É. Picard, *La notion de police administrative*, Paris, LGDJ, 1984, vol. I, p. 54.

[22] Delamare, *supra* note 21, at p. 4. See also M. Rueff, ''The Well-Ordered Police State and the Development of Modernity in Seventeenth- and Eighteenth-Century Europe: An Attempt at a Comparative Approach,'' 80 *American Historical Review* 1221, 1235, note 48 (1975).

[23] Boucher d'Argis, ''Police,'' in M. Diderot & M. d'Alembert, *Encyclopédie raisonnée des arts et des métiers*, Paris, 1751-1780, Vol. XII, p. 905.

[24] As examples of these ordinances, reference must be made to the Ordinance of Villers-Cotterêts (1539) which imports a profound reformation of justice, reorganizes the jurisdiction of the courts (in limiting the jurisdiction of ecclesiastical courts), modifies the

the realm, a term that encompasses public peace; moral order[25] ; the economy, in particular in the domain of commerce and transportation;[26] and lastly the ordinances pertaining to policing the colonies.[27] In the seventeenth and eighteenth centuries, they grow in scope to include social concerns (civil status, hospitals, and poverty) together with economic regulation (factories, public works). All these ordinances were elaborated with great care, after inquiries and consultations. An already well-staffed civil service called for the opinions of the parties most interested. It sent questionnaires to the *parlements* in the provinces on matters within their competence. It drafted bills that were examined first by the *Parlement* of Paris and then by the king's council. The *loi* (ordinance) never came into force without being reviewed by the *parlements* in the provinces before its registration in the books.[28] At this point, the sovereign provincial courts of law could address ''remonstrances'' to the king, who was thereby invited to modify his bill. This procedure gave rise to all kinds of abuses, which eventually made every reform impossible to carry out and precipitated the Revolution. If these procedures are still relevant today, it is because of their contribution to the ''culture of prevention''[29] that still characterizes the French law-making process. The idea is to write *lois* (statutes) perfect in their language,

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criminal procedure (in reinforcing the secret of the inquisitorial procedure), and introduces many changes in civil procedure and judicial formalities. Forbidding recourse to Latin as a legal and judicial language, it prescribes that all courts' opinions, judgments, procedural documents, contracts, wills, and other legal pieces be written henceforth in ''the French mother tongue and not otherwise.'' The idea is to extirpate Latin, not vernacular dialects. In the same manner, the great ordinances of Louis XIV dealing with the procedure (Civil Ordinance of 1667 and Criminal Ordinance of 1670) fall also in the domain of justice.

[25] This is the case for the numerous edicts of the king dealing with the policing of religious practices and the affairs of the Church, with the Edict of Nantes (1598), which recognized the Protestant religion and granted freedom of religion to the Protestants in the French realm, and the Edict of Fontainebleau (1685) withdrawing the former.

[26] Such is the case with the Ordinance on Trade (1673) and the Ordinance on the Marine (1681).

[27] This is the case of the Ordinance on the Colonies (1685), known as the ''Black Code,'' which acknowledged the practice of slavery as a mere fact, a practice from purely private origin developed by private merchants under the pressure for bigger profits in their trade with the continent, and which endeavoured to subject it to elementary rules of humanity. Slavery is not a public law institution, but a private law one, rooted in the right of property and developed by Roman law, a law of servitude, into a whole array of diverse rules from acquisition to manumission (*i.e.*, the freeing of a slave).

[28] For more details on these procedures, see Olivier-Martin, *supra* note 2, at p. 419; from the same author, F. Olivier-Martin, *Les Lois du Roi*, Reprint, LGDJ, 1997, p. 290.

[29] On the culture of prevention, see N. Questiaux, ''Administration and the Rule of Law: The Preventive Role of the French Conseil d'Etat,'' 1995 *Public Law* 247, 251.

beyond reproach in their substance, in which the legislative enactment as a work of human beings is in agreement with the law and equity as a work of God. Despite the triumph of positivism in the nineteenth century, these idealistic objectives have remained the major characteristics of the French law-making process.

Until the eighteenth century, the ordinances said to be of ''private law,'' that is, directly affecting private law matters, remained very rare.[30] The idea remained that private law was governed by customs. However, under the concept of public order, some royal ordinances indirectly modified some private law rules in the domain of the law of persons and family law. More often than not, they did away with unreasonable customs or they imposed emergency measures required by the circumstances. The *loi* in the form of ordinances started really to affect private law at the end of the eighteenth century, when the great Ordinances of the Chancellor d'Aguesseau brought about deep reforms in the law of gifts and estates, wills, and forgeries. These ordinances were a forerunner to the codifications of Napoleon. Except for them, the French monarchy did not intrude in the sphere of private life.

2. Legal Regime

The loi *as an act of sovereignty.* In turning ''the power to give and break the law'' into the first attribute of sovereignty, Jean Bodin imposed a new idea: law is a human work. He is the founder of the modern approach to law, which contemplates law as a product of power or, in more precise terms, as the product of the will that holds supreme power. Moreover, his emphasis on the absolute character of sovereignty supports the so-called ''power of the State,''[31] the basis of modern legislation, which regards the *loi* (statute) as the expression of a sovereign word bound by the customs, rights, and privileges on the sole condition of his good will.

A brilliant lawyer of the Renaissance, Bodin (1529-1596) was aware that one effectively destroys something if one finds a replacement for it. His genius was to replace the two pillars of medieval public law with the two (new) pillars of modern public law. Instead of the act of a plurality, the formation of which involved several participants, Bodin made the law of the king a unilateral act.

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[30] An exception is the Ordinance of Blois (1579) on marriage that, in line with the instructions by the Council of Trent, required that the consent of the spouses be received by a priest.

[31] This theory is fully expounded by O. Beaud, *La puissance de l'État*, Coll. Léviathan, PUF, 1994, in particular in Title I of Part I: ''La loy ou la domination du souverain sur les sujets étatiques,'' pp. 53-130.

Instead of the conservative act, par excellence, always respecting vested rights, franchises, and privileges of the subjects, Bodin turned the modern *loi* (statute) into an abrogative act that may always withdraw what it had previously granted.

a. The Loi *as a Unilateral Act*

The initial theory. Jean Bodin made ''the power to make law binding on all his subjects in general and on each in particular'' a power that the sovereign must exercise alone, in full independence, ''without the consent of any superior, equal, or inferior being necessary,'' because, he goes on, ''if the prince can only make law with the consent of a superior, he is a subject; if of an equal he shares his sovereignty; if of an inferior, whether a council of magnates or the people, it is not he who is the sovereign.''[32] These ideas were in complete contradiction with those of the Middle Ages, when nobody would have envisioned a king legislating without being surrounded by the councils of the various estates in the realm. They may be explained by the intractable and endless conflicts of the wars of religion and the need to find, in the wake of the solution already found by the English king and pursued by the German princes, a decision-making process that would place in the hands of one authority, and only one, that of the king, the unshared, unique, and absolute power to establish religious law. In affirming the need for an unshared power, Bodin writes against the Huguenots and their doctrine of divided sovereignty. Also called shared sovereignty, this idea was usually linked to a theory of legal limits to monarchical authority under the form of a right of resistance to oppression by a tyrant—ideas that were to be found in the essay ''Against One'' by La Boétie. As Bodin conceives it, sovereignty is a power that cannot be shared; it is indivisible.

Practical consequences. Beginning in the sixteenth century, everywhere in Europe, one organ, and only one, rose in each State and affirmed itself as the exclusive holder of legislative power, under which all other powers were subsumed. The nature of this organ varied depending on the State. In France, it was the king. The *lois* (statutes) of the king are the expression of one will only; all attempts to give to the king a ''companion'' in his legislative majesty failed. Some argued that the tradition was well established, pointing to a vote taken by the General Estates during the sixteenth century that gave the king the power to govern alone and, in addition, the power to raise a permanent tax, the *taille.*[33] It

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[32] J. Bodin, *The Six Books of the Commonwealth* [Abridged and translated by M. J. Tooley], Barnes and Noble, 1967, Book I, chap. X, available at http://www.constitution.org/bodin/bodin.htm.

[33] See Channu, *supra* note 8, at pp. 146-147. It must be said that the estates' consent will later be overlooked by Sir John Fortescue in his terrible and very critical picture of

must be recalled that the consent of the estates was given under the pressure of tragic circumstances, the Hundred Years War.

Under the monarchy by divine right, however, no national tragedy ever forced the legists of the French king to uphold in triumph the old formulas of imperial Roman law *Quod principi placuit legis vigorem habet* (what pleases the prince acquires the force of law) or *Sic jubeo, sic volo* (As I want, so I ordain). These are the formulas that will enable Louis XV, during the memorable meeting of the Flagellation of March 3, 1766, to assert: ''To me alone does the law making power belong, without dependence, or sharing.'' Bodin's theory of absolute and nonseverable sovereignty was adopted by all States on the European continent and led to the centralization of sovereign power into a single organ in the State. European thought adopts without nuances the theory of indivisible sovereignty, well summarized in the almost hypnotic formula by Cardin Le Bret, a contemporary of Richelieu: ''Sovereignty is no more divisible than the point in geometry.''[34]

With a few exceptions (England and the Low Countries), most European states evolved toward government by one. This was a transformation. At the beginning of the sixteenth century, ''every country of western Christendom, from Portugal to Finland, and from Ireland to Hungary, had its assemblies of estates. By the end of the century most of these assemblies had been eliminated or greatly reduced in power.''[35] Absolutism introduced a new style of government, the government by one. The government by several, by all of those who made the Curia Regis, no longer existed. True, absolute monarchs governed surrounded by counselors and councils, thus forming the *polysynodie* (government by councils) that characterizes the French government of the old regime in the eighteenth century. However, all these councils staffed with courtiers[36] do not alter the fact that, in the end, the monarch can decide in a sovereign manner, alone in majesty, that is, without the consent of anyone, whatever the legislative, executive, or judicial nature of their powers. Power is not shared—or, to put use

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the French monarchy in 1468-1471, when he will portray the miserable French who lived not only in misery, but also in servitude, since they were subject to a tax that they had not freely consented to.

[34] Cardin Le Bret, *De la souveraineté du roy* (1632), I, IX, quoted by É. Maulin, ''Souveraineté,'' *DCC*, p. 1435, and by M. Cottret, ''Absolutisme,'' *DAR*, p. 8.

[35] Huntington, *supra* note 10, at 386.

[36] The career of courtier comes into being with absolutism. A courtier, of course, has no representative character; he represents himself only.

to the terms that were to become famous after Montesquieu's analysis of the English Constitution, powers are not ''separated.''[37]

b. *The* Loi *as an Abrogative Act*

The maxim Princeps legibus solutus est. In the Middle Ages, the king was under the law and bound to respect it. This was, indeed, the condition of conformity of the law with the common good. The theoreticians of absolute monarchy introduced new ideas. No idea of Jean Bodin[38] was more striking than that which claimed sovereignty must be absolute. Sovereignty is the power ''to make law''; but he insisted that it must also be the power ''to unmake it,'' since the ruler, like the pilot of a ship, must be able to steer where he sees fit. After Jean Bodin, it was acknowledged, in complete contradiction with medieval ideas, that the king is not bound by human laws, that he may break the customs, that he may change or abrogate them by legislative enactments, and make new laws. The true sovereign is one who is not bound by the laws enacted by his predecessor or the rights he may have granted. Sovereign power is absolute (*solutus legibus*), that is, not bound by human laws in application of the Roman maxim *(princeps solutus legibus est)*. Sovereignty is a supreme power because of its abrogative character, because of its capacity to destroy what exists. The true sovereign is the one who may abrogate and derogate from the law.

At the time of Jean Bodin, the maxim *princeps legibus solutus est* was well known.[39] It had been used during the thirteenth century by the French jurists who had recourse to Roman law in order to solve a legal difficulty regarding the devolution of the crown. In order to avoid the partition of the realm, they successfully argued that the realm was not a private property that could be divided up at will and that its devolution must obey specific rules. This was the birth of public law as a law derogatory from the common law, with the consequence that this derogatory character required the establishment of a hierarchy between the laws. For if the king is not bound by his own laws, then he may absolve himself from the laws relating to his status—hence, the necessity to make a distinction between laws that are binding on the king (the fundamental laws of the realm) and the laws that are not (the ordinary laws).

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[37] Montesquieu, *The Spirit of Laws,* [Translated by Th. Nugent, 1752, revised by J. V. Prichard], 1748, Book XI, chap. 6, available at http://www.constitution.org/cm/sol.htm.

[38] See *supra* note 32.

[39] The study of reference remains A. Esmein, ''La maxime *Princeps legibus solutus est* dans l'ancien droit public français,'' in P. Vinogradoff (Ed.), *Essays in Legal History Read Before The International Congress of Historical Studies Held in London in 1913*, Oxford University Press, 1913, p. 201.

With ''the idea of a royal constitution unattainable by its own beneficiaries,''[40] legal thought took the first steps towards constitutional law.

This being said, in Roman law, the Emperor was not in reality freed from the laws; he was, on the contrary, bound by them but with the possibility that he might occasionally obtain a dispensation from the legal rules. Then, it was allowed that he could grant dispensations to the subjects. As he could, exceptionally, grant dispensations also to himself, it was further admitted that the dispensations for himself were self-evident. For greater simplicity, it was later admitted that he was inherently free from the laws he could grant dispensations from. But, and this is a decisive point, this ability applied only to private law and, according to Esmein, who quotes Mommsen on this point, to the laws of police. By contrast, the emperor was bound by public laws and, in particular, by criminal laws, although, in accordance with general principles, it was admitted that he could not be prosecuted. In France, the maxim *princeps legibus solutus est* was applied to all laws, both public and private, although with more liberty for the former than the latter.

Application to public laws. The legists of the old regime considered that the king was not bound by public laws and that he could free himself from them, as he wished. The king made laws and dispensed justice, without being bound by prior laws. When the king intervened in person to decide an administrative matter or to adjudicate a case, he could do so without taking into account the former laws that his officers, by contrast, were obliged to respect. The royal privilege was all the more remarkable when the king dispensed justice himself to his subjects, as he was entitled to do from time immemorial. When adjudicating on the merits of a particular case, the council of the king could decide only by reference to fairness (*équité*); the council of the king was regarded as the king himself, who was held to be always virtually present at its meetings. Older authors pointed to the fact that in his coronation oath, the king promised to dispense justice in fairness. This could have been worse, as Esmein put it, although recourse to fairness could bring about serious abuses. The principle unfortunately brought about much graver dangers.

Criminal law: When he adjudicated a case in person, the king could inflict the most serious punishments *ex post facto* and without trial. Logically, there was no reason he could not have done so sitting as a judge. However, in the private hearings that the French kings held for a long time, they usually decided civil cases only, most of them of minor importance.

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[40] S. Rials, ''La dévolution de la Couronne,'' in Rials (Ed.), *supra* note 5, at p. 93.

On the other hand, the Council of the king put a very early end to its role in judging criminal cases. In these matters, the most well-known application of the maxim *princeps legibus* was the practice of ''*lettres de cachet,*'' warrants that could carry any kind of order by the monarch, usually for the imprisonment without trial of a specified person. French kings occasionally put to death persons whom they judged themselves to be guilty of certain crimes. Earlier commentators called such behaviors royal ''fiats.'' They insisted that legally the king was authorized to act only by and with legal means (*i.e.*, with due process of law).

General public law: At a more general level, the maxim *princeps legibus* is at the root of the principle according to which public law is withdrawn from the purview of ordinary judges, a principle destined for a great future. All new legislation passed in the form of ordinances in matters of public law was withdrawn from ordinary courts. These ordinances dealt with the administration of justice, the public peace, and policing the realm, which included the material and moral order, the general administration, and all economic regulation usually based on old customs: monitoring of professions, distribution of vital supplies, regulation of markets.

One of the most important texts in this domain was the edict of Saint-Germain of 1641, which forbade the *Parlement* of Paris to consider cases dealing with the affairs of the State or the administration in very stringent terms:

> [W]e have declared that our said *Parlement* of Paris and our other courts of law were established to do justice to our subjects only; we prohibit them by most express inhibitions not only to take cognizance of any case similar to those mentioned above, but also in more general terms of any case dealing with the State, the administration or the government which we reserve solely to our person . . . except if we happened to give them the power to do so by special command and letters patent . . . [W]e henceforth declare null and void any opinion or judgment which could be made in the future in contradiction with the present declaration as having been made by persons without power to intermeddle in the government of our realm.[41]

The remarkable part of the edict of Saint Germain is its systematic and sweeping scope. How can it be explained that the king withdrew from the courts authority over all cases dealing with the affairs of the State, the administration, and the

[41] See E. Laferrière, *Traité de la juridiction administrative et des recours contentieux*, vol. I (1887), LGDJ, Reprint 1989, p. 127; see also G. Bigot, *Introduction historique au droit administratif français*, Coll. Droit fondamental, PUF, 2002, p. 22.

government? What made them so unfit to adjudicate such cases? True, as Laferrière noted at the end of the nineteenth century, ''As early as we go back in our history . . . we cannot find times when the courts in charge of enforcing civil and criminal laws were also in charge of deciding the difficulties in matter of public management.''[42] True, as he observes with much precision, some special courts for eminent domain, taxation, and public accounting had been established as early as the fourteenth century. However, the creation of special courts such as the King's Council that appeared later in the seventeenth century cannot be explained solely by the technical nature of the cases to be decided, as may be so with cases dealing with public accounting; there was nothing particularly technical to consider in cases dealing with the exercise of police power. Other factors came into play.

The burden of the venality of offices. In *The Old Regime and the Revolution*, Tocqueville has argued that the willingness of the king to withdraw all cases dealing with the State and the general administration of the realm from the cognizance of the courts of law can be explained by the venality of the offices, the scourge of the old regime.[43] The vast majority of officers of the State, whether employed in the service of justice, finances, or economic affairs, were the holders and owners of hereditary offices. As owners of their offices, judges were untouchable and could not be removed for cause. As nothing could be done against them, they were denied the power to adjudicate important cases and special courts were created to decide such cases. Tocqueville astutely noted:

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[42] E. Laferrière, *supra* note 41, at p. 109.

[43] A. de Tocqueville, *The Old Regime and the Revolution* [Translated by Alan S. Kahan], vol. I, University of Chicago Press, 1998. Venality of offices goes back to Louis XI; on October 21, 1467, he gave the first impulse (J.-P. Royer, *Histoire de la justice*, Coll. Droit fondamental, PUF, p. 114) with the ordinance for ''the immovability of law officers and others'' whose major consequence was to stabilize the offices. François I, however, is usually regarded as the king who gave venality of offices its biggest boost. In theory, the price for the office was a loan paid to the Treasury and always reimbursable. As a matter of fact, the Treasury was always unable to reimburse the price of their offices to the officers. Under Henry IV, the royal Declaration of December 12, 1604, established the system of the ''Paulette.'' According to the scheme invented by the cunning financial manager Charles Paulet, an annual taxation was established; each year, the holder of the office was obliged to pay a tax equal to the sixtieth part of the total price of the charge. The system was advantageous both for the officer, who was relieved from paying in cash the former high price of the office, and for the Treasury, which henceforth avoided the disruption of unpredictable sales and benefited from a regular source of revenue. Well aware of the dangers of this system, Richelieu tried in vain to do away with it. Louis XIV is supposed to have said resignedly one day: ''The most enticing prerogative of the French kings is to create new offices; as soon as he creates one, God creates a fool to buy it.''

> There was no country in Europe where the ordinary courts were less subordinate to the government than in France; but there was also no country where extraordinary tribunals were more common. These two things were more related than one might think. Since the King had barely any influence over the judges' fate, since he could neither fire them, nor change their residence, nor as even promote them; since in a word he controlled them neither through ambition nor fear, he soon felt troubled by their independence. This led him, more than anywhere else, to limit their jurisdiction over matters which directly affected his power, and to create alongside the ordinary courts, for his own special use, a more dependent kind of tribunal, which gave his subjects the appearance of justice without making him fear its reality.[44]

Progressively, the idea, still alive in French law, developed that any case dealing with the government or the administration must, in principle, escape ordinary courts and hence the ordinary law.

Application to private laws. The king was freed from complying with private laws so far as his personal status was concerned. The rules on the succession to the throne are the first case in point. Together with heredity, the right of primogeniture held sway in order to avoid the partition of the realm, and it soon became a matter of law. On a more general level, if the king performed an act that any individual could accomplish, such as writing his will, making a gift or entering into a contract, he could do so legally without taking into account the laws and customs, setting them aside or even discarding them.[45]

So far as the personal status of his subjects was concerned, the position of the king *vis-à-vis* private laws was completely different. The king did not often avail himself of his power to derogate from them. His freedom of action was ''impeded by a true thicket of privileges,'' so to speak.[46] Contrary to official appearances and the proud assertions of the king's legists, who were quite vocal in affirming in Latin maxims the sovereignty of the law [*sic jubeo, sic volo*, ''as the king wishes, so the law does too''], the *loi* (statute) was not in fact wholly sovereign. Opposing it, there was the law (*droit*), or better the laws protecting the rights (*droits*)—all rights that were protected by the customs of provinces, by the franchises of cities and corporations, by the privileges of the nobility and

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[44] Tocqueville, *supra* note 43, at p. 132.

[45] Examples of such private acts are the will of Philippe de Valois, or the contract of marriage between Louis XIII and the Infant Anne.

[46] See J.-L. Harouel, ''La monarchie absolue,'' in Rials (Ed.), *supra* note 5, at p. 101, especially p. 105.

the clergy, all rights made of private interests, particular and communitarian, that were protected by the *Parlements* (ordinary courts of law), and that all kings when acceding to the throne solemnly swore to respect and maintain. Before the Revolution, the *loi* (statute) could override these private interests only with great difficulty. It ran up against privileges (*i.e.*, vested and private rights). These rights were effectively protected by the *Parlements*, that is, the courts of law, which were regarded as official custodians of the estates and orders of society, corporations, families, and individuals.[47]

An extraordinary discrepancy between the theory of sovereignty and the reality of legislation marked the old regime. In theory, the *loi* (statute) was sovereign; it was held to stand for the will of the prince and it sufficed that it appeared for everything else to vanish before it. In practice, it was a completely different story. No one better explained the inconsistency than Portalis. Expounding before the *Conseil d'État* on 4 Ventôse Year XI (1803), he explained the motives for a preliminary title to the Civil Code dealing with the publication, effects, and application of statutes in general:

> Under the old regime, the *loi* (statute) was the will of the prince. This will was sent to the sovereign courts of law in charge of reviewing and registering it. The statute was not enforceable in a jurisdiction without having been formerly reviewed and registered [. . .] A statute could be refused by a sovereign court, but accepted by another; it could be diversely construed by the various courts. The pace of the legislation was stumbling, shy and uncertain. Among such confusion and conflicts between different wills, there could be no unity, no certainty, and no majesty in the operations of the lawmakers. One never knew whether the State was led by the general will, or by the anarchy of particular wills. All this was the consequence of the then constitution. France, before the Revolution, was less a single nation than a collection of diverse nations, successively reunited or conquered, distinct by the climate, the soil, the privileges, the customs, by civil law and political law. The prince ruled over these diverse nations under the different titles of duke, king or count: he promised to maintain each country in its old customs and privileges. It can easily be felt that, in such a situation, it was a prodigy when the same statute could fit all parts of

[47] See P. Legendre, *Histoire de l'administration de 1750 à nos jours*, PUF, Thémis, 1968, p. 473.

the empire. Some measure of uniformity in the legislation was out of reach.[48]

As each province of France was a particular state within the State, the statute of the king had to be naturalized (in a formal acceptance followed by a regular promulgation) in order to be locally enforceable. In each province, the *Parlements* (there were thirteen of them, each being a ''sovereign'' court of law and supreme within its jurisdictional territory) had the right, upon registration of royal legislation, to address remonstrances to the king whenever his laws were likely to abridge privileges, to withdraw franchises, or to abrogate vested rights—in other words, whenever the statutes of the king affected the rights and privileges of the subjects of his Majesty. To that extent, the French realm actually was a country of freedom where the private rights of men were protected. The absolute monarchy by divine right was no despotic State.

The legacy of absolute sovereignty. Jean Bodin's book found tremendous success. It went through at least fourteen editions before 1629. In Bodin's views, absolute sovereignty did not mean unlimited sovereignty. As he saw it, sovereignty was designed to be exercised within the sphere of human laws only, leaving untouched the laws of God[49] and nature[50] which the king was bound to

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[48] Exposé des motifs du titre préliminaire du code civil, de la publication, des effets et de l'application des lois en général par le conseiller d'État Portalis, Séance du 4 ventôse an IX, in *Discours préliminaire du premier projet de Code civil*, Paris, Éditions Confluences, Voix de la cité, Reprint 1999, pp. 63-64.

[49] In the system of Bodin, the sovereign is not at the top of the legal order. Above all earthly sovereigns, there is God. No matter how high a human authority may be, it is always supposed to act in a world governed by rules deriving from the divine scriptures or from the nature of things. These rules usually, but not always, termed *droit* (law) or *jus* are not vis-à-vis the sovereign in a position identical to statutes (*lex* or *loi*). The sovereign has complete control over the *loi*, not over the *droit*. As he was writing in the sixteenth century, Bodin could not treat the laws of God and nature as they are treated today, that is, as merely moral obligations. Like most of his contemporaries, he firmly believed that the sovereign was directly accountable to God. He was steadfast in his expectation of divine retribution for acts that violated principles of natural law. Political sovereignty, as he termed it, operated within a world governed by God.

[50] At the time of Bodin, the notion of natural law was relatively well-developed. The basic principles were to be found in Roman law; several judicial precedents had brought additional concrete guarantees. As a jurist, Bodin was familiar with these developments. He used the concept of natural law to lay down two limits to the power of the king. In the first place, like a private person, the sovereign is as tightly bound by his promise and even by the promises made by his predecessor. This limitation on the action of the sovereign is based on the idea (of religious origin) that keeping the faith and carrying out the obligations of contracts are essential to the public peace. In the second place, every one is entitled to receive his fair share (*id quod justum est*); from this premise, Bodin built such

comply with. Bodin acknowledged: ''As God only is almighty, human power can never be truly absolute.'' The principle was never forgotten and, later, in the seventeenth century, Bossuet, in often harrowing sermons, reminded the king of the consequences of these limitations on his governance.[51]

Bossuet, however, always reasoned within the framework of absolutism, that is, within a system where limitations to power, if any, originate in the king's self-restraint, not in the external limits that may be imposed on his power, whether these limits come from the provinces or from the natural law. The essence of absolutism lies in the single fact that it cannot be limited and remain absolute at the same time. Absolute power may never be heterolimited; it may at most be autolimited, with the result that, in order to fully understand it, it must be laid onto a political theology and assimilated to divine authority. In Bossuet's system, the providential prince is God himself. The growing secularization of societies and the coming into being of scientific thought turned the laws of God and nature into meaningless princ iples. Both did away with the ethical and moral authority that, during the seventeenth century, limited the State in the exercise of its sovereign power.

Whatever its theological underpinnings, the theory of absolute sovereignty turned the traditional functions of the State completely upside down by ousting the power to dispense justice as the first power of royal prerogatives, replacing it with the power to legislate. Beginning with the sixteenth century, the *loi*, in the form of the ordinance, became beyond France, throughout continental Europe, the rational instrument of public order and brought about a new style of governance, with a new approach to the *res publica*.

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a large defence of property rights that it required prior consent by landlords before taxation unless the pressing needs of the time were such that a waiting period would put the state into jeopardy. With Bodin, the right of property is protected by natural law. The difficulty was in the real and practical application of such principles. Bodin intimated that the General Estates and the provincial estates, sole representative bodies at the time, could play a role in consenting to taxation. However, these assemblies had no separate existence from the royal person so that their possible interposition to the royal will, in particular under the form of a right of veto, was in theory hypothetical and in practice impossible.

[51] Bossuet, *Politique tirée des propres paroles de l'Écriture sainte*, Paris, Pierre Cot, 1760, Book V, Article 5, Prop. 1, p. 237, available at http://gallica.bnf.fr/ark:/12148/bpt6k103256m.

Chapter 2

The German Legacy

Public law as a science. In France, a theory of public law developed at the end of the nineteenth century, and even then, only in part, since its theorization dealt solely with administrative law. In contrast, public law in Germany was built systematically, like a scientific discipline devoted to a branch of law distinct and separate from private law, as early as the sixteenth century. This rapid development was initiated by an author today forgotten, Nicolas Vigelius (1529-1600), a law professor at the University of Marburg, who published in 1561 a 470-page treatise under the title *Methodus universi iuris civilis absolutissima* (The Most Perfect Method of the Entire Civil Law). This work appears to be where the concept ''public law'' (*jus publicum*) as an autonomous branch of law was introduced for the first time into the European legal vocabulary. Vigelius was looking for a method to reorganize the entire legal system (known at that time as ''civil law''—hence the title of his book), which had been destabilized by the Reformation, the crisis of the Roman Catholic Church, and the disappearance of ecclesiastical courts. Looking for a new classification for the kinds (*genera*) of law, he took up the distinction made in Roman law and proposed a division between public law and private law. To be sure, his reference to a classification formerly made by Ulpianus was not original. The novelty, if any, was in the huge scope attributed to public law, which he identified as coming into play ''wherever a public interest is present'' and therefore included under the new branch of law ''legislation, magistracy, judgments, both secular and ecclesiastical, as well as criminal law and criminal and civil procedure, together with the affairs of the Empire including taxation, municipalities, public duties, and honors.''[1]

Public law was born; it grew and developed continuously throughout the principalities of the Empire. In the eighteenth century, two states, Prussia and

[1] On Vigelius's ideas, see H. J. Berman & C. J. Reid, ''Roman Law in Europe and the *Jus Commune*: An Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century,'' 20 *Syracuse J. Int'l L. & Comm.* 1, 23-26 (1994).

Austria, played a decisive role in the deepening of the new discipline, which soon turned into a true science—the science of the State. In all countries with Germanic cultures, public law became a scholarly discipline that rested on the same pedagogical traditions, a feeling shared by professors and students of belonging to the same corporation and sharing common problems.[2]

Public law as a general theory of the State. The second major difference between the French and German traditions of public law is related to the very conception of the field. As opposed to French legal thought, which always thought of public law in reference to its object from the *res publica* of the first Capetian dynasty to the general interest of the twentieth century, German legal thought has always thought of public law in reference to its subject, the State, which was, in the first place, the State personified by the prince. A decisive factor in the historical formation of public law is that public law in Germany has developed on the basis of the Prince-State. The divergent routes taken by both countries resulted in a German doctrine of public law so preoccupied with the idea of the State that it endeavored to detach it from the physical body of the prince, so as to create a pure legal concept under which the whole legal order could fall, rearranged and put into place in a so-called general theory of the State.[3] German legal science went so far in construing an abstract concept of State that it eventually identified public law with the State and rejected the possible existence of public law outside the framework of a State, or at least under its tight control.[4] Unsurprisingly, long and well-established German legal

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[2] On the development of public law as a science in German universities, see M. Stolleis, *Geschichte des öffentlichen Rechts*: München-Erster Band: *Reichspublizistik und Policeywissenschaft, 1600-1800,* Verlag, C.H. Beck, 1988, p. 48.

[3] For a French analysis of the general theory of the State, see the developments by O. Beaud, ''Préface, Carl Schmitt ou le juriste engagé,'' Introduction to the work by C. Schmitt, *Théorie de la Constitution*, PUF, Coll. Léviathan, 1993, pp. 59-75.

[4] The absorption of public law by the State had drastic consequences on international public law. One of the most important was to oust international public law from the field of general public law, since public law can be internal only. When public law is envisioned and theorized as the law of a state, all law that does not fit into it is reputed to be out of it and, even more, of a different essence. There is no surprise in the fact that Germany became the birthplace of dualism that postulates international law as completely distinct from domestic law and that regards international public law (as defined above [Introduction, Section C] as the law of an international *res publica* or international public good) as being an oxymoron, a pipe dream or, at best, part of a distant future. German legal thinking of the nineteenth century is the fountain head of the so-often made distinction between, on the one hand, public law defined as a law of domination between unequal subjects (the State and its subjects) and, on the other, international law viewed as a law of coordination among equal subjects of law (the sovereign States). In identifying public law with the law of a State, German scholarship had no other option than to erect a

tradition used to make it impossible to reflect on public law without starting with a ''general theory of the State,'' understood as the study of the State envisioned as both a social and a legal phenomenon.[5]

After World War II, German public law took a completely different turn with the adoption of the Fundamental Law (*Grundgesetz*) of May 23, 1949. Nowadays, it is no longer possible for German legal scholars to elevate the idea of the State to the rank of an object for legal analysis and attribute to it normative power. The new bases of the German legal order (fundamental rights and popular sovereignty) no longer allow it. Moreover, they even preclude thinking of the State as a reality per se; the former ''general'' theory of the State has become obsolete. With fundamental rights as the basis of the legal system, legal scholars can no longer build the legal system upon the State. The State is no longer a reality per se. The result takes two main forms. Either the general theory of the State absorbs itself into a ''legal'' theory of the State,[6] or it reconstructs itself on foundations (popular sovereignty) and with materials (fundamental rights) so different from those of the former theory that it is no longer the same theory.[7] The legal theory of the State consists in thinking of the State as a pyramid of norms set up in the neutral and smooth world of legal

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wall of separation between relations of subordination in internal law and relations of coordination in the international legal order. This conception, which had tremendous success and to which many scholars are still very faithful, has become much dated; it is powerless to explain current international regimes, which are far from a law of coordination, such as the law of collective security under Chapter VII of the U.N. Charter or the law of nuclear nonproliferation of the Treaty on Nonproliferation of Nuclear Weapons (1968), in which some States, often said to be ''particularly interested,'' are actually more equal than others and exercise a domination over other States, quietly and without publicity, diplomatic practice giving the illusion than all actors interact under a law of coordination.

[5] Notwithstanding the famous *Contribution à la théorie générale de l'État* by R. Carré de Malberg, 2 volumes, 1920, reprint CNRS 1962, and volume II of *Traité de science politique* by G. Burdeau, entirely devoted to the State, LGDJ, 1968, French legal scholarship has not much invested in the general theory of the State. For an explanation and a criticism of this lack of interest, see O. Beaud, ''La théorie générale de l'État (*Allgemeine Staatslehre*) en France, Quelques notations sur un dialogue contrarié,'' in O. Beaud & E. Volkmar Heyen (Dirs.), *Eine deutsch-französische Rechtswissenschaft? / Une science juridique franco-allemande?* Nomos Verl.-Ges., 1999, p. 83.

[6] The evolution is well explained by O. Lepsius, ''Faut-il au droit constitutionnel une théorie de l'État? Point de vue allemand: de la théorie de l'État à la théorie des formes de domination,'' *RUDH*, vol. 15, no. 3-6, October 30, 2003, p. 86.

[7] This development is remarkably well analyzed by C. Grewe, ''L'État de droit sous l'empire de la Loi fondamentale,'' in O. Jouanjan [Dir.], *Figures de l'État de droit*, Presses Universitaires de Strasbourg, 2001, pp. 385-393.

formalism propounded, for example, by the normative school of Hans Kelsen. In contemporary German legal scholarship, the State is assimilated to the law, more specifically, to its own law, always within and under the Constitution.[8]

Nowadays, the Prince-State, which eventually turned into the idea of the ''God-made State,'' is a historical phenomenon only. The study of its basic tenets, however, remains necessary for understanding what the cradle of European public law was. The Prince-State (Section A) actually was the ancestor of the modern State, the powerful agent of economic and social transformations, under the form of an institution peculiar to the European continent, the well-ordered Police-State (Section B).

A. THE PRINCE-STATE

Difference from the Royal-State. Beginning with the Renaissance, the sovereign State in most polities of the Holy German Empire developed under the form of the Prince-State (*Furstenstaat*).[9] By contrast to the Royal-State based upon a complete fusion between the monarch and his people, the Prince-State built itself upon a sharp, clear-cut, and rigid distinction between the prince and his people. The Prince-State is the prince made a State, so to speak; it is the personified State.[10] However, the prince is not the king. The German conception of the monarchical State is that of the Person-State; it regards the State as a person, a person that was, in the first place, a physical person and that much later, in the nineteenth century, has been turned into a legal person, or a juridical person; whereas the State in the French tradition is a thing that has been entrusted to a person, the sovereign.[11]

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[8] See Zippelius & Würtenberger, *Deutsches Staatsrecht*, 31. Auflage, Verlag C. H. Beck, München, 2005, p. 12.

[9] See H. Möller, *Furstenstaat oder Bürgernation? Deutschland 1763-1815*, 4th ed., Berlin, Verlag Gruppe Random House, Bertelsmann, 1998.

[10] See E. H. Kantorowicz, *The King's Two Bodies*, *A Study in Medieval Political Theology*, Princeton University Press, 1981, p. 446.

[11] The German conception of the Person-State still entails today two important differences between the French and German approaches to public law. The first one is that, from a historical standpoint, the conception of the Person-State made the idea of a contract between the prince and the people possible, whereas the same idea of a contract between the French king and the people was ruled out by the theory of the divine right of the king, the king being under obligation only to God. The second consequence is that, when the State is regarded as being a person and, in particular, a juridical person, it is possible for a citizen to have rights against it, ''subjective rights'' as German scholars put it, and therefore to enjoy better protection for them. By contrast, the French conception of the Nation-State, which regards the State as an institutionalization of the nation, makes it impossible for the citizen, a member of the nation, to have rights against the nation, or

1. Foundations

a. The Doctrine of Luther

Lutheranism as the basis of continental public law. The Prince-State cannot be understood without reference to the ideas of Martin Luther. Luther by himself did not create, of course, the Prince-State that emerged from the turmoil of the Reformation that radically transformed the principalities of the Holy German Empire. But it is impossible to understand what the Prince-State meant for the development of public law, and how far beyond Germany it left its mark on fundamental notions of contemporary public law, without an inquiry into Luther's ideas.

In 1517, Martin Luther, professor of theology and jurist by education, published his famous theses against the business of indulgences. It was a revolt against the state of the Catholic Church at the beginning of the sixteenth century. His ideas destabilized the Church, wrought havoc in the Holy German Empire, and laid the foundations of modern public law, from at least a triple perspective.

Affirmation of a private space distinct from a public space. In the Middle Ages, the spiritual quest of man was in the first place the salvation of his soul. The ''true'' life of the Christian was the everlasting life, not daily life on this earth. The Church taught that man could, to a certain extent, contribute to his own salvation; he could by the grace of God and with the help of the Church

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against the State, as this would imply that the citizen may have rights against himself (or herself).

The differences between the French and the German conceptions of the State had important consequences for administrative law and procedure, in particular regarding the position of the citizen *vis-à-vis* the administration. Judicial review of administrative acts in French law (*recours pour excès de pouvoir*) is an objective adjudication; the plaintiff is suing an act, not a person; standing therefore need not be based on a right, strictly speaking; a mere interest suffices: scholars refer to it as the ''model of objective legality.'' By contrast, judicial review of administrative action in German law operates on different premises; the plaintiff is suing the administration and he (or she) must base his cause of action on a right, a legal right, which has been violated. As the starting points diverge, so do the judicial processes. The French model invites the judge to decide whether the administration followed a regular decision-making process; the German model invites the judge to decide whether a right has been violated. For a general survey of theses differences, see R. Denoix de Saint Marc, ''Allocution d'ouverture,'' *R.A,* 2001, Deuxième centenaire du Conseil d'État, p. 535, and M. Fromont, ''Regards d'un juriste français sur la juridiction administrative allemande,'' *R.A,* 2001, Deuxième centenaire du Conseil d'État, p. 560; see also N. Foulquier, *Les droits publics subjectifs des administrés. Émergence d'un concept en droit administratif français du XIXe au XXe siècle*, Paris, Dalloz, 2003.

accomplish good deeds, which accrued rewards that, in turn, enabled him to be saved. Luther revolutionized medieval thinking in asserting that, to earn salvation in the beyond, the Christian does not need intercession of the Church. Salvation, he said, is a private matter that results exclusively from a direct and immediate relationship between man and God. Whereas in the Middle Ages the Church had delineated a temporal world separate from a spiritual one, Protestantism as initiated by Luther and developed by Calvin drew a line between two worlds meant to coexist next to each other but as separate domains: the private sphere, which the individual possesses as his own, which belongs to him only, and in which he enjoys the right of free examination—a womb for all modern rights; and the public sphere, the sphere of the State, and submission to its power, where public affairs are debated and decided by common consent. In the sixteenth century, privacy and the rights attached to it started to detach themselves from public life.

Broader responsibilities for political power. From Luther's predications, all the countries that had been won over to Reformation rapidly concluded that the Church, with its institutions and structures, had not much good to offer and was in fact doing more harm than good. From the beginning, the author of the ninety-five theses requested abolition of the ecclesiastical courts. The Church, said Luther, is not a law-making institution; the Church is the invisible community of the faithful, of all those who believe in God, inside of which all are priests, and in which everyone participates, but always in a private and personal relation with God. Each one must read and react individually to the Bible; the institutional Church is not needed. It is up to the secular political authority, to the prince and his counselors, to the magistrates of the cities, to endorse the legal responsibilities that used to be in the jurisdiction of the Roman Catholic Church. With these revolutionary ideas, Luther drew a line between two worlds, that of the invisible church, which unites the community of the faithful, which belongs to the realm of grace and faith, and which is governed by the scriptures; and the earthly and temporal world, to which belongs the visible institutional Church, itself governed by law and solely within the jurisdiction of the prince. Once the Catholic Church was ousted from the world of law, its former responsibilities had to be followed up and pursued, and the Prince-State naturally stepped into its shoes. Luther's doctrine tends to make the prince the master of both the bodies and the souls of his subjects.

Submission and absolute obedience to authority. The direct relation between man and God of the Lutheran doctrine completely transformed the conditions of salvation formerly earned by, and with the intercession of, the Church. For the good Christian, in Luther's view, obedience to God requires, in the first place, fulfilling his duty to be what he was meant to be, to be what

God's will intended him to be. The good Christian must be happy and satisfy himself with his condition, and he must not try to change it by getting richer or moving up in the social hierarchy; however, when one is rich and powerful, one must, all the more, fulfill the duties of one's charge, one's state of being, one's ''*Stand.*'' As Joseph Rovan explains,[12] those who have received a mission from God to fight against the Devil, have a particular *Stand*, a station, which constitutes their *Beruf*, or their calling or profession, which is also under Luther's views their *Berufung*, or their vocation. The *Beruf* of the mighty is to be the *Obrigkeit* (from *oben*, above), that is, the power imposed by God.

Luther's ideas played an important role in the merciless repression of the peasants' revolt (1524-1525) by the princes of the Empire. Emboldened by the wind of reforms that blew all over Germany, the peasants asked for the abolition of feudal fees and *corvées* (taxation in kind—which amounted to forced labor—such as paving roads, repairing streets, cleaning ditches, etc.), together with a return to the old customary law (which had been replaced by Roman law in the fifteenth century) and to a system of justice administered by elected judges. Luther took sides with the princes and called the peasants ''criminal and wild hordes of looters.''[13] He invited the princes to fully and completely exercise their powers in order to tame the revolt; he exhorted them to plunder, put on the wheel, hang, and cut throats. Having destroyed the Catholic Church and stripped its clergy of all legitimacy, Luther had no other option than to transfer the power of moral and spiritual guidance to the temporal authority and, thereby, to invest the princes with a complete power over men and things. All temporal power, however perverse, is willed by God, so obedience is always due, in Luther's doctrine. There is no longer a right of resistance against unjust or unfair power. The good Christian must suffer or flee by emigration. In affirming a principle of absolute obedience to the State, Luther established an ideology of subservience to political authority. His exaltation of the secular authority of the princes destroyed the authority of the Church and its law.[14] Of Luther's ideas, Michel Villey said: ''The fairness of the law is no longer a condition of its validity. I mean, at the minimum, the fairness of its *substance*; what henceforth matters, as German legal thought would say, is its *formal* fairness, that is to say, its being issued by the regular authority according to the regular procedure. Law must be obeyed because it is a command of the

[12] J. Rovan, *Histoire de l'Allemagne: des origines à nos jours* (1994), Paris, Seuil, Coll. Points Histoire, 1999, p. 258.

[13] M. Villey, *La formation de la pensée juridique moderne*, Paris, PUF, Coll. Léviathan, reprint 2003, p. 298.

[14] See L. Pfister, ''Réforme (La) et le droit,'' *DAR*, p. 1311.

Prince.''[15] Luther is a forerunner of positivism, which holds all law legitimate from the moment it is laid down by the State.

b. Roman Law

A dual contribution. The Prince-State would never have gained its legendary strength if, in addition to that of Protestantism, it had not received a decisive contribution from Roman law. German public law from its origins had been fed *ad nauseam* by Roman law, which brought to it two main characteristics: the idea of the division of law between private and public law, and an imperial conception of power.

Reception of Roman law. Beginning with the twelfth century and the first lectures delivered on the ''*Corpus juris civilis,*'' Roman law never ceased to irrigate continental legal scholarship. Accepted very early in Italy as the subsidiary law in force in case of a conflict between local customs and laws, Roman law was well known in Germany at the end of the Middle Ages. Because of lectures given at the University of Bologna that attracted many law students, it had become the major and almost exclusive source of study for German lawyers, without however being formally part of the law in force.[16] At the end of the Middle Ages, the German courts adopted Roman law in its totality. The reasons for this adoption, which was formally recognized by a decree of the Imperial Court of Law (*Reichskammergericht*) in 1495, remain a mystery. German historians attribute it to two causes:

(1) an attraction to the languages and literature of antiquity that characterized the spirit of the times; and

(2) the idea of an historical continuity between the Roman Empire and the Holy German Empire, with the latter being the successor to the former, even in legal matters.

However, other factors also came also into play, such as the absence of legal unity in the Empire, of written law, and (because of the fragmented nature of the legal system) of professional jurists who could stand in defense of the customs and local usages. A further factor was the necessity of educating and raising a

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[15] Villey, *supra* note 13, at p. 298 (emphasis in original).

[16] Beginning in the thirteenth century, France too received Roman law, but it never succeeded in completely setting aside the customs and local usages of feudal law that survived for a very long time.

class of skilled civil servants with a solid legal background in order to replace the former administrators drawn from the nobility who were not jurists.[17]

Consequences. The adoption of Roman law in Germany had important consequences, from both a social and political standpoint.

On the social plane, the condition of the peasantry got worse. In his book *The Old Regime and the Revolution*, Tocqueville noted:

> I have reason to believe that, through the jurists' work, many conditions of old German society became worse, notably that of the peasants; many of those who had up to then managed to keep all or part of their freedom or their property lost them then by pedantic analogies to the situation of Roman slaves or hereditary lessors.[18]

At the political level, the new elites had extensive recourse to Roman law in order to acquire complete and absolute sovereignty over their subjects and to bring within their power several large German towns. Again, as per Tocqueville, it must be recognized that the extraordinary success of Roman law throughout Europe can be explained by the fact that it accelerated the drive of the new princes, newly enriched by the confiscation of the goods and properties belonging to the Catholic Church, towards absolute power. As Tocqueville notes, ''this came from the fact that, at the same time, the absolute powers of rulers was solidly establishing itself everywhere, on the ruins of the old liberties of Europe, and thus that Roman law, a law of servitude, agreed wonderfully with their perspectives.'' He adds:

> Roman law, which everywhere improved civil society, everywhere tended to degrade political society, because it had chiefly been the work of a very civilized and subordinated people. The kings therefore enthusiastically adopted it, and established it everywhere where they were the masters. The interpreters of this law became their ministers or their chief agents throughout Europe. At need, the jurists furnished them legal support against the law itself. Thus they have often done since. Alongside a ruler who is violating the law, it is very rare not to see a lawyer appear who assures you that nothing could more legitimate, and who proves academically that the violation was just and that the oppressed were in the wrong.[19]

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[17] See J.-R. Gordley & A. T. von Mehren, *The Civil Law System*, 2nd ed., Boston, Little Brown, 1977, p. 11.

[18] A. de Tocqueville, *The Old Regime and the Revolution*, [Translated by Alan S. Kahan], University of Chicago Press, 2 vols., 1998, p. 257.

[19] *Id*., p. 258.

2. Characteristics

Rise of a princely legal system. The Prince Electors of the Palatinate, Saxe, Brandenburg, the landgrave of Hesse, and more, together with the municipal councils of many free towns, embraced the Lutheran faith. They took advantage of their conversion to allocate to themselves properties belonging to the Church that were enclaves in their own territories. These confiscations, known under the name of ''secularizations'' (the ecclesiastical properties were diverted from their former spiritual destination and reassigned to secular purposes), were used to finance the development of a civil service and the creation of a standing army. With the annexation of new territories, princes and towns gained in prestige and wealth. They invaded social and religious space and filled the void left by the Church. In the universities, the curriculum on Church and canon law was replaced with secular law. A legal system made by princes developed and became the privileged means by which the princes asserted their sovereignty over their subjects.

The new law called for new governance, which in turn called for new elites. A new class of administrators appeared and staffed the princes' courts. Most of them were civil servants; a great many were lawyers. Educated in universities, endowed with broad Roman law training, well aware of the new thought on natural law, these agents were the first staff of a permanent civil service in the State.[20] They propagated ideas and beliefs that, in the long run, profoundly changed European societies; in particular, they spread the idea that societies are governed by laws that may be drawn by the human mind from reason and conscience. They taught that government must aim at discovering the best laws, those that will conduce to the happiness of society.

The new theologians who entered the service of the princes in the sixteenth century believed that law must be inspired by principles that the human mind can find through reason and conscience. In particular, they offered a new theory of natural law, which in their opinion had its origin in the essential nature of man. God, they said, has implanted in all persons certain elements of knowledge, including both logical and moral concepts. These inborn concepts are facts of human nature that form the premises, not the objects, of rational inquiry. They are beyond the power of human reason to prove or disprove.[21]

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[20] See C. J. Friedrich, ''The Continental Tradition of Training Administrators in Law and Jurisprudence,'' 11 *Journal of Modern History* 129 (1939).

[21] On the role of the Protestant theologians in the formation of modern public law, see H. J. Berman & J. Witte, ''The Transformation of Western Legal Philosophy in Lutheran Germany,'' 62 *South. Calif. L. Rev.* 1573, 1617 (1989).

Thus, it is no longer possible to validate legal propositions by demonstrating that they come from authoritative texts. The validity of legal rules must be demonstrated by reference to their conformity with principles of conscience recognized to be just by human reason. These new jurists felt a need to define a method that could enable them to show the legitimacy of their law; to this end, they had extensive recourse to Roman law and principles of natural law. Public law affirmed itself as a law of reason, a law of abstract principles, a collection of rules elaborated by the bureaucracy.

External sovereignty and the dawning of the law of nations. *Vis-à-vis* the Emperor, the conquest of sovereignty by principalities was progressive. Princes claimed, in the first place, external sovereignty in the conduct of war and diplomacy. They obtained large portions of it in 1648 at the peace of Westphalia. Treaties then concluded enabled them to carry out an autonomous diplomacy that eventually precipitated the dissolution of the Holy Roman Empire. Former feudal and hierarchical relations between members were replaced by diplomatic and quasi-international relations. Sovereignties being deemed equal, each prince became fully sovereign and judge of his own cause. As conflicts between them could no longer be decided by the high court of the Empire, a new law emerged in order to avoid annihilation between belligerents. New rules of law came into being for peacetime (law of treaty and diplomatic relations) and wartime (with a distinction between *jus ad bellum*—law on the right to wage war, with the problem of the just war—and *jus in bello*—law applicable in the conduct of hostilities). States sought to protect themselves in a society of equals. A first outline for a modern law of nations, which would later turn into international public law, began to take shape.

Internal sovereignty and the rise of ordinances. The princes also claimed complete internal sovereignty, with its two components: juridical and legislative sovereignty.

In demanding complete juridical sovereignty from the Emperor, in particular, exclusive jurisdiction to adjudicate cases, the prince argued that he was a ''judge''; both justice and preservation of the public peace were his political aims and the condition of his legitimacy. His legists exhumed the powers of the Roman praetor, the highest Roman dignitary after the consuls. The praetor, they said, had two powers, *imperium* and *jurisdictio*. The *imperium* is the power to bring the accused before the court and to enforce the decision; the *jurisdictio* is the power to say what the law is. The German princes requested both powers, the *imperium mixtum*.

The sovereignty of the prince was also, and in particular, illustrated by his power of command, the power to legislate. Only with the successful claim by

the princes of the power to legislate did the real *jus publicum*, modern public law, come into being. In the second half of the sixteenth century, the power to legislate came to public notice in the form of ordinances. These ordinances were more ambitious in their scope than those of the French monarchy. Drafted by theologians educated in law, including Luther himself and Philip Melanchton, they regulated all subject matters that used to be within the jurisdiction of Roman Catholic Church: marriage, family law, social behavior and redress for moral torts, school curricula, children's education, and assistance for the needy (widows, orphans, ill people, vagrants). Progressively, in the seventeenth century, the ordinances extended their reach to all domains of economic and social life of the State.

To characterize this shift in the responsibilities of power, a new word is coined: ''*policey,*''[22] a term that has a broader meaning and scope than mere public peace. The type of State that developed in Germany beginning in the sixteenth century and reaching its apex in the eighteenth went far beyond maintaining public peace and order. With the exception of criminal law and private law, secret affairs of the State, war, and ecclesiastical matters, all domestic policies of the German States in the seventeenth and eighteenth centuries belonged to the ''*policey*.'' As the term was understood at that time, the police (*policey*) was supposed, as Vattel put it, to ''preserve every thing in order.''[23] Throughout most of continental Europe, the ordinances were the legal instruments of the ''police'' or, to use more modern language, of the public policy of order. They were made to preserve order in all its possible forms, that is, in the first place, public order as public peace, and in the second place (the enumeration being not all-inclusive), economic, social, religious, and professional order. As it transformed into a true science of the State during the eighteenth century, police power eventually came to encompass everything that could contribute to enactment of the ''well-ordered police State.''

B. THE WELL-ORDERED POLICE-STATE

1. Origins and Ideological Foundations

The search for felicity. In the eighteenth century, political power in Germany began an evolution that eventually resulted in the creation of a State

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[22] See Stolleis, *supra* note 2, at p. 334.

[23] E. de Vattel, *Le droit des gens ou Principes de la loi naturelle* [Translated by Joseph Chitty], 1883, Book I, chap. XIII, § 174.

model, the well-ordered Police-State,[24] the birthplace of modern public law, which conquered all Central Europe. Order and police are its two main pillars.

The ''well-ordered'' State was the ultimate goal of Jean Bodin. The expression ''Well-Ordered Commonwealth'' (*République bien ordonnée*) has pride of place in his work (*i.e.*, it is the title of the first chapter of the first book of *The Six Books of the Commonwealth*, which is entirely devoted to the definition of this new kind of State). A well-ordered Commonwealth, according to Bodin, is ''the rightly ordered government of a number of families, and of those things which are their common concern, by a sovereign power.'' In order to attain the state of perfection that is ''the rightly ordered government,'' where law that proceeds from the sovereign conforms to equity that proceeds from God, Bodin starts with the premise that ''the final end must be understood as the starting point of any subject.''[25] ''The final end''—these are the decisive words, for it is from the ''final end'' of the State that everything flows.

The ''final end'' of government for the Ancients was happiness. For Aristotle, a republic is ''a society of men gathered together for the good and happy life.'' Bodin is not satisfied with this definition and the term ''happy.'' In his opinion, this is not enough, for this does not keep the republic from being ''given over to every wickedness and abandoned to vicious habits.'' What Bodin is interested in is not happiness, but felicity. The difference between the two concepts is that felicity implies virtue, not the virtue of the Ancients, which is understood as courage or moral strength, but the virtue of Christians, which commands self-abnegation. In order to come as close as possible to the ''rightly ordered government,'' ''we must aim higher'' and attain ''the true felicity,'' that is, a situation where ''the conditions of [. . .] felicity are one and the same for the commonwealth and the individual.'' Clearly, the ''rightly ordered government'' is related to the late and obviously lamented model of the religious community of medieval Christianity, which was swept away by the Reformation, and which Bodin's theory endeavors to bring back to life. Later, Hobbes will follow in the footsteps of Bodin. In the blueprint that he outlines for a ''Christian Commonwealth'' at the end of *Leviathan*, he, too, considers ''it to be granted that the civil government be ordained as a means to bring us to a

[24] The historian Marc Raeff combined the two terms in his book *The Well-Ordered Police State, Social and Institutional Change through Law in the Germanies and Russia (1600-1800)*, Yale University Press, 1983.

[25] J. Bodin, *The Six Books of the Commonwealth*, [Abridged and translated by M. J. Tooley], Barnes & Noble, New York, 1967, Book I, chap. 1, available at http://www.constitution.org/bodin/bodin.htm.

spiritual felicity.''[26] As these authors describe it, the ideal of the modern State is a secularized Church, so to speak. Their model of the well-ordered State that leaves nothing to chance and undertakes to regulate everything, where liberty is checked, has developed nowhere so well as in Germany and all continental Europe.

Felicity and public good. The model of the well-ordered State blossomed in the Holy Roman Empire because of the huge void left after the collapse of the structures and institutions by which the Catholic Church had organized and regulated medieval society. It was less successful in France because, on the one hand, far from collapsing onto itself, the French Church with its clergy, its properties, and its institutions that structured French society grew stronger with the principles of Gallicanism,[27] and, on the other hand, the freedom of action of the king was much narrower than that of German princes, limited as it was by the franchises, freedoms, and countless privileges of the subjects that the king swore to maintain and defend in his consecration's oath. The well-ordered police State did develop in part in France, without, however, ever reaching the strength, vigor, and force of intrusiveness that it reached in Central Europe. The well-ordered Police-State in France, if any, was manifest primarily in the system of political economy undertaken by Colbert.

Whether triumphal (as in Germany, Austria, or Russia),[28] or more modest because it was limited and constrained (as in France), one thing is sure, the well-ordered Police-State is a Police-State, and police is the means by which the State leads its people not only to happiness but even to felicity (*Glückseligkeit*). It is not enough for a subject of the prince to be happy alone; he may be happy only on the condition that everybody else is too. The prince makes sure that his subjects are happy individually and collectively. The concept of public interest is neither liberal nor republican; it is unitary. The theme of the common good remains very pervasive. The idea is to attain the good, at all cost, and to reach a situation where private and public interest would be, if possible, united; individual liberty is stifled. The Police-State tends toward taking charge of the entire society. In order to help it in this huge undertaking, a new scientific

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[26] T. Hobbes, *Leviathan*, Part III, chap. 42, Penguin Classics, 1985, p. 601.

[27] Gallicanism is made of the principles and practice of the Gallican party, a school of French Roman Catholics of which Bossuet was the leader, which maintained the right of the French church to be in certain important matters self-governing and free from papal control.

[28] On the Police-State spreading out all over Europe, see J. Van Horn Melton, ''Absolutism and 'Modernity' in Early Modern Central Europe,'' 8 *German Studies Review* 383 (1985).

discipline, comprising the so-called cameral sciences, emerges. Cameral sciences are a true science of the State;[29] they are the ancestor to modern administrative sciences and public management of the twentieth century.[30]

Cameral sciences. Cameral sciences are often presented as the German expression of mercantilism (the *Kamera* used to be the place where the public treasury was kept). These sciences were indeed concerned first with the good management of the State's finances.[31] However, they went beyond the merely economic.[32] Cameral sciences began to be taught at the university in the eighteenth century; the first chair was established in Halle in 1727. They were made of three disciplines: (1) economy, which, once distinguished from its domestic component, encompassed the whole society and included in its object all the territorial resources and productive activities aimed at ensuring general prosperity, with the result that it eventually led to political economy; (2) the police, strictly speaking, being itself divided into eight subdisciplines, that is, eight domains freely open to the legislative activity of the State—population, schools and universities, religious practices, labor, health, land use, security, assistance to the poor; (3) the cameralistics, the disciplines dealing with internal revenue and its optimum use in order to increase the strength of the State and the well-being of the subjects, a forerunner of the modern science of public finances.[33]

2. Developments

The ordinances of the Police-State. As the legal instrument of the Prince-State, the Police-State has not remained static but has evolved over time, as the felicity supposed to be distributed among the Subjects has been defined differently over time. Initially, the ordinances of the Police-State sought to put an end to the religious crisis born of the Reformation, and it is indeed in religious matters that they were most plentiful. Secular authorities sought to fill

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[29] See K. Tribe, ''Cameralism and the Science of Government,'' 56 *Journal of Modern History* 263 (1984)

[30] See J. Chevallier, *Science administrative*, 3rd ed., Paris, PUF, Collection Thémis Science politique, 2002, pp. 10-13.

[31] See Georget, ''Les caméralistes allemands: du principe de réalité à la théorie codifiée,'' avalaible at http://www.lameta.univ-montp1.fr/PEA/ pages_composantes/ Communications/georget.pdf.

[32] On cameral sciences, see the study available at http://accfinweb.account.strath.ac.uk/ df/b2.html.

[33] See P. Napoli, *Naissance de la police moderne: Pouvoir, normes, société*, Paris, La Découverte, 2003, pp. 257-266.

the void left by the rejection of the former ecclesiastical authorities. In Protestant countries, princes legislated by ordinances to establish and organize the new Protestant churches, while, in the countries that remained faithful to Catholicism, they endeavored to put an end to the disaffection of the faithful and legislated to oblige them to attend the traditional religious services. One of the first police ordinances enacted in the Empire was a series of regulatory provisions on Sabbath observance and attendance at mass and church services, with a prohibition of superstitious beliefs and practices. After the dramatic demographic consequences of the Thirty Years War, which bled the country dry (the population dropped from seventeen to five millions inhabitants), all German States undertook policies aimed at renewing and maintaining a healthy population. Under the influence of natural law theories (Wolff), felicity tends to be equated with wealth. This transformation in political theory led to the State assuming responsibility for a new discipline—one destined to a great future—political economy.[34]

In the seventeenth century, public law is in full expansion. The prince devotes himself to ensuring that his subjects are in good health, well fed, and that agriculture produces enough surpluses to be exported in order to increase the country's wealth. Everyone's work is essential to everybody's prosperity, and the State ensures that everyone is efficacious (*i.e.*, contributing appropriately to collective welfare). Gradually, the ordinances enter the social domain. In particular, the regulation of agricultural property (the prohibition against farmers leaving their lands) and family matters (the regulation of conjugal life, filial relations, and wills and estates—sometimes to avoid a loss of wealth, sometimes to punish intemperance or idleness) are new areas of regulation. The ordinances enter the economic domain too (commerce, industries, agriculture, fiscal matters); they invade health and public hygiene (medical ordinances to avoid epidemics, town-planning and city ordinances to limit the number of insalubrious buildings and to oblige inhabitants to protect themselves against fire, and numerous regulations for the organization and the discipline of each profession); they even apply to education (regulations for mandatory school attendance) and culture.

There is no domain of civil society in which the prince may not interest himself. Everything is open to regulation by ordinance. Everyone is under the benevolent protection of the prince; his solicitude is constant. His projects for his people are often grandiose, always impressive. At the end of the eighteenth

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[34] On these developments, see C. Larrère, *L'invention de l'économie au XVIIIe siècle*, PUF, Coll. Léviathan, 1992.

century, in 1794, a Prussian general code (*Allgemeines Landrecht für preussischen Staaten*) is published. The document is unprecedented; no distinction is made between private and public law; the code legislates on everything.[35] Tocqueville aptly summarizes its sprawling content: ''This law code is a real constitution, in the sense that was then attributed to that word; its purpose was not only to regulate relations among citizens but between citizens and the State: it is simultaneously a civil code, a criminal code, and a political constitution.''[36] With this document, not only does the police power enter into the law; the entire law falls under its control. Law becomes engulfed by statutes (ordinances), or, in other words, private law henceforth survives subsumed under public law. The codification of Frederic II is a forerunner of the French and German codifications of the nineteenth century, by which the State becomes the sole source of law.

The governmental structure: despotism. The government of the Police-State boils down to government by one: the entire sovereignty is in the person of the prince. Bound by no fundamental law, the prince unites in his person all powers, legislative, executive, and judicial. All provincial estates, all intermediate bodies are suppressed; nothing may stand between the prince and his subjects, not even his ministers. The justification for such a concentration of powers into one man's hands lies in the belief that he is the only one able to discern the general interest and to strive for the public good. This prejudice will later become the backbone of the so-called monarchical principle; it comes directly from Luther's ideas and from the Reformation.

In the sixteenth century, a new figure emerged in Germany, that of the *landesvater*, the sovereign as the father of his subjects (his ''children,'' as he occasionally may say), who is in charge of the common good for his State and his administration and who has no other goal than to make his people happy. This State model will reach its pinnacle with despotism, dubbed by those who benefited from it (such as Voltaire), ''enlightened despotism.''[37] The personal component of this form of government was considerably accentuated by Frederic II, who deprived his ministers of any legitimacy to govern alongside him. A minister, he said, ''will fill the public offices with his own creatures and

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[35] See G. Birstch, ''Reform Absolutism and the Codification of the Law, The Genesis and Nature of the Prussian General Code (1794),'' in J. Brenner & E. Hellmuth (Eds.), *Rethinking Leviathan, The Eighteenth Century State in Britain and Germany*, Oxford University Press, 1999, p. 343.

[36] A. de Tocqueville, *supra* note 18, at p. 261.

[37] Enlightened despotism and the mechanics of the Police-State are well explained by F. Bluche, *Le despotisme éclairé* (1969), Hachette, Pluriel, 2000, p. 35.

try to gain power by the number of people attached to his own person; [. . .] the State does not belong to the ministers.'' The prince therefore must govern by himself. There is no other way to ensure the public interest and the well-being of the commonwealth.

As sovereigns who aspired to appear ''modern,'' Frederic II of Prussia and Joseph II of Austria introduced the theory of the social contract in the government of the Police-State, but they completely distorted its meaning. According to them, the contract between society and the monarch is permanent; both of them took pains to explain how such a contract could endure even if power fell into the hands of an incompetent or irresponsible monarch and how the subjects could be protected against the mistakes made by their prince.[38] Their theory was that the people consented once and forever that all powers should be entrusted to the monarch, including juridical power of last resort, with the consequence that every decision made by the prince under his police powers is withdrawn from any review by courts. The only domain left to the jurisdiction of the courts deals with the *fiscus*, which concerns the property of the Prince-State (*i.e.*, eminent domain). Public domain is supposed to belong to a private person distinct from the State, who is called the *fiscus*. As a result, property relations between the prince and his subjects are regarded as private law matters and may be reviewed by courts—on the condition, however, that property be directly affected.[39]

From a general viewpoint, the subjects of the prince in a myriad of domains are entirely under his will and the regulations he sees fit to adopt without any possibility of judicial review. The prince always justifies his actions by claiming it is his right—or rather, his duty—to protect his subjects from the dangers that threaten their security, well-being, and happiness. No economic or social domain is free from his exacting and bureaucratic rules.

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[38] The contradictions of the Police-State are well explained by E. Weis, ''Enlightenment and Absolutism in the Holy Roman Empire: Thoughts on Enlightened Absolutism in Germany,'' 58 *Journal of Modern History* (1986), Supplement: Politics and Society in the Holy Roman Empire, 1500-1806, S181-S197, particularly SS192-S193.

[39] This theory has left traces in contemporary German administrative law, particularly in how the distribution of competences is organized between administrative and civil tribunals. See M. Fromont & A. Rieg, *Introduction au droit allemand*, vol. I: Les fondements, Paris, Editions Cujas, 1977 p. 19.

C. FROM THE STATE AS A PHYSICAL PERSON TO THE STATE AS A JURIDICAL PERSON

1. The Building of the *Rechtsstaat*

The crisis of the Police-State. At the end of the eighteenth century, the model of the Police-State goes through a critical phase. Not everyone is made happy by this overwhelming will to make everybody happy. The liberals require civil liberty, *libertas civilis*, which they find in natural law; they request a declaration of rights, in a first attempt to carve out a space that is free from the control of the *polizei*, which wants to regulate all the spaces of private life.

The criticism of the Police-State begins in the eighteenth century with the philosophical works of Immanuel Kant.[40] The Kantian interpretation of the relationship between the State and civil society is in complete opposition to the principles of enlightened despotism, which claims to make people happy at all costs. Happiness for Kant is an individual matter: The State must not meddle with what citizens ought to do; the role of the State is to guarantee a sphere of liberty within which everyone may pursue his own chosen ends, chosen to further his own happiness. The ultimate goal of the State is ''neither the citizen's well being, nor his happiness,'' but ''the agreement between the constitution and the principles of law.''[41] Defense of and respect for the inalienable rights of man are the foundations and the ends of a legitimate political order. In the wake of Kantian ideas, W. von Humboldt develops the theme of a State whose unique function is to ensure protection for human rights.[42]

The coming into being of the Rechtsstaat. In 1798, a pamphlet authored by a certain Placidus (*alias* Wilhelm Petersen) and published in Strasburg contained a chapter entirely devoted to the liberal criticism of the *Polizeistaat*. In one of these semantic twists possible only in the German language, the book contrasts the students of the law made by the State (*Staats-Rechts-Lehrer*) with those of the State made by the law (*Rechts-Staats-Lehrer*).[43] This publication marks the first time the word *Rechtsstaat* occurs; the new term makes sense only in

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[40] On the legacy of Kant for the *Rechtsstaat,* see J. Hummel, *Le constitutionnalisme allemand (1815-1918): le modèle allemand de la monarchie limitée*, Paris, PUF, Léviathan, 2002, p. 114.

[41] *Métaphysique des mœurs, Première partie: Doctrine du droit*, quoted by J. Hummel, *id*. at p. 115.

[42] See Wilhem von Humboldt, *The Limits of State Action* (1852) (ed. J. W. Burton), Liberty Fund, Indianapolis, 1993.

[43] See L. Heuschling, *État de droit, Rechtsstaat, Rule of Law*, Paris, Dalloz, 2002, p. 37.

contrast with its opposite. The law made by the State (*Staatsrecht*) is, of course, public law—the *jus publicum*, the law of ordinances—which limits, at discretion, the Law (with a capital L)—the law of private persons, the law of liberty and of property, in a nutshell, natural law, that is, the law of the rights of man. The *Rechtsstaat* is, therefore, a State that puts the rights of man before the law (statute) or, in other words, that makes the validity of the law (statute) dependent on its conformity with the law (rights). It is the opposite of the *Polizeistaat* in which, by contrast, the statute (under the princely form of ordinances) not only precedes the law (rights) but also negates it by determining its domain and its substance.

The constitutional expression of the Rechtsstaat. The logical end result of the new liberal ideas should have been the abolition of the Police-State, the transfer of sovereignty from the prince to the people, and the establishment of a representative democratic State.[44] This, however, does not happen, or happens only partially. The problem is that although the German nation has been in existence for centuries, it cannot affirm its sovereignty; it cannot find its political institutionalization. The idea of national representation fails to become a political reality under the form of a Reichstag that would represent the many historical estates of the German nation. Sovereignty remains prisoner of the secular form of the Prince-State, which survives, and in the legal form of the Police-State, which the liberals are at pains to overthrow. The *Rechtsstaat* does not succeed in affirming itself in its plenitude at the constitutional level. At best, the new ideas oblige the princes to make concessions and accept some limitations to their absolute power.

Between 1806 and 1850, absolute monarchy is progressively replaced by constitutional monarchy.[45] The German model of limited monarchy lasted until 1918. It is a bridge between an impossible national sovereignty and an outdated monarchical sovereignty—a two-headed eagle, so to speak. Prussia represents its most fully realized example. It is a dualist political regime in which two powers, the king and the Parliament (*Landtag*), coexist. These two powers are

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[44] As Olivier Jouanjan explains, the very first problem in the Kantian doctrine is that of the ''constitutional form'' and this form can only be that of representation, insofar as only a representative system of government makes it possible to distinguish between the abstract entity of the State and the actual human being in charge of power, so that ''*Rechtsstaat*'' is synonymous with ''representative State,'' ''free State,'' ''State of reason''; see his article ''État de droit, forme de gouvernement et représentation,'' in O. Jouanjan (Ed.), *Études de droit théorique et pratique*, Presses Universitaires de Strasbourg, 1998, pp. 279-301.

[45] See Fromont & Rieg, *supra* note 39, at p. 28.

not on an equal footing, and the monarchical principle remains very strong. The king accepts limitations on his legislative power only as far as the so-called ''legal'' rules are concerned. Here lies the victory of the basic tenet of the *Rechtsstaat*, namely, that the State's interferences with liberty and property are legal (and legitimate) only if undertaken in pursuance of a law in the making of which citizens participate by electing representatives to Parliament. Invasions of liberty and property rights fall within a so-called ''reserve of legislative power,'' including especially budgetary matters. The victory is modest. The *Rechtsstaat* protects the citizen with respect to his personal interests only. The prince keeps a ''reserve of executive power'' (*Vorbehalt*) that includes foreign affairs (war and diplomacy). His power is absolute over all political and State affairs, direction of the administrative departments and control of the civil service, organization and command of the army and defense of the State in times of emergency. He has the constitutional power to enact as ordinances all decisions that do not concern his subjects directly or that the Constitution does not forbid him to make. The prince holds onto supreme authority. True, the legislative assembly has some real powers, especially in budgetary and fiscal matters; but it cannot impose its will on the king. From a constitutional standpoint, the victory of the *Rechtsstaat* is a half-victory.

The administrative expression of the Rechtsstaat. As the *Rechtsstaat* fails to grow in the field of constitutional law, its basic ideas are sown instead in the field of administrative law, and it will come to full bloom there, especially with respect to the relations between the administration and the citizens. Here, in this precise domain, is where all efforts to cast off the Police-State have concentrated. They are crowned victorious when Prussia establishes the bourgeois Law State (*bürgerlicher Rechtsstaat*), which will reign supreme for almost half a century (1871-1918). Although it does not eliminate the monarchical principle, the backbone of the Police-State,[46] the bourgeois Law-State is a moderate Police-State that respects civil rights and accepts judicial review. It forms the half-liberal, half-authoritarian version of the bourgeois Law-State, as theorized by R. von Mohl.

Not going as far as Kant, who required only judicial enforcement of the laws by the State, Mohl believes that effective protection of rights may also require administrative enforcement. The ideology of the Police-State remains very much alive in his theory. In his opinion, judicial power is not enough; an administration endowed with police power is also required. However, this police

[46] See Ph. Lauvaux, ''Le principe monarchique en Allemagne,'' in O. Beaud & P. Wachsmann (Eds.), *La science juridique française et la science juridique allemande*, Strasbourg, Presses Universitaires de Strasbourg, 1997, p. 65.

power is now reviewed by a judge, but not an ordinary judge. German States established administrative courts distinct from ordinary courts and endowed them with the authority to decide cases between the administration and citizens. These administrative courts were granted the power to set aside any regulations contrary to the laws. This power was a decisive turning point in the evolution of German public law. It represents a first step, followed by many more: a link is henceforth established between the police and the law; and the State is henceforth under the rule of law.

The problem, however, is that the Law-State does not go further; it remains frozen in a purely formal interpretation that dispenses with the problem of the ends, the crucial question of the aims of the State. In the definition given, for instance, by F. J. Stahl, the Law-State is not characterized by the aims of its actions but only by the manner in which it performs them. The sole relevance of State action is the State's method. At the end of the nineteenth century, the Law-State became an empty shell of legal dogmatism that no longer had anything in common with the liberal constitutional doctrine. It was distinguished from the Police-State only because it silenced liberty while complying with its formal legal requirements. There is no longer an interest in finding the essence of the *Rechtsstaat* in a suprapositive law made of moral values but in efficient formalism. The State is said to be under law only insofar as the validity of its actions derives from their conformity to a principle of legality; the sovereignty of the State absorbs itself in the sovereignty of positive law. The *Rechtsstaat* has become, as Otto Mayer put it, the ''well ordered administrative State.''[47]

2. The Transformations of the State

The theory of the State as a legal person comes into being. The unfortunate petrifaction of the great theory of the Law-State into a legal doctrine of pure administrative law is the result of all kinds of factors. These boil down to a blockage at the constitutional and political level. The German people cannot get rid of the Prince-State. To be fair, they have been refused the possibility to do so; they have been forbidden even to attempt to do so, since the Final Act of the Ministerial Conference to Complete and Consolidate the Organization of the Germanic Confederation signed at Vienna (1820), article 57, which aimed at maintaining the monarchical principle throughout the Germanic Confederation.[48] The idea then prevailing was that, although the monarch may be limited

[47] On all these points, see the excellent analysis by Hummel, *supra* note 40, at pp. 123-127

[48] Clive Parry (Ed.), *Consolidated Treaty Series*, vol. 71 (1820-1821), p. 89, especially pp. 103 and 120.

in the exercise of certain powers, he must remain the sovereign in the State. The German people were doomed to conceive of themselves as a unity only through the person of a prince—hence, the proclamation of Wilhelm I as Emperor of the II Reich in the gallery of mirrors at the palace of Versailles on January 18, 1871. The German dilemma lies in a State conceived as a physical person, which Kantorowicz called the ''personified State,''[49] that is, in this identification inherited from history between sovereignty and the person of the prince.

At the end of the nineteenth century, German legal scholarship accomplishes a feat of great magnitude. It reinvents the concept of the State as a physical person by using the theory of legal personhood, and it replaces it with the former theory. The doctrine of the legal personhood of the State was not a novelty in the nineteenth century. The legal personhood of the State was well established in the law of nations. Vattel makes reference to it at the beginning of his treatise *The Law of Nations*.[50] In the relations between States, legal (or moral) personhood makes it possible to ensure continuity in the law. Treaties, for instance, do not come to an end when the sovereign passes away. By contrast, however, inside the nation, the State whose organization was shaped by the monarchical principle was no abstraction at all; it was a physical person alive and well, so to speak. The State was the prince, and the prince was the State. German legal scholarship escaped this confinement and left the Prince-State behind, by simply inverting the traditional approach. It decided to detach the State from the person of the prince and built the theory of the legal personhood of the State accordingly.[51]

The State as a legal person of public law. The legal personhood of the State was modeled after the private law institution of legal or juristic personhood as a ''system of possibilities of wills'' (C. F. Gerber), all these wills being

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[49] Kantorowicz, *supra* note 10, at p. 446.

[50] Speaking of ''Nations'' or ''States,'' which he defines as ''bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint effort of their combined strength,'' he adds: ''Such a society has its affairs and its interests; it deliberates and takes resolutions in common; thus becoming a moral person, who possesses an understanding and a will peculiar to itself, is susceptible of obligations and rights'' in *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (1758) [Translated by Joseph Chitty (1852)], Preliminaries, §§ 1-2.

[51] For an excellent analysis of the differences of approaches between France and Germany on this question, see F. Linditch, ''La réception de la théorie allemande de la personnalité morale de l'État dans la doctrine française,'' in Beaud & Wachsmann (Eds.), *supra* note 46, at p. 179.

attributable to a person.[52] The State has legal personhood because it has a will—or better, because it has the power to want.

The personhood of public law (based on the works of Savigny) shares with the personhood of private law a common foundation in the will.[53] But the former does not have much in common with the latter. The difference lies in the content that the will may express. Whereas the private will is always that of an individual, free to choose whatever direction he likes, the will of the State is not free; it is determined by its end. That end in turn is determined by the constitution of the State, and it is a political choice par excellence. As proof of the continuous influence of this mode of thought, note that it is precisely on the end of the State that German public law made a U-turn after World War II by designating the protection of fundamental rights as the only legitimate end of the State.

The theory of the legal personhood of the State represents tremendous progress for advancing both the liberal State and the *Rechtsstaat*. Regarding the building of a liberal State and establishing a constitutional monarchy, Olivier Jouanjan accurately notes:

> To affirm the personhood of the State, and to attribute to it sovereignty [means] to downgrade the monarch to a secondary and inferior rank, a rank of ''civil servant of the people'' or, as later said, to a rank of mere ''organ'' of the State which he may no longer possess; it also means, at the same time, to reassert the value of the elected assemblies which, even with their limited competences, must henceforth exercise the sovereignty of the State, with the rank of ''civil servant of the State,'' together with the monarch.[54]

Regarding the building of the *Rechtsstaat* and the protection of individual rights against public power, the legal personhood of the State made it possible to analyze the relation between the State and the citizen as a bilateral relation between two persons. This method was used for the first time by Carl Friedrich Gerber, the first author to imagine a notion of individual public right and to use it as the groundwork for building a new science of public law that no longer goes from the State to the individual, but rather starts from an individual

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[52] On all these points, see O. Jouanjan, ''Carl Friedrich Gerber et la constitution d'une science du droit public allemand,'' in Beaud & Wachsmann (Eds.), *supra* note 46, at p. 11, especially pp. 53-55.

[53] On this crucial filiation, see O. Jouanjan, *Une histoire de la pensée juridique en Allemagne (1800-1918)*, Paris, PUF, Collection Léviathan, 2005.

[54] *Id*. at p. 206.

endowed with rights and builds from there a public law against power. The scientific study of administrative law is pursued in the works of Bähr, for whom the totality of public law, especially administrative law, had to be thought out using the notions and concepts of private law and civil procedure. It is finalized by Otto Mayer, who demonstrates that the Law-State can materialize only if based on the premise of subjective public rights, that is, on the premise of a legal relationship governed by public law.[55] The individual can assert himself and find efficient protection against power (whether public and private) only by the rights bestowed upon him. The notion of subjective rights is as important in public law as it is in private law. It would never have come of age without the Prince-State. The theory of public subjective rights is, indeed, one of the greatest legacies of German public law in the monarchical age.

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[55] E. Forsthoff, *Traité de droit administratif allemand* [Translated by M. Fromont], Bruxelles, Bruylant, 1969, p. 102.

Part B
The English Monarchy

A peculiar path. The English monarchy stood apart from the evolution that led the continental monarchies toward the institutionalization of the State. The State did not develop in England under either the French approach of the State understood as the *res publica* or still less under the German concept of the personified State. The English legal system therefore has no public law, either as the law of the public interest or still less as the law of the State. There is only one law. The public interest, as a rule, does not call for special laws other than those that apply to private matters. On the rare occasions that public affairs do call for a settlement different from that applicable to private affairs, the different rules or particular institutions that fit the case are always contained in the common law and administered by ordinary courts. Under such circumstances, the words ''State'' and ''public law,'' in the English language, have different meanings from those in use on the continent.

The word ''State'' in England is legally meaningful principally in reference to the official denomination of ''United Kingdom of Great Britain and Northern Ireland.'' It designates a subject of law in international law, that is to say, the State, the international legal person with a will of its own, formed by the union of England, Scotland, Wales, and Northern Ireland. The United Kingdom taken as such is a State for international purposes or, to put it differently, the word ''State'' is legally meaningful in relation to international law only. Regarding internal affairs, there is no ''State'' in England, but rather a ''Crown.''[1] The absence of the concept of ''State'' in England indicates that sovereignty is not, and cannot be, approached in the same manner as on the continent. This is the reason why English lawyers, and all those who have been educated in the British legal tradition, make a distinction that continental lawyers usually do not make and may even find odd; they distinguish between ''internal'' and ''external''

[1] M. Loughlin, ''The State, the Crown and the Law,'' in M. Sunkin & S. Payne (Eds.), *The Nature of the Crown*, 1999, Oxford University Press, pp. 33-76.

sovereignty. The major interest in this distinction is its assertion that sovereignty must be treated differently depending on where it acts. Concretely, those who govern do not have the same powers and the same discretion; their particular powers depend on whether they conduct the external or the internal relations of the country. Internally, the government is under the law and amenable to the courts; externally, it is fully sovereign and a judge in its own cause.

The term ''public law'' in England has no specific content, as opposed to ''common law.'' It does not refer to a body of rules distinct from the latter. According to the definition given by Lord Denning in *O'Reilly* v. *Mackman*, a 1982 case that stirred great concern: ''[P]ublic law regulates the affairs of subjects vis-à-vis public authorities.''[2] In other words, the term ''public law'' as understood by the highest court of England has, first and foremost, a purely procedural content; the High Court used it to draw a line between two kinds of adjudication. Does it have the revolutionary import that some lawyers attach to it? There is no easy answer. It depends on what judges see fit to do when reviewing activities of public authorities. One thing is certain: failing a better term, the word ''public law'' was resorted to in order to oblige plaintiffs (and their counsels) to distinguish between two legal remedies, the private law remedies directed against private persons and the public law remedies used against public authorities.

As on the continent, public authorities may be sued with legal remedies that are unavailable against private persons. This enables the judge to intrude deeply in public activities and to request from public actors a behavior without equivalent in private legal matters.[3] For instance, public authorities are obliged to comply with and respect the rights provided for in the European Convention of Human Rights *vis-à-vis* the citizens. Moreover, individuals may have recourse to specific legal remedies to enforce their rights against public authorities, particularly by way of judicial review. However, it is also still possible to sue them by common law remedies and to claim compensatory damages. Under such circumstances, the House of Lords, in a show of solid

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[2] *O'Reilly* v. *Mackman* [1983] 2 AC 237, 255.

[3] There is no principle of freedom or autonomy of will in public law. In private law, an individual may act by selfishness, by personal interest, out of spite or generosity, for capricious or reasonable motives, as long as he, of course, does not break the law in using force. In public law, this principle does not exist. A public authority may act for motives of public interest only, with due consideration for the public good and the *res publica*. The will in public law is not autonomous; this is indeed the *raison d'être* of public law. This is particularly well explained by Sir William Wade, *Administrative Law*, 9th ed., Oxford University Press, 2004, p. 355. Sir William is himself referring to G. Vedel & P. Delvolvé, *Droit administratif*, 12th ed., p. 328.

common sense, decided that allowing a plaintiff to assemble against a public authority the advantages of both a common law action (compensatory damages, for instance) and judicial review (intrusive judicial inquiry into the decision-making process of the public body) would be an abuse of the right to sue, and it decided that it would be henceforth an abuse of procedure not to submit a public law case to justice by way of judicial review whenever this is possible.

In a noted comparative legal essay, J. W. F. Allison argued that in distinguishing between private and public law remedies, the House of Lords had introduced public law like a Trojan horse into English law.[4] At any rate, it recognized that administrative law adjudication should obey special rules. At the present time, the term ''public law'' in England, to the extent that it has a precise definition, means administrative adjudication, not administrative law. Will this adjudication give birth to a public law in the continental sense, that is, a law of the *res publica*? It is still too soon to say.

The English exception. England never experienced public law, and British scholars today are divided as to whether it should. One thing is certain; in the eighteenth century, when the kings and princes of continental Europe were occupied with making their people happy, the British rejoiced that they did not live under the rule of continental public law, derided by their lawyers as ''imperial law.''[5] Nothing could be more alien to the English spirit than the well-ordered Police-State then thriving on the continent. England, of course, knew the police power necessary to the public peace and security. But it was not the well-ordered, ''well-fed,'' continental State that promulgated happiness among the people by exacting laws. England was a land of freedom. The laws of police there had a different object than on the continent; they were aimed not at producing the happiness (even less the felicity)[6] of the people, but more modestly at providing ''the due regulation and domestic order of the kingdom.''[7] England was regulating, not policing, the country; its laws were more concerned with the individual than the State.

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[4] J. W. F. Allison, *A Continental Distinction in the Common Law, A Historical and Comparative Perspective on English Public Law*, Clarendon Press, Oxford, 1996, p. 72.

[5] Sir William Blackstone, *Commentaries on the Laws of England*, Introduction, Section I, p. 5.

[6] On the distinction between happiness and felicity, see Chapter 2, Section B.1.

[7] Blackstone, *supra* note 5, Book IV, chap. 13, at p. 163:

> By the public police and economy I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.