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Privatization and the Constitutional Delegation of Coercive Power in Germany

German Supreme Court upholds a (more-or-less) private delegation of the use of force

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The U.S. Constitution is silent on whether any sort of power can be delegated to private actors. The due process clause protects people from the bias of state actors, whether these state actors are public or private. Financial motives may of course stand in the way of a private party's faithfully executing its disinterested public duties, but of course public officials can also be subject to bias, and the same constitutional doctrine applies to both. The Nondelegation Doctrine prevents Congress from giving up legislative power—whether the recipient of such power is public or private doesn't matter. (Some courts have interpreted the Nondelegation Doctrine as barring any delegation of regulatory power to private parties [see my August 2013 Amtrak post], but whether that's right or wrong, the fact remains that they do so without any explicit constitutional text.)

The situation is the same in most state constitutions, so any doctrinal distinction they make between public and private delegates is purely judge-made. In Israel, the Basic Law (the closest Israel has to a constitution) provides for the rights to liberty and dignity—"A person's liberty shall not be denied or restricted by imprisonment, arrest, extradition, or in any other way," and "One may not harm the life, body or dignity of a person." Based on these extremely general phrases that make no reference to public or private, the Israeli Supreme Court struck down a statute allowing for private prisons—based on a high-level philosophical view that private-sector incarceration was illegitimate, regardless whether abuses were any more or less prevalent in private prisons.

Against this background, it's interesting to see what happens when a country has constitutional text that actually addresses the issue of privatization. The German Basic Law (as in Israel, Germany's equivalent of a constitution) has some general text, like the so-called "Democracy Principle" of Article 20(2): "All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies." But it also has specific text related to the public-private distinction. In 1993, the Basic Law was amended to provide for the privatization of railways, and in 1994, it was again amended to provide for the privatization of postal and telecommunications services. A more longstanding provision—dating to the very beginning, in 1949—is Article 33(4), which provides that: "The exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law."

On January 18, 2012, the Federal Constitutional Court of Germany upheld a delegation of coercive power to a private mental hospital against a challenge under Articles 33(4) and 20(2). The Court's reasoning is interesting as an example of how other countries, under their own constitutional text, approach issues of

privatization and the delegation of coercive power.

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Mr. S., who sounds like a character from a Kafka novel, was an inmate of the Vitos Clinic for Forensic Psychiatry in the German town of Haina in the state of Hesse, about 80 miles north of Frankfurt. (Hesse has already played an important role in privatization history: in the 18th century, its ruler, Frederick II, raised money by renting Hessian mercenaries to Great Britain to fight the unruly colonists in the American Revolutionary War.) In April 2008, after repeated aggressive outbursts, S. was taken into (closer) confinement by clinic employees—whether this seizure took place in his own room or in a holding cell is unclear. He sued, charging that this confinement was illegal because it wasn't ordered or performed by public authorities.

The Vitos Clinic had been a facility of the Hessian social welfare organization until 2007, when Hesse passed a privatization statute. The new Hessian statute on psychiatric commitment continued to provide, as before, that people could be committed in facilities of the Hessian social welfare organization—though now such facilities could be owned by corporations, as long as their shares were directly or indirectly wholly owned by the Hessian social welfare organization. The director of the facility and his deputies, as well as doctors with management responsibilities, remained employees of the state social welfare organization and were granted the discretionary power to make decisions affecting inmates' fundamental rights. Both before and after the new statute, certain particularly sensitive decisions—for instance regarding furloughs, privileges, consensual medical treatment, or security measures—were reserved to the director alone. At the opposite extreme, in case of imminent danger, any facility staff was authorized to take temporary special security measures (with immediate reporting to the facility director). The confinement of Mr. S. was, in fact, pursuant to this very "imminent danger" provision.

In 2007, the Vitos Clinic became a non-profit, limited liability company under contract with the Hessian state government; 5.1% of its shares were held by the Hessian social welfare organization, and the other 94.9% were held by a limited-liability corporation named Vitos that was itself wholly owned by the Hessian social welfare organization. Some of the clinic staff was employed by the Vitos Clinic itself and some by the Vitos corporation; but in any event, the subordinate staff members who confined Mr. S. weren't technically government employees, which is what prompted Mr. S.'s suit based on Article 33(4) and 20(2) of the German Basic Law.

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The regional court and higher regional court both denied Mr. S.'s claim, and, on appeal, the Federal Constitutional Court agreed that the constitutional complaint was meritless.

Article 33(4)—the provision that "sovereign authority on a regular basis" should "as a rule" be exercised by public servants—does continue to apply when these duties are transferred to private entities, but there was no violation of the Article in this case. On its face, confining someone is an exercise of sovereign authority (within the "core" of sovereign authority, said the Court), and the Hessian statute allowing facility staff to take special security measures in case of imminent danger did grant this authority to non-public servants as a *permanent* matter, which seems to fall within the "on a regular basis" language. Nonetheless, the "as a rule" phrasing (i.e., "usually") implies that there could be exceptions to the presumptive ban, and this case indeed fits into such an exception. The Court reasoned that the exception should be interpreted narrowly so it doesn't eat up the rule; any exceptions should be justified by a special, objective reason related to the function of the general norm. For instance, cost savings alone can't justify a departure from the presumptive rule of Article 33(4), because cost savings aren't part of the constitutional provision's goal; rather, the constitutional provision was

motivated by the 1949 Founders' belief that public servants were in general ("as a rule") more loyal and trustworthy than private actors. (But neither are cost savings irrelevant, at least if, in a particular area, the costs and security benefits of public provision are significantly less favorable than presupposed by the general constitutional rule.) On the other hand, the principle of proportionality can provide the necessary justification: transferring duties to non-public servants is more justifiable when the duties impair fundamental rights to a lesser degree.

In this case, the Hessian government was able to provide specific reasons that justified the transfer of duties to non-public servants. First, according to the government, the privatization allowed for synergies—combining forensic commitment and psychiatric facilities—that improved opportunities for personnel recruitment and training, as well as the overall quality of confinement. The contract assured adequate staffing, budgetary, and quality requirements. The state welfare organization had adequate oversight and control rights. (Moreover, non-civil service employees were often used even before privatization.)

It was also important that the privatization was "purely formal"—indeed, one might say, almost fictitious. As noted above—and as required by the state statute—the clinic was a non-profit partly owned by a state agency and partly owned by corporation that was itself owned by a state agency. The providers were thus "free from profit-making motives and constraints," and there was little reason to fear that the effectiveness of confinement and the protection of the detainees' rights would be sacrificed to cost-cutting concerns.

The Court also found that there was no violation of the Democracy Principle of Article 20(2). The Democracy Principle requires every official act to have democratic legitimation: it must be traceable to the will of the people, to which it must also be accountable. Privatization must not lead to a reduction in public accountability; parliamentary observation and monitoring must be guaranteed. There are two kinds of legitimacy: a personal legitimacy that comes from an uninterrupted "legitimacy chain" between oneself and the people (for instance, being personally appointed by political officials) and a substantive legitimacy that comes from following the law and instructions of the government. A defect in personal legitimacy can be counterbalanced by an excess of substantive legitimacy, and vice versa.

The Court found that the required level of legitimacy was present here. As noted above, facility directors, their deputies, and doctors with management responsibilities were required to be state welfare agency employees, which provided the necessary personal legitimacy. The other employees lacked personal legitimacy, but the director's control right over the employees provided substantive legitimacy, as did the oversight of the state agency. Moreover, their ability to affect fundamental rights was limited by the proportionality requirement that they only act temporarily and in case of immediate danger, with immediate notification of the facility director. This combination of personal and substantive legitimacy was sufficient to legitimate the use of force in this case.

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In some sense, this "privatization victory" seems anticlimactic. Most notably, as the Court noted, the privatization was purely formal: in reality, the clinic was a nonprofit entirely owned, directly or indirectly, by the state government. But the decision didn't rest entirely on the fact of state ownership. Much of the reasoning, though not all, would also apply if the Hessian government had tried a transfer to entirely private ownership. The nonprofit form is legitimately important; even in the American context, it can often make more sense to contract with privately owned nonprofits, since the inability to distribute profits to shareholders mutes the incentive to cut costs, which can be a valuable feature if we particularly fear unobservable harmful cost-cutting. Transfer to private owners can of course also be accompanied by strong contractual requirements related to budgets, staffing, performance, and monitoring. As far as the Democracy Principle goes, the "personal legitimacy" prong was assured in this case by the fact of government employment, but it's not clear

that this need always be the case; perhaps having politically accountable public officials choose the director personally would be enough for personal legitimacy even if the director wasn't technically a state employee. And the control right of the director over his staff, as well as the oversight and monitoring rights of the government over the facility at large, could guarantee "substantive legitimacy."

Thus, even though this particular privatization was fairly timid, the court victory in this case could pave the way for further experimentation with more private structures.

From a comparative constitutional perspective, it's interesting to compare this German case with related American doctrines. The focus on financial bias, opportunities for oversight, and the personal legitimacy of those who execute the law have echoes in American doctrines of due process and the Appointments Clause and removal power. Does the fact that the Germans have a specific piece of privatization-related text to interpret make a difference, compared to the relatively vague text of the U.S. Constitution? Perhaps not: the "as a rule" exception here allowed plenty of room for creative interpretation, and future Courts that are more or less friendly to privatization could interpret the scope of the exception more broadly or narrowly. On the other hand, it seemed to anchor the analysis in a way that was absent in the Israeli Supreme Court's decision striking private prisons. Interpreting specific text probably tends to make judges more like appliers of law and less like philosopher kings.

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