

VARIOUS HISTORICAL CONSIDERATIONS REGARDING THE PUBLIC LAW–PRIVATE LAW DICHOTOMY

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Abstract

Throughout the history of law, has been structured logically in law institutions and branches being considered in a divided or unitary manner. But legal norms have obtained general recognition either taken as a unitary system or divided into divisions or branches as maximum logical-organizational structures. The law originally intersects with the process of formation and evolution of the state. The law has been formed unconsciously as the result of a psychological process in which the individual reacts to certain external stimuli. At the beginning, the law came under the form of non-unitary chaotic customs or practices. In the second phase, the law, though yet rudimentary, became a conscious action being imposed by a public force. The difference between the public law and the private law results from the fact that private law may be attributed to the structure of society, and the public law may be attributed to the superstructure of society. Even nowadays, the delimitation between the public law and the private law is not clear, because the most numerous legal relations refer both to the general interest and the private interest and, basically, the legal norms contribute to public order as the observation thereof brings social peace.

Keywords: law, public law, private law, legal norms.

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1. Introductory remarks

In the first sense, the word *law* designates the *science of law*, i.e. all ideas, notions, concepts and principles that explain the law and through which the law may be thought.²

The science of law studies the laws of existence, of the development of the State and of law, the political and legal institutions, their concrete historical forms, the correlation with the other components of the social system, how the political and legal institutions influence the society and support, in turn, the social influence.

Considered a normative phenomenon³, the law is an attempt to discipline, to coordinate the social relationships, in order to defend values widely perceived by the society, such as: ownership, legal safety and security of individual freedoms etc.

At the same time, law is⁴ a generalization of the human experience in the legal sector and contains a number of verified and systematized data, a complex of notions, categories, concepts and principles, but also a methodological set, under which phenomena can be studied, investigated, and the science of law analyzes people's participation to the legal circulation, as bearers of legal rights and obligations, with all the consequences incurred, their cooperation in the field of social reality involving the intervention of law to steer behaviors by normative rules in a particular direction.

But law⁵ is not just a science; it is equally technique and art. As a set of rules that organize life in common, the law is a technique of human coexistence, designed to discipline the human behavior and protect society of excesses.

This assembly forms the *objective law*,⁶ the law containing compulsory legal standards addressing to all men, so that society be protected from excesses. Rules of conduct in this case have a general nature, because they address to all subjects of law, either only to certain categories of

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² Alexandru Văllimărescu, *Tratat de Enciclopedia dreptului*, Lumina Lex Publishing House, 1999, p. 39.

³ Mihail Niemesch, *Teoria Generală a Dreptului*, Hamangiu Publishing House, București, 2014, pp. 9-10.

⁴ Nicolae Popa, *Teoria Generală a Dreptului*, Actami Publishing House, Bucharest, 1994, pp.42 and following.

⁵ Ion Dogaru, *Teoria generală a dreptului*, Europa Publishing House, Craiova, 1996, p.5.

⁶ Ion Ceterchi, Ioan Craiovan, *Introducere în Teoria generală a dreptului*, All Publishing House, Bucharest, 1998, pp. 15-16.

them. Also, these rules of conduct refer to the fact that they are compulsory and can be achieved by the coercive force of the State, where they haven't been complied willingly.

The *objective law* includes impersonal, abstract legal rules that do not address to a specific person. The rules of law must find a minimum framework of legitimacy to be the prerequisite of the possible existence of society⁷.

In the history of legal culture numerous definitions of the concept of law have been developed, making a difference between the philosophical concept and the legal concept. Ever since the ancient Roman jurist Celsus, quoted by Ulpian in Book I of Institutions, referring to the categories of morality, said that law is the art of fairness and well - *jus est ars boni et aequi*. Law had not been yet emancipated at the time of the tutelage of morals, its goal being only achieved by observing on the following principles: *honeste vivere, neminem laedere, suum quique tribuere* (live in honesty, do not hurt anyone, give everyone what he owns).

2. The distinction between public law and private law

The distinction between public law and private law has its origins in roman law, the criterion of delimitation being that of interests protected.⁸ Roman law, given its importance, had a great influence on the subsequent development of the legal system of many countries and even of the entire legal thinking. Roman law⁹ has not remained only a document of history, like other ancient legislation, but surpassed, in terms of form, the limitations of the society that created it, exerting a decisive influence on the later law.

The writings of the Roman jurisconsult Ulpianus¹⁰, are among the first who made the dichotomy of Roman law in *public law - jus publicum* and *private law - jus privatum*¹¹, *public law* being defined as the field of legal rules governing the organization of the State, while *private law* was centered, as a set of legal rules, on regulation and protection, on defense of everyone's interest, of the interest of a person as individual in his private life sphere, or those of a legal person within its contractual liberties, businesses, promotion of private groups' interests, obviously within a public order limits and a minimum standard of public morality. For a while this dichotomy of law - in public and private - has been denied in some States. But the division remained, the idea survived, currently gaining new meanings and interpretations.

In the Middle Ages was achieved the preservation of the ancient legal thinking and in particular of the Roman one and law manifests customary differing widely from borough to borough, from city-state to city-state or from a province to another province.

Also during this period the science of law, the law itself has got powerful idealistic, religious connotations. The Christian religion has been the cornerstone of spiritual scientific manifestations. The most imposing figure of those times is the philosopher Thomas d'Aquino. He distinguished between the eternal law - which comes from the divine, the human law and the positive law. Undoubtedly human law and positive law must be in accordance with eternal law.

During the medieval period, spiritual life and philosophy gain a dogmatic and scholastic character. Scholastic education acquires a formal character. During this period thinkers have interpreted the works of ancient Greek philosophers, Plato and Aristotle, according to the Christian dogma and, in particular, the Catholic Apostolic dogma.

The European legal tradition identifies the concept of *State* with the *public* one, although it would be to notice that in private law relations the State presents itself as arbiter of rights and obligations, while in the public legal relations the State is present as one of the subjects of the legal relation in question. As such, whenever the *public law* is reduced to the State, the acceptance of the

⁷ Costică Voicu, *Teoria generală a dreptului*, Lumina Lex Publishing House, Bucharest, 2002, p. 41.

⁸ Mircea Tutunaru, *Drept constituțional*, Editura Scrisul Românesc, Craiova, 2012, p. 12.

⁹ Vladimir Hanga, *Principiile dreptului privat roman*, Dacia Publishing House, Cluj-Napoca, 1989, p. 11.

¹⁰ Emil Molcuț, Dan Oancea, *Drept roman*, Naturismul Publishing House, Bucharest, 1991, p. 5.

¹¹ *Publicum ius est quod ad statum rei sromanae spectat privatum quod ad singulorum utilitate* – public law is that which concerns the organization of the Roman State, and private law is that which relates to the interests of each.

unification in a single legal entity of the attributes of judge and party is reached, which raises many problems in understanding the distinction between *public law* and *private law*. In modern law, the State is regarded as a legal person; and even being a fictitious legal person, legal fiction regarding the State is accepted as operational and capable of solving, pragmatically, a variety of pressing issues.

Like any legal entity¹², the State or may be the right owner both *in rem* and *in personam*, which may constitute precisely a criterion to distinguish the *public law* of *private law*. Starting from here, we might consider that the distinction between public law and private law covers both *procedures*, which are designed to operationalize the resolution of the litigation, as well as the fact that the *defense* and the *complaint* are tools used by the State. The principle that no one can be judge in his own cause is saved and maintained as the representative body of the State as real or fictional subject of rights and obligations is not identical to the body that represents the State as a judge, so, however, there shouldn't be a union of the attributes of judge and party¹³.

Therefore, can say that, being in a debt legal relationship between the creditor and the debtor, the State appears under the guise of private law subject, while in a legal relationship in which the State appears under the guise of administrative authority or court, it, the State shows its guise of public law subject. This is because the State no longer appears as subject of rights and obligations, but manifests visibly and authoritatively its material competence *of applicator of penalties*.

Private law is where the parties are legally at grade, while *public law* is the field of legal relations in which parties play out one in front of the other from a position of superordination or subordination. In public legal relations the State intervenes more vigorously to defend certain values considered essential, while in private law State reserves itself more the task to watch, to arbitrate legal relations between persons on an equal footing¹⁴. The real criterion of the division of law ought to be, as consistent with the logic of law, the classification of the law goal by its subjects in three classes, namely: the individual; the society; the State. Moreover, such a criterion is not absolute, but relative, because each legal institution may have as addressee either the individual or a whole society or the State. Such a criterion implies as previous logic operation, a classification of institutions, and not a classification of forms which, in turn, may have the legal institution.

Savigny¹⁵, and after him Stahl, as a matter of fact inspired by Ulpianus, proposed a teleological system of classification of law, considering that in the public law the State is the purpose of legal regulations, the individual, the person being on a secondary position, while in the private law the person is the goal, while the State is nothing but the means by which a private person achieves personal interests. Savigny also said that State bodies are not entitled to create the law, the law being the product of the national spirit, so that the rules of law can not take the form of law, but the form of the common law, the legal tradition. If, in general, theoretical disputes aimed and continue to aim the criticism of the theoretical foundations of Ulpianus's division¹⁶, it does not mean, however, that legal doctrine also got wise to the uncertainty of the adoption of a division of law in public law and private law, whereas it should be recognized, at the same time, the existence of a *canon law* and an *international law* or a *social law*. It turns up to be a real issue this division of law which is hold under some sign of uncertainty also by the legal doctrine of the second half of the twentieth century.¹⁷

Hence, Roubier had inventoried, immediately after the Second World War, many contrary opinions to the classical division of Ulpianus¹⁸, his opinion being that in addition to the classic division into public and private law, the existence of a *joint law* was taking shape, covering branches of law as *labor law* and *family law*.

¹² Andrei Rădulescu, *Izvoarele Codului Calimach*, Bucharest, 1927, pp. 15-20.

¹³ Hans Kelsen, *General Theory of Law and State*, Cambridge – Massachusetts, Harvard University Press, 1949, p. 203.

¹⁴ Alexandru Florin Măgureanu, *Principiile generale ale dreptului*, Universul Juridic Publishing House, Bucharest, 2011, p. 17.

¹⁵ Erwin Em. Antonescu, *Tratat teoretic și practic de Drept Internațional Privat*, Volume I, Part I, Țăranu&Co Publishing House, Bucharest, 1934, pp. 137-144.

¹⁶ Ulpianus, 68, *Ad Edictum*, D, 43, 8, 2, 21.

¹⁷ Pierre Pescatore, *Introduction à la science du droit*, Luxembourg, Office des Imprimés de l'Etat, 1960, pp. 39 and following.

¹⁸ Paul Roubier, *Théorie générale du droit (Histoire des doctrines juridiques et philosophiques des valeurs sociales)*, Paris, L.G.D.J., 1951, p. 295.

For example, if the principle of distinction between public law and private law accounts for the concept of *patrimony* then there is the situation of theoretical and methodological doubts because if private law has as main feature the patrimony, it should be noted that the public law has also some definite elements of patrimony, as for example, the domain or taxes legally owed by persons to the State etc. Or if it is considered as a criterion of distinction between the two divisions the *coercivity of law*, a specific character of public law - rules of *ius cogens*, it must be admitted that such a criterion is ambiguous, because such rules are also found in the private law, the rules of *ius dispositivum* in the private law obeying, however, to some rules of *ius cogens* also existing in the private law field. So Paul Roubier warned that “the controversy field on the principle of distinction between private law and public law is confined mainly to the controversy between the two theories called, one, the *theory of interests* and the other the *theory of subjects*”. In the doctrine, in differentiating the two divisions of law, it was shown that public law is subject to legal positivism mainly, while private law contains important projections of the natural law¹⁹.

The same view is reflected from professor Pescatore²⁰ who considers, on the one hand, that private law is far from focusing exclusively on the private interest, and on the other hand, the public law has a predominant place even in the private law, so it is almost impossible, at least nowadays, to delimitate *private law* by *public law*, so possibly it should be allowed at least one tripartite criterion of law division, to include, along with public and private law, the economic and social law.

3. Conclusions

In summary, the division of the system of law in public and private law is the largest division of law and considerations that were made in the course of history on this division, as well as current trends of division, result in highlighting the dynamic nature of the law system, the continuous trend of improving the form and content of the law and the emergence of new branches of law such as: environmental law, social insurance law, European Union law, space law etc. Although the division of law is made in these two great branches, currently no fixed limits can be established between public law and private law, implicitly between general and particular interests, because legal phenomena of States are related and interact quite closely, and is quite difficult to make a distinction of the starting of the public interest and the cease of the private interest. The history of law, as its genesis, is inextricably linked to the history and genesis of peoples in that, as peoples' lives are changing through the centuries, so the law, as a branch of this life, is changing also over time, it is developing along with the people to whom it belongs and adapts in its various stages of development. Compliance with the law in all its forms is primarily for the convenience of the society as a whole, as a society would not exist without standing on the law. Consequently, it can be argued that the difference between the two major branches, public law and private law, is based solely on the idea of interest, which is the most relevant in legal standards for the State and for individuals. Both public law and private law have the same interest for the State and for individuals.

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¹⁹ Claudiu Ramon Butculescu, *Considerații privind influența culturii juridice asupra codificării în România, în perioada 1864-2009, în volumul Știință și Codificare în România*, Universul Juridic Publishing House, Bucharest, 2012, p. 368.

²⁰ Paul Pescatore, *op. cit.*, pp. 40-42.

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