SOME HISTORICAL CONSIDERATIONS ON THE DIVISION OF LAW INTO PRIVATE AND PUBLIC LAW

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Abstract

The division of public and private law constitute the basis of the systematization of law where public law is the field of legal rules governing the existence and the organization of the state and private law is centered, as a set of legal rules, on regulating, protecting and defending the individual interest, in the interest of the person as a participant in the scope of their private life, or of a legal person within the scope of its contractual freedoms, of business, of promoting the interests of private groups, obviously within the limits of public order and a minimum standard of public morality. Democracy - the power of the people - is characterized by a very rigorous order of law and legal order where the science of law organizes and disciplines social life, based on the fundamental principles of law - the principle of ensuring the legal bases for the operation of society, the principle of equality and freedom, the principle of responsibility, and the principle of fairness and justice. In the course of history, law has been divided into private and public law, taking as a basis certain social, political and economic considerations, specific to certain periods of the transformation of society

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The notion of public and private law

In the entire European legal tradition, the concept of *state* is identified with the *public*, although it should be noted that within the relations of private law, the state is presented as the judge of the rights and obligations, while in the legal relationships governed by public law the state is presented as one of the subjects of the legal relationship in question.

As such, whenever *public law* is limited to the *state* we get to an acceptance of merging into a single legal person the attributes of *judge* and *party*, which raises many problems in the rational understanding of the distinction between *public law* and *private law* (Kelsen, 1949: 202).

The separation of the two types of law is right from the beginning of law and, as normal, the Romans were the first to define the two types of law: *publicum ius est quod ad statum rei romanae spectat, privatum quod ad singulorum pertinent utility* which in the approximate translation would be that

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the public right is when he is in the service of the Roman empire, private when serving the interests of the individual in part. This definition is still present today because it makes the clearest distinction between the two branches in function of the interests of whom they defend and to whom they apply: the individual as a stand-alone entity or society as an ensemble of individuals.

In modern legislation (Niemesch, 2014: 43), the state is considered a legal person; and even as a fictitious legal person, the legal fiction regarding the state is accepted as being operational and able to resolve, in a pragmatic way, a multitude of pressing matters.

The state (Mihai, 2008: 57), as any legal person, is or may be the holder of rights *in rem* and *in personam*, which might just constitute a criterion in distinguishing *public law* and *private law*. Starting from here, we might consider that the distinction between public law and private law affects both the *procedure*, as well as the fact that the *defense* or the *complaint* are tools used by the state.

The principle that nobody can be the judge in his own legal case is saved and retained, because the organ which represents the state as the subject, even a fictitious one, of rights and obligations is not identical to the organ that represents the state as a judge, and as such, there would not be a *merging* of the attributes of judge and party to a legal case.

Consequently, in the first instance, it can be said that the state, being in a legal relationship of debt between the creditor and the debtor, shall appear under the mask of a subject of private law, while in a legal relationship in which the state appears under the mask of administrative authority or court of law, it, the state, wears its mask of subject of public law. And this is because the state no longer appears as the subject of rights and obligations, but visibly and with authority shows its material competence as *applier of sanctions*.

Private law is the field in which the parties are placed on positions of legal equality between them, while public law represents the field of the legal relationships in which the parties are in a position superordination or subordination to one another.

It might also be asserted in a more nuanced way that private law may constitute the favorite field of legal relationships in which any party to the relationship is in a position of legal equality to the other party, with only the *state* (Butculescu, 2017: 101) being in a position of superiority to the other parties of the relationship.

In Rudolf Jhering's opinion, the real criterion for the division of law ought to have been, being in accordance with the logic of the law, the classification of the scope of the subjects of law into three categories, namely: the individual; society; the state (Jhering, 1877: 452).

As a matter of fact, for Jhering, such a criterion is not absolute, but only relative, because each legal institution may have as the recipient either the individual or society as a whole, or the state, an example in this respect

would be that property, as a legal institution, may be either private property, or social property, or public property. Such a criterion requires a previous logical operation, a classification of the institutions, and not a classification of the forms which a legal institution may successively take.

As a matter of fact, Savigny, regarding Ulpianus's theory, criticized the fact that it had not explained, and no one after him had raised this problem, how the state can frequently become the subject of legal relationships? Whenever the state concludes a legal document for the sale, lease, etc., it, the state, is *a purpose, and not a means*.

Any legal document, in its implementation, has a certain finality, is concluded with a view to achieving a purpose, and the State, therefore, does not appear as a means. This criticism is based on finding another possible criterion of dividing law according to the dual category of purpose, namely the *immediate purpose* and the *final purpose*, in the sense that the final purpose of any law is human personality. However, a human person can be an *immediate purpose* of a legal relationship, which places it in the field of private law, just as society or the state can be an *immediate purpose* in a legal relationship, which places them in the field of public law.

In such an opinion, what vary are just the *means* to achieve the purpose. Whenever the difference consists in that, in private law, the purpose is achieved through individual determination, while in public law it is performed in its final determination (Craiovan, 2007: 467-469), and only in accordance with such means we can distinguish between a public and a private law, because, if we refer to the *final function*, to the *purpose*, there would be an identity of essence between the public and private.

Or the main distinction would consist in that if in private law the purpose is achieved by an individual determination, in public law it is achieved by the collective action of the society in question, as a whole. (Rousseau, 1957: 101)

Savigny proposes a teleological system of classification of law, considering that in public law, the state is the purpose of legal regulations, the individual, the person, being in a secondary position, while in private law the person is the purpose, while the state is nothing more than the means by which a private person seeks to achieve its interests.

The opinion that the distinction between public and private law does not have a theoretical basis was more interesting, being a justifiable opinion if it takes into account applying this doctrine only to the case of Russia where legal relationships were not determined by Roman law. For this author, private law contains normative institutional parts that differ totally from each other, but that make up, however, private law because they have thus been arranged and transmitted by the Romans.

Those different parts which have some unity, having rules which somewhat originate from the same sources of law, have been combined by the

Romans under the name of *civil law* (*ius civile)*. Rejecting the division of law as proclaimed by Ulpianus, Kaweline proposes a classification but also a division of law, considered by him as being more rational and, at the same time, simpler, starting from the distinction between *patrimonial rights* and *other rights*.

As such, for this author, modern civil law would be defined as all the rights that affect the assets of natural or legal persons. Two consequences would arise by adopting such definitions: any legal relationships that do not have a patrimonial character would be excluded from the scope of civil law; family legal relationships do not belong to civil law.

Civil Law, including all the legal relationships that affect, in one way or another, the assets of the person, it would result that many of the legal relationships that are traditionally classified in the scope of public law should be regarded as being within the scope of civil law.

An example in this respect would be that in which the financial and fiscal legal relationships relating to taxes and duties, or those which concern the administrative sanction of *fine*, or those relating to pensions.

Kaweline's conception is criticizable, whereas it leads to arbitrary distinctions and, at the same time, fails to explain what exactly public law would include by determining the scope and content of such a division. (Kaweline, 1864: 32)

Korkounov criticized Arens's classification as insufficient as regards the argumentative field offered for support, stating that:

Ahrens's theory, as well as the theories of Savigny and Stahl, do not explain how the state can frequently be the subject of purely civil private legal relationships;

Ahrens forgets that legal protection, whatever the interests concerned, involves the collaboration of the entire society, and not just the singular determination of the individual. (Korkounov, 1971: 281)

If, in general, the theoretical disputes have affected and affect the criticism of the theoretical bases of Ulpianus's division, that does not mean, however, that the legal doctrine has not noticed the uncertainty of adopting the division of law into public law and privatelaw, since the existence of a canonical or ecclesiastical law, as well as that of *international law* also has to be recognized. A problem of this bipartite division of law which the legal doctrine of the second half of the 20th century also places under uncertainty.

Thus, Professor Paul Roubier (Roubier, 1951: 293 and next) had identified, immediately after the Second World War, at least 17 views contrary to Ulpianus's classic division. Thus, for example, if the principle of the distinction between public and private law is the concept of *asset ownership*, (Pescatore, 1960: 39 and next) then we are faced with theoretical and methodological doubts, whereas, if the private law has as its main characteristic assets, it should be noted that public law also contains some

elements of asset ownership, an example in this respect being the field or the taxes legally due to the state by persons, etc. (Terre, 1001: 64). On the other hand, if a criterion for the distinction between the two divisions is considered to be the *coerciveness of law*, a characteristic specific to public law - the rules of *ius cogens*, in which case it must be conceded that such a criterion is dubious, since such rules are also encountered in private law, the rules of *ius dispositivum* of private law are, however, subject to certain rules of *ius cogens* also present in the field of private law.

Thus, Paul Roubier (Roubier, 1951: 295) drew attention to the fact that this field of the controversy relating to the principle of the distinction between private law and public law is mainly limited to the controversy between two theories, one called, *the theory of interests* and the other *the theory of subjects*.

Or, in another of Pescatore's opinions, private law is a long way away from focusing exclusively on private interest, on the one hand, and on the other hand, public law also plays a great part in private law, so that it is almost impossible, at least nowadays, to separate private law from public law, so that, probably, at least one tripartite criterion for the division of law should be allowed, in order to include, along with public and private law, economic and social law.

And maybe it should be understood that such a distinction, which in any case is not a *summa divisionis*, only has a methodological role, serving to legal education as well as to the science of law.

Conclusions

Therefore, more than 2000 years later from the famous division of law which was made by Ulpianus between what is *public law* and what is *private law*, it can be concluded that such a distinction still constitutes the basis for the systematization of law today. In such a tradition, apparently unquestioned or unquestionable, and taking into account that the division declared by Ulpianus is generated by the indisputably individualistic character of Roman law, public law is the field of the legal rules governing the organization of the state, while private law is centered, as a set of legal rules, on the regulation and protection, on the defense of the interest of each individual, in the interest of the person as an individual within the scope of its private life, or of a legal person within the scope of its contractual freedoms, of business, of promoting the interests of private groups, obviously within the limits of public order and a minimum standard of public morality.

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