



Axiological and philosophical perspectives of distinguishing private law (against the back-ground of public law)

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Abstract. The article presents the philosophical concepts and axiological foundations that affect the understanding of the concept of private law and also justify the orderly distinction in the legal system between private and public law. In particular, the considerations contained in the following work answer the question of how universal philosophical and humanistic concepts, as well as principles and values such as human dignity and freedom, for example - influence the modern legislator and the understanding of private and public law. The authors also establish how philosophical and axiological criteria affect the relationship between private and public law, in particular, how such criteria, in the processes of interpretation and application of law, allow the construction of a coherent and complementary "legal order."

Keywords: private law, public law, freedom, will autonomy, equity, justice.

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1. OBJECT (SCOPE) AND PURPOSE OF THE DELIBERATIONS

The following remarks focus on the importance of selected axiological and philosophical foundations and concepts that in a certain way influence the understanding of private law and at the same time justify the distinction between private and public law within the entire legal system. Our deliberations are intended to allow us to express our opinions on two issues: first, to what extent pre-legal, including pre-constitutional, principles and values (e.g. human dignity and freedom), as well as universal humanistic and philosophical concepts influence the contemporary legislator and the understanding of private and public law; and second, what effect this has on the relationship between these parts of the legal system, how axiological and philosophical criteria allow, e.g. in the process of

interpretation and application of law, to build a coherent and complementary “legal order,” shaped by norms of private and public law.

2. PRIVATE LAW VERSUS PUBLIC LAW - CRITERIA AND NEED FOR DISTINCTION

As part of preliminary findings, it must be assumed that a legal system is an orderly set of legal norms established by the state within the framework of a proper procedure and division of competences, characterized by formal completeness and coherence. Non-legal rules, included in its composition through the so-called general clauses, may also constitute components of such a system. The legal norms that make up such a system are consistent with each other vertically, as they are ordered hierarchically (e.g., according to Article 8(1) of the Constitution of the Republic of Poland, “The Constitution is the supreme law of the Republic of Poland”), while horizontally they are ordered according to the division of the object and method of regulation, as the legal system is divided into branches (e.g., civil law, administrative law, criminal law, etc.) (Wronkowska, 2005, p. 104). At the same time, the legal system is also characterized in jurisprudence by distinguishing the concepts of private and public law, which are called “supra-branch divisions of law” (Rot, 1976, p. 23); civil law is considered to be the principal component of private law that determines its essence and main features, while in the case of public law such a role is assigned to administrative law. The distinction between private law and public law as components is fundamental to such an extent that it affects the essence of the purposes, methods, and ranges of objects of regulation of the principal branches of law that make up the legal system (Radwański, 2005, p. 31).

The division into private and public law, which is present in the Polish legal system today, has its universal and local inspiration in Roman law; it has been written about the law in force in the territory of Poland in the 19th and 20th centuries that it found itself “in the magic circle of Roman law.” (Stelmachowski, 1998, p. 46). The rules of Roman law have been incorporated into Polish law through the codifications of Austria (ABGB), Germany (Prussian Landrecht and BGB), and France (Napoleonic Code). The aforementioned codes became the carriers of Roman law in its so-called “third incarnation”; in its first incarnation, it was in force in the period of the Roman Republic and the Roman Empire, and the second incarnation was its adoption during the Middle Ages in the territory of the Holy Roman Empire of the German Nation.

Originally, the division of law into private and public was based on the criterion of source; laws adopted by popular assemblies were called “*lex publica*,” while contract clauses agreed upon by equal partners fell into the category of “*lex privata*.” The times of Cicero brought a new perspective in the organization of the legal system: in that period, law was divided according to the object of regulation; public law, or constitutional law, which was related to the state system (*status rei publice*), was distinguished from regulations adopted by way of legal actions in equivalent relations between private persons, which benefited only those persons. *Ius publicum* was intended to protect the interests of the community as a whole, while *ius privatum* contributed to the protection of the interests of individuals, except that in case of a conflict between the protected interests, priority was given to *utilitas publica* (Prutis, 2018, p. 25-26); the public interest was a counterpoint to the subjective rights of individuals.

It follows from the above that the distinction between private and public law has an impressive history, dating back to antiquity (Duniewska, 2010, p. 152), while, in modern times, it has been based on the approval of certain values and a certain philosophy of law and socio-political ideology (Nowacki, 1992, p. 132). For example, in the promotion of the concept of private law, one can see a method of affirmation of the autonomy and freedom of the individual (person), while in the promotion of the concept of public law, one can see an efficient state (public) authority (Duniewska, 2010, p. 153). Let us just mention that the most important concepts formulated in science in order to distinguish law into private and public are as follows: theories of interest; theories of subject and object of regulation; theories of method of legal regulation; theories of tasks; theories of proponent of good; theories of will or initiative of the parties; theories of public authority or subordination; theories of legislative technique, function

of law, and distinctiveness of laws; theories of tradition; theories of courts' jurisdiction; theories of sanctions; and numerous mixed theories (Fundowicz, 2000, p. 52).

The distinction between private and public law should be considered as beneficial, because it allows to systematize all the law in force in a state, to describe the nature of legal norms and methods of legal regulation, to distinguish between legal sanctions and legal protection methods, and to systematize the subjects of legal relations and their legal powers (Włodyka, 1995, p. 7). Although the advisability of distinguishing between the concepts of private and public law is sometimes challenged, this procedure should be considered as useful. The main reason is that it shows the differences in the essence and function, and the method of regulation of social relations by the different branches of law (Zimmermann, 1964, p. 16); it also shows the differences in the essence, method, and objectives of action of different legal entities (private persons, public entities) (Nowacki, 1992, pp. 50-69).

The distinction between private and public law also makes it possible to show the values and philosophical and legal ideas that constitute the axiological and ideological basis for the establishment, interpretation, and application of specific legal norms. A feature of public law in general is regulation of the activities of the state and other public entities, and people as citizens - in their relations with the state. In private law, the subjects of legal relations are equal and autonomous with respect to each other, and private-law regulation is aimed at protecting private, individual property and personal interests. In public law, on the other hand, the individual is subordinated to the subject of authority and the latter acts in the public interest, in the interest of the entire society, seeking to implement and protect values that are common to the entire society (Duniewska, 2010, p. 156). Private law, in the name of individual interests, organizes mutual relations of individuals, while public law, in the name of the collective interest, organizes the relations of individuals as citizens ("members" of the state) and the mutual relations among states (Nowacki, 1992, p. 9). In private law, the content of legal relations is, as a rule, shaped by the parties themselves, mainly by contract; in public law, on the other hand, there is a more powerful entity (*potentior persona*) that unilaterally establishes the rights and obligations that make up the content of the legal relationship and has the power to use coercion to enforce them (Radwanowicz, 2007, p. 131). A legal relationship shaped on the basis of the norms of public law assumes a superior dependency between the parties, while in the case of a civil-law (private-law) relationship, such a dependency does not exist (Rajca, 2001, pp. 76-77). Unlike private law, public law concerns public tasks performed by public entities (Łączkowski, 1999, p. 15). Private law is not "task-oriented" and does not mandatorily set goals to be achieved, but creates opportunities for action through (subjective) rights. Public-law norms determine the powers and duties of administrative authorities towards individuals, while private-law norms regulate the rights and duties of individuals towards other individuals. Interestingly, by taking advantage of provisions of private law, the administrative authority, e.g., acting as the owner of state property, equates itself with an individual and "descends to the role of a private entity." (Peretiatkowicz, 1947, p. 10).

It should be emphasized that in modern literature the method of operation of law, i.e. the manner of shaping of legal relations and legal situations, is considered to be the main criterion for distinguishing the concepts of private and public law, as well as an important feature of legal relations and the subjects of the regulation of such qualified legal norms. The private-law method relies on the predominant equality and autonomy of the subjects, while the public-law method relies on the predominance of sovereignty, supremacy, and subordination. Importantly, each method of regulation of social relations is determined by certain axiological assumptions, particularly those expressed in the principles of a particular branch of law. However, there is no complete separation: in the domains of relations regulated by civil law and administrative law alike, the methods indicated above do not operate on an exclusive basis (Łętowska, 1999). Moreover, there is even a kind of convergence of methods of legal regulation (Prutis, 2010, p. 495) and also public-law subjects can be parties to legal relations shaped on the basis of relative equivalence and autonomy. From a different perspective, the phenomenon of publicization of private law, which is defined as the process of moving away from the assumptions of classic civil law (e.g. from the *pacta sunt servanda principle*) (Safjan, 2007b, p. 47), is noted in the science of law. Such remarks can be put in the form of the conclusion that "The public sphere is never fully public, just as the private sphere is not only fully private. Public law, together with private law,

creates institutions regulated jointly by the overlapping provisions of both segments of law (...)”(Duniewska, 2010, p. 159). To put it slightly differently, three legal spheres regulating the activity of public administration can be distinguished: the first is treated as the sphere of exclusive application of administrative law, the second - as the sphere of exclusive application of civil law, and the third - as the border sphere, a sphere of “intersection of both legal regimes” (Langrod, 2003, p. 59).

3. PRINCIPLES AND VALUES OF PRIVATE LAW

It should be noted that the specific content of the provisions of continental private law, shaped within the circle of concepts and structures of Roman private law (Rozwadowski, 2012, Dajczak *et al.*, 2012; Kupiszewski, 1988, Kuryłowicz 2001; Wołodkiewicz, 1978; Wołodkiewicz, 1987), has changed significantly over time (Stelmachowski, 1998, p. 46), especially under the influence of the demand current in the specific political and socio-economic system for the functioning of independent and autonomous legal entities (Prutis, 2018, p. 18). However, private law, as an element of European civilization and culture, is invariably based on a universal, timeless system of values (Wilejczyk, 2014, p. 111). The role of the system of values is to rationalize the law in force and to legitimize it to the addressees of legal norms; a certain system of values thus has a directional influence on the interpretation and application of law; axiology is in this sense the foundation of law, in particular civil law (Żuławska, 1999, p. 9).

As far as a more detailed description of the aforementioned system of values is concerned, one should first of all point to the ideas that once formed the foundations of Roman private law, in which modern private law, including civil law, is rooted. Of particular importance are the idea of law being the basis of social order (*ius*), the ideas of justice and equity (*iustitia et aequitas*), and finally the idea of knowledge (science) of the law and experience in its application in a way that guarantees the implementation of justice and equity (*iurisprudentia*) (Zajadło, 2019, p. 65; Brodecki & Kowalczyk, 2016, p. 101). From the modern perspective, it can be noted that the values and ideas that constitute the basis of the system of today's civil law are defined by the concept and content of the fundamental principles, which are the basic source for interpretation of the legal values of that branch of law (Prutis, 2018, p. 85). The momentous functions of civil-law principles become particularly apparent in the processes of interpretation and application of the law (Safjan, 2007a, p. 3; Wronkowska *et al.*, 1974; Kordela, 2012). The very principles of law in the system and culture of positive law are usually the result of the interpretation of the provisions of the law in force, but they are also formulated by reconstructing the basic assumptions, values, and ideas underlying the specific system of law, or the system of the specific branch of law (Leszczyński, 2016, p. 13). The principles of civil law are thus the result of a kind of generalization of the basic constructs adopted in civil law, which are accompanied by a similar axiological idea or assumption (the implementation of a moral standard) (Bierć, 2012, p. 39). Thus, the principles of civil law express the most important trends and directions of the adopted regulations, taking into account their historical development and legal traditions, as well as established legal views and beliefs, and their main feature is that the reconstruction of the principles and the functions played by them are a part of the universally recognized elements of the axiology of the system of law (Mojak, 2016, p. 148).

It follows from the above that a reconstruction of the basic principles of private law, carried out by way of generalization of specific provisions of law and accompanied by a search for common values or ideas, requires prior identification of the axiological assumptions of a specific branch of law (e.g. civil law). When determining the principles of the basic branches of law, reference to constitutional principles relevant to the underlying statutory constructs also plays an important role (Radwański & Olejniczak, 2015, p. 16; Safjan, 2007b, p. 320). Specific values and ideas that are the justification for, and object of, protection under a detailed statutory regulation of legal relations also underlie the principles of private law, including in particular the principle of autonomy of will, the principle of protection of the dignity of every human being, the principle of implementation and protection of private interests through the construct of a subjective right, the principle of certainty and security of transactions, and the principle of implementation of equity by private law. The factors that make up the axiology of private law, by influencing the

nature and functions of specific normative solutions, are at the same time the reason for the adoption and explanation of the meaning of a specific general principle, as a general basis for the formation of the so-called private-law relations. The general principles of private law reconstructed by the doctrine have their normative dimension, including constitutional, pragmatic, but also axiological.

As regards the role and significance of the principle of autonomy of will (Stelmachowski, 1998, p. 35, 37), it can be pointed out that the nature of private legal relations and the essence and function of their legal regulation consists in striving to form individualized legal relations in transactions between equal and independent subjects having the power to decide on the manner of implementation of their own legally protected interests (Prutis, 2018, p. 88; Radwański, 1977, p. 110). Thus, the essence of the principle of autonomy of will (autonomy of subjects of private law) is an injunction addressed to the legislator and the bodies interpreting and applying the law to ensure that every subject of private law is free to shape his or her own legal situation by making free (unconstrained) choices (Bierć, 2012, p. 41). The normative justification of the principle of autonomy of will can be found in particular in Article 56 and Article 353¹ of the Civil Code. Specific legal constructs based on the principle of autonomy of will are a tool for the implementation, in the sphere of private-law relations, of important moral values, such as the freedom and subjectivity of every person, the possibility to decide for oneself in private and family life, and the dignity of every person (Grochowski, 2020, p. 3; Kaczor, 2001, p. 1). Thus, private law consists of regulations that serve to reflect and implement individual interests in private-law transactions, assuming a search for compromise and a degree of balance between the divergent and intersecting interests of autonomous subjects and their responsibility for their obligations.

In essence of the principle of protection of the dignity of every human, it is recognition and protection of the personality (subjectivity) of every human being to the same extent. The institution in which this principle manifests itself is the legal capacity of every person, i.e. the attribute of legal subjectivity in private legal relations and the capacity to perform legal acts, which consists in the ability to independently perform legal acts. The principle in question also has its normative justification in the provisions that govern the protection of personal interests, i.e. non-property values closely related to the human being, his or her physical integrity, and the sphere of mental life covered by privacy (Doliwa, 2012, p. 7). The moral confirmation of this principle is the value, separate from the autonomy of will, of respect for the subjectivity and dignity of every human being (Wilejczyk, 2014, p. 98).

Also the principle of implementation and protection of private interests through subjective rights has an important axiological context. Autonomous subjects of private-law relations, through the construct of subjective rights, implement their freedom, individual identity, and independence of their decisions as to the manner of performance of their legal actions and use and disposal of their property and non-property interests (Safjan, 2007b, p. 340).

On the other hand, the nature and importance of the principle of certainty and security of transactions is determined by reconstructing the values implemented by many key institutions of private law. At issue in these cases is the importance of trust in the state and its laws. The protection of trust, as the foundation of the principle of security of transactions, implies a general prohibition on violation of basic moral rules in legal transactions (Prutis, 2018, p. 104). The principle is based on such values as certainty and predictability of the law in force, and thus certainty about one's own legal situation and the related possibility to rationally arrange and conduct one's own affairs (Machnikowski, 2010, p. 48).

Last but not least, the principles of private law include the principle of equity (Prutis, 2018, p. 113), also referred to as the injunction to respect equity in private-law relations (Safjan, 2007b, p. 353). It should be noted that the foundation of the entirety of private law is the idea of implementation of, or respect for, equity through specific legal constructs and provisions of law. The civil-law principle of equity expresses the regularity that all private-law institutions aspire to be equitable and therefore morally just solutions (Wilejczyk, 2014, p. 102). It is about a search for an equitable law for each particular case, for a specific relation between positive law and morality (Doliwa, 2014, p. 89).

All the above factors, principles, and values influence the interpretation and application of private law understood as a special method of regulation of social relations (Stelmachowski, 1998, p. 35) towards their normalization as legal relations (property and personal) between subjects equipped with the attribute of autonomy of will, with the assumption of striving to shape their equal position (Prutis, 2018, p. 58).

4. PHILOSOPHICAL CONCEPTS AT THE FOUNDATION OF PRIVATE AND PUBLIC LAW

We mentioned above that the source of such ideas as the idea of legal order (*ius*), justice and equity (*iustitia et aequitas*), and knowledge of the rules of application of law that guarantee the implementation of justice and equity (*iurisprudentia*) was Roman law. It should be added that these concepts were developed earlier in the writings of Greek philosophers and penetrated Rome through the philosophy of the Stoics. One evidence of such influence is a passage in the Digests that quotes Chrysippus, the most important among the Stoics: "Law is sovereign over all divine and human affairs. It ought to be the controller, ruler, and guide of good and bad men alike, and in this way to be a standard of justice and injustice and, for beings political, by nature a prescription of what ought to be done and a proscription of what ought not to be done" (The Digest of Justinian, D.1.3.2). According to the above quotation, law is the ground for the formation of morality and is primary to it. The ethical dimension of law in ancient Rome is summed up by Celsus' maxim cited by Ulpian: law is the art of application of what is good and right (*Ius est ars boni et aequi*). Ulpian is also credited with defining the concept of justice - in his opinion, it is a fixed and unchanging will to grant everyone his or her due right (entitlement). The Roman jurist's achievements in the field of ethics also include the definition of the law's precepts concerning ways of life: "The basic principles of right are: to live honorably, not to harm any other person, to render to each his own" (D.1.1.10.2) - these precepts flow from the need to ensure justice.

Equity and justice are concepts to which Roman jurists refer particularly often; in their approach, they mean the "spirit of law" and the reflection of the ideal law of nature. These concepts, adopted by Roman law from Greek philosophy, were often invoked for practical purposes as an element that mitigates the rigor of positive law. Consequently, it should be noted that, according to Aristotle, justice, which is the culmination of all virtues, is present in a situation where relations between men are regulated by law (Prutis, 2018, pp. 29-33); the judgment of a court is the determination of what is just and what is unjust. "For justice exists only between men whose mutual relations are governed by law; and law exists for men between whom there is injustice; for legal justice is the discrimination of the just and the unjust. And between men between whom there is injustice there is also unjust action (though there is not injustice between all between whom there is unjust action), and this is assigning too much to oneself of things good in themselves and too little of things evil in themselves. This is why we do not allow a man to rule, but rational principle, because a man behaves thus in his own interests and becomes a tyrant. The magistrate on the other hand is the guardian of justice, and, if of justice, then of equality also" (Aristotle). The Stagirite defines the relationship between justice and equity as follows: that which is equitable is admittedly just, however, not in the sense of established justice. This is due to the fact that all law is general, while some things cannot be accurately judged in a general way. If, therefore, a law stipulates something in general terms and there happens to be an accident that is not covered by that stipulation, it is equitable that, where the legislator has omitted something and has made a mistake through a general formulation, it should make up for the deficiency by ruling in the same way that the legislator would rule if it was present at the decision and as it would rule itself if it had known the accident in advance. "When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission - to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice - not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is

defective owing to its universality. In fact this is the reason why all things are not determined by law, that about some things it is impossible to lay down a law, so that a decree is needed” (Aristotle). Aristotle was the first to observe that general rules, in view of the vastness and diversity of human affairs, are not applicable in every possible case and that sometimes it is necessary to look at each case individually. The philosopher's belief in the unique superiority of equity over justice was adopted by Roman jurists: *aequitas*, derived from ideal natural law, became a pillar of the law-making activity of the praetor who invoked it when civil law needed supplementation or correction.

The concept of *aequitas* was also introduced into the Christian tradition by St. Thomas Aquinas. He distinguished three kinds of laws, three legal orders: eternal law, natural law, and positive law (Szlachta, 2008, pp. 136-137). In the spirit of Aristotle, Aquinas wrote about the superiority of equity derived from the first two systems over the order of positive law and considered it a kind of guiding principle (Stelmachowski, 1998, p. 111). In his opinion, equity plays the role of a mechanism that corrects positive law so as to implement justice where it would lead to injustice. “Even as unjust laws by their very nature are, either always or for the most part, contrary to the natural right, so too laws that are rightly established, fail in some cases, when if they were observed they would be contrary to the natural right. Wherefore in such cases judgment should be delivered, not according to the letter of the law, but according to equity which the lawgiver has in view. (...) In such cases even the lawgiver himself would decide otherwise; and if he had foreseen the case, he might have provided for it by law.” (St. Thomas Aquinas). It is through the writings and high authority of St. Thomas that the legacy of antiquity's concept of equity has had a remarkably vivid impact on legal thought not only of the Middle Ages but also of modern times (Prutis, 2014, p. 207).

5. SUMMARY AND CONCLUSIONS

In conclusion, it should first of all be stated that the foundation of all law are the concepts, cited above and having its origins in Greek philosophy, Roman law, and the Christian tradition, of justice and equity. In the current state of the law in Poland, in the context of its constitutional identity, it should also be emphasized that the axiological and ideological foundation of the Polish legal system is formed by the principle of a democratic state, the rule of law, and the principle of social justice. In the context of the distinction between private and public law, in the light of the above considerations, it can be said that justice and equity of law is the pursuit of a balance between individualism and social reason, and a tool for correction of private egoism in the direction of social solidarity. While private law creates opportunities for an independent pursuit of needs and interests, public law protects the weaker members of the society in this respect, and justice and equity play a similar role in both spheres of law.

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