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The case of Blanco: Epoch-making ruling vs. general law doctrine. The public–private divide in historical context

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Abstract: The article presents a brief characterization of the two main ways in which the public–private divide is understood in today's European law. First, it explains the genesis of the public–private divide using a historical context to show when and how law as a whole was divided into "two separated worlds." Subsequently, according to general law doctrine, the author tries to show that there is no significant difference between the "private" and the "public" due to the nature of law which is actually the same. The article also points to the famous and still valid 19th-century French case of Blanco, which was a turning point in thinking about law as "public" or "private" and its consequences. In fact, this short characterization attempts to show a historical approach to the public–private divide and it addresses the main question of whether the public–private divide is still a relevant division (or perhaps better a relevant distinction) in legal and in regulatory practice and whether it makes sense to continue to research legal phenomena based on the presumption that "public" and "private" represent truly distinctive normative orientations. This text tries to propose an open approach focused on thought-provoking statements presenting a wider than only legal research point of view, which is more promising than the conventional discussion on the public–private divide.

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Sprawa Blanco — epokowe orzeczenie a doktryna prawa ogólnego. *Public–private divide* w kontekście historycznym

Abstrakt: W artykule przedstawiono krótką charakterystykę dwóch głównych sposobów rozumienia *public–private divide* w aktualnym prawie europejskim. Po pierwsze, wyjaśniono genezę *public–private divide*, używając kontekstu historycznego, aby pokazać, kiedy i jak prawo jako całość zostało podzielone na „dwa oddzielone światy". Następnie, zgodnie z doktryną prawa ogólnego, starano się wykazać, że nie ma znaczącej różnicy między tym, co „prywatne", a tym, co „publiczne", ze względu na naturę prawa, która jest rzeczywiście taka sama. Autor wskazuje również na słynną i wciąż aktualną dziewiętnastowieczną francuską sprawę *Blanco*, która jest punktem zwrotnym w myśleniu o prawie jako „publicznym" lub „prywatnym" i jego konsekwencjach. W rzeczywistości ta krótka charakterystyka ma pokazać historyczne podejście do *public–private divide* i stawia autora przed głównym pytaniem: czy *public–private divide* nadal jest odpowiednim (a może lepiej — rozróżnieniem) w praktyce prawnej i regulacyjnej i czy sensowne jest kontynuowanie badania zjawisk prawnych z założenia, że „publiczne" i „prywatne" reprezentują prawdziwie wyróżniające się kierunki normatywne? Autor stara się przedstawić otwarte podejście skoncentrowane na prowokujących do myślenia wypowiedziach prezentujących szerszy niż tylko prawno-naukowy punkt widzenia, co jest bardziej obiecujące niż konwencjonalna dyskusja na temat *public–private divide*.

1. Introduction

From very practical reasons the temptation to divide law into branches, areas etc. seems to be understandable, but conducting this in an appropriate way is much more problematic. What can we call public law and what establishes its element of publicness, distinguishing it from private law? Such deceivingly simple questions are of central importance to current legal problems and also receive lots of attention in legal doctrine. Today we have plenty of law division theories diversifying law due to specific types of interests, types of legal relationships, differences in the situation of addressees of the law, separate features of legal norms in these two branches of law, ways of compensating violated entitlements, etc.[1] Despite this we are still unable to conclusively decide which legal norm is 'public' and which is 'private'. It is still impossible to set up an explicit boundary between public law and private law. Areas of public and private law cannot be strictly and completely separated neither in legislation nor in science.[2] From the legal theory point of

[1] More on ways of distinction the public sphere from the private sphere and its historical context, see: J. Helios, "Publicyzacja prawa prywatnego — prywatyzacja prawa publicznego w kontekście rozważań nad prawem europejskim," *Przegląd Prawa i Administracji* 92, 2013, pp. 11–36. It is also worth noticing that attempts to delimit public law and private law are still being made. Last (but, however, seems to be, unsuccessful) try to prove the claim of similarity between public law and private law by I. Zachariasz is based on an ssumption that the boundaries of public law and private law is "a matter of cognition and the boundaries of distinguishing these two parts of law can be carried out in a clear and certain way, contrary to the skeptical views found in legal science on this matter" — I. Zachariasz, *Prawo w ujęciu strukturalnym. Studium o dychotomicznym podziale prawa na prawo publiczne i prawo prywatne*, Warszawa 2016, p. 10.

[2] R. Longchamps de Bérier, *Wstęp do nauki prawa cywilnego*, Lublin 1922, p. 7.

view in the legal sciences the divisions are usually typological, not logical, and derived from the very nature of law.[3] In empirical sciences (also legal sciences), cognition is a derivative of accepted linguistic cognitive tools, which consequently leads to the conclusion that in its essence, it is conventional.[4] The division of law is therefore a matter of recognition, adopted convention and specific evaluating assumptions. Whenever we speak about public law and private law, we speak about concepts that mean something only when we assign them meanings derived from assumptions completely external to the law.[5] Another thing is that if we consider the public–private divide as a dichotomy, it is necessary to perceive the law as two separate branches without a sphere between. Such a multiplicity in a system of law — the existence of two separate kinds of norms, which always belong only to "public" law norms or "private" law norms, would undoubtedly require an explanation.[6] The question also arises about the criteria according to which one type of regulations (rights and obligations or legal relationships) belongs to public law, and the other to private law and what this justifies. In fact, none of any of the distinguished criteria could be called objective so far, so it is still impossible to divide law in a clear and precise way.

2. Historical context

The dichotomy between "public" and "private" becomes even more groundless in the context of the historical background of the public–private divide. This division is derivate to the law, which is rooted in habits and daily practice in various spheres of human life. The development of law, today conventionally called private, has lasted for centuries, and is connected with everyday human existence such as progressive urbanization, trade, or in later centuries — industry.[7] At the same time,

[3] According to A. Grabowski, "Podział logiczny," [in:] *Logika dla prawników* (note), Faculty of Law and Administration of the Jagiellonian University, Kraków [2004]. As the judge of the Supreme Court of the United States Oliver Wendell Holmes said: "The life of the law has not been logic, it has been experience" — R. Serick, *Rechtsform und Realitat Juristischer Personen*, Berlin-Tubingen 1955, p. 103.

[4] K. Ajdukiewicz, "Obraz świata i aparatura pojęciowa," [in:] K. Ajdukiewicz, *Język i poznanie. Wybór pism z lat 1920–1939*, vol. 1, Warszawa 1985, p. 175.

[5] J. Nowacki, *Prawo publiczne — prawo prywatne*, Katowice 1992, pp. 81 ff.

[6] In accordance with William of Ockham (c. 1287–1347) Ockham's razor problem-solving principle that essentially states that *pluralitas non est ponenda sine necessitate* and *frustra fit per plura, quod fieri potest per pauciora* (R. Majeran, "Ockham," [in:] *Universal Encyclopedia of Philosophy*, vol. 7, Lublin 2006, pp. 761–769), multiplicity is treated as unnecessary, therefore it needs explanation.

[7] Historically, the division of the law into two large sections — public law and private law — has been the subject of research since the time of Ulpian — actually Gnaeus Domitius Annius Ulpianus, a Roman jurist and writer of the empire era living in the 2nd century AD — who, formulating the sentence placed in later centuries in Digest of Justinian (1. Inst. D. 1.1.1.2.) — *publicum ius est quod ad statum rei Romanae spectat, ius privatum est quod ad singulorum utilitatem*, gave the foundation of today's understanding of public–private divide (sentence after: J. Nowacki, op. cit.,

but definitely not from the very first ancient codifications, there were systems of state and public administration regulation,[8] not based on the law in today's understanding but being rather corporate-based systems extended to the dimensions of the state and not subject to regulation mechanism and external control. As a consequence of the progressive development of statehood, as a result of increasing legal and social awareness, the aspiration of forming societies to protect values, which in their opinion could not be achieved by individual actions so far, became more common. The parallel development of law, today conventionally called private, led to the separation of a set of exceptions included in all the areas that did not fit under the then existing law, such as criminal law — distinguished for codification purposes.[9] In the consciousness of Europeans of the Age of Enlightenment, there was also a commonplace opinion that "it is ridiculous to pretend to decide the rights of kingdoms, of nations and of the universe, by the same maxims on which we should decide the right of a gutter between individuals."[10] Social-contract theory became a direct expression of the convictions of that day and grew out of Locke's theory of natural law and the assumption of strict opposition of the individual to the state and the interests of the individual to the public interest. Intensive development of public law — the "set of exceptions," was dictated by the desire to protect against the absolutist power of the authorities and by the desire to legally regulate the actions of the authorities, which often compromised the natural freedom of individuals. It was only social-contract theory that gave the philosophical foundation of the dichotomy of public law — private law and made it the basis of the legal order of constitutionalism. Due to the construction of the opposing interests of the individual and the state, the sphere of public and private law was successfully distinguished, which hitherto had been impossible for the representatives of German and French humanist jurisprudence until then. Therefore, it should be emphasized that the final separation between public and private law took place only in the Age of Enlightenment. It should also be pointed out that in the Age of Enlightenment, the term "private law" was identified with civil law (in a broad sense) and covered all legal personal and property relationships between individuals. This was very late, because in the nineteenth century "civil law" began to be distinguished in Europe as a part of "private" law, recognized as a branch of law comprising personal and property relationships of individuals in general, from "commercial" law, regulating

p. 5). However, the view of A. Zieliński that Ulpian's quote is referred to the system of teaching law, but it cannot be applied to the construction of the system of sources of law should be fully shared — A. Zieliński, "Cywilnoprawne aspekty godzenia interesu indywidualnego z interesem publicznym," [in:] *Prawa stają się prawem. Status jednostki a tendencje rozwojowe prawa*, ed. M. Wyrzykowski, Warszawa 2006, pp. 99 ff.

[8] R. Chapus, "Droit du contentieux administratif," Montchrestien 2006, *Revue de Droit Henri Capitant* 2012, no. 30, p. IB.

[9] K. Sójka-Zielińska, *Historia prawa*, Warszawa 2009, pp. 212–213.

[10] Charles de Secondat baron de Montesquieu, *The Spirit of Laws*, vol. 2, London 1773, p. 189.

only some property relationships of individuals, separated from private law on the basis of specific subjective or objective criteria. In most countries of the continent there were also separate — in addition to civil codes — codifications of commercial law. At the same time, invented in response to feudalism as a system in which public and private powers remained undifferentiated, the idea of public law gained particular momentum in the nineteenth century as a decisive era of modern law's development. The time from the Age of Enlightenment through the nineteenth and twentieth centuries until the present day has been a long-lasting, very complicated process of separation of public law from private law,[11] depending vastly on the internal political and social realities in European countries. Regardless of these conditions that led to the conventional understanding of the public–private divide in European countries, it should be pointed out that public law is derivate to the law (today conventionally called private) having been developed for thousands of years. It is very notable that "private" law — construed, according to its traditional meaning, as the reign of free will, not subject to outside intervention — is progressively losing ground to "public" law.[12]

3. General law doctrine as a holistic approach to law

The development of law seems to be a kind of *continuum*. Public law, in today's conventional sense,[13] reaches its genesis to the Age of Enlightenment and to the time of social-contract theory. Therefore, public law was not created in a vacuum, it is not a special alternative to the law (today conventionally called private) set of norms. According to the holistic approach, law is the medium of power — a social relationship characterized by the lack of symmetry of actions

[11] K. Sójka-Zielińska, *Wielkie kodyfikacje cywilne. Historia i współczesność*, Warszawa 2009, p. 28.

[12] H. Collins, *Regulating Contract*, Oxford 1999, from: G. Alpa, "Harmonisation of and codification in European contract law," [in:] *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice*, eds. S. Vogenauer, S. Weatherill, Oxford-Portland, Oregon 2006, p. 152.

[13] It should be pointed out that in European legal culture the conventional sense of "public" and "private" is in general very close to J. Carbonnier sentence, that "Tout le droit se divise en deux parties: droit public et droit privé. Le droit public a pour objet l'organisation de l'État et des personnes morales qui en dépendent, ainsi que leurs rapports avec les particuliers. Il comprend plusieurs subdivisions : droit constitutionnel, droit administratif, droit financier (finances publiques). Le droit privé a pour objet des personnes privées entre elles, des personnes privées comprenant à la fois des personnes physiques (les individus, les particuliers) et les personnes morales," in translation: "All rights are divided into two parts: public law and private law. The object of public law is the organization of the State and the juridical persons who depend on it, as well as their relations with individuals. It comprises several subdivisions: constitutional law, administrative law, financial law (public finances). Private law relates to private persons between them, private persons including both natural persons (individuals) and legal persons" — J. Carbonnier, *Introduction au Droit civil*, Paris 1995, p. 95, author's translation.

between parties. The party "in power" can change the behaviour of the "subordinate," without full reciprocity; in relation to the initial, predictable behaviour, dependent on the maintained (original) preferences of the subordinate.[14] This approach is the basis for the public–private divide as a general law doctrine, rooted in the history of law development and fully articulated in the first half of the last century (especially in the 1920s and 1930s).[15] According to this doctrine, private law is the general law that is always applicable, unless rules of public law exist which derogate from private law. In this view, public law is not of a different nature than private law. When there is a loophole in public law, private law rules are applicable,[16] operating consequently as a legal safety net, especially in all those areas where the government has no public powers. General law doctrine also makes a fundamental difference between constitutional law and the rest of the remaining so-called public law. Constitutional law is considered to be of a substantially different character than other parts of law, due to its close relationship with the organization of the community itself.[17] In this context, leaving constitutional law aside, it appears that the other public law is not of another nature than private law[18] and there is no substantial differentiation between two branches of law — public law and private law. These fields of law are considered not to be of a fundamentally different character and this is of great importance. Private law is conceived as general law, and public law is conceived as special law — a part of general law and fully encompassed within it. General law doctrine also explains much about the applicability of the rules of private law in legal relationships with the government and about the applicability of public law rules. It creates room for the idea that a number of legal principles and traditional legal concepts, such as liability and contract, are of a common nature rather than of a typical private law nature, which analytically precedes the distinction between public law and private law.[19] According to this theory, both rules that originate from public law and private law can be applied in one legal relationship at the same time.[20] For example, very open private law standards, such as reasonableness, fairness and

[14] K. Pałecki, "Wprowadzenie do normatywnej teorii władzy politycznej," [in:] *Wprowadzenie do nauki o państwie i polityce*, eds. B. Szmulik, M. Żmigrodzki, Lublin 2002, p. 195.

[15] See especially F.G. Scheltema, *Het grensterrein van publiek — en privaatrecht*, RM Themis 1927, p. 233.

[16] C. Asser, P. Scholten, G.J. Scholten, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Algemeen Deel*, Zwolle 1974, pp. 31–32.

[17] Ibidem, pp. 28, 31.

[18] Criminal law as well as constitutional law is not a part of ordinary public law, it is not associated with the dramatic dread of criminal law — A. Stelmachowski, *Wstęp do teorii prawa cywilnego*, Warszawa 1984, p. 11.

[19] A.R. Bloembergen, "Overheidsprivaatrecht: schets van een algemeen deel", *Weekblad voor Privaatrecht, Notariaat en Registratie* 1992, no. 6074, p. 950.

[20] Since 1986/1987 when the Supreme Court in the landmark case of Amsterdam vs. Ikon, ruled that the general principles of proper administration, and particularly the legal principle of equality,

the duty of care, become more specified by using the more differentiated general principles of proper administration and fundamental rights at the same time.[21] This demands that all governmental private law actions be subject to the standards of public origin. According to this doctrine, a combination of the applicability of public and private law standards is a rather common phenomenon.[22]

4. The case of Blanco and the idea of two legal columns

Nevertheless, it is worth remembering that general law doctrine is less obvious than it seems. In opposite to this doctrine, in the idea of two columns, public and private law are traditionally conceived as "two separated worlds," unable to live entirely in peace, but "neither enough friend nor foe" to get thoroughly acquainted.[23] To fully understand this sentence, we need to first explain the theoretical background of forming *droit administratif* in France and second to move back to the end of the nineteenth century and analyze the very famous case of Blanco. For one thing, French administrative law is based on the designs of theoreticians like Bodin and Hobbes, who envision the government above civil law, with its absolute position necessary to prevent a fall-back to a state of nature that makes life nasty, brutish and short or otherwise unbearable.[24] This is the main reason why French administrative law is based today on the idea that the government — representing the nation — has special rights and duties of which the extent can only be determined by rules and principles that differ from those that fix the legal relations of citizens amongst each other. Second, French public law rests on the — mistaken — interpretation of Montesquieu's *trias politica* doctrine as a strict separation of powers, rigidly preventing the legislature, the government and the courts from encroaching upon one another's domain.[25] The most powerful in this context is Article 13 of the Law of 16–24 August 1790 on the organization of the judiciary, states that "it shall be a criminal offense for the judges of the ordinary court to interfere in any manner whatsoever with the operation of the administration." According to this

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were directly applicable to governmental actions based on private law — *Amsterdam vs. Ikon*, AB 1987, 273 (HR 27 March 1987), AB Klassiek, 6th ed., Deventer, Kluwer 2009, no. 13, p. 193.

[21] See especially *Apeldoorn vs. Duisterhof*, NJ 1998, 363 m.nt. ARB (HR 9 January 1998).

[22] The Dutch legal point of view could be the best example. According to section 3:14 of Dutch Civil Code competences that are entitled to anybody under civil law cannot be exercised in violation of the written or unwritten rules of public law, on the other hand according to section 3:1(2) of Dutch General Administrative Law Act (GALA), the principles related to issuing administrative acts enshrined in this Act are also applicable to other forms of administrative activity, as long as these principles are reconciled with the nature of these other forms.

[23] A. de Tocqueville, *Correspondance anglaise*, "Oeuvres Complètes," vol. 6, Paris 1991, p. 66.

[24] J. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law*, Oxford 1994, pp. 44–46.

[25] Originally from: Charles de Secondat baron de Montesquieu, *O duchu praw*, trans. T. Boy-Żeleński, Kraków 2003, p. 149.

article, those judges are also forbidden "to call administrators to account before them in respect of the exercise of their official functions." This interpretation had the result that protection against government actions in administrative matters was initially only possible within the hierarchy of government itself and later by a system of gradually established and independent in fact administrative courts. On that basis the idea of two legal columns arose, where public and private law is governed by their own rules and principles and falling under the jurisdiction of their own courts. The theory has been turned into legislative practice in the Tribunal of Conflict's epoch-making ruling in Blanco, generally regarded as the turning point of understanding the public–private divide as "two separated worlds" in modern French administrative law, as well as in law in general and as a consequence of criticism of holistic approach to law and supremacy of government and administrative law. The case concerns a five-year-old girl named Agnès Blanco, who had been severely injured by a cart belonging to a state-owned tobacco factory in Bordeaux.[26] The girl was hit by a trolley and her father brought an action in the ordinary (civil) courts for a declaration that the state was civilly liable under Articles 1382, 1383 and 1384 of the French Civil Code for the damage suffered by his daughter as a result of a road traffic accident caused by a vehicle driven by employees working for a state organisation. The *Préfet* of the *Département*, acting on behalf of the state, raised the issue of conflict of jurisdiction, arguing that the ordinary courts did not have the jurisdiction to deal with the matter. The then newly-created Tribunal des Conflits held that the rules and principles laid down in the Civil Code to deal with the relationships between individuals could not apply to any liability incurred by the state for damage caused to individuals by state employees. The accident was caused in the context of the service public so the Civil Code was not applicable and therefore the father of the girl could not bring a case against the state before the civil court. The Tribunal added that the responsibility of the state, being neither general nor absolute, was subject to a body of special rules which would vary depending on the needs of public service in question or the general public interest and the need to reconcile the rights of the state with the individual's private rights. Thus, the court neglected the fact that there was little that substantively discerned the factory workers and their state-owned factory from other such workers at private enterprises. While driving their tobacco carts, they were considered to perform a public service that exempted them from the rules of civil law. With the general interest at stake, the state as the workers' employer could only be held liable by an administrative court, steeped in public law as a separate body of rules and principles. The case of Blanco represents the cornerstone of French (and not only French) administrative law because of at least two reasons. First, it establishes the principle of state liability for damages caused to private individuals. Second, it marks the independent

[26] Tribunal des Conflits, Les grands arrêts de la jurisprudence administrative, no. 1, 8 February 1873 (*Blanco*).

autonomy of *droit administrative* from civil law, which in practice has been qualified in two main ways: (1) many rules of private law have been transplanted into the body of administrative law — the "reception" of civil law into administrative law; (2) there are areas where administrative activities are subject to private law. This phenomenon is referred to as an "osmosis" of public law and private law[27] and also calls into question the idea of public and private law as "two separate worlds."

5. Summary and conclusions

It all shows that the idea of public and private law is deeply ingrained in legal culture and taking into account the historical context of law development it would be wrong to speak of completely separate or indeed incommensurable normative realms of "private law" and "public law" and there may be more common ground between these realms than first meets the eye. The above also indicates that now it finally seems to be clear that public law is not just something artificial, setting aside the rules and principles of private law within a legal domain of exception in which the state reigns supreme. Instead, it has replaced that formalist tradition with a relational theory that presupposes that public law — not different from private law — is most essentially governed by principles that precede the commands of the state, binding both citizens and government by prepositive standards of law from which they cannot be artificially exempted. With the ongoing "osmosis" between state and society that is typical of the developing social state, the idea of public and private law as two distinct legal spheres came under increasing pressure. With the state deeply penetrating into society and the unity of public *imperium* having been broken to pieces, the dividing line between the public and the private has been blurred almost beyond recognition. But does it mean that we should once and for all reject the public–private division? What, then, should be the conclusion to all this? First, we cannot raise the indicated awareness of the existence of individual and public interests to the level of division, creating one of the most serious barriers in our thinking about law — a division which is an outdated stereotype of legal thinking, weakening the sensitivity of the courts and their hermeneutic skills in reading the laws.[28] We also cannot regard *summa divisio* of public and private law as a fallacious opposition, an ill-chosen distinction that severely damages the "factual unit" of the social world that law is supposed to regulate, distracting from a much more heterogeneous range of social differences and power relations that would instead require law's primary attention.[29] Second, we have to realize that understanding the

[27] E. Huisman, "Osmose tussen publiek- en privaatrecht," *Ars Aequi* 1987, no. 5 (Special Edition), pp. 273–372.

[28] See: E. Łętowska, "Bariery naszego myślenia o prawie w perspektywie integracji z Europą," *Państwo i Prawo* 4–5, 1996, p. 46.

[29] R. Drago, M. Frison-Roche, "Mystères et mirages des dualités des ordres de juridictions et de la justice administrative," *Archives de philosophie du droit* 1997, no. 41, pp. 142–143.

specificity of private and public law is only a starting point for the responsible legal actions of the representative authority in the protection of the values for which it was previously established by the society. Notwithstanding these criticisms, however, the public–private distinction remained of central importance for the ways in which we tend to conceptualize and organize the legal landscape, ranging from academic departments and curricula to the distribution of judicial competences and default principles of substantive and procedural law.[30] We need to find legal forms of the administrative action which involve private persons and organizations in matters of public service in a way that is typical of the welfare state. It all requires careful consideration and proper and clear legal arrangements. Thirdly and finally we need to re-consider the significant role of public law that remains true to principled values of the state of law and the common good, but at the same time is flexible enough to cope with societal changes that seem inevitable. However, both public and private law contain unwritten ideals and principles constituting law's common core, public law acknowledges the unique position of the government by means of unilaterally determining the legal positions of its subjects, dividing rights and goods among its citizens. In order to find possible ways for public law to be effectively renewed, something else is needed: a thorough re-investigation of its deep-rooted precepts and theoretical conjectures themselves.[31] This seems to be our research task in the following decades.

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