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THE PUBLIC/PRIVATE *SUMMA DIVISIO IURIS*

LA *SUMMA DIVISIO IURIS* PUBBLICO/PRIVATO

ABSTRACT

This article analyzes the old dichotomy between public and private Law, summa divisio of the juridical disciplines, where we find the other dichotomy that deals with the opening and closing of the juridical phenomena: *lex* and *ius*. Not only does a useful bipolarity arise from this fundamental classification of subject matters that jurists are dedicated to, but also the basis and juridical principles transmitted to the corresponding norms; and these basis and principles are amended by means of the supplementary technique integrating norms among different areas of the Law.

SINTESI

Il presente articolo analizza la vecchia dicotomia tra diritto pubblico e privato, summa divisio delle discipline giuridiche, ove ritroviamo l'ulteriore dicotomia, che si relaziona con l'apertura e la chiusura dei fenomeni giuridici: *lex* e *ius*. Da questa classificazione fondamentale di materie, alla quale i giuristi si sono dedicati, non deriva solo un utile bipolarita ma derivano anche le basi e i principi trasmessi alle norme corrispondenti; e queste basi e principi sono modificati per mezzo della tecnica integrativa delle norme tra le diverse aree del diritto.

KEYWORDS: Juridical Science – Public Law – Private Law – Lex-ius
PAROLE CHIAVE: Scienze giuridiche – Diritto pubblico – Diritto Privato – Lex-ius

Introduction

The juridical bipolarity that distinguishes between the public and the private is actually a *summa divisio* of the juridical disciplines, which marks a fundamental classification frame of all of them.

It is a duty of the Theory of Law to understand and analyze the Law phenomenon, in particular, the links between the rules *(lex)* and the science of Law *(ius)*. It is the role of the epistemology of the juridical disciplines to analyze the way in which the branches and that bipartite division are created.

In this article I will analyze the old dichotomy of public/private law, the *summa divisio* of juridical disciplines, which would seem to always be at the center of everything. It means one must refer to the epistemology of juridical disciplines from where this other dichotomy emerges, lying at the opening and closing of this legal phenomenon: *lex* and *ius*.

Therefore, an epistemological review of the juridical disciplines is important: that of the *summa divisio iuris*, which heuristically classifies Law as public and private. Not only does a useful bipolarity arise from this fundamental classification of subjects to which jurists are dedicated, but also the basis and juridical principles that are transmitted to the corresponding norms. We will see that these foundations and principles can be amended by means of the supplementary technique that integrates norms from different sectors of Law.

I. History and current wide acceptance of this bipolarity.

1. Bipolarity in juridical history.

This ancient classification has had a unique journey in the history of juridical thinking. It steps into history in Rome[1], then it vanishes from the map during the Middle Ages, reemerging in the early modern period without any end to this continuity ever since.

[1] About the origin and history in Rome, see G. NOCERA, *Il binomio pubblico-privato nella storia del diritto*, Napoli, Edizioni Scientifiche Italiana, 1992, p. 7 and *passim*.

In fact, this bipolarity enters the historical sources through a fragment of a doctrinaire nature from the Ulpian Institutes, taken from the Institutes and from the Digest[2]. The said text points out that the aspects of the study *(positiones studii)* of Law are two: *publicum et privatum:*

i) "public law is that concerning the Roman thing" [*publicum ius est, quod ad statum rei Romanae spectat*]; and

ii) "private [law] is the one concerning the utility of individuals" *[privatum, quod ad singulorum utilitatem]*.

This distinction disappears during the Middle Ages, a period dominated by the concept of a "Common Law" *(ius commune)* legal system based on autonomy with respect to the particular laws *(iura propria)*[3]. Romanists and Canonists for many years refused to mutilate the unity of the perspective[4].

This diptych of private Law/public Law reappears in the middle of the XVII century in juridical literature[5], where diverse works were written, precisely and wholly naturally entitled private Law and public Law[6]. From that period until today, this terminology has been adopted by legal work authors in order to distinguish, paraphrasing Ulpian, *positiones studii iuris*, the fields of science.

It is evident that the philosophers view it with the same naturalness, and the studies of Law are classified in the schools of education in the same way. This is how teaching and the different departments or sections that group different law professors are usually separated. Additionally, specialists in the different branches of Law usually classify themselves as either "publicists" or "privatists" if their dedication is relative to a discipline of one side of this diptych.[7]

2. The public and the private under current law.

[2] Compiled in both *Institutas*, I, 1, 4, and *Digesto*, I, I, 1, 2.

[3] Cf. P. GROSSI, *L'ordine giuridico medievale*, Roma-Bari, Laterza, 1995, 226 [traducc.: *El orden jurídico medieval* (Madrid, Marcial Pons, 1996) 224].

[4] Thus: G. CHEVRIER, *Remarques sur l'introduction et les vicissitudes de la distinction du «jus privatum» et du «jus publicum» dans les œuvres des anciens juristes français*, en *Archives de philosophie du droit*, 1952, 7.

[5] *Ibidem*

[6] It is the case of the *traité* de *"Droit Public"*, by J. DOMAT, *Le droit public, suite des lois civiles dans leur ordre naturel*, en *Œuvres de J. Domat*, Paris, Libraire de Jurisprudence, 1829.

[7] See *Metaphysik der Sitten* 1797, by Kant, of which the first part is dedicated to the "metaphysical principles of the doctrine [theory] of Law", where it offers a supreme division of Law, which he precisely refers to as public Law and private Law.

The Public Law/Private Law bipolarity today is an undeniable part of legal culture and is a distinction that, for a long time, has been structuring the discourse of the jurists of our "continental" tradition[8]. Thus, the point is an object of intense discussion from those who deny the distinction[9], calling it ideological and anti-scientific, to those who relativize it[10], but every jurist in his or her works seems to feel obliged to point out something about the distinction, either vaguely or with greater precision.[11]

Notwithstanding the foregoing, the public/private today is not only a matter of juridical analysis, but is the object of study of other perspectives, whether philosophical, sociological or historical; hence, many still think that it is merely ideological and not juridical. The public and the private emerge from human reality, and from life in society[12], and these perspectives are useful to Law, albeit not always coinciding. We will not address these perspectives.

Therefore, this bipolarity is a creation of juridical literature and the teaching of Law. It is clearly the incorporation of a doctrinaire language of the authors and professors, connected with

[8] M. TROPER, *Pour une théorie juridique de l'État*, Paris, Presses Universitaires de France, 1994, 184, [traducc. *Por una teoría jurídica del Estado*, Madrid, Dykinson, 2001, 164].

It would seem that this distinction has no relevance in the *Common Law*. See D. OLIVER, *"Pourquoi n'y a-t-il pas vraiment de distinction entre droit public et droit prive en Angleterre?"*, *en Revue internationale de droit comparé*, N° 2, pp. 327- 338, who points out that "there is only law and justice", and J. B. AUBY y M. FREEDLAND, *La distinction du droit public et du droit privé: regards français et britanniques. The Public Law/Private Law Divide: une entente assez cordiale?*, Paris, Editions Pánthéon-Assas, 2004, which contains the minutes of a Franco-British meeting of professors from different specialties aimed at analyzing the dichotomy in both systems.

[9] As the positivist normativist position that denies the distinction in the case of Kelsen.

[10] A discussion we cannot address herein; a perspective and extensive bibliography in S. PUGLIATTI, *"Diritto pubblico e diritto privatto"*, voz en: *Enciclopedia del diritto,* Milano, Giuffrè editore, XII, 1958, 606-746.

[11] This echoes back to each introductory manual of the disciplines of Law, or philosophy or theory of Law. The might be rather extensive. For our current purposes, we can establish it in G. RADBRUCH, *Filosofía del derecho*, Granada, Editorial Comares, 1999; G. ROBLES, *Introducción a la teoría del derecho*, Madrid, Debate, 2003, 159-164; É. DESMONS, *"Droit privé, droit public"*, voz en *Dictionnaire de la culture juridique,* Paris, Quadrige/Lamy-PUF, 2003, 520-525, and in Chile, the incimparable attempt by R. CÉSPEDES Proto, *"La clasificación del derecho en público y privado en el ordenamiento jurídico chileno"*, en *Revista Actualidad Jurídica,* N° 9. 2004, 273-300.

[12] See philosophical perspectives on the public and private realm in H. ARENDT, *The Human Condition*, Chicago, Illinois, The University of Chicago Press, 1958, [traducción: *La condición humana*, Barcelona, Paidós, 1993] chapter II, 37-95 and in J. HABERMAS, *Strukturwandel der Öffentlichkeit* [traducc.: *Historia y crítica de la opinión pública*, Madrid, 1982; traducc. francesa: L'espace public.,1962, 94-123, who have developed it from their perspectives, and in a polemical fashion among them, a historical vision in B. CLAVERO, *Razón de Estado, razón de individuo, razón de historia,* Madrid, Centro de estudios constitucionales, 1991.

reality, which little by little began to imbue the dialogue with the rest of the literature and especially with that of the legislator.

It is important to observe this phenomenon of the public/private from different perspectives that are different from the juridical and enable an approximation of reality[13]. Their perspective is the observation of life itself. They ask themselves: what is the purpose of the public/private binomial in an explanation of social life? We can review the more common answers.

a) It is a rationalizing tool of social organization

All of these analyses fog the current thinking and each one uses this counterpoint in different ways. There seems to be a breaking point with what we jurists think (following Ulpian, Kant), and the public and the private for philosophical or general sociological thinking. It seems to be somewhat subdued:

i) The public: would be that which belongs to the people, on the whole/what is common in all, not necessarily that of the state.

ii) The private: that which is personal and private. Nevertheless, it is possible to distinguish two dimensions of individual behavior: i) the private dimension: it is the free initiative of the individual, personal development; and, ii) the public dimension: individuals.

Thus, the public/private intermingle: i) the State may safeguard the public as well as the private; and, ii) individuals have two dimensions: private/public. In such a way that we cannot attribute the whole public thing to the State, or the whole private thing to the individual, these two dimensions are part of both entities.

The philosophical and sociological view then does not necessarily coincide with either historical vision (we have already seen that the bipartition has been evolutionary) or with the juridical approach (which we will review in due course).

b) Axiology of the public and the private

There is an axiology in both sectors from which a constant creation of principles arises. From here, specific juridical principles might emerge for each sector. Thus:

[13] H. ARENDT, 1958, *ibidem* and in J. HABERMAS, *ibidem*, come forth as advocates of the public interest. The split of these two dimensions suggests society and State, but it is something different.

i) The public sphere: would be dominated by the notion of general interest. From here it is possible to distinguish if the general interest is a sort of interest ontologically typical of the new entity created by the meeting of individuals, meaning the State, or if it is the interest of society as a whole, which is distinct and distinguishable from that reality called State.

ii) The private sphere: submitted to individual interests.

As a juridical consequence of this bipolar representation of society, two categories of individuals or juridical subjects have been formed:

i) Private individuals, which are natural and legal; and ii) public individuals, which are only juridical. Thus, for some jurists (or juridical systems) all distinction of public law and private law lies in this syllogism:

1) *Public bodies*: the "public" juridical entities (that is, the bodies of the State) are in charge of the general interest, followed by:

2) *Special/public Law for said public bodies*: for its juridical regulation, the Law creates statutory rights meaning a right created for said "public" individuals, which is prohibitive of the "common law" (civil Law, which applies to "private" individuals) whose outcome is public/private bipolarity:

3) *Public jurisdiction*: All this translates into a jurisdictional dualism, two orders of jurisdiction, which gives an institutional basis to the division of law; judges for the public and for the private. This is the case of France. It is necessary to verify in each conflict whether an administrative judge (public law) or a judicial judge (private law) is authorized.

c) This division in society is not static; it is evolutionary

The division of the public and the private is linked to the historical context and to the dominant ideologies. The public and the private are not the same thing in regimes that are more or less: i) statist (that try to capture through the State all that is public/to seize everything that is common, including relevant private aspects); or, *ii)* liberal (that try to expand the private). Ultimately, it is a fluctuating division. Kelsen was right; it is an ideological division. It depends on the trends at the heart of a society.

Therefore, the public and the private are different in reality. We must be careful when trying to transfer without filter, purely and simply, the philosophical or sociological texts to the world of Law. Let us review the public/private in Law.

Essentially, today its analysis is necessary not only as a theoretical dialogue in the midst of the epistemology of the disciplines of Law, but it also requires a dogmatic-juridical analysis. This is an interpretation of current norms, given that legislators have resumed this classification to define frameworks for implementing norms. The assumption here is that, for example, norms of one or another sector of the regulatory order may be successively applied to administrative Law. That is the case in the following two examples:

1) Article 21 of the Decree with the Force of Law No. 164 of 1991 [whose text was set out in D.S. Nº 900 of 1996], Law of Public Works Concessions refers to *"norms of public Law"* and to *"norms of private Law"*,

2) Article 1 of Law No. 19.886 of 2003 on Rules for Administrative Contracts for Provision of Supplies and Services refers to *"norms of public Law"* and *"norms of private Law"*[14]. Hence, it is possible to offer the following two responses:

i) that which is public Law and that which is private Law, and then, ii) that which is a norm from one or another sector.

Let us not deceive ourselves, because every time we mention this division, we can only do so because: *i)* we think systemically about the proximate genus: the legal reality that covers everything; and, *ii)* next we classify because we know that the whole has to be divided and each discipline must be contained in one or another part of the system.

3. The functions of the bipolarity.

What is the public? What is the private? What is the proximate genus of the nouns/adjectives public and private? What is the legal use of a widespread philosophical and sociological discussion about it? When a philosopher or a sociologist classifies reality by public/private, do they come from the same position as the jurist?

[14] The Law says, *"Contracts (...) shall be adjusted to the rules and principles of the legal body and its regulations. In a suppletory manner, the rules of Public Law will apply to them and, in the absence of those, the rules of Private Law."*

Clarity about the bipolarity is not only necessary for the purposes of the science of Law, to look for coherence or similarities in each sector of Law, and for the purposes of its teaching, but also for these two practical effects:

1 to assign this or that condition to the norms, and

2 to verify if the method of integrating the norms of both sectors is possible or coherent; i.e. if the interference of norms is theoretically and practically acceptable to close loopholes from one to another sector. This is something new in our normative scheme, and it is possible to analyze and offer elements for said task of normative integration.

The brief development that we offer in this work on bipolarity is only an attempt to cover the second objective indicated above.

II. The normative phenomenon and the public-private.

1. The unique origin of the sources of Law.

The task of legal dogmatics presupposes, at least initially as a point of departure, the acceptance of a legal system - laws - as part of the juridical phenomenon. In our current regulatory reality, as a primeval fact, there is the *populus,* gathered around a referendum, which dictates the Political Constitution. Said regulatory body contains regulations (norms: *lex*), whose nature we can only qualify once the juridical disciplines *(ius)* are created, which in turn are classified as public or private.

The legislator (or the constituent) regulates social life according to political imperatives without a classifying spirit. It is unimaginable for a legislator to have a classificatory conscience regarding a public or private nature. The legislator simply dictates norms, which only later are classified by the jurists in the specific areas. The disciplines of Law are those that can be clearly classified first into private or public and conform the two old branches of Law as a science by established academic convention. Second, the transmission of this classification to laws or norms takes place in the subsequent operation that the jurist undertakes by systematizing the regulations, integrating a given norm as part of each discipline. In such cases, the jurist assigns each law or

norm a specific nature in accordance with its subject matter (civil, procedural, constitutional, administrative, labor, etc.), which in turn will be public or private, depending on the position of said discipline within the partition of scientific Law. Therefore, only once this entire process has been followed will the jurist assign the nature of a law or norm.

It usually happens in juridical practice that the same regulatory body may include norms of a different nature, either public or private as explained above. What matters to the science of Law for classificatory purposes is the substance of the content. The repository (the specific norm, the Law/legal) is important for the purposes of validity or the normative hierarchy[15]. The *origin* of the Law/legal is neither public nor private. If the very *nature* of legal Law can become binary, this is the result of a subsequent verification by a jurist, as stated above.

The classification of the public/private does not refer to a supposed binary origin of the sources of the positive law in force, as if they were from discernible authors.[16]This is because today they all originate in the *only* politically accepted way: the *populus*, through a plebiscite (Political Constitution) or the State/legislator (Congress: nearly always through laws (or substitute customary Law); the President of the Republic: D.F.L.; the Supreme Court: self-stipulated).

From the above it appears that the *privus* of today (individuals) are never authors of a Law/legal, i.e. regulations. A contract or a will are not laws. They are not Law/legal sources, nor can they be considered "regulations" by any definition, however lax. They are simply private, unilateral or bilateral acts according to the classic classification, fruit of the principle of the autonomy of will. Hence, a current jurist cannot take Article 1545 of the Civil Code seriously insofar as it refers to the fact that the contract is a "*law*" for the contracting parties, which cannot be considered more than mere metaphor on the unilateral inviolability of its clauses[17].

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[15] See A. VERGARA BLANCO, *"Prólogo"* a Guzmán Brito, 1995, now in *Derecho Administrativo: identidad y transformaciones*, Santiago, Ediciones UC, 2018.

[16] As A. GUZMÁN BRITO, *El derecho privado constitucional de Chile*, Valparaíso, Ediciones Universitarias de Valparaíso de la Universidad Católica de Valparaíso, 2001, p. 18.

[17] In this context, L. CLARO SOLAR, *Explicaciones de Derecho Civil chileno y comparado*, Editorial Jurídica de Chile, T. V, 1939, 470, points out: "The comparison of the contract with the law, in terms of the effect that it is called upon to produce among the contracting parties, is therefore traditional. The Roman jurisconsult wants to indicate an exact and complete idea of the binding force of the contract; and does not find a more appropriate word to express it than to say that the contract constitutes a law, *legem contractus decit*, that is to say that for the contracting parties their consent gives rise to the obligation that the obligated party has imposed on itself as it would be imposed by the law itself that

2. The juridical nature of each norm.

As a result of the foregoing, each of the branches or disciplines of Law, i.e. specialized law sciences can be included in any of the two poles or spheres of either public law or private law. Now, Law/legal meaning legislation, every sectored regulation, or even each norm are in fact classified or systematized "by" such disciplines. Being situated within a given branch in accordance with the subject imbues it with that nature. It is the Law scientist, who observes the norms and reality of social life that encapsulates each norm in a "factual hypothesis" that designs, separates, disaggregates, dissects, whatever it may be called, the concentrations of rules or norms (of any hierarchy be it constitutional or legal), and verifies and assigns the nature of such norms *(lex)* considering them from such an analysis as the "source" of the corresponding discipline. This function is typical of the "doctrine" (of jurists) and forms the so-called external system.

In the normative analysis (of the Law/legal: first phase of the legal phenomenon) the work of the jurist commences, creating and delimiting the juridical disciplines and formulating theories and juridical principles. By connecting a norm with a discipline, it assigns a legal nature in a real world context. It is what we explain next.

III. The public and the private of juridical disciplines and laws.

The "public-private" binomial today is first of all a disciplinary *summa divisio*. It is a great disciplinary classifier that splits into two parts the entire constellation of autonomous disciplines that make up the scientific legal universe.

This binomial does not explain the *origin* of the laws that make up the internal order. It is rather a (in truth: *"the"*) great classification of the dogmatic legal phenomenon: any legal discipline should be classifiable as public or private (equivalent to public Law or private Law); otherwise it would no longer have its systematizing role.

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would have arranged it that way. And the modern legislator could not leave aside the formula that so accurately expressed the binding effect of the contract.

It is necessary to review, then, the public/private binomial in both the *lex* and the *ius*. In fact, the classification public/private is relative:

i) to the content of the juridical disciplines *(ius)*, and

ii) from there, then, indirectly, to the nature of the norms *(lex)*.

We will analyze both places where this public/private binomial is used and applied in juridical matters.

1. Bipartition of all juridical disciplines

The binomial first applies to the juridical «abstract-conceptual system» elaborated by jurists.

In this case, the juridical disciplines are classified by the public/private bipolarity, which consist of the specification of a subject from which the nature of the norms that are its object derives.

How are juridical disciplines categorized? They are encompassed by two units that differentiate the disciplines that are public from those that are private. All the disciplines of Law are classified and incorporated into each of these two parts of the *summa divisio*, thus, each juridical discipline (Civil Law, Criminal Law, Administrative Law, Labor Law, etc.) turns out to be from one or another sector.

As each discipline, in turn, systematizes the norms relative to its subject matter (civil, criminal, administrative, labor, etc.), as we see below, this public/private classification is indirectly transferred to the norms.

Consequently, we see that the first application of the binomial is directed at the scientific disciplines, the so-called "external system" that is not legislative, but rather a conceptual abstract that includes each specific science or jurist specialty. This means it is firstly a classification intended for the doctrinal sectors.

2. Assignment of the "juridical nature" of each law.

This binomial also indirectly applies to the juridical "legal" system, elaborated by a legislator.

In this case the juridical norms are classified by the public/private bipolarity.

Let us recall that the norms of a given subject matter as a whole are the subject of a particular discipline that systematizes them: Civil Law, Criminal Law, Administrative Law, Labor Law, etc.

In what way is any *lex* considered to pertain to this and that discipline, incorporated into its core and studied as such? It is said that a given law or norm is civil, criminal, administrative, labor, etc., from the analysis of the legal reality or regulated subject from which arises its "legal nature": civil, criminal, administrative, labor, etc. Then as each norm has a "juridical nature" assigned to it, they can in turn be qualified as public or private norms, according to the juridical discipline whose dogmatic core is integrated by that norm.

These are the two approaches from a legal viewpoint of referring to the public or private.

IV. The public or the private of legal science.

In short, the phenomenon of private/public in Law, first of all, can be reduced to the classification made by Law scientists in two large groups of juridical disciplines according to their content.

The jurist's work of dissection is carried out with respect to the norms that comprise these disciplines, which includes describing its juridical nature or formulating principles, institutions and juridical theories, through all the technical apparatuses of the Science of Law. Additionally, the disciplinary autonomy of each juridical discipline is a result of the fact that each has its own nucleus, foundation, principles and essential characteristics. This is why criminal Law (on penalties), labor Law (on subordinate relationships), water Law (on usage rights), etc. exist. These subjects and subsequent disciplines, according to their kinship form two large families, giving rise to the great public/private classification.

1. The juridical disciplines and their autonomy.

For the conformation of a legal discipline, and therefore to consider it autonomous from the juridical perspective, there are essential aspects that make up its content, which the jurist must

discover by observing the normative data and the material reality. They are the aspects that constitute the *"dogmatic core"* of each discipline because in said nucleus it must be possible to discover the central juridical institutions of each autonomous discipline. From these essential aspects dissected from its regulation *(lex)* do the core institutions of each discipline and the general principles of Law *(ius)* arise, enabling legal science to bring to bear all of its added value, and not merely legalism, to address social problems.

The classifications that juridical Science performs in public/private and also in other specialized branches: tax, forestry, financial, environmental, etc., are aimed at creating disciplines of study, shaping legal principles from which to offer solution models, which is why the Science of Law "systematizes" the laws in force at any given time. The Science of Law grants these laws a juridical nature, and wherever they are collected, or whatever the denomination that the legislator (or the constituent) has given them, the jurist "systematizes" them in a specific discipline. Thus, what makes a discipline public or private is its doctrinal classification.

The norms in and of themselves always have their own nature, but this nature does not come from pertaining to a legal body with a better or worse name applied by a legislator, nor does a legislator define it. Its nature arises from the essential content of each discipline and the classification that the jurist gives it, depending on whether it forms part of the core of a given discipline.

2. The two hemispheres of Law.

As stated above, from the classification derived from this *summa divisio* emerges what is called public law as well as private law. These two fields do not constitute disciplines unto themselves; rather these expressions are used for classifying them into two separate large groupings of juridical disciplines. Although this may be controversial, juridical disciplines are usually classified in both areas and could be as follows:

a. *The disciplines of public Law*

Its most marked characterization is the existence of powers of state entities (belonging to authorities) in the respective juridical relationship (this is the case of Administrative Law:

administrative authority, Constitutional or Political Law: legislative powers, Procedural Law: jurisdictional powers or of process).

b. *The disciplines of private Law*

Its most marked characterization is the existence of a relationship between private or private individuals (this is the case of Civil Law: property, family, inheritance, acts and contracts, etc.; Criminal Law, Labor Law, Commercial Law).

c. *The disciplines combined?*

They are usually called Criminal Law and Labor Law. The need to classify all juridical disciplines as a whole into public or private Law could raise the suspicions of those who believe that the boundaries between public and private law are not always clear, however, what I offer in this classification is a criterion: the existence of public powers in the branches and juridical relationships in which one of the powers of the State intervenes as a subject, and the non-existence of these powers in private law relations, in which the subjects interact on equal footing. It is a criterion for dividing these two hemispheres. No one disputes that the legal disciplines are public or private. The debate centers on how each one is classified, and the possibility of a *tertium genus*. A third class would break the bipolarity.

3. Two ancient and ambiguous legal axioms.

The following is connected with the foregoing: the two legal proverbs below are usually considered as two characteristics of the public/private classification, according to which:

i) "In public Law it is possible to do that which is expressly allowed", and

ii) "In private law it is possible to do everything except what is expressly prohibited".

Said axioms derive from the old compilations of Law of medieval origin[18] through which we should understand that confusing language was often employed to attempt to describe what we

[18] This legal axiom featured in the work of V. VIZCAINO PEREZ, *Compendio del Derecho Público y Común de España de las Leyes de las Siete Partidas*, first Volume, in Regla decimoquinta, Título IX *"De las Reglas Generales o Principios del Derecho"*, Editorial Joaquín Ibarra, 1784.

describe today with greater precision, with the following two juridical phenomena/principles, respectively:

1 for public Law: of juridicity (or legality); in truth, of the necessary typicality of the powers of action of the authorities, and

2 for private Law: of the autonomy ["private"] of action and creation of rights of individuals.

But in both cases, or in both spheres, public and private, there are regulations, either "prohibiting" or "allowing, respectively.

The disciplines that make up each of the two major sectors in which Law is divided (Public Law/Private Law) share essential bases and legal principles among themselves, whereas the disciplines of different sectors do not share them. Hence the difficulty of using normative integration techniques, such as the case of suppletory application, between disciplines of the opposing areas of Law.

4. Legal system and local priority, as contexts for the configuration of divisions and subdivisions of Law.

The juridical disciplines are subdivisions between the two large parties (public and private) of the juridical phenomenon. The juridical disciplines are thus either public or private. Is this also applicable to laws? To answer this, we can analyze the role of jurists to internally divide and subdivide these dimensions.

The creation of juridical disciplines is one of the more significant tasks of academic jurists because through it the legal dogma, also known as "external order" (or juridical or legal doctrine = *science of law, doctrine juridique, dottrina, Rechtswissenschaft, Rechtsdogmatik)*. This is truly the juridical knowledge par excellence[19]: *it is* the legal *literature*. Such literature is always specialized. It is never offered in a generic way (there are no "Law" treaties, to be plain), but it is always singled out in branches, special disciplines: administrative Law, criminal Law, constitutional Law, civil Law, etc.

[19] This affirmation is stated by M. ATIENZA, *"Prólogo"*, en *Courtis* (ed.), 2006, 9.

The so-called juridical dogmatics, juridical or legal doctrine, or simply doctrine, then is always specialized and never general.

This task is different from the construction of a legal system, of norms (commissioned to a legislator) or of the issuance of sentences (commissioned to a judge).

The study or analysis of the design, the structure and the contours of each legal discipline is doubly relevant:

1) Because of the usefulness of such a disciplinary division for better understanding and teaching Law; and,

2) Because of its evident usefulness in the implementation that judges carry out under the law.

Hence, it is worth asking what the role is in applying the Law of the following two areas: (i) of the specialized "branches"; and, (ii) now (with the regulatory imperative of articles 21 D.S. No. 900 and 1st Law No. 19.886) of the public/private dichotomy.

The creation and function of specialized "branches" has been a constant theme in the analysis of the juridical phenomenon from Savigny (as *"system"*) to Dworkin (as *"local priority"*).

It seems that any investigation must start by reviewing the first clues found in Savigny (mid-nineteenth century) and then analyzing the latest proposals in Dworkin (at the end of the 20th century). Thorough research in this regard is not something that we can do in this first formulation, only that which we say in due course.

In this regard, it is stated, correctly and realistically, that judges, in applying the law, grant an essential preference and relevance (*"local priority"*, the author points out) to the specialized disciplines in which the law is divided ("departments" or "provinces").[20] It is from there, from said disciplines, where the judge gets the first answers, in the attempt made by every judge that the application of the Law be "coherent".

From there, the judge identifies with even greater precision:

- The existing rules (which, if they exist, implementation cannot be hindered, except as a perversion of justice); and,

[20] R. DWORKIN, *Law's Empire*, Cambridge, Harvard University Press, 1986, 250-251, [traducido como: *El imperio de la justiciar*, Barcelona, Gedisa, 1988, 180-181].

- In case of the absence of a rule (simply put, the "difficult case"), he or she shall turn to the juridical principles[21].

In both cases, rules and principles, the judge perceives them as pertinent and unique to a singular branch of the law. If the rules and principles were too *general*, the judge would not have a tool to apply said rules and principles to cases, which are always specific and unique. The tool *is* each specialized discipline. The judge perceives that a norm or a principle will always be of a special juridical nature:

i) either from a specific and unique branch, part or department of law; that is, a rule or principle will always be, for example, administrative law, civil law, criminal law, etc.;

ii) or from one of the two hemispheres of Law: public or private.

This division of law in public and private is, by the way, already shown and expressly mentioned at the dawn of legal science in the nineteenth century by Savigny (as dividing the legal system), and in the late twentieth century by Dworkin (as a local priority)[22].

5. The summa divisio public/private as a classifier of legal norms.

The current problem for jurists and judges is that articles 1st Law No. 19.886 (regarding administrative contracting) and 21 D.S. No. 900 (in terms of concession of public work) in the case of filling loopholes, forces them to an epistemological/ontological task: classify the norms of the juridical order as having a public or private nature. But this classification already exists for the juridical disciplines.

In these two cases, the normative loopholes must be filled by applying correlatively, as a supplement, first *other* Public Law norms and then *other* Private Law norms.

There is:

[21] The distinction between rules and principles is highlighted by Dworkin in many passages of his work *Law's Empire*, Cambridge, Harvard University Press, 1986, 250-251, [transl. 1984, 72].

[22] See F. K. SAVIGNY, *System des heutigen römischen Rechts*, Berlin reimp. Scientia, Aalen, 1981, I, § 9 y R. DWORKIN, *Law's Empire, Cambridge*, Harvard University Press, 1986, 250 [transl. 1988, 180].

i) Something a bit unusual: a reference to *"Law"* (that is, to *ius*/in contrast to the *lex*. This is what we are trying to explain.

ii) There is a *supplementary source order of precedence*: First Public Law, then Private Law.

iii) It is uncommon for Regulation to supersede other laws. The filling of loopholes is done through hierarchical measures and other laws that supersede *special* regulations, but of lesser normative hierarchy. This is problematic.

iv) If we understand that it is a purely normative integration mandate, does it rule out the possibility of resorting to juridical principles to fill loopholes? Unless we understand that the legislative reference to norms of Public Law and Private Law is to legal principles, which is not expressly stated, it refers to "norms."

V. The state, the public and the private.

1. That of the state and the public and the private.

In the Chilean case, the problem of the public/private is particularly relevant in regard to the Political Constitution of 1980 (CP), where the difference between the public and a related phenomenon, but necessarily distinguishable, is quite evident: the state.

The CP is riddled with references to the public and private, and as a direct dichotomy; or, *avant la lettre,* referring expressly only to the public, which reveals the implicit existence of the private. This dichotomy appears at every moment.

Today it is not possible to include all that is state-related in the realm of the public. In fact, although this is strange and paradoxical at first glance, there is the state/public and the state/private.

a) The public state

The public, that of the people, cannot be confused with the state, to put it succinctly, for there are missions of political power [the phenomena we call State/Administration;

State/Regulator (legislator); State/Jurisdiction] that are linked to the *populus*, as such; and, separately, with the *privati*, but *uti singuli*.

We must not lose sight of the object of study of juridical dogmatics: the domestic law of a given country. In a dogmatic analysis it is not possible to bring up the (debatable) thesis of the legal personality of the State as political entity in terms of International Relations.

Once this is clear, it should be noted that the phenomenon of public/private in terms of domestic Law is of such complexity that it requires detailed analysis. Plainly stated, the "State" has no operation in the legal world, although the Constitution makes mentions to the State, so it cannot be considered as a legal entity under domestic Law (is possible to study that perspective in International Relations). In domestic Law, there are political organizations exercising specific powers to which the CP references as "State bodies": administrative power (the State/Administration); power to legislate or regulate (the State/Legislator); power to judge (the State/Jurisdiction). State bodies do have legal personality, but not so the "State" itself, which is rather a sociological concept. In fact, only the administration possesses legal personhood, but the Judicial and the Legislative Powers do not.

This is a state issue and in effect "public", given that it belongs to the common interest, that of the people.

This is an initial perspective of *the state: as public*.

b) The private state

As for property, there are aspects of the state covered by a private legal regime. In effect, various aspects of the state can be regulated (by the norms) and analyzed (by the jurist) through private statute. This is the case of fiscal property (real estate owned by the state treasury), for example, in which the legal/government individual acts according to the same basic property regime as a private individual and is governed in its real relationship to the real estate by private law. However, this does not cause it to lose its quality as a state actor. It would not be an option for the State/Treasury (which is not possible save for the State/Administration), but it is for private property law.

The property framework for the practical exercise of these powers gives rise to a legal person: the treasury (the State/treasury), and said juridical person, in spite of its connection with all the

facultative organs, acts in said sphere (property) under the same basic regime like an individual. The resulting connection to money and goods is identical to that of a private individual, although this should not be confused with the "purpose" of its use, or the "capability" to dispose of them, or the "responsibility" of its agents, because they are money or assets of a legal entity (the treasury) managed by other people (tax officials, called "public" officials, but rather administrative).

This phenomenon is the same with regards to other goods. We see the state, in the public sphere as well as the private sphere. Indeed, *State* goods (of private status: the State/treasury can be the owner) cannot be confused with *public* goods (of public statute: in which the State/Legislator or the State/Administration act optionally, without being able to be "Owners").

This is a second perspective of *the state: as private*.

c) The fiscal and the state

In sum, in the analysis of the public/private dual scheme, it is necessary to clearly distinguish:

1 the "fiscal", which only claims to pertain to the property aspects, which is regulated on the basis of norms and principles of private Law; of the 2nd state/facultative, which is regulated by public Law.

This means in the current legal context the state appears to us to have different regulations in both sectors of Law: public and private.

2. Administrative law and private law.

For instance, private juridical disciplines develop their own principles, their own characteristics and their own institutions. Examples of principles include autonomy of the will, equality of contracting parties, etc. Some examples of the institutions include contracts, responsibility derived from damages, prescription (manner of acquisition and termination), property or ownership, legal personality, representation or mandate, nullity, family law, and in the commercial arena there are societies, acts of commerce, bankruptcy, etc. Private Law has a tradition of two thousand years, but Administrative Law was born just after the French Revolution, i.e. just over 200 years ago.

In Administrative Law, the relationship is not peer-to-peer; rather it is about an individual in front of a State organism. Although the individuals and the bodies of the State are legal subjects, and can face each other in a Court of Law, the relation or confrontation in the facts is unequal.

Until the middle of the 20th century, the Administration enjoyed many privileges. They argued that they acted in function of the public good and this led individuals to calmly give up their rights and liberties before the Administration.

Example of the incompatibility of civil law concepts with Administrative Law: to make a road (acquisition of goods) it is necessary to resort to expropriation, and not to the autonomy of will to verify whether individuals want to sell or not. The relationship between the administration and the property is called "public property", i.e. suggesting the civilian concept of "property or domain". However, the administration does not have a proprietary connection to these goods.

Institutions have been created in Public Law using these sorts of oddities. Public property does not have the same exclusionary nature as private property because general it is a public good (fiscal goods also exist). That is to say, distinctions definitely have to be made for the same concept, even if the same one is used. The idea of an "administrative contract" has also been transferred, although there is no equality of parties.

Occasionally the Administration carries out activities in the private world, and it does so using legal personhood: the Treasury.

The "principle of good faith", common to Civil Law, is united to the "principle of legitimate trust" of Administrative Law.

When reviewing the legislation and treaties of Administrative Law one must recognize the conceptual transfer from Civil Law to Administrative Law.

VI. The bipolarity and the suppletory aspects.

1) The Public Law/Private Law bipolarity is a *summa divisio* of juridical disciplines, which marks a fundamental classifier of all of them; from whence two differentiated areas of the juridical phenomenon originate. Hence, the disciplines that make up each of the two major areas share

essential bases and legal principles among themselves, but the disciplines of different areas do not share them.

From this *summa divisio*, according to the specific matter of each discipline; the jurist, *a posteriori*, assigns a juridical nature concordant to each norm. In turn, depending on the location of the discipline at one of the two poles, said norms may be grouped according to public or private.

2) Hence the difficulty of using normative integration techniques, such as the case of supplementarity between disciplines in opposing areas of Law. Therefore, it does not seem appropriate in the face of regulatory loopholes to use normative integration techniques, such as substitution among disciplines from opposing sectors of the Law. It is problematic, because the norms thus integrated do so *without the adjustments* that the judge and the jurist incorporate through the delicate process of constructing juridical principles to and from bipolar/opposing sectors, which do not share essential bases or juridical principles.