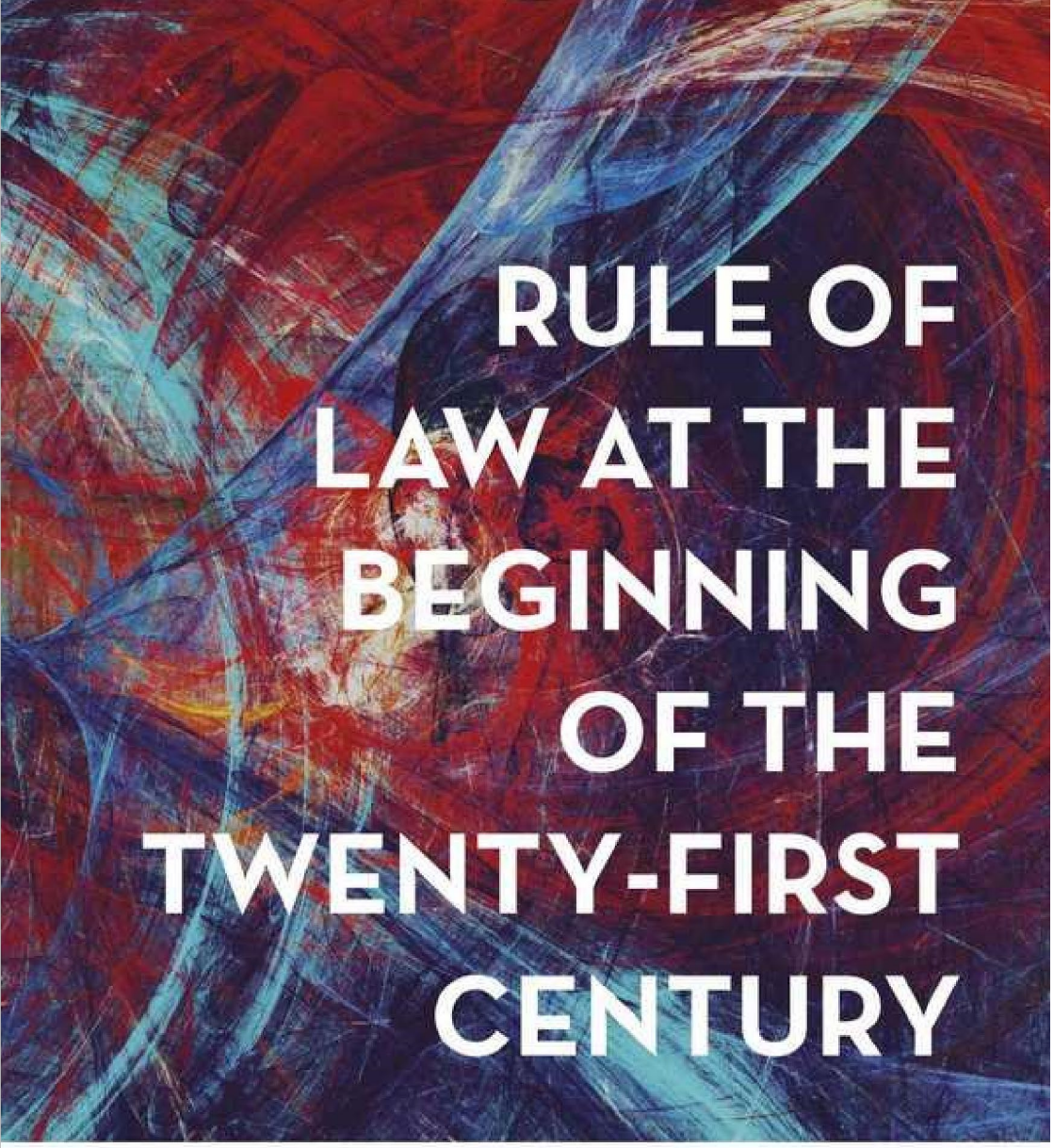

RULE OF LAW AT THE BEGINNING OF THE TWENTY-FIRST CENTURY

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LEGAL PRINCIPLES IN PUBLIC LAW

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1.1 INTRODUCTION

In legal theory the matter of legal principles is one of particular interest on at least three grounds. The first point of importance is whether we treat legal principles as legal norms (albeit ones with certain peculiarities) or we consider them as entities of a different nature. On several occasions I have expressed my opinion on this matter[1] and adduced arguments supporting the thesis that there are no particular reasons to regard legal principles as entities conceptually different from legal norms.

The second reason to examine legal principles is the connection between some of them and the socially accepted system of values or the established concepts of political expediency in a given society. Indeed part of the legal principles, despite not being value-neutral, do not have a connection to the hierarchy of values adopted by a given society, or to the established concepts of political expediency *(e.g.,* the principle that no one shall obtain rights from their own illicit behavior). Others, however, express certain value standpoints that are directly connected to concepts of political expediency *(e.g.,* the principle of equivalence of the different types of ownership). This second group of principles is particularly distinctly outlined in public law and especially constitutional law. Unfortunately, in Bulgarian legal system there hasn't been established a general rule, and Bulgarian legal doctrine does not have a common conceptualized understanding as to the admissible general outlets of law toward morals (such as Gustav Radbruch's formula regarding justice as a boundary of the legal validity) and/or toward political expediency (such as the Carl Schmitt's consideration of necessity).

And third, legal principles are a matter of interest because some of them do not emerge through their institutionalization in a single legal act (a piece of legislation or a precedent) but in a rather different manner. The question of how legal principles come into being in public law and in private law is the focus of this chapter.

The thesis that I am about to enunciate can be concisely formulated in the following manner: principles in private law most often emerge as a result of summarization and

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[1] Valchev D. *On the Nature of Legal Principles, Collection of the reports of scholarly readings on Legal Principles and Legal Norms*, Sofia, 'St. Kliment Ohridski' University Press, 2017, p. 31-45. Valchev D. *Lectures on General Theory of the Law*, Sofia, Ciela, 2016, p. 190-199, Valchev D. *From Apology of Legal Norm to Theory of Legal System*, Sofia, 'St. Kliment Ohridski University Press and Jurispess', 2003, ch.V.

standardization of court practice whereas principles in public law are being formulated on the basis of political theories and are most commonly expressed in constitutional acts and in laws. Along with that I will try to make a connection between the different ways of establishing principles in public law and in private law, and the old, although lately taking new forms, tension between the centralized and the decentralized way of creating legal norms (principles), between autocracy and democracy, between hierarchy and network.

1.2 Public Law and Private Law

Let us start with a banal question, how does public law differ from private law? Usually the answer begins with reminding the Roman tradition, and namely Ulpian, according to whom public law is "concerned with the Roman state, while private law is concerned with the interests of individuals, for some matters are of public and others of private interest."[2]Then is mentioned the theory of Savigny and his disciples according to whom the criterion is be the end ('der Zweck'), and at the end the theory according to which the criterion is the capacity of the subjects in the legal relation, when at least one of them acts on behalf of the state, the norm regulating this relation is a norm of public law, whereas in all other cases, one of private law.

My understanding is a bit different. I am inclined to accept that the main practical criterion for the differentiation between public law and private law is the method of legal regulation but on certain conditions.

Typical for public law is the autocratic setup of individual legal norms that can be well expressed through the concept of the imperative method perceived as a mechanism for creation and effect of individual legal norms. The norms of public law are those general legal norms that create grounds for the establishment of valid individual norms without their eventual addressees' consent. This lack of necessity of consent applies to three things simultaneously: (a) whether the individual norm should be established or not; (b) its content; (c) the possibility of employing law enforcement.

Typical for private law is the democratic setup of individual legal norms that can be well expressed through the concept of the dispositive method perceived as a mechanism for creation and effect of the individual legal norms. The norms of private law are those general legal norms that create grounds for the establishment of valid individual norms by mutual consent of their eventual addressees. This consent applies

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[2] *Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim*. D.1.1.1.2. (Ulpianus libro primo institutionum).

to (a) whether the individual norm should be established or not, (b) its content, and (c) the possibility of employing law enforcement.[3]

1.3 Legal Principles and Their Content

The second question, the answer to which is of importance to our exposition, is whether one can establish a norm, respectively a principle, with no-matter-what content. Kant himself accepts that in his relations with nature man is completely limited. And indeed a person does not decide whether, when and where to be born, whether to carry certain genes or others, and if a person jumps through the window of the 10th floor, whether to fall on the sidewalk or to wave his hands and fly South. A person may formulate or at least be familiar with the law of universal gravitation (Newton) or not suspect of its existence at all. In both cases though the rule that

a particle attracts every other particle in the universe with a force (F) which is directly proportional to the product of their masses (m_1 and m_2) and inversely proportional to the square of the distance (r) between their centers will be valid:

$$F = G\,\frac{m_1 \times m_2}{r^2}$$

And if a person jumps off a high place, they will injure themselves. Therefore, the validity of the rule 'do not jump off high places' does not depend on its establishment and the threat of a sanction (some sort of negative reaction of the community) but rather on the existence of the causal connection between the action and the unfavorable result.

At the same time people are completely free to manifest any sort of behavior toward each other. Hence, the difficulty to formulate a universal ethic rule of general validity (the type of Kant's categorical imperative) that is not only procedural but also content defined. A rule/a principle with any content can be legally established as long as the society explicitly or tacitly accepts it, whether because it considers it right (just, useful or beautiful), or out of fear, indolence or folly.

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[3] Valchev D., 2016, p. 247-253.

If we trace the Western intellectual and cultural tradition (Antiquity, Christian Medieval Period, Enlightenment, and modern individualism), we will be convinced that for a long time man has not perceived himself as a true creator of law. In the Antiquity, a good legislator was deemed a person who, by speculation, was able to gain knowledge of the laws governing the cosmos (uniform, eternal, invariable) and to reproduce them in the polis (the fullest and most sincere image is that of the Platonic philosopher-legislator). During the Middle Ages, the situation remains more or less the same (and even slightly worsen). For a long period of time it is believed that not only the man is not the creator of the order in which he lives, but that he could not even comprehend this order (or at least not comprehend a significant part of it). The Enlightenment formally gives Man and his Reason their dues but does not practically succeed to fully disenchant law. Law remains a product of an unknowable force, this time defined as the Reasonable Nature of Man, and embodied by the people, nation or state.

Therefore, while in the Antiquity law is a 'translation' of the universal natural order by the philosopher; in the Middle Ages it is an 'translation' of God's will made by the Church or the God-fearing king, in the Age of Enlightenment law still remains a 'translation', only this time of the will of the people, the nation or the state, made by the elected political elite. In fact, whether the people, the nation or the state wants a certain thing, and what exactly it is, is just as disputable as what God wants, or what follows from the original cosmic order. What the three have in common is that law is a 'translation' rather than a 'source text'.

At least two conclusions can be drawn so far. First, for a long period of time the legitimacy of law derived not from its characteristics but rather from an authority outside the man. Second, the legal principles regarding the public sphere, formulated in this situation, can be expressed unambiguously by someone who assumes the respective position in the hierarchy (the philosopher-legislator, the pope or the king ruling by God's will, or the representatives of the people/nation/state). Therefore, the principles in public law do not need a democratic procedure per se (a network discussion and a gradual adoption in time) because the main part of their legitimacy does not derive from their content but rather from their source. Thus, practically, elements of every political theory can be transformed into principles of public law *(e.g.*, in Bulgaria, in the course of several decades, were consecutively constitutionalized: a soft version of the separation of powers, then the principle of unity of state power, and then again the principle of separation of powers in a more rigid form).

Max Weber is right to point out that the modern state of a rational type requires a new kind of legitimacy in the form of written impersonalized rules. By default it requires a clearer basic hierarchy of values standing in the foundation of this new kind of legitimacy. The answer to this demand is the appearance of the constitutionally established principles of public law (although it is conceivable that the constitution may establish principles of private law as well, *e.g.,* the principle according to which children born out of wedlock enjoy equal rights with those born in wedlock). These principles are synthesis of the political theories, considered to be correct by those who govern. For example, the aforementioned principle of the unity of state power, proclaimed in the constitutions of the countries of the former Eastern Bloc, rests on the theory of Marxism (and more precisely, mainly on Marx's *The Civil War in France* and partly on Lenin's *The State and Revolution).* Meanwhile, the proclamation of the opposite principle, the separation of powers, is based mainly on parts of Locke's *Two Treatises of Government* and Montesquieu's *The Spirit of Laws.* These principles are always imposed autocratically by the politically established hierarchy.

In private law, the establishment of legal principles transpires in a slightly different manner. The greater part of the principles in private law is created democratically, as a decentralized creation of individual norms and their transformation in general norms through multiple acts of uniform jurisdiction, *e.g.,* as an accumulation of courts' (and other jurisdictional) practice. Thus, it is the network, and not the hierarchy, which gives birth to the rule, verbalizes it, eliminates its controversies and fluctuations in time, and gives it legitimacy. This legitimacy, however, has different grounds. It originates not so much from the source of the rule, rather than from its content.

Principles of private law need protection neither by sophisticated institutional balances, nor by heavy procedures for amendment (as is the case in public law and especially in constitutional law). Since principles in private law are established mainly as a result of continuous uniform court practice, they are considerably less influenced by the political situation and are therefore more stable. An additional stability is imparted by the fact that they draw their legitimacy from their content, which is massively perceived as right, *e.g.,* just, reasonable and/or useful *{e.g.,* in Bulgaria since the Liberation from Ottoman rule the main principles in constitutional law have been changed several times whereas the principle of private law 'one cannot transfer more rights than he has' remains with unaltered validity).

1.5 Some Reasoning Forwards: Hierarchy and Network

Finally, another interesting question: will there be a change in the way principles of public law are established? Probably yes, for everything in the world changes. If we

divest ourselves of the idea that law is given to us by a superior authority and accept what is far more prosaic, namely that people themselves create law, then undoubtedly with the development of people and people's communities law ought to develop likewise. Forecasting today (unlike some 20 years ago) is very difficult and would be to a great extent speculative last but not least because of the turbulences due to the precarious state of the contemporary world. Nevertheless, from today's point of view, several reasonable assumptions can be made.

On one hand, unless a world cataclysm turns things to the opposite direction, societies will become more and more multicultural and globally dependent. This means that the local hierarchies (including the local political hierarchies) will be under pressure from global or at least regional economic and informational networks. In mid-term perspective this cannot remain without consequences.

Two hypotheses are possible. One of them is that a new attempt at creating a unipolar world will be made *{e.g.,* a world with a distinguished leader, explicitly or tacitly recognized as such). The experience that we have had in the last few decades is about to come to an end, since nowadays two of the tokens of the unipolar imperial political paradigm are already absent, monopoly over force and monopoly over the legal system, whereas the third one, centralized finances, is challenged by the Chinese economic development as well as the cryptocurrencies). The second hypothesis (which as of today I find more plausible) is that a few big regional centers will emerge and coexist in Westphalian style. In both scenarios, in mid-term perspective there will be an additional political centralization, hence preservation (and even reinforcement) of the autocratic manner of creating legal norms/principles.

On the other hand, if the institutional matrix typical for Western societies and namely for Europe is more or less preserved, the accumulation of practice of the constitutional jurisdictions (let me remind that they are only a century old) will lead to a rapprochement between the ways of establishing principles in public and in private law, toward more network at the expense of hierarchy and more democracy at the expense of autocracy.

An influence in the same direction will be exercised by the mere manner of decisionmaking within the European Union. Should it be preserved in terms of general logic, *e.g.,* with strong elements of decentralization, this would facilitate the tendency toward a net- work-based establishment of principles in public law. Paradoxical as it may be, the exact opposite influence would be exerted by the case law created by the Court of Justice of the European Union. The practice of the Court in Luxembourg shows that some of its decisions are founded on hierarchical authority rather than a network-based thesis, which is why they are far more political than juridical (a typical example is the thesis of the priority of the EU law over the national constitutions).

At the end, an intellectual speculation. The interest toward cryptocurrencies shows that there is vast distrust in political hierarchies (governments) and economic hierarchies (banks) in the contemporary world. The greatest advantage of cryptocurrencies (along with their many flaws) is the exclusion of the political and economic elites from their governing, hence their manipulation. I would go as far as to define this situation as a revolution of the network against the hierarchy in the name of fairness.

Is it possible that something similar occurs in the domain of law? Probably yes. Some would point out that the principles of fair exchange have long been internationally acknowledged *(e.g.,* in the form of the courts of arbitration which operate by their own procedural rules). But let's not forget that they apply somebody else's hierarchically established material law rather than a network-based substantive law. Will there be a network-based substantive private law? How about a network-based substantive public law, at least as far as principles are concerned? As of now, I do not have the answers to these questions. But let's not forget that until now network has always been an instrument for political changes bringing uniform results: new political constellation based on a new hierarchy.