Against the erosion of private law by public law

(English translation of German original)

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In the Greek tragedy Antigone from Sophocles, King Creon prohibits the burial of her own brother Polyneices. The heroine Antigone fights against Creon's interference in her rights with the words: "He has no right to keep me from my own." And later, when Antigone's betrothed, Haemon, meets his father Creon, in defence of Antigone he says: "No state is property of a single man." And further: "You'd rule a desert beautifully alone." These are immortal words against the striving for almighty power of the state and the political rulers.

The work by Sophocles describes an everlasting basic conflict in the law: The right of the individual to privacy and the threat of the state power to restrict the rights of the individual by means of public rules – in Antigone's case by means of a burial ban. Ultimately, this conflict has dragged on throughout the history of law. Again and again, authoritarian leaders have attempted to intervene in private and legal relationships and to prevent the free interaction of individuals in personal and economic spheres.

A liberal constitutional legal state is based on private autonomy, individualism, freedom of contract and private ownership. These principles are an expression of the constitutional rights of freedom, in particular personal freedom, economic freedom and the guarantee of ownership[1]. People and legal entities should be able to determine their relationships independently. They should face each other on equal footing, without any relationship of subordination and not in any sovereign function. It should be possible for contractual

[1] See Art. 10, 26 and 7 of the Swiss Federal Constitution. Rights of freedom were already guaranteed in the Swiss Federal Constitutions of 1848 and 1874. In the USA, the "Virginia Bill of Rights" – even before the declaration of independence of 1776 and the "Bill of Rights" of 1789 - provided for rights of freedom. Article 1 of the "Virginia Bill of Rights" guaranteed that all people "are by nature free and independent" and possess "certain inherent rights", and granted "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

relationships, whether they are purchase contracts, lease contracts, financial contracts, works contracts or other contracts, to be regulated at their own discretion.

Dichotomy of private law and public law in the current legal system

In Swiss law, the delimitation of private law and public law is already provided for in Art. 122 of the Swiss Federal Constitution (BV). Art. 35 para. 3 BV also specifies a certain "effect of the basic rights", which is problematic from a liberal perspective and hardly relevant in practice[2]. On a legal level, Art. 6 of the Civil Code (ZGB) – primarily from federalist considerations – establishes the proviso of the public law of the cantons.

The distinction between private law and public law dates back to Roman law.

The Roman lawyer Ulpian in the 3rd century, formulated the distinction as follows[3]: "Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem." A public law is defined as the law which benefits the state interests, and private law as the law which is based on the interests of private entities[4]. This theory of interests denies that in a liberal state, private law also serves the common interest and there are no state interests detached from the interests of individuals.

Today, in order to distinguish between private law and public law, other theories are primarily used. According to the so-called

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[2] On the constitutional dispute in Switzerland regarding the "effect of the basic rights", see in particular: Kley, Der wissenschaftliche Streit um die Drittwirkung der Grundrechte [The academic dispute about the third-party effect of the basic rights] 1987-1989, in: L'Homme et son droit, Mélange en l'honneur des Marco Borghi, Zurich 2011, p. 227-240, 238; Bucher, Schweizerisches Obligationenrecht, AT, Zurich 1988, p. 82.

[3] Dig. 1, 1, 1, 2, inst. 1, 1, 4.

[4] Koller, Berner Kommentar, Vol. I/1, Introduction, Art. 1-9 ZGB, Art. 6 No. 28 et seq., with numerous additional notes. There is a great deal of literature on the various theories of differentiation; see e.g. also Imboden, Schweizerische Verwaltungsrechtsprechung [Swiss Administrative Law], Basel 1976, p. 1 et seq. with further references; Müller, Das öffentliche Gemeinwesen als Subjekt des Privatrechts [The public community as a subject of private law], Zurich, p. 8 et seq.; Eckhardt/Schmidt, Einführung in die Rechtswissenschaft [Introduction to Legal Science], Düsseldorf 1972, p. 23; Maurer, Staatsrecht I [State Law I], 5th edition, Munich 2007, p. 6 et seq.; Sodan/Ziekow, Grundkurs Öffentliches Recht [A Basic Course in Public Law], 7th edition, Munich 2016, p. 473. The "Public/Private Dichotomy" topic is also discussed in English-speaking legal circles; see e.g. Mnookin, The public/private dichotomy: political disagreement and academic repudiation, University of Pennsylvania Law Review, Vol. 130, No. 6, 1982.

subordination theory, it is crucial for public law to be essentially based on the subordination of the citizens to the state. The core point of private law, on the other hand, is the coordination of legal entities of equal rank[5].

Accordingly, private law standardises the relationships between legal entities on the same level, while public law means the exercise of sovereign power[6].

In some cases, the question is also considered as to whether a rule of law is mandatory or optional. According to the Swiss lawyer Walther Burckhardt, mandatory rules of law that restrict the freedom of contract of individuals should be designated as public law, while rules that give individuals a comprehensive right to influence their own legal relationship should be considered private law[7]. The so-called functional theory merely aims to assess whether public tasks are fulfilled with the questionable legal relationship[8].

The various theories on separation are applied by the Federal Supreme Court depending on the individual case, which means one can talk of a plurality of methods. The Federal Supreme Court checks, in each case, "which differentiation criterion best meets the specific circumstances".[9] In the process, the subordination theory in case law is of overriding importance in a certain way.[10] For the purpose of differentiation, it is thus especially relevant whether sovereign rules of law or rules that affect the horizontal relationship between two or more legal entities are at issue.

Notwithstanding the specific definitions and different theories, the thought of separating private law and public law for a liberal legal system has a deeper significance. The possibility to conclude transactions of one's own accord and exchange goods and

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[5] Arzt, Einführung in die Rechtswissenschaft [Introduction to Legal Science], Basel 1987, p. 55.
[6] Braun, Einführung in die Rechtswissenschaft [Introduction to legal science], Tübingen 2011, 4th edition, p. 154, formulated it as follows: "In private law, everyone can make a separate plan, according to which he acts; in public law, however, it concerns the achievement of an overall plan."
[7] Burckhardt, Einführung in die Rechtswissenschaft [Introduction to Legal Science], Zurich 1972, p. 139.
[8] Koller, loc. cit., with references.
[9] BGE 109 Ib 149.
[10] BGE 109 Ib 152; Bucher, Schweizerisches Obligationenrecht [Swiss Law of Obligations], AT, Zurich 1988, p. 81 et seqq. The Federal Supreme Court adopted the term "expansive force" coined of the public law, a term coined by Huber (Huber, Berner Kommentar, Einleitungsband, Art. 6 no 70 et seq.) in connection with Art. 6 ZGB, in several decisions (BGE 132 III 49; BGE 129 III 161; BGE 126 III 370). Art. 6 ZGB also has, above all, a federalist background. Huber did not consider the "expansive force" of the cantonal public law to be barrier-free.

services voluntarily is the basis of a market economy system and a community based on free individuals.

The significance of the separation is clearly expressed in the history of the law. In times when liberal ideas were developed and the freedom of the citizen from the state was proclaimed, legal scholars considered the separation to be of key importance, while the distinction was considered to be unimportant or overhauled in phases when emphasis was placed on collective law.

Emphasis on the idea of separation in liberalism of the 19th century

The dichotomy of private law and public law became particularly strong during the Enlightenment and even more so in the time of postulation of rights of freedom in the 19th century. Private law was regarded as an opposition against the Absolutism and as a possibility for state-free activity. The bourgeois world made private law the protection-worthy "state-free space", "autonomous, politically-free sphere".[11]

The legal theorist Friedrich Carl von Savigny wrote that in private law "the individual person is for itself, and every legal relationship only refers to its existence or its particular circumstances as a means".[12]

In the 19th century, it was a matter of protecting privacy from politicisation and to keep public law as far away as possible from private law[13]. Private law was regarded as "Reich of Freedom", which evades state paternalism.[14]

Private law was codified in laws.[15] In 1812, the oldest codification of civil law in the German-speaking world, the General Civil Code (ABGB), came into force in Austria. Pursuant to § 1 of the

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[11] Hoffmann-Riem/Schmidt-Assmann, Öffentliches Recht und Privatrecht als wechselseitige Auffangordnung [public law and private law as reciprocal collection system, Baden-Baden 1997, p. 56 et seq.

[12] Friedrich Carl von Savigny, System des heutigen römischen Rechts [System of modern-day Roman Law], Vol. 1., Berlin 1840, p. 22.

[13] Ed. by Joachim Rückert, Reden über Arbeit, Arbeit und Recht seit 1800 [Talks about work, work and law since 1800], Cologne 2014, p. 34 f.

[14] Hoffmann-Riem/Schmidt-Assmann, loc. cit., p. 55.

[15] Mohnhaupt, Historische Konkurrenzen und Beeinflussungen zwischen Privatrecht und öffentlichem Recht, Rechtsgeschichte [Historical rivalry and influences between private law and public law, legal history], Rg 19/2011, p. 239-246.

ABGB, the law should regulate the "private rights and obligations of the inhabitants of the state". In the mid-19th century, Bluntschli created the code of private law for the canton of Zurich.[16] In 1883, Swiss Code of Obligations (OR) came into force, followed by the Swiss Civil Code (ZGB) in 1912. The central codification of the German general private law was the Civil Code (BGB) of 1900.

Relativisation of private law in totalitarian legal thinking

At the beginning of the 20th century and at the time of the First World War, there was then a turning point. Especially in Germany, there was a strong relativisation of private law. At that time, the civil law academics complained about a "significant increase in enforcement"[17].

The private lawyers criticised that public law was expanded more and more into their sphere at the expense of private law. There was a "seizure of power of public law" and a loss of significance for private law.[18]

In National Socialist legal doctrine, the distinction between private law and public law was then declared to be outdated. The split was identified as a source of all evil. The Volksgemeinschaft [national community] and the national common law were propagated, not the idea of rights of freedom.[19] The party program of the National Socialist German Workers' Party demanded the complete overcoming of the Roman law, which was considered as a materialistic. Number 19 of the party program read: "We demand that the Roman law serving the material world order be replaced by a German law."[20]

The demands went much further, however. The institutions of private property and freedom of contract and economic freedom were meant to – as many other freedoms, e.g. freedom of media, freedom of assembly or freedom of religion – be abolished or highly relativised.

[16] Elsener, The Swiss law schools from the 16th to the 19th century, the cantonal codifications up to the Swiss Civil Code, Zurich.
[17] Hedemann, Das bürgerliche Recht und die neue Zeit [Civil Law and the new time], 1919, p. 11 et seq.; see: Hoffmann, loc. cit., p. 44.
[18] Wieacker, Industriegesellschaft und Privatrechtsordnung [Industrial society and private law system], Frankfurt a.M. 1974, p. 36 and 39; see Hoffmann, loc. cit., p. 44.
[19] Stolleis, Geschichte des öffentlichen Rechts in Deutschland, Staats- und Verwaltungsrechtswissenschaft in Republik und Diktator 1914-45 [History of public law in Germany, state and administrative law in Republic and Dictatorship 1914-45], third volume, Munich 1999, p. 338 et seq.
[20] The 25-point program of the National Socialist German Workers' Party dated 24 February 1920 (NSDAP Party Program), number 19.

In this sense, the "nationalisation" of all companies already undertaken was required.[21]

The party program also provided: "We demand to share in the profits of large businesses." [22] Contrary to the guarantee of ownership, the State was also to be allowed to take possession of the land for non-profit purposes, free of charge.[23] The main principle was not the interest of the unknown individual[24]but rather the "common interest". The political keyword was: "Common use before own use".[25]

A strong state was required, which would overcome the old conflict between private law and public law. Public law should dominate the entire life of the individual. In his essay entitled "Die nationale Revolution" [The national revolution], the German National Socialist lawyer Scheuner wrote the following: "More and more materials are stepping out of the sphere of private law into the area of public law. The authoritarian state is in the sign of public law …"[26] The authoritarian interventionist state was fighting against liberal private law and saw a threat in this.

In his essay, Scheuner expresses the opinion that in liberalism, freedom could "develop too uninhibitedly". Instead, a "strong state that bans social opposition by outstanding power" was needed. The individual must be integrated into the "great unity of the nation". In the "strong state", an "absolute value" would be visible and the weakening of the state through liberalism would have to be countered "with full determination".[27] The German revolution of 1933 was all about the "redirection of state authority". In the process, the focus would be on the state, and would have to be redesigned according to the "principle of authoritarian leadership".

According to Scheuner, German socialism would have to repeal the doctrines of liberalism and understand the economy as a "part of the overall life of the nation". Scheuner wrote the following: "This national socialism replaces liberal individualism and liberal

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[21] NSDAP party program, number 13.
[22] NSDAP party program, number 14.
[23] NSDAP party program, number 17.
[24] See: Eisele, Interesse des unbekannten Individuums [Interest of the unknown individual], commemorative publication by Robert Nef, Fighter for Freedom, Lucerne 2012, p. 200-205.
[25] NSDAP party program, numbers 18 and 24.
[26] Scheuner, The National Revolution, Public Law Archive, Vol 63, No. 2 (1934), p. 204-205; see: Hoffmann, loc. cit., p. 340.
[27] Scheuner, loc. cit., p. 171-172.

'laissez faire,' and classifies and subordinates individual interest below the common good, the principle of responsibility of every member of the economy for the national economy at large."[28]

The "authoritarian Volksstaat" was based, according to Scheuner, on the "activist expansion of state leadership and monitoring in all areas of life". The ideas of rationalism and the "freedom of the individual" would have to end in favour of the concept of the authoritarian state. Scheuner accused the liberal state of having a "deficiency of state substance" by Scheuner. It would take a "historical change", which would return to the "dominance of the executive power". The "right-creating deed" of the executive power would be the "most important form of state leadership". The ideas of the "autonomous economy" and the "defence of state intervention" would disclose a "lack of understanding for the state concept".[29]

During this time, the totalitarian regimes were handling an "arsenal of commands and prohibitions" and tried to involve "all private legal entities – from the simple 'Volksgenossen' [national comrade] to major industry – in a network of public obligations - to steer the exchange of goods and to assign goods from on high."[30]

This development was strengthened by the controlled wartime economy, which meant that the private law rule of permission was no longer subject to prohibition, but rather the prohibition was subject to authority approval.[31] According to Scheuner, according to the National Socialist opinion, the economy was a "part of the state that covers the entire system of social life", of the "total state". A "sovereignty that stands above all individual interests" would be necessary for the "active state leadership of the economy" and for the overcoming of individualism required by German socialism.[32]

The Bürgerliche Gesetzbuch [German Civil Code], which was perceived as liberal and too strongly emphasised private law and private autonomy, was to be replaced in German national socialism by a Volksgesetzbuch. However, the Volksgesetzbuch prepared by the Academy of German Law did not go beyond drafts due to World War II. According to the draft of the Volksgesetzbuch from 1942, all law should be "at the service of the Volksgemeinschaft" [national

[28] Scheuner, loc. cit., p. 180-181.
[29] Scheuner, loc. cit., p. 182, 185, 197, 200-202, 213.
[30] Stolleis, loc. cit., p. 341.
[31] Stolleis, loc. cit., p. 341.
[32] Scheuner, loc. cit., p. 217.

community].[33] In the interpretation of the laws, the judges should not be bound to the wording of the laws. Rather, it was envisaged that the judges would administer justice "according to the legal interpretation supported by the National Socialist ideology". The goal was a "life value for the Germany community that was as high as possible".[34]

Thus, gateways were created for the erosion of private law by case law and the fundamental legal principle for a legal state was thwarted. Subjective rights of the individual, the basis of every private legal order, were superseded. All actions were declared to be part of a higher national system, whereby general clauses served as ideological means to change the law.[35]

"The party and their idea had to steer the state" in the area of law as well, and the law merely became the means for implementing national socialism.[36] The judges should take common good wording such as the "interests of the general public", "national needs", "community interest", "common welfare" and "common good"[37] as a guideline for the application of the law. One did not have the possibility to design legal relationships, but rather as a link to the national community.[38]

Liberalism in law, which is based on independence of individuals and their right to autonomously determine contracts and circumstances without the influence of the state, seemed to be overhauled once and for good. The single person, the individual, no longer counted. Rather, every doing was at the service of the state or the "Volksgemeinschaft" [national community]. The "invisible hand" of the market, which, in legal matters, led to individual collaboration and legal relationships that were marked by mutual benefits and a balancing of interests, was overridden.

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[33] Volkgesetzbuch, Grundregeln und Buch I, Entwurf und Erläuterungen [Volkgesetzbuch, Basic Rules and Book I, Draft and Explanations], submitted by Hedemenn, Lehmann and Siebert (1942), printed in: Schubert (Hrsg.), Volksgesetzbuch, Teilentwürfe, Arbeitsberichte und sonstige Materialien [Volksgesetzbuch, Partial drafts, work reports and other materials], Berlin 1988, p. 511 (517), second item, clause 19.
[34] Volkgesetzbuch, loc. cit., second item, numbers 20 and 21.
[35] Mager, Das Recht im Nationalsozialismus, Wege völkischer Rechtserneuerung [The law in National Socialism, ways of regenerating national laws: Rechtsquellenlehre und Auslegung als Gesetzgebungsersatz [Legal source teaching and interpretation as a replacement for legislation, http://www.juracafe.de/bildung/seminar/self/rechtserneuerung.pdf
[36] Frank, Die Einwirkung des nationalsozialistischen Ideengutes auf das deutsche Rechtsleben [The effect of the National Socialist ideas on German legal life], in DJZ 1934, column 1169 (1171).
[37] Numbers 10, 17, 18, 23 and 24 of the NSDAP party program.
[38] Larenz, Gemeinschaft und Rechtsstellung [Community and Legal Position], 1936, p. 33 et seq.

Restriction of private autonomy and freedom of contract in socialism

"Creating a strong central force"[39] but was not just a goal in the National Socialist philosophy, however. The abolition and/or relativization of private ownership and the restriction of the freedom of contract and thus private law, were also dominant basic lines of socialist or communistic legal ideas.

Already in Lenin's April Theses of 1917[40], a demand had been made for the "nationalisation of all the land in the country", the "merger of all banks of the country into a national bank" and the "transition to control over the societal production and distribution of the products made by the Soviet of workers' deputies." While the "societal production" and the ownership of the land passed into the hands of the state, neither economic nor property freedom existed.

While in the Federal Republic of Germany, after World War II, efforts were made for the "Restoration of Private Law" and the restoration of the "Intrinsic Value of the Personality of Individual People"[41] private law remained in socialistically managed countries of subordinate importance. The battle cry "public law before anything"[42] continued to be the general foundation of legal policy in such countries.

In the German Democratic Republic (DDR) founded in 1949, the civil law had to be in line with the "decisions of the socialist state". The planned economy was apparent not only in the design of state supply relationships, but also particularly clearly in the statist land law.[43] Although the Civil Code (BGB) initially continued to apply formally, it was increasingly overlaid by the case law of the Supreme Court of the DDR, which felt committed to a socialist understanding of the law.[44] In 1952, work began on a socialist civil code (ZGB), which was meant to lead to the replacement of the BGB.

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[39] NSDAP party program, numbers 25.

[40] Lenin, Über die Aufgaben des Proletariats in der gegenwärtigen Revolution, Aprilthesen, April 1917 [Lenin, About the tasks of the working classes in the current revolution, April Theses, April 1917, published on: https://www.marxists.org/german/archive/lenin/1917/04/april.htm.

[41] Hallstein, Wiederherstellung des Privatrechts [Restoration of Private Law], Süddeutsche Juristen-Zeitung, Year 1, No. 1, April 1946, p. 1-7.

[42] See the criticism in Hallstein, loc. cit., p. 2.

[43] Brauender, Europäische Privatrechtsgeschichte [A history of European Private Law], Vienna 2014, p. 164 et seq.

[44] Brauender, loc. cit., p. 165.

The civil code of the DDR, which came into force in 1976, contained a strong restriction on private law and private ownership. Not “personal ownership”, but rather “socialist ownership”, was the “economic basis for the development of the socialist society”[45]. On the other hand, “personal ownership” was of subordinate importance in the Civil Code of the DDR. This “personal ownership” specifically included “work income and savings, the equipment of the home and household, items for professional needs, items acquired for training, education and leisure, as well as land and buildings for satisfying the residential and recreation situation of the citizen and his family.”[46]

“Social ownership” was “untouchable” and enjoyed “the protection of the socialist state”.[47] It was defined as “Volkseigentum [national property], the ownership of socialist associations and the ownership of social organisations of the citizens”. This was “to be used according to social requirements and the principles of the socialist planned economy”. In the process, the “socialist state” organised the “use and increase of the Volkseigentum, particularly by the national-owned companies, conglomerates, economic bodies, government bodies and institutions, socialist associations and societal organisations as well as by the citizens”.[48]

Civil law contracts were possible based on the civil code of the DDR, but narrow limits were imposed on them and all contracts had to be compatible with the “Principles of Social Morality”.[49]. In addition, the legislation established numerous prohibitions, which hugely restricted the freedom of contract and the right to create economic relationships autonomously. The entire private law was subject to the “political power of the working class, the societal production and ownership conditions, as well as the state leadership and planning of the societal processes”.[50] It was primarily necessary to increase the socialist ownership.[51] Contract law was stifled by the proliferation of public law.

The Civil Code of the DDR was not primarily directed at freely acting enterprises and entrepreneurs, but rather to companies and “economic management bodies”, which were committed to the

[45] Civil Code of the German Democratic Republic, DDR, dated 19 June 1975, § 17.
[46] Civil Code of the DDR, dated 19 June 1975, § 23.
[47] Civil Code of the DDR, § 20.
[48] Civil Code of the DDR, § 18 para. 1 and 2.
[49] Civil Code of the DDR, § 44 and § 68.
[50] Civil Code of the DDR, Introduction.
[51] Civil Code of the DDR, § 3.

"state supply policy".[52] In the area of Commercial Law, the Civil Code of the DDR stipulated, for example, that the "production and trading companies as well as economic management bodies … [were] obligated to provide consumer goods when implementing the state supply policy."[53] Also, service contracts were also aimed at the "implementation of the state supply policy" , not the interests of consumers.[54] The Civil Code of the DDR therefore did not build on the private initiative and the innovative capacity of rival companies, which attempt to manufacture and sell to consumers more, better, healthier and cheaper products through curiosity, courage and effort. Rather, the goal of all activities was the "implementation of the state supply policy".

Private law as a correlate to market economy

Liberal law focuses its considerations on the individual, not the state. It is based on the fact that it is not the state that assumes the "supply" of the citizens, but that companies and private individuals compete to offer consumers services and products that are as good as possible.[55] No state planners "implement" a state "supply policy" based on a forced and subordinate relationship. Rather, a network of contractual relationships, which are based on equal rights and voluntary nature, represents the basis for the prosperity and the innovative strength of the liberal economy.

Private law allows this economic system to align itself with the wishes of the people. It creates a "democratic system of the market", which makes consumers feel confident.[56]

[52] Civil Code of the DDR, § 133.
[53] Civil Code of the DDR, § 133.
[54] Civil Code of the DDR, § 162.
[55] Mises wrote (Mises, Planned Chaos, 1947, p. 15): "In spite of the anticapitalistic policies of all governments and of almost all political parties, the capitalist mode of production is still fulfilling its social function in supplying the consumers with more, better and cheaper foods. It is certainly not a merit of governments, politicians and labor union officers that the standard of living is improving in the countries committed to the principle of private ownership of the means of production. Not offices and bureaucrats, but big business deserves credit for the fact that most of the families in the United States own a motorcar and a radio set."
[56] Mises explained the market principle as follows (Mises, Anti-Capitalistic Mentality. 1956, p. 2: "The profit system makes it easier for those who have succeeded in filling the wishes of the people in the best possible and cheapest way. Wealth can be acquired only by serving the consumers. The capitalisation of their funds as soon as they fail to invest them in those lines in which they are eating best the demands of the public. In a daily repeated plebiscite in which every penny gives a right to vote the consumers determine who should run the plants, shops and farms." and so on (Mises, loc.

Specifically for this reason, the erosion of private law by public law has been criticised in the past by liberal legal entities. For example, Braun wrote the following: “The attempt to assign private law to public law is therefore always big. However, as the example of the socialist states proves, in the long term this demotes all citizens to public officials and recipients of orders. For the development of one’s own ideas, there is increasingly less space left…”[57]

Liberal economists expressed similar opinions. Hayek wrote in his work “Law, Legislation and Liberty: “During the last hundred years, in the interest of so-called ‘social’ target concepts, the distinction between rules of correct behaviour and rules for the organisation of state services has become increasingly blurred.”[58] Hayek maintained that it was a “complete reversal of the truth” to believe that only public law served the “general welfare”, while “private law only protects the individuals own interests”.[59]

The spontaneous regulation of the market would be “for general welfare more important … than most specific services that the state can provide”. Organisational rules of the state should be clearly differentiated from the rules that form the “basis of spontaneous order”. The spread of public law led to the fact that “under the law, public law is mainly meant, and under regulation only organisation” is understood. Thus, “socialist and totalitarian ideologies” had apparently gained too strong an influence on the law.[60] This led to the fact that the law is not understood as rules of conduct, but is equivalent to a hierarchy of power or command.[61] The spontaneous market regulation would thus be converted into an administrative organisation. The “citizens and their ownership” would increasingly be treated as “management objects”.[62]

Hayek warned that because of the “socialisation” of the law “the characteristic feature of universal rules of conduct is being eliminated”, namely the principle of equality. The liberal economist

cit., p. 9): “It is precisely this that the democratic system of the market means. The consumers are supreme – i.e., sovereign.”

[57] See e.g. Braun, loc. cit., p. 154.

Hayek, (original edition in English, entitled: Law, Legislation and Liberty (1973/1976/1977, a one-volume first edition in English, issued in 1982), translated by Monika Streissler, Tübingen 2003, p. 135.

[59] Hayek, Law, Legislation and Liberty loc. cit., p. 135.

[60] Hayek, Law, Legislation and Liberty, loc. cit., p. 136.

[61] Fuller, The Morality of Law, New Haven 1964, p. 63; cited in Hayek, Law, Legislation and Liberty, loc. cit., p. 513, note 135:19.

[62] Hayek, Law, Legislation and Liberty, loc. cit., p. 145 et seq.

turned vehemently against the socialist legal theorists, who preached the "doctrine" "that private law, the purpose of which is the coordination of individual activity, would be increasingly replaced by a public law of subordination."[63]

In particular, Hayek criticised Radbruch, who had written the following on the legal systems marked by individualism and socialism: "For an individualistic legal system, public law, the state is only the narrow protective framework, which revolves around private law and private ownership, for a social legal system, on the other hand, private law is only a provisionally omitted and always decreasing space for private initiative within the comprehensive public law."[64]

With the wording of "provisionally omitted" and "always decreasing space for private initiative", it becomes clear what this attack on private law consists of. The freedom of entrepreneurs and the competition principle as such should be contested and ultimately eliminated. The attack on private law is furthermore always an attack on the market economy and a free legal system.

Necessity of safeguarding the liberal Swiss private law

In economic terms, the market principle guarantees, and legally above all private law, that people can benefit from increasingly better products and services under increasingly attractive conditions.

Economic history with all its unbelievable inventions, whether these are washing machines, contact lenses, mobile phones or mountain bikes, is proof that markets and voluntary collaboration - not based on subordination - of people and companies, actually work. This is also the social function of private law. It allows freedom and progress.

Swiss law is traditionally based on a liberal, not a socialist basis. In addition to other principles such as democracy, the division of powers and federalism, the liberal law is one of the central cornerstones for the unbelievably impressive success of Swiss history in view of the lack of mineral resources and the difficult alpine position. The clear differentiation of private law and public law is of fundamental importance for a liberal legal entity. An increasingly

[63] Hayek, Law, Legislation and Liberty, loc. cit.
[64] Radbruch, Vom individualistischen Recht zum sozialen Recht [From individualistic law to social law] (1930), printed in ds, Der Mensch im Recht [The person in law], Göttingen 1957, p. 40.

strong integration and embedding of private law in administrative rules jeopardises this success. In addition, it leads to an excessive strain and thus also to a loss of credibility in public law.

The tendency to undermine private law by public law, which has shown itself in Switzerland, especially (but not only) in areas of labour law, rental law and finance law, should be kept in place. Switzerland should, especially if it wants to continue to successfully exist in global competition, realise that enterprises and entrepreneurs can regulate their private legal relationships as far as possible, and these private contractual relationships are not controlled by state intervention rules with prohibitions and invalidity consequences.

The principle of freedom of contract must be kept up. Swiss law should remain individualistic and altruistic (and not collectivist and selfish).[65] Private law should enable space for design and implement a spontaneous market regulation.[66]

[65] The philosophically significant contrast between individualism-altruism and collectivism-egoism is clearly highlighted by Popper (Popper, Die offene Gesellschaft und ihre Feinde Popper, The open society and its enemies], vol. I, 8th edition, Tübingen 2003, 120-123).

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