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EFFICIENCY: A PARADIGM OF PUBLIC LAW AND PRIVATE LAW*

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Abstract. The present study examines the paradigm of state efficiency, and by extension, the efficiency of law, as a foundational assumption. This assumption posits that the law (and the state) should fulfil its functions and achieve its goals in a manner that genuinely safeguards fundamental rights, operates swiftly and cost-effectively, and upholds quality standards (respecting core values). Efficiency is therefore an inherent element that defines the phenomenon of the state and law. The author argues that the law constitutes one of the fundamental pillars of a democratic state, and as such, it also defines the efficiency and causality of the state.

Keywords: effectiveness of law; law paradigm; public law; private law.

1. THE DIVISION OF LAW INTO PUBLIC AND PRIVATE LAW – ARCHAISM OR NECESSITY?

In contemporary discourse, the concepts of efficiency, effectiveness, causality, and other related ideas frequently emerge in discussions about the state, the law, and the actions of the individual. These issues serve as an ever-precise benchmark for the actions of public bodies and other entities. The concept of efficiency, particularly when considered from an economic perspective, gives rise to a number of questions. Should the law, by definition, be *efficient*? How is the concept of efficiency understood when confronted with emerging social and cultural trends, advancements in technology (such as artificial intelligence [AI]), or crises? Does efficiency take precedence over quality and underlying values? Can law, in its traditional view, still achieve effectiveness? Does achieving legal effectiveness necessitate a shift from *ossified* rules toward post-classical frameworks of *dialogue* and the art of argumentation? Does the distinction between public

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and private law remain relevant in an era characterized by the redefinition of reality and the relationships between subjects, which are based on models different from those of previous years? Answering these questions is crucial in an era of rapidly evolving social and technological realities that challenge established economic foundations and long-standing legal institutions.

The traditional view of Roman jurists, such as Ulpian, is that public law secures and promotes the supra-individual public interest, potentially involving the state and society. This perspective emphasises that public law achieves its goals and functions through commands and prohibitions enacted for the common good, emanating from statutes and public bodies vested with the power to enforce compliance through legal and physical coercion. As Ulpian states, "*Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quedam privatum*. Public law is that which pertains to the system of the Roman state, while private law is that which (pertains to) the benefits of individuals: for there are some (norms) generally useful, others again private" [Pogonowski 2024, 214ff]. The goal of this activity is the common good – based on accepted values creation and looking at the individual through the prism of the group (family, society). In light of the potential for interference in the situation of subordinated subjects, it is imperative that both the authorities (public entities) and the subordinated are aware of the extent of their authority, duties and associated sovereign powers of the public administration. Consequently, public-legal relations are founded upon the principle of legalism. Sovereign bodies are entitled to exercise authority only in matters where the law expressly provides for it. This authority is to be exercised in accordance with the tools and institutions expressly permitted by the law [Barker 2018, 9ff]. The principle of legalism has for some time before our eyes acquired completely new designations and dramatic actuality. It is complemented by the principle of helping the weak – the welfare state, state subsidiarity, or proportionality [Jouannaud 2023, 35ff]. The state is not an enemy of the individual and their freedom; rather, it is tasked with securing it. This includes protecting the weakest subjects, creating a level playing field in the market and establishing conditions that facilitate the development and expansion of positive outcomes for all.

Private law focuses on defining, regulating, and safeguarding the realization of private interests, the existence, nature, and potential violations of which do not directly impact the performance of state functions, the circumstances of an indeterminate number of subjects, or the pursuit of the public interest in a broad sense. The protection of these rights (claims, interests, subjective rights) depends on the initiative of the free and interested individual, who autonomously chooses to safeguard their own interests in interactions with another equal subject. Private-law relations are based on

the principle of equality, autonomy and are governed by the maxim: what is not expressly forbidden – is allowed (e.g., the idea of freedom of contract). However, the autonomous individual is not a lonely island, the subjects of law function, realize their freedoms (interests) in the environment of others – equal to them. Thus, to balance and secure the possibility of action (sphere of freedom) amid sometimes conflicting interests or inherent inequalities (e.g., economic, intellectual, informational), public authority must intervene, moderate, guide, regulate, and, when necessary, impose penalties, even within the realm of *purely* private activities. This approach is also a reflection of the social (welfare) state – implementing the principles of social justice in its operation, which dominates in the European Union.

The division of law into public and private is necessary especially in times of methodological confusion, blurring of the foundations of the system of law (the values on which it is based) and its paradigms [van Kędzierski 2018, 5ff; Kustra 2008, 105ff]. J.S. Langrod stresses that the division between public and private law occurs everywhere, in particular, it is derived from the idea of separation of powers. Wherever the state appears, there appear also the instruments of its sovereign action. This division arises not only from abstract considerations and theoretical constructs but also from a practical assessment essential for delineating the necessary differences between the regimes governing subjects of power and private individuals [Langrod 2003, 55ff].

Thus, the aforementioned concept remains relevant today, meriting attention not only due to its inclusion in the works of Roman jurists – who, despite their reluctance to define it, articulated legal principles that provided intelligible and practical meaning for the protection of the individual, economic development, and governmental efficiency – but also because the criterion of *utility* and the concept of *interest*, emphasized during the in-depth debates on law in the 19th century, play an incresingly vital role in defining legal phenomena [Ihering 1877; Szpunar 1947, 18ff]. Debates over law, its purposes and functions, after all, never really die out.

The concept of *subjective right* – its understanding and the consequences of adopting a certain definition, are also attractive in public law (public subjective rights) [Jakimowicz 2002; Błachut 2002, 35ff; Wróbel 2015, 329ff; Kania-Chramęga 2021, 117ff]. Therefore, in order to resolve the complex issues of rights protection, including the fundamental concept of *abuse of right* and the core principle of proportionality, it is essential to consider the indicated division [Błaszczak 2018, 7ff]. It is also the foundation for newer methods of studying the law related, for example, to its economic analysis [Fabbi 2013].

A certain reflection of the division of law and also a paradox is that we observe the following side by side: the contractualization of public law (e.g., judicial, administrative proceedings) and the proceduralization (publicization) of private law [ibid.].

The *publicization* of law, recognized for years, is typically defined as the regulation of an increasing number of individual life areas and economic activities through public (administrative) law, thereby interfering with the right to property [Safjan 2012, 49ff]. An element of this trend is the *proceduralization* of law [Jakubecki 2023, 68ff; Helios and Jedlecka 2013, 11ff]. There is a perceived tendency to disrupt the balance among participants in legal transactions by disproportionately granting rights to certain groups (e.g., consumers, tenants) while imposing burdens on others (e.g., entrepreneurs, property owners). This dynamic distorts legal subjectivity and undermines the principle of equality before the law. However, it stems from certain basic assumptions – which must always underlie the law (state).

Mauro Cappelletti emphasizes, using the example of civil judicial law (classified as public law), that the result of an approach based on the idea of real, effective access to justice (law in action), is a *contextual* conception of law [Cappelletti 1993, 282ff]. Thus, instead of a one-dimensional conception in which law and the science of law are limited to the establishment of norms, a three-dimensional conception is noted. The first dimension reflects a social problem, need, or necessity that prompts legal intervention or the creation of a legal institution; the second dimension reflects a legal response or solution, or even a response that, in addition to norms, includes institutions and processes to satisfy that social need, problem or demand; and finally, the third dimension concerns the results or impact of such a legal response to a social need, problem, or demand. In this *environment*, alternative dispute resolutions (ADRs) are gaining prominence, aimed at *alleviating* the state's responsibilities in the realm of justice, as part of the broader phenomenon of the *privatization of public tasks* [Wrona 2023, 47ff].

2. THE PARADIGM OF EFFECTIVENESS OF LAW

As noted, the paradigm is a set of basic theories on the basis of which detailed theories are built, which are then subjected to processes of testing and verification. The role of the paradigm in the development of science is twofold. On the one hand, treated as *sacred* and inviolable, it can contribute to a regression in a particular field of science, and on the other hand, it is a determinant of scientific *craftsmanship* [Brycz and Dudycz 2010, 53ff; Niżnik 1979, 179ff; Biernat 2019, 21ff]. In this context, the term *paradigm* refers to the "accepted model" or "pattern" as described by Thomas C. Kuhn [Kuhn 1962]. The paradigm of state efficiency (from the Greek: παράδειγμα/ parádeigma, meaning an *example*, a *model* – a pattern, a desirable model) serves as a foundational assumption that the law (and the state) must fulfil its functions and achieve its goals in a manner that effectively secures fundamental rights – swiftly, cost-effectively, and while maintaining quality

in its actions (respecting core values). This paradigm is a crucial element that defines the essence of both the state and the law. Law as one of the pillars of a democratic state under the rule of law, therefore, also defines the efficiency, causality of the state [Spasowska-Czarny 2017, 179ff].

Effectiveness should therefore be understood broadly – as the achievement of the objectives of the law and the realization of its functions in the shortest possible time, using proportionate means (including costs), to the greatest extent possible (including economic) up-to-date and in accordance with the systemic assumptions [Kern 2007, 41; Chiarloni 2002, 153ff; Machelski 2018, 61ff; Doliwa 2022, 49ff]. Effective law leads to an effective state that realizes its duties.

It is also important to consider what the goals of the law and the state are in the 21st century, especially in an era of social and technological change and recurring economic crises. Without elaborating further on this key issue, it is necessary, following the preamble to the Polish Constitution, to point to the universal values that the state and the legal system secure: truth, justice, goodness, and beauty. Both the essence of the actions of all entities, the relationship between the authority and the citizen, as well as relations between individuals, should realize these ideas *in concreto* [Pogonowski 2021, 355ff]. This is because they are not mere meta-principles, but ideas defined, secured, and realized in each case or factual situation of the subject.

From this perspective, the paradigm of efficiency appears to be an indispensable component of the very essence of the law. It is difficult to envisage the creation of norms of conduct without the assumption of their rational implementation, that is, the achievement of goals and the performance of functions. After all, efficiency is a feature of any orderly human action aimed at a specific goal. It is not so much an entitlement as an obligation of public authority action. Given the above, it is also obvious that the paradigm of efficiency must be taken into account in the creation of the application (implementation) of the law by all entities (including: public bodies, courts).

One of the perceived dimensions of the emphasis on the efficiency of the law is the method of its study usually referred to as "economic analysis of the law – law and economics" [Schäfer, Ott, and Bełdowski 2024; Cooter and Ulen 2011; Araszkiewicz 2015, 176ff]. This trend gives rise to fundamental questions for those responsible for creating and applying the law in relation to economic efficiency. It is important to note that there are instances where economic justification does not align with the law. The efficiency of the law, in economic terms, is a fundamental aspect of distributive justice. This entails the achievement of the law's objectives and the fulfilment of its functions in a timely and cost-effective manner. Justice, too, must be efficient, and this efficiency must be fair (just *ad casum*) [Pogonowski 2021, 355ff]. The law's guarantee function, which secures and realizes

fundamental rights (including those enshrined in the Constitution), typically leads to complexity. Upholding equality, individual rights, and fair substantive and procedural laws – such as rights of subjects, duties of bodies, evidentiary standards, adjudication, and appeals – requires time and increase both individual and social costs. The proceduralization of law raises the question of whether the principles and values are as important as the cost and time required to protect them [Kern 2007, 41ff].

The effectiveness of law in shaping subjective rights (legally protected interests, including property) cannot be considered without addressing the fundamental effectiveness of formal rules governing the enforcement of rights by state bodies (such as the judiciary). This effectiveness is ultimately shaped by procedural justice, as well as by the competence and integrity of judges, officials, and citizens. They, along with good laws, determine the quality of the functioning of the individual and the implementation of the principle of an effective (and just) state.

An effective law, as noted by Jerzy Stelmach, has the following characteristics: it is effective; it should anticipate changes that may occur in socio-economic reality; it should be created and applied in such a way as to maximize social and individual wealth; it should take into account the assumption that its addressees are economically rational subjects (*homo oeconomicus*); it should enable the proper allocation of wealth to be carried out; it should strive for self-restraint (simplicity, conciseness); it should take into account tradition, already developed habits, accepted principles and commonly accepted standards; legal science should focus its attention on the study of *effective law* [Stelmach 2010, 960ff; Stelmach, Brożek, and Załuski 2007].

3. AN EFFECTIVE STATE

The effectiveness of the law is a pillar of state efficiency. Law, as a tool for securing individual freedom and development while advancing the public interest, forms the foundation of a democratic state governed by the rule of law.

The principle of subsidiarity asserts that the state should intervene only when necessary and only by means that are essential, particularly when individuals are unable to cope or when there is a need to secure and realize the public interest.

Proportionality in the means employed to create a space for freedom and uphold values (principles) entails not only the appropriate allocation of resources but also the avoidance of unnecessary consumption of public resources or expenditure beyond legitimate needs. These two principles co-define the need and scope of the authorities.

The principle of legalism is to provide guidance to the individual and a limit to the authority's power of wielding influence.

Equality, freedom, the limits of which are set by the freedom of another, solidarity, fairness, set the basis for relations between individuals [Chojnacka 2018, 26ff].

The dignity of the human being underlies and binds all these activities and domains, highlighting the purpose and responsibilities of the state and the law. The human person, as the pinnacle of creation, simultaneously defines the principles of equality, freedom, and the pathway to individual self-realization [Plich 2021, 205ff]. A personalistic approach to people and communities ensures that both the multiple needs of the individual and the state are seen.

The effective state implements all these assumptions, protecting the sphere of individual freedom and setting limits to intervene in the individual's essence – for the good of the whole [Stefaniuk 2011, 55ff].

4. EFFECTIVENESS OF THE LAW – SUMMARY

Law (*ius* and *lex*), as the cornerstone of the state and the guarantor of individual freedom and the realization of the common good, must be effective. This characteristic is inherently derived from its essence. Clarity, certainty, and accountability (quality) of the law are crucial components of efficiency, as they underpin the achievement of its goals and functions. The division of law into public and private categories serves an organizing function, enhancing the transparency and comprehensibility of the law for its recipients. This division is not merely a doctrinal construct; rather, it is *forced* by the provisions of the Constitution of the Republic of Poland, which establishes the relationship between the state (public interest) and the citizen (subject, private interest) based on principles distinct from those governing autonomous legal relations among equal subjects, where private interests are primarily realized. The state's task and the law's function are to adequately and proportionately balance these spheres, recognizing that the public interest also aims to create a safe *environment* for individual self-realization and the protection of personal interests.

In the context of ongoing redefinition of values, definitional and methodological ambiguity, and accelerated technological advancement, there is a pressing need to revert to foundational principles – those that, at first glance, appear straightforward yet serve to establish and guarantee a minimum standard of quality within the legal system. It is not a matter of empty reverence for tradition, but of taking proven patterns and building on them a new quality. The laws of the market alone are insufficient in this context,

as evidenced by successive crises, business failures, unemployment, and the human tragedies that accompany these definitions. Simultaneously, it is important to recognize that efficiency devoid of values (the axiology of purposes) resembles mercy without truth – it can ultimately be deemed harmful.

An effective, good law, created and applied by a good legislature and good judges and public authorities, guarantees the preservation of a state of real balance and the possibility of safe individual and social development. Thus, it is a guarantor of individual self-realization, harmonious social development, and an economy based on sound principles.

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