INTRODUCTION TO LAW

Lesson 1

The science of Public Law

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The content

- What is the science of public law?
- The difference between public law and private law
- Different perspectives on the separation of public and private law
- Definition and content of public law
- Features of public law norms and its branches
- Birth of the right
- Various theories on the origin of the state and law

Information regarding the course

The course will focus

- on the study of the laws,
- on the formation and the development of the state and the right,
- the social laws that determine the specific properties, characteristics and features of the state and the right, as well as their mutual influence.

The aim of the course

This course aims to provide students with:

- the principles of state functioning
- the sources of the state and the right
- The main state institutions and their functions.
- the characteristics of different countries and the way how they operate.

Course evaluation method

- Midterm 40 %
- Final Exam 50%
- Active participation 10 %

- Total 100%

The science of public law

- It studies state and legal phenomena in close relation to each other.
- It studies the development of state and law,
- It studies the specific properties, characteristics and features of the state and law, as well as their interrelation and influence.
- It elaborates a number of their fundamental issues, such as origin, social content, historical types of states, systems of law, their importance in the life of society, etc.
- **The origin and the development of state and the right**

The difference between public and private law

- The main division of law is in public law and in private law.

  This division made in classical jurisprudence continued even during the boom of the period of capitalism and liberalization.

- It was first done by Roman jurists.

  Ulpian divided the right into public and private on the basis of interests protected by legal norms

  "*Public law is what concerns the state of the Roman state, private law is what concerns the interests of particular persons as there is public interest and private interest*."

The difference between public and private law

The period of capitalism has accepted the division into public and private law.

- Public law includes the branches of law that regulate relations between state bodies and citizens and between state bodies between them.
- Private law includes the branches of law that regulate relations between citizens.

Different perspectives on public and private law

Puhta the representative of the Historical Law School :

The right was divided into these two groups according to the quality of human rights, as a separate person or as a member of society.

Savinji divided the right into public and private for the purpose of the right.

In public law wholeness is the goal, while man occupies a second place;

In private law man is the goal, the state (wholeness) is the means to achieve that goal.

German Lawyer **Berling** according to the characteristics of the participants of the legal relationship,

public law includes relations between the state and citizens,

private law refers to legal relations between citizens themselves.

Perspectives on the division of public and private law

Formal theory

The right is divided not by the interest protected by the right but by the way the rights are protected by the legal norms.

- If the right is protected by state bodies on their own initiative, due to their duties or functions, this is a public right.
- If the right is protected at the initiative of the individual who has infringed this right, it is a private right.

Problems

There are criminal cases initiated by the injured party despite the fact that criminal law is part of public law.

A prosecutor in the capacity of a state representative can sue for the interests of a minor child, although civil law is a private matter.

Perspectives on the division of the public and private law

The view of **socialist law**

- separation into public and private law is unacceptable because there is no private property in the socialist state.

Definition and content of public law

- Public law can be defined as the set of legal norms pertaining to the status (position) of the state and the government as well as the norms regulating the relationship between the governors and the citizens.

- This definition refers only to the domestic law of the state. If the definition also encompasses public international law, it must be extended to include relations between states, as well as between international organizations.

Definition and content of public law

This definition of public law is justified by the Constitution:

- **Article 5:** "The Republic of Albania applies international law that is binding upon it."
- **Article 122 par 1:** "Any ratified international agreement constitutes part of the internal legal system after it is published in the Official Journal of the Republic of Albania."
- **Article 122 par 2:** "An international agreement ratified by law has priority over the laws of the country that are incompatible with it."

Features of public law norms

- Public law norms are **general norms** that apply to an abstractly defined category of citizen. These norms are addressed to an indefinite number of people and formulated on the basis of a public interest.
- Second, these norms have **binding force** on citizens and fall into the group of binding norms. Citizens are not required to consent to their application, unlike private law norms that are generally characterized as permissive norms. (in Albanian =norma lejuese).

The main branches of public law

- **Constitutional law** is the set of norms that determine the basic principles of the political organization of society and the state. Constitutional legal norms deal with the higher state bodies, the way they are organized, function, the powers of these bodies, and the relationships between them. But the constitutional law also deals with the relations that state bodies have with citizens.

- In our country, besides the Constitution, as the fundamental law of the state, with particular importance there are the Constitutional Court's decisions regarding the interpretation of the Constitution.

The main branches of public law

- ***Administrative law*** consists of norms that regulate administrative activity.

- ***Financial law*** (or public finance) is the set of legal norms that govern the financial activity of the state and other public entities and the administration of public funds. This area includes fiscal law and is related to government spending, income, debt or taxes.

The main branches of public law

Criminal law and criminal procedure Law.

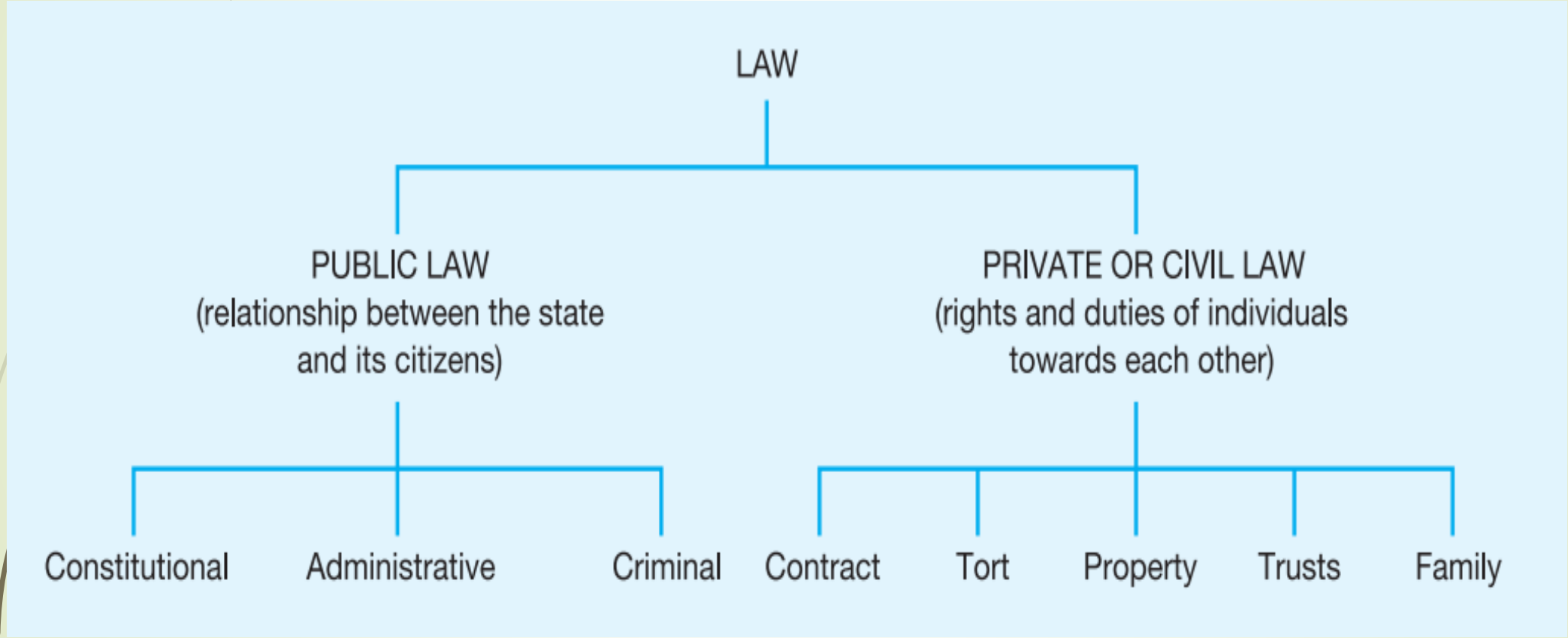
- Criminal law relates to the set of legal norms that prescribe criminal offenses (criminal offenses and offenses)=vepra dhe kundravajtje penale, the penalities and principles of criminal responsibility of the persons who commit these offenses.
- Criminal proceedings relate to the set of legal norms that prescribe rules and procedures for investigating and adjudicating criminal cases.

"***Domestic Public Law*** "and "***International Law*** ".

The first deals with the activity of each state within its framework,

The second deals with the relations between different states, the relations of states in the community with larger or smaller ones.

The main branches of law



Organized life is the need of every human society

- The birth of man as a reasonable being "homo sapiens" serves as a starting point for the organization of human society.
- People from the primitive stages of their existence have always lived in community and never separated as individuals.
- Aristotle's statement that man is a "political animal" expresses man's tendency to live with other people. This tendency stems from one's inability to live alone, in order to meet certain demands.

Organized life is the need of every human society

- All scholars believe that every organized society, even though primitive, has operated on the basis of certain rules accepted or imposed by its members.
- Various studies prove that in these societies there were people dressed in special authority with a power that made them distinguished from the other members of the society.
- Question: Do these rules constitute the right? And do these people with power over others constitute the state although in its genesis?

Organized life is the need of every human society

The researchers' opinions are divided into two groups:

A. **The first group** speaks of the existence of the state and law in every human society and equates the rules of social coexistence with the "right" and the position of primitive tribal leaders with the term "king".

B. **The second group** opposes such treatment. For them, state and law mean the existence of a coercive apparatus that does not exist in primitive social groups and that makes it possible to enforce the law.

For them state and law are not phenomena that arise at the same time with human society, but at a later stage with the development of society.

The birth of law

- There are scholars who see the **birth of law** as closely **linked to the birth of the state.**
- There are other scholars who consider **the law as a phenomenon born before the state** and associate its existence with the rules of conduct that existed in pre-primitive societies.
- For the first group of scholars, **these rules were merely moral norms** accepted by the whole collective while the **tribal leaders were the first among equals**, but without state power without the coercive apparatus that is also a feature of state power.

Different theories about the society-state-law relationship

- **2 Groups**

The first set of theories:

- links the existence of the state with the beginning of the existence of humanity and denies the importance of dealing with the problem.
- Representative of this stream, French lawyer **Esmen** says:

"*The state by nature is eternal and its legal existence is not interrupted. By equaling the state with the nation, it is destined to exist as long as the nation exists.* "

Different theories about the society-state-law relationship

The second group theories raise the question of the origin of the state from different points of view. The most important theories in this group are:

- theological theory
- patriarchal theory
- patrimonial theory
- social contract theory
- the force theory
- psychological theory
- Marxist theory

THEOLOGICAL THEORY

- This theory defends the divine origin of state power and stems from the time of ancient theological monarchies.
- Originally defended by representatives of the Christian faith, it was particularly prevalent in medieval feudal society.
- In the XVI and XVII century, Frenchman **Bosue** and others used theological theory to justify the king's unlimited power.
- In the 19th century its patron was the Franco-Italian ideologue **Josef de Mestre.**
- Its essence is simply based on religious views, so everything comes from God, not just the state but all that comes before the state and the factors that destroy the state.

PATRIARCHAL THEORY

- It explains the birth of the state with the expansion or branching of the family.
- The way to create a state is to transform the family into a village and a community into a larger city.
- Its founder is the **Greek philosopher Aristotle.**
- According to this theory, the state is born directly from the large patriarchal family, while the monarch's power derives from the father's power over the members of his family.
- Patriarchal theory has served to justify feudal doctrines on the monarch's unlimited power.
- Proponents of this theory ------ **FILMER**, the ideologue of absolutism through his work "The Patriarch".

PATRIARCHAL THEORY

- According to Filmer: the monarch stands at the head of the state like the father in the family, making the analogy between royal and paternal power.
- The head of state should have a paternal authority and the citizens had to submit to him, as his family members submit to their father.
- This theory made progress in the genesis of the state. Unlike religious views, this theory linked the origin of the state for the first time to social factors.
- The state was seen as a social phenomenon.

PATRIMONIAL THEORY

- According to this theory: **the state was born from the right of ownership of land**. State power was formed by the ownership of land and the right of ownership of princes over land.
- At the beginning of the XIX century, these ideas were defended by the Swiss theorist **HALLER**.
- According to him, the state is created by an effective power such as ownership.
- Governments rule over the territory because of their right of ownership.
- The people are a cluster of farmers, tenants of the land of the proprietor, while the relation of the prince's servants to the people is the same as that of the farmer land owners to the people.

PATRIMONIAL THEORY

- This doctrine reflected the feudal reaction of Europe at the beginning of the XIX century.
- It renewed the practice of feudal societies where land ownership was linked to political power. The royal land was considered the king's inherited property.
- The HALLER doctrine excludes the specific feature of state power as public power as opposed to private ownership of land.
- It is arbitrary to consider state power as the private property of the monarch.

SOCIAL CONTRACT THEORY

- This theory was born in the era of the development of capitalist relations. Prominent thinkers such as **HUGO GROCI** and **SPINOZA** in the Netherlands and **ROUSSEAU** in France are supporters of this theory.
- The basic idea of this theory is that the state was born on the basis of a conscious human action, on the basis of a contract, of an agreement.
- The man realized that the state of everyone's war against everyone was harmful and decided to put an end to it.
- This is why the people created the state in order to end this general and mutual war.

SOCIAL CONTRACT THEORY

- The individual who by his birth has some natural rights that he cannot enjoy in an unlimited state of war.
- The individual by himself is unable to secure his rights such as life, liberty, property, and this state of insecurity drives people to create an institution, thus to create **the state** that can provide them with the enjoyment of their rights.
- According to this theory, the people were submitted to the state in order to enjoy their natural rights from the state.
- The individual transfers on the state a part of his rights and freedoms in order to be able to safely exercise his other rights and freedoms.

SOCIAL CONTRACT THEORY

- **Thomas Hobbes** (1588-1679) : Leviathan (1651)
- **John Locke** (1632-1704) : Second Treatise of Government (1689)
- **Rousseau** (1712-1778)

SOCIAL CONTRACT THEORY

- **Hobbes ;**

  It was a state of war, a savage state, men were selfish and aggressive brutes. Every men was the enemy of others. In order **to avoid fear and danger** of this terrible situation, people agreed to setup an authority.

- **John Locke;**

  Life in the state of nature was one of the peace and ease. Freedom and tranquility (harmony) prevailed.

  Men were bound by the law of nature and possessed certain natural rights, but there was the absence of **an agency to interpret and implement the law of nature,** so men agreed to create a common authority.

SOCIAL CONTRACT THEORY

- **Rousseau**

  People led to an ideal life and enjoyed 'idyllic happiness' in the state of the nature. But the **rise of property produced quarreling and exploitation**. To escape from them, people set up authority by contract.

- According to Rousseau, the birth of private property and the desire for profit put an end to the natural equality of the people.

- In order to restore peace and justice, **the poor accepted the proposal of the rich to create organized human society**. Consequently, the state was born.

THE FORCE THEORY

It is one of the most popular theories nowadays.

- Austrian jurist and sociologist Gumplovic (late 19th and early 20th centuries) defended the thesis that **the state had its origin from acts of violence.**
- He emphasizes **the class character of the state** where the **war of races was of decisive importance in the history of mankind in comparison to the class war.**
- According to him, the subordination of one tribe to another and the violence exercised by the invaders on the defeated group/population explains the origin of the state.
- **The state was created as a result of violence of one tribe against another**.

THE FORCE THEORY

- According to this theory the causes of the birth of the **state were connected to the war between tribes**, in the loss of one tribe and in the deployment of power by the other tribe.
- The victorious tribe established the power of the state, and thus ruled it socially. Ownership arose after the establishment of state organization.
- This theory does not explain the reasons why the strongest intended to subdue the weakest.

PSYCHOLOGICAL THEORY

- This is also one of the most widespread theories today. According to this theory, the causes of the birth of the state are of a psychic nature.

There are two variants:

- **The first variant** considers psychic differences between people to be permanent and they are the basis of the birth of the state.
- According to these representatives, society is separated into two groups of people.

PSYCHOLOGICAL THEORY

The leaders/ the chosen

The subordinates

Representatives of this variant (Gobino, for example) **associate psychic changes with racial differences.**

According to him, there are **capable and incapable races of having a state.**

PSYCHOLOGICAL THEORY

- **Variant 2** analyzes primitive psychology, attributing a great role to the **hypnotic power of tribal chiefs and magicians, unknown forces of nature**, and so on.
- The birth of the state is explained by the strengthening of the power of these chiefs/leaders who are separated from the masses and create a **special apparatus by adding psychic power and physical violence**.
- We note that this theory treats psychic phenomena as primary factors and independent of material factors.
- In reality, **they cannot be seen as independent because the material factors are the drives toward psychic phenomena.**

MARKSIST THEORY

- **This theory was developed by Marx and Engels.** According to them, the state was born as a result of a long process of internal development of society.
- Part of this development has been the **destruction of the primitive genus order** (rendi primitiv gjinor) based on the shared ownership of all members of society and the absence of class divisions.
- **The development of productive forces brought about new economic relations, the creation of classes and their struggle**. Gender as a community of equal groups of people could not withstand class conflicts.
- So **genus is replaced by the state**.

The creation of the state pave the way for the ruling class to gain political power as

MARKSIST THEORY

There are three main forms of formation of the state:

- **Athens:** where the state arose directly from **the antagonisms of the classes which are developed within gendered society** (shoqerise gjinore);
- **Rome: the victory of the incoming population who had no rights and who were not part of the Roman genus**, rose up against the Roman aristocracy and influenced the formation of the state.
- The third form is a state created as a result of the **occupation of foreign lands** where the rule of the tribal order proved to be powerless.

- The invasion leads to the formation of the state among the invaders, where tribal bodies are quickly transformed into state organs. An example could be **the creation of the state by the Germanic tribes that occupied Rome.**

MARKSIST THEORY

- In all cases, **the state does not represent a force imposed on society from outside. It comes as a result of the internal development of society.**

Two characteristic features that distinguish the state from the gender organization:

- **Territorial division of population**
- **Public power/authority that consists not only of armed men but also of material supplements such as prisons and penitentiary institutions of all kinds.**

According to Marxist theory, the state emerges because of the need of the wealthy class organization to be protected from the poor one.