

Chapter III
Branches of Law

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1. Concept of Branch of Law

- Tree – represents the legal order, that is, the whole legal-normative system.
- Trunk – comprises the legal values, as well as the general principles, common to all branches of Law.
- Branches – the various parts or divisions of the Objective Law, that are differentiated depending on the subject matter that legal rules regulate. Dividing Law in branches is not for separating Law in watertight compartments, without connections or communication with each other, because the legal order of each community is unique. Dividing Law in branches is made for the convenience and benefit of the study (research) and Law teaching (pedagogy).

- i. Within the romanist subsystem, where Portuguese Law is integrated, *summa divisio* applies, i.e., the basic division between Private Law and Public Law, ganging up on each of these features a vast set of branches of Law.

- ii. This division had, as a starting point, a text of Roman Law in which Ulpian writes: “*Publicum jus est, quod ad statum rei Romanae spectat; privatum, quod ad singulorum utilitatem pertinet.*”

- iii. Ulpian considered as public law rules those which organize the Roman State and govern its activity; whilst Private Law would be the set of rules that, because do not respect the *status rei publicae*, would be related to the utility of each individual.

2. Public Law and Private Law – Distinction Criteria

a) Criteria – Nature of Interest

- Public Law – the one which aims for the pursuing of public interest;
- Private Law – the one that aims for the satisfaction of private interest.

Comments:

- All juridical rules, even those of Private Law, are elaborated having in consideration the public interest;
- There are rules of Public Law that protect the execution of private interests (the rules of Civil Procedural Law, aimed at regulating the lawsuits taking place in courts, for the enforcement of civil rights belonging to individuals, or commercial rights of individuals or private companies;
- There are rules of Private Law aimed at protecting, within the private life of individuals, certain public interests (the rules of Civil Law aimed to protect the interests of children in case of separation or divorce of parents).

b) Criteria – the Quality of Subjects

- Public Law - a set of rules governing relations in which the State, or any other public organ intervenes;
- Private Law - a set of rules governing relations between individuals.

Comments:

- The State and other Public Entities can act in the same terms that any individual (buying and selling; exchanging or donating goods);
- There are rules of Private Law regulating juridical relations in which the subject is the State itself (or a Municipality, a Parish, a public University), notwithstanding one of the subjects has a public nature, the rule regulating its activity is of a private nature;
- There are cases where both subjects of a legal public Law relation are mere private entities: for instance, in the relation between concessionaires and users of a public service or a public work, within the institutes of sub-concession and transfer (*trespasse*) of an administrative concession.

c) Criteria – Position of the Subjects

- Public Law - when public entities intervening in a given situation are characterized by its "*ius imperii*", by their power of authority, intervening endowed with supremacy;
- Private Law - when the subjects of the legal relation are in an equal position, of equality before the applicable legal rules.

Adopted criterion:

This seems to be the best applicable criterion, perhaps because it raises fewer repairs, and because it appears to be more in line with modern coding, and, mainly, because the legal relations are structured in two typical ways: coordination (private Law) and subordination (public Law).

3. Distinction between International Law and Internal (National) Law

- International Law – a set of rules and principles that underlie and regulate the system of relationships that are developed within the international community, comprising States and other entities endowed with international legal personality (international organizations);
- Internal (National) Law – a set of rules and principles that underlie and regulate the system of relationships that are developed within a specific State.

4. International Law

a) Public International Law – a system of legal rules that are applied to all members of the international community and which deals, mainly, with the relations between States, most times bilaterally, as well as between States and international organizations, in order to build a truly international community.

Most relations between States are made through bilateral or multilateral international treaties (also called conventions, pacts or charters) – agreements between sovereign States, in which mandatory rules are set, for the matters set forth therein.

When States force themselves to perform, in their own legal internal system, the rules contained in those treaties, these are named as Normative Treaties.

Traditionally, it is common to distinguish three phases of the process of conclusion of treaties:

- Negotiation – carried out by representatives of each State. The purpose of this phase is to get to the final text of the Treaty;
- Signature – Having been drafted the final text, time has come to proceed with the signatures. However, this does not imply the entry into force in the contracting States, leaving them only the obligation to develop all necessary steps towards its ratification in the respective State;
- Ratification – individual and solemn juridical act whereby the competent organ of State asserts the willingness to be bound to the Treaty, which text was executed by him.

- According to the Portuguese Constitution (CRP), rules contained in international treaties, once approved by the Parliament (art.161, §i), or by the Government (art.197, no.1, §c), ratified by the Head of State (art.135, §b), and published in the Official Gazette, 1st series (art.119, no.1, §b), are automatically part of Portuguese Law (art.8, no.2);
- The Portuguese Legal Order believes that rules contained in treaties, not only bind the State, but as well as citizens;
- Art.8 of the Portuguese Constitution (CRP), under title “International Law”, establishes a set of rules on the incorporation of International Law in the Portuguese internal legal order;
- Art.8, no.3, of the CRP, also establishes that the rules issued by competent organs of international organizations, to which Portugal belongs, directly apply in internal order, when expressly set forth in the respective treaties;
- It should be also noted also the importance of art.8, no.4, of the CRP, about the integration of European Union Law (Original and Secondary EU Law) in Portuguese Internal Law.

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International treaties are of great importance in International Law, because they constitute one of its most significant sources. Among them we can find:

- i. The Charter of the United Nations (1945);
- ii. The Universal Declaration of Human Rights (1948);
- iii. The North Atlantic Treaty (NATO) (1949);
- iv. The Vienna Conventions on Diplomatic Relations and on Consular Relations dated 1961 and 1963, respectively;
- v. The Vienna Convention on Treaties between States (1969);
- vi. The Chicago Convention on International Civil Aviation (1944);
- vii. The United Nations Convention on Maritime Law, Montego Bay (1982);
- viii. The Lisbon Declaration of 1996, which created the CPLP-Community of Portuguese Speaking Countries;
- ix. The Statute of the International Criminal Court, based in Rome (1998);

In addition to international treaties, the following are also sources of international Law:

- The international custom, as a result of a general procedure practice, uniform and constant, accepted as legally binding by the members of the international society, in their mutual relations;
- The general principles of Law, recognized and accepted by "civilized nations" and whose importance is decisive to the regulation of international relations;
- The acts of international organizations, which can be "decisions" or "resolutions", as derived from a singular or a collective organ.

b) Private International Law – also named as Conflicts of laws, constituted by a set of juridical rules that, in the absence of direct regulation of the content of private international relations, appoints the relevant laws (domestic or foreign) to regulate those same relations.

- Private International Law (DIP) is applied in private situations of private individuals, with an international context, where conflicts of laws arise, i.e., when, simultaneously, to a same situation of life, rules from different jurisdictions are of application, with different legal responses and, ultimately, absolutely irreconcilable;
- The Portuguese DIP is contained in our Civil Code (CC), not because it has the nature of Civil Law, but because, traditionally, the Conflict of laws of the DIP finds shelter in civil codes, which are the main documental source of a country's private Law.

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- The Portuguese CC includes a chapter whose title is “Foreign Law and conflicts of laws” (from art.14 to art.65), which constitutes Domestic Private International Law, capable of solving most diverse situations of international private life.
- DIP uses "connection elements" to seek the closest law to conflicting interests, such as: nationality of the parties, residence of the parties, the place where certain fact occurred, the choice of certain laws by parties on a contract, the location of the asset, ...
- The main purpose of DIP is to apply, for each type of international private situation, the law that can best meet the grounded expectations of the parties in conflict.

c) International Trade Law – comprised by a legal rules system that directly regulates matters related to international transactions of goods, services and capital, as well as the rules of conflicts that state the applicable law to govern contracts and obligations within the international market.

In terms of its sources, this branch of Law comes from sources of International Law and Domestic Law; as for its object, its rules are part of Private Law because they regulate private relationships of private life, and do not require the intervention of the State or any other public entity in the exercise of powers of authority.

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It consists, essentially, of important International Conventions, such as:

- Geneva Conventions which adopted the Uniform Laws on Bills of Exchange and Promissory Notes (1930) and on checks (1931), still under the aegis of the League of Nations;
- United Nations Convention on Contracts for the International Sale of Goods, concluded in Vienna in 1980;
- Rome Convention of 1980, on the law applicable to contractual obligations;
- New York Convention, on the recognition and enforcement of foreign arbitral awards (1958), from the initiative of the International Chamber of Commerce.

Besides these International Conventions, the doctrine identifies other sources of international trade law without binding nature, that integrate the so called *lex mercatoria*, such as:

- The UNIDROIT Principles relating to international trade contracts;
- The various “model-laws” adopted under the United Nations Commission on International Trade Law, and typified standard contracts made by other reference entities (e.g.: the standard contract of commercial agency, of the International Chamber of Commerce). The latter is also responsible for the famous *Incoterms*.

d) Community Law or European Union (EU) Law – a set of rules governing the organization and functioning of the EU, as well as the fundamental rights of European citizens, in order to pursue the gradual political, economical and monetary integration of its Member States. In EU Law we must consider:

- i. Original EU Law – comprising all the rules that are at the origin or integrate the treaties establishing the European Communities, the treaties that proceed to the successive enlargements of the communities, and the revised treaties of the founding treaties.
- ii. Secondary EU Law – comprising the rules directly created by the EU institutions with competence to do so, in view of the implementation of the EU Treaties.

Secondary European Union Law comprises:

- i. Regulations – they constitute the main legislative instrument of the EU, so far as in them lies the most direct legal effectiveness. The legislative rules of this type are endowed with direct applicability, being applicable throughout all EU-Members, regardless of any action arising from the legislative power of each of the Member States, including the absolute unnecessary procedure of publishing these regulations on the Official Gazette of the Member States;
- ii. Directives – the main function is to promote the harmonization of the national legislation of the various Member States, because it binds them in terms of an obligation of achieving a result, within a specified period, modifying its domestic legislation in a particular area, according to the directives. Thus, in order for the directives to enter into force in a Member State, it is necessary that they are transposed into the National Law of that Member State.

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- iv. Decisions – are binding, in its entirety, to their recipients, subject to notification in order to become effective. Decisions can be addressed to States, corporations or individuals;

- v. Opinions and Recommendations – are not binding, reflecting only the views of the institution which issues them. Recommendations are acts of the Commission that are directed to the Council or the Member States, suggesting a specific type of performances; Opinions may arise from many different organs and have the most varied purposes.

EU Legislative Process – in very simplified terms, we can state that the power of legislative initiative belongs to the Commission; the Council holds the decision-making power; the power of democratic control of EU acts belongs to the European Parliament; and the power to issue opinions belongs to the Social and Economic Committee or the Regions Committee .

Legislative power in the EU belongs to the European Commission, the European Council and the European Parliament.

Application of EU rules:

- *Principle of primacy of EU Law over National Law* – in case of conflict between EU rules and national rules, rules of EU Law shall apply;
- *Principle of direct applicability* – it consists of the susceptibility of applicability of an EU provision to the Member States, without the need of any act of transposition, that is to say, the EU legislation enters immediately into force in national law.

- *Principle of direct effect* – individuals have the possibility of evoking before a competent organ, a rule of EU Law, in order to challenge the application of a less favorable rule of National Law. For this purpose, the EU rule must be clear, precise and unconditional. The direct effect may be:
 - a) Vertical – from a private individual against a public company; the first must evoke the EU rule that should apply for the protection of rights and/or the obligation to duties.
 - b) Horizontal – from a private company against another private company.

- Principle of Subsidiarity – EU should only intervene when the effects that it envisages to achieve can not be achieved by the Member States, since it is understood that decisions should be taken, as a priority, as close as possible to citizens.

5. Domestic Law (Internal Law)

5.1. Public Law

- a) **Constitutional Law** – a set of rules that takes governs the organization and functioning of the State, the organs of sovereignty, and the division of powers between them, as well as to ensure the effective protection of the constitutionality of laws and rights, freedoms and guarantees of citizens.

Not all Constitutional Law is included in the Constitution: a significant part is scattered by separate legislation (Law of the Constitutional Court, Law of Nationality, Regulation of the Parliament, The Status of the Members of the Parliament, the Law of Referendum, ...).

- b) Administrative Law** – set of rules that regulates the organization and functioning of the organs of the executive power of the State (Public Administration), as well as the relationships established by it with other subjects of law, in the exercise of administrative activity of public administration, and which ensure the protection of the rights of individuals against the public administration, and of the latter before them;

- c) Criminal Law** – set of rules that criminalizes the acts or omissions classified as crimes, and determines sanctions or measures of criminal security applicable to criminal agents.

Criminal Law has a threefold purpose:

- 1) Punishment of the harm done to the victim, and to the society, in general;
- 2) General prevention of crime, by demonstrating that crime does not pay;
- 3) Promotion of social reintegration of convicts, through individual plans of reintegration.

Our Penal Code (1982) contains a general section (applicable to all crimes); and a special section, whereby each of the crimes is treated as such, as well as the respective penalties. This second part comprises the following categories of crimes:

- *Crimes against people* – murder, offenses against physical integrity, kidnapping, rape, defamation, verbal injury, ...
- *Crimes against property* – burglary, theft, damage, extortion, ...
- *Crimes against peace and humanity* – incitement to war, genocide, war crimes, racial discrimination, religious discrimination, torture, ...
- *Crimes against life in society* – counterfeit of documents, bigamy, cemetery desecration, manufacture of counterfeit currency, ...
- *Crimes against the State* – treason, espionage, electoral crimes, disobedience to authority, obstruction of justice, corruption, ...

Not all Criminal Law is contained in the Criminal Code; there is further criminal legislation: law on crimes against public health, law on computer crime, law on the criminalization of traffic of drugs, ...

d) Law of mere Social Ordering (*Direito de Mera Ordenação Social*) – a legal rules system that qualifies certain unlawful acts of minor social gravity as administrative offenses (*contra-ordenações*), and establishes penalties, called fines (*coimas*). The General Regulation on Administrative Offences and Fines is established in Decree-Law no.433/82 of 27th October.

The main matters governed by the Law of Mere Social Ordering are:

- The qualification of certain unlawful facts of minor social gravity as administrative offenses (traditionally, one used to talk about the terms of “transgressions” or “offenses” (*infracções*), already used in popular language);
- The setting, for each of these facts, of less severe penalties than "criminal penalties", which are monetary penalties, named as fines;
- Reduction of the scope of this sanction to punishment and prevention, without a purpose of social reintegration.

e) **Financial Law** - set of legal rules governing the financial activity of the State and other public entities, reflected in the allocation of economic goods (revenue collection), in order to meet community needs (expenditure). The Financial Law establishes the rules to be observed by those who serve the public affairs in the collection, accounting and expense of taxpayers' money. It comprises:

- Rules that restrict and constrain the recovery and the expenditure of public money;
- Rules that allow recovering the misappropriated or illegally spent money, and punish those organs and administrative officials who have committed financial irregularities;
- Rules that give to organs and administrative agents, as to individuals in general, the right to defend themselves against accusations of financial irregularity.

- f) **Tax Law** – set of legal rules that govern the incidence and collection of taxes payable by citizens and corporations to the State, and which ensure the protection of the rights of taxpayers before the tax administration, and of the latter before them.

In Tax Law one can distinguish a general section and a special section:

- i. General section – it defines the tax and establishes the common rules to all taxes, relating to liquidation, collection, deadlines, rights and duties of taxpayers.
- ii. Special section – it includes the diplomas that regulate each of the taxes in force in the country, such as IRS, VAT, IRC, IMI, ...

- g) Procedural Law** – set of legal rules that regulates the legal procedures to be followed in dispute resolution in court. This can take the following types:
- i. Civil Procedural Law – set of rules that establish the terms to be observed in the filling and development of civil proceedings, i.e., in lawsuits based on Civil Law;
 - ii. Criminal Procedural Law – set of rules that establish the terms to be observed in the filling and development of criminal lawsuits;
 - iii. Labor Procedural Law – set of rules governing the resolution of disputes of labor nature, in labor courts;
 - iv. Administrative Procedural Law – set of rules governing the settlement of disputes of administrative nature, in administrative courts.

- h) **Military Law** – comprises the system of legal rules that govern the organization and operation of the Armed Forces, as well as their powers over the person and the property of citizens, as well as the rights and guarantees of the latter towards the Armed Forces.

- i) **Education Law** – comprises the system of legal rules that govern the organization and operation of schools and public universities, private and cooperatives, as well as the rights and duties of citizens in education, and those of teachers, students and staff before the school.

- j) **Health Law** – comprises the system of rules which govern the organization and operation of health units of the State and of the private sector, as well as their duties before the citizens and the rights of the latter towards those units.

- k) **Information Law** – system of legal rules that govern the organization and functioning of the Media, as well as newer forms of electronic transmission of information, ensuring the regulatory intervention of the State, and the rights and guarantees of citizens before the State.

- l) **Urban Planning Law** – system of legal rules that govern the intervention of the State and the Municipalities in the proper physical planning of urban areas, and their respective expansion.

- m) **Road Law** – system of legal rules that govern the driving on national public roads, to ensure the smooth flow of traffic and the safety of people and property, ensuring the powers of intervention of the police and the rights of citizens towards the police.

5.2. Private Law

5.2.1. Common Private Law

a) **Civil Law** – set of rules that govern the generality of acts and activities of the private life of individuals (personal and patrimonial sphere), which are not subject to any other special branch of Private Law. The Civil Law is divided into four sub-branches, according to the Germanic classification:

- i. Obligations Law – a branch comprising the rules that govern obligations (obligational juridical relations or credit juridical relations). According to art.397 (Civil Code), an obligation is a juridical bond, by virtue, of which someone has the duty towards another person to undertake a certain performance;
- ii. Law of Things (“*in rem*”) – a branch consisting of a set of legal rules that govern the direct and immediate powers of a person over something (a thing). Under art.202, CC, a thing (*coisa*) is all that can be subject to legal relations. Its central institution is the concept of *property rights*;

- iii. Family Law – a branch consisting of a set of legal rules that govern family relations (marriage, blood connection, affinity and adoption), and even those relations, which not having such nature, are established and developed in the dependence of family relations (the duty of providing food, administration of children’s property by parents);

- iv. Succession Law – a branch consisting of all legal rules that govern the transfer of rights and obligations *mortis causa*, of the deceased to his heirs. Succession may be: testamentary (by means of a will); legitimária (prevailing against the will of the deceased), and legítima (in the event that the deceased dies without a testament).

5.2.2. Special Private Law

- b) Commercial Law** – a branch constituted by a set of legal rules that govern the acts and activities of trade, the status of merchants and commercial companies.

There are two major sectors in Commercial Law:

- i. Subjective or Statutory Sector – a set of rules that establish the legal status of merchants, that is, individuals or companies that are engaged, exclusively or predominantly, to commercial affairs;
- ii. Objective or Negotial Sector – a set of rules that establish the legal regime of acts and activities of trade, or commercial businesses (trade law, business law).

- c) **Labor Law** – a branch consisting of all legal rules that govern the individual employment relations (employment contract), as well as the collective related phenomena.

This branch of Law includes:

- i. Individual Labor Law – consisting of the rules that govern the employment contract (art.1152, Civil Code);
- ii. Collective Labor Law – constituted by a set of rules governing the mass employment phenomena, such as strikes, "lock-outs" (temporary termination in the industrial company, with suspension of payment of wages, and the threat of dismissing employees, for the duration of the strike), negotiated resolution of labor conflicts, collective employment agreements, union and employer associations, ...

- d) **Copyright Law** – a system of legal rules that govern the intellectual property, that is, the rights of creators on their literary, artistic or scientific work, as well as the rights of artists that interpret or execute those works.

- e) **Industrial Property Law** – a system of legal rules that attribute exclusive rights to creators of original utility models for the industry, including regulating patents, trademarks and denominations of origin (*denominações de origem*).

- f) **Maritime Law** – a system of rules that regulate the Shipping Institutions, as well as the trade held through navigation by sea.

- g) **Air Law** – a system of rules that regulate the Commercial Aviation Institutions, and acts and contracts related to aeronautical navigation.

5.3. Hybrid or Mixed Branches of Law

- a) **Environmental Law** – a set of legal rules - international, EU and national, public and private – which govern the relations between men and nature, men's duties toward nature, and, eventually, the rights of nature before men, as well as the maintenance and revitalization of a human environment, healthy and ecologically balanced.
- b) **Consumer Law** – a system of legal rules, public and private, that protect individuals in their capacity as consumers, and in particular, their right to the quality of consumed goods and services, and the protection of their health, and the prohibition of all forms of hidden or misleading advertising.
- c) **Economic Law** – all the legal rules, public and private, which govern the ordering of economic activity by public and private powers, within the market economy, so as to make it economically efficient and more just, from a social point of view.
- d) **Sports Law** – the system of legal norms (national and international, public and private, State and Non-State), that regulate sports activities, and their conditioning and supervision by private international organizations and by the State.

- e) **Agricultural Law** – a set of legal rules, public and private, community and national, that govern the legal regime of farmers and agriculture as a private activity, the agrarian contracts (namely, the farm lease), the “*in rem*” rights on agricultural buildings allocated to agriculture, the agrarian structure, the types of exploitation and the State intervention in land and incentive on the public agricultural activity – agricultural credit.
- f) **Law of Registries and Notaries** – a system of legal rules, public and private, that regulate the organization and functioning of national public services designed to archive and give public faith in certain situations and legal acts of a private nature, that require, for the protection of others, to be endowed with adequate publicity.
- g) **Social Security Law** – a system of legal rules, public and private, that regulate the social security system, aiming the protection of individuals in sickness, in ageing, in unemployment and in other situations of economic hardship or inability to work.
- h) **Banking Law** – a system of legal rules, public and private, which regulate banks and financial institutions, and their supervision by the State and by the Bank of Portugal, as well as banking and financial operations, performed by those with their customers.