The Public–Private Law Divide in Spanish Law

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I. METHODOLOGICAL FOUNDATIONS

The main topic of this paper is the current meaning and value of the public–private law divide in Spanish law. The ‘summa divisio’ has been permanently present in the legal culture since ‘Digesto’. This is perhaps the reason why scholarly debate in this area lacks clear patterns. The principal difficulty for an adequate answer is, in my opinion, methodological, and concerns the question itself. In legal scholarship it is not always clear what the ‘summa divisio’ classifies: whether it comprises rules, legal methods or legal relationships. Even those who mention the ‘summa divisio’ in regard to positive law frequently mix historical and current rules, as well as national and foreign norms. Neither is it clear what the sense of the ‘summa divisio’ is: if it is a logical construction, which does not need any empirical corroboration, if it systematizes a legal reality, or if it is a constitutional constraint on the Legislature.

As enduring as the existence of the ‘summa divisio’ are the proposals of relativism or even denial of such a division. Some of these theories have been formulated abroad, but have gained widespread acceptance in Spain, since, as is well known, Spanish law is traditionally very open to other European legal doctrines. It has been said, in this sense, that the public–private law divide is incompatible with the unity of law. The

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4 H Kelsen, Teoría general del Derecho (15th edn) (translation into Spanish by Legaz y
'summa divisio' has also been substituted by two intertwined principles (of personality and community), which steer the law as a whole and override the limits of the traditional 'divisio'. Several scholars nowadays identify the 'summa divisio' with the opposition between State and society and consequently dismiss the public–private law divide as simply old-fashioned. Finally, other scholars have concluded that the public–private division lacks the complexity to explain the variety of laws in present times. All these objections could be easily accepted and all of them highlight different insufficiencies and incoherencies of the 'summa divisio'. Nevertheless, these proposals of revision are not capable of expelling the public–private law divide from our rhetorical legal repertoire. Despite all of these critical stances, scholars, representatives, public officers and judges continue to address the 'summa divisio' and even draw practical consequences from it.

The core element of the apparent contradiction could be methodological. Critics have unduly assumed the 'summa divisio' to be something that has never been nor ever could be. They often concede too many relevant functions to the 'summa divisio', in logical, explanatory and even constitutional terms. They frequently exaggerate the role of the 'divisio' as a dogmatic tenet of the whole law and this is perhaps the root of its perceived weakness. It would be more productive to go back to the original sense of the division, given by Ulpianus as 'studio positiones'.

In this article, I will emphasise the present value of the 'summa divisio' as a category of thought based on the intrinsic limits of the concept. The 'summa divisio' should not be restricted to a pair of interdependent concepts that explain law as a whole. Rather, the public–private law divide should be analysed typologically, which would permit the exclusion of certain areas of law, for example criminal and constitutional law could be/should be considered separately. Furthermore, the typological analysis of law accepts that current public and private law share many core features (particularly central values and principles). At the same time, the validity of

5 F De Castro, Derecho civil... (n 4) 91.
8 See, in comparative terms for Germany, M Ruffert, 'The transformation of Administrative Law', in M Ruffert (ed), The Transformation of Administrative Law in Europe/La mutation du droit administratif en Europe (Sellier, München, 2007) 3 ff.
the division can only be tenable under the strict acceptance of its historical mutability and its rhetorical use and misuse in politics.

A brief historical survey shows significant developments in understanding of the public–private law division. Despite being derived from Roman law, the relevance of the ‘summa divisio’ in that historical period appears to be scarce. From the 12th century, Castile received the Roman law, and along with it came the ‘summa divisio’.

However, the public–private law divide does not seem to have been a relevant issue in its time. The glossators tackle the conflict between royal laws and the laws of the corporations, but do not discuss the ‘summa divisio’ itself.

The ‘summa divisio’ began to make more sense with the construction of the modern State, a definition of which is typified by the Spanish Empire of the 16th century (above all in the Indias). The modern State brought with it the expansion of ‘governance’, and with that the expansion of *ius publicum* or *ad publicam utilitatem*.

It was a Law that appeared to struggle with traditional or common law, the only existing Law at the time. It was the Law necessary for the organization of an empire and for the realization of the ‘ius naturalismus’ of the second Spanish scholastic period. The new establishment—an organization of power under the influence of state and Christian humanist thought—did not question traditional Law. It did serve to give an autonomous impulse to an *ius publicum* that was dormant until then and for the generalization of the *summa divisio* as a systematic paradigm to the Law.

While this was taking place in Spanish law, the Reformation was extending in the centre and the north of Europe. This affirmed, for political purposes, the essential distinction between public and private Law. As M. Bullinger has said, ‘The distinction between *ius publicum* and *ius privatum* came to receive a peculiar political push by means of the interest, observable above all in the writings of the protestant jurists, to impede the reception, in benefit to the German Emperor, from the legal–political axioms of the *Corpus Iuris*, which is to say from the absolute monarchy, and to conserve, in the traditional German constitutional structure, the special *status* of the Imperial privileged classes’.

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10 J M Villar Romero, *La distinción...* (n 2) 19.
12 A similar explanation for Germany can be seen in M. Bullinger, *Derecho público y Derecho privado* (n 7) 32–33. This author formulates these conclusions from his national sources, already very influenced by Protestantism. It cannot be denied, nevertheless, the historical continuity between the Spanish ‘iusnaturalismus’ (of the second Spanish scholastic and among several authors, fundamentally Vázquez de Mencachca and Suárez) and the rationalist Natural Law of Grocio and Pufendorf (See: A. Gallego Anabitarte, ‘Las facultades de derecho españolas y la influencia francesa, con especial atención al derecho público y derecho natural (siglos XVIII–XXI)’, in J Luis Iglesias Prada (coordinator), *Estudios jurídicos en homenaje al profesor Aurelio Menéndez*, Vol. 4 (Cititas, Madrid, 1996) 4465, 4471.
13 M Bullinger, *Derecho público y Derecho privado* (n 7) 33.
the affirmation of public law as a national law, against private (or simply traditional) and universal law (according to the sacred Romano Germanic Empire). It is paradoxical that modern public law, elaborated primarily in the Spanish universities of the counter-reform, would end up being the heritage of the protestant jurists.14

At the end of the ‘Ancient Régime’, and therefore just at the dawn of contemporary constitutionalism, jurists continue to refer to the ‘summa divisio’. In 1800, private law was considered synonymous with Roman law, which was additionally defined as Natural law. Public law concerned the political government and was arbitrary, as opposed to Natural law.15 This conception was greatly influenced by the Frenchman Domat.16 At the core of public law were the commercial concerns of the kingdom, much more so than taxation or the military. We can see here a concept of public law rightly influenced by the Enlightenment. While private law is considered natural and permanent, public law is easily modifiable. Resting on this assumption, royal statutes would never formally abrogate private laws but would influence and complement them by new statutes qualified as public laws. Despite the real permanence and value of the ‘summa divisio’ in this historical period, I must point out that other classifications were even more relevant, such as the central division of ecclesiastical and civil laws.

Revolution and constitutionalism at the beginning of the 19th century also brought new meaning to the public–private law division. Private law was no longer regarded as ‘ius commune’, permanent and resistant to the political order of the time. A striking difference can be underlined at this point, in contrast with those European countries that kept aside from the revolutionary wave, as in the case of Germany.17 In Spain, from 1812, private law was also a Law of the Parliament (Cortes de Cadiz) as well as public law. In this sense, the new codes (the proposal of a first civil code in 1821 and the effectively passed commercial code of 1829) were not substantially different from the Constitution itself.18 The Codes and the

15 R Dou y de Bassols, Instituciones de Derecho publico general de Espana con noticia particular del de Cataluna (Madrid, 1800; reedition, Barcelona, 1975) 14.
16 J Domat Derecho publico (translated by J A Trespalacios) (Madrid, 1778; reedited IEAL, Madrid, 1985) 64, 86-87, 101, 161, 165. Saying Dou in relation to DOMAT, ‘this author was the first who considered with the greatest, and the most perfect separation from that which had been done until his time by the jurists, the public law of the private law’ (Instituciones..., prólogo, 8).
Constitution were intertwined parts of a unique political order. Moreover, the different Codes of that time (civil, rural and commercial) ruled out not only relationships between individuals, but also administrative measures to guarantee freedom of property and economy in order to protect family and customs. Codes were not synonymous with private law. Neither was the Constitution equal to public law. Assuming that the whole law was based on a unique legitimacy—that of the national Parliament—the public–private law divide necessarily mutated its meaning. On the one hand, private law referred to several and typical matters where individuals are especially concerned: property, contracts, torts, heritage, marriage and family status. All of these laws ruled the behaviour of individuals, but also the status of public corporations and the procedures of public officers. On the other hand, public law mainly refers to the core of the political order of the State (constitution, electoral regime, jurisdiction, criminal law, public order and security). Through the first half of the century, public law was additionally defined as political law. Only this reduced political public law was included in the official law studies at university in 1836. Once severed from public law, a new administrative law developed rapidly. This new legal subject included the typical public law issues of the ‘Ancient Régime’ (public utilities, taxes, military supplies, public health, etc). Official studies of law began to include subjects like ‘Public and Administrative Law’ or ‘Public Law, administrative theory and Administrative Law’. As an attempt at a conclusion for this historical period, a progressive typological distinction between private and public law appeared. The ‘summa divisio’ rested on matters referred more or less directly to individuals and political order, rather than on internal values or legitimacy.

During the 19th century, the ‘summa divisio’ would progressively lose relevance. The emergent Administrative Law, from 1834 (the year of the new Royal Statute) began to occupy the conceptual role of public law. The public–private law divide became notoriously secondary or even irrelevant for legal studies. Administrative law was the central category throughout the 19th century and has remained so. The methodological opposition is no longer between private and public law, but between private and administrative law, as two technical and rational orders of law. Both are connected to (but different from) constitutional or political law. The long dictatorial periods of the 20th century prevented constitutional or political law from any further development. In the non-constitutional Spanish state of the

20 A Gallego Anabitarte, Las facultades... (n 12) 4485.
21 Royal Order of 26 October 1836.
22 Royal Decree of 8 July 1847.
23 Royal Decree of 28 August 1859.
20th century, with history and God as unique sources of legitimacy, constitutional or political law logically vanished as a legal matter and mutated into political theory. At the same time, public law overcame its confusion with political law and tended to identify itself with administrative law. In this sense, the rhetorical referral to the public–private law divide did not disappear in the 19th and 20th centuries; rather it became private *versus* administrative law.

The historical evolution of the public–private law divide shows, as portrayed above, diverse political or ideological approaches to law. This is a permanent feature of the 'summa divisio', and obviously not only in Spanish law. Either by emphasizing or softening the role of the public–private law division, as well as the extent and peculiarities of each concept, different political goals are sought. A bold defence of private law, practically identified with common law and clearly severed from public law, normally expresses the opposition of certain social bodies against the State or public authority. That could be the real meaning of the 'summa divisio' in the Spanish law of the 16th century and afterwards in the German 'Historical School of Law'.

This starting point could also help to explain the defence of the 'summa divisio' in the dictatorial periods of the 20th century. In turn, the refutation of the 'summa divisio' frequently expresses political absolutism or totalitarianism. This is clearly the case of the Fascist and socialist rhetoric in the 20th century, which usually denied any kind of possible distinction between public and private law. In a very different sense, an acute distinction between public and private law has historically been defended to legitimate the power of certain political bodies against others; for example, the resistance of some states against the power of the Empire in the 16th century.

The political or ideological use of the 'summa divisio' is an issue even in our times. Several present-day scholars, often defenders of the liberal version of the economical analysis of law, support the public–private division as a means to shelter property and economical freedom against the State. According to this point of view, private law finds its legitimacy in its economic rationality and is therefore the natural or normal law of any society. Public law should then step aside from economy, and be strictly confined to governing the political institutions. On the other side, the 'summa divisio' is often invoked in the debate on the competences of the different levels of government. This can be seen both in Spanish and in European Community law, although leading to different results. The territorial distribution of power in the current Spanish constitution of 1978

24 See F Von Savigny, *System...* (n 17) 233 ff, 331 and 337 ff.

normally reserves the legislative power in the traditional matters of private law (civil, commercial and labour law) to the central State. This starting point has revitalized the political use of the ‘summa divisio’. The central State defends a wide interpretation of the concept of private law as a means to protect its own power, while the ‘Autonomous Communities’ defend—exactly for the opposite result—a broad concept of public law. The features of the revitalization of the public–private law divide in the competence struggle in the EU are very different. Private law is often regarded as an ensemble of merely technical rules, subsumed in the functionalist logic of the European market, and therefore competence of the European institutions.\textsuperscript{26} By contrast, public law is the realm of sovereign political choices and worthy of a much higher degree of deference in the process of harmonization.\textsuperscript{27}

As a conclusion to the first part of this paper, it must firstly be recognized that the public–private law divide still plays an important role in our legal thought. However, the ‘summa divisio’ lacks conceptual precision; it seems to be an intuitive assumption of vanishing profiles, or even a rhetorical tool, much more than a precise academic construction. Scholars frequently build new concepts or theories on the basis of the public–private law division, overlooking the extraordinary imprecision of those categories. A first step to overcome this situation lies in the acceptance of the historical and contextual value of the ‘summa divisio’. This was the aim of the first part of this paper. The second step is to identify the legal factors under which the ‘summa divisio’ can be understood in the current Spanish legal system. Only after considering these particular legal factors can we propose a current understanding and definition of the public–private division. It is only when starting from this conceptual precision, that one can compare the role of the ‘summa divisio’ in the European context and identify its potential for new developments in European law.

II. THE PUBLIC–PRIVATE LAW DIVIDE IN CURRENT SPANISH LAW

The preceding exposition seeks to highlight that the meaning and possible utility of the ‘summa divisio’ is profoundly determined by its national, historical and political context. Considering these conditions it is still possible to identify the main legal patterns, which frame the public–private division in Spanish law today. These are: the position and function of the Constitution in the whole legal system; the horizontal and vertical distribution of powers;

\textsuperscript{26} So tort law, according to STJCE c.183/00, González Sánchez v Medicina Asturiana.
and, finally, the distribution of judicial competences among specialized courts and tribunals.

Paying attention to all these main factors, it will be concluded that the 'summa divisio' nowadays only refers in a typological way, to the relevance of public administration by the enforcement of law. Therefore, any possible distinction based on values or on peculiar qualities of norms is rejected. In addition, the constitutional and the criminal law are excluded from the 'summa divisio', as they do not find their current meaning through the public–private distinction. This proposal obviously rests on the traditional 'subject theories', but renounces any explanation of law as a whole, focusing on public administration instead of the State, and pays more attention to the enforcement of law, rather than the addressee of rules.

A. Relevance of the Constitution for the 'Summa Divisio'

The Spanish Constitution of 1978 contains a full list of values, principles and rights. This constitutional content ties in all public powers, including the legislative ones. The Constitutional Court guarantees that laws of the national Parliament—as well as those of the Parliamentary Assemblies of the 'Autonomous Communities'—respect the primary provisions of the Constitution. In some cases, public officers and judges directly enforce the exhaustive list of constitutional values, principles and rights. In other cases, constitutional decisions are given effect by means of laws. The way the constitutional content is developed is an option given to each Parliament. Sometimes the laws trust the enforcement of rules to individuals and private corporations themselves, and complementarily assign to the courts the settlement of any conflicts. In other cases, laws assign a salient role to the Public Administration in order to enforce the rules. These two options are of a technical character. They are neither based on values nor are they exclusive.

Consumer law offers a good example of the role of these constitutional rules and their development by Acts of Parliament. According to Article 51 of the Constitution, 'The public authorities shall guarantee the protection of consumers and users and shall, by means of effective measures, safeguard their safety, health and legitimate economic interests'. As a development of this constitutional provision, the State Act 26/1984, of 19 July, outlaws any abusive clauses in consumer contracts (Articles 37–39). This rule is obviously addressed to individuals. The primary legal consequence of non-compliance is the nullity of the clause, to be declared by a civil judge. However, such a legal ruling has little effect on prevention of abusive clauses, and thus, a new State Act 7/1998, of 13 April, additionally provides for administrative fines for the inclusion of abusive clauses in consumer contracts. As discussed, the constitutional goal of consumer protection is
primarily developed in a general prohibition of abusive clauses, obviously addressed to private subjects. Nevertheless, the enforcement of this rule is entrusted both to the judges, by means of nullity, and to the Public Administration, in the form of fines. This kind of ruling appears to be rare in comparative terms, but it is nowadays very common in Spanish commercial law. Other similar examples are to be found in Article 89 of the Companies Act or in Article 43 of the Private Assurances Act. One could state at this point that a constitutional norm can be developed by both private and public laws. This conclusion lies near of the concept of 'Auffangordnungen' proposed in German law in the last decade.

Another good example of the connection between the Constitution and the summa divisio is in the Law of Competition. Article 38 of the Spanish Constitution states that 'Free enterprise is recognized within the framework of a market economy'. Competition law today is considered to be a development of this constitutional provision. There are two fundamental parliamentary Acts that, from the perspective of competition in the market, have developed through Article 38 of the Constitution. One is Act 3/1991 of 10 January on Unfair Competition; the other is the Law of Defence of Competition (Act 15/2007 of 3 July). In both laws the current connection between economical competition and civil society can be seen. The law of unfair competition regulates concurrent relations between companies, but it also makes sure that these relationships are beneficial to consumers and, in general, for the national economy. Because of that, Article 15.2 of Act 3/1991 expresses that 'the simple infraction of juridical norms whose object it is to regulate concurrent activity will also be considered unfair.' On the other hand, the Act of Defence of Competition, or 'antitrust,' seeks to guarantee the existence of a competitive market, and to achieve this objective it prohibits and punishes, inter alia, acts of unfair competition. Article 3 of

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the Act 15/2007 establishes that ‘the National Competition Commission [will recognize] acts of unfair competition that by falsifying free competition affect the public interest’. Thus, the regulation of these two laws is intimately intertwined. The key distinction between the two is the different instruments used for compliance or execution. The Law of Defence of Competition is applied by an administrative organ, the ‘Competition Commission,’ while the Law of Unfair Competition is applied by ordinary judges and courts. This institutional distinction creates very different functional consequences (types of procedures, discretion in the application of the law, legitimation etc). In summary, for the single constitutional principle of free competition there are two Acts: one of public law and another of private law; the difference between them is, fundamentally, in the organ, or organization, charged with ensuring compliance therewith.

As mentioned above, the Spanish Constitution includes a limited but exhaustive list of values, principles and rights. Parliamentary legal provisions do not reflect their own values, but those of the Constitution itself. The traditional private laws are beneath the supremacy of constitutional values. Most of these private laws have been updated since the Constitution of 1978; for example, the Labour Act (Act 1/1995 of 24 March), which nowadays duly reflects the constitutional outlawing of any sexual or racial discrimination (Article 17); or the constitutional protection of personal data (Article 18). In all these cases, traditional private laws rest on a legislative balancing of contractual freedom (a traditional core of private law) and fundamental rights. Moreover, fundamental rights bind individuals directly, when laws are not in accordance with the Constitution or not duly interpreted in accordance with the Constitution. In all of these cases, fundamental rights can be defended both before civil tribunals and the Constitutional Court. The traditional German discussion on the direct or indirect effectiveness of fundamental rights has not been a controversial issue in Spanish law since 1981.33 By admitting the unrestricted and immediate value of fundamental rights, both against public and private powers, certain proximity can be considered between Spanish law and the idea of ‘common values’ in current British law.34 Nevertheless, it must be admitted


34 In this sense, the common values identified by Dawn Oliver (*Common Values and the Public–Private Divide* (Butterworths, London, 1999) 56 as defining the status of citizens against any sort of power (freedom of action, dignity, equal respect, status and security) also constitutes the core of the fundamental rights of the citizens (and therefore of the values) in Spanish law.
that fundamental rights in Spanish law, despite their general effectiveness, do not perform in the same way in private as in public contexts.

As for the central issue of this paper, it can be concluded that constitutional law cannot simply be classified into private or public law. Constitutional values, principles and rights work both through public and private law structures. In this sense, private and public law, whatever they ultimately are, share a 'common code of values', not induced by the courts, but rather directly stated in the Constitution.

B. Vertical Distribution of Power

A second main factor that determines the sense and value of the public-private divide in Spain is the distribution of power between Parliament, the Courts and the Executive. From the first half of the 19th century, the Spanish State developed a very large Public Administration,\(^{35}\) as a central part of the Executive power together with the Government. The Public Administration has traditionally exercised powers that in other countries are normally trusted to judges and courts. Many examples of this can be found: compensation for expropriation of property, delimitation of public estates, relationships between neighbours, and compliance with contractual obligations. All these issues are directly decided by the Public Administration. This traditional feature of Spanish law grew even larger through the creation of the administrative welfare state in the second half of the 20th century.\(^{36}\) Large parts of labour, property, commercial, companies and family law are enforced by the Public Administration. These decisions certainly remain subject to judicial review, but this occurs only 'ex-post facto'.

The Public Administration functions according to special rules, the addition of which is normally designated as 'a régime administratif'. Special laws regulate public services, property, contracts, employment, compensation schemes and so on. Some of these rules are not essentially different from the equivalent in civil or common law (for example, compliance with contracts according to the current Act 30/2007, on Contracts of the Public Sector). However, they have one special feature in common: they have to be enforced by the public administration following special procedures, according to special powers and surveys. It is the peculiar procedural status of the Public Administration that identifies public law: we are concerned with public law when the appliance or enforcement of rules is legally assigned to the Public Administration. The main issue is therefore neither the content

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\(^{35}\) See A Nieto, 'Los primeros pasos del Estado constitucional: historia administrativa de la regencia de María Cristina' (Ariel, Barcelona, 1996) in toto.

\(^{36}\) Recently, JM Rodríguez de Santiago, La administración del Estado Social (Marcial Pons, Madrid, 2007) 23 ff.
of the specific norms, nor the addressee of the norms, but rather the ways in which they are to be applied or enforced.

C. Horizontal Distribution of Power

Another decisive factor assisting our understanding of the present meaning of the public–private law divide is the territorial distribution of power. In the decentralized Spanish State, public power—including legislative power—is distributed between the central State and the 17 Autonomous Communities. The Constitution reserves for the State legislative competence on civil and commercial laws. However, the Constitution simultaneously allows that Autonomous Communities rule on relevant matters in which traditional private laws are concerned (for example, transport). In order to solve the frequent conflicts on these issues, the Constitutional Court has used the private–public law divide and has given an actual meaning to it. According to the constitutional rulings, the Autonomous Communities are empowered to regulate the performance of the Administration on specific matters, such as means of transport or public commercial registers. These regulations are categorized as public law. By contrast, the central State holds legislative power on the private side of these matters, essentially those in which individuals are directly concerned (and not the Public Administration). The competence struggle between the central State and the Autonomous Communities reveals that the public–private divide bears scant relation to value or content; instead it relates more significantly to the more or less salient role of the Public Administration.

D. Judicial Competences

Finally, a brief overview of the jurisdictional order in Spanish law will be given. According to the Organic Act for the Judicial Power (Act 6/1985, of 1 July) and the Act on Administrative Jurisdiction (Act 29/1998, of 13 July), the acts and omissions of the Public Administration can be challenged before Administrative Courts. This is so not only when the Public Administration applies ‘public laws’ but also in many cases in which the Public Administration is ruled by ‘private laws’. For example, in the case of tort liability: even when the Public Administration acts within the scope of private law, liability is always a competence of the Administrative Jurisdiction (Article 2(e) of Act 29/1998). On other subjects, the judicial competence of the Administrative Courts is less clear, and they frequently

come into conflict with Civil Courts: for example in matters of public property and competition law. However, even in those matters there is a clear tendency to concentrate the lawsuits in the Administrative Courts. In addition, Administrative Courts have progressively developed specific standards of review when applying both public and private laws. Particularly relevant is the review of the Public Administration when acting in the private domain. The Administrative Courts interpret these 'private' rules in accordance with the laws shaping the special status of the Public Administration.

Let us quote the example of contractual interests; contracts entered into by the Public Administration are subject to the common norms of the Civil Code about interest payable for late payment. However, due to the specific procedures of public accountancy, which necessarily delay public payments, the civil norms cannot be applied in the same way as they are to private firms and individuals.38 One can conclude on this issue that the concentration of lawsuits being directed to the Administrative Courts reinforces the idea of public law as the law of the Public Administration and offers an interesting new development: the necessary adaptation of private rules when they are applied to the Public Administration.

E. A Contextual Conclusion

So far the legal factors, which could determine the sense and scope of the 'summa divisio' in Spanish law, have been identified and portrayed. In this legal context, it can be concluded that the distinction between private and public law lies in the role of the Public Administration in each normative field. One is thus faced with a very technical issue. The distinction does not lie in values or in normative contents, but in the relevance of the Public Administration in each context. The particular constitutional and legal status of the Public Administration allows the identification of public law wherever the role of the Public Administration is salient, regardless of whether the specific rules concern private interests or relationships. Consequently, one can categorize as public law any rules directly addressed to the Administration. However, one is also in the ambit of public law when one encounters rules that regulate relationships between individuals, when such rules are developed or enforced by Public Administration. For instance, special rules on private property can be categorized as public law when they are developed or enforced by the Public Administration. Let us think of the extensive list of limits to private law in the Coastal Law (Act 22/1998 of 28 July). The compulsory compliance with these norms is a task

essentially assigned to the Public Administration, and this starting point qualifies the legal regulation as a whole. Even when the law protects the interests of individuals—by constructing prohibitions—the main feature of these regulations is their application through administrative procedures. The proposed distinction highlights an empirical feature of the current Spanish legal system, and seeks to offer a practical and contemporary meaning to the ‘summa divisio’. To be useful, this distinctive criterion should duly overcome several objections or difficult cases.

1. **Dual regulation**

Several matters show twofold regulation. Let us remember the example of consumer law mentioned above. The prohibition of abusive clauses in consumer contracts can be enforced both by private-law procedures (private requests and civil actions before ordinary judges) and by the Public Administration. In this case, there is no need to speak of a mixed public–private rule. It is much clearer to conceive of two coinciding and complementary rules. The first one outlaws abusive clauses and assures its observance by judicial actions; the second also forbids the abusive clauses and compliance with it to the Public Administration.

2. **Escape to private law**

Administrative laws frequently refer to private-law rules. For example, the General Administration Act of 1997 (Act 6/1997 of 14 April) placed the so-called ‘Public Business Entities’ under private law. Such is the case of AENA, which governs the airports in Spain. At other times, administrative law decides that a part of the activity of public administrations is governed (or can be governed) by private law. So, for example, with the possibility that public administrations can engage, in addition to functionaries, other employees in the labour structure (Article 11 of Act 1/2007, of the Basic Statute of Public Employment); or with the provision that public administrations be the owners, in addition to goods ‘of the public domain,’ of other goods in the area of private property (Article 7 of Act 33/2003, of Properties of Public Administrations). A final example would be the possibility that public administrations contract not only in the administrative context, but for more specific purposes too, also according to the rules of private law (Article 20 of the Act 30/2007 on Contracts of the Public Sector).

One could certainly argue that in these cases the Public Administration really acts under private law. Following on, if this statement is analysed in more detail it can be seen that the private law applicable to public administrations is not the same as that which is applied to
individuals.39 Sometimes those very rules that apply private law to an administration introduce significant modifications. At other times, it is the jurisprudence that adjusts the reach of private law when it is to be applied to a public administration. In view of this situation, in Spanish doctrine an idea of ‘private administrative law’ has been proposed,40 with greater scope than even the German concept of ‘Verwaltungsprivatrecht’. So far as this study is concerned, one can affirm that the law regulating public administration is always public law, to the extent that this regulation brings private law rules into public law (with the necessary corrections and approximations).

As has been mentioned, it is occasionally legislative Acts that directly moderate the application of private law to public administrations. For example, Article 20(2) of the Act 30/2007, on Contracts of the Public Sector establishes that the preparation and adjudication of private contracts made by an administration is not regulated by general civil or commercial law rules, but by the specific norms contained in the Contract Act itself, it being the administrative courts that are competent to hear claims referring to those preparatory acts and adjudication. These are—originally under the influence of French Law—called ‘separable acts’ of the administration. On the other hand, a public administration cannot freely sell its ‘patrimonial property’ (its property that is subject to private law): Article 137 of the Act of Proprieties of Public Administrations (Act 33/2003) imposes a general requirement of a previous auction or public contest.41 In all of these cases, which are only examples, private law undergoes considerable legal modification in order to be able to be applied to public administrations. However it is questionable how far one can properly speak of a public law that incorporates norms originally aimed at individual persons. In this sense, one should not properly speak of remitting an issue to private law but of the reception of original rules of private law into the public law system. In these cases, public laws do not renounce their steering of the Administration, they simply no longer do so exhaustively; they economize such regulation by calling upon the common rules of private law. However, the original private law norms do not act in this way in relation to the Public Administration. They adapt their content to the peculiar constitutional and legal status of the Public Administration. In other words, by means of a constitutional and systematic adaptation, the original private law norms turn into public law rules, and only these really steer the Public Administration.

41 On the meaning and reach of the special rules about private goods of the Administration, see C Chinchilla Marín, Bienes patrimoniales del Estado (Marcial Pons, Madrid, 2001) 126 ff.
Judicial practice in Spain also shows that private laws are heavily reinterpreted by the courts, when they have to be applied to the Public Administration. One example is that according to the 'Statute of Workers' (Article 15.3 of the Royal Legislative Decree 1/1995), temporary labour contracts entered into by companies fraudulently happen *ipso iure* to be permanent. This is undoubtedly a rule protecting the worker against the employer. This norm should also be applied to public employees connected to the administration by a temporary labour contract. This would mean that it would suffice that an authority failed to comply with the law at the point of entering into a temporary labour contract for the employment in question to become permanent. But this conclusion has been corrected by jurisprudence: the employee in the service of a public administration does not find himself in the same situation as that of an employee contracted by a private company. Thus, some of the general norms that regulate labour contracts would not be applicable to the administration.

3. The law of commercial associations and public foundations

The question of the Public Administration in the legal form of a private company or a private foundation must also be addressed. Nowadays, the central State, the autonomous communities and most municipalities have at their disposal private companies or foundations to deliver public services. Rules that we normally identify as private law (contained in the Civil Code, the Law of Trading Companies, the Law of Foundations, the Law of Publicity, and so on) are applied to these companies or foundations, as private legal persons. There is no doubt that all of these are norms of private law, whose rules regulate the activity of private subjects, and effective compliance with which is not entrusted to the Public Administration, but rather to individuals themselves and to the Courts. Therefore, according to the criteria sustained in this study, we find ourselves before norms of private law: private law rules do not cease to be such because of the fact that, on occasion, they also apply to instrumental juridical persons, created by a Public Administration in order to satisfy their purposes. Having clarified this, the controversial legal question is whether these norms, when applied to companies or public foundations, are applied in the same way as to truly private subjects. Or if, on the contrary, they (initially referring to

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42 SSTS of 7 October 1996 (Ar. 7492); 20 January 1998 (Ar. 1000); 12 March 2002 (Ar. 5140).
private law) apply to the associations and public foundations in a modified, corrected, or adapted way, considering that those companies or foundations are simply instruments of the administration that creates them. In this sense it can be shown that the jurisprudence, by means of the doctrine of ‘lifting the veil’ (disregarding the legal entity), severely limits the application of the private laws.44 Once it is demonstrated that a commercial association is, in reality, part of a Public Administration (because it is under the effective control of that administration) the private law norms are corrected and modified as necessary; and they are only applied if they are compatible with the rules that regulate the functioning of the Public Administration. In these cases, the reference should be to public law rather than private law: norms that proceed from private law but that apply to commercial associations and public foundations with a corrected content, as norms of public law.

The Constitutional Tribunal, on the few occasions in which this type of problem has arisen, has clearly declared that the juridical–private personifications of the Public Administration cannot avoid the application of the special Law of Administration (public Law). In Sentence 35/1983, the Constitutional Tribunal considered that the ‘Spanish Television, Anonymous Association’ (a commercial association of the State) had rights of fundamentally the same form as a Public Administration. Private Law (principally applicable to that state company) has to be applied in a manner compatible with the fundamental rights that the Constitution requires all public powers respect. In another case, about the firing of the director of a public theatre (even though formally created as a private foundation), it was declared (Auto 206/1999) that ‘in the present case the company, certainly a formally juridical–private person, can in reality be equated to a public entity with public capital and purposes that acts in the legal world using only in an instrumental way its foundational guise. Therefore, the post of General Director of the Foundation of the Lyrical Theatre is one more of the tools of cultural politics and of spectacles of two administrations...’ Consequently, the application to this case of the laws about public duties (stayed on the basis of political decision) and not the ordinary labour laws (the need for justified termination of employment) was not constitutionally objectionable.

The Administrative Courts systematically review the performance of these ‘private’ firms under the simple argument that a company under the effective control of a public body (frequently a municipality) is no longer a private company, but a Public Administration.45 These arguments have

45 STS of 24 June, 2003 (Ar. 4589). See also S González-Varas, ‘Levantamiento del velo y Derecho administrativo privado en el ámbito de la Administración local’, Revista de Estudios
been reinforced by means of the European case law on 'adjudication authorities', used in Spanish law to propose a wide concept of Public Administration. Once the Administrative Courts have declared their jurisdiction over these 'private companies', they only apply private law rules as far as they are compatible with the constitutional and legal special status of the Public Administration. For example, a municipal Council provides the service of supplying water through a commercial association, created by the Council itself. Litigation commences over the cost passed on to citizens, the court concluding that because of the form of commercial association, the case actually concerns the Council and the management of an obligatory public service. Thus, in this case the court does not apply private law that regulates the formation of prices, but rather the regime of public tariffs for the reception of the service. One must conclude again that it is not private law that rules 'public companies', but original private law rules received and adapted for the public law system.

4. Competition law

Competition Law draws various paradoxes into the distinction between public and private law. The so-called public law of competition, that regulates the functioning of the Competition Commission (Act 15/2007, of 3 July, of Defence of Competition), normally applies to public administrations (juridical-public persons) that act as simple economic agents in the market. This is the case of the 'Professional Colleges,' that are a part of the Public Administration but can receive and realize professional duties. Nonetheless, public competition law does not apply to numerous cases in which a Public Administration (directly, or by means of an instrumental commercial association) acts as an economic agent, together with other private subjects. In effect, the Tribunal of Defence of Competition (actually the Competition Commission) declares itself incompetent to judge the possible 'abuse of a dominant position' of public commercial associations that act in the market, but according to specific administrative norms or regulations. A good example was the provision of the funeral service in

de la Administración Local y Autonómica, No. 274–275 (May–December 1997) 361 ff (380) and S Ortiz Vaamonde, El levantamiento del velo en Derecho administrativo. Régimen de contratación de los entes instrumentales de la Administración, entre sí y con terceros (La Ley, Madrid, 2004).

46 See recently: STJCE c-283/00, Commission v Spain; c-214/00, Commission v Spain; c-84/03, Commission v Spain; c-295/03, 'Tragsa'.

47 E Carbonell Porras, 'Las sociedades mercantiles publicas y los contratos con terceros en las Directivas comunitarias y en el Derecho español', Noticias de la Unión Europea, No 267 (April 2007) 29 ff.

48 STS of 18 May 1995 (At. 3861).

49 See S González-Varas, Levantamiento del velo... (in 45) 389.
Madrid (competence of the City Council) by means of an anonymous municipal association, which other companies in the sector accuse of 'abuse of a dominant position.' Here the Competition Tribunal (presently the Commission) declared that 'the provision of funeral services constitutes undoubtedly a public service that cannot be submitted to the normal regulators of the market economy, as a commercial service would be.'50 More and more frequently in these cases, it cannot be affirmed that public competition law is inapplicable to commercial associations in public hands. Instead, public competition law only provides for the Competition Commission to act when the economic subject (public or private) acts in true market conditions, and does not conform to a specific regulatory specification (distinct from the rules of the market). This is the result of Article 4 of Act 15/2007, of Defence of Competition. In other words, that which determines the inapplicability of the Law of Defence of Competition to public commercial associations is not simply whether that association pertains to, or is controlled by, a Public Administration, but rather the functioning of that commercial association in accordance with specific administrative rules, distinct from those of the market. With the same reasoning, it can be understood why on other occasions the Competition Commission does apply public law (the Law of Defence of Competition) to public commercial associations created and controlled by a Public Administration. It refers to cases in which the commercial association acts in conditions of equality in the market, without specific functional regulation. For these cases, the Law of Defence of Competition applies its regulation, without any distinction, to public commercial associations. In summary and as a conclusion of what has been discussed, the applicability (or not) of the Law of Defence of Competition to public administrations, or to their commercial associations, is not the determinate element for referring to that law as public competition law. That which is truly important is that this law regulates the functioning or intervention of a special organ of State Administration (the Competition Commission). The fact that this law sometimes applies to public administrations (because they act as true economic agents in the market) and that at other times that same Law of Defence of Competition does not apply to public commercial associations (when they provide a specifically regulated public service) says nothing about the public character of the regulation, but rather about the type of activities it regulates: the economic activity of the market.