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PAPER

The problem of differentiation between private and public law

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Abstract The object of research is division of law. This study is focused on the fact that, in addition to branches in the structure of law, legal norms can be divided into two large groups: private and public law. The division of the system of law to public and private is the most researched and widely recognized in jurisprudence. The purpose of the article to provide criteria for public and private law division.

Keywords: Legal norm; private law; public law; bodies of state power; social relations.

JEL Classification: K21; L40

Formulation of the problem. The problem of private and public law division is a trendy area of the theory of law. The essence of this study is that, in addition to the branches of law in the structure of law, legal norms can be divided into two categories: - private and public law. The division of the law system into public and private is considered widely researched and recognized by scholars. Such a division was recognized even in the days of Ancient Rome. However, this subject remains relevant today, as scientists propose new theories and ideas.

The division of the right to public and private is universally recognized, however criteria for the division remain controversial.

Analysis of the recent research and publications.

Significant contribution to the development of this problem was made by such scientists as S.S. Alekseev, L.V. Borysova, L.Y. Gudtsina, N.D. Eriashvili, S.O. Ivanova, V.V. Kopeichikov, V.O. Kotyuk, V.V. Lazarev, M.M. Marchenko, N.M. Onischenko, Y.S. Kharitonova and others.

To date, criteria for the division of the right to private and public remain a a dynamic category in the theory of law, as well as the importance of the division of law, which has an important theoretical and practical significance, remains unresolved and is insufficiently researched in the theory of law and legal science.

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Goal. Goal of this study is to prove that the main criteria for the division of the law to private and public depends on the relationships and interest of the subjects of the law and their legal relationship. According to this, private law is governed by the rules and principles of the legal relationship between individuals and legal entities that satisfy an individual interest.

Presentation of the main research subject.

Several opinions are presented in the scientific literature regarding the division of law for public and private. For example, according to M.M. Marchenko practically there is no division of the law to private and public in the Anglo-Saxon law system. [24, c. 252-253]. According to the researchers Borisova L.V, Grudtsyna L.Y., Ivanova S.O., Kharitonova Y.S., Eriashvili N.D. etc., the division of the law to private and public is based on the the method of establishing legal relations (the theory of subordination and coordination) According to these researchers, the legal relationship between legally-equal entities are governed by private law, and the legal relationship between the legally-dominant and (subordinate) is governed by the public law.

However, this theoryis not applicable for legal relationships where legal subjects are non-subordinate (equal). For example, for legal relationships driven by public agreements between states (or parts of states), administrative agreements between public authorities, collective labor agreements between the employer and employees. Moreover, public legal rights and obligations can be implemented not only in power relations.

For example, per Article 55 Part 1 of the Constitution of Ukraine “Rights and freedoms of a person and a citizen are defended by the court” [1]. Therefore, everyone is guaranteed a right to appeal in court decisions, actions or inactivity of state authorities, local self-government bodies, and state officials.

Therefore, Article 55, Part 1 of the Constitution of Ukraine outlines the general norm: right of everyone to go to the court if rights or freedoms have been violated or being violated, there are any obstacles to realize these rights, or other violations of human rights and freedoms have been created or being created. The above norm obliges courts to accept applications for review even in the absence of a special provision on judicial protection in the law.

According to the Article 64 of the Constitution of Ukraine, court cannot refuse to accept court claims or complains that are submitted according to the law, as this will be a violation of the court protection law per the Constitution of Ukraine. [1]

Thus, the provisions of Article 55 Part 1 of the Constitution of Ukraine documents one of the most important guarantees to exercise of both constitutional and other rights and freedoms of a person and a citizen.

Article 55 Part 1 of the Constitution of Ukraine addresses obligations of Ukraine related to the ratification of the International Covenant on Civil and Political Rights [5, (582-12)] and the Universal Declaration of Human Rights (Rome, 1950) [6, (995_004)] by Ukraine, which is part of the national legislation of Ukraine according to Article 9 of

the Constitution of Ukraine. Everyone has the right to get their case hearted by the court and the judge of the jurisdiction. A citizen has the right to sue, and the court is obliged to accept the case for review. Of course, this is according to the public law, but is the case in the situation of authority and subordinate? Of course not, since neither citizen nor court submits in this case to each other, each of them only realizes its legal rights and obligations.

Therefore, the method of constructing legal relationships cannot be considered as a universal criterion for the division of the right to private and public. A reference to the fact that in private law the relationship is between equal parties, and in public law the parties are unequal (subordinate to each other), does not always reflect the specifics of private and public law: in some cases, in public relations, the subordination of one subject to another does not exist.

Per researcher Muromtsev S.O., the criteria of the distinction between private and public law is considered a way to protect the rights of their participants [25, c. 169]. According to this concept, private law governs the legal relationship, where the initiative to protect an infringed subjective legal right is given to the person concerned, and if the protection is initiated by the competent authorities, then the legal relationship is governed by public law. Regarding this position, it can be noted that although the method of protection in practice can only manifest itself after the violation of subjective legal rights, however, it, and, consequently, the nature of subjective law is determined for the offense, and not after it.

However, an attempt to define the concept of private or public law through the means of judicial protection inevitably leads to the definition of "X" through "X": private law is a right protected by a private action, and a private claim is a way of protecting private law [7, p. 31]. According to the author, another problem is the way of protection as the basis for the distribution of the right to private and public, and that public authorities can file lawsuits to protect the private subjective legal rights of citizens.

For example, according to Article 56 of the Civil Procedure Code of Ukraine [2] and Article 23 of the Law of Ukraine "On Public Prosecutor's Office" a prosecutor may file an application for the protection of the rights, freedoms and legitimate interests of a citizen based on the a citizen's health, age, incapacity and other objective reasons that can prevent him to file a lawsuit in person. Therefore, the method of protection can not be considered a criteria for the division of law to private and public.

As the basis for such a division is often referred to as the nature of the realization of legal relationships of interest [18]. According to this, researchers argue that private law is directed at the satisfaction and protection of individual interests, and public - the common interests. Given that public interests are sometimes viewed as a set of private interests, that is, common interest is understood as a collection of individual. But if public interest can be regarded as a set of individual (private), then the totality of not all private interests can claim general significance. [8, p. 60].

The general is not the same as a set of individual phenomena, the general is only what unites all these phenomena. Consequently, the general is not a mechanical connection of individual phenomena. Public interest is an interest that affects society as

a whole, and not individual members of the society who for various reasons may or may not recognize the general interest, and vice versa, they sometimes tend to regard their private interests as public.

In the public law common interest is realized by its participants to somehow satisfy their own private interests [20, p. 24].

However, if the satisfaction of the public interest does not preclude the possibility of realizing private interest along with it, then in the case of private interests only public interest is not satisfied. Because the law in general must reflect and protect both public interests and private interests at the same time [11, p. 13].

In the medical field, the right to differentiate public and private interests is necessary, Oleh Zaiarnyi in his work notes, States, a damage caused by the medical organizations, due to the use of the AIS, should be compensated in full amount. Medical organizations are obligated to compensate both the real cost of health services, which result in negative consequences, deterioration of the patient's health, expenses for professional rehabilitation and the lost profits caused by the loss of working capacity and the terms for the proper treatment of the patient. In the same way the practice of legal regulation of moral (non-property)harm, caused to a patient due to illegal use of his/her harm, caused to a patient due to illegal use of his/her personal data for thepurpose of machine learning or due to not reporting about the use of the AIS in the process of providing medical services, infringement of honor, dignity or business reputation of the patient, in any other way, by using information systems should be developed. [17, p.363]. Therefore, the responsibility for the offense depends on the type of public interest of the state or the doctor personally.

This can be reduced to two conceptual approaches. Thus one group of research adheres to the general approach, according to which the developer should bear responsibility for the offenses connected with the development and technological support of the use of the AIS, unless something does not follow directly from the terms of contract between this subject and the medical organization employing AIS. [12 , p.383-402].

The author completely shares the opinion of reserchers, however if we consider private and public law separately, then the first protects rights and obligations, realizing which subjects meet their personal interests, and public law - rights and obligations the realization of which concerns the interests of society as whole. Therefore, the integrity of the law does not deny the difference, the isolation of the reflected and the interests that protect it.

Since it is believed that the nature of interest is a manifestation of subjectivity in the law, but in no case is an essential feature. [8, p. 19]. It does not take into account subjectivity can only be demonstrated when subjective rights and responsibilities are being realized. Objective legal norms since the real differentiation between public and private interests is being established.

In some cases, this criteria is being applied when private norms are being defined as relations that the state gives defers to dependent decisions of citizens to use them or not to use their subjective rights [9, p. 64]. At the same time, researchers note that the content of public law cannot be determined or changed by the agreement of the

legal relationship participants [26, p.269-277]. However, here it is not considered that the use of subjective rights in contrast to duties always depends on the discretion of their owners. And the conclusion of contracts, which involves the independent use of subjective rights by the parties to the contract process, is regulated not only by private but also by public law.

Worth to state the other criteria for the division of private and public law – it's subjective structure of legal relationships [25]. Consequently, in accordance with it, private law regulates the legal relationship of citizens (subjects) with each other, that is the legal relationship between persons subordinated not to each other, and to bodies of public authority and in this sense equal to each other. Public law, in turn, regulates the legal relationship, where one of the parties is necessarily a state or part thereof in the person of the authorized bodies.

However, there is also the point of view that if the subject of public authority carries out its activities in accordance with the same legal requirements that apply to a private person, has the same subjective rights and carries the same duties, carries out the same acts , as well as a private entity (for example, the conclusion of agreements for state needs, other legal relations between citizens and the state as a treasury, that is, the state as a carrier of property rights and obligations), then it carries out private law activities [20, p. 95].

Although, the legal relationships are regulated by civil law, physical (legal) persons realize in this case their personal interests, while the state (municipal) authorities act in the public interest [27, p. 533-541].

Therefore, they may be imposed on any additional restrictions that are not in relation to the same activity of a physical or legal person. So, we can say that such legal relationships are regulated not only by private but also by public law.

Some researchers, while not finding a universal basis for demarcating private and public law, try to use several criteria at a time. For example, R. Iering names the nature of interest together with the basis and method of protection as the criteria for the division of the right to private and public [21, p. 181-183].

According to scientists D. E. Erofeeva and R. V. Shagieva, as base for the classification of legal norms on the norms of public and private law, they propose to consider the role they play in society, what they are doing, and the nature of the interests that they protect. However, what exactly is the identity between an act, which of them performs private, and which public law, scientists do not finally determine. [18, p. 109]. The author agrees with the opinion of the scientist V.V. Bolgov that in applying the "complex" criteria, we are in an ambiguous position. On the one hand, filling gaps, we overcome the disadvantages that exist in each individually, and on the other - we combine their shortcomings. [9, p. 28]. At the same time, the simultaneous use of several criteria does not always lead to a combination of their shortcomings.

Conclusions

In our opinion, the basis for defining if the law is considered private and public are:

First, the nature of interests and the structure of the legal relationship. Private law includes the rules and principles that govern the legal relationship between individuals and legal entities that satisfy individual and private interests.

Secondly, public law covers the norms and principles that allow participants in the legal relationship to serve interests of the society as whole (possibly, along with the individual interests of individuals). In this case, in the public legal relations of at least one of the parties is the state or its representatives.

Thirdly, the distinction between private and public law is as follows:

a. public law is aimed at regulating legal relationships whose participants satisfy the interests of society as whole (possibly with personal interest), and private law subjects are individual, personal interests;
b. in public law relations one side always has a state (its separate parts) in the person of authorized bodies, the other party may be as another state (part of the state) and a physical (legal) person. Participants in private legal relations are only individuals and legal entities;
c. the core of private law is regulation private property; the basis of public law are relations that are related to the organization and competence of public authorities.

Fourthly, in modern times in some cases the convergence of private law and public law principles is observed, as the state (its separate parts) actively engages in civil legal relations, legalized and widespread term “public services”. However, this convergence does not facilitate their merger. Private and public law exist objectively, regardless of the recognition or non-recognition of such a unit.

Fifth, private and public law - these are objectively existing, relatively independent, interacting units of law as a system. The reasons for their differentiation are the nature of the legal relationships of interests and features of their subjective composition. Only the joint use of these criteria allows the most consistent and clear separation of subsystems of private and public law.

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