

8. Economic Law and Procedure.

THE ISSUES OF THE SO-CALLED “DUALITY OF PRIVATE LAW” AND FUNCTIONING OF COMMERCIAL CODES

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The current system of law in many countries was built on the principles developed in ancient Rome. Modern lawyers praise the Roman law for the availability of many legal institutions in all branches of law. For the first time in the known history of mankind, the Roman jurists separated the law into branches. The Roman law was first separated into private and public right.

The Roman jurists attributed the branch ensuring the interests of the state to the branches of the so-called public law. In particular, the public law in ancient Rome included constitutional, criminal, administrative, fiscal, budgetary, environmental and some other branches of law. In turn, the so-called branches of the private law in ancient Rome included the branches that protected the interests of a person and a citizen. In particular, they included the branches that formed civil, family, and inheritance law. Part of legal institutions that have formed the branch of commercial law was referred to the private law, and another part was referred to the public law in ancient law.

Today, the above division can be criticized and adjusted. Given that the ancient Roman lawyers formed their vision of law more than two thousand years ago, we could find excuses for them and make them a lot of compliments. However, the law after the Ancient Rome was actively developing worldwide. Nowadays, we can clarify and correct the ancient Roman vision of law. Thus, modern lawyers need to understand that the law should not be divided into private and public, it's not right. The law can be neither private nor public. Each branch of law contains a large number of institutions that provide for the implementation of both private and public interests. Surprisingly, many modern lawyers make mistakes referring various branches to private or public law. Such inaccuracies can

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be refuted by the fact that the branches that today belong to the so-called branches of the public law have a large number of private interests and vice versa. In particular, the family law, in addition to ensuring the interests of a private person—a family member, is aimed at the interests of the state, particularly in terms of improving the demographic situation. Likewise, administrative law, in addition to implementing the state interests, involves achieving the interests of each citizen.

Inaccuracies of theoretical classification of branches of law could have been forgiven. However, they have an impact on the practice of adoption and application of the certain law in many countries. Conditional division of branches of law in ancient Rome led to the classification of branches of law that regulates relations in the economy to the so-called private law. This led to the emergence of the term “duality of private law” at the end of the eighteenth and beginning of nineteenth centuries. The new pseudo-institution of law was named the Duality because, according to some lawyers of that time, civil and commercial law (commercial, economic, entrepreneurial, etc.) were referred to the private law. Unfortunately, many lawyers are sharing this misconception now.

The objective process led to the adoption of commercial codes, along with civil codes, in many European and later Asian and American countries. In different countries they have different names – commercial, trade, economic, business, entrepreneurial codes, etc. However, they are aimed to regulate the relations in the economy, which mediate the achievements of both public and private interests. However, many lawyers who are followers of the old theory of division of the law into private and public are trying to diminish the role of objective processes, explaining the presence of civil and commercial codes in many countries by the dual nature of the private law. Their main goal is the abolition of the validity and cancellation of commercial, business and other codes around the world by incorporating some of their norms in the Civil Code. It should be noted with regret that one of the world’s first commercial codes that was adopted in the nineteenth century in Italy, and was used as an example in Japan and some other countries, has lost its validity.

Obsolete straightforward division of the law into public and private could be considered progressive for Ancient Rome, but not for the 19th-21st centuries. The situation of disregard of the regulation of relations in the economy by commercial codes leads to one-sided coverage of legal issues in research, academic and publicistic literature. Thus, the curricula of universities, academies and institutes in many European countries pay much attention to the study of the Digest of Justinian, which had been codified and

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systematized by December 30, 533 AD on the territory of the Eastern Roman Empire (Byzantium). It was used to form the Justinian Code of Civil Law – *Corpus juris civilis*. However, most modern lawyers diminish or silence the role of the Book of the Eparch that was finally formed in the tenth century in Byzantine Empire under the Emperor Leo VI the Wise. The Book of the Eparch was developed as a modern code or law and contained chapters with groups of legal rules that governed the relations in various sectors of the economy.

Almost in all European countries, law students study “the Napoleonic Code”, which is the Criminal Code of France and the French Civil Code, often forgetting to mention the Trade (Commercial) French Code of 1807, which was in force until 2000, after which it was replaced by a new one. The Russian Empire and later the Soviet Union and post-Soviet countries paid significant attention to the fundamental studies of G.F. Shershenevich on the issues of civil law [1; 2]. Fundamental educational works on the regulation of various aspects of business (commercial, business, etc.) law and procedure are known in increasingly narrow range of legal scholars. With respect to the scientist, we should specify his works published in the early twentieth century and reprinted in our time. In particular, these are works on the basic principles and legal status of trade (economic) law [3; 4], the legal regime of trade (economic) agreements [5], regulation of securities and international trade [6], economic and procedural issues [7], general issues of trade (economic) law [8].

In Soviet times, from 1937 until the early 1960s, commercial law was completely prohibited in the Soviet Union. However, objective differences that exist in all components of civil and commercial law, including the focus of activities of subjects on achieving approximately equally public and private interests, found its expression even here. Civil legal relations are limited by the boundaries of administrative units – country, republic, region, land, state, region, etc. Economic legal relations due the significant role of objective physical, chemical and biological characteristics of goods and services regulated by these economic relations go beyond boundaries of administrative units. In the absence of a codified act, economic relations were governed by a special law, a subordinate legislation act or a legal custom. In the USSR, republics adopted the Civil Code. Drafts of Commercial Code of the USSR of 1970 and 1988 were planned for the entire great state. Similarly in the United States, where the state is subject to the law, instead of a person or a citizen, the states adopt the civil legislation. The Uniform Commercial Code is valid across the United States.

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This situation is completely justified and logical. The relations with the participation of large transnational corporations, banks and stock exchanges, insurers and carriers cannot be governed by the same laws as the relations between husband and wife, father and son, neighbors, etc. Relations in the economy have a significant (if not overwhelming) number of public interest, they are more complex than the relations with the participation of people (citizens, subjects or individuals in the terminology of modern civil law). Therefore, the legislation, which governs them, should be more complex and more comprehensive [9, p. 79].

Therefore, the term “duality of private law” is an obsolete and false notion, and its application is detrimental. All modern attacks on Commercial Code of Ukraine under the slogan “Europe will not understand us, we must use only the Civil Code” should be stopped. Today in Europe, business, economic, commercial codes are valid in Austria, Belgium, Germany, France, Spain, Portugal, Latvia, Estonia, the Netherlands, Liechtenstein, Luxembourg, Monaco, Malta, Bulgaria, Slovakia, and Kazakhstan.

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