ARTICLES

Public Law, Private Law and Court Practice

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1. Background

In all countries of the Romano-Germanic legal family, jurisprudence divides the fields of law into two major systems: public law and private law. Theorists often raise the question of the criteria and idea of such a division. According to *Rene David* the practice "grown" at the history lessons has not doubted its importance. Public and private laws was differentiated by Roman law but its only purpose was to take public law from the judicial field and pass it to laymen. Throughout many centuries the European continent recognised only private law as law in general. The courts established and recognised by states could carry out their activities or settle disputes impartially only in the field of private law. There was no doubt that public interests and the interests of private individuals are not the same and can not be weighed in the same balance. From today's standpoint it is hard to imagine how a state can not obey the law.

In practice there was raised a question – how to do in order to make judges to settle the dispute between the state and private person impartially and independently?

The Natural Law School broke the taboo laid on public law. Under its influence it was declared that the relations between the governor and those who are governed, administration and private persons should be regulated by the law and courts should be arranged in a way to enable them to adopt decisions in the name of the state and at the same time be sufficiently independent of it.

Unlike Romano-Germanic law, Common law does not classify the legal system into public and private fields. Its explanation is found in the historical development of English law. Common law, as distinct from local customs, emerged as the law common to all England. It had not existed until 1066 when justice was rendered by the assemblies of free men, called County or Hundred Courts, by applying only local customary law. Within the scope of ecclesiastic jurisdiction the Canon law common to all Christianity was applied. The creation of Common law, an English law truly common to the whole of England, was to be the exclusive work of the royal courts of justice. At the beginning, royal courts had no general jurisdiction, so without en-

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largement of its jurisdiction it was impossible to establish common law. On the other hand, the king tried to fortify his influence and extend judicial power and so royal jurisdiction was enlarging and by the end of Middle Ages became overpowering. All other courts practically lost meaning. Unlike on the Continent, the scope of royal jurisdiction was extended not by bringing the local or County courts (which adjudicated private disputes) up to its level. The royal courts in England enlarged their jurisdiction by developing the basic idea that their intervention was justified in the interests of the crown and the kingdom. Due to this reason all cases submitted to royal courts were deemed as public law disputes. In the end they acquired full jurisdiction. Courts adjudicating the private law disputes gradually disappeared, and with them the idea of private law disappeared in England.[1]

The French conception of autonomy of administrative law is often considered to be opposed to the Anglo-Saxon conception, according to which administration and its representatives are subjected to the rules of common law. *Dicey*, a classical scholar of English law explains this in general by the major principle of the English system. This is the idea of dominance of law, which means that everyone irrespective of title and status is subject to ordinary law applied by ordinary courts. Any preferential and special treatment of a certain class, even of public officials, contradicts equality before the law and obedience of one law. In Britain every official from the prime minister to tax collector is subject to the same liability as an ordinary citizen. The idea of dominance of law means that one law applies to the whole nation. Consequently, the French *le droit administratif* is unclear for an Englishman. In France, like other continental countries, state officials are subject not to common law but administrative law applied by administrative institutions.[2] However today such a contrast is not that rough and the trend of separation of administrative elements is apparent in English law too.

2. Modern Meaning of Separation of Public and Private Laws

Georgian law like Romano-Germanic law is divided into public (*jus publicum*) and private (*jus privatum* or *jus civile*) law-order. Public law comprises constitutional, international, administrative and criminal laws as well as customs, taxation and procedure legislation. Traditionally civil and company law fell within the scope of private law. Today such a division has retained its practical importance for the classification of legal facts and the identification of the course of justice.

Private law disputes are adjudicated under civil proceedings on an adversarial basis.

Public law disputes are adjudicated under administrative proceedings and with inquisitional elements.

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[1] *David*, Major Legal Systems in the World Today, Tbilisi, 1993, 213.
[2] *Dicey*, Basics of English Constitutional Law, Moscow, 1907, 33.

An administrative body has a special authority precisely prescribed by the law whereas natural persons and legal persons of private law are entitled to carry out any action not forbidden by the law. An administrative body is bounded by the principle of observing legitimacy and state interests; the principle of autonomy of will provided for by private law does not apply to it. Due to this fundamental distinction, legal persons of public law can not be treated like private persons under a common civil law regime. Thus it becomes necessary to introduce special regime for the activity of legal persons of public law.

Administrative law is the law regulating the activity of administration. According to prevailing viewpoint administrative law exists as far as the set of these rules differ, in their essence, from the rules applied in the relations between private persons. It is a fact that only private law can not cover the activity of an administrative body and the related scope of relations. Thus, special laws are found necessary. These include the necessity to define an administrative body, regulate its prerogatives, which are held only by the legal persons of public law, define the rules on public procurement and licensing. However, it might also happen that private law becomes a rule in administrative relations whereas special laws are an exception.

It could be said that in regulating public and private law relations Georgian law also keeps such balance. Pursuant to Article 1 II of the Administrative Procedure Code of Georgia unless the Code stipulates otherwise, the provisions of the Civil Procedure Code are applied in administrative proceedings. It is also common to apply substantive rules of civil law and several institutions in administrative relations.

Thus, according to popular opinion, administrative legal regulation in general is not essentially something different but the set of exceptions in the regulation of legal relations by private law. Nevertheless, due to numerous fundamental principles and distinctions it could be concluded that administrative law is a specific branch that is different from civil law. Administrative activity applies the means of "private management" leading to the application of the rules of private law. In practice private management is one of the types of implementation of administrative activity. Administrative law comprises two fields: public and private law (i.e. a set of rules of private law applied in public governance and which plays an auxiliary role in the performance of a public task by the administration).

The 1958 French Constitution established the presumption according to which any public activity bears an administrative character, unless there is another regime (legislative, judicial) applicable to the type of activity concerned. Consequently an administrative regime is a special regime regulating the activity of the state and public legal persons.

Governance is the set of actions by the state and public legal entities, which due to numerous specifications belong to the administrative regime.

Administrative law is the common law of public governance. The provision about autonomy of administrative law in France was first distinctly formulated in the 1873 famous decision on the Blanko case. Although this decision meant only the rules concerning the administration's liability, its wordings were applied to administrative law in general:

"Liability imposed on the state for the damage caused to private persons by the employees of public service can not be regulated by the rules of the Civil Code regulating the relationships between private persons..."

Similarly the rules of the Civil Code on transactions can not be applied to administrative contracts. The fundamental provision according to which "contracts concluded lawfully take up the place of the laws for the persons concluding them" is not applied to administrative contracts, which vice versa could be unilaterally changed by the administration. The legal regime of the property being the part of administration's public sector is based upon specific principles (inalienability, impartibility) fundamentally different from the Civil Code rules regulating ownership. An administrative body is not authorised to gift or otherwise dispose of property in a discretionary manner, or to enjoy contractual autonomy. The whole theory of executive decisions is unique and has no analogy in the private law.

The full autonomy of administrative law has many opponents. The administrative law judge *Valine* raises a doubt about the meaning of administrative law. When an administrative law judge adjudicates in a dispute, the application of the rules of private law codes and laws is more multilateral than administrative law itself: thus the traditional understanding of the autonomy of administrative law, which is "absolutely" different from private law, becomes arguable.

Vedel opposes this view. According to him the administrative regime – the common law regime of public governance – comprises the following key principles.

The first principle of separation of administrative and civil courts identifies the scope of issues, which do not fall within the jurisdiction of a general civil court but of the administrative law court;

The second principle concerns the specific regime of administrative acts. On the one hand, the administration is entitled to adopt executive decisions i.e. to issue normative acts leading to legal consequences without the consent of private persons to whom they impose obligations. On the other hand, the administration has special prerogatives in concluding contracts subject to the administrative regime.[3]

Thus administrative-law relations by nature fundamentally differ from private-law relations. The rules of private law do not always cover administrative-law relations

[3] *Vedel*, Administrative Law of France, Moscow, 1985, 205.

and it is impossible to regulate them without special administrative legislation and procedures.

To differentiate between administrative and civil contracts the French court practice elaborated two criteria: "objectives of public service" and "terms of contract going beyond the framework of common law". The existence of one of these criteria is enough to deem contract as the public-law contract. Terms not falling within the framework of common law are the clauses of the contract, which in their nature are different and can not be introduced in a similar civil-law-contract, such as the right to the unilateral termination of a contract, the right to give instructions etc. The inclusion of such clauses may not be prohibited under civil rules but generally they are not met in private contracts.

The establishment of such an approach is observed in Georgian court practice. The Georgian Gas Transportation Company brought an action to the Panel of the Civil, Entrepreneurial and Bankruptcy Cases of Tbilisi District Court against the Georgian Wholesale Electricity Market (GWEM) claiming payment of arrears and compensation of damages caused by a breach of the contract. The Court Panel considered the admissibility of the case and found that it fell within the jurisdiction of the administrative court. Although GWEM is a legal person of private law, it is granted with such authorities that are related only to the activity of administrative bodies. For example, GWEM gives instructions which dispatch licensees are obliged to fulfil; licensees and members of GWEM seek its consent on direct contracts and supply information about such contracts according to the established rule. The Director General of GWEM within his competence issues individual legal acts and carries out control over their enforcement. The Court Panel considered that the rule of similar accountability is familiar only to the administrative proceeding and thus the relationship between GWEM and licensees or direct customers can not be of a private law nature because the relationship is based on the principle of voluntarism and equality of parties. This decision is even more significant because it established in practice the approach under which a legal person of private law may carry out public law authorities. This increases the crisis of classification of legal relations according to the criteria of subjects.

Another case from Tbilisi District Court practice proves this. Mamatsashvili brought an action to Kareli Regional Court against the Property Management Department and Education Department of Kareli. He claimed the restoration of ownership right on a dwelling space. The regional court dismissed the claim and it was appealed at Tbilisi District Court's Chamber of Civil, Entrepreneurial and Bankruptcy Cases. Due to the involvement of administrative bodies in the case, the Civil Chamber categorised the case as administrative and under jurisdiction transferred it to the Administrative Chamber. The Administrative Chamber did not agree with the Civil Chamber's finding that "recognition of an individual as an owner of state property is the object of administrative dispute", referring to the argument that it did not derive from administrative legislation. The recognition of ownership right on a house is a dispute originating from the civil-law-relation which derives not

from administrative legislation but from the ownership institution under the Civil Code. Consequently, although administrative bodies are defendants in the case, according to the finding of the Administrative Chamber, this circumstance does not change the civil nature of the dispute.

3. Conflict of Civil and Administrative Laws

Article 1 of the Civil Code of Georgia defines the scope of application of civil law – it "regulates property, family and personal relations of a private nature, based on the equality of persons". Pursuant to Article 8 I of the Civil Code, "any natural or legal person may be a subject of private law relations. This rule applies to both entrepreneurial and non-entrepreneurial persons of Georgia or of other countries".

"Private law relations between state bodies and legal persons of public law, on the one hand, and other persons on the other hand, shall likewise be regulated by civil laws unless these relations, in the interests of the state or the public, are to be regulated by public law" (Article 8 II of the Civil Code).

Pursuant to Article 7 of the Civil Code "an object of private legal relations may be a material or non-material good, of property or non-property value, which has not been excluded from [commercial] circulation by law". According to Article 10 I "the exercise of civil rights shall not depend upon political rights regulated by the Constitution or by other laws of public law".

"Participants in a civil relation may exercise any action not prohibited by law, including any action not directly foreseen by law" (Article 10 II of the Civil Code).

As for the scope of application of the administrative law, pursuant to Article 2 I of the Administrative Procedures Code, a common court shall hear disputes arising from legal relations that are regulated by administrative legislation.

Pursuant to Article 2 II of the Administrative Procedure Code of Georgia the subject of an administrative dispute may be in conformity of an administrative act with Georgian legislation; conclusion or performance of an administrative transaction; and the obligation of administrative body relating to compensation of damage, issuance of administrative act, or taking any other action.

Under Article 2 I a of the General Administrative Code an administrative body is any state or local self-government body or agency and any other natural or legal person that exercises public-law authority in accordance with law.

An administrative act is an individual legal act issued by an administrative body pursuant to law (Article 2 I d of the General Administrative Code).

The notion of administrative transaction has raised quite a serious dispute. Court practice can not be deemed well-defined with regard to the issue whether for the definition of administrative transaction, the nature of transaction is decisive, contents of legal relation or status of subjects parties to the transaction. As for Article 2 I g of the General Administrative Code of Georgia an administrative transaction means "a civil-law-contract concluded between an administrative body and a natural or legal person or another administrative agency".

Georgian legislation is characterised by a conflict of laws with regard to the separation of public and private law relations. The Civil Code includes the general clause that it regulates relations of a private nature based on equality of persons no matter who are the parties to these relations. The cornerstone of civil law is the nature of the relationship. It must be based on equality and of private nature.

One of the authors of the Civil Code *Djorbenadze* notes that "property relations of private law nature is based on the principle of equality of rights of parties, which means the existence of horizontal commodity-money relations and provides for legal equality between the subjects of civil circulation, their property independence, taking of initiative by them, non-interference of other persons in their activity. This makes the civil property relation different from property relations based on taxation, financial and administrative subordination to which this Code does not apply".[4]

The author of the General Administrative Code *Adeishvili* is of the opposite opinion. According to the Code an administrative transaction is a civil or any other transaction to which an administrative body is a party despite the counterpart's identity and status. All transactions concluded by an administrative body are deemed as administrative transactions but the name does not mean that only administrative law rules should be applied to such transactions. The state participates in civil law relations as a subject of civil law. In these relations it is equal with another party (even if the other party is a natural person) and it may not be treated preferentially. However, as per the new administrative legislation, if an administrative body concludes a transaction, any dispute arising with regard to this transaction must be adjudicated by the court in accordance with the rules of administrative law.[5]

Pursuant to the administrative legislation civil law transactions concluded by an administrative body or with an administrative body are the public law relations i.e. the nature of legal relations is not distinctive, but the status of subjects participating in the relations is. Under the Civil Code a civil transaction concluded by a ministry is a private law relation whereas under the Administrative Code the same dispute is of a public law nature due to

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[4] *Djorbenadze* in: Akhvlediani/Chanturia/Djorbenadze/Zoidze (eds.), Commentary to the Civil Code of Georgia, Book I, Tbilisi, 1999, 29.
[5] *Adeishvili* in: Adeishvili/Winter/Kitoshvili (eds.), Commentary to the General Administrative Code of Georgia, Tbilisi, 2002, 16, 178.

the involvement of a public law body in it. Such conflicts of law are directly reflected in court practice. The following provides examples.

The Chief Treasury Department of the Ministry of Defence of Georgia brought an action against the joint-stock company "Kurort Aveji" claiming compensation of damages caused by the non-performance of the contract of manufacture and supply of furniture. The first-instance court satisfied the claim, which was appealed by the defendant at the Tbilisi District Court's Chamber of Civil, Entrepreneurial and Bankruptcy Cases. After considering its admissibility, the Chamber transferred it to the Appellate Chamber of Administrative Law and Taxation Cases. The Civil Chamber substantiated its decision with the argument that according to the administrative legislation, the object of administrative dispute is the conclusion or performance of an administrative transaction. Since the object of the dispute in the case concerned was originated from the transaction concluded between an administrative body and a legal person of private law, the Civil Chamber considered that it fell within the jurisdiction of the Administrative Chamber;

The Civil Chamber's decision with regard to some other cases is similar. For instance the local government (Gamgeoba) of Saburtalo District brought a claim to the Saburtalo Regional Court and claimed to declare A. and G. Mardanovs' right on the apartment dwelling space lost. After satisfying the claim the Mardanovs' right on the disputed apartment was declared lost. They appealed at the Tbilisi District Court's Chamber for Civil, Entrepreneurial and Bankruptcy Cases. The Civil Chamber considered the transaction concluded between the citizen and local government on the allocation of dwelling apartment as an administrative transaction and subject to administrative law;

An oral agreement was concluded between the Georgian Academy of Sciences and the joint-stock company "AES Telasi" according to which AES Telasi supplied the Academy with electricity and the Academy paid for the consumed electricity. The Academy of Sciences brought an action against AES Telasi claiming to declare a 29 January 2002 Decree of AES Telasi about payment of consumed electricity by the Academy. The Regional Court dismissed the claim, which was appealed at the Tbilisi District Court. The Chamber of Administrative and Taxation Cases categorised the dispute as a civil relationship and transferred it for consideration to the Chamber of Civil, Entrepreneurial and Bankruptcy Cases of the same Court. In its turn, the Civil Chamber objected to the Administrative Chamber's decision and transferred the case to the Supreme Court to resolve the dispute on jurisdiction. The Civil Chamber's argument was that it did not agree with the Administrative Chamber in deeming the dispute as a civil relationship due to following circumstances. Since the Academy of Sciences is a budgetary organisation and a legal person of public law, the agreement concluded by it with a natural or legal person is an administrative transaction and thus the dispute should be adjudicated under administrative proceedings at the administrative court.

The Supreme Court of Georgia makes decisions on these disputes between civil and administrative courts. However court practice can not be seen as already formed. For illustration we would like to offer one of the best examples from the court practice:

The State Property Management Department brought an action against the cooperative "Nobati" and claimed the nullification of the court's registration of the enterprise and return of state property transferred to the enterprise to the Hothouse Farming Union. A regional court found the claim ill-founded and dismissed it. The Chamber of Civil, Entrepreneurial and Bankruptcy Cases of Tbilisi District Court repealed the decision of the Regional Court and a new decision satisfied the claim of the Property Management Department. In its turn the Cooperative "Nobati" appealed this decision at the Supreme Court, which repealed the decision and returned the case for consideration to the Appellate Chamber of Administrative and Taxation Cases under jurisdiction. In its turn the Administrative Chamber objected that the dispute was an administrative law relationship and returned the case to the Supreme Court to resolve the dispute on jurisdiction by referring to the following grounds. The Administrative Chamber did not share the opinion that since an administrative agency was involved in the case the dispute should be deemed as administrative and thus it should be resolved under the administrative rule. According to the Administrative Procedure Code, an administrative court shall adjudicate disputes arising from administrative legislation i.e. administrative legislation shall be the grounds for origination of this relationship. According to the Administrative Chamber, the legislator referred to legal relations, i.e. the legislation from which arise these relations, as a criterion for splitting of the jurisdiction between the courts and this element makes the dispute attributable to the category of administrative cases, which initially excludes classification of disputes according to the subjects. The provision stipulating that if a party is an administrative body then the case shall be deemed as administrative, is incompatible with the administrative legislation itself. The Administrative Chamber noted that the Civil Procedure Code, when defining civil cases bases itself upon legal relations and does not provide for attributing the dispute to the civil category according to the subject. Namely pursuant to Article 11 I a of the Civil Procedure Code, the court adjudicates "the disputes between citizens, citizens and legal persons as well as between legal persons arising from civil, family, labour, estate, utilisation of natural resources and environment protection relations" in accordance with the rule prescribed by the civil procedure legislation.

In particular the object of dispute in the case concerned were two claims: the nullification of the regional court decision on registration of the enterprise, which was adopted on the basis of the Law on Entrepreneurs and bore the nature of civil law and the return of property by the cooperative, which was also an institution of civil law and thus regulated by Articles 155-169 of the Civil Code. Consequently, this second part of dispute also originated from civil legislation. The cooperative had got the property not on the basis of an administrative act or transaction but on the bases of the decision of the general meeting of the Hothouse Farming Union.

Since in practical terms it is necessary to differentiate between public and private law, it is also important to set criteria for a differentiation of legal relations the application of which allows the proper classification of public and private relations in practice. This problem has a long history and in legal theory, at various times distinct criteria and theories of differentiation have existed. For the solution of this problem in France a special body, the Tribunal of Conflicts, was set up. The Tribunal of Conflicts is staffed on parity basis. It is chaired by the Minister of Justice. The Cassation Court appoints three members to participate in the Tribunal's sessions, for the same purpose three representatives are delegated from the Council of State (body adjudicating administrative cases). Appointed judges elect two more members. A conflict regarding jurisdiction is positive when administrative authority takes a disputable case from the jurisdiction of general courts under the pretence that it falls within the jurisdiction of an administrative court. In its turn a civil court is not entitled to take a case from administrative jurisdiction and subject it to its competence. A conflict regarding jurisdiction is negative when a civil court attributes a case to an administrative jurisdiction but an administrative court vice versa attributes it to the civil court's jurisdiction. The Tribunal of Conflicts adopts final decisions concerning jurisdiction.

4. Classical Theories of Differentiation between Public and Private Law

The cornerstone of the theory of interests lies in the direction of interests of legal relations and their consequences. Public law comprises legal rules serving the public interests whereas private law serves individual interests. This approach was established in the statement of the Roman lawyer *Ulpian* (170-228): *publicum jus est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem*.

A radical differentiation of private and public interests is impossible and that is why this theory of differentiation does not allow for a precise classification of legal relations. First of all a majority of legal rules and relations envisage both public and private interests. In addition, public interest is not only the number of private interests. In such a case public interest is for example a synthesis of interests of producers of alcoholic beverages and the victims of alcoholism. On the other hand, it would also be a self-deceit to think that public interest has nothing to do with individuals or groups, which make up a society.

This error serves as a basis of certain administrative action. When one talks about traffic service interests, railway service or in general administration's interests, the state does not notice that this interest makes no sense unless living people or their successors benefit from it in the end.

According to *Vedel*, even the interest of homeland in the end becomes the interest of contemporary French people or their successors. Such a realistic opinion of public benefit does not diminish but increases and proves that sacrificing of individual or private

interest for the sake of a public interest is not a mystification but only a victim sacrificed by a man for the sake of another man.[6]

Moreover, if only the material aspect of public activity is taken into account, it means that any activity which serves lawful collective requirements be it a bakery or music concert, would be a public service. That is why later material aspect was supplemented by an organic (formal) aspect – public service became the activity of public legal person.

The cornerstone for the theory of subordination is the nature of the relationship between the parties. Public law is characterised by subordination of parties of this relationship whereas private law – by the equality of the parties. Thus, obligatory unilateral regulation (law, administrative act) of legal relations is typical for public law, while in private law it is the contract. This theory was greatly supported by court practice. However, it has not turned out to be a perfect criterion for classification of legal relations. When performing its mission, contemporary public law broadly applies contracts and transactions, which on the one hand is of private law nature. At present even a special trend has originated – private law in the field of public governance. Even in criminal procedure, the imperative nature of which is distinguishable among public law fields, there are a number of rules and institutions oriented on the parties' will, such as private criminal prosecution. Criminal proceedings on crimes provided for by Articles 120, 125 and 148 of the Georgian Criminal Code can only be brought upon aggrieved party's complaint but proceedings should be terminated in case an aggrieved party reconciles with the accused. A new draft of the Georgian Criminal Procedure Code goes even farther and introduces a new institution into public law, which is called plea bargaining. If a prosecutor and accused person's defender agree that the accused will cooperate with the prosecution and plead guilty and the prosecutor deems that a reduction of charge is justified in exchange for cooperation, the prosecutor has the right to refuse indictment and instead submit to the court a petition on issuance of the warrant of punishment. Punishment imposed on the accused person by the warrant of punishment shall not be more than two thirds of the penalty stipulated by the criminal law for this offence. Imperative rules are applied in private law as well. They determine the rights and obligations independently from the parties of a legal relationship.

After the theory of subordination, the theory of subjects (persons) was acknowledged. According to this theory, the basis of classification of legal relations is the status of the subjects involved. If the state or other public law person participates in a legal relation we are dealing with public law. If the parties are private law persons or if in the legal relations the state acts not as a public authority but as a private person, then we are dealing with private law. This theory was modified in German law and a special law theory was developed according to which together with the involvement of public law persons, the relations should require the regulation under public law. Georgian administrative law is based on this special law theory with one peculiarity. The question

[6] *Vedel*, Administrative Law of France, Moscow, 1985, 213.

of how much the involvement of administrative body in a legal transaction requires special administrative regulation was not made the subject matter of assessment, based upon the special power of an administrative body. An administrative body needs to conclude any transaction only for the purpose of the implementation of a public task, as an optional, auxiliary means of fulfilment of this main task. As a result, according to this theory all transactions, even private ones, concluded by the subjects with special limited capacity are administrative transactions. The authors of the Georgian administrative law chose a rather simple way of differentiation between public and private laws. They tried to exclude evaluating elements. This formula in the end looks as follows. A civil transaction concluded by the administrative body is an administrative transaction because the administrative body is limited to a special capacity and applies it only for one purpose – the fulfilment of its mission. Otherwise it could not have concluded a contract because the principle of autonomy of will does not apply. However, we can not avoid investigation of the nature of public and private legal relations because, besides administrative transactions under the administrative court's jurisdiction, disputes arise from administrative legislation. In practice there is the issue of whether to prefer an administrative character of a dispute or a procedural regime of regulation. Tbilisi District Court resolved the case in favour of the latter.

Odzelashvili claimed to be a victim of political repressions and applied to the administrative court. He based his claim upon the Law of Georgia on the Declaration of Citizens of Georgia as Victims of Political Repression and on Social Protection of the Repressed. Since the plaintiff claimed the confirmation of a fact and thus the claim was not directed to a particular person and the case did not have the nature of a dispute, the administrative court deemed it as falling within civil jurisdiction. An uncontested trial is provided for by the civil procedure legislation and does not comply with the specificity of administrative procedure. Under administrative proceedings disputable relations are adjudicated, which implies adversary proceedings. Although the law on Declaration as Victims of Political Repression is administrative, the specific regime of regulation of this relationship is provided for by civil procedure legislation. Thus, the administrative court deemed that the institution of an uncontested trial is new for administrative procedure and incompatible with the nature of administrative dispute.

Most analysts deem material aspect as the criterion of differentiation between public and private law relations. The distinction between public and private law lies in the substance itself, in the essence of regulated relations. Property-related relationship is the field of civil law. Other analysts think that the criterion of differentiation is a type of judicial remedy. Public law is defended by the state's initiative under administrative or criminal proceedings. Civil law is defended by a private person's initiative under civil proceedings.

5. The Differentiation between Civil and Administrative Laws According to the Object of Regulation

Most civil law specialists believe that the object of civil law is property-related relations – ownership relations based on the will of parties. Other analysts argue that the fields of law (civil and administrative laws) are differentiated mainly according to the objects of regulation. Civil law regulates property-related relations of persons (natural and legal persons), which is based on the equality of parties. However, property-related relations where one party is administratively subordinated to the other, as well as tax and budget-related relations are not regulated by civil law.

The equal status of the subjects of civil legal relations means that they act as independent persons who are not subordinated to each other in terms of service or otherwise. Parties to civil law relations are equal.

Thus civil law is distinct from other fields of law not only according to the subject but the method of legal regulation as well. The content of the method of legal regulation contains four units: legal personality reflected in a general legal status of parties; legal facts; the content of legal relations and legal sanctions.

In civil law the first unit means the equality of parties reflected in property-disposal independence of parties. Legal facts (second unit) in civil law mean the parties' voluntary actions aimed at the creation of a legal relation. The specific character of the content of a civil legal relation (third unit) covers the principle of disposition. A contract is not only a legal fact but a sub-normative instrument for the regulation of the parties' action. Finally, the fourth unit is the peculiarity of legal forms for ensuring civil legal relations. This mainly bears not a repressive but restorative character (in terms of restoration of aggrieved party's property status). The element of parties' equality is still the leading specific aspect of the method.[7] When assessing the method of legal regulation and the character of legal relations, giving priority to the first one in the classification of legal relations is groundless.

In the view of *Genkin*, the existence of administrative subordination does not exclude contractual relations between superior and inferior bodies, if they are financially independent and have a legal personality. In these relations these bodies are equal to each other and bear property liability for the performance of their duties.[8]

The nature of legal relations alone is not a cornerstone of classification, because property relations or the relations based on the will of parties are regulated both by civil and administrative law, in particular the relations where one party is administratively subordinated to another. For instance, in credit-related relations with business organisations, the state

[7] *Alekseev*, Law, Alphabet, Theory, Practice, Moscow, 2002, 180.
[8] *Genkin*, Object and System of Soviet Civil Law, Social State and Law, N6, Moscow, 1940.

bank defines the sequence of operations, carries out control over credit relations due to administrative power, and becomes the party of administrative legal relations. It is easy to distinguish from these relations the case when the state bank appears in a legal transaction as an equal party with a customer.[9]

The content of legal relations does not itself define the form of legal regulation. Fields of law are classified according to three criteria: object, method and functions fulfilled by each field of law.

Administrative legal relations originate on the basis of unilateral acts – a decision of an administrative body, taken within the limits of its public authority. In addition an administrative body adopts a decision on the basis of the law and with due account of another party's lawful interests. In administrative relations an administrative body always subjects its decision to another body or individual. The latter is obliged to comply with the adopted decision. Thus, administrative legal relations always become the area of power and subordination.

In *Joffe's* view the authoritative essence of administrative legal relations lies in the peculiarity that a decision to issue a particular administrative act and to create administrative legal relations under this act is taken by one party's will.[10]

Civil law is characterised by the voluntary nature of the creation of a legal relation. This is an important feature for the differentiation of private and public law. "If an obligation originates from another's order it is public law whereas private law obligations originate from the self-obedience of an obliged person" (*Gustav Radbruch*), "Public law can not be replaced by the contracts between private persons" (*Justinian* Digests).

A pensioner's right to a pension, a school-leaver's right to be enrolled in university; the right of a mother to many children to receive allowances does not mean that an interested party has the right to participate in taking relevant decisions. Taking such decisions is the competence of state administrations. The equality of parties in civil legal relations is revealed not only in the circumstance that relations are regulated by dispositive rules i.e. parties at their discretion set any term of contract. For instance if parties can not alter statutes of limitation, provisions on quality of thing, it is clear that the imperative nature of rules can not affect the legal equality of parties because neither by mutual agreement nor indeed unilaterally can they alter the terms stipulated by the imperative rules. This means that neither party can prescribe anything to the other. This proves the parties' legal equality in the legal relation concerned.

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[9] *Agarkov*, Object and System of Soviet Civil Law, Social State and Law, No. 8, Moscow, 1940.
[10] *Joffe*, Soviet Civil Law, Moscow, 1963, Vol. I, 210.

6. Administrative Law – Law Made Mainly by Judges

The criteria to differentiate competences of public and private laws vary in every country and cause many disputes. Since legislation can not comprehensively define the precise criteria of differentiation, many matters are solved by court practice. Even in France, which is a traditional country of Romano-Germanic legal system, and which acknowledges a law and other written rules as a main source of law, case law has played a decisive role in the establishment and development of administrative law.

Administrative law is not codified (even in France administrative code – collection of laws and decrees unified according to the object of regulation – does not exist). Moreover administrative law for the most part does not have a legislative character. Consequently, many important rules of administrative law have been defined by judges. There is no doubt that the role of case law is great in other fields of continental law. Law can not be both so general and precise as to suit every case and to limit the judge's role to a mechanical application on a particular case. A judge interprets the law (often vague or contradicting) and he has to apply it in situations, which were not envisaged by the lawmaker and fill the gaps. All this depends on a particular judge's attitude. Generally a successful solution of a problem becomes a precedent for the resolution of similar cases.

Initially the French Civil Cassation Court elaborated an approach under which jurisdiction of civil courts was a general rule, whereas jurisdiction of administrative courts was an exception. This approach was not shared by the Council of State. This body believed that there were disputable administrative cases deserving full, and not exceptional, adjudication under administrative jurisdiction.

The Council of State formulated the concept of state-debtor as one of the criteria to differentiate between civil and administrative cases. The Council rejected the civil courts' right to charge the state with payment of any sum of money whatever the origination of the debt. This was based on the principle under which only the legislative branch may, at its discretion, dispose state means and resources. In terms of public finances, it meant that the rules of private law could not have been used against the state.

Other criterion of differentiation, the concept of *acte d'autorite* was less successful in court practice. It is based upon the difference between authoritative and management acts. Among administrative acts should be distinguished acts involving the application of public authority (authoritative acts) and acts not involving this element (management acts). The first does not fall within the jurisdiction of the civil court whereas the second type does.

The third criterion is the concept of public governance (*gestion publique*). In some areas (management of private sector of administration, contracts under private law) the administration applies the same methods of activity as do private persons. This

is why the rules of differentiation between administrative and civil law are not applied in private management. In other areas public governance takes place and thus the rules of differentiation between administrative and civil law apply to disputes arising from public governance. This criterion had been primarily supported by the civil courts until the Tribunal of Conflicts adopted its famous decision on Blanko's case in 1873.

A child Agnes Blanko was injured by the wagon between the two buildings of a tobacco factory in the city of Bordeaux. The civil court under the ruling on the conflict of jurisdictions transferred the case to the Tribunal of Conflicts to decide whether the action brought by the aggrieved party's father on compensation of damage fell within the administrative or civil court's jurisdiction. The Tribunal of Conflicts decided in favour of the administrative court's jurisdiction. This decision caused a revolution. The Tribunal based its decision not on the famous criterion of state-debtor but another criterion. The decision first of all ruled that the source of damage was the activity of public service and on these grounds preference should be granted to administrative jurisdiction. The idea of the decision was that liability for damage caused by public services was the object of regulation not by the rules of the civil code regulating relations between private persons but by other independent rules. Thus, the decision gave birth to a new criterion of jurisdiction "public service" and strengthened the autonomy of administrative law and administrative judges towards private law. Many authors believe that this was a revolution in court practice, which replaced all the old criteria. Criterion of public service later became broadly recognised and served as the basis of the general theory of French administrative law.

Pursuant to fundamental thesis of the school of public service administrative law is explicated by means of the concept of public service. Consequently it is necessary to discuss what public service is; why it dominates in administrative law overall and how it creates the criterion of jurisdiction.

Public service is "an institution representing the public interest and its purpose is to meet the collective requirements of society" (*Rolane*). According to a second definition "public service is any activity of public collective the aim of which is to meet the requirements bearing public interest. Thus, public service has three characters: activity or action; carried out by public collective; aims at meeting the public interests".[11]

Administrative law is the law of "public services". This idea serves as basis for all its rules. What is most important, public service provides the criteria for administrative court jurisdiction. It adjudicates all disputes arising from public service activities, while all the disputes arising from other activities of administration are adjudicated by civil court, for instance, in cases when it manages its private sector or concludes contracts not directly related to public service.

[11] *Wedel*, Administrative Law of France, Moscow, 1985, 218.

With regard to this last point court practice supports the views of the school of public service. The following three decisions from French case law confirm this:

The *Terre* case deals with a dispute raised in relation to the decision of the Department of Loire of the General Council, which paid 0.25 Francs as a bonus for killing one certain kind of snake. Hunting turned out to be so profitable that the Department's budget soon was exhausted. The department refused payment of some bonuses. In addition there was a suspicion concerning the certificates issued by the Mayors to hunters. One of the hunters named Terre applied to the Council of State and claimed payments from the department. The dispute was caused by the question of jurisdiction. The question concerned whether criterion of public service is applicable to the activity of local authorities and whether the General Council has really established the public service for killing of snakes. The Council of State in the form of a governmental commission positively responded to both questions. So it was recognised that on the one hand criterion of public service is a common criterion applicable to all disputes even with regard to the activity of local collectives and on the other hand for the establishment of public service, it is not obligatory to create the corpus of public servants. It could be reflected only in the collective's action aimed at meeting the requirements having public interest.

The Tribunal of Conflicts applied public service criterion to the activity of local collective when in one of its cases it decided that the claim on a department's liability to compensate damages caused by the fleeing of mentally diseased persons from the house for mentally disordered persons of the Department should be transferred for adjudication to the administrative court because this claim concerned the operation of the department's public service.

Due to nationalisation legislation a number of industrial and commercial public enterprises (public law legal persons with industrial and commercial functions) were growing. They operated under conditions analogous to private enterprises, aimed at the same objectives and did not enjoy the prerogatives of public authority. Court practice subjected their activity to the civil courts' jurisdiction. This caused a distance between public service criterion and legal practice. Since it was extremely difficult to determine where the concept of public service began and where it ended and since any activity bearing public interest could have been deemed as a public service, if the administration had more or less full control thereon or helped it. The concept of "public service" became so comprehensive that it lost legal interest.

Due to the crisis of criteria of jurisdiction the administrative court and Tribunal of Conflicts applied the new wordings "public law relations" or "private law relations" and the formula on "public law rules" and "private law rules". The jurisdiction of administrative court is obligatory where the disputable relation falls within public law and requires regulation by public law rules.

In addition the concept of "public service" was not familiar in French constitutional law. Basing administrative law on this concept caused a disparity between administrative law and constitutional law. To this end all efforts were focused on setting such a criterion of jurisdiction that would be based on the constitution. Proceeding from the principle of separation of powers, executive authority is an independent branch from judicial authority and its activity is subjected to administrative jurisdiction. Disputes arising from the activity of executive authority while applying public law methods fall within the jurisdiction of the administrative court. Grounds of dispute should be the acts and actions of public authority.

In French court practice claims against private persons are not subjected to administrative courts. A private person's claim against another private person does not concern any public activity. The same applies to an administration's claim against a private person because the source of dispute is not administrative but a private person's activity. The principle of administrative and civil jurisdiction should not be violated even in the case of an adjudication of a counter-claim. For example, if a private person's car runs into an administration car, the administrative judge is entitled to adopt decision on the claim for compensation of damages filed by a private person. However, he can not adopt a decision on a counter-claim for compensation for damages filed by the administration against a private person. The administrative judge has the jurisdiction over claims filed against legal persons of public law.

7. Compulsory Public Mission of Administrative Law

Administrative law aims at regulating relations in the field of public administration (*administratio*). The importance of this task is strengthened by the role of administration in contemporary public life. The field of public administration covers the provision of public order and security, protection of public health, provision of education, the promotion of economic welfare of citizens etc. From other forms of human activity public administration differs by its compulsory public mission.

Public administration acquires functions necessary for the cohabitation of the society to be fulfilled independently from the will of individual members of society. Thus, in terms of its objectives, public administration's deep and authoritative interference in the individuals' life is substantiated and justified from the beginning.

We contact with public servants exercising public administration nearly at every step. When mailing a letter or telegram we enter in a relationship with the administration, when using a subway we also make certain relations with the city transport service, which in its turn fulfils the functions of public administration. Even when we just walk in the streets we become linked to the chain of relations built up based on public administration. A city's special services equip the streets for common use, police regulates traffic rules and even if we do not want to have any relationship with the government at all, we still have to recognise the realism of the relationship with the government.

8. Government – an Irreplaceable Party of Public Relations

Since an individual has an inevitable relation in the management field with the government we can not deny the need to regulate these relations. Proceeding from such a need we are never free in the choice of a partner in public relations. In exercising our private interests we are able to choose the person with whom we would like to make property-related or private non-property relation (choice of wife or husband, rental of apartment with this or that landlord, purchase of goods of our choice etc.).

Public administration functions are implemented by certain officials gathered in a certain state institution. Every official and institution has its official competence on certain affairs and within a certain territory. Consequently, wherever we are we acquire irreplaceable partners in the form of local government and public institutions. As for the central governmental bodies applying their authority over a certain category of affairs within the entire territory of the state, these institutions become irreplaceable partners for the country's entire population. Certainly central and local governments, officials appointed and elected are changed from time to time. However, while they occupy their positions a citizen can not make a choice among them in the way that he can choose partners in private relations.

In addition, the difference between public and private law lies in the character of public-law and private-law relations. In public law relations, one party is always a state in the form of its bodies and public servants. The characteristic of public law relations is its imperative nature. Parties of public-law relations define the scope of their rights and obligations not independently by mutual agreement but by involuntarily entering into public-law relations, they become obliged to obey the pre-determined rules of the game. The nature of public-law relations is totally predetermined by the will of the state. The will of separate individuals of these relations does not participate in the determination of the relations. Its participation is theoretically possible in the form of the government's source. The initiative in public-law relations belongs to the state, which unilaterally by dictating and ordering regulates the relations. Relations where parties determine the scope of their rights and obligations based on mutual agreement and consensus are of a private-law character.

9. *Jus cogens* and *Jus dispositivum*

Legal rules regulating legal relations may be imperative or dispositive. Imperative rules (*jus cogens*) precisely define the content of legal relations and leave no space to its parties to define it. So-called dispositive rules (*jus dispositivum*) grant public or private persons with more or less freedom of determination of their relations. The principle of public law is that what is not permitted by the law is prohibited. Whereas the principle of private law is that what is not prohibited is permitted. The state's role in public and in private law is different. In public law a state appears as an emperor

granted with unlimited power whereas in private law it appears just as a drowsy night guard. According to *Kant* private law is the law according to which obligation and compulsion are based not upon the law but upon justice and human freedom to be a master of oneself.

Private-law relations are in contrast to public-law relations and are built on the theories of will and interests. The subject of such relations possesses a will – use power at his discretion, in his interests. An owner has the right to sell his own thing, change it, throw it away or destroy it at his own discretion. A creditor guided with his interests has the right to require payment of a debt but he may also acquit the debtor of a debt or mitigate the conditions of debt. The element of duty i.e. the obligations retains dominant significance in public-law relations. It is characterised with the primary role of legal obligations and not with person's right to enjoy his status at his discretion in his interests. Thus, public law is the law of obligations and private law - law of rights.

Imperative rules in private law are met in the form of exception (e.g. family law). The "supremacy of will" is incompatible in imperative rules. By its nature these rules exclude the freedom of discretion of a competent person. If necessary it limits the subjective right to the legal obligations.

The provision of Article 10 II of the Georgian Civil Code reflects the "supremacy of will" of the subjects of private law - "participants in a civil relation may exercise any action not prohibited by law including any action not directly foreseen by law". Transactions and contracts, basic institutes of civil law, are based on "the supremacy of will". Pursuant to Article 50 "transaction is a unilateral, bilateral or multilateral declaration of will aimed at creating, changing or terminating of legal relations". Pursuant to Article 52 "in interpreting the declaration of will, the will shall be ascertained as a result of reasonable deliberation and not only from the literal meaning of its wording". In addition "supremacy of will" is reflected in the principle of freedom of contract.

Persons of private law may freely conclude contracts and determine the contents of this contract within the framework of the law. They can conclude contracts not foreseen by the law but they shall not contradict the law. If, for the protection of essential interests of society or individual the validity of contract depends on the state's permission, then it should be regulated by a separate law.

Article 19 I of the Swiss Act on the Law of Obligations points out: "there may be determined any content of the contract within the framework of the law". Article 1134 of the French Civil Code states the well-known wording "lawful contract is the law for its parties".

By what reason does modern law order recognise the obligatory nature of private persons' contracts and secures their performance under court proceedings? According to *Zweigert* and *Kötz* there are numerous opinions concerning this doctrine but the following two are basic. The major task of the law order is to provide and

secure an individual's freedom and self-determination. Independently from the influence of the state or other governmental body, everyone should enjoy the freedom of action. An individual should be allowed to make his relations with others at his own discretion and not according to pre-determined mandatory provisions. He is free in achievement of goals that he considers lawful provided other's similar freedom is not violated.

The Georgian Civil Code admits the application of imperative rules in private law from this view. Pursuant to Article 10 III "imperative rules of civil law protect the freedom of others from the abuse of rights. Actions that contravene these rules shall be invalid, except when the law explicitly defines other effects. Individual interventions through administrative acts shall be prohibited unless these acts are applied on the grounds of a specific law."

Thus, the state should take account of individual freedom and assign the right to determine independently the conditions of his living. For an individual this means not only freedom of religion, expression, private property, commerce and business, but also freedom of contract to enter into relations with a person of his choice. The content of this relationship, basically, should remain as a prerogative of the parties to the contract and depend on the decision of each of them and on their joint consent.

The idea of contract is that the agreed terms are mandatory to the parties because each of them voluntarily confirms to the other that they should be considered proper. Freedom of contracts as an expression of individual's autonomy is historically closely linked with the so-called "theory of autonomy of will". Pursuant to this theory, recognition and fulfilment of contractual obligations is based upon the identification that parties to the contract have "voluntarily wished" to assume their obligations.

The theoretical basis of the second opinion is utilitarianism. Supporters of this doctrine are interested in the question of the functioning and optimisation of government bodies in society, and the efficiency of decisions adopted by them. The following example proves this. An owner values his property at 500 Marks and as a rule is ready to sell it for 600 Marks. Certainly it will only happen if he finds a buyer who values this thing at 600 or more Marks and thus is ready to pay this sum to buy it. If such buyer is found he, as a smart person who cares about his interests, will conclude a contract on the purchase of this thing for 600 Marks.[12]

10. Public Law – System of Legal Centralisation

A comparative analysis of public-law and private-law relations illustrates the contrast between these two different types of law orders. Although the law generally aims at the regulation of relations between individuals, the methods and mechanisms of such

[12] *Zweigert/Kötz,* Introduction to the Comparative Law in the Field of Private Law (in Georgian), Tbilisi, 2000, Vol. I, 13.

regulation differ significantly. In one area relations are regulated by orders from the single centre such as the state government. The latter stipulates for each person its legal place, its rights and duties before the state as a whole and before other individuals.

According to *Pokrovsky* the major difference between private and public laws is observed in the methods applied. Only a state may issue ordinances defining the status of separate individuals in this field of relations and no private will, no private agreement can change this status (Roman lawyers believed that – *publikum jus pactis privatorum mutari non potest*). Regulating all these relations on its initiative and at its own will the state government can not admit any other will or anyone else's initiative in this field. Consequently, the rules from the state have an unconditional mandatory nature (*jus cogens*). At the same time the rights granted by it have a mandatory nature. They should be exercised because otherwise the obligations related to these rights will not be fulfilled.

A typical and the illustrative example of such method of legal regulation is how state defence is organised. Here everything is related with the single governing centre, which is the only one to issue rules defining the life of the whole and status of each individual. These rules define whether the person concerned is subject to military service or not; if yes it will allocate him in the ranks of the army, determine his status as of an ordinary or officer in this or that regiment etc. No private agreement may change any line in this position. I can not substitute you at work, exchange legions with you or take officer's status for myself. Everything here is subject to one governing centre and everything is centralised.

This method of legal centralisation is the essence of public law. What is clearly and directly observable in the area of military law is the general characteristic of all fields of public law.

11. Private Law – System of Legal Decentralisation

The law applies different methods in the fields falling within the category of private law. In this case, the state principally refrains from direct and authoritative regulation of relations. Here it treats itself not as the only governing centre but grants such regulation to other small centres deemed as independent social units as subjects of law. Such subjects of law are mostly individuals – human beings or various artificial unions – corporations or institutions, i.e. legal persons. Each of these small centres is presumed to carry its own will and initiative and they themselves regulate bilateral relations between each other. The state does not define these relations under its own will. It enjoys the status of protecting what is determined by others. It does not order a private person to be an owner, heir or get married. Everything depends on the private person or persons. However, the state will protect the relations established. If it defines anything as a general rule then it

will apply only to cases where private persons have not defined it on their own initiative, in other words only for filling a gap. For instance, if there is no testament the state defines the sequence of intestate succession. For this reason the rules of private law, as a general rule, bear not a mandatory but only a subsidiary, supplementary character and may be cancelled and altered by private definitions (*jus dispositivum*). Consequently, civil rights (rules) are rights and not obligations. A person to whom they belong is entitled to use or not to use them. The non-exercise of rights does not mean any violation of law.

If public law is the system of legal centralisation of relations, civil law is the system of legal decentralisation. In its essence it comprises many self-defining centres for its existence. If public law is the system of subordination, civil law is the system of coordination. If the first one is the field of power and subordination the second one is the field of freedom and private initiative.[13]

12. Examples of Public and Private Law

The division into public and private law is not only classificatory but also conceptual. It concerns the basics of law, its place and role in people's life and its defining values. Two examples bear this out.

The first concerns taxation relations and their legal regulation. The payment of taxes is the obligation for persons owning property. The obligation to pay tax, the amount of tax and terms of its payment are stipulated by law. Relations in the field of tax payment are of imperative nature. Whether the taxpayer wishes to pay the taxes or whether the tax inspection wishes to set allowances for this or that taxpayer does not have any legal meaning. When a person owns property that is subject to taxation, the duty of tax payment originates automatically, "in compliance with the law". Moreover, taxpayers, individuals or organisations should not have any impact on the terms of payment of taxes. They do not have this right (in addition, agreement on this matter with the employee of tax inspection is an unlawful action followed by legal liability of guilty persons). The application of allowances – partial payment or exemption from taxes is available only based on the law and the decision of a competent official.

The second example is when an individual purchases an apartment. Legal relations in this field are principally different from taxation relations. Even if an individual purchases an apartment from a municipal state organisation, the latter appears in the form of a private person who does not enjoy any privileges over separate individuals. For this reason the relationship on the sale of the apartment develops, so to say, on an equal basis and good will, only with parties' agreement and also at the will of a purchaser – the citizen. In addition, the seller and buyer of an apartment define by mutual

[13] *Pokrovsky*, Basic Problems of Civil Law, Moscow, 2002, 77.

agreement the terms of obligations including price, sequence of payment, sanctions for non-performance of obligations etc.

In addition there is another essential element. A contract, including all its terms, concluded at parties' will and in their interests, which is defined by the buyer and seller, becomes a legally binding document. In legal terms it is almost as binding as the law.

Pursuant to the civil code, a seller's obligation to transfer immovable property to a buyer is deemed fulfilled upon transfer of this property, unless otherwise prescribed by the law. (Such rules are called dispositive. The legal rule applies if the parties have not agreed thereon and here the agreement between private persons will turn out to be even "stronger" than the law).[14]

13. Conclusions

Each theory discussed, despite certain shortcomings, has rational roots because of which the following general conclusion can be drawn. The basis of private law is a legal order under which an individual is entitled to independently, autonomously, at his own free will, without state authority define the legally important conditions of his action. State authorities, however paradoxical it may sound, are obliged to recognise and under constraint support this decision and ensure the resolution of every disputable matter by an independent court.

The basis of public law is different. In general, it is the order of "power-subordination". The order under which a person having a power is authorised to define unilaterally and directly another person's action and consequently the whole system of authoritative-repressive bodies is obliged, under constraint, to ensure full and precise realisation of government orders and instructions. All other persons are obliged to obey it unconditionally. The content of public law is reflected in the formula: legal obligations + legal liability; private law: subjective rights + legal guarantees. To make it even specific a legal relation is administrative (i.e. by its nature it is essentially different from civil law relations) when an administrative agency is the party to this relation on the one hand and on the other implements a pubic law function. The implementation of a public law function takes place when an administrative agency carries out an action foreseen and regulated by administrative legislation.

Administrative law unlike other fields of law comprises the elements of codification and precedence simultaneously. It is especially difficult to formulate the rules on jurisdiction. This process is in a constant dynamic. Consequently, when defining civil and administrative laws, their scopes of application and making differentiation between them, the theory and practice become closely linked.

[14] *Alekseev*, Private Law, Moscow, 2002, 8.