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The Measure of Public and Private Law (on Material of Ukrainian Legislation)

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The article is about the phenomenon of guilt as measure of the public and private law. The guilt originally expresses itself as based on the causality. The legal science considers the guilt as the psychological attitude of the human Being, who has committed the offence towards its social consequences. The guilt as causal relation is localized between intent or negligent deed and caused damage. The form of guilt (intent or negligence) is a marker which allows us to distinguish the areas of private law and public law. The gross negligence is "gray area" between public and private law. So, the true ground of the civil responsibility is guilt as causa, and the determination of guilt as psychical attitude to the deed and its consequences is valid to the area of public law only.
Keywords: guilt, psychological attitude, causa, intent, negligence, damage.

Viešojoje ir privatinėje teisėje naudojami instrumentai (Ukrainos teisės aktų turinio kontekste)

Straipsnyje aptariamas kaltės fenomenas viešosios ir privatinės teisės požiūriu. Pažymėtina, kad kaltė yra pagrįsta priežastiniu ryšiu. Remiantis teisės mokslu kaltė yra žmogaus, padariusio pažeidimą, psichologinio padarinių suvokimo rezultatas. Kaltė visada yra lokalizuota tarp tyčios, neatsargumo ir padarytos žalos. Kaltės forma (tyčia ar neatsargumas) yra požymis, leidžiantis atskirti privatinės teisės ir viešosios teisės sritis. Taigi civilinės atsakomybės pagrindas yra kaltė kaip priežastis, o viešosios teisės srityje kaltė yra suvokiama kaip psichinis požiūris į veiką ir jos padarinius.
Pagrindiniai žodžiai: kaltė, psichinis santykis, priežastinis ryšys, ketinimas, neatsargumas, žala.

Introduction

The question of guilt is one of the most fundamental for the general theory of law and various branches of law, too. At the same time it is worth to stress on that circumstance, that the phenomenon of guiltiness is not the same in the criminal and civil law. On the other side, the concept of a guilt, which is elaborated by the general jurisprudence, as compared with the concrete legal branches, is very distinctive. As we know, the aim of the criminal law and process is to find a person, who has committed a crime, to prove his/her guilt and give a sentence, which is just and adequate to the crime. The classification of a crime,

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as well as a measure of punishment is determined by the form of a guilt to a large extent: negligent or intentional guilt. In its turn, the core of the civil law and process is not just a search of guilty person but, rather, a compensation of the committed harm. In the similar situation the guilt is equal to the causa of the damage. And the task of the general jurisprudence is to clarify the phenomenon of guiltiness itself: how is it possible to establish the relation between human deed and its legal consequences?

The mentioned circumstances push us to the hypothesis: if the origins of the dichotomy of public/private law, as well as the roots of the legal responsibility as such, lie in the phenomenon of guiltiness. So the *aim* of the research is to consider, if the phenomenon of guilt could be the hidden root of the differentiation of the public and private law spheres? So, the object of our work is the phenomenon of guilt, which is considered through phenomenological as well as historical-comparative methods. The named approach gives us a possibility to validate relevance of the topic and degree of research in the next part of the article.

1. Relevance of the topic, its historical exposition and overview of the sources

As we know, in Ancient Times law as such was not separated from the whole volume of the social norms. The norms of law were inscribed in the syncretic mass of the religious, ethical and other similar rules. The social life of the human Beings was determined by the customary norms. In its turn, the phenomenon of guilt was contemplated also as syncretic, not as "psychological attitude of the person to the committed deed" but as "human Being as causa" of the occurrence. The latter means the possibility of the human Being "to be origin of the cause–effect relationship", which leads to the certain results (Karnaukh, 2014, p. 10). In other words, "the guilt" originally means: origin, beginning, causa and the named meaning is more original than "psychological attitude of the person to the committed deed". At the same time in Latin (causa) as, for example, in German (die Schuld), the guilt means human ability to start that cause–effect chain, that leads (or is able to lead) to the damage or harm. As the famous German philosopher Martin Heidegger stressed "it's possible to understand the guilt in two ways: as "being-ought" or as "being-obliged" before the other person, or "being-cause" of something. The both modes of guilt coincide in that we call "to become guilty", which means through the guiltiness as "oughtness" to break the law and make himself "ought to be punished". … "Oughtness" is not derived by the law-breaking itself, but due to my fault, that the other person in its existence is put in danger, miss his way or even broken. The similar "Oughtness" before the others is possible without breaking the "public" law" (Heidegger, 2001, p. 282).

In order to understand the Heidegger's position correctly, it's worth to underline, that in the history of law a guilt was understood originally as the ability of the human Being to be the causa of that, what have been done (damage, harm). The best illustration of the similar thesis was the legal books of early Middle Ages ("Lex Salica", "Russkaia Pravda", "Gragas"), which included not the elements of the crime only, but presented itself as the certain "catalog" of the material equivalent of the damage, which replaced, in fact, the guilt and the delict as such.

By the way, what does it mean "to be the causa"? For example, the "causa" of a murder committed by a son are his parents, because they are the "causa" of his birth. By the similar way the "causa" theft of food is hunger of a thief, the "causa" of the road accident is that vehicle, which harmed the person, etc. In other words, the question about guiltiness as causa demands the certain criterions, which determine the "point of countdown". From what point we have to countdown the occurrence as such, as well as its consequence – the damage? The similar issue is rooted in the origin of the law. From the civilistic point of view even in the Ancient Rome the complication of the forms of economic circulation have made clear the issue of imputation. It consists in a fact, that default of commitments or causing harm

were determined by the complex of transitive causes and effects, when the "objective imputation" itself couldn't serve the ground of effective solution for the legal dispute.

As we know, even in the oldest origins of Roman law existed a provision, that the obligation appeares from the double grounding: delict and contract. Later the list of the similar grounds was extended. For example, Gaius in Institutions (III.88) proved, that «omnis obligatio vel ex contractu nascitur vel ex delicto», and only later, in his other book (2-nd book Aureorum) added the third group – «aut propria quodam jure ex variis causarum figuris» (from other different grounds). At the ages of Justinian, to the contracts and delicts were added quasicontracts and quasidelicts (Pokrovskiy, 1999, p. 372, 390, 391), (Rimskoe chastnoe pravo..., 1997, p. 239, 240).

So, in the archaic Roman law (and German also) "a guilt" as certain causa of obligation (to pay compensation for a damage) is that deed which was harmful. The similar deed was recognized as harmful due to its delictous character or as violation of the obligation. The Roman law considered a guilt in three specific modes: the guilt as a culpable intent (*lat. dolus*), a grossly negligence (*lat. culpa lata*) and a slight negligence (*lat. culpa levis*) (Karnaukh, 2014, p. 11). It seems reasonable to suppose, that the named distinction is the historical ground for the sedimentation of "substantive" and "procedural" difference of private and public law in contemporary legal theory. If the delict was committed deliberately, the similar action belongs to legal sphere of public law and public prosecution. If the harm was unintended or presented itself as consequence of the violation of the contract, the similar delict belongs to the sphere of private law and private prosecution. It may be no accident that the Roman law understood *dolus malus* as not the degree of a guilt, but as the delict as such ("willful damage") (Karnaukh, 2014, p. 12). In their turn, Roman lawyers primary understood negligence as carelessness. A guilt exists only when there was any care, which careful man could provide (Karnaukh, 2014, p. 13).

Thus, the form of a guilt served as the criterion of the distinction and determination of the substantive law, so as the procedural one also. As we know, in the Early Middle Ages both legal prosecution of a guilty person and execution of the sentence were prerogatives of plaintiff (claimant). But from the Higher Middle Ages the right to resolve disputes has been taken from parties by the royal power. At the same time the public prosecutor as the specimen of the state has appeared. The king or the state received the legal status of victim of every crime, which has been committed. At the same time the concept of offence has replaced the concept of damage. Through this the state power monopolized the right to prosecute the intentional crimes. The highest point of the similar tendency was Absolutist State of Modern Age, when every public offence was interpreted as "an attempt to the body of king", which could be balanced by the substantive repression of the state power towards a body of delinquent (Foucault, 1999, p. 73).

2. The phenomenon of guilt in contemporary Ukrainian jurisprudence

As we know, the similar grounds for the differentiation of public and private law are valid even today, in current Ukrainian legislation. The legislative consequences of such distinction are both "substantive" difference of the public and private law and "procedural" distinction of the criminal or administrative procedure from the one side, and civil or commercial procedure – from another.

As a response to the possible objection, that every procedure is public in its core (as provided by the public institution – court), we can answer, that, for example, deliberate harm to the property or intentional obligation default are public offences in their essence. In similar cases the officials are obliged to prosecute the guilt person. But at the same time the equal deeds, which are committed negligent, belong to the sphere of private law and prosecution of the guilty person is the prerogative of the victim itself. And there is also so-called "gray area" between public and private law, where some of the negligent delicts (for example, negligent homicide (Art. 119 Criminal Code of Ukraine) or fatal road accident

(Art. 286 Criminal Code of Ukraine)) are criminalized. In the procedural aspect the similar "gray areas" are the cases of private prosecution in criminal procedure or public claims in civil procedure.

It seems reasonable to presuppose, that the historical ground for the determination of the "gray area" between public and private law are these forms and kinds of the guilt, which were disclosed even in the Early Roman jurisprudence. They are: grossly negligence (*culpa lata*) and slight negligence (*culpa levis*). Then, grossly negligence took its place where that measure of foreseeing (*diligentia*), which was requested from anyone (Karnaukh, 2014, p. 12), was absent. And at the same time slight negligence was understood as the absence of that foreseen, which belonged not to anyone, but to the good, prudent goodman (*bonus paterfamilias, diligens paterfamilias*) only (Karnaukh, 2014, p. 13). So, if the grossly negligence was equal to the intent and in its essence belongs to the public area, slight negligence is immanent to the private area.

Therefore, the guilt as relation of person to the committed deed and its consequences is the most important criterion for the distinction between the deeds of public and private law. The similar distinction determines also the substantive and procedural consequences of that, what has been done. If the guilt is expressed as intent, the correspondent deed in its essence relates to the public law. At the same time, in the event of slight negligence the deed relates to the area of private law. The guilt in the form of grossly negligence puts committed deed in the "gray area" between public and private law. In the similar case the identification of the correspondent legal relations depends on the concrete historical, political, social and other standards. For example, in accordance with Art. 1187 of the Civil Code of Ukraine a driver, who damaged a car of the other person in road accident negligently, has made a civil delict (hurt the property, which belongs to the other person, negligently). But in case, if the similar deed has been done deliberately, his deed, as intent destruction of the property, which belongs to the other person, is criminal offence (Art. 194 of the Criminal Code of Ukraine). But it's clear, of course, that the civil and criminal legislation of the other countries can provide another legal regulation of the similar cases.

Analogically the nature and specifics of the legal consequences of the deed depend on the forms of guilt. In the case of intentional guilt the focal point is punishment and the question of compensation of damage is secondary only. At the same time, any negligence puts on the first plan an issue of the damage compensation, when "pure justice" as "just vengeance" is only secondary. The marked difference covers even the named "gray areas" between public and private law. The numerous evidences of legal practice make clear, that in the case of negligence crimes the most important thing is compensation of damage and peaceful treatment with the offended person. The similar resolution in many cases leads to the discharge from the penalty (or even from the criminal responsibility). But in the cases of the intent crimes the named factors lead to the commutation of sentence only.

As we can see, the whole phenomenon of a guilt presents itself as a complex of interaction between a guilt as such, responsibility and damage. In the area of public law as a sphere of intent, a guilt "dominates" over the damage and determines responsibility primary by the way of the deed itself, and only secondary – by its consequences and possibility of the compensation. In other words, the intentionally done deed forms its legal consequences "by itself", when responsibility as legal consequences of the committed deed is determined by intentional character of the deed first of all. From the other side, in the area of the private law as negligent delict the focal point shifts from the guilt to the substantive consequences, i.e. damage, the absence of which excludes the responsibility of the law-breaker. In this case, the compensation of the damage as the result of the negligent delict "erases" the committed deed and gives to the legal responsibility the "derivative" character (derivative from the substantive compensation of damage). So, it seems reasonable to presuppose, that in the area of private law guilt turns itself from the psychological attitude to the committed deed into the objective imputation. The latter consists in the breaking of that rules, obedience of which allows subject to avoid the harm. The highest point of the similar transition

from the phenomenon of guilt as the ground of legal responsibility to the deed is *liability without fault,* as it takes place by the compensation of damage as result of the source of increased danger effect. It seems that so wide spread civil constructions as the presumption of defendant's guilt or liability without fault are *fictions* in fact, which are summoned by the lawyers to conceal the objective imputation. So, in mentioned examples "the countdown of the focal point of guilt" as the causa of the occurrence shifts from the guilty (intentional or negligent) commitment of the delict to the fact of owning the special (dangerous) property (by the liability without fault) or to the commitment of that deed, which causes damage in pure mechanistically way. In this case the psychological attitude of the defendant to his/her deed or its consequences is relevant only as the ground for the distinction between the *intent* (which puts the occurrence in the public law area) and *negligence* (which allows to stay in the private law area). So, in fact, the objective imputation is concealed by the named constructions of objective imputation or presumption of guilt, which play a role of "ideological masquerade" of state legal politics.

Therefore, during the consideration of guilt issue we come to the necessity of revising the coordinates of its reasoning. The syncretic phenomenon of guilt falls into the deed, damage and responsibility. It is possible, that there is no more place for the guilt as such. But what is the ground of the legal responsibility? It seems that here is the endpoint of the questioning in the frame of the civil law science, which is able to create dogmatic constructions only, but doesn't conceive its nature. For example, in accordance with Art. 179 of the Civil Code of Ukraine, the thing is a "subject of the physical world in reference to which civil rights and duties can appear". But the civil law science in its frame is not able to determine, what is "world", "subject", what means "physical", etc. To elaborate the similar categories is the task of philosophy. So, the way of further questioning leads beyond regional legal science, to the philosophy of law, which is called to the reasoning fundamental phenomena.

Conclusions

1. The reasoning of a guilt phenomenon leads us to the idea, that guilt and its forms present themselves as a possible criterion for the distinction of the public and private law.
2. Guilt in the form of slight negligence is the ground for specification of private law area.
3. Guilt in the form of intent is the origin for the determination of the measures of public law area.
4. Grossly negligence is a so-called "gray area" which is relevant to the private or public law sphere and determined by cultural, social and historical conditions.
5. The named factors give a reason to suppose, that the virtually syncretic phenomenon of guilt is divided into such elements as deed, damage and responsibility, what allows us to elaborate more realistic representation about legal responsibility.

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The Measure of Public and Private Law (on Material of Ukrainian Legislation)

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S u m m a r y

The article is about the reasoning of the measure between public and private law in the area of general legal theory. The similar measure is guilt, which originally expresses itself as based on the phenomenon of the causality. At the present times the legal theory of law considers the guilt by the way of the interpretation of the guilt as the psychological attitude of the human Being, who has committed the offence towards its socially dangerous consequences. The similar point of view is grounded partly on the comparative examination of the duties, which derivate from contract and from the infliction of the damage (contractual obligation and delict obligation). In such situation the guilt as the causal relation is localized between the intent or negligent deed and the damage, which derivate from the similar action. Thus, the form of guilt (intent or negligence) is a marker, which gives us coordinate to distinct the areas of private law and public law. It's important to stress that area of gross negligence is the measure (so-called gray area) between the public and the private law. At the end of the research it becomes clear, that the true ground of the civil responsibility is guilt as causa of the occurrence, and the determination of guilt as psychical attitude to his/her deed and its consequences is valid for the area of public law only.

Viešojoje ir privatinėje teisėje naudojami instrumentai (Ukrainos teisės aktų turinio kontekste)

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S a n t r a u k a

Straipsnyje aptariama viešosios ir privatinės teisės skirtis bendrosios teisės teorijos srityje. Jų skiriamasis elementas yra kaltė, kuri visada yra pagrįsta priežastingumo ryšiu. Remiantis teisės teorija kaltė yra asmens psichologinio santykio su padarytu pažeidimu rezultatas. Panašus reiškinys yra pastebimas pareigų, kylančių iš sutarčių bei žalos sukėlimo (sutartinių prievolių ir deliktinių prievolių), lyginamojoje analizėje. Kaltė priežastinio ryšio analizėje yra tarp tyčios, neatsargumo ir žalos, kuri atsiranda dėl panašių veiksmų. Taigi, kaltės forma (tyčia ar neatsargumas) yra požymis, kuris leidžia identifikuoti veiksmus siekiant atskirti privatinės teisės ir viešosios teisės sritis. Darytina išvada, kad civilinės atsakomybės pagrindas yra kaltė kaip įvykio priežastinis veiksnys, o kaltės, kaip asmens psichinio santykio su padarytu nusižengimu ir jo padariniais, nustatymas galioja tik viešosios teisės srityje.

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