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THE PRIVATE/PUBLIC LAW DIVIDE IN DIGITAL LAW

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Abstract

As the digitization process of last decades affects the way of life, the need for digital law regulations is felt more. Thus, courts and scholars feel the need to categorize the digital law either under public law domain or under private law domain, so that the principles that govern the sub-discipline of digital law becomes clear. This study discusses the criteria that were employed since Romans for distinguishing public law from private law and analyses digital law, with its subcategories as to whether it falls under public law or private law. The study finds that public-private law divide is not perfectly severe, to classify every relation or dispute of law under one of the two domains and that digital law is not a field of law that can be categorized technically under either of these domains, but it can be related to the public sphere rather than the private sphere.

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Öz

Son on yılların dijitalleşme süreci yaşam biçimini de etkilediğinden, dijital hukuk düzenlemelerine olan ihtiyaç daha fazla hissedilmektedir. Bu nedenle, mahkemeler ve akademisyenler dijital hukuk alt disiplinine hakim olan ilkelerin neler olduğunun netleşmesi için dijital hukuku kamu hukuku alanı veya özel hukuk alanı altında sınıflandırma ihtiyacı duymaktadırlar. Bu çalışma, Romalılardan bu yana kamu hukukunu özel hukuktan ayırmak için kullanılan ölçütleri ele almakta ve dijital hukuku, kamu hukuku veya özel hukuk kapsamına girmesi açısından alt kategorileri ile incelemektedir. Çalışma, kamu-özel hukuku ayrımının, her hukuk ilişkisini veya ihtilafını iki alandan biri altında sınıflandırabilecek kadar keskin olmadığını ve dijital hukukun teknik olarak bu alanlardan herhangi biri altında kategorize edilebilecek bir hukuk alanı olmadığını, ancak özel alandan ziyade kamusal alanla ilgili olabileceğini göstermektedir.

Anahtar Kelimeler: Dijital Hukuk, Bilişim Hukuku, Siber Hukuk, Kamu Hukuku, Özel Hukuk

INTRODUCTION

The Private/Public Law divide is very old an approach. It goes back to ancient Roman law.[1] However, it still applies in common law to a certain extent[2] and it applies prevalently in

[1] Roscoe Pound, "Public Law and Private Law," *Cornell Law Quarterly* 24 (1938): 470.

[2] Though common law courts are not classified according to public law-private law divide, there are a number of situations where public and private bodies are treated differently or public functions and private functions are handled separately; but there is no clear public-private law divide in Anglo-American jurisdictions. See Oliver Dawn, "Public-Private Law Divides in English Law," in *The Public-Private Law Divide: Potential for Transformation?*. United Kingdom: British Institute of International and Comparative Law, 2009: 16.

continental law.[3] In continental jurisdictions, public law and private law are practiced by separate courts that may apply different principles.

Therefore, the Public-Private Law dichotomy is a fact under continental law, for judicial purposes at courts and for methodological purposes in academia[4], since there are certain principles in private law domain that cannot be applied to public law domain, and there are certain principles that cannot be applied to private law domain.[5] This is why, today's jurists, continental law jurists in particular, may feel the need to classify digital law either under public law or under private law, in order to handle the cases more easily. Notwithstanding this, it must be noted that this divide is a common fact but it is technically not a must. There are some branches of law that are accepted has both public law and private law aspects, such as international law, on one hand, and there are certain branches of law whose domain, as to whether fall under public law or private law, depends on the jurisdiction it is applied, on the other hand. For instance, criminal law is classified as a public law branch in Germany[6], whereas it is considered a private law branch in French law system,[7] though they are both continental jurisdictions. Therefore, classifying every branch of law under public law/private law domain is not a necessity, but a convenience in terms of legal methodology that is open to questioning.

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[3] John Henry Merryman, "The Public Law-Private Law Distinction In European And American Law," J. Pub. L. 17 (1968): 3.

[4] Neil MacCormick, *Institutions of Law: An EsSay in Legal Theory* (United Kingdom: OUP Oxford, 2007), 224.

[5] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (United States: Liberty Fund, Incorporated, 1982), 255.

[6] Markus D. Dubber, "Criminal Law Between Public And Private Law," in The Boundaries of the Criminal Law (Oxford: Oxford University Press, Incorporated, 2011), 200.

[7] Dubber, "Criminal Law", 200.

Some traditional branches of law are easily identified as to whether they fall under public law or private law. For instance, civil law, commercial law, torts law, all are studied under private law division, whereas constitutional law, administrative law, tax law all are studied under public law division.[8] The certainty in classification of these branches of law is not seen in classification of digital law. It covers relations that are exactly public on one hand, and it also covers relations that are exactly private on the other hand.

The main reason for this difference may be the fact that digital law is defined according to medium, the digital environment, through which its legal relations take place and its cases occur, whereas traditional branches of law are defined not according to a medium, which host the events, but according to the types of relations between the parties or certain characteristics of the parties of the legal relations. For example, constitutional law is considered to fall under public law as long as it concerns the regime of the government and its effects on the citizens/subjects, whether or not it is through a any medium, including digital media. Another example can be obligations law. A case is a matter of obligations law, taking place in any environment, as long as it concerns an obligation that can be subject of a contract between equal parties.

Therefore; unlike the traditional branches of law, digital law is defined according to its technology, rather than the concerning types of relationship or the concerning subjects of law. This makes it difficult to determine as to whether digital law falls under public law, private law, if not both. This also brings the question as to whether public law/private law divide makes sense in every branch of law. To this end, the criteria for distinction of private law and public law must be asserted first.

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[8] Harold J. Berman, *Law and Revolution* (Canada: Harvard University Press, 1985), 34-35.

This can provide a perspective, equipped with clear distinction measures to solve the matter.

I. PUBLIC/PRIVATE LAW DISTINCTION CRITERIA

A. General

Though the most common jurisdictions in the world, during the last century have been continental law, common law, Islamic law and socialist law systems,[9] this study handles the public-private law divide in Roman law and continental law, substantially, as the other systems of law do not have strict distinction of public-private law.

Islamic law system does not have such a distinction as public law-private law.[10] Though it is possible for a jurist to observe and classify the legal norms of Islamic law according to public law-private law divide,[11] that taxonomy belongs to the observer rather than Islamic jurisprudence.

Socialist law system does not distinguish private law from the public law, either.[12] This as a result of the fact that socialist states do not allow private property in the means of production.[13] This is why, distinguishing public law from private law cannot be discussed in the socialist systems of law.

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[9] Mariana Pargendler, "The rise and decline of legal families," in *The American Journal of Comparative Law* 60, no. 4 (2012), 1053.

[10] Darío Fernández-Morera, *The Myth of the Andalusian Paradise : Muslims, Christians, and Jews under Islamic Rule in Medieval Spain* (Wilmington: ISI Books, 2016), 85.

[11] Mathias Rohe, "Islamic Law in Western Europe," in *The Oxford Handbook of Islamic Law*, ed. Anver M. Emon, and Rumee Ahmed (Oxford University Press, Incorporated, 2019), 727.

[12] Scott Newton, *Law and the Making of the Soviet World: The Red Demiurge* (Taylor & Francis Group, 2014), 81-82.

[13] Michael Heinrich and Alex Locascio, "Communism—Society Beyond the Commodity, Money, and the State," in *An Introduction to the Three Volumes of Karl Marx's Capital* (United States: Monthly Review Press, 2012), 219.

In its theoretical discussions, common law system uses the public law-private law divide. Nevertheless, common law system does not have code, such as civil code, criminal code, etc. that might be alleged to be subject to interpretation principles of private law or public law. Since common law systems is mostly based on legal precedents and principles inferred from legal precedents, there is no substantial judicial discussion on classification of the cases as to whether they belong to public law domain or private law domain. It can be said that common law finds the public-private law distinction unnecessary.[14]

B. Roman Law Distinction of Private/Public Law

"*According to the Roman law books, public law was that part which had to do with the constitution of the Roman state; private law was that part which had to do with the interest of individuals*".[15] According to Ulpian, matters that concern the welfare of the state of Rome fall under public law , whereas matters that concern individuals' interest fall under private law.[16] Modern continental approach of continental law systems, including Germany and France also make the same distinction, though not with the same criteria as the Roman law.[17]

In Roman law, lawsuits, where the defendant was accused with murder, treason, etc., were considered a public case since the outcome of the lawsuit concerns the whole citizens, but lawsuits filed for collection of debt was considered a private matter, because who ever keeps the money would not directly affect the welfare. It is only the creditor's concern to collect the money. On the other hand, if it was a taxpayer's debt, then it would be considered a public case.

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[14] Maren Heidemann, "Private Law in Europe-The Public/Private Dichotomy Revisited," in *Eur. Bus. L. Rev.* 20 (2009), 126.

[15] Pound, "Public and Private Law," 470.

[16] F.J.M. Feldbrugge, "Private law and public law", in *Private and Civil Law in the Russian Federation* (Leiden, The Netherlands: Brill | Nijhoff, 2009), 261.

[17] Heidemann, "Public/Private Dichotomy", 126

This was a basic distinction governing the division of work among tribunal, but the codification process in continental Europe changed the taxonomy fundamentally, so much that it cannot be said that modern continental conception of public law-private law divide is the same with that of the Roman law.[18] This dichotomy became an important component of the legal theory, rather than a mere didactic classification, only after the enlightenment.[19] For this reason, continental jurisprudence's approach to the distinction of public law-private law must be handled more thoroughly than other systems.

C. Continental Distinction of Private/Public Law

Though private law-public law divide does not make much juridical sense even some continental law countries, European Union's law or European Court of Human Right's legislation,[20] it can be crucial in many continental European countries as a result of traditional terminology and concepts.[21]

1. Interest Theory

Essentially, interest theory is an attempt to describe what a 'right' is, with a general definition that applies to every jurisdiction and regulation. It can be seen as a derivative of Ulpian's aforementioned public-private law distinction criterion.[22] It suggests that a person has a right, if that person has an interest/benefit that is protected by the law system.[23]

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[18] Charles Donahue Jr, "Roman Law Influence on the Civil Law," 81 *Michigan L. Rev.* (1983), 973-974.

[19] András Jakab, *European Constitutional Language*. (United Kingdom: Cambridge University Press, 2016), 388.

[20] Jakab, *European Language*, 394.

[21] Jakab, *European Language*, 389.

[22] R. A. Duff, Lindsay Farmer, S. E. Marshall, Massimo Renzo, and Victor Tadros, "Criminal Law Between Public and Private Law," in *The Boundaries of the Criminal Law* (United Kingdom: Oxford University Press, 2010;2011), 9.

[23] George W. Rainbolt, *The Concept of Rights* (Germany: Springer Netherlands, 2006), 86.

Therefore, an interest, protected by the legal system, falls under private law domain, where it is an interest that concerns an natural or legal person.[24] On the other hand, an interest, protected by the legal system, falls under public law domain, where it is an interest that concern the entire public.[25]

This theory can be criticized in several aspects. Firstly, every individual interest, protected by the legal system, concerns the entire public, more or less. Secondly, the procedural legislation, necessary for protection of the individual interest, will always pose a public interest, as a part of the rule of law.[26]

2. Subjection/Subordination Theory

According to the subordination theory, or subjection theory in another name[27], public law essentially concern the subordination of the citizens to the state, whereas private law essentially concern the proper coordination of the natural or legal persons that have equal status against the state.[28]

In light of this definition, one can say constitutional law, administrative law and criminal law (to the extent lawsuits are filed by a public prosecutor) is a part of the public law domain as these branches of law provide for the relations among governmental bodies and relations of private persons against governmental bodies. It can also be said obligations law, commercial law, consumers law are a part of private law, as they handle the matters between equals, i.e. natural or legal persons,

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[24] Jean-Bernard Auby, "Public/Private.", *The Oxford Handbook of Comparative Administrative Law*, ed. Cane, Peter, Herwig CH Hofmann, and Eric C. Ip (United Kingdom: Oxford University Press, 2021), 475

[25] William A.Edmundson, *An Introduction to Rights* (New York: Cambridge University Press, 2012), 106.

[26] Jakab, European Language, 390.

[27] Sławomir Fundowicz, "Liability under Anti-Doping Law in Public Law Domain," *Roczniki Nauk Prawnych* 31, no. 4 (2021), 11.

[28] Paul Volken, Petar Sarcevic, *Yearbook of Private International Law: 2002* Vol. 4 (Germany: Otto Schmidt/De Gruyter European Law Publishers, 2009), 266.

who are not subordinate to each other. Nevertheless, today's conception of public law contradicts with this perspective since citizens are not deemed 'subordinates' of their governments anymore under modern understanding of human rights.[29] Subordination is rather a term dedicated to the relation between the agents of government. Similarly, administrations, being party to a contract can be deemed equal in terms of public contracts, considering the fact that there are now many public contracts[30] that are subject to international arbitration, which are treat the parties equally, as legally expected.[31]

3. Subject Theory

The third most important[32] approach to distinguishing public law from private law is the subject theory.[33] According to this theory; unlike private law, public law grants power or charges duty to a body, with a public law character, or exercising public authority[34]. On the other hand private law may grant power or charge duty to any subject of law, such as natural or legal persons, including the holders of the sovereign power, as well.[35] This viewpoint works better for distinction of public law and private law domains as a private contract, signed even by an administration or the government can be identified as a private law relationship, while a relation between a citizen and the citizen's state can still be defined as a matter of public law.

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[29] Fundowicz, *Public Law Domain*, 12.

[30] Meinhard Schröder, "Administrative Law in Germany," in *Administrative law of the European Union, Its Member States And The United States: A Comparative Analysis*, ed. F. A. M. Stroink, René Seerden (Belgium: Intersentia, 2002), 96

[31] Jakab, *European Language*, 391.

[32] Fundowicz, *Public Law Domain*, 10.

[33] *Subjektstheorie* in German. See Fundowicz, *Public Law Domain*, 13.

[34] Volken, *International Law,* 265.

[35] Schröder, *Law in Germany*, 95.

Nonetheless, this theory is also criticized for being grounded on a circular reasoning.[36] The question as to whether a body has a public law character is answered by the relevant body's public law status. Thus, identification of a legal matter, as to whether it is a matter of public law, depends on identification of the relevant body's public law character. This, naturally is a construction that never fails, but it cannot be used as a criterion, because it is grounded on itself as an argument, using 'public law' characterization circinately.[37]

4. Trusteeship Theory

Trusteeship theory suggests that public law is the domain that determine the legal norms that govern relationship, in which at least one of the parties acts as trustee of the public welfare.[38] Accordingly, a contract between a corporate body and an administration will not necessarily fall under public law, and a constitutional relation between a citizen and the citizen's state would fall under public law;[39] both as desired. Even so, there is a problem with this pattern. A contract, intended for public benefit, between to natural persons, for example, would fall under public law, though it would normally be a private relationship.[40]

5. Disposition Theory

Disposition theory handles the matter as to whether parties are legally able to shape a legal relationship or they are legally required, under law, to act strictly as provided for under the applicable law. As can be deduced, relationships that may be shaped relatively freely by the parties are accepted in private

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[36] Mahendra P. Singh, *German Administrative Law in Common Law Perspective* (Germany: Springer, 2001), 9.

[37] Jakab, *European Language*, 392.

[38] Singh, *German Common Law Perspective*, 17.

[39] Neli Frost, *'Old'vs.'New'Governance Regulatory Mechanisms to Prevent Human Trafficking* (GlobalTrust Working Paper, 2017), 9-10.

[40] Jakab, *European Language*, 392-393.

law, whereas relationships that are already shaped strictly by the legislation and don't allow the parties to alter it, are accepted in public law. This, too, is refutable as there are public law relations that are left to the discretion of the administration on one hand, and there there are private law transactions that are subject to severe conditions set by the law-giver.[41]

6. Modified Subject Theory and Further Theories

There are some other theories trying to explain the public-private law difference, but they are not mentioned in this study as there are too insignificant[42], and the objective of this study is to determine the commonly accepted, general principles of public-private law divide.

As a reaction to the criticism, subject theory was modified (and referred to as 'modified subject theory' or *sonderrechtstheorie* in German) in a way that is free of circular reasoning. According to this approach,[43] if one of the subjects involved in a legal relation or dispute acts with exclusive competence as holder of sovereign authority[44], i.e. a governmental body under the applicable constitution, in compliance with the rule of law[45], then the matter falls under public law.[46] On the other hands, if none of the subjects, regardless of their hierarchical status and regardless of the interest involved, acts with such a competence, then it falls under private law.[47] This is the soundest standpoint

[41] Jakab, *European Language*, 393.

[42] Fundowicz, *Public Law Domain*, 10.

[43] Olha O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions* (Germany: Sellier. European Law Publishers, 2007), 27-28.

[44] Auby, "Public/Private.", 475.

[45] Olha, *Fundamental Rights*, 28.

[46] Dubber, "Criminal Law", 203.

[47] Cherednychenko, *Fundamental Rights*, 28.

for making the distinction, as it has not faced any fierce criticism.[48]

II. HANDLING DIGITAL LAW TOPICS IN ASPECT OF PRIVATE/PUBLIC DIVIDE

Digital law covers several disciplines of law, all of which relate to digital communication, digital data storage or digital processing. Handling the major areas of digital law will help public-private law distinction of digital law.

A. Information Technology Law and Informatics Law

Though they don't have the same meaning, there are contexts where Information Technology Law and Informatics Law can be used interchangeably.[49] These two fields have a broader area of study when compared to digital law, as information and informatics may easily refer to technologies that are not digital, such as mechanic systems. Still, handling these two disciplines might give clue about classification of digital law, as digital law is covered by them.

As informatics law covers both private law branches and public law branches, it is widely accepted that it cannot be limited to neither of the divisions. Though it can be suggested that informatics law is closer to private law domain as private law debates are more than public law debates in informatics law,[50] this classification does not depend on the content, but structure of the law branch in question, as handled above. Additionally, content of informatics law, theoretically, is not limited to current debates. New debates will arise as the informatics technology improves. Therefore, it would not be a permanent analysis to identify informatics law, and thereby

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[48] Olha, *Fundamental Rights*, 28.

[49] Yüksel Bozkurt, A.E. "Hukukun Bağımsız Bir Alanı Olarak Bilişim Hukuku." *Türkiye Adalet Akademisi Dergisi* (2023), 396-397.

[50] Bozkurt, "Bilişim Hukuku", 400.

digital law, according to the types of the debates taking place under it.

B. Cybersecurity Law

Cybersecurity law is for protection of information and systems that are accessible through cyber sphere.[51] It is substantially related to economic interest, privacy rights and national security. Data security infringements such as computer hacking[52] and unauthorized access[53], as well as privacy issues such as violation of communication privacy[54] and national security[55] are included in this area of study.

Personal data, professional secret, individual privacy and measures for protection of national security were already provided for in every country's legislation in general terms. Nevertheless, emergence of computer rendered the data, stored in the computer, a private information that needs to be protected from newly emerging ways of violation. Similarly, communication through computers made it possible to breach communication rules with new methods. Promulgation of new norms against such breaches also are a part of cybersecurity law.

Therefore, there are two aspects in potential occasions and potential disputes of cybersecurity: criminal liability and damages liability. Criminal liability under cybersecurity offenses fall under public law domain since the crimes are prosecuted and penalties are enforced by relevant bodies of the state, exercising its sovereign power under the constitution. On the other hand, damages claim fall under private law since the object of any such potential dispute are just personality rights or professional

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[51] Jeff Kosseff, "Defining Cybersecurity Law," in *Iowa Law Review* 103, no. 3 (03, 2018), 1010.

[52] Kosseff, *Cybersecurity Law*, 1017.

[53] Chucks Medoh, and Arnesh Telukdarie, "The future of cybersecurity: a system dynamics approach." in *Procedia Computer Science* 200 (2022), 319.

[54] Kosseff, *Cybersecurity Law*, 1020.

[55] Kosseff, *Cybersecurity Law*, 1025.

interests, for which neither party exercises a public authority. Even damages caused by an offender disguised as a public authority or giving damage by abuse of public authority, would not be considered to be exercising a public authority as it does not stem legitimately from the legislation. For this reason, any occasion that results a damages claim must be classified as a matter of private law.

C. Digital Intellectual Property Law

In present context, intellectual property rights covers industrial property rights, as well.[56] Digital intellectual property is a subset of intellectual property, i.e. any intellectual property that is created, expressed or stored in digital format.[57] Therefore, any relationship or dispute that may arise in relation to digital intellectual rights will involve the same type of parties as regular intellectual property law did, only involving digitization of the intellectual property in some manner.

Though it has been facing some serious criticism in last decades, the dominating idea is that intellectual property law falls under private law domain.[58] It is confirmed by the public-private distinction standpoint in this study as the parties to a digital intellectual property relationship or conflict act in their capacity as holder of a private right, i.e. copyright, patent right etc. Digital law is involved only because the matter in question is discussed in relation a digital technology.

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[56] Gustavo Ghidini, *Innovation, Competition and Consumer Welfare in Intellectual Property Law* (Cheltenham: Edward Elgar Publishing Limited, 2010), 1.

[57] Daniela Valerica Gatea, "Regulating the Internet: Enforcing Digital Intellectual Property Rights in a Global Community" (Master of Law thesis, University of Toronto, 2004), 6.

[58] Shyamkrishna Balganesh, Intellectual Property Law and Redressive Autonomy, in *Oxford Studies in Private Law Theory: Volume I,* ed. Miller, Paul B., and Oberdiek, John (Oxford: Oxford University Press, Incorporated, 2021), 161.

D. E-Commerce Law

Electronic commerce is a branch of law that deals with any transaction regarding provision of goods or services, carried out via electronic devices rather than physical proximity.[59] Digital signature is one of the key technological developments that made it possible.[60] While signing a document for transaction purpose was limiting it with the physical sphere, electronic signature made it possible to sign any document and thereby enter into any commercial transaction in the world using the digital technology.[61]

Since parties to any e-commerce transaction don't act with a public authority and any dispute that may arise from international e-commerce transactions are handled as a matter of international private law[62], it is possible to classify e-commerce relations under private law. It is worth to note that even a party to the e-commerce transaction is an administration, i.e. signing a public contract, it will still be handled as a private relation as the parties are acting as equals, not using a public authority under sovereign power, as mentioned above.

E. Digital Assets Law

A digital asset is any textual, image or multimedia content in binary form, being is an object of usage rights.[63] Digital assets have already become a part of the digital world.[64] Whether or not

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[59] Paul Todd, *E-Commerce Law* (Taylor & Francis Group, 2015), 3.

[60] Todd, E-Commerce Law, 105.

[61] Todd, E-Commerce Law, 127.

[62] Zheng Qin, *Introduction to E-commerce* (Heidelberg: Springer, 2009), 173.

[63] Albert van Niekerk, "Strategic Management of Media Assets for Optimizing Market Communication Strategies, Obtaining a Sustainable Competitive Advantage and Maximizing Return on Investment: An Empirical Study," *Journal of Digital Asset Management* 3, no. 2 (2007), 90.

[64] Alp Toygar, C. E. Rohm Jr, and Jake Zhu, "A new asset type: digital assets," in *Journal of International Technology and Information Management* 22, no. 4 (2013), 117.

they are namely defined and provided for in relevant legislation, it is fact that they are produced and traded, so there are transactions about them.[65] And there are a countries and jurists that acknowledge ownership of 'pure information' and even theft of such digital assets.[66]

In year 2009, with introduction of Bitcoin, cryptocurrency became one of the digital assets.[67] Introduction of Bitcoin as a cryptocurrency was followed by other cryptocurrencies starting from 2015. They are neither text, nor media. They are products of block-chain technology and even the legislation don't acknowledge them, it is a fact that they are used as instruments of trading and even instruments of investment.[68]

These facts indicate that digital assets are treated as commodities actually, though not always legally. Assuming all these assets are acknowledged legally, one can suggest that trading them is subject to private law, as the parties of any such transaction will not be exercising a public authority. Nonetheless, a legal ban that may be put on their trade, of cryptocurrency in particular, would be a matter of public law since the reason of the ban would be protection of the public. Therefore, digital assets are subject of private law to the extent they are acknowledged by the law, and they are subject of public law to the extend their trading is forbidden by the states.

CONCLUSION

As seen above, some branches of digital law, such as cybersecurity clearly falls under public law, whereas some branches of it, such as digital intellectual property law falls under private law. Since digital law is still open to a very large

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[65] Toygar, *"Digital Assets"*, 118.

[66] Sjef van Erp, "Ownership of Digital Assets?" in *European Property Law Journal* 5, no. 2 (2016), 74-75.

[67] Avtar Sehra, "On Cryptocurrencies, Digital Assets And Private Money," in *Journal Of Payments Strategy & Systems* (1750-1806), 12, 1 (2018), 16.

[68] Sehra, *"Crytptocurrencies"*, 39.

scope of practice, it is not possible to mention all possible branches in this study. Furthermore, as digital law is open to new technological developments, there may be other branches, probably stemming from the usefulness of artificial intelligence. As the technology continues to advance, the digital law will be modified and improved according to the developments, as it has done for last quarter century.[69]

Therefore, the types of legal relations and legal disputes that come forth as a result of digital developments are neither unique to public law nor unique to private law. None of the public-private law distinction criteria mentioned above, including the modified subject theory is capable of classifying digital law under either of the domains.

Notwithstanding this, as the discussions above showed, the concepts of public law and private law are too vague to be used technically in legal terminology. For this reason, these terms can rather be used as metaphors referring to law either governing a private sphere or a public sphere.[70] Hence, it is possible to discuss whether digital law is a matter of private sphere or public sphere. Considering the fact that all types of relations and disputes that may emerge under digital law concern relatively new technologies and often require a new legislation or precedent, one can say digital law relates to public sphere more, not because it has a public law nature, but because the current developments of digital law, irrespective of being in public or private nature, are a result of the public concern to regulate a newly emerging area of legal study.

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[69] M. Ethan Katsh, *Law in a Digital World*. (Cary: Oxford University Press, Incorporated, 1995), 240.

[70] Maren Heidemann, "Private Law in Europe-The Public/Private Dichotomy Revisited," in *Eur. Bus. L. Rev.* 20 (2009), 138.

Additionally, there is a current trend that public law's scope "eats up" the scope of the private law.[71] This trend makes it easier to see digital law's public law nature, than its private law nature.

Therefore, if one has to choose whether digital law is more inclined to public law or private law; the answer would be public law. Nonetheless, what public law-private law divide in digital law shows more clearly is the fact that this division does not work smoothly for digital law, as it does not work for several other branches of law.

Public law/private law divide was necessary in the ages, when there were many types of legal relations and only physical means of communication and interaction. In those conditions, it made sense to classify legal relations and debates according to the nature of the relations' being public or private. Those were the main elements of each matter of law. Nonetheless, today's emerging branches of law are distinguished by their means of interaction rather than creating a new type of relation. Therefore; though digital law touches upon public sphere (not even public law) slightly more than private sphere, the most distinct characteristic of digital law that separates it from other branches is the fact that it requires reinterpretation of existing legal relations on new means of communication, which proves that public law/private law divide is no more necessary in today's jurisprudence. Though it can be argued that public law/private law divide brings certain benefits to a system of law, the emergence of digital law apparently rendered this distinction obsolete.

[71] Pound, "Public and Private Law," 469.

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