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THE PARADIGMS FOR DISTINGUISHING BETWEEN PRIVATE LAW AND PUBLIC LAW

ABSTRACT

To conclude the above discussion it needs to be stressed that it is extremely important to try to find the borders between public law and private law. These borders should be searched for by way of improving the existing type models. The practical example of using the typology method in the Polish legal doctrine is the assessment of the character of property dispossession claim.

The presented example clearly indicates the degree to which social sciences are interconnected. The change in social attitudes indirectly affects the general philosophy, which in turn reflects in legal philosophy. The change of a paradigm in legal philosophy, for example a switch from legal natural paradigm to positivist paradigm steadily reveals itself in the paradigm of dogmatic sciences, e.g. in the used methods of interpretation (and their respective value) and the division of more detailed sciences. Social sciences paradigms influence one another and are closely interconnected.

KEY WORDS

public law, private law, distinguishing, branches of law

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OVERVIEW

A legal system, when analysed from a horizontal perspective, can be divided into specific sections, or so-called ‘branches.’[1] Each of these branches has its own characteristics, which can be understood as a separate set of general rules which protect separate categories of goods and legal values. A branch of law “encompasses several sets of legal norms, which are coherent and classified on the basis of defined criteria and which regulate extensive categories of social relations. In other words, it is assumed that a branch of law regulates social relations with which it fully corresponds. As a result, the legal norms included in a given branch of law directly apply to a corresponding legal relation.”[2]

Throughout the ages, the problems concerning the distinction between various branches of law appeared along with the experience of applying the law. Moreover, there is a question of distinguishing between the entire systems – the private law system and the civil law system.

THE INTENDMENT OF DISTINGUISHING PRIVATE LAW FROM PUBLIC LAW AND ITS IMPACT ON THE METHODOLOGY OF DOGMATIC LEGAL THEORIES

As already mentioned in the introduction of this paper, there are significant difficulties in the process of determining to which branch of the law a given regulation and its derivatives (e.g. legal relations, rights, obligations) really belongs. Sometimes meaning of a norm differs depending on into which branch of law we include a specific set of legal regulations. Particularly, such situation occurs if:

- legal regulations do not regulate legal institutions fully;
- a legal institution is considered to be the so-called borderline institution between public law and private law.

If the abovementioned situation occurs, the law should be interpreted on the basis of the general principles of a given law section, or the legal inference rules should be applied, e.g. analogical reasoning. The results of our analysis can vary, depending on the law section the regulations of which we decided to refer to in our reasoning. The example of problematic institutions is indemnification of damages caused through lawful actions of public authorities. In such situations, applying the criteria of distinction between public law and private law becomes indispensable.

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[1] L. Morawski, *Wstęp do prawoznawstwa*, Toruń 2004, p. 73.

[2] Z. Radwański, *Prawo cywilne – część ogólna*, Warszawa 2005, p. 5.

THE PARADIGMS FOR DISTINGUISHING BETWEEN PRIVATE LAW AND PUBLIC LAW

Throughout the ages, legal scholars have been interested in the duality of public and private law. Some of the representatives of the doctrine perceive this division as the pillar of the legal order or a starting point for legal systematics. Another group of scholars considers the division an example of the destructive interference of politics in legal doctrine.[3]

In the theory of law, the following paradigms have been distinguished:

- the paradigm which enables us to assign separate legal institutions to public law or private law through classification method;
- the paradigm which denies the need to make a distinction between public law and private law;
- the paradigm which enables us to assign separate legal institutions to public law or private law through typology method.

re. a) Classification as the method of distinguishing between private law and public law

Classification is a multilevel logical division which guarantees exhaustive and disjoint division. In order to perform classification, it is required to adopt a criterion, which would clearly determine the public or private law nature of legal regulations.

Protecting natural rights of individuals in relation to the whole society and the state was the underlying concept of the modern natural law philosophy. Therefore, the thinkers of the Enlightenment era opted for a strict division between the sphere of rights inherent to individuals and those inherent to wider community.[4] As a result, Ulpian's formula *Publicum ius est quo ad statum rei Romanae spectat privatim quo ad singulorium utilitatem* was reborn and popularized. This formula recognized the legal norms related to state interest as public law, whereas the norms related to the interests of individuals were considered as private law.[5]

The systematics of the *Prussian Landrecht* serves as a good example of a strict division between private law and public law. Landrecht was divided into two parts: the one concerning individual rights and the other on social rights.[6] This division was being justified by the thesis promoted by natural law philoso-

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[3] Ibidem, p. 2.

[4] K. Sójka-Zielińska, *Historia prawa*, Warszawa 2006, p. 230.

[5] The period before the 19th century can be considered a *pre-theory* phase.

[6] K. Sójka-Zielińska, op. cit., p. 231.

phers, who stated that a human being simultaneously serves two roles in the world: he exists as an individual, as well as a member of society.[7]

The scholars who referred to this paradigm in their activities were convinced that dichotomous (disjunctive) division between public and private law is possible and valuable. However, these scholars applied different criteria of division. In theory, there were several different criteria of distinguishing between public law and private law proposed by the scholars, for example:

- the subject criterion – it is based on the assumption that private law regulates relations between private entities, whereas public law regulates relations between entities, among which at least one is a public authority;[8]
- the subject of regulations – this criterion was a part of the so-called 'revenue office theory,' which stated that the property subject of regulations is a criterion which distinguishes both legal systems;[9]
- the criterion of claims vindication – regulatory claims are vindicated according to official routine, whereas claims related to private law are vindicated upon application of the interested parties;[10]
- the criterion of the method of regulating social relations – this criterion is an element of the theory of subordination, also called submission theory. Subordination of one entity of the legal relation to the other one serves as the division criterion. It is worth stressing that the abovementioned criterion was criticized by E. Iserzon, who claimed that: "The administered party is not legally subordinated to the administrating party, but they are both restricted by law;"[11]
- the criterion of administrative-legal relation – according to E. Iserzon: "The criterion of administrative-legal relation consists in obeying *nemo iudex idoneus in causa propria* rule in civil law relationships and not obeying it in administrative law relationships;"[12]
- the criterion of sovereignty – it refers to the variant of the theory of subordination, namely the theory of subordination concerning sovereignty criterion. The characteristic feature of public law is the fact that one of the entities participating in the legal relation is the authority which exercises state sovereignty – that is the right to one-sidedly determine the legal situation of an external entity. In this case, the difference between both types of legal relations consists in "a different trial status of the parties in case the need to authoritatively determine the legal relation between the parties occurs."[13]

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[7] Ibidem.

[8] J. Zimmerman, *Prawo administracyjne*, Warszawa 2012, p. 37.

[9] Ibidem.

[10] L. Morawski, op. cit., p. 92.

[11] E. Iserzon, *Uwagi o kryterium stosunku administracyjno-prawnego (próba rewizji)*, „Państwo i Prawo" 1965, No. 11, p. 666.

[12] Ibidem, p. 668.

[13] Ibidem, p. 666.

The methodology of distinguishing between private law and public law presented above was applied nearly until the end of the 20th century. However, the described paradigm was abandoned, because it proved ineffective. Very often, the developed distinction criteria could not have been used to clearly classify specific legal institutions. Moreover, there were doubts expressed concerning the aim and sense of distinguishing between private law and public law. As the crisis continued, a new paradigm emerged.

re. b) The paradigm which denied the need to make a distinction between private law and public law

The proponents of legal positivism – including Kelsen – claimed that the distinction between public law and private law is entirely ideological and should be replaced with hierarchical, multilevel structure of positive law. Such structure would clearly correspond with the hierarchical structure of state authorities, which have different competences regarding law creation.[14]

The criticism of the dichotomous division of law was also a part of totalitarian states ideology. Private law was *per se* perceived as contradictory to the underlying principles of these systems and was expected to steadily vanish.[15]

The western legal culture, however, accepted the theory of private law society,[16] where the legal order was a product of decentralized declarations of intent made by entities driven by their own interests.[17]

The scholars propagating the described paradigm denied the necessity to maintain the dualism of public law and private law within a single legal order. Therefore, searching for any criteria for distinguishing public and private law seemed pointless.

The demise of totalitarian states (e.g. in the countries of the eastern block) and the tendency to publicize law in the west, which resulted from the development of welfare state functions, led to the crisis of the paradigm described above. It was stated that monistic legal system cannot be applied in contemporary states.

re. c) Typology as the method of distinguishing between private law and public law

The weaknesses of the paradigms described in points a) and b) above resulted in the creation of a new paradigm, which is becoming increasingly popular and respected nowadays. According to this paradigm, the division into public law and private law:

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[14] S. Włodyka, *Problem struktury prawa*, „Państwo i Prawo" 1995/4, p. 4.

[15] Ibidem, p. 5.

[16] For example the theory created by Hayek, Böhm.

[17] S. Włodyka, op. cit., p. 5.

- is very important in pragmatic and systematic terms;
- is considered approximate, since it is impossible to strictly distinguish these two systems of law. There are two reasons for this. Firstly, there is neither a single criterion nor a set of criteria which, when applied, would guarantee disjunctive division. Secondly, the legal system is a derivative of social relations, which cannot be subjected to the abovementioned division processes.[18]

In order to apply the abovementioned assumptions, the method of distinguishing types should be used. This method consists in assessing "the degree to which the characteristics of the items from a given set are similar to the item which characteristics are crucial for us [...] One can distinguish typical and less typical items by stating how much they differ from the chosen specimen."[19]

There are obvious advantages of using such method of division, namely "the possibility to highlight the underlying features, which are characteristic for a given law type and, on this basis, indicate the desired law development paths; the possibility to distinguish public law and private law method of regulation and indicate which elements and methods of regulation are 'foreign' in a given branch of law, as well as assess if there is a serious justification for this situation and how rational it is."[20]

While analyzing the specific institutions on the borderline between public law and private law, one can notice the characteristic features of both areas of law. The area that a given institution should be included in depends on which features are prevalent (the so-called 'type distinction').

The type model is a product of a simultaneous application of multiple different division criteria. Scholars using the typology method paradigm should specify this paradigm, in this way creating a better specimen of a given type.[21]

AN EXAMPLE OF A TYPE SPECIMEN

The model relation/private law institution is distinguished by the following features:

- the party of a legal relation is a public authority;
- claims are vindicated upon request of interested parties;
- the parties of a legal relation remain equal;

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[18] See J. Boć, *Wyrównywanie strat wynikłych z legalnych działań administracji*, Wrocław 1971, p. 188. The author indicates that the tendency to perceive different branches of law as separate systems results from the assumption that social relations which are regulated by these branches are also separate and frequent ambiguity while dividing the subjects of regulation is only caused by social relations' variety, intensity and mutual connection.

[19] Z. Ziembiński, *Logika praktyczna*, Warsaw 2005, p. 61.

[20] S. Włodyka, op. cit., p. 12.

[21] Por. A. Cebera, *Charakter prawny odszkodowania za wywłaszczenie nieruchomości*, „Przegląd Prawa Publicznego" 2013, No. 9, p. 7.

- the rule *nemo iudex idoneus in causa propria* is applied;
- none of the parties of a legal relation exercises administrative sovereignty.

The model public law institution is distinguished by the following features:

- one of the parties of a legal relation is a public authority;
- claims are vindicated according to official procedure;
- the parties of a legal relation do not remain equal;
- the rule *nemo iudex idoneus in causa propria* is not applied;
- one of the parties of a legal relation exercises administrative sovereignty.

CONCLUSION

To conclude the above discussion, it needs to be stressed that it is extremely important to try to find the borders between public law and private law. These borders should be searched for by way of improving the existing type models. The practical example of using the typology method in the Polish legal doctrine is the assessment of the character of property dispossession claim. Its results were published in the *Public Law Overview* ("Przegląd Prawa Publicznego") in 2013.[22]

The presented example clearly indicates the degree to which social sciences are interconnected. The change in social attitudes indirectly affects the general philosophy, which in turn reflects in legal philosophy. The change of a paradigm in legal philosophy, for example a switch from legal natural paradigm to positivist paradigm, steadily reveals itself in the paradigm of dogmatic sciences, e.g. in the used methods of interpretation (and their respective value) and the division of more detailed sciences. Social sciences paradigms influence one another and are closely interconnected.

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[22] Ibidem.