

Beata Kornelius
University of Białystok

THE TOPICALITY OF THE LAW DIVISION INTO PUBLIC LAW AND PRIVATE LAW

This article attempts at the discussion of the important issue, that is the division of law into public law and private law. Arguments referring to the subject have been divided into two parts. The first section is devoted to theoretical aspects whereas the second one discusses practical aspects, that is using the concept of the law division by the law application authorities.

Considering the current law division into public law and private law, in the first place it is necessary to answer the question whether it is possible to divide the widely understood law into two subsystems, or, bearing in mind the increasing specialization of the law in the legal system, is it better to discuss it in terms of its themes instead of the above-mentioned subsystems¹? The later part of this paper will be devoted to the analysis of the usefulness of the above-mentioned division in the law application process. Moreover, this paper is an attempt to take a stand in the discussion regarding the possibility and necessity of the law division practical use at the horizontal order supported by the justification referring to its appropriate legal regulations, both public and private ones.²

In addition to legal theorists' dispute there is a statement that legal norms forming a legal system remain in certain relationships with each other.³ For if the legal system is treated as an ordered set of elements, the placement of its individual components cannot be accidental. Systematizing

¹ J. Leszczyński, *Dogmatyki prawnicze w dobie globalizacji*, [in:] *Filozofia prawa wobec globalizmu*, ed. J. Stelmach, Kraków 2003, p. 121.

² The main opponent in the debate over the usefulness of the division of law in public and private laws is J. Nowacki, *Prawo publiczne – prawo prywatne*, Katowice 1992; see also J. Nowacki, Z. Tobor, *Wstęp do prawoznawstwa*, Kraków 2002, p. 107.

³ For more information on the norm relationships in the legal system see, S. Wróńska, Z. Ziemiński, *Zarys teorii prawa*, Poznań 2001, p. 185 and following.

treatments of the legal system affect both vertical and horizontal orders. The issue of division of the legal system in the vertical order is not the subject of this paper.⁴ Therefore, further considerations will concern the arrangement of the horizontal elements of the law.

A dispute over the current division of law into public and private laws cannot be settled without prior stating what the subject of the division is. J. Nowacki rightly notices that the problem of the justified division cannot be done without a prior determination of the object which is the topic of the discussion. Are they legal norms, legal relations or perhaps different branches of law (eg. criminal law, civil law, administrative law, constitutional law) which are defined as the branches of the subsystem of public law or private law?⁵ It seems that discussing a horizontal division of the legal system already presupposes that legal norms are the subject of interest. Recent jurisprudence works take for granted the statement regarding the separation of the terms “legal norm” and “legal regulation” so it is unnecessary to discuss this relationship in the present study, as the author agrees with this statement. In fact, a character of the legal relation as a subject for division could also be discussed. However, it should always be determined whether it is an elementary ratio, irreducible to simple factors, or whether it is a ratio composed of several simple monoline (elementary) relations, connected functionally.⁶ For if we accept the legal relationship as a preliminary analysis subject which has a complex character, the thesis of the disjoint division of law into public and private laws will fail.

A significant theoretical-legal aspect of the considerations regarding the topicality of the law division into public law and private law concentrates on the division criterion. Traditionally, the discussion of the subject begins by recalling the words of Ulpian, expressing the sense of the interest application criterion.⁷ Hence, a public law is the law that applies to all citizens and the interest of all of them as a community. On the other hand, a private law is the law which serves to protect their particular interests. Since the established criterion presupposes the existence of discrepancies between

⁴ For more information on this subject see K. Pleszka, *Moc prawna a hierarchia w systemie prawa*, ed. K. Opalek, F. Ryszka, W. Sokolewicz, Warszawa 1988, p. 56 and following.

⁵ J. Nowacki, *Prawo publiczne...*, p. 50.

⁶ Z. Ziemiński, *O metodzie analizowania „stosunku prawnego”*, PiP 1967, Nr 2, p. 207.

⁷ “*Publicum ius est quod ad statum rei romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia quaedam privatim*” (D. 1,1,1,2) referred to by K. Kolańczyk, *Prawo rzymskie*, Warszawa 1976, p. 24.

public and private interests (which may not always occur), it is sometimes used only as an alternative.⁸ A frequently employed subjective criterion assumes that a public law is the law which regulates relations between public authorities as well as between public authorities and citizens. A private law is the law that governs relations between individuals and legal persons. This thesis is challenged on the grounds that it is not always so that a public authority acting as a party of the legal relation acts within the limits of the empire (when he uses the power). Such a subject may be a party of the legal relationship under the private law, which happens when dominium is used. The criterion of pursuing claims states that a private law is the law where the interested party shows the initiative to seek protection of one's rights, and the initial sanction has a property dimension. A public law is the law on the basis of which the behavior inconsistent with the legal norms is prosecuted ex officio, and the applied sanction, apart from compensating the damage of the injured party, has also a repressive and preventive dimension. Independence of this criterion is also questionable, it is enough to mention the crimes prosecuted by private prosecution, where the initiative to seek protection lies on the victim's side, despite the fact that the criminal law and its norms are classified as a public law.

The doctrine also formulates the criterion characterizing the nature of the norms regulating the sphere of legal relations. On the ground of private law such a regulation is indirect and conditional, and the predominant type of norms are dispositive norms. In the public law norms of the *ius cogens* character dominate; they do not give the law recipient a possibility of making a derogation from the model behavior predicted by the disposition.⁹ These two subsystems are distinguished on the basis of the property or non-property character of the subject. Sometimes a technical-legislative criterion¹⁰ is involved which refers to the codification scope. In this way, placement of certain regulations under the Civil Code, for example, would determine the scope of norms making up a private law.

⁸ Regarding the lack of conflict between individual and collective interests see the Supreme Court Judgement of February 26, 2004 III SK 2/04, OSNP 2004, No. 19, pos. 343; Decision of the President of the Office of Competition and Consumer Protection No. RKT-42/2006 [https://fafik.uokik.gov.pl/dec_prez.nsf/0/17301DD7509C69A9C12574F60028D5DC/\\$file/Decyzja_nr_RKT42_2006_z_dnia_10.07.2006.pdf](https://fafik.uokik.gov.pl/dec_prez.nsf/0/17301DD7509C69A9C12574F60028D5DC/$file/Decyzja_nr_RKT42_2006_z_dnia_10.07.2006.pdf) (March 23, 2011).

⁹ Z. Pulka, *Podstawy prawa. Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2008, p. 74.

¹⁰ M. Safjan, *System Prawa Prywatnego. Prawo cywilne – część ogólna*, Warszawa 2007, p. 35.

The usefulness of this criterion is also questionable; a separation of the codification of certain fields has an ideological dimension (sometimes it has a purely practical dimension), which does allow to automatically decide whether the field belongs to the private or public law. It seems that the chosen method of regulation seems to be the most appropriate criterion the adoption of which the doctrine justifies.¹¹ At the same time, the method of regulation is understood as a way of determining the relation between the legal parties' intercourse on the ground of the appropriate public or private law subsystem rather than the content or character of the norms making it. For it is helpless to look for any significant differences in the sphere of the construction of norms belonging to the private or public law.

What is more, it is impossible to find any differentiation in the regulatory process of the legal provision establishment of a given subsystem. The method of regulation, which is typical for the private law, presumes that the parties of the legal relationship are equal and autonomous. This means that each party of a legal relationship, having complied with certain characteristics to be treated as a party of this relationship, uses corresponding rights and obligations that have been, are or will be associated with any other subject, if it has the same characteristics or, in other words, it has become a party of such a relationship. So regardless of whether it is a public authority (acting under the dominium) or a physical person acting on the basis of the private law as a party of the relationship, they will have the same rights and obligations, and thus no party will be able to impose any obligations on the other. A content of the legal relationship on the grounds of the private law is an expression of the autonomous behavior of the legal relationship parties which, according to the principle of freedom of contract, have accepted certain responsibilities.

Summarizing the above arguments, one should state that further issues can be discussed in the light of the proviso that legal norms (rules of the proper behavior) are the subject of controversy regarding the timeliness and usefulness of the division of law into public and private laws reconstructed in the process of applying the law and considering the method of regulating of a given legal relationship. Is the adoption of such a proposal sufficient to challenge the thesis of the impossible (being inseparable) division into two subsystems of public and private laws? The answer to that question should be preceded by a preliminary consideration of the objection put by J. Nowacki, namely that a qualification of a given norm to the subsystem of

¹¹ A. Stelmachowski, *Zarys teorii prawa cywilnego*, Warszawa 1998, p. 24; S. Grzybow-ski, *System prawa cywilnego*, Vol. I, Ossolineum 1985, p. 19.

the private or public laws is the result of a prior, arbitrary decision of what is public and what is private.¹²

M. Sajfan was the one to address that objection as well as other issues tackled by J. Nowacki, the main opponent of the need to introduce a division of law into private and public laws.¹³ He emphasized the necessity to introduce a primary arrangement of the expectations regarding a formulated concept of the law division. He also highlighted the need to differentiate between a descriptive judgment from a normative judgment. A division of the whole set into certain categories may be held while the determination of certain common features (such as the type of sanction, the status of the subjects of a given legal relationship, or the type of the norms that constitute a legal relationship) which do not require a prior definition of what is public and what is private. It is only later and for various reasons (including ideological) that a certain group is considered to be more appropriate for regulating the behavior of individuals within the sphere of the individual subsystems. At the same time, in this concept the use of the terms “public” or “private” has a traditional dimension rather than bringing any content by itself. The acceptance of certain principles and values determines which sphere is to be acknowledged as the appropriate one for the regulation of the individual’s behavior within the private law, and which sphere is to be used for the regulation of the individual’s behavior with the participation of the public authority.

The above-presented elements of M. Sajfan’s concept seem to be an important argument in reviving the discussion regarding the topicality of the law division into private law and public law. Since the publication of J. Nowacki’s monograph in 1992, no Polish-language publications have appeared on the subject which comprehensively relate to these issues (in terms of the legal theory) and which provide solutions. Recently the use of the adjectives “private” and “public” has become noticeable that in the formulation of new concepts which aim to develop the opposing legal institutions (in the relation “public-private”). The direction of such a development is well illustrated by the ongoing discussions in the framework of the administrative law regarding the notions of regulatory subjectivity and regulatory personality as notions which have to show a different status of the subjects (parties) of the legal relation towards their status within the public law relationship.

¹² J. Nowacki concentrates his argumentation on the unjustified thesis regarding the division of law into public and private laws. See J. Nowacki, *Prawo publiczne...*, p. 85.

¹³ M. Sajfan, *System...*, p. 30 and following.

A subject of the legal relationship is the one who has been granted certain rights or duties. Basing on the distinction between legal subjectivity and legal personality, the distinction between public law subjectivity and public law personality is made within the framework of public law.¹⁴ The administrative law subjectivity is understood as the ability to participate in the course of the administrative law as a separate subject.¹⁵ The usefulness of this concept on the grounds of the public law is beyond doubt not only because it specifies one of the parties of a legal relationship governed by the public law, but also because it expresses the principle of the subjective integrity of the state.¹⁶ While the concept of the public law subjectivity is accepted by the administrative law representatives, the concept of legal personality results in a number of disputes which are obviously caused by the attempts to automatically introduce the already formed concepts of the private law on the ground of the public law, without taking into account the differences between these two subsystems. In the majority are those who argue that when it comes to defining the characteristics of the administrative subject, as a party of the public law relationship, it is sufficient to use the term of the public-law subjectivity. The construction and use of the public-law personality concept is unnecessary, since through the administrative subject in a legal relationship with an administered subject the state enters itself. Using a concept of the legal-public personality for the assessment of the public law subject is useless to determine its position as the legal relationship party. Each action of such a body is the action on behalf of the state, whereas its acting part in this regard remains inscribed in its structure, and even if it does not fit in this structure, by doing the task assigned, it does so on behalf of the administrative subject and under its responsibility. Therefore, a recognition of such a subject as a subject separate from the state is unjustified.

Opponents of the public law personality distinction also refer to a practical aspect of the constructed concept. The very acknowledgment that a given subject possesses such a status does not allow for making a conclusion that it has some powers, as it is in the private-legal sphere. On the basis of

¹⁴ The legitimacy of isolating this concept and its usefulness has been discussed among other by T. Rabska, *Podstawowe pojęcia organizacji administracji*, [in:] *System prawa administracyjnego*, Vol. I, ed. J. Starościak, Wrocław – Warszawa – Kraków – Gdańsk 1977, p. 275 and following; S. Fundowicz *Osoby prawne prawa publicznego*, ST 2000, Nr 3, pp. 3–12; P. Radziejewicz, *Kilka uwag w sprawie prawnej przydatności pojęcia osoba prawa publicznego*, ST 2000 r., Nr 6, pp. 3–18.

¹⁵ J. Filipek, *O podmiotowości administracyjno-prawnej*, PiP 1961, Nr 2, p. 209 and following.

¹⁶ A. Jamróz, *Wprowadzenie do prawoznawstwa*, Warszawa 2008, p. 113.

the private law, the very statement that a given subject has a legal personality automatically results in the statement that it has a legal capacity to act (as to the principle) in the sphere of the private law relations. Meanwhile, such a statement is obsolete on the grounds of the public law, the authority is entitled to act towards an individual only in terms of such actions which he was authorized to perform.

The use of the public law personality concept to justify the ability to be a party of the administrative-legal relation if the authority has not previously been given powers (competence) to act in this particular case is excluded. These considerations also apply to the position of the administrative subject. Regarding the administered subjected, it always appears as a separate and isolate subject, and the elements that constitute this distinction (legal capacity and capacity to perform legal acts) remain the same as in the civil law, taking into account the differences arising from the nature of the relationship of the public law.¹⁷

The author of this paper argues that the decision regarding the usefulness of the legal-public personality concept on the basis of the administrative law should be preceded by defining the purpose for which the author uses the aforementioned construction. It is necessary to remember that *the classification of the legal life's part implies its assessment classification in some sense and results in further consequences in the qualification sphere*.¹⁸ Therefore, there is a need to specify whether the author treats the public-legal personality concept as an object of cognition.¹⁹ Using the concept of the public-legal personality as an object of cognition, it is necessary to determine whether such an item exists. Therefore, it is necessary to answer the question whether such a concept, that is subject, has been developed within public law.

On the basis of the administrative law the work on this subject begins by noting that on the ground of the private law the concept of legal personality is already formed. Next, the authors focus on stating the extracts of the relevant normative acts devoted to the status of the subject under consideration (usually the municipality). With regards to the rights and obligations granted to it, the authors concentrate more on the legal-public personality rather than on subjectivity. There is no discussion about whether the sub-

¹⁷ M. Grażawski, *Podmiotowość i osobowość prawna w prawie administracyjnym*, [in:] *Instytucje współczesnego prawa administracyjnego Księga Jubileuszowa prof. zw. dr hab. J. Filipka*, Kraków 2001, p. 229.

¹⁸ F. Longchamp, *Współczesne problemy podstawowych pojęć prawa administracyjnego*, PiP 1966., Nr 6, p. 890.

¹⁹ F. Longchamp, *Współczesne problemy...*, p. 888.

ject under the analysis satisfies the conditions to be considered a separate entity. What is more, there is no statement what conclusions can be drawn from the fact that the subject has been granted a public-legal personality. In the works devoted to the concept of the public law personality there is an evident reference to the construction of the private law personality, which is often limited to the transfer of certain settlements with regards to the public law personality from the private law. The abnormality of this approach is justified not only by the separateness of the private and public laws, but primarily by the fact that on the basis of the so-called private law the so-called normative theory of legal personality is applied, which means that a legal person is such an organizational entity which is recognized by the law as such.

The statement that a person benefits from the rights and duties usually granted to a legal subject is not sufficient to recognize some organizational entity as a legal person. A liberal understanding of the Civil Code art. 33²⁰ is unauthorized as well as the assumption that for the subject to be recognized as a legal person it is enough to find the legal basis in the regulations that a given subject is a legal person.²¹ Hence, recognizing that a particular subject has the public law personality because it acquires rights, incurs obligations, and performs tasks on its own behalf and for its own account, remains ineligible as long as within the administrative law the construction of separate legal existence in the shape of a legal person in the private law meaning is not designed. It is necessary to consider whether the use of the public law personality concept is justified in the context of its use as a tool. Such use of the legal personality structure does not add anything to the public law science. Indeed, if what was mentioned above is true, namely that the administrative subject operates only so far and as much as it is allowed by the law, the same statement that it has the public law personality should be regarded as unsuitable. In the absence of the regulations determining the working area of this subject, the statement that it has the public law personality will not be able to justify its activity in this sphere. It seems that the concept of the public law personality is used by administrative lawyers to emphasize the individuality and independence of a given subject, but rather in the ideological dimension.²²

²⁰ Act of April 23, 1964, The Civil Code (Journal of Laws dated 1964 r., Nr 16, pos. 93 later amended).

²¹ J. Frąckowiak, *Prawo cywilne – część ogólna*, Vol. 1, ed. M. Safjan, Warszawa 2007, p. 1027.

²² Among others A. Doliwa, *Podmiotowość prawna jako element prawnoustrojowej konstrukcji jednostek samorządu terytorialnego*, *Administracja Publiczna* 2010, Nr 2, p. 183.

Using the concept of the public law personality should also serve as the attempts to locate the private law subjects in the structure of the legal relationship of the public law which, through the so-called commission of public tasks, become a party of the public-legal relationship. In this situation, the concept of the public law personality formulated in relation to them would highlight their unique status with regards to the private-legal sphere on the grounds of the public law. The author of this paper thinks that this goal can be achieved using the concepts which are already known and used in the administrative law science. At this point it is worthwhile to draw attention to the notion of the general competence and specific competence of the subject to carry out the case. This construction allows to use the term “administrative subject” not only in relation to the bodies of the state administration but also in relation to the subjects who have been given public tasks.²³

At this point, it is necessary to address another argument raised by the opponents of the thesis regarding a separable division of the legal system into public law and private law, which relates to the so-called mixed subjects acting as a legal relationship party. This term refers to the private law subjects performing public functions, whose placement among the subjects of the public or private laws is apparently problematic. The above-mentioned arguments concerning the status of the private and public law subjects illustrate that the presence of the private subject as the administrative subject in the legal relationship does not lead to the loss of the previous status of the subject performing a task. Its previous status does not change that is, the subject benefits from the rights reserved for the public administration only in the framework of the task performed²⁴ and beyond that activity the subject remains the private law entity. Therefore, it does not mean that it becomes a mixed subject whose rights and obligations, being a private-legal subject, mix with the competences that are held in the public-legal sphere. The author of this paper claims that the above-presented view is a reference to the dualistic nature of the public law subjects, visible on the basis of the private law. Yet, it remains indisputable that public authorities may act within the empire (with the use of the power) and dominium (as a party of the private-legal relationship, being a parallel and autonomous subject). The author of this paper argues an analogous structure can be assumed on the basis of the public law when the private law subjects enter the pub-

²³ B. Adamiak, *System Prawa Administracyjnego*, Vol. IX, Warszawa 2010, p. 103.

²⁴ A. Dajnowska, Z. Kapiński, J. Mirgos, I. Rosińska, R. Stec, D. Strus, *Prawne formy działalności administracji publicznej*, ed. R. Stec Warszawa 2008, p. 129.

lic-legal relationships. This thesis shows that the statements on the mutual penetration of the powers and competences and the existence of the so-called mixed legal subjects are erroneous.

Undoubtedly, the legitimacy and necessity to introduce a division of law in a parallel order is essential in jurisdiction. The Constitutional Tribunal has repeatedly referred to the division of law into public law and private law.²⁵ Consequently, the division into the public law subjects and private law subjects also plays an important role.²⁶ The affiliation to one of the above-mentioned categories has to justify the possession of specific rights. Such argumentation, referring to the public nature of the service, was used by the Constitutional Tribunal in its decision of January 25, 2011.²⁷ The case focused on the public operator, Poczta Polska S.A., and their failure to perform a universal postal service (a postal transfer). The decision aimed at the resolution of a legal question whether limitation of the subject's liability only to the range specified in the Act for doing something which was not a tort was consistent with the Constitution. The Tribunal did not find the investigated regulations to be unconstitutional. The decision was justified stating that Poczta Polska S.A. is a public company whose sole shareholder is the Treasury and it is the sole operator performing the service of postal transfers. The Tribunal held that the privilege of Poczta Polska is justified by its status of the public operator, which has a statutory duty to carry out universal postal services in such a way as to be accessible and affordable.

The above-mentioned division was referred to by the Constitutional Tribunal in its decision of March 15, 2011²⁸ in which it judged on the legislation constitutionality conferring legal validity of the business account books and extracts from the bank books in respect to the rights and obligations arising from banking activities in the civil proceedings conducted against a consumer. The Tribunal stated that, in principle, the validity of official documents is associated with the performance of their public duties, and not with the activities of private subjects, which are now banks in Poland. In this situation the use of the privilege to grant the official document

²⁵ For example, the decision of the Constitutional Tribunal dated July 10, 2000, SK 12/99, OTK ZU 2000, Nr 5, pos. 143, the resolution of the Constitutional Tribunal dated May 22, 2007, SK 70/05, OTK-A 2007, Nr 6, pos. 60.

²⁶ The decision of the Constitutional Tribunal January 18, 2011, P 44/08, <http://www.trybunal.gov.pl/Rozprawy/2011/rozprawy.htm> (30.03.2011).

²⁷ The decision of the Constitutional Tribunal dated January 25, 2011, P 8/08, unpublished, see also opposing comments by T. Liszcz.

²⁸ <http://www.trybunal.gov.pl/Rozprawy/2011/rozprawy.htm> (March 23, 2011).

power to business account books by the subject who does not perform public tasks is unjustified. Therefore, the Tribunal decided on the separation of the two types of relationships – public-legal relationship and private-legal relationship, and thus on a different nature and status of the subjects – parties of the public-legal and private-legal relation.

A division of law into public law and private law in the parallel order plays an essential role also in the jurisprudence of the Supreme Court. In its resolution of June 26, 2001²⁹ resolving the legal question posed by the Warsaw Regional Court, the Supreme Court decided on the inadmissibility of the court proceedings in cases in which the parties were related through the administrative relation, thus emphasizing its separateness from the private-legal relationship. It decided that the previous determination of the source of the legal relation was acknowledged as being reliable when deciding on the appropriate investigation procedure.³⁰ To support the above-mentioned decision³¹ R. Szarek highlighted that the decision regarding a separate investigation procedure is a consequence of the prior division of matters into private and public matters.

Significant reflections on the nature of the legal relationship involving public and private bodies have been made in the background of the article 57 of the Energy Law³² before the amendment was introduced.³³ There is no doubt that a legal relationship between the subject who is a provider of electricity and its recipient is a civil law relation. In this case, the act creating mutual obligations of the parties (the source of the legal relation) is an agreement made according to the norms of the substantive civil law. The above mentioned regulation related to the situation in which an illegal uptake of energy took place. The statement of such facts entitled the supplier of energy to determine the compensation according to the rank or file a claim in accordance with the general principles. In the situations when the debtor

²⁹ The Supreme Court Resolution of 26 June, 2001, III CZP 30/01, LexPolonica nr 351448.

³⁰ Also the Supreme Court resolution of November 19, 2010, III CZP 88/10, LexPolonica nr 2412828, in the resolution of October 22, 2010, III CZP 74/10, LexPolonica nr 2399810.

³¹ R. Szarek, Glosa do uchwały Sądu Najwyższego z dnia 26 czerwca 2001, III CZP 30/01, ST 2003, nr 3, p. 65 and following.

³² Resolution dated April 10, 1997 – The Energy Law (Journal of Laws of 2006, Nr 89, pos. 625, later amended).

³³ Art. 57 of the Act dated April 10, 1997 – The Energy (Journal of Laws of 2006, Nr 89, pos. 625, later amended) was replaced by the act of January 8, 2010 regarding the amendment of the law – The Energy Law and other laws' amendments) (Journal of Laws of 2010, Nr 21, pos. 104, later amended).

refused to comply with the provision, the set compensation was to be taken through the administrative execution. The discussed issue concentrated on the investigation of to which extent a public character of the goods covered by the contract (to be more precise, providing a public service) may justify the preference of one of the relationship parties. Strengthening one party's position was to rely on the possibility of issuing an enforcement order by the supplier (in practice, without the prior settlement of the claim by the court) and the ability to conduct execution in administration.³⁴ To which extent does a public character of the provided goods determine the departure from the proper methods of the private-legal relation regulations? Is it relevant that, as it was justified by the Supreme Court³⁵, apart from the parity of the subjects – a principle rule for the civil law relation, the position of one of them, that is the energy supplier, was strengthened by the will of the legislature while claiming for the compensation from the recipient of the illegal intake of energy? In case of the claims being unsatisfied, the supplier did not begin a court dispute with the customer in which, according to the rule of the proof burden, he would be required to illustrate the fact of illegal consumption of energy and the harm resulting from it.

The Constitutional Tribunal gave comments on this matter. In the decision of July 10, 2006³⁶ it concluded that the private-legal subjects' usage of the possibility to enforce their claims in the enforcement proceeding mode in administration cannot lead to distortion of the nature of the legal relationship based on the agreement. In this situation, a necessary condition to benefit from this privileged form of execution of the claim enforcement is a prior reference of the matter to a general court. Granting special privileges of a possibility of the claim enforcement through administrative execution to the energy supplier as a party of the private-legal relationship cannot lead to the abuse of his position in relation to the customer. Prioritizing the energy supplier as a party of the legal relationship, as the exception from the principle of equality of the parties of the private-legal relationship, should not lead to widening of the powers of that subject. The customer cannot be denied the right to submit the disputed case to the general court's judgment. As a consequence of the Constitutional Tribunal decision, the legislator made an amendment to the article 57 of the Energy Law.

³⁴ Act of June 17, 1966 regarding execution proceedings in administration (Journal of Laws of 2005, nr 229, pos. 1954 later amend).

³⁵ The Supreme Court decision dated November 15, 2002 IV KKN 570/99, OSP 2003, Nr 9, pos. 106.

³⁶ The Constitutional Tribunal decision of July 10, 2006, K 37/04, OTK-A 2006, Nr 7, pos. 79.

Theorists of law are criticized that they formulate concepts that are not reflected in practice, and their conclusions have a purely scientific value. The above-presented position in the discussion regarding the topicality of the division of law in the parallel order and particularly the jurisdiction referred to in the paper indicate that the considerations in this regard are not only valid but also useful to be implemented in practice. The author of this paper believes that the view expressed by H. Rot³⁷ that, on the other hand, the dispute about the topicality of this division was an attempt to identify the boundaries of the public authority powers, and, on the other hand, it aimed at the manifestation of the boundaries marking the individual's free activity. Arguing on the need to differentiate between public law and private law, the Constitutional Tribunal³⁸ highlighted that constitutional regulations of the private law results from the idea of the liberal democratic state which treats freedom of the individual as a primary value, hence each democratic state should notice such a division.

In the literature there are claims regarding the division of law into public law and private law as being outdated. They are justified by the increasing specialization of law, creation of hybrid legal structures, formation of legal relations at the boundaries between public and private legal relations. Decreasing tasks, which so far have been defined as public, have an impact on the scope of what is public and what is private. The evolutionary process of transformation also involves the state, which greatly affects the activity of the economic subjects. However, the economic development control decreases, changing its form and content.³⁹ A progressive phenomenon of the so-called privatization of public tasks, that is a transfer of public tasks to private subjects⁴⁰ has become a necessity for *the one who covers a lot squeezes badly*⁴¹ and vice versa. According to the opponents of the idea of the law division, such shifts were to lead towards disappearance of the borders between private-legal relations and public-legal relations, or towards a mixture of their components.

³⁷ H. Rot, *Wstęp do nauk o państwie i prawie. Cz. 2*, Wrocław 1980, p. 198.

³⁸ The Constitutional Tribunal decision of April 29, 2003, SK 24/02, LexPolonica nr 360504.

³⁹ B. Kurczewska, *Interwencjonizm państwa i jego rola w gospodarce*, <http://mikro.univ.szczecin.pl/bp/pdf/6/0.pdf> (March 23, 2011).

⁴⁰ For more information see S. Biernat, *Prywatyzacja zadań publicznych*, Warszawa – Kraków 1994, p. 25.

⁴¹ J. Baszkiewicz, *Powszechna historia ustrojów państwowych*, Gdańsk 1998, p. 211.

The author of this paper claims that such statements are inappropriate and result from the simplification of certain statements. To a large extent, all difficulties regarding the correct classification of what public and private are due to the improperly chosen object of study. It is not certainly a complex of elements, but only its individual parts; it is not the group of relations, but the homogeneous relation irreducible into smaller parts. In the situation where such mixing of public-legal and private-legal elements takes place, we deal with a complex relationship which requires to be arranged into smaller elements – elementary relations to be analyzed. The concept of such an approach towards the legal relationship considerations is noticeable in the Constitutional Tribunal jurisdiction referred to above. As it results from the above-mentioned decisions, allowing private subjects to realize a public task or a public service does not mean that this subjects loses its current status. In this respect, such a subject performs given functions using the tools provided for this purpose, bearing in mind that as a result of such modification there should not be a deterioration of the beneficiary's position as the recipient of the service because of the subject performing the task. It is, therefore, essential to mark the limits within which the state and other subjects performing its proper tasks operate and within which individuals exist and within which the division of law into public and private law may become useful.

S. Wronkowska writes that horizontal systematizing is necessary for the arrangement of thinking about the law, for its interpretation.⁴² Hence, a reference to the division of law into public law and private law is not only *decorum*, but it becomes a necessity. It is not sufficient to acquire the knowledge and practical abilities of the various fields of law. As M. Safjan highlights that *a broader perspective of the existing law overview, a possibility of crossing the borders of the existing branch rules and search for other points of reference beyond the branch... become a great chance and can lead to a gradual evolution of the whole system in the direction which is friendlier towards people, their freedom and needs.*⁴³

⁴² S. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2005, p. 111.

⁴³ M. Safjan, Speech given on 3 March 2003 at a ceremony organized by the editors of "Rzeczpospolitej" to launch the ranking of law firms <http://www.trybunal.gov.pl/Wiadom/Prezes/003.htm> (31.03.2011).

The topicality of the law division into public law and private law

S U M M A R Y

The public and private law are two subsets of the legal system isolated pursuant to horizontal organisation, to which, according to classification (as stated by the opponents of the thesis about disjunctive division of the law on public and private law), or solely typological criteria, assignment of separate branches of the law is done. However, the controversy related to the division of the law according to horizontal organisation into both mentioned subsystems is not only a dispute over criteria but also over the importance of such a division in the process of application of the law.

The author of the article aims at demonstrating that the division of the law into public and private is topical and, above all, plays a significant role in the process of application of the law, including its interpretation.

