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Actual Problems with Distinctions between Private Relationships and Public Relationships¹

Rzeczywiste problemy z rozróżnieniem między relacjami prywatnymi a publicznymi

INTRODUCTION

The distinction between private law and public law was one of my first knowledge, which I received as a student during my studies of law at the university. This division has a strong and long legal tradition. It is known from Roman law and the criteria for the distinction are today almost identical compared to that time².

Elements of this division are also in our legal order³. Despite this fact, it is possible to find opinions which deny this kind of distinction⁴.

This kind of division of law has very close to the distinction of relationships between private and public. It is based on the criteria of division between private law and public law⁵. This kind of distinction is connected with similar problems

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² See closer P. Blaho, I. Haramia, M. Židlická, *Základy Rímskeho práva*, Bratislava 1997, pp. 25–57.

³ For instance, Article 60 of the Act No. 460/1992 Coll. Constitution of the Slovak Republic as amended (hereinafter: Constitution of the Slovak Republic) uses the term “institution of the public Law”.

⁴ See closer B. Fábry, D. Krošlák, *Verejné a súkromné právo – nové výzvy v systematike práva*, „Acta Facultatis Iuridicae“ 2007, zv. 25, pp. 47–54.

⁵ See closer J. Boguszak, J. Čapek, A. Gerloch, *Teorie práva*, Praha 2004, pp. 100–104.

in praxis. Because of that, I want to characterize the distinction between private relationships and public relationships in the first part of this paper. In the second part, I point out some problems connected with the differentiation between private and public kinds of relationships. In the end, I offer my opinion to that, if it is still important to divide the relationships between the private and public.

The main research methods that I use are analysis, synthesis, systemic method, and personal observation. If I mention the term “relationship” in this paper, I mean the legal relationship.

DISTINCTION BETWEEN PRIVATE RELATIONSHIPS AND PUBLIC RELATIONSHIPS

The theoretical works often use the terms “private relationship” and “public relationship”⁶. This paper does not have the ambition to amend it. I only want to point out the main differences between these relationships.

When we try to identify the kind of relationship, it is necessary to use the recognition criteria. I consider, the most important of them is, if the body is a holder of the public power.

We could divide the legal relationships according to many criteria⁷. One of them could be pursuant to the position of subjects.

The legal theory recognizes the main three different kinds of relationships according to the position of subjects. The subjects could be in vertical, horizontal, or diagonal position together. Because of that, we could say about horizontal relationships, vertical relationships, and diagonal relationships⁸.

If we take into account private relationships, the position of the subjects is usually horizontal. It means that the subjects are equal to their rights and duties⁹.

We could find vertical relationships too. Some subjects can be holders of a special power which allows entering into the rights and duties of other subjects. The examples can be found in the governing relations within the private companies or in the relations between parents and children without full legal capacity.

These relationships are usually realized as a part of a decision-making procedure. The subjects issuing decisions can influence other subjects. Of course, decision-making subjects need special power. This power is formed by law but it is not the public power.

⁶ See, for example, J. Lazar [et al.], *Občianske právo hmotné*, zv. 1. Bratislava 2006, p. 13; J. Švestka, L. Kopáč, M. Knappová, V. Knapp, *K aktuálnej otázke kodifikácie súkromnoprávných rodinných vzťahů*, „Právni rozhledy“ 1995, č. 9, pp. 345–392.

⁷ For instance, see closer the distinction of administrative legal relationship in: P. Škultéty [et al.], *Správne právo hmotné. Všeobecná a osobitná časť*, Šamorín 2002, pp. 76–78.

⁸ See closer M. Vrabko [et al.], *Správne právo hmotné. Všeobecná časť*, Bratislava 2018, pp. 70–71.

⁹ It is very common in contractual relations.

Public power is defined as the power which can interfere with the rights and obligations of the non-subordinated subjects. This power is set by law for particular kinds of subjects. According to this law, the particular authorities can decide about the rights and obligations of other subjects or can interfere with the rights and duties of these subjects directly.

The decision about rights and obligations is intended as a possibility of the public power authorities to create new rights and obligations or can change the established. This activity is realized as a legislative power or decision-making power within the application of law.

The interference to the rights and duties of the subjects¹⁰ can have various forms. This implies the performance of control by public power authorities, the interferences of the public corps, the performance of the decisions which are in force, etc.

The position of subjects in public relationships can be horizontal, vertical, and diagonal. It means that it is not important for determining the kind of relationship to examine the position of the subjects. For public relationships is significant that at least one of the subjects is a holder of the public power. According to the mentioned above, it is possible to state that public relationships have to contain a minimum of one of the public power authorities.

Of course, the public power authorities shall apply the public power within the public relationships. If the public power authorities do not apply the public power in the relationships, we cannot consider these relationships as public. This kind of relations would be private. This means, that it is important to assess the conduct of every subject within every relationship separately¹¹.

EXAMPLE CONNECTED WITH DIFFICULTIES TO RECOGNIZE THE RELATIONSHIPS AND CONSEQUENCES FOR PRAXIS

One of the firsts questions in my career in the university was connected with the distinction between private relationships and public relationships. That relationship concerned the setting of real damage because of illegal input of electricity of the private person. This question was related to the character of relationships and it was asked by one of the public administration authorities who have competency in the area of energy supply. Since that time I had to determine many times if the relationship is private or public.

The deeper analysis of the question mentioned above is not necessary for this article. Also, I do not want to present my answer. I only want to point out that

¹⁰ The theory uses also the term “factual acts”. See closer P. Průcha, *Správní právo: obecná část*, Brno 2007, pp. 315–316.

¹¹ Pursuant to the Section 21 of the Act No. 40/1964 Coll. Civil Code as amended the state can be the subject of private relationships too. It has the position of legal entity in these situations.

the praxis is always in touch with the problem of distinction between private and public relationships.

Why is this distinction for praxis so important? According to my opinion, there are two main reasons. The first reason is connected with the different conduct of the subjects in private relationships and public relationships. The second reason deals with the different kinds of protection of the rights of the subjects.

The conduct of the subjects within the relationships is different in private relationships and public relationships. It is because the holders of public power have a stronger position compared with the position of private subjects.

It is possible to find it in the principles which establish the conduct of the holders of the public power differently. These principles are usually set in the main documents. The Slovak legal regulation contains them in the Constitution of the Slovak Republic.

This legal act creates the rule that the holders of state power¹² can act only what is allowed by legal acts. The different rule is created for other law subjects. They can act with everything that is not forbidden¹³.

The specificity of the legal regulation of the Slovak Republic is, that the stronger rules are connected only with the holders of the state powers. This could mean that the other holders of the public powers¹⁴ could act everything, what is not forbidden.

Because of the above, it is possible to state, that the Constitution of the Slovak Republic divides between the position of holders of state power and other holders of the public power. However, that does not mean, that the other holders of the public power would have the same position as the private subjects. Moreover, it is possible to find the legal opinion, that the rule established the duty to act only to the extent allowed by legal acts should include all holders of the public power¹⁵.

It could be possible to offer a deeper analysis of the differences between the position of the private subjects and holders of the public power in the legal relationships. But this would probably not change the fact, that the legal orders have the special requirements for the behavior of the holders of the public power.

The protection of the rights and duties in private relationships and public relationships is usually connected with the different systems of protection. The main difference is not only in the other kinds of protecting subjects but also in separate manners for protection the particular rights and interests.

¹² To the differences between public power and state power, see closer J. Prusák, *Teória práva*, Bratislava 2001, pp. 65–67.

¹³ Pursuant to Article 2 (2) of the Constitution of the Slovak Republic: “State bodies may act solely on the basis of the Constitution, within its scope and to the extent and manner which shall be laid down by Law”. Pursuant to Article 2 (3) of the Constitution of the Slovak Republic: “Everyone may do what is not forbidden by a Law and no one may be forced to do what the Law does not allow”.

¹⁴ For instance, municipalities.

¹⁵ See closer J. Drgonec, *Ústava Slovenskej republiky. Komentár*, Šamorín 2007, pp. 94–105.

The protection of private relationships usually belongs to the courts which decide private cases. The legal orders usually contain the procedural laws which create the general legislation for court protection of rights and duties in private relationships¹⁶. It is also possible to create other entities which could protect private rights¹⁷.

Public relationships are usually protected in other ways. There is also a very important role of courts¹⁸ but the states usually create the complex controlling system of holders of public power.

CONCLUSION

If I summarize the mentioned above, I consider that there is always a need to distinguish between private relationships and public relationships. This distinction is more important than the division of the branches of the law between private law and public law.

I tried to demonstrate that it is still necessary to know if the subjects are members of the private relationship or the public relationship. It is mainly because of the different requirements for behavior of the subjects in these kinds of relationships and also different ways of protection of the particular rights and interests.

Despite this fact it can be stated that there is very difficult to determine the nature of some kinds of legal relationships. This is a problem for legal practice. Consequently, this problem has to be solved mainly by courts. Despite the fact, that every case connected with the problems of determining the particular kind of relationship is the problem of the quality of legal regulation, every problem with determining the kind of relationship should create a signal for the legislative power that the legal regulation is unclear in this area.

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¹⁶ For instance, in the Republic of Poland it is Act of 17 November 1964 – Code of Civil Procedure (Journal of Laws 1964, No. 43, item 296 as amended) (see closer: <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19640430296>, access: 23.08.2019); in Slovak Republic it is Act No. 160/2015 Coll. Civil Dispute Order as amended (see closer: www.slov-lex.sk/pravne-predpisy/SK/ZZ/2015/160/20181212, access: 23.08.2019).

¹⁷ For instance, pursuant to the Act No. 244/2002 Coll. on Arbitration as amended the courts of arbitration in the Slovak Republic can decide the cases which have commercial and civil nature. To the arbitration in the Slovak Republic see closer R. Palková, *Mimosúdne riešenie sporov v Slovenskej republike*, „Justičná revue“ 2008, č. 3, pp. 383–393.

¹⁸ For instance, criminal courts, administrative courts.

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- Vrabko M. [et al.], *Správne právo hmotné. Všeobecná časť*, Bratislava 2018.

LAW ACTS

- Act of 17 November 1964 – Polish Code of Civil Procedure (Journal of Laws 1964, No. 43, item 296 as amended).
- Act No. 40/1964 Coll. Civil Code as amended.
- Act No. 460/1992 Coll. Constitution of the Slovak Republic as amended.
- Act No. 244/2002 Coll. on Arbitration as amended.
- Act No. 160/2015 Coll. Civil Dispute Order as amended.

STRESZCZENIE

Rozróżnienie między relacjami prywatnymi a publicznymi wiąże się z wieloma problemami w praktyce. Charakter stosunków prawnych ma wpływ na pozycję ich uczestników oraz na możliwości ochrony ich praw. Granica pomiędzy relacjami prywatnymi a publicznymi jest wciąż słabsza. Według niektórych opinii przełamano rozróżnienie między prawem publicznym i prywatnym. W opracowaniu autor wskazał na niektóre szczególne sytuacje, w których występowały problemy z określeniem rodzaju stosunku prawnego oraz na wynikające z tego konsekwencje. Podjęto też próbę sformułowania możliwości rozwoju w przyszłości.

Słowa kluczowe: relacje prywatne; relacje publiczne; zachowanie uczestników; rodzaje ochrony w relacjach

SUMMARY

The distinction between private relationships and public relationships is connected with a lot of problems in praxis. The nature of the legal relations has an impact on the position of participants in these legal relations and the possibilities to protect their rights. The current line between private relationships and public relationships is still weaker. There are also the possibilities to find the opinions that the distinction between public law and private law is overcome. In the study, the author pointed to some particular situations where there were problems with the determination of the kind of legal relationship and consequences which are connected with this. Finally, he tried to formulate the development possibilities in the future.

Keywords: private relationships; public relationships; conduct of the subjects; kinds of protection in the relationships