

STUDIES AND COMMENTS

Semantic aspects of research on the application of private law in the public sector within the legal culture of Continental Europe (with particular emphasis on Polish experience)¹

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Abstract

As you know, the language level is one of the main research areas of jurisprudence. The author puts forward the thesis that the adopted language apparatus has a significant influence on the research results in legal sciences. This is particularly evident in the analysis of the application of private law to the public sector. The article indicates the semantic problems faced by the author analyzing the application of private law in the public sector. The source of these problems is the adjective "public" that appears in many terms. In addition, there are problems of comparative nature. There is a phenomenon of non-translation of terms from individual languages. Other problems consist in the fact that the use of certain concepts is associated with the adoption of certain initial assumptions. Not always, the authors who write about the application of private law in the public sector are aware of this. An example of such a situation is the concept of "Fiskus".

Keywords: *semantic areas of jurisprudence, the application of private law in the public sector, public law contract, division into public law and private law.*

JEL Classification: K15, K23, K33

1. Introduction

The catalog of forms of action used by the administration is wide. They also include forms commonly associated with civil law.³ An important role in the mechanism of regulation of public relations under assignation is played by the institutional sources (forms) of contract law, i.e. laws and other regulations⁴. As a

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³ The Polish approach regarding the catalog of forms of administration is generally very similar to the German one; Polish law science has always been influenced by the science of law of the German-speaking countries (including Austria); similarly to the German science, the Polish science of administrative law is characterized by careful and precise enumeration of the forms included in this catalog; this is what makes the Polish and German approach different from those of some other European countries, which are characterized by a greater emphasis on pragmatism and less on the creation of an exhaustive list of forms.

⁴ See I. Kalaur, N. Fedorchenko, *Normative and individual regulator in the mechanism of regulation of legal relations under transfer of property in use*, „Transformations in Business & Economics”,

consequence, the subject of the research conducted by theoreticians of law is also the application of private law in the public sector. Therefore, there are a number of methodological problems of semantic nature. Although several areas can be distinguished in the methodology of law theory⁵, yet the linguistic or logical-linguistic plane still plays a leading role. Law itself is considered as a language system.⁶

As argued by the outstanding Polish methodologist K. Ajdukiewicz, in empirical sciences, which in most classifications comprise legal sciences,⁷ cognition is a "derivative of accepted linguistic cognitive tools", which in consequence leads to the conclusion that cognition in its essence is of conventional character.⁸ According to K. Ajdukiewicz, "all the judgments that we accept and which form our entire picture of the world are not yet clearly determined by the data of the experience, but depend on the choice of conceptual apparatus with the help of which we copy the data of the experience."⁹ Consequently, if we change the conceptual apparatus, "we can refrain from recognizing these judgments despite the presence of the same experience data."¹⁰ The views of K. Ajdukiewicz have for many years influenced the work of Polish legal scientists. In particular, there is a consensus around another well-known statement of K. Ajdukiewicz claiming that one of the tendencies in the development of science is the constant striving to

Vol. 17, No 1 (43), 2018, p. 41. The law on any public relations cannot be implemented without the mechanism of their regulation. The mechanism of legal regulation has fundamental significance for the civil regulation of contractual relations because it provides a systematic approach to the analysis of legal regimentation. This category allows identifying all legal means, other objects (phenomena) involved in the legal regulation of contractual relations, and to consider them in conjunction with each other as the only legal mechanism (I. Kalaur, N. Fedorchenko, *op. cit.*, p. 40).

⁵ See K. Opałek, J. Wróblewski, *Law: Methodology - Philosophy - Prawo. Metodologia, filozofia, teoria prawa*, Warsaw 1991, p. 55 and n., pp. 97 and n., pp. 149 and n. J. Łakomy, *Pojęcie integracji zewnętrznej nauk prawnych*, Wrocławskie Studia Erazmiańskie. Zeszyty Studenckie. Studia Erasmiana Wratislaviensia, Wrocław 2009, p. 52 and n.

⁶ See M. Dąbrowska-Kardas, *Analiza dyrektywalna przepisów części ogólnej Kodeksu karnego*, Warsaw 2012, p.15.

⁷ On the subject of legal disciplines as empirical sciences, see J. Woleński, *Empiricism, Theory and Speculation in the General Study of Law*, [in] *Archivum Iuridicum Cracoviense*, 1970, vol. III, p. 41; W. Patryas, *Próba wyjaśnienia domniemań prawnych*, Poznań 2011, p. 7 and n.; As M. Dąbrowska-Kardas points out, "in the legal considerations, the basic methodological tool still consists in logical-linguistic methods. Most probably, this is due to the fact that the logical-linguistic platform brings together research on the law as a language system as well as linguistic aspects of legal practice. Thus, it covers such issues as the meaning of linguistic expressions, the methodological characteristics of jurisprudence, the justification of decisions in law enforcement processes, the general features of legal systems, and the structure of a legal norm." See M. Dąbrowska-Kardas, *Analiza dyrektywalna ...*, p.15.

⁸ K. Ajdukiewicz, *Obraz świata i aparatura pojęciowa*, [in] *Język i poznanie*, Warsaw, vol. I, 1985, p. 175; see also I. Zachariasz, *Prawo w ujęciu strukturalnym, Studium o dychotomicznym podziale prawa na prawo publiczne i prawo prywatne*, Warsaw 2016, p. 29.

⁹ See K. Ajdukiewicz, *Obraz...*, p. 175.

¹⁰ See K. Ajdukiewicz, *Obraz...*, p. 181. K. Ajdukiewicz's cognitive conventionalism corresponds to the concept of cognition, created by the German philosopher H. Vaihinger. This philosopher wrote about the conventional shaping of the world image (*Das menschliche Vorstellungsgebilde der Welt*). See H. Vaihinger, *Die Philosophie des "als ob"*, Berlin, 1911, p. 14.

improve the conceptual apparatus. This tendency is manifested in the transition from languages in which some problems are essentially undecidable, to languages in which such problems are becoming increasingly rare. An example of this tendency is the introduction of semantic conventions, including definitions.

Consequently, it is a truism to say that all scientific research must be accompanied by the reflection of the researcher over the language he uses. Otherwise, his research lacks methodological order. In his analyses the researcher should, among other things, take into account the fact that the participants of certain phenomena under investigation, as well as people who scientifically describe a certain image of reality, do not always apply exactly the same semantic rules, despite the use of equally sounding concepts. Without realizing this truth, one may draw wrong conclusions from the conducted research and the observation one makes may be distorted.

Thus my thesis is that the role of the language is particularly evident in the research into the application of private law in the public sector.

2. Classification of languages within the field in question

In the legal theory of the countries of Continental Europe, we distinguish the language of legal acts (normative acts - *le langage légal*) and the language of legal discourse (*le langage juridique*),¹¹ i.e. the language by means of which the law is spoken about (*avec lesquels on parle du droit*).¹² Thus, the language of legal discourse is a second degree language, which is a kind of metalanguage in relation to the language of normative acts. The language of legal discourse is not a homogeneous language and several levels can be distinguished in it. The first of them is the language used by courts and public authorities (mainly administrative bodies) applying the law (*le langage dans lequel on formule les décisions relevant de l'application du droit*). The second level is the scientific legal language (theoretical legal language, the language of legal philosophy) and possibly the language of the legal doctrine.¹³ The third level is the common legal language (*le langage juridique commun*), which is the language of the remaining kinds of discourse devoted to law. This third language is used by specialists, such as lawyers in conversations they have with one another about law, as well as non-specialists who make statements and opinions about law.

¹¹ B. Wróblewski, a Polish law theoretician, conducted the most developed classification. See B. Wróblewski, *Język prawny i prawniczy*, Kraków 1948. On this subject, W. Voisé, *Review of Bronisław Wróblewski's book "Język prawny i prawniczy"*, [in] *Ruch Filozoficzny* 1948, volume XVI, No. 3-4, p. 1 and n. This distinction is less important in the common law system. T. Gizbert-Studnicki, *Język prawny a język prawniczy*, [in] *Zeszyty Naukowe UJ, Prace Prawnicze* 55, 1972. J. Wróblewski, *Les langages juridiques: une typologie*, [in] *Droit et société*, 1988, No. 8, pp.13-27.

¹² J. Wróblewski, *Les langages...*, pp. 13-27.

¹³ On the subject of dogmatics as the exegesis of the text of a legal act, which cannot be equated with the theory of law, nor can it be given the attribute of science, see E. Bernatzik, *Rechtsprechung und materielle Rechtskraft, Verwaltungsrechtliche Studien*, Wien 1986, p. IV.

There are specific relationships between these levels of language of legal discourse and the phenomenon of interpenetration can be observed. First of all, as noted by Waldemar Voisé, a judge may use theoretical legal language in the justification of his decision.¹⁴ In addition, the phenomenon of interpenetration also concerns the language of legal discourse and the language of normative acts. It is true that in Continental Europe, the creation and application of law are usually separated. Nevertheless, in the field of private law application in the public sector, which is of interest to us, the role of the judiciary is not limited to being "the lips of the act". One can speak of a specific judge's law ("*droit prétorien*"), as evidenced by the evolution of the compensation liability of public authorities in France and other European countries,¹⁵ as well as the development of the concept of a public law contract.

3. Problems of comparative nature

For natural reasons, the comparative method, which is so useful in legal science, deepens the semantic complexity of research into the application of private law in the public sector. It should be pointed out that conducting comparative law research on the application of private law in the public sector requires a certain methodological caution.¹⁶ The solutions adopted in the national legal systems are determined by long-standing tradition, including the political doctrines on the role of the state and its relations with citizens and other entities prevailing in a given country. In the circle of administrative-law scientists, it is rightly pointed out that all the conclusions based on comparative considerations and especially using some models of the laws of other states must be carried out with far-reaching restraint. Certainly, it would not be appropriate to transplant legal solutions and institutions developed in other countries without deep reflection. There are far-reaching differences between individual European countries when it comes to the scope of matters covered by the regulation regarding the so-called the public sector. The differences can be seen, among others, in relation to such fundamental issues as the system of sources of law and the scope (object) of public law; sometimes one can observe the phenomenon of the untranslatable language of legal acts or of the language of legal discourse of individual countries into the legal language of another country. The semantic rules of various European languages differ. This applies, for example, to issues such as public law contracts whose

¹⁴ See W. Voisé, *Review of Bronisław Wróblewski's ...*, p. 1 and n.

¹⁵ See U. Stelkens, *Le développement de la responsabilité administrative en droit allemand*, [in] *Droit comparé de la responsabilité administrative*. Table ronde organisée par La Chaire "Mutations de l'Action Publique du Droit Public", Science Po., 13 novembre 2009, p. 9.

¹⁶ See J. Bell, *Governmental Liability: Some Comparative Reflections*, [in] *InDret*, Revista para el análisis del derecho, 2006, (322), p. 3 and n. See on this subject K. Ziemiński, *Indywidualny akt administracyjny jako forma prawna działania administracji*, Poznań 2005, p. 143; see on this subject R. Szczepaniak, *The nature of the division into public and private law, with specific emphasis on the Polish experience*, [in] *Comparative Law Review* 2015, No. 20, p. 50.

understanding in different legal systems may be extremely different.¹⁷ In various countries, various models of public administration are adopted, and the differences include the degree of its decentralization. In individual countries, the tasks of the territorial self-government as well as forms of activity of the administration are also classified in different ways. For example, the category of tasks of the territorial self-government commissioned by the State is not encountered in every country, and it is not always understood in the same way.¹⁸

In Polish conditions, the division into public and private law, albeit universally respected, is not as clear and as strongly emphasized as in Germany, or, especially, in France.¹⁹ This is partly due to the fact that for decades Poland was under the communist yoke. In the communist theory of law, the division into public and private law was principally rejected. As a consequence, this division had a much lower impact in Poland than in France or Germany on shaping such legal arrangements and instruments as: contract, liability for damages or property. In particular, among the legal arrangements and instruments that did not develop in Poland, to a degree comparable to French or German solutions is the concept of a public law contract, public property or the public law regime of compensatory liability of public authorities (the latter being characteristic especially of French law). Even if the sense of separating public law contracts or public property as an instrument of administrative law is discussed in the Polish science of law, these concepts are still immature, not to say *in statu nascendi*.²⁰ A decisive position

¹⁷ This problem was encountered by the authors of the monumental work: *Droit comparé des Contrats Publics*, ed.R. Noguellou and U. Stelkens, Bruxelles 2010. According to the authors, the shortcomings of comparative research mean that the term "public contract" is not uniformly understood in individual European countries. Not everywhere the term "public contrat" means the same. The authors argue that one of the reasons for this is the fact that the division into public and private law is not equally developed in all European countries, and, moreover, it is not uniformly carried out in different legal systems. As a consequence, the term contract is associated primarily with private law. In order to be able to compare the so-called "public contracts" in individual countries, the authors had to adopt some initial semantic assumptions. A very broad understanding of the term "public contract" was adopted. The authors understand thereunder all contracts that can be concluded by all administration entities, without prejudging whether it is a public or private law contract. Otherwise, it would be necessary to exclude from research many contracts which in many countries are described as private. The authors admit that it would be better to use the concept of "contrats de l'administration". However, the concept of "public contract" seems to be firmly rooted in the language of legal acts and legal discourse in many European countries. See p. 5-6.

¹⁸ See B. Dolnicki, *Nadzór nad samorządem terytorialnym*, Katowice 1993, p. 126, R. Szczepaniak, *Odpowiedzialność odszkodowawcza jednostek samorządu terytorialnego*, Warsaw 2001, p. 184.

¹⁹ See W. Taras, A. Wróbel, *W sprawie jednolitej koncepcji umów publicznych*, [in] *Prawo administracyjne w okresie transformacji ustrojowej*, Kraków 1999, p. 115.

²⁰ On the development of the institution of special administrative property in France and Germany, see P. Radziński, *Pojęcia „dobra publiczne” i „rzeczy publiczne” we francuskiej i niemieckiej nauce prawa administracyjnego*, [in] *Samorząd Terytorialny* 1997, No. 4, pp. 4 and n.; P. Radziński, *Pojęcie öffentliche Sachen we współczesnej niemieckiej nauce prawa administracyjnego*, [in] *Samorząd Terytorialny* 1998, No. 7-8, p. 120 and n.

prevailed decades ago in Poland, according to which the issue of the State's liability for damages is of a civil law nature.²¹

It is noted that sometimes even such a court as the European Court of Human Rights in Strasbourg has difficulty in understanding the specificity and complexity of national legal systems. As a result, the sentences it issues may be controversial.²²

I am therefore aware that the statements contained in this text may be unacceptable to legal practitioners whose roots are in a different tradition and legal culture, even though, generally speaking, at a higher level of abstraction, our legal systems belong to a common European tradition and culture, including the tradition of Roman law (the Romano-Germanic legal traditions).²³ Thus, if I am at least understood, I shall consider it a success.

4. Lack of conceptual precision in research on the application of private (civil) law in the public sector

4.1. Problem with concepts in which the adjective "public" appears

The problem of the lack of conceptual precision is encountered by every lawyer analyzing the issue of the application of private (civil) law in the public sector. A lawyer dealing with the subject matter in question is facing a methodological challenge at the very beginning of his work. The challenge consists in the need to clarify the key concepts for this subject, the understanding of which is still not yet fully unified. Unfortunately, the efforts to achieve it often turn out to be a Sisyphean task. To a large extent this problem stems from reasons of objective nature. The terms in question essentially include all the concepts in which the adjective 'public' is used, namely: 'public sector', 'public administration', 'public entity', 'public law agreement', 'public property' and then the notion of 'public authority' ("*Öffentliche Gewalt, pouvoir public*) and "exercising public authority". It can be said that the adjective "public" infected the whole area under investigation, i.e. both the language of legal acts and the language of legal discourse. This adjective covers most of the key concepts and arrangements being analyzed: 'public property', 'public contract', 'public tort liability', 'legal persons

²¹ See R. Szczepaniak, *Komentarz do art. 1 k.c. [in] Kodeks cywilny. Komentarz*, ed. M. Gutowskiego, Warsaw 2016, Volume I, p. 12-13.

²² See J. Bell, *Governmental Liability...*, p. 12. J. Bell points out the judgment of the European Court of Human Rights in the case of *Osman v. United Kingdom* of 28 October 1998 No. 23452/94, 1998-VIII, as an example of misunderstanding of the British legal system.

²³ See e.g. F. G. Jacobs, *Some Remarks on Community and Member State Liability*, in: *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune*, ed. J. Wouters, J. Stuyck, Cambridge 2001, pp. 129-130, where the author presents very skeptical views on the common European principles of responsibility of public authorities. In his opinion, they are on such a high level of abstraction and generality that, in fact, they do not exclude numerous differing solutions.

governed by public law' (*une personne morale de droit public, Körperschaft des öffentlichen Rechts, Juristische Personen des öffentlichen Rechts*).

“Meanwhile, the features 'public' and 'private' are attributed to specific phenomena, but not discovered in them; there does not exist a criterion independent of a given subject, that is empirically verifiable, a criterion for distinguishing what is public and what is private.”²⁴ “As a consequence, attributing the ‘public’ value to a given instrument or the legal relationship is not a matter of cognition, but a matter of approval, recognition of certain values, a specific political or socio-political ideology.”²⁵

These semantic problems concerning the term "public" are also unavoidable in the analysis of EU law. They are additionally increased by a different perspective on the division of the public sphere and the private sphere in individual EU member states.²⁶

Thus, the mere inclusion of legal disciplines in the group of empirical sciences remains, in a certain sense, in methodological contradiction with the use of the adjective "public" in the legal discourse, unless the author explains precisely what he understands under the term "public". However, the reader of legal texts sometimes cannot find such explanations in them. Even if attempts are made to define them, there is often an error of *ignotum per ignotum* in these definitions.²⁷

Hence there is "a far-reaching discrepancy in the positions of various authors who are unaware of the evaluating (ideological) character of their statements", “[...] when they treat a given instrument or a legal relationship as ‘public’ or ‘private’.”²⁸ That is why “[...] understanding the term "public" occasionally appearing in a legal text (e.g. 'public interest', 'public good') is also completely dependent on what a given person views as public in a given context.”²⁹

These concepts, even though they are commonly used in legal language and some of them also in the regulations do not usually have legal definitions, either in national or EU law³⁰. Consequently, any attempt to define them, even for a specific text, must be based on a series of initial assumptions, while the definitions created in this way are at least partly projecting definitions.

²⁴ See J. Nowacki, *Prawo publiczne – prawo prywatne*, Katowice 1992, p. 107.

²⁵ See J. Nowacki, *Prawo publiczne...*, s. 132.

²⁶ See C. Semmelmann, *The Public-Private Divide in the European Union Law or an overkill of functionalism*, [in] Maastricht European Private Law Institute, Working Paper No. 2012/12, p. 5.

²⁷ For example, T. R. Aleksandrowicz, sees this error in the definition of the term "public information" contained in Article 1 Section 1 of the Polish Act on Access to Public Information. In the light of this provision, "public information is the information about public affairs". However, the legislator does not explain what the term "public affairs" means. See T. R. Aleksandrowicz, *Komentarz do ustawy o dostępie do informacji publicznej*, Warsaw 2008, pp. 93-94.

²⁸ See J. Nowacki, *Prawo publiczne...*, p. 132.

²⁹ See J. Nowacki, *Prawo publiczne...*, p. 132.

³⁰ As noted by C. Semmelmann, “The EU Treaties do not contain an express distinction between public and private law or legal relations. However, we find the terms “public” and “private” used throughout the Treaties in a random fashion and without any terminological or conceptual specification.” See C. Semmelmann, *The public ...*, p. 12.

4.2. The problem of internal stratification of the compensation liability of public authorities

These numerous terminological ambiguities, among others, make it difficult to resolve a number of dilemmas related to the application of private (civil) law in the public sector, in such areas as the freedom of contract in the public sector, or the internal stratification of the liability regime of public authorities.³¹ The latter issue is connected with the division that still exists in European regimes of the compensation liability of public authorities into the realm of the governmental acts (*actes d'autorité, acts of authority*) and corporate acts (*actes de gestion; acts of management*) as far as the activity of the state and other entities that are its derivatives, including local government units is concerned. The former (*actes d'autorité, acts of authority*) are public acts, the latter (*actes de gestion, corporate acts*) are private acts. Wherever this distinction is used, it evokes endless doubts. An objective criterion for separating the two spheres has not yet been developed.³²

There are many concepts around the problem of tort liability of public authorities, but in a way of a synthesis, it can be stated that since the end of the 19th century, two alternative solutions have been competing with each other. One based on the French idea of *public service* (the so-called *l'école du service public* or *l'école de Bordeaux*)³³ disputes the division of the activities of the state and other public entities into acts of power (sovereign acts, *actes d'autorité*) and the so-called economic acts (acts of management, *gestia, actes de gestion*). According to

³¹ See R. Szczepaniak, *Swoboda umów w sektorze publicznym*, [in] *Prawo kontraktów*, ed. Z. Kuniewicz and D. Sokołowska, Warsaw 2017 pp. 426 and n., R. Szczepaniak, *Facteurs de développement de la responsabilité délictuelle des pouvoirs publics en Pologne*, [in] *Revue de droit international et de droit comparé*, 2015, no. 3, p. 337 and n.

³² One irritated judge of one of the state supreme courts in the USA, in his statement somewhat maliciously compared the lack of clear rules in the qualification of given commune acts as imperious or non-imperious to the conjugation of irregular French verbs. See *Weeks v. City of Newark* (1960) 62 NJ Super. 166, 162 A. 2 d 314, see W.L. Prosser, J.W. Wade, *Cases and Materials on Torts*, Minnesota 1971, p. 1124. The German doctrine analyzes whether a given factual activity was public or not due to a different regime of responsibility for actions in the performance of public tasks. Under Paragraph 89 of the BGB, a public legal entity is liable only if it acts as a private-law body. Otherwise, the grounds for liability should be sought in Article 34 GG (and § 839 BGB). U. Stelkens writes about the chaos in this respect in German law due to the lack of clear criteria for separating cases in which the administration is liable according to the general principles of tort liability, i.e. based on § 31, § 89, § 823 and n. BGB from cases where the administration is responsible under § 839 BGB in conj. from art. 34 GG (so-called Amtshaftung). See U. Stelkens, *Le développement de la responsabilité ...*, p. 15; U. Stelkens describes the historical dilemmas of German case law and doctrine related to the use of the term "public force" (Öffentliche Gewalt). See also U. Stelkens, *The public-private law divide. Annual Report 2010*, [in] *Ius Publicum Network Review*, November 2011, p. 9-10. Dilemmas of a similar nature have occurred since the amendment of the Polish Civil Code of 2004. In Article 417 of the Civil Code, the legislator introduced the term "damage caused by illegal actions of public authorities".

³³ See W. Zylber, *Odpowiedzialność cywilna za szkody wyrządzone przez działalność władz publicznych w prawie francuskim*, Warsaw 1934, p. 12.

the supporters of such a solution, the State is a unified creation, and its activity regardless of one or another character is always aimed at the public good, and this is the main difference between the activity of the State and the activity of physical entities and private legal persons.³⁴ Consequently, the special regime of liability of public authorities should be applied in the entire scope of its activity in the name of the idea of equality against public burdens. As L. Duguit, the most eminent representative of the Bordeaux school, wrote: "The activities of the State are in the interest of the whole community; therefore, the burdens associated with this activity cannot be borne by individual units to varying degrees. [...] The State in a sense acts as the insurer of the so-called social risk associated with its functioning. [...] The responsibility of the State is always based on this idea, even when no guilt of a particular official is found."³⁵

The supporters of the opposite view (Toulouse School) cultivated the old traditional division into the spheres of *governmental acts* and *corporate acts* (*gestia*). In their opinion, the State, only acting in the sphere of the *governmental acts*, has a special character, because it then acts as a stronger entity. In the remaining scope it acts just like any other entity. Therefore, a separate regime of responsibility of public authorities is only justified in the sphere of the *governmental acts*.

These two concepts shaped in the 19th century in France, i.e. the Bordeaux school and the Toulouse school, are still a source of inspiration today. Their echoes can be heard in the justification of the judgment of the Polish Constitutional Tribunal of December 4, 2001 which has so far been crucial for the development of the Polish regime of tort liability of public authorities.³⁶

In its justification the Tribunal outlined this alternative, but definitely did not support either of the two solutions. In particular, it was not able to decide whether the old concept of the dual nature of the actions of the state and other public entities should be cultivated in relation to the regime of tort liability of public authorities, i.e. the division into *governmental acts* (*actes d'autorité*) and *corporate acts* (*gestia actes de gestion*). The justification of this judgment included the following significant passage: "There can be no doubt that all cases in which the actions of state organs related to the *governmental acts* (and even more broadly – connected with exercising a public service, which corresponds quite well with the concept formed in the French doctrine against the background of the Council of State's judicial decisions, the so-called *actes de services*), leading to damage caused by officers, are comprised in such a compensation liability field jointly defined by Article 77 Section 1 of the Constitution and Article 417 of the Civil Code."

³⁴ See W. Zylber, *Odpowiedzialność cywilna za szkody wyrządzone przez działalność władz publicznych w prawie francuskim*, p. 12.

³⁵ See L. Duguit, *Traité de droit constitutionnel*, vol. III, La théorie générale de l'état, Paris 1923, p. 433-435.

³⁶ SK 18/2000, OTK ZU 2001/8 item 256.

It seems that the Constitutional Tribunal tended to adopt a solution that would be in agreement with the assumptions of the Toulouse school representatives, but it did not ultimately solve the issue, as evidenced by the above quotation. In Polish jurisprudence, the issue of this internal stratification is still not fully resolved - probably also because of the not fully unambiguous position of the Constitutional Tribunal. The analysis of Polish jurisprudence still allows us to perceive a certain tension between the concept proclaiming the homogeneity of actions of the State and other public entities for the non-contractual damages and the concept that cultivates the assumption of dichotomous division of public entities' activity in this respect. To some extent, this tension is also noticed in the legal systems of other countries. It is noted that cultivating this division is very often the result of a certain convention and leads to solutions that are often quite accidental.

Not only Poland, but also other European national legal systems have failed to finally deal with this stratification of the tort liability of the State and other public entities.³⁷ The recommendation of the Committee of Ministers of the Council of Europe No. R (84) 15 on the liability of public authorities of 1984 may also serve as a manifestation of this hesitation. Both from its preamble and the content of principle 2 it is clear that the main idea of this responsibility is to be equality against public burdens. The point is that "since the public authorities serve the Community, the damage should reward the Community in the event that it would be unreasonable to charge the victims for compensation." In principle, the content of the Recommendation does not refer explicitly to the concept of division of the state's activities into governmental acts and corporate acts.³⁸ Meanwhile, in the official Commentary to this Recommendation, there were clear suggestions that this legal act applies only to the actions of public authorities understood in such a way that it is "the use of powers or prerogatives stronger than the rights of ordinary people."³⁹ The commentary refers to the notion of domination in the traditional

³⁷ Examples are provided by the German experience regarding tort liability of local government units for damage caused by improper performance of tasks in the field of broadly understood municipal economy. These include, for example, cases regarding maintaining the road surface in proper condition. The individual Länder are competent in their own legislation to regulate the forms and nature of activities undertaken by local government units in carrying out tasks in the field of municipal management. Consequently, it depends either on this regulation or on the case-law in a given Land whether such damages are classified as Amtshaftung or whether they will be subject to the tort liability regime of private entities. In one Land, a given activity can be considered an example of public law action, and in another of private law action. As noted in the doctrine, the problem of the delimitation of public-law and private-law activities is characterized by casuistic solutions. See K. O. Bergmann, H. Schumacher, *Die Kommunalhaftung. Ein Handbuch des Staatshaftungsrechts*, Köln, Berlin, München 2007, p. 245-246.

³⁸ A different view is expressed by E. Bagińska, in whose opinion "Under 'action of public authority' one understands any act or omission that may have a direct effect in the sphere of rights, freedoms or interests of other persons". Hence the suggestion that the Recommendation introduces a distinction between governmental acts and corporate acts. See E. Bagińska, *Odpowiedzialność odszkodowawcza za wykonywanie władzy publicznej*, Warsaw 2006, p. 238.

³⁹ See *Standardy Prawne Rady Europy. Teksty i komentarze*, tom II, *Prawo cywilne*, ed. M. Safjan, Warsaw 1995, p. 269.

sense of the word. There is therefore a gap between the content of the Recommendation and the content of the official commentary on it. It should be noted on this occasion that the Court of Justice of the European Union, in its judgements devoted to the liability of Member States for damages caused by the violation of the EU law, does not cultivate the division into the government and corporate acts.⁴⁰ However, such an attitude of the CJEU does not really resolve much in this respect. Because of the specific minimalism and generality of the so-called common European rules on the liability of public authorities, it is the national legislators who decide whether their regimes of responsibility of public authorities refer to this division. The position of the CJEU only means that a Member State is in principle liable for damage caused as a result of a breach of the EU law, regardless of whether it applied the so-called public-law or private-law forms of action.

4.3. The attribute "public law"

Conceptual confusion is even more intense when the attribute "public law" is used to define certain notions instead of the word "public". In this case, we are opening the box of Pandora; we are beginning to get involved in the meanders of an unspecified division into public and private law.

5. An attempt to systematize concepts

5.1. Initial assumptions

Although the efforts to systematize the conceptual apparatus in the field under discussion have repeatedly turn out to be a Sisyphean task, as the author dealing with the application of civil (private) law in the public sector, I undertook this task by adopting some preliminary assumptions that I would like to present here.

5.2. "Public sector", "public entity", "public administration"

The first notion refers to the concept of "public sector". It is widely used in legal languages of European countries as well as EU law.⁴¹

⁴⁰ See the ruling of the CJEU of 25 November 2010 in the case of *Günter Fuss*, C-429/09; see also A. Gawrysiak-Zabłocka, *Odpowiedzialność odszkodowawcza państwa członkowskiego jako konsekwencja naruszenia prawa unijnego w świetle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej*, [in] *Odpowiedzialność majątkowa władzy publicznej*, ed. E. Gierach, M. Jabłońskiego and K. Koźmińskiego, Warsaw 2016, p. 75.

⁴¹ E.g. the Spanish Act of 2008 called *Ley de contratos del sector público*; the Polish Act on the re-use of public sector information from 2016; The Directive on the re-use of public sector information of the Parliament European and of the Council of 17 November 2003 (2003/98/EC), revised by the Directive of 26 June 2013 (2013/37EU); the term "public sector" is known in European law; it appears in it mainly in the context of public procurement (Art.12 of the Directive

In my understanding, this is a very broad concept. It covers in principle the entire sphere of activity of the state and other public entities.⁴² I put forward the thesis that only such a broad approach allows to eliminate a number of semantic problems. The term "public sector" therefore refers both to relations among public entities themselves and among public and private entities. Under the term "public entity", in turn, I mean the State, as well as organizational units related to the State, such as at least some of the state legal persons and local government units.⁴³ Often a public entity, at least in certain contexts, will also be an organizational unit indirectly derivative to the state such as a municipal company, which is directly derived from a local government unit, performing most of the tasks assigned to the local government by law. Frequently, in the judgements of the EU Court of Justice, a municipal company is identified with a municipality.⁴⁴

2014/24 / EU of the European Parliament and of the Council of Europe, including the preamble to this directive, Section 31). However, we will not find a legal definition of this concept there either. In the Polish Act of 25 February 2016 on the re-use of public sector information (journal of Laws of 2016 Item 352, as amended) this sector was defined indirectly in Article 3 as including:

1) entities of the public finance sector within the meaning of the Public Finance Act;
2) organizational units of the state without legal personality other than those referred to in Section 1;
3) legal persons other than those specified in Section 1, established for the specific purpose of satisfying general needs, not having an industrial or commercial character, if the entities referred to in that provision and Sections 1 and 2, individually or jointly, directly or indirectly by another entity:

(a) finance them in more than 50% or
(b) own more than half of the shares or stock, or
(c) oversee the management body, or
(d) have the power to appoint more than half the members of the supervisory or management body;
and

4) associations of entities referred to in Sections 1-3.

⁴² Such a position is confirmed, among others, in the arguments of the Polish Constitutional Tribunal contained in the statement of reasons for the judgment of 7 May 2001 4.K 19/00: "The status of territorial self-government is not determined by the provisions concerning the rights and freedoms of man and citizen, but by the provisions of Chapter VI of the Constitution. Since the territorial self-government participates in the exercise of public authority and performs public tasks (Article 16 (2) and Article 163 of the Constitution), the economic activity of its organizational units falls within the public sector, and its constitutional reference is in particular the provisions of Article 165 Section 1 second sentence, Article 165 Section 2 and Article 167 Section 2 ". This argument concerned, among others, the operation of municipal companies. For a different understanding of the adjective "public" see also F. Grzegorzcyk, *Przedsiębiorstwo publiczne (public undertaking) kontrolowane przez państwo*, Warsaw 2012. The author notes that sometimes "public enterprises" also mean those whose being public is determined only by the qualification as controlled (usually) by the capital by the state. They operate in a competitive market and do not fulfill public tasks. See F. Grzegorzcyk, *Przedsiębiorstwo publiczne...* p. 428. As a rule, such organizational units are not included by myself among public entities.

⁴³ On the subject of local government units as a kind of state emanation at the local level, see M. Szewczyk, *Podmiotowość prawna gminy*, [in] *Ruch Prawniczy Ekonomiczny i Socjologiczny*, 1993, No. 3, p. 36-37.

⁴⁴ See the CJEU ruling in the Teckal case of 18 November 1999.C-107/98 *Teckal Srl v. Comune di Viano and Azienda Gas-Acqua Consorziale di Regio Emilia*.

The adoption of such a broad understanding of the "public sector" may encounter resistance. In particular, there may be claims that the issue of contracts deserves to be treated as a separate research subject only in some parts of such a widely understood public sector. According to some lawyers, there are such spheres of activity of public entities in which they are no different from private entities, and legal relations in which they participate with private units do not diverge from the features of classical civil law transactions. At this point, anticipating further arguments, I will explain that in principle I do not share such a view. In this view one can hear the echoes of the long outdated Fiskus theory (Fiskustheorie).

In the literature and jurisprudence, different criteria are adopted for the separation of the public sector. This separation is attempted to be carried out taking into account the way activities are financed, or tasks are performed, e.g. the application of authority (functional approach), the type of tasks performed (so-called public tasks). There is also a subjective approach, that is referring to the legal status of entities. An example of this subjective approach is the so-called institutional criterion. The institutional approach is based on legal provisions in which certain entities have been qualified as belonging to the public sector. They include the entities that have either been explicitly named public entities in legal acts or those for whom the legal regulations that considered part of public law were the basis for their creation.

The understanding of the term "public sector" adopted in the text may be called a broadly understood subjective approach⁴⁵. This approach is the result of the assumption that every activity of the state or other public entities is characterized by a certain specificity regardless of the legal forms of their activity. I assume that public entities must always observe standards set forth in the Constitution and ordinary legislation, sometimes referred to as standards of a democratic state ruled by law. Even the use by these entities of legal institutions or arrangements of civil law such as the contract does not exempt them from this obligation. If we adopted the reverse assumption, it could lead to various abuses. Sometimes, especially in German literature, they are called "the escape of the administration from constitutional standards and the choice of civil law forms of action"⁴⁶. This kind of assumption has a deep theoretical foundation. It is based on the achievements of several generations of administrative-law specialists and constitutionalists⁴⁷. In

⁴⁵ On the subject of the so-called subjective, objective and mixed concept of "public administration" see L. Kaczmarek, *Ewolucja pojęcia administracji publicznej w polskiej doktrynie prawa administracyjnego po II wojnie światowej*, [in] *Studia Lubuskie*, Tom V, Sulechów, 2009, p. 222-223.

⁴⁶ ("Flucht vor dem Staatsrecht", "Flucht ins Privatrecht"). On this topic. See B. Binder, L. Fröhler, *Die Haftung der Gemeinden für ausgegliederte Unternehmungen*, Linz 1982, p. 13; U. Stelkens, *The public-private law divide...*, p. 6.

⁴⁷ Here one can point to the so-called School of Bordeaux, questioning the legitimacy of division into imperious and non-imperious acts in the administration. See W. Zylber, *Odpowiedzialność cywilna za szkody wyrządzone przez działalność władz publicznych w prawie francuskim*, p. 12. As J. Łętowski wrote: "An inherent principle is that the non-imperious administration is also part of the

some European legislations, it also finds expression in the regulations of law⁴⁸. Such a broad subjective approach is also confirmed by court rulings. The Polish Supreme Court in its justification of the resolution of 4 February 1993 accurately stated: "a municipality as a local self-government community of its residents, created by law, has no 'private' interests, even if it operates in the forms provided for civil law entities."⁴⁹ The Polish Constitutional Tribunal stated, in turn, that all tasks of local self-government are of public nature, because they all serve to fulfill collective needs⁵⁰. This claim can be extended to the state and other public entities⁵¹.

Thus, the determinant of the public character of a sector or administration is not so much the nature of the tasks or the form of their execution, but the fact that these are the tasks of the state and other organizational units related to the state, including in the first place local government units.

Some lawyers prefer to use the term "administration" or "public administration"⁵². It should be noted, however, that so far attempts to define the term "public administration" have also been unsuccessful, for the same reason as in the case of the "public sector"⁵³. The source of the problem is the adjective "public". In addition, the meaning of this concept has significantly and dynamically expanded over the last century⁵⁴. Consequently, it is difficult to defend the view

state administration and fulfills the tasks established by law; the principle of the rule of law - regardless of the possible diversification of the imperative of legal determination - also applies to it." J. Łętowski, *Prawo administracyjne. Zagadnienia podstawowe*, Warsaw 1990, p. 136, p. 206.

⁴⁸ See Article 3:14 of the Dutch Civil Code in conj. with art. 3:1 (2) of the Dutch General Administrative Law Act. See G. Jurgens, F. van Ommeren, *The Public-Private Divide in English and Dutch Law: A Multifunctional and Context-Dependent Divide*, [in] *Cambridge Law Journal*, 2012, 71 (1), March pp. 172 and n. From the indicated provision of the Dutch Civil Code, it follows that "competences which are conferred to anyone under civil law cannot be exercised in violation of written or unwritten rules of public law." The aforementioned provision of the Dutch Law: general provisions of administrative law stipulates that "principles related to the administrative acts enacted in this Act are also applicable to other forms of administrative activity, as long as these principles are reconciled with the nature of these other forms."

⁴⁹ Resolution of the Supreme Court of 4.02.1993.III AZP 35/92, [in] *Samorząd Terytorialny* 1994 No. 4, p. 69, with the approving comment of Z. Czarnik.

⁵⁰ Resolution of the Constitutional Tribunal of September 14, 1994.W. 5/94, OTK 1994 / II item 44. See also the resolution of the Constitutional Tribunal of 27 September 1994. W. 10/93, OTK 1994 / II, item 46. See M. Małecka-Lyszczek, *Pojęcie i podziały zadań publicznych ze szczególnym uwzględnieniem zadań samorządu terytorialnego*, [in] *Zeszyty Naukowe Uniwersytetu Ekonomicznego w Krakowie. Problemy społeczne, polityczne i prawne*, 2013 (921), p. 57.

⁵¹ According to the so-called legal positivism of local government units as well as legal persons other than the state derive their public-law authority as well as subjectivity in the field of private and public law from bills issued by state authorities. Having the statutorily granted competence to exercise public authority, they are thus a kind of state emanation. See M. Szewczyk, *Podmiotowość prawna gminy*, p. 36-37.

⁵² See e. g. P. Stec, *Umowy w administracji. Studium cywilnoprawne*, Warsaw 2013, p. 1 and n.

⁵³ See also L. Kaczmarski, *Ewolucja...*, p. 221, p. 229.

⁵⁴ See Z. Niewiadomski, *System Prawa Administracyjnego*, ed .R. Hauser Z. Niewiadomski and A. Wróbel, vol. 1, pp. 3, 19 and n. On the evolution of the concept of "public administration" and the development of especially the so-called "administracja świadcząca" see M. Bitner, M. Kulesza,

that the term "public administration" is more precise than the term "public sector". These two concepts will be used interchangeably.

5.3. Occam's razor method

a) **"Entity of public law"**. The adoption of a broad understanding of the term "public sector" is in my opinion the first step towards ordering some concepts. The second step will be to use the method commonly known as Occam's Razor. In particular, we should strive to eliminate unnecessary beings, categories and concepts that only hinder the perception by distorting the picture of reality and hindering a precise description of phenomena.

First of all, I suggest avoiding the term "public law entity" due to the ambiguity of the term "public law", as well as other concepts in which the words "public law" should appear, e.g. "public law contract", "institution of public law". It is true that in some legal systems the concept of legal personality of public law (Germany, Austria, France) is deeply rooted⁵⁵. The author of this text takes this tradition into account and respects it. Nevertheless, he also notices the whole ambiguity of this concept.

On the Polish ground, such a proposal seems to be justified. By using these concepts we intensify even more the ambiguity associated with the term "public". For example, a person using the term "public law entity" somehow automatically refers to the division into public and private law, trying at the same time to determine that the rules of public law apply to the activity of this entity. However, one should explain in the first place what is understood under the term "public law". Unfortunately, very rarely such a sufficiently precise explanation is made.

I prefer to use the term "public entity" in the sense indicated above, that is, comprising the state and other entities derivative in relation to it, including, in particular, local government units.

As administrative-law experts point out, the terms or "subjectivity of public law", as well as "personality of public law" have no fixed meaning. The conventional character of these concepts is emphasized⁵⁶. In essence, the statement that a given organizational unit is a public law entity does not prejudice anything in terms of norms. This is certainly so if we accept the currently dominant fundamental thesis of the rule of law saying that every action of a public entity, regardless of the form of activity, must have a normative basis (principle of legalism)⁵⁷. The term "public law entity" is therefore usually not a normative one. Also, its descriptive or cognitive quality is very dubious due to the dilemmas

Zasada legalizmu a zdolność kontraktowa jednostek samorządu terytorialnego, [in] *Samorząd Terytorialny* 2009, No. 6, pp. 8-9.

⁵⁵ In Germany, e.g., it appears in the legal language; see §89 BGB, §12 Insolvenzordnung of 1999.

⁵⁶ See M. Stahl, *Podmiotowość administracyjnoprawna (publicznoprawna) i osobowość publicznoprawna podmiotów administrujących*, [in] *System Prawa Administracyjnego*, ed. R. Hauser, Z. Niewiadomski i A. Wróbel, Warsaw 2011, vol. 6, pp. 50-60, especially 60.

⁵⁷ See J. Boć, *System Prawa Administracyjnego*, ed. R. Hauser, Z. Niewiadomski i A. Wróbel, Warsaw 2011, vol. 5, pp. 246.

referred to above regarding the use of the adjective "public". On the other hand, the situation is different when it is stated that a given entity is a legal entity in the field of civil law relations. The very assignment of a legal subjectivity (personality) without adding the unfortunate adjective "public" determines the possibility of being a party to civil law relations, that is, having legal capacity, including tort liability or liability for damage caused by unlawful acts and legal capacity. The statement, therefore, that a given organizational unit is a subject of law (a legal entity), at least on the ground of civil law transactions has both normative and descriptive (cognitive) value. This is the result of the guiding principle of civil law which is the autonomy of the will of the parties. However, a reservation should be made that the latter regularity does not refer, besides the tort capacity, to public entities as defined above, even if they were provided by the legislator with legal personality. Their actions, even in the course of civil law, must have a more or less explicit legal basis. According to the prevailing view, just to confer legal personality is not enough here. This view is supported by strong arguments of constitutional nature⁵⁸. The issue is connected with the dilemma of freedom of contract in the public sector or the special legal capacity (*ultra vires*) of public entities.

The issue of legal personality and legal subjectivity is regulated in the Civil Code and is definitely best adapted to the realities of civil law transactions. It seems, therefore, that the efforts to create the concept of subjectivity or the personality of public law are the aftermath of the nineteenth-century aspirations of administrative law scientists to create parallel institutions modeled on civil law institutions (see the discussion on this subject below). At the same time, as has been indicated above, the normative and descriptive (cognitive) values of such efforts are very limited and controversial. I am not saying that the subjectivity or legal personality of public entities does not display certain particular features⁵⁹. However, many reasons can be found in the views arguing for one universal concept of legal personality (subjectivity) that has been developed by the science of civil law⁶⁰. For example, in Articles 29-30 of the Polish Code of Administrative Procedure, the legislator implicitly refers to the civil-law understanding of legal personality and explicitly to the concepts of legal capacity and legal competence shaped in civil law.

⁵⁸ See M. Bitner, M. Kulesza, *Zasada legalizmu a zdolność kontraktowa jednostek samorządu terytorialnego*, Samorząd Terytorialny 2009, No. 6, p. 15. V. Schlette, *Die Verwaltung als Vertragspartner*, Tübingen, 2000, pp. 98 and n., H. de Wall, *Die Anwendbarkeit privatrechtlicher Vorschriften im Verwaltungsrecht*, Tübingen, 1999, p. 92 and n. The principle of legalism (Legalitätsprinzip) is very strongly emphasized in German-speaking countries, see, for example, Austrian law, M. Steiner, [in] *Droit comparé des Contrats Publics*, ed. R. Noguellou and U. Stelkens, Bruxelles 2010, p. 386; on the subject of the German law U. Stelkens, H. Schröder, [in] *Droit comparé ...*, p. 317 and n.

⁵⁹ On some aspects of the specificity of the legal personality of public entities as a restricted (special) personality see R. Szczepaniak, *Komentarz do art. 33 polskiego kodeksu cywilnego*, [in] *Kodeks cywilny. Komentarz*, ed. M. Gutowski, Warsaw 2016, pp. 177-178.

⁶⁰ On this subject see M. Stahl, *Podmiotowość administracyjnoprawna (publicznoprawna) i osobowość publicznoprawna podmiotów administrujących*, p. 50 and n.

In Poland, work on a new civil code has been going on for many years. The usefulness of introducing the concept of "legal persons governed by public law" unknown in the Polish legal language has been discussed. Ultimately, however, the idea was abandoned. It was aptly argued that the purposefulness of introducing such a category of entities is doubtful, and it is very difficult to define the criteria on the basis of which a particular organizational unit should be included in this category⁶¹.

b) The concept of "Fiskus" as the state operating in the area of private law. The concept of "Fiskus" is strongly rooted in the Polish legal language both regarding legal acts and legal discussions.⁶² Its frequent use still has a strong impact on the way of thinking of Polish courts and other law enforcement agencies.

The use of the term "Fiskus" proves that the semantic problems related to the application of private law in the public sector are not limited to the lack of conceptual precision. We also have to deal with such cases in which certain concepts are even quite precise, or at least much more precise than those in which the adjective "public" is present, and have also grown into our legal consciousness, but nevertheless they pose a problem in solving issues related to the application of private civil law in the public sector. This problem lies in the fact that they clearly though imperceptibly direct our thinking and make us adopt a priori certain initial assumptions, which in themselves should be subject to analysis for the purpose of their verification.⁶³

The genesis of this concept should be recognized in the nineteenth century Fiskustheorie. According to it, a public entity using civil law forms of action, particularly contracts, becomes the same participant in legal transactions as private entities. As a consequence, it can also use the freedom of contracts as all other participants in civil law transactions. The notion of "Fiskus" appeared as a consequence of this way of reasoning in the nineteenth century. It developed as an expression of the conviction that the state loses its unique nature assigned to it when engaged in civil-law relations, becoming a different subject, not differing in any special way from private entities. The Fiskus understood in this way may conclude any contract with a private entity. Once a contract is concluded, it is assumed that there was a consensus between the parties and the principle *volenti non fit iniuria* applies.

At the same time, it is an expression of the support for the approach assuming the dual nature of the state's activities, which clearly dominated at the time when the concept of the "Fiskus" acting in the way described in the Fiskustheorie appeared. With time, the opposition against this way of thinking began to grow. In the late nineteenth and early twentieth century, one of the

⁶¹ See J. Frąckowiak, A. Górski, J. Gromska-Szuster, *Osoby w projekcie kodeksu cywilnego*, [in] *Przegląd Sądowy*, march 2010, p. 18 footnote No 37, p. 31.

⁶² In Polish, the term "fiskus" is used, and even more often its synonym the "Skarb Państwa".

⁶³ As M. Mączyński remarks, "there are few Polish institutions, concepts or organs whose names are written with a capital letter as consistently as "Skarb Państwa". See M. Mączyński, *Wybrane zagadnienia ustrojowe SP*, [in] *Przegląd Sejmowy* 2003, No. 6, pp. 19.

strongest opposing trends was derived from the French idea of *service publique*. Its foundations were developed by the members of the so-called *l'école du service publique* otherwise known as the Bordeaux school⁶⁴, which has already been mentioned above.⁶⁵

The very idea of Fiskus has in many ways a lot in common with constructing legal fiction. Until the second half of the nineteenth century, the view prevailed in Europe that the king can do no wrong⁶⁶. It expressed the principle that the king (the State) as sovereign is not responsible to his subjects before court. This concerned, among others property liability. The sovereign as the creator and source of law is situated above the law. The processes of citizens' empowerment that took place in the 18th and 19th centuries increasingly undermined the legitimacy of this principle. These processes progressed gradually. At some stage, a compromise was developed based on the fiction suggesting that there was another entity alongside the State (the king) - its alter ego named "der Fiskus". Thus, the idea of the Fiskus, as a legal entity in its own way, in isolation from the State, was based on legal fiction claiming that the State changes its nature when entering into civil-law relations with other entities, and becomes the so-called Fiskus, a participant in civil law relations on the same terms as private individuals. In a more radical sense, this fiction went even further by assuming that the State and the Fiskus are two different entities.⁶⁷ Therefore, I completely agree with the views of these authors, who believe that the Fiskus "is in fact the State itself in the field of civil law relations." Only as a result of legal fiction, an illusion arises, as if there were two different entities: the State and the Fiskus⁶⁸.

The theory of Fiskus constituted a progress in relation to the system of the absolute state. Its consequence was, inter alia, the sovereign (the State) being bound by laws and assuming liability for compensation to citizens at least in the scope of so-called civil law relations. In this respect, the Fiskus was somewhat

⁶⁴ See J. Rivero, *Existe-t-il un critère du droit administratif?*, Séminaire franco-polonais de droit administrative organisé en 1998 par l'Institut de droit et de science administrative à Cracovie.

⁶⁵ The work of adopting the principles of the Bordeaux school to Polish law in the interwar period was undertaken, among others by Zylber, W. Zylber, *Odpowiedzialność cywilna za szkody wyrządzone przez działalność władz publicznych w prawie francuskim*, p. 12.

⁶⁶ See J. A. Jołowicz, [in] *International Encyclopedia of Comparative Law*, Volume XI, ed. de A. Tunc, Tübingen, 1975, p. 16.

⁶⁷ F. Bossowski, e.g., refers to the earlier nineteenth century theories according to which the Treasury was to be a legal person separate from the State itself. See F. Bossowski, *O odpowiedzialności cywilnej Skarbu Państwa za bezprawne czyny i zaniechania funkcjonariuszy publicznych poza wypadkami naruszenia stosunków obligacyjnych*, Lviv, 1912, p. 1; he very vividly commented on the emergence of the notion of the 'Fiskus' in Germany. According to H. De Wall, in the nineteenth century there was a legal dismemberment of the State into two different legal entities, one of which was called the "Fiskus". It was a kind of "whipping boy" or "Prügelknabe" of the State, because only the treasury was liable regarding property against the citizens. See H. de Wall, *Die Anwendbarkeit ...*, p. 12.

⁶⁸ See S. Grzybowski, *Prawo cywilne. Zarys części ogólnej*, Warsaw 1985, p. 185, see also L. Kurowski, *O pojęciu Skarbu Państwa w prawie socjalistycznym*, [in] *Studia Prawnicze*, 1970, pp. 26-27, pp. 93 and n.

equated with private entities (*«Fiscus iure privato utitur»*)⁶⁹. With time, however, especially in the light of post-war constitutions of democratic states in Europe, the theory began to be perceived as obsolete. In particular, it became superfluous in democratic states of law as a means of protecting human rights. It was pointed out that in the long run it gave rise to undesirable effects. It creates only an illusion of equality of individuals and the State in civil law relations and allows public entities to escape from the principles of the Constitution and the standards of a democratic state of law.⁷⁰

However the situation is still different in the Polish doctrine and judicature, where the Fiskus theory is still firmly rooted. Incidentally, it is a phenomenon quite typical of former European communist states where the view is still held that the treatment of the Fiskus as an entity on equal terms with private individuals is a kind of progress, especially when one remembers the state's hegemony in the communist system. Consequently, in the practice of applying the law in these countries the specificity and risks of using civil law instruments in the public sector is not always perceived.

That is why I am in favor of removing the concept of "Fiskus" from legal discourse and the language of legal acts. Currently, this concept may even be misleading as it creates the illusion that the state changes its nature in its civil law relations and loses its specificity becoming in a way another entity, a participant in legal transactions on the same terms as private entities. As noted by H. Vaihinger, the use of fiction leads to the phenomenon of subjective or conventional shaping of the world image (*Das menschliche Vorstellungsgebilde der Welt*)⁷¹. However, the question arises whether this fiction does not distort the reality excessively. For the very notion of 'fiction' has some pejorative meaning. As Roman Longchamps de Bérier wrote: "[...] Practice gets help from fiction until phenomenon A has not been investigated and explained, and once it happens, practice rejects fiction as unnecessary"⁷². Fiction is not an autonomous value. It can therefore be tolerated as long as it serves to achieve goals consistent with a sense of fairness. Otherwise, it should be abandoned.

c) The division into public and private law. The above remarks on the subject of the adjective "public" also refer to the traditional division into public and private law. The prevailing view in the science is that "the separation of public and private law is not a matter of cognition, but a matter of a convention, approval, recognition of certain values, a specific socio-economic ideology. The boundary of separation is not clear and certain."⁷³ Let us note that the legislator usually does not

⁶⁹ See J. Hatschek, *Die rechtliche Stellung des Fiskus im Bürgerlichen Gesetzbuche*, VerwArch 7 1899, p. 424 and n.; U. Stelkens, H. Schröder, [in] *Droit comparé* ..., p. 314.

⁷⁰ U. Stelkens, *The public-private law divide*..., p. 3 and n.

⁷¹ H. Vaihinger, *Die Philosophie des "als ob"*, Berlin 1911, p. 14.

⁷² See R. Longchamps de Bérier, *Studia nad istotą osobowości prawnej*, Lviv 1911, p. 8.

⁷³ J. Holliger counted seventeen such theories. See J. Holliger, *Das Kriterium des Gegensatzes zwischen dem öffentlichen Recht und dem Privatrecht dargestellt im Prinzip und in einigen Anwendungen mit besonderer Berücksichtigung des schweizerischen Rechtes*, Zürich 1904, p. 11.

comment on the legal or private nature of an institution or relationship⁷⁴. We do not know what the attribute "public-law" means, in particular assigning public-law character to a given social relation does not dispel doubts whether the application of civil law is excluded, even by analogy⁷⁵.

Personally, in my scientific discourse, I would prefer to avoid being drawn into dilemmas, whether a given regulation (legal institution) belongs to private or public law. Ideally, this division should be eliminated from the discourse using the *Occam's razor*. But would it be possible? This question cannot be answered in an unequivocal manner. In various European countries, this division is observed with varying intensity. In some countries, e.g. in France, it has so deeply grown into the nature of the legal system that eliminating it is virtually unimaginable. In particular, the obstacle to the abandonment of this division is the current stage of the development of legal science, the tradition dating back to Roman times, the way legal disciplines are classified and the prevailing conceptual apparatus. As J. Nowacki noted, it is not only the division of the legal system, but also of the science of law⁷⁶. In recent decades a renaissance of this division can be observed. Not only was it revived in the former socialist countries, including Poland, but it also started to be discussed in Anglo-Saxon countries, such as the United Kingdom and Australia, that traditionally did not emphasize it, which set them apart from the countries of Continental Europe⁷⁷. Consequently, according to some theoreticians, this division stems from the very nature of law⁷⁸.

In modern science of law some advantages of this division are noticed. It is supposed to express and simultaneously implement the idea that there is an inherent sphere of human freedom (freedom of people as members of the society).

See J. Łętowski, *W sprawie granicy między prawem publicznym a prywatnym*, [in] *Prace z prawa cywilnego*, Wrocław 1985, p. 354-356.

⁷⁴ In the literature, an exceptional case is quoted when the creators of law tried to define the concept of "public law" in a legal act. The act was a rejected draft of the Württemberg Law on Administrative Proceedings of 1931 (art. 1 The wording of this provision was as follows: "Das öffentliche Recht umfasst alle Verhältnisse, in denen der Staat, Körperschaften oder Anstalten als Träger der Staatshoheit einzelnen gegenüberstehen, und es umfasst außerdem die Verhältnisse, in denen der Staat, Körperschaften, Anstalten oder einzelne einander gleichgeordnet gegenüberstehen, soweit diese Verhältnisse überwiegend im öffentlichen Interesse geordnet sind". See on this subject J. Nowacki, *Public Law ...*, p. 30 footnote 93.

⁷⁵ In German science there appeared a view that this division has a conflict-of-law value. Ch. Pestalozza, *"Formenmißbrauch" des Staates. Zu Figur und Folgen des "Rechtsmißbrauchs" und ihrer Anwendung auf staatliches Verhalten*, München 1973, pp. 170 and n. Assigning a given legal institution or a legal relationship either public or private character is supposed to have the effect that we will apply to this institution or legal relationship the provisions classified as private law or provisions included in public law. However, this is probably only an apparent benefit. Still, even if we assign a public-law character to a given institution, we are not sure whether such a qualification excludes the application of, for example, analogy to civil law provisions. On the possibility of applying private law by analogy in the public sector, see H. de Wall, *Die Anwendbarkeit ...*, p. 56-80.

⁷⁶ See J. Nowacki, *Prawo publiczne...*, p. 12.

⁷⁷ See on this subject, G. Jurgens and F. van Ommeren, *The Public-Private Divide*, pp. 172 and n.

⁷⁸ See O. Gierke, *Deutsches Privatrecht*. Band 1. *Allgemeine Teil und Personenrecht*, Leipzig 1895, p. 29; A. Ross, *On Law and Justice*, London 1958, p. 203.

This sphere is in opposition to the sphere of activity of the state and other public entities. The functioning of the society as a set of free and autonomous individuals is to be regulated in such a way that this freedom and autonomy can be implemented. This way of regulation, called private law, is of a cooperative and open character. As F. Bydlinski emphasizes, even legal positivism accepted this openness and independence of private law⁷⁹. Private law understood this way comprises "the norms supporting the sphere of autonomous private activities of the society"⁸⁰. It is in a counterbalance to public law regulating the functioning of the state and its derivatives, and at the same time it is a barrier against its omnipotence, including the totalitarianism of the state⁸¹. As a consequence, the division into public and private law coincides with the constitutional axiology of European democratic states of law. It is even to strengthen the sphere of individual freedom against unjustified interference of public authorities.

I do not intend to question these claims, nevertheless I agree with M. Safjan's statement that it is not the matter of the division of law itself into public and private law that is the most important⁸². As the author correctly notes, in the science of law there has long been a problem with understanding the very separation of the public from the private sphere. In particular, there is often no precise determination in the legal discourse what is the subject of the division. One attempts to separate private law from public law, or public law norms from private law norms. There are endless disputes over the criteria to be applied in this respect. The heart of the matter, however, comes down to answering the question what type of legal relationships are and should be subjected to the regulation method appropriate for public law (the method assuming subordination) and which type should be subject to private law (taking into account the equivalence and autonomy of entities). The question what type of relations should be included in public law and which in private law is less important in the descriptive sense⁸³. I believe that the strength and vivacity of this division is derived from the fact that it expresses quite well the not always articulated but thoroughly rooted belief that the specificity of the state and its other public entities requires its own specific rules that diverge from the so-called common law, which for several hundred years many lawyers have considered to be civil law. Both the legislator and law enforcement bodies, and especially the courts, should be aware of this. However, to be aware of this, it is not necessary to cultivate the division into public and private law. Sometimes this specificity of the functioning of the state and other entities being its emanation is so intense that it justifies the need to distinguish various branches of law. This is the case when these entities use the form of the administrative act - a classical imperious unilateral act. Sometimes this specificity

⁷⁹ See F. Bydlinski, *Kriterien und Sinn der Unterscheidung von Privatrecht und öffentlichem Recht*, [in] *Archiv für die zivilistische Praxis*, 1994, 194 Bd, p. 342.

⁸⁰ S. Włodyka, *Problem struktury prawa*, [in] *Państwo i Prawo*, 1995, No. 4, p. 9 and n..

⁸¹ See F. Bydlinski, *Kriterien und Sinn ...*, p. 342; see also Z. Radwański, *Prawo cywilne-część ogólna*, Warsaw 2009, p. 2-4.

⁸² See M. Safjan, *System Prawa Prywatnego*, ed. Z. Radwański, Warsaw 2007, Volume 1, p. 33-34.

⁸³ See M. Safjan, *System...*, p. 33-34; similarly, U. Stelkens, *The public - private law divide ...*, p. 3.

does not manifest itself with such a great force, and as a consequence it is sufficient to distinguish only a group of regulations within one branch of law and even within one single legal act. This is the case, for example, with regard to the liability for damages of public entities in Polish law, which is regulated in Articles 417-421 of the Polish Civil Code and partly in German law (see § 839 BGB).

It is possible that in some cases the specificity of public entities does not even require the introduction of such a group of regulations. An appropriate attitude of the courts, sometimes referred to as the judges' law, may turn out to be sufficient. As it seems, the example for the latter case may be the phenomenon of contracts in the public sector. After all, the contract contrary to the administrative decision is by no means a form of action assigned only to public entities. For example, in the Polish civil law doctrine, a postulate was formulated a few years ago to develop a special catalog of principles of equity taking into account the specificity of civil transactions with the participation of public entities⁸⁴.

To sum up, it is better to use the attributes "tax-law" or "social-security-law" rather than "public-law", or even the term "administrative" rather than "public-law"⁸⁵.

Of course, it can be said that if the proposal is made to avoid the attribute "public-law", the term "private law" used as an attribute should be avoided as well for the sake of consistency. In principle, it would be appropriate to agree with such a conclusion, yet with some reservations. In my opinion, the use of the attribute "private-law", is less risky than "public-law". The lack of this precise criterion delimiting public and private law has so far been particularly acute in the case of administrative-law scientists. This state of the matters has its roots and causes in distant history. When more than two centuries ago, civil-law scientists began to create monumental codes of civil law, the issue of this distinction was not a fundamental problem for them. Civil law in the well-established consciousness of those lawyers was treated as so-called common law, or as a general part of the whole legal system. Administrative law in the present sense of the word began to shape several dozen years later and built its identity in opposition to civil law. The nineteenth-century luminaries of administrative law adopted a characteristic methodological attitude. Conscious of the immaturity of the administrative doctrine in comparison with civil doctrine, they developed the conceptual apparatus and administrative law institutions drawing on the achievements of the science of civil law⁸⁶. In this way, on the basis of parallels to the civil-law conceptual apparatus and the institutions of civil law, the notions of public property and public ownership, public-law agreements, administrative-legal declarations of will, administrative powers, or the public regime of compensatory liability of the administration were formed in Germany and France. The process of developing

⁸⁴ See P. Stec, *Umowy w administracji. Studium cywilnoprawne*, ..., p. 73.

⁸⁵ The authors of the monumental work: *Droit comparé des Contrats Publics*, ed.R. Noguellou and U. Stelkens, Bruxelles 2010 were aware of this. See the remarks in p. 5-6.

⁸⁶ See O. Mayer, *Deutsches Verwaltungsrecht*, Berlin 1921, Bd. 1, p. 117; on this topic see also H. de Wall, *Die Anwendbarkeit* ... , p. 13-15.

these parallel institutions has become particularly evident in France through the rulings of the Council of State and views of the doctrine⁸⁷. Civil law was a kind of point of reference for them and to some extent it has remained so until today. Therefore, emphasizing the distinction between public and private law was almost a matter of existential importance for the administrative-law scientists. For this reason, the nineteenth-century luminaries of administrative law quite often absolutized this division. This was sometimes manifested in the programmatic rejection of the possibility of applying, even by way of analogy, civil law provisions to institutions which they treated as public-law institutions (administrative-law institutions)⁸⁸. The manifestations of this kind of attitude even today can be found in the circles of administrative-law scientists⁸⁹. As a consequence, I am inclined to accept the presumption that in the case of a dilemma, whether we are dealing with a civil-law institution or a non-civil-law institution (a so-called public-law institution), it is a civil-law institution, unless serious reasons speak for the opposite view. We are talking here about civil-law character at least in a technical sense, that is, civil law regulations apply, and especially the Civil Code. Since such a dilemma has turned up, it means that the institution has its own civil-law counterpart, and civil law has at least chronological precedence. The legitimacy of this approach can be seen when considering the dilemma of contracts in the administration, i.e. whether these are civil law contracts or administrative contracts (so-called public law contracts). Until today, Polish administrative-law scientists - as they admit themselves - have not created a coherent mature concept of public-law contracts⁹⁰. Even if we assume that some contracts are public-law contracts, in most cases we are forced to apply to them at least some civil law regulations, especially the Civil Code. It is in the science of civil law that the contract has been fully investigated and thus also regulated. Issues such as the ways of concluding contracts, ways of terminating them, rules for submitting declarations of will and reaching a consensus, defects of declarations of will, effects of non-performance of contracts have been regulated in most European countries only in the Civil Code. A similar relationship occurs in the classification of the liability regime of public authorities as a public or private law institution. In some countries there may be doubts as to whether it is a public or private law

⁸⁷ See F. Zylber, *Odpowiedzialność cywilna za szkody wyrządzone przez działalność władz publicznych w prawie francuskim*, p. 2 and n.

⁸⁸ See on this subject H. de Wall, *Die Anwendbarkeit ...*, p. 13, footnote.36.

⁸⁹ One can come across opinions of administrative law experts about the "expansion of civil law doctrine into the area of relations between public administration and economic entities", about "arbitrary appropriation" by civil law of contractual forms, one of which was a state administrative body. See e.g. W. Taras, A. Wróbel, *W sprawie jednolitej koncepcji ...*, p.122. Civil law experts, on the other hand, make accusations about "turning civil law into public law". Interesting examples of this attitude of both administrative-law and civil-law scientists in France were presented by M. Lemonnier in the paper entitled "*Prawo prywatne – prawo publiczne – recepcja przy użyciu metody porównawczej*", the paper delivered on April 22, 2016 at a nationwide scientific conference organized by the University of Warmia and Mazury in Olsztyn, "Instytucje prawa prywatnego w służbie prawa publicznego – nadużycie czy konieczność?"

⁹⁰ See W. Taras, A. Wróbel, *W sprawie...*, p.124.

institution. However, even if in a given European country we recognize the liability of the public authorities as a public law institution, then the legislator usually refers to the mechanism of compensation for damages developed in civil law⁹¹. Even in French science of law there is a group of prominent administrative-law and civil-law scientists who question the idea of autonomy and originality of the regime of compensatory liability of public authorities in relation to the civil-law universal system of non-contractual liability. This is despite the fact that it is not anywhere else, but in France that the strongest conviction exists of the alienation of the regime of public authorities' liability under civil law⁹².

At one time, it was remarked in the Polish science of civil law that "material civil law has a highly developed (which can be considered a paradox) procedural aspect"⁹³. This regards, for example, the provisions of the Civil Code regulating the ways of concluding contracts. These "procedural provisions" of substantive civil law can in my opinion be called "civil law in a technical sense". They should be used in every case where a legal institution of civil law provenance is used in public administration, unless the provisions of the administrative law contain a special regulation. In other words, one can speak about "general models", mechanisms or procedures regulated in the Civil Code that can also be applied outside the area of classic science of civil law. It is possible to indicate the provisions of the Civil Code that regulate the manner of concluding a contract, defects in declarations of will, or more broadly speaking provisions on declarations of will, rules for their interpretation. It is also possible to indicate other models or mechanisms such as the above-mentioned unjust enrichment and fraudulent transfer, deduction, and the mechanism for redressing damages. The unjust enrichment, for instance, regulated in the Civil Code can be treated as an expression of a certain "inter-branch subsidiary instrument of restitution"⁹⁴. The use of these institutions is in many cases more desirable because administrative law often does not include its own regulations in this area. As an example one can indicate §62 of the German *Verwaltungsverfahrensgesetz* (VwVfG) Act, which clearly states that in matters not governed by administrative contracts, the provisions of the Civil Code should be applied.

Civil law understood in this way, as a kind of civil law in the technical sense, is still common law, or a general part of the whole legal system, a particular

⁹¹ This is the case, e. g. in Germany, although there are still doubts about whether it is within the domain of civil or public law. See U. Stelkens, *Le développement ...*, p. 2 and n.

⁹² See A. de Laubadère, J.C. Venezia, J.C. Gaudemet, *Traité de droit administratif*, vol. I, Paris, 1994, p. 870; Ch. Eisenmann, *Sur le degré d'originalité de la responsabilité extra-contractuelle des personnes publiques*, [in] *Jurisclasseur Périodique* (Semaine juridique) 1949, I, pp. 742-751.

⁹³ See E. Łętowska, *Bariery naszego myślenia o prawie*, *Państwo i Prawo* 1996, No. 4-5, p. 51 and n.

⁹⁴ See M. Grochowski, E. Łętowska, *Czemu może dziś służyć bezpodstawne wzbogacenie?*, [in] *Współczesne problemy prawa zobowiązań*, ed. A. Olejniczak, J. Haberko, A. Pyrzyńska i D. Sokołowska, Warsaw 2015, pp. 213 and n.

point of reference. One can find many examples of civil law being understood in this way⁹⁵.

d) The non-dichotomous nature of division into public and private law.

In European legal thought shaped by the analysis of EU law, an increasingly skeptical in relation to the concept of dichotomous division of the legal system into public and private law attitude is currently prevailing. Gradual departure from formalism, dogmatism and positivism characterized by the creation of dichotomous divisions and classification towards a pragmatic and functional attitude can be observed⁹⁶.

In recent years it has been very convincingly argued that the division into private and public law is of a non-dichotomous nature, as it is dependent on various contexts, and in addition it displays a multifunctional character. This means that the division is effected for the implementation of various goals, which are often temporary⁹⁷. In the light of Polish law, for instance, an academic employee may be considered a public official (or, to be more specific, a person performing public functions) within the meaning of Article 5 Section 2 of the Act on Access to Public Information⁹⁸, while not being considered a public official in other normative contexts (for example, with regard to the special legal and criminal protection granted to public officials)⁹⁹. Consequently, if one is to refer to this division, it can be assumed that the relationship or institution may be of a mixed nature (both public and private), or only be of public nature in certain aspects, and of private nature in others.

Questioning the dichotomous character of this division is part of the logic of Occam's razor, based on the assumption that excessive emphasis should not be put on artificially created abstract entities, categories and concepts.

A non-dichotomous view of this division is methodologically more fruitful. We can then avoid getting into the frequently fruitless disputes whether a given institution, for example the contract, is a civil law or public law institution, especially that even agreeing that the institution is of public and legal nature is

⁹⁵ In the German administrative doctrine in recent decades there has been a trend to construct administrative quasi-contractual obligation relationships between public authorities and citizens, along the lines of civil contractual relations. For example, such relations were found between the school and the student, between the municipality and people using public areas, or public facilities in general. As a consequence, the basis for possible liability for damages of public authorities was then seen in the provisions of the Civil Code regulating contractual liability. See U. Stelkens, *Le développement...*, p. 9.

⁹⁶ See M. W. Hesselink, *The new European Private Law*, Kluwer Law International, 2002, p. 11 and n.; M. W. Hesselink, *The Structure of the New European Law*, [in] *Electronic Journal of Comparative Law*, 2002 December, p. 8 and n.; C. Semmelmann, *The public-private divide in ...*, p. 1 and n.

⁹⁷ See G. Jurgens and F. van Ommeren, *The Public-Private Divide ...*, pp. 172 and n.

⁹⁸ The Act of 6 September 2001. *Journal of Laws* 2012 item 1764.

⁹⁹ See the judgment of the Supreme Administrative Court of 19 April 2011.I OSK 125/11 and the NSA judgment of 12 April 2012. I OSK 161/12. On the legal and criminal status of the academic teacher see P. Duks, M. Tomkiewicz, *Nauczyciel funkcjonariuszem publicznym? Zakres ochrony i odpowiedzialności nauczycieli w polskim prawie karnym*, [in] *Studia Warmińskie* 2011, No. 48, p. 229, 232, 246.

often ambiguous, and therefore not particularly communicative. The acceptance that the contract or another institution used in the public sector is of a public and legal nature does not in itself exclude the application of the provisions of the Civil Code to it, or the settlement of disputes on the basis of this contract by a civil court, and at the same time does not exclude taking into account the constitutional principles of the functioning of public authority. An approach characterized by a programmatic questioning of the dichotomous character of the division into public law and private law, contributes to the adoption of solutions that protect the rights of individuals more effectively, because it extends the possibility of implementing the standards of a democratic state ruled by law. For example, thanks to such an approach, even if we assign a contract concluded in the public sector a civil law nature, we do not deny that it is also assessed in accordance with the requirements included in the Constitution as well as in ordinary legislation that are addressed to public authorities. We reduce the risk of the escape on part of the administration from constitutional standards and principles by using forms of civil law. Therefore, I fully agree with the idea expressed by J. Boć that the analysis of the essence of contracts or other legal institutions of civil-law provenance used in administration should not assume the form of "struggle for affiliation, but for conceptual and normative improvement of the system of applicable law instead"¹⁰⁰.

It seems that an expression of similar ideas is the terminology used in the international and Polish science of administrative law. This terminology testifies to attempts to remove unnecessary barriers between such branches of law as civil and administrative law. This is exemplified by expressions like: "quasi private-law acts" used for describing specific forms of activity of the administration, which display many features typical of civil law¹⁰¹. The distinction between administrative law in the strict sense and the law of administration (administrative law in a broader sense) introduced many years ago in French science¹⁰². In German science, on the other hand, the term "Verwaltungsprivatrecht" was coined, which is translated by Polish administrative-law scientists as "prawo cywilno-administracyjne" (civil-administrative law)¹⁰³.

At this point, a general remark must be made that very often there are problems with classifications in legal science. Often, they fail to be carried out in accordance with the requirements of the so-called logical division, and thus in an exhaustive and disjointed (dichotomous) way. As a consequence, as theorists of law point out, the divisions in the legal sciences are most often typological and not

¹⁰⁰ J. Boć, *System Prawa Administracyjnego*, p. 258.

¹⁰¹ See W. Chróścielewski, *Akt administracyjny generalny*, Łódź, 1994, p. 63.

¹⁰² On the concept of "administration law", see W. Taras, A. Wróbel, *W sprawie jednolitej...*, p. 120.

On this distinction, see also A. de Laubadère, J.C. Venezia, Y. Gaudemet, *Traité de droit administratif*, p. 20.

¹⁰³ See H. de Wall, *Die Anwendbarkeit...*, p. 35; D. Ehlers, *Verwaltung in Privatrechtsform*, Berlin 1984, p. 212 and n.; U. Stelkens, *The public-private ...*, p. 6; Z. Leoński, *Glosa do wyroku NSA – Ośrodek Zamiejscowy w Łodzi z dnia 27 września 1994 r. SA/Łd 1906/94.SA / Łd 1906/94*, OSP 1996, No 3. See on this wording of P. Stec, *Umowy w administracji*, p. 13.

logical. Such phenomenon results from the very nature of law¹⁰⁴. Becoming aware of it can be methodologically useful. There is a wider reflection to be made here that the source of difficulties in grasping the essence of some fundamental legal institutions is the tendency of forcing them into the framework of the dichotomous division performed a priori.

e) **Breaking with the division into *actes d'autorité* and *actes de gestion*.** Another manifestation of Occam's razor method is breaking with division into *actes d'autorité* and *actes de gestion* for purposes of compensation on the part of public authorities. In fact, every manifestation of the activity of the state and its derivatives is imperious. See the remarks contained in particular in Section 4.2.¹⁰⁵

6. Risk of manipulation through interference in the semantic rules of the language of legal acts and legal language

Another type of semantic aspect of the application of private law in the public sector is related to the contemporary phenomenon of creative interference of public authorities, from the legislator and the Constitutional Tribunal to courts and administrative authorities, in the semantic rules of classical civil law. In extreme cases, this interference may lead to, as K. Ajdukiewicz said, changes in our image of the world. As a consequence, individual processes or events in this world can be assessed and legally qualified in different ways. Such interferences are dictated by the intention of achieving specific, often temporary and provisional goals by public authorities.

The analysis of the language of legal acts and legal discourse both in Poland and in other countries leads to the conclusion that classic concepts and institutions developed in civil law are sometimes treated by public authorities as legal metaphors, from which the true shape of a given institution must only be reconstructed in the complex process of interpretation. All these institutions with a civilian origin considered en bloc (e.g. property, legal person, contract), become a kind of "civil law veil", a veil hiding the actual legal state, under which the State performs its tasks.¹⁰⁶

This kind of overly liberal approach to the legal institutions of civil law has been observed for a long time in the legal doctrine of many countries. For example, one can see manifestations of a certain kind of social engineering and manipulation carried out by public authorities. E. Łętowska writes about the "privatization of

¹⁰⁴ See A. Grabowski, *Podział logiczny. Skrypt „Logika dla prawników*, Jagiellonian University, 2010.

¹⁰⁵ J. Starościan, a luminary of Polish science of administrative law, wrote that the whole of the administration's activities bears the hallmarks of administrative authority. See J. Starościan, *System Prawa Administracyjnego*, 1978, vol. III, p. 106. Following this, a new broad understanding of imperious authority is presented by W. Chróścielewski; see W. Chróścielewski, *Imperium a gestia w działaniach administracji publicznej*, [in] *Państwo i Prawo* 1995, No 6, p. 59.

¹⁰⁶ See R. Pacud, *Elementy publiczno i prywatnoprawne OFE. Potrzeba rekonstrukcji*, [in] *Współczesne problemy prawa pracy i ubezpieczeń społecznych*, ed. L. Florek and Ł. Pisarczyk, Warsaw 2011, p. 337 footnote 22.

public functions" as a manifestation of a wider phenomenon called by philosophers "liquid modernity"¹⁰⁷. As E. Łętowska points out, sometimes "the state dresses its decisions into the garments of a contract", concealing that in this way it rids itself of the obligations and guarantees towards the citizen in connection with the possession and exercise of public authority¹⁰⁸. This is one of the manifestations of the above-mentioned phenomenon of "the administration's escape from administrative law". In this way, the state also conceals the imperious nature of its activities by creating the illusion of partner-like treatment of individuals. In one of the judgments, the Polish Constitutional Tribunal drew attention to the danger of creating a "fiction of civil law equality of parties" by the legislator¹⁰⁹. It is the case when the legislator envisages a contract concluded by an administrative body with a citizen as a form of administrative activity, whereas the contract is concluded in such circumstances that the citizen is left with no freedom of decision.

This phenomenon is a manifestation of a much wider problem occurring in the modern world, consisting in the façade character of at least some institutions, which in theory are to co-create a democratic system and a civil society. Thanks to the use of concepts and institutions of civil-law provenance, the illusion of partner treatment of individuals by the public authorities arises. After all, civil law relations are always associated with a certain at least formal equality or autonomy of the parties.

Methodologists draw attention to certain stigmas of postmodernism that give rise to the discourse that is typical of social sciences. One of their manifestations is the spread of various kinds of metaphors in the scientific language which occurs at an alarming rate¹¹⁰. Legal theorists transferring these remarks to the ground of legal philosophy notice the occurrence of this phenomenon in both the language of legal discourse and of legal acts. According to the classical Aristotelian definition, a metaphor is transferring the name from one thing to another, or from genre to species¹¹¹. As a result, there is a deviation from the accepted language rules. As a consequence, we are dealing with the phenomenon of borrowing, or "transferring definitions, associations and meanings from one object to another."¹¹² It is possible to put forward the thesis that the concepts of the classic science of civil law are sometimes used by contemporary

¹⁰⁷ See E. Łętowska, *Prawo w "płynnej nowoczesności"*, [in] *Państwo i Prawo* 2014, No. 3, p. 22. The author refers to the book by Z. Bauman, *Płynna nowoczesność*, Cracow 2006.

¹⁰⁸ See E. Łętowska, *Prawo w "płynnej nowoczesności"*, p. 23.

¹⁰⁹ See the judgment of the Constitutional Tribunal of 27 May 2014.P 51/13, *Journal of Laws* 2014, Item 735 with the comment by R. Szczepaniak, [in] *Państwo i Prawo*, 2015, No. 12, p. 130-135. A written justification of this judgment was published on the website <http://trybunal.gov.pl/sprawy-w-trybunale/katalog/s/p-5113/>.

¹¹⁰ See on this subject A. Wróbel, *Krótki szkic o metaforze w dyskursie prawniczym*, [in] *Teka Komisji Prawniczej PAN Oddział w Lublinie*, 2014, VII, p. 136.

¹¹¹ See A. Wróbel, *Krótki szkic...*, p. 131.

¹¹² See M. Karwat, *O statusie poznawczym i zaletach metafor*, [in] *Metafory w polityce*, ed. B. Kaczmarek, Warsaw 2003, p. 18.

legislators as a kind of metaphors. Metaphors, as must be emphasized, can be used in a good or bad way. In the latter case confusion and disinformation may occur¹¹³.

Metaphors play, among others, explanatory and persuasive functions. With the help of metaphors one can influence the listener's or reader's way of thinking and shape their view of the world. Thus, it appears that by using the concepts developed in civil law as metaphors, public authorities, including the legislator, want to form positive associations in citizens, suggesting that the legislator transfers the citizen's relationship with public authorities to a civil law platform that is characterized by equality, autonomy of the parties and partner-like treatment.

The issue has only been mentioned in this text. However, it deserves deep analysis.

7. Conclusions

This text proves the importance of the reflection of researcher studying legal phenomena over the conceptual apparatus that he uses and the conceptual apparatus used by the participants of the phenomena studied. The significance of this statement is particularly apparent when analyzing issues related to the application of private law in the public sector. Of course, the semantic proposals presented in this text do not provide full precision; when the adjective "public" is used, precision simply cannot be achieved. The author of this text is aware that the source of dilemmas in analyzing the issue of the application of private law in the public sector is not only the imperfect conceptual apparatus. This apparatus serves to describe the reality which is very complex in itself. As E. Ochendowski observes, the source of problems in capturing the essence of public administration "is not the inability to scientifically address this issue through the doctrine of administrative law, but it can be found in the characteristic features of the administration, in its areas of activity, its structure and forms of action, which are so diverse that it seems almost impossible to fully define them."¹¹⁴

Nevertheless, it appears that it is in the area of legal science that the dependence of research results on the adopted language rules is particularly evident compared to other empirical sciences. This text also proves that there is a mutual dependence here. The language convention adopted is the result of certain assumptions of substantive nature. Individual authors investigating phenomena in the field of public administration do not always realize this in a sufficient way.

Many a legal issue could be explained in a much more effective way if the researcher had sufficient methodological reflections on the language he uses, as well as on the language used by the participants of the phenomena studied. These participants include the legislator who is the holder of the legal language, law enforcement bodies (courts, public administration bodies), as well as parties to

¹¹³ See W. Taras, A. Wróbel, *W sprawie jednolitej...*, p. 137.

¹¹⁴ See E. Ochendowski, *Prawo administracyjne. Część ogólna*, Toruń 2006, p.23. See also L. Kaczmarek, *Ewolucja pojęcia administracji publicznej...*, p. 221, p. 229.

relations occurring in the public sector. This text has also attempted to show that in the case of the actions conducted by the legislator and the public bodies that apply the law, disturbing phenomena resembling manipulation of the semantic rules of the language of legal acts as well as the legal discourse may sometimes be observed. They may take the form of metaphors and instances of legal fiction.

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