

ŚLAWOMIR FUNDOWICZ

Katolicki Uniwersytet Lubelski Jana Pawła II

slawomir.fundowicz@kul.pl

ORCID: <https://orcid.org/0000-0001-5305-8239>

## LIABILITY UNDER ANTI-DOPING LAW IN PUBLIC LAW DOMAIN

**Abstract.** In Poland, the Act of April 21, 2017 on Combating Doping in Sport is in force. The new law raises new questions. One of the questions is whether, the combating doping in sport belongs to private law or public law. The dualistic division of law itself is problematic. The legal regulation of doping has undergone a process similar to criminal law, i.e. from private law to public law. A breakthrough in combating doping was the establishment of the World Anti-Doping Agency (WADA) in 1999. The new Polish act followed this path. The Act on Combating Doping in Sport provided the legal basis for the existence of the Polish Anti-Doping Agency (POLADA), as a state legal entity. POLADA is therefore a body governed by public law, which establishes anti-doping rules, controls and oversees compliance, authorises the use of prohibited substances or methods, and conducts disciplinary action for violation of anti-doping rules.

**Keywords:** private law; public law; doping; combating of doping; World Anti-Doping Agency (WADA); Polish Anti-Doping Agency (POLADA).

### INTRODUCTION

The legal regulation of doping has undergone a process similar to criminal law, i.e. from private law to public law. Originally, it was enough for athletes to make a statement that they have not used illicit methods to boost their fitness. A breakthrough in combating doping was the establishment of the World Anti-Doping Agency (WADA) in 1999. The Polish Act on Combating Doping in Sport from 2017 provided the legal basis for the existence of the Polish Anti-Doping Agency (POLADA), as a state legal entity.

By choosing one of the theories on the division of law into public law and private law, we can answer to questions: what is the nature of the Polish Anti-

Doping Agency (POLADA) and to what area of law Polish anti-doping law should be included.

### DUALIST DIVISION OF LAW

It is commonly believed that the dualist division of law originates in Roman law. The classical statement on this dichotomy was included in the “Digest,” and was attributed to Ulpian:

Huius studii duae sunt positiones, publicum et privatum. Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim. Publicum ius in sacris, in sacerdotibus, in magistratibus consissint, privatum ius tripartitum est: collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus.<sup>1</sup>

The contemporary discussion of this distinction began in the 16th century<sup>2</sup> and revived in Germany in the 19th century. As a matter of course, nineteenth-century literature considered as a fundamental problem the distinction between public law and private law as associated with the new understanding of the state government. New theories were proposed to this end. As early as 1904, Holliger was able to distinguish 17 theories on this subject, which he systematised in two groups:

a) The distinctive criterion is beyond a legal norm, e.g. in the legislative technique or in the organisation of legal protection institutions;

b) The distinctive criterion lies within a legal norm itself, e.g. in the history of the establishment of a legal norm, in the extent to which a legal norm is mandatory or in the objective or subjective relations construed by a legal norm.<sup>3</sup>

<sup>1</sup> D 1, 1, 1, 2. There is a dispute in Roman law studies over the authenticity of the statement quoted; cf. H. MÜLLEJANS, *Publicus und Privatus im Römischen Recht und im älteren Kanonischen Recht unter besonderer Berücksichtigung der Unterscheidung Ius publicum und Ius privatum*, München: M. Hueber 1961, p. 7ff.; E. MOLITOR, *Über öffentliches Recht und Privatrecht. Eine rechtssystematische Studie*, Karlsruhe: CF Müller 1949, p. 8f.

<sup>2</sup> Public law has been taught at universities since the beginning of the 17th century. Attempts have been made ever since to delimit the subject of public law in academic lectures in relation to the adjacent field of study, i.e. private law. One of the earliest known lectures devoted to the relationship between public law and private law was the inauguration lecture of Ulrich Obrecht in 1682 on his appointment as Dean of Institution and Public Law at the Faculty of Law at the University of Strasbourg. M. BULLINGER, *Öffentliches Recht und Privatrecht. Studien über Sinn und Funktionen der Unterscheidung*, Stuttgart: Kohlhammer 1968, p. 8.

<sup>3</sup> J. HOLLIGER, *Das Kriterium des Gegensatzes zwischen dem öffentlichen Recht und dem Privatrecht dargestellt im Prinzip und in einigen Anwendungen mit besondere Berücksichtigung des schweizerischen Rechtes*, Doktordisseration, Zürich 1904, p. 11ff.

In 1985, I. von Münch argued that the number of known theories of this issue varied between 20 and 30.<sup>4</sup>

## 2. IMPORTANCE OF DICHOTOMOUS DIVISION OF LAW

Literature tended to underrate the importance of the distinction between public law and private law. For authors such as Martin Bullinger,<sup>5</sup> Gerd Rinck,<sup>6</sup> or Joachim N. Stolterfoht<sup>7</sup> this distinction was not valid for the whole law but only for singular issues, and in particular for determining the admissibility of a legal action, as a historically justified separation of legal material.<sup>8</sup> A similar position is taken by those authors who, though they do not deny the importance of the dichotomous division of law, see its influence primarily in putting legal actions in order.<sup>9</sup>

Reducing the division of law into public law and private law to a simple phenomenon of organisation of the judiciary stems from a narrow understanding of the presented problem. It is primarily about the diversity of forms of action in both legal areas.

The distinction between private and public law is also relevant when defining supplementary assumptions and legal effects of a form of action chosen or to be chosen, and for the statutory damages relationship.

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<sup>4</sup> I. von MÜNCH, *Verwaltung und Verwaltungsrecht im demokratischen und sozialen Rechtsstaat*, [in:] H.-U. ERICHSEN, W. MARTENS (ed.), *Allgemeines Verwaltungsrecht*, Berlin-New York: Walter de Gruyter 1988, p. 16. On the dichotomous division of law: S. FUNDOWICZ, *Pojęcie osoby prawnej prawa publicznego*, "Przegląd Sejmowy" 1999, nr 2, p. 64ff; ID., *Dychotomiczny podział prawa*, "Samorząd Terytorialny" 2000, nr 1-2, p. 47ff.; ID., *Osoby prawne prawa publicznego w prawie polskim*, "Samorząd Terytorialny" 2000, nr 3, p 3ff.

<sup>5</sup> M. BULLINGER, *Öffentliches Recht und Privatrecht. Studien über Sinn und Funktionen Unterscheidung*, p. 106ff.; ID., *Öffentliches Recht und Privatrecht in Geschichte und Gegenwart*, München: FS Rittner 1991, p. 69ff.

<sup>6</sup> G. RINCK, *Wirtschaftsrecht: Wirtschaftsverfassung, Wirtschaftsverwaltung, Wettbewerbs- und Kartellrecht*, Köln: Carl Heymanns Verlag KG 1977, p. 5f.

<sup>7</sup> J. N. STOLTERFOHT, *Zur Rechtswegzuständigkeit bei der Geltendmachung legalziedierter Steueransprüche*, "Juristen Zeitung" 1975, p. 658ff.

<sup>8</sup> D. SCHMIDT, *Die Unterscheidung von privatem und öffentlichem Recht*, Baden-Baden: Nomos-Verlagsgesellschaft 1985, p. 45.

<sup>9</sup> F. BAUR, *Neue Verbindungslinien zwischen Privatrecht und öffentlichen Recht*, "Juristen Zeitung" 1963, 41ff.; W. JELLINEK, *Verwaltungsrecht*, Offenburg: Lehrmittel Verlag 1948, p. 45f.; W. RÜFNER, *Formen öffentlicher Verwaltung im Bereich der Wirtschaft*, Berlin: Lehrmittel Verlag 1967 p. 177f.; H.-P. RILL, *Zur Abgrenzung des öffentlichen und privaten Recht*, "Österreichische Zeitschrift für öffentliches Recht und Völkerrecht" 1961, p. 464.

The very content of a legal provision can often only be understood when it is attributed to a larger set of norms that can be termed “regulation”. Any regulation (e.g. tenancy law) defines the principles necessary for a proper understanding of each single legal provision of this regulation. With the principle that private law and general administrative law apply only to material relationships and legal provisions within their jurisdiction, the limitation of regulation becomes at the same time an auxiliary argument in favour of distinguishing between private law and public law.

### 3. DISCRIMINATING THEORIES

There are many theories that define public law and private law. There is no need to discuss all of them in this paper. It is worth, however, pointing out those that are most often applied and which still find many followers. These include the following theories: a) interest theory; b) advocate theory; c) subjection/subordination theory; d) tradition theory; e) competence theory; f) subject theory; g) combined theories; h) other theories.

Usually, however, law textbooks focus on three of these theories: the interest theory, the subjection theory, and the subject theory.

#### a) The interest theory

The historical point of departure for the interest theory is Ulpian’s famous statement in the Digest: “publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem.”<sup>10</sup> According to this theory, public law covers all the norms that serve the public interest (the interest of the state), while the norms of private law serve the interest of individuals (the private interest).<sup>11</sup>

Comprehensibility is a great advantage of this theory. It seems that there is no more obvious criterion than that public law is established in the public interest, and private law in the private interest. Moreover, the interest, and especially the public interest, belongs to the most current legal concepts.<sup>12</sup>

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<sup>10</sup> D 1, 1, 1 2.

<sup>11</sup> It was noted, however, that Ulpian distinguished public law on the grounds of the subject, the state, and private law on the grounds of the interest, the benefit (*utilitas*); cf. H. MÜLLEJANS, *Publicus und Privatus*, p. 18f. Therefore, the authors who refer to Ulpian give different criteria for the distinction, and different interpretations of his division; J. NOWACKI, *Prawo publiczne – prawo prywatne*, Katowice: Uniwersytet Śląski 1992, p. 9ff.

<sup>12</sup> Cf. P. HÄBERLE, »*Öffentliches Interesse*« als juristisches Problem, Bad Homburg: Athenäum 1970; H. SCHULTE, *Eigentum und öffentliches Interesse*, Berlin: Duncker & Humblot 1970.

It has long been pointed out in literature that the problem of the dichotomous division of law was replaced in the interest theory with the problem of a division of interest into public and private, which poses an equally, if not more, difficult question. It is often impossible to separate private interests from public interests, and to attribute specific legal provisions to only one interest.<sup>13</sup> It is not that a provision protects either a private interest or a public interest, since often these interests are not contradictory and may even be identical. Given the multitude of purposes and interests, the same legal provision can serve both the private interest and the public interest.<sup>14</sup> Moreover, in many public law provisions it is not possible to indicate even a prevailing public interest. The most notorious example is a subjective public right, which, according to its assumptions, is to rely precisely on the fact that a legal norm also serves private interests. Therefore, public law will always play an important role for private interests.<sup>15</sup> It was further noted that the whole body of law, by giving legal certainty and legal security, serves the public,<sup>16</sup> and so both private law and the fulfilment of all obligations under private law are also in the public interest.<sup>17</sup>

b) The subjection/subordination theory (*Subordinationstheorie*)

Until the 1950s, the subordination theory (*Subordinationstheorie*), also known as the subjection theory (*Subjektionstheorie*) or the higher value theory (*Mehrwerttheorie*), was dominant in German law studies. The most significant proponents of this theory were E. Forsthoff<sup>18</sup> and G. Jellinek.<sup>19</sup> For the advocates of this theory, the decisive criterion is the equality or subordination of the participants of a legal relationship. Private law relationships are characterised by the equality of subjects acting as parties, while in public law relationships one party occupies a superior position over the other. In the former case, a legal relationship emerges and continues as a result of congruent declarations of the parties, while

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<sup>13</sup> J. MIELKE, *Die Abgrenzung der juristischen Person des öffentlichen Rechts von der juristischen Person des Privatrechts*, : Doktordisertation, Hamburg 1965, p. 58; H. KELSEN, *Allgemeine Staatslehre: Studienausgabe der Originalausgabe 1925*, Wien: Mohr Siebeck 2019, p. 81.

<sup>14</sup> E. MOLITOR, *Über öffentliches Recht*, p. 30.

<sup>15</sup> H. J. WOLFF, O. BACHOF, R. STOBER, *Verwaltungsrecht I*, München: C.H. Beck 2017, p. 322; H. U. ERICHSEN, W. MARTENS (ed.), *Allgemeines Verwaltungsrecht*, p. 121; H. MAURER, *Allgemeines Verwaltungsrecht*, München: C.H. Beck 1994, pp. 144-147; D. SCHMIDT, *Die Unterscheidung*, p. 91.

<sup>16</sup> J. HOLLIGER, *Das Kriterium*, p. 61.

<sup>17</sup> J. MIELKE, *Die Abgrenzung*, p. 57; E. MOLITOR, *Über öffentliches Recht*, p. 30; H. U. ERICHSEN, W. MARTENS (ed.), *Allgemeines Verwaltungsrecht*, p. 16.

<sup>18</sup> E. FORSTHOFF, *Lehrbuch des Verwaltungsrechts*, München: C.H. Beck 1956, p. 113ff.

<sup>19</sup> G. JELLINEK, *Allgemeine Staatslehre*, Nabu Press 2012, p. 384ff.

in the other the party in a superior position may unilaterally both cause a legal relationship to emerge and interfere in the sphere of rights and obligations of the subordinate party by its own unilateral decisions.<sup>20</sup>

This theory is valid insofar as it related to classical public law (such as police law or tax law), characterised by the relationship of subordination of a citizen to the state power.<sup>21</sup> Therefore the constitutional and administrative obsolescence of this theory is emphasised.

The subordination theory conflicts with the constitutional principle of democracy, which prevents, in essence, a formation of relationships between the state and the citizen such that the citizen is subordinated to the state power. This “democratic inadmissibility” of the subjection theory is particularly evident in the subjective rights of individual citizens, arising from the democratic order itself (e.g. the democratic function of many constitutional rights, such as freedom of expression, freedom of the media, freedom of assembly and association). Subjective civil rights are characterised precisely by the lack of citizen’s subordination to the state.<sup>22</sup> The rejection of the subordination theory as an undemocratic one was postulated already by H. Kelsen, who pointed out that the distinction between superiority (or subordination) and equality was at the same time a distinction between forms of the state, namely between autocracy and monarchy as a form of the state of superiority and subordination on the one hand, and democracy and the republic as a form of the state of equality, on the other. It is precisely for this reason that H. Kelsen attributed political grounds or an ideological character to the subordination theory, and concluded that it aimed to strengthen the state power.<sup>23</sup>

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<sup>20</sup> “Der Gegensatz von Privat- und öffentlichem Recht kann auf den Grundgedanken zurückgeführt werden, daß im Privatrecht die einzelnen als grundsätzlich Nebengeordnete einander gegenüberstehen, es daher die Beziehungen der einzelnen als solcher ordnet, während das öffentliche Recht verhältnisse zwischen verschiedenen Herrschaftssubjekten oder die Organisation der Herrschaftssubjekte und deren Beziehungen zu den der Herrschaft Unterworfenen regelt.” G. JELLINEK, *Allgemeine Staatslehre*, p. 384.

<sup>21</sup> H. J. WOLFF, *Der Unterschied zwischen öffentlichem und privatem Recht*, “Archiv des öffentlichen Rechts” 76/3 (1950/51), p. 211f.

<sup>22</sup> D. SCHMIDT, *Die Unterscheidung*, p. 96f.

<sup>23</sup> H. KELSEN, *Allgemeine Staatslehre*, p. 86ff.; *Id.*, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik (Studienausgabe der 1. Auflage 1934)*, Tübingen: Mohr Siebeck 2008, p. 286; a similar contemporary view in M. ZULEEG, *Die Anwendungsbereiche des öffentlichen Rechts und des Privatrechts*, “Verwaltungsarchiv. Zeitschrift für Verwaltungslehre, Verwaltungsrecht und Verwaltungspolitik”, Bd 73 (1982) p. 391, and H. J. WOLFF, O. BACHOF, R. STÖBER, *Verwaltungsrecht I*, p. 98.

The subordination theory is utterly at variance with the theory of subjective public rights universally accepted today. Legal relationships under public law, that is, most commonly legal relationships between the state and the citizen, have the same structure as legal relationships under private law, where a subjective public right correlates with an obligation of the state.<sup>24</sup>

One may add further that this theory ignores the public service administration or administrative contracts or administrative agreements, where subordination is out of the question altogether, although these are undoubtedly institutions governed by public law. On the other hand, there are many instances of subordination relationships in private law, such as legal relationships under labour law or relationships between parents and children.<sup>25</sup>

### c) The subject theory

In view of the weaknesses of the interest theory and the subordination theory, the idea emerged very early that public law and private law should be separated by the criterion of subjects participating in a legal relationship. It was first termed the subject theory (Subjektstheorie) by Otto Mayer in its “Lehrbuch des Deutschen Verwaltungsrechts.” He wrote that public law was nothing more than the order of relationships, which involve a public authority subject as such, and therefore public administration itself.<sup>26</sup>

The contemporary version of the subject theory was announced by Hans J. Wolff in 1950.<sup>27</sup> This version was named the special rights theory (*Sonderrechtstheorie*).

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<sup>24</sup> N. ACHTERBERG, *Allgemeines Verwaltungsrecht. Ein Lehrbuch*, Heidelberg: C.F. Müller 1986, p. 315; D. SCHMIDT, *Die Unterscheidung*, p. 97f. This problem was also recognised by G. Jellinek. In his work on subjective public rights he departed from the subordination theory which he had still accepted in the “Allgemeine Staatslehre” and saw the difference between a subjective public right and a subjective private right by the material criterion according to the interest theory, namely in the prevalence of the public interest; cf. G. JELLINEK, *System der subjektiven öffentlichen Rechte*, Mohr Siebeck: Tübingen 2012, p. 53f.; G. JELLINEK, *Allgemeine Staatslehre*, p. 416ff.

<sup>25</sup> W. MARTENS, *Öffentlich als Rechtsbegriff*, Berlin, Zürich: Bad Homburg v. d. H. 1969, p. 91f.; H. MAURER, *Allgemeines Verwaltungsrecht*, p. 28.

<sup>26</sup> O. MAYER, *Lehrbuch des Deutschen Verwaltungsrechts*, Bd. 1, Leipzig: Duncker & Humblot 1895, p. 16. The criterion of the subject is already mentioned in F. C. v. Savigny, who wrote: “bleibt zwischen beiden Gebieten ein fest bestimmter Gegensatz darin, daß in dem öffentlichen Recht das Ganze als Zweck, der Einzelne als untergeordnet erscheint, anstatt das in dem Privatrecht der einzelne Mensch für sich Zweck ist, und jedes Rechtsverhältniss sich nur als Mittel auf sein Daseyn oder seine besonderen Zustände bezieht”; F.C. von SAVIGNY, *System des heutigen Römischen Rechts*, Bd. 1, Berlin: Veit 1840 p. 22f.; cf. J. NOWACKI, *Prawo publiczne*, p. 23f.

<sup>27</sup> H. J. WOLFF, *Der Unterschied*, p. 205ff.

Hans J. Wolff observed that there were legal norms that concerned, granted powers to or imposed obligations on only public authority subjects or bodies. It is these that compose public law. This is thus a special law of public management, or administration. It is not about whether an action is taken by contract or by privilege, but about the legal norm on which a claim is based. Those obligations, rights, claims and legal relationships fall under public law, which refer to a public special legal norm, and only insofar they do so. In cases of doubt, it is therefore about the legal norm on which a claim or an obligation has been or may be based. When any private person can rely on a legal norm in their claim against any other private person, the claim falls under private law. And when a subject of public management or administration is involved in the facts concerned, or when powers or obligations vest in a public authority subject or a public administration body, then the claim or obligation falls under public law.<sup>28</sup>

German law studies, however, concluded that the state could participate in private law relationships on equal terms as natural persons, also together with natural persons.<sup>29</sup> This thesis required a modification of the special rights theory. It was not enough to declare that a specific legal norm was addressed to a public authority subject. The decisive factor should be whether the public authority subject was, in that capacity, empowered or obliged. The modification proposed by O. Bachof was termed as the assignment theory (*Zuordnungstheorie*)<sup>30</sup> or the material special rights theory (*materielle Sonderrechtstheorie*), whereas the original definition was termed the formal special rights theory (*formale Sonderrechtstheorie*).<sup>31</sup> The assignment theory allows for certain demarcation in many doubtful cases. It suffices if one of those in whom powers vest under a legal norm, or on whom obligations are imposed, is a subject of the state power. In this case, according to the assignment theory or the special rights theory, such legal norm belongs to public law, since the legal norms establishing such subjects, by giving them a specific legal position, (e.g. public law corporations), simultaneously assign relevant obligations and powers to them. These subjects are defined without the use of the terms “authority” or “the public”, so the assignment theory

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<sup>28</sup> “Öffentliches Recht ist der Inbegriff derjenigen Rechtssätze, welche nur solche Subjekte berechtigen oder verpflichten, die ausschließlich durch Rechtsätze und Staatsakte bestimmt sind, oder die auf Grund eines Tatbestandes berechtigen oder verpflichten, der nur einem solchem Subjekt zurechenbar ist.” H. J. WOLFF, *Der Unterschied*, p. 210.

<sup>29</sup> D. SCHMIDT, *Die Unterscheidung*, p. 107.

<sup>30</sup> H. J. WOLFF, O. BACHOF, R. STÖBER, *Verwaltungsrecht I*, pp. 200-205; D. SCHMIDT, *Die Unterscheidung*, p. 111.

<sup>31</sup> D. EHLERS, *Verwaltung und Verwaltungsrecht im demokratischen und sozialen Rechtsstaat*, [in:] H.-U. ERICKSEN, W. MARTENS (ed.), *Allgemeines Verwaltungsrecht*, p. 28 ff.



escapes the *definitio per idem* error, or the circular reasoning error.<sup>32</sup> It is not burdened with the *petitio principii* error,<sup>33</sup> as the subject's qualification is not reasoned from the legal norm to be applied. One cannot accuse it of legitimising any legal or actual monopoly either, especially any duress in contract, since any such monopoly may also arise for private persons and relationships under private law.<sup>34</sup>

The subject theory is further complemented by the conflict of law rules proposed by Christian Pestalozza.<sup>35</sup> The first rule defines public law as a mandatory special law for the state. Private law norms are binding on the state where public law is missing, or where the application of a private law norm is expressly or implicitly permitted. The concept of special law is therefore of dual meaning, i.e.

- a) as the assignment of a relevant norm to the state;
- b) as the mandatory application of the norm to the state<sup>36</sup>.

The second conflict of law rule provides that private law is a possible special law of the individual. Just as public law is in principle a mandatory special law for the state, private law may also appear to bear features of a special law. Private law also includes conflict of law rules, i.e. the rules on who may act in the capacity of a private law subject. Any civil law norm can be questioned whether it is applicable to the state at all (or to everyone, according to the special rights theory) or whether it is addressed only to private persons given its meaning and association. Any private law action of the state faces a double barrier of the conflict of law rules, which provide for options for the state to move beyond the borderline of its special law (first barrier), which does not mean, however, the state may apply any private law norm (second barrier). It can thus be concluded that private law applies only to the state in a subsidiary way.<sup>37</sup>

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<sup>32</sup> This accusation in: N. ACHTERBERG, *Allgemeines Verwaltungsrecht*, p. 10.

<sup>33</sup> This accusation in: H. WAGNER, *Amts- oder Fiskalhaftung*, "Juristen Zeitung" 1968, 246.

<sup>34</sup> H. J. WOLFF, O. BACHOF, R. STÖBER, *Verwaltungsrecht I*, p. 201f.

<sup>35</sup> Ch. PESTALOZZA, *Kollisionsrechtliche Aspekte der Unterscheidung von öffentlichem Recht und Privatrecht. Öffentliches Recht als zwingendes Sonderrecht für den Staat*, "Die Öffentliche Verwaltung. Zeitschrift für Öffentliches Recht und Verwaltungswissenschaft" 1974, p. 188ff. More on this issue in Ch. PESTALOZZA, *"Formenmißbrauch" des Staates. Zu Figur und Folgen des "Rechtsmißbrauchs" und ihrer Anwendung auf staatliches Verhalten*, München: C.H. Beck 1973.

<sup>36</sup> Ch. PESTALOZZA, *Kollisionsrechtliche*, p. 190.

<sup>37</sup> *Ibid.*, p. 191.

#### 4. INTERNATIONAL LEGAL REGULATION OF DOPING

The legal regulation of doping has undergone a process similar to criminal law, i.e. from private law to public law. Originally, it was enough for athletes to make a statement that they have not used illicit methods to boost their fitness. Such statements were first introduced in 1928 by the International Amateur Athletic Federation, then the International Cycling Federation, the International Football Federation, and finally the International Olympic Committee. The International Cycling Union was the first to develop a list of prohibited substances, including, but not limited to, strychnine, amphetamine, narcotic analgesics. It also defined the rules for anti-doping control. This was accomplished in 1967. In the same year, however, there was also a fatal case associated with the use of doping at one of the stages of the Tour de France. Tommy Simpson from England died after taking amphetamine while climbing Mont Ventoux.<sup>38</sup> Therefore, doping issues were regulated by the internal laws of sports associations.

1967, however, became a turning point also because the International Olympic Committee established the Medical Commission. The Chairman of the Commission, Prince Alexandre de Merode of Belgium, defined its objectives as protection of athletes' health, sports ethics, and equal opportunities for all competing athletes, in the spirit of fair play. The IOC Medical Commission began its doping controls from the Olympic Games in Mexico in 1968. In Munich in 1972, systematic examinations of athletes were conducted, with more than two thousand tests completed, which detected seven cases of doping with amphetamine, ephedrine and coramine. Doping with anabolics and hormones was on a rising tide at that time. Tests for these were first used at the Montreal Olympic Games in 1976, where 8 cases of doping with substances of this type were detected.<sup>39</sup> However, this was still the internal law of sports organisations, even if one with a universal coverage.

A breakthrough in combating doping was the establishment of the World Anti-Doping Agency (WADA) in 1999, which took over the powers for anti-doping control and listing of prohibited substances and methods. Since 1 January 2004, the WADA has become the main organisation in charge of the fight against doping on the Olympic Games and championship levels, at the events organised by individual national and supranational sports federations, to replace the IOC Medical Committee. The first Olympic Games, where the controls were run by the WADA and based on the World Anti-Doping Code, were the Athens Olympic

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<sup>38</sup> S. FUNDOWICZ, *Prawo sportowe*, Warszawa: Wolters Kluwer 2013, pp. 217-218.

<sup>39</sup> *Ibid.*, p. 218.

Games in 2004. Almost 3,500 blood and urine samples were analysed, resulting in the disqualification of 17 athletes. The WADA gained a fundamental recognition in international law through the International Convention against Doping in Sport of 19 October 2005 (OJ of 2007, no. 142, item 999), which was adopted during the 33rd session of the General Conference of the UN Educational, Scientific and Cultural Organisation (UNESCO) in Paris. The Convention has two annexes and three appendices. Annex 1 covers The Prohibited List – International Standard. Annex 2 sets out the Standards for Granting Therapeutic Use Exemptions. Appendices comprise: World Anti-Doping Code, International Standard for Laboratories, International Standard for Testing and Investigations. However, the appendices do not form an integral part of the Convention but are attached to it for informational purposes only. The documents created by the WADA are today widely recognised as standard in the fight against doping. Although the WADA is a foundation established under Swiss law, its significance goes far beyond the private law dimension suggested by its legal personality. T. Dauerman notes that the Agency is an entity created under Swiss private law, which may not entail difficulties in relation to sports organisations and associations but is sometimes troublesome in the relationship between the Agency and state governments. The Copenhagen Declaration envisaged that the Agency would become a subject of international law, treated on the basis of partnership between states and international organisations. At the 2006 Munich International Symposium on Biomedical Side Effects of Doping, Paul Mariott-Lloyd stated: “State governments, given the status of a private foundation enjoyed by the WADA, have not been obliged to adopt its anti-doping solutions, they could only express their moral support for the Code's principles by signing the Copenhagen Declaration.” In any case, the WADA is an independent international organisation whose primary objectives are to monitor, harmonise and update all legally available methods of combating doping. On 5 March 2003 the WADA Foundation Board adopted the World Anti-Doping Code. The set of WADA anti-doping rules together with the international standards and best practice models constitute the World Anti-Doping Program. International standards concerning the various technical and operational areas in the anti-doping program are developed in consultation with signatories and governments, and then endorsed by the WADA. The international standards aim to harmonise the activities undertaken by the anti-doping organisations responsible for the specific technical and operational parts of anti-doping programs. Under the Code, compliance with the international standards is mandatory. The international standards may be revised from time to time by the WADA Executive Committee following well-founded consultation with the signatories and governments. Unless the Code provides otherwise, the international standards

and any revisions thereto become effective on the date stated in the specific international standard or revision. The WADA Executive Committee is empowered to revise the international standards without having to amend the Code or the rules and regulations of individual parties concerned. Best practice models and guidelines based on the Code are intended as solutions practicable in different areas of combating doping. The models are recommended by the WADA and made available to the signatories upon request, though their application is not mandatory. In addition to the models of anti-doping documentation, the WADA also offers the signatories some training assistance. The Anti-Doping Code itself is a fundamental and universal document underlying the World Anti-Doping Program.<sup>40</sup>

International law thus provides for a special role for the World Anti-Doping Agency, which oversees the uniformity of anti-doping regulations and their correct application. In spite of the private law character of its personality, it operates by means characteristic of public law and is universally recognised in this capacity by states, the International Olympic Committee and the Sports Federations.

## 5. COMBATING DOPING IN POLISH LAW

The Polish doctrine of law has recognised that different types of liability may arise as a result of the use of doping. M. Bojarski notes that in the cases of doping athletes are subject to international rules. According to the World Anti-Doping Code, the use of doping by an athlete during a competition may result in the cancellation of the achieved result. The cancellation may apply to the results not only of the competition, during which the athlete was confirmed for having used a prohibited substance but also of other competitions. Those who use doping are liable to up to two years of disqualification. For repeated use of doping, an athlete is liable to lifetime disqualification. This also applies to an attempt to use a prohibited substance or a mere possession thereof.<sup>41</sup> Following the accepted distinction of the rules of the game between the technical and disciplinary rules, in the sports sphere A. Wach distinguishes the professional sport liability and

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<sup>40</sup> S. FUNDOWICZ, *Prawo sportowe*, pp. 223-227. More: S. GARDINER (ed.), *Sports Law*, Routledge: London and New York 2012 (4), pp. 363-392; J. ADOLPHEN, M. NOLTE, M. LEHNER, M. GERLINGER (ed.), *Sportrecht in der Praxis*, Stuttgart: Verlag W. Kohlhammer 2012, pp. 247-257, 319-398; J. FRITZWEILER, B. PFISTER, T. SUMMERER, *Praxishandbuch Sportrecht*, München: C.H. Beck 2014, pp. 810-829; M. LECIAK (ed.), *Prawo sportowe*, Warszawa: C.H. Beck 2018, pp. 343-369.

<sup>41</sup> M. BOJARSKI, *Doping w sporcie – prawnokarna ocena zjawiska*, [in:] A. J. SZWARC (ed.), *Ustawa o sporcie*, Poznań: Polskie Towarzystwo Prawa Sportowego 2011, p. 108.

disciplinary liability. The former provides for a response to a violation of the technical rules of a particular sport discipline. This includes a warning, a reprimand or a temporary disqualification of an athlete, a cancellation of a result or a record. The latter concerns a violation of the anti-doping rules.<sup>42</sup> A violation of anti-doping rules entails not only the consequences under sports law, such as disqualification, but also, to a certain limited extent, criminal liability.<sup>43</sup>

The Polish Act on Sport of 25 June 2010<sup>44</sup> originally defined the competent authority for combating doping in sport. It was the Commission against Doping in Sport. However, the 2010 Act did not entrust the Commission with the possibility of establishing anti-doping rules. These were to be developed by individual Polish sports associations. It was not until 2015, after many Polish sports associations were accused of inactivity and received various reminders from representatives of the International Olympic Committee, that the Act on Sport was supplemented with a provision enabling the Commission against Doping in Sport to establish anti-doping rules applicable to all Polish sports associations. The next step was the adoption of the Act on Combating Doping in Sport of 21 April 2017.<sup>45</sup> The new Act pursues the following objectives:

- 1) defining the concept of doping in sport;
- 2) establishing the Polish Anti-Doping Agency, giving it a legal personality, defining the scope of its activity and identifying its bodies and their responsibilities;
- 3) defining requirements for doping inspectors, their training programs and their powers and responsibilities;
- 4) defining the principles of financial management of the Agency;
- 5) introducing the obligation on athletes to submit to doping controls during and outside the competition;
- 6) setting up an independent Disciplinary Board at the Agency;
- 7) defining the rules of the Agency's cooperation with the Police, Customs Service, Border Guard, Military Police and prosecutor offices to the extent necessary to establish disciplinary liability for doping in sport, and with the minister competent for healthcare insofar as doping in sport remains a matter of public health;

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<sup>42</sup> A. WACH, *Odpowiedzialność prawna za stosowanie dopingu w sporcie*, "Studia Iuridica" 2008, vol. 48, pp. 374-375.

<sup>43</sup> S. FUNDOWICZ, *Prawo sportowe*, p. 228.

<sup>44</sup> Consolidated text: Journal of Laws of 2017, item 1463.

<sup>45</sup> Journal of Laws item 1051.

8) defining the rules for awarding a special-purpose grant to the Institute of Sport – the National Research Institute for the tasks related to maintaining the World Anti-Doping Agency's accreditation and purchasing doping testing equipment;

9) amending penal provisions on doping in sport;

10) introducing the concept of public interest in the context of the Agency's activities;

11) granting the Agency's doping inspectors the protection provided for in the Act of 6 June 1997 – the Penal Code (Journal of Laws of 2016, item 1137 and 2138) for public officials.<sup>46</sup>

The Act thus provided the legal basis for the existence of the Polish Anti-Doping Agency (POLADA), as a state legal entity, whose tasks are, among others:

1) to determine the principles and procedure of doping control;

2) to lay down disciplinary rules regarding doping in sport;

3) to plan and conduct in-competition and out-of-competition doping control;

4) to train and develop the competence of Agency's doping inspectors;

5) to authorise the use of a prohibited substance or prohibited method by an athlete;

6) to prepare and implement education, training and information programs concerning the combating of doping in sport;

7) to notify athletes or other persons collaborating with the person assisting in the preparation for sports competition of the status of that person and of the consequences of collaborating with them;

8) to issue opinions on draft laws and draft regulations on combating doping in sport;

9) to cooperate with foreign entities involved in combating doping in sport;

10) to cooperate with public administration bodies, research institutes and other entities competent in the field of research supporting the combating of doping in sport.<sup>47</sup>

POLADA is therefore a body governed by public law, which establishes anti-doping rules, controls and oversees compliance,<sup>48</sup> authorises the use of prohibited

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<sup>46</sup> Print No. 1184, Government draft law on combating doping in sport; <http://orka.sejm.gov.pl/Druki8ka.nsf/0/9E8501FEA895DC14C125809D004C3C98/%24File/1184.pdf>

<sup>47</sup> Articles 4-5 of the Act on Combating Doping in Sport.

<sup>48</sup> It is noteworthy that the Agency, when conducting doping controls during a competition or out of the competition, performs a public benefit task as referred to in Article 23 (1) (4) of the Act on the Protection of Personal Data of 29 August 1997 (Journal of Laws of 2016, item 922), the purpose of which is to ensure the fairness of sporting competition, the disclosure of offences

substances or methods, and conducts disciplinary action for violation of anti-doping rules.<sup>49</sup>

The Act on combating Doping in Sport also took over the penal provisions, which had been previously included in the Act on Sport.<sup>50</sup>

## CONCLUSION

In view of the weaknesses of the interest theory and the subordination theory, the idea emerged very early that public law and private law should be separated by the criterion of subjects participating in a legal relationship. It was first termed the subject theory (*Subjektstheorie*). The contemporary version of the subject theory was announced by Hans J. Wolff in 1950. This version was named the special rights theory (*Sonderrechtstheorie*). Hans J. Wolff observed that there were legal norms that concerned, granted powers to or imposed obligations on only public authority subjects or bodies. It is these that compose public law. This is thus a special law of public management, or administration.

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referred to in the Act and the protection of the health of athletes (Article 29 (1) of the Act) and that the inspectors, when performing their duties or in connection therewith, enjoy protection provided for public officials and are subject to criminal liability laid down for public officials under the rules set out in the Act of 6 June 1997 – Penal Code (Journal of Laws of 2016, item 1137, as amended. (Article 28 (5) of the Act)

<sup>49</sup> The Disciplinary Board (Article 35 (1)) acts independently and impartially at the Agency.

<sup>50</sup> “Article 48. 1. Any person, who gives a minor athlete a prohibited substance as listed in group S1, S2 or S4 of Annex 1 to the Convention referred to in Article 2 (1), shall be liable to a fine, restriction of liberty or imprisonment of up to 3 years. 2. Any person, who gives an athlete, without their knowledge, a prohibited substance as listed in group S1, S2 or S4 of Annex 1 to the Convention referred to in Article 2 (1), shall be liable to the same sanction. Article 49. 1. Any person, who makes available to third persons, for consideration or free of charge, a prohibited substance as listed in group S1, S2 or S4 of Annex 1 to the Convention referred to in Article 2 (1), or stores it to make it available to third persons, for a consideration or free of charge, without holding a marketing authorisation issued pursuant to Article 3 (1) or (2) of the Act of 6 September 2001 – Pharmaceutical Law (Journal of Laws of 2016, item 2142 and 2003), shall be liable to a fine, restriction of liberty or imprisonment of up to 3 years. 2. Any person, who, without the authorisation referred to in Article 70 (4), Article 74 (1) or Article 99 (1) of the Act of 6 September 2001 – Pharmaceutical Law, markets a prohibited substance as listed in group S1, S2 or S4 of Annex 1 to the Convention referred to in Article 2 (1), shall be liable to the same sanction. 3. Any person, who in violation of Article 68 of the Act of 6 September 2001 – Pharmaceutical Law imports or brings into the Territory of the Republic of Poland a prohibited substance as listed in group S1, S2 or S4 of Annex 1 to the Convention referred to in Article 2 (1), shall be liable to the same sanction.” The provisions refer to, as a matter of course, the International Convention against Doping in Sport of 19 October 2005. More about the Polish anti-doping system: M. LECIAK (ed.), *Prawo sportowe*, pp. 370-380.

Polish Anti-Doping Agency (POLADA) is a body governed by public law, which establishes anti-doping rules, controls and oversees compliance, authorises the use of prohibited substances or methods, and conducts disciplinary action for violation of anti-doping rules

Therefore, there should be no doubt that the Polish regulation on combating doping in sport falls within the scope of public law; a specialised state entity is set up, which unilaterally formulates anti-doping law and enforces it in the disciplinary terms, applying the rules of professional sport liability, unilaterally grants exemptions and enjoys protection of its activity under public law.

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## PUBLICZNOPRAWNY CHARAKTER ODPOWIEDZIALNOŚCI W PRAWIE ANTYDOPINGOWYM

### Streszczenie

W Polsce obowiązuje ustawa z dnia 21 kwietnia 2017 r. o zwalczaniu dopingu w sporcie. Nowe prawo stawia nowe pytania. Jedno z pytań dotyczy, czy zwalczanie dopingu w sporcie należy do prawa prywatnego czy publicznego. Już sam dualistyczny podział prawa jest problematyczny. Na początku XX wieku można było wyróżnić 17 teorii dotyczących tego rozróżnienia, a dziś wskazuje się nawet na 30 takich teorii. Ponadto w literaturze pojawiła się tendencja do nieprzyznawania rozróżnieniu między prawem publicznym i prawem prywatnym zbyt dużego znaczenia. Dominujące znaczenie mają trzy teorie: teoria interesu, teoria podporządkowania i teoria podmiotu. Zgodnie z ustaleniami ostatniej z nich są takie normy prawne, które dotyczą, uprawniają lub zobowiązują tylko podmioty władzy publicznej lub ich organy. One właśnie tworzą prawo publiczne. Jest to więc prawo specjalne zarządu lub administracji publicznej. Przełomem w zwalczaniu dopingu było powołanie w 1999 r. Światowej Agencji Antydopingowej (WADA). Tą drogą poszła polska ustawa. A jest to droga podobna do ewolucji prawa karnego, tj. od prawa prywatnego do prawa publicznego. W Polsce utworzona została Polska Agencja Antydopingowa (POLADA) jako państwowa osoba prawna. POLADA jest podmiotem prawa publicznego, który ustanawia reguły antydopingowe, kontroluje i czuwa nad ich przestrzeganiem, wyraża zgodę na stosowanie substancji lub metod zabronionych, prowadzi postępowania dyscyplinarne za naruszenie przepisów antydopingowych. Nie powinno więc budzić wątpliwości, że polska regulacja dotycząca zwalczania dopingu w sporcie wpisuje się w prawo publiczne: powołany jest wyspecjalizowany podmiot państwowy, który jednostronnie kształtuje prawo antydopingowe i je egzekwuje w zakresie dyscyplinarnym, stosując zasady odpowiedzialności sportowej, jednostronnie też zwalnia z jego stosowania, korzysta z publicznoprawnej ochrony w swojej działalności.

**Słowa kluczowe:** prawo prywatne; prawo publiczne; doping; zwalczanie dopingu; Światowa Agencja Antydopingowa (WADA); Polska Agencja Antydopingowa (POLADA).