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The constitutionalisation and Europeanisation of private law as key concepts in the contemporary general theory of the state and the study of constitutional law in the EU from the perspective of Central and Eastern European countries

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Abstract
The author puts forward several hypotheses and verifies them. Three of them are the most important. Firstly, despite the fact that Europeanisation and constitutionalisation are broad concepts that have ramifications in all areas of law, their most significant manifestations nowadays pertain to private law. Secondly, the constitutionalisation and Europeanisation of private law have not only become crucial issues in contemporary civil law theory, but also in the contemporary theory of the state and constitutional law studies. This hypothesis can also be reformulated as follows: civil law, through its constitutionalisation and Europeanisation, has become one of the key issues in the contemporary theory of the state and constitutional law studies. The author notes that perhaps the most characteristic phenomenon within the constitutionalisation and Europeanisation of the law is the horizontal application of principles and values of constitutional rank. Yet horizontal relations are, by definition, the domain of private law. Thirdly, this is the first time in European history that private law has been so programmatically linked to the emergence of a supranational structure – which is what the EU is currently developing into. This last hypothesis contains a certain paradox, because the view has long been held that classic civil law is by definition the law of a free society, which could at least theoretically exist without a state. It is therefore necessary to ask how this entanglement of private law in the process of European integration affects private law, that is, its classic role and functions. Therefore, the author also tries in the last part of the text to assess the constitutionalisation and Europeanisation of private law from the perspectives of the study of private law, the general theory of the state and the study of constitutional law.

Keywords
Constitutionalisation of private law, Europeanisation of private law, Division into private and public law, Interdisciplinary and eclectic research methods in legal sciences

1. Introduction – Research problems and hypotheses

The classic legal scholarship that prevailed in the first half of the 20th century was characterised by a dichotomous division between public and private (civil) law.1 These two branches of the legal system were treated as contraries, and their regulatory spheres were not supposed to overlap. As a consequence, this division became absolutised.[2] In principle, the state was reserved for the analysis of public law specialists.[3] On the other hand, public law specialists were not supposed to be interested in civil-law issues. As Franz Bydlinski observed, the natural environment or the native scope of the application of civil law (Kernbereich) is found in relations exclusively between private individuals, i.e. natural persons and the organisational entities created by them.[4] As Bydlinski went on to write,[5] civil law developed in relationships between private individuals in a sphere separate from, or even in opposition to, the state. Consequently, private law is viewed as a branch of law that could exist even without the existence of the state. For experts in civil law, issues related to the state and its system were considered a proverbial terra incognita.

In turn, matters associated with the constitution were traditionally assigned to public law.[6] This way of thinking about the constitution and constitutional law is epitomised by Fritz Werner's assertion that "administrative law is concretised constitutional law".[7]

The early stages of the European Community appear to have confirmed this separation of private and public law. As has been noted by Maciej Szpunar, the First Advocate General of the EU, European Community law (EU law) has its roots in public law, as it was initially a part of international law and was based on agreements between states. Initially, Community officials were not interested in private law, and even deliberately ignored it. Private law was treated as

1 The terms "private law" and "civil law" are usually treated as synonyms in continental Europe. Sometimes, however, specialists in comparative law contrast "continental law" (civil law) with Anglo-Saxon law (common law). See R Mańko, *Prawo prywatne w Unii Europejskiej. Perspektywy na przyszłość* [Private Law in the European Union: Future Prospects] (Podyplomowe Studium Prawa Europejskiego UW 2004) 93. As Mańko notes, the term "private law" was not used during the period of socialism. It was accused of being synonymous with "capitalist law". Moreover, it referred to the division into public and private law, which was denied in socialism. The term "civil law" was believed to be more neutral and free of these contested legacy issues. See R Mańko, 'The Culture of Private Law in Central Europe after Enlargement: A Polish Perspective' (2005) European Law Journal 11(5), 536.

2 The wording "absolutising the division into public and private law" appears in the German literature and describes the phenomenon of exaggerating the significance of this division. See H de Wall, *Die Anwendbarkeit privatrechtlicher Vorschriften im Verwaltungsrecht* (Mohr Siebeck 1999) 61.

3 Even public entities' use of civil-law instruments was considered a subject reserved for specialists of public law. This belief was most firmly established in France. In Germany, this conviction has contributed to the development of *Verwaltungsprivatrecht*. See R Szczepaniak, 'Methodology for Applying Private Law in the Public Sector' in R Szczepaniak (ed), *Constitutional Barriers to the Applicability of Private Law in the Public Sector: A Comparative Study with Particular Emphasis on Polish and German Law* (Wydawnictwo Naukowe UAM 2020) 512–518, 532–534.

4 F Bydlinski, 'Kriterien und Sinn der Unterscheidung von Privatrecht und öffentlichem Recht' (1994) Archiv für die civilistische Praxi 194(4), 339.

5 Ibid., 319 et seq.

6 See P Radziewicz, 'Pojęcie horyzontalnego skutku norm konstytucyjnych – uwagi wprowadzające z perspektywy prawa konstytucyjnego' [The Concept of the Horizontal Effect of Constitutional Norms: Introductory Remarks from the Perspective of Constitutional Law] in A Młynarska-Sobaczewska, P Radziewicz (eds), *Horyzontalne oddziaływanie Konstytucji Rzeczypospolitej Polskiej oraz Konwencji o ochronie praw człowieka i podstawowych wolności* [Horizontal Impact of the Constitution of the Republic of Poland and the Convention for the Protection of Human Rights and Fundamental Freedoms] (Biuro Trybunału Konstytucyjnego 2015) 44.

7 F Werner, 'Verwaltungsrecht als konkretisiertes Verfassungsrecht' (1959) Deutsches Verwaltungsblatt, 527.

the domain of the national legislatures, in accordance with the subsidiarity principle.[8] These officials tended to underestimate the specificity of private law, and therefore, they treated private law with some mistrust. For many of them, traditional civil codes were associated with nation states and the reinforcement of national identity, while the European integration project aimed at something entirely different: the merging of national identities to create something greater.[9]

Moreover, from the earliest days of the Community, the central point of interest was the common market, which operated on the basis of community freedoms. Any restrictions on these freedoms were inherently of a public-law nature; as a result, community law focussed on public law.[10] Consequently, everything related to private law in Europe, according to the classic approach, should be somewhat on the periphery of the theory of the state, interstate relations and constitutional law. Despite this, we are currently witnessing a strong contrary tendency in Europe: private law is becoming increasingly important for the functioning of the EU and Member States, as well as for relations between states and the EU.

It seems that nowadays private law is becoming progressively more entangled in state and constitutional matters within the EU. "The constitutionalisation of private law" and "the Europeanisation of private law" are phrases frequently used in legal discourse to denote this entanglement. This observation inspires the hypothesis that this new trend is connected with the constitutionalisation and Europeanisation of private law.

Constitutionalism is today one of the main legal phenomena on a global scale,[11] covering all areas of law.[12] The development of the European Community is an example of this globalisation. The author expresses the belief that this entanglement of private law at the EU level is so theoretically important and interesting that it deserves to be the subject of in-depth scientific

8 As H-W Micklitz states, the treaty does not contain a particular competence in private law (the principle of enumerated powers). See H-W Micklitz, 'European Regulatory and Private Law – Between Neoclassical Elegance and Postmodern Pastiche' in M Kuhli, M Schmidt (eds), *Vielfalt im Recht* (Duncker & Humblot, 2021) 80 ff. The view is even expressed in the literature that the EU legislator entering into the sphere of private law without a detailed legal basis expressed in the Treaty law is a violation of the principle of subsidiarity and the principle of proportionality. For more, see R Mańko, 'Kompetencje UE w dziedzinie prawa prywatnego w ujęciu systemowym' [EU Competences in the Field of Private Law from a Systemic Perspective] (2016) Kwartalnik Prawa Prywatnego vol. 1, 41–42.

9 M Szpunar, 'Private Law within the Process of Europeanisation' in R. Szczepaniak (ed), *The Constitutionalisation of Private Law versus the Europeanisation of Private Law: A Legal Study Based on the Example of Selected Countries of Central and Eastern Europe Belonging to the European Union* (Brill-Nijhoff, 2025) 55 et seq. See also H-W Micklitz (2021) 75 ff.

10 See M Szpunar (2025) 55 et seq.

11 See J Husa, 'Global Constitutionalism – A Critical View' (2016) Maastricht European Private Law Institute Working Paper no. 11, 2 ff. The author distinguishes two stages of the process of constitutionalisation. The first stage took place after World War II, when modern European national constitutions were created. They were characterised by far-reaching binding of the public authority by law. The second stage was clearly marked at the end of the 20th century, when transnational systems which protected human rights gained importance. Since then, we can talk about the global dimension of constitutionalisation. See ibid., 4. See also G Brüggemeier, 'Constitutionalisation of Private Law – The German Perspective' in T Barkhuysen, IS Lindbergh (eds), *Constitutionalisation of Private Law*, (Brill Nijhoff 2006) 77 ff.

12 See e.g. the very interesting arguments of Monika Florczak-Wątor on the right of citizens to the truth. M Florczak-Wątor, 'O potrzebie konstytucjonalizacji prawa obywateli do prawdy i konieczności poszerzenia ustawowego zakresu jego ochrony w czasach postprawdy' [On the Need to Constitutionalise the Right of Citizens to the Truth and the Necessity to Expand the Statutory Scope of its Protection in the Era of Post-truth] (2023) Przegląd Prawa Publicznego no. 11, 73–89.

research. There are several questions and research problems that arise today and have not yet been sufficiently analysed:

(1) What does this entanglement of civil law in state and constitutional affairs in the EU involve and how is it manifested?
(2) Does the observed phenomenon that private law is becoming progressively more entangled in state and constitutional matters within the EU relate to the constitutionalisation and Europeanisation of private law?
(3) Are the constitutionalisation and Europeanisation of private law methodologically similar and related phenomena?
(4) Do the issues of the constitutionalisation and Europeanisation of private law belong solely to the science of private law?
(5) How should the constitutionalisation and Europeanisation of private law be assessed from the perspective of private law science, as well as of the general theory of the state and the study of constitutional law?

Trying to answer these questions, the author puts forward the following hypotheses:

(1) The nature of the current stage of integration within the EU is characterised by a deep and multifaceted entanglement of issues of civil law in state and constitutional affairs.
(2) This entanglement takes the form of phenomena (processes)[13] called the constitutionalisation and Europeanisation of private law.
(3) The constitutionalisation and Europeanisation of private law are methodologically similar and related phenomena.
(4) At the EU level both processes (the constitutionalisation and Europeanisation of private law) serve the same goal, which is integration within the EU. Consequently, in the EU context, both processes should be considered together.
(5) The constitutionalisation and Europeanisation of private law become crucial issues in the contemporary theory of the state and constitutional law. In other words, civil law, through its constitutionalisation and Europeanisation, has become one of the key issues in the contemporary theory of the state and constitutional law studies in the EU.
(6) Despite the broad nature of Europeanisation and constitutionalisation, covering all fields of law, their most significant manifestations nowadays pertain to private law.
(7) This is the first time in European history that private law has been so programmatically linked to the emergence of a supranational structure – which is what the EU is currently developing into.
(8) The constitutionalisation and Europeanisation of private law have both positive and negative consequences for private law and the legal system in general.

The aim of this text is to verify these hypotheses. The author is aware that due to the complexity and extensiveness of this entanglement of private law at the EU level, to exhaustively analyse these issues it would be necessary to write a comprehensive monograph. This text should therefore be treated as a sketch for such an even more in-depth study.

13 In scientific publications, the terms "phenomenon" and "process" are often used interchangeably. "Phenomenon" is therefore understood to refer to various types of events, cases, experiences and reactions.

2. Clarification of terminology – the constitutionalisation of private law and the Europeanisation of private law

2.1. Introductory remarks

This section is very important for further considerations. To conduct the subsequent deliberations in a precise manner, it is necessary to specify what is understood by the key concepts of this paper: the constitutionalisation of private law and the Europeanisation of private law. This is no easy task because these phenomena are complex and ambiguous.[14] However, the author assumes that it makes sense to consider these two phenomena together at the EU level, since – at least in some respects – there are significant similarities between them. Europeanisation is, at least in part, a development of constitutionalisation (see hypotheses 3 and 4).

(1) The second goal of this section is to verify these hypotheses.

The phenomenon of constitutionalising private law occurred first, emerging within individual European countries. The primary example here is Germany and the jurisprudence of the German Constitutional Court.[15] Therefore, the analysis should start with the constitutionalisation of private law.

2.2. Constitutionalisation of private law

Constitutionalisation is not limited to a narrow meaning of *constitution*. The concept of the constitutionalisation of private law is usually understood as various manifestations of the impact of constitutional norms and norms of international law (principles, values, standards and basic human rights) on the creation and application of civil law.

The constitutionalisation of private law occurs in many senses; for the purposes of these considerations, three are significant: a) a specific methodology for applying private law; b) the process of the "axiologisation" of private law with values of constitutional rank occurring in a manner consistent with the adopted set of methods; and c) the effect of this process.

The constitutionalisation of private law is identified with the methodology of the axiologisation of private law. In other words, constitutionalisation implies a specific methodology for applying principles of constitutional rank in the domain of private law, i.e. in civil-law relations (at least there is an aspiration to develop such a methodology; whether this goal has been fully achieved is another matter). This typically involves the application of these principles as meta-norms, since they influence the interpretation of provisions of private law. This concerns the indirect horizontal effect of principles of constitutional rank. In the much rarer and more controversial case of direct horizontal effect, specific legal rights – including claims in civil-law relationships – are derived directly from principles (values) of constitutional rank.[16]

14 For more on the different understandings of the concepts of the constitutionalisation and Europeanisation of law, see M-L Paris, 'Europeanisation and Constitutionalisation: The Challenging Impact of a Double Transformative Process on French Law' (2010) Yearbook of European Law, 21–64.

15 Judgment of Federal Constitutional Court of 15 January 1958, BVerfGE 7 [1958].

16 As noted in the scholarly literature, the terms "values" and "principles" tend to be used interchangeably in the EU. See M Diaz Crego, R Mańko, W van Ballegooij, *Protecting EU Common Values within Ten Member States: An Overview of Monitoring Prevention and Enforcement Mechanisms at EU Level* (European Parliamentary Research Service 2020) 7.

Constitutionalisation cannot therefore be equated with both national and EU legislation. Legislation, or the enactment of laws, is of course the most direct way of shaping the law in the traditional continental (European) legal culture. Constitutionalisation, which emerged over 60 years ago as a programmatically new phenomenon in European legal culture, generally does not aim for such an impact. To some extent, constitutionalisation even remains in opposition to traditional legislation.[17] It is often identified with the competence and – at the same time – the imperative of ordinary courts directly applying the Constitution, in the sense that they have the right and duty to disregard an unconstitutional law. Of course, such court action is still extremely controversial in European legal culture, and is by no means universally accepted. Nevertheless, this approach is often advocated by the most active proponents of constitutionalisation. This is evident in the EU context.

It is also worth noting that nowadays a distinction is made between EU legal integration by legislative acts and EU legal integration by non-legislative methods. Constitutionalisation through case law is considered to be a non-legislative method of integration.[18] Constitutionalisation therefore refers to non-legislative methods of shaping the law, including influencing the content of the law. This influence primarily occurs at the stage of judicial application of the law. Thus, the issue of "judicial law" is one of the most significant aspects associated with the constitutionalisation of private law. The key concept for the constitutionalisation of private law is its axiologisation. It involves ethical values expressed through fundamental rights and principles of constitutional rank. It is assumed that these values (principles) of constitutional rank have an objective and universal character, and that, consequently, they should also be applicable horizontally, meaning in relationships between private individuals.[19]

Proponents of the constitutionalisation of private law set themselves a very ambitious task. Constitutionalisation is intended to be "a change in the reflection on law".[20] Constitutionalising the law is supposed to be a kind of methodology that encompasses all aspects of law, including its creation, application (judicial decisions), science and education. However, this phenomenon is most visible at the stage of applying the law. In constitutionalisation, as a specific methodology of the axiologisation of law, special emphasis is placed on methods of interpretation and the closely related rules of inference. The impact through interpretive rules is most typical of the indirect horizontal effect. However, constitutionalisation can also significantly shape the law, through the system of the sources of law. Within the constitutionalisation of private law there is an impact on

17 See C Busch, H Schulte-Nölke, 'Building a Bridge between Research and Practices: An Introduction to the Fundamental Rights Action Plan' in C Busch, H Schulte-Nölke (eds), *Fundamental Rights and Private Law* (Sellier European Law Publishers 2011) XV; C Busch, 'Fundamental Rights and Private Law in the EU Member States' in C Busch, H Schulte-Nölke (eds), *Fundamental Rights and Private Law* (Sellier European Law Publishers 2011) 23.

18 See C Busch, H Schulte-Nölke (2011) op. cit.; C Busch (2011) 23.

19 Judgment of Federal Constitutional Court of 15 January 1958, BVerfGE 7 [1958]. The Polish Constitutional Tribunal, following the example of the German Constitutional Court, also supports the idea that the Constitution is the source of a certain objective, an absolute system of values, and is applicable both in vertical (state–individual) and horizontal relationships. See the judgments of the Polish Constitutional Tribunal of 23 March 1999, K 2/98 (1999) OTK ZU 3, 38; of 8 October 2002, K 36/00 (2002) OTK-A 5, 63; of 9 July 2009, SK 48/05 (2009) OTK-A 7, 108.

20 M Safjan, 'Evolution or Revolution? Some Reflections on the Constitutionalisation and Europeanisation of Private Law' in R Szczepaniak (ed), *The Constitutionalisation of Private Law versus the Europeanisation of Private Law: A Legal Study Based on the Example of Selected Countries of Central and Eastern Europe Belonging to the European Union* (Brill-Nijhoff, 2025) 29.

two spheres of private law: the validity of norms and the content of norms. Constitutionalisation inspires, for example, the development of various ways of extracting a norm from the legal system. This testifies to the strength of this impact, sometimes referred to as "radiation" (*Ausstrahlung* in the German-language scholarship). Constitutionalisation and Europeanisation have an impact on the very core of the legal matter, on the system of the sources of law, starting with the perception of the so-called basic norm in the Kelsenian sense. As a result of shaping the sources of law, the importance of judicial law in Continental Europe increases. Therefore, the issue of the creative role of case law arises, including the role of the CJEU, and particularly the issue of the court as a kind of negative legislator. Constitutionalisation also influences the validity of norms through the rules on conflicts of law (*lex superior*, the procedure of weighing up principles and values or the erosion of the public policy clause of Member States in the traditional sense at the EU level).

This new methodology of constitutionalisation has certain characteristic features. Firstly, it is characterised by thinking about the law in hierarchical terms.[21] The constitution, being hierarchically superior, should have direct application. The hierarchical nature of the legal system leads part of the legal community to conclude that an ordinary court has the power to refuse to apply a statutory norm that is incompatible with a constitutional norm. This decentralised control of the constitutionality of laws stands in stark contrast to the centralised control of the constitutionality of laws exercised exclusively by national constitutional courts. Consequently, constitutionalisation can lead to a certain weakening of the significance of these constitutional courts. This decentralised control is inherent in the essence of the direct horizontal effect of constitutional principles. The direct horizontal effect is the most radical version of understanding the direct application of the constitution.

Secondly, this methodology manifests a holistic approach to the phenomenon of law. This holism is intended to address the needs of the modern era. It is argued that nowadays it is necessary to adopt a legal approach that transcends the boundaries between branches and disciplines of law, as well as the boundaries embodied in the traditional division between public and private law. To grasp the essence of the phenomena occurring in the complex modern world, one cannot confine oneself to the specialised legal sciences as they are traditionally conceived, including civil-law studies. An example of such complex relationships is the processes occurring in the EU. The legal system cannot be reduced to individual fields, even those as extensive as private law. No part of the legal system can be considered an enclave. The legal system must be based on a certain catalogue of fundamental values expressed at the highest level in the hierarchy of the sources of law, in both national constitutions and international law.

The holistic approach reveals a third characteristic of this methodology: its eclecticism. Proponents of constitutionalisation argue that individual legal institutions, even those of civil-law provenance, cannot be considered solely through the methodology of private law. It is necessary to also draw on the methodology of other specialised legal sciences, including public law. An example is the issue of applying fundamental rights. They are an expression of constitutional axiology, being its essence. Originally, fundamental rights were applied only in vertical relations, serving to protect the private individual from the arbitrariness of a public authority. However,

21 For example, Sonya Walkila, following Alexy, observes that human rights are institutionalised by transforming them into positive law. If this occurs at the level of the legal system hierarchy, which can be termed "constitutional", human rights become fundamental rights. See S Walkila, *Horizontal Effect of Fundamental Rights: Contributing to the "Primacy, Unity and Effectiveness of European Union Law"* (University of Helsinki, Faculty of Law, European Law 2015) 56.

it is argued that nowadays their application cannot be limited solely to such relations: there is also a need to apply them in horizontal relations.

The horizontal application of fundamental rights is itself another, fourth characteristic of constitutionalisation. The private individual has the right to expect from a public authority, including a court, that it will respect their fundamental rights, even when considering cases where the other party is also a private individual. In the process of the horizontal application of fundamental rights, there is thus a kind of collision between the methodologies of private and public law.

A fifth hallmark of this methodology is the new approach to legal interpretation. It is supposed to be based to a greater extent on functional (teleological) and systemic directives. This new approach to interpretation is, in a way, a synthesis of the characteristics mentioned earlier, namely holism and eclecticism. One cannot limit oneself solely to the meanings of legal concepts established in the legal scholarship within specialised legal sciences. This also applies to the field of civil law. Therefore, constitutionalisation is also characterised by the development of autonomous constitutional concepts. In the process of interpreting the law, one cannot ignore the existence of these concepts. On the basis of the constitution, constitutional jurisprudence and legal scholarship, terms like "property", "incompatibility with the law" and "damage" have meanings that deviate from those established long ago in classic civil law. Such autonomous concepts act as a kind of link between different legal disciplines; they are the "keystone of constitutional methodology". Autonomous concepts, shaped on the basis of norms of constitutional rank, should determine the manner of interpreting provisions contained in lower-order normative acts. Consequently, civil law and its science evolve, undergoing constitutionalisation. The autonomous concepts reinforce the effect of the direct application of the constitution, including horizontal application.

The specificity of this methodology is a function of the specificity of principles of constitutional rank. Firstly, these principles serve as meta-norms, which influence the process of applying other norms, including norms of private law (civil law). Secondly, as noted by Ronald Dworkin and Robert Alexy, legal principles differ from other legal norms (rules) in that they can be fulfilled to varying degrees; consequently, conflicts between principles are resolved using the so-called weighing formula, also known as the balancing procedure, based on the principle of proportionality.[22] In the scholarly literature it is even suggested that, as a result of constitutionalisation and Europeanisation, the classic method of applying the law – involving mechanical formal/dogmatic subsumption – is to be replaced by a method based on balancing constitutional values. These remarks on the essence of the constitutionalisation of private law serve as a reference point for the phenomenon of the Europeanisation of private law.

2.3. The Europeanisation of private law

There are two types of Europeanisation when it comes to private law: EU Europeanisation and Europeanisation within the Council of Europe. Although these two types share many common features in terms of the ethical values promoted, they differ in the structural (institutional) sphere. This is due to the fact that EU bodies have somewhat stronger instruments to influence Member

22 See R Alexy, 'On the Structure of Legal Principles' (2000) Ratio Juris 13(3), 294–304; R Dworkin, 'The Model of Rules' (1967) University of Chicago Law Review 35(1), 14–46; M Dybowski, 'Ronalda Dworkina koncepcja zasad prawa' [Ronald Dworkin's Concept of the Principles of Law] (2001) Ruch Prawniczy Ekonomiczny i Socjologiczny no. 3, 99–115.

States. It is noteworthy that despite the announcement in Article 6(3) of the TFEU, to date the EU has not acceded to the European Convention on Human Rights.[23] The Europeanisation of private law within the Council of Europe (mainly through the jurisprudence of the ECtHR) represents a form of constitutionalisation of private law. This involves the axiologisation of private law with values of an ethical nature.

The EU Europeanisation of private law is in turn divided into two variants. Firstly, there is Europeanisation that is equivalent to the constitutionalisation of private law. This involves the axiologisation of private law with the ethical values prevailing in EU law and structures. The emanation of these values is reflected in the fundamental rights of the EU, especially those currently enshrined in the Charter of Fundamental Rights of the European Union. In essence, this type of Europeanisation is part of the constitutionalisation of private law and can therefore be described as the EU constitutionalisation of private law. For this reason, the terms "the constitutionalisation of private law" and "the Europeanisation of private law" are often used interchangeably.[24] There is also discussion about "the constitutionalisation of European law".[25]

As a result, one can distinguish between the national constitutionalisation of private law, EU constitutionalisation and constitutionalisation within the framework of the Council of Europe. These three types of constitutionalisation, although they are all related to the promotion of ethical values in civil law, may differ from each other. Axiological conflicts may therefore arise among them. These differences are especially evident between national constitutionalisation and the other two types. These distinctions may relate to issues such as the differently understood prohibition against discrimination and the consequences of violating it, as well as the issue of same-sex relationships. Some of these values (principles) are considered part of the constitutional identity of a particular country, which further emphasises the impact of these collisions.[26]

However, the author puts forward the thesis that in the EU we can speak of yet another type of Europeanisation of private law. This second variant of the EU Europeanisation of private law is a part of EU integration, i.e. the construction of a quasi-state or supranational structure. Therefore, it involves the axiologisation of private law through values with a utilitarian character (political, economic or pragmatic). This type of Europeanisation of private law is undoubtedly an element of the "integration through law" paradigm described in the

23 See A Gajda, 'Przystąpienie UE do Europejskiej Konwencji Praw Człowieka i Podstawowych Wolności' [Accession of the EU to the European Convention on Human Rights and Fundamental Freedoms] (2013) Kwartalnik Kolegium Ekonomiczno-Społecznego. Studia i Prace no. 1, 11–35.

24 See C Mak, 'Human Rights in Private Law' in M Bartl, L Burgers, C Mak (eds), *Uncovering European Private Law: European Private Law Handbook* (Amsterdam Centre for Transformative Private Law 2022) 1–12, <http://dx.doi.org/10.2139/ssrn.4304817>.

25 See H-W Micklitz (ed), *Constitutionalisation of European Private Law* (Oxford University Press 2014); OO Cherednychenko, 'Report on the Conference "European Constitutionalisation of Private Law"' (2003) European Review of Private Law 11(5), 709; Micklitz also writes about "Constitutionalised private law" in the EU, which consists of primary EU law, the Charter of Fundamental Rights and the European Convention of Human Rights in their impact on private law, with the CJEU and the ECHR as the key actors. See H-W Micklitz (2021) 75 ff.

26 See e.g. J Gajda, 'The Impact of Article 18 of the Constitution of the Republic of Poland on the Europeanisation of Polish Family Law' in R Szczepaniak (ed), *The Constitutionalisation of Private Law versus the Europeanisation of Private Law: A Legal Study Based on the Example of Selected Countries of Central and Eastern Europe Belonging to the European Union* (Brill-Nijhoff, 2025) 271–288.

literature, which is characteristic of the EU.[27] This assertion is a development of the first and second hypotheses expressed in the Introduction (see section 1).[28]

As is evident in both the constitutionalisation and the Europeanisation of private law, there is always the matter of a specific axiologisation of private law, even though different value systems are at play (ethical, utilitarian values of a pragmatic, economic and political nature leading, for instance, to the creation of a common, integrated market). The Europeanisation of private law is therefore a broader phenomenon than the constitutionalisation of private law. In addition to issues typical of constitutionalisation, Europeanisation also encompasses other matters. Furthermore, Europeanisation is sometimes equated with EU legislation, which is not the case with constitutionalisation.

The above-presented classification of the types of constitutionalisation and Europeanisation of private law is important for the subsequent considerations. It is crucial to always specify in legal discourse which type of constitutionalisation or Europeanisation is being referred to.

3. The constitutionalisation of private law versus the Europeanisation of private law understood as a part of the EU integration process

The purpose of this section is to verify the validity of the third hypothesis. *Prima facie* it might seem that the constitutionalisation of private law (including the EU constitutionalisation of private law) and the Europeanisation of private law as a part of EU integration are phenomena of completely different nature. However, it turns out that despite being based on different sets of values, they both involve very similar mechanisms of the axiologisation of private law. At the same time, both phenomena can be regarded as alternative methods of shaping the law, other than legislation. This is an essential alternative, as this type of law shaping can sometimes serve as a complement to legislative changes.

The methodology in both cases is characterised by a) blurring the distinction between private and public law, b) aiming for the direct and horizontal application of higher-order rules, c) creating autonomous concepts, d) employing an appropriate method of interpretation characterised by the primacy of functional (purposive/teleological) interpretation, e.g. pro-constitutional and pro-EU and e) distinguishing between enforceable (executable) laws (provisions or rules) and programmatic principles.

All these separate phenomena are perceived within the broader phenomenon of the constitutionalisation of private law and are invoked to explain the nature of this constitutionalisation as a specific method of the axiologisation of private law (see point 2.2.). At the same time, however, they are also characteristic of the Europeanisation of private law, understood as the integration

27 See M Bartl, 'Private Law and Political Economy' in M Bartl, L Burgers and C Mak (eds), *Uncovering European Private Law: European Private Law Handbook* (Amsterdam Centre for Transformative Private Law 2022) 1–11, <http://dx.doi.org/10.2139/ssrn.4344615>.

28 As Micklitz notes, European integration is taking place in stages. In the first stage, the EU was primarily concerned with building a common market. The second stage concerned the development of a multilevel governance structure. The third stage, no less important, concerns building a European society. Micklitz believes that European society does not require the existence of a European constitution. However, it does require the existence of European private law, if European society should be more than a mere aggregation of national societies. See H-W Micklitz, (2021) 85 ff.

process within the EU. For example, it is noted by legal scholars that pro-EU interpretation resembles pro-constitutional interpretation from a methodological point of view.[29]

As an example, one can consider the shaping of methods for a pro-EU interpretation of national provisions to align national law with directives.[30] This dilemma accompanies both constitutionalisation and Europeanisation, understood as integration processes. The challenge here is to determine the boundary between the process of a pro-constitutional or pro-EU interpretation of private-law provisions and the situation where there is already a direct application of the constitution or EU law in horizontal relations. As stated by the CJEU in its judgment of 5 February 1963, in Case C-26/62 *Van Gend & Loos*,[31] EU law is a new, autonomous legal order that is applicable directly, to individuals as well. The consequence of this assumption is the development of autonomous concepts of EU law. At the EU level, unlike with national constitutionalisation, the development of such autonomous concepts also serves strictly integrative purposes. As Martin Schmidt points out, even if national law contains identical concepts, the meaning of terms in Community law must be determined independently because, as a rule, the Community legal system does not wish to define its terms based on one or more national legal orders, unless this is expressly provided for. The principle of autonomous interpretation is thus intended to ensure the uniformity of meaning of Community legal terms in all Member States.[32]

The horizontal application of higher-level law is a characteristic feature of both constitutionalisation and Europeanisation, understood as a process of integration. This phenomenon has a different origin and a partly different nature in EU law when compared to national law, although the applied methodology is very similar. In EU law, it is primarily associated with the distinction between regulations and directives. The issue of the direct and indirect horizontal effect of directives emerged long ago, especially in the context of EU law. This is a *sui generis* issue in EU law.[33]

EU law has been shaped from the outset based on the paradigm of economic integration; it was therefore pragmatically orientated. Consequently, all doctrinal divisions and classifications typical of traditional legal science, including the distinction between public and private law, lose significance in the EU. Of course, this division also diminishes as a result of constitutionalisation.[34]

Further significant parallels can be observed. As indicated, the constitutionalisation of private

29 Maslák makes a similar assertion. See M Maslák, 'The Applications of European Values and Principles of European Private Law with an Emphasis on the Social Function of Slovak Private Law' in M Jurčová, M Maslák, R Dobrovodský, P Mészáros, Z Nevolná, A Olšovská (eds), *Social Function of Private Law and its Proliferation by Applying the Principles of European Private Law* (Nakladatelství Leges 2019) 35. Writing about the "principle of methodological equality of EU law and constitutional law", the author mainly refers to identical methods of national courts interpreting constitutional and EU law. This involves a pro-constitutional and pro-EU interpretation, leading to an indirect horizontal effect.

30 As stated by the CJEU in its judgment C-91/92 EU:C:1994:292, points 26–30, a national court applying national law, even in a case between private parties, is obliged to interpret it in the broadest possible manner, in light of the letter and purposes of the directive, to achieve the intended result. Such a pro-EU interpretation by a national court means that directives, even before their implementation, have an indirect impact on relationships between private parties. See M Szpunar, '*Bezpośredni skutek dyrektyw wspólnotowych w postępowaniu przed sądem'* [Direct Effect of Community Directives in Court Proceedings] (2004) Państwo i Prawo no. 9, 56–69.

31 Judgment of the ECJ C-26/62 EU:C:1963:1. See also judgment of the CJEU C-6/64 EU:C:1963:1.

32 See M Schmidt, *Konkretisierung von Generalklauseln im europäischen Privatrecht* (De Gruyter 2009) 41.

33 See M Maslák (2019) 31 et seq.

34 See OO Cherednychenko, 'Rediscovering the Public/Private Divide in EU Private Law, (2020) European Law Journal 26(1–2), 27–47.

law is associated with a certain kind of influence on the shaping of this law. These influences are not as obvious and formalised as legislation. Therefore, they are referred to as radiation (*Ausstrahlung*). It is worth noting that various types of subtle, informal influences on the shape of private law are characteristic of processes taking place within the EU. There is sometimes mention of means of influence situated between soft law and case law.[35]

One more common feature of the two phenomena is worth mentioning. Even national constitutionalisation promotes globalisation. This is the result of the internationalisation of human rights and fundamental freedoms that occurred after World War II. It is evident that this international human rights system has constitutional status. Therefore, as Jakko Husa writes, constitutionalisation is today one of the main legal phenomena on a global scale.[36] The EU itself can be considered a manifestation of this globalisation.

The methodological similarities between the constitutionalisation and the Europeanisation of private law understood as the process of EU integration are intriguing and prompt the question of whether this is a coincidence. It would seem that such numerous similarities, especially concerning significant issues, cannot be coincidental. One can look at both phenomena from a broader perspective and discern the presence of a similar mechanism. Firstly, in both cases, it involves a process of axiologisation, albeit with at least partly different values. In the case of constitutionalisation, the focus is on objective, universal ethical values. On the other hand, in the case of EU integration, the primary concern is not ethical values but values of a pragmatic, economic and political nature leading to the creation of a common, integrated market – even a united political entity on the international stage. In both cases, the aim is the direct application of higher-order norms that serve as carriers of values that bind the entire legal system. Horizontal application, in turn, is the most spectacular manifestation of the direct application of higher-order norms. Consequently, both constitutional law and EU law "strive" for their horizontal application, at least in the sense of indirect horizontality. By necessity, constitutional law and EU law assert their universality and precedence over ordinary national legislation. This higher-level law is treated as an autonomous system, independent of the construction and institutions developed in lower-order law. This dynamic fuels the process of creating autonomous concepts. Furthermore, the universality of values and goals, of which the higher law is the direct application, causes traditional doctrinal divisions and classifications to lose significance. The higher-level law, in pursuit of universal values and supreme goals, influences and transforms institutions of ordinary legislation, regardless of whether they traditionally belong to the realm of private or public law. This is achieved through the shaping of autonomous concepts, among other things.[37]

35 See C Ramberg, 'Ole Lando Memorial Lecture. The Interaction between Soft Law and Case Law: How Precedents Fulfill Ole Lando's Ambition to Harmonise European Contract Law. Madrid 2023' (2023) European Review of Private Law 31(1), 3–14.

36 J Husa (2016) 2–21.

37 For more on the methodological similarity of these two phenomena, see R Szczepaniak, 'The Essence of the Constitutionalisation of Private Law and the Europeanisation of Private Law' in R Szczepaniak, (ed), *The Constitutionalisation of Private Law versus the Europeanisation of Private Law: A Legal Study Based on the Example of Selected Countries of Central and Eastern Europe Belonging to the European Union* (Brill-Nijhoff, 2025) 359–384.

4. Mixing state issues (systemic and constitutional) with civil law issues at the EU level

4.1. Introductory remarks

Section 1 referred to the increasingly noticeable (in the EU) blending of factors that *prima facie* belong to the entirely different categories of private law and public law. This raises the question of what this entanglement of civil law in state and constitutional affairs in the EU involves and how it is manifested. This section presents the manifestations and causes of this entanglement. The purpose of this section is also to verify hypotheses 1, 2, 6 and 7. To a certain extent, the answer to these questions is already apparent from the foregoing arguments (see section 2. and 3.).

4.2. A holistic approach at the EU level

It has been pointed out that a characteristic feature of the methodology of the axiologisation of private law, known as constitutionalisation, is a holistic view of legal issues. As a result of such a holistic approach, we perceive the law as a whole, paying less attention to potential divisions and classifications. The boundaries between the branches and fields of law recede into the background. We find connections between institutions which are traditionally categorised in the legal doctrine into two separate worlds: public law and private law. The constitutionalisation of private law therefore provides a convenient foundation for this blending, eclecticism and hybrid structures, including the publicisation of private law. It turns out that blurring the boundaries between branches and institutions is also characteristic of the Europeanisation of law, understood as a part of the EU integration process (see section 3.). When examining the phenomenon of constitutionalisation – and especially the Europeanisation of private law, which is often an aspect of constitutionalisation – nowadays a civil law scholar must go far beyond classic civil law. When writing about the constitutionalisation and Europeanisation of private law, contemporary experts on civil law are forced to address issues associated with the theory of the state.

Constitutionalisation leads to viewing regulations of civil law and its institutions from the perspective of constitutional principles. This, in turn, leads to the tendency to negate the traditional view that principles such as the principle of good faith, the prohibition of abusing subjective rights or the prohibition of unjustly enriching oneself at another's expense belong exclusively to civil law. The belief that these are principles of the entire legal system and have constitutional rank is beginning to prevail. They are also applicable in public law (tax or administrative law).[38] The attribution of an exclusively civil-law character in traditional legal doctrine results from the

38 Opinion of Advocate General A Szpunar in joined cases C-131/13, C-163/13 and C-164/13 EU:C:2014:2217 stated that the Court's application of the "principle of good faith" stems from the structure of the added value tax, not from private law; see also para. 60 of the judgment of the CJEU in joined cases C-131/13, C-163/13 and C-164/13 EU:C:2014:2455. See also para. 51 of the judgment of the CJEU C-642/11 EU:C:2013:54; para. 52 of the judgment of the CJEU C-409/04 EU:C:2007:548; para. 19 of the judgment of the CJEU C-271/06 EU:C:2008:105; para. 54 of the judgment of the CJEU C-643/11 EU:C:2013:55; para. 28 of the judgment of the CJEU C-492/13 EU:C:2014:2267; para. 38 of the judgment of the CJEU C-321/05 EU:C:2007:408; the judgment of the CJEU C-423/15 EU:C:2016:604. See also D Simon, 'Abus de droit' (2016) Europe no. 10, 11; S Krieger, 'Rechtsmissbrauch durch "AGG-Hopping"' (2016) Europäische Zeitschrift für Wittschaftsrecht, 696–698.

fact that these principles were first expressed in civil law and then incorporated into civil codes. For example, the principle prohibiting the abuse of subjective rights can be considered an emanation of the constitutional principle of proportionality. It is especially noticable at the EU level.[39]

4.3. The legal eclecticism (hybridity and blurring of divisions within the legal sciences) inherent in the European integration process from the outset

European Community law, as has been mentioned, was from the outset based on the paradigm of economic integration, and hence pragmatically orientated.[40] According to Martijn W. Hesselink, within the EU a gradual shift can be discerned in the paradigm of private law, or even the crystallisation of a new European legal culture. It is characterised by a departure from formalistic, dogmatic and positivistic approaches in favour of pragmatic ones.[41] Hesselink also points out the rapidly advancing functionalisation of the law. This process involves creating comprehensive areas of law based on functional criteria rather than formalistic or dogmatic ones.[42] These areas are characterised by a blending of regulations traditionally classified as belonging to public or private law. As a result, the distinction between public and private law must give way to other values, such as pragmatism. This applies to areas such as labour law, environmental law, information technology law and medical law.[43] According to Hesselink, the search for elements that belong to either private or public law in such regulations is a result of a certain nostalgia among traditionally-orientated civil-law scholars.[44]

As Hans-Wolfgang Micklitz notes, the idea of European experimentalism for a post-nation-state private legal order is revealed here. The existence of a post-national structure such as the EU and of a diverse European society within the EU, impose such a pragmatic (functional) approach.[45]

As a result, the EU legislator shows little sensitivity to the classic division between public and private law. This is consistent with the principle that where the law is primarily seen as an instrument for achieving political goals (goal-orientation), the distinction between public and private law naturally weakens. Both institutions are primarily treated by the EU legislator in pragmatic terms, that is, as instruments to achieve the political goals set by the EU authorities (*effet utile*, the principle of effectiveness). The boundary between public and private law is delineated differently in various EU countries. Certain institutions may be classified as public law in one country and private law in another. From the perspective of the EU's interest, the primary concern is that EU goals are achieved. As a consequence, public law and private law become two sets of norms that are complementary and interchangeable. They are two repositories of measures that can be interchangeably applied to achieve EU objectives.

39 R Sikorski, 'Proportionality and Intellectual Property Law Remedies – Constitutional and EU Law Perspectives', in R Szczepaniak (ed), *The Constitutionalisation of Private Law versus the Europeanisation of Private Law: A Legal Study Based on the Example of Selected Countries of Central and Eastern Europe Belonging to the European Union* (Brill-Nijhoff 2025) 320–336.

40 C Semmelmann, 'The Public–Private Divide in the European Union Law or an Overkill of Functionalism' (2012) Maastricht European Private Law Institute Working Paper no. 12, 4.

41 MW Hesselink, *The New European Legal Culture: Ten Years On* (Social Science Electronic Publishing 2009), 1–8.

42 Ibid.

43 Ibid.

44 Ibid.

45 H-W Micklitz (2021) 75 ff.

4.4. The coupling of ethics and utilitarian values in EU law

The methodological similarity between the constitutionalisation of private law and the Europeanisation of private law understood as a part of the process of EU integration (see section 3.) is symptomatic. Section 2.3. of this text distinguishes two types of EU Europeanisation of private law. Only in one sense is the EU Europeanisation of private law a variant of the constitutionalisation of private law. However, it is not possible to completely separate these two types of EU Europeanisation of private law. They follow similar methods or, one might say, templates. Consequently, it is possible to achieve different goals simultaneously with the same methods. One could venture to say that the Europeanisation of private law understood as a part of the integration process is more technical, even though values also underlie it. However, these are utilitarian values. The integration process itself must, by its nature, have a partly technical character, as it involves the creation of common structures, institutions and bodies.

However, only in an ideal theoretical model can we separate the technical dimension from the axiological dimension of civil law.[46] In reality, these two dimensions are always to some extent intertwined. In almost every institution of civil law, one can find both axiological and technical components, though the intensity of these components may differ.[47] Furthermore, when analysing the constitutionalisation of private law, one can detect the presence of significant technical issues. As an example of such intertwining of technical (structural) and axiological issues, one can consider the development of autonomous concepts in both national constitutional law and EU law. On the one hand, they are the result of axiologisation with ethical values, as they constitute the "product" of applying principles of the highest constitutional rank. On the other hand, they serve as a tool of legislative technique. At the EU level, this technique also serves integration, i.e. the unification of law within the EU (see section 3.). This intertwining of the axiological and technical dimensions is, in a sense, an expression of methodological eclecticism, as Marek Safjan noted. The title of his text is telling: "On the Charms of Methodological Eclecticism: From the Community of Principles and Axiology to the Community of Legal Constructions and Interpretation".[48] According to the author, shared legal constructions are the product of shared principles and axiology. Therefore, although distinguishing between the axiological and technical dimensions of private law is theoretically useful, it is essential to be aware that in practice the intertwining of these two dimensions is inevitable. This intertwining of technical and axiological elements is also an expression of the blending of factors of different natures mentioned in this text.

4.5. Private law as a reservoir of institutions with dual application

The instrumental (technical) treatment of civil law and its institutions is not a new phenomenon, and it is not exclusively associated with the EU. In the previous subsection (4.4.) it was mentioned

46 In this case, the concept of "axiology" is meant in a narrow sense, that is, identified with ethical values.

47 R Szczepaniak, 'Between the Technical and Axiological Dimension of Civil Law' in R Szczepaniak (ed), *Constitutional Barriers to the Applicability of Private Law in the Public Sector: A Comparative Study with Particular Emphasis on Polish and German Law* (Wydawnictwo Naukowe UAM 2020) 590–604.

48 M Safjan, 'O urokach eklektyzmu metodologicznego. Od wspólnoty zasad i aksjologii do wspólnoty konstrukcji i wykładni prawa' [On the Appeal of Methodological Eclectism: From the Community of Principles and Axiology to the Community of Construction and Interpretation of Law] in R Szczepaniak (ed), *Problemy pogranicza prawa cywilnego* [Boundary Problems of Civil Law] (CH Beck 2022) 15–36.

that in civil-law institutions, one can distinguish between an axiological component and a technical one. More detailed examples are provided below to confirm this statement.

As a result, some civil-law institutions exhibit a certain technicality and flexibility. They are vessels that can be filled with various contents, and we have witnessed this several times in the last two centuries. Therefore, civil law contains rules that can be called the grammar of legal actions.[49] The significance of this technical component in civil-law institutions to some extent stems from their nature. Civil law was treated for centuries as universal law, because its regulations directly applied to general transactions. Consequently, it is primarily in civil law that the most strongly embedded universal praxeological rules have been manifested, for centuries, in human relationships. For example, the mechanism of offsetting reciprocal claims is an expression of the praxeological guidelines for thrift, based on legal relations and requiring the reduction of resource consumption to achieve a desired goal. On the other hand, the technique of making and delivering declarations of intent, as well as the principles of their interpretation, can be classified as one of the rules of interaction distinguished in praxeology. This concerns the efficiency of internal communication in a given separate system.[50] Furthermore, the regime of tort liability and unjust enrichment are often considered universal inter-branch mechanisms for the distribution of goods, burdens and risks.[51] Civil law is a reservoir of such rules, from which the entire legal system draws. As a result, civil-law institutions are used as forms of action by public authorities.[52] Administrative law scholars refer to the so-called reception capacity of civil law in this regard.[53] In the 19th and 20th centuries, they developed administrative law by creating so-called parallels: institutions equivalent to civil-law institutions such as contracts, ownership, tort liability, offsetting, unjust enrichment and declarations of will.[54]

However, the instrumentalisation of civil law in the EU deserves to be treated as a separate research trend, and signs of this approach are already visible in the legal scholarship.[55] It can be said that in EU law, the instrumentalisation of private law has taken on a new dimension. Only in the EU has the instrumentalisation of law, including private law, become programmatic, officially declared – and even an element of the culture of EU private law, stemming from the idea of neofunctionalism, which is considered one of the main features of EU legal culture (see

49 See R Szczepaniak, 'The Application of Private Law in the Public Sector: A Key Issue in the Legal Theory of EU Member States' (2023) European Review of Private Law 31(1), 70–72.

50 In German legal scholarship, the view has been expressed that § 133 BGB, which indicates the directives for interpreting declarations of intent, is an expression of the universal hermeneutic principle applicable in communication. See E Forsthoff, *Lehbruch des Verwaltungsrechts* (CH Beck 1973) 161.

51 See M Grochowski, E Łętowska, 'Czemu może dziś służyć bezpodstawne wzbogacenie?' [What Can Unjust Enrichment Serve Today?] in A Olejniczak, J Haberko, A Pyrzyńska, D Sokołowska (eds), *Współczesne problemy prawa zobowiązań* [Contemporary Problems of Contract Law] (Wolters Kluwer 2015) 213 ff.

52 Bartl draws attention to the centuries-old use of private law institutions by public authorities, including corporations, to pursue their goals. See M Bartl, 'Toward Transformative Private Law: Research Strategies (2023) Amsterdam Law School Research Paper no. 11, 2–10, <http://dx.doi.org/10.2139/ssrn.4376854>.

53 For a more detailed discussion of this issue, see R Szczepaniak, 'Reception Capacity of Civil Law' in R Szczepaniak (ed), *Constitutional Barriers to the Applicability of Private Law in the Public Sector: A Comparative Study with Particular Emphasis on Polish and German Law* (Wydawnictwo Naukowe UAM 2020) 599 et seq.

54 See R Szczepaniak, 'Linguistic Determinants of Research on the Application of Private Law in the Public Sector' in R Szczepaniak (ed), *Constitutional Barriers to the Applicability of Private Law in the Public Sector: A Comparative Study with Particular Emphasis on Polish and German Law* (Wydawnictwo Naukowe UAM 2020) 42, 44.

55 CU Schmidt, *Die Instrumentalisierung des Privatrechts durch die Europäischen Union* (Nomos 2010); P Gillaerts, 'Instrumentalisation of Tort Law: Widespread yet Fundamentally Limited' (2019) Utrecht Law Review 15(3), 27–43.

hypothesis 7).[56] As Marek Safjan points out, "[t]he starting point for classic private-law regulatory instruments is the individual and their autonomy, while the starting point for European regulatory instruments in the field of private law is the interest of the European Union, i.e. the protection of fundamental freedoms and principles on which the European legal order is based."[57]

In section 2.3., the Europeanisation of private law was highlighted as a part of European integration. Consequently, a methodology for applying private law is being shaped as one of the factors supporting EU integration, for example, to promote the functioning of the common market based on community freedoms. In the literature one can find the phrase "the Europe-making capacity of private law".[58] As a result, the application of private law is intended to serve the realisation of values of a utilitarian nature (political and economic).

For example, some authors would like the EU to use private law instrumentally in the field of consumer law, thus enhancing the functioning of the European market and resulting in the hybrid idea of the "consumer citizen of the EU".[59] An analysis of the CJEU's case law on private legal matters leads some authors to use the term "shadow citizenship in the CJEU's case law".[60] According to Chantal Mak, the constitutionalisation of European private law in consumer cases has started to provide constitutive elements of a developing European society.[61]

The phenomenon of institutions of dual applications has emerged. These are private-law institutions that are at the same time serving Europeanisation, understood as an element of EU integration. This is clearly evident in the regime of tort liability of the Member States and even the liability of private entities for violations of EU law.[62] As is well known, the mechanism of liability for damages, in turn, originates from private law.[63] It is justified to argue that issues related to this regime appear in all the most significant aspects of EU integration. Compensation

56 See R Mańko, 'Idee polityczne i prawne a kultura europejskiego prawa prywatnego: przyczynek do dalszych badań' [Political and Legal Ideas and the Culture of European Private Law: A Contribution to Further Research] (2017) Miscellanea Historico-Iuridica 16(2), 71 et seq. Citing other authors, Mańko notes that "this neofunctionalism emphasizes the dynamics of integration, which is an ongoing, expanding process, referred to as the 'spill-over effect.'" This neofunctionalism is supposed to be "the most coherent, rigorous, methodologically correct theory of European integration." See also MW Hesselink, 'The Structure of the New European Law' (2002) Electronic Journal of Comparative Law, 7–23.

57 See M Safjan, 'Europeizacja prawa prywatnego – ewolucja czy rewolucja. Perspektywa orzecznicza' [Europeanisation of Private Law – Evolution or Revolution: A Jurisprudential Perspective] in J Gudowski, K Weitz (eds), *Aurea Praxis Aurea Theoria. Księga pamiątkowa ku czci Prof. T. Erecińskiego* [Aurea Praxis Aurea Theoria: A Commemorative Book in Honour of Prof. T Ereciński] vol. 2 (LexisNexis 2011) 2513–2534.

58 See C Mak (2022) op. cit.; and C Mak, 'Reimagining Europe through Private Law Adjudication' in C Mak, B Kas (eds), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe* (Hart Publishing) 63–77.

59 C Mak (2022) op. cit. See also I Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press 2013) 37–39.

60 G Comandé, 'The Fifth European Union Freedom: Aggregating Citizenship... around Private Law' in H-W Micklitz (ed), *Constitutionalisation of European Private Law* (Oxford University Press 2014) 61–101. See also C Mak (2022) op. cit.

61 C Mak (2022) op. cit.

62 See judgment of the ECJ C-14/83 EU:C:1984:153.

63 It is true that in some European countries the regime of tort liability of public authorities is classified as an institution of public law; a prime example is France. Although the situation is different in Poland, it is usually emphasised that this regime originates in private law. In legal science, attention is drawn to the problematic absence of a coherent doctrine of civil liability in EU law. See E Frantziou, 'The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle' (2020) Cambridge Yearbook of European Legal Studies vol. 22, 223–224; N Reich, 'The Interrelation between Rights and Duties in EU Law – Reflections on the State of Liability Law in the Multilevel Governance System of the Union: Is There a Need for a More Coherent Approach in European Private Law?' (2010) Yearbook of European Law 29(1), 113.

from a Member State for breaches of EU law has become one of the most important means of ensuring the effectiveness of EU law and its primacy over national law.[64] Legal scholars refer to the "Frankovich formula", developed in the case law of the CJEU.[65] This is often referred to as the "privatisation of enforcement".[66] Even in the judgment of the CJEU of 5 February 1963, in *Van Gend en Loos* (C-26/62), the view was expressed that the diligence of individuals interested in protecting their rights ensures effective additional control of compliance by states, with Community law alongside control by the Commission and other Member States. The author would add that this empowerment of individuals in EU law is reflected in the principle that Member States are responsible towards individuals for damages resulting from breaches of EU law.

One can observe the influence of the Frankovich formula on horizontal relations, i.e. between private entities. Currently, a private entity making a claim for damages for a breach of EU law is not excluded. Here, too, the tort liability regime is to serve as an instrument strengthening EU integration.[67,68]

Another example of institutions with dual application in the EU is the general clauses of civil law, which, in addition to their traditional functions, are used as a tool for dividing competencies between EU bodies and the Member States. This function is considered when the general clause is included in EU law, especially in directives. In many cases, this is then regarded as a type of legislative technique that results in the delegation of decision-making freedom to the Member State's authorities, namely, the legislature implementing the directive and the courts subsequently applying the law. However, an analysis conducted by Martin Schmidt indicates that such a conclusion is by no means justified in every case.[69]

4.6. The horizontal application of principles and values as a factor in EU integration

The most characteristic and controversial manifestation of the constitutionalisation and Europeanisation of law is considered to be the horizontal application of certain principles (values) that were originally meant to apply in vertical relationships, i.e. between private individuals and public authorities.[70] This primarily concerns the fundamental rights. Of course, horizontal relations,

64 See OO Cherednychenko (2020) 27–47.

65 See N Półtorak, 'Odpowiedzialność odszkodowawcza państwa za naruszenie prawa UE po 20 latach od orzeczenia w sprawie Francovich' [State Liability for Damages for Violating EU Law 20 Years after the Francovich Ruling] (2014) Europejski Przegląd Sądowy vol. 1, 79.

66 Regarding the privatisation of enforcement, see M Szpunar (2025) 55–70.

67 M Szpunar, *Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego* [Liability of a Private Entity for Violation of Community Law] (Wolters Kluwer 2008) 29; N Półtorak (2014) 79. See the judgment of the CJEU C-14/83.

68 As Verbruggen writes, the belief is beginning to prevail that EU law grants an autonomous right to claim damages also in relations between private entities for infringements of EU law. This is intended to be an expression of the principle of *ubi ius, ibi remedium* and the principle of effectiveness. See P Verbruggen, 'The Impact of Free Movement of Goods and Services on Private Law Rights and Remedies' in H-W Micklitz, C Sieburgh (eds), *Primary EU Law and Private Law Concepts* (Intersentia 2017) 47 ff.

69 See M Schmidt (2009) 35 et seq.

70 This concept denotes the capacity of an EU law norm to be invoked by a private actor before a national court in proceedings against another private actor. For an analysis of the various doctrines justifying such a horizontal effect, see P Verbruggen (2017) op. cit.

i.e. relations between formally equal entities, are *ex definitione* within the domain of civil law.[71] For example, the horizontal application of the Frankovich formula for infringements of EU law was indicated above (subsection 4.4.).[72]

The phenomenon of horizontality is strongly interwoven into the process of EU integration. As noted in the literature, the starting point for considerations on the horizontality of EU principles and values is the supremacy and direct effect of EU law.[73] Consequently, strengthening the process of EU integration must lead to contact with issues of private law.[74] Therefore, when analysing the entanglement of civil law in state and constitutional affairs in the EU, one cannot ignore the issue of horizontally applying fundamental rights and constitutional principles.

It seems that this horizontality is becoming more important in the process of European integration. Some legal scholars have expressed the opinion that the horizontality of the Charter of Fundamental Rights is an independent, structural constitutional principle in the EU. Horizontality is not meant to be merely a means of strengthening the effectiveness of EU law, but an independent principle.[75] Such a conviction, for obvious reasons, further entangles civil law in the process of EU integration.

Undoubtedly, the horizontal application of principles and the values of fundamental rights serve the purposes of integration. They fit into the logic of *effet utile*, particularly the assumption of the primacy of EU law over national law and its direct application. This is a kind of zero-sum game. The nature of the integration process is that it occurs to a greater or lesser extent at the expense of the competencies of the bodies of the Member States. The more EU law is horizontally applied (e.g. the Charter of Fundamental Rights), the narrower the scope of application for national constitutions and laws, and consequently, the narrower the scope of competencies for national parliaments and constitutional courts. Constitutionalisation is an alternative to legislation, including state legislation.[76] Thus, the phenomenon of governance through principles emerges.[77]

However, this is most evident in the relationship between the CJEU and the national constitutional courts. The horizontal application of fundamental rights means that national courts must refer to them, to a greater or lesser extent, in the cases they consider, without necessarily consulting the national constitutional courts. This, in turn, leads to structural changes, with the CJEU gaining significance at the expense of constitutional courts. As Marek Safjan pointed out in the passage cited above, the application of common values and principles leads to structural changes, particularly in the development of shared constructions and autonomous concepts, ultimately strengthening integration.

71 Verbruggen aptly emphasises this. See P Verbruggen (2017) op. cit.

72 Horizontality itself is not a homogeneous phenomenon. Technically, different means can lead to the horizontal effect. This applies in particular to the Charter of Fundamental Rights. See E Frantziou (2020) op. cit.

73 See C Sieburgh, 'A Method to Substantively Guide the Involvement of EU Law in Private Law Matters' (2013) European Review of Private Law 21(5–6), 1165–1188.

74 As Verbruggen writes, the most direct route through which EU law may impact horizontal relationships is offered by the concept of "direct effect" in EU law. See P Verbruggen (2017).

75 See E Frantziou (2020) op. cit.

76 See C Busch, H Schulte-Nölke (2011) 23.

77 Examples include judgments from the CJEU refusing to apply national law due to its inconsistency with horizontally applied principles of the Charter of Fundamental Rights. See judgment of the ECJ C-144/04 EU:C:2005:709. See also judgment of the ECJ C-555/07 EU:C:2010:21; judgment of the ECJ C-414/16 EU:C:2018:257; judgment of the ECJ C-193/17 EU:C:2019:43.

Considering the future of the idea of a common European civil code, Martijn Hesselink stated that there will ultimately be a need to define the place of national constitutional courts in the multi-level governance of private relationships in Europe. In particular, this includes the relationship between the competences (jurisdiction) of these courts and that of the CJEU. According to Hesselink, this issue is also related to which version of the horizontal effect of fundamental rights we adopt: direct or indirect.[78] He thus acknowledged that the issue of establishing such a common EU civil code is a very political and systemic one.

5. EU CONSTITUTIONALISATION OF PRIVATE LAW IN THE SERVICE OF EUROPEAN INTEGRATION

The purpose of this section is to verify the validity of hypotheses 4 and 7. The evolution of the EU system of ethical values, including the system of fundamental rights, demonstrates a close functional connection between this system and the process of EU integration. This mixed axiologisation of private law (i.e. the blending of inherently ethical values with utilitarian values) is characteristic of the current stage of EU development. There is even a feedback loop at work here: the realisation of this system of ethical values strengthens integration processes and vice versa. Then, in turn, the thus reinforced international structure that is the European Union is inspired to further develop fundamental rights, since this method is treated as a means of further strengthening its international position.[79] A certain universal regularity is noticeable here. Such entanglement of the system of ethical values and fundamental rights with state-building processes took place much earlier, in North America.[80]

The development of the EU system of fundamental rights, including the creation of the Charter of Fundamental Rights, was intended, inter alia, to neutralise the arguments of the so-called Eurosceptics, who accused the European Communities – and later the European Union – of failing to develop an adequate system of protection for fundamental rights, in contrast to the national legislatures, and argued that in consequence national constitutions held primacy over EU law, at least in this respect.

The flagship example of this stance was the judgment of the German Constitutional Court in *Solange I*,[81] which articulated the conviction that the German Constitution had greater moral superiority and maturity than Community law.[82] In other words, the German Federal Con-

78 See MW Hesselink, 'The Politics of a European Civil Code' (2004) European Law Journal 10(6), 682.

79 See L Pech, 'A Union Founded on the Rule of Law: Meaning and Reality on the Rule of Law as a Constitutional Principle of EU Law' (2010) European Constitutional Law Review 6(3), 359–396.

80 The process of European integration is often compared to the integration process of the United States in North America, and analogies are sought between these two processes. See K Lenaerts, 'Respect for Fundamental Rights as a Constitutional Principle of the European Union' (2000) Columbia Journal of European Law 6(1), 21; S Walkila (2015) op. cit.; D Schwarzer, 'Pushing the EU to a Hamiltonian Moment' (2020) German Council on Foreign Relations no. 10, 1–9. For the "Americanisation" of private law in Europe, see A Całus, 'Europeizacja prawa prywatnego jako wartość współgrania i konkurencji porządków: międzynarodowego, „europejskiego" i krajowego' [The Europeanisation of Private Law as the Value of Interplay and Competition between International, "European" and National Orders] in E Cała-Wacinkiewicz, J Menkes (eds), *Wspólne wartości prawa międzynarodowego, europejskiego i krajowego* [Common Values of International, European and National Law] (CH Beck 2019) 11.

81 Judgment of the Federal Constitutional Court of Germany of 29 May 1974, BVerfGE 37, 271 [1974], 285.

82 See P Hilpold, 'So Long Solange? The PSPP Judgment of the German Constitutional Court and the Conflict Conflict between the German and the European "Popular Spirit"' (2021) Cambridge Yearbook of European Legal Studies vol. 23, 163.

stitutional Court indicated that it would only refrain from reviewing Community law for its compatibility with the German Constitution if the protection of fundamental rights at the Community level was essentially equivalent to the minimum protection of fundamental rights provided by the German Constitution. In legal scholarship, the subsequent reaction of the Community institutions, especially the CJEU, to the *Solange I* ruling has gone down in history as a "battle for the last word in matters of fundamental constitutional importance" between the national constitutional courts and the CJEU.[83]

The essence of this dispute can be reduced to the question of whether EU law is above national law, and indeed above national constitutions. It has been recognised that, in the *Solange I* judgment, the German Constitutional Court compromised with the CJEU judgment in *Van Gend en Loos* and the very concept of the primacy of Community law over national law.[84] As noted in the doctrine, the CJEU managed to overcome the contested deficit in the protection of human rights with a clever ploy, namely by extracting fundamental rights from national constitutional orders and transplanting them into the EU legal order as "general principles of EU law". *Solange I* provided a decisive impetus for intensifying this process.[85] The CJEU achieved its intended goal more than a decade later with the judgment of the German Federal Constitutional Court in *Solange II*.[86]

In that judgment, the German Federal Constitutional Court assessed the evolution in the CJEU's jurisprudence since *Solange I* and concluded that the protection of fundamental rights provided by the CJEU had become essentially similar to the protection of fundamental rights unconditionally required by the German Basic Law. Consequently, there is no longer a need for the German Constitutional Court to continue to review Community legislation based on the fundamental rights standards of the German Basic Law. The adoption of the Charter of Fundamental Rights was supposed to be the culmination of the process of shaping the EU system for the protection of fundamental rights and the final proof that the EU had reached a level of protection of fundamental rights on par with the Member States. It is generally believed that this goal has essentially been achieved by the EU authorities, a view that has been expressed by legal scholars in both Germany and other Member States, including Poland.[87]

Evidently, the development of an EU system for the protection of fundamental rights has even become a *sine qua non* for continuing the effective process of strengthening EU integration. In other words, the constitutionalisation of EU law, and thus its axiologisation through fundamental rights, contributes to the strengthening of this integration. As is well known, the characteristic feature of law of constitutional rank, in addition to its greatest legal force, is also the object of its regulation, defined as "constitutional matter". The minimum content of this matter includes the regulation of citizens' fundamental rights and freedoms. Further stages of

83 The term "La Querelle Allemande" is also used. See P Hilpold (2021) 162.

84 See L Pech (2010) 159 et seq.

85 Ibid.

86 Order of the Federal Constitutional Court of Germany of 22 October 1986, 2 BvR 197/83 [1986].

87 As Anna Śledzińska-Simon and Michał Ziółkowski write: "In the academic debate that followed this decision, it was argued that the transfer of competences in the Accession Treaty implies a substantive change in the Constitution, which excludes the possibility of controlling the constitutionality of EU secondary law, especially when the level of protection of fundamental rights in the Union and in Poland is equivalent". See A Śledzińska-Simon, M Ziółkowski, 'Constitutional Identity of Poland: Is the Emperor Putting On the Old Clothes of Sovereignty?' in C Calliess, G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 243 et seq.

EU political integration would not have occurred if the organisation had concentrated exclusively on shaping a common economic area, i.e. respecting the four freedoms in their strict economic sense. This view is now widely accepted. As has been previously indicated, the constitutionalisation of private law – in other words, the axiologisation of the private law of the Member States as a result of it being saturated with fundamental rights in the process of judicial application of the law – is now regarded as an alternative to, or even more effective than, EU legislation as a means of harmonising law in the EU.[88] This is also because EU legislation does not have general competence in private law (the principle of enumerated powers).[89]

Of course, the "battle for the last word in matters of fundamental constitutional importance" is not over yet. It can be observed that the CJEU and the national constitutional courts are on a collision course. This is very visible in the CJEU's relations with the constitutional courts of Central and Eastern European countries, such as Poland, Hungary and Romania.[90] Disputes between national constitutional courts and the CJEU over the so-called "*Deutungshoheit*", or "interpretative sovereignty", are ongoing, to varying degrees. The issue concerns the "last word" in the process of interpreting both national constitutions and EU treaties,[91] as well as the status of the main guardian of fundamental rights.[92] The stakes in this competitive game concern further progress in the integration process and the scope of the Member States' sovereignty. Unfortunately, the ongoing constitutional crisis in Poland since the end of 2015, related to the controversy over the election of judges of the Constitutional Tribunal – regardless of which side in this dispute is right – weakens the prestige and position of this very important Polish constitutional body in relation to the CJEU and common courts.[93] One can only regret that this crisis has come at a time of great importance for the future of the EU and the Member States. Right now, a partnership dialogue between national constitutional courts and the CJEU is necessary.

There is therefore a feedback loop between ethical and utilitarian values in the EU. Ultimately, however, it seems that utilitarian values take precedence. In some sense this explains why the

88 See C Busch, H Schulte-Nölke (2011) 23.

89 See H-W Micklitz (2021) 80 ff.; R Mańko (2016) 41–42.

90 See the judgment of the Polish Constitutional Tribunal of 7 October 2021, K 3/21 (2022) OTK-A 65; judgment of the CJEU in joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 EU:C:2021:393; judgment of the Romanian Constitutional Court of 8 June 2021, 304/2004 (2021) Official Gazette no. 612; judgment of the CJEU in joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 EU:C:2021:1034; judgment of the Constitutional Court of Hungary of 5 December 2016 no. 22/2016 HUN-2016-3-006; judgment of the CJEU in joined cases C-156/21, C-157/21 EU:C:2022:97.

91 See P Hilpold (2021) 161, and the evolution of the German Constitutional Court's jurisprudence mentioned there. As Daniel Thym points out, dozens of articles and monographs have been written about the potential and actual conflict between the German Federal Constitutional Court and the CJEU: D Thym, 'Separation versus Fusion – Or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice' (2013) European Constitutional Law Review 9(3), 391.

92 See C Rauchegger, 'National Constitutional Courts as Guardians of the Charter: A Comparative Appraisal of the German Federal Constitutional Court's Right to Be Forgotten Judgments' (2022) Cambridge Yearbook of European Legal Studies vol. 22, 258–278.

93 For more on the systemic significance of this crisis, see P Radziewicz, 'Rozproszona kontrola konstytucyjności ustawy wobec kryzysu Trybunału Konstytucyjnego. Glosa do wyroku SR w Gorzowie Wielkopolskim z 23 kwietnia 2021 r., sygn. I C 1326/19' [Distributed Control of the Constitutionality of an Act in the Face of the Crisis of the Constitutional Tribunal: Commentary on the Judgment of the Regional Court in Gorzów Wielkopolski of 23 April 2021, Reference Number I C 1326/19] (2022) Gdańskie Studia Prawnicze vol. 4, 91–98. See also M Krotoszyński, 'Transitional Justice and the Constitutional Crisis: The Case of Poland (2015–2019)' (2019) Archiwum Filozofii Prawa i Filozofii Społecznej 3(21), 29–39.

EU has not joined the Council of Europe, despite the clear content of Article 6(3) TEU. The issue here involves the interests of the EU itself, particularly the competencies of the CJEU. The problem of the relationship between the CJEU and the ECtHR arises in this context.

In summary, the development of the EU system of ethical values, which is intended to permeate the private law of Member States through EU constitutionalisation, serves EU integration. Consequently, it is not possible to make a strict distinction between the EU constitutionalisation of private law and the Europeanisation of private law understood as a part of EU integration. Even the EU constitutionalisation of private law serves this integration.

This conclusion is supported by the horizontal application of fundamental rights and constitutional principles indicated above, among other things.[94] In particular, the problem of the scope of application of the Charter of Fundamental Rights arises through a certain interpretation of its Article 51. It is noted in the literature that the tendency towards extending the application of the Charter, at least through an appropriate interpretation of Article 51(1), is in its effects identical to the desire to create a European state.[95] The literature directly refers to the "centralist effect of the Charter".[96]

6. The translatability of the languages of civil and constitutional law

Perhaps in the wake of a holistic approach to law, these reflections should also extend to the conceptual apparatus used in scholarly discourse. Two semantic issues arise within this context. The first has already been mentioned: autonomous concepts in the realm of constitutional law and EU law. The second issue is presented below.

If capturing the essence of phenomena occurring in the complex contemporary world requires a holistic approach to law – characterised by transcending boundaries between legal branches and disciplines, including the boundaries set by the traditional division into public and private law – the question arises of whether there are concepts in one legal field that serve as the counterparts of another. In other words, the question arises about the translatability of languages developed in two disciplines of legal science: the science of civil law, on the one hand, and the science of constitutional law and general theory of law, on the other hand.

The above considerations confirm that holism reveals strong connections between certain concepts (principles) in the field of civil law and concepts in the field of public (constitutional) law. At the highest level of abstraction, it is worth noting that among legal theorists of civil law in Central and Eastern European countries during the period of communist totalitarian-

94 See section 4.6. of the article.

95 S Walkila (2015) 99.

96 See P Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) Common Market Law Review 39(5), 945. In the judgment of the CJEU C-617/10 EU:C:2013:105, points 19–31, the idea was expressed that the phrase used in Article 51, "solely in so far as they implement Union law", should be understood broadly, functionally. This means that national provisions, regardless of when and for what purpose they were issued, fall within the scope of application of EU law if they objectively and functionally refer to relationships to which EU law also applies. This verdict was met with a critical reaction from the German Constitutional Court just a few weeks after it was issued (Judgment of the German Constitutional Court of 24 April 2013, 1 BvR 1215/07 [2013]). According to Daniel Thym, it would be difficult to imagine a more perfect example of how widely the formula of Article 51 can be extended in order to recognise that the provisions of the Charter are applicable: D Thym (2013) 395.

ism, there was a belief that civil law embodied the values characteristic of democratic societies. Consequently, classic civil law was treated as a repository of these values and principles, and its principles were viewed as a resource that could provide a counterbalance to the premises of the authoritarian communist regime. These principles were seen as means for protecting the heritage of European legal culture, especially the fundamental autonomy of the individual's will. Lawyers from this region emphasise the importance of the principle of individual autonomy for a state that has embraced the democratic rule of law.[97] Such views in post-communist countries are of course not isolated. As noted in the literature, they correspond to the republican and democratic foundations of ordo-liberalism, which is enshrined in the concept of a private-law society (*Privatrechtsgesellschaft*).[98]

Descending to a lower level of abstraction, one can observe that the subsidiarity principle may be perceived as a derivative of the principle of autonomy of the will of private individuals.[99] One could even venture to assert that the "subsidiarity principle" employed in the language of constitutional law and its scholarship is the equivalent of the concept of "autonomy of the will" found in the language of civil law and its scholarship.[100] The development of the subsidiarity principle in the early 20th century was a response to the emerging totalitarian tendencies in Europe, i.e. fascist and communist regimes. The subsidiarity principle was intended to protect human freedom, arising from its inherent dignity.

On the other hand, the civil-law concept of "freedom of contract" with regard to local self-government bodies is to some extent equivalent to the concepts of decentralised local self-government or the autonomy of local self-government. At least the issue of the freedom of contracts for these bodies falls within the scope of their autonomy and decentralisation.[101]

Meanwhile, one can perceive some subjective rights in civil law as the equivalent of fundamental rights. This applies in particular to the so-called civil-law personal rights. It has been observed that due to the constitutionalisation of civil law, there is a tendency to broaden the scope of such civil-law rights to personal goods.[102] Of course, the above semantic reflection requires further development and in-depth research, but these examples seem to demonstrate that combining issues of private law and constitutional and state law can often make sense from a linguistic point of view.

97 See O Frinta, 'Constitutionalisation and Europeanisation of Private Law in the Czech Republic', in R Szczepaniak (ed), *The Constitutionalisation of Private Law versus the Europeanisation of Private Law: A Legal Study Based on the Example of Selected Countries of Central and Eastern Europe Belonging to the European Union* (Brill-Nijhoff, 2025) 96.

98 HW Micklitz (2021) 86 ff.

99 For more on the relationship between private law and the principle of subsidiarity, see F Bydlinski (1994) 350.

100 As Sieburgh writes, the EU's Charter of Fundamental Rights "can be used to translate a private law principle into a principle that is recognised under EU law": C Sieburgh (2013) 1165–1188. See P Kowalik, 'Zasada subsydiarności a przypisanie wydatków i podatków w federacjach – ujęcie teoretyczne' [The Principle of Subsidiarity and the Allocation of Expenses and Taxes in Federations – A Theoretical Approach] (2012) Nauki społeczne 1(5), 104–105.

101 See R Szczepaniak, 'List of the Most Important Conclusions' in R Szczepaniak (ed), *Constitutional Barriers to the Applicability of Private Law in the Public Sector: A Comparative Study with Particular Emphasis on Polish and German Law* (Wydawnictwo Naukowe UAM 2020) 627.

102 In Poland, some hold that the right to clean air should be considered as a right to personal goods. In the Romanian Civil Code of 15 July 2011, certain rights on personal goods were expressly introduced, which were previously enshrined in the constitution, such as the right to life or the right to respect for private life and human dignity. In Romanian doctrine, this is considered a manifestation of the constitutionalisation of private law. See R-D Popescu, 'Constitutionalisation of Civil Law: The Right to Respect for Private Law and Human Dignity' (2013) International Journal of Judicial Sciences vol. 7, 150–156.

7. THE CONSTITUTIONALISATION AND EUROPEANISATION OF PRIVATE LAW AND THE DIVISION BETWEEN PUBLIC AND PRIVATE LAW

In discussions on the involvement of private law in the EU integration process, the issue of the division into public and private law always comes up. According to many scholars, the division into public and private law deserves to be called a distinction of the highest importance, because it results from the nature of the law itself.[103] This is also why this issue is important for the general theory of the state and the study of constitutional law.

The constitutionalisation of private law and the Europeanisation of private law are essentially linked to this division. Firstly, these phenomena seem to shed some light on the essence of this division. Secondly, as has been pointed out, they contribute to the blurring of the boundary between public and private law (see sections 2.2. and 3.). If only for this reason, the constitutionalisation of private law and the Europeanisation of private law are important for the general theory of the state and the study of constitutional law (see hypothesis 5.).

The problem with this division is that it has many dimensions and everyone can understand it differently. Therefore, one should always be aware of what dimension of this division we are considering. It seems once again worthwhile to delve into the distinction between the technical and axiological (constitutional) dimensions of private law (see sections 4.4. and 4.5.). Additionally, it is essential to differentiate between two levels of considerations: 1. individual institutions which are usually attributed to civil law (the first level) and 2. private law understood *en bloc*, or at least as a civil-law method of regulation (the second level). This distinction can be useful for understanding the nature of the division between private and public law.[104]

As indicated above (sections 4.4. and 4.5.), some institutions within private law contain a distinctly technical component and are therefore not axiologically assigned to private law. They can essentially be utilised throughout the entire legal system. This includes the ways of concluding contracts, the principles of expressing will and the interpretation of declarations of will. It also applies to some extent to the regimes of tort liability for public authorities and unjust enrichment as universal mechanisms of compensation and repartition concerning public entities. At times, parallels between public- and private-law institutions are identified, such as public-law ownership, unjust enrichment in public law and public-law contracts.[105] This explains why the tort liability regime of public entities may be classified as a private-law institution in one EU country and as a public-law institution in another.[106] Therefore, attempting to classify individual institutions as public or private law is often a fruitless endeavour. Comparative research shows that assigning a particular institution to civil or public law is a matter of legal convention, customs and tradition.[107] For example, a certain contract concluded by the state in Poland is classified as a civil-law

103 See O von Gierke, *Deutsches Privatrecht. Bd. 1, Allgemeine Teil und Personenrecht.* (Duncker & Humblot 1895) 29; A Ross, *On Law and Justice* (Stevens and Sons Ltd 1958) 203.

104 See R Szczepaniak (2023) 72–73.

105 Meyer and other German administrative law experts advocated the development of administrative law by creating public-law institutions parallel to the existing private-law arrangements (*Parallelkonstruktionen zum Privatrecht*). See A Rinken, 'Verwaltungsrecht' in A Görlitz (ed), *Handlexikon zur Rechtswissenschaft* (Ehrenwirth Verlag 1972) 516 ff. In the French scholarship, it is "des emprunts juridiques". See B Plessix, *L'utilisation du droit civil dans l'elaboration du droit administratif* (Panthéon Assas, 2003) 50.

106 See footnote 63.

107 See R Szczepaniak, M Krzymuski in R Szczepaniak (ed), *Constitutional Barriers to the Applicability of Private Law in the Public Sector: A Comparative Study with Particular Emphasis on Polish and German Law* (Wydawnictwo Naukowe UAM 2020) 223–257, 267–315 and 323–351.

contract, while in France it is considered an administrative-law contract.[108] Consequently, it is not advisable to absolutise this division at the first level, i.e. that of individual institutions. Such absolutisation is manifested in treating this division as a value in itself, creating so-called walls of autonomy between different branches of the legal system, or imposing a programmatic prohibition on cross-branch analogy. It often leads to the ossification of the legal system, and consequently hinders a holistic view of the law, resulting in a deterioration of the individual's position in relation to a public authority.

This division makes sense primarily at the second level, thus not strictly related to specific legal institutions; it therefore makes sense when we consider private law *en bloc*, or at least as a method of regulation. At this level, this division has a constitutional dimension. It corresponds to the constitutional axiology of the modern, European democratic state. It is a negation of legal theories typical of totalitarian states, which were characterised by the denial of individuals' private interests, or at least the assumption that law primarily serves the realisation of the public interest. It is a characteristic of non-democratic (totalitarian) regimes that this division was usually resisted. This fact is used in arguments for reinforcing the importance of this division: it reemerged after the fall of communism in Central and Eastern European countries as an expression of the belief that there is a sphere of private legal relations subject to special protection against state interference. It is emphasised that maintaining this division is an element of the timeless European legal culture. Such an approach is in line with the principles of liberalism, which assumes the need to limit the state, and it also corresponds to the principle of subsidiarity. The role of the state is to set certain boundaries. Private law is universal law, the framework of which the state merely establishes. Thus, the understanding of the division into public and private law has a monumental meaning. This division is therefore a carrier of certain general assumptions about justice and values that are respected in our legal culture. It should be pointed out, however, that these constitutional-level assumptions mainly matter in the choice of the method of regulating social relations. Therefore, it is justified to assert constitutional limits on the legislature's freedom to choose the method for regulating social relations (private law or public law). For this reason, contesting this division within the framework of this new European legal culture of private law (see sections 2.2. and 4.) may cause some concern because, although it is not necessary to maintain this division, it is an expression of the existence of a society of free individuals.

In summary, one of the advantages of the constitutionalisation and Europeanisation of private law is breaking away from the absolutisation of this division wherever it is not of primary importance. This absolutisation occurs at the level of considerations relating to individual legal institutions. However, at the same time, it may be somewhat disconcerting to blur this division across the entire scope of legal issues, especially in cases where the principle of private autonomy must compete with other constitutional principles.

108 This fact raises certain methodological problems: see e.g. R Noguellou, U Stelkens (eds), *Droit comparé des Contrats Publics* (Bruylant 2010) 5–6. In order to be able to compare the public contracts in individual countries, the authors had to make some initial semantic assumptions. They also adopted a very broad understanding of the concept of a public contract, understanding them as all contracts that can be concluded by all administrative entities, without predetermining whether it is a contract under public or private law. Otherwise, many contracts which are described as private in many countries would have had to be excluded from the research.

8. The constitutionalisation and Europeanisation of private law from the point of view of the science of civil law as well as the general theory of the state and the study of constitutional law (hypothesis 8)

8.1. Introductory remarks

This assessment is a logical consequence of the above considerations on the entanglement of private law in the process of European integration. One can find a certain paradox in this entanglement, because the view has long been held that classic civil law is by definition the law of a free society, which could at least theoretically exist without a state. Since this entanglement takes the form of constitutionalisation and Europeanisation of private law, it is therefore necessary to ask how this constitutionalisation and Europeanisation affects private law, that is, what its classic role and functions are.

8.2. The contribution of the constitutionalisation and Europeanisation of private law to the development of the science of civil law

As a civil-law scholar, I can say that constitutionalisation and Europeanisation undoubtedly contribute to the development of civil law and its science. These phenomena enrich the methodological approach of civil law, allowing for the assessment of legislative activity in the field of private law in terms of compliance with constitutional principles.[109] Through this maturation, expressed in the constitutionalisation of private law, we have come to understand that legislatures cannot arbitrarily employ civil and administrative legal methods to regulate social relations, and that the choice of regulatory method is subject to control in the light of constitutional principles. Private law cannot be reduced to a mere method of regulation. The civil-law method of regulating social relations, in conjunction with these constitutional principles, forms a collective criterion for distinguishing private law. This provides a valuable new perspective for the analysis of civil law, through which we can identify manifestations of the legislature juggling and even manipulating various methods of regulating social relations.[110] Consequently, we have come to understand that the sensible use of the civil-law method of regulation requires the fulfilment of certain axiological conditions. It seems justified to speak of constitutional-law limits on the application of the civil-law method of regulation, which a few decades ago may not have been as evident, especially in Poland and other countries of Central and Eastern Europe that emerged from the communist system. If these conditions are not met, civil law becomes a caricature, giving rise to what the Polish Constitutional Tribunal has termed the fiction of civil-law equality between parties.[111]

109 As Mak notes, there is great potential for human rights reasoning to enrich the range of private legal remedies: C Mak (2022) op. cit.

110 Ewa Łętowska has repeatedly pointed out these manipulations in her publications: see E. Łętowska, 'Prawo w „płynnej nowoczesności"' [Law in "Liquid Modernity"] (2014) Państwo i Prawo vol. 3, 22.

111 See judgment of the Polish Constitutional Tribunal of 27 May 2014, P 51/13 (2014) OTK-A 5, 50; for a commentary on this judgment, see also R Szczepaniak, 'Granice cywilnoprawnej metody regulacji. Glosa do wyroku TK z dnia 27 maja 2014 r., P 51/13' [The Limits of the Civil Law Method of Regulation. Commentary on the Judgment of the Constitutional Tribunal of 27 May 2014, P 51/13] (2015) Państwo i Prawo vol. 12, 130–135.

The phenomenon of constitutionalisation necessitates changing the perception of civil law's place within the entire legal system. While civil law has a fairly consistent axiology, guided by the belief in the inherent dignity and freedom of private individuals, it ceases to be regarded as a closed, axiologically self-sufficient system. This results from "thinking about law in hierarchical terms", which is one of the defining features of constitutionalisation. The constitution unquestionably stands above civil law. Fortunately, the conviction has solidified that the supreme principles of civil law, especially the principle of autonomy of the will of private individuals, also have constitutional rank, thus providing a certain degree of protection for civil law against excessive interference and abuses. However, the perception of certain principles traditionally attributed to civil law is beginning to change. Examples include the principle prohibiting the abuse of law and the principle prohibiting unjust enrichment at the expense of others without legal basis (see section 4.2.). There are many arguments that these principles are not exclusive to civil law; they are universal principles of the entire legal system, with constitutional rank.[112] In the past, they were attributed to civil law because they were first expressed in civil-law regulations. This shift in the perception of these principles is also a manifestation of maturing legal awareness. Consequently, there has been a development in the methodology of legal sciences, which, as noted by Marek Safjan, is becoming more eclectic. This trend, without prejudging its overall assessment, also has positive features. Once again, we gain a new, broader perspective. As Ewa Łętowska would argue, the sensitivity of the courts and their hermeneutic skills in interpreting the text of the law at their disposal are growing, as is the recognition of the multidimensionality of the legal system, which consists not only of regulations but also unwritten principles, constitutional standards and norms of international law.[113]

Constitutionalisation and EU Europeanisation unquestionably revealed its innovativeness in the field of tort liability. Constitutionalisation allowed a certain positivistic paradox to be overcome, namely the oxymoron of the "unlawful law". As Jean-F. Brunet wrote over 80 years ago, the legislature appears as the "ultimate interpreter of the will of the Absolute, somewhat like a Moses to whom God dictates the Decalogue on Mount Sinai".[114] This statement captures the legal awareness of Europeans in the first half of the 20th century well. Maurice Hauriou added: "The assertion that the legislator can commit unlawfulness seems absurd; but it is not absurd in a country that would allow laws to be unconstitutional because a law conflicting with the constitution is unlawful".[115] Thanks to this, it was recognised that the legislature is liable to compensate for unconstitutional laws and legislative omissions. Due to Europeanisation, the concept of this liability has developed further, mainly due to directives not being implemented or implemented improperly; however, this development has a mainly instrumental character, as it primarily served to strengthen European integration.

112 See R Szczepaniak, 'The Issue of the Civil Law Provenience of the Main Principles of the Legal System' in R Szczepaniak (ed), *Constitutional Barriers to the Applicability of Private Law in the Public Sector: A Comparative Study with Particular Emphasis on Polish and German Law* (Wydawnictwo Naukowe UAM 2020) 543–555; see also J Parchomiuk, *Nadużycie prawa w prawie administracyjnym* [Abuse of Rights in Administrative Law] (CH Beck 2018) 739.

113 See E Łętowska, 'Bariery naszego myślenia o prawie w perspektywie integracji z Europą' [Barriers to Our Thinking about Law in the Perspective of Integration with Europe] (1996) Państwo i Prawo vol. 4–5, 44–58.

114 See J-F Brunet, *De la responsabilité de l'Etat législateu* (E de Boccard 1936) 10.

115 As cited in M Leroy, 'La responsabilité des pouvoirs publics du chef de méconnaissance des normes supérieures de droit national par un pouvoir législatif' in *La responabilité des pouvoirs publics. Actes du colloque interuniversitaire organisé par la Faculté de Droit de l'Université Catholique de Louvain et la Faculté de l'Univerité Libre de Bruxelles* (Bruylant 1991) 305.

Constitutionalisation, including EU constitutionalisation, opens up new possibilities and broadens the horizons for analysing phenomena of a civil-law nature. Constitutionalisation makes it possible to solve problems that were previously unsolvable. Classic civil law, as described by Andrzej Stelmachowski, was traditionally imbued with the spirit of individualism.[116] Therefore, civil law has always had difficulties dealing with mass phenomena. This is well illustrated by the example of the regime of tort liability for public authorities. Constitutionalisation allows us to see the real, deepest basis for the tort liability of public authorities; these are the principles written in the constitutions of EU countries, such as the principles of social justice, trust in the state and the law it enacts, the principle of social solidarity, the principle of equality in bearing public burdens and the principle of protection of property and other property rights. The principle of inherent and inalienable human dignity can be added to this list. These principles, as described by Michał Ziółkowski, are the constitutional foundations of the axiological basis for the tort liability of public authorities, both for unlawful acts and legal acts.[117] It seems that thanks to this, it is possible to justify the compensation liability of public authorities for damage to property caused by legal acts directly on the basis of constitutional principles – once the other prerequisites, which are not presented here, are met.

This innovation of EU Europeanisation also applies to consumer law. Undoubtedly, Europeanisation has contributed to a larger arsenal of measures protecting individuals in their relationships with powerful corporations.[118] When facing powerful international corporations, EU structures may be more effective than individual Member States. Therefore, the protection of consumer rights at the EU level can have a strong rational justification in light of the subsidiarity principle. It should be noted that the carrier of this innovation was the jurisprudence of the CJEU. This is not the first time in the history of law that the development of civil law, including tort law, occurred through case law.[119]

116 See A Stelmachowski, *Wstęp do teorii prawa cywilnego* [Introduction to the Theory of Civil Law] (Wydawnictwo Naukowe PWN 1984) 208.

117 See M Ziółkowski, *Odpowiedzialność odszkodowawcza za niezgodne z prawem działanie władzy publicznej. Studium z prawa konstytucyjnego* [Liability for Damages for Unlawful Actions of Public Authorities: A Study in Constitutional Law] (Wolters Kluwer 2021) 69–72.

118 Another issue is that many critical comments have been made about EU consumer law. The criticism particularly concerns the remarkable casuistry of consumer directives, which does not align with the systematics of civil-law codes. According to Rafał Mańko, these directives – especially their literal implementation – lower the quality of legislative technique developed in the legal doctrines of European countries. As a result of this consumer Europeanisation, according to Mańko, there is an excessive publicisation of contract law. He argues that emphasising the need to protect consumers has also given the Community authorities a pretext for extensive intervention in private law, which traditionally was reserved for Member States. This process occurred in the 1980s. Community authorities justified intervention in consumer transactions by arguing that such transactions are part of the common European market and should be subject to Community regulation. See R Mańko (2004) 9–10, 30 et seq.

119 As an example, one can point to the creative jurisprudence of the French Council of State from the late 19th century to the first half of the 20th century regarding the extra-contractual liability of public authorities. This jurisprudence later became an inspiration for the development of tort liability for powerful private corporations, as well. See R Szczepaniak, 'The Effectiveness of Civil Law Methodology and the Specifics of the Public Sector' in R Szczepaniak (ed), *Constitutional Barriers to the Applicability of Private Law in the Public Sector: A Comparative Study with Particular Emphasis on Polish and German Law* (Wydawnictwo Naukowe UAM 2020) 577.

8.3. Shortcomings of the constitutionalisation and Europeanisation of private law from the perspective of the science of private law, the general theory of the state and the study of constitutional law

However, constitutionalisation and Europeanisation pose certain threats to civil law. As indicated above (see section 7.), the blurring of the division between private and public law within the so-called new European legal culture may already raise concerns. In the context of EU law, private law serves a state-forming (federalising) function. Examining this function of private law is fascinating because it presents a paradox. As Franz Bydlinski noted,[120] civil law was formed in the relations between private individuals and, to some extent, in opposition to the state. *Prima facie*, civil-law institutions should not have a state-forming function. However, in the context of EU law, the situation is different. While there have been historical instances of civil law having state-forming functions, they did not manifest with the same strength as they do in the EU context.[121] This function is also interesting for constitutional scholarship. Therefore, it should be analysed by both private-law and constitutional-law scholars. Collaboration is highly recommended here.

At the beginning there is a reflection of a general nature. Such an instrumental vision of private law clashes with the well-known statement of Ernest J. Weinrib, that private law is an end in itself and not a means to some other particularly political, economic or social change. There is concern about the far-reaching effects of such a vision.[122]

As has been demonstrated, both the constitutionalisation of private law and the Europeanisation of private law, understood as the methodological support for EU integration, are associated with the promotion of a specific kind of axiology. These axiological systems may differ depending on the type of constitutionalisation and Europeanisation. Nevertheless, the concept of axiologisation is crucial for both the constitutionalisation and Europeanisation of private law. Certainly, the constitutionalisation of private law in particular can be considered another attempt (of which there have been many over the centuries) to rationalise the relationship between law and equity, including the rationalisation of the process of introducing equity into the law. Despite the undeniable advantages mentioned above, the constitutionalisation and Europeanisation of private law cannot be deemed sufficiently successful attempts to rationalise the relationship between law and equity and to introduce equity into legal matters. Constitutionalisation and its counterpart, Europeanisation, work best in relationships involving public entities. In this field, such axiologisation is the least controversial. In cases where only private entities are involved, the controversy

120 See F Bydlinski (1994) 3.

121 An example of this is the German Civil Code (BGB) from 1896. German lawyers, starting from the enactment of the BGB, were familiar with the idea that this code represented something akin to a constitutional act. See on this topic See C. Bornhak, '*Das Verwaltungsrecht in Preussen unter der Herrschaft des BGB*' (1900) Band 8, Heft 1/2 VerwArch 1ff ; G Brüggemeier, 'Constitutionalisation of Private Law – The German Perspective' in T. Barkhuysen, I.S. Lindbergh (eds.) *Constitutionalisation of Private Law*, (Leiden and Boston 2006), 60 ff; G Brüggemeier, 'Horizontal Effects of Fundamental Rights – A Critical View on the German Cathedral and Beyond' in H Tiberg, M Clarke (eds), *Essays on Tort, Insurance, Law and Society in Honour of Bill W. Dufwa*, vol. 1 (Jure Förlag AB 2006) 313–330; K. Hesse, *Verfassungsrecht und Privatrecht*, (Müller, Jurist. Verl. 1988), 10; J. Krzeminska-Vamvaka, 'Horizontal Eeffect of Fundamental Rrights and Ffreedoms – Mmuch Aado about Nothing ? German, Polish and EU Ttheories Compared after Viking Line' (2009) 11/09 Jean Monnet Working Paper vol. 11, p. 12 and the literature given there.

122 "If we must express [private law's] intelligibility in terms of purpose, the only thing to be said is that the purpose of private law is to be private law" – EJ Weinrib, *The Idea of Private Law* (Oxford University Press 1995) 5.

increases. Firstly, this methodology, i.e. the constitutionalisation and Europeanisation of private law, does not allow us to break free from the perpetual cycle of a kind of *dialectica diabolica* that has always accompanied the application of law and its scholarly study.

The nature of legal mechanisms is imbued with a certain dialectic, a unique combination of opposites giving rise to constant internal tensions. Philosophically, this can be framed more broadly, stating that every aspect of human existence is subject to this dialectic, the struggle of opposites.[123] The pursuit of just solutions is unfortunately accompanied by an opposing trend, causing distortions in planned processes and even paradoxes. It has long been observed that unrestricted appeals to justice lead to injustice – including the erosion of a sense of security and legal certainty – and to unrestrained judicial activism. This explains why, over the centuries, legal scholars have expressed extreme opinions on the matter of equity, ranging from the most enthusiastic to the most critical.[124] By the way, it is believed that judicial activism is inscribed in the essence of the current stage of EU integration, especially including the Europeanisation of private law. This activism is supposed to fill "the political vacuum which resulted from the two failures". This concerns the failure to establish a European civil code and a European Constitution ("the judges as the heroes of our times").[125] It is therefore not surprising that there is an overwhelming impression that, as Rodot wrote, "in the silence of politics judges are making Europe".[126] This in turn raises controversy when it comes to the democratic foundations of these processes.

Conversely, the apotheosis of human rights, the absolutisation of fundamental rights, can eventually turn against humanity, as it may result in the limitation of the sphere of freedom. Meanwhile, the individual's assertion of rights against public authority, initially a manifestation of the maturation of citizens' legal consciousness – when it goes beyond a certain threshold – can begin to corrupt legal awareness. Due to the unchecked escalation of claims, it can transform into an attitude of destructive entitlement, weakening the sense of responsibility for the common good, i.e. the state.[127]

Of course, one cannot deny the goodwill of EU officials who sought to establish a European system of fundamental rights. The development of human rights in the European context, manifested in national and EU constitutionalisation, was undoubtedly a response to the tragic

123 As Plato wrote, "'The same malady,' I said, 'that, arising in oligarchy, destroyed it, this more widely diffused and more violent as a result of this licence, enslaves democracy. And in truth, any excess is wont to bring about a corresponding reaction to the opposite in the seasons, in plants, in animal bodies, and most especially in political societies.'" – Plato, 'The Republic' in Plato, *Plato in Twelve Volumes*, vol. 5, 6 (Harvard University Press–William Heinemann Ltd 1969).

124 For example, "God save us from the justice of parliaments", "there is nothing worse for the administration of justice than justice" and "justice is as variable as the length of the foot of every chancellor": IC Kamiński, *Słuszność i prawo. Szkic prawnoporównawczy* [Equity and Law: Comparative Law Overview] (Zakamycze 2003) 13.

125 See H W Micklitz (2021) 77 ff.

126 S Rodotà, *Il diritto di avere diritti* (Laterza 2012) 96.

127 In Poland, this can be seen, for example, in compensation claims against the state for living in smog. The CJEU, in its judgment C-336/16 EU:C:2018:94 – resulting from a complaint brought by the European Commission under Article 258 of the TFEU – found a violation by Poland of Article 13(1) of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008, on ambient air quality and cleaner air for Europe [2008] OJ L 152, 1. As a result, there has been a trend of filing compensation lawsuits against the Polish state for the mere fact of breathing air that does not meet EU standards, https://chat.openai.com/c/090646ab-c987-4dab-a0d9-2b1dfbcf3d1a. See R Szczepaniak, 'Smog a odpowiedzialność odszkodowawcza władz publicznych' [Smog and the Liability for Compensation of Public Authorities] (2020) Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu 2(66), 26–48. Polish courts have started to award compensation to citizens in these cases. However, if this trend were to become widespread, it could lead to the paralysis of public finances.

experiences of European totalitarian regimes in the 20th century. After the Second World War, there emerged a desire to create an objective, universal axiological order of constitutional rank. This constitutional axiological order is meant to transcend the legislation created by the national legislatures. However, even this noble intention and the constitutional status of this axiological legal system do not safeguard against the operation of the aforementioned dialectic.

The struggle of opposites is inherent to the nature of private law itself. The cooperative (self-regulatory) character of civil law makes it an open system. This openness is reflected, among other things, in the receptiveness of private law to non-legal norms, various ideas and value systems. This is evidenced, for example, by the significant role of general clauses in private law. Consequently, private law is also open to the influences of various ideologies, which over time may threaten the very nature of private law as a law of autonomous, free individuals. Excessive axiologisation of the law eventually turns against humanity, leading to destructive ideological disputes and an ideologisation that restricts individual freedom, including freedom of conscience. The specific instrumentalisation of private law in the EU, as mentioned above, may further reinforce the process of filling private law with values foreign to its nature. Consequently, there is a risk of private law being abused.[128] Indeed, there has been much discussion over the years about the risk that the autonomy of private individuals will be limited due to excessive constitutionalisation. This autonomy is unquestionably a principle of civil-law provenance and applies *ex definitione* to civil transactions. However, recognising it as a constitutional principle only ostensibly strengthens the autonomy of civil law. Constitutionalisation inherently involves a certain conflict between constitutional values. We encounter axiological conflict because constitutional principles often remain in collision with each other, to a greater or lesser extent. The civil-law principle of autonomy of the will of private individuals must therefore compete with other constitutional principles, such as prohibitions of discrimination. In extreme cases, this leads to the emergence of various forms of contractual compulsion. Nowadays, the tendency to expand contractual obligations (obligation to conclude a contract) based on certain constitutional principles and values is noticeable.[129]

It is not only contract law that is threatened by this dialectic. The second fundamental source of obligations in civil law is tort liability. It has already been said that in the area of tort liability, Europeanisation brings certain benefits (see section 8.2.). However, it was also said that tort liability is currently widely regarded as an autonomous instrument of EU law aimed at counteracting violations of it (see sections 4.5. and 4.6.).[130] There are emerging non-compensatory functions of the tort liability regime in the EU. There is a risk that treating the tort liability regime as an instrument may lead to its deformation. There is a fear that in order to prevent violations of EU law, this measure will be applied even when the classic premises for liability for damages do not occur. Such instrumentalisation of this regime may lead to certain anomalies.

128 In legal theory for many years, scholars have written not only about the abuse of subjective rights, but also about the so-called abuse of legal form (institutional abuse). The concept of "Formenmissbrauch" was popularised by Christian Pestalozza. See C. Pestalozza, *Formenmißbrauch' des Staates. Zu Figur und Folgen des ‚Rechtsmißbrauchs' und ihrer Anwendung auf staatliches Verhalten* (CH Beck 1973). The concept of "institutional abuse" was developed in German science (institutionelle Rechtsmissbrauch; Missbrauch eines Rechtsinstituts). See also R Serick, *Rechtsform und Realität juristischer Personen* (W de Gruyter 1955) 23–24.

129 See S Sprafke, *Diskriminierungsschutz durch Kontrahierungszwang: Vertragsabschlusspflicht aus [section] 21 AGG im System der Kontrahierungspflichten* (Kasel University Press 2013) 13 et seq.

130 P Verbruggen (2017) 47 ff.

They may consist, for example, in the fact that, in order to ensure the effectiveness of EU law, certain cases of infringement by the authorities of the Member States give rise to liability for damages, while other similar cases of actions by public authorities of the Member States which do not relate to EU law may not do so. In legal science, the term "dualistic approach" is used in this context.[131]

In essence, as a kind of methodology for the axiologisation of law, the two related phenomena (constitutionalisation and Europeanisation) unfortunately are not accompanied any new mechanism that would sufficiently safeguard against the risks associated with this axiologisation. In particular, such a guarantee is not provided by the procedure of balancing constitutional principles (values) based on the principle of proportionality. The classic method of mechanical formal logical subsumption is expected to give way to the method of balancing constitutional values in the event of a legal conflict between principles. In the German legal scholarship, this is seen as a victory of interest jurisprudence (*Interessenjurisprudenz*) over conceptual jurisprudence (*Begriffsjurisprudenz*).[132] Undoubtedly, this balancing of values is another manifestation of the growing importance of judicial activism. To this day the criteria for deciding such conflicting cases remains an unresolved issue. The so-called proportionality test is often touted as a solution in these cases. The principle of proportionality is intrinsic to the essence of balancing. In other words, the application of one legal principle should be such that the harm to another legal principle is minimised.[133]

However, in both the American and European legal scholarship, where this balancing method is employed, many sceptical voices can be heard regarding the effectiveness of the principle of proportionality or "balancing language".[134] An expression of a certain powerlessness in this regard is the often-suggested idea that courts must find a balance by taking into account the circumstances of each specific case (*in casu*).[135] Consequently, there is a risk that balancing may infringe upon the essence of the autonomy of private individuals.

Constitutionalisation and Europeanisation have not introduced any groundbreaking new methodology for interpreting the law. Let us recall that constitutionalisation and Europeanisation favour the functional (teleological) method of interpretation. Through interpretation, the goal is to achieve compliance of national law with higher-order law, such as the constitution and EU law. The functional (teleological) method of interpretation indeed has undisputed merits; it is even indispensable in the process of applying the law and its scholarly analysis, as it contributes to the development of autonomous concepts, among other things. However, when it is put on a pedestal (as is the case with the constitutionalisation and Europeanisation of the law), it risks fostering judicial

131 See N Półtorak (2014) 80; BJ Hartmann, 'Alignment of National Government Liability Law in Europe after Francovich' (2012) ERA Forum vol. 12, 613–623; FG Jacobs, 'Some Remarks on Community and Member State Liability' in J Wouters, J Stuyck (eds), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune* (Intersentia Publishing 2001) 131.

132 See K Larenz, *Methodenlehre der Rechtswissenschaft* (Springer Verlag 2014) 58.

133 See R Alexy (2000) 295 et seq.

134 J Bomhoff, 'Lüth's 50th Anniversary: Some Comparative Observations on the German Foundations of Judicial Balancing' (2008) German Law Journal 9(2), 121–124. For more on the controversy related to the application of the principle of proportionality to horizontal relations, i.e. between private entities, see P Verbruggen (2017) 47 ff.

135 See J Krzeminska-Vamvaka, 'Horizontal Effect of Fundamental Rights and Freedoms – Much Ado about Nothing? German, Polish and EU Theories Compared after Viking Line' (2009) Jean Monnet Working Paper vol. 11, 47.

activism beyond permissible limits.[136] Due to these limits being exceeded, a trend of thought has emerged concerning the interpretation of the law, which can be collectively termed "textualism" ("Semantic originalism").[137] The author evaluates "textualism" to be a somewhat desperate reaction to the phenomenon of excessive judicial activism. It is desperate because, fundamentally, it is based on the utopian assumption that the process of interpreting a legal text can be confined in practice to a strictly linguistic method.

Moreover, the view expressed in the past by representatives of the Free Law School and interest jurisprudence (*Interessenjurisprudenz*), and now by some enthusiasts of the constitutionalisation and Europeanisation of private law, is not convincing. There arises an assumption that constitutional law is supposedly the source of an objective, universal system of values. In contrast, civil law is cast as the opposite of constitutional law thus understood, as it is said to be dependent on ideological and political conditions.[138] Unfortunately, such an assumption is utopian. Firstly, constitutional provisions, to an even greater extent than civil-law provisions, abound in various open-ended concepts and general clauses, the interpretation of which is inherently dependent on the evaluations being adopted.[139] Twenty years ago, Marek Smolak, while analysing methods of constitutional interpretation, drew attention to the fact that we live in times of the "juridification of politics". This means that decision-making bodies pursue political goals under the guise of applying the constitution. In other words, law –especially constitutional law – is not autonomous and independent from politics. Marek Smolak understands such autonomy as the law not being abused as a means to achieve various political objectives.[140] Thus, in legal discourse, especially when discussing the constitutionalisation of the law, the concept of the abuse of law arises. As Smolak writes, abuse occurs when the law is used for political purposes: open-ended concepts and general clauses in a constitution or, for example, in the Charter of Fundamental

136 As M Andrzejewski writes: "We can speak of legal interpretation as long as lawyers analyze the legal text that serves as a basis for their actions. Lawyers go beyond the limits of their craft if they ignore the text of the law or formulate conclusions based on mental constructs built upon an imaginary text that does not exist in the law. In other words, when they claim that the norm formulated by them exists despite the fact that there are no provisions from which it can be interpreted, or when they claim that a given norm does not exist despite the existence of provisions in which it is codified; when they forget that what 'the legislator wanted to enact is expressed (...) in what the legislator enacted' and not in what the interpreter implies that it has enacted. One of the signs of yielding to the temptation of judicial activism is the downgrading of the word, i.e. the content of the provision/provisions, in favor of one's own intellectual expression. It leads to an undesirable switching of roles, or at least to an undesirable stepping out of one's role – someone who is a judge (and sometimes a scholar) pretends to be a kind of legislator constantly acting in the role of a judge or a scholar": M Andrzejewski, 'Application of the Clause of the Good of the Child: Reflections Inspired by the Decision of the Supreme Court on the Creation of Foster Families' (2021) Studia Iuridica Lublinensia 30(5), 47–48.

137 LB Solum, 'Semantic Originalism' (2008) Illinois Public Law and Legal Theory Research Papers Series no. 07–24, 176.

138 In a sense, these convictions are expressed in the judgment of the Federal Constitutional Court of Germany of 15 January 1958, BVerfGE 7, 198 [1958]; and in judgment of the Federal Constitutional Court of Germany of 26 February 1969, BVerfGE 25, 256 [1969].

139 This is emphasised in the literature. For example, Cherednychenko notes that human rights are too vague to give guidance to balancing processes in private law. The well-established general clauses of private law are substituted or even subordinated to vague standards of public legal nature. See OO Cherednychenko, 'Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or towards Walking in Circles?' in S Grundmann (ed), *Constitutional Values and European Contract Law* (Kluwer Law International 2008) 44. Views on this subject are also presented by C Mak (2022) op. cit.

140 M Smolak, 'Sądownictwo konstytucyjne a autonomia prawa wobec polityki' [Constitutional Judiciary and the Autonomy of Law in Relation to Politics] (2003) Ruch Prawniczy Ekonomiczny i Socjologiczny vol. 1, 14.

Rights that "explicitly require reference to politics" or political ideology in their content. As Smolak observes, although there are various theoretical models of constitutional adjudication, constitutional courts de facto resolve politically charged disputes. Therefore, these courts are, in reality, political organs. This applies particularly to national constitutional courts and courts performing such a function, including the CJEU. Smolak concludes that "creative interpretation of the constitution, 'complementing', and 'finding' additional detailed principles of law is a kind of political activity of constitutional adjudication, not a guarantor of non-interference of politics in the content of the examined law".[141] As he continues, "I agree with L. Morawski, who writes: 'I think that Dworkin's construction of legal principles aptly describes the practice on which constitutional adjudication is based, in most countries, because it is more concerned with reconciling its own legal system with a set of fundamental principles and rules fundamental to liberal democracies than with whether these principles and rules are actually expressed in currently applicable legal texts'". Smolak concludes that, unfortunately, a "meta-theory has yet to be developed concerning the universal substantive morality that would provide solutions when giving content to specific principles of the rule of law".[142]

Considering the interplay of phenomena from the various fields described above, including the political/legal system of the state and civil law, it should be noted that in this sphere, the *diabolical dialectic* of the law can also make itself felt. The apotheosis of principles and values, including human rights, may paradoxically lead to further unfavourable phenomena, and not only in the area of civil law. It may develop as a consequence of the "governance through principles" phenomenon, which in the long run is not conducive to legal certainty. If such a governance method is implemented by EU bodies, it may be a pretext for them to take on new *ultra vires* competencies, i.e. without a clear basis, at the expense of Member States, which may result not only in violating the principle of legality (the rule of law), but also in unjustified interference in the sovereignty of Member States.[143] The more horizontally EU law is applied, the narrower the scope of application of national constitutions, and the narrower the scope of competence of the national parliaments. In some sense, the horizontal nature of EU law clashes with the principle of subsidiarity. The result of such a process may be the centralisation of power concentrated at the highest level, e.g. in Brussels instead of in the Member States. Such centralisation again threatens the principle of subsidiarity and may be detrimental to individuals. Concerns have already been expressed that further development of this horizontal effect, especially its direct version, may undermine the classic tripartite separation of powers, as disproportionately large powers are assigned to courts, including ordinary courts, which ultimately resolve conflicts between values and create law.[144] These adverse effects are reinforced by the broadly understood

141 Ibid., 20.

142 Ibid., 21.

143 An extremely interesting issue is the scope of application and understanding of the principles of the rule of law and legalism in EU structures. Safjan and Gwóźdź emphasise that these principles undoubtedly apply to EU bodies, and the EU itself is built on the foundation of the rule of law: M Safjan, Ł Gwóźdź, 'General Report: The Revival of the Rule of Law Issue' in M Safjan (ed), *The Revival of the Rule of Law Issue* (Intersentia 2024) 1–50. At the same time, they point to emerging opinions that some standards in the scope of control over EU institutions or, for example, regarding appointments to EU judicial institutions and guarantees of their irremovability are not satisfactory. They quote Düsterhaus, according to whom "a certain veneration of autonomy has largely immunised the EU against outside scrutiny and the benefits of external critique and contention. In this regard, it may be considered that, as long as the discretion involved in the judicial review of legality is not itself checked and balanced, the rule of law is not fully observed in the EU legal order."

144 See M Maslák (2019) 42.

multicentricity of EU law.[145] Such a process may lead to the destabilisation of the system of the sources of law (so-called *validation chaos*)[146] and the erosion of the principle of legality (the rule of law). We can recall that Montesquieu already warned against giving too much power to the judiciary, as then "the judge might behave with violence and oppression".[147]

Manifestations of such unfavourable phenomena have been observed in Poland in recent years. Symptoms of a serious constitutional crisis have appeared, characterised by disputes over the hierarchy of sources of law (dispute over the supremacy of the national constitution over EU law or vice versa), and the blurring of the principle of legalism.[148]

9. Conclusions

The above considerations prove that the constitutionalisation and Europeanisation of private law interpenetrate on many levels with the general theory of the state and the study of constitutional law in the EU. The analysis leads to conclusions that help answer the questions posed in the In-

145 This concerns, among other things, the issue of the so-called dispersed control of the constitutionality of laws by courts. In the justification of the judgment of the District Court in Częstochowa of 16 September 2021, IC U 718/21 [2021], the following reasoning was presented: "In a state governed by the rule of law, not every product of the legislator (a statute) is law. It is subject to judicial control from the position of the principles of the Constitution and the fundamental rights of the EU (Article 9 and Article 91 of the Constitution). The multicentric model of applying the law expands the basis of judicial decision-making to principles and confronts them with provisions; it justifies the judge being bound by law in the traditional sense and the technique of removing a provision (in conflict with the law) from the system. In the multicentric model, the validity of the law is not only of a formal nature. According to the Simmenthal judgment, not only can a tribunal derogation be a basis for removing a norm from the legal system. As S. Wronkowska writes, just as there is a wealth of possibilities for adding norms to the legal system, there are also many ways of removing a norm from the system. In turn, M. Atienza adds that the new quality of applying the law consists of 'replacing the criterion of the validity (formal and procedural) of state legal norms with others that add a condition of a material nature to the previous requirements: in a constitutional state, for a norm to be valid, it cannot conflict with the constitution, it cannot contradict the principles and fundamental rights adopted in it'. The concept of the 'negative legislator' introduced into legal discourse by Hans Kelsen comes into play here" – S Wronkowska, 'Kilka uwag o „prawodawcy negatywnym"' [A Few Remarks about the "Negative Legislator"] (2008) Państwo i Prawo vol. 10, 5–20.

146 A Kalisz, 'Multicentryczność systemu prawa polskiego a działalność orzecznicza Europejskiego Trybunału Sprawiedliwości i Europejskiego Trybunału Praw człowieka' [Multicentricity of the Polish Legal System and the Judicial Activity of the European Court of Justice and the European Court of Human Rights] (2007) Ruch Prawniczy Ekonomiczny i Socjologiczny vol. 4, 35–49. In the German literature, there is also a suggestion that the current, incompletely defined model of EU integration may lead to the unsettling of the system of sources of law. Peter Hilpold, describing the evolution of disputes between the German constitutional court and the CJEU, writes: "this conflict has drastically revealed the many lacunae in the federal model of the Union, the imperfections of [the Economic and Monetary Union], and the uncertainties of the integration model. This model seems to be far away from the often-cited 'Hamiltonian moment' and unsure what kind of solidarity perspective should be adopted. Beyond all legalistic swaggering on both sides, these are the real, political problems to solve. As has been well-portrayed in literature, legally this problem is probably not solvable: both the BVerfG and the ECJ claim 'to be right' and as 'border organs' ('Grenzorgane') operating at the threshold between law and politics, they both are advocating Kelsenian 'basic norms' ('Grundnormen') that are mutually not reconcilable. In the attempt to over-trump the other Grundnorm, both sides have made legal errors and if they are weighed and balanced, it is difficult to say who is right and who is wrong, if the decision is not be taken merely on the basis of sympathies": P Hilpold (2021) 190.

147 See Montesquieu, *The Spirit of Laws* (T. Evans 1777) 188.

148 For more on this topic, see M Krotoszyński (2015) especially 30–31. See also A Czarnota, 'Populist Constitutionalism or New Constitutionalism' (2019) Krytyka Prawa vol. 11, 43–55; M Stambulski, A Czarnota, 'The Janus Face of Constitutionalism' (2019) Krytyka Prawa vol. 1, 18–26.

troduction. It seems that the validity of all the hypotheses has been confirmed. This does not change the fact that this text also confirmed how complex and comprehensive a phenomenon the entanglement of private law in the process of EU integration is, and that it deserves an in-depth monographic study. This text contains a plan for such in-depth research. The framework of this research is determined by the research questions indicated in the Introduction.

The constitutionalisation and Europeanisation of private law become key concepts in the contemporary general theory of the state and the study of constitutional law in the EU. In other words, civil law – through its constitutionalisation and Europeanisation – has become one of the key issues in the contemporary theory of the state and constitutional law studies in the EU.[149] It is currently impossible to conduct a discussion on EU integration without taking into account the issue of the constitutionalisation and Europeanisation of private law.

When analysing civil-law issues in the context of EU law, we always reach a point where we cannot avoid questions relating to constitutional and state law. There are two main topics in the discourse on the Europeanisation of private law. The first one is the issue of the constitutionalisation of private law. The second one concerns integration within the EU. However, this paper has shown that in the EU context, the Europeanisation of private law is intertwined with the constitutionalisation of private law (see sections 3., 4. and 5.). Consequently, these two topics cannot be considered separately. In particular, the development of European private law through the influence of human rights also serves integration within the EU.

Within the EU framework, there is an increasingly evident mutual interaction of factors (principles, values, institutions and concepts) that *prima facie* belong to completely different categories: private law and public (constitutional) law (see sections 4. and 5.). There is a kind of blending of these elements. A distinctive eclecticism comes into play, where "everything interacts with everything". The author refers to the principles and values determining the political/legal system of a given state, such as the rule of law (principle of legality), state sovereignty, the principle of the separation of powers, the principle of subsidiarity, budgetary balance and fundamental rights of individuals (see sections 4. and 5.). On the other hand, the author also addresses the fundamental principles of civil law, especially the autonomy of the will of the parties. All the most important aspects of the Europeanisation of private law are inextricably linked, to a greater or lesser extent, with the issue of EU integration (see sections 4. and 5.). This applies especially to issues such as the scope of EU competencies, and therefore to the institutional relationship between the EU's subjectivity and the sovereignty of its Member States. This concerns issues such as 1. the horizontal application of fundamental rights recognised by EU bodies, 2. the scope of the Charter of Fundamental Rights, especially issues associated with the interpretation of Art. 51 CFR, 3. the meaning and functions of general clauses in EU directives in the field of private law and 4. the principles of tort liability of the Member States, but also the question of tort liability of private entities for violating EU law.

Thus, in the context of EU law, private law serves a state-forming (federalising) function. This mixing of civil-law issues with constitutional and EU issues inevitably sometimes leads to conflicts. Principles of national family law, such as the principle that marriage is the union of

149 The growing importance of private law from the point of view of state science, including political science, has also been noticed by other researchers. See e.g. M Bartl (2023) op. cit. The author sees a manifestation of a new trend in legal scholarship called "law over political economy". The author writes: "A Law and Political Economy approach thus (definitionally) cuts across the boundaries of scientific disciplines, using insights from law, economics, politics, geography and religion, to understand how various social institutions are made and can be remade": M Bartl (2022) 1–11.

a man and a woman or the prohibition of adoption by same-sex couples, come at least partially into conflict with the EU principle of free movement of persons and the right to family reunification, as well as with appropriately understood prohibitions against discrimination.[150] At the same time, there is a conflict related to the sovereignty of EU Member States. The aforementioned family law principles are considered part of the constitutional (national) identity of at least some EU Member States.[151] If EU bodies attempt to intervene in this matter in one form or another, they may face the charge of acting *ultra vires*. It goes without saying that the issue of *ultra vires* actions is among the most significant issues in the current stage of the EU's development.

The complexity of the modern world forces the adoption of interdisciplinary and eclectic research methods in legal sciences. Nowadays, every private-law expert in Europe must also be a constitutionalist[152] and must have extensive knowledge of European law. Cooperation between specialists in private law and constitutional law is also needed. This can lead to synergy for the benefit of both legal disciplines.[153]

In today's complex world, numerous interdependencies exist between the spheres of civil law and constitutional law. It is true that in the past, the codification of civil law within a state was seen as a unifying factor, especially in federal states.[154] However, constitutionalisation, Europeanisation and the multi-centric and hybrid nature typical of the EU have significantly altered the perception of civil law, negating the dichotomy between public law and private law and the complete autonomy of civil law. Civil law has never been perceived, in a programmatic way, as a factor that strengthens transnational integration.[155] As a result, the constitutionalisation and Europeanisation of private law have contributed to stronger intertwining and mixing factors from different legal domains, as discussed in this paper.

As a result of the triumph of this new thinking, namely constitutionalisation and Europeanisation, private law has become a significant subject in the field of constitutional law, traditionally the domain of public-law specialists. Naturally, the question arises as to whether this constitutionalisation and Europeanisation of private law are positive phenomena. In particular, it prompts the question of whether constitutionalisation and Europeanisation can be considered successful

150 See J Rijpma, N Koffeman, 'Free Movement Rights for Same-Sex Coples under EU Law – What Role to Play for the CJEU?' in D Gallo, L Paladini and P Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer 2014) 455–491. See J Gajda (2025) 271–288.

151 For more on the concept of constitutional identity, see C Calliess, G van der Schyff, *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).

152 See R Szczepaniak, 'Preface', in R Szczepaniak (ed), *The Constitutionalisation of Private Law versus the Europeanisation of Private Law: A Legal Study Based on the Example of Selected Countries of Central and Eastern Europe* (Brill-Nijhoff 2025).

153 Ewa Łętowska recognises here a manifestation of the phenomenon referred to by Zygmunt Bauman as "liquid modernity", which is said to be a consequence of postmodernism. In this "liquid modernity", there is, among other things, a process of "desystematization" of the law. See E Łętowska (2014) 6–27. The author refers to Bauman's book, *Płynna nowoczesność* [Liquid Modernity] (Kraków 2006).

154 As Mańko writes: "Undoubtedly, since the era of the great civil codifications, the connection between private law and sovereignty has strengthened. The civil code has since become a symbol of the unity of the national community, as was the case with the Napoleonic Code, which replaced the diversity of legal systems in pre-revolutionary France. In Germany, the enactment of the BGB was celebrated with the slogan Ein Volk, ein Reich, ein Recht, which a generation later underwent a sinister mutation": R Mańko (2017) 89.

155 As noted by Mańko, members of the Research Group on Social Justice in European Contract Law – who are also leading representatives of EU private-law doctrine – recognised that "initiatives undertaken in the field of private law are part of the mechanism of increasing emancipation of the European Union (...), aimed at creating a political entity with its own constitution": R Mańko (2017) 89–90.

methodologies, representing genuine progress in legal scholarship. The above analysis has shown that the constitutionalisation and Europeanisation of law have numerous advantages, but one can also point out significant shortcomings of these two phenomena (see section 8.). It seems that constitutionalisation and Europeanisation reveal their advantages and disadvantages most clearly in the field of private law.

References

Literature

Alexy R, 'On the Structure of Legal Principles' (2000) 13(3) Ratio Juris 294–304.

Andrzejewski M, 'Application of the Clause of the Good of the Child: Reflections Inspired by the Decision of the Supreme Court on the Creation of Foster Families' (2021) Studia Iuridica Lublinensia 30(5) 47–48.

Bartl M, 'Private Law and Political Economy' in M Bartl, L Burgers, C Mak (eds), *Uncovering European Private Law. European Private Law Handbook* (Amsterdam Centre for Transformative Private Law 2022) 1–11, <http://dx.doi.org/10.2139/ssrn.4344615>.

Bartl M, 'Toward Transformative Private Law: Research Strategies' (2023) Amsterdam Law School Research Paper no. 11, 2–10, <http://dx.doi.org/10.2139/ssrn.4376854>.

Benöhr I, *EU Consumer Law and Human Rights* (Oxford University Press 2013).

Bomhoff J, 'Lüth's 50th Anniversary: Some Comparative Observations on the German Foundations of Judicial Balancing' (2008) German Law Journal 9(2), 121–124.

Bornhak, Conrad, 'Das Verwaltungsrecht in Preussen unter der Herrschaft des BGB' (1900) Band 8, Heft 1/2 VerwArch vol. 8, 1–88.

Brüggemeier G, 'Constitutionalisation of Private Law – The German Perspective' in T Barkhuysen, IS Lindbergh (eds), *Constitutionalisation of Private Law* (Brill 2006) 59–82.

Brüggemeier G, 'Horizontal Effects of Fundamental Rights – A Critical View on the German Cathedral and Beyond' in H Tiberg, M Clarke (eds), *Essays on Tort, Insurance, Law and Society in Honour of Bill W. Dufwa*, vol. 1 (Jure Förlag AB 2006) 313–330.

Brunet J–F, *De la responsabilité de l'Etat législateu* (E. de Boccard, Éditeur 1936).

Busch C, 'Fundamental Rights and Private Law in the EU Member States' in C Busch, H Schulte-Nölke (eds), *Fundamental Rights and Private Law* (Sellier European Law Publishers 2011) 1–25.

Busch C, Schulte-Nölke H, 'Building a Bridge between Research and Practices: An Introduction to the Fundamental Rights Action Plan' in C Busch, H Schulte-Nölke (eds), *Fundamental Rights and Private Law* (Sellier European Law Publishers 2011) XV–XXII.

Bydlinski F, 'Kriterien und Sinn der Unterscheidung von Privatrecht und öffentlichem Recht' (1994) Archiv für die civilistische Praxis 194(4), 319–351.

Calliess C, Schyff G van der, *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).

Całus A, 'Europeizacja prawa prywatnego jako wartość współgrania i konkurencji porządków: międzynarodowego, „europejskiego" i krajowego' [The Europeanisation of Private Law as the Value of Interplay and Competition between International, "European" and National Orders] in E Cała-Wacinkiewicz, J. Menkes (eds), *Wspólne wartości prawa międzynarodowego, europejskiego i krajowego* [Common Values of International, European and National Law] (CH Beck 2019) 3–11.

Cherednychenko OO, 'Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or towards Walking in Circles?' in S Grundmann (ed), *Constitutional Values and European Contract Law* (Kluwer Law International 2008) 35–60.

Cherednychenko OO, 'Rediscovering the Public/Private Divide in EU Private Law' (2020) European Law Journal 26(1–2), 27–47.

Cherednychenko OO, 'Report on the Conference "European Constitutionalisation of Private Law"' (2003) European Review of Private Law 11(5), 708–712.

Comandé, G., 'The Fifth European Union Freedom: Aggregating Citizenship...around Private Law' in H-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) 61–101.

Czarnota A, 'Populist Constitutionalism or New Constitutionalism' (2019) Krytyka Prawa vol. 11, 43–55.

Diaz Crego M, Mańko R, Ballegooij W van, *Protecting EU Common Values within Ten Member States. An Overview of Monitoring Prevention and Enforcement Mechanisms at EU Level* (European Parliamentary Research Service 2020).

Dworkin R, 'The Model of Rules' (1967) University of Chicago Law Review 35(1), 14–46.

Dybowski M, 'Ronalda Dworkina koncepcja zasad prawa' [Ronald Dworkin's Concept of the Principles of Law] (2001) Ruch Prawniczy Ekonomiczny i Socjologiczny no. 3, 99–115.

Eeckhout P, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) Common Market Law Review 39(5), 945–994.

Florczak-Wątor M, 'O potrzebie konstytucjonalizacji prawa obywateli do prawdy i konieczności poszerzenia ustawowego zakresu jego ochrony w czasach postprawdy' [On the Need to Constitutionalise the Right of Citizens to the Truth and the Necessity to Expand the Statutory Scope of its Protection in the Era of Post-truth] (2023) Przegląd Prawa Publicznego no. 11, 73–89.

Frantziou E, 'The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle' (2020) Cambridge Yearbook of European Legal Studies vol. 22, 208–232.

Frinta O, 'Constitutionalization and Europeanization of Private Law in the Czech Republic' in R Szczepaniak (ed), *The Constitutionalization of Private Law versus the Europeanization of Private Law. A Legal Study Based on the Example of Selected Countries of Central and Eastern Europe* (Brill-Nijhoff 2025) 73–121.

Forsthoff E, *Lehbruch des Verwaltungsrechts* (CH Beck 1973).

Gajda A, 'Przystąpienie UE do Europejskiej Konwencji Praw Człowieka i Podstawowych Wolności' [Accession of the EU to the European Convention on Human Rights and Fundamental Freedoms] (2013) Kwartalnik Kolegium Ekonomiczno-Społecznego. Studia i Prace no. 1, 11–35.

Gajda J, 'The Impact of Article 18 of the Constitution of the Republic of Poland on the Europeanization of Polish Family Law' in R Szczepaniak (ed), *The Constitutionalization of Private Law versus the Europeanization of Private Law: A Legal Study Based on the Example of Selected Countries of Central and Eastern Europe Belonging to the European Union* (Brill-Nijhoff 2025) 271–288.

Gierke O von, *Deutsches Privatrecht. Bd. 1, Allgemeine Teil und Personenrecht* (Duncker & Humblot 1895).

Gillaerts P, 'Instrumentalisation of Tort Law: Widespread yet Fundamentally Limited' (2019) Utrecht Law Review 15(3), 27–43.

Grochowski M, Łętowska E, 'Czemu może dziś służyć bezpodstawne wzbogacenie?' [What Can Unjust Enrichment Serve Today?] in A Olejniczak, J Haberko, A Pyrzyńska, D Sokołowska (eds), *Współczesne problemy prawa zobowiązań* [Contemporary Problems of Contract Law] (Wolters Kluwer 2015) 213–229.

Hartmann BJ, 'Alignment of National Government Liability Law in Europe after Francovich' (2012) ERA Forum vol. 12, 613–623.

Hesse K., Verfassungsrecht und Privatrecht, (Müller, Jurist. Verl. 1988).

Hesselink MW, *The New European Legal Culture: Ten Years On* (Social Science Electronic Publishing 2009).

Hesselink MW, 'The Politics of a European Civil Code' (2004) European Law Journal 10(6), 675–697.

Hilpold P, 'So Long Solange? The PSPP Judgment of the German Constitutional Court and the Conflict Conflict between the German and the European 'Popular Spirit'' (2021) Cambridge Yearbook of European legal Studies vol. 23, 159–192.

Husa J, 'Global Constitutionalism – A Critical View' (2016) Maastricht European Private Law Institute. Working Pape no. 11, 2–21.

Jacobs FG, 'Some Remarks on Community and Member State Liability' in J Wouters, J Stuyck (eds), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune* (Intersentia Publishing 2001) 129–134.

Kalisz A, 'Multicentryczność systemu prawa polskiego a działalność orzecznicza Europejskiego Trybunału Sprawiedliwości i Europejskiego Trybunału Praw człowieka' [Multicentricity of the Polish Legal System and the Judicial Activity of the European Court of Justice and the European Court of Human Rights] (2007) Ruch Prawniczy Ekonomiczny i Socjologiczny vol. 4, 35–49.

Kamiński IC, *Słuszność i prawo. Szkic prawnoporównawczy* [Equity and Law. Comparative Law Sketch] (Zakamycze 2003).

Kowalik P, 'Zasada subsydiarności a przypisanie wydatków i podatków w federacjach – ujęcie teoretyczne' [The Principle of Subsidiarity and the Allocation of Expenses and Taxes in Federations – A Theoretical Approach] (2012) Nauki społeczne 1(5), 103–115.

Krotoszyński M, 'Transitional Justice and the Constitutional Crisis: The Case of Poland (2015–2019)' (2019) Archiwum Filozofii Prawa i Filozofii Społecznej 3(21), 22–39.

Krieger S, 'Rechtsmissbrauch durch "AGG-Hopping"' (2016) Europäische Zeitschrift für Wittschaftsrecht, 696–698.

Krzeminska-Vamvaka J, 'Horizontal Effect of Fundamental Rights and Freedoms – Much Ado about Nothing ? German, Polish and EU Theories Compared after Viking Line' (2009) Jean Monnet Working Paper vol. 11, 1–55.

Lenaerts K, 'Respect for Fundamental Rights as a Constitutional Principle of the European Union' (2000) Columbia Journal of European Law 6(1), 21.

Larenz K, *Methodenlehre der Rechtswissenschaft* (Springer Verlag 2014).

Leroy M, 'La responsabilité des pouvoirs publics du chef de méconnaissance des normes supérieures de droit national par un pouvoir législatif' in *La responabilité des pouvoirs publics. Actes du colloque interuniversitaire organisé par la Faculté de Droit de l'Université Catholique de Louvain et la Faculté de l'Univerité Libre de Bruxelles* (Bruylant 1991) 299–341.

Łętowska E, 'Bariery naszego myślenia o prawie w perspektywie integracji z Europą' [Barriers to Our Thinking about Law in the Perspective of Integration with Europe] (1996) Państwo i Prawo vol. 4–5, 44–58.

Łętowska, Ewa, 'Prawo w „płynnej nowoczesności"' [Law in "Liquid Modernity"] (2014) Państwo i Prawo vol. 3, 6–27.

Mak C, 'Human Rights in Private Law' in M Bartl, L Burgers, C Mak (eds), *Uncovering European Private Law. European Private Law Handbook* (Amsterdam Centre for Transformative Private Law 2022) 1–12, <http://dx.doi.org/10.2139/ssrn.4304817>.

Mak C, 'Reimagining Europe through Private Law Adjudication' in C Mak, B Kas (eds), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe* (Hart Publishing 2023) 63–77.

Mańko R, 'The Culture of Private Law in Central Europe After Enlargement: A Polish Perspective' (2005) European Law Journal 11(5), 527–548.

Mańko R, 'Idee polityczne i prawne a kultura europejskiego prawa prywatnego: przyczynek do dalszych badań' [Political and Legal Ideas and the Culture of European Private Law: A Contribution to Further Research] (2017) Miscellanea Historico-Iuridica 16(2), 69–95.

Mańko R, 'Kompetencje UE w dziedzinie prawa prywatnego w ujęciu systemowym' [EU Competences in the Field of Private Law in a Systemic Perspective] (2016) Kwartalnik Prawa Prywatnego vol. 1, 37–79.

Mańko R, *Prawo prywatne w Unii Europejskiej. Perspektywy na przyszłość* [Private Law in the European Union. Future Perspectives] (Podyplomowe Studium Prawa Europejskiego 2004), <http://ssrn.com/abstract=2175511> accessed 10 Sept 2023.

Maslák M,'The Applications of European Values and Principles of European Private Law with an Emphasis on the Social Function of Slovak Private Law' in M Jurčová, M Maslák, R Dobrovodský, P Mészáros, Z Nevolná, A Olšovská (eds), *Social Function of Private Law and its Poliferation by Applying the Principles of European Private Law* (Nakladatelství Leges 2019) 17–43.

Micklitz H-W (ed), *Constitutionalisation of European Private Law* (Oxford University Press 2014).

Micklitz H-W, 'European Regulatory and Private Law – Between Neoclassic Elegance and Postmodern Pastiche' in M Kuhli, M Schmidt (eds), *Vielfalt im Recht* (Duncker & Humblot 2021) 75–99.

Montesquieu, *The Spirit of Laws* (T. Evans 1777).

Noguellou R, Stelkens U (eds), *Droit comparé des Contrats Publics* (Bruylant 2010).

Parchomiuk J, *Nadużycie prawa w prawie administracyjnym* [Abuse of Rights in Administrative Law] (CH Beck 2018).

Paris M-L, 'Europeanization and Constitutionalization: The Challenging Impact of a Double Transformative Process on French Law' (2010) Yearbook of European Law, 21–64.

Pech L, 'A Union Founded on the Rule of Law. Meaning and Reality on the Rule of Law as a Constitutional Principle of EU Law' (2010) European Constitutional Law Review 6(3), 359–396.

Pestalozza C, *Formenmißbrauch' des Staates. Zu Figur und Folgen des ‚Rechtsmißbrauchs' und ihrer Anwendung auf staatliches Verhalten* (CH Beck 1973).

Plato, 'The Republic' in Plato, *Plato in Twelve Volumes*, vol. 5, 6 (Harvard University Press–William Heinemann Ltd 1969).

Plessix B, *L'utilisation du droit civil dans l'elaboration du droit administratif* (Panthéon Assas, 2003).

Popescu R-D, 'Constitutionalisation of Civil Law: The Right to Respect for Private Law and Human Dignity' (2013) International Journal of Judicial Sciences vol. 7, 150–156.

Półtorak N, 'Odpowiedzialność odszkodowawcza państwa za naruszenie prawa UE po 20 latach od orzeczenia w sprawie Francovich' [State Liability for Damages for Violating EU Law 20 Years after the Francovich Ruling] (2014) Europejski Przegląd Sądowy vol. 1, 76–83.

Radziewicz P, 'Rozproszona kontrola konstytucyjności ustawy wobec kryzysu Trybunału Konstytucyjnego. Glosa do wyroku SR w Gorzowie Wielkopolskim z 23 kwietnia 2021 r., sygn. I C 1326/19' [Distributed Control of the Constitutionality of the Act in the Face of the Crisis of the Constitutional Tribunal. Commentary on the Judgment of the Regional Court in Gorzów Wielkopolski of 23 April 2021, reference number I C 1326/19] (2022) Gdańskie Studia Prawnicze vol. 4, 91–98.

Radziewicz P, 'Pojęcie horyzontalnego skutku norm konstytucyjnych – uwagi wprowadzające z perspektywy prawa konstytucyjnego' [The Concept of the Horizontal Effect of Constitutional Norms – Introductory Remarks from the Perspective of Constitutional Law] in A Młynarska-Sobaczewska, P Radziewicz (eds), *Horyzontalne oddziaływanie Konstytucji Rzeczypospolitej Polskiej oraz Konwencji o ochronie praw człowieka i podstawowych wolności* [Horizontal Impact of the Constitution of the Republic of Poland and the Convention for the Protection of Human Rights and Fundamental Freedoms] (Biuro Trybunału Konstytucyjnego 2015) 25–60.

Ramberg C, 'Ole Lando Memorial Lecture: The Interaction between Soft Law and Case Law. How Precedents Fulfill Ole Lando's Ambition to Harmonize European Contract Law. Madrid 2023' (2023) European Review of Private Law 31(1), 3–14.

Rauchegger C, 'National Constitutional Courts as Guardians of the Charter: A Comparative Appraisal of the German Federal Constitutional Court's Right to Be Forgotten Judgments', (2022) Cambridge Yearbook of European Legal Studies vol. 22, 258–278.

Reich N, 'The Interrelation between Rights and Duties in EU Law: Reflections on the State of Liability Law in the Multilevel Governance System of the Union: Is There a Need for a More Coherent Approach in European Private Law?' (2010) Yearbook of European Law 29(1), 112–163.

Rijpma J, Koffeman N, 'Free Movement Rights for Same-Sex Coples under EU Law – What Role to Play for the CJEU?' in D Gallo, L Paladini, P Pustorino (eds), *Same-Sex Couples before National, Supranational and International Juisdictions* (Springer 2014) 455–491.

Rinken A, 'Verwaltungsrecht' in A Görlitz (ed), *Handlexikon zur Rechtswissenschaft*, (Ehrenwirth Verlag 1972) 516–520.

Rodotà S, *Il diritto di avere diritti* (Laterza 2012).

Ross A, *On Law and Justice* (Stevens and Sons Ltd 1958).

Safjan M, 'Europeizacja prawa prywatnego – ewolucja czy rewolucja. Perspektywa orzecznicza' [Europeanisation of Private Law – Evolution or Revolution: A Jurisprudential Perspective] in J Gudowski, K Weitz (eds), *Aurea Praxis Aurea Theoria. Księga pamiątkowa ku czci Prof. T. Erecińskiego* [Aurea Praxis Aurea Theoria: A Commemorative Book in Honour of Prof. T Ereciński] vol. 2 (LexisNexis 2011) 2513–2534.

Safjan M, 'Evolution or Revolution? Some Reflections on the Constitutionalization and Europeanization of Private Law' in R Szczepaniak (ed), *The Constitutionalization of Private Law versus the Europeanization of Private Law: A Legal Study Based on the Example of Selected Countries of Central and Eastern Europe* (Brill-Nijhoff 2025) 29–54.

Safjan M, 'O urokach eklektyzmu metodologicznego. Od wspólnoty zasad i aksjologii do wspólnoty konstrukcji i wykładni prawa' [On the Appeal of Methodological Eclectism. From the Community of Principles and Axiology to the Community of Construction and

Interpretation of Law] in R Szczepaniak (ed), *Problemy pogranicza prawa cywilnego* [Boundary Problems of Civil Law] (CH Beck 2022) 15–36.
Safjan M, Gwóźdź Ł, 'General Report: The Revival of the Rule of Law Issue' in M Safjan (ed), *The Revival of the Rule of Law Issue* (Intersentia 2024) 1–50.
Schmidt CU, *Die Instrumentalisierung des Privatrechts durch die Europäischen Union* (Nomos 2010).
Schmidt M, *Konkretisierung von Generalklauseln im europäischen Privatrecht* (De Gruyter 2009).
Schwarzer D, 'Pushing the EU to a Hamiltonian Moment' (2020) German Council on Foreign Relations no. 10, 1–9.
Semmelmann C, 'The Public-Private Divide in the European Union Law or an Overkill of Functionalism' (2012) Maastricht European Private Law Institute Working Paper no. 12, 2–32.
Serick R, *Rechtsform und Realität juristischer Personen* (W de Gruyter 1955).
Sieburgh C, *A Method to Substantively Guide the Involvement of EU Law in Private Law Matters* (2013) European Review of Private Law 21(5–6), 1165–1188.
Sikorski Rafał, 'Proportionality and Intellectual Property Law Remedies–Constitutional and EU Law Perspectives' in R Szczepaniak (ed), *The Constitutionalization of Private Law versus the Europeanization of Private Law: A Legal Study Based on the Example of Selected Countries of Central and Eastern Europe* (Brill-Nijhoff 2025) 320–336.
Simon D, 'Abus de droit' (2016) Europe no. 10, 11–12.
Smolak M, 'Sądownictwo konstytucyjne a autonomia prawa wobec polityki' [Constitutional Judiciary and the Autonomy of Law in Relation to Politics] (2003) Ruch Prawniczy Ekonomiczny i Socjologiczny vol. 1, 13–22.
Solum LB, 'Semantic Originalism' (2008) Illinois Public Law and Legal Theory Research Papers Series no. 07–24, 1–176.
Sprafke S, *Diskriminierungsschutz durch Kontrahierungszwang: Vertragsabschlusspflicht aus [section] 21 AGG im System der Kontrahierungspflichten* (Kasel University Press 2013).
Stambulski M, Czarnota A, 'The Janus Face of Constitutionalism' (2019) Krytyka Prawa vol. 1, 18–26.
Stelmachowski A, *Wstęp do teorii prawa cywilnego* [Introduction to the Theory of Civil Law] (Wydawnictwo Naukowe PWN 1984).
Szczepaniak R, 'Between the Technical and Axiological Dimension of Civila Law' in R Szczepaniak, K Kokocińska, M Krzymuski (eds), *Constitutional Barriers to the Applicability of Private Law in the Public Sector. A Comparative Study with Particular Emphasis on Polish and German Law* (Wydawnictwo Naukowe UAM 2020) 590–604.
Szczepaniak R, 'Granice cywilnoprawnej metody regulacji. Glosa do wyroku TK z dnia 27 maja 2014 r., P 51/13' [The Limits of the Civil Law Method of Regulation. Commentary on the Judgment of the Constitutional Tribunal of 27 May 2014, P 51/13] (2015) Państwo i Prawo vol. 12, 130–135.
Szczepaniak R, 'List of the Most Important Conclusions' in R Szczepaniak (ed), *Constitutional Barriers to the Applicability of Private Law in the Public Sector: A Comparative Study with Particular Emphasis on Polish and German Law* (Wydawnictwo Naukowe UAM 2020) 623–648.
Szczepaniak R, 'Methodology for Applying Private Law in the Public Sector' in R Szczepaniak, K Kokocińska, M Krzymuski (eds), *Constitutional Barriers to the Applicability of Private Law in the Public Sector. A Comparative Study with Particular Emphasis on Polish and German Law* (Wydawnictwo Naukowe UAM 2020) 512–518, 532–534.

Szczepaniak R, 'Technical and Axiological Component in Civil Law Institutions' in R Szczepaniak, K Kokocińska, M Krzymuski (eds), *Constitutional Barriers to the Applicability of Private Law in the Public Sector. A Comparative Study with Particular Emphasis on Polish and German Law* (Wydawnictwo Naukowe UAM 2020) 591–598.

Szczepaniak R, 'The Application of Private Law in the Public Sector: A Key Issue in the Legal Theory of EU Member States' (2023) European Review of Private Law 31(1), 57–92.

Szczepaniak R, 'The Effectiveness of Civil Law Methodology and the Specifics of the Public Sector' in R Szczepaniak, K Kokocińska, M Krzymuski (eds), *Constitutional Barriers to the Applicability of Private Law in the Public Sector. A Comparative Study with Particular Emphasis on Polish and German Law* (Wydawnictwo Naukowe UAM 2020) 575–582.

Szczepaniak R, 'The Issue of the Civil Law Provenience of the Main Principles of the Legal System' in R Szczepaniak (ed), *Constitutional Barriers to the Applicability of Private Law in the Public Sector: A Comparative Study with Particular Emphasis on Polish and German Law* (Wydawnictwo Naukowe UAM 2020) 543–555

Szczepaniak R, 'Preface', in R Szczepaniak (ed), *The Constitutionalisation of Private Law versus the Europeanisation of Private Law: A Legal Study Based on the Example of Selected Countries of Central and Eastern Europe* (Brill-Nijhoff 2025).

Szczepaniak R, 'Smog a odpowiedzialność odszkodowawcza władz publicznych' [Smog and the Liability for Compensation of Public Authorities] in (2020) Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu 2(66), 26–48.

Szpunar M, *Bezpośredni skutek dyrektyw wspólnotowych w postępowaniu przed sądem* [Direct Effect of Community Directives in Court Proceedings] (Centrum Europejskie Natolin 2003).

Szpunar M, *Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego* [Liability of a Private Entity for Violation of Community Law] (Wolters Kluwer 2008).

Szpunar M, 'Private Law within the Process of Europeanization' in R Szczepaniak (ed), *The Constitutionalization of Private Law versus the Europeanization of Private Law: A Legal Study Based on the Example of Selected Countries of Central and Eastern Europe* (Brill-Nijhoff 2025) 55–70.

Śledzińska-Simon A, Ziółkowski M, 'Constitutional Identity of Poland: Is the Emperor Putting On the Old Clothes of Sovereignty?' in C Calliess, G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 243–267.

Thym D, 'Separation versus Fusion – Or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice' (2013) European Constitutional Law Review 9(3), 391–419.

Verbruggen P, 'The Impact of Free Movement of Goods and Services on Private Law Rights and Remedies' in H-W Micklitz, C Sieburgh (eds), *Primary EU Law and Private Law Concepts* (Intersentia 2017) 47–91.

Walkila S, *Horizontal Effect of Fundamental Rights. Contributing to the "Primacy, Unity and Effectiveness of European Union Law"* (University of Helsinki, Faculty of Law, European Law 2015).

Wall H de, *Die Anwendbarkeit privatrechtlicher Vorschriften im Verwaltungsrecht* (Mohr Siebeck 1999).

Weinrib EJ, *The Idea of Private Law*, (Oxford University Press 1995).

Werner F, 'Verwaltungsrecht als konkretisiertes Verfassungsrecht' (1959) Deutsches Verwaltungsblatt, 527–533.

Wronkowska S, 'Kilka uwag o „prawodawcy negatywnym"' [A Few Remarks about the "Negative Legislator"] (2008) Państwo i Prawo vol. 10, 5–20.
Ziółkowski M, *Odpowiedzialność odszkodowawcza za niezgodne z prawem działanie władzy publicznej. Studium z prawa konstytucyjnego* [Liability for Damages for Unlawful Actions of Public Authorities: A Study in Constitutional Law] (Wolters Kluwer 2021).

List of legislative acts

Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008, on ambient air quality and cleaner air for Europe [2008] OJ L 152.

Judgments

Judgment of Federal Constitutional Court of 15 January 1958, BVerfGE 7 [1958].
Judgment of the ECJ C-26/62 EU:C:1963:1.
Judgment of the CJEU C-6/64 EU:C:1963:1.
Judgment of the Federal Constitutional Court of Germany of 26 February 1969, BVerfGE 25, 256 [1969].
Judgment of the Federal Constitutional Court of Germany of 29 May 1974, BVerfGE 37, 271 [1974].
Judgment of the ECJ C-14/83 EU:C:1984:153.
Order of the Federal Constitutional Court of Germany of 22 October 1986, 2 BvR 197/83 [1986].
Judgment of the CJEU C-91/92 EU:C:1994:292.
Judgment of the Polish Constitutional Tribunal of 23 March 1999, K 2/98 (1999) OTK ZU 3, 38.
Judgment of the Polish Constitutional Tribunal of 8 October 2002, K 36/00 (2002) OTK-A 5, 63.
Judgment of the ECJ C-144/04 EU:C:2005:709.
Judgment of the CJEU C-321/05 EU:C:2007:408.
Judgment of the CJEU C-409/04 EU:C:2007:548.
Judgment of the CJEU C-271/06 EU:C:2008:105.
Judgment of the ECJ C-555/07 EU:C:2010:21.
Judgment of the Polish Constitutional Tribunal of 9 July 2009, SK 48/05 (2009) OTK-A 7, 108.
Judgment of the CJEU C-642/11 EU:C:2013:54.
Judgment of the CJEU C-643/11 EU:C:2013:55.
Judgment of the CJEU C-617/10 EU:C:2013:105.
Judgment of the German Constitutional Court of 24 April 2013, 1 BvR 1215/07 [2013].
Judgment of the Polish Constitutional Tribunal of 27 May 2014, P 51/13 (2014) OTK-A 5, 50.
Judgment of the CJEU C-492/13 EU:C:2014:2267.
Opinion of Advocate General A Szpunar in joined cases C-131/13, C-163/13 and C-164/13 EU:C:2014:2217.
Judgment of the CJEU in joined cases C-131/13, C-163/13 and C-164/13 EU:C:2014:2455.
Judgment of the CJEU C-423/15 EU:C:2016:604.
Judgment of the Constitutional Court of Hungary of 5 December 2016 no. 22/2016 HUN-2016-3-006.
Judgment C-336/16 EU:C:2018:94.
Judgment of the ECJ C-414/16 EU:C:2018:257.

Judgment of the ECJ C-193/17 EU:C:2019:43.
Judgment of the CJEU in joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 EU:C:2021:393.
Judgment of the Romanian Constitutional Court of 8 June 2021, 304/2004 (2021) Official Gazette no. 612.
Judgment of the District Court in Częstochowa of 16 September 2021, IC U 718/21 [2021].
Judgment of the CJEU in joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 EU:C:2021:1034.
Judgment of the CJEU in joined cases C-156/21, C-157/21 EU:C:2022:97.
Judgment of the Polish Constitutional Tribunal of 7 October 2021, K 3/21 (2022) OTK-A 65.