INTRODUCTION

(by Rafał Szczepaniak, with the exception of the fragment devoted to the relationship between the German Constitution and EU law, in Section 2, 7) which was written by Marcin Krzymuski)

1.

At present, four major areas of private law application can be distinguished: universal transactions (including those covering family law and inheritance law), consumer transactions,[1] as well as professional and the public sector transactions.

The thesis that the most interesting and the most spectacular dilemmas concerning civil law methodology can be found in the public sector seems justified. This is evidenced by numerous judgments of Polish and German courts, such as the Constitutional Court (Constitutional Tribunal in Poland), the Supreme Court, common courts, administrative courts dealing with issues such as: application of the Paulian action to tax obligations, calculation of statutory interest on monetary public law liabilities, including adjudicated costs of court proceedings, application of provisions on unjust enrichment in cases of refund of overpayment in VAT, application of the provisions of the Civil Code on declarations of intent to statements of officers of uniformed services on leaving the service, submitting administration bodies concluding civil law contracts to constitutional standards addressed to public authorities, the application of the Civil Code provisions on set-off and many more.[2] The analysis of this type of cases provokes questions of almost existential importance for every civil law scientist. One wonders whether there is one civil law, or if it makes sense to talk not only about different areas of civil law, but also about different levels of civil law, e.g., civil law as a set of certain axiological principles, and civil law in the technical sense, i.e., as a reservoir of certain technical institutions, mechanisms and structures from which one can

[1] It is the inclusion in the scope of civil law of universal transactions and consumer law that, as the outstanding Polish civil law scientist A. Stelmachowski put it, makes civil law "the law of everyday life." About this statement, see A. Mączyński, Uwagi o stanie nauki polskiego prawa cywilnego [Notes on the state of science of Polish civil law], PiP 2011, no. 6, p. 15.

[2] H. de Wall draws attention to the large number of court rulings in Germany where there is a problem with the application of private law in the public sector. H. de Wall, Die Anwendbarkeit privatrechtlicher Vorschriften im Verwaltungsrecht, Tübingen, 1999, p. 1. It is similar in Polish case law.

freely draw. This last question basically boils down to whether civil law is just a specific method of regulating social relations that can be considered in a technical way, i.e., in isolation from a particular system of values. As a consequence, another question arises whether the legislator has in the light of the Constitution full freedom to use this method.

The public sector remains outside the borders of classic civil law science.[3] Therefore, when applying private law in this environment, questions what civil law is and whether the division into public and private law makes sense must inevitably be asked. For this reason, the subject of applying civil law in this specific environment, which is the public sector, seems to be an exciting intellectual challenge; it is like an intellectual trip to the sources of the Amazon. A scientist specializing in civil law may view the public sector as a giant laboratory for the application of civil law and a particular environment in which all of these border issues resonate with doubled power. Consequently, this monograph could without exaggeration be entitled „In search of the limits of civil law" or "In search of the limits of the admissible application of civil law."

The authors put forward a hypothesis that the effect of analyzing the use of civil law institutions in the public sector may be to enrich the civil law methodology. In the past, there were cases when the impulse for the development of civil law and civil law science came from observing areas located on the periphery of civil law regulations.

In recent decades, e.g., in connection with the phenomenon of privatization of public tasks, as well as the decentralization of public administration, we have repeatedly witnessed the occurrence of complex legal phenomena in connection with applying private law in the public sector. Comprehensive legal acts appear more and more often in which intermingling of methods of regulation typical of private and public law can be observed. These acts are an expression of the complexity of social life. Various phenomena occured as a result of these processes. In German-speaking countries, the pictorial terms "Flucht vor dem Staatsrecht" (escape from administrative law) and "Flucht ins Privatrecht" (escape to private law) were coined in this connection. Such phenomena raise specific legal issues. For example, many legal institutions of an eclectic nature have appeared, in which there are manifestations of both civil law and administrative law solutions. For example, in the science of administrative law, the term "atypical administrative

[3] As noted by F. Bydlinski, we deal with the natural environment, or the so-called "most elementary or indigenous area of application of civil law" (*Kernbereich*) in the case of relations between private entities, i.e. natural persons and the organizational units created by them. See F. Bydlinski, Kriterien und Sinn der Unterscheidung von Privatrecht und öffentlichem Recht, Archiv für die civilistische Praxis 1994, vol. 194, p. 339.

entities" began to be used. It referred mainly to organizational units of the State using both classic administrative law forms as well as forms typical of civil law in their activities.[4] It is also worth pointing out that there are mixed legal constructions in which the decision-making process consists of two stages. First, an administrative decision is taken, e.g., to award a grant, and then an executive contract is concluded based on it. Examples include procedures for applying for research grants (*Zwei-Stufen-Theorie* in German science). These phenomena, among other things, will be the subject of analyses from the point of view of constitutional principles and values here. The question arises how these phenomena should be assessed in the light of the Constitution.

The authors put forward the hypothesis that classical civil law institutions used in this particular environment, which is the public sector, change their nature at least in part. Some problems can be observed in connection with this. In particular, the use of civil law institutions in public administration especially the use of the contract, does not guarantee, contrary to a fairly superficial opinion, partner-like treatment of the citizens by the administration. Failing to take this phenomenon into account on the part of the legislator and courts may lead to various types of abuses or aberrations that are incompatible with constitutional axiology. This in turn prompts the hypothesis that it is justified to develop a separate section of civil (private) law related to the functioning of public sector entities. At the same time, the term "section of civil law" in the above sentence has two meanings: as a discipline of legal sciences and as subject law, i.e., a set of norms. The development of such a department of civil law is enforced by the shortcomings of classical civil law methodology, which is not adapted to the specifics of the public sector, but also the need to respect the constitutional rights and freedoms of citizens. Expressions of a similar idea are found in German-language legal discourse such concepts as Sonderrecht or Verwaltungsprivatrecht, or the French concept of „le droit de l'administration" as opposed to „le droit administrative."

The purpose of this monograph is to answer several fundamental questions. Firstly, whether there are constitutional barriers to the application of private

[4] See J. Jagielski, M. Wierzbowski, A. Wiktorowska, Nietypowe podmioty administrujące – kilka refleksji na tle organizacyjnych form wykonywania zadań publicznych [Atypical administrative entities – some reflections on the background of organizational forms of performing public tasks], [in] Podmioty administracji publicznej i prawne formy ich działania [Public administration entities and legal forms of their operation. Studies and materials from the scientific conference dedicated to the 80th birthday of E. Ochendowski], Toruń, November 15–16, 2005, pp. 203–222; on the hybrid status of bailiff, see R. Szczepaniak, Zagadnienie praw podmiotowych na styku prawa prywatnego i publicznego. Rozważania de lege ferenda na przykładzie opłat należnych komornikowi [The issue of subjective rights at the meeting point of private and public law. De lege ferenda considerations on the example of fees due to the bailiff], RPEiS 2014, no. 3, p. 73ff.

law in the public sector. Then, if the first question is answered in the affirmative, whether it is necessary to clarify what kind of barriers these are, whether they form a homogeneous axiological and functional group of principles and values, i.e., whether they are aimed solely at protecting the interests of individuals in their relations with public authorities, or if in some cases the purpose of these barriers is also to protect the public interest (the interest of the State and other public entities). The question of what the result of these barriers is also needs to be answered. Is it absolutely impossible to apply private law in this sector, or is it necessary to appropriate modify civil law institutions in this specific environment?

It should be borne in mind that there is a kind of dialectics and interdependence within the analyzed matter. If we see the need to modify private law institutions for the needs of the public sector, another aspect of the issue should not be forgotten. The question arises as to how far this modification is justified. To what extent are the principles expressed in civil law protected by the Constitution. There is also a question of how far interfering with property rights can go, and in particular whether it can violate the essence of these rights.

This work would not have come into being if its authors were not convinced that the application of private law in the public sector is characterized by far-reaching specificity and that this specificity is enforced by the norms of the Constitution.

2.

1) There are numerous methodological pitfalls looming for the researchers who undertake the analysis of the application of private law in the public sector. First of all, it is difficult to indicate a research field in which the final result of research would so much depend on the adoption of preliminary assumptions, sometimes not always clearly pronounced. Whereby, these assumptions can most often be reduced to the linguistic or semantic level. Consequently, some conceptual conventionalism as well as cognitive conventionalism appears. Sometimes we become slaves to a certain rooted conceptual apparatus, which causes us to force our way of thinking into settled ruts. For example, when we use names derived from civil law doctrine, it is easy to recognize that civil law is being applied in the public sector. It would sometimes be enough to modify this apparatus to reach opposite conclusions. Consequently, there is the problem of distinguishing between the real and apparent application of private law in the public sector and the need to avoid endless idle disputes in connection with this. In the era of the ongoing process of constitutionalization of civil law, we often encounter such problems. The

good faith clause, which has specific civil law connotations, can be mentioned as an example. And yet we could use other concepts, such as equity, justice and dignity of the individual, which appear in the Constitution, and then associations with civil law may not occur.

The legal conceptual apparatus is not perfect. In the science of law we deal with many concepts that are misleading or at least suggest a solution incompatible with the prevailing theories. Such problems are particularly numerous in the subject matter discussed. Therefore, despite the fact that this Introduction is intended to clarify a number of concepts, it was necessary to include a separate chapter on methodological problems of a semantic nature in this work (Part I, Chapter 1 of the work).

The title of the work should be thoroughly clarified at this point. The authors are aware that each word used in the title is the result of certain preliminary assumptions that guide the undertaken research. Any word from the title can also be controversial.

2) The above remark applies to, among others, the use of the term "application of private law in the public sector." Some authors, especially from the area of French science of administrative law, question the term "the application of private law in administrative domain" (see Part III, Chapter 9). They argue that we are dealing here with a legal technique other than application, which can be called "reception" or "use" of civil law. Such views are based on the original features of French administrative law. However, it seems that in relation to legal systems such as Polish or German system, "application" will be a more appropriate term. This concept has a relatively wide range of meanings. However, the authors explain that they understand the concept of "applying civil law" even more widely than has been adopted in the traditional science of law.

Under the term „applying private law" the authors understand situations where the subject of legal qualification carried out by the courts are cases when a public entity uses the so-called civil law forms of action. At the same time, it is about using them in a very broad sense, i.e., starting from the legislator who uses various methods of regulating social relations and ending with a public entity which, e.g., decides to settle certain public matters by concluding a civil law contract with another public entity or private entity. It can be said otherwise that the subject of courts' ruling are cases of „using private law institutions by public entities."[5]

[5] S. Prutis also presents a broad understanding of the concept of "applying private law" – id., Instytucje podstawowe prawa prywatnego [Basic private law institutions (in opposition to public law regulations)], Białystok, 2018, pp. 268–271.

Such a broad understanding of the phrase „the application of private (civil) law in the public sector" results from the fact that in each of the cases mentioned we deal with the use of civil law institutions by a public entity. Many cases of such use are worthy of analysis, because they are associated with interesting phenomena and trends. First of all, these examples give valuable material for reflection, which function is assigned to the institutions of civil law provenance by public authorities or, more broadly, public entities.

The authors realize that they may be accused of understanding the concept of "applying the law" too broadly. In our European legal culture, it is customary to distinguish the creation and application of law as separate phenomena. Meanwhile, as the above explanation implies, the authors also include legislative activities within the term „applying the law." Nevertheless, it has long been known that there are many relationships between these two spheres. The authors concluded that faithful adherence to the traditional division into the creation and application of law would unduly deplete the scope of consideration. One cannot disregard the phenomenon of blurring the division into the creation of law and its application by courts in the modern world. This process occurs in Europe and its numerous manifestations can be indicated. The question about constitutional barriers to the applicability of private law in the public sector is also a question about the constitutional limits to interchangeability of civil-law and administrative-law method of regulating social relations, and thus a question about the extent of the legislator's freedom in this respect. Legislative decisions are subject to review by constitutional courts, which thus affect the shape of civil law.[6] Consequently, this is a question that not only the legislator must face, but also judges and other bodies applying the law. Thus, there is a kind of interaction (interdependence) between the language of the law (the language spoken by the legislator) and the legal language (the language in which the discourse on law takes place – for these languages see Part I, Chapter 1).

The issue of admissibility of applying private law in this specific environment, which is the public sector, is in some sense integrally related to the issue of lawmaking. These two aspects (creation and application of law) are intertwined to some extent. If after interpretation of the applicable provisions, including the Constitution, the court finds that the civil-law method of regulation is inadvisable with respect to given social relations, inevitably then its inclination to apply civil law institutions will be largely limited. Sometimes the civil law regulation method is in a way introduced in the so-called judicial law or law of judges. It is the judges who

[6] See on this subject F. Becker, Öffentliches und Privates Recht, NVwZ 2019, p. 1389 and the judgment of the German Constitutional Court indicated as an example BVerfGE 133, 59 = STAZ 2013, 184 = NJW 2013, 847 = NVwZ 2013, 1207 Ls.

often, in the absence of precise legal regulations, decide on the application of institutions that are typical of the civil law method of regulation. It is the judges who determine the content of the norms established by the legislator. As a consequence, the phenomenon of reviewing the constitutionality of the norm appears, the content of which is determined by the case law of the Supreme Court and other courts.[7]

Therefore, both the legislator and the judges must consider whether the application of civil law institutions to relations within the public sector does not violate the principles expressed in the Constitution. In other words, they must take into consideration the question whether the use of a civil law institution in the public sector does not lead to a kind of abuse of legal form.[8]

The problem of the applicability of private law in the public sector itself is therefore at least two-fold: at the highest level of abstraction the question arises about the admissibility of choosing the civil law method of regulating social relations; it is therefore a question addressed mainly to the legislator, followed by the judges (judicial law). There are fundamental dilemmas here; ideological and social issues arise, including questions about constitutional axiology. At the lower level of abstraction (the second level) there are questions about the use of specific institutions, or even individual provisions classified as civil law regulations. They are addressed to public authorities other than the legislator. These questions are not necessarily accompanied by such fundamental dilemmas as those that occur when choosing a method of regulation. It can be said that this is a more technical question. So it may regard such issues as the possibility of offsetting, the application of the power of attorney, defects of declarations of intent, etc.

These two levels of the application of private (civil) law in the public sector should be taken into account when considering specific practical issues.[9]

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[7] M. Wiącek, S. Żółtek, Niekonstytucyjność normy ustalonej w drodze orzecznictwa Sądu Najwyższego [Unconstitutionality of the norm established by the case law of the Supreme Court], [in] Analizy Sądu Najwyższego. Materiały Naukowe. Jednolitość orzecznictwa, standard, instrumenty, praktyka [Analysis of the Supreme Court. Science materials. Uniformity of jurisprudence, standard, instruments, practice], vol. I, Warsaw, 2015, edited by M. Grochowski, M. Raczkowski and S. Żółtek, p. 49, and the following; e.g., P. Wszołek notes that the phenomenon of "escaping into the sphere of civil law" can be discussed both at the level of legislation and the application of law by courts. See P. Wszołek, Kryteria wyodrębniania prawa administracyjnego [Criteria for separating administrative law], Warsaw, 2016, p. 128.

[8] The concept of "Formenmissbrauch" was propadated by Ch. Pestalozza, see Ch. Pestalozza, "Formenmißbrauch" des Staates. Zu Figur und Folgen des "Rechtsmißbrauchs" und ihrer Anwendung auf staatliches Verhalten, Munich, 1973 (for the abuse of form by the legislator, see p. 39ff.).

[9] In German science these levels [or planes] are distinguished in connection with the analysis of the so-called horizontal effect of fundamental rights (Drittwirkung). It is noted that these planes are not clearly distinguished and often analyzed together. See C.W. Canaris, Grundrechte und Privatrecht, Eine Zwischenbilanz, Berlin and New York 1999, p. 11ff.; see Ch Starck, Human Rights and

3) With reference to the above argument about the multifaceted character of the analyzed issue, it should be noted that the very concept of "private (civil) law" can be understood differently. Sometimes it may be a specific method of regulating social relations, and at other times the use of individual institutions or even a single provision qualified as a civil law provision. The authors make a methodological assumption that different research perspectives may be assumed depending on this. The authors will bear this in mind in their research.

In yet another sense, the authors of the study have adopted a broad understanding of the term "private (civil) law." They used the technical and legislative criterion, according to which the provisions of civil law are those contained in normative acts commonly classified as civil law acts. According to this criterion, of course, the provisions of the Civil Code stand out. The authors are aware of the controversy of such a technical and legislative criterion,[10] although civil codes are indeed indicated in Europe as a criterion of distinction.[11] However, without adopting this criterion at least at the beginning of the discussion, it would be difficult to address the topic at all. From the beginning, the authors would be entangled in intricate theoretical considerations which provisions do or do not belong to civil law and which to public law. For similar reasons, the authors make no distinction between civil and private law. They will use these terms interchangeably. Nevertheless, the division into public and private law must be analyzed. It is impossible to escape this issue. The authors are aware that this division is not uniform in individual countries, even within the EU. As a consequence, they are also aware that in one legal system a given institution, e.g., the contract concluded by a public entity, may be classified as a public law instrument and in another as belonging to civil law. As a result, the application of the contract does not have to be included in the application of private law in the public sector. Consequently, there are problems of comparative nature.

Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court, [in] D. Friedmann and D. Barak-Erez (eds.), Human Rights in Private Law, Oxford and Portland, Oregon, 2001, p. 97; see J. Krzeminska-Vamvaka, Horizontal effect of fundamental rights and freedoms – much ado about nothing? German, Polish and EU theories compared after Viking Line, Jean Monnet Working Paper 2009, no. 11/09, p. 8.

[10] For the controversy of this approach, see M. Safjan, System prawa prywatnego [Private Law System], edited by Z. Radwański, vol. 1, Warsaw, 2007, p. 35; P. Wszołek, Kryteria wyodrębniania prawa administracyjnego [Criteria for separating administrative law], p. 109.

[11] See J. Helios, Publicyzacja prawa prywatnego – prywatyzacja prawa publicznego w kontekście rozważań nad prawem europejskim [Publicization of private law – privatization of public law in the context of consideration of European law], Przegląd Prawa i Administracji 2013, no. 92, p. 35. As S. Prutis writes, referring to Z. Radwański, the Civil Code is the foundation of private law. See Instytucje podstawowe prawa prywatnego (w opozycji do regulacji prawa publicznego) [Basic private law institutions (in opposition to public law regulations)], Białystok, 2018, p. 52.

4) Therefore, the application of the comparative method, in this case comparing Polish and German solutions, in such complex legal and semantic conditions, faces a number of difficulties. Individual institutions classified in Poland as belonging to private law, in the light of German law, may be qualified as public law arrangements and vice versa. This applies not only to the issue of the contract, but also to property, unjust enrichment or tort liability of public authorities. Sometimes we encounter a phenomenon of almost untranslatable legal language of individual countries. Without making some preliminary assumptions, it is very difficult to begin any comparative considerations (see Part 1 Chapter 1, section III). As a consequence, the sense of conducting comparative research on the application of private law in the public sector may sometimes even be questioned.

In spite of these problems, the authors undertook the task of comparing German and Polish solutions in selected fields. They did so for several reasons. They are convinced that comparative research makes sense because it brings a number of positive results. By learning about a different legal system, we can better understand the legal solutions of our own system, and, as a consequence, assess their effectiveness and determine the directions of change. Therefore, it is worth making such comparative efforts despite the indicated difficulties. The accuracy of this claim is demonstrated by the works of other authors undertaken on a large scale to compare legal solutions occurring in various European and non-European countries (see, e.g., R. Noguellou, U. Stelkens (eds.), Droit comparé des Contrats Publics, Bruxelles 2010). They had to make certain initial assumptions to conduct such comparative studies (see Part I, Chapter 1, section III). Although the main emphasis in the work will be placed on comparing Polish and German solutions, the authors will also refer to selected legal solutions of other European countries and EU law.

In fact, the difference between two legal systems, especially when considering those belonging to the European cultural circle, may be smaller than it appears at the first glance. The authors are convinced that the State and other public entities are not the same kind of entities as private entities, even when they use civil law activities, including civil law contracts. The authors assume that this pattern is basically present in all European Union countries, i.e., that the use of forms of civil law provenance by the administration has specific characteristics in each country, and it is possible to make and worth making a comparative analysis in this respect. This assumption is based on the so-called functional method, which is still dominant and one of the oldest methods in comparative legal analyses.[12]

[12] See O. Brand, Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies, Brooklyn Journal of International Law 2007, vol. 32, no. 2, p. 409ff.; R. Michaels, Forthcoming. Comparative Law, [in] Oxford Handbook of European Private Law, edited by Jürgen Basedow, Klaus

The basis of this method is the belief that in all countries and societies there are essentially similar or even identical problems. Consequently, the measures used in one legal system to eliminate these problems are the functional equivalents of instruments found in other legal systems. Of course, these equivalents may have different degrees of effectiveness.

On the other hand, it should be noted that in the circle of administrative law experts, it is sometimes rightly pointed out that any conclusions made on the basis of comparative considerations, and in particular drawing examples from the laws of other countries, must be made with extreme caution.[13] It would certainly not be appropriate to transpose without reflection legal solutions and institutions developed in other countries. There are far-reaching differences between individual European countries when it comes to the scope of the subject matter covered by the regulation related to the so-called public sector. An analysis of the development of Polish law and the law of Western European countries indicates the extent and scale of these differences, contrary to the popular belief that the legal systems of the countries of Continental Europe are similar. The differences occur among other things with regard to such fundamental issues as the system of sources of law and the scope (subject) of public law. Hence, this entire work is also in some part a study of problems encountered in comparative law research on issues of public sector functioning.

The authors will attempt to answer the question whether there is a process of convergence between the legal systems of European countries in the studied field.

5) It should be emphasized here that the authors adopted certain preliminary assumptions, e.g., they gave primacy to the subjective criterion in the conducted considerations. It is a criterion used to distinguish between private and public law, but also a criterion justifying the introduction of specific modifications of principles developed in the science of civil law. The primacy of the subjective criterion will be explained in individual chapters of this work (Part I, Chapter 1, section V.2; Chapter 2 section VIII).

Hopt and Reinhard Zimmermann, Oxford, 2011, p. 1ff. available at: https: //scholarship.law.duke.edu/faculty_scholarship/2388; A. Doczekalska, Comparaive law and legal translation in the search for functional equivalents – Intertwined or separate domains? Comparative Linguistics 2013, no. 16, p. 63ff.

[13] See on this topic K. Ziemski, Indywidualny akt administracyjny jako forma prawna działania administracji [Individual administrative act as a legal form of administration], Poznań 2005, p. 143; see on this topic R. Szczepaniak, The nature of the division into public and private law, with particular emphasis on the Polish experiences, Comparative Law Review 2015, no. 20, p. 50. See also A. Piskorz-Ryń, Ponowne wykorzystanie informacji sektora publicznego [Reusing public sector information], Warsaw, 2018, p. 36ff. The author draws attention to the different tradition of individual EU Member States. EU law introduces harmonization through directives, leaving Member States relative freedom to achieve their goals, though.

The admissibility of applying private law in the public sector has always been more or less controversial. These controversies are derived at least in part from the significance of the division of the legal system into public and private law, which is respected in the Continental European legal culture. As some representatives of the doctrine claim, not only in Poland and Germany, this division results from the very nature of the legal system. The reference here to such a momentous division, which is the division into public and private law, is most justified. It suggests that arguments of the highest level referring to this division are raised in discussions on the application of private law in the public sector. This is demonstrated by the analysis of case law and literature in Poland and other European countries. Repeatedly, the refusal to use certain institutions of civil law provenance in public sector environment is justified by the impassability of the two spheres: i.e., the sphere of private law and the sphere of public law. Without prejudging the legitimacy of this division, the authors of the work put forward a hypothesis that modern times require a proper redefinition of this division. In particular, the traditional view that it is a dichotomous division raises doubts. This approach leads to a kind of absolutization of the division. There is still an attitude in the scientific community that manifests itself in treating this division as a value in itself. Such an attitude alone can be the subject of research. The question arises whether such a strong division between public and private law finds justification in the Constitution; also, whether such a strong division between public and private law is in line with constitutional axiology. In particular, it is worth asking the question whether it has not become, as Ewa Łętowska would describe, one of the barriers in our thinking about law.[14] The authors will analyze instances of case law where the reference to this division has influenced the content of the judicial decision and will assess these cases from the point of view of constitutional axiology.[15]

6) The term "public sector" should also be clarified. Its understanding will be thoroughly substantiated in Part I, Chapter 1 of the work. At this point, it should only be noted that the authors understand this concept in a broad manner. In particular, in their view, it is a broader notion than the concept of "public finance sector" as defined in art. 9 of the Polish Act of 27 August 2009 on public finance[16] as it also covers the activities of, e.g., municipal companies. The term „public sec-

[14] 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], PiP 1996, no. 4–5, p. 46.

[15] See R. Szczepaniak, Sens i nonsens podziału na prawo publiczne i prywatne [The sense and nonsense of the division into public and private law], PiP 2013, no. 5, and the same author Przyczyny odwoływania się do podziału na prawo publiczne i prywatne przez polskie organy stosujące prawo [Reasons for referring to the division into public and private law by Polish courts], Forum Prawnicze 2015, no. 3 (27).

[16] Journal of Laws 2013, item 885.

tor" is intended to mean the entire sphere of activity of the State and other public entities. Therefore, it applies both to relations between public entities as well as between public and private entities. Such a broad understanding is also the result of granting primacy to the subjective criterion in the conducted considerations.

The term "application of private law (or application of the provisions of private law) in public (administrative) law" or "application of private law in administrative law" is frequently used. Also in this publication, this expression is sometimes used (especially in Part III, Chapter 9) to distinguish the application of private law provisions in the area subject only to administrative law regulations from the cases of civil law provisions application in the entire public sector. However, it seems that a better term, and especially a more cautious term, is "the application of private law in the public sector." In order to be able to use the term "public law" in the title, one should first answer the question what public or administrative law is. Such answers could not be given without making a series of preliminary assumptions that would introduce far-reaching conventionalism in the research and cognitive sphere. A much more methodologically neutral term is "public sector." Moreover, in the title of the work, the authors wanted to avoid the a priori assumption that the public sector is regulated solely by public law.

It should be noted that replacing the term "public law" with the term "administrative law" would not introduce sufficient precision either. The concept of „administrative law" raises far-reaching objections as well (see Part I, Chapter 1, section V.2).

In addition, one more reason should be mentioned why the authors prefer to use the phrase „the application of private law in the public sector." The expression „applying private law to public (administrative) law" is also not fortunate for another reason. There is a logical contradiction in this expression. It can be reduced to an even shorter formulation that „the law finds application in law" or that „the provisions find application in law." On the other hand, the law (legal regulations) applies in actual individual cases. A better wording would be „to apply private law in the area reserved for administrative law." However, the book will attempt to answer the question whether it is possible to speak of applying private law in the area reserved for administrative law at all. Since a given area is reserved for administrative law, then perhaps we can consistently speak only about the application of administrative law in this area. The provisions of civil law are then only used to develop the administrative law that is applied. In other words, administrative law develops at the expense of civil law.

7) The Constitution is understood by the authors as both the highest legal act of the State (the basic law) and a set of certain fundamental norms (principles) of international law, including EU law and the European Convention on Human

Rights and Fundamental Freedoms signed by the Member States of the Council of Europe. As we know, EU law, especially the so-called primary law, including the treaty law, functions as a constitutional legal order.[17] Nowadays, the growing influence of European law on the sphere traditionally reserved for the civil law method of regulation is observed.[18] As a rule, this sphere has so far belonged to national legislators. In this connection, one speaks of "Europeanization of private law."[19] The phenomenon of Europeanisation of constitutional law itself is even being noticed. This raises the issue of the complex question of the relationship between national constitutions and EU law, and in particular the issue of the primacy of EU law over the constitutions of the Member States, or vice versa. This complexity is perfectly reflected in the rulings of the German constitutional court. The Federal Constitutional Court (Bundesverfassunsgericht – BVerfG) – unlike the Court of Justice of the European Union (CJEU) – and in a manner characteristic of German legal methodology, tries to take into account the differences between the treaty (primary) law and the secondary law (acts adopted by the organs of European Union). In short, BVerfG generally does not give European law as such absolute priority over national constitutional law. Of course, it honors the European law system as an autonomous system and confirms that the European Union as a legal community cannot exist unless European law is given the attribute of universal and uniform effectiveness throughout the Union, which can only be ensured by giving European law priority regarding its application over national law.[20] However, according to BVerfG, the source of this primacy is not the nature of European law as supranational law, but provisions in national regulations opening the national legal order to a foreign legal system.[21] In Germany, such a provision is art. 23 para. 1 GG and the discussion about the relationship between German constitutional law and EU law is centered around it. Thus, it is the Basic Law (Grundgesetz) that is the basis for the transfer of power to the EU, and it sets the conditions and limits for the exercise of powers by EU bodies. This is correlated with the principle of *individual limited authorization* expressed in art. 5 para. 1 Sentence 1 and para. 2 Sentence 1 of the Treaty on European Union. The Federal Constitutional Court is therefore entitled and even obliged to review the activities

[17] See J. Helios, Publicyzacja prawa prywatnego [Publicization of private law], p. 31.

[18] See F. Becker, Öffentliches und Privates Recht, NVwZ 2019, p. 1388.

[19] See M. Adamczak-Retecka, Odpowiedzialność odszkodowawcza jednostek za naruszenie prawa wspólnotowego [Liability of individuals for violation of Community law], Warsaw, 2010, pp. 76–77.

[20] BVerfGE, judgment of 6 July 2010 (2 BvR 2661/06 (Honeywell)), Entscheidungen des Bundesverfassungsgerichts vol. 126, pp. 286–331 (p. 301), in an obvious reference to the judgment of the CJEU of 15 June 1964, reference number 6/64 (Costa / ENEL), Collector General 1964, p. 1251.

[21] BVerfGE, judgment of 22 October 1986 (2 BvR 197/83 (Solange II), Entscheidungen des Bundesverfassungsgerichts vol. 73, pp. 339–388 (pp. 374–375).

of the institutions and bodies of the European Union in maintaining their competences and, where appropriate, to declare that *ultra vires* activities have no effect in the German legal system.[22] The BVerfG's obligation to respond to justified complaints regarding infringements of competences of the European institutions and bodies is coordinated with the task of interpreting and applying the treaties, and thus maintaining the unity and consistency of EU law entrusted to the Constitutional Court pursuant to art. 19 para. 1 point 1 Sentence 2 TEU and art. 267 TFEU. Such supervision must be carried out with a friendly attitude towards EU law (europarechtsfreundlich) and in a restrained manner so as not to violate the essence of the legal community.[23] Therefore, BVerfG does not dispute the jurisdiction of the EU Court of Justice to bindingly interpret EU law. Furthermore, before BVerfG has expressed an opinion on the effectiveness of a specific act of secondary legislation, it must be possible for the CJEU to take a position. This is what the instrument of preliminary ruling is used for.

Therefore, BVerfG confines itself to checking for *ultra vires* acts only in those situations where it is obvious that the acts of the European institutions and bodies go beyond the powers conferred.[24] The violation of the principle of *individual limited authorization* must therefore be evident, i.e., the limits of competences are exceeded by European institutions and bodies in an explicit manner (it is drastic, explicit, obvious, and in isolation from the Treaty basis).

At the same time, BVerfG distinguishes between primary and secondary EU law. Acts of secondary law, adopted by EU bodies on the basis and in the procedure provided for in the Treaty on the Functioning of the EU, are not only subject to formal and legal control in terms of compliance with the competence framework, but also from a substantive legal point of view considering their compliance with fundamental rights according to the rules described in the BVerfG ruling of 22 October 1986 (Solange II).

Before the EU has developed its own system of protection of fundamental rights codified in the Charter of Fundamental Rights and undertook to respect them in art. 6 of the EU Treaty, the German Court examined the compatibility of secondary law with fundamental rights protected by the Basic Law (Grundgesetz),

[22] BVerfGE, judgment of 6 July 2010 (2 BvR 2661/06 (Honeywell)), Entscheidungen des Bundesverfassungsgerichts vol. 126, pp. 286–331 (p. 302), with reference to numerous previous judicial decisions (BVerfGE 75, 223 (pp. 235 and 242); 89, 155 (p. 188); 113, 273 (p. 296); 123, 267, (353).

[23] BVerfGE, judgement of 30 June 2009 (2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09, Lissabon), Entscheidungen des Bundesverfassungsgerichts vol. 123, pp. 267–437 (p. 354).

[24] BVerfGE, judgment of 30 June 2009 (2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09, Lissabon), Entscheidungen des Bundesverfassungsgerichts vol 123, pp. 267–437 (pp. 353 and 400) and judgment of 6 July 2010 (2 BvR 2661/06 (Honeywell)), Entscheidungen des Bundesverfassungsgerichts vol. 126, pp. 286–331 (p. 304).

assuming that only the Grundgesetz guarantees an adequate level of protection.[25] However, in 1986, recognizing the gradual increase in legal protection at EU level, the German constitutional court stated that „as long as (*solange*) the European Communities, and in particular the judicial decisions of the Court of Justice, guarantee effective protection of fundamental rights vis-à-vis the authorities of the Communities, which will in principle be equivalent to the level of protection of fundamental rights required by GG, BVerfG will not exercise its powers in the supervision of secondary Community law, which the German federal authorities will use as a legal basis, and thus will not check if the provisions of secondary law comply with the protection standards provided for in the Basic Law […].”[26]

At present, the level of protection of fundamental rights at the level of European law is so high that control based on the principles arising from this judgment is absolutely exceptional. Constitutional complaints and court applications, based on allegations of violation of fundamental rights under secondary EU law under the Basic Law, are in principle inadmissible, unless they reasonably state that protection at European level, including the case law of the Court of Justice of the EU, after passing the Solange II ruling, fell below the required standard.[27]

The conclusion of treaties, which are the essence of primary EU law, on the other hand, requires, according to art. 79 para. 3 GG and art. 23 para. 1 Sentence 3 GG, issuing a law (Gesetz) in which consent is given to the transfer of powers to an international organization such as the EU (Zustimmungsgesetz). As this act is an act of national law, it is under the supervision of BVerfG with regard to whether there has been an interference with the sphere constituting the “inviolable core of the constitutional identity of the Basic Law” (“unantastbarer Kern der Verfassungsidentität des Grundgesetzes”).[28] If BVerfG questions a national act expressing consent to ratify an international agreement, then it is not included in the national law system.

To sum up, it can be concluded that the German Constitutional Court, unlike the Court of Justice of the EU, does not advocate the absolute primacy of EU law in Member States, but, firstly, it does not rescind the supervision of the application of EU law in Germany and diversifies the principles of supervision depending on whether what is dealt with is an act of secondary law or supervising an act of

[25] BVerfG, judgment of 29 May 1974 (BvL 52/71 (Solange I)), Entscheidungen des Bundesverfassungsgerichts vol 37, pp. 271–305 (p. 285).

[26] BVerfG, judgment of 29 May 1974 (BvL 52/71 (Solange I)), Entscheidungen des Bundesverfassungsgerichts vol 37, pp. 271–305 (p. 285).

[27] BVerfG, resolution of 7 June 2000 (2 BvL 1/97 (Bananenmarktordnung)), Entscheidungen des Bundesverfassungsgerichts, vol. 102, pp. 147–166 (p. 164).

[28] BVerfGE, judgment of 30 June 2009 (2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09, Lissabon), Entscheidungen des Bundesverfassungsgerichts vol. 123, pp. 267–437 (p. 344ff.).

national law which enables the ratification of treaties constituting the foundations of the EU.

It seems that the position of the Polish Constitutional Tribunal is consistent with the position of the German Constitutional Court described above. Although the Polish Constitution Tribunal acknowledges the primacy of the Constitution over EU law, it also stipulates that "the development of the European Union in many cases requires a new approach to issues and legal institutions that have been shaped in the course of many years (and sometimes centuries) of tradition, enriched by the jurisprudence and doctrine rooted in the consciousness of generations of lawyers. The need to redefine certain – seemingly inviolable – institutions and concepts stems from the fact that in the new legal situation resulting from European integration, there may sometimes be a conflict between the common understanding of some constitutional provisions and the newly emerging needs for effective action, which would be consistent with constitutional principles, on the forum of the European Union. […] It is necessary to attempt to interpret constitutional norms in such a way that will allow to integrate the influence of Polish state organs (including the parliament) on EU law in the existing political framework of the Republic of Poland. This approach is, moreover, consistent with the principle of interpreting the Constitution in a manner that would be friendly to European integration."[29]

Consequently, as the above presentation of German and Polish case law shows, EU countries provide an instance of multicentric legal systems.[30]

3.

This work has been divided into four parts. The first part is of a profoundly theoretical nature. The analysis made in it is as an outstanding Polish civil law expert Adam Szpunar would put it, „conceptual cleansing of the forefield," in other words it is an indispensable basis for more detailed analyses contained in the further parts. Part Two of the monograph is an expression of a certain interdisciplinary nature within legal sciences. The authors tried to make the whole work interdisciplinary. However, the authors admit that the work presents the achievements

[29] See the judgment of the Constitutional Tribunal of 12 January 2005, reference number K 24/04, OTK 2005/1/3. See also the judgment of the Constitutional Tribunal of 11 May 2005, reference number K 18/04, OTK 2005/5/49; Constitutional Tribunal's judgment of 24 November 2010, reference number K 32/09, OTK 2010/9/108.

[30] See E. Łętowska, Multicentryczność systemu prawa i jej konsekwencje [Multicentricity of the legal system and its consequences], PiP 2005, no. 4, p. 3ff.

of civil law most strongly. This approach to this research topic is relatively rare in Europe. So far, representatives of the science of administrative (public) law are most often interested in the subject of applying private law in the public sector. This is even the case when there is a perception that we are still dealing with the provisions of civil law. An example is German science. The most important theories and concepts regarding this subject are the result of analyzes of excellent German specialists in the field of administrative law. Therefore, for greater balance, Part Two presents the achievements of public law science devoted to civil law forms of public administration activities. The authors express the hope that the considerations contained in this part will constitute an interesting counterpoint for the remaining analyzes presented in the monograph. Part III of the work is more casuistic. It was devoted to the analysis of the application of selected legal institutions of civil law provenance in the public sector. This does not mean, though, that the considerations in Part Three are merely legal dogmatics. The authors also tried to give them theoretical value. In this part, the authors had to confront, among others such fundamental issues as: the nature and scope of subjective rights serving public sector entities, the issue of freedom of contract of public sector entities and the constitutional principle of legalism, or the scope of legal capacity of public entities. Part Four is an overview. In this part an attempt was made to present selected issues in the area of civil law methodology through the prism of analyzing the application of private law in the public sector.

At the end of the monograph a list of the most important conclusions is presented.

According to the authors, these conclusions go beyond the narrowly understood topic of the monograph. The analysis of constitutional conditions for the application of private law in the public sector inspires reflection on the condition of civil law, the essence of the division into public and private law, as well as the relationship between constitutional and civil law.