A Structural Approach to the Effects of Fundamental Rights on Legal Transactions in Private Law

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Horizontal effect of fundamental rights – Legal principles – Dichotomy between private and public law – Systemic or anti-systemic elements in legal orders – Conflict between contractual autonomy and fundamental rights – Coherence in law – Balancing – Cases of permissibility of bank charges in the Czech and German legal systems – General clauses on good morals and good faith in private law

Introduction

In many countries, the interaction between private and public law, and the development of the two branches of law, have become topical issues in the early 21st century. While the divide between private and public law is reportedly becoming less clear,[1] there is a trend whereby many rules of private and public law do not necessarily originate at the state level. In his description of current law, Somek refers to 'the process of denationalization',[2] and Krisch uses the expression 'postnational law'.[3]

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[1] H.-W. Micklitz, 'Rethinking the Public/Private Divide', in M. Maduro et al. (eds.), *Transnational Law. Rethinking European Law and Legal Thinking* (Cambridge University Press 2014) p. 271 at p. 272.

[2] A. Somek, 'The Cosmopolitan Constitution', in Maduro et al., *supra* n. 1, p. 97 at p. 98.

[3] N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010) p. 4.

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Although the above-mentioned authors primarily explore changes in public law, private law does not remain unaffected. For example, the growing focus on fundamental rights introduces a new dimension to the more general phenomenon of the constitutionalisation of private law.[4] While the increasing importance of fundamental rights in contemporary states governed by law is obviously not limited to private law, the issue of whether and how fundamental rights should affect the relations regulated by private law remains rather controversial. Traditionally, fundamental rights have been viewed as affecting an individual who holds the rights, and the state which is either obligated to refrain from interfering in those rights or to act in such a way that the fundamental right in question can be exercised.[5] However, the prevailing paradigm of fundamental rights as negative rights ended with the development of post-war constitutionalism (particularly in Germany), where the central position of the constitution was supposed to indicate a departure from the previous theories. Kumm describes this development as a move from 'total state' to 'total constitutionalism',[6] Somek refers to this 'second generation' of constitutionalism as the replacement of the ideal of limited government with the ideal of optimal government.[7] The key issue is to what extent these changes in the legal order have affected private law.

It should be mentioned that, until the 19th century, in the European continental legal culture it was private law (e.g. as *jus commune* or the legal methodologies with respect to private law) that set the standard for public law branches.[8] Also, having developed over the centuries in Rawlsian reflective

[4] H.-W. Micklitz, 'Introduction', in H.-W. Micklitz (ed.), *Constitutionalisation of European Private Law* (Oxford University Press 2014) p. 1 at p. 1. For wider context *see* H.-W. Micklitz, 'Konstitutionalisierung, Regulierung und Privatrecht', in S. Grundmann, et al. (eds.), *Privatrechtstheorie*. Band I. (Mohr Siebeck 2015) p. 623-645.

[5] For the German distinction between negative rights (*Abwehrrechte*) and positive rights (*Leistungsrechte*) *see* the classic texts by Georg Jellinek (G. Jellinek, *Allgemeine Staatslehre*, 3rd edn (O. Häring 1914) p. 419 ff). For a current approach *see* K. Stern, 'Idee und Elemente eines Systems der Grundrechte', in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts. Vol. 5. Allgemeine Grundrechtslehren* (C. F. Müller 2000) p. 45 at p. 70-74.

[6] M. Kumm, 'Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', 7 *German Law Journal* (2006) p. 341-369.

[7] Somek, *supra* n. 2, p. 97-98.

[8] Micklitz 2015, *supra* n. 4, p. 624. In the 19th century, civil codes were the most general regulations in legal systems, covering both private and constitutional law. Using the example of the Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch*), Adamová pinpoints certain human rights principles, e.g. the premise that each human being has inborn rights, apparent by virtue of reason. *See* K. Adamová, 'Občanská práva a svobody v rakouských ústavách 19. století' [*Civil Rights and Freedoms in Austrian Constitutions in the 19th Century*], in K. Malý and L. Soukup (eds.), *Vývoj české ústavnosti v letech 1618–1918* [*The Development of Czech Constitutionalism in 1618-1918*] (Karolinum 2006) p. 414 at p. 423.

equilibrium,[9] civil law has been rather conservative with respect to major changes, such as human rights aspects being applied in private law.

According to the academic literature, the *Lüth* decision[10] delivered by the German Federal Constitutional Court is considered to be a milestone in the constitutionalisation of private law. In this case, an action for damages was brought by Veit Harlan, a former prominent Nazi film director, for an alleged intentional violation of good morals. The defendant was Eric Lüth, a civil servant employed by the city of Hamburg and an activist fighting Nazi criminals, who had encouraged the citizenry to boycott a new Harlan film. At first, Mr Lüth unsuccessfully invoked freedom of expression before the German courts,[11] but was successful in 1958 before the Federal Constitutional Court, which in its decision elaborated a theory of the indirect horizontal effect of human rights on private law relations.[12] The court viewed human rights as an objective order of values radiating to all corners of the legal system. This could be regarded as a reflection of Smend's pre-war integration

[9] H. Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law', in H.-W. Micklitz (ed.), *Constitutionalisation of European Private Law* (Oxford University Press 2014) p. 26 at p. 41. John Rawls describes reflective equilibrium as a set of commonly-shared conditions from which rules are deduced. But rather than implying unchangeability, the concept of equilibrium suggests dynamics in the examination of other relevant examples. For details *see* J. Rawls, *A Theory of Justice* (Belknap Press of Harvard University Press 1973) p. 20.

[10] Decision of the German FCC BVerfGE 7, 198 of 15 January 1958 (*Lüth*). For the importance of this case for post-war constitutionalism in Germany *see*, in the Czech literature, P. Holländer, 'Putování po stezkách principu proporcionality: intence, obsah, důsledky' [*Wandering the Paths of the Principle of Proportionality: The Intensions, Content and Implications*] 155 *Právník* [*The Lawyer*] (2016) p. 261 at p. 270. From abundant German literature *see* H. Dreier, *Dimensionen der Grundrechte. Von der Wertordnungsjudikatur zu den objektiv-rechtlichen Grundrechtsgehalten* (Hennies und Zinkeisen 1993).

[11] The courts decided in favour of Mr Harlan, who filed an action on the basis of § 826 of the German Civil Code (*Bürgerliches Gesetzbuch*), which stated 'Whoever causes damage to another person intentionally and in a manner offensive to good morals is obliged to compensate the other person for the damage' – quoted from the English translation in D. P. Kommers, R. A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd edn (Duke University Press 2012) p. 443.

[12] The decision was based on the constitutionally consistent interpretation of the concept of 'good morals' in the above-mentioned provision of § 826 of the German Civil Code. As H. Nieuwenhuis rightly notes, in the *Lüth* decision the Federal Constitutional Court does not claim that the Basic Law creates a system of values but rather that, due to the prepositive character of such values, this system (which objectively exists) commands the foreground (*hat aufgerichtet*), *see* H. Nieuwenhuis, 'Fundamental Rights Talk. An Enrichment of Legal Discourse in Private Law?', in T. Barkhuyen and S. Lindenbergh (eds.), *Constitutionalisation of Private Law* (Martinus Nijhof 2005) p. 1 at p. 4. This claim by the Federal Constitutional Court tends to be frowned upon by certain academics, because the objective nature of the order of values is not as self-evident in modern pluralist societies as would initially appear: *see* J. van der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (de Gruyter 2014) p. x.

theory of the constitution.[13] Thus, in this case German ordinary courts were wrong to interpret the invitation to boycott the film as a violation of good morals; according to the Federal Constitutional Court the invitation amounted to an exercise of constitutionally-guaranteed freedom of expression. The key issue, i.e. whether and how fundamental rights can affect private law relations, has generated considerable discussion. According to current legal doctrine, 'the horizontal effect of fundamental rights' refers to a number of theories. Depending on the relative relevance accorded to various factors, some authors describe direct or indirect effects, or effects brought about by the case law of courts. At the risk of a certain degree of simplification, direct horizontal effect refers to a situation wherein individuals engaged in private law disputes directly invoke fundamental rights against other private law entities. An indirect effect arises when constitutional rights emerge through the interpretation of vague legal concepts in private law, e.g. good morals or good faith. Effects brought about by case law differ from the previous models in that they exclude any interaction between private entities, yet even a court hearing a private law dispute is considered to be a state body obliged to ensure the protection of fundamental rights. A court must ensure that its judgment does not interfere with the fundamental rights of either party to a lawsuit.[14]

This lack of consensus on the horizontal effect of fundamental rights in the *Lüth* decision can be demonstrated, for example, by the length of the adjudication process in a case where more than six years elapsed between the commencement of proceedings and the delivery of the Federal Constitutional Court judgment.[15] Moreover, we should note the numerous critical opinions expressed by jurists on the approach to the horizontal effect of fundamental rights expressed in the *Lüth* decision. It is not possible to give a full account of the academic debate here, however we do note two lines of criticism concerning indirect horizontal effect as applied in the *Lüth* decision. Some authors, for example H. C. Nipperdey and W. Leisner, argue that constitutional rights enjoy a special status superior to private law, giving rise to the direct effect of fundamental rights on private law transactions. On the other hand, E.-W. Böckenförde for example challenges the decision by arguing that it significantly increases the power of the judiciary at the expense of the democratically elected legislature. He goes on to criticise the method of balancing fundamental rights.[16]

[13] *See* Kommers and Miller, *supra* n. 11, p. 57. For details *see* R. Smend, *Staatsrechtliche Abhandlungen und andere Aufsätze*, 4th edn (Dunckler und Humblot 2010) p. 180 ff.

[14] For details, *see* A. Barak, 'Constitutional Human Rights and Private Law', in D. Friedman and D. Barak-Erez (eds.), *Human Rights in Private Law* (Hart Publishing 2001) p. 13-42.

[15] E.-W. Böckenförde, 'Grundrechte als Grundrechtsnormen', in E.-W. Böckenförde, *Staat, Verfassung, Demokratie. Studien zum Verfassungstheorie und zum Verfassungsrecht* (Suhrkamp 1991) p. 159 at p. 163.

[16] More details on the German academic debate are provided in van der Walt, *supra* n. 12, p. 201 ff.

Over the past several decades we have seen the emergence of another dimension in the debate on the horizontal effect of fundamental rights.[17] When discussing 'the horizontal effect revolution', Johan van der Walt primarily refers to the transformation of public authority as no longer being associated solely with the state, but now also rooted in supranational entities (in Europe, particularly the EU and the Strasbourg system of human rights protection), and that international courts may (and often do) give effect to fundamental rights in private law disputes.[18]

The current tendency to constitutionalise private law was recently illustrated by the Czech Republic's new (2012) codification of private law. The new Civil Code replaced the previous code of 1964 which, despite numerous amendments, was no longer fit for its intended purpose, having been adopted under a different political system, ie socialist Czechoslovakia.

Among other changes, the new Civil Code introduced, as its point of departure, a provision laying down rules for the interpretation of private law: 'Each provision of private law may be interpreted only in accordance with the Charter of Fundamental Rights and Freedoms and the constitutional order in general, the principles underlying this Act [i.e. the Civil Code], and considering at all times the values that it protects. Should the interpretation of a provision diverge from this imperative solely on the basis of its wording, the imperative prevails.'[19] With this provision, the legislator confirmed the settled case law of the Czech Constitutional Court which has, since its establishment in 1993, advocated the view that laws and statutory instruments should, first and foremost, be interpreted so as to be in agreement with the constitution.[20]

The horizontal effect of fundamental rights and freedoms has been recognised in many states as one dimension of the impact those rights have. However, certain recent decisions by Czech and foreign courts suggest that horizontal effect must be addressed comprehensively. For example, there are uncertainties surrounding the specific form it should take or its links to the relevant legal

[17] I would like to give credit to the anonymous reviewers of this paper for bringing this dimension to my attention.

[18] van der Walt, *supra* n. 12, p. xi. Particularly well-known judgments by the ECJ, such as 22 November 2005, Case C-144/04, *Mangold* and 19 January 2010, Case C-555/07, *Kücükdeveci*, in which the Court applied the general principles of Directive 2000/78/EC and non-discrimination as a general principle of EC law, have provoked considerable criticism among academics.

[19] Provision of s. 2(1) Act No. 89/2012 Sb., Občanský zákoník [*Civil Code*].

[20] In the Czech Republic, the priority of constitutionally consistent interpretation has been confirmed by commentaries on the new Civil Code. *See* F. Melzer, P. Tégl et al., *Občanský zákoník. § 1-117. Velký komentář* [*The Civil Code. Ss. 1-117. Grand Commentary*] (Leges 2013) p. 76; J. Švestka et al., *Občanský zákoník. Komentář. Svazek I. (§ 1 až 654)* [*The Civil Code. Commentary. Volume I. (Ss. 1-654)*] (Wolters Kluwer 2014) p. 18; P. Lavický et al., *Občanský zákoník I. (Obecná část § 1-654)* [*The Civil Code I. (General Provisions ss. 1-654)*] (C. H. Beck 2014) p. 40.

institutions (e.g. the protective function of fundamental rights or the positive obligations of the state).[21] This article attempts to provide an abstract discussion of the horizontal effect of fundamental rights, using a theoretical model of the conflict of principles and values in constitutional and private law.[22] I will attempt to give support to the thesis that it is necessary to apply a structural approach to the horizontal effect of fundamental rights, rather than to slavishly give priority to constitutional rules, principles and values. To provide a firm basis for this structural approach, I will concentrate on values and principles as the foundation of a legal system and its individual branches. In this article I do not address the pluralistic relationship between national, international, and transnational law in great detail. A certain level of differentiation is present even within national legal systems. Other, concurrent, legal systems, each with their own sources of normativity, only serve to increase the effect of the fragmentation of law.[23] Next, I will attempt to demonstrate the various ways constitutional arguments are reflected during the adjudication process by examining a specific example: the permissibility of bank charges. This issue was deliberately chosen because it has recently become highly topical in several European states.[24] Particular emphasis will be placed on the divergent reasoning applied by courts in Germany and the Czech Republic. The final part of the paper will outline a structural approach to resolving the conflict between legal rules, principles, and values in situations concerning the horizontal effect of fundamental rights. In this part I will attempt to examine the various approaches to the organisation of values, principles, and rules within legal systems. This theoretical analysis seeks to offer detailed arguments to explain the circumstances under, and the manner in which constitutional rules, principles, and values are to be applied to private law transactions.

[21] E. Wagnerová, 'Úvod' [*Introduction*], in E. Wagnerová et al., *Listina základních práv a svobod. Komentář.* [*The Charter of Fundamental Rights and Freedoms. Commentary*] (Wolters Kluwer 2012) p. 1 at p. 13.

[22] The conflicting character of principles and values will, due to their abstract character, largely depend on our own interpretation of their mutual relationship, one which may also be regarded as being merely ostensibly in conflict.

[23] *See* K. Röhl and H. Ch. Röhl, *Allgemeine Rechtslehre*, 3rd edn, (Carl Heymanns Verlag 2008) p. 453.

[24] *See* M. Kenny, 'Orchestrating Sub-prime Consumer Protection in Retail Banking: Abbey National in the Context of Europeanized Private Law', 19 *European Review of Private Law* (2011) p. 43-69, S. Saintier, 'France, Germany and the United Kingdom's Divergent Interpretations of Directives 86/653 and 93/13s' Exclusionary Provisions: An Overlooked Threat to Coherence?', 19 *European Review of Private Law* (2011) p. 519-544, R. Frank et al., 'Přípustnost poplatků za správu a vedení úvěrových účtů vedených pro spotřebitele' [*Permissibility of Maintenance Charges for Consumer Loan Accounts*], 21 *Právní rozhledy* [*Legal Perspectives*] (2013) p. 515-522.

Values and Principles as a Foundation of Constitutional and Private Law

Non-positivist legal thinkers typically emphasise the role of unwritten legal principles and values. Of the modern theories, Alexy's dual nature of law is noteworthy, as it contains both an ideal and critical dimension, and a real or factual dimension.[25] The ideal dimension plays a very prominent role in Alexy's thesis on claim to correctness (*Anspruch an Richtigkeit*) in law and its interpretation.[26] However, under current legal doctrine the role of legal principles and values is not limited to the non-positivist conception of law; legal principles and values are often understood to be elements of applicable law and, in comparison with legal provisions, have their own specific features. In German legal doctrine, this issue has been addressed, for example, by Claus-Wilhelm Canaris, who noted the difference between the conception of law as a logical and axiomatic system similar to Kelsen's normativity conception, and the conception of law as a teleological or axiological system where general legal principles and values are at the forefront.[27]

As for jurisprudence in common law countries, the American constitutional theorist Larry Alexander regards the constitution as an instrument that helps overcome the diversity of individual opinion on how society should be governed. In his view, each individual ideally holds an opinion on how public authority should be exercised in society. Such opinions differ substantially from one another. The main purpose of constitutions is thus to reach consensus on fundamental issues using a system of basic rules, such as the taking of decisions by majority vote or the existence of courts, to protect individual rights.[28]

Alexander further explores the key issue of whether the adoption of a constitution only implies agreement to the constitutional text, or also to the related doctrines and principles traditionally associated with the concepts used in the act. Alexander argues in favour of the latter, claiming that by adopting a constitution we accept much more than a mere system of simple rules, because we also accept rules governing the

[25] R. Alexy, 'The Dual Nature of Law', 23 *Ratio Juris* (2010) p. 167 at p. 167.

[26] For details on these theses *see* R. Alexy, *The Argument from Injustice. A Reply to Legal Positivism* (Oxford University Press 2002) p. 35 ff. For an overview in the context of Alexy's whole work *see* M. Klatt, 'Robert Alexy's Philosophy of Law as System', in M. Klatt (ed.), *Institutionalized Reason. The Jurisprudence of Robert Alexy* (Oxford University Press 2012) p. 1 at p. 15-16.

[27] C.-W. Canaris, 'Systemdenken und Systembegriff in der Jurisprudenz', in J. Neuner and H. Ch. Grigoleit (eds.), *Claus-Wilhelm Canaris. Gesamte Schriften. Band 1. Rechtstheorie* (De Gruyter 2012) p. 191 at p. 226-243.

[28] L. Alexander, 'Constitutionalism', in M. P. Golding and W. Edmundson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2006) p. 248 at p. 248-249. This set of abstract rules indicates who makes decisions in a state, when the decisions are made and what their scope is.

jurisdiction to decide in disputes, and on modes of interpretation. Using Alexander's terminology, such rules make up a metaconstitution.[29] A metaconstitution specifically comprises basic principles and values on which the constitution is based, as they indicate how to approach complex interpretational issues. A distinction between constitutions and metaconstitutions helps to explain how amending a constitution (amending applicable constitutional law, but not its fundamental values) differs from constitutional revolution, which is the path to changing a metaconstitution.[30] Reflection on the existence of a metaconstitution is, in my opinion, also relevant to other constitutional doctrines such as the eternity clause and constitutional identity in general.[31]

From the very beginning, constitutional law has evolved into the branch of law regulating the relationship between the individual in the face of public authority, rather than relationships between private persons. By contrast, private law is built upon various foundations, primarily those regulating contractual relations, torts and property issues. Thus, varying principles serve the different objectives served by private law.[32] It is the remarkable continuity of private law (in the case of continental law, systems going back to ancient Roman traditions) that suggests that, just as certain principles and values underlie constitutional texts, private law is based on principles and values which stem from even older traditions. On the European continent, private law codes to a certain extent served as constitutions before constitutions were formally adopted.

Contract theories in private law, for example, reflect the binding character of promises or mutual agreements.[33] However, it is not a single theory but rather a

[29] Alexander, *supra* n. 28, p. 250.

[30] Ibid.

[31] A similar consideration concerning the context of constitutional law was explored by M. Jestaedt, who distinguished between the major constitution (*constitutio maior*) comprised of a foundation of ideology, metaphysics and values, and the minor constitution (*constitutio minor*), which sets out the conceptual form of constitutional doctrine (*Verfassungsdogmatik*). For details on this theory in the Czech literature, *see* J. Kysela, *Ústava mezi právem a politikou* [*The Constitution between Law and Politics*] (Leges 2014) p. 35, referring to M. Jestaedt, *Die Verfassung hinter der Verfassung: Eine Standortbestimmung der Verfassungstheorie* (Ferdinand Schöningh 2009) p. 45 ff. According to Jestaedt, the distinction between constitutional theory and constitutional doctrine (*Verfassungsdogmatik)* should be maintained to ensure that the constitution is not amended merely by means of interpretation.

[32] B. Zipursky, 'Philosophy of Private Law', in J. Coleman and S. Shapiro (eds.), *The Oxford Handbook on Jurisprudence and Philosophy of Law* (Oxford University Press 2002) p. 623 at p. 653; Collins, *supra* n. 9, p. 28. For arguments in favour of the distinction between private law and public law principles in Czech academic literature, *see* J. Wintr, *Říše principů. Obecné a odvětvové principy současného českého práva* [*The Empire of Principles. General and Sectorial Principles of Contemporary Czech Law*] (Karolinum 2006) p. 62-63.

[33] E. A. Posner, 'Contract Theory', in Golding and Edmundson (eds.), *supra* n. 28, p. 138 at p. 138. For details on the binding character of promises in legal transactions, *see* J. Raz, 'Promises in

multitude of approaches, such as the currently fashionable economic analysis of law[34] or legally realistic approaches, which question the thesis asserting that judicial decision-making, even in civil proceedings, has an apolitical character.[35] Certain extreme approaches even disregard any distinction to be made between private and public law. However, according to Zipursky such an approach can be challenged by arguing that the role of the state in, respectively, private and public law is fundamentally different despite any possible overlap of public and private law. Private law regulates the mutual rights and duties of persons,[36] and thus the state should primarily enable individuals to seek legal recourse in disputes with other individuals,[37] for example by determining conclusively which party breached a contract or caused damage by interfering with a property right.

The horizontal effect of fundamental rights raises the crucial issue of striking the right balance between the private law principle of contractual autonomy and the protection of fundamental rights and freedoms.[38] Due to doctrinal development after World War II, fundamental rights now enjoy a wider scope of application than they had at the time when they were first compiled. Their applicability is not limited to the relationship between an individual bearing those rights and the state's obligation not to interfere in them. First I will attempt to illustrate horizontal effect with an analysis of cases drawn from several states concerning the permissibility of bank charges with respect to loan accounts. This example is quite specific in that opposing parties, banks and its client, find themselves in unequal circumstances. Such unequal relationships tend to generate arguments in favour of the horizontal effect of certain human rights, which in an equal relationship would otherwise not apply, for example, the fairness argument which can limit the exercise of factual power in private law transactions.

Of the countries that have dealt with cases involving bank charges, I selected Germany and the Czech Republic mainly to illustrate varying approaches to the horizontal effect of fundamental rights. I will subsequently attempt to delineate the issue by analysing the structure of legal rules, principles and values in private and constitutional law.

Morality and Law. Book Review: Atiyah P., S. Promises, Morals, Law. Oxford: Clarendon Press, 1981', 95 *Harvard Law Review* (1982) p. 916 at p. 928.

[34] Posner, *supra* n. 33, p. 138-140.

[35] Zipursky, *supra* n. 32, p. 653.

[36] *See* s. 1(1) of Act No. 89/2012 Sb., Občanský zákoník [*Civil Code*].

[37] Zipursky, *supra* n. 32, p. 655.

[38] In Czech literature, e.g. P. Maršálek, 'Soudobá delegitimizace lidských práv' [*Contemporary Delegitimization of Human Rights*], in P. Šturma, A. Gerloch et al., *Ochrana základních práv a svobod v proměnách práva na počátku 21. století v českém, evropském a mezinárodním kontextu* [*Protection of Fundamental Rights and Freedoms in terms of Changes in Law at the Beginning of the 21st Century in the Czech, European and International Context*] (Auditorium 2011) p. 79 at p. 82.

Bank charges cases

In June 2011, the German Federal Court of Justice ruled against the provisions stipulated in the banks' business terms and conditions that imposed maintenance charges on loan accounts.[39] This decision stirred up an interesting debate on the limits on autonomy of will in private law relationships. The Federal Court of Justice's reasoning turned mainly on the distinction between principal and subsidiary terms regarding the price, arguing that, in cases where the price of the consideration is a principal term, European and national regulations preclude its review. This is a logical argument, since if parties agree to a price, it is not the court's role to step in to modify that agreement. However, in the present case the German Federal Court of Justice saw the bank charges as a subsidiary term for which no reciprocal consideration was provided by the bank. According to the court, such terms are in breach of good faith and do unreasonable harm to consumers. The decision of the Federal Court of Justice caused considerable controversy; many critics challenged the distinction made between the two types of price terms,[40] arguing that the disputed charges were included in the total price for the service provided by the bank.[41]

Soon after the German decision, a campaign was launched in the Czech Republic to persuade large numbers of citizens to join mass actions aimed at banks, which charged similar fees in the Czech Republic. Several concurrent initiatives were successful; according to available sources, by mid-2013 over 300,000 clients of banks had started procedures leading to individual actions against their banks.[42] The campaigners against bank maintenance charges for loan accounts in the Czech Republic argued that the conclusions of the Federal Court of Justice were applicable, since the regulations in the two states were similar, and

[39] Decision of the IXth panel of the German Federal Court of Justice (BGH) of 7 June 2011, ref. IX ZR 388/10.

[40] Frank et al., *supra* n. 24, p. 515. In their article the authors primarily referred to German literature which polemised the conclusions of the Federal Court of Justice.

[41] The UK Supreme Court held the same view regarding bank charges in a similar case, *see* 25 November 2009, *Office of Fair Trading* v *Abbey National plc* [2009] UKSC 6 (one of the first judgments of the newly-established Supreme Court). According to the court, clients took those charges into account when they entered into legal transactions with the bank.

[42] Frank et al., *supra* n. 24, p. 515. Class actions do not exist in Czech law. The great number of actions probably suggests dissatisfaction with the amount of the charges imposed on clients by banks in the Czech Republic. For example, the annual survey of the most absurd bank charges at <www.bankovnipoplatky.com> regularly receives considerable coverage in most national media. The case also highlighted the problems arising from the absence of class actions in Czech law which contributes to the clogging up of courts with thousands of claims of the same type. For details *see* D. Bartoň and P. Toman, 'Spor o bankovní poplatky z pohledu základních procesních principů' [*A Dispute over Bank Charges from the Perspective of Basic Procedural Principles*], *Bulletin advokacie* (2015) p. 26 at p. 30.

were both based on the European Directive on unfair terms in consumer contracts.[43] However, despite the similarities, the outcome in the Czech Republic was different from the outcome in Germany. While in Germany the case was heard at last instance by the Federal Court of Justice, and the arguments before ordinary courts had turned on a discussion of the applicable private law principles, the Czech Republic cases failed to reach the appellate level because the amounts claimed were too low. The Czech system precludes appeal if the amount claimed is too low (the bank charges amounted to around CZK 150, i.e. less than €6 per month). The Czech trial court decisions on the permissibility of bank charges were not consistent; some courts adopted the reasoning of the German Federal Court of Justice, while others dismissed identical actions. Thus, the Constitutional Court's judgment was anxiously awaited to de facto unify the case law of the ordinary courts.[44] The Constitutional Court was apparently aware that it was necessary to rule on the case quickly: approximately seven months elapsed between the September 2013 bank charge judgments handed down by trial courts and the Constitutional Court's judgment. This can be regarded as very speedy adjudication by the standards of the present day Czech Republic.[45]

In the Czech case, the complainant in the proceedings before the trial courts raised arguments which had been successful in proceedings before the German Federal Court of Justice, arguing in particular that the bank charges were 'charges for nothing' and were incompatible with good morals. In the proceedings before the Czech Constitutional Court, it was up to the complainants to justify the constitutional dimension of their case. They tried to subordinate consumer protection[46] to the constitutional principle of equality in the material sense, and to restrict the autonomy of will with the principle of equity or fairness.[47] The first issue to be addressed by the Constitutional Court was whether the case had a constitutional dimension, or whether it fell under general, i.e. sub-constitutional, law. Only in the former case is the Constitutional Court to become involved. If the case did not have a constitutional dimension, the Constitutional Court would be obliged to dismiss the complaint.[48] The decision to hear the case was, in my opinion,

[43] Council Directive 93/13/EEC.

[44] Judgment of the Constitutional Court ref. III. ÚS 3725/13 of 10 April 2014 (bank charges).

[45] Bartoň and Toman, *supra* n. 42, p. 30.

[46] For the legal status of 'consumer' in private law of the Czech Republic *see* D. Elischer, 'Spotřebitel' [*The Consumer*], in J. Dvořák et al., *Občanské právo hmotné 1. Díl první: Obecná část* [*Substantive Civil Law I. Volume I: General Part*] (Wolters Kluwer 2016) p. 290 at p. 295-300.

[47] Judgment of the Constitutional Court ref. III. ÚS 3725/13, para. 7 of the reasoning. However, the constitutional dimension of the case was not discussed in great detail. It was not possible to draw inspiration from Germany because the case was not heard before the Federal Constitutional Court.

[48] As stated by the Constitutional Court of the Czech Republic in one of its recent decisions: 'The Constitutional Court is not placed at the top of the court system (Article 91 of the Constitution);

partly motivated by the fact that, as noted above, owing to the small amounts claimed there was no superior court within the Czech court system that could enforce uniformity of adjudication upon the various trial courts. The Constitutional Court thus assumed this role although, formally, it stands aside from the general court system, much like, for example, the Federal Constitutional Court.

Moreover, there was the earlier case law of the Constitutional Court in the area of consumer protection to consider. In its 18 July 2013 decision on the amount of contractual penalty negotiated by a non-banking company engaged in providing loans to consumers, the Constitutional Court explained:

> In the past, the Constitutional Court stated that the creation of obligations must primarily be based on the respect for and protection of the autonomy of will of contracting parties, as this is a crucial condition for the material rule of law. Also, in its earlier case law, the Constitutional Court inferred the autonomy of will from Article 2 (3) of the Charter of Fundamental Rights and Freedoms, under which everyone may do that which is not prohibited by law and nobody may be compelled to do that which is not imposed upon them by law. This provision, according to the Constitutional Court, represents both a structural approach and an individual's right that can be restricted by law in order to enforce another right or public interest, while this restriction must be proportionate to the objective pursued… In general, we agree with the opinion emphasising the autonomy of will in the area of obligations. Yet, the protection of the autonomy of will cannot be absolute in situations where there is another fundamental right vested in an individual, or a constitutional principle, or another constitutionally-approved public interest that is capable of proportionately restricting the autonomy of will.[49]

In the Constitutional Court's 11 November 2013 decision concerning the application of general terms and conditions in consumer contracts, the Czech Constitutional Court first emphasised the constitutional dimension of consumer disputes by stating that 'Consumer protection therefore does not operate merely on the sub-constitutional level, but has an impact on the constitutional level as well. Specifically, consumer protection can be ranked under the constitutional principle of equality, in its material or factual conception (Article 1 of the Charter).'[50] Elsewhere in this decision, the Constitutional Court explained the

therefore, it is not in a position to review evidentiary rulings made by general courts, unless such rulings violated the basic constitutional rights or freedoms of the complainant': Judgment of the Constitutional Court ref. I. ÚS 3308/16 of 19 January 2017, para. 14 of the reasoning.

[49] Judgment of the Constitutional Court ref. IV. ÚS 457/10 of 18 July 2013, paras. 12-13 of the reasoning.

[50] Judgment of the Constitutional Court ref. I. ÚS 3512/11 of 11 November 2013, para. 19 of the reasoning.

duty of Czech general courts to conduct proceedings where no appeal was permissible (including the bank charges disputes) with the utmost care.[51]

In the bank charges case we examine here, the Constitutional Court adhered to its earlier case law, considered the complaint on its merits, and finally dismissed the complaint as unfounded. In the proceedings, the Court addressed four issues: the small amount in question in relation to the possible number of trials involving similar claims that could follow, the requirement for the Constitutional Court to ensure consistency in the case law of the general courts, the protection of consumers as the weaker contracting party, and court costs.[52] Given the topic of this paper, I will focus only on the third issue, which – in my opinion – demonstrates how the Czech Constitutional Court took account of the case law of the German Federal Constitutional Court concerning the constitutional limits applicable to legal transactions in private law relations.

At the very beginning of its reasoning, the Constitutional Court pointed out that, despite finding ourselves in an alleged human rights era, it is very important to identify the constitutional dimension of a case. In response to arguments advanced by the petitioner, the Court noted that consumer protection, albeit an important principle of European law, 'does not belong to the fundamental rights and freedoms individually guaranteed by the constitution, […] but rather is an objective of the state policy, set out in the Constitution and subject to specific consumer protection regulation under general law.'[53] The state implemented this policy by adopting specific legislation, incorporating the requirements arising from EU law,[54] and this legislation was not challenged by the complainant.

In the key part of its reasoning, the Constitutional Court observed that:

> in contrast to the pre-war positivist approach (*lex dura, sed lex*, 'law is law'), it is inappropriate to merely emphasise that 'a contract is a contract'. This implies that

[51] 'A court decision where no appeal is permissible may be challenged through a constitutional complaint only where serious errors have been made affecting the constitutional rights of the complainant, because in the absence of basic protection of human rights and adherence to fundamental constitutional principles the rule of law cannot be achieved. According to the Constitutional Court, since such proceedings are conducted before general courts at one instance only, the general courts are obliged to exercise utmost care and skill in conducting the proceedings and preparing the reasoning of the decision': Judgment of the Constitutional Court ref. I. ÚS 3512/11 of 11 November 2013, para. 16 of the reasoning. For details *see* R. Frank and P. Veselková, '*Poplatky za správu a vedení úvěrových účtů vedených pro spotřebitele – ústavněprávní aspekty*' [*Maintenance Charges for Consumer Loan Accounts – The Constitutional Aspects*], 22 *Právní rozhledy* [*Legal Perspectives*] (2014) p. 194 at p. 196.

[52] Judgment of the Constitutional Court ref. III. ÚS 3725/13 of 10 April 2014 (bank charges), para. 28 of the reasoning.

[53] Ibid., para. 42 of the reasoning.

[54] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

> the principle of the autonomy of will in private law transactions cannot be unilaterally replaced with (paternalistic) guidance and intervention by the state. The position of a stronger party (the other party to the same legal transaction) cannot be intrinsically regarded as unlawful or even unconstitutional.[55]

The Czech Constitutional Court regarded the bank charges as one of the two strands of revenue arising from loan agreements (beside interest). Consequently, the abolition of bank charges would inevitably lead to an increase in bank interest rates. Furthermore, the Constitutional Court regarded as unconvincing the complainant's argument that the consumer was 'misled' by the bank because, although the consumer had agreed to a clearly-stipulated monthly charge for the loan management, the consumer did not know what consideration was specifically provided in return.[56] A passage emphasising the constitutional dimension of the autonomy of will is particularly relevant to the constitutional debate: 'The protective role of the state (a public element) in relation to fundamental rights and freedoms is enshrined in Article 1 (1) of the Constitution[57]… Therefore, the state is obliged to protect this autonomous space of free decision primarily through general law… This applies to so-called consumer contracts as well.'[58] If we compare the bank charges decisions with earlier case law dealing with consumer contracts, we may conclude that in the bank charges proceedings the Constitutional Court dealt with the constitutional dimension of autonomy of will in private law in greater detail than it had with the potential constitutional aspects of the protection of a weaker party. However, even if a more detailed discussion was offered in the reasoning, given the facts of the case, I believe that priority should be probably given to the argument that a legal transaction in private law is freely entered into and is guaranteed by autonomy of will.

Although, as stated above, in the bank charges case the Constitutional Court did not accept the petitioner's argument, I believe it is important to present the different arguments put forward in Germany and in the Czech Republic. In the German case the line of reasoning stuck to private law doctrines, while in the

[55] Ibid., para. 46 of the reasoning.

[56] Ibid., para. 56 of the reasoning.

[57] Article 1(1) of the Constitution of the Czech Republic (Constitutional Act No. 1/1993 Sb., as amended) provides: 'The Czech Republic is a sovereign, unitary, and democratic state governed by law, founded on respect for the rights and freedoms of man and of citizens.'

[58] Judgment of the Constitutional Court ref. III. ÚS 3725/13 of 10 April 2014 (bank charges), para. 43 of the reasoning. The Constitutional Court did not deal with the question of whether the legislation governing consumer contracts complied with the Constitution, because the Court did not find any reasons therefor, and the complainant did not challenge this legislation in her complaint.

Czech case certain constitutional principles and values were introduced into what was largely a private lawsuit.[59]

In dealing with the bank charges case it was, in general, necessary to address the conflict of rights, principles and values at several levels of applicable law. On the one hand, there was autonomy of will (in this case freedom of contract); on the other hand, there was factual inequality between the contracting parties.[60] The alleged inequality, combined with the imposed content of the contract, strongly suggests a need for the protection of human dignity in private law relationships.[61] The arguments in favour of autonomy discourage any intervention in the contractual relationship, as the contract was entered into by both parties voluntarily. By contrast, the arguments in favour of material equality indicate that the law should protect the weaker party,[62] thus promoting 'more fairness' in private law.[63]

The bank charges case is somewhat reminiscent of another well-known case heard by the German Federal Constitutional Court. In the early 1990s the court considered two cases in a joint trial concerning the constitutionality of loan guarantee agreements that had been concluded between banks and the family members of debtors who sought to obtain a loan.[64] Such practices were quite widespread, and banks often accepted persons who demonstrably lacked the funds necessary to assume the debts as guarantors. In the first case, the bank accepted the guarantee of the 21-year-old daughter of a businessman, with no higher education and a very low income of her own, to stand surety for a DM 100,000 loan taken out by her father. Just to cover the interest on that loan, she could be asked to pay in excess of DM 700 from her monthly

[59] Certainly, it is a valid argument to point out that constitutional courts use constitutional law in their reasoning, while ordinary courts rely on statutes. However, ordinary courts should not disregard the constitutional dimensions of a case. Otherwise, constitutional courts would have to become universal supreme review institutions, which is a role they have been very reluctant to assume.

[60] For greater detail on the two principles *see* J. Hurdík and P. Lavický, *Systém zásad soukromého práva* [*The System of Principles of Private Law*] (Masarykova univerzita v Brně 2010) p. 82 ff.

[61] Human dignity is a concept whose meaning very much depends on interpretation. For an appreciation of these interpretive concepts in greater detail, *see* R. Dworkin, *Justice in Robes* (Belknapp Press 2006) p. 10-12. The current, rather controversial, trend is to favour very broad interpretation. For more detail on critique of the broad interpretation of the concept of human dignity *see* e.g. H. Dreier, 'Human dignity in German law', in M. Düwell et al. (eds.), *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014) p. 375 at p. 380 ff.

[62] Hurdík and Lavický, *supra* n. 60, p. 95. 'The ability to exercise free will is part of the legal status of each individual […]. Such an approach may only work well if it applies to individuals who […] have approximately the same bargaining power.'

[63] Micklitz 2014, *supra* n. 4, p. 1.

[64] Judgment of the FCC of 19 October 1993, BVerfGE 89, 214 *Bürgschaftsverträge* (available at <www.servat.unibe.ch>).

income of DM 1,800. The second case heard during the same trial involved a wife on maternity leave who had guaranteed her husband's loan of DM 30,000. In both cases, German ordinary courts were of the opinion that persons of legal age and sufficient legal capacity were capable of taking their own financial situations into account in order to determine whether or not to enter into loan guarantee agreements.[65]

In the process of considering the constitutionality of the loan guarantee agreements, the German Federal Constitutional Court primarily sought to define the boundaries between the autonomy of will in private law and the restrictions placed upon it by fundamental rights, which serve as 'an objective order of values'. By joining the two cases, the Federal Constitutional Court sought to set parameters delineating the situations in which a legal entity's private law transactions should not enjoy judicial protection because fundamental rights have been violated.

According to the German Federal Constitutional Court, in these cases the key issue was how ordinary courts construed the general clauses on good morals (*guten Sitten*) and good faith (*Treu und Glauben*). The court applied the doctrine of the radiating effect of fundamental rights, which in turn creates 'directives' (*Richtlinien*) for the interpretation and application of general clauses. While contract law is, according to the Federal Constitutional Court, based on the autonomy of will, that autonomy may not lead to situations in which the stronger party can unilaterally impose obligations on the weaker party. Consequently, ordinary civil courts are obliged to interpret general concepts in a way that ensures that contracts do not serve as instruments enabling one party to impose contractual terms on the other.[66]

When applying these principles, the Federal Constitutional Court examined the relevant facts and identified the differences between the two cases. The first complainant – the young daughter of a businessman – was, due to her personal situation (specifically, her lack of education and experience) not in a position to fully comprehend the scope of her obligations as guarantor. In addition, the evidence suggested that the bank officers had paid little heed to her role as such. After examining the complainant's financial situation, the bank should have realised that, if asked to assume the loan and the interest, the complainant would probably be paying it back for the rest of her life.

In the case of the businessman's wife, it was held that the amount of the loan was not unreasonable considering the financial situation of the family. Likewise, the wife appeared to have been aware of all risks. The fact that the complainant currently lacked sufficient income or property (as she was on maternity leave) was

[65] Ibid (for details on the facts *see* p. 215-222).
[66] Ibid., p. 234.

not reason enough to quash the decision of the ordinary courts, even if the courts had not sufficiently elaborated on the role of fundamental rights. In conclusion, the ordinary courts in the second case had not erred.

In the following part of the article I will analyse possible approaches to resolving the above-mentioned cases, which both turned primarily on the validity of legal transactions. Additionally, it will be possible to analyse the conflict of values and legal principles against the backdrop of the underlying regulation. In this way, after analysing the structure of the legal order and the underlying system of values, it will be possible to outline models describing the horizontal effect of fundamental rights.

A structural approach to resolving the conflict of legal rules, principles and values in situations involving the horizontal effect of fundamental rights

The horizontal effect of fundamental rights is clearly associated with a certain tension between the groups of rules, principles and values to be found in private and constitutional law. Due to the complexity of the rules which apply in the cases in question, I suggest analysing two variables independently in order to describe the model of horizontal effect: the system of values and the system of law. Either system may be ideally placed in the relationship of order, hierarchy and unity, or plurality, heterarchy and differentiation.

At the level of values, differentiation becomes apparent when addressing the question of whether a legal system identifies a single supreme value, or whether it adheres to many values without preferring any of them as the absolute value. I will refer to those situations as hierarchical and non-hierarchical value systems.[67] Both models may recognise multiple values; the difference is whether a certain value is regarded as the supreme value or whether there is so-called reasonable disagreement[68] when, after a debate on the hierarchy of values, no agreement can be reached as to whether one of the values should prevail.

At the level of the system of law, similar differentiation is manifested by the manner in which various systemic and anti-systemic elements operate in law. Systemic elements include, for example, universal legal principles that perform a unifying function,[69] or the existence of a hierarchical judicial system headed

[67] I would like to thank J. Wintr for his terminological suggestions in respect of my theory.

[68] For details on this conception in Czech academic literature *see* T. Sobek, *Právní myšlení. Kritika moralismu* [*Legal Thinking. Critique of Moralism*] (Aleš Čeněk, The Institute of State and Law of the Academy of Sciences of the Czech Republic 2011) p. 84.

[69] A. Gerloch, *Teorie práva* [*The Theory of Law*], 6th edn. (Aleš Čeněk 2013) p. 115.

by a single supreme court (as in the American legal system). The existence of several supreme courts for specific areas of law would count as an anti-systemic element.[70] Either unity or differentiation will tend to be reinforced depending upon which elements prevail in a legal system.[71]

Model legal systems can be examined using the above-mentioned criteria, but in real life most cases are of a mixed character, where several values of varying significance are recognised and where, although the legal system may suffer from a degree of fragmentation, it seeks unity.[72] For this reason, I will consider a system resembling the Kelsenian pyramid to serve as an example of an ideally unified legal system. In a differentiated legal system, there will inevitably be sectorial boundaries between the branches held in place, for example, by the legal principles and doctrines of the respective branches of law. In the Czech legal system, the provision of s. 1(1) of the Civil Code can be seen as an element of differentiation: '[…] The application of private law is independent of the application of public law.'

Horizontal effect should not cause any difficulties in a legal system that enjoys ideal unity of law and a hierarchical arrangement of values, because the supreme value (a value in constitutional law) will prevail. For example, if a legal order emphasises human dignity, that value will act as a sort of trump card in the event of conflict with any other value or principle, whether it originates in private or constitutional law.

The situation will be slightly different if the hierarchical value system becomes associated with a view of the law as a body of sub-systems (emphasising differentiation rather than unity of law). In such cases the emphasised supreme value must also prevail. It must operate in all branches of law, although a case would only be considered in the appropriate branch. Consequently, horizontal effect is of no relevance, because a solution is offered by raising the very argument of rules, principles, and values of the appropriate branch of private law.

[70] Röhl and Röhl, *supra* n. 23, p. 453. In the Czech Republic, there are two supreme courts at the top of the judicial system: the Supreme Court for civil and criminal law and the Supreme Administrative Court for administrative justice. Moreover, there is the Constitutional Court, which is the judicial body responsible for the protection of constitutionality. The Constitutional Court is a special court situated outside the system of ordinary courts. In Germany, the situation is similar, with five supreme courts and the Federal Constitutional Court (under Art. 95(1) of the German Basic Law such courts include: the Federal Court of Justice, the Federal Administrative Court, the Federal Labour Court, the Federal Social Court and the Federal Finance Court).

[71] Here I disregard the pluralism of national, international and European law that would add further dimensions to the analysis. For the purposes of outlining the model of horizontal effect it will probably be sufficient to analyse the national legal order.

[72] M. van de Kerchhove, F. Ost, *Legal System between Order and Disorder* (Clarendon Press 1994).

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Application of differing models can be demonstrated by using the bank charges case, starting with the case in the Czech Republic. Assuming that the model of the hierarchical value system is in place, we would first have to identify the supreme value as recognised within the legal system. Any such conclusion can in and of itself be disputed, barring a clear constitutional provision ('State X recognises Y as the supreme value'). However, this is a merely academic example, non-existent in the real world. The situation would change and become subject to various interpretations if the legislator had laid down, in the initial provision, the protection of a single value (e.g. Article 1 of the German Basic Law: 'Human dignity shall be inviolable […]').[73]

In a case with a hierarchical value system, with a person's freedom considered to be the supreme value, its expression in private law would be the autonomy of will in legal transactions. As a result, we would have to accept any term agreed to between the client and the bank if such an agreement was an expression of free will.[74] Likewise, within the differentiated system of individual legal branches we would argue that freedom is expressed in private law through autonomy of will and that this value must prevail over any other private law value in the event of conflict.[75] The application of fundamental rights could be disregarded, since the supreme value of the legal order affects private law, too.

However, a hierarchical system of values is hard to come by in the legal systems of contemporary states; states are often described as pluralistic with non-hierarchical value systems. This is consistent with such constitutional provisions as Article 2(1) of the Czech Charter of Fundamental Rights and Freedoms: 'Democratic values constitute the foundation of the state, so that it may not be bound either to an exclusive ideology or to a particular religious faith.'[76] This situation may be associated with both an ideally unified and a more differentiated legal system. While few disputes arise concerning the value systems of modern democratic states regarding the rule of law, a systemic examination of the law may yield a more complex picture. The legal orders in place in many European states (national, international and European law) are

[73] The first sentence of Art. 1(1) of the German Basic Law.

[74] First, it would have to be determined whether the agreement was concluded freely. If so, the content of the agreement would be irrelevant.

[75] Analysis of the case law of the Czech Constitutional Court shows that, in the Czech Republic, there are several constitutional sources of autonomy of will: Art. 1(1) of the Charter of Fundamental Rights and Freedoms ('All people are free and equal in their dignity and rights'); Art. 2(3) ('Everyone may do that which is not prohibited by law; and nobody may be compelled to do that which is not imposed upon her by law'); Art. 11 (freedom of contract as derived from the protection of property rights). For details *see* Hurdík and Lavický, *supra* n. 60, p. 83-85.

[76] The Charter of Fundamental Rights and Freedoms is a separate piece of legislation which is part of the constitutional order of the Czech Republic.

generally believed to have non-hierarchical arrangements of values protected by the respective legal orders. An examination of several national legal orders suggests a combination of systemic and anti-systemic elements.[77]

In the case of a non-hierarchical arrangement of values combined with an ideally unified system of law, we must balance the relevant values and principles, because none of those standards will automatically prevail. The balancing methodologies are currently a widely-debated topic in legal theory; however, it is impossible to discuss that in much detail in this article.[78] Balancing may be carried out at the statutory or the constitutional level. The unity of the system creates significant pressure to ensure that the results of the balancing radiate from the constitutional level to the realm of private law. Consequently, it will be sufficient to undertake balancing at the constitutional level and simply transfer the results to private law. In the present case of the bank charges, constitutional freedom (expressed by the freedom to perform legal transactions) would be balanced against material equality or fairness, which would, in the case of factual inequality of parties to a private law relationship, require certain restrictions to be placed on the stronger party (the bank). In carrying out this balancing, a number of factors would play a role: first, the extent to which the freedom to conclude legal transactions would be restricted when entering into contracts with banks, next, the actual disadvantage suffered by the banks' clients as a result of their unequal relationship with the bank, and finally, the importance attached to the values of freedom and equality in a given country.[79]

The last alternative is differentiated law seen through the lens of a non-hierarchical value system, i.e. a pluralism of values without an absolute preference for a supreme value. In this situation, the application of horizontal effect appears to be the most complicated. A balancing of values in one sub-system does not automatically correspond to the balancing in another sub-system because the values may differ, or the relative preference may differ depending on the context. Thus, pluralist normative theories of coherence[80] come to the

[77] Röhl and Röhl, *supra* n. 23, p. 451-454.

[78] My views on this method of reasoning are presented in the following article: P. Ondřejek, 'Limitations of Fundamental Rights in the Czech Republic and the Role of the Principle of Proportionality', 20 *European Public Law* (2014) p. 451-466.

[79] However, the list of arguments is not (and cannot be) exhaustive, as I argued in detail elsewhere: *see* P. Ondřejek, 'Poměřování jako klíčový argument přezkumu ústavnosti v éře proporcionality a některé projevy jeho kritiky' [*Balancing as Key Argument of Constitutional Review in the Era of Proportionality and Some Implications of Its Critique*], 155 *Právník* [*The Lawyer*] (2016) p. 366-367.

[80] K. Kress, 'Coherence', in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing 1999) p. 521 at p. 533.

forefront, reflecting the need to view the law as a system despite the existence of a number of anti-systemic elements.[81] In that case, balancing is not exclusively performed using constitutional law, but rather at both constitutional and private law levels. Since there is no unified order of values, the results achieved in individual branches may vary. If that happens, horizontal effect comes into play, as evidenced by certain constitutional arguments emerging in private law during the balancing exercise and radiating to all corners of the legal system. As opposed to the unified legal system model, constitutional arguments do not automatically trump all other arguments. It is necessary to relate all principles and values in private law to constitutional values and principles.[82] For example, if in private law the principle of autonomy of will prevails, while in constitutional law material equality prevails, the outcome of the conflict must be brought into line in both sub-systems. Due to its greater legal force, constitutional law must influence private law and not vice versa. This influence may be expressed in several ways: first, certain constitutional arguments may be used to resolve a conflict of private law principles (e.g. the freedom to enter into transactions could be transferred into private law through the autonomy of will; material equality and fairness could be transferred through the protection of consumers – the weaker contracting party). Second, fundamental rights could exert indirect horizontal effect on the interpretation of vague concepts laid down in private law. Concepts such as 'good faith' or 'good morals' may be interpreted in a way that takes constitutional values into account. For example, a person may enter into legal transactions in violation of good morals if he or she treats another person like an object (restricting that person's dignity).[83] On the other hand, not every

[81] For the heterarchical arrangement of the law *see* N. Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders', 6 *International Journal of Constitutional Law* (2008) p. 373-396, and in Czech literature a number of texts by Jan Kysela: J. Kysela, *Měnící se struktura právního řádu a jeho atributy* [*Changing the Structure of the Legal Order and its Attributes*]. *Eric Stein Working Paper*, No. 1/2009, available at <csesp.files.wordpress.com/2015/05/eswp-2009-01-kysela.pdf>, visited 23 March 2017, J. Kysela, 'Evropský konstitucionalismus: hierarchie, heterarchie a povídání mezi soudy' [*European Constitutionalism: Hierarchy, Heterarchy and Talking between the Courts*], in V. Göttinger (ed.), *Evropský konstitucionalismus v kontextu soudního dialogu* [*European Constitutionalism in the Context of Judicial Dialogue*] (The Constitutional Court of the Czech Republic 2016) p. 100-111.

[82] Certainly, even if no constitutionally-compliant interpretation was ultimately possible, constitutional principles could still be the reason for the Constitutional Court's intervention, if private law regulation was inconsistent with the Constitution.

[83] For details on 'object-theory' *see* M. Mahlmann, *Elemente einer ethischen Grundrechtstheorie* (Nomos 2005) p. 101 ff, referring particularly to the work of G. Dürig, who is the author of this conception (e.g. G. Dürig, 'Die Menschenauffassung des Grundgesetzes', *Juristische Rundschau* (1952) p. 259 ff). In Czech literature *see* the commentary by J. Baroš to Article 1 of the Charter of Fundamental Rights and Freedoms in Wagnerová et al., *supra* n. 21, p. 58.

subjectively perceptible limitation of freedom should reflexively be classified as a violation of good morals.

By means of illustration, I have outlined the above-mentioned approaches in the following table:

	Ideal Unity of Law	**Differentiation of Law**
Hierarchical System of Values	The supreme value prevails in constitutional law; the case will not cause any difficulties due to this value and the coherence of the system	The supreme value prevails; we operate within the relevant sub-system of law
Non-hierarchical System of Values	Balancing is performed only at the constitutional level; constitutional values and principles radiate to other areas	Balancing is performed at the constitutional and private law levels and the results are compared; horizontal effect is applied in the balancing exercise in private law

Conclusion

This article explores the horizontal effect of fundamental rights through the lens of the conflict of principles and values in constitutional and private law. Those principles and values are the foundations of the various legal branches, and a conflict between them is not expressly foreseen in the legal order. Fundamental rights are not usually directly binding on private persons. However, they are binding on the courts that hear private lawsuits, as well as on other state bodies that, in performing their tasks, should ensure the effective protection of fundamental rights.[84] Hence, while there is no direct effect of fundamental rights on private law relationships, state bodies exercise influence on private persons and their legal transactions, because the recognition of horizontal effect has an impact on the legal conscience of the addressee of the law. Although such effect is considered indirect, it clearly has an impact on the addressees of the law by creating and stabilising the normative expectation that obligations that are inconsistent with fundamental rights will not be enforceable

[84] Wagnerová, *supra* n. 21, p. 13. In the German doctrine *cf.* C.-W. Canaris, 'Grundrechte und Privatrecht', in J. Neuner, H. Ch. Grigoleit (eds.), *Claus-Wilhelm Canaris. Gesamte Schriften. Band 1. Rechtstheorie* (De Gruyter 2012) p. 727 at p. 768. For details on his theory *see* Van der Walt, *supra* n. 12, p. 229.

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by public authority.[85] It follows from the Czech and German court cases outlined above and which dealt with the effect of fundamental rights in private law, that horizontal effect is not always applied uniformly. The German case dealing with loan guarantee agreements turned on interpreting vague legal terms in private law so as to keep them compatible with the Basic Law, whereas the Czech bank charges case was not about the interpretation of vague legal terms but rather about bringing consumer protection under the umbrella of the constitutional values of fairness and equality as a means of counterbalancing the principle of autonomy of will. This approach was, however, ultimately rejected by the Constitutional Court.[86]

The theoretical questions surrounding the interaction between private law and constitutional law, both in jurisprudence and case law, suggest a need to address two related issues: the first focuses on the autonomy of will as a basic principle of private law, and how that relates to fundamental rights and freedoms. The second issue concerns the strengthening of judicial power, particularly at the constitutional level where the court steps into the shoes of the legislature, places limits on an individual's legal transactions, and reinterprets the scope of the general principles of private law.[87]

In order to examine the relationship between fundamental rights and the autonomy of will in legal transactions in private law it is necessary to take a systemic approach and undertake an analysis of the law on two levels: an analysis of the value system on an abstract level, and an examination of systemic and anti-systemic elements in law on a concrete level. When exploring the horizontal effects

[85] The creation and stabilisation of normative expectations are perceived by many authors as the key function of the law: *see* namely N. Luhmann, *Das Recht der Gesellschaft* (Suhrkamp 1993) p. 151-153. Recently a debate took place in the Czech academic literature, involving Slovak legal theorists, about the importance of human mind from the perspective of the existence of law: E. Bárány, 'Kde je právo?' [*Where is the Law?*], 154 *Právník* [*The Lawyer*] (2015) p. 281-295; L. Berdisová and M. Káčer, 'Na západe nič nového (kopernikovský obrat v ontológii právnych noriem)' [*All Quiet on the Western Front (Copernican Turn in the Ontology of Legal Norms)*], 155 *Právník* [*The Lawyer*] (2016) p. 154-170.

[86] Obviously, the case studies referred to in this article cannot cover all cases of the effect of fundamental rights in private law. In addition to an application of fundamental human rights and freedoms (property rights, protection of human dignity, protection of personal rights), we come across the application of fundamental political rights (typically freedom of speech). For example, in a recent Czech case, the relationship between a political party (as a private person) and a member of a body thereof was interpreted by referring to a provision of the Charter of Fundamental Rights and Freedoms which enshrined, in Art. 20(2), every citizens' right to freedom of association in political parties and political movements – Judgment of the Constitutional Court of the Czech Republic ref. II. ÚS 1969/10 of 27 December 2011.

[87] *See* O. Gerstenberg, 'Private Law and the New European Constitutional Settlement', 10 *European Law Journal* (2004) p. 769.

of fundamental rights, it becomes obvious that it is the analysis of the above-mentioned systemic issues that gives rise to the multitude of views on these effects.

Although the expression of autonomy of will in private law may be reflected in the constitutional values of freedom and human dignity,[88] I do not think that the sources of private law principles and human rights can be regarded as having the same foundations. Therefore, it is questionable whether post-war constitutional development – which emphasised the 'radiation' of the objective order of values composed of fundamental rights[89] – could suppress, or even fundamentally alter, private law principles that had already been evolving over the centuries. If so, we would have to regard private law and other legal branches simply as a concretisation of the constitution, which would considerably limit the importance of specific sectorial legal principles and laws.

The legal orders of many modern states cannot rightly be thought to pursue a single central value. Due to the existence of value pluralism and the absence of a hierarchy of values, it is necessary to balance principles and values in order to resolve possible conflicts. Balancing is thus the starting point for the application of the horizontal effect of fundamental rights. The level at which balancing should be performed depends on an analysis of systemic and anti-systemic elements in current law. The legal orders of modern states do not resemble an ideal pyramid; there are many sources of differentiation and sometimes even fragmentation. Here, certain features which tend to weaken systemic unity have become apparent. On the other hand, the autonomy of legal branches must be limited so as to avoid the excessive fragmentation of a legal system.

The portrayal of current law as a differentiated system that does not pursue one absolute value, and at the same time as a system that maintains its internal structure and strives for coherence, suggests that the horizontal effect of fundamental rights is primarily indirect. The actual outcome is mainly affected by balancing at the constitutional level, which at the same time has an impact on conflicts of private law principles. Since the legal order is neither completely unified nor completely differentiated or fragmented, it is necessary, when examining the horizontal effect of fundamental rights, to take into account the specificities of legal transactions in private law. Thus, the approach described in this article recommends that (notably, constitutional) courts maintain a certain level of moderation when applying constitutional rules, principles, and values to private law. This is how the Czech Constitutional Court determined (in my opinion correctly) the case of the constitutionality of bank charges.

[88] M. Bartoň et al., *Základní práva* [*Fundamental Rights*] (Leges 2016) p. 56.
[89] Judgment of the German FCC in *Lüth* case of 15 January 1958 (BVerfGE 7, 198).