

**CIVIL LAW  
CODIFICATION COMMISSION  
Acting under the Minister of Justice**

***GREEN PAPER***  
***An Optimal Vision of the Civil Code of the  
Republic of Poland***

*Edited by*

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## Introduction

This Green Paper was compiled once the independent Civil Law Codification Commission (CLCC)<sup>1</sup>, acting under the Minister of Justice, had completed its work<sup>2</sup>. It is an expression of the predominant opinions of the CLCC, although the CLCC chairman is responsible for editing this text. This Green Paper was produced not only thanks to the participation of the CLCC members, but also with the support of a broader group of scholars and practicing lawyers who sat on thematic working groups of the CLCC and met to discuss particular issues presented in this document.<sup>3</sup> The CLCC also benefited from the support of a team of Dutch experts who provided information about the Dutch codifying process (the most recent in Western Europe) and other Western European codifying processes, as well as civil law in the EU.<sup>4</sup>

To date, the CLCC has handled CC amendments of the Constitution of the Republic of Poland, new commercial practices, other laws related to the CC<sup>5</sup>, and numerous pieces of draft legislation coming from private law and initiated by institutions other than the Ministry of Justice, all with the aim of harmonising them with EU law.

The time has come to undertake a fundamental discussion about the shape and role of the Civil Code within the Polish legal system. This document was drafted with the aim of presenting an optimal vision of the Civil Code. Separate consideration would be required to decide whether efforts should be taken to draft a new civil code, or whether this vision could be pursued through fundamentally amending (recodifying) the current Civil Code, originating back to 1964.

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<sup>1</sup> Members included: chairman Prof. Zbigniew Radwański; deputy chairman Prof. Tadeusz Ereciński, chair of the Civic Chamber of the Supreme Court; Dr Gerard Bieniek, Supreme Court judge; Katarzyna Gonera, Supreme Court judge; Jacek Gudowski, Supreme Court judge; Dr Andrzej Jakubecki, director of the Chair of Civil Proceedings and International Private Law of the Maria Skłodowska-Curie University in Lublin; Prof. Mirosław Nazar, director of the Civil Law Institute of the Maria Skłodowska-Curie University in Lublin; Prof. Maksymilian Pazdan of the Silesian University in Katowice; Stanisław Rudnicki, Supreme Court judge (retired), former president of the Civic Chamber of the Supreme Court; Prof. Stanisław Sołtysiński of the Adam Mickiewicz University in Poznań; Prof. Feliks Zedler, director of the Chair of Civil Law of the Adam Mickiewicz University in Poznań; Prof. Czesława Żuławska, Supreme Court judge (retired) and secretary of the Commission; Robert Zegadło, judge of the Warsaw Circuit Court.

<sup>2</sup> This term expired in August 2006.

<sup>3</sup> The experts will be mentioned in footnotes related to the issues where their research focused or concerning discussions in which they participated..

<sup>4</sup> The Dutch team of experts will be mentioned in the section concerning their report. The participation of the Dutch experts was supported by the MATRA programme, financed by the Dutch government. A key role in arranging contacts with Dutch experts was played by Prof. Paul Meijknecht, CLCC consultant in the years 1999-2004.

<sup>5</sup> Compare with Z. Radwański, *Civil Code, Introduction*, edition 24, Warsaw 2005, p. XV et seq.

In accordance with the recommendations of the Legislative Council of the Council of Ministers (LCCM), legislative decisions concerning important legal acts should be made only after publicly presenting the premises of the proposed changes, ideally in the form of a green paper and not an already drafted piece of legislation.<sup>6</sup> It is in this spirit that the CLCC is presenting this document.

The solutions presented herein are organised along the traditional system of private law upon which the current Polish Civil Code is based.

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<sup>6</sup> Compare with the Report of the Prime Minister's Legislative Council, 'Tworzenie prawa w Polsce – ocena i proponowane kierunki zmian. Raport', Warsaw, October 2005. This report was published in *Przegląd Legislacyjny*, nr 1/2006, p. 7 et seq.

## I. GENERAL

### 1. Private law and the Civil Code

#### 1.1. Private law

First and foremost, it is important to determine what area of law the Civil Code is meant to govern.

When the CC was drafted, back in 1964, it was clearly based on the communist concept of law. This was tantamount to questioning the basic premise that civil law is the regulation of private legal relationships of individuals. Communist doctrine vigorously denied the basic legal division into the subcategories of private law and public law.

These views were manifested, *expressis verbis*, in the justification of the CC compiled in 1961 by the contemporary Codifying Commission, acting under the chairmanship of Prof. Jan Wasilkowski. This document states that: ‘In legal systems based upon private ownership of the means of production, civil law is a branch of law that regulates first and foremost the private sphere of individuals. [...] In a socialist system, the vast majority of ownership relationships are outside the realm of private ownership by individuals. Thus, the legal realm of individuals involves personal relationships and property relationships stemming from the ownership of items of individual usage, and property relationships are of only one form of ownership, and that is a derivative form’.<sup>7</sup> This concept was later elaborated by S. Szer, operating on the premise that ‘Against the backdrop of socialist law, it is widely held that subdivisions into particular branches of law are based first and foremost upon the **object**; in other words they are based upon the nature of the social relationships as regulated by legal norms’. As a result, Szer concluded that the fundamental distinguishing criterion of civil law is the regulated property **object**, and that there is also a ‘second criterion of an **additional**, supplementary nature, the so-called method of regulating societal relationships’.<sup>8</sup>

The further development of Polish civil law research has increasingly evolved in the direction of minimising the significance of the object of the regulation, as a criterion distinguishing civil law, towards the method of regulation based on an equality of parties.<sup>9</sup>

<sup>7</sup> CLCC. Draft of the Civil Code, Warsaw 1961, p. 189.

<sup>8</sup> S. Szer, ‘Prawo cywilne’, Warsaw 1962, p. 11; also, S. Szer, ‘Prawo cywilne’, 1967, p. 18 et seq.

<sup>9</sup> Compare with A. Wolter, ‘Prawo cywilne, Zarys części ogólnej’, Warsaw 1963, p. 21 and following.; op. cit., 1970 edition, p. 18 et seq.; 1986 edition, p. 27; A. Wolter, J. Ignatowicz, K. Stefaniuk, ‘Prawo cywilne, Zarys części ogólnej’, Warsaw 2001, p. 16 et seq.

S. Grzybowski was in favour of establishing the method of regulating as the exclusive trait distinguishing civil law. As a result, he concluded that if 'the terms contained in art. 1 par. 1 of the CC, "this code regulates civil-legal relationships", are to have any normative sense, then they can mean nothing else than that the regulations of the CC should be applied to all societal relationships regulated by the civilian method.'<sup>10</sup> This position was fully shared by A. Stelmachowski, who noted that 'We can talk about civil law only as a method; it is only in this manner that we may flexibly show both its function and its specific characteristics'.<sup>11</sup> This position is clearly predominant in the Polish study of civil law and judicial tradition.<sup>12</sup>

However, there are certain divergences in Polish legal doctrine as concerns a more precise description of this civil-law method of regulating societal relationships. Generally these apply to the issue of whether the distinguishing characteristic of civil law should be the traditional principle of the **equality of parties** to a legal, or whether it should be the principle of **autonomy**, as expounded in more recent civil law scholarship.<sup>13</sup>

It seems that the essence of civil law should ultimately be viewed from the perspective of the **fundamental division of the legal system into private law and public law**. For ideological reasons, this division was questioned in the communist doctrine, and was largely ignored in considerations of civil law during the period of the Polish People's Republic. This approach was universally accepted, however, in pre-WWII Polish legal tradition, and was clearly sanctioned by art. 3 of the Constitution of the Polish Republic of 1921, which established that 'The scope of state legislation encompasses all possible **private and public laws** and the manner in which they are executed.'

This tradition dates back to the Roman Republic. According to Ulpian: *publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia quaedam private* (D. 1,1,1,2).<sup>14</sup>

Classic legal scholarship, and the distinction of civil law as private law, is ensconced in civil codes based upon this division of private and public law.<sup>15</sup> In spite of the growing

<sup>10</sup> S. Grzybowski, 'System prawa cywilnego', vol. I, Ossolineum 1985, p. 19.

<sup>11</sup> A. Stelmachowski, 'Zarys teorii prawa cywilnego', Warsaw 1998, p. 24.

<sup>12</sup> Compare with also Z. Radwański, 'Prawo cywilne - część ogólna', Warsaw 2004, Nb. 11.

<sup>13</sup> Compare with in particular A. Stelmachowski, op. cit., p. 35 et seq., accepting the views of the Hungarian scholar G. Eörsi, similar to Z. Radwański, op. cit.

<sup>14</sup> Compare with W. Wołodkiewicz, M. Zabłocka, 'Prawo rzymskie'. Instytucje, Warsaw 2000, p. 21.

<sup>15</sup> It is self-evident not only in France, where the authority of the civil code is equal to that of the constitution, but also in other countries; for example Switzerland. The outstanding civil law expert W. Yung, in *Études et articles*, Geneve 1971, stated that the text of the new civil code was accepted by the whole society as a 'charter for private life in Switzerland' ("pour charte de la vie privée en Suisse"). P. Tuor, *Das schweizerische Zivilgesetzbuch*, Zürich 1965, p. 18 writes: "An die Spitze seiner Regelung stellt es (the civil code) die Personen und die Familie als Träger und Grundlage der gesamten Privatrechtsordnung".

interventions of the state into civil law relationships, the private-public division of the legal system is still applicable. This understanding is defended in the writings of Franz Bydlinski, which show that private law is the law governing the social relations between individuals, and that in a sense it is their own law, something very distant from the state.<sup>16</sup> This trend of thought is very similar to the thinking of Poland's E. Łętowska, who believes that the realm of civil law is a self-serving mechanism that generally operates without any necessary involvement from the state.<sup>17</sup> Civil law textbooks in Western countries often begin their considerations of civil law by presenting private law as a sphere within which civil law exists.<sup>18</sup>

The civil law doctrine now emerging in the Republic of Poland is returning to the concept of private law that was forsaken during the period of the Polish People's Republic.<sup>19</sup> Such an understanding has already been incorporated into civil law textbooks<sup>20</sup> and has been accepted by the Constitutional Tribunal (CT)<sup>21</sup>. The CT has referred to constitutional norms of private law deriving from the idea of a liberal democratic state that treats individual freedom as the highest possible value. In particular, the CT has emphasised that the 'Principle of the freedom of contract is a norm belonging to the realm of **private law**, as it concerns legal relationships between civil law subjects', and that "the bond between the principle of freedom of contract and the constitutional guarantee of protection of personal freedoms means respecting the freedom as mandated by the Constitution for all subjects of legal relationships, including those engaged in civil law relations." In accordance with art. 31 sec. 2 of the Constitution, every person is required to respect the freedom and rights of others. The principle of freedom of contract is not a public law norm, i.e. generally speaking it does not apply exclusively to relations with the state or other subjects of public law acting in a position of authority relative to subjects of private law. For this reason, the principle of freedom of contract should not be treated as derivative of other 'classic' rights concerning relations between public authorities and individuals in certain areas of life (human and civil rights), but generally the constitutional proclamation of human freedoms'. In its analysis of the principle of freedom of contract, the Constitutional Tribunal also cited comparative legal arguments

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<sup>16</sup> Compare with F. Bydlinski, *System und Prinzipien des Privatrechts*, Wien, New York 1996, p. 79, 92.

<sup>17</sup> E. Łętowska, 'Podstawy prawa cywilnego', Warsaw 1993, p. 29.

<sup>18</sup> Compare with *Allgemeiner Teil des bürgerlichen Rechts*, begründet von K. Larenz, fortgeführt von M. Wolf, München 1997, p. 1 et seq.

<sup>19</sup> The strongest basis in this regard is the work of S. Włodyki, 'Problem struktury prawa', PiP 1995, book 4, p. 3 et seq.

<sup>20</sup> Compare with A. Wolter, J. Ignatowicz, K. Stefaniuk, op. cit., p. 19; Z. Radwański, *Prawo cywilne - część ogólna*, Warsaw 2004, Nb. 2.

<sup>21</sup> Compare with the verdict of Constitutional Tribunal of 29.04.2003, file no. SK 24/02.

and indicated that this principle also stems from art. 2 of the 1949 Constitution of the Federal Republic of Germany, which sets out the right of free personal development and the inalienable freedom of every individual person. In this respect, the German legal tradition bases the entire legal construct of private law upon this moral and constitutional value, as distinguished from public law.<sup>22</sup> What is more, regulations generated in this field are granted primacy over others.<sup>23</sup>

In full consideration of civilization's achievements rooted in traditional democratic societies, the following will be an attempt to characterise the key aspects of private law, as distinguished from public law. Private law regulates societal relationships between individuals, and is therefore open to **each and every individual**. Individuals engaged in such relationships act as autonomous subjects fully capable of regulating the substance of these relationships in such a manner as to protect their own individual interests. This all takes place within a framework defined by the general good or moral practices. As opposed to public law relationships, where at least one party is an **organ of public authority** mandated by law for the pursuit of a common interest of a distinct community (public interest), rather than an individual interest. As a consequence of this situation, the organ of public authority is entitled to specifically defined powers allowing it to authoritatively (unilaterally) shape the legal situation of the individual. As is frequently the case, organisational units can play two roles: 1. as the performer of a mandated authoritative power, or 2. as a party to a private law relationship, accessible to all individuals (e.g. state units representing the interests of the State Treasury, or local government agencies). In this second instance, the legal relationship will be governed by private law regulations.

The autonomy of subjects in private law relationships is by no means tantamount to their equivalent situation, which is by and large recognised as a unique characteristic of private law or civil law. This is also because, in cases mandated by law, organs of public authority can be party to mutual equal relationships between each other (administrative law contracts). In turn, in relationships there can be unequal relations between private law subjects that are not grounded in the powers of organs of public authority, and which may be on the other side of these relationships. Civil law scholarship has for quite some time treated as such the relationship between parents and underage (minor) children, as well as relations within corporate legal persons.<sup>24</sup> The relatively recent development of the concept of consumer

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<sup>22</sup> Compare with K. Larenz, M. Wolf, *Allgemeiner Teil des bürgerlichen Rechts*, München 1997, p. 1 et seq.

<sup>23</sup> Compare with F. Rittner, *Über den Vorrang des Privatrechts*, (w) *Festschrift für Wolfram Müller-Freienfels*, Baden-Baden 1986, p. 509 et seq.

<sup>24</sup> Compare with K. Larenz, M. Wolf, *op. cit.*, p. 6.

protection provides further examples. Thus indicating the equality of the legal positions of the parties to a private law relationship does not seem to be a sufficiently useful criterion for distinguishing these legal relationships from public law relationships.

In keeping with the classic codifications of civil law, neither the draft of the general section of the Civil Code of 1947<sup>25</sup>, nor the Decree of 12 November 1946 (General Regulations of Civil Law (Journal of Laws No. 67, item 369)), nor the Law of 18 July 1950 (General Regulations of Civil Law (Journal of Laws No. 34, item 311)), contained a definition of civil law or distinguished any of its distinct characteristics.

The 1964 Civil Code, on the other hand, took exception to this tradition. According to the original wording of art. 1 of the CC, its scope was delineated by the following two indications:

- 1) In terms of object – it encompasses ‘civil law’ relationships (art. 1 par. 1), and
- 2) In terms of subjects – it involves a circle of parties to civil law relationships, such as natural persons, legal persons, and a host of organisations specific to the system of the People’s Republic of Poland.

Placing an elaborate catalogue of subjects, between whom there were civil law relationships, in art. 1 of the CC was certainly justified at the time. It was in this manner that the codifiers resolved the intense dispute of the day concerning the distinctness of commercial law (in favour of the concept of the unity of civil law.)<sup>26</sup> However, the reference to ‘civil law relationships’ as an object of CC regulations does not serve to clarify anything, as no provision of the CC defined the meaning of the term ‘civil law relationships’, not even partially. As a result, there have been questions about the sense of inserting this language into art. 1 par. 1 of the CC.

The following statement concerning this topic can be found in the unpublished protocols of the Substantive Law Team of the Codifying Commission (dated 16 December 1956): ‘J. Wasilkowski mentioned, among other things, that one could undoubtedly represent the view that par. 1 of art. 1 is a textbook norm and does not have to exist in the Code. However, practice shows that it is necessary.’ This clarification is difficult to treat as convincing because it is unknown how a reference to ‘civil law relationships’, which is undefined in the Civil Code, could possibly be needed in practice.

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<sup>25</sup> Compare with *Demokratyczny Przegląd Prawniczy* 1947, no. 12, p. 19.

<sup>26</sup> Compare with J. Wasilkowski, *Metoda opracowania i założenia Kodeksu cywilnego*, PiP 1964, book 5-6, p. 739.

The fundamental amendments to the CC in 1990 removed elaborate definitions of civil law subjects of socialist origins from art. 1 of the CC, and established the new wording currently in effect. According to the current wording of these provisions, the ‘Civil Code regulates relationships between natural persons and legal persons,’ and no additional distinctions concerning ‘civil law’ relationships were introduced. Maintaining the wording in this form would be difficult to consider compliant with the general directive on legislative propriety, whereby laws should not contain unessential provisions. The current wording is undoubtedly unessential because it does not serve to expand our knowledge any further beyond what is already clearly written in the CC itself. Moreover, one could also take this wording to task for the formal error of defining *idem per idem*.<sup>27</sup>

From the perspective of legislative propriety, there are two possible options for suitably regulating this issue.

The first model is based upon the premise that defining the concept of civil law relationships would be best left to the broadly perceived civil law doctrine (judgements and civil law scholarship). This model is essentially incorporated into the current Polish CC. However, in such a case, there should not be any provisions referring to such a legal relationship, especially one limited to CC regulations, because an essential practical advantage of the concept of civil law relationships is manifested in its application to extracodical regulations.

The second model assumes that a crucial issue for civil law, and the application thereof, is the definition of civil law itself, and that it must somehow be legally defined. This does not mean that we need to formulate a classic definition ( $X=Y + \text{some aspect of } Z$ ), but that we indicate certain distinct and distinguishing characteristics of this type of legal norms. In such an approach, it is eminently clear that the Civil Code should contain an appropriately specified reference to civil law relationships, or simply a description of civil law, without indicating its subject (i.e. civil law relationship).

As previously mentioned, Western European civil law codifications use the first of the two models. An exception in this regard is the Austrian Civil Code of 1812, which describes in § 1 the concept of civil law, indicating that this law regulates private rights and responsibilities of residents of the state **among themselves**.<sup>28</sup> It seems reasonable to conclude

<sup>27</sup> As in A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej*, Warsaw 2001, p. 15.

<sup>28</sup> “Der Inbegriff der Gesetze, wodurch die Privatrechte und Pflichten der Einwohner des Staates unter sich bestimmt werden, macht das bürgerliche Recht in demselben aus.”

that such a general premise lies at the basis of other Western European codifications. This was considered so obvious, that in some cases corresponding provisions were not written into particular civil codes. On the other hand, the civil codes of the republics of the former Soviet Union included a large number of regulations concerning the object of the civil codes, and in particular defining civil law relationships, and the subjects of these relationships. In particular, outstanding examples of such civil codes include the Lithuanian Civil Code of 2000 (see art. 1.1, 1.2.), the Civil Code of the Russian Federation of 1994-2001 (see art. 1 and 2), and the Civil Code of Ukraine of 2003 (see art. 1 and 2). Such an approach was justified by the radical departure of these states from communist legal doctrine, and the acceptance of generally accepted principles of civil law from Western democracies.

## 1.2. Legal status of the Civil Code

From a formal-legal point of view, the Civil Code is no different to other Polish laws. The Constitution of the Polish Republic does not reserve any special position for the civil code among other pieces of legislation.<sup>29</sup>

In spite of that, Polish legal doctrine does ascribe the Civil Code a specific role in the legal system. The codifiers started with the premise that the notion of the totality of the Civil Code was unrealistic; that in every country where civil law has been codified, there are also many other laws regulating civil law relationships of **a special nature**. However, they believed that the ‘Objective of civil codification has been achieved if the code embraces the **core** of civil legislation, i.e. if the principles expressed therein will facilitate the proper application of regulations of civil law relationships, independent of whether the norms regulating these relationships are contained in the code itself, or in other pieces of legislation. In the event this condition is met, the Civil Code, though it does not **directly** comply with the principle of totality of its scope, does implement this postulate **indirectly**, for the Code does comprise a source of general solutions also applicable to relationships regulated by provisions that are formally outside of its scope.’<sup>30</sup>

This particular instance of the primacy of the Civil Code in relation to extracodical regulations has been reinforced by the CT,<sup>31</sup> which has indicated that ‘The essence of a code is to create a coherent and — as far as possible — total and durable regulation of a given area of law [...] codes are prepared and ratified within a separate and more complex procedure than

<sup>29</sup> Compare with CT verdict of 18.10.1994 file no. K 2/94, OTK 1994, part II, item 36.

<sup>30</sup> Draft of Civil Code, Warsaw 1962, p. 199.

<sup>31</sup> Compare with the verdict of Constitutional Tribunal of 18.10.1994, file no. K 4, OTK 1994, part II, item 36.

‘regular’ laws, the essence of a code is to codify a given branch of the law. Subsequently, the terminology and concepts used by codes are treated as templates, and it is presumed that other laws will assign the same meanings. It is indisputable that both in terms of axiology and technique of creating law, codes are treated in a specific manner.’ This abstract from the justification for the verdict of the CT indicates an additional **interpretative** role played by codical norms in relation to the civil law norms contained in ‘regular’ laws. At the same time, the Constitutional Tribunal emphasised the particular ‘immunity’ of codical norms relative to extracodical regulations. The CT articulated the view that ‘[...] when interpreting new laws, one can presume that the legislative intent was not to carry out changes in the codes that holistically regulate particular areas of law.’ The CT also reiterated the ‘specific role of codes’ and the danger that ‘may emerge from unnecessary interference into codical institutions of a fundamental nature. Not only does such violate the coherence of currently mandatory law [...], but it also encumbers commercial activity [...]. Private law institutions shaped over centuries are based on a deeply-seated rationale, and the current legislator should not lose sight of this, even if in this case no constitutional norm is being violated.’

At this point it should be noted that in some codifications the ‘supremacy’ of codical norms over extracodical norms has been accentuated more strongly, thus limiting the application of the principle that a detailed or later piece of legislation is more applicable than a general norm expressed in a code. Thus, for example, according to art. 1.3 sec. 2 of the Lithuanian Civil Code: ‘If there is a conflict between the provisions of the current code and other laws, the **provisions of this code shall govern**, with the exception of the cases when **the code** gives primacy to the provisions of other laws.’ In turn, the Civil Code of the Russian Federation suffices with the general provision of art. 3 sec. 2, stating that ‘Civil law norms contained in extracodical laws should be compliant with the code.’

In light of the current law in Poland, and of Poland’s constitutional order, it does not seem possible to grant the civil code primacy over other laws, or to repeal the principle of *lex posterior derogat legi priori*.<sup>32</sup> This could happen only if mandated by a clear constitutional provision, and this does not seem likely. However, the CT’s judicial rulings on interpretative rules giving preference to codical norms deserve full acceptance. There are also no hindrances to ensuring cohesive private law based upon civil code templates, through specifying a detailed method of legislative procedure for laws changing the Civil Code, all within the framework of the general constitutional traditions. In practice, it is this objective that is

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<sup>32</sup> Compare with CT ruling of 18.10.1994, file no. K 2/94, OTK 1994, part II, item 36.

served, albeit rather ineffectively, by codification commissions and particular parliamentary committees created for such legislative activities.

However, there are no obstructions to a general provision of the Civil Code to mandate such a practice, in accordance with the above-mentioned views of legal doctrine based ‘essentially’ on this codification, in other words that its norms are also applicable to civil law or private law relationships in extracodical laws. One could of course question the need for such a provision, given the doctrinal views sanctioned by the position of the Constitutional Tribunal.

However, when observing legislative activity, there is an impression that legislators at times rely exclusively on the wording of art. 1 of the Civil Code, and are inclined to accept that the provisions of the Civil Code apply exclusively to the legal relationships regulated therein. This leads to the conclusion that extracodical laws should include particular provisions that ‘stretch’ the scope of the Civil Code onto private law relationships exogenous of the Code.

The general provision proposed here and indicating the application of codical norms to all civil law (or private law) relationships (and thus to relationships regulated in other extracodical laws), would have to be codical with a constraining caveat stemming from detailed norms. In such a case, the complementary application of relevant codical norms would be subject to exemption or modification. Such a regulation would correspond to the doctrinal view that the relation between codical and extracodical norms ‘is in principle a *legis specialis do legi generali* relation’.<sup>33</sup> It should also be emphasised that such a relation between a general norm and a particular norm can occur not only between individual norms, but also between entire sets of norms.<sup>34</sup>

The current Civil Code does not regulate the general relation to extracodical norms, though it does refer to them in the context of some institutions. Three types of such regulations are distinguished.

The first type encompasses provisions that clearly refer to extracodical regulations as **supplementary** to general codical norms (e.g. art. 35, 44<sup>1</sup> par. 2, 46, 56, 244 par. 2, 308, 605<sup>1</sup>). Sometimes, such as in art. 24 par. 3 of the Civil Code, these regulations are very detailed, since they clearly indicate an accumulation of entitlements indicated in the Civil

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<sup>33</sup> S. Grzybowski, System vol. I, p. 78; more on this topic: J. Zamorska, Stosunek ustaw szczególnych do kodeksu cywilnego, S.C. 1971, vol. 18, p. 37 and following.; similar to A. Wolter, J. Ignatowicz, K. Stefaniuk, Zarys, p. 66, showing that when the same matter is regulated by a general law and a particular law, the general law has primacy.

<sup>34</sup> A. Ohanowicz, Zbieg norm w polskim prawie cywilnym, Warsaw 1963, p. 47.

Code, with entitlements foreseen ‘in other provisions, in particular in the Copyright Law or in the Invention Law’.

The second type of provisions indicates, in turn, the **application** of codical norms to certain legal relationships delineated in extracodical norms (e.g. art. 110, 845, 907).

The third type of provisions indicates an **exemption** or **limitation** of codical norms in relation to specified legal institutions. According to the provisions of art. 820 of the CC, codical provisions on insurance contracts do not apply to ‘maritime insurance and forms of indirect insurance’. These types of insurance are regulated by separate provisions in the Maritime Code, which obviously does not preclude the application of other general provisions of the CC. In turn, in reference to a contract of carriage (art. 775 CC) and forwarding contracts (art. 795 CC), the legislator used wording indicating that codical norms regulating these types of contracts should be applied in a subsidiary manner<sup>35</sup> (‘only to the extent that this is not regulated by other separate provisions’). The second sentence of art. 143 CC has a similar meaning when it indicates the primacy of applying provisions regulating water rights relative to the general principle delineating the spatial borders of land ownership, as articulated in this provision.<sup>36</sup>

Moreover, separate laws regulating private law relationships contain provisions describing their relations to the Civil Code. In particular, the Commercial Companies Code contains one such provision; according to art. 2 of the Commercial Companies Code, for matters unregulated the provisions of the Civil Code should be applied. If the aspects (nature) of a legal relationship of a commercial company so require, then the provisions of the Civil Code shall be applied correspondingly.<sup>37</sup> In art. 1 sec. 2, the Maritime Code states that ‘Should the Maritime Code not have relevant provisions, then provisions of civil law should be used in civil law relationships connected with maritime navigation.’ This means that, first and foremost, Civil Code provisions would apply.<sup>38</sup> In the Law on Public Procurement of 29 Jan 2004 (Journal of Laws No. 19, item 177), art. 139 sec. 1 states that: ‘Contracts for matters of public procurement, herein after known as "contracts," are governed by provisions of the Civil Code of 23 April 1964, unless the provisions of the law establish otherwise’. The legislator made a similar pronouncement in the Law on Tourism Services of 29 August 1997

<sup>35</sup> Compare with A. Kidyba, *Prawo handlowe*, Warsaw 2001, p. 683, 694; L. Ogiegło (w) K. Pietrzykowski, *K.C. Komentarz*, Art. 777, Nb. 1, Art. 795, Nb. 1, Warsaw 2003.’

<sup>36</sup> J. Zamorska, *Stosunek*, p. 54; more on the substance of this provision: S. Rudnicki, *Komentarz do kodeksu cywilnego. Księga druga. Własność i inne prawa rzeczowe*, Warsaw 2003, p. 58 and following.

<sup>37</sup> Compare closely with S. Sołtysiński, (w) Sołtysiński, Szajkowski, Szumański, Szwaja, *Komentarz KSH*, t. I, Warsaw 2001, Art. 2; critical to this provision: M. Pazdan, *Kodeks spółek handlowych a kodeks cywilny*, PiP 2001, book. 2, p. 32.

<sup>38</sup> Compare with J. Młynarczyk, *Prawo morskie*, Gdańsk 1997, p. 32.

(Journal of Laws z 2001, No. 55, item 578) by stating that 'The Civil Code will apply to any contracts with clients concluded by tourism organisers and tourism intermediaries that are not otherwise encompassed by the scope of the current law [...]'. Extracodical laws contain provisions which, analogous to art. 820 of the CC, unequivocally preclude the application of specific provisions of the CC within the scope of legal relationships regulated by a separate law. For example, according to art. 18 of the Law on Consumer Credit of 20 July 2001 (Journal of Laws No. 100, item 1081): 'Contracts encompassed by the current law are not governed by the provisions contained in Chapter I, Section IV, Title XI of the Third Book of the Civil Code'.

This negative legislative method (which limits or eliminates the application of CC norms) is of a coincidental nature, is inconsistent, and can be the cause of instability in the CC and doubts concerning the application of codical norms. The history of art. 680 best illustrates the shortcomings of this approach. The original wording of art. 680 stipulated that the application of codical provisions on renting premises was subsidiary to rentals regulated 'by the provisions of the Housing Law'. This provision was unstable as it was forced to undergo changes corresponding to amendments in the law regulating rentals, which resulted from administrative decisions. Moreover, these separate laws specified their relationship to the Civil Code as *lex specialis*, not as *lex primaria*. As a result, the lawmakers wished to avoid all these adversities, and left out any specification of the relation between this law and the CC, both in art. 680 of the CC, and in the Law on Protecting Tenants Rights of 21 June 2001 (Journal of Laws, No. 71, item 733).<sup>39</sup> As a consequence, one should apply the general, but unarticulated in the CC, principle of *lex specialis derogat legi generali*. Furthermore, as a result of passing the Geological and Mining Law of 4 Feb 1994 (Journal of Laws No. 27, item 96), the word 'mines' was removed from art. 143 of the CC. Certainly the content of art. 2 sec. 2 of the Maritime Code, which clearly refers to the principle of *lex specialis - lex generalis*, is not entirely cohesive with the content of art. 775 of the CC setting out the subsidiary application of specific provisions of the CC to separate laws regulating carriage.

It is against this backdrop that two *de lege ferenda* proposals emerge:

First and foremost, we should discontinue the practice of placing into the CC **any provisions whatsoever** that suspend or limit the application of codical norms because of the regulation of a legal relationship in an extracodical law. Provisions of this type should be

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<sup>39</sup> Compare with statements in this regard by A. Mączyńskiego in: Ustawa o najmie lokali mieszkalnych i dodatkach mieszkaniowych a K.c., (w) Księga Pamiątkowa ku czci Profesora Leopolda Stockiego, Toruń 1997, p. 196; Dawne i nowe instytucje polskiego prawa mieszkaniowego, KPP 2000, book 1, p. 72 et seq.

contained exclusively in relevant separate laws. This would ensure the durability of the CC and remove the threat of non-cohesive regulations.

Based on the principle *lex specialis - lex generalis*, when regulating private law relationships in separate laws, the legislator should discontinue the practice of specifying the relation of these norms to the CC. This principle stems from the CC itself, and it would be best if it were articulated therein *expressis verbis*. The way would be clear for another or more precise specification of the relations between the norms contained in separate laws and those of the Civil Code.

### 1.3. Scope of the Civil Code

The report of the Legislative Council<sup>40</sup> rightly underscored that it is essential to 'amalgamate the Polish system of law by issuing codes or acts of a high level of generality, which would, as such, be based on clear principles regulating **vast areas** of societal life'. Developing this same train of thought, it was also mentioned that the role of codes is exceptional: 'They not only provide exhaustive regulation of a vast area of issues, but they also systematise particular sections of law, by establishing leading principles. In addition, codes help to stabilise the legal status quo in a given area, and this stabilising effect guarantees, among other things, that, as far as possible, all provisions belonging to a given area of law are covered in one place'.<sup>41</sup> It is from this perspective that the Legislative Council criticised the 1964 Civil Code, and stated that: 'Unfortunately its current state gives the impression of **partial** codification, and one that is largely obsolete. This is the result of a host of factors, primarily that the code dates back to 1964 and is based on premises of the socialist system. The serious changes to the CC carried out during the last 16 years have not managed to remove many of the vestiges of the previous system. Moreover, those changes were conducted *ad casum* and lacked a broader perspective on the whole of the code. In such conditions, substance becomes decodified, i.e. material which should be in the CC gets placed outside of the code, thus damaging the totality of the code as such'.<sup>42</sup>

Let these introductory reflections serve a framework for more thorough considerations of an optimal scope for the Polish Civil Code. To begin with, it is important to consider which areas of law should be regulated by the CC.

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<sup>40</sup> Warsaw 2005, p. 20.

<sup>41</sup> M. Kępiński, M. Seweryński, A. Zieliński, Rola kodyfikacji na przykładzie prawa prywatnego w procesie legislacyjnym, p. 1.

<sup>42</sup> Op. cit., p. 5, 6.

Suffice it to focus on only a couple of the most important and controversial issues:

**A) Commercial law.** This area of law, perceived specifically as the law of merchants was originally (in the 19<sup>th</sup> century) codified separately from civil codes. This traditional approach was also taken by Poland's pre-war lawmakers when, in addition to the Code of Obligations of 1933, they also established the Commercial Code of 1934.

Contemporary European codifications have departed from this model and now incorporate provisions regulating the private law relationships of persons professionally active in commercial activity into their civil codes. This concept was adopted in particular by the Swiss Code of Obligations, the Italian Civil Code, the Dutch Civil Code, the Civil Code of Quebec (in spite of its basis in French legal tradition), the new Civil Code of the Russian Federation, and the civil codes of a host of other states that emerged from the former Soviet Union (including the Lithuanian Civil Code). This monistic concept has also been adopted in the draft civil codes of Slovakia<sup>43</sup>, Hungary<sup>44</sup> and the Czech Republic.

The Polish Civil Code of 1964 pursued a similar approach and adopted a monistic concept of codification (art. 1). Consequentially, the provisions of the Commercial Code regulating commercial activities were repealed (and largely transferred to the CC), though regulations governing commercial companies were maintained and, in practice, applied exclusively to international commerce. In the socialist economic system of the time, this approach was aimed at, first and foremost, countering the creation of 'economic law' understood as a combination of administrative law and civil law rules. As such, this was supported within a certain current of communist doctrine and was implemented through legislation in certain 'people's democracies'. After the socialist system in Poland toppled, there were voices that proposed reinstating the dualistic system of codifying private law, and in effect uphold the pre-war Commercial Code. This concept continues to be championed by some legal scholars, but the Codifying Commissions rejected it as a solution, and Polish lawmakers definitively resolved this problem in favor of maintaining the principle of oneness of the codification of civil law. This happened as a result of passing the Code of Commercial Companies, whose scope encompassed only civil law subjects, without the commercial activities, and which repealed all the Commercial Code provisions still in effect.

While the above-mentioned models of modern codifications are relevant, it is primarily rational legislative deliberation that supports the monistic principle for the CC. This

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<sup>43</sup> J. Lazar, Die Aufgaben der Neukodifikation des slovakischen Privatrechts im Kontext seiner Europäisierung (w) Kodifikation, Europäisierung und Harmonisierung des Privatrechts, Bratislava 2005, p. 134.

<sup>44</sup> L. Vékás, Über die Grundzüge der ungarischen Privatrechtsreform, (w) Kodifikation (j.w.), p. 156 et seq.

principle is conducive to reducing the number of legal provisions as it prevents the unnecessary repetition of regulations governing contracts, and it facilitates the cohesiveness of the legal system because it places all the basic institutions of private law into one codifying act. Additionally, this concept is open to the adoption of the new and highly dynamic area of law that is consumer-professional relations. Such regulations would be difficult to qualify legislatively in a system based on a dualistic premise of private law. However, regulating these legal relationships in yet a third codification would only increase the deficiencies present in the dualistic concept.

**B) Family Law.** Legislative tradition distinctly includes the regulation of familial relationships into civil codes. However, communist doctrine determined that family law is a separate branch of law from civil law, and thus in both the USSR as well as the ‘people’s democracies,’ family law was regulated in separate codes. Following the collapse of communism, a separate codification of family law was maintained in particular in the Russian Federation – with the exception of marital property relationships which are regulated by the Russian Civil Code. According to the general premise adopted by this code, it aims to regulate only property relationships, while family law is based upon personal associations. This was not a route chosen by many of the other former soviet republics. In particular the civil codes of Lithuania and Georgia encompass family law. Hungary, Slovakia, and the Czech Republic will likely also be incorporating family law into the scope of their currently drafted civil codes.<sup>45</sup>

In accordance with European tradition, the predominant view in Polish legal thought is decidedly one that family law is an element of civil law. In keeping with this approach, the first draft of the new civil code prepared in 1948 included the area of family law. This concept was also presented initially by the Codifying Commission in 1964, when it dedicated one of the books of the code drafted in 1964 to family law. Nonetheless, under undoubtedly political pressure, during the last stage of the codifying work the decision was made to refrain from such a positioning of the regulation of familial relationships, and the provisions of the book on family law were removed from the CC and, without any changes, published as a separate document entitled the Family and Guardian Code. Following the collapse of the socialist regime, it seemed self-evident that we should return to the traditional concept of housing

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<sup>45</sup> Compare with papers in the collection: “Kodifikation, Europäisierung und Harmonisierung des Privatrechts“, Bratislava 2005: Lazar, op. cit, p. 135, L. Vékás, p. 155, Z. Králičková, “Das Tschechische Familienrecht auf dem Weg der Rückkehr zu den traditionellen Instituten“, p. 415 et seq.

family law in the CC. Such an expectation was expressed specifically by Stefan Grzybowski in 1994.<sup>46</sup> Originally he reminded us that it was 'under strong pressure by the ruling communists powers, and the members of the commission that were under their influence, that the position to make family law the object of a separate legislative act, in the form of the Family and Guardian Code, became predominant.' Later Grzybowski made the *de lege ferenda* proposal: 'The basic and most general postulate is the necessity to totally disassociate ourselves from the family law codification of 1964 based in communist legislative tradition. New law cannot be established as a result of reforming the code currently in effect, which would basically be a revision of the provisions. New law must be created by starting all over from the beginning. We should reject all notions of the independence of family law breaking all highly natural connections. Family law should be perceived as a part of civil law, which obviously does not mean the obligatory identical nature of certain solutions, but does fundamentally mandate the application of the general provisions of civil law to familial relationships [...] Thus there are many reasons to place family law inside the Civil Code itself. One of them is the need to apply appropriate technical approach to legislation. If the provisions of family law were included in a separate legislative act this would not only make it more difficult to position and incorporate legal provisions of a general nature, but it would also lead to numerous uncertainties and reservations.'<sup>47</sup>

However, the concept of retaining family law within a separate codification is not without supporters. Some maintain that the disconnection of Polish codifications of family law corresponds to the specific regulation of family law associations that are dominated, by in large, by the non-pecuniary interests of the subjects of these relationships. The separate codification of family law is thus relevant to the nature of this area of law as a clearly specialised field of civil law. From a socio-technical point of view, a particular understanding of family law has been ingrained into the general social awareness, i.e. one of a regulator of fundamental social associations. The element of tradition is not without relevance, and is extraordinarily significant in shaping the legal regulation of familial relationships, including those manifested in their external form and its position within the system of legal acts. From this perspective, it is impossible to not take into account the separate codifications of Polish family law that have been in effect for the last 50 years.

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<sup>46</sup> S. Grzybowski, Z problematyki usytuowania prawa rodzinnego w systemie prawa cywilnego, "Studia Juridica" XXI/1994, p. 201 et seq.

<sup>47</sup> Op. cit. p. 206-207.

However, the above arguments are not entirely compelling. Fifty years of history shaped by the pressure of communist doctrine should not decide about the form of the legal system of the Polish Republic. The fact that many countries of the former soviet bloc have departed from this tradition attests<sup>48</sup> that a 'return' to European democratic traditions is considered quite desirable. Following the Constitution, the Civil Code is the second most significant normative act, and thus it would be difficult to conclude that incorporating family law into the CC would result in any sort of depreciation of this area of law.

Furthermore, the focus on the non-pecuniary related nature of the family law relationships should not decide that this is a separate area of law, because the property criterion is not distinctive in civil law. One could even put forward the argument that law is evolving in the direction of increasingly broad protection of personal interests by civil law instruments covering such fundamental rights as human life, health and dignity. However, the link between regulating familial relationships with other fields of civil law is particularly close – especially as concerns establishing civil status, care of not only children but also handicapped people, or the regulating of inheritance law, the main objective of which is to reinforce familial associations (compare with part IV of this book). The shape of the Family and Guardian Code did undergo considerable transformations during the IIIrd Republic of Poland, for example bringing the act of marriage closer to the general civilian legal construct, primarily through introducing the institution of defects to declarations of intent. Additionally, C. Żuławska, supporting the concept presented here, fittingly referred to 'consideration for the private law nature of that (e.g. family) law mandates that its foundations are comprised by civil-legal categories: persons and declarations of intent – all from the Civil Code. The civilian 'nature' of family law is also articulated in the fact that the Family And Guardian Code does not contain a general section, and one is not needed precisely because of the Civil Code'. The future civil code, which would be a 'constitution' for civil law, should not omit such a serious component of this field of law.

It should be noted that the decision not to integrate family law into the Civil Code, which happened at the beginning of the 1990s, should not be understood as an acceptance of any legislative concept as such. The legislative intent of the contemporary lawmakers was

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<sup>48</sup> The drafter of the new Hungarian civil code, Lajos Vékás, clearly states that “In das neue ungarische ZGB wird demnach das Familienrecht wieder eingebaut, wie es in den Entwürfen der Vorkriegszeit immer der Fall war.” “Kodifikation”, p. 155. Similarly, the drafter of the new Slovak civil code, Jan Lazar, broadly justifies incorporating family law into the civil code indicating that it is of a private law nature, and that there is no basis for limiting civil law relative to legal property issue, Kodifikation, p. 118, 119. The draft of the Czech civil code is going in this same direction, compare with Jan Dvůrák, Kodifikation, p. 248, and also Zdeňka Kulikova, Kodifikation, p. 426.

clearly limited to conducting speedy and essential changes to the CC in order to adapt to the systemic changes underway. The question of creating a new codification was clearly deferred for a later time. Subsequently, the scope of the CC went unchanged, and, for example, there was no change of the extracodical regulation of mortgages, which are generally considered an integral part of civil law.

**C) Labour law** is also the object of a separate codification. The Labour Code is currently living out its last days. The Codifying Commission of Labour Law is currently preparing two new codifications that will replace the old Labour Code. The first will govern individuals and the other will cover collective labour relations. The former is currently being completed.

All indications suggest that the current draft of the Code of Individual Labour Relations, much like its precursor, will be of a private law nature. For this reason, its provisions could be integrated into any future Civil Code. It would be difficult to envision that the privileged position of an employee would justify exempting the norms of labour law from the scope of private law. Commonly, the norms regulating consumer contracts are considered to be civil law, and these also are distinctive in the formal inequality of the legal situation of the engaged parties. The concept of encompassing individual labour relations with the scope of the civil code also appears in some other codifying drafts in other post-communist countries.

However, the implementation of this idea in Poland is unlikely, primarily due to political, and not substantive, reasons. It would be more sensible to not put forward concepts that are destined to fail, but rather concentrate on ensuring that the drafted Code of Individual Labour Relations be based as much as possible upon the general civilian ideas and institutions, and that it not create new material in an effort to manifest its distinct nature.

**D) Intellectual property law (copyright and industrial property).** These areas of law are also regulated outside of the CC in a number of distinct laws.

The omission of copyright and inventors' law from traditional 19<sup>th</sup> century codifications is usually explained by the fact that these areas of law were in their formative stage; as embryonic as they were, they were not sufficiently mature to be set in stone through the codifying process. The ensuing 20<sup>th</sup> century brought about not only the normative development of these areas of law, but also immense social and economic importance, something that was articulated in many of the newer European codifications. The Dutch Civil

Code devotes the entirety of its ninth book to intellectual property<sup>49</sup>; as did Ukrainian lawmakers in book four (intellectual property) of their 2003 Civil Code. The Polish Codification Commission preparing the 1964 draft did consider adding copyright law to the CC. However, predominant was the pragmatic view that it was best not to disturb the existing and good regulations of the separate law on copyright.

Another reason to regulate these areas of law outside of the CC is that, although they are concentrated on private law matters, they also encompass the closely related areas of administrative and criminal law. Additionally, these laws are frequently amended (and it seems that this tendency, subsequent to Poland's membership in the EU and further planned directives concerning intangible goods, will not slow down), this being a factor that could weaken the stability of the Civil Code in relation to the implementation of these areas of law.

This issue requires further discussion and it is difficult to express any definite proposals at this point.

However we could indicate a minimal scope of legislative activities that should be undertaken in the event that the extracodical regulation of these areas of law were to be required. This regulation should be closely coupled with the Civil Code, in particular in the following areas: the scope of regulating individual rights; the definition of rights on intangible goods; and in provisions on property. One should also insert provisions requiring the corresponding application to the jointness of property rights on intangible goods into the provisions on co-ownership of possessions. Additionally, the notion of licensing contracts should be regulated in the CC.

However, Articles 81-84 should be removed from the Law on Copyright and Neighbouring Rights because these articles are devoted to protecting the personal image and the addressee of correspondence, because these concern personal interest and general law rather than copyright.<sup>50</sup> These provisions should be in the CC.

**E) International private law** is currently regulated in a separate law. However, efforts to draft a new law regulating this area of law are currently being completed, and this is necessitated by changes in international relations as well as in EU law.

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<sup>49</sup> Not yet written, compare with P. Meijknecht "Założenia, struktura i treść nowego holenderskiego kodeksu cywilnego, Przegląd Legislacyjny 2003, No. 1, p. 77.

<sup>50</sup> The referenced proposals were put forward by J. Barta and R. Markiewicz.

From a theoretical point of view, there is a balance between arguments for the private law vs. the public law nature of these norms. Various comparative legal studies also suggest similar conclusions.

In this situation, it is possible to maintain the current concept of these norms being located outside of the CC.

**F) Intertemporal law.** The importance of this area of law has grown considerably given the frequent changes in legal regulations, including those of a private law nature. These matters have generated numerous judgements by not only the Supreme Court, but also the Constitutional Tribunal, which has reviewed claims not only from the point of view of constitutionality, but also from that of the protection of rights acquired.

The Civil Code regulates only one fragment of this very broad issue with the general principle of the non-retroactivity of law in article 3. The wording of this provision could be called into question in light of the recent position of the Constitutional Tribunal in this matter. Additionally, in another law, the Provisions Introducing the Civil Code of 23 April 1964, there are numerous provisions regulating the relationship of the Civil Code to the norms of that branch of law in effect at the time. They are often cited as a model for general and conclusive regulation for the resolution of the conflict between old provisions and new laws, if the new laws do not contain such introductory provisions, as is relatively often the case. This practice is justified by the lack of a developed regulation of temporary law in the Civil Code. From the legislative point of view, this is not a satisfactory solution and does not meet the requirement that law be certain in that it is based upon a *per analogiam* understanding.

Therefore a proposal should be put forward to regulate the problem of temporary law within the CC itself, and by using Polish jurisprudence and the rather limited scholarship on this topic. This would make it possible to strengthen the certitude of the law, and also reduce the number of legal provisions, releasing lawmakers from the obligation to regulate intertemporal issues in those cases when there is no intention to deviate from the general rules contained in the CC.

## 2. Civil law subjects

### 2.1. General issues

Civil law subjects are and should remain those designated by the norms of civil law and incorporated into the fundamental act that is the Civil Code. However, it may not be entirely necessary to mention them in the provision defining civil law, as is the case in article 1 of the CC. Suffice that particular types of subjects are regulated by the further provisions of the CC. Such a concept was adopted by codifiers in Germany. Whatever the case, it is important to maintain the term 'person' as the general name of civil law subjects. Similar to other codes, this category of subjects is subdivided into 'natural persons' and 'legal persons.' Both categories of subjects share the trait that they are equipped with legal capacity within the realm of civil law.

### 2.2. Natural persons

The codical regulation of natural persons in the CC is incomplete and imprecise about establishing the beginning and end of these legal areas. The CC contains not one single mention of criteria for establishing the moment of death of a person, in spite of the fact that this issue has long since been clarified by science and in the provisions of medical law. Moreover, article 8 of the CC, which declares that a person acquires legal capacity at the moment of birth, should be declared archaic and incompatible with many detailed legal provisions and the predominant scientific position that maintains granting the unborn child (*nasciturus*) conditional legal capacity starting with the moment of conception. This situation requires intervention by lawmakers.

According to article 12 of the CC, people gain capacity for legal actions (limited) on their 14<sup>th</sup> birthday. Acts conducted by a person who has not reached that age are invalid in all events (art. 14, par. 1, CC). The lawmakers stipulated, however, that when a person incapable of legal actions enters into a contract of a type considered generally applied in petty matters of everyday life, then this contract becomes valid upon the moment of execution, with the exception of cases where such would result in egregious harm to a person incapable of legal actions. This provision gives rise to misgivings concerning this construct, which presumes the execution of an 'invalid contract', and this as the result of an act by a person incapable of legal actions, and thus incapable of making any declarations of intent. If the gist of this provision is to be preserved, then it should be accompanied by the general principle articulated in art. 14

par. 1 of the CC with its limiting reservation of 'unless s/he entered into a contract generally applied in petty matters of everyday life, with the exception of cases where such would result in egregious harm to a person incapable of legal actions.' Such wording would clearly indicate that minors up to the age of 13 do have some very limited capacity for legal actions – in line with the general social perception that youth now comes of age more quickly and participates in contractual relationships. These facts bring forth a question of a more general nature, i.e. is the age constraint of 13 years too high for achieving legal capacity? Or perhaps minors under the age of 13 might need another distinction, with a subcategory of, for example, up to the age of 7 years.

Next, the method of incapacitation needs to be modernised, and this is an issue that belongs to civil proceedings. Corresponding legislative proposals have already been put forward by the Civil Law Codifying Commission.

The notion of consumer, introduced in art. 22<sup>1</sup> of the CC, and the specification of the consumer as someone being a natural person, should be maintained in its current state. The very same legislative solution was adopted by German lawmakers (compare with art. 13 of the German Civil Code). The notion of consumer is correlative to the notion of 'business'. If the latter notion undergoes any transformation, it should correspondingly be noted in the provision defining the notion of consumer.

### 2.3. Protection of personal interests<sup>51</sup>

The current regulation of **personal interests** must meet with fundamental criticism. In comparison with the original regulation of this issue in the CC, the amendment of 1996 expanded the scope of protection of personal interest considerably - and this is generally something praiseworthy. However, this was an incidental intervention that imposed tortious liability upon the existing provisions (of art. 445 and 448) and upon the general provisions on protecting personal interests (art. 23, 24). This caused an internal incoherency of codical provisions in this regard, and it evoked fundamental controversies concerning interpretations that are impossible to resolve unambiguously, without rationally regulating the whole issue.

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<sup>51</sup> Issues in the field of protecting personal interests were discussed during a conference with the Dutch experts on 25-26 November 2005. Written reports from this event were prepared by Prof. Jan M. Smits (the Netherlands) and Dr Maciej Mataczyński (Poland). The discussion was chaired by Prof. Stanisław Sołtysiński, and participants included: Prof. Zbigniew Radwański, Prof. Paul Meijknecht, Prof. Bogudar Kordasiewicz, Supreme Court judge Katarzyna Gónera, Prof. Marian Kępiński, Prof. Wojciech Katner, Prof. Leszek Ogiełło, Prof. Janusz Szwaja, Prof. Adam Olejniczak, and Aneta Wiewiórska.

Additionally, there is a conspicuous dispersion of norms referring to personal interests outside of the CC. For example, for historical rather than any other rational reasons, the protection of personal image and privacy of correspondence is still regulated by copyright law rather than the CC. The most serious current problem is the protection of human dignity from the media, which is regulated in the Media Law in a manner difficult to reconcile with the general codical regulation, this being the source of endless discussions and opposing court judgements.

A proposal has emerged for new regulation of the protection of personal interests in the CC. Here it is possible to indicate only the general directions in which lawmakers should aspire.

First and foremost, one should open with a general characterisation of the object and construct of the protection of personal interests. It is accurately believed that this protection is based upon a construct of subjective rights that are of an absolute nature, and thus in effect *erga omnes*, which are rigidly attached to a natural person, and terminate upon the death of that person, and which protect non-pecuniary values (interests) affiliated with this person. In spite of an initial certain irresolution, the predominant view now is that these protected values (non-pecuniary interests of the individual) differentiate themselves on the basis of objective and socially approved foundations, not according to a subjective measure or the particularised adverse perceptions of the injured party.

However, whether this concerns one personal right or a multitude of rights, relative to the multitude of protected personal interests, is even now still the subject of discussion. At the same time, everyone agrees that the catalogue of rights indicated in art. 23<sup>52</sup> of the CC is not comprehensive and could still be augmented with new interests, although the process for such has never been fully explained. It is insufficient to state that these are created by case law because there are still doubts about the powers to do so.

This issue also has the following comparative-legal dimension, as explained by Prof. Jan M. Smits of the Netherlands<sup>53</sup>: 'It would seem just to state that a ruling establishing a violation of personal interests in any legal system is always based upon a violation of a **specific personal interest** [...] In this context, there is no need to create one general personal interest as a basis for granting damages. It is only in German law that the protection of

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<sup>52</sup> CC Art. 23: The personal interest of a human being, in particular health, dignity, freedom, freedom of conscience, surname or pseudonym, image, secrecy of correspondence, inviolability of home, and scientific, artistic, inventor's and rationalizing achievements, shall be protected by civil law independent of protection envisaged in other provisions.

<sup>53</sup> Compare with materials from the conference organised by the CLCC with the participation of Dutch experts on 25-26 November 2005.

personal interests fulfils a special function in that the German Constitution (art. 1, 2) protects human dignity and the right to personal development. In German law, particular personal interests stem from this generally formulated right. However, the general practice is to discuss the general right in the framework of particular personal interests.' Additionally it should be explained that the German Civil Code still maintains provisions specifying particular personal interest, the violation of which justifies a claim for the payment of compensation for non-pecuniary damages (art. 253) or another type of sanction (art. 12 protecting the right to a surname). It seems that this position, as a more pragmatic approach, should be maintained in the construct protecting personal interests in Polish law. Also worth taking into consideration are proposals to create protection for new personal interests – in indistinguished laws – based upon the creative interpretation of the Constitution of the Polish Republic, supported by a reference to social approval. One can consider the Constitution, together with acts of international human rights law and basic legal acts of the EU, to be the source of objective rights protecting the personal interests of an individual. It also seems the evidence suggests that it would be best to continue to use the plural form in establishing general rules concerning the protection of personal interests and the subjective rights that protect them.

However, we need to resolve the controversial problem concerning where to place the provisions demarcating the protection of personal interests. It should be proposed that the general part of the CC should not limit itself to simply enumerating the particular personal interests that are legally protected, but should also specify their fundamental substance. Such would be in following with rational legislative practice aiming at concentrating all private law provisions in the CC. Furthermore, this approach would ensure better communication, economy of legal provisions and systemic cohesion. One should also take into consideration the personal interests that have been shaped as the result of a given jurisprudence. The contemporary civil code of Quebec is a paragon of such a regulation.

As opposed to many traditional codifications, the Polish system of civil law codification shaped the protection of personal interests based on the premise of **illegality**, and not of guilt; thus it developed outside the regime of tortious liability. This is a contemporary approach worth maintaining. However, the current regulations lack provisions spelling out the general message, and in particular rules indicating what circumstances would revoke the illegality of the actions of a violator of a personal interest. Additionally, there should be a declaration establishing clearly that injured parties are entitled to protection from each violator – regardless of whether the violator is answering on the basis of a provision on delicts, or as the result of non-performance or inappropriate performance of an obligation.

There is no rational basis for maintaining the traditional concept that linked the protection of personal interests with transgressive responsibility. This is the manner in which foreign legal systems handle this issue, and this approach is also strongly represented in Polish legal doctrine - especially as concerns the responsibility of medical personnel.

The burden of proof – an issue of great importance in the system of protecting personal interest – has not been regulated in any particular manner. Thus we apply the general principle that the injured party should produce all premises substantiating the need to apply protective measures (art. 6 CC). However, this absolute rule concerning the focus of evidence can result in unjust consequences for the injured party – an issue that has been correctly raised in the Polish literature, in particular in connection with personal damages. This problem has also been recognised by legal scholarship in other countries, and is discussed in relation with *prima facie* evidence. Dutch court rulings have responded to this, and Dutch courts can now reverse the general principle of burden of proof and impose upon the perpetrator the burden of proving that s/he did not cause damage. The decisive criterion in this case is common sense. On this basis the burden of proof can be reversed. It should be considered whether a similar solution would be useful in Polish law, and not only within the scope of responsibility for violating personal interests.

The consequences of an illegal violation of personal interests can be of a non-pecuniary or a pecuniary nature.

For a non-pecuniary violation, the perpetrator is expected to undertake actions aimed at removing the effects of violations that were committed – in particular through making certain statements. This general formula provides judges with considerable flexibility in their judgements and enables them to adapt the non-pecuniary sanctions to a specific state of affairs. Perhaps this formula should be described in greater detail in relation to particular personal interests. Additionally, art. 24 par. 1 of the CC grants the injured party general authority of a preventative nature, meaning that s/he may demand the cessation of illegal actions threatening his/her personal interest<sup>54</sup>. Such broad authority, lacking any accompanying constraints, could lead to undesirable social consequences. In particular, rigorous application would be in conflict with the constitutionally-protected informational

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<sup>54</sup> CC art. 24 par. 1: The person whose personal interest are threatened by another person's activity may demand the cessation of that activity unless it is not illegal. In case of an infringements/he may demand that the person who committed the infringement perform acts necessary to remove its effects and in particular to make a statement of an appropriate contents and in appropriate form. On the terms provided in this Code s/he may also demand pecuniary compensation or an appropriate sum of money paid to a specific public purpose.

function of the media. This could open the door to preventative censorship on behalf of an individual citizen.

On the other hand, pecuniary means of protecting personal interests entail monetary redress granted to the injured party, or, at his/her express request, a third party. The premises for obtaining such compensation are not clearly specified in art. 24 par. 1 and 448 of the CC<sup>55</sup>. It is clear that the whole issue should be regulated together with the general rules of the general part of the CC defining the protection of personal interests. Thus it would be unambiguous that claims for compensation would be accessible in any event of the illegal violation of a personal interest, but only when there would be additional general premises giving the judge considerable flexibility in evaluating the justification and amount of pecuniary compensation. It would also be desirable to more clearly indicate the recipient of this compensation, should the injured party desire that such be intended for a third party.

Additionally, we should maintain the principle that claims for compensation can be made only by the **directly** injured party, unless the detailed provisions on violations of specific personal interests state otherwise. In such a case, the provisions should clearly indicate a circle of authorised parties (as in art. 445, par 3 and art 446 of the CC, for example).

It is self-evident that illegal violations of personal interests can also result in the deterioration of the financial situation of the injured party. There is no doubt that in such cases the financial interests of the injured party can be protected with the general institutions of civil law. For this reason, it does not seem justified that art. 24 par. 2 of the CC<sup>56</sup> refers only to provisions regulating the addressing of damages, but not to the institution of unjustified enrichment.

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<sup>55</sup>CC art. 448: In the case of an infringement of one's personal interests the court may award pecuniary compensation to a person whose interest have been infringed, an appropriate amount as pecuniary compensation for the damage caused or may, on his/her demand, adjudge an appropriate amount of money to be paid for a social purpose chosen by hi/her, irrespective of other means necessary to remedy the effects of the infringement.

<sup>56</sup> CC art. 24 par. 2: If, as a result of an infringement of a personal interest, a damage to property has occurred, the injured person may demand that it be redressed in accordance with general principles.

## 2.4. Legal persons<sup>57</sup>

The differentiation of legal persons among other social entities (organisational units) occurs in Polish law according to the normative method, which means upon the basis of a clear legal provision granting legal personality. This method should continue to be applied as it most effectively fulfils the postulate of certainty when qualifying subjects of civil law relationships.

However, the CC – as opposed to a host of other codifications of civil law - only provides norms for the general structure of legal persons, but does not regulate the particular types of legal person. Only in relation to the unique type of legal person that is the State Treasury do the lawmakers make an exception from this principle and include several provisions regulating this specific subject of civil law. This was necessitated by the fact that there were no extracodical provisions giving the state a legal personality.

This type of legislative model was adopted primarily out of consideration for the already numerous extracodical provisions regulating a variety of types of legal persons. Incorporating these into the CC would devastate the structure of the code, which was dominated at the time by norms concerning legal persons. Additionally, these are provisions which undergo frequent amendments, something which would undoubtedly decrease the stability of the CC.

However, the view expressed above does not question the need to further regulate the general structures of legal persons and the State Treasury. It might even be a worthy exercise to undertake efforts to specify the following: the legal position of public legal persons; the precise legal nature of their charters and their relations to laws; the role of legal organs in their two functions (internal and external); the manner of passing resolutions and the required premises for their validity; and a more precise clarification of the activities of the State Treasury through *stationes fisci*.

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<sup>57</sup> Issues related to legal persons were discussed during a conference with the Dutch experts on 15 December 2005. Written reports from this event were prepared by Prof. A.L.G.A. Stille (the Netherlands) and Dr Elwira Marszałkowska-Krześ (Poland) and are attached to this Paper. The discussion was chaired by Prof. Stanisław Sołtysiński, and participants included Prof. Zbigniew Radwański, Prof. Paul Meijknecht, Prof. Andrzej Całus, Prof. Józef Frąckowiak, Prof. Edward Gniewek, Prof. Leopold Moskwa, Prof. Jacek Napierała, Prof. Józef Okolski, Dr Bartłomiej Sieraga, Prof. Andrzej Szajkowski, Prof. Andrzej Szumański, Dr Dominika Wajda, Prof. Małgorzata Wrzolek-Romańczuk, Prof. Bronisław Ziemianin, Prof. Tadeusz Ereciński, Dr Wojciech Klyta, Prof. Czesława Żuławska, Katarzyna Lis, Aneta Wiewiórska, and Przemysław Mikłaszewicz.

## 2.5. Imperfect legal persons

Organisational units that do not have a legal personality have emerged in legal relationships. While these units have not been mandated legal personalities, provisions do indicate a legally separate entity and a limited legal capacity of sorts (they are the subject of rights and responsibilities). In light of the dualistic concept of persons (natural and legal) articulated in art. 1 of the CC, the legal qualification of this organisational unit has encountered considerable difficulties. Divergent views have emerged in Polish legal scholarship and legal conventions. Some champion the view that these social entities should be recognised as a separate and third type of legal subject. Others perceive an impediment in that such a construct would be incompatible with the premises of the CC. In such a situation, this issue requires resolution at the level of the general provisions of the CC. This was done by lawmakers by establishing art. 33<sup>1</sup> par. 1 CC which states that: 'Provisions on legal persons shall apply accordingly to organisational units that are not legal persons, but which have been granted statutory legal capacity,' with the caveat that members have subsidiary liability for the [unit's] obligations (par. 2).

Lawmakers decided not to endow this entity with a name, given the highly divergent proposals presented in legal literature, and thus they used a descriptive indication. It does seem, however, that legislative propriety would require a name for this institution. In the commission's opinion, the sense would best be expressed by the name 'imperfect legal person'.

This name, however, should not imply that the referenced organisational units belong to a subclass of legal persons. They are undoubtedly distinct subjects of civil law, clearly differentiated by the law and distinguished by many legal provisions that address them. The usage of the term 'person' in the name indicates only that, in accordance with the CC terminology, [these units] are entitled to legal capacity in the field of private law relationships, and that their legal regime is similar, but not identical, to that of legal persons.

A dilemma emerges, however, concerning how to reconcile the regulation of 'imperfect legal persons' with the current substance of art. 1 of the CC which states that 'The current Code regulates civil law relationships between natural persons and legal persons.' In the commission's consideration of this *de lege ferenda* question, the following options to resolve this question emerge.

Firstly, it is not necessary in the future to maintain a general provision enumerating the types of civil law subjects (persons). Many civil law codifications contain no such

determination (for example the German CC, the Swiss CC), they simply launch into regulating the legal status of first natural persons, then legal persons. Accepting such a legislative concept would eliminate the referenced dilemma, and imperfect legal persons' would comprise a subsequent type of 'person', following 'natural persons' and 'legal persons'.

The second resolution calls for a general provision to enumerate the types of subjects of civil law (as is established by art. 1 of CC currently in effect), but to distinguish not two, but three types of persons (natural persons, legal persons, imperfect legal persons).

## **2.6. Business**

According to current law, every person (natural person, legal person, and imperfect legal person) can be recognized as a business if they meet the conditions specified in the law. This fitting principle should also be maintained in a *de lege ferenda* sense.

Controversy has been caused, however, by the definition of business, in other words the indication of the traits constituting this notion. This is linked tightly with the problem of various definitions of this notion in particular laws, something which is harshly criticised by business people.

It seems that this dilemma could best be resolved by agreeing upon one most general definitions of the notion of business with representatives of various branches of law. This notion should start with an economic premise in that this is a subject that actively and professionally acts in the marketplace, and this activity is manifested in the provision of paid services or goods. Generally, the CC should include a definition of a business, as the CC is the fundamental law for commercial transactions. Additionally, this definition should be correlated with the notion of consumer, whose participation in the marketplace is also regulated by the CC. The German Civil Code rightly regulated both notions in its general provisions (par. 13 and 14), in spite of the fact that Germany also has a functioning commercial code.

It is, however, apparent that the legal regime connected with the activities of a business will never be harmonised. In particular, differences appear in the scope of administrative law and private law relationships. Administrative law relationships are regulated in particular in the Law on the Freedom of Economic Activity. The formulation of different definitions of a business is not needed to regulate the characteristic legal regimes. The same objective can be achieved by indicating a varying scope of application of a specified legal regime. As concerns the provision currently in effect, art. 43<sup>1</sup> of the CC, and

the definition contained therein, indicates not only 'economic activity' but also 'professional activity' of the subject; the reason behind this should be sought in the old provisions of the Law on Economic Activity. This law indicated that professional activity – in particular the activities of educated professionals [doctors, lawyers, architects etc] - were not covered by the scope of the notion 'business'. On the other hand, the drafters of art. 43<sup>1</sup> started with an entirely different assumption, and thus clearly used this provision to include the referenced subjects within the notion of a business. Against the backdrop of the new Law on the Freedom of Economic Activity, and in particular its introductory provisions, this basic difference disappears and there do not seem to be any fundamental impediments to concurring on a harmonised notion of a business.

## **2.7. Protection of the personal interests of legal persons**

This problem is resolved in a very general manner by art. 43 of the CC, which establishes that provisions on the protection of personal interests of natural persons also apply correspondingly to legal persons.

It can be stated with all certainty that this rule should be extended to cover imperfect legal persons.

There is no doubt that subjects may benefit from the protection of their personal interests in the form of applying non-pecuniary measures. However, there is some controversy about whether legal persons are also entitled to claims of pecuniary compensation for damages sustained (a pecuniary measure for protecting personal interests). It seems that such claims should not be excluded, *de lege ferenda* – at least as far as they concern businesses. However, this should be concurrent with strengthening legal measures facilitating the protection of pecuniary interests related to violations of personal interests. One such measure could be a clear indication that a business that is an injured party could – in addition to damages (i.e. monetary compensation for the damage) – demand reimbursement of the benefit gained, in an amount not limited to the harm sustained by the injured party, from the person illegally violating its personal interest.

### **3. Acts in law<sup>58</sup>**

#### **3.1. General comments**

The civil law system currently in effect in Poland rightly indicates that one essential element of every act in law is a declaration of intent. This is also about intent revealed through the behaviour of a subject conducting an act in law.

#### **3.2. Interpretation**

The rules of interpretation indicate the path to establishing whether a given behaviour has the traits of a declaration of intent, and what constitutes the substance of this declaration. The Polish legal system— as with many other contemporary legal systems (e.g. in the Netherlands, Germany and Switzerland) – has forgone the formulation of a cluster of archaic particular rules, and limits itself to the synthetic norm of art. 65 of the CC<sup>59</sup>. This concept should be maintained in the current wording of art. 65 par. 2. However, the reference to the general clause of the principles of social co-existence and established customs, as contained in par. 1, is too vague to uniformly resolve disputes where each of the parties has a different understanding of the substance of a declaration of intent. In this regard, the provision requires specification stemming from the indications of Polish legal doctrine, and also in consideration of art. 5:101 of the Principles of European Contract Law. Most generally speaking, it is also important to remember the protection of justified good faith on the part of the recipient of a declaration of intent.

However, if other, different rules of interpretation should be applied to certain types of acts in law (for example wills, general contractual conditions, consumer contracts, unilateral acts in law directed towards the general public), then relevant corresponding provisions should be found in these institutions.

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<sup>58</sup> Issues related to acts in law were discussed during a conference with the Dutch experts on 16-17 February 2006. A written report from this event was prepared by Prof. Wouter Snijders. The discussion was chaired by Prof. Paul Meijknecht, and participants included Prof. Zbigniew Radwański, Prof. Maksymilian Pazdan, Prof. Jacek Gołaczyński, and Supreme Court judge Dr Gerard Bieniek.

<sup>59</sup> CC art. 65 par. 1: A declaration of will is to be interpreted so as is required by the circumstances in which it was made, the principles of community life, and the established custom. Par. 2 In the case of contracts, the congruent intention of the parties and the purpose of the contract, rather than relying on its literal wording, must be established.

### 3.3. Typology

It seems that the general part of the CC should contain a specification (not necessarily in the form of a classic definition) of the primary types of acts in law, in other words: contracts, unilateral acts in law, and resolutions. The legal regime for contracts (without defining this notion) is the only one broadly regulated by the CC. Unilateral acts in law are mentioned incidentally, but are not defined. In particular, there is no resolution of the controversial question of whether the principle of freedom to shape acts in law applies to unilateral acts, and if so, to what extent. The third type of acts in law, resolutions, are not even mentioned in the general part of the CC (they are referred to in art. 865 when discussing partnerships). And this is taking place at a time when the importance of this act in law is growing extremely quickly, along with the expansion of corporate subjects of civil law. The construct of acts in law (the role of declarations of intent by participants passing a resolution, applying defects of declarations of intent) should be regulated, and this applies first and foremost to the validity of resolutions undertaken by multi-person organs without quorum or with improper membership.

### 3.4. Representation

This issue is linked with a broader problem partially regulated in the current wording of art. 39 of the CC<sup>60</sup>: the conclusion of a contract on behalf of a legal person (including partial legal persons) by natural persons who are not organs of the legal person, or who are overstepping the authorities they have been granted. It seems that the current sanction of the absolute invalidity of such contracts is too harsh, since it is not conducive to the certitude of economic activity. It should be possible for the appropriate organ to ratify such a contract with retroactive force (as in art. 103 of the CC, which refers to the actions of an attorney acting without authorisation).

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<sup>60</sup> CC art. 39 par. 1: Anyone who, acting as a body of a legal person, concludes a contract in its name without being its body or exceeding the scope of authorization of that body, shall be obliged to return what s/he has received from the other party while performing the contract and to redress any damages which the other party has incurred as a result of the fact that it concluded the contract unaware of the lack of relevant authorization. Par. 2: The above provision shall correspondingly apply when a contract has been concluded in a name of a person which is non-existent.

### **3.5. Trusteeship**

There is a question about the expediency of the regulations of trustee acts in law. It is indisputable that there are several forms of trusteeship in the economic sphere. However, there are only fragments of relevant legal regulations scattered through a variety of extracodical laws.

This issue requires more discussion, though it would be difficult to not notice that legal scholarship is increasingly supportive of the view that this institution should be included in the general norms of civil law.<sup>61</sup> In particular, consideration should be given to the structure of this act in law, its typology, the objective scope, and premises for application.

It seems that any synthetic and homogeneous regulation of this matter will encounter significant difficulties, and perhaps even turn out to be a dangerous legislative operation, as it may not be sufficiently adapted to the various functions of this institution. For this reason, it certainly would be more desirable to separately regulate the two generally distinguished types of trustee acts: transfer of ownership as security for a debt and fiduciary management. In both forms of trusteeship, there is a need for detailed reference to trustee acts over real estate property, which is subject to a distinct, general legal regime.

Polish economic practice has formed models of trustee acts for the purpose of collateralising, but not for the purpose of trustee management, which in turn has found a variety of articulations in the form of statutory trusteeships. It does seem that it would be desirable to regulate a trustee management contract, something that could be done in the general part of the Civil Code.

### **3.6. Form of act in law**

The general rule that an act in law does not require a particular form should be maintained; there are no doubts in this regard. Subjects can use all forms of communication, including electronic forms.

The law, as well as parties to an act, may make exceptions and anticipate particular forms for specified acts in law. Traditionally the Polish legal system links this with written characters on a material capable of permanent storage of such (usually paper) and accompanied by a handwritten signature of the person submitting a declaration of intent (exceptions for the required signature are indicated in the law).

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<sup>61</sup> Compare with recent monographical works on this institution: P. Stec, *Powiernictwo w prawie polskim na tle porównawczym*, Kraków 2005; R. Rykowski, *Pojęcie powiernictwa – konstrukcja prawna zarządu powierniczego*, Warsaw 2005.

**Ordinary written form** suffices to meet these conditions, although it may be reserved with various legal consequences such as: 1) under rigor of invalidity of the act in law; 2) for evoking only specified legal consequences; 3) for purposes of evidence. The establishing of written form for purposes of evidence, involving limiting the gathering of evidence to interviewing witnesses or the parties, has always and continues to give rise to serious misgivings. Following the French model, this institution was introduced to the Code of Obligations in 1933. Later, in 1950, it was removed from the general section of civil law, only to be reinstated in the 1964 Civil Code. In 2003, amendments to the CC considerably limited the scope of application of this practice. It seems that this should be removed completely from the Polish system of civil law, primarily because it unnecessarily formalises legal interactions and limits the freedom of courts to evaluate evidence in a civil case. One should also recall that the reinstatement of this practice into the Civil Code was supported with the following argumentation: 'The need for written evidence is all the starker in the socialist system, where the necessary documentation of more important acts in law is an absolute prerequisite of control.'<sup>62</sup> It is difficult to say that this argument remains convincing today. However, it is not necessary to have a written contract to document economic activities. Other documents can serve this purpose, in particular those specified in provisions on bookkeeping and the newly-introduced institution of a letter confirming the conclusion of a contract (art. 77<sup>1</sup> CC). Additionally it should be noted that the referenced form has undergone considerable limitation in France itself, and is unknown in many modern legal systems. The elimination of this form would greatly simplify the functioning of acts in law in the Republic of Poland, but it would require careful review of all institutions that currently require written form. It is not possible to generally replace the *ad probationem* form with an *ad solemnitatem* form, as that could lead to the undesirable effect of impeding economic exchange.

The implementation of the referenced proposal would require a corresponding modification of the provisions of the CC. Given its nature, the written form creates a presumption of the execution of the act in law of a specific substance by the undersigned person. As a result, the burden of proof falls upon the person who questions the content of the document, its totality, or the authenticity of the signature. From this perspective, this form strengthens the certitude of exchange and is desirable for those who are trying to achieve this objective.

It should be noted that a judge should always take into account, *ex officio*, non-compliance with the written form as indicated in the law, even if neither of the parties to the

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<sup>62</sup> A. Wolter, *Prawo cywilne. Zarys części ogólnej*, Warsaw 1963, p. 234.

proceedings raises this point. This rule is in effect regardless of to what extent procedural law implements the adversary system of parties in court proceedings.<sup>63</sup>

### 3.7. Electronic form of declarations of intent

Electronic forms of declarations of intent do not comply with requirements for maintaining written form, as referenced above, thus they can not be classified as a subcategory of the written form.<sup>64</sup> A dissenting view could be adopted only on the basis of a new definition of the written form (and signature), considerably broader than the current one. Such a legislative action would not be desirable as it would not serve the clarity of the law nor the certitude of economic exchange; and it would unnecessarily undermine centuries-old social convictions concerning the written form.

However, there is no doubt that declarations of intent made in electronic form do have legal relevance and are equivalent to the written form, as long as they comply with the particular prerequisites for such. Thus it would seem justified to adopt the concept that there is a separate electronic form that functions in addition to the written form.<sup>65</sup> These prerequisites – from the perspective of their changing nature, caused by the rapid development of information technologies - should be regulated in a separate law, and the CC should only make reference to them (as is established by art. 78 par. 2 of the CC). These questions, and in particular the so-called secure electronic signature equivalent to a handwritten signature, are currently regulated by the Law of 18 Sept. 2001 (Journal of Laws, No. 130, item 1450, with subsequent amendments) which implements the corresponding EU directives in this regard. This law, however, is widely criticised and is not applied in practice (much like analogous laws in other EU countries.) This leads to the relevant *de lege ferenda* conclusions concerning changes to this law, and not regulating this matter in the CC. In turn, there should not be the tendency for particular normative regulation of the electronic form (equivalent to the written form imposed by the law) within specific types of acts in law (for example bank transactions). The whole field of private law should be governed by uniform stipulations of cultivating this form. This was the idea that inspired the creators of the corresponding EU directives, and was warranted by the pursuit of uniform practice and, ultimately, the desire to facilitate economic exchange.

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<sup>63</sup> Also compare with K. Larenz, M. Wolf, *Allgemeiner Teil des bürgerlichen Rechts*, München 2004, p. 501.

<sup>64</sup> Compare with Z. Radwański, *Uwagi ogólne o zakresie stosowania formy elektronicznej w prawie cywilnym (w) Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, Kraków 2005, p. 1291 et seq., and literature cited here.

<sup>65</sup> The same goes for a significant part of the views of the Polish authors, compare with above cited and German law, compare with § 126 a) BGB (German CC).

However, the Civil Code, and perhaps other laws regulating private law relationships, should contain norms indicating to what extent the electronic form may be used *in lieu of* the written form, and also whether they may be used in relation to qualified written forms. The current legal state of affairs excludes such a possibility – with the exception of a form with a certain date. In this case one should use a special 'time-specific' electronic form.

Additionally, the Civil Code and other particular laws require regulation of the question of freedom to use the electronic form. Most likely it will be necessary to articulate the general principle that one party can not impose upon another the use of the electronic form, and the accompanying legal consequences of using or not using it. By the same token, the agreement of the second party may be expressed, and the law should also indicate situations when a given act in law may be executed exclusively through submitting a declaration of intent in electronic form.

### **3.8. Relations between forms**

For purposes of clarity and bringing order to the system of forms of acts in law, the general part of the CC **should clearly enumerate the types of forms** generally applied, i.e.: ordinary written form, written form with a certified date, written form with a certified signature, notary act, and time-specific electronic form. The interchangeability of one form with another should also be indicated.

## **4. General clauses**

Two general clauses of the CC are of communist origins: the principles of social co-existence, and the socio-economic predetermination of law. These two general clauses should be removed not only because of their origins, but also because of the particular function they served in the system of the People's Republic of Poland, and for the currently unwarranted connotation stressing the opposing nature of the socialist and bourgeoisie legal systems. This cannot be done, however, by simply replacing these two clauses with another two of a general nature. In order for this operation to be conducted rationally, we must examine all the legal institutions where these clauses occur. It is necessary to determine whether the use of general clauses or other imprecise terminology is essential in a given institution, and ultimately establish what terminology should be used. Assuming that the modernisation of the Civil Code will be conducted through amending particular sections, it will be impossible to avoid

the unbeneficial situation, from the point of view of the principles of legislative propriety, where old general clauses become stretched out in time in such a manner that they co-exist with the new general clauses additionally introduced, or during partial improvements to particular segments of the CC.

In following with pre-war traditions, and practices still followed in the EU and Western legal systems, we recommend the general clauses include references to such phrases as 'common decency' and 'fairness'. Such general clauses, clearly referring to a moral assessment of the situation, have already been included in new CC institutions (compare 385, 417<sup>2</sup>, 764<sup>3</sup> art. 1 of the CC). These clauses, and certainly the one concerning common decency, should be applied as widely as possible in the Polish system of private law.

Additionally, another noteworthy proposal is to widely apply the concept of 'reason', used in this and its adjectival reasonable form. Such an approach has been adopted in particular by: the Principles of European Contract Law; the UNIDROIT Principles of International Commercial Contracts (1994, 2004), the Vienna Convention of 1980, and the Dutch Civil Code of 1992. It is slowly and in a very limited scope gaining recognition in Polish civil law, in court rulings, and in legal scholarship.<sup>66</sup> It would be particularly important to ensure universal application of this approach in the interpretation of acts in law, and in specifying their legal consequences. This approach, however, should not define the boundary of freedom of acts in law. After all, people are also free to conduct unreasonable acts, just as long as they are acting with an appropriate perception of what they are doing. The reasonability clauses, together with the 'fairness' clauses, could perform a controlling function.

While accepting the referenced concept, application could be limited to the interpretation of the term 'good faith' (only in the 'subjective' sense) that is already implemented in the Polish system of civil law. Using this expression in its 'objective' meaning causes confusion in terminology, and is inconsistent with the principles of legislative propriety. Additionally it is absolutely unnecessary. As was explained by R. Longchamps de Berier: 'In an **objective** sense, good faith means the same as common decency, i.e. a certain objective measurement for evaluating behaviour as appropriate or inappropriate from the perspective of ethical norms adopted for [human] interactions'.<sup>67</sup> If, stemming from tradition, international law or the EU still use the term 'good faith' in an objective sense, then this should be understood as tantamount to 'common decency' or the new general clauses. That is

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<sup>66</sup> More broadly: E. Rott-Pietrzyk, *Klauzule generalne rozsądku w kodeksie cywilnym*, KPP 2005, z. 3, p. 617 et seq.

<sup>67</sup> R. Longchamps de Berier, *Zobowiązania*, Poznań 1999, p. 141.

just what Dutch lawmakers did when they replaced the term 'good faith' with the principle of 'sense and fairness' (art. 6.248); and the term 'good faith' is used in the new code only in the sense of 'unknowingly' or 'unable to know'.<sup>68</sup>

## **5. Limitation of claims and preclusive terms<sup>69</sup>**

### **5.1. General comments. Preclusive terms**

Legal scholarship distinguishes between two aspects of discontinuing limitation statute of limitations on claims, and preclusive terms, which in the most general sense are distinguished by the intensity of the intervention of lawmakers into the implementation of subjective rights.<sup>70</sup>

Both of these institutions were regulated by the general provisions of the Civil Law of 1950. In turn, the drafters of the 1964 CC limited themselves to regulating the limitation of claims, as a homogenous legal institution in Book I of the CC. On the other hand, the institution of preclusive terms is lacking in any general regulations, and it appears exclusively in detailed provisions (in different shapes and forms, and not fully regulated.)

This state of legal affairs was assessed as a 'step backwards in the development of regulations concerning regulations on duration', and that 'using the provisions on limitation means "groping" around for an analogy. Practice, in this regard, shows the weakness, and not the strength of the Civil Code'.<sup>71</sup>

A proposal should be made for the general regulation of preclusive terms in the CC. This institution, as opposed to the statute of limitations, would apply to other subjective rights in that it would bring about their termination.

### **5.2. Statute of Limitation of claims**

The current regulation of claims should be analysed in light of the newest developments and experience to date.

Following the CC amendments of 1990, the regulations of claims have taken the form of a 'soft' regulation. This means that a claim does not expire as a result of time passing, but 'the person against whom a claim is raised may choose to evade the satisfaction of this claim'

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<sup>68</sup> J.H. Nieuwenhuis, C.J.J.M. Stolker, W.L. Valk, *Vermogensrecht*, Deventer 2004, commentary to Art. 6.248.

<sup>69</sup> A written report on this topic was drafted by Prof. Wouter Snijders and is included in the attachments.

<sup>70</sup> B. Kordasiewicz, *System Prawa Prywatnego*, Tom 2, Warsaw 2002, p. 531 et seq.

<sup>71</sup> B. Kordasiewicz, *op. cit.*, p. 631.

(art. 117 par. 2 of the CC). Thus a debtor is entitled to the substantive law **objection** of limitation. This objection takes the form of a subjective right to which art. 5 of the CC<sup>72</sup> is applied. On this basis, a court may decide to not recognise an objection of limitation if it determines that the debtor abused the referenced subjective right. It seems that such a solution should be kept in force because it does mitigate the harshness of the criticism of the limitation of claims as an institution of dubious axiological justification.

The current inclination is to significantly shorten the general terms for limitations of claims, which in some older codifications reached up to 30 years. European drafts of contractual law currently recommend 3 years as a primary term of limitations. This was also the decision of Russian lawmakers when drafting the new civil code. When reformed in 2002, the German Civil Code curtailed the term of limitation of claims from 30 years to just 3. The CCs of Belgium, Switzerland, Italy and Quebec all established 10 year limitations. The Dutch Code retained its 20-year limitation, but in many cases assigns shorter terms. These terms are generally longer where it concerns non-contractual claims (in particular tortious liability). Polish law establishes two fundamental terms for limitations of claim: 3 and 10 years, with varying scopes of application. The proposal to adopt one 3-year term for limitations, which is already being widely applied, seems justified. Such an manoeuvre would not only correspond to the newest European legislative developments, but it would also simplify the domestic regulation of the limitations of claims by eliminating the need to consider whether a given claim is for performance benefits or related to economic activity.<sup>73</sup> There are also doubts over the rigorous prohibition on contractually regulating terms of limitation (art. 119). It seems that this could be relaxed by indicating types of legal relationships in which the modification of statutory terms would be allowable (for example in relationships between professionals), and of course by providing possible potential timeframes. The draft of the Principles of European Contract Law takes this approach (art. 17:116 PECL).

The beginning of the progression of terms of limitations in Polish law is based upon a similar basis as in other legal systems, i.e. a combination of subjective and objective prerequisite conditions. The German experiments to reduce the number of prerequisite

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<sup>72</sup> CC art. 5: One cannot exercise a right in a manner which would contradict its socioeconomic purpose or the principles of community life. Such an act or omission on the part of the person entitled shall not be considered the exercise of that right and shall not be protected.

<sup>73</sup> P. Zakrzewski, *Przedawnienie w znowelizowanym niemieckim kodeksie cywilnym*, *Przełęcz Legislacyjny*, 5-6/2005, p. 79.

conditions to one (the moment when a creditor learns or could learn about entitlement to a claim) were unsuccessful, and thus do not encourage replication.<sup>74</sup>

In addition to the general term of limitations of claims, it will be necessary to determine other terms to be indicated in particular provisions, though the recommendation is for caution in creating more terms. Without getting into broader considerations, one must mention the specific problem of limitations on claims stemming from torts, especially as concerns harm to a person.

It turns out that much time may pass, far more than the general term for limitations, between an event causing the harm and the moment this harm is revealed. This issue could be resolved by adopting a subjective prerequisite of the beginning of the progression of the limitation (as in amended art. 2270–1 of the French CC). This does have the drawback that it enables the possibility of a claim for damages that is unlimited in time. It is for this reason that European legal systems establish an additional term of limitation of 20 or 30 years from the moment of the event causing the harm. However, even the longest terms of limitation of claims can at times be insufficient, as shown by the case, widely discussed in Dutch legal scholarship, which involved a lung disease that appeared 30 years after the injured party came into contact with asbestos. W. Snijders, the architect of the contemporary Dutch civil code, is of the opinion that this issue can not be resolved by a general provision, without consideration of the specific circumstances of a given state of affairs.<sup>75</sup>

In light of the above, art. 442 of the CC should be revised. The maximum limit of claims should definitely be extended to 20 or 30 years, which would enable nearly all cases resulting from torts to be resolved. However, in rare cases where harm would be revealed only after the expiry of the limitation of claims, there would be a possibility to ascribe this as an abuse of the subjective right. This would comply with W. Snijders's proposal to take into consideration the specific facts of the case, in particular the details of the harm done to the person.

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<sup>74</sup> Compare with P. Zakrzewski, *op. cit.*, p. 61 et seq.

<sup>75</sup> Compare with report concerning establishing terms by Prof. Wouter Snijders.

## II. PROPERTY RIGHTS

### 1. Introduction

Property rights unquestionably comprise an integral part of every civil code. However, the regulation of this area of law in the Polish legal system requires far-reaching revisions in the following two directions:

1. concentrating provisions regulating property law in one book of the CC, which would prevent the current dispersion that is particularly unfavourable given the current principle of a closed catalogue;
2. revising the usefulness of certain property rights in the socio-economic reality of the 3rd Republic of Poland, and considering whether new types should be established.

### 2. Land and mortgage registers

#### 2.1. General comments

Undertaking the first of these themes, it should be mentioned that land and mortgage registers are maintained for the purpose of determining the legal status of immovables. Consequentially, entries into these registers are equipped with the trait of formal transparency and a legal presumption of reliability (they comply with the actual legal status) of both the rights articulated therein, and the non-existence of rights that have been removed from the record and unrevealed rights (art. 3, Law on Land and Mortgage Registers Mortgages). The principle of reliability is built upon the presumption of the formal and material transparency of the land and mortgage registers (art. 5 Law on Land and Mortgage Registers and Mortgage). This is a guarantee by which the State ensures the security of the legal exchange of immovables for the participants of these transactions. The guaranteeing role of the State is achieved through the intermediacy of independent courts. A typical example of the judicial branch conducting land and mortgage registers is a decision by the court to establish, change, or repeal property rights through the execution of constitutive (law-creating) entries into the registers. Not only is each entry constitutive, but the decision of the court is declarative (art. 516 in relation to art. 626<sup>8</sup> par. 6 of the Code of Civil Procedure) and subject to appeal.

These institutions are of enormous importance for the economic development of the country, and create solid foundations for securing loans and the State to oversee the exchange of immovables which is a unique productive asset of vital importance. It is for these reasons that in Poland and in other European countries land and mortgage registers are maintained by the State itself, or by public agencies which remain under State oversight. EU law also foresees that these registers are of a public law nature and are maintained by public law institutions.

The stated functions of land and mortgage registers have not been fully implemented in Poland for three main reasons. Firstly, it was very expensive to make an entry into a land and mortgage register. Secondly, proceedings took far too long, and finally, there was no universal requirement to disclose the transfer of ownership rights (constitutive entry), which weakened the credibility of the institution of land and mortgage registers.

This first obstruction above was removed by the new law on court costs, which established low, fixed court fees and also introduced the possibility of the court not charging anything at all.

The second obstruction, one that has been highly criticised by entrepreneurs, could be removed by improving the operation of the courts. Efforts in this regard have been undertaken, in particular through the creation of an electronic system for maintaining land and mortgage registers. The positive effects of these efforts are already being seen. The waiting period for making an entry into a register has been shortened considerably, and is reaching acceptable limits, something that has already happened in smaller municipalities. However, we cannot yet expect entries to be made on an as-you-wait basis. Were this to be the case, courts would no longer be able to perform their function of verifying the credibility of the land and mortgage entries, something that is essential in order to maintain the principle of reliability, which is so important for strengthening the certitude of exchange of immovables.

Meeting these expectations will make it possible to introduce the principle of constitutive entries for acquiring ownership of immovables. This is further necessitated by the steady increase in the resale of immovables, and the significance of the warranty of ownership that the State provides to its citizens. The computerisation of land and mortgage registers removes the fundamental reason why post-war Poland was forced to forgo the constitutive nature of entries, i.e. the practical inability to maintain land and mortgage registers as a universal institution for all immovables. Also gone are the ideological considerations of the People's Poland, which endeavoured to eliminate the private ownership of land, which would

consequently diminish the importance of and eventually eliminate the institution of land and mortgage registers.

## **2.2. Legislative proposals**

It was precisely these communist ideological considerations that decided that the institution of land and mortgage registers, together with the closely-related institution of mortgage, would not, as they were considered to be dying institutions, be set in stone in the CC, but would rather be covered by the separate Law on Land and Mortgage Registers and Mortgage of 1982. The motives behind this form of regulation cannot be found in the precursor acts of 1818 and 1825, when the Polish Kingdom of the day (known as the *Kongresówka*) introduced separate laws regulating land and mortgage registers and mortgages (in addition to the French Civil Code that was already in effect). These institutions were not regulated by the French CC; the model introduced was based upon an 18<sup>th</sup> century Prussian law (*Hypothekenordnung*) that was already being implemented in the Prussian partition of Polish land.

The draft of the Property Law prepared by the Codification Commission in 1937 placed this whole group of issues into one legal act. In 1946 the lawmakers followed this example partially when they put general provisions on public rights deriving from land and mortgage registers into property law (Decree of 11 Oct. 1946, Title II). Organisational and procedural provisions concerning land and mortgage registers were issued in a separate decree on the same day (Law on Land and Mortgage Registers).

It appears advisable to return to a similar type of regulation. Organisational and procedural provisions are not of a civil law nature and should be partially contained in a separate law, and partially in the Code of Civil Procedure. Substantive law provisions concerning land and mortgage register entries could be regulated by the CC.

## **3. Ownership**

The definition of ownership, as formulated in art. 140 of the CC, unquestionably needs to be changed and adapted to the contemporary socio-economic premises of civil law, of which ownership is a fundamental institution that is protected in a particular manner by the Constitution of the Republic of Poland.

As already discussed in the general section of this Green Paper, this proposal stems from the

plan to remove the general clause on the 'socio-economic purpose', which comprises of the components of the notion of ownership in light of art. 140 of the CC. It does not seem, however, that we can limit the changes to removing this fragment of the definition of the right of ownership. Establishing the substance of this notion of ownership will require thorough research, taking into consideration the position of the EU in this regard.

Consequently, we should also examine the wording of the provisions detailing the substance of the right of ownership (art. 142 et seq. provisions of the CC).

Additionally, the legal status of animals needs to be clearly specified, especially as a particular object of property. It will not be sufficient to rely on the current particular regulations in extracodical documents. Animals are living creatures capable of not only moving from place to place, but also of experiencing physical and psychological pain, and developing attachments to people.

## **4. Separate ownership of premises**

### **4.1. Introductory comments**

This sort of legal construct has developed only recently. It aims, on the one hand, to provide access to necessary financial resources from interested parties for residential housing, and on the other hand to ensure these individuals the broadest possible ownership rights. However, these institutions violate the principle of *superficies solo cedit*, and thus have met with resistance on the part of traditionally-minded codifiers. This is reflected in some of the older codifications – in particular in the German CC – where separate ownership of premises is treated as an exceptional case and is regulated in an extracodical law. Swiss lawmakers, however, amended their CC (art. 712a et seq.) to include this institution. The newer codes include this institution as an integral component (compare art. 4.81–4.83 of the Dutch Code; art. 288 et seq. of the Russian CC; art. 379 et seq. of the Ukrainian CC; and art. 1041 of the Quebec CC).

### **4.2. Polish law**

Polish lawmakers passed a law regulating the separate ownership of premises relatively early, i.e. in 1934 before there was even a Civil Code. The 1964 CC devoted three articles to this institution (135, 136, 137) and linked it with a specifically socialist law concept

of 'personal property' (art. 133 of the CC). These provisions were later repealed, and the separate ownership of premises was regulated in a long extracodical law of 24 June 1994.

We concur with the proposal of the Prime Minister's Legislative Council to place these regulations in the CC. This is a matter of pure civilian interest and of great social importance, given the widespread practical application of this institution. Additionally, there are inherent links with the basic provisions of the CC on ownership and co-ownership. Creating a separate extracodical law would be highly undesirable and would lead to the decodification of the system of civil law.

While the opportunity presents itself, the value of the provisions currently in effect should be verified, especially where they concern the management of property by a management board and by condominium owners' councils, and specifying the legal capacity of these councils.

## **5. Cooperative ownership right to premises**

The institution of the separate ownership of premises could fully replace the 'cooperative ownership right for premises' currently incorporated as one of the limited property rights. The creation of multiple legal institutions with the same social function is inexpedient as it both increases the number of legal provisions beyond what is needed, and makes it more difficult to apply these provisions, especially when they are outside the CC, and under the deceptive rubric of 'ownership' rights.

Pre-war regulation of the ownership of premises was primarily intended for use by members of residential housing cooperatives and for the purpose of protecting their rights.

For these reasons, the possibility of any future creation of a 'cooperative ownership right for premises' should be eliminated. If, however, lobbying by cooperative movement activists makes this impossible, the provisions of this institution (or at least the fundamental scope) should be incorporated into the CC. A report from the Prime Minister's Legislative Council made such a suggestion concerning all cooperative ownership rights for premises.

## **6. Perpetual usufruct**

### **6.1. Introductory comments**

The institution of perpetual usufruct has always been the source of numerous misgivings, primarily concerning the nature of this subjective right. The predominant view is that it is of a particular nature closer to ownership than other proprietary rights, a conclusion that also clearly results from both the motives of the Codification Commission and the specific positioning of this institution in between ownership and limited property rights. Maintaining this hybrid construct would be at odds with the systemic requirements for proprietary rights as posed by the Constitution.

Attention has rightly been drawn to the fact that this doubtful legal construction, which serves as a substitute for ownership, is a product of communist ideology whereby immovables indivisibly belonged to the State. For this reason, following the collapse of that legal regime, there were demands to remove this institution from the legal system. Were there to be no structural or legislative defects, the institution's communist origins would not justify its elimination. However, the structural defects are manifested by a division of the regulations of this institution between the Civil Code and the Law on Administering Immovables, and in ambiguities of the legal regime. It is difficult to determine which provisions should be applied to fill in the numerous gaps in the law to this hybrid construct (provisions on ownership or provisions on limited property rights (by means of analogy)). It should be pointed out that this quasi-ownership institution is exposed to accusations of being unconstitutional, as it clearly distinguishes between the protection of ownership and protection of other proprietary rights. Additionally, it should be noted that it was because of ideological reasons that this institution was applied in a much broader manner than originally planned (to support residential housing). The desire to maintain the state ownership of immovables inspired the use of perpetual usufruct for other purposes far from housing construction, such as agricultural property.

In recent years, several laws have been enacted that facilitate the transformation of perpetual usufruct into ownership rights on a preferential basis for the perpetual usufruct holder. This trend was further encouraged by high usufruct fees and a desire by usufruct holders to expand their rights. The matter was ultimately regulated by the Law on Transforming Perpetual Usufruct into Ownership Rights of Immovables of 29 July 2005. In this manner, the door was opened for the gradual disappearance of this institution from the Polish legal order.

## 6.2. Legislative proposals

In light of the above, the following legislative proposals should be put forward:

- 1) The institution of perpetual usufruct should be removed from the Civil Code, which in practice will mean that no more usufructs can be granted.
- 2) Existing perpetual usufructs would be governed by the provisions used to date, including the referenced Law on Transforming Perpetual Usufruct into Ownership Rights. Within this scope, usufructs would be maintained, in respect of the principle that rights that have been granted are subject to protection. This method will be more effective than any possible repairs to the institution of perpetual usufruct, which would, in any case, have to result in an entirely new institution. That might also result in the danger of a violation of rights already granted.

## 7. Rights to develop a plot of land<sup>76</sup>

If the proposal to eliminate the institution of perpetual usufruct is implemented, then a new type of limited property right in the form of the right to develop a plot would have to be created. This would encompass the administrative function of perpetual usufruct, but its substance would be adapted to contemporary economic needs and socio-systemic conditions.

In particular, as a limited property right, the right to develop a plot would have a specified place in the structure of the legal system. It would serve to support all types of construction, both above and below ground. Such rights could be established over private land, and not just communal and state land.

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<sup>76</sup> Issues related to land and mortgage registers and building law were discussed during a conference with the Dutch experts on 2-3 June 2005. Written reports from this event were prepared by Prof. S. van Erp (Holland) and Dr Viola Heutger and Dr Kamil Zaradkiewicz (Poland). (Dr K. Zaradkiewicz's report was published in *Przegląd Legislacyjny* 2006, no. 2, p. 53 et seq.) The discussion was chaired by retired Supreme Court judge Stanisław Rudnicki, and participants included Prof. Zbigniew Radwański, Prof. Paul Meijknecht, Supreme Court judge Dr Gerard Bieniek, Prof. Edward Gniewek, Prof. Jacek Gołaczyński, Dr Andrzej Cisek, Aleksandra Gregorowicz, prosecutor Marek Sadowski, and Aneta Wiewiórowska.

## 8. Transmission equipment<sup>77</sup>

### 8.1. Legal status quo

The legal status of transmission equipment is currently governed by art. 49 of the CC<sup>78</sup>, which has been in effect since the Civil Code was first enacted. The systemic and socio-economic transformations that began in the 1990s, along with significant changes to legal regulations, have resulted in a series of legal qualms that emerged during the application of art. 49 of the CC. In its judgment of 4 December 1991 (W 4/91 (OTK 1991, nr 1, item 22)), the Constitutional Tribunal interpreted art. 49 of the CC to mean that upon the moment of connection with a public utility, transmission equipment not only ceases to be an integral part of the immovable where it is installed, but it becomes the property of the owner of the state enterprise. The legal basis for the transfer of property is art. 191 of the CC.

This same view was accepted by the Supreme Court in other of its rulings (e.g. the judgment of 23 June 1993. I CRN 72/93, Mon. Pol. 1993, no. 4, item 15; Resolution of 13 January 1995, III CZP 169/94, OSNC 1995, no. 4, item 64; and others), as did the Supreme Administrative Court (e.g. the judgment of 7 October 1999, I SA 2082/98, unpublished).

In its verdict of 26 February 2003 (II CK 40/02, unpublished), the Supreme Court conducted a different interpretation of art. 49 of the CC by indicating that art. 49 merely determines that the equipment mentioned therein, and other similar types of equipment, no longer comprise integral parts of a property when they become part of a transmission enterprise, but the question of the person administering the enterprise obtaining legal title to this equipment remains unresolved. At the same time, the Court referred to art. 31 sec. 1 of the Law on Collective Water Supplies and Collective Sewage Disposal (Journal of Laws, No. 72, item 747) of 7 June 2001, which determines that anyone using their own resources to build water transmission equipment and sewer systems can transfer the same to the municipality, or a water-sewage enterprise, in exchange for pecuniary consideration according to conditions set out in the contract'. According to the Supreme Court, the freedom to establish the substance of a contract enables the parties to establish the legal title on the basis of which the municipality or enterprise will be using the equipment. This could be either a property law title, or an obligational one (usufruct, rent, leasing).

This new direction of interpretation has been continued in Supreme Court rulings, and its rectitude has been confirmed by a resolution of seven Supreme Court judges of 8 March

<sup>77</sup> This section was drafted by Dr Gerard Bieniek.

<sup>78</sup> CC art. 49: Facilities for the supply or removal of water, steam, gas or electric current and other similar facilities shall not be component parts of land or a building if they belong to an enterprise or an institution.

2006 (III CZP 105/05, not published), which decided that 'art. 49 of the CC does not provide a independant legal basis for transferring the ownership title to equipment serving the supply or disposal water, steam, natural gas, electricity or other similar forms of equipment to the owner of the enterprise as a result of simply connecting these to a network belonging to this enterprise'. The Supreme Court also rejected the possibility of ownership of equipment being transferred to the owner of an enterprise on the basis of art. 191 of the CC<sup>79</sup>, and noted that the CC does not contain the notion of a 'component of an enterprise'.

This direction of interpretation of art. 49 and 191 of the CC is justified on the basis of the current legal system in effect. As a result, it should be presumed that anyone who has built equipment mentioned in art. 49 with their own resources, may use a contractual arrangement to transfer (at cost or no cost) ownership to the owner of a distribution enterprise. The parties may establish another legal title (property or obligational), on the basis of which the enterprise may use the equipment. This state of affairs has resulted in an increasing number of court cases because the parties cannot agree upon conditions (in particular as concerns payment) for transferring ownership or establishing another legal title. It is not possible to rule out a situation where the termination of a leasing agreement and the requirement to return the leased equipment may create a real danger of the disintegration of a distribution network. It would be justified to add regulations to the Civil Code that clearly specify the legal status of transmission equipment, while at the same time ensuring that the costs of building infrastructure can be reimbursed to those people who have done so on their own.

## **8.2. Legislative proposals**

The best point of departure for developing the necessary legal regulations in this area would be to specify the legal status of the network belonging to the owner of the transmission enterprise. The network is understood as a set of installations and equipment that are linked and co-functioning in order to deliver or remove water, steam, natural gas, etc. From a legal perspective, the network should be classified as a set of things. Such a legal qualification would make it possible to acknowledge that the equipment mentioned in art. 49 of the CC, which prior to hook up comprised a component of the property, could, as a result of connection to a network belonging to a transmission enterprise, become a constituent component of the network. This all depends on the extent of the connection with the network.

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<sup>79</sup> CC art 191: The ownership of immovable property shall cover a movable connected with that immovable property in such a manner that it has become its component part.

If the connection is sufficiently attached to the network that it meets the conditions specified in art. 47 par. 2 of the CC (the conditions for determining that something is a constituent component), then upon connection this equipment will obtain the status of a constituent component of the network. At the moment of connecting the equipment to the network, the hitherto owner loses ownership to the owner of the network to which they have been attached; this generally is the owner of the transmission enterprise.

Given these premises, one should consider whether to add the following sentence to the current wording of art. 49: 'The transfer of ownership of this equipment to the owner of the enterprise (utility) occurs through the fact of connecting them with the network in such a manner that they become a constituent component. Art. 194 of the CC<sup>80</sup> shall be applied as appropriate'.

The second problem related with the matter at hand is the reinstatement of a provision regulating the 'transmission servitude'. In a resolution of 17 January 2003 (III CZP 79/02 (OSNC 2003, nr 11, item 142)), the Supreme Court allowed the possibility of establishing a contractual land servitude for an energy enterprise, and noted that this can also be done even if the land in question belongs to the enterprise. The legal basis is art. 285 of the CC<sup>81</sup>. This resolution met with criticism that it did not meet the prerequisite requirement of art. 285 par. 2 of the CC, as the purpose of establishing a servitude is to increase the usefulness of the transmission enterprise. It is impossible to come to terms with this criticism, though the functional interpretation of art. 285 par. 2 of the CC supports the propriety of the resolution.

It should be noted that the CC did not adopt the legal regulation of art. 175 of the Property Law, under which a servitude may be established also on behalf of each and every owner of a specific enterprise; the corresponding provisions of land servitude would be applied to such a servitude. Ideological motives of lawmakers aside, it seems that this decision was justified from an economic perspective. It is of course self-evident that any transmission enterprise installing the equipment mentioned in art. 49 of the CC on someone else's land must be in possession of a relevant legal title to the property on which the equipment will stand. This title should also facilitate access to the equipment for the purposes

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<sup>80</sup> CC art. 194: The provisions concerning the transformation, connection and mixing of things shall not prevail over those concerning the duty to redress damages, nor those concerning unjustified enrichment.

<sup>81</sup> CC art. 285(1) An immovable property may be encumbered on behalf of the owner of another immovable property (dominant immovable property) with a right whose contents consist either in that the owner of the dominant immovable property may avail himself of the encumbered immovable property within the designated scope, or in that the owner of the encumbered immovable property becomes limited in the possibility of performing certain designated acts, or in that the owner of the encumbered immovable property cannot exercise designated prerogatives which he has with respect to the dominant immovable property by virtue of the provisions on the contents and exercise of ownership (predial servitude). (2) A predial servitude may only lead to an increase in the usefulness of the dominant immovable property or its designated parts.

of repair and maintenance. The basic method for obtaining such a legal title is a contract with the owner or holder of the perpetual usufruct (e.g. sale contract, decision to use, servitude, rent, lease). According to art. 124 of the Law on Administering Immovables of 21 August 1997, legal title can be granted to other people's immovable property in an administrative procedure, and is dependent on, among other things, showing that the owner of the property (or holder of perpetual usufruct) would not agree to establishing such a title for the transmission enterprise by means of a civil law process.

For these reasons, the proposal to reinstate norms for transmission servitude into the CC seems fully justified. The following content could be added (to art. 145 of the CC, creating provision art. 145<sup>1</sup>):

**'art. 145<sup>1</sup> § 1.** It is possible to establish a servitude corresponding in substance to the necessary path for a business operating a public utility enterprise, regardless of whether it is the owner of the immovable or not.

**§ 2.** The servitude, as referred to in § 1, can be established for the purpose of building, maintaining or conserving drain conduits, pipes and equipment for the transmission of liquids, steam, natural gas and energy installed on a property, as well as other improvements or objects required for the proper operating of these conduits and equipment.'

## **9. Timesharing**

### **9.1. General comments**

Timesharing contracts are regulated in the Polish legal system in a manner compliant with EU directives. It is possible to use a contract of an obligatory nature, as well as one creating property rights. This causes difficulties in positioning this institution within the CC. For this reason, Polish lawmakers have placed this institution in a separate law outside the CC.

Nonetheless, in order to make it possible for timesharing to take on the form of a proprietary right, it is necessary to anchor this institution somehow within the provisions of property law, due to the closed catalogue of subjective property rights. Polish lawmakers did this by creating a corresponding subtype of usufruct (compare with art. 270<sup>1</sup> of the CC).

## 9.2. Legislative proposals

This solution is incompatible with the essential elements of the right of usufruct, and thus a bolder decision should be made in the future. This would involve shaping a separate limited property right specially adapted for the function of timesharing.<sup>82</sup>

## 10. Real security of liabilities<sup>83</sup>

### 10.1. Mortgage

This is the basic institution in Polish law for securing a liability with immovable property. It is based on the principle of the interdependency of rights, meaning that mortgages are accessorial.

There is good reason to be critical of the regulation of this institution outside of the CC. As mentioned above, this was caused by ideological considerations that are no longer relevant. Thus emerges a *de lege ferenda* proposal to incorporate into the CC **all** substantive law provisions regulating this institution, not just those encompassed by the Law on Land and Mortgage Registers and Mortgage.

We should also carry out a thorough review of this institution from the perspective of its usefulness in contemporary economic exchange, particularly as concerns the interdependency of rights and the scope thereof.

The preparatory efforts underway to create a homogenous European notion of mortgage may be particularly relevant in this regard.

### 10.2. Land debt<sup>84</sup>

A fundamental principle of a market economy is an effective system of credit. The proper functioning of such a system is strictly connected with effective legal institutions providing the necessary level of security to creditors, primarily institutional lenders, for their liabilities. The traditional forms of security in our legal system do not sufficiently perform

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<sup>82</sup> Compare with K. Zaradkiewicz, *System Prawa Prywatnego*, vol. 4., Warsaw 2005, p. 385 et seq.

<sup>83</sup> These issues were discussed during a conference with the Dutch experts on 15-16 September 2005. Written reports from this event were prepared by Prof. Sjef van Erp and Prof. Jacek Gołaczyński and are attached to this Paper. The discussion was chaired by retired Supreme Court judge Stanisław Rudnicki, participants included Prof. Paul Meijknecht, Prof. Zbigniew Radwański, Supreme Court judge Stanisław Rudnicki, Supreme Court judge Dr. Gerard Bieniek, Dr Kamil Zaradkiewicz, Prof. Edward Gniewek, Prof. Jacek Gołaczyński, judge Jan Bołonkowski, prosecutor Teresa Ostrowska, Dr Fryderyk Zoll, Dr Agnieszka Drewicz-Tułodziecka, and Aleksandra Gregorowicz.

<sup>84</sup> This section was prepared by K. Zaradkiewicz.

this task, especially concerning the material security of real credit. This applies primarily to mortgages, which do not meet the needs of specialised crediting methods that often involve frequent subjective and objective changes to a liability within a specific given security. Because of the stringent attachment to a secured liability (the interdependency of rights), the possibilities for adapting to on-going needs are quite limited. The institutional attachment of a mortgage with a secured liability means that changes within the mortgage are impossible, which means that it is impossible to secure another liability (also for another creditor) under the same mortgage that was established to secure a specific liability, and no other. Using current legal provisions, it is impossible to use one mortgage to secure consortium credit. This makes it significantly more difficult to finance investment processes, which require flexibility in securing various liabilities stemming from a loan agreement.<sup>85</sup>

Thus the proposal, first put forward long ago, to introduce into Polish law an instrument that would be independent of the liability. This property law institution would make it possible to, first and foremost, secure financial liabilities independent of the liability itself, and regardless of a change of the owner (holder of internal usufruct). Polish and other legal literature has long been in agreement that non-accessorial material security on immovable property is more flexible than a traditional mortgage, and makes it possible to achieve the objectives mentioned above, which are not achievable with a mortgage.<sup>86</sup> In this context, the Polish legal system would need to restore certain modern institutions to facilitate exchange. Some of these partially functioned before the homogenisations of property law in the Decree of 11 October 1946 (Property Law, (Journal of Laws No. 57, item 319, with subsequent amendments)), some partially existed prior to the passing of the Law on Land and Mortgage Registers and Mortgages of 6 July 1982 (Journal of Laws, 2001 No. 124, item 1361, with subsequent amendments), and yet others were drafted by the Codification Commission of the Republic of Poland working on the homogenisation of property law during the interwar period (with certain changes related to adapting some legal constructions to the premises of the law and in keeping with contemporary principles of producing legislation).

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<sup>85</sup> See for example O. Stöcker, *L'eurohypothèque*, pionnier d'un marché intérieur du crédit hypothécaire, *Banque & Droit* 1996, nr 49, p. 14 et seq.; M.H. Picherer, *Sicherungsinstrumente bei Konsortialfinanzierungen von Hypothekenbanken*, Frankfurt am Main 2002, O. Soergel, O. Stöcker, *EU-Osterweiterung und dogmatische Fragen des Immobiliarsachenrechts - Kausalität, Akzessorietät und Sicherungszweck*, *Zeitschrift für Bankrecht und Bankwirtschaft* 2002, no. 5, p. 412 et seq.

<sup>86</sup> See: M. Planiol, G. Ripert, E. Becqué, *Traité pratique de droit civil français*, vol. XII: *Suretés réelles*, wyd. 2, Paris 1953, p. 379; P.H. Steinauer, *Les droits réels*, t. III, wyd. 2, Berne 1996, p. 97; w piśmiennictwie polskim zob.: S. Szer, *Nowe prawo rzeczowe*, *Demokratyczny Przegląd Prawniczy* 1947, no. 5, p. 16; J. Wasilkowski, *Prawo rzeczowe w zarysie*, Warsaw 1957, p. 259.

One such institution is a limited property right functioning in Poland up until 1947, known as a 'land debt'. A draft bill has already been proposed to reinstate this specific limited property right into the Polish system of civil law. It was determined advisable to name this institution 'land debt', thus referring to a traditional institution that existed before the unification of property rights, and which was nearly identical in substance and function. Moreover, this name is already well known in legal scholarship. Other possible names were considered, including 'property debt'.<sup>87</sup> In the end, traditional concerns won out. The notion of land debt is not entirely foreign to the current legislation. Given the fundamental difference between a land debt and a traditional mortgage, it was considered desirable to use a name without any associations to terminology used in existing provisions concerning securing liabilities, including the term 'non-accessorial mortgage'.

Given these advantages, non-accessorial property security is known and is popular in Europe, in particular in Germany (land debt) and Switzerland (mortgage letter). Statutory regulations for this type of institution also exist in Liechtenstein and Turkey whose civil legislation is based upon Swiss solutions, and to some extent both Austrian law (the right to ordain the mortgage place) and the Scandinavian systems (letter pledge law). During the recodification efforts in the 1990s, non-accessorial pledge rights were introduced in Hungary, Estonia, and in the new Slovenian Code of Property Rights (starting 1 January 2003), where regulations governing land debt are found next to mortgages.<sup>88</sup> Such solutions have been basically lacking in Polish law since the homogenisation of the norms of property law in 1946.

Thus the draft project refers to well-known solutions in European mortgage law, first in foremost that of Slovenia and Germany. The introduction of the concept of land debt will meet the expectations that have been formulated in Polish legal literature. However, the project modifies principles existing in other legal systems, or introduces solutions that were developed in other systems as the result of practical experiences, and which aim first and foremost at ensuring the security of exchange.

The proposed legal constructs are not faithful copies of the regulations of the German Civil Code (§§ 1191-1203). It should be stressed that, by introducing these provisions, the project meets the proposals that have been put forward, and is partially modeled after

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<sup>87</sup> Compare with other materials on this topic: A. Zieliński, *Opinia o projekcie ustawy o zmianie ustawy – kodeks cywilny, ustawy o księgach wieczystych i hipotece, ustawy – Kodeks postępowania cywilnego, ustawy o listach zastawnych i bankach hipotecznych oraz ustawy – Prawo o notariacie (projekt ustawy z lutego 2002 r.)*, *Przegląd Legislacyjny* 2002, book. 2, p. 91 et seq.

<sup>88</sup> Compare with K. Zaradkiewicz, *Tzw. zastaw nieakcesoryjny w polskim prawie cywilnym. Uwagi ogólne na tle ustawy o zastawie rejestrowym i rejestrze zastawów*, *Kwartalnik Prawa Prywatnego* 2000, book. 2.

proposals that have been prepared by teams of specialists called together to work out general directions for change in European mortgage law. This applies especially to the statutory regulation of a contract limiting the scope of application of a land debt; the possibility for there to be a land debt of an owner, including purchase with the current authorised party relinquishing rights (art. 112<sup>8</sup>-112<sup>13</sup>), and the impermissibility of an owner to satisfy (proposed art 1023 par 3 of the Code of Civil Procedure). These proposals are close to or comprise models for some contained in the project by a team of eminent specialists of the Union of German Mortgage Banks<sup>89</sup>.

### 10.3. Pledges

The regulation of this institution is dispersed throughout the Polish legal system: in addition to being governed by the general provisions of the CC, various types of pledges are regulated outside of the CC in a variety of laws. We should aim at concentrating all these provisions within the CC, as was done by Dutch lawmakers. In particular this applies to the substantive law regulation of registered pledges, currently regulated in a separate law. At the same time, there is no current reason why a treasury pledge, subject to entry into a register maintained by tax offices, should still exist. It also seems that there is no justification for the further existence of separate regulations for a register of movables in warehouses.

After introducing these changes, we could introduce into the CC homogenous principles for all pledges concerning priority, which would take into account the moment a pledge was established.

It also seems desirable to introduce the registration of pledges for securing liabilities from general exchanges. At the current time, only banks, financial institutions, the State Treasury, local government agencies, and businesses conducting economic activity in Poland can secure their liabilities with this form of pledge

The system of registering pledges has also been criticised for being overly formalised and protracted. Subsequently there is a proposal, in following with other Central European

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<sup>89</sup> See H. Wolfsteiner, O. Stöcker, *Diskussionspapier: Nicht akzessorisches Grundpfand für Mitteleuropa*, *Zeitschrift für Bankrecht und Bankwirtschaft* 1998, book. 4, p. 264 et seq., compare with in particular p. 266-270 and §§ 1, 7, 9, 10, 12 and 15 of that draft; S. Nasarre Aznar, O. Stöcker, *Propuesta de regulación de un derecho real de garantía inmobiliaria no accesorio. El ejemplo de la Europa central*, *Revista crítica de derecho inmobiliario* 2002, vol. 671, p. 915 et seq.; see also on the proposal to introduce non-accessorial pledge rights on real property, a report prepared for the EU Commission: *The building of a European Capital Market*, Bruxelles 1966, and the report by the International Union of Latin Notarys on the proposal for the *Euromortgage* – compare with H.G. Wehrens, E. Gresser, *L'eurohypothèque*, ed. 2, *Union Internationale du Notariat Latin*, Amsterdam 1994.

countries, to limit the register to an informational function and to eliminate any constitutive meaning that the register may have.

At the same time, the scope of cognition of the registry court would be limited to disclosing to third parties the fact that a pledge has been established.

We should also reconsider the prerequisites for establishing a pledge, as well as the issue of a non-accessorial registered pledge.

The effectiveness of this limited property right would certainly increase were there to be created some sort of non-execution based manner of satisfying liabilities that have been secured with a pledge. In particular, this could be through a public auction by a notary public or bailiff.

#### **10.4. Transfer of ownership as security for a debt**

Against the backdrop of solutions for foreclosure in other legal systems, and Polish practices to date, one suggestion would be to replace the currently fragmented regulations contained in banking, bankruptcy, and recovery law with one homogenous regulation in the form of contractual trusteeship in the CC book devoted to property law. When adopting this legislative direction, in particular the question of the effectiveness of security towards third parties is something that needs to be put right.

The greatest misgivings in this area were caused by encompassing immovables with the institution of pledges, but this is now the predominate trend in legal scholarly thought.

### **III. LAW OF OBLIGATIONS**

#### **1. Scope of codical and extracodical regulation**

##### **1.1. General comments**

This branch of law undoubtedly constitutes the core of civil law, including the Civil Code. It should be remembered that Book III of the Civil Code, devoted to obligations, contains more articles than all the remaining three books put together. Although formally it is not divided into a general part and a specific part, this division is justified in the sequence of the legal institutions regulated therein, and is generally accepted in science. This is of utmost importance for the application of law, since the general rules apply also to obligation relationships regulated outside the Civil Code.

The specific part, in turn, almost exclusively comprising regulations for the most typical contracts, by the nature of things applies to the obligation relationships defined in such regulations. However, the catalogue of admissible contracts is not closed because of it. Typical contracts can be created on the basis of extracodical regulations and, in addition, in light of the freedom of contract principle (art. 353<sup>1</sup> of the Civil Code) – parties may conclude contracts that are not named, i.e. contracts whose wording is not regulated in the statute law system. They may also regulate their rights and obligations in a different way than according to the indications of the default rules that prevail in the law of obligations. One should be warned, however, against excessive interference of the statute law in the area of obligation relations, which links individually designated parties. Let them rather themselves decide about their mutual relations because they can assess their interests best.

However, increased focus should be placed on the established customs in specified types of social relations that are closer to the intentions of the parties than general legal norms.

Progressing with the disintegration of the law of obligations system involving the location of norms, and sometimes even entire institutions of this branch of law, in extracodical acts, in particular in ‘comprehensive’ acts, where norms from different branches of law are combined, is a highly disquieting phenomenon.<sup>90</sup>

This trend is based on an erroneous conviction that in this way one can “comprehensively” regulate all the legal problems arising in connection with a specific social phenomenon, as if the necessity to apply additional general rules governing individual branches of law was waived. As a result, this method easily leads to inconsistency in the legal system and the redundant repetition of legal norms, becoming one of the causes of their redundant multiplication. This direction of legislation is supported by the flawed organisation of the law-making, through assignment to individual ministries, which display a natural tendency to regulate all the social issues subject to their powers in a comprehensive manner.

It is worthwhile noting some examples of this kind.

## **1.2. Banking law**

Banking law, as set out in the act of 29 August 1997, is a classic example of such a comprehensive regulation. Next to norms regulating the creation and transformation of banks

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<sup>90</sup> This progressing de-codification was fairly noted by E. Łętowska in *System Prawa Prywatnego*, vol. 5, devoted to the general part of the law of obligations, currently prepared for printing.

and their internal structure, there are numerous norms of a typically civil law nature, such as: bank account contract (which is also regulated by the Civil Code), different regulations of banking activities, a unique regulation of the electronic form of a legal act, loan contract, guarantees, suretyships, letters of credit, transfer of ownership as security on a debt, and security deposit.

This regulation has come under fire from the convincing criticism of a distinguished expert on banking law, Professor Mirosław Bączyk. He writes that “in the course of work on consecutive amendments of the Banking Law of 1997, a questionable postulate was voiced that some banking contracts (e.g. bank account contract, art. 725 of the Civil Code) should be regulated only in the Banking Law. However, it would more appropriate, in my opinion, to adopt the opposite concept, i.e. the synthetic regulation of certain banking contracts primarily in the Civil Code (e.g. loan contract, and guarantee (including bank guarantee) contract).”<sup>91</sup>

Such a regulation leads to the decomposition of the civil law, creating a separate system of civil law activities not integrated with the Civil Code.

### **1.3. Right to lease living accommodation**

The Law on the Protection of Tenants’ Rights, Municipal Housing Resources and an Amendment of the Civil Code of 21 June 2001 is also of such a comprehensive nature. It combines the tasks and obligations of the municipality with the regulations on lease contract set out in the Civil Code. Civil law regulations set out in this separate act are at the same time not integrated with Civil Code regulations, and are often redundant repetitions thereof. Their defectiveness is often pointed to in legal doctrine.

### **1.4. Travel contract**

The Law on Travel Services of 29 August 1997 (*Journal of Laws* no. 133, item 884 as amended) implements directive 90/314/EEC. Articles 11-19 of this act regulate protection for clients using the services of businesses providing travel services. These entities are subject to restrictive administrative limitations specified in the act. The legislative concept of this act involves mixing, in a single legal act, issues of administrative and legal restriction of travel

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<sup>91</sup> Banking Law, Introduction by Mirosław Bączyk, 5<sup>th</sup> edition 2006, Warsaw 2006, p. XV.

services, and fragments of the legal regime of a contract on the provision of such services. This has met with decisive criticism on the part of the most learned experts on this matter.<sup>92</sup>

Hence it is worthwhile supporting the postulate that, considering the social importance of the travel contract, it should be regulated in the Civil Code, while waiving civil law regulations and leaving only administrative regulations in the Law on Travel Services. It is important to remember that the provisions of a travel contract have to be connected with a number of other general provisions of the Civil Code.<sup>93</sup>

It should be noted that this route was successfully implemented by the German legislator, regulating this type of contract in § 651 a – 651 k. BGB (Civil Code).

### **1.5. Contract of delivery**

Deliberations on the Civil Code should also cover the question of whether or not it should be “slimmed” by rescinding redundant institutions.

It seems that the contract of delivery is such an institution; it was established mainly for the needs of a centrally planned economy in the People’s Republic of Poland. However, in the market economy system, the functions of such a contract can be successfully performed by a sales contract – as it is generally accepted in Western European countries – or a specific-work contract.<sup>94</sup>

### **1.6. The problem of legal regulation of contracts in economic practice**

The question to consider is whether the catalogue of named contracts should be expanded in the Civil Code to include the types of contracts that have taken root in economic practice, and whether the existing legal regulation is sufficient to clearly resolve legal effects resulting from them.

The problem still requires a more extensive legal discussion. However, examples could be raised of contracts that would require consideration in light of this evaluation criterion.

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<sup>92</sup> Cf. E. Łętowska, *Prawo umów konsumenckich*, Warsaw 2002, p. 499; M. Nesterowicz (in) *System Prawa Prywatnego*, vol. 7, Warsaw 2004, p. 803 - 804.

<sup>93</sup> M. Nesterowicz, *op. cit.*

<sup>94</sup> Cf. W.J. Katner (in) *Prawo umów handlowych*, vol. 5 edited by S. Włodyki, Warsaw 2006, p. 1036 et al.

Mainly the following contracts are meant here: factoring<sup>95</sup>, forfeiting<sup>96</sup>, franchising<sup>97</sup>, compensation<sup>98</sup>, cartel<sup>99</sup>, and framework contracts<sup>100</sup>.

## 2. European contract law

### 2.1. Introductory remarks

The idea of European unification of the law of obligations, in particular the part constituting the core of contract law, has a long history. It dates back to the times of Roman law. It is often forgotten that it has been modified and supplemented with particular laws, performing the function of general principles. This was shown most clearly by particular codifications of German countries (Landrechts). It was only the classic 19<sup>th</sup> century codifications that deprived the Roman law of its binding power (the last BGB since 1 January 1900). Despite that, the Roman tradition placed great significance on contract law regulations, not only in the aforementioned, but also in later codifications. It was the proximity of general concepts that contributed to the easiest and fastest unification of the law of obligations in the Second Republic of Poland, coming in the form of the Code of Obligations in 1933.

However, the intensification of international economic trade, particularly within the European Community – requires a fuller unification of contract law, not only to facilitate trade, but also to reduce its costs. It is also important that these regulations take into account new technological (e.g. electronic communication) and organisational (e.g. financing methods) developments and changes of an axiological nature (e.g. increasing focus on the protection of human rights and consumers).

There is also the economic argument to take into account, namely that capital avoids risk, and a lack of uniformity of legal regulations and the resulting diversified practices in the application of law increases the economic risk of individual businesses and consumers in cross-border relations.

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<sup>95</sup> Cf. K. Kruczałak, E. Rott-Pietrzyk (in) *Prawo umów handlowych*, vol. 5. p. 604 et al.

<sup>96</sup> Cf. op. cit., p. 623 et seq.

<sup>97</sup> Cf. S. Włodyka, op. cit., p. 829 et seq.

<sup>98</sup> Cf. op. cit., p. 846 et seq.

<sup>99</sup> Cf. op. cit., p. 883 et seq.

<sup>100</sup> Cf. op. cit., p. 68 et seq.

## 2.2. Unification efforts

For these reasons, initiatives are being undertaken to unify contract law, especially in the European Union.

They are manifested primarily in the form of legally binding regulations and directives. The former are binding directly upon EU members, including Poland, and cannot be even reproduced in Polish laws, automatically constituting a component of the Polish legal system. The latter must be implemented in the form of Polish law-making bodies enacting appropriate norms. These acts, after all, regulate only certain fragments of the area of contract law, and they do it in a most casuistic manner, without making up a coherent system.

The Vienna Convention on contracts for the international sale of goods, ratified by Poland, is of a slightly broader scope, though it does not apply to the national (internal) law of individual states. Undoubtedly, however, it was an inspiration for taking initiatives aimed at unifying the law of obligations, in particular contract law, of all EU states.

In particular, an informal group of scholars has developed the so-called Principles of European Contract Law, in short PECL or “Lando Principles”.<sup>101</sup>

These principles can be applied only where the parties express their will to do so, with the exception of several cases of imperative regulations. Their purpose was to prepare a notional and dogmatic infrastructure to place community law in order, and establish a model for national legislation and – possibly in the future – for the preparation of a European Civil Code.<sup>102</sup>

The study group was appointed in 1998 and, just like in the case of PECL, the starting point for the group’s work is neither a specific system of law nor community law. Its work entails the development of 16 chapters incorporating the content of PECL in books I - IV. Books V to X are to comprise regulations pertaining to individual types of contracts (originally this was supposed to be prepared by the Lando group), book XI – tort law, XII – unjustified enrichment, XIII – management of another person’s affairs without mandate, XIV – XV – transfer of title to a movable thing and credit collateral on immovable property, XVI – is to be devoted to the institution of trust. It is important to note the extensiveness of service contracts in terms of typology and content, to which the project devotes a separate “general part”, defining common issues. Individual service types (towards non-professionals)

<sup>101</sup> They were published in three stages, part I in 1995, part II in 1999, and in 2000 a modified version of two first parts appeared, comprising art. 1:101 – 9:10, and in 2003 – part III, art. 10:101 to 16:103.

<sup>102</sup> Inspired by the paper by E. Łętowska, chapter I System Prawa Prywatnego, vol. 5 currently prepared for printing.

comprise: mandate (agency) – activity for another person that binds it legally; construction – performance of a work (object) out of separate parts; design – performance of a work (object) used to perform other works; and services - involving the provision of information, processing goods, storage, transport, treatment (procedures aimed at changing the health condition). In addition, the service of commercial intermediation, franchising, distribution contract, leasing of movables, insurance, financial services, collateral contracts (personal and property), donation, and articles of association are envisaged.<sup>103</sup>

The intention to create a uniform Civil Code for the EU area does not seem to be realistic in the foreseeable future. However, the results of this work should definitely be closely considered in the legislative work over the shape of the Polish private law system – in particular the Civil Code.

It should be also noted that the legislative inspirations may also arise out of other centres dealing with the unification of civil law. This applies in particular to the work of: the Trento group (Common Core of European Private Law); the Tilburg group (European Center of Tort Law and Insurance Law); and the Gandolfi group (Academy of European Private Lawyers).

### **3. Consumer contracts<sup>104</sup>**

#### **3.1. Introduction**

The acts from the *acquis communautaire* regulating trade with consumer participation have, for the most part, been transposed into Polish law. Only acts where the deadline for transposition to domestic law has not passed are still awaiting implementation<sup>105</sup>. The time that has passed since the transposition makes it possible to assess the implementation, identify problems and present proposals for necessary changes. Poland is not acting under an exceptional time pressure any more, which was the case in harmonising the *acquis* before EU Accession. At that time, the Polish legislator made a hasty transposition of directives as there

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<sup>103</sup> E. Łętowska, as above.

<sup>104</sup> This text is based on a report drawn up by a team with the following composition: prof. dr. hab. Ewa Łętowska, M. Jasielska PhD, A. Wiewiórowska, P. Miłkaszewicz M.A., Judge K. Lis. The report is based on the findings of the Polish-Dutch conference devoted to the implementation of consumer directives in the Polish legal system (26-27 I).

<sup>105</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council, OJ L 149/22, of 11 June 2005.

was limited time to reflect upon the functionality, fairness and effectiveness of the adopted solutions, as well as upon their effect on the whole area of civil law. In addition, tactical considerations relating to the accession (obtaining the formal approval of the adaptation process) forced solutions which were often far from the optimal balancing of these three factors: achievement of *effet utile*, coherence of the Polish civil law system and ensuring the best possible consumer protection.

During the work of the Civil Law Codification Commission on the implementation of individual acts of community law, an assumption was made that one should strive to incorporate the consumer contract law to the maximum extent into the Civil Code and, as far as possible, bring about extracodical implementation and then consider transferring the specific subject matter to the Civil Code<sup>106</sup>. The co-operation between the CLCC and the Ministry of Justice ensured that the work progressed smoothly and was a guarantee of top legislative quality of the bills submitted by the Government. There was an intensification of work on the transposition of consumer directives between 1998 and 2002. During this period, the following consumer acts were adopted, among others, the Act of 2 March 2000 on the protection of selected consumer rights and on liability for losses caused by hazardous products (Journal of Laws No. 22, item 271, as amended) (implementing four directives: 97/7/CE on the protection of consumers in respect of distance contracts, 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, 93/13/EEC on unfair terms in consumer contracts and 85/374/EEC on liability for defective products, the law on timesharing of 13 July 2000 (implementing directive 94/47/CE on timesharing) and the Act of 27 July 2002 on the particular terms of consumer sales and on amendments to the Civil Code (Journal of Laws No. 141, item 1176) (implementing directive 99/44/CE on consumer sales). Opening a debate about modifying the Polish Civil Code requires also a discussion about the position of consumer regulations in the civil law system. The point is not only about improving the quality of the existing consumer legislation, or about ensuring its cohesion and effective functioning, but a decision is also required about capturing all consumer matters in the Polish civil law system, whose core is the Civil Code, and amendments that should be introduced in other areas of law, such as the Code of Civil Procedure and the Bankruptcy law as a result of amendments introduced to the Civil Code.

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<sup>106</sup> This was the case, for example, with the implementation of the directive on consumer sales, which is currently implemented in the Act of 27 July 2002 on the particular terms of consumer sales and on amendments to the Civil Code (Journal of Laws No. 141, item 1176). However, already during the work on the transposition, an assumption was made that later the subject matter will be moved to the Civil Code (see the minutes from the meeting of the Civil Code Codification Commission on 22 February 2001).

Also, decisions must be taken over where consumer matters should ultimately be regulated (and at what level of detail), in order to ensure the coherence of the civil law system, and at the same time to facilitate its flexible development. Civil law develops quickly, in particular because of the dynamics of European legislation, and it is therefore necessary to ensure that the civil law is open to the coming changes. The choice of the legislative technique that will be used in the future to implement the European consumer law must take into account the character, the systematics and, to some extent, the tradition of the Polish Civil Code, while the implementation of the directives into the Code should not upset its internal cohesion.

### **3.2. Key features of the European consumer law causing implementation problems**

Consumer law, contrary to the widely accepted belief in Poland, is not axiologically saturated with the spirit of consumer protection. As part of the common market law, it is primarily to facilitate the free movement of goods, capital, services and persons.

Until the European Union Treaty (EU Treaty) entered into force (1993), consumer policy was pursued within the framework of the gradual development of internal markets, based on four basic treaty freedoms. The objective of community acts was to contribute to the development of transborder trade. This formal requirement, however, is not closely observed (e.g. directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises applies to contracts that are normally concluded within a given state). This did not raise any doubts since, until 1987, these acts were adopted unanimously and each member state could veto decisions (former art. 100, currently art. 94 of the European Community Treaty (EC Treaty)).

The Single European Act introduced into the EC Treaty a new article 100A (currently art. 95), which makes it possible to adopt acts harmonising the law of member states with a qualified majority (not unanimously) in the European Council. The key objective of such acts is to ensure the correct functioning of the internal market, and the “high level of consumer protection” should be only taken as a basis in the work on bills.

The consumer protection policy gained independent standing through the EU Treaty, which added art. 153 to the EC Treaty. It is enforced through acts of community law adopted pursuant to art. 95 of the EC Treaty (with regard to internal markets) and through measures that support, supplement and supervise the policy of member states. Only in the latter case, does the Treaty guarantee that member states have the right to maintain or enact more

rigorous protection measures. If an act of community law is adopted pursuant to art. 95 of the EC Treaty, member states may enact in their national laws more rigorous protection measures only if the act permits it (cf. item III (1) – Different harmonisation models).

These treaty amendments were accompanied by a move from the ‘negative transition’, which involves lifting customs barriers, to ‘positive integration’, which concentrates on introducing regulations aimed at eliminating barriers existing within the common market. This is connected in particular with the process of harmonising the private law sphere of regulations.

The European legislator strives to create a common legal system for all member states (or at least to even out the protection level granted in internal systems) in order to facilitate legal trade in the EU, and ensure the common market functions correctly. This objective is different from that of the national legislator, whose key task is to strive to ensure coherence of its own legal system and its efficient functioning.

Consumer law is regulated to some extent by European law, and to some extent by internal law. As a result, during implementation, it is subject on the one hand to the *effet utile* principle and, on the other, to axiological requirements of the domestic legal systems, which constitutes a source of technical and dogmatic difficulties.

A clear majority of consumer directives are adopted pursuant to art. 95 of the EC Treaty, which makes it possible to carry out both minimum and total harmonisation. In the latter case, it is inadmissible to make any modifications in the national law regarding the level of protection envisaged in the directive (both “downwards” and “upwards”). Some authors incorrectly use the term maximum harmonisation meaning total harmonisation.

In the case of minimum harmonisation, implementation has to respect the guarantees of the basic freedoms set out by the treaties, in particular the requirements pertaining to the free movement of goods (art. 28 et seq. of the EC Treaty). In this situation, too high a level of consumer protection may create barriers to the free movement of goods between member states to a degree inconsistent with the Treaty, which constitutes a breach of the requirement of proportionality. A breach of the Treaty, in turn, may have serious consequences; in particular it may give rise to a compensatory obligation. ECJ practice, pertaining also to consumer matters, provides a rich exemplification.

The European Commission has recently been increasingly using the total harmonisation instrument, e.g. directive 2005/29/EC on unfair commercial practices, or the

bill of the consumer credit directive<sup>107</sup>. The assumptions of such harmonisation are close to an attempt of unification of the area covered by the regulations of the directive. They preserve terms that are not fully defined in this type of directive, which, as in the case of directive 2005/29/EC on unfair commercial practices, intensifies implementation problems because a member state may not modify the protection level envisaged in the directive to any extent. The application of a total harmonisation instrument increases the risk of the incorrect implementation by the national legislator and national bodies applying the law (in particular the courts) and extends the scope of the ECJ's freedom of evaluation (with the *ex ante* uncertainty of law accompanying it) in controlling the correctness of implementation (both by the legislator and in the practice of national courts). At the same time, this approach creates a prolonged state of legal instability, when there is no certainty as to the meaning of individual terms, and obtaining an ECJ ruling in this matter is a time-consuming process.

Directives are not aimed at regulating the legal standing of the consumer in economic trade in a comprehensive manner, but only attempt to prevent negative consequences for consumers or, more frequently, for the common market) resulting from consumers' participation in commercial trade.

There are significant differences between the legal systems of member states. The regulations comprised in directives are an outcome of political compromise worked out between member states, though many times the contents of adopted solutions are influenced by the interests of various lobby groups.

Some directives are modelled on the legal solutions of specific member states. For example, directive 98/27/EC on injunctions for the protection of consumer interests is based on the procedural solutions of the French model. This leads to great implementation difficulties for states with a different institution or structure.

Directives do not constitute regulations directly binding in the legal systems of member states. They must be completed through the implementation process, which is difficult and complicated both due to the complexity and the imperfection of the implemented subject matter, and the threat to the integrity of the internal law system caused by the inclusion of new (often foreign) elements.

Directive regulations are of a "spot" nature, which means that directives apply only to selected areas of specified legal issues. At the same time, directives do not regulate selected issues in a comprehensive manner, but only deal with certain aspects. For example, directive 99/44/EC on consumer sales clearly states that it is the regulations of internal law that are to

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<sup>107</sup> COM (2004) 747 final.

define against whom and under what procedure a salesperson may have recourse claims (art. 4). Hence a lack of consistent system assumptions is manifested in two dimensions: the lack of a consumer law system as such, and the lack of a comprehensive, harmonised regulation of its individual institutions.

Contracts in directives are defined in an economic sense and not according to the criterion of the structure of relationships between the debtor and the creditor. For example directive 87/102/EEC on consumer credit, which defines a credit contract (art. (1)(2)(c)) as a contract through which the lender grants or promises to grant to the consumer credit in the form of a deferred payment, advance payment or otherwise. This is also true in directive 99/44/EC on consumer sales, which does not contain a clear definition of sales and, at the same time, states that sales contracts under the directives are deemed to include also contracts for the delivery of goods that are yet to be manufactured or produced (art. (1)(4)).

Directives often regulate identical relations of exchange but use different points of view as criteria for legal regulations:

- directives 99/44/EC on consumer sales, 87/102/EEC on consumer credit, 94/47/EC on timesharing, 90/314/EEC on travel contracts – regulation from the perspective of the type of contractual relationship with the consumer;
- directive 93/13/EEC on unfair terms in consumer contracts – regulation from the perspective of the content of the contract;
- directives 85/577/EEC on contracts negotiated away from business premises, 2002/65/EC concerning the distance marketing of consumer financial services, 2000/31/EC on electronic commerce – regulation from the perspective of the place or manner of conclusion of the contract.

The lack of a predefined dogmatic systematics in European law leads to an overlapping of regulations and the scopes of their application, as well as discrepancies in the manner in which certain institutions are regulated. The EU legislator is obviously aware of the fact that the scopes of directives it issues “cross each other”, which it often admits *expressis verbis*, e.g. motives 6 and 14 of directive 2002/65/EC concerning the distance marketing of consumer financial services (“6. *This directive should be applied in conformity with the Treaty and with secondary law, including Directive 2000/31/EC on electronic commerce, the latter being applicable only to the transactions it covers.*”; “14. *This directive covers all financial services liable to be provided at a distance. However, certain financial services are governed by specific provisions of Community legislation, which continue to apply to those*

*financial services. However, principles governing the distance marketing of such services should be laid down.”*). An example of a discrepancy between the adopted solutions can be illustrated by the question of keeping the deadline in withdrawal from a contract. Directive 85/577/EEC on contracts negotiated away from business premises, in art. 5 (1) defines precisely that the deadline for withdrawing from a contract is kept if a notice is sent before it has elapsed. Art. 6 of directive 97/7/EC on distance contracts, which regulates the question of withdrawal from the contract, does not contain this or similar wording. Overlapping the scopes of regulations of individual directives necessitates "mirroring" this overlap also in their implementation. Additional implementation and interpretation-related problems arise here. The implementation of regulations on pre-existing contracts is a perfect example of this. Directive 87/102/EEC on consumer credit stipulates that in the case of pre-existing contracts, the borrower should, in addition to his normal contractual rights, have rights against the grantor of credit and against the supplier of goods or provider of services. In art. 11, the Directive indicates that the grantor of credit should incur subsidiary liability together with the seller. The Polish legislator did not overlook this issue during implementation, but in the regulation set out in the consumer credit act it did not rely on any consistent concept. Arts. 11 and 13 of the act cause particular difficulties – it appears from them that if the consumer withdraws from the credit in a situation where there is a contract regulating settlement principles between the borrower and the seller, the seller is obliged to refund money to the grantor of the credit. But there is no regulation for a situation where the consumer withdraws from the sales contract because it was not performed by the seller, which pursuant to the act entails automatic withdrawal from the credit contract.

The wording of the directives is not expressed in a precise technical-legal language that could be freely “moved” to national legislation. Hence the equivalence of national and community terms may often turn out to be only apparent. This applies for example to differences in the understanding of the term “form” under Polish law and in consumer directives. Here we have a situation where we can speak about a split of expectations with regard to the issues concerning the notion of form. Polish law reviews three types of forms (*ad solemnitatem*, *ad probationem* and *ad eventum*) from the perspective of the effects that selecting one of them has for the person making a declaration of will. As for the term “form” used in the directives, there is an impression that it is rather recording specific contents formulated *verba volens* on a media, which has significance for the consumer because it provides easier access to information. Hence this is about a measure of protection for the consumer, and hence its interpretation should not turn against the consumer’s interests.

At present the European Commission's plans regarding the future of the European consumer law are not clear. This question fits within the stream of a broader debate pertaining to the future of the European contract law, which has been subject to enlivened discussion since 2001<sup>108</sup>.

It seems that despite a lack of clear declarations in this regard, the Commission is aiming for the widest possible harmonisation of the consumer contract law. This has been taking place on two plains. The first includes activities connected with consumer legislation. These have taken a turn towards the full harmonisation of consumer contract law<sup>109</sup>, which can be seen in the fact that directive 29/2005 on unfair commercial practices and the draft directive on consumer credit were subject to full harmonisation, and more and more frequent use of regulations entail direct effects. The second plain is the work on the harmonisation of contract law in the EU, where, despite declarations that there is no intention to develop a European Civil Code<sup>110</sup>, the Commission's actions seem to be driving in this direction.

A certain expansiveness can also be seen in the judicial decision-making line of the European Court of Justice (ECJ). In principle, the interpretation of community law resulting from an ECJ ruling (in particular one issued in preliminary form) has an *ex tunc* effect, i.e. is effective from the act subject to the interpretation entering into force. If a national administrative court fails to perform the obligation of submitting a preliminary question to ECJ, and bases a resolution on an interpretation of the community law that is not compliant with the subsequent ruling of the ECJ, then in certain situations this may create an obligation to re-examine a case that has ended with a final administrative decision (ECJ's judgment of 13 January 2004 in the case C-453/00 *Kühne & Heitz*). However, the interpretation of community law provided by a later ECJ judgment does not undermine the binding force of resolutions issued by national courts (ECJ's judgment of 16 March 2006 in case C-234/04 *Kapferer*). However, Judicial decision-making by the ECJ entails a requirement for the same level of protection of subjective rights based on the provisions of national and community law and the obligation to remedy a loss caused by breach of the community law (judgment of 30 September 2003 in case C-224/01 *Köbler*).

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<sup>108</sup> Cf.: Communication of the Commission to the Council and the European Parliament on European contract law of 11 July 2001, COM (2001) 398 final, OJ 2001, C 255; A more Coherent Contract, An Action Plan, Communication from the Commission to the Council and European Parliament of 12 February 2003, COM (2003) 68 final; European contract law and the revision of the acquis: the way forward, Communication from the Commission to the Council and European Parliament of 11 October 2004, COM (2004) 651 final.

<sup>109</sup> Consumer Policy Strategy, 2002 O.J. (C 137) 2.

<sup>110</sup> D Staudenmayer, The Way Forward in European contract Law, *European Review of Private Law*, no. 13, 2005, p. 98, 100.

The expansiveness of the European Commission is also manifested in the increasingly intensive monitoring and control of the implementation process (the organisation of more and more meetings with member states in connection with the implementation process, during which the manner of implementation is suggested).

At present, work is under way in the EU to create a Common Framework of Reference to be adopted by the end of 2009. The Common Framework of Reference is to perform two tasks. Firstly, it is to improve the quality and coherence of European legislation in the area of contract law. Secondly, it is to constitute the basis for creating one or several optional European contract law instruments.<sup>111</sup> This work is conducted within the framework of the ‘Network of Excellence’, consisting of a “group of groups” comprising the Study Group on a European Civil Code, the Acquis Group and the Basedow Group for insurance law<sup>112</sup>.

Despite (or perhaps because of) a lack of clear direction of development, the European legal market is currently very creative. Next to comparative law research, in-depth *acquis communautaire* analyses are carried out. Regardless of the final outcome of the work, this process undoubtedly contributes to the development of national and European legislation.

### **3.3. Implementation of European consumer law in the Polish civil law system based on the Civil Code**

#### **The implementation models for consumer directives**

Member states use different implementation models for consumer directives. Article 249 sec. 3 of the EU Treaty gives freedom of choice regarding the form and method of implementation. This freedom, however, is decisively limited – on the one hand by the detailed nature of directives subject to implementation, and on the other through the judicial decision-making line of the ECJ.

It is possible to implement the entire consumer law in the Civil Code, though this would require the incorporation of the “spot” community regulations into the whole codical system. This method was applied in Germany, where in 2002 the Law on the Modernisation of the Law of Obligations was implemented (known as the big reform). The regulations comprised in consumer directives were fully incorporated into the restructured German Civil Code (BGB). This concerns in particular: consumer sales, contracts concluded away from

<sup>111</sup> D. Staudenmayer, *The Way Forward in European contract Law*, *European Review of Private Law*, no. 13, 2005, p. 96.

<sup>112</sup> H.-W. Micklitz calls this establishment of a “research cartel”; Hans-W. Micklitz, *The Concept of Competitive Contract Law*, *Penn State International Law Review*, no. 3, 2005, p. 549.

business premises and abusive clauses. The coherence of regulations for different issues was achieved within the framework of the whole law of obligations. The amendment is deemed to be the largest contract law reform since the adoption of the BGB, and is generally assessed favourably. Using this method, however, requires a very high level of legislative skills and implementation experience.

The regulation of the Dutch Civil Code is the closest to this model, because the Dutch legislator has tended to transpose consumer directives into the Civil Code. This process is facilitated by a “multi-level” structure of the code, in which the most general regulations are located at the beginning, followed by increasingly detailed regulations. However, directives on contracts negotiated away from business premises and on consumer credit have been implemented in separate acts because they comprised regulations both from the area of private law and public law. After the adoption of a new consumer credit directive, it will comprise only private law matters, which will make it possible to implement it within the code. At the same time, for example, information duties in the case of contracts pertaining to organised tours and timesharing have been regulated in separate regulations, on account of the level of detail and technical nature of these provisions. Consumer protection regulations have also been incorporated into the Swiss Code of Obligations and the Italian Civil Code.

The French model, in turn, is the complete opposite. Consumer directives are consistently implemented in the form of separate acts and regulations that have been put together in a collection under the title *Code de la consommation*.

A “mixed” approach can also be used, which means that the consumer subject matter is partly implemented through the Civil Code, and partly part through separate legal acts. This implementation method has been employed in particular in the newly acceded EU members from Central Europe.<sup>113</sup>

### **3.4. Implementation in the Polish legal system**

In Poland, the “mixed” model has been employed – some of the matters comprised in consumer directives have been regulated in the Civil Code (definition of consumer, abusive clauses, liability for a hazardous product) and some in the form of separate acts (e.g. consumer credit, contracts negotiated away from business premises or distance contracts -

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<sup>113</sup> More in J. Lazar, Die Aufgaben der Kodifikation des slowakischen Privatrechts im Kontext seiner Europäisierung (w. P. Blako, J. Švidroň, Kodifikácia, Europeizácia a harmonizácia súkromného práva, Bratislava 2005, p. 136, 137); L. Vékás, Über die Grundzüge der ungarischen Privatrechtsreform, op. cit., p. 153 et seq.; J. Dworák, Kodyfikace občanského práva w České Republice, op. cit., p. 245.

distance marketing of consumer financial services). This choice was rational because of the time pressure on account of accession requirements. The adopted method made it possible to bring about implementation relatively quickly and it was easy for the organs of the Commission to evaluate implementation from the point of view of the formal requirements. This solution was, in addition, justified by the level of experience of legislators with regard to implementation and operation on the point of contact between European and internal legislations.

The subject matter or the specific character of the regulations of a given directive did not always decide about the place of implementation; sometimes the time available for implementation was the decisive factor, for example in the case of directive 99/44/EC on consumer sales, most difficult to “fit in” into the existing system of internal legal regulations (abolishing from warranty in a subjectively distinguished segment of trade while retaining the traditional approach to trade with other contractors; overlapping of the consumer sales regime with the codical regime relating to specific-work contracts and broadly understood services).

Sometimes the regime of a given contract category is regulated both by the Civil Code and by a separate act. This applies in particular to consumer sales – to an extent not regulated in the Consumer Sales Act, the provisions of the Civil Code on sales contracts apply. In turn, delivery contracts concluded with the participation of consumers, specific-work contracts and commission contracts, whose basic regulation is found in the Civil Code, are subject to the provisions of the Consumer Sales Law accordingly. This complex system of combinations of applying the code and a separate act makes it very difficult to reconstruct norms in the process of applying the law.

Because of the implementation method, individual Polish implementation acts are not correlated with one another, which worsens the quality of the internal legal system and hinders its interpretation and application. Whereas the reason for the lack of coherence between individual Polish laws (such as between the 2001 Consumer Credit Act and the 2000 Consumer Rights Protection Act) often lies in the content of implemented directives. Implementation, understood as striving towards a faithful reflection of the directive (which was formally required of Poland at the time of accession) could not improve the situation.

The European Commission’s rigorous policy towards implementation work in Poland coincided with the need to carry out economic and legal transformations. The problems faced by the “old” member states were easier to overcome, both in terms of their quality and historical context..

Problems regarding the implementation of European law in new democracies such as Poland have coincided with political problems, a situation that is reflected in arguments about the sovereignty of the state formulating its laws.

### **3.5. Discussion on the location of implemented consumer directives in the Polish legal system**

The first question that appears in the process of implementing a defined subject matter is the issue of the location for its transposition. The choice is between implementation in the Civil Code or outside it. The official position of the European Commission voices no preferences as for locating the implementation. The most difficult problem connected with implementation (and especially with implementation through the code) is about the dogmatic incompatibility of the European consumer law with the internal systematics of the Polish Civil Code. (This problem is universal and occurs in states with traditional codical regulations). The legislator is faced with a choice between implementation through the code, which is difficult in terms of dogma and system, or theoretically an easier implementation outside the code. Extracodical implementation does not, however, offer solutions to problems but merely moves the problems to the application of the law. Both codical and extracodical implementation bring about specific positive and negative consequences, as reviewed below.

The implementation of consumer regulations within the framework of the Civil Code undoubtedly enriches the code and contributes to its development. It also contributes to the unity and coherence of the civil law system, and helps avoid a feeling of implementing solutions foreign to Polish legal tradition, which has a certain significance for the application of the law in practice. At the time of introducing consumer matters into the code, the legislator is forced to adapt the directive regulations to the systematics and methodology of the code, while at the same time retaining codical methodology. In a sense, the legislator translates the directives into the language of the code (for example the implementation of directive 85/374/EEC on liability for defective products, where the term “defective product” was replaced with the term “hazardous product”). At the same time, however, the legislator has to foresee the consequences of the transposition of the directive for the civil code system. This applies not only to the question of which regulations have to be eliminated from the system, but also which regulations will be applied in combination with the directive. In addition, codical implementation prevents the fragmentation of consumer matters, at least in the area of civil law (for example, directive 93/13/EEC on unfair terms in consumer contracts,

and directive 85/374/EEC on liability for defective products were efficiently incorporated into the codical system).

At the same time, however, codical implementation is a difficult and time-consuming process (because of the need to adapt the subject matter to the codical systematics). This inconvenience, however, is counterbalanced by the possibility of negotiating longer implementation periods in the case of transposition to the Civil Code, which is often of great (but largely underestimated) importance. On the other hand, it seems that the organs that evaluate the implementation tend to apply a more critical approach when evaluating codical implementation, which is connected with their reluctance to study the national legal system and its dogmas. Incorporating directives into the Civil Code can split their subject matter because of the systematics of the code (such as art. 6 of the Civil Code in the case of implementing directive 85/374/EEC on liability for defective products). It is extremely difficult to predict how a regulation is going to operate in practice, as well as in which direction the European consumer law will progress. This may cause the need to amend the Civil Code quite often, i.e. not only when new consumer regulations are passed, but also when implementation imperfections are discovered, or there is a need to react to judicial decision-making from the ECJ.

When deciding on implementation through the Civil Code, there is a problem with the internal systematics of the Code (a separate book; separate regulations pertaining to individual institutions). Consumer regulations are often casuistic, which is contrary to the codical tradition. The issue, therefore, calls for a solution. The fact that the development of a **proper legal** practice could result in reaching the *effet utile* does not seem to be enough of an argument to renounce the normative regulation; such a situation may well lead to charges of incorrect implementation.

It is important to realise that the decision on incorporating consumer law into the code, and completing the task, even to very high standards, is not the end the question of implementation.

Extracodical implementation is easier to carry out as it does not require adapting regulations from the directives into the systematics of the Civil Code. This does not mean, however, that there are no problems with implementation. It merely means that the ruling regarding these problems is left to the courts of law. This is because consumer regulations are going to give rise to problems that can be solved only by resorting to civil law regulations. These problems cannot be bypassed in any way, and must be tackled either at the legislative or judicial decision-making level. We must bear in mind that it is not possible to predict all

possible problems in the legislation, and that law-making can only minimise the scope that is left for judicial decision-making. Extracodical implementation provokes questions over the Polish courts' ability to meet its requirements (and the consequences of its application).

Extracodical implementation keeps the casuistic approach away from the code, gives an opportunity to capture the whole of a given issue in just one act (for example, the implementation of directive 97/7/EC on distance contracts, and directive 85/577/EEC on contracts negotiated away from business premises in the Law on the Protection of Certain Consumer Rights and on Liability for Damage by a Hazardous Product of 2 March 2000). Extracodical laws also tend to be more susceptible to potential amendments, and the legislation process pertaining to them is not as troublesome as in the case of the Civil Code (for example directive 2002/65/CE concerning the distance marketing of consumer financial services implemented in the Law on the Protection of Certain Consumer Rights and Liability for Losses caused by a Hazardous Product of 2 March 2000). Moreover, it offers a possibility of retaining terms that are close to the directive's nomenclature, which does not necessarily have to be beneficial for the integrity of the whole of the national civil law system. Tackling a specific subject in a separate act also enhances the accessibility of its subject matter to consumers.

Deciding on extracodical implementation brings about serious risks, especially to the coherence of the civil law system. The point is that the solution of implementing directives through separate acts does not force a direct confrontation with the norms included in individual national legal acts. This can lead to a situation of acts containing mutually contradictory regulations. The ill adjustment of the systematics, methodology or terminology of laws to codical standards increases the existing discrepancies between the classic codical civil law and the consumer law. Moreover, problems connected to interpretation and application of the law by courts grow more serious.

An important issue connected to extra-codical implementation is the possibility of transposing some parts of directives into lower-level regulations. This practical solution has been used, for example, in the Netherlands and Germany, where issues relating to the obligation to provide information were implemented as regulations. Such an implementation technique allows for very detailed parts (technical parts) to be included in regulations, which enables the "legislative purity" of the adopted solutions.

The fact that the transposition of consumer directives took place before accession exerted a major influence on the pace of work on their implementation into the Polish legal system, and often also the implementation methods adopted.

The pace of legislative work was determined by the need to keep to implementation deadlines. The implementation progress was under constant scrutiny from the European Commission, which in that respect was more rigorous towards acceding states than towards existing Member States (i.e. the regular screening of the implementation progress). A failure to meet implementation deadlines was an argument for postponing accession.

### **3.6. General codification conclusions for the Polish law**

As an introduction, it is worth noting that not only Poland is facing the choice of the implementation method for consumer directives, but also the other new EU members that have undertaken recodification efforts. The draft Hungarian Civil Code and the Slovak Civil Code, which have already been prepared, are decisively based on the full model of implementation of the directives, and their main codifiers have extensively justified this decision.<sup>114</sup> The recent version of the Czech Civil Code is also driving towards this solution.<sup>115</sup>

The Polish Civil Code should also cover consumer contracts defined in EU law<sup>116</sup>. This solution is supported primarily by the arguments pointing to the integrational function of the code for the civil law system. In particular, it is clear that in a market economy trade in goods is based on contracts – from the producer to the end consumer. Hence it is based on two pillars – contracts concluded by the producer and by the consumer. Taking this second pillar out of the Civil Code only because of certain special regulations of some elements of these contracts would be an undesirable action, leading to the unnecessary repetition of regulations or the creation of legal rules that are internally inconsistent.

The implementation of the provisions of consumer directives in the Civil Code is undoubtedly facilitated by the fact that they comprise a number of common solutions, such as: enhanced information duty towards the consumer, the consumer's right to withdraw from the contract within a specified time, the semi-imperative or imperative nature of norms protecting consumer interests and limitation periods that are more advantageous for the consumer.

<sup>114</sup> Cf. the statements of J. Lazar and L. Vékás.

<sup>115</sup> Cf. K. Zaradkiewicz, *Rekodyfikacja prawa cywilnego. Stan obecny i kierunki zmian w Czechach i na Słowacji*, *Przegląd Legislacyjny* 2003, No. 2, p. 72.

<sup>116</sup> Also W. J. Kocot, *Perspektywy harmonizacji prawa prywatnego w ramach Unii Europejskiej ze szczególnym uwzględnieniem zobowiązań kontraktowych*, *Studia Juridica* XLIV/2005, p. 413-415.

However, as the experience of the German law-maker has shown, full integration of consumer norms in the Civil Code can succeed only as a result of an in-depth reform of the law of obligations, and not through adding EU directive regulations to the traditional system. This naturally requires more time, which Poland did not have when applying for EU accession. Now, however, this obstacle has been removed.

The largest difficulties in implementing consumer directives in the Civil Code, i.e. the “spot” nature of their regulations, may be resolved following an initiative undertaken by EU bodies, which aims to bring this area of EU legislation into order. However, the activity of the Polish legislator can also contribute to that. Poland, as an EU member, has now a stronger position in this organisation, which enables it to better defend the solutions adopted in local law. In addition, some detailed legal regulations, following the German and Dutch pattern, can be located in executive regulations issued pursuant to competency norms contained in the Civil Code.

### **3.7. Detailed conclusions**

#### **3.7.1. Consumer sales<sup>117</sup>**

The implementation method for directive 99/44/EC on consumer sales resulted from the manner in which Poland was assessed by the European Commission on the basis of the implementation of earlier directives, which additionally coincided with the accession haste. For these reasons, the directive was transposed outside the Civil Code, with a reservation that the subject matter in question may possibly be moved to the Civil Code later.

The criticism of the Consumer Sales Act is voiced on many plains. From the perspective of the purpose of the directive itself, it is stressed that the EU legislator's intention was to build a uniform legal system in the area of sales on the basis of the system created by the UN Convention on Contracts for the International Sale of Goods of 1980, ratified by Poland in 1997 (Vienna Convention). Polish implementation caused a far-reaching disintegration of the system and the break-up of axiological unity.

The implementation caused a deepening diversification of the legal regime for sales contracts (and several other contracts) based on the subjective criterion (a) and objective criterion (b). A complex mosaic of sales legal regimes has been devised, which has caused obvious difficulties in orientation, especially among non-lawyers.

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<sup>117</sup> The Law on Detailed Conditions of Consumer Sales and an Amendment of the Civil Code of 27 July 2002 (Dz. U. no. 141, item 1176).

## (a) subjective criterion

- Contracts concluded by a professional in the area of an enterprise's activity are subject to the codical regime if the buyer is: a) another domestic professional, b) a non-professional who is not a natural person, c) everyone who purchases the thing for a purpose relating to his/her business or professional activity.
- Contracts concluded by a professional with regard to an enterprise's activity are subject to the legal regime of the Consumer Sales Act if the buyer is a natural person who purchases goods for purposes not related to professional or business activity.
- Contracts concluded by a professional are subject to the Vienna Convention regime if the buyer is a professional from a different convention member country.

Looking at the same issue from the perspective of the buyer, one should note that:

- Contracts concluded by a natural person who purchases goods or a purpose not related to professional or business activity are subject to the legal regime of the Consumer Sales Act, if the seller is a professional acting within the scope of the enterprise's activity.
- Contracts concluded by a natural person who purchases the thing regardless of the purpose), are subject to the code's regime if the seller is not a professional acting within the scope of the enterprise's activity.

## b) objective criterion:

- The legal regime of the Consumer Sales Law covers the sale of consumer goods, i.e. movables, used for purposes not related to professional or business activity, including where they were embedded (inbuilt) during the purchase in such a way that they became part of immovable property. This regime does not comprise the sale (in market practice known as "delivery") of utilities "collected from ducts", namely electricity, water and gas, where the amount due for the collected volume is calculated on the basis of meter readings according to actual consumption.
- The code's regime covers the sale of immovables and movables used for purposes related to the buyer's business or professional activity.
- The legal regime of the Vienna Convention covers the sale of movables in professional international trade (between Convention member states).

Another critical argument regarding the Consumer Sales Law is that it has actually reduced the level of consumer protection. The reduction of the standard of protection does not have to be negative, assuming that a general, consistent concept regulating the buyer's and the seller's rights has been adopted. However, a situation where a professional buyer is protected better than a consumer buyer (i.e. when the consumer has an interest in proving that s/he is not a consumer) is axiologically incorrect, and the consequences of the subjective differentiation of parties are going too far. The most severe criticism of the act pertains to abolishing warranty liability and replacing it with liability for non-conformity of the goods with the contract. The institution of warranty, although juridically complicated and not well understood by non-lawyers, has become adopted by social awareness through long-lasting tradition, constituting part of the network of juridical notions defined precisely in rich judicial decision-making. At present, in the consumer market environment, the elimination of warranty from the consumer sales regime is generally believed to be an indication that the legislator favours businesses at the expense of consumers (consumer organisations have multiple reservations already at the stage of the work on the bill of the Consumer Sales Law). The most frequently quoted example is the abandonment of the system developed over the years whereby legal protection measures are selected by the consumer, and a directive-based hierarchy of remedies is adopted, where the legal protection measure most favourable to the consumer, i.e. withdrawal from the contract, is put in the last place.

The act also creates legal problems in detailed solutions, e.g. in the question of mutually inconsistent notions: "defectiveness" and "non-conformity with the contract" at different stages of trade in goods.

The next problem voiced also pertains to the notion of non-conformity of the goods with the contract: the directive makes reference to the regulation comprised in the Vienna Convention that distinguishes between legal defects and non-conformity of the goods with the contract. In light of the directive, it is unclear whether non-conformity with the contract also covers the legal defects in the goods. The consumer sales act excludes warranty liability for legal defects, which leads to a conclusion that legal defects should be treated as a non-conformity with the contract.

The question of the seller's redress towards persons earlier in the business chain is problematic. The regulations of the directive in this respect are very general. Polish law envisages the possibility of there being not only a direct predecessor, but also other parties. This creates a situation where the seller may lose the ability to pursue claims because of the one-year preclusive term. The problem also appears with regard to the question of relations

between the provisions of the Consumer Sales Act and the Vienna Convention. If the seller comes from a convention member state, the question arises as to whether, within the framework of recourse and liability for damages, the provisions of the Vienna Convention or national legislation (Civil Code) pertaining to recourse liability should be applied.

Under Polish law, the construction of presumption used in the directive also raises doubts. In Polish law, there are two types of presumption – the first type allows conclusions from one fact to be drawn regarding another fact; the second type is set out in art. 7 of the Civil Code<sup>118</sup>. In light of these presumptions, it is hard to determine the nature of the presumption used in the directive – does the seller have to prove that the good sold to the consumer has the same features as the presented sample (art. 2 sec. 2 letter a)? If the proof fails, the assumption is that there is a non-conformity of the goods with the contract. This reasoning, however, is contradicted by the presumption comprised in art. 5 sec. 3 of the directive, whereby it is assumed that all non-conformities in a good's features with the contract that are identified within 6 months from the date of issuing the goods will be treated as having existed at the time of delivering the goods. After 6 months, the consumer has to prove that the goods were not in conformity with the contract. Hence one can claim that we are not talking about presumption in both the directive and in the act.

Consumer sales contract regulation was “expanded” to include other codical types of contracts, namely delivery contracts, specific-work contracts and commission contracts. Considering the uniqueness of the construction and content of each of these three types of contracts, there are inevitable difficulties in applying different specific solutions of the Consumer Sales Act to each of them (for example, the definition of the elements of the legal standing of a commission agent performing the role of a seller or the legal standing of a contractor accepting an order for performing a work from materials entrusted by the consumer.)

It is also raised that the regulation of guarantee included in the Civil Code more closely corresponds to the needs of consumer trade than the provisions included in the Consumer Sales Act, as it refers to practical aspects of pursuing the rights arising out of guarantee (periods of limitations, way of performance, costs). Hence the possibility of restoring the regulation of consumer trade in the code should be considered.

The directive has a minimal character, which enables member states to introduce or preserve a higher level of consumer protection. Its use would make it possible to retain the

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<sup>118</sup> CC art. 7: If statutory law makes legal effects dependent upon good or bad faith, good faith should be presumed.

regulations on warranty for defects and contractual guarantee. This reasoning is obviously supported by a generalised view that warranty and guarantee provided “better” protection than that ensured by liability for non-conformity with the contract. With regard to the Consumer Sales Act, one should consider whether the situation is currently mature enough to incorporate consumer sales into the Civil Code. Such an action could be used to unify the regime regulating liability for sold things, increase the level of consumer protection and restore coherence to codical regulations.

### **3.7.2. Consumer credit<sup>119</sup>**

A lack of synchronisation of the definition of consumer included in art. 2 sec. 4 of the act with the definition in the Civil Code (art. 22<sup>1</sup>) causes a certain problem. This results from the fact that originally the act defined consumer in narrower terms than the Civil Code (the term was limited to natural persons). After the amendment of the Civil Code in 2003, however, there was no need to keep the definition of consumer in the act. The difference between the definition in the Consumer Sales Act and the Civil Code is that the Civil Code does not only recognise as consumers natural persons that enter into a contract with a business that is unrelated not only to their business activity, but also to their professional activity. Whereas the definition in the Consumer Credit Act does not mention professional activity, which might suggest that the relation with professional activity does not prevent recognising a business partner as a consumer, this discrepancy can be removed through interpretation by adopting a broad understanding of the term “business activity”. However, there is still the problem as to whether the relation with the business (professional) activity now conducted is meant, or activity to be conducted in the future. It seems that the term “consumer” in the act remains in line with the definition set out in the directive.

Another issue of concern is how to determine the relation of the contract with conducted business (professional) activity. This results from the fact that only in the case of bank loan contracts does Polish law require that the contract specifies the purpose of the loan. In other cases the purpose of a loan does not have to be defined, so there is a question about the basis on which a business/professional concluding a contract with a natural person is to determine whether his/her business partner acts as a consumer or as a professional.

The amendment of the act of July 2005 requires that the lender provide the consumer with information about the annual rate of interest on a delay in performance, and the

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<sup>119</sup> Consumer Credit Act of 20 July 2001 (Dz. U. no. 100, item 1081 as amended).

conditions for its change, as well as other costs incurred by the consumer in connection with a failure to perform the obligations arising out of the contract, including the costs of demands, reminders and the costs of court and execution proceedings. Providing precise information on court costs and the costs of legal proceedings at the time of concluding the contract is practically impossible, since they depend not only on the level of debt, but also, for example, on the procedure method (the fees in injunction and reminder proceedings are lower) or execution method (the highest costs have to be incurred in real estate execution), hence these costs can only be estimates. The same amendment limited, as of 20 February 2006, the total level of all fees, commissions and other costs pertaining to the conclusion of a consumer credit contract (art. 7a). This is related to the introduction of a maximum rate of interest in the Civil Code (art. 359 § 2<sup>1</sup> -§ 2<sup>3</sup>), and is aimed at preventing the circumvention of this limitation. However, this regulation also raises a number of reservations.

Doubts regarding consistency with the directive are raised by another change made in the act of July 2005, namely the amendment of sec. 4 in the attachment to the act. Although the Polish act does not comprise a definition of the annual percentage rate, it prescribes that the rate should be calculated according to the formula presented in attachment no. 2 to the directive (art. 7 *sec.* 2, see also the attachment to the act). With this, the annual percentage rate so far reflected the total annual cost of credit. However, the amended provision prescribes that the calculation of the annual percentage rate should take into account the costs that will be excluded from the total cost of credit (including the cost of establishing collateral), as a result of which the annual percentage rate calculated this way will be different from the one calculated pursuant to the directive.

It should also be pointed out that the notion of the total cost of credit does not fully correspond to the provisions of art. 1 *sec.* 2 letter d and art. 1a *sec.* 2 of the directive. Although art. 7 *sec.* 1 of the act is a repetition of the definition of the total cost of credit from art. 1 *sec.* 2 letter d of the directive, the calculation of costs that are not taken into account in calculating the total cost of credit, as presented in *sec.* 2 art. 7 of the act, is different from its original in art. 1a *sec.* 2 of the directive. First of all the act does not include in the total cost of credit the costs resulting from a change in foreign exchange rates. This difference, however, does not matter since the directive requires that the annual percentage rate (i.e. the total cost of credit expressed as a percentage of granted credit in annual terms) be calculated as at the time of concluding the contract, assuming that the interest rates and the level of other fees do not change throughout the term specified in the contract (cf. art. 1a *sec.* 6 of the directive). Since nobody is able to predict how the exchange rate of a foreign currency against the Polish

zloty will fluctuate (if the credit amount is expressed in a foreign currency), it is impossible to take into account its changes when calculating the total cost of credit (used to derive the annual percentage rate). Whereas the Polish legislator did not exclude from the total cost of credit the fees for membership in associations or clubs, resulting from contracts independent of the consumer credit contract, even if they influence the terms of the credit (c.f. art. 1a sec. 2 (iv) of the directive). In addition, as opposed to art. 1a sec. 2 (iii) of the directive – art. 7 sec. 2 point 3 of the act excludes from the total cost of credit fees for operating the account from which repayments are made (unlike in the directive – fees for operating the account used for receiving amounts paid).

The provision of art. 8 sec. 1 and sec. 1a of the act also raise reservations. These regulations prescribe that the consumer should warn the lender at least 3 days before the planned repayment of a loan, and that the repayment should be made on the date corresponding to the date of paying the instalments specified in the contract. The consequences of breaching these two requirements are unclear. It seems, however, that a failure to perform them should not enable the lender to refuse to accept the performance or deprive the consumer of the benefits of early repayment. The problem of admissibility of early repayment of part of a loan pursuant to the act (just as in the directive) remains unresolved (in the opinion of some authors, art. 8 of the act, just like art. 8 of directive no. 87/102, only permits the early repayment of the whole loan; early repayment of part of the loan would only be possible with the lender's consent).

Also the regulation in the act of the relation between the consumer credit contract and the sales contract or service contract it finances raises numerous doubts. The construction adopted in art. 13 of the act corresponds to a large extent to the provisions of art. 11 sec. 2 of the directive. In particular, the occurrence of the effects envisaged by art. 13 of the act depends on the existence of a contract between the lender and the seller or the service provider, defining the rules for granting credit to clients of a given seller or service provider (the condition of the existence of a formal tie between these entities), though credit is required to be available only to this lender, which is also required by art. 11 sec. 2 letter b of the directive (which is different from, for example, § 359 of the German BGB). It should be considered whether the existence of an agreement envisaging exclusivity is the right solution. The German solution in this respect serves its purpose as it points to features that are easily recognisable to the consumer, i.e. features applying to the economic equality of transactions (e.g. the seller appears as an intermediary in the conclusion of the credit contract, in connection with which the consumer has the right to perceive these two entities as a whole).

The Polish solution refers to a very formal criterion, i.e. the existence of a contract that anyway will not normally envisage exclusivity. For this reason there is doubt as to how to understand exclusivity. Is it sufficient that the seller has permanently cooperated with a given lender and that, for example, a specific type of thing can be purchased on credit granted by a specified lender, in a situation where other things can be purchased on credit granted by another, named lender? This would lead to a situation where the existence of contracts with two different banks would cause the requirements of art. 13 to be unfulfilled.

Serious problems also arise out of the inconsistency between art. 11 and 13 of the act, which pertain to the question of withdrawal from the contract in the case of pre-existing contracts. The government's draft of the act envisaged that if a consumer returned an item purchased on credit to the seller, then he was released from the obligation of returning the credit to that extent. The provisions of art. 11 and 13 of the Consumer Credit Act were introduced at the stage of parliamentary work, and do not present any consistent concept, unlike, for example, in German law, which envisages the mutual interdependence of contracts. In light of art. 11 sec. 3 and 4, there is a view that a sales contract remains effective, despite withdrawing from the credit contract, although there may be an assumption that the credit contract lapsed, because only then a solution envisaging the refund of the credit by the seller who received it, would be justified. Legally this is a performance that was fulfilled in favour of the consumer, and on general principles it is the consumer who should return the performance obtained. In the case when a consumer withdraws from the credit contract this would lead to the situation analysed in the ruling *Schulte* of 25 October 2005 (C-350/03), i.e. a unique trap. This is because withdrawal from the contract creates the need to immediately return the received performance if the consumer does not have cash (if s/he had, s/he would not have needed the credit). In principle, withdrawal from a contract entailing the need for a refund would make the right to withdraw from the contract illusive. There are also problems with the interpretation of art. 13, which does not contain any provision pertaining to settlements. This occurs since the lender's performance, even if in favour of the seller, is legally a performance in favour of the consumer, and so once the consumer credit contract lapses, as a result of withdrawal from the sales contract, the consumer should refund the remaining credit. Irrespective of that, s/he may demand the return of the performance from the seller, but if the seller does not refund to the consumer the money s/he has paid, then the consumer's situation becomes problematic again. Adopting this solution will deteriorate the consumer's standing in relation to his/her situation before the act was adopted. Previously there was the assumption that withdrawal from the sales contract, e.g. because of a defect, did

not affect the effectiveness and validity of the credit contract, and so the consumer could repay the credit in instalments, demanding that the seller repair the loss if the conditions for liability were fulfilled.

In a situation where there is an automatic lapse of the financing contract following a withdrawal from the financed contract (e.g. sales), the consumer's standing may deteriorate as there are no solutions that are envisaged by the German law, i.e. the possibility of raising claims on the basis of a different legal relationship, or putting the lender in the place of the seller (which brings about the same effects). There are only 2 options: either the possibility of raising claims on account of relations with a third party is accepted, which overcomes the principle of the relativity of obligation relations (this solution is not unknown to Polish law); or the possibility of replacing the seller with the lender is accepted (the possibility of raising claims under the sales contract in relation to the lender who steps into the place of the seller does not raise any doubts).

The Consumer Credit Law envisaged a special sanction for breaching the provisions of art. 4-7 (regulations defining the form and the minimum content of the contract). A failure to follow these provisions leads to a conversion of the contract – the contract is valid but the consumer is not obliged to pay the lender interest or any other fees in connection with the conclusion of the contract, except for the costs of establishing collateral (including insurance) for the credit repayment. Unfortunately, this regulation, which was clear in the original wording, was amended as part of the act of 23 May 2003, and its current wording raises interpretation doubts. The act presently stipulates that the consumer should submit a written representation to the lender. The content of this is unknown (should it indicate the type of the default under which the consumer pursues his right to refuse to pay the agreed interest and other costs, or maybe only a representation that he intends to take advantage of the right granted to him in art. 15 sec. 1 of the act). The second doubt comes down to answering the question whether submission of such a representation is a premise for the conversion of the contract, so until such a representation is submitted, the consumer is obliged to perform the contract pursuant to its wording, or whether it is only a point of order, preventing any statement of claim by the lender for payment of outstanding interest and fees (in the case of banks – issue of a banking execution title). In jurisprudence, the prevailing view is that contract conversion – caused by a breach of the provisions of art. 4-7 of the act – still takes place *ex lege*, in light of which the consumer can demand the return of interest and other fees paid to the lender, even if he does not submit the representation.

It should be pointed out that justified doubts are raised by the relation of some of the provisions of the Consumer Credit Law to the provisions of other acts (especially the Law on the Protection of Certain Consumer Acts and Liability for a Loss caused by a Hazardous Product of 2 March 2002). In particular this applies to regulations pertaining to withdrawal from a consumer credit contract if the contract was concluded outside the lender's business premises or remotely (the provisions of the act of 2 March 2000 constitute *lex specialis* to art. 11 of the Consumer Credit Law), and the relation between art. 12 of the Consumer Credit Law and art. 13 sec. 2 of the act of 2 March 2000 determining the influence of a withdrawal from the contract concluded remotely, on a credit contract tied to such a contract.

The amendment that came into force on 20 February 2006 lifted the floor limit of credit that is subject to the provisions of the Consumer Credit Law. It seems, however, that this is not a solution that has been well thought out. On the one hand the legislator wanted the act to cover a large part of minor loans granted by different entities, not necessarily banks or para-banks (cooperative credit unions), but also by entities that are not subject to any control (pawn shops) where the conditions of granting credit below PLN 500 can be called scandalous. The amendment brings about consequences that were probably not intended, since as a result, for example, a deferred payment card contract, regulated by the Law on Electronic Payment Instruments, becomes a consumer credit contract that may be subject to the law. Hence it does not seem that the legislator's intention was to expand all the instruments protecting the consumer to include payment cards, because such contracts do not create a high risk for consumers.

### **3.7.3. Abusive clauses**

There is some discussion on the purposefulness of keeping the requirement of written confirmation from the consumer of receipt of information about the right to withdraw from the contract in the context of abusive clauses. Such a regulation may cause an excessive burden for the consumer and may lead to abuses on the part of the business.

### **3.7.4. Liability for hazardous product<sup>120</sup>**

The regulation introduced into the Civil Code pertaining to importers of products (art. 449<sup>5</sup> par. 2 sentence 2), refers to a person who introduces a product of foreign origin into domestic trade within the framework of his business activity, despite the fact that directive

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<sup>120</sup> The Act of 2 March 2000 on the protection of selected consumer rights and on liability for losses caused by hazardous products (Journal of Laws No. 22, item 271, as amended).

85/374/EEC on liability for defective products refers to an importer to the community market (art. 3 sec. 2). According to the purpose of the directive, this regulation was to perform 2 functions: firstly, to facilitate consumer trade, and secondly, to discourage consumers from buying goods from outside the EU. During the implementation it was modified due to the fact that Poland was not yet a member of the EU, as a result of which the objective of the directive was in a way distorted, since it indirectly discourages imports from outside Poland. Such an interpretation obviously leads to a discriminating measure, i.e. it also breaches the original law. Considering this, one should postulate a change of this regulation and, until a change is effected, the regulation should be interpreted pursuant to the directive.

The possibility of introducing a 10-year preclusive term in place of the statute of limitation for liability should be discussed. This is related to the stance of the ECJ presented in three rulings issued jointly on 25 April 2002 - the Commission vs. France (C-52/00) and Greece (C-154/00) and *Maria Victoria Gonzáles Sánchez vs. Medicina Asturiana SA* (C-183/00); and *Bilka* of 10 January 2006. ECJ found that directive 374/85/EEC on liability for defective products is not of a minimum nature, hence solutions deviating from its content cannot be introduced.

One could possibly consider replacing the wording on “normal use” with wording on “reasonably foreseeable use” – considering the text of directive 374/85/EEC on liability for defective products, which uses this term.

### **3.7.5. Contracts negotiation away from business premises**

One should consider the sense of keeping reinsurance contract exclusions in the application of the act (chapter 1) (art. 5 sec. 6 of the act of 2 March 2000). This solution is comprised in directive 85/577/EEC on contracts negotiated away from business premises, but in Polish law it is redundant. Considering the Polish definition of consumer, applying exclusively to natural persons and activities not related directly to business activity, it is not actually possible for a consumer to conclude a reinsurance contract.

## 4. Securities <sup>121</sup>

### 4.1. Introduction

After World War II, as a result of the regime transformation, Polish regulations concerning securities and the capital market, i.e. institutions typical of the capitalist political system, lost their practical importance. From among the provisions regulating issues related to securities, only the regulations of promissory note law and cheque law remained in force, because they turned out to be useful to a certain, though limited extent in the “nationalised trade.” Due to the realities of the political system and economy, the codification of civil law in 1964 did not include any regulations pertaining to securities, and disregarded the issue of remittance – an institution which traditionally in Poland formed the foundation for building legal relationships associated with securities<sup>122</sup> – and the issue of the legacy of a bearer debt. These institutions were, however, regulated in the Code of Obligations of 1933. The capital market did not exist in Poland until the start of the transformation of the political system in 1989-1990. It was then that the problem emerged of introducing securities-related regulations to civil law.<sup>123</sup>

Over the course of legislation work on an amendment to the Civil Code related to this issue, a decision was made to refer to the Polish regulations from the period between the world wars contained in the Code of Obligations. The amendment to the Civil Code of July 1990 reinstated the institution of remittance to the legal system and introduced provisions devoted to securities. It should be emphasised that all regulations pertaining to individual types of securities (except for promissory notes and cheques) and trade in them were enacted after the adoption of the amendment of the Civil Code. In 1991, the Law on Public Trading in Securities and Mutual Funds came into force and became the normative grounds for dematerialising securities. In the same year, a stock exchange and the Polish Securities and

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<sup>121</sup> This text presents the results of a comparative law conference on securities organized by CLCC and attended by Dutch experts. It has been edited by Andrzej Jakubecki, Ph.D. hab., (member of CLCC) and Jan Mojak, Ph.D. The annex will contain reports of Dutch experts Prof. F.H.J. Mijnsen and Prof. C.M. Grundmann-van de Troll, Ph.D. The conference was also attended by: Prof. Paul Meijknecht, Ph.D., Prof. Zbigniew Radwański, Ph.D., Prof. Andrzej Jakubecki, Ph.D. hab., Beata Binek (Polish Securities and Exchange Commission), Prof. Aleksander Chłopecki, Ph.D. hab., Marcin Dyl, Ph.D., Magdalena Habdas, Ph.D., Piotr Machnikowski, Ph.D., Jan Mojak, Ph.D., Prof. Leszek Ogiełło, Ph.D. hab., Jerzy Pisuliński, Ph.D. hab., Piotr Piniór, Ph.D., Magdalena Rośniak-Rutkowska (Polish Securities and Exchange Commission), Marcin Spyra, Ph.D., Prof. Andrzej Szajkowski, Ph.D. hab., Przemysław Telenga, M.A., Prof. Marek Wierzbowski, Ph.D. hab., Aneta Wiewiorowska, judge Elżbieta Paczos (WMiPE Department of the Ministry of Justice).

<sup>122</sup> A. Szpunar, *Przekaz według kodeksu zobowiązań*, Kraków 1937; same author, *Przekaz obowiązujący w prawie polskim*, *Prace z Zakresu Prawa Cywilnego i Własności Intelektualnej*, No. 41, Kraków 1985; same author, *Kilka uwag o przekazie*, PPH 1997, No. 1.

<sup>123</sup> Cf. C. Żuławska, *O potrzebie kodeksowej regulacji papierów wartościowych*, *Problemy kodyfikacji prawa cywilnego (Księga pamiątkowa ku czci Profesora Z. Radwańskiego)*, edited by S. Sołtyński, Poznań 1990.

Exchange Commission were established. The year 1995 brought the Bond Act, and the year 1997 brought the Mortgage Bond Act, the Banking Law, the Investment Fund Act and the new Law on Public Trading in Securities. The Public Finance Act of 1998 created the grounds for issuing treasury securities. In 2000, the Commercial Companies Code, regulating the issue of stocks, and the Warehouse Act were enacted. Finally, in 2005, completely new regulations related to trading in securities emerged, namely: the Act on Trading in Financial Instruments, the Act on Public Offerings and the Conditions for Floating Financial Instruments in an Organized Trading System and on Public Companies and the Capital Market Supervision Act.

In light of this, the regulation of the Civil Code pertaining to securities appears to be inadequate for its “legal environment.” The Civil Code does not take into consideration the fact that the majority of securities exist in a dematerialised form, it does not know the concept of “financial instruments”, and its provisions on transferring securities are not correlated with regulations concerning different types of securities.

## **4.2. Definition of securities**

The various Polish acts regulating different types of securities contain definitions of those securities, e.g. bonds, stocks, etc. However, although the Civil Code regulates the institution of securities, it does not provide a general definition of securities. It is therefore justified to pose the question as to whether such a definition should be included. Moreover, the Civil Code does not contain any mention of dematerialised securities, although, as mentioned above, a significant majority of securities in Poland exist in trading in a dematerialised form. This is connected with a restrictive system of depositing such securities. In the jurisprudence, on the basis of the overall regulations of the Civil Code, a security is defined as a document reflecting a specific private property right, and affixing this right to itself so closely that the exercise of the right requires that this document be produced.<sup>124</sup> This description, fully justified in light of the provisions of the Civil Code, completely fails to correspond with the fact that the notion of securities also covers dematerialised securities. Dematerialised securities are transferred by applying a specific legal regime, by way of a book entry in a securities account. Thus, it needs to be considered whether a possible general definition of securities should also cover securities existing in a dematerialised form, and

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<sup>124</sup> Cf., e.g.: K. Zawada in: *Kodeks cywilny. Komentarz*, edited by K. Pietrzykowski, Warsaw 2003, Vol. II, p. 669; J. Mojak: *Prawo papierów wartościowych. Zarys wykładu*, 2nd edition, Warsaw 1995, p. 715ff.

whether the civil law regulation of securities in the Civil Code should be broadened by adding provisions pertaining to dematerialised securities.

This issue is additionally made more complicated by the fact that the Law on Trading in Financial Instruments of 29 July 2005 (Journal of Laws No. 183 item 1538) introduced the notion of financial instruments to the Polish legal system. Financial instruments in the meaning of this law are: (1) securities, (2) non-security instruments such as: (a) titles of participation in collective investment institutions, (b) money market instruments, (c) financial futures contracts and other equivalent cash-settled financial instruments, forward interest-rate agreements, stock swaps, interest-rate swaps, currency swaps, (d) options to buy or sell financial instruments, interest-rate options, currency options, options on such options, and other equivalent cash-settled financial instruments, (e) property rights whose prices depend directly or indirectly on the value of things defined as to their generic type, specified kinds of energy, standards and limits of the volume of production or discharge of pollutants (derivative commodity instruments), (f) other instruments, provided that they have been admitted to trade on a regulated market of a member state or are the subject matter of an application for such admittance. In turn, the Law on Trading in Financial Instruments lists the following as securities: stocks, subscription rights in the meaning of the Commercial Companies Code, stock rights, subscription warrants, certificates of deposit, bonds, mortgage bonds, investment certificates and other marketable securities, including those incorporating property rights corresponding to rights arising out of stocks or debt incurrence, issued pursuant to the applicable provisions of Polish or foreign law, and other marketable property rights created as a result of an issue, incorporating the right to purchase or subscribe for these securities, or executed by performing a cash settlement (derivative rights). The provisions of the law are not applicable to promissory notes or cheques in the meaning of the promissory note law and cheque law.

Accordingly, the question arises as to whether a definition of securities is necessary at all, since a broader notion of financial instruments is more important to trade; should we therefore aim at a closed-end definition of securities, or should we stop at an open-end definition of financial instruments?

### **4.3. Securities and the *numerus clausus* principle**

It has not been decided in the Polish Civil Code whether a certain document may be deemed a security only if this results unequivocally from a provision of law, or if it is also

admissible for participants of trade to freely create securities, which is a matter of significance in respect of ‘creditor securities’, i.e. securities covering receivables. In Poland, this principle usually applies to bearer securities, and is an issue contested in the doctrine.<sup>125</sup> Thus, there is also a question about whether Polish law should accept the *numerus clausus* principle in respect of securities, and whether this principle should also apply to bearer securities.

#### 4.4. Relevant place for regulating the transfer of securities

The Polish Civil Code stipulates that securities to order can be transferred by delivery or endorsement (article 921<sup>9</sup> of the Civil Code). However, the effects of a transfer of securities are specified only in respect of registered securities and bearer securities (article 921<sup>13</sup> of the Civil Code). In turn, endorsement with regard to promissory notes and cheques is regulated in promissory note law and cheque law. At the same time, the methods of transfer of certain securities are regulated in separate acts, e.g. in the Commercial Companies Code with respect to stocks. With this in the background, the issue arises whether the transfer of different types of securities, e.g. registered stock, should be regulated in the Civil Code or only in separate acts, and whether it is necessary for the Civil Code to include a regulation concerning endorsement in respect of securities to order.

#### 4.5. Scope of consignment contracts

The Polish Civil Code limits consignment to movables; article 765 of the Civil Code stipulates that the consignee undertakes, against remuneration (commission) within the scope of activity of its enterprise, to buy or sell movables on behalf of the consignor, but in its own name. The Commercial Code of 1936 captured the subject of consignment in a somewhat different, that is to say, broader manner. Pursuant to article 581 of the Commercial Code, by concluding a consignment contract, the consignee undertakes to buy or sell movables or securities in its own name, but on behalf of the consignor. Amending the consignment-related provisions of the Civil Code in such a manner as to make the consignment contract also

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<sup>125</sup> The advocates of *numerus clausus* of creditor securities include: Z. Radwański, *Prawo zobowiązań*, Warsaw 1986, p. 450; Z. Radwański, J. Panowicz-Lipska: *Zobowiązania – Część szczegółowa*, issue V, Warsaw 2004, p. 322 and A. Szumański, *Problem dopuszczalności prawnej emisji nowych typów papierów wartościowych*, in: *Księga pamiątkowa ku czci Profesora S. Włodyki*, Kraków 1996, p. 438ff. A contrary stance, especially with regard to registered securities is expressed by K. Zawada, *ibid.*, p. 673; T. Komosa, *Papiery wartościowe*, PPH 1994, No. 4 (insert); A. Chłopecki, *Czy w prawie polskim obowiązuje zasada numerus clausus papierów wartościowych*, *Przegląd Sądowy* 1994, No. 2, p. 32ff.; P. Machnikowski, *Numerus clausus papierów wartościowych inkorporujących wierzytelności*, *PiP* 2000, No. 8, p. 53ff.; and others.

pertain to the buying or selling of securities would allow the application of the consignment contract in private trade in securities. A possible extension of the subject of consignment to include intermediation in private trade in securities would probably require that the current weak regulation of the consignment contract be extended by using solutions stipulated in the Commercial Code.<sup>126</sup>

#### **4.6. Instruments of entitlement**

Article 921<sup>15</sup> of the Civil Code contains a regulation whereby the provisions related to securities are applicable correspondingly to instruments of entitlement stating the duty to perform, and the provisions related to bearer securities are applicable correspondingly to instruments of entitlement that do not indicate the entitled person by name. Thus, the nature of this regulation is “rudimentary”, and it should be considered whether the Civil Code should contain broader regulations pertaining to instruments of entitlement and their relation to securities. It is proper to recall that the problem of instruments of entitlement was regulated in chapter VIII of the Code of Obligations of 1933, under the general title “Bearer documents and instruments of entitlement” (articles 225-230 of the Code of Obligations).

#### **4.7. Legacy of a bearer debt**

The Civil Code currently in force in Poland does not regulate the institution of the legacy of a bearer debt (issuing a document in which the issuer undertakes to make a performance at the request of the bearer). Such a regulation was contained in the Code of Obligations of 1933 previously in force. Pursuant to article 225 of the Code of Obligations, “the issuer of a document containing this issuer’s undertaking to make a performance at the request of the bearer shall be obliged to make the performance for the return of the issued document or, in the event of a partial performance, indicating this fact on the produced document.” The provisions of the Code of Obligations also regulated the problem of charges that might be raised by the issuer of a bearer document against the holder of such a document (article 227 of the Code of Obligations) and certain issues related to the procedure for making a performance in favour of the bearer of a document by the issuer of the document (article 228 of the Code of Obligations).

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<sup>126</sup> Cf. M. Allerhand: Kodeks handlowy. Księga II. Czynności handlowe, reprint Warsaw 1991, p. 863ff.

#### 4.8. Final conclusions

In consideration of the practical and systemic aspects of the operation of the institution of securities in business trade in contemporary Poland, the following postulates can be formulated with regard to the regulations of the Civil Code.

1) There is no need to introduce a definition of securities into the Civil Code. In this regard, it is desirable to maintain the existing legal status. The creation of such a definition should be left to the doctrine and judicial rulings. Securities are a collection of such diverse legal institutions that finding their common denominator is practically impossible. Given this fact, it would also be pointless to introduce the definition of dematerialised securities into the Civil Code.

2) Even less justifiable would be the introduction into the Civil Code of the notional category of “financial instrument.” This notion encompasses many diverse and ever-changing phenomena to which it is sometimes difficult to ascribe any designations in terms of civil law. The current legal status, in which financial instruments are enumerated in the Law on Trading in Financial Instruments of 2005, without their closer specification, is methodologically correct and axiologically sufficient. For as it stands now, the current legal status serves the purpose of delineating public law competency of the authorities supervising the financial market, in particular the Polish Securities and Exchange Commission.

3) It would be advisable to go along with the suggestions of the representatives of the Dutch doctrine, whereby the institutional catalogue of securities should be open in order to allow the inclusion into the system of new forms of securities, often created by trading practice. A closed list (*numerus clausus*) of securities would not serve the needs of a dynamically changing practice, which is also being shaped on the international securities markets.

4) In connection with this, it ought to be postulated that the institution of the legacy of a bearer debt be introduced into the Civil Code in a modified formula of the norm laid down in articles 225ff. of the Code of Obligations. This will create a complete and irrefutable framework for making out or issuing bearer securities by virtue of unilateral obliging legal actions.

5) It seems that the current status of codical norms in respect of securities transfer mechanisms (registered securities, securities to order, bearer securities) requires some careful modification. First of all, the current presentation of the institution of endorsement in the Civil Code is too general and requires either significant supplementing, consisting in transferring endorsement-related regulations in promissory note law to the Civil Code, or the complete omission of the regulation of this institution in the Civil Code. This concerns predominantly the following two issues: 1) regulation of different types of endorsement (complete, blank and bearer endorsement, as well as owner's, attorney-in-fact's, pledgee's and trustee's endorsement); 2) regulation of the legal effects of securities purchased through the endorsement and delivery of a document.

6) In the context of the remarks in item 5, it should be deemed expedient to supplement the current Civil Code regulation with provisions normalising the procedure of transferring dematerialised securities through a book entry (i.e. by changing an entry in the securities account). The introduction of such a regulation into the Civil Code will constitute a kind of "anchoring" of dematerialised securities in the civil law system, which is desirable due to the enormous role of such securities in contemporary business trade.

7) Amending the provisions of the Civil Code pertaining to consignment contracts in such a manner as to make such contracts also relate to the buying or selling of securities should also be deemed advisable. The Dutch experience supports this stance. Such amendments would allow the application of consignment contracts to trade in private securities. An extension of the subject of consignment to include intermediation in private trade in securities would require that the current regulation be extended by using solutions stipulated in the Commercial Code of 1934.

8) It seems that there is no need to interfere with the existing regulations pertaining to the institution of instruments of entitlement. Both the Polish experience and the Dutch experience indicate that the significance of this institution is currently marginal.

## 5. Remittance

### 5.1. Description of the institution

The institution of remittance, regulated originally in articles 613-620 of the Code of Obligations, was reinstated into Polish law by the Law Amending the Civil Code of 28 July 1990. It is currently regulated by articles 921<sup>1</sup>-921<sup>5</sup> of the Civil Code. A remittance is the remitting party's unilateral declaration of intent containing the following two authorisations:

- 1) for the remitter – to effect the performance on the account of the remitting party,
- 2) for the remittee – to accept the performance from the remitter.

In the event that, as a result of these authorisations, the remitter makes the performance directly in favour of the remittee, it has the same effect as if the remitter had first fulfilled the performance in favour of the remitting party, and then the remitting party had fulfilled the same performance in favour of the remittee. In other words, a performance between the remitter and the remittee may be accepted both in the remitter-to-remitting-party relationship (called the coverage relationship) and in the remitting-party-to-remittee relationship (called the currency relationship). The shaping of both these relationships in the substantive law context may be different – their contents are outside the remittance.

In principle, any performance may be the subject of a remittance. However, in trading practice, this will most often be a pecuniary performance. The validity of a remittance does not require any special form, but in trading practice written form is necessary. In relation to the remittee, it may be an registered remittance, a remittance to order or a bearer remittance.

The authorisations contained in the remitting party's declaration do not establish an obligation on the remitter or the remittee. The remitter becomes liable for the performance only upon acceptance. The acceptance of a remittance creates an abstract (detached) obligation between the remitter and the remittee, whereby the remitter may not refuse to make the performance by claiming charges resulting from the legal relationship between the remitter and the remitting party (i.e. from the coverage relationship). Also, the remitter may not, obviously, raise charges from the relationship between the remitting party and the remittee, or from the relationship between the remitter and the remittee (the currency relationship).

Pursuant to the regulation of article 921<sup>2</sup> § 2 of the 1990 version of the Civil Code, the remitter may not refer to charges resulting from the relationship between the remitter with the remittee, which was explained as the lawmaker's mistake. Currently (after the 1996 amendment to the Civil Code), article 921<sup>2</sup> reads as follows:

“§ 1. If the remitter has declared acceptance of the remittance to the remittee, the remitter shall assume the obligation with respect to the remittee to carry out the performance specified in the remittance.

§ 2. In such a case, the remitter may refer only to charges resulting from the contents of the remittance and charges that the remitter is personally entitled to apply toward the remittee.

§ 3. The remittee’s claims against the remitter resulting from the acceptance of the remittance shall be barred by limitation of one year.”

Thus, the current norms pertaining to the abstractness of remittance are clear. They have also sensibly captured the rigour of liability of the remitter who has accepted the remittance.

A remittance by itself does not generate any obligation on the part of the remitting party. For this reason, the remitting party may, pursuant to article 921<sup>3</sup> of the Civil Code, revoke the remittance, though only until the remitter accepts it or makes the performance. Such revocation may be carried out by notifying the remitter or the remittee.

The Civil Code also regulates certain effects of remittance in the coverage relationship and in the currency relationship. Thus, if the remitter is a debtor of the remitting party as to the performance remitted, the remitter shall be obliged with respect to the remitting party to satisfy the remittance (article 921<sup>4</sup> of the Civil Code). In turn, if the remitting party is a debtor of the remittee, the debt shall be written off only when the performance is made, unless agreed otherwise (article 921<sup>5</sup> of the Civil Code). As demonstrated above, the remittance significantly facilitates and accelerates legal transactions.

In practice, it exists quite rarely in its pure form. However, the construction of the remittance constitutes the foundation for classic institutions of securities law, such as the draft and the cheque, as well as for many institutions of contemporary legal transactions in banking (e.g. the letter of credit), and, to a limited extent, also for the postal money order (cf. order of the Supreme Court of 5 May 2005, IV CK 4/05, OSN 2006, No. 4, item 69).

## **5.2. *De lege ferenda* conclusions**

The question arises as to whether the current regulations on remittance should be moved en masse to the potential new Polish Civil Code and whether the current, quite clear, regulations on the abstractness of remittance are sufficient and meet the expectations of business trading practice.

It seems that the current regulations on remittance should be upheld. However, it could be considered whether these regulations require certain corrections (e.g. in respect of the abstractness of remittance). Yet suggestions, sometimes appearing in the doctrine, that the institution of remittance be removed from the Civil Code should be deemed as hasty.

## **6. Compensatory liability of a debtor<sup>127</sup>**

### **6.1. General comments**

The general grounds for the liability of a debtor for a failure to perform or a failure to properly perform an obligation are regulated in articles 471ff. of the current Civil Code. It seems that these principles should be upheld – which does not rule out the introduction of certain amendments of a mostly editorial importance.

The legal regime of this liability is complemented by the provisions of articles 361-363 of the Civil Code regulating the causal relationship, the notion of damage and the methods of its redress. They refer not only to *ex contractu* liability, but also to liability in tort, and do not raise any significant doubts.

However, during discussions with the Dutch experts, the following two issues were considered more broadly: liability for a wrong suffered as a result of a failure to perform or perform properly an obligation by a debtor, and a contractual penalty.

### **6.2. Liability for a wrong suffered (non-material damage)**

In the Polish civil law literature, it is assumed that demanding pecuniary compensation for a wrong is excluded in the case of *de lege lata* contractual liability.

Dutch law does not have to deal with the problem of whether pecuniary compensation for a wrong may occur in relation to contractual liability, because legal protection measures (compensation for material and non-material damages) are regulated in the Dutch Civil Code separately, and such regulations are applicable both to contractual liability and liability in tort. Pursuant to article 6:106 section 1 of the Dutch Civil Code, in respect of detriment

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<sup>127</sup> Issues pertaining to this subject were discussed during the 25-26 November 2005 conference attended by Dutch experts. Enclosed in the annex will be written reports on this subject prepared by Prof. Jan M. Smits, Ph.D., representing the Dutch side, and Maciej Mataczyński representing the Polish side. The discussion was moderated by Prof. Stanisław Sołtyński, Ph.D. hab. The meeting was also attended by: Prof. Paul Meijknecht, Ph.D., Prof. Bogudar Kordasiewicz, Ph.D. hab., Katarzyna Gonera, Judge of the Supreme Court, Prof. Marian Kępiński, Ph.D. hab., Prof. Wojciech Katner, Ph.D. hab., Prof. Leszek Ogiełło, Ph.D. hab., Prof. Janusz Szwaja, Ph.D. hab., Prof. Adam Olejniczak, Ph.D. hab., Aneta Wiewiórowska.

constituting non-material damage, the sufferer has the right to indemnity in accordance with the principles of equity:

- a. if the liable person intended to cause the detriment;
- b. if the sufferer's health has been harmed, if the sufferer's honour or good name has been injured, or if the sufferer's person has been offended in another manner;
- c. if the detriment consists in harming a good remembrance of a deceased person (...).

While at it, attention should be drawn to European Communities Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours. Article 5 of the Directive obliges the Member States to ensure that the organiser and/or retailer is/are liable for damage resulting for the consumer from a failure to properly perform the contract, unless failure is not their fault or the fault of another supplier of services. Further on, this provision stipulates that in the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract, and that such limitation shall not be unreasonable.

In Case C-168/00 *Simone Leitner v. TUI Deutschland GmbH & Co* adjudicated by the European Court of Justice, the Court ruled that, in principle, article 5 of the Directive imposes on the Member States a duty to introduce into their internal legal systems, the consumer's right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday. The Court decided that in article 5, the Directive implicitly recognises the existence of a right to compensation for damage other than personal injury, including non-material damage.

In this context, it should be pointed out that in accordance with the principle of the interpretation of internal law of the Member States formulated in the verdicts of the European Court of Justice, it should be assumed, in accordance with the Directive, that, in respect of the matter regulated by the Directive, also Polish law stipulates the possibility of seeking compensation for non-material damage.

The Dutch implemented the Directive in book VII of the Dutch Civil Code.

In the discussion about this matter, the *de lege ferenda* proposal to introduce into Polish law pecuniary compensation for a wrong (non-pecuniary damage, *dommage moral*) in respect of contractual liability won widespread approval. However, it was suggested that

qualified fault, i.e. wilfulness or gross negligence, would be necessary to ascribe such liability.

### **6.3. Contractual penalty**

This institution plays an important role in contractual relationships, especially in business trade. The Dutch experts indicate that in more detail, and their opinion in this matter is worth citing. In this light, the contractual penalty may perform two functions. First, it specifies the amount of compensation to be paid in the case of non-performance of a contract, thus eliminating the time-consuming and difficult process of assessing the actual damage (the function of assessment of compensation). Second, the contractual penalty may constitute an incentive for the debtor to perform the contract (the function of incentive). In such a situation, the amount of the contractual penalty exceeds the possible damage.

European legal systems differ in respect of the extent to which they accept these two functions *and* in respect of their approach to contractual penalties in unreasonable amounts.

First, in most legal systems (including the Netherlands – article 6:91-93 of the Dutch Civil Code – and France – article 1152 of *Code Civil*), the contractual penalty is accepted regardless of which of the two functions it performs. This may lead to the application of contractual penalties in unreasonable amounts. For this reason, these legal systems confer on their courts the possibility of reducing (or increasing) the amount of a contractual penalty. Pursuant to articles 6:91 and 6:94 of the Dutch Civil Code:

Article 6:91. A contractual penalty is any contractual clause stipulating that the debtor, in the event of non-performance (of the contract) is obliged to pay a certain amount of money or perform another performance, regardless of whether it is to constitute compensation for damage or make the other party perform (the contract).

Article 6:94. 1. At the debtor's request, the court may, if so required by the principles of equity and reasonableness, reduce the established penalty, though the court may not award the creditor less than the indemnity to which the creditor is entitled by law.

2. At the creditor's request, the court may, if so required by the principles of equity and reasonableness, award (the creditor), apart from the penalty agreed upon by the parties, additional indemnity as a replacement for the indemnity to which the creditor is entitled by law.

3. Any and all provisions contradicting § 1 shall be invalid.

This approach is also presented by the Principles of European Contract Law.

Article 9:509 of the PECL: Agreed Payment for Non-performance

1. Where the contract provides that a party who fails to perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party shall be awarded that sum irrespective of its actual loss.
2. However, despite any agreement to the contrary, the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the loss resulting from the non-performance and the other circumstances.

Second, English (and U.S.) law allows only such contractual penalties that perform the function of assessing the amount of indemnity: the parties may agree on a contractual penalty determining the amount of money to be paid in the amount of loss that may be reasonably predicted at the time of concluding the contract. Accordingly, a clause aimed at assessing the damage (a liquidated damages clause) is valid, but a penalty (in the strict meaning of the word) clause is not. As a result, it is not necessary to confer on the court the possibility of reducing the amount of the agreed upon contractual penalty.

A third solution has been adopted in Germany. German law accepts both functions of the contractual penalty, but in the opinion of the Supreme Court, these functions should be differentiated, because only the *Vertragsstrafe* (a contractual penalty as an incentive or stimulus) has a legal basis (articles 339ff. of *Bürgerliches Gesetzbuch*). The *Schadensersatzpauschalierung* is also binding, but it does not have a legal basis. Such an approach presented in court verdicts is heavily criticised in the doctrine, especially since it is difficult to differentiate between these two functions in a specific case. However, such differentiation is not necessary, because only the *Vertragsstrafe* is subject to court control (article 343 of *Bürgerliches Gesetzbuch*), albeit not in the case of contracts concluded between professionals.

Taking this criticism into account, it seems that the approach presented in the PECL (and Dutch and German law) should be preferred. Such a solution allows a conclusion that the agreed upon amount of a contractual penalty is too high, and the court should be able to reduce it.

As regards Polish law, there is a question over the desirability of upholding the principle of limiting the scope of application of the contractual penalty to non-performance of non-pecuniary obligations (article 483 § 1). It seems that this limitation cannot be repealed

until the prohibition on charging maximum interest, introduced by the Act of 7 July 2005, is lifted. Otherwise, an easy way to circumvent this prohibition would be open.

All in all, it should be concluded that the current regulation of this institution is appropriate. Thus, in particular:

- the stipulation of a contractual penalty does not relieve the debtor of the duty to pay it if it is demonstrated that the creditor did not suffer any loss; however, such circumstances may constitute the basis for moderation of the contractual penalty pursuant to article 484 § 2 of the Civil Code<sup>128</sup>;
- a contractual penalty must be limited only to non-performance or improper performance of a non-pecuniary obligation, though the latter notion should be construed broadly: it encompasses non-pecuniary obligations stipulating a performance of a material or non-material nature.

#### **6.4. Alleviation of sanctions for non-performance of mutual contracts**

Another issue that requires consideration is the postulate of conferring on the courts the powers to moderate a party's performance, if it is glaringly exorbitant in relation to the reciprocal performance of the other party to the contract. Although this issue is regulated in article 388 (exploitation)<sup>129</sup>, the powers of the courts set forth therein in respect of appropriate modification of the contents of a contract are limited by so many conditions that, in practice, this provision of law rarely finds any application.

#### **6.5. Unavoidable non-performance of an obligation**

Taking advantage of the most recent achievements of Polish scholars<sup>130</sup> supported by comparative law analyses, it would be desirable also to regulate in the Civil Code a debtor's liability for an unavoidable non-performance of an obligation (especially a refusal to perform an obligation).

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<sup>128</sup> CC art. 484 (2): If the obligation was performed in a considerable part the debtor may demand a reduction of the contractual penalty; the same shall apply to the case where the contractual penalty is glaringly exorbitant.

<sup>129</sup> CC art. 388: (1) If one of the parties, taking advantage of the state of necessity, inefficiency or inexperience of the other party, in exchange for its own performances shall accept or reserve for itself or for a third party a performance whose value at the moment of the conclusion of the contract glaringly exceeds the value of its own performance, the other party may demand a reduction of its performance or an increase of the performance due to it, and if both are excessively difficult it may demand that the contract be declared null and void. (2) These rights expire after two years from the day of the conclusion of the contract.

<sup>130</sup> Cf. J. Napierała, *Odpowiedzialność dłużnika za nieuchronne niewykonanie zobowiązania*, Warsaw 1997.

## 7. Compensatory liability for illegal acts

### 7.1. Introductory remarks

The Polish tort law system is based on the following three principles: fault, risk and equity. Following the French example, fault is captured in a synthetic manner, combining objective and subjective elements (article 415 of the Civil Code<sup>131</sup>).

In this regard, a postulate arises to reconsider this concept and reflect on the advisability of establishing norms distinguishing two of its elements, namely unlawfulness and fault in the subjective sense. The current provisions of law support an inclination to do so by connecting unlawfulness with the duty to redress a material damage or pay pecuniary compensation for the wrong suffered.

### 7.2. Liability based on risk

First of all, due to technical progress and developments in the organisation of social relationships, people are exposed to growing hazards to their lives, health and property. In the field of civil law, a reaction to these phenomena emerged in the form of establishing more rigorous regimes of liability based on the principle of risk. In particular, this tendency is reflected in the provisions of articles 435<sup>132</sup> and 436<sup>133</sup> stipulating the liability of a person conducting an enterprise set in motion by the elements of nature and of the possessor of a mechanical vehicle.

The regulation of article 435 of the Civil Code, with an appropriately flexible interpretation of this provision, allows it to cover damage inflicted on the environment – at the sufferer's demand. Certain supplementations to this provision can possibly be considered, consisting in a stronger indication of liability for damage caused by the emission, use or storage of hazardous substances.

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<sup>131</sup> CC art. 415: Whoever by his fault caused a damage to another person shall be obliged to redress it.

<sup>132</sup> CC art. 435 (1) A person who runs on his own account an enterprise or a business set in motion by natural forces (steam, gas, electricity, liquid fuels, etc.) shall be liable for the damage caused to a person or a property by the functioning of the enterprise or establishment unless the damage was due to force majeure or solely to a fault of the person who suffered the damage or a third party for whom he is not responsible. (2) the above provisions shall apply correspondingly to enterprises or establishments producing explosives.

<sup>133</sup> CC art. 436 (1) The liability provided for in the preceding Article shall also be borne by the autonomous possessor of a mechanical means of transport propelled by natural forces. However, if the autonomous possessor gave his means of transport in dependent possession it shall be dependent possessor who is liable. (2) In the case of a collision of mechanical means of transport propelled by natural forces the said person may claim from each other the redress of their respective damages on general principles only for the damage suffered by those whom they transposed by courtesy.

It might be worthwhile also to take into consideration the proposed provision of article 3:206 proposed by the Study Group on a European Civil Code. This provision of law follows without further analysis.

Article 3:206: Accountability for Damage Caused by Dangerous Substances or Emissions:

(1) A keeper of a substance or an operator of an installation is accountable for that substance or emissions from that installation causing personal injury and consequential loss, loss within Article 2:202, loss resulting from property damage or burdens within Article 2:209, if:

- (a) having regard to their quantity and attributes, at the time of the emission, or, failing an emission, at the time of contact with the substance, it is very likely that the substance or emission will cause such damage unless adequately controlled, and
- (b) the damage results from the realisation of that danger.

(2) “Substance” includes chemicals (whether solid, liquid or gaseous). Microorganisms are to be treated like substances.

(3) “Emission” includes:

- (a) the release or escape of substances,
- (b) the conduction of electricity,
- (c) heat, light and other radiation,
- (d) noise and other vibration, and
- (e) other incorporeal impact on the environment.

(4) “Installation” includes a mobile installation and an installation under construction or not in use.

(5) However, a person is not accountable for the causation of damage under this Article if that person:

- (a) does not keep the substance or operate the installation for purposes related to that person’s trade, business or profession; or
- (b) shows that there was no failure to comply with statutory standards of control of the substance or management of the installation.

Also worth attention are the specific provisions of the Dutch Civil Code pertaining to the use of waste dumping grounds (6:176). The point is to prevent the user of a dumping ground from defending themselves by raising a charge that the dumping was illegal, or that

the person who dumped their waste presented false information about the substance or had not known the hazardous properties of the substance.

In the Polish legal system, liability for children and animals is based on the principle of fault in supervision. A problem arises of whether, following the Dutch example, this liability should perhaps be sharpened to the level of liability based on the principle of risk.

### **7.3. Burden of proof**

The general norm of article 6 of the Civil Code stipulates that the burden of proof relating to a fact rests on the person who attributes legal effects to that act. In respect of tort liability, strict adherence to this principle would often put the sufferer in a hopeless evidential situation – especially severe in cases of personal injury.

For these reasons, scholars are looking for legal concepts allowing the distribution of the burden of proof in a manner that would be more convenient for the personally injured (e.g. *prima facie* evidence). The Dutch judicature has tackled this problem by stipulating that the court may reverse this principle and impose on the person who has allegedly committed a wrongful act the duty to prove that the damage was *not* caused by that person. The deciding criterion in such a case is reason: if it so requires, the burden of proof may be reversed.

The principle of reversal of the burden of proof is currently based on a determination of whether the damage was caused by a certain event. The lone fact that the event took place, *prima facie* constitutes proof of the existence of a causal relationship. Accordingly, in the event of liability toward a pedestrian for a road accident, the existence of a causal relationship between the accident and the damage is *prima facie* assumed – unless the car driver can prove the absence of such a relationship. This principle is also adopted in other types of cases. Thus, if a notary public or lawyer is liable toward their client (liability related to the practiced profession), it is deemed that the causal relationship between a certain behaviour and damage exists *prima facie* and the burden of proof that the damage would have occurred also in the absence of such behaviour rests with the notary public or lawyer. The same principle is applicable also to doctors: if a doctor has breached a certain norm and, in connection with this, caused that a certain risk has materialised (because damage has occurred), the burden of proof that the doctor's negligence was the cause of the damage does not rest with the patient – it is the doctor who has to prove the contrary.

It would be advisable to consider whether, in the Polish legal system, such evidential facilities should rather be regulated within the framework of civil procedure, thus leaving the substantive law regulation of article 6 of the Civil Code unchanged.

## IV. FAMILY AND GUARDIANSHIP LAW

### 1. Preliminary remarks

This section of the Civil Code requires amending, primarily with regard to relationships between parents and children. This need results from the contents of international treaties ratified by Poland and from the provisions of the Constitution. However, other *de lege ferenda* postulates formulated in the doctrine of law and in judicial rulings, in statements of the Ombudsman for Civil Rights and the Children's Commissioner should be taken into account. First of all, it is important to remember that family law is strongly conditioned by the prevailing morals and practices. Therefore, foreign legal examples and recommended international standards should not be copied mechanically, and norms of behaviour should not be imposed just because they are more modern than those currently prevailing in our society.

At the same time, partial changes that would threaten the stability of the code and consistency of the legal system should be avoided. The Civil Law Codification Commission has prepared a comprehensive reform of family and guardianship law, currently included in the Family and Guardianship Code – mainly in the area indicated above. This modification encompasses, among other things, the following institutions: affiliation of the child, parental authority, contacts between parents and children, the relationship between parents and children, and surrogate care over a child.

A draft of modifications forms an attachment to this book. Below, there is a discussion based on the justification prepared by the Family Law Team of the Civil Law Codification Commission.<sup>134</sup>

### 2. Definition of kinship and relations by marriage

In order to ensure the correct legislative considerations, the code should contain definitions of such legal relations. The proposed definition of kinship (art. 61<sup>7</sup>) is modelled after art. 1 of the 1946 Family Law, and the definition of relation by marriage (art. 61<sup>8</sup>) was transferred from art. 26 of the Family and Guardianship Code, which itself will be repealed.

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Moreover, the proposed § 2 explains the manner of defining the line and level of relationship by marriage.

### **3. Establishing the affiliation of a child**

#### **3.1. Establishing maternity**

This is of fundamental importance for establishing the child's civil status.

In general, the certainty of that legal relationship is based on the fact of the birth of the child. This certainty has been gradually weakened by the possibilities offered by modern medicine – impregnation and conception of a child is possible without physical contact between a couple, especially through impregnation outside of a woman's body when a woman different from the one who gave the fertilized egg carries the pregnancy until term (surrogate maternity). A dispute may arise over which of the women is the child's mother. The common solution is that legal maternity is ascribed to the woman who gives birth to the child. The 1975 European Convention on the Legal Status of Children Born out of Wedlock, ratified by Poland, clearly states (in art. 2) that maternal affiliation of every child born out of wedlock shall be based solely on the fact of the birth of the child.

However, the current Family and Guardianship Code and the Law on Vital Records do not provide a clear answer to the question of who is the child's mother. This answer is given in the draft, according to which the child's mother is the woman who gives birth to the child (art. 61<sup>9</sup>).

If a birth certificate has been prepared for a child of unknown parents, or if the maternity of the woman entered in the birth certificate has been denied, then the child and its mother may demand that maternity be determined (art. 61<sup>10</sup>). Other than a prosecutor, whose title to appear before court in cases of determining or denying a child's affiliation results from art. 86 of the Family and Guardianship Code, the action to determine the legal relationship of maternity may be brought only by a person directly affected by that legal relationship, i.e. the child itself and its mother. Even the husband of the mother at the time of the birth has no right of action in this matter, but should be notified about it (a copy of the statement of claim should be delivered) in order to be able to participate in the case in the capacity of an outside intervener. A relevant provision is being introduced to the Code of Civil Procedure (art.456<sup>1</sup> § 1). The presumed father of the child has no right of action in a case to determine maternity; this is based on the presumption that this very personal and intimate sphere of a woman's life

and the “mother – child” relationship, is her sole decision. Only if the woman wishes to positively define the legal relationship of maternity may the presumed father of the child influence the court decision in this matter. Otherwise, the man would be able to influence the legal relationship between the mother and the child against the will of the supposed mother, i.e. in a sphere not related to his person. The legal situation of the presumed father is secondary (derivative) to the maternity of the woman.

The child’s claim to establish maternity never expires, just as its claim to establish paternity. On the other hand, the child’s mother may file a claim to establish maternity only until the child becomes an adult (art. 61<sup>11</sup>).

### **3.2. Denial of maternity**

Pursuant to art. 61<sup>12</sup> of the draft, a claim to deny maternity is possible when a mother who did not give birth to the child was entered as the mother in the birth certificate. Only those directly interested in the matter personally, and not financially, have the right to file this claim. This means that this right is not vested in the heirs of any of those authorised to file this claim, or in any person whose inheritance would depend on the existence of the legal relationship of maternity, or lack thereof. Therefore, the right to appear before court is vested in the following people:

- 1) the child
- 2) the woman entered in the birth certificate as its mother,
- 3) the woman who gave birth to the child,
- 4) the husband of the woman entered in the birth certificate as the mother,
- 5) a man who has recognised the child of the woman entered in the birth certificate as the mother, as his own,
- 6) a man whose paternity has been established by the court on the basis of the fact that, during the conception period, he had sexual intercourse with the woman entered in the birth certificate as the mother,
- 7) the prosecutor.

Due to the need to ensure the stability of the civil status, the possibility of filing a claim to deny maternity should be limited by a reasonably short preclusive deadline. As in the case of denying paternity, a period of six months is set, depending on the event that justifies the beginning of the period. For the child’s mother, i.e. the woman who gives birth to the

child, the period starts on the date when the child is born; the beginning of the period for the child's mother to file a claim to deny paternity is defined in the same way.

### 3.3. Establishing paternity

If a child is born in wedlock then the previous rules for establishing paternity do not require any modification, except for the case of the separation of spouses.

However, the issue of establishing the paternity of a child born out of wedlock should be reconsidered, due to the advances that allow us to positively ascertain the affiliation of the child with a certain person. Therefore, it should become the rule that the paternity relationship is based on the actual biological relation between the father and the child.

In typical situations it is not justified, however, (for social, economic and organisational reasons) to verify this relationship in every instance, especially if it is highly probable, bordering on certainty. Acceptance of all the duties and rights resulting from the legal parental relationship with a child born out of wedlock is voluntary; therefore, it implies that the motive of a man who accepts such duties towards a child, who was not given birth by his wife, is his genetic affiliation with the child. Therefore, except for the court-conducted determination of paternity, it is permitted that the legal relationship of paternity is established voluntarily. It would be justified, however, to formulate such premises for its effectiveness that, to the extent possible without a routine check of genetic links, would ensure the maximum level of effectiveness that the legal parental relationship is as consistent with reality as possible.

Therefore the draft proposes that the current legal activity of recognising the child be replaced by the **recognition of paternity**. According to the draft, a father would recognise his paternity by admitting, before a specific state body (manager of the Registrar's Office, guardianship court), that the child is affiliated with him. Recognition of paternity is treated as an "act of knowledge" of both parents of the child who are convinced that the child is affiliated with the father. The necessary premise for the legal validity of the recognition of paternity is for the child's mother to confirm that the child is affiliated with the man who recognises his paternity. Therefore, the mother's statement confirming the paternity is not (as currently) her "consent" for the recognition. Recognition of paternity is treated as an act of knowledge about the child's affiliation with certain persons participating in the activities necessary to recognise paternity; therefore, as a result, recognition of paternity is ineffective if the child is not affiliated with a man who has recognised his paternity. The change in the

recognition concept proposed in the draft results in new criteria of the ability to recognise paternity, and the influence of third parties on its effectiveness (statutory representatives, see. art. 72-86 of the draft).

### **3.4. Denial of paternity**

The availability of genetic tests making it possible to establish or deny paternity with certainty justifies the proposal to adopt a simple and clear rule in the Family and Guardianship Code that paternity may be denied only by showing that the husband of the child's mother is not its father (art. 67). It was additionally accepted that the denial or establishment of affiliation of an **adult child** is only permitted upon his/her request.

## **4. Surnames for children**

The prevailing regulations accept, as a rule, that a child affiliated with the husband of the mother (art. 88 § 1 of the Family and Guardianship Code) and a child born out of wedlock recognised by the father (art. 89 § 1 of the Family and Guardianship Code) should have the father's surname (unless the directly involved parties make consistent statements that the child will bear the mother's surname). On the other hand, if paternity is established by court, the child receives the father's surname by virtue of the court award only upon its request, or upon request of its statutory representative (art. 89 § 2 of the Family and Guardianship Code).

In the first two cases, it is noted sometimes that the father's surname is being favoured (see the letter of 10 December 2004 from the Government's Commissioner on the Equal Status of Women and Men to the Justice Minister). On the other hand, art. 89 § 2 of the Family and Guardianship Code, in its current wording does not consider the amendment of art. 84 of the Family and Guardianship Code made in 2004, whereby a presumed father would also have the right of action in the process of establishing paternity. It seems that the equal status of the child's mother and father, including where paternity is established in a court award closing the procedure that he initiated, would be ensured by accepting a rule stating that when the child's parents do not agree on its surname, it would have a surname composed of the mother's surname and the father's surname (art. 88).

Due to the fact that the surname of future spouses constitutes the framework for defining their children's surnames, statements on children's surnames should be submitted at the same time as statements on surnames of future spouses are submitted. Such statements

(art. 25 § 1 sentence 2 of the Family and Guardianship Code) may be submitted before the manager of the Registrar's Office draws up a certificate ascertaining that there are no hindrances against the matrimony (see art. 4<sup>1</sup> of the Family and Guardianship Code on "concordat marriages"), or "immediately after the marriage is concluded".

A lack of agreement of the future spouses as to the surname of their children may be a sign of hesitation, and not a final and well-thought over decision. However, a decision concluded when the marriage is concluded may not be adequately thought over and the spouses may reach a lasting conviction that it would be justified to select another surname for their children only after their first child is born. Accordingly, the parents should be able to change the surname initially selected for their children when the birth certificate of their firstborn child is drawn up (art. 88 § 3). Concurring statements then submitted would determine the surname of the subsequent children of the same spouses (see art. 90<sup>1</sup> § 2: *Children affiliated with the same husband of the mother bear the same surname*).

If a child is recognised, the cooperation of parents in defining the child's surname may be permitted. Therefore, parents would be able to select the mother or father's surname, or choose a surname created by combining the mother's surname with the father's surname (in any order). If the parents cannot reach an agreement, the child would have a surname that consists of the mother's surname and the father's surname; in order to exclude discretion in combining components of the child's surname, a specific order of the surnames being combined should be clearly adopted. If the child has reached thirteen years of age, its personal approval would be necessary to change its surname.

The rule expressed in the currently prevailing art. 89 § 2 of the Family and Guardianship Code should be applied only if a lawsuit is started by the child or its statutory representative to establish paternity. This is because art. 84 of the Family and Guardianship Code currently gives the right of action to the presumed father as well. With regard to his authority to set the child's surname, he should be considered equal to the man who recognised the child. This is because in both cases paternity is established upon the initiative of the father who is interested in defining his own civil status and the child's civil status. However, if paternity is established by court, this means that the child's parents do not cooperate in defining its civil status (which indicates the existence of a conflict between the parents). Therefore, the child's statutory representative should be authorised to object to the father's application to give only the father's surname to the child, and also in such case give authority to the father to file an application to give the child a surname composed of the mother's surname and the appended father's surname.

The wording of art. 90 should be adjusted to the new wording of art. 88 § 1 and art. 89 of the draft Family and Guardianship Code, which will make it possible to give the surname of the mother's husband to the child. Paragraph 2 excludes the possibility of giving the surname of the mother's husband who is not the child's father to the child (and also a surname combining the surname of the mother's husband with her surname) if the child has the surname of its father, unless it is given upon an application by the child or its statutory representative. Therefore, it is not possible to give the surname of the mother's husband to the child if, upon the father's application, his surname or the surname composed of the mother's surname and the father's surname has been given to the child; such an application may be submitted by the father if he himself has filed a suit to establish paternity (see draft art. 89 § 2 sentence 2 of the Family and Guardianship Code). The situations in which paternity is established at the initiative of the father, i.e. by recognition and the court establishing paternity following a claim submitted by the interested man, should be treated similarly.

## **5. Parental authority**

### **5.1. General comments**

The term "parental authority" has taken root in social awareness and does not raise any objections. Occasionally there are proposals to replace the term and institution of parental authority with the term and institution of "parental care" (cf. e.g. the Senate's draft amendment to the regulations of the Family and Guardianship Code related to parental authority submitted to the Sejm on 15 November 1995 (Sejm form no. 1357), critically evaluated by the legal community and rejected by the Sejm after the first reading. Parents should have at their disposal "imperious" powers towards the person and property of their child who, due to the state of his or her physical, psychological and intellectual development and lack of life experience, is unable to independently make decisions in a manner appropriate for his or her benefit. Parental authority does not rule out taking the child's opinion into consideration, or joint decision-making on the child's affairs. Thus, it is doubtful whether replacing the term "authority" with the term "care" would have any significant "upbringing" connotation. One cannot disregard the social and moral realities (a loosened judgment and value system, the deterioration of moral authorities in a period of accelerating social and moral changes). Attention should also be drawn to parents' "imperious" actions in relations with third parties when representing the child and handling its affairs under the parents'

vested autonomy in exercising parental authority. The terms “care” and “parental responsibility” overexpose only certain aspects of the comprehensive set of rights and obligations comprising the legal situation of parents in relation to their child and third parties. The semantic scope of the term “parental responsibility” proposed in COE Recommendation No. R(84)4 on parental responsibilities also includes all parental rights and obligations, including those that, according to the Family and Guardianship Code, are not elements of parental authority (duty of maintenance, right to personal contact with the child).

The term “parental authority” is an adequate description of the parents’ role in the sphere of their child’s upbringing in relation to other entities. Article 48 of the Constitution gives parents priority in taking upbringing action towards their child. It seems that the term “parental authority” better reflects parents’ vested autonomy in executing their rights and obligations. By its nature, authority is necessarily autonomous, whereas care is not. Thanks to their life experience, older people are, by nature, predestined to lead younger people, who lack adequate life experience, and to make authoritative decisions in their interest. The draft upholds the requirement of the child’s obedience, but emphasises the increasing independence of growing children in making decisions and submitting declarations of will (see the draft wording of art. 95 par. 2 of the Family and Guardianship Code). Emphasis in the draft has been placed on ensuring a rational partnership of parents and children within the confines of and beside parental authority. Before making a decision on important matters concerning the person or property of a child, the child’s parents should listen to him or her, provided that his or her mental development, state of health and degree of maturity allow it, and, to the extent possible, should take into account the child’s reasonable demands (art. 95 par. 4 of the Family and Guardianship Code). On the other hand, the child, in matters where he or she can independently make decisions and make declarations of will (having a limited capacity to perform legal actions), should listen to the opinions and recommendations of his or her parents formulated for his or her benefit (art. 95 par. 2 of the Family and Guardianship Code).

Parents’ actions in various spheres of their vested parental authority, especially within the framework of their care for the person of the child and representation of the child, should be taken with respect for the child’s dignity (see the draft wording of art. 95 of the Family and Guardianship Code) and personal relations between children and their parents should be based on mutual respect (see the draft wording of art. 87 of the Family and Guardianship Code). Explicit wording of the proposed obligations will not only have a persuasive and upbringing value, but also a normative value. Although these obligations cannot be enforced directly, an evaluation of their execution may influence an evaluation of the exercise of rights in mutual

relationships between parents and their children (for instance, through the construction of an abuse of right), and the obligation to respect the child's dignity will be one distinct criteria for an evaluation of the correct exercise of parental authority.

## 5.2. Authorised subjects

The draft upholds the principle that parental authority is vested with both parents having full capacity to perform legal actions. However, it provides parents who do not have full capacity to perform legal actions with the rights to exercise ongoing care for the person of the child and to raise the child unless the guardianship court decides otherwise for the good of the child (art. 96 par. 2 of the Family and Guardianship Code). The drafted norms sanction frequent cases of the actual participation of the child's parents without full capacity to perform legal actions in exercising care for the child. This especially concerns underage, unmarried mothers, in particular those who, despite having turned sixteen, are currently unable to exercise legally sanctioned care for their child, as opposed to their married contemporaries who, as a result of entering into a marriage, have full capacity to perform legal actions and full parental authority. The proposed regulations will also create, in the child's interest, the basis for court solutions limiting or totally excluding the parents' participation in exercising care for the child and the child's upbringing. However, the drafted regulations do not create limited parental authority, but a legal basis for the co-participation of parents without full legal capacity in exercising care, upbringing and representation of the child with the other parent vested with parental authority or with the child's guardian.

Granting men the right of action to establish paternity (art. 84 of the Family and Guardianship Code) prompts an amendment to art. 93 par. 2 of the Family and Guardianship Code. It should therefore be resolved that parental authority will be obtained *ex lege* by the mother and the father, both in the event of the court's establishment of paternity and maternity. However, in a judgment determining the child's affiliation, the court may decide to suspend, limit or deprive one or both parents of parental authority. The provision of art. 98 par. 2 of the Family and Guardianship Code currently creates only an alternative – either a total absence of parental authority or full parental authority of a father whose paternity has been established in a court judgment. Thanks to the proposed regulations, already in the judgment ascertaining the child's affiliation, especially paternity, the court could exercise flexibility in modifying parental authority in a manner appropriate for the given case. The proposed amendment does not contravene the provision

of art. 48 sec. 2 of the Constitution, which reads that a “limitation or deprivation of parental rights may be effected only in the instances specified by statute and only on the basis of a final court judgment,” as the existing rights have been placed under guaranteed constitutional protection. In its judgment of 28 April 2003 (K18/02), the Constitutional Tribunal points out that the ascertainment of a child’s affiliation does not automatically have to lead to the child’s parents taking over parental authority.

### **5.3. Trust management of a child’s property**

Management of a child’s property is an attribute of parental authority that is subject to limitation in the sphere of activities exceeding the scope of regular management (art. 101 par. 3 of the Family and Guardianship Code) or subject to exclusion as a result of a declaration issued by a testator or donor making a bestowal on the child (art. 102 of the Family and Guardianship Code), and by virtue of a court ruling (art. 109 of the Family and Guardianship Code).

The provisions regulating the management of a child’s property do not raise any doubts. Therefore, they should be upheld in their current form. In particular, drawing up an enumerative list of management activities pertaining to a child’s property for which court permission would be required might set in stone the list of activities in a manner inappropriate for dynamically changing commercial and social relations. For the management of a child’s property, the model of management of shared property of spouses (articles 36 and 37 of the Family and Guardianship Code) is inappropriate, because it lacks differentiation of management activities into two categories and contains a closed-ended list of activities requiring action by both spouses (art. 37 of the Family and Guardianship Code). Also, both spouses participate in such management and are able to exercise effective control over each other’s actions (articles 36<sup>1</sup> and 40 of the Family and Guardianship Code), whereas a child does not participate (except for the situations indicated in the Civil Code) in the management of his or her property, and the factor of trade velocity does not play as important a role as in the management of spouses’ property. In this case, the most important thing is the child’s welfare, his or her proprietary interest. Therefore, the court should adjudicate *in casu* if there is any doubt as to the nature of the management of the child’s property, and should express its opinion on the permissibility of the performance of such an activity by the child’s parents.

Sizeable property of a child is no rarity these days (the source of a child's property is usually a donation, an inheritance and, sporadically, the execution of compensation claims and prizes won in lottery games). In the child's interest, a basis should be created for the court's formulation of an obligation addressed to both parents to prepare an inventory of the child's property, and to provide information on significant changes to that property. In order to facilitate the exercise of management of a child's property, especially property with a high value and diversified composition, and to protect such property against unjustified depletion in the longer term, through even minor activities of ordinary management, it should be proposed that the guardianship court be granted powers to specify an annual cap on the disposal of such property (cf. articles 103 and 104 of the draft).

#### **5.4. Execution of parental authority by separated parents**

In ruling practice, it is quite a common tendency to leave separated parents full parental authority without an appropriate examination of the actual possibilities of its agreeable execution in a manner consistent with the child's welfare. Thus, it is proposed, in reference to the postulates formulated in this matter in the doctrine (W. Stojanowska), that the solutions in question would be contingent on the presentation to the court of a parental agreement on the manner of executing parental authority and maintaining contact with the child. The concept of parental agreement refers to the American model of the "custody plan", which is the result of parents' negotiations and their voluntary undertaking before the court to exercise parental authority in a specified manner and to maintain contacts with their child. A similar plan (an "agreement" according to the draft) would be drawn up by parents and presented to the court for approval. The parents could be assisted by employees of the Family Diagnostic and Consulting Centres, who would combine their assistance with mediation and family therapy.

#### **5.5. Foster care**

Until 1975, the Family and Guardianship Code contained no mention of the organisation of foster families, the scope of rights (authorisations) and obligations of foster parents, custody and upbringing centres, and natural parents or the selection of foster parents. This gap was partly filled by the provisions of articles 112<sup>1</sup> and 112<sup>2</sup> which were added in 1975. Pursuant to art. 112<sup>2</sup> of the Family and Guardianship Code, separate provisions of law

regulate issues related to the selection of foster families and the cooperation of guardianship courts with state administration bodies in such matters, the scope and forms of state assistance to children placed in foster families, and the principles of parents paying for their children's stay in such families and the procedures applicable to such cases. The public tasks related to child care have been moved from the domain of education (the Educational System Act of 7 September 1991) to social aid – originally regulated by the Social Aid Act of 29 November 1990 and currently by the Social Aid Act of 12 March 2004 (Journal of Laws, No. 64, item 594 with subsequent amendments; hereinafter referred to as SAA). Thus, there exist parallel foster child care regulations in which the rightful leading role of the Family and Guardianship Code has been significantly weakened. The structure and substance of foster child care is defined exclusively by extracodical regulations. The Family and Guardianship Code does not specify the principles of placing children in foster families and custody and upbringing centres either. The principle of non-separation of siblings directed to custody and upbringing centres should be established by the Code, and not (as is currently the case) by separate social aid regulations.

Inserting basic foster child care regulations in the Code will stabilise the legal status in this respect, preventing the adoption of ad hoc, partial or inconsistent amendments to extracodical regulations within the domain of public law.

In particular, the draft amendment takes into account the constitutional principles set out in art. 72 (the right of a child deprived of parental care to care and assistance provided by public authorities), art. 48 (parents' priority in undertaking upbringing activities towards their child) and art. 47 (protection of private and family life). The provisions of the Convention on the Rights of the Child, adopted in 1989, have been taken into consideration, especially art. 20 of the Convention stipulating that a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State, which should ensure "alternative care" for such a child, in particular by foster placement or "placement in suitable institutions for the care of children." The draft amendment also refers to legal standards of the Council of Europe laid down in Resolution No. (77)33 on the placement of children (adopted by the Committee of Ministers of the Council of Europe on 3 November 1977) and Recommendation No. R (87)6 on foster families (adopted by the Committee of Ministers of the Council of Europe on 20 March 1987).

The exercise of foster care is ancillary to the original and natural parental care. Accordingly, wherever possible, the placement of a child in a foster family or in a custody

and upbringing centre should serve the purpose of returning the child to his or her natural family (family reintegration). Thus, alternative care exercised by a foster family should not, either in regulatory or practical terms, become similar to adoption. Quite the contrary: these two legal institutions should be clearly differentiated. A consequence of these assumptions is the principle, expressed in the proposed regulations (as well as in the provisions of the Social Aid Act currently in force), of a temporary nature of the exercise of foster care. Such a perception of foster care encompasses the assumption of the duty to protect emotional ties connecting the child with his or her parents (as the people to whom the child is to return) and other relatives (see also the proposed regulations on contacts with the child, especially art. 113<sup>1</sup> par. 2 of the Family and Guardianship Code).

The placement of a child in a foster family or in a custody and upbringing centre should not be treated as an absolute seizure of the child from his or her natural family, but as a form of aid rendered to the child and the family. This should be legally reflected in providing the possibility to ensure the child foster care both on the basis of a court ruling involving interference with the sphere of parental authority, and within the framework of rendering aid to families in their exercise of parental authority, as stipulated in art. 100 of the Family and Guardianship Code (see also the proposed art. 112<sup>4</sup> par. 2 and 3). The task of family courts and other family support institutions, especially social aid structures at the county (*powiat*) and municipality levels, is to take joint and coordinated action for the protection of the child's welfare and the right to live in a family. A legal duty of the courts and the other institutions mentioned above is their close cooperation stipulated by par. 229 of the Justice Minister's Regulation of 19 November 1987 on the internal work by-laws for common courts and art. 112 sec. 10 and 11 of SAA.

## **5.6. Personal contact with a child**

Article 113 of the Family and Guardianship Code is not a sufficient basis for defining the rules and scope of personal contact between parents and children for the child's welfare. Therefore, a new basis for making decisions on personal contacts between parents and children should be created if required by the child's welfare. It is necessary to define the rules and the scope of personal contact between the child and its siblings, grandparents, direct relatives by marriage, and other people who took care over the child for a longer period. Due to the fact that the right to contact the child is not an element of parental authority, it is regulated in a separate chapter. According to the draft, the child has a right and a duty to

maintain contact with parents . This approach corresponds to provisions of art. 9 sec. 3 of the Convention on the Rights of the Child, which states that the child has the right to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. The draft also takes into account art. 10 of the Convention, which provides that a child whose parents reside in different states should have the right to maintain personal relations and direct contacts with both parents on a regular basis (save in exceptional circumstances). The draft also takes into account the content of the Convention on contact concerning children, adopted by the member states of the Council of Europe in Vilnius in May 2002. Taking into consideration the predominant opinion of the doctrine and the jurisprudence, contact with children is stated as an attribute independent of parental authority, but which is one of the "parental rights" indicated in art. 48 item 2 of the Constitution of the Republic of Poland. The contact should be solely the parents' right, but also a duty, which in turn is fully consistent with the nature of parental authority (art. 113 – 113<sup>6</sup> of the draft).

The draft contains a catalogue of elements of contact with the child that includes: first, spending time with the child, comprised of visits, meetings, taking the child outside the place of its permanent residence; second, direct communication; third – correspondence; and fourth – using other means of remote communication, including means of electronic communication. The catalogue is open, but it contains the most important elements of contact with the child and should make it easier to formulate the court decision in this matter.

If the child stays permanently with one of the parents, they should together define how contact with the child is to be maintained, being guided with the child's welfare and considering its reasonable demands. Only when the parents cannot reach an agreement should these issues be resolved by the guardianship court.

According to the nature of contact – which is not an element of parental authority – the parents are not "relieved" from the duty to maintain contact with the child when they are deprived of parental authority or when their parental authority is limited and care over the child is exercised by a guardian, or when it has been placed in a foster family or in a custody and upbringing centre. This assumption is considered in the draft as it maintains, with regard to such parents, their right and duty to continue contacts with the child; the court may also intervene in the area of contact with the child if parents who are deprived of their parental authority neglect their duties. In the current legal status, contact is not an element of parental authority, and is not the duty of the parents; therefore, there are no legal grounds for the court to intervene in the event that the parent resigns from maintaining personal contact. Moreover,

the draft defines an open catalogue of the ways in which contact with the child may be restricted, namely: 1) a prohibition on meeting the child; 2) a prohibition on taking the child outside of the place of its permanent residence; 3) permission to meet the child only in the presence of the other parent or guardian, court-appointed curator or another person named by the court, 4) restriction of contact to certain means of remote communication, 5) a prohibition on remote communication. The regulation of contact is a brand new concept in Polish law. The open catalogue will be vital assistance for the decision-making court. The most severe measure, a ban on contact, is decided by the court in the event of a serious threat or violation of the child's welfare. According to the general assumption that the best option is to heal the situation in the child's family, or at least improve it partially, it has been envisaged that if circumstances change, the guardianship court may change its decision on contact.

An important novelty in the Polish family law is the planned provision that authorises the guardianship court deciding on contact with the child to oblige parents to ensure a certain behaviour. This provision also contains an open catalogue of the actions that may be included in the decision, indicating that the court may direct the parents to certain centres or specialists in family therapy and advice, or providing other appropriate assistance to the family.

Additionally, the draft regulates the child's contacts with relatives other than the parents, by reference to the appropriate application of the regulations that govern the child's contact with its parents. This way the relatives obtain quite strong protection, with a reservation that the child's welfare will always prevail.

Due to the legal and factual results of a divorce in the area of personal relations of the spouses, it would be justified for the divorce court to also decide on how contacts with the child would be kept, taking into account the agreement between the divorcing parents.

## **6. Duty of maintenance**

### **6.1. Parties**

The draft kept the general principle that the duty to provide maintenance binds direct relatives and siblings.

However, it modified the rules that define the duty of maintenance between stepchildren and the stepfather or stepmother (art. 128 § 2 and 3). The authors assumed that marrying a person who has his/her own child means to a significant extent that one accepts family duties. Therefore, a duty of maintenance towards a stepchild is introduced despite the

fact that the duty of the child's parents takes precedence. However, if the child has no other parent, or if one parent or both parents cannot provide benefits, then the duty of the stepfather or stepmother is created. If family duties are performed by a spouse of the child's parent, which includes participation in the child's maintenance and upbringing, then there are sufficient legal and moral premises for the duty of maintenance to arise between the stepchild and the stepfather or stepmother. A mutual duty of maintenance between a stepfather (stepmother) and a stepchild depends on a specific family situation, which is evaluated in consideration of the rule of equity. This means that in certain factual situations, a claim for maintenance benefits from a stepfather or a stepmother, or from a stepchild, may raise objections, e.g. in the event of antipathy or even hostility between the parties of this family legal relationship. Another reason for weakening the discussed duty of maintenance is the risk that, if this duty is to bind the spouse who is not the child's parent just as it binds the child's parents, it may prevent people from marrying people with children. This behaviour would be detrimental, because the creation of a full family through marriage (reconstructed family) stabilises social relationships better than the initiation of a common-law conjugal life with a person raising their own child. The criterion of equity introduced to the Family and Guardianship Code with respect to the duty of mutual assistance of spouses who remain in separation ruled by a court (art.61<sup>4</sup> § 3), will also provide an ethical evaluation of the demands of maintenance from the stepfather (stepmother) or from the stepchild.

## **6.2. Duration and scope of the duty of maintenance**

The Family and Guardianship Code imposes the duty of maintenance on the parents with respect to a child until the child becomes capable of maintaining itself on its own. Therefore, quite often doubts arise about in what situation a child, especially an adult child, can maintain itself on its own. The key issue is that the parents no longer exercise parental authority, the child acts at its own discretion, and the parents have no influence over decisions concerning education or resignation from obtaining professional qualifications. This, however, may prevent the child from earning a higher income, but does not mean that the grown up child cannot provide for itself with its own work. The current wording of art. 133 § 1 of the Family and Guardianship Code means that the parent's duty of maintenance does not expire on the date the child becomes an adult, and demands for maintenance by an adult child often raise doubts. One should mention here that in most European states, the absolutely binding duty of maintenance on the parents concerns minor children only. Any further duty

refers usually to adult children who, due to their disability, illness and continuation of education, are not able to maintain themselves on their own. The draft rejects the concept of the duty of maintenance being phased out at the moment the child becomes an adult, but it proposes to give the parents the right to decline the performance of the duty of maintenance if they are at the risk of excessive loss, or if the child does not attempt to become independent. The term “excessive loss” is already used in the code, in the duty of maintenance regulations (art. 134 of the Family and Guardianship Code).

Performing the duty of maintenance may consist in providing means for maintenance or upbringing, i.e. in the form of a pension, or by satisfying the maintenance needs in a shared household. The Family and Guardianship Code envisages yet another way of performing the duty of maintenance in the form of personal efforts by parents to maintain or raise the child. Taking into consideration the financial and family condition of certain people obliged to perform the duty of maintenance, it is desirable that this form of personal effort to maintain the entitled party be extended to all the disabled. It is common for the obliged party to earn a low income, but, through his/her work and personal efforts, may contribute to the provision of proper living condition to a minor (e.g. a grandchild) or to a disabled person (e.g. an elderly spouse, father or mother, grandparents etc.). In this case, another co-obliged party or a party obliged in the further order who has the earning and financial possibilities is obliged to provide supplementary performance in the form of money. Therefore, the duty of maintenance is facilitated according to the possibilities of respective family members. It should be emphasised that personal care for an entitled person is as important and as necessary as money, especially in the case of a disabled person or a minor child (art. 135 § 2 and 3).

There are certain doubts related to the affect of social benefits on the existence and scope of the duty of maintenance of family members. The notion of social benefits is not uniform. Social insurance benefits (old age pension, disability pension, family pension and other benefits associated with the legal relationship of employee insurance or insurance for the self-employed) support the entitled party’s own efforts and have the character of a claim. The same applies to benefits under universal social care, e.g. a benefit for giving birth to a child, a family benefit. On the other hand, social aid benefits are of a subsidiary character and do not reduce the duty of maintenance, which precedes social aid. The institution providing such aid is entitled to pursue a claim against the obliged family members, or it demands them to make a certain payment, e.g. for a stay in a care facility. Uncertainty as to the role of material benefits for the foster family has been the reason for frequent legislative changes.

Legal solutions should be supported that prevent the weakening of the duty of maintenance towards a minor child living in a foster family. Public aid to people comprising a foster family does not release them from the duty of maintenance towards the child, but serves the purpose of satisfying the child's current needs that cannot be satisfied by the maintenance benefits due from the relatives in connection with their earning and financial possibilities (see the draft art. 135 § 3 of the Family and Guardianship Code). If a foster family is comprised of people outside of the group obliged to provide maintenance benefits, then material aid for the child allows these people to discharge the function of foster parents.

The question of pursuing unpaid maintenance benefits is related to the limitation of claims. The legal nature of maintenance benefits is that they should provide the means for sustenance on an ongoing basis. Therefore, the Supreme Court resolution of seven judges of 28 September 1949 Wa.C 389/49 OSN 1951 item 60 remains accurate and valid, whereby a claim concerning past benefits may refer to the unsatisfied needs of the entitled party, the payment of liabilities incurred by that party to satisfy its needs, the payment of overdue rent etc., for example. The issue of pursuing claims for unpaid maintenance pensions should be unequivocally regulated, because it is in the best interests of both the entitled party and the obliged party. This uncertainty as to the applicability of the *pro praeterito nemo alitur, nemo vivitur* rule is resolved by the proposed regulation in the draft § 2 art. 137 of the Family and Guardianship Code. At the same time, there is a need to reduce the limitation period applicable to maintenance benefits. In the Polish family law, this period is very long and not compliant with the function of maintenance benefits. A one-year period is used in foreign legislation. It seems that, in light of the delicate nature of family relationships, and considering the need to avoid excessive burden on the obliged party, the period of one year seems to be optimal.

In the future, this provision may be referred to, in particular, by spouses and also by parents of adult children demanding maintenance benefits. On the other hand, the allegation of abusing the right was removed with respect to claims of a minor child against its parents, because neither difficulties with upbringing nor the bad behaviour of the child may release the parents from the obligation to care for the child, and primarily from the duty of its maintenance and upbringing (art. 144<sup>1</sup>).

The reference to the principles of community life, and not to the rules of equity, for example, is justified by the fact that the construction depicting the evaluation of a demand for maintenance benefits refers to the construction depicting an abuse of the subjective right

expressed in art. 5 of the Civil Code containing the general clause of principles of community life.

## 7. Guardianship and curatorship

### 7.1. Appointment of a guardian

The authors envisage that art. 150 of the Family and Guardianship Code regulating “institutional guardianship” would be revoked. This is an outdated concept that does not correspond to the requirements and postulates of modern pedagogy. Also, when a child stays in an educational establishment (currently – in a custody and upbringing centre, juvenile detention facility or reformatory establishment), its guardianship should be entrusted to natural persons who are not employees of the guardianship establishment. This is justified by the need to duly and objectively verify the conditions of the minor’s stay in the establishment. The concept of institutional guardianship in the literal meaning of this phrase (entrusted to guardianship establishments or social organisations) was considered not only as detrimental for the minor, but also legally flawed due to the character of the entity (an organisational unit, in particular – a legal person).

On the other hand, a natural person cannot be appointed as a guardian if he/she does not have full capacity to perform acts in law, or has been deprived of public rights. Additionally, the draft formulates a number of contra-indicators against the performance of the function of a guardian (art. 148).

First, a person named by the father or mother should become a guardian of a minor; if they have not named any such person – a person from among the minor’s relatives or other persons related to the minor. If there is no such person, the guardianship court asks an *appropriate social aid organisational unit* or a social organisation caring for minors, to name a person to whom the guardianship could be entrusted, or if the minor is in a *custody and upbringing centre or in a juvenile detention centre or in a reformatory establishment*, the court may also address *such centre or establishment*. If there is a need to appoint a guardian for a minor placed in a foster family, the court will entrust guardianship primarily to the foster parents (art. 149).

However, there are frequent cases when the requests of family courts addressed to communal or municipal social aid centres to name people who could be entrusted by the court with guardianship of fully legally incapacitated people and curatorship over partially legally

incapacitated people, prove to be totally ineffective. The prevailing provisions of the Family and Guardianship Code impose an obligation to accept the guardianship on every person appointed by the guardianship court to be the guardian, and permit that this person be relieved from this obligation for important reasons (art. 152 of the Family and Guardianship Code). This regulation pertains to the guardianship of a minor, guardianship of a fully legally incapacitated person (art. 152 in connection with art. 175 of the Family and Guardian Code) and curatorship of a partially legally incapacitated person (art. 152 in connection with art. 178 § 2 of the Family and Guardian Code). The guardianship court may fine a person who evades the acceptance of guardianship (art. 598 § 1 of the Code of Civil Procedure). Therefore, the acceptance of guardianship is not only an honourable and civic duty; it is also a legal obligation. Nevertheless, it is generally impossible to effectively enforce acceptance of guardianship. A fine, whose purpose is to enforce the obligation to accept guardianship, does not have to result in the acceptance of guardianship by making a pledge before the guardianship court (art. 153 of the Family and Guardianship Code). Additionally, it seems that a person evading the acceptance of guardianship will not properly perform guardianship duties, and the probability of the improper performance of guardianship duties by a person should rule out his/her appointment as a guardian (art. 149 of the Family and Guardianship Code). No changes to these regulations are necessary. Nevertheless, the introduction of a general rule for remunerating the guardian should be examined. A reluctance towards accepting guardianship duties (especially of a fully legally incapacitated person) is caused by the fear that one may fail to perform the duty of care and administration of the financial affairs of the person under guardianship, the fear that expenses could be incurred when discharging this function, despite the fact that the pursuit of reimbursement of incurred outlays and expenditures has been regulated (art. 163 of the Family and Guardianship Code) and the time consumption of the guardian's or curator's function. The rule that guardianship duties (considered to be a civic duty) are performed without remuneration, with the exception of a significant work effort made to administer the property of the person under guardianship (art. 162 § 2 of the Family and Guardianship Code) is being questioned. This is due to the fact that personal efforts and care for the person under guardianship often require significant time, at the cost of time for gainful employment, or for rest.

## 7.2. Exercise of guardianship

The current wording of art. 158 may be removed from the code, because provisions on parental authority (art. 155 § 2 of the Family and Guardianship Code), and therefore also the drafted art. 95 § 4 (“Before making a decision on important matters concerning the child or its property, the parents should hear the child, if this is reasonable considering the mental development, health condition and maturity level of the of child, and take into account, if possible, its reasonable demands”), apply accordingly to the exercise of guardianship.

The new wording of art. 158 has been adjusted to the proposed regulation of art. 96 § 2 of the Family and Guardianship Code. It states that parents who have a limited capacity to perform acts in law participate in the exercise of ongoing care of the child and its upbringing. Therefore, the guardian should inform the child’s parents who take part in ongoing care of the child and its upbringing, about decisions in the more important matters associated with the person or property of the minor.

## 8. Regulations on spouses

### 8.1. Concluding marriage

The draft envisages that art. 8 § 3 of the Family and Guardianship Code would be amended by adding a sentence stating that the statutory non-business days **shall not be included** in the calculation of the 5-day deadline for a religious official to deliver to the Registrar’s Office a certificate that the persons intending to conclude marriage have submitted representations on concluding marriage. This amendment is to help the religious officials to keep this short final deadline in the event that marriages are concluded on days before holidays, or when holidays occur within this period.

### 8.2. Marital property relationship

In order to strengthen the protection of interests of a creditor who cannot obtain repayment from the debtor’s personal property and who could obtain repayment from the debtor’s share in the joint property of spouses, the draft envisages in art. 52 § 2 that: “In addition, a creditor of one of the spouses may demand that the court institute separate estates in matrimony if it demonstrates the probability that the repayment of a receivable debt, confirmed by an enforcement title, requires that the joint property of spouses be separated.”

Premises for the creditor's title to appear before court have been formulated so as to limit as far as possible the risk of unjustified and overtly troublesome interference of third parties in marital property status, but also to make it easier for the creditor to initiate effective execution relatively quickly. In accordance with these assumptions, a creditor interested in instituting separate estates in matrimony in the debtor's marital property relationship should only demonstrate the probability, and not proof, that the repayment of its receivable debt under a liability not resulting from an act in law requires that the joint property of spouses be separated. The demonstration of probability does not require adherence to the detailed regulations on the evidence process (art. 243 of the Code of Civil Procedure). If the institution of separate estates in matrimony upon a creditor's request depends on a demonstration that execution was ineffective, this would unnecessarily burden the creditor with the cost of execution and the time needed to obtain repayment of the receivable debt would be increased. The proposed § 2 art. 52 of the Family and Guardianship Code refers – with respect to the substantive law – to the regulation of the process prescribed by art. 778<sup>1</sup> of the Code of Civil Procedure *in finem*. On the other hand, in order to prevent the creditor's actions from merely being harassment, with no intention to carry out the execution process in the future, the proposed provision requires that the receivable debt be confirmed with an enforcement title for the creditor's request to be considered effective.

The interests of spouses and their creditors should be balanced, and therefore it should be adequately regulated whether the spouses are permitted to conclude a marital property agreement, and in particular an agreement restoring the joint property of spouses, after the court institutes separate estates in matrimony upon a creditor's request. This is necessary, as the spouses could frustrate the ruling instituting separate estates benefiting the creditor by immediately instituting, through an agreement, the joint property of spouses that encompasses the assets comprising the joint property during the previous joint property status, which was subsequently replaced by separate estates by the court upon the creditor's request. Therefore, the creditor might have not enough time to attach the right to demand the separation of joint property. Therefore, the spouses should be permitted to conclude a property agreement, but not before the joint property is divided. If a creditor attaches the right to demand separation of joint property then this right covers everything that the debtor receives on the basis of the legally valid court decision on the separation.

However, as a creditor of one spouse may have a claim for future periodic payments under a liability not resulting from an act in law (an obligation to provide maintenance benefit, pension duty – e.g. 446 § 2 of the Civil Code), the proposed art. 52§ 4 allows the

spouses to conclude a marital property agreement only after the creditor obtains collateral covering the benefits that are not yet due. Art. 730 § 2 of the Code of Civil Procedure permits a claim for benefits that are not yet due to be secured also after the entitled party obtains an enforcement title. Additionally, to avoid any excessive hindrance of the spouses' freedom to decide on their property status, the proposed § 4 art. 52 of the Family and Guardianship Code sets a maximum period in which the creditor should take action to obtain repayment or secure its receivable debt. After the lapse of three years after the separate estates in matrimony is instituted at the request of a creditor of one of the spouses, the spouses could replace the compulsory status with the contractual status. If such regulation was not in place, the creditor could wait and not take the action that was made possible by the institution of the compulsory separation of estate between the debtor and his/her spouse.

## **9. Extracodical regulations**

The amendment of the provisions of the code regulating the substantive family and guardianship law naturally require amendments to the related provisions of the Code of Civil Procedure and the Law on General Registry Office Records.

These amendments have been formulated in the draft amending the Family and Guardianship Code.

## V. INHERITANCE LAW<sup>135</sup>

### 1. Preliminary remarks

#### 1.1. Origin of legal regulations

After World War I, Poland was resurrected and combined in one state organism, but it contained as many as five legal areas pertaining to private law.

This situation with respect to inheritance law (taking into account the territorial changes after WW II) existed until 1 January 1947. On that date, an inheritance law decree of 8 October 1946 came into force. The decree was based on the solutions prepared by the inheritance law sub-commission established within the Codification Commission of the Republic of Poland, established in 1919. It was well received by the community of scholars.

However, it was not consistent with the assumptions of the communist system that was being intensively introduced in Poland since 1949. In the draft civil codes created in the early 1950s, the circle of people entitled to inheritance and the freedom of testation was significantly reduced, and a number of institutions regulating the area of inheritance law were removed.

These drafts were a significant step back in comparison to the law prevailing at that time. Fortunately, they never came into effect, and the “thaw” period of 1956 created a new situation in which the threat of any of them being enacted became non-existent.

#### 1.2. Civil Code

The 1964 Civil Code regulated the inheritance law in book four.

The novelties and changes introduced by the Civil Code to our inheritance law were not significant.

It seems that the opinion is justified that the devastation of the Polish civil law in the period preceding 1989, although significant, was not as deep as was once feared. This was caused by various factors, including:

- a) significant codification traditions in Poland between the wars and their influence on the unification and codification in the post-war period,

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<sup>135</sup> This paper has been drawn up by Prof. Maksymilian Pazdan Ph. D; also see the lectures delivered during the Polish-Dutch inheritance law conference (Katowice, 19-21 October) published in the “Rejent” 2006 no. 2.

- b) work on the Civil Code was recommenced immediately after the “thaw” period of 1956, and this task was assigned to the Codification Commission. This commission was not as independent as the Codification Commission from the interwar period, but between 1956-1962 developed a draft civil code that, despite many ideological elements, Poland should not be ashamed of.

This opinion is also true with respect to the provisions of inheritance law in the Civil Code.

Still today, i.e. after more than forty years, an overall evaluation of the provisions of Book Four of the 1964 Civil Code is rather positive.

Therefore, the question should be asked whether they should be changed.

In order to answer this question, the following should be considered:

- a) whether our membership in the European Union forces a reform of the inheritance law?
- b) whether the changes in the social and economic system that occurred in Poland after 1989 should result in changes in the inheritance law?
- c) whether the choices made while searching for suitable inheritance law solutions when the civil code was written were correct, and whether these solutions work smoothly and are suitable in the context of the current needs and expectations towards inheritance law regulations?

This paper does not serve the purpose of presenting a consistent draft, a new take on the inheritance law in the future Civil Code, but it is supposed to set out matters that require studies and discussion in search of the optimum solutions. However, this is just the beginning of the path towards the new Civil Code.

### 1.3. Objectives of inheritance law regulations

Before taking further steps along this path, however, there are certain considerations requiring that the objectives of inheritance law regulations be defined.

The relation between inheritance law and family law is commonly emphasised. It is expected that the norms of the inheritance law should strengthen family ties<sup>136</sup>. This must be taken into consideration when defining the criteria decisive for statutory succession, the circle of statutory heirs, the order of succession, the freedom of making *mortis causa* dispositions, as well as possible restrictions of this freedom.

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<sup>136</sup> See: J. Gwiazdomorski, *Prawo spadkowe*, Warszawa 1959, p. 20; J.S. Piątowski, [in:] *System prawa cywilnego*, t. IV: *Prawo spadkowe*, Wrocław 1986, p. 27.

There is no doubt that in every society, there is a relationship between the inheritance law and property relationships (especially ownership)<sup>137</sup>. The latter is decisive for the content of inheritance.

Personal relationships are closely related to the people that they concern, and naturally they expire upon the death of the entitled party. On the other hand, property relationships are usually established for a period independent of the usually random length of human life<sup>138</sup>. If these relationships are to serve their purpose correctly, then the death of the entitled party should not lead to their expiry. Bundles of such relationships, when properly combined, are often used to perform various forms of life activities (professional, economic) of the entitled parties (by which is meant largely professionals). The inheritance law enables the continuation of property relationships, individual or bundled (in groups) after the entitled party's death. Its norms create a chance to continue the economic use of the property owned by the testator after his/her death. This is in the interest not only of inheritance beneficiaries, but also of society as a whole.

The institutions of inheritance law should encourage a person to lead an active life and to accumulate property, while discouraging the waste of property. Therefore, every potential testator should have a broad freedom of making *mortis causa* dispositions concerning his/her property; if there is no such disposition, then the succession *ab intestato* of his/her relatives should be defined according to the rules corresponding to his/her hypothetical will (of course, this is the probable point of view of an abstract, not a specific testator). When the testator uses his/her right to make *mortis causa* dispositions, s/he opens a way to extending his earthly existence and influencing the future. Therefore, this is a form of a post-mortem self-fulfilment. And finally, the norms of the inheritance law are used to enhance the safety of business, as they remove uncertainty as to the validity of property relationships after a counterparty dies.

The institutions of the inheritance law should promote solutions in which the testator's property after his death is used optimally.

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<sup>137</sup> This is emphasised, among others, by J. Gwiazdomorski, *Dziedziczenie ustawowe ...*, p. 221; J.S. Piątowski, [in:] *System* p. 23; the same in *Prawo spadkowe. Zarys wykładu*, Warsaw 2002, page 21; T. Kipp, H. Coing, *Erbrecht*, Tübingen 1990, p. 1.

<sup>138</sup> For more on this subject see E. Till, *Prawo prywatne austriackie*, vol. VI: *Wykład prawa spadkowego*, Lwów 1904, p. 2.

## 2. Consequences of European Union membership

So far, work on unifying international inheritance law is being conducted in the European Union.

An announcement of starting work on the European succession instrument appeared in 1998, in the Vienna Action Plan (Plan d'action de Vienne)<sup>139</sup>. This task was also introduced to the Council's agenda of November 2000<sup>140</sup>. Moreover, the Hague agenda of the Council of 2004 called upon the Commission to present a Green Book<sup>141</sup>.

The study was ordered from the German Notary Institute in Würzburg. Based on national reports from 15 member states, a final report was created in 2002, along with proposals to unify the international inheritance law. These proposals were presented at a conference in Brussels on 10 and 11 May 2004<sup>142</sup>.

And finally, on 1 March 2005, a Green Book on Succession and Wills was published, containing 39 questions concerning the governing law and jurisdiction of courts in inheritance cases, the method of confirming the qualification of a heir or estate administrator, a register of wills, trusts, etc.

Therefore, in the near future, national legislators will remain responsible for the substantive inheritance law.

The proposal to unify international inheritance law within the European Union, and to introduce solutions facilitating the pursuit of succession rights is supported by observations of social and economic processes in the Union resulting from the rule of free flow of capital and people, freedom of movement and employment (which however is somewhat limited for our citizens) and freedom of settlement.

As a result of these processes, the number of inheritance cases with a foreign element in the EU states is constantly increasing. The foreign element usually involves the fact that, upon his death, the testator lived or stayed in a member state other than his mother state, or the testator left monies on an account in a foreign bank or owned real estate located abroad.

<sup>139</sup> Official Journal C 19 of 23.1.1999

<sup>140</sup> Official Journal C 12 of 15.1.2001

<sup>141</sup> See: R. Wagner, Die Aussagen zur Justiziellen Zusammenarbeit in Zivilsachen im Haager Programm, IPRax 2005, vol. 1, pages 66-67; see also: information in IPRax 2001, vol. 1, p. 163 et seq.

<sup>142</sup> The whole documentation was published in the paper entitled *Les successions Internationales dans UE. Perspectives pour une Harmonisations*, Bruxelles 10-11.05.2004. On this work also see: H. Dörner, Ch. Hertel, P. Lagarde, W. Riering, *Auf dem Weg zu einem europäischen Internationalen Erb- und Erbverfahrensrecht*, IPRax 2005, vol. 12, pp. 1-8; T. Pajor, *O projekcie harmonizacji międzynarodowego prawa spadkowego w Unii Europejskiej*, (in: *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu*, Poznań 2005, pp. 877-888; M. Voltz, *Internationales Erbrecht in der EU – Perspektiven einer Harmonisierung*, IPRax 2005, vol. 1, pp. 64-66; G. Hohloch, *Kollisionsrecht in der Staatengemeinschaft*, (in: *Festschrift für Hans Stoll*, Tübingen 2005, pp. 550 et seq.; J. Pazdan, *Ku jednolitemu międzynarodowemu prawu spadkowemu*, Rejent 2005, nr 3, p. 9 et seq.

According to statistical information quoted in the annex to the Green Book (1.2.), in 1999-2000, citizens of member states constituted on average 1.5% of inhabitants of other Union states (though this number was almost 20% in Luxembourg and almost 5% in Belgium).

According to the data, in absolute numbers, there were 1,858,000 citizens of other member states living in Germany, over a million in France, 859,000 in the UK, 563,000 in Belgium. It was also calculated that 11.7% of the Irish, 8.2% of the Portuguese and 4.2% of Greeks lived in other member states in the discussed period.

According to the same source, from 800,000 to one million German citizens owned real estate abroad (mainly in Spain, Italy and France).

One should also note that annually ca. 50,000 inheritance cases are cases from citizens of EU member states.

One should also expect that, in time, the number of inheritance cases with a foreign element, especially those associated with the territory of EU member states, will increase. This will also increasingly apply to Poland and its citizens.

Although the future act of community law will cover mainly international inheritance law (both private and process law), new norms must be created in the domestic law that will make it possible to use community instruments such as a European inheritance certificate issued to heirs, or a European certificate issued to the executor of the testament or the administrator of estate. The domestic law will also have to reflect the adoption in community law of rules of the unified system of national testament registers.

The Notarial Law will also have to be amended if notaries obtain powers in this area. Such postulates are already being made<sup>143</sup>.

### **3. Succession**

#### **3.1. Preliminary remarks**

Succession is the main subject matter of inheritance law regulations. Under Polish law, it is based on the principle of universal succession, i.e. succession that occurs *ipso iure* when the inheritance is opened (though which may be rejected) according to the *le mort saisit le vif* rule. A similar solution is envisaged under the Belgian, French, Luxembourgian, Dutch, German and Greek law.

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<sup>143</sup> See: K. Grzybczyk, M. Szpunar, . Notarialne poświadczenie dziedziczenia jako alternatywny sposób stwierdzenia prawa do dziedziczenia, Rejent 2006, no. 2, p. 44 et seq.

The principle of *hereditas iacens* (“resting inheritance”) is accepted under Austrian, Italian and Spanish law (heirs obtain inheritance only after they accept it, and in Austria additionally after “tying themselves to possession”).

The estate administration system<sup>144</sup> after the testator’s death, based on the custody principle, has been adopted under British and Irish law. Similar solutions apply in the Danish, Finnish and Swedish law.

It seems rather unlikely that the comparison of the inheritance principle adopted in our law with different solutions adopted in another legal system could convince us to abandon the fundamental principle of our inheritance law, i.e. universal succession.

It should be considered, however, whether we should not allow a departure from the universal succession principle, in the form of a recovery legacy (*legatum per vindicationem*), which is a form of singular succession. The recovery legacy gives the testator a chance to have greater influence over the future of his individual property items after his death, and this is its main advantage. For various reasons (not only emotional, but also rational), the testator may prefer this solution. The final response to the question of whether or not to introduce *legatum per vindicationem* in our law requires further study. It should be examined how this institution works in the states where it is permitted by law (in Italy, France, Belgium and Luxembourg), and whether or not it will make liability for inherited debt too complicated.

### 3.2. Statutory succession

The following solutions adopted in the 1964 Civil Code may be considered as undisputable:

- a) whether a child is born in a marriage or outside of a marriage does not influence its position under inheritance law.
- b) a child conceived but not born (*nasciturus*) inherits on the condition that it is born alive,
- c) agreements to renounce the inheritance are permitted,
- d) inheritance in connection with adoption (therefore, the current regulation of these issues does not require major changes),
- e) a municipality or State Treasury is included as a statutory heir,
- f) a foundation is permitted to be included in the testament as a heir or legatee.

The following questions should be asked concerning the statutory succession regulations in the future:

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<sup>144</sup> See: A. Kozioł, System administracji spadku w porządkach prawnych państw kręgu anglosaskiego, Rejent 2006, No. 2, p. 119 et seq.

- a) What links (criteria) should be decisive for including a person in succession *ab intestato*? Can this role be ascribed to kinship (for example by permitting the statutory succession of a testator's stepchildren if there are no descendants) or to the factual relationship of remaining in a common household?
- b) How broad is the circle of testator's relatives considered to be his/her statutory heirs? At present, the circle of statutory heirs includes the testator's descendants, parents, siblings and siblings' descendants. Should this circle be enlarged?
- c) How should the inheritance law consider the position of a spouse, especially when the spouse inherits together with the testator's descendants? Should he/she participate also in the part of the inheritance originating from the division of the joint estate when they maintained the status of joint estate in matrimony?
- d) What circumstances should exclude succession?

With reference to a) and b)

The enlargement of the circle of the testator's relatives<sup>145</sup>, considered to be his/her heirs, to include grandparents<sup>146</sup> and their descendants is supported not only by the rule of equity, but also a conviction that this will serve the purpose of strengthening family ties, and this is consistent with the idea of the best possible economic use of the testator's estate. One may also raise an argument of strong spiritual and family links usually existing between grandparents and grandchildren. Similarly, when there are no relatives who want and can inherit, or the testator has no spouse, one may expect that strong family ties usually form between the testator and the stepchild. This justifies the introduction of *ab intestato* succession of stepchildren.

If the testator's parents are alive, in the order of succession they come before siblings and siblings' descendants. This is supported by the following two arguments: the situation of the parents and their contribution to the creation of estate assets. As a rule, parents are at an age that leads to their life opportunities (earning and other) gradually decreasing. After their child dies, they cannot count on his/her aid in various difficult life situations. Most frequently, they were the ones who provided for upbringing and education. Thanks to their efforts, their

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<sup>145</sup> For the proposal of how to regulate statutory succession with the assumption that the circle of statutory heirs see M. Pazdan, O potrzebie i kierunkach zmian dziedziczenia ustawowego w polskim prawie cywilnym, Rejent 2005, No. 9, p. 46 et seq.

<sup>146</sup> In this spirit, de lege ferenda postulates have been made by: S. Wójcik, Ochrona interesów jednostki w polskim prawie spadkowym w zakresie powołania do dziedziczenia, ZNUJ – Prace Prawnicze, Kraków 1981, vol. 98, pp. 177-179; J. Piąkowski, [in:] System ..., pp. 128 and 146; J. Pietrzykowski, Wybrane zagadnienia..., p. 250.

child obtained earning possibilities. Therefore, the parents indirectly contributed to the creation of estate assets, when their child is the testator. Therefore, the parents should receive inheritance in the event of their child's death, provided that the child does not leave any descendants who are willing and able to accept inheritance. When evaluating succession, it is not important whether or not the parents remain in matrimony.

If the parents do not survive until the opening of inheritance, then his/her children (who are the testator's siblings anyway) should take his/her place, and if also none of their children survived until the opening of inheritance, the share of the sibling should be received by his/her children etc.

The enlargement of the group of relatives considered to be in the circle of statutory heirs will certainly push the statutory succession of a municipality to a more distant level.

The maintenance rights of grandparents should be maintained when there are no people obliged to provide them with maintenance benefits and the testator's spouse receives the inheritance.

During further discussion, it should be considered whether or not to include "foster children" in the circle of statutory heirs<sup>147</sup>. In the final decision, the scale of this phenomenon in Poland should also be taken into account.

With reference to c).

There is no reason to cause any deterioration of the spouse's position under the inheritance law. One could only deliberate whether or not to restore the solution prescribed by art. 25 of the 1946 Inheritance Law, whereby if there is joint estate in matrimony, the surviving spouse inheriting together with the descendants does not participate in the part of the joint estate that is added to the estate after the deceased spouse<sup>148</sup>. However, there are strong arguments against this proposal. Not unreasonably, the argument is raised that, upon a spouse's death, the other spouse obtains half of the joint estate, and this is not any special

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<sup>147</sup> At one time this was postulated by J. Gwiazdomorski, *Dziedziczenie ustawowe...*, page 230. He was supported in the discussion during the session in December 1954 by J. Ignatowicz, [in:] *Materiały ...*, page 270. Similarly, S. Wójcik states, in *Ochrona interesów...*, pp. 180-181 "the circle of statutory heirs should also include both minor and adult foster children, who were supported by the testator for a longer period, at least for one year. Those foster children should be included in statutory succession as are the testator's children". Certain reservations have been reported by J. Pietrzykowski, *Wybrane zagadnienia...*, p. 251.

<sup>148</sup> From the period when the discussion on the draft Civil Code was conducted see J. Policzekiewicz, *Głos w dyskusji nad księgą piątą projektu kodeksu cywilnego*, PiP 1960, No. 7, p. 115. For a more recent voice against this idea, see M. Habdas, *Pozycja prawna małżonka spadkodawcy na tle prawnoporównawczym*, *Rejent* 2006, No. 2, p. 58 et seq. (especially p. 77 et seq.) For an exhaustive description of the legal status from before the inheritance law came into force and the codification work see M. Stus, *Ewolucja dziedziczenia ustawowego w prawie polskim (1918-1964) – part II*, *Rejent* 2005, No. 11, p. 62 et seq.

privilege but a result of the fact that he/she was the co-owner of that property and the co-ownership is abolished in connection with the spouse's death. Most frequently, the surviving spouse contributed with his/her efforts to the creation or increase of the joint estate.

The proposed solution would also violate the unity of inheritance principle, which leads to significant practical complications<sup>149</sup>.

It is also postulated in public discussions that the legal position of the spouse should be strengthened by granting him/her the right to reside indefinitely in the apartment/house owned by the testator, structured according to the rules envisaged for the "statutory extra legacy". However bringing about this postulate would require a detailed and precise definition of premises for acquiring the right to the residence so that the acquisition of this right would be an exception from the rule.

Also in the future it should be possible to exclude the spouse's succession right if the testator filed for a divorce or separation through the fault of the spouse, and this request was justified. The provision of art. 940 of the Civil Code requires editorial modifications taking into account judiciary experience and the doctrine.

With reference to d)

At present, the following circumstances exclude the succession right: unworthiness to inherit and an inheritance renunciation agreement (concluded between a person from the circle of statutory heirs and the testator).

There is no doubt that the unworthiness to inherit criterion must be maintained in the future. It is based on ethical considerations. However, a question arises as to how the mechanism of unworthiness to inherit should be worded? Should the solution adopted in the 1964 Civil Code (art. 928-930 of the Civil Code) be upheld, according to which the unworthiness to inherit depends on the court's constitutive decision issued after a separate lawsuit is conducted to declare the heir unworthy, or should we return to the solution prescribed by the inheritance law decree of 1946, according to which the unworthiness occurred by virtue of law *ipso iure*) and its existence was determined in the inheritance procedure? Another question to be pondered is whether we should modify grounds for unworthiness (specify them more broadly or narrowly than in art. 928 of the Civil Code).

The discussion on those questions cannot be considered finished<sup>150</sup>.

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<sup>149</sup> See a statement in the discussion in December 1954 A. Ohanowicz, *Materiały...*, p. 259.

<sup>150</sup> See proposals made in this discussion by J. Zrałek, *Niegodność dziedziczenia – uwagi de lege ferenda*, Rejent 2006, No. 2, p. 203 et seq.

There is no doubt, however, as to the usefulness of the agreement to renounce inheritance. The only proposal is to examine whether or not the norm specified in art. 10 § 2 and art. 13 of the 1946 Inheritance Law should be restored<sup>151</sup>.

### 3.3. Last will dispositions

The following questions should be considered in the first place:

- a) whether inheritance agreements should also be allowed besides testaments,
- b) whether joint testaments should be allowed,
- c) whether the testator should have the full freedom of testation, without any correcting rules, or should the freedom be restricted; if so then how: using the system of reserve or legitim or in any other way (e.g. through maintenance claims of the testator's spouse and direct relatives),
- d) to what extent should the provisions regulating the content of last will dispositions be changed, among other things whether custody substitution be allowed in a testament (or in another *mortis causa* disposition),
- e) whether "division" testaments should be allowed,
- f) how should the regulation of the testament's form be changed.

With reference to a)

A preliminary discussion on the need to introduce the inheritance agreement to the Polish law bore a negative response. An argument was raised that if joint testament is allowed, and if the donation *mortis causa* agreement is looked upon favourably, then the inheritance agreement is not necessary<sup>152</sup>. It is said against the inheritance agreement that its permissibility violates the principle according to which the testator's will may be changed until his/her death (*ambulatoria est voluntas testatoris usque ad mortem*). Therefore every person should have the freedom to make a decision about his/her inheritance until the end of their life.

With reference to b)

<sup>151</sup> See E. Rott-Pietrzyk, Umowa o zrzeczenie się dziedziczenia – uwagi de lege lata i de lege ferenda, Rejent 2006, No. 3, p. 105 et seq. (especially pp. 118 and 119).

<sup>152</sup> See E. Rott-Pietrzyk, Umowa dziedziczenia – uwagi de lege lata i de lege ferenda, Rejent 2006 No. 2, p.178. It should be mentioned that a ban on an inheritance agreement was instituted in the Dutch civil code (art. 4 and 4). As for the German regulation of the inheritance agreement, see A. Duda, Umowa o dziedziczenie w prawie niemieckim – pojęcie i moc wiążąca, Rejent 2004, No. 3-4, p. 116 et seq.

Another answer seems to emerge with respect to the second question. A ban on joint testaments does not correspond with the regulation of the joint estate in the matrimony system as prescribed by family law<sup>153</sup>. The provisions of family law encourage spouses to perform *inter vivos* acts in law jointly, though they forbid a joint disposition of their income in the event of death.<sup>154</sup>

Nevertheless, the revocation of art. 942 of the Civil Code does not seem sufficient to introduce the permissibility of joint testaments<sup>155</sup>. It would be desirable for joint testaments to be fully regulated in separate provisions. Those may be based on the German model.<sup>156</sup>

With reference to c).

In the period preceding the adoption of the Civil Code, there was vivid discussion on the restrictions of the freedom of testation that should be adopted: reserve or legitim. Eventually – as we know – the proponents of legitim prevailed. Nevertheless, there were numerous different statements even after the Civil Code came into force<sup>157</sup>. Foreign legal systems feature various solutions<sup>158</sup>.

The pending discussions do not provide any convincing arguments for replacing the legitim system with the reserve system. There is an undisputable need for the correction of *mortis causa* dispositions (and also *inter vivos* donations) of the testator in order to protect the interests of the testator's relations.

There is a question, however, as to whether, in the name of strengthening respect for the testator's will, the right to legitim should have the character of a maintenance benefit (i.e. should it depend on the insufficiency and lack of the entitled party's earning possibilities). This matter requires further discussion.

If the system of legitim is kept, then the provisions of the Civil Code regulating this matter should be improved considerably.

<sup>153</sup> K. Przybyłowski, Niedopuszczalność wspólnych testamentów, *Studia Cywilistyczne* 1963, vol. IV, page 3. See also S. Wójcik, O niektórych uregulowaniach w prawie spadkowym. De lege ferenda comments in: *Rozprawy prawnicze. Księga pamiątkowa Maksymiliana Pazdana, Zakamycze 2005*, p. 1491 et seq.; W. Klyta, Testamenty wspólne, *Rejent* 2006, No. 2, p. 98 (especially pages 116-118). On the proliferation of joint testaments in other legal systems see: K. Osajda, *Testamenty wspólne*, Warsaw 2005, p. 15 et seq.

<sup>154</sup> See: A. Szpunar, Recenzja „Komentarza do kodeksu cywilnego” Księga IV: Spadki, autorstwa E. Skowrońskiej-Bocian, *Kwartalnik Prawa Prywatnego* 1995, No. 4, p. 605.

<sup>155</sup> Which is proposed by K. Osajda, *Testamenty...*, p. 118 et seq.

<sup>156</sup> See S. Wójcik, O niektórych uregulowaniach..., p. 1492; W. Klyta, *Testamenty...*, p. 117.

<sup>157</sup> The system of reserve was supported by S. Wójcik, *Ochrona interesów jednostki...*, p. 188; the system of legitim by J. Pietrzykowski, *Wybrane zagadnienia...*, p. 255.

<sup>158</sup> A broad range of solutions applied in other legal system was presented by M.-A. Zachariasiewicz, *Zachówek czy rezerwa? Głos w dyskusji nad potrzebami i kierunkami zmian polskiego prawa spadkowego*, *Rejent* 2006, No. 2, p. 183 et seq.

With reference to d)

The provisions that govern the content of a testament should be reviewed.

There is a very interesting proposal to permit the “custody substitution”, which is present in Spanish, Italian, Austrian, German, Swiss and Dutch law. Thanks to the “custody substitution”, the testator has a greater influence on the future of his estate after death. He may decide what happens to items comprising his life achievements and to which he is emotionally attached, after his death and the death of his descendants. Thus, certain items may remain in the family.

Custody substitution could take the form of a custodial appointment of a heir and a custody legacy (useful especially if recovery legacy is introduced)<sup>159</sup>.

With reference to e)

Proposals are coming from various circles, especially from the community of notaries, to introduce division testaments to our law, in which the testator could effectively decide on the division of components of his estate between the people specified in the testament<sup>160</sup>. This solution is present in some foreign legal systems (e.g. the French law, art. 1075 sec. 1 of the French Civil Code). There are many arguments for introducing this possibility to Polish law. Thus, the testator could prevent many disputes and distasteful scenes that may happen after his death when the heirs take control over the items from the estate.

With reference to f)

The current regulation of the form of the testament is rightly criticised. This refers mainly to the oral testament (art. 952 of the Civil Code) considered to be a special testament (art. 955 of the Civil Code). There are suspicions that these provisions lead to frequent abuses in practice.

There is no doubt that the holographic testament and notarial testament should remain among the admissible forms of testament. Following the Washington convention, which has

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<sup>159</sup> A draft regulation of custody substitution was prepared by F. Longchamps de Berier. It is in the materials of the Codification Commission.

<sup>160</sup> See: K. Łaski, *Postępowanie spadkowe. Proponowane kierunki zmian*, Nowy Przegląd Notarialny 2001, no. 7-8, p. 84 et seq.; J. Biernat, *Z problematyki tzw. testamentu działowego w polskim prawie cywilnym*, Przegląd Sądowy 2005, No. 4, p. 46 et seq.; J. Górecki, *Umowa darowizny na wypadek śmierci*, Rejent 2006, No. 12, p. 43;

M. Fras, *Dział spadku. Uwagi de lege lata i de lege ferenda*, Rejent 2006, No. 2, p. 22 et seq.

not yet been ratified by Poland, we may consider the purpose of introducing the possibility of depositing with a notary a testament written by the testator.

Further discussion is required on whether to keep the current form of the allographic testament.

The special oral testament should no longer be allowed, and, for practical reasons, nor should a testament written during a voyage.

#### **4. Jointly inherited estate**

The regulation of jointly inherited estate in the Civil Code is coming under much criticism. There are allegations<sup>161</sup> that it is too laconic and that some provisions (e.g. art. 1036) are unclear. Art. 1035 of the Civil Code, which contains a reference to the provisions on co-ownership in fractional parts, is the source of many doubts and practical difficulties.

Therefore, the provisions on jointly inherited estate require many changes and additions.<sup>162</sup> This matter should be fully and exhaustively regulated in the inheritance law and references to provisions of substantive law should be removed. It is necessary to clearly regulate certain matters that raise doubts, such as the situation of joint heirs when the estate includes a claim for an indivisible obligation, the operation of the surrogacy principle when the estate includes property items obtained in return for sold items, the legal situation of proceeds and other income from items comprising the estate. Therefore, there are questions about whether to remove the solution given in art. 1036 of the Civil Code.

Nevertheless, the whole construction of jointly inherited estate, which differs from co-ownership in fractional parts and from joint co-ownership, deserves to be accepted and kept in the future.

#### **5. Liability for inherited debts**

Liability for inherited debts is generally regulated correctly.

However, this does not rule out postulates for changes and additions.

Art. 1030-1033 of the Civil Code define only general limits of liability of a heir who has accepted the inheritance with the benefit of inventory. They do not provide the heir with

<sup>161</sup> See J. Gwiazdomorski, Dwa problemy z zakresu wspólności spadkowej, *Państwo i Prawo* 1977 No. 3, page 137 et seq.; E. Drozd, in: *System...*, vol. IV, 1986, p. 415; M. Kłos, *Wspólność majątku spadkowego*, Warsaw 2004, p. 44 et seq.

<sup>162</sup> See: W. Kurowski, *Stosunki między współspadkobiercami przed działem spadku – uwagi de lege ferenda*, *Rejent* 2006, No. 2, p. 140 et seq.

instruments that he/she may use to ensure liability within the limits specified in the act. There are diverse situations in life. First of all, the heir's liability for respective debts may differ. Secondly, the heir may not be aware of certain debts.

Therefore, an heir could benefit from an institution that would remove a threat that he would have to pay for the inheritance using his own property, and at the same time would properly protect the creditors. A convocation of inheritance creditors may be such an institution. In this institution, after the lapse of a certain date, a plan would be arranged to satisfy the reported receivable debt and the creditors who are otherwise known to the heir.

This institution has not been introduced to the Civil Code. In any case, the purpose of such an institution is not satisfied by the very laconic provision of art. 1032 of the Civil Code.

Therefore, the postulate *de lege ferenda* to regulate the convocation of inheritance creditors in the future Civil Code seems to be justified.<sup>163</sup>

A change of the solution prescribed by art. 1034 § 2 of the Civil Code should be supported, as should joint and several liability of heirs for inherited debts also after the division of the estate. The weakening of liability resulting from this provision is detrimental to the justified interests of the inheritance creditors.<sup>164</sup>

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<sup>163</sup> This has already been postulated by J. Gwiazdomorski, *Prawo spadkowe w kodeksie cywilnym PRL*, PiP 1965, No. 5-6, p. 724.

<sup>164</sup> See J. Gwiazdomorski, as above, p. 725.

## Conclusion

In light of all these considerations, there is a question about the path that should be taken to achieve the desirable final Civil Code. In particular, the matter should be resolved as to whether the further course of legislation work should focus on “improving” the current 1964 Civil Code, or whether it should aim at developing a new code for this branch of law. There is no unanimity in this matter among legal communities.

Those saying that the 1964 Civil Code should be kept, mainly indicate the technical advantages of this solution for the legislation process. They also refer to the postulate of the stability of law, which would be breached by developing a new Civil Code. This would also make it more difficult to apply the law, because new regulations would be created with different numbers, which would sometimes find no explanations in the past jurisprudence. Proponents of this solution indicate, in particular, the old codes, especially the French civil code, which have remained valid despite 200 –years of history.

On the other hand, there is strong support for the opinion that a new Civil Code should be enacted. This position is represented especially in the 2006 law development report issued by the Legislation Council at the Chairman of the Council of the Ministers.<sup>165</sup> This claims that “it is extremely important that the Civil Code meets the challenges of the present. Unfortunately, its current condition leaves the impression of only a partial codification, and an outdated one. This results from a number of factors, primarily from the fact that the code was introduced in 1964 and is based on the assumptions of the socialist system. The significant changes made in the Civil Code in the last 16 years could not remove the many remaining relics of the former system. Additionally, these changes have been made *ad casum* and they lacked an overall perspective on the whole code. In such conditions, “decodification” occurs: certain matters that should be placed in the Civil Code were instead placed outside of the code to the detriment of its completeness. (...) Therefore, a new Civil Code should be urgently developed, as it has been done in other states of the former socialist block. This is a very responsible task and requires efforts by a large group of specialists for a period of at least 2-3 years. So far, the urgent needs to harmonise the code with the current social and economic changes has made it impossible for the Civil Law Codification Commission to make that effort. Therefore, we should meditate on how this work could be sped up and finished as soon as possible.”

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<sup>165</sup> See the paper of M. Kępiński, M. Seweryński and A. Zieliński 9. Rada kodyfikacji na przykładzie prawa prywatnego w procesie legislacyjnym, *Przeгляд Legislacyjny* 2006, no. 1, p. 100.

This very direction of legislation work was proposed by the Civil Law Codification Commission in as early as 2004 when discussion on this subject was initiated.<sup>166</sup> This report confirms the thesis that the postulate of restoring the due role of the Civil Code as the fundamental legal act of private law cannot fully be performed; also, the further decodification of the civil law cannot be stopped and this legal system cannot be made internally consistent – without creating a new Civil Code.

This road was chosen by most of the post-communist states of Central and Eastern Europe, including those where the codes from the communist times were the most similar to the traditional. This refers in particular to the Slovenian<sup>167</sup> and Hungarian<sup>168</sup> codes.

On the other hand, the argument indicating the 200-year history of the French civil law as an example of the stability of the civil law does not seem to be convincing. This example is not very informative in the context of Polish civil law, mainly because it disregards the fact that the Polish Civil Code was created in a very different social system, and its relics are still visible in its provisions. Additionally, the stability of the French civil code is doubtful, as half of its provisions have already been changed. Without starting a discussion on whether this is “as much as” half or “only” half, it seems sufficient to evaluate the “remaining” half of the French Civil Code. During a celebration of the bicentenary of the code, the French President made a very negative statement on this subject, uttering that the outdated code requires “rejuvenation”. Its lack of harmonisation with modern business requirements is causes businesses to leave France in search of states where investments are more convenient. Other critics have pointed to the decomposition of the civil law and its internal inconsistencies.<sup>169</sup> Therefore, this is not a model to be followed by the Polish legislator.

There is no doubt that the stability of the Civil Code is one of its more desirable features. It cannot be understood, however, as a ban against any changes if there is social need therefor. Such a rigid stance would easily marginalise the code, deprive it of its central function in the whole civil law system, leading to the creation of separate legal systems outside of the code. This should be remembered today, when the law changes frequently, trailing the development of production and communication technologies, new communication

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<sup>166</sup> See Z. Radwański: Założenia dalszych prac kodyfikacyjnych na obszarze prawa cywilnego, PiP 2004, vol. 3, p. 5 et seq.

<sup>167</sup> See the Slovenian contract code of 2001, which replaced the Yugoslavian contract law of 1971; more on this subject in V. Trstenjak, Das neue slowenische Obligationenrecht, “Monatsheft für Osteuropäisches Recht” 2/2002, p. 94, 95.

<sup>168</sup> See the draft of the new Hungarian civil code; more in L. Vékás, Über die Grundzüge der ungarischen Privatrechtsreform, (w) Kodifikation, Europäisierung und Harmonisierung des Privatrecht, p. 149 et seq.

<sup>169</sup> See, among others, M. Olechowski, Sprawozdanie z Konferencji Międzynarodowej na temat 200 lat francuskiego kodeksu cywilnego, Paryż 11-12 III 2004, PiP 2004, vol. 6, p. 111, 112.

methods and political relations, especially in international relations. The strict understanding of the stability of codes that were formed in the 19<sup>th</sup> century, in a period of stable social relationships, should now be approached with flexibility. Therefore, one should not expect the new Civil Code to become a final and unchangeable legal act. Nevertheless, a modern content and style of the code will considerably reduce the need for constant amendments, especially when an appropriate legislation procedure is followed to prevent the continuous introduction of small corrections.

It is obvious that professionals do not like acts, and especially codes being changed, as it requires learning new legal rules. Therefore, the accepted and tested legal institutions and terms should not be changed too hastily. Accordingly, the new code should be a continuation of Polish civil law doctrine, which should not be abandoned in a revolutionary fashion. It should be emphasised, however, that the new codification will make it easier for the lawyers applying the law to satisfy their tasks, because it will indicate how the issues formed in the context of a different hierarchy of values and new social and economic relations should be solved.

There is one more question – whether a new Civil Code should be created, considering the emerging tendencies to establish a European Contract Code. This concept has had many proponents<sup>170</sup> and sceptics<sup>171</sup> in the doctrine. Two factors are important in this respect.

First, this intention does not in any way cover the whole scope of the civil law, but only part thereof. Second, the official stance of the EU and of most of the governments, including the Polish government, is to support a “soft” EU law in this matter. Therefore, contract law may be regulated internally, and its possible replacement by a unified EU law is uncertain and not to be expected in the foreseeable future. However, the main principles of contract, developed in the working groups, should certainly be an inspiration for Polish lawmakers.

A decision to start the work on a new Civil Code should naturally entail an initiative to develop a new Code of Civil Procedure. This has not been examined by the Civil Law Codification Commission to any greater extent. This proposal has been made by the deputy chairman of the Commission, prof. Tadeusz Ereciński.<sup>172</sup> It was countered with a critique from prof. Witold Broniewicz<sup>173</sup>, though this is hard to share as it is based on an ungrounded

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<sup>170</sup> Recently, the work of W.J. Kocot, *Perspektywy*, p. 405 et seq.

<sup>171</sup> See especially P. Meijknecht, *Tworzenie zasad europejskiego prawa kontraktów*, *PiP* 2004, vol. 2, p. 39 et seq.

<sup>172</sup> T. Ereciński, *O potrzebie nowego kodeksu postępowania cywilnego*, *PiP* 2004, vol 4, p. 3.

<sup>173</sup> W. Broniewicz, *Czy potrzebny jest nowy kodeks postępowania cywilnego?*, *PiP* 2004, vol 4, p. 11 et seq.

assumption that the new code will reiterate the current regulations. It may be added that new Codes of Civil Procedures are being developed in Slovakia<sup>174</sup> and in the Czech Republic,<sup>175</sup> among others.

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<sup>174</sup> A. Vinterova, Die Vorbereitung der neuen Kodifikation des Zivilprozessrechts in der Tschechischen Republik, Kodifikation, p. 261.

<sup>175</sup> L. Fogaš, Vorbereitung einer Neuregelung des Zivilrechtsverfahrens in der Slowakischen Republik, Kodifikation, p. 273.