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The Unification of Private Law in Europe from the Perspective of the Polish Legal Culture

Abstract: *The paper analyses the relationship between the possible future unification of private law in the European Union and Polish culture of private law understood as the ability of Polish legal culture to adapt to a new unified European private law in the future. Based on the assumption that Polish culture of private law does not have a 'unique' or 'original' character making it qualitatively distinct from e.g. German or French legal culture, the paper argues that Polish legal culture as such does not pose any obstacles to the unification of private law. The paper also analyses the possible impact of the unification of European private law on the practices of Polish legal culture, i.e. legislation, adjudication, legal counselling, scholarship and education. It argues that the unification would be the most beneficial for Polish practitioners and scholars, making their professions much more internationalised than at present and enhancing the possibility of their effective free movement across the Union. The same applies to legal education: the new unified European private law introduced into curricula of law schools, law faculties and legal professional training would mean that Polish students and apprentices would study subjects of a pan-European, and not only national relevance. A benefit common to judges, practitioners and scholars would be the possibility of resorting to a much wider scope of case-law and scholarly writings in pleadings, court decisions and academic discussions de lege lata. However, it would also be important to ensure that an input from Polish scholars is made into the new European doctrine of private law, so that the movement of legal ideas is not only one-sided.*

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Introduction

The unification of private law in Europe in the form of a European Civil Code has been on the academic agenda since the 1970s:[1] the first to propose the idea in the context of the European Communities was Professor Ole Lando in 1976 at a conference at the European University Institute.[2] In the 1980s, the idea gradually started to concretise in the form of the *Principles of European Contract Law* (PECL) prepared by the Lando Commission[3] which were published in parts between 1995 and 2003.[4] The PECL can in fact be said to be an 'embryo' of the future European Civil Code. By the end of the 1980s, the idea of a European Civil Code caught the attention of the European Parliament[5] and a decade later of the European Commission[6] and of the Council.[7] At present, responding to a call from the Commission to prepare a 'Common Frame of Reference',[8] a group of scholars has elaborated what

[1] The idea of a European Civil Code was first presented in the mid-19th century by two Frenchmen, A. de Saint-Joseph and E.Moulin, see: P.Legrand, *Against a European Civil Code*, "Modern Law Review" vol. LX: 1997, p.59.

[2] O.Lando, *Unfair Contract Clauses and a European Uniform Commercial Code* in: *New Perspectives for a Common Law of Europe,* ed. M.Cappelletti, Firenze 1978, p.267 et seq. Recently recalled by R.Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription*, Cambridge 2002, p.4.

[3] On the Lando Commission see e.g. M.Hesselink, *Principles of European Contract Law: Some Choices Made by the Lando Commission* in: idem, *The New European Private Law. Essays on the Future of Private Law in Europe*, The Hague-London-Boston 2002, p.89ff. The Lando Commission worked between 1980 and 2003 preparing the Principles of European Contract Law, a set of black-letter rules exhaustively regulating all aspects of general contract law. The PECL rules are drafted in a way which makes them a ready to use resource for legislators, thus making them a significant source of inspiration.

[4] *Principles of European Contract Law: Part I*, The Hague 1995; *Principles of European Contract Law: Parts I & II Combined and Revised*, The Hague 2000; *Principles of European Contract Law: Part III*, The Hague 2003.

[5] See: EP Resolution of 26.5.89. on action to bring into line the private law of the Member States, OJ C 158, 26.5.89., p.400-401 and EP Resolution of 6.5.94. on the harmonisation of certain sectors of the private law of the Member States, OJ C 205, 6.5.94., p.518-519.

[6] See: Commission Communication of 11.7.01. on European Contract Law, OJ C 255 p.1, reacting to the EP Resolution B5-0228, 0229 – 0230/2000 of 16.3.2000. OJ C 377, 29.12.2000., p.323.

[7] See: Council report of 18.10.01. on the need to approximate Member States' legislation in civil matters, Brussels, 18 October 2001, 12735/01 LIMITE JUSTCIV 124.

[8] In its documents the European Commission presented the Common Frame of Reference as a tool-box of rules and principles of European private law which could be useful for the European legislator when drafting new private-law instruments or revising the existing private-law *acquis*. The potential use of the CFR as the basis of a future European Civil Code was not made explicit by the European Commission.

can be said to be a first draft Civil Code, entitled *Draft Common Frame of Reference* (DCFR). The DCFR has been published in its preliminary version[9] which brings a new quality to the drafting of a common European instrument of contract law.[10]

Despite the unfavourable political conditions towards further integration in the field of private law, caused, *inter alia*, by the rejection of the Constitutional Treaty in 2005 and the recent problems with the ratification of the Treaty of Lisbon,[11] the fact that the drafting of the DCFR is progressing allows to remain optimistic, even if the enactment of a European Civil Code in a binding form is not a question of the nearest few years.

The debate about a European Civil Code in Poland started much later than in Western European countries;[12] the first Polish article on the topic was published only in 2001.[13] However, since then a host of papers regarding the unification of European private law have been published analysing the issue from various points of view.[14] Against this background, the aim of the present

[9] *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Interim Outline Edition*, Munich 2008.

[10] The new quality of the DCFR follows especially from the fact of its comprehensiveness – the text comprises not only a functionally limited field of law (as general contract law in the case of PECL) but also contains a set of rules on specific contracts, as well as rules on legal acts in general and certain rules on property law. This brings the DCFR closer to the scope of a typical civil code (with a general part) although it still does not enter the areas of family law or the law of succession.

[11] Although one can argue that the problems with the ratification of the Constitution and Lisbon Treaty are caused by unfavourable political conditions towards further integration, it seems that the lack of political will to move further on the path towards a unified private law is rather a consequence of those events; it is often said that the European Commission does not make proposals with that regard knowing that the Member States represented in the Council would look unfavourably upon them.

[12] This is obvious taking into account the fact that Poland was a socialist country until 1989, became associated with the EU only in 1991 and acquired membership only in 2004. Those facts explain why the Polish interest in European private law appeared later than in Western Europe. One should also mention here that no Polish scholars were invited to collaborate within the Lando Commission, this being due to the fact that Ole Lando decided to base the composition of his Commission on a member state parity (one Lando Commission member per each EU member state).

[13] C.Żuławska, *Uwagi o 'europeizacji' prawa umów (Remarks on the 'Europeanisation' of Contract Law),* "Kwartalnik Prawa Prywatnego" vol. 2/2001, p.229ff. A year earlier a translation of C.von Bar's article appeared in Polish – *Prace nad projektem Europejskiego Kodeksu Cywilnego (The Drafting of a European Civil Code)*, "Państwo i Prawo" no. 10/2000, p.43ff.

[14] T.Pajor, *Prawo cywilne a prawo Unii Europejskiej (Civil Law and European Union Law),* "Studia Prawno-Europejskie" vol. 6/2002, p.59ff.; E.Hondius, A.Wiewiorowska-Domagalska, *Europejski kodeks cywilny (Analiza prac Grupy Studyjnej) (The European Civil Code (An*

paper is to analyse the potential interaction between the hypothetical uniform and binding European Civil Code and Polish legal culture. This interaction will be understood as a two-sided relationship: on the one hand the possibility of adaptation towards a new European Civil Code and its possible impact upon Polish legal culture and on the other hand the possibility of an input of Polish legal culture into the drafting of a future Civil Code and into a unified European legal culture which would be based thereupon.

For the purposes of this paper, legal culture, understood as internal legal culture (i.e. the culture of lawyers)[15] shall be defined by resorting to the notion of legal practices, i.e. repetitive, socially and culturally pre-defined actions performed by the agents of legal culture (lawyers)[16] within the inter-subjective systems of meanings constituting the interpretive community of

Analysis of the Works of the Study Group)), "Państwo i Prawo" no. 6/2002, p.27ff; R.Mańko, *Prawo prywatne w Unii Europejskiej. Perspektywy na przyszłość (Private Law in the European Union: Perspectives for the Future)*, Warszawa 2004; R.Mańko, *Europejski kodeks cywilny – obecny stan prac i perspektywy dalszego rozwoju (The European Civil Code: The Present State of the Drafting and the Perspectives for Future Development)*, "Studia Iuridica" vol. 43/2004, p.135ff.; R.Mańko, *Instytucje UE wobec idei europejskiego kodeksu prawa prywatnego (The Institutions of the EU and the Idea of a European Code of Private Law),* "Przegląd Prawa Europejskiego" no. 2/2004, p.36ff; J.Bełdowski, *Ku Europejskiemu Kodeksowi Cywilnemu? (Towards a European Civil Code?),* "Edukacja Prawnicza" no. 7/2005, p.7ff; W.J.Kocot, *Perspektywy harmonizacji prawa prywatnego w ramach Unii Europejskiej ze szczególnym uwzględnieniem zobowiązań umownych (The Perspectives of Unifying Private Law in Europe With Particular Reference to Contractual Obligations),* "Studia Iuridica" vol. 44/2005, p.405ff; R.Mańko, *Idea europejskiego kodeksu cywilnego w świetle zasady pomocniczości (The Idea of a European Civil Code in the Light of the Principle of Subsidiarity)*, Zeszyty Naukowe TBSP UJ vol. 13/2005; J.Pisuliński, *Kilka pytań o europejski kodeks cywilny (Some Questions Regarding the European Civil Code),* "Transformacje Prawa Prywatnego" no. 2/2006, p.99ff; M.Kaczorowska, *Kontrowersje wokół unifikacji prawa prywatnego w Europie w świetle projektu Europejskiego Kodeksu Cywilnego (The Controversies Regarding the Unification of Private Law in Europe in the Light of the Draft European Civil Code),* "Transformacje Prawa Prywatnego" no. 2/2007, p.27ff; K.Kudrycka, *Czy kodeks cywilny jest sposobem na harmonizację prawa prywatnego w Europie? (Is a Civil Code a Way of Harmonising Private Law in Europe?)*, "Przegląd Prawa Europejskiego i Międzynarodowego*"* no. 1/2008, p.23ff.

[15] Cf. L.M.Friedman, *The Legal System: A Social Science Perspective*, New York 1975, p.194, 223ff; J.W.Johnson, *American Legal Culture 1908 – 1940,* Westport, Connecticut-London 1981, p.6.

[16] A term borrowed from sociology, see e.g. P.Bourdieu, *An Outline of a Theory of Practice* (translated by R.Nice), Cambridge 1977, p.16ff, p.78ff. In the legal context see: B.Z.Tamanaha, *Realistic Socio-Legal Theory. Pragmatism and a Social Theory of Law,* Oxford 1997, p.168ff; R.Münch, *American and European Forms of Social Theory reflecting Social Practice* in: *European Ways of Law: Towards a European Sociology of Law,* eds. V.Gessner, D.Nelken, Oxford-Portland 2007, p.149-150; K.Tuori, *Legal Culture and the General Societal Culture* in: *Private Law and the Many Cultures of Europe*, The Hague 2007, p.32.

lawyers.[17] Therefore legal culture is, on the one hand, the '*collective programming of the mind*'[18] of the legal community and, on the other hand, the activities (practices) of the members of that community that are informed by such programming. The two remain strictly interconnected. I also subscribe to Tuori's opinion that legal practices fulfil the role of channels of 'vertical communication' between the surface level of the law and its deeper structures, determined *inter alia* by legal traditions.[19] This view gives an insight into the relationship between legal practices, the 'mental software'[20] of the interpretive community performing those practices and the deeper structures of that 'software', as determined by legal traditions.[21] Within legal culture, one can identify five forms of practices: legislation, adjudication, legal scholarship, legal service (in-court and out-of-court) and legal education. Practices are performed by agents: judges, legislators, scholars, advocates and so forth; the same person may be an agent of multiple practices, e.g. one person may be at the same time a judge, a university professor of law and a member of a codification commission.[22] My analysis of the impact of the unification of private law in Europe upon Polish legal culture will therefore take into account all five practices. The structure of the paper shall reflect this methodology, analysing first general issues common to all practices of legal culture (section 2) and then aspects characteristic for each of the practices (section 3).

The enactment of a European Civil Code still remains a highly hypothetical event, nevertheless it seems right to analyse it, as if it were to be binding and directly effective; otherwise it would not have the unifying result which is crucial from the point of view of the present analysis.[23] For the purposes of my analysis I will treat a future European Civil Code as a binding and directly effective legal instrument (especially in the form of a regulation under the current Treaty provisions or a European law in the terminology of the Constitutional Treaty), covering the law of obligations (contract, tort,

[17] Cf. B.Z.Tamanaha, op.cit., p.171-172.

[18] G.Hofstede, *Cultures and Organisations: Software of the Mind,* London 2005, p.4ff; J.M.Smits, *Legal Culture as Mental Software* or: *How to Overcome National Legal Culture?* in: *Private Law and the Many Cultures of Europe,* The Hague 2007, p.143.

[19] K.Tuori, op.cit., p.32.

[20] J.M.Smits, op.cit.

[21] K.Tuori, op.cit., p.32.

[22] Cf. B.Z.Tamanaha, op.cit., p.172 and 175.

[23] Only a European Civil Code enacted in a *binding and directly effective* form would actually unify private law across the European Union. A Code in the form of a recommendation would obviously not lead to unification and a Code in the form of a directive would only approximate (harmonise) law rather than unify them. For an analysis of the potential legal forms of a future European Civil Code see e.g. M.Kaczorowska, op.cit.

restitution and benevolent intervention), property law and trust law. Due to foreseeable controversies, I do not expect that the European Civil Code, at least in the first stage, would cover family law,[24] the law of persons or the law of succession.

Two further issues are procedural law and the judiciary. A natural consequence of a European Civil Code and its natural supplement would be a European Code of Civil Procedure, however, in this paper I will concentrate only on issues connected to substantive law. The uniform application of the European Civil Code would certainly require[25] the creation of a new Community court which would have the jurisdiction to rule on preliminary references from the national courts.[26]

1. The Impact of a European Civil Code upon Polish legal culture: general remarks

1.1. The cultural argument

One of the arguments against the unification of private law in the European Union is the so-called 'cultural argument', vehemently propagated *inter alia* by Legrand. This argument has two aspects. According to the first aspect, a national legal culture constitutes an autonomous value, hence the existence of different legal cultures across Europe is a value in itself which ought to be protected.[27] In such a perspective the idea of a European Civil Code is an attack against cultural pluralism.[28] The other aspect of the cultural

[24] The controversies with unifying family law are best evidenced by the directions in which the Commission on European Family Law is progressing: until now it has published model rules regarding divorce and maintenance as well as parental responsibility, leaving for the time being the potentially most controversial area of conclusion of marriage (which would require to define whether this institution extends to homosexual couples too). For details see the CEFL website: http://www2.law.uu.nl/priv/cefl/

[25] This need results from two factors: first of all, the workload which would exceed the capability of the currently existing Community Courts and secondly the specialisation in private law which would be required from the judges sitting on a new court devoted exclusively to private-law issues.

[26] The need of creating of such a court was pointed to by J.Pisuliński, op.cit., p.107. A.Watson proposed that the ECJ have the right to enact non-binding guidelines for national courts if it notices incoherence in the application of the European Civil Code (A.Watson, *Legal Transplants and European Private Law*, "Electronic Journal of Comparative Law" vol. 4/2000, p.12).

[27] See e.g. P.Legrand, *A Diabolical Idea* in: *European Ways of Law: Towards a European Sociology of Law*, op.cit., p.245ff.

[28] P.Legrand*, Against...,* op.cit., p.53.

argument is a more pragmatic one: according to it, the differences between legal cultures in the European Union are too large to make unification feasible.[29] This argument is made especially with regard to the common law v. civil dichotomy. The next section will be devoted to answering the question whether these two forms of the cultural argument are applicable in any way to Polish legal culture.

1.1.1. Polish culture of private law as a value *per se*?

1.1.1.1. Polish culture of private law before 1950

As regards the argument, based on the value of cultural pluralism *per se*, it should be pointed out that a historically separate[30] Polish legal culture ceased to exist together with the partitions at the end of the 18th century. The separateness and autonomy of Polish legal culture was, as a matter of fact, applicable only to the so-called *ius terrestre* (applicable to nobles), since the law binding in towns was an received from Germany (Magdeburg law[31]). With the demise of the existence of the Polish state in 1795, the legal systems of the new sovereigns on the territory were introduced: the Austrian *ABGB*, the Prussian *Landrecht*, in the Duchy of Warsaw – the French *Code civil* and in the mid-19th century the Russian *Svod Zakonov*. In 1900 the new German *BGB* entered into force on the former Polish territories under German jurisdiction.[32] As a matter of fact, it has been argued that the 19th century was a period of reception of Roman law in the former Polish territory, taking into account the fact that the codifications which were introduced in that period were under a strong influence of Roman law.[33]

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[29] P.Legrand, *European legal systems are not converging*, "International and Comparative Law Quarterly" vol. 45/1996, p.52ff.

[30] Which follows from the fact that Polish law did not receive Roman law. Cf. J.Sondel, *O roli prawa rzymskiego w dawnej Polsce (On the role of Roman law in Poland in the old times),* Acta Universitatis Lodziensis. Folia Iuridica vol. 21/1986, p.45.

[31] It was already at that time that certain concepts derived from Roman law began to infiltrate Polish legal culture through the channels of Magdeburg law and Lithuanian law, see e.g. J.Bardach, *Recepcja w dziejach państwa i prawa (Reception in the history of state and law)* in: *Themis a Clio czyli prawo a historia (Themis and Clio or law and history)*, ed. J.Bardach, Warszawa 2001, p.90.

[32] On the history of Polish law in the 19th century see e.g. W.Witkowski, A.Wrzyszcz, *Modernisierung des Rechts auf polnischem Boden von 19. bis Anfang des 20. Jahrhunderts* in: *Modernisieurng durch Transfer im 19. und frühen 20. Jahrhundert*, ed. T.Giaro, Frankfurt am Main 2006, p.249ff.

[33] Cf. W.Rozwadowski in: *System prawa prywatnego (System of private law),* vol. I, Warszawa 2007, p.1.

After the re-establishment of Polish statehood as a consequence of World War I (in the form known as the Second Republic), only selected areas of private law were unified: the law of obligations,[34] commercial law and contentious civil procedure. The remaining areas of private law were still regulated by Austrian, German, French and Russian law. As regards the unified law, it is worth to note the opinion of Giaro who wrote that the Code of Civil Procedure of 1930 '*was an original mixture of modern Western procedural laws*'[35] the Commercial Code of 1934 '*tended towards the German model*'[36] and the Code of Obligations of 1933 '*could have been enacted in any other European country*'[37] of the period. Liebscher and Zoll indicate that certain provisions of the Code of Obligations, which was intended to be a compromise between German, French and Swiss law, are similar to those adopted half a century later by the PECL.[38] Rozwadowski, in turn, underlined that the Code of Obligations was '*entirely permeated by rules (...) developed by Roman law*'.[39]

Thus, the legal tradition of the Second Republic was not, as a matter of fact an emanation of a specifically Polish national legal culture but, to the contrary, it was utterly European and cosmopolitan in its essence. The legislator did not base its solutions on the outdated pre-1795 Polish law but on contemporary European codes. Thus the law in force was either foreign (Austrian, German, French, Russian) or, although enacted by the Polish legislator, was based on foreign solutions (Swiss, German, French). One could even argue that the culture of private law in the Second Republic was in fact a precursor of the Lando Commission, the Study Group on a European Civil Code or the consortium elaborating the *Draft Common Frame of Reference*. The approach of the Polish Codification Commission preparing the codes of private law was pragmatic and, in essence, free from legal nationalism.[40] Just as the legal systems binding in Poland at the time were placed in a melting pot, mixed and cross-fertilised to create a uniform law, so

[34] Including areas which in the pandectist system belong to the general part, save for the law of persons.

[35] T.Giaro, *Westen im Osten.Modernisierung osteuropäischer Rechte bis zum Zweiten Weltkrieg*, "Rechtsgeschichte" no. 2/2003, p.137.

[36] Ibidem.

[37] Ibidem, p.138. Cf. A.Stawarska-Rippel, *Prawo sądowe Polski Ludowej 1944-1950 a prawo Drugiej Rzeczypospolitej (The Judicial Law of People's Poland 1944-1950 and the Law of the Second Republic)*, Katowice 2006, p.82.

[38] See: *Einführung in das polnische Recht*, eds. M.Liebscher, F.Zoll, München 2005, p.108.

[39] W.Rozwadowski, op.cit., vol. I, p.4.

[40] Although the aim of the codification was nationalistic in form, i.e. to create a national private law, it was cosmopolitan in substance, i.e. the 'national' law created by the Commission was in fact a mixture of foreign legal system and not an essentially 'Polish' legal system.

the drafters of the European Civil Code are creating a uniform law for the entire European Union.

The task of unifying private law in Poland was continued in 1945-1946, when the remaining parts of private law, including non-contentious civil procedure were unified.[41] Legal historians are of the opinion that the unified law '*represented a high level on the merits and it was based on classical civilian solutions, typical of a liberal state*'[42] thus not (yet) departing from Western European models, implemented during the Second Republic. This was possible thanks to the fact that the post-War Ministry of Justice based the bulk of its drafting efforts on the materials inherited from the pre-War Codification Commission.[43]

1.1.1.2. Polish culture of private law under the impact of socialist legal culture

The permeation of Soviet socialist elements into Polish legal culture began essentially with the advent of Stalinism, i.e. after 1948. The year of 1950 was crucial in this respect: in that year Soviet elements were introduced both into substantive law and into the law of civil procedure. As regards substantive law, the most significant novelty was the general clause of the 'principles of social coexistence' which displaced traditional general clauses derived from Roman law, such as good faith (*bona fides*), good customs (*boni mores*), and equity (*aequitas*).[44] The principles of social coexistence were treated as a new quality, permeated by class content conditioned by the change of the type of the state and the law.[45] Nowacki wrote in 1957 that the principles '*[c]ontain a different class content, different from the concept of "good customs" and "good faith" in the legislation of the previous*

[41] During a period of 15 months almost entire private law (with the exception of maritime law) was unified by way of adopting 25 decrees.

[42] M.Kallas, A.Lityński, *Historia ustroju i prawa Polski Ludowej* (*A History of the Political System and the Law of People's Poland)*, Warszawa 2003, p.376.

[43] Ibidem, p.375; A.Stawarska-Rippel, op.cit., p.81.

[44] On the principles of social coexistence see most recently M.Pilich, *Zasady współżycia społecznego, dobre obyczaje czy dobra wiara? Dylematy nowelizacji klauzul generalnych prawa cywilnego w perspektywie europejskiej (Principles of Social Life, Good Customs or Good Faith? Dillemas of Amending the General Clauses of Civil Law in a European Perspective)* in: *Europeizacja prawa prywatnego (The Europeanisation of Private Law)*, eds. M.Pazdan, W.Popiołek, E.Rott-Pietrzk, M.Szpunar, Warszawa 2008, vol. II, p.165ff.

[45] J.Nowacki, *Niektóre zagadnienia zasad współżycia społecznego (Certain Issues Regarding the Principles of Social Coexistence)*, "Państwo i Prawo" no. 7-8/1957, p.107.

formations'. A similar view was also adopted by the Supreme Court which saw the principles of social coexistence as '*principles of socialist morality*'.[46]

The Civil Code enacted in 1964 adopted numerous Soviet elements generally became a mixture of socialist and Western European currents. However, the typically socialist solutions were grouped together[47] save for the socialist general clauses (principles of social coexistence, socio-economic purpose of a right/thing) which indeed permeated the entire Code.[48] Nevertheless, the Civil Code of 1964 was generally based on earlier codifications and on solutions indirectly received from Roman law.[49] As Górnicki stated, the Civil Code '*is a synthesis of elements derived from French, Austrian and German legislation. Especially its layout and constructions are inspired by the BGB, although many detailed solutions are nearer to the Romanist system than the Germanic one. The elements derived from various legislations have been creatively developed (...) melted into a new and original legal work*'.[50] The Civil Code of 1964 was thus of a mixed character, containing both elements pertaining to the civil law tradition and socialist elements. Wołodkiewicz remarked that the Code was '*quite traditional both from the point of view of its structure, as well as from the point of view of particular legal institutions which were based on concepts originating from Roman law (or, perhaps more accurately, from doctrine developed on the basis of Roman law)'*.[51]

Without discussing those socialist elements which eventually disappeared after 1990, let us note some of those elements which already in 1964 represented the ingredient of the civilian tradition within the Code. First of all,

[46] Supreme Court resolution of 19 December 1972, case III CZP 57/71, OSNCP 1973/3 item 37 OSNPG 1973/1-2 item 1.

[47] E.g. the provisions on various types of property (giving special privileges to social property) were all put together in Title I of Book II (Ownership and other Property Rights) rather than being dispersed around the whole book; similarly, provisions regarding the duty to enter into contracts between units of socialised economy (state enterprises, co-operatives) were placed in one Title III of Book III (Obligations).

[48] The socialist general clauses: the 'principles of social coexistence' and the 'socio-economic destination of a right' were placed in numerous articles in all books of the Code.

[49] W.Rozwadowski, op.cit., p.4-5. Detailed remarks about the reception of Roman law in the Civil Code and Family and Guardianship Code, ibidem, p.7-28.

[50] L.Górnicki in: *System prawa prywatnego (System of private law),* vol. I, Warszawa 2007, p.120-121.

[51] W.Wołodkiewicz, *I cambiamenti del codice civile polacco dopo 1989 possono essere trattati come segno del ritorno alla tradizione romanistica?* in: *The Roman Law Tradition in Societies in Transition. Proceedings of the International Conference held in Prague 14th-16th May* 2002, eds. P.Bělovský, M.Skřejpek, Praha 2003, p.130. For Soviet law and its partly Romanist character see: J.Quigley, *The Romanist Character of Soviet Law* in: *The Emancipation of Soviet Law*, ed. F.J.M.Feldbrugge, Dordrecht-Boston-London 1992, p.27ff.

the structure of the Code was, in principle, pandectist (general part, property law, law of obligations, law of succession)[52] with the exception that family law was formally enacted in a separate Code (which, however, possessed neither a general part nor an independent conceptual framework and in practice it functioned as a fifth book of the Civil Code[53]). The list of traditional institutions within the original text of the Civil Code of 1964 is very long indeed, so only a few of the most significant examples are going to be highlighted here. The general part included *inter alia* the Pandectist notion of a juridical act (*Rechtsgeschäft*, *czynność prawna*)[54] and a declaration of will (*Willenserklärung, oświadczenie woli*)[55] a Romanist regulation of condition and deadline,[56] the notion of natural and legal persons.[57] In the part dealing with property law, we may find the traditional features of dualism of ownership and limited real rights (*iura in re aliena*), the protection of ownership through *rei vindicatio* and *actio negatoria,*[58] and differentiation between ownership and possession.[59] The book of the Code on the law of

[52] Cf. W.Rozwadowski, op.cit., p.7.

[53] Cf. A.Wolter, *Prawo cywilne. Zarys części ogólnej (Civil Law. An Outline of the General Part)*, Warszawa 1968, p.23; J.Ignatowicz, *Prawo rodzinne. Zarys wykładu (Family Law. An Outline of a Lecture)* 3rd ed., Warszawa 1998, p.20-21; J.Winiarz, J.Gajda, *Prawo rodzinne (Family law)* Warszawa 1999, p.30-31; E.Skowrońska-Bocian, *Prawo cywilne. Część ogólna. Zarys wykładu (Civil Law. General Part. Outline of a Lecture),* Warszawa 2005, p.21; M.Safjan, *Pojęcie i systematyka prawa prywatnego* in: *System prawa prywatnego vol. I*: *Prawo cywilne – część ogólna (Civil Law – the General Part)*, ed. M.Safjan, Warszawa 2007, p.60. The main ideological supporter of the idea of an independent family law, Seweryn Szer, upheld, however, his views even after the Family and Guardianship Code in its final form – dependent on the Civil Code's conceptual framework and terminology – was enacted (see: S.Szer, *Prawo rodzinne w zarysie (Family law in an outline)*, 2nd ed., Warszawa 1969, p.13-14.

[54] Book I, Title IV of the Civil Code of 1964 (Articles 56 to 94), Dziennik Ustaw (Journal of laws), no. 16, item 93, regulating the effects, validity, interpretation of legal acts, as well as condition and defects of a declaration of will.

[55] Cf. J.Wasilkowski, A.Wolter, *Projekt kodeksu cywilnego. Część ogólna (The Draft Civil Code: General Part)*, "Demokratyczny Przegląd Prawniczy" no. 1/1948, p.14, who point out that the origins of the concept date back to the Prussian *Landrecht* of 1794, thus predate the Pandectist school.

[56] Articles 89 to 94 (condition) and Article 110 to 116 (deadline). Cf. W.Rozwadowski, op.cit., p.10.

[57] Certain other communist legislations (e.g. Czechoslovakian) did not know the general notion of a legal person but only of a 'socialist organisation' – see: H.Izdebski, *General Survey of Developments in Eastern Europe in the Field of Civil Law* in: *The Revival of Private Law in Central and Eastern Europe*, G.Ginburgs, D.D.Barry, W.B.Simons, The Hague-London-Boston 1996, p.10.

[58] Article 222 of the Civil Code. Cf. W.Rozwadowski, op.cit., p.14.

[59] Book III, Title IV of the Civil Code. Cf. W.Rozwadowski, op.cit., p.15.

obligations contained a traditional, general definition of an obligation,[60] a traditional catalogue of sources of obligations[61] (contracts,[62] delicts,[63] unjust enrichment,[64] benevolent intervention[65]) and modes of their extinction,[66] as well as a number of traditionally codified contracts,[67] mostly borrowed from two pre-communist codes: the Code of Obligations and the Commercial Code.[68] Similar remarks may be made with regard to family law and the law of succession.[69]

Against this background of traditional private law, rooted in Western legal culture, we find, however, the second face of the Janus-faced Code: a number of principles and rules typical for socialist legal culture. Most of them which were, however, repealed as result of the transformation in 1990.

The most significant remaining socialist peculiarity is the general clause of the principles of social coexistence, which has been mentioned above. Scholars are increasingly critical of the clause, e.g. Rott-Pietrzyk recently wrote that '*It seems that in connection with Poland's membership in the EU the decision to eliminate the clause of the principles of social coexistence does not have a merely symbolic meaning. In the Union the clause of the principles of social coexistence, originating in Soviet law, is incomprehensible. It can even be seen by some as our "internal secret"*.'[70] Although after 1990 the principles of social coexistence have been generally deprived of their original class content, many features of the judicial application of those principles still display elements which date back to the socialist period. First of all, the

[60] Article 353: '§ 1. An obligation shall consist of the creditor being entitled to demand performance from the debtor and the debtor being under a duty to perform. § 2. A performance may consist in an act or forbearance.' Cf. W.Rozwadowski, op.cit., p.16.

[61] W.J.Wagner, *Obligations in Polish Law*, Sijthoff, Leiden 1974, p.6-7.

[62] Book III, Title III of the Civil Code: 'General Provisions on Contractual Obligations'.

[63] Book III, Title VI of the Civil Code: 'Unlawful Acts'.

[64] Book III, Title V of the Civil Code: 'Unlawful Enrichment'.

[65] Book III, Title XXII of the Civil Code: 'The Management of Another's Affairs in the absence of a Mandate'.

[66] Book III, Title VII ('The Performance of Obligations and Consequences of Non-Performance', Title VIII: 'Compensation, Novation and Liberation from Debt', Title IX: 'Change of Creditor or Debtor' – Cf. Rozwadowski, op.cit., p.17. In addition, one may also mention the traditional Paulian action in Title X of Book III – 'The Protection of Creditors in Case of the Debtor's Insolvency'.

[67] W.J.Wagner, op.cit., p.10.

[68] W.Rozwadowski, op. cit., p.19-21.

[69] Ibidem, p.21-28.

[70] E.Rott-Pietrzyk, *Holenderska klauzula rozsądku i słuszności na tle innych uregulowań prawnych (wzór dla polskiego ustawodawcy?) (The Dutch Clause of reason and Equity Against the Background of Other Legal Regulations (A Model for the Polish Legislator?))*, "Studia Prawa Prywatnego" vol. 3/2006, p.92.

principles create a single standard of ethical conduct, as opposed to the diversity of standards connected to a plurality of general clauses (as *Treu und Glauben* vs. *Gute Sitten* in German law).[71] Secondly, the judges applying the principles present themselves as being a *bouche de la societé,*[72] i.e. they purport to apply certain principles of social coexistence actually and objectively professed by Polish society *hic et nunc*[73] (this elegantly justifies the removal of the pre-1989 class content).[74] This allows judges to escape the political accountability for being *de facto* legislators, creating new rules for hard cases. Thirdly, a practice of referring to specific principles of social coexistence, developed in People's Poland,[75] is still continued. Thus case-law indicates that the courts demand that litigants indicate the concrete principle of social coexistence they claim has been violated. The higher courts demand the same from the lower courts, regardless of any such initiative by the litigants. Accordingly, the courts may not accept a litigant's submissions that the principles of social coexistence have been violated without pin-pointing

[71] With this regard see especially M.Pilich, op.cit., p.175-176.

[72] For the socialist period see the words of Supreme Court judge Bryl: '*The principles of social coexistence are born primarily in the consciousness of the advancing social class. Those rules gradually mature into the consciousness of society, which follows them in its conduct in the conditions of the political system of the Polish People's Republic. They are objective in character. The courts are under a duty to follow the principles of social coexistence (...). On the contrary, they may not themselves create the principles of social coexistence. (...) The courts are subordinated to those principles. The role of the courts is limited to stating whether rules of conduct are grounded in the society of the Polish People's Republic and, if so, which rules are so grounded (...)*'. W.Bryl in: *Kodeks cywilny. Komentarz. 1. Księga pierwsza – część ogólna. Księga druga – własność i inne prawa rzeczowe (Civil Code. Commentary. 1. Book One, General part. Book 2 – ownership and other property rights)*, ed. Z.Resich, Warszawa 1972, p.55.

[73] For a contemporary version of the *bouche de la societe* approach see e.g. the words of judge Machnikowski: '*The principles of social coexistence are assessments or norms functioning and grounded in society. This clause does not allow a judge to freely decide on the result of the litigation but, instead, requires the application of existing social rules (...)'.* P.Machnikowski in: *Kodeks cywilny. Komentarz (Civil Code. Commentary)*, 2nd ed., ed. E.Gniewek, Warszawa 2006, p.16.

[74] See e.g. Professor Radwański's remark: '(...) *the values to which the principles of social coexistence refer evolve alongside changes in social consciousness which have been strongly influenced by changes in the political system of the Polish state'.* (Z.Radwański, *System prawa prywatnego* vol. II: *Prawo cywilne – część ogólna* (*Civil Law – the General Part*), ed. Z.Radwański, Warszawa 2002, p.248).

[75] See e.g. the words of Supreme Court judge Bryl who wrote that '(...) *the competent organs should refer generally to a violation of the (...) principles of social coexistence clause but should point out which concrete (...) principle of coexistence was violated in a given case, since this facilitates review of whether discussed provision was the applied properly by the competent organs and also assists in elevating societal consciousness'.* (W.Bryl, op.cit., p.60).

which 'concrete' principle of social coexistence.[76] The example of the principles of social coexistence clearly shows that despite surface changes, the continuity of the socialist legal tradition within Polish private law subsists on the subsurface level.

Further socialist peculiarities within the binding private law include two limited real rights unknown in other countries: 'perpetual usufruct'[77] (which is to be substitute by the 'right of construction' known in Germany as *Baurecht*[78]) and a 'proprietary right to an apartment in a co-operative'.[79]

Family law and the law of succession – having no direct connection with socialised transactions – were not extensively affected by socialist legal culture,[80] save for the purely formal separate enactment of a Family and Guardianship Code.

1.1.1.3. Polish culture of private law after 1989

After 1989 the elements derived from the socialist legal culture were in general removed, mainly by the amendment of 28 July 1990[81] that brought about truly revolutionary changes in the Civil Code. The task was not extremely difficult; as Professor Stelmachowski wrote: '(...) *the drafters of the Civil Code of 1964 remained under a profound influence of European civilian traditions. As a matter of course, they had to adapt the legal regulations to the existing principles of the [political and socio-economic] system. They retained a model core of traditional constructions. However, they added a system of «extensions» which were supposed to express the then binding*

[76] This view is epitomised in the following Supreme Court judgment of 2002: '(...) *it is the duty of the Court to determine whether, in the circumstances of the case before it, a party's conduct is culpable from the perspective of a concrete ethical norm (i.e. that it violates a concrete principle of social life). In failing to perform such an assessment of the defendant's conduct, the Circuit Court essentially failed to decide on a question of fundamental significance for the whole litigation, which is unacceptable*' (Supreme Court decision of 23.5.2002, Case IV CKN 1095/2000, published in *LexPolonica* no. 384109).

[77] Book II, Title II of the Civil Code.

[78] *Zielona księga. Optymalna wizja kodeksu cywilnego w Rzeczypospolitej Polskiej (A Green Paper: The Optimal Vision of a Civil Code in the Republic of Poland)*, Warszawa 2006, p.71.

[79] Regulated outside the Code but for all purposes treated as a limited real right.

[80] M.Kallas, A.Lityński, op.cit., p.413. Although certain aspects of family law and the law of succession were due to the socialist character of the law, e.g. the limitation of heirs *ab intestato* or the prohibition of *fideicommissa*. For a detailed account of the Polish family law of the socialist period see: D.Lasok, *Polish Family Law,* Leyden 1968.

[81] Civil Code Amendment Act 1990, Dziennik Ustaw (Journal of laws), no. 34, item 198.

systematic solutions. The removal of those "extensions" (...) could be done relatively quickly'.[82]

Since 2000 Polish private law has been undergoing intensive Europeanisation in the form of the implementation of Community directives in the field of private law. The Unfair Terms Directive,[83] the Product Liability Directive[84] and the Commercial Agency Directive[85] have been implemented into the Civil Code, whereas the Doorstep Selling Directive,[86] the Distance Selling Directive,[87] the Timesharing Directive,[88] the Consumer Sales Directive[89] and the Late Payments Directive[90] have been implemented in separate statutory instruments.[91] The implementation of the private law *acquis*

[82] A.Stelmachowski, *Przemiany polityczne 1989 r. a model prawa własności* (*The Political Changes of 1989 and the Model of the Right of Ownership*) in: *Przekształcenia własnościowe w Polsce (determinanty prawne) (Reforms of Property in Poland (Legal Determinants)),* ed. S.Prutis, Białystok 1996, p.20.

[83] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p.29-34.

[84] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210, 7.8.1985, p.29-33.

[85] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ L 382, 31.12.1986, p.17-21.

[86] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372, 31.12.1985, p.31-33.

[87] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997, p.19-27.

[88] Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ L 280, 29.10.1994, p.83-87.

[89] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, p.12-16.

[90] Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, OJ L 200, 8.8.2000, p.35-38.

[91] The Doorstep and Distance Selling Directives were implemented by the Act of 2 March 2000 on the protection of certain rights of consumers and on the liability for damage caused by a dangerous product (Ustawa z dnia 2 marca 2000 r. o ochronie niektórych praw konsumentów oraz o odpowiedzialności za prodkut niebezpieczny), Dziennik Ustaw (Journal of laws), no. 22/2000, item 271 with amendments; the Consumer Sales Directive was implemented by the Act of 27 July 2002 on special conditions of consumer sales and on amendment of the civil code (Ustawa z dnia 27 lipca 2002 r. o szczególnych warunkach sprzedaży konsumenckiej oraz o zmianie Kodeksu cywilnego), Dziennik Ustaw (Journal of laws), no. 41/2002, item 1176 with amendments; the Late Payments Directive was implemented by the Act of 12 June 2003 on payment deadlines in commercial transactions (Ustawa z dnia 12 czerwca 2003 r. o terminach zapłaty w transakcjach handlowych), Dziennik Ustaw (Journal of laws), no. 139/2003, item 1323.

into Polish law has created new areas of very close convergence between Polish legal culture and the new European legal culture.

1.2. The character of Polish legal culture is not an obstacle to the introduction of a European Civil Code

In this context it is therefore no wonder that Polish lawyers, in search of cultural roots and traditions of the currently binding Polish private law, instead of turning to the customary law of the pre-1795 Poland rather find those traditions in Roman law which had provided the bricks for the construction of the civil codes binding in Poland prior to the unification of law and indirectly influenced the Polish codes of private law which were based chiefly thereupon. Therefore, the representatives of legal scholarship and the judiciary readily underline the links with Roman law: e.g through placement of eighty-six Roman legal maxims on the building of the Supreme Court in Warsaw.[92] One should not forget the presence of Roman law in curricula of Polish law faculties (where it is studied during one or two semesters). Finally, one should also mention the presence of maxims and other Latin expressions derived from classical or later (including medieval) Roman law which are present in scholarly writings and university textbooks as well as judicial decisions.[93]

Therefore, if anything differentiates contemporary Polish legal culture from other legal cultures of the continental EU states are the few remains of socialist law.[94] Although, as Stroiński termed it, Polish law took an '*overnight divorce*'[95] with socialist legal culture, the offspring of that forty-five year marital union cannot be denied.[96] Remnants of socialist legal culture are not

[92] See: *Regulae iuris. Łacińskie inskrypcje na kolumnach Sądu Najwyższego Rzeczypospolitej Polskiej* (*Latin inscriptions on the columns of the Polish Supreme Court building*), ed. W.Wołodkiewicz, Warszawa 2001. The new seat of the Supreme Court decorated with Latin legal maxims was officially opened by President Kwaśniewski on 11 November 1999. The presence of the maxims is seen by Polish lawyers as a manifestation of the continuity of the tradition of Roman law in Poland which is seen as '*universal and timeless*' (W.Wołodkiewicz, *Łacińskie inskrypcje na kolumnach gmachu Sądu Najwyższego Rzeczypospolitej Polskiej w Warszawie* in: ibidem, p.13.

[93] See: *Łacińskie paremie w europejskiej kulturze prawnej i orzecznictwie sądów polskich* (*Latin sayings In the European legal culture and the jurisprudence of Polish courts*), ed. W.Wołodkiewicz, J.Krzynówek, Warszawa 2001. Cf. R.Mańko, *The Culture of Private Law in Central Europe...,* op.cit., p.544-547.

[94] Cf. R.Stroiński, *Report from Poland*, "European Company Law" vol. 3/2006, p.39.

[95] Ibidem.

[96] R.Mańko, *Is the Socialist Legal Tradition 'Dead and Buried'? The Continuity of Certain Elements of Socialist Legal Culture in Polish Civil Procedure* in: *Private Law and the Many Cultures of Europe*, ed. T.Wilhelmsson *et al*., Alphen aan den Rijn 2007, p.103.

yet fully erased;[97] however, at the same time it seems quite improbable that those remains would become the defence of Polish lawyers against a European Civil Code.

Summarising, there do not seem be any cultural barriers to the unification of private law across the EU in form of a national, indigenous or original Polish culture of private law which would require to be protected at any price due to its unique character.

2. Differences between Polish legal culture and other European legal cultures – no obstacle for a European Civil Code

The conclusions presented above are *a fortiori* applicable to the second form of the cultural argument according to which the differences between national legal cultures are so deep as to make it impossible to find compromise solutions which could be the basis of a unified private law. Legrand, the main representative of this line of criticism based his arguments on the alleged cultural differences between common law and civil law.[98] However, Zimmermann in a series of publications pointed out that below a thin layer of differences, the common law is derived in essence from the same roots as the civil law and the existing differences are concerned mainly with formal issues rather than actual dogmatic solutions.[99] According to Zimmermann, the alleged '*noble isolation*'[100] of English law is in fact a myth[101] and he points out the reception of continental legal thought in England.[102] Leaving, however, aside the issue of the common law vs. civil law dichotomy, let us return to Polish law with regard to which, in the light of the above, it would be unjustified to argue that there are cultural barriers making the unification of private law impossible or particularly difficult. This does not, of course, exclude possible differences in the interpretation of a future European Civil Code.[103] They could be caused e.g. by the fact that Polish judges, in line with views established in Polish legal culture, treat the literal (grammatical) interpretation as having priority over other forms of interpretation, notably

[97] H.Kötz, *Preface to the Third Edition* in: *Introduction to Comparative Law*, eds. K.Zweigert, H.Kötz, 3rd ed., Oxford 1996, p.V.

[98] See: P.Legrand, *Against...,* op.cit., p.47.

[99] See: R.Zimmermann, op.cit., p.34-41.

[100] See to this effect J.H.Baker, *An Introduction to English Legal History*, London 1990, p.35.

[101] R.Zimmermann, op.cit. p.34.

[102] R.Zimmermann, *Savign's Legacy. Legal History, Comparative Law and the Emergence of a European Legal Science*, "Law Quarterly Review", no. 112/1996.

[103] Cf. J.Pisuliński, op.cit., p.107.

functional interpretation.[104] Thus, a Polish judge will, in principle, resort to functional interpretation only if literal (grammatical) interpretation does not bring satisfactory results. Differences arising from this (e.g. different decisions in similar cases) could be prevented and overcome through the creation of European court for civil cases which would rule on preliminary references regarding the interpretation of the Code.

Furthermore, the cultural liaisons of Polish private with Roman law, evidenced by its indirect reception into the Civil Code currently in force, as well as the underlining of those liaisons by Polish lawyers, are certainly an element which facilitate a positive approach towards a European Civil Code in Poland. There is no doubt that a codification based, *inter alia*, on a comparative analysis of European systems of private law would inevitably be also based on models dating back to Roman law.[105] It would therefore be advisable to analyse the draft of the European Civil Code from this angle. This would have a persuasive value showing to Polish lawyers that both the current Polish Civil Code and a future unified European private law are both derived, to a large extent, from the same roots.[106]

A glimpse at the Draft Common Frame of Reference (DCFR) indeed shows that many of its leading rules and principles share the same roots of the civilian tradition as the currently binding Polish Civil Code of 1964. Thus, the DCFR adopts the principle of the freedom of contract,[107] of *pacta sunt servanda,*[108] the principles of good faith (*bona fides*),[109] a typically Roman

[104] T.Stawecki, P.Winczorek, *Wstęp do prawoznawstwa (Introduction to Jurisprudence)*, 2nd ed., Warszawa 1998, p.133; S.Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa (Basic Notions of Law and Jurisprudence)*, 2nd ed. Poznań 2003, p.84-87.

[105] The example of the Consumer Sales Directive (99/44/EC) is exemplary in this respect. There is a popular view according to which this Directive departs from Roman law with respect to the liability for defect of the object sold. A closer analysis, however, provides evidence to the contrary. See: W.Dajczak, *Znaczenie tradycji prawa rzymskiego dla europejskiej harmonizacji prawa prywatnego (The Significance of the Roman Law Tradition for the European Harmonisation of Private Law)*, "Państwo i Prawo" no. 2/2004, p.60-61; F.Longchamps de Bèrier, *Skargi edylów kurulnych a dyrektywa 1999/44/EC Parlamentu Europejskiego i Rady w sprawie określonych aspektów sprzedaży i gwarancji na dobra konsumpcyjne (The Aedilitian Actions and Directive 1999/44/EC)*, "Studia Iuridica" vol. 44/2005, p.427ff.

[106] Cf. W.Dajczak, op.cit., p.67-68.

[107] Art. II-I:102 (1): '*Parties are free to make a contract or other juridical act and to determine its contents, subject to the rules on good faith and fair dealing and any other applicable mandatory rules*.'

[108] Art. II. – 1:103(1): '*A valid contract is binding on the parties*'.

[109] Art. III. – 1:103(1): '*A person has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship*'.

definition of an obligation,[110] the notion of an *obligatio alternativa*[111] – to mention just a few examples.

2.1. Polish private law as an object of 'legal export'?

An additional value of legal pluralism is the possibility of the so-called 'legal export' practiced in particular by English lawyers. In a position paper submitted to the European Commission on behalf of the Law Reform Committee of the General Bar Council of England & Wales,[112] it was pointed out that: '*Every year a large number of international commercial contracts are concluded which provide for English law as their governing law, and subject the parties' disputes to the jurisdiction of the English courts. Often this is done despite the fact that neither of the contracting parties is domiciled in England, and the contract has no obvious connection to England as a system of law. In this way English law is acting as an invisible export from the UK (...)*'. According to the Law Reform Committee, the reasons for which such an invisible legal export is possible, are certain features of the English common law, such as the promotion of the freedom of contract, the rejection of a broad doctrine of good faith in business dealings, the adoption of objective principles of construction (interpretation) of contracts (as opposed to subjective), the severe limitation of the circumstances in which terms will be implied into commercial contracts and the reduction of areas in which a court may intervene to re-write the parties' bargain. Furthermore, the Law Reform Committee expressed the view that a rigid doctrine of *stare decisis* and a close link between the facts of the case and the rule established therein are also a factor which attracts businesses to English law, making it more reliable and certain.

Contrary to the English common law, the Polish legal system is not a object of 'invisible legal export'. There are various reasons for that, including the fact that Polish courts use a language which is not popular in international commercial relations, the long delays in obtaining a court decision, the low stability of the Polish legal system, its short traditions as a legal system based on a market economy and finally the lack of consistency between judgments due to the absence of a *stare decisis* doctrine. On top of that one may add that Polish private law does not demonstrate the substantive

[110] Art. III. – 1:101(1): '*An obligation is a duty to perform which one party to a legal relationship, the debtor, owes to another party, the creditor*'.

[111] Art. III. – 2:105 (1): '*Where a debtor is bound to perform one of two or more obligations, or to perform an obligation in one of two or more ways, the choice belongs to the debtor, unless the terms regulating the obligations or obligation provide otherwise*'.

[112] http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/4.14.pdf

features pointed out by the English Bar Council as attracting international businesses. Polish law has the equivalent of a general good faith doctrine in the form of the 'principles of social coexistence' which permeate entire private law,[113] the interpretation of contracts is subjective as opposed to objective,[114] implied terms may be introduced by courts on the basis of foggy premises such as 'established usages' or 'principles of social coexistence', practically allowing for an unlimited expansion of the content of the contract beyond the parties' actual consent,[115] not to mention numerous detailed default rules with regard to specific contracts. Under Polish private law courts may therefore interfere to a large extent with the content of contracts. An illustration of the operation of broad general clauses as instruments of unexpected judicial interference with the parties' consent is the operation of the concept of the 'nature of a legal relationship' which, under Art. 353^1 of the Civil Code, constitutes a limitation on the freedom of contract. In a recent judgment the Court of Appeal in Warsaw decided that a term of contract providing that a contractor shall pay remuneration to the subcontractor only upon receiving payment from the investor was void on the account of the fact that it conflicted with the 'nature' of the obligation.[116] If we add that the whole concept of the 'nature' of an obligation was introduced into the Civil Code haphazardly and in the last stage of drafting,[117] this will suffice understand why Polish contract law does not enjoy a good reputation among forum shoppers.

If Polish courts and commercial arbitration tribunals were to become an object of forum shopping, one of the prerequisites would be the fastest possible adoption of a European Civil Code in Poland, even before it become actually binding on a European level. Of course, substantive law is not the only feature that attracts international businesses but indeed, if coupled with practical and effective reforms of procedural law it could be a major factor leading to the export of Polish law e.g. to those Eastern European countries which have even less stable and reliable systems of contract law (e.g. Ukraine). Furthermore it should be pointed out that whereas hitherto forum shopping within the Union has been influenced to a large degree by the differences in the rules of substantive law, after unification forum shoppers

[113] Cf. e.g. Art. 5, Art. 58 §2, Art. 65 §1, Art. 353^1 and Art. 357^1 of the Civil Code.

[114] Cf. e.g. Art. 65 §2 of the Civil Code.

[115] Cf. e.g. Art. 58 §3 in conjunction with 58 §1-2 and art. 353^1 of the Civil Code.

[116] Judgment of the Court of Appeal in Warsaw of 17 July 2007, Case no. I ACa 817/06, published in the LEX electronic database of case-law (no. 351793).

[117] P.Machnikowski, *Swoboda umów według art. 353^1 k.c. Konstrukcja prawna (Freedom of Contract Accordnig to Acrticle 353^1 of the Civil Code: the Legal Construct),* Warszawa 2005, p.313.

would predominantly focus on procedural rules and on the effectiveness of the judiciary in the several Member States.

2.2. Possibility of wider and more effective access to foreign scholarly writings and case-law

As Rudolf von Jhering had already remarked a century ago, legal scholarship has become reduced to the boundaries of a nation-state.[118] Unlike economics, chemistry or medicine, which, as academic and applied disciplines do not know national frontiers, the scholarship and practice of the law has become, since the demise of the old pan-European *ius commune*, a matter of purely national business.[119] The internationalised fields of the law, such as public international law, comparative law or more recently Community law still constitute exceptions to the rule. Most notably, the scholarship and practice of private law is dominated by the interest in national law.[120] Therefore, the possibility of making use of foreign literature and case-law[121] by Polish scholars and judges has been reduced to comparative purposes, either in books and articles on comparative law proper or in texts about Polish law with comparative elements. However, German, French or Italian judicial decisions and scholarly writings do not have a direct bearing on decisions of the Polish courts and on the discourse of Polish academics since they are not concerned with private law actually binding in Poland. Therefore such practical significance of texts of foreign legal culture for Polish judges and practitioners occurs rather rarely, e.g. when there is a need for filling a lacuna in Polish law.[122]

The unification of substantive private law in the European Union would bring about a complete change in this respect. The scholarly literature and case-law from other EU member states regarding the unified European private law would become fully relevant for Polish courts, practitioners and

[118] R. von Jhering, *Geist des römisches Rechts auf den verschiedenen Stufen seiner Entwicklung*, *vol. I*, 8th ed., Leipzig 1924, p.15.

[119] See e.g. R.Zimmermann, op.cit.

[120] M.Hesselink, *The New European Legal Culture*, Deventer 2001, p.9ff.

[121] For a general account on the use of foreign material by courts and scholars see: B.Markesinis, *Comparative Law in the Courtroom and Classroom*, Oxford-Portland, 2003.

[122] See e.g. Supreme Court case I CK 287/02 OSNC no. 6/2004, p. 82 where the French and Italian Civil Codes were cited with regard to the issue whether an arbitration clause also covers disputes arising from a bill of exchange.

academics.[123] This would facilitate the faster elucidation and interpretation of the new provisions due to the significantly larger number of judges applying the same provisions and scholars analysing them. However, one cannot forget the existence of the linguistic barrier which could act as a limitation of this process. The knowledge of other European languages on a level enabling the speedy and effective reading of foreign case-law and literature with comparable facility and speed as national case-law and judgments seems to be limited to a minor percentage of Polish judges. And even if a certain part of them have this ability, it is usually concerned with one or two languages but not more.

This brings the issue of translations as a necessary intermediary between the actors of culture of private law in Poland and the texts (case-law, literature) produced by judges and scholars in other European countries. Without a systematic programme of translations of selected texts, the unification of private law in the European Union could be *de facto* reduced to only certain aspects of legal culture: legislative texts (a uniform European Civil Code) and the case-law of a European court for civil cases (which would be published in all EU languages).

3. The unification of private law in the EU and the specific practices of internal legal culture

3.1. The unification of private law and Polish practitioners

The Polish Commission for the Codification of Civil Law in its recently published *Green Paper* on the future Polish civil code remarked that practitioners dislike legislative changes, especially amendments to the Civil Code, because this requires them to become acquainted with new legal rules.[124] The continuous application of the same rules of private law is economically sound for the practitioner because it does not require additional investments of time and effort to master the new rules.

Therefore, at least *prima facie*, it seems that the unification of private law would create additional costs and difficulties for practitioners. However, first of all it should be pointed out that Polish practitioners, unlike many of their foreign colleagues, are quite used to frequent and deep amendments to the

[123] This relevance would extend above all to the case-law and scholarly writings pertaining to the new, uniform European private law. However, it could to a certain degree extend also to earlier case-law in all those situations when the European legislator would chose to adopt a rule identical or almost identical to an earlier existing national rule.

[124] *Zielona księga*..., op.cit., Warszawa 2006, p.200.

codes of private law. Since 1990, the Civil Code has been amended dozens of times and the interpretation of many of its provisions by the courts has also undergone changes. Community directives on private law have been implemented since 2000. During the last two decades Polish private law has not only undergone serious amendments, but has twice undergone a change of paradigm: first of all in 1990 when a socialist civil law has been transformed into a capitalist private law and in 2000 when a purely national private law has become interwoven into the structures of a polycentric system[125] by opening up to Community law.[126]

Furthermore, the costs of having to learn a new legal system will be, in this author's opinion, to a certain extent compensated by the fact that the free movement of lawyers would become much more feasible than presently.[127] Although the relevant Community directives provide for such free movement[128] the divergences between national legal systems create a significant barrier to such free movement, making it scarcely attractive to the bulk of lawyers. A Polish lawyer trained in Polish law, after five years of university studies and three years of professional training is not prepared to become a practitioner in Germany, Spain or Italy. First of all, there is the linguistic barrier which could effectively be reduced by introducing the duty of knowing

[125] See e.g. E.Łętowska, *'Multicentryczność' systemu prawa i wykładnia jej przyjazna (The Polycentrism of the Legal System and the Interpretation Favouring It)* in: *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana, (Legal essays. Book in honour of professor Maksymilian Pazdan)*, Kraków 2005, p.1127ff.

[126] It must be kept in mind in this context that the legislative implementation of a directive by the national legislator does not end the process of interaction between Community law and national law. The national provisions implementing directives are not just ordinary provisions of national law. They enjoy a special status due to the operation of the doctrine of pro-European interpretation or indirect effect: national judges applying the national provisions must always bear in mind the content and purposes of the Directive and ECJ-case law interpreting them. This specific duty follows *inter alia* from the general clause of loyal co-operation contained in Art. 10 EC. See to this effect ECJ cases: C-408/01 Adidas, [2003] ECR I-12537, par. 21, 14/83 Von Colson and Kamman, [1984] ECR 1891, par. 26, C-106/89 *Marleasing*, [1990] ECR I-4135, par. 8. The principle is wholeheartedly endorsed in Polish legal culture, see e.g. *Prawo instytucjonalne Unii Europejskiej (Institutional Law of the European Union)*, 3rd ed., ed. A.Łazowski *et al*., Warszawa 2007, p.310; W.Postulski in: *Stosowanie prawa Unii Europejskiej przez sądy (The Application of the Law of the European Union by Courts)*, ed. A.Wróbel, Kraków 2005, p.443; T.Koncewicz, *Sędziowski obowiązek interpretacji prawa krajowego w zgodzie z prawem wspólnotowym (The Duty of the Judge to Interpret National Law in Conformity with Community Law)*, "Przegląd Sądowy" no. 6/2000, p.22.

[127] It is indeed difficult to compare the costs and benefits in any empirical way, however it does seem right to balance them against each other.

[128] Directives: 77/249/EEC on the exercise by lawyers of freedom to provide services; OJ 1977, L 78, p. 17 and 98/5/EC on establishment for lawyers; OJ 1998, L 77, p. 36.

at least two Community languages at C2 level for a lawyer to qualify. However, even if the linguistic barrier is reduced or, in an individual case, does not exist, the fact that during her 8 years of preparation for the legal profession a Polish lawyer has learnt only Polish law creates a practically insurmountable barrier for the free movement as professional. This cannot be effectively remedied by the introduction of foreign legal systems into legal curricula, first of all because of their large number and secondly because this would be done at the cost of quality of legal education. Only the unification of private law across the Union would make the free movement of lawyers a possibility open to practitioners of private law in general and not only to those who have actually studied foreign law simultaneously (as e.g. students at the Viadrina University).

In my opinion the benefits of free movement as well as the access to a much wider palette of literature and case law (see section 2.3) would, to a certain extent, outweigh the costs of adapting to a new legal system. This is more so because the costs would be borne only once (at the moment of transition) whereas the benefits would be durable. Furthermore, the transition costs could be effectively reduced by a long period of *vacatio legis* of the European Civil Code (e.g. two years) during which a vast amount of literature on the new law could already be published, and specialised adaptation courses for practitioners could be organised. The new law could also be introduced into the curricula of law faculties and legal apprenticeships which would allow newly graduated and qualified lawyers to be trained already in the European Civil Code.

3.2. The unification of private law and Polish judges

The remarks made with regard to practitioners are only partially applicable to judges. The profession of the judge, as a form of civil service, is not subject to liberalisation within the framework of the free movement of lawyers. Even after the unification of private law in the EU the judicial career will be still inseparably connected to the citizenship of the member state, in which the judge pursued her legal education and professional training.[129] Therefore, the benefits of a unified private law for Polish judges would be reduced to the possibility of accessing foreign case-law and doctrine as texts fully relevant for national practice of private law (see section 2.3). One can ask, however, to what extent will judges be both linguistically capable and *de facto* interested in making use of this possibility. Therefore, one can expect

[129] An issue which I am not discussing here is the possibility of pursuing the free movement as a lawyer (advocate, legal counsellor) after leaving the judicial profession.

that Polish judges will be less enthusiastic about the European Civil Code than their colleagues from the academia and legal practice.

3.3. The unification of private law and Polish academics

From the point of view of the Polish academia, the unification of private law across the Union would allow for a further and deeper internationalisation of private law scholarship which usually opens up to a more international perspective only in the specific areas of comparative private law, private international law and international commercial law. Nevertheless, the bulk of private legal scholarship remains concentrated on the national civil code and national case-law (see section 2.3). This situation would change significantly with the enactment of a European Civil Code and the creation of a European court for civil cases as the highest judicial authority interpreting the uniform law. Nevertheless it is very important whether the new European Civil Code would be binding besides the national Civil Code (on an opt-in or opt-out basis) or would become the exclusive source of private law in the fields covered (e.g. law of obligations and property of movables), ousting national private law in those areas. The second option would certainly strengthen the impact of the unification of private law upon private law scholarship due to the central role of the law of obligations *sensu largo* (covering also the notion of the 'legal act' etc.).

A further issue is the access to literature and case-law from other EU member states (discussed already in section 2.3) which from the moment of unification and within its scope, would become relevant *per se* and not only for comparative-law purposes. However, the unification of substantive private law would not lead automatically to the abolition of barriers of the free circulation of ideas, owing to the existence of linguistic frontiers across the Union. One could expect that literature and case-law in the so-called 'congress languages' (English, French, German), as a rule known more frequently among scholars than other languages, would have a much greater impact upon Polish academics than literature in other western languages (such as Spanish, Italian, Portuguese) not to mention Central European languages which are scarcely known outside the respective member states (such as Hungarian, Czech, Slovak, Lithuanian).

The same applies to the interaction between Polish scholars and scholars from other European countries. Polish scholarly writings regarding the unified private law published in Polish have an impact practically limited only to other Polish scholars. One can expect that this tendency would also be continued after the enactment of a European Civil Code. If this was the case it would mean that Polish private law scholarship would remain isolated from

European scholarship, open only to a one-sided influence of western European literature but without any real impact upon the European legal debate. Therefore it would seem necessary to create channels of communication through which Polish private lawyers could make their input into the European scholarship of private law. A national journal of private law, developed exclusively to issues of the European Civil Code, published in English and available not only in paper form but also in electronic form (preferably free of charge) could be an effective solution, not to mention the enhancement of a regular presence of texts by Polish scholars in established European journals devoted to the subject.[130]

The unification of private law in the EU would also lead to an enhancement of the free movement of private law scholars. A scholar versed exclusively in her national private law, even if no legal barriers for free movement exist or if the existing legal barriers are relatively easily removable, is not sufficiently well-prepared to circulate freely among academic centres across the Union.

3.4. The unification of private law and legal education

Legal education, both academic (legal studies) and professional (bar training, judicial training) should react to the unification of private law in the EU in the fullest possible way. The new unified law should be introduced into academic and professional training curricula as soon as the texts are enacted and preferably already at a later drafting stage in order to make the transition smooth. As a matter of fact the PECL, and the *Draft Common Frame of Reference*, which can be said to be a pre-preliminary draft of a European Civil Code, could already become part of the legal curriculum, making students and apprentices for the legal professions aware of the tendency towards the unification of private law in Europe and the concrete shape which it is gradually obtaining.

The unification of private law across the Union could allow for a further internationalisation of legal studies. Private law studied in a different EU member state within the framework of a Socrates/Erasmus scholarship would be fully useful in the course of one's legal studies at home. A further added value of the unification of private law would be the possibility to use translated textbooks from other member states in the process of teaching at Polish law faculties and law schools.

3.5. The unification of private law and legislation

[130] This presence, as a matter of course, is also correlated to the quality and relevance of Polish scholarly writings from a European perspective.

The unification of vast areas of European private law would preclude, in principle, the Polish legislator from legislating in those areas. However, this does not mean that the relevant provisions would be enacted without Polish participation. In this context it is worth mentioning that among the members of the various groups working within the European Civil Code process we find a growing number of Polish scholars.[131] Following Hesselink's suggestion to give the debate on a European Civil Code a political dimension,[132] it would be advisable that the Polish Parliament organise a debate on a European Civil Code. Although the enactment of a such an instrument remains currently in sphere of a hypothetical future, such a debate would make Polish MPs and other politicians, as well as at least part of the general public more aware of the idea and, hopefully, more involved in it and more conscious of the fact that contract law, and more generally private law, is not only about 'purely technical' issues but that the decisions made by the legislator with regard to those issues have a truly political dimension and should be fully subject to a truly democratic process.[133] A good moment for such a debate would be the publication of the final Draft Common Frame of Reference. The results of the debate could become the object of a parliamentary resolution pleading support for the idea of unification of private law in Europe and possibly indicating the preferences of the Polish Parliament with regard to specific choices of the European legislator within contract law. Such a resolution would have both an internal and an external impact. The internal impact of the resolution (in Poland) would be to make Polish lawyers and the general public following political developments more aware of the drafting of a European Civil Code. The external impact of such a resolution, provided that it would be a plea of support for the unification, could certainly contribute to the enhancement of Poland's image within the European Union and show that Polish politicians are actively following and supporting the current trends of European integration.[134]

[131] In the Acquis Group: P.Machnikowski, J.Pisuliński, E.Rott-Pietrzyk, M.Szpunar, F.Zoll; in the Study Group: Z.Brodecki (insurance law), J.Lehmann (non-contractual obligations), J.Rajski (steering committee, coordinating group), A.Wiewiórowska-Domagalska (sales, services, long-term contracts). On top of that one should mention the Polish members of the Trento Group: M.Habdas, S.Kalus, B.Sitek, M.Sitek, E.Traple, M.Zielińska.

[132] M.Hesselink, *The Politics of a European Civil Code*, "European Law Journal" no. 10/2004, p.675ff.

[133] M.Hesselink, ibidem.

[134] Taking into account the current political situation in Poland one has to remark that neither the ruling conservative Civic Platform nor the nationalist opposition Law and Justice would be interested in organising such a debate and had it been organised, they would probably criticise the idea of a European Civil Code. Both parties seem to fight for the support of the

Conclusions

The present paper analysed the relationship between, on the one hand, the hypothetical future unification of private law in the European Union in the form of a European Civil Code, and, on the other hand, Polish legal culture. Based on the assumption that Polish culture of private law does not have a 'unique' or 'original' character when compared to other continental European systems of private law it has been argued that Polish legal culture does not pose any specifically 'cultural obstacles' to the unification of private law. Since the currently binding private law in Poland is a mixture of various western European inspirations (notably French, German and Swiss) with certain remnants of socialist legal culture, the unification would not lead to the introduction of anything essentially new or foreign.

The possible impact of the unification of Polish private law on the practices of Polish legal culture, i.e. legislation, adjudication, legal counselling, scholarship and education has also been analysed. It has been argued that the unification would be the most beneficial for Polish practitioners (advocates, legal counsellors) and scholars, making their professions much more internationalised than at present and enhancing the possibility of their free movement across the Union. The same applies to legal education: the new unified European private law introduced into curricula of law schools, law faculties and legal professional training would mean that Polish students and apprentices would study subjects of a pan-European, and not only national relevance. A benefit common to judges, practitioners and scholars would be the possibility of resorting to a much wider scope of case-law and scholarly writings in pleadings, court decisions and academic discussions *de lege lata*. Until now, foreign cases and academic texts on private law had only a comparative value but were not directly relevant from the point of view of the private law actually in force in Poland. After the unification of private law in Europe, this situation would change, opening new possibilities. However, it would also be important to ensure that an input from Polish scholars is made into the new European doctrine of private law, so that the movement of legal ideas is not only one-sided.

In light of the above it is possible to conclude that Polish culture of private law does pose any obstacles to the unification of private law in Europe; to the contrary, such a unification would be beneficial for Polish legal culture and Polish lawyers, bringing about a truly European dimension. It is therefore essential that Polish scholars continue to be actively involved in the drafting

same nationalist and conservative voters. Nevertheless there is a chance that pro-European oriented MEPs in all parties could act together and e.g. initiate such a debate in the future.

of a future European Civil Code and that the Polish Parliament and public opinion become aware of the issue and make their input into the debate.