PROTECTION OF THE FAMILY IN POLISH PRIVATE INTERNATIONAL LAW

Dr Katarzyna Bagan-Kurluta, University of Białystok, Poland

Over the past 15 years Poland has undergone a series of changes related to the transformation of the system and accession to the European Union. These changes have had a rather obvious impact on Polish legal system – a great number of legal acts has been repealed, new solutions have been introduced which do not resemble previous communist models but which indeed have been fully harmonized with community law. Finally, the catalogue of sources of law has encompassed all sources of community law which, in the hierarchy of sources of law, take precedence over national legal acts, Constitution included.

The present Polish legislation, confirmed by Polish accession to the European Union on 1 May 2004, is composed of the laws listed in Art 87 of the Constitution of 2 April 1997. These are: the Constitution, acts, ratified international agreements and ordinances. Above these are the sources of community law, most often distinguished as the so called primary and secondary legislation. Primary legislation includes founding and amending treaties, annexes and protocols to amending treaties, accession treaties of new members, as well as common law and general legal principles. The latter constitute the general principles common to all legal systems of the EU, general principles of international law, rights and fundamental freedoms. Secondary legislation, on the other hand, is composed of regulations, directives, and decisions, i.e. legal provisions issued by community bodies. The most important documents from the above are regulations as they are to be obligatorily applied by member states by their publication in the Official Journal of the European Communities. They are binding in their entirety and cannot be subject to amending. Moreover, they are in force directly, do not require transformation into domestic legislation, need no reception in the form of a domestic legal act, and in case of conflict of norms, take precedence over domestic law.

1 Journal of Laws (hereinafter referred to as JoL) of 1997, No 78, item 83.
2 In Polish literature the two meanings of sources of law in the meaning of primary and secondary legislation as well as basic and auxiliary sources are to be found in J. Jabłońska-Boncy, Źródła prawa Wspólnot Europejskich. Wprowadzenie, Gdańsk University, Gdańsk 1993, P 26.
4 As a practice developed in a certain period of time and seen as the law.
5 Apart from secondary sources of a binding nature, there are also those which lack such nature. These are opinions and recommendations.
Issues related to the family are regulated in Poland mainly via family law despite a separate regulation deemed as part of civil law. Together with civil law, family legislation has been placed in the group of private laws\(^7\). The rules provided for by the Family Code\(^8\) are on the one hand supplemented by the provisions of public rights in protection of the family (e.g. provisions of criminal law introducing penal sanctions for acts detrimental to the interests of children\(^9\)) and, on the other, family relations of international character are regulated by the numerous legal acts of private international law, known also as the law on conflict of laws. Both the Polish, as well as international doctrines provide for a multitude of definitions of private international law. Generally, there are no profound differences between them but rather a number of similarities. The Polish doctrine defines it as a set of norms which distinguish in private legal relations the areas in which the laws of the different states are in force, thus determining which of these laws should indeed be applied\(^10\). It is also assumed that they are composed of norms which define and determine the law proper for private legal relations but which go beyond the borders of a given state in their functions or factors\(^11\). Furthermore, it is also a set of norms in force in the territory of the given state, the subject of these norms being the indication of the legislation (domestic or foreign) which is proper for the resolution of a legal relation in the area of civil law, family and guardianship law, as well as labour law, in whose actual state there is an alien element (international element, foreign element, international relation)\(^12\). Private international law can also be seen as a set of norms applied in relation to private persons in their international relations or as a set of norms whose function is to determine which of the legal system currently in force is applicable to the given actual state\(^13\).

The general constitutional rule regarding sources of law is, of course, applicable in case of private international law, thus the scope of this law includes legal acts which have been created in the course of domestic legislation, including norms of competence, as well as – to a

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\(^7\) Also in relation to the legal and systemic transformation the need to distinguish law as public and private was again perceived pending.

\(^8\) JoL of 1964, No 9, item 59 with later amendments.

\(^9\) Criminal law is applied only to a subsidiary effect in cases where the application of institutions of family law fail. Examples of such an intervention of criminal law are provisions pursuant to which criminal liability is born for: cruelty to minors (Art 207), inducing a monitor to drink alcoholic beverages (Art 208), evasion of maintenance payment (alimony) (Art 209), abandonment of a minor (Art 210), See Criminal Code of 1997, JoL of 1997, No 88, item 553 with later amendments.


\(^11\) F. Zoll, Międzynarodowe i międzydzielnicowe prawo prywatne w zarysie, Kraków 1945, p 1.

\(^12\) W. Ludwiczak, Międzynarodowe prawo prywatne, Poznań 1996.

lesser extent - norms based on merit directly governing international relations of natural and legal persons. Private international law also encompasses legal acts constituted in the course of the so called international legislation\textsuperscript{14}, which includes corresponding norms. Moreover, international customs regarding relations of international character of natural and legal persons are classified as a source of private international law, however in family cases their role is marginal. Furthermore, issues pertaining private international law can also be subject to community law. The above is the more relevant considering the discussions pending over the past years on the possibility of unifying private law in the European Union due to the postulate of eliminating all the barriers in legal relations among member states. On top of the diversities of technical, fiscal and tax barriers stemming from the public laws of EU states, the diversity of private law systems is seen as one of the prime barriers, apart from customs regimes, in internal European trade\textsuperscript{15}. However, the Study Group on a European Civil Code set up in 1998 at the initiative of the so called Lando Commission, in drawing up the text of a European Civil Code decided to regulate liabilities (including in the general provisions, in the part devoted to the different types of agreements, and in the part on the consumer law) and torts. Plans also encompass the unification of bank law, as well as real estate regime regulations\textsuperscript{16}. Works are pending on: sale agreements, services provision agreements, as well as long-term agreements, bank law, warranty and guarantee, torts and unjust enrichment, alienation of movable assets\textsuperscript{17}. However, there still remains the question of the competence of the European Union to introduce a unified law, provided the regulations in place do not detriment the functioning of the common market. Both the Union as a structure, as well as the different community bodies, have competence only in issues which have been indicated in the founding or amending treaties of the Community. The discrepancies in the legislations of the different member states serve no grounds for the unification of law. Only those discrepancies which could have at least a probable negative effect on the common market (as a result of the application of their legal provisions) could serve as justification for applying one of the treaty clauses which, in the opinion of representatives of the doctrine, provide for the competence to

\textsuperscript{14} International legislation is defined by J. Jakubowski, \textit{Prawo międzynarodowe prywatne. Zarys wykładu}, PWN, Warsaw 1984, pp 23 – 24, as a common legislative effort of states aimed at regulating relations of international nature of natural and legal persons.


\textsuperscript{17} http://www.sgecc.net/index.php?subsite_3&id=4.
undertake legislative steps and, in turn, steps aimed at unification\textsuperscript{18}. The proposals voiced by representatives of the science, as well as representatives of community bodies, are related to the unification of private law. It is difficult to assume, however, that that the unification process could also encompass family and guardianship law. Based on the provisions determining the competencies of communities in undertaking unification efforts, one could conclude that the assumption that family law provisions could have an impact on the functioning of the common market, is somewhat dubious. However, there is one community act which is of significance from the point of view of legal relations in family cases - Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000\textsuperscript{19}. Among the domestic private international law sources in Poland, the core place is taken by the private international act of 12 November 1965\textsuperscript{20}. The law was enacted on 1 July 1966, repealing the previous act of 2 August 1926. It includes 38 articles in 12 chapters. Apart from general provisions, which are of auxiliary function in the process of indicating law proper, and final provisions, the act provides for norms of competence only. It governs personal and property relations of natural and legal persons in the scope of civil, family, guardianship and labour law\textsuperscript{21}. 10 articles (Art 14 – 23) have been devoted to family law. These articles are included in three chapters dedicated to marriage, blood relations, as well as guardianship and custody. Articles 14-15 of Chapter V (Marriage) regulate issues connected with the possibility of contracting marriage, with the word “possibility” encompassing the material prerequisites for contracting marriage, as well as the form of the marriage. The possibility of contracting marriage had been subject to the domestic laws of each of the parties, while the form of contracting marriage is determined by the law of the state where the marriage is contracted. However, in case it is contracted outside the territory of Poland, it is sufficient to observe the form required by the national laws of both spouses. Pursuant to Art 16, the annulment of marriage is governed by the same laws as those indicated for the possibility and form of marriage. The doctrine extends this provision also over issues related to the non-existence of marriage. The effects of marriage are at any time subject to the common national law of spouses. The same law determined the admissibility of the conclusion, amendment, or termination of marriage.


\textsuperscript{20} JoL No 46, item 290; with amendments: JoL of 1995, No 83, item 417, JoL of 1999, No 52, item 532.

settlement. However, the property relations resulting from the agreement are governed by the common national law of spouses as of the conclusion of the settlement. In case there is no common national law of both spouses, the applicable law is that of the state of residence of both spouses. In case of no domicile in one state – the prevailing law is Polish (Art 17). The chapter on marriage ends with Art 18 indicating the law applicable in case of divorce and separation, which is the common national law of spouses at the time of pleading for divorce or separation. The provision encompasses a corresponding solution to that of marriage, namely that should the spouses be of different nationalities at the time of pleading for divorce or separation, the applicable law is that of the state of domicile of the spouses. In case there is no domicile in the same country – the applicable law is Polish. The above article, as one of the two provisions of the act, was amended in 1999\(^2\), as a result of the reintroduction of the institution of legal separation to the Polish family law\(^3\). In Chapter VI (Blood Relations) the applicable laws were provided for: legal relations between parents and children (national law of the child), establishment and denial of paternity or maternity (national law of the child at the moment of birth), fathering a child (law of the state of which the child is a citizen at the moment of admission of fatherhood), fathering a conceived child not yet born (national law of the mother) – Art 19. In light of Art 20, maintenance (alimony) claims between blood relations or relations by affinity are subject to the national law of the person entitled to alimony (maintenance rights). Claims of a mother against a father of a child out of wedlock and connected with the conception and birth of the child have been placed subject to the national law of the mother (Art 21). A separate regulation governs adoption. Art 22, amended in 1995, stipulates the application of the national law of the adoptive parent. However, the adoption cannot take place without observation of the national law of the adoptee, nor without a proper consent of a proper state authority and a limitation of the adoption resulting from changing the current place of residence to a domicile in another country. Chapter VII (Guardianship and Custody) includes only Art 23, which provides for the jurisdiction of national law of the person who is already or who is to be placed under guardianship, with a concurrent application of the provision in case of custody – except for custody for the resolution of a particular matter (cura ad actum), which has been subject to the law of the matter. Moreover, issues regarding family law are governed by normative acts which include norms of competence in the scope of private international law. The first of these acts is the


\(^3\) It was the topic of a decree regulation – matrimonial law of 1945 (JoL No 48, item 270). It was not, however, incorporated in the Family Code of 1950. See T. Smyczyński, Prawo rodzinne i opiekuńcze. Analiza i wykładnia, C.H.Beck, Warsaw 2001, p 218.
Decree on the recognition of validity of some marriages and divorces of Polish nationals of 3 February 1947. The eight articles of the Decree provide for the acknowledgment of divorces granted under the regime of Soviet law with respect to Polish nationals residing in areas annexed to the USSR in 1945. Moreover, it presents the possibility of acknowledging marriages contracted during the war and German occupation before a liaison officer or a camp commander. The acknowledgement was extended also to marriages contracted according to the form provided by religious regulations of one of the spouses. Another normative act is the Code of Civil Procedure of 1964 which includes provisions on international law of civil procedures, encompassed in part four of the Code (Art 1096-1153). The consecutive chapters describe: national jurisdiction (general provisions, joint provisions for national jurisdiction in litigious and non-litigious proceedings, national jurisdiction during litigation, national jurisdiction in non-litigious proceedings, exception from national jurisdiction), proceedings (capacity to be a party in civil cases, capacity to be a party in a given civil case, securing the costs of proceedings, exemption of an alien from court costs, legal assistance and services of documents, securing of evidence, foreign official documents, securing an inheritance from foreign nationals, ascertainment of foreign law and reciprocity, stating reasons for valid decisions), recognition and execution of the decisions of foreign courts, as well as settlements concluded before such courts. Another law that requires mentioning is the Law on acts of marital status of 1986 which, in Chapter 8 (Art 70 – 78), stipulates the procedure in case of specific cases of marital status registration. Such specific cases include births, marriages or deaths abroad, on a Polish sea vessel or aircraft, birth or death on a war ship or a military aircraft, as well as death in a situation of hostilities during active military service. Moreover, the act also includes provisions regarding documents ascertaining the possibility of contracting marriage by aliens (art 56) and Poles staying abroad, or stateless aliens (Art 71).

The postulate to supplement norms of competence by universal rules included in international conventions has been stipulated as far back as 19th c. by two distinguished representatives of the European doctrine, a German - Friedrich Carl von Savigny and an Italian - Pascuale Stanislao Mancini. It was fulfilled in 1892 when, at the initiative of a Dutch lawyer and professor - Tobias Michael Carea Asserand, an international convention of European states was organized in the Hague. The meeting was devoted to the unification of rules related to the conflict of laws. Six consecutive Hague Conferences took place in 1893 – 1928. In 1955 the Statute of the Hague Conference on Private International Law was adopted.

24 JoL No 14, item 51.
25 JoL of 1964, No 43, item 296 with later amendments.
6 conventions were adopted as part of the conference before 1945, and 36 conventions in the post-war years. The conferences are attended by states – parties to the Statute, the number of which is 64, including Poland who signed the Statute on 29 May 1984. Some of the international treaties developed as part of the conference are addressed to a broader group of states, e.g. the Convention on the Civil Aspects of International Child Abduction of 1980 has been signed by 75 countries (including Poland in 1992). However, it also sometimes happens that the number of signatories is small (e.g. 4 states have signed the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 1971). Some conventions have never been enacted due to the lack of interest expressed by states, as was the case of the Convention on the Choice of Court adopted in 1965 which was signed only by Israel, or the Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions of 1965 which has not been ratified by any country. The conference develops draft conventions which include norms of competence, as well as norms based on merits. Moreover, it also focuses on substantive and litigious law. Drafts of conventions are developed at the Permanent Bureau of the Hague Conference, and then presented to the member states of the conference, to be finally adopted at interstate negotiation at the intergovernmental diplomatic conferences which take place every four years in the Hague. The official languages of the conference are English and French, and it is in these languages that all texts of the convention are drafted. Poland is a party to eight conventions related to family issues: Convention Relating to the Settlement of Guardianship of Minors of 1902, Convention Relating to Deprivation of Civil Rights and Similar Measures of Protection of 1905, Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors of 1961, Convention on the Recognition of Divorces and Legal Separations of 1970, Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations of 1973, Convention on the Law Applicable to Maintenance Obligations of 1973, Convention on the Civil Aspects of International Child Abduction of 1980, as well as Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 1993. In 2000 Poland ratified but has

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27 Poland has been party to the convention from 1929, JoL of 1929, No 80, item 596.
28 Poland has been party to the convention from 1929, JoL of 1929, No 80, item 598.
29 JoL of 1995, No 106, item 519.
30 It was enacted in Poland in 1996, JoL of 2000, No 53, item 561.
31 JoL of 2000, No 2, item 13.
32 It was enacted in Poland in 1996, JoL of 2000, No 39, item 444.
33 JoL of 1995 r., No 108, item 528.
34 It was enacted in Poland in 1995- JoL of 2000, No 39, item 448.
not yet ratified the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children z 1996 r. The following conventions were in force in Poland until the early 1970’s: Convention Relating to the Settlement of the Conflict of the Laws Concerning Marriage of 1902\(^{35}\), Convention Relating to the Settlement of the Conflict of Laws and Jurisdiction as Regards to Divorce and Separation of 1902\(^{36}\), Convention Relating to Conflicts of Laws with Regard to the Effects of Marriage on the Rights and Duties of the Spouses in Their Personal Relationship and with Regard to Their Estates of 1905 \(^{37}\).

Poland is also party to other conventions on international family law which have been developed outside of the Hague Conference on Private International Law. These are: New York Convention on seeking maintenance claims abroad (1956)\(^{38}\), New York Convention on the Citizenship of Married Women (1957)\(^{39}\), New York Convention on the Consent to Marriage, New York Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962)\(^{40}\), Convention No 3 on International Exchange of Information relating to civil status (Istanbul, 1958)\(^{41}\), European Convention on the Abolition of Legalization of Documents Executed by Diplomatic Agents or Consular Officers (London, 1968)\(^{42}\) and The Convention on the issue of certain extracts from civil status records for use abroad (Vienna, 1976)\(^{43}\). Moreover, Poland was the initiator of the draft of the UN Convention on the Rights of the Child (New York, 1989), which is in force in Poland\(^{44}\) together with two supplementary optional protocols of 25 May 2000: on the involvement of children in armed conflicts\(^{45}\) and on the sale of children, child prostitution and child pornography\(^{46}\). Among the agreements concluded by Poland which are of regional – European character, there are: European Convention on the Adoption of Children, concluded in Strasburg on 24 April 1967 \(^{47}\), European Convention on the Status of Children Born out of

\(^{35}\) Poland had been party to the convention from 1929 – JoL of 1929, No 80, item 594 until 1970 when the convention was denounced – JoL of 1970, No 26, item 214.

\(^{36}\) Poland had been party to the convention from 1929 – JoL of 1929, No 80, item 595 until 1969 when the convention was denounced – JoL of 1969, No 29, item 231.

\(^{37}\) Poland had been party to the convention from 1929 – JoL of 1929, No 80, item 597 until 1969 when the convention was denounced – JoL of 1969, No 29, item 231.

\(^{38}\) JoL of 1961, No 17, item 87.

\(^{39}\) JoL of 1959, No 56, item 334 – annex.

\(^{40}\) JoL of 1965, No 9, item 53 – annex.

\(^{41}\) JoL of 2003, No 172, item 1667.

\(^{42}\) JoL of 1995, No 76, item 381.

\(^{43}\) JoL of 2004, No 166, item 1735.

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\(^{45}\) JoL of 2004, No 194, item 1982.

\(^{46}\) JoL of 2004, No 238, item 2389.

\(^{47}\) JoL of 1999, No 99, item 1157.

After World War II Poland signed a series of bilateral agreements which, due to their repetitive titles, can be termed as agreements on legal assistance. They include norms of competence, as well as norms of procedure and jurisdiction and organizational norms. In most cases they regulate similar range of cases as the act on private law of 1965 (civil law, family law, guardianship law and labour law), however some of them are also related to criminal cases. Several of these agreements (e.g. the ones signed with Egypt or Libya) are also focused on commercial issues. Provisions have been introduced to these agreements on issues regarding international law of civil procedure in relation, \textit{inter alia}, to jurisdiction but also documents. Some of them also regulate issues which have not been provided for by the act, such as incapacitation. Attention should also be drawn to yet another agreement – different in content but one which has a profound impact on the issues of contracting marriage, i.e. the concordat concluded with the Vatican. The present bilateral relations of Poland are governed by conventions concluded with 37 states\textsuperscript{51}, few of which do not regulate family issues\textsuperscript{52}.

When analyzing the remits of the legal acts above, as well as the solutions which they incorporate, several conclusions could be drawn on the issue of family protection. Taking into consideration the construction and function of norms of competence, it is difficult to say that they protect the family. However, the very scope of sources of law indicate which institutions and values are or can be the subject of legal protection from the state, and which the state leaves beyond the area of legal relations. The protection provided to the family by the state is limited only to the cases specifically stipulated in the act or, pursuant to the private international law, to the institutions similar to those regulated by Polish law\textsuperscript{53}. It can generally be said that the protection is related to relations pertaining family and guardianship law,

\textsuperscript{48} JoL of 1999, No 79, item 888.
\textsuperscript{49} JoL of 1996, No 31, item 134.
\textsuperscript{50} JoL of 2000, No 107, item 1128.
\textsuperscript{51} Agreements with Algeria, Austria, Belgium, Belarus, Bulgaria, China, Cyprus, Czechoslovakia and Czech republic, Egypt, Estonia, Finland, France, Greece, Spain, The Netherlands, Iraq, Yugoslavia, North Korea, Cuba, Libya, Lithuania, Latvia, Morocco, Mongolia, Norway, Federal Republic of Germany, Russia, Romania, The Vatican, Tunisia, Turkey, Ukraine, Hungary, United Kingdom of Great Britain and Northern Ireland, Vietnam and Italy.
\textsuperscript{52} For example the Treaty with Spain on conciliation, litigious proceedings and arbitration concluded in Madrid on 3 December 1928 (JoL of 1930, No 20, item 162), Treaty with The Netherlands on litigious proceedings, arbitration and conciliation, concluded in The Hague on 11 April 1930 (JoL of 1931, No 15, item 72).
\textsuperscript{53} Kefallah.
which are subject to the provision of the act on private international law (marriages, blood relations, as well as guardianship and custody) and that none of the international conventions, to which Poland is a party, has a scope that would exceed that of the act. However, going beyond the framework of norms of competence, the private international regulation by law is a consequence of the particular scope of family and guardianship code which has been adopted, as well as a visible extension of family protection by the state provided for by the Constitution. Polish constitutional norms on family protection are not particularly different from the regulations adopted in other countries. The solutions stipulated by the Constitution of 1997 place Poland among nations where the norms on family and children have been granted the rank of constitutional rules or have been located among norms of the highest priority to the state. Art 18 of the chapter on The Republic stipulates that: marriage being a relationship between a man and a woman, family, maternity, and parenthood are under special care and protection of the Republic of Poland. This provision is further supplemented by a series of provisions included in the part of the Constitution dedicated to human and civic rights and freedoms. It, therefore, seems justified to say that Art 18 alone, as well as its location, are an expression of the legislator’s intention to provide the family with particular protection. Despite the fact that not all representatives of Polish doctrine of constitutional law see this as a constitutional principle, there are also opinions present in light of which the current Constitution places Poland among countries where norms on family and children are given the significance of such principles. Moreover, these norms set out the fundamental values related to the family and its social position, as well as the objectives and tasks of the state. Thus it can be said that family protection has been expressed by means of a constitutional norm as a fundamental constitutional value. The norm, in turn, translates into the principle of family law. Therefore, both the Constitution and family law protect marriage,

54 There are, however, constitutions, devoid of such provisions, such as the Constitution of Australia, Canada, Czech Republic, Israel, and such states as Barbados and Bangladesh.

55 Art 33, which provides for the general rules of gender equality, including in family life, Art. 47 with the right for privacy protection, including family life, Art 48 constituting the right of parents to bring up their children in line with their own beliefs, in consideration of the degree of maturity of the child, freedom of conscience, faith and beliefs (in addition pursuant to Art 53 par 3 – with the right to provide children with moral and religious upbringing and education in line with their beliefs), as well as limiting the possibility to limit or deprive of parental rights to cases provided for in the act of law and only pursuant the decision of the court, Art 65 par 3 prohibiting permanent employment of children below the age 16, Art 68 par 3 obliging public authorities to ensure particular health care for children, Art 68 par 5 including the declaration of support by public authorities of physical education among children and youth and, finally, Art 72 entirely related to children’s rights.


as a relationship of man and woman, as well as the family. The very term family is a cause of certain doubts, particularly that Polish law lacks a legal definition while many scientific disciplines offers their abundance. From the point of view of a historian, the family is a historical category, transforming with time, depending on the epoch. From the point of view of a sociologist, it is a primary group due to its fundamental role in shaping the social nature of the ideals of an individual or a unity of cooperating personalities. Moreover, a family is seen by sociologists and psychologists as a group of people: close to each other, united by some form of regular co-participation in life or mutual dependencies, connected with each other by means of different relations and dependencies establishing duties with regard to each other and defining specific roles to be played, connected by special ties of duties and responsibilities, in which a person is born and on which a person depends for many years. The family has also been defined as the main place where a person born gains social skills and form. In light of the complex definition made up of many elements, it is a socially accepted form of permanent cohabitation composed of persons who are inter-related by what the social custom deems as blood relation, marriage or adoption, living under the same roof. It is further composed of members who cooperate with each other within the framework of the socially accepted internal division of roles, including the most important ones – giving birth, maintaining and bringing up children. The individual members of a family can be named using the terminology associated with the socially accepted method of measuring blood relations and descent. The shape of the family has been subject to, on the one hand, social and economic conditions, including the evolution of the social roles of spouses and parents and, on the other, the shape of the family reflects, to a large extent, religious relations and moral values adopted at the consecutive stages of social development. Whilst the doctrine


of social sciences reveals a wealth of definitions of the notion of family, the legal doctrine has not much focused on the issue – which is perhaps a result of the lack of a legal definition of the notion. This lack may stem from a twofold perception of the meaning of a family: 1) a conviction that the meaning is obvious thus its colloquial meaning overlaps its meaning in the law, or 2) a conviction that the colloquial meaning of the notion is not congruent with its equivalent in the law.\textsuperscript{68} One of the classics of Polish civil law defines the family as a minute or the most minute social group, inter-related by internal conditions stemming from the shared feeling of closeness and community, both personal and financial, general and dominating but not necessary justified blood relations, a “blood bond”.\textsuperscript{69} On the other hand, the family is defined as a rather legal notion which is constructed by indicating the criteria of belonging to it or, in other words, by indicating the ties connecting family members. The catalogue presented in the doctrine includes six criteria of belonging to a family, indicated pursuant to the provisions of Polish law. Some of these criteria can be manifested in joint, however each of them serves as an independent basis for indicating the affiliation with a family. These are: blood relations, marriage, adoption, affinity, foster family, as well as remaining in a joint household.\textsuperscript{70} Both from the perspective of universal conventions, as well as from the point of view of Polish law, it is not difficult to list persons who are granted protection as family members. There are no doubts that this protection is extended to spouses and their offspring, mothers and fathers bringing up their children, persons remaining in adoption relations and, in broader terms, also ascendants, descendants and lateral relatives.\textsuperscript{71} It is obvious that each of these persons is entitled to the right to respect family life. Moreover, pursuant to the convention on the international protection of human rights, this right is granted also to other persons despite the lack of legal classification of them as family members and without their possibility to exercise the right to contract a marriage. In this context, a clear step towards the broadening of the term “family member” seems to be Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their

\textsuperscript{68} E. Wiśniowska, \textit{Pojęcie rodziny w ustawodawstwie polskim}, Acta Universitatis Wratislaviensis, No 1152, Prawo CLXXXVI, Wrocław 1990, p 352.


\textsuperscript{70} E. Wiśniowska, \textit{Pojęcie rodziny w ustawodawstwie polskim}, Acta Universitatis Wratislaviensis, No 1152, Prawo CLXXXVI, Wrocław 1990, p 360.

\textsuperscript{71} It stems, among other things, from family and guardianship law, as well as inheritance law. Conclusions can also be drawn on the basis of certain provisions of international conventions (Art 23 and Art 17 of International Covenant on Civil and Political Rights - JoL of 1977, No 38, item 167, Art 10 and 11 of International Covenant on Economic, Social and Cultural Rights - JoL of 1977, No 38, item 169, Art 16 of European Social Charter - JoL of 1999, No 8, item 67) despite the fact that they usually do not allow for such far-fetching generalizations.
family members to move and reside freely within the territory of the Member States. Art 2 providing for the definitions of terms used in the directive, lists the following as family members: 1) the spouse, 2) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State, 3) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner, 4) the dependent direct relatives in the ascending line and those of the spouse or partner. Moreover, in light of Art 3 item 2, the possible beneficiary of the directive is 1) any other family member, irrespective of their nationality, who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen, 2) the partner with whom the Union citizen has a durable relationship, duly attested.

It relation to the notions of family, it is possible to juxtapose two different concepts of the issue. Pursuant to the first one, a family is a narrow social group based on the principles of a formal relationship between man and woman, who are connected by personal emotional, cultural, social and property bonds. In consequence of traditional values, a clear formal association between marriage and family has been drawn. Thus the family bonds of the closer and distant relatives all begin or are strengthened by the contracting of a marriage, the prime function of which is procreation. In light of this concept, family ties stem from biological, formal and legal, as well as mental foundations. The characteristic trait of family ties is the feeling of community by family members, awareness of mutual relations and unity. The family, therefore, is the smallest, “molecular” social organization based on marriage, constituting a social form where the process of preserving the human kind is taking place, and which is cemented by the feelings of love, friendship, and devotion. Family members provide


each other with moral support, assistance, and mutual respect. However, the laws from the turn of 20th and 21st c. of many states allow now for relationships which had thus far been deemed informal. The result was the introduction of institutional changes, both in terms of the subject matter, as well as in relation to the function and model of a family. Therefore, whilst staying with the notion of exceptionality of a family, with the traditional values usually originating from religion and morality, a certain dilemma arises as to what extent should the term “family” reflect the liberal tendencies in the sphere of morality. It is for this reason that a precise definition of family is difficult. The traditionally seen family can be confronted by a broader concept which reflects the actual informal ties existing among people who do not constitute a family in the traditional sense of the word. In its nuclear sense, a family could be therefore defined as a community which is composed by spouses and their offspring, but also a family is hence persons who are related by means of actual ties equivalent to those resulting from marriage and its offspring. In such context, apart from matrimonial ties, we will also see actual ties, most often informal or legalized as a formal partnership and, to this effect, protected by law. These two types of bonds will constitute family ties. Moreover, it seems that the fact of existence or non-existence of a marriage bond does not have an impact on the existence of ties between parents and children. After all, a bond between a single mother and a child or a single father and a child is cause for no controversy. Neither is it controversial to claim that the optimum environment for the development of a child is the family. Due to the fact that Polish law on conflict of laws reflects the scope of regulations by family law, the prime problem is the lack of possibility to indicate the jurisdiction of law for relationships which are seen as family relationships by other countries and as such are granted protection. The situation is related to the broadly understood formal partnerships, common-law marriages, and homosexual marriages. Polish law on conflict of laws in the form of the act has remained unamended, despite the fact that significant changes have taken place in the legislations of a series of countries so as to reflect the transformations in the sphere of social behavior and customs. The problem that calls for resolution by the legislator is whether the law on the conflict of laws should reflect these transformations. If not, then the scope of regulations will precisely respond to the scope of cases regulated by family and guardianship law and the remit of protection it guarantees. If yes, then the scope of private international regulations will be broader and a separate protection of relations will be constituted, which are

75 Definition quoted from: J. Winiarz, Ochrona praw matki, dziecka i rodziny, Wydawnictwo Prawnicze, Warsaw 1965, p 17.
76 See T. Szczyński, Reforma kodeksu rodzinnego i opiekuńczego w świetle konwencji o prawach dziecka, in: Księga pamiątkowa ku czci Profesora Leopolda Steckiego, Toruń 1997, p 297.
not regulated by Polish family law. The first possibility, which is definitely met with approval by the advocates of the preservation of identity and autonomy also in the sphere of family relations, can lead to a substantial slowing down of legal relations in family cases, as well as a refusal to consider certain cases in Poland due to the lack of legal regulations in this respect. Even if we were to assume the possibility to use, per analogiam, a certain existing norm of competence (e.g. the norm of marriage to formal partnerships), the indication of a foreign law, which could include legal solutions shocking to the Polish legislation, could lead to the application of the clause of public order. The result of such application could be the elimination of the foreign law and, in consequence, refusal to grant legal protection. The second possibility could cause the law on conflict of laws to break off from national family law and the acceptance of its international character. Such a concept seems to have been adopted in the process of drafting the new act. Therefore, if an equal sign is to be drawn between the terms “regulate” and “protect”, then the scope of protection of the laws on the conflict of laws in the area of family cases will be broader than that of family law.