

# MATER FAMILIAS

## SCRITTI ROMANISTICI PER MARIA ZABŁOCKA

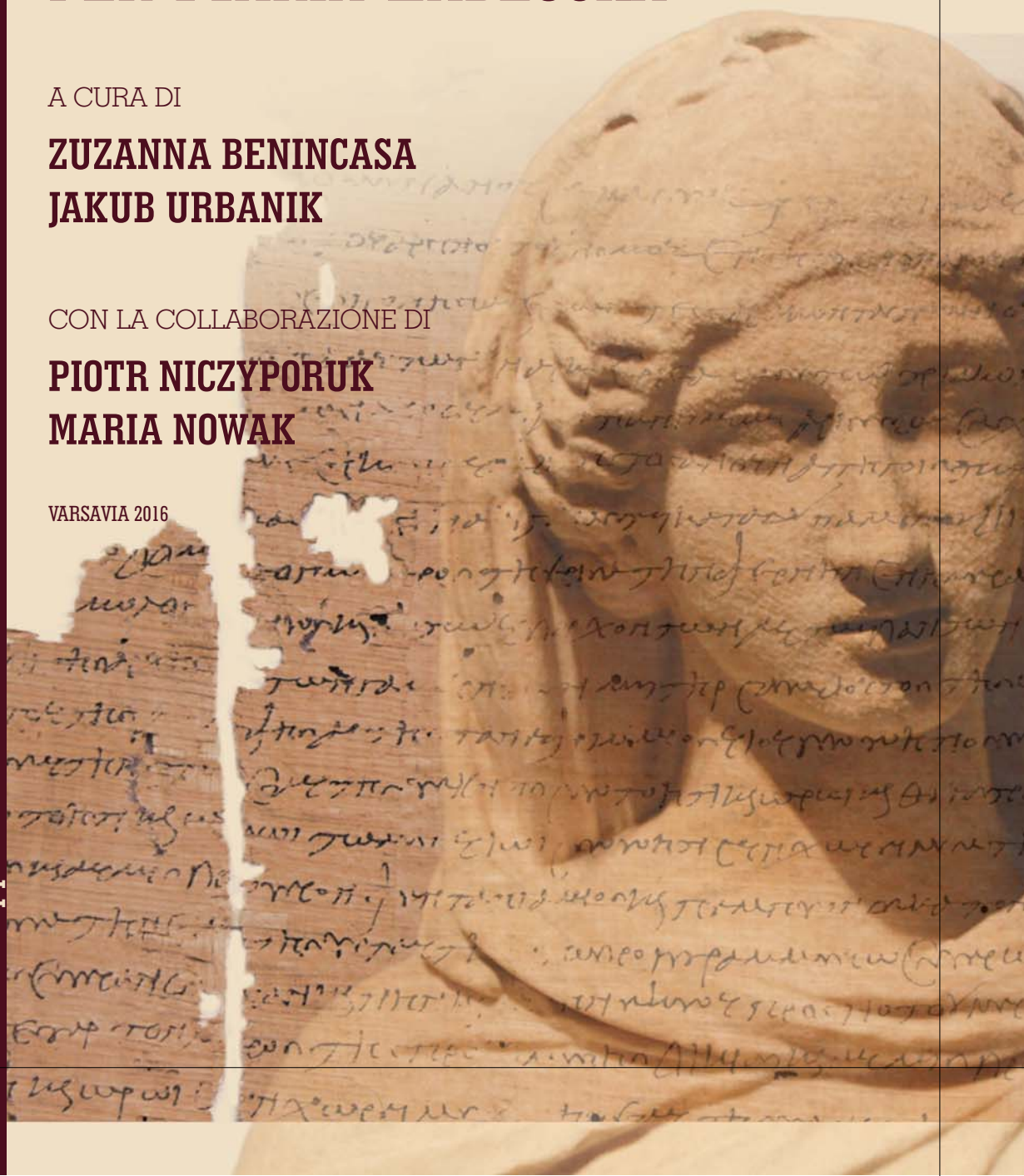
A CURA DI

**ZUZANNA BENINCASA  
JAKUB URBANIK**

CON LA COLLABORAZIONE DI

**PIOTR NICZYPORUK  
MARIA NOWAK**

VARSAVIA 2016



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**FAMILY LAW IN THE PRIVATE LAW SYSTEMATICS  
FROM THE ROMAN LAW UNTIL THE PRESENT DAY**

THE TERM ‘FAMILY LAW’ relates to a distinct group of legal norms, to which refer to a specific social group, called a family, related to marriage, cognation or other similar, or secondary relations. These norms regulate economic and non-economic relationships concerning relations within a family and with third parties.<sup>1</sup> The above mentioned leads to the fact that family is the basic category of this branch of law. Although being generally a sociological phenomenon, it is also subject to interest of legal norms. The family is the oldest natural and irreplaceable element of sociological structure,<sup>2</sup> and according to Art. 10 of the 1966 *International Covenant on Economic, Social and Cultural Rights*, it is referred to as the society fundamental group unit.

<sup>1</sup> Z. RADWAŃSKI, ‘Miejsce prawa rodzinnego w systemie prawa’ [The status of family law in the legal system], *Państwo i Prawo* 1(2008), p. 3.

<sup>2</sup> Rita JAWORSKA-STANKIEWICZ, ‘Familia rzymska –miniaturowe państwo w państwie’ [Roman Family – a miniature state in the state], [in:] D. BOGACZ & M. TRACZUK (eds.), *Podstawy materialne państwa*, Szczecin 2006, pp. 353–360. F. ADAMSKI, *Socjologia małżeństwa i rodziny. Wprowadzenie* [Sociology of Marriage and Family. An Introduction] Warszawa 1982, pp. 10–15; Z. TYSZKA, *Socjologia rodziny*, Warszawa 1979, pp. 7–10.

Family, life and family relationships, due to their confidentiality remain under weaker control of the law in comparison to other social relationships. In historical development the family was subject to the interest of law, jurisprudence and legislative activity in reference to material relationships, the matter connected to mutual administration of assets and its transmission to inheritors. Personal relations among family members underwent regulations and control especially in the moral and social sphere. Religious aspects had a great impact in this case.<sup>3</sup>

In this article, I would like to discuss the place of family law in the private law system over the centuries, starting with the Roman law and concluding with the current Polish law.

2. The division of personal, family, property and inheritance law presented in Roman law books is not Roman. Once established by pandecrists it created the systematical canon of Roman law manuals, national private laws and modern codifications.<sup>4</sup>

The first reference to family in Roman law, and precisely agnation relationship may be found in the *Law of the Twelve Tables*. The tables iv and v refer to the organization of an agnation family and are related to matters concerning intestate inheritance based on agnation. Obviously, it is not a fully developed systematics but it is essential to point out the relation of issues referring to the Roman family with those concerning inheritance.<sup>5</sup>

<sup>3</sup> Cf. further, J. PIĄTOWSKI (ed.), *System prawa rodzinnego i opiekuńczego* [The System of Family and Tutelary Law], Wrocław 1985, §§ 4–7; T. SMYCZYŃSKI, *Prawo rodzinne i opiekuńcze* [Family and Tutelary law], Warszawa 2003, pp. 2–5; Z. TYSZKA (ed.), *Stan i przeobrażenia współczesnych rodzin polskich* [The Status and the Transformation of the Modern Polish Families], Poznań 1991; T. SMYCZYŃSKI (ed.), *Rodzina w świetle prawa i polityki społecznej* [Family in the Light of Law and Social Policy], Poznań 1990; J. IGNATOWICZ, *Prawo rodzinne* [Family Law], Warszawa 2002, pp. 24–25.

<sup>4</sup> K. KOLAŃCZYK, *Prawo rzymskie* [Roman Law] Warszawa 1997, p. 29; H. KUPISZEWSKI, *Prawo rzymskie a współczesność* [Roman law and the Modern World], Warszawa 2013, p. 108; and recently M. KURYŁOWICZ, 'Prawo spadkowe w systematyce rzymskiego prawa prywatnego' [Law of succession in the systematics of roman private law], [in:] Anna DAŃKO-ROESLER, A. OLESZKO & R. PASTUSZKO (eds.), *Rozprawy z prawa prywatnego oraz notarialnego. Księga pamiątkowa dedykowana prof. M. Pazdanowi*, Warszawa 2014, pp. 184–185.

<sup>5</sup> KURYŁOWICZ, 'Prawo spadkowe' (cit. n. 4), p. 185.

A subsequent systematics of Roman law, in which family law may be found is the one of the work of Q. Mucius Scaevola on civil law, comprising 18 books, which begins with inheritance law problems, and later discusses personal, family, property and debenture law.<sup>6</sup>

It is difficult to notice a uniform systematics based on scientific premises in the praetorian edicts, which content was shaped during the last two centuries of the Republic. Edicts were adjusted to the needs of the current judicial performance of the praetor and basically contained *formulae* of judicial claims and announcements of other protection measures performed by praetors on legal course and other extra judicial ones. The regulations concerning the matters of family law were placed in the 20th, 21th, 22nd title and concern matters of dowry (*de re uxoria*), descendants, acknowledgement of paternity (*de liberis et de ventre*) and guardianship (*de tutelis*).<sup>7</sup>

A subsequent systematics which significantly concerned family law as a bigger substantial entirety, was the lective system of the Gaian *Institutions*. Nevertheless, Gaius did not distinguish family law as a separate legal branch, the information on marriage, paternal power and guardianship were placed in the first Commentary of the *Institutions*:

Gai.1.8: Omne autem ius, quo utimur, vel ad personas pertinent vel ad res vel ad actiones.

According to Gaius, all law referred either to persons (*personae*), or property (*res*), or claims (*actiones*). Law, which referred to *personae* was understood as law of persons and family law. *Res* covered the regulations concerning property (division and categories of property, types of the control over it, but also obligation and law of succession, determining the fate of the estate of the deceased). *Actiones* contain court actions.<sup>8</sup>

<sup>6</sup> D. 1.2.2.41; Cf. KOLAŃCZYK, *Prawo* (cit. n. 4) p. 52; W. LITEWSKI, *Jurisprudencja rzymska* [Roman Jurisprudence], Kraków 2000, p. 64; KURYŁOWICZ, 'Prawo spadkowe' (cit. n. 4), p. 186.

<sup>7</sup> O. LENEL, *Das Edictum Perpetuum*, Leipzig 1921 (3 ed.), pp. 293–312. Also W. LITEWSKI, *Historia źródeł prawa rzymskiego* [The History of the Sources of Roman Law], Warszawa 1989, pp. 60–62; W. WOŁODKIEWICZ & Maria ZABŁOCKA, *Prawo rzymskie. Instytucje* [Roman Law. Institutions], Warszawa 2009, p. 29.

<sup>8</sup> See M. KURYŁOWICZ, 'Prawo osobowe' [Law of Persons], [in:] M. SAWCZUK (ed.),

The legal analysis of Gaius commenced with the introduction of legal regulations, which applied to persons (Gai. 1.8: ‘... sed prius videamus de personis’).

A detailed division of persons and the overview of their legal status were placed in the beginning. Later, the jurist proceeded to issues related to marriage (Gai. 1.56–57) and legal status of children born therein (Gai. 1.55–56). Then, he presented the concept of *conubium* (Gai. 1.56–57) and the issue of marriage impediments (Gai. 1.58–64), and detailed matters regarding the establishment of *patria potestas* or its lack arising from the establishments of *lex Aelia Sentia* (Gai. 1.65–73). Then, the problems concerning the solemnization of a marriage of a Roman citizen with a *peregrinus* (and *vice versa*) were discussed and also the legal status of children born in such a relationship was presented, obviously if there was no *conubium*.

In the further part of his deliberations, after discussing matters concerning the origin of slavery and obtaining Roman citizenship, Gaius returned to issues regarding the establishment of *patria potestas*, discussing in detail matters concerning adoption (Gai. 1.97–107), in order to proceed to the term of *manus* (Gai. 1.108–115b). Subsequent extracts of the first glossary are dedicated to the problem of personal law in order to refocus on custody and guardianship in later extracts – Gai. 1.142–200.

A similar formula concerning the range of family law can be found in the *Institutes* of Justinian. Consequently, the analysis of family law began with the presentation of problems concerning *patria potestas* (*IJust.* 1.9), later marriage was discussed (*IJust.* 1.10) in order to proceed to adoption (*IJust.* 1.11) and ways of expiration of *patria potestas* (*IJust.* 1.12). In order to finish matters concerning the custody of a Roman family, custody (*IJust.* 1.13–22) and guardianship (*Inst.* 1.23) were discussed in detail, and final provisions (*IJust.* 1.24–26) refer to the matters of custody and guardianship. The remaining titles refer to matters connected to personal law and concern the law of persons (*IJust.* 1.3); freeborn (*IJust.* 1.4); freed slaves (*IJust.* 1.5–7) and also the division of persons into *alieni* and *sui iuris* (*IJust.* 1.8).

The above mentioned matters contained in the first volume of the *Institutes* of Gaius and the *Institutes* of Justinian suggest that the law concerning persons (Gai. – *ius ... ad personas*; *IJust.* – *de iure personarum*) referred to rules later specified as family and personal law. It seems that an explicit distinction of these two branches of law was not familiar to the private Roman law and therefore, its roots should be searched in later development of the systematics. In the Roman state legal systematics had rather a didactical than scientific meaning. Only in the reception period of Roman law, systematics has become subject of scientific and codification interest.<sup>9</sup>

The belief as to the integrity between issues of family law was also revealed in the interpretations not only in the *Institutes* of Gaius and Justinian, but also in the *Digest* (*D.* 23; *D.* 24; *D.* 25; *D.* 26; *D.* 27) and the Justinian code (*Cf.* 5; *Cf.* 8.46 e *Cf.* 8.47). However, there is no precise determination of the place of the family law in the Justinian's codification.<sup>10</sup>

3. In the feudal period, it is difficult to talk about the presence of family law. The regulations of that time, which are currently included in family law, did not constitute a solid and substantial entirety. Firstly, they were scattered between secular and ecclesiastical law. Secondly, they referred to varied social groups being a blood-related tribe (cognition tribe) or a household community (agnation tribe).<sup>11</sup>

Only under the influence of the doctrine of natural law, it family legal relations started to be presented in their entirety. The representatives of

<sup>9</sup> See KOLAŃCZYK, *Prawo* (cit. n. 4), p. 178; KUPISZEWSKI, *Prawo rzymskie* (cit. n. 4), pp. 76–77; KURYŁOWICZ, 'Prawo osobowe' (cit. n. 8), pp. 343–344.

<sup>10</sup> Although the *Digest* were not randomly arranged, as they relate to the composition of praetorian and aedilician edicts, however, as reported by T. PALMIRSKI [in:] *Digesta Justyniańskie. Tekst i przekład* [Justinian's Digest. Text and translation] 1, Kraków 2013, p. 10: 'there is no consistent narration, logical continuity of problems or some procedural functionality'.

<sup>11</sup> Katarzyna SÓJKA-ZIELIŃSKA, *Historia prawa od wczesnego średniowiecza do wieku oświecenia* [History of Law from the early Middle Ages to the Age of Enlightenment], Warszawa 1979, pp. 71–72; T. MACIEJEWSKI, *Historia powszechna ustroju i prawa* [Universal History of State and Law], Warszawa 2007, pp. 289–290.

natural law were interested in the regulation of relations among citizens instead of particular groups or relationships. According to them, a social agreement creating a national organization directly connected a citizen to the country without the participation of the so called indirect bodies, which included for instance a family. That is why a family was not treated as a separate institution in law on the basis of legal naturalism. Matters currently included in family relations were then called individual laws of one towards the other.<sup>12</sup>

Legal naturalism greatly influenced the systematics of first European codifications. Generally, it based on the systematics of Institutes and the trisection of *personae, res, actiones* was present therein. The distinction of family law as a specific entirety, determining all legal rules referring to family relations, did not appear during that time.

The *Prussian Landrecht* of 1794 divided the whole material into two sections. The first section determined an individual and its attitude towards property, whereas the second section included social laws being rules regulating the relation of individuals towards varied social bodies – for example the family. This section contained, among others, regulations in reference to family law and the law of family goods.<sup>13</sup>

In the *Code of Napoleon* of 1804,<sup>14</sup> rules related to marriage, divorce, blood relationship, adoption and paternal power, custody and guardianship together with provisions concerning the legal status were placed in the first book (on persons). Matters concerning property, family law were placed in the third book (on different forms of acquisition of property). The *Code*

<sup>12</sup> Katarzyna SÓJKA-ZIELIŃSKA, *Wielkie kodyfikacje cywilne. Historia i współczesność* [The Great Codifications of Civil Law. The History and Modern Times], Warszawa 2009, pp. 38–40; RADWAŃSKI, 'Miejsce prawa rodzinnego' (cit. n. 1), p. 3.

<sup>13</sup> Further, SÓJKA-ZIELIŃSKA, *Wielkie kodyfikacje* (cit. n. 14), pp. 70–72.

<sup>14</sup> The French civil code comprised of three books (I. persons; II. property and types of thereof, III. various ways of acquiring property). However, this systematics was criticized in consecutive years, among others for the lack of distinction of a general part or the division of personal family law (1st book) and marriage property law (3rd volume). Further see: G. JĘDREJEK, 'Prawo rzymskie a systematyka prawa prywatnego w Polsce w XIX–XXX wieku' [Roman Law and private law systematics in Poland in 19th–20th cent.], [in:] A. DĘBIŃSKI (ed.), *Starożytne kodyfikacje prawa*, Lublin 2000, pp. 219–222.



was the first codification, which regulated the totality of family relations in reference to all individuals despite their religion.<sup>15</sup>

A similar systematics was used in the *Austrian Civil Code (ABGB)* of 1811, which was also influenced by natural law. It contained three sections – personal law, property law and mutual provisions regarding personal and property law. Provisions concerning legal family relations were placed in a part marked as personal law, which contains laws due to a person as a legal entity and also a person being a member of family. In this part family and property law were presented.<sup>16</sup>

The critic of the natural law doctrine with its individualistic attitude towards legal family relations occurred in the 19th century. Varied concepts were presented during the scientific discussion regarding the matter of family law on the field of private and public law. Eventually, the view that family law belongs to private law which concerns material and personal relations, has prevailed. It was especially visible in German law which was dominated by the pandectistic system.<sup>17</sup>

The pandectistic systematics<sup>18</sup> is mostly visible in the *German Civil Code (BGB)* of 1896. Five different volumes were distinguished: I. general part; II. law of contracts; III. property law; IV. family law; V. law of succession. Family law was distinguished in the fourth volume right before law of succession (5th volume), but in distance from the general part, after

<sup>15</sup> Katarzyna SÓJKA-ZIELIŃSKA, *Kodeks Napoleona. Historia i współczesność* [The Napoleonic Code. The History and Contemporary Times], Warszawa 2008, pp. 92–93; EADEM, *Wielkie kodyfikacje* (cit. n. 14), pp. 201–202.

<sup>16</sup> SÓJKA-ZIELIŃSKA, *Wielkie kodyfikacje* (cit. n. 14), pp. 108–109.

<sup>17</sup> Pandectists were consequently striving to distinguish substantive law from procedural law. Such a systematics was firstly presented by A. HEISE in his work entitled *Grundrisseeines Systems des Civilrechts zum Behum von Pandekten – Vorlesungen* (cf. R. ORESTANO, *Introduzione allo studio storico del diritto romano*, Torino 1963, p. 103). He suggested the following division: I: General part; II: Property law; III: Obligations; IV: Family law; V: Law of succession; VI: *In integrum restitutio*. Later, A. J. THIBAUT introduced a similar composition in his *System des Pandektenrechts* (KURYŁOWICZ, 'Prawo osobowe' [cit. n. 8], p. 345).

<sup>18</sup> The private legal code for the Zurich canton was the earliest one which was based on the pandectistic systematics (1853–1855). Family law was placed in the second part – after the first part dedicated to personal law. That code had an important impact on the shape of the *Swiss Civil Code* of 1908. Cf. also F. C. VON SAVIGNY, *System des heutigen Römischen Recht* I, Berlin 1940, pp. 345–355 and B. WINDSCHEID, *Lehrbuch des Pandektenrechts* I, Düsseldorf 1862, p. 39.

contract law and property law. Such an attitude towards family law was a result of legal natural concepts placing family between an individual and the country and strictly binding matters of family law with inheritance law, especially in the scope of inheritance of property.<sup>19</sup>

The above mentioned codifications were also, with some amendments, in force in the partitioned territories of the former Polish-Lithuanian Commonwealth. The first book and the 5th title of the third book of the *Code of Napoleon* were replaced in 1825 by the *Civil Code* of the Kingdom of Poland 1825.<sup>20</sup>

<sup>19</sup> Such a view was present in democratic countries due to the fact that totalitarian countries perceived rules concerning family law in a different way. And so, according to the social Nazi doctrine, family law was supposed to be fully in compliance with the interest of the German nation, serving strengthening and promotion of the Nordic race. According to the new legislation (act of July 6th 1938 about the harmonization of law of contracting marriage and divorce in Austria and other territories of the Reich – *German Journal of Laws* I S 807/1938) family was not a private matter anymore, but a political one (cf. SÓJKA-ZIELIŃSKA, *Wielki kodyfikacje* [cit. n. 14], pp. 327–329).

The communist concept of law had a similar view in terms of family in reference to doctrinal assumptions of the Marxist-Leninist ideology. A family was seen through the prism of a bourgeois family concept which would disappear together with the elimination of the capitalistic system and the creation of a family based on a communist system. Where a single family will stop being an economic social entity and the care of children will become a public matter. Subsequently, two views on the family and marriage institution in a socialist system were created in the Marxist doctrine. The first one having an extreme liberal character, treated family as a private matter, whereas the second one represented among others by Lenin, accentuated the social significance of family. The second one was accepted in the later decree of December 18th 1917 about civil marriage, children and keeping of vital records and of December 19th 1917 about the termination of marriage and a later codification concerning family law of 1918. Cf. P. FIEDORCZYK, 'Radzieckie prawo rodzinne jako przedmiot recepcji w Polsce i innych państwach Europy środkowo-wschodniej' [Soviet Family Law and its Reception in Poland and Other East and Central-European Countries], [in:] M. MACIEJEWSKI (ed.), *Studia nad Faszyzmem i Zbrodniami Hitlerowskimi*, 31 (2009), pp. 355–380; H. ŚWIĘTKOWSKI, 'Za wzorem prawa kraju socjalizmu' [Taking an Example from the Law of Soviet Country], *Demokratyczny Przegląd Prawniczy* 11 (1949), pp. 3–10; A. LITYŃSKI, *Prawo Rosji i ZSRR 1917–1991* [Russian and Soviet law 1917–1991], Warszawa 2010, pp. 252–253; M. NAZAR, 'Etapy i kierunki rozwoju radzieckiego prawa rodzinnego (1917–1987)' [Stages and Directions of Soviet Family Law (1917–1987)], *Annales UMCS, Sectio G* 35.13 (1988), pp. 253–354.

<sup>20</sup> F. RYSZKI (ed.), *Historia państwa i prawa Polski* [History of State and Law in Poland], Warszawa 1968, pp. 169–170; Ewa BORKOWSKA-BAGIEŃSKA, K. KRASOWSKI, B. LESIŃSKI & J. WALACHOWICZ, *Historia państwa i prawa Polski* [History of Polish State and Law],

4. In the re-united, independent, Poland the legislation of the occupying countries remained in force.<sup>21</sup> On the 3rd of June 1919, the Sejm created a Codification Committee whose task was to prepare uniform legislation for the new state.<sup>22</sup> These works also covered family law. Yet in the twenty years between the Wars civil law, with the exception of Code of Obligations of 1933, was not unified. In reference to family law, particular controversies arose due to the project regarding personal marriage law, prepared in 1929 by W. L. Jaworski and K. Lutostański. It was strongly criticized by the Catholic Church because of the introduction of optional civil marriages and possibility of divorce. The draft of marital property law by K. Lutostański, published already in 1927, provoked fears due to the fact that it postulated equal position of the husband and the wife in matters of property. The codification of family and guardianship law, by S. Gołąb and K. Lutostański, respectively, did not surpass the preparatory stage before 1939. Only a draft on relations between parents and children and the welfare office was prepared, whilst there were no proposals relating to custody and guardianship.<sup>23</sup> In the Polish doctrine of the inter-war period the place of family law in the legal system did not raise a controversy. Family law – commonly used in terminology of that time was used to indicate family law – as a part of civil law.<sup>24</sup>

Poznań 1994, pp. 281–283; Katarzyna SÓJKA-ZIELIŃSKA, *Historia prawa* [History of Law], Warszawa 2011, pp. 240–241.

<sup>21</sup> The former Kingdom of Poland: 2nd and 3rd book of 1804 *Code Napoleon* as amended in 1818 and 1825 (*Civil Code of the Kingdom of Poland*); the territory of the former Russian partition: part 1 of the 10th book of the *Collection of Laws of the Russian Empire* of 1835 r.; the former Prussian partition: *BGB* (1896/1900); the former Austrian partition: *ABGB* (1811) as amended in 1914, 1915 and 1916; Spiš and Orava: the Hungarian Marriage Act (1895), cf. W. L. JAWORSKI, *Prawo cywilne na ziemiach polskich 1. Źródła. Prawo małżeńskie, osobowe i majątkowe* [Civil Law on the Polish Territories 1. Sources. Marriage Law, Law of Persons. Property Law], Kraków 1919, pp. 44–45.

<sup>22</sup> Codification Committee Act of 3.06.1919, *The Journal of Laws* 44 (1919), item 315.

<sup>23</sup> P. FIEDORCZYK, 'Kościół katolicki i opozycja polityczna wobec unifikacji osobowego prawa małżeńskiego w 1945 r.' [Catholic Church and political Opposition towards the unification of personal marriage law in 1945], *Czasopismo Prawno-Historyczne* 56.1 (2004), pp. 97–100.

<sup>24</sup> S. KALETA, 'Koncepcja prawa rodzinnego i jego miejsca w systemie prawa w polskiej literaturze prawniczej okresu międzywojennego' [The Concept of Family Law and its Sta-

The legislative drafts the interwar period were used in the works leading to the unification of civil law after 1945. The unification took form of four decrees: Marriage Law of 25 of September 1945;<sup>25</sup> Family Law of 22 January 1946;<sup>26</sup> Guardianship Law of 14 May 1946;<sup>27</sup> and Marriage Property Law of 29 May 1946.<sup>28</sup> Each of them was provided with a separate act containing introductory provisions.<sup>29</sup>

The next phase connected to the fortune of family law in Poland is the year 1947 when a codification try of civil law was made in reference to unified legal acts based on the pandectistic systematics. The project of the code, including the second volume containing regulations concerning family and custody law was even published in the legal press. However, the works concerning the codification were aborted in 1949. In their place a law containing a general part of civil law and a separate family code was passed in 1950 (Act of 27 June 1950).<sup>30</sup>

tus in the Legal System in Polish Legal Literature], *Acta Universitatis Wratislaviensis, Prawo* 23.87 (1969), pp. 71–73.

<sup>25</sup> *Journal of Laws* No. 48, item 270.

<sup>26</sup> *Journal of Laws* No. 6, item 52.

<sup>27</sup> *Journal of Laws* No. 20, item 135].

<sup>28</sup> *Journal of Laws* No. 31, item 196].

<sup>29</sup> The subject of family law after 1945 was broadly analysed by P. FIEDORCZYK. He devoted several articles to this subject: 'Z prac nad unifikacją osobowego prawa małżeńskiego w 1945 roku' [From the Works on the Unification of Personal Marriage Law in 1945], *Miscellanea Historico-Iuridica* 1 (2003), pp. 65–70; 'Wykorzystanie dorobku Komisji Kodyfikacyjnej Drugiej Rzeczypospolitej w pracach nad unifikacją osobowego prawa małżeńskiego w 1945 roku' [The use of the works of the Codification Committee of the Second Republic in the work on the Unification of Law of Marriage in 1945], *Zeszyty Prawnicze Towarzystwa Biblioteki Słuchaczy Prawa UJ* 13 (2005), pp. 89–91; 'Stosunki prawne z pokrewieństwa w pracach nad unifikacją prawa cywilnego w 1945–46' [Legal Parental Relationships in the works on the civil law in 1945–46], *Miscellanea Historico-Iuridica* 3 (2005), pp. 55–60; 'Założenia ideologiczne prac nad unifikacją prawa rodzinnego w Polsce w latach 1945–46' [Ideological grounds of the works of the unification of family law in Poland in 1945–46], [in:] M. MIKOŁAJCZYK & A. DROGOŃ (eds.), *Miedzy 1 a 11 Rzeczpospolitą. Kształtowanie europejskiej kultury prawnej. Prace ofiarowane Adamowi Lityńskiemu w czterdziestolecie pracy naukowej*, Tychy 2005, pp. 121–130, as well as a book *Unifikacja i kodyfikacja prawa rodzinnego w Polsce (1945–1964)* [The Unification and the Codification of Family Law in Poland (1945–1964)], Białystok 2014.

<sup>30</sup> *Journal of Laws* 1950 No. 34, item 308.

The establishment of a separate family law code did not determine the position of family law in the Polish legal system and its relation towards civil law. The discussion of that time strictly referred to the Soviet ideology, which treated family as a separate branch from civil law.<sup>31</sup> The code was prepared together with Czechoslovakia and it was published in both countries in an almost identical shape. Nevertheless, Czechoslovakia already had its own civil code and the passing of a separate family code indicated the acceptance of the Soviet pattern of codification.<sup>32</sup> Whereas the problem of the systematic formulation of family law and its relation to civil law occurred on Polish territories once more during the preparation of the Polish civil code. During works on the code, the issue regarding the problem of the presence of family law in the civil code was current. In the beginning, the view being for including the family was prevailing which was visible in the project of the Polish civil code of 1960, where the family was placed in the fourth volume. However, one year later the concept was changed and it was established that family law shall be subject to a separate codification. The situation was explained due to lack of containing varied civil relations such as socialistic relations and family relations in one code. Finally, the legislator determined the separate position of family law during passing the Law of February 25th 1964: *Family and Guardianship Code*, which entered into force on January 1st 1965 together with the Civil Code.<sup>33</sup>

However, such placement of family law does not resolve the problem of its relation towards civil law. The relation can be considered in at least

<sup>31</sup> FIEDORCZYK, *Radzieckie prawo rodzinne* (cit n. 22), pp. 3–5.

<sup>32</sup> Further see: P. FIEDORCZYK, 'Czechosłowacka droga do kodyfikacji prawa rodzinnego (1918–1949). Z dziejów współpracy z Polską' [Czechoslovakian way to the codification of family law (1918–1949). From the history of collaboration with Poland], [in:] A. LITYSKI (ed.), *Państwo, prawo, społeczeństwo w dziejach Europy Środkowej. Księga jubileuszowa dedykowana Profesorowi Józefowi Ciągwie w siedemdziesięciolecie urodzin*, Katowice – Kraków 2009, pp. 184–185; P. FIEDORCZYK, 'Debata nad uchwaleniem polsko-czechosłowackiego prawa rodzinnego w Czechosłowackim Zgromadzeniu Narodowym w 1949 r.' [The debate concerning the Polish-Czechoslovakian family law in the Czechoslovakian Parliament], *Studia Iuridica Lublinensia* 19 (2013), pp. 131–135.

<sup>33</sup> *Journal of Laws* 1964 No. 9, item 59 and *Journal of Laws* 1964 No. 16, item 93 (Act of 23.04.1964: *Civil Code*)

three aspects (the legislation aspect concerning the systematics of law and connected to its interpretation and the implementation of law). Firstly, it should be asked if family law should be present in the civil code or should it be subject to another legislative act. Secondly, what seems to be significant, whether the law constitutes a separate branch of law from the civil law. Thirdly, if during the implementation of family legal rules it should be referred to regulations contained in civil law that is the civil code and code of civil procedure.<sup>34</sup>

After structural changes in the late twentieth century, the existence of a separate *Family and Guardianship Code* was criticized. It was argued that it does not meet the requirements for codes due to the lack of a general part. Grzybowski, among others, postulated to regulate family matters in the *Civil Code* again. This idea was then presented in 2006 by the Civil Law Codification Commission, which drafted the *Green Book* on the potential new civil code for Poland. The *Green Book* puts forward that the family

<sup>34</sup> On family law within the system of law, cf. S. KALETA, 'Prawo rodzinne w systemie prawa polskiego' [Family law in the system of Polish Law], *Studia Cywilistyczne* 1 (1961), pp. 55–57; IDEM, 'Kształtowanie się poglądów na temat pozycji prawa rodzinnego w systemie prawa w polskiej literaturze prawniczej w okresie dwunastolecia (1944–1956)' [The evolution of ideas concerning the status of family law in the Polish legal scholarship (1944–1956)], *Acta Universitatis Wratislaviensis Prawo* 29, 107 (1969), pp. 71–73; IDEM, 'Teoretyczne i praktyczne znaczenie sporu o miejsce prawa rodzinnego w systemie prawa' [The Theoretical and practical influence of the dispute concerning the status of family law in the legal system], *Studia Cywilistyczne* 13–14 (1969), pp. 123–125; RADWAŃSKI, 'Miejsce prawa rodzinnego' (cit. n. 1), pp. 3–4; 'Uchwała Stowarzyszenia Sędziów Rodzinnych w Polsce. Zakopane, dnia 4 października 2007 r.' [The Resolution of the Family Judges Association in Poland. Zakopane, on 4 October 2007], *Zeszyty Prawnicze* 8.1 (2008), pp. 302–305; 'Uchwała Stowarzyszenia Sędziów Rodzinnych w Polsce. Zakopane, dnia 3 października 2008 r.' [The Resolution of the Family Judges Association in Poland. Zakopane on 3 October 2008], *Rodzina i Prawo* 11 (2009), p. 106. Zob. także: Elżbieta HOLEWIŃSKA-ŁAPIŃSKA, 'Opinia sędziów na temat przedstawionego w 'Zielonej Księdze' usytuowania prawa rodzinnego w przyszłej kodyfikacji' [The Judges' opinion on the placement of family law in the future codification as evidenced in the 'Green Book'], *Rodzina i Prawo* 9–10 (2008), pp. 17–19; EADEM, 'Uwagi na temat przedstawionego w 'Zielonej Księdze' usytuowania prawa rodzinnego w przyszłej kodyfikacji' [Some remarks on the placement of family law in the future codification as exposed in the 'Green Book'], [in: J. KRAJCZYŃSKI & J. WROCEŃSKI (eds.), *Finis legis Christus. Księga pamiątkowa dedykowana księdzu profesorowi Wojciechowi Góralskiemu z okazji siedemdziesiątej rocznicy urodzin* 11, Warszawa 2009, pp. 1021–1023.

code should be incorporated into the civil code as a separate book. This proposal received both praises and criticisms. One of its critics, Nazar, while assuming that family law is a part of civil law, disproved its incorporation into the civil code, mainly because family law related to non-economic matters. Contrariwise, Piątkowski pointed out that civil code regulates both economic and non-economic issues (*e.g.* inheritance law).<sup>35</sup> Supporters of the incorporation of family law to the Civil Code justify their opinion with arguments referring not only to Western European codifications of civil law but also to the post-war concept of the Polish civil law system.

The discussion regarding the location of family law in the Polish legal system has been a subject of debate for years and this study does not attempt to answer the above question. However it seems that the distinction of family law in 1950 and 1964 in the code did not mean the establishment of a new branch of law. The *Family and Guardianship Code* is not a comprehensive regulation, and in the cases of family relations the rules of the *Civil Code* and the *Code of Civil Procedure* are accordingly applicable.<sup>36</sup>

5. A brief sum-up. Even if family law area could be distinguished among Roman law norms, it was not singled out as a substantial entirety in the Roman legal systematics, instead one observes particular regulations concerning marriage, paternal power or guardianship. Also the law of succession was strongly linked to the family law matters, especially in regards to the order of succession (both testate and intestate one). The 19th century pandectistic systematics distinguished family law, as a part private law bearing specific features. In contrast, the family law in the current Polish law is a separated branch of law regulated by the *Family and*

<sup>35</sup> Cf. further, RADWAŃSKI, 'Miejsce prawa' (cit. n 4), p. 4; HOLEWIŃSKA-ŁAPIŃSKA, 'Opinia sędziów' (cit. n 40), p. 180.

<sup>36</sup> According to article 1 of the *Code of Civil Procedure*: 'The code of civil procedure shall regulate judicial proceedings in the cases arising from the civil law, family and guardianship law, and labour law relationships, as well as the cases of social security; likewise other cases in which the provisions of the present code shall be applied in virtue of particular statutes (civil cases)'.

*Guardianship Code.* And yet, as Jerzy Ignatowicz has put it: family law is a part of civil law, being its special part, but not really different from the other branches of civil law.

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