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# The Principle of Freedom of Contract. The Approach to the Principle and its Location within the System of Polish Law in the 20th and 21st Centuries

## Abstract

The principle of freedom of contract is one of the guiding principles of modern contract law. It was reflected in different forms and to different extents in the laws of the partitioning powers, applicable in the Polish lands in the era of partitions. After Poland regaining independence, work began on the unification of legal systems, which was an extremely difficult task in terms of substantive law. The work on contract law and the accompanying debate could not ignore the fundamental principle of freedom of contract, which eventually resulted in developing an original solution. It was first captured in Article 55 of the Code of Obligations[1], and then restored, in slightly changed wording, in the Polish legal system in Article 353[1] of the Civil Code[2]. Although the principle of freedom of contract was not formally enshrined in the regulations that were effective between 1965 and 1990, it was considered by scholars in the field to be still applicable to a limited extent. From current perspective, this regulation is worth looking at and assessing, especially in the context of its future application. This analysis leads to the conclusion that the existing regulation is generally sufficient and does not need to be amended at the current stage of development of civil law.

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1 Rozporządzenie Prezydenta Rzeczypospolitej Polskiej z dnia 27 października 1933 r. – Kodeks zobowiązań, Dz.U. Nr 82, poz. 598 (hereinafter the Code of Obligations).

2 Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny, tekst jedn. Dz.U. z 2022 r. poz. 1360 ze zm. (hereinafter the Civil Code).

HTTPS://DOI.ORG/10.36128/PRIW.VI53.1137

KEY WORDS: Napoleonic Code, codification of Polish law in the interwar period, Code of Obligations, positive approach to the principle of the freedom of contract, Civil Code, restrictions on the principle of the freedom of contract

## 1 The concept of the freedom of contract

The principle of freedom of contract is one of the elements of a broader institution, namely the principle of autonomy of the parties, understood as the competence „of subjects of law to regulate their civil-law relations according to their own will by means of a legal act"[3]. The principle of freedom of contract is one of the central values of private law and the most notable manifestation of the civil-law concept of autonomy of the will of the parties, making this will a fundamental element in contract making[4].

The following features of the principle of freedom of contract (the scope of which is subject to legal and extra-legal modifications depending on the social and/or economic system concerned) can be distinguished in various configurations:

1. freedom of entering into the contract,
2. freedom to choose a counterparty,
3. freedom to shape the content of the contract,
4. freedom to amend and terminate the contract,
5. freedom to choose the form of the contract,

The latter only exists in the view of certain scholars[5].

3 Piotr Machnikowski, *Swoboda umów według art. 353[1] kc. Konstrukcja prawna* (Warszawa: C.H. Beck, 2005), 2.

4 Zbigniew Radwański, Krzysztof Mularski in: *Prawo cywilne – część ogólna*, ed. Zbigniew Radwański, Adam Olejniczak (Warszawa: C.H. Beck, 2019), 14; substantiation of the judgment of the Constitutional Tribunal of 13 September 2005 r., case file K 38/04, OTK-A no. 8 (2005): 92.

5 Radwański, Mularski in: *Prawo cywilne – część ogólna*, 17–19; Piotr Machnikowski, „Zasada swobody umów jako problem kodyfikacyjny", [in:] *Czterdzieści lat kodeksu cywilnego. Materiały z ogólnopolskiego zjazdu cywilistów w Rzeszowie (8–10 października 2004 r.)*, ed. Mieczysław Sawczuk (Kraków: Wolters Kluwer, 2006), 214; idem in: *Prawo zobowiązań – część ogólna*, ed. Konrad Osajda (Warszawa: C.H. Beck, 2020), 522–523; Kinga Bączyk, „Zasada swobody umów w prawie polskim" *Studia*

## 2 Emergence and development of the principle of freedom of contract by the end of the 19th century

The principle of freedom of contract, natural to modern legal systems, emerged at a certain stage of development of law. It was unknown to ancient Roman law, which was based on the principles of contractual nominalism. Informal contracts were not a source of obligation and were not subject to appeal. However, the Roman texts already bear the roots of the subsequent principle of freedom of contract by the concept of covering other informal contracts (*pacta vestita*) with legal protection, which was a response to increasingly diverse economic conditions and the development of trade exchange[6]. The process of shaping the principle of freedom of contract began in medieval canon law doctrine, which proclaimed the obligation to perform contracts due to the Christian moral imperative[7]. Due to Christian morality, in the fourteenth century, the view on the admissibility of the challengeability of non-actionable contracts (*pacta nuda*) by means of the *condictio ex canone*[8] became entrenched. The concept of the principle of freedom of contract as viewed by canonists was developed not on the basis of a specific source of law, but by combination of many elements constituting the foundations of canon law[9]. It used to also be developed later, although the views of jurists often did not refer to the earlier argumentation of canonists. This was the case, among others,

*Iuridica Toruniensia*, No. 2 (2002): 44-46; Mieczysław Sośniak, „Zasada swobody umów w prawie obligacyjnym z perspektywy schyłku XX wieku" *Studia Iuridica Silesiana*, Vol. X (1985): 13-15.

6 Wojciech Dajczak in: Wojciech Dajczak, Tomasz Giaro i Franciszek Longchamps de Berier, *Prawo rzymskie. U podstaw prawa prywatnego* (Warszawa: Państwowe Wydawnictwo Naukowe, 2018), 466-468; Witold Wołodkiewicz in: Witold Wołodkiewicz, Maria Zabłocka, *Prawo rzymskie. Instytucje* (Warszawa: C.H. Beck, 1996), 285; Renata Świrgoń-Skok, „Kształtowanie się zasady swobody umów w prawie rzymskim", [in:] *Z badań nad prawem prywatnym. Księga pamiątkowa dedykowana Profesorowi Andrzejowi Kochowi*, ed. Adam Olejniczak, Marcin Orlicki, Jakub Pokrzywniak (Poznań: Wydawnictwo Naukowe UAM, 2017), 555-563.

7 Bogna Kaczorowska, „Rys historyczny kształtowania się swobody umów" *Opolskie Studia Administracyjno-Prawne*, Vol. VI (2009): 247.

8 Piotr Alexandrowicz, *Kanonistyczne uzasadnienie swobody umów w zachodniej tradycji prawnej* (Poznań: Wydawnictwo Naukowe UAM, 2020), 46.

9 Ibidem, 48, 77-79, 94, 96-97.

with the views of the representatives of the Dutch elegant jurisprudence, including, in particular, the precursors of natural law, who referred to the principle of party autonomy (Christian Wolff, Jean Domat, Robert-Joseph Pothier, Immanuel Kant and Jean-Jacques Rousseau). At the end of the 18th century, the principle was shaped not only by the philosophy of the Enlightenment, but also by the ideological assumptions of liberalism and the socio-economic changes that accompanied it.

During that period, the principle of freedom of contract was closely related to another principle of private law, namely *pacta sunt servanda*, which should be linked to the fact that both were expressed in one passage of the *Decretals* of Gregory IX („Pacta quantumcumque nuda servanda sunt")[10].

However, these two principles must be distinguished one from another. This is because the obligation to honour a contract when it has been concluded in accordance with the law (i.e. when it is protected by law), which is the essence of the principle of *pacta sunt servanda*, is different from the freedom to enter into a contractual relationship, either as regards its conclusion or its content, which is covered by the principle of freedom of contract. The history of both principles is also different, since the emergence of the principle of freedom of contract must be linked to medieval canon law studies, while the principle of *pacta sunt servanda* had accompanied archaic law since ancient times[11]. Moreover, it is difficult to imagine a private law system that does not recognise the principle of pacta sunt servanda, which does not mean that this principle is absolute[12].

10 Wacław Uruszczak, „Znaczenie średniowiecznej kanonistyki dla prawa zobowiązań", [in:] idem, *Opera historico-iuridica selecta. Prawo kanoniczne, nauka prawa, prawo wyznaniowe*" (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2017), 455.

11 Hans Wehberg, „Pacta sunt servanda" *The American Journal of International Law*, No. 53 (1959): 775.

12 Cf. Tomasz Kędzierski, „Zarys ogólny obecnych tendencji w teorii umów" *Głos Sądownictwa. Miesięcznik poświęcony zagadnieniom społeczno-prawnym i zawodowym*, No. 12 (1937): 984-986.

## 3 Principle of freedom of contract in the legal systems of the partitioning powers that were applicable in the Polish lands

The regaining of independence and the unification of the territories inhabited by the Polish population, which had been left with different legal systems by the partitioning states, presented the reborn Polish state with the complicated task of creating a new unified legal system. In such situation, foreign provisions were provisionally treated as regional Polish law, and provisions of an anti-Polish nature or contrary to the Constitution of 1921[13] were repealed. In the territory of the Second Republic of Poland there were up to five different systems of civil law:

a. in the area of the former Prussian partition – the German Civil Code, i.e. *Bürgerliches Gesetzbuch für das Deutsche Reich* (hereinafter: BGB) of 1896;
b. in the area of the former Austrian partition – the Austrian Civil Code. i.e. *Allgemeines Gesetzbuch für die gesamten Deutschen Erbländer der Österreichischen Monarchie* (hereinafter: ABGB) of 1811, but also the Hungarian law was applicable in a small portion of the area;
c. in the former Kingdom of Poland – the Napoleonic Code of 1804 (introduced back in the period of the Duchy of Warsaw by imperial decrees of 1808. and 1810);
d. in the remaining area of the former Russian partition – volume X, part I of the Digest of Russian Laws (formerly Digest of Laws of the Russian Empire).

The principle of freedom of contract was formally provided for only by the Napoleonic Code in Article 1134 („Les conventions légalement formees tienent lieu de loi à ceux qui les ont faites")[14], although this is not clear and

13 Stanisław Płaza, *Historia prawa w Polsce na tle porównawczym. Część 3: Okres międzywojenny* (Kraków: Księgarnia Akademicka, 2001), 33; Leonard Górnicki, *Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919–1939* (Wrocław: Kolonia Limited, 2000), 69-70.

14 Katarzyna Sójka-Zielińska, *Kodeks Napoleona. Historia i współczesność* (Warszawa: Lexis Nexis, 2007), 114; Marta Janina Skrodzka, Karol Skrodzki, „Źródła zasady swobody umów oraz wybrane aspekty jej granic", [in:] *Wokół zasad prawa cywilnego*, ed. Teresa Mróz and Stanisław Prutis (Białystok: Temida 2, 2008), 87;

stirs controversy among French scholars (also based on the views presented in case law)[15]. This provision may be read (especially in comparison with Article 55 of the Code of Obligations, Article 353[1] of the Civil Code, Articles 19-20 of the Swiss Code of Obligations of 1911. and Article 1322 of the Italian Civil Code of 1942) as expressing the principle of *pacta sunt servanda*, rather than explicitly granting the parties the power to freely determine civil-law relations by means of contracts that bind them, i.e. the principle of freedom of contract. This is possible with an interpretation invoking the legal-natural principle of autonomy of the will of the parties. As far as contract law is concerned, it means the free will of the parties to enter into contracts and develop their property relationships in terms of the content and form of the contract[16] on which the Napoleonic Code was based, but formally did not explicitly refer to it. The sources thereof, however, can be found in the *a contrario* interpretation of Article 6 of the Napoleonic Code: „Private agreements must not contravene the laws which concern public order and good morals"[17].

The other codifications did not contain a provision that would introduce *expressis verbis* the principle of freedom of contract as an institution governed by private law, i.e. none of them indicated that the parties could freely regulate the contractual relationship (especially the obligation-establishing relationship).

At the same time, the existence of the principle of freedom of contract in these legal systems was not in doubt, as reflected in the opinions of scholars or judicial decisions[18], although at the end of the nineteenth century,

Witold Czachórski, *Zobowiązania. Zarys wykładu* (Warszawa: Państwowe Wydawnictwo Naukowe, 1976), 115.

15 In more detail: Andrzej Całus, „Podejście legislacyjne do instytucji 'swoboda umów' w prawie francuskim i niemieckim na tle zasad modelowych", [in:] *Ustawowe ograniczenia swobody umów. Zagadnienia wybrane*, ed. Bogusława Gnela (Warszawa: Wolters Kluwer, 2010), 23-27, 29-30.

16 Paulina Święcicka-Wystrychowska, „Kodeks Napoleona a prawo rzymskie" *Kwartalnik Prawa Prywatnego*, vol. IV (2004): 1113.

17 According to the text: *Kodex Napoleona. Z przypisami. Xiąg trzy* (Warszawa: Drukarnia XX. Piarów, 1810), 4. [English translation excerpted from the Napoleon Series archive https://www.napoleon-series.org/research/government/code/book1/c_preliminary.html (accessed 5.12.2024)] See also: Katarzyna Sójka-Zielińska, *Wielkie kodyfikacje cywilne XIX wieku* (Warszawa: Wydawnictwa Uniwersyteckiego Warszawskiego, 1973), 122.

18 Całus, „Podejście legislacyjne do instytucji 'swoboda umów' w prawie francuskim i niemieckim na tle zasad modelowych", 31–33; *Prawo cywilne Ziem Wschodnich, tom X, cz. I Zwodu praw rosyjskich. Tekst podług wydania urzędowego z roku 1914,*

as a result of socio-economic changes (combined with the phenomenon of the „crisis of contract"), there was a growing tendency to combine the principle of freedom of contract with the demand for contractual justice[19].

## 4 The principle of freedom of contract in the Code of Obligations of 1933

In the inter-war period, work on the unification and codification of Polish civil law was mainly carried out by the Codification Commission established by the Act of 3 June 1919[20]. The composition of the Codification Commission, made up of legal scholars and practitioners, was determined in August and September 1919, and its first meeting was held on 10 October 1919[21].

Understandably, the codification work was influenced by the three great codifications of the 19th century: the Napoleonic Code, the ABGB and the BGB. To a much lesser extent, this concerned Volume X, Part 1 of the Digest of Russian Laws, as it was considered outdated. However, the new Polish law on obligations was not based on any of these codifications (it is only assumed in the literature that the BGB regulations had the greatest on it); nor was it a compilation of them in terms of the principle of freedom of contract contained therein.

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*z uwzględnieniem zmian, wprowadzonych przez ustawodawcę polskiego, oraz ustawy związkowe, tudzież judykatura Sądu Najwyższego i b. Senatu Rosyjskiego*, transl. and edited by Zygmunt Rymowicz, Witold Święcicki (Warszawa: Księgarnia F. Hoesicka, 1932), 363; Andrzej Dziadzio, „Opinie profesorów i doktorów Wydziału Prawa Uniwersytetu Jagiellońskiego jako źródło badań nad stosowaniem Kodeksu Napoleona w Wolnym Mieście Krakowie" *Krakowskie Studia z Historii Państwa i Prawa*, Vol. XIII (2020): 312-313.

19 Roman Trzaskowski, *Granice swobody kształtowania treści i celu umów obligacyjnych – art. 353[1] K.C.* (Kraków: Kantor Wydawniczy Zakamycze, 2005), 43-44; Sójka-Zielińska, *Wielkie kodyfikacje cywilne XIX wieku*, 75-76, 82, 137, 148, 157, 183-188. This issue was also addressed during the work of the Codification Commission in the period of the Second Republic of Poland – Górnicki, *Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919–1939*, 411–412.

20 Ustawa z dnia 3 czerwca 1919 r. o Komisji Kodyfikacyjnej, Dz. Pr. Nr 44, poz. 315.

21 Stanisław Grodziski, „Komisja Kodyfikacyjna Rzeczypospolitej Polskiej" *Czasopismo Prawno-Historyczne*, No. 1 (1981): 47, 49-55; *Gazeta Sądowa Warszawska*, No. 15 (1919): 151-152.

The work on the Code of Obligations took a dozen or so years. This led to the drafting and publication of several draft laws of obligations, of which the following are relevant to the matter under discussion:

1. the so-called „Lwów draft" of the General Part of the Law of Obligations of 1923, whose main author was Ernest Till[22], but with a contribution by other lawyers associated with the Lwów legal academic community: Maurycy Allerhand, Aleksander Doliński, Roman Longchamps de Berrier and Kamil Stefko (hereinafter: the Lwów Draft of 1923);
2. the partial draft of 1929 proposed by Ignacy Koschembahr-Łyskowski[23] (hereinafter: the Koschembahr-Łyskowski Draft);
3. draft General Part of the Law of Obligations of 1927 by Ludwik Domański[24] (hereinafter the Domański Draft);
4. the comprehensive draft of the Law of Obligations of 1932 prepared by the Codification Commission[25] (hereinafter: the Draft of 1932);
5. the comprehensive draft as prepared by the Codification Commission in 1933, immediately preceding the final version of the Code of Obligations[26] (hereinafter: the Draft of 1933).

Importantly, all these draft laws (with the exception of the Koschembahr-Łyskowski Draft) expressed the principle of freedom of contract in a positive way, i.e. by explicitly conferring on the parties to the contractual relationship the power to freely shape its content through the agreement (the will of the parties was therefore a determining factor for the establishment and content of the agreement), while indicating the limitations

22 Ernest Till, *Polskie prawo zobowiązań (część ogólna). Projekt wstępny z motywami* (Lwów 1923).

23 Ignacy Koschembahr-Łyskowski, *W sprawie kodyfikacji naszego prawa cywilnego* (Warszawa: Themis Polska, 1925).

24 Komisja Kodyfikacyjna RP, Sekcja Prawa Cywilnego, *t. I, z. 1, Projekt prawa o zobowiązaniach w opracowaniu koreferenta projektu adwokata Ludwika Domańskiego* (Warszawa 1927).

25 Komisja Kodyfikacyjna RP, Podsekcja III Prawa Cywilnego, t. I, z. 5, *Projekt prawa o zobowiązaniach przyjęty w drugiem czytaniu przez Podkomisję Przygotowawczą Podsekcji III Prawa Cywilnego* (Warszawa 1932); Górnicki, *Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919–1939*, 409.

26 Komisja Kodyfikacyjna RP, Podkomisja Prawa o Zobowiązaniach, z. 1, *Projekt kodeksu zobowiązań przyjęty przez Kolegjum Uchwalające Komisji Kodyfikacyjnej w dniach 23–27 czerwca 1933* (Warszawa 1933).

of that power. This is so significant that a similar solution was applied at that time only in the Swiss Code of Obligations of 1911. It combined in its content solutions inspired by French law and German law, and it was this direction, merging solutions from the Romanesque and Germanic systems, that prevailed during the work on the Polish law of obligations[27].

The principle of freedom to contract was expressed in the Lwów Draft of 1923 in Article 19, which reads as follows: „Parties entering into a contract, may arrange their relationship freely, as long as this does not contravene a statutory prohibition or good morals"[28]. In the Domański Draft, its counterpart was Article 76, worded almost identically as follows" „Parties entering into a contract may arrange their relationship as they see fit, as long as this does not contravene statutory prohibitions or good morals"[29].

However, with regard to the matter of interest here, these two drafts differed substantially from the official drafts of the Codification Commission. In the Draft of 1932, the principle of freedom of contract was expressed in Article 64 („Parties entering into a contract may arrange their relationship as they see fit, provided that the content of the agreement does not contravene statutory prohibitions and that the social or economic purpose is fair"), and its limitations were further specified in Article 65 („A social or economic purpose is fair if it is not contrary to the fundamental principles of the legal, private or public system, statutory provisions, or good morals")[30].

The principle of freedom of contract was captured by the Draft of 1933 similarly to the Draft of 1932, as its Article 55 read as follows: „The parties entering into a contract may arrange their relationship as they see fit, provided that the content of the agreement does not contravene mandatory provisions, and the social or economic purpose thereof is fair, namely not contrary to public order, statutory law or good morals"[31].

The text of this version was abridged by the inter-ministerial commission, as a result of which Article 55 of the Code of Obligations had the following wording: „The parties entering into a contract may arrange

27 Till, *Polskie prawo zobowiązań* (*część ogólna*), 44; Roman Longchamps de Berier, *Zasada wolności umów w projektach polskiego prawa o zobowiązaniach* (Lwów: Pierwsza Związkowa Drukarnia, 1930), 3; Machnikowski, „Zasada swobody umów jako problem kodyfikacyjny", 228.

28 Till, *Polskie prawo zobowiązań* (*część ogólna*), 4; Longchamps de Berier, *Zasada wolności umów*, 5-9.

29 Komisja Kodyfikacyjna RP, Sekcja Prawa Cywilnego, 21.

30 Komisja Kodyfikacyjna RP, Podsekcja III Prawa Cywilnego, 21.

31 Komisja Kodyfikacyjna RP, Podkomisja Prawa o Zobowiązaniach, 20.

their relationship as they see fit, provided that the content and purpose of the agreement are not contrary to public order, statutory law or good morals"[32]. It approached the principle of freedom of contract in a synthetic way, similar to the Lwów Draft of 1923 and the Domański Draft, while defining the criteria for the limitation of the principle; it also pointed to the purpose of the contract, which was a reference to the Lwów Draft of 1932 and the Draft of 1933.

Even a cursory comparative analysis of the two versions of the provision defining freedom of contract and its limits proposed in the course of the work of the commission shows that the related controversy focused on the role that the purpose of the contract was to play in determining the limits for the parties in the contractual shaping of civil-law relations. This was also related to discussions within the Codification Commission on the scope of the principle of freedom of contract[33].

This discussion and the emphasis on the role of the legal basis of the contract as an element defining the limits of the principle of freedom of contract can be traced back to one of the drafts of the law of obligations. This is the Koschembahr-Łyskowski partial draft, which made the economic purpose one of the key institutions of its concept (reference to the economic purpose occurs in 5 of the 17 articles of this draft)[34]. The economic purpose referred to in the draft was identified with the reason (basis) for the legal act, i.e. the so-called *causa* of this act (in this case, a contract), which the author in turn understood as „the economic purpose defined by law for each individual obligation"[35]. These and other assumptions of the draft resulted from the adoption of a different concept of the principle of freedom of contract (taking into account the social role of contracts, including the postulate of contractual justice), which – according to the author's view – meant only the absence of compulsion to conclude a contract[36].

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32 Górnicki, *Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919–1939*, 417.

33 In more detail: Alfred Ohanowicz, „Wolność umów w przyszłym polskim kodeksie cywilnym" *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, Vol. III (1926): 147 et seq.

34 Articles 9 to 13 of the Koschembahr-Łyskowski Draft; Koschembahr-Łyskowski, *W sprawie kodyfikacji*, 84–89.

35 Koschembahr-Łyskowski, *W sprawie kodyfikacji*, 29, 34-35.

36 Ignacy Koschembahr-Łyskowski, *Cele i zadania polityki społecznej* (Warszawa: Księgarnia F. Hoesicka, 1927), 9; Alexandrowicz, *Kanonistyczne uzasadnienie swobody umów*, 256-257.

In view of the foregoing, a question must be asked: is the purpose of contract referred to in Article 55 of the Code of Obligations a *causa* within the meaning of the Koschembahr-Łyskowski Draft or some other form of it, or perhaps a clarification of the provisions of the Lwów Draft of 1923 and the Domański Draft by reference to the purpose which the parties wished to achieve by entering into a particular contract?

In the study of the law of obligations, in the context of Article 55 of the Code of Obligations, the latter view has prevailed. The purpose of a contract is not its legal cause (basis), as referred to in the Napoleonic Code and the Italian Civil Code of 1865[37], but rather the objective that the specific parties to a particular contract wish to achieve together by entering into it[38].

Other concepts contained in Article 55 of the Code of Obligations did not raise any major doubts as to their scope, although there were some voices regarding the validity of the very distinction between the criteria in the form of the concepts of „statutory law" and „public order". This is because L. Domański rightly pointed out that public order is based on statutory law and, consequently, a contradiction with public order will also be a contradiction with statutory law[39].

Freedom of contract was limited only by mandatory provisions[40]. Unilateral mandatory provisions should also be equated with them. The criterion of good morals refers to the moral principles commonly adopted in a „sane society (fair dealing)"[41].

However, the fundamental achievement of the new law of obligations was not the definition of criteria for restrictions on the principle of freedom of contract. The most important thing was the very insertion of Article 55 containing this guiding principle in the Code of Obligations. The provision

37 Ludwik Domański, *Instytucje kodeksu zobowiązań. Komentarz teoretyczno-praktyczny. Część ogólna* (Warszawa: Marjan Ginter – Księgarnia Wydawnictw Prawniczych, 1936), 28; Komisja Kodyfikacyjna, Podkomisja Prawa o Zobowiązaniach, Z. 4, *Uzasadnienie projektu kodeksu zobowiązań z uwzględnieniem ostatecznego tekstu kodeksu w opracowaniu głównego referenta projektu prof. Romana Longchamps de Berrier, Art. 1–167* (Warszawa, 1934), 72 et seq.

38 Jan Namitkiewicz, *Kodeks zobowiązań. Komentarz dla praktyki*, Vol. I (Łódź: Wydawnictwo Kolumna, 1949), 79; Witold Czachórski, *Zarys prawa zobowiązań. Część ogólna* (Warszawa: Państwowe Wydawnictwo Naukowe, 1962), 152.

39 Domański, *Instytucje kodeksu zobowiązań*, 28.

40 Namitkiewicz, *Kodeks zobowiązań*, 78; slightly differently: Domański, *Instytucje kodeksu zobowiązań*, 29.

41 Namitkiewicz, *Kodeks zobowiązań*, 79; cf. also: Domański, *Instytucje kodeksu zobowiązań*, 29.

contained two elements: a positive one, declaring the freedom of civil-law entities to freely shape their contractual relations, and a negative one, defining the limits of this freedom. Most of the major European codifications (Napoleonic Code, BGB, ABGB) approached the principle of freedom of contract only from a negative point of view, probably based on the assumption that its positive aspect was natural and obvious.

The first significant European code to express the principle of freedom of contract from a positive perspective was the Swiss Code of Obligations of 1911 (Article 19), because, as mentioned above, Article 1134 of the Napoleonic Code should not be considered to have such a character. The capturing of the principle of freedom of contract in the Code of Obligations in a positive manner was therefore a valuable achievement of Polish legal thought in the interwar period, which referred to the Swiss Code of Obligations and at the same time anticipated solutions introduced in modern codifications of the period, e.g. in the Italian Civil Code of 1942 (Article 1322).

This situation changed after Second World War. Article 55 of the Code of Obligations was not formally repealed until the entry into force of the Civil Code. Nevertheless, a dispute previously arose as to whether that provision had ceased to apply under Article 41 § 1 of the general provisions of civil law of 1950, which made the validity of legal acts conditional on the lack of contradiction with statutory law or the principles of social coexistence in the People's State.[42] The interpretation guidelines from the General provisions of civil law of 1950 determined the view (which is also reflected in case-law) that where an old norm cannot be filled with new content, in line with the principles of the system of government and the objectives of the People's State, or its application would infringe the principles of social coexistence in the People's State, it should be regarded as unreasonable, outdated, not corresponding to the new conditions and therefore not binding[43]. This, in fact, led to gradual de-codification of the law of obligations in the new socio-economic realities[44] and, consequently,

42 Article 41 § 1 of the General provisions of civil law (Ustawa z 18 lipca 1950 r. – Przepisy ogólne prawa cywilnego, Dz.U. Nr 34, poz. 311).

43 Anna Stawarska-Rippel, „O prawie sądowym Drugiej Rzeczypospolitej w początkach Polski Ludowej" *Czasopismo Prawno-Historyczne*, No. 2 (2003): 121; Arkadiusz Bereza, *Sąd Najwyższy w latach 1945–1962. Organizacja i działalność* (Warszawa: C.H. Beck, 2012), 96, 210-211; Articles 1 and 3, Ustawa z dnia 18 lipca 1950 r. – Przepisy ogólne prawa cywilnego, Dz. U. Nr 34, poz. 311.

44 Anna Stawarska-Rippel, „Kodeks zobowiązań w pierwszych latach Polski Ludowej" *Kwartalnik Prawa Prywatnego*, Vol. III (2004): 715.

to the loss of relevance (depreciation) of the principles on which it had so far been based.

Jan Gwiazdomorski, the main advocate of the thesis of non-applicability of Article 55 of the Code of Obligations, attacked this provision not only with legal arguments, but also with ideological arguments (the inadmissibility of the principle of freedom of contract in a socialist state). He even argued that Article 55 of the Code of Obligation, had not been formally repealed due to an omission on the part of the legislator, which constituted a serious codification error[45].

On the other hand, the defence of the principle of freedom of contract was undertaken at that time by Aleksander Wolter and Stefan Buczkowski. The latter even put forward the thesis that the principle of freedom of contract accompanied mankind since it „began to use contracts", and it is only its scope that varies[46]. Thus, while Wolter's earlier polemic[47] was based primarily on purely juridical arguments, Buczkowski undertook to defend the principle of freedom of contract on the basis of ideology in force at the time. This author also maintained that a provision analogous to Article 55 of the Obligation Code should be included in the new Civil Code, and even suggested that this principle could only be fully implemented in a socialist economy[48]. Wolter's view on the further applicability of Article 55 of the Code of Obligations was also supported by Jerzy Jodłowski when presenting the motives and course of the legislative work in the Constituent Sejm on the General provisions of the civil law, in which he participated[49], and Witold Czachórski, who saw only a limitation of the scope of freedom of contract due to the type of obligation relationships and the parties (especially state-owned economic entities) involved[50]. This view was shared by almost all scholars in the field in the 1950s and early 1960s , emphasizing

45 Jan Gwiazdomorski, „Glosa do orzeczenia Sądu Najwyższego z 13.VI.1958 r., 4 CR 548/58" *Nowe Prawo*, No. 5 (1960): 708 et seq.; idem, „Czy art. 55 kod. zob. obowiązuje?" *Nowe Prawo*, No. 11 (1960): 1478-1481.

46 Stefan Buczkowski, „Zasada wolności umów" *Państwo i Prawo*, No. 3 (1961): 432, 434.

47 Aleksander Wolter, „Czy art. 55 kod. zob. obowiązuje?" *Nowe Prawo*, No. 10 (1960): 1335-1339.

48 Buczkowski, *Zasada wolności umów*, 433-437.

49 Jerzy Jodłowski, „W sprawie mocy obowiązującej art. 55 k.z." *Nowe Prawo*, No. 1 (1961): 76-82.

50 Witold Czachórski, *Prawo zobowiązań w zarysie* (Warszawa: Państwowe Wydawnictwo Naukowe, 1968), 158.

a much narrower scope of application of the principle of freedom of contract than in the interwar period.

## 5 The principle of freedom of contract in the work on the Civil Code in the period before 1990

The approach to the principle of freedom of contract in the work on the comprehensive codification of civil law evolved significantly with the consolidation of the socialist system. The principle of freedom of contract from was also expressed from the positive side in the Draft of 1948 (Article 579)[51], but the wording of the proposed provision differed significantly from Article 55 of the Code of Obligations, since the provision was worded as follows: „Within the limits laid down by the provisions in force, including in particular by the provisions on economic planning, the establishment and content of contractual obligations shall be subject to the free will of the parties". Article 579 of the draft, while still invoking the free will of the parties, nevertheless prioritising (unlike Article 55 of the Code of Obligations) restrictions to it, and moreover emphasised the role of economic planning. These changes were not merely editorial, but reflected broader ideas arising from the new socio-political realities of the time.

Subsequent drafts, i.e. the unpublished draft of 1951[52] and the published drafts of 1954[53], 1955[54], 1960[55], 1961[56] and 1962[57] went even further and proposed the complete removal of the principle of freedom of contract from the future Polish codification of civil law. This option ultimately prevailed, despite the fact that throughout the work on the Civil Code there

51 „Projekt księgi trzeciej kodeksu cywilnego" *Demokratyczny Przegląd Prawniczy*, No. 10 (1948): 46.

52 *Kodeks cywilny Polski Ludowej*, Archiwum Akt Nowych 2/285/0/4.2/2391.

53 *Projekt kodeksu cywilnego Polskiej Rzeczypospolitej Ludowej* (Warszawa, 1954).

54 *Projekt kodeksu cywilnego Polskiej Rzeczypospolitej Ludowej* (Warszawa, 1955).

55 *Projekt kodeksu cywilnego Polskiej Rzeczypospolitej Ludowej* (Warszawa, 1960).

56 Komisja Kodyfikacyjna przy Ministrze Sprawiedliwości, *Projekt kodeksu cywilnego* (Warszawa: Wydawnictwo Prawnicze, 1961).

57 *Projekt kodeksu cywilnego oraz przepisów wprowadzających kodeks cywilny* (Warszawa, 1962).

had been calls for the principle of freedom of contract to be explicitly included in the Code[58]. Thus, the aversion of some scholars to the principle of freedom of contract, described above, was statutorily reflected in the absence of this principle in the Civil Code, while at the same time formally repealing Article 55 of the Code of Obligations[59].

Interestingly, however, already under the Civil Code in force, the existence of the „non-code" principle of freedom of contract used to be accepted by eminent Polish civil law scholars. Its source was also seen in the *a contrario* interpretation of the content of Articles 56 and 58 of the Civil Code (assuming that from the negative side it means the same what Article 55 of the Code of Obligations formulated from the positive side), and even the very fact that the provisions on obligations are predominantly dispositive provisions[60]. The prevailing view was that this principle, although to a very limited extent, was also respected in relations between state-owned economic entities[61]. Thus, despite emphasizing the limitations of the principle of freedom of contract and downplaying its significance for the entire civil law system, it proved impossible to eliminate it from the legal system.

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58 Witold Czachórski, „Z problematyki wykonania zobowiązań według projektu Kodeksu Cywilnego Polskiej Rzeczypospolitej Ludowej", [in:] *Materiały dyskusyjne do projektu kodeksu cywilnego Polskiej Rzeczypospolitej Ludowej. Materiały sesji naukowej 8–10 grudnia 1954 r.*, ed. Jan Wasilkowski (Warszawa: Wydawnictwo Prawnicze, 1955), 185; Buczkowski, *Zasada wolności umów*, 437.

59 Article III item 5), Ustawa z dnia 23 kwietnia 1964 r. – Przepisy wprowadzające kodeks cywilny, Dz.U. nr 16, poz. 94. This was not a rule in all the Eastern Bloc countries, as the principle of freedom of contract was introduced in the new Hungarian Civil Code of 1959, Article 200 (1).

60 Andrzej Stelmachowski, *Wstęp do teorii prawa cywilnego* (Warszawa: Państwowe Wydawnictwo Naukowe, 1969), 93; Stefan Grzybowski, *System prawa cywilnego, część ogólna* (Wrocław: Zakład Narodowy im. Ossolińskich, 1974), 467-471; Zbigniew Radwański, *Teoria umów* (Warszawa: Państwowe Wydawnictwo Naukowe, 1977), 109-111; idem in: *Prawo zobowiązań – część ogólna,* red. tomu Zbigniew Radwański (Wrocław: Zakład Narodowy im. Ossolińskich, 1981), 364; Bogusław Gawlik, „Pojęcie umowy nienazwanej" *Studia Cywilistyczne*, Vol. XVIII (1971): 5; cf. also (in the context of the very applicability of the principle of freedom of contract): Franciszek Błahuta in: *Kodeks cywilny. Komentarz*, Vol. II, ed. Jerzy Ignatowicz (Warszawa: Wydawnictwo Prawnicze, 1972), 916; Czachórski, *Zobowiązania. Zarys wykładu*, 114-124; Sośniak, „Zasada swobody umów w prawie obligacyjnym z perspektywy schyłku XX wieku", 29-30.

61 Gawlik, *Pojęcie umowy nienazwanej*, 7-10; Radwański, *Teoria umów*, 112-115; Stefan Buczkowski, Zygmunt Konrad Nowakowski, *Prawo obrotu uspołecznionego* (Warszawa: Państwowe Wydawnictwo Naukowe, 1971), 124; Sośniak, „Zasada swobody umów w prawie obligacyjnym z perspektywy schyłku XX wieku", 31-36.

## 6 Return of the principle of freedom of contract to the Civil Code

On 1 October 1990, an amendment of the Civil Code became effective. It was one of the most significant amendments in the area of private law in the period of systemic transformation. First of all, it removed the provisions on state-owned economic entities from the Code. At the same time, it restored to Polish contract law the principle of freedom of contracts, which had been removed from the legal system after the entry into force of the Civil Code (1 January 1965), viewed from a positive side (Article $353^1$ of the Civil Code)[62]. In the view of some legal practitioners, this was relevant to the interpretation of the law, since this provision reinstated an interpretative rule according to which all provisions relating to contracts are to be regarded as mandatory, with the exception of those whose wording or function clearly implies their mandatory character[63].

The new regulation was in fact a slight modification of Article 55 of the Code of Obligations. Here too (unlike, for example, the draft Civil Code of 1948), the emphasis was put mainly on the freedom of the parties rather than on their limitations. Thus, it is not only the content of the contractual relationship but also the purpose of the contract that must be assessed from the point of view of the limits of the freedom of contract.

The most significant changes concerned, however, the criteria used for limiting the freedom of contract. Instead of the criteria of Article 55 of the Code of Obligations: public order, statutory law and good morals, there are the properties (nature) of the relationship, statutory law and the principles of social coexistence.

Therefore, the number of criteria enumerated is the same, but only one of them remained (statutory law). First of all, the criterion of public order disappears, which should be assessed positively, because the nature of this restriction was unclear in the light of the provisions of the Code of Obligations. As noted above, these doubts concerned primarily the issue of whether public order, however, is enclosed within the concept of legal

62 Article 1 item 48), Ustawa z dnia 28 lipca 1990 r. o zmianie ustawy – Kodeks cywilny, Dz.U. z 1990 r. Nr 55, poz. 321.

63 Czesława Żuławska, „Wokół zasady wolności umów (art. $353^1$ k.c. i wykładnia zwyczaju)" *Acta Universitatis Wratislaviensis. Prawo*, No. 238 (1994): 174-175. Another perspective, based on the adopted concept of general competence norm, in: Machnikowski, „Zasada swobody umów jako problem kodyfikacyjny", 229-231.

provisions (statutory law), and consequently what is the scope of this concept and the reason for its introduction in the Code of Obligations.

The reference to good morals also disappeared. A decisive factor in this respect, however, was the general editorial technique applied to the Civil Code. The clause on the principles of social coexistence in the Civil Code displaced certain earlier general clauses, in particular the clause of good morals[64]. While the very introduction of the social coexistence clause into Polish law must be assessed with criticism, bearing in mind the history of this general clause[65], it is nevertheless rational to maintain in Article $353^1$ of the Civil Code of the vocabulary and consequently the general clause, which is present throughout the entire contemporary Polish civil law. Thus, until the social coexistence clause is removed from Polish law (if ever), it is reasonable to use it also as a criterion for limiting the principle of freedom of contract.

Another limitation of the principle of freedom of contract that appeared in Polish law in 1990 became the nature (property) of the legal relationship. A thorough analysis of this concept is beyond the scope of this study, but it should be emphasised that, like public order in Article 55 of the Code of Obligations, it is the most undefined limitation of the freedom of contract and, moreover, an innovative one, that did not previously exist in Polish law.

Various views have emerged about this criterion (including those that question its usefulness)[66], including two competing trends. According to the first one, the nature of the relationship should be understood as the nature of the obligatory relationship as such, or of a specific category of these relations. According to the second, this nature must also take into account the nature of specific types of obligation relationships[67]. This dispute appears to be unresolved to this day, although it seems that the second view prevails in the scholarly opinion[68].

64 Grzybowski, *System prawa cywilnego*, 95.

65 For more detail on the rules of social coexistence clause, see: Małgorzata Pyziak-Szafnicka in: *Prawo cywilne – część ogólna*, ed. Marek Safjan (Warszawa: C.H. Beck, 2012), 903-910.

66 Machnikowski, „Zasada swobody umów jako problem kodyfikacyjny", 225-228, 234.

67 Janusz Guść, „O właściwości (naturze) stosunku prawnego" *Państwo i Prawo*, No. 4 (1997): 17-18; Marek Safjan, „Zasada swobody umów (Uwagi wstępne na tle wykładni art. $353^1$ k.c.)" *Państwo i Prawo*, No. 4 (1993): 15-16.

68 Cf. Maciej Gutowski in: *Kodeks cywilny. Komentarz*, red. Maciej Gutowski (Warszawa: C.H. Beck, 2022), Legalis, kom. do art. $353^1$ KC, nb. 66; Zbigniew Radwański, Adam Olejniczak, *Zobowiązania. Część ogólna* (Warszawa: C.H. Beck,

## 7 The principle of freedom of contract in the rules of European contract law and the work on the Civil Code

It should be noted that the principle of freedom of contract viewed from the positive side has also been adopted by the Principles of European Contract Law (hereinafter: PECL[69]) in their Article 1.102 (1. The wording of this provision is substantially similar to both Article 55 of the Code of Obligations and Article $353^1$ of the Civil Code, on the one hand emphasizing the freedom of the parties to determine the legal relationship, and on the other – introducing three criteria of restrictions, i.e. general clauses of good faith ) and fair dealing as well as PECL *mandatory rules*[70]. It can be argued that Article 1.102 (1) of the PECL is much more similar to the Polish rules (both current and pre-war) than to the rules set out in Article 1134 (1) of the French Civil Code of 1804 (as indicated in the source note indicating the provision of national law used in the formulation the rule in Article 1.102 of the PECL), Article 1322 of the Italian Civil Code of 1942 and Article 19 of the Swiss Code of Obligations of 1911. This is further evidence of the high legislative quality of the solution adopted in Poland.

In the draft of Book One of the Civil Code published in 2009, the principle of freedom of contract was relocated to the general part of civil law and included in Article 79 § 2 („The parties to a contract may arrange the legal relationship binding upon them as they see fit")[71]. The wording of the principle thus became even more synthetic, with the emphasis on respect for the free will of the parties. Its limitations were to be derived from the general limitations provided for legal transactions (Article 98 of the draft)[72]. Such an extremely liberal approach to the principle of freedom of

2020), 138; wyrok Sądu Najwyższego z dnia 8 grudnia 2005 r., sygn. II CK 297/05, Legalis no. 173833; Marek Safjan in: *Kodeks cywilny. Komentarz*, Vol. I, ed. Krzysztof Pietrzykowski (Warszawa: C.H. Beck, 2020), Legalis, kom. do art. $353^1$ KC, nb. 16.

69 Content of the PECL as published in: *Kwartalnik Prawa Prywatnego*, Vol. III (2004), 814-911.

70 For more detail on the solution adopted in the PECL, see: Michał Bieniak, „Zasady: dobrej wiary i uczciwego obrotu oraz swobody umów w kodeksie zobowiązań oraz zasadach europejskiego prawa umów" *Studia Prawnicze*, No. IV (2008): 49-58.

71 *Księga pierwsza kodeksu cywilnego. Projekt z uzasadnieniem* (Warszawa, 2009), 95.

72 Ibidem, 107.

contract, however, does not seem to reflect contemporary realities, when – even in the area of private law – an increasingly important role is played by the protective legal policy, focused on the legally sanctioned protection of the economic interests of the weaker party to a legal relationship (e.g. consumer law)[73].

## 8 Conclusion

The formula of the principle of the freedom of contract used in Article 55 of the Code of Obligations and largely transferred to Article 353[1] of the Civil Code, was a significant achievement of the Polish jurisprudence, which at the time followed the latest trends and was even at the forefront of them.

This regulation is characteristic of the free market economy, as evidenced by the strong reluctance to the principle of freedom of contract in the socialist economy itself. A kind of symbol of this may be the restoration of the principle of freedom of contract approached from the positive side at the very beginning of the reforms of Polish private law at the turn of the 1990s.

At the same time, the fact that, despite the absence of a provision similar to Article 55 of the Code of Obligations in the original version of the Civil Code, the existence of the principle of freedom of contract was not effectively called into question between 1965 and 1990 shows that, in fact, no modern legal system can fully eliminate the principle of freedom of contract. It can only be significantly restricted, but it is no longer possible to get rid of the principle of freedom of contract completely and return to the contractual nominalism known under Roman law.

Moreover, the existing regulation has shown its flexibility over so many years, adapting in its judicial interpretation to changing social and economic conditions. It therefore seems that, beside possible minor corrections, it should remain in Polish law, even if a new codification of substantive civil law is developed. One must agree in this respect with Mariusz Szczygieł who points to the fact that it is impossible to keep up

73 Kaczorowska, *Rys historyczny*, 252–253; Elżbieta Traple, „Ochrona słabszej strony umowy i kontrola treści umowy ze względu na przekroczenie granic swobody umów i sposób zawarcia umowy" *Kwartalnik Prawa Prywatnego*, No. 2 (1997): 228-229.

with constantly changing realities by constraining the principle of freedom of contract. Therefore, the best response is to lay down the general rules and let them to be filled by the judicial case-law[74]. The existing regulation perfectly meets these criteria, and the fact that there has been much scientific reflection and a lot of judicial decisions about it (even those of the interwar period remains partially valid) at the same time makes it essential for legal certainty to be maintained.

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74 Marek Szczygieł, „Właściwość (natura) stosunku zobowiązaniowego jako ograniczenie zasady swobody umów" *Palestra*, No. 7-8 (1997): 21.

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