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Legal survivals: A study on the continuity of Polish private law after 1989

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Publication date

2014

Document Version

Final published version

[Link to publication](#)

Citation for published version (APA):

Mańko, R. T. (2014). *Legal survivals: A study on the continuity of Polish private law after 1989*.

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Chapter I Introduction

1 Research question

The relationship between the legal world and other institutional worlds of social reality,¹ such as the economic, political and cultural ones, is one of the most fascinating topics confronted by philosophy of law and legal theory. The very existence of this relationship, and a reflection upon it, are inaccessible if one takes exclusively the *internal* point of view of the ‘institutional world’ of law.² By an internal point of view I understand here the point of view proper to epistemic communities of legal practitioners and scholars focused on a positivistic-dogmatic approach to the law³ ‘as it is’ in a given time and place. Only adopting an *external* point of view can one see to what extent the institutional world of the law is dependent upon the influence of the economic, social and political spheres. Defining legal philosophy, the late Artur Kozak (1960-2009), one of the most prominent representatives of this discipline at the eve of the 21st century in Poland, resorted to the metaphor of a ‘village fool’.⁴ Philosophy, wrote Kozak, is like a village fool who poses questions to the representatives of various social practices which, viewed from the internal

¹ I use the notion of an ‘institutional world’ following Peter Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* [1966] (London: Penguin, 1991), p. 65ff.

² Cfr. Herbert L.A. Hart, *The Concept of Law* (2nd ed., Oxford: Clarendon Press, 1994), p. 89; Artur Kozak, *Myślenie analityczne w nauce prawa i praktyce prawniczej* [Analytical Thinking in Legal Scholarship and Legal Practice] (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2010), p. 80.

³ Cfr. Martijn W. Hesselink, *The New European Legal Culture* (Deventer: Kluwer, 2001), p. 9.

⁴ Kozak, *Myślenie analityczne...*, p. 53-54.

perspective of that practice, are inappropriate or even simply stupid. We could therefore say that a philosopher of law approaches the representatives of the social practice of law (both practitioners and academics) with questions which would rather not come to the minds of those who look only from the internal perspective of those practices. Legal philosophy, in Kozak's understanding of the term, is a dialogue in which the philosopher asks questions, and the lawyer (both practitioner and academic) responds to them.⁵

The present dissertation could therefore be described, in Kozak's terms, as an exercise in legal philosophy. Its aim is to enquire about the relationship between the social practice of law and other social practices, which are rarely reflected upon by lawyers themselves. If at all, such questions are sometimes considered by representatives of academic legal theory and philosophy of law, but not by practitioners or representatives of the 'dogmatic' legal disciplines.⁶

The research question which I wish to pose (as a Kozakian 'village fool') and answer (as a Polish lawyer)⁷ in this dissertation is as follows: 'What are the conditions of possibility⁸ of the endurance of legal institutions which were introduced under one political and socio-economic system (in order to fulfil a function specific to that system), but have not been removed from the legal

⁵ Ibid., p. 53.

⁶ Such as scholars of private law, criminal law, administrative law etc., analysing the (positive) law 'as it is' in a given time and space.

⁷ As Kozak wrote, legal philosophy occurs if 'answers to philosophical questions are given by a lawyer who is set within a cognitive perspective characteristic for legal practice towards which he takes an affirmative stance.' (Kozak, *Myślenie analityczne...*, p. 53). By integrating both roles (the 'village fool' and the lawyer of an internal perspective) I hope to achieve an informed critical position with regard to Polish legal culture.

⁸ By 'conditions of possibility' I understand the circumstances in which a given phenomenon (e.g. the endurance of legal survivals) may take place. As I will indicate later on, these conditions relate primarily to the functional relationship between the legal framework and the prevalent socio-economic system.

order following a systemic transformation (transition)?' In order to answer this generally framed question, I will resort to a case study focusing on legal survivals in Polish private law after 1989. The case study will therefore be limited by subject matter (only private law⁹), country (only Poland) and time (only the 1989 transformation). I explain the choice of this specific case study in section 2 below.

Drawing inspiration from Karl Renner's *Institutions of Private Law and Their Social Functions*,¹⁰ I will identify, as the key to the endurance of a legal framework (as a legal survival), its functionality towards the new socio-economic system. Owing to the importance of the conceptual tool I am resorting to, that is the notion of a 'legal survival', I present it in detail in Chapter II.

2 Choice of case study

The choice of the example of Polish private law is justified by a number of factors which make post-1989 Poland, and especially its private law, worth a case study for the analysis of continuity and discontinuity in law under conditions of a fundamental socio-economic and political transformation. In fact, Polish economic, social, political and indeed legal history of the past 100 years has been characterised by abrupt and profound changes.¹¹ One can say, without much exaggeration, that it has been truly dominated by discontinuity. The facts speak for themselves: first, in 1918 a Polish state with a parliamentary democracy was created from multi-ethnic territories of the western part of the

⁹ I define the notion of 'private law' in section 2 of this chapter.

¹⁰ Karl Renner, *The Institutions of Private Law and Their Social Functions* [1904] (translated by Agnes Schwarzschild, London-Boston: Routledge and Kegan Paul, 1976).

¹¹ For a concise presentation of Polish (legal) history in the 20th century see e.g. Ewa Borkowska-Bagieńska, 'Historical development of public law in Poland' and Wojciech Dajczak 'Historical development of private law in Poland' in *Handbook of Polish Law*, ed. Wojciech Dajczak et al. (Warszawa-Bielsko-Biała: Wydawnictwo Szkolne PWN, 2011).

former German Empire, the northern part of the Austro-Hungarian Empire and the western part of the Russian Empire. Then, in 1926 a military coup *de facto* abolished parliamentary democracy, retaining, however, a market-driven economic system. In 1935, parliamentary democracy was also abolished *de iure*.

As regards the legal sphere, in the 1930s core areas of German, Austrian, French and Russian (private) law, hitherto in force in Poland as an inheritance of the past, were repealed and replaced by newly elaborated national codes. Subsequently, in 1939 with the outbreak of World War II the Polish state disappeared from the political map of Europe. In 1944 it resurfaced under Soviet auspices as a *de facto* Soviet protectorate with a socio-economic system characterised by state monopoly in industry, banking and commerce, central planning, a humble but egalitarian welfare state, coupled with the political monopoly of the Soviet-backed Polish United Workers' Party (PZPR). Private law (known as 'civil law' in that period) underwent sweeping reforms and was brought into line with the principles of the emerging Socialist Legal Family.

Finally, after 45 years of People's Poland, in 1989, the country made yet another U-turn during a single century, this time embracing neoliberalism in the economy and pluralist democracy in politics, simultaneously regaining sovereignty in international relationships. Private law once again underwent deep reform, aiming at the eradication of influences of the *ancien régime*. The country joined the supranational integration structures of the Western world: WTO (1995), NATO (1999) and the EU (2004). The latter membership has had a profound impact upon Poland's private law, which now had to be 'Europeanised', that is brought into line with the EU's legal instruments and case-law. These two abrupt turns in economic, social and political spheres –

which occurred within a relatively short time span – had their direct impact not only upon the institutional world of law.

My enquiry in this dissertation focuses on selected examples of continuity within the legal framework of private law in Poland that have persisted despite the country's radical transformation from actually existing socialism to a market economy, which occurred at the turn of the 1980s and 1990s. This enquiry takes place in a specific context: that of the dominant discontinuity narrative, which is characteristic for the mainstream legal discourse in Poland.¹²

The choice of private law (defined in the following paragraph) as the focus of my case study is based on the assumption that this sphere of law is more intimately connected to economic relationships (in comparison to criminal or administrative law), and therefore more readily reflects changes in economic governance, such as the passage from state socialism to a market economy. This closer connection follows from the fact that private law regulates economic relationships *directly* (especially in contract law and property law), whilst criminal and administrative law interfere with them either in a subsidiary manner (criminal law) or indirectly (administrative law). Therefore, on account of this close and special connection between private law and economic governance, I consider any legal survivals in the field of private law to be more paradoxical, and hence meriting more attention, than those in criminal or administrative law.

¹² I present this narrative in Chapter III, section 4 below.

Aligning myself with the definition adopted by the Study Group on Social Justice in European Private Law in its programmatic *Manifesto*, I contend that:

‘Private law concerns social and economic relations between citizens. It provides the basic rules governing economic transactions, business organisation, property rights, compensation for wrongs, and other kinds of associations between citizens.’¹³

Thus I adopt a definition of private law which is based on its subject-matter (‘social and economic relations between citizens’) rather than on the method of regulation, mechanisms governing the system or relationship between legal subjects (formal equality, formal lack of subjection).¹⁴ This approach entails that I have no objections against using the term ‘private law’ (both substantive private law and procedural private law) with regard to the state-socialist period, despite the fact that scholars and judges of the time preferred the term ‘civil law’ instead. As a matter of fact, they avoided the term ‘private law’ in line with Lenin’s famous statement to the effect that Bolsheviks

‘do not recognise anything “private”, and regard *everything* in the economic sphere as falling under *public* and not *private* law.’¹⁵

¹³ Study Group on Social Justice in European Private Law, ‘Social Justice in European Contract Law: a Manifesto’, *European Law Journal* 10.6 (2004): 653–674, p. 654.

¹⁴ Therefore, I distance myself from liberal definitions of private law which, ‘[p]remised on the separation of state and society, [...] proceeded on the assumption that private law, by organizing a depoliticized economic society withdrawn from state intrusion, guaranteed the *negative* freedom of legal subjects’ [Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, transl. by William Rehg (Massachusetts: MIT Press, 1996), p. 396], as opposed to public law.

¹⁵ Vladimir Ilich Lenin, ‘On the Tasks of the People’s Commissariat for Justice under the New Economic Policy’, 20 February 1922, available online at: <http://www.marxists.org/archive/lenin/works/1922/feb/20c.htm> (last accessed: 31/10/2013).

Finally, under the term of 'private law' I will understand not only the respective substantive rules (on rights and obligations) but also the corresponding procedural rules regarding the enforcement of those rights and obligations in court or out-of-court. In doing so, I follow the approach of various contemporary European and American scholars who treat civil procedure as a branch of private law.¹⁶ I am aware, however, of the fact, that some scholars treat civil procedure as part of public law¹⁷ or as an independent, borderline branch of law suspended somewhere at the interstices of the public vs. private law divide.¹⁸ I do not subscribe to this way of thinking on pragmatic grounds, pointing to the auxiliary character of procedural law to substantive law.¹⁹ I consider this inseparable functional link between civil procedure and

¹⁶ Jürgen Basedow notably included civil procedure in volume III of his monumental *European private law: sources* (The Hague: Kluwer Law International, 1999-2002), 3 vols.; Ulrich Drobnig, 'Private Law in the European Union', *Forum Internationale* 22 (1996), p. 3, 12-13; G. Betlem and Edwoud Hondius, 'European Private Law after the Treaty of Amsterdam', *European Review of Private Law* 1 (2001): 3-20, p. 4; Ewa Łętowska, *Podstawy prawa cywilnego* [The Foundations of Civil Law] (2nd ed., Warszawa: Ecostar, 1997), p. 236ff; Ernest J. Weinrib, *The Idea of Private Law* (Harvard University Press: Cambridge, Massachusetts – London, 1995), p. 1; Jan M. Smits, *The Making of European Private Law: Toward a Ius Commune Europaeum as a Mixed Legal System* (Antwerp: Intersentia, 2002), p. 23-24; Adam Zieliński, in: *Kodeks postępowania cywilnego. Komentarz do artykułów 1-505¹⁴* [Code of Civil Procedure: A Commentary on Articles 1 to 505¹⁴], ed. Adam Zieliński (2nd ed., Warszawa: C.H. Beck, 2006), p. 5.

¹⁷ See e.g. Stanisław Włodyka, 'Problem struktury prawa' [The Issue of the Structure of the Law], *Państwo i Prawo* 4 (1995), p. 15; Zbigniew Radwański, *Prawo cywilne – część ogólna* [Civil Law: the General Part] (7th ed., Warszawa: C.H. Beck, 2004), p. 7; Jolanta Jabłońska-Bonca, *Wprowadzenie do prawa. Introduction to law* (2nd ed., Warszawa: LexisNexis 2008), p. 150.

¹⁸ Marek Safjan, 'Pojęcie i systematyka prawa prywatnego' [The Notion of Private Law and Its Systematic Division] in *System prawa prywatnego* [System of Private Law], ed. Zbigniew Radwański (Warszawa: C.H. Beck, 2007), vol. I, 29ff at p. 63-65).

¹⁹ Jacques Héron, *Droit judiciaire privé* (3rd ed. by T. Le Bars, Paris: Montchrestien, 2006), p. 1516. Incidentally, also historical factors strongly militate in favour of a conceptual unity of substantive and procedural private law. As legal historian Tomasz Giaro points out, the two have become separated only with the 19th century codifications; hitherto civil procedure was treated as part and parcel of private law (Tomasz Giaro, 'Interpretacja jako źródło prawa – dawniej i dziś' [Interpretation as a Source of Law: Past and Present], *Studia Prawnoustrojowe* 7 (2007): 243-253, p. 246).

substantive private law to be a decisive factor which fully justifies treating both branches as part of private law, rather than taking out civil procedure and aligning it with constitutional, administrative and criminal law as part of a broader notion of ‘public law’.

3 Structure, methodology and sources

A Structure

The dissertation is structured as follows. In Chapter II I introduce the notion of ‘legal survivals’ – concrete instances of continuity within legal culture, explaining the genealogy, outline and conditions of operationalisation of this central notion. In Chapter III I set the scene by presenting Poland’s transformation from actually existing socialism to a market economy, including background data on the history of Polish private law from World War II onwards. Further on, entire chapters are devoted to legal survivals in substantive private law (Chapter IV) and to legal survivals in procedural private law (Chapter V). Summarising and concluding remarks are presented in Chapter VI.

B Methodology

The very formulation of the research question (in section 1 above) implies the use of *empirical* (rather than analytical) methodology, in the sense that I will answer the questions on the basis of concrete case-studies, taken from Polish private law, rather than reason by referring merely to abstract concepts. Furthermore, my approach will be mainly *descriptive and interpretive*, in that I will present facts about Polish legal culture after 1989 against the background of the socio-economic transformation, and offer their interpretation as legal survivals of the period of actually existing socialism. In general, I will not be normative (prescriptive) in my methodology, in that I will not make proposals on how Polish legal culture should evolve or what solutions should be adopted

by the Polish legislators, judges or legal scholars. I will allow, however, for two exceptions with that regard. First of all, in the final part of the conclusions (Chapter VI, section 7) I will make a number of critical and normative remarks with regard to the place of legal survivals in legal culture. Secondly, whilst presenting Poland's post-1989 transformation in Chapter III, I will present the views of sociologists and political economists who are at times critical with regard to a number of aspects of the transition. However, outside these two limited contexts, and in particular in Chapters IV and V, where I analyse examples of legal survivals, I will not express any opinion as to the need for preserving or discarding the legal institutions in question. Instead, I will mainly focus on the mere fact of their endurance and try to explain the factors which enabled this endurance, leading up to a generalised, descriptive account on the mechanism of endurance of legal survivals which I will present in the concluding remarks (Chapter VI, sections 4-6).

Furthermore, individual chapters follow specific methodological approaches. Chapter II, which introduces the conceptual tool of 'legal survivals', has a theoretical character, and it draws to a certain extent on methods of conceptual metaphor analysis²⁰ as well as theoretical socio-legal research.

Chapter III, which presents the background data on socio-economic, political and legal transformation in Poland at the turn of the 1980s and 1990s, has a historical character, and is based on a synthetic presentation of existing

²⁰ In analysing conceptual metaphors I rely mainly on George Lakoff and Mark Johnson, *Metaphors We Live By* [1980] (Chicago-London, University of Chicago Press, 2003); Zoltán Kövecses, *Metaphor: A Practical Introduction* (2nd ed., Oxford-New York: Oxford University Press, 2010) and Stefan Larsson, *Metaphors and Norms: Understanding Copyright Law in a Digital Society* (Lund: Lund University, 2012). Cfr. Alberto Vespaziani, 'Towards a Hermeneutical Approach to Legal Metaphor', in *Human Rights, Language and Law*, ed. Thomas Bustamante, Oche Onazi (Stuttgart: Franz Steiner/Nomos, 2012): 79-91.

literature in the fields of law (including legal history), economics (including economic history), political science and sociology. In contrast, the closing section of chapter III, where I present the dominant narrative on the legacy of the period of actually existing socialism, the methodology draws on critical discourse analysis and conceptual metaphor analysis.

Chapters IV and V, where I present examples of legal survivals, are based on case studies presenting individual legal institutions – interpreted as legal survivals of the period of actually existing socialism.²¹ Each legal survival is presented following the same scheme: first I discuss the circumstances of its introduction (using the historical method), then the legal framework and its endurance (using the positivistic-dogmatic method), then the application of the legal framework (using the socio-legal method) and finally its social function (also using the socio-legal method). The details of this methodological approach are set out in Chapter II.

C Sources

This dissertation relies, first of all, on typical sources used by lawyers applying the internal point of view, that is legislative texts, published case-law and academic legal writings. This source base is expanded to cover also literature analysing the Polish transformation from the points of view of economics, sociology and political science, as well as documents reporting legal practice in the form of official reports published by the state institutions, in particular annual reports of the Ministry of Justice, the Prosecutor General's Office and the Supreme Court. The vast majority of sources relied upon in this dissertation are in the Polish language; unless otherwise indicated, all

²¹ Hence, I will not analyse any legal survivals of the pre-socialist period which endured despite the introduction of actually existing socialism and continue to exist until today.

translations of quotes from such sources are my own. However, as I have pointed out already, adopting the external point of view of the Kozakian ‘village fool’, the use I make of those sources is different from the typical one: I do not stop at the dogmatic question of ‘what the law *is*’ or the historical-dogmatic question of ‘what the law *was*’, but rather ask the ‘why’ questions: ‘*why* did the legal framework not change?’, ‘*why* could this or that institution be retained following the transformation?’ Therefore, whilst mostly working on the same texts as a legal practitioner or academic private lawyer does, I approach them from a different viewpoint, and, as a consequence, invest them with a different meaning.

4 Notions of ‘actually existing socialism’ and a ‘(neoliberal) market economy’

A Actually existing socialism (state socialism)

For the purposes of this dissertation, I will understand the notion of ‘actually existing socialism’ (otherwise known as ‘really existing socialism’, ‘real socialism’ or ‘state socialism’) as referring to the political, social and economic system prevailing in the Soviet Union and other countries of the former Soviet bloc. The element of ‘*actually* existing’ in the term serves to emphasise the gap between ‘socialism’ in the strict sense of the word (as envisaged, e.g. by Marx and Engels or by non-Soviet Marxists)²² and the actual economic, political and social practice in the Soviet bloc.²³ Being aware of a long-standing debate as to the nature of that system, in particular whether it should be described even as

²² Lucio Lombardo Radice, ‘State Socialism’, *International Journal of Politics*, 10.2-3 (1980), p. 135.

²³ This aspect is underlined *inter alia* by Polish critical theorist Jan Sowa, ‘An Unexpected Twist of Ideology. Neoliberalism and the Collapse of the Soviet block’, *Praktyka Teoretyczna* 5 (2012): 153-180, available online at: http://www.praktykateoretyczna.pl/PT_nr5_2012_Logika_sensu/13.Sowa.pdf (last accessed: 11/3/2014).

‘state capitalism’,²⁴ I do not wish to enter it here, sticking to a purely descriptive understanding of the notion of ‘actually existing socialism’. According to the late Polish economist Tadeusz Kowalik (1926-2012):

‘The most important attribute of really [actually] existing socialism was the combination of closely centralized and hierarchical political authority with state ownership of means of production. This gave the political authority nearly absolute control over the economy. The all-encompassing planning, often called command-distributive planning, was bureaucratic in nature.’²⁵

Drawing inspiration from this description, I will henceforth identify three chief features of actually existing socialism: firstly, the authoritarian rule of a pro-Soviet party (‘closely centralized and hierarchical political authority’); secondly, the state ownership of major means of production, and thirdly, strict state-controlled economic planning instead of market mechanisms. Furthermore, I concur with critical theorist Jan Sowa that

‘there are strong theoretical and historical reasons to question the communist nature of regimes developed within the Soviet Bloc in the 20th century (...) if we accept the conceptual framework developed by Marx and Engels as a point of reference.’²⁶

Therefore, despite the practice of many other authors, I do not use the term ‘communism’ to describe the social, economic and political system of actually existing socialism.

²⁴ See especially Tony Cliff, *State Capitalism in Russia* [1948] (London-Chicago-Sydney: Bookmarks, 1996).

²⁵ Tadeusz Kowalik, *From Solidarity to Sellout: The Restoration of Capitalism in Poland*, trans. Eliza Lewandowska (New York: Monthly Review Press, 2011), p. 26.

²⁶ Sowa, *An Unexpected Twist...*, p. 161-162.

B (Neoliberal) market economy

In contrast to state socialism, which prevailed in Poland roughly between 1945 and 1989, I place a '(neoliberal) market economy', which was introduced as a result of the transformation. I define it as a system characterised by a dominant private ownership of the means of production coupled with very limited or no state control of the economy (domination of the market mechanism as a means of allocating resources, no 'command-distributive system'). Despite an abyss separating state socialism from a neoliberal market economy, it must be kept in mind that the opposition in question is not a classification, but a typology, which means that empirically existing states can be placed somewhere on the continuum between extreme state socialism (no private property whatsoever, total state control of the economy) and an extreme neoliberal market economy (only market mechanisms, no state ownership of means of production, no redistribution mechanisms, no welfare state). For instance, within the former Soviet bloc, Poland, with its privately-owned family farming sector and an artisan sector, would be placed on a different part of the continuum than the Soviet Union (where individuals were allowed to own only small gardens, but not family farms as in Poland). Despite differences on both sides, that is the existence of 'varieties' of market economies on the one hand²⁷ and of centrally planned economies on the other hand, it is plausible to maintain a distinction between the two, and to argue that Poland's 1989 transformation was one *from* (a variety

²⁷ Cfr. Peter A. Hall and David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: OUP, 2001). Hall and Soskice identify, *inter alia*, 'liberal market economies' and 'coordinated market economies' (p. 8). See also Bruce R. Scott, *Capitalism: Its Origins and Evolution as a System of Governance* (New York: Springer, 2011), p. 111ff.

of) state socialism *to* (a variety of) a market-economy system, and not between varieties of the same system. In sum, it must be emphasised that actually existing socialism can under no circumstances be identified either with parliamentary democracy or with a system of market economy. Presenting the 1989 transformation as a change *within* the same system (however labelled), rather than a transition from one system to another, would not be possible without materially distorting the fundamental political, social and economic facts.

As regards the notion of 'neoliberalism', which I often use in this dissertation to describe the political and economic ideology prevalent in post-1989 Poland, I refer to David Harvey's definition, according to which:

'Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices. (...) State interventions in markets (once created) must be kept to a bare minimum (...).'²⁸

Being aware of the on-going debate on how to conceptualise the phenomenon of neoliberalism in the most adequate way,²⁹ for the present, rather limited,

²⁸ David Harvey, *A Brief History of Neoliberalism* [2005] (Oxford: OUP, 2007), p. 2.

²⁹ For a recent overview see e.g. Loïc Wacquant, 'Three steps to a historical anthropology of actually existing neoliberalism', *Social Anthropology* 20.1 (2012): 66-79, p. 69-70. See also, in the context of analyses of Poland, Jane Hardy, *Poland's New Capitalism* (London-New York: Pluto Press, 2009), p. 5, who defines neoliberalism as 'a set of institutional initiatives that have reconfigured the relationship between the state, labour and markets. In Poland, as elsewhere, the aim is to manage the economic system in order to restore profitability, raise the rate of exploitation in the workplace and secure a wider range of opportunities for accumulation by capital.'

purposes of using the term in order to characterise the political and socio-economic system in post-1989 Poland, I contend that Harvey's definition will suffice. Ultimately, this dissertation is not about neoliberalism as such, but about legal survivals following a socio-economic transition, and the label 'neoliberal' is only used to place an additional emphasis upon the fundamental difference between Poland's pre-1989 and post-1989 political, social and economic system.