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

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Chapter III

The background: Poland's transformation from state socialism to a neoliberal market economy

1 Introduction

The interest of legal survivals stems from the fact that they 'go against the current' of a socio-economic and political transformation, representing the centripetal facet of legal discourse.¹¹⁸ Whilst the structures of economic power change, thereby creating centrifugal pressures upon legal discourse, some aspects of the legal framework remain the same, as if immune towards the transition. In this dissertation I analyse this interplay between continuity and discontinuity of legal culture by resorting to the case study of Poland's transformation from actually existing socialism to a (neoliberal) market economy which occurred at the turn of the 1980s and 1990s. As I indicated in Chapter II, legal survivals are a *relative* phenomenon: a given legal institution can be said to be a 'survival' only if it endures after a transformation of the socio-economic and political system which leads, in general, to a wholesale change of the legal system. Within this framework of approaching legal survivals, the purpose of the present chapter is to give an outline account of the transformation, preceded by a presentation of the system of actually existing socialism. Only against this background the institutions studied in Chapters IV and V can be conceived of as legal survivals.

¹¹⁸ On centripetal and centrifugal pressures upon discourse see Fairclough, *Critical...*, p. 7.

2 The period of actually existing socialism (1944-1989)

A Background¹¹⁹

The radical transformation in Poland which occurred after World War II was caused by external factors – firstly, the liberation of Polish territories from German occupation by the Red Army, and secondly, the macro-political decisions taken by the victorious powers as to Poland’s subjection to Soviet tutelage. Polish Communists were fully aware that social support for their rule is low, and therefore never dared to organise truly free elections or referenda. Regardless of the successes of Communist rule in Poland in the fields of social progress and economic development,¹²⁰ this chronic lack of democratic legitimacy and the consciousness of external imposition of the Communist government have been weighing heavily on commonly held views about the period of actually existing socialism. The stifling lack of political choice (with systematically falsified elections) and the constant repression of the freedom of expression by preventive censorship, both features enduring throughout the period, have left an overall negative impression of People’s Poland even on intellectuals of a sincerely left-wing orientation. If we add to this the widely felt symptoms of Poland’s long-term economic crisis which began at the end of the 1970s and spread over the subsequent decade, limiting consumer access to even the most basic goods, it will not come as a surprise that the need for

¹¹⁹ The following synthetic account draws *inter alia* on *Polska pod rządami PZPR* [Poland Under PZPR Rule], ed. Mieczysław F. Rakowski (Warszawa: Profi, 2000); Andrzej Leon Sowa, *Historia polityczna Polski 1944-1991* [A Political History of Poland 1944-1991] (Kraków: Wydawnictwo Literackie, 2011); and *Zrozumieć PRL* [Understanding the Polish People’s Republic], ed. Wiesław Żółtkowski (Warszawa: Muza, 2012).

¹²⁰ Cfr. Jan Sowa, ‘An Unexpected Twist of Ideology. Neoliberalism and the Collapse of the Soviet Block’, *Praktyka Teoretyczna* 5 (2012): 153-180, p. 172-173.

a transformation from actually existing socialism to a market economy was widely accepted.

This background well explains why actually existing socialism does not enjoy a particular prestige, also among legal elites, which has led to the adoption of a dominant narrative aimed at downplaying the role of legal survivals in Polish legal culture. However, before I move to the analysis of this narrative (in section 4 of this chapter), I will first provide a systematic background overview of the economic (subsection B), social (subsection C) and legal (subsection F) spheres of the actually existing socialism in Poland, before turning to the transformation itself (in section 3).

B Economics

At the aftermath of World War II Poland's economy emerged mutilated. The country suffered one of the greatest damages (even greater than those of defeated Germany), amounting to a 39% destruction of the material base of economic activity (within post-War boundaries).¹²¹ The starting point of the state-socialist period was thus placed much below what had been the state before the outbreak of World War II. Following a short period of spontaneous bottom-up workers' self-government,¹²² the new communist government nationalised the sectors of banking, heavy industry and wholesale trade, as well as a majority of the retail trade and light industry.¹²³ Large farms were partly

¹²¹ Irena Kostrowicka, Zbigniew Landau and Jerzy Tomaszewski, *Historia gospodarcza Polski XIX i XX wieku* [An Economic History of Poland of the 19th and 20th Centuries] (4th ed., Warszawa: Książka i Wiedza, 1984), p. 451.

¹²² Hardy, *Poland's...*, p. 13-14.

¹²³ See Act of 3.1.1946 regarding the nationalisation of the fundamental branches of national economy (Dz.U. No. 3 item 17) and Regulation of the Council of Ministers of 30.1.1947 on the procedure regarding the nationalisation of enterprises (Dz.U. No. 16 item 62).

nationalised and partly divided among poor farmers, but small family farms (below 50 ha) remained in private hands. After a short period of attempted collectivisation of family farms through the organisation of forced cooperatives, after 1956 their private ownership became the hallmark of the Polish variety of actually existing socialism.

Once the key branches of the economy became nationalised, centralised planning at the state level was introduced.¹²⁴ Due to Poland's geopolitical situation, its economic planning was not autonomous but was subjected to the needs of the Soviet Union, leading to an exorbitant expansion of the military industry going far beyond Polish self-defence needs and the capabilities of the Polish economy.¹²⁵ This, in turn, led to under-investments in the sector of consumer goods manufacturing.¹²⁶

Furthermore, certain inherent features of the planning system led to the emergence of shortages.¹²⁷ This was because state enterprises would not face any negative consequences if they demanded and then utilised as much resources as they could receive under the central planning scheme; however, this stimulated growth of demands and, as a consequence, led to shortages. Faced with shortages, managers of the state enterprises only increased their demand for resources, hoping to stock or exchange them, but this only accelerated the vicious circle.

¹²⁴ Elizabeth C. Dunn, *Privatizing Poland: Baby Food, Big Business and the Remaking of Labor* (Ithaca-London: Cornell University Press, 2004), p. 14.

¹²⁵ *Ibid.*, p. 42.

¹²⁶ Hardy, *Poland's...*, p. 14-16.

¹²⁷ Dunn, *Privatizing...*, p. 15.

Since the mid-1960s both labour and capital productivity began to decline.¹²⁸ After a social revolt over increased food prices led to a change of political power in 1970, the new leader, former miner Edward Gierek (1913-2001), faced with the dilemma of choosing between massive capital accumulation and modernisation, on the one hand, and the increase of consumption, on the other hand, decided to implement a new economic strategy based on import-led growth which was intended to attain both goals simultaneously.¹²⁹ The idea behind Gierek's strategy was to take loans in Western banks in order to finance technological innovation (licenses, machinery, ready-made industrial plants) which would then become repaid through export to the same Western economies, simultaneously allowing for a higher level of consumption by Polish society.¹³⁰ At the end of the day Gierek's strategy failed: Poland ended up with a very high debt upon which it defaulted. The country eventually plunged into a deep crisis which provoked social anger and led to mass strikes and absences in work, thus only aggravating the economic situation of the country. Workers united in the non-governmental 'Solidarity' (*Solidarność*) trade union demanded a more rational management of the industry, an improvement of work conditions and an end to shortages in consumer goods.¹³¹

In the 1980s the ruling elite of PZPR functionaries came to the conclusion that the country's economy not only is no longer able to deliver rising standards of living for workers but the deep crisis has threatened the privileged position of

¹²⁸ Ibid., p. 18.

¹²⁹ Ibid., p. 19.

¹³⁰ Edward Gierek (interviewed by Janusz Rolicki), *Przerwana dekada* [The Interrupted Decade] (Warszawa: BGW, 1990), pp. 59, 74, 133, 150-151; Hardy, *Poland's...*, p. 19.

¹³¹ Dunn, *Privatizing...*, p. 32.

the elite itself.¹³² This led them to the idea that only a reform towards a market economy ('market socialism') could improve the economic situation of the country. Central planning was relaxed and state enterprises were given a large degree of independence, in order to make them self-financing.¹³³ As a result, Poland's economy 'ceased to be a classical planned economy, but decision-making (...) descended into chaos and uncertainty.'¹³⁴

These circumstances were in turn used by the *nomenklatura* members to initiate the so-called '*nomenklatura* privatisation', i.e. the appropriation of state assets by private individuals holding managerial positions in the socialised economy. Privatisation processes of this kind began in the second half of the 1980s; Poland officially remained a socialist country, and the legal system was still a socialist one, but the underlying economic system began to change.

The legal framework for early privatisation processes was created by a statute enacted in 1987,¹³⁵ enabling to transform state enterprises into commercial companies, thus allowing the sale of state enterprises' assets, as well as mergers, divisions of such enterprises and their lease.¹³⁶ A further easement in that regard was created by provisions enacted in 1989¹³⁷ which simply allowed to

¹³² Hardy, *Poland's...*, 23.

¹³³ Ibid.

¹³⁴ Ibid., p. 24.

¹³⁵ Act of 31.7.1985 adapting the provisions of certain acts regulating the functioning of the economy to the conditions and needs of further socio-economic development of the country] (Dz.U. no. 37 item 174), especially art. 5(4) and (6).

¹³⁶ Piotr Zalewa, *Transformacja ustrojowa a kształt polskiego systemu ekonomicznego* [Regime Transformation and the Shape of the Polish Economic System] (Lublin: Wyd. UMCS, 2008), p. 67.

¹³⁷ Act of 24.2.1989 regarding certain conditions of the consolidation of the national economy amending certain acts] (Dz.U. no. 10 item 57), in particular art. 3, and Zalewa, *Transformacja...*, p. 67.

transfer the assets of a state enterprise to natural or legal persons.¹³⁸ According to English political economist Jane Hardy:

‘these so-called *nomenklatura* privatisations involved the selling of non-core operations such as a computer centre, repair facilities or a sales centre to a group of insiders that included managers and party members. State-Owned Enterprises were often stripped of their most profitable operations (...) The *nomenklatura* used their position to become wealthy owners of what used to be state enterprises through two important legal forms: the leasing of state owned companies and joint stock companies (...).’¹³⁹

Polish economist Piotr Zalewa pointed out that *nomenklatura* privatisation, despite being formally legal, was in fact an ‘ordinary embezzlement’ and that the *nomenklatura* companies ‘did not create any added value’ but ‘served ordinary looting’¹⁴⁰. He drew attention to the fact that in order to remove any obstacles to a mass appropriation of state property, in 1989 the administrative instruments of control of economic crime were disabled.¹⁴¹ As Jan Sowa observed:

‘Party members, even high ranking officials, were becoming private entrepreneurs, mainly by taking control over restructured state enterprises.

¹³⁸ Zalewa, *Transformacja...*, p. 67.

¹³⁹ Hardy, *Poland's...*, p. 24-25.

¹⁴⁰ Zalewa, *Transformacja...*, p. 68.

¹⁴¹ *Ibid.*, where the author points out that the Office for Combat with Organised Crime of the Chief Police Headquarters was dissolved; the structures of the Ministry of the Interior responsible for the protection of the economy were dissolved; the General Prosecution Office was deprived of its independence and subjected to political control.

Jadwiga Staniszkis showed that 80% of the Party elite from the 1980s became private entrepreneurs in the 1990s.¹⁴²

The changing socio-economic relationships paved the way to a political change which will be discussed in section 3.A below. Before that, let me now present basic facts about the social policies of actually existing socialism in Poland (in section C below).

C Social policy

After World War II, Poland's communist government embarked upon an ambitious project of building a state-socialist welfare state based on an egalitarian distribution of wealth through pay policy, taxation¹⁴³ and social benefits,¹⁴⁴ extensive public services offered for free (especially in the sectors of education¹⁴⁵ and healthcare¹⁴⁶) or heavily subsidised (transportation, culture), guaranteed full employment and an active housing policy. Undoubtedly a society hitherto based on acute inequalities (as pre-1939 Poland had been) was transformed into an egalitarian one, where the level of wealth and income,¹⁴⁷ as well as the actual lifestyle of physical workers was similar to that of white-collar

¹⁴² Sowa, 'Unexpected Twist...', p. 175.

¹⁴³ Henryk Reniger in *Prawo finansowe* [Financial Law], ed. Leon Kurowski (Warszawa: PWN, 1955), p. 366-367, 416-417.

¹⁴⁴ Zofia Grodek, 'Położenie ludności' [The Situation of the Population, in *Historia gospodarcza Polski (1939-1989)* [An Economic History of Poland (1939-1989)], ed. Janusz Kaliński (Warszawa: Oficyna Wydawnicza SGH, 1996), p. 225-226.

¹⁴⁵ Czesław Banach, 'Oświata i szkolnictwo wyższe w latach 1945-1989' [Education Between 1945 and 1989] in *Zrozumieć PRL* (2012): 144-160.

¹⁴⁶ Alicja Sobczak and Janusz Opolski, 'Ochrona zdrowia w PRL. Wybrane zagadnienia' [Healthcare in the Polish People's Republic: Selected Aspects] in *Zrozumieć PRL...* (2012): 120-143.

¹⁴⁷ Grodek, 'Położenie...', p. 224; Andrzej M. Świątkowski, *Social Security Law in Poland* (Alphen aan den Rijn: Kluwer Law International, 2010), p. 22.

employees.¹⁴⁸ The idea of state-socialist social policy was to allow for social progress of the entire society and at the same time, by providing, in an egalitarian gesture, a minimum level of subsistence and social security benefits to all citizens.¹⁴⁹ Nevertheless, especially from the perspective of consumer interests it should be mentioned that due to the aforementioned exorbitant expansion of the military industry (see section B above), society at large suffered from underinvestments in the sector of consumer goods manufacturing.¹⁵⁰

D Private law

(a) unification and codification of substantive private law

When the Polish state emerged in 1918, its private laws were fragmented, following the borders of previously existing jurisdictions.¹⁵¹ Hence, as many as five different legal systems were in force (German/Prussian law, French/Russian law, Russian law, Austrian law and Hungarian law). The task of unification of private law in Poland was only partially executed during the inter-War period (i.e. between World War I and World War II).¹⁵² Vast areas of the law, including property law, family law, inheritance law, as well as non-litigious civil proceedings remained divided along the lines of pre-1918 political borders.

¹⁴⁸ Tomasz Ciborowski and Grzegorz Konat, 'Między II i III RP. Gospodarka Polski Ludowej' [Between the Second and Third Republic: the Economy of People's Poland], in *PRL bez uprzedzeń* [Polish People's Republic Without Prejudice], ed. Jakub Majmurek and Piotr Szumlewicz (Warszawa: Instytut Wydawniczy 'Książka i Prasa', 2010), p. 34-35.

¹⁴⁹ Andrzej M. Świątkowski, *Social Security Law in Poland* (Alphen aan den Rijn: Kluwer Law International, 2010), p. 25.

¹⁵⁰ Hardy, *Poland's...*, p. 14-16.

¹⁵¹ For a concise account in English see e.g. Dajczak, 'Historical development...', p. 42-58.

¹⁵² See in particular the comprehensive monograph on the topic by Leonard Górnicki, *Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919-1939* [Civil Law in the Proceedings of the Codification Commission of the Polish Republic Between 1919 and 1939] (Wrocław: Kolonia, 2000).

The change of Poland's political boundaries following World War II meant that a large portion of the country was governed by German law, but nevertheless the areas governed by Austrian, French, Russian and partly Hungarian law remained. The unification of private law was treated as a priority by the new government. This task was executed swiftly between June 1945 and December 1946, that is mainly during a period of relative autonomy of the Polish government *vis-à-vis* the Soviet Union. There was still no extensive pressure on Sovietisation of the Polish legal system, and formal continuity with the legal system of pre-1939 Poland was strongly emphasised.

Therefore, the Ministry of Justice, which drafted the unifying legislation,¹⁵³ could rely not only on pre-War War II drafts,¹⁵⁴ but even involve those pre-War drafters who survived the War.¹⁵⁵ The first reform was to extend the force of German-Polish law to the regained territories, thus repealing Nazi German

¹⁵³ Stanisław Grodziski, 'Prace nad kodyfikacją i unifikacją polskiego prawa prywatnego (1919-1947)' [The Process of Codification and Unification of Polish Private Law (1919-1947)], *Kwartalnik Prawa Prywatnego* 1.1-4 (1992): 9-56, p. 22; Stefan Grzybowski, 'Zagadnienia kodyfikacji polskiego prawa cywilnego (Organizacja i wyniki pracy 1919-1992)' [Codification of Polish Civil Law: Organisation and Results 1919-1992], *Kwartalnik Prawa Prywatnego* 1.1-4 (1992): 91-114, p. 103; Aleksandra A. Kozioł, 'Organizacja prac nad prawem cywilnym w Polsce w latach 1945-1946' [The Organisation of Civil Law Drafting In Poland Between 1945 and 1946], *z Dziejów Prawa* 7 (2005): 174-186, p. 178.

¹⁵⁴ Józef Skąpski, 'Kodeks cywilny z 1964 r. Blaski i cienie kodyfikacji oraz jej perspektywy' [The Civil Code of 1964: Good and Bad Sides of the Codification and Its Perspectives], *Kwartalnik Prawa Prywatnego* 1.1-4 (1992): 57-90, p. 58-59; Witold Wołodkiewicz, 'I cambiamenti del codice civile polacco dopo 1989 possono essere trattati come segno del ritorno alla tradizione romanistica?', in *The Roman Law Tradition in Societies in Transition*, ed. Petr Bělovský and Michal Skřejpek (Praha: Právnická Fakulta Univerzity Karlovy w Praze, 2003), p. 129; Krzysztof Felchner, 'Prace kodyfikacyjne nad prawem rzeczowym w Polsce okresu dwudziestolecia międzywojennego i bezpośrednio po II wojnie światowej' [The Codification Works on a Law of Things in Poland in the Period of the Twenty Inter-War Years and Directly After World War II], *Przegląd Prawniczy Uniwersytetu Warszawskiego* 5.3 (2006): 23-35 (with regard to property law).

¹⁵⁵ Grodziski, 'Prace...', p. 24.

law.¹⁵⁶ The drafting process was closed to the public, no preliminary drafts were published and no public debate whatsoever was envisaged.¹⁵⁷

A legislative package of 16 decrees unifying the entirety of Polish private law was enacted between 1945 and 1946, and entered into force from 1.1.1947 (or earlier, in the case of some enactments). They unified all areas of substantive private law¹⁵⁸ not previously unified during the Second Republic (with the exception of maritime law¹⁵⁹), together with the remaining areas of procedural private law¹⁶⁰. Concurrently, the pre-War Code of Obligations¹⁶¹ remained in

¹⁵⁶ Stefan Grzybowski, 'Zagadnienia kodyfikacji polskiego prawa cywilnego (Organizacja i wyniki pracy 1919-1992)' [Codification of Polish Civil Law: Organisation and Results 1919-1992], *Kwartalnik Prawa Prywatnego* 1.1-4 (1992): 91-114. 95; Skąpski, 'Kodeks...', p. 58. It must be noted here that any legislative modification introduced by Germans after 1 September 1939 on the pre-War territory of the Republic of Poland were treated – in accordance with the pertinent rules of public international law – as non-existent (Ewa Łętowska and Jan S. Piątowski, 'Introduction' in *Civil Code of the Polish People's Republic* (Warszawa: Wydawnictwo Prawnicze, 1981), p. 6

¹⁵⁷ Grodziski, 'Prace...', p. 23-24.

¹⁵⁸ Decree of 29.8. 1945 – Law of Persons (Dz.U. no. 40, item 223); Decree of 25.9.1945 – Law of Marriage] (Dz.U. no. 48 item 270; Decree of 29.1.1946 – Family Law (Dz.U. no. 6, item 52); Decree of 14.5.1946 – Guardianship Law (Dz.U. no. 20, item 130); Decree of 29.5.1946 – Law of Matrimonial Property (Dz.U. no. 31, item 196); Decree of 8.10.1946 – Law of Succession (Dz.U. no. 60, item 328); Decree of 11.10.1946 – Law of Property (Dz.U. no. 57, item 319); Decree of 11.10.1946 – Land Register Law (Dz.U. no. 57, item 321). All the substantive decrees were accompanied by introductory provisions containing long lists of repealed acts, many of them dating back to the beginnings of the 19th century.

¹⁵⁹ German maritime law remained in force until 1962. See Stanisław Matysik, *Podręcznik prawa morskiego* [A Handbook of Maritime Law] (2nd ed., Warszawa: Państwowe Wydawnictwo Naukowe, 1963), p. 29-31, 35-36. Cfr. Wołodkiewicz, 'I cambiamenti...', p. 129.

¹⁶⁰ Decree of 18.7.1945 – Code of Non-Contentious Procedure (Dz.U. no. 27 item 169); Decree of 29 August 1945 regarding incapacitation proceedings (Dz.U. no. 40, item 225) Decree of 29 August 1945 regarding incapacitation proceedings (Dz.U. no. 40, item 225); Decree of 21.5.1946 regarding the proceedings before the guardianship authority (Dz.U. no. 22, item 140); Decree of 8.11.1946 regarding succession proceedings (Dz.U. no. 63, item 346). Thus Sacco is mistaken when he writes that French law remained in force in the territory of the former Duchy of Warsaw until 1964 – the last French legal instruments lost their binding force as of 1 January 1947 (see Rodolfo Sacco, 'The Romanist Substratum in the Civil Law of the Socialist Countries', *Review of Socialist Law* 14.1 (1988): 65-86, p. 72).

force until 1964 and some of its parts until 1975, when the Labour Code¹⁶² entered into force.

Following the unification of private law, the government expressed the desire of enacting a uniform Civil Code, and in 1947 a special commission was created, charged with the task of drafting such an instrument.¹⁶³ On the basis of the existing uniform legislation,¹⁶⁴ the commission prepared a draft Code by the end of 1948.¹⁶⁵ However, the progressing Sovietisation of Poland meant that the Code, based mainly on the Western legal tradition, would not fit the new economic and political system.¹⁶⁶ Therefore, instead of enacting the draft, the government embarked on profound reforms of private law, encompassing a new general part of civil law,¹⁶⁷ a new family code,¹⁶⁸ a profound reform of civil procedure¹⁶⁹ and of the judiciary,¹⁷⁰ all enacted in 1950.

It was only after these reforms that a new drafting commission was appointed, which came up with a new draft in 1954.¹⁷¹ The text reflected the

¹⁶¹ Regulation of the President of the Republic of 27.10.1933 – Code of Obligations (Dz.U. no. 82 item 598), hereinafter: ‘k.z.’ (*kodeks zobowiązań*).

¹⁶² Act of 26 June 1974 – Labour Code (Dz.U. No. 24 item 141, hereinafter: ‘k.p.’).

¹⁶³ Grodziski, ‘Prace...’, p. 27; Marian Kallas and Adam Lityński, *Historia ustroju i prawa Polski Ludowej* [A History of the Political System and Law of People’s Poland] (Warszawa: Lexis Nexis, 2003), p. 390-391.

¹⁶⁴ Grodziski, ‘Prace...’, p. 27-28.

¹⁶⁵ The drafts were published in subsequent issues of the *Demokratyczny Przegląd Prawniczy* review in 1948.

¹⁶⁶ Łętowska and Piątowski, ‘Introduction’, p. 6.

¹⁶⁷ Act of 18.7.1950 – General provisions of civil law (Dz.U. no. 34 item 311).

¹⁶⁸ Act of 27.6.1950 – the Family Code (Dz.U. no. 34 item 308).

¹⁶⁹ Act of 20.7.1950 amending the rules of civil procedure (Dz.U.no. 38 item 349).

¹⁷⁰ Act of 20.7.1950 amending the Law of the Common Courts (Dz.U. no. 38, item 347).

¹⁷¹ *Projekt kodeksu cywilnego* [Draft Civil Code] (Warszawa 1954).

Sovietisation of Polish private law, with such characteristic institutions as special legal capacity of legal persons,¹⁷² stratification of ownership,¹⁷³ special rules for business transactions in the socialised sector of economy¹⁷⁴ or a limited freedom of disposing one's property upon death.¹⁷⁵ The draft did not receive a warm welcome in academic circles, which (probably out of fear of repressions) limited their critique to its formal aspects, such as lack of precision and terminological incoherence.¹⁷⁶ The Commission revised its draft, publishing a subsequent one in 1955.¹⁷⁷ Nevertheless, this draft remained predominantly based on the 2nd Draft, with only minor changes,¹⁷⁸ and ultimately failed to achieve government support.¹⁷⁹

The next year (1956) Poland witnessed a radical political breakthrough, marking the end of Stalinism and a departure from the policy of all-embracing Sovietisation of the country.¹⁸⁰ From the point of view of private law this meant that the 3rd draft of the Civil Code (1955) was discarded, and a new (third) codification commission was established.¹⁸¹ Opening its proceedings, the Deputy Minister of Justice openly stated that the 'period of blind imitation' of the Soviet model 'is over', and that Polish law 'will now go along its own path, following the

¹⁷² Skąpski, 'Kodeks...', p. 67-68.

¹⁷³ Ibid., 68.

¹⁷⁴ Ibid., 68.

¹⁷⁵ Ibid., 69

¹⁷⁶ Ibid., 69.

¹⁷⁷ *Projekt kodeksu cywilnego PRL* [Draft Civil Code of the Polish People's Republic] (Warszawa 1955)

¹⁷⁸ Skąpski, 'Kodeks...', p. 70.

¹⁷⁹ Kallas and Lityński, *Historia...*, p. 398.

¹⁸⁰ Skąpski, 'Kodeks...', p. 70-71.

¹⁸¹ Skąpski, 'Kodeks...', p. 71.

Polish road to socialism.”¹⁸² This new road meant that yet another (4th) draft Civil Code was finalised in 1959 and published in 1960.¹⁸³ Unlike the 2nd and 3rd Draft, the 4th Draft included provisions on family law. In addition to being considered as technically superior to the previous drafts, it also expanded the law of obligations to include new types of contracts, socialised legal relationships were regulated to a greater extent and family law was expanded.¹⁸⁴ Following discussions on the 4th Draft – mainly concerning family law and economic law – a 5th Draft was published in 1961¹⁸⁵ which was the final draft prepared by the Codification Commission.

The drafting was continued within the Ministry of Justice, which published the 6th Draft of the Civil Code in 1962,¹⁸⁶ containing some modifications to the 5th Draft.¹⁸⁷ The new draft itself was subject to further modifications:¹⁸⁸ new provisions were added on perpetual usufruct, state liability for damages and limitations on the freedom of alienation and division of farms. Although the book on family law was eventually excluded and placed in a separate code,¹⁸⁹ the

¹⁸² Reported in *Państwo i Prawo* 3 (1957), p. 621.

¹⁸³ *Projekt kodeksu cywilnego* [Draft Civil Code] (Warszawa 1960).

¹⁸⁴ Skąpski, ‘Kodeks...’, p. 74.

¹⁸⁵ *Projekt kodeksu cywilnego* [Draft Civil Code] (Warszawa 1961).

¹⁸⁶ *Projekt kodeksu cywilnego oraz przepisów wprowadzających kodeks cywilny wraz z uzasadnieniem* [Draft of a Civil Code and Transitory Provisions to the Civil Code, with Motives] (Warszawa 1962).

¹⁸⁷ Skąpski, ‘Kodeks...’, p. 74.

¹⁸⁸ *Ibid.*

¹⁸⁹ Act of 25.2.1964 – Family and Guardianship Code (*kodeks rodzinny i opiekuńczy*) (Dz.U. no. 9 item 59); referred to as ‘k.r.o.’

Civil Code was finally enacted in 1964¹⁹⁰ and entered into force of 1 January of the following year.

(b) the socialist Civil Code of 1964

What was characteristic of Poland's socialist Civil Code of 1964 was that it contained a mix of Western and Soviet elements.¹⁹¹ Traditionally civilian elements were represented within the Code by its pandectist structure (general part, property law, law of obligations, law of succession),¹⁹² but following the Soviet model,¹⁹³ family law was formally enacted in a separate Code which possessed neither a general part nor an independent conceptual framework; in practice it functioned as a fifth book of the Civil Code.¹⁹⁴ Inspired by the German Civil Code (1896) but following the Soviet model, the book on property law was placed before the book on obligations. According to Soviet authors, such

¹⁹⁰ Act of 23.4.1964 – Civil Code (*kodeks cywilny*) (Dz.U. no. 16 item 93; consolidated version as of 2014 published in: Dz. U. 2014 item 121), hereinafter: 'k.c.'

¹⁹¹ Wołodkiewicz, 'I cambiamenti...', p. 130; Nobert Reich, 'Transformation of Contract Law and Civil Justice in the New EU Member Countries', *Penn State International Law Review* 23 (2005): 587ff, p. 597; Rafał Mańko 'The Unification of Private Law in Europe from the Perspective of Polish Legal Culture', *Yearbook of Polish European Studies* 11 (20082009): 109-136, p. 118-122

¹⁹² Władysław Rozwadowski, 'Tradycje rzymskie w polskim prawie cywilnym' [Roman Traditions in Polish Civil Law] in *System prawa prywatnego* [System of Private Law] vol. I: *Prawo cywilne – część ogólna* [Civil Law – the General Part], ed. Marek Safjan (Warszawa: C.H. Beck, 2007), p. 7; Gianmaria Ajani, 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe', *American Journal of Comparative Law* 43 (1995): 93-117, p. 106; Gábor Hamza, *Wege der Entwicklung des Privatrechts in Europa* (Passau: Schenk, 2005), p. 151.

¹⁹³ Olimpiad S. Ioffe, *Soviet Civil Law* (Dordrecht-Boston-Lancaster: Martinus Nijhoff, 1988), p. 7-8, 15-16.

¹⁹⁴ Cfr. Aleksander Wolter, *Prawo cywilne. Zarys części ogólnej* [Civil Law. An Outline of the General Part] (Warszawa: Państwowe Wydawnictwo Naukowe, 1968), p. 23; Jerzy Ignatowicz, *Prawo rodzinne. Zarys wykładu* [Family Law: An Outline of a Lecture] (3rd ed., Warszawa: Wydawnictwa Prawnicze PWN, 1998), p. 20-21; Jan Winiarz and Janusz Gajda, *Prawo rodzinne* [Family Law] (Warszawa: Wydawnictwo Prawnicze PWN, 1999), p. 30-31; Elżbieta Skowrońska-Bocian, *Prawo cywilne. Część ogólna. Zarys wykładu* [Civil Law. General Part. Outline of a Lecture] (Warszawa: LexisNexis, 2005), p. 21; Marek Safjan, 'Pojęcie i systematyka prawa prywatnego' in *System prawa prywatnego* vol. I: *Prawo cywilne – część ogólna* [Civil Law – the General Part] (ed. by M. Safjan, Warszawa: C.H. Beck, 2007), p. 60.

a deliberate systemic modification served to underlie that property (rather than contract) is the cornerstone of society.¹⁹⁵ In pandectist spirit, the Civil Code was endowed with a general part containing such abstract notions as 'legal transaction'¹⁹⁶ and 'declaration of will'.¹⁹⁷ Legal subjects were divided into 'natural' and 'legal' persons.¹⁹⁸ In the part dealing with property law, we may find the typically civilian dualism of 'ownership' as opposed to 'limited real rights', the protection of ownership through an owner's action to recover property (*rei vindicatio*) and negatory action (*actio negatoria*),¹⁹⁹ and differentiation between ownership and possession.²⁰⁰ The law of obligations contained a traditional, general definition of an obligation,²⁰¹ a traditional catalogue of sources of obligations²⁰² (contracts,²⁰³ delicts,²⁰⁴ unjust enrichment,²⁰⁵ benevolent

¹⁹⁵ Ioffe, *Soviet Civil Law*, p. 15, 91.

¹⁹⁶ Book I, Title IV k.c. (Art. 56 to 94), regulating the effects, validity, interpretation of juridical acts, as well as condition and defects of a declaration of will.

¹⁹⁷ Cfr. Jan Wasilkowski and Aleksander Wolter, 'Projekt kodeksu cywilnego. Część ogólna' [The Draft Civil Code: General Part], *Demokratyczny Przegląd Prawniczy* 4.1 (1948): 10ff, p. 14 n. 22, who point out that the origins of the concept date back to the Prussian *Landrecht* of 1794, thus predating the Pandectist school.

¹⁹⁸ Certain other state-socialist legislations (e.g. Czechoslovakian) did not know the general notion of a legal person but only of a 'socialist organisation'. See Hubert Izdebski, 'General Survey of Developments in Eastern Europe in the Field of Civil Law' in *The Revival of Private Law in Central and Eastern Europe*, ed. G. Ginburgs, D.D. Barry, W.B. Simons (The Hague/London-Boston: Martinus Nijhoff, 1996), p. 10.

¹⁹⁹ Art. 222 k.c. Cfr. Rozwadowski, 'Tradycje...', p. 14.

²⁰⁰ Book III, Title IV k.c. Cfr. Rozwadowski, 'Tradycje...' p. 15.

²⁰¹ Art. 353 k.c.: '§ 1. An obligation shall consist of the creditor being entitled to demand performance from the debtor and the debtor being under a duty to perform. § 2. A performance may consist in an act or forbearance.' Cfr. Wienczyśław J. Wagner, *Obligations in Polish Law* (Leiden: A.W. Sijthoff, 1974), p. 6; Rozwadowski, 'Tradycje...', p. 16.

²⁰² Wagner, *Obligations...*, p. 6-7.

²⁰³ Book III, Title III k.c.: 'General Provisions on Contractual Obligations'.

²⁰⁴ Book III, Title VI k.c.: 'Unlawful Acts'.

²⁰⁵ Book III, Title V k.c.: 'Enrichment without Cause'.

intervention in another's affairs²⁰⁶) and modes of their extinction,²⁰⁷ as well as a number of traditionally codified contracts,²⁰⁸ mostly borrowed from two pre-socialist codes: the Code of Obligations²⁰⁹ and the Commercial Code.²¹⁰ Similar remarks may be made with regard to family law and the law of succession.²¹¹

Against this background of traditional private law, rooted in Western legal culture, we find, however, the other side of this Janus-faced Code: a number of principles and rules typical for the Socialist Legal Tradition. They merit special attention since it is by virtue of their presence that the Polish Civil Code of 1964 may be referred to as a socialist code.

The first peculiarity was the so-called 'principle of unity of the civil law'²¹² meaning that the Civil Code regulated both traditional private law relationships (as between citizens or private undertakings) and relationships between the so-called 'entities of the socialised economy' (*jednostki gospodarki uspołecznionej*) i.e. predominantly state undertakings and cooperatives, which

²⁰⁶ Book III, Title XXII k.c.: 'The Management of Another's Affairs without a Mandate'.

²⁰⁷ Book III, Title VII k.c. ('The Performance of Obligations and Consequences of Non-Performance', Title VIII: 'Compensation, Novation and Liberation from Debt', Title IX: 'Change of Creditor or Debtor' – cfr. Rozwadowski, 'Tradycje...', p. 17. In addition, one may also mention the traditional Paulian action in Title X of Book III – 'The Protection of Creditors in Case of the Debtor's Insolvency'.

²⁰⁸ Wagner, *Obligations...*, p. 10.

²⁰⁹ Regulation of the President of the Republic of 27.10.1933 – Code of Obligations (*kodeks zobowiązań*) (Dz.U. no. 82 item 598).

²¹⁰ Regulation of the President of the Republic of 27.6.1934 – Commercial Code (*kodeks handlowy*) (Dz.U. no. 57 item 502). See Rozwadowski, 'Tradycje...', p. 19-21.

²¹¹ Rozwadowski, 'Tradycje...', 21-28.

²¹² Cfr. art. 1 k.c.

were also subject to state control.²¹³ There would be nothing extraordinary about this, were it not for two significant factors. Firstly, the rules of the Civil Code (having statutory legal force) could be derogated from by any act of the central administration with regard to so-called 'socialised transactions'.²¹⁴ Secondly, the entities of the socialised economy were quite peculiar legal persons as will be discussed later. A consequence of the principle of unity of civil law was the rejection, on the one hand, of commercial law as a regulator of business transactions²¹⁵ and, on the other hand, the refusal to officially create a distinct body of 'economic law' to regulate 'socialised legal relationships'.²¹⁶ Article 2 of the Civil Code, permitting the government to regulate transactions between entities of the socialised economy in a manner other than dictated in the Civil Code, was resorted to frequently, thus *de facto* leading to the creation of a distinct body of civil law known as the 'law of socialised transactions'.²¹⁷

The second peculiarity was the replacement of traditional general clauses, such as 'good faith', 'good customs' and 'equity', with new, socialist general

²¹³ Seweryn Szer, *Prawo cywilne. Część ogólna* [Civil Law. The General Part] (Warszawa: Państwowe Wydawnictwo Naukowe, 1967), p. 12; Wolter, *Prawo cywilne...* (1968), p. 17; Łętowska and Piątkowski, 'Introduction', p. 8-14. On entities of the socialised economy in general see e.g. L. Kos-Rabcewicz-Zubkowski, 'Civil Law Aspects of Commerce and Trade', in *Polish Civil Law*, ed. Dominik Lasok (Leyden: Sijthoff, 1975), vol. 3, p. 74-77.

²¹⁴ Art. 2 k.c.

²¹⁵ Aleksander Wolter, *Prawo cywilne. Część ogólna* [Civil Law: the General Part] (Warszawa: Państwowe Wydawnictwo Naukowe, 1955), p. 16; Wolter, *Prawo cywilne...* (1968), p. 14.

²¹⁶ Wolter, *Prawo cywilne...* (1968), p. 17-20. For a general account on the notion of 'economic law' (*Wirtschaftsrecht*) in the socialist context see Tomasz Giaro, 'Aufstieg und Niedergang des sozialistischen Zivilrechts: von der Ideologie zur Rechtsdogmatik der Pauschalenteignung' in *Recht im Sozialismus: Analysen zur Normdurchsetzung in Osteuropäischen Nachkriegsgesellschaften (1944/45 - 1989)*, ed. Gert Bender and Udo Falk, Bd 1: *Enteignung* (Frankfurt am Main: Vittorio Klostermann, 1999), 217-317, pp. 272-276. Cfr. Marek Furtek, 'Czy kryzys prawa cywilnego?' [A Crisis of Civil Law?] *Res Publica* 2 (1988): 26ff, p. 26-27.

²¹⁷ See e.g. Stefan Buczkowski and Zygmunt Konrad Nowakowski, *Prawo obrotu u społęcznionego* [The Law of Socialised Transactions] (2nd ed., Warszawa: Państwowe Wydaw. Naukowe, 1975).

clauses, such as the ‘principles of social co-existence and the ‘socio-economic purpose of a right’.²¹⁸

The third element responsible for providing the Civil Code with a characteristically state-socialist flavour²¹⁹ was the so-called ‘special legal capacity of legal persons’²²⁰ (as opposed to the general capacity of legal persons as in market economy legal systems²²¹). Legal persons, primarily entities of the socialised economy (including co-operatives), were only endowed with such legal capacity as was necessary in order to allow them to perform their allotted functions.²²² All ultra vires juridical acts were automatically null and void. This meant that the actual content and scope of such special legal personality was to be found elsewhere than within the Civil Code itself.²²³ This feature – imported from Soviet law²²⁴ – was typically state-socialist because it was closely linked to centrally planned economic system in which each entity of the socialised economy was intended to have a determined, distinct area of its economic activity. In market-economy legal systems – as the Polish legal system after 1990

²¹⁸ For details see Chapter IV, sections 2 and 3 below.

²¹⁹ For Soviet law see Ioffe, *Soviet Civil Law*, p. 35-36.

²²⁰ Łętowska and Piątowski, ‘Introduction’, p. 28; Andrzej Stelmachowski, ‘Przemiany polityczne 1989 r. a model prawa własności’ [The Political Changes of 1989 and the Model of the Right of Ownership] in *Przekształcenia własnościowe w Polsce (determinanty prawne)* [Reforms of Property in Poland (Legal Determinants)], ed. Stanisław Prutis (Białystok: Temida2, 1996), p. 17; Czesława Żuławska, ‘Dwadzieścia pięć lat reformowania prawa cywilnego materialnego. Kronika – wspomnienia – refleksje’ [Twenty-Five Years of Reforming Substantive Civil Law], *Kwartalnik Prawa Prywatnego* 16.2 (2007): 305ff, p. 310, 312.

²²¹ Cfr. Ajani, ‘By Chance...’, p. 107.

²²² Art. 36 k.c.; Łętowska and Piątowski, ‘Introduction’, p. 28.

²²³ Stelmachowski, ‘Przemiany...’, p. 17.

²²⁴ Cfr. Art. 12 of the Fundamentals of Civil Legislation of the USSR and Union Republics of 1961 (English text available in: *Soviet Civil Legislation and Procedure: Official Texts and Commentaries* (Moscow: Foreign Languages Publishing House, no year of publication): 55-114) (hereinafter: ‘Fundamentals (1961)’).

– the legal capacity of legal persons is not limited, since it is assumed that legal persons, especially companies, may undertake any type of activity (in line with the principle of freedom of economic activity²²⁵) and should not be constrained by private-law rules only to a certain field of entrepreneurship (another issue is the need of obtaining permits or concessions for certain types of economic activity as a matter of public law).

The centrally planned economic system²²⁶ also exerted an influence upon the system of civil law by way of special provisions regarding the duty of entities of socialist economy to enter into a contract which followed from the economic plan.²²⁷ Such a duty was a ‘normal, everyday phenomenon’ of Polish legal culture in the socialist period.²²⁸ It was sanctioned not only by any applicable administrative measures but also by a civil-law sanction.²²⁹ If an entity refused to enter into such a contract, it could be sued (before the State Economic Arbitration, ‘SEA’) by another entity. The SEA then decided that a contract has been concluded and determined its content²³⁰ which had binding effects on the parties: a decision of the SEA replaced the parties’ autonomous will.²³¹ Administrative decisions could also give rise to civil-law obligations directly,

²²⁵ See Art. 1 of the Act of 23.12.1988 on economic activity (Dz.U. no. 41 item 324).

²²⁶ On which see e.g. Janusz Skodlarski, *Zarys historii gospodarczej Polski* [An Outline of Polish Economic History] (Warszawa: Wydawnictwo Naukowe PWN, 2007), p. 392ff.

²²⁷ K.c., Book III – ‘Obligations’, Title IV – ‘The Duty of Concluding Contracts Between the Entities of the Socialised Economy’ in book three on the law of obligations

²²⁸ Paul A.M. Meijknecht, *Planverbintenissen: Vormgeving aan privaatrechtelijke verbintenissen in het bijzonder ten dienste van he economisch beleid, mede gezien tegen de achtergrond van het Poolse recht* [Plan Obligations: The Formation of Private Law Obligations Especially in the Economic Interest also Viewed Against the Background of Polish Law] (Zwolle: W.E.J. Tjeenk Willink, 1979), p. 87.

²²⁹ Ibid.

²³⁰ Art. 398 § 1 k.c..

²³¹ Art. 64 k.c.

without the interference of the contractual stage, thus becoming independent sources of civil-law obligations;²³² however, this way of organising the civil-law relationships between the entities of socialised economy was rather infrequently resorted to after 1956.²³³

The fourth socialist aspect of the Civil Code was the barring of claims between entities of socialised economy²³⁴ which could be taken into account by a court or arbitration commission of its own motion.²³⁵ This form of prescription displaced the traditional limitative prescription of claims (limitation of actions) whereby the creditor-plaintiff was still entitled to pursue a claim but the debtor-defendant was entitled to plead the defence of prescription.²³⁶

Further peculiarities existed in respect to the law of property. Both property (*mienie*) in general and specifically the right of ownership (*prawo własności*) were divided into socialised property/ownership, personal property/ownership and individual property/ownership.²³⁷ Socialised property/ownership was itself subdivided into ‘national property/ownership’

²³² Art. 403 § 1 k.c.

²³³ Meijknecht, *Planverbintenissen...*, p. 88.

²³⁴ Wołodkiewicz, ‘I cambiamenti...’, p. 132; Żuławska, ‘Dwadzieścia pięć...’, p. 312.

²³⁵ Art. 117 § 2-3 k.c. Under Art. 118 k.c. the period of prescription for claims arising from transaction between units of socialised economy amounted to one year. The solution that courts could take prescription into account on their own motion was also inspired by Soviet law (see Ioffe, *Soviet Civil Law*, p. 86).

²³⁶ This was the position of Art. 272 k.z. which explicitly prohibited judges from applying prescription of their own motion. Cfr. Roman Longchamps de Bérier, *Polskie prawo cywilne. Zobowiązania* [Polish Civil Law: Obligations] [1939] (Poznań: Ars Boni et Aequi, 1999) [hereinafter: *Zobowiązania*], p. 415. This position was maintained under Art. 106 of the General Provisions of Civil Law of 1950. Cfr. Wolter, *Prawo cywilne...* (1955), p. 330.

²³⁷ Art. 44 k.c. Łętowska and Piątowski, ‘Introduction’, p. 37-46; cfr. Wołodkiewicz, ‘I cambiamenti...’, p. 132-133. As regards the Soviet model and the manner in which it pursued such a division, see Ioffe, *Soviet Civil Law*, p. 95ff; Giaro, ‘Aufstieg...’, p. 258-259.

(state-owned) and 'group property/ownership' (owned by co-operatives).²³⁸ Individual ownership comprised means of production²³⁹ whereas personal ownership was, in principle, limited to housing and movable property.²⁴⁰ The differentiation of property rights had practical consequences for the level of protection afforded to each distinct right, with socialised property and ownership emerging privileged and being afforded a much greater protection.²⁴¹ Evidence of the protective balance being tilted in favour of the latter may be found in legal provisions creating a general rule of interpretation in its favour²⁴² and imposing a duty upon all citizens to protect this right.²⁴³ Furthermore, socialised property and ownership were exempted from the possibility of compulsory purchase orders.²⁴⁴ Even outside the field of civil law, the differentiation of property rights had legal consequences, e.g. in the field of tax law.²⁴⁵ As regards adverse possession (usucaption), following the Soviet model,²⁴⁶ state property was protected from this institution.²⁴⁷ Furthermore,

²³⁸ For details see Jan Wasilkowski and Marek Madey, *Prawo własności w PRL. Zarys wykładu* [The Right of Ownership in Poland: Outline of a Lecture] (Warszawa: Państwowe Wydawnictwo Naukowe, 1969), 58ff.

²³⁹ Art. 130-131 k.c. Cfr. Wasilkowski and Madey, *Prawo...*, p. 67ff.

²⁴⁰ Art. 132-134 k.c. Wasilkowski and Madey, *Prawo...*, p. 86ff.

²⁴¹ Stelmachowski, 'Przemiany...', p. 18; Wołodkiewicz, 'I cambiamenti...', p. 133. Stelmachowski actually draws an analogy with feudalism wherein certain forms of property were also privileged.

²⁴² Art. 129 k.c.

²⁴³ Art. 127 k.c.

²⁴⁴ Art. 177 k.c.

²⁴⁵ Stelmachowski, 'Przemiany...', p. 18.

²⁴⁶ Soviet law did not know adverse possession but claims to return an object of personal property could be time-barred: this rule was not applicable to state property. See Ioffe, *Soviet Civil Law*, p. 90.

²⁴⁷ Art. 177 k.c. However, this protection extended only to strictly state property and not to other forms of social property such as cooperative property or the property of associations.

a high tax on acquiring property under the doctrine of adverse possession (up to 72% of the value of the estate) effectively paralysed the functioning of the institution.²⁴⁸

In one aspect the Polish Civil Code was more socialist than Soviet law: whilst in Soviet civil law the only limit on the scope of the right of ownership was 'the law',²⁴⁹ the drafters of the Polish Civil Code imposed two additional limits upon the very content of the right of ownership: the principles of social coexistence and the socio-economic purpose of the right.²⁵⁰ a practical consequence of the limitation of the content, and not only exercise, of the right of ownership by way of general clauses meant that they could be applicable also outside the context of an alleged abuse of the right by its holder,²⁵¹ and the burden of proof of legality of exercise of the right of ownership was transferred onto the owner.²⁵² In the context of ownership, the two general clauses factored into the right itself were interpreted to the detriment of private property – the doctrine of principles of social life was understood as the priority of social interest over private interest, and the doctrine of socio-economic purpose was construed as a reference to central planning and to the gradual elimination of private property.²⁵³ In practice, the very definition of the right of ownership

²⁴⁸ Anna Machnikowska, *Prawo własności w Polsce w latach 1944-1981. Studium historycznoprawne* [The Right of Ownership in Poland Between 1944 and 1981: A Study in Legal History] (Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego, 2010), p. 399.

²⁴⁹ Art. 19 of the Fundamentals (1961); Ioffe, *Soviet Civil Law*, p. 92-93.

²⁵⁰ Art. 140 k.c.

²⁵¹ Machnikowska, *Prawo własności*, p. 334-335.

²⁵² *Ibid.*, p. 393.

²⁵³ *Ibid.*, p. 395.

could, therefore, be the legal basis of expropriation, for instance if the owner of a farm was not cultivating the land.²⁵⁴

In accordance with a Soviet doctrine concerning the ‘uniform fund of state ownership’,²⁵⁵ all state ownership was held exclusively by the state,²⁵⁶ which had significant consequences for the legal regime governing state enterprises. Such enterprises were precluded from disposing of their property, whether ownership or limited real rights,²⁵⁷ and were only permitted to exercise ‘operative management’ over the state property entrusted to them.²⁵⁸ Accordingly, it was impossible for state enterprises to become bankrupt.²⁵⁹ Sale contracts entered into between two state enterprises merely provided for transfer of possession of the relevant property and not for transfer of its ownership, since the property itself would remain state owned.²⁶⁰ Although the State Treasury was not,

²⁵⁴ Ibid., p. 395-396.

²⁵⁵ Fundamentals (1961), art. 21(1). See also Wasilkowski and Madey, *Prawo...*, p. 28ff; Stelmachowski, ‘Przemiany...’, p. 19-20; Żuławska, ‘Dwadzieścia pięć...’, p. 309. Cfr. Giaro, ‘Aufstieg...’, p. 278-280.

²⁵⁶ Art. 128 § 1 k.c.

²⁵⁷ Żuławska, ‘Dwadzieścia pięć...’, p. 309.

²⁵⁸ Art. 128 § 2 k.c.: ‘Within the limits of their legal capacity state legal persons shall exercise in their own name the rights which follow from state ownership with regard to the parts of the national patrimony which they manage.’ The notion itself of ‘operative management’ originates in Soviet law – see Ioffe, *Soviet Civil Law*, p. 93. However, in Soviet civil law the right of operative management was also limited by planning tasks (ibid.). Scholars have attempted to compare operative management to the medieval *duplex dominium* (e.g. the Soviet scholar V.P. Shredov as well as H.J. Berman, both cited by Ioffe, ibid., p. 94); however, it seems that it could rather be compared to the ancient *precarium* (cfr. Ioffe, ibid., p. 95: ‘the Soviet state may withdraw any property from state organizations *ad libitum* (...). The state, of course, can thus act solely as the owner, not as a subject who shares its ownership with its own organizations.’).

²⁵⁹ Żuławska, ‘Dwadzieścia pięć...’, p. 309.

²⁶⁰ Art. 535 § 2 k.c. Cfr. Alfred Ohanowicz and Józef Górski, *Zobowiązania. Część szczegółowa* [The Law of Obligations: The Specific Part] (Warszawa-Poznań: Państwowe Wydawnictwo Naukowe, 1964), p. 10-11; Kos-Rabcewicz-Zubkowski, ‘Civil-law aspects...’, p. 57; Giaro, ‘Aufstieg...’, p. 283; Żuławska, ‘Dwadzieścia pięć...’, p. 309. Similarly under Soviet law – see

theoretically, liable for the debts of state enterprises, in practice such debts were covered by the state budget.²⁶¹ In consequence, the liability of state undertakings was *de facto* unlimited.²⁶²

Further socialist peculiarities within the law of property included the creation of two limited real rights – ‘perpetual usufruct’ and ‘proprietary right to an apartment in a co-operative’, the latter of which was hitherto unknown in Polish law. Both will be discussed in Chapter V as legal survivals within substantive private law.

The law of obligations contained further characteristically socialist aspects, amongst them the absolute nominalism of monetary obligations,²⁶³ the judiciary’s inability to reinterpret a contract following a serious change of circumstances,²⁶⁴ the obligation to enter into contracts provided for by the national economic plan²⁶⁵ and specific government-issued rules governing standard terms which frequently altered the manner in which contracts were regulated by the Civil Code. Nowhere was the freedom of contract principle expressly proclaimed²⁶⁶ and, in practice, it was notably absent with regard to socialised commerce, since contracts were subject to the economic plan and

Ioffe, *Soviet Civil Law*, p. 215. For an attempt to explain the sale between socialised units as the transfer of ‘quasi-ownership’ see Witold Czachórski, *Prawo zobowiązań w zarysie* [The Law of Obligations in Outline] (Warszawa: Państwowe Wydawnictwo Naukowe, 1968), p. 416-417.

²⁶¹ Żuławska, ‘Dwadzieścia pięć...’, p. 309-310.

²⁶² *Ibid.*, p. 310.

²⁶³ Art. 358 § 2 k.c. Cfr. Wołodkiewicz, ‘I cambiamenti...’, p. 134.

²⁶⁴ Wołodkiewicz, ‘I cambiamenti...’, p. 134.

²⁶⁵ Book III, Title IV k.c.; Wołodkiewicz, ‘I cambiamenti...’, p. 134; Giaro, ‘Aufstieg...’, p. 281-282; Żuławska, ‘Dwadzieścia pięć...’, p. 313. For the position of Soviet law see Ioffe, *Soviet Civil Law*, p. 152-154.

²⁶⁶ Wagner, *Obligations...*, p. 45-46.

administrative decisions imposed from above.²⁶⁷ The inclusion of transactions between state undertakings under the umbrella of the Civil Code, termed as the principle of unity of civil law, was criticised as leading to the ‘degradation’ of the civil law itself, which was treated by the management of those undertakings as an unnecessary burden and formality.²⁶⁸

(c) procedural private law

Following World War II, Polish procedural private law underwent serious modifications affecting its core principles. A notable shift occurred away from the hitherto applicable principle of autonomy towards the principle of an active court acting on its own motion.²⁶⁹ The most important aspects of this direction of reform were embodied in the prosecutor’s right of action and intervention (discussed in detail in Chapter VII); judicial control over the plaintiff’s ability to unilaterally discontinue proceedings (from the perspective of the principles of social life); and the right of the court to make an award beyond the plaintiff’s claim.²⁷⁰ The principle of adversarial proceedings was limited in favour of the inquisitorial principle, and the court was under a duty to investigate the case thoroughly (e.g. by gathering evidence on its own motion or by way of investigation),²⁷¹ even if the parties remained passive. A ‘revision’ (*rewizja*, appeal to the second instance) could be based on the ground that the trial court

²⁶⁷ Żuławska, ‘Dwadzieścia pięć...’, p. 313-314.

²⁶⁸ Furtek, ‘Czy kryzys prawa cywilnego?’ [A Crisis of Civil Law?] *Res Publica* 2 (1988), p. 28.

²⁶⁹ See e.g. Andrzej Jakubecki, ‘Naczelne zasady postępowania cywilnego w świetle nowelizacji kodeksu postępowania cywilnego’ [Fundamentals Principles of Civil Procedure in the Light of an Amendment of the Code of Civil Procedure], in *Czterdziestolecie kodeksu postępowania cywilnego* [Forty Years of the Code of Civil Procedure] (Kraków: Zakamycze, 2006), p. 352. Cfr. Feliks Zedler, ‘Co dalej z kodeksem postępowania cywilnego?’ [What to do Further with the Code of Civil Procedure?] in *Czterdziestolecie...*, p. 324.

²⁷⁰ Cfr. Jakubecki, ‘Naczelne zasady...’, p. 352-353.

²⁷¹ Art. 3 § 2 of the Polish Code of Civil Procedure (hereinafter: ‘k.p.c.’).

failed to thoroughly investigate all the circumstances of the case.²⁷² The Court was under a special duty to protect social property²⁷³ and this duty was elevated to one of the fundamental principles of civil procedure. Finally the principle of substantive (objective) truth displaced the principle of formal truth, obliging the court to find out the actual content of factual and legal relationships.²⁷⁴

The hitherto existing French model of appellate proceedings, with an appeal (on points of fact and law) and a cassation (on a point of law), was repealed and replaced by a two instance system, modelled on Soviet law, with a revision (modelled on the Soviet cassation) and an extraordinary revision (modelled on the Soviet supervisory instance proceedings).²⁷⁵

It should be borne in mind that the Code of Civil Procedure applied only to a relatively limited number of cases, since all disputes between entities of the socialised economy were decided by the State Economic Arbitration, another legal transplant from Soviet law, introduced in 1949.²⁷⁶ The SEA was competent if both parties were 'entities of the socialised economy', that is state-owned undertakings (including state farms), cooperatives and their unions, farmers' unions, economic organisations of the crafts, any other economically active social organisations and companies in which the State or entities of the socialised economy held more than 30% of their assets.²⁷⁷ Proceedings before the

²⁷² Jakubecki, 'Naczelne zasady', p. 358.

²⁷³ Art. 4 k.p.c. (original text).

²⁷⁴ Art. 3 § 2 k.p.c.(original text).

²⁷⁵ For details see Chapter V, section 3 below.

²⁷⁶ Zedler, 'Co dalej...', p. 324; Kos-Rabcewicz-Zubkowski, 'Civil-law aspects...', p. 30-31; Meijknecht, *Planverbintenissen...*, p. 102-106; Kallas and Lityński, *Historia...*, p. 249.

²⁷⁷ Act of 23.10.1975 on the State Economic Arbitration (Dz.U. nr 34 item 183, 'SEA Act 1975'), art. 3(1)(2)-(6).

SEA were aimed not only at dispute-resolution, but also at safeguarding the socialist rule of law, protection of the legal order and of the social interest; in fact, interests of the litigants were accorded a secondary role, to be taken into account only if they accorded with the social interest.²⁷⁸ Arbitrators of the SEA were not, formally speaking, judges, but the criteria of their appointment and dismissal were similar.²⁷⁹

3 The transformation and beyond

A Political transformation

According to Naomi Klein,

‘authoritarian regimes have a habit of embracing democracy at the precise moment when their economic projects are about to implode. Poland was no exception.’²⁸⁰

Indeed, in the 1980s an ideological consensus between the neoliberal/neoconservative wing of the opposition and the liberal wing of the Polish United Workers’ Party (PZPR) enabled a peaceful transformation from actually existing socialism to democracy and a market economy,²⁸¹ and by mid-1988 PZPR leaders had conceded to share their political power and responsibility for the country with the hitherto illegal opposition movement. This unprecedented peaceful transfer of power was first negotiated within the

²⁷⁸ SEA Act 1975, art. 1-2; cfr. Kallas and Lityński, *Historia...*, p. 251.

²⁷⁹ To become appointed to the post of an arbitrator, the candidate had, *inter alia*, to be a lawyer and complete an arbitrator’s apprenticeship. Arbitrator’s could be dismissed if they did not give ‘guarantee’ of fulfilling their duties correctly (SEA Act 1975, art. 18(1)(2)), a general clause found also in the judiciary acts of the socialist period.

²⁸⁰ Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (New York: Metropolitan Books, 2007), p. 175.

²⁸¹ Cfr. Sowa, ‘Unexpected Twist’, p. 172.

framework of the famous 'Round Table' talks between representatives of the PZPR and opposition leaders, which lasted between February and April 1989. The deal struck by PZPR and the 'Solidarity' Independent and Self-Governing Trade Union (*NSZZ 'Solidarność'*, hereinafter: 'Solidarity') provided for significant political reforms, including partly pluralist parliamentary elections to be held on 4 June 1989 and the legalisation of the Solidarity trade union. It involved an amendment of the 1952 constitution.²⁸² Following the 1989 elections, in which Solidarity won 260 of the 261 seats subject to free voting,²⁸³ a coalition government of PZPR members and Solidarity members was formed in September 1989.

On 31.12.1989 the Parliament of the Polish People's Republic adopted an amendment to the Constitution,²⁸⁴ symbolically changing the name of the country to 'Republic of Poland' (which had also been used until 1952) and reintroducing the crown on the head of the eagle on the national emblem (which had been used in the 2nd Republic). Nevertheless it must be kept in mind that the newly-born 'Third Republic' (as Poland came to be known from 1989 onwards) was for all internal and external purposes, a legal continuation of the hitherto Polish People's Republic, possessing the same constitution that had been in force since 1952 and continuing its international relationships and treaty obligations.

The further two steps of the Polish transformation were the pluralist presidential elections (1990) and the first fully pluralist parliamentary elections

²⁸² Act of 7.4.1989 amending the Constitution of the Polish People's Republic (Dz.U. no. 19, item 101).

²⁸³ Klein, *Shock Doctrine...*, p. 174-175.

²⁸⁴ Act of 29.12.1989 amending the Constitution of the Polish People's Republic (Dz.U. no. 75, item 444).

(1991), followed by the enactment of a 'Small Constitution' the next year.²⁸⁵ Finally, in 1997 a new Polish constitution was enacted,²⁸⁶ replacing the 1952 constitution (alongside the 'Small Constitution') and creating a system of parliamentary democracy with a president elected in general elections. From the point of view of constitutional law, this moment marked the completion of the process of transformation commenced eight years later.

B Socio-Economic Transformation

The introduction, as from 1 January 1990, of a package of neoliberal reforms known as the 'Balcerowicz plan', or the 'shock therapy',²⁸⁷ is perhaps the best symbolic date delimiting the end of state socialism and the beginning of Poland's neoliberal market economy. Although, as I showed in the previous section, the more or less informal privatisation of state property, by way of so-called '*nomenklatura* privatisation' started already in the second half of the 1980s and elements of the central planning began to be dismantled, the shock therapy changed Poland in a revolutionary way. As Naomi Klein pointed out,

'[a]n economic meltdown and a heavy debt load, compounded by the disorientation of rapid regime change, meant that Poland was in the perfect weakened position to accept a radical shock therapy program.'²⁸⁸

This programme was implemented by a coalition government, uniting PZPR members with opposition activists. The mastermind of the shock therapy was a professor of the Warsaw School of Economics, Leszek Balcerowicz, the

²⁸⁵ Constitutional Act of 17.10.1992 regarding the mutual relationships between the legislative and executive power of the Republic of Poland and local self-government (Dz.U. no. 84, item 426).

²⁸⁶ Constitution of the Republic of Poland of 2.4.1997 (Dz.U. no. 78, item 483).

²⁸⁷ For a broader context of the element of shock in the imposition of neoliberal socio-economic models, see Klein, *Shock Doctrine...*, passim.

²⁸⁸ Klein, *Shock Doctrine...*, p. 176.

minister of finance at the time, and a convinced neoliberal economist,²⁸⁹ aided by two American neoliberal economists, academic Jeffrey Sachs assisted by his associate, IMF economist David Lipton.²⁹⁰ The therapy, advocated by the International Monetary Fund,²⁹¹ was based on the neoliberal paradigm in economics with such fundamental tenets as, first of all, the superiority of private ownership over any other form of ownership (co-operative, public, social, state),²⁹² secondly, a theory of the enterprise according to which its only aim is the maximisation of profit²⁹³ and thirdly the belief that the free market is the most effective regulator of the economy.²⁹⁴

The essential elements of Poland's shock therapy comprised the introduction of extremely high interest rates,²⁹⁵ tight controls on money supplies, the abolition of government controls of prices, the introduction of bankruptcy procedures, drastic austerity measures affecting particularly social welfare and subsidies, and the opening up of Poland to international trade by a reduction of tariffs.²⁹⁶ The next step, which began to be implemented right from the very beginning, was the mass privatisation of state enterprises, in 'direct clash with Solidarity's economic program of worker ownership'.²⁹⁷

²⁸⁹ Dunn, *Privatizing...*, p. 34-35; Klein, *Shock Doctrine...*, p. 179.

²⁹⁰ Klein, *Shock Doctrine...*, p. 177-178.

²⁹¹ Hardy, *Poland's...*, p. 28-29.

²⁹² Zalewa, *Transformacja...*, p. 23.

²⁹³ Ibid. For a critique of this reductionist perspective see *ibid.*, p. 23-27.

²⁹⁴ Ibid., p. 27-32.

²⁹⁵ Interest rates for existing and future debts rose instantly from 8% p.a. to 120% p.a., leading many enterprises to bankruptcy (Zalewa, *Transformacja...*, p. 70) in what was perceived by the authors of the shock therapy as a form of 'creative destruction' (*ibid.*, p. 59).

²⁹⁶ Dunn, *Privatizing...*, p. 35; Hardy, *Poland's...*, p. 28-29, 56.

²⁹⁷ Klein, *Shock Doctrine...*, p. 177.

The shock therapy was introduced overnight without any prior social consultations²⁹⁸ and against the social consensus,²⁹⁹ drawing on the 'disorientation of rapid political change combined with the collective fear generated by an economic meltdown'.³⁰⁰ In short, the neoliberal economic plan was introduced at a moment when the new-born Polish democracy was (still) 'off guard', to use Naomi Klein's expression.³⁰¹ Therefore, the shock therapy has even been compared to the introduction of martial law in 1981.³⁰² Actually, Balcerowicz himself spoke of what he did as 'extraordinary politics', understood as an exception from the normal democratic procedures entailing consultations and debates.³⁰³

A priori treating state enterprises as ineffective,³⁰⁴ the neoliberal reformers decided to introduce discriminatory tax measures directed against them.³⁰⁵ These included the so-called 'dividend' imposed on state enterprises³⁰⁶

²⁹⁸ Zalewa, *Transformacja...*, p. 59; Hardy, *Poland's...*, p. 209.

²⁹⁹ Zalewa, *Transformacja...*, p. 59.

³⁰⁰ Klein, *Shock Doctrine...*, p. 181.

³⁰¹ *Ibid.*, p. 146 (expression used with regard to Bolivia, but the description fits the Polish transformation equally well).

³⁰² Cfr views of sociologist Maciej Gdula cited in Grzegorz Rudynek, 'Krytyka Polityczna: Plan Balcerowicza jak stan wojenny' [*Krytyka Polityczna: Balcerowicz Plan like Martial Law*], wyborcza.pl 16/2/2009, accessible online at: http://wyborcza.pl/1,75248,7369024,Krytyka_Polityczna_Plan_Balcerowicza_jak_stan_wojenny.html (last accessed: 19/11/2013).

³⁰³ Klein, *Shock Doctrine...*, p. 181.

³⁰⁴ Zalewa, *Transformacja...*, p. 81.

³⁰⁵ *Ibid.*, p. 70-71.

³⁰⁶ The so-called 'dividend' was introduced by the Act of 31.1.1989 on the financial management of state enterprises (Dz.U. no. 3 item 10), art. 9-16, as a determined percentage of the state enterprise's 'founding capital'. The exact percentage of this capital tax was determined freely by the legislature in the yearly budget act.

calculated in an arbitrary manner³⁰⁷ which was in fact a property tax, as well as a tax on pay rises in the public sector.³⁰⁸ The abolition of import duties on imports of final products and the introduction of such barriers on imports of raw materials and partly transformed products had an adverse effect upon the industrial sector.³⁰⁹

The privatisation of state enterprises was based on an act of 1990,³¹⁰ drafted in very broad terms, without any indications as to the aims, direction and speed of the process nor the methodology of evaluating the value of the privatised entities.³¹¹ The legal provisions granted special powers to the Government, thus insulating the privatisation process from other stakeholders (employees, society at large represented by Parliament etc.).³¹² Contrary to the convictions of society at large that privatisation should lead to an equitable distribution of wealth,³¹³ the process took the form of a bargain sale of the majority of Polish enterprises to international capital.³¹⁴

³⁰⁷ Zalewa, *Transformacja...*, p. 70-71 points out that the value of the 'founding capital' of state enterprises was overestimated 11 times.

³⁰⁸ The legal basis for the *popiwiek* tax was Chapter 3a of Act of 26.2.1982 on the taxation of units of socialised economy (Dz.U. 1982 no. 7 item 55) the Units of Socialised Economy (Taxation) Act 1982 as amended by the Act of 31.7.1985 adapting the provisions of certain acts regulating the functioning of the economy to the conditions and needs of further socio-economic development of the country (Dz.U. no. 37 item 174). The limits on pay rises were set in a discretionary manner by the Council of Ministers; the level of the tax was set by the same Council between 40% and 500% of the 'excessive' remunerations paid (see Art. 29c of the aforementioned act).

³⁰⁹ Zalewa, *Transformacja...*, p. 72.

³¹⁰ Act of 13.7.1990 on the privatisation of state enterprises (Dz.U. no. 51 item 298).

³¹¹ Zalewa, *Transformacja...*, p. 79.

³¹² *Ibid.*, p. 80.

³¹³ Dunn, *Privatizing...*, p. 36-37.

³¹⁴ I omit from my discussion the so-called 'universal privatization programme' (*program powszechnej prywatyzacji*) which, despite a complicated mechanism and the purported aim of

C Private law: removing key elements of the period of actually existing socialism

The radical socio-economic and political transformation which occurred in Poland at the turn of the 1980s and 1990s had an immense impact upon private law. Indeed, as I have already indicated, the legal survivals studied in this dissertation are rather exceptions against the dominant current of radical changes in Polish private law. However, first of all it is necessary to draw attention to the continuity of the general scheme of the legal framework for private-law relationships. Neither of the three codes of private law (Civil Code, Family Code, Code of Civil Procedure) has been repealed, although all have been more or less profoundly amended. The continuity of the structural coordinates of private law as codified in the mid-1960s remains, nevertheless, remarkable.

The Civil Code was the first of the three private law codes to undergo post-socialist reforms. These were enacted essentially in three main waves – 1990, 1996 and 2000. The first reform of 1990³¹⁵ removed a vast majority of typically state-socialist institutions of private law, such as the special legal capacity of legal persons, the stratification of property (with a privileged position of state property), rules on business transactions between entities of socialised economy. Instead, new liberal principles were reintroduced, such as the principle of the freedom of contract,³¹⁶ the change of circumstances (*rebus sic stantibus*) clause³¹⁷ as well as the first consumer protection measures.³¹⁸ The

giving ownership powers to all citizens, ended up as a complete failure (Zalewa, *Transformacja....*, p. 85-86). The value of a 'participation certificate' in the programme was equal to a pair of discount shoes (economist Ryszard Bugaj cited after *ibid.*, p. 86).

³¹⁵ Act of 28.7.1990 (Dz.U. no. 55, item 321).

³¹⁶ Art. 353¹ k.c.

³¹⁷ Art. 357¹ k.c.

second major reform of 1996³¹⁹ amended the rules on conclusion of contract and sales, as well as the rules on change of circumstances. The third major reform of 2000³²⁰ inaugurated the Europeanisation of the Polish Civil Code by introducing rules on unfair terms in consumer contracts³²¹ and on product liability.³²² Traditional general clauses – ‘good morals’ and ‘equity’ began to be reintroduced to the Code.³²³ Since then, the Civil Code has been amended many times, in particular in 2003,³²⁴ when a general definition of consumer and trader were introduced to the General Part,³²⁵ further contributing to the Code’s Europeanisation.

The Code of Civil Procedure remained intact in its state-socialist character until 1996. It was only then that a first major reform was effected,³²⁶ whereby the Soviet-inspired system of two-instance proceedings (trial and revision) was replaced by the French model of three-instance proceedings (trial, appellate proceedings, cassation proceedings).³²⁷ The typically Soviet institution of the extraordinary revision was abolished. Furthermore, the guiding principles of state-socialist civil procedure (inquisitorial trial) were replaced by liberal

³¹⁸ Art. 385¹ – 385² k.c.

³¹⁹ Act of 23.8.1996 (Dz.U. no. 114, item 542).

³²⁰ Act of 2.3.2000 (Dz.U. 2000 nr 22 poz. 271).

³²¹ Art. 385¹ – 385³ k.c.

³²² Art. 449¹ – 449¹¹ k.c.

³²³ See e.g. Art. 70⁵, 72 § 2, 385¹ § 1, 385² k.c. (good morals); Art. 417², 761², 764³ § 1, 764⁴(2), 827 § 1 k.c. (equity).

³²⁴ Act of 14.2.2003 (Dz.U. 2003 no. 49 item 408).

³²⁵ Art. 22¹ k.c. (definition of consumer); Art. 43¹ k.c. (definition of trader).

³²⁶ Act of 1.3.1996 (Dz.U. 1996 no. 43 item 189).

³²⁷ For more details see Chapter V below.

principles (adversary trial). The Code of Civil Procedure has been in constant flux since.

In 2000 a new Commercial Companies and Partnerships Code³²⁸ replaced the old, pre-socialist Commercial Code dating back to 1934.³²⁹ It does not contain a general part and merely regulates the establishment, functioning and restructuring of companies and commercial partnerships (but not the so-called 'civil' partnership, regulated in the Civil Code). The enactment of the Commercial Companies and Partnerships Code marked a reinforcement of the legislature's adherence to the monist principle in private law, whereby commercial law is not treated as a parallel branch of private law, in opposition to civil law. Thus, unlike the old Commercial Code of 1934³³⁰ (and other commercial codes in Europe) it does not regulate the notion of a merchant nor commercial transactions.³³¹

Most of the Europeanisation of Polish private law has taken place outside the Codes, including consumer sales,³³² distance and doorstep selling,³³³ late

³²⁸ Act of 15.9.2000 (Dz.U. 2000 no. 94 item 1037).

³²⁹ Regulation of the President of the Republic of 27.6.1934 – Commercial Code (Dz.U. no. 57 item 502).

³³⁰ Regulation of the President of the Republic of 27.6.1934 – Commercial Code (Dz.U. no. 57 item 502).

³³¹ Andrzej Kidyba, *Prawo handlowe* [Commercial Law] (7th ed., Warszawa: C.H. Beck, 2006), p. 6.

³³² Act of 27.7.2002 on special conditions of consumer sales (Dz.U. 2002 nr 141 poz. 1176).

³³³ Both distant and doorstep selling were originally regulated in the act of 2.3.2000, *supra*, now replaced by Act of 30.5.2014 on consumer rights (Dz.U. item 827).

payments,³³⁴ timeshare³³⁵ and package travel.³³⁶ The prevailing method of implementation was a copy-out approach.³³⁷

Since the 1990s a Commission for the Codification of Civil Law has been preparing a draft new Civil Code.³³⁸ Until now, only a first book has been published (in 2008³³⁹) which was heavily criticised by judges of the Supreme Court in 2010.³⁴⁰ Although during the last 5 years no further draft texts have been published, the Codification Commission has been working on books on the law of property and the law of obligations.³⁴¹ Whether and when a new Civil Code will replace the heavily amended socialist Code of 1964 remains to be seen.

³³⁴ Act of 12.6.2003 on deadlines for payment in commercial transactions (Dz.U. No. 139 item 1323), now replaced by Act of 8.3.2013 on deadlines for payment in commercial transactions (Dz.U. 2013, item 403).

³³⁵ Act of 13.7.2000 on the protection of purchasers of a right to use a building or apartment (Dz.U. 2000 nr 74 poz. 855), now replaced by Act of 16.9.2011 on timeshare (Dz.U. 2011 nr 230 poz. 1370).

³³⁶ Act of 29.8.1997 on tourist services (consolidated version: Dz.U. 2014, item 196).

³³⁷ Ewa Łętowska, *Europejskie prawo umów konsumenckich* [European Consumer Contract Law] (Warszawa: C.H. Beck, 2004), p. 13.

³³⁸ See the official website of the Commission: <http://www.bip.ms.gov.pl/dzialalnosc/komisje><http://www.bip.ms.gov.pl/dzialalnosc/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-cywilnego/kodyfikacyjne/komisja-kodyfikacyjna-prawa-cywilnego/> [last accessed: 30/7/2014].

³³⁹ *Księga pierwsza Kodeksu cywilnego. Projekt z uzasadnieniem* [First Book of the Civil Code: a Motivated Draft] (Warszawa: C.H. Beck, 2008).

³⁴⁰ 'Projekt Kodeksu cywilnego. Księga pierwsza. Sprawozdanie z dyskusji przeprowadzonej w Izbie Cywilnej Sądu Najwyższego' [Draft Civil Code. Book I. Report of the Discussion in the Civil Chamber of the Supreme Court], *Przełąd Sądowy* 10 (2010): 104–123.

³⁴¹ See *Sprawozdanie z działalności Komisji Kodyfikacyjnej Prawa Cywilnego za 2012 r.* [Report of Activities of the Commission for the Codification of Civil Law for 2012], available online at: http://bip.ms.gov.pl/Data/Files/_public/bip/kkpc/sprawozdanie-z-dzialalnosci-kkpc-2012.pdf [last accessed: 30/7/2014]. No report was available, as of August 2014, for the Commission's activity in 2013.

4 Narratives of the state-socialist past

Whilst in the preceding sections I synthetically presented the two radical transformations experienced by Poland after 1989, I will now analyse the way in which those transitions are viewed by the Polish legal community. As Polish legal historian Tomasz Giaro recently pointed out:

[...] according to a stereotype [...] “the real socialism” was a historical regression; indeed, a kind of blackout of European legal history. [...] [T]he law of real socialism aligns neither with the preceding nor with the following system and should be forgotten straight away.³⁴²

This approach to the period of actually existing socialism as a ‘blackout’ applies not only to the legal community, but to the public discourse in Poland in general. A ‘discourse of transformation’, which remains dominant, structures the narrative of the past and the interpretation of historic events. Doubtlessly, as I have shown in this chapter, Poland’s history during the last century was marked by perplexing discontinuity. These radical changes affected all aspects of social life – from property regimes to state boundaries, from organisation of the workplace to the overall economic system, and from procedural rights of the parties to the organisation of judiciary. Such radical changes, undermining the feeling of sense and purpose, require to be built into a broader narrative structure, lending them a feeling of order and teleology. In the general discourse of the past in post-1989 Poland this function has been played by a figure which I propose to refer to as the ‘RETURN TO EUROPE schema’. This schema is composed in the same way as any classical narrative structure (from the old Russian fairy-tale to a scholarly paper), in that it is based on three

³⁴² Tomasz Giaro, ‘Some Prejudices about the Legal Tradition of Eastern Europe’ in *Comparative Law in Eastern and Central Europe*, ed. Bronisław Sitek, Jakub Szczerbowski and Aleksander Bauknecht (Newcastle upon Tyne: Cambridge Scholars Publishing, 2013): 26-50, p. 45.

compositional elements – a SOURCE, a PATH and a GOAL.³⁴³ The narrative commences with the SOURCE, then progresses along the PATH in order to reach the GOAL.

In the RETURN TO EUROPE schema the three compositional elements can be identified as follows. First is the initial stage (i.e. the SOURCE), during which Poland is presented as belonging to the (prestige-lending) West. This stage corresponds to the period of the Second Republic (1918-1939). The SOURCE is a point of reference for the entire narrative, and therefore the Second Republic is heavily idealised both in popular media and in historiography.³⁴⁴

The second stage in the narrative is the PATH, a transitory period, characterised by a lack and imbalance. In the RETURN TO EUROPE schema, the PATH is what is presented as Poland's submission to Soviet domination, which – in contrast to the previous period (the SOURCE) is shown as her 'kidnapping away from Europe'. The narrative structure thus detracts away from facts pointing to the development and progress of the nation's society and economy during actually existing socialism,³⁴⁵ but focuses exclusively on the incessant struggle for freedom. Hence, instead of concentrating on socio-economic aspects, the dominant narrative points society's attention to moments of revolt and struggle

³⁴³ On narratives and their compositional structures see e.g. Winter, *A Clearing in the Forest...*, 108-111.

³⁴⁴ See Agnieszka Mrozik, 'II RP – raj utracony, raj odzyskany' [The Second Republic: Paradise Lost, Paradise Regained], *Bez dogmatu* 93 (2012).

³⁴⁵ An attempt to revindicate those positive aspects of actually existing socialism have been recently made by the authors of two collective works: *PRL bez uprzedzeń* [The Polish People's Republic Without Prejudices], ed. Piotr Szumlewicz, Jakub Majmurek (Warszawa: Książka i Prasa, 2010) and *Zrozumieć PRL* [Understanding the Polish People's Republic], ed. Wiesław Żółtkowski (Warszawa: Muza, 2012)

(1956, 1968, 1970, 1976, 1980-1981) ³⁴⁶ (and subsequent repressions), even structuring the very history of the Polish People's Republic by reference to those events. Important as they undoubtedly are, the predominant focus on those moments of struggle under the RETURN TO EUROPE schema makes the narrative of Polish history one-sided.

The PATH in line with its compositional function, obviously leads to the GOAL or *agon*, that is the third and final stage of the narrative, culminating it and lending sense to the previous compositional elements. Therefore, if Poland's initial balanced starting point was in the West (SOURCE) and this balance was distorted by subjection to the East (PATH), the GOAL is Poland's RETURN TO EUROPE. This corresponds to what Polish constitutionalist Wojciech Sadurski identified as the 'discourse of "normalcy"', typical of post-transition Central European countries, which boils down to the wish of having

'no experiments; [the wish] to build a normal country, a normal economy, a normal constitutional rule-of-law', where 'normal' refers 'invariably [...] to a situation corresponding to the (real or imagined) state of affairs in Western Europe or North America'. ³⁴⁷

In the Polish context, let us add, 'normal' also refers, on various occasions, to the idealised period of the Second Republic. ³⁴⁸

³⁴⁶ In June 1956 workers organised riots in Poznań; in March 1968 students protested against excessive censorship in the field of culture; in December 1970 workers protested against raises in the prices of heavily subsidised meat; in June 1976 workers once again protested against attempts to reduce the subsidising of foodstuff prices; in 1980 workers went on strike for the same reason, but this time the weakened Communist government entered into a social contract (August 1980), broken the next year (December 1981) by the introduction of Martial Law.

³⁴⁷ Wojciech Sadurski, 'Transitional Constitutionalism: Simplistic and Fancy Theories' in *Rethinking the Rule of Law After Communism*, ed. Adam Czarnota et al. (Budapest: CEU Press, 2005): 9-24, p. 9.

³⁴⁸ See Mrozik, 'II RP...'

Any narrative has a certain agenda and political consequences. The RETURN TO EUROPE schema is no exception here. The most important consequence of adopting this narrative is the view of the transformation of 1989 as a historical necessity, outcome of a 45-year-long struggle for freedom and independence from foreign occupation, rather than as a conscious, reflected upon and informed choice of society.³⁴⁹ If the transformation of 1989, and especially the Shock Therapy, is presented in this teleological way, this allows to conceal the fact that the Polish reformers could have chosen between different varieties of a market economy, instead of opting for the most neoliberal one, as they did. The example of the Czech Republic, where more concern was shown for the potential victims of transformation, is a case in point. Furthermore, the RETURN TO EUROPE schema also disempowers Polish society, depriving it of the status of conscious subject of historical change, and transforming it into a mass, subjected to destiny or to choices made by enlightened elites.

A further consequence of the dominant narrative is the representation of actually existing socialism as, to use Giaro's expression cited above, a 'blackout' in Polish history,³⁵⁰ a period tainted with only negative features, an illegitimate³⁵¹ regime.³⁵² This delegitimation has of course the other side of the coin – an

³⁴⁹ Marta Trawińska, 'Współczesne polskie feministki o możliwościach upodmiotowienia kobiet w okresie PRL-u' [Contemporary Polish Feminists on the Possibilities of Female Empowerment in the Period of the Polish People's Republic], *PRL bez uprzedzeń...*, p. 185.

³⁵⁰ Giaro, 'Some Prejudices...', p. 45.

³⁵¹ The regime of actually existing socialism was of course 'illegitimate' if judged against standards of pluralist democracy. Without, however, entering into the debate on the legitimacy of that regime, a fact which needs to be underlined was Poland's geopolitical situation within the Soviet sphere of influences, which ruled out any democratic legitimation of government from the outset and as a matter of principle.

³⁵² Jakub Majmurek and Piotr Szumlewicz, 'Fakty i mity o PRL-u' [Facts and Myths About the Polish People's Republic], in: *PRL bez uprzedzeń...*, p. 8-9. Cfr. David Ost, 'Wstęp' [Introduction] in Elizabeth C. Dunn, *Prywatyzując Polskę. O bobofrutach, wielkim biznesie*

unqualified legitimisation of the neoliberalisation³⁵³ processes that have occurred after 1989.³⁵⁴ The RETURN TO EUROPE narrative contributes, therefore, to the entrenchment of neoliberalism in Poland in all its dimensions (as an ideological hegemonic project, as a policy and program, as a state form and as governmentality³⁵⁵). Any form of continuity or even semblance with the period of actually existing socialism becomes, therefore, problematic, and can be employed as a delegitimising argument.³⁵⁶ This allows neoliberals and neoconservatists to discard any proposals aiming at ensuring greater social justice only on the premise that this or that solution bears a similarity to certain solution known during the period of actually existing socialism. An example of this approach is a paper by Polish private lawyer and ECJ judge Marek Safjan, in which he expresses his scepticism with regard to the promotion of social justice in private law, preferring the liberal paradigm of autonomy, and treating social justice as ‘publicisation’ of private law. Among the arguments raised is a historical one - placed in a section symptomatically entitled ‘Socialist Lesson’, where he writes:

‘The tendencies to publicize private law, which seem to question its autonomous goals and values and to blur the division between private and public law, are nothing new in the history of the twentieth century. Being

i restrukturyzacji pracy [Privatizing Poland: Baby Food, Big Business and the Remaking of Labor], trans. by Przemysław Sadura (Warszawa: Wydawnictwo Krytyki Politycznej, 2008): 5-12, p. 11.

³⁵³ On the notion of ‘neoliberalisation’ see e.g. Simon Springer, ‘Neoliberalism as discourse: between Foucauldian political economy and Marxian poststructuralism’, *Critical Discourse Studies* 9.2 (2012): 133-147, p. 135-136.

³⁵⁴ Majmurek and Szumlewicz, ‘Fakty i mity...’, p. 15.

³⁵⁵ These four dimensions of neoliberalism have been identified by Springer, ‘Neoliberalism as discourse...’, 136-137.

³⁵⁶ Majmurek and Szumlewicz, ‘Fakty i mity...’, p. 16

aware of all the differences, *we must not forget an experiment carried out for decades in Eastern and Central Europe* which systematically undermined the idea of private law and its status as a branch of law independent from public law [...]. [T]o some extent the lesson learnt from that “experiment” may be useful and instructive in as much as it shows that there is an impassable border to the interference with private law, beyond which there is a risk of damaging the core of its structures.³⁵⁷

Let us now move from the general level of public discourse of the state-socialist past in Poland to the more specific level of legal discourse. I contend that the Polish legal community is imbued in the same RETURN TO EUROPE narrative which is applied onto the legal field. Whereas the general compositional structure remains the same, with the idealisation of the period of the Second Republic and in particular, its legal output, such as the Code of Obligations,³⁵⁸ and a negative evaluation of the period of actually existing socialism, there are some interesting specific conceptual figures in the legal narrative which I would like to draw attention to. I will refer to them as CONTAINER schema, SUBMISSION metaphor, PURIFICATION metaphor and RECONSTRUCTION metaphor.

The CONTAINER schema³⁵⁹ is used to underline that Poland *always belonged* to the Western Legal Tradition, *was part* of the West and so forth. For instance a Polish author writing for a Western audience felt obliged to underline, in the first words of his contribution, that:

³⁵⁷ Marek Safjan, ‘European Law versus Private Law: Transformation or Deformation of the Paradigm?’ in: *General Principles of EU Law and European Private Law*, ed. Ulf Bernitz et al. (Alphen aan den Rijn: Kluwer Law International, 2013): 155-169, p. 159

³⁵⁸ Regulation of the President of the Republic of 27.10.1933 – Code of Obligations (kodeks zobowiązań) (Dz.U. no. 82 item 598).

³⁵⁹ On the ‘container’ schema from a cognitive perspective see Winter, *A Clearing in the Forest...*, p. 62-63.

‘Polish law *belongs* to the western legal tradition, its laws for historical and cultural reasons *belonging* to the Germanic and Romanist legal families. This influence survives strongly until now [...].’³⁶⁰ (Emphasis added)

Other authors, however, more realistically admitted that ‘Polish private law does not have a very long tradition’.³⁶¹ And indeed, the second is closer to the reality, in the sense that medieval and early modern Polish law did not belong to the Western legal tradition (there was little or no reception of the *ius commune*³⁶²). In fact, the pre-1795 system of ‘nobility democracy’ in Poland was based on a rejection of Roman law.³⁶³ Furthermore, it is rather difficult to conceptualise ‘Polish law’ in the 19th century, when the lands of the former Polish state (dismembered in 1795) became the object of a wholesale reception of Prussian, French, Austrian and Russian laws.³⁶⁴ After the Polish state reappeared on the map of Europe in 1918, those foreign laws remained in force. Only in the 1930s did Polish codes of law appear (covering selected areas of the law) and only with regard to this very short period one can claim that there was a ‘Polish law’ which actually belonged to the Western Legal Tradition.³⁶⁵

³⁶⁰ Rafał T. Stroiński, ‘Report from Poland’, *European Company Law* 3.1 (2006): 39-44, p. 39

³⁶¹ Marek Safjan and Aneta Wiewiórska-Domagalska, ‘Political Foundations of European Private Law: Rethinking the East-West Division Lines’, in *The Foundations of European Private Law*, ed. Roger Brownsword, Hans-W. Micklitz, Leone Niglia and Stephen Weatherill (Oxford-Portland OR: Hart, 2011): 265-284, p. 277.

³⁶² Tomasz Giaro, ‘Legal Tradition of Eastern Europe. Its Rise and Demise’ *Comparative Law Review* 2.1 (2011): 4-5. Available online at: <http://www.comparativelawreview.com/ojs/index.php/CoLR/article/view/16/20> (last accessed: 17/3/2014); Giaro, ‘Some Prejudices...’, p. 31-38.

³⁶³ Giaro, ‘Some Prejudices...’, p. 36.

³⁶⁴ Cfr. Wojciech Witkowski and Andrzej Wrzyszczy, ‘Modernisierung des Rechts auf polnischem Boden vom 19. bis Anfang des 20. Jahrhunderts’, in *Rechtskulturen des modernen Osteuropa. Traditionen und Transfers*, ed. Tomasz Giaro, vol. I: *Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert* (Frankfurt am Main: Vittorio Klostermann, 2006): 249-274.

³⁶⁵ Cfr. Mańko, ‘Unification...’, p.115-116.

Despite its weak grounding in historical facts, the CONTAINER schema, presenting Poland as *part* of the legal West (in the SOURCE stage of the RETURN TO EUROPE narrative), is an important compositional prelude to the SUBMISSION metaphor (employed on the PATH stage of the RETURN TO EUROPE narrative). As I noted above, the period of actually existing socialism is presented in the dominant discourse as something unwanted and forced upon Poland. This is expressed, in the legal discourse, by the SUBMISSION metaphor. Lawyers write therefore about ‘a fifty-year-long period of *submission* to the so called “socialist family”³⁶⁶ (emphasis added) or indicate that ‘[t]he development of the civil law codification [in Poland] was *stopped* [...] during the Communist regime, again *imposed by force* (...)’.³⁶⁷

The way towards the *agon* or GOAL of the RETURN TO EUROPE narrative, that is the final return to ‘normalcy’, is presented in legal texts by two metaphors – one of PURIFICATION and another of RECONSTRUCTION. Once the relationship between the Polish legal community and the Socialist Legal Tradition is interpreted as a form SUBMISSION, it comes as a logical consequence that upon ‘regaining freedom’ in 1989, the task of the Polish legal community was to remove the unwanted traces of Soviet influence. This is expressed with two schemas.

First, the PURIFICATION schema, whereby Polish laws during the period of actually existing socialism were ‘contaminated’ by (the dirt of) Soviet influence, and now must be purified. This way of thinking is clearly visible in the language employed by Safjan and Wiewiórowska who write that:

³⁶⁶ Stroiński, ‘Report...’, p. 39.

³⁶⁷ Jerzy Rajski, ‘European Initiatives and Reform of Civil Law in Poland’ *Juridica International* 14 (2008): 151-155, p. 152.

[...] the Polish private law system [...] survived the communist times *buried under the cover* of ideology' and that 'the classic civil law basic constructions remained, sometimes *hidden under the surface* of the ideological ornament', therefore '[w]hen the ideological *implant is removed*' private-law treatises written under actually existing socialism can 'serve as a source of great inspiration [...].'³⁶⁸

Also for Polish compararist Jerzy Rajski, the post-1989 legal reforms 'were greatly facilitated by the possibility of *returning* to Poland's pre-war *traditions*' and were 'aimed at *eliminating* "socialist" *distortions* to civil law'.³⁶⁹ In the same vein, the authors of a textbook on civil procedure write about legal survivals of actually existing socialism as '*accretions* imported from the East' which, after 1989, 'began to be gradually *removed*'.³⁷⁰ A Polish private law specialist writing for foreign authors speaks explicitly of the need to '*épurer* notre Code civil de 1964 des *traces* bien visibles du système socialiste',³⁷¹ and authors of a compendium on Polish law for German-speaking lawyers indicate a task of Polish legislature after 1989 was '*sozialistische Spuren* aus dem ZGB zu *tilgen*'.³⁷²

³⁶⁸ Safjan and Wiewiórowska, 'Political foundations...', p. 278. Emphasis added.

³⁶⁹ Rajski, 'European Initiatives...', p. 152. Emphasis added.

³⁷⁰ Jerzy Jodłowski, Zbigniew Resich, Jerzy Lapierre and Teresa Misiuk-Jodłowska, *Postępowanie cywilne* [Civil Procedure] (3rd ed., Warszawa: LexisNexis 2003), p. 33. Emphasis added.

³⁷¹ Małgorzata Pyziak-Szafnicka, 'L'évolution contemporaine du droit des obligations en Pologne' in *Kierunki rozwoju prawa cywilnego we Francji, w Niemczech i w Polsce w perspektywie prawa europejskiego* [Directions of Development of Civil Law in France, Germany and Poland in the Perspective of European Law] (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2008), p. 123.

³⁷² Marc Liebscher and Fryderyk Zoll, 'Allgemeiner Teil des Zivilrechts', in *Einführung in das polnische Recht*, ed. Liebscher and Zoll (München: C.H. Beck, 2005), p. 109.

Whilst the PURIFICATION schema operates within organic conceptions of law (as BODY, PLANT or GARDEN), if law is conceived as a BUILDING (EDIFICE)³⁷³ the way of conceptualising legal survivals is the RECONSTRUCTION metaphor. It stems from the assumption that the ‘edifice of Polish law’ suffered damages during the period of actually existing socialism and now needs to be rebuilt. An example of this approach is the phrase from a post-1989 textbook on civil procedure which indicates that ‘[t]he efforts of *rebuilding of the law* of civil procedure have not been yet ended’.³⁷⁴

The dominant legal narrative, based on the RETURN TO EUROPE schema, treats therefore any interaction of Polish legal culture with the Socialist Legal Tradition either in terms of pollution and impurity, which must be cleaned (PURIFICATION schema) or in terms of a damage which must be repaired (RECONSTRUCTION metaphor). Although in the first schema the Soviet influence is seen additively (as something impure, added to Polish legal culture) and in the second subtractively, they both coincide in presenting the interaction of Polish legal culture with the Socialist Legal Tradition exclusively in a negative light. This interaction is not interpreted as a stage in the development of Polish legal culture, but rather as something unnatural, imposed by force, whose traces must be removed. The RETURN TO EUROPE schema serves therefore to prevent an evolutionary/teleological account of Polish legal history, which would see the period of actually existing socialism as yet another stage of purpose-oriented

³⁷³ As in the metaphorical expression stating that ‘international law is an *edifice built on a volcano* – state sovereignty’ [Antonio Cassese, ‘On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’, *European Journal of International Law* 9 (1998): 2-17, p. 11, citing H. Gerhart Niemeyer, *Einstweilige Verfügungen des Weltgerichtshofs, ihr Wesen und ihre Grenzen* (Leipzig: R. Noske, 1932), p. 3. Emphasis added, original emphasis removed].

³⁷⁴ Jodłowski et al., *Postępowanie cywilne* (2003), p. 33.

development, leading to the current outcome. To the contrary, to quote Giaro once again, the state-socialist period is presented as ‘a historical regression (...), a kind of blackout’, and therefore the law of that period ‘aligns neither with the preceding nor with the following system and should be forgotten straight away.’³⁷⁵

Is the period of actually existing socialism really a complete ‘blackout’, as the stereotype has it, or can existing legal survivals of that period be said to undermine such a view? The instances of legal continuity after 1989, analysed in the two following chapters, will challenge the stereotype, and allow putting forward (in the conclusions of the dissertation) a counter-intuitive explanation of the issue.

³⁷⁵ Giaro, ‘Some Prejudices...’, p. 45.