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Mańko, R.T.

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Chapter IV

Legal survivals in substantive private law

1 Introduction

In this chapter I will analyse instances of legal survivals within the sphere of substantive private law in Poland after 1989. Such instances can be found in all areas of private law, but I have decided to focus on some of the most representative ones. The first two – the doctrines of ‘principles of social life’ (section 2) and ‘socio-economic purpose’ (section 3) belong, predominantly, to the general part of private law which makes them horizontally applicable throughout this branch of law. The following two, the right of perpetual usufruct (section 4) and the cooperative member’s right to an apartment (section 5) belong to property law, and the final example, the cultivation contract (section 6), is taken from the law of obligations. Further examples of specific legal solutions, introduced during the period of actually existing socialism under the influence of Soviet law or in general, the ideological, political and socio-economic conditions of the period could also be identified, such as the supply contract,³⁷⁶ the rule against *fideicommissa* in inheritance law³⁷⁷ or the unqualified equality of ‘legal’ and ‘natural’ children in inheritance and family

³⁷⁶ The supply contract (Russian: *договор поставки, dogovor postavki*, Polish: *umowa dostawy*) was a contract whereby one entity of the socialised economy (the supplier) undertook to produce generic goods and deliver them in parts or periodically to another unit of socialised economy in exchange for price (See Art. 605ff k.c.). When the Civil Code underwent a sweeping reform in 1990, the supply contract was not repealed. It was, however adapted to the new economic system in that the requirement that a unit of socialised economy be party to the contract was removed. It is still used in practice within the private sector. See recent cases on delivery contracts: SN 7.11.2007, II CSK 341/07, LEX no. 485860; SN 9.2.2005, II CK 423, LEX no. 152293.

³⁷⁷ Art. 964 k.c. Cfr. Franciszek Longchamps de Bériér, ‘Podstawienie powiernicze’, *Kwartalnik Prawa Prywatnego* 8.2 (1999): 323-340, who clearly links the prohibition of *fideicommissa* in socialist Polish law with its Marxist inspiration.

law.³⁷⁸ Nevertheless, it seems to me that the five case-studies analysed in this chapter will be of sufficient importance to make an assessment of the mechanisms of endurance of legal survivals of the period of actually existing socialism.

2 The concept of principles of social life

A Circumstances of introduction

As I have indicated in Chapter III, during the inter-War period Poland unified its law of obligations and commercial law in the form of codes. The Code of Obligations³⁷⁹ included numerous general clauses (general standards), such as ‘good faith’ (*dobra wiara*), ‘good morals’ (*dobre obyczaje*), ‘public order’ (*porządek publiczny*), ‘reasons of equity’ (*względy słuszności*) and ‘usages of fair dealing’ (*zwyczaje uczciwego obrotu*). Furthermore, in the Commercial Code³⁸⁰ there was an additional general clause of ‘good mercantile customs’ (*dobre obyczaje kupieckie*). Clearly, the Polish system was heavily modelled on German, French and Swiss law and the general clauses tended to reflect what could be found in the Civil Codes of those countries. The main drafter of the Code of Obligations, Professor Roman Longchamps de Bériér (1883-1941), was himself of the opinion that ‘good faith’ regarded the honest dealing with the other party of a legal relationship, ‘good morals’ were the equivalent of ethical views accepted in society, ‘public order’ was concerned with the fundamental principles of the

³⁷⁸ On equality of ‘legal’ and ‘natural’ children as an innovative feature of Soviet law, see John Quigley, *Soviet Legal Innovation and the Law of the Western World* (Cambridge: CUP, 2012), ch. 4.

³⁷⁹ Regulation of the President of the Republic of 27.10.1933 – Code of Obligations (kodeks zobowiązań) (Dz.U. no. 82 item 598).

³⁸⁰ Regulation of the President of the Republic of 27.6.1934 – Commercial Code (Dz.U. no. 57 item 502).

legal order and 'equity' was a synonym of contractual fairness (it was used to supplement the content of contracts if parties did not provide for a certain aspect,³⁸¹ thus tending (in principle³⁸²) towards a semantic differentiation of the general clauses present in the Code.

After the introduction of actually existing socialism, these general clauses, typical of the Romanic and Germanic legal traditions, came to be viewed as inappropriate and were ultimately replaced by, on the one hand, the 'principles of social life' (*zasady współżycia społecznego*) (since 1950) and the 'socio-economic purpose' (*społeczno-gospodarcze przeznaczenie*) (since 1964, discussed in section 3 below). I will now briefly present the origins of the principles of social life³⁸³ in Soviet law, from where this peculiar doctrine was transplanted to Poland.

The origins of the principles of social life can be traced back to Lenin's book on *The State and Revolution*,³⁸⁴ in which he laid down his ideas on the

³⁸¹ Longchamps de Bériet, *Zobowiązania*, pp. 150-151, 321.

³⁸² But see *ibid.*, p. 141 where the drafter treats good faith and good customs interchangeably. According to Pilich this view of Longchamps had an impact upon later generations of Polish lawyers (Mateusz Pilich, 'Zasady współżycia społecznego, dobre obyczaje czy dobra wiara? Dylematy nowelizacji klauzul generalnych prawa cywilnego w perspektywie europejskiej' [Principles of Social Community Life, Good Customs or Good Faith? Dilemmas of Amending the General Clauses of Civil Law in a European Perspective] in *Europeizacja prawa prywatnego* [The Europeanisation of Private Law], ed. Maksymilian Pazdan et al. (Warszawa: Wolters Kluwer, 2008), vol. 2, p. 175).

³⁸³ The Polish expression '*zasady współżycia społecznego*' can also be translated as 'principles of community life', 'principles of social intercourse', 'principles of social coexistence' or 'principles of living together in society'. The same applies, *mutatis mutandis*, to the Russian expression '*принципы социалистического общежития*' (*printsipy sotsyalisticheskovo obshchezhitia*) which can be translated as 'principles of socialist intercourse' or 'principles of socialist coexistence'. The difference between the Polish and Russian expression is that the word '*социалистического*' (socialist) in the Russian version is replaced by '*społecznego*' (social) in the Polish one.

³⁸⁴ Vladimir Ilich Lenin, *The State and Revolution* [1918], trans. by Robert Service (London: Penguin, 1992).

socialist revolution and the post-revolutionary order. Sketching the future of a socialist, and later – communist society, Lenin developed Engels' view of the 'withering away' of the state, explaining that the socialist revolution would smash the bourgeois state machine and create its own state machine in the form of the dictatorship of the proletariat. As the society would progress towards socialism, and later, communism, the socialist state – and socialist law – would 'wither away'. It is precisely in this context that Lenin introduced the notion of the principles of social life. The concept appears three times in the book, in three slightly different terminological forms – as (in the English translation) 'elementary conditions of social life'³⁸⁵, 'necessary rules of social intercourse'³⁸⁶ and 'fundamental rules of social intercourse'³⁸⁷. The essence of the notion of the principles of social life in Lenin's conception is a set of rules that people will observe in a communist society after the withering away of the state and law; they will observe those rules not because of an organized sanction of the state apparatus but because they will be accustomed to compliance with them during the preceding period of a socialist society. The internalisation of the principles of social coexistence is, in fact, one of the preconditions of the withering away of the state.³⁸⁸ According to Hugh Collins, they would be sanctioned by intervention of other members of society.³⁸⁹ As the Soviet jurist Stučka explained in 1927:

³⁸⁵ Ibid., p. 74.

³⁸⁶ Ibid., p. 80.

³⁸⁷ Ibid., p. 86-87.

³⁸⁸ Ibid.

³⁸⁹ Collins, *Marxism and Law*, p. 105.

‘Communism means not the victory of socialist law, but the victory of socialism over any law, since with the abolition of classes with their antagonistic interests, law will die out altogether’.³⁹⁰

It is therefore clear that the principles of social life in Lenin's conception are part and parcel of the passage from the lower to the higher (communist) phase of socialist society. Taking into account, however, that members of the society should internalise those principles *before* the passage to communism (of which this internalisation is a precondition), they must appear already in a socialist society building communism. However, after the October Revolution Lenin realised that in view of the

‘economic underdevelopment and cultural backwardness of the Russian masses, there is no way for Russia to “pass directly to Socialism”; all that Soviet power can do is to combine the moderate politics of “state capitalism” with the intense education of the inert peasant masses’.³⁹¹

In fact, in Lenin's view a socialist society could be attained only after a long period of educating and training the society.³⁹² It comes therefore as a paradox that Lenin's concept, one of political philosophy, was received into the legal field in the Stalinist period. Still in the early 1930s, in the early period of Stalinism, the withering away of the law was taken seriously, with law faculties embarking upon teaching economic policy instead of law and judges deciding cases not on the basis of legal rules but expediency and economic efficiency.³⁹³

³⁹⁰ George M. Armstrong Jr, *The Soviet Law of Property: The Right to Control Property and the Construction of Communism* (The Hague-Boston-Lancaster: Martinus Nijhoff, 1983), p. 31.

³⁹¹ Slavoj Žižek, ‘Introduction: Between the Two Revolutions’ in *Revolution at the Gates: Selected Writings of Lenin from 1917*, ed. Slavoj Žižek (London: Verso, 2002), p. 9.

³⁹² Armstrong, *Soviet Law of Property...*, p. 74.

³⁹³ *Ibid.*, p. 54.

However, as the power of Stalin grew, the Leninist tendencies in all spheres - including the withering away of state and law – began to be abandoned.³⁹⁴ Stalin did not aim at the destruction neither of the state nor of the legal system, but rather at their strengthening, arguing that

‘as Soviet society approached socialism, the internal enemies would increasingly resort to resistance, requiring Soviet authorities to be increasingly vigilant and to employ more severe forms of state repression. State and law must therefore become more, not less, powerful.’³⁹⁵

Thus, the Soviet state, instead of withering away, became only stronger. The ideas of state and law were restored and their eventual withering away postponed until a time when the Soviet Union would free itself from capitalist encirclement.³⁹⁶ Indeed, ‘Stalin's vision of socialism [...] pertained less to the reform of popular consciousness and more to governmental power’;³⁹⁷ the socialist idea of a cooperative society was ‘abandoned or indefinitely postponed’.³⁹⁸ It can therefore be treated as a historical paradox that in 1936, when the construction of socialism was officially completed³⁹⁹ and crowned by a new Constitution,⁴⁰⁰ and the country officially embarked upon the

³⁹⁴ Cfr. Slavoj Žižek, ‘Afterword: Lenin’s Choice’ in *Revolution at the Gates* (2002): 165-336, p. 193: ‘It is [...] crucial to distinguish “Leninism” (as the authentic core of Stalinism) from the actual political practice and ideology of Lenin’s period: the actual greatness of Lenin is not the same as the Stalinist authentic myth of Leninism.’ Armstrong indicates that some Western scholars, such as Harold Berman, ‘have mistaken this [Stalinist] appearance of socialism as reality’ (Armstrong *The Soviet Law of Property...*: p. 73).

³⁹⁵ Armstrong, *Soviet Law of Property...*, p. 54-55.

³⁹⁶ *Ibid.*, p. 80-81.

³⁹⁷ *Ibid.*, p. 89.

³⁹⁸ *Ibid.*, p. 89.

³⁹⁹ *Ibid.*, p. 79.

construction of its higher phase, Communism,⁴⁰¹ the Leninist ‘principles of social life’ were codified. Article 130 of the 1936 Constitution stated:

‘It is the duty of every citizen of the U.S.S.R. to abide by the Constitution of the Union of Soviet Socialist Republics, to observe the laws, to maintain labour discipline, honestly to perform public duties, and to respect the rules of socialist intercourse [life].’

A draft Civil Code for the USSR, never promulgated, also contained reference to the principles of social life; this draft, together with the constitution, which was treated as a model in all socialist countries,⁴⁰² and therefore had an influence upon the drafting of the Polish Civil Code. When the civil law legislation of the USSR was amended in the early 1960s, the concept found its way also there. The drafts of Soviet codes of civil law were known during the drafting of the Polish Civil Code (1948-1964) and viewed as a model. In their final text, the Fundamentals of Civil Legislation of the USSR and the Union Republics of 1961, stated that the Soviet Union:

‘having reached the total and final victory of socialism, has embarked upon the period of developed construction of a communist society’⁴⁰³.

One of the aims of that period is the ‘gradual transformation of socialist social relationships into communist relationships’ and ‘the education of citizens in the spirit of high attachment to the communist idea and a communist approach

⁴⁰⁰ For an English translation see *1936 Constitution of the USSR*, available online at <http://www.departments.bucknell.edu/russian/const/1936toc.html>, (last accessed: 17/3/2014). Hereinafter referred to as ‘USSR Constitution of 1936’. Its Art. 1 stated that the Soviet Union ‘is a *socialist* state of workers and peasants.’ Emphasis added.

⁴⁰¹ William E. Butler, *Soviet Law* (London: Butterworths, 1983), p. 137.

⁴⁰² Gianmaria Ajani, *Le fonti non scritte nel diritto dei paesi socialisti* (Milano: Giuffrè, 1985), p. 81 n. 17.

⁴⁰³ First motive in the preamble of the Fundamentals (1961).

towards labour [...].⁴⁰⁴ These aims correspond to Lenin's envisaged internalisation of the principles of social life. And indeed, the notion of 'principles of socialist life' appears in Article 5 of the Fundamentals, which obliges citizens to observe them when performing their rights and duties:

'In exercising their rights and performing their duties, citizens and organisations must observe the laws, and respect the *rules of socialist community life* and the ethical principles of the society building communism.'⁴⁰⁵ (emphasis added)

The place of the principles of socialist community life in the Soviet legal system was debated but in general it was agreed that they are

'rules of social morality governing the conduct of individuals in their work and their daily life which are reinforced by public opinion and interact with and support legal rules'.⁴⁰⁶

A contemporary Soviet author viewed the principles as 'the entirety of norms binding in a socialist society and expressing the progressive views of that society'⁴⁰⁷ or 'all those rules which, in accordance with the progressive ideology established in a socialist society, regulate the mutual relationships of the

⁴⁰⁴ Second motive in the preamble of the Fundamentals (1961).

⁴⁰⁵ Art. 5 second indent of the Fundamentals (1961). An identical rule is contained in Art. 5 of the Civil Code of the Russian Socialist Soviet Republic of 11 June 1964 [I was using the Polish translation available in *Zasady ustawodawstwa cywilnego ZSRR i Republik Związkowych. Kodeks cywilny Rosyjskiej Federacyjnej Socjalistycznej Republiki Radzieckiej* (Wrocław: Ossolineum 1977)].

⁴⁰⁶ Butler, *Soviet Law*, p. 53.

⁴⁰⁷ Soviet scholar Karieva cited in Józef Nowacki, 'Niektóre zagadnienia zasad współzycia społecznego' [Certain Issues Regarding the Principles of Social Coexistence] *Państwo i Prawo* 12.7-8 (1957), p. 101.

members of that society'.⁴⁰⁸ However, despite certain theoretical discussions by legal scholars, in the Soviet Union itself the principles of social life were not treated seriously as a legal doctrine.⁴⁰⁹

What was transplanted, therefore, to Poland and other state-socialist countries, was a legal term, certainly representing a determined philosophical concept (as defined by Lenin in *State and Revolution*) but not necessarily a clearly defined and practically tested legal concept.

B Legal framework

Within Polish law, the principles of social life first appeared in the General Provisions of Civil Law 1950 – a statute containing the new general part of Polish private law (roughly covering the same matters as the *Allgemeiner Teil* of the law of Pandects and the German Civil Code). The new general clause fulfilled much more functions than its Soviet model: it became a standard for the evaluation of abuse of rights,⁴¹⁰ a standard for the evaluation of validity of legal acts⁴¹¹ a source of implied terms in legal acts⁴¹² and a benchmark for the interpretation of the will of the parties.⁴¹³ According to Ajani, the introduction of the principles of social life to Polish private law was not only a sign of abandoning the traditional clauses of the Western Legal Tradition, such as good faith, but also led to the

⁴⁰⁸ Soviet scholars Karieva, Kecheckian, Fiedosieyev and Fiedkin cited in Nowacki, 'Niektóre...', p. 101.

⁴⁰⁹ 'The principles of social life [...] of Soviet law in fact represented at that time little more than a mere enunciation, a declamation of the advent of a future society, deprived of any elaboration in the case-law, neglected by the legal scholarship, suffocated by the normativist exaltation of the Stalinist era.' (Ajani, *Fonti...*, p. 82).

⁴¹⁰ Art. 3 p.o.p.c. (1950).

⁴¹¹ Art. 41 p.o.p.c. (1950).

⁴¹² Art. 82 p.o.p.c. (1950).

⁴¹³ Art. 47 p.o.p.c. (1950).

'flattening' (*appiattimento*) of various general clauses,⁴⁴⁴ i.e. to the loss of their distinct character. The new general clauses had a strong symbolic message of drawing a clear line distinguishing the new socialist legal system from the capitalist past.⁴⁴⁵

During the period of actually existing socialism in Poland the principles of social life appeared not only within private law but were also raised to the level of constitutional law and enshrined in Article 76 of the Constitution of the Polish People's Republic enacted in 1952.⁴⁴⁶ Following the USSR Constitution of 1936, on which it was heavily modelled,⁴⁴⁷ Article 76 of the Polish Constitution - in force (though heavily amended) until 1997⁴⁴⁸ - imposed a duty upon Polish citizens to 'respect the principles of social life'.⁴⁴⁹ It was only with the entry into force of the current constitution (enacted on 2 April 1997) that the rule obliging Polish citizens to observe the principles of social life was finally removed from the constitutional system.

⁴⁴⁴ Ajani, *Fonti...*, p. 82.

⁴⁴⁵ Anna Stawarska-Rippel, 'O klauzulach generalnych w pierwszych latach Polski Ludowej słów kilka' [A Few Words on the General Clauses in the First Years of People's Poland], *Miscellanea Iuridica* 6 (2005): 117-129, p. 129.

⁴⁴⁶ Constitution of the Polish People's Republic of 22.7.1952 (Dz.U. no. 33, item 232), hereinafter referred to as the 'Constitution of 1952'.

⁴⁴⁷ Kallas and Lityński, *Historia...*, p. 91ff.

⁴⁴⁸ The Constitution of 1952 was heavily amended in December 1989 and later abrogated in 1992, however, even after that date many of its rules remained in force [enjoying a constitutionally peculiar status of rules being part of an abrogated legal act but nevertheless 'remaining in force' (*przepisy utrzymane w mocy*)].

⁴⁴⁹ 'A citizen of the Polish People's Republic is obliged to comply with the provisions of the Constitution and statutes, as well as the socialist labour discipline, respect the principles of social life, duly fulfil duties towards the state.'

When the socialist Civil Code was finally enacted in 1964, as part of the third wave of post-War private law codification in the Socialist Legal Family,⁴²⁰ all hitherto formally existing general clauses (good faith, good morals, equity etc.) disappeared completely, and their place was taken exclusively by the principles of social life (appearing in the Civil Code 26 times)⁴²¹ and, to a lesser extent, by the ‘socio-economic purpose’. Most notably, within the Civil Code the principles of social life are a standard limiting the exercise of private rights,⁴²² their violation results in the invalidity of a legal act,⁴²³ serve as a guideline for the interpretation of declarations of will,⁴²⁴ are a source of implied terms in legal acts,⁴²⁵ limit the content of the right of ownership⁴²⁶ and are a standard for the performance of obligations.⁴²⁷

The general clause ‘principles of social life’ appeared not only in the Civil Code but also in other codes, of private and public law alike. In the Family and Guardianship Code (1964),⁴²⁸ the principles of social life appeared three times in

⁴²⁰ The first wave occurred directly after World War II - in Poland it was 1945-1946. The second wave of recodification took place roughly in 1950 and was marked inter alia by the Polish General Principles of Civil Law, the Polish Family Code and the Czechoslovak Family Code. The third wave lasting from the late-1950s until the mid-1960s, took place in a new, postStalinist political reality and it encompassed a new Hungarian Civil Code (1959), a recodification of Soviet private law (1961) and new Civil Codes in Poland and Czechoslovakia (both 1964).

⁴²¹ Ajani, Fonti..., p. 96.

⁴²² Art. 5 k.c.

⁴²³ Art. 58 § k.c.

⁴²⁴ Art. 65 § 1 k.c.

⁴²⁵ Art. 56 k.c.

⁴²⁶ Art. 140 k.c.

⁴²⁷ Art. 354 § 1 k.c.

⁴²⁸ Act of 25 February 1964 – Family and Guardianship Code (Dz.U. no. 9 item 59, hereinafter: ‘k.r.o.’).

connection with divorce,⁴²⁹ claims for alimony⁴³⁰ and the remuneration of a curator.⁴³¹ Within the Labour Code (1974),⁴³² the principles of social life played an important role. The preamble to the Code stated that labour law is ‘consistent with the principles (...) of social life in a people's state’⁴³³ and the Code itself ‘is favourable towards (...) the shaping of principles of socialist life in the enterprise’.⁴³⁴ The Labour Code contained a prohibition of abuse of rights modelled on the Civil Code and thus containing both the ‘socio-economic purpose’ of a right and the ‘principles of social life’.⁴³⁵ Enterprises were under a duty to propagate the principles of social life within the enterprise⁴³⁶ and workers were under a duty to respect them.⁴³⁷ The principles appeared also in detailed rules regarding appeals against dismissals⁴³⁸ and alternative labour dispute resolution.⁴³⁹

⁴²⁹ Under Art. 56 § 2 k.r.o. a court may deny divorce if it would be ‘contrary to the principles of social life’. Under § 3 of the same article, a court may grant divorce even at the demand of the party at fault (which, in principle, is not possible) if the ‘innocent’ party's opposition is ‘contrary to the principles of social life’.

⁴³⁰ Under Art. 144 § 1 k.r.o. a child may demand alimony from its mother's husband who is not its father if such a claim is consistent with the principles of social life. Under § 2 of this article, a mother's husband may claim alimony from his wife's child if the husband actively took part in the child's education and his claim for alimony is justified by the principles of social life.

⁴³¹ Under Art. 179 § 2 k.r.o. a curator whose curatorship activity corresponded to a duty arising under the principles of social life may not claim remuneration.

⁴³² Act of 26 June 1974 – Labour Code (Dz.U. No. 24 item 141, hereinafter: ‘k.p.’).

⁴³³ Para. 2 in the preamble to k.p.

⁴³⁴ Para. 6 in the preamble to k.p.; it seems that this paragraph was the only Polish legal act to use the Soviet general clause of principles of *socialist* life.

⁴³⁵ Art. 8 k.p.

⁴³⁶ Art 94 and 95 k.p.

⁴³⁷ Art. 100 § 1(7) k.p.

⁴³⁸ Art. 62 k.p.

⁴³⁹ Art. 260 k.p.

As regards procedural private law, within the Code of Civil Procedure (1964)⁴⁴⁰ the general clause of ‘principles of social life’ appeared 8 times, *inter alia* in the context of settlement,⁴⁴¹ withdrawal of action⁴⁴² and judicial review of arbitration awards.⁴⁴³

The principles of social life appeared even in codes of public law. The Code of Criminal Procedure (1969)⁴⁴⁴ stated that one of the purposes of criminal proceedings is to ‘strengthen respect for (...) the principles of social life’.⁴⁴⁵ A prosecutor or court terminating proceedings due to a lack of a criminal act, could, nonetheless if the non-criminal act ‘violated (...) the principles of social life’ refer the case to a competent body.⁴⁴⁶ The Code of Petty Offences (1971)⁴⁴⁷ likewise contained references to the principles of social life.⁴⁴⁸ Finally, it should

⁴⁴⁰ Act of 17 November 1964 – Code of Civil Procedure (Dz.U. No. 43 item 296, hereinafter: ‘k.p.c.’).

⁴⁴¹ Art. 184 sentence 2 k.p.c.: ‘The Court shall declare a settlement inadmissible if its content violates the law or the principles of social life (...)’

⁴⁴² Art. 203 § 4 k.p.c. ‘The court shall declare inadmissible a withdrawal of an action, a renunciation or limitation of a claim if such an act violates the law or the principles of social life (...)’

⁴⁴³ See Art. 711 § 3 sentence 2 k.p.c. according to which a court shall refuse to grant *exequatur* if, in light of the facts of the case, a judgment of an arbitration court or a settlement entered into before such a court ‘violates legality or the principles of social life in the Polish People’s Republic.’). Violation of the principles was a plea in law which could be raised by a party bringing an action to set aside a decision of an arbitration court (Art. 712 § 1(4) k.p.c.). Such a violation was also taken ex officio into account by a state court hearing a case to set aside an arbitration award (art. 714 k.p.c.).

⁴⁴⁴ Act of 19 April 1969 – Code of Criminal Procedure (kodeks postępowania karnego) (Dz.U. No. 13 item 96, hereinafter: ‘k.p.k. (1969)’).

⁴⁴⁵ Art. 2. § 1(3) in fine k.p.k. (1969).

⁴⁴⁶ Art. 12 k.p.k. (1969).

⁴⁴⁷ Act of 20 May 1971 – Code of Petty Offences (kodeks wykroczeń) (Dz.U. No. 12 item 114, hereinafter: ‘k.w.’).

⁴⁴⁸ Art. 36, 40 and 41 k.w.

be mentioned that the principles of social life appeared in other legal acts, including telecommunications law.⁴⁴⁹

After 1990, the principles of social life met with the criticism of legal scholars, many of whom urged that they be abrogated on account of their Soviet/state-socialist origins,⁴⁵⁰ the fact that they are unknown in Western Europe,⁴⁵¹ their alleged vagueness⁴⁵² and the fact that they suggest that there exists an extra-legal system of norms to which they refer.⁴⁵³ Only a minority of scholars have argued for retaining the general clause in question.⁴⁵⁴

⁴⁴⁹ Under § 8 (2) of the regulation of the Minister of Telecommunications of 23 June 1986 regarding the Telecommunications Ordinance (Dz. U. Nr 27, poz. 135): 'A telecommunications service may not be executed if the content of the communicated information violates the law, public order or the principles of social life.' The constitutionality of this provision was analysed by the Constitutional Court but before a judgment could be pronounced the rule was abrogated on 29.9.1988 (see TK order of 16.7.1988 in Case U 11/88).

⁴⁵⁰ See e.g. Marek Safjan, 'Klauzule generalne w kodeksie cywilnym (przyczynek do dyskusji)' [General Clauses in the Civil Code (A Starting Point of Discussion), *Państwo i Prawo* 11 (1990), p. 56; Tomasz Justyński, *Nadużycie prawa w polskim prawie cywilnym* [Abuse of Right in Polish Civil Law] (Kraków: Zakamycze, 2000), p. 112-113; Magdalena Konopacka, 'Dobra wiara w prawie umów' [Good Faith in Contract Law] in *Polskie prawo prywatne w dobie przemian. Księga jubileuszowa dedykowana Profesorowi Jerzemu Młynarczykowi* [Polish Private Law in the Age of Transformations: Liber Amicorum Professor Jerzy Młynarczyk] (Gdańsk: Wyd. Uniw. Gdańskiego, 2005), p. 66-67; Mateusz Pilich, 'Zasady współzycia...', p. 169.

⁴⁵¹ See e.g. Zbigniew Radwański and Maciej Zieliński, 'Uwagi *de lege ferenda* o klauzulach generalnych w prawie prywatnym' [De Lege Ferenda Remarks on General Clauses in Private Law], *Przegląd Legislacyjny* 2 (2001): 11-33, p. 20; Krzysztof Pietrzykowski in *Kodeks cywilny. Komentarz do artykułów 1-449*¹¹ [Civil Code: Commentary to Articles 1 to 449¹¹], ed. Krzysztof Pietrzykowski, vol. 1 (5th ed., Warszawa: C.H. Beck, 2008), p. 67.

⁴⁵² See e.g. Stanisław Rudnicki in: *Komentarz do kodeksu cywilnego. Księga pierwsza. Część ogólna* [Commentary to the Civil Code: Book One. General Part], ed. Stanisław Rudnicki and Stanisław Dmowski (7th ed., Warszawa: LexisNexis, 2007), p. 249-250.

⁴⁵³ Pilich, 'Zasady współzycia...', p. 170.

⁴⁵⁴ See e.g. Beata Janiszewska, 'O potrzebie zmiany klauzuli zasad współzycia społecznego (głos w dyskusji)' [On the Need to Change the Clause of the Principles of Social Life (Voice in Discussion)], *Przegląd Ustawodawstwa Gospodarczego* 61 (2003), p. 7ff; Beata Janiszewska, 'Pojęcie dobrej wiary w rozumieniu obiektywnym a zasady współzycia społecznego' [The Concept of Good Faith in the Objective Sense and the Principles of Social Life]. *Przegląd Ustawodawstwa Gospodarczego*, 61.9 (2003), p. 2ff; Konrad Osajda, in *Nadużycie prawa* [Abuse

The approach of the legislature towards the principles of social life can be described as piecemeal, inconsequent and erratic. First of all, the legislature has not deleted the principles of social life from any of the rules where they were placed under actually existing socialism. Secondly, even new legislative enactments, both within private⁴⁵⁵ and public⁴⁵⁶ law, have been referring to the principles of social life. Thirdly, other legislative enactments which otherwise would mention the principles of social life, contain, instead of them, traditional general clauses known previously in Polish law (good morals,⁴⁵⁷ equity⁴⁵⁸) or

of Right], ed. Hubert Izdebski and Aleksander Stępkowski (Warszawa: Liber, 2003); Konrad Osajda, 'Głos w obronie klauzuli zasad współzycia społecznego (głos w dyskusji)' [A Voice in Defence of the Clause of the Principles of Social Coexistence (A Voice in the Discussion)], in *Europeizacja prawa prywatnego...*, vol. 2. The main arguments raised rested upon the fact that they have changed their meaning, that the term 'principles of social life' is semantically widest, that it is endowed with an intuitive meaning and characterised by a larger degree of openness. Other arguments pointed to the society-focused character of that general clause and to the risk of the potential discontinuity in the case-law and reversal of legal development in case of the abrogation of the principles.

⁴⁵⁵ See e.g. the rule on the freedom of contract (Art. 353¹ k.c. introduced in 1990), the rule on *rebus sic stantibus* (art. 357¹ k.c. introduced in 1990), the rule on separation of marriage (art. 61¹ § 2 k.r.o. introduced in 1999); the rule limiting the right to demand alimony (Art. 144¹ k.r.o. introduced in 2008), the preventing a guardian from claiming remuneration (Art. 162 § 2 k.r.o. as amended in 2008); the rule on worker liability (Art. 121² § 2 k.p.).

⁴⁵⁶ See e.g. the new Code of Criminal Procedure (act of 6.6.1997, Dz.U. no. 89 item 555) which still provides that criminal proceedings have the aim of strengthening respect for the principles of social life (Art. 2 § 1(2)) and if proceedings are terminated for want of criminality, a court or prosecutor may refer the case to a competent body if there is a violation of the principles of social life (but no violation of criminal law) (Art. 18 § 2).

⁴⁵⁷ See e.g. art. 3 of the Unfair Competition Act (act of 16.4.1993, Dz.U. no. 47, 211) (definition of an act of unfair competition); Art. 705 k.c. according to which a violation of good morals by a tenderer is a ground for the annulment of the contract; Art. 72 § 2 k.c. which bases precontractual liability on a violation of good morals; Art. 385¹ k.c. where a violation of good morals is part of the definition of an unfair contractual terms. Incidentally it should be remarked that in other legal systems it is rather good faith and not good morals which are the basis of pre-contractual liability or the definition of an unfair contractual term. On good faith as a basis of pre-contractual liability in German case-law see e.g. Friedrich Kessler and Edith Fine, 'Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: a Comparative Study', *Harvard Law Review* 77.3 (1964): 401-449, p. 403-404; Menezes Cordeiro, 'La bonne foi à la fin du vingtième siècle', *Revue de droit de l'Université de Sherbrooke* 26 (1996): 223-245, available online at:

reasonableness⁴⁵⁹ – a new general clause,⁴⁶⁰ hitherto unknown in Poland. This has led to a legislative mosaic or patchwork, where state-socialist general clauses coexist with reintroduced traditional clauses as well as with new general clauses of foreign origin, hitherto unknown in Polish legal acts.

C Application of the legal framework in practice

(a) *before 1989*

The case-law on the principles of social life can be roughly divided into two periods. During the first period, encompassing especially the 1950s, the principles were treated as a question of law, and not only as a question of fact, they were applied *contra legem* (against the statutory law)⁴⁶¹ and treated as the

http://www.usherbrooke.ca/droit/fileadmin/sites/droit/documents/RDUS/volume_26/26-2-cordeiro.pdf (last accessed: 28/1/2014), p. 227; Mateusz Pilich, *Dobra wiara w konwencji o umowach międzynarodowej sprzedaży towarów* [Good Faith in the Convention of International Sales of Goods] (Warszawa: C.H. Beck, 2006), p. 59-62. Good faith, and not good morals, are to be found in the statutory definitions of unfair terms in EU law (art. 3 of the Unfair Terms Directive), German law (§ 307 of the German Civil Code) and English law (Regulation 5(1) of the Unfair Terms in Consumer Contracts Regulations) and it was on the basis of good faith that judge-made standard term control was established e.g. in Germany, the Netherlands and Greece (Martijn W. Hesselink, 'The Concept of Good Faith', in *Towards a European Civil Code*, ed. Arthur Hartkamp et al. (4th ed., Alphen a/d Rijn: Kluwer 2010): 619-650, p. 629).

⁴⁵⁸ See Art. 417² k.c. on compensation for damage caused by lawful government action; art. 761² k.c. on division of commission between previous and current commercial agent; art. 61⁴ § 2 k.r.o. on duty of alimony between separated spouses.

⁴⁵⁹ See Art. 95 § 4 k.r.o. (amended in 2008) and art. 113¹ k.ro. (added in 2008) which use the concept of 'reasonable wishes' of a child. The Draft Civil Code (Book One) makes much wider use of 'reasonableness' as a general clause (see below).

⁴⁶⁰ On 'reasonableness' as a functional equivalent of general clause in the English legal system see e.g. Simon Whittaker, 'Theory and Practice of the 'General Clause' in English Law: General Norms and the Structuring of Judicial Discretion' in *General Clauses and Standards in European Contract Law: Comparative Law, EC Law and Contract Law Codification*, ed. Stefan Grundmann and Denis Mazeaud (The Hague: Kluwer, 2006): 52-76, p. 70-76.

⁴⁶¹ Ajani, *Fonti...*, p. 82; Stawarska-Rippel, 'O klauzulach...', p. 126-127, 129.

basis for creating a parallel (alternative⁴⁶²) normative system, comparable to Roman *ius honorarium* (Praetor-made law) or English equity. This body of judge-made law was intended to bring Polish private law into line with the socio-economic developments of state socialism. New rules were judicially created especially in property law, contract law and tort law, as well as the law of succession.

Within property law, for example, in 1951 the Supreme Court ruled that an owner's action to recover property (*rei vindicatio*) brought by an informal seller of land against the informal buyer⁴⁶³ should be examined in the light of the principles of social life and the trial judge must consider, *inter alia*, such factors as the class membership of the parties.⁴⁶⁴ In a 1954 decision, the Supreme Court established a general presumption according to which an action for repossession brought by the formal owner against a long-term possessor violates the principles of social life; such a presumption had to be refuted by the owner, otherwise the claim was dismissed.⁴⁶⁵ This line of case-law began to be reversed only beginning with the 1960s.⁴⁶⁶ In 1952 the Supreme Court held that an action for repossession brought by a private owner against a socialised entity (e.g.

⁴⁶² For a similar view on the operation of general clauses in Western European legal systems see Hesselink, 'The Concept...', p. 642-644. It should be added that in the case of freshly established states of Really Existing Socialism, as Poland, the difference between the 'old law' and 'socialist equity' was not merely formal (enacted code vs. judge-made law based on general clause) or quantitative (more autonomy vs. more solidarity) but rather substantive and qualitative (law of the market economy vs. state-socialist law).

⁴⁶³ Polish law required, and still does, a notarial deed to transfer ownership in land; an informal sale contract was, and is, incapable of transferring title and technically it does not alter anything in the property relationships.

⁴⁶⁴ SN decision of 11.12.1951, Case C 1573/51, LEX no. 207385.

⁴⁶⁵ SN decision of 18.6.1954, Case I CZ 730/54, LEX no. 118473.

⁴⁶⁶ SN decisions of 11.9.1961, Case I CR 693/61, LEX no. 105707 and 10.9.1964, Case III CO 45/64, LEX no. 236.

a socialised farm) may not succeed if it would threat the fulfilment of the economic plan by the socialised farm.⁴⁶⁷

In the sphere of contract law, the Supreme Court ruled that if the landlord was a private party and the tenant a state-owned enterprise, the landlord's right of termination of the lease agreement was limited on the basis of the principles of social life: for instance in a case decided in 1949, the Supreme Court did not allow a private landlord to end a lease agreement with a state pharmacy in a village where there was no other premises to set up a pharmacy and the local populace would suffer the lack of this facility.⁴⁶⁸ A person who granted another person a gratuitous loan for use (commodate) of their apartment, could not request the apartment to be returned if this would lead the lessor to gain an excessive living space.⁴⁶⁹ The Supreme Court also ruled that a private person may not demand from a unit of socialised economy a rent which would be significantly higher than rent payable to another unit of socialised economy.⁴⁷⁰ Other areas of contract law where the principles of social life brought about judicial law-making was the prohibition of unpaid labour (including unpaid internships and volunteership)⁴⁷¹ or the ruling that that citizens may not treat a state-owned enterprise as something completely alien to themselves, hence they may not rely on the fact that the termination of their labour contract was

⁴⁶⁷ SN decision of 16.10.1952, Case C 1940/52, LEX no. 292939.

⁴⁶⁸ SN decision of 7.12.1949, Case C 1675/49, LEX no. 159802 (technically this case was decided on the basis of the rule on abuse of right in force between 1946 and 1950 which referred to the 'social purpose' and 'good faith' but not yet to the 'principles of social life').

⁴⁶⁹ SN decision of 15.10.1951, Case I C 1288/53, LEX no. 196533.

⁴⁷⁰ SN decision of 9.1.1952, Case C 1270/51, LEX no. 195574.

⁴⁷¹ SN decision of 7.11.1950, Case C 162/50, LEX no. 117060.

formally vitiated in order to question the validity of the termination of the labour contract.⁴⁷²

Within tort law, the Supreme Court ruled that a claim for monetary compensation for a wrongful death is contrary to the principles of social life,⁴⁷³ unless the moral wrong entails also a patrimonial loss.⁴⁷⁴ Within the law of succession the Supreme Court ruled, for instance, that the party entitled to a legitim (forced share in deceased estate) may not demand the immediate payment of the legitim if the creditor is in a good financial situation, whereas the debtor would become financially ruined if he satisfied the claim.⁴⁷⁵

During this period, Polish scholars and judges started working on cataloguing the principles of social life with view of systematising an emerging body of judge-made law and creating an 'inner system' of the general clause.⁴⁷⁶ Courts proclaimed specific (individual) principles of social life and even indicated the date of entry into force of a specific principle which could either be prospective or retrospective, depending on whether the court registered an existing social view (retrospective) or acted as an 'educator' of society (prospective).⁴⁷⁷

⁴⁷² SN decision of 23.9.1958, Case IV CO 18/58, LEX no. 168954.

⁴⁷³ SN decision of 21.4.1951, Case C 25/51, LEX no. 160157.

⁴⁷⁴ SN decision of 15.12.1951, Case C 15/51, LEX no. 117056.

⁴⁷⁵ SN decision of 11.11.1954, Case I CR 1573/54, LEX no. 118049.

⁴⁷⁶ Thus taking an inductive approach towards the general clause, similar to the approach of the German and Dutch doctrine towards *Treu und Glauben* and *redelijkheid en billijkheid* respectively. Cfr. Simon Whittaker and Reinhard Zimmermann, 'Good Faith in European Contract Law: Surveying the Legal Landscape', in *Good Faith in European Contract Law*, ed. Whittaker and Zimmermann (Oxford: OUP, 2000): 7-62, p. 23ff (who speak of 'concretisation' or creation of 'groups of cases' [*Fallgruppen*]); Hesselink, 'The Concept...', p. 623-624.

⁴⁷⁷ See e.g. SN decision of 13.12.1952, Case C 1208/52, LEX no. 117610.

In later case-law, roughly from the 1960s onwards, the principles of social life were treated as a question of fact, rather than a question of law. They lost their function of a superior legal rule, capable of derogating from the black-letter rules of the Code. As a consequence, scholars and judges abandoned the idea of proclaiming and cataloguing individual principles of social life.⁴⁷⁸ This shift in attitude was not something extraordinary: when the statutory law, especially the Codes, were re-codified to take stock of the revolutionary socio-economic changes, the adaptive function of general clauses was no longer necessary.⁴⁷⁹

(b) after 1989

The continuity of the principles of social life after 1989 is not merely terminological (although such a form of continuity is undoubtedly interesting in its own right, owing to its symbolic dimension). Courts actually treat the continuity of the pre-1989 terminology as an invitation to continuity with the pre-1989 case-law. What is more, according to Polish scholars, an opposite move, i.e. the change of the name of the general clause (e.g. to 'good faith')

⁴⁷⁸ Thus, in 1967 the Supreme Court ruled (decision of 28.11.1967, Case I PR 415/67, LEX no. 4615) that the principles of social life 'can serve as the basis for correcting the evaluation of an atypical case, but they do not serve the purpose of generalisations in typical situations'. In 1970 the Committee of Legal Sciences of the Polish Academy of Sciences – an authoritative body of the Polish legal academia – officially endorsed the view that the principles of social life have a 'complex' character, and should be applied on a case-by-case basis rather than used to proclaim new legal principles as it used to be done in the 1950s. The academics' view was, in turn, officially endorsed in a Supreme Court resolution (of 17.1.1974, Case III PZP 34/73, LEX no. 15390) where it found that the principles 'may form the basis for correcting the evaluation of a concrete case which does not submit itself to an abstract legal regulation' but may not be the source of judge-made law: otherwise the court would 'enter[s] into the scope of legislation.' The Supreme Court explicitly departed from its own case-law of the 1950s on the need for cataloguing the principles of social life.

⁴⁷⁹ Cfr. Ajani, *Fonti...*, p. 165.

might entail an opposite result, namely a rejection of the case-law interpreting the doctrine of principles of social life.⁴⁸⁰

Thus, the view adopted in the 1960s that the principles of social life are a question of fact, not a question of law is upheld in contemporary case-law.⁴⁸¹ Courts reject the possibility of creating an ‘inner system’ of the general clause, pointing out that the principles cannot be ‘catalogued’.⁴⁸² A dispute which is on-going since the 1960s, is whether a court applying the principles of social life is under a duty to specify that principle in the sense of explicitly formulating an abstract rule which it considers to be one of the principles of social life. Such a practice was commonplace in the 1950s, when the principles were treated as a question of law, but since they began to be considered a question of fact, the issue of proclaiming specific principles became controversial. Courts in post-1989 Poland either require that a concrete principle be specified, or openly reject such a requirement. However, what is characteristic, is that each time they rely on pre-1989 case-law to support one or the other option⁴⁸³ which allows to acknowledge the continuity of the terms of reference of the debate itself. In fact,

⁴⁸⁰ Cfr. Leszek Leszczyński, ‘Nadużycie prawa – teoretycznoprawny kontekst aksjologii luzu decyzyjnego’ [Abuse of Right – The Legal-Theoretical Context of the Axiology of DecisionMaking Leeway], in *Nadużycie prawa* [Abuse of Right] ed. Hubert Izdebski and Aleksander Stepkowski (Warszawa: Liber, 2003), p. 31. The opposite view was expressed by Justyński, *Nadużycie...*, p. 112.

⁴⁸¹ See e.g. SN judgment of 25.5.2011, Case II CSK 528/10, LEX no. 794768: ‘...the requirement that a legal transaction comply with the principles of social life is a question relating to the facts of a case and is analysed only in the concrete circumstances of that case’. SN decision of 15.4.2011, Case II CSK 494/10, LEX no. 1027172): ‘The principles of social life within the meaning of Art. 5 k.c. are a concept indivisibly linked with the totality of the circumstances of a given case’.

⁴⁸² SN judgment of 25.5.2011, Case II CSK 528/10, LEX no. 794768: ‘it is impossible to create a catalogue of all individual principles of social life’.

⁴⁸³ See e.g. SN judgment of 6.1.2009, Case I PK 18/08, no. 584914, where the Supreme Court explicitly rejected the need of specifying a concrete principle of social life, citing as authority *inter alia* a resolution of the SN of 17.1.1974, Case III PZP 34/73, LEX no. 15390.

there are many more examples which indicate that the social practice of dealing with the principles of social life in adjudication is an uninterrupted one, and that the transformation of 1989 was not a major threshold.

Thus, for instance, a decision from 1987⁴⁸⁴ remains the leading case for the proposition that the principles of social life are not applicable in social security cases.⁴⁸⁵ A 1971 decision⁴⁸⁶ is still cited⁴⁸⁷ as authority for the proposition that the principles of social life ‘cannot give rise to entitlements of a durable character and is not superior with regard to other legal rules’. Established case-law dating from the 1950s to the 1970s continues to be cited⁴⁸⁸ as authority⁴⁸⁹ for applying the ‘clean hands principle’⁴⁹⁰ to the principles of social life. The Supreme Court continues to rely⁴⁹¹ on a 1961 precedent to argue that when evaluating whether a private right is exercised contrary to the principles of social life, the judge must

⁴⁸⁴ SN judgment of 19.6.1986, Case II URN 96/86 (reference according to SN judgments cited in subsequent footnote; decision not available in LEX database).

⁴⁸⁵ Recently cited e.g. in SN judgment of 23.10.2006, Case I UK 128/06, LEX no. 221705 and SN judgment of 2.12.2009, Case I UK 174/09, LEX no. 585709.

⁴⁸⁶ SN resolution (7 judges) of 19.4.1971, Case III PRN 7/71, LEX nr 527259.

⁴⁸⁷ SN order of 2.6.2011, Case I CSK 520/10, LEX no. 1129076.

⁴⁸⁸ SN judgment of 20.1.2011, Case I PK 135/10, LEX no. 794776.

⁴⁸⁹ SN judgments of: 13.5.1957, Case II CR 343/57, LEX no. 178051; 13.1.1960, Case II CR 1013/59, LEX no. 115388; 11.9.1961, I CR 693/61, LEX no. 105707; 6.4.1963., III CR 117/62, *Państwo i Prawo* 4 (1964) 703 (not available in LEX database); 29.1.1964, Case III CR 344/63, LEX no. 105536; 8 May 1973 r., Case I PR 90/73, LEX no. 12264; 29.1.1975, Case III PRN 67/74, LEX no. 12321; 30.1.1976, Case I PRN 52/75, LEX no. 13460. Apart from that, the Supreme Court cited also a number of post-1989 cases, thus strengthening the feeling of legal continuity – the line of case-law neatly extends over the 1989 threshold.

⁴⁹⁰ According to which (in the words of the SN) ‘the principles of social life may not be relied upon by a person who violates those principles (or legal rules)’. As Polish private lawyer Andrzej Stelmachowski (1925-2009) noted, this principle, known in the English equity law, was not formulated neither in the legislative nor doctrinal texts, but simply applied by the courts (*Zarys teorii prawa cywilnego* [An Outline of the Theory of Civil Law] (Warszawa: Wydawnictwa Prawnicze PWN, 1998), p. 121).

⁴⁹¹ SN judgment of 20.1.2011, Case I PK 135/10, LEX no. 794776.

take into account all circumstances of the case at hand and not only one of them, regardless of its importance. And finally, a 1981 precedent⁴⁹² is still relied upon by courts⁴⁹³ when reducing the legitim⁴⁹⁴ on the basis of the principles of social life.

Obviously, none of the rules deduced from the doctrine of principles of social life is originally 'socialist' or 'Soviet' in the sense of being derived from the writings of the classics of Marxism-Leninism or Soviet legal authors. However, it was not my aim to argue in that direction. What I intend to show, rather, is that the rules derived by the Polish Supreme Court from the Soviet doctrine of principles of social life during the state-socialist period are still relied upon in their specific configuration shaped in that period, and especially in the 1960s. These specific features, let me underline once again, are: firstly, the uniformity of the general clause (one standard for all situations, instead of a hierarchy of standards of variable intensity⁴⁹⁵); secondly, the general clause is treated always as merely a question of fact, which prevents the creation of an 'inner system' of stable rules deduced from the general clause (as is the case with *Treu und Glauben*) and even relatively stable sub-rules as the 'clean hands principle' are not applied on their own, but always within the framework of a totality-of-

⁴⁹² See SN resolution of 19.5.1981, Case III CZP 18/81, LEX no. 2666.

⁴⁹³ See e.g. SN judgment of 7 April 2004, Case IV CK 215/03, LEX no. 152889; SA/Warszawa judgment of 9.9.2009, Case VI ACa 286/09, LEX nr 1120244; SA/Szczecin judgment of 22.4.2009, Case I ACa 459/08, LEX nr 550912.

⁴⁹⁴ A legitim ('*zachowek*', i.e. forced share in a deceased estate) in Polish law is a claim of the would-be statutory heirs to the heirs appointed in a will for a partial monetary equivalent (1/2 or 2/3) of the share in the estate they would have obtained had the testator not made a last will.

⁴⁹⁵ Cfr. German private lawyer Grundmann's remarks on a hierarchy of standards provided by different general clauses (Stefan Grundmann, 'The General Clause or Standard in EC Contract Law Directives', in *General Clauses and Standards in European Contract Law*, ed. Grundmann and Denis Mazeaud (The Hague: Kluwer, 2006): 141-161, pp. 160-161.

circumstances approach; fourthly, that the doctrine applies only in substantive private law, and not in procedural private law⁴⁹⁶ or in public law (as is the case with *Treu und Glauben* in Germany⁴⁹⁷).

Although this methodology of applying the doctrine of principles of social life (as opposed, for instance, to its counterpart in German law, the doctrine of *Treu und Glauben*) is not specifically Soviet nor Marxist-Leninist, the link between the system of actually existing socialism and the doctrine is not thereby compromised. This is because one single doctrine (in place of ‘good faith’, ‘good morals’, ‘equity’ etc.) was introduced following Soviet law and precisely in order to offer a clear break from earlier law. Furthermore, the specific approach followed by the Supreme Court since the 1960s (as outlined above), and in particular its reservation towards openly using the doctrine for judicial law-making (as in the case of creating an ‘inner system’ of the doctrine) was part and parcel of the specific circumstances of the period of actually existing socialism, when courts deliberately retreated from activism (of the Stalinist period) into formalism and passivism, which were viewed – after the atrocities of

⁴⁹⁶ Małgorzata Pyziak-Szafnicka, in: *System prawa prywatnego* [System of Private Law] vol. I: *Prawo cywilne – część ogólna* [Civil Law: General Part], ed. Marek Safjan (Warszawa: C.H. Beck, 2007), pp. 811-812. This distinction means that the doctrine of abuse of right (art. 5 k.c.) is applicable only to subjective rights arising from substantive private law, also at the stage when they are the object of civil proceedings. It does not apply, however, to purely procedural rights.

⁴⁹⁷ Otto Palandt et al., *Palandt, Bürgerliches Gesetzbuch* (73rd ed., München: C.H. Beck 2014), p. 263 (ad § 242 BGB, para. 4) (the principles of *Treu und Glauben* are applicable throughout public law, as well as in procedural law, especially civil procedure, enforcement proceedings, law on costs of proceedings, competition law); Günther H. Roth, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. 2a: *Schuldrecht Allgemeiner Teil. §§241-432*, ed. Wolfgang Krüger (4th ed., München: C.H. Beck, 2003), p. 139 (ad § 242, para. 93, 95 (applicability of *Treu und Glauben* in public law, with regard to the exercise of public power, in all types of procedural law, as well as in social law). Cfr. Hesselink, ‘The Concept...’, p. 634.

Stalinism – as a means of enhancing and preserving the rule of law.⁴⁹⁸ Therefore, the specific Polish methodology of applying the chief general clause of private law is inseparably linked to the characteristic features of the legal culture of the period of actually existing socialism and the transition from anti-formalist judicial law-making of the Stalinist period to the formalist judicial passivity of the post-Stalinist period. This is the decisive argument for treating the entire legal framework of the principles of social life, that is not only the rules of the Civil Code, but also the detailed framework set out in the established case-law of the Supreme Court, as a legal survival of the period of actually existing socialism.

D Social function

According to a long-standing and established view which can be traced back to Roman law and the functions of the Praetor's Edict,⁴⁹⁹ a general clause

⁴⁹⁸ For a general argument linking Central European (including Polish) judicial passivism as formalism as an aftermath of Stalinism see Zdeněk Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Leiden-Boston Martinus Nijhoff 2011), p. 116-119. Also Polish authors of the socialist period expressly opposed the Stalinist *contra legem* interpretation with the post-Stalinist strict rule of law, see e.g. Stanisław Włodyka, 'Rola Sądu Najwyższego w kształtowaniu prawa' [The Role of the Supreme Court in Shaping the Law] in *Sąd Najwyższy w PRL* [The Supreme Court in the Polish People's Republic], ed. Marian Rybicki (Wrocław et al.: Zakład Narodowy im. Ossolińskich, 1983), p. 316). Cfr. the view of contemporary Polish researcher of constitutional history of actually existing socialism, Lech Mażewski, who has argued that after the end of Stalinism, the ruling Party bureaucracy (the *nomenklatura*) considered the idea of a 'socialist rule of law' as a means of securing its position and preventing the reappearance of an unchecked form of lawless totalitarianism (Lech Mażewski, *Długa dekada lat siedemdziesiątych (1968-1981). Rola nowelizacji z 10 lutego 1976 r. Konstytucji PRL z 22 lipca 1952 r. w ewolucji ustroju PRL na tle konstytucji europejskich państw socjalistycznych* [The Long Decade of the Seventies (1968-1981): The Role of the Amendment of 10 February 1976 to the Constitution of the Polish People's Republic of 22 July 1952 in the Evolution of the Political System of the Polish People's Republic Against the Background of Constitutions of European Socialist States] (Toruń: Adam Marszałek: 2011), p. 195).

⁴⁹⁹ D. 1.1.7.1 (Papinianus libro secundo definitionum): 'Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam. (...)' ('The Praetorian Law is that which the Praetors introduced for the purpose of aiding, supplementing, or amending, the Civil Law, for the public welfare'. English translation

can play three functions *vis-à-vis* the written law: it can concretise or interpret it (*'adiuvare'*), supplement it (*'supplere'*) or correct it (*'corrigere'*).⁵⁰⁰ These functions can take place *ad hoc*, only in the limits of a given case (as envisaged, for instance, in the Swiss Civil Code⁵⁰¹), or they can have a durable effect, just like the Praetor's Edict which created a parallel system of law partly supplementing (*supplere*) and partly superseding (*corrigere*) the rules of the old law (the *ius civile*). If judicial decisions handed down on the basis of a general clause work in a similar way as the Praetor's Edict, and give birth to a parallel system of 'equitable law', one can speak of an 'inner system' of a general clause,⁵⁰² and treat the clause itself as a 'mouthpiece through which new rules speak, or the cradle where new rules are born'.⁵⁰³ In the latter case the general

according to: S.P. Scott, *The Civil Law*, II, Cincinnati, 1932, available online at: http://droitromain.upmf-grenoble.fr/Anglica/D1_Scott.htm#I [last accessed: 23/4/2014].

⁵⁰⁰ Hesselink, 'The Concept...', p. 626-627.

⁵⁰¹ Art. 1(2) of the Swiss Civil Code (1907) states that: 'A défaut d'une disposition légale applicable, le juge prononce selon le droit coutumier et, à défaut d'une coutume, selon les règles qu'il établirait s'il avait à faire acte de législateur.' Cfr. Art. 4 of the same Code: 'Le juge applique les règles du droit et de l'équité, lorsque la loi réserve son pouvoir d'appréciation ou qu'elle le charge de prononcer en tenant compte soit des circonstances, soit de justes motifs.' Coupled with the lack of formally binding precedent, such rules mean exactly that the general clauses may give rise to one-off judicial law making for the case at hand.

⁵⁰² Cfr. Peter Schlechtriem, 'The Functions of General Clauses, Exemplified by Regarding Germanic Laws and Dutch Law', in *General Clauses and Standards in European Contract Law*, ed. Stefan Grundmann, Denis Mazeaud (The Hague: Kluwer, 2006): 41-56, p. 43-44: 'Since in a codified system the judicial creation of new rules needs a basis in the code (...) a general clause (...) is used as a legal basis *as a peg to hang a new rule on*.' (Emphasis added.) See also *ibid.*, p. 44-47. The 'inner system' of *Treu und Glauben* is an example of such rules, which sometimes are taken over by the legislature, as in the case of the German reform of the law of obligations in 2001, which codified many rules previously created by established case-law of the German Supreme Court. See e.g. Mathias Reimann, 'The Good, the Bad and the Ugly: Reform of the German Law of Obligations', *Tulane Law Review* 83 (2009): 877-917, p. 888: 'An important element of the reform was the codification of doctrines and remedies that had been developed by case law and scholarship [...] [which] [...] were mainly derived [...] from the general principle [of] good faith (§ 242). [...] [T]hese doctrines were so firmly established [...] that their codification was by and large uncontroversial.'

⁵⁰³ Hesselink, 'The Concept...', p. 645.

clause itself serves as a 'cover', due to the fact that judges in certain legal cultures feel 'uncomfortable with their role as creators of the law'.⁵⁰⁴

Applying this typology of functions of a general clause to the doctrine of principles of social life, we find that in the initial period of their presence in Polish law (until the 1960s) they were used to create a parallel system of equitable law,⁵⁰⁵ and the Supreme Court did not hesitate to supplement (*supplere*) the written law with new, abstractly framed rules (e.g. a general prohibition of unpaid labour, such as unpaid traineeships)⁵⁰⁶ or to derogate rules (*corrigere*) which it found unfit for the new state-socialist system (e.g. the elimination of monetary claims as compensation for wrongful death).⁵⁰⁷ From a substantive point of view, the Supreme Court at that time understood the new general clause as a means of imposing preference for the social interest and interest of the state over private interest.⁵⁰⁸

⁵⁰⁴ Ibid.

⁵⁰⁵ Cfr. Leszek Leszczyński, *Stosowanie generalnych klauzul odsyłających* (Kraków: Zakamycze, 2001), p. 226.

⁵⁰⁶ Including unpaid internships and the work of 'volunteers' – see SN decision of 7.11.1950, Case C 162/50, LEX No. 117060.

⁵⁰⁷ Under the case-law from the 1950s, a claim for monetary compensation for a wrongful death – allowed under the Code of Obligations – was considered to violate the principles of social life (SN decision of 21.4.1951, Case C 25/51, LEX No. 160157), unless the moral wrong entailed also a patrimonial loss (SN decision of 15.12.1951, Case C 15/51, LEX No. 117056).

⁵⁰⁸ Leszek Leszczyński, 'Właściwości posługiwania się klauzulami generalnymi w prawie prywatnym. Perspektywa zmiany trendu' [Characteristic Features of the Use of General Clauses in Private Law: Perspectives for a Change of the Existing Trend], *Kwartalnik Prawa Prywatnego* 4.3 (1995): 289-307, p. 296; Leszczyński, *Stosowanie...*, p. 78 points out that whereas such a term as 'equity' can be understood as referring both to individual and to social interest, the very term 'principles of social life' 'presupposes as a point of departure a supraindividual point of view'. However, whilst he acknowledges that the name of a general clause may, by itself, impact upon its interpretation, he also adds that it is not the the name which plays a decisive role, but rather the prevailing axiology which underlies the legal system (ibid., p. 77-78).

However, this ‘Praetorian’ activity ceased once the written law was brought into line with the state-socialist system: from then on, the Supreme Court stopped invoking the principles of social life to proclaim new rules or abrogate old ones. Thus, in 1967 the Supreme Court explicitly ruled that the doctrine of principles of social life ‘can serve as the basis for correcting the evaluation of an atypical case, but does not serve the purpose of generalisations in typical situations’.⁵⁰⁹ In 1974 the Supreme Court developed this idea by stating that the principles of social life may not be the source of judge-made law, lest the court would ‘enter into the scope of legislative activity.’⁵¹⁰ Therefore, the functions of *supplere* or *corrigerere* on the basis of the principles of social life would, from then on, be performed only on an *ad hoc* basis. The general clause would no longer fulfil the function of a ‘mouthpiece’ or ‘cradle’ for a judge-made ‘inner system’ of equitable law.⁵¹¹ Characteristically, the systemic transformation of 1989 did not bring about a change in this respect.⁵¹² Judges, just like before 1989, tend to downplay the law-making potential of general clauses and are at pains to underline that a concrete interpretation of a general clause is always applicable only in the case at hand.⁵¹³

E Mechanism of endurance of the legal survival

If we treat the legal framework of the doctrine of ‘principles of social life’ as equal to the formulation of the general clause in the Civil Code, it can be said that the legal framework did not require any adjustment in order to survive after

⁵⁰⁹ SN decision of 28.11.1967, Case I PR 415/67, LEX No. 4615.

⁵¹⁰ SN resolution of 17.1.1974, Case III PZP 34/73, LEX No. 15390.

⁵¹¹ Leszczyński, *Stosowanie...*, p. 100.

⁵¹² *Ibid.*, p. 226

⁵¹³ *Ibid.*, p. 225.

1989.⁵¹⁴ This continuity – at the level of the statutory rule containing the general clause – is, perhaps, not that surprising. Similar situations have been noted in other jurisdictions. For instance, the German general clause of *Treu und Glauben* also survived, untouched, in the German Civil Code since its entry into force 1900, although it has been reinterpreted first to adapt the Code to the changed economic circumstances after World War I, then to the needs of the Nazi regime (1933-1945),⁵¹⁵ and later to the new liberal-democratic system of post-War Federal Republic of Germany.⁵¹⁶

However, what is interesting about the Polish legal survival of the principles of social life, is that even if we extend the notion of ‘legal framework’ to encompass the case-law handed down before 1989, the same result – continuity – obtains (save for some exceptions from the case-law of the 1950s). As the analysis of case law has indicated, the pre-1989 decisions are still heavily relied on as authority for the methodology of applying the doctrine of principles of social life. Therefore, whilst it is relatively easily conceivable to observe continuity in the formulation of a general clause, even despite radical political and socio-economic changes, it seems remarkable that also the case-law handed down under the general clause has survived.

A possible explanation for this may lie precisely in the specific Polish method of interpreting the general clause. As I mentioned above, since the

⁵¹⁴ To be precise, the words ‘in the Polish People’s Republic’ were removed in Art. 5 k.c., but the expression itself (‘principles of social life’) remained the same. Furthermore, in all other articles of the Civil Code the expression ‘principles of social life’ was not accompanied by the addition ‘in the Polish People’s Republic’.

⁵¹⁵ On which see, specifically, Bernd Rüthers, *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus* (7th ed., Tübingen: Mohr Siebeck, 2012), p. 224236.

⁵¹⁶ See e.g. Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (Oxford: OUP, 2005), p. 25-28.

1960s, it has been treated not as a ‘mouthpiece through which new rules speak, or the cradle where new rules are born’,⁵¹⁷ but rather as a ‘general safety valve’.⁵¹⁸ This enabled judges at the fact-finding level to step in as *ad hoc* law-makers (within the limits of the case at hand). The difference is significant. A glance at the substantive doctrines proclaimed on the basis of the principles of social life in the 1950s (and rejected *en masse* in the 1960s when the idea of an inner system of the general clause was disbanded) clearly permeated by the then prevalent collectivist view of society⁵¹⁹ is sufficient to give an impression of what would have happened with the pre-1989 case-law, had it followed the path of creating an ‘inner system’ of the general clause.

Obviously, such an ‘inner system’ created under actually existing socialism, permeated by a radically different vision of society from the vision prevalent after 1989, would have had to be discarded following the transformation.⁵²⁰ The nude rule of the Code would have perhaps survived (which is not at all sure), but the Supreme Court would have had to draw a clear line between its state-socialist and post-socialist case-law. In reality, however, such an operation was not at all necessary. Indeed, thanks to the delegation of the law-making competences granted by the principles of social life to the judge of fact (as opposed to the judge of law in the Supreme Court), and thanks to the treatment of the principles as an *ad hoc* ‘safety valve’, rather than a ‘mouthpiece’ or ‘cradle’ for proclaiming new, abstract rules, not only the Civil Code’s provisions on the

⁵¹⁷ Hesselink, ‘The Concept...’, p. 645.

⁵¹⁸ Andrzej Stelmachowski, *Zarys teorii prawa cywilnego* [An Outline of a Theory of Civil Law] (Warszawa: Wydawnictwa Prawnicze PWN, 1998), p. 120.

⁵¹⁹ As discussed above in section C(a).

⁵²⁰ Just like the racist case-law proclaimed under general clauses of *gute Sitten*, *Treu und Glauben* as well as *wichtige Grund* during the period of Nazi jurisprudence (Rüthers, *Die unbegrenzte...*, p. 219-260) were abandoned in post-War democratic Germany.

principles of social life, but also the case-law interpreting them, have successfully survived the transformation and are being still applied today. One could rephrase this aspect by referring to a rule vs. principle distinction,⁵²¹ and point out that the principles of social life survived because they are a *standard*, and because as from the 1960s, as a standard they have been not been filled in with *rules* forming an inner system. The generality and flexibility of the standard, as opposed to the more rigid character of rules, can be said to be a factor enabling the survival of the principles of social life. To put it more abstractly, the more general and flexible the legal framework, the easier it can assume a modified social function following a socio-economic transformation.

3 Concept of socio-economic purpose

A Circumstances of introduction

The origins of the doctrine of socio-economic purpose (Russian: *социально-хозяйственное назначение, sotsyalno-khozaystvennoye naznachenye*; Polish: *społeczno-gospodarcze przeznaczenie*) which will have been later transplanted to Polish law after World War II, are to be found in the Soviet Russian Civil Code of 1922 which, in its Article 1, famously provided that '[t]he law protects private rights except as they are exercised in contradiction to their social or economic purpose.' This provision was enacted in the context of the New Economic Policy (NEP), which, once again after the Revolution, enabled individuals to acquire private rights, something that was impossible under War Communism⁵²² which followed the Revolution immediately.⁵²³

⁵²¹ Kennedy, 'Form and Substance...', p. 1687-1688.

⁵²² 'War Communism' (*военный коммунизм*) is a term used to denote the economic governance in the Soviet Union between 1918 and 1922, when the liberal New Economic Policy (NEP) was introduced. War Communism was characterised by a fully administrative regulation of the economy (requisitions, duty of labour) and the elimination of market mechanisms (which

The drafters of the Soviet Russian Civil Code of 1922, whilst heavily borrowing from bourgeois law, nevertheless were concerned to protect the revolutionary *status quo* by denying private rights an unconditional protection.⁵²⁴ This aim was achieved, inter alia, by the doctrine of purpose-oriented legal capacity (special legal capacity)⁵²⁵ and by a likewise purpose-oriented limitation of the scope of enjoyment private rights. The doctrine of socio-economic purpose was intended, in the words of the People's Commissioner for Justice, Pēteris Stučka (1865-1932), as a 'Damocles' sword' hanging over the private rights of capitalists.⁵²⁶ Although the terminology of the new general clause was inspired by French doctrine (Saleilles, Duguit, Josserand),⁵²⁷ nevertheless it was an original Soviet innovation explicitly to introduce such a formula into the text of a civil code.⁵²⁸ Soviet authors underlined that the new formula meant that private rights were inherently combined with social duties and were no longer enjoying unconditional legal protection, as in capitalist legal systems.⁵²⁹

would later be reintroduced under NEP). See e.g. Robert William Davis, 'Changing Economic Systems: An Overview', in *The Economic Transformation of the Soviet Union, 1913-1945* (Cambridge: CUP, 1994), p. 6-8.

⁵²³ Vladimir Gsovski, *Soviet Civil Law: Private Rights and Their Background Under the Soviet Regime*, vol. I: Comparative Survey (Ann Arbor: University of Michigan Law School, 1948), p. 314.

⁵²⁴ Gsovski, *Soviet Civil Law*, vol. 1, p. 314.

⁵²⁵ Art. 4 granted legal capacity to subjects of private law '[f]or the purpose of the development of the productive forces of the country'.

⁵²⁶ Gsovski, *Soviet Civil Law*, vol. 1, p. 316.

⁵²⁷ See also Art. 153(3) of the Weimar Constitution: 'Property obliges. Its use shall simultaneously be service for the common best.' (Translation according to: http://www.zum.de/psm/weimar/weimar_vve.php (last accessed: 14/3/2014)).

⁵²⁸ Gsovski, *Soviet Civil Law*, vol. 1, p. 317.

⁵²⁹ *Ibid.*, p. 319, citing Soviet jurists Malitsky and Slivitsky.

The Soviet doctrine was transplanted into Polish law first in 1946 – in the guise of ‘social purpose’ (repealed in 1950) and a second time⁵³⁰ in 1964, this time as a ‘socio-economic purpose’. It should be emphasised that contemporary Polish authors do not question the Soviet origin of this legal transplant.⁵³¹

B Legal framework

In the General Provisions of Civil Law, enacted in 1946,⁵³² the notion of ‘social purpose’ was resorted to in the definition of the doctrine of abuse of right in Article 5 of the Act, which provided that private rights must be ‘exercised (...) in accordance with their social purpose and the requirements of good faith.’⁵³³ Acts contrary to this rule were deemed to fall outside the scope of enjoyment of the right and did not enjoy legal protection.⁵³⁴ However, when the general part of private law was re-codified in 1950, the doctrine of social purpose disappeared, and the only limit of the exercise of private rights was the doctrine of the principles of social life.⁵³⁵

The purpose-oriented general clause – now known as ‘socio-economic purpose’ – reappeared in the Civil Code of 1964. Although not as proliferated as the principles of social life, it was present in a number of rules. Most notably,

⁵³⁰ The notion was transplanted for a second time, because the original expression ‘social purpose’ disappeared with the repeal of the 1946 general provisions of civil law which contained them. The 1950 act on general provisions of civil law did not contain such a notion, but only the notion of ‘principles of social life’. Therefore, it was only in 1964, when the Civil Code was enacted, that the ‘socio-economic purpose’ became a statutory expression in Polish private law.

⁵³¹ See e.g. Zbigniew Radwański and Maciej Zieliński in: *System Prawa Prywatnego* [System of Private Law], vol. 1: *Prawo cywilne – część ogólna* [Civil Law – the General Part] ed. Marek Safjan (Warszawa: C.H. Beck, 2007), p. 343.

⁵³² Decree of 12.11.1946 (Dz.U. 1946 no. 67 item 369).

⁵³³ Art. 5 § 1.

⁵³⁴ Art. 5 § 2.

⁵³⁵ Art. 3 p.o.p.c. (1950).

together with statutes and the principles of social life, socio-economic purpose became the limitation of the exercise of private rights.⁵³⁶ The second prominent use of the doctrine is within the definition of the right of ownership – the owner may enjoy his property

‘[w]ithin the limits set by statutes and the principles of social life [...] in accordance with the socio-economic purpose of the right [...].’⁵³⁷

Finally, the third prominent resort to this Soviet doctrine was with regard to the performance of obligations, which were to be executed in line with the socio-economic purpose of the obligation and the principles of social life.⁵³⁸ The same standards were made binding on the creditor with regard to his cooperation in the performance of an obligation.⁵³⁹

Furthermore, the doctrine of socio-economic purpose, on its own (i.e. without any resort to the principles of social life) determines the physical scope of ownership of land above and below the level of soil.⁵⁴⁰ The notion also appears in a number of more technical rules, such as the definition of ‘legal fruits’ (*fructus legales*),⁵⁴¹ of nuisance in relations between neighbours,⁵⁴² the

⁵³⁶ Art. 5 k.c. Authors writing during the socialist period emphasised that the doctrine of socio-economic purpose applied mainly to ownership and was aimed at assuring that exercise of ownership would correspond to its form and type (socialist ownership, other social ownership, individual ownership, personal ownership) (see e.g. Jerzy Ignatowicz, in: *Kodeks cywilny. Komentarz* [Civil Code: A Commentary] ed. Zbigniew Resich (Warszawa: Wydawnictwo Prawnicze, 1972), vol. I, p. 370).

⁵³⁷ Art. 140 k.c. Cfr. Basic Law for the Federal Republic of Germany (*Grundgesetz*) (1949), Art 14(2): ‘Property entails obligations. Its use shall also serve the public good.’ (translation according to: <http://www.iuscomp.org/gla/statutes/GG.htm#14> (last accessed: 14/3/2014)).

⁵³⁸ Art. 354 § 1 k.c.

⁵³⁹ Art. 354 § 2 k.c.

⁵⁴⁰ Art. 143 k.c.

⁵⁴¹ Art. 54: ‘The fruits of a right are the income generated by that right in accordance with its socio-economic destination.’

limitation of the right to demand the division of co-ownership,⁵⁴³ and the exclusion of state liability for buildings erected by a cooperative on land held by it under cooperative usufruct.⁵⁴⁴

C Application of the legal framework in practice

The legal framework of the doctrine of socio-economic purpose has been resorted to relatively less frequently in the practice of adjudication than the legal framework of the principles of social life. Particularly infrequent have been cases in which courts relied exclusively, or at least distinctively on the socio-economic purpose, rather than invoking it jointly with the principles of social life. Examples of case-law from the period of actually existing socialism include decisions in which the Supreme Court relied on this doctrine for the purposes of ascertaining the value of a cooperative member's proprietary right to an apartment in the context of division of matrimonial property;⁵⁴⁵ for the purposes of declaring the abusive character of an informal acquisition of agricultural land by an inhabitant of a town for non-agricultural purposes (ruling that that such a transaction violates both the socio-economic purpose of the said plot of land and the principles of social life);⁵⁴⁶ in the context of ascertaining the

⁵⁴² Art. 144 k.c.: 'The owner of an immovable should (...) refrain from actions which would interfere with the enjoyment of neighbouring immovables in excess of an average measure following from the socio-economic destination of the immovable (...).'

⁵⁴³ Art. 211 k.c. which provides that a physical division of a thing owned jointly may not be demanded if it would be 'contrary to statutory rules or to the socio-economic destination' of that thing.

⁵⁴⁴ Art. 273 k.c. However, the special usufruct established in favour of agricultural cooperatives is no longer in use.

⁵⁴⁵ SN resolution of 14.10.1977, Case III CZP 77/77, LEX no. 8012.

⁵⁴⁶ SN judgment of 30.12.1976, Case III CRN 297/76, LEX no. 2085.

effectiveness of a unilateral termination of an employment contract;⁵⁴⁷ as well as in the context of nuisance in relations between neighbours.⁵⁴⁸

References to the doctrine of socio-economic purpose have continued in the post-1989 period, despite views urging its abrogation.⁵⁴⁹ Most frequently, the doctrine has been invoked together with the principles of social life. For instance, in 2010 a court of appeal⁵⁵⁰ dismissed an owner's action to recover possession of property (*rei vindicatio*) on account of a joint violation of both the principles of social life and the socio-economic purpose of the vindicated right.⁵⁵¹ Although the socio-economic purpose of the right was explicitly mentioned by the court, it was not analysed separately from the principles of social life. In a case decided in 2009,⁵⁵² another court held that an owner's action to recover the land beneath the Chopin Airport in Warsaw, even if it were formally justified by the existing property relationships, would nevertheless violate the socio-economic purpose of the right and the principles of social life. In this context, the Court pointed out that

‘the primacy of the widely understood public interest [...] over the individual interest of the plaintiffs must be accepted’.

⁵⁴⁷ SN resolution of 22.1.1985, Case III PZP 53/84, LEX no. 14863 (a unilateral termination of the labour contract on account of the suppression of the employment post is justified even if on the day of the declaration of will there were no legal reasons for the termination, if the termination was justified by the socio-economic purpose of the right).

⁵⁴⁸ SN judgment 28.12.1979, III CRN 249/79, LEX no. 2480.

⁵⁴⁹ See e.g. Justyński, *Nadużycie prawa...*, p. 116-117 with further references.

⁵⁵⁰ SA/Poznań judgment of 3.11.2010, Case I ACa 578/10, LEX no. 756672.

⁵⁵¹ In the facts of the case the plaintiff wanted to recover a public road (which he was formally owner of) in order to gain a better bargaining position in administrative proceedings regarding the expropriation with view of obtaining a higher compensation. The court underlined that the plaintiff does not have any plans with regard to the land (formally: a plot agricultural land) and is not a farmer.

⁵⁵² SA/Warsaw judgment of 2.2.2009, Case VI ACa 606/08, LEX no. 530990.

There are, however, also cases in which courts have been analysing the violation of both doctrines separately: for instance in a 2012 ruling a court of appeal found that the plaintiff is pursuing his right to a legitim in accordance with its socio-economic purpose (but not in accordance with the principles of social life).⁵⁵³ It should be added that the approach which does not differentiate between the doctrines of socio-economic purpose and principles of social life was endorsed by the Supreme Court in 2009,⁵⁵⁴ which ruled that what counts, is an evaluation of the ‘totality of the circumstances’ of a case, rather than a distinct analysis of the facts of the case in light of both doctrines.

The less prominent rules of the Civil Code which contain the general clause also give rise to case-law, for instance with regard to the division of a co-owned object of property,⁵⁵⁵ or on the scope of the owner's rights in space.⁵⁵⁶

D Social function of the legal framework

The social function of the doctrine of socio-economic purpose during the period of actually existing socialism was

‘to give absolute priority to the state interest or social interest before the interest of right-holders, and in particular to ensure the conformity of enjoyment of subjective rights with the socialist typology of property, as

⁵⁵³ SA/Poznań decision of 15.2.2012, I ACa 1121/11, LEX no. 1133334.

⁵⁵⁴ SN judgment of 16.6.2009, Case I CSK 522/08, LEX nr 518132.

⁵⁵⁵ See e.g. SN order of 13.1.2012, Case I CSK 358/11; SN order 21.4.2004, III CK 448/02, LEX no. 585807.

⁵⁵⁶ SN judgment of 3.11.2004, III CK 52/04, LEX no. 1124087.

well as the conformity of economic turnover with the indications following from the system of central economic planning.⁵⁵⁷

After the transition in 1989, the role of the analysed doctrine certainly diminished. However, as the analysed case-law shows, courts treat this doctrine as a last resort in situations when individuals try to invoke their rights in a formally correct manner, but in obvious contradiction to the public interest.

E Mechanism of endurance of the legal survival

The legal framework of the doctrine of socio-economic purpose did not require any adjustment to become a legal survival. Although its practical role, in comparison to the sister doctrine of principles of social life, has been smaller, there is published case-law which indicates that courts sometimes resort to it in their case-law. It seems that the key to the endurance of this legal survival is its open-ended formulation as a standard, rather than a rule. ‘Socio-economic purpose’ refers to the current socio-economic system, without clearly pointing to state-socialist central planning or to a market economy. Thanks to this open-ended character, typical for standards, which is an inherent adaptation mechanism,⁵⁵⁸ the general clause can be applied under different political systems.

4 Right of perpetual usufruct

A Circumstances of introduction

State-socialist property law was based on a dogmatic belief in the need of expanding and preserving state property, which was understood as a direct

⁵⁵⁷ Radwański and Zieliński in *System...*, vol. 1, p. 344. See also Justyński, *Nadużycie prawa...*, p. 114 who points out that this general clause was introduced in order to ‘clearly underline the dominant role of the social interest in civil law.’

⁵⁵⁸ Cfr. Rüthers, *Die unbegrenzte...*, p. 216-217, who speaks of the ‘changing content’ (*inhaltliche Wandelbarkeit*) of general clauses as their feature under any political system.

implementation of Marx and Engels' views expressed in the *Communist Manifesto*, where they explicitly intimated that 'the theory of the Communists may be summed up in the single sentence: Abolition of private property.'⁵⁵⁹ Faithful to this mandate, upon seizing power, Bolsheviks ensured, *inter alia*, the abolition of private ownership of land.⁵⁶⁰ Furthermore, state ownership of all land in the country became enshrined in Soviet constitutions, making the state's right constitutionally unalienable.⁵⁶¹ Under such circumstances, private individuals, wishing to erect a house or another building, which necessarily must be placed on a plot of land, could not acquire the right of ownership of the soil below the building, but had to satisfy themselves with a weaker title. Whilst individuals could acquire, in the guise of 'personal property', a house of a limited surface for their private use,⁵⁶² the land had to remain state-owned.

In order to enable this arrangement, required by the fundamental principles of actually existing socialism, a dedicated legal framework had to be used. In the Soviet Union, a pre-revolutionary legal institution (itself received from Germany), the 'right of construction' (*право застройки, pravo zastroyki*), was used for this purpose.⁵⁶³ Under the Soviet-Russian Civil Code of 1922, this legal institution provided that state-owned land could be granted for building tenancy by a local authority for a fixed period (up to 50 years for wooden houses,

⁵⁵⁹ Karl Marx and Friedrich Engels, *The Communist Manifesto* [1848] (London: Penguin, 2002), p. 235.

⁵⁶⁰ Adam Lityński, *Prawo Rosji i ZSRR 1917-1991 czyli historia wszechzwiązkowego komunistycznego prawa (bolszewików). Krótki kurs* [The Law of Russia and the USSR between 1917 and 1991 or a History of the All-Union Communist Law (of the Bolsheviks): A Short Course] (Warszawa: C.H. Beck, 2012), p. 216-219.

⁵⁶¹ Michel Lesage, *Le droit soviétique* (Paris: PUF, 1975), p. 78; Lityński, *Prawo Rosji...*, p. 227.

⁵⁶² Lesage, *Le droit soviétique*, p. 79-80; Butler, *Soviet Law*, p. 173.

⁵⁶³ Gsovski, *Soviet Civil Law*, vol. 1, p. 580-582.

65 for stone or concrete, and 60 for a mixed one).⁵⁶⁴ The lot, together with the house, reverted to the state upon expiry of the tenancy.

After the transformation to actually existing socialism, Polish law had to accommodate to the same needs of preserving the state fund of land property. A wholesale nationalisation of land, following the Soviet model, was not implemented. However, the socialist Polish state did acquire the right of ownership to considerable tracts of land: nationalisation was effected with regard to land in the boundaries of the capital city of Warsaw,⁵⁶⁵ as well as with regard to German property in the former Free City of Gdańsk and the territories of the former Reich.⁵⁶⁶ Furthermore, the state acquired land through the nationalisation of key branches of the industry and commerce, as well as certain forests.⁵⁶⁷ Over time, the area of state land was continuing to expand thanks to a broadly conceived right of pre-emption,⁵⁶⁸ which allowed the State to buy the land offered for sale by a private individual, as well as on the basis of generous expropriation laws.⁵⁶⁹

During the first 15 years of actually existing socialism (1945-1961), the legislature experimented with various legal frameworks, including the Germanic 'right of construction' (*prawo zabudowy*) and the right of 'temporal ownership'

⁵⁶⁴ Ibid., p. 582.

⁵⁶⁵ Decree of 26.10.1945 on the ownership and use of plots of land located within the territory of the capital city of Warsaw (Dz.U. no. 50, item 279).

⁵⁶⁶ Decree of 8.3.1945 on abandoned and former German properties (Dz.U. 1946 no. 13, item 87). See Machnikowska, *Prawo własności...*, p. 212-216.

⁵⁶⁷ Decree of 12.12.1944 regarding the nationalisation of certain forests (Dz.U. no. 15, item 82).

⁵⁶⁸ Machnikowska, *Prawo własności*, p. 402.

⁵⁶⁹ Ibid., p. 511.

(*własność czasowa*), reverting to the state upon the expiry of a deadline.⁵⁷⁰ In the end, the legislature opted for a hybrid legal institution, combining elements of civil law and public law, which was named ‘perpetual usufruct’ (*użytkowanie wieczyste*), and which could serve as an ‘ideologically conditioned surrogate for the right of ownership’,⁵⁷¹ aimed at preserving the state ownership of land, whilst simultaneously encouraging the richer citizens to invest their means into the satisfying their own housing needs.⁵⁷²

B Legal framework

The legal framework of perpetual usufruct appeared first in a statute enacted in 1961.⁵⁷³ Perpetual usufruct was defined in a similar way to ownership, in the sense that the holder of the right could use the land ‘with the exclusion of other persons and to dispose of it within the limits prescribed by statute.’⁵⁷⁴ Perpetual usufruct could be granted only with regard to urban land, i.e. either land within the boundaries of towns and settlements or lying outside such boundaries but nevertheless included in urban land management plans.⁵⁷⁵ The beneficiaries of the right of perpetual usufruct (perpetual usufructuaries) could

⁵⁷⁰ Cisek, ‘Użytkowanie wieczyste’, [Perpetual Usufruct] in *System prawa prywatnego* [The System of Private Law], vol. 4 *Prawo rzeczowe* [Property Law], ed. Edward Gniewek (2nd ed., Warszawa: C.H. Beck, 2007), p. 140-141.

⁵⁷¹ Zdzisław Gawlik, ‘Użytkowanie wieczyste *de lege ferenda*’ [Perpetual Usufruct *De Lege Ferenda*] in *Czterdzieści lat kodeksu cywilnego* [Forty Years of the Civil Code], ed. Mieczysław Sawczuk (Kraków: Wolters Kluwer, 2006), p. 115.

⁵⁷² Błażej Wierzbowski, ‘O przydatności użytkowania wieczystego’ [On the Usefulness of Perpetual Usufruct] in *Honeste vivere... Księga pamiątkowa ku czci Profesora Władysława Bojarskiego* [Honeste vivere... Collection of Essays in Memory of Professor Władysław Bojarski] (Toruń: Wyd. UMK, 2001), p. 618.

⁵⁷³ Act of 14.7.1961 on land management in towns and settlements (Dz.U. no. 32, item 159, hereinafter ‘Urban Land Management Act 1961’).

⁵⁷⁴ Urban Land Management Act 1961, Art. 6.

⁵⁷⁵ *Ibid.*, Art. 1.

be natural persons and legal persons, with the exclusion of state and socialised legal persons.⁵⁷⁶ The granting of land to construction cooperatives and agricultural cooperatives was excluded from the scope of the act.⁵⁷⁷ Perpetual usufruct was established for a period of 99 years (in exceptional cases for a shorter period but not less than 40 years).⁵⁷⁸ The standard was a long-term right, unlike the hitherto existing temporary ownership. Furthermore, the prolongation of the right for another period of up to 99 years was now a standard; a refusal had to be justified by 'an important public interest'.⁵⁷⁹

The right was established by way of a contract between the beneficiary and the local authority,⁵⁸⁰ however the contract had to be preceded by an administrative decision of the competent authority specifying the details of the contract.⁵⁸¹ The destination of the land had to be specified in the contract and entered into the land register.⁵⁸² If the land was destined for construction, the contract should specify all the details regarding the buildings.⁵⁸³ Perpetual usufruct was established against a yearly fee determined unilaterally by the competent authority.⁵⁸⁴ The amount of the yearly fee corresponded to the infrastructural quality and location of the plot of land.⁵⁸⁵ The competent

⁵⁷⁶ Ibid., Art. 3(1)-(2).

⁵⁷⁷ Ibid., Art. 3(3).

⁵⁷⁸ Ibid., Art. 13(1).

⁵⁷⁹ Ibid., Art. 13(2).

⁵⁸⁰ Ibid., Art. 14(1).

⁵⁸¹ Ibid., Art. 18(1)-(2).

⁵⁸² Ibid., Art. 17(1).

⁵⁸³ Ibid., Art. 17(2).

⁵⁸⁴ Ibid., Art. 24-25.

⁵⁸⁵ Jan Winiarz, *Prawo użytkowania wieczystego* [The Right of Perpetual Usufruct] (Warszawa: PWN, 1970), p. 177-178.

authority was entitled to terminate the contract unilaterally and repossess the land if the perpetual usufructuary used the land in a way manifestly contrary to the destination laid down in the contract or if he did not erect buildings which he was supposed to erect according to the contract.⁵⁸⁶ The perpetual usufructuary had a right of administrative appeal (to a higher instance authority within the state administration) but no judicial review was provided for.⁵⁸⁷

When the Civil Code was enacted in 1964, the rules on perpetual usufruct were split between that Code (of private law) and the (public-law) Land Management Act.⁵⁸⁸ The definition of perpetual usufruct was, once again, very broad, allowing the perpetual usufructuary to

‘enjoy the land, with the exclusion of other persons, within the limits set by statutes and the principles of social life, as well as by the contract.’⁵⁸⁹

The standard duration of perpetual usufruct was set at 99 years, and the minimum duration at 40 years, with possibilities of an unlimited number of extensions.⁵⁹⁰ Characteristically, the new legal framework was not placed among other limited real rights (such as usufruct, pledge or servitudes), but was located between the right of ownership and limited property rights, in a separate chapter.⁵⁹¹ Both doctrine and case-law attached an importance to this systematic arrangement, stressing that perpetual usufruct is not a limited

⁵⁸⁶ Urban Land Management Act 1961, Art. 19(2).

⁵⁸⁷ *Ibid.*, Art. 19(3).

⁵⁸⁸ Winiarz, *Prawo...*, p. 22-23.

⁵⁸⁹ Art. 233 k.c.

⁵⁹⁰ Art. 236 k.c.

⁵⁹¹ Aleksander W. Rudziński, ‘A Comparative Study of Polish Property Law’ in *Polish Civil Law*, vol. 1, ed. Dominik Lasok (Leiden: A.W. Sijthoff, 1973), p. 71-72.

property right, but is rather similar to ownership, and the rules on ownership should be applied to it by analogy.⁵⁹²

The legal framework of perpetual usufruct remained a hybrid one throughout the period of actually existing socialism, in the sense that private-law aspects of the institution in question were regulated in the Civil Code, but there were also numerous rules to be found in administrative law.⁵⁹³ In particular, the creation, extinction and modification of the right was always preceded by an appropriate administrative decision issued by the competent authority.⁵⁹⁴

The legal framework of perpetual usufruct was aptly described as a 'rather unconventional legal institution',⁵⁹⁵ which is fully justified owing to its hybrid legal framework (combination of elements of civil and administrative law) as well as other features which distinguish it from similar legal frameworks known in earlier historical periods.⁵⁹⁶ Even today, Polish authors acknowledge that the right of perpetual usufruct is a peculiarity of Polish law, although they draw attention to its functional equivalents in other legal systems, such as the German hereditary right of construction or the French lease for construction.⁵⁹⁷

⁵⁹² Cisek, 'Użytkowanie...', p. 146.

⁵⁹³ Cisek, 'Użytkowanie...', p. 144. In fact, it was difficult to separate the private-law aspects of the institution from its public-law aspects, and the elements of state *dominium* from elements of state *imperium* (Wierzbowski, 'O przydatności...', p. 618-619).

⁵⁹⁴ Ibid., p. 144.

⁵⁹⁵ Rudziński, 'A Comparative...', p. 70.

⁵⁹⁶ Rudziński compared the socialist perpetual usufruct to the Roman emphyteusis, pointing out that perpetual usufruct is granted for a definite period, and that the perpetual usufructuary is not obliged to give notice to the owner of their intent to alienate the right and that no right of pre-emption of the owner exists (Rudziński, 'A Comparative...', p. 72).

⁵⁹⁷ Gawlik, 'Użytkowanie', p. 116.

After 1990, the legal framework of perpetual usufruct underwent a characteristic evolution, in that the administrative-law aspects were gradually removed, and the institution has become regulated almost exclusively by private law. At present, the main form in which the right is created is by way of a contract between the state or a local government and an individual or a legal person.⁵⁹⁸ The conclusion of such a contract must be, in principle, preceded by a call for tenders.⁵⁹⁹ As under actually existing socialism, the perpetual usufructuary may be obliged to construct a building or make other use of the land.⁶⁰⁰ Most limitations inherent in the original legal framework have been lifted. First of all, under the Civil Code,⁶⁰¹ both the state and local government (municipal, district, regional) may encumber their land with the right of perpetual usufruct. Secondly, the said right may be established in favour of any natural or legal persons, without any limits as to their character (such as the requirement, that the legal person in question be a housing cooperative). The requirement that the land be within the boundaries of a town or be covered by an urban development plan has been removed, thus creating the possibility of establishing the right of perpetual usufruct on any land held by the State Treasury or a unit of local government for the benefit of any private party, individual or corporate.⁶⁰²

⁵⁹⁸ Ibid., p. 151.

⁵⁹⁹ Ibid., p. 152-153.

⁶⁰⁰ Ibid., p. 157.

⁶⁰¹ Art. 232 k.c.

⁶⁰² Gerard Bieniek, 'W sprawie przyszłości użytkowania wieczystego' [Regarding the Future of Perpetual Usufruct] in *Ars et usus. Księga pamiątkowa ku czci Sędziego Stanisława Rudnickiego* [Ars et Usus: A Collection of Essays Dedicated to the Memory of Judge Stanisław Rudnicki] (Warszawa: LexisNexis, 2005), p. 54.

The perpetual usufructuary is under a duty to pay a fee, expressed as a percentage of the market value of the land. A first one-off fee of 15-25% is due at the beginning of the tenancy, and then fees of 0.3, 1%, 2% or the standard 3% of the value of the land are due every year.⁶⁰³ The fee of 0.3% is applicable if the land is used for religious, cultural, charitable purposes; the fee of 1% - for housing purposes, 2% - for tourist purposes and the standard 3% fee applies for commercial use of the land.⁶⁰⁴

The right of perpetual usufruct is an absolute property right and is protected by an action to recover property (*rei vindicatio*) and a negatory action (action to stop violation of property, '*actio negatoria*') in analogy to the right of ownership.⁶⁰⁵ If the perpetual usufructuary uses the land in violation of the contract, the owner of the land (the State Treasury or the local municipality) may file an action in a civil court demanding the dissolution of the tenancy.⁶⁰⁶ However, in contrast to the socialist period, since 1998 the tenancy may no longer be ended by a (unilateral) administrative decision of the land owner.⁶⁰⁷

Finally, it should be mentioned that after 1989 rules have been enacted which enable the transformation, against payment, of the right of perpetual usufruct into the right of ownership.⁶⁰⁸ In certain cases the transformation was also possible free of charge.⁶⁰⁹ However, the Constitutional Court questioned the possibility of expropriating the owner (municipality) of its ownership without

⁶⁰³ Cisek, 'Użytkowanie...', p. 173.

⁶⁰⁴ Act of 21.8.1997 on the management of immovables (Dz.U. no. 115, item 741).

⁶⁰⁵ Cisek, 'Użytkowanie...', p. 179.

⁶⁰⁶ Ibid., p. 180.

⁶⁰⁷ Ibid.

⁶⁰⁸ Ibid., p. 184-190; Bieniek, 'W sprawie...', p. 54-58.

⁶⁰⁹ Cisek, 'Użytkowanie...', p. 190-200.

due compensation, and the rules had to be adapted so that the perpetual usufructuary, wishing to become an owner, would have to pay the difference of value between the market value of the land and the market value of the right of perpetual usufruct.⁶¹⁰

C Application of the legal framework in practice

The legal framework of perpetual usufruct has been frequently resorted to both under actually existing socialism and after the transformation. Scholars underline that after many decades of its existence, it has gained social acceptance.⁶¹¹ Statistical data also witness a rich practice making use of the socialist legal framework. Thus out of all transactions regarding real estates, contracts for the creation of a right of perpetual usufruct represent 2,9% yearly, and contracts for the sale of such a right (between private parties) represent 1,5% of all real estate transactions.⁶¹² Out of the entire stock of municipally-owned land in Poland⁶¹³ (1,012,503 ha) almost 8% is held by private parties under a perpetual usufruct title (79,828 ha). Within the stock of land held under perpetual usufruct, 30% is held by individuals (23,670.20 ha) and the remaining 70% by legal persons. Income from fees paid by perpetual usufructuaries constitute, together with income for fees paid by ordinary usufructuaries and

⁶¹⁰ Bieniek, 'W sprawie...', p. 56.

⁶¹¹ Gawlik, 'Użytkowanie...', p. 116.

⁶¹² Data for 2011. Source: Central Statistical Office, Real Estate Turnover in 2011 (Warszawa 2012), available online at: http://www.stat.gov.pl/cps/rde/xbcr/gus/IK_obrot_nieruchomosciamii_2011.pdf, (last accessed: 10/11/2013), p. 11.

⁶¹³ Data for 2012. Source: 'Powierzchnia gruntów komunalnych wg prawnych form użytkowania' at *Sejmometr* website; available online at: http://sejmometr.pl/bdl_wskazniki/838 (last accessed: 10/11/2013).

from remuneration for management of real estates by local government, 9% of the income of Polish towns and cities.⁶¹⁴

There is also substantial case-law regarding the right of perpetual usufruct, indicating that the relevant legal texts are resorted to in practice. For instance, in recent decisions courts have ruled on the (lack of) reciprocal character of the contract establishing perpetual usufruct;⁶¹⁵ on the (im)possibility of acquiring ownership of land held under perpetual usufruct under the doctrine of adverse possession;⁶¹⁶ on the legal character of the annual fee paid by the usufructuary;⁶¹⁷ on the possibility of acquiring the right of perpetual usufruct under the doctrine of adverse possession;⁶¹⁸ on the possibility of creating a servitude by way of a contract between perpetual usufructuaries and the land owner, if the servitude is to serve a different plot of land owned by the same owner;⁶¹⁹ on the (legal im)possibility of a building to be partly located on land held under perpetual usufruct, and partly not held under that right;⁶²⁰ on the relationship between the right of perpetual usufruct and ownership of water constructions under Water

⁶¹⁴ Data for 2009. Source: Główny Urząd Statystyczny (Central Statistical Office), *Budżety jednostek samorządu terytorialnego* [Budgets of Entities of Local Government] (Warszawa 2010), available online at: http://www.stat.gov.pl/cps/rde/xbcr/gus/PUBL_rn_budz_jedn_sam_teryt_lata_2003-2009.pdf (last accessed: 10/11/2013), p. 67 (the notion of 'cities' covers cities having legal form of districts, that is usually above 100,000 population).

⁶¹⁵ SA/Warsaw judgment of 6.2.2013, Case VI ACa 1236/12, LEX no. 1344292.

⁶¹⁶ SN order of 14.3.2012, Case II CSK 127/11, LEX no. 1170220.

⁶¹⁷ SN judgment of 25.11.2010, I CSK Case 692/09, LEX no. 736524.

⁶¹⁸ SN order of 24.6.2010, Case IV CSK 553/09, LEX no. 885034.

⁶¹⁹ SN order of 15.5.2009, Case II CSK 674/08, LEX no. 519243.

⁶²⁰ SN judgment of 11.1.2013, I CSK 282/12, LEX no. 1288603.

Law;⁶²¹ on the ownership of a building erected by a lessor on land held under perpetual usufruct,⁶²² to name but a few examples from the rich recent case-law.

Both statistical data regarding the number of transactions and area of land held under the perpetual usufruct title, as well as reported case-law indicate that this legal survival is far from being a dead letter of the law. Not only are new titles established by the State and local government authorities, but also fees paid by usufruct holders constitute an important source of municipal income.

D Social function of the legal framework

In its original form under actually existing socialism, the right of perpetual usufruct was an important instrument of managing state-owned land, allowing to further the public interest in the form of satisfaction of housing needs, development of tourist infrastructure, as well as other forms of sports and entertainment infrastructure (playgrounds for children, stadiums), and even for the purposes of furthering agricultural production.⁶²³ However, priority was given to housing policy, which was treated as the basic function of this legal institution.⁶²⁴ By resorting to the institution of perpetual usufruct, the state encouraged citizens to use their own resources in order to satisfy their housing needs.⁶²⁵ Simultaneously, the state did not diminish its own property of land

⁶²¹ SN judgment of 25.10.2012, I CSK 145/12, LEX no. 1281378.

⁶²² SN resolution of 25.11.2011, III CZP 60/11, LEX no. 1027882.

⁶²³ Cisek, 'Użytkowanie...', p. 143.

⁶²⁴ Winiarz, *Prawo użytkowania...*, p. 34; Edward Gniewek, *Prawo rzeczowe* [Property Law] (2nd ed., Warszawa: C.H. Beck, 1999), p. 162-163; Cisek, 'Użytkowanie...', p. 143; Krzysztof Pietrzykowski in *Kodeks cywilny* [Civil Code] vol. 1: *Komentarz do artykułów 1-449* [Commentary to Articles 1-449], ed. Krzysztof Pietrzykowski (4th ed., Warszawa: C.H. Beck, 2005), p. 654.

⁶²⁵ Wierzbowski, 'O przydatności...', p. 618.

which was an important ideological factor under actually existing socialism.⁶²⁶ For private parties and cooperatives, the main function of this legal institution was simply gaining access to land, since the possibility of acquiring ownership of state land were very limited. Perpetual usufruct was a very important legal title used in practice by housing cooperatives,⁶²⁷ which delivered a vast majority of collective housing in socialist Poland.⁶²⁸ Also private individuals built family houses on land granted to them under this title.⁶²⁹ It was also pointed out that social purpose of the institution of perpetual usufruct, as seen from the point of view of the perpetual usufructuary, was to

‘secure (...) the economic advantages necessary for the construction of buildings, particularly bank credit and the possibility of getting his [i.e. the perpetual usufructuary’s – R.M.] financial investment back by selling his right with the building (...).’⁶³⁰

After the transformation to a market economy, the public-interest function of the right of perpetual usufruct seems to have diminished in favour of the public owner’s desire to retain ownership and to generate long-term income in the form of yearly fees, which can, in the long run, exceed the market value of the real estate (if the fee is set at 2% or 3%).⁶³¹ It should also be added that establishing the right of perpetual usufruct, instead of selling the land to private

⁶²⁶ Gniewek, *Prawo rzeczowe*, p. 163.

⁶²⁷ Winiarz, *Prawo użytkowania...*, p. 37.

⁶²⁸ Maciej Cesarski, ‘Dorobek materialny spółdzielczości mieszkaniowej w Polsce’ [The Material Output of the Housing Cooperative Sector in Poland], in: *Historia i przyszłość spółdzielczości mieszkaniowej w Polsce* [History and Future of the Housing Cooperative Sector in Poland], ed. Zbigniew Gotfalski (Warszawa: Wydawnictwo Dom, 2011), p. 29.

⁶²⁹ Winiarz, *Prawo użytkowania...*, p. 38.

⁶³⁰ Rudziński, ‘A Comparative...’, p. 71.

⁶³¹ Cisek, ‘Użytkowanie...’, p. 145.

investors, enables local authorities to have greater control over the way in which the land is used.⁶³² For private parties, who now can gain access to land on the market, the main function of gaining access to it, as under actually existing socialism, has diminished in favour of the possibility of gaining cheaper access to land (without the need of paying the entire value of the plot).⁶³³ It seems that private parties who have a choice between ownership and perpetual usufruct compare the financial conditions of obtaining bank credit with the financial conditions of perpetual usufruct and make an appropriate choice. Probably book-keeping aspects of the alternative (value of the right of ownership *versus* value of the right of perpetual usufruct) play a certain role, owing to differences in their treatment in corporate book-keeping.⁶³⁴

It can also be claimed that the social function of the yearly fee underwent an evolution. Under actually existing socialism its function was identified as similar to a special form of tax, aimed at ensuring that perpetual usufructuaries would participate in the costs of infrastructural investments, as well as a means of preventing or at least limiting the extraction of capital rent by perpetual usufructuaries.⁶³⁵ After the transformation it can be assumed that the yearly fee is actually a form of perceiving capital rent by the public owners of the land,⁶³⁶ treated as an economically attractive alternative to selling the assets directly on

⁶³² Wierzbowski, 'O przydatności...', p. 621.

⁶³³ Bieniek, 'W sprawie...', p. 59; Cisek, 'Użytkowanie...', p. 145; Wierzbowski, 'O przydatności...', p. 624.

⁶³⁴ Cfr. 'Grunt i prawo wieczystego użytkowania gruntu w księgach rachunkowych' [Land and the Right of Perpetual Usufruct of Land in Balance Books], *Zeszyty Metodyczne Księgowości* 16 (2010), available online at: <http://www.sgg.gofin.pl/12,6,124647,175,grunt-i-prawowieczystego-uzytkowania-gruntu-w-ksiegach.html> (last accessed: 11/11/2013).

⁶³⁵ Winiarz, *Prawo użytkowania...*, p. 186.

⁶³⁶ Gawlik, 'Użytkowanie...', p. 119.

the market. In fact public owners, eagerly making use of a fee adjustment mechanism (bringing the fee into line with the market value of the land) have been criticised for abusing it in order to make a greater profit.⁶³⁷

E Mechanism of endurance of the legal survival

The right of perpetual usufruct, despite being an idiosyncratic product of the Socialist Legal Tradition in Poland, has survived after 1989 without major problems. Although the Polish state, following a transformation from actually existing socialism to a market economy, has lost interest in the welfare of its citizens and in particular the satisfaction of their housing needs, which was the fundamental purpose of the creation of this right in the 1960s, other aspects of the legal institution in question have remained attractive. The legal framework within the Civil Code did not undergo a serious modification after 1989, whilst the legal framework in public law was modified to limit the administrative-law aspects of the legal construction, transforming it into an almost purely private-law legal institution.⁶³⁸ Of course, the role of establishing perpetual usufruct has diminished as municipalities and the state have been free, after 1989, to sell land to private parties, irrevocably losing ownership thereof. Nevertheless, the possibility of exercising a private-law influence on the use of land (not only through public land management *via* administrative law) and the attractiveness of securing a steady and high income of 3% of the land's market

⁶³⁷ Bieniek, 'W sprawie...', p. 67 (who made proposals for the limiting of this possibility to an adjustment every 3 years and to create the possibility of introducing a ceiling in the contract creating the right).

⁶³⁸ Gawlik, 'Użytkowanie...', p. 120, underlines those differences between the original legal framework and the current one: '...it is now a title established according to market principles, it has a different subjective and objective scope, as well as a different function.'

value yearly have translated themselves into the on-going popularity of the institution in practice.⁶³⁹

5 Cooperative member's proprietary right to an apartment

A Circumstances of introduction

As I indicated in Section 4 whilst discussing the right of perpetual usufruct, property law in state-socialist Poland developed according to a dialectic of two opposing factors: the dogma of socialised property of real estates, on the one hand, and the pragmatic desire to create certain individual rights pertaining to such estates (e.g. buildings, apartments) which, however, would not undermine the underlying social property.

Directly after World War II it was the state itself which acted as the main investor in the housing sector.⁶⁴⁰ Since the state owned the land, the buildings and the apartments, with tenants enjoying an administrative title to their dwelling, the need of devising a distinct legal framework under private law did not arise at that stage. Indeed, the role of existing housing cooperatives in the construction of new dwellings gradually shrunk.⁶⁴¹ They became practically 'deprived of any possibilities of development and of influence upon their

⁶³⁹ Commenting on the survival of the right of perpetual usufruct after 1989, a Polish author remarked that 'within the law regulating the ownership of real estates, [existing] normative solutions, even if not fully perfect, are better than a continuous flux of the legal framework.' (Gawlik, 'Użytkowanie...', p. 125).

⁶⁴⁰ Adam Andrzejewski, *Zarys polityki mieszkaniowej* [An Outline of Housing Policy] (Warszawa: SGPiS, 1979), p. 102ff, 201.

⁶⁴¹ Tadeusz Kowalak, *Dorobek spółdzielczości w trzydziestoleciu Polski Ludowej* [The Output of the Cooperative Sector during the Three Decades of People's Poland] (Warszawa: CRS, 1975), p. 103-104.

housing stock',⁶⁴² eventually leading to their elimination from the housing sector in Poland.

During the early 1950s the main area of state investment was (heavy) industry at the expense of consumption, including housing.⁶⁴³ This translated itself into a growing housing deficit which became a major social problem, with just one newly built dwelling per four newly established families.⁶⁴⁴ Furthermore, tenants in state-owned apartment buildings, who paid highly subsidised rents, did not present due care for the state of the housing facilities, which led to their fast deterioration.⁶⁴⁵ The government's decision to give a new role to cooperatives in the development of the national housing stock was motivated by various factors. First of all, it allowed transferring resources from the fund of consumption (salaries and personal savings, enterprise funds) to finance housing investment, hitherto financed entirely and directly by the state's local administration.⁶⁴⁶ Secondly, it was believed that citizens who have financed their own apartment by way of long-term savings and further payment of instalments would demonstrate more responsibility and care for the housing facilities offered to them.⁶⁴⁷ This political choice required an adequate legal solution which would allow combining ultimate state control over the housing stock with a legal framework which, nevertheless, would still seem sufficiently attractive to persuade citizens to allocate their own resources in the housing

⁶⁴² Krzysztof Madej, *Spółdzielczość mieszkaniowa. Władze PRL wobec niezależnej inicjatywy spółdzielczej* [Housing Cooperatives: The Authorities of the Polish People's Republic Towards Independent Cooperative Initiative] (Warszawa: Trio, 2003), p. 15.

⁶⁴³ Andrzejewski, *Zarys...*, p. 113; Madej, *Spółdzielczość...*, p. 15.

⁶⁴⁴ Madej, *Spółdzielczość...*, p. 16.

⁶⁴⁵ Kowalak, *Dorobek...*, p. 104.

⁶⁴⁶ Kowalak, *Dorobek...*, p. 104-105; Madej, *Spółdzielczość...*, p. 16-17.

⁶⁴⁷ Cfr. Kowalak, *Dorobek...*, p. 105.

sector. The system existing before World War II, under which those cooperative members who financed the construction of their apartments acquired ownership of the apartment itself was not acceptable for reasons of principle. Strangely, such a right of personal ownership of an apartment in a building owned by a cooperative existed in Soviet law.⁶⁴⁸ The housing cooperatives which constructed, owned and administered housing estates were federated, on a compulsory basis, in a national federation. Despite a certain degree of autonomy, they functioned as cogs in the mechanism of a centrally planned economy in Poland.⁶⁴⁹

B Legal framework

(a) prior to 1989

Within the legal framework of the cooperative member's proprietary right to an apartment it is necessary to discern a core – the alienable property right giving its holder the right to live in a determined apartment located in a building owned by a housing cooperative – and a penumbra,⁶⁵⁰ encompassing the conditions of alienation of the right, the relationships between the right holder and the cooperative, the type of admitted right holders and the number of rights one person may acquire. The core of the right has remained intact since the creation of the legal institution in question, although the legal framework underwent subsequent modifications since its introduction in the 1950s. In contrast, the penumbra of this legal institution underwent a characteristic evolution after 1989.

⁶⁴⁸ Cfr. Butler, *Soviet Law*, p. 173.

⁶⁴⁹ Jerzy Kleer, *Co dalej ze spółdzielczością* [What to do Further with the Cooperative Sector?] (Warszawa: Wyd. Spółdzielcze, 1981), p. 8.

⁶⁵⁰ I introduced the notion of core/penumbra for the purposes of analysis of legal survivals in Chapter II, section 6.

The legal framework of housing cooperatives, including the rights to apartments therein, was laid down in the 1950s⁶⁵¹ and found its final shape in the Cooperatives Act 1961.⁶⁵² A recodification of cooperative law in the Cooperatives Act 1980⁶⁵³ did not lead to a major modification in the dogmatic construction of cooperative rights to apartments.⁶⁵⁴

The housing cooperatives were all federated (united) in the Central Union of Housing Construction Cooperatives which, on the one hand, acted as a representative of the cooperative interests in relations with the government but on the other hand exercised extensive control powers over the cooperatives themselves.⁶⁵⁵ New cooperatives could not be organized spontaneously but had to obtain authorisation of the Central Union. From the 1970s onwards, cooperatives were also federated on a regional level in regional housing cooperatives. Housing cooperatives were heavily financed by the state which meant that their investment plans were part of the National Economic Plan⁶⁵⁶

⁶⁵¹ See, *inter alia*, decree of 25.6.1954 (DzU no. 31, item 120); Resolution of the Council of Ministers no. 269 of 8.5.1954 (MP no. A-59, item 729); Resolution of the Council of Ministers no. 81 of 15.3.1957 (MP no. 22, item 157); Resolution of the Council of Ministers no 60 of 15.3.1958 (MP no. 22, item 133); Resolution of the Council of Ministers no 64 of 15.3.1958 (MP no. 26, item 155); Resolution of the Council of Ministers no 65 of 15.3.1958 (MP no. 26, item 156).

⁶⁵² Act of 17.6.1961 on cooperatives and their unions (Dz.U. no 12, item 161, hereinafter 'Cooperatives Act 1961').

⁶⁵³ Act of 16.9.1982 – the Law of Cooperatives (Dz.U. no. 30, item 210, hereinafter: 'Cooperatives Act 1982').

⁶⁵⁴ Krzysztof Pietrzykowski, *Spółdzielnie mieszkaniowe. Komentarz* [Housing Cooperatives: A Commentary] (5th ed., Warszawa: C.H. Beck, 2010), p. 52-53.

⁶⁵⁵ Madej, *Spółdzielczość...*, p. 53ff.

⁶⁵⁶ Madej, *Spółdzielczość...*, p. 91ff.; Iwona Drozd-Jaśniewicz, 'Straty poniesione przez spółdzielczość mieszkaniową w Polsce w okresie transformacji' [The Losses Suffered by the Housing Cooperative Sector During the Period of Transformation] in *Historia i przyszłość spółdzielczości mieszkaniowej w Polsce* ed. Zbigniew Gotfalski (Warszawa: Dom, 2011), p. 61-62.

which, in turn, led to increased state control over the sector;⁶⁵⁷ as a result, cooperatives ‘increasingly became assimilated to state-owned enterprises and in their essence became transformed into quasi-state enterprises’.⁶⁵⁸ Government control had a wide impact upon the sector, ranging from the sizes of apartments allocated to members (state-determined standard sizes)⁶⁵⁹ and methods of construction (propagation of low-cost construction technologies)⁶⁶⁰ to an influence upon the allocation of apartments and the granting of membership. In practice, cooperatives could allocate only a certain fraction of the apartments they built,⁶⁶¹ the remaining part being at the disposal of state enterprises, local government bodies or simply sold against payment of a commercial price in Western currency to the richer strata of society by the Office of Foreign Commerce ‘Locum’ owned by the Central Union.⁶⁶²

As regards the legal framework for allocating apartments to cooperative members there were two possible forms: the ‘stronger’ proprietary right to an apartment (a real right/property right) and the ‘weaker’ tenancy right (a personal right). The essential difference between the two depended on the amount of money paid by the right holder – to obtain a proprietary right it was

⁶⁵⁷ Madej, *Spółdzielczość...*, p. 32.

⁶⁵⁸ Kleer, *Co dalej...*, p. 8.

⁶⁵⁹ Madej, *Spółdzielczość...*, p. 77, 81-82.

⁶⁶⁰ *Ibid.*, p. 84ff.

⁶⁶¹ According to data provided by Eugeniusz Ochendowski, *Prawo mieszkaniowe i polityka mieszkaniowa* [Housing Law and Housing Policy] (Toruń: UMK, 1980), p. 114, cooperatives could allocated ca. 50% of the housing stock. According to other data, in 1977 cooperatives allocated only 36% of housing to their members, the remaining 64% being at the disposal of state-owned companies which financed the construction (32% apartments), persons directed by the local administration (21%) and persons directed by other authorities. See Tadeusz Janczyk, *Spółdzielczość w Polsce Ludowej* (Warszawa: LSW, 1980), p. 150.

⁶⁶² Ochendowski, *Prawo...*, p. 117; Janczyk, *Spółdzielczość...*, p. 150.

necessary to cover (even if in instalments⁶⁶³) the whole cost of the construction of an apartment.⁶⁶⁴ In order to obtain a tenancy right, it was sufficient to cover a certain fraction thereof (16-20%),⁶⁶⁵ the rest being subsidised by the state. The sum paid by the apartment holder was, in legal terms, a contribution to the cooperative (called, respectively, construction contribution and housing contribution⁶⁶⁶) which was closely linked to the right but survived its extinction. It must be emphasised that with regard to both types of rights, it was always the cooperative that remained the owner of the entire building, including the dwellings.⁶⁶⁷

The proprietary right to an apartment was, in certain aspects, similar to ownership in that it could be alienated (sold, exchanged, donated), inherited and was attachable in civil enforcement proceedings.⁶⁶⁸ Nevertheless, the apartment being owned by the cooperative, the right itself was, strictly speaking, a right on another's thing⁶⁶⁹ and was, therefore, subject to certain limitations. First of all, one person could be the holder of only one right to an apartment and

⁶⁶³ Loans for construction were taken by the cooperative, not by the members, who did not enter into any legal relationship with the bank (Pietrzykowski, *Spółdzielnie...*, p. 230).

⁶⁶⁴ Cooperatives Act 1961, Art. 148 § 1. The costs of constructing an apartment was covered by the member in the form of a 'construction input', linked to the membership in the cooperative. If for some reason membership in the cooperative and the right to an apartment became extinguished, the construction input did not and had to be repaid by the cooperative, e.g. to the heirs of the deceased member.

⁶⁶⁵ Andrzejewski, *Zarys...*, p. 209.

⁶⁶⁶ Even if the tenancy right to an apartment became extinguished for some reason, the (former) member or his heirs had a claim to the cooperative to repay the value of the housing input which was the member's share in the cooperative capital.

⁶⁶⁷ Cooperatives Act 1961, Art. 135 § 2-3; Cooperatives Act 1982, Art. 204 § 2(1).

⁶⁶⁸ Cooperatives Act 1961, Art. 147 § 1 sentence 1.

⁶⁶⁹ *Ibid.*, Art. 147 § 2 sentence 1. The 'another's thing' being the building owned by the cooperative, as apartments were not considered to be distinct 'things'.

be a member of only one housing cooperative.⁶⁷⁰ If the person was married, both spouses held the apartment jointly.⁶⁷¹ Secondly, one apartment could be held only by one person (or by a married couple); co-holdership was excluded.⁶⁷² Thirdly, in case the apartment was sold or donated, the transaction became effective only once the acquirer became admitted to the cooperative.⁶⁷³ The same applied in case of succession.⁶⁷⁴ Fourthly, an apartment could be sublet only with the cooperative's consent.⁶⁷⁵ Fifthly, the right holder participated not only in the costs of running his apartment and *pro rata* in the costs of maintaining the building stock of the cooperative but also participated financially in the social, cultural and educational activity of the cooperative.⁶⁷⁶

A tenancy right, in contrast with the proprietary right, was decommodified: it could not be alienated (neither sold, nor donated) and it was not subject to inheritance upon death of the right holder.⁶⁷⁷ However, the rules of cooperative law required that upon the right holder's death the right be assigned to a next of kin who was living together with the deceased person.⁶⁷⁸ Although formally this was not a form of succession, in practice it fulfilled the social functions of

⁶⁷⁰ Cooperatives Act 1961., Art. 136 § 1; Cooperatives Act 1982, Art. 206 § 1.

⁶⁷¹ Cooperatives Act 1961, Art. 138.

⁶⁷² Ibid.

⁶⁷³ Cooperatives Act 1961., Art. 147 § 1 sentence 2

⁶⁷⁴ Cooperatives Act 1961, Art. 150.

⁶⁷⁵ Cooperatives Act 1982, Art. 217 § 2.

⁶⁷⁶ Cooperatives Act 1961., Art. 208 § 1. These non-housing forms of activity encompassed the running of libraries, cultural centres, clubs, specialist hobby workshops, sports facilities, nurseries, leisure facilities for the elderly and so forth. For statistical data see Janczyk, *Spółdzielczość...*, p. 231-232; Drozd-Jaśniewicz, 'Straty...', p. 66-67.

⁶⁷⁷ Cooperatives Act 1961, Art. 144 § 1.

⁶⁷⁸ Ibid., Art. 145.

inheritance towards e.g. the spouse or the children of the deceased cooperative member.

As from 1972 it was permissible to transform a tenancy right into a proprietary right against the payment of the difference between the construction input and the housing input.⁶⁷⁹ However, this process did not work the other way round (a proprietary right could not be ‘downgraded’ to a tenancy right)⁶⁸⁰ nor did it go any further (a proprietary right could not be ‘upgraded’ to individual ownership).⁶⁸¹

(b) after 1989

After 1989, the legal framework underwent a series of adaptations. Whilst the core of the legal title – the right to enjoy an apartment and transmit it between living persons (*inter vivos*) and in case of death (*mortis causa*) – was retained, the penumbra⁶⁸² of the right, strictly connected to the socio-economic reality of actually existing socialism were gradually dismantled both by legislative amendments and Constitutional Court case-law.

As early as 1991 the legislature permitted the encumbrance of a proprietary right to a cooperative with mortgage⁶⁸³ which should be linked to the growing role of the commercial banking sector in the financing of housing. In 1994 the principle of that one person (or married couple) could hold only one proprietary

⁶⁷⁹ Cesarski, ‘Dorobek materialny...’, p. 29. This right was later formally enshrined in the 1982 act Cooperatives Act 1982, art. 219

⁶⁸⁰ Ochendowski, *Prawo...*, p. 109.

⁶⁸¹ Andrzej Mączyński, ‘Dawne i nowe instytucje polskiego prawa mieszkaniowego’ [New and Old Institutions of Polish Housing Law], *Kwartalnik Prawa Prywatnego* 11.1 (2002): 65ff p. 88.

⁶⁸² I introduced the notion of core/penumbra for the purposes of analysis of legal survivals in Chapter II, section 6.

⁶⁸³ Act of 25.10.1991 (Dz.U. no. 115, item 496).

right to an apartment was abolished,⁶⁸⁴ transforming the cooperative apartment into an investment asset. Since 2001, the co-holdership of the proprietary right became possible,⁶⁸⁵ further detaching the right from the idea of satisfying housing needs (of a family) and treating it as any other object of property rights. From that year on also minors – even living with their parents, *ergo* not having housing needs of their own – could acquire cooperative rights in apartments.⁶⁸⁶

The holdership of an apartment has been separated from membership in the cooperative,⁶⁸⁷ effectively depriving the cooperative of any means of controlling the inflow of inhabitants into its housing stock. For the sake of full commodification of cooperative apartments, Polish housing cooperatives have been deprived of this right with regard to proprietary apartments, apartments under individual ownership and the subletting of such apartments. Despite repeated legislative proposals, proprietary rights to cooperative flats have not been transformed into individual ownership automatically. Such a transformation can take place only at the right holder's request and after the repayment of the costs of the construction of the apartment.⁶⁸⁸ However, if the legal status of the land on which the cooperative house is built is unregulated,

⁶⁸⁴ Act of 7.7.1994 (Dz.U. No. 90, item 419).

⁶⁸⁵ TK judgment of 25.2.1999, Case K 23/98; TK judgment of 29.6.2001, Case K 23/00. Cfr. Ewa Bończak-Kucharczyk, *Spółdzielnie mieszkaniowe. Komentarz* [Housing Cooperatives: Commentary] (Warszawa: Wolters Kluwer, 2010), p. 359.

⁶⁸⁶ Act of 15.12.2000 on housing cooperatives (Dz.U. No. 2001 No 4 item 27, hereinafter 'Housing Cooperatives Act 2000'), Art. 3.

⁶⁸⁷ TK judgment of 21.5.2001, Case SK 15/00; TK judgment of 30.3.2004, Case K 23/03; SN judgment of 28.4.2006, Case V CSK 42/06. Cfr. Gerard Bieniek, 'Nieruchomości spółdzielni mieszkaniowych' in *Nieruchomości. Problematyka prawna* [Immovables: Legal Issues], ed. Gerard Bieniek and Stanisław Rudnicki (Warszawa: LexisNexis, 2005), p. 283; Bończak-Kucharczyk, *Spółdzielnie...*, p. 362-363.

⁶⁸⁸ Bończak-Kucharczyk, *Spółdzielnie...*, p. 413ff.

a transformation cannot take place.⁶⁸⁹ In fact, such a situation is not infrequent in practice.⁶⁹⁰ Taking this into account, it is possible that proprietary rights to apartments, although they may no longer be established, will still continue to function in practice for many years.

C Application of the legal framework in practice

The practical importance of the proprietary right to an apartment under actually existing socialism was immense. In practice, tenancy rights to apartments – representing the social housing sector, subsidised by the state-socialist welfare state, dominated: as of 1977, 91% of cooperative flats were held under tenancy rights and just 9% under proprietary rights⁶⁹¹ and as of 1989 the number of proprietary apartments doubled, with the numbers, respectively 78% and 22%).⁶⁹² Cooperatives held approximately 25% of housing stock in towns and the same proportion of Poland's population inhabited this stock.⁶⁹³

Proprietary rights to apartments in cooperative estates could be established, as regards newly built stock, until 2007 (with a 20-month interval between April 2001 and January 2003⁶⁹⁴), i.e. during a period of 18 years following Poland's transition to a market economy. In existing buildings that had been constructed on land whose legal status remains 'unregulated',⁶⁹⁵

⁶⁸⁹ Bończak-Kucharczyk, *Spółdzielnie...*, p. 417.

⁶⁹⁰ Pietrzykowski, *Spółdzielnie...*, p. 271.

⁶⁹¹ Janczyk, *Spółdzielczość...*, p. 150.

⁶⁹² Cesarski, 'Dorobek...', p. 29.

⁶⁹³ Janczyk, *Spółdzielczość...*, p. 151.

⁶⁹⁴ To be precise, from 24.4.2001 (entry into force of the Housing Cooperatives Act 2000). The possibility of creating such rights was reopened as of 15.1.2003 (entry into force of Act of 19.12.2002, Dz.U. no. 240 item 2058).

⁶⁹⁵ This concept basically means that the cooperative is neither the owner nor a perpetual usufructuary of the land.

proprietary rights to an apartment could be established at the request of holders of tenancy rights who wished to 'upgrade' their right until the end of 2012.⁶⁹⁶

Despite the above mentioned option of 'converting' the cooperative proprietary right into full ownership, many millions of such rights are still in existence. As of 2010, there were still 2.6 million cooperative apartments,⁶⁹⁷ a vast majority of them held under the cooperative member's proprietary right.⁶⁹⁸ In comparison, until 2010 only 700,000 cooperative apartments, hitherto held by under the cooperative property title, had been transformed into objects of full private ownership.⁶⁹⁹ The fact that the majority of holders of cooperative proprietary rights to apartments do not transform their right into full ownership stems from various reasons, among them the costs of such an operation and the fact that both ownership and cooperative property rights have their respective advantages and disadvantages in practice, often depending on the particular circumstances of a given housing cooperative or condominium.⁷⁰⁰

D Social function of the legal framework

On a macro-social level, the initial function of the property right to apartments in cooperative housing stock was to retain socialised ownership of immovables but simultaneously create stimuli for citizens to redirect their savings to the underfinanced housing sector, thereby transferring means from the consumption fund to the investment fund. This function has entirely lost its

⁶⁹⁶ Bończak-Kucharczyk, *Spółdzielnie...*, p. 346-348.

⁶⁹⁷ Cesarski, 'Dorobek...', p. 42.

⁶⁹⁸ *Ibid.*, p. 8.

⁶⁹⁹ *Ibid.*, p. 43.

⁷⁰⁰ Cfr. Iwona Foryś and Maciej Nowak, *Spółdzielnia czy wspólnota? Zarządzanie zasobami mieszkaniowymi* [Cooperative or Condominium? Housing Stock Management] (Warszawa: Poltext, 2012), p. 202.

significance after 1989: housing cooperatives are no longer state-controlled, and the state does not show any interest in retaining ownership of immovables.

On a micro-social level, the acquisition of a property right to a cooperative apartment had the function of satisfying the housing needs of a citizen and his family. This function has remained intact. Presumably, the vast majority of those who acquired cooperative property rights after 1989, be it on the primary or secondary market, did so in order actually to live in the apartments concerned. However, after the transition to a market economy, a new social function of the legal framework in question emerged: that of drawing capital rent. The legal framework was modified in such a way as to enable both individual and collective investors (legal persons) to acquire cooperative property rights either to rent them out (and draw capital rent) or even to speculate (hoping to sell them for a higher price than the price of acquisition from the cooperative). Both such practices were clearly discouraged or even made illegal under the state-socialist legal regime.

E Mechanism of endurance of the legal survival

The state-socialist limited real right, the ‘cooperative member's proprietary right to an apartment’, proved to be a legal survival in need of a far-reaching adaptation. Its construction as it stood at the beginning of transformation enabled it to fulfil only one social function: that of satisfying private housing needs. However, the new economic system required that also private apartments become investment assets. Therefore, through a joint effort of the legislature and the Constitutional Court, the legal framework underwent a profound change. The entire socialist penumbra⁷⁰¹ of the right were amputated, laying

⁷⁰¹ I introduced the notion of core/penumbra for the purposes of analysis of legal survivals in Chapter II, section 6.

bare the very core of the right: an alienable entitlement to the exclusive enjoyment of an apartment in a building owned by a housing cooperative. In this revamped legal framework, the old limited real right of state-socialist origin could now fulfil the function of drawing capital rent and (speculative) investment. Incidentally it could be added that the extent, to which the legal framework of the cooperative title to an apartment was modified to suit the needs of post-socialist economic relationships has gone very far, giving cooperatives less control of their housing stock in comparison to Sweden⁷⁰² and possibly even infringing the recommendations of the International Cooperative Association.⁷⁰³ It is perhaps possible to speak of a ‘hyper-adapted’ legal survival in this context.

6 Cultivation contract

A Circumstances of introduction

A cultivation contract (*umowa kontraktacji*) is a typified contract whereby a farmer undertakes to produce and sell a determined quantity of agricultural produce in exchange for a fixed price. Such a typified contract was unknown to Polish legal texts, although cultivation contracts were concluded also during the pre-socialist period.⁷⁰⁴ Nevertheless, the codification of the contract within the

⁷⁰² Rafał Mańko, ‘Proprietary Right to a Cooperative Apartment: A Survival of the Socialist Legal Tradition in Polish Private Law’, in *Public Interest and Private Interest in the European Legal Tradition*, ed. by Bronisław Sitek et al. (forthcoming), author’s version as submitted to the editors available at: <http://ssrn.com/abstract=2170845> (last accessed: 17/7/2014), p. 15 (pinpoint citations refer to the pages of the PDF file available at SSRN).

⁷⁰³ Mańko, ‘Proprietary...’, p. 15, n. 123.

⁷⁰⁴ Juliusz Krzyżanowski, in *Kodeks cywilny. Komentarz* (Warszawa: Wyd. Prawnicze, 1972), vol. 2, p. 1348; Andrzej Stelmachowski, ‘Kontraktacja’ [The Cultivation Contract], in *System prawa prywatnego* [The System of Private Law], ed. Jerzy Rajski, vol. 7: *Prawo zobowiązań – część szczegółowa* [Law of Obligations: General Part] (2nd ed., Warszawa: C.H. Beck, 2004): 249277, pp. 249-252.

Civil Code of 1964 was most probably a direct Soviet inspiration. In Soviet law, the cultivation contract (*договор контрактации, dogovor kontraktatsii*) was codified in Articles 51-52 of the Fundamentals of Civil Legislation of the USSR and Union Republics.⁷⁰⁵ The contract is not codified in any Western civil codes which are known to have influenced Polish private law (e.g. French, Austrian, German or Swiss).

B Legal framework

The legal framework of the cultivation contract, as codified in 1964,⁷⁰⁶ has undergone only a slight textual change. Whereas under the original rules from the procuring side it could be concluded only by a unit of socialised economy, duly authorised to perform the function of agricultural procurement,⁷⁰⁷ this limitation has been removed in 1990 allowing private sector economic operators to procure agricultural produce under the cultivation contract.

The legal framework of the contract was and is distinct both from sales and from the contract to perform a specific service (*umowa o dzieło*).⁷⁰⁸

⁷⁰⁵ Art. 51: 'State purchase of agricultural produce from collective and state farms shall be made by contracts for delivery of agricultural produce, which are concluded on the basis of plans for state purchases of agricultural produce and plans for the development of agricultural production in collective and state farms.'

⁷⁰⁶ The cultivation contract was regulated in a detailed manner in Art. 613-626 k.c. Art. 613 § 1 defined the essence of the contract as follows: 'By virtue of a cultivation contract, a party running an agricultural, gardening or animal farm (the producer) undertakes to produce and deliver to a unit of socialised economy (the contractor) a determined quantity of agricultural or animal produce of a determined quality, and the contractor undertakes to receive these products on the agreed date, pay the agreed price and discharge an additional performance if the contract or detailed rules of law provide for such a duty.'

⁷⁰⁷ Stelmachowski, 'Kontraktacja...', p. 262, Witold Czachórski, *Prawo zobowiązań w zarysie* (Warszawa: Państwowe Wydawnictwo Naukowe, 1968), p. 473. Krzyżanowski (in: *Kodeks...*, vol. 2, p. 1352) indicates that in practice the Minister of Agriculture decided which units could act as agricultural contractors.

⁷⁰⁸ Stelmachowski, 'Kontraktacja...', p. 259.

A characteristic feature of a cultivation contract is that the agricultural product must be produced by the farmer who is party to the contract, who cannot perform by buying the same crop on the market; this creates an essential difference between a cultivation contract and the sale of a future object, that is 'purchase of a hope' (*emptio spei*) and the 'purchase of a hoped-for thing' (*emptio rei speratae*).⁷⁰⁹

C Application of the legal framework in practice

During the state-socialist period, cultivation contracts were concluded usually by municipal cooperatives acting as agents for central procurement entities.⁷¹⁰ Cultivation contracts were concluded for a wide range of crops, including potatoes, barley, wicker, flax, herbs, poppy, peas, beans, and onions⁷¹¹ as well as pigs, cattle, sheep, wheat, hops,⁷¹² cabbage⁷¹³ and turkeys.⁷¹⁴ After 1989 the role of the cultivation contract decreased, nevertheless they are still in use, in particular for the procurement of sugar beet and tobacco leaves,⁷¹⁵ as well as canola,⁷¹⁶ wheat,⁷¹⁷ turkeys,⁷¹⁸ duck and goose eggs,⁷¹⁹ strawberries and raspberries.⁷²⁰

⁷⁰⁹ This aspect was identified as an essential element of the cultivation contract, differentiating it from sale, already in 1957 – see SN resolution of 22.10.1957, Case II CO 10/57, LEX no. 119339; it was introduced to the Civil Code and is underlined in modern case-law too: see e.g. SN judgment of 18.3.1998, Case I CKN 576/97, LEX no. 746161; SA/Poznań judgment of 19.8.2009, Case I ACa 507/09, LEX no. 756625 citing Case II CO 10/57, *supra*).

⁷¹⁰ Stelmachowski, 'Kontraktacja...', p. 252.

⁷¹¹ *Ibid.*

⁷¹² *Ibid.*, p. 473.

⁷¹³ SN judgment of 28.1.1967, Case I CR 45/67, LEX no. 6109.

⁷¹⁴ SN judgment of 18.5.1983, Case I CR 124/83, LEX no. 2900.

⁷¹⁵ Stelmachowski, 'Kontraktacja...', pp. 255-257.

⁷¹⁶ SN judgment of 18.3.1998, Case I CKN 576/97, LEX no. 746161.

⁷¹⁷ SN judgment of 27.6.2002, Case IV CKN 1165/00, LEX no. 80264.

D Social function of the legal framework

On a macro-social level, the cultivation contract played a distinct function under actually existing socialism. In the absence of collectivisation of farms in Poland, its function was to integrate private family holdings into the centrally planned economy.⁷²¹ On a micro-social level, the contract was simply a way of guaranteeing farmers a secure demand for their products at a fixed price, regardless of the market situation.

After 1989, the former macro-social function of cultivation contracts disappeared, together with the planned economy of state socialism.⁷²² Nevertheless, the micro-social function remained in place, although now the role of the procuring party has been taken over by private sector economic operators: the existing legal obstacle was removed directly in 1990.⁷²³

E Mechanism of endurance of the legal survival

The endurance of the cultivation contract as a legal survival can be explained by two factors. First of all, the demand for part of its social function, i.e. the guarantee of a price for the farmer, did not disappear after 1989. However, for the legal framework to continue fulfilling that social function a textually minimal adaptation was necessary: the removal of the requirement that only socialised enterprises may conclude the contract on the side of the

⁷¹⁸ SN judgment of 17.12. 2003, Case IV CK 303/02, LEX no. 599555.

⁷¹⁹ SN judgment of 19.2.2009, Case III SK 31/08, LEX no. 503413.

⁷²⁰ WSA/Gdańsk judgment of 20.10.2009, Case I SA/Gd 465/09, LEX no. 571204.

⁷²¹ Stelmachowski, 'Kontraktacja', p. 252-253; Czachorski, *Prawo zobowiązań*, p. 473; Krzyżanowski, in: *Kodeks...*, vol. 2, p. 1348; SN judgment of 7.8.1975, Case III CRN 179/75, LEX no. 7732; SN judgment of 25.5.1988, Case II CR 129/88, LEX no. 8884.

⁷²² Stelmachowski, 'Kontraktacja', p. 253.

⁷²³ *Ibid.*, p. 262.

procuring party. Indeed, had this requirement been upheld, legal practice regarding the contract would have been scarce, if at all existent.