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

Mańko, R.T.

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Chapter V

Legal survivals in procedural private law

1 Introduction

Whilst the impact of actually existing socialism upon substantive private law was mainly concerned with the regime of property (preference for social property) and the impact of economic planning upon contract law, in the field of procedural private law the most visible impact was concerned with a public-interest orientation of the procedure. Thus the emphasis upon ‘objective truth’ (as opposed to ‘formal truth’),⁷²⁴ initiative of state organs (as opposed to initiative of the litigants) and ‘objective’ socialist legality (as opposed to the defence of private rights).⁷²⁵

As a justification of remoulding civil procedure, scholars of the socialist period readily quoted Lenin’s famous phrase:

‘We do not recognise anything “private”, and regard *everything* in the economic sphere as falling under *public* and not private *law*. [...] Hence, the task is to extend the application of state intervention in “private legal” relations; to extend the right of the state to annul “private” contracts; to apply to “civil legal relations” not the *corpus juris romani* [body of Roman law – R.M.] but *our revolutionary concept of law* [...]’.⁷²⁶

⁷²⁴ Jerzy Jodłowski, *Les principes de la procédure civile polonaise* [Extrait de la Revue internationale de droit comparé (continuation du Bulletin de la Société de législation comparé), 1960, No. 2] (Agen: Imprimerie Moderne, 1960), p. 8. Cf. Anna Stawarska-Rippel, ‘O politycznych założeniach procedury cywilnej w Polsce Ludowej’ [On the Political Foundations of the Civil Procedure in People’s Poland], *Miscellanea Iuridica* 7 (2005), p. 264.

⁷²⁵ See e.g. Zbigniew Resich, *Nauka o ustroju organów ochrony prawnej* [Science about the Organs of Legal Protection] (Warszawa: WUW, 1970), p. 22–26, p. 41.

⁷²⁶ Vladimir Ilich Lenin, ‘On the Tasks of the People’s Commissariat for Justice under the New Economic Policy’, 20 February 1922, available online at: <http://www.marxists.org/archive/lenin/works/1922/feb/20c.htm> [last accessed: 31/10/2013]..

Lenin's statement was treated as a binding instruction by scholars⁷²⁷ and practitioners.⁷²⁸ This approach was summarised by a Polish professor of civil procedure in the following terms:

'Within the political system of the Polish People's Republic, civil procedure has, above all, the task of implementing the principles of rule of law, socialist democracy, protection of social ownership and protection of citizens' rights as guaranteed by the legal order of a state constructing socialism.'⁷²⁹

The impact of the official Marxist-Leninist state ideology upon procedural private law was recognised by authors of the period. Writing in 1951, a specialist of civil procedure remarked that:

'Marx himself emphasised that "substantive law has its necessary and appropriate procedural forms" and highlighted the organic link between substantive law and procedural law. Therefore, it is not only substantive law which is dependent on the relationships of production and social relationships but also procedural law, organically linked with substantive law, which takes its shape under their influence. The rules of procedural law represent the expression of the existing system of class forces and the existing relationships of production to no less a degree than norms of substantive law. Together with the entirety of legal norms, procedural law is part of the ideological superstructure, shaped by the economic base.'⁷³⁰

⁷²⁷ Jodłowski, *Les principes...*, p. 7-9.

⁷²⁸ Kazimierz Stefko, *Udział prokuratora w postępowaniu cywilnym* [The Participation of the Prosecutor in Civil Proceedings] (Warszawa: Wydawnictwo Prawnicze, 1956), p. 44.

⁷²⁹ Władysław Siedlecki, *Zarys postępowania cywilnego* [A Outline of the Civil Procedure] (2nd ed., Warszawa: Państwowe Wydawnictwo Naukowe, 1968), p. 10.

⁷³⁰ Jerzy Jodłowski, *Nowe drogi polskiego procesu cywilnego. Założenia ideologiczne reformy postępowania cywilnego* [The New Ways of the Polish Civil Procedure. The Ideological Basis of

Other prominent authors of the socialist period also noted the existence of a strict link between the political system and the general principles of the procedural private law.⁷³¹

The main instruments of achieving the objectives of the public-interest oriented state-socialist civil procedure included, firstly, the principle of an active court, not bound by the limits of the parties' initiative,⁷³² and the prosecutor's broad standing.⁷³³ Secondly, a special form of appeal – the extraordinary revision – available only to public officials and not to the parties, which could be brought against any judgment having the force of *res judicata*.⁷³⁴ Thirdly, special forms of centralised Supreme Court supervision over the entire judiciary – binding guidelines of the administration of justice⁷³⁵ and preliminary references to the Supreme Court.⁷³⁶ Socialist legality was also to be achieved by way of involving citizenry in the administration of justice through a typically Soviet institution of trial by mixed bench (one judge and two lay assessors determining issues of law

the Reform of Civil Proceedings] (Warszawa: Wydawnictwo Ministerstwa Sprawiedliwości, 1951), p. 5; Jodłowski, *Les principes...*, p. 3-4.

⁷³¹ Siedlecki, *Zarys...* (1968), p. 44.

⁷³² In Soviet civil procedure the principle that the civil court must actively seek to discover the objective truth by admitting evidence not requested by the parties was introduced already in an instruction of the People's Justice Commissioner of 1923 (see Lityński, *Prawo Rosji...*, p. 278) and later codified in the Civil Code of the RFSSR of the same year (*ibid.*, p. 283).

⁷³³ See section 2 below.

⁷³⁴ See section 3 below.

⁷³⁵ Art. 24 of Act of 6.2.1928 – Law on the Common Judiciary (consolidated version: Dz.U. 1950, no. 39, item 360), later Art. 13(3), 17 and 23(1) of the Act of 20.9.1984 on the Supreme court (Dz.U. no. 45, item 241).

⁷³⁶ See section 4 below.

and fact),⁷³⁷ as opposed to the Western jury (determining issues of fact) or trial by single professional judge.

In this chapter I will analyse in more detail the most characteristic legal survivals of the period of Actually existing socialism in the Polish law of civil procedure – the prosecutor’s standing (section 2), the public-interest form of appeal available to certain public officials (section 3) and the preliminary reference proceedings (section 4).

2 Prosecutor’s standing in civil proceedings

A Circumstances of introduction

Under pre-1939 Polish civil procedure, the powers of the prosecutor (*prokurator*) to intervene in civil proceedings were extremely narrow even for Western European standards of the period (such as French law).⁷³⁸ A prosecutor’s standing in civil proceedings was considered in pre-War Poland as violating the principle of equality of the parties to civil proceedings.⁷³⁹ In contrast, under the Soviet model, the Prosecution Service (*прокуратура*, *prokuratura*) was conceived of as an independent, hierarchical agency of government entrusted with the task of controlling all other powers, defending

⁷³⁷ See in particular Act of 2.12.1960 on people’s lay assessors in common courts (Dz.U. no. 54, item 309).

⁷³⁸ Walery Masewicz, *Prokurator w postępowaniu cywilnym* [The Prosecutor in Civil Proceedings] (Warszawa: Wydawnictwo Prawnicze, 1975), p. 15; Jerzy Smoleński, *Prokuratura Polskiej Rzeczypospolitej Ludowej. Komentarz do ustawy o prokuraturze PRL i innych przepisów dotyczących prokuratury* [Prosecution Service of the Polish People’s Republic. A Commentary to the Act on the Prosecution Service of the Polish People’s Republic and other Provisions Concerning the Prosecution Service] (2nd ed., Warszawa: Wydawnictwo Prawnicze, 1981), 127; Kazimierz Stefko, *Udział prokuratora w postępowaniu cywilnym* [The Participation of the Prosecutor in Civil Proceedings] (Warszawa: Wydawnictwo Prawnicze, 1956), 33-40; Jodłowski, *Les principes...*, p. 8; Halina Zięba-Załućka, *Instytucja prokuratury w Polsce* [The Institution of the Prosecution Service in Poland] (Warszawa: LexisNexis 2003), p. 14.

⁷³⁹ Jakubecki, ‘Naczelne zasady...’, p. 356 with further references.

'socialist legality' and enjoying, for this purpose, the powers of protest, proposal and prosecution.⁷⁴⁰ Specifically within the realm of civil proceedings, a Soviet prosecutor could – already under the Code of Civil Procedure of 1923⁷⁴¹ – participate in the hearing of any case at any instance, file suits and applications, give his opinion to the court, as well as bring appeals (called 'protests') against any decisions made by the court.⁷⁴² The broad standing of the prosecutor in Soviet civil procedure was justified by the need to implement Lenin's request of enlarging state intervention within civil-law relationships and the negation of the public law/private law divide.⁷⁴³

The roots of these broad powers of the prosecutor in Soviet civil proceedings can be traced back to imperial Russian law, where prosecutors could take part in certain types of civil cases.⁷⁴⁴ The imperial Prosecution Service, established in 1722, was conceived as an 'eye of the Tsar' and was entrusted with the task of supervising the observance of the rule of law by the entire state administration, including the judiciary.⁷⁴⁵ However, these powers

⁷⁴⁰ William E. Butler, *Russian Law* (3rd ed. Oxford: Oxford University Press, 2009), p. 192; Lityński, *Prawo Rosji...*, p. 317-318.

⁷⁴¹ Lityński, *Prawo Rosji...*, p. 280-281. These rules were later taken over into the Principles of Civil Procedure of 1961 and the Code of Civil Procedure of the RFSSR of 1964. See Lityński, *Krótki kurs...*, p. 288.

⁷⁴² Butler, *Soviet Law*, p. 106-107; Dmitry Maleshin, 'Russian Style of Civil Procedure', *Emory International Law Review* 21.2 (2007): 543-562, p. 549; Lityński, *Prawo Rosji...*, p. 278, 280-281, 288; Maleshin, 'Russian Civil Procedure: An Exceptional Mix', *Civil Procedure Review* 1.1 (2010): 00-117, available online at: http://www.civilprocedurereview.com/index.php?option=com_content&view=article&id=91&Itemid=87&lang=en (last accessed: 21/7/2013), p. 106-107

⁷⁴³ Anna Stawarska-Rippel, 'Radziecka procedura cywilna: totalitarna czy nowoczesna' [Soviet Civil Procedure: Totalitarian or Modern?] *Acta Universitatis Vratislaviensis* 3365 (2011): 467-479, p. 470.

⁷⁴⁴ Maleshin, 'Russian Style...', p. 549.

⁷⁴⁵ Butler, *Russian Law*, p. 191.

were taken away in the 19th century⁷⁴⁶ and returned only by the Soviet power which re-created the Prosecution Service in 1924, vesting in it the powers of constitutional, general and judicial supervision.⁷⁴⁷ Interestingly, after Stalin's death the supervisory powers of the Prosecution Service were even strengthened.⁷⁴⁸

In 1950, the Soviet model of the prosecution service became the object of a legal transfer to Polish law⁷⁴⁹ as part of a wider reform package covering the entire procedural law and the organisation of the judiciary.⁷⁵⁰ Prosecutorial standing in civil proceedings has also survived in the donor state, i.e. post-Soviet Russia.⁷⁵¹

⁷⁴⁶ Ibid.

⁷⁴⁷ Ibid., p. 192.

⁷⁴⁸ Ibid., p. 193.

⁷⁴⁹ Jakubecki, 'Naczelne zasady...', p. 356. Although there is no doubt that the Polish model of prosecutor's standing in civil proceedings is a legal transfer from the Soviet Union, it should also be kept in mind that a broad standing of the *ministère public* is provided for in French civil procedure. See Gerard Couchez, Xavier Lagarde, *Procédure civile* (16th ed., Paris: Dalloz, 2011), p. 146-153, 282-285; John Bell, Sophie Boyron, Simon Whittaker, *Principles of French Law* (2nd ed., Oxford: OUP, 2008), p. 60-61, 89-90. Nevertheless, the powers of the prosecutor in civil proceedings under the Soviet model (still in force in Polish law) are in practice much broader. In Poland, a prosecutor who joins civil proceedings, has all the powers of a party to the proceedings (e.g. may bring an appeal or petition for cassation) and is not limited only to giving a non-binding advice the court, as in France (see Bell et al., *Principles...*, p. 89-90), where the *ministère public* may challenge a decision only if it initiated the proceedings, but not if it joined proceedings already in motion (see Bell et al., *Principles...*, p. 112).

⁷⁵⁰ For details see Rafał Mańko, 'Is the Socialist Legal Tradition "Dead and Buried"? The Continuity of Certain Elements of Socialist Legal Culture in Polish Civil Procedure', in: *Private Law and the Many Cultures of Europe*, ed. Thomas Wilhelmsson et al. (The Hague: Kluwer Law International, 2007), p. 88ff.

⁷⁵¹ Butler, *Russian Law*, p. 246-247.

B Legal framework

Under the Polish legal framework introduced in 1950, prosecutors enjoyed a general and unlimited standing to join or initiate any civil proceedings, as well as to challenge any judicial decision. These powers were thoroughly independent from the will or interest of any private party to the civil proceedings and from the will of the court; however, they had full legal effects *vis-à-vis* the litigants. A judicial decision handed down in such a procedure was binding on the parties (unlike, for instance, in the French cassation ‘in the interest of the law’⁷⁵²). The Prosecutor General – head of the hierarchical prosecution service – enjoyed additional, special powers to appeal to the Supreme Court against any judicial decision having the force of *res judicata* regardless of the time lapsed (the ‘extraordinary revision’).⁷⁵³

This legal transfer, first codified in 1950, was taken over into the new socialist Code of Civil Procedure enacted in 1964. The prosecutor’s standing was raised to the level of a fundamental principle of civil procedure⁷⁵⁴ and scholars emphasised its role in making Polish civil procedure truly socialist.⁷⁵⁵ The only exception to the prosecutor’s standing obtaining since 1965 was the exclusion of the right to file for divorce.

⁷⁵² The ‘*pourvoi dans l’intérêt de la loi*’ which can be filed by a *procureur général* attached to the *Cour de cassation* ‘has no effect on the parties’ to the proceedings (Bell et al., *Principles...*, p. 112-113; see also Couchez and Lagard, *Procédure...*, p. 508).

⁷⁵³ Even this extraordinary type of appeal affected the rights and duties of the parties, unless a certain period had lapsed from the day that the original decision had obtained the force of *res judicata*. The extraordinary revision is discussed at length below in section 3.

⁷⁵⁴ Art. 7 k.p.c.

⁷⁵⁵ Albert Meszorer, *Stanowisko i czynności procesowe prokuratora w postępowaniu cywilnym* [The Position and Procedural Acts of the Prosecutor in Civil Proceedings] (Warszawa: PWN, 1957), p. 75; Smoleński, *Prokuratura...*, p. 127.

After 1989, numerous scholars began to criticise the generalised prosecutorial standing.⁷⁵⁶ Some of them even argued that such an institution actually violates the right to an impartial court as guaranteed by international human rights instruments.⁷⁵⁷ It was also pointed out that in this respect Polish civil procedure differs from other European countries.⁷⁵⁸ Nevertheless, despite numerous amendments to the Code of Civil Procedure, the prosecutor's standing has remained unaffected. The only change which occurred was the removal of the notion of 'protection of social property' from the list of very broadly framed grounds for a prosecutor's intervention (the others being: protection of the rule of law, protection of citizens' rights and protection of the social interest).⁷⁵⁹

The Internal Rules of the Prosecution Service (2010)⁷⁶⁰ currently in force specify the types of civil cases in which a prosecutor's participation in civil proceedings 'desirable'.⁷⁶¹ These include, for instance, cases of simulated

⁷⁵⁶ Tadeusz Ereciński, 'O potrzebie nowego kodeksu postępowania cywilnego' [On the Need of a New Code of Civil Procedure], *Państwo i Prawo* 59.4 (2004) 3ff, p. 8; Piotr Pogonowski, *Realizacja prawa do sądu w postępowaniu cywilnym* [The Realisation of the Right to a Court in Civil Proceedings] (Warszawa: C.H. Beck, 2005), p. 73ff.; Adam Zieliński, in *Kodeks postępowania cywilnego. Komentarz do artykułów 1-505*¹⁴ [Code of Civil Procedure. Commentary to Articles 1 to 505¹⁴] (2nd ed., Warszawa: C.H. Beck, 2006), p. 71.

⁷⁵⁷ Feliks Zedler, 'Glosa do wyroku SN z dnia 14 września 2005 r. III CZP 58/05' [Case-note Supreme Court judgment of 14.9.2005 in Case III CZP 58/05], *Orzecznictwo Sądów Polskich* 50.1 (2006), p. 518.

⁷⁵⁸ Andrzej Oklejak, 'Co dalej z kodeksem postępowania cywilnego w czterdziestolecie jego istnienia?' [What Should be Done with the Code of Civil Procedure on the Fortieth Anniversary of Its Existence?] in *Czterdziestolecie kodeksu postępowania cywilnego* [Forty Years of the Code of Civil Procedure], ed. Izabela Ratusińska (Kraków: Zakamycze, 2006), p. 13.

⁷⁵⁹ See Art. 7 k.p.c., as modified by Act of 13 July 1990 (Dz.U. No. 55, item 318).

⁷⁶⁰ Regulation of the Minister of Justice of 24 March 2010 – the Internal Rules of the Common Organisational Units of the Prosecution Service (consolidated version: Dz.U. 2014, item 144, hereinafter: 'Internal Rules 2010').

⁷⁶¹ §§ 374, 378-379 of the Internal Rules 2010.

declarations of will, declarations of will made to hide a different legal act or circumvent the law, cases for the annulment of a legal act whose effect is the transfer or encumbrance of an immovable, cases regarding protection of cultural property and protection of copyright, cases regarding the protection of the family and environmental protection.⁷⁶² Furthermore, within family law the Internal Rules make it 'desirable' for prosecutors to intervene in cases regarding the annulment of marriage, a declaration of its existence or inexistence, negation of paternity or maternity, adoption of foreigners or Polish citizens who are non-residents, dissolution of adoption, removal of a person subject to parental authority or guardianship, deprivation of parental authority and injunctions prohibiting contacts with a child. Finally, within labour law, the Internal Rules urge prosecutors to bring actions, inter alia, whenever workers' rights have been flagrantly violated and in cases of termination of employment due to discrimination.

C Application of the legal framework in practice

The legal practice applying the principle of prosecutor's participation in civil proceedings continues to be rich.⁷⁶³ In 2012 as many as 83,687 civil cases⁷⁶⁴ were registered at the Prosecution Service, which meant an increase in the number of incoming cases (from 79,996 in 2011). Most of such cases are dealt

⁷⁶² Arguably, at least some of the spheres enumerated in the Internal Rules 2010, e.g. environmental protection or protection of cultural property, have an inherent public interest element in them. However, this is not the case with all the spheres, and furthermore, it must be kept in mind that the proceedings in question are *civil*, and not *administrative* proceedings.

⁷⁶³ The following description of this activity is based on *Sprawozdanie Prokuratora Generalnego z rocznej działalności prokuratury w 2012 roku* [Prosecutor General's Report on the Annual Activity of the Prosecution Service in 2012, hereinafter '*Prosecutor General's Report 2012*'] (Warszawa: Prokuratura Generalna, 2013), vol. I, available online at: http://www.pg.gov.pl/upload_doc/000003717.pdf (last accessed: 9/7/2013), pp. 250-258.

⁷⁶⁴ Including family and guardianship cases, as well as labour and social security cases.

with at the lowest level of the Prosecution Service, that is at District Prosecution Offices (*prokuratury rejonowe*) (81.8% of the cases). The number of cases actually dealt with by the Prosecution Service is similar to the number of incoming cases (those registered): in 2012 prosecutors dealt with 82,596 cases (in 2011 with 78,669). In 2012 prosecutors filed a total of 3,872 actions in litigious civil cases (*powództwa*) and 18,603 actions in non-litigious civil cases (*wnioski wszczynające postępowanie nieprocesowe*) which gives a total of 22,475 civil lawsuits filed altogether.

The subject matter of the lawsuits in litigious civil cases included delict (261 actions), confiscation of consideration provided for in exchange for the commission of a criminal act (183 actions), actions in labour law (7 actions), actions for determination of paternity (79 actions), actions for negation of paternity (1,117 actions), actions for annulment of recognition of paternity (129 cases), as well as actions for alimony or for the increase of alimony (275 cases).

The Prosecutor General's *Annual Report* for 2012 notes that the amount of civil lawsuits in labour cases was relatively low and should be increased. In fact, a special circular to this effect was addressed by the Deputy Prosecutor General to all prosecutors.⁷⁶⁵

The *Report* underlines the activity of the Prosecution Service in cases concerning the reactivation of pre-World War II companies, which had not been removed from the company register in the meantime. Prosecutors in particular bring actions for annulment of resolutions dissolving such companies and establishing liquidators.

⁷⁶⁵ *Prosecutor General's Report 2012*, p 252.

Actions filed by the Prosecution Service in litigious cases are very effective (in the sense that prosecutors usually win them).⁷⁶⁶ For instance, in 2012 the Prosecution won in 95.2% cases it had filed (in 2011 – in 94.3% cases). The total amount of damages awarded in cases brought by the Prosecution Service amounted to PLN 4,546,319 (EUR 1,075,517),⁷⁶⁷ including damages awarded to citizens amounting to PLN 916,335 (EUR 216,776).

As regards actions brought in non-litigious civil cases in the area of family and guardianship law, a total of 18,603 filed cases was filed 2012. The subject matter of the actions concentrated on actions for compulsory anti-alcoholism treatment⁷⁶⁸ (11,399 actions), actions for incapacitation (2,038 actions) and actions regarding family relationships (3,682 actions). The rate of success of the Prosecution Service in non-litigious civil cases was also high, and in 2012 amounted to 85.8% (in 2011 – 84.2%). According to the Prosecutor General's *Yearly Report*, the main reasons for losing non-litigious cases was a change of the facts of the case during the proceedings as well as the content of expert

⁷⁶⁶ An explanation of this extremely high rate of cases won by the Prosecution Service would exceed the scope of this dissertation. A hypothetical reason could be that prosecutors file cases only when they are absolutely sure of their chances of winning, whilst attorneys-at-law representing private parties file cases whenever their client instructs them to do so, even if chances of winning are *prima facie* limited.

⁷⁶⁷ The average exchange rate in 2012 was 1 EUR = 4,2271 PLN. See http://www.nbp.gov.pl/kursy/archiwum/wagi_archiwum_2012.xls (last accessed: 9/7/2013).

⁷⁶⁸ A civil (family) court may impose upon an individual the duty to undergo anti-alcoholic treatment upon request by a prosecutor or the competent Municipal Commission for the Solution of Problems Posed by Alcoholism (*gminna komisja rozwiązywania problemów alkoholowych*). See art. 26 of the Act of 26.10.1982 on educating society in sobriety and combating alcoholism (consolidated version published in Dz. U. 2012, item 1356). The alcoholic's family or neighbours do not enjoy standing to file such an action.

opinions, especially in cases regarding the obligatory anti-alcoholism treatment.⁷⁶⁹

As regards appellate proceedings, in 2012 prosecutors filed 95 appeals (in 2011 – 121 appeals). The success rate was much lower than at trial level, amounting to only 57.8%. Apart from regular appeals, prosecutors also filed 261 petitions for reopening of proceedings (in 2011 – 215 petitions). The success rates for those petitions amounted to 87%.

Apart from filing themselves actions, appeals and petitions for reopening of proceedings, prosecutors also joined civil proceedings initiated by private parties. In 2012 prosecutors participated in 19,999 civil cases initiated by other parties (in 2011 – in 18,913 cases). The *Yearly Report* of the Prosecutor General underlines a growth of prosecutors' participation in labour cases.⁷⁷⁰ In 2012 prosecutors intervened in 117 cases concerning the protection of workers' rights.

Following a procedure provided for in Article 59 of the Code of Civil Procedure, courts may call upon the Prosecution Service to intervene in a pending case. In 2012 this procedure was resorted to by civil courts in 3,928 cases, regarding *inter alia* matters belonging to the law of persons, law of succession, law of civil status, property law, origin of a child, relationship between parents and children, actions for payment, actions for dissolution of marital community of property, actions for legitim (forced share in deceased's estate) and labour law actions. The Prosecution Service was generally responsive, taking part in 3,477 cases and refusing in only 451 cases (rate of responsiveness 88.5%). According to the Prosecutor General's *Yearly Report*, the

⁷⁶⁹ Cfr. footnote 753 above.

⁷⁷⁰ *Prosecutor General's Report 2012*, p. 255.

reasons for refusing to respond to a court's request for prosecutorial participation included the fact that the parties were represented by professional attorneys, an opinion regarding the justified character of the parties' demand with regard to their interest and the benefit of children, and finally an evaluation of the facts of the case.

As regards cassation proceedings in cases, in which prosecutors participated in the appellate phase of proceedings (not to be mistaken with 'extraordinary' cassations launched by the Prosecutor General), prosecutors brought 23 cases in 2012 (in 2011 – 11 petitions for cassation). In 2012 the Supreme Court decided upon 2 petitions for cassation, ruling in favour of the Prosecution Service in one case (rate of success – 50%).

The Prosecutor General's *Yearly Report* for 2012 underlines that the Office of the Prosecutor General has indicated the need for specialisation of prosecutors in areas other than criminal law and urged the National School of the Judiciary and Prosecution Service (*Krajowa Szkoła Sądownictwa i Prokuratury*) to organise trainings in private law for prosecutors. Indeed, in the curriculum of trainings for 2013 the National School provided for a specialised training on private law for prosecutors, including such subjects as adoption, delictual liability, private-law aspects of child abduction, company law and actions for annulment of resolutions of housing condominiums.⁷⁷¹

⁷⁷¹ Krajowa Szkoła Sądownictwa i Prokuratury, *Harmonogram szkoleń w 2013 r.* [Schedule of Trainings in 2013], available online at: <http://www.kSSIP.gov.pl/files/production/clips/original/5e27cc6d2aae28b4eef774db7510b486.pdf> (last accessed: 9/7/2013), p. 68-69.

D Social function of the legal framework

If the social function of the prosecutor's standing in civil proceedings is conceived as a power given to the Prosecution Service to intervene in private litigation on behalf of (its understanding of) the public interest, then it must be admitted that this function has remained the same. Of course, the political allegiance of the Prosecution Service has changed after 1989, it is no longer controlled by the ruling PZPR party and since the 2009 reform⁷⁷² it has even become independent from the government.⁷⁷³

However, on a more detailed level changes in the function could be identified. During the socialist period prosecutors filed many cases in order to protect state property⁷⁷⁴ or intervene, on behalf of working peasants, in cases of class struggle with 'kulaks' (*kulacy*). Such cases are, obviously, not present any more in legal practice. The lack of interest of the prosecution service in the on-going class struggle after 1989 is best evidenced by the fact that only 2 labour cases were brought in 2011. However, this number grew to 7 in 2012,⁷⁷⁵ and the Prosecutor General's Office requested prosecutors to increase their activity in this field. In other areas of prosecutorial activity in the field of family law

⁷⁷² See Act of 9.10.2009 amending the Act on the Prosecution Services and certain other acts (Dz.U. no. 178, item 1375).

⁷⁷³ See especially Art. 10a (appointment of Prosecutor General) and Art. 10e(6) (revocation of Prosecutor General by qualified majority in lower house of Parliament) of the Act of 20.6.1985 on the Prosecution Service (consolidated version Dz.U. 2011, no. 270, item 1599). Hitherto, since 1990, the post of the Prosecutor General, i.e. head of the entire Prosecution Service, had been held by the Minister of Justice, i.e. a political member of government – see Art. 1(2) of the Act of 20.6.1985 on the Prosecution Service (Dz.U. no. 31, item 138) as amended by Act of 22.3.1990 (Dz.U. no. 20, item 121).

⁷⁷⁴ A. Graff and L. Karłowski, 'Działalność prokuratury w sprawach cywilnych' [The Activity of the Prosecution Service in Civil Case] in *Prokuratura P.R.L. w latach 1950-1960* [The Prosecution Service of the Polish People's Republic Between 1950 and 1960], ed. Ignacy Druski (Warszawa: Wydawnictwo Biuletynu Generalnej Prokuratury, 1960), p. 183.

⁷⁷⁵ *Prosecutor General's Report for 2012*, vol. 2, p. 252.

(incapacitation cases) or in cases regarding the confiscation of an illegal performance, there is more continuity of the social function.

In sum, it could be said that the essential function of the prosecutor's standing in civil proceedings – the right of the state to intervene in private litigation, supporting one of the litigants or representing the public interest – has been upheld. On a more detailed level, however, the function has partly shrunk, especially with regard to the protection of state property.

E Mechanism of endurance of the legal survival

The legal framework of the institution of prosecutorial involvement in civil proceedings required only minor adaptations in order to become a legal survival. Similarly as in the case of general clauses (the doctrines of principles of social life and of socio-economic purpose), discussed in Chapter IV, the key to endurance of this legal survival – having the form of a competence rule – analysed in this section seems to lie in its inherent flexibility. Whereas in the case of the two general clauses discussed above the flexibility (of the standard, as opposed to a rule) signified a discretionary power of the courts (whether to apply the doctrines or not, and if yes, in what manner precisely), in the case of the prosecutor's standing in civil proceedings the discretionary power in question is vested in the Prosecution Service.⁷⁷⁶ Namely, whether to file a civil lawsuit or join an on-going one remains at the discretion of the competent

⁷⁷⁶ However, the provision enabling the prosecutor to intervene in civil proceedings is, in itself, not a standard, but a *rule* in Kennedy's terminology (or, more precisely – a 'competence rule', see above Chapter II, section 4.B(b)). This is because it is 'formally realizable': it is clear (without any penumbra of doubt) that if a person who is a prosecutor wishes to intervene in civil proceedings, he may do so. The element of flexibility arises elsewhere, *outside* the rule itself: what is flexible, is *what* the prosecutor will actually do (which party will he support, what requests will he formulate, will he file an appeal etc.). All this is left to the individual prosecutor's discretion. However, since a prosecutor functions within a hierarchically organised Prosecution Service, this discretion is ultimately vested in the higher echelons of the Service.

prosecutor. The same applies, of course, to the exact content of the prosecutor's pleadings, which is not pre-determined by the legal framework. This inherent flexibility allowed the Prosecution Service to make use of the power in a way not interfering with the basic tenets of the current political and socio-economic system, and therefore enabled the endurance of the legal survival.

3 Prosecutor General's and Ombudsman's power to challenge judicial decisions having the force of *res judicata*

A Circumstances of introduction

The Polish Code of Civil Procedure of 1930⁷⁷⁷ followed the French model of three-instance proceedings. After the first-instance court issued its judgment, it could be challenged by way of an appeal (*apelacja*) on points of law and fact to a second-instance court. The judgment of the second instance court could, in turn, be challenged on a point of law by way of a 'petition for cassation' (*skarga kasacyjna*).⁷⁷⁸ The cassation procedure itself was a mixture of the French *cassation* and the German *Revision*: the Supreme Court could also decide the case and not only quash the lower court's judgment. A petition for cassation was allowed in most types of civil cases and the Supreme Court did not enjoy any discretion with regard to selecting cases: a formally admissible petition had to be heard, even if the legal aspects were trivial. The petition for cassation could be filed only by one of the parties, and not by any public official such as the Prosecutor General or Minister of Justice.

⁷⁷⁷ Regulation of the President of the Republic of 29 November 1930 – Code of Civil Procedure] (Dz.U. no. 83 item 651, consolidated version Dz.U. 1932, no. 112, item 934), hereinafter: 'k.p.c. (1930)'.

⁷⁷⁸ Art. 424-441 of k.p.c. (1930).

In contrast to the French and German model, the Soviet civil proceedings was based on a two-instance model (trial and cassation), with the second instance aimed not at as a re-trial (as in the French *appel*) but only as a review (on law and fact) of the first-instance decision, which justified its name cassation⁷⁷⁹ to which it was compared.⁷⁸⁰ However, all judgments having the force of *res judicata* were capable of being challenged at any time via the 'supervisory instance' (*надзорная инстанция, nadzornaya instantsya*) – a special form of appeal, available only to certain public officials (such as the Prosecutor General of the USSR, Chief Justice of the USSR and their deputies) but not to the litigants themselves.⁷⁸¹ The Soviet model of two-instance proceedings (trial, cassation) coupled with a protest procedure was exported to other socialist countries, where it appeared under diverse names.⁷⁸² In all socialist countries the equivalent of an extraordinary revision could be launched by the Prosecutor General, in most – by the Chief Justice (President of the Supreme Court), in Poland and Czechoslovakia – also by the Minister of Justice.⁷⁸³

⁷⁷⁹ *Кассационная инстанция* (*kassatsionnaya instantsya*) i.e. 'cassation instance'.

⁷⁸⁰ Jodłowski, *Les principes...*, p. 13; Lityński, *Prawo Rosji...*, p. 285, 289.

⁷⁸¹ Lityński, *Prawo Rosji...*, p. 289.

⁷⁸² Herbert Küpper, *Einführung in die Rechtsgeschichte Osteuropas* (Frankfurt am Main et al.: Peter Lang, 2005), p. 590; Zbigniew Resich, 'Nadzór judykacyjny Sądu Najwyższego', in *Sąd Najwyższy w PRL* [The Supreme Court in the Polish People's Republic], ed. M. Rybicki (Wrocław et al.: Zakład Narodowy im. Ossolińskich, 1983), p. 161. The supervisory proceedings as a means of attacking judgments having the force of *res judicata* have been retained in post-Soviet Russian civil procedure, but the possibility of initiating them has been granted to the litigants themselves. See Dmitry Maleshin, 'Some cultural characteristics of the new Russian code of civil procedure of 2002', *Zeitschrift für Zivilprozess International* 10 (2005): 385-389, available at SSRN <http://ssrn.com/abstract=2209085> (last accessed: 17/3/2014), p. 387.

⁷⁸³ Stanisław Włodyka, 'Specjalne środki nadzoru judykacyjnego Sądu Najwyższego', in *Sąd Najwyższy w PRL*, ed. Marian Rybicki (Wrocław et al.: Zakład Narodowy im. Ossolińskich, 1983), p. 196-197.

B Legal framework

(a) 1950-1996

The Soviet supervisory instance was introduced to Polish civil (and incidentally, also criminal) procedure in 1950, as part of a broad reform of the judiciary and procedural law during a phase of intense Sovietisation of the Polish legal system.⁷⁸⁴ Instead of the Soviet terminology,⁷⁸⁵ perhaps in order to avoid confusion with the old ‘cassation’ which was simultaneously abolished, the Soviet ‘cassation instance’ (*кассационная инстанция*, *kassatsyonnaya instantsya*) was called ‘revision’ (*rewizja*, somewhat misleadingly adopting the German term *Revision*), whilst the Soviet ‘supervisory instance’ (*надзорная инстанция*, *nadzornaya instantsya*) was called ‘extraordinary revision’ (*rewizja nadzwyczajna*). The old terminology – appeal (*apelacja*) and cassation (*kasacja*) – were therefore repealed in order to symbolically underline the qualitative change in civil procedure. Whilst the newly introduced revision could be filed by the litigants themselves, the power to launch an extraordinary revision was vested in the Minister of Justice, the First President of the Supreme Court and the Prosecutor-General. By way of an extraordinary revision they could challenge any judicial decision having the force of *res judicata*. It was required that the decision ‘violate the interests of the People’s State’ or ‘infringe essential legal provisions.’⁷⁸⁶ Whilst no limitation period existed in respect of extraordinary revision, where such a revision was initiated more than after six

⁷⁸⁴ A number of other legal survivals studied in this dissertation were likewise introduced in 1950 – the prosecutor’s standing, the preliminary reference procedure, the guidelines of the Supreme court, trial by mixed bench, and the principles of social life.

⁷⁸⁵ Whereby the term ‘cassation instance’ (*кассационная инстанция*) was used to denote second-instance appellate proceedings, in Poland known as ‘revision’ proceedings (*postępowanie rewizyjne*).

⁷⁸⁶ Art. 396 k.p.c. (as of 1950).

months from the moment when a judgment acquired definitive force, the Supreme Court could neither quash, nor modify the challenged decision, but could nevertheless issue a declaratory judgment, finding that the challenged decision was illegal.⁷⁸⁷

Although the decision to file an extraordinary revision could be made exclusively by one of the enumerated public officials, citizens were allowed to petition them to do so, a right which was recognised in 1958.⁷⁸⁸ Such a citizen's petition did not however, require any reaction from the entitled public officials, who were not under a duty to give reasons for not taking the petition into account.⁷⁸⁹ Conversely, the Supreme Court was obliged to analyse an extraordinary revision on its merits, even if it deemed the petition to be manifestly unfounded.⁷⁹⁰

The Soviet origin and 'socialist' character of the extraordinary revision was acknowledged and even emphasised by Polish scholars.⁷⁹¹ Whilst acknowledging certain similarities with Western European public-interest forms of appeal to supreme courts,⁷⁹² the specificity of the socialist solution was underlined.⁷⁹³ In

⁷⁸⁷ Art. 399 § 1 k.p.c. (as of 1950).

⁷⁸⁸ Art. 396¹ § 1 k.p.c. (as of 1958).

⁷⁸⁹ Art. 396¹ § 3 k.p.c. (as of 1958).

⁷⁹⁰ Tadeusz Zembrzuski, *Dostępność skargi kasacyjnej w procesie cywilnym* [The Availability of the Petition for Cassation in Civil Litigation] (Warszawa: Lexis Nexis, 2008), p. 279-280.

⁷⁹¹ Jerzy Jodłowski, *Nowe drogi polskiego procesu cywilnego. Założenia ideologiczne reformy postępowania cywilnego* [The New Ways of the Polish Civil Procedure. The Ideological Basis of the Reform of Civil Proceedings] (Warszawa: Wydawnictwo Ministerstwa Sprawiedliwości, 1951), p. 45-46; Jodłowski, 'Les principes...', p. 15; Włodzimierz Berutowicz, *Postępowanie cywilne w zarysie* [Civil Procedure in Outline] (Warszawa: PWN, 1974), p. 352; Witold Broniewicz, *Postępowanie cywilne w zarysie* [Civil Procedure in Outline] (3rd ed., Warszawa: Państwowe Wydawnictwo Naukowe, 1983), p. 214.

⁷⁹² Jerzy Jodłowski noted that extraordinary revision was, to a certain extent, comparable with the French *pourvoi en cassation du procureur général dans l'intérêt de la loi*, the Italian *ricorso*

particular, comparing the legal regime in the Soviet bloc and in Western countries, the socialist solution was praised for putting the conformity of judicial decisions with the law before their definitive force (*res judicata*).⁷⁹⁴ Scholars of the period stressed the public-interest focus of the extraordinary revision.⁷⁹⁵

The extraordinary revision was taken over into the new socialist Code of Civil Procedure of 1964 with only minor modifications. The precondition of filing an extraordinary revision was now formulated as a ‘gross violation of the law or interests of the Polish People’s Republic’⁷⁹⁶ by the operative part of the decision or a ‘violation the interests of the Polish People’s Republic, gross infringement of the honour of a party or a gross violation of a party’s rights’⁷⁹⁷ by its grounds, although the decision whether any such fact took place remained with the public officials enjoying standing to file the petition. One important modification was the strengthening the principle of priority of legality over *res judicata* in that an extraordinary revision, even if filed following the expiry of the 6-month deadline, could still lead to the quashing or modification of the challenged judgment, where such a judgment violated the interests of the Polish

nell'interesse della legge and the Swiss *Kassation von Amts wegen*. Jodłowski, *Les principes...*, p. 15. However, as Resich indicated, the main difference between Western forms of public interest appeals and the socialist extraordinary revision was the fact that Western appeals did not have any *inter partes* effects (Zbigniew Resich, ‘Nadzór judykacyjny Sądu Najwyższego’, 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. 160). Indeed, as I noted earlier, the contemporary French ‘*pourvoi dans l'intérêt de la loi*’ which can be filed by a *procureur général* attached to the *Cour de cassation* ‘has no effect on the parties’ to the proceedings (Bell et al., *Principles...*, p. 112-113; see also Couchez and Lagard, *Procédure...*, p. 508).

⁷⁹³ Jodłowski, ‘Les principes...’, p. 15

⁷⁹⁴ Ibid.

⁷⁹⁵ E.g. Berutowicz, *Postępowanie...*, p. 358.

⁷⁹⁶ Art. 417 sentence 1 k.p.c. (1964).

⁷⁹⁷ Art. 417 sentence 2 k.p.c. (1964).

People's Republic.⁷⁹⁸ In all other cases, i.e. when the challenged judgment did not violate the interests of the Republic, an extraordinary revision submitted after the expiry of the 6-month deadline was inadmissible. There was therefore no possibility, such as under the 1950 provisions,⁷⁹⁹ to declare such a judgment unlawful (without simultaneously quashing it).

Finally, it should be noted that the catalogue of public officials entitled to file an extraordinary revision was gradually expanded. Under the original text of the Code of Civil Procedure of 1964, this right was vested in the Minister of Justice, First President of the Supreme Court and Prosecutor General.⁸⁰⁰ In 1985 this right was granted, in cases concerning employment and social security, to the Minister of Labour, Pay and Social Affairs (*Minister Pracy, Płacy i Spraw Socjalnych*).⁸⁰¹ When in 1987 the office of the Ombudsman (*Rzecznik Praw Obywatelskich*, 'spokesman of citizens' rights') was created, he was also vested with the right of filing extraordinary revisions as from 1 January 1988.⁸⁰²

(b) initial discontinuity of the legal framework (1996-2000)

Directly after the demise of actually existing socialism, the Soviet-style extraordinary revision became the object of critique. Already in 1992 the government tabled a proposal for re-introducing the French-style three-instance

⁷⁹⁸ Art. 421 § 2 k.p.c. (1964).

⁷⁹⁹ Władysław Siedlecki in *Kodeks postępowania cywilnego. Komentarz* [Code of Civil Procedure. Commentary], ed. Zbigniew Resich and Władysław Siedlecki (2nd ed., Warszawa: Wydawnictwo Prawnicze, 1975), vol. 1, p. 693-694.

⁸⁰⁰ Art. 417 § 1 k.p.c. (1964).

⁸⁰¹ Art. 417 § 1 k.p.c. (1964) as amended by Act of 17.4.1985 (Dz.U. no. 20, item 86).

⁸⁰² Art. 417 § 1 k.p.c. (1964) as amended by Act of 15.7.1987 on the Ombudsman (Dz.U. no. 21, item 223).

proceedings (trial, appeal, cassation).⁸⁰³ The petition for cassation was intended to be an ordinary, third-instance means of challenging judicial decisions available to the litigants without, in principle, any limits and without any preliminary review by the Supreme Court. A petition for cassation would be inadmissible only in certain limited cases regarding trivial legal issues.⁸⁰⁴ The explanatory memorandum to the proposal heavily criticised the socialist legal framework, describing it as ‘undemocratic’ and considering that it ‘enables the state to interfere with judgments having the force of *res judicata*’, and pointing out, on a comparative note, that an extraordinary revision ‘is unknown in legal systems of states with developed market economies.’⁸⁰⁵

The proposal was eventually enacted in 1996. The reintroduced petition for cassation was shaped as an ordinary means of challenging court decisions,⁸⁰⁶ available to the litigants without limits (subject to some very minor exceptions) against judgments or orders issued by second-instance courts terminating proceedings in a given case.⁸⁰⁷ As regards the filing of petitions for cassations by a prosecutor, this was limited to cases in which a prosecutor had

⁸⁰³ ‘Projekt ustawy o zmianie kodeksu postępowania cywilnego, kodeksu postępowania administracyjnego oraz ustawy o kosztach sądowych w sprawach cywilnych wraz z uzasadnieniem’ [Draft Act on the Modification of the Code of Civil Procedure, the Code of Administrative Procedure, the Act on Judicial Costs in Civil Cases with Motives], *Kwartalnik Prawa Prywatnego* 1.1-4 (1992), p. 213ff (hereinafter: ‘Draft amendment act 1992’).

⁸⁰⁴ Draft amendment act 1992, p. 227.

⁸⁰⁵ Draft amendment act 1992, p. 225-228.

⁸⁰⁶ ‘Ordinary’ (zwyczajne środki zaskarżenia) in the meaning that they are available, as a rule, in all cases, as opposed to ‘extraordinary means of challenging judicial decisions’ (nadzwyczajne środki zaskarżenia) which are available only exceptionally, in specific, narrowly defined situations and are not part of the ordinary judicial review of lower courts’ decisions.

⁸⁰⁷ Art. 392 § 1 k.p.c. (as of 1996).

actually participated already at the level of second-instance proceedings.⁸⁰⁸ The types of cases in which third-instance proceedings were inadmissible was limited and included cases of minor significance,⁸⁰⁹ although even this limitation was criticised in scholarly commentaries.⁸¹⁰ A petition for cassation could be based on two grounds: an infringement of substantive law or an infringement of procedural law which significantly affected the outcome of the case.⁸¹¹ Once cassation proceedings had been duly initiated, the Supreme Court was obliged to consider the case on the merits and enjoyed no power of discretionary case selection.⁸¹² This ensured that the petition for cassation was truly an ordinary means of challenging court decisions,⁸¹³ primarily serving the private interests of the individual party⁸¹⁴ rather than the public interest, as was formerly the case in respect of extraordinary revision. In the Constitutional Court's words, the

⁸⁰⁸ Art. 392 § 2 k.p.c. (as of 1996). Therefore, neither a prosecutor nor the Prosecutor General could join proceedings at the stage of cassation (third instance).

⁸⁰⁹ Pursuant to Art. 393 k.p.c. (as of 1996) the following were excluded from third instance proceedings: 1) claims for a sum lower than PLN 10,000 in ordinary proceedings and PLN 10,000 in economic proceedings; 2) claims regarding the amount of alimony; 3) landlord's claim for rent; 4) possessor's claim to restitution of property and certain minor claims regarding labour law and social security law.

⁸¹⁰ Sławomir Dalka, 'Zmiany w procedurze cywilnej według nowelizacji z 1 marca 1996 r.' [Changes in the Civil Procedure According to the Amendment of 1 March 1996], *Państwo i Prawo* 51.8-9 (1996), 29ff, p. 36.

⁸¹¹ Art. 393¹ k.p.c. (1964/1996). Cfr. Kazimierz Piasecki in *Kodeks postępowania cywilnego. Komentarz* [Code of Civil Procedure: A Commentary] (Warszawa, C.H. Beck, 1996), Vol. I, p. 1164-1170.

⁸¹² Dariusz Krupa in *Postępowanie cywilne*, ed. Henryk Mądrzak (2nd ed., Warszawa: C.H. Beck, 1999), p. 310-313.

⁸¹³ *Ibid.*, 305.

⁸¹⁴ Cfr. Jerzy Jodłowski, Zbigniew Resich, Jerzy Lapierre and Teresa Misiuk-Jodłowska, *Postępowanie cywilne* [Civil Procedure] (3rd ed., Warszawa: LexisNexis 2003), p. 414.

petition for cassation was intended to be ‘an instrument of a subjective right held by an individual’.⁸¹⁵

Lawyers and the public opinion began to view the right to file a petition for cassation in civil cases as an element of the fundamental right of access to justice (‘right to a court’) and any limitations imposed thereupon, such as those relating to the value of a claim, were considered as limitations of this fundamental right.⁸¹⁶ Scholars emphasised that the 1996 amendment did not allow filing a petition for cassation ‘in defence of the law’ (i.e. in the public interest) as is the case in France.⁸¹⁷ The 1996 mechanism of cassation, just like its 1930 model, was not a pure French *cassation* but also contained elements of the German *Revision*, such as the right (but not duty) of the Supreme Court to modify a challenged judgment instead of simply quashing it (*casser*).⁸¹⁸

These new rules inevitably led to an increase in the number of petitions for cassation.⁸¹⁹ In 2000, the fourth year of the functioning of the three-instance procedure, as many as 9,657 petitions for cassation in civil cases awaited

⁸¹⁵ TK judgment of 31.3.2005, Case SK 26/02, p. 29 (page references to the PDF version of the decision available at the TK’s website).

⁸¹⁶ See e.g. Tadeusz Zembrzusi, *Dostępność skargi kasacyjnej w procesie cywilnym* [The Availability of the petition for cassation in a Civil Process] (Warszawa: Lexis Nexis, 2008), p. 280-281. Cf. the remarks of the Constitutional Court in TK Case SK 26/02, p. 23.

⁸¹⁷ Piasecki in *Kodeks...*, p. 1151.

⁸¹⁸ Tadeusz Ereciński, *Apelacja i kasacja w procesie cywilnym (według ustawy z dnia 1 marca 1996 r.)*. [Appeal and Cassation in Civil Proceedings (According to the Act of 1 March 1996)] (Warszawa: Wydawnictwo Prawnicze, 1996), p. 97-98.

⁸¹⁹ In Polish terminology, the name of the petition submitted by the litigant’s lawyer to the Supreme Court was initially ‘*skarga kasacyjna*’ (*petition for cassation*) under the pre-World War II code of civil procedure, but when the cassation proceedings were re-introduced in 1996, the term chose was simply ‘*kasacja*’ (cassation). Later, the pre-World War II terminology was restored (‘*skarga kasacyjna*’), but only in civil matters (in criminal cases the petition is still called ‘*kasacja*’). In order to avoid confusion between the petition itself and the judgment of the Supreme Court quashing (French ‘*casser*’) the lower court’s decision, I will use the term ‘petition for cassation’ as a translation both of the Polish ‘*skarga kasacyjna*’ and ‘*kasacja*’.

consideration by the Supreme Court, of which 4,405 had been filed in 2000.⁸²⁰ Compared to the size of the Civil Chamber – counting approximately 30 judges⁸²¹ – this was a huge workload. And indeed, judges were rather disappointed with the additional workload resulting from the new rules on cassation.⁸²²

(c) restoration of elements of the extraordinary revision in 2000

After negative experiences with the French model of cassation between 1996 and 2000, the legislature decided to look for possibilities of installing floodgates. An amendment to the Code of Civil Procedure enacted in 2000 introduced so-called ‘pre-court proceedings’ (*przedsąd*), whereby the Supreme Court would decide by itself whether a petition for cassation is worth considering or not.⁸²³ In the explanatory memorandum to the proposed amendment it was noted that its aim is to ‘underline the exceptional character of the petition for cassation’ and allow the Supreme Court to reject petitions for cassation which did not contain a ‘public interest aspect’.⁸²⁴ A first step away from the French model and back to the Soviet model was made: three-instance civil proceedings were *de facto* reduced to two instances (trial and appeal). In fact, one of the arguments raised in the explanatory memorandum, namely the

⁸²⁰ <http://www.ms.gov.pl/statystyki/tablgus2001.pdf> [last accessed: 30/6/2008; as of 20/3/2014 link no longer active], p. 72.

⁸²¹ As of 2013, the Civil Chamber counted 31 judges. See http://www.sn.pl/osadzienajwyzszym/SitePages/Organizacja.aspx?e=Org_IC [last accessed: 8/7/2013]. The number has been similar in the past years.

⁸²² Zembrzuski, *Dostępność...*, p. 282.

⁸²³ Art. 393¹ § 1 k.p.c. as amended on 24.5.2000: ‘The Supreme Court may refuse to allow a cassation where: the case raises no essential legal issue; the case does not require interpretation of legal provisions causing serious doubts or causing inconsistency in the caselaw of the courts; the cassation is manifestly unfounded.’

⁸²⁴ Sejm document no. III.1202 (1999).

acceleration of civil proceedings⁸²⁵ was a repetition of an argument used in 1950s to promote the Soviet two-instance model.⁸²⁶ Furthermore, in a judgment analysing the constitutionality of the limitation of the right to file a petition for cassation, the Constitutional Court explicitly compared the 2000 reform to the socialist model, stating that due to the introduction of pre-court proceedings the Polish petition for cassation

‘acquired features of the much-criticised “extraordinary revision” procedure that had been abolished in 1996 and replaced with the cassation’.⁸²⁷

The continuity of the socialist model – which began to resurface in 2000 – is therefore not only an external observer’s interpretation, but also a perception shared by those who take the internal point of view on Polish legal culture, such as Constitutional Court judges. Even if a departure from the classical French model of *cassation* is not something unusual in Western Europe, where such reforms have been also introduced, in the Polish context they can be, and indeed sometimes are, viewed as a return to the solutions typical for the period of actually existing socialism and its hallmark in civil proceedings: two instances plus extraordinary revision. I would like to emphasise here that a specific feature of the Soviet system (and of the Polish one between 1950 and 1996, as well as since 2000) was that there was no ordinary third instance, and judicial proceedings would in principle comprise only two instances.

In 1999 a proposal was tabled by the lower house (*Sejm*) Human Rights Committee to allow the Ombudsman to bring ‘extraordinary petitions for cassation’ within 6 months (as opposed to the 1-month limit applicable to the

⁸²⁵ Sejm document no. III.1202 (1999), p. 38-39.

⁸²⁶ See e.g. Jodłowski, ‘Nowe drogi...’, p. 40ff.

⁸²⁷ Ibid.

litigants themselves) from the date on which judgment was handed down, where such judgment violated constitutionally-guaranteed fundamental rights.⁸²⁸ The drafters justified their proposal on the basis that the Ombudsman must be allowed to:

‘intervene in exceptional situations when the defects of a judgment infringing the constitutional rights and freedoms of a human being and of a citizen are such that the judgment may not remain in force in a democratic state of law.’⁸²⁹

The bill was enacted into law⁸³⁰ and, in consequence, an extraordinary and public law-focused means of challenging judicial decisions re-emerged following a brief period of absence. The new ‘extraordinary petition for cassation’ (*kasacja nadzwyczajna*, as it has been informally referred to) was restricted in comparison with the old extraordinary revision in the sense that it could be utilised by only one public official (the Ombudsman) who was under a duty to employ it to protect the public interest. Thus, following a brief period of discontinuity, the continuity with the socialist extraordinary revision was strengthened and secured once more. Indeed, this continuity cannot be explained without referring to the period of actually existing socialism.

Interestingly, the Ombudsman’s right to launch an extraordinary petition for cassation was challenged by the Supreme Court in a preliminary reference submitted to the Constitutional Court.⁸³¹ The Supreme Court took the view that the Ombudsman’s privileged position violated the principle of equality of the

⁸²⁸ Sejm document no. III.944 (1999).

⁸²⁹ Sejm document no. III.944 (1999). p. 11.

⁸³⁰ See Art. 393³ k.p.c. (as of 2000).

⁸³¹ SN decision of 5.3.2002 discussed in TK judgment of 19.2.2003, Case P 11/02.

parties in civil proceedings and raised doubts as to when second-instance judgments acquire definitive force (following the expiry of the deadline to lodge a petition for cassation by the litigants or following the expiry of the deadline of lodging an ‘extraordinary petition for cassation’ for the Ombudsman).⁸³² In the proceedings before the Constitutional Court, the speaker of the lower house of Parliament concurred with the Supreme Court and noted that the Ombudsman’s privileged position was discriminatory vis-à-vis a party in respect of whom the Ombudsman failed to lodge an ‘extraordinary petition for cassation’ and thereby deprived that party of the guarantee of a fair trial.⁸³³ The Prosecutor General disagreed with the Supreme Court and supported the Ombudsman, arguing that the principle of equality of the parties in civil proceedings does not extend to public officials such as the Ombudsman or a prosecutor.⁸³⁴

The Constitutional Court rejected the arguments put forward by the Supreme Court and the speaker of the lower house, and concurred with the arguments of the Ombudsman and Prosecutor General. Nevertheless, it ruled that the challenged provision was unconstitutional on the basis that it was unclear as regards the definitive force of judgments capable of being challenged by the Ombudsman.⁸³⁵ The Court explicitly supported the reintroduction of the ‘extraordinary petition for cassation’, arguing that the principle of equality of the parties does not extend to public authorities intervening in civil proceedings.⁸³⁶

⁸³² Discussed after TK Case P 11/02, p. 2-3 (of the PDF file).

⁸³³ Discussed after: *ibid.*, p. 6-7.

⁸³⁴ Discussed after: *ibid.*, p. 7-8.

⁸³⁵ Discussed after: *ibid.*, p. 19.

⁸³⁶ Discussed after: *ibid.*, p. 17.

A mere one month following the declaration that the Code of Civil Procedure provision governing extraordinary petition for cassation was unconstitutional, the Constitutional Court issued an order requesting that the legislature enact a statute which would allow the Ombudsman to challenge judgments having acquired *res judicata* where such judgments infringed human rights.⁸³⁷ Interestingly, the Court highlighted the powers of the *Procureur de la Cour de Cassation* in France and did not mention socialist extraordinary revision as an argument supporting the existence of the need for such a mechanism.

The government complied with the Constitutional Court's request and submitted a bill⁸³⁸ which brought about a total reform of the cassation procedure, *inter alia* reintroducing an extraordinary petition for cassation. In the draft amendment to the Code, not only the Ombudsman (as the Constitutional Court explicitly requested) but also the Prosecutor General (as in the socialist period) was empowered to initiate the extraordinary cassation procedure. In the explanatory memorandum to the draft amendment the government failed to mention its desire to maintain continuity with the period of actually existing socialism. In fact practically only two arguments were raised: firstly, the need to comply with the Constitutional Court's request and thereby restore the law to a constitutional state; and secondly, the desire to ensure coherence between the codes of civil and penal procedure. The latter code already allowed for extraordinary petitions for cassation since 1997 (this mechanism having replaced

⁸³⁷ TK decision of 12.3.2003, Case 1/03.

⁸³⁸ Sejm document no. IV.2500(2004).

extraordinary revision) and empowered both the Ombudsman and Prosecutor General to initiate the cassation procedure.⁸³⁹

The amendment to the Code of Civil Procedure entered into force in February 2005, establishing a new system of access to the Supreme Court in civil cases and formally abolishing the prior petition for cassation (*'kasacja'*) which was treated as an ordinary means of challenging court decisions, albeit very limited since 2000. Instead, two new extraordinary means of challenging court decisions were created: the *'skarga kasacyjna'* (petition for cassation) and a 'petition for declaration of illegality of a final judicial decision' (*skarga o stwierdzenie niezgodności z prawem prawomocnego orzeczenia*). The deadline for filing the new petition for cassation was fixed at two months in respect of the litigants themselves and at six months in respect of both the Prosecutor General and Ombudsman.⁸⁴⁰ Since 2010 both the petition for cassation and the petition for declaration of illegality of a final judicial decision may also be brought by the

⁸³⁹ Art. 521 k.p.k. (1997, as of 2003): 'The Prosecutor-General and the Ombudsperson may initiate a cassation against any decision having the force of *res judicata* which ends proceedings.' Litigants are entitled to initiate a cassation within 30 days from the delivery of the decision (Art. 524 § 1 k.p.k.) whilst the Prosecutor-General and Ombudsperson are not bound by this time limit (Art. 524 § 2 k.p.k.) save for a cassation *in peius* which may be brought only within 6 months from the day when the decision obtained the force of *res judicata* (Art. 524 § 3 k.p.k.). Extraordinary cassation is also privileged in comparison with ordinary cassation in the sense that the Supreme Court may not declare it inadmissible during *ex parte* proceedings and without explaining its reasoning in the case of manifest inadmissibility (Art. 535 § 2 k.p.c.; however, it should be noted that the provision allowing for such a way of proceeding with ordinary petitions for cassation has been declared unconstitutional by TK judgment of 16.1.2006, Case SK 30/05 and this provision lost its binding force as of 1.1.2007).

⁸⁴⁰ Art. 398⁵ § 2 k.p.c.

Children's Ombudsman (*Rzecznik Praw Dziecka*),⁸⁴¹ an authority established in 2000.⁸⁴²

The petition for cassation is conditional upon fulfilment of certain limiting criteria which have the effect of excluding, in principle, cases of a small and medium value⁸⁴³ and certain other categories of cases, notably divorce and alimony.⁸⁴⁴ The 'pre-court' procedure which had been criticised because of its discretionary, secret and non-transparent character was upheld.⁸⁴⁵ Scholars emphasised that the existence of the pre-court procedure resulted from the public-law character of this remedy and that the Supreme Court exercises its discretion as part of the fulfilment of its public-law tasks, with protection of the interests of the party having submitted the application being merely incidental.⁸⁴⁶

A petition for declaration of illegality of a final judicial decision may be filed against a second-instance judgment, where the unlawful character of that decision caused damage to a party who would otherwise have no alternative means of challenging the judgment.⁸⁴⁷ In exceptional cases, such petitions are admissible even where an alternative means of challenge existed but had not

⁸⁴¹ Act of 9.11.2010 (Dz.U. no. 197, item 1307) introduced the appropriate amendments to the Code of Civil Procedure.

⁸⁴² By Act of 6.1.2000 on the Children's Ombudsman (Dz.U. no 6, item 69).

⁸⁴³ At present, the minimum value of the object of litigation for a petition for cassation is set at PLN 50,000 (approximately EUR 12,500) for all civil cases, save for PLN 10,000 (approximately EUR 2,500) in labour cases.

⁸⁴⁴ Aside from this, a petition for cassation is also excluded in cases concerning rental fees, violation of possession, penalties imposed by for contempt of court, labour certificates and cases heard by way of summary procedure. See Art. 398² § 2 k.p.c.

⁸⁴⁵ Art. 398⁹ § 1 k.p.c.

⁸⁴⁶ Zembrzuski, *Dostępność...*, p. 274-275.

⁸⁴⁷ See Art. 424¹ § 1 k.p.c.

been utilised by the parties within prescribed time limits.⁸⁴⁸ Both of these extraordinary means of challenging judicial decisions may only be based on points of law (either substantive or procedural), but never on points of fact.⁸⁴⁹

The Prosecutor General, Ombudsman and Children's Ombudsman are required to fulfil certain conditions before they will be entitled to utilise either of the aforementioned extraordinary procedures. Firstly, certain limitations are foreseen as regards the substantive basis for challenging a judgment. The Prosecutor General may challenge a judgment only where it 'infringes the fundamental principles of the legal order', the Ombudsman is required to show that the challenge concerns an 'infringement of the constitutional liberties or rights of any person or citizen' and the Children's Ombudsman may base his challenge on an 'infringement of a child's rights'.⁸⁵⁰ The two-year deadline for filing a petition for the declaration of illegality of a final judicial decision binds the Prosecutor General, the Ombudsman and the Children's Ombudsman but, as concerns the petition for cassation, they enjoy a privileged position and are entitled to initiate this procedure within a 6-month, as opposed to a two-month, deadline.⁸⁵¹

⁸⁴⁸ The exceptional cases are defined by Art. 424¹ § 1 k.p.c. as situations in which 'the illegality [of the decision] results from the violation of the fundamental principles of the legal order or the constitutional liberties or rights of the human or citizen'.

⁸⁴⁹ Art. 398³ k.p.c.: '§ 1. A petition for cassation may be based on the following: (1) violation of substantive law by its wrongful interpretation or inappropriate application; (2) violation of the provisions of procedural law if the violation could have a substantial impact upon the outcome of the case. (...) § 3. A petition for cassation may not be based on pleas regarding the determination of facts or the evaluation of evidence.'

⁸⁵⁰ See Art. 398³ § 2 k.p.c. (petition for cassation) and Art. 424² k.p.c. (petition for declaration of illegality of a final judicial decision).

⁸⁵¹ See Art. 398⁵ § 2 k.p.c. The deadline runs, in principle, from the day when the judgment obtained the force of *res judicata*.

The filing of a petition for cassation by a litigant precludes the possibility that the Prosecutor General, Ombudsman or Children's Ombudsman may file a petition for cassation on the same subject-matter.⁸⁵² It should be stressed that a judgment issued by the Supreme Court as a result of one of the aforementioned extraordinary procedures initiated by the Prosecutor General, Ombudsman or Children's Ombudsman is binding on the litigants to the case and therefore it is not merely abstract or prospective in character. Thus, the 'extraordinary petition for cassation' in its present form is not merely a petition for cassation in defence of the law but a real means of challenging judgments, similar in its effects to the socialist extraordinary revision.

C Application of the legal framework in practice

Admittedly, the practice applying the legal framework of the restored extraordinary revision – the 'extraordinary' petition for cassation and the 'extraordinary' petition for the declaration of illegality of a final judicial decision – which can be filed by the Prosecutor General, Citizens' Ombudsman and Children's Ombudsman is rather meagre.⁸⁵³ Neither in 2011⁸⁵⁴ nor in 2012⁸⁵⁵ did the Prosecutor General file a single extraordinary petition for cassation or a single extraordinary petition for declaration of illegality of a final judicial decision, despite requests to do so submitted by litigants. If this tendency

⁸⁵² Art. 398¹ § 2 k.p.c. (1964/2010).

⁸⁵³ An alternative way of framing the legal survival in question could be to identify it not with the extraordinary petition for cassation (as an instance of continuity of the old extraordinary revision) but with the two-tier system as such. If this point of view is adopted, then the 'legal practice' applying the legal framework would, of course, be rich. However, in this section I focused on the extraordinary petition as such, and not on the two-tier vs. three-tier system of civil proceedings, therefore I will not develop this point any further here.

⁸⁵⁴ Prosecutor General's Report for 2011, p. 162. Available online at: http://www.pg.gov.pl/upload_doc/000003370.pdf (last accessed: 9/7/2013).

⁸⁵⁵ Prosecutor General's Report for 2012, vol. I, p. 259.

echelons of the *nomenklatura*, such as the Prosecutor General or First President of the Supreme Court, could control the case-law of all courts in the country. Thus, just like supervisory proceedings in the Soviet Union,⁸⁵⁸ the extraordinary revision in Poland served the purpose of ensuring that the judiciary follows the policy put forward by PZPR and was the instrument of a strong, centralised political power. Officially, this was presented as the need to secure the ‘benefit of the justice system’ which ‘expresses itself [...] in the need to pursue [...] a determined justice policy’.⁸⁵⁹

A second function of the Polish extraordinary revision, just like its Soviet model⁸⁶⁰ known as the ‘supervisory instance’, was the correction of judgments in the interests of objective, socialist legality. The extraordinary revision thus served the public interest, on the assumption that the two-instance system and the reopening of proceedings are sufficient to protect the private interests of the litigants.⁸⁶¹ This public interest could be identified as the securing of the uniformity of case-law.⁸⁶²

A third function of the switch from the French three-instance system (trial, appeal, cassation) to the Soviet two-instance system (trial, revision) with the possibility of filing an extraordinary revision was undoubtedly the efficiency of the judiciary. The availability of access to the Supreme Court as a matter of right, without any filtering mechanism, inevitably leads to immense backlogs, as evidenced by the experience of the French *Cour de cassation* and the Italian

⁸⁵⁸ Stawarska-Rippel, ‘Radziecka procedura...’, p. 474.

⁸⁵⁹ Włodyka, ‘Specjalne środki...’, p. 193.

⁸⁶⁰ Stawarska-Rippel, ‘Radziecka procedura...’, p. 475.

⁸⁶¹ Włodyka, ‘Specjalne środki...’, p. 193.

⁸⁶² Siedlecki, *Zarys postępowania cywilnego* (Warszawa: PWN, 1968), p. 380; Włodyka, ‘Specjalne środki’, p. 193;

Corte suprema di cassazione. This function, the speedy administration of justice, was also officially presented in the 1950s as a reason for the introduction of the Soviet model. All these functions clearly served the furtherance of the public interest; any concern for the private interest of the litigants was merely incidental.

The French model of petition for cassation as a matter of right, obtaining in Poland prior to 1950 and between 1996 and 2000, obviously had different social functions. Access to the Supreme Court, given to the litigants themselves, was intended as a way of defending their own subjective rights, with the rule of law (objective legality) treated only as an incidental aspect. This led Romanic systems to introduce a petition for cassation in defence of legality as a supplementary means, serving the function of safeguarding the rule of law. However, unlike the socialist extraordinary revision, a petition for cassation in defence of legality does not affect the legal situation of the litigants but is rather an invitation to the supreme court to hand down an interpretation of the law in the circumstances of the particular case, albeit without legal effects for the case at hand. This function was not fulfilled by the extraordinary revision in socialist Poland.

The intended social function of extraordinary means of challenging judicial decisions having the force of *res judicata* currently in force, that is the extraordinary petition for cassation and the extraordinary petition for declaration of illegality of a final judicial decision, available to the Prosecutor General, Citizens' Ombudsman and Children's Ombudsman, is the protection of the public interest. As the Code of Civil Procedure expressly indicates,⁸⁶³ an extraordinary petition for cassation may be brought by the Prosecutor General if

⁸⁶³ Art. 398³ § 2 k.p.c.

the challenged decision ‘violates the fundamental principles of the legal order’, the Citizens’ Ombudsman – if the challenged decision violates ‘constitutional freedoms of rights of a human and a citizen’ and the Children’s Ombudsman – if the challenged decision ‘violates children’s rights’.

What is characteristic is the similarity of the social function of the old ‘extraordinary revision’ and its posthumous form, the so-called extraordinary petition for cassation. Both serve the public, rather than the private, interest.⁸⁶⁴ Whilst the petition for cassation existing between 1996 and 2004 (even after the introduction of ‘pre-court’ proceedings in 2000) was a third-instance ordinary means of appeal, after 2004 it became, just like the former extraordinary revision, an extraordinary form of appeal (*nadzwyczajny środek zaskarżenia*), placed outside the ordinary scheme of instances.⁸⁶⁵ Furthermore, the contemporary petition for cassation, like the old extraordinary revision, has as its main function the uniformity of case-law.⁸⁶⁶

However, the old function of the extraordinary revision, namely the influence of the ruling party or the executive in general upon the judiciary, is no longer part of the social function of the contemporary petition for cassation. This is especially so taking into account the fact that the Prosecutor General does not use this legal framework, and the Ombudsperson uses it only sparingly.

E Mechanism of endurance of the legal survival

The metamorphosis of the extraordinary revision (1950-1998) into the extraordinary petition for cassation (from 2000 onwards) is somewhat atypical

⁸⁶⁴ Jerzy Jodłowski, Zbigniew Resich, Jerzy Lapiere, Teresa Misiuk-Jodłowska and Karol Weitz, *Postępowanie cywilne* [Civil Procedure] (5th ed., Warszawa: LexisNexis, 2007), p. 488.

⁸⁶⁵ Jodłowski et al., *Postępowanie...* (2007), p. 488-489.

⁸⁶⁶ *Ibid.*, p. 489.

as an example of a legal survival. Unlike it has been the case with most legal survivals discussed in this dissertation, the legal framework as such was discontinued. The rules on extraordinary revision, contained in the Code of Civil Procedure of 1964, were repealed in 1996, and stopped being applied definitely in 1998. The petition for cassation (*kasacja*) introduced in 1996, was, from a formal point of view, a completely different legal framework from the old extraordinary revision and it was placed in a different place in the Code (directly after appeal, to emphasise the fact that it was a third instance on top of the two instances existing under socialism). When cassation proceedings underwent reform in 2000, bringing it closer to the old extraordinary revision, they were still placed in the same part of the Code and formally remained a third instance procedure. It was only in 2004 that the 1996 petition for cassation (*kasacja*) was definitely repealed and a new petition for cassation (now called '*skarga kasacyjna*') was introduced. This new legal framework, although certainly a form of continuity with the 1996 petition for cassation, was now placed in the part of the Code of Civil Procedure devoted to 'extraordinary forms of appeal' (*nadzwyczajne środki zaskarżenia*), just like the old extraordinary revision had earlier been, in contrast to the 1996 petition for cassation. However, the repealed rules of the 1964 extraordinary revision were not revived: from a purely textual point of view, the post-2004 petition for cassation is a new legal framework, not a continuity of the old one.

This could lead to the question of whether the special right of the Prosecutor General and Ombudsperson to launch petitions for cassation and petitions for the declaration of illegality of a final judicial decision can be legitimately described as a legal survival of the period of actually existing socialism? Is their genealogy really traceable to that period? Is their treatment as legal survivals a permissible interpretation of Polish legal culture, or rather an

overinterpretation? In other words, is there any genuine continuity between the extraordinary revision and the special powers enjoyed by the Prosecutor General and Ombudsperson, or is the coincidence merely accidental? Those questions are legitimate, and the presumption of continuity based on identity of legal framework clearly does not apply to this case.

Certainly, some of the social functions of the two sets of rules are the same, namely the uniformisation of case-law and the pursuit of an important public interest. The basic mechanism, i.e. the power of the Prosecutor General and Ombudsperson (since 1988) to seize the Supreme Court with an appeal challenging a decision which has already obtained the force of *res judicata*, is also the same. The relatively short period between the final demise of the socialist extraordinary revision (1998) and the introduction of the Prosecutor General's and Ombudsperson's special powers (2000) is also a factor which should be taken into account. Finally, the Constitutional Court's explicit request to re-introduce a functional equivalent of the extraordinary revision seems to be the decisive argument, allowing to consider the existence of a legal survival as a legitimate interpretation, rather than a biased overinterpretation of the legal data.

However, if Renner's example of the unaltered rules on property which changed their social function be taken as a prototypical legal survival, the 'extraordinary' petition for cassation will be a first-degree extension, rather than the prototype.⁸⁶⁷ Whilst most of the other examples discussed here, such as the principles of social life, the cultivation contract or the prosecutor's standing in civil proceedings are based on a textual continuity of the legal framework, or –

⁸⁶⁷ I am using the notion of a 'prototype' in the sense given by Winter, *A Clearing in the Forest...*, p. 71ff, 94.

even if the statutory rules have changed, on the recognised continuity of existing rights (proprietary right to a cooperative apartment), the legal survival discussed in this section certainly stands out. However, to deny its existence only on the basis of lack of a textual continuity of the legal framework would amount to far-reaching formalism. Regard has to be taken of the social function and social practice referring to the legal framework, and these two factors strongly militate in favour of recognising the continuity between the state-socialist extraordinary revision, on the one hand, and the contemporary institutions of civil procedure fulfilling a similar function, i.e. the 'extraordinary' cassation and the 'extraordinary' petition for declaration of illegality of a final judicial decision, on the other hand. The latter institutions of contemporary Polish civil procedure can, therefore, be referred to as legal survivals of the period of actually existing socialism.

4 Preliminary references to the Supreme Court

A Circumstances of introduction

A preliminary reference procedure is a procedure whereby a court which is deciding a case may submit a reference for a preliminary ruling to a different court regarding the interpretation or validity of a law which the referring court intends to apply to the dispute pending before it. The ruling from the requested court (court *ad quem*) on a point of law is binding on the referring court (court *a quo*). Preliminary references rulings are most widely known in the context of EU law, as well as constitutional law in certain countries, but it is worth noting that such a procedure exists in Polish civil procedure, and is a legal survival of the socialist period. In Poland, a second instance (appellate) court in civil proceedings, if it harbours doubts as to the interpretation of a rule of substantive

or procedural law, may submit a preliminary reference to the Supreme Court, seeking a legal interpretation which is necessary to decide the case.

A preliminary question which must be dealt with is whether preliminary references in Polish civil procedure, undoubtedly introduced during the period of actually existing socialism (in 1953)⁸⁶⁸ may legitimately be treated as a survival typical for that period, especially that the procedure itself was not a legal transfer from the Soviet Union, as was the case with most other legal survivals discussed in this dissertation. An argument against including this procedure in the present analysis could be that this procedure itself is merely an ideologically neutral tool, and displays no features typical of the period of actually existing socialism. *Prima facie*, there seem to be strong arguments supporting this objection. First of all, the fatherland of the preliminary references seems to be the United States, where it was introduced as a ‘certification of questions’ procedure before the federal Supreme Court already in 1946,⁸⁶⁹ that is seven years before the Polish procedure came into being. However, in reply to this objection it must be emphasised, that the ‘certification of questions’ has been

⁸⁶⁸ Due to a typographical mistake, in my paper ‘Is the Socialist...’, it is erroneously stated that the procedure was introduced already in 1950.

⁸⁶⁹ 28 USC § 1254 (2), available online at: <http://www.law.cornell.edu/uscode/text/28/1254> (last accessed: 9/7/2013): ‘By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.’ See also Rule 19 of the US Supreme Court, available online at http://www.law.cornell.edu/rules/supct/rule_19 (last accessed: 9/7/2013) which sets out the procedural details. In particular para. 1 of the Rule states that ‘[o]nly questions or propositions of law may be certified’. Polish authors during the socialist period were aware of the existence of this procedure – see e.g. Włodyka, ‘Specjalne środki...’, p. 244-245.

applied extremely rarely (approximately once a decade)⁸⁷⁰ and Polish authors denied any inspiration by the American model, alleging that the apparent similarity is 'purely casual'.⁸⁷¹ Other jurisdictions where preliminary references had been introduced prior to Poland⁸⁷² include Italy (preliminary reference to the Constitutional Court since 1948),⁸⁷³ and, of course, the then European Coal and Steel Community (preliminary references to the ECJ on validity of community acts introduced by the Treaty of Paris in 1951⁸⁷⁴). However, no such procedure seems to have been known either in the USSR, or in any of the nations of the Soviet bloc.⁸⁷⁵ Polish authors were aware, though, of the proposal to introduce preliminary references in Imperial Germany.⁸⁷⁶

However, if we consider the definition of a legal survival outlined in Chapter II, the formal aspects, such as the need of reception from Soviet law (which did not take place here), or a lack of connection with Western law (which apparently is the case here) are not crucial to treat a given legal

⁸⁷⁰ Marcia Coyle, 'Supreme Court Asked to Take Certified Question for Only Fifth Time in SixPlus Decades', *National Law Journal* (August 3, 2009), available online at: <http://www.law.com/jsp/article.jsp?id=1202432706422&rss=newswire> (last accessed: 9/7/2013).

⁸⁷¹ S. Włodyka, 'Specjalne środki...', p. 245.

⁸⁷² Interestingly, Polish authors of the socialist period seemed to have been ignorant of those precedents – see Włodyka, 'Specjalne środki...', p. 245 where the preliminary reference procedure is described as being almost exclusive to Poland, with the only exception being US law. No mention is made either of Italian constitutional law, or of Community law.

⁸⁷³ Art. 1 of Legge cost. 9 febbraio 1948, n. 1 – Norme sui giudizi di legittimità costituzionale e sulle garanzie d'indipendenza della Corte costituzionale.

⁸⁷⁴ Art. 41 ECSC Treaty.

⁸⁷⁵ Stanisław Włodyka 'Specjalne środki nadzoru judykacyjnego Sądu Najwyższego' [Special Instruments of the Supreme Court's Adjudicational Supervision], in *Sąd Najwyższy w PRL*, ed. Marian Rybicki (Wrocław et al.: Zakład Narodowy im. Ossolińskich, 1983), p. 244.

⁸⁷⁶ The proposal was discussed in 1937 by M. Waligórski, 'O potrzebie rozszerzenia zakresu działalności Sądu Najwyższego', *PPC* 1937, p. 350 (cited in: Włodyka, 'Specjalne środki...', p. 246, n. 163).

institution as a legal survival of actually existing socialism. The crucial element that I identified in Chapter II is the *functional link* between the legal institution in question and the socio-economic, political and legal system of the period. What is decisive, then, is the fact that the preliminary reference procedure in Poland was introduced as part of a broader reform package Sovietising Polish civil procedure, and it grew out of the initial rule allowing to refer an entire case (and not only an isolated, abstract legal question) to the Supreme Court (as will be explained later on).

Let me recall here that the Sovietisation of Polish procedural law, consisted not only in the introduction of the principles of substantive truth and the court's initiative (inquisitorial principle),⁸⁷⁷ but also followed the Soviet model with regard to organisational arrangements. Hence, the hitherto existing three-instance French system (trial, appeal, cassation) was replaced by the Soviet two-instance system (trial and cassation, known in Poland as revision), considered as typical for the Socialist Legal Family.⁸⁷⁸ Likewise, the court structure was flattened, moving from four levels (borough court, circuit court, court of appeal, Supreme Court) to three (district court, regional court, Supreme Court).⁸⁷⁹ Whilst direct access of the litigants to the Supreme Court by way of a petition for cassation was abolished, the chief court of the land had to obtain new means of supervising the case-law of the lower courts. One such means was the extraordinary revision, discussed in section 3. Another was the already existing system of abstract resolutions, inherited from the pre-War period, whereby the Supreme Court, upon request of its First President, a president of

⁸⁷⁷ Mańko, 'Is the Socialist...', p. 90-91.

⁸⁷⁸ Resich, 'Nadzór judykacyjny...', p. 168.

⁸⁷⁹ Act of 20.7.1950 (Dz.U. No. 38, item 347).

a chamber or the Minister of Justice could issue an abstract interpretation of a controversial legal rule.⁸⁸⁰ Yet another one were the Guidelines of Administration of Justice, copied from the Soviet Union, providing for comprehensive guidance in a given legal field, binding on all courts.⁸⁸¹ It is within this broader framework that one should place and evaluate the introduction of the preliminary reference procedure in 1953. Only in the light of the specific context of the reform of Polish procedural law is it possible to fully appreciate the direct functionality of the new system of preliminary references towards the Sovietised system of courts and forms of appeal, which denied private parties access to the Supreme Court in those cases, which were tried (in the first instance) before district courts.⁸⁸² The preliminary reference procedure can thus be treated as one of the procedural ‘short circuits’ between the entire judiciary and the Supreme Court,⁸⁸³ some of them of local genealogy (abstract resolutions), others imported from the Soviet Union (guidelines of administration of justice, extraordinary revision).⁸⁸⁴ The model in which the Supreme Court obtained broad supervisory powers over the entire judiciary –

⁸⁸⁰ Act of 6.2.1928 – Law on the Common Judiciary (Dz.U. 1932, no. 102, item 863), art. 41.

⁸⁸¹ Act of 6.2.1928 – Law on the Common Judiciary, consolidated version of 1950 (Dz.U. 1950, no. 39, item 360), art. 24.

⁸⁸² Cases tried by Regional Courts (acting as courts of first instance) were heard by the Supreme Court by way of ordinary revision (acting as a court of second instance). Hence, the only cases in which the Supreme Court’s supervision of the judiciary was really problematic were those cases in which the Regional Courts acted as courts of second instance.

⁸⁸³ Marian Rybicki, ‘Geneza i ewolucja Sądu Najwyższego w Polsce’ [The Origins and Evolution of the Supreme Court in Poland], in: *Sąd Najwyższy w PRL*, ed. Marian Rybicki (Wrocław et al.: Zakład Narodowy im. Ossolińskich, 1983), p. 31, where the author underlines that as part of the reform of the Polish judiciary in the 1950s three new ‘means of adjudicatory supervision outside the instances’ were introduced, mentioning the extraordinary revision, the guidelines and preliminary references. Similarly Resich, ‘Nadzór judykacyjny...’, p. 165 where the three means are classified together as ‘[s]pecial, constitutional [...] supervision over adjudication’.

⁸⁸⁴ Cfr. Mańko, ‘Is the Socialist...’, p. 102.

executed *inter alia* through the preliminary reference procedure – was considered to be a ‘new, socialist model of the Supreme Court’⁸⁸⁵ and contrasted with the pre-War ‘system of deconcentration, originating in France and in force until now in many capitalist countries on the European continent.’⁸⁸⁶ The concentration of supervisory powers in the hands of one supreme court was treated as a hallmark of the socialist system of judicial organisation.⁸⁸⁷ The tendency to limit the Supreme Court’s powers within the instance system, and an expansion of its powers outside instances was viewed as typical for the socialist system.⁸⁸⁸

Ending these preliminary remarks, it needs to be added that in 1985 an analogous procedure was introduced regarding preliminary references to the Constitutional Court on the constitutionality of a statute.⁸⁸⁹ However, owing to its possible inspiration in Western constitutional law, quite independent from the existing preliminary reference procedure, I will not treat it as a legal survival of actually existing socialism.

⁸⁸⁵ Rybicki, ‘Geneza...’, p. 32.

⁸⁸⁶ Ibid.

⁸⁸⁷ Zbigniew Resich, ‘Organizacja Sądu Najwyższego’, in: *Sąd Najwyższy w PRL*, ed. Marian Rybicki (Wrocław et al.: Zakład Narodowy im. Ossolińskich, 1983), p. 116, 119.

⁸⁸⁸ Zbigniew Resich, ‘Właściwość i zasady postępowania przed Sądem Najwyższym’, in: *Sąd Najwyższy w PRL*, ed. Marian Rybicki (Wrocław et al.: Zakład Narodowy im. Ossolińskich, 1983), p. 139; Resich, ‘Nadzór judykacyjny...’, p. 155-156 (‘the principal difference between the [judicial] systems of socialist countries when compared to the systems of Western countries lies in the broader development of form of supervision outside instance proceedings.’), p. 159, p. 180 (‘The Supreme Court’s special supervision over adjudication is an institution characteristic for the socialist system which appeared within its framework.’).

⁸⁸⁹ Introduced by Art. 11-12 of the Act of 29.4.1985 on the Constitutional Court (Dz.U. no. 22 item 98).

B Legal framework

Before being introduced to Polish civil procedure in 1953, preliminary references had been first introduced in 1949 into criminal procedure.⁸⁹⁰ The origins of the legal framework of the civil preliminary reference ruling are to be found in 1950. A new rule, introduced to the chapter on revision proceedings, provided that if the decision upon a revision heard by a Regional Court depends on ‘deciding upon a legal question that gives rise to serious doubts or has been decided upon differently by courts’, the Regional Court may, upon request of the prosecutor or on its own motion, refer the entire case to the Supreme Court.⁸⁹¹ This was not yet a preliminary reference procedure, but a procedure allowing to transfer the entire case (as opposed to an isolated legal issue) to the Supreme Court for decision.

In 1953 the rule was amended, and now it provided that if a Regional Court deciding upon a revision encounters a ‘legal question giving rise to serious doubts’, it could stay proceedings and ‘refer that question to the Supreme Court for decision’.⁸⁹² The Supreme Court could still, if it wished to, decide the case by itself, as under the 1950 rules.⁸⁹³ The new rule stated explicitly that a resolution of the Supreme Court (the preliminary ruling) is binding on lower courts in the case.⁸⁹⁴ The new Code of Civil Procedure of socialist Poland, enacted in 1964,

⁸⁹⁰ Art. 513 k.p.k. (1932) as amended by Act of 27.4.1949.

⁸⁹¹ Art. 388 k.p.c. (1930) (consolidated version of 25.8.1950 – Dz.U. no. 43, item 394).

⁸⁹² Art. 388 § 1 sentence 1 k.p.c. as amended by Decree of 23.4.1953 (Dz.U. 23 item 90).

⁸⁹³ Art. 388 § 1 sentence 2 k.p.c. as amended by Decree of 23.4.1953.

⁸⁹⁴ Art. 388 § 2 k.p.c. as amended by Decree of 23.4.1953.

contained an identical rule on preliminary reference proceedings, combined with the procedure of taking over the case.⁸⁹⁵

This legal framework survived the demise of actually existing socialism almost unmodified. In 1990 it was slightly updated to take stock of the re-introduction of Courts of Appeal as a third level of courts (between the Regional Courts and the Supreme Court), allowing both Regional Courts and Courts of Appeal to submit preliminary references when hearing revisions.⁸⁹⁶ Between 1996 and 2000 the role of the institution was somewhat reduced, albeit temporarily. In 1996, when the two-instance Soviet model (trial, revision) was replaced by the re-introduced three-instance French model (trial, appeal, cassation) the possibility of submitting a preliminary reference ruling was limited only to those cases in which the parties were not entitled to file a motion for cassation.⁸⁹⁷ Owing to the fact that the petition for cassation was widely admissible as a matter of right (following the classical French model), the socialist institution of the preliminary reference procedure was greatly reduced in its importance. However, further reforms of the Polish civil procedure, enacted in 2000, moved the Polish model of appeals away from the three-instance French model, and back to the two-instance model.⁸⁹⁸ As part of this

⁸⁹⁵ Art. 391 k.p.c. (1964).

⁸⁹⁶ Art. 391 k.p.c. as amended by Act of 13 July 1990 (Dz.U. 53, item 306).

⁸⁹⁷ Art. 390 k.p.c. as amended by Act of 1 March 1996 (Dz.U. 43, item 189). The rule was applied strictly by the Supreme Court – see SN order of 15.1.1997, Case III CZP 124/96, LEX no. 28607; SN order of 13.5.1998, Case III CZP 13/98, LEX no. 50680 (preliminary reference is not admissible even with regard to those aspects of the case which lie outside the scope of a potential cassation); SN order of 8.7.1998, Case III CZP 23/98, LEX no. 34029 (preliminary reference is not admissible on interlocutory appeal, if in the case a cassation will be available to the parties), the same view was expressed in SN order of 8.7.1998, Case III CZP 17/98, LEX no. 34229.

⁸⁹⁸ See section 3.B(c) above.

reform, the petition for cassation was transformed from a form of appeal available to the litigants as a matter of right into a discretionary form of appeal, granted at the discretion of the Supreme Court. As a result, the role of preliminary reference rulings was re-enhanced: any second instance court hearing an appeal could now submit a preliminary reference to the Supreme Court regardless of whether the parties were entitled to file a petition for cassation or not.⁸⁹⁹ As in the socialist period, the Supreme Court could always, instead of answering the referred question, decide the entire case by itself.

The last modification of the legislative framework for preliminary reference rulings in civil cases occurred in 2005. From that time onwards the Supreme Court, upon receiving a request for a preliminary ruling, can not only decide the case by its normal composition (of 3 judges), but even directly submit it to an enlarged composition (typically, a panel of 7 judges).⁹⁰⁰

C Application of the legal framework in practice

(a) number of preliminary references

The legal framework of the preliminary reference procedure in civil cases has constantly been made use of by the courts since its inception. In fact, the number of references submitted yearly has been roughly similar over the last 60 years of the functioning of the institution, and therefore the transition from actually existing socialism to a market economy was not a significant threshold in this respect. Thus, as regards the socialist period, for instance in 1962, 88

⁸⁹⁹ Art. 390 k.p.c. as amended by Act of 24.5.2000 (Dz.U. 448, item 554). However, the SN would not allow preliminary references in those cases, where the first instance judgment was issued before the entry into force of the amendment, and under the pre-1 July 2000 rules a cassation would have been admissible – SN order of 7.12.2000, Case III ZP 27/00LEX no. 46059. Only when a first instance judgment was pronounced after 1.7.2000 there are no limits as to the submitting of a preliminary reference (SN order of 7.3.2001, Case III CZP 3/01 LEX no. 550984).

⁹⁰⁰ Art. 390 § 1 k.p.c. as amended by Act of 22 December 2004 (Dz.U. 2005, no. 13 item 98).

questions were submitted and the average number of questions between 1971 and 1974 amounted to 185 yearly,⁹⁰¹ whilst in 1977 there were 103 preliminary references in the Civil Chamber.⁹⁰² Currently, the number of references stays comparable, oscillating within the Civil Chamber around 100 (e.g. 141 in 2010, 96 in 2011, 110 in 2012),⁹⁰³ and in the Labour Chamber⁹⁰⁴ around 20 (e.g. 16 in 2012, 26 in 2011).⁹⁰⁵ Although the preliminary references are, in statistical terms, only a small fraction (0.2%) of the Supreme Court's business (in 2012 the number of incoming cases in the Civil Chamber amounted to 4,866, with only 110 of these being preliminary references),⁹⁰⁶ their actual importance is much greater, and many of the most important decisions of the SN are actually rendered within this procedure.⁹⁰⁷ This is because of a double filter of selection on the merits: first of all, a second-instance court must identify an issue as being legally

⁹⁰¹ Włodyka, 'Specjalne środki...', p. 274.

⁹⁰² Resich, 'Właściwość i zasady...', p. 142. The 103 preliminary references were, statistically, a minor fraction of 2449 cases incoming to the Civil Chamber in 1977. Most of its activity was concentrated on being a second-instance court in ordinary proceedings (1541 revisions, 429 interlocutory appeals), on top of which it heard 348 extraordinary revisions and 28 other cases.

⁹⁰³ Sąd Najwyższy Rzeczypospolitej Polskiej (Supreme Court of the Republic of Poland), *Informacja o działalności Sądu Najwyższego w 2012 r.* [Information on the Activity of the Supreme Court in 2013] (Warszawa, 2013), available online at: http://www.sn.pl/layouts/SPZWebParts/download.aspx?id=71&ListName=Dzialalnosc_SN (last accessed: 17/3/2014) (hereinafter: 'SN report for 2012'), p. 152. The number of 'legal questions' covers not only preliminary references, but also a very limited number of requests for abstract resolutions.

⁹⁰⁴ The full name of the chamber is currently 'Labour, Social Security and Public Issues Chamber'. Labour and social security cases are civil cases in the technical sense, and hence the Code of Civil Procedure is applied to them.

⁹⁰⁵ SN report for 2012, p. 69. In 2011 the Supreme Court rejected 10 preliminary references, but in 2012 it did not reject any one.

⁹⁰⁶ SN report for 2012, p. 152. The proportion within the Labour Chamber is 26 out of 2987 as for 2012. However, the number of 'legal questions' covers not only preliminary references, but also requests for abstract resolution.

⁹⁰⁷ As evidenced by the role given to preliminary rulings in the Supreme Court's yearly reports SN report for 2012, p. 5, pp. 17-40.

controversial, and secondly, before the Supreme Court decides to issue a formally binding answer (in the form of a so-called 'resolution') it also analyses whether the issue is of significant legal importance. This ensures that only the most legally significant and vexed issues are decided upon in this procedure.

(b) case law of the state-socialist period (1953-1989)

The succinct rule of the Code of Civil Procedure introduced in 1953 and re-codified in the new code of 1964 was developed in the case-law of the Supreme Court. In two cases rendered directly after the introduction of the new institution,⁹⁰⁸ the Supreme Court developed the criteria of admissibility of preliminary references, which hold until today. First of all, an answer to the referred question must be necessary to decide the case. Secondly, the question contained in the preliminary reference must be stated in a general way, 'so that it can be regarded also in abstraction from the facts of a concrete case'. Thirdly, it must be concerned with a question 'giving rise to truly serious doubts'. As to the formal criteria, the Supreme Court stated that a reference must have the form of an order (*postanowienie*), that it must contain motives which explain what the serious doubts are concerned with, unless this is explicit from the content of the question itself. If it is not obvious, the motives should explain in what way an answer to the question is necessary for deciding the case. The Supreme Court also developed procedural rules, stating that if a preliminary reference does not fulfil those criteria, the Supreme Court returns the file of the case to the Regional Court without answering the question. Thereupon, the Regional Court is under a duty to continue proceedings and decide upon the revision.

⁹⁰⁸ SN decision of 23.4.1956, Case I CO 8/56, LEX no. 118785 and SN decision of 26.4.1956, Case IV CO 8/56, LEX no. 412607

Whereas the rules of the Code of Civil Procedure provided for preliminary references in revision proceedings (i.e. an appeal against the final judgment in the first instance), the question arose whether such references may also be made on interlocutory appeal (concerning an incidental aspect in the first instance, before the final judgment is handed down). The Code was not fully clear on the issue, mandating, however, a *mutatis mutandis* application of rules on revision proceedings to interlocutory appeal proceedings. The issue was settled in 1964⁹⁰⁹ in favour of the possibility of filing preliminary references also in interlocutory appeal proceedings, provided that the question submitted is strictly limited to the scope of the interlocutory appeal and does not concern the main subject matter of the case. However, the Supreme Court was not willing to expand the preliminary reference procedure any further, ruling in 1967 that references may not be submitted in proceedings initiated by an action for reopening of proceedings.⁹¹⁰

The Supreme Court also addressed the issue of the relationship between the rules on preliminary references on the one hand, and the binding force of a decision quashing a judgment and ordering retrial, giving precedence to the latter. Therefore, when deciding the case after having quashed the decision of a District Court, a Regional Court is bound by the quashing decision and cannot submit a question to the Supreme Court with regard to that legal view.⁹¹¹ This applies even in cases when a panel of the Supreme Court acts as a court of revision: in that case, that panel is bound by the legal view it expressed itself when quashing the decision of the Regional Court which heard the case in the

⁹⁰⁹ SN decision of 13.3.1964, Case III CO 4/64, LEX no. 4475.

⁹¹⁰ SN order of 16.3.1967, Case III CZP 82/66, LEX no. 6127; similarly SN order of 16.3.1967, Case III CZP 1/67, LEX no. 551;

⁹¹¹ SN order of 3.12.1971, Case CZP 77/71, LEX no. 7030.

first instance.⁹¹² This applies even if the Supreme Court has taken over a case which was to be heard by the Regional Court acting as a court of first instance – in that situation the panel of the Supreme Court which is hearing the case is bound by the legal view expressed by the Regional Court in its decision quashing the decision of the District Court (of first instance) and therefore may not submit a preliminary reference request to a broader panel of the Supreme Court with regard to the legal views expressed by the Regional Court.⁹¹³

After the transformation of the principles of social life from an issue of law into an issue of fact,⁹¹⁴ the Supreme Court openly declared that it will not answer any questions regarding the application of the principles of social life, even if the question is framed in the abstract.⁹¹⁵ This stance was justified by the view that the application of the doctrine of abuse of right (where the principles of social life are a criterion) account must be taken of the entirety of the circumstances of the case, a requirement which excludes any generalisations.⁹¹⁶

If the question referred by the Regional Court was not pertinent, the Supreme Court in practice used its power to take over the case to decide itself (without answering the question), instead of rejecting the preliminary

⁹¹² SN decision of 16.3.1965, Case II CR 107/65, LEX no. 4499.

⁹¹³ SN decision of 16.3.1965, Case II CR 107/65, LEX no. 4499; SN resolution of 15.2.1968, Case III CZP 3/68, LEX no. 6285.

⁹¹⁴ As discussed in Chapter IV, section 2, above.

⁹¹⁵ SN resolution of 17.1.1974, Case III PZP 34/73, LEX no. 15390.

⁹¹⁶ Case III PZP 34/73, *supra*,: ‘...an application of the principles of social life [...] is inseparably linked with the totality of the circumstances of every case, evaluated on an individual basis. [...] It is therefore impossible, in a way abstracted from the facts of a given case, to formulate general guidelines regarding the application of those principles. They are intended to be a basis for correcting the evaluation of an atypical, concrete situation, which is not capable of being regulated by the law in an abstract manner. A court [...] is not entitled to regulate in such a way, because it would enter into the domain of legislation.’

reference.⁹¹⁷ Such a practice was possible thanks to the relatively limited case-load of the Supreme Court; after 1990, as it will be seen below, the Supreme Court would rather reject the preliminary reference instead of deciding it itself.

(c) *the case-law after 1989*

The transition from actually existing socialism to a market economy in 1989 not only was not a rupture from the point of view of the preliminary reference procedure in quantitative terms (with a comparable amount of incoming references both before and after the rupture, see subsection (a) above), but a substantial continuity is visible also in the qualitative dimension. Indeed, the Supreme Court's post-1989 case-law on the admissibility of preliminary references can be viewed, to a large extent, as an elaboration of the case-law from the previous period (1953-1989).

Just like before 1989, the preliminary reference procedure is limited to appellate proceedings (*apelacja*) (formerly known as 'revision' proceedings [*rewizja*]) and to interlocutory appeal proceedings (*zażalenie*). Just as before 1989, the SN is not willing to expand the right to submit preliminary references to courts hearing petitions for reopening of proceedings.⁹¹⁸ In the spirit of this narrow reading of the scope of the preliminary reference proceedings, the SN has denied the right to launch references to trial courts,⁹¹⁹ courts deciding on an *exequatur* clause,⁹²⁰ or during proceedings concerning the supplementing of a decision having the force of *res judicata*.⁹²¹ However, a court hearing an appeal

⁹¹⁷ SN judgment of 26.2.1975, Case I PR 31/75, LEX no. 12330.

⁹¹⁸ SN order of 27.11.2002, III CZP 63/02, LEX no. 76166.

⁹¹⁹ SN order of 11.5.2000, Case III ZP 10/00, LEX no. 43853.

⁹²⁰ SN order of 7.11.2006, Case III CZP 77/06, LEX no. 209205.

⁹²¹ SN order of 5.12.2009, Case I UZP 1/09, LEX no. 738259.

or interlocutory appeal in a case initiated by a petition for reopening of proceedings, which acts as a court of second instance in those proceedings, is entitled to submit preliminary references.⁹²²

The first substantive requirement formulated by the SN in 1956, namely that the answer to the question be necessary to decide the case, has been upheld and developed in the post-1989 case-law.⁹²³ In reaffirming this principle, the SN readily cites its case-law from the 1950s, that is from the period directly following the introduction of the preliminary reference procedure in Poland.⁹²⁴

The same continuity can be detected as regards the second substantive criterion formulated by the Supreme Court in 1956, namely that the question be framed in an abstract manner, dealing the legal issue, and not a factual one. There is plenty of recent case-law upholding his position.⁹²⁵

⁹²² SN order of 6.6.2007, Case III UZP 5/06, LEX no. 611434. An exception had been made for the Anti-Trust Court which had the power to bring such references despite the fact that formally speaking it does not hear cases as a court of second instance, but was performing judicial review of administrative decisions taken by the Anti-Trust Office (SN resolution of 24.9.1993, Case III CZP 92/93, LEX no. 3960).

⁹²³ SN order of 22.10.2009, Case III CZP 75/09, LEX no. 532090; SN order of 8.4.2010, Case III UZP 1/10, LEX no. 667503; SN order of 9.4.2010, Case III CZP 17/10, LEX no. 584036; SN order of 20.10.2010, Case III CZP 68/10, LEX no. 677764; SN order of 6.11.1998, Case III CZP 35/98, LEX no. 519292; SN judgment of 17.4.1996, Case II UR 5/96, LEX no. 26113; SN order of 22.1.2009, Case III CZP 120/08, LEX no. 508950; SN order of 27.2.2002, Case III CZP 2/02, LEX nr 75253; SN order of 9.6.2005, Case III CZP 31/05, LEX no. 180857; SN order of 17.11.2009, Case III CZP 85/09, LEX no. 551876; SN order of 6.3.1998, Case III CZP 73/97, LEX no. 50797; SN order of 30.5.2003, Case III CZP 30/03, LEX nr 109444; SN order of 29.11.2005, Case III CZP 102/05, LEX nr 177297; SN order of 14.11.2006, Case III CZP 84/06, LEX no. 232135.

⁹²⁴ SN order of 12.1.2000, Case III CZP 34/99, LEX no. 51568 where the SN cites its decision of 26.4.1956, Case 4 CO 8/56, LEX no. 118785, as authority for the proposition that the legal question raised in a reference must be 'necessary to decide the case'.

⁹²⁵ SN order of 8.4.2010, Case III UZP 1/10, LEX no. 667503; SN order of 15.10.2002, Case III CZP 66/02, LEX no 57240. SN order of 4.12.2009, Case III CZP 101/09, LEX no. 565646; a striking example of such a question describing the facts in detail is the reference in Case III CZP 17/11 (SN order of 18.11.2011, LEX no. 897708) which even specifies names of parties, dates of decisions, sums of money etc.

The third requirement of admissibility formulated by the SN back in 1956, namely that the question ‘give rise to truly serious doubts’, has likewise been upheld and developed in post-1989 case-law. Thus, a distinction between ‘ordinary doubts’ (‘doubts of the first degree’) and serious doubts has been introduced; in the case of ‘ordinary’ doubts, the reference is rejected and the referring court is asked to decide the case by itself.⁹²⁶ The SN requires that doubts have both an objective and subjective character, meaning that not only must there exist doubts within the legal community, but also the court itself must share them.⁹²⁷ In some cases the SN considers that a legal rule is so obvious, that it cannot give rise to any doubts at all.⁹²⁸

The formal criteria of admissibility of a preliminary reference, set out in the 1950s, have not been departed from either. The Supreme Court still requires that a preliminary reference be submitted in the form of an ‘order’ (*postanowienie*), and all the formalities for this type of decision must be met.⁹²⁹

The second formal requirement formulated in 1956, namely that the order containing the preliminary reference must be motivated and that it must explain

⁹²⁶ SN order of 25.1.2007, Case III CZP 100/06, LEX no. 260385; SN order of 12.10.2005, Case III CZP 68/05, LEX no. 175457; SN order of 25.1.2007, Case III CZP 100/06, LEX no. 260385.

⁹²⁷ SN order of 23.7.1998, Case III CZP 24/98, LEX no. 50682; SN order of 12.1.2010, Case III CZP 113/09, LEX no. 575096.

⁹²⁸ See e.g. SN order of 20.8.1998, Case III CZP 21/98, LEX no. 50681; SN order of 7.12.2005, Case III PZP 2/05, OSNP 2006/23-24/358, LEX no. 214274; SN order of 16.10.2008, Case III CZP 97/08, LEX no. 471063; SN order of 8.4.2010, Case III UZP 1/10, LEX no. 667503.

⁹²⁹ The SN will refuse to answer a question if the composition of the referring court is faulty (SN order of 26.6.2002, Case III CZP 42/02, OSP 2003/6/78, LEX no. 75101; SN order of 21.11.2002, Case III CZP 74/02, LEX no. 583853), or if the operative part of the reference was not signed by all judges (SN order of 13.2.2003, Case III CZP 91/02, LEX no 78869; SN order of 18.3.2003, Case III CZP 9/03, LEX no. 78853; SN order of 4.4.2003, Case III CZP 10/03, LEX no. 583956; SN order of 8.4.2004, Case II PZP 2/04, LEX nr 585791; SN order of 25.11.2010, Case III CZP 95/10, LEX no. 694261).

what the serious doubts are concerned with has also been preserved and developed.⁹³⁰

The pre-1989 case-law on the conflict between the binding force of a decision vacating an earlier judgment and the possibility of overturning the holding of that decision by resorting to the preliminary reference procedure has been upheld – a preliminary reference aimed at circumventing that holding is considered inadmissible.⁹³¹

Apart from upholding all the requirements for an effective preliminary reference formulated in the 1950s, the Supreme Court has added several new ones, which need not be discussed in detail here.⁹³² The SN has also developed the formal criteria of the way in which questions should be formulated.⁹³³

⁹³⁰ The SN ruled, inter alia, that the referring court must present arguments for opposing solutions (e.g. SN order of 8.6.2000, Case III ZP 14/00, LEX no. 532136), and will refuse to answer a question if the referring court only presented the views of the trial court and of the litigants (SN order of 25.1.2007, Case III CZP 100/06, LEX no. 260385) or just arguments for one view (SN order of 20.10.2011, Case III CZP 55/11, LEX no. 1084727) or even an overview of the case-law, but without giving its own view (SN order of 26.10.2011, Case III CZP 59/11, LEX no. 1102648).

⁹³¹ SN order of 22.10.2009, Case III CZP 75/09, LEX no. 532090.

⁹³² First of all, it requires that the answer must be useful not only in the case at hand, but also in the future (e.g. SN order of 7.9.2005, Case II UZP 8/05, LEX no. 191089); secondly, a limited doctrine of *acte éclairée* has been developed (see e.g. SN order of 12.5.2011, Case III CZP 9/11, LEX no. 897714); thirdly, the relationship between other preliminary reference procedures (to the TK and the CJEU) have been clarified (SN order of 10.7.2008, Case III CZP 63/08, LEX no. 437199); fourthly, the SN has introduced a new requirement, whereby the referring court must have sufficiently investigated the facts of the case before submitting a preliminary reference (see e.g. SN judgment of 12.10.1994, Case II UR 8/94, OSNP 1995/2/25, LEX no. 112; SN order of 12.3.2010, Case III CZP 7/10, LEX no. 585826).

⁹³³ On top of the traditional requirements of abstractness and limitation to question of law (as opposed to fact), the SN has also underlined the need to formulate questions in a clear and unambiguous way (SN order of 5.11.2009, Case II PZP 11/09, LEX no. 551886) and to formulate them in a closed manner (so that the SN can choose from an alternative) and not an open one (see e.g. SN order of 13.4.2000, Case III CZP 2/00, LEX no. 43410).

In general it can be said that in the application of the legal framework of preliminary references, the SN has demonstrated a great degree of continuity. Not only has it been relying on its earlier case-law from the socialist period, but also it has been developing the criteria set out for the first time in the 1950s.

D Social function of the legal framework

The social function of any preliminary reference procedure is the possibility for a court to request a binding answer from a different court, either situated higher in the court hierarchy, specialised in a different branch of law or belonging to a different legal system. This social function consists in creating a channel of inter-judicial communication independently of the system of appeals and of the initiative of the parties.

When the preliminary reference procedure was introduced in 1953, its main function was to supplement the limited channels of communication between lower courts and the Supreme Court, somewhat broken after the reforms of 1950. It must be kept in mind that after the abolition of cassation as a matter of right in 1950, a case heard in the second instance by a Regional Court could reach the Supreme Court only if the Minister of Justice, Prosecutor General or First President of the Supreme Court would decide to launch an extraordinary revision.⁹³⁴ However, first of all such a motion could be brought only if the judgment violated the interests of the Polish People's Republic, and secondly, the decision to file an extraordinary revision was outside the control of the parties and of the referring court. In order to remedy this situation, the legislature introduced in 1950 the possibility of referring the entire case to the Supreme Court for decision. Three years later this possibility was supplemented

⁹³⁴ Art. 396 k.p.c. 1930 (consolidated version of 1950).

by a more limited reference, consisting in requesting a ruling from the Supreme Court on a specific point of law relevant to the case, rather than deciding the entire case. The preliminary reference was thus conceived as an additional channel of communication between the Supreme Court and the lower courts, supplementing the possibility of issuing abstract resolutions and guidelines of the administration of justice. In the procedural system of the Polish People's Republic, the preliminary reference procedure inscribed itself into the idea that public officials (such as the Prosecutor General) and courts should have the initiative in resolving legal questions, rather than the parties themselves.

Stanisław Włodyka identified the social function of the preliminary reference procedure as being a measure aimed at preventing the issue of a wrongful (erroneous) judgment.⁹³⁵ In his view, this served predominantly the interest of the justice system, but incidentally also the parties, who would have no other means available to challenge the wrongful decision.⁹³⁶

After 1989, this basic social function of the preliminary reference procedure as a channel of inter-judicial communication has been upheld. During the period between 1996 and 2000 it was limited to only those cases in which a petition for cassation was not available, on the assumption that in a liberal state the right to initiate the communication between courts should belong to the litigants, and not to the courts. However, after this brief period of the Romanic model of civil procedure, the cassation was retransformed into a public-interest remedy, no longer available to the parties as a matter of right, but subject to the discretion of the Supreme Court. In line with that, the availability of the preliminary reference procedure was, once again, broadened.

⁹³⁵ Włodyka, 'Specjalne środki...', p. 247.

⁹³⁶ Ibid.

E Mechanism of endurance of the legal survival

The legal framework of the preliminary reference procedure, having the form of a competence rule (see Ch. II, section 4.B(b)), did not require any adaptations to survive after 1989. This was due to its universality and neutrality towards the socio-economic order. There are indeed similarities, in this respect, with the survival, on the one hand, of general clauses (which, essentially, grant courts discretionary power), and, on the other hand, other competence rules, such as the prosecutor's standing in civil proceedings (which grants a discretionary power to intervene in a civil case to the prosecution service), as well as the Prosecutor General and Ombudsperson's right to lodge a petition for 'extraordinary' cassation (which grants discretionary power to the two aforementioned officials). In all those cases one can speak of a legal framework which can be metaphorically described as a value-neutral container (one could say a 'merely formal' survival), capable of absorbing any such content as its current users (judges, prosecutors) deem fit. The task of adaptation to the new system lies, therefore, not on the side of the legal framework (which can stay unchanged, or subject only to minor adjustments), but on the side of the competent authorities (judges, prosecutors) making use of the legal framework.

Finally, it should be underlined that the legal framework of the preliminary reference procedure survived in its entirety, that is not only on the level of the statutory rules (in the Code of Civil Procedure), but also on the level of established case-law, laying down detailed aspects of the institution (one could say a 'survival in form and substance'). This bears a similarity to the legal survival of the doctrine of principles of social life (discussed in Chapter IV), where not only the relevant rules in the Code survived, but also established case-

law prescribing the detailed modalities of resorting to the general clause in question.