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

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Chapter VI Conclusions

1 Introduction

The research question that I posed in the introduction to this dissertation was as follows: ‘What are the conditions of possibility of the endurance of legal institutions which were introduced under one political and socio-economic system (in order to fulfil a function specific to that system), but have not been removed from the legal order following a systemic transformation (transition)?’ The general terms of reference of this research question were set out in Chapter I, section 1, whilst a definition of the notion of a ‘legal survival’ and its operationalisation as a novel research tool were presented in Chapter II.

In the following section (2) I will recall the terms of the case study; then I will reply to certain *prima facie* objections to the validity and relevance of the case study (section 3), before analysing two key aspects necessary for answering the research question: the issue of functionality as a key factor of endurance of legal survivals (section 4) and the relevance of the form of a given survival’s legal framework in its endurance (section 5). This will allow me to provide a concise answer to the research question (section 6) and draw more general conclusions on the place of legal survivals in legal culture (section 7).

2 The case study

In order to answer the generally framed research question, I resorted to a case study focusing on legal survivals in Polish private law after 1989. The case study was limited by subject matter (substantive and procedural private law), country (Poland) and time (the 1989 systemic transformation from actually existing socialism to a market economy). I justified the reasons for choosing this specific case study in Chapter I, section 2.

For the case study of legal survivals of the period of actually existing socialism following Poland's transformation to be feasible, I presented the background discontinuity in the political, legal, social and economic spheres (in Chapter III). That presentation of background data relating both to the legal order, and to its environment was necessary in order to be able to treat certain instances of continuity with the period of actually existing socialism as 'legal survivals'. In contrast, many other legal institutions, some of them mentioned in Chapter III, did not survive the transformation and were either removed (as the rules on entering into planned contracts between socialised enterprises) or fell into disuse (as the rules on special usufruct for agricultural cooperatives). Their effective disappearance after the regime change automatically removed them from the scope of the present enquiry, in line with the definition of a legal survival as a legal institution which not only endures on the level of legal texts (the legal framework), but also within the sphere of legal practice, in the sense of the same text continuing to be 'applied' (i.e. invoked by judges when deciding cases), but (not necessarily) in the sense of actually have the same meaning ('content') or exactly the same socio-economic effects. In fact, the change of socio-economic effects, that is the change of the function of a legal survival, is – as will be seen – almost an inevitable element of the adaptation of a legal institution and its ensuing survival following a systemic transformation.

The borderline between 'legal survivals' and those legal institutions which did not survive is determined by legal practice: if no cases are decided any longer on the basis of a given legal provision or set of legal provisions, it does not survive and is not a legal survival, even if the relevant rules, despite having become obsolete in practice, have not been explicitly abrogated from the codes of law. Conversely, if the legal institution in question continues to have practical significance (e.g. cases are decided on its basis), it is a legal survival, even if the

actual outcomes of cases and the ensuing social function of the institution have changed (sometimes even radically).

According to an intuitive understanding it could seem that all legal institutions which not only were *introduced* during the period of actually existing socialism but also were specifically *functional* towards that system, having been designed on purpose for the Polish socialist legal order or transplanted from Soviet law, would be removed after 1989. This intuitive view would be based on the assumption that such legal institutions simply lost any significance under the new post-socialist system, or could even undermine its efficacy. Such an intuitive assumption is strengthened by the prevailing narrative,⁹³⁷ according to which the period of actually existing socialism is considered, as Tomasz Giaro put it, as a 'blackout' in Polish legal history.⁹³⁸

Whilst this intuitive understanding is true with regard to a number of institutions of private law (e.g. rules on planned contracts between socialised enterprises; rules on special usufruct for agricultural cooperatives; rules privileging state property, which were all removed or fell into disuse after 1989) a number of other institutions, equally functional towards the system of actually existing socialism, were not removed from the legal order following the transformation.

These legal survivals of the *ancien régime* of actually existing socialism were analysed in Chapters IV and V in order to explain the reasons for their persistence, in line with the research question recalled above. In other words, analysing the eight legal survivals, I tried to answer the questions: '*how is it*

⁹³⁷ Discussed in Chapter III, section IV, above.

⁹³⁸ Giaro, 'Some Prejudices...', p. 45.

possible for these legal institutions to have stayed in place?’ or ‘*why* were these institutions not removed, like many other ones, introduced under actually existing socialism?’

3 Reply to *prima facie* objections

A *prima facie* answer to these questions (and an objection to my findings in this dissertation) could be that the institutions in question *were not really state-socialist* in the first place, therefore their survival is not at all problematic.⁹³⁹ However, let me recall once again the definition of a legal survival as set out in Chapter II, section 4, whereby an institution counts as a legal survival only if it was, first of all, introduced during the period in question, and, secondly, if it was functional towards the political, social and economic system prevailing during that period. The choice of legal survivals for the case study followed this approach strictly. In fact, many of the institutions studied were actually more or less direct legal transfers from the Soviet Union, such as, in particular, the doctrines of principles of social life and socio-economic purpose, the cultivation contract, the prosecutor’s standing in civil proceedings, as well as the Prosecutor General’s power to launch an extraordinary revision. Other institutions, even if not legal transplants in the strict sense, were inspired by their Soviet counterparts and their introduction was strictly functional to the fundamental principles of property law under actually existing socialism (cooperative member’s right to an apartment; right of perpetual usufruct). Finally, the institution of preliminary references to the Supreme Court, despite apparently being an originally Polish institution and not a legal transfer from any foreign legal system, was introduced as part and parcel

⁹³⁹ This and the following objection were raised e.g. by Professor Håkan Hydén (University of Lund) during a discussion on my paper on the principles of social life presented at a conference on ‘The Normative Anatomy of Society in the 21st Century’ (Lund, Sweden, 23-24 April 2012).

of a broader legal transfer from the Soviet Union, namely the system of two-instance civil proceedings (first instance trial and revision) which replaced the three-instance French-inspired system hitherto in place (first instance trial, appeal, cassation).

Another objection which could be raised on a higher level of abstraction is that actually existing socialism itself was not really socialist. Indeed, as I have indicated in Chapter I section 4, there is no doubt that *actually existing* socialism can neither be equated with ‘socialism’ or ‘communism’ in the sense used by Marx and Engels. However, as I equally emphasised in that chapter, actually existing socialism can neither be described as an instance of a market economy and a parliamentary democracy, which Poland has become after the transformation. This is because of three key reasons: the *state ownership* of means of production, centralised economic planning in the form of a *command-distributive system* under the *centralised political authority* of a one ruling party, enjoying Soviet backing (the Polish United Workers’ Party, ‘PZPR’).

Therefore, from an economic, social and political point of view there persisted, throughout the post-World War II period, an enormous qualitative difference between, on the one hand, Soviet bloc countries governed by the system of actually existing socialism, and Western market economies, on the other hand. Many of the legal survivals analysed in this dissertation explicitly reflected the aforementioned features of actually existing socialism, such as legal institutions which were created precisely in order to avoid that private individuals would become owners, respectively of apartments (the cooperative right to an apartment) and of land for private housing (the right of perpetual usufruct), or legal institutions created precisely to suit the command-distributive system of economic governance (the cultivation contract).

A feature inherent in this command-distributive system, as opposed to market economies, was the primacy of collective (social) interest over the private interest, in line with Lenin's famous statement that in the economic sphere the Bolsheviks 'do not recognise anything "private"'.⁹⁴⁰ Such legal survivals as the concept of principles of social life, the concept of socio-economic purpose or the prosecutor's right to intervene in any civil proceedings were initially conceived exactly as mechanisms enabling the state authorities to ensure the primacy of collective interest over the private one. The same can be said of the abolition of a three-instance procedure and the ensuing loss of direct access of litigants to the Supreme Court with an appeal on a point of law (the petition for cassation), which was replaced with the Prosecutor General's extraordinary revision, launched in the public interest and regardless of the will of the private litigants.

As the analysis of the legal survivals studied in Chapters IV and V indicates, none of these legal novelties of actually existing socialism appeared by pure chance or due to a caprice of the ruling elites. To the contrary, each and every single legal survival I analysed was introduced during that period due to the specific conditions prevailing at that time and in order to play a specific role, inscribing itself into the social, economic, political and legal framework of the regime. This could even lead to the conclusion that the legal institutions presented in Chapters IV and V were inseparably linked with the socio-economic system of actually existing socialism and one could have expected them to disappear simultaneously with, or shortly after, its demise, just like it was the case with rules on planned contracts or the special regime of protection of state property, abrogated in July 1990. Nevertheless, as the study revealed, this

⁹⁴⁰ Lenin, 'On The Tasks...'

has not been the case. This brings us back to the research question: how was it possible for these institutions to have survived until now, especially that a considerable amount of time (25 years) has already passed since the demise of actually existing socialism?

4 Functionality as key factor of endurance

My hypothesis, indicated in Chapter I, referred to the possibility of testing Karl Renner's explanation of the phenomenon of legal survivals, whereby legal frameworks may endure because their *social function* is adapted to the new socio-economic situation. Therefore, even a profound socio-economic change need not necessarily entail a similar change in the legal framework, provided that the legal framework is either already capable of fulfilling a different function or is tweaked accordingly. This leads me to the need of looking at each of the eight legal survivals from the perspective of their social function, in order to reveal the mechanism of their endurance. In the case of some legal survivals, a distinction between the macro-social function and the micro-social function (as introduced in Chapter II, section 4.D above) is of assistance. Another distinction within the social function of legal survivals that I make is that between various levels of generality (between more general and more specific functions). The purpose of making these distinctions is to analyse with greater precision what exactly changed with regard to the social function: was the macro-social or micro-social function affected, did the function change on a more general, or more specific level?

I will now overview all eight legal survivals studied in this dissertation (in Chapters IV and V), examining them from the point of view of their social function and its modification after the systemic transformation from actually existing socialism to a market economy.

First of all, the doctrine of principles of social life had been initially introduced (in 1950) as a legal transfer from Soviet law with the aim of subverting the hitherto existing system of private law, in order to promote a new, collectivist vision of society typical for actually existing socialism. Indeed, this social function was fulfilled by the general clause in question during the 1950s, when the Supreme Court resorted to the principles of social life in order to introduce new rules into private law or to abrogate old ones. However, once private law was re-codified in the mid-1960s, the principles of social life stopped being a ‘mouthpiece’ for proclaiming new rules, but became a ‘safety valve’, allowing trial judges to refuse applying a certain rule of private law in an *ad hoc* manner, if that application would amount to injustice. Therefore, the function of the principles of social life was from then on to correct the outcome of an individual case, in light of its particular, unusual circumstances. The legal framework of this legal survival consisted of a number of rules in the Civil Code, most notably its Art. 5 proclaiming the doctrine of abuse of right, as well as a body of established case law, laying down the ‘procedural’ aspects of invoking the principles of social life in individual cases. However, no substantive ‘inner system’ of the general clause was developed, leaving the decision on the equitable outcome, dictated by the principles of social life, to the trial judge. I stipulate that it was exactly this function of the general clause, it being a ‘safety valve’, rather than a ‘mouthpiece’, which allowed the entire legal framework, not excluding the respective case law,⁹⁴¹ to endure despite the fundamental socio-economic change.

Of crucial importance here is the distinction between, on the one hand, a *substantive* ‘inner system’ of a general clause, comprised of rules directed at

⁹⁴¹ I.e. the ‘procedural’ ‘inner system’ of the general clause.

the subjects of private law (regarding their rights and duties in given types of situations) and, on the other hand, a *merely procedural* framework of procedural rules directed at judges (regarding the exact methodology of resorting to the general clause). In a substantive inner system, the (vague) standard is translated into a set of (formally realizable) rules. The former *substantive* inner system is known, for instance, in Germany, whereas the latter merely procedural framework has been adopted in Poland since the mid-1960s.

Whereas the fact that general clauses and other open-ended concepts may be invested with different meanings under different political and socio-economic systems is not astonishing,⁹⁴² the continuity not only of the mere provisions of the Civil Code referring to ‘principles of social life’ but also of the almost entire Supreme Court case-law from the mid-1960s onwards, is noteworthy as a legal survival. This is because the authoritative case-law deals only with the *methodology* of applying the general clause (‘procedural’ aspects), and not with the *substantive* outcomes, making it much easier for that case law to survive a systemic transformation, than in the case of a general clause which is ‘filled’ with substantive content (i.e. specific rights and duties of parties). In the latter case only the text in the Code may survive, but not the substantive case law translating the standard into detailed rules (an ‘inner system’). If, however, the case-law of the Supreme Court preserves the open-endedness of the standard, and refuses to translate it authoritatively into a set of detailed rules, the survival of such ‘merely formal’, but not substantive, case-law is much

⁹⁴² Cfr. Rüthers, *Die unbegrenzte...*, p. 216-217; Carl Schmitt, *On the Three Types of Juristic Thought* [1934], transl. Joseph W. Bendersky (Westport-London: Praeger, 2004), p. 91: ‘As soon as concepts such as “good faith”, “common decency,” and so on are not linked to the individualistic, bourgeois, commercial society, but to the interests of the whole nation, the entire *Recht* [law – R.M.] changes in reality without it being necessary to change a single “positive” law [i.e. statute – R.M.]. I am therefore of the conviction that a new juristic way of thinking can be brought through these general clauses.’

easier. To make a historical comparison: the case-law of the German supreme courts of the Nazi period, which, in an openly political manner,⁹⁴³ translated general clauses such as *Treu und Glauben* or *gute Sitten* into concrete, racist principles,⁹⁴⁴ was obviously abandoned after 1945. The much more ‘technical’ case-law of the socialist Supreme Court in Poland (from the 1960s onwards), providing guidelines as to the *methodology* of application of the standard of principles of social life, but *not translating the standard into detailed rules*, easily survived after 1989. Incidentally, this cannot be said of the case-law of the Polish Supreme Court of the 1950s with its inner system of substantive rules, which is no longer treated as authoritative, precisely because of its obvious state-socialist content.

The second legal survival I studied was the general clause of ‘socio-economic purpose’. Just like the principles of social life, it was also a legal transfer from the Soviet Union and its initial aim was to promote the primacy of the collective interest over private interest. After 1989, the general clause survived, and has been used sparingly, in situations of obvious conflict between the legally protected private interest (such as a private legal title in a public

⁹⁴³ As Rütters pointed out, summarising his research on general clauses in Third Reich case-law, ‘The [NSDAP] program was the standard according to which general clauses were filled with content’ (Rütters, *Die unbegrenzte...*, p. 266). Indeed, it was a matter of established principle of Nazi case-law that general clauses were to be interpreted in light of the ‘basic views of National Socialism’ (Reichsgericht, 3. Senat, 28.1.1943, JW 1943, 610, cited after Rütters, *Die unbegrenzte...*, p. 219).

⁹⁴⁴ For instance, the Reichsgericht ruled – as a matter of principle – that it is not contradictory to *gute Sitten* to inform customers that a competitor is of Jewish ethnicity, because German customers wish to avoid entering into transactions with Jews (Reichsgericht, 4.2.1939, DR 1939, 437, cited after Rütters, *Die unbegrenzte...*, p. 223), whilst it followed from established case-law of the Reichsarbeitsgericht a Jewish plaintiff’s claim for a contractual pension (*Ruhegeld*) from his former German employer should not be fully satisfied in line with the requirements of *Treu und Glauben* (Reichsarbeitsgericht 9.1.1940, ARS 38, 262, cited after Rütters, *Die unbegrenzte...*, p. 226-227). Discussing these examples of case-law Rütters himself uses the notion of ‘*Falgruppen*’, thereby hinting at the ‘inner system’ of the general clause.

airport or a public road) and the public interest which precludes the private party's right to launch an action for physical repossession of the property in question. In a way it can be said that the social function of this legal survival has stayed the same in a qualitative sense, but has been greatly reduced in the quantitative sense. This is because only the most flagrant conflicts of the private vs. public interest are taken into account when applying the general clause in question.

The third legal survival analysed was the right of perpetual usufruct. The initial social function of this legal framework was to allow individuals and housing cooperatives to acquire stable titles in land in urban areas, in practice for the purposes of housing construction (micro-social function), without, however, acquiring the ownership of the land (which continued to be held by the state). This was due to the will of the ruling elites to preserve and promote state ownership of means of production, including land (macro-social function). The original legal framework of the institution in question was a mixed one, combining elements both of private and public law, in particular the right was created by an administrative decision.

After 1989 the legal survival under consideration retained its initial micro-social function, namely to enable individuals to acquire a stable title in land without, however, purchasing it and paying the entire price. The function was broadened, in that any natural or legal persons could acquire the right, and not only in urban areas, but also in rural ones, making the right much more flexible and widely available both for private purposes, as well as for business activity. On a macro-social level the initial function of protecting the extent of state property was abandoned, and its place was taken by a different social function,

namely that of securing a stable income (from yearly fees) to the municipal budget.

In sum, it can be said that the legal survival in question endured precisely because partly its social function could be continued under a market economy (the micro-social function of acquiring a stable title in land, usually for housing construction purposes), but that it owes its on-going popularity to the fact that it acquired new, additional social functions, namely from the point of view of the individual or firm (which may acquire land not only for housing, but also for business purposes) and from the point of view of the local administration (which can treat the granting of a right of perpetual usufruct as a source of stable annual income to the municipal budget, instead of a one-off profit from selling the land).

The fourth legal survival studied in this dissertation was the cooperative member's proprietary right to an apartment. Initially, the legal institution in question fulfilled two functions. On a macro-social level, it allowed the state to retain control of property in real estates (the land remained state-owned, whereas the building and apartments therein were owned by the state-controlled housing cooperatives). Individuals would acquire only a limited property right in the apartment which they financed entirely from their own resources, instead of acquiring full ownership rights as in a condominium. This was in contrast to the system of cooperative housing in Poland prior to World War II, when those cooperative members who had financed their housing entirely would acquire full ownership of the apartment in question.

On a micro-social level, the institution in question fulfilled the function of granting to individuals a stable title in their apartment, in exchange for covering the costs of its construction. After 1989, it was exactly this micro-social function

which was retained. However, the original macro-social function was abandoned. Furthermore, the legal survival in question came to fulfil entirely new social functions, typical for a (neoliberal) market economy. Cooperative rights to apartments could now be treated as investment assets, as means for locating savings, as assets for speculation, as well as an instrument for drawing capital rent (by renting out the property to a third party). All these functions, typical for market economies (especially neoliberal ones) but fundamentally inconsistent with the state-socialist system, were introduced after 1989.

However, the original legal framework of the legal survival in question had been designed precisely to prevent its application for such purposes. Exactly for this reason the legal framework in question had to undergo an adaptation. This occurred both at legislative and judicial level, namely through judgments of the Constitutional Court which struck down certain provisions of cooperative law that prevented the extension of the social function of the cooperative right to an apartment. However, despite that, the identity of the legal survival was maintained, and it continues to co-exist side by side with full ownership of apartments as a *distinct* legal title, not only on a purely nominal level (different name), but also on a practical level, entailing a different system of housing governance (in housing cooperatives vs. in condominiums). Although new cooperative rights to apartments may no longer be created, they are widely available on the real estate market and citizens wishing to buy a second-hand apartment have a choice between two distinct legal titles with their respective advantages and disadvantages.

The fifth and final legal survival in substantive private law which was analysed in the dissertation was the cultivation contract. This nominate contract, unknown in pre-World War II Polish private law, was a direct legal

transfer from the Soviet Union. The contract was specifically designed for the command-distributive, centrally planned economy, and was intended to be concluded between small family farms, and state-owned agricultural companies which would buy produce from the family farmers. The macro-social function of the legal survival in question was to entangle the family farming sector, not subjected to collectivisation, into the web of the state-controlled, centrally planned command-distributive economy. The micro-social function was to guarantee farmers' payment for their produce regardless of the actual harvest (if the crops were defined in the contract by reference to a specific plot of land, and not to quantity), thereby providing for an insurance function. After 1989, the initial macro-social function was abandoned, as state-owned firms in the agricultural sector were either closed down or privatised, and the entire system of command-distributive economic governance was replaced by the market mechanism. However, the micro-social function of the contract was retained, enabling its successful survival. A textually small adaptation of the legal framework proved sufficient: the requirement that the procuring party be a unit of socialised economy was dropped. Otherwise, the entire scheme of rights and duties of the parties remained the same. As evidenced by reported case-law, the contract is frequently resorted to by private parties active in the agricultural sector.

The first legal survival in procedural law that I analysed was the institution of the prosecutor's standing in civil proceedings. Its general social function is to enable the Prosecution Service to intervene in private litigation whenever, in its view, the public interest requires it. Indeed, this social function has been retained after 1989, and prosecutors do intervene in a considerable number of cases each year, as was indicated on the basis of available statistical data. However, on a more detailed level it can be said that the social function was

modified, in the sense that the original social function was to enable the Prosecution Service to implement Lenin's statement that Bolsheviks 'do not recognise anything "private"',⁹⁴⁵ and to intervene in civil proceedings in order to promote the collective interest at the expense of the private one. However, the decision as to intervene in civil proceedings, and if yes, in what direction exactly, is left to the discretion of the Prosecution Service itself. Therefore, the legal framework has a chiefly procedural character (it is a competence rule), and the actual use made of it depends on the prosecutors themselves. The survival of the legal institution in question, despite its obviously Soviet origins, must be due to the fact that although it is resorted to frequently in a quantitative sense, it is applied sparingly in a qualitative sense. If prosecutors used their powers to upset private contracts and undermine the market mechanism, the legal framework would either have been curtailed or removed altogether. The fact that it has survived is evidence for the fact that the adaptation of its social function to the new socio-economic system has been performed at the level of legal practice.

The second legal survival in civil procedure that I studied was the Prosecutor General's (and, since 1988, also the Ombudsman's) power to challenge judicial decisions having the force of *res judicata* in a specially designed procedure. The procedure was initially known as 'extraordinary revision', but was abolished in 1996 (with effect from 1998). However, in 2000 its functional equivalent was reintroduced as a special form of the petition for cassation (informally known as 'extraordinary' petition for cassation).

The initial social function of this legal institution was closely linked to the Soviet model of civil procedure, whereby private parties could only trigger the second instance of proceedings (in Poland called 'revision'), whilst access to the

⁹⁴⁵ Lenin, 'On The Tasks...'

Supreme Court with a challenge on a point of law was reserved to certain public officials, and was not considered to be a third instance of proceedings. This scheme of civil procedure remained in force until 1996, when the French-style three-instance system, guaranteeing private parties access to the Supreme Court with a challenge on a point of law, was reintroduced. However, the Supreme Court became soon flooded with cases and the system was abolished in favour of a two-instance system, with the cassation instance allowed only at the Supreme Court's discretion. Simultaneously, the Prosecutor General and Ombudsperson were granted a right to file 'extraordinary' petitions for cassation for the protection of the public interest and human rights, respectively. The Prosecutor General has not been making use of his power. Therefore the legal survival in question remains mainly on paper. The Ombudsperson, however, has been filing such petitions, although rather infrequently.

The initial, rather political social function of the institution in question, namely to enable the ruling Polish United Workers' Party (which controlled the office of the Prosecutor General directly) to influence case-law, has been obviously abandoned after 1989. However, the general social function of enabling certain public officials to seise the Supreme Court on a point of law, challenging a judicial decision which otherwise is final (has the force of *res judicata*) has been retained, although in a limited scope. This is because under the current legal framework the filing of a petition for cassation by a private litigant precludes the filing of such a petition by the Prosecutor General and Ombudsperson. The legal framework of the institution under consideration underwent considerable modifications; nevertheless the functional continuity of

its main features in the new cassation proceedings can be detected, allowing to speak of a legal survival.⁹⁴⁶

The final legal survival analysed in the dissertation was the institution of preliminary references to the Supreme Court. Its social function on a most general level is to enable a court of second instance to request a binding answer on a point of law from the Supreme Court, if that answer is necessary to decide the case pending before the referring court. In other words, this social function consists of creating a channel of inter-judicial communication in parallel to the system of instances (trial and revision/appeal) and extraordinary challenges (extraordinary revision, petition for cassation).

When the preliminary reference procedure was initially introduced, its main function was to supplement the limited channels of communication between lower courts and the Supreme Court, somewhat weakened after the implementation of the Soviet model of civil proceedings which removed the third instance of cassation proceedings. After the transformation, this basic social function of the preliminary reference procedure as a channel of inter-judicial communication has been upheld.

The legal framework of the survival under consideration did not require any adaptations to endure under the new socio-economic system thanks to its universality and neutrality, which make it similar in this respect to the principles of social life, prosecutor's standing in civil proceedings or the Prosecutor General' and Ombudsperson's right to challenge a decision having the force of *res judicata*. In all these cases the legal rules lay down a certain framework

⁹⁴⁶ The legal survival in question is 'substantive', but not 'formal', if 'substance' is understood as the normative content of a legal institution, and the 'form' is understood as its wording. For the various understandings of the form vs substance distinction in relation to legal survivals, see above Chapter II, section 6.

which is filled in concrete situations by the competent legal actors.⁹⁴⁷ The burden of adaptation of the social function to the new system is therefore transferred from the legislature to other legal actors.

On the basis of the above overview of the social function of the legal survivals analysed in this dissertation it is possible to stipulate that for a certain legal institution which was introduced under an earlier socio-economic system, in order to fulfil a function specific to that system, to endure despite a transition towards a new socio-economic system is that the legal survival in question be *functional* towards that new system. In other words, the legal institution in question must be useful in some way or another under the new system; otherwise it will become obsolete and either be explicitly abrogated, or remain dormant in legislative texts without being resorted to in practice.

It follows that the conformity between the social functions of a legal survival and the new socio-economic system is a necessary condition of endurance of such a survival. In theory, the conformity in question can be the result of five hypothetical scenarios. In the *first scenario*, the legal institution in question can fulfil exactly the same functions under the old system and under the new system. In the *second scenario*, the legal institution can fulfil some of its old functions, but not all of them. In the *third scenario* the legal institution fulfils its old functions, but also additionally assumes some additional, new functions. In a *fourth scenario* (which is a combination of the second and third scenarios), the institution in question abandons some of its old functions, and assumes some new ones. And finally in a *fifth scenario*, the institution

⁹⁴⁷ Using form vs. substance terminology, one could speak of a 'form' filled in with 'substance'. Cfr. above, Chapter II section 6.

completely changes its social function, entirely abandoning the old functions and assuming new ones in their place.

In practice, the empirical material analysed in this dissertation falls under three scenarios: the first (full retention of old functions), the second (partial retention of old functions) and the fourth (partial abandonment of old functions combined with an assumption of new functions). None of the legal survivals analysed fell within the third scenario (partial retention of old functions, but no new functions) or within the fifth scenario (total change of functions).

As regards the *first scenario*, namely full retention of old functions, one can mention in particular the general clause of 'principles of social life' (with regard to the function of a 'safety valve' available to judges, as from the 1960s) and the preliminary reference mechanism (with regard to the function of a channel of communication between courts). As regards the *second scenario*, namely a partial retention of old functions, one can mention the general clause of 'socio-economic purpose', the prosecutor's standing in civil proceedings and the Prosecutor General's power to challenge final judicial decisions. In all three cases, the original function was retained, but only partly. The element which was eliminated was the promotion of collective interest at the expense of private interest. However, no new functions were assumed. Finally, as regards the *fourth scenario*, namely the partial abandonment of old functions combined with an assumption of new functions, one can mention the right of perpetual usufruct, the cooperative member's proprietary right to an apartment and the cultivation contract. Macro-social functions typical for the system of actually existing socialism were abandoned (protection of state property, involvement of farmers in the command-distributive economy). In contrast, the micro-social functions (as seen from the perspective of users of the legal system) were retained. At the

same time, the legal survivals in question assumed new functions, typical for a market economy.

5 Form of legal framework and mechanism of endurance

Now I would like to reflect whether the character ('form') of the legal framework may have a bearing on the mechanism of endurance of the institution in question. For this purpose I consider it useful to divide the legal survivals analysed in the dissertation into three distinct groups: standards, competence rules and clusters of rules. I explained this typology in more detail in Chapter II, section 4.B. Let me recall that under this typology I regard principles of social life and socio-economic purpose as *standards*; the prosecutor's standing in civil proceedings, the Prosecutor General's and Ombudsperson's right to challenge final judicial decisions as well as the preliminary reference mechanism as *competence rules*; and the remaining legal survivals (the right of perpetual usufruct, the cooperative member's right to an apartment and the cultivation contract) as *clusters of rules*. My claim here is that these three categories of legal survivals differ with regard to the mechanism of their endurance.

As regards the first category, that is *standards* (general clauses), the legal framework did not require any adaptation. Both standards analysed in the dissertation (principles of social life and socio-economic purpose) fulfilled, from the 1960s onwards, the function of 'safety valves', allowing judges to correct (*corrigere*) the outcome otherwise following from the rules of written law. However, apart from a short period of the 1950s, the general clauses in question did not fulfil the function of 'mouthpieces', allowing judges to create an inner system of substantive law (*supplere*) or permanently derogating existing rules of written law (*corrigere*). The function of a safety valve, allowing for pointillistic

judicial interference with the rules of written law, has been fully retained after 1989. Hence, the standards in question did not change their social function as seen from the perspective of civil litigation (micro-social level). Nevertheless, on a macro-social level, a change did occur, as I noted above: in the socialist period the general clauses in question were aimed at permeating the system of private law with public-interest considerations; these functions ceased after the demise of actually existing socialism. However, what should be underlined, is that this change of the macro-social function did not require any modification of the legal framework, and could be done by judges themselves on a case-by-case basis. It must be kept in mind that the substantive outcomes dictated by the principles of social life have been regarded, since the 1960s, as a question of fact, not of law. Therefore, such a change did not require the abandoning of any body of case-law constituting a substantive inner system of the general clause simply because such a body of reported case-law does not exist. In general it can therefore be said that the modification of the social function of a *standard* need not involve a change in the legal framework itself. The change can be implemented on the level of legal practice.⁹⁴⁸

There is a great similarity as regards the mechanism of endurance between standards (general clauses) and *competence rules*. Whereas the micro-social functions of the three legal survivals having the form of competence rules has been retained, changes occurred on the macro-social level with regard to the prosecutor's standing in civil proceedings and the Prosecutor General's and Ombudsperson's right to challenge final judicial decisions: the interventions of the Prosecution Service in civil proceedings are not intended to strengthen the

⁹⁴⁸ Which is *inter alia* due to the fact that the name of a general clause does not fully pre-determine, on its own, the outcome of cases (Leszczyński, *Stosowanie...*, p. 80). Cfr. *ibid.*, p. 57.

system of actually existing socialism but rather respect the fundamental principles of a market economy. In order to provide for these changes, the legal framework of two of the legal survivals in question (the prosecutor's standing and the preliminary reference procedure) did not require any major adaptation.⁹⁴⁹ As in the case of standards, also in the case of competence rules any necessary modification of the social function occurred at the level of legal practice, not on the level of legislation. The situation is different with regard to the Prosecutor General's and Ombudsperson's power to challenge final judicial decisions but this is mainly due to the fact the original legal framework was abrogated, together with the mechanism of extraordinary revision, and a new legal framework, within the mechanism of petition for cassation, was introduced in its place.

In general it can be said that competence rules bear a similarity, as regards the mechanism of endurance, with standards, in that a change of the legal framework is not always necessary. Furthermore, sometimes even a change of the social function of a competence rule is not necessary (as in the case of the preliminary reference procedure), which rules out from the outset any need of modifying the legal framework.

The third category of legal survivals, that is *clusters of legal rules* regulating property rights (right of perpetual usufruct, cooperative right to an apartment) or nominate contracts (cultivation contract) seem to have been different from standards and competence rules with regard to the mechanism of their endurance. In the case of all three of the above-mentioned legal survivals, the

⁹⁴⁹ However, it should be noted that as of 1990 the the notion of 'protection of social property' was removed from the generally framed grounds for a prosecutor's intervention (the others being: protection of the rule of law, protection of citizens' rights, protection of the social interest). See Art. 7 k.p.c., as modified by Act of 13 July 1990 (Dz.U. No. 55, item 318).

original micro-social function was retained, the original macro-social function was abandoned and additional micro-social functions were assumed. For this to take place, the legal framework of all three legal survivals had to be explicitly adapted, in contrast to legal survivals having the form of standards and competence rules, where such adaptations were usually not necessary.

The adaptations to the legal survivals having the form of clusters of rules were, from a textual point of view, either minor (cultivation contract), rather small (right of perpetual usufruct) or far-reaching (right to cooperative apartment). However, in all three cases, despite the modifications, the distinct character of each legal institution was retained, which allows to speak of legal survivals.

Summarising the comparison of the mechanism of endurance of various types of legal survivals depending on the form of their legal framework (i.e. standards, competence rules and clusters of rules) I maintain that whereas an element common to all legal survivals is their functionality towards the new socio-economic system, this functionality is reached in different ways. In the case of *standards* and *competence rules*, the adaptation, to the extent necessary, is performed at the level of legal practice, not on the level of legislative texts. It is the task of competent officials (judges, prosecutors) and need not (as a rule) involve the legislature.⁹⁵⁰ In the case of *clusters of rules* (regulating property rights or nominate contracts), the necessary adaptation involved amending the legislative framework, which took place either by legislative action (in all three cases) or through decisions of the Constitutional Court striking down certain

⁹⁵⁰ The Prosecutor General's and Ombudsperson's power to challenge final judicial decisions is, obviously, an exception here.

rules deemed incompatible with a market economy (cooperative right to an apartment).

6 Answer to the research question

Summarising the discussion of the results of my research in the previous sections, I will now return to the research question in order to provide a concise answer to it. Let me reiterate the question once again: ‘What are the conditions of possibility of the endurance of legal institutions which were introduced under one political and socio-economic system (in order to fulfil a function specific to that system), but have not been removed from the legal order following a systemic transformation (transition)?’ On the basis of the results of my research, presented especially in Chapters IV and V, and its interpretation presented in particular in sections 4 and 5 above, I propose the following synthetic answer to the research question: *The fundamental condition of possibility of the endurance of legal survivals following a systemic transformation is the functionality of the legal institution in question towards the new socio-economic system.* Such functionality results from the fact that at least partly the old functions of the institution in question are still useful after the systemic transformation, as well as from the fact that the institution in question assumes new functions. The way in which a legal survival changes its functions (its “mechanism of endurance”) differs depending on the legal form of the survival. Standards (general clauses) and competence rules, especially if their form is very abstract and flexible with regard to content (as was the case in the examples studied in Chapter IV, sections 2-3 and Chapter V, sections 2 and 4), are able to assume new functions relatively easily, precisely because of the *content-neutral* character of their form. Conversely, clusters of rules which are permeated with content, usually require explicit legislative adaptation in order to be able to drop old functions and assume new ones.

Returning to the relevance of the form/substance dichotomy for the study of legal survivals (see Chapter II, section 6 above), I conclude that *the mechanism of endurance of legal survivals depends directly on the textual form of their legal framework*, and that content-neutral textual forms, such as those of standards (general clauses) and competence rules, survive much more easily than content-permeated legal forms, which require more far-reaching adaptations, usually performed by the legislature and occasionally by the Constitutional Court.

7 Legal survivals and legal culture

The synthesis of the results of my research (sections 4-5 above), apart from answering the research question (in section 6 above), allows also for a more general reflection on legal survivals and their place in legal culture. This reflection has three distinct elements: descriptive, critical and normative.

On a *descriptive* note, I conclude that legal survivals are a normal (physiological) feature of legal culture, rather than its pathology. Any radical socio-economic transformation, such as Poland's passage from actually existing socialism to a neoliberal market economy in 1989, can be compared to a shift of paradigm in science.⁹⁵¹ Just like in science, different theoretical constructions can be superimposed on the same set of data,⁹⁵² so the socio-economic relationships of a given society can be governed by very different (legal) systems, guided by radically different principles or paradigms. But the rupture, however radical in its fundamental premises, is never total: there is always a certain space of continuity. In the domain of science:

⁹⁵¹ For the source domain of this metaphor see Thomas S. Kuhn, *The Structure of Scientific Revolutions* [1962] (3rd ed., Chicago: University of Chicago Press, 1996).

⁹⁵² Kuhn, *Scientific Revolutions...*, p. 76.

'Since new paradigms are born from old ones, they ordinarily incorporate much of the vocabulary and apparatus, both conceptual and manipulative, that the traditional paradigm had previously employed. But they seldom employ these borrowed paradigms in quite the traditional way. Within the new paradigm, old terms, concepts, and experiments fall into new relationships with each other.'⁹⁵³

The same happens after a 'change of paradigm' of the legal system,⁹⁵⁴ that is its transition from, for instance, state-socialist law to a market-economy law. Just like scientists, lawyers do not discard those elements from their professional toolbox which, although used in new ways, can still be fruitfully deployed under the new paradigm. What varies, though, is the degree of adaptation necessary, or – to use the metaphor drawing from science – the way that the old apparatus will be employed. Furthermore, in the domain of science:

'[...] the new paradigm must promise to preserve a relatively large part of the concrete problem-solving ability that has accrued to science through its predecessors. *Novelty for its own sake is not a desideratum in the sciences* [...]. As a result [...] new paradigms [...] usually preserve a great deal of the most concrete parts of past achievement and they always permit additional concrete problem-solutions besides.'⁹⁵⁵ (Emphasis added)

⁹⁵³ Ibid., p. 149. See also ibid., p. 130: '[...] postrevolutionary science invariably includes many of the same manipulations, performed with the same instruments and described in the same terms, as its prerevolutionary predecessor. [...] [O]ccasionally, the old manipulation in its new role will yield different concrete results.'

⁹⁵⁴ Cfr. Habermas, *Between Facts...*, p. 388ff. Habermas understands a paradigm in law as a 'the judge's implicit image of society', and links it with a specific 'social ideal' ('social model', 'social vision') (p. 392). The change of paradigm analysed by Habermas was a shift from the liberal to the social model of private law, which occurred *via* a re-interpretation of general clauses (p. 404), a constitutionalisation of private law (p. 403), as well as by explicit legislative intervention (p. 403).

⁹⁵⁵ Kuhn, *Scientific Revolutions...*, p. 169.

Law – like science – is above all, a practical enterprise, and the test of viability that legal institutions must pass is their concrete problem-solving ability, the capacity for effectively regulating socio-economic interests and resolving conflicts. In law – like in science – '[n]ovelty for its own sake is not a desideratum'.

On a *critical* note, I wish to return to the narrative about the state-socialist legal past which prevails among the contemporary Polish legal community discussed in Chapter 3, section 4. As I indicated therein, the legal survivals of actually existing socialism, persistent in Polish private law, certainly cause irritation among those who insist on 'purging' the legal order from any traces of the *ancien régime*. The story of adaptation of legal survivals, told in Chapters IV and V and synthetically summarised above, clearly indicates that the dominant narrative overlooks the fact that law is above all a practical enterprise, and if legal survivals (when necessary, adapted) are capable of fulfilling their social functions within the legal system, there is no need of getting rid of them in the name of historical policy or ideological purism.

Finally, on a *normative* note, I wish to insist on the positive aspects of legal survivals for the legal community and society at large. Whilst at first blush legal survivals might seem as synonymous to 'relics', that is outdated legal institutions, opposed to new, more 'rational'⁹⁵⁶ legal phenomena, introduced consciously after a transformation, this is not the case. I contend that the legal community's willingness to retain 'traditional' courses of action (in the Weberian sense),⁹⁵⁷ that is old institutions, rules or concepts, of course adequately adapted to the requirements of the new socio-economic order, is

⁹⁵⁶ Cfr. Sztompka, *Sociologia...*, p. 61.

⁹⁵⁷ Weber, *Economy...*, s. 25.

deeply rational and should be supported. This is because it allows saving time, effort and other resources, which would have to be expended if a new legal framework were to be created from scratch, be it by the legislature or by the courts. One could remark that the legal system has a tendency to ‘lag behind’ social change; however, this ‘lagging behind’ does not occur for the sake of an unthinking, dogmatic conservatism, but for the sake of preserving the concrete problem-solving ability of the law despite a change of paradigm.

What is perhaps most characteristic, is that even after the October Revolution, when the Bolsheviks officially abolished all pre-revolutionary legal texts by one blow,⁹⁵⁸ the post-revolutionary law-makers nevertheless returned to the laws of the *ancien régime* when seeking inspiration for the codification of state-socialist law.⁹⁵⁹ From a purely symbolic point of view this must not have been a welcome move, but from the perspective of the institutional world of law it was logical and consequent.

Exactly the same mechanism seems to be at work in today’s Poland. The efforts of numerous academics to draft a new Polish Civil Code⁹⁶⁰ with the intent of breaking definitely from the state-socialist past (represented to them by the current Code of 1964), have been heavily criticised by judges of the Supreme

⁹⁵⁸ Adam Lityński, *Prawo Rosji...*, p. 197.

⁹⁵⁹ A case in point is the Civil Code of the Russian Federal Socialist Soviet Republic of 1922, whose drafters relied on Western European models and, according to some researchers, even to the draft of Russian Civil Code prepared between 1905 and 1913. See Lityński, *Prawo Rosji...*, p. 203.

⁹⁶⁰ Komisja Kodyfikacyjna Prawa Cywilnego działająca przy Ministrze Sprawiedliwości [Codification Commission for Civil Law attached to the Minister of Justice], *Księga pierwsza Kodeksu cywilnego. Projekt z uzasadnieniem* [First Book of the Civil Code: Draft with Motives] (Warszawa: C.H. Beck, 2009).

Court (incidentally, many of them academics).⁹⁶¹ I agree with their criticism. The judges are perfectly right in that they see nothing wrong in continuing to use a Civil Code of the socialist period, adequately adapted to the new circumstances.

It is here that the analogy between a legal survival and a legal transfer, hinted to in Chapter II, is most clearly visible: in both instances the legal community aims at ‘unburdening’⁹⁶² itself, avoiding unnecessary effort. This ‘unburdening’ can take place either by sticking to an old legal framework (if necessary, adapted, but not replaced) or by borrowing ideas for a new legal framework abroad, instead of inventing it from scratch at home. This analogy allows to argue that not only legal transfers, but also legal survivals, are inherent phenomena of legal culture: not a pathology, but the very physiology of legal life, which should not be criticised, but rather encouraged for the sake of a rational approach to legal culture.

⁹⁶¹ ‘Projekt Kodeksu cywilnego. Księga pierwsza. Sprawozdanie z dyskusji przeprowadzonej w Izbie Cywilnej Sądu Najwyższego’ [Draft Civil Code. Book One. Report from a Discussion Held at the Civil Chamber of the Supreme Court], *Przełąd Sądowy* 2 (2010).

⁹⁶² Cfr. Kozak, *Granice...*, p. 166