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

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Summary

The research question posed in the dissertation is as follows: *'What are the conditions of possibility of the endurance of legal institutions which had been 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?'* In order to answer this generally framed question, the dissertation resorts to analyses of selected legal survivals present in Polish private law after 1989. The notion of 'private law' encompasses, for the purposes of the dissertation, both substantive and procedural law (civil procedure).

The dissertation is based on the assumption that post-1989 Poland, and especially its private law, are a case worth studying for the purpose of research on continuity and discontinuity in law under conditions of a fundamental socio-economic and political transformation. This is because Polish economic, social, political and indeed legal history of the past 100 years has been characterised by abrupt and profound changes, making any examples of continuity, that is survivals of the previous period despite a general tendency towards discontinuity, worth particular attention of the researcher.

Following World War II, Poland found itself within the sphere of Soviet domination. This heavily impacted upon the political, social, economic and legal system. Key sectors of the economy became nationalised and central planning at the state level was introduced. This system of governance, known as actually existing socialism, had an immense impact upon private law (referred to exclusively as 'civil law' in the socialist period). Poland's codes of the period of actually existing socialism, that is the Civil Code and Code of Civil Procedure, both enacted in 1964, contained a mix of Western and Soviet elements.

The socio-economic and political transformation from actually existing socialism to democracy and a market economy in 1989 had an immense impact upon private law and most legal institutions typical for the previous regime were removed, leading to a sharp legal discontinuity. However, certain legal institutions - referred to in the dissertation as 'legal survivals' - remained. Eight most prominent examples of such legal survivals have been analysed in the dissertation in order to answer the research question. These include: two standards (general clauses): (1) the 'principles of social life' (*zasady współżycia społecznego*) and (2) 'socio-economic destination' (*społeczno-gospodarcze przeznaczenie*); two property rights: (3) the 'cooperative member's right to an apartment' (*spółdzielcze własnościowe prawo do lokalu*) and (4) the 'right of perpetual usufruct' (*prawo użytkowania wieczystego*); one typified contract, the (5) 'cultivation contract' (*umowa kontraktacji*); as well as three institutions of procedural private law: (6) the prosecutor's (*prokurator's*) standing in civil proceedings; (7) the Prosecutor's General and Ombudsman's right to challenge judicial decisions having the force of *res judicata*; and (8) preliminary references to the Supreme Court in civil cases. A detailed analysis of the social function of the eight legal survivals under consideration revealed that some of them fully retained their old functions (principles of social life; preliminary reference mechanism), others retained them, albeit partly

(socio-economic purpose; prosecutor's standing in civil proceedings; Prosecutor's General and Ombudsman's power to challenge judicial decisions having the force of *res judicata*); whilst others partly retained their old functions but simultaneously assuming new ones (right of perpetual usufruct; cooperative member's proprietary right to an apartment; cultivation contract). This allows to conclude that the key to endurance of a legal survival despite a systemic transformation is its functionality towards the new system. A legal institution 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.

An additional issue explored in the dissertation is the existence of a link between the form of the legal framework of a legal survival and the mechanism of its endurance. For the purposes of analysing the form of the legal frameworks of the institutions under consideration, they have been divided into three groups: (1) standards (principles of social life; socio-economic purpose); (2) competence rules (the prosecutor's standing in civil proceedings; the Prosecutor General's and Ombudsperson's right to challenge final judicial decisions; the preliminary reference mechanism); and (3) clusters of rules (the right of perpetual usufruct; cooperative member's right to an apartment; cultivation contract).

The empirical findings regarding the link between the form of a legal survival and the mechanism of its endurance are as follows. As regards standards, their legal framework did not require any adaptation. 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. In the socialist period the general clauses in question were aimed at securing the primacy of public interest of the private interest within the realm of private law. These functions of the above-mentioned general clauses ceased after the demise of actually existing socialism. However, 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. 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.

As regards competence rules, whereas the micro-social functions of the three legal survivals having this form 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 Ombudsman's right to challenge final judicial decisions. There were not changes in the social functions of the preliminary reference mechanism. In order to endure, the legal framework of two of the legal survivals in question (the prosecutor's standing in civil proceedings and the preliminary reference procedure) did not require any major adaptation. 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 Ombudsman's power to challenge judicial decisions having the force of *res judicata*. However, 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.

As regards clusters of legal rules regulating property rights (right of perpetual usufruct, cooperative right to an apartment) or nominate contracts (cultivation contract), the research indicated a difference from standards and competence rules with regard to the mechanism of their endurance. In the case of all the three clusters of legal rules studied in the dissertation, their original micro-social function was retained, the original macrosocial 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), the dissertation maintains 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. 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 rules deemed incompatible with a market economy (cooperative right to an apartment).

On the basis of the empirical analysis of eight legal survivals in Polish private law after 1989, the dissertation provides 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, 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. Therefore, the mechanism of endurance of legal survivals depends directly on the textual form of their legal framework, and 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.