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Chapter 5

Is the Socialist Legal Tradition 'Dead and Buried'? The Continuity of Certain Elements of Socialist Legal Culture in Polish Civil Procedure

*Rafał Mańko**

1. INTRODUCTION

It is fascinating to note how much the history of Finland – the host of this conference – and Poland are interconnected. It is sufficient to look from the window of the University of Helsinki's Faculty of Law to see a monument of the Russian emperor, Alexander II, who was assassinated by a Polish revolutionary.[1] The fact that the Finns have retained the monument of Alexander II on the Senate Square is a prominent example of symbolic historical continuity between today's independent Republic of Finland and the 19th century Grand Duchy of Finland which was bound to Russia by a personal union. Poland was also subject to Russian rule in the 19th century, as well as to direct Soviet control in the period after World War II. It is worth noting that Poles have always strived to remove visible

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1. The Pole Ignacy Hryniewiecki killed Alexander II in a bomb attack on 13 March 1881 in which he also died himself. It is not clear whether the attack was actually intended to be a suicide bombing.

Thomas Wilhelmsson, Elina Paunio and Annika Pohjolainen (eds), *Private Law and the Many Cultures of Europe*, pp. 83–103.
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elements of symbolic continuity with Russian and Soviet rule – such as, notably, monuments or street names.[2] However, in the field of legal culture the situation is somewhat more complicated and indeed, one can point to various elements of significant continuity, some of which will be discussed in this paper.

Before turning to the proper argument it seems necessary to clarify the notions of continuity and discontinuity in the context of legal culture. The two concepts have been the object of scholarly reflection in the works of the French thinker, Michel Foucault, especially in his book devoted to – what he himself calls – *The Archaeology of Knowledge*.[3] In this book, Foucault questions the methodological approach underpinning the history of sciences which – in his view – is biased towards continuity.[4] Historians of sciences and historians of ideas focus on finding predecessors (e.g. picturing Ricardo as a predecessor of Marx)[5] and on treating changes in the sciences as a product of gradual evolution (e.g. regarding 19th century medicine as the product of the evolution of 18th century medicine).[6] Foucault criticizes this approach, drawing attention to rupture and discontinuity both in the history of ideas and the history of the sciences. He points out, for example, that between 1790 and 1815 medicine changed to such a degree that it is difficult to maintain the identity of pre-1790 and post-1815 medicine and using the same term 'medicine' suggests a continuity which simply does not exist due to the complete rupture and discontinuity which occurred in that period.[7] In order to underline the novelty of his approach, Foucault gave it a new name – the archaeology of knowledge as opposed to the hitherto existing history of ideas and history of science.[8]

Foucault's approach to the history of sciences and ideas has recently been transposed into the field of legal research by the Italian comparatist Pier Giuseppe Monateri who, in his famous paper entitled *Black Gaius,* criticized the continuity-focused approach dominating in legal scholarship, especially in legal history.[9]

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2. After World War I, when Poland regained independence (1918), the Polish authorities removed all monuments of Russian emperors, renamed streets commemorating Russian governors (such as Fiodor Berg, who incidentally later became the governor-general of Finland) and even decided to pull down most of Warsaw's Russian Orthodox Churches. A similar move was taken in 1989, when monuments of Socialist activists – such as the famous founder of the Socialist secret police and a descendant of a Polish noble family, Feliks Dzierżyński – were destroyed and names of streets commemorating famous socialists were changed to honour the Solidarity movement or Pope John Paul II.
3. M. Foucault, *L'archéologie du savoir* (Paris, Gallimard, 1969, reprinted in 2004). There is a recently reprinted English translation: *The Archaeology of Knowledge* (trans. by A.M. Sheridan Smith, London and New York, Routledge, 2002).
4. Foucault, n. 3 *above*, pp. 221–222.
5. *Ibid.*, p. 230.
6. *Ibid.*, p. 44 *et seq.*
7. *Ibid.*, p. 222.
8. *Ibid.*, p. 221.
9. P. G. Monateri, 'Black Gaius: A Quest for the Multicultural Origins of the "Western Legal Tradition"', (2000) 50 *Hastings Law Journal*, 479 *et seq.*, freely accessible online at <www.jus.unitn.it/cardozo/users/pigi/blackgaius/bge.pdf>, 8 January 2007 (all page references are to the PDF offprint published online). The title of the paper – Black Gaius – is an allusion to the famous

Monateri pointed to the evolutionary approach, which sees changes of law as a product of organic development, as exemplified, *inter alia*, in Reinhard Zimmermann's *opus magnum*, the *Law of Obligations*, which presents all institutions of the law of obligations as being products of an organic evolution from the Law of the Twelve Tables until the BGB.[10] Monateri puts forward a critique of this approach,[11] stating that authors such as Zimmermann concentrate only on continuity (putting it in the foreground) while, at the same time, concealing significant elements of discontinuity (which they place in the background). Monateri went so far in his critique as to accuse continuity-focused legal historians of being biased and subjective in their approach:

> The continuity approach, which leads us to 'observe' the existence of traditions, is based, at the very root, on a tendential but systematic denial of change in history. The continuity approach always internalizes change within an 'evolving' tradition ... its very foundation lies in the desire to see continuity, and an unwillingness to admit change.[12]

Monateri suggests to 'reverse the grounds' whereby the background of discontinuity would be placed in the foreground:

> [I]t is quite easy to simply reverse this approach. Since it is based on putting continuity in the foreground, and changes and breaks in the background, we can adopt the delegitimizing move to reverse the grounds.[13]

In the second part of his paper, Monateri gives a practical example of the application of his methodology of research – he questions the Roman origins of contemporary Western legal tradition by showing, on the one hand, that there were numerous elements of discontinuity between Roman law and modern law and, on the other hand, by pointing to non-Roman influences, including influences of African origin – hence the title of the paper: *Black Gaius*.

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book by Martin Bernal, *Black Athena: The Afroasiatic Roots of Classical Civilisation*, volumes I – III (Rutgers University Press, 1987–2006). Bernal's book puts forward the hypothesis that the roots of ancient Greek culture should be traced back to the cultures of Egypt and Phoenicia (hence 'Afroasiatic Roots').

10. R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford, Oxford University Press, 1996, originally published in 1990). Zimmermann's continuity-focused approach is set out in the preface, especially at pages vii–ix. He has recently reaffirmed this approach – *see* e.g. R. Zimmermann, 'Roman Law and the Harmonization of Private Law in Europe' in *Towards a European Civil Code*, M. Veldman and M. Hesselink (eds) (3rd edn, Nijmegen, Ars Aequi, 2004), p. 21 *et seq. See especially* the statement at p. 24: 'the common tradition on which the modern national legal systems [of European countries] are based, constitutes a unifying force of great potential; and anyone aiming to found a renewed European legal culture should use it to his advantage'.
11. Monateri, n.9 *above*, 33 *et seq*.
12. *Ibid.,* 29.
13. *Ibid.,* Emphasis added.

2. CONTINUITY AND DISCONTINUITY OF POLISH LEGAL CULTURE

The problem with the scholarly approach to Polish legal culture seems to be completely the opposite. Scholars focus on two important ruptures – the introduction of Socialist law after World War II and the reintroduction of a Western-style democracy and market-oriented legal system after 1989. Thus, the focus is on discontinuity, which is prominently placed in the foreground, whereas elements of continuity do not play an important role in the overall picture. This approach is adopted both by Polish and by Western scholars. A particularly poignant example of this way of viewing the legal cultures of Central Europe is provided by Hein Kötz, who, in the preface to his textbook on comparative law, not only wrote that the 'socialist legal tradition is dead and buried'[14] but also decided to completely discard the chapters on socialist law,[15] thereby assuming not only a complete discontinuity but also an unqualified amalgamation of Central European legal cultures with Western European legal culture.[16] Polish scholars take a similar approach. For example, Rafał Stroiński makes the unqualified statement that:

> Polish law belongs to the western legal tradition, its laws for historical and cultural reasons belonging to the Germanic and Romanistic legal families. This influence survives strongly to this day, notwithstanding a 50-year period of submission to the so called 'socialist family' ... For the last sixteen years the country's laws have been in a state of constant flux, first in order to divorce, practically overnight, its 'socialist family' in favour of a marriage more proper for a market economy, and second, as soon as Poland's entry into the European Union became a feasible option, to meet the requirements of the *acquis communautaire*.[17]

Stroiński's metaphor of an 'overnight divorce' through which Polish law departed from the socialist legal family in 1990 is indeed illustrative of the discontinuity-focused approach. Moreover, Polish law is completely assimilated with the western legal tradition, 'notwithstanding a ... submission' to the socialist legal

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14. H. Kötz, 'Preface to the Third Edition' in *Introduction to comparative law*, K. Zweigert and H. Kötz (eds) (3rd edn, Oxford, Clarendon Press, 1996), p. v: 'The 'socialist legal family' is dead and buried, and although it will take a long time to erase the traces of more than forty years of total subjection to political ideology, it seemed right to discard the chapters on socialist law.'
15. *See* my remarks in R. Mańko, 'The Culture of Private Law in Central Europe After Enlargement: A Polish Perspective', (2005) 11 *European Law Journal*, 547–548.
16. H. Kötz is not apparently the only German legal scholar who still perceives Central Europe from the perspective of 19th century political criteria, when the whole region was subject to German, Austrian and Russian domination. Also prominent German legal historians – Paul Koschaker and Franz Wieacker – in their widely known works (respectively, *Europa und das romische Recht* and *Privatrechtsgeschichte der Neuzeit*) 'completely omitted the development of private/civil law in Central and Eastern Europe as though such regions did not exist in Europe' (G. Hamza, 'Continuity and Discontinuity of Private/Civil Law in Eastern Europe After World War II', (2006) 12 *Fundamina. A Journal of Legal History*, 48, emphasis added).
17. R. T. Stroiński, 'Report from Poland' (2006) 3 *European Company Law*, 39.

family, which – as we already know from Kötz – is nothing other than simply 'dead and buried'.

A similar approach is taken – for example – by the authors of a revised version of a pre-1989 textbook on civil procedure who limited their discussion of socialist civil procedure to a very brief statement:

> After Poland regained actual sovereignty and began the difficult process of establishing an authentic state of law, those accretions imported from the East also began to be gradually removed ... Work on rebuilding the law of civil procedure has not yet ended. One should expect further changes aiming at the ... elimination of certain remnants of the previous period.[18]

The discontinuity approach has been consequently implemented throughout the textbook; e.g. in the chapter about judicial remedies, remedies existing between 1950 and 1996 are mentioned only in one sentence.[19] A similar approach can be seen e.g. in the commentary to the Code of Civil Procedure published in 1996 by C.H. Beck, directly after the reintroduction – after 46 years – of appeal and cassation to Polish civil procedure.[20] The author who wrote the commentary to the articles on those two remedies against judicial decisions[21] cited only pre-1950 literature and virtually only pre-1950 case-law, thus presenting the changes in civil procedure as abrupt jumps from 1950 directly to 1996, treating the 46 years in between as practically nonexistent for the purposes of the discourse.[22] The history of appeal is presented from Roman law until the Polish pre-War Code of Civil Procedure 1930; with a rupture in 1950 and the resurfacing of the appeal procedure in 1996.[23] The same approach is taken towards cassation. Its history evolves organically from the French *loi* of 1790 establishing the *Tribunal de Cassation* (there is even a prehistory of the *Grand Conseil* in the period of the *Ancien régime*), through the introduction of cassation in the autonomous Polish

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18. J. Lapierre in *Postepowanie cywilne,* J. Jodłowski, Z. Resich, J. Lapierre and T. Misiuk-Jodłowska (eds) (3rd edn, Warsaw, LexisNexis, 2003), p. 33. The original textbook was written by Jodłowski and Resich; in 2003 the text was modified to a large extent by Lapierre and Misiuk-Jodłowska with the consent of Professor Jodłowski and the family of the late Judge Resich.
19. J. Jodłowski, Z. Resich, J. Lapierre and T. Misiuk-Jodłowska, n. 18 *above*, p. 405.
20. The system of judicial remedies existing between 1950 and 1996 provided for a revision (to the court of second instance) and an extraordinary revision which could be brought by certain public authorities against judgments which had the force of *res iudicata* (the extraordinary revision will be discussed in detail later in this chapter). The revision (*rewizja*) was thus the only judicial remedy available to the parties; under the revision system, the court of second instance acted as a court of law and fact but in principle it could not issue a new judgment (as in the appeal system) but rather quash the judgment of the lower court (as in the cassation system) and send it back to that lower court in order to issue a new, correct judgment.
21. Professor Dr Kazimierz Piasecki – Judge Emeritus of the Supreme Court and professor at the Private School of Business and Administration.
22. *See* K. Piasecki in *Kodeks postępowania cywilnego. Komentarz* (Warsaw, C.H. Beck, 1996), Vol. I, p. 1098 *et seq.*
23. *See* Piasecki, n. 22 *above*, pp. 1099–1101.

'Grand Duchy of Warsaw' in 1807 until the Code of Civil Procedure 1930.[24] Then the rupture of 1950 came, so that cassation resurfaces 46 years later.

Scholars – both Polish and foreign – clearly maintain a discontinuity-focused approach when dealing with the changes occurring in Polish law and legal culture after 1989. Paraphrasing Monateri's expression, one can therefore speak of a foreground of discontinuity. The existence of clear discontinuity is beyond doubt – there are numerous prominent examples both in public and private law, ranging from the introduction of democracy and human rights protection to the establishment of freedom of economic activity, freedom of contract[25] and equal treatment of public and private property. Indeed, contemporary Polish legal culture has changed profoundly since 1989 and it would be a mistake to maintain that Poland has a 'socialist' or 'communist' legal system and should in treatises of comparative law be discussed together with Cuba or North Korea. In fact, nothing could be more wrong. This paper certainly does not aim to question the profound discontinuity which divides pre-1989 and post-1990 Polish legal culture. However, I maintain that by focusing exclusively on discontinuity one risks obtaining a somewhat limited, one-sided picture of Polish legal culture. Therefore, in order to avoid this, I propose to bring the continuity in Polish legal culture to the foreground without, however, losing discontinuity from sight. Or, to paraphrase the marriage and divorce metaphor of Stroiński cited above, enquire about the 'fruits' of the 50-year-long 'marriage' with the socialist legal family which still might be wandering around despite the 'overnight divorce' in 1990.

3. EXAMPLES OF CONTINUITY IN THE LAW OF CIVIL PROCEDURE

3.1 Introduction

There are numerous areas of Polish law and legal culture where continuity with the socialist period can be spotted. In the area of criminal law this would especially be the so-called substantive definition of a crime;[26] in the area of public law one can

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24. *See* K. Piasecki, *ibid.*, pp. 1145–1150.
25. For an overview of the changes in the law of obligations (e.g. freedom of contract, *rebus sic stantibus*) *see* M. Nesterowicz, 'Przekształcenia w prawie zobowiązań (1990 – 2001)', in *Przemiany polskiego prawa. Tom drugi* [Reforms of Polish Law. Volume Two], E. Kustra (ed.) (Toruń, UMK, 2002), p. 15.
26. The 'substantive definition of a crime' means that in order for a human act to be a crime it must not only violate the provisions of the criminal statute (formal element) but must also be 'socially dangerous' (substantive element). The substantive element was introduced in the case-law of the early years of socialism in Poland and it was codified in the Criminal Code 1969. The literature at the time underlined the strong connection between the notion of social danger of a crime and its class content (*see* e.g. K. Mioduski in *Kodeks karny. Komentarz* [Penal Code. Commentary], J. Bafia, K. Mioduski and M Siewierski (eds) (Warsaw, Wydawnictwo Prawnicze, 1977) pp. 12–13; a prominent author even wrote that 'the idea of the substantive content of a crime is a bridge between the conceptual apparatus of criminal law and the principles of

point to various general principles of administrative procedure which have remained unchanged since the 1960s.[27] Substantive private law also offers numerous interesting examples, such as socialist general clauses:[28] 'principles of social coexistence'[29] and the 'socio-economic destination of a right',[30] which have been retained in the Civil Code since its enactment in 1964. On the level of legal methodology, one can point to textual positivism and abstract reasoning as elements of significant continuity with earlier stages of the development of Polish legal culture, reaching even beyond the socialist period.[31]

3.2 Socialism and Civil Procedure

However, out of these numerous potential examples of continuity, I would like to discuss in the present paper those which stem from the law of civil procedure. This is an area particularly influenced by socialist ideology. One should first of all point to the fact that the socialists negated the public v. private division according to Lenin's famous statement that '[w]e do not recognize anything ''private'', for us everything that is connected to the economy is of public-law character and not private'.[32] In the case of civil procedure this meant that the outcome of civil litigation was no longer a private issue of the litigants but a matter of public interest. In order to secure promotion of that interest, the socialists introduced several specific instruments which were incorporated into the Code of Civil Procedure 1930 as a result of several amendments in the course of 1950. The new Code of Civil Procedure 1964 – enacted together with a new Civil Code and a new Family Code – took over all those elements. The Code of

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historical materialism', that is the Marxist ideology – I. Andrejew, *Polskie prawo karne w zarysie* [Polish Penal Law in Outline] (7th edn, Warsaw, Państwowe Wydawnictwo Naukowe, 1983), p. 95, *emphasis in the original*).
The current Criminal Code 1997 retains this definition in Article 1 § 2: 'A forbidden act does not constitute a crime if its social harmfulness is minimal.'

27. *See* Chapter 2 'General Principles' of the Code of Administrative Procedure 1960 which have only undergone a linguistic change – the term 'organ of state administration' used throughout the Code was changed in 1998 to 'organ of public administration' in order to take into account the existence of organs of local self-government established in 1990.
28. On the two general clauses, *see* in particular W. J. Wagner, *Obligations in Polish Law* (Leiden, A. W. Sijthoff, 1974), p. 13 *et seq.*; Mańko, n. 15 *above*, 531–533.
29. The clause of principles of social coexistence is present throughout the Civil Code 1964, both in the general part (e.g. Article 5 – abuse of rights, Article 56 – the effects of a legal act, Article 58 – invalidity of a legal act), property law (e.g. Article 140 – limits of the right of ownership), the law of obligations (e.g. Article 353-1 – limits of the freedom of contract, Article 354 – standard of performing obligations) and even in the law of succession (e.g. Article 1008 – possibility of disinheritance).
30. Most notably present in Article 140 of the Civil Code 1964 as one of the parameters limiting the scope of the right of ownership.
31. *See* Mańko, n. 15 *above*, 534–536.
32. W. I. Lenin, 45 *Dzieła* [Works] (1975), p. 430. English translation according to Mańko, n. 15 *above*, 536.

Civil Procedure 1964 – although subject to numerous amendments – is still in force today. It is therefore interesting to examine to what extent the contemporary Polish Law of Civil Procedure is 'Western', in the sense of being a private-law oriented procedure, and to what extent it still– at least in some respects – resembles the civil procedure of a state belonging to the 'socialist legal family'.[33]

A second ideological element that influenced the law of socialist procedure is the emphasis put on objective truth rather than on so-called 'formal' or 'judicial' truth.[34] This way of looking upon civil procedure was founded on the Marxist-Leninist epistemology which affirms the existence of objective reality and the possibility of its cognizance by the human mind.[35] Therefore, the task of the judge in socialist civil procedure is to find the actual facts and he may not be satisfied with a limited view of them on the basis of the submissions of the parties.[36] Hence, the principle *quod non est in actis non est in mundo*[37] is expressly rejected. This, of course, is not only a consequence of Marxist philosophical approaches but also a consequence of the public-interest focus of socialist civil procedure and the negation – in Soviet law – of the public v. private division.[38]

A third characteristic feature is the quest for objective legality which, in a certain way, stems from the two previous elements (public interest and objective truth). Objective legality – the strict observance of laws by public bodies and by

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33. I do not aim at evaluating the elements of continuity that will be studied in this paper. The mere fact that they were introduced by a totalitarian, Stalinist regime, does not by itself justify their rejection. Furthermore, many of the elements which will be discussed did not necessarily stem from the socialist ideology but were either of Russian origins (such as the strong role of the Office of the Prosecutor) or are even known in Western legal cultures (such as the reference for a preliminary ruling).
34. A. Stawarska-Rippel, 'O politycznych założeniach procedury cywilnej w Polsce Ludowej' [On the Political Foundations of the Civil Procedure in People's Poland] in *Między I a III Rzecząpospolitą. Kształtowanie europejskiej kultury prawnej. Prace ofiarowane prof. zw. dr hab. Adamowi Lityńskiemu w czterdziestolecie pracy naukowej* (Miscellanea Iuridica, t. 7) [Between the First and Third Republic: The Shaping of European Legal Culture. Papers Offered to Professor Adam Lityński on the Fortieth Anniversary of His Scientific Work], M. Mikołajczyk and A. Drogoń (eds) (Tychy, Śląskie Wydawnictwo Naukowe, 2005), p. 259 *et seq.* I am aware of the fact that modern Western European systems of civil procedure are gradually opening up towards objective truth. However, it seems that this development is a matter of pragmatism rather than an ideologically-motivated reform.
35. Z. Resich, 'Organizacja Sądu Najwyższego' [Organization of the Supreme Court] in *Sąd Najwyższy w PRL* [The Supreme Court in the Polish People's Republic], L. Garlicki, Z. Resich, M. Rybicki and S. Włodyka (eds) (Wrocław-Warsaw, Zakład Narodowy im. Ossolińskich, Wydawnictwo Polskiej Akademii Nauk, 1983), p. 117, who draws a clear distinction between the socialist principle of objective truth (as having a philosophical background) and the principle of objective truth which, to some extent, exists in certain Western European legal systems (e.g. the French).
36. The judge had the right and duty to conduct an investigation in civil proceedings. *See* Stawarska-Rippel, n. 34 *above*, pp. 260–261.
37. In free translation: 'What is not in the file of the case does not exist.'
38. Stawarska-Rippel, n. 34 *above*, p. 260; A. Lityński [in:] M. Kallas and A. Lityński, *Historia ustroju i prawa Polski Ludowej* [A History of the Political System and Law of People's Poland] (Warsaw, Wydawnictwo Prawnicze PWN, 2000), pp. 420, 422. Cfr. Mańko, n. 15 *above*, 536.

citizens[39] – rather than protection of private rights, is the aim of socialist civil procedure.[40]

These three general principles of socialist civil procedure were realized by way of various legal instruments. The principle of objective truth was realized through the instrument of the judicial investigation, introducing elements of inquisition into civil proceedings.[41] The principle of public interest was guaranteed through participation of the prosecutor – a guarantor of public interest – in civil proceedings, as well as by the possibility of lodging an extraordinary revision by the Minister of Justice, the Attorney General, and the First President of the Supreme Court whenever a judgment was regarded by them to violate the interests of the Polish People's Republic. Finally, the principle of objective legality was guaranteed by various means of guaranteeing uniform case-law – the abstract resolutions of the Supreme Court (which had existed since 1928), the binding guidelines of the Supreme Court[42] and the preliminary reference procedure.

Since 1996 the basic principles of Polish civil procedure have changed, or at least are said to have changed.[43] However, many of the institutions of civil proceedings mentioned above are still in force. This applies especially to three of them, which will now be the object of more detailed discussion: participation of the prosecutor in civil proceedings (section 3.3), extraordinary revision – which has its continuity in extraordinary cassation (section 3.4) and finally – the preliminary reference procedure (section 3.5).

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39. *See* e.g. Z. Resich, *Nauka o ustroju organów ochrony prawnej* [Science About the Organs of Legal Protection] (Warsaw, Wydawnictwa Uniwersytetu Warszawskiego, 1970), pp. 22–26.
40. *See* e.g. Resich, n. 39 *above*, p. 41.
41. Lityński n. 38 *above*, p. 424.
42. The guidelines – known in Poland as the 'guidelines of the administration of justice and judicial practice' – were introduced into the Polish legal system in 1949. They were known to all countries of the socialist legal family and were modelled on the guidelines introduced in the Soviet Union in 1938. S. Włodyka, 'Specjalne środki nadzoru judykacyjnego Sądu Najwyższego' [Special Measures of Judicial Supervision by the Supreme Court] in *Sąd Najwyższy w PRL* [The Supreme Court in the Polish People's Republic], L. Garlicki, Z. Resich, M. Rybicki and S. Włodyka (eds) (Wrocław-Warsaw, Zakład Narodowy im. Ossolińskich, Wydawnictwo Polskiej Akademii Nauk, 1983), pp. 208–210. The existence of the guidelines – besides extraordinary revision and preliminary rulings – was justified by the specific character of socialist law, which required that judicial errors be eliminated not only in concrete cases but in general, not only *ex post* (as by way of extraordinary revision) but also *ex ante,* and not only in a situation when the lower court shows sufficient initiative (as by way of preliminary rulings) – *see* Włodyka, *above*, p. 213. However, it was always underlined that the guidelines 'cannot be evaluated as a source of law but they are a specific form of interpretation of the law' (Włodyka, *above*, p. 215). *See also* Mańko, n. 15 *above*, 535 with further references.
43. Stawarska-Rippel, n. 34 *above*, p. 264. However, some authors still maintain that Polish civil procedure is based on the principle of substantive truth, even though the instruments for its implementation (especially judicial investigation and the judge's right to admit evidence not mentioned by the parties) were abolished in 1996. *See* W. Broniewicz, *Postępowanie cywilne w zarysie* [Civil Procedure in Outline], (8th edn, Warsaw, LexisNexis, 2005), pp. 52–53.

3.3 The Prosecutor in Civil Proceedings

The participation of the prosecutor (*prokurator*[44]) in civil procedure was one of the key elements of reform[45] introduced by the socialists in 1950; some authors have even expressed the opinion that participation of the prosecutor is one of the fundamental principles of socialist civil procedure. Since 1950 any prosecutor could initiate and take part in any civil proceedings, as well as bring any available remedy against any court decision (a revision against a judgment[46] or a complaint against an order), regardless of whether he took part in the case in its earlier stages.[47] The power of the prosecutor to participate in civil proceedings should be viewed in its wider context – namely that of redefinition of the tasks of the Prosecutor's Office (*prokuratura*) in socialist Poland. Unlike Western prosecutors, whose main task is prosecution of crimes, the Prosecutor's Office Act 1950[48] provided for seven different tasks of the prosecutor's office, the first of these being 'supervision over strict observance of the provisions of law by all organs, authorities and offices ... and by citizens', and the fourth being supervision over the accurate and uniform application of the provisions of law by the courts. Prosecution of crimes was only in fifth place and the prevention of crime in seventh.[49] When deciding whether to participate in civil proceedings, a prosecutor

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44. The Polish term is of Latin origin ('*procurator*' meaning plenipotentiary, especially in the context of litigation) – *see* H. Zięba-Załucka, *Instytucja prokuratury w Polsce* (Warsaw, LexisNexis, 2003), p. 7. A similar term ('procurator fiscal depute') is used in Scotland. In the UK the same official is termed prosecutor, in the US – 'prosecutor'. I have chosen to use the term 'procurator' due to its formal similarity to the Polish term and its potentially broad semantic scope (as opposed to 'prosecutor' which has only criminal-law connotations). The relevant office ('*prokuratura*' in Polish) will be termed the Procurator's Office (cfr the American 'District Attorney's Office' and the like) rather than Prosecution Service (cfr. the English 'Crown Prosecution Service').
45. The Polish Prosecutor's Office (*Prokuratura*) in the Second Republic (1918–1939) had very narrow competences, even in the field of criminal procedure where investigative judges (*sędziowie śledczy*) and the State Police had wide prosecuting powers. *See* Zięba-Załucka, ibid., p. 14.
46. The revision (named after the German *Revision see* § 542 *et seq.* of the *Zivilprozessordnung*) was the basic remedy against a judgment in the two-instance system of civil procedure existing in Poland between 1950 and 1996. The Polish revision, unlike its German namesake, could, however, be brought both on questions of law and of fact (*see* Articles 368–369 of the Code of Civil Procedure 1964 in the original wording, hereinafter 'CCP 1964'). The court of second instance was in principle bound by the revision brought by a private party but it could take into account *ex officio* certain issues, especially essential facts which had not been sufficiently examined in the first instance as well as any violation of substantive law (*see* Article 380–381 CCP 1964). The court of second instance generally based its judgment on the basis of the file sent by the court of first instance, but it could also admit new evidence (Article 385 CCP 1964). If the court of second instance found the revision founded, it in principle quashed the judgment and sent the case back to the court of first instance (Article 388 CCP 1964) – similarly as in the German *Revision* (*see* §§ 562–563 *Zivilprozessordnung*).
47. Lityński n. 38 *above*, pp. 423.
48. *Ustawa z dnia 20 lipca 1950 r. o Prokuraturze Rzeczypospolitej Polskiej* [Act on the Prosecutor's Office of the Republic of Poland] (Dz.U. nr 38, poz. 346).
49. Zięba-Załucka, n. 44 *above*, p. 30.

was required to take into account the interest of the state.[50] However, due to the hierarchical organization of the prosecutor's office, this determination had to be done in line with the orders of the Attorney General.[51]

Until 1964 there was no limitation *ratione materiae* as to the scope of the prosecutor's powers, which meant that – theoretically – a prosecutor could even sue spouses for divorce, claiming that their conjugal life had broken up even if the spouses wanted to keep their marriage in force.[52] After 1965, the prosecutor's right to bring divorce cases was eliminated, but he could still bring any other form of action. When in 1996 separation was reintroduced, the prosecutor did not obtain the right to bring an action for separation; however, divorce and separation are – until today – the only two types of cases where the prosecutor may not initiate civil proceedings.[53]

As regards the prosecutor's position in civil litigation, he can either take one of the sides or bring an action against all parties to a legal relationship.[54] The prosecutor brings an action on the basis of his own evaluation of the public interest; the court may not review the prosecutor's evaluation, hence the court cannot block him from taking part in the proceedings even if in the court's opinion the prosecutor is acting contrary to the public interest.[55]

Since 1987, when the office of the Ombudsman was established, the Ombudsman obtained the same powers as a prosecutor, meaning that he can initiate and participate in any civil proceedings. Slightly limited powers were conferred in 1996 on labour inspectors (from the State Labour Inspection)[56] and in 1998 on district consumer ombudsmen.[57]They may initiate civil proceedings only in their respective areas of competence[58] and may take part in ongoing

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50. Lityński n. 38 *above*, p. 423.
51. Zięba-Załucka, n. 44 *above*, p. 34.
52. Lityński n. 38 *above*, p. 423 with highly critical remarks: 'This drastic example shows how much the prosecutor could interfere with subjective human rights and dispose of others' rights. This had nothing to do with the principle of objective truth in civil proceedings, so much stressed by the socialist theorists, but it was an interference with subjective rights'.
53. Broniewicz, n. 43 *above*, p. 67.
54. *Ibid.*, pp. 67–68.
55. *Ibid.*, p. 67.
56. Article 63-1–63-2 of the Code of Civil Procedure 1964 as amended by Act of 2 February 1996 (Dz.U. nr 24 poz. 110) which entered into force on 2 June 1996.
57. Articles 63-3 and 63-4 of the Code of Civil Procedure 1964 as amended by Act of 24 July 1998 (Dz.U. 106, poz. 668) which entered into force on 1 January 1999. District Consumer Ombudsmen are appointed, in principle, in each of the 380 administrative districts into which Poland is divided since 1998, although two or more districts may decide to have one common Consumer Ombudsman. The District Consumer Ombudsmen are appointed and released by the local council (District or Town Council) and he is an official of the local self-government. *See* Articles 32–38 of the Competition and Consumer Protection Act 2000 (*Ustawa z dnia 15 grudnia 2000 r. o ochronie konkurencji i konsumentów*, Dz.U. nr 122 poz. 1319 with further amendments).
58. Labour Inspectors may initiate proceedings only in cases concerning determination of the existence of a labour relationship (Article 63-1 CCP); District Consumer Ombudsmen may

litigation only with the worker- or consumer-plaintiff's consent. What must be underlined here is the fact that since 1950 the powers of the prosecutor in civil proceedings – save for divorce and separation cases – have not been limited.[59] However, some authors, instead of pointing to the socialist (or Soviet or perhaps Russian) origins of the strong position of the prosecutor in civil proceedings, rather tend to emphasize certain French origins of the solution and point to the originality of Polish regulation.[60]

Participation by the prosecutor in civil proceedings has important practical significance, especially because there are cases in which the prosecutor's participation is obligatory.[61]These are cases concerning incapacitation (declaration of legal incapacity of e.g. mentally ill persons)[62] and, it is worth noting, all cases concerning recognition of foreign judgments, including judgments of foreign arbitration tribunals.[63]

3.4 Extraordinary Revision and Extraordinary Cassation

In order to secure objective legality, or perhaps in order to have full control over all judgments, the socialists introduced a specific means of recourse in 1950:[64] extraordinary revision (*rewizja nadzwyczajna*),[65] known in all countries of

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initiate proceedings for the benefit of consumers in all cases relating to consumer protection (Article 63-3 CCP).

59. On the law currently in force, *see* e.g. Broniewicz, n. 43 *above*, pp. 66–71.
60. Broniewicz, n. 43 *above*, pp. 66–67: 'The fatherland of the institution of the prosecutor is France. The participation of the prosecutor in civil proceedings was developed above all in France and it was later received by civil procedures of other countries ... The prosecutor's participation in the Polish civil procedure is defined broadly; although it shows some resemblance to the *reglamentation* adopted in French civil proceedings, it has to a large extent an original character.'
61. Broniewicz, n. 43 *above*, p. 71.
62. Article 546 § 2 Code of Civil Procedure 1964. The prosecutor's participation is obligatory in the strict sense of the word, i.e. his physical presence is necessary for the proceedings to be valid – *see* Broniewicz, n. 43 *above*, p. 71.
63. Article 1148 § 2 Code of Civil Procedure 1964. *See* Broniewicz, n. 43 *above*, pp. 464–466.
64. An early form of extraordinary revision – under the name of 'judicial supervision' – was introduced as early as 1945 into military criminal procedure. Under the name of 'extraordinary revision' it was introduced into the (ordinary) criminal procedure in 1949 (act of 27.4.1949) and into civil procedure in 1950 (act of 20 July 1950). *See* Włodyka, n. 42 *above*, p. 188; Z. Resich, 'Nadzór judykacyjny Sądu Najwyższego' [The Judicial Supervision of the Supreme Court] in *Sąd Najwyższy w PRL* [The Supreme Court in the Polish People's Republic], L. Garlicki, Z. Resich, M. Rybicki and S. Włodyka (eds) (Wrocław-Warsaw, Zakład Narodowy im. Ossolińskich and Wydawnictwo Polskiej Akademii Nauk, 1983), p. 180.
65. Extraordinary revision was taken over by the Code of Civil Procedure 1964. Its Article 417 § 1 provided: 'Against any decision having the force of *res judicata*, ending the proceedings in a case, the Minister of Justice, the First President of the Supreme Court and the Attorney General of the Polish People's Republic may bring an extraordinary revision, if the decision flagrantly violates the law or the interests of the Polish People's Republic. The extraordinary revision may be limited to the motives of the judgment having the force of *res judicata*'.

the socialist family.[66] Extraordinary revision could be brought by the Minister of Justice, the Attorney General or the First President of the Supreme Court against *any* judgment[67] which had obtained the force of *res judicata,*[68] including judgments issued by the Supreme Court.[69] Extraordinary revision was thus a means of recourse unavailable to the parties and available only to certain public organs,[70] which were expected to bring it in the public interest;[71] all a party needed to do was to write a petition for an extraordinary revision to the Minister of Justice or to the Attorney General[72] who, however, had full discretion in lodging it or refusing to do so.[73] Since the establishment of the office of the Ombudsman (1 January 1988), the Ombudsman too has been entitled to bring an extraordinary revision as a means of protecting rights and liberties, as well as the principles of social community life and social justice.[74] The deadline for bringing an extraordinary revision was set for six months from the

66. S. Włodyka, 'Specjalne środki nadzoru judykacyjnego Sądu Najwyższego' [Special Measures of Judicial Supervision by the Supreme Court] in *Sąd Najwyższy w PRL* [The Supreme Court in the Polish People's Republic], L. Garlicki, Z. Resich, M. Rybicki and S. Włodyka (eds) (Wrocław-Warsaw, Zakład Narodowy im. Ossolińskich, Wydawnictwo Polskiej Akademii Nauk, 1983), p. 187. However, in some periods in some socialist countries (Czechoslovakia and Soviet Union) extraordinary revisions were decentralized and were heard *in pleno* by the court which pronounced the judgment. However, by the 1980s all socialist countries had already introduced the centralized system in which extraordinary revisions were reserved for the Supreme Court exclusively (Włodyka, n. 66 *above*, pp. 188, 189, n. 10–11).
67. Until 1962 some types of judgment (in social security cases and in military cases) were excluded from this means of recourse. Włodyka, n. 66 *above*, p. 190.
68. This covered all judgments issued by courts of second instance as a result of a revision, as well as judgments against which a revision was inadmissible.
69. However, a super-extraordinary revision was inadmissible, i.e. a judgment issued by the Supreme Court as a result of an extraordinary revision could not be attacked by another extraordinary revision (*see* Article 417 § 3 CCP 1964 and Article 467 § 7 CPP 1969). The rule that an extraordinary revision could also be brought against a Supreme Court decision was a common feature of the socialist legal family – *see* Włodyka, n. 42 *above*, p. 191.
70. This model was common for the whole socialist family. The right of the Attorney General to bring this means of recourse was recognized in all countries of the family, most of which – like Poland – recognized the right of the First President of the Supreme Court (with the exception of Yugoslavia); the right of the Minister of Justice was recognized only in Poland and in Czechoslovakia. During a certain period in the Soviet Union and Czechoslovakia the right to bring extraordinary revisions was also granted to medium and high-level local prosecutors and court presidents. *See* Włodyka, n. 42 *above*, pp. 196–197.
71. Włodyka, n. 42 *above*, p. 193 states that extraordinary revision is a means of recourse aimed primarily at realization of the social interest, whereas a different extraordinary means of recourse – the restitution of proceedings – is aimed primarily at realization of the individual interest. The individual interest is sufficiently protected, according to Włodyka, by the ordinary judicial remedy – the revision (to the court of second instance).
72. Włodyka, n. 42 *above*, pp. 198–200. The authorized organ has a duty to take the petition into account and reply to it (positively or negatively).
73. This is a result of the public-interest oriented construction of this means of recourse – *see* Włodyka, n. 42 *above*, p. 194.
74. Article 1(3) of the Ombudsman Act 1987.

date when the decision became *res judicata*; however, the deadline did not apply if the decision 'violated the interest of the Polish People's Republic'.[75]

Extraordinary revision – a clear example of socialist legal culture – survived without any modifications until 1996. In that year it was abolished and in its place the legislator introduced cassation – a judicial remedy loosely modelled on the French *cassation* which can be brought by the parties against a judgment issued by a court of second instance. However, in order to provide for a smooth transition from the extraordinary revision system to the cassation system, the legislator provided for sunshine legislation which enabled the Attorney General and the Ombudsman to bring so-called extraordinary cassations against judgments with the force of *res judicata* for a period of two years. Extraordinary cassations were a hybrid judicial remedy. They could be brought under the conditions provided for extraordinary revisions, but were heard by the Supreme Court according to the new provisions on cassations.

When the transition period expired in 1998, the fate of extraordinary revision seemed to have come to an end. However, it waited only two years to resurface once again. An amendment to the Code of Civil Procedure, enacted in 2000, reintroduced extraordinary cassation and allowed the Ombudsman (but not the Attorney General) to bring a cassation against any civil judgment issued by a court of second instance within six months from the date of the judgment, whereas parties were entitled to bring a regular cassation within a shorter, one-month deadline. This legislation was clearly intended to reintroduce some kind of public-law intervention in civil procedure, allowing the Ombudsman to bring it whenever – in his opinion – it was necessary in order to protect the rights and freedoms of citizens.

Autonomy-oriented lawyers did not give extraordinary cassation a warm welcome. It caused wide criticism and was also looked upon unfavourably by Supreme Court judges. The legislation also contained a technical failure: it was not clear when a judgment obtained the force of *res judicata* – after the deadline for a normal cassation had expired (one month from the day of the judgment) or after the expiry of the deadline for an Ombudsman's cassation (six months). These controversies found their finale before the Constitutional Tribunal. When the Ombudsman brought an extraordinary cassation in favour of a citizen in a matter concerning social security, the Supreme Court panel which heard the case decided to question its constitutionality by submitting a reference for a preliminary ruling to the Constitutional Tribunal. The judges harshly criticized extraordinary cassation, claiming that it is undemocratic and that it violates the principle of equality, giving the Ombudsman additional powers which are unavailable to ordinary litigants. The Constitutional Tribunal did not agree with this line of reasoning and pointed to the fact that extraordinary cassation is an effective instrument which allows the Ombudsman to fulfil his constitutional functions, that is, to ensure that human rights are protected. However, it agreed with the argument

75. Article 421 § 2 CCP 1964.

that the question of *res judicata* was not resolved properly and therefore such legislation – as violating the principle of a state of law enshrined in the Polish Constitution – could not be upheld.[76]

However, just one month after invalidating the provision of the Code of Civil Procedure regarding extraordinary cassation, the Constitutional Tribunal issued an order in which it requested the legislative power to enact a statute which would allow the Ombudsman to attack judgments that obtain the force of *res judicata* on account of human rights violations.[77] Interestingly, the Tribunal pointed to the powers of the *Procureur de la Cour de Cassation* in France. It did not, however, give socialist extraordinary revision as an example.

The government fulfilled the order of the Supreme Court by submitting a legislative draft in which extraordinary cassation was reintroduced to the Code of Civil Procedure. In the motivations of the draft amendment to the Code, the power to bring an extraordinary cassation was granted not only to the Ombudsman (as the Constitutional Tribunal requested) but also to the Attorney General. In the motivations of the draft amendment, the government, not unexpectedly, did not mention the desire to maintain continuity with the socialist legal tradition. In fact, there were practically only two arguments raised – first, the need to fulfil the request of the Constitutional Tribunal and therefore remove a state of unconstitutionality and secondly, the desire to bring about coherence between the Codes of Civil and Penal Procedure. The latter code had already since 1997 provided for extraordinary cassation (which had replaced extraordinary revision), granting the power to bring such a cassation not only to the Ombudsman but also the Attorney General.[78]

The amendment to the Code of Civil Procedure 1964 entered into force in February 2005, establishing a new system of access to the Supreme Court in civil cases. The hitherto existing cassation was formally abolished and its place was taken by two separate extraordinary recourses: the motion for cassation (*skarga kasacyjna*) and the motion for a declaration of illegality of a judicial decision having the force of *res judicata* (*skarga o stwierdzenie niezgodności z prawem prawomocnego orzeczenia*). The deadline for bringing a motion of cassation is

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76. Judgment of the Constitutional Tribunal of 19 February 2003 in Case P 11/02; *see* especially motivations, section IV subsection 5.
77. Order of the Constitutional Tribunal of 12 March 2003 in Case S 1/03.
78. Article 521 of the Code of Penal Procedure 1997 (as amended in 2003): 'The Attorney General, as well as the Ombudsman, may bring a cassation against any decision having the force of *res judicata* which ends the proceedings.' Ordinary parties may bring a cassation within 30 days from delivery of the decision (Article 524 § 1 CPP) while the Attorney General and Ombudsman are not bound by this time limit (Article 524 § 2 CPP) save for a cassation *in peius* which may be brought only within six months from the day when the decision obtained the force of *res judicata* (Article 524 § 3 CPP). Extraordinary cassation is also privileged in comparison with an ordinary one in that the Supreme Court may not declare it inadmissible during a closed session in the absence of the parties without motivating its decision in the case of obvious inadmissibility (Article 535 § 2 CPP; however, it should be noted that the provision allowing for such a way of proceeding with ordinary cassations has been declared unconstitutional by judgment of the Constitutional Tribunal of 16 January 2006, Case SK 30/05 *Dmochowski* and it will lose binding force as of 1 February 2007).

two months for the parties and six months for the Attorney General or the Ombudsman (Article 398-5 § 2 of the CCP).

The grounds of the motion for cassation are significantly limited by excluding, in principle, cases of small and medium value[79] as well as certain types of cases, notably divorce and alimentation.[80] It should be pointed out that in 1996, when cassation was introduced, the minimum value was set much lower and was applicable only to disputes regarding performance.[81] Therefore, in order to allow access to the Supreme Court for parties whose case does not qualify for cassation, the motion for declaration of illegality was introduced. This is designed as a subsidiary means of recourse: it may be brought by a party against a decision of the court of second instance if that decision – by virtue of its illegality – causes damage to the party and no means of recourse is available.[82] In exceptional cases, a motion for a declaration of illegality is admissible even if means of recourse were available but the parties failed to act within the prescribed time limits.[83]

Both of these extraordinary means of recourse – the motion for cassation and the motion for a declaration of illegality – can only be based on pleas in law (both substantive and procedural) and never on pleas in fact.[84] An additional requirement in order to bring a motion for a declaration of illegality is the actual damage suffered by the party.[85] The deadline for the parties is set, respectively for

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79. The minimum value of the object of the recourse (which, as a matter of course, is not necessarily equal to the value of the whole litigation) is set relatively high – 75,000 złotys (approx. € 19,000 or $ 24,000) for economic (commercial) cases, 50,000 złotys (approx. € 12,600 or $ 16,000) for other civil cases. Only as a result of parliamentary intervention, the minimum value for certain social security cases is set lower at 10,000 złotys (approx. € 2,500 or $ 3,200) to include medium claims.
80. Apart from that, the motion for cassation is also excluded in cases concerning rental fee, violation of possession, penalties imposed by the court for violation of order, labour certificates as well as all cases which were heard in summary procedure. *See* Article 398-2 § 2 CCP 1964 (as of 2004).
81. In 1996 the minimum value of the object of recourse (in a dispute regarding performance) was set for 5,000 zł (approx. $ 1,800 at the time) for ordinary civil cases and at 10,000 zł (approx. $ 3,600 at the time) which is significantly lower when compared with the current minimum (respectively equal to $ 24,000 in economic cases and $ 16,000 in other civil cases). It must be stressed that those minimum values did not apply to other patrimonial disputes, e.g. a claim for vindication of a thing would be eligible for cassation even if the value of the thing was lower than 10,000 złotys.
82. *See* Article 424-1 § 1 CCP 1964/2004.
83. Exceptional cases are defined by Article 424-1 § 1 CCP 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'.
84. Article 398-3 CCP 1964/2004: '§ 1. A motion 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 motion for cassation may not be based on pleas regarding the determination of facts or the evaluation of evidence.'
85. Art. 424-4 CCP 1964/2004: 'A motion [for the declaration of illegality] may be based on the violation of substantive law or the provisions of procedural law which caused the illegality of the decision if by the issue of the decision the party suffered damage. A motion may not be based on pleas regarding the determination of facts or evaluation of evidence.'

two months from the delivery of a motivated decision (motion for cassation)[86] and two years from the day when the judgment obtained the force of *res judicata* (motion for declaration of illegality).[87]

The Attorney General and the Ombudsman are entitled to bring both extraordinary means of recourse on special conditions. First of all, they may bring motions only on specifically tailored grounds. The Attorney General may base his motion (for cassation or for declaration of illegality) only on 'violation of the fundamental principles of the legal order', whereas the Ombudsman may base his motion only on 'violation of the constitutional liberties or rights of man or citizen'.[88] The two-year deadline for bringing a motion for a declaration of illegality is binding on the Ombudsman and Attorney General. However, in the case of a motion for cassation they have a privileged position, being entitled to bring that motion within a deadline of six months (rather than two months).[89] A motion for cassation brought by one of the parties excludes – within its scope – a motion brought by the Ombudsman or Attorney General.[90] It must be underlined that the extraordinary means of recourse brought by the Ombudsman or the Attorney General have an effect *inter partes* and cannot therefore be compared e.g. with the French 'cassation in defence of the statute' which does not affect the legal situation of the actual parties to civil litigation.

The current legal framework – which gives the Ombudsman and the Attorney General the right to question the outcome of civil proceedings by bringing an extraordinary means of recourse against judgments which have the force of *res judicata* – bears a strong sign of continuity with extraordinary revision, which was introduced by the socialist regime in 1950 and abolished only in 1996. Undoubtedly, there are significant differences between extraordinary revision and the means of recourse currently available to the Attorney General and the Ombudsman. However, there are also significant features common to both institutions. On the one hand, they allow us to speak of continuity and, on the other hand, they should be considered as yet another strong argument in favour of the distinctiveness of Polish law as a result of the strong influence of the (allegedly dead and buried) socialist legal tradition.

3.5 The Preliminary Reference to the Supreme Court

Most Western lawyers know the notion of the preliminary reference procedure from European Community law which, in the famous Article 234 EC, allows

86. Article 398-5 § 1 CCP 1964/2004.
87. Article 424-6 § 1 CCP 1964/2004.
88. *See* Article 398-3 § 2 CCP 1964/2004 (motion for cassation) and Article 424-2 CPP 1964/2004 (motion for declaration of illegality).
89. *See* Article 398-5 § 2 CCP 1964/2004. The deadline runs, in principle, from the day when the judgment obtained the force of *res judicata*.
90. Article 398-1 § 2 CCP 1964/2004.

national courts to submit questions regarding Community law to the Court of Justice of the EC or from the constitutional law of certain states (such as Germany) which allows lower courts to submit questions regarding the constitutionality of a statute. It is therefore interesting to point out that the Polish law of civil and penal procedure also provides for such references – which may be submitted by courts of second instance to the Supreme Court. The preliminary rulings procedure was introduced into Polish law in 1950 when the three-instance system (first instance, appeal, cassation) was replaced by a two-instance system (first instance, revision) while four grades of courts (municipal courts, circuit courts, appellate courts, Supreme Court) were replaced with only three grades (district courts, regional courts, Supreme Court). Most cases were heard by district courts in the first instance and by regional courts in the second instance, which did not allow the Supreme Court to exert any direct influence (as prior to 1950 by way of cassation) upon the case-law of the lower courts. Therefore, additional instruments had to be introduced – these included extraordinary revision, abstract resolutions, guidelines and preliminary rulings, which will be discussed now.

The preliminary reference procedure has not changed much since its introduction in 1950. It is always facultative and never obligatory and may only be brought by a court of second instance. The court has to be faced with a 'legal question causing serious doubts' as the Code formulates it. The Supreme Court has discretion to answer the question; however, if the Supreme Court finds the question inadmissible (because it does not cause 'serious doubts') it must motivate its decision, thus in some way answering the question. This seems to be similar to the *acte clair* and *acte éclairé* doctrines followed by the ECJ. There is also another similarity – the resolution of the Supreme Court answering the question is binding upon the court *a quo* but only in the case at hand. This, of course, does not exclude the persuasive value of the Supreme Court's resolution in other cases, but formally speaking it does not have the force of precedent.

According to S. Włodyka, the preliminary reference procedure described above is a peculiar feature of the Polish legal system, unknown in other socialist states.[91] The only jurisdiction where a similar institution exists is US law, which allows for 'certified questions' to be submitted by federal Courts of Appeal to the US Supreme Court.[92] However, Włodyka underlines that no reception took place

91. Włodyka, n. 42 *above*, p. 244.
92. *See* US Code, Title 28, § 1284: 'Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; (2) By certification at any time by a court of appeal 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.' State laws also provide for the certification of questions procedure: this is, however, aimed at providing federal courts or courts from other states an answer about the law of the given state. *See* e.g. Montana Code, Rule 44, which – as a ground for certifying a question – points to a situation when 'the pending litigation involves a question to be decided under the law of the other jurisdiction' (Rule 44(b) (1)). It seems, therefore, that the American

since the similarity is 'purely casual'.[93] Włodyka did not mention the Treaty of Rome; however, the same remark could be made in that regard. Finally, it should be added that the certified questions procedure is very rarely used in American practice, in contrast with preliminary rulings in Polish legal culture.

Interestingly, the number of questions submitted by lower courts of second instance has not changed radically. In 1962, 88 questions were submitted;[94] between 1971 and 1974 on average 185 yearly.[95] The current data – for civil cases alone – is 93 questions submitted in 2004, 114 questions submitted in 2005 and 62 questions submitted during the first half of 2006.[96] Questions submitted range from very detailed[97] to more general ones, such as the recently submitted question regarding the difficult problem of the legal capacity of a housing condominium,[98] the powers of the court of second instance when hearing an appeal[99] or the possibility of amending a claim at the appellate stage of divorce proceedings.[100] The questions are accompanied by a reasoned opinion,

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certification of questions procedure has more in common with transfrontier judicial assistance (*pomoc sądowa*) as in the private international law context, rather than with the preliminary reference procedure known in Polish or EC law.

93. Włodyka, n. 42 *above*, p. 245.
94. Data according to Włodyka, n. 42 *above*, p. 274 (n. 245).
95. *Ibid.*, p. 274.
96. *See* respectively for 2004: <www.sn.pl/aktual/stat/ic/ic_2004.pdf>, 15 September 2006; for 2005 <www.sn.pl/aktual/stat/ic/ic_2005.pdf>, 14 September 2006, and for 2006 (first half): <www.sn.pl/aktual/stat/ic/ic_1polr_06.pdf>, 14 September 2006.
97. Many questions deal with intertemporal issues, e.g. connected with the entry into force of the new Judicial Costs Act 2005 (questions in cases, III CZP 70/06, III CZP 74/06, III CZP 100/06) or the interpretation of this new Act (III CZP 58/06, III CZP 91/06, III CZP 98/06)
98. Question submitted in case III CZP 97/06: 'Does a housing condominium (*wspólnota mieszkaniowa*) have legal capacity and judicial capacity and, as a result, can it possess property, this property being separate from the property of the owners of the apartments or does a housing condominium not have legal capacity and it acquires property on behalf of its members in a relationship corresponding to their share in the common immovable?' at <www.sn.pl/aktual/index.html>, 14 September 2006.
99. Question in case III CZP 85/06 submitted by the Circuit Court in Katowice: 'Does a court of second instance, when hearing a case once again [i.e. as a result of a second appeal in the same case] decide on its merits outside the scope of the plaintiff's appeal against the first decision of the court of first instance in the part rejecting the claim when the court of second instance, when deciding the case for the first time, quashed the judgment of the district court also outside the scope of the appeal?' at <www.sn.pl/aktual/pytaniapr/ic/III-CZP-85_06.pdf>, 14 September 2006.
100. Question submitted in case III CZP 87/06: 'Is it possible for a party to divorce proceedings to withdraw, at the stage of appellate proceedings, her demand that the court refrain from deciding on guilt for decomposition of cohabitation (Article 57 § 2 Family and Guardianship Code)?' at <www.sn.pl/aktual/pytaniapr/ic/III-CZP-87_06.pdf>, 15 September 2006. The facts of the case described in the order from the lower court reveal a situation in which the marriage ended as a result of the husband's fault; however, the wife agreed that the court would not decide on fault, hoping that the matrimonial property would be divided amicably. When this did not work out, the wife decided to withdraw her request and asked the court to decide on the husband's guilt for the marriage break-up.

explaining the facts of the case as well as discussing the existing, contradictory case-law, and thus justifying the need for the Supreme Court's decision.[101]

4. LEGAL TRANSPLANTOLOGY: SOCIALIST, SOVIET OR RUSSIAN?

Looking at the public-law elements in Polish civil procedure from the point of view of legal transplants,[102] one has to face the question of their origin. There seem to be three alternative answers – transplants can be either socialist (stemming from Marxist-Leninist ideology), or Soviet (stemming from the law of the USSR) or even Russian (originating in pre-revolutionary Russian law but transplanted to Poland only after 1945). Finally, some legal institutions may simply be of Polish origin, not being a foreign transplant at all.

Aiming at a preliminary assessment, one should first point out that the preliminary reference procedure – introduced, incidentally, together with many Soviet solutions – seems to be an original Polish 'legal invention', rather than a transplant. This view is supported by several factors. First of all, there was no such procedure in any socialist country. Secondly, a similar procedure was introduced in other legal systems (such as Community law or US federal law) but later than the Polish solution.

On the other hand, the wide power of the prosecutor in civil proceedings was modelled on Soviet law, which in turn stems from imperial Russian law of the times of Peter the Great when the Russian *Prokuratura* was established as a body in charge not only of prosecuting crimes (as in Western countries), but also with a general competence in the field of supervising the administration and the courts.[103] Therefore, one can state that the Polish model of the prosecutor's wide participation in civil proceedings is a legal transplant from Russia.

Extraordinary revision, as mentioned, was a legal institution common to all jurisdictions of the socialist family; it can therefore be treated as a Soviet legal transplant.

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101. *See* e.g. question III CZP 87/06, accompanied by a 7-page opinion, in which the Court of Appeal discussed three Supreme Court judgments supporting one solution (judgments of 1952, 1958 and 2005) and one judgment supporting the other solution (dating from 1960). Having established a contradiction between those judgments, the Court of Appeal asked the Supreme Court to resolve the dispute, at <www.sn.pl/aktual/pytaniapr/ic/III-CZP-87_06.pdf>, 15 September 2006 (on file with the author).

102. The notion of legal transplants has been introduced under this name by A. Watson, *Legal Transplants: An Approach to Comparative Law* (Charlottesville, The University Press of Virginia, 1974). However, the concept itself, known under the name of 'reception' (*Rezeption*) is much older and was widely discussed especially in the context of the reception of Roman private law in Germany and other European countries.

103. The Russian Attorney's Office was established in 1722 and was headed by an Attorney General (*General-Prokurator*). *See* M. Sczaniecki, *Historia powszechna państwa i prawa* (9th edn, Warsaw, Wydawnictwo Prawnicze PWN, 1998), p. 293; H. Izdebski, *Historia administracji* [History of Administration], (5th edn, Warsaw, Liber, 2001).

5. CONCLUSIONS

Referring once again to Stroiński's 'marriage-and-divorce' metaphor, as a concluding remark one could say that although there is no doubt as to Poland's 'overnight divorce' from the socialist legal family, there are still numerous surviving offspring of the 50-year-long marriage. Among these one should point to at least three: the prosecutor's participation in civil proceedings, extraordinary cassation and the preliminary reference procedure. Their presence contributes to the particularity of Polish law of civil procedure – or, speaking in more general terms, of Polish legal culture which, in an original way, combines transplants stemming from various foreign legal traditions (Russian, Soviet, Western) with original solutions invented by Polish lawyers. Therefore, representations of Polish legal culture, which describe it in black-and-white categories of neatly-cut discontinuity from former socialist law or its present unqualified adherence to the 'Western legal tradition' should at least be approached with caution, if not rejected for being tainted with the error of oversimplification.