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**Publication date**

2016

**Document Version**

Final published version

**Published in**

Law and Critique in Central Europe

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**Citation for published version (APA):**

Mańko, R. (2016). Demons of the Past? Legal Survivals of the Socialist Legal Tradition in Contemporary Polish Private Law. In R. Mańko, C. Cercel, & A. Sulikowski (Eds.), *Law and Critique in Central Europe: Questioning the Past, Resisting the Present* (pp. 66-89). Counterpress. <https://counterpress.org.uk/publications/law-and-critique-in-central-europe/>

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# Law and Critique in Central Europe

Questioning the Past, Resisting the Present

*Edited by*

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and Adam Sulikowski

COUNTERPRESS  
OXFORD

First published 2016  
Counterpress, Oxford  
<http://counterpress.org.uk>

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ISBN: 978-1-910761-01-4 (paperback)

Typeset in 10 on 12 pt Sabon  
Cover by SUGAHTANK design  
[www.behance.net/SUGAHTANK](http://www.behance.net/SUGAHTANK)

Global print and distribution by Ingram

## Demons of the Past? Legal Survivals of the Socialist Legal Tradition in Contemporary Polish Private Law

*Rafał Mańko*

According to a stereotype ... ‘the real socialism’ was ... a kind of blackout of European legal history.<sup>1</sup>

—Tomasz Giaro

### 4.1 Introduction

The radical socio-economic transformation from capitalism to actually existing socialism, which occurred in Poland after World War II, was caused by external factors—firstly, the liberation of Polish territories from German occupation by the Red Army, and secondly, the macro-political decisions taken by the victorious powers as to Poland’s subjection to Soviet tutelage as part of the ‘Eastern bloc.’<sup>2</sup> Polish Communists were fully aware that social support for their rule was low, and therefore never dared to organize truly free elections or referenda. Regardless of the successes of Communist rule in Poland in the fields of social progress and economic development,<sup>3</sup> this notorious lack of democratic legitimacy and the consciousness of external imposition of the Communist government have been weighing heavily on commonly held views about the period of actually existing socialism. The stifling lack of political choice (with

<sup>1</sup> Tomasz Giaro, ‘Some Prejudices about the Legal Tradition of Eastern Europe,’ in *Comparative Law in Eastern and Central Europe*, ed. Bronisław Sitek, Jakub Szczerbowski and Aleksander Bauknecht (Newcastle-upon-Tyne: Cambridge Scholars Publishing, 2013), 26–50, 45.

<sup>2</sup> Jerzy J. Wiatr, ‘PZPR w pojałtańskiej rzeczywistości’ [The Polish United Workers’ Party in the Post-Yalta Reality] in *Polska pod rządami PZPR* [Poland under PZPR Rule], ed. Mieczysław F. Rakowski (Warszawa: PROFI, 2000), 293.

<sup>3</sup> Cf. Jan Sowa, ‘An Unexpected Twist of Ideology. Neoliberalism and the Collapse of the Soviet Block,’ *Praktyka Teoretyczna* 5 (2012), 153–80, 172–3.

systematically falsified elections) and the constant repression of the freedom of expression by preventive censorship, both features enduring throughout the period, have left an overall negative impression of People's Poland even on intellectuals of a sincerely left-wing orientation. If we add to this the widely felt symptoms of Poland's long-term economic crisis which began at the end of the 1970s and spread over the subsequent decade, limiting consumer access to even the most basic goods, it will not come as a surprise that the need for a transformation from actually existing socialism to a market economy was widely accepted. This background well explains why actually existing socialism does not enjoy a particular prestige, also among legal elites, which has led to the adoption of a dominant narrative aimed at downplaying the role of state socialist legal survivals in Polish legal culture.

The purpose of the present chapter is to critically reflect on the dominant narrative of discontinuity with the state socialist past within legal culture. To this end, the chapter will focus on legal survivals of the period of actually existing socialism in private law. Due to the large number of such survivals, the chapter will analyze only four selected examples, two from substantive civil law and two from civil procedure. What is characteristic for the four legal institutions which will be discussed in more detail is that despite their state socialist origin (they date, respectively, from 1950, 1953, 1961, and 1964), they are still being resorted to in practice after the transformation of 1989. This patent fact will serve as a basis to destabilize the dominant anti-communist narrative about discontinuity in Polish legal culture: if legal institutions created under communist rule in Poland are still useful after the transformation, this period cannot be treated as a 'legal black hole' or 'blackout' of Polish legal history. To the contrary, any historical narrative of Polish legal culture should take the period of actually existing socialism (1944–89) into account, treating it *al pari* with any other period of reduced national sovereignty, such as the period of the Duchy of Warsaw (1807–14) or the period of the semi-sovereign Kingdom of Poland (1815–31) created by the Congress of Vienna.<sup>4</sup> Despite the radically different foundations of the socio-economic system (actually existing socialism vs. capitalism), institutions of private law developed during the socialist period have proven to be useful today. This paradoxical feature of legal survivals—their capability of surviving a radical transformation from one system to another—leads me to draw more general conclusions on legal survivals and legal culture, claiming that they are a normal, physiological feature of legal culture, rather than its pathology.

The present chapter is structured as follows: the present chapter begins with a presentation of the dominant narrative about the state socialist

<sup>4</sup> Cf. Andrzej Leon Sowa, *Historia polityczna Polski 1944–1991* (Kraków: Wydawnictwo Literackie, 2011), s. 719.

past. This is followed by a discussion of four examples of post-socialist legal survivals in Polish private law. The final section makes more general, concluding remarks about legal survivals and legal culture.

#### 4.2 A Blackout only Worth Forgetting: Narratives of the State socialist Past

As Polish legal historian Tomasz Giaro recently pointed out:

According to a stereotype ... ‘the real socialism’ was a historical regression; indeed, a kind of blackout of European legal history. ... [T]he law of real socialism aligns neither with the preceding nor with the following system and should be forgotten straight away.<sup>5</sup>

This approach to the period of actually existing socialism as a ‘blackout’ applies not only to the legal community, but to the public discourse in Poland in general. A ‘discourse of transformation,’ which remains dominant, structures the narrative of the past and the interpretation of historic events. Doubtlessly, Poland’s history during the last century was marked by perplexing discontinuity. These radical changes affected all aspects of social life—from property regimes to state boundaries, from organization of the workplace to the overall economic system, and from procedural rights of the parties to the organization of judiciary. Such radical changes, undermining the feeling of sense and purpose, need to be built into a broader narrative structure, lending them a feeling of order and teleology. In the general discourse of the past in post-1989 Poland this function has been played by a figure which I have elsewhere proposed referring to as the ‘RETURN TO EUROPE schema.’<sup>6</sup> This schema is composed in the same way as any classical narrative structure (from the old Russian fairy tale to a scholarly paper), in that it is based on three compositional elements—a SOURCE, a PATH, and a GOAL.<sup>7</sup> The narrative commences with the SOURCE, then progresses along the PATH in order to reach the GOAL.

In the RETURN TO EUROPE schema the three compositional elements can be identified as follows. First is the initial stage (i.e. the SOURCE), during which Poland is presented as belonging to the (prestige lending) West. This stage corresponds to the period of the Second Republic (1918–39).

<sup>5</sup> Giaro, ‘Some Prejudices,’ 45.

<sup>6</sup> Rafał Mańko, ‘Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as Symptom/*Sinthome*,’ *Pólemos: Journal of Law, Literature and Culture* 7/2 (2013), 207–33, 210–12.

<sup>7</sup> On narratives and their compositional structures, see, e.g. Steven L. Winter, *A Clearing in the Forest: Law, Life and Mind* (Chicago-London: University of Chicago Press, 2001), 108–11.

The SOURCE is a point of reference for the entire narrative, and therefore the Second Republic is heavily idealized both in popular media and in historiography.<sup>8</sup>

The second stage in the narrative is the PATH, a transitory period, characterized by a lack and imbalance. In the RETURN TO EUROPE schema, the PATH is what is presented as Poland's submission to Soviet domination, which—in contrast to the previous period (the SOURCE) is shown as her 'kidnapping *away from* Europe.' The narrative structure thus detracts away from facts pointing to the development and progress of the nation's society and economy during actually existing socialism,<sup>9</sup> but focuses exclusively on moments of anti-regime revolt and struggle (1956, 1968, 1970, 1976, 1980–81 and subsequent repressions),<sup>10</sup> even structuring the periodization of Poland's post-War history by reference to those events. Important as they undoubtedly are, the predominant focus on those moments of struggle under the RETURN TO EUROPE schema makes the narrative of Polish history one-sided.

The PATH in line with its compositional function obviously leads to the GOAL or *agon* that is the third and final stage of the narrative, lending sense to the previous compositional elements. Therefore, if Poland's initial balanced starting point was in the West (SOURCE) and this balance was distorted by subjection to the East (PATH), the GOAL is Poland's RETURN TO EUROPE. This corresponds to what Polish constitutional lawyer Wojciech Sadurski identified as the 'discourse of "normalcy",' typical of post-transition Central European countries, which boils down to the wish to have

no experiments; [the wish] to build a normal country, a normal economy, a normal constitutional rule-of-law [where 'normal' refers] invariably ... to a situation corresponding to the (real or imagined) state of affairs in Western Europe or North America.<sup>11</sup>

<sup>8</sup> See Agnieszka Mroziak, 'II RP—raj utracony, raj odzyskany' [The Second Republic: Paradise Lost, Paradise Regained], *Bez dogmatu* 93 (2012).

<sup>9</sup> An attempt to revindicate those positive aspects of actually existing socialism have been recently made by the authors of two collective works: Piotr Szumlewicz and Jakub Majmurek, ed., *PRL bez uprzedzeń* [The Polish People's Republic Without Prejudices] (Warszawa: Książka i Prasa, 2010) and Wiesław Żółtkowski, ed., *Zrozumieć PRL* [Understanding the Polish People's Republic] (Warszawa: Muza, 2012).

<sup>10</sup> In June 1956 workers organized riots in Poznań; in March 1968 students protested against excessive censorship in the field of culture; in December 1970 workers protested against rises in the prices of heavily subsidized meat; in June 1976 workers once again protested against attempts to reduce the subsidizing of foodstuff prices; in 1980 workers went on strike for the same reason, but this time the weakened Communist government entered into a social contract (August 1980), broken the next year (December 1981) by the introduction of Martial Law.

<sup>11</sup> Wojciech Sadurski, 'Transitional Constitutionalism: Simplistic and Fancy Theories,' in *Rethinking the Rule of Law After Communism*, ed. Adam Czarnota et al. (Budapest: CEU Press, 2005), 9–24, 9.

In the Polish context, let us add that ‘normal’ also refers on various occasions to the idealized period of the Second Republic.<sup>12</sup>

Any narrative has a certain agenda and political consequences. The RETURN TO EUROPE schema is no exception here. The most important consequence of adopting this narrative is the view of the transformation of 1989 as a historical necessity, the outcome of a 45-year-long struggle for freedom and independence from foreign occupation rather than a conscious, reflected upon, and informed choice of society.<sup>13</sup> If the transformation of 1989, especially the Shock Therapy,<sup>14</sup> is presented in this teleological way, this allows concealment of the fact that the Polish reformers could have chosen between different varieties of a market economy, instead of opting for the most neoliberal one, as they did. Furthermore, the RETURN TO EUROPE schema also disempowers Polish society, depriving it of the status of conscious subject of historical change, and transforming it into a mass, subjected to destiny or to choices made by enlightened elites.

A further consequence of the dominant narrative is the representation of actually existing socialism as, to use Giaro’s expression cited above, a ‘blackout’ in Polish history,<sup>15</sup> a period tainted with only negative features, an utterly illegitimate regime.<sup>16</sup> This delegitimization has of course the other side of the coin—an unqualified legitimization of the imposition of neoliberal governance after 1989.<sup>17</sup> Under such circumstances, any form of continuity or even semblance with the period of actually existing socialism becomes, therefore, problematic, and can be employed as a delegitimizing argument.<sup>18</sup> This allows neoliberals and neoconservatives to discard any proposals aiming at ensuring greater social justice solely on the premise that this or that solution bears a similarity to a certain solution known during the period of actually existing socialism. An example of this approach is a paper by Polish private lawyer and ECJ judge Marek Safjan, in which

<sup>12</sup> See Mrozik, ‘II RP.’

<sup>13</sup> Marta Trawińska, ‘Współczesne polskie feministki o możliwościach upodmiotowienia kobiet w okresie PRL-u’ [Contemporary Polish Feminists on the Possibilities of Female Empowerment in the Period of the Polish People’s Republic], in Szumlewicz and Majmurek, *PRL bez uprzedzeń*, 185; Mańko, ‘Weeds,’ 211.

<sup>14</sup> On which see especially: Jane Hardy, *Poland’s New Capitalism* (London-New York: Pluto Press, 2009), ch. 3 and Tadeusz Kowalik, *From Solidarity to Sellout: The Restoration of Capitalism in Poland* (New York: Monthly Review Press, 2011), part 1.

<sup>15</sup> Giaro, ‘Some Prejudices,’ 45.

<sup>16</sup> Jakub Majmurek and Piotr Szumlewicz, ‘Fakty i mity o PRL-u’ [Facts and Myths About the Polish People’s Republic], in *PRL bez uprzedzeń...*, p. 8–9. Cf. David Ost, ‘Wstęp’ [Introduction] in *Prywatyzując Polskę. O bobofrutach, wielkim biznesie i restrukturyzacji pracy* [Privatizing Poland: Baby Food, Big Business and the Remaking of Labor], Elizabeth C. Dunn, trans. Przemysław Sadura (Warszawa: Wydawnictwo Krytyki Politycznej, 2008), 5–12, 11.

<sup>17</sup> Majmurek and Szumlewicz, ‘Fakty i mity,’ 15.

<sup>18</sup> Majmurek and Szumlewicz, ‘Fakty i mity,’ 16.

he expresses his scepticism with regard to the promotion of social justice in private law, preferring the liberal paradigm of autonomy, and treating social justice as the ‘publicization’ of private law. Among the arguments raised is a historical one—placed in a section symptomatically entitled ‘Socialist Lesson’—where he writes:

The tendencies to publicize private law, which seem to question its autonomous goals and values and to blur the division between private and public law, are nothing new in the history of the twentieth century. Being aware of all the differences, *we must not forget an experiment carried out for decades in Eastern and Central Europe* which systematically undermined the idea of private law and its status as a branch of law independent from public law. ... [T]o some extent the lesson learnt from that ‘experiment’ may be useful and instructive in as much as it shows that there is an impassable border to the interference with private law, beyond which there is a risk of damaging the core of its structures.<sup>19</sup>

The above passage confirms the view that the Polish legal community is imbued in the same RETURN TO EUROPE narrative which is applicable in general political and historical discourse. Whereas the general compositional structure remains the same, with the idealization of the period of the Second Republic and, in particular, its legal output such as the Code of Obligations,<sup>20</sup> and a negative evaluation of the period of actually existing socialism, there are some interesting specific conceptual figures in the legal narrative which I would like to draw attention to. I have labelled them elsewhere as the CONTAINER schema, the SUBMISSION metaphor, the PURIFICATION metaphor, and the RECONSTRUCTION metaphor.<sup>21</sup>

The CONTAINER schema is used to stress the fact that Poland was always part of the Western legal tradition, the ‘West’ is metaphorically pictured as a ‘container.’ and Poland is ‘inside’ this ‘container.’<sup>22</sup> Thus for instance Polish lawyer Rafał T. Stroiński, writing for a Western audience about Polish company law, started his paper by making the following assertion:

Polish law *belongs* to the western legal tradition, its laws for historical and cultural reasons *belonging* to the Germanic and Romanist legal families. This influence survives strongly until now.<sup>23</sup> (Emphasis added)

<sup>19</sup> Marek Safjan, ‘European Law versus Private Law: Transformation or Deformation of the Paradigm?’, in *General Principles of EU Law and European Private Law*, ed. Ulf Bernitz et al. (Alphen aan den Rijn: Kluwer Law International, 2013), 155–169, 159.

<sup>20</sup> Regulation of the President of the Republic of 27 October 1933—Code of Obligations (kodeks zobowiązań) (Dz.U. no. 82 item 598).

<sup>21</sup> Mańko, ‘Weeds,’ 212–14.

<sup>22</sup> On the ‘container’ schema from a cognitive perspective, see Winter, *A Clearing in the Forest*, 62–3.

<sup>23</sup> Rafał T. Stroiński, ‘Report from Poland,’ *European Company Law* 3/1 (2006), 39.

If, in line with the CONTAINER schema, Poland was always part of the Western legal tradition, its exposure to Soviet legal influence (1944–89) cannot be treated otherwise than as a form of submission. As I noted above, the period of actually existing socialism is presented in the dominant discourse as something unwanted and forced upon Poland. This is expressed, in the legal discourse, by the SUBMISSION metaphor. Lawyers write therefore about ‘a fifty-year-long period of *submission* to the so called “socialist family”;<sup>24</sup> (emphasis added) or indicate that ‘the development of the civil law codification [in Poland] was *stopped* ... during the Communist regime, again *imposed by force*.’<sup>25</sup>

The way towards the *agon* or GOAL of the RETURN TO EUROPE narrative, that is the final return to ‘normalcy,’ is presented in legal texts by two metaphors—one of PURIFICATION and another of RECONSTRUCTION.<sup>26</sup> I will focus on the first one here, under which Polish legal culture is metaphorically presented as being ‘contaminated’ by (the dirt of) Soviet influence which must be cleaned (purified) after 1989. A good example of this metaphorical way of portraying the post-socialist changes in Polish legal culture is the following passage from a paper written by Judge Marek Safjan in co-authorship with an official from the Polish Ministry of Justice:

‘the Polish private law system ... survived the communist times *buried under the cover* of ideology ... the classic civil law basic constructions remained, sometimes *hidden under the surface* of the ideological ornament [therefore] [w]hen the ideological *implant is removed* [private-law treatises written under actually existing socialism can] serve as a source of great inspiration.’<sup>27</sup>

Also for Polish comparative lawyer Jerzy Rajski, the post-1989 legal reforms ‘were greatly facilitated by the possibility of *returning* to Poland’s pre-war *traditions* [and were] aimed at *eliminating* “socialist” *distortions* to civil law.’<sup>28</sup>

In the same vein, the authors of a textbook on civil procedure write about legal survivals of actually existing socialism as ‘*accretions* imported from the East’ which, after 1989, ‘began to be gradually *removed*.’<sup>29</sup> Many

<sup>24</sup> Stroiński, ‘Report from Poland,’ 39.

<sup>25</sup> Jerzy Rajski, ‘European Initiatives and Reform of Civil Law in Poland,’ *Juridica International* 14 (2008), 151–155, 152.

<sup>26</sup> Mańko, ‘Weeds,’ 213–4.

<sup>27</sup> Marek Safjan and Aneta Wiewiórowska-Domagalska, ‘Political Foundations of European Private Law: Rethinking the East-West Division Lines,’ in *The Foundations of European Private Law*, ed. R. Brownsword et al. (Oxford-Portland OR: Hart, 2011), 278. Emphasis added.

<sup>28</sup> Rajski, ‘European Initiatives,’ 152. Emphasis added.

<sup>29</sup> Jerzy Jodłowski, Zbigniew Resich, Jerzy Lapiere and Teresa Misiuk-Jodłowska, *Postępowanie cywilne* [Civil Procedure] (3<sup>rd</sup> ed., Warszawa: LexisNexis 2003), 33. Emphasis added.

more examples could be mentioned.<sup>30</sup>

The dominant legal narrative, based on the RETURN TO EUROPE schema, treats therefore any interaction of Polish legal culture with the socialist legal tradition in terms of pollution and impurity, which must be cleaned. This interaction is not interpreted as a stage in the development of Polish legal culture, but rather as something unnatural, imposed by force, whose traces must be removed. The RETURN TO EUROPE schema serves therefore to prevent an evolutionary/teleological account of Polish legal history, which would see the period of actually existing socialism as yet another stage of purpose-oriented development, leading to the current outcome. To the contrary, to quote Giaro once again, the state socialist period is presented as: ‘a historical regression ... a kind of blackout,’ and therefore the law of that period ‘aligns neither with the preceding nor with the following system and should be forgotten straight away.’<sup>31</sup>

This constant disavowal of the state socialist past can be illustrated by the way in which a leading textbook on civil procedure deals with one of the survivals of the socialist legal tradition analyzed in 3.4 below, namely the prosecutor’s *locus standi* in civil proceedings. Whilst the 1983 edition of that textbook openly admitted (if not boasted) the Soviet origins of the institution in question,<sup>32</sup> its post-transformation edition tried to conceal them, mentioning that the ‘fatherland of the institution of the prosecutor is France,’<sup>33</sup> but symptomatically failing to mention that the Polish model of prosecutorial intervention is a direct (and forced) reception of Soviet law.

A similar approach was taken by the authors of an article-by-article commentary to the Code of Civil Procedure published in 1996,<sup>34</sup> directly after the reintroduction—after 46 years—of ‘appeal’ (*apelacja*) and ‘cassation’ (*kasacja*) to Polish civil procedure, which displaced the appellate proceedings of the socialist period, namely the ‘revision’ (*rewizja*) and the ‘extraordinary revision’ (*rewizja nadzwyczajna*). The commentary to the articles on *apelacja* and *kasacja* referred exclusively to literature pre-dating the introduction of *rewizja* and *rewizja nadzwyczajna*, and tried to create an impression that the entire period of 46 years (1950–96) was being erased, as if Polish civil procedure made a journey in a time machine back to the pre-1950 period. In fact, the commentary was at pains to underline the origins of *apelacja* in ancient Rome(!), but upon arriving at 1950

<sup>30</sup> See Mańko, ‘Weeds,’ 213 n. 31.

<sup>31</sup> Giaro, ‘Some Prejudices,’ 45.

<sup>32</sup> Witold Broniewicz, *Postępowanie cywilne w zarysie* [Civil Procedure in Outline] (3<sup>rd</sup> ed., Warszawa: Państwowe Wydawnictwo Naukowe, 1983), 63–4.

<sup>33</sup> Witold Broniewicz, *Postępowanie cywilne w zarysie* [Civil Procedure in Outline] (8<sup>th</sup> ed., Warszawa: Lexis Nexis, 2005), 66.

<sup>34</sup> Kazimierz Piasecki in *Kodeks postępowania cywilnego. Komentarz* (Warszawa: C.H. Beck, 1996), Vol. I, 1098–101.

it made an abrupt jump and immediately referred to 1996.<sup>35</sup> The same approach was taken towards the reintroduced *kasacja* which replaced the former *rewizja nadzwyczajna*. Again, the commentary looked for distant historical references, tracing the Polish *kasacja* back to a French *loi* of 1790, but found it totally irrelevant to discuss the *rewizja nadzwyczajna*.

These examples demonstrate that both local and foreign scholars display a manifest preference for a discontinuity-focused approach, treating the period of actually existing socialism as a ‘blackout’ in local legal history (as Giaro calls it), which should be ‘leaped over’ rather than analyzed. One is tempted to see here a reversal of what Monateri showed with regard to the Roman law tradition:<sup>36</sup> instead of a bias for continuity, there is a strong bias of discontinuity, and the current impact of the socialist legal tradition is being systemically overlooked, downplayed, and minimized.

Is the period of actually existing socialism really a complete ‘blackout’ as the stereotype has it, or can existing legal survivals of that period be said to undermine such a view? The instances of legal continuity after 1989, analyzed in the following section, will challenge the stereotype, and allow us to put forward (in the conclusions of the dissertation) a counter-intuitive explanation of the issue.

### 4.3 Examples of State Socialist Legal Survivals in Polish Private Law

#### 4.3.1 Introduction

The notion of ‘legal survivals’ denotes legal institutions introduced under one historically existing socio-economic and political system (here: actually existing socialism), which were functional towards that system, and which were not removed following a transformation to a different system (here: post-socialist neoliberal capitalism).<sup>37</sup> In contemporary

<sup>35</sup> Piasecki in *Kodeks*, 1145–50.

<sup>36</sup> Pier Giuseppe Monateri, ‘Black Gaius: A Quest for the Multicultural Origins of the “Western Legal Tradition”.’ *Hastings Law Journal* 50 (2000), 479–555.

<sup>37</sup> ‘Survivals’ as a theoretical concept originated not in legal scholarship, but in anthropology and sociology. See, e.g. Bronisław Malinowski, *A Scientific Theory of Culture and Other Essays* [1944] (New York: OUP, 1961), 29; Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley-Los Angeles: University of California Press, 1978), 25, 69–71. Probably the first legal scholar to analyze survivals in law in a systematic way was the Austrian sociologist of law Karl Renner, who devoted an entire monograph to the topic (Karl Renner, *The Institutions of Private Law and Their Social Functions* [1904], trans. Agnes Schwarzschild [London-Boston: Routledge and Kegan Paul, 1976]). The theoretical concept of survivals was further developed by British legal philosopher and private lawyer Hugh Collins (Hugh Collins, *Marxism and Law* [1982] [Oxford-New York: OUP, 1988]), 52–55. See also Mańko, ‘Weeds?’, 215–16; Rafał Mańko, ‘Relikty w kulturze prawnej. Uwagi metodologiczne na tle pozostałości epoki socjalizmu realnego w polskim prawie prywatnym’

Polish private law, understood as encompassing both substantive civil law and civil procedure, there are a number of legal survivals of the socialist period. For the purposes of this chapter, I will draw closer attention to four of them: the right of perpetual usufruct (4.3.2), the cultivation contract (4.3.3), the prosecutor's standing in civil proceedings (4.3.4), and the preliminary references to the Supreme Court (4.3.5).

#### 4.3.2 *Perpetual Usufruct*

State socialist property law was based on a dogmatic belief in the need to expand and preserve state property, which was understood as a direct implementation of Marx and Engels' views expressed in the *Communist Manifesto*, where they declare that 'the theory of the Communists may be summed up in the single sentence: Abolition of private property.'<sup>38</sup>

Faithful to this mandate, upon seizing power Bolsheviks ensured inter alia the abolition of private ownership of land.<sup>39</sup> Under such circumstances, private individuals wishing to erect a house or another building, which necessarily must be placed on a plot of land, could not acquire the right of ownership of the soil below the building, but had to satisfy themselves with a weaker title. Whilst individuals could acquire, in the guise of 'personal property,' a house of a limited surface for their private use,<sup>40</sup> the land had to remain state-owned.

After the transformation to actually existing socialism, Polish law had to accommodate to the same needs of preserving the state fund of land property. The final legal solution to this conundrum in the form of the 'right of perpetual usufruct' (*prawo użytkowania wieczystego*) was finally devised

[Survivals in Legal Culture: Methodological Remarks in the Light of the Remnants of Real Socialism in Polish Private Law] 102 *Przegląd Prawa i Administracji* (2015), 185; Rafał Mańko, 'Legal Survivals: A Conceptual Tool for Analysing Post-Transformation Continuity of Legal Culture' in *The Effectiveness of Law in Post-modern Society = Tiesību efektivitāte postmodernā sabiedrībā*, ed. Jānis Rozenfelds (Riga: Latvia University Press, 2015); Rafał Mańko, 'Transformacja ustrojowa a ciągłość instytucji prawnychuwagi teoretyczne' [Systemic Transformation and the Continuity of Legal Institutions: Theoretical Remarks], 16/2 *Zeszyty Prawnicze* (2016), 5.

<sup>38</sup> Karl Marx and Friedrich Engels, *The Communist Manifesto* [1848] (London: Penguin, 2002), 235.

<sup>39</sup> Lityński, *Prawo Rosji i ZSRR 1917–1991 czyli historia wszechzwiązkowego komunistycznego prawa (bolszewików). Krótki kurs* [The Law of Russia and the USSR between 1917 and 1991 or a History of the All-Union Communist Law (of Bolsheviks): a Short Course] (Warszawa: C.H. Beck, 2012), 216–19.

<sup>40</sup> Michel Lesage, *Le droit soviétique* (Paris: PUF, 1975), 79–80; William E. Butler, *Soviet Law* (London: Butterworths, 1983), 173.

in 1961.<sup>41</sup> Perpetual usufruct was defined in a similar way to ownership,<sup>42</sup> in the sense that the holder of the right could use the land ‘with the exclusion of other persons and to dispose of it within the limits prescribed by statute.’ Perpetual usufruct could be granted only with regard to urban land, i.e. either land within the boundaries of towns and settlements or lying outside such boundaries but nevertheless included in urban land management plans. The beneficiaries of the right of perpetual usufruct (perpetual usufructuaries) could be natural persons and legal persons, with the exclusion of state and socialized legal persons. Initially, housing cooperatives could not obtain land under this title, but the limitation was later lifted. Perpetual usufruct was established for a period of 99 years (in exceptional cases for a shorter period but not less than 40 years). Furthermore, the prolongation of the right for another period of up to 99 years was a standard and a refusal had to be justified by ‘an important public interest.’

The right was established by way of a contract between the beneficiary and the local authority, however the contract had to be preceded by an administrative decision of the competent authority specifying its details, such as the destination of the land. If it was destined for construction, the contract should specify all the details regarding the buildings. Perpetual usufruct was established against a yearly fee determined unilaterally by the competent authority which corresponded to the infrastructural quality and location of the plot of land. The competent authority was entitled to terminate the contract unilaterally and repossess the land if the perpetual usufructuary used the land in a way manifestly contrary to the destination laid down in the contract or if he did not erect buildings which he was supposed to erect according to the contract.

When the Civil Code was enacted in 1964, the rules on perpetual usufruct were split between that Code (of private law) and the (public law) Land Management Act.<sup>43</sup> The standard duration of perpetual usufruct was set at 99 years and the minimum duration at 40 years, with possibilities for an unlimited number of extensions.<sup>44</sup> The legal framework of perpetual usufruct remained a hybrid one throughout the period of actually existing socialism in the sense that private law aspects of the institution in question were regulated in the Civil Code, but there were also numerous rules to be found in administrative law.<sup>45</sup> In particular, the creation, extinction,

<sup>41</sup> Act of 14 July 1961 on land management in towns and settlements (Dz.U. no. 32, item 159, hereinafter ‘Urban Land Management Act 1961’).

<sup>42</sup> The notion of ‘ownership’ is used here in the strict Civilian sense of *dominium / Eigentum / propriété*.

<sup>43</sup> Winiarz, *Prawo*, 22–3.

<sup>44</sup> Art. 236 Polish Civil Code [*kodeks cywilny*] (1964).

<sup>45</sup> Cisek, ‘Użytkowanie,’ 144. In fact, it was difficult to separate the private law aspects

and modification of the right was always preceded by an appropriate administrative decision issued by the competent authority.<sup>46</sup>

After 1990, the legal framework of perpetual usufruct underwent a characteristic evolution, in that the administrative law aspects were gradually removed, and the institution became regulated almost exclusively by private law. At present, the main form in which the right is created is by way of a contract between the state or a local government and an individual or a legal person.<sup>47</sup> The conclusion of such a contract must be, in principle, preceded by a call for tenders.<sup>48</sup> As under actually existing socialism, the perpetual usufructuary may be obliged to construct a building or make other use of the land.<sup>49</sup> Most limitations inherent in the original legal framework have been lifted. First of all, under the Civil Code,<sup>50</sup> both the state and local government (municipal, district, regional) may encumber their land with the right of perpetual usufruct. Secondly, the said right may be established in favour of any natural or legal persons, without any limits as to their character (such as the requirement, that the legal person in question be a housing cooperative). The requirement that the land be within the boundaries of a town or be covered by an urban development plan has been removed, thus creating the possibility of establishing the right of perpetual usufruct on any land held by the State Treasury or a unit of local government for the benefit of any private party, individual, or body corporate.<sup>51</sup>

The right of perpetual usufruct is an absolute property right and is protected by an action to recover property (*rei vindicatio*) and a negatory action (action to stop violation of property—*actio negatoria*) in analogy to the right of ownership.<sup>52</sup> If the perpetual usufructuary uses the land in violation of the contract, the owner of the land (the State Treasury or the local municipality) may file an action in a civil court demanding the dissolution of the tenancy.<sup>53</sup> However, in contrast to the socialist period, since 1998 the tenancy may no longer be ended by a (unilateral)

of the institution from its public law aspects, and the elements of state *dominium* from elements of state *imperium* (Wierzbowski, 'O przydatności,' 618–19).

<sup>46</sup> Cisek, 'Użytkowanie,' 144.

<sup>47</sup> Cisek, 'Użytkowanie,' 151.

<sup>48</sup> Cisek, 'Użytkowanie,' 152–3.

<sup>49</sup> Cisek, 'Użytkowanie,' 157.

<sup>50</sup> Art. 232 Polish Civil Code [*kodeks cywilny*] (1964).

<sup>51</sup> Gerard Bieniek, 'W sprawie przyszłości użytkowania wieczystego' [Regarding the Future of Perpetual Usufruct] in *Ars et usus. Księga pamiątkowa ku czci Sędziego Stanisława Rudnickiego* [Ars et Usus: a Collection of Essays Dedicated to the Memory of Judge Stanisław Rudnicki] (Warszawa: LexisNexis, 2005), 54.

<sup>52</sup> Cisek, 'Użytkowanie,' 179.

<sup>53</sup> Cisek, 'Użytkowanie,' 180.

administrative decision of the land owner.<sup>54</sup>

The perpetual usufructuary is under a duty to pay a fee, expressed as a percentage of the market value of the land. A first one-off fee of 15–25% is due at the beginning of the tenancy, and then fees of 0.3%, 1%, 2%, or the standard 3% of the value of the land are due every year, depending on the use to which the land is put.<sup>55</sup>

The legal framework of perpetual usufruct has been frequently resorted to in practice both under actually existing socialism and after the transformation. Scholars underline that after many decades of its existence it has gained social acceptance.<sup>56</sup> Statistical data also witness a rich practice making use of the socialist legal framework. Thus out of all transactions regarding real estates in any one year, contracts for the creation of a right of perpetual usufruct represent 2.9%, while contracts for the sale of such a right (between private parties) represent 1.5% of all real estate transactions.<sup>57</sup> Out of the entire stock of municipally-owned land in Poland (1,012,503 ha) almost 8% is held by private parties under a perpetual usufruct title (79,828 ha).<sup>58</sup> Within the stock of land held under perpetual usufruct, 30% is held by individuals (23,670.20 ha) and the remaining 70% by legal persons. Income from fees paid by perpetual usufructuaries constitute, together with income for fees paid by ordinary usufructuaries and from remuneration for management of real estates by local government, 9% of the income of Polish towns and cities.<sup>59</sup>

#### 4.3.3 Cultivation Contract

A cultivation contract (*umowa kontraktacji*) is a typified contract whereby a farmer undertakes to produce and sell a determined quantity of agricultural produce in exchange for a fixed price. Such a typified contract

<sup>54</sup> Cisek, 'Użytkowanie,' 180.

<sup>55</sup> Cisek, 'Użytkowanie,' 173. Act of 21 August 1997 on the management of immovables (Dz.U. no. 115, item 741).

<sup>56</sup> Zdzisław Gawlik, 'Użytkowanie wieczyste de lege ferenda' [Perpetual Usufruct De Lege Ferenda] in *Czterdzieści lat kodeksu cywilnego* [Forty Years of the Civil Code], ed. Mieczysław Sawczuk (Kraków: WoltersKluwer, 2006), 115–125, 116.

<sup>57</sup> Data for 2011. Source: Central Statistical Office, Real Estate Turnover in 2011 (Warszawa 2012), 11, accessed 10 November 2013, [http://www.stat.gov.pl/cps/rde/xbcr/gus/IK\\_obrot\\_nieruchomosciarni\\_2011.pdf](http://www.stat.gov.pl/cps/rde/xbcr/gus/IK_obrot_nieruchomosciarni_2011.pdf).

<sup>58</sup> Data for stock of municipally-owned land in Poland from 2012. Source: 'Powierzchnia gruntów komunalnych wg prawnych form użytkowania' *Sejnometr*, accessed 10 November 2013, [http://sejnometr.pl/bdl\\_wskazniki/838](http://sejnometr.pl/bdl_wskazniki/838).

<sup>59</sup> Data for 2009. Source: Główny Urząd Statystyczny (Central Statistical Office), *Budżety jednostek samorządu terytorialnego* [Budgets of Entities of Local Government] (Warszawa 2010), 67, accessed 10 November 2013, [http://www.stat.gov.pl/cps/rde/xbcr/gus/PUBL\\_rn\\_budz\\_jedn\\_sam\\_teryt\\_lata\\_2003-2009.pdf](http://www.stat.gov.pl/cps/rde/xbcr/gus/PUBL_rn_budz_jedn_sam_teryt_lata_2003-2009.pdf). The notion of 'cities' covers cities having the legal form of districts, that is usually above 100,000 population.

was unknown under the pre-War Code of Obligations, although cultivation contracts were concluded in practice also during that period.<sup>60</sup> However, the codification of the contract within the Civil Code of 1964 seems to have been a direct Soviet inspiration. This is because, on the one hand, in Soviet law, the cultivation contract (договор контрактации, *dogovor kontraktatsii*) was codified in Arts 51 and 52 Fundamentals of Civil Legislation of the USSR and Union Republics,<sup>61</sup> and, on the other hand, the contract is not codified in any Western civil codes which are known to have influenced Polish private law (e.g. French, Austrian, German, or Swiss).

The legal framework of the cultivation contract, as codified in 1964,<sup>62</sup> has undergone only a slight textual change after 1989. Whereas under the original rules from the procuring side it could be concluded only by a unit of socialized economy, duly authorized to perform the function of agricultural procurement,<sup>63</sup> this limitation was removed in 1990 allowing private sector economic operators to procure agricultural produce under the cultivation contract.

The legal framework of the contract was and is distinct both from sales and from the contract to perform a specific service (*umowa o dzieło*).<sup>64</sup> A characteristic feature of a cultivation contract is that the agricultural product must be produced by the farmer who is party to the contract, who cannot perform by buying the same crop on the market; this creates an essential difference between a cultivation contract and the sale of a future object, that is ‘purchase of a hope’ (*emptio spei*) and the ‘purchase of a hoped-for-thing’ (*emptio rei speratae*).<sup>65</sup>

<sup>60</sup> Juliusz Krzyżanowski, in *Kodeks cywilny. Komentarz*, vol. 2 (Warszawa: Wydawnictwo Prawnicze, 1972), 1348; Andrzej Stelmachowski, ‘Kontraktacja’ [The Cultivation Contract], in *System prawa prywatnego* [The System of Private Law], ed. Jerzy Rajski, vol. 7 of *Prawo zobowiązań—część szczegółowa* [Law of Obligations: General Part] (2<sup>nd</sup> ed., Warszawa: C.H. Beck, 2004), 249–52.

<sup>61</sup> Art. 51 Fundamentals of Civil Legislation of the USSR and Union Republics: ‘State purchase of agricultural produce from collective and state farms shall be made by contracts for delivery of agricultural produce, which are concluded on the basis of plans for state purchases of agricultural produce and plans for the development of agricultural production in collective and state farms.’

<sup>62</sup> The cultivation contract is regulated in a detailed manner in Arts 613–26 Polish Civil Code [*kodeks cywilny*] (1964).

<sup>63</sup> Andrzej Stelmachowski, ‘Kontraktacja’ [The Cultivation Contract], in *System prawa prywatnego* [The System of Private Law], vol. 7 of *Prawo zobowiązań—część szczegółowa* [Law of Obligations: General Part], ed. J. Rajski (2<sup>nd</sup> ed., Warszawa: C.H. Beck, 2004), 262; Witold Czachórski, *Prawo zobowiązań w zarysie* (Warszawa: Państwowe Wydawnictwo Naukowe, 1968), 473. Krzyżanowski indicates that in practice the Minister of Agriculture decided which units could act as agricultural contractors (Krzyżanowski, *Kodeks*, 1352).

<sup>64</sup> Stelmachowski, ‘Kontraktacja,’ 259.

<sup>65</sup> This aspect was identified as an essential element of the cultivation contract, differentiating it from sale already in 1957, see SN resolution of 22 October 1957, Case II CO 10/57, LEX no. 119339; it was introduced to the Civil Code and is underlined in modern

During the state socialist period, cultivation contracts were concluded usually by municipal cooperatives acting as agents for central procurement entities.<sup>66</sup> Cultivation contracts were concluded for a wide range of crops, including potatoes, barley, wicker, flax, herbs, poppy, peas, beans, and onions.<sup>67</sup> They were also concluded for pigs, cattle, sheep, wheat, hops,<sup>68</sup> cabbage,<sup>69</sup> and turkeys.<sup>70</sup> After 1989 the role of the cultivation contract decreased, nevertheless they are still in use, in particular for the procurement of sugar beet and tobacco leaves,<sup>71</sup> as well as canola,<sup>72</sup> wheat,<sup>73</sup> turkeys,<sup>74</sup> duck and goose eggs,<sup>75</sup> and strawberries and raspberries.<sup>76</sup>

On a macro-social level, the cultivation contract played a distinct function under actually existing socialism. In the absence of collectivization of farms in Poland, its function was to integrate private family holdings into the centrally planned economy.<sup>77</sup> On a micro-social level, the contract was simply a way of guaranteeing farmers a secure demand for their products at a fixed price, regardless of the market situation. After 1989, the former macro-social function of cultivation contracts disappeared, together with the planned economy of state socialism.<sup>78</sup> Nevertheless, the micro-social function remained in place, although now the role of the procuring party has been taken over by private sector economic operators.

#### 4.3.4 Prosecutor's Standing in Civil Proceedings

Under pre-1939 Polish civil procedure, the powers of the prosecutor (*prokurator*) to intervene in civil proceedings were extremely narrow even for Western European standards of the period (such as French law).<sup>79</sup> In

case law too: see, e.g. SN judgment of 18 March 1998, Case I CKN 576/97, LEX no. 746161; SA/Poznań judgment of 19 August 2009, Case I ACa 507/09, LEX no. 756625 citing Case II CO 10/57, supra).

<sup>66</sup> Stelmachowski, 'Kontraktacja,' 252.

<sup>67</sup> Stelmachowski, 'Kontraktacja,' 252.

<sup>68</sup> Czachórski, *Prawo*, 473.

<sup>69</sup> SN judgment of 28 January 1967, Case I CR 45/67, LEX no. 6109.

<sup>70</sup> SN judgment of 18 May 1983, Case I CR 124/83, LEX no. 2900.

<sup>71</sup> Stelmachowski, 'Kontraktacja,' 255–7.

<sup>72</sup> SN judgment of 18 March 1998, Case I CKN 576/97, LEX no. 746161.

<sup>73</sup> SN judgment of 27 June 2002, Case IV CKN 1165/00, LEX no. 80264.

<sup>74</sup> SN judgment of 17 December 2003, Case IV CK 303/02, LEX no. 599555.

<sup>75</sup> SN judgment of 19 February 2009, Case III SK 31/08, LEX no. 503413.

<sup>76</sup> WSA/Gdańsk judgment of 20 October 2009, Case I SA/Gd 465/09, LEX no. 571204.

<sup>77</sup> Stelmachowski, 'Kontraktacja,' 252–3; Czachórski, *Prawo*, 473; Krzyżanowski, in: *Kodeks* vol. 2, 1348; SN judgment of 7 August 1975, Case III CRN 179/75, LEX no. 7732; SN judgment of 25 May 1988, Case II CR 129/88, LEX no. 8884.

<sup>78</sup> Stelmachowski, 'Kontraktacja,' 253.

<sup>79</sup> See, e.g. Kazimierz Stefko, *Udział prokuratora w postępowaniu cywilnym* [The Participation of the Prosecutor in Civil Proceedings] (Warszawa: Wydawnictwo Prawnicze, 1956), 33–40; Halina Zięba-Zalucka, *Instytucja prokuratury w Polsce* [The Institution of

contrast, under the Soviet model, the Prosecution Service (*прокуратура*, *prokuratura*) was conceived of as an independent, hierarchical agency of government entrusted with the task of controlling all other powers, defending ‘socialist legality’ and enjoying, for this purpose, the powers of protest, proposal, and prosecution.<sup>80</sup>

In 1950, the Soviet model of the prosecution service became the object of a legal transfer to Polish law,<sup>81</sup> which was part of an overhaul of the entire procedural law and organization of the judiciary.<sup>82</sup> Under the Polish legal framework introduced in 1950, prosecutors enjoyed a general and unlimited standing to join or initiate any civil proceedings as well as to challenge any judicial decision. These powers were thoroughly independent from the will or interest of any private party to the civil proceedings and from the will of the court; however, they had full legal effects vis-à-vis the litigants. A judicial decision handed down in such a procedure was binding on the parties (unlike, for instance, in the French cassation ‘in the interest of the law’<sup>83</sup>).

This legal transfer, first codified in 1950, was carried over into the new socialist Code of Civil Procedure enacted in 1964, where the prosecutor’s standing was raised to the level of a fundamental principle of civil

the Prosecution Service in Poland] (Warszawa: LexisNexis 2003), 14.

<sup>80</sup> William E. Butler, *Russian Law* (3<sup>rd</sup> ed. Oxford: OUP, 2009), 192; Adam Lityński, *Prawo Rosji i ZSRR 1917–1991 czyli historia wszechzwiązkowego komunistycznego prawa (bolszewików). Krótki kurs* [The Law of Russia and the USSR between 1917 and 1991 or a History of the All-Union Communist Law (of Bolsheviks): A Short Course] (Warszawa: C.H. Beck, 2012), 317–18.

<sup>81</sup> Andrzej Jakubecki, ‘Naczelne zasady postępowania cywilnego w świetle nowelizacji kodeksu postępowania cywilnego’ [Fundamentals Principles of Civil Procedure in the Light of an Amendment of the Code of Civil Procedure], in *Czterdziestolecie kodeksu postępowania cywilnego* [Forty Years of the Code of Civil Procedure], ed. Izabela Ratusińska (Kraków: Zakamycze, 2006), 356. Despite certain prima facie similarities between the role of the prosecutor in civil proceedings in Poland and in France, there is no doubt that the Polish model of prosecutor’s standing in civil proceedings is a legal transfer from the Soviet Union, whereas the French is not. It should also be kept in mind that in Poland a prosecutor who joins civil proceedings has all the powers of a party to the proceedings (e.g. may bring an appeal or petition for cassation) and is not limited only to giving non-binding advice to the court, as is the case in France. In the latter, the prosecutor may challenge a judicial decision only if he initiated the proceedings himself, but not if he joined proceedings already in motion. On French law see, e.g. Gerard Couchez, Xavier Lagarde, *Procédure civile* (16<sup>th</sup> ed., Paris: Dalloz, 2011), 146–53, 282–5; John Bell, Sophie Boyron, and Simon Whittaker, *Principles of French Law* (2<sup>nd</sup> ed., Oxford: OUP, 2008), 60–1, 89–90, 112.

<sup>82</sup> For details see Rafał Mańko, ‘Is the Socialist Legal Tradition “Dead and Buried”? The Continuity of Certain Elements of Socialist Legal Culture in Polish Civil Procedure,’ in *Private Law and the Many Cultures of Europe*, ed. Thomas Wilhelmsson et al. (The Hague: Kluwer Law International, 2007), 88–91.

<sup>83</sup> The ‘*pourvoi dans l’intérêt de la loi*’ which can be filed by a *procureur général* attached to the *Cour de Cassation* ‘has no effect on the parties’ to the proceedings (Bell et al., *Principles*, 112–13; see also Couchez and Lagard, *Procédure*, 508).

procedure.<sup>84</sup> Scholars emphasized its role in making Polish civil procedure truly socialist.<sup>85</sup> The only exception to the prosecutor's standing obtained since 1965 was the exclusion of the right to file for divorce.

After 1989, numerous scholars began to criticize the generalized prosecutorial standing.<sup>86</sup> Some of them even argued that such an institution actually violates the right to an impartial court as guaranteed by international human rights instruments.<sup>87</sup> It was also pointed out that in this respect Polish civil procedure differs from other European countries.<sup>88</sup> Nevertheless, despite numerous amendments to the Code of Civil Procedure, the prosecutor's standing has remained unaffected. The only change which occurred was the removal of the notion of 'protection of social property' from the list of very broadly framed grounds for a prosecutor's intervention (the others being: protection of the rule of law, protection of citizens' rights and protection of the social interest).<sup>89</sup>

The Internal Rules of the Prosecution Service (2010; hereinafter 'Internal Rules') currently in force specify the types of civil cases in which a prosecutor's participation in civil proceedings 'desirable.'<sup>90</sup> These include, for instance, cases of simulated declarations of will, declarations of will made to hide a different legal act or circumvent the law, cases for the annulment of a legal act whose effect is the transfer or encumbrance of an immovable, cases regarding protection of cultural property and

<sup>84</sup> Art. 7 Code of Civil Procedure [*kodeks postępowania cywilnego*] (1964).

<sup>85</sup> Albert Meszorer, *Stanowisko i czynności procesowe prokuratora w postępowaniu cywilnym* [The Position and Procedural Acts of the Prosecutor in Civil Proceedings] (Warszawa: PWN, 1957), 75; Jerzy Smoleński, *Prokuratura Polskiej Rzeczypospolitej Ludowej. Komentarz do ustawy o prokuraturze PRL i innych przepisów dotyczących prokuratury* [Prosecution Service of the Polish People's Republic: A Commentary to the Act on the Prosecution Service of the Polish People's Republic and other Provisions Concerning the Prosecution Service] (2<sup>nd</sup> ed., Warszawa: Wydawnictwo Prawnicze, 1981) 127.

<sup>86</sup> Tadeusz Ereciński, 'O potrzebie nowego kodeksu postępowania cywilnego' [On the Need of a New Code of Civil Procedure], *Państwo i Prawo* 59.4 (2004), 3–10, 8; Piotr Pogonowski, *Realizacja prawa do sądu w postępowaniu cywilnym* [The Realisation of the Right to a Court in Civil Proceedings] (Warszawa: C.H. Beck, 2005), 73; Adam Zieliński, in *Kodeks postępowania cywilnego. Komentarz do artykułów 1–50514* [Code of Civil Procedure. Commentary to Article 1 to 505–14] (2<sup>nd</sup> ed., Warszawa: C.H. Beck, 2006), 71.

<sup>87</sup> Feliks Zedler, 'Głosa do wyroku SN z dnia 14 września 2005 r. III CZP 58/05' [Case-note on Supreme Court judgment of 14 September 2005 in Case III CZP 58/05], *Orzecznictwo Sądów Polskich* 50/1 (2006), 518.

<sup>88</sup> Andrzej Oklejak, 'Co dalej z kodeksem postępowania cywilnego w czterdziestolecie jego istnienia?' [What Should be Done with the Code of Civil Procedure on the Fortieth Anniversary of Its Existence?] in Ratusińska ed., *Czterdziestolecie*, 13.

<sup>89</sup> See Art. 7 Code of Civil Procedure (1964), as modified by Act of 13 July 1990 (Dz.U. no. 55, item 318).

<sup>90</sup> Regulation of the Minister of Justice of 24 March 2010—the Internal Rules of the Common Organisational Units of the Prosecution Service (consolidated version: Dz.U. 2014, item 144, hereinafter: 'Internal Rules 2010'); Re types of civil cases in which a prosecutor's participation in civil proceedings is 'desirable,' see §§ 374, 378–9 Internal Rules 2010.

protection of copyright, cases regarding the protection of the family and environmental protection. Furthermore, within family law the Internal Rules make it ‘desirable’ for prosecutors to intervene in cases regarding the annulment of marriage, a declaration of its existence or inexistence, negation of paternity or maternity, adoption of foreigners or Polish citizens who are non-residents, dissolution of adoption, removal of a person subject to parental authority or guardianship, deprivation of parental authority and injunctions prohibiting contacts with a child. Finally, within labour law, the Internal Rules urge prosecutors to bring actions *inter alia* whenever workers’ rights have been flagrantly violated and in cases of termination of employment due to discrimination.

The legal practice applying the principle of prosecutor’s participation in civil proceedings continues to be rich.<sup>91</sup> In 2012 prosecutors filed a total of 3,872 actions in litigious civil cases (*powództwa*) and 18,603 actions in non-litigious civil cases (*wnioski wszczynające postępowanie nieprocesowe*) which gives a total of 22,475 civil lawsuits filed altogether.

The subject matter of the lawsuits in litigious civil cases included delict (261 actions), confiscation of consideration provided for in exchange for the commission of a criminal act (183 actions), actions in labour law (7 actions), actions for determination of paternity (79 actions), actions for negation of paternity (1,117 actions), actions for annulment of recognition of paternity (129 cases), as well as actions for alimony or for the increase of alimony (275 cases). The subject matter of the actions in non-litigious proceedings concentrated on actions for compulsory anti-alcoholism treatment (11,399 actions),<sup>92</sup> actions for incapacitation (2,038 actions) and actions regarding family relationships (3,682 actions). The rate of success of the Prosecution Service in non-litigious civil cases was also high, and in 2012 amounted to 85.8% (in 2011, 84.2%).

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

<sup>91</sup> The following description of this activity is based on vol. I of *Sprawozdanie Prokuratora Generalnego z rocznej działalności prokuratury w 2012 roku* [Prosecutor General’s Report on the Annual Activity of the Prosecution Service in 2012, hereinafter ‘Prosecutor General’s Report 2012’] (Warszawa: Prokuratura Generalna, 2013), 250–8, accessed 9 July 2013, [http://www.pg.gov.pl/upload\\_doc/000003717.pdf](http://www.pg.gov.pl/upload_doc/000003717.pdf).

<sup>92</sup> A civil (family) court may impose upon an individual the duty to undergo anti-alcoholism treatment upon request by a prosecutor or the competent Municipal Commission for the Solution of Problems Posed by Alcoholism (*gminna komisja rozwiązywania problemów alkoholowych*). See Art. 26 of the Act of 26 October 1982 on educating society in sobriety and combating alcoholism (consolidated version published in Dz. U. 2012, item 1356). The alcoholic’s family or neighbours do not enjoy standing to file such an action.

Apart from filing actions, appeals, and petitions for reopening of proceedings themselves, prosecutors also joined civil proceedings initiated by private parties. In 2012 prosecutors participated in 19,999 civil cases initiated by other parties (in 2011, in 18,913 cases). The *Yearly Report* of the Prosecutor General underlines a growth of prosecutors' participation in labour cases.<sup>93</sup> In 2012 prosecutors intervened in 117 cases concerning the protection of workers' rights.

#### 4.3.5 *Preliminary References to the Supreme Court*

Preliminary reference rulings are most widely known in the context of EU law as well as constitutional law in certain countries, but what is less known to the international legal community is the fact that such a system of judicial dialogue was introduced in Poland after World War II—in 1949 in criminal proceedings and in 1953 in civil proceedings. Under the Code of Civil Procedure, as amended, if a regional court deciding upon a revision encountered a 'legal question giving rise to serious doubts,' it could stay proceedings and 'refer that question to the Supreme Court for decision.'<sup>94</sup> The Supreme Court could still, if it wished to, decide the case by itself.<sup>95</sup> The new rule stated explicitly that a resolution of the Supreme Court (the preliminary ruling) is binding on lower courts in the case.<sup>96</sup> The new Code of Civil Procedure of socialist Poland, enacted in 1964, contained an identical rule on preliminary reference proceedings combined with the procedure of taking over the case.<sup>97</sup>

This legal framework survived the demise of actually existing socialism almost unmodified. It has been constantly made use of by the courts since its inception. In fact, the number of references submitted yearly has been roughly similar over the last 60 years of the functioning of the institution, and therefore the transition from actually existing socialism to a market economy was not a significant threshold in this respect. Thus, as regards the socialist period, for instance in 1962, 88 questions were submitted and the average number of questions between 1971 and 1974 amounted to 185 annually,<sup>98</sup> whilst in 1977 there were 103 preliminary references in

<sup>93</sup> Prosecutor General's Report 2012, 255.

<sup>94</sup> Art. 388 § 1 sentence 1 Code of Civil Procedure (1930) as amended by Decree of 23 April 1953 (Dz.U. 23 item 90).

<sup>95</sup> Art. 388 § 1 sentence 2 Code of Civil Procedure (1930) as amended by Decree of 23 April 1953.

<sup>96</sup> Art. 388 § 2 Code of Civil Procedure (1930) as amended by Decree of 23 April 1953.

<sup>97</sup> Art. 391 Code of Civil Procedure (1964).

<sup>98</sup> Stanisław Włodyka, 'Specjalne środki nadzoru judykacyjnego Sądu Najwyższego' [Special Means of the Supreme Court's Supervision over Adjudication] in *Sąd Najwyższy w PRL* [The Supreme Court in the Polish People's Republic], ed. M. Rybicki (Wrocław et al.: Zakład Narodowy im. Ossolińskich, 1983), 274.

the Civil Chamber.<sup>99</sup> Currently, the number of references stays comparable, oscillating within the Civil Chamber around 100 (e.g. 141 in 2010, 96 in 2011, 110 in 2012),<sup>100</sup> and in the Labour Chamber around 20 (e.g. 16 in 2012, 26 in 2011).<sup>101</sup> Although the preliminary references are, in statistical terms, only a small fraction (0.2%) of the Supreme Court's business (in 2012 the number of incoming cases in the Civil Chamber amounted to 4,866, with only 110 of these being preliminary references),<sup>102</sup> their actual importance is much greater, and many of the most important decisions of the Supreme Court are actually rendered within this procedure.<sup>103</sup> This is because of a double filter of selection on the merits: first of all, a second instance court must identify an issue as being legally controversial, and secondly, before the Supreme Court decides to issue a formally binding answer (in the form of a so-called 'resolution') it also analyzes whether the issue is of significant legal importance. This ensures that only the most legally significant and vexed issues are decided upon in this procedure.

#### 4.4 Conclusions: Demons of the Past or Useful Legal Institutions?

The four examples of legal survivals briefly presented in the previous section beg the question whether they should be classified as 'demons of the past,' haunting modern Polish private law, which should be removed in the name of its 'purification,' or whether they can be legitimately referred to as

<sup>99</sup> Zbigniew Resich, 'Właściwość i zasady postępowania przed Sądem Najwyższym.' in *Sąd Najwyższy w PRL* [The Supreme Court in the Polish People's Republic], ed. Marian Rybicki (Wrocław et al.: Zakład Narodowy im. Ossolińskich, 1983), 142. The 103 preliminary references were, statistically, a minor fraction of 2,449 cases incoming to the Civil Chamber in 1977. Most of its activity was concentrated on being a court of second instance in ordinary proceedings (1,541 revisions, 429 interlocutory appeals), on top of which it heard 348 extraordinary revisions and 28 other cases.

<sup>100</sup> *Sąd Najwyższy Rzeczypospolitej Polskiej* (Supreme Court of the Republic of Poland), *Informacja o działalności Sądu Najwyższego w 2012 r.* [Information on the Activity of the Supreme Court in 2013] (Warszawa, 2013), 152, accessed 17 March 2014, [http://www.sn.pl/\\_layouts/SPZWebParts/download.aspx?id=71&ListName=Dzialalnosc\\_SN](http://www.sn.pl/_layouts/SPZWebParts/download.aspx?id=71&ListName=Dzialalnosc_SN) (hereinafter: 'SN report for 2012'). The number of 'legal questions' covers not only preliminary references, but also a very limited number of requests for abstract resolutions.

<sup>101</sup> The full name of the chamber is currently 'Labour, Social Security and Public Issues Chamber.' Labour and social security cases are civil cases in the technical sense, and hence the Code of Civil Procedure is applied to them. Re number of references, see SN report for 2012, p. 69. In 2011 the Supreme Court rejected 10 preliminary references, but in 2012 it did not reject any one.

<sup>102</sup> SN report for 2012, 152. The proportion in 2012 within the Labour Chamber is 26 out of 2,987. However, the number of 'legal questions' covers not only preliminary references, but also requests for abstract resolution.

<sup>103</sup> As evidenced by the role given to preliminary rulings in the Supreme Court's yearly reports, see SN report for 2012, 5, 17–40.

useful legal institutions, which have proven their utility also after the 1989 transformation. The mere fact that local administration still establishes perpetual usufruct titles, that private parties enter into cultivation contracts, that prosecutors intervene in a considerable number of civil lawsuits yearly, and that courts of second instance continue to submit preliminary references on important legal questions to the Supreme Court militate in favour of the second option. Although the examples of four legal survivals of actually existing socialism, analyzed in the previous section, were only selected case studies of a broader phenomenon, they already in themselves allow one to draw certain conclusions on the assumption that these would be confirmed by a broader analysis of other legal survivals.

First of all, I stipulate 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.<sup>104</sup> Just like in science, different theoretical constructions can be superimposed on the same set of data,<sup>105</sup> 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:

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.<sup>106</sup>

The same happens after a 'change of paradigm' of the legal system,<sup>107</sup> that is its transition from, for instance, state socialist law to market economy law. Just like scientists, lawyers do not discard those elements from their professional toolbox which, although used in new ways, can

<sup>104</sup> For the source domain of this metaphor see Thomas S. Kuhn, *The Structure of Scientific Revolutions* [1962] (3<sup>rd</sup> ed., Chicago: University of Chicago Press, 1996).

<sup>105</sup> Kuhn, *Scientific Revolutions*, 76.

<sup>106</sup> Kuhn, *Scientific Revolutions*, 149.

<sup>107</sup> Cf. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, transl. by W. Rehg (Massachusetts: MIT Press, 1996), 388–404. Habermas understands a paradigm in law as 'the judge's implicit image of society' and links it with a specific 'social ideal' ('social model,' 'social vision') (392). The change of paradigm analyzed by Habermas was a shift from the liberal to the social model of private law, which occurred *via* a re-interpretation of general clauses (404), a constitutionalization of private law (403), as well as by explicit legislative intervention (403).

still be fruitfully deployed under the new paradigm. What varies, though, is the degree of adaptation necessary, or—to use the metaphor drawn 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.<sup>108</sup> (Emphasis added)

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—‘novelty for its own sake is not a desideratum.’

Secondly, 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 section two above. As I indicated, 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 survival 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 to get rid of them in the name of historical policy or ideological purism.

Thirdly, 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 synonymous to ‘relics’ (outdated legal institutions opposed to new, more ‘rational’ legal phenomena,<sup>109</sup> introduced consciously after a transformation), this is not the case. I contend that the legal community’s willingness to retain ‘traditional’ causes of action (in the Weberian sense),<sup>110</sup> that is, old institutions, rules, or concepts (of course adequately adapted to the requirements of the new socio-economic order) is deeply rational and should be supported. This is because it allows the saving of time, effort, and other resources, which would have to be expended if a new legal framework were created from scratch, be it by the

<sup>108</sup> Kuhn, *Scientific Revolutions*, 169.

<sup>109</sup> Cf. Piotr Sztompka, *Socjologia. Analiza społeczeństwa* [Sociology: The Analysis of Society] (Kraków: Znak, 2007), 61.

<sup>110</sup> Weber, *Economy*, s. 25.

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 in one blow,<sup>111</sup> the post-revolutionary law-makers nevertheless returned to the laws of the *ancien régime* when seeking inspiration for the codification of state socialist law.<sup>112</sup> 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 logically followed.

Exactly the same mechanism seems to be at work in today’s Poland. The efforts of numerous academics to draft a new Polish Civil Code,<sup>113</sup> with the intention of effecting a definitive break from the state socialist past (represented to them by the current Code of 1964), have been heavily criticized by judges of the Supreme Court (incidentally, many of them academics).<sup>114</sup> I agree with their criticism. The judges are perfectly right in that they see nothing wrong in continuing to use the Civil Code of the socialist period, adequately adapted to the new circumstances.

Finally, the story of legal survivals of actually existing socialism allows one to draw more general conclusions about the significance of this period for Polish legal culture. Contrary to common wisdom, criticized by Tomasz Giaro, whereby the socialist period in Polish legal culture is but a ‘black-out,’ which must be ‘forgotten straight away,’ the post-War period, albeit characterized by Soviet tutelage and Poland’s unprecedented exposure to the socialist legal tradition, still has something to offer to modern legal culture. The preliminary reference procedure, today a commonplace tool in EU law and constitutional law in many European countries, was introduced in Poland already in 1953. The right of perpetual usufruct, giving local administration additional private law instruments to ensure land is used

<sup>111</sup> Adam Lityński, *Prawo Rosji*, 197.

<sup>112</sup> 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 on the draft of Russian Civil Code prepared between 1905 and 1913. See Lityński, *Prawo Rosji*, 203.

<sup>113</sup> 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).

<sup>114</sup> ‘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], *Przegląd Sądowy* 2 (2010).

in the public interest, was created in 1961. The cultivation contract, a useful legal form unknown to Western European civil codes, was codified in the socialist Civil Code of 1964. And finally the possibility of defending the public interest in private litigation by way of an unlimited standing of prosecutors in virtually all types of civil proceedings has been in place in Poland since 1950. Most of these legal institutions (save for the preliminary reference procedure) were legal transplants from the Soviet Union, i.e. legal solutions derived from the socialist legal tradition. Nevertheless, following, if necessary, some adaptations of the legal framework, they proved to be capable of also being applied after 1989. This mere fact undermines the dominant 'blackout' narrative and sheds more light on the positive developments in Polish legal culture during the period of actually existing socialism. Therefore, legal survivals of the period of actually existing socialism can be more aptly described as useful legal institutions than as 'demons of the past.' This is because they have passed the only valid test in the life of the law—that of practical utility.