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Private Interest and Public Interest in European Legal Tradition

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Szpanowska and Katarzyna Wasyliszyn

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“WE DO NOT RECOGNISE ANYTHING ‘PRIVATE’”: PUBLIC INTEREST AND PRIVATE LAW UNDER THE SOCIALIST LEGAL TRADITION AND BEYOND

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Introduction*

The division of law into “public” and “private” was introduced by Roman lawyers, with the *criterium divisionis* being based on the interest protected with each branch of the legal system. As Ulpian famously formulated:

*Publicum ius est quod ad statum rei Romanae spectat, ius privatum est quod ad singulorum utilitatem.*¹

Public law is that which respects the establishment of the Roman commonwealth, private that which respects individuals' interests, some matters being of public and others of private interests.²

Two millennial later, the leader of the Bolshevik revolution openly distanced himself from this aspect of the Civilian Tradition, making the famous statement to the effect that

*Мы ничего «частного» не признаем, для нас все в области хозяйства есть публично-правовое, а не частное. [...] Отсюда – расширить применение государственного вмешательства в “частноправовые” отношения; расширить право государства отменять “частные” договоры; применять не *corpus juris romani* “гражданским правоотношениям”, а наше революционное правосознание [...].*³

* All views presented in this chapter are exclusively those of the Author and should not be attributed to the European Union or any of its institutions, bodies or agencies.

¹ Dig. 1.1.1.2 - Ulpian 1 inst.

² English translation: Alan Watson, 1 *The Digest of Justinian* (1998). This division has become an axiom of the Civilian Tradition See e.g. Tomasz Giaro, *Od redaktora in Interes publiczny a interes prywatny w prawie* 8-9 (2012).

³ Владимир Ильич Ленин, *О задачах наркомюста в условиях новой экономической политики. Письмо Д. И. Курскому*, 20.II.1922, available at <http://tinyurl.com/qefychh> (last visited 6th January, 2015).

We do not recognize anything “private”, and regard everything in the economic sphere as falling under public and not private law. [...] Hence, the task is to extend the application of state intervention in “private legal” relations; to extend the right of the state to annul “private” contracts; to apply to “civil legal relations” not the *corpus juris romani* [body of Roman law – R.M.] but *our revolutionary concept of law* [...].⁴

However, despite seeking to replace the *Corpus Iuris Romani*, as Lenin formulated, with a revolutionary concept of law, the Civil Code of Soviet Russia enacted during NEP times (in 1922), and later codifications of what is commonly known as “private law”, both in the Soviet Union and in its satellite countries, was based, to a large extent, on the Civilian Tradition.⁵ This created a certain paradox or tension between the legal institutions inherited from the essentially liberal and market-oriented Western private law, and the will of imposing a domination of public interest over private interest in this sphere, underlined in a categorical manner by the Bolshevik leader.

The aim of this chapter is to shed some light on this paradox on the basis of a case study. The paper will focus on Polish private law, and specifically on its two codifications effected during the period of actually existing socialism, namely the Civil Code and Code of Civil Procedure, both enacted in 1964. The chapter will identify the main instruments, both in substantive and procedural private law, which were inserted into the two Codes in order to guarantee a domination of public interest over the private one. Having accomplished that task, the narrative will move beyond 1989 and seek to ascertain what happened with those public-interest legal institutions following the transformation. *Prima facie* it could be assumed that such legal institutions, which were introduced during the period of actually existing socialism in order to promote the aim of securing the domination of public interest over the private interest, would be removed following Poland’s transformation towards a neoliberal market economy.

⁴ English translation: Vladimir Ilich Lenin, *On the Tasks of the People’s Commissariat for Justice under the New Economic Policy*, February 20th, 1922, available at <http://tinyurl.com/nccx4d6> (last visited 6th January, 2015).

⁵ Rodolfo Sacco, *The Romanist Substratum in the Civil Law of the Socialist Countries*, 14-1 Review of Socialist Law 65-86 (1988).

However, as the study will reveal, this has not always been the case, and there are numerous legal institutions which have endured within the Civil Code and the Code of Civil Procedure despite the transformation. This begs the question whether it would be justified to put forward the argument that within Polish private law one can still speak of a domination of the public interest over the private one, in line with Lenin’s famous statement ‘we do not recognize anything “private”’. I will argue that this is not the case, precisely because those socialist legal institutions – which I call “legal survivals”⁶ of the socialist period – have changed their *social function* and became adapted to the system of a market economy. Therefore, despite their undoubtedly socialist origins, they do not upset the current economic arrangements.

In line with that, the main arguments pursued in the chapter are as follows. Firstly, that private (civil) law during the period of actually existing socialism underwent modifications aiming at the promotion of public (social) interest. Secondly, that these modifications usually took the form of specific, new legal institutions. Thirdly, that most of these legal institutions

⁶ „Survivals“ as a theoretical concept originate not in legal scholarship, but in anthropology and sociology. The Polish anthropologist Bronisław Malinowski (1884-1924) drew attention to the fact that a condition of endurance of a survival (in culture) is that it gains a new function under the changed circumstances. Malinowski mentioned the example of a fireplace in an English home which, in modern times, fulfils symbolic, rather than heating, functions. Another scholar who analysed survivals, referring to them as ‘traditional’ or ‘routine actions’ was German sociologist Max Weber (1864-1920). See Bronisław Malinowski, *A Scientific Theory of Culture and Other Essays* [1944] 29 (1961); Max Weber, *Economy and Society: An Outline of Interpretive Sociology* 25, 69-71 (1978). Probably the first legal scholar who analysed survivals in law in a systematic way was the Austrian sociologist of law Karl Renner, who devoted an entire monograph to the topic – *The Institutions of Private Law and Their Social Functions* [1904], translated by Agnes Schwarzschild (1976). The theoretical concept of survivals was further developed by British legal philosopher and private lawyer Hugh Collins, *Marxism and Law* [1982] 52-55 (1988). For a broader discussion of the notion of ‘legal survivals’ see Rafał Mańko, *Relikty w kulturze prawnej – uwagi metodologiczne na tle pozostałości epoki socjalizmu realnego w polskim prawie prywatnym*, forthcoming in *Przegląd Prawa i Administracji* (2015).

were removed from the legal system after 1989. And finally, that some of them were not abrogated and have remained as "legal survivals", but nevertheless do not, in principle, fulfill the same functions as under actually existing socialism.

As regards methodology, the present chapter may be defined as a socio-legal enquiry. Its main focus is the social function of legal institutions and the change of such social function over time.⁷ From the point of view of sources, the chapter is based on typically legal sources, i.e. legal texts (especially the Civil Code and Code of Civil Procedure), doctrinal commentaries and other scholarly publications, as well as reported case-law.

Finally, certain terminological conventions followed in this paper need to be explained and justified. First of all, the term "private law", despite the fact that it fell into disuse for ideological reasons under actually existing socialism, will be used to refer to the area of law regulating relationships between individuals regardless of whether it protects the public or private interest.⁸ Hence such areas of law as property, contract or tort, as well as

⁷ Without entering a debate on functionalism in the social sciences, I am using the notion of a "function" in a simple and descriptive way, as an answer to the question "what do legal actors (lawyers, citizens, judges) do with a legal framework?" or "how do legal actors use a legal framework?" or "what does the legal framework in question serve in practice?". Therefore, the notion of "function" serves as a link between the abstract legal framework (of a textual nature – a set of rules in a Code, or a line of established case-law), and actual, real-life socio-economic behaviour of human subjects. For a brief discussion of the main types of functionalism in the context of legal theory see e.g. Brian Z. Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* 105-107 (1997). A seminal study on the changing social functions of legal institutions is Karl Renner, *The Institutions of Private Law and Their Social Functions* [1949] (1976).

⁸ Aligning myself with the definition adopted by the Study Group on Social Justice in European Private Law in its programmatic Manifesto, I contend that: "Private law concerns social and economic relations between citizens. It provides the basic rules governing economic transactions, business organization, property rights, compensation for wrongs, and other kinds of associations between citizens". See Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law: a Manifesto*, 10-6 European Law Journal 654 (2004).

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the corresponding procedural arrangements will be collectively referred to as “private law” even with regard to the period of actually existing socialism, when these areas would be known as (substantive and procedural) civil law. Secondly, the term “private law” is used in this chapter in a broad way, encompassing both substantive and procedural law.⁹

Furthermore, with regard to terminology, the term “actually existing socialism” is used indiscriminately to refer to the political regime existing in the Soviet bloc, regardless of the various phases of its evolution. Hence, with regard to Poland, which is the object of the present case study, “actually existing socialism” refers to the period from 1944 until 1989.

The chapter is structured as follows. Following the present introduction, section 2 is devoted to an overview of the chief institutions introduced into the law of the period of actually existing socialism with the aim of promoting the public (social) interest. Section 3 focuses on the law reforms following the demise of actually existing socialism in 1989. Section 4, on the contrary, focuses on the “legal survivals” of actually existing socialism, namely those institutions analyzed in section 2 which were not removed as part of the law reforms discussed in section 3. The chapter ends with conclusions in section 5.

Institutions aimed at promoting the public interest in

Polish private law of the socialist period

The public interest in socialist private law in Poland was promoted by a number of institutions which appeared in that law following the socio-economic and political transformation. Many of them were legal transfers¹⁰

⁹ Historical factors strongly militate in favor of a conceptual unity of substantive and procedural private law. As legal historian Tomasz Giaro points out, the two have become separated only with the 19th century codifications; hitherto civil procedure was treated as part and parcel of private law (Tomasz Giaro, *Interpretacja jako źródło prawa – dawniej i dziś*, 7 *Studia Prawnoustrojowe* 246 (2007).

¹⁰ I use the notion of „legal transfers“ as a synonym of „legal transplants“. On the latter see Alan Watson, *Legal Transplants, An Approach to Comparative Law*

from Soviet law, nevertheless often transformed. Others were the effect of local legal innovation. It is appropriate to start the analysis from horizontal measures, i.e. those institutions which were applicable throughout the legal system, before moving onward to sectoral measures, i.e. those institutions which applied in given branches of private law, such as the law of property, contract law or civil procedure.

General clauses

As regards horizontal legal institutions, particular emphasis should be placed on the two general clauses of Soviet origin, namely “principles of social life” and “socio-economic purpose”. The first of these two can be traced back to Lenin’s book *The State and Revolution* written in 1917, where the Bolshevik leader, developing Engels’ theory of “withering away” of the state and state law, put forward the idea that once the higher phase of communism is reached, state law will be replaced by social norms in the form of “principles of social life”.¹¹ Initially, Lenin’s newly coined expression did not have a direct impact upon legal texts, and specifically neither the Soviet Russian Civil Code nor the first Soviet Constitution referred to this concept. It was only in 1936 that the Stalinist Constitution of the USSR introduced a rule whereby Soviet citizens became obliged to abide by the “principles of socialist life” (*принципы социалистического общежития*).¹² The Fundamentals of Civil Legislation of the USSR and the Union Republics of 1961,¹³ and the new wave of

[1974] 21-30, 95-101 (2nd ed. 1993).

¹¹ Vladimir Ilich Lenin, *The State and Revolution* [1918], trans. by Robert Service 70, 74, 80, 86-87 (1992). The concept appears three times in the book, in three slightly different terminological forms – as (in the English translation) “elementary conditions of social life”, “necessary rules of social intercourse” and “fundamental rules of social intercourse”.

¹² Article 130 of the 1936 Constitution stated: “It is the duty of every citizen of the U.S.S.R. to abide by the Constitution of the Union of Soviet Socialist Republics, to observe the laws, to maintain labor discipline, honestly to perform public duties, and to respect the rules of socialist intercourse [life]”), English translation available online at <http://tinyurl.com/n3h7job> (last visited January 1st, 2015).

¹³ Fundamentals of Civil Legislation of the USSR and Union Republics of 8.12.1961, English text available in *Soviet Civil Legislation and Procedure*:

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civil codes of Soviet republic which followed it, likewise repeated this expression.¹⁴

The reception of the Soviet general clause into Polish law took place in 1950 within the framework of the General Principles of Civil Law Act,¹⁵ enacted that year as part of a broader law reform. The general clause immediately caught the attention both of scholars and the judiciary. It was commonly accepted that its introduction into Polish law is to be understood as an explicit departure from the hitherto existing general clauses, such as good faith, good morals and equity.¹⁶ There was a consensus that the values underlying the new general clause are socialist and collectivist, in contrast to the individualist and liberal values enshrined in “bourgeois general clauses” (good faith, good morals etc.). This trend was not merely verbal, but translated itself into concrete judicial decisions, whereby the principles of social life were invoked in order to impose a domination of the public interest over the private one.¹⁷

Official Texts and Commentaries (Moscow, Foreign Languages Publishing House, no year of publication).

¹⁴ See Article 5 of the Fundamentals: “In exercising their rights and performing their duties, citizens and organisations must observe the laws, and respect the rules of socialist community life and the ethical principles of the society building communism.”

¹⁵ Act of July 18th, 1950 on General Provisions of Civil Law (*przepisy ogólne prawa cywilnego*) (Journal of Laws, No. 34, item 311).

¹⁶ A typical representative of this way of thinking was Seweryn Szer who wrote: “In socialist Soviet law, instead of such abstract formulations as good faith, good customs, fair dealing etc., we have a single concept: the principles of socialist life. These principles regulate the reciprocal relationships of people within a socialist society and are based on the postulates of socialist morality. Socialist law and socialist morality are based on the same assumptions of socialism. They possess the same substantive basis (socialist relationships of production) and the same ideological basis (Marxism-Leninism)”. (Seweryn Szer, *Prawo cywilne* 25 (2nd ed. 1962).

¹⁷ For concrete examples see Rafał Mańko, *Quality of Legislation Following a Transition from Really Existing Socialism to Capitalism: A Case Study of General Clauses in Polish Private Law*, in Jānis Rozenfelds & Jānis Plebs (eds.), *The Quality of Legal Acts and Its Importance in Contemporary Legal Space* 545-546 (2012).

The second horizontal measure introduced into socialist law with the aim of promoting the public interest over the private one – the “socio-economic purpose” – was likewise a general clause of Soviet origin. It was first introduced in 1922 in the Soviet Russian Civil Code¹⁸ of the NEP period and was explicitly conceived as a Damocles’s sword hanging over private rights. In fact, Article 1 of that Code provided explicitly that “[t]he law protects private rights except as they are exercised in contradiction to their social or economic purpose (*социально-хозяйственное назначение*)”. A reception of this general clause into Polish law occurred already in 1946 in the General Provisions of Civil Law¹⁹ of that year and the clause was known as “social purpose” (*społeczne przeznaczenie*). When the 1946 act was replaced by the 1950 General Provisions, the “social purpose” clause was removed and replaced by the principles of social life, but in the socialist Civil Code of 1964²⁰ both clauses were jointly present, respectively as principles of social life and socio-economic purpose. The function of the latter was, first of all, to limit the exercise of all subjective rights (Article 5), but also to limit the extent of the right of ownership (Article 140).

Moving on the sectoral measures aimed at promoting the public interest within socialist private law, the following branches of law will be addressed: property law, contract law, tort law and the law of civil procedure.

Property law

Within property law, the most important socialist innovation was the stratification of property.²¹ In fact, property was divided into three categories:

¹⁸ English translation available in Vladimir Gsovsky, *2 Soviet Civil Law: Private Rights and Their Background Under the Soviet Regime* (1948).

¹⁹ Decree of November 12th, 1946 – General Provisions of Civil Law (*przepisy ogólne prawa cywilnego*) (Journal of Laws No. 67, item 369).

²⁰ Act of April 23rd, 1964 – Civil Code (*kodeks cywilny*) (Journal of Laws No. 16, item 93; consolidated version as of 2014 published in Journal of Laws from 2014, item 121; hereinafter: k.c.)

²¹ Art. 126-139 k.c.. See also Article 44 k.c.: “Ownership and other property rights are either property of the whole nation (state property) or the property of cooperative organizations or other social organizations of the working people, or the individual property of natural persons or legal persons which are not

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social property (divided into national property, i.e. state property, cooperative property and other collective property)²²; individual property;²³ personal property.²⁴ The notion of “private property” was not used. The stratification of property was not merely a terminological or conceptual exercise, but had a real impact upon the level of protection, with the highest level afforded to state property.²⁵ Hence, the stratification of property was in instrument of promoting the public interest.

Further instruments of promoting the public interest within property law comprised specifically socialist property rights, namely the cooperative member’s right to an apartment and the right of perpetual usufruct. These two rights were *jura in re aliena*, aimed at enabling citizens the satisfaction of their housing needs, simultaneously preserving the social property of land and immovables. Under the cooperative member’s right to an apartment, a citizen could acquire an exclusive and alienable right to enjoy

entities of the socialized economy, or personal property of natural persons”.

²² Art. 126 k.c.: “Social ownership is either socialist ownership of the entire nation (state property), or cooperative ownership or the ownership of other social organizations of the working people”.

²³ Art. 130 k.c.: “Land, buildings and other means of production which are not the object of exclusive social ownership may be, on the basis of legislation and within its limits, the object of ownership of natural persons (individual property)”.

²⁴ Art. 132 k.c.: “§1 Personal ownership is the ownership of things which serve the purpose of satisfying the material and cultural needs of the owner and his close relatives. §2 Also the ownership minor means of production which serve the purpose of producing objects aimed at satisfying the personal needs of the owner and his close relatives shall be considered personal ownership”. Art. 133 of the Civil Code: “§1 In particular, the following may be the object of personal ownership: a one-family house or an apartment constituting a separate immovable (...), objects belonging to the household and furniture, mechanical vehicles. (...)”.

²⁵ See especially Article 127 k.c. Within criminal law, see Articles 199-202 of the Criminal Code of 1969 which provided for a special regime of protection of social property, distinct from the regime of protection of private property. Within civil procedure, see Article 4 of the Act of November 17th, 1964 – the Code of Civil Procedure (*kodeks postępowania cywilnego*) [Journal of Laws No. 43, item 296; hereinafter: k.p.c.).

an apartment, however, both the building and even the apartment itself remained the object of ownership of a housing cooperative, hence they remained social property.²⁶ The land on which the cooperative erected its housing was usually state-owned, and was held by the cooperative under the right of perpetual usufruct,²⁷ which will be described in detail later on.

Although the cooperative member's right to an apartment gave the cooperative member an exclusive and alienable title to enjoy the apartment (the legal title could be sold, exchanged, donated, inherited and was attachable in civil enforcement proceedings),²⁸ nevertheless the title was subject to a number of limitations which were aimed precisely at safeguarding the public interest. First of all, one person could be the holder of only one right to an apartment and be a member of only one housing cooperative.²⁹ If the person was married, both spouses held the apartment jointly.³⁰ Secondly, one apartment could be held only by one person (or by a married couple); co-holdership was excluded.³¹ Thirdly, in case the apartment was sold or donated, the transaction became effective only once the acquirer became admitted to the cooperative.³² The same applied in case of succession.³³ Fourthly, an apartment could be sublet only with the cooperative's consent.³⁴ Fifthly, the right holder participated not only in the costs of running his apartment and pro rata in the costs of maintaining the building stock of the cooperative but also participated financially in the social, cultural and educational activity of the cooperative.³⁵

²⁶ The legal framework was laid down in Act of June 17th, 1961 on Cooperatives and Their Unions (*ustawa o spółdzielniach i ich związkach*) (Journal of Laws No. 12, item 161), later replaced by Act of September 16th, 1982 – the Law of Cooperatives (*Prawo spółdzielcze*) (Journal of Laws, No. 30, item 210).

²⁷ Jan Winiarz, *Prawo użytkowania wieczystego* 37 (1970)

²⁸ Cooperatives Act 1961, Art. 147 §1 sentence 1.

²⁹ Cooperatives Act 1961, Art. 136 §1; Cooperatives Act 1982, Art. 206 §1.

³⁰ Cooperatives Act 1961, Art. 138.

³¹ Ibid.

³² Cooperatives Act 1961, Art. 147 §1 sentence 2.

³³ Cooperatives Act 1961, Art. 150.

³⁴ Cooperatives Act 1982, Art. 217 §2.

³⁵ Cooperatives Act 1961, Art. 208 §1.

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The second socialist property right which was introduced in its final form in 1961³⁶ (and later codified in the socialist Civil Code of 1964³⁷) was the right of perpetual usufruct (*prawo użytkowania wieczystego*). Although bearing some resemblance to legal institutions of the civilian tradition, such as *emphyteusis* or *Baurecht*, the right of perpetual usufruct was a distinctively socialist legal institution, combining elements of private law and administrative law.³⁸ In particular, the creation, extinction and modification of the right was always preceded by an appropriate administrative decision issued by the competent authority. The land itself remained property of the state and the private party enjoying the title of perpetual usufruct had to comply with limitations as to the purpose of its use laid down in the administrative decision, lest the right be withdrawn. An annual fee was payable in exchange for the enjoyment.

In its original form under actually existing socialism, the right of perpetual usufruct was an important instrument of managing state-owned land, allowing to further the public interest in the form of satisfaction of housing needs, development of tourist infrastructure, as well as other forms of sports and entertainment infrastructure (playgrounds for children, stadiums), and even for the purposes of furthering agricultural production.³⁹ However, priority was given to housing policy, which was treated as the basic function of this legal institution.⁴⁰ By resorting to the institution of

³⁶ Act of July 14th, 1961 on Land Management in Towns and Settlements (Journal of Laws No. 32, item 159; hereinafter: Urban Land Management Act 1961).

³⁷ Articles 232-243 k.c.

³⁸ Aleksander W. Rudziński, *A Comparative Study of Polish Property Law* in Dominik Lasok (ed.), *1 Polish Civil Law 70* (1973). Even today, Polish authors acknowledge that the right of perpetual usufruct is a peculiarity of Polish law, although they draw attention to its functional equivalents in other legal systems, such as the German hereditary right of construction or the French lease for construction Zdzisław Gawlik, *Użytkowanie wieczyste de lege ferenda* in Mieczysław Sawczuk (ed.), *Czterdzieści lat kodeksu cywilnego* 116 (2006).

³⁹ Andrzej Cisek, *Użytkowanie wieczyste* in Edward Gniewek (ed.), *4 System prawa prywatnego. Prawo rzeczowe* 143 (2nd ed. 2007).

⁴⁰ Jan Winiarz, *Prawo użytkowania...* 34; Edward Gniewek, *Prawo rzeczowe* 162-163 (2nd ed. 1999); Andrzej Cisek, *Użytkowanie...* 143; Krzysztof

perpetual usufruct, the state encouraged citizens to use their own resources in order to satisfy their housing needs.⁴¹ Simultaneously, the state did not diminish its own property of land which was an important ideological factor under actually existing socialism.⁴² For private parties and cooperatives, the main function of this legal institution was simply gaining access to land, since the possibility of acquiring ownership of state land were very limited. Perpetual usufruct was a very important legal title used in practice by housing cooperatives,⁴³ which delivered a vast majority of collective housing in socialist Poland.⁴⁴ Also private individuals built family houses on land granted to them under this title.⁴⁵ It was also pointed out that social purpose of the institution of perpetual usufruct, as seen from the point of view of the perpetual usufructuary, was to “secure (...) the economic advantages necessary for the construction of buildings, particularly bank credit and the possibility of getting his [i.e. the perpetual usufructuary’s – R.M.] financial investment back by selling his right with the building (...)”.⁴⁶

Law of obligations

Within contract law, the primary instrument of promoting the public interest was a set of rules on the conclusion of planned contracts between entities of the socialized economy (*jednostki gospodarki uspołecznionej*), i.e. not only state-owned enterprises, but also cooperatives.⁴⁷ These fairly detailed rules were comprised in the Civil Code, but were also developed in greater detail in an entire body of regulation enacted on the basis of two

Pietrzykowski in Id. (ed.), 1 *Kodeks cywilny. Komentarz do artykułów 1-449* 654 (4th ed. 2005).

⁴¹ Błażej Wierzbowski, *O przydatności użytkowania wieczystego in Honeste vivere... Księga pamiątkowa ku czci Profesora Władysława Bojarskiego* 618 (2001).

⁴² Edward Gniewek, 4 System prawa prywatnego. *Prawo rzeczowe...* 163.

⁴³ Jan Winiarz, *Prawo użytkowania...* 37.

⁴⁴ Maciej Cesarski, *Dorobek materialny spółdzielczości mieszkaniowej w Polsce* in Zbigniew Gotfalski (ed.), *Historia i przyszłość spółdzielczości mieszkaniowej w Polsce* 29 (2011).

⁴⁵ Jan Winiarz, *Prawo użytkowania...* 38.

⁴⁶ Aleksander W. Rudziński, *A Comparative...* 71.

⁴⁷ Articles 397-404 k.c.

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specific provisions of the Civil Code – Article 2 and Article 384. The first of these rules allowed governmental regulation to derogate from the Civil Code with regard to relationships between entities of socialized economy, and the latter Article allowed to enact standard terms of contracts applicable to contracts concluded by such entities. Undoubtedly, the binding character of the national socio-economic plan and its direct impact upon contract law was an instrument of promoting the public interest.

It must added here that in contrast to the law of many states of the Soviet bloc, such as in particular Czechoslovakia or the German Democratic Republic, Polish law adhered to the so-called “principle of unity of civil law”, whereby trade between the units of socialized economy (socialized trade, “*obróć społeczniomy*”) remained, in principle, regulated by the Civil Code and not by a separate Economic Code as in the aforementioned countries.⁴⁸ This was even strengthened by the monist principle, whereby commercial law was not a separate branch of private law (as in the French or German systems), but all types of contracts, commercial or consumer, were brought together under the umbrella of the Civil Code.⁴⁹

This meant not only that many nominate contracts from the pre-World War II Commercial Code of 1934 were integrated into the socialist Civil Code of 1964,⁵⁰ but also that nominate contracts typical of a centrally

⁴⁸ The principle of unity of civil law was proclaimed in Article 1 k.c.: “§1 This code regulates the civil-law relationships between entities of the socialized economy, between natural persons and between entities of the socialized economy and natural persons. §2 The provisions of the code pertinent to the entities of the socialized economy are applicable also to state institutions and the social organizations of the working people whose task is the performance of economic activity. §3 If nothing different can be inferred from the code or other statutes, the provisions of the code pertaining to natural persons are applicable *mutatis mutandis* to legal persons which are not entities of the socialized economy”.

⁴⁹ However, owing to the aforementioned Articles 2 and 384 k.c., the principle of unity was subject, *de facto*, to far-reaching limitations.

⁵⁰ E.g. the contract of agency (*umowa agencyjna*), the contract of commission (*umowa komisu*), the contract of shipment (*umowa spedycji*), the contract of carriage (*umowa przewozu*), or the contract of storage (*umowa skladu*), formerly regulated in Book II – *Commercial Acts*, Section III – *Obligations*,

planned economy were introduced to that Code, as legal transfers from Soviet law. These included the cultivation contract (*umowa kontraktacji*)⁵¹ and the delivery contract (*umowa dostawy*).⁵² Both nominate contracts were unknown either to the pre-War Code of Obligations of 1933 or the Commercial Code of 1934.⁵³ Such *contractus nominati* could not be found also in the Western civil codes which inspired Poland's pre-War drafters, namely the German, Austrian, French or Swiss one. However, these two contracts were codified in Soviet civil law⁵⁴ and it is from this source that the legal transfers in question emerged.

The cultivation contract in its Polish version was a contract for the sale of future crops concluded between, on the one hand, a farmer (be it a private farmer or a state-owned farm) and, on the other hand, by a socialized entity acquiring crops. The element of public interest present in this legal institution stemmed from the fact that it integrated private farmers – the supplier of the majority of agricultural produce in socialist Poland – with the centrally planned economy.⁵⁵

Chapters IV-VIII of the Commercial Code.

⁵¹ The cultivation contract was regulated in a detailed manner in Articles 613-626 k.c. Article 613 §1 defined the essence of the contract as follows: “By virtue of a cultivation contract, a party running an agricultural, gardening or animal farm (the producer) undertakes to produce and deliver to a unit of socialized economy (the contractor) a determined quantity of agricultural or animal produce of a determined quality, and the contractor undertakes to receive these products on the agreed date, pay the agreed price and discharge an additional performance if the contract or detailed rules of law provide for such a duty”.

⁵² The delivery contract (*umowa dostawy*) was a contract whereby one entity of the socialized economy (the supplier) undertook to produce generic goods and deliver them in parts or periodically to another unit of socialized economy in exchange for price (See Art. 605ff k.c.).

⁵³ Regulation of the President of the Republic of June 27th, 1934 – the Commercial Code (*kodeks handlowy*) (Journal of Laws No. 57, item 502).

⁵⁴ See Fundamentals of Civil Legislation of the USSR and Union Republics (1961), Articles 44-50 (delivery contract – *договор поставки*) and Articles 51-52 (cultivation contract – *договор контрактиции*).

⁵⁵ Andrzej Stelmachowski, *Kontraktacja*, in Jerzy Rajski (ed.), *7 System prawa prywatnego. Prawo zobowiązań – część szczegółowa* 252-253 (2nd ed. 2004); Witold Czachórski, *Prawo zobowiązań w zarysie* 473 (1968); Juliusz Krzyżanowski, in *2 Kodeks cywilny. Komentarz* 1348 (1972); Supreme Court

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As regards the delivery contract, it was a mix of the location *conductio operis* with the contract of sale, and could be concluded only by units of the socialized economy. Hence it can be said to serve the public interest in that it regulated socialized trade (*obróć społeczniomy*), whilst being unavailable for the private sector.

Procedural law

The law of civil procedure became geared towards furthering the public interest especially as a result of the law reforms of 1949-1950 which effectively introduced into Polish law a number of legal transfers from the Soviet Union, changing the face of Polish civil procedure from a Western-style one to a typically socialist one. The main instruments deployed included, first of all, an unlimited power of the public prosecutor to initiate or join any civil lawsuit whilst enjoying full rights of a litigant; secondly, the abolition of cassation as a third instance available to litigants as a matter of right and its replacement by public-interest-oriented extraordinary revision; thirdly, the introduction of binding Guidelines of Administration of Justice and Judicial Practice issued by the Supreme Court; fourthly, the introduction of the principle of an active court and of objective truth in place of the liberal principles of adversarial proceedings and formal truth.

As regards the unlimited power of the prosecutor to initiate or join civil proceedings, it must be emphasized that the institution in question was a

legal transfer from Soviet law.⁵⁶ It appeared in Poland in 1950,⁵⁷ and as from that moment all lawsuits were susceptible to being either initiated or joined by a prosecutor. In 1964 the prosecutor's right of intervention was codified in the new Code of Civil Procedure.⁵⁸ From that moment on, it became no longer possible for the prosecutor to file for divorce.⁵⁹ In contrast to those Western legal systems which provide for a certain extent of *locus standi* for prosecutors in narrowly defined areas and/or with narrowly defined powers which are quite distinct from the powers of the private litigants,⁶⁰ the Soviet model of prosecutorial participation in civil proceedings, duly implemented in socialist Poland, provided that a prosecutor who initiates or joins civil proceedings enjoys, in principle, the status

⁵⁶ Under the Soviet Code of Civil Procedure of 1923 a prosecutor could participate in the hearing of any case at any instance, file suits and applications, give his opinion to the court, as well as bring appeals (called 'protests') against any decisions made by the court. These rules were later taken over into the Principles of Civil Procedure of 1961 and the Code of Civil Procedure of the RFSSR of 1964. Adam Lityński, *Prawo Rosji i ZSRR 1917-1991 czyli historia wszechzwiązkowego komunistycznego prawa (bolszewików). Krótki kurs* 280-281 (2012); William E. Butler, *Soviet Law* 106-107 (1983); Dmitry Maleshin, *Russian Style of Civil Procedure*, in 21-2 Emory International Law Review 549 (2007); Maleshin, *Russian Civil Procedure: An Exceptional Mix*, 1-1 Civil Procedure Review 106-107 (2010), available at <http://tinyurl.com/kq93cbl> (last visited January 6th, 2015); Anna Stawarska-Rippel, *Radziecka procedura cywilna: totalitarna czy nowoczesna?*, 3365 Acta Universitatis Vratislaviensis 470 (2011).

⁵⁷ Act of July 20th, 1950 amending the Rules on Proceedings in Civil Matters (Journal of Laws No. 38, item 349).

⁵⁸ Articles 7, 55-60 k.p.c.

⁵⁹ Article 7 and 55 sentence 2 k.p.c. read in conjunction with Articles 22, 86 and 127 of Act of February 25th, 1964 – Family and Guardianship Code (*kodeks rodzinny i opiekuńczy*) (Journal of Laws No. 9, item 59).

⁶⁰ For instance, a broad standing of the ministère public is provided for in French civil procedure. See Gerard Couchez & Xavier Lagarde, *Procédure civile* 146-153, 282-285 (16th ed. 2011); John Bell et al., *Principles of French Law* 60-61, 89-90 (2nd ed. 2008). However, a French prosecutor is, in principle, limited only to giving a non-binding advice the court (see John Bell et al., *Principles...* 89-90), and may challenge a decision only if he initiated the proceedings, but not if it joined proceedings already in motion (see *ibid.* 112).

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of a party to the proceedings.⁶¹ This means not only making proposals as to the outcome of the case, but also introducing evidence as well as launching any normally available procedural remedies (forms of appeal).

It is beyond any doubt that such a broad power of intervention cannot be classified otherwise than as an obvious imposition of the public interest over the private one within civil litigation, and indeed, the importance of this institution was fully acknowledged by the legislature and by scholars in that the prosecutor’s right of intervention was not only considered to be one of the socialist hallmarks of Poland’s Code of Civil Procedure, but also the institution in question was elevated to the rank of one of the fundamental principles of Polish civil procedure.⁶²

A second feature aimed at promoting the public, rather than the private interest, was the replacement of the possibility of filing a petition for cassation to the Supreme Court as a matter of right with the so-called “extraordinary revision” (*rewizja nadzwyczajna*).⁶³ The latter was a transfer from the Soviet Union.⁶⁴ In the fatherland of the world Proletariat it was known as the “supervisory instance” (*надзорная инстанция*) and it consisted of the possibility by certain high-ranking public officials to attack any judicial decision having the force of *res judicata* before the Supreme Court.⁶⁵ In the Polish version of the supervisory instance, introduced in 1950 as part of the larger Sovietising law reform mentioned already above, this special means of appeal was available to the Prosecutor General, the Minister of

⁶¹ Article 60 k.p.c.

⁶² See e.g. Albert Meszorer, *Stanowisko i czynności procesowe prokuratora w postępowaniu cywilnym* 75 (1957); Jerzy Smoleński, *Prokuratura Polskiej Rzeczypospolitej Ludowej. Komentarz do ustawy o prokuraturze PRL i innych przepisów dotyczących prokuratury* 127 (2nd ed. 1981).

⁶³ Rafał Mańko, *Is the Socialist Legal Tradition “Dead and Buried”? The Continuity of the Certain Elements of Socialist Legal Culture in Polish Civil Procedure* in Thomas Wilhelmsson et al. (eds.), *Private Law and the Many Cultures of Europe* 94-99 (2007).

⁶⁴ Exported also to other socialist countries, see e.g. Stanisław Włodyka, *Specjalne środki nadzoru judykacyjnego Sądu Najwyższego* in Marian Rybicki (ed.), *Sąd Najwyższy w PRL 196-197* (1983).

⁶⁵ Adam Lityński, *Prawo Rosji...* 289.

Justice, the First President of the Supreme Court,⁶⁶ later joined also by the Minister of Labor (since 1985)⁶⁷ and the Ombudsman (since 1988).⁶⁸ The extraordinary revision was filed to the Supreme Court and it could be brought against a judicial decision having the force of *res judicata*. This obviously raised the issue of a collision between two values – legal certainty (in the guise of stability of judicial decisions) on the one hand, and “socialist legality” on the other hand. Just like all other countries of the Soviet bloc, socialist Poland resolved the conflict in favor of the latter.

Once again, as in the case of the prosecutor’s intervention in civil proceedings, certain similarities between the socialist legal institution and certain Western institutions should not obscure the essential difference. It is namely known that in France the prosecutor of the Court of Cassation may bring a so-called cassation in defense of statutory law. Nevertheless, the fundamental difference is that, first of all, such a cassation does not replace the litigants’ right to bring their own cassation, and, secondly it has no effects upon the original judgment itself, being rather a legal exercise *pro futuro* than a real intervention in the original lawsuit itself. In the socialist version, to the contrary: the parties were barred from bringing an extraordinary revision themselves (they could only petition the competent public officials) and the outcome of the extraordinary revision proceedings impacted upon the judgment under reconsideration.⁶⁹

A third institution introduced to Polish civil procedure of the socialist period with view to furthering the public interest were the Guidelines of Administration of Justice (*wytyczne wymiaru sprawiedliwości i praktyki*

⁶⁶ Art. 417 §1 k.p.c.

⁶⁷ Art. 417 §1 k.p.c. as amended by Act of April 17th, 1985 (Journal of Laws No. 20, item 86).

⁶⁸ Art. 417 §1 k.p.c. as amended by Act of July 15th, 1987 on the Ombudsman (Journal of Laws No. 21, item 223).

⁶⁹ See e.g. Zbigniew Resich, *Nadzór judykacyjny Sądu Najwyższego* in Marian Rybicki, *Sąd Najwyższy...* 160. In contrast to the Polish extraordinary revision, the French “*pourvoi dans l’intérêt de la loi*” which can be filed by a *procureur général* attached to the *Cour de cassation* “has no effect on the parties” to the proceedings (John Bell et al., *Principles...* 112-113; see also Gerard Couchez & Xavier Lagard, *Procédure...* 508).

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sądowej).⁷⁰ In contrast to Western Supreme Courts whose main task is the resolution of conflicts and only incidentally a contribution to the development of law (even in common law countries a new legal rule qua precedent can be established in a concrete, real case), socialist Supreme Courts were endowed with functions collectively known as a the “extra-instance means of adjudicatory supervision” (*pozainstancyjne środki nadzoru judykacyjnego*).⁷¹ Among them the principal one was the issue of the said Guidelines. The Supreme Court could issue them upon request of the Minister of Justice, the Prosecutor General or its own First President. The Guidelines, in the form of generally and abstractly framed rules, were binding on all courts in the country and their violation could be the reason to quash a judgment.⁷² Hence, they were in fact a source of peculiar, socialist judge-made law.⁷³

Finally, among the procedural institutions aimed at promoting the public interest, one should mention two intertwined principles – of an active court and of objective (substantive) truth.⁷⁴ Thus, on an organisational level, the proceedings were closely managed by the judge, rather than steered by the initiative of litigants.⁷⁵ In particular, the judge was entitled to admit evidence on his own motion and even to order an investigation of the facts of the case.⁷⁶ Parties were not free to withdraw a claim, as the

⁷⁰ Article 22(d) and 24 Act of February 6th, 1928 – Law on the Organisation of Common Courts], consolidated version as of 1950 published in Journal of Laws from 1950, No. 39, item 360.

⁷¹ On which see e.g. Stanisław Włodyka, *Specjalne środki nadzoru judykacyjnego Sądu Najwyższego* in Marian Rybicki, *Sąd Najwyższy...*

⁷² Art. 24 §3 of the Common Courts Act.

⁷³ Rafał Mańko, *The Culture of Private Law in Central Europe after Enlargement: A Polish Perspective*, 11-5 European Law Journal 535 (2005).

⁷⁴ Art. 3 §2 k.p.c.: “The court shall strive to analyze all essential facts of the case in a comprehensive manner and discover the actual content of factual and legal relationships. The court may out of its own motion take any actions, permissible according to the state of the case, that it deems to be useful for the purposes of supplementing the materials and the evidence submitted by the parties and participants of the proceedings”.

⁷⁵ Article 212 k.p.c.

⁷⁶ Articles 213 §1 and 232 k.p.c.

withdrawal was subject to judicial control in the light of the principles of social life.⁷⁷ The recognition of the claim by the defendant was not binding on the court.⁷⁸ All these principles undoubtedly served the public interest (objectively legal outcome of litigation).⁷⁹

Law reforms following 1989

Preliminary remarks

The transition from a centrally planned and politically monocratic system of actually existing socialism to a market-oriented and politically pluralist system of capitalism after 1989 had its direct and immediate impact upon private law. This justifies the enquiry into the removal or survival of the institutions introduced under actually existing socialism with view to promoting the public interest at the expense of the private one.

The post-socialist reforms of private law in Poland did not occur all at once but were divided into two distinct phases. The first phase, comprised a Civil Code Amendment Act enacted already in July 1990⁸⁰ which entered into force in October of the same year, therefore some ten months after the definite demise of actually existing socialism (as from January 1st, 1990 and the implementation of Balcerowicz's "shock therapy"). The second phase comprised two amendment acts – the Civil Code Amendment Act of August 1996⁸¹ and a Code of Civil Procedure Amendment Act,⁸²

⁷⁷ Article 203 §4 k.p.c.

⁷⁸ Article 213 §2 k.p.c.

⁷⁹ Nevertheless, it must be admitted that the instruments in question were not original innovations of socialist law, but rather a reintroduction of well-known principles of inquisitorial proceedings which had been abandoned in the West, roughly in the 19th century, in favour of liberal principles of contradictory proceedings, or were never known in the first place (as in the common law countries).

⁸⁰ Act of July 28th, 1990 amending the Civil Code (Journal of Laws No. 55, item 321).

⁸¹ Act of August 23rd, 1996 amending the Civil Code (Journal of Laws No. 114, item 542).

⁸² Act of March 1st, 1996 amending the Code of Civil Procedure (Journal of Laws No. 43, item 189).

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also of August 1996. Further major reforms of private law, enacted especially in 2000 and 2003, go beyond the scope of post-socialist reform and are therefore outside the scope of the present enquiry.

The 1990 reform of the civil code

As regards the 1990 reform, it must be emphasized that it affected only substantive private law, leaving the Code of Civil Procedure patently intact for the forthcoming 6 years. The main thrust of the 1990 law reform was directed at removing a vast majority of the socialist institutions in the Civil Code. In particular, an entire chapter of the Code’s book on property law dealing with the stratification of property was removed; the same was done with the rules on planned contracts in the book on obligations. Likewise, smaller rules, such as the one requiring that the Code be interpreted in line with the fundamental rules of the political system was removed.⁸³ The contracts of cultivation and delivery were amended so as to allow their conclusion by any economic operators. However, despite these amendments, a number of rules stayed in place, in particular the two socialist general clauses (principles of social life and socio-economic purpose).

Reforms of the Code of Civil Procedure

Since 1996, the Code of Civil Procedure underwent a series of reforms certainly moving it away from the public-interest focus typical for the Socialist Legal Tradition. In 1996, the extraordinary revision procedure (described above in section 2.3) was abolished and replaced with a French-style cassation procedure, aimed at protecting the private interests of litigants and not the public interest.⁸⁴ The rules on an active court and objective truth, although not yet removed, were alleviated.⁸⁵ In particular,

⁸³ Article 4 k.c.: “The rules of civil law shall be interpreted and applied in conformity with the principles of the political system (ustrój) and aims of the Polish People’s Republic”.

⁸⁴ Articles 392–393 k.p.c. (as amended in 1996).

⁸⁵ See in particular the amendment introduced by Act of March 1st, 1996 to Articles 203 §4, 213 and 232 k.p.c.

the court became bound by a recognition of the claim by the defendant, with exceptions,⁸⁶ could no longer order an investigation.⁸⁷

Over the years the Code was amended many times. In particular, the cassation underwent a characteristic modification whereby the public interest became much more visible, and in fact the Prosecutor General and Ombudsman regained the right to file such a cassation in the public interest, making it similar to a certain extent to the former extraordinary cassation.⁸⁸ In 2010 they were joined by the Children's Ombudsman.⁸⁹ As regards the principles of an active court and objective truth, they have been in general dismantled, although the court still may refuse to recognize the withdrawal of a statement of claim or a renunciation of the claim (by the plaintiff) or an admission of the claim (by the defendant) if it would be not only illegal or circumvent the law, but also violate the principles of social life.⁹⁰ The court may still admit evidence not adduced by the parties.⁹¹

Reforms of cooperative housing law

After 1989, the legal framework of the cooperative member's right to an apartment underwent a series of adaptations. Whilst the "core" of the legal title – the right to enjoy an apartment and transmit it *inter vivos* and *mortis causa* – was of course retained, the "penumbra" of the right, strictly connected to the socio-economic reality of actually existing socialism were gradually dismantled both by legislative amendments and Constitutional Court case-law.

As early as 1991 the legislature permitted the encumbrance of the right with mortgage.⁹² In 1994 the principle that one person (or married couple) could hold only one proprietary right to an apartment was abolished,⁹³

⁸⁶ Article 213 §2 k.p.c. (as amended in 1996).

⁸⁷ Article 232 k.p.c. (as amended in 1996).

⁸⁸ Article 398¹ k.p.c. (added in 2005).

⁸⁹ Art. 2 of Act of September 24th, 2000 (Journal of Laws No. 197, item 1307).

⁹⁰ Article 204 §4 and 213 §2 k.p.c. (current, consolidated version – as published in Journal of Laws from 2014, item 101).

⁹¹ Article 232 sentence 2 k.p.c. (current version).

⁹² Act of October 25th, 1991 (Journal of Laws No. 115, item 496).

⁹³ Act of July 7th, 1994 (Journal of Laws No. 90, item 419).

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allowing the cooperative apartment to become also an investment asset. Since 2001, the co-holdership of the proprietary right became possible,⁹⁴ further detaching the right from the idea of satisfying housing needs (of a family) and treating it as any other object of property rights. From that year on also minors – even living with their parents, ergo not having housing needs of their own – could acquire cooperative rights in apartments.⁹⁵ Holding the right to an apartment became separated from membership in the housing cooperative,⁹⁶ effectively depriving the cooperative of any means of controlling the inflow of inhabitants into its housing stock.

Reforms of the law on perpetual usufruct

After 1990, the legal framework of perpetual usufruct underwent a characteristic evolution, in that the administrative-law aspects were gradually removed, and the institution has become 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.⁹⁷ The conclusion of such a contract must be, in principle, preceded by a call for tenders.⁹⁸ As under actually existing socialism, the perpetual usufructuary may be obliged to construct a building or make other use of the land.⁹⁹

Most limitations inherent in the original legal framework have been lifted. First of all, under the Civil Code,¹⁰⁰ both the state and local government

⁹⁴ Constitutional Court judgment of February 25th, 1999, Case K 23/98; TK judgment of June 29th, 2001, Case K 23/00. Cfr. Ewa Bończak-Kucharczyk, *Spółdzielnie mieszkaniowe. Komentarz* 359 (2010).

⁹⁵ Act of December 15th, 2000 on housing cooperatives (Journal of Laws from 2001 No. 4 item 27, hereinafter: Housing Cooperatives Act 2000), Art. 3.

⁹⁶ Constitutional Court judgment of May 21st, 2001, Case SK 15/00; Constitutional Court judgment of March 30th, 2004, Case K 23/03; Supreme Court judgment of April 28th, 2006, Case V CSK 42/06. Cfr. Gerard Bieniek, *Nieruchomości spółdzielni mieszkaniowych* in idem & Stanisław Rudnicki (eds.) *Nieruchomości. Problematyka prawna* 283 (2005).

⁹⁷ *Ibid.*, 151.

⁹⁸ *Ibid.*, 152-153.

⁹⁹ *Ibid.*, 157.

¹⁰⁰ Art. 232 k.c.

(municipal, district, regional) may encumber their land with the right of perpetual usufruct. Secondly, the said right may be established in favor 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 corporate.¹⁰¹

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.¹⁰² However, in contrast to the socialist period, since 1998 the tenancy may no longer be ended by a (unilateral) administrative decision of the land owner.¹⁰³

Legal survivals of the Socialist Legal Tradition: still furthering the public interest?

Preliminary remarks

Despite the law reforms, undoubtedly numerous and far-reaching, described in section 3, there still persists a number of legal institutions which, during the period of actually existing socialism, were introduced with view to furthering the public interest. The most significant ones comprise: the general clause “principles of social life”; the general clause “socio-economic purpose”; the cooperative member’s right to an apartment (which, although can be no longer established, still exists); the right of perpetual usufruct; the prosecutor’s right to intervene in civil proceedings; the Prosecutor’s General right to file an “extraordinary cassation”.

¹⁰¹ Gerard Bieniek, *W sprawie przyszłości użytkowania wieczystego* in *Ars et usus. Księga pamiątkowa ku czci Sędziego Stanisława Rudnickiego* 54 (2005).

¹⁰² *Ibid.*, 180.

¹⁰³ *Ibid.*

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General clause of “principles of social life”

Undoubtedly, when initially introduced to the Polish legal system back in 1950, the “principles of social life” were meant to be an instrument of furthering the public interest. And indeed, they were used in this manner, as evidenced by the case law of the 1950s. Furthermore, the general clause was in fact used to create a parallel system of equitable law,¹⁰⁴ and the Supreme Court did not hesitate to supplement (*supplere*) the written law with new, abstractly framed rules (e.g. a general prohibition of unpaid labor, such as unpaid traineeships)¹⁰⁵ or to derogate rules (*corrigere*) which it found unfit for the new state-socialist system (e.g. the elimination of monetary claims as compensation for wrongful death).¹⁰⁶ From a substantive point of view, the Supreme Court at that time understood the new general clause as a means of imposing preference for the social interest and interest of the state over private interest.¹⁰⁷

However, from the mid-1960s onwards the situation changed. The Supreme Court’s “Praetorian” activity actually ceased once the written law was brought into line with the state-socialist system: from then on, the Supreme Court stopped invoking the principles of social life to proclaim

¹⁰⁴ Cfr. Leszek Leszczyński, *Stosowanie generalnych klauzul odsyłających* 226 (2001).

¹⁰⁵ Including unpaid internships and the work of “volunteers” – see SN decision of November 7th, 1950, Case C 162/50, LEX No. 117060.

¹⁰⁶ Under the case-law from the 1950s, a claim for monetary compensation for a wrongful death – allowed under the Code of Obligations – was considered to violate the principles of social life (SN decision of April 21st, 1951, Case C 25/51, LEX No. 160157), unless the moral wrong entailed also a patrimonial loss (SN decision of December 15th, 1951, Case C 15/51, LEX No. 117056).

¹⁰⁷ Leszek Leszczyński, *Właściwości posługiwania się klauzulami generalnymi w prawie prywatnym. Perspektywa zmiany trendu*, 4-3 *Kwartalnik Prawa Prywatnego* 296 (1995); Id., *Stosowanie...* 78 points out that whereas such a term as “equity” can be understood as referring both to individual and to social interest, the very term “principles of social life” “presupposes as a point of departure a supra-individual point of view”. However, whilst he acknowledges that the name of a general clause may, by itself, impact upon its interpretation, he also adds that it is not the name which plays a decisive role, but rather the prevailing axiology which underlies the legal system (Ibid., 77-78).

new rules or abrogate old ones and in 1967 it explicitly ruled that the doctrine of principles of social life “can serve as the basis for correcting the evaluation of an atypical case, but does not serve the purpose of generalisations in typical situations”.¹⁰⁸ In 1974 the Supreme Court developed this idea by stating that the principles of social life may not be the source of judge-made law, lest the court would “enter into the scope of legislative activity”.¹⁰⁹ Therefore, the functions of *supplere* or *corrigere* on the basis of the principles of social life would, from then on, be performed only on an *ad hoc* basis. The general clause would no longer serve to create a judge-made “inner system” of equitable law.¹¹⁰ Characteristically, the systemic transformation of 1989 did not bring about a change in this respect.¹¹¹ Judges, just like before 1989, tend to downplay the law-making potential of general clauses and are at pains to underline that a concrete interpretation of a general clause is always applicable only in the case at hand.¹¹²

Most importantly, however, the principles of social life after 1989 have been detached from their earlier ideological character. In a leading commentary on the Civil Code a Supreme Court judge stated that the principles of social coexistence should, after the transformation, be interpreted by way of invoking the traditional general clauses, such as equity, fair dealing, as well as concepts unknown to the legal system such as “honesty”, “loyalty” and “Christian values”.¹¹³ Also other authors argued that the name of the general clause is immaterial and it can be easily filled with new content.¹¹⁴ Also the Supreme Court understand the old socialist “principles of social life” as equal to Western general clauses, such as *boni mores*, *bona fides* or *aequitas*.¹¹⁵ Their Leninist origins have obviously fallen into oblivion. Therefore, although some authors have argued for the

¹⁰⁸ SN decision of November 28th, 1967, Case I PR 415/67, LEX No. 4615.

¹⁰⁹ SN resolution of January 17th, 1974, Case III PZP 34/73, LEX No. 15390.

¹¹⁰ Leszek Leszczyński, *Stosowanie...* 100.

¹¹¹ *Ibid.*, 226.

¹¹² *Ibid.*, 225.

¹¹³ Stanisław Rudnicki in 1 *Komentarz do kodeksu cywilnego* 250 (2007).

¹¹⁴ See e.g. Krzysztof Pietrzykowski in 1 *Kodeks cywilny. Komentarz do artykułów 1-449* 67 (5th ed. 2008); Stanisław Dmowski in 1 *Komentarz do kodeksu cywilnego* 38 (7th ed. 2007).

¹¹⁵ Rafał Mańko, *Quality of Legislation...* 551-552, with references.

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elimination of the “principles of social life” from the legal system,¹¹⁶ one should rather agree with those authors who see nothing dangerous in the preservation of this general clause.¹¹⁷

General clause of “socio-economic purpose”

The social function of the doctrine of socio-economic purpose during the period of actually existing socialism was

“to give absolute priority to the state interest or social interest before the interest of right-holders, and in particular to ensure the conformity of enjoyment of subjective rights with the socialist typology of property, as well as the conformity of economic turnover with the indications following from the system of central economic planning”.¹¹⁸

After the transition in 1989, the role of the analysed doctrine certainly diminished. However, as the analysed case-law shows, courts treat this doctrine as a last resort in situations when individuals try to invoke their rights in a formally correct manner, but in obvious contradiction to the

¹¹⁶ See e.g. Tomasz Justyński, *Nadużycie prawa w polskim prawie cywilnym* 112-113 (2000); Mateusz Pilich, *Zasady współzycia społecznego, dobre obyczaje czy dobra wiara? Dylematy nowelizacji klauzul generalnych prawa cywilnego w perspektywie europejskiej*, 2 *Europeizacja prawa prywatnego* 169 (2008); Zbigniew Radwański & Maciej Zieliński, *Uwagi de lege ferenda o klauzulach generalnych w prawie prywatnym*, 2 *Przegląd Legislacyjny* 20 (2001); Krzysztof Pietrzykowski, *Kodeks...*, 67; Stanisław Rudnicki, *Komentarz...*, 249-250.

¹¹⁷ See e.g. Beata Janiszewska, *O potrzebie zmiany klauzuli zasad współzycia społecznego (głos w dyskusji)*, 61-4 *Przegląd Ustawodawstwa Gospodarczego* 7ff (2003); eadem, *Pojęcie dobrej wiary w rozumieniu obiektywnym a zasady współzycia społecznego*, 61-9 *Przegląd Ustawodawstwa Gospodarczego* 2ff (2003); Konrad Osajda, *Nadużycie prawa. Konferencja Wydziału Prawa i Administracji. 1 marca 2002 roku* (2003); id., *Głos w obronie klauzuli zasad współzycia społecznego (głos w dyskusji)* in 2 *Europeizacja prawa prywatnego* (2008).

¹¹⁸ Zbigniew Radwański & Maciej Zieliński in Marek Safjan (ed.), 1 *System Prawa Prywatnego. Prawo cywilne – część ogólna* 344 (2007). See also Tomasz Justyński, *Nadużycie prawa w polskim prawie cywilnym* 114 (2000) who points out that this general clause was introduced in order to “clearly underline the dominant role of the social interest in civil law”.

public interest. For instance, in 2010 a court of appeal¹¹⁹ dismissed an owner's *rei vindicatio* on account of a joint violation of both the principles of social life and the socio-economic purpose of the vindicated right.¹²⁰ Although the socio-economic purpose of the right was explicitly mentioned by the court, it was not analyzed separately from the principles of social life. In a case decided in 2009,¹²¹ another court held that a *rei vindicatio* of land beneath the Chopin Airport in Warsaw, even if it were formally justified by the existing property relationships, would nevertheless violate the socio-economic purpose of the right and the principles of social life. In this context, the Court pointed out that

“the primacy of the widely understood public interest [...] over the individual interest of the plaintiffs must be accepted”.

There are, however, also cases in which courts have been analyzing the violation of both doctrines separately: for instance in a 2012 ruling a court of appeal found that the plaintiff is pursuing his right to a legitim in accordance with its socio-economic purpose (but not in accordance with the principles of social life).¹²² It should be added that the approach which does not differentiate between the doctrines of socio-economic purpose and principles of social life was endorsed by the Supreme Court in 2009,¹²³ which ruled that what counts, is an evaluation of the “totality of the circumstances” of a case, rather than a distinct analysis of the facts of the case in light of both doctrines.

¹¹⁹ Court of Appeal in Poznań judgment of November 3rd, 2010, Case I ACa 578/10, LEX No. 756672.

¹²⁰ In the facts of the case the plaintiff wanted to recover a public road (which he was formally owner of) in order to gain a better bargaining position in administrative proceedings regarding the expropriation with view of obtaining a higher compensation. The court underlined that the plaintiff does not have any plans with regard to the land (formally: a plot agricultural land) and is not a farmer.

¹²¹ Court of Appeal in Warsaw judgment of February 2nd, 2009, Case VI ACa 606/08, LEX No. 530990.

¹²² Court of Appeal in Poznań of February 15th, 2012, I ACa 1121/11, LEX No. 1133334.

¹²³ Supreme Court judgment of June 16th, 2009, Case I CSK 522/08, LEX No. 518132.

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As in the case of the principles of social life, it seems obvious that despite the Soviet origins of the general clause of “socio-economic purpose”, it is no longer used in line with the original intent of the legislature, i.e. to trump the private interest and ensure a domination of the public interest. Although indeed, the above-mentioned case-law indicates that the clause is being used to further the public interest, the facts of those cases, i.e. a *rei vindicatio* of a public road or of an international airport, fully justify the decisions taken by the courts applying the general clause and it cannot be said that those decisions are incompatible with a market economy.

Cooperative member's right to an apartment

Under actually existing socialism, the acquisition of a property right to a cooperative apartment had the function of satisfying the housing needs of a citizen and his family. This function has remained intact. Presumably, the vast majority of those who acquired cooperative property rights after 1989, be it on the primary or secondary market, did so in order actually to live in the apartments concerned. However, after the transition to a market economy, a new social function of the legal framework in question emerged: that of drawing capital rent. The legal framework was modified in such a way as to enable both individual and collective investors (legal persons) to acquire cooperative property rights either to rent them out (and draw capital rent) or even to speculate (hoping to sell them for a higher price than the price of acquisition from the cooperative). Both such practices were clearly discouraged or even made illegal under the state-socialist legal regime.

Once again, as in the case of the two general clauses of Soviet origin which were discussed above, the legal survival of actually existing socialism in the form of the cooperative member's right to an apartment, despite its pedigree, has been modified to such an extent that it no longer serves its original purpose, that is the promotion of public interest at the expense of the private one. To the contrary, from a functional point of view, the right has virtually become an equivalent of private property.

Right of perpetual usufruct

After the transformation to a market economy, the public-interest function of the right of perpetual usufruct seems to have diminished in favor of the public owner's desire to retain ownership and to generate long-term income in the form of yearly fees, which can, in the long run, exceed the market value of the real estate (if the fee is set at 2% or 3%).¹²⁴ It should also be added that establishing the right of perpetual usufruct, instead of selling the land to private investors, enables local authorities to have greater control over the way in which the land is used.¹²⁵ For private parties, who now can gain access to land on the market, the main function of gaining access to it, as under actually existing socialism, has diminished in favor of the possibility of gaining cheaper access to land (without the need of paying the entire value of the plot).¹²⁶ It seems that private parties who have a choice between ownership and perpetual usufruct compare the financial conditions of obtaining bank credit with the financial conditions of perpetual usufruct and make an appropriate choice. Probably book-keeping aspects of the alternative (value of the right of ownership versus value of the right of perpetual usufruct) play a certain role, owing to differences in their treatment in corporate book-keeping.¹²⁷

It can also be claimed that the social function of the yearly fee underwent an evolution. Under actually existing socialism its function was identified as similar to a special form of tax, aimed at ensuring that perpetual usufructuaries would participate in the costs of infrastructural investments, as well as a means of preventing or at least limiting the extraction of capital rent by perpetual usufructuaries.¹²⁸ After the transformation it can be assumed that the yearly fee is actually a form of perceiving capital rent by the public owners of the land,¹²⁹ treated as an economically attractive alter-

¹²⁴ Andrzej Cisek, *Użytkowanie...* 145.

¹²⁵ Błażej Wierzbowski, *O przydatności...* 621.

¹²⁶ Gerard Bieniek, *W sprawie przyszłości...* 59; Andrzej Cisek, *Użytkowanie...* 145; Błażej Wierzbowski, *O przydatności...* 624.

¹²⁷ Cfr. *Grunt i prawo wieczystego użytkowania gruntu w księgach rachunkowych* in *Zeszyty Metodyczne Księgowości* 16 (2010), available at <http://tinyurl.com/p9ol9lp> (last visited January 1st, 2015).

¹²⁸ Jan Winiarz, *Prawo użytkowania...* 186.

¹²⁹ Zdzisław Gawlik, *Użytkowanie...* 119.

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native to selling the assets directly on the market. In fact public owners, eagerly making use of a fee adjustment mechanism (bringing the fee into line with the market value of the land) have been criticized for abusing it in order to make a greater profit.¹³⁰

Similarly as the cooperative member’s right to an apartment, also the right of perpetual usufruct has undergone a characteristic evolution as regards its social function. Whilst it can be said that this legal institution serves the public interest, the latter is defined in a different way than originally and is no longer in a conflict with the private interest. In its original form, the right of perpetual usufruct was meant as a substitute of private property, and hence promoted the public interest at the expense of the private one (by limiting the access of individuals to full ownership of land). Today, however, such access is unlimited, and the public interest furthered by means of the right of perpetual usufruct is mainly economic – by encumbering public land with the right, municipalities gain a new source of income.

Prosecutor’s right to intervene in civil proceedings

A legal survival of the socialist period aimed at furthering the public interest which is being resorted to quite frequently in practice is the prosecutor’s right to intervene in civil proceedings.¹³¹ In 2013 as many as 85,083 civil cases¹³² were registered at the Prosecution Service, which meant an

¹³⁰ Gerard Bieniek, *W sprawie przyszłości...* 67 (who made proposals for the limiting of this possibility to an adjustment every 3 years and to create the possibility of introducing a ceiling in the contract creating the right).

¹³¹ The following description of this activity is based on 1 *Sprawozdanie Prokuratora Generalnego z rocznej działalności prokuratury w 2012 roku* [1 *Prosecutor General’s Report on the Annual Activity of the Prosecution Service in 2012*; hereinafter *Prosecutor General’s Report 2012*] 250-258 (2013), available at <http://tinyurl.com/orsuddv> (last visited July 9th, 2013), as well as 1 *Sprawozdanie Prokuratora Generalnego z rocznej działalności prokuratury w 2013 roku* [1 *Prosecutor General’s Report on the Annual Activity of the Prosecution Service in 2013*; hereinafter *Prosecutor General’s Report 2013*] (2014), available at <http://tinyurl.com/omvzlx> (last visited January 6th, 2015).

¹³² Including family and guardianship cases, as well as labour and social security cases.

increase in the number of incoming cases (from 79,996 in 2011, through 83,687 in 2012). In 2012 prosecutors initiated a total of 21,031 civil cases (1,705 less than in 2012). The subject matter of the lawsuits in litigious civil cases included *delict* (218 actions), confiscation of consideration provided for in exchange for the commission of a criminal act (128 actions), actions in labor law (5 actions), actions for determination of paternity (55 actions), actions for negation of paternity (1,143 actions), actions for annulment of recognition of paternity (137 cases), as well as actions for alimony or for the increase of alimony (282 cases). Apart from filing cases, appeals and petitions for reopening of proceedings themselves, prosecutors also joined civil proceedings initiated by private parties. In 2013 prosecutors participated in 21,119 cases initiated by other parties (in 2012 – 19,999, in 2011 – in 18,913 cases).

The 2013 yearly report underlines the participation in the widely known case of the bankruptcy of Amber Gold Sp. z o.o. in *Gdańsk*,¹³³ as well as in the case concerning the reactivation of the Gieseche company. The latter was nationalized following World War II, and the shareholders were compensated by the Polish State. Nevertheless, former shareholders reactivated the company and elected the company's organs which they attempted to register. The Circuit Prosecutor in Katowice prevented this by intervening in the proceedings.¹³⁴ There were three other such cases concerning attempts at fraudulently reactivating pre-World War II companies.¹³⁵

The original social function of the prosecutor's right of intervention was clearly linked to the political system of actually existing socialism. Prosecutors were controlled by the Communist party, and many of the cases launched by them were aimed at protecting state property¹³⁶ or intervening, on behalf of working peasants, in cases of class struggle with "kulaks"

¹³³ *Prosecutor General's Report 2013* p. 237.

¹³⁴ *Prosecutor General's Report 2013*, p. 238-239.

¹³⁵ Concerning companies: *Nowe Dzielnice, Zakłady Amunicyjne Pocisk and Jan Gotz Okocimski Browar i Zakłady Przemysłowe* – see *Prosecutor's General Report 2013*, p. 239.

¹³⁶ Agnieszka Graff & Lucjan Karłowski, *Działalność prokuratury w sprawach cywilnych*, Ignacy Druski (ed.), *Prokuratura P.R.L. w latach 1950-1960* 183 (1960).

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(*kulacy*). However, after 1989 the situation has changed radically. The Prosecution Service, obviously, is no longer under the control of the Communist party, and since the 2009 reform¹³⁷ it has even become independent from the government.¹³⁸ The types of cases have also changed. It seems from the Prosecutor’s General Annual Report that prosecutors, as a rule, intervene when the public interest really requires it, e.g. in order to prevent fraud but in order to trump the private interest.

Prosecutor’s General and Ombudsman’s right to appeal against judicial decisions having the force of res judicata

The last legal survival of actually existing socialism which had been introduced in order to further the public interest is the possibility of filing “extraordinary” means of appeal against judgments having the force of *res judicata*. Admittedly, this legal institution continues to serve the public interest, although in light of the new constitutional order of the democratic Republic of Poland that interest is defined differently than in the socialist Polish People’s Republic. Furthermore, the practice applying the legal framework of the ‘extraordinary’ petition for cassation and the ‘extraordinary’ petition for the declaration of illegality of a final judicial decision – which can be filed by the Prosecutor General, Citizens’ Ombudsman and Children’s Ombudsman is rather meager. For instance, in 2013 the Prosecutor General filed only one such an “extraordinary” petition for cassation

¹³⁷ See Act of October 9th, 2009 amending the Act on the Prosecution Services and certain other acts (Journal of Laws No. 178, item 1375).

¹³⁸ See especially Art. 10a (appointment of Prosecutor General) and Art. 10e(6) (revocation of Prosecutor General by qualified majority in lower house of Parliament) of the Act of June 20th, 1985 on the Prosecution Service (consolidated version Journal of Laws from 2011, No. 270, item 1599). Hitherto, since 1990, the post of the Prosecutor General, i.e. head of the entire Prosecution Service, had been held by the Minister of Justice, i.e. a political member of government – see Art. 1(2) of the Act of June 20th, 1985 on the Prosecution Service (Journal of Laws No. 31, item 138) as amended by Act of March 22nd, 1990 (Journal of Laws No. 20, item 121).

and not a single “extraordinary” petition for the declaration of illegality.¹³⁹ No such petitions were filed either in 2011¹⁴⁰ or in 2012.¹⁴¹ The two forms of challenging judgments are somewhat more used by the Citizens’ Ombudsman, who filed in 2012 four civil petitions for cassation and one petition for the declaration of illegality of a final judicial decision.¹⁴² In contrast to the participation of the Prosecution Service in civil cases, which seems to be flourishing and even expanding (see previous section), the two extraordinary procedures described in this section are much less resorted to in practice, although not exactly a dead letter of the law.

Conclusions

In line with Lenin’s famous quote that Bolsheviks “do not recognize anything private” and that private law must be permeated with public interest, the private (civil) law of the USSR and other countries of the Soviet bloc, including Poland, which served here as a case study, underwent reform aimed at furthering the public interest at the expense of the private one. Specific legal institutions were introduced for this purpose. Usually they were legal innovations, loosely, if at all, based on pre-existing Western models. Even if similitudes were visible, there were essential differences. More often than not such legal institutions were legal transfers, imported from the Soviet Union.

When the socio-economic and political system changed at the turn of 1989 and 1990, the fundamental reforms profoundly impacted upon private law. As a matter of fact, as it was showed in section 3 of this chapter, a vast majority of legal innovations of the socialist period aimed at giving preference to the public interest over the private one were either completely repealed (stratification of property, rules on planned contracts) or at least underwent deep reform (right of perpetual usufruct, cooperative member’s right to an apartment).

¹³⁹ *Prosecutor’s General Report for 2013*, p. 244.

¹⁴⁰ *Prosecutor General’s Report for 2011*, p. 162. Available at <http://tinyurl.com/pdygs7c> (last visited July 9th, 2013).

¹⁴¹ *Prosecutor General’s Report for 2012*, p. 259.

¹⁴² See *Report of Ombudsperson’s Activity in 2012* available at <http://tinyurl.com/ocettk6> (last visited July 8th, 2013), p. 399.

It was on those legal institutions – legal survivals of the period of actually existing socialism – that the chapter focused in section 4. The main object of enquiry in that section was whether the institutions in question, in particular the two aforementioned property rights, the socialist general clauses (“principles of social life”, “socio-economic purpose”), as well as public-interest-oriented arrangements in the law of civil procedure can still be deemed to fulfill their original function, namely that of furthering the public interest at the expense of the private one. The answer to this question is in the negative. The legal institutions under consideration, despite being correctly described as legal survivals of the previous period of actually existing socialism, have indeed changed their social function and no longer serve the original purpose of furthering the public interest at the expense of the private one.

The adaptation of the institutions in question took place in a variegated manner, both as regards modality of adaptation, and its time frame. Interestingly, the general clauses, initially conceived as vehicles of promoting the public interest, lost their sharp edge quite early on, indeed long before the demise of actually existing socialism. From the 1960s onwards, they stopped being a source of a public-interest oriented “inner system” of rules, but were only applied on a case-by-case basis.¹⁴³ The cooperative member’s right to an apartment and the right of perpetual usufruct were gradually adapted, almost exclusively by legislative action, over the 1990s. Finally, one should keep in mind that both the content of general clauses and the use made of competence norms (such as the prosecutor’s right of intervention in civil proceedings) depends not only on the wording of the relevant rules of private law, but also on the constitutional order of the country, which has changed fundamentally as a result of the systemic transformation.

¹⁴³ Therefore, in order to arrive at more complex conclusions on the actual role of the principles of social life, it would be necessary to analyse not only reported case law, mainly that of the Supreme Court (as was done in the research which provides the basis of the present chapter), but also, or even above all, the case-law of lower courts in order to find and evaluate cases in which the principles of social life were invoked as the basis of the judicial decision.