Legal Transfers and Legal Survivals: Theoretical Implications of the Continuity of the Socialist Legal Tradition in Poland

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1. Introduction

Alan Watson's metaphorical concept of 'legal transplants'[1] revolutionised the way we approach comparative law. Instead of just searching for differences and similarities between legal systems, the metaphor of legal transplants allowed to conceptualise units of legal culture (legal models) that actually circulate in space, from one jurisdiction between another. This new approach allowed to draw interesting conclusions, which would remain invisible had comparative law only concentrated on the search for similitude/difference. Thus, the legal transplants approach allowed to underline that most of legal change in legal systems is actually a result of borrowing from foreign legal systems, that transfer of legal rules between societies is relatively easy (contrary to what *Volksgeist* proponents speculated) and that transplants are part of lawyers' strategy of justifying their decisions or proposals by authority (if something works abroad, it should work in here).[2] Clearly, Watson's metaphor opened up a new perspective of approaching the field of comparative law, which enabled new conclusions to be drawn from already known materials.

In this paper I wish to put forward a parallel metaphorical concept - 'legal survivals' - which I believe could also provide new insights into comparative law and legal history. Just like Watson's notion of legal transfers, the notion of a 'legal survival' is capable of opening up new perspectives on legal continuity, shifting the focus from continuity in general to the endurance of concrete entitites of legal culture, such as legal rules, institutions, concepts or methods. Whilst Watson's concept of legal transfers is applicable at any historical time, legal survivals are a tool specific for a period following a more or less abrupt socio-economic and/or political change, such as a passage from one economic system to another (e.g. from state socialism to capitalism) or from one political system to another (e.g. decolonisation).

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[1] Alan Watson, *Legal Transplants: An Approach to Comparative Law* [1974] (2nd ed., Athens-London: Univ. of Georgia Press, 1993), esp. pp. 21-30, 95-101.

[2] Watson, *Legal Transplants*, pp. 95-99.

After explaining the notion of legal survivals (in section 2), I will test their explanatory potential by taking the example of continuity of certain legal forms, dating back from the socialist period, in post-1989 capitalist Poland. The Polish example seems particularly promising from the point of view of legal survivals owing to the fact that the country belonged for 45 years to the Socialist Legal Family (1944-1989) and its legal system, including private law, were developed during this period under the influence of Soviet law and was specifically adapted to suit the needs of a centrally planned and administratively managed economy, as opposed to a market-driven, capitalist economy introduced in Poland from 1989 onwards. Any elements of socialist law, which remained after 1989, will be treated as 'legal survivals'. However, for the purposes of this paper I will limit my focus to four selected examples – the cultivation contract (section 3), the cooperative member's right to an apartment (section 4), a general standard of conduct of private law subjects ('general clause') - 'principles of social intercourse' (section 5) and the *locus standi* of the public prosecutor in civil proceedings (section 6). Each legal survival will be studied according to the same outline: first the circumstances of the introduction of the legal arrangement in question will be analysed, then its legal form and its application both under actually existing socialism and now, and finally its social function and its possible change after 1989 despite a continuity on the level of legal rules. In the concluding part (section 7) I will draw more general conclusions on the explanatory potential of the concept of legal survivals in the light of the historical and contemporary legal material analysed as part of the four case studies.

2. The Notion of Legal Survivals

2.1. Generalogy

The notion of "survivals" in the legal context seems to have been used for the first time by Hugh Collins in his book *Marxism and Law*,[3] where he understands them as "legal rules [which] [...] were first established under a former mode of production."[4] Collins, in turn, borrowed the term 'survival' (which he applied in the legal context)

[3] Hugh Collins, *Marxism and Law* [1982] (Oxford-New York: Oxford University Press, 1988), p. 52-55.

[4] Colins, *Marxism and Law*, p. 52.

from Louis Althusser's essay on 'Contradiction and Overdetermination'[5] originally written in 1962. Althusser noted that after the Russian Revolution many survivals have remained in place. He enumerates economic survivals (such as small scale peasant production), as well as

> "other structures, political ideological structures, etc.: customs, habits, even 'traditions', such as the 'national tradition' [...]"[6]

Althusser did not do, however, much to theorise on the concept, noting only that it deserves further investigation.[7] Noting the generally Marxist background of the term (as evidenced by Althusser's treatment), let us now return to Collins's arguments, where the notion of legal survivals were actually discussed as a reply to the challenges to the Marxist class instrumentalist theory, accusing it of reductionism. He discussed the existence of legal survivals in the context of the Marxist view emphasising an essentially bi-polar class struggle and the opposing view, emphasising the role of intra-class conflicts and non-class social groups, such as lawyers. Arguing from a Marxist perspective, Collins was interested in downplaying the role of legal survivals, warning that "[i]t is [...] easy to exaggerate the frequency of the occurence of survivals" and advising care "to distinguish the form of words constituting the legal rule from their meaning when applied to particular circumstances."[8] On this basis, Collins argued that:

> "The same legal concepts may still be in use, but that does not prove the existence of a survival, for the words may now be interpreted differently. Thus, although English lawyers speak in the feudal language of property tenure [...], owners of real property may rest assured that this continuity of language conceals major substantive reorientations of the law [...] [as] required by the capitalist mode of production."[9]

Collins tacitly adopted the view that the interpretation of legal texts is a dynamic, rather than static phenomenon, and therefore the same texts stemming from an earlier formation can be reinterpeted in a completely new way to suit the needs of the new

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5 Louis Althusser, 'Contradiction and Overdetermination: Notes for an Investigation' [1962], in Louis Althusser, *For Marx* [1965] (London-New Yourk: Verso, 2005): 87-128.
6 Althusser, 'Contradiction...', p. 114.
7 Althusser, 'Contradiction...', p. 114-115.
8 Collins, *Marxism and Law*, p. 53.
9 Collins, *Marxism and Law*, p. 53.

formation. Collins expressly dismissed Karl Renner's view that a given legal rule may remain constant but its social function may change[10] by pointing out that:

> "In fact, only in a trivial sense has the rule endured whilst its social function has changed. The words or symbols used to express the rules have remained constant, but their meaning has surely altered since they are being applied in novel contexts. For Renner's thesis to be significant, it must be supposed that a rule can have a meaning independent of its effects on social behaviour."[11]

In essence, on the basis of legal theory (of interpretation) Collins makes an argument against the existence of legal survivals. He tacitly rejects both intentionalism (whereby interpretation is understood as second-guessing the original intent of the drafter of a legal text) and textualism (whereby a text is said to have some inherent, objective meaning whcih awaits to be decoded by the interpreter). Although Collins does not make an explicit statement as to what theory of interpretation he relies on, we can assume that it is somewhat close to the hermeneutic model, which emphasises the role of the interpreter as a member of a given epistemic community in the investment of meaning within a text. As Steven L. Winter crisply put it, "[m]eaning is not a matter of words, but of minds"[12], and the assumptions with which interpreters approach a legal text are certainly of paramount importance for the meaning they will invest in a text."[13]

Whereas I am perfectly fine with Collins's tacit assumptions about interpretation, and join him in rejecting intentionalism and textualism as useless fictions, especially in post-modern fragmented societies where legislation is drafted by hundreds of actors and meanings of texts cannot be viewed as stable, I cannot follow him in making Renner a textualist. Collins states that '[f]or Renner's thesis to be significant, it must be supposed that a rule can have a meaning independent of its effects on social behaviour.' In my view, this assumption is a distortion of Renner's view. What Renner wanted to draw attention in his groundbreaking monograph on legal continuity was that the texts stay the same (e.g. the text of the Austrian Civil Code regarding property) but their social functions change. Renner only claims that the

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10 Karl Renner, *The Institutions of Private Law and Their Social Functions* [1904] (translated by Agnes Schwarzschild, London-Boston: Routledge and Kegan Paul, 1976).

11 Collins, *Marxism and Law*, p. 54.

12 Steven L. Winter, *A Clearing in the Forest: Law, Life and Mind* (Chicago-London: University of Chicago Press, 2001), p. 303.

13 Winter, *Clearing in the Forest*, p. 316.

texts as such stays the same. Nowhere does he make the statement that the *meaning* of the text also remains static; to the contrary, to my mind a tacit assumption in Renner's reasoning is that text are actually capable to hold different meanings. In other words, Renner's contribution can be read as a case-study of dynamic interpretation of a legal text. The legal survivals that Renner studies are texts, not their meanings. He focuses his attention exactly on the adaptation of meanings invested in texts to the changing socio-economic conditions. To use the language of Selznick and Nonnet, we could say that Renner's contribution was devoted to responsive legal interpretation.

Furthermore, the analogy between legal transfers and legal survivals, invoked at the beginning of this paper, could also be of assistance here. Watson has no objections in studying legal transfers and applying this concept despite acknowledging that when a legal rule or entire code is transferred from one jurisdiction to another, in very often changes its meaning, sometimes even radically – to the extent of being 'totally misunderstood'.[14] If transfers of legal texts across jurisdictions merit attention as 'legal transfers' despite the fact that recipient communities of lawyers often invest different meanings in those texts, departing from those invested by the donor communities, so survivals of legal texts, despite changes in their meaning over time, also merit attention as 'legal survivals'.

2.2. Legal Survivals as a Conceptual Metaphor

The term 'legal survival' hints at the metaphorical nature of the underlying concept. In fact, conceptual metaphors are not rhetorical devices, but rather the normal way of understanding the world around us.[15] Metaphorical concepts serve to highlight some aspects of a phenomenon, but to hide or downplay others.[16] A conceptual metaphor is based on a link (a number of mappings) between the target domain (which we try to conceptualise and understand) and the source domain (which provides us familiar with structures).[17] The metaphorical expression 'legal survival' links the target domain of 'continuity in law' with the source domain of 'survival of a species despite a mass extinction event'. By building a metaphorical link between the these two

[14] Watson, *Legal Trasnfers*, p. 97, 99.
[15] George Lakoff, Mark Johnson, *Metaphors We Live By* [1980] (Chicago-London, University of Chicago Press, 2003), 3-5.
[16] Lakoff & Johnson, *Metaphors*, p. 10-13.
[17] Zoltán Kövecses, *Metaphor: A Practical Introduction* (2nd ed., Oxford-New York: Oxford University Press, 2010), 7-10; 77ff.

apprently distant spheres, the concept of a 'legal survival' allows to highlight a number of features of legal continuity.

First of all, it focuses our attention on the identity of a certain entity which survives, be it a rule, doctrine, entire Code or a specific methodological approach. The essentially amorphous concept of continuity is thereby re-structured to focus on concrete examples of such continuity, just like continuity in evolutionary biology focuses on concrete species (such as crocodiles) which have survived, despite the extinction of their fellow species (such as dinosaurs).

Secondly, the metaphor draws our attention to an extinctive event, a change of circumstances external to the legal survival itself, based on a mapping regarding a change of climate (which was the extinction even which doomed dinosaurs). The change of climate was something external to the dinosaurs and beyond their control. The same applies within the target domain: the socio-economic transformation of 1989 was something which ocurred due to political and economic factors, which lay outisde the hitherto existing system of socialist law and were essentially outside the control of the legal community. Judges, practitioners and legal academics of the Polish People's Republic had no choice but to adapt to the new conditions which they did not bring about themselves.

Thirdly, the metaphor of a 'legal survival' emphasises its diachronic dimension. A legal survival is an element of the legal past which survives within the present, just like crocodiles are the surviving next of kin of dinosaurs. A legal survival can thus be compared to a 'living fossil' in evolutionary biology. It is at the same time a 'fossil', that is a part of the past, but it is also 'living', that is it is still used in legal practice, rather than being confined to dusty books of legal history.

Fourthly, the metaphor draws attention to the close links between the analysed phenomenon and the previous socio-economic conditions. Dinosaurs were adapted to the climatic conditions prevaltent in their era. Crocodiles, which can be said to be living fossils of dinosaurs, survive now *despite* being adapted to the conditions of the past. The same can be said of legal survivals: at the time of their appearance, they were functional towards the then existing socio-economic formation (i.e. that their appearance was not merely accidental, but somehow linked to the reality of that formation).

Finally, survival is not possible without adaptation. Crocodiles and other living fossils survived not because they were adapted to the conditions at the time of the apearance of their species, but, in a way, despite that – thanks to the adaptation to the new conditions.

These metaphorical mappings allow to delineate the contours of the concept of a 'legal survival' as against a more general background of continuity in law and legal culture. Therefore, I will define legal survivals as:

1) elements of legal culture, such as rules, doctrines, institutions, concepts or methodological approaches;

2) which originate in an earlier socio-economic formation, such as feudalism, early capitalism, Actually Existing Socialism;

3) which, at the time of their appearance, were functional towards that socio-economic formation (i.e. that their appearance was not merely accidental, but somehow linked to the reality of that formation);

4) which endured despite a profound socio-economic and political transformation.

Let me briefly explain each of the elements of the definition.

First of all, under the broad notion of 'element of legal culture' I will understand a legal text (such as the text of a rule, a cluster of rules, or an entire Code), or a legal practice (such as a specific trait of legal methodology, e.g. insistence on 'literal interpetation' of statutes).

Secondly, I use the notion of socio-economic formations, such as 'feudalism', 'state socialism' or 'capitalism'. Obviously, the notion of such a formation conciously serves to underline the differences between socio-economic and political systems, rather than to emphasise the smooth passage between them.

Thirdly, I use the sociological concept of 'functionality' to introduce a causal link between the formation during which a certain legal arrangement emerged and that legal arrangement itself as a legal survival. I use the notion of functionality to eliminate from the scope of my research any accidental legal developments which coincided historically with a certain socio-economic formation but were not conditioned by that formation (left vs right hand side driving being a case in point) or

even run contrary to that formation (the introduction of constitutional review in Poland during the last phase of state socialism in 1985).

The final element of my definition of a legal survival is its endurance after the respective transformation. For this criterion to be meaningful in any way, I require that a legal survival preserve not only in its legal form (e.g. as a text in a Code) but also still be made use of in actual social (socio-legal) practice. Thus, for instance, the institution of special usufruct established for the benefit of farming cooperatives – for want of any legal practice making use of this legal form – will not count as a legal survival. Conversely, the prosecutor's *locus standi* in civil cases will count as a legal survival, because prosecutors in Poland do intervene in around 100,000 civil cases yearly, as evidenced by the official statistics.

2.3. Method of Analysis

Each example of a legal survival that will be studied in section 3-6 below is analysed from the point of view of four aspects: circumstances of introduction, legal form and social function. By 'legal form' I understand the text, regardless of any meaning invested in it by different epistemic communities. Whilst from a purely analytical perspective continuity would be limited to this aspect, I treat as merely the starting point to enquire, whether the legal form in question (e.g. a chapter in a code) is actually put into practice. For instance, if the Civil Code contains rules on a certain type of contract, introduced under socialism, whether people actually sign this type of contract in practice.

Furthermore, inspired by Renner, I analyse each legal survival from the point of view of its social (socio-economic) function, that is the the use that people make of a given legal form in their socio-economic relationships,[18] or, in other words its "economic and social effect".[19] Following Renner, I draw a sharp distinction between the 'legal form' (the legal text in question) and its social function.[20]

In particular, departing from the assumption that the condition for the endurance of a legal survival is its adaptation to the new socio-economic conditions, I enquire about the *locus* of such an adaptation. It can be identified either within the legal form or the

[18] Cfr. Renner, *Institutions*, p. 53: '...legal institutions have a two-fold nature, according to their constituent norms on the one hand and their social significance on the other.'
[19] Ibid., p. 55.
[20] Ibid., p. 75.

social function.[21] The legal form can be adapted explicitly (e.g. by an amendment) or implicitly (by a new interpretation given by scholars and courts). Furthermore, the legal form itself can be divided into a 'core' (which identifies the legal institution in question) and a 'penumbra' (connected legal rules which can be modified without affecting the identity of the legal survival). This core/penumbra distinction within legal survivals draws upon a metaphor from the philosophy of mathematics, where an initially proposed theorem is, in the course of a dialectic of proofs and refutations, gradually reduced to its hard core which resists falsification, which allows to speak of a

> "contracting sequence of the nested *domains of successive improved theorems*; these domains shr[i]nk under the continued attack of global counterexamples in the course of the emergence of hidden lemmas [...]."[22]

In the case of legal survivals, the need of drawing the line between a legal survival (a form of continuity) – and a "legal non-survival" (a form of discontinuity) is fundamental for delineating the scope of the enquiry into legal survivals. If a given institution is modified to an extent affecting its "core", we can no longer speak of a legal survival. The line will have to be drawn in each case individually, but what will guide me will be the socio-economic function of an institution as reflected in the legal form. Thus, for instance, in the case of the right of ownership I would identify the "core" as comprising the triade of *ius utendi, fruendi, disponendi*; the durable removal of any of these would make it impossible to speak meaningfully of ownership.

3. The Survival of the Cultivation Contract

3.1. Circumstances of Introduction

A cultivation contract 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 was uknown to Polish legal texts, although cultivation contracts were concluded also during the capitalist period.[23] Nevertheless, the

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21 Ibid., p. 76.

22 Lakatos, *Proofs and Refutations*, p. 64.

23 Juliusz Krzyżanowski, in: *Kodeks cywilny. Komentarz* (Warszawa: Wyd. Prawnicze, 1972), vol. 2, p. 1348; Andrzej Stelmachowski, "Kontraktacja", in: Jerzy Rajski (ed.) *System prawa prywatnego* [The System of Private Law] vol. 7: *Prawo zobowiązań – część szczegołowa* [Law of Obligations: General Part] (2nd ed., Warszawa: C.H. Beck, 2004): 249-277, pp. 249-252.

codification of the contract within the Civil Code of 1964 was most probably a direct Soviet inspiration. In Soviet law, the cultivation contract was codified in Articles 51-52 of the Fundamentals of Civil Legislation of the USSR and Union Republics[24]. The contract is not codified in any Western civil codes which have influenced Polish law (e.g. French, Austrian, German or Swiss).

3.2. Legal Form

The legal form of the cultivation contract, as codified in 1964[25], has undergone only a slight change. Whereas under the original rules from the procuring side it could be concluded only by a unit of socialised economy duly habilitated to perfom the function of agricultural procurement[26], this limitation has been removed in 1990 allowing private sector economic operators to procure agricultural produce under the cultivation contract.

The legal form of the the contract was and is distinct both from sales and from *locatio conductio operis*.[27] A characteristic feature of a cultivation contract is that the agricultural product must be produced by the famer who is party to the contract, who cannot perform by buying the same crop on the market; this makes an essential difference between a cultivation contract and the sale of a future object (*emptio spei* or *rei speratae*).[28]

3.3. Practical Application of the Legal Form

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24 Article 51: '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.'

25 The cultivation contract was regulated in a detailed manner in Articles 613-626 of the Code. 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 socialised 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.'

26 Stelmachowski, 'Kontraktacja', p. 262, Witold Czachórski, *Prawo zobowiązań w zarysie* (Warszawa: Państwowe Wydawnictwo Naukowe, 1968, p. 473. Krzyżanowski (in: *Kodeks...*, vol. 2, p. 1352) indicates that in practice the Minister of Agriculture decided which units could act as agricultural contractors.

27 Stelmachowski, 'Kontraktacja', p. 259.

28 This element was identified as an essential element of the cultivation contract, differentiating it from sale, already in 1957 – see resolution of the Supreme Court of 22 October 1957, Case II CO 10/57, OSNCK 1958/2/59, LEX no. 119339; it was introduced to the Civil Code and is underlined in modern case-law too: see e.g. Supreme Court judgment of 18 March 1998, Case . I CKN 576/97, LEX no. 746161; judgment of the Court of Appeal in Poznań of 19 August 2009, Case I ACa 507/09, LEX no. 756625 citing resolution in Case II CO 10/57, *supra*).

During the state-socialist period, cultivation contracts were concluded usually by municipal cooperatives acting as agents for central procurement entities.[29] Cultivation contracts were concluded for a wide range of crops, including potatoes, barley, wicker, flax, herbs, poppy, peas, beans, and onions[30] as well as pigs, cattle, sheep, wheat, hops[31], cabbage[32], turkeys[33]. After 1989 the role of the cultivation contract decreased, nevertheless they are still in use, in particur for the procurement of sugar beet and tobacco leaves[34], as well as canola[35], wheat[36], turkeys[37], duck and goose eggs[38], strawberries and raspberries[39].

3.4. Social Function

On a macrosocial level, the cultivation contract played a distinct function under Actually Existing Socialism. In the absence of collectivisation of farms, its function was to integrate private family holdings into the centrally planned economy.[40] On a microsocial 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 macrosocial function of cultivation contracts disappeared, together with the planned economy of state socialism.[41] Nevertheless, the microsocial function remained in place, although now the role of the procuring party has been taken over by private sector economic operators: the existing legal obstacle was removed directly in 1990.[42] Furthermore, after accession to the EU, agricultural procurement contracts were revived in practice as a result of EU law which regulates e.g. such contracts for the procurement of tobacco[43] and starch potatoes.[44]

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29 Stelmachowski, 'Kontraktacja', p. 252.
30 Ibid.
31 Ibid., p. 473.
32 Supreme Court judgment of 28 January 1967, Case I CR 45/67, LEX no. 6109.
33 Supreme Court judgment of 18 May 1983, Case I CR 124/83, OSNC 1983/12/202, LEX no. 2900.
34 Stelmachowski, 'Kontraktacja', pp. 255-257.
35 Supreme Court judgment of 18 March 1998, Case I CKN 576/97, LEX no. 746161.
36 Supreme Court judgment of 27 June 2002, Case IV CKN 1165/00, LEX no. 80264.
37 Supreme Court judgment of 17December 2003, Case IV CK 303/02, LEX no. 599555.
38 Supreme Court judgment of 19 February 2009, Case III SK 31/08, LEX no. 503413.
39 Judgment of the Regional Administrative Court in Gdańsk of 20 October 2009, Case I SA/Gd 465/09, LEX no. 571204.
40 Stelmachowski, "Kontraktacja", p. 252-253; Czachorski, *Prawo zobowiązań* p. 473; Krzyżanowski, in: *Kodeks...*, vol. 2, p. 1348; Supreme Court judgment of 7.8.1975, Case III CRN 179/75, LEX no. 7732; Supreme Court judgm ent of 25.5.1988, Case II CR 129/88, LEX no. 8884.
41 Stelmachowski, 'Kontraktacja', p. 253.
42 Stelmachowski, 'Kontraktacja', p. 262.
43 Article 6 of Regulation 2075/92; Articles 91-92 of Commission Regulation 2848/98.
44 Article 3 of Regulation 571/2009.

4. The Survival of the Cooperative Member's Right to An Apartment

4.1. Circumstances of Introduction

Property law in state-socialist Poland developed according to a dialectic of two opposing factors: the dogma of socialised property of real estates, on the one hand, and the pragmatic desire to create certain individual rights pertaining to such estates (e.g. buildings, apartments) which, however, would not undermine the underlying social property. As a result, a number of idiosyncratic legal models, among them[45] the 'cooperative member's proprietary right to an apartment in a housing cooperative', emerged. Although not a direct legal transfer from Soviet law, the right was a functional equivalent of the Soviet personal ownership of flats in a building owned by a housing collective.[46] The housing cooperatives which constructed, owned and administered housing estates were federated, on a compulsory basis, in a national federation and despite a certain degree of autonomy, they functioned as cogs in the mechanism of a centrally planned economy. By the mid-1960s cooperatives became the main investors in the housing sector in Poland and constructed more new housing than any other socialised investor.[47]

4.2. Legal Form

Within the legal form of the cooperative member's proprietary right to an apartment[48] it is necessary to discern a core – the alienable *ius in rem* giving its holder the right to live in a determined apartment located in a building owned by a housing cooperative – and a penumbra, encompassing the conditions of alienation of the right, the

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45 Other state-socialist innovations in property law include the 'right of perpetual usufruct' (*prawo użytkowania wieczystego*) entitling the holder to exclusive enjoyment of a plot of land (for a period of up to 99 years, with possibility of prolongation) combined with the ownership of buildings, installations and plants growing on that land. The right of perpetual usufruct is a legal survival, as opposed to the 'right of usufruct of agricultural cooperatives' which, despite not being abrogated, is now defunct in practice.

46 Cfr. William E. Butler, *Soviet Law*, p. 173.

47 Maciej Cesarski, "Dorobek materialny społdzielczości mieszkaniowej w Polsce" [The Material Output of the Housing Cooperative Sector in Poland], in: *Historia i przyszłość społdzielczości mieszkaniowej w Polsce* [History and Future of the Housing Cooperative Sector in Poland: Materials from a Programmatic Conference], ed. Zbigniew Gotfalski (Warszawa: Wydawnictwo Dom, 2011): 25-46, p. 29.

48 For a detailed discussion of the emergence of the legal form and its subsequent remoulding after 1989 see Rafał Mańko, "Proprietary Right to a Cooperative Apartment: A Survival of the Socialist Legal Tradition in Polish Private Law", forthcoming in: Bronisław Sitek, Jakub J. Szczerbowski, Aleksander W. Bauknecht (eds), Public Interest and Private Interest in the European Legal Tradition, available at SSRN: http://ssrn.com/abstract=2170845 (last accessed: 13/6/2013).

relationships between the right holder and the cooperative, the type of admitted right holders and the number of rights one person may acquire. The core of the right has remained intact, although the legal form underwent subsequent modifications since its introduction in the 1950s. In contrast, the penumbra of this legal institution underwent a characteristic evolution after 1989.

Under state socialism, a number of characteristic limitations obtained. 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. If the person was married, both spouses held the apartment jointly. Secondly, one apartment could be held only by one person (or by a married couple); co-holdership in any other situation was excluded. Thirdly, in case the apartment was sold, donated or inherited, the transaction became effective only once the acquiror obtained membership in the cooperative. Fourthly, an apartment could be sublet only with the cooperative's consent. Fifthly, the rightholder participated not only in the costs of running her 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.

After 1989, most of these penumbra were gradually dismantled both by legislative amendments and Constitutional Court case-law. One person may own as many rights as she wishes; legal persons can acquire such rights too; there are no limitations on letting the apartment; it is no longer necessary for the right holder even to be a member of the cooperative which owns the building. However, despite the dismantling of the penumbra of the right, it has remained a distinct legal form, different from full ownership of an apartment in a condominium both formally and practically.

Despite repeated legislative proposals, proprietary rights to cooperative flats have not been transformed into individual ownership automatically. Such a transformation can take place only at the right holder's request and after the repayment of the costs of the construction of the apartment.[49] However, if the legal status of the land on which the cooperative house is built is unregulated, a transformation cannot take place;[50] in fact, such a situation is not infrequent in practice.[51] Taking this into account, it is possible

[49] Cfr. Ewa Bończak-Kucharczyk, *Społdzielnie mieszkaniowe. Komentarz* [Housing Cooperatives: Commentary] 413ff (2010), pp. 413ff.

[50] Bończak-Kucharczyk, *Społdzielnie*, p. 417.

[51] Krzysztof Pietrzykowski, *Społdzielnie mieszkaniowe: Komentarz* (5th ed., Warszawa: C.H. Beck, 2010), p. 271.

that proprietary rights to apartments, although they may no longer be established, will still continue to function in practice for many years.

4.3. Practical Application of the Legal Form

Despite modifications of the legal form, all cooperative members' proprietary rights to apartments established before 1989 continue to be regarded as such. Despite the above mentioned option of "converting" this *ius in rem* into full ownership, many millions of cooperative proprietary rights are still in existence. As of 2010, there were still 2,6 million cooperative apartments,[52] a vast majority of them held under the cooperative member's proprietary *ius in rem*.[53] In comparison, until 2010 only 700.000 cooperative apartments, hitherto held by under the cooperative property title, had been transformed into objects of full private ownership.[54] The fact that the majority of holders of cooperative proprietary rights to apartments do not transform their right into full ownerships stems from various reasons, among them the costs of such an operation and the fact that both ownership and cooperative *ius in rem* have their respective advantages and disadvantages in practice, often depending on the particular circumstances of a given cooperative or condominium.[55]

4.4. Social Function

On a macrosocial level, the initial function of the *ius in rem* to apartments in cooperative housing stock was to retain socialised ownership of immovables but simultaneously create stimuli for citizens to redirect their savings to the underfinanced housing sector. This function has entirely lost its significance after 1989: housing cooperatives are no longer state-controlled, and the state does not show any interest in retaining ownership of immovables.

On a microsocial level, the acquisition of a *ius in rem* to a cooperative apartment had the function of satisfying the housing needs of a citizen and her 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

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52 Cesarski, "Dorobek", p. 42.
53 Ibid., p. 38.
54 Ibid., p. 43.
55 Cfr. Iwona Foryś, Maciej Nowak, *Społdzielnia czy wspolnota? Zarządzanie zasobami mieszkaniowymi* [Cooperative or Condominium? Housing Stock Management] (Warszawa: Poltext, 2012), p. 202.

capitalism, a new social function of the legal form in question emerged: that of drawing capital rent. The legal form 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 made illegal under the socialist legal regime.

5. The Survival of the Principles of Social Intercourse

5.1. Circumstances of Introduction

Continental legal systems, especially those belonging to or inspired by the Germanic family, are known for their employment of open-ended standards, known as 'general clauses', such as the German '*Treu und Glauben*'.[56] Pre-World War II Polish law, heavily influenced *inter alia* by the Germanic legal family,[57] also had its own set of general clauses, such as 'good faith', 'fair dealing', 'good morals' and 'equity'.[58] However, with the inception of Actually Existing Socialism, these legal standards became to be considered as inappropriate on account of what was perceived as their inherently bourgeois character.[59] Therefore, new general clauses of Soviet inspiration were introduced: initially, in 1946 – 'social purpose'[60], then superseded in 1950 by 'principles of social intercourse' which, in 1964, was supplemented by 'socio-economic purpose'.

5.2. Legal Form

The legal form of the general clause 'principles of social intercourse' as a limitation on the exercise of private rights became fixed in 1950 and has not undergone any

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56 § 242 of the German Civil Code.

57 Mańko, "Culture of Private Law", p. 531.

58 Mańko, "Quality of Legislation", p. 543 (with references).

59 See e.g. Seweryn Szer, *Prawo cywilne - część ogolna* [Civil Law: General Part] (Warszawa: Wydawnictwo Prawnicze, 1962), p. 25.

60 Inspired by Article 1 of the RSFSR Civil Code (1922): 'The law protects private rights except as they are exercised in contradition to their *social and economic purpose*.' The English text of the RSFSR Civil Code is available in: Vladimir Gsovsky, *Soviet Civil Law: Private Rights and Their Background under the Soviet Regime* (Ann Arbor: University of Michigan Law Schoo, 1949), vol. II: *Translation*.

meaningful modification since.[61] In the Civil Code (1964)[62] the principles of social intercourse became, most notably, a standard limiting the exercise of private rights, a standard of limiting the content of a legal act (their violation leading to invalidity), a guideline for the interpretation of declarations of will, a source of implied terms in legal acts,[63] a limitation of the content of the right of ownership and a standard for the performance of obligations.[64] After the transition from Actually Existing Socialism to capitalism, the system of general clauses was left intact for almost a decade. It was only from 1999 that the legislature began resorting to traditional general clauses – 'good morals' and 'equity' – but without simultaneously abrogating the real-socialist ones ('principles of social intercourse' and 'socio-economic purpose') which still remain in place.

5.3. Practical Application of the Legal Form

The continuity of the principles of social intercourse in the Civil Code is not merely verbal. Courts actually treat the continuity of the pre-1989 terminology as an invitation to continuity with the pre-1989 case-law. Thus, the view adopted in the 1960s that the principles of social intercourse are a *quaestio facti*, not *qaestio iuris* is upheld in contemporary case-law.[65] Courts reject the possibility of creating an 'inner system' of the general clause, pointed out that the principles cannot be 'catalogued'.[66] A dispute which is ongoing since the 1960s, is whether a court applying the principles of social intercourse is under a duty to specify that principle in the sense of explicitly formulating an abstract rule which it considers to be one of the principles of social intercourse. Such a practice was commonplace in the 1950s, when the principles were treated as a *quaestio iuris*, but since they began to be considered a *quaestio facti*, the

61 Save for the additional words 'in a People's State' (1950) and 'in the Polish People's Republic' (1964), deleted in 1990.

62 Although the expression 'private law' was avoided by socialist lawyers (who used 'civil law', instead), I will use it here to denote what is usually known as private law (contracts, torts, property,family law, law of succession, as well as civil procedure) regardless of the legal family/legal tradition.

63 The notion of 'legal acts' (*czynności prawne*) in Polish law corresponds to the German notion of *Rechtsgeschäft* and thus covers not only all types of contracts and agreements, but also unilateral acts such as wills, public promises etc.

64 Mańko, 'Quality of Legislation...', p. 544 (with references).

65 See e.g. SN judgment of 25 May 2011, Case II CSK 528/10, LEX no. 794768: '...the requirement that a legal transaction comply with the principles of social intercourse is a question relating to the facts of a case and is analysed only in the concrete circumstances of that case'. SN decision of 15.4.2011, Case II CSK 494/10, LEX no: 1027172): 'The principles of social intercourse within the meaning of art. 5 k.c. are a concept indivisably linked with the totality of the circumsntaces of a given case'.

66 SN judgment of 25 May 2011, Case II CSK 528/10, LEX no. 794768: 'it is impossible to create a catalogue of all individual principles of social intercourse'.

issue of proclaiming specific principles became controversial. Courts in post-1989 Poland either require that a concrete principle be specified, or openly reject such a requirement. However, what is characteristic, is that each time they rely on pre-1989 case-law to support one or the other option[67] which allows to acknowledge the ongoingness of the debate itself. In fact, the are many more examples which indicate that the social practice of dealing with the principles of social intercourse in adjudication is an uninterrupted one, and that the transformation of 1989 was not a major threshold. Thus, for instance, a decision from 1987[68] remains the leading case for the proposition that the principles of social intercourse are not applicable in social security cases;[69] a 1971 decision[70] is still cited[71] as authority for the proposition that the principles of social intercourse 'cannot give rise to entitlements of a durable character and is not superior with regard to other legal rules'; established case-law dating from the 1950s to the 1970s continues to be cited[72] as authority[73] for applying the "clean hands principle"[74] to the principles of social intercourse. The Supreme Court continues to rely[75] on a 1961 precedent to argue that when when evaluating whether a private right is exercised contrary to the principles of social intercourse, the judge must take into account all circumstances of the case at hand and not only one of them, regardless of its importance. And finally, a 1981 precedent[76]. is still relied upon

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67 See e.g. SN judgment of 6 January 2009, Case I PK 18/08 Centrum Mechanizacji Gornictwa, no. 584914, where the Supreme Court explicitly rejected the need of specifying a concrete principle of social intercourse, citing as authority *inter alia* a resolution of the SN of 17 January 1974, Case III PZP 34/73, OSNCP 1975 no. 1, item 4.

68 SN judgment of 19 June 1986, Case II URN 96/86, reported in: *Służba Pracownicza* 3/1987 (not available in LEX database)

69 Recently cited e.g. in SN judgment of 23 October 2006, Case I UK 128/06, LEX no. 221705 and SN judgment of 2 December 2009, Case I UK 174/09, LEX no. 585709.

70 Resolution of 7 judges of the Supreme Court of 19 April 1971, Case III PRN 7/71, Biul. SN 1971, nr 7-8, s. 115, LEX nr 527259.

71 Order of the Supreme Court of 2 June 2011, Case I CSK 520/10, LEX no. 1129076.

72 Supreme Court judgment of 20 January 2011, Case I PK 135/10, LEX no. 794776.

73 SN judgments of: 13 May 1957, Case II CR 343/57, OSNCP 1958, z. 3, poz. 19; 13 January 1960, Case II CR 1013/59, OSNCK 1961, nr 3, poz. 67; 13 May 1960 Case II CR 1013/59, OSNCK 1961, nr 2, poz. 67; 11 September 1961 r., I CR 693/61, OSNCP 1963, z. 2, poz. 31; 6 April 1963 r., III CR 117/62, PiP 1964, z. 4, s. 703; 29 January 1964., Case III CR 344/63, OSNC 1964, nr 11, poz. 234; 8 May 1973 r., Case I PR 90/73, OSNCP 1973, nr 11, poz. 203; 29 January 1975 r., III PRN 67/74, OSNC 1975, nr 7-8, poz. 123; 30 January 1976 r., I PRN 52/75, OSPiKA 1977, z. 3, poz. 47. Apart from that, the Supreme Court cited also a number of post-1989 cases, thus strengthening the feeling of legal continuity – the line of case-law neatly extends over the 1989 threshhold.

74 According to which (in the words of the SN) 'the principles of social intercourse may not be relied upon by a person who violates those principles (or legal rules)'.

75 Judgment of the Supreme Court of 20 January 2011, Case I PK 135/10, LEX no, 794776.

76 See resolution of the Supreme Court (in reply to a preliminary reference) of 19 May 1981, Case III CZP 18/81, OSNC 1981/12/228, LEX no. 2666.

by courts[77]. when reducing the legitim[78] on the basis of the principles of social intercourse.

5.4. Social Function

The social function of any general clause – such as the principles of social intercourse – can be fourfold. First of all, judges can invoke the general clause to supplement *ad hoc* the written law, but only in a given case. Such an invocation of the general clause will be a one-off event, and courts deciding cases in the future will not be bound nor particularly persuaded by this kind of decision, lacking any value as precedent. Secondly, judges may invoke the general clause, also *ad hoc*, in order to derogate from what perceive to be a rule of written law whose application *in casu* would seem unjust or unfair. Thirdly, a judge may invoke a general clause in order to create new, abstract rules, which – owing e.g. to the authority of the court in question – will be applied by lower courts just as statutory rules. Fourthly and finally, a judge can also invoke a general clause to declare certain rules of the written law as no loner applicable, not only *in casu* but in general.

Applying this grid to the principles of social intercourse, we find that in the initial period of their presence in Polish law (until the 1960s) they played all four roles, but from the mid-1960s they have been only playing the first two of them, which – characteristically – has not changed after 1990. General rules proclaimed in the 1950s and 1960s under authority of the principles of social intercourse include, *inter alia*, a general prohibition of unpaid labour, such as unpaid traineeships[79] or the elimination of monetaty claims as compensation for wrongful death.[80]

Once the written law was brought into line with the socialist system, the Supreme Court stopped invoking the principles of social intercourse to proclaim new rules or

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77 See e.g. Supreme Court judgment of 7 April 2004, Case IV CK 215/03, LEX no. 152889; judgment of the Court of Appeal in Warsaw of 9 September 2009, Case VI ACa 286/09, LEX nr 1120244; judgment of the Court of Appeal in Szczecin of 22 April 2009, Case I ACa 459/08, LEX nr 550912.

78 A legitim (*zachowek*) in Polish law is a claim of the would-be statutory heirs to the heirs appointed in a will for a partial monetary equivalent (1/2 or 2/3) of the share in the estate they would have obtained had the *de cuius* deceased intestate.

79 Including unpaid internships and volunteership – see SN decision of 7 November 1950, Case C 162/50, LEX No. 117060.

80 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 intercourse (SN decision of 21 April 1951, Case C 25/51, LEX No. 160157), unless the moral wrong entailed also a patrimonial loss (SN decision of 15 December 1951, Case C 15/51, LEX No. 117056).

abrogate old ones. Thus in 1967 the Supreme Court explicitly ruled that the principles of social intercourse 'can serve as the basis for correcting the evaluation of an atypical case, but they do not serve the purpose of generalisations in typical situations',[81] adding in 1974 that the principles may not be the source of judge-made law: otherwise the court would 'enter[s] into the scope of legislation.'[82]

6. The Survival of the Prosecutor's *Locus Standi* in Civil Proceedings

6.1. Circumstances of Introduction

Under Polish pre-1939 civil procedure, the powers of the prosecutor to intervene in civil proceedings were exteremely narrow even for Western European standards of the period (such as French law)[83]. In contrast, under the Soviet model the Prosecution Services 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[84]. Specifically within the realm of civil proceedings, a Soviet 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.[85] In 1950, this model of the prosecution service became the object of a legal transfer to Polish law as part of a wider reform of civil and criminal procedures.[86]

6.2. Legal Form

81 Supreme Court decision of 28 November 1967, Case I PR 415/67, LEX No. 4615.

82 Supreme Court resolution of 17 January 1974, Case III PZP 34/73, LEX No. 15390.

83 W. Masewicz, *Prokurator w postępowaniu cywilnym* [The Prosecutor in Civil Proceedings] (Warszawa: Wydawnictwo Prawnicze, 1975), p. 15; J. Smoleński, *Prokuratura Polskiej Rzeczypospolitej Ludowej. Komentarz do ustawy o prokuraturze PRL i innych przepisow 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] (2nd ed., Warszawa: Wydawnictwo Prawnicze, 1981), 127; K. Stefko, *Udział prokuratora w postępowaniu cywilnym* [The Participation of the Prosecutor in Civil Proceedings] (Warszawa: Wydawnictwo Prawnicze, 1956), 33-40; J. Jodłowski, *Les principes de la procedure civil polonaise* [Extrait de la Revue internationale de droit comparé (continuation du Bulletin de la Société de législation comparé), 1960, No. 2] (Agen: Imprimerie Moderne, 1960), p. 8; H. Zięba-Załucka, *Instytucja prokuratury w Polsce* [The Institution of the Prosecution Service in Poland] (Warszawa: LexisNexis 2003), p. 14.

84 W.E. Butler, *Russian Law* (3rd ed. Oxford: Oxford University Press, 2009), p. 192.

85 W.E. Butler, *Soviet Law* (London: Butterworths, 1983), p. 106-107

86 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 Wilhemsson et al. (The Hague: Kluwer Law International, 2007): 83-103, p. 88ff.

Under the new legal framework prosecutors enjoyed a general and unlimited *locus standi* 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, it had full legal effects *vis-à-vis* the litigants. A judicial decision handed down in such a procedure was binding on such parties (unlike, for instance, in the French cassation "in defence of the law"). The Prosecutor General – head of the hierarchical prosecution service – enjoyed additional, special powers to appeal to the Supreme Court against any judicial decision having the force of *res iudicata* regardless of the time lapsed (the "extraordinary revision").[87]

This legal transfer, first codified in 1950, was taken over into the new socialist Code of Civil Procedure enacted in 1964. The prosecutor's general *locus standi* was raised to the level of a fundamental principle of civil procedure[88] and scholars emphasised its role in making Polish civil procedure truly socialist.[89] The only exception to the prosecutor's *locus standi* obtaining since 1965 was the exclusion of the right to file for divorce.

After 1989 numerous scholars began to criticise the generalised prosecutorial *locus standi*;[90] some of them even argued that such an institution actually violates the right to an impartial court as guaranteed by international human rights instruments.[91] Nevertheless, despite numerous amendments to the Code of Civil Procedure, the prosecutor's general locus standi remained unaffected. Although the special procedure of "extraordinary revision" was abolished, the Prosecutor General obtained powers of bringing the newly established forms of appeal before the Supreme Court – the motion for cassation and the motion for anullment of an illegal decision, which functionally replaced the socialist extraordinary revision.

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87 Even this extraordinary form of appeal affected the rights and duties of the parties, unless a certain period had lapsed from the day that the original decision had obtained the force of *res iudicata.*

88 Article 7 of the Code of Civil Procedure 1964.

89 Meszorer, *op.cit.*, p. 75; Smoleński, *op.cit.*, p. 127.

90 Tadeusz Ereciński, 'O potrzebie nowego kodeksu postępowania cywilnego' [On the Need of a New Code of Civil Procedure] (2004) 59:4 *Państwo i Prawo* 3f, p. 8; Piotr Pogonowski, *Realizacja prawa do sądu w postępowaniu cywilnym* [The Realistion of the Right to a Court in Civil Proceedings] (Warszawa: C.H. Beck, 2005), p. 73ff.; Adam Zieliński, in: *Kodeks postępowania cywilnego. Komentarz do artykułów 1-505[14]* [Code of Civil Procedure. Commentary to Article 1 to 505[14]] (2nd ed., Warszawa: C.H. Beck, 2006), p. 71.

91 Feliks Zedler, 'Glosa do wyroku SN z dnia 14 września 2005 r. III CZP 58/05' [Case-note Supreme Court 14.9.2005, III CZP 58/05] (2006) 50:10 *Orzecznictwo Sądów Polskich* 516ff, p. 518.

6.3. Legal Practice Applying the Legal Form

The legal framework regarding the prosecutor's locus standi in civil proceedings is by now means a dead letter of the law, a fact which can be ascertained both on the basis of the Internal Rules of the Prosecution Service (2010)[92] currently in force and on the basis of statistical data published by the Prosecution Service itself. The Internal Rules specify the types of civil cases in which a prosecutor's participation is "desireable"[93]. 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 anullment of a legal act whose effect is the transfer or encumberance of an immovable, cases regarding protection of cultural property and 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 anullment 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 guardinship, deprivation of parental authority, injunction prohibiting contacts with a child. Finally, within labour law the Internal Rules urge prosecutors to bring actions, inter alia, whenever workers' rights were flagrantly violated, in cases of termination of employment due to discrimination.

Statistical data are illuminating. Yearly prosecutors participate in around 100,000 civil cases[94]. In 2011 the prosecution service brought filed a total of 22,000 civil lawsuits. Their subject matter included[95] actions for compensation on account of damage to property (4,125 cases), actions for confiscation of an illegal or immoral performance (409 cases), actions in labour law (2 cases), actions for pursuit of paternity (84 cases), actions for negation of paternity (1,063 cases), actions for invalidation of recognition

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92 Rozporządzenie Ministra Sprawiedliwości z dnia 24 marca 2010 r. – Regulamin wewnętrznego urzędowania powszechnych jednostek organizacyjnych prokuratury [Regulation of the Minister of Justice of 24 March 2010 – the Internal Rules of the Common Organisational Units of the Prosecution Service] (Dz.U. z 2010 r. nr 49, poz. 296, hereinafter: "Internal Rules 2010").

93 §§ 374, 378-379 of the Internal Rules 2010.

94 In 2007 the number amounted to 98,000; in 2008 to 129.000; in 2011 – 80.000. For 2008 – see http://www.bip.ms.gov.pl/Data/Files/_public/bip/statystyki/prokur_dzial_2008.pdf (last accessed: 9/4/2013). For 2007 see http://www.bip.ms.gov.pl/Data/Files/_public/bip/statystyki/2007_informacja_statyst_prokuratury.pdf (last accessed: 9/4/2013). For 2011 – see http://www.pg.gov.pl/upload_doc/000002780.doc (last accessed: 9/4/2013). For 12 see – http://www.pg.gov.pl/upload_doc/000003686.rtf (last accessed: 9/4/2013).

95 In this list exact numbers are given.

of child (113 cases), actions for alimony or raising of alimony (250 cases), actions for incapacitation (1,748 cases), actions against persons abusing liquors (10,902 cases), other actions in family law (3,516 cases), remaining other actions (3,056 cases)[96].

6.4. Social Function

If the social function of the prosecutor's *locus standi* in civil proceedings is conceived as a power given to the Prosecution Service to intervene in private litigation on behalf of (its understanding of) the public interest, then it must be admitted that this function has remained the same. Of course, the political allegiance of the Prosecution Service has changed after 1989, it is no longer controlled by the Communist Party and since the 2010 reform it has even become independent from the government.

However, on a more detailed level changes in the function could be identified. During the socialist period prosecutors filed many cases in order to protect state porperty[97] or intervene, on behalf of working peasants, in cases of class struggle with *kulaks*. Such cases are, obviously, not present any more in legal practice. The lack of interest of the prosecution service in the ongoing class struggle after 1989 is best evidenced by the fact that only 2 labour cases were brought in 2011.

However, if we look upon other areas of prosecutorial activity in the field of family law (incapacitation cases) or in cases regarding the confiscation of an illegal performance, we will find more continuity of the social function.

In sum, it could be said that the essential function of the prosecutor's *locus standi* in civil proceedings – the right of the state to intervene in private litigation – has been upheld. On a more detailed level, however, the function has partly shrunk, especially with regard to the protection of state property.

7. Conclusions: Legal Continuity Despite a Change of Paradigm

A radical socio-economic transformation, such as the passage from state socialism to capitalism in 1989, can be compared to a shift of paradigm in science.[98] Just like different theoretical constructions can be placed on the same set of data,[99] so the socio-economic relationships of a given society can be governed by very different

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96 The two types of actions in Polish law (the '*powodztwa*' and '*wnioski')* have been merged here.

97 Graff, Karłowski, "Działalność", 183.

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

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

(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 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 the other."[100]

The same happens after a "change of paradigm" of the legal system, or its transition from, for instance, state-socialist law to neoliberal capitalist law. Just like scientists, lawyers do not discard those elements of their professional toolbox which, although used in new ways, can still be fruitfully deployed under the new paradigm. What varies, though, is the degree of adaptation necessary, or – to use the metaphor 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."[101]

Law – like science – is above all, a practical enterprise, and the test of viability that legal institutions must pass is their concrete problem-solving ability, the capacity for effectively regulating socio-economic interests and resolving conflicts. In law – like in science - "[n]ovelty for its own sake is not a desideratum". Already Domitius Ulpianus, a Roman lawyer living in the 2nd century, remarked that:

> "*In rebus novis constituendis evidens esse utilitas debet, ut recedatur ab eo iure, quod diu aequum visum est*"[102]. (For new things to be established, their utility must be evident in order to abandon a law which had seemed fair for a long time).

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[100] Kuhn, *Scientific Revolutions*, p. 149. See also ibid., p. 130: "[...] postrevolutionary science invariably inclydes many of the same manipulations, performed with the same instruments and described in the same terms, as its prerevolutionary preedecessor. [...] [O]ccasionally, the old manipulation in its new role will yield different concrete results."

[101] Kuhn, *Scientific Revolutions*, p. 169.

[102] D. 1, 4, 2 (Ulpianus libro quarto fideicommissorum).

Whether we like it or not, an inherent feature of the legal superstructure is its tendency to "lag behind": not 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 the study of legal survivals is ultimately about, is the an analysis of the mechanisms of legal adaptation. How does it happen, that old legal institutions are not removed altogether, but remoulded to suit the needs of the new socio-economic system by fulfilling new functions. If a most generalised conclusion is to be drawn from the case-studies analysed above, it is certainly to the effect that the ultimate factor determining the appearance and endurance of legal survivals is their functionality towards the social, economic, political and legal system. If the legal survival in its original form is not functional, it is either adapted – or it perishes. The extent of adaptations varies, depending on the degree of disfunctionality. There is no uniform recipe and much depends on the flexibility or open-endedness of the legal survival in question.

For instance, the general clause of the principles of social intercourse was not amended at all. Courts could continue applying the same general clause and resorting to the same "procedural" rules (such in what type of case the clause may be invoked, what effect it has on the rights and duties), but of course the situational context differed. The social function of allowing judges to play *ad hoc* legislators or derogators, has remained constant.

The prosecutorial locus standi in civil cases also did not require any essential amendment of the Code of Civil Procedure. Decisions as to whether intervene and in what types of cases are taken by individuals prosecutors operating within a hierarchical structure. Clearly, the social function conceived as the power of the state to intervene in private litigation did not change.

Other legal survivals, however, required explicit legislative adaptations. The cultivation contract provides an example of a legal survival whose adaptation was only minor: it was only necessary to allow also private businesses to procure agricultural produce under the contract, to enable its continued use after 1989. The contract, however, changed its macrosocial function: it ceased to serve the purpose of integrating private farmers with a state-controlled and centrally planned economy.

Nevertheless, the microsocial function of giving farmers stable and predictable prices for their produce remained unaltered.

Finally the real-socialist *ius in re aliena* – the "cooperative member's proprietary right to an apartment" – proved to be a legal survival in need of most far-reaching adaptation. Its construction as it stood at the beginning of transformation enabled it to fulfil only one socio-economic function: that of satisfying private housing needs. However, the new capitalist economic system required that also private apartments become investment assets. Therefore, through a joint effort of the legislature and the Constitutional Court, the legal form underwent a profound change. The entire socialist penumbra of the right were amputated, laying bare the very core of the right: an alienable entitlement to the exclusive enjoyment of an apartment in a building owned by a housing cooperative. In this new revamped legal form, the old *ius in re aliena* of state-socialist origin could now fulfil the function of drawing capital rent and speculation.

A more general conclusion to be drawn from this study is that the traditional Marxist conceptual metaphor of law as a superstructure, overdetermined "in the last instance" by the socio-economic base, seems to make sense in the context of legal survivals: the ultimate reason for the survival of certain legal arrangements (parts of the supertructure) is their functionality towards the socio-economic system (the base).