The Role of Legal Transfer in Post-Communist Poland

The Search for a Metaphor

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Abstract: The fall of the Berlin Wall in November 1989 marked the symbolic end of socialism. The collapse of the Soviet Union and the end of the socialist system meant that the legal system in force had to be rebuilt. The purpose of this article is to deal with the role of legal transfer in this transitional period, using the example of the change of the property regime in Poland. This question is embedded in the search for an appropriate metaphor for this unprecedented process.

The article elaborates on how Poland has managed the transformation of the property regime. This elaboration is oriented to the central question of the role of legal transfer.

The theories of *Watson*, *Legrand*, *Frankenberg* and *Foljanty* are used to characterise the transformation process in terms of legal theory. This aims to provide an optimal metaphor for the post-communist transformation of the Polish legal system. The central issue in this context is transfer in all its facets. Transfer is not only considered in the form of translation in the sense of a technical translation of a norm from one language into another, but also with regard to cultural differences and a possible change in meaning as a result of the transfer. In this respect, the object of research is the translation process as such, but also the continued existence of the norms at issue in the new legal order.

Keywords: Legal transfer, Post-communist transformation, Legal translation, Poland, Property rights, Socialist law.

1. Introduction: Poland and property

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The fate of post-communist legal systems after the collapse of the Soviet Union and the end of the socialist system has long been perceived as a blank slate to be filled from nothing.[2] Contrary to this simplistic assumption, the transformation process is more multi-layered and complex. The transformation of the property regime can serve as an example to illustrate the entire process, guided by the question of the role of the transfer of rights and the search for a metaphor capable of capturing this process.

At first glance, it seems evident to regard property as the central legal institution in connection with the change from a communist economic order to a capitalist system. The link between the political and economic system and the prevailing property regime can be described in a well-founded way on the basis of socialist law. At its core, the systemic antagonism between state socialism and private capitalism could even be reduced to opposing conceptions of property and property regimes, and their effects.[3] At the very least, the transformation of the property regime is one of the most far-reaching measures in the transition from a communist to a post-communist market economy, which affects the legal sphere of both the state and its citizens. For the particularity of the legal institution of property is that it affects everyone and moreover, represents a legal, economic and social category at the same time.

The peculiarity of the post-communist transformation in the case of Poland lies in the combination of several significant aspects. First of all, Poland's geopolitical position is a special feature. Bordering Germany, it is located in direct proximity to the countries of the West and situated in the centre of Europe.

Poland's position in the overall transformation process of Eastern Europe should also be mentioned. Poland has played a pioneering role in democratisation and the introduction of a market economy. The People's Republic of Poland is one of those post-Soviet states that showed a clear tendency to establish overtly capitalist institutions in both politics and the economy right after the collapse of the Soviet Union.[4]

In order to further describe Poland's role in this context, Poland's earlier legal history before socialism must be taken into account. In particular, this upheaval must be seen against the background of a long and difficult process: with the attainment of independence in 1918, the young state of Poland was confronted with problems of unification and codification of law. At the time, the state had to be rebuilt from territories that were under the rule of different countries, each with distinctly different legal systems. In the case of civil law, this involved French, Russian, German and Austrian law.[5] Therefore, Poland has always been under the influence of various continental European legal traditions, so the legal system appears amenable to legal transfer at its core.

Another peculiarity is that the communist revolution in Poland did not take place on the same scale as in Russia, meaning that there was no complete discarding of the pre-socialist legal order during the socialist system.[6] As a result, the postwar period is characterised by a transformation process that is oriented both to the original legal order and to other legal systems.

In comparative law, the Polish legal system is considered to be a legal system that, after the collapse of communism, was actively oriented toward other legal systems and adopted parts of these legal systems. In this respect, the unification of the law, predominantly influenced by both German and French traditions, is a particular feature, also with regard to legal harmonisation within Europe.[7]

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[2] B. KORDASIEWICZ, M. WIERZBOWSKI, *Polish Civil and Commercial Law*, in S. FRANKOWSKI, P. B. STEPHAN III (eds.), *Legal Reform in Post-Communist Europe*, Dordrecht 1995, p. 163.

[3] H. ROGGEMANN, *Rechtsentwicklung in Mittel–und Osteuropa*, Berlin, 1999, p. 36.

[4] H. IZDEBSKI, *General Survey of Developments in Eastern Europe in the Field of Civil Law*, in D. D. BARRY, G. GINSBURGS, W. B. SIMONS (eds.), *The Revival of Private Law in Central and Eastern Europe*, The Hague, 1996, pp. 5, 8.

[5] M. GONDEK, *Article Poland*, in J. M. SMITS (eds.), *Elgar Encyclopedia of Comparative Law*, Cheltenham, 2012, p. 681; P. KORDASIEWICZ, M. WIERZBOWSKI, *op. cit*., p. 163 f.

[6] B. KORDASIEWICZ, M. WIERZBOWSKI, *op. cit.*, p. 163.

[7] M. GONDEK, *op. cit*., p. 681; W. GLATZ, *Die Entwicklung des polnischen Zivilrechts: Darstellung und Bewertung unter dem Aspekt des wirtschaftlichen Wandels*, Berlin, 2000, p. 24 ff.

2. Historical context

In Poland, the system change in 1989/90 took the form of a negotiated transition, which was initiated by the 1989 Round Table negotiations and was eventually characterised by Poland's return to a parliamentary democracy.[8] Previously, the independent trade union *Solidarność*, along with the Catholic Church, had been the main force behind the movement that marked the end of communism in Poland.[9] This transformation of the communist system into a democratic state governed by the rule of law also set the course for the legal way of dealing with the past.

3. The socialist property regime

To understand the transformation of the legal system in Poland and the challenges it created, hawse have to look back to the socialist legal system and the socialist property regime. Two aspects must be taken into account when examining the legal institution of property in the socialist system:

Firstly, after 1945, research on Eastern European law predominantly took the form of a comparison of systems that combined several or even all socialist countries.[10] Hence, from this legal research persepective, a general presentation of the socialist concept of property is given for the purpose of this article, although supplemented with the specific Polish implementations. Secondly, in socialist law many civil law matters, in particular property, were characterised by a strong public law component.[11] For this reason, the property regime will be discussed in the following primarily on the basis of constitutional law.

3.1. The Marxist concept of property

The Marxist concept of property served as a foundation for defining the concept of property as a socio-economic category in socialist doctrine.[12]

> At a certain stage of their development, the material forces of production in society come in conflict with the existing relations of production, or—what is but a legal expression for the same thing—with the property relations within which they had been at work before.[13]

According to Marxist theory, property is not a relation between person and object that authorises the person with the power of disposal. On the contrary, it is a social relationship.[14] Although it contains all the powers of the subjective property right, it is not an exclusive right in the traditional sense, since other legal subjects are intended to participate in the utilisation of that same property.[15]

3.2. Types of property and owners in the Polish legal system

[8] T. DE VRIES, *Der rechtliche Umgang mit der Vergangenheit in der Republik Polen*, in F. C. SCHROEDER, H. KÜPPER (eds.), *Die rechtliche Aufarbeitung der kommunistischen Vergangenheit in Osteuropa*, Frankfurt, 2010, p. 128.

[9] K. ZIEMER, Das politische System Polens, Wiesbaden, 2013, p. 21 f., 85; see generally A. MICEWSKI, *Kirche, „Solidarność" und Kriegszustand in Polen*, München, 1988.

[10] H. KÜPPER, *Einführung in die Rechtsgeschichte Osteuropas*, Frankfurt am Main, 2005, p. 696 f.

[11] H. KÜPPER, *op. cit.*, p. 697.

[12] O.W. JAKOBS, *Eigentumsbegriff und Eigentumssystem des sowjetischen Rechts*, Köln, 1965, p. 6.

[13] Original version: "*Auf einer gewissen Stufe ihrer Entwicklung geraten die materiellen Produktionskräfte der Gesellschaft in Widerspruch mit den vorhandenen Produktionsverhältnissen oder, was nur ein juristischer Ausdruck dafür ist, mit den Eigentumsverhältnissen, innerhalb derer sie sich bisher bewegt hatten*…", K. MARX, *Zur Kritik der politischen Ökonomie* (1859), in: Marx-Engels-Werke, vol. 13, Berlin, 2015, p. 9; English translation by N. I. STONE, *K. MARX, A Contribution to the Critique of Political Economy*, New York, 2014, p. 12.

[14] V. PETEV, *Sozialistisches Zivilrecht*, Berlin, 1975, p. 76.

[15] V. PETEV, *op. cit.*, p. 112.

In agreement with this theory, ownership was not treated as a unitary legal concept, applying to all legal subjects and all legal objects. Instead, the socialist property regime knew different types of ownership. In total, three types of property were distinguished: social, individual and personal property. The first type was further divided into state-owned and cooperative property.[16]

3.2.1. Property at the constitutional level

The tripartite divison of property was initially embodied at the constitutional level: The socialist constitutions contained not only fundamental provisions on property, but also detailed regulations on the economic foundations of the socialist state and social order.[17]

Socialist property was understood to mean property based on the socialisation of the means of production.[18]

State property as the first form of social property was the highest form of socialist property and therefore particularly protected. Since it was intended to serve the entire people, the Polish Constitution referred to it as the people's property.[19] However, the people functioned only as a theoretical institution, personified by the state. State property could refer to any object and was thus not subject to any restrictions.[20]

The objects of Polish state property were goods such as natural resources, transportation and communication facilities, and banking and insurance institutions. However, land was not nationalised in the Polish People's Republic.[21]

This form of ownership found expression in Art. 77, par. 1 of the Constitution of the Polish People's Republic as follows:

> It is the duty of every citizen of the Polish People's Republic to safeguard and strengthen social property, which is the unshakable foundation of the development of the State, the source of the wealth and might of the country.[22]

The other component of social property was cooperative property. Its subject was a group, so it qualified as group property. Due to its nature as a component of socialist property, cooperative property also received special care and protection from the state.[23]

This was expressed in Art. 11 of the Constitution of the Polish People's Republic as follows:

> The Polish People's Republic promotes the development of various forms of the co-operative movement in town and country and gives it every help in the fulfilment of its tasks, while extending special care and protection to co-operative property, as constituting social property.[24]

[16] V. PETEV, *op. cit.*, p. 78; O. W. JAKOBS, *op. cit.*, p. 52; correspondingly for Polish Law: A. BILINSKY, *Das Eigentumsrecht in Polen*, in *Studien des Instituts für Ostrecht, Band 5, Das Eigentum im Ostblock*, West-Berlin, 1958, p. 96 f.

[17] V. PETEV, *op. cit.*, p. 77; B. KORDASIEWICZ, M. WIERZBOWSKI, *op. cit.*, p. 171.

[18] O.W. JAKOBS, *op. cit.*, p. 53.

[19] O.W. JAKOBS, *op. cit.*, p. 53; A. BILINSKY, *op. cit.*, p. 98.

[20] V. PETEV, *op. cit.*, p. 78 f.

[21] V. PETEV, *op. cit.*, p. 79; A. BILINSKY, *op. cit.*, p. 97.

[22] Art. 77 (renumbered as Art. 91 by decree of February 1976) § 1, Constitution of the Polish People's Republic (1952), official English translation: http://libr.sejm.gov.pl/tek01/txt/kpol/e1952a-r7.html (as consulted online on 26 January 2023).

[23] A. BILINSKY, *op. cit.*, p. 96 f.; B. KORDASIEWICZ, M. WIERZBOWSKI, *op. cit.*, p. 171.

[24] Art. 11 (renumbered as Art. 16 by decree of February 1976), Constitution of the Polish People's Republic (1952), official English translation: http://libr.sejm.gov.pl/tek01/txt/kpol/e1952a-r2.html (as consulted online on 26 January 2023).

Furthermore, the socialist property regime knew individual and personal property, with the distinction based on the criterion of its use. While individual property was used for production purposes, personal property was defined as property conceptualised to satisfy the consumption needs of the individual.[25]

According to this concept, the Constitution of the Polish People's Republic stated in Art. 12:

> The Polish People's Republic recognises and protects, on the basis of existing laws, individual property and the right to inherit land, buildings and other means of production belonging to peasants, craftsmen and persons engaged in domestic handicrafts.[26]

Personal property concerned the property of objects for personal use.[27] Characteristic of personal property were its sources as well as its destination, namely the creation through individually earned income or inheritance and the use to satisfy material needs.[28] The Constitution guaranteed full protection of personal property in Art. 13:

> The Polish People's Republic guarantees to citizens full protection of personal property and the right to inherit such property.[29]

Legal objects accessible to this form of ownership, though, were not mentioned.[30]

The form of classic private property remained a relic for the socialist order. Nevertheless, some countries granted it to varying degrees. Unlike in the Union of Soviet Socialist Republics (USSR), land was not generally nationalised in Poland. In addition, private catering establishments were very common.[31]

3.2.2. Property at the civil law level

The property regime of the Polish Constitution then formed the basis for the civil law concept of property in the Civil Code (*kodeks cywilny*). Consequently, the Civil Code also distinguished between three types of property: social, personal and individual property. Here, property law outlined the abstract limits of entitlement. These resulted from the entire legal system, from the principles of social coexistence regulated in Art. 140 of the Civil Code, from the social-economic purpose of property law, as well as from other special regulations.[32]

The principle of special protection of social property found expression in Art. 126 and 127 of the Civil Code: Art. 126 contained the definition of social property already enshrined in the Constitution as either state property or cooperative property. Art. 127 obliged every citizen to protect social property from any harm threatening it.[33]

The owner's entitlement finds its limits according to Art. 140 of the Civil Code in the principles of social coexistence as well as in the purpose of the property:

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[25] B. KORDASIEWICZ, M. WIERZBOWSKI, *op. cit.*, p. 171.

[26] Art. 12 (renumbered as Art. 17 by decree of February 1976), Constitution of the Polish People's Republic (1952), official English translation: http://libr.sejm.gov.pl/tek01/txt/kpol/e1952a-r2.html (as consulted online on 26 January 2023).

[27] A. BILINSKY, *op. cit*., p. 97.

[28] V. PETEV, *op. cit*., p. 82.

[29] Art. 13 (renumbered as Art. 18 by decree of February 1976), Constitution of the Polish People's Republic (1952), official English translation: http://libr.sejm.gov.pl/tek01/txt/kpol/e1952a-r2.html (as consulted online on 26 January 2023).

[30] A. BILINSKY, *op. cit*., p. 97.

[31] A. BILINSKY, *op. cit*., p. 97; V. PETEV, *op. cit*., p. 83 f.

[32] D. KEMPTER, *Der Einfluss des europäischen Rechts auf das polnische Zivilgesetzbuch*, Baden-Baden, 2007, p. 45; W. GLATZ, *op. cit*., p. 54 f.

[33] Art. 126, 127, Ustawa z dnia 23 kwietnia 1964 r. Kodeks Cywilny, Dziennik Ustaw, 1964, nr. 16, poz. 93.

> Within the limits set by the laws and principles of social coexistence, the owner may, with the exception of other persons, benefit from things according to the socio-economic purpose of his or her right, and may, in particular, charge the benefits and other income from the things. Within the same limits, it can dispose of a thing.[34]

Furthermore, the socialist conception of property implied ist loss in function as a means of securing credit. Mortgages and other forms of security were partially or completely eliminated as legal institutions.[35]

4. The transformation process

The transformation process in Eastern Europe can be divided into three areas of a coherent reform process: institutional infrastructure, currency stabilization and real regulation at the microlevel, i.e. at the level of enterprises. Property rights can be identified as one of the most important elements of the institutional infrastructure.[36] Looking at the overall Eastern European transformation process, it can be seen that apart from Hungary, only Poland preserved the tradition of the socialist principle of the unity of civil law in the legislative process.[37] Moreover, in Poland it was even a question of accentuating this unity.[38]

4.1. The constitutional reform

The political and economic development of the transition countries after the end of Soviet influence represented a revolution. This revolutionary process was not initiated simply by enacting a civil code. Rather, the first step was a constitutional reform, which was characterised by the essential importance of the legal institution of property. The reform pursued the abolition of the tripartite division of types of property and thus the establishment of a uniform property right that applied equally to all legal subjects.[39]

This revolutionary process was undertaken in Poland through a significant amendment to the 1952 Constitution, which was passed in December 1989.[40] Thus, Poland was the only post-socialist state that, even after the reform, preserved a large part of the socialist constitution—albeit in a modified form—without, however, enacting a completely new version.[41]

Apart from the actual property regime, though, the 1952 constitution with its democratic values was meaningless during Soviet rule, since in practice, it was disregarded by the Polish leadership, first completely and, from the 1970s onwards, at least to a large extent. It is noteworthy that by 1989, when the most significant amendment was passed, the 1952 constitution had been amended 17 times.[42]

The new property right was initially reflected in Art. 6 and 7 of the Constitution as amended in 1989. Art. 6 guaranteed the freedom of economic activity, which could only be restricted by law, and Art. 7 protected property and inheritance rights, and made expropriation subject to the conditions of just

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[34] Art. 140, Ustawa z dnia 23 kwietnia 1964 r. Kodeks Cywilny, Dziennik Ustaw, 1964, nr. 16, poz. 93; English translation: https://www.globalregulation.com/translation/poland/2985870/act-of-23-april-1964-civil-code.html (as consulted online on 30 January 2023).

[35] H. ROGGEMANN, *op. cit*., p. 36.

[36] H. SIEBERT, *The Transformation of Eastern Europe*, in KIEL INSTITUTE FOR THE WORLD ECONOMY (ed.), *Kieler Diskussionsbeiträge*, Vol. 163, Kiel, 1991, p. 7.

[37] Unity of civil law means that the relations of the socialist economy are also fundamentally subject to the regulations of civil law, so that there is no need for a special economic law, W. GLATZ, *op. cit*., p. 39.

[38] H. IZDEBSKI, *op. cit*., p. 5.

[39] H. IZDEBSKI, *op. cit*., p. 6.

[40] M. GONDEK, *op. cit*., p. 681.

[41] H. IZDEBSKI, *op. cit*., p. 7.

[42] M. BREZINSKI, L. GARLICKI, *Polish Constitutional Law*, in S. FRANKOWSKI, P. B. STEPHAN III (eds.), *Legal Reform in Post-Communist Europe*, Dordrecht 1995, p. 21.

compensation and pursuit of public purposes.[43] What is noteworthy in this respect is the explicit mention of "personal property", which is a legacy of the earlier provisions on property. This formulation specifically expressed the recognition of private property in contrast to the previous constitution.[44] The regulations had thus introduced a right to property, which also included the individual's right to economic activity.[45]

As a consequence of the constitutional amendment, the property guarantee existed in the post-socialist constitutional law of Poland, and its provisions could, in turn, be used as a basis for civil law reform.

The *"Little Constitution"* of 1992 enabled the Polish state to function properly until the final Polish constitution (*Konstytucja Rzeczypospolitej Polskiej*) came into force in 1997.[46] The current Constitution of Poland was enacted on 2 April 1997, granting all property rights as well as the right of succession.[47]

4.2. The civil law amendments

On the basis of constitutional law, the property right was then defined sub-constitutionally in civil law.

As early as the beginning of the 1980s, under pressure from both the economic crisis and the *Solidarność* trade union, the first reforms of economic law were introduced in Poland with the aim of gradually denationalising the economy. Despite the socialist basis of the Civil Code, the amendment of civil law provisions was initially not considered necessary, as the fundamental influence of Polish legal tradition on the Civil Code was invoked.[48]

However, this approach was not sustainable for long, so that by 1985 the Legislative Council noted the incompatibility of the Civil Code with socioeconomic changes. Since a new codification of the Civil Code was not considered, the only option was successive amendment.[49]

The aim of the reform was to provide legal protection and support for economic change. In formal terms, the continental European system implemented in the Civil Code of 1964 was to be retained.[50]

4.3. Foreign participation in the transformation and the "war of advice"

After the collapse of socialism, a "war of advice"[51] broke out within the Western community of values, a dispute over the choice of model legal systems for the transition countries.

While it is true that massive financial resources flowed from the USA, the work enabled by it refuted the assumption that common law countries were better suited for transformation assistance than countries with codified civil law in the Roman tradition.[52]

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[43] Art. 6, 7, Ustawa z dnia 29 grudnia 1989 r. o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej (Act amending the Constitution of the Polish Peoples' Republic of Poland), Dziennik Ustaw, 31 December 1989, nr. 75, poz. 444.

[44] W. GÄRTNER, *Die Eigentumsgarantien in den Verfassungen Polens, Ungarns, der Tschechischen und der Slowakischen Republik – Verfassungsrechtliche Grundlagen und Verfassungspraxis*, in H. ROGGEMANN (ed.), *Eigentum in Osteuropa*, Berlin, 1996.

[45] W. GLATZ, *op. cit*., p. 119.

[46] See generally K. ZIEMER, *op. cit*.

[47] Art. 64, Constitution of the Polish People's Republic (1997), official English translation: https://www.sejm.gov.pl/prawo/konst/angielski/konse.htm (as consulted online on 17 February 2023).

[48] W. GLATZ, *op. cit*., p. 89.

[49] W. GLATZ, *op. cit*., p. 89.

[50] W. GLATZ, *op. cit*., p. 89 f.

[51] "*War of advice may break out in Russia*", in: Financial Times, 21. Dezember 1992, cited after: H. SCHMIEGELOW, *Why Legal Transformation Assistance from Germany and Japan to Former East-Bloc Countries?* in H. KÜPPER, W. BRENN (ed.), *Rechtstransfer und internationale rechtliche Zusammenarbeit: Deutsche und japanische Erfahrungen bei der Kooperation mit Osteuropa und Zentralasien*, Frankfurt am Main, 2010, p. 76.

[52] H. SCHMIEGELOW, *op. cit*., p. 76 f.

The transformation assistance provided by Japan and Germany, which in contrast to the U.S. approach can be characterised as cautious and oriented toward the needs of the respective countries, was considerably less costly. While Japan concentrated on Southeast Asia, German assistance was directed at Eastern Europe, the former Soviet Union and China, including Poland. In this context, German advice mainly concerned civil and commercial codes.[53]

The motives of Germany and Japan were of a foreign policy nature and can be explained by the similar experiences of their own post-war transformations and reintegration into the Western community of values. The possibility of working with civil law books, yet freed from the legislative proliferation induced by a planned economy, proved to be a precondition for the 'economic miracle' of the two countries. Hence, Germany and Japan were valuable sources of legal transformation advice.[54]

Regarding assistance from the German side, the following institutes were engaged in transformation consulting: the German Foundation for International Legal Cooperation (*Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit e.V.*; *IRZ*), the German Society for Technical Cooperation (*Deutsche Gesellschaft für Technische Zusammenarbeit*; *GTZ*) and the Institute for Eastern Law (*Institut für Ostrecht*; *IOR*).[55] On the Austrian side, the Center of Legal Competence in Vienna was established to provide consulting services to the transition countries.[56]

The founding of the *IRZ* in May 1992 coincided with a time when German experience with restructuring the law in the former German Democratic Republic was still very fresh.[57] Moreover, the inspiration for these efforts was the idea that, in view of the upheaval in the Eastern bloc countries, reunified Germany in particular had a special obligation to help the affected countries quickly and effectively in shaping the legal framework.[58] The legal advice of the IRZ was intended to contribute to the establishment of the legal system and to provide assistance in the implementation of this legal system.[59] The focus in this respect was on support for the reform of the private legal system, which includes the creation of a private property regime.[60] The consulting activities were based on the maxim of merely providing support for independent reform.[61]

A large part of the *IRZ's* work consisted of advising on the preparation, drafting and implementation of laws. In addition to the adoption of new laws, the transformation process for the practical implementation of the new legal system required measures for the education and training of legal practitioners. Specifically, this part of assistance consisted of seminars, as well as providing internships at courts, law firms, authorities, chambers or even companies in Germany.[62]

4.4. The first reform stage (1989/90)

[53] H. SCHMIEGELOW, *op. cit.*, p. 78, 80.

[54] H. SCHMIEGELOW, *op. cit.*, p. 78 f.

[55] H. SCHMIEGELOW, *op. cit.*, p. 78 f.; about the work of the IRZ: https://www.irz.de/index.php/en/about-us (as consulted online on 1 February 2023). The GTZ was merged with two other German governmental public development organisations to form the German Agency for International Cooperation GmbH (GIZ), https://archive.ph/20130915125908/http:/www.bmz.de/en/press/aktuelleMeldungen/2010/december/20101216_pm_184_fusion/index.html (as consulted online on 1 February 2023); website URL GIZ: https://www.giz.de (as consulted online on 1 February 2023); website URL IOR: https://www.ostrecht.de (as consulted online on 1 February 2023).

[56] Website URL: https://www.clc.or.at (as consulted online on 1 February 2023).

[57] K. HOBE, *Politik und Institutionen der deutschen Zusammenarbeit* in M. BOGUSLAWSKIJ, R. KNIEPER (eds.), *Wege zu neuem Recht: Materialien internationaler Konferenzen in Sankt Petersburg und Bremen*, Berlin, 1998, p. 259.

[58] L. FADÉ, *Die Tätigkeit der Deutschen Stiftung für internationale rechtliche Zusammenarbeit*, in M. BOGUSLAWSKIJ, R. KNIEPER (eds.), *Wege zu neuem Recht: Materialien internationaler Konferenzen in Sankt Petersburg und Bremen*, Berlin, 1998, p. 262.

[59] K. HOBE, *op. cit.*, p. 260.

[60] L. FADÉ, *op. cit.*, p. 263.

[61] L. FADÉ, *op. cit.*, p. 264.

[62] L. FADÉ, *op. cit.*, p. 265; in this article, the work of the IRZ in particular is presented as an example of foreign participation.

In accordance with a *"policy of small steps"*, the Commission under the Ministry of Justice for the Reform of Civil Law, created in 1986, determined that the revision should be carried out in stages as needed.[63]

It was decided to carry out the civil law reform in two stages, with the first stage to be implemented quickly and to include the most important and urgent changes, while the second stage was to deal with less urgent problems.[64]

The first stage of reform is of primary importance for the property regime, so that only this reform stage will be considered here. It took effect mainly through the adoption of the Law of 28 July 1990 on the Amendment of the Civil Code.[65]

Notwithstanding this classification, short-term reforms had become so urgent by the end of 1988 that a special committee and members of the Polish Parliament drew up further new regulations: An amendment, passed in advance on 31 January 1989, was programmatic in nature, changing only Art. 128 of the Civil Code and deleting Art. 535, par. 2 of the Civil Code.[66]

What is relevant to property is the following: The amended Art. 128 of the Civil Code, under which national property belonged to the treasury or other legal entities, broke with the principle of the unity of state property and was thus intended to adapt the Civil Code to the requirements of economic change.[67] With the deletion of Art. 535, par. 2, the most important follow-up provision to the concept of unitary state ownership was abolished. Art. 535, par. 2 detached the seller's obligation of a state economic unit from the transfer of ownership in sales contracts between state enterprises, and instead made it sufficient that the thing was handed over to the buyer and left at his exclusive disposal. With its deletion, this restriction of the seller's obligation thus ceased to apply. The elimination of the unity of state ownership accordingly also meant the end of Art. 535, par. 2.[68]

4.5. The transformation of the property regime

One of the key elements of the reform of the Civil Code, aimed at adapting it to the requirements of the market economy, was the abolition of the distinction between types and forms of property, as well as of the special provisions protecting state property. The point of departure of the problem was therefore everywhere where state property had previously been regulated.[69]

However, it was not necessary to completely reintroduce private property, as the institution of private property had always existed in Poland to a certain extent. While jurisprudence in the 1980s was still pursuing the question of *how* state property was structured in accordance with the economic model, once the decision was made to unify ownership, the focus shifted to the question of *who*, i.e. the ownership of the formerly state-owned property. By abolishing all privileges of state property and the underlying tripartite division, a uniform form of property was established, irrespective of the diversity of the legal entities, including equal treatment in principle.[70]

Any preferential treatment was no longer based on fundamental, economic policy considerations, but at best on a rule-exception principle through legal regulations. The emergence and special treatment of state property, on the other hand, was not ruled out. Nevertheless, state property no longer had any intrinsic value that could be traced back to the people as a whole through the state's legal authority. Accordingly, state property lost its legitimacy. In addition to the ideological justifications that once applied, no legal justifications could be found.[71]

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[63] D. KEMPTER, *op. cit.*, p. 53.
[64] W. GLATZ, *op. cit.*, p. 91; D. KEMPTER, *op. cit.*, p. 53; B. KORDASIEWICZ, M. WIERZBOWSKI, *op. cit.*, p. 170.
[65] D. KEMPTER, *op. cit.*, p. 54; H. IZDEBSKI, *op. cit.*, p. 9.
[66] W. GLATZ, *op. cit.*, p. 92; Ustawa z dnia 31 stycznia 1989 r. o zmianie ustawy – Kodeks cywilny (Amendment of of the Civil Code), Dziennik Ustaw, 1989, nr. 3, poz. 11; own translation.
[67] L. FADÉ, *op. cit.*, p. 92.
[68] L. FADÉ, *op. cit.*, p. 62, 92.
[69] D. KEMPTER, *op. cit.*, p. 54.
[70] W. GLATZ, *op. cit.*, p. 119.
[71] W. GLATZ, *op. cit.*, p. 121.

4.6. The evolution of Art. 128 of the Civil Code

The legal restructuring of the nature and protection of property can be exemplified by the aforementioned amendment of Art. 128 of the Civil Code. In particular, the course of the legislation of this norm shows the problem of the gradual departure from the principle of uniform state property.

Thus, Art. 128 (old version) of the Civil Code regulates the principle of the unity of state property and furthermore constructs an overall social property of the people:

> Art. 128, par. 1. Socialist people's property (state property) belongs indivisibly to the state.[72]
>
> Art. 128, par. 2. Within the limits of their legal capacity, the state legal persons shall exercise in their own name the rights flowing from the state property with regard to the part of the people's property administered by them.[73]

Here, the state's property position results from the wording. The state legal persons only had the objects of state property for administration, so that they could not become owners.[74]

The dissolution of state property under civil law thus had the consequence that it became questionable who should move into this formerly comprehensive social ownership position. The previously chosen path of gradual reform proved to be problematic in this respect.[75]

The amendment of 31 January 1989 changed Art. 128 of the Civil Code to the effect that state property should go to the treasury or other legal entities:

> Common property (state property) serves the state assets or other legal persons under public law.[76]

The fact that this amended Art. 128 of the Civil Code was ultimately deleted altogether in the course of the 1990 reform shows that Art. 128 (new version) of the Civil Code was not a satisfactory provision, either, with regard to relieving the burden of legal practice. For even after the enactment of the new version of Art. 128 of the Civil Code, the question remained as to whether state legal persons should acquire property directly by virtue of the new regulation.[77]

Art. 128 of the Civil Code was intended to provide a solution to an interpretation dilemma and to satisfy the need for a provision, which, on the one hand, grants the treasury property of the assets managed by the companies and, on the other hand, enables the management of the state-owned properties.[78]

A differentiating solution then assumed that Art. 128 (new version) of the Civil Code only standardised a direct regulation insofar as no special provision existed. Accordingly, in the absence of a special provision for movable property, the companies were directly entitled to ownership of the objects that had been in their possession until then.[79]

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[72] Art. 128, par. 1, Ustawa z dnia 23 kwietnia 1964 r. Kodeks Cywilny, Dziennik Ustaw, 1964, nr. 16, poz. 93; own translation.
[73] Art. 128, par. 2, Ustawa z dnia 23 kwietnia 1964 r. Kodeks Cywilny, Dziennik Ustaw, 1964, nr. 16, poz. 93; own translation.
[74] D. KEMPTER, *op. cit.*, p. 48 f., 56.
[75] W. GLATZ, *op. cit.*, p. 122.
[76] Art. 1, Ustawa z dnia 31 stycznia 1989 r. o zmianie ustawy – Kodeks cywilny (Amendment of the Civil Code), Dziennik Ustaw, 1989, nr. 3, poz. 11; own translation.
[77] W. GLATZ, *op. cit.*, p. 122.
[78] W. GLATZ, *op. cit.*, p. 123.
[79] W. GLATZ, *op. cit.*, p. 123 f.

After the elimination of Art. 128 of the Civil Code, Art. 44 of the Civil Code assigned property to the treasury and only incidentally to other state legal persons.[80]

4.7. The elimination of other legal provisions

In addition to Art. 128 of the Civil Code, Art. 126 to 135 of the Civil Code, which made the treatment of persons under civil law dependent on the form of ownership they represented, were ultimately deleted without replacement. Furthermore, the regulations of Art. 129, 131 and 139 of the Civil Code, which standardised special rules of interpretation regarding the protection of forms of property, as well as Art. 177, which excluded the possibility of the acquisition of a state property, were repealed.[81]

4.8. The (re)privatisation

The transformation of the property regime now also required a corresponding implementation in actual terms. The principles of economic freedom and the protection of private property pushed the state out of the economy to a certain extent, so that legal constructions became necessary to accomplish the transition from state property to people's property.[82]

In the first phase of the privatisation policy, which ended with the legal regulation of privatisation, the legal foundations that are still valid today were created.[83] Privatisation is regulated by the Law on Privatisation of State Enterprises of 13 July 1990[84], which was amended in August 1996 by the Law on Commercialisation and Privatisation of State Enterprises.[85] For the enforcement of privatisation, a ministry was established on the basis of the Law on the Establishment of the Ministry for Ownership Transformation[86], which was dissolved in 1996. Its tasks were then taken over by the Ministry of State Treasury.[87] These laws only concern enterprises, but no general privatisation law has been enacted.[88]

In the case of property transformation based on the privatisation laws, a distinction must be made between indirect and direct privatisation. While indirect privatisation occurs through the transformation of a state-owned enterprise into a company (commercialisation) and the subsequent sale of the shares or stock, direct privatisation is based on the direct transfer of ownership into private hands.[89]

The implementation of the privatisation programme resulted in an enormous discrepancy between the legislator's conception, the people's expectations, and the results. The reason for this lies in enforcement: The implementation of the law, which was developed by the political right, became the

[80] W. GLATZ, *op. cit*., p. 123.

[81] D. KEMPTER, op. cit., p. 56.

[82] B. POPOWSKA, *Der Wandel der rechtlichen Rahmenbedingungen für das Eigentum in Polen in den Jahren 1989-2003,* in *Jahrbuch für Ostrecht, Vol.* 45, 1/2004, pp. 11-28, 12.

[83] D. SÜß, *Privatisierung und öffentliche Finanzen: Zur Politischen Ökonomie der Transformation*, Stuttgart, 2011, pp. 98, 117.

[84] Ustawa z dnia 13 lipca 1990 r. o prywatyzacji przedsiębiorstw państwowych, Dziennik ustaw, 1990, nr. 51, poz. 298; English translation: Z. SLUPINSKI, *Poland: Law on Privatization of State-Owned Enterprises*, in: *International Legal Materials*, vol. 29, iss. 5, 1990, pp. 1226-1243, 1229-1243.

[85] Ustawa z dnia 30 sierpnia 1996 r. o komercjalizacji i niektórych uprawnieniach pracowników, Dziennik Ustaw, 1996, No. 118, poz. 561; E. MROCZEK, L. VON SCHUTTENBACH, C. MIECZYSLAW, *Mittelständische Unternehmen in Polen: Ihre Entwicklung und ihr Einfluss auf die Transformation*, Heidelberg, 2000, p. 40.

[86] Ustawa z dnia 13 lipca 1990 r. o utworzeniu urzędu Ministra Przekształceń Własnościowych, Dziennik Ustaw, 1990, No. 51, poz. 299.

[87] Z. SLUPINSKI, *op. cit*., p. 1226; Zarządzenie Prezydenta Rzeczypospolitej Polskiej z dnia 30 września 1996 r. w sprawie zmian w składzie Rady Ministrów, Dziennik Ustaw, 1996, nr. 60, poz. 558; Zarządzenie Prezydenta Rzeczypospolitej Polskiej z dnia 1 października 1996 r. w sprawie zmiany w składzie Rady Ministrów, Dziennik Ustaw, 1996, nr. 60, poz. 559.

[88] T. DE VRIES, *op. cit*., p. 132 f.

[89] B. POPOWSKA, *op. cit*., p. 16 ff.; B. KORDASIEWICZ, M. WIERZBOWSKI, *op. cit*., p. 181. P. LIS, J. MAZURKIEWICZ, *Ownership transformations of state-owned enterprises in Poland (1990-2008)* in J. J. TOMIDAJEWICZ (ed.), *Privatization in Poland and Formation of European Social Order*, Poznań, 2009, p. 55f.

responsibility of the political left after a change of government. Thus, the resulting low level of participation of the originally envisaged large companies led to only meagre effects.[90]

Another area of transformation of the property regime was reprivatisation, i.e. the restitution of the property of private owners that was taken over by the state in the mid-1940s. From the perspective of today's values and the legal system introduced after 1989, these nationalisations violated the principle of property protection and thus were among the injustices that had to be remedied. Compensation for the nationalisations is prevented, however, because corresponding implementing regulations were never issued. Nor has there been a repeal of the nationalisation laws, so that nationalisation has remained a legal institution. Accordingly, civil proceedings would not be successful due to the lack of an invalid administrative act. Therefore, the only remaining option is to challenge the nationalisation decision in an administrative procedure. [91]

What would be required is regulation by the legislator through a comprehensive single reprivatisation law. However, such a regulation has not been enacted to date. Instead, as outlined above, the reprivatisation process has been slow and based on a patchwork of several smaller, limited laws.[92] Reprivatisation as an important economic, moral and legal task, especially with regard to the constitutional protection of property, remains problematic to this day.

5. Property law after the collapse of the Soviet Union

With regard to property order and *legal transfer*, two aspects in particular are relevant for property law after the reform processes:

For the transfer of ownership, the causal system of title transfer was chosen, i.e. the direct transfer of ownership by sale. This corresponds to French law and clearly not to the German abstract system of title transfer.[93]

Furthermore, by moving away from the tripartite division of property types, property regained its function as a means of security, so that regulations regarding limited rights in rem and security interests became necessary.

A vestige of the socialist order is found as regards mortgages. There are no regulations on mortgages in the amended Civil Code itself. These were standardised in a separate law. The question of why no integration into the Civil Code was sought cannot be answered unequivocally. Possible reasons are the lack of time during the reforms or the assumption that the existing regulations outside the Civil Code were sufficient. Ultimately, however, there was no urgent need, as mortgages had developed to become, in practice, the most important means of security at banks anyway, and therefore did not require a theoretical increase in importance associated with integration into the Civil Code.[94]

6. The post-communist transformation: Legal transfer or return to the legal tradition?

The civil law reforms in the course of the transformation in Poland create the initial impression that only the socialist passages were deleted. However, this was a much more complex process, which is characterised not least by the resumption of the development of European legal institutions from the 19th and early 20th centuries.[95]

Nevertheless, the new version consisted almost exclusively of deletions, especially in property law, from which one can draw the conclusion that the original Polish property law did not have a basis completely different from the Western market-oriented property systems.[96]

[90] B. POPOWSKA, *op. cit.*, p. 21.
[91] B. POPOWSKA, *op. cit.*, p. 23 f.
[92] B. POPOWSKA, *op. cit.*, p. 25 f.
[93] W. GLATZ, *op. cit.*, p. 164.
[94] W. GLATZ, *op. cit.*, p. 130 f., 162.
[95] W. GLATZ, *op. cit.*, p. 169.
[96] W. GLATZ, *op. cit.*, p. 170.

Consequently, the question arises as to whether the reforms should be classified as a transformation process from West to East or as a return to the country's own national legal tradition.

In this respect, it should first be noted that Polish civil law was already close to the continental legal tradition before 1990/91. Both the original and the 'new' version of the Civil Code were strongly influenced by the legal systems of other countries, especially Germany, France and Switzerland.[97]

Glendon, Gordon and *Osakwe* divided the socialist legal tradition into three subgroups, differentiating between Eastern and Central Europe (1), China (2) and Southeast Asia (3), with the first having abolished socialist law and returned to its *"civil law roots"*.[98]

It is true that a large part of the transformation consists of a return to the roots of civil law. In this respect, one could speak of a renaissance of civil law. However, the reform is a much more complex and multilayered process, consisting of a wide variety of components in addition to a mere return.

The transition from a socialist, centrally administered economy to a market economy does not represent the creation of an unprecedented economic order. Rather, a return to the original system is also taking place in economic terms. These results neither in the simple transfer of a new, 'foreign' legal system or regulations, nor in a mere return to the original legal system, but rather in a combination of both aspects.

When searching for a metaphor, the discussion of the respective foreign norm or principle that served as an example for the concrete implementation in Poland is problematic, especially due to the fact that the Polish legal system has always been influenced by foreign legal traditions. Having said that, Polish civil law did borrow from German law.

The extent of Germany's advisory activities in the Eastern Bloc was based on the need for advice. The demand for those activities was also influenced by the degree of interest in continuing a legal tradition related to German law.[99] In Poland, such interest is likely to have existed to a high degree in view of the implementation, so that a strong German influence can be assumed.

The advisory function was intended to mainly have a supporting function in the process of independent reform efforts. The adoption of a foreign system without restrictions, for example through a mere translation of laws, was not to be expected. Rather, the legal advice aimed at a transfer of knowledge, experience and legal know-how.[100]

This approach also contributes to the difficulty of ascertaining whether, and if so to what extent, the specific legal provisions were influenced by German or other foreign law. Not least for this reason, it is fruitful to shift the perspective from specific provisions to actors and processes.

For in connection with the aforementioned advisory function, there is also the question of actors raised above. In addition to the foreign advisors, the reform process was mainly shaped by the Polish Commission for the Reform of Civil Law.[101] For the evaluation of the transformation process with regard to the actors on the basis of the concepts of transfer and renaissance of civil law, this is significant insofar as foreign consultation is an indicator of a transfer, while the Polish Commission is an indicator of a renaissance. The exclusion of the US legal system as a possible model legal system is remarkable. This means an orientation towards continental European, codified law and the rejection of a completely new legal system. Consequently, the question of the actors also results in an interplay of transfer and renaissance.

The question of how the new legislative regulations and their implementation were achieved allows the following evaluation: The emphasis on the autonomy of reforms, on the one hand, and their implementation with foreign, practical assistance, on the other, represent the aforementioned two components of transformation. Thus, the legislative process itself, admittedly not entirely uninfluenced by foreign law, could be characterised as a return to legal tradition and a 'Polish achievement', while

[97] H. IZDEBSKI, op. cit., p. 9.

[98] M. A. GLENDON, M. W. GORDON, C. OSAKWE, *Comparative Legal Traditions,* Saint Paul (Minnesota), 1991, p. 396.

[99] L. FADÉ, *op. cit.*, p. 264.

[100] L. FADÉ, *op. cit.*, p. 264; see 4.2.1. Foreign participation in the transformation and the "war of advice".

[101] W. GLATZ, *op. cit.*, p. 90.

the actual legal transfer is more evident in the advice given regarding its implementation in legal practice.

The question of the reaction of legal practitioners, and of the synchronicity of legislative change and change in legal awareness and application, must be answered in a differentiated manner. A uniform answer is probably not possible because of individual and local differences. In addition, the various factors are interrelated as well in this respect. The transformation of Eastern Europe started in Poland, so that the reform mood before the fall of communism[102] could show a change in legal consciousness even before the changes in the law. Germany's practical help in implementing the law, on the other hand, speaks for a change in legal awareness and application that followed the legislation in time.

6.1. Theoretical approaches

A metaphor is a rhetorical figure transposing a term from its original concept to another and similar one to suggest a likeness between them.[103] Metaphors can not only be an embellishment, but also go hand in hand with specific possibilities of cognition (Erkenntnis).[104] This epistemological function of metaphors can also be utilised for research in legal history and comparative jurisprudence. Notwithstanding the three most influential theories on metaphors[105], the search for a metaphor in the context at hand is based on the following concept: capturing the post-communist transformation in Poland with a term other than transformation is intended to make visible similarities to and differences from transformation processes in other former Eastern bloc countries. A concise denotation allows insights into the transformation of communist to post-communist legal systems and could reveal blind spots. At the same time, a clear denotation opens the space for discourse.

Further criteria for a conceptual classification of transformation and corresponding metaphors are offered by the theoretical approaches of *Watson* and *Legrand*, *Frankenberg* and *Foljanty*.

6.1.1. Autonomy of law (Watson)

Based on the relative autonomy of law, *Watson* argues that "*the moving of a rule or a system of law from one country to another, or from one people to another*"[106] is possible and even a central driver of legal development.[107] *Watson* coined the term *legal transplant* to describe this very process. According to this approach, most changes in most legal systems are the result of borrowing. The term *legal transplant* implies a technical and isolated understanding of this process. Furthermore, it refers to the result rather than to the process itself.[108]

This autonomy of law from the rest of culture cannot be assumed for the post-communist transformation because the socialist legal system was strongly ideologically influenced, especially by political considerations oriented toward a planned economy. In a sense, law served as a tool of politics and ideology. Like property itself, as a central legal institution in the context of the transformation from a planned economy to a market economy, the transformation process as a whole is composed of economic, social and legal components that are interwoven with one another. Regardless of whether law

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[102] As early as 1986, the *Commission under the Ministry of Justice for the Reform of Civil Law* was entrusted with the amendment of the Civil Code; D. KEMPTER, *op. cit.*, p. 53.

[103] *Article Metaphor*, in D. D. RUNES (ed.), *Dictionary of Philosophy*, 1942, URL: http://www.ditext.com/encyc/frame.html (as consulted online on 20 April 2023); A. P. MARTINICH, *Article Metaphor*, in E. CRAIG (ed.), *Routledge Encyclopedia of Philosphy*, London, 1998, URL: https://www-rep-routledge-com.uaccess.univie.ac.at/articles/thematic/metaphor/v-1 (as consulted online on 20 April 2023).

[104] See for the academic fields of literature studies and philosophy: A. HETZEL, *Metapher, Metaphorizität, Figurativität* in A. ALLERKAMP, S. SCHMIDT (eds.), *Handbuch Literatur & Philosophie*, Berlin/Boston, 2021, p. 125.

[105] The comparison theory, the interaction theory and the speech act theory; see A. P. MARTINICH, *Article Metaphor*, in E. CRAIG (ed.), *Routledge Encyclopedia of Philosphy*, London, 1998, URL: https://www-rep-routledge-com.uaccess.univie.ac.at/articles/thematic/metaphor/v-1 (as consulted online on 20 April 2023).

[106] A. WATSON, *Legal Transplants: An Approach to Comparative Law*, Second Edition, Athens (Giorgia), 1993, p. 21.

[107] A. WATSON, *op. cit.*, p. 21 f.

[108] See G. ARJANI, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, in The American Journal of Comparative Law, vol. 43, iss. 1, 1995, pp. 93–117, 93.

can induce socio-economic change, or whether this change is a condition of the legal system, there is at least a connection between law and the economy. The two interact with each other and apply to received law as well as internally set law. A conclusion of the possibility of legal transfer in the post-communist transformation of the Polish legal system is precluded by *Watson*'s very concept of law.

6.1.2. Contextuality of law (Legrand)

In contrast, *Legrand* qualifies law as part of culture and thus denies the possibility of such transfers in the sense of *legal transplants*. Due to the contextuality of law, a new meaning, in short, a new law would always emerge in the cultural and historical framework in question.[109] *Legrand* criticizes the etymological criterion of *Watson's* choice of the term *legal transplant* to the effect that transplant always means displacement.[110] This concerns solely statutory rules.[111] However, according to *Legrand*, at best, *"what can be displaced from one jurisdiction to another is, literally, a meaningless form of words"*.[112] Due to its nature as a rule, it must necessarily undergo change as soon as it crosses the borders of a jurisdiction.[113] Overall, *Legrand* disagrees with *Watson's* understanding of both law and rules.

As discussed earlier, the autonomy of law in socialist structures can be ruled out because of the close intertwining of politics and ideology with law. In post-communist transformation, law cannot be viewed in isolated terms. As has been seen, not even the terminology of property can be transferred from a legal system oriented to market-economy needs to a post-communist legal system. This is because although the socialist property system itself had been abolished, the concept of property was in a state of flux, which meant that transitional arrangements had to be found for the socialist relics.

An emergence of new law in *Legrand's* sense could be seen in the transformation process of Poland through the return to the old legal system in terms of substantive law, in combination with foreign assistance in practical implementation and application. Although foreign elements were borrowed in both substantive and practical respects, the product of this composition is found neither on the foreign, e.g. German side nor on the Polish side, thus creating 'new law'.

6.1.3. Identity & politics in comparative law (Frankenberg)

Against the background of the advisory work in Albania, *Frankenberg* critically presents the newly acquired function of comparative jurisprudence as an *"invasive political enterprise"*[114]. *Frankenberg* thus describes a change in comparative law, more precisely in the motivation and intention of the comparativists, from an academic approach to political intervention.[115] In the transformation context, a form of this *"invasive political enterprise"* can be found in the *"war of advice*".

Frankenberg proceeds to create two stereotypical characters: On the one hand, there is the *"hegemonic comparatist"*, symbolising the politics of paternalism in comparative law, who is an ambivalent persona. Guided by humanistic and idealistic motives, he is in search of the ideal law. At the same time, however, he finds himself in uneasy coexistence with the pragmatic politician, who pursues uniformity and unification under the patronage of the very rule of law he likes best. His approach, however, is characterised by the attempt *"to suppress their peculiar perspective behind the rhetoric of objectivity and neutrality, while camouflaging their politics by pragmatism."*[116] On the other hand,

[109] P. LEGRAND, *The Impossibility of 'Legal Transplants'*, in Maastricht Journal of European and Comparative Law, vol. 4, iss. 2, 1990, pp. 111–124.
[110] P. LEGRAND, *op. cit*., p. 111.
[111] P. LEGRAND, *op. cit*., p. 112.
[112] P. LEGRAND, *op. cit*., p. 120.
[113] P. LEGRAND, *op. cit*., p. 120.
[114] G. FRANKENBERG, *Stranger than Paradise: Identitiy & Politics in Comparative Law,* in Utah Law Review, iss. 2, 1997, pp. 259–274, 260.
[115] G. FRANKENBERG, *op. cit*., p. 261.
[116] G. FRANKENBERG, *op. cit*., p. 263.

Frankenberg introduces the *"tragic comparatist"*, symbolising the politics of modesty in comparative law, who seems to be well aware of the limits and defects of her home law and her intellectual situation, and ends up in a *"dilemma of showing equal concern and respect for the known as well as the knowable"*.[117] Yet being aware of the traps of ethnocentrism and Western paternalism, and wanting to take the pluralism of legal cultures seriously, in the end, she avoids the unsafe immersion into the other. This approach is characterised by modesty overall.[118]

These opposite poles of the characters of the *"hegemonic comparatist"* and the *"tragic comparatist"* can also be assigned in a generalized way to the approach of the USA, on the one hand, and the cautious, demand-oriented assistance provided by Germany on the other. However, there was also a certain dependence of Poland on these same characters at the individual level with regard to German transformation assistance, although the fact that the desire to adapt to Western legal and economic systems came from Poland itself could in some ways offer protection against the approach of a hegemonic comparatist. In addition, the subjective aspects mentioned by Frankenberg also played a role in reform work. For example, the first reform stage was characterised by time pressure, which affected individual working methods and ultimately necessitated repeated improvements to the changes. The fact that a general privatisation law has not been enacted could also be attributed to various subjective aspects. One could also think of identity issues. It is obvious, for example, that Poland in particular, with its pioneering (legal) role in the transformation process, attached importance to its own legal system, which was influenced by, but not simply adopted from foreign models.

6.1.4. Cultural translation (Foljanty)

With the concept of *cultural translation*, *Foljanty* offers a metaphor that makes it possible to gain a deeper understanding of transfer processes and, with the help of the disciplines of translation and cultural studies, to grasp the most diverse aspects of the transfer process. In contrast to the common perception of translation as a technical act, translation in this context is a creative process in which pragmatic or aesthetic considerations often take precedence over the exact reproduction of the original. Accordingly, translation does not take place in a vacuum. With this expanded concept of translation in terms of transcultural transfer, the metaphor of *cultural translation* goes beyond the concepts of both *legal transplant* and legal transfer to make the characteristics of the transformation process, such as complex positionings of actors, visible.[119]

The pragmatic nature of the first stage of the reform reveals the external aspects of the alignment of the Polish property regime with the Western system. In the course of this stage, ultimate solutions had to give way to considerations of urgency, and corresponding priorities had to be set.

The tripartite division of property types disappeared from the Civil Code, but was still of actual relevance due to the lack of regulations on conversion. However, legal provisions that continued to differentiate between types of property became necessary to clarify their fate. Thus, the concept of property could not entirely be equated with the Western concept of property immediately. The emphasis on the process of translation is reflected precisely in this necessity. Just as a concept cannot be translated from one language to another in a technical and isolated way, a legal institution cannot be transferred directly from one legal system to another. The metaphor of translation is able to capture this process.

The general alignment with the Western property regime, detached from concrete norms, can therefore be summarised in its complexity by the metaphor of *cultural translation*.

6.2. Theoretical conclusion

[117] G. FRANKENBERG, *op. cit*., p. 266, 269.
[118] G. FRANKENBERG, *op. cit*., p. 269 f.
[119] L. FOLJANTY, *Rechtstransfer als kulturelle Übersetzung: Zur Tragweite einer Metapher*, in Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft, vol. 98, iss. 2, 2015, pp. 89–107.

Ultimately, no clear result emerges for the transformation in Poland in the sense of an exclusion of the respective other term. An approach to the conceptual question is offered by the following consideration: The mere fact that a complete recodification was never considered, and that the 1964 Civil Code continues to exist to a large extent as a result, speaks in favour of a renaissance of civil law, supported by the arguments already mentioned. Such a return, however, by no means excludes a legal transfer. On the contrary, the renaissance of civil law can be brought about precisely by a transfer. On the whole, the transformation in Poland can be characterised as a renaissance, which, in addition to independent reform work in awareness of its own legal tradition, was also achieved through the means of transfer.

Neither transfer nor reform work happens in a vacuum. The metaphor of cultural translation is able to capture this with regard to transfer. The metaphor of renaissance also includes reform work oriented toward the country's own legal tradition. After the collapse of the socialist system, the Polish legal system was not a blank slate to be filled.[120] Instead, passages had to be uncovered and elaborated, removed and filled with entirely new elements or old forgotten elements—a renaissance.

7. The end of the transformation?

Due to the ongoing effects of the transformation process, there are doubts as to whether the transformation can even be considered as complete. It is true that the relevant laws have been enacted, implementation has begun and legal practice has been adapted accordingly. However, the transformation of the legal system still poses problems today.

Furthermore, it is questionable which criteria should be used to measure the end and/or success of the transformation of legal systems after the fall of socialism. There are various points of reference:

The consequences of decades of state-socialist property law and property thinking remain effective, to say the least. Hence, in 1999, *Roggemann* ventured the prognosis that the effects of this very system would be encountered for decades to come. New legislation is not capable of forcing an immediate and total change in the consciousness of legal practitioners and in the application of the law in practice. The socialist property regime also remains relevant insofar as reprivatisation and privatisation measures are linked to the preceding legal situation.[121]

Instead of enacting a completely new civil code, comprehensive revisions were made, so that the civil code had a provisional character. According to *Izdebski*, concerns arise from the fact that even the most comprehensive legislative amendment cannot modify the legal nature of a codification of socialism. Moreover, it is doubtful whether such an amendment would lead to sufficient homogeneity and thus meet the needs of a market economy.[122]

Küpper also sees the after-effects of the thinking and legal ideas of the socialist past in the post-socialist legislative acts themselves. Old socialist legal stereotypes can be identified in the underlying textual and mental layers of Eastern European laws. Thus, some laws or judgements in various post-socialist states are more similar than one would assume based on the great differences in (legal) culture. With regard to the transformation process, this means that these similarities are fading as the generations that received their general and jurisprudential socialisation under communism withdraw from lawmaking, application and teaching of law.[123]

The high legislative level of the 1964 Civil Code[124] speaks against such a critical view, as does the fact that there is still a deficit of historisation in order to be able to adequately analyse the transformation.

[120] See Footnote 2.
[121] H. ROGGEMANN, *op. cit.*, p. 35.
[122] H. IZDEBSKI, *op. cit.*, p. 10.
[123] H. KÜPPER, op. cit., p. 701.
[124] B. KORDASIEWICZ, M. WIERZBOWSKI, *op. cit.*, p. 164.

As explained above, civil law was only gradually reshaped during communism. This led to a similar approach in shaping the transformation system, thereby preserving the basic structure of the Civil Code.

Since the late 1990s, the post-communist transformation has increasingly been replaced by the integration of the legal systems of the candidates for membership of the European Union (EU) into the legal system of the EU.[125] This harmonisation with European Union law is also part of the work of the IRZ. Especially for the judges of Central and Eastern Europe, including Poland, the foundation began to hold seminars on questions of the impact of European law on judicial practice as early as 1995. These served to familiarise the judges with the question of the influence of European law on national law, as well as interactions between national and European jurisdictions.[126]

Regardless of any success or completion of the transformation, Poland, along with all other European Union member states at least, thus faces the challenge of transformation, then as now.

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[125] L. FADÉ, *op. cit.*, p. 266; G. ARJANI, *op. cit.*, 95.
[126] L. FADÉ, *op. cit.*, p. 266.

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