Foundations of Law

The Polish Perspective

FACULTY OF LAW
AND ADMINISTRATION

Edited by

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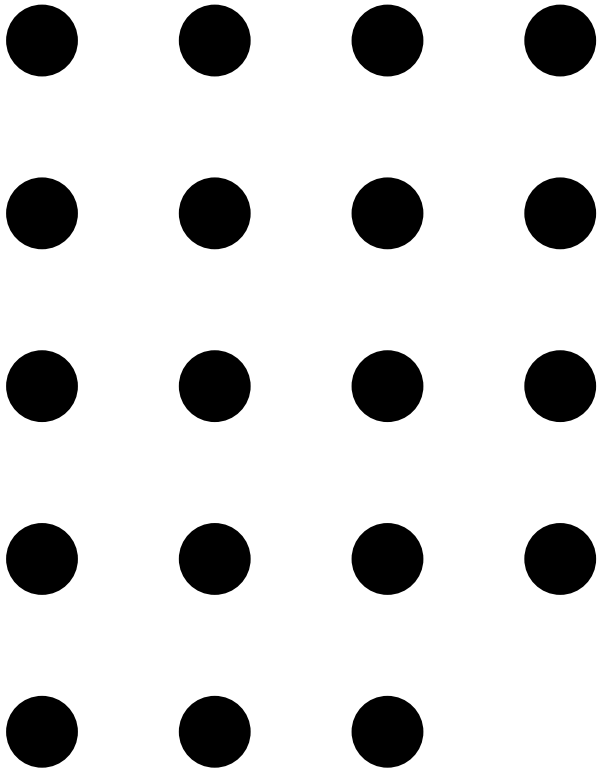

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ABBREVIATIONS

Legislation

ABGB	– Austrian General Civil Code of 1812 (*Allgemeines bürgeliches Gesetzbuch*)
ALR	– General state law of the Prussian states of 1794 (*Allgemeines Landrecht für die Preussischen Staaten*)
BGB	– German Civil Code of 1900 (*Bürgerliches Gesetzbuch*)
CBD	– Convention on Biological Diversity, open for signature at Rio de Janeiro from 5 June 1992
CC	– French *Code Civil* of 21 March 1804
CFR	– Charter of Fundamental Rights of the European Union of 1 December 2009 (OJ C 326, 26/10/2012, p. 391)
CRR Regulation	– Capital Requirements Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms (OJ L 176, 27/06/2013, p. 1)
ECHR	– European Convention on Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950
EPC	– European Patent Convention of 5 October 1973 (Convention on the Grant of European Patents)
k.c.	– Civil Code of 23 April 1964 (*Kodeks cywilny*, Dz.U. 2019, item 1145, as amended)
k.k.	– Penal Code of 6 June 1997 (*Kodeks karny*, Dz.U. 2020, item 1444)
k.k.s.	– Fiscal Penal Code of 10 September 1999 (*Kodeks karny skarbowy*, Dz.U. 2020, item 19)
k.k.w.	– Penal Enforcement Code of 6 June 1997 (*Kodeks karny wykonawczy*, Dz.U. 2020, item 523)
k.p.	– Labour Code of 26 June 1974 (*Kodeks pracy*, Dz.U. 2019, item 1040, as amended)
k.p.a.	– Administrative Procedure Code of 14 June 1960 (*Kodeks postępowania administracyjnego*, Dz.U. 2020, item 256, as amended)
k.p.c.	– Civil Procedure Code of 17 November 1964 (*Kodeks postępowania cywilnego*, Dz.U. 2020, item 1575)

k.p.k.	– Criminal Procedure Code of 6 June 1997 (*Kodeks postępowania karnego*, Dz.U. 2020, item 30)
k.r.o.	– Family and Guardianship Code of 25 February 1964 (*Kodeks rodzinny i opiekuńczy*, Dz.U. 2020, item 1359)
k.s.h.	– Code of Commercial Companies and Partnerships of 15 September 2000 (*Kodeks spółek handlowych*, Dz.U. 2020, item 1526)
k.w.	– Code of Petty Offences of 10 May 1971 (*Kodeks wykroczeń*, Dz.U. 2019, item 821, as amended)
k.z.	– Code of Obligations of 27 October 1933 (*Kodeks zobowiązań*, Dz.U. 1933 No. 82, item 598)
p.e.	– Energy Law of 10 April 1997 (*Prawo energetyczne*, Dz.U. 2020, item 833, as amended)
p.o.ś.	– Environmental Law of 27 April 2001 (*Prawo ochrony środowiska*, Dz.U. 2019, item 1396, as amended)
p.t.	– Telecommunications Law of 16 July 2004 (*Prawo telekomunikacyjne*, Dz.U. 2019, item 2460)
p.w.p.	– Industrial Property Law of 30 June 2000 (*Prawo własności przemysłowej*, Dz.U. 2020, item 286, as amended)
StGB	– German Criminal Code of 13 November 1998 (*Strafgesetzbuch*)
TEU	– Treaty on European Union, consolidated version of 26 February 2001 (OJ C 325, 24/12/2002, p. 33)
TFEU	– Treaty on the Functioning of the European Union, signed in Rome on 25 March 1957 (consolidated version, OJ C 326, 26/10/2012, p. 47)
u.f.p.	– Public Finance Act of 27 August 2009 (*ustawa o finansach publicznych*, Dz.U. 2019, item 869)
u.o.k.k.	– Act on competition and consumer protection of 16 February 2007 (*ustawa o ochronie konkurencji i konsumentów*, Dz.U. 2020, item 1076, as amended)
u.p.e.a.	– Act on administrative enforcement proceedings of 17 June 1966 (*ustawa o postępowaniu egzekucyjnym w administracji*, Dz.U. 2018, item 1314, as amended)
u.t.k.	– Act on railway transport of 28 March 2003 (*ustawa o transporcie kolejowym*, Dz.U. 2020, item 1043, as amended)
UNCITRAL Model Law	– UNCITRAL Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985

Institutions, organizations and other

ADR	– alternative dispute resolution
AFIS	– automated fingerprint identification system
AK	– Polish Home Army (*Armia Krajowa*)
B2B	– business to business
BAT	– best available techniques
BFG	– Bank Guarantee Fund (*Bankowy Fundusz Gwarancyjny*)
CAP	– common agricultural policy

CEDR	– European Council for Rural Law
CEIDG	– Central Registration and Information on Sole Proprietors (*Centralna Ewidencja i Informacja o Działalności Gospodarczej*)
CHP	– combined heat and power
CIT	– corporate income tax
CJEU	– Court of Justice of the European Union
CLKP	– Central Forensic Laboratory of the Police (*Centralne Laboratorium Kryminalistyczne Policji*)
EAW	– European Arrest Warrant
EBA	– European Banking Authority
EBU	– European Banking Union
ECB	– European Central Bank
ECJ	– European Court of Justice
ECtHR	– European Court of Human Rights
EEA	– European Economic Area
EIO	– European Investigation Order
EIOPA	– European Insurance and Occupational Pensions Authority
EMU	– European Monetary Union
EPO	– European Protection Order
ESA	– European Supervisory Authority
ESFS	– European System of Financial Supervision
ESMA	– European Securities and Markets Authority
ESRB	– European Systemic Risk Board
ETS	– emissions trading system
EUIPO	– European Union Intellectual Property Office
FRONTEX	– European Border and Coast Guard Agency
ICC	– International Criminal Court
ICJ	– International Court of Justice
ILC	– International Law Commission
IPBES	– Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services
ISO	– independent system operator
ITO	– independent transmission operator
JSC	– joint-stock company
KNF	– Polish Financial Supervision Authority (*Komisja Nadzoru Finansowego*)
KRS	– National Court Register (*Krajowy Rejestr Sądowy*)
KSF	– Financial Stability Committee (*Komitet Stabilności Finansowej*)
LLC	– limited liability company
LLP	– limited liability partnership (USA)
LNG	– liquefied natural gas
NBP	– National Bank of Poland (*Narodowy Bank Polski*)
NIK	– Supreme Audit Office (*Najwyższa Izba Kontroli*)
NSA	– Supreme Administrative Court (*Naczelny Sąd Administracyjny*)
NSDAP	– National Socialist German Workers' Party
OECD	– Organization for Economic Co-operation and Development
OU	– ownership unbundling model

PCIJ	– Permanent Court of International Justice
PCR	– polymerase chain reaction
PDO	– register of protected designations of origin (EU)
PEL	– public economic law
PGI	– register of protected geographical indications (EU)
PIT	– personal income tax
PKWN	– Polish Committee of National Liberation (*Polski Komitet Wyzwolenia Narodowego*)
PPP	– public-private partnership
RES	– renewable energy sources
RIO	– regional chambers of audit (*regionalne izby obrachunkowe*)
SA	– Nazi Party's paramilitary wing (*Sturmabteilung*)
S.A.	– joint-stock company (*spółka akcyjna*)
SAS	– a type of a joint-stock company (*société par actions simplifies*; France)
S.K.A.	– limited joint-stock partnership (*spółka komandytowo-akcyjna*)
SJSC	– simple joint-stock company
SME	– small and medium-sized enterprises
SOKiK	– Court of Competition and Consumer Protection (*Sąd Ochrony Konkurencji i Konsumentów*)
sp. k.	– limited partnership (*spółka komandytowa*)
sp. z o.o.	– limited liability company (*spółka z ograniczoną odpowiedzialnością*)
TK	– Polish Constitutional Tribunal (*Trybunał Konstytucyjny*)
UG	– simple joint-stock company (*Unternehmergesellshaft*; Germany)
UKE	– Office of Electronic Communications (*Urząd Komunikacji Elektronicznej*)
UN	– United Nations
UNHCR	– United Nations High Commissioner for Refugees
UOKiK	– Competition and Consumer Protection Office (*Urząd Ochrony Konkurencji i Konsumentów*)
WIPO	– World Intellectual Property Organization
WSA	– voivodship administrative court (*wojewódzki sąd administracyjny*)
ZUS	– Social Insurance Institution (*Zakład Ubezpieczeń Społecznych*)

Journals

Amtsbl	– Amtsblatt, German Official Journal
BGBl	– Bundesgesetzblatt, German Federal Law Gazette
Dz.U.	– Dziennik Ustaw, Polish Journal of Laws
OJ	– Official Journal of the European Union
OSNKW	– Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa, Rulings of the Polish Supreme Court, Criminal and Military Chamber
OTK	– Orzecznictwo Trybunału Konstytucyjnego, Rulings of the Polish Constitutional Tribunal
RGBl	– Reichsgesetzblatt, German Reich Law Gazette

PREFACE

Poland is a country in the heart of Europe. The geometric centre of the continent lies within the country. However, the history of the past 250 years and the difficult parochial language excluded Polish law from the mainstream of comparative legal analyses. Polish lawyers have contributed and continue to contribute to the development of the global legal heritage. Poland adopted the first written, democratically drafted constitution in Europe in May 1791. The Polish Code of Obligations of 1933 was a success in the unification of private law. This regulation replaced the French, Austrian, German and Russian codifications on Polish territories. The concept of genocide was introduced into the legal debate by Raphael Lemkin, a lawyer who started his legal carrier in Poland. Poland has been a Member State of the European Union since 2004. Public support for European integration is in Poland among the highest in Europe.

There are good reasons for choosing Poland as a place to start studying the European approach to the idea of law, legal reasoning, recent challenges and problems of legal developments. This book can be useful as a first step in this. The work was compiled by scholars of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań. The structure of the book reflects the main elements of the curricula of law schools in Poland. The chapters dedicated to the Polish legal tradition and legal methods are followed by seventeen contributions focusing on specific areas of law. The link between all the chapters is Polish law viewed in the European context. This book may be approached with various objectives and can be read in a number of ways. We hope that the demonstration of how local identity, fundamental values and the EU legal framework affect the Polish discussion of law can be informative for foreign students and revealing for foreign lawyers. The fact that the book is rather short should help look at Polish law this way. You will find references to recommended multilingual publications at the end of each chapter that can cast further light on Polish law and the Polish legal culture.

We would like to thank all the authors for their contributions provided during the difficult time of major institutional changes in higher education in Poland. Special thanks go to the former Dean of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań, Professor Roman Budzinowski, among others, for his kind support of this project and for providing the funding for this initiative. Last but not least, we are greatly indebted to the editorial staff of Wolters Kluwer Polska for their patience and professionalism.

Editors

Wojciech Dajczak, Piotr M. Pilarczyk

HISTORICAL FOUNDATIONS OF POLISH LAW

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1. History of Polish public law

1.1. Creation of the state. The First Polish Republic

1.1.1. Evolution of the system

In the sixth century, the lands of Central Europe were inhabited by Slavic tribes. Free farmers, who were their members, lived in settlements, several of which formed a territorial community called *opole*. Individual *opoles* were part of larger tribal organizations. A group of warriors emerged in one of the tribes with the surpluses obtained. This enabled expansion, subordination and occupation of the neighbouring tribes. It then became necessary to create a new, supra-tribal structure. The emerging state grew outside the borders of the then European civilization, so it assumed original, specific forms arising from the tribal past.

The adoption of Christianity in 966 is the first piece of historical evidence marking the existence of a state that around the year 1000 was named *Polska*. It was headed by a prince (some such princes received the royal crown) supported by a *drużyna* (fellowship), namely warriors deployed in various different parts of the country. Wars were waged with their help and they ensured the obedience of the people and the enforcement of their performances which constituted the basis for maintaining the team, the prince and his court in the form of various tributes and services. A veche (assembly) was convened on the most important matters. This was an institution known

from the tribal era. All free people initially took part in it, but together with the evolution of statehood and the emergence of social divisions, the circle of participants narrowed down to the upper strata. Important state affairs were decided upon and the judiciary took their place at the veches.

The state was treated as the common property of the prince's family, which created numerous problems. It was divided among the members of the dynasty in 1138, and the division turned out to be permanent and deepening. The central authority disappeared, but there were dozens of principalities that copied the previous political forms on a micro scale. These states divided, united and waged wars against each other. However, important social changes took place during this period, for instance, the estate system emerged. The maintenance of the members of the *drużyna* required giving them land, which gave rise to knighthood, i.e. the later nobility (*szlachta*). The previously free peasants became dependent on them, and *opoles* were transformed into territorial administration units. Self-governing towns and cities began to arise with the nascent burgher estate in the 13th century, in place of the defensive castles, trade settlements and new locations. Thus, separate legal systems emerged that governed individual estates.

Poland was united in the 14th century and only hints of the old divisions of the territorial structure and local hierarchies of the officials remained. Poland's alliance with Lithuania, which lasted over 400 years, was established in 1385. Jadwiga, who was the monarch at that time, married the Lithuanian Duke Władysław Jagiełło, the result of which was that Jagiełło's descendants had no right to inherit the throne. The non-formalized election system prompted the search for broad support to win the throne for the descendant. Kings gained it by granting further privileges to the nobles, thereby increasing their role in public life, while eroding the royal power.

This way, a system defined as a mixed monarchy was created, which, in contrast with an absolute monarchy, in the days before the concept of the separation of powers arose, referred to a political system where power was distributed among various entities. In Europe, only England and Venice developed a similar form. Poland began to be called *Rzeczpospolita* (the Commonwealth), which is a translation of the Latin *res publica*. The term did not refer to the form of the political system (republic versus monarchy), but – in line with Cicero – the state as such, the political community, the common good of all citizens. From 1569 onwards, it was the Polish-Lithuanian Commonwealth, as the existing relationship with Lithuania was transformed into a real union of both states. By combining huge areas into one country, the Commonwealth became a pan-European phenomenon. It was a multicultural country: multilingual, multinational, and multireligious. Religious freedoms were granted by the act of the Warsaw Confederation (1573) signed by representatives of the largest denominations. Jews and Muslims lived alongside the followers of various Christian religions.

In the Commonwealth, only the nobles enjoyed full civic rights. Compared to other countries, this was formally an egalitarian and very populous group (about 10% of the population). The Golden Liberty, as the Commonwealth's political system was also described, granted the nobility the exclusive right to sit in parliament and to elect the king.

The key role in the system was vested in a *Sejm* (parliament) as the representation of the nobility. Like in other countries, in Poland, the parliament was formed as a result of the king's need to obtain permission to impose taxes, but the legislation later covered all areas of the state's activity. The final, bicameral Sejm was formed in the second half of the 15th century. Members of the chamber of deputies were elected by a regional gathering of the nobility called *Sejmik*. The most important state officials and Catholic bishops entered the Senate, the upper house, *ex officio*. The king had a legislative initiative, but he did not stand above the Sejm but was its third element. New laws had to be approved by the chamber of deputies, the Senate and the king.

After the death of the last monarch of the Jagiellonian dynasty (1572), the election of the king became a common political act in which every nobleman was entitled to participate. The elections themselves attracted numerous candidates, both among the representatives of European ruling families and Polish nobility. Elected for life, the monarch was the head of state, but his position was limited by noble privileges and the position of the Sejm. After the Supreme Court was established (1578), he was removed from the judiciary, even losing his power to pardon. The king appointed all officials but could not dismiss them. In addition, the state was decentralized and, apart from the group of the highest central dignitaries, it had virtually no functioning bodies.

The basic political principles were contained in the Henrician Articles, which were drawn up for the first elected king, Henry of Valois (1573). The act was an unchanging law and a newly elected king had to pledge to respect it. They described the powers of the king and the Sejm, and primarily confirmed free elections and the obligation to convene the Sejm every two years. The breach of this obligation by the monarch gave the right to refuse to be obedient to him.

Pacta conventa, a public law agreement with the voters, was also agreed with each king. The elected monarch undertook to perform specific actions for the state, e.g. build a navy, repair fortresses or found an academy. The nobility promised obedience in return.

Confederations were an extraordinary element of the system. If necessary, the nobility could form a union which temporarily suspended the operation of all other state bodies, creating their own authorities and judiciary. Free from unanimity, the con-

federations, with wider support, could make changes that could not be ordinarily effected.

Formally, the political system of the Commonwealth created in the 16th century changed little afterwards. In practice, however, it evolved towards anarchy as a result of social and economic transformations followed by the collapse of political culture. Fossilized forms were increasingly anachronistic, and changing practice led to the dissolution of the state. The Sejm ceased to operate because the Roman law principle of *quod omnes tangit ab omnibus tractari et approbari debet* was brought to the point of absurdity. It evolved into an increasingly strict rule of unanimous consent, leading to the sessions of the Sejm being broken by its deputies. The failure to pass taxes meant that the state had to reduce the army to a minimum and there was no state administration on the ground. Power was transferred to the *Sejmiks* as self-governing bodies, which took over the full authority: the Commonwealth became a federation of provinces. It became a union with Saxony (1697–1763) after two more Wettin rulers from the Wettin dynasty were elected as kings. This union turned out to be very unfortunate. The Saxon monarchs were unable to carry out reforms and eventually, in order to remain on the throne, reached out for Russia's help, making the Commonwealth dependent on it.

Changes only took place in the last years of the Commonwealth. Stanisław August Poniatowski, elected king in 1764, with Russian support, was able to push through political reforms. The Sejm's operations were restored under the confederation rules. Collective government administration bodies, namely army and treasury committees were created with modern features of the executive power: the Sejm elected the committee members who were responsible for their actions.

Fearful of losing its influence, Russia decided to stop the reforms and forced the Sejm to adopt cardinal laws (1768). This was a formal act containing important and fixed elements of the Commonwealth's political system: they guaranteed the estate system, the free election of the king and rules of the Sejm, in which most matters were to be decided upon unanimously. The cardinal laws were included in the Polish-Russian treaty, so Russia became a guarantor of the maintenance of the system.

Excessive Russian interference caused the outbreak of an uprising and the difficulties with its suppression prompted Russia to come to an agreement with Austria and Prussia, which partitioned part of Poland (1772). It was easier to control a smaller state and to ensure a more efficient system, the Permanent Council (*Rada Nieustająca*) was established under additional cardinal laws. It was the first collegiate government divided into five departments. It was headed by a king, while the Sejm elected other members who reported to it.

The political system was stable until 1788, when the Sejm began its deliberations, later called the Four-Year Sejm, as it did not finish its work within the prescribed period and deliberated until 1792. In fact, it became the supreme authority, freeing Poland from Russian influence and conducting numerous reforms. Its greatest contribution was the Constitution of 3 May 1791, considered the first European Constitution. It stipulated that all laws were to comply with it, thereby creating a hierarchy of sources of law. It adapted the European Enlightenment concepts: the separation of powers, the sovereignty of the nation and the Physiocratic idea of agriculture as a source of wealth. The latter was all the more important because, with the social stratification into estates, it was an argument for improving the situation of the peasants. The existing social barriers were reduced. The Sejm retained its legislative power, while the executive power was vested in the Guard of Laws (*Straż Praw*). It was a governing body, presided over by the king as the non-accountable head of state, to which a royal council was subject. Instead of free elections, heredity of the throne was restored by handing it over (after Stanisław August's death) to the Wettin dynasty. The constitution only initiated broader reforms. In the same year, the Polish-Lithuanian union was terminated through the creation of a unitary state. However, further reforms proved impossible. At risk of losing all influence, Russia started a war and, after defeating the Commonwealth, together with Prussia, conducted the Second Partition (1793). The reforms of the Four-Year Sejm were revoked.

The last Sejm in Grodno (1793), under the Russian diktat, conducted reforms to improve the functioning of the small Commonwealth. This did little good because dissatisfaction with the partitions led to the outbreak of an uprising (1794). It was led by General Tadeusz Kościuszko, Commander-in-Chief (*naczelnik*) from the very beginning; an insurgent government was formed after the uprising. The war against Russia, Prussia and Austria, whose troops entered the Commonwealth, was lost. These countries conducted the last partition, King Stanisław August abdicated (1795), and the Commonwealth ceased to exist.

1.1.2. Pre-partition public law

While the state of Poland grew, the Roman division into private and public law was not known beyond the borders of the Latin civilization. Nevertheless, there were norms that today fall under public law, regarding performances for the state or crimes. It was a customary law that originated from the tribal era and continued for centuries (e.g. the *opole* was collectively responsible for prosecuting an escaping criminal). The new norms were only related to the Christianity that had been introduced. The first legal regulations were intended to put order to and unify the existing customary law and confirm its changes taking place in judicial practice.

Until the very end, the Commonwealth preserved its social stratification estate system reflected in public law, where types of taxes or rules of criminal liability depended on estate affiliation. Three different systems were evident in criminal law: rural, urban and land court systems. Rural courts often ruled on an equitable basis, while urban courts primarily relied on the German modified Magdeburg law. The land law, intended for the nobility, preserved its original and native characteristics, such as low repressiveness as compared to other European countries. Despite the efforts made at the end of the Commonwealth, the law was not codified, so in practice it was necessary to resort to unofficial compendia, as the norms were partly customary and partly arose from extensive parliamentary legislation. If necessary, other legal systems, Lithuanian or Roman, were also applied. Another feature was the absence of a distinction between the rules on civil and criminal trials, as the latter essentially maintained the principle of complaint.

A significant evolution took place at the end of the Commonwealth, when torture and the death penalty for witchcraft were abolished, isolation penalties were more widely used, and more frequent *ex officio* prosecution of crimes led to a mixed trial. In addition, the new authorities, treasury and military commissions also acted as courts, which can be treated as a prototype of the original administrative court system that controls the legality of administrative decisions. The procedure itself was similar to the criminal procedure, and an official, soldier or state authority could be a party to it that was sued for illegal actions.

1.2. Partitions

1.2.1. Forms of Polish statehood

The former lands of the Commonwealth lay within three different countries. Between 1795 and the rebirth of the state in 1918, only provisional substitutes of statehood existed.

In 1807, when France defeated Prussia, an uprising broke out on the Polish lands that had been previously taken by Prussia. Napoleon decided to create a separate satellite state there, called the Duchy of Warsaw (*Księstwo Warszawskie*), in order not to refer to the pre-partition past. The constitution of 1807 is an example of Napoleonic constitutionalism. The French Emperor directly or indirectly led the creation of several constitutions for various European countries between 1805 and 1810, all of which included various French political solutions. The constitution of the Duchy was mainly based on the consular constitution of 1799, later being a model for Westphalian or Bavarian law.

Napoleon, convinced that the Commonwealth had collapsed as a result of the bad political system, only symbolically reached out for Polish traditions: he preserved Polish nomenclature and the throne was given to the Saxon dynasty, as provided for in the constitution of 3 May. The bicameral Sejm had limited powers, while the king held extensive power in his hands. The council of state (*conseil d'état*) and the council of ministers were created, followed by the chamber of accounts (*cour des comptes*) as the first control body in Poland.

The constitution was short but not free of defects. The members of the council of state and the council of ministers were the same and had vaguely delimited powers. Only as a result of the practice, the former was entrusted with the judiciary functions, and the latter with the executive power. It became an actual government, as the Saxon monarch was rarely present in the Duchy.

The post-Napoleonic European order established at the Congress of Vienna (1815) brought about changes in Poland. The Kingdom of Poland (*Królestwo Polskie*) was created from a part of the Duchy of Warsaw. This was a state that was tied to Russia through a personal union, i.e. the tsar was the king of Poland. Apart from the common monarch and the common foreign policy, the Kingdom had all the attributes of a sovereign state. The constitution passed by the tsar created a modern constitutional monarchy, preserving some elements of the Duchy of Warsaw system and referring more broadly to pre-partition traditions. The council of state was preserved, the powers of the bicameral Sejm were extended, and the absent monarch was replaced by a governor. Compared with the rest of Europe at that time, the constitution guaranteed a wide range of civil rights and public participation in authority. However, the problem was the discrepancy between its regulations and practice.

In fact, the constitutional system only concealed the real mechanisms of power. Rules were broken in various ways: censorship was introduced, MPs were persecuted and the Sejm was not convened. Important state decisions were made by the tsar and they were influenced by competing people who had direct access to the ruler. None of them had legal legitimacy: the tsar's brother commanding the Polish army, the tsarist envoy and the minister of the treasury.

Dissatisfaction with the existing situation led to the outbreak of the November Uprising (1830). The Sejm dethroned the tsar, the National Government (*Rząd Narodowy*) took over power and the Kingdom became a sovereign state. Russia responded with war and, after a few months, suppressed the uprising and the constitution ceased to be effective. The Kingdom of Poland, within Russia, was granted autonomy, which was increasingly curtailed in successive years. In view of the situation, the next January Uprising (1863) took on a specific form: in the military sphere, it was limited to guerrilla warfare, while the power was taken over by the secret National Government. There was a dualism of power: official Russian, and underground Polish, which

lasted two years, until the uprising fell. The underground state set up alternative state institutions, collected taxes and had courts and police. Widespread obedience in society and trust in the incognito authorities were a phenomenon. The Kingdom was incorporated into Russia after the fall of the uprising.

The lands of the Austrian Partition, where the autonomy was created after 1860, proved to be important for the statehood. This was a consequence of the internal problems of multinational Austria and its transformation into Austria-Hungary. Although it is not part of the history of the Polish political system, the autonomy gave way to the future state. After the rebirth of Poland in 1918, many experienced politicians and educated lawyers contributed to its development.

1.2.2. Public law of the partitions

Not only did the era of the Polish political system end with the partitions, but so did the era of law, understood as the original system, organically developed over the centuries. Although some of its norms survived until the second half of the 19th century, the partitioning powers successively abolished Polish regulations imposing their own systems. In most cases, there was a complete change and the acts introduced are not part of the history of Polish law.

However, the partitioning states did not bring any modern solutions with their law. Politically, Russia, Austria and Prussia were absolute states with estate systems, without parliaments and the principle of separation of powers. Their inhabitants were only subjects with limited rights, not citizens. Public law was equally backward, with a few exceptions, such as the Austrian criminal law that grew out of the Enlightenment (*Franciscana*, 1803).

Only the Duchy of Warsaw and the Kingdom of Poland could develop original solutions. As the issues of regulating the governance of the state rested in the monarch's hands, it is difficult to discern modern administrative law there, but a French model of two-tier administrative judiciary was added, which survived until 1867.

Unlike civil and commercial law, French criminal law was not re-enacted in the Duchy of Warsaw. The application of pre-partition Polish law was restored, with the auxiliary Prussian *Landrecht*. Since the law was uncodified and separate for each estate, it hindered its application and maintained the – unconstitutional – estate system. However, changes were made – both inspired by the French *Code pénal* of 1810 (a triple division of crimes: felony – misdemeanour – offence) as well as original laws enacted in the spirit of humanitarianism, limiting the use of corporal and capital punishment.

The first Polish Penal Code was drawn up as late as in 1818 in the Kingdom of Poland. Being relatively modern (based on the principle of *nullum crimen sine lege*), it adapted modern French and Austrian models to local conditions. After the November Uprising, its provisions began to resemble Russian law, by introducing the penalty of exile, among other things, which allowed for the deportation of Poles to Siberia. Eventually, a new code was introduced in 1847, which was actually the assumption of the provisions of the Russian code issued two years earlier. Casuistic, unclear, allowing for the principle of analogy, it was a step backwards by breaking with the principles of humanitarianism. The Russian code of 1866 was introduced in 1876, not being very different from the previous one. Tagancev's much more modern Russian Code of 1903 was not introduced in Poland until World War I.

1.3. The Second Polish Republic

1.3.1. Political system of the state

The defeat of Germany and Austria-Hungary in World War I, whose troops controlled most of Poland's lands in 1918, enabled the rebirth of the Polish state. Józef Piłsudski seized power as a Provisional Chief of State (*tymczasowy naczelnik państwa*). The title referred to the last leader from the period of the Commonwealth, Tadeusz Kościuszko. This reflected the idea of Poland as a reborn state. It was based on questioning the legality of the partitions under international law and took into account the pre-partition concept of the nation as a sovereign, although it remains controversial. However, it was impossible to restore the pre-partition political system and law, just because of the nature of social stratification. The reborn state took on a republican form from the beginning, so it is referred to as the Second Polish Republic.

Although many new states were created after 1918, none of them faced the problem of uniting areas previously belonging to three different states. The unification of the political system and law was one of the aspects of building the state. Its formation was not easy, as the concepts of individual institutions varied and, until 1922, wars were waged over the borders with neighbouring countries. A unicameral legislative parliament was elected in democratic elections as early as in 1919 and started to develop new legislation, but its main task was to draft a constitution. Before that, the Sejm adopted the Small Constitution in 1919 which regulated the basic constitutional principles.

The March Constitution adopted in 1921 contained an extensive list of modern civil liberties, not only political but also social ones. It was based on the principle of national sovereignty, respected the separation of powers and created a three-tier local government. Being a compromise between different concepts, it adopted the principles of the Third French Republic system, which was considered a model

of a parliamentary republic at the time. The democratically elected bicameral parliament had a superior position over other bodies. The council of ministers was formed on the basis of a parliamentary majority, and its members were constitutionally and parliamentarily responsible. The position of the president, like that of the French president, who was elected by both houses of parliament, was weak.

However, the democratic constitution brought unstable and inefficient governments. These problems underlay the 1926 coup d'état conducted by Józef Piłsudski. He did not assume dictatorial power, but at his bidding, the executive power was strengthened at the expense of the Sejm in the adopted amendment to the constitution (August amendment). Not only could the president issue regulations with the force of a law, but he could also block attempts to dismiss the government. This is the start of the authoritarian rule of Piłsudski's associates, without the support of the parliamentary majority.

A new constitution was adopted in 1935. Known as the April Constitution, it established an authoritarian regime. Although its authors rejected foreign models, this constitution is a typical product of the 1930s constitutionalism, as it departs from democratic and liberal values. Its first ten articles contained ideological principles on which the entire legal order was to be based. They abandoned the concept of the triple division of powers and sovereignty of the nation, making the institution of the state the highest value. The president, *sui generis* father of the nation, was elected in a complex and undemocratic procedure. He had no responsibility but exercised uniform and indivisible state authority over the government, parliament, armed forces, as well as the judicial and control bodies.

1.3.2. Public law

The Second Polish Republic inherited Russian, Austrian and German public law with its new branches: administrative and financial. In contrast to the unification of the system, and as in the case of private law, its uniform application throughout the country was a long process not completed before the outbreak of World War II. The solutions of one of the partitioning powers were initially used, after which the time came for original ideas.

In order to create a single economic organism, the unification of financial law was urgently started, as there were different taxes and income structures in the different parts of the country. Difficulties prompted the expansion of the existing Prussian, Austrian and Russian treasury monopolies throughout the country and increased fiscalism. The 1920 Act on state income tax, modelled on Prussian regulations, was of fundamental importance to tax unification. This tax, which was imposed on natural and legal persons, was to become the main source of state income. The Tax

Ordinance was adopted in 1934 and was the first Polish codification of general tax law. This was not a full codification, but a general tax regulation was laid down for the first time, and the tax procedure and the rules of liability for a breach of tax law were regulated. Like the Tax Ordinance, this type of regulation was a sign of the times, as the need to create it arose from the increasing amount of taxes, while the neighbouring countries already had similar acts.

Administrative law, widely developed and spread over many acts, was not fully unified. The administrative judiciary, exercised by the Supreme Administrative Court, was only partially harmonized. Such judiciary had not previously existed in Russia; Austria-Hungary had a one-tier system, while Germany had a three-tier system. In Poland, it was based on Austrian solutions, while the one-tier jurisdiction (the three-tier system was preserved where it was already in place) was explained by the costs and difficulties of organizing lower courts in the reborn country. The provisions of administrative proceedings (1928) were also modelled on Austrian laws.

The unification of criminal law was a complete success. The Criminal Procedure Code (1928) and then the Penal Code (1932) entered smoothly into force by presidential decree. The former replaced three laws of the partitioning states, dating back to the 19th century and incorporating elements of complaints and investigations to varying degrees. In comparison with them, the Criminal Procedure Code was modern, offered numerous procedural guarantees and introduced a mixed form of a trial. However, the later Penal Code of 1932 became a real achievement. It was drawn up by the Codification Committee, mainly due to the persistence of Juliusz Makarewicz, who opposed the idea of rewriting Tagancev's Code and became the main author of a completely new act of law.

Progress in the study of criminal law led to the creation of new codes in many countries after 1918. In Poland, this was even more needed because the legislation was outdated and non-harmonized. The German criminal code was expanded in the 19th century with additional penal legislation, the Austrian code was a reworking of the already archaic *Franciscana*, and Tagancev's Code stood out with its casuistry and repressiveness. Taking into account the latest developments in the theory of criminal law based on the principles of humanitarianism and individualization of responsibility, the Penal Code of 1932 was innovative and is considered a great pan-European achievement, comparable to the Swiss Criminal Code of 1937. As it was clear, concise, precise and contained abstract formulations, it was preserved in the new system after World War II.

1.4. World War II and post-War Poland

1.4.1. World War II

Poland was attacked by allied Nazi Germany and the USSR in 1939. Before the army surrendered, the constitutional authorities were evacuated and resumed their activity first in France and then in England. The ability to operate in exile was assured by the provisions of the April Constitution, which allowed the president to appoint a successor in case of war.

The lands of the Second Polish Republic were divided. The USSR incorporated the part it occupied into its territory, forcing Soviet citizenship, as well as exterminating and displacing Poles. The Germans annexed part of the land directly into the Reich, starting with the displacement of Poles to the General Government established in its remaining part. It was a quasi-state dependent on the Reich and ruled by the Germans. Its inhabitants were used as slave labour force and exterminated in an organized network of extermination camps.

As during the January Uprising of 1863, there was an underground state in Poland, which was an alternative to the German and Soviet authorities. It not only had administration but also courts and the army (Home Army). Secret civilian institutions were subject to the government-in-exile, which created a separate administrative body operating in the occupied territories, headed on the spot by a secret Government Delegate for Poland (*Delegatura Rządu na Kraj*).

1.4.2. People's Poland

After the end of the German-Soviet alliance and the outbreak of war between these countries, the Western Allies decided to support the USSR. This sealed the fate of Polish lands, as the USSR intended to subjugate Poland and change its borders. To this end, it created an alternative to the government-in-exile, a subordinate puppet communist Polish government. This government advocated an enigmatic thesis on the validity of the March Constitution, which constituted the basis for its functioning. It took power from the Soviet army, which entering Poland, liquidated the administration of the underground state. The new authorities deprived of social support were maintained by the presence of the Soviet army and their dependence on the USSR marked the absence of state sovereignty.

The communist party took full power under the guise of the legal seizure of power and after the fraudulent elections to the unicameral legislative parliament. The Sejm elected the president and passed a provisional Small Constitution (1947), which, still referring to the March Constitution, only regulated the political system. In fact,

a totalitarian system was introduced, where society was subjected to state control. All forms of self-government were abolished; the courts and prosecution service were reformed in the Soviet spirit, which were henceforth tasked with protecting the system, not caring for civil rights.

Despite the loss of significance and universal international recognition, based on the provisions of the April Constitution, the government-in-exile continued to operate in London as a symbol of opposition to the authorities imposed by the USSR.

The 1952 Constitution was modelled on the 1936 Constitution of the USSR. Its enactment crowned the stage of introducing communist power. Changing the name of the country to the Polish People's Republic was a symbolic gesture. The concept of national sovereignty was rejected and replaced by the concept of supremacy of the working people. This vague idea resulted in further confusing principles which were not always explicitly formulated. The key derivative of people's rule was the concept of uniformity of state power, which contradicted the theory of separation of powers. Formally, this meant a concentration of power in a representative, unicameral parliament. In fact, its role was assumed by the council of state (*Rada Państwa*), elected by the Sejm, which was a collective head of a state body that (among numerous powers) could issue decrees which had the force of laws.

Despite the full list of rights and freedoms, they were an empty declaration as no institutions could ensure that they would be exercised by the citizens. While the constitution was brief, it was also unclear and vague in many respects and did not regulate many important political issues. However, this did not matter in a situation where the system was a sham and decisions were made by the communist party's unconstitutional bodies. In this situation, the political changes did not depend so much on the law but on the practice and policy of successive party leaders. The constitution itself was amended many times, and major changes took place in 1976 when a number of declaratory statements and political principles were added, with a provision on cooperation with the USSR, limiting sovereignty.

The economic disaster and social disorders prompted the authorities to reform the system, which was to divert attention away from the real problems and persuade the people that Poland was not much different from the Western European countries. They began to restore political solutions and institutions that had existed in the Second Polish Republic, as well as to establish those that were typical of modern democratic countries. The changes that took place from 1980 onwards included the subordination of state control to the Sejm, the restoration of the administrative judiciary and the establishment of a Constitutional Tribunal and Tribunal of State. Finally, an Ombudsman was appointed in 1987 and the institution of a referendum was introduced as a manifestation of direct democracy. All these developments did not change

the essence of the totalitarian system, but the institutions were already in place when democratic reforms started.

The unprecedented collapse of the state led to the peaceful handover of power by the communist party (1989). The office of the president and the second chamber of parliament (the Senate) were restored and, after partially free elections, the democratic opposition took over the power which started the process of the economic and political transformation intended to create a liberal democracy. The constitutional provisions on the socialist system were no longer in force after 1990, while the name of the Republic of Poland and local government at the lowest level were restored. Ending its activity, the government-in-exile handed over the insignia of the Second Polish Republic to a democratically elected president, symbolically bridging the new Third Polish Republic with the Second. The Small Constitution (1992), while partially preserving the provisions of the previous one, governed the relations between the legislature and the executive power. The temporary system functioned until the adoption of the Constitution of the Third Polish Republic in 1997.

1.4.3. Public law of the totalitarian state

The unified public law was initially a weapon to fight the opponents of the existing order, but later took on specific features because of the adopted socio-economic model.

The pre-War regulations, which were in force alongside the new regulations that had been modelled on the Soviet ones, were maintained in administrative proceedings. This was sorted out by the 1960 codification of administrative proceedings. Substantive administrative law remained uncodified, which arose primarily from the extraordinary diversity of the matter it covered.

However, the administrative judiciary was not reinstated, as it was thought unnecessary when the state and its administration represented the interests of society so the antagonisms between the individual and the state disappeared. In fact, the administration expanded tremendously without any control mechanisms while it was supposed to supervise all spheres of life. Even state-owned enterprises performed administrative functions, while administrative acts applied to situations previously regulated by private law. A characteristic feature was the 'duplicate law', i.e. regulations created *en masse* by administrative bodies, which were not officially published, while citizens usually only found out about them when settling a specific matter.

Nationalization resulted in almost all enterprises becoming state-owned and consequently, in line with the Soviet example, separate economic law was created. Govern-

ing economic relations became a separate branch of public law as civil law instruments became inadequate to the situation. When the state monopolized the role of the employer, labour law also increasingly assumed the features of public law.

Financial law had a broader scope for the same reasons. It became necessary to regulate the finances of enterprises the payments of which constituted the basis of budget revenues. Pre-War regulations were initially applied in tax law itself, but a number of Soviet solutions were soon adopted. The equality of taxpayers before the law was broken and the regulations became an instrument for eliminating the private sector from the economy. A partial decodification took place through the repeal of the Tax Ordinance of 1934. From 1950, decisions on taxes on state-owned enterprises and cooperatives (and therefore almost all enterprises) were taken not by the Sejm but by the council of ministers with its independent resolutions.

In line with Soviet standards, criminal law was to be used as a tool in the class struggle to eliminate political enemies. It was characterized by a repressive nature that is typical of a totalitarian state. Although the 1932 Code was preserved, a number of new sources of criminal law emerged, as criminal norms were contained in dozens of various laws. A code known as the Small Penal Code (1946) was also issued, which was extremely strict and regulated crimes against the new system. Vague provisions and uncontrollable, expanding interpretations made it a convenient method of applying repression and eliminating political opponents. Cases of civilians were referred to available military courts. There were also secret courts not subject to any control, where no judicial standards were respected and sentences were handed out as requested by the authorities. Many trials were conducted under a special ad hoc procedure: accelerated and simplified, defying the principles of a fair trial, not leaving any possibility of appeal.

The worst pathologies were eradicated after 1956 and the need to regulate criminal law emerged. The new code was adopted in 1969 and was more extensive than the previous one as it repealed and superseded criminal provisions that had been scattered around a number of different laws. Although it contained ideological elements (e.g. the archaic penalty of property confiscation), it took over many of the assumptions of the 1932 Code. It introduced new probation measures, essentially limiting repression for minor crimes. At the same time, a new Criminal Procedure Code was introduced, replacing the Code of 1928, which had been repeatedly amended and adapted to new conditions.

1.4.4. Public law of the transition period

The authorities tried to break with the image of a totalitarian state as early as in the 1970s, although changes in law and practice started later. In 1980, the tax

powers of the council of ministers were revoked and tax law was regulated. The rules applied so far, such as *in dubio pro fisco* or the principle of analogy, were withdrawn, which, together with the restoration of the administrative judiciary, brought Poland somewhat closer to the standards of democratic countries. The Act on freedom of economic activity was passed in 1988, abolishing its administrative and legal regulation and, in fact, restoring the free market economy.

It was only in criminal law that the direction of changes was initially different, as it was related to martial law (1981–1982) which was introduced to pacify the emerging opposition. However, six amnesties were announced in 1983–1989, while capital punishment, which was regulated by law in 1995, virtually stopped being implemented in 1988. Repression was being reduced after 1989, although this arose from practice and not new regulations. The new system and political conditions, as well as the independence of the judiciary and the prosecution contributed to this. The new Penal Code was adopted in 1997.

1.5. Conclusions

The fall of the Commonwealth interrupted the centuries-long evolution of the system. Foreign forms that were introduced later brought paradoxical effects: foreign political solutions either did not work or were counterproductive. Instead of the monarch's strong power that was provided for in the constitution, there was the rule of the council of ministers in the Duchy of Warsaw. Tsarist despotism prevailed in the Kingdom of Poland under the cover of the liberal constitution. In the Second Polish Republic, the March Constitution, which was based on French models, created a caricature of democracy, while the introduction of authoritarianism by the April Constitution did not strengthen the state. After World War II, having the lowest level of the societal enslavement among the communist countries, Poland became the place where the totalitarian system started to fall.

Modern public law was developed in European countries in the 19th century when the Polish state did not exist. Therefore, the need to unify it after 1918 enabled choices to be made and appropriate solutions to be adopted, although this often meant relying on foreign models. The post-War period showed the extent to which public law was connected with the state: the nature of the state was reflected in the scope and shape of public law, while its instrumental use by the authorities was a feature of the totalitarian regime. Its collapse brought about numerous changes in public law.

2. Historical development of private law in Poland

2.1. Sources of private law in Polish territories

2.1.1. Law in the feudal period

The history of Poland begins with the baptism of Prince Mieszko in 966. The first information about private law in Poland can be found in documents from the 12th and 13th centuries, e.g. contracts of sale or donations. A characteristic feature of private law in Poland in the feudal period included territorial particularities and different legal rights (privileges) for the nobility, clergy, city burghers and peasants. The basic sources for analysing private law of that time are the Book of Henryków (*Księga henrykowska*), a list of transactions of the Cistercian monastery in Henryków in Lower Silesia at the turn of the 13th and 14th centuries; books from the 14th century with descriptions of claims and legal acts from court practice; records of Polish common law from the 15th and 16th centuries (e.g. *Consuetudines Terrae Cracoviensis*); postulates of the unification of the law published in the 16th century (e.g. Łaski's Statutes, 1505). The Book of Henryków reflected the autonomous nature of Polish legal customs and the impact of German legal reasoning on legal practice in Silesia. The development of town law in the 13th and 14th centuries was based on the German town privileges (Magdeburg rights). The Chełmno law (*Ius Culmense*) from the 14th century was its natural development, which was then adopted by many Polish towns. Poland, unlike other estate monarchies in Europe, never became an absolutist state. That is why, until 1795 when it lost its independence, the above-mentioned territorial particularities in law had continued to remain in force. The structured descriptions of laws that applied in Poland began to be published in the 16th century. The first work of this kind was the *Farrago civilis actionum ad formam Iuris Magdeburgensis pro consuetudine in Regno Poloniae* of 1531 by Cervus Ioannes Tucholiensis. The late example of the early modern Polish legal literature was the Civil Law of the Polish Nation (*Prawo cywilne narodu polskiego*) published in Polish by Teodor Ostrowski in 1784. Knowledge of Latin legal terminology, definitions and systematization rules from the *ius commune* was common for the authors of such legal books. However, legal science, which was developing in Western Europe since the 11th century and was especially based on Roman legal texts (*ius commune*) never gained practical significance in Poland. Throughout this whole period, Polish common law was of primary importance for private law developed by court practice. As a result, the judicial precedent of a higher-instance court became an important source of law, supplementing the provisions of Polish common law.

2.1.2. Idea of codification of private law in Poland before 1795

In the mid-16th century, Jakub Przyłuski published a collection of *Leges seu statuta ac privilegia Regni Poloniae* based on the Roman classification of *personae – res – actiones* and was to form the basis for codifying the law. Although the codification was considered by Polish legal scholars before Poland's partitions, it never materialized and, after 1795, when Poland lost its sovereignty it had to be abandoned altogether. There are nevertheless two noteworthy projects from the second half of the 18th century, namely the Zamoyski Code and Stanisław August Code. Each of them combined norms of criminal and private law, fell back on the natural law school and represented the attempts then made to reform the law in order to create a system that would respond to the needs of a modern constitutional monarchy. The draft of the Zamoyski Code was rejected by the parliament in 1780. Drafts that were subsequently prepared are jointly referred to as the Stanisław August Code. The need to distinguish between private and public law was highlighted during the discussion on the draft. Book One on civil law distinguished between the law of persons, encompassing personal property and rights, and family law, ownership of land, contracts, law of succession and prescription. This codification work did not even set up a full project. The loss of independence in 1795 interrupted the first Polish attempts to codify civil law.

2.1.3. ALR, *Code civil*, ABGB and BGB in Polish territories in the 19th and 20th centuries

From 1772, the territory of Poland was gradually taken over and annexed to the neighbouring states: the Prussian Empire (Prussia), the Russian Empire (Russia) and the Habsburg Monarchy (Austria). The process is referred to as the Partitions of Poland and it ended with Poland's total loss of independence in 1795. This initiated the process of replacing Polish law that was formerly binding in those territories with foreign legal codifications. In 1794 *Allgemeines Landrecht für die Preussischen Staaten* (ALR), the general state laws of the Prussian states, were introduced in the part of Poland that fell under the Prussian partition. ALR was a collection of regulations with 19,187 articles of administrative, criminal and private law. Interestingly enough, Friedrich Wilhelm II's determination to destroy the Polish system and legal institutions was a direct motive to introduce the ALR throughout Prussia. In 1900, the civil law part of the ALR was replaced with the German civil code (*Bürgerliches Gesetzbuch*, BGB). In the territory Poland that fell within the Austrian partition, Polish private law was replaced by the so-called Civil Code for Western Galicia (*Bürgerliches Gesetzbuch für Westgalizien*) in 1798. Its introduction was treated as an experiment in the process of codifying civil law in the Austrian Empire. This codification, known as the General Civil Code (*Allgemeines bürgeliches Gesetzbuch,* ABGB), replaced the Civil Code for Western Galicia at the beginning of 1812. During Napoleon's campaign, the Kraków Department (*departament krakowski*) was

attached to the Duchy of Warsaw. The French Civil Code was implemented in its territory in 1810, which was replaced with the Austrian Civil Code in 1855. The prevailing law in the small areas of Spiš and Orava was Hungarian. The process of replacing Polish law with the law of the partitioning state took more time (continued for years) in the territories of the Russian partition and the resulting system still lacked homogeneity. There were two reasons for this: firstly, Russia had no uniform legal system; secondly, the existence of the Duchy of Warsaw (1807–1815) in the territory annexed by the Russian Empire. Initially, the Duchy had strong ties with Napoleon's France but after it was eventually transformed into Congress Poland, it fell under Russian domination. The French Civil Code (*Code civil*, CC), which was adopted on 1 May 1808 as the main civil law regulation in the Duchy of Warsaw, remained in force in Russia-ruled Congress Poland. Its regulations regarding personal law and matrimonial law were replaced in 1825 with the Civil Code of Congress Poland. Land and mortgage registration was introduced in Congress Poland by a special act of 1818. The obliteration of Polish law by Russian law was completed with the introduction of the Collection of Laws of the Russian Empire (*Svod zakonov Rossiĭskoĭ Imperii*) in 1835. The first part of volume 10 of that Collection dealt with private law. The foreign civil codes imposed in the 19th century in the Polish territories remained in force until Poland regained its independence in November 1918. The only new, unified area of the codified civil law implemented in Poland in the inter-War period (1919–1939) was the law of obligations. In all remaining areas, foreign civil codes remained in force until the end of 1946 when they were finally repealed.

2.1.4. Polish codification of private law in 1919–1939

In 1918, upon regaining independence, Poland had to cope with five different legal systems of private law that were in force in different parts of the country. These included German (BGB), Austrian (ABGB), French (CC) laws, with modifications of the Civil Code of the Duchy of Warsaw, Russian (*Svod zakonov*) and Hungarian laws in Spiš and Orava. One of the challenges that the Polish state faced after 1918 was to overcome practical difficulties arising from those territorial particularities and form a uniform, modern private law. There was no uniform view on how to harmonize civil law in Poland. Proposals were raised to leave the codification of Polish law to the next generation of jurists because of the economic and social turbulence after World War I and the lack of identity of the Polish legal culture. However, the parliament appointed the Codification Commission as early as in 1919. The Commission was tasked with the unification and codification of Polish civil and criminal law. The civil department was further divided into civil law, commercial law and civil procedure sections. The work of the civil law section of the Commission was to be based on comparative studies, especially on the legislations of the neighbouring states, Polish experience based on the foreign civil codes but also drew on the achievements of European and global legal science, such as the Swiss Code of Obligations and the Franco-Italian

draft law of obligations published in 1927. The tradition of Polish law up to 1795, namely before the partitions, was of little importance. It was clear to the Commission members that the codification which was both modern and appropriate for Poland was a long-term task. Only a part of the Commission's work had been completed by 1939, when World War II broke out. The Act on the protection of inventions, designs and trademarks was passed in 1924. The new Polish Patent law enacted in 1928 incorporated the provisions of the new Hague Convention on the protection of industrial property of 1925. The Polish Law on bills of exchange came into force in early 1925, to be subsequently replaced by a new Act on bills of exchange in 1936. New laws on copyright, competition law and international private law were introduced in 1926. The Civil Procedure Code was adopted in 1930. The Code of Obligations (*Kodeks zobowiązań*) and the Commercial Code took effect in 1934, and the Regulation on insolvency and composition procedures came into force in 1935. However, the Commission did not manage to complete its work on three of the 'classical' areas of private law, namely family, property and inheritance law. In matrimonial law, controversies continued around the religious form of marriage and the acceptability of divorce, but the codification of regulations regarding relations between parents and children and guardianship was drafted and announced in 1938. The codification project regulating property law was published in 1937. Meanwhile, the Codification Committee only managed to initiate a discussion on the principles of inheritance law.

2.1.5. Unification of private law in 1945–1946

Civil law was unified soon after World War II. However, it was not a simple or straightforward continuation of the work that was started before the War. Unlike before the War, there was no political freedom for discussion on the unification of the law. Power in Poland passed into the hands of institutions that were supported by and to a large extent subordinated to the USSR. Consequently, their goal was to implement such a vision of Poland's transformation that would make its political system similar to that which prevailed in the USSR, and therefore make it recognize and respect the political, military, cultural and economic dominance of the Soviet Union. Discussions on the unification projects were substantially reduced and their extent restricted, certain rules from before 1939 that had been drafted had to be simplified, while matrimonial law had to provide for the recognition of only a secular form of marriage. Luckily, among those who worked on the final unification were lawyers who decided to incorporate the results of the work of the pre-War Codification Commission and followed the previously initiated reasoning. It was because of them that the final regulations leading to the unification of Polish civil law belonged to the same tradition of private law as the legal acts developed by the Codification Commission before 1939. The unification process of Polish civil law was concluded in 1946 with the decrees being issued on the general provisions of civil law, which generally corresponded with the pandectic content of the general part of civil

law, property law, the law on land titles and mortgage registers, the law of succession, the law of persons, matrimonial law, family law, guardianship law, and marital property law.

2.1.6. Development of the law in 1946–1989

The implementation of the vision of making the Polish political system similar to that of the USSR was progressing in the late 1940s and early 1950s. It was manifested in the nationalization of industry and trade, efforts to eliminate individual farm ownership, the exclusion of the freedom of city residents to use space in private buildings at their own discretion, and subjecting economic processes to plans drawn up by the state authorities. In addition, cultural patterns originating from the USSR were intensively promoted throughout the whole period. The political atmosphere had a major impact on how civil law was applied; it also inspired the implementation of even more substantial changes. Their objective was to make the legal system suitable for a centrally planned economy, with a desirable form of social life, while the country would remain under the dictatorship of the communist party. A new family code was introduced in 1950, which borrowed abundantly from USSR law. A typical example of the type of amendments was the implementation of the principle of community of property between spouses, while any possible exceptions to this rule were severely restricted. In practical terms, the much promoted notion of full codification of Polish civil law, which would be more 'appropriate' for the new social and political system, brought about the enactment of what was known as the general provisions of civil law (1950). Even its first article stipulated that 'Provisions of law should be explained and applied in accordance with the rules and objectives rooted in the political system of the People's Republic'. A significant modification was also introduced to the Civil Procedure Code in 1950: proceedings on taking evidence were to be based on the principle of 'material truth', obliging the court to initiate proceedings on taking evidence. However, the concept of a newly codified civil law that would be entirely subjected to the dominant social and political system never fully came to fruition. The political 'thaw' of 1956 in Eastern and Central Europe under the dominance of the USSR opened the opportunity for private law to evolve, which may be described as a compromise solution between the still persisting civil law tradition and the attempts to create a number of legal instruments (instruments available in law) that would comply with the vision of a state that is fully subjugated to the communist party dictate. Some obvious elements of the European legal tradition were preserved in the Polish Civil Code of 1964. In systematic terms, the general part was separated from the books covering ownership and other property rights: obligations and inheritance. Its authors borrowed heavily from the 1933 Code of Obligations, as well as the decrees of 1946 that unified the remaining areas of civil law. Additionally, 1964 saw the implementation of a new Civil Procedure Code. It was aimed intended to complete the evolution of the civil procedure law, based on the 1930 Code, which

was subsequently modified after 1945. And yet the obvious political agenda can be identified in a series of acts on property laws and laws of contracts that were issued by the end of the 1980s. It was primarily those acts that intended to impose significant restrictions on private owners who leased premises to others, limiting the ability of private people to purchase real property, create a special method of administering public property (alien to classical civil concepts), and introduce far-reaching control over economic relations between public entities. For ideological reasons, family and custody law was left out of the civil code, only to be uniformly codified by the Family and Guardianship Code, also in 1964. In 1968, efforts made as a result of political pressure and under the guise of expanding employee entitlements resulted in the enactment of the Labour Code of 1974. The new hybrid nature of the civil law in Poland was not irrelevant to the development of local legal science in the 1970s and 1980s.

2.1.7. Changes in Polish private law in 1990–2020

In 1989, the communist party lost the power it had exercised over Poland for more than 40 years. This triggered a process of momentous political and economic transformations that primarily revolved around the creation of a democratic state in which the rule of law would guarantee freedom, ownership, and the right of citizens to inherit, and where the state's involvement in economic life would be considerably limited and the economy would follow market principles. Consequently, Poland would eventually join the European Union. Once again, the legal theorists relied on the division into public law (*ius publicum*) and private law (*ius privatum*). As early as 1990, an important amendment made to the Civil Code cleansed it of elements closely related to the abolished political and economic system. Some of the eliminated elements included the 'notion of collectivized economy units' and provisions determining specific economic relations between them. Also, Article 4 of the Civil Code, which imposed the requirement to explain and apply civil law provisions in compliance with the rules and objectives rooted in the political system of the Polish People's Republic, was repealed. Another provision that was repealed was related to the notion of 'socialist national ownership', which in fact resulted in the elimination of all 'general provisions' on ownership (Articles 126–139 k.c.). The same applied to the provisions restricting the freedom of trading in farmland and disposing of it in the event of the death of the owners. Amendments to the Civil Code comprised the regulations enabling liability to be modified because of a fundamental change in circumstances (*rebus sic stantibus*), which were, in fact, present in the 1933 Code of Obligations. The provisions regulating the concepts of remittance and securities constituted another new solution. The Polish Civil Code was amended 84 times between the end of 1990 and March 2020. Those changes had three primary objectives: firstly, to harmonize Polish law with European law by implementing European Directives; secondly, to update the detailed issues that were brought about by techno-

logical progress (e.g. provisions on electronic declarations of intent); thirdly, to adapt the code to emerging social needs (e.g. the introduction of a legacy by vindication and the modification of the liability for the succession of debts). Looking at and analysing the frequency and types of changes in the Polish Civil Code and the scope of changes resulting from it, or implemented in conjunction with the substantial development of specific legislation, it can be claimed that, over the past thirty years, Polish civil law has demonstrated the characteristics of a process known as decodification. Some of the features of this process include a gradual loss of the central position of the code in the system, a substantial increase in the significance of specific legal regulations and the increasing importance of a judge-made law. The Civil Procedure Code was amended 269 times between 1990 and March 2020, and the amendments ranged from very minor, cosmetic, to substantial amendments. However, two of its new features should be listed here as those most clearly demonstrating the present-day evolution of Polish civil proceedings. The first is the duty to act in good faith imposed on parties. The second is the set of specific rules to make the civil litigation procedure more efficient. After 1989, controversies arose as to how commercial, bankruptcy and composition law (still based on the 1934 provisions) should be updated. Here, new regulations turned out to be the preferred option, namely the Code of Commercial Companies and Partnerships (2001) and the Bankruptcy and restructuring law (2003).

2.2. Impact of *ius commune* and civil tradition on private law in Poland

Comparative studies focusing on private law would point to the still influential tradition of Roman law as a valid factor affecting the shape of today's European 'legal landscape'. Simply put, those legal systems that remain under the influence of this tradition are believed to belong to the civil law tradition. Generally speaking, this tradition is made up of two components: the first is the legal science based on Roman law texts (*Corpus Iuris Civilis*) developed between the late 11th and the 19th centuries; and the other is the practical experience arising from the application of Roman *rationes decidendi* in the late mediaeval and early modern times. The first traces of Roman law in the Polish legal culture date back to the 13th century. They involved the assimilation of terminology from Roman law. However, importantly, the Polish nobility (*szlachta*) opposed the extensive recognition of Roman law and its role in Poland since the noblemen perceived it as a manifestation of the much dreaded power of the Holy Roman Emperor and an attempt to strengthen the central power of the King of Poland, which would clearly infringe on their excessive privileges. Consequently, until Poland's loss of independence in 1795, *ius commune* exerted a minor influence on the formation of Polish law for the nobility (referred to as land law). However, the Roman law tradition left a visible mark on town law, which was modelled on German law. The little practical importance of Roman law in old Poland can be exemplified by the fact that

the 1364 foundation charter of the university in Kraków provided for the establishment of five Roman law chairs. In reality, Roman law started to be taught in Kraków as late as at the beginning of the 16th century. Since then, the terminology and structure derived from Roman law was applied to describe the Polish legal system. Efforts to make more extensive use of Roman law in order to modernize or codify law were thwarted by the nobility. As a result, until 1795, the impact of Roman law on Polish legal culture was limited and superficial. Preparatory work on the early, innovative codes of private law in Europe such as CC, ABGB, BGB show the important role of the arguments from Roman law for the drafters of new legislation. The gradual introduction of foreign codifications to Polish territories strengthened their position in Polish legal thought, science and practice of private law. Its links with Roman law were emphasized in the 19th century in the Kingdom of Poland, which was subordinated to Russian reign, where the French *Code civil* was in force. In fact, it was Roman law that started to be seen as an element of the European legal identity used to combat the process of Russification. From the mid-19th century, the professors of faculties of law in Lwów and Kraków were holding a legal debate inspired by German Pandectists, whose aim was to develop the modern theory of private law using texts of Roman law in a new systematic manner. For example, Ernest Till, a professor of the faculty of law in Lwów, was one of the forerunners of the modernization (i.e. pandectization) of private law in the Habsburg Monarchy. Consequently, when Poland won back its independence in 1918, the Polish language theory of private law was already a part of the civil law tradition. The tremendous role played by this legal tradition after World War I in the formation of a uniform codified Polish private law was emphasized by the words of Professor Roman Longchamps de Bérier, Till's disciple, the main rapporteur of the 1933 Code of Obligations. When commenting on a relatively fast and successful completion of the work on the codification of the uniform Polish law of obligations, he emphasized that 'with respect to former territorial legislations, it exhibited, in relative terms, the fewest differences, as it was based on the principles of the Roman law of obligations'. After 1945, when the USSR-dependent authorities took over power in Poland, Roman law remained an element in legal studies and teaching as a symbol of the European legal culture. One of the reasons why pandectic civil concepts were quite extensively present in the Polish Civil Code of 1964 was the fact that many contemporary Polish experts in civil law educated before World War II kept emphasizing the prominence of the Roman law tradition. Today, also in Poland, there are proponents of the idea that the *ius commune* tradition is still the basis of the cultural identity of private law in Europe. The rediscovery of this identity may be an important premise for the revival of the European science of private law. It can also inspire new attempts to harmonize private law in Europe. As is being suggested, when looking for a solution to a specific dogmatic issue that needs to be acceptable throughout Europe, it would be necessary to show how it was dealt with in the ancient Roman law and *ius commune*, explain why national codifications can differ from *ius commune*, and finally, taking a broad historical perspective, demonstrate what conclusions can be drawn from the scrutiny solutions introduced

in selected countries. The disregard of tradition and the cultural identity of private law was one of the factors that resulted in the failure of the harmonization drafts from the beginning of the 21th century (primarily the Draft Common Frame of Reference and the Common European Sales Law).

2.3. Fundamental question of civil law in the light of the development of Polish law

In today's discussion on the future of private law, it is worth referring to the 'legal map' of our continent. Several questions immediately arise, namely: Why was a specific dogmatic solution implemented in a given system of private law? Which solutions arise from the transplants of law and which are unique in dogmatic terms? The answer to these questions required account to be taken of the historical development of law. Let us have a look from a historical perspective how some particular issues of civil law were resolved in Poland.

2.3.1. General part of civil law

The idea of the separation of the provisions of civil law that have broad and general application may be traced back to the early 19th century (e.g. *Titre préliminaire du Code civil* or the Introduction to Austrian ABGB). The major breakthrough in the systematics of civil law was the introduction of the 'general part'. The general part of private law is perceived by modern legal science as the equivalent to the process of taking out the common factor in mathematics. The origins of the general part in law are associated with the mathematical inspirations of legal methods in the 17th and 18th centuries. The complete structure of the general part was applied in legal literature for the first time by the German jurist Georg Heise in 1807. This style was adopted and developed in the German theory of private law (called pandectistic) in the 19th century. In line with the pandectistic theory, the drafters of BGB included rules from the general part regulating legal capacity, the concept of a thing, a legal transaction, prescription, the exercise of rights, self-defence and the provision of security. The preliminary draft of the general part was discussed as part of the Polish codification works in the 1920s. Yet, in 1922, the general part was adopted in the structure of the first Soviet Civil Code. The concept of the general part was introduced into Polish law by a decree of November 1946: General provisions of civil law. It was superseded in 1950 by the Act on the general provisions of civil law, which remained in force until 1965, when the Civil Code came into force. The primary difference between the Polish approach to the general part of civil law and the first book of BGB was that, in Poland, the general part contains provisions on admissibility of the retroactive effect (Article 3 k.c.), the abuse of rights (Article 5 k.c.), the burden of proof (Article 6 k.c.), and the presumption of good faith

(Article 7 k.c.). The structure of the 1964 Civil Code was based on the pandectistic systematics, with the general part as the first book. The amendment to the Civil Code after 1990 brought about a number of modifications to the provisions of the general part. Those amendments included the separation of the concept of a consumer from the concept of a natural person (Article 22^1 k.c.), the concept of an entrepreneur added to the provisions on legal subjects (Article 43^1 k.c.), the introduction and definition of the concept of an enterprise (Article 55^1 k.c.) and a farm (Article 55^4 k.c.), the development of provisions on contracts concluded through an auction or tender (Article 70^1 k.c.), the introduction of a provision on the binding effect of an electronic offer (Article 66^1 k.c.) and the addition of provisions on a commercial proxy (Articles 109^1 to 109^9 k.c.). In 2018 the general limitation period was shortened from 10 to 6 years (Article 118 k.c.). The separation of the general part is widely accepted in the Polish theory of private law. However, there are also doubts as to whether such a systematic model is useful at the time of the digitization of private law.

2.3.2. List of rights *in rem*

The origin of the notion of a right *in rem*, an attribute of the civil law tradition, is the Roman *actio in rem* against anyone who breaches the right of a claimant to a thing (*res*) in his power, such as ownership (*dominium*) and limited rights *in rem* (*iura in re aliena*), e.g. easements (*servitutes*). In Polish law, before Poland lost its independence in 1795, the notion of property was not as unique as in Roman law. It varied with respect to the social position of its owners. Furthermore, there were also limited rights *in rem*:

- an easement (*servitutes*), i.e. the right to use a thing that belongs to another person in a prescribed manner;
- ususfruct (*ususfructus*), i.e. the right to use and derive a profit or a benefit from property that belongs to another person;
- a pledge (*pignus*) on a thing transferred by a debtor to a creditor for possession;
- a mortgage (*hypotheca*) established by the entry of an encumbrance on ownership in a land register; and
- real burdens, introduced into Poland in the 14th century, i.e. obligation of the owner to make periodic payments (e.g. monetary annuity) to the beneficiary of this right *in rem*.

The Act of 1588 was an innovative regulation for this area of property law and was probably the first statute in Europe that introduced a mortgage on land constituted by an entry into a specific register. The constitutive effect that is relevant to this idea returned to Polish law in the specific Mortgage Act of 1818 adopted in Congress Poland. It was also novel in the 19th century. In Prussia, the entry of a mortgage by a constitutive effect was introduced in 1872. When foreign codifications were being adopted in Poland in the 19th century, they transplanted their unique property rights.

The draft of the Property Law published in 1937 developed this legal experience in an innovative manner. The concept that made 'the object of property rights' the central notion of the property law was innovative from the point of view of the main structures of this field of law. A uniform list of property rights was introduced by the decree on the Property Law in 1946. The adoption of the definition of a material thing as the central concept of Polish law on property was a result of hasty oversimplifications by the Polish legislature after World War II. The unified property law was based on the 19th century principle of *numerus clausus* and arose from the absorption of the laws from the civil tradition (ownership, usufruct, easement on real property, personal easement, pledge on property and rights), which were then supplemented with so-called 'temporary ownership', i.e. ownership of real property purchased from the public authorities for a period of 30–80 years (the property was to be returned upon expiry of that period), a mortgage which is established by an entry in the land register to secure liability and real burdens, namely obligations of performance which apply to the owner. The concept of 'temporary ownership' encountered criticism as a legal instrument 'frowned upon by the people'. Furthermore, since it transformed public property into private property, it was deemed contradictory to the new economic system. Consequently, with the Act of 1961, the notion of temporary ownership was replaced with 'perpetual usufruct' (*użytkowanie wieczyste*). It was declared that this law was a balanced solution, situated somewhere between ownership and limited property rights. The objective of perpetual usufruct was to provide public land for residential construction purposes within the legal framework of a long-term lease. The right to reside in a 'housing and building cooperative' as a new limited right *in rem* was introduced into Polish law in 1961. The 1964 Civil Code rejected the real burdens as its drafters took into account the evolution of law and established a list of rights *in rem*, such as ownership, perpetual usufruct, and such limited property rights *in rem* as usufruct, easement, pledge, and the cooperative ownership right to residential property and a mortgage. One of the changes recently introduced into Polish law (2000) is called timesharing (Article 270^1 k.c.). People who were entitled to the cooperative ownership right to residential property were granted the right to transform this into ownership of residential property. Another change in this respect took place in 2005, when people were given the right to transform their perpetual usufruct right into ownership. The law adopted in July 2018 converted *ipso iure* the perpetual usufruct right to real property for housing purposes into ownership. The gradual removal of this right *in rem* from the Polish legal system was based on the idea of the rejection of the relics of communist rule. In terms of the list of rights *in rem*, Polish law essentially follows the tradition of Roman law. Even the solutions applied in the Polish People's Republic, namely the introduction of the perpetual usufruct right and the cooperative ownership right did not change this. In fact, in practical terms, these two rights, if analysed outside their ideological context, resemble the Roman *superficies* right. What fundamentally differs from the Roman tradition is the mortgage that arises from the development of land registers, and the exclusion of usufruct from easement.

2.3.3. Concept of ownership

Ownership is the core concept of private law, an institution of fundamental importance to any economic and political system. Consequently, it is of primary significance to provide answers to the following questions: What are the owner's rights? Can the transfer of ownership be limited in any way? Can various legal positions be called ownership? A separate term for ownership only became common in Poland in the 16th century. Before that, legal power over a thing was referred to as 'perpetual possession' (*possessio perpetua*) or heritage (*possessio hereditatria*). Just like in the rest of Europe, real property and personal property were treated differently in mediaeval Poland. The land outside towns could only belong to secular and clerical feudal lords. Polish law generally did not adopt a system of feudal property divided (*duplex dominium*) into the landlord's estate (*dominium directum*) and the tenant's estate (*dominium utile*), which was typical of the western part of Europe. As a rule, since the 13th century, the nobility (*szlachta*) enjoyed full rights to the land to which they were entitled, although they had the duty of military service. Nevertheless, the drafters of the 18th century drafts that were intended to modernize and codify Polish law did not introduce a uniform concept of ownership. Having maintained a distinction between personal property and land property, they treated ownership in towns as a separate issue. Those drafts however, frequently referred to the concept of ownership as full power over a thing, which is a feature that very much resembles the ancient Roman tradition. The uniform concept of ownership appeared in Polish legal practice through the French *Code civil* and later the German BGB. A common element to both these codes – the liberal approach to ownership as the 'most absolute' power over a thing – was a reference point for the formation of a uniform concept of ownership in the Property Law bill of 1937 (Article 20). The decree on the Property Law of 1946 defined ownership as an 'entitlement to use and manage physical objects, to the exclusion of other people, within the limits specified by law'. In many ways, such a definition was incompatible with the ideological framework of the economic and political system forming special laws after 1945. It arose from the fact that the system was based on the nationalization of a large proportion of privately-owned real property, acknowledging the fundamental position of public ownership. Such an approach to ownership was presented in the so-called 'Stalin Constitution' of Poland of 1952. Consequently, the Civil Code of 1964 was supplemented with forms of property that was differentiated with respect to the entity entitled to it. These were state property, cooperative property, individual property (which included ownership of land by farmers who cultivated it, ownership of tools which were used by craftsmen, ownership of tenement houses), and personal property (objects used to satisfy one's personal needs). The Civil Code expressed the principle of special protection provided to public property (i.e. state, cooperative and social organizations). The meaning of various forms of ownership was clarified under the general provisions of the property law (Book Two of the Polish Civil Code), and the consequences of such a division were outlined. Ownership was defined in the Code as the right

to use and manage physical objects within the limits specified by law, the principles of social coexistence and in accordance with the social and economic purpose of this right (Article 140 k.c.). One of the pillars of the 1989 political transition was the cancellation of public ownership as the basis of economic life and the introduction of a market economy. Accordingly, all provisions of the Code regarding different types of property and special protection of public property were cancelled in 1990. Apart from the definition contained in the code, of key importance to understanding ownership in Polish civil and legal practice after 1990 was the jurisdiction of the Constitutional Tribunal (*Trybunał Konstytucyjny*) over the principle of the protection of property. Therefore, although the rights of an owner are limited by the principle of social coexistence and the social and economic purpose of these rights (an idiosyncratic feature of the Polish code), the understanding of ownership in Poland has had the primary features of the civil law tradition since 1990.

2.3.4. Sources of obligations

The 6th century's *Institutes of Justinian* (I.3, 13, 2) distinguished the sources of obligations by those arising from contracts (*ex contractu*), delicts (*ex delicto*; torts), quasi-contractual obligations (*quasi ex contractu*) and incidents similar to delicts (*quasi ex delicto*). This taxonomy of sources of obligations was commonly followed in the European legal science until the 19th century. The French *Code civil* which was in force in certain parts of Poland from 1808 to mid-1934 also adopted the systematics of the sources of obligations based on those four sources. The rationale for distinguishing between obligations *quasi ex contractu* and *quasi ex delicto* started to be questioned in the 19th century. Consequently, that distinction disappeared from the German BGB, which was also in force in the western part of Poland until the Polish Code of Obligations of 1933 came into force. The drafters of the Code of Obligations referred to the 'modern development of the law' and divided sources of obligations into two basic categories: those arising from declarations of will (intent) (contracts and unilateral statements) and from other incidents. Among the latter, they distinguished between human acts that were lawful and those which were unlawful (delicts), as well as other incidents like unjustified enrichment. Chapter II of the Polish Code of Obligations entitled Creation of Obligations was split into two sections: Declaration of will and Creation of obligations from other sources. The latter section distinguished the following as the sources of obligations: unauthorized management of another person's affairs (*negotiorum gestio*), unjustified enrichment, mistaken payment, and delicts. The approach to the sources of obligations in the Polish Civil Code of 1964 is more similar to the structure of the German BGB and the Polish Code of Obligations of 1933 and deals with individual sources of obligations under separate titles: General provisions on contractual obligations (Title 3), Unjustified enrichment (Title 5), Delicts (Title 6), Unauthorized management of another person's affairs (Title 22), Public promise (Title 36), and Remittance and securities

(Title 37). The sources of obligations in Polish law today exhibit features derived from the evolution of private law in Europe, such as the separation of contracts and delicts as the sources of obligations and the formation of certain institutions that are specific to the civil tradition, such as unjustified and unauthorized management of another person's affairs (*negotiorum gestio*).

2.3.5. Freedom of contract

A trend to increase the number of transactions enforced by law could already be observed in the evolution of ancient Roman law. The idea of contractual freedom was declared by late-mediaeval jurists of canon law. This idea has been spreading gradually in the *ius commune* since the 16th century. The principle of contractual freedom was one of the basics of the theory of contract developed in the 17th and 18th centuries by the School of Nature. However, the preliminary draft codification of Polish contract law of 1791 did not express this principle, but was based on the Roman division into nominate and innominate contracts. According to this draft, the general factors determining whether the contract was valid were the capacity of the parties to contract, the formation of the contract in good faith, and just the title of the transaction (Article 1). The principle of contractual freedom was introduced into modern private law by the *Code Civil* of 1804. The drafters of the 1933 Polish Code of Obligations recognized its fundamental importance, highlighting that 'the principle of freedom of contract permeates the entirety of the law of obligations'. Limits on the freedom of contract were established in a dual manner: (1) with the use of general clauses, and (2) through regulations that expressly forbade certain contractual terms. The Code of Obligations pointed to the following clause limiting contractual freedom: such freedom is allowed unless it is in conflict with public order and good practice (Article 55 k.z.). Furthermore, the Code specifically banned contracts for inheritance from a living person (Article 58 k.z.). The list of prohibited contracts further included certain specific acts, regarding, for instance, control of the purchase of real property by foreigners or control of transfers of foreign currency and gold from Poland. It further provided for the protection of lessees of flats (a regulation modelled on Austrian solutions) by setting maximum amounts of rent and only allowing leases to be terminated for important reasons. The Code of Obligations remained in force until 1965, when it was replaced with the Civil Code. However, the change of the economic system in Poland after World War II radically limited contractual freedom. As the centrally-planned economy was introduced in 1946, many regulations controlling the conclusion of contracts were put in practice. For instance, in rural areas, farmers were required to sign contracts for obligatory deliveries of their agricultural produce and it became illegal to trade them freely. Urban house owners were deprived of the freedom to enter into rental contracts. To a very large extent, cooperation between business entities became subjected to state-imposed plans. According to the general provisions of civil law of 1950,

any contract which was 'in conflict with the act and principles of social coexistence in the People's State' was deemed invalid. Such a direction of economic and legal evolution influenced the approach of the drafters of the 1964 Civil Code regarding contractual freedom. The original texts of the Civil Code lacked the provision corresponding to Article 55 of the Code of Obligations of 1933, i.e. the provision expressing contractual freedom. In practical terms, the legal landmarks demarcating the area of this freedom were the Civil Code provision which deemed all legal transactions that were contrary to the law or principles of social coexistence to be invalid, the Civil Code provision authorizing the state authorities to limit or rule out the freedom of concluding and formulating the content of contracts between public business entities, as well as a number of other provisions, such as the statute which ruled out the freedom to enter into contracts and formulate the content of rental contracts by the owners of buildings in cities. This model only ceased to exist with the collapse of the political system in 1989. The 1990 amendment to the Civil Code implemented a regulation that expressed the principle of contractual freedom. Restrictions to this principle were made with regard to contracts that were in conflict with the law, the nature of the legal relationship (contract) or principles of social coexistence (Article 353^1 k.c.). Additionally, the provisions allowing for a separate, radical limitation of contractual freedom between public business entities were repealed. Gradually, the limitations imposed upon contractual freedom which originated from acts passed before 1989 were cancelled. However, the introduction of regulations on consumer protection had a major impact on the real extent of the freedom after 1990. Generally speaking, the Polish law of obligations, which was codified in 1933, incorporated the contractual freedom in a form that was typical of the Western legal tradition. Notably, this principle was subject to severe restrictions throughout the whole period of the communist party dictatorship. The political change of 1989 restored the principle in the Polish Civil Code. Today, the limitation of contractual freedom with reference to the principles of social coexistence is seen as a relic of communist legal terminology. However, the boundary set by the nature of the contract is new to Polish law. The suggestion of its application to the legitimate expectations of the parties to a contract refers in some way to the ancient Roman law, as well as to the judicial practice of Germany and France since the mid-20th century.

2.3.6. Model of delictual liability

The reinterpretation of the Roman delict based on *Lex Aquila* that took place in the 17th and 18th centuries had a crucial role in the formation of today's understanding of delictual liability in continental Europe. In principle, this creative modification comprised a rejection of the 'penal' element of Aquilian liability and conferring a more general sense via the formation of what is referred to as a general delictual clause. This 'legal invention' of the School of Nature developed the Roman principle of 'not harming any other person' (*alterum non laedere*). The essence of that

provision is the principle that a person must pay compensation whenever damage is caused by his or her negligence. The French *Code civil* adopted a general delict clause. That regulation constituted an important point of reference for many issues of law that were under discussion in the 19th and 20th centuries when attempts were made to resolve questions like: Does not the adoption of a general delict clause cause too much uncertainty? How should damage be defined in an act? Can delictual liability be independent of the tortfeasor's fault, and if so, to what extent? The drafters of the Polish Code of Obligations of 1933 used this legal know-how creatively. They adopted the 'broadest understanding' of a wrongful act, which encompassed all cases of damage arising from the fault of a person (Article 134 k.z.), caused by animals in the person's charge (*culpa in custodiendo*) (Article 149 k.z.), things (Article 151 k.z.), and forces of nature (Article 152 k.z.). The liability for the damage caused by a person was based on the general clause taken from the Code Civil. The drafters of the Code identified this model of regulation as very useful in practice. The principles of fault liability were supplemented with strict liability in specific situations. They were in line with the idea that no person should profit from causing special risk to others. Looking at the example of the French *Code civil* and the German BGB, the drafters of the Polish Code of Obligations decided that a definition of damage should be superfluous. The model of delictual liability adopted by the Polish Code of Obligations was, in principle, copied in the Civil Code of 1964. Some minor modifications reflected the nature of the development of the law in the period of the Polish People's Republic, such as, e.g. the state's liability for damage caused by state functionaries performing their duties (a repetition of the principle introduced into Polish law by the Act of 1956). And yet, compared to the Code of Obligations, the Civil Code of 1964 limited the possibility of adjudicating for damage caused by pain and suffering. This was primarily justified by the claim that 'monetary compensation for personal injury is in conflict with the sense of dignity of a member of the socialist society'. The broad ability to claim compensation for personal injury was restored into Polish law by the amendment to the Civil Code in 1996. A later amendment (2004) to the Code increased liability for acts of the public authorities. In fact, how this issue is dealt with is one of the unique features of Polish delictual liability. The provisions recognizing the state's liability for damages caused by issuing an act of law that has been subsequently found to be in conflict with the Constitution, a ratified international contract or a statute is also new in the Civil Code.

2.3.7. Model of statutory succession

Until the loss of independence in 1795, succession in Poland had been largely based on customary law. Different orders of inheritance applied to nobles, burghers and peasants. To some extent, inheritance customs also differed in various regions of the country. The Polish order of succession by the representatives of the nobility had been fully developed by the end of the 17th century. The following general rules

were applied if a person died intestate: firstly, the estate was divided among the legitimate children, although daughters' rights were restricted to a quarter of the father's estate; secondly, if there were no surviving descendants, the parents inherited the estate; thirdly, if there were no surviving parents, the estate was divided among the siblings; fourthly, if there were no surviving siblings, the estate was divided according to the rules of consanguinity up to the seventh degree of kinship, as defined in canonical law. In towns, inheritance was modelled on German law. Foreign civil codifications introduced into Poland's territories had their own orders of succession, although in rural areas, inheritance customs still played a vital role in peasant families in the 19th and 20th centuries. Work on a uniform inheritance law started as late as in 1926, as this was considered a difficult issue for social and political reasons. Before World War II, the most important regulation in terms of inheritance law was the prohibition introduced in 1920 to divide farms that had been established by the plotting of land. A uniform Polish inheritance law was introduced by decree in 1946. It stipulated the following rules of succession: firstly, the estate was divided among the descendants and the spouse of the deceased; secondly, when there was no surviving spouse or descendants, the estate was divided among the parents and siblings; if there were no surviving parents or siblings, the estate was divided among the descendants of the siblings. If no such relatives or spouse existed, the property was declared *bona vacantia* and escheated to the municipality (*gmina*) in which the deceased lived or to the State Treasury. The spouse of the deceased was entitled to a quarter of the estate. Limitations were established through specific acts to restrict the division of farmland that constituted part of the estate. Changes brought about by the Civil Code of 1964 reinforced the position of the deceased's spouse, granting him or her a share in the same proportion as was granted to the deceased's children, however, no less than a quarter of the inheritance; it also contained some special principles regarding the inheritance of farms. A characteristic feature of Polish statutory succession, which was in effect after 1947, was the strong position of the spouse of the deceased and the narrow group of the deceased's relatives who were entitled to inherit. A consequence of that was a strong position of the municipality in which the deceased resided or of the State Treasury. This situation was changed, to some extent, in 2009 when the amendment to the Civil Code also included the deceased's grandparents and stepchildren among the group of statutory heirs. The institution known in the civil law tradition as legacy by vindication (2011) and the principle that the deceased's debts and liabilities should not exceed the inherited assets (2015) were introduced into Polish inheritance law during the last decade.

2.3.8. Limits of freedom of testation

The freedom to distribute an estate through a will emerged in Poland in the late 12th century. One of its proponents – and an influential one, too – was the Catholic Church, which claimed that the testator should have the ability to offer a part of his

or her estate to a church-related institution to 'save the soul'. The debate that had been a subject of discussions of generations of lawyers since time immemorial, also became a hot topic in Poland, where attempts were made to address the following dilemmas: what should the extent of the testator's freedom to dispose of his/her property be and when is the will of the testator detrimental to his or her family? Although a benefactor enjoyed unlimited freedom in the 13th century with regard to disposing of the land he owned through a will, the 14th century witnessed a process of restricting that freedom. The disposal of an estate through a will without the parliament's consent was prohibited in the 16th century. The projects of the 18th century which were intended to codify Polish law envisaged full unrestricted freedom to dispose of property upon the death of its owner (*mortis causa*). It was argued that such unrestricted freedom is a prerequisite of ownership. Foreign civil codifications that became binding in Poland's territories brought their own restrictions on the freedom of testation. These were: (1) the reserve system, which was a statutory guarantee that part of the deceased's estate would be passed on to his or her close relatives (as provided for in the CC), and (2) the system of a lawful share (a legitimate portion), i.e. the right to claim the payment of an amount of money from the testamentary heir for the omission from the will or invalid disinheritance of entitled statutory heirs (as provided for in the ABGB and BGB). In the course of the work on the codification of Polish law after World War I, priority was given to the reserve model. Despite this, the decree that unified Polish inheritance law in 1946 adhered to the lawful share model, which applied to the descendants, the husband or wife of the deceased, and the parents of the deceased, who were not effectively disinherited. The amount due to the entitled person was half of the amount he or she would have received under statutory succession. That model was later incorporated in the Civil Code of 1964 and provided for more extensive rights of minors and the permanently disabled, entitling them to two-thirds of what they would have received under statutory succession. As for the freedom of testation, Polish inheritance law maintains and applies solutions that are based on the Roman *pars legitima* model.

2.4. History and style of Polish private law

A historical analysis of the basic principles and institutions of modern Polish civil law shows that – as a rule – they are 'national versions' of models that originated in Roman law and constitute the civil tradition. A historical and comparative analysis of this will demonstrate a certain link that should be noted here. Some formal continuity in the development of Polish private law has been maintained since 1918. A crucial factor in the formation of the Polish dogmatics of civil law in the first half of the 20th century was the fact that the French *Code civil*, Austrian ABGB and German BGB were already used in Polish legal practice, while other civil codifications (especially the Swiss Code of Obligations) were also referred to in the process of the codification work. Therefore, to claim that Polish law belongs to the Germanic or Romanic

legal thought would be a great over-simplification. Polish civil law may be deemed to be a 'hybrid civil law system', i.e. a system in which uniform solutions superseding the previous 'classical' European civil codes – *Code civil*, ABGB and BGB – were developed. The excellence achieved by Polish legal academics and top legal practitioners in the first half of the 20th century later became a countermeasure to deep and ideologically inspired alternations of civil law made at the times of the communist party rule. The inclusion of Polish law in the family of socialist law is at least outdated today. However, this part of Polish legal experience was not irrelevant to the style of legal reasoning of many Polish lawyers educated in the years from the 1950s to the 1980s. In some cases, this can even continue to this very day. From a historical perspective, the assessment of changes implemented into the Polish Civil Code after the political transformation of 1989 leads to the conclusion that some of them have, in fact, reverted to the structures that were incorporated in the first half of the 20th century, as part of the efforts to codify and unify the law. The recent developments of Polish private law also reflect the issue of coherence between the EU's *acquis communautaire* and so-called *acquis commune*, i.e. principles or systemic structures arising from the historical development of private law that are common for European countries. Polish civil law may be one of the most interesting contributions to the debate on the preconditions for the reasonable harmonization of private law. Therefore, studying the history and dogmatics of Polish civil law can – even today – inspire a discussion on the cultural identity of private law and the reasonable understanding of its harmonization in Europe.

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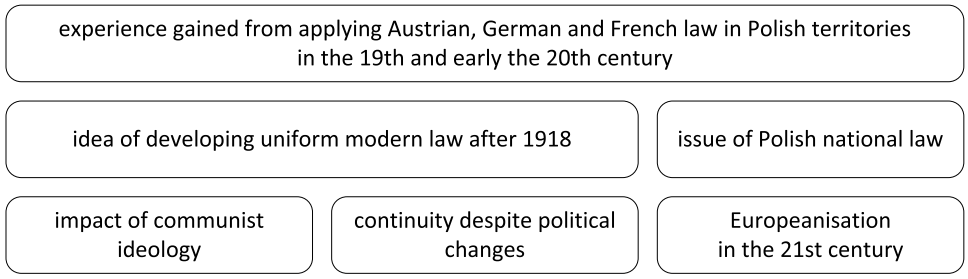
Figure 1.1. Key historical factors shaping Polish contemporary law



Source: Wojciech Dajczak, Piotr M. Pilarczyk

Marek Smolak

POLISH THEORY AND PHILOSOPHY OF LAW: AN OVERVIEW OF THE ORIGINS, IDEAS AND PEOPLE

Contents

1. Introduction

It should be mentioned at the outset that the complexity of the subject and the range of issues raised by Polish philosophers and theorists of law over the years is so vast

that an outline of this subject could never aspire to serve as a fully comprehensive and exhaustive account of the whole issue. Therefore I have to make one but important reservation. Although, this chapter bears the title of *Polish theory and philosophy of law: An overview of the origins, ideas and people*, I will focus mainly on the Polish theory of law and the analytical theory of law. Additionally, the term 'contemporary theory and philosophy of law' will be understood here as the philosophy and theory of law developed since 1918.

For the above reason, this chapter has been divided into three parts. The first part presents the basic trends in the development of the Polish theory and philosophy of law and highlights issues that have been the main subject of interest of Polish theorists and philosophers of law.

The second part presents the achievements of the most prominent theorists of law, such as Leon Petrażycki, Czesław Znamierowski and Jerzy Lande, whose theoretical and legal, as well as philosophical and legal conceptions have affected the theoretical and legal discourse in Poland for many years.

The third part discusses selected theoretical and legal concepts developed by Polish legal theorists. The concepts have been selected on the basis of two criteria: their significance to the Polish theoretical and legal debate and their impact on the general theory of law.

And this is ultimately the key challenge of how to account for all the issues raised by Polish philosophers and theorists of law over the years. This chapter does not offer a comprehensive overview of this matter. Nevertheless, special attention is given to the Polish theory of law, and particularly to the Poznań School of Legal Theory.

2. General characteristics of the basic trends and subject of research of contemporary Polish theory and philosophy of law

When speaking of the period of 'crystallization' of the theory or philosophy of law, simultaneously disregarding their former relations with philosophy, it may be said that the discussion on certain issues of theory and philosophy of law in Poland has been going on since the beginning of the 20th century. Consequently, the term 'contemporary theory and philosophy of law' will be understood as the philosophy and theory of law developed since the independent Polish state was re-established, namely since 1918.

Before moving on to the characteristics of the trends and problems raised by Polish theorists and philosophers of law, some remarks must be offered about the terms 'philosophy of law' and 'theory of law' and an explanation on how they interrelate.

The terms 'philosophy of law' and 'theory of law' have recently lost their clarity which has consequently led to lesser intelligibility of these terms today. Therefore, only some trends connecting certain areas of research with those terms may be mentioned. Therefore, there is some confusion in the literature about the use of these terms and their interrelationships.

Given the above, the following issues constituting the subject of interest of philosophers of law can still be identified: ontology of law, axiology of law, semantics of the language of law, the logic of norms and deontic logic.[1]

On the other hand, the theory of law is still a field of jurisprudence that essentially involves logical-linguistic research into law and legal studies. It aims to develop a conceptual apparatus of jurisprudence and formulate statements regarding law and its institutions. Clear philosophical premises are rarely assumed in jurisprudence, and if they are, they most frequently take the form of statements regarding the language. Typical issues researched in the theory of law include the sources of law, legal systems, the language of legal texts, legal norms, the interpretation of the law, the law-making process and the application of the law, as well as the methodology of jurisprudence. These aspects of the theory of law have been particularly studied and researched in Poland, where the tradition of analytical philosophy is very strong.[2]

2.1. Subjects of research in the years 1918–1989

As already mentioned, after the rebirth of the Polish state, the early years of the 20th century were significant to legal theory and the philosophy of law. After 123 years of the partitioning of the country between Russia, Prussia and Austria-Hungary, and because Poland did not have its own legal system in that period, the theory of law was initially taught relying largely on familiarity with the legal system of one of the partitioning states.[3]

The unification of the three portions of the formerly partitioned land into one state generally ended this situation. For Polish theorists and philosophers of law, a particularly important event appeared to be the summit of Polish legal theorists held in Kraków between 25 and 27 March 1924. According to Czesław Znamierowski,

[1] K. Opałek, *Zagadnienia teorii prawa i teorii polityki*, Warszawa 1982, pp. 71–77.

[2] M. Zirk-Sadowski, *Wprowadzenie do filozofii prawa*, Kraków 2000, at p. 20.

[3] S. Czepita, *Koncepcje teoretycznoprawne w Polsce międzywojennej*, 'Czasopismo Prawno-Historyczne' 1980/2, pp. 107–149.

the summit defined the area for long-term research for legal theorists, as well as laying the foundation for often fierce disputes.[4] Because, the variety of theoretical ideas that emerged in the inter-War period are related to Leon Petrażycki, Czesław Znamierowski and Jerzy Lande, whose ideas I will analyse later, but now I shall focus on the subject of research after World War II.

The climate for the study of the theory of law was extremely unfavourable after World War II. The huge loss of scholars during the war, the dispersion of research institutes and, above all, the newly imposed communist rule restrained or even successfully prevented theoretical legal research in areas such as axiology or ontology of law. Furthermore, in the 1950s, a theory of law emerged that was based on the Marxist methodology, but, despite its political and ideological grounds, it never – and this should be emphasized here – led to the full standardization of the theory or philosophy of law in Poland. This can be explained by the fact that, in the pre-War period, Poland already had a strong tradition of logical and linguistic research into the law originating from the Lwów–Warsaw School, which, consequently, safeguarded many Polish theorists in jurisprudence against following or practicing the Marxist theory of law.

In the years 1950–1970, the followers of Jerzy Lande worked in research centres studying the theory of law in Kraków, Lublin and Toruń, while Poznań could pride itself on the work of Czesław Znamierowski's successors. The researchers in Kraków focused mainly on the methodology of jurisprudence, logical and semantic problems of law and sociology of law. In Łódź, the scholars (Jerzy Wróblewski, Lande's student, and Józef Nowacki, who subsequently moved to Katowice) specialized in methodological problems and the theory of legal interpretation and application of the law. A number of methodological issues related to the use of cybernetics in jurisprudence were researched in Toruń (Wiesław Lang, Lande's student). In Poznań, the scholars (Zygmunt Ziembiński, Znamierowski's student, Leszek Nowak, Maciej Zieliński, Sławomira Wronkowska) focused on the conceptual apparatus, methodology of jurisprudence, the theory of sources of law and legal logic, while Warsaw, under the influence of Leon Petrażycki developed a strong centre for studies in the sociology of law represented by Adam Podgórecki and subsequently by his student, Jacek Kurczewski. In Wrocław, Henryk Rot formed the framework of the theory of law.[5] Henryk Groszyk developed the framework of the theory of the state in Lublin.

During this period, the special interest of theorists of law focused on theoretical and methodological issues of jurisprudence. Attention should be drawn to the issue of the philosophical grounds of the theory of law and the relationship between the theory and philosophy of law. Analytical studies of the analogy of the structure

[4] *Ibid.*, at p. 107.
[5] K. Opałek, see no. 1 above, pp. 16–19.

and methodological postulates of empirical sciences and jurisprudence, and primarily legal dogmatics were initiated in connection with this. Another group of issues included those of legal taxonomy that were considered in relation to the contemporary development of law (new branches of law and fields such as legal sociology).

Issues regarding the characteristics of the language of law and juridical language were studied within the linguistic-logical analyses. Jerzy Wróblewski continued working on the concept of neopositivism and Polish linguistic philosophy, which had been initiated by his father, Bronisław Wróblewski. Alternative propositions based on the philosophy of colloquial, everyday language and the performatives theory of John L. Austin were formulated some time later. Issues of normative meaning, the logical and semantic structure of norms, the ontology of norms, and types of normative utterances were raised in the theory of norms. Analyses of these problems reveal influences of intentionalism, extentionalism, and descriptive and reconstructionist tendencies in the philosophy of language.

The issue of foundations and possibilities of building the logic of norms and deontic logic, as well as the perspective they provide for the science of law also attracted a great deal of attention. The range of relevant considerations includes the analyses of normative, and, in particular, legislative and legal notions, compared with deontic notions.[6] In the 1970s, special interest focused on the issue of the law-making process, including the problems of legislative technique and the policy of legislation. As for the policy of legislation, the concept of 'a rational legislator' was of considerable importance. This construct also constitutes the basis for developing theoretical models of the law-making process (Jerzy Wróblewski, Sławomira Wronkowska, Ewa Kustra).

Among the issues regarding the interpretation of the law, the concept of normative meaning developed by Wróblewski played an especially important role. Attempts are currently being made to discuss the interpretation of the law from different perspectives. However, the specificity of the Polish theory of law lies in the formation of two basic theories of the interpretation of law: clarifying and derivational – these two are original Polish theories not encountered elsewhere.[7]

Of the many trends in the Polish theory and philosophy of law, one trend has a special position. It is the analytical theory of law, which sought its philosophical sources in the achievements of the representatives of the Lwów–Warsaw School. Zygmunt Ziembiński, Kazimierz Opałek and Jerzy Wróblewski – the most prominent figures in the Polish analytical theory of law – all referred in their works to the tradition of the above school. The school's influence not only appeared in the manner in which its followers chose the method of solving theoretical legal problems, but it was also

[6] *Ibid.*, pp. 22–24.
[7] *Ibid.*, pp. 19–27.

responsible for the type of issues constituting the focus of attention of the researchers. Therefore, it greater attention should be devoted to it here.

The establishment of the Lwów–Warsaw School is strictly related to Kazimierz Twardowski, head of the Chair of philosophy at Lwów University. Twardowski raised the first generation of philosophers, including Kazimierz Ajdukiewicz, Tadeusz Kotarbiński, Stanisław Leśniewski, Jan Łukaszewicz, Władysław Tatarkiewicz, Władysław Witwicki and Tadeusz Czyżowski.[8]

Those philosophers formed a group that shared an approach that was characteristic of philosophical minimalism that treated philosophy as a set of answers to specific philosophical questions rather than as a doctrine in its entirety. The representatives of the Lwów–Warsaw School shaped the philosophical culture of lawyers in Poland, at least in the years 1930–1970.[9]

One of the important features of Polish analytical theory of law is the fact that it places great emphasis on semiotic, formal logic and methodological issues. This approach started to prevail in the 1930s, becoming fully developed after World War II. Undoubtedly, the approach consolidated due to the influence of the Lwów–Warsaw School. It seems noteworthy that the political situation after World War II paradoxically facilitated or encouraged the development of the Polish analytical theory and philosophy of law, and the above-mentioned philosophical minimalism safeguarded it from coming to conflict with Marxism. Nevertheless, as some critics have emphasized, the price of this protection against ideologization of the philosophy of law (practised within the theory of law) was its occasionally exaggerated formalism and the avoidance of axiological issues.

In contrast to the Anglo-Saxon tradition of analysis, in the Polish analytical philosophy the language in which law was formulated was treated as a relatively autonomous subject of examination, and therefore linguistic issues were regarded as being separate from social issues. The analysis of law distinguished between the legal language, i.e. the language of legal texts, and the language of law being the language of the statements about law formulated, for instance, through the teaching of law. It was initially assumed that the legal language was, in principle, a kind of artificial language. Such an approach aimed to achieve total autonomy of analysis of the law. In the 1970s and 1980s, under the influence of Anglo-Saxon concepts, a significant broadening of the concept of language, including by its social dimension, was observed. This was mainly the result of accepting Austin's performatives theory, which led to the devel-

[8] J. Woleński, *Filozoficzna szkoła lwowsko-warszawska*, Warszawa 1985, at p. 157.
[9] J. Woleński, *Szkoła lwowsko-warszawska a polska teoria prawa*, 'Studia Prawnicze' 1986/3–4, at p. 289.

opment of the research into the ways of using the language by its users, simultaneously limiting the research to the structure of language.[10]

This change of focus in the research into language from studying the structure of legal language to its actual usage resulted in the development of non-linguistic concepts of a legal norm, as a result of which, in the late 1970s, the trend that can be called the Polish analytical theory of law originating in the Lwów–Warsaw School came to an end.[11] In the following years, the research into the legal language was partly orientated towards the broadly understood pragmatics of the legal language, where a particularly important part was played by the theory of conventional actions, i.e. social actions which – as linguistic statements used in a culturally separated social space – are considered to be actions creating new social meanings (the issues of conventional actions were discussed by the representatives of the Poznań School of Legal Theory, as well as by, among others, Andrzej Bator and Stanisław Czepita). Other studies included sociolinguistics, sociology of legal language and the manner in which the social background of the language user influences the language of law (Tomasz Gizbert-Studnicki). Finally, a separate research group focused on the hermeneutical trend.

The analyses conducted in other European states with legal systems based on Roman law were similar in nature to the philosophical trend that prevailed in Poland until the late 1970s. In principle, they all led towards legal positivism which, as is generally known, accepts separation law and morality. Therefore, as can be easily concluded, analytical formalism supported that trend in legal philosophy which had the objective of taking a neutral attitude to the applicable law. That was the reason why the analytical theory of law was criticized for its axiological minimalism.

Another trend that can be found in the Polish philosophy of law is that of the natural law theories. Natural law theories should be also mentioned among the main trends in Polish philosophy of law, although their influence on the Polish theory of law was rather insignificant. That was because they appeared when the Lwów–Warsaw School had already started to prevail and set the long-term trend in the Polish philosophy and theory of law.[12]

Essays on natural law published before World War II were of a propaedeutic or utilitarian nature. In other words, they were to spread the knowledge of natural law. Antoni Peretiatkowicz was a scholar who was especially appreciated for promoting legal and natural concepts. The followers of the natural law theory did not form an organized group or a philosophical legal school and so the legal and natural con-

[10] M. Zirk-Sadowski, see no. 2 above, pp. 106–107.
[11] *Ibid*., at p. 108.
[12] M. Szyszkowska, *Europejska filozofia prawa*, Warszawa 1993, at p. 139.

cepts were also disseminated and promoted by scholars representing dogmatic legal sciences, such as Fryderyk Zoll, Władysław L. Jaworski, Stanisław Gołąb, Edmund Krzymuski, Juliusz Makarewicz, Józef Reinhold or Franciszek Kasparek.

A variety of ideas in the field of the natural law theory emerged in the inter-War period. Natural law was analysed within the framework of Polish philosophy, references were made to Immanuel Kant's basic philosophical ideas, the law of nature was interpreted in the spirit of the philosophical thought of Saint Thomas Aquinas, Giorgio Del Vecchio, and research was influenced by the works of Gustav Radbruch and Rudolf Stammler. Many of those theories were unfortunately of an eclectic nature.[13]

Paradoxically, the development of the theory of natural law in the spirit of Aquinas reached its peak after World War II. Christian philosophy bloomed in the years 1956–1989, while Polish followers of Thomism enjoyed a practically monopolistic position. The legal and natural concepts which do not have a Christian or Thomistic provenance originated in the pre-War period and must be attributed to such philosophers as Eugeniusz Jarra, Czesław Martyniak, Czesław Znamierowski and Antoni Peretiatkowicz.

One more fact is noteworthy here. In the communist period, the only place where the philosophy of law was practised in the spirit of natural law was the Catholic University of Lublin, which, after 1950, became the mainstay of natural law teaching, usually in line with the Thomistic doctrine.[14] Concluding this very brief outline of natural law concepts, it should be noted that the turn of the 20th and 21st centuries saw a return to the natural law issues, both in the educational and conceptual spheres.

2.2. Research problems and development trends in the Polish theory and philosophy of the law in the years 1989–2020

The 1990s and at the beginning of the 21th century are marked by four trends in the Polish theory and philosophy of the law. Firstly, this is the period of a new generation of Polish theorists and philosophers of law who discuss issues from all possible philosophical and legal areas. They are so numerous that it is impossible to mention them all, so only some of them are mentioned below. And so, issues of legal reasoning and legal argumentation (Jerzy Stelmach, Bartosz Brożek), evolutionary philosophy of law (Wojciech Załuski), economic analysis of law (Jerzy Stelmach, Mariusz Golecki), analytical theory of law (Andrzej Grabowski, Tomasz Gizbert-Studnicki, Adam Dyrda, Michał Araszkiewicz), legal interpretation (Krzysztof Płeszka) are studied in Kraków. A group of theorists and philosophers of law in Wrocław discuss

[13] *Ibid.*, at p. 140.
[14] *Ibid.*, pp. 141–142.

the problems of broadly understood legal hermeneutics, post-analytical theory of law, critical analysis of law, postmodernism and feminist jurisprudence (Andrzej Bator, Zbigniew Pulka, Adam Sulikowski, Przemysław Kaczmarek, Wioletta Jedlecka, Joanna Helios, Michał Paździora). In Szczecin, a great deal of attention is attached to the theory of the interpretation of the law (Maciej Zieliński, Agnieszka Choduń) and the legal system (Stanisław Czepita, Beata Kanarek, Olgierd Bogucki) primarily thanks to Professor Maciej Zieliński. In Warsaw, Marcin Matczak is developing his own original idea of interpretation of the law and legal text. In Poznań, as traditionally, the focus is on the theory of norms and principles (Wojciech Patryas, Marzena Kordela), the policy of legislation, the concept of the rule of law (Sławomira Wronkowska) and the interpretation of the law (Marek Smolak, Jarosław Mikołajewicz). Additionally, a variety of subjects are being researched in various academic institutions throughout Poland. For instance, in Toruń, Lech Morawski studied the concept of the rule of law, legal argumentation and the interpretation of the law. In Katowice, Zygmunt Tobor, Professor Józef Nowacki's student, gathered a group (Tomasz Pietrzykowski, Agnieszka Bielska-Brodziak, Sławomir Tkacz) working on issues of law-making, legal ethics, interpretation of the law and the concept of legitimacy. In Lublin, Leszek Leszczyński and his student (Bartosz Liżewski) are analysing the problems related to the judicial application of the law. In Gdańsk, Jerzy Zajadło is studying the standard questions from the borderland of the philosophy of law and morality, while in Łódź Marek Zirk-Sadowski and his students (Bartosz Wojciechowski, Sylwia Wojtczak) are examining problems regarding axiology of the law and legal culture. The rapidly developing theory of law at the newly founded universities in Rzeszów, Opole and Olsztyn also deserve a mention.

Secondly, it is notable that some issues and subjects were particularly preferred and in vogue in various periods of the development of the theory of law in Poland. To mention a few examples, there was a time of great interest in logic, linguistic analysis, and legal semantics (the 1950s and 1960s), which was largely influenced by the fact that the communist authorities did not allow researchers to work on ideologically suspicious issues, such as the axiology of law. Likewise, the interest in logic or language in the 1960s and 1970s became an area for those who did not want to research the theory of law based on Marxist premises. There was also a noticeably increased interest in the methodology of jurisprudence (the 1970s) and in the politics of law, including the politics of rational law-making.

Thirdly, a group of researchers represents the analytical theory of law, whose focus is still the linguistic aspect of law.

Fourthly and finally, there is a strong tendency to question and challenge the theories of researchers of the analytical theory of law, indicating the faults and negative consequences of the suggestions of the Lwów–Warsaw School tradition about the theory of law and legal practice.

3. Leading figures in the Polish theory of law

This section presents the basic theoretical legal ideas of three Polish law theorists: Leon Petrażycki, Czesław Znamierowski and Jerzy Lande. Leon Petrażycki is generally known for initiating the realistic trend in the studies of law and therefore to have come up with his ideas ahead of Axel Hägerström's, a representative of the Uppsala school, whose theses were similar to his own. Petrażycki can also be considered the progenitor of non-cognitivism formed under the influence of logical empiricism, treating norms as 'a projection' of the 'legal emotion'. Petrażycki's theory is, or rather was, an attempt to formulate an integrative vision of law, as he attempted to apply the results of the studies in psychology, ethics, logic and methodology of sciences in his research.

As for the other two theorists of law, Znamierowski and Lande, whose innovative propositions regarding the theory of law were extremely interesting, it should be emphasized that the Polish theory of law could be revived after World War II because of those two scholars, around whom the first Polish schools of the theory of law were subsequently established in Kraków and Poznań.

Leon Petrażycki belonged to the theorists of law who significantly contributed to the development of the theory of law in Poland. Petrażycki presented the outline of his psychological theory of law in his study *Wstęp do nauki prawa i moralności* (1905) and then complemented it with his work entitled *Teoria prawa i państwa w związku z teorią moralności* (1907). The basic issue which Petrażycki discussed is expressed in the question about the possibility of building an adequate theory of legal and moral phenomena. It transpires that a new psychological concept (emotional psychology) is needed to describe a phenomenon, which would enable a psychological theory of law and morality to be formulated. According to this author, there are specific cognitive-imperative experiences, which can be discovered by means of introspection and conscious impulses.

Petrażycki analysed the new group of experiences using the example of psychological sensations related to the feelings of hunger and appetite. He called these experiences emotions, which, in contrast with other experiences, have a dual cognitive-imperative nature. The emotions constitute the basic group of psychological (mental) phenomena because they decide on our behaviour and actions. Other elements of our psychological life (cognition, will, feelings) can, at most, indirectly influence our behaviour, causing specific emotions.[15] Consequently, the analysis of law and morality is only possible in terms of emotional psychology.[16]

[15] L. Petrażycki, *Wstęp do nauki prawa i moralności*, Warszawa 1959, at p. 317.
[16] J. Stelmach, R. Sarkowicz, *Filozofia prawa XIX i XX wieku*, Kraków 1998, pp. 93–94.

When classifying the stimuli of behaviour, Petrażycki differentiated between specific moral and legal experiences. Among the emotional and intellectual stimuli, he distinguished a group of motivations which he called principal. An emotion is directly triggered by the sole imagination of the assessed deed. Some deeds, such as for example theft, cause a repulsive emotion in people without even imagining their results. While these motivations (experiences) are expressed in teleological judgments, the experiences are expressed in specific principal judgments consisting of principal regulations or norms. In this area, Petrażycki distinguished principal experiences, namely aesthetic, ethical experiences, which differ in the type of emotions from which they originate.[17]

Ethical emotions are of imperative nature, which is why they are sometimes called emotions of obligation. These are the obligations which we perceive in our relationship with others as free, under which the obliged are not indebted to others. Petrażycki called this 'moral obligations'. On the other hand, Petrażycki called the obligations that we perceive in our relationships with others as restricted, connected with the people, in which what burdens one party is due to the other party, legal obligations.[18]

In summary, Petrażycki suggested two types of ethical emotions of obligation: moral and legal emotions. The first is unilaterally imperative, i.e. purely obliging, while the other is imperative and attributive. It involves the feeling of duty of given behaviour oriented towards the well-being of another person, which is personal to the person who can claim the fulfilment of such a duty.[19]

Despite its programmatic psychological unilaterality, Pertażycki's theory is also the starting point for the contemporary multifaceted study of law on various levels: linguistic-logical, psychological, sociological, as well as axiological. Furthermore, the emotional theory of law became the means to achieve another objective, namely the formation of the politics of law, the scientific discipline which was to formulate the postulates of improving law, and especially the law-making process based on scientific grounds.

The influence of Leon Petrażycki was noticeable in Poland in the inter-War period, although, as already mentioned, many circles voiced criticism of his ideas. In Warsaw, Petrażycki influenced other scholars directly as the head of the chair of sociology. At that time, Petrażycki's ideas were adopted by Eugeniusz Jarra, who was the head of the chair of the theory of law, and even more evidently by his student, Henryk Piętka. Another eminent student of his, Jerzy Lande (1886–1954), worked

[17] J. Lande, *Studia z filozofii prawa*, Warszawa 1959, at p. 592.
[18] K. Motyka, *Wpływ Leona Petrażyckiego na polską teorię i socjologię prawa*, Lublin 1993, p. 95–96.
[19] J. Stelmach, R. Sarkowicz, see no. 16 above, at p. 95.

in Vilnius until 1929 to later move to Kraków. Vilnius had several talented scholars, with Sawa Frydman, Bronisław Wróblewski and Józef Zajkowski being the most influential. In this context, Frydman's sociological research into the dogmatics of law, Wróblewski's semantic analyses of the legal language and Zajkowski's methodological analyses should also be mentioned.

One of the most prominent researchers among Polish legal theorists was Czesław Znamierowski. He belonged to the group of scholars who followed the basic principle of the Polish intelligence ethic in their research work, which was expressed in the imperative of combining a professional vocation with a commitment to public life. He even treated theoretical and legal considerations, which might have seemed distant from the issues of contemporary public life, as some kind of practical activity with the task of freeing the representatives of legal science from posing trivial questions and solving apparent problems.[20]

This brief outline focuses on selected ideas and concepts found in Znamierowski's works. One of the most interesting concepts he formulated is the idea of universal friendliness.

According to Znamierowski, the basic obligation arising from the acceptance of the attitude of friendliness is the norm according to which every person should be generally benevolent and guided by friendliness in their every act of will. This general norm of friendliness may be defined by means of simple precepts grouped according to four types:

- Firstly, everyone should, within their capacity, refrain from actions which can cause someone's suffering.
- Secondly, everyone should, within their capacity, actively reduce the sum of other people's suffering.
- Thirdly, everyone should, within their capacity, refrain from actions which hinder the happiness of others.
- Finally, everyone should, within their capacity, actively increase the sum of happiness of others.[21]

The precepts were compiled in a way that describes them from the most basic to the maximum level. The question of whether the above should be followed depends on individual knowledge, social status, wealth, and, ultimately, physical and spiritual energy. Znamierowski emphasized that anyone who lacks these attributes should observe the first and third precepts of universal friendliness, whereas those who, either through natural powers or through their efforts, possess abilities, knowledge or wealth, should act in accordance with all the above four rules.

[20] M. Smolak, *Czesław Znamierowski. W poszukiwaniu sprawnego państwa*, Poznań 2007, at p. 5.
[21] Cz. Znamierowski, *Rozważania wstępne do nauki o moralności i prawie*, Warszawa 1964, pp. 48–49.

Of course, Znamierowski was perfectly aware of the fact that it is not easy to follow the precepts of universal friendliness. This does not mean, however, that he agreed to a passive attitude to a wrong that is committed wrong. He argued that the acceptance of such an attitude (passivity with respect to a wrong) may only be justified by the belief that, in the world order, a wrong will sooner or later be condemned or the attitude of passivity 'can arise from long-lasting humiliation caused by slavery'.[22]

In Czesław Znamierowski's works on the theory of law, there is a place for the concepts of axiological and thetic norms, as well as the concepts of imperative and constructing norms, and the idea of a legal system. At the beginning of the 1920s, Znamierowski, probably influenced by phenomenology, treated norms as the 'organic wholes', beings placed in an ideal world.[23] However, he rejected this concept as early as in 1924 and expressed the view that norms were expressions of a special kind. He stated that norms may be ascribed logical values: truth or falsity. Such an understanding of norms as expressions was related to the fact that he understood expressions which, in some circumstances, require an individual to act in a given way; he referred to 'the core of a norm' as a part of a norm. Moreover, according to Znamierowski, a norm should not only include 'the core', but also 'the relativizing indication' which describes the constituting act or evaluation defining the way the content of a norm operates. Using contemporary terminology, what Znamierowski called a norm was rather a deontic statement that is an expression about the qualification of someone's act with regard to a given norm. And yet, while still adhering to his basic thesis regarding norms as statements in the logical sense, in his later works Znamierowski continued to introduce numerous changes which were not entirely consistent.

Accordingly, Znamierowski distinguished axiological norms and thetic norms. The differentiation between those norms – so widely known and generally accepted today – was introduced for the first time by Znamierowski in *Podstawowe pojęcia teorii prawa* (1924). According to his terminology, an axiological norm must contain an indication of why a person should behave in a given way, and the basis here may be someone's evaluation. Consequently, the axiological norm is as follows:

'According to the evaluation of P: A ought to perform act C.'

As for the thetic norm, it has to contain an indication of why a person should behave in a given way, and the basis here may be someone's act of enacting:

'According to the enactment of P: A ought to perform act C.'[24]

[22] *Ibid.*, at p. 33.

[23] Cz. Znamierowski, *Psychologistyczna teorja prawa. Analiza krytyczna*, Warszawa 1922, pp. 47–49.

[24] S. Czepita, *Conception of Law System Formulated by Czesław Znamierowski (in Comparison with H.L.A. Hart's Conception)*, 'Studies in the Theory and Philosophy of Law' 1986/2, pp. 111–124.

When discussing the concept of thetic norms, it should be emphasized that Znamierowski introduced two significantly different types of these norms: constructive and non-constructive, which he called imperative norms. The non-constructive norm performs a suggestive role. It orders or prohibits someone from behaving in some way under specific circumstances. The role of the constructive norm is different. It constructs a special kind of act, which he called thetic. This norm ascribes a conventional meaning to a certain psychophysical behaviour. This way, the norm creates a thetic act by ascribing a special conventional meaning to an act referred to as a material act of a given thetic act. Znamierowski emphasized that the material act of a given thetic act was not of a psychophysical nature but the nature of a thetic conventional act of a lower rank.[25]

Znamierowski presented his concept of a system of law in 1924 in *Podstawowe pojęcia teorii prawa*, and its somewhat modified version in his later works: *Realizm* (1925) and *Prolegomenay* (1930). In the latter, the author was particularly interested in matters regarding a thetic system, namely a system of law consisting solely of thetic norms.

A system of norms should first be defined in order to describe the system of law. For Znamierowski, the system of norms was a set of norms in which the elements (norms) were ordered and interrelated well enough to create a system. Apart from imperative norms, the elements of the system also included constructive norms, so the system of law was of a constructive nature. The system had to meet specific requirements in terms of its structure and relationship with reality in order to qualify as a system of law.

As Stanisław Czepita noted, Znamierowski's concept of the system of law is very similar to Herbert L.A. Hart's concept, but it was formulated 40 years earlier.[26]

It should be emphasized that Znamierowski had a rather low opinion of the level of jurisprudence in the pre-War period. And indeed, the numerous theories and ideas proposed at the time were practically reduced to a few statements formulated on the basis of a certain legal maxim, and not on reliable scientific research. That is why, facing the heavily neglected condition of the Polish jurisprudence, Znamierowski treated his work as a certain kind of mission, the objective of which was to free the jurisprudence of any methodological and conceptual confusion.

Czesław Znamierowski's influence on the Polish theory of law was immense because of the activity of his eminent student, Professor Zygmunt Ziembiński, the author and creator of many original theoretical and legal concepts. It will not be an exag-

[25] Cz. Znamierowski, *Podstawowe pojęcia teorii prawa*, Part I: *Układ prawny i norma prawna*, Warszawa 1924, pp. 28–29, 101, 107, 149.

[26] S. Czepita, see no. 24 above, pp. 111–124.