



CODIFICATION OF THE CIVIL LAW IN POLAND

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ABSTRACT

In this chapter, the developmental trajectory of civil law codification in Poland is traced in parallel with the major events of Polish history. It reveals that codification work began in earnest during the so-called Second Republic, being subject to numerous international influences, in different parts of Poland, which affected it in various degrees. The traditionally dualist system of Polish civil and commercial law is also analysed in light of its effects on codification. Finally, the codification work during the communist dictatorship, and its later modification, is examined, and a question is posed as to whether a new codification would be preferable and appropriate.

Keywords: civil law, codification, private law, commercial law, Poland.

1. INTRODUCTION

Codification of civil law is an enormous task and a milestone in a nation's legislative history. Poland is no exception; the country's codification attempts have been connected with its turbulent history. We have the union with Lithuania, partitions, the Napoleonic era, regaining independence, communist rule, the fall of the Berlin Wall, etc.

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In this chapter, I present the attempts to codify Polish Civil law and explain why Poland, one of the two Eastern and Central European countries, did not prioritise recodifying its civil law. And, why do we still have a civil code enacted in 1964?

2. FROM THE FIRST REPUBLIC TO PARTITIONED POLAND

Since the 16th century, Poland was a federation of two states: the Kingdom of Poland and the Grand Duchy of Lithuania. Both countries had equal footing in the Commonwealth, with most offices doubling. For instance, there were two lord chancellors, one for Poland and one for Lithuania. Both countries had one monarch and were politically united as one federal State but had separate legal systems. Lithuanian law was codified in the 16th century by the so-called Lithuanian Statutes, a modern codification of local law highly influenced by Roman law, a gold standard in that era. Roman law was also used as a subsidiary law to fill potential loopholes. These statutes survived Poland's partitions and were still in use years after the Commonwealth ceased to exist.¹

Polish law remained largely customary, although in the 14th century, the Polish king Casimir the Great ordered the codification of existing customs in what is known as *Wiślica Statutes* (*Statuty Wiślickie*). Later, creating a new civil code was impossible for various reasons, although restatements of existing customs were made and used in courts and professions. In the final years of the Commonwealth, Andrzej Zamojski prepared a draft of a uniform civil code for Poland. This work was not completed because Poland ceased to exist as an independent state for over one hundred years.

Ignacy Koschembar Łyskowski claims that the relatively low interest of the kings in codifying private law was caused by the plurality of legal systems in use. The restatements and customary law were used outside the cities, that is, primarily by the nobility. The cities used Germanic

1 Zakrzewski, 2023, p. 578.

laws, suitable for trade relationships, and were not interested in replacing something that already worked.²

Another peculiarity of the pre-codification era was the lawmakers' attitude towards Roman law. Polish and Lithuanian nobility loved the Roman Republic but feared Roman law as an instrument of German imperial oppression. A centralised state with a strong ruler could bring an end to constitutional monarchy and individual freedoms they loved so much.³ Moreover, the kings of Poland knew that an attempt to create a code based on Roman principles led to a revolt in neighbouring Czechia and were afraid that the same could happen in Poland.⁴

The first Polish university in Cracow, established in 1364, had many Canon Law professorships. Still, in the 16th century, it had only one professor of Roman Law, a Spanish scholar and poet, Pedro Ruiz de Moroz (Piotr Roizjusz, Doktor Hiszpan). In his writings, he complained about Poles' disregard towards Roman law and his low salary, which additional sources of income could not supplement.⁵ Finally, de Moroz quit academia and became one of the royal experts responsible for preparing the Lithuanian Statutes. Lithuanians, unlike the Polish nobility, had nothing against Roman law.⁶ Reformers on the Polish side knew that Roman law was state-of-the-art and tried to include its principles in their codification drafts with different results. Contemporary opinions on these attempts vary from close to enthusiastic appreciation to wry remarks on scholars who only knew Roman law existed and pretended to know it.⁷

In the partition period, Polish territories followed the fate of the occupying countries. So, at the end of World War I, parts of Poland under German rule used the BGB, those under Austrian rule ABGB (and in some small parts also Hungarian law), and those under Russian control under Code Napoleon (Semi-autonomous Duchy of Warsaw) and Volume

2 Koschembar-Łyskowski, 1925, p. 11.

3 Hamza, 2016, p. 87.

4 Sondel, 2001, pp. 47–48.

5 Kremer, 2010, p. 479.

6 Diccionario Biográfico Español, 2013, p. 799.

7 Sondel, 2001, p. 47 (59).

10 of the Roll of Laws of the Russian Empire (Svod zakonov).⁸ The first three were modern brainchildren of the Age of Great Codifications. The last one was a not-so-good attempt to adapt the Russian law to modern times.⁹

3. THE SECOND REPUBLIC

Creating a unified legal system was the task of the codification committee composed of the greatest Polish legal minds of that era. The works of the committee were public, and the proposed acts were widely discussed. The committee had worked on particular themes, such as commercial law or criminal law in full-fledged codes or, like in the case of the codification of private law in acts regulating particular matters, for instance, contracts or matrimonial law. Assembling all this in one volume was not a high-priority task. The committee had a lot of freedom in preparing the laws promulgated as presidential decrees, which means, as submitted, without any parliamentary amendments.¹⁰

Interestingly, Polish lawyers have not even considered looking to old Polish legislative traditions, relying instead on the Great 19th codifications and the Swiss code of obligations. We do not know why no one has even tried to show the iunctum between the First Republic consciously and restituted Poland. As Koschembar-Łyskowski points out, it would be simply impractical.¹¹ On the other hand, The German Civil Code, the Austrian Civil Code, and the French Civil Code were at that time state-of-the-art and a really good starting point for drafting your own legislation. The Swiss civil law had no dependency connection, and, of course, was also a state-of-the-art solution at that time. Just marginally, one may mention that some traditional Polish institutions, like, for instance, the *dożywocie* contract, were imported to the Code Civil from old Polish law, and the *nawiązka*, a lump sum indemnity provided in the

8 Giaro, 2015, p. 309.

9 For an account of the partition period see Hamza, 2016, *passim*.

10 Górnicki, Prawo, 2020, p. 109.

11 Koschembar-Łyskowski, 1925, pp. 14–15.

Lithuanian Statutes, was imported to the Polish penal code as a sort of criminal indemnity.

Since it would be both impractical and politically irresponsible to keep five different legal systems running or to take one of them as Poland's own, it was necessary to create a new system of laws, based partly on the laws currently in force but being a new set of tools for a new country. Lawyers working on this were trained in five different legal systems, aware that these systems, although all within the Roman law tradition, were often incompatible. On the other hand, this was one of the rare moments in legal history when new laws were created using, something we could call today, a comparative method. Finding the common core of legal systems and creating a set of rules lawyers trained under Austrian, German, French, or Russian law could use and understand. It seems also that the law of that time was written with a wider set of stakeholders in mind. So, its language was precise and simple enough to be understood by a merchant or a farmer deciding who will inherit his land. This specific legislative technique was a hallmark of the Second Republic lawmaking and highly appreciated at home and abroad. The quality of these laws was so good that some survived almost intact until modern times.¹²

One of the first tasks of the newly established republic was ensuring that its citizens could do business, enter into contracts, marry, and deal with property affairs. There were no rules available to solve simple problems, like, for instance, which law should be applied if a lady from Poznań (BGB area) wants to marry a divorcee from Warsaw (Code Civile) in Cieszyn (ABGB area). The solution for this was simple and genial: Inter-provincial Private Law was created to solve internal conflicts of laws just like private international law resolves conflicts of laws in an international context.¹³

Another interim but important act was the law on recalculating pecuniary obligations after currency exchange resulting from inflation. This act was rather complex legislation, with exchange rates from old currency (Polish mark) to new (Polish zloty) depending on the region

12 Koźmiński, Jackowska, 2023; Koźmiński, 2019, *passim*.

13 Dvorský, 2020, p. 70; Jastrzębski, 2015, p. 277.

and branch of the industry connected with any given obligation. The exchange rates were negotiated with stakeholders, which was sometimes detrimental to the stakeholders, who, being honest merchants, declared that they would pay all their debts and did not ask for special treatment.¹⁴

The two largest pieces of legislation were the Code of Obligations and the Commercial Code. The logic behind them reflected the legal dualism of that era, with the division of general civil law and the law merchant regulating commercial relations. Both acts were complementary in the sense that in general rules of the code of obligations applied also to commercial transactions unless specifically stated otherwise.

The code of obligations did not deal with the law of persons, in particular, with the capacity to enter into a contract. These matters were still regulated by old foreign laws still in force. It dealt with obligations in general, sources of obligations (contractual and non-contractual ones, like delicts, negotiorum gestio, or unjust enrichment), performance, transfer of debts, and liability for non-performance of the contract. The second part of the code regulated specific contracts.¹⁵ Since the labour law had not yet been accepted as a specific branch of the law, labour contracts were also included in the code.¹⁶

Other main branches of civil law, including property law, family law, and the law of persons, have never been turned into statutes. All legislative works had to stop after the German and Soviet invasion in 1939 and the occupation of Poland for the whole period of World War II.

The commercial code regulated the legal status of merchants, accounting principles, some property law issues, and commercial contracts. The first part of the code was a complex regulation of legal status and organisational forms for commercial activities, starting with one-person-business, through unincorporated partnerships up to limited liability and joint stock companies. The second part dealt with so-called *commercial activities*' (*czynności handlowe*), that is, contracts between merchants. Some minor provisions dealt with issues like

14 Jastrzębski, 2016 passim.

15 Jędrejek, 2001, p. 47.

16 Baszak, 2018, p. 189.

acquisition of property, sale of the enterprises, or good faith acquisition of movable property. The law of commerce was supplemented by a decree on insolvency, a law on amicable settlement for insolvent debtors, and two laws implementing the Geneva Conventions on cheques and promissory notes. Public law regulation of business activities was the subject of a separate statute called the Industrial Law (*prawo przemysłowe*).¹⁷

The third stream of private law regulation was intellectual property, when copyright law, patent, trademark, and design laws were created.¹⁸ Many issues remained unsolved or under construction; for instance, agricultural reforms and the dissolution of fideicommissa have not been fully implemented. The reforms were aimed at stopping accumulation of agricultural property in the hands of a small number of wealthy families and the Churches. The State bought the property at half the market price and distributed it among the farmers. The last act in this area was the act on dissolution of the trusts (fideicommissa). Basically, all trust property was to be transformed into standard real estate, which the owners could then sell without restrictions. The only exceptions were the not-so-numerous trusts established *inter alia* to fund museums and to aid the maintenance of important heritage sites. This act entered into force in September 1939, and, because of the war and later political changes, has never been really implemented.¹⁹

4. PEOPLES REPUBLIC OF POLAND

The end of World War II was also the beginning of the New World Order, with Europe and the rest of the world falling either into the US or Soviet sphere of influence. Poland, along with other Central and Eastern European countries, became a socialist state, implementing the communist vision of private law. This process in the case of Poland was somewhat distorted, and the final version of the Brave New World differed in some

17 Dąbrowski et al., 2019, *passim*.

18 Ferenc-Szydełko, 2000, *passim*.

19 Noniewicz, 2016, p. 76.

aspects in what was a standard experience of other Central European countries.

One of the founding myths of the new legal order was the agricultural reform, that is, nationalisation of large rural estates and giving the land to small farmers. This continued pre-war reforms but was well-packed and marketed as the eve of a happy future. Of course, unlike the nationalisation of enterprises, giving back seized property to farmers was not in line with the socialist property law theory, where the State should own all the land. This original sin of Socialist Poland had irreversible effects on the property law. Farmers who got the land were unwilling to return it to the State or join collective farmer enterprises (*kolkhoz*, aka farmer cooperatives). The resistance was so strong that even hard repressions against farmers failed, and the government had to accept private land ownership. The only regions where farms were state-owned were former German territories, where the State acquired the property of former landowners.²⁰

The creation of a socialist civil code was difficult for many other reasons as well. One of them was that the legislators were trained under a *bourgeois* regime and were inclined to implement solutions they were familiar with. Another was that civil law remained largely uncodified, and the only interim solution possible was to use drafts prepared by the predecessors in the pre-war era. Hence, the acts regulating private law, in particular general norms of civil law, property law, family law, and law of succession, were based on the works of the pre-war codification commission. Of course, patches and add-ons making them more socialist in form were added, but still, it was the law of the ancient regime.

Somewhere towards the beginning of 1950, there was no one civil code for Poland, but separate statutes regulated all major branches of private law. The legal community considered it an interim period before creating a new civil code, preferably based on the work already done.²¹

The government had prepared a draft of a new civil code in the early 1950s. This code was supposedly a truly socialist piece of legislation taking Poland from the Western to the Socialist legal culture, or, as it was

20 Kozerska, Stec, 2018, p. 1115 (1126).

21 Ohanowicz, 2007, p. 99.

named in that period, to the Socialist legal family. Academic and professional lawyers criticised the draft and pointed out its many defects. This was one of the rare cases when the legal community had proven itself to be attached more to the rules of the profession than to the ideology and perspective of being rewarded by the government. Even hard-core adherents of socialist Poland were sceptical about making the draft a binding and working legislation.²² Soon it was back to the drawing board, and a new set of legislators started to work on a new code. Their work was completed in 1964 when the Parliament accepted the new Civil Code.

The new Civil Code was still a brainchild of the Second Republic, although with socialist add-ons. So, unlike in some other Central European Countries, private law codification was not the emergence of a new era. Old legal literature and pre-war theoretical concepts were still a valid currency among legal scholars. Often it was supplemented by a ritual mantra *'that was then, and this is now,'* but still applicable. This does not mean that the Polish Civil Code created a bourgeois enclave in the socialist world. On the contrary, the new code, although capitalist in form, was quite socialist in many respects.

The structure of the Civil code reflects the Pandectist model, although with some modifications. Gluing up the code from different laws in force has also made its mark on the code. The code comprises five books: the general part, property law, the general part of the law of obligations, the specific part of the law of obligations, and the law of succession. Although the general idea was to have one, unified civil code, some important branches of private law were deliberately taken out of the code and regulated by separate statutes. The reasons for this were partly pragmatic, partly ideological. For instance, the work contract was not regulated in the code. Labour law became, as a result of natural evolution not only in Central Europe, a separate legal discipline with its own set of rules. The labour law was codified in 1973(?) in a separate code, with civil law serving as a subsidiary statute to cover matters like legal capacity not covered in the labour code. The reasons for regulating the family law outside of the civil code were of a more political nature.

22 Szer, 1967, p. 50.

The prevalent opinion was that it is too bourgeois to have family matters only classed as a private law. This responsibility for family policy and protection is also (if not mainly) a matter of the socialist State. So, the family code became a separate statute to maintain both legislative (separation of public and private law) and political purity.²³ Finally, land registration rules were also regulated separately. Land registration law was in a separate statute because technically private ownership of land was incompatible with the rules of the socialist economy. However, with relatively large number of plots owned by farmers and people owning their homes, it was decided that it is too early to abolish the land registration system.²⁴

What was characteristic of the law of the general part of the civil code was the lawmakers' intention to put in it all legal institutions common to other parts of the code. So, besides the law of persons, this book deals with legal acts, formation of contracts, essential error, deceit, and other elements influencing the validity of the consent, power-of-attorney, conditions, and legal effects of the lapse of time. Persons according to the code were humans, legal persons and so-called '*jednostki gospodarki uspołecznionej*' (socialised economy units, the JGUs), that is, state enterprises, government-controlled cooperatives, trade unions, etc. Although there was the principle of unity of civil law as a general act to regulate all legal relationships, there were separate rules for legal relationships between JGUs included in the code.²⁵ In effect, the code regulated three types of civil law relationships:

- between natural and legal persons other than JGUs
- between JGUs
- between JGUs and natural persons (in rare instances, between JGUs and other legal persons).

The last category covered consumer protection law as well, although in the 60s this branch of private law was in *statu nascendi*.

23 Ziemiński, 1977, p. 11.

24 Szer, p. 58.

25 Dawidowicz, 1987, p. 18.

A peculiar problem of the law of persons was the legal status of so-called *imperfect legal persons* (*ułamne osoby prawne* in Polish). This problem resulted from a normative approach to legal personality: only entities explicitly defined as legal persons. This left many entities in a legal lacuna: they were unincorporated and had no laws regulating their status. The courts and part of the legal doctrine recognised them as quasi- or imperfect legal persons giving them *per analogiam* some of the attributes of a legal person, like, for instance, the capacity to enter into a contract. The discussion on the legal status of these entities continued until 1997 when a statute regulated their status. A safety valve built into the code was in art. 4 CC. According to this rule, all the provisions of the code should be interpreted following the goals and principles of the People's (i.e., socialist) Poland. This prevented the courts from applying a more 'capitalist' approach to private law.

The property law was the part of the civil code most influenced by the rules of the socialist State. The reason for this was communism (I am using both terms interchangeably and I am aware of the debate on whether it was real socialism, communism, or commune-fascism), wherein the conviction was that all real property should belong to the State and should be strongly protected. As a result, we had a property stratification in the code with state property being the most important type of property, enjoying the widest protection, and the property of the JGUs and individual property the least protected one. State entities, even if they were legal persons, did not own real property. It was originally vested upon them by a special public law property right (not being the part of the civil code) called permanent administration right (*prawo trwałego zarządu*). Other JGUs could also get perpetual use (*emphyteusis*, see below) on public land.

Apart from the above rules many other provisions of the Civil Code cared for a preferential treatment of the state property. For instance, it could not be acquired by *usucapio* (acquisitive prescription, see old art. 177 CC), or, in the case of movables, acquired in good faith *a non domino* (see old art 171 CC).

Further, a specific form of using state land for private purposes, a perpetual usufruct (*użytkowanie wieczyste*), was created. This was (and still is, although its days seem to be numbered) a special property right,

somewhere between full ownership and restricted property rights. This right allows the user to use public real property within the limits normally assigned to the property owner. Buildings built on such land belong to the perpetual user, making an exception to the *superficies solo cedit* rule. The user was free to dispose of the perpetual usufruct with the buildings: sell it, donate, or lease. The right can also be inherited. There were normally two constraints limiting the user's rights. One was the agreement between the user and the State. Technically, the State could wind up the right in the case of improper use of the property, which, however, hardly ever happened. The other constraint was that the perpetual use is a time-limited right, created for 99 years, with the possibility of prolongation for the next 99 years. After that period, the property would return to the State, and the user would get only compensation for the buildings he or she built on the ground. The reason for creating the right was very simple: the socialist State was not able to build enough flats and houses for the booming post-war population, so it decided to let the citizens to solve the problem by themselves. Which they did with surprising effectiveness.²⁶

The law of obligation seems to be least affected by the socialist ideology. It is still based on pre-war code of obligations, being a creature of the non-socialist past. Again, socialist era add-ons have been added to accommodate the needs of the growing JGU sector and the needs of the centrally planned economy. The law of obligations has its general part, dealing with debtor-creditor relationships, contractual obligations, non-contractual obligations like, for example, delicts, unjust enrichment, etc., execution of contracts, and contractual liability, that is, basically, civil code standard. The specific part of the law of obligations deals with named contracts and some non-contractual obligations, like, for instance, negotiorum gestio. What was new were rules regarding the JGUs, like, for instance, provisions on the duty to enter into a contract arising from state production plans. The centrally planned economy also regulated prices, which was reflected in the law of sales. Some of the contracts could only be concluded by state entities, a specific form of civil-law confiscation. In the case of profits from illegal or immoral

26 For a general overview from that era see Ohanowicz, 2007a, p. 99.

contracts, most civil law jurisdictions use the *condictio ob turpam vel injustam causam*. Polish civil code provides for confiscation of profits from such contracts by the State. The original version of the civil code was created in a way giving the State the right to confiscate property even in minor cases such as not putting the right fiscal stamp on the contract.

The law of succession was also more or less unsurprising with testaments, protection of minors, statutory rules of inheritance, etc. The most socialist part of the code dealt with rules of succession of agricultural property. The law had very detailed provisions on qualifications of heirs to such property. If none of the heirs were qualified to run the farm or were handicapped, the State acquired the land as a statutory heir. This was a tool to get back in time what had been given to farmers in the times of agricultural reform. Another incentive to give land back to the State was the retirement rules. Farmers had no retirement benefits, and, during their old age were literally at the mercy of the next generation. An alternative was to transfer the farm to the State in exchange for a lifetime pension. A separate statute regulated this particular contract.²⁷

As far as commercial law is concerned, the situation in People's Poland was again a little unusual: The Commercial Code was abolished, but its provisions on business trade names, companies register, partnerships and companies were kept in force. Commercial contracts were incorporated into the civil code.

5. THE THIRD REPUBLIC

The fall of the Berlin Wall and the collapse of communist governments strongly affected private law. With Poland's turn towards a market economy and all the state entities competing with the private sector without preferential treatment from the state, modification of the civil code was necessary. As we know, the code already in force was still mostly compatible with the principles of the new political and legal

²⁷ Moszyńska, 2013, p. 239.

environment, so, it was possible to run the business as usual without the need for a big revamp of the code. However, the code included rules on preferential treatment of state entities and distorting free competition. This is why one of the first law reform decisions was to enact an amendment to the civil code removing the socialist add-ons. Consequently, Poland entered the 1990s with a fully functional civil code fit for the needs of the market economy. Some new provisions like definition of the contractual freedom were added to the code. These changes took place in times of economic crisis, so the amendments included reintroduction of the *clausula rebus sic stantibus* and valorisation of pecuniary debts by the court in case of an unexpected change of circumstances.

This also removed the pressure on having a completely new civil code; approximating the Polish law to that of the European Union, becoming the new priority. Most of the legislative work of that era was focused on this goal. Although Poland became a member of the EU in 2004, preparatory works had started much earlier. One of the choices to be made was how much of the EU-related matters should be put into the civil code. The answer was not obvious and clear.²⁸ Changing the code is a big thing because it is a fundamental act for private law relationships. Putting something outside the code is easier, but it can lead to a systemic defragmentation of private law. Knowing that there is no good solution to the problem, Poland adopted a mixed approach: some of the changes became parts of the Civil Code, and some remained separate statutes. Although there is no hard evidence for this, the deciding factor was the predictable stability of a rule. Codes do not like frequent changes. This worked fine with product liability rules, unfair contract terms, and some others, mainly related to the consumer law provisions. On the other hand, rules on liability for sale of defective merchandise relating to consumers were originally kept in a separate statute; after the next change of the EU law, they were incorporated into the code to ensure uniform treatment of B2B and B2C relationships. In 2023, after yet another change of the EU consumer law, they are again regulated in

28 Radwański, 2009, 134.

a separate act. Apparently, the EU laws are not as stable or predictable as one may think.²⁹

Other changes that happened were parallel to the approximation of the Polish law to that of the EU. They were mostly connected with social, economic, and technological changes.³⁰ Some of these changes were evolutionary, like the introduction of the rules on auction sales or some changes in the requirements of form. Some were thought as a response to the needs of the business community, for example, modifications of the rules on formation of contract or introduction of a *Kaufmanische Bestätigungsschreiben*. Although these rules work in some cases, some of them, like the *Bestätigungsschreiben*, seem to be legal transplants from the 19th century having no place in the modern economy. As a result, we have again the code that regulates three types of private law relationships:

- B2B
- B2C
- All the other

The technological changes, together with the EU legislative actions, have caused the Polish Parliament to introduce the code rules on electronic signatures and documentary form, making contracts documented through a sheer exchange of emails as sufficiently documented.

Finally, social changes have had a huge impact on the law of succession and family law. The changing model of family relationships has caused lawmakers to widen the number of statutory heirs. The limitation of liability of heirs was introduced to protect minors and heirs not aware of the financial status of the deceased. New rules on wealth transfer in business-related matters were introduced,³¹ and a new vehicle of intergenerational transfer, the family foundation, was introduced in 2023, to name a few.

The family law, still outside the civil code, was enhanced and now includes new matrimonial property regimes and rules of representation

29 Max Planck Encyclopedia of European Private Law, 2012.

30 Radwański, 2009, pp. 134–135.

31 Borysiak, 2011, p. 39.

and liability of spouses for business debts of one of them. All this was done to protect the spouse and the children from reckless business decisions of the other spouse. No serious legislative attempt to regulate same-sex relationships have been undertaken, although the problem is still on the political agenda.³²

Other branches of private law, especially company law and intellectual property law, have undergone massive changes leading to recodification. Unlike the civil code, the old commercial code and the decrees on insolvency and amicable composition with creditors did not survive the test of time. They were prepared for old-fashioned business models, with entrepreneurs avoiding risks, acting honestly, and striving to pay their debts. The wild early years of market reforms were not the time for such people. Furthermore, it was easier to introduce a new code than to revamp the laws from the 1930s.

6. WHY NO NEW CIVIL CODE IN POLAND?

Poland has not decided to recodify its private law for reasons that are complex and not always clear. The debate on recodification peaked somewhere around 2010, after the rather successful recodification of the Commercial Companies Code (Kodeks spółek handlowych), intellectual property (copyright and industrial property laws plus insolvency law). In all the above cases, change was inevitable. Either, as in the case of the Companies Law of 1936, the act was outdated, and it was easier to rebuild than to revamp the code, or the need to adjust the laws to European Union laws forced the lawmakers to act.

Speaking in general terms, neither of the two reasons existed in the case of the civil code. The 1964 Civil Code was more a vestige of the pre-1945 legislation than a not-so-proud relict of the socialist past. The reasons for this have been already explained elsewhere in this paper. The discussion on the (re)codification of the civil code in the first decade of the 21st century started with the Adam Mickiewicz University in Poznań's Professor Zbigniew Radwański, who assembled private

32 Załucki, 2022, p. 107.

lawyers, formed teams, with each team responsible for preparing one of the books of the future code. The unwritten rule (shared with me by one of the members of these teams) was that the teams should not share their ideas not only with the general public, but also with each other. Only after the publication of all the books the discussion and gluing and fitting the books into one, new code should begin. The only document known to the general public from the very beginning was the Green Book on the reform.³³ The codification teams managed to publish only a draft of the general part of the civil code,³⁴ and then, subsequently, their activities slowly died out. One of the possible reasons for this was the death of the spiritus movens of this enterprise, Professor Radwański: no one was willing to step into his shoes. Another important fact was that, at that time, many lawyers believed that it would be possible to create a European Civil Code, one that would make all other codes obsolete. Finally, in 2015, owing to political tensions, the government disbanded the Codification Commission, and law professors lost their interest in the subject.

Further, the private project of the civil lawyers from the Jagiellonian University suggested that the new law of obligations should be centred around services as a central term. Cracow scholars purported that in the 21st century, the economy is a services economy, not a goods economy, so traditional approaches centred on sales and ownership.³⁵ This approach, although quite innovative and interesting, has not been discussed in the legal literature. The proposed idea was either too novel to be considered by the academic community, or simply too impractical at the time the proposal was made. Today, with software-as-service solutions and widespread use of online shopping and streaming services, the Jagiellonian team proposal could be a good starting point for a discussion on the new framework for private law regulation.

Apart from the external circumstances described above, strong debates were common about the necessity of recodification. The debates,

33 Radwański, 2006, *passim*.

34 Available at: <https://www.gov.pl/web/sprawiedliwosc/komisja-kodyfikacyjna-prawa-cywilnego> (Accessed: 11 September 2023).

35 Karasek-Wojciechowicz et al., 2009, *passim*.

as usual, took place in law reviews, and the practitioner community issued its own (generally unfavourable) statements..³⁶ A book from the conference commemorating 50 years of the Polish civil code has been published.³⁷ The opinions issued by learned colleagues varied from strong support of recodification, through proposals for the reform of select institutions, up to the straightforward *'it ain't broke, don't fix it'* position. Clearly, no consensus was observed on the need to create a new civil code. It seems, however, that the majority opinion seems to be that it is better to amend the existing code than to create a new one from scratch.

Other circumstances also need to be considered. One is that every new codification needs to have a leitmotif, something that sets its goals and objectives. In the age of great codifications, sometimes the need is to fix a patchwork of local or particular laws, just to put together what has already been in force. In most cases, however, the need to put the blocks together is not enough to start drafting a new code. You need something more. The 19th-century world had been changing both politically and economically. It needed legal tools that could be used to deal with the challenges of the second industrial revolution and also be the hallmark of emerging political powers. Two of them – Germany and France – became such important players that they managed to influence the shape of laws elsewhere in Europe and abroad: the French lawyer Boissonade authored a draft of the modern civil code commissioned by the Emperor of Japan. This draft was not adopted, because the Japanese government decided to adopt the German civil code (already in force and working) instead.³⁸ The same was true for Polish interwar codification attempts: one, its goal was to show that Poland is an independent state with its laws (maintaining a legal system created by former rulers was not an option).³⁹ Even the 1964 code seems to maintain the decorum of being the creation of an independent country, maintaining its independence against all odds. At the same time, it was a symbol of the

36 Radwański, 2009, p. 131; Kępiński, 2014, p. 237; Andrzejewski, 2014, p. 87.

37 Stec, Załucki, 2015, p. 25.

38 Epp, 1967, p. 15; Sherman, 1918, p. 198.

39 Górnicki, 2011, p. 111.

new normal. In this socialist economic system, even bourgeois rules of the civil code can be tamed, fixed, and used to regulate relationships between state-owned enterprises.

There was no such thing as a ‘we need to do something new’ moment after 1989. The Polish transition from being a socialist state to something new, called The Third Republic, was peaceful and negotiated. The communist government and democratic opposition or, more precisely, the part willing to parley concluded a series of so-called *Roundtable Agreements* being a roadmap for both future actions and transition of power. It was a system where former apparatchiks and former dissidents served as cabinet ministers in the same government. It is for future historians to analyse this period and to assess the outcomes of the Roundtable era. What we know for sure is that these political changes were not violent. There was no symbolic fall of an equivalent of the Berlin Wall. Rather, it was named after a largely misunderstood statement of the first non-communist prime minister of Poland, Tadeusz Mazowiecki, ‘*a thick line policy*’. He meant that in 1989 we decided to cut off from the past and start anew. No hard feelings, no revenge, let bygones be bygones. This policy of forgiveness and giving a second chance could not be a turning point for re-creating civil law. It was more business as usual. No Big Idea, no Big Picture!

Besides, the principal goal of that era was mainly to make Polish law compatible with the European one, to join the European Union within reasonable time. Having joined the EU, the Polish parliament spent years passing laws implementing numerous directives. It was not a good time for codification; although, as far as I know, this issue has never been raised in the codification debate, Poland’s being a part of the EU can also be an argument against recodification, understood as creating something more than just a restatement and a cleanup of existing laws. The reason for this is that even if we have this Big Idea, it should fit into an even Bigger Idea, which is the European Union, which, so far, has not been able to come up with a coherent draft of the European Civil Code, but is more than keen to regulate contractual matter, particularly consumer contracts. In the case of the sales contract, regulated in the Civil Code, we have witnessed so far four different modifications of the rules on the liability for sale of defective goods induced by constant changes

of the EU law. This lack of stability is disastrous for the code and is not a good prognosis for the new code.

Another reason for no particular drive seen for recodification is because what we are experiencing right now is another trend, which is sometimes called the de-codification of private law. The subject-matter of private law became so complex, and socio-economic environment so unstable, that the idea of having everything important covered in one civil code is no more sustainable. Consumer relations, business-to-business relationships, transnational entities, intellectual property, or international private law, and online transactions all require separate legislation. These tend to be amended every now and then. The same goes for more specialist legislation and areas regulated both by private and public laws. With this complexity of regulated matters *'one single code to bind them all'* is but a dream.

7. CONCLUSION: THE DECLINE OF THE AGE OF CODIFICATION?

Will there be a new Polish civil code? I believe that recodification will not happen in the near future, unless something really unusual happens. The Age of Codification seems to be over. What we see in countries liberated from Soviet dominations is nothing more and nothing less than completing the work started in the first half of the 20th century. Of course, newly emerged states will still have to create their laws, but having a brand new civil code will no longer be as important as it was one hundred years ago.

Much to my regret, if we ever get excited in the future over a brand new code, it will most probably not be a civil code but some public law creation. All this because of what I called in one paper a 'post-civil-law society'. In the 1960s German lawyer and economist Böhm wrote a paper about private (civil) law society.⁴⁰ A socio-economic system is governed by the principles of the civil code. Very bourgeois, but also oriented at individual freedom, wealth generation, and entrepreneurship. Such a

40 Böhm, 1966, p. 75.

society exists no more. Even in Bohm's times, it was difficult to organise one's affairs in a way that a person was completely or almost completely independent from the support of the State. Today, it is almost impossible. Almost everything, access to health care, retirement benefits, public transportation, roads, and even Internet access, is regulated by the State. The world has become too complex for individuals to organise on a purely contractual basis. It is the State that takes over from here, becoming increasingly omnipotent and omnipresent. Thus, we are faced with our good old friend Leviathan, whose actions are perhaps counterbalanced by Behemoths: large, multinational firms able to operate outside of the nation-state legal system and able to create their own 'rules of the community': contractual in nature but uncertain and unpublished. No traditional *Privatrechtsgesellschaft* institution: family, churches, NGOs, or cooperative will be able to defend its members from any of these two powers. They most probably will either cease to exist or become vassals of either Leviathan or Behemoth. So will the people.⁴¹

I am not declaring that the civil law is dead. No, or at least not yet. As long as people have property and accept traditional values of the *Privatrechtsgesellschaft*, civil law institutions will be needed. Wills have to be made, contracts prepared, companies run. However, this will not be forever. It is possible that we are going towards the Public Law Society of the future, where public law reigns over minds and hearts of people, which means that perhaps we should preserve our old textbooks from the times of the centrally planned economy era. Because, regardless of political reasoning behind giving power to public law institutions, legislative techniques used to make the system work will be the same as those used before 1989. This will go well with the world of Leviathans. The Behemoths are much more whimsical and can be governed by changing moods of an Elon Musk and his ilk, or by mutating ideas of what is fair and held by self-appointed volunteers acting as guardians of the '*standards of the community*'. Classical civil law techniques will not work while dealing with Behemoths. Perhaps the Behemoth law will be analysed with data science methods, or perhaps it will be easier and

41 For an elaborate version of this argument, see Stec, 2022, p. 103.

much cheaper to buy a pack of Tarot cards and try to guess the rules in force today. If any of this happens, it will mean that private law will no longer shape the mindset of the general public. Will this change of mindset have any longstanding effects on the society? Only time will tell.

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