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DOI: 10.15290/oes.2019.04.98.11

THE ROLE OF PROPERTY LAW IN CREATING THE BASIS OF THE MARKET ECONOMY AFTER 1989 (REGARDING THE HISTORICAL CONTEXT)¹

Summary

Purpose – The purpose of the paper is to demonstrate the role of property law in the period of systemic transformation of the state and economy, which is the period of the transition from command-and-distribution economy to market economy.

Research method – Analysis of the sources of law, views of representatives of science of law and views of judicature.

Results – It can be considered that this was a unique process in the history of the Polish political system and in the history of the Polish economy. Property law became the basis for the functioning of legal institutions specific to the market economy, such as for example, commercial companies.

Key words: property law, state system and private property, privatization, economic freedom, economic activity, market economy, legal forms of running a business, commercial companies

JEL Classification: K11, K25, K41

1. Introduction

In the historical development of people, some institutions of private law have a special value, an example of which is property or commercial companies when it comes to running a business. A characteristic feature of property law is the fact that it is lasting (eternal) [Pańko, 1984, p. 13], and this creates a special value, at least due to the fact that there are not many legal constructs which can be characterised with continuation and stability of principles. Unfortunately, the same does not apply to the institution of a state, which several times lost its entity and independence, or to that of a local government or public life organisations [Stelmachowski, 1998, p. 11]. Property law and commercial companies are institutions of private law, which due to their structural stability play a fundamental role in politics, economy, and also in law. Especially, with respect to property it can be said that its lasting nature results

¹ Article received on 8 January 2019, accepted on 6 May 2019.

from axiology, that is from the fact that it belongs to the natural rights of a human being. In each legal system, property belongs to fundamental laws meeting a number of material functions, such as economic or social.

In the economic sense, property law creates the greatest possibilities to enjoy specific property goods [*Pravo rzeczowe...*, 2013, p. 219]. In Poland, property is a right that is highly appreciated not only in the economic sense, but also from the social perspective. When describing the social function of property it may be concluded that it is a measure of goods distribution; it is also the foundation on which freedom of an individual is based [Rozwadowski, 2010, p. 1123].

Property and institutions intrinsic to the market economy either evolved or were subject to change. In a formal sense, after 1944, they went through various stages of transformation, and their content in Poland and other countries of the “socialist camp” was subject to experiments. The then regulations in the field of property law and commercial companies met with harsh political criticism as they were based on incorrect foundations originating from capitalistic social and economic relations. They did not respect the needs of “state socialist property and socialised trade relations”, or the situation of the “entities of socialised economy”, to which the institutions of the private law could be applicable.

In 1950, new general civil law regulations were published [Act, 1950], which first of all introduced changes with respect to the legal interpretation and the execution of subject laws, which would reflect the ideological assumptions of the state regime. The need for total cancellation of the former regulations of private law was particularly strongly stressed in the resolution of the Presidium of the Government dated 27 September 1950, imposing the development of a new civil code [Resolution of the..., 1950]. The discrepancy between the pre-war regulations and the post-war regime was gaining increased visibility, and as a result the existing regulations were replaced with new ones and thus “adjustments” to new social relations were introduced. In 1956, a Codification Commission was established which for many years worked on codification of the civil law [cf. Mazuryk, Sadowski, 2013].

On 23 April 1964, the Civil Code was approved [Act, 1964] which overruled the Commercial Code [Regulation of the President..., 1934]. Formally, for a long time the binding document was a framework regulation concerning running a business, that is the Industry Law [Regulation of the President..., 1927], which was finally overruled pursuant to art. 45 of the Act of 8 June 1972 on the execution and organisation of handicraft [Act, 1972]. It should be stressed, however, that despite the fact that the Commercial Code was overruled, the regulations concerning general partnerships, limited liability companies and joint stock companies were maintained in force, and additionally with respect to those companies and partnerships, regulations concerning the business name, power of procuration and commercial register were kept in force [Act, 1964, art. VI § 1 of introductory stipulations]. Keeping those regulations resulted from the need to maintain trading relations with capitalist countries.

Almost thirty years since 1989, it may be stated that despite the pressure of the socialist doctrine from 1944 to 1989, it was not possible to completely eliminate property law and commercial company law by the ideology of the socialist state regime. Any attempts to reform the centrally planned economy which were undertaken before 1989 also failed. It may be assumed that to a larger degree, property law as such was “defended” by the individual ownership of land in rural areas. It was impossible to nationalise the arable land as was the case of industry and manufacturing². In urban areas, some “private-owners” (*“prymaciarzy”*) survived, who after 1989 took the effort of making the way “back to capitalism” [Jasiński, 1994, p. 10]. As it turned out, it was a complicated and multi-layered process with numerous dysfunctional phenomena. Previous academic theories did not foresee such a turn in history; therefore it was difficult to find a model to follow or verified institutional tools which would facilitate such regime transformation. This process was commonly referred to as privatisation.

The comprehensive processes of political transformations after 1980 in Poland, and later in other Central and Eastern European countries gave privatisation a special character. In a manner different to capitalistic economies, privatisation did not only mean a technique leading to an enhanced efficiency of business, but it was related to fundamental transformations affecting all levels of functioning of society and the state. Property law and capital companies became legal instruments, which were allocated a special task, not typical for those institutions, that is the task of social and economic transformation to be implemented without a violent upheaval in the life of the society and the state.

Change of property relations and forms of running a business became tools to build the identity of the new system [Zdziennicki, 2015, p. 9]. There were no new legal institutions developed specially for the needs of privatisation; there were no new experimental legal instruments created (the process of privatisation in post communist countries was an experiment by itself). Instead, the existing, safe and stable legal constructs were adopted, but with modifications resulting from their special tasks. The property law and commercial companies received a special role and specific and unusual functions with respect to the political system, as well as the economy and society [Mróz, 1999, p. 167].

² It should be added that there were also other opinions concerning the issue of the property law in the times of system transformation [cf. Zdziennicki, 2015, p. 9].

2. The idea versus the content of the property law in the context of the political breakthrough after 1989.

The universal role of property law in the times of political breakthrough can be clearly seen when separating the idea of property from its content. The idea of property is lasting and eternal, defined as attributing to an individual or a group of people the presumption of exclusive rights to and control over objects or intangible assets; while its content can be variable, depending on the economic and other conditions, including history of social organisms [Pańko, 1984, p. 15; Mazurek, 1991, p. 143; Majka, 1988, p. 88]. The etymology of the word ‘property’ from the Latin word *proprietas* which means “conformity with the tradition” indicates the pre-legal sources of property. [Zaradkiewicz, 2013, p. 15 et seq.; Tittenburn, 1996, p. 126]. The interdisciplinary and eternal character of ownership and its relation to numerous aspects of human activities is obvious; it originated from philosophy and “walked” into law and economy [Jaruś, 2014, p. 8; Jaruzelska, 1992, p. 49].

The variability of contents of property law depending on the political conditions did not destroy the idea of property as such, even in the situation when the subject of property law was the socialist state. Therefore, when we separate the idea of property law from its content, we can say that the content of property law and its function change depends, for example, on the social and economic context, time, place and the subject executing the property law. In case of such an assumption, we should not talk about the reform of regulations concerning property law after 1989, but about the reconstruction of this law. It is commonly understood that the term “reform” refers to a change in a certain system which, however, does not mean any radical and qualitative transformation of this system. The term “reconstruction” means restoring something according to the preserved fragments, remains, or recreating something partially destroyed. Furthermore, in the study of the civil law of the socialist times it was stressed that the unification and codification activity which took place from 1945 to 1946 applied constructs from the French, German and Austrian legal studies, that is classical institutions binding in European capitalistic countries. On 12 June 1945, the Ministers’ Council passed a resolution that a total unification of the civil law should take place by 1 April 1946 at the latest [Lityński, 1999, p. 219].

The unification of the civil law included over a dozen decrees, including the Decree dated 11 October 1946 – the Property Law [Decree, 1946], Act on Land and Mortgage Registers and the Regulations implementing the Property Law and the Act on Land and Mortgage Registers [Decree, 1946a]. These issues were subject to numerous academic discussions [cf. Grzybowski, 1946, p. 4; Lityński, 1999, pp. 217-227]. The origin of these legal constructs resulted from the reception of the Roman law in Europe in the 17th and 18th centuries. At that time, Europe acquired the heritage of Roman lawyers, and additionally, in the 19th century, the dogmatic studies included in the „*Corpus iuris Civilis*” were developed and deepened by legal studies, creating the so called modern Roman theory. Great codifications were created following the dogmatic interpretations of the Roman law, such as the

Napoleonic Code, or the civil codes in Austria and Germany. The Roman dogmatic system was subject to various modifications in those codifications, nevertheless it remained their foundation.

After Poland regained independence in 1918, different scopes of regulations concerning civil law were binding within its boundaries. After World War I, codification works were commenced to introduce unified law for the whole country [Mazuryk, Sadowski, 2013, p. 8]. The unification works lasted for many years; there was a special Codification Commission established with the Act of 1919, including eminent representatives of the jurisprudence. In Poland, in the period between the wars, it was possible to unify the law of obligations by issuing in 1933 the Code of Obligations which was highly appraised by theoreticians and practitioners. In 1934, a partial unification of commercial law was achieved in the form of also highly appraised Commercial Code. This Code was only the first part of further works, since it was supposed to include two more parts: the maritime and river law, and also the insurance law.

After 1944, in the context of nationalisation and inadequacy of the property law structure to the needs of the socialist economy, the most important fields of legal relations occurring in the command-and-distribution economy were standardised mainly by legal documents of a rank lower than acts of law, issued by various state bodies. Legal regulations which were not codified and occasionally did not comply with the constitution, with time became “normal” phenomena in the socialist system. Such mode of legal regulation was allowed by art. 2 of the Civil Code decreed on 23 April 1964 [Act, 1964], from which it transpired that in cases of special needs concerning trade relations among the units of socialised economy, the Ministers’ Council or any other governing body of the state administration could regulate the legal relations of such trade relations in a manner differing from the stipulations of the Code. It was peculiar that this specific manner of making law also concerned the regulations of the Civil Code of the *iuris cogentis* nature. The *iuris dispositivi* regulations could be changed freely; it was assumed that if contractual parties can regulate their mutual relations in a different way, then it is even more justified in the case of the governing body. Furthermore, if we add that in the Civil Code there was a regulation [Act, 1964, art. 384] authorising the supreme state governing bodies to issue binding contractual conditions or contract samples, then it is clear that the newly implemented Code opened the possibility for the standard-making activity of the administration in the field of socialised trade relations. Such state of affairs perfectly facilitated the commanding control of the economy and was the expression of the dominance of the ideology over the principles of market economy.

In the conditions of the market economy based on private property, it is of fundamental importance to secure autonomic and equal position of entities participating in the conduct of legal transactions, without any direct constrain from the state organs. Among the pillars of the civil law, apart from the property law, there are also freedom of contract, safety of trade and principle of equity [Stelmachowski, 1998, p. 46, 91; Machnikowski 2005, p. 125 et seq.]. Such values

create the fundamental catalogue of civil law principles. During the communist era in Poland, the catalogue of principles reflecting the values protected by law was never adopted by the communist doctrine of the civil law.

In their contents, a number of legal constructs of the Civil Code of 1964 were far from the classical interpretation originating from the Roman law. That was for example the case of the property law and the freedom of contract. The legal understanding of property was given a totally new content originating from the ideology adopted from the Soviet Union. In the Constitution of 1952, communist Poland introduced a categorisation of property law by differentiating types and forms of property [*Kodeks cywilny...*, 2018, p. 24], and the consequence of this resulted in the differentiation of property law protection. It was setting the direction for the state to influence the economic structure of the country.

Following the indications of the Constitution, the Civil Code introduced a division into public property (of the state, cooperatives or other organisations of the working people), individual property and personal property. In fact, the dominating state property was structurally cohesionless and far from the typical classical structure of property right. According to the wording of the then binding art. 128 of the Civil Code, the socialist national property (of the state) was the impartible right of the state (the principle of unity of national property). Taking into consideration the classical structure of property law originating from the Roman law, it may be concluded that the concept of the socialist property was quite peculiar [more in: Czachórski, 1956; Czachórski, Wasilkowski, 1952; Machnikowska, 2010; Radwański, 1960; *System prawa cywilnego...*, 1977; Wasilkowski, 1972; Wieniediktow, 1952].

The state served the function of the owner while formally not being one, since pursuant to the wording of this regulation, the whole society was the owner. Usually private property is the factor of social differentiation, but the in the case of the national property it was made a special factor of social “integration” or rather of proletarianisation of the society. The artificial concept of socialist property provokes the question: is the “all-nation property” a property at all? [Brozi, Winiarski, 1980, p. 19]. The author of this question reached the conclusion that the meaning of the (socialist) “all-nation property” in comparison to the meaning of the “private property” is so different that using the word “property” in both cases is so misleading that it would be good to find a different term to define “socialist property” [Brozi, Winiarski, 1980, p. 32]. In the socialist controlled economy, this led to the reduction of the subject nature of business entities and, as a result, the elimination of the principle of freedom of contract from legal regulations and the practice of socialised trade relations.

After rejecting the Marxist concept of property, the lawmaker faced the necessity to re-establish the shape of property to be adequate for the developed market economy. For that purpose, legislative actions were taken in many areas concerning the property relations and the property law itself.

3. On normative foundations of the reconstruction of property relations

Reconstruction of property relations was commenced from the change of constitutional regulations, as well as the provisions of the Civil Code, since those acts of law contained the base for further regulations of property relations. The Law of 29 December 1989 on the Amendment of the Constitution of the Polish People's Republic [Act, 1989], introduced the principle of equal rights for all business entities instead of the Marxist concept of property. It removed the regulations related to the existing differentiation of property, those which established preferences for public property. Following the changes in the Constitution, the lawmaker also introduced the amendment of the Civil Code and in 1990 waived the stipulations of art. 126-135 which were the consequence of the Marxist standardisation of property types. The new Civil Code [Act, 1990] also eliminated regulations referring to the entities of socialised economy, gave up a number of privileges in the field of civil substantive law and procedural law concerning units of social economy. The new Civil Code [Act, 1990, art. 55] also introduced the concept of an enterprise in the objective sense, useful for legal transactions [Wilejczyk, 2004, p. 23]. Furthermore, passing the Law on Business Activity on 23 December 1988, constituted a significant base for the re-introduction of the market economy [Act, 1988]; it waived the principle according to which running a business activity required a permit from the state.

After 1989, a common justification for privatisation was simple: if we want to have a market economy, then we should bring our property structure of the economy to that of developed market economies, and that meant the privatisation of formerly state-owned property [Iwanek, 1992, pp. 7-8]. Numerous experiences with the state-owned economy clearly showed that its reforms were groundless and incurred long-term dysfunctional phenomena. Radical changes in the property structure were an absolute necessity; otherwise the process of the market economy development would have been sentenced to a failure. The evidence of this were the attempts to "market" the economy of the communist Poland after 1980. Many years earlier, in the subject literature there were already opinions confirming the "inherent incompetence of state administration" and stating the fact that "the state being a huge consumer will always be only a poor producer" [Szyszkowski, 1939, p. 15]. It was also concluded that "the one who believes that (...) in the management of its market monopolies, the state would adopt simple, strict and productive methods of private industry must be either very naïve or believes into Machiavellianism" [Szyszkowski, 1939, p. 15]. The idea of a change of a specific subject of the property law (i.e. the state as the owner) occurred already many years before the commencement of privatization of state-owned companies, however then it was not the starting point for the political transformation of the state.

From 1944 to 1989, state-owned companies constituted the base and the foundation of the controlled economy. That is the reason why the property transformation in the field of economy started from them. Pursuant to art. 1 of the Law of 13 July 1990 on the privatisation of state-owned enterprises [Act, 1990], the idea

of privatization was to make available for third parties the stock or shares in companies with the exclusion of the State Treasury, created as a result of the transformation of state-owned companies; also, to make available for third parties the companies' property or sale of such companies to third parties. The quoted regulation did not identify the third parties in favour of whom such privatisation of state-owned companies could take place. In the Law on commercialisation and privatisation of state-owned companies, the term "third party" was eliminated [Act, 1996].

In both cases, the general understanding of privatisation was sufficient to conclude that privatisation should be in favour of natural persons or legal persons other than the state. As it turned out, the issue was not simple from the legal point of view, since it was not defined which entities should be deemed as state legal persons. Domański [1993, p. IV] stated that a participation of at least one non-state entity as a shareholder or a stockholder in a company equals to the fact that such company has lost its status of being state-owned. In such context a question arises: if we assume that a limited company with a minimum participation of capital other than that of the state is not a state legal person, does it introduce a totally new concept? Should we treat such a company as an entrepreneur whose operations are based on private property?

A positive answer to the above questions would signify that we fail to recognise the purpose of privatisation as a process transcending the framework of a barely formal change of the owner. In such a case it would be difficult to talk about an actual change of the owner since the decisive role would still remain with the state.

Scholars studying the rules of market functioning noticed long ago that the principles guiding private economy can be summarised as two twin laws, that is the law of profit and the law of risk. It was stressed that when separated, these laws do not have any economic or social value. The state is not subject to the law of risk; it cannot go bankrupt on the same conditions as a private entrepreneur. "Citizen would just have to open their purses and cover the deficit; this sanction is so dispersed among the whole society that it becomes almost unnoticeable and inefficient" [Szyszkowski, 1939, p. 17]. Profit as an ultimate goal in an enterprise based on state property may be of secondary importance, postponed due to social and political reasons which at a given moment happen to be of special interest for the state.

The regulations of both privatisation acts of law exposed rather the "technical" and procedural side of "eliminating the state" from state-owned companies allowing for various paths of privatisation. In a way it was justified, since the purpose of privatisation regulations was not to develop a theoretical structure of private property, but to carry out the unique process of political transformation of the state and the market system via private companies, that is a limited liability company and a joint stock company, which were previously based on state-owned property. The evidence of the great importance attributed to the privatisation was the fact that a special Ministry of Ownership Transformation was established, and on the level of regions (*voivodships*) there were special departments for privatisation. Irrespective from the general supervision over the course of privatisation, the Minister of

Ownership Transformation decided about the privatisation of state-owned companies on the central level, and regional governors (*voivods*) decided about the privatisation of local companies which were under their supervision. Individual companies created on the basis of the regulations on privatisation had to face numerous new challenges, such as competition and its mechanisms [cf. Gorynia, 1998, p. 14 et seq.].

Unfortunately, the privatisation also induced numerous dysfunctional phenomena both on macro and micro scales [Mróz, 1999, p. 236 et seq.]; for example, income from privatisation served first of all to “patch” the state budget. There was also the process of accumulating property rights by former communist nomenclatura, as well as other numerous negative phenomena manifesting in the process of selling state-owned companies. Furthermore, the problem of re-privatisation was not resolved, which still today poses a serious challenge. It seems that the change of the political system and the economy of the state should have been started with regulating the issue of re-privatisation, which later should have been followed by the privatisation of state-owned companies.

Authors of subject literature do not agree on the exact timing of the commencement of the privatisation process and market economy development. According to Tittenbrun, the actual privatisation started before 1989. Following the Regulation of the Ministers’ Council of 8 February 1988 changing the regulation on the execution of the law on state-owned companies [Regulation..., 1988], there was a possibility to establish private companies on the basis of the property of state-owned enterprises for the purpose of their more economical use and enhanced productivity of such property; such companies were later referred to as the “nomenclatura companies”. In February 1989, a law “on some conditions of consolidation of national economy” was passed. It was the legal base for massive over-taking of state-owned companies property by the said nomenclatura companies. In many cases, numerous companies which were established (most often as limited liability companies) as a result of „division” of state-owned enterprise property, took over those parts of their assets which were the most profitable. Usually, such companies were established and managed by managers of state-owned companies, as well as members of the communist party apparatus and other representatives of the party nomenclatura. In a state-owned company, a typical nomenclatura company monopolised the procurement of raw materials, consumables and energy, and also sales of finished goods, in this way grasping from both sides all profits of the company [www 1].

During the times of the transformation of property relations after 1989, it was not properly secured to provide at the right moment the general statutory law to regulate the re-privatisation issue³, which turned out to be a serious mistake. It should be also stressed that the process of re-privatisation has not been properly resolved; the missing element was a comprehensive approach to the transformation

³ In the field of law, the problem of re-privatization is a wide subject which requires separate studies and research [cf. *Problemy reprivatyzacji*, 2017; Osajda, 2009].

of property relations. Nowadays, it usually results from administrative decisions or valid rulings of the court. However, it only refers to those cases where taking over of property was illegal (e.g. there is no legal base or transgression of nationalisation limits). Poland remains the only country of the former socialist block where the process of re-privatisation has not been carried out. The consequences of the lack of re-privatisation are nowadays strongly and negatively felt by society, which impacts the general perception of the transformation of property and political system of the state.

4. Conclusions

The Polish economy is a young market economy, and private property is its foundation. It is also the base for shaping social relations. Typical legal forms of running a business are partnerships and limited companies.

The process of property transformation, which started after 1989, created the foundations for the development of market economy. Despite numerous dysfunctional phenomena, it should be stated that property law and limited companies were the legal constructs which handled the challenge of “the return of capitalism”. It was an unprecedented process of changing social, economic and political systems mainly with the use of legal constructs from the field of private law.

Nowadays, the Constitution of the Republic of Poland, which defines the freedoms and rights in the field of economy, social life and culture, underlines the statement that everybody is entitled to ownership, to other property rights and to the right of succession (art. 64). Ownership, other property rights and the right of succession are legally protected and equal for all. Pursuant to art. 64 point 3 of the Polish Constitution, property may be only limited by means of a statutory law and only to the extent that it does not violate the substance of such right. Within the limits defined by laws and principles of community life, to the exclusion of other persons, owners may enjoy objects of their ownership in accordance with the social and economic purpose of their rights, in particular they can collect fruits and other incomes from that object [*Kodeks cywilny...*, 2018, art. 140]. Within the same limits, owners may dispose of such objects [*Kodeks cywilny...*, 2018, p. 29]⁴.

Since pursuant to art. 20 of the Polish Constitution, the social market economy based on the freedom of economic activity, private property, and solidarity, dialogue and cooperation between social partners constitutes the basis of the economic system of the Republic of Poland, it is the foundation for developing contracts, that is the main sources of social relations with the participation of entrepreneurs [*Prawo zobowiązań – ...*, 2018, p. 3].

Public property is the exception to the principle that the private property is the statutory foundation of the economy. The lawmaker assumes that the owner himself has to look after his property. Furthermore, the owner shall also bear the risk of its

⁴ The relationship between art.140 of the Civil Code with art. 64 of the Constitution of the Republic of Poland is the subject of discussions on the doctrine [cf. Rozwadowski, 2010, p. 1131].

depletion or loss; the owner should manage his property duly in his own interest [*Prawo rzeczowe...*, 2013, p. 303]. However, there are such public purposes which cannot be secured or achieved by way of private property. In the public sphere the state no longer holds the monopoly, however, there are some fields such as national defence or public security, where the state plays an important role. New threats or new public needs which were not taken into consideration previously continue to arise (e.g. environmental protection issues). They are the arguments to maintain the specific scope of state property. However, such property is not a unified mass, either with respect to the object or the subject of ownership. As it is stated in the subject literature, after 1989, the functional division into public and private property is the most important, however, such division is not always very clear [Stelmachowski, 1998, pp. 187, 189]. Furthermore, it should be stated that such division nowadays does not equal to the differentiation in the property law with references to the subjects of this law. Operating next to each other in the economic system, the private and the public sectors find areas where they co-operate using specific legal instruments. Depending on the economic policy of the state, the integration of the public and private sectors may have various intensity and various levels, such as for example the public-private partnership [Zagożdżon, 2016, p. 45]

The subject literature numerously stressed the eternal character of property and the principal role of property in the life of an individual, as well as an organised society [Pańko, 1984, p. 13]. Therefore, it may be concluded that as a result of the process of political transformations after 1989 and the development of market economy, property regained its fundamental and natural character in the organisation of society and economy; however, it requires a new perspective on the issue of the market balance which nowadays is deemed to be the base concept of the economy [Akerlof, Shiller, 2017, pp. 1, 6-7, 199].

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