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Freedom of Contract in Poland and the Central European Experience

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Abstract
The present foundations of contract law in Central Europe developed in a compound way, under a constant "center" – "peripheries" tension. In the 20th century most countries in the region followed a similar way of evolution. This originated in the free-market approach with a strongly liberal dimension in the inter-war period, proceeded through radical denial of party autonomy under the post-war socialist regime and was concluded with the revival of the *laissez-faire* concept in early 1990s. A pivotal element of this development was the concept of freedom of contract, perceived in a symbolic way, as a manifestation of market libertarianism. The paper analyzes the main threads of this development, adopting Polish law as the vantage point. It attempts to draft focal premises of the intellectual history of freedom of contract in Polish law. It draws attention both to specific features of the Polish attitude towards this concept, as well as seeking to identify common denominators for Central European contract law. In doing so, the paper attempts to locate the development of Polish contract law against the backdrop of the "center" – "peripheries" dynamic and to reach a preliminary understanding of the extent to which the Polish concept of freedom of contract bears certain mainstream or particular features.

Keywords
Contract law, consumers, European private law, socialist law, Poland, Central Europe.

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1. Introduction: from the center to peripheries

"This is a cultured gentleman from a God-forsaken place"[1]. In this way, mixing irony with a grain of condescending honesty, Sergei Prokofiev referred to Karol Szymanowski, the Polish composer and his contemporary. This fairly innocent joke touches however upon a more fundamental intuition about relations between the center and the "God-forsaken" peripheries. The inherent tension between these two concepts has shadowed the perception of social and economic realities in Central Europe for centuries:[2] they have framed, at various levels, both the collective self-consciousness of societies in the region, as well as the perception of "outsiders". The second half of the 20th century opened new chapters in this interaction. Most of the Central European countries then went through profound social and market tensions, which unfolded along roughly the same pattern: from inter-war capitalist (or early capitalist) socio-economic structures, through five decades of a communist regime, to the post-socialist transformation followed by accession to the EU and subsequent integration of EU *acquis* with domestic legal orders.

Contract law was one of the protagonists of these changes. Throughout the 20th century it was evolving under the pressure of the political and market forces that carved out the CE's internal realities. The concept of autonomy and self-determination of the market was at the very center of this evolution, being either strongly endorsed or fiercely opposed. The main conceptual axis of this evolution was the idea of freedom of contract, which throughout the 20th century either adhered more closely to the *laissez-faire* ideal or drifted towards more specific and constrained notions. In this way, freedom of contract encapsulates the destiny of the relationship between market and politics in Central European countries throughout the 20th century and serves as one of the main indices for more detailed features of contract law in this period.

One of the principal factors that drove changes in this respect was a clear center–peripheries dynamic[3]. Historically, the Central European countries have been suspended constantly between political and intellectual affiliation to Western Europe and seeking their own voice about policy and institutional design in contract law. This foundational tension recurred, in various forms, throughout the entire 20th century. The proportion between inspiration or direct transplants from "the center" and keeping "peripheral" identity was floating over time. In this paper I do not aspire to exhaust the topic fully, nor to provide the final argument. Instead, I attempt to map the most conspicuous patterns of development that seem to constitute a common denominator for the countries of the region. In doing so, I pay particular attention to Polish contract law, which is specific when set against the background of the entire region for two principal reasons. First, Poland – as the only country of the region to do so –

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[1] D. Nice, *Prokofiev: From Russia to the West 1891-1935*, New Haven 2003, p. 208.

[2] The concept of Central Europe is, as such, quite vague and its geopolitical and historical boundaries can be set differently, depending on a variety of assumptions (cf. e.g. R. Okey, *Central Europe / Eastern Europe: Behind the Definitions*, 137 Past Pres. (1992), p. 102ff). For the sake of this text, Central Europe will be understood as the countries located south of the Baltic Sea, which after the Second World War fell under Soviet political control, yet did not become incorporated into the Soviet Union. Further remarks will pertain mostly to Poland, Czechia, Slovakia and Hungary, with extension to the German Democratic Republic (which, though not normally perceived as one of the Central European countries, shared with these countries a few meaningful elements of legal development. On various concepts of Central Europe from the legal scholarship vantage point see e.g. K. Kelemen, B. Fekete, *How Should the Legal Systems of Eastern Europe Be Classified Today?*, in: A. Badó, D.W. Belling, J. Bóka, P. Mezei (eds.), *International Conference for the 10th Anniversary of the Institute of Comparative Law of the University of Szeged*, Potsdam 2014; R. Mańko, *Delimiting Central Europe as a Juridical Space: A Preliminary Exercise in Critical Legal Geography*, 89 Acta Univ. Lodz. F. Iur (2019) and R. Mańko, M. Škop, M. Štěpáníková, *Carving Out Central Europe as a Space of Legal Culture: A Way Out of Peripherality?*, 6 Wroc. R. L. Adm. Econ. (2018), along with further publications referred to by the authors.

[3] Further on the doctrinal accounts of center-peripheries links see amongst others M. Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 Am. J. Comp. L. (2007), p. 621–626; A. Somma, *Introduzione al diritto comparato*, Rome 2014, p. 114; V. Corcodel, *Modern law and otherness: the dynamics of inclusion and exclusion in comparative legal thought*, Northampton 2019, p. 196; D. Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in: D. Trubek, A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal*, Cambridge 2006, p. 24f and *passim*.

enacted its own, quite progressive, codification of contract law in the inter-war period. It provided a different basis for changes that ensued under the communist regime. Second, the Polish post-socialist transformation took a particularly rapid form and was carried out much more radically than in other Central European countries, which entailed substantial consequences for the actual shape of contract law in the recreated free-market economy. At the same time, however, many general tendencies observable in Polish contract law are common to the whole region and, to some extent, can be universalized as the "Central European" experience of contract law evolution.

The paper attempts to delve more deeply into the intellectual history of the concept of freedom of contract in Central Europe and to understand better its compound development under the changing economic and political premises. It seeks the more profound roots of the contemporary perception of contractual freedom along with its peculiar features. In particular, I try to grasp the specificity of the evolution of this concept, and to trace back how the historical specificity of this region could shape the current understanding of this idea.

Prior to making further comments I'd like to make one methodological *caveat*. Any remarks on the freedom of contract have to face its natural vagueness and complexity, both at the conceptual and the practical ("empirical") level. This pertains especially to all the analyses that attempt to delve into the intellectual premises of this idea. The notion of contractual freedom involves a broad array of foundational questions, related to the notion of contract, understanding of freedom and the conceptual model of contracting parties. Separately, it involves also a question of whether the analysis pertains to freedom of contract as a conceptual construct or rather to its actual shape in the particular realities. In the latter case: if this pertains to the content of rules or rather to the way in which they are shaped in legal and market practice. Answering these questions in a way that would preserve the coherence of the analytical argument is possible only to a limited extent. For these reasons, the picture drafted in this paper remains obviously selective and builds on several assumptions as to the nature and premises of freedom of contract, which will be further discussed below. The unavoidable elusiveness of the matter allows us to reach only partial conclusions on the freedom of contract in its historical evolution. In the best case they may approximate understanding of this phenomenon, but cannot aspire to setting an exhaustive explanatory framework.

With this in mind, the paper begins with an overview of the development of the freedom of contract in 20th-century Central Europe, from its inter-war affirmation to various stages of denial under the communist regime (point 3). Building upon these foundations, I proceed to deeper insight into the fate of freedom of contract in the post-socialist transformation and, then, attempt to understand what meanings of contractual freedom (re)appeared in that era (points 4–5). Further, the paper discusses selected instances of conspicuous interrelation between the specific Central European shade of contractual freedom (point 5). In particular, I attempt to juxtapose the Polish concept(s) of contractual freedom and the EU law, trying to reverse-engineer the nature of frictions in transposition of European contract policy and rules in the region.[4]

2. Freedom of contract at the crossroads of the legal and economic *imaginarium*

The foundations of the contemporary contract law in Central European countries developed in a rather meandering way. In the 20th century most of the countries of the region followed a similar path of evolution. This originated in the inter-war period with a strong *laissez-faire* market approach, followed by radical denial of party autonomy under the post-war socialist regime and concluded with the revival of classically liberal contract law in the early 1990s. Throughout this development, freedom of contract was perceived in an emblematic way, symbolizing the entire liberal agenda of contract law[5], a

[4] I base this paper primarily on the sources on Central European contract law available in English and in German. In some parts I combine them with sources in Polish, where the relevant data or ideas were not featured in publications in the other two languages or where Polish scholarship provides a more substantial point of reference.

[5] This phenomenon is in many ways universal for the general public narratives about contract law and, more generally, the popular depictions on the state–law relationship: "[o]utside the legal academy, »freedom of contract« largely serves as a slogan for *laissez-faire* capitalism. Even within contract theory, the term retains a particular libertarian flavor." (H. Dagan,

"touchstone to reveal perceptions about individual autonomy and the legitimacy of self-interest."[6] At each of the three historical stages the political and legal narratives about the market were in some way related to contractual freedom, either by setting it aside or by taking a more apologetic stance.[7]

In these terms, freedom of contract was understood mostly as a heuristic[8] notion that epitomizes market liberty.[9] As a consequence, it is clearly "ideologically charged"[10] and conveys a particular set of values and policy considerations. The exact content of these underlying elements is, however, partly volatile and may change, depending on the particular political, economic or ideological premises. They may be used both as a rationale for freedom of contract as such, as well as a yardstick to measure the actual degree of contractual freedom that exists in the particular legal system.[11] Although at the technical level freedom of contract is usually understood merely as the possibility for parties to form contracts according to their intention,[12] the deeper nature and rationale of this possibility remains much less clear.

In particular, the notion of contract freedom does not determine whether it encompasses merely formal elements (i.e. the freedom to make contracts unconstrained by any mandatory rule) or also some material (functional) considerations, which assumes the actual possibility of making meaningful market choices. In the optimal setting, these two conceptual components should operate in synergy, supplementing each other. The legal design of institutions that frame and guarantee contractual freedom is usually directly informed by the more profound understanding of individual autonomy and the ultimate goals of contract law. In various settings, however, both substrates can generate certain frictions. This may be especially the case in transitional situations, where a change in the descriptive dimension does not necessarily have to lead to an adjusted understanding of the abstract concept. And conversely, changes in the political premises of contract law are not always followed by attuned understanding of formal institutions of contract law.

The development of freedom of contract in the Central European countries after the fall of communism vividly illustrates this type of conceptual and policy mismatch. I discuss this phenomenon, building on the post-transformation experience of Polish private law, against a broader background of the economic and legal changes in Central European countries. As I further explain below, Polish contract law has been through an especially complex process of development since the inter-war period, working through a few stages in an approach towards freedom of contract: from its vivid acceptance in the classically liberal form in the inter-war codification (quite unique in this region of Europe), through predominant denial at the conceptual level, to its revival in the old form, somewhat obsolete in the reality of 1990s and the subsequent decades.

3. At the outset of distortion: freedom of contract in transition

3.1. Setting the scene: the libertarian model of the inter-war era

The end of World War II found Central European countries with a relatively well-developed structure of contract law established in-between the wars. In most of the countries of the region contract law was still rooted in the rules created before the First World War, which prevailed throughout the 1920s and

M. Heller, *Freedom of Contracts*, Columbia Law and Economics Working Paper No. 458, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325254, p. 1, 22.6.2020).

[6] I. Markovits, *Justice in Lüritz: Experiencing Socialist Law in East Germany*, Princeton 2010, p. 221.

[7] *Ibid*.

[8] See also R. Kreitner, *Calculating Promises: The Emergence of Modern American Contract Doctrine*, Stanford 2006, p. 97.

[9] See also P. Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 Hastings L.J. (1987), p. 850f.

[10] P. Cserne, *Freedom of Contract [and Economic Analysis]*, in: J. Backhaus (ed.), *Encyclopedia of Law and Economics*, Springer 2015.

[11] See also B. Mensch, *Freedom of Contract as Ideology*, 33 Stan. L. Rev. (1981), p. 755.

[12] In the Polish scholarship a similar distinction has been made by Z. Radwański. *Teoria umów*, Warsaw 1977, p. 94–6; see also T.M.J. Möllers, *Working with Legal Principles – demonstrated using Private Autonomy and Freedom of Contract as Examples*, 14 ERCL (2018), p. 130.

1930s. Most notable amongst them was the Austrian *Allgemeines Bürgerliches Gesetzbuch* (ABGB), the principal source of contract law for most of the Central European states, which had emerged from the dissolved Austro-Hungarian Empire. In the other countries of the region, the principal source of inspiration was the German *Bürgerliches Gesetzbuch* (BGB)[13], along with the French *Code Civil* and the Swiss *Obligationenrecht*. All of these codes strongly endorsed individual autonomy and equality, rooted in the *laissez-faire* accounts of 19th-century scholarship.[14] In this way most of the Central European countries remained in a strong and direct link with the center of European private law thinking throughout the inter-war period. In this way, the early 20th century set the scene for the center–peripheries dynamic, which underpinned all Central European systems of contract law.

Against this backdrop, Polish contract law developed along less obvious threads. The lands that constituted the newly-independent Polish Republic at the end of World War I were governed by five systems of contract law: German, Austrian, Russian, modified French and Hungarian. This created an obvious plea for unification, which resulted in the Code of Obligations enacted in 1933.[15] It recognized the *laissez-faire* concept of contract law[16], counting it amongst its foundational principles.[17] As such, it was directly expressed in Article 55[18] of the Code, according to which parties could "arrange the agreement according to their wish, as long as the content and the aim of [the agreement] do not contradict social order, nor the statute, nor good faith."[19] The Code understood its political dimension in rather minimalistic terms, treating contract law as a general frame for market operation and building it mostly through non-mandatory rules. Most of the market inefficiencies were understood as external to contract law and proper to public rather than private law responses.

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[13] See also A. Bakardijeva Engelbrekt, *The impact of EU enlargement on private law governance in Central and Eastern Europe: the case of consumer protection*, in: F. Cafaggi, H. Muir-Watt (eds.), *Making European Private Law. Governance Design*, Cheltenham – Northampton, MA 2008, p. 101.

[14] Cf. H.-W. Micklitz, *On the Intellectual History of Freedom of Contract and Regulation*, 4 Penn. St. J.L. & Int'l Aff. (2015), p. 21–25.

[15] Enacted on 27 October 1933. On the codification efforts in the inter-war period see e.g. B.A. Wortley, *Poland's New Codes of Law*, Birmingham 1937, p. 3f (and a broad bibliographical record on p. 13–19); S. Gołąb, *The Codification of Polish Law*, 6 J. Comp. Leg. Int.'l L. Third S. (1924), p. 95–99; Z. Nagórski, *Codification of Civil Law in Poland (1918–1939)*, in: *Studies in Polish and Comparative Law. A Symposium of Twelve Articles*, London 1945, p. 44ff.; L. Górnicki, *Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w Latach 1919–1939*, Wrocław 2000; H. Capitant, *Préface*, in: *Code des obligations de la République Pologne. Traduit par Stefan Sieczkowski et Jan Wasilkowski, avec la collaboration de Henri Mazeaud*, Paris 1935, p. V–XX. The Code was based on an extensive comparative study, which encompassed mostly the legal systems that were in force in Poland after World War I, with the addition of the other codifications, especially the Swiss law – on the reception of the foreign law and scholarship in Poland of that era see C. Kraft, *Europa im Blick der polnischen Juristen: Rechtsordnung und juristische Profession in Polen im Spannungsfeld zwischen Nation und Europa 1918-1939*, Frankfurt am Main 2002.

[16] Cf. A.W. Rudziński, *New Communist Civil Codes of Czechoslovakia and Poland: A General Appraisal*, 41 Ind. L. J. (1965), p. 37; D.T. Ostas, *Institutional Reform in East-Central Europe: Hungarian and Polish Contract Law*, 26 J. Econ. Issues (1992), p. 514; D.T. Ostas, B.A. Lette, *Economic Analysis of Post-Communist Legal Reform: The Case of Hungarian Contract Law*, 36 Acta Jur. Hng. (1994), p. 190f.

[17] See e.g. U. Rukser, *Das neue polnische Obligationenrecht*, 8 Zeitschr. ausl. int. Privatrecht (1934), p. 353.

[18] Literally: "Parties making a contract may arrange their relationship at their discretion so long as the content or purpose of the contract is not contrary to the law, the legal order or good mores."

[19] On the discussion that underpinned this provision see A. Ohanowicz, *Wolność umów w przyszłym polskim kodeksie cywilnym,* 6 RPEiS (1926); the debate was also summarizes by K. Bączyk, *Zasada*, p. 37f and P. Machnikowski, *Swoboda umów według art. 353[1] KC. Konstrukcja prawna*, Warsaw 2005, p. 7, fn. 16.

In some instances, the Code tried to outbalance it in selected areas with more protective measures[20] and limit thereby the freedom of contract[21]. However, these instruments were rather insular and reflected an understanding of market failures – and the role of contract law – proper to early 20th-century European scholarship. Elements of a systematically protective treatment can be found mostly in the home rental and labor agreements, introduced in the 1933 Code and in accompanying acts. In both cases regulatory interventions were justified by the particular social significance of these contracts, along with their susceptibility to causing detriment to a renter and an employee as weaker parties.[22] Apart from this, the exceptions to full freedom of contract were made also in provisions on the abuse of market power (similar to the German concept of *Ausbeutung*)[23] and on standard contract terms (adhesion agreements).[24] The rationale of these rules was, however, rooted in the liberal conviction that contracts should respect a minimal degree of reasonableness and actual freedom of choice, rather than in any systematic protective attitude.[25]

The general attitude adopted in the 1933 Code turned out to be surprisingly persistent in Polish contract law. Despite the profound changes of the economic and social contingencies since 1933, the main theoretical foundations remained deeply rooted in the classic *laissez-faire* concept. The overshadowing inheritance of the inter-war period is reflected not only at the legislative level (many rules of the current Civil Code of 1964 copy almost *verbatim* provisions of the 1933 Code), but above all in the intellectual fabric of contract law. Especially, in its deeper intellectual background Polish contract law stayed partly immune to the modern developments of legal and economic scholarship. In particular, it missed the growing awareness of inefficiencies in the market (especially the systematic imbalances created by mass consumption, and the social role of private law), as well as the developing awareness of the social role of contract law. In this way, *laissez-faire* thinking seems still to remain at the core of the Polish collective perception of contract law, as a legacy of the inter-war period.

3.2. The symbolic expulsion of contractual freedom

Soon after the end of World War II, the classically liberal framework of contract law had to be confronted with the newly-established communist agenda.[26] The concept of freedom of contract found itself at the very center of the substantial change in private law that followed.[27] At the conceptual level,

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[20] On the discussion between libertarian and socially-aware attitudes in *travaux preparatoires* see M. Derek, *Indywidualizm czy socjologizm? Zasada swobody umów w projektach polskiego kodeksu zobowiązań z 1933 roku na tle porównawczym*, CPH (2015).

[21] On the idea of protective interventions in the Polish inter-war contract law see also R. Longchamps de Bérier, *Zasada wolności umów w projektach polskiego prawa o zobowiązaniach*, in: *Księga pamiątkowa ku czci Władysława Abrahama*, vol. 1, Lwów 1930, p. 356.

[22] See R. Longchamps de Bérier, *Zasady kodeksu zobowiązań*, 14 RPEiS (1934), p. 80.

[23] See e.g. M. Derek, *Indywidualizm*, p. 181f.

[24] See e.g. P. Mikłaszewicz, M. Bednarek, in: K. Osajda (ed.), *System Prawa Prywatnego*, vol. 5, *Prawo zobowiązań – część ogólna*, Warsaw 2020, p. 702–704; M. Lewandowicz, *Is There a Polish Legal Tradition: On the Margins of Considerations regarding the 1933 Code of Obligations*, 8 Journal on European History of Law (2017), p. 75.

[25] For instance, the prohibition of exploitation (*Ausbeutung*) was justified with reference to freedom of consent and of trust, and without explicit reference to protective measures – see R. Longchamps de Bérier, *Uzasadnienie projektu kodeksu zobowiązań z uwzględnieniem ostatecznego tekstu kodeksu. Art. 1-167*, Warsaw 1934, p. 46f. and *id*, *Zasady*, p. 83.

[26] Further on the development of contractual freedom under the socialist regime see K. Bączyk, *Zasada*, p. 38–42 and L. Stępniak, *Rozwój funkcji umów w gospodarce PRL*, in: L. Bar (ed.), *Instytucje prawne w gospodarce narodowej (studia prawne)*, Wrocław–Warsaw–Cracow–Gdańsk–Łódź 1981.

[27] On the post-war tensions regarding freedom of contract, cf. also K. Grzybowski, *Reform of Civil Law in Hungary, Poland and the Soviet Union*, 10 Am. J. Comp. L. (1961), p. 257–260; see also generally J. Pokój, *From Capitalism to Stalinism. Transition of Polish Law of Obligations in the Stalinist Period (1948- 1956)*, XXIst Annual Forum of Young Legal Historians – 6th Berg Institute International Conference, Tel Aviv, 2 March 2015 (available at: https://video.tau.ac.il/events/index.php?option=com_k2&view=item&id=5752:from-capitalism-to-stalinism-transition-of-polish-law-of-obligations-in-the-stalinist-period-1948-1956&Itemid=553, 22

this process was driven mainly by the Marxist concept of market and state.[28] From this point of view, freedom of contract was condemned as one of the model expressions of bourgeois ideology, providing an explanatory framework for the exercise of social power by the ruling class[29] and the unequal distribution of wealth.[30] In this sense, freedom of contract constituted an institutional promise that any valid contract, regardless of its content, would be enforceable with the use of state-provided coercion. Contractual liberty was hence perceived as a purely ostensible formula, which in fact opened the way to lack of freedom and to privilege for an elite cluster of contractors.[31] As a result, Marxist legal thought denied autonomy as an underlying principle of contract law and advocated replacing it with state direction.[32] This viewpoint sees the state as the optimal proxy for citizens' interests,[33] being able to aggregate and reconcile them, and thus to achieve a just allocation of resources.[34] Therefore, the actual autonomy of market actors could be achieved only by denying the formal notion of contractual freedom and by replacing it with collective-oriented state steering.[35]

.6.2020).

[28] See also W.J. Wagner, *General Features of Polish Contract Law*, in: W.J. Wagner (ed.), *Polish Law Throughout the Ages*, Stanford 1970, p. 396f.

[29] As was explicitly observed in one of the foundational handbooks, for the owner of private tools and means of production, the 1964 Code did not constitute for the private entrepreneur the principle of freedom of contract. (J. Topiński, *Prawo gospodarki uspołecznionej w zarysie*, Warsaw 1966, p. 286f). This assertion was rooted in the more fundamental assumption that contract law (being an element of the Marxist-based superstructure) should reflect the interest of the ruling class, which in principle excludes decentralized transfer of economically useful assets. As a result, socialist contract law should be deemed as inherently opposed to the autonomy of private proprietor. See also S. Spitzer, *Marxist Perspectives in the Sociology of Law*, 9 Ann. Rev. Social (1983), p. 112; J. Banaji, *The Fictions of Free Labour: Contract, Coercion, and So-Called Unfree Labour*, 11 Hist. Mater. (2003), p. 90f.

[30] See e.g. J. Banaji, *The Fictions*, p. 90f; I. Markovits, *The Death of Socialist Law?*, 3 Ann. Rev. L. Soc. Sci. (2007), p. 234f and *ea*, *Last Days*, 80 California Law Review (1992), p. 115. In a brochure "The bourgeois civil law at the service of the monopolist capitalism", published in 1947, the Soviet theorist of civil law E.A. Fleishic asserted that: "because the principles: »liberty of ownership« and »liberty of contracts« opened the way to unrestrained oppression of the workers by the owners of the means of production and legitimized this oppression, the ideologists of the bourgeois were defending these principles and the first great civil code […] the French *Code civil* of 1804 established these principles, and the other bourgeois civil codes, with some changes, recreated the provisions of the French civil code." (the quote after the Polish translation of the book: E.A. Flejszyc, *Burżuazyjne prawo cywilne na usługach monopolistycznego kapitału*, Warsaw 1949, p. 7).

[31] See e.g. C. Rojek, S.A. Collins, *Contract or Con Trick?*, 17 Br. J. Social Wk. (1987), p. 204f; cf. K. Renner, *The Institutions of Private Law: And Their Social Functions*, London 1949.

[32] Obviously, direct state interventionism – in particular substantial limitations to freedom of contract in the form of state planning – was not the exclusive property of the socialist approach to the market. It was also a commonly adopted solution in post-war Western Europe, in many instances with use of the similar regulatory techniques as on the other side of the Iron Curtain – see, e.g. J. Quigley, *Socialist Law and the Civil Law Tradition*, 37 Am. J. Comp. L. (1989), p. 787f. Both approaches were, however, fundamentally different in terms of the underlying values and concepts.

[33] The separation between freedom of contract and individual party interests – assumed at the general level – entailed further consequences in the *ex post* perspective: "In this view, contract law no longer is supposed to enable parties to advance their interests by way of cleverly negotiated deals but is simply a means of coordinating socially desirable exchange relationships. If after the conclusion of a contract the parties later disagree about its meaning, the court will search not for the intent and expectations of the parties but for that interpretation most in line with overall political and economic goals." (I. Markovits, *Justice*, p. 196).

[34] Cf. J. Waldron, *Foundations of Liberalism*, 37 Philos. Q. (1987), p. 147. As observes I. Markovits, *Justice*, p. 221, socialist private law expressed, hence, "little sympathy for the idea that every citizen should be entitled to arrange his own affairs with as much individual autonomy as possible."

[35] Apart from limitations based on central planning, communist thought also triggered many subtle types of restriction to freedom of contract. Intense Marxist infusions into social and economic thinking resulted in shifting the general understanding of the concept of unfairness in contract law. It started to involve much stronger considerations related to community values or "socialist" morality (cf. A.W. Rudziński, *New Communist*, p. 71f; I. Markovits, *Justice*, p. 222f.; D.T. Ostas, *Institutional Reform*, p. 519f.). A similar criticism of the bourgeois concept of contract freedom was formulated also by S. Szer in one of the first post-war handbooks to the general part of civil law (S. Szer, *Prawo cywilne. Część ogólna. Zarys wykładów wygłoszonych na Uniwersytecie Łódzkim i w Wyższej Szkole Prawniczej im. T. Duracza*, Warsaw 1950, p.

The transformation of contract law in this period was, however, not entirely upfront. The general evocation of contractual freedom in Article 55 of the 1933 Code was kept formally untouched as late as 1965 (when then new Civil Code of 1964 came into force).[36] Throughout the two post-war decades, the actual meaning of this concept was, however, gradually refuted and watered down.[37] First of all, it was subjected to subversive judicial reinterpretation[38], which ultimately removed many of its liberal foundations.[39] This process was accompanied by more directed legislative interventions, which incrementally sliced off layers of market liberty. The most intense and far-reaching of them were introduced in the early post-war period, along with the establishment of a centrally-planned economy in Poland (same as in other countries of the region)[40]. In most parts of the market, private entrepreneurship was replaced with a state-owned enterprise, subordinated to a centrally-set economic agenda. In this way, the state eradicated freedom of contract from a robust part of the market[41], being able to determine

172–174); later the same attitude was taken by A. Wolter in his handbook: *Prawo cywilne. Część ogólna*, Warsaw 1955, p. 14f, 300–302. Notably, while criticizing freedom of contract in its classic understanding, both authors observe attempts to regulate the market in the capitalist economy – but attribute them to the pressure of big entrepreneurs who lobby for legal instruments that fix their dominant position.

[36] In the early post-war handbooks to the law of obligations, freedom of contract was evoked as a principle of private law, without any limits (see J. Górski, *Zarys prawa zobowiązań*, Poznań 1946, p. 29; F. Zoll, *Zobowiązania w zarysie według polskiego kodeksu zobowiązań*, Warsaw 1948, p. 43). More criticism towards this principle started to be expressed only subsequently, especially after the introduction of a thorough system of central economic planning (see fn. 35). The explicit distance towards contract liberty started to become visible in the mainstream of Polish scholarship in early 1950 (see also fn. 30) and continued until the political thaw of 1956.

[37] On the discussion over the place for freedom of contract in the new Civil Code see especially W.J. Wagner, *General Features* and *id, The Interplay of Planned Economy and Traditional Contract Rules in Poland*, 11 Am. J. Comp. L. (1962), p. 350–364.

[38] Redrafting of statutory law was, for obvious reasons, too difficult and time-consuming (especially in the post-war reality, where legal institutions were gradually recreated and the pre-war legal elite had effectively disintegrated) to achieve a prompt transition to a new policy agenda of contract law. Therefore, one of the most immediate ways of transition was judicial re-interpretation of the existing body of provisions and principles: on the post-war argumentative shift in the Supreme Court opinions regarding freedom of contracts *see* A. Stawiarska-Rippel, *Prawo sądowe Polski Ludowej 1944–1950 a prawo Drugiej Rzeczypospolitej*, Katowice 2006; W.J. Wagner, *The Interplay*, p. 356. More generally on the interpretive approach of Polish case law in the period of establishing socialist legal order till 1956 *see* A.W. Rudziński, *Marxist Ethics and Polish Law*, Natural Law Forum, Paper 1960, p. 48, 55–65. On similar phenomena in other countries of the region see also K. Grzybowski, *Continuity of Law in Eastern Europe* 6 Am. J. Comp. L. (1957), p. 64–70. This development was part of a much broader and more profound attempt to alter the entire intellectual structure of Polish society and the economy – cf. e.g. J. Connelly, *Captive University: The Sovietization of East German, Czech, and Polish Higher Education, 1945-1956*, Chapel Hill–London 2000, p. 71ff. Particularly illustrative of this phenomenon is a resolution of the General Assembly of the Polish Supreme Court of 27 November 1948, which declared that all the case law and principles of the pre-war law (including the law of contracts) had no relevance, if they were not compliant with the foundations of the current (i.e. communist) regime. This resolution – as well as a broader conviction about discontinuity between the former and the current contract law – opened a way to re-establish the default/mandatory rules division in post-war law, without direct change of the content of statutory provisions.

[39] The contractual freedom was altered also in a subtler way, by changes in legislative framing and interpretation of standards, usually general clauses that referred to "external" values. In particular, the instruments existing in contract law in the pre-war period, which typically represented a liberal understanding of contract law – referring to market values in the relational sense – were replaced with more community-oriented formulas. The latter elements were introduced mostly by a few general and overarching formulas, such as a standard of the "principles of social coexistence" (which replaced the classic concept of "good faith", adopted in the 1933 Code, following the general concepts of European contract law).

[40] Introduced in 1950 by the act on planned contracts in the national economy, enacted on 19 April 1950 (subsequently replaced with other acts on economic planning); cf. J. Topiński, *Ustawa o umowach planowych w gospodarce socjalistycznej*, Warsaw 1950; S. Buczkowski, S. Szer, A. Wolter, *Prawo cywilne*, in: L. Kurowski (ed.), *Dziesięciolecie prawa Polski Ludowej 1944–1954*, Warsaw 1955, p. 179–181; A. Meszorer, *Plan a prawo cywilne*, 7 NP 1951. The central planning was also coupled with price control in consumer and professional transactions – on the development of price regulation till 1960s P. Bubieńska, *Skutki cywilnoprawne ustalania cen w obrocie socjalistycznym*, Warsaw 1965, p. 32–106.

[41] Incremental dismantling of freedom of contract resulted also in a significant shift of balance between mandatory and default rules, both through amendments to statutory rules, as well as through judicial reinterpretation of the existing legal framework. All of these changes aimed to broaden the ambit of state steering in contract law, most commonly by replacing

virtually all elements of transfer of assets on a vast part of the market.[42] Multiple parts of the post-war economy were governed either through administrative ordering or by "internal" dealings between various actors in the state's ownership structure. Consequently, the autonomy-based concept of contract was substituted by a legal obligation to make particular contracts (the terms of which were often predetermined by a statute).[43] In this way, under the socialist regime the concept of contract transformed from a tool of exercising one's liberty to an instrument of governance, which remained in a "symbiotic relationship to power" and embedded "preference of policy over principle".[44]

As a consequence, agreements in the planned economy had only an outer form[45] of contracts, being in fact an instrument of state steering.[46] The centrally-planned economy in socialist states was hence populated by "contracts-shadows, contracts-adornments, which in fact do not organize anything, do not shape anything",[47] where the conclusion and substantial parts of the agreement were usually mandated by public law.[48] Only on the margins of the state-ruled market was a contract put to its classic use: an instrument of self-organization of the market, able to reveal the preferences of its actors.[49] This pertained mostly to the spheres where central planning was too costly in terms of lack of data or fluidity of a particular matter.[50] Only to a limited extent was the centrally-steered economy supplemented by instruments of classic contract law. They were, however, mostly marginal and limited to purely technical matters (wherever they could enhance smooth functioning of the state-planned mechanism).[51] This

default rules with mandatory ones and by further introduction of mandatory rules in the spheres previously not embraced by any regulation.

[42] See also I. Markovits, *Socialist vs. Bourgeois Rights: An East-West German Comparison*, 45 U. Chi. L. Rev. (1978), p. 631 who noticed that under the socialist concept, "contracts are often enforced not because the interest constellation between the parties makes enforcement desirable, but because the state so orders".

[43] The idea of planning does not necessarily entail full exclusion of freedom of contract. From the socialist view, freedom of contract was challenged as a "bourgeois" fiction, to be superseded under socialism by the will of society, as manifested in the plan [see also H.J. Berman, *Commercial Contracts in Soviet Law*, 35 Cal. L. Rev. (1947), p. 210]. In practice, however, freedom of contract in this regard was purely declaratory and mostly deprived of any coherent normative content – cf. C.W. Gray *et al.*, *The Legal Framework for Private Sector Development in a Transitional Economy: the Case of Poland*, 23 Ga. J. Int'l & Comp. L. (1992), p. 314.

[44] I. Markovits, *Last*, p. 117.

[45] As Z.H. Mihaly suggests [*The Role of Civil Law Institutions in the Management of Communist Economies: The Hungarian Experience*, 8 Am. J. Comp. L. (1962), p. 313f], the notion of contract could be used only as a "figure" for reciprocity in exchange between state-owned units: [t]he contract-law relation is the external symbol of the law of value. Since the application of the law of value is designed to forward a systematic development of the entire economy, non-fulfillment of contract law relations established between the enterprises is not only a failure to apply the law of value, but also hinders the development of the whole economy."

[46] On the peculiar understanding of freedom of contract in this sphere cf. J. Gwiazdomorski, *"Najem" lokali jako problem kodyfikacyjny*, 11 PiP (1956), p. 661f.

[47] A. Stelmachowski, *Czy kryzys prawa cywilnego?*, 36 RPEiS (1974), p. 275; similarly also J. Zemánek, *Problems and Perspectives of the Legal Adaptation to the Market Economy in the Czech and Slovak Republics*, in: P.-Ch. Müller-Graff (ed.), *East Central European States and the European Communities: Legal Adaptation to the Market Economy*, Baden-Baden 1993, p. 52.

[48] In a similar way I. Markovits refers to this phenomenon, observing that "[s]ocialist contracts were planning instruments in the guise of civil law […], and basically a contradiction in terms." (I. Markovits, *Last*, p. 115); see also W. J. Wagner, *The Interplay*, 349f; further on the relation between a contract and the plan J. Trojanek, *Umowa jako instrument planowania produkcji rynkowej. Studium prawno-gospodarcze*, Poznań 1974, p. 22–31.

[49] Z.H. Mihaly, *The Role of Civil Law*, p. 315f, 327f; S. Buczkowski, S. Szer, A. Wolter, *Prawo cywilne*, p. 173.

[50] Because of the profound dysfunctions of state-owned firms under the socialist regime, these goals were hardly achievable in practice – see H. Mihaly, *The Role of Civil Law*, p. 327f). On the (in)efficiency of contract-based schemes of governance in this sector *cf.* empirical study by J. Kurczewski, K. Frieske, *Some Problems in the Legal Regulation of the Activities of Economic Institutions*, 11 Law Soc. Rev. (1977), p. 493ff.

[51] "One wonders how tenacious are the old principles of the law of contracts, which, even after total removal of some of their essential elements (especially the freedom to conclude the contract), are still used to help fulfill the economic plans of the socialized economy. As is well-known, the socialized economy cannot work by administrative rules alone." – J. Fedynskyj,

amalgamation of contract and public steering never reached the more profound policy layers, which in that period were subordinated directly to the state's supreme control.

Though with the fall of the Stalinist regime and the 1956 thaw[52] the idea of the centralized economy was partly eased, the concept of freedom of contract remained invariably strongly suspect in the doctrinal and policy discussions. This dynamic was incorporated in a debate between the principal private law scholars of that era, hosted by the *"Nowe Prawo"* ("New Law") journal: did Article 55 of the 1933 Code (that time still in force) preserve any actual role in contract law.[53] Apart from the purely doctrinal arguments, the main threads of the discussion focused on the question of whether the general principle of freedom of contract is compliant with socialist state policy. Notably, though most of the authors agreed that freedom of contract is still relevant to Polish law, they stressed strongly the supremacy of the socialist legal order, which in principle should trump on contractual autonomy.[54] This conclusion is a particularly vivid illustration of the nexus of "the old" and "the new" elements in contract law in the communist era.[55] The profound transformation taking place in this period was still "channeled" by the classic conceptual framework of contract law, which only in part could be replaced by the new structures.

This particular dynamic was concluded with the final expulsion of the explicit declaration of freedom of contract in the 1964 Code.[56] What is particularly illustrative in this shift of paradigms,
is that the bulk of the new contract law directly replicated provisions of the 1933 Code[57]. In this way the old structures were set in the context of new policy and values.[58] At the same time, the expulsion of freedom of contract in the 1964 Code should be considered as a mostly symbolic act. It only "stamped" the change of values that has already taken place in Polish law and concluded the evolution that had begun in mid-1940s.[59]

3.3. Insubstantial freedom: the Machiavellian argument from contract liberty

The rejection of market autonomy and freedom of contract did not mean, however, that socialist contract law abandoned them entirely at the rhetorical level. In some instances, arguments referring to contractual autonomy could enhance, quite ironically, the shift towards a centrally-steered economy. Such instances, though not very frequent, are worth mentioning as the illustration of a particular fate of freedom of contract in the communist era. Quashed and marginalized on the one hand, on the other hand it was used

Obligations in Polish law. By W.J. Wagner. Leiden. Sijthoff, 1974. Pp. ix, 287 (Vol. 2 of Polish civil law, D. Lasok, ed.; and Vol. 18 (2) of Law in Eastern Europe) [review], 37 La. L. Rev. (1977).

[52] On the broader context of this period in the legal history of the region see L. Damşa, *Property transformations and restitution in post-communist Central Eastern Europe*, Cham 2017, p. 26–41.

[53] See J. Gwiazdomorski, *Commentary to the judgment of the Supreme Court of June 13, 1958, 4 CR 548/58*, 16 NP (1960); J. Gwiazdomorski, *Czy art. 55 kod. zob. obowiązuje?*, 16 NP (1960); A. Wolter, *Czy art. 55 kod. zob. obowiązuje?*, 16 NP (1960); J. Jodłowski, *W sprawie mocy obowiązującej art. 55 k.z.*, 17 NP (1961). While the first of these authors was advocating the view that explicit declaration of freedom of contract is no longer in force, the others were defending the opposite view. On the elements of this discussion see also W.J. Wagner, *The Interplay*, p. 355.

[54] *See also* S. Buczkowski, *Zasada wolności umów*, 16 PiP (1961), p. 433.

[55] This general amalgamation was, in certain ways, characteristic for the entire period of early communist regimes in the region: "behind a façade of uniformity separate national traditions continued through the Stalinist period in much of the »northern tier« of East Central Europe, creating different contexts for politics and for societal experience." (J. Connelly, *Captive University*, p. 2).

[56] The act of 23 April 1964 (in force as of 1 January 1965).

[57] On the general continuity between the Polish post-war private and the overall European legal tradition cf. R. Sacco, *The Romanist Substratum in the Civil Law of the Socialist Countries*, 14 Rev. Social. Law (1988), p. 75f.

[58] As M. Safjan observed for the Polish private law of that era, "[i]n private law, the infiltration of ideological elements, although much smaller than in other fields, seemed particularly dangerous because it disfigured the essence of the structures designed for a different reality, for the real market and for free citizens." – M. Safjan, *Is it worth being a Rejtan?*, https://verfassungsblog.de/is-it-worth-being-a-rejtan (22.6.2020).

[59] Cf. A.W. Rudziński, *New Communist*, p. 42, 54.

in a purely instrumental and somewhat deceitful way. This process of skewing contractual freedom added also to the general imbroglio around this concept in the post-war era, which subsequently became the foundational concern for its current role and understanding at the outset of the 21st century.

One of the most illustrative instances of this tendency is provided by two decisions of the Polish Supreme Court of the mid-1950s. Both of them address the question of parties' autonomy in labor relations (at that time still regulated as a part of contract law[60]). In both decisions the Court was faced with the question of whether the inter-war rules on employee remuneration should be considered as mandatory or should default in the new post-war realities of a centrally-steered economy.

The first of these judgments (25 February 1955[61]) seems quite plain in its content and rationale. The Supreme Court concluded that "the statutory provisions on employees' remuneration has lost its default character, but it has the character of mandatory rules". This conclusion, apart from its any possible justice- or individual utility-based justification, directly reinforced the state's ability to steer remuneration rates, by excluding parties' freedom to establish their own salary rates.

In the second, earlier, decision (11 March 1953[62]) the shift between a default and a mandatory rule took a much more particular and unusual shape. The judgment addressed a problem: whether rules on labor contracts, set out in the inter-war period and still in force, and originally construed as mandatory, still maintained this character. The Court answered this question in the negative, establishing that the former mandatory provisions "in the new regime do not need to have the same character". This pertained in particular to situations where the provisions were to be altered by a collective employment agreement (between an employer and all the employees). Hence, surprisingly at first sight, the post-war authoritarian shift in contract law entailed loosening the restraints of mandatory rule by replacing them with a full default.

In the motives of the judgment the Court revealed a part of the rationale behind this decision. It observed that in-between the wars the capitalistic employment market was based on the inherent opposition between employers (enjoying an economically and politically privileged position) and employees and, therefore, needed to be regulated by use of mandatory rules.[63] At the same time, default rules provided mostly a vehicle for freezing the existing inequalities, by allowing employers to exercise their market superiority and concealing it in a form of (ostensibly voluntary and equal) contract. Developing this reasoning, the Court concluded that under the communist regime this situation was reversed: "[i]n the changed social and economic regime, there is no antagonistic opposition between the interests of the employee of the state-owned firm and the interests of the State of all working people, who rule the State through their organs and in their own interest." For this reason, in the socialist economy default rules may thrive as a tool of enhancing a real party's autonomy. Finally, the Court went even further down this path, claiming that the rules setting forth overtime work entitlements were not only optional, but the policy- and value-based specificity of collective agreements excluded entirely the judicial control of equivalence and fairness of its provisions.[64]

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[60] Cf. point 3.1.

[61] ZCR 69/55 (not published in the official collection of the Supreme Court decisions); quote according to: M. Piotrowski, *Normy prawne imperatywne i dyspozytywne*, Warsaw 1990, p. 102.

[62] II C 2525/52 (published in the collection: Decisions of the Civil and Criminal Chamber of the Supreme Court of the 1954, No. 2, item 37).

[63] What is also noteworthy is that the Supreme Court claimed that the mandatory character of the rules in question provided in fact a "veil", covering the actual aim of the stakeholders, who were interested in maintaining the *status quo* on the labor market, by appeasing employees with an act, which was not enforced in practice. The Court observed that while applying the inter-war provisions, it should be kept in mind that they were "enacted at the time of a capitalist regime, directly after the shock, which in all capitalist countries caused the Great October Revolution." As a result, capital had to issue for "the workers' masses an act, the content of which would acknowledge the antagonistic character of opposition between capital and labor and, consequently, contain provisions of a mandatory character." For this reason, like other bourgeois rules, the provisions in question awarded merely "formal [ostensible] rights to employees".

[64] According to the Court, "[t]he lack of antagonistic contradictions between the interests of employees in state industry and the interests of the State, excludes the need to investigate, whether [an additional surplus awarded to employees for working overtime] is adequately high according to the number of hours [worked overtime]".

At the same time, the judgment had, however, a deeper and less evident dimension, which – at a closer look – reveals a rather Machiavellian shade. The main idea presented as a rationale for a judgment camouflages, quite ironically, a completely opposite assumption about the actual role of default rules and contractual freedom in a socialist sense.[65] A shift from a mandatory to an optional requirement allowed for the partial dismantlement of the former system of employee protection, and for the opening of a broader possibility for immediate and unilateral state governance. Beyond a doubt, the consensual character of collective agreements was, in the reality of the 1950s, quite delusional. The state-owned firms were – in the reality of a centrally-steered economy – agents of the state policy, with almost unlimited bargaining power vis-à-vis employees.[66] As a result, abrogation of the mandatory character of the rules led in fact to depowering employees' rights by opening a broader possibility to shape them unilaterally by the state-owned enterprise. In this way, the judgment clearly subscribed to a general concept of a contract in socialism, which turned out to be "a technique for placing both control and responsibility in the hands of those who manage enterprises".[67]

The judgment referred directly to functional and policy arguments, reestablishing thus the default/mandatory division in labor law.[68] This led the Supreme Court to the ultimate conclusion that the socialist labor market no longer needed the mandatory labor rules. Quite the opposite: according to the Court, in the communist regime the problem of unemployment does not exist, therefore the law should not create too far-reaching entitlements for employees, thereby disincentivizing them from effective work.[69] In particular, there is no need to allow them to claim rights for working overtime, which "in many instances may jeopardize the social property" (implicitly: may encourage employers to purposefully extend the overtime work for a higher remuneration). As a consequence, if a collective agreement limits the overtime entitlements, it should prevail over the (formerly) mandatory rules that awarded these entitlements to a broader degree. Finally, the Court went even further and claimed the rules setting forth overtime work entitlements were not only non-mandatory, but the judicial control of equivalence and fairness should be entirely excluded with respect to collective employment agreements.[70]

As a result, by abrogating the mandatory character of the remuneration provisions, the Supreme Court allowed the state to directly govern the salary rates on the market. Moreover, in the realities of the lowly-competitive 1950s economy, state-owned enterprises had almost unlimited *de facto* bargaining power over employees and could dictate to them almost any remuneration rules. The reference to autonomy and freedom, made by the Supreme Court, seems thus to have been a purposefully dishonest attempt to

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[65] As the Court observed, in the communist regime – as opposed to capitalism – the problem of unemployment does not exist, therefore the law should not create too far-reaching entitlements for employees, disincentivizing them thereby from effective work. In particular, there is no need to allow them to claim rights for working overtime, which "in many instances may jeopardise social property" (implicitly: to purposefully extend overtime work, earning thereby higher remuneration). As a consequence, if a collective agreement limits the overtime entitlements, it should prevail over the (formerly) mandatory rules that awarded these entitlements to a broader degree.

[66] Moreover, as the communist regime did not recognize any direct forms of employees' associations (such as trade unions), any form of deliberative decision making over terms of employment was rather illusory. It was especially so for the Stalinist period of the early 1950s, when the state's control and impact on society was particularly strong and straightforward.

[67] S. Macaulay, E. Models, *Empirical Pictures and the Complexities of Contract*, 11 Law Soc. Rev. (1977), p. 510.

[68] This attitude is also interesting from an instrumental perspective. The Supreme Court turned out to be particularly innovative in interpreting black letter contract law, which seems to be a clear deviation from the usual formalistic approach adopted by socialist courts in Central Europe – cf. G. Ajani, *Formalism and Anti-formalism under Socialist Law: the Case of General Clauses within the Codification of Civil Law*, 2 Glob. Jurist Adv. (2002), p. 6–9.

[69] This observation was, obviously, quite far from the actual situation on the employment market; see e.g. N. Jarska, *Gender and Labour in Post-War Communist Poland: Female Unemployment 1945–1970*, 110 Acta Pol. Hist. (2014), p. 51–55. Most probably, however, in the intention of the Court it had to provide a purely "conventional" rationale for differentiating between the present and the former economic reality and, thereby, justifying a different reading of the same provision in the post-war context.

[70] "The lack of antagonistic contradictions between the interests of employees in state industry and the interests of the State, excludes the need to investigate, whether [an additional surplus awarded to employee for working overtime] is adequately high to the number of hours [worked overtime]".

conceal the actual policy aim of the judgment. In this way, although the concept of freedom of contract was ostensibly referred to in its classical shape, in fact it was employed as a clearly non- (or even: anti-) freedom option. In this way the periphery took on the disguise of a "centric" concept and transformed it to opposite ends.

3.4. The unspoken autonomy

The symbolic removal of freedom of contract in the 1964 Code did not eradicate it completely from the conceptual framework of private law. Throughout the socialist period it still existed in the shadow of the more exposed principles of the "new" socialist contract law. This hidden life of freedom of contract deserves a deeper look. Plausibly, this period of mismatch and pretension is one of the main roots of the "identity crisis" of contract law in the post-socialist era, which will be further discussed below.[71]

Being quite radically different in terms of its values, socialist contract law remained relatively conservative in its institutional agenda.[72] All spheres of contracting were highly contingent on the classic structures of private law (such as the concept of consent and the taxonomy of contracts). In its outcome, despite the general denial of contractual freedom, most contract law in the socialist regime was underpinned by the classic concepts of autonomy and self-determination, with freedom of contract as their main tenet.[73]

The exact dynamic between the centric and peripheral attitude towards freedom of contract was highly contingent on the path of legal development adopted by particular Central European countries. Some of them kept their legislation rather apart from the liberal agenda. This route was taken most obviously by Czechoslovakia, which adopted in the Civil Code of 1950 a radically socialist reform of private law, quite a far departure from the core elements of the European tradition.[74] In a more liberalized form, this approach was maintained in the Civil Code of 1964, which limited contract autonomy with a robust body of mandatory rules.[75] Even to a more radical extent, this approach was followed by the East German Civil Code of 1975. The code was attempting to embody the ideas of socialist justice to the greatest possible extent and to follow the ideas of a "popular code", understandable to every citizen. In terms of contract law, it was putting a strong emphasis on the material equality of parties and on safeguarding just allocation of resources in society.[76] At the same time it almost entirely neglected freedom of contract as a principle, following its Marxist perception as a part of the *bourgeois* heritage of socially exploitive contract law.[77]

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[71] Cf. point 6.

[72] On the conceptual continuity between private law in Western Europe and the socialist countries see e.g. G. Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 Am. J. Comp. L. (1995), p. 94; K. Grzybowski, *Continuity*, p. 44; N. Reich, *Sozialismus und Zivilrecht*, Frankfurt am Main 1972, p. 33ff.

[73] See e.g. R. Mańko, *Resistance towards the Unfair Terms Directive in Poland: the interaction between the consumer acquis and a post-socialist legal culture*, in: J. Devenney, M. Kenny (eds), *European Consumer Protection: Theory and Practice* Cambridge 2012, p. 414. In more general terms, on this phenomenon also H. Collins, *Marxism and Law*, Oxford: 1984, p. 71: "[h]istorical materialism cannot admit the existence of free-floating ideologies affecting the course of events without gravely endangering its fundamental principles concerning the material determination of social evolution."

[74] L. Tichý, *Czech and European Law of Obligations at a Turning Point*, in: R. Schulze, F. Zoll (eds.), *The Law of Obligations in Europe. A New Wave of Codifications*, München 2013, p. 29f; H. Izdebski, *General Survey of Developments in Eastern Europe in the Field of Civil Law*, in: G. Ginsburgs D.D. Barry, W.B. Simons (eds.), *The Revival of Private Law in Central and Eastern Europe. Essays in Honor of F.J.M. Feldbrugge*, The Hague–London–Boston 1996, p. 9.

[75] L. Tichý, *Czech and European*, p. 30; R. Sacco, *The Romanist*, p. 79.

[76] As I. Markovits observes, "[t]he new East German contract law should advance collective cohesion. It should not help some parties to secure advantages over others.", and further, "[s]ocialism wants its contract law to be unselfish and cooperative." (I. Markovits, *Justice*, p. 223).

[77] "From its beginnings, East German law mistrusted contracts. That does not only hold for economic law, where obviously the Plan left little room for self-determined legal relationships between state-owned enterprises. Legal relationships between individual citizens, too, were increasingly controlled and limited by rules and targets set by state authorities rationing, price fixing, rent controls, and the like. […] By and by, the state proceeds to close those legal loopholes that for a while allowed enterprising people to make a living by contracting along the outskirts of the economic plan.", I. Markovits, *Justice*, p. 221;

At the same time, other countries in the region maintained the core formal structures of contract law relatively unaffected. This was, in particular, the case in Hungary (Civil Code of 1959) and Poland (Civil Code of 1964). In the first – quite exceptionally against the backdrop of the other countries of the region – § 200(1) could roughly resemble a humble declaration of contractual freedom.[78] Its wording was directly in line with similar pronouncements in the classically liberal private law codifications: "[t]he parties are free to define the contents of contracts, and they shall be entitled, upon mutual consent, to deviate from the provisions pertaining to contracts if such deviation is not prohibited by legal regulation."[79] The Polish 1964 Code in turn, grounded the bulk of contract law in the pre-war provisions of the 1933 Code, altering only to some extent their underlying political rationale. The mechanics of socialist contract law remained, however, rather liberal in nature.[80] For these reasons, it could be easily adapted to the evolution of a socialist economy, incrementally liberalized[81] from the 1970s, and then could function quite easily in the realities of the post-socialist transformation.

In all of these systems, the final outcome of development under a socialist regime was a hybrid form, which combined the previously existing structures with the newly-developed policy agenda.[82] This led to a peculiar situation, where "the written provisions of the laws were much closer to market circumstances than business reality."[83] Preservation of individual autonomy in these systems was usually not a matter of a value-based choice, but of one that was purely pragmatic. It rested on the assumption that the socialist economy is based predominantly on the same properties as any other economy and, hence, cannot be deprived of the core guiding values.[84] Following on from this premise, socialist contract law could not entirely neglect "the general principle of autonomy of will of the parties and their parity and in consequence, the principle of freedom of contract."[85] The relevance of contractual freedom can be broken down into three domains.[86]

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see also H.-W. Micklitz, *Consumer law*, in: F. Cafaggi *et al.*, *Europeanization of Private Law in Central and Eastern Europe Countries (CEECS): Preliminary Findings and Research Agenda*, EUI Working Papers, LAW 2010/15, p. 39 and R. Sacco, *The Romanist*, p. 78.

[78] On the liberal attitude of the Hungarian contract law of that era see also V. Petev, *Sozialistisches Zivilrecht*, Berlin–New York 1975, p. 133–141.

[79] Translation available at: https://esdac.jrc.ec.europa.eu/Library/.../HungaryCivilCode.doc (22.6.2020).

[80] See also more generally M. Raff, *The importance of reforming civil law in formerly socialist legal systems*, 1 Int. Comp. Jur., 2015, No. 1, p. 27.

[81] See also further parts of this paper.

[82] The acknowledgement of contract freedom in the socialist economy was observed also by H.J. Berman, *Commercial Contracts*, p. 210f, who observed that "[i]t is not considered, however, as a natural right, but rather as a right emerging from social conditions. Its source is found in the harmony of social and personal interests under socialism, and in the equality of bargaining power of the contracting parties. Actual freedom of contract, it is said, is thus created by socialism itself – by the absence of unemployment, by confidence in the future, by regulation and integration of the national economy. Moreover, experience has shown that the welfare of the national economy itself requires the granting of initiative and responsibility to the parties." Similarly also A. Wolter, in one of the most prominent post-war handbooks for the general part of civil law – emphasizing the role of party autonomy as the essential premise of the concept of a juridical act (equal to German *Rechtsgeschäft*) and hence, a contract (A. Wolter, *Prawo cywilne. Zarys części ogólnej*, Warsaw 1967, p. 219). On the contradictory perceptions of freedom of contract in the socialist law see also A. Stelmachowski, *Czy kryzys*, p. 274–277 and *id*, *Ewolucja autonomii woli*, in: E. Łętowska (ed.), *Tendencje rozwoju prawa cywilnego*, Wrocław–Warsaw–Cracow–Gdańsk–Łódź 1983, p. 182–187.

[83] L. Vékás, *Contract in a Rapidly Changing Institutional Environment*, 152 J. Inst. Theor. Econ. (JITE) / Zeitschr. gesamt. Staatswiss. (1996), p. 50.

[84] Moreover, as has been noted, the use of the conceptual framework of contract law can facilitate achieving a higher level of synergy and consensus between public entities (even if the ultimate goal of this would not be a contract in the strict sense) – see E. Łętowska, *Pozycja rad narodowych i ich organów w sferze prawa cywilnego*, 26 PiP (1971), p. 560.

[85] S. Buczkowski, *Obrót gospodarczy a metody jego regulacji prawnej*, 15 PiP (1960), p. 443.

[86] Cf. also V. Petev, *Sozialistisches*, p. 133–141.

The first, quite counter-intuitively, pertained to transactions between state-owned entities.[87] Though this sphere of socialist economy was regulated mostly by administrative ordering and mandatory rules, in the parts governed by contract law it was subordinated to the general conceptual framework of contact law (such as liability for non-performance and defects of consent). Private entities still enjoyed a certain level of freedom of contract, even though it was limited by multiple mandatory rules and administrative ordering.

The actual ambit of this insular freedom was changing over time. It was underpinned by various processes, at the crossroads of political, economic and legal fluxes of the communist regime. In Poland this development had two main culminations: the first of them happened in the outcome of the post-Stalinist thaw in 1956, the second was the result of the economic liberalization of the 1970s.[88] In the result of the first change, Polish contract law – still directly grounded in Marxist concepts – extracted from its body the most evident manifestations of ideological influence. This change was of fundamental importance for contract law. It created the environment[89] for a return to the classic freedom-based agenda, repudiated or marginalized at the era of intense ideological pressure in the 1940s and 1950s. It further allowed contact law to start its way back to its liberal origins and to focus on individual, rather than collective, interests.[90] As was observed at the time, "in societies that earlier in this century were very heavily committed to the planning principle, the relative importance of contract […] appears to have increased."[91] The same dynamics took place at a different pace in all the Central European countries.

Second, a broad sphere of contractual practice remained beyond the scope of direct state steering. It embraced mostly "everyday" contracts concluded between individuals, beyond the commercial context.[92] They were governed by the general rules of contract law, with strong (yet usually implicit) endorsement of individual autonomy.[93] In these spheres freedom of contract was limited – usually for

[87] Also in international trade relations with the Western world, for obvious reasons socialist states did not question freedom of contract as a principle – see e.g. J. Rajski, *The Law of International Trade of Some European Socialist Countries and East-West Trade Relations*, 1967 Wash. U. L. Q. (1967), p. 133f.

[88] See also P. Szymaniec, *The Influence of Soviet Law on the Legal Regulations of Property in Poland (1944-1990)*, 5 Russ. L.J. (2017), p. 100–104; G. Ajani, *By Chance*, p. 101; K. Sajko, *Enterprise Organization of East European Socialist Countries – A Creative Approach*, 61 Tul. L. Rev. (1986-1987), p. 1373; T. Sarközy, *Problems and Perspectives of the Legal Adaptation in the Market Economy in Hungary*, in: P.-Ch. Müller-Graff (ed.), *East Central European States and the European Communities: Legal Adaptation to the Market Economy*, Baden-Baden 1993, p. 69, 71.

[89] It was an element of a more general trend towards reformulation of the ideological foundations of the political and legal regime, remaining still within the general frames of Marxism. In the outcome of this period, "[a] Westernized, more humanistic kind of socialist ethics was accepted in the process by a large part of the Polish intelligentsia." (A.W. Rudziński, *New Communist*, p. 77).

[90] S. Buczkowski, S. Szer, A. Wolter, *Prawo cywilne*, p. 165.

[91] A. v. Mehren, *A General View of Contract*, in: A. v. Mehren (ed.), *International Encyclopedia of Comparative Law*, vol. VII, *Contracts in General*, part 1, Tübingen–Leiden–Boston 1976, p. 10. Amongst the spheres where this increase is observable, the author mentioned not only "the economic importance or role of contract as an institution", but also emphasis on "free choice as a source of legal rights and liabilities".

[92] As A. Bakardijeva Engelbrekt (*The impact*, p. 102) puts it, "[p]rivate law was divorced from the market, which it was originally supposed to facilitate. Its application was reduced to the sphere of individual and family relationships".

[93] One of the most vivid illustrations of this phenomenon may be the duality of legal regime of sales contract, regulated separately for dealings between state enterprises and for the "other" sales (mostly between non-professional individuals) – *cf.* W. J. Wagner, *The Interplay*, p. 370f; see also *id*, *General Features*, p. 406.

fairness-based reasons[94] – but never entirely excluded. It was also scarcely recognized in case law.[95] Moreover, even in the spheres subjected to more intense state steering, legal doctrine and case law attempted (purposefully or intuitively) to maintain the classic taxonomies and conceptual framework of contract law to as broad an extent as was possible.[96]

Third, contract law in the socialist era had a strong unofficial dimension as well, which manifested itself in various forms of the black-market economy. This phenomenon was common, in various forms and to various extents, for all the socialist countries, where contracts, being "increasingly neglected" in "public economic life", were "gain[ing] in number and significance in the shadow economy"[97]. Since the centrally-steered economy, almost from its outset, was unable to provide citizens with meaningful ways to satisfy their consumption needs,[98] socialist societies almost instantly started developing unofficial channels and forms of contracting. These substituted the official economy to a great extent, providing goods and services that were unavailable (or hardly available) through official ways of distribution.[99] This sphere of contractual dealings encompassed mostly everyday-life dealings[100] and created a peculiar "parallel" contracting domain, dependent on bottom-up social norms and informal ways of enforcement (e.g. through reputation harm).[101] In these terms, the black market constituted another island of autonomy and freedom of contract. Both principles occurred, however, in a rather peculiar shape: as freedom from state steering and freedom to make any contract that would be compliant with the underlying social framework. Hence, contractual freedom functioned in this context in its most radical version: as freedom from any form of regulation[102], enjoyed by formally independent individuals.[103]

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[94] As observed by I. Markovits (based on the 1950s East Germany case law): "The early people's judges did not care about contractual freedom but about contractual justice, and they defined that justice not by what the contracting parties had intended but by what Socialist morality would have required them to do." (I. Markovits, *Justice*, p. 221). On another example of this overlap also P.J.D. Wiles, *Changing Economic Thought in Poland*, 9 Ox. Econ. Pap., NS (1957), p. 198, who observes that the state's scheme of economic steering provides for "devolution of decisions, as to both price and output, not to ministry or voyevodship but to agreement between customer and supplier. But such agreement is nothing other than the free play of supply and demand […]".

[95] See e.g. judgments of the Supreme Court of 1965, discussed and quoted by W.J. Wagner, in: ed. D. Lasok (ed.), *Polish Civil Law*, Vol. II, *Obligations in Polish Law*, Leiden 1974, p. 45f.

[96] On the attempt to preserve the pre-war structural and conceptual agenda of law in the time of the rise of communism in Poland *see also* generally K. Grzybowski, *Reform and Codification of Polish Law*, 7 Am. J. Comp. L. (1958), p. 401f; M. Raff, *One Summer in Gdańsk: Poland's leadership in transition from the socialist legal model*, 16 Hum. Res. (2010), p. 75f. At the same time, however, the actual content of these terms had to be filtered through the premises of communist ideology. This pertained, especially, to the underlying autonomy-related notions of contract law – cf. W.J. Wagner, *Polish Civil Law*, p. 45–49.

[97] I. Markovits, *Justice*, p. 224.

[98] See e.g. I. Markovits, *Justice*, p. 198–201.

[99] Cf. J. Kochanowski, *Jenseits der Planwirtschaft: der Schwarzmarkt in Polen 1944-1989*, Göttingen 2013.

[100] J. M. Litwack, *Legality and Market Reform in Soviet-Type Economies*, 5 J. Econ. Perspect. (1991), p. 80.

[101] The outcome was that the socialist economy developed two parallel ways of buyer protection: "[o]n the one hand, there were the rules of the black market relying on the honesty, and often, just the instantaneous performance, of people cutting their own deals. On the other hand, there was the law, trying to keep everyone in line by punishing sellers for what officially was considered excessive greed and by protecting buyers against their own risky purchases." – I. Markovits, *Justice in Lüritz*, 50 Am. J. Comp. L. (2002), p. 871.

[102] Usually this included also a *de facto lack* of state enforcement in the case of breach. For obvious reasons participants in the unofficial market were inclined to resort to informal ways of enforcement rather than to reveal the conclusion of contract to any public authority, including courts.

[103] Such a high degree of autonomy does not imply, obviously, that the black-market economy was efficient and just. Quite the opposite: the radical version of autonomy entailed massive exploitation and injustice – see e.g. I. Markovits, *Justice*, p. 224–227.

4. Fossilization of freedom of contract

The "double life" of contractual freedom, both denied and tolerated in the socialist regime, triggered quite profound consequences for the conceptual agenda of contract law. It led to the development of its very peculiar shape of "freedom of contract »under socialist conditions«"[104], which combined elements of liberty and compulsion. At the same time, freedom of contract in the socialist realities developed usually without any more profound theoretical or policy agenda, and was not rooted in any coherent intellectual structure. Academic study of the liberal framework of contract law was in that period at least unfashionable and, if carried out at all, usually limited itself to rather trivial and obvious findings.[105] Moreover, a part of the discussion over contractual freedom was focused on the peculiar issues of the socialist economy, in particular on the agreements between the state-owned enterprises in the planned economy. For similar reasons, contract freedom was also not at the center of attention of courts and (apart from a few instances, open to dispute) never developed as a case law doctrine.

Consequently, in the communist era freedom of contract was usually seen through the prism of its inter-war notion. It was the most proximate – and the only fully-shaped – concept of contractual liberty available to legal scholarship of the Central European countries in that era. The confinement to this idea made it, however, hardly possible to absorb more modern attitudes towards freedom of contract that developed in Western European scholarship after World War II. It pertained, in particular, to the new ways of perceiving market inequalities and the social role of contract law in areas such as consumer law. These ideas started to proliferate in Central European scholarship relatively late (in the late 1970s and 1980s)[106] and until the 1990s did not find broader recognition in case law and legislation. Consequently, freedom of contract in Poland, along with other Central European states, became fossilized in its pre-war understanding, rather obsolete in terms of the actual market and social needs that developed on both sides of the Iron Curtain[107]. While Western European scholarship began to realize that freedom of contract is a field of balancing values[108], it was more usual in Central European legal thought to portray freedom of contract in terms of a binary distinction between liberty and non-liberty. It rested, in particular, on equalizing the formal and real freedom of contracting parties[109] and denied in general a more differentiated approach towards various types of market actors, along with the need to introduce protective measures.

The outcome was that the post-socialist transformation found Central European contract law partially decomposed at the conceptual level, as well as partially petrified in a rather obsolete shape.[110] Hence, after the collapse of the socialist regime contract law in the region was not fully equipped to address the new economic realities. In particular, it was not able to embrace fully new forms of organizing market

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[104] On this approach in East German legal scholarship *see* I. Markovits, *Civil Law in East Germany. Its Development and Relation to Soviet Legal History and Ideology*, 78 Yale L.J. (1968), p. 40.

[105] See also W.J. Wagner, *The Law of Contracts in Communist Countries (Russia, Bulgaria, Czechoslovakia and Hungary)*, 7 St. Louis U. L.J. (1963), p. 297 and V. Petev, *Sozialistisches*, p. 134.

[106] Cf. e.g. E. Łętowska, *Kodeks cywilny a obrót mieszany*, 36 PiP (1981), p. 41–44; M. Sośniak, *Zasada swobody umów w prawie obligacyjnym z perspektywy schyłku XX wieku*, 11 St. Iur. Sil. (1986), p. 18ff.

[107] This pertained to the consumer market as well, which, however – thanks to the specificity of the socialist economy – created partly peculiar regulatory needs; on the specificity of the socialist consumer market cf. e.g. F. Trentmann, *Empire of Things. How We Became a World of Consumers, from the Fifteenth Century to the Twenty–First*, New York 2016, p. 326–337 and A.K. Koźmiński, *Consumers in Transition From the Centrally Planned Economy to the Market Economy*, 14 JCP (1992), p. 351–363.

[108] See also Thomas M.J. Möllers, *Working*, p. 121–123.

[109] Later Polish law developed a tacit assumption that beyond limited areas (such as labor contracts or clearly exploitive agreements) contract law should remain indifferent to imbalances of bargaining power; cf. point 6.2.

[110] This argument was used e.g. in the context of the review of clauses in consumer contracts, introduced by European Union law in order to protect consumers against the abuse of the dominant market position by professionals. On the similar issue in Hungarian law see N. Reich, *Transformation of Contract Law and Civil Justice in the New EU Member Countries – The Example of the Baltic States, Hungary and Poland*, 23 Penn St. Int'l L. Rev. (2005), p. 6.

exchange and to address the specific protective needs arising in the market. These phenomena occurred with various intensity in all the Central European countries, which after the fall of communism revived the early-20th century concepts of contract autonomy. They dated back to the last known sets of contract rules which endorsed free market ideals, in most of the region this was the ABGB, the source of contract law for most of the post-Austro-Hungarian states until the introduction of socialist codifications (except for Poland, which replaced its contract law part with the 1933 Code). It endorsed a strongly *laissez-faire* version of contractual liberty, directly rooted in 19th-century views of market freedom and the role of private law. In this way, at the initial stage of post-socialist transformation freedom of contract – already a bit dissociated after the communist era – was even further entrenched in the obsolete version of economic liberalism.[111]

5. The missing link: revival of freedom of contract

5.1. The "big bang" transformation and contract law

The change of political regime in Central Europe in the late 1980s and early 1990s triggered almost immediate alterations in market institutions and in the legal order. The foundational element of this process was the transformation of the economy from the state-steered to the free-market model. In this way, contract law reclaimed its impact on the entire economy, including the spheres where it used to be neglected or marginalized under the socialist regime.[112] Each of the countries in the region had its own dynamic in this regard. In all of them, however, the economic shift was quite instant and abrupt, and it triggered equally abrupt consequences for contract law design.

The case of Poland is especially interesting against this backdrop, both because of the chronology (Poland was the first country in the region to liberalize its economy) and the radical nature of the reform. It also triggered particularly deep outcomes for the intellectual background of contract law. The attempts to liberalize the market substantially were orchestrated in late 1980s by the Communist Party itself,[113] with the hope to invigorate the economy at a time of catastrophic depression.[114] This change set the preliminary grounds for a much more in-depth evolution that ensued shortly after the political shift in 1989. It was founded on the neoliberal economic agenda[115] inspired by the Chicago School model[116].

The new attitude was introduced in a series of reforms, carried out within approximately 100 days of 1990. They are commonly known as the "Balcerowicz's Plan" (after Leszek Balcerowicz, the first non-communist Ministry of Finance). They overruled central planning, along with most of the other

[111] See also L. Vékás, *Contract*, p. 51.

[112] *Ibid*.

[113] In fact, early attempts to loosen the system of central planning and introduce selected elements of a free market economy were taken in the early 1980s, after the temporary prevalence of the anti-communist opposition forces gathered in the "Solidarność" ("Solidarity") movement. These reforms were, however, soon abandoned after the imposition of martial law in Poland in December 1981.

[114] Cf. e.g. M.G. Woźniak, *Lessons from the Polish way of transformation*, 52 NSWG (2017), p. 45; M. Ratajczak, *Polish Economics and the Polish Economy: A Study for the Twentieth Anniversary of Transition in Poland*, 51 Hist. Econ. Thought (2009), p. 9f. Further on the ideas of social justice advocated by Solidarność see e.g. M. Glasman, *Unnecessary Suffering. Managing Market Utopia*, London-New York 1996, p. 90–95.

[115] See e.g. M. Iwanek, *Some Issues in the Transformation of Ownership Institutions in Poland*, 148 J. Inst. Theor. Econ. (JITE) / Zeitschr. gesamt. Staatswiss. (1992), p. 52f.

[116] Cf. J. Sowa, *An Unexpected Twist of Ideology. Neoliberalism and the Collapse of the Soviet Bloc*, 3 PT (2012), p. 176f, who perceives the Polish model of transformation as a "part of the global neoliberal shift of the 1980s and 1990s".

hurdles to market autonomy.[117] Such a "big bang"[118] economic shift was intended to create a shock wave[119] to push the market towards self-reform.[120] The result was that "Poland became a textbook example of Friedman's crisis theory: the disorientation of rapid political change combined with the collective fear generated by an economic meltdown to make the promise of a quick and magical cure – however illusory – too seductive to turn down."[121]

Similar dynamics were present in other countries of the region as well. In all of them, one of the most immediate outcomes of the fall of communist rule was deep liberalization of the market, inspired by neoliberal ideas, prominent in the Western European thinking of that era.[122] In most of the countries these ideas were introduced hastily, yet usually in a milder or more prolonged way than the Polish "big bang" shift. The only country that opted for a similarly abrupt transformation was East Germany.[123] The reality there, however, was that transformation did not mean establishing a new economic order from scratch, but instead integration with the West German market and institutional system. Problems and frictions that occurred in this regard were, thus, peculiar to this country.

In all these countries, the transformation posed an obvious and immense task for contract law.[124] It had to adapt itself rapidly to the new economic policy[125] and the new attitude towards market–state relations. The switch from central planning to the free market was not of a purely technical nature, but triggered much more profound consequences for the conceptual structure of contract law. It radically altered the general way of perceiving contract, transforming it from a tool of economic coordination, focused on collective welfare, to a way of expressing the idiosyncratic needs of individuals in an autonomous and (in principle) unconstrained way.[126] Due to the form and pace of transformation,

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[117] As Balcerowicz noted from the perspective of time – in a commemoration of M. Friedman – "[i]n his Newsweek columns published between 1966 and 1983, and in his books »Capitalism and Freedom«, »Free to Choose«, and »The Tyranny of the Status Quo« (written with his wife, Rose), Friedman offered a vision of liberty that was both appealing and achievable. Indeed, »Free to Choose« – later the basis of a popular television series thathe hosted – was published illegally in Poland in the 1980s, helping to inspire me, and many others, to dream of a future of freedom during the darkest years of communist rule" (L. Balcerowicz, *Losing Milton Friedman, a Revolutionary Muse of Liberty*, "Daily Star" 22 November 2006).

[118] See also A. Harmathy, *Codification in a Period of Transition*, 31 U.C. Davis L. Rev. (1998), p. 784.

[119] As has been summed-up by one of the main architects of the Polish economic transformation, "shock therapy" should be understood as "a rapid, comprehensive, and far-reaching program of reforms to implement »normal« capitalism." – J. Sachs, *Shock Therapy in Poland: Perspectives of Five Years. The Tanner Lectures on Human Values*. 6–7 April 1994, University of Utah (https://tannerlectures.utah.edu/_documents/a-to-z/s/sachs95.pdf, 22.6.2020), p. 268.

[120] On the premises of market reform see also L. Balcerowicz, *Understanding Postcommunist Transitions*, 5 J. Democr. (1994), p. 81f.

[121] Cf. N. Klein, *The shock doctrine: the rise of disaster capitalism*, New York 2008, p. 191, 227f.

[122] H. Izdebski, *General Survey*, p. 5; J. Zemánek, *Problems and Perspectives*, p. 51; I.T. Berend, *Toward a New World System? The Promises of Transition to Market-Economy*, in: *Debates and Controversies in Economic History. A-Sessions. Proceedings. Eleventh International Economic History Congress, Milan, September 1994*, Milan 1994, p. 194–204.

[123] I.T. Berend, *Toward a New World System?*, p. 216–218.

[124] See generally J. Rajski, *European Initiatives and Reform of Civil Law in Poland*, 14 Jur. Int'l (2008), p. 152; see also more generally, P.H. Rubin, *Growing a Legal System in the Post-Communist Economies*, 27 Cornell Int. L. J. (1994), p. 27; P.H. Brietzke, *Designing the Legal Frameworks for Markets in Eastern Europe*, 7 Pac. McGeorge Global Bus. & Dev. L.J. (1994), p. 44; Daniel T. Ostas, *Institutional Reform*, p. 514.

[125] Cf. e.g D. Lipton, J. Sachs, *Creating a Market Economy in Eastern Europe: The Case of Poland*, 1 Brookings Pap. Econ. Activity (1990), p. 77; E. Łętowska, A. Wiewiórowska-Domagalska, *The Common Frame of Reference – The Perspective of a new Member State*, 3 ERCL (2007), p. 279; A. Harmathy, *Codification*, p. 784f; K. Hoff, J.E. Stiglitz, *After the Big-Bang? Obstacles to the Emergence of the Rule of Law in Post-Communist Societies*, 94 Am. Econ. Rev. (2004), p. 753f.

[126] In a similar way, also A. Bakardijeva Engelbrekt (*The impact*, p. 103): "[a]t stake has therefore been changing the role of the state from dictating to framing economic relations and reforming a rigid, secretive and politicised bureaucracy into a modern public administration along principles of legality, transparency, accountability and public service." See also with respect to East German experience, I. Markovits, *Children of a Lesser God: GDR Lawyers in Post-Socialist Germany*, 94 Mich. L. Rev. (1996), p. 2272, who observes that "the move from socialism to capitalism can be described as a change in legal paradigms", amongst which she enlists a switch "from Plan to contract".

contract law was, however, substantially unprepared to absorb the new reality.[127] Although the formal toolbox of contract law could persist without more profound variations, its more profound intellectual structures – including freedom of contract – faced growing bewilderment.[128]

Only over a decade after the fall of communism, did Central Europe experience a substantial codification movement, with new codes enacted in Czechia (2012) and Hungary (2013).[129] This concluded symbolically the post-socialist shift in the region, building directly on the modern concepts of market liberty and incorporating the values and structures of EU law.[130] The new codes were also one of the most vivid tenets for establishing new, independent political communities with a strong national identity.[131] Poland and Slovakia did not develop their new codes, opting tentatively for an evolutionary modification of the existing acts enacted in 1960s.[132]

5.2. Particularities of post-socialist contract liberty

The 1980s/1990s transition entailed a very particular version of market liberalism in the Central European countries. It was based on a strong affirmation of the *laissez-faire* approach, which at the same time was perceived in both an obsolete and trivialized way.[133] It was built on selective elements of modern liberalism (mostly the focus on individual autonomy), but overlooked the others.[134] Each of the countries of the region took a partly different approach towards developing a free market economy.[135]

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[127] See also A. Harmathy, *Codification*, p. 797. The lack of the proper instrumental background in contract law can be also considered as an element of a broader accusation of "premature" transformation of the Polish economy, without preparatory changes of market and proprietary structure – on this critique see e.g. (in a polemic way) L. Balcerowicz, *Common Fallacies in the Debate on the Transition to a Market Economy*, 9 Econ. Policy (1994), p. 28f.

[128] In a similar way, the danger of inflexible theoretical accounts in contract law is acknowledged by A. Harmathy: "[t]he other danger is the conservatism of legal theory. This danger is particularly great in a period of fundamental, political, and economic change when, according to the German experience, many people do not understand what the new needs are, and theoreticians are likely to stick to theories worked out by them or those to which they are accustomed." (A. Harmathy, *Codification*, p. 797). At the same time, the Central and Eastern European states were still, in general, relatively more receptive to Western legal concepts than a much more petrified Soviet Union and the post-Soviet countries (cf. R.M. Buxbaum, *Modernization, Codification, and Harmonization: The Influence of the Economic Law of the European Union on Law Reform in the Former Socialist Bloc*, in: R.M. Buxbaum *et al.* (ed.), *European Economic and Business Law. Legal and Economic Analyses of Integration and Harmonization*, Berlin–New York 1996, p. 128).

[129] The other noteworthy instances of the recent codification initiatives are the civil codes of Lithuania (2000) and Romania (2009).

[130] "Enacted after a decades-long forced interlude of state capitalism, the civil codes of post-Communist countries should be regarded as belated examples of codifying private law. Paradoxically, however, they are actually comparable to the codes enacted in the early 19th century, particularly in terms of their social function. The *Code civil* and the ABGB served the abolition of feudal conditions and the erection of a new social order resting on private property. The new codes in Eastern Europe in the 21st century had to be created for a modern regulation of the civil law relations arising through the privatisation of production assets that had been nationalised by the states across the board." – L. Vékás, *Private Law Codifications Through the Lens of Cultural History*, 9 Hung. Rev. (2018), http://www.hungarianreview.com/article/20180525_private_law_codifications_through_the_lens_of_cultural_history (22.6.2020).

[131] See also J. Basedow, *Private Law in Eastern Europe. Autonomous Developments or Legal Transplants?*, in: C. Jessel-Holst, R. Kulms, A. Trunk (eds.), *Private Law in Eastern Europe. Autonomous Developments or Legal Transplants?*, Tübingen 2010, p. 1.

[132] In Poland, the codification debate has been unfolding since the end of the 1990s. Apart from policy proposals and academic sets of selected rules, it has never resulted in creating a fully-developed proposal of a code, which could reach the level of political decision.

[133] See also J. Szacki, *Liberalism after Communism*, Budapest 1995, p. 6.

[134] See e.g. elements of this discourse referred to by A. Walicki, *Od projektu komunistycznego do neoliberalnej utopii*, Kraków 2013, p. 326f.

[135] Cf. D. Bohle, B. Greskovits, *Neoliberalism, Embedded Neoliberalism and Neocorporatism: Towards Transnational Capitalism in Central-Eastern Europe*, 30 West Eur. Polit. (2007), p. 443 and *passim*; D. Bohle, B. Greskovits, *The State, Internationalization, and Capitalist Diversity in Eastern Europe*, 11 Compet. Change (2007), p. 90–92 and *passim*.

In all of them, however, this attitude was built on certain simplifications and a rather sketchy understanding of concepts from the liberal toolbox. This translated directly onto the domain of contract law. In the post-transformation era contract liberty – in an attempt to come back to its liberal roots – was caught in a somewhat trivialized version, which in fact was an outdated and slightly superficial reiteration of the inter-war *laissez-faire* attitude.

The unsuccessful evolution of contract law after the fall of communism – which led to its petrification in obsolete forms – is the result of two principal reasons. First of all, it was intellectually rooted in the inter-war *laissez-faire* approach, which (as discussed above[136]) could not evolve into a more refined form during its "double life" in the socialist era. Second, the post-socialist transformation created a very particular intellectual environment, which entrenched the fossilized version of contractual freedom even further. The switch towards a free-market economy was not merely of an organizational or legal nature. It entailed also a massive shift of the collective imaginarium,[137] which led to symbolic rejection of the reality that existed prior to the transformation. The naïve version of liberalism, endorsed in the post-socialist years, provided a simple and handy antithesis for Marxism, a catchy version of "new" that could instantly replace the "old".[138] The example of Poland seems, again, especially illustrative for this issue. The particularly radical libertarianism that developed in Poland after the shift towards the free market and democracy, was plausibly determined by the rapidity and depth of Polish social and economic reform. In the post-socialist discourse the strong version of the *laissez-faire* attitude was a "reaction on the collectivist statism of the »real socialism«".[139] In other words, it developed as an "anticommunist allergy"[140] and embodied broad openness towards social and market liberty, as an intuitive counterweight to the radical interventionism of the socialist era.[141]

At the same time, quite coincidentally, Central European political and economic transformation happened in a period of global triumphs of neoliberalist theory. It not only provided a very catchy and easily-available conceptual framework for market reform.[142] In the 1980s, and throughout the 1990s, it was virtually the most prevalent and celebrated economic doctrine, and any substantial critique of its premises could sound rather ill-reasoned and futile.[143] The Central European economic reform was hence, in a way, destined to become a laboratory of (neo)liberal ideas, where their soundness could be practically proven. This triggered a further consequence in the form of an almost unconditional belief that private law and private enforcement might provide the optimal solution to the bulk of economic problems that were (ineffectively) governed through state steering under socialism.[144]

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[136] Cf. point 4.

[137] See also B. van Apeldoorn, *Transnational Capitalism and the Struggle over European Integration*, London–New York 2002, p. 159-161; D. Bohle, B. Greskovits, *Neoliberalism*, p. 462 and *passim*.

[138] *See also* Jerzy Szacki, *Liberalism*, p. 6.

[139] A. Walicki, *Od projektu*, p. 327.

[140] *Ibid*.

[141] On doctrinal accounts of this issue see also T. Sirovátka, M. Guzi, S. Saxonberg, *Support for Market Economy Principles in European Post-Communist Countries during 1999–2008*, 55 Czech Sociol. Rev. (2019), p. 321–323; S. Shields, *From socialist Solidarity to neo-populist neoliberalisation? The paradoxes of Poland's postcommunist transition*, 31 Cap. Cl. (2007), p. 162–165.

[142] Cf. T. Sirovátka, M. Guzi, S. Saxonberg, *Support for Market Economy*, p. 320: "The fall of communism coincided with the peak of neoliberalism's global diffusion and there were no influential transnational networks advocating alternatives to neoliberal theories."

[143] To refer again to A. Walicki's words: "the fact that Polish political transformation took place in the period of the highest triumphs of the free-market dogmatism of neoliberal right was a very disadvantageous circumstance, as it eliminated in practice the role of the left and paralyzed thinking of the intellectuals of the main stream of the Solidarność opposition" (A. Walicki, *Od projektu*, p. 412).

[144] In the outcome, "[t]he ideologically preferred governance solution in the wake of the failed experiment of state socialism has apparently been to entrust the making of private law to civil courts" (A. Bakardijeva Engelbrekt, *The impact*, p. 103).

In this way, once again, Central European countries adopted ideas from the "center"[145] and subsequently filtered them through their own "peripheral" experience. The *laissez-faire* model that was formed as a juxtaposition of these processes, produced direct and vivid outcomes for the perception of law and its relation towards the state. The early post-transformation period was underpinned by strong enthusiasm for the self-remedying aptitude of the market, and hence, for limiting compulsory legal interventions and paternalism. As was observed a few years after the post-socialist shift, "[a]fter the political change, the mostly liberal governments started with enthusiasm to build up the institutional system of market economy. However, in a few years it became obvious that the market will not automatically solve the economic problems inherited from the socialist era: industrial production declined, unemployment, social problems and thus the dissatisfaction of people rose."[146] The "post-communist allergy" triggered hence not only an allergy to state activism in market dealings, along the lines of a (neo)liberal agenda (reduced mostly to a strong endorsement of individual autonomy and lack of state interventionism). It also entailed aversion to any more profound involvement of market laws in pursuing social goals. Under the ideals developed in Central Europe in the early post-modern era, law was expected mostly to facilitate economic dealings and reduce their costs. In contract law its role should be hence reduced only to enforcement of agreements[147] and supplementing them through default rules. Any more profound ideas of social welfare and justice through market regulation were instinctively considered as a reminder of the socialist period and – as such – mostly neglected.

For these reasons, freedom of contract in the post-socialist era was raised to the role of one of the mightiest principles of the new relation between the market and the law. It was strongly endorsed in private law scholarship and case law, as well as starting to proliferate in the popular consciousness, as a symbolic incarnation of market (and to some extent individual) freedom.[148] Admittedly, the strong validation of freedom of contract also had a direct instrumental value. It was one of the natural prerequisites of privatization of state property, which began shortly after the fall of the communist regime. In these terms, absolutization of freedom of contract had its direct doppelgänger: the "sacralization" of private property,[149] which emerged after the transformation as the second pillar of the libertarian economic order in the Central European states.[150]

Over time, the initial "big bang" liberalism was gradually smoothed by states' welfarist policies,[151] sometimes triggered by external economic necessities.[152] Nonetheless, it still maintains a powerful position in the academic and public discourse.[153] In the following sections I attempt to understand the

[145] "The main idea [of the Polish shock therapy – M.G.] was to create institutions of the kind already in existence, and with proven merit, in Western Europe" – J. Sachs, *Shock Therapy*, p. 270.

[146] L. Vékás, *Contract*, p. 49.

[147] J. Kornai, *Individual freedom and reform of the socialist economy*, 32 Eur. Econ. Rev. (1988), p. 242, 254.

[148] In this way, "[i]n Poland, thanks to Balcerowicz, in 1989 an economic order started to be created, which was equivalent to a pure model of a neoliberal market economy. This meant that the ideas of creation of the social market economy, especially of corporate features – with strong employee participation and social dialogue – were put on a discard pile", J. Gardawski, in: *Czy mogliśmy wyminąć liberalny kapitalizm?* (an interview), 676 "Więź" (2019).

[149] On the link between freedom of contract and the liberal concept of property see also generally J. Kornai, *What the Change of System From Socialism to Capitalism Does and Does Not Mean*, 14 J. Econ. Perspect (2000), p. 29, 32 and L. Vékás, *Contract*, p. 49f.

[150] See also L. Damşa, *Property transformations*.

[151] G.W. Kołodko, *A two-thirds of success. Poland's post-communist transformation 1989–2009*, 42 Communist Post-Communist Stud. (2009), p. 327ff.

[152] Cf. point 6.2.

[153] The particular content of this argument was, as such, also instrumentalized and had multiple uses in public discourse. As A. Walicki observes, "the word »liberalism« […] was appropriated by proponents (or opponents) of the neoliberal marketization" (A. Walicki, *Od projektu*, p. 412).

more precise outcomes of the Central European version of a *laissez-faire* approach for the concept of contractual freedom in the post-transformation era.[154]

5.3. Freedom of contract – the new, but the old?

The concept of freedom of contract was at the center of the post-socialist market changes[155]. It provided both the conceptual agenda for adjusting contract law to the new economic realities and a basis for framing new instruments of contract law.[156] Therefore, it came as no surprise that one of the most immediate legislative changes in the transformation process was restoration of an explicit reference to freedom of contract. The process originated in 1988 when Poland restored freedom of business activity as a legal principle[157] (which was subsequently elevated to the constitutional level, as one of the fundamental rights featured in the 1997 Constitution).[158]

In the second step, the amendment of 1990[159] reintroduced to Polish private law an explicit declaration of contractual freedom in Article 353^1 of the 1964 Code. The new provision declared admissibility of any agreement, as long as it does not infringe the statute, principles of social coexistence (mostly understood as fairness) or the nature of the particular transaction.[160] Admittedly, this change did not add much to the existing content of freedom of contract[161] and was mostly a symbolic affirmation that tides in contract law shifted to a classically liberal attitude.[162]

Notably, Article 353^1 was shaped as a clear (re)incarnation of Article 55 of the 1933 Code.[163] This illustrates vividly that the deeper aim of the post-transformation reform was reversing its post-war

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[154] From a more general perspective see, however, a compelling critique of liberalism as the universal explanation of post-socialist developments by V. Ganev, *The "Triumph of Neoliberalism" Reconsidered: Critical Remarks on Ideas-Centered Analyses of Political and Economic Change in Post-Communism*, 19 East Eur. Politics Soc. 2005. The actual scope of this analysis does not pertain, however, directly to contract law, where the idea of liberalism seemed to be used in a rather simplified way, as a one-size-fits-all justification for removing regulatory hurdles to the (formally considered) freedom of contract.

[155] See generally, for instance, U. Drobnig, *The Conversion of a Socialist Economic System to a Market Economy: Legal Implications*, in R. Cranston, R. Goode (eds.), *Commercial and Consumer Law. National and International Dimensions*, Oxford 1993.

[156] See also H. Unberath, *Freedom of Contract*, in: J. Basedow *et al.* (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. I, Oxford 2012, p. 752, who observes that "[n]otwithstanding the restrictive trend [towards limiting freedom of contract in Europe – M.G.] [...] freedom of contract has recently witnessed a renaissance in Eastern Europe following the collapse of the socialist systems."

[157] As C.R. Sunstein observed at the time, freedom of contract was one of the key liberal freedoms introduced in East European constitutionalism after the transformation – C.R. Sunstein, *Something Old, Something New*, 1 E. Eur. Const. Rev. (1992), p. 19.

[158] J. Frąckowiak, *Problems and Prospects of Adaptation of the Law to the Market Economy in Poland*, in: P.-Ch. Müller-Graff (ed.), *East Central European States and the European Communities: Legal Adaptation to the Market Economy*, Baden-Baden 1993, p. 127. Moreover, as of 1 July 1988 free-market prices were reintroduced into the Polish economy.

[159] By the amendment of 28 July 1990.

[160] Literally: "Parties making a contract may arrange their legal relationship at their discretion, so long as the content or purpose of the contract is not contrary to the nature of the relationship, the law or the principles of social coexistence." – on the broader context of reintroduction of this provision see M. Safjan, *Zasada swobody umów (uwagi wstępne na tle wykładni art. 353^1 k.c.)*, 48 PiP (1993); C. Żuławska, *Wokół zasady wolności umów (art. 353^1 i wykładnia zwyczaju)*, 238 Acta Univ. Vrat. Prawo (1994), p. 174.

[161] Cf. e.g. B. Gessel-Kalinowska vel Kalisz, *Mixing Legal Systems in Europe; the Role of Common Law Transplants (Polish Law Example)*, 25 ERPL (2017), p. 808.

[162] On the "somewhat symbolic value" of this act also M. Safjan, Ł. Gorywoda, A. Jańczuk, *Taking Collective Interest of Consumers Seriously: A View from Poland*, EUI Working Papers, LAW 2008/26, at 20. In broader terms the symbolic role of law in the Polish social and economic transformations in the second half of the 20th century see also A. Leder, *Prześniona rewolucja. Ćwiczenie z logiki historycznej*, Warsaw 2013, p. 32.

[163] So e.g. R. Trzaskowski, *Granice swobody kształtowania treści i celu umów obligacyjnych. Art. 353^1 k.c.*, Cracow 2005, p. 169 and M. Safjan, *Zasada swobody*, p. 13f.

development and bringing the concept of freedom of contract to its inter-war form.[164] Along the same lines, contractual freedom was also understood in the scholarship and case law, which referred directly to the inter-war sources, especially to the doctrinal output that accompanied the 1933 Code.[165] In this way, the initial fossilization of contractual liberty (see point 4.1.) was further extended and entrenched. The rapidity and depth of market transformation significantly impeded the possibility out of working out a more coherent and modern agenda. The new market and social issues required a prompt legal reaction, which did not leave much space for deliberation and the careful devising of new tools. The old framework of concepts, notwithstanding its obsolescence, was hence the only one handy and ready for instant use.

Also in this regard Polish contract law was not unique, nor exceptional against the backdrop of the other Central European countries. In all of them, withdrawal from the centrally-planned economy triggered a steep turn towards classical concept of contractual autonomy in its radical form.[166] This was, in part, a result of a sudden and expedient nature of the reform, which did not leave much space for in-depth legal and economic consideration.[167]

The mismatch between the market and its institutional framework turned out particularly detrimental for the development well-functioning modern private law. The removal of hurdles to the free market opened a way for the uncontrolled and spontaneous growth of private entrepreneurship, which from the very beginning experienced a high level of economic inequality[168] and unfair market practices.[169] Contract law turned out, to a great extent, to be defenseless towards these tendencies. It lacked not only particular instruments (e.g. a developed system of consumer protection), but also a deeper conceptual agenda, which would allow for the legitimized intervention in contractual dealings.[170] Moreover, the

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[164] In a similar way – as a revival of the inter-war concept of contractual liberty – this principle has been also interpreted in the doctrine; see e.g. J. Rajski, *European Initiatives*, p. 152; M. Safjan, Ł. Gorywoda, A. Jańczuk, *Taking Collective Interest*, p. 20.

[165] What is also noteworthy, the inter-war literature is still one of the most important and appreciated points of reference for the Polish private law scholarship. As A. Mączyński puts it, there is "a particular fashion for quoting older scholarship and older case law." (A. Mączyński, *Uwagi o stanie nauki polskiego prawa cywilnego*, PiP 2011, p. 10). Although in many instances such references may be fully justified (especially because of the lacunae in the more recent literature or the special qualities of the particular texts and authors, the general proclivity for the literature originated in a different context (happening automatically and without deeper consideration) may amplify the "fossilization" of the contract law conceptual agenda.

[166] L. Vékás, *Contract*, p. 51.

[167] For instance, on the rapidity of the reform of Czech contract law after 1990 see L. Tichý, *Czech and European*, p. 30f.

[168] The outcome of this process was not a growth of oligarchy and burst of inequality – as opposed to some other countries, which adopted the Polish pattern of transformation. The most feasible explanation of this difference rests mostly on political and social premises. Polish transformation was directly supervised by the government, which from the outset was following quite a clear view of development and did not experience too strong subversive tendencies (the possible destabilizing social fractions were not strong enough in terms of political or economic power). See also N. Klein, *The shock*, p. 221–225, who observes *inter alia* that in the outcome of introducing liberalism in Russia, "the Communist state was simply replaced with a corporatist one: the beneficiaries of the boom were confined to a small club of Russians, many of them former Communist Party apparatchiks, and a handful of Western mutual fund managers".

[169] Noteworthily, the change in question was conducted quite contrary to the majoritarian view of society, embedded in the close political background of the first non-communist government – the massive "Solidarity" (*Solidarność*) social movement (the main opponent to the communist regime throughout the 1980s). The political agenda of this fraction was developed mostly "from inside out" Marxist thought, being strongly focused on equality, employee protection and fair allocation of assets in society – cf. N. Klein, *The shock*, p. 171–184; D. Ost, *The Defeat of Solidarity: Anger and Politics in Postcommunist Europe*, Ithaca 2006.

[170] In more overall terms on the intellectual weakness of the CE countries in the transformation era also D. Bohle, *Neoliberal hegemony, transnational capital and the terms of the EU's eastward expansion*, 30 Cap. Cl. (2006), p. 78f, who in the context of (Central) and Eastern European countries observes "specific legacies, which resulted in their incorporation into the transnational historical bloc through passive revolution. In contrast to others'—western, northern and southern European countries—their 'return to Europe' could not be based on established societal groups and around a specific hegemonic project at the national level. Lacking a domestic bourgeoisie, weakly embedded intellectuals and state elites became responsible for the rapprochement with the EU […]".

"fossilized" *laissez-faire* attitude advocated for an opposite solution: lack of intervention[171] or removing regulatory instruments to the ambit of antitrust and unfair competition law.[172]

The revival of contract law as a market regulatory edifice was paired in Central European countries with an opposite phenomenon: the increasingly shrinking role of contract rules by the market itself. [173] In many parts of the economy (such as large-scale commerce or investment contracts), legal rules were progressively replaced with self-regulatory schemes.[174] This pertained especially to a broad use of standard terms enacted and enforced by international companies, which managed to effectively exclude (*de iure* or *de facto*) application of contract rules and the control of state authorities[175].

The fossilization at the level of concepts and values was accompanied by methodological conservatism. In the entire region, the post-socialist period was dominated by a textual-centric interpretation,[176] which was minimizing or neglecting more functional or dynamic approaches.[177] The roots of this attitude may be traced back to the socialist era.[178] However, even after the change of political realities it persisted as one of the most prominent features of Central European legal culture.[179] Needless to say that formalist reasoning creates a strong hurdle to any change in contract law, especially if it were to take place in a bottom-up way, without a wholesale alteration of the existing rules (which was the case of Polish private law after the transformation). In the period of transition these particularities of legal methodology created significant frictions in adjusting the existing contract law agenda to the post-transformational reality.

In the course of time, the pressure of diverse forces (international markets, state regulation and the growing maturity of the domestic economy) smoothed the radical color of the early transformation. The

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[171] As was diagnosed subsequently in the literature, regarding the whole model of liberal transformation and its pitfalls, "the values of the emerging system – personal and political freedoms, free market liberties – were universalized by the people. It quickly turned out, however, that the changes were imbued with immanent and structural contradictions, and that – at last – people's habits shaped under communism, models of relations between the state and the individual, opinions about their mutual rights, obligations and services are still playing an important role and are influencing acceptance of the reconstruction." – I.C. Kamiński, B*etween the Old and the New. Legitimatory Dilemmas of the Transitory Period in Poland*, 117 Pol. Sociol. Rev. (1997), p. 47.

[172] "The initial stage of transposition was characterized by an emphasis on market-facilitating measures, that is, company law, investment law, competition and unfair competition law […], rather than market-correcting measures, such as consumer law. This implied a systematic scarcity of direct consumer protection rules and institutions. […] In the absence of specialized consumer protection legislation, the soaring consumer problems prompted by the imperfections of emerging markets were partly addressed through antitrust law and early laws on unfair competition." – A. Bakardijeva Engelbrekt, *The impact*, p. 105; see also *ea*, *Grey Zones, Legitimacy Deficits and Boomerang Effects: On the Implications of Extending the Acquis to Central and Eastern Europe, in: N. Wahl, P. Cramér, Swedish Studies in European Law*, Oxford 2006, p. 11. More generally on the post-transformation development of antitrust and unfair competition rules in the region see T. Varady, *The Emergence of Competition Law in (Former) Socialist Countries*, 47 Am. J. Comp. L. (1999).

[173] L. Vékás, *Contract*, p. 52.

[174] In Poland on this phenomenon also E. Łętowska, *Prawo w płynnej nowoczesności*, PiP (2014), p. 10f.

[175] More generally on this phenomenon see K. Pistor, *The Code of Capital. How the Law Creates Wealth and Inequality*, Princeton–Oxford 2019, p. 209–216.

[176] A. Bakardijeva Engelbrekt, *The impact*, p. 102; P. Cserne, *Formalism in judicial reasoning: Is Central and Eastern Europe a special case?*, in: M. Bobek (ed.), *Central European Judges under the European Influence: The Transformative Power of the EU Revisited*, Oxford 2015.

[177] On an attempt to construe a common denominator for the legal experience of the countries in the region see also A. Fogelklou, *East European legal thinking*, RGSL Working Papers No. 4, Riga 2002, p. 16–27.

[178] Cf. e.g. M. Bobek, *A New Legal Order, Or a Non-Existent One? Some (Early) Experiences in the Application of EU Law in Central Europe*, 2 Croatian Yearbook of European Law & Policy 2006, p. 298; Z. Kühn, *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement*, 52 The American Journal of Comparative Law (2004), p. 538-545; R. Mańko, *Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome*, 7 Pólemos. Journal of Law, Literature and Culture (2013), p. 210–214.

[179] Cf. P. Cserne, *Thinking about Judicial Formalism in Central and Eastern Europe – Symptom of an Inferiority Complex?*, https://www.academia.edu/10178306/Discourses_on_Judicial_Formalism_in_Central_and_Eastern_Europe_Symptom_of_an_Inferiority_Complex (22.6.2020), p. 6–9.

major role in this process was played by EU private law, which introduced a new view of contract law, quite diverse from the "fossilized" and somewhat simplified concept that was established in the post-socialist era.[180] Nevertheless, as will be further explained below,[181] the EU rules were never fully integrated with the conceptual agenda of domestic contract law,[182] but, rather, functioned next to it, with a partly separate set of rules, values and policy goals. In this way the libertarian concept of freedom of contract – once set at the specific moment of the "shock" transformation – became surprisingly persistent as an element of the collective imagination, occupying both a theoretical agenda, as well as judicial and political assertions.[183]

6. The persistence of the *laissez-faire* concept of contract law

6.1. The symbolic power of freedom of contract

Freedom of contract in its classically liberal understanding, reborn (in fact: excavated) during the post-socialist transformation, played quite a significant role in the public debate in Poland. Its position has reached far beyond the purely legal dimension. Often freedom of contract was referred to as a quintessence of the liberal concept of the market.[184] In other words, it became one of the clear signposts of the post-socialist turn in the economy.[185] Moreover, it started to serve as a catch-all dogma of the state economic order.

Even over two decades after the transformation, L. Balcerowicz described the essence of market freedom through reference to freedom of contract:[186] "[t]he principle of freedom of contract constitutes a basis for freedom in certainly the most important sphere of the people's conduct – in interactions. Therefore, the legal erosion of this principle, which took place within the past one hundred years, is thus the erosion of freedom." Following on this observation, he claims that the deterioration also takes place nowadays, in particular by "the actual quashing of the freedom of contract between contractors on the market." Further, looking for the values that underlie this approach, the author accentuates that this unwanted occurrence is not proper for socialist countries (that are, by nature, anti-liberal), but to the "capitalist" states, where "[t]he main ideological basis of the aforesaid erosion is an assumption that in certain kinds of transactions one of the parties is inherently weaker than the other and hence, that the law should protect this party by limiting freedom of contract. This legal paternalism, associated with the expansion of the concept of coercion, is perhaps the most visible in the case of labor contracts, i.e. in the labor law." This brought the author to a conclusion that "[i]n this case the concept of a weak party reflects clearly the influence of Marxism."[187]

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[180] See also A. Bakardijeva Engelbrekt, *Grey Zones*, p. 31–33.

[181] See point 6.2.

[182] On generally limited (yet growing recently) inclusion of the legal scholarship in Central and Eastern Europe in the EU legal discourse cf. D. Zgrabljić Rotar, M. Jokić, S. Mateljan, *The Visibility of Papers Written by Authors from European and Post-Socialist Countries as an Indicator of Integration into the EU Legal System*, 14 CYELP (2018), p. 159.

[183] On an issue that is a little similar, for public convictions as a possible facilitator or inhibitor of legal change A. Harmathy, *Codification*, p. 796: "A very important problem is the content of the codes' rules. It is not a special problem of codification but a general one of legislation. Legislation is not free from public opinion or from the values accepted by the society. In a period of transition, social values become uncertain and change. The mentality of citizens does not change quickly. Therefore, the legislature must take into consideration what is acceptable for the population if it does not want to formulate rules that will not be applied in practice."

[184] On the use of freedom of contract as a general explanatory formula see also B. Gessel-Kalinowska vel Kalisz, *Mixing Legal Systems*, p. 807f.

[185] On the use of freedom of contract as a general explanatory formula see also *ibid.*

[186] L. Balcerowicz, *Wstęp*, in: L. Balcerowicz (ed.), *Odkrywając wolność. Przeciw zniewoleniu umysłów*, Warsaw 2012, p. 26.

[187] This claim triggered the broad critique of E. Łętowska and J. Woleński, *Czy prawo zatruwa wolność*, 22 Prz.Fil.–N.S. (2013), who emphasise that the relation between law and freedom is more complex.

Such a vivid apology for market liberty understood in a *laissez-faire* sense, leads to a very particular picture of freedom of contract, quite characteristic for the imaginary shape of this concept in the post-transitional Polish discourse. It tends to perceive freedom of contract not only as an embodiment of the liberal market idea, but also as a symbolic plea for a minimalism of state intervention. In this understanding, freedom of contract, to recall the Isiah Berlin's celebrated distinction, is usually referred to as a freedom "from" state regulation, rather than a freedom "to" efficient and just contracts. Notably, the regulatory intervention is perceived in these terms not as a limitation of freedom of contract, but as a contradiction of its *essence* (the present-day incarnation of Marxism).[188]

This view provides a particularly conspicuous instance of a broad and powerful trend in perceiving freedom of contract in the post-transformational legal and policy discourse in Poland. Its outcomes turn out sometimes to be surprisingly conspicuous. One of the most illustrative amongst them is a reception of the Recommendation "S" of the Polish Financial Supervisory Authority (*Komisja Nadzoru Finansowego*). The document, published in 2006, was intended to frame the market of consumer credit when in a foreign currency (usually in Swiss francs), by mandating banks to disclose to consumers detailed information concerning risks and to ensure that the choice between domestic- and foreign-currency credit was made in full consciousness. The Recommendation triggered massive criticism from financial experts and politicians, who emphasized that it jeopardizes market liberty and the freedom of individuals to make economic decisions (even if rash or ill-considered).[189] Along these lines, the attempts to shape consumer credit practice were portrayed as an assault on the essence of market freedom.

The discussion over Recommendation "S" proved vividly the power of freedom of contract as an argument in public discourse. What is also noteworthy in these narratives is that contract freedom was seen in an abstract way, as an archetype, and not as a description of the actual degree of market autonomy. At the same time, the fate of the "S" Recommendation adds further evidence to the phenomenon of fossilized contractual freedom in its early-20th century shape. Despite the lapse of time and accumulated experience of market deficits, the old-fashioned perception of contract freedom seems still to remain the dominant signpost in the economic narratives. It is, however, equally interesting to see, how the fossilized idea of contract liberty functions in more particular legal contexts.

6.2. Consumer law without consumer awareness

The particularly lively element of this landscape was consumer protection. Its relevance for the problem of contract freedom became particularly clear in confrontation with the EU consumer law, introduced in Poland in 2000.[190] The concept of consumer protection was, as such, neither new nor unprecedented in the Polish legal order. In the socialist era, Poland started to develop incrementally consumer protection, initially (along with the entire sphere of commercial contracts)[191] based on public steering through legislation and *quasi*-legislative administrative acts.[192]

Polish case law and legal scholarship in the 1970s and 1980s in some instances acknowledged that the classic contract law framework contains pro-consumer components (such as limited duties to inform or warranty periods),[193] which can be derived from it through interpretation and application on a case-by-case basis[194]. Amongst other issues, courts paid significant attention to proper disclosure of the facts

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[188] See also P. Zumbansen, *The Law of Society: Governance Through Contract*, 14 Ind. J. Global Legal Stud (2007), p. 207f.

[189] On this discussion *cf.* P. Reszka, *Chciwość. Jak nas oszukują wielkie firmy*, Warsaw 2016, p. 95–102

[190] The first piece of new consumer legislation, implementing EU law, was the act of 2 March 2000, which transposed to the Polish system the EU rules on doorstep and distance contracts, unfair contract terms and on product liability.

[191] Further on the development of consumer law in Poland: M. Grochowski, A. Wiewiórowska-Domagalska, *Consumer law in Poland: or There and Back Again*, in:

[192] Cf. e.g. E. Łętowska, *Consumer Protection as Public Interest Law*, 121–124 Dr. pol. cont. (1999).

[193] Cf. J. Łętowski, *Verbraucherschutz in Polen: Rechtslage, Wirklichkeit und Zukunft*, 40 RabelsZ (1976), p. 659–662.

[194] Cf. E. Łętowska, *La protection du consommateur en Pologne à la lumière de la jurisprudence*, 65–68 Dr. pol. cont. (1985).

relevant for the contract, deriving them e.g. from the general principle of loyalty in contracting.[195] At the same time, as in the other Central European countries, the fall of the communist regime was also fueled by consumer dissatisfaction with the deteriorating living standards and the inefficiency of the centrally-steered supply of commodities.[196]

In the post-transition period, the idea of consumer protection in contract law was confronted with the *laissez-faire* understanding of freedom of contract. The intensity of this conflict became even stronger because of the rapid adoption of EU consumer law in the Central European counties. All of them signed partnership agreements with the EU in the 1990s and started subsequently a "wholesale" adoption of the existing consumer *acquis*. In this way a vast body of protective consumer rules was faced with domestic contract law, which, in the whole region, remained in its adolescent period and sought its identity vis-à-vis the heritage of the communist era.[197] The encounter of these forces resembled more of a mêlée than a harmonious adjustment: "[f[itting the more interventionist consumer protection *acquis* into the fabric of private law slowed down the process of private law consolidation and was in conflict with the legal policy goal of strengthening the position of private autonomy. In this way harmonization proved indeed to be »at war with codification and liberalization«."[198]

These assumptions had clear ramifications for the concept of consumer protection by means of contract law. From this viewpoint, business constitutes a pivotal substrate of the market economy, which needs a broad margin of liberty and freedom from public intervention. Following this view, contract law should guarantee, above all, freedom of contractors. Hence, any sort of state intervention that favors one of the parties remains, from this perspective, at least suspicious, and usually unwanted. As a consequence, as was observed in the mid-1990s, "[w]e can see a complete lack of sensitivity of the courts to the problems of consumers. The breaches of their rights are believed to be one of the unavoidable costs of the economic transformation, as was the case a few years earlier when their interests were not protected in order not to harm state enterprises."[199]

From the consumer perspective, this approach rested on a formal idea of equality and autonomy, assuming that consumers should bear both risks and profits arising from voluntary engagement in market activity. This approach – endorsing the *volenti non fit iniuria* principle – did not ignore market failures entirely. It disregarded, however, their impact on market mechanisms and built on a strong reliance that the economy would be able to self-remedy these inefficiencies. This equation between "free market" and "flawless market" serves as an additional argument against interventionism in contract law and in favor of the *laissez-faire* dogma.

The structure of values and policy goals that resulted from the post-socialist change framed the playground for the subsequent turn in Polish consumer law that was brought about by implementation of EU rules on consumer contracts.[200] Problems arising in this sphere did not result, however, merely from the general approach towards market regulation. Transposition of consumer law faced also several pragmatic problems, grounded in a more particular set of deeply ingrained convictions on the essence of contract law and freedom of contract.

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[195] See judgments of the Supreme Court of Poland: of August 28, 1980 (II CR 237/80) and of November 18, 1983 (I CR 336/83).

[196] From this viewpoint, the anticommunist revolutions in the late 1980s and early 1990s, which turned the European political and economic landscape upside down, was in fact the "consumer revolution": an immense unrest of the masses that strived for a higher standard of living against the regime that appeared severely ineffective in fulfilling its promise of universal welfare (R. Boyes, *The Hard Road to Market: Gorbachev, the Underworld, and the Rebirth of Capitalism*, London 1990, p. 4).

[197] More generally on the issue of the unfitness of EU economic rules to the specificity of CE's countries in early 1990s also D. Bohle, *Neoliberal hegemony*, p. 70, 78f.

[198] A. Bakardijeva Engelbrekt, *The impact*, p. 127.

[199] E. Łętowska, *The Barriers of Polish Legal Thinking in the Perspective of European Integration*, 1 YPES (1997), p. 58, fn. 2.

[200] On the transitory impact of EU law see also D. Kempter, *Der Einfluss des europäischen Rechts auf das polnische Zivilgesetzbuch*, Badan-Baden 2007, p. 53–72.

In this sense, the introduction of EU contract law cut corners in the development of the Polish legal order, by introducing "foreign" institutions and a policy rationale that were adopted rather than developed by the Polish law. This compulsory introduction, confronted with a certain obsolescence of the ideas of autonomy and freedom of contract in Polish law, created strong frictions in the absorption of EU consumer law in the domestic system.[201] Although at the legislative level Poland, as the other EU Member States, followed the regulatory patterns established at the Union's level, the practical understanding and application of these rules is much less obvious and predictable.

The transposition of EU consumer rules was accompanied by a more fundamental phenomenon: separation of consumer law and "general" contract law, in terms of methodology and underlying values. The introduction of EU consumer law changed this picture to a significant extent. The protective attitudes have been, quite inadvertently, "channeled" into consumer law as a newly-established section of the law of contracts. At the same time, the simplified version of *laissez-faire* ideas started to monopolize the mainstream of contract law thinking, being unable to support a more pro-consumer attitude. As a result, although after adoption of EU consumer contract law Poland obtained quite a well-developed system of consumer protection, supported with clear policy foundations, the general vector of the case law took another direction.[202] Somewhat astonishingly, pre-transformation consumer case law was hence, in certain aspects, more attentive to the regulatory needs of the consumer market, without acknowledging consumer law as a subset of the law of contracts. This observable discrepancy seems to result in part from the intellectual heritage of the transformation period and its persistent impact on the concepts of autonomy and freedom of contract.[203]

The *laissez-faire* view on consumer law values highly the independence of individuals from any sort of state coercion and steering in the economic sphere. A deep conviction that one can and should rely only on oneself entailed a deeply embedded approach that individuals ought to be allowed to seek freely self-fulfillment and self-satisfaction of their own needs and that existing market shortcomings will be cured by the market itself. The *laissez-faire* version of contract freedom, elaborated and venerated as an abstract ideal, was thereby translated onto practice, directing particular choices about the regulatory design of contract law.[204] Even several years after the post-socialist transformation it was nevertheless observable that "there still is a strong belief among Polish lawyers that the invisible hand of the market will resolve any problem and that any market intervention equals a paternalistic approach towards the

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[201] On a similar phenomenon, generally, D. Berkowitz, K. Pistor and J.-F. Richard, *The Transplant Effect*, 51 Am. J. Comp. L. (2003), p. 189: "[w]here law develops internally through a process of trial and error, innovation and correction, and with the participation and involvement of users of the law, legal professionals and other interested parties, legal institutions tend to be highly effective. By contrast, where foreign law is imposed and legal evolution is external rather than internal, legal institutions tend to be much weak."

[202] Notably, however, Polish doctrine begins to observe that full and exceptionless *laissez-faire* attitude may produce self-contradictory results. The problem in question is especially conspicuous in the consumer financial services market, where numerous studies reveal substantial exploitation of consumers by means of contract law (which indirectly rests on the classically liberal concept of contract freedom). As a result, a part of the doctrine seems to abandon understanding of economic liberalism as a "negative liberty from the state and its constraints" and to emphasize also the notion of "positive liberty to have the opportunity to exercise one's rights" – so, referring to the problem of economic inequality and exclusion in consumer loan contracts, I. Jakubowska-Branicka, *On democracy and social exclusion*, in: I. Jakubowska-Branicka (ed.), *Loan companies in Poland. Theory and practice*, Warsaw 2018, p. 181.

[203] Cf. M. Safjan, Ł. Gorywoda, A. Jańczuk, *Taking Collective Interest*, p. 20: "In the legal doctrine, a claim that undistorted market competition is the best way to achieve a high level of consumer satisfaction emerged. Accordingly, any arguments justifying the need to protect the »weaker« contractual party tended to be rejected and associated with the former socialist system. At the same time, individual and not public (or collective) interest turned to be emphasised as an overriding value in contractual relationships. However, as far as the jurisprudence is concerned, its approach to consumer protection remained ambiguous. On the one hand, one could observe judgments denying any protection and promoting formalistic understanding of the freedom of contract; on the other there were many judicial decisions acknowledging the need to protect the »weaker« party."

[204] They translate also in judicial practice – both in terms of deciding particular cases, as well as in a perspective of the judiciary as a whole. On the generally liberal approach towards consumer loan agreements in Polish case law see for instance, I. Jakubowska-Branicka, M. Grochowski, *Economic Exclusion as a Predictor of Cascade Exclusion: A Case Study of Loan Companies in Poland*, 139 Pol. Sociol. Rev. 2019, p. 464–469.

consumer, which destroys the sacred freedom of contract. If there are any inconveniences experienced on the market, consumers should bear them as they present an unavoidable cost of the free market. Moreover, a free market economy should not tolerate privileges for any particular group of participants on the market, even consumers."[205]

The clash of two narratives about the role of consumer law and the frontiers of contractual freedom opened a new chapter in the long-lasting tension between the "centric" and "peripheral" elements in contract law of the Central European countries. What is notable, however, is that the old dynamic occurred hence in a form that was overturned. The post-socialist transformation in Poland was carried out with a clear view of bringing Central European contract law back to the European mainstream. At the same time, the imaginary "center", to which Polish contract law was trying to return (i.e. the *laissez-faire* contract law), was no longer the actual core of Western European legal thought. Under the influence of socio-economic studies and the EU law it turned visibly towards more welfarist and regulatory attitudes. In this way, through endorsement of the "fossilized" view of contractual liberty, Polish contract law was in fact drifting towards a more peripheral understanding of this concept. At the same time, quite ironically, the attempts to introduce more mainstream ideas (such as intensified consumer protection) were considered by many lawyers in Poland to be "peripheral" and foreign to the *laissez-faire* essence of contract law.

In the course of time, the particular opposition between consumer protection and the superficial version of market liberalism, endorsed in Polish contract law after transformation, was slowly alleviated. The crucial trigger of this transformation was the 2008 economic crisis, which entailed the collapse of a few, previously thriving, parts of the consumer economy. This pertained, in particular, to consumer credit denominated in foreign currencies (usually the Swiss franc) and other consumer financial services. Before the crisis this sector was clearly underregulated and (as the debate over the "S" Recommendation may vividly portray[206]) underpinned with strong *laissez-faire* convictions. At the same time, consumers on financial markets were subjected to various forms of abuse, both in terms of information (especially by not being sufficiently informed, or being misled, about the actual risk) and of the content of the agreements (by frequent use of exploitative terms).[207] Although the perils created by these practices were in many instances quite evident, the state apparatus (especially the market regulatory authorities) remained quite passive towards them, until the outcomes of the crisis became conspicuous. A similar approach was also characteristic of adjudication in individual disputes, where the courts seemed to adopt a hands-off approach towards the inequalities and possible market abuse for quite some time.[208] Also in this respect the dominant narrative referred, directly or implicitly, to liberty of contracts.[209]

Under the experience of crisis, this narrative gradually shifted towards stronger appreciation of consumer welfare and market fairness. One of the clear symbols of this change may be the CJEU *Dziubak* decision.[210] It addressed and effectively tamed Polish case law, which attempted to replace unfair clauses in consumer agreements with terms construed upon the general criterion of fairness. This attitude was clearly underpinned with a *laissez-faire* version of contract freedom, where the courts should take all the possible steps to protect contracts from being cancelled or altered contrary to the parties' intent. In other words, if one of the clauses turned out to be unfair, the court should seek the

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[205] E. Łętowska, A. Wiewiórowska-Domagalska, *The Common Frame of Reference – The Perspective of a new Member State*, ERCL (2007), p. 283.

[206] See point 6.1.

[207] See also G. Szustak, *Consumer protection as a premise to build trust in the financial service market*, 16 J. Econ. Manag. (2014), p. 128.

[208] Cf. A. Wiewiórowska-Domagalska, *CJEU's jurisprudence in domestic legal orders: potential and hurdles – a case study*, in: S. Grundmann, M. Grochowski (eds.), *European Contract Law and the Creation of Norms*, Antwerp–Portland 2020 [forthcoming].

[209] The 2008 crisis entailed, however, in the entire Central European region, a gradual withdrawal from the radically liberal attitude of the Member States – cf. H. Appel, M.A. Orenstein, *Why did Neoliberalism Triumph and Endure in the Post-Communist World?*, 43 Comp. Pol. (2016), p. 327f.

[210] Judgment of 3 October 2019, C-260/18, *Kamil Dziubak, Justyna Dziubak v Raiffeisen Bank International AG*, ECLI:EU:C:2019:819.

solution that would preserve balance and fairness between parties. This reasoning, true to the classic model of contracting, which rests on the assumption of parity of bargaining power, is no longer relevant in the consumer law context, where the parties are considered to stay in systematic imbalance. For these reasons, as well as for the sake of effectiveness of EU consumer law, the CJEU disapproved of filling-in consumer agreements with *ad hoc* rules created by courts upon the criteria of fairness and market customs. In so doing, it opted implicitly for another concept of the state–contract relation than the classic libertarian view. It built on the assumption of parties' lack of parity and departed from endorsement of a formal perception of contractual liberty.

7. Conclusions: from peripheries to the center

The Central European concept of contractual freedom, and the history of its development in the 20th century, seems to provide an instance of a peculiar development of concepts between the center and peripheries. The trivialized version of the liberal argument, which gained prevalence in a large part of the region, overshadowed also the contract law imaginarium.

The problems discussed in this paper provide, first of all, a cautionary tale about the intrinsic risk of inadvertent distortion of the concept of market liberty. The skewed version of contractual freedom, which proliferated in Poland (and to varying degrees in other Central European countries), resulted from a juxtaposition of two principal factors: rapid and profound change of an economic and political agenda confronted with a relatively fragmented and incoherent understanding of contract law (inherited from a very peculiar and vague notion of this principle in the socialist era). In Poland, at the very outset of the post-socialist transition, the *laissez-faire* concept of contract law was transplanted quite directly into the intellectual background of contract law. At that stage, however, contract law was not fully prepared to grasp intellectually the essence of this change and absorb it. Instead, being confronted with the new phenomena, it turned back to the inter-war understanding of contract liberty, which was the only well-developed conceptual framework that survived during the communist era.

The outcome was that the concept of freedom of contract occurred in the early 1990s in a rather simplified version, closer to the inter-war market liberalism (dating back to the 19th century *laissez-faire* attitude), rather than to the modern concept of liberal contract law. For these reasons, freedom of contract in Polish law was shaped in quite a hectic and obsolete way, occurring rather in the wrong geopolitical place and in the wrong moment. It missed, in particular, a deeper understanding of market deficits and differentiation between formal and material (functional) contract freedom, understood as the actual possibility to make meaningful market choices.

In this way, the concept of freedom of contract (and more generally: the idea of contractual liberty) developed in Central Europe in constant tension between the "centric" understanding and the "peripheral" idiosyncrasies, instigated by the geopolitical fluctuations in the 20th century. Traditionally, the countries of the region have been within the intellectual ambit of Western European legal thinking. At the same time, this influence was filtered through the particular political and legal experience of the region, which led to an idiosyncratic version of contract law and its political premise. Since the 1990s, this historical dynamic has been reinvigorated further by EU private law, which became the main vehicle of the center/peripheral dynamic in the region. It introduced a modern version of contract freedom, strongly rooted in the welfarist premise developed after World War II. Thanks to the specific thread of development in the communist era, this conceptual agenda was mostly overlooked in Central Europe. As a result, it had to be incorporated in a wholesale way, without a fully-developed intellectual background in the domestic legal orders. This created substantial frictions and resulted in the particular way of development of the contract law agenda in the region.

At the same time, the EU law added one more dimension to the center–peripheries dynamic, which allowed the peripheral states to voice their peculiar legal experience. The common European legal order is, by nature, more pluralistic and creates channels both for the "downstream" and the "upstream" transfer of legal ideas. The first are the lawmaking processes taking place in the EU institutions, which in a natural way involve a multitude of national viewpoints, and, at least to some extent, aim to create solutions that could fit all the domestic legal systems. In this regard, as has been already observed in the literature, the Central European view on market and contracts can be praised for bringing into the ambit

of EU law a higher awareness of enforcement issues and the procedural effectiveness of rules.[211] Further, the tendency to channel consumer protection out of contract law, characteristic in the early transformation period,[212] was finally reflected at the EU level by adopting the idea of a merger between antitrust law and consumer protection.[213]

The second meaningful channel of upstream interactions in the EU legal order has been provided by the preliminary questions asked of the ECJ/CJEU by the Central European courts.[214] Many of them arise between two views of contract law when they are confronted: the outdated version of *laissez-faire* liberalism and the more welfarist-oriented view endorsed by EU law. Apart from the *Dziubak* case, where this clash was particularly strong,[215] there are other examples of cases where the Central European shade of market liberalism triggered development in CJEU case law. Such "Easternization of EU law"[216] does not always entail substantial change in the institutional design of EU law. In some instances it also reshapes the EU legal order by refining the already existing rules and unlocking their less apparent potential (as was the case for Article 47 of the EU Charter of Fundamental rights[217]).[218]

In any case, however, peripheries may undoubtedly serve as "laboratories of legal innovation"[219] and thereby co-shape the mainstream.[220] EU private law seems to provide particularly open ground for such a reverse dynamic: "[g]iven the scale of the operation and its duration, however, it is more plausible to view enlargement as an inevitably two-way avenue, where part of the experience and insights gained from the process of accession flow back to the Union and transform into new strategies, policies and priorities."[221] The *laissez-faire* concept of contract law, which developed in the Central European countries, may yet provide a surprisingly prolific ground for revealing new issues and new development prospects for the "centric" ideas and narratives.

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[211] A. Bakardijeva Engelbrekt, *Grey Zones*, p. 31–33.

[212] Cf. point 5.3.

[213] A. Bakardijeva Engelbrekt, *Grey Zones*, p. 31–33.

[214] Cf. H.-W. Micklitz, *Prologue: the Westernization of the East and the Easternization of the West*, in: M. Bobek (ed.), *Central European Judges Under the European Influence. The Transformative Power of the EU Revisited*, Oxford–Portland 2015, p. 10–12.

[215] Cf. point 6.2.

[216] The concept coined by H.-W. Micklitz, *On the Politics of Legal Methodology*, 21 MJECL (2014), s. 590; see also *id*, *Prologue*, p. 9f.

[217] Cf. CJEU decisions: of 13 September 2018, C-176/17, *Profi Credit Polska* (ECLI:EU:C:2018:711) and of 28 November 2018, C-632/17 *Powszechna Kasa Oszczędności* (ECLI:EU:C:2018:963).

[218] On further instances see also H.-W. Micklitz, *Prologue*, p. 10–12.

[219] A. Likhovski, *Peripheral Vision: Polish-Jewish Lawyers and Early Israeli Law*, 36 Law and History Review (2018), p. 241.

[220] From a partly different vantage point (accentuating "centric" rather than "peripheral" character of the Polish private law) the firm opposition between "the East" and "the West" is also questioned by M. Safjan and A. Wiewiórowska-Domagalska, *Political Foundations of European Private Law: Rethinking the East–West Division Lines*, in: R. Brownsword, H.W. Micklitz, L. Niglia, S. Weatherill (eds.), *The Foundations of European Private Law*, Oxford 2011, p. 275 ff.

[221] A. Bakardijeva Engelbrekt, *Grey Zones*, p. 31.

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