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## *Some Remarks on the Law-making Process in Socialist Countries on the Example of People's Poland<sup>1</sup>*

### Abstract

According to communist doctrine, law is an element of class rule. It belongs to the so-called superstructure, alongside such concepts as the state, power and coercion. Its content and functions are determined by the so-called base, that is, conditions of economic production. In the Communist Manifesto of 1848, there is the famous expression that law is the will of the ruling class elevated to the dignity of an act. From this came the assumption that the rightness of the law, its legitimacy, depended only on its origin from the proper, that is, revolutionary power. Such doctrinal assumptions resulted in the depreciation of the process of law-making in socialism; important was the fact of its connection with revolutionary power. Law in socialism was not intended to be a long existing entity, as it served for transformations towards the achievement of a communist regime. The subject of this text is the process of law-making in socialist Poland, Czechoslovakia and Hungary. The author will focus on the Polish example mainly, with which he is most familiar, and will limit himself to general remarks relating to the other two countries. The rejection of the tripartite division of power in the socialist system was to be expressed in the dominance of parliament as the body expressing the will of the working people. In theory, this was to mean the dominance of acts over decrees. In practice, it was different – socialist power bypassed parliament, abusing the form of decree. Among other things, this was how the fiction of public consultation on draft legislation manifested itself. A certain phenomenon was the process of creating codes: for example, the so-called legal bicentennial in Czechoslovakia (1949–1950) or the Codification Commission (1956–1969) in Poland. This text will pay attention to activities aimed at ensuring the proper legislative level of legal acts. In this context, the views of Adam Podgórecki will be discussed as distinguished by an originality unparalleled in other socialist countries.

**Keywords:** law-making, inflation of legislation, sources of law, socialism, Constitutional Tribunal, stalinisation, sovietisation

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## 1. Introduction

This text deals with three issues: the sources of law and their hierarchy, the process of law-making, and some aspects of the legislative technique in the process of law-making in people's democracies and socialist countries, with particular reference to the specificity of Poland and with partial emphasis on some themes concerning socialist Hungary and Czechoslovakia. The temporal scope covers the situation after February 1948, when, as a result of the communist takeover, Czechoslovakia joined the countries of "people's democracy" and a process of intensive Sovietization and Stalinization began in the aforementioned countries, meaning a resemblance of the systems of the aforementioned countries to the Soviet model.<sup>2</sup> The *uravnilovka* introduced at the time partly facilitates the formulation of general conclusions, but the paucity of literature with regard to Hungary<sup>3</sup> and, to a lesser extent, Czechoslovakia,<sup>4</sup> dictates that a reservation be made about the limited nature of the findings made. The text is therefore merely a highlighting of the problem and an introduction to further research. They have been virtually ignored in previous studies of socialist law. This is all the more surprising as – at least in relation to People's Poland – the broadly understood process of law-making has been the subject of many studies by socialist constitutionalists, administrative lawyers and legal theorists.<sup>5</sup>

## 2. The Marxist theory of law-making

"Your ideas themselves are the product of bourgeois relations of production and property, just as your law is merely the will of the ruling class elevated to the dignity of a statute," stated Karl Marx and Friedrich Engels in *the Communist Manifesto*.<sup>6</sup> From this quotation, Marxist legal science derived its best-known definition of law as an expression of the will of the ruling class taking the form of law. Law was thus for Marxists an element of class rule. Together with concepts such as the state, power and violence, it belonged to the so-called superstructure, the content and function of which were determined by the base, i.e. by the means of production. The rightness of a law was understood in that it was identified with its origin – if the law came from the right, i.e. revolutionary power – it was

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<sup>2</sup> One should point out that the most recent book on the history of the law-making process in Poland after WW II refers to the years 1944–1947, but the thesis of the monograph may be partially helpful for the understanding of the situation after. See: Kania, *Prawo w służbie*, 27–71. See also the newest comparative remarks on communist Poland, Hungary and Czechoslovakia and the status of governmental ministers in these countries: Grzybowski, *Prawnoustrojowy status ministra*, 613–56.

<sup>3</sup> Czyż, Kubas, *Doświadczenia*.

<sup>4</sup> See some publications from communist Czechoslovakia: Czafik, *Legislativny proces*; Lakatoš, *Otázky tvorby*; Šrámek, *Pravidla upravující*.

<sup>5</sup> Already after the change of regime, a comparative work was produced: Rot, *Wartości proceduralne*. The author, a prominent theorist of communist law, faced a task of limited scope: leaving aside the political aspects of law-making, he dealt with its superficial expression as revealed in procedural and organizational rules. *Idem*, 4.

<sup>6</sup> Marks, Engels, *Manifest komunistyczny*, chapter 2: *Proletariusze a komuniści*, 56–7.

right. Marxists constantly stressed that the parliament, the organ of power coming from elections made by the proletariat, the working people, had full, unlimited power,<sup>7</sup> thus allegedly referring to Jean-Jacques Rousseau's views on the sovereignty of the people and to the content of the Jacobin constitution of 1793 and the practice of the Paris Commune of 1871. With regard to Poland, the expression of this approach was Art. 15.2 of the Stalinist constitution of 1952,<sup>8</sup> according to which "the Sejm, as the supreme expressor of the will of the working people of towns and villages, realizes the sovereign rights of the nation." However, these were only high-sounding declarations and a semblance of law.

After seizing power in Russia, the Bolsheviks, in line with the theories of Marx and Engels, depreciated the importance of law, considering it "an even more dangerous and tantalizing opium for the people than religion."<sup>9</sup> Thus, they did not attach importance to the process of its creation either, following the complete rejection of pre-Bolshevik law. The state was supposed to die, and with it the law was supposed to die. However, in fact "law" was made, although its form was entirely arbitrary. Criminal law is cited as an example; more than 400 different acts were passed between November 1917 and June 1922. A peculiar thing – they were not enacted in the form of resolutions or laws of the councils (soviets), but in the form of decrees of the workers' and peasants' government.<sup>10</sup> The Bolsheviks were relatively quick to recognize the importance of law as a tool for consolidating their rule. Stalin, in connection with the thesis that the class struggle would sharpen as the building of socialism progressed, argued that "the dying of the state will take place not through the weakening of state power, but through its maximum strengthening, necessary in order to beat back the remnants of the dying classes, to organize a defense against the capitalist environment." The radical turn from legal nihilism to a kind of legal "positivism" also meant an interest in the problem of the sources of law. "In the Soviet Union the creative role of the socialist act of law and socialist law are large. This role will be even greater and stronger now, especially in connection with the new Stalinist constitution," the leading Stalinist jurist Andrei Yanuaryevich Vyshinsky stated in 1937.<sup>11</sup> However, in reality, the provisions of the Stalinist USSR Constitution of 1936 on the sources of law were very laconic. The legislative power of the USSR was to be exercised exclusively by the Supreme Soviet of the USSR (Art. 32). The legislative initiative belonged to both chambers of the Supreme council (Soviet): The Union Council and the Council of Nationalities (Art. 38). In turn, the Presidium of the Supreme Soviet of the USSR was to interpret the existing laws of the USSR and issue decrees (Art. 49a) and "consult the entire people (hold a referendum) on its own initiative or at the request of one of the union republics" (Art. 49d). In turn, according to Art. 66, the Council of People's Commissars, i.e. the government, was to issue decrees and ordinances on the basis of, and by the way of, implementing the laws in force, and to check their imple-

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<sup>7</sup> In 1958, Communist Party (PZPR) MP Bronisław Ostapczuk asked in the Sejm: "Who, apart from the Sejm of the People's Republic of Poland, is the most law-abiding body in this country? I think it is impossible to use the argument of illegality at a session of the Sejm and to accuse, to warn against the fact that the Sejm can pass a resolution that is unconstitutional." See: Fiedorczyk, "Polski Październik," 808.

<sup>8</sup> Konstytucja PRL z 1952 r. Dz.U. nr 33 poz. 232.

<sup>9</sup> Lityński, "O tworzeniu i stosowaniu prawa," 325.

<sup>10</sup> Laskowska, *Przestępczość w Rosji*, 117.

<sup>11</sup> Quoted by: Lityński, „O tworzeniu i stosowaniu prawa,” 329. See also: Bosiacki, "Między nihilizmem prawnym," 117–28.

mentation. These norms basically exhausted the constitutional regulation of the sources of law in the USSR, if one does not count similar provisions on law in the republics being a part of the Soviet Union. Thus, these were very general provisions, with no regulations on the hierarchy of sources of law or on law-making. There were no provisions on the legislative initiative of the Council of People's Commissars, on the mode of issuing, enacting and possibly repealing decrees. The Stalinist Constitution did not deal with the mode of law-making at all. This was probably due to the Stalinist understanding of the Constitution: "A constitution is not a legal code, a constitution – is a fundamental law, and only a fundamental law. The constitution does not exclude, but provides for the ongoing legislative work of future legislative bodies. The Constitution gives the future legislative activity of such bodies a legal basis," stated Józef Stalin.<sup>12</sup> The way this statement should be understood is that the general nature of the Constitution did not justify the need to make regulations related to the law-making process. Here, moreover, was the problem of whether the constitution had a normative character.<sup>13</sup>

After the fall of Stalinism, the work of Kovachev was written in the USSR, who undertook a comparison of the law-making process in European socialist states.<sup>14</sup> The work has the merit of attempting, in its introduction, to indicate the basic features of legislative activity in socialist states, made against the background of the legislative process in capitalist states. The scheme was typical of legal publications in the socialist bloc at the time – its aim was to demonstrate the alleged superiority of socialist regulation. Regardless of its ideological baggage, however, the work is of great value to the legal historian, as it captures the approach of the socialist legal science of the time to legislative issues. Kovachev begins his reflections with a quotation from Marx about the connection between substantive and formal law – a quotation that was the starting point in the studies of socialist jurists on formal law at the time.<sup>15</sup> Kovachev formulated the following features of the law-making process in socialist states: (1) the law-making process is a legally regulated order of the legislative activity of the higher representative bodies; (2) the higher representative bodies fulfill their activity in this field with the direct and wide participation of the working masses and their social organizations; (3) the activity of the representative bodies and the working masses in this field takes place under the leadership of the Communist and workers' parties; (4) the law-making process secures the issuance of such laws as strengthen the will of the people and faithfully express the objective needs of socialist society.<sup>16</sup> Elaborating on these elements, Kovachev stated that only elected representative bodies could legislate, stipulating, however, that their presidencies, such as in the USSR or in Czechoslovakia and Hungary, governments, central bodies of certain social organizations, deputies and committees could also participate in the law-making process by representative bodies. However, he emphasized that these

<sup>12</sup> Stalin, *O projekcie konstytucji*, 21. This booklet, published in Polish, also contains the text of the Constitution with annexes, 31–56.

<sup>13</sup> Sokolewicz, *Wokół konstytucji*, 428.

<sup>14</sup> Kovachev, *Zakonodatelnyj process*.

<sup>15</sup> "Material law has its necessary corresponding forms [...]. Process and law are as inextricably linked together as, for example, the forms of plants and animals are linked to the flesh and blood of animals. One spirit must animate the process and the laws, for the process is only the life form of the law and therefore the manifestation of its inner life." Quoted by: Fiedorczyk, *Komisja Specjalna*, 169.

<sup>16</sup> Kovachov, *Zakonodatelnyj process*, 15–6.

were only manifestations of a participation in the law-making process by representative bodies, which alone have the right to make laws.<sup>17</sup> He showed that things are different – i.e. undemocratic – in capitalist states, where the bourgeoisie controls parliaments through the right of initiative, the right of *veto* (President Franklin Delano Roosevelt, who allegedly used the right of *veto* 631 times during his presidency, served as an example here), the right to sanction laws and their promulgation, the consideration of a bill by the upper house of parliament and the right to dissolve parliament.<sup>18</sup>

In assessing Kovachov's findings, it can be said that they were an expression of Marxist ideology, affirming the role of the will of the ruling class in the law-making process and drawing attention to the "leadership" of the Communist Party in this process. Underpinning this claim was the Marxist assumption that the will of the party was consistent with the will of the people and *vice versa*. The extensive legal and comparative material he collected is grouped into three chapters: on the structure of representative bodies, on the right of legislative initiative, and on the stages of the law-making process. The work does not close with any conclusions.

### 3. Law-making in the Stalinist era

Probably no one today doubts that the establishment of People's Poland, commonly associated with the creation of the Polish Committee of National Liberation (PKWN) on 22 July 1944 and its assumption of partial power on the territory of the Republic west of the River Bug, took place in a manner having nothing to do with legalism. Although the new people's power emphasized the legalism of its functioning, this was only a shame. Reference was made to the March Constitution of 1921 as "the only legal one," as opposed to the "fascist" April Constitution of 1935. The alleged application of the March Constitution was selective and this state of affairs continued also after the enactment of the so-called Small Constitution of 1947, even though at that time reference was already made to specific articles of the March Constitution, and not only to its "basic assumptions," as it had been the case since July 1944. However, in the jurisprudence of courts and tribunals after the collapse of communism, the legality of legal acts enacted by the "people's" authorities after 22 July 1944 was not questioned. This was done for practical reasons, drawing attention to the irreversible effects caused by these legal acts (e.g. the decree of 1944 on agricultural reform).<sup>19</sup> The legislative apparatus of the new authorities

<sup>17</sup> Commenting on this state of doctrine, the eminent Polish constitutionalist and historian of doctrines Konstanty Grzybowski wrote: "Both certain formulations of the constitution, as well as their interpretation, have shaped the supreme organ as if it were the sovereign and not – just the representative of the sovereign." Grzybowski, "«Stalinizm» w socjalistycznym prawie," 1062. The cited text is probably the strongest critique of Stalinism in the constitutional law, published in Poland after Stalinism's fall.

<sup>18</sup> Kovachov, *Zakonodatelnyj process*, 7.

<sup>19</sup> See, for example, the decision of the Constitutional Tribunal of 28 November 2001, ref. no. SK 5/01: "The lack of constitutional legitimacy of organs such as the Polish Committee of National Liberation, the National Council, the Provisional Government, as well as the doubtful legitimacy of later existing organs, cannot have the consequence of ignoring the fact that they actually exercised state authority. The normative acts of these bodies were the basis for individual decisions which, inter alia, shaped the property structure in

was created, following the pre-war model, on the basis of the Legislative Department of the Ministry of Justice. Within its structures, a Law Commission (Komisja Prawnicza) was established, which was tasked with giving an opinion on the drafts of legislation prepared in the individual ministries.<sup>20</sup> The solutions adopted were provisional, even primitive. Nevertheless, between June 1945 and October 1946, the Commission held 460 meetings, considering some 600 draft laws. Laws were made primarily in the form of decrees of the Council of Ministers, subject to subsequent approval by the provisional parliament, the National Council. Among them, of great importance for the legal system were 26 decrees unifying civil law, thanks to which Poland lived to see, for the first time in its history, a uniform civil law throughout the country.<sup>21</sup> In this way, the omission of the legislative procedure allowed for the rapid enactment of the new law. In fact, an identical mode was used in Poland before the war, when codes of judicial law prepared by the Codification Commission were introduced.<sup>22</sup>

An important change in the law-making procedure took place in December 1948, when the fateful decision was taken to move the center of legislative work from the Legislative Department of the Ministry of Justice to the Presidium of the Council of Ministers.<sup>23</sup> This state of affairs persists today, as the Government Legislation Centre is located at the Prime Minister office.<sup>24</sup> The question arises as to why this step was taken. The answer can be found in the reconstruction of the state apparatus taking place at the time, with the aim of accelerating the Sovietization and Stalinization of Poland. Perhaps the Czechoslovak model was of significance. In 1948, legislative competences were transferred from the Ministry of the Interior (this was also the case in the First Republic) to the Office of the Presidium of the Government (Úřad předsednictva vlády), which was an auxiliary body of the government secretariat type. Admittedly, this state of affairs did not last long, as already in 1953 the functions of coordinating law-making activities were transferred to the Ministry of Justice.<sup>25</sup> However, the temporal convergence of the solutions adopted in Poland and Czechoslovakia is noteworthy. In the Hungarian People's Republic, on the other hand, the Minister of Justice was for the entire period the organizer and manager of legislative work.<sup>26</sup>

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the area of agricultural property, as well as legal relations in other areas of social life. The passage of time, which from the legal point of view is not an indifferent phenomenon, has given permanence to these relations and today they are the basis of economic and social existence of a significant part of Polish society.”

<sup>20</sup> Fiedorczyk, “Organizacja rządowego etapu,” 97–107.

<sup>21</sup> Fiedorczyk, *Unifikacja*, 713.

<sup>22</sup> Michał Pietrzak expressed the view that in a democratic state the form of a decree may be “the only possible solution to urgent state tasks.” Pietrzak, “Stanowienie prawa,” 84–5.

<sup>23</sup> Fiedorczyk, Volkonovski, “Organizacja prac legislacyjnych,” 295–303.

<sup>24</sup> However, there are opinions suggesting a return of the legislation to the competence of the Minister of Justice. Andrzej Zoll wrote in 2011: “I believe that now that the offices of Minister of Justice and Attorney General have been separated, it is the Minister of Justice who should be in charge of legislation in the government and chair the Legislative Council, as well as supervise the Government Legislative Centre. This is the way to improve the level of our legislation; very low today.” Zoll, *Zollowie*, 468–9. The question arises as to the actuality of this opinion in the light of the experience of the operation of the law-making process between 2015 and 2023.

<sup>25</sup> Mazur, “Rada Legislacyjna,” 109.

<sup>26</sup> Takaćs, “Planowanie prawotwórstwa,” 267.

In the course of the drafting of the Constitution of the People's Republic of 22 July 1952, Stalin participated and was consulted on the content of the draft.<sup>27</sup> Propaganda reported that some 11 million people had participated in the consultation on the project, some 200,000 deliberations had taken place and more than 25,000 discussants had submitted written comments.<sup>28</sup> Like its Stalinist model from the USSR, the constitution contained only laconic mentions of the sources of law and practically did not regulate the law-making process. Laws were to be enacted by the Sejm as the highest organ of state power, with only the adoption of the budget, national socio-economic plans, amendment of the constitution, electoral law and the determination of the emblem, flag and anthem of the People's Republic of Poland being exclusively statutory. The legislative initiative was vested in the Council of State, the Government and the MPs (Art. 20). The Sejm was to meet in sessions, i.e. at times of the year when only then could the Sejm meet (Art. 17.1). In all other matters, the Council of State (a body created in Poland in 1947 on the model of the Soviet Presidium of the supreme Soviet of the USSR and retained by the Constitution of the People's Republic of Poland) could issue decrees with the force of law "in the period between sessions of the Sejm," which were to be presented to the Sejm at the next session for approval (Art. 26). In addition, the Constitution, in Art. 32.8, provided that the Council of Ministers "on the basis of laws and for the purpose of their implementation, shall issue decrees, adopt resolutions and ensure their execution." Art. 33.2 granted the ministers the right to issue regulations and orders implementing laws. It is impossible not to notice that this laconic regulation is basically a copy of the Soviet regulations of 1936. The laconic nature did not, however, prevent a very extensive paper on the sources of law in the new constitution being presented at the famous PAN (Polish Academy of Science) scientific session on the legal issues of the Constitution of the People's Republic of Poland in July 1953.<sup>29</sup> Already at that time, a dilemma arose as to whether the catalogue of sources of law in the constitution was of a closed nature, and it was postulated that it should be expanded, for example to include joint resolutions of party and government bodies – following the Soviet model.

It did not take long to see the practical effects of the Stalinist constitution in terms of law-making. Elections to the Sejm of the People's Republic of Poland were held in October 1952. By the end of its term, the Sejm had held 7 sessions, of which 2 sessions lasted 3 days each, 3 sessions lasted 2 days each, the 6th session lasted 3 weeks and the last session lasted 1 day. It passed 42 laws during them, while the Council of State then issued 161 decrees with the force of law. In total, the Sejm was only active for 5.2% of the time of its first term.<sup>30</sup> "Realization" by the Sejm of the "sovereign rights of the people" was thus carried out through the Council of State, which, as can be seen, issued four times as many decrees as the Sejm enacted laws.<sup>31</sup> "There has been a serious violation of the constitution, consisting in the disappearance of the legislative activity

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<sup>27</sup> Persak, "Troskliwy opiekun," 187–209.

<sup>28</sup> Adamczyk, Pastuszka, *Konstytucje polskie*, 309.

<sup>29</sup> Lustacz, Milewski, "System źródeł prawa," 5–55. "In the light of this historical document of a peculiar understanding of the constitution, it may seem that the constitution, by its provisions, norms a number of issues which in fact it neither directly nor indirectly mentions," zob. Opalek, Zakrzewski, *Z zagadnień praworządności*, 132.

<sup>30</sup> Kraczkowski, "Sejm w okresie PRL," 292.

<sup>31</sup> *Prawo konstytucyjne*, 121.

of the Sejm” – stated Opalek and Zakrzewski.<sup>32</sup> The symbolic expression of this was the abolition of the Chancellery of the Sejm, and the body newly created from the merger was called the Chancellery of the Council of State.<sup>33</sup> Among the decrees enacted were such restrictive criminal law acts as the so-called March Decrees of 1953, designed to strengthen the protection of social property.<sup>34</sup> It must be stressed that according to the Soviet pattern, similar decree – passing bodies – were introduced also in Czechoslovakia and in Hungary.<sup>35</sup>

The Stalinist expression of legislative activity in Czechoslovakia, on the other hand, was the so-called Legal Biennial, covering the years 1948–1950, which aimed to codify courts’ law. It was carried out under the slogans of modernizing the law and abolishing even feudal legal relics, but its real purpose was to initiate a process of transforming Czechoslovak law towards its Sovietization.<sup>36</sup> A section for the accelerated codification of law was then created in the Ministry of Justice, as well as the relevant commissions: civil law, criminal law and special tasks. There was also a Political Commission and a Coordination Commission.<sup>37</sup> The participation of workers and non-lawyers in general in the committee’s work was widely emphasized, with attention paid to the layperson’s understanding of the legal texts produced.<sup>38</sup>

## 4. The post-Stalin era

The collapse of Stalinism after the 20th Congress of the Communist Party of the Soviet Union in 1956 also meant changes in the law-making process. In Poland, they were symbolised by the reduction of the role of the decree as a source of law-making: during the second term of the Sejm of the People’s Republic of Poland, covering the years 1957–1961, 174 acts were passed and only 13 decrees were issued.<sup>39</sup> This was in great contrast to the previous term and marked the restoration of the legislative role of the Sejm. This was also served by changes to the Sejm’s Rules of Procedure, the essence of which was to lengthen the legislative course by considering a bill in two readings during a sitting of the chamber. However, there were still, until the end of the People’s Republic of Poland, instances of the decree being used to circumvent the role of the Sejm; examples include in 1968 the self-government of higher education institutions being restricted in this way, and in 1972 the salaries and pensions of state executives being regulated by decree. The

<sup>32</sup> Opalek, Zakrzewski, *Z zagadnień praworządności*, 132.

<sup>33</sup> Kulisiewicz, “100 lat Biblioteki Sejmowej,” 29–30.

<sup>34</sup> See a list of these: Andrejew, Lernell, Sawicki, *Prawo karne Polski Ludowej*, 243. See also: Szczygieł, *Prace nad kodyfikacją*, 163–84.

<sup>35</sup> In Hungary it was the Presidential Council (Elnöki Tanácsa), consisting of 21 persons; in Czechoslovakia it was the Presidium of the National (from 1968 Federal) Assembly (Předsednictvo Národního shromáždění, consisting of 24 persons. See: Działocha, *Ewolucja prawna*, 42–9, 68–72.

<sup>36</sup> Fiedorczyk, *Unifikacja*, 160–2.

<sup>37</sup> Chvojka, “Organizacja prac kodyfikacyjnych,” 53–4. See in more detail: Frantalová, “Činnost politické komise,” 19–38.

<sup>38</sup> Kabát, “Lay Participation,” 237–47.

<sup>39</sup> *Prawo konstytucyjne*, 121.

most notorious, however, is the imposition of martial law by decree of the Council of State in 1981, carried out in violation of the law.<sup>40</sup> The legal community also attached great importance to the creation in 1956 of the Codification Commission of the PRL. This Commission referred in its organizational form to the highly regarded Codification Commission of 1919–1939. The 1956 Commission did not have as much independence as its predecessor, being situated under the supervision of the Minister of Justice and not as an independent body – but its existence was for many a reference to the best Polish traditions.<sup>41</sup> The several years of operation of the Commission (until 1969) only partially confirmed the hopes placed in it. The fact is, however, that the Commission drafted six codes: civil, family and guardianship, civil proceedings, penal code, code of criminal proceedings and code of penal executive criminal proceedings, three of which are still in force today. Political pressure on the Commission from the Communist Party was constantly increasing, and this was expressed, among other things, in the surveillance of Commission members by the Security Service.<sup>42</sup> Perhaps this was due – in the party's opinion – to the Commission's excessive freedom of action. An example of such action was, among others, consultations on projects in society.<sup>43</sup>

During the post-Stalinist thaw, legal science began to play a certain role, which, based on criticism of the previous state of affairs, pointed out errors and formulated postulates for changes in the process of creating law. In addition to the aforementioned criticism of the abuse of decree activity, its subject was the institution of guidelines for the judiciary, known to the entire socialist bloc, originating from the USSR, adopted by the Supreme Court. They were binding for the courts, which *de facto* made them a source of law. However, it was noted that guidelines were often of a *contra legem* nature and became:

[...] an unforeseen institutional, unlawful means of repealing outdated norms and creating in their place, under the guise of interpretation, norms recognized by the courts as meeting the needs of socialist construction. The lack of proper activity, corresponding to the requirements of the rule of law, of bodies authorized to repeal and establish norms with the force of law, and disregard for this obligation incumbent on them – constituting an element of the general phenomenon of disregard for the rule of law – had to lead in consequence to interpretation *contra legem*.<sup>44</sup>

Therefore, guidelines were used for immediate needs, without the need to refer to a long legislative process. This was a pathological situation for law-making. Among the phenomena related to law-making, the subject of criticism was also the failure to publish lower-level normative acts in official state publications.<sup>45</sup>

However, the most “thaw-like” publication in the field of law-making was the work of Adam Podgórecki.<sup>46</sup> This continuator of Leon Petrażycki's thought formulated legislative directives (12), and separately codification directives (10), completely separated from Marxist ideology. They are universal in nature and have not lost their relevance to this day. Podgórecki had great hopes for the establishment of the aforementioned

<sup>40</sup> Kraczkowski, “Sejm w okresie PRL,” 295–8.

<sup>41</sup> Fiedorczyk, “O powstaniu, strukturze,” 473–84.

<sup>42</sup> Fiedorczyk, Ostapa, “Projekt kodeksu karnego PRL,” 166–87.

<sup>43</sup> Fiedorczyk, “Kilka uwag,” 360–80.

<sup>44</sup> Opalek, Zakrzewski, *Z zagadnień praworzędności*, 124.

<sup>45</sup> *Ibid.*, 191–200.

<sup>46</sup> Podgórecki, *Założenia polityki*.

Codification Commission, which he wanted to see as a kind of modern center of legislative work, setting, for example, the standards of the legislative technique.<sup>47</sup> However, these were dashed hopes.<sup>48</sup>

Podgórecki signaled another problem, which was the inflation of legal acts, which could be observed already in Stalinist times, combined with the overregulation of social and economic life. He wrote in the introduction:

The Presidium of the Government in the adopted resolution establishes the principles of remuneration of cleaners, and the Ministry of Finance determines the nature of activities consisting in gutting and salting fish. [...] However, no one is dealing with the problem of what science and who should deal with how to create law in a good, fair and effective way.<sup>49</sup>

The Constitution of the Polish People's Republic did not clearly define the subject of the parliamentary act, which meant that the Council of Ministers, through so-called independent resolutions, i.e. those issued without statutory authorization, regulated many areas of social life. Such activity was also carried out by ministers, issuing orders. The Constitution did not contain a closed catalogue of sources of law, which was an additional factor causing the government and ministers to intensify their law-making activity. This activity was called independent, spontaneous and "duplicative" (xerox) law-making,<sup>50</sup> because these acts were often not published in the Journal of Laws or the Polish Monitor. The concept of a "shaky" system of sources of law in Poland appeared at this time. The problem was very serious, since during the post-Stalinist thaw in 1957 the General Prosecutor's Office presented the view that:

[...] we consider only an act, decree or regulation issued on the basis of an act or decree and within the limits of the statutory delegation as a provision of law, as well as resolutions of the Council of Ministers based on the same legal basis. Therefore, they do not constitute a source of law and instructions, circulars, guidelines or even orders are not legal regulations.<sup>51</sup>

The rigorous position of the prosecutor's office did not change anything. Despite the fact that the phenomenon was noticed in the science of law, the problem was constantly growing, and statistical data can prove it. At the end of 1984, there were 467 acts and decrees in force in the Polish People's Republic, 1,593 regulations of the Council of Ministers, the Prime Minister, ministers, 1,069 resolutions of the Council of Ministers (mostly spontaneous), 931 orders of ministers published in the Monitor Polski, 276 orders, circulars and circular letters and about 10,000 orders of ministers (so-called departmental regulations).<sup>52</sup> Based on these data, it was calculated that acts constituted only 3.5% of the general normative acts. This phenomenon was practically not dealt with until the end of the People's Republic of Poland. It is worth emphasizing, however, that this country was practically the only country of the Eastern Bloc in which constitutional courts were established (1985). In this connection, it is not a coincidence that the first ruling of the

<sup>47</sup> *Ibid.*, 54–5.

<sup>48</sup> The scientific work of Podgórecki is the subject of new studies. See: Kania, "Adama Podgóreckiego koncepcja," 341–62; Rodak, "Społeczne śnienie," 370–84.

<sup>49</sup> Podgórecki, *Założenia polityki*, 3.

<sup>50</sup> Pichlak, *Zamknięty system źródeł*, 105.

<sup>51</sup> Quoted by: Zakrzewski, *Zakres przedmiotowy*, 44.

<sup>52</sup> *Raport o stanie prawa*, 20–1.

Constitutional Tribunal concerned the problem of sources of law, specifying the constitutional requirements that should be met by the implementing regulation to the act. It was pointed out that the act should specify the scope of the statutory delegation (blank authorizations were rejected), the claim about the presumption of the law-making competence of the government and ministers was rejected, and the statutory exclusivity of the Sejm was defined.<sup>53</sup> This was not the only ruling of the Tribunal on the legislative procedure in the initial period. It was an important change in the legal situation in the conditions of the collapsing communist system and the approaching time of the rule of law.

The aforementioned interest of science in the state of law-making in Poland was visible in the 1970s. Sławomira Wronkowska noted that “the acute legislative crisis that occurred in the early 1970s in the countries of our cultural circle made the need for changes in the law-making process very clear.”<sup>54</sup> The resolutions of the 6th and 7th Congresses of the Polish Communist Party – PZPR (1971, 1975), mentioned the improvement of the state of law as one of its goals.<sup>55</sup> One of its manifestations was to be the planning of legislative activity. In a socialist state – it was claimed – such planning is related to the planned nature of the economy and was to concern both individual normative acts and legislative activity within the framework of the current planning of the Council of Ministers’ work, the arrangement of specific areas of law and the preparation of a comprehensive plan for such activity.<sup>56</sup> From the Polish perspective, reference was made to the experiences of other socialist countries. “Planned activity aimed at organizing and improving the legal system has become a regularity in all socialist countries, mainly the Soviet Union, Bulgaria and Hungary” – it was stated in the first half of the 1970s.<sup>57</sup> For example, in the Hungarian People’s Republic, five-year plans for codification activities were developed by the government as early as in the 1960s.<sup>58</sup> In Czechoslovakia, on the other hand, a two-phase procedure was in force from this time on: first, the principles of the act were developed and presented, in which variant solutions were proposed, then the draft was developed and submitted for adoption. Attention was also paid to attach draft implementing regulations to the draft acts.<sup>59</sup> In Poland, in December 1971, a symposium was held, organized by the Polish Academy of Sciences, devoted to assessing the state of law. Its purpose was to prepare material for the creation of the first report on the state of law.<sup>60</sup> This report was prepared on the basis of the decision of the Presidium of the Government No. 93/72,<sup>61</sup> and its preparation was commissioned to the Association of Polish Lawyers. It is likely that the critical assessment of the state of law contained in the report (unpublished!) from 1972, led to the adoption by the Council of Ministers of Resolution No. 46/74 of 8 February 1974 on the program of improving law for the years 1974–1980.<sup>62</sup> This program was only

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<sup>53</sup> Wiącek, “Komentarz do orzeczenia,” 33–49.

<sup>54</sup> Wronkowska, “Ekspert a proces,” 5–6.

<sup>55</sup> Bafia, “Podstawowe założenia,” 3–15.

<sup>56</sup> Zawadzki, “Planowanie działalności,” 168–9.

<sup>57</sup> Siarkiewicz, “Rządowy program,” 10.

<sup>58</sup> Takas, “Planowanie prawotwórstwa,” 265–6.

<sup>59</sup> Grospič, Sin, “Planowanie prawotwórstwa,” 253–5.

<sup>60</sup> See for example: Łopatka, “Ogólne założenia,” 3–12; Rybicki, “Kierunki doskonalenia,” 3–9.

<sup>61</sup> Decision No. 93/72 of the Presidium of the Government of 28 July 1972 on the improvement of the law-making process, unpublished.

<sup>62</sup> IPN Archive, file reference number: IPN BU 01891/9 628/9, k. 16–74.

implemented by 25%,<sup>63</sup> which means it ended in spectacular failure. The second report on the state of law, issued in 1986 and published then, is now only a specific testimony to the catastrophe that Polish law found itself in the face of the fall of communism. Nevertheless, the postulates of changes included in the conclusions, namely: (1) development of the activity of the Constitutional Tribunal; (2) new regulation in the constitution on the system of sources of law; (3) completion of work on the act on creating law; and (4) computerization of legislative work (!)<sup>64</sup> sound like a message from lawyers to future legislators in a free Poland.

The aforementioned resolution of the Presidium of the Government of 1972 established the Legislative Council under the Prime Minister. The experience of socialist Czechoslovakia probably played a role here, where, after the Prague Spring and the invasion of Warsaw Pact troops, the federal Legislative Council (Legislativni rada vlády ČSSR) was established in March 1969, and councils were established in the Czech and Slovak republics somewhat later. The federal council, consisting of 14 members, had no authority of any kind and was an internal, auxiliary body. It was a “coordinating, advisory and initiative body of the government of the Czechoslovak Socialist Republic in the area of legislative activity.”<sup>65</sup> The Polish Legislative Council was established as an advisory and consultative body to the Prime Minister, and its tasks included, among others, making periodic assessments of the state of the law, giving opinions on the legislative work of administrative bodies and giving opinions on legal acts of fundamental importance.<sup>66</sup> The role of the Council in the 70s and 80s was constantly growing, and the importance of the regulations governing its operation was also growing. This state of affairs continued after the change of the political system, and it was not until 2016 that this body experienced an 8-year depreciation. The Council is therefore a creation from the People’s Republic of Poland, but one with an important position today.

In the same year, 1972, the Legislative Works Commission was established in the Sejm, whose task was to assess each draft law in terms of its compliance with the law of the Polish People’s Republic. The Commission was therefore intended as a kind of guardian of the coherence of the legal system.<sup>67</sup> It survived the People’s Republic of Poland.

One of the tasks of the newly established Legislative Council was to develop a draft law on creating law. A team was selected to relatively quickly develop the project’s assumptions, and then the project itself, which covered issues such as: (a) the principles of creating law; (b) the principles of formulating law; (c) the mutual relationship of legislative acts; (d) guidelines and instructions; (e) the legislative procedure; (f) the principles of agreeing on draft legislative acts; (g) the promulgation of legislative acts.<sup>68</sup> The first draft came from 1979; the next revision came from 1980 and was to be the subject of legislative work.<sup>69</sup> However, this was not the only project, as in 1987 a citizen’s project was created.<sup>70</sup> Yet there is no bill to this day.

<sup>63</sup> *Raport o stanie prawa*, 1.

<sup>64</sup> *Ibid.*, 186–7.

<sup>65</sup> Mazur, “Rada Legislacyjna,” 111.

<sup>66</sup> Prokop, “Rada Legislacyjna,” 136.

<sup>67</sup> Zwierzchowski, Borski, “Udział Komisji Ustawodawczej,” 47.

<sup>68</sup> Bafia, “Podstawowe założenia,” 6–7.

<sup>69</sup> Bafia, *Zasady tworzenia*, 193. See the draft bill published there in the January 1980 version, 215–32.

<sup>70</sup> Wróblewski, *Zasady tworzenia*, 165–77.

## Conclusion

Despite constant declarations, the process of creating law in socialist countries was never democratic. This resulted from the nature of the system, in which the content of the law was decided by the communist party, not the parliament, which played a *façade* role. The case study described in Polish literature, i.e. the work on one act from preparation of the project to its implementation,<sup>71</sup> shows that the socialist system was not able to develop democratic processes of creating law, based on the parliamentary struggle of clashing political interests. However, one should appreciate the attempts at a formal, technical improvement of the legislative activity visible since the post-Stalinist times, which have gradually changed the creation of law. One should agree with the opinion of American authors that during the whole period of communist rule the core elements of the political philosophy of socialist law were a recognition of the leading role of the communist party, rubber stamping parliament and political elections without choices.

The concept of the rubber stamp parliament meant: the parliament was pro forma legislative organ in the society, but it enacted laws under the watchful eyes of communist party. Because legislative bills that were presented in parliament had already been debated and approved by the communist party at it closed meetings, the only role left to parliament was to legitimize the will of the communist party. Under this arrangement, law making was similar to the submission of a legal instrument that had been drafted by an attorney to a notary for the latter's notarial stamp. Without this notarial stamp the legal instrument would be invalid, just in the same way that a policy adopted by the communist party would not be regarded as law without the legitimizing but perfunctory function of the parliament.<sup>72</sup>

However, even today, the communist belief is sometimes heard that the parliamentary majority, i.e. the party and its leader, can create such law that is consistent only with their will. The Polish Constitutional Tribunal opposed this, stating in its judgment of 9 December 2015: "After the experience of totalitarian governments, there is no doubt that even a democratically elected parliament has no competence to make decisions that would be contrary to the Constitution, even when their justification is the abstractly understood good of the Nation."<sup>73</sup>

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<sup>71</sup> Szmyt, *Stanowienie prawa*, 53–244.

<sup>72</sup> Glendon, Gordon, Osakwe, *Comparative Legal Traditions*, 419.

<sup>73</sup> *Na straży państwa*, 5.

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