Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome (forthcoming)

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Abstract: After 1989, the Polish legal elites embraced a transformation discourse, presenting modern Polish legal history as a circular journey from Europe to the dystopia of “Communism” and back. As a consequence, links with the state-socialist past are repressed from the collective consciousness of the legal community and presented as post-Soviet “weeds” in the Polish gardens of justice. However, the repressed weeds return in the form of symptoms – legal survivals, which lawyers tend to ignore or conceal because they subvert the dominant ideological narrative. In this paper, I focus on metanormative survivals of the Socialist Legal Tradition in Poland which can all be brought under the umbrella term of “hyperpositivism”. This concept denotes an extreme version of classical legal positivism, mixed with elements of orthodox Marxism-Leninism, in the form created in the Soviet Union in the 1930s and exported to Central European countries after World War II. Owing to the persistence of legal survivals of Actually Existing Socialism in Polish

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legal culture, the paper argues for their reappraisal by resorting to a metaphorical reconceptualisation on the basis of selected mappings from the source domain of Lacanian psychoanalysis.

**Keywords:** Socialist Legal Tradition, Polish legal culture, transition, legal survivals, hyperpositivism, symptom, sinthome.

Many have complained that the words of wise men are only ever metaphors that do not apply to everyday life, which is all we have. [...] Then someone said: “[...] If you abided by the metaphors, you would become metaphors yourselves, and then you would soon be free from everyday troubles.” Someone else said: “I bet that’s a metaphor, too.” The first person said: “You have won.” The second said: “But only metaphorically, alas.” The first said: “No, in reality; metaphorically you have lost.”

Franz Kafka

1. Introduction

Conceptual metaphors are aimed at understanding one phenomenon (the “target domain”), usually abstract and difficult to comprehend, in terms of another phenomenon (the “source domain”), usually more concrete and relatively easily perceptible.2

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A notoriously abstract phenomenon – the law – which “in itself is invisible [...] can appear only as a metaphor [...]”.

Hence the importance not only of metaphors in law (indeed, “legal language is intrinsically metaphorical” itself) but also of metaphors of law, which are the vehicles of conceptualising the legal system as such. As a matter of fact, most metaphors of law are visual, including well-known ones, such as LAW IS A BODY (as in “Corpus iuris civilis”), LAW IS A TEXT, LAW IS AN EDIFICE, LAW IS A SPACE (“within the scope of Art. 5”) or - LAW IS A FOREST. The importance of visual metaphors is part of a wider human preference for sight as compared to the other senses, which finds its reflection not only in conceptual metaphors (such as KNOWING

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4 Vespaziani, “Hermeneutical Approach”, 79. An interesting example are metaphors in copyright law discussed by Larsson, Metaphors and Norms, 94-104. On competing metaphorical conceptualisations of the legal field see also Pierre Schlag, “The Aesthetics of American Law”, Harvard Law Review 115 (2002): 1047-1115, who identifies four competing aesthetics of law: the grid aesthetic, the energy aesthetic, the perspectivist aesthetic and the dissociative aesthetic. Each of the aesthetics represents a competing metaphor of law each of which favours the use of different metaphors in legal discourses.


6 Cfr. Hibbits, “Making Sense”, 230. Cfr. the conceptual metaphor complex systems are buildings (Kőveceses, Metaphor, 139-140).

IS SEEING\(^8\), as in “I see what you mean”) but also in social practice (e.g. tourists prefer to take pictures, rather than only record sounds, people correct even minor deficiencies of sight by wearing glasses, although they would not, in general, correct a minor impairment of hearing\(^9\)).

One of the less diffused visual metaphors of the law is one which sees the LAW AS A GARDEN. Although, perhaps, not that obvious to a lawyer\(^10\), it does lend itself to our imagination and, once accepted, allows to reconceptualise the legal field in a fruitful manner. Mappings\(^11\) between the respective source and target domains include\(^12\) the creation of a space governed by certain rules, which must be complied with lest the space will lose its essential features (e.g. a garden will become a wild forest; rule of law will turn into the “law of the jungle”); the anthropogenetic nature of both gardens and legal systems (both are parts of culture as opposed to nature); the opposition between the enclosed garden (enclosed within certain, defined limits) and the unregulated space (“wilderness and savagery”) outside its confines; as well as parallels between a gardener and a law-maker.

Induced by the LAW IS A GARDEN metaphor, in the present paper I will roam the Polish “gardens of justice” in search of survivals of the Socialist Legal Tradition.\(^13\) Before that, I will note (in section 2) that the mainstream legal discourse in Poland could be

\(^10\) But see similar metaphors such as GENERAL CLAUSES ARE AN ENCHANTED FOREST (mentioned by Peter Schlechtriem, “The Functions of General Clauses, Exemplified by Regarding Germanic Laws and Dutch Law”, in General Clauses and Standards in European Contract Law: Comparative Law, EC Law and Contract Law Codification, ed. Stefan Grundmann, Denis Mazeaud (The Hague: Kluwer Law International, 2006), 41-55, 49, 54) or LAWS ARE TREES IN A FOREST (discussed by Winter, A Clearing, 1).
\(^11\) On metaphorical mappings and their partial nature see Kövecses, Metaphor, 91-103.
\(^12\) Cfr. Carpi, “Garden as Law”, 35-36.
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described as identifying those survivals with “weeds in the gardens of justice”, that is undesirable elements which need to be removed to restore order. I will then move on (in section 3) to probe the extensiveness of post-socialist legal survivals, considering “hyperpositivism” as the a most prominent and pervasive one. The ideological fantasy,\textsuperscript{14} according to which legal survivals are no more than weeds (the thesis), finds it dialectical opposition (the antithesis) in the Real\textsuperscript{15} of their persistence within Polish legal culture, which cannot be accounted for within the dominant narrative of discontinuity with Actually Existing Socialism.\textsuperscript{16} Therefore, as a synthesis of this dialectical opposition, I will propose to reconceptualise the field of legal survivals by resorting to a new metaphor, viewing LEGAL SURVIVALS AS SYMPTOMS.

2. The Dominant Narrative: Weeds in the Gardens of Justice

During the 20th century Poland and its legal system experienced a series of radical transformations, in particular the establishment of Actually Existing Socialism (1944/1948) and its subsequent demise in 1989.\textsuperscript{17} Such profound changes required


\textsuperscript{15} I am using the notion of “Real” in the Lacanian sense as “what has not yet been put into words or formulated [...] the connection or link between two thoughts that has succumbed repression and must be restored” (Bruce Fink, A Clinical Introduction to Lacanian Psychoanalysis [1997] (Cambridge MA-London: Harvard University Press, 1999), 49.

\textsuperscript{16} In this paper I will use the terms “Actually Existing Socialism” and “state socialism” interchangeably in order to denote the socio-economic and political system de facto prevailing in the Soviet Union from the late 1920s and in its satellite states – including Poland – after World War II.

\textsuperscript{17} For a synthetic account in English see e.g. Jane Hardy, Poland's New Capitalism (London-New York: Pluto Press, 2009), 12-53.
a justification and explanation. They are offered by the dominant narrative of transformation, based on the RETURN TO EUROPE schema (an application of the classic SOURCE-PATH-GOAL compositional structure\(^{18}\)). At first, there is the initial state (SOURCE): Poland belongs to the West. Then, in 1944, it is brutally submitted to the sphere of Soviet influence which creates an imbalance or lack. The period of 1944-1989 is presented as an incessant struggle for freedom (PATH) which ends in the agon – “restoration of independence” and “return to Europe” in 1989 (GOAL). A consequence of this narrative is that the transformation of 1989 is presented not as a conscious, reflected upon and informed political choice (between the possible versions of Actually Existing Socialism, on the one hand, and one of the varieties of capitalism on the other) made by the Polish elites (or people), but as the outcome of Poland’s identity and struggle for freedom. The very construction of the narrative does not leave any space for a critical approach to the events of 1989, elevating them to the position of historical necessity.\(^{19}\)

Under the dominant narrative the period of Actually Existing Socialism is presented exclusively in a negative light, the state-socialist past is delegitimised\(^{20}\) while simultaneously the neoliberalisation\(^{21}\) processes that have occurred after 1989 are

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\(^{18}\) On narratives and their compositional structures see e.g. Winter, A Clearing, 108-111.


\(^{21}\) On the notion of “neoliberalisation” see e.g. Simon Springer,
legitimised. The RETURN TO EUROPE narrative contributes, therefore, to the entrenchment of neoliberalism in Poland in all its dimensions (as an ideological hegemonic project, as a policy and program, as a state form and as governmentality23). Under such circumstances, pointing to continuity with Actually Existing Socialism is, within the dominant discourse in contemporary Poland, used as a delegitimising argument24: any proposal for reform or innovation can always be discarded on the basis that a given solution or idea can be traced back to state-socialist Poland (even if it functions perfectly well, as, for instance, in Sweden).

Within this context it not surprising that the legal community, functioning within the dominant transformation discourse, avoids emphasising the continuity of Polish legal culture with the state-socialist period. Such an approach could be dangerous for the lawyers themselves by delegitimising those among the instruments and mechanisms of their craft which have their genealogy in the state-socialist past. Within the legal discourse, the RETURN TO EUROPE narrative serves the representation of the state-socialist past and is frequently expressed by resorting to a series of conceptual figures which I label CONTAINER schema, SUBMISSION metaphor, PURIFICATION metaphor and RECONSTRUCTION metaphor.

The CONTAINER schema25 is used to underline that Poland always belonged to the Western Legal Tradition, was part of the West

22 Majmurek, Szumlewicz, “Fakty i mity”, 15.
23 These four dimensions of neoliberalism have been identified by Springer, “Neoliberalism as discourse”, 136-137.
24 Majmurek, Szumlewicz, “Fakty i mity”, 16
and so forth. Of course, such sweeping statements are not exactly accurate: medieval and early modern Polish law did not belong to the Western legal tradition (there was little or no reception of the *ius commune*); furthermore, it is rather difficult to conceptualise ‘Polish law’ in the 19th century, when the lands of the former Polish state (dismembered in 1795) became the object of a wholesale reception of Prussian, French, Austrian and Russian laws. After the Polish state reappeared on the map of Europe in 1918, those foreign laws remained in force. Only in the 1930s did Polish codes of law appear (covering selected areas of the law) and only with regard to this very short period one can claim that there was a “Polish law” which actually belonged to the Western Legal Tradition. Nevertheless, the CONTAINER schema with Poland as part of the West is as a necessary compositional prelude to the subsequent SUBMISSION metaphor, employed to


interpret the period of Actually Existing Socialism. According to
the dominant narrative, Poland and its legal system were
submitted by brute force to Soviet influences, the Socialist Legal
Tradition being something foreign and external.30

The logical consequence of “regaining freedom” in 1989 is that the
Polish legal community had to concentrate on removing the
unwanted traces of Soviet influence. Two schemas can be
identified in this respect. First, the PURIFICATION schema,
whereby Polish laws during the period of Actually Existing
Socialism were “contaminated” by Soviet influence.31 To put it in

30 This schema is visible in texts which speak of “a fifty-year-long period of
submission to the so called ‘socialist family’” (Stroiński, “Report”, 39,
emphasis added) or indicate that “[t]he development of the civil law
codification [in Poland] was stopped […] during the Communist regime,
again imposed by force (…)” (Jerzy Rajski, “European Initiatives and
Reform of Civil Law in Poland”, Juridica International 14 (2008): 151-155. Also available online at:
http://www.juridicainternational.eu/public/pdf/ji_2008_1_151.pdf (last

31 This way of thinking is clearly visible in the language employed by
Safjan, Wiewiórowska ("East-West", 278) who write that “...the Polish
private law system [...] survived the communist times buried under the
cover of ideology” and that “the classic civil law basic constructions
remained, sometimes hidden under the surface of the ideological
ornament”, therefore “[w]hen the ideological implant is removed” private-
law treatises written under Actually Existing Socialism can “serve as
a source of great inspiration” (emphasis added). Also for Rajski, the post-
1989 legal reforms “were greatly facilitated by the possiblity of returning
to Poland’s pre-war traditions” and were “aimed at eliminating ‘socialist’
distortions to civil law” (“European Initiatives”, 152, emphasis added).
The authors of a textbook on civil procedure write about legal survivals of
Actually Existing Socialism as “accretions imported from the East”
which, after 1989, “began to be gradually removed” (Jerzy Jodłowski,
2003), 33, emphasis added). A Polish civil law specialist writing for
foreign authors speaks of “épurer notre Code civil de 1964 des traces bien
visibles du système socialiste” (Małgorzata Pyziak-Szafnicka,
“L’évolution contemporaine du droit des obligations en Pologne” in
Kierunki rozwoju prawa cywilnego we Francji, w Niemczech i w Polsce w
perspektywie prawa europejskiego [Directions of Development of Civil
the terms of the LAW AS A GARDEN metaphor, the Polish gardens of
despite the survival of Hyperpositivism
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the terms of the LAW AS A GARDEN metaphor, the Polish gardens of
justice were full of Soviet weeds which had to be pulled out. The
PURIFICATION schema is complemented by the RECONSTRUCTION
metaphor (based on the LAW IS AN EDIFICE metaphor)\(^{32}\) whereby
the “edifice of Polish law” was damaged during the period of
Soviet influence and had to be rebuilt following the
transformation.\(^{33}\)

Within the dominant narrative, there is, therefore, no place for
the Socialist Legal Tradition as a legitimate ancestor of
contemporary Polish legal culture. Rather, the legacy of the
Socialist Legal Family is negated, treated as something foreign,
external and impure.

Another reason for which Polish lawyers cling to the RETURN TO
EUROPE narrative is their complex of inferiority. When explaining
Polish law to Westerners, they tend to emphasise what they
consider to be its “achievements.”\(^{34}\) Feeling that the survivals of

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\(^{32}\) As in the metaphorical expression stating that “international law is an
edifice built on a volcano – state sovereignty” (Antonio Cassese, “On the
Current Trends towards Criminal Prosecution and Punishment of
Breaches of International Humanitarian Law”, *European Journal of
International law* 9 (1998): 2-17, 11; available online at:
http://ejil.oxfordjournals.org/content/9/1/2.full.pdf (last accessed:
26/3/2013), citing H. Gerhart Niemeyer, *Einstweilige Verfügungen des
Weltgerichtshofs, ihr Wesen und ihre Grenzen* (Leipzig: R. Noske, 1932),
3. Emphasis added, original emphasis removed.

\(^{33}\) As in the phrase: “The efforts with the rebuilding of the law of
civil procedure have not been yet ended” (Jodłowski et al., *Postępowanie
cywilne*, 33) (own translation from the Polish, emphasis added).

\(^{34}\) See e.g. Safjan, Wiewiórowska-Domagalska, “East-West”, 277: “Due to
historical and political considerations [...] Polish private law does not
have a very strong tradition. However, its achievements are nevertheless

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the Socialist Legal Tradition are something embarrassing and “dirty”, they tend to downplay them, placing an emphasis on the Western inspirations of Polish law\textsuperscript{35}, and thereby promoting an agenda which entails the obliteration of the East-West division in Europe – a division, which they perceive as stigmatising\textsuperscript{36}. In the following section I will argue that the obliteration of this division is certainly premature.

3. Hyperpositivism: A Legal Survival of Actually Existing Socialism

All legal systems are to a certain extent “hybrids created in significant part by the diffusion of laws”\textsuperscript{37} and Polish legal culture is no exception here: contrary to what Polish legal elites would like it to be, it is not exclusively a legitimate descendant of the Western Legal Tradition but rather a hybrid, combining elements both from the West and from the East. In order to emphasise the heterogeneous roots of the Polish “gardens of justice”, in a gesture of “quasi-symptomatic” reading,\textsuperscript{38} I will draw attention to elements of continuity with the Socialist Legal Tradition, thereby “reversing the grounds” and placing in the foreground the legal survivals of Actually Existing Socialism in Poland – the “Red

\begin{footnotesize}
\begin{enumerate}
\item See e.g. Safjan, Wiewiórowska-Domagalska, “East-West”, 277-279.
\item See e.g. Safjan, Wiewiórowska-Domagalska, “East-West”, 265, 275-276.
\item Cfr. Riccardo Baldissone, “Sovereignty Forever: The Boundaries of Western Medieval and Modern Thought in a Quasi-Symptomatic Reading of Schmitt’s Definition of Sovereignty”, in this issue of \textit{Polémos}. Drawing upon Althusser’s notion of a symptomatic reading of a text which aims at revealing not only its explicit, but also its hidden content, Baldissone proposes “a quasi-symptomatic hermeneutic approach, which would underline our role as interpreters in making texts show or hide content.” My reading of texts of Polish legal culture in roaming for legal survivals embodies exactly such a quasi-symptomatic approach.
\end{enumerate}
\end{footnotesize}
Gaius” of Polish legal culture39 – instead of its regularly (over-)emphasised Western roots.

I define “legal survivals” as elements of legal culture originating within an earlier socio-economic formation40 which were functional towards that formation but which, following the transition to a historically subsequent formation, have remained in place.41 Given the wide variety of legal survivals, they can be categorised in various ways. For instance, it is possible to speak of *organisational* survivals (regarding the organisation of legal

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40 I am using the notion of a “socio-economic formation” in the classical Marxist sense, as signifying “a concrete stage of development of the human society in all manifestations of social life”, including both the economic base and ideological superstructure (Adam Schaff, *Wstęp do teorii marksizmu: Zarys materializmu dialektycznego i historycznego* [An Introduction to the Theory of Marxism: An Outline of Dialectical and Historical Materialism] (5th ed., Warszawa: Książka i Wiedza, 1950), 219). Although traditional Marxist understandings were based on the assumption that, in principle, only progress is possible and necessary (see e.g. Schaff, *Wstęp*, 242), the degeneration of Soviet rule into “Actually Existing Socialism” and its subsequent collapse have proven that opposite movement is also possible (cfr. Jan Wawrzyniak, “Nowelizacja Konstytucji PRL z 7 kwietnia 1989 roku – początek transformacji (refleksje prawno-polityczne)” [The Amendment of the Constitution of the Polish People’s Republic on 7 April 1989: The Beginning of the Transformation (Juridico-Political Reflections)] in *Transformacja ustrojowa w Polsce 1989-2009* [Regime Transformation in Poland 1989-2009], ed. Maria Kruk, Jan Wawrzyniak (Warszawa: Scholar, 2011), 11-20, 12. In resorting to the notion of “socio-economic

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institutions such as courts, the prosecution service, bar associations, law schools etc.), *metanormative* survivals (metanorms regulating the actual legal discourse and practice or, simply – “working legal thought”\(^{42}\)) and *normative* survivals (legal rules, doctrines, concepts, procedures, present in legislation, caselaw and scholarly writings, both regarding substantive and procedural law).

It is possible to argue for the persistence of all three kinds of legal survivals in Poland. As regards the organisational legal survivals, suffice it to mention the continuity of the structures of the judiciary and their staffing after 1989\(^ {43}\) – which undoubtedly


\(^{42}\) Defined by Grey as “the cluster of attitudes and approaches to law that lawyers take on during their apprenticeship, and then actually manifest in their work as practitioners, judges, teachers and doctrinal commentators” as opposed to “jurisprudential high theory whose influence reaches only to those who take a specialized academic interest” in it (Thomas C. Grey, “Judicial Review and Legal Pragmatism”, *Wake Forest Law Review* 38 (2003): 473-511, 478).

\(^{43}\) Daniela Piana, “The Power Knocks at the Courts’ Back Door: Two Waves
created a solid, personal basis upon which other forms of legal continuity could rest. As regards normative legal survivals, there are also various examples, including, for instance, within property law, the persistence of real-socialist legal forms such as the “cooperative member’s right to an apartment”, the “right of perpetual usufruct”\(^{44}\) or, within the law of civil procedure, the broad powers of the prosecutor in civil proceedings, directly modelled on Soviet law,\(^{45}\) or the “Guidelines” of the Supreme Court\(^{46}\) which, although officially abolished in 1989\(^{47}\) and subsequently declared non-binding\(^{48}\), are still frequently cited and relied on by judges, not excluding the Supreme Court itself.\(^{49}\)

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\(^{45}\) For details see e.g. Mańko, “Is the Socialist”, 92-94.

\(^{46}\) Such guidelines were a distinct feature of all socialist countries and were issued by the supreme courts in the form of an abstractly formulated, binding interpretations of statutory rules. On the original Soviet model see e.g. William E. Butler, *Soviet Law* (London: Butterworths, 1983), 98.

\(^{47}\) Act of 20 December 1989 (Dz.U. no. 73, item 436).

\(^{48}\) The Supreme Court officially proclaimed that such Guidelines are no longer binding on the courts – see Resolution of the Supreme Court (full composition) of 5 May 1992 in Case KwPr 5/92, LEX no. 3805.

\(^{49}\) Among the still frequently cited Guidelines from the socialist period one should mention the guidelines on division of matrimonial property (e.g. relied on in order of the Supreme Court of 26 January 2011 in Case II CSK 329/10, LEX no. 794955); guidelines on employee liability (1975) (see e.g. judgment of the Supreme Court of 10 March 2010 in Case II PK

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In this paper, though, it is *metanormative* legal survivals that I wish to focus on. They are perhaps somewhat less visible (for the internal, and external observer alike) – and hence require a “quasi-symptomatic approach” to unravel them – but it is exactly owing to their embeddedness that they seem to be potentially most enduring as a link between Polish legal culture and its real-socialist past. Specifically, by metanormative legal survivals – in contrast to the normative and organisational ones – I mean those instances of continuity which are not concerned with the actual substance of legal discourse but to the metarules governing it. These include, first of all, metarules determining the boundaries of that discourse (what is considered as “law”, what authorities can be invoked in legal arguments), the methods governing that discourse (rules on legal interpretation) and, on a more specific plane, the judicial ideology (views on the role of the judge in deciding a case). The metanormative survivals of the Socialist Legal Tradition in Poland can all be brought under the umbrella term of “hyperpositivism”,\(^{50}\) denoting an extreme version of classical positivism, mixed with elements of Soviet-style Marxism-Leninism,\(^{51}\) in the form created in the Soviet Union in

\(^{50}\) Tomasz Milej, “Europejska kultura prawna a kraje Europy Środkowej i Wschodniej” [European Legal Culture and Central-Eastern European Countries], *Przegląd Legislacyjny* 15.1 (2008): 60-74, 68.

the 1930s and transplanted\textsuperscript{52} to Central European countries after World War II.

Approaching hyperpositivism from the point of view of those of its aspects which are relevant for practices of legal culture (in particular adjudication), four elements can be discerned which, taken together, can be said to form a working definition of the phenomenon. These include: the concept of law (\textit{i.e.}, what counts as law and what does not), the concept of interpretation (\textit{i.e.}, what is interpretation), the judicial ideology\textsuperscript{53} (what are the functions of judges when deciding cases) and the degree of formalism (what role is given to formal issues in law as opposed to substantive ones)\textsuperscript{54}.

First of all, the concept of law in hyperpositivism takes over from classic positivism the view that law emanates from the sovereign but limits this scope to abstract and general written legal instruments adopted by the competent state bodies.\textsuperscript{55} Therefore, in contrast to classic Western positivism, hyperpositivism rejects

\textsuperscript{52} Comparatists agree that the notion of legal transplants extends not only to legal rules, institutions or entire codes, but also to jurisprudential theories (see e.g. Michele Graziadei, “Comparative Law as the Study of Transplants and Receptions” in \textit{The Oxford Handbook of Comparative Law}, ed. Mathias Reimann, Reinhard Zimmermann [2006] (Oxford-New York: Oxford University Press, 2008). 441-476, 458 who mentions – as an example of a legal transfer – the reception of the legal theory of Kelsen, Hart and Dworkin in Latin America).

\textsuperscript{53} On the notion see Kühn, “Worlds Apart”, 532-533.

\textsuperscript{54} The four elements are certainly heterogenic, but as I insist on a working definition and one which is oriented on the practices of legal culture, I believe this approach to be justified. The definition does not reflect all possible positions adopted by scholars working within the Socialist Legal Tradition but concentrates on the dominant position in legal theory and its reflection in actual legal practices.

such sources of law as precedent (treated as source of law in Anglo-American positivism), customary law and doctrinal writings (treated as source of law in German conceptual jurisprudence\(^{56}\)), as well as general principles of law.\(^{57}\) Hence, the notion of law is reduced to the Constitution, statutes and sub-statutory law emanating from the government and administration.

Secondly, the concept of legal interpretation is reduced to a decoding of the inherent meaning of texts.\(^{58}\) In this approach, hyperpositivism coincides with early 19th-century schools of exegesis, as known in France or Austria directly after the enactments of Civil Codes\(^{59}\), and more broadly speaking – with a modernist approach to interpretation.\(^{60}\) A strictly literal construction of statutes is given functional primacy over any other form of interpretation.

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\(^{58}\) Cfr. Ewa Łętowska, “Kilka uwag o praktyce wykładni”, *Kwartalnik Prawa Prywatnego* 11.1 (2002): 27-64, 43: “[in Poland] the law is commonly regarded as a text and there is a mistaken conviction that there exists ‘one correct’ reading of it, externalised in the ‘one correct’ application in a case.”


\(^{60}\) Cfr. Jakub Łakomy, “Spory wokół wykładni prawa między nowoczesnością a ponowoczesnością. Na przykładzie debaty Dworkina z Fishem” [The Conflict over Legal Interpretation Between Modernity and Postmodernity: The Example of the Dworkin-Fish Debate], in *Teoria prawa między nowoczesnością a ponowoczesnością* [Legal Theory Between Modernity and Postmodernity], ed. Aleksandra Samonek (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, forthcoming in 2013): “A positivist – and thereby modernist as to its sources – theory of interpretation (...) presupposes the existence of one, objective meaning of a legal text which can be and should be attained through the deployment of appropriate directives of interpretation. What is essential here is the issue of the place and function of the interpreter [...] treated as the ‘mouthpiece of the statute’ who, by making use of the toolbox of formal logic (the legal syllogism), as well as directives and propositions of Legal Theory [...] discovers (akin to a natural scientist analysing empirical facts) the proper meaning of a legal text.”
A scholar or judge may look into the purpose of a statute or its internal order only if the literal interpretation provides a result which is overtly absurd and cannot, under any circumstances, be attributed to the imaginary “legislator.”

Thirdly, the judicial ideology of hyperpositivism reduces the judge to a mere machine for “applying” statutes and other legal rules. As noted with regard to the concept of law, precedent is openly rejected. Furthermore, in contrast to more nuanced versions of positivism, hyperpositivism insists that the task of the judge is a syllogistic operation of subsumption, rejecting such elements of the judge’s methodology as reasoning per rationem decidendi (as in Anglo-American positivism), or the balancing of conflicting principles or interests. The hyperpositivist judge is someone who ascertains the facts, decodes the legal norm from the legal rule and “applies” the norm to the facts.

Fourthly, hyperpositivism is an ultra-formalist species within the positivist genus. The insistence on the form of the law, rather than its substance, is particularly visible in the practice of adjudication. Hyperpositivist judges prefer to dismiss a case on the most minute formalist ground than to look into its substance.

Undoubtedly, hyperpositivism is a historical paradox: Marx himself was a critical legal realist and early Soviet Marxist legal thought in the 1920s was openly anti-positivist. During the first decade after the October Revolution, Lenin’s view on the withering away of the state and law was still taken seriously. Legal education was gradually transformed into economic policy

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64 Sadurski, “Marxism”, 195-198.
education, private law was transformed into economic law and judges decided cases on the basis of economic efficiency rather than legal rules. Still in 1927 Pēteris Stučka, Chief Justice of the USSR Supreme Court, wrote that “Communism means not the victory of socialist law, but the victory of socialism over any law.” However, the Stalinist turn in the 1930s reversed everything. Initially, Stalin put forward the view that as long as the Soviet Union is surrounded by capitalist states, the Soviet state will have to exist, not only in the socialist phase but even in the higher, communist classless society. According to Stalin's dialectical approach, for the socialist state to wither away, it first had to become even stronger. Eventually, by 1939 Stalin abandoned the dogma of withering away of the state altogether and by 1948 the Stalinist Attorney-General, Vyshinski, could correctly remark that instead of withering away, “the role of Soviet law and Soviet legislation grew vastly [...]”. This distortion of Marxist legal theory under Stalin was by no means

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75 Lesage, *Droit soviétique*, 15.

an isolated phenomenon. It was part of a larger process whose sociological foundations were the transformation of a critical theory (as original Marxism was) into an apologetic theory, aimed at providing the ideological justification for the rule of the Communist Party bureaucracy.\footnote{Sadurski, “Marxism”, 189.} This transformation went across the board and changed fundamental Marxist concepts, not infrequently into their opposites, thus effectively distorting the theory as such.\footnote{Sadurski, “Marxism”, 190-191.}

Secondly, when hyperpositivism appeared in the Soviet Union (in the 1930s), classical Western positivism had already been overcome in the United States\footnote{Martijn W. Hesselink, The New European Legal Culture (Deventer: Kluwer, 2001), 25-26, also available at SSRN SSRN: \url{http://ssrn.com/abstract=1029579} (last accessed: 26/3/2013); Alexander Kremer, “An Application of Pragmatism: Legal Pragmatism. Introduction” Pragmatism Today 3.1 (2012), 5-6. Available online at: \url{http://www.pragmatismtoday.eu/summer2012/Kremer-Introduction.pdf} (last accessed: 26/3/2013).} and was being softened and qualified in Europe.\footnote{Hesselink, European Legal Culture, 29.} And when hyperpositivism was transferred, by way of a \textit{receptio necessaria}, from the Soviet Union to countries in its sphere of influence within Central Europe, Western positivism in its classical form was fading away in Western Europe. As a result of Radbruch’s identification of Nazism with positivism,\footnote{Cfr. Kühn, “Worlds Apart”, 535.} the doctrine ceased to be the working legal thought in post-War Germany, and its supreme courts became much more open about their law-making powers.\footnote{Wieacker, History of Private Law, 421; Kühn, “Worlds Apart”, 537; Kühn, Mechanical Jurisprudence, 87-88, 197-198.} Within the Western world, one could also mention the European Court of Justice, established in 1952, which from the outset applied a pragmatic legal approach, giving precedence to functional interpretation and frequently resorting to unwritten general principles of law.\footnote{Anthony Arnall, The European Union and Its Court of Justice (2nd ed., forthcoming in Pólemos – Journal of Law, Literature and Culture}
Of course, the success and entrenchment of hyperpositivism in Poland during the period of state socialism cannot be attributed exclusively to Soviet political domination. There were also other factors at work.

First of all, Polish legal culture during the pre-socialist period was exposed to the influence of German positivism, i.e. the Pandectist conceptual jurisprudence. Legal positivism was therefore a dominant way of thinking of practitioners, dogmaticians and theorists. Thus, Soviet hyperpositivism, a modified species of general legal positivism, was not perceived as uncanny.

Secondly, hyperpositivism correctly reflected the actual social position of the judicial apparatus. It was coherent with the everyday experiences of lawyers and therefore could become easily accepted and entrenched. The socio-economic and political position of the judiciary under Actually Existing Socialism was weak. Judges did not have real political power, there was no judicial review of administrative action (in Poland: until 1980) nor of constitutionality of legislative action (in Poland: until 1986). In most sensitive cases (political ones), judges would have to succumb to the will of the ruling Party bureaucracy. Furthermore, in a system of central planning, the most important socio-economic decisions were taken by the administrative and Party apparatuses, and not by the judicial apparatus. This weak social position of judges harmonised well with hyperpositivism’s view of the judge as a cog in the state machine, mechanically applying the statutes to facts of cases, following a simple syllogism. This weak position of judges was also the reason for the development of excessive formalism which enabled judges to escape difficult cases by dismissing them on formal grounds or postponing their

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84 Sadurski, “Marxism”, 207; Mańko, “Culture of Private Law”, 531.
85 That is specialists in the branches of positive law (e.g. civil law, criminal law etc.), from the German “Dogmatiker”.
decision as long as was necessary for the case to be solved in an extra-judicial manner.\(^\text{87}\)

Thirdly, hyperpositivism fulfilled a number of important socio-political functions, both from the view of the ruling party bureaucracy and from the point of view of the legal community.

For the ruling bureaucracy, hyperpositivism enabled to transform judges into “obedient and thoughtless instrument[s]”,\(^\text{88}\) who would not question any rules of positive law, provided they were presented in the appropriate form of statutory or sub-statutory enactments. The ideology of hyperpositivism itself, entrenched in lawyers’ minds, was part of the system’s governmentality. Although, arguably, this does not fall very far away from classical positivism, its political significance and social function are radically different owing to the authoritarian character of Actually Existing Socialism. It goes without saying that there is a fundamental difference between mechanically applying the end-product of a democratic decision (as in the French revolutionary ideal of courts merely applying the law) and mechanically applying the decisions of a narrow circle of Party bureaucrats.

It should also be underscored that hyperpositivism had (at least) three important advantages for the legal community. First of all, by conceptually separating law from politics and presenting legal interpretation as a technical, not socio-political exercise, it created a safe haven for academics and judges. By stating that they are merely performing their technical and neutral activity, they could avoid difficult political questions.\(^\text{89}\) They could also rely on the classical positivist claim of the autonomy of law \(\text{vis-à-vis} \) politics\(^\text{90}\)


\(^{89}\) Cfr. Piana, “Power Knocks”, 820.


\(\text{forthcoming in Pòlemos – Journal of Law, Literature and Culture}\)
and plunge into secure judicial passivism. The temptation to take such a stance is all the more stronger if the political sphere is dominated by an authoritarian model of power, as was the case under Actually Existing Socialism.

Secondly, thanks to the simplistic account of legal interpretation and reductionist judicial ideology, judges could benefit from hyperpositivism because their professional life was simply made easier. Writing a judicial decision is a far more simple exercise if the only arguments that need to be presented in the opinion are linguistic ones (regardless of the true reasons behind the decision). Compared to the doctrine of stare decisis with its meticulous distinguishing of precedents or to policy jurisprudence with the careful and open weighing of interests, the writing of a judicial opinion under hyperpositivism is indeed a trivial exercise. Free of such constraints, by presenting their activity as a merely mechanical application of the literal meaning of statutes, judges under hyperpositivism could – when a hard case came up – actually decide it according to their whim.

Thirdly, the Polish legal community was, generally speaking, cut off from the developments in Western legal thought. Even if individual scholars travelled to the West, in general neither professors, nor judges were au courant with the writings and case-law from Western, formerly positivist countries. The view of Western legal culture they had was, therefore, obsolete, dating back from before World War II. By adhering to hyperpositivism,


Polish lawyers could actually believe that they were following the Western legal tradition, unaware that legal positivism was no longer the standard of working legal thought in the West. What is more, the opaqueness of legal discourse in some countries (e.g. France\textsuperscript{94}) could mislead scholars as a result of the external faithfulness to positivism.\textsuperscript{95}

When transformation from Actually Existing Socialism to capitalism took the judicial community by surprise in 1989, hyperpositivism was deeply entrenched as the working legal thought of Polish scholars and practitioners alike. And indeed, considering the institutional legal survivals outlined above, and especially the form of legal training in which current judges educate future judges, it does not come as a surprise that hyperpositivism, despite a gradually growing critique among academics, continues to be the standard working legal thought among Polish practitioners.\textsuperscript{96} The concept of law is still narrow,\textsuperscript{97} preference for linguistic interpretation strong;\textsuperscript{98} even more sophisticated agents, such as Supreme Court Justices, still subscribe to the view that legal texts “contain” legal norms which


\textsuperscript{94} Kühn, \textit{Mechanical Jurisprudence}, 86-87.

\textsuperscript{95} Kühn, “Worlds Apart”, 536-537.

\textsuperscript{96} Zirk-Sadowski, “Uczestniczenie”, 6.


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must be “decoded”; judges are seen as those who “apply” existing legal norms. Judicial precedent, although increasingly accepted as a source of law (but not without controversy), is understood in a superficial way, no doubt due to the fact of its persistent rejection during the socialist period which did not allow for a more sophisticated doctrine to emerge. Judicial proceedings in Poland are conducted in a strictly formalist manner and courts strive at dismissing cases on formal grounds in order to avoid entering into the merits. Indeed, four decades of Soviet influence upon legal culture could not dissolve without trace. An important role in the perpetuation of this attitude is played by legal education. As Kennedy observed with regard to American legal education, “[b]ecause students believe what they are told [...] about the world they are entering, they behave in ways that fulfil the prophecies the system makes about them and about that world. This is the linkback that completes the system [...]” The same can be said about Polish legal education. Just as under

99 See e.g. (Supreme Court Justice) Teresa Flemming-Kulesza, “Czy w Polsce możemy mówić o prawie precedensowym” [Is It Possible to Speak of Precedent Law in Poland?] in Precedens w polskim systemie prawa, 15-21, 15.
100 Łętowska, “Barriers”, 59.
101 For an overview of positions in the Polish (theoretical) debate on precedent see Stawecki, “Precedens”, passim.
102 Ewa Łętowska, “Czy w Polsce możemy mówić o prawie precedensowym?” [Is It Possible to Speak of Precedent Law in Poland?], in: Precedens, 9-14, 13.
Actually Existing Socialism,\textsuperscript{106} neither in law school nor in professional training are Polish lawyers explicitly taught legal methodology (in the sense of the German \textit{Methodenlehre des juristischen Denkens})\textsuperscript{107}. Instead, during the first year, they are offered a course in “juridical logic”; a leading textbook on the topic (reprinted since the state-socialist period) devotes only 24 (out of 275) pages to legal interpretation, and of these 24 pages - only a meagre 3 to functional interpretation. And even these 3 pages are labelled with the author's cautions remark that:

\(...) it is accepted as a general principle of interpretation that the alleged “purposes of a statute” \(...) is taken into account only if \(...) there is a need of selecting the meaning regarded as “correct” in cases when it is found that the interpreted legal text is polysemic or unclear from the linguistic point of view. Sometimes exceptions are admitted from this essential principle, namely if there are sufficiently clear and uncontroversial reasons to state that the analysed legal rule taken in the interpretation clearly determined by the linguistic directives of interpretation \(...) would formulate a norm which would not correspond to the evaluations attributed to the “legislator” \(\ldots\).\textsuperscript{108}

Beyond doubt, functional interpretation is accorded at the most a secondary place in legal methodology, following the hyperpositivist tradition and in sharp contrast to the legal culture of the European Union and its Western Member States. Both at university and during professional training, future lawyers are persuaded that “the law” exists independently of any

\begin{itemize}
\item \textsuperscript{106} Kühn, “Worlds Apart”, 542-543
\item \textsuperscript{107} Łetowska, “Kilka uwag”, 42-43.
\item \textsuperscript{108} Zygmunt Ziembiński, \textit{Logika praktyczna} [Practical Logic] (26th ed., Warszawa: Wydawnictwo Naukowe PWN, 2004), 244. The same can be said of another fundamental first-year course, “Introduction to Jurisprudence”. A leading textbook (used e.g. at the University of Warsaw) devotes only 16 (out of 238) pages to legal interpretation and also contains a similar caveat: “it is accepted, that linguistic interpretation \[\ldots\] enjoys precedence before systemic, functional and especially comparative interpretation” [Tomasz Stawecki, Piotr Winczorek, \textit{Wstęp do prawoznawstwa} [Introduction to Jurisprudence] (4th ed., Warszawa: C.H. Beck, 2003), 174-175, emphasis added].
\end{itemize}

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interpretation, remaining to be discovered and applied. This formalist style of legal education plays an important social role: it helps to entrench the power of the existing legal elites.

4. Legal Survivals as Symptoms

For the mainstream legal discourse in Poland, survivals of the state-socialist period are no more than weeds – undesirable elements that should be eliminated from the gardens of justice. However, almost quarter of a century after the socio-economic transformation, there are still numerous and persistent survivals of the Socialist Legal Tradition. Most notably, hyperpositivism of Soviet origin remains the everyday working legal thought of Polish lawyers and judges. Under such circumstances it is legitimate to ask whether the gardeners are seriously committed to removing what they (officially) consider as weeds? Or perhaps the metaphor LEGAL SURVIVALS ARE WEEDS represents the publicly declared “ideological lie” but not the actual mindset of the Polish legal community?

What if legal survivals could be more adequately compared to symptoms, as understood by Lacanian psychoanalysis? Such a reconceptualisation of legal survivals of Actually Existing Socialism, by highlighting certain aspects while suppressing others, could bring about a new, coherent vision of legal survivals. Although the domains of legal culture and Lacanian psychoanalysis could be considered as being far apart, one must bear in mind that new metaphors may be based not only on pre-existing isolated similarities but also on the creation of new similarities. If, according to Lacan, it was actually Marx who

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110 Łetowska, “Kilka uwag”, 43. This seems to be a typical feature of legal education - cfr. Kennedy, “Legal Education”, passim.
112 Cfr. Larsson, Metaphors and Norms, 23.
113 Cfr. Lakoff, Johnson, Metaphors, 141-142.
114 Lakoff, Johnson, Metaphors, 154.
invented the symptom (in his analysis of capitalist commodities), a notion which Freud could then use (in his analysis of the unconscious¹¹⁵), then perhaps it will not be exceedingly far-fetched to move along the chain of signifiers and press the metaphor further – right down to the field of legal culture. Additional encouragement can be derived from the successful application of the psychoanalytic conceptual toolbox in literary analysis.¹¹⁶ And since literary approaches to the law have opened up new spaces of interpretation (in the burgeoning field of law and literature), there even seems to be a pressing need of adopting a psychoanalytical perspective on legal culture.

Before making such an attempt, there is a need to clarify what the symptom is – in its source domain of psychoanalysis – from which I will try to transpose it onto the target domain of legal culture. Symptoms develop as a result of repression of a certain reality into the unconscious.¹¹⁷ However, the repressed thoughts return in dreams, in linguistic slips (parapraxes) and symptoms, such as convulsive movements of the face.¹¹⁸ Symptoms are strictly connected to jouissance, giving the patient a certain form of satisfaction, even if the individual in question may not be immediately aware of that.¹¹⁹ Nevertheless, symptoms are “the only way the individual knows how to obtain enjoyment.”¹²⁰ The precondition of access to this enjoyment (jouissance) is, however, “a certain non-knowledge on the part of the subject: the subject can ‘enjoy his symptom’ only in so far as its logic escapes him – the measure of success of its interpretation is precisely its dissolution.”¹²¹ Žižek, stressing the difference between a fetish and a symptom, explains that:

¹¹⁵ Žižek, Sublime Object, 3.
¹¹⁷ Fink, Lacanian Psychoanalysis, 113.
¹¹⁸ Fink, Lacanian Psychoanalysis, 114.
¹¹⁹ Fink, Lacanian Psychoanalysis, 3.
¹²⁰ Fink, Lacanian Psychoanalysis, 3.
¹²¹ Žižek, Sublime Object, 16.
In the [...] [symptomal] mode, the ideological lie which structures our perception of reality is threatened by symptoms *qua* “returns of the repressed” – cracks in the fabric of the ideological lie – while the fetish is effectively a kind of envers of the symptom. That is to say, the symptom is the exception which disturbs the surface of the false appearance, the point at which the repressed Other Scene erupts, while the fetish is the embodiment of the Lie which enables us to sustain the unbearable truth.122

The symptom in psychoanalysis has a thoroughly paradoxical nature, in that it simultaneously destroys the subject and is “is the only thing which gives him consistency”.123 Therefore, a symptom can be defined as “an element which causes a great deal of trouble, but its absence would mean even greater trouble: total catastrophe.”124 A symptom therefore be characterised as:

a particular element which subverts its own universal foundation, a species subverting its own genus[, ...] a point of breakdown heterogeneous to a given ideological field and at the same time necessary for that field to achieve its closure, its accomplished form...125

I hope that by now even those readers who are not familiar with Lacanian psychoanalysis have already come to appreciate the striking analogies between the symptom and legal survivals in Polish legal culture.

First of all, Soviet-socialist legal survivals are symptomatic, in that they are cracks in the fantasy of discontinuity with the real-socialist past of Polish legal culture, a past consistently repressed from the collective consciousness of the legal community. An illustrative example is the treatment of the prosecutor’s participation in civil proceedings, a notorious legal transplant from the Soviet Union. A 1983 edition of a leading textbook on civil procedure openly speaks about its Soviet origins: during the real-socialist period, those origins were still within the

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122 Žižek, *First as Tragedy*, 65.
125 Žižek, *Sublime Object*, 16.
Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinhome

sphere of collective legal consciousness. After a brief presentation of what is referred to as “bourgeois civil procedure”, the author of the textbook contrasted the narrow participation of the prosecutor there with socialist law:

The situation is different in socialist civil procedure. Due to the state's interest in the legal protection of all legal relations and situations and the lack, under socialist law, of a legal dualism comprising public law and private law, the participation of the prosecutor is provided for to the largest extent possible. Therefore, Soviet procedure, which is, in this respect, a model for the civil procedures of other socialist states, gives [...] the prosecutor the possibility of initiating proceedings in any case and participating in any ongoing procedure[...].

After this illustrative introduction, the author went on to present the legal rules under the Polish Code of Civil Procedure of 1964. Characteristically, the post-1989 editions of the same textbook only remark that “[t]he fatherland of the institution of the prosecutor is France” but symptomatically fail to mention that the Polish model of prosecutorial intervention is a direct (and forced) reception of Soviet law. They simply go on to describe the legal details (which – characteristically – have not changed after 1989). The Soviet origins of this legal survival have, therefore, been repressed to the collective legal unconscious.

Secondly, symptoms are something problematic from the point of view of the patient, who considers them troubling, anomalous and deviant. Mapped onto the target domain of Polish legal culture,

127 Broniewicz, Postępowanie cywilne (3rd ed.), 63.
130 Broniewicz, Postępowanie cywilne (8th ed.), 67-71. The presentation is almost verbatim copied from the earlier editions.

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this captures well the uneasiness with which Polish lawyers approach the survivals of the Socialist Legal Tradition. The efforts of certain prominent representatives of the Polish legal community at reframing the discourse of comparative law in order to obliterate the East-West division in the European legal space[132] are instructive in this respect.

Thirdly, the survivals of the Socialist Legal Tradition are a key structural element of Polish legal culture. They are symptomatic, in that they “cause […] a great deal of trouble, but [their] absence would mean even greater trouble: total catastrophe.”[133] As I tried to argue in section 3, legal survivals are omnipresent and contemporary Polish legal culture would not be itself were it not for the (repressed) ingredient of the Socialist Legal Tradition. This is particularly visible in the case of the hyperpositivist legal methodology that I focused on in my paper. It underpins Polish legal thinking and at the same time is a direct consequence of the influence of Soviet legal theory and practice during the period of Actually Existing Socialism.

Finally, legal survivals of the Socialist Legal Tradition are symptomatic in that they give the legal community access to a certain form of jouissance.[134] Once again, the example of hyperpositivism as a pervasive legal methodology is instructive here. Writing briefs, judicial opinions or academic papers playing the game of formalism (where everybody knows it’s just a game) is a way of enjoyment which “is too roundabout, ‘dirty’ or ‘filthy’ to be described as pleasurable or satisfying”,[135] certainly from the intellectual point of view. Although some lawyers might actually believe the formalist myth, most of them are fully aware of the ideological lie. As Zupančič pointed out:

Formalism can be cynically used as a language game […]. The end result of this is the schizophrenic discrepancy between what is said and what is really meant. […] [L]egal formalism then becomes the

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[133] Žižek, Sublime Object, 85.
high art of intelligent deception in one extreme, or self-deception in the other (less intelligent) extreme.\textsuperscript{136}

This coincides with what Žižek refers to as the cynical mode of functioning of ideology, whereby

The cynical subject is quite aware of the distance between the ideological mask and the social reality, but he non the less still insists upon the mask. The formula [...] would then be: “they know very well what they are doing, but still, they are doing it.”\textsuperscript{137}

as opposed to the classical formula of ideology - “they do not know it, but they are doing it.”\textsuperscript{138} However, although “the illusion is not on the side of knowledge”\textsuperscript{139} (Polish lawyers know very well that hyperpositivism with its syllogism and so forth is a fantasy), it is, however, “on the side of the reality itself, of what the people are doing”\textsuperscript{140} (lawyers write briefs \textit{as if} adjudication was syllogistic, judges write opinions \textit{as if} they were based on a “grammatical interpretation”). Thus, despite being an ideological fantasy and despite the legal community’s awareness of this fact, hyperpositivism continues to shape the actual practices of Polish legal culture (especially adjudication and, of course, legal education). In spite of the cynical distance of (enlightened) lawyers, they are still subject to the power of the ideological fantasy of hyperpositivism. In that sense, the Polish legal community actually \textit{believes} in the dogmas of hyperpositivism, of course not in the subjective, but in the objective sense, just as the Pascalian subject who, submitting himself to the religious ritual “believe[s] without knowing it”, for his belief is “materialized in the external ritual”,\textsuperscript{141} or as the user of a Tibetan prayer wheel who is objectively praying (having attached a prayer onto the prayer wheel) even if “his thoughts are occupied with most

\textsuperscript{136} Boštjan Zupančič (former Justice at the Slovenian Constitutional Court), cited after: Kühn, \textit{Mechanical Jurisprudence}, 204.

\textsuperscript{137} Žižek, \textit{Sublime Object}, 25.

\textsuperscript{138} Žižek, \textit{Sublime Object}, 24 (quoting Karl Marx).

\textsuperscript{139} Žižek, \textit{Sublime Object}, 29.

\textsuperscript{140} Žižek, \textit{Sublime Object}, 29-30.

\textsuperscript{141} Žižek, \textit{Sublime Object}, 30.
obscene sexual fantasies [...]”¹⁴² A practising lawyer, engaged in the formalist discourse, objectively adheres to hyperpositivist (in his briefs, while pleading, while writing a judicial opinion), even if subjectively she may (cynically) be a legal pragmatist/realist which she will admit in private.

Under a perverted, hyperpositivist notion of judicial independence, emphasising fidelity only to “the law” (as opposed to principles, policies...),

...in hard cases – and even in some easy cases – where a simple logical syllogism cannot be applied, [...] [judges] might decide in the way they see fit. [...] [W]here the letter of the law does not offer any easy solution, pure arbitrariness and unpredictability can enter the scene.¹⁴³

And this possibility of deciding cases on the basis of “pure arbitrariness”, whilst acting behind the ideological veil of formalism, is the “residue, [...] leftover, [...] stain of traumatic irrationality” which, being a “non-integrated surplus of senseless traumatism [...] sustains what we might call the ideological jouissance, enjoyment-in-sense (enjoy-meant), proper to ideology [...]”¹⁴⁴ And here we come to the conclusion that a legal survival (such as hyperpositivism) qua symptom is the Real of Polish legal culture (“[s]ymptom as real”¹⁴⁵), its traumatic kernel which escapes symbolization within the dominant RETURN TO EUROPE narrative.

What then, can be done about legal survivals/symptoms in Polish legal culture? The psychoanalytic metaphor provides insightful guidance. Under Lacan’s early theory

...the symptom [...] announces its dissolution through interpretation: the aim of psychoanalysis is to re-establish the broken network of communication by allowing the patient to verbalize the meaning of

¹⁴⁴ Žižek, Sublime Object, 43.
¹⁴⁵ Žižek, Sublime Object, 79.
his symptom: through this verbalization, the symptom is automatically dissolved.\textsuperscript{146}

But this does not work. Despite repeated declarations of the gardeners, the “weeds” of the Socialist Legal Tradition persist, just as symptoms which do not dissolve themselves\textsuperscript{147}. And indeed, we must follow later Lacan on this, admitting that “[o]ne should not dream of eliminating [the symptom]: an analysis which starts with the symptom will also end with the symptom – hopefully transformed.”\textsuperscript{148} This is because

[t]he symptom is not only a cyphered message, it is at the same time a way for the subject to organize his enjoyment – that is why, even after the completed interpretation, the subject is not prepared to renounce his symptom; that is why he “loves his symptom more than himself”.\textsuperscript{149}

Despite the acknowledgement of the existence of Soviet-socialist legal survivals, a growing body of scholarly literature condemning the false consciousness of hyperpositivism\textsuperscript{150} nothing is changing. The Polish legal community “is not prepared to renounce [its]
symptom”, the real-socialist survival of Soviet hyperpositivism. Actually, this legal survival/symptom amounts, therefore, to a sinthome,

>a certain signifying formation penetrated with enjoyment: it is a signified as a bearer of jouis-sense, enjoyment-in-sense. [...] [S]ymptom, conceived as sinthome, is literally our only substance, the only positive support of our being, the only point which gives consistency to the subject. [...] [T]he only alternative to the symptom is nothing: pure autism, a psychic suicide [...].  

Legal survivals of Soviet socialism in Polish legal culture as its symptoms/sinthomes, seem to be unrenouncable. Over two decades after the demise of Actually Existing Socialism, can one imagine the Polish judiciary en masse actually abandoning the jouis-sense of hyperpositivist formalism and textualism? Is it realistic to expect Polish judges to engage in Western-style policy jurisprudence, comparative-law arguments, perhaps law-and-economics analysis? The symptom/sinthome of hyperpositivism seems to be the essence of Polish legal culture, perhaps even its point de capiton giving it consistency. Therefore, the ultimate task of the analysis of legal culture, is to “recount a new, more complete narrative [...], one which will interpret and make sense” of the symptoms. As Lacan himself wrote, “to know what to do with the symptom, that is the end of the analysis [...].” In the words of Žižek:

 [...] the final Lacanian definition of the end of the psychoanalytic process is identification with the symptom. The analysis achieves its end when the patient is able to recognize, in the Real of his symptom, the only support of his beyond.

If the therapy is successful, the patient will not only learn how to live with her symptom but even how to enjoy it. The analyzand

151 Žižek, Sublime Object, 81.
152 Cfr. Fink, Clinical Introduction, 93-94.
153 Eagleton, Literary Theory, 139.
155 Žižek, Sublime Object, 81.
identifies with the Real of the symptom [...] [and thereby] acquires a Real identity, connecting it to the Real of its being. This is the identity which defines the subject, that is, his particular, privileged way of enjoying.

Thus, in the end, the “symptom is no longer the problem but the solution [...] without any paradox.” Undoubtedly, the survivals of the Socialist Legal Tradition *qua* symptoms are part of the cultural history of Polish law and an inherent part of its identity. Only by admitting the heterogeneous roots of its legal culture – thereby recounting a new, more complete narrative – instead of repressing the real-socialist past, can the Polish legal community seriously approach the problem of “hyperpositivist weeds” filling its gardens of justice. Indeed, they certainly require to be “worked through”.

158 Coler, “Paradoxes”, 90.
159 Cfr. Jean-Michel Rabaté, “Preface” in *Cambridge Companion to Lacan*, xi-xv, xiii: “...my symptoms, resemble the study of cultural history [...] these are the ‘monuments’ of my body, the ‘archival documents’ of my childhood memories, the ‘semantic evolution’ of my idioms and personal style, the ‘traditions’ and ‘legends’ that carry my heroic stories, and finally the distortions and obliterations rendered necessary by the need to ‘finish the story’ and make it somewhat palatable.”

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