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HYPERPOSITIVISM AS A SAFETY VALVE IN A POST-COMMUNIST LEGAL SYSTEM: THE CASE OF POLAND

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Abstract. The present paper suggests that hyperpositivism, considered a metanormative legal survival of the Communist rule in the Polish legal system, might serve as a safety valve preventing activities by public authorities that could destabilise the system. Hyperpositivism may entail a mental (even if only imaginary) barrier that stops those applying law from departing too far from the lexical meaning of a legal text. While the dangers of extreme formalism (or "ultra-formalism") in the application of law, characteristic of hyperpositivism, are well-known, it might be the case that in a post-Communist system that has not matured yet after the transition to democracy, this feature of the system is a necessary element that keeps a precarious homeostasis in it. Its hasty removal – without other checks being established – may lead to chaos. The present paper indicates that recent months have seen some more abrupt cracks in the barrier of hyperpositivism, which are motivated rather instrumentally by the willingness to remove the legal changes made by the previous government and, allegedly, to restore the rule of law in Poland. In this process, non-formalist readings of legal texts have led some public authorities to ignore the decisions or even the existence of others. This seems to be destabilising the state in a geopolitical situation where stabilisation and consolidation should be sought instead. Without engaging in the ongoing political dispute, the paper, using the case study and dogmatic methods and drawing on a review of selected legal theoretical and comparative law literature, analyses two examples of such activities, including the outright questioning of the so-called "neo-judges" and the removal and appointments of the National Prosecutor's office holders in 2024. In both situations, a more formalist reading of positive law would prevent dangerous consequences these situations are likely to produce for the legal system, the state and its citizens.

Keywords: hyperpositivism; ultra-formalism; legal survivals; neo-judges; National Prosecutor.

INTRODUCTION

Excessive formalism in the application of law brings to mind the injustice that may be done by a public authority sticking too closely to the literal meaning of a legal text. In the title of his thought-provoking monograph, Matczak even refers to the "error of formalism", claiming that formalism

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is incompatible with the rule of law [Matczak 2007]. After all, warnings against overstrictness in applying law – such as "summum ius summa iniuria" [Cicero 1928, 34] and "ius summum saépe summast málitia" [Afer 1891, 45] – have been voiced since antiquity. Indeed, it is undeniable that blind adherence to a legal text may lead to injustice, which is the case especially when disputes between private parties or between a private party and the state are being resolved. This notwithstanding, the present paper argues that the picture of extreme formalism is not black and white, at least insofar as it may act as a check on activities destabilising a legal system. This potential seems to apply to relations between the public authorities of a post-Communist state, where "ultra-formalism" or "hyperpositivism" became a dominant legal ideology under the former system [see Mańko 2013a, 8-10] and whose current system has not yet matured in the process of transition to democracy.

Arguments for such a take on formalism will be drawn from the developments in Poland in recent months, during which – apparently under the guise of the non-formalist application of law – certain public authorities have begun to ignore the decisions or even the existence of other public authorities. A special focus will be placed on the problem of the so-called "neo-judges" and the appointment of a new National Prosecutor. Based on these examples, it will be shown that, despite arguments pointing to the fallacy of a purely literal interpretation, characteristic of formalism, the awareness of constraints imposed by a legal text (even if these constraints are merely imaginary, mental barriers) may act as a safety valve preventing activities that could destabilise the system. In other words, the author, having both legal and linguistic background, does not argue that a purely literal interpretation is possible but submits that the belief in constraints imposed by a legal text can lead to positive practical results in an immature political and legal system.[1] Removing this safety valve (at least too early) may, in turn, lead to chaos. Using another metaphor, it could be said that hyperpositivism is perhaps not a "weed in the gardens of justice" that needs to be eradicated in the name of discontinuity with the former system [see Mańko 2013b, 210] but an (as yet) essential element of the current system's environment that keeps a precarious homeostasis in it.

In order to support the above thesis, first of all, the notion of "hyperpositivism" is analysed in Section 1. Focus is placed on its origins and nature as a legal survival [see Mańko 2015]. Then, Section 2 discusses some of the key arguments against formalism in the application of law. In Section 3, the examples mentioned above are discussed and examined to show how a more formalist approach could prevent destabilisation. Based on these findings, Section 4 elaborates on the potentially positive role of hyperpositivism,

[1] Obviously, the author has no competence to elaborate on this observation in psychological terms, but it might be an interesting subject for "law and psychology" research.

demonstrating that, at least in relations between public authorities, it can be considered an essential element of the Polish legal system.

Apart from the case study method, the present research employs the dogmatic method, which has been used to analyse the regulations concerning the examples discussed, and also draws on a review of selected legal theoretical and comparative law literature. A major limitation of the research is its inductive nature, which, however, seems sufficient to demonstrate just the potentially positive impact of hyperpositivism. This observation may be a starting point for further, more comprehensive studies. What is more, as the examples discussed are politically sensitive, it needs to be stressed that the author does not wish to side with any political grouping or platform. Yet, an underlying axiological assumption accepted by the author – which needs to be made clear from the outset – is that the stability of a legal system, translating into the stability of the state, is a vitally important value for both the state and its citizens.

1. HYPERPOSITIVISM AS A LEGAL SURVIVAL

Mańko defines "legal survivals" as "elements of legal culture originating within an earlier socio-economic formation which were functional towards that formation but which, following the transition to a historically subsequent formation, have remained in place" Mańko [2013b, 215-16]. In addition to organisational and normative legal survivals, he distinguishes a category of metanormative survivals, which are instances of continuity in the form of metarules governing legal discourse, including rules defining what is considered "law", rules on legal interpretation and views on the judge's role in resolving a case. It is the metanormative survivals of the Socialist Legal Tradition that the umbrella term "hyperpositivism" covers [ibid., 217-18]. An alternative term used by Mańko is "ultra-formalism" [Idem 2013a, 1, 8-10]. In this connection, it should be mentioned, as a side note, that although contemporary formalism is historically related to positivism [Niesiłowski 2017, 85], the mere concept of positivism does not predetermine the use of particular methods of resolving legal problems. However, positivists may have a greater proclivity for formalism in legal interpretation [Gizbert-Studnicki 2013, 54]. The latter observation is definitely the case with hyperpositivism. It should also be clarified that the concept of formalism referred to in the present paper concerns the level of applying law rather than the level of law-making or of law as a certain product of the lawmaker [Niesiłowski 2017, 85-86].

Hyperpositivism is characterised by adherence to the view of law as abstract and general written legal instruments adopted by competent state authorities. As such, it rejects precedents, customary law, scholarly writings and general principles of law as law sources. Furthermore, its concept

of interpretation boils down to decoding the inherent meaning of a text, with functional primacy being given to strictly literal interpretation. The role of the judge is thus reduced to a machine applying legal rules in the course of syllogistic subsumption. Hyperpositivism insists on the form of law rather than on its substance [Mańko 2013b, 218-20].

Poland and other Central European countries received hyperpositivism, born in the 1930s in the Soviet Union, under the latter's influence. The success and entrenchment of this approach in the period of state socialism in Poland was also due to the influence of German positivism (the Pandectist conceptual jurisprudence) in the pre-socialist period. As a result, the Soviet species of legal positivism was not seen as unfamiliar. Also the weak social position of judges corresponded to the view of a judge as an element of the state machine. From the ruling party's perspective, hyperpositivism was a way to prevent judges from disobeying and questioning any rules of positive law. As regards the legal community, hyperpositivism helped them avoid difficult political questions by letting academics and judges claim their activity was technical and neutral. Judges' work was also made easier, as writing a decision presenting solely linguistic arguments (irrespective of the true reasons behind it) is simpler. In addition, Polish lawyers, who were generally cut off from the developing legal thought and had an outdated view of Western legal culture, could actually believe that they followed Western ideas. Consequently, in 1989, hyperpositivism was the working legal thought among Polish legal scholars and practitioners. Despite a growing critique, it was perpetuated in subsequent years [ibid., 220-25]. However, gradual changes in Polish judges' reasoning – with even "a new dynamic" – have been observed recently [Klimaszewska, Machnikowska, and Koch 2023, 304].

An interesting question asked by Mańko is whether the mainstream of Polish lawyers, who officially consider socialist legal survivals as something undesirable ("weeds" that need to be removed), are really committed to eliminating the survivals – or perhaps their actual mindset is different, and the metaphor of legal survivals as "weeds" is just an "ideological lie" [Mańko 2013b, 226]. This notwithstanding, it seems recent years have seen some change, with a truly more activist approach that openly departs from formalism emerging in the legal community. This change, however, appears to be – at least to some extent – instrumental, marking an attempt to oppose the legal reforms made by the Law and Justice government (in power between 2015 and 2023). While in 2013, Mańko was wondering whether one could "imagine the Polish judiciary *en masse* actually abandoning the *jouis-sense* of hyperpositivist formalism and textualism" [ibid., 232], in 2024, it seems that a significant group of prominent lawyers and judges (perhaps not *en masse*, though) has turned towards an openly and radically non-formalist approach. One scholar even claims that recent years have shown

a universal value and feature of the Polish legal system: a judge interpreting law is becoming a central figure of legal culture, relying on his or her beliefs and their justness and coherence [Wyjadłowski 2024, 123-25]. Supposing this statement were correct, relying on beliefs rather than positive law would mean a paradigm shift. A symptom of changing attitudes was also a meeting in which the Prime Minister ventured to openly declare, in front of a group of renowned legal experts – who did not seem to protest – that his decisions might not fully correspond to the rule of law in purists' eyes.[2]

Proposing a view of legal survivals as symptoms within the meaning of Lacanian psychoanalysis, Mańko makes the following claim [quoting: Žižek 2008, 85]: "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'" [Mańko 2013b, 229]. With this in mind, it needs to be enquired whether the rather instrumental and abrupt breakaway from hyperpositivism (even if following earlier, slower changes) is not, in fact, a step towards such a disaster.

2. THE FORMALIST MYTH, OR IS IT?

A crucial element of hyperpositivism (notably also referred to as "ultra-formalism") is its formalist component. Matczak provides a general definition of formalism as a concept of applying law whereby law is applied strictly according to the provisions of a legal text, even if the result is unjust or contrary to common sense [Matczak 2007, 9]. In his work, he questions the commonly held view that such application of law is compatible with the premises of legal positivism. The present paper will generally accept this definition but will not explore the relationship between positivism and formalism or the various more detailed concepts and definitions of formalism presented in Matczak's monograph.[3] Yet, it is worth summarising the catalogue of common features of formalist conceptions provided by Matczak. It includes, in short, belief in the syllogistic nature of the application of law, the desire to reduce the number of interpretative premises and the belief that the formalist process of the application of law constrains lawyers, ensuring foreseeability of the interpretative decision and limiting their discretion [ibid., 15, 70].

Each of the above features of formalism has been criticised in the literature. Adherence to syllogism may be challenged as creating a pretence

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[2] See *Premier: nie wszystkie moje decyzje będą spełniały kryteria praworządności z punktu widzenia purystów*, https://www.pap.pl/aktualnosci/premier-nie-wszystkie-moje-decyzje-beda-spelnialy-kryteria-praworzadnosci-z-punktu [accessed: 28.10.2024].

[3] See also the criticism of Matczak's understanding of formalism by Tomza [Tomza 2011, 100-101].

of objectivity, seemingly making the interpretative decision independent of the interpreter's preferences. An argument against reductionism is that understanding a legal text is impossible without considering the interpretative premises derived from the context in which the text was created or is interpreted. Another argument is that taking account of a broader range of interpretative premises yields a better result of the process of the application of law. Furthermore, it can be argued that due to the semantic properties of language, a textual approach to the interpretation of law is impossible, as one cannot speak of clarity of legal language. It can also be claimed that the interpretation of a text is only one of the multiple components of the broadly conceived process of applying law [Matczak 2007, 70-79].

Matczak identifies three errors of formalism that consist in the failure to realise that communication through law takes place over multiple channels, that it is diachronic and that legal communications are hierarchical [ibid., 181]. In his arguments, he invokes the Kripke-Putnam semantics, claiming that formalism cannot be defended in its light [ibid., 136]. What is more, formalism can also be perceived as a game. Its participants are generally aware that it is merely a game, and only some actually believe in the formalist myth. This would suggest that practising lawyers may objectively adhere to formalism, while subjectively (cynically) they are legal pragmatists or realists, which they are prepared to admit in private [Mańko 2013b, 230-31].

Much seems to have been said about the advantages and disadvantages of formalism. No matter whether one sees formalism as an error or a myth or is a true believer in it – and regardless of which of these positions is deemed to be right – there remains the question of the real impact of adherence to formalism, in particular in its extreme version ("ultra-formalism"). Can the actual or pretended belief in the syllogistic nature of the interpretation of legal texts, which is supposed to ensure legal certainty and security, really contribute to achieving this result? This will be demonstrated based on two examples discussed in the following section.

3. SELECTED RECENT EXAMPLES OF NON-FORMALIST APPROACHES IN THE POLISH LEGAL SYSTEM

Before looking at the two examples mentioned in the introduction, it is worth noting the criticism of non-formalist attitudes among the judiciary expressed by Muszyński [Muszyński 2023, 21-22]. Muszyński argues that the rule of law[4] is absent at the level of the application of law by certain national

[4] This seems to be the formal conception of the rule of law, which focuses on the requirement of acting on the basis of obligatory law rather than concentrating on the content of legal enactments [Nowacki 1969, 85].

and international courts. Referring to a number of examples, including that of the alleged illegality of the National Council of the Judiciary, he justifies his standpoint by stating that those courts' activities are not based on the law *written down* in the Constitution,[5] statutes or international agreements. Thus, as he puts it, their rulings reflect some mysterious, not universally known legal system (hence the reference to "alternative rule of law" in his paper's title). Obviously, such arguments may be easily challenged by those for whom the world beyond a legal text is an integral part of their notions of the legal system and of the rule of law. For instance, Wyjadłowski submits that the judge's conscience includes judicial disobedience which, as it were, goes beyond the framework of the constitutional legal order and that such disobedience may become a source of law [Wyjadłowski 2024, 130-31]. With regard to the same problem of the National Council of the Judiciary, he concludes that the new method of the appointment of its judicial members can only be considered legal if the constitutional provisions are read at random and with uncritical adherence to legal rules [ibid., 134]. It seems impossible to reconcile these perspectives. Hence, the examples presented below do not serve to prove the superiority of either formalist or non-formalist approaches to the application of law. Nor does the author seek to engage in the ongoing political dispute in Poland, which, sadly, has also crept into scholarship. Rather, these examples are intended to show that, in practical terms, in the situations discussed, faithfulness to the hyperpositivist legacy of the Polish legal system could have prevented (and might prevent further) destabilisation of the state.

3.1. The so-called "neo-judges"

The neologism "neosędzia" ("neo-judge") is defined as referring to a judge appointed with the involvement of the National Council of the Judiciary following its reform in 2017.[6] As is well-known, the status of the reformed Council has been challenged on multiple occasions by the European courts[7] as well as part of Polish politicians and part of the legal community. Notably, since the new government, formed by previous opposition parties, was appointed on 13 December 2023, the outright questioning of selected rulings issued by the so-called "neo-judges" seems to have been on the rise. For instance, on 10 January 2024, in a case concerning a Law and Justice politician who had been controversially pardoned by the President [Kusik 2024], a ju-

[5] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended.

[6] See https://pl.wiktionary.org/wiki/neos%C4%99dzia [accessed: 29.10.2024].

[7] Judgment of the ECtHR of 22 July 2021, Reczkowicz v. Poland, Application no. 43447/19; judgment of the Court (Grand Chamber) of 19 November 2019, Joined Cases C585/18, C624/18 and C625/18.

dicial panel of one of the Supreme Court's chambers declared an earlier decision by judges of another chamber of the same court,[8] allegedly improperly appointed, not to be a ruling of the Supreme Court. As a result, it examined the same case on its own,[9] thus openly disregarding the other judicial panel.

Another example is the Minister of Justice's announcement of 27 September 2024, released on X (formerly Twitter), according to which the "position" of the three neo-judges who had found the appointment of a new National Prosecutor (see Subsection 3.2.) invalid was not a resolution of the Supreme Court and was non-binding. The National Prosecutor's Office issued a similar statement, claiming that the "position" had been expressed by unauthorised persons. It is worth noting that all the judges considered as "neo-judges" in that case have had decades of careers in the judiciary.[10] One might also find it surprising that a public authority uses social media to undermine the status of another public authority. Furthermore, there have already been cases of judges of ordinary courts ignoring rulings issued by the so-called "neo-judges" and citing, among others, the European courts' case law [Jałoszewski 2024].[11]

The root cause of the "neo-judges" problem is Article 9a of the Act of 12 May 2011 on the National Council of the Judiciary,[12] added under an amendment coming into force on 17 January 2018.[13] The new provision gave the Sejm the power to elect the judicial members of the Council. A formalist reading of the Constitution, like the one presented by Muszyński, indeed gives no grounds for challenging this method of appointment [Muszyński 2023, 26-30]. Articles 186 and 187 of the Constitution of the Republic of Poland do not specify who should appoint the Council's judicial members, leaving this procedure to be established in an ordinary statute. Even more importantly, the Constitutional catalogue of law sources excludes the possibility of the CJEU authoritatively reviewing the compatibility of the Polish Constitution with EU law, including in terms of the relations between the National Council of the Judiciary and the legislative and executive powers. Nor is it possible to treat the judgments of either the CJEU or the ECtHR as overriding the provisions of the Polish Constitution. Furthermore,

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[8] Order of the Supreme Court of 5 January 2024, ref. no. I NSW 1267/23, Lex no. 3649912.

[9] Order of the Supreme Court of 10 January 2024, ref. no. II PUO 2/24, OSNP 2024/5/55.

[10] See *Bodnar dąży do anarchii: Stanowisko neosędziów ws. Dariusza Barskiego nie jest uchwałą SN i nie jest wiążące. Komentarze*, https://wpolityce.pl/polityka/707775-anarchia-bodnar-stanowisko-neosedziow-nie-jest-uchwala-sn [accessed: 29.10.2024]. Resolution of the Supreme Court of 27 September 2024, ref. no. I KZP 3/24, Lex no. 3760705.

[11] Judgment of the Court of Appeals in Warsaw of 8 March 2024, ref. no. II AKa 142/22, Lex no. 3729595 (one judge dissenting).

[12] Journal of Laws No. 126, item 714, as amended.

[13] Article 1(1) of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and Certain Other Acts, Journal of Laws of 2018, item 3.

the Constitution provides no grounds for courts or other public authorities to challenge the appointments of judges, which are, to wit, made by the President and not by the Council (Article 179 of the Constitution).

3.2. Appointment of a new National Prosecutor

Another noteworthy case is that concerning the appointment of, first, Jacek Bilewicz as an "acting National Prosecutor"[14] and then Dariusz Korneluk as the National Prosecutor.[15] This happened even though the previous holder of the National Prosecutor's office, Dariusz Barski, had not been dismissed in the procedure provided for in Article 14(1) of the Act of 28 January 2016 on the Public Prosecution Service.[16] Barski's "dismissal" took the form of a letter in which the Minister of Justice declared that his reinstatement in active service back in 2022, under Article 47 of the Act of 28 January 2016 – Provisions Introducing the Act on the Public Prosecution Service,[17] had not had a valid legal basis and was thus ineffective. Again, note should be taken of the current Minister of Justice using instruments ungrounded in positive law. What is more, with the President's refusal to recognise Barski's removal, the appointments of Bilewicz (to a non-statutory position of an "acting National Prosecutor") and Korneluk did not follow the procedure under Article 14(1) of the Act on the Public Prosecution Service either, as this provision requires the President's opinion. In effect, not only Barski's removal but also the appointments of the new office holders were conducted in a non-statutory procedure. According to the Supreme Court's reading of Article 47(1) and (2) of the Provisions Introducing the Act on the Public Prosecution Service presented in case no. I KZP 3/24 (cited also in Subsection 3.1.) – which can be considered as formalist – the above provisions are not transitional, and their applicability is indefinite unless they are repealed. This means that Barski had been validly appointed and remains the National Prosecutor. The Supreme Court's judgment is clearly consistent with the wording of the above provision, which does not contain any indications of its time-limited applicability. Its alleged temporary nature was read into it in an evidently non-formalist manner. The practical consequences of the doubts about who holds the National Prosecutor's office are exemplified by an earlier ruling in which a judge of the Warsaw Regional Court refused to authorise surveillance requested by a public prosecutor appointed by Bilewicz [Pilarek 2024].

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[14] See *Prokurator Prokuratury Krajowej Jacek Bilewicz pełniącym obowiązki Prokuratora Krajowego*, https://www.gov.pl/web/sprawiedliwosc/prokurator-prokuratury-krajowej-jacek-bilewicz-pelniacym-obowiazki-prokuratora-krajowego [accessed: 29.10.2024].

[15] See *Dariusz Korneluk nowym Prokuratorem Krajowym*, https://www.gov.pl/web/sprawiedliwosc/dariusz-korneluk-nowym-prokuratorem-krajowym [accessed: 29.10.2024].

[16] Journal of Laws, item 177, as amended.

[17] Journal of Laws, item 178, as amended.

3.3. A looming chaos

Both examples presage the chaos these situations – and the proliferation of similar cases – may lead to. Regardless of what one thinks of the legal changes made by the Law and Justice government – some of which may be considered as driven by a non-formalist approach, too[18] – the open and escalating refusal to recognise certain public authorities by other public authorities seems to mark a line that had not been crossed before. In fact, there are other examples, which, due to space constraints, cannot be discussed here at a greater length. These include the manner in which the management of the public media has been taken over in disregard of the National Media Council's competence [see Nowicki 2023] or the Speaker of the Sejm boycotting the Constitutional Tribunal [Przybył 2024]. Such steps are more than just "bending the law" and are likely to trigger dramatic consequences for the whole legal system and, thus, the state and its citizens. This is particularly worrying in the context of the current geopolitical situation, which necessitates consolidation of the state, including its legal framework, rather than destabilisation.

4. WOULD HYPERPOSITIVISM PREVENT CHAOS?

At first, it might be worth noting that in his monograph, Matczak demonstrates Polish courts' adherence to formalism by referring to the example of administrative courts' case law [Matczak 2007, 33-50]. While the following observation can only be considered anecdotal, it is interesting that the internal confusion – well-known from the Supreme Court – has not been replicated in the Supreme Administrative Court. Even recently, the Board [*Kolegium*] of this Court made it clear that defective composition of the National Council of the Judiciary, recommending a particular judge for appointment by the President, is not sufficient to find a violation of the right to a fair trial or to disqualify that judge. The resolution, which focused on the appointments of administrative courts' assistant judges, emphasised the duty of administrative courts to hear cases without undue delay and stated that such appointments should not be conditioned by political developments [Rojek-Socha 2024]. This standpoint clearly manifests prudence and responsibility. Moreover, it shows that even if one considers the Council's composition wrong, which already entails a non-formalist reading of the Constitution, going a step further and undermining the status of such judges for this reason would be taking the non-formalist approach too far.

[18] See Article 6 of the Act amending the Act on the National Council of the Judiciary and Certain Other Acts, which allowed the premature discontinuation of the term of the judicial members of the Council, even though the term is defined in the Constitution (Article 187(3) of the Constitution).

The present paper is not intended to take a stance in the debate on the meaning of legal texts and will not enquire, in particular, into whether there is anything like plain meaning or into the controversies over the "clara non sunt interpretanda" and "omnia sunt interpretanda" maxims [see Tobor 2013, 20-36]. One should agree, however, that "legal norms and institutions work only through language as normative creatures", and legal language is "a form of discourse in which legally meaningful linguistic operations take place" [Husa 2023, 65]. Unsurprisingly, understanding legal texts, including legislation and case law, is one of lawyers' most important skills [Tobor 2020, 297]. Legal texts are, therefore, the starting point in the application of law, no matter what one makes of these texts in the process.

Furthermore, it should be noted that while linguistic expressions have certain lexical, grammatical and semantic properties, only utterances in which these expressions are used have pragmatic meanings. In this way, the utterer's meaning is what is meant by the speaker when he or she uses a particular expression. Without the context of the utterance, it has lexical meaning only [Lanius 2019, 7]. It seems the reader of a legal text is usually aware of such lexical, acontextual meanings in ordinary language (an expert will also often realise specialised meanings in legal language) or at least has certain intuitions about them. This may even be true if one accepts, for instance, the Kripke-Putnam semantics [Matczak 2007, 133-57]. In that case, the more "ordinary" meaning would be the one that comes to mind without a detailed analysis of all the multiple groundings of a particular expression. These groundings, in fact, seem to open the meaning of a legal text very broadly to various sources under the pretence of still working on the text.

Consequently, even if a given reader (interpreter) does not consider lexical meanings useful, there still seems to be some potential for such meanings to have, mentally, a constraining effect. They may arouse fear or discomfort that departing too far from the lexical meaning is not the right thing to do or might be frowned upon by other legal community members. Returning to the above examples – with this constraint in mind, one may conclude that the National Council of the Judiciary is wrongly composed but will not challenge, in an extraconstitutional manner, the position of the judges appointed upon its recommendation. Similarly, it will, perhaps, feel like going too far to remove the holder of a key public office, such as the National Prosecutor, by resorting to a very far-fetched interpretation of a statutory provision (at least in the light of its literal reading). Such a mental barrier – or, perhaps, an inhibition, as this term is understood in psychology[19] – seems to be part of the legal mentality – "the collective mental programme" [Legrand 1996,

[19] Defined, among others, as "the process of restraining one's impulses or behavior, either consciously or unconsciously, due to factors such as lack of confidence, fear of consequences, or moral qualms" [VandenBos 2015, 540].

60] – of the members of a hyperpositivist legal system. If that barrier is cracked, the reader of a legal text will feel freer to interpret its meaning by taking into account multiple other factors, e.g. creatively reconstructing the intention of the lawmaker or looking for a wide range of interpretative premises (under the heading of "holistic interpretation"). From a realist perspective, of course, interpreting a legal text by prioritising either the lexical meaning or other factors can be just a veil behind which the interpreter seeks to impose the meaning he or she prefers. Yet, it seems that in the case of a formalist approach, the text can still act as a check, giving less leeway to the interpreter. In non-formalist approaches, if there are no other checks – such as a mature sense of responsibility for the interpreter's actions – there is much more leeway, which could be hazardous.

Notably, it seems that hyperpositivist formalism (ultra-formalism), inherited from the Communist system, has, until recently, kept a relative balance in the Polish legal system. As already mentioned, this does not mean there were no earlier attempts at manipulating the law. However, a situation where certain public authorities openly and increasingly refuse to recognise other public authorities is definitely novel. Unfortunately, even if there has been a gradual change in attitudes among the legal community, these recent developments seem to be rather instrumental and politically motivated. As is well-known, a significant part of the legal community has shown outright antipathy towards the former ruling party and its reforms [see Markiewicz 2018], trying to restore what they believe to be "the rule of law" at any cost. It should not be forgotten, however, that there are lawyers who think differently or just refuse to take sides in the dispute. Moreover, given that those previously in power had been democratically elected – and then re-elected – this state of affairs seems to testify to the immaturity of the Polish legal system. Similar conclusions can actually be reached about the Polish political class and its members holding the highest public offices (other than the judicial ones).

As a result, at least with reference to the examples discussed in this paper, it seems that the peculiar adherence to legal texts might have, for a long time, constrained lawyers and politicians in their handling of law. In a legal and political system with a relatively short history – which succeeded the Communist rule and has not matured yet – the hyperpositivist approach, however critical one may be of it, appears to have served a stabilising function. As it has been weakened, at least in some circles, destabilisation is creeping in.

CONCLUSION

The thesis put forward in this paper may sound controversial in that it finds virtues in hyperpositivism – seen as a post-Communist "weed" in the Polish legal system. One should agree, though, that "it goes without saying that there is a fundamental difference between mechanically applying

the end-product of a democratic decision […] and mechanically applying the decisions of a narrow circle of Party bureaucrats" [Mańko 2013b, 223]. Thus, the legal survival of hyperpositivism may fulfil different or additional functions in the current legal system compared to those it served under the Communist rule. It is no longer a tool of an undemocratic government imposed on Poland by the Soviet Union. Change of function is, indeed, a frequent characteristic of legal survivals [Idem 2016, 22; 2023, 9-11].

Having changed its role, hyperpositivism, at least in a certain sphere, may well be considered a necessary element of the contemporary Polish legal system. To come back to a quote used before – hyperpositivism might be "an element which causes a great deal of trouble, but its absence would mean even greater trouble: total catastrophe" [Žižek 2008, 85, quoted in Mańko 2013b, 228]. Hence, the present paper is not intended as a general defence of formalism or ultra-formalism, as the author acknowledges the injustice it may lead to, especially in the individual cases of ordinary citizens. Yet, it is submitted that the picture of hyperpositivism is not black and white. The examples provided in this paper may suggest that in a post-Communist legal system, hyperpositivism may serve a balancing function – or act as a safety valve – in relations between public authorities. Removing the mental barrier against departing too far from a legal text – at least too early and too abruptly – may be a step towards chaos in a system that is not fully mature yet. The emerging chaos is likely to impact the average citizen, too, and threaten the stability of the state as a whole. To paraphrase computer programmers (and end on a lighter note), hyperpositivism is, perhaps, not a "bug" of the Polish legal system but its "feature".

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