

# SURVIVAL OF THE SOCIALIST LEGAL TRADITION? A POLISH PERSPECTIVE

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*Abstract: The dissolution of the Socialist Legal Family should not be identified with the disappearance of the underlying Socialist Legal Tradition. The impact of the 45 years of Actually Existing Socialism upon Polish legal culture is still significant. First of all, there has been an almost uninterrupted continuity of legal institutions (courts, legal professions), and the system of legal education and judicial appointments furthers the continuity of legal culture. Secondly, ultra-formalism ('hyperpositivism') associated with the Socialist Legal Tradition in its post-Stalinist version remains the dominant working legal thought in Poland. Thirdly, there are still many examples of normative continuity, especially in procedural and substantive private law. On the basis of these factors, it is possible to enquire whether the differences of legal style between the new Central European member states of the EU and its old Western European member states are sufficiently significant as to justify the identification of a Central European legal family as the fifth legal family in the European Union (apart from the Common Law, Romanic, Germanic and Scandinavian Legal Families).*

## I. INTRODUCTION

The collapse of the Soviet block prompted Kötz to declare solemnly that the Socialist Legal Tradition 'is dead and buried'.<sup>1</sup> Although Kötz realistically acknowledged that 'it will take a long time to erase'<sup>2</sup> its traces, this did not prevent him from simply discarding the chapters on socialist law from his textbook, without writing anything else in their place, thereby leaving what Kühn described as a 'legal black-hole'.<sup>3</sup> This move sounded like an obituary for the Socialist Legal Tradition, now to be buried within the dusted *volumina* of legal history, rather than flourish in contemporary handbooks of comparative law, as it did for the previous four decades.

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<sup>1</sup> Kötz H. 'Preface to the Third Edition' in: K. Zweigert & H. Kötz, *Introduction to Comparative Law* (3rd ed. 1998) v, p. v.

<sup>2</sup> *Ibid.*

<sup>3</sup> Kühn Z. *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (2011), 293.

Although undoubtedly socialist law in its hitherto known form definitely ceased to exist, one is tempted to ask whether Kötz's symbolic deletion of the relevant chapters, on the apparent assumption of complete legal discontinuity in the region and an amalgamation of the former socialist legal family with the West,<sup>4</sup> was not, perhaps a somewhat premature, if not fundamentally misconceived, gesture. And indeed, now – more than two decades after the demise of Actually Existing Socialism – legal scholars are enquiring whether the Socialist Legal Tradition is really resting in peace in the graveyard as it appeared to Kötz in the mid-1990s. Recently Uzelac<sup>5</sup> and Kühn<sup>6</sup> have argued that the legacy of the Socialist Legal Tradition is still alive, in particular as regards legal culture.<sup>7</sup> Whilst prominent Polish scholars<sup>8</sup> vociferously argue for the obliteration of the East-West divide of legal cultures in Europe, one is tempted to test the validity of their claim against the background of 'actually existing' legal culture.

In this paper I will try to argue, looking from the perspective of Polish legal culture, that the legacy of the Socialist Legal Tradition proved to be more viable than initially expected. I will commence my argument by insisting on a conceptual distinction between a legal family and a legal tradition, as well as identifying the characteristic features of the Socialist Legal Tradition (section 2). The essential premises of my argument (presented in section 3) will rest upon the assertion of an institutional, methodological and normative continuity of the Socialist Legal Tradition in Poland. On this basis I will hypothesise (in section 4) that the differences of legal style between Central European countries and the old

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<sup>4</sup> See Mańko R., 'Is the Socialist Legal Tradition "Dead and Buried"? The Continuity of Certain Elements of Socialist Legal Culture in Polish Civil Procedure', in T. Wilhelmsson et al (eds), *Private Law and the Many Cultures of Europe* (2007): 83-103, p 86.

<sup>5</sup> Uzelac A., 'Survival of the Third Legal Tradition?', *Supreme Court Law Review* 49 (2010): 377-396.

<sup>6</sup> Kühn, *supra* note 3, *passim*.

<sup>7</sup> Also Tomasz Giaro indicates that the East-West divide in Europe is, today, 'a matter of legal culture and of juristic style rather than of substantive law' - see T. Giaro, 'Legal Tradition of Eastern Europe. Its Rise and Demise' *Comparative Law Review* 2.1 (2011), <<http://www.comparativelawreview.com/ojs/index.php/CoLR/article/view/16/20>> [accessed 17 June 2013], p 21.

<sup>8</sup> Safjan M., Wiewiórowska-Domagalska A., 'Political Foundations of European Private Law: Rethinking the East-West Division Lines' R Brownsword *et al* (eds), *The Foundations of European Private Law* (2011): 265-284.

EU member states might be perceived as being sufficiently significant as to justify the identification of the Central European Legal Family as a fifth legal family in European Union (besides the Common Law, Romanic, Germanic and Scandinavian ones). In conclusion (section 5) I will underscore that whereas the enduring impact of the Socialist Legal Tradition upon Polish legal culture is indubitable, the question of the status of the proposed Central European Legal Family still requires further comparative analysis.

## 2. THE SOCIALIST LEGAL TRADITION AS A LEGAL TRADITION

### *A. LEGAL TRADITIONS AND LEGAL FAMILIES*

In his study of legal traditions, Glenn distinguishes between seven distinct legal traditions: the chthonic (aboriginal), talmudic, civil law, islamic, common law, hindu and confucian.<sup>9</sup> In fact, this level of classifying or grouping legal systems seems to coincide with the notion of ‘legal families’, used e.g. by Zweigert and Kötz, who – before 1989 – identified eight legal families (the Romanistic, Germanic, Anglo-American, Nordic, Socialist, Far Eastern, Islamic and Hindu.<sup>10</sup>) or David (who, prior to 1989, identified seven legal families (Romano-Germanic, Socialist, Common Law, Muslim, Indian, Far Eastern and African),<sup>11</sup> to mention but two authors of classical tratises in the field of comparative legal studies.

David defined legal families as groups of legal systems whose lawyers share a common methodology to the extent of being able to ‘handle’ one another’s law, and which are based on common philosophical, political and economic principles.<sup>12</sup> Zweigert and Kötz defined their criterion of categorisation into legal families as ‘legal style’ and indicated four elements of that style: (i) historical background and development, (ii) predominant and characteristic mode of legal

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<sup>9</sup> Glenn H. P., *Legal Traditions of the World* (4th ed., 2010).

<sup>10</sup> Zweigert K. & Kötz H., *Introduction to Comparative Law* vol. I: *The Framework* (2nd ed. 1987).

<sup>11</sup> David R. & Brierley J. E. C., *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (1968).

<sup>12</sup> *Ibid*, 12.

thought, (iii) acknowledged sources of law and (iv) ideology understood as a religious or political conception of society.<sup>13</sup> Common to both approaches is the rejection of substantive or procedural law features as indicators of a legal family, owing to their relatively easy mutability, as opposed to deeper layers of legal culture, informed by legal traditions.<sup>14</sup>

Whilst some authors use the notions of legal family and legal tradition interchangeably,<sup>15</sup> or alternatively,<sup>16</sup> it seems that the simultaneous employment of both concepts, carefully distinguished from each other, could be useful in order to account for the variety of historical influences (legal traditions) which partake in the shaping of a group of affinite (national) legal cultures (a legal family). A legal family would thus be understood as referring to a contemporary and existing socio-legal reality, whereas a legal tradition would be one of many historical layers within a given legal culture.<sup>17</sup> The criterion of legal style, put forward by Zweigert and Kötz, could be applied as a tool both in differentiating both between (currently existing) legal families and legal traditions (extending from the past to the present).

The usefulness of the distinction between ‘legal family’ and ‘legal tradition’ manifests itself in the possibility of simultaneously acknowledging a plurality of legal traditions, which have participated in the moulding of a given legal culture and the identification of an overall dominant feature which justifies the inclusion of that legal culture within one, specific legal family.<sup>18</sup>

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<sup>13</sup> Zweigert & Kötz, *supra* note 1, 68-72.

<sup>14</sup> Cfr Tuori K., ‘Legal Culture and the General Societal Culture’, Wilhelmsson T. *supra* note 4: 23-36, 32.

<sup>15</sup> See e.g. Glendon M. A., Gordon M. W., Osakwe C., *Comparative Legal Traditions* (1985).

<sup>16</sup> Thus Glenn speaks of a legal tradition where Zweigert and Kötz would speak of a legal family.

<sup>17</sup> Cfr Mańko R., ‘The Culture of Private Law in Central Europe After Enlargement: A Polish Perspective’ (2005) 11 *European Law Journal* 11.5 (2005): 527-548, p 528; Sacco R., ‘The sub-Saharan legal tradition’, Bussani M. & U. Mattei (eds), *The Cambridge Companion to Comparative Law* (2012): 313-343, 314; Tuori, *supra* note 14, p 32.

<sup>18</sup> Thus, for instance, Italian legal culture may well belong to the Romanic Legal Family, nevertheless it was influenced not only by the Romanic, but also the Germanic Legal Tradition. See Pozzo B. ‘Comparative Law and Language’ Bussani & Mattei, *supra* note 17: 88-114, p 92-93.

*B. STYLE OF THE SOCIALIST LEGAL TRADITION*

The Socialist Legal Tradition, which appeared in the Soviet Union after the October Revolution, was not built *ex nihilo*, in spite of the abrogation of all pre-revolutionary legal texts by the Bolsheviks. All legal traditions have a hybrid character, drawing inspiration from various sources,<sup>19</sup> and the Socialist Legal Tradition was no exception, being essentially based on three sources – the Germanic Legal Tradition, which had influenced pre-revolution Russian legal culture,<sup>20</sup> local Russian legal culture,<sup>21</sup> and, of course, the official ideology of Marxism-Leninism. Three phases in the evolution of the Socialist Legal Tradition could be discerned: the initial Bolshevik period (1920s), when Lenin’s view on the withering away of state and law was treated seriously both by theorists (e.g. Pashukanis) and practitioners; the Stalinist period (1930s-1950s) when the state and law, instead of withering away, became stronger, but a post-revolutionary anti-formalist spirit still obtained, and the third, formalist post-Stalinist period (from the 1950s onwards).<sup>22</sup>

Although of Soviet origin, the Socialist Legal Tradition spread to the entire region of Central and Eastern Europe after World War II, where it continued to influence local legal cultures until the end of Actually Existing Socialism at the turn of the 1980s and 1990s. The hasty reforms of statutory law that followed attempted at removing the substantive and procedural law features typical of the socialist legal tradition. Nevertheless, as will be seen in further sections of this paper, in Poland some of them have actually survived, bearing witness to the enduring influence of the Socialist Legal Tradition not only in the sphere of legal mentality, but also black-letter rules in the codes of law.

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<sup>19</sup> Cfr S. Donlan P., ‘Remembering: Legal Hybridity and Legal History’, *Comparative Law Review* 2.1 (2011): article 1.0. Available online at: <<http://www.comparativelawreview.com/ojs/index.php/CoLR/article/view/13/17>> (last visited: 27 September 2013), 13-14.

<sup>20</sup> Zweigert & Kötz, *supra* note 10, 310; Ajani, *Il modello post-socialista* (3rd ed. 2008), 21-25.

<sup>21</sup> A prominent example is the extremely powerful Soviet Prosecution Service conceived as a guardian of socialist legality, heavily modelled on the pre-Revolutionary Russian imperial model. See Butler W. E., *Russian Law* (3rd ed., 2009), 191-192.

<sup>22</sup> Kühn, *supra* note 3, 116-117.

A crucial feature of the Socialist Legal Tradition was its mode of legal thought which can be conveniently referred to by the shorthand term of ‘hyperpositivism’.<sup>23</sup> It seems that this feature, encompassing the mode of legal thought and the doctrine of sources of law (discussed in the next sub-section), can be said to be the hallmark of the Socialist Legal Tradition. Hyperpositivism insists on a preference for linguistic and ‘logical’ interpretation, with other methods (such as functional or systemic interpretation) treated as subsidiary ones, which may be resorted to only if the literal interpretation patently fails.<sup>24</sup> In this mode of legal thinking, judges are seen as agents mechanically ‘applying’ legal texts to facts (*‘bouche de la loi’* or *‘Subsumptionsautomat’*),<sup>25</sup> and the role of the legal syllogism as a valid method of legal reasoning is emphasised. Consequently, more sophisticated methods of legal reasoning, such as the common-law reasoning *per rationem decidendi*, reasoning by balancing of interests or by reference to underlying policies are unknown.<sup>26</sup> These aspects of legal thought manifest themselves especially in the style of judicial argumentation.<sup>27</sup> Finally, hyperpositivism’s formalism extends not only to interpretation, but also entails a high level of purely procedural formalism, whereby courts tend to dismiss cases on formal grounds in order to avoid analysing them on the merits.<sup>28</sup>

The Socialist Legal Tradition was characterised by a strict adherence to the concept of ‘limited law’, whereby the notion of ‘law’ was drastically reduced to cover only abstract and general enactments of state authorities, to the exclusion of

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<sup>23</sup> On the notion of ‘hyperpositivism’ see Mańko R. ‘Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome’, *Pólemos: Journal of Law, Literature and Culture* 7.2 (2013): 207-233, 218-226. I borrow the term from Milej T., ‘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.

<sup>24</sup> Ziemiński Z., *Teoria prawa* [Legal Theory] (1978), 120-121.

<sup>25</sup> Mańko, *supra* note 17, 534-5; Milej, *supra* note 23, 68-69.

<sup>26</sup> Mańko, *supra* note 17, 534; Kühn, *supra* note 3, 135-138.

<sup>27</sup> See e.g. Mańko, *supra* note 17, p 538-43.

<sup>28</sup> Uzelac, *supra* note 5, p 383-385; Kühn, *supra* note 3, 204.

judge-made law, general principles of law or customary law.<sup>29</sup> The concept of limited law manifested itself also in a very sharp distinction between texts considered to be ‘legally binding’ and all other texts or opinions, considered ‘not binding’, and therefore – for the hyperpositivist lawyer – completely irrelevant for deciding a case.<sup>30</sup>

The Socialist Legal Tradition originated as a product of the official, ‘orthodox’, state-sponsored Soviet version of Marxism-Leninism. As Sadurski convincingly argued, however, this form of Marxism-Leninism was a distortion of the critical legal thought of Karl Marx,<sup>31</sup> and, indeed, Western Marxists, such as Collins, even refused to treat the Soviet state ideology as a form of authentic Marxism.<sup>32</sup> With the Soviet block’s demise, this form of ideology lost its hegemony mainly in favour of neoliberalism.<sup>33</sup> It must be added, however, that the actual impact of official Marxist ideology upon legal culture was overestimated by Western lawyers.<sup>34</sup> According to Uzelac, the overarching principle of legal ideology within the Socialist Legal Tradition is the instrumentalist approach to the law which is ideologically neutral and capable of surviving also after the demise of Soviet Marxism.<sup>35</sup> Uzelac’s observation, downplaying the impact of state Marxism upon legal culture, is important for any argument (as the present one) proposing the survival of the Socialist Legal Tradition.

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<sup>29</sup> Sadurski W., ‘Marxism and Legal Positivism: A case study on the impact of ideology upon legal theory’ Galligan D. J. (ed), *Essays in Legal Theory* (1984): 187-211, 203; Kühn Z., ‘Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement’, *American Journal of Comparative Law* 52.3 (2004): 531-567, 540-541; Mańko, *supra* note 17, p 534-35; Kühn, *supra* note 3, 129-135; Mańko, *supra* note 23, 218-219.

<sup>30</sup> Kühn, *supra* note 3, 210.

<sup>31</sup> Sadurski, *supra* note 29, 203-204.

<sup>32</sup> Collins H., *Marxism and Law* (1988), p 2.

<sup>33</sup> See in particular Hardy J., *Poland’s New Capitalism* (2009), ch. 4.

<sup>34</sup> Uzelac, *supra* note 5, 380.

<sup>35</sup> Uzelac, *supra* note 5, 379-381.

### III. THE CONTINUITY OF THE SOCIALIST LEGAL TRADITION IN POLAND

#### *A. THE INCEPTION OF THE SOCIALIST LEGAL TRADITION*

The Socialist Legal Tradition was introduced in Poland as result of the country's political subjection to the USSR, together with all other features of the Soviet way of life in culture, society, politics and the economy. Although the country had remained in the sphere of Soviet influence already from 1944, it was only between 1948 and 1951 that an extensive Sovietisation of the legal sphere took place.<sup>36</sup>

At the height of Stalinism, the Socialist Legal Tradition in Poland displayed a number of anti-formalist features: judges openly resorted to political and ideological arguments, and even openly created new legal rules in the guise of the 'principles of social intercourse', a new general clause introduced in 1950.<sup>37</sup> However, as Stalinism came to an end, Poland, together with the other new members of the Socialist Legal Family plunged into formalist jurisprudence.<sup>38</sup> According to Kühn, the willingness of socialist lawyers to embrace formalism was a result of the 'post-Stalinist atmosphere and a deep desire of many Marxist lawyers to avoid future injustices.'<sup>39</sup>

There were also other factors which favoured the inception of hyperpositivism as the working legal thought of Polish lawyers. Polish legal culture (like the pre-Revolutionary Russian one) was traditionally under a strong

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<sup>36</sup> Cfr Kallas M. & Lityński A., *Historia ustroju i prawa Polski Ludowej* [A History of the Constitutional System and Law of the Polish People's Republic] (2003), 213ff, 391ff, 422ff.; Mańko R. 'Unification of Private Law in Europe from the Perspective of Polish Legal Culture', *Yearbook of Polish European Studies* 11 (2007/2008): 109-136, 117. Also available at SSRN: <http://ssrn.com/abstract=2062451> (last accessed: 27/9/2013).

<sup>37</sup> See e.g. Mańko R. 'Quality of Legislation Following a Transition from Really Existing Socialism to Capitalism: a Case Study of General Clauses in Polish Private Law', in *The Quality of Legal Acts and Its Importance in Contemporary Legal Space* (2012) 540-561, 543-546. Also available at SSRN: <http://ssrn.com/abstract=2159271> (last accessed: 27/9/2013).

<sup>38</sup> Kühn, *supra* note 3, 116ff.

<sup>39</sup> Kühn, *supra* note 3, 119. This evolution went in contrast to the German post-Nazi experience, where textual positivism was identified, following Radbruch, with totalitarianism, thereby opening the way to anti-formalism, deemed more democratic.

influence of German legal culture, including the 19th century highly formalist ‘conceptual jurisprudence’.<sup>40</sup> The formalist aspects of hyperpositivism were not, therefore strange or foreign, nor were the substantive features of the Socialist Legal Tradition, such as the use of abstract notions and concepts (e.g. ‘declaration of will’, ‘legal transaction’).<sup>41</sup>

Its reception was also facilitated by the fact that the hyperpositivist ideology of adjudication was not a form of false consciousness, but rather a quite faithful reflection of the everyday experiences of lawyers, whose socio-economic and political position as well as prestige under Actually Existing Socialism was inferior, especially if compared to the Common Law judge.<sup>42</sup> In these circumstances, the tool of ultra-formalism proved to be useful, because it enabled judges to avoid deciding difficult cases by dismissing them on formal grounds or postponing their decision as long as was necessary for the case to be solved in an extra-judicial manner.<sup>43</sup>

Furthermore, hyperpositivism allowed lawyers to insulate themselves from politics by claiming that their task can be reduced to the performance of a rather technical and neutral activity.<sup>44</sup> The classical positivist claim to the autonomy of law from politics, embraced in practice (although not in theory) by hyperpositivism, was also useful in this context,<sup>45</sup> creating favourable conditions for judicial passivism<sup>46</sup> as a survival strategy under the authoritarian system of Actually Existing Socialism. Apart from relative autonomy from the political

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<sup>40</sup> Sadurski, *supra* note 29, 207; Mańko, *supra* note 17, 531.

<sup>41</sup> *Ibid.*, 531.

<sup>42</sup> Uzelac, *supra* note 5, 385-387; Kühn, *supra* note 3, 53-4.

<sup>43</sup> Cfr. Uzelac, *supra* note 5, 393-394.

<sup>44</sup> Cfr. Piana D., ‘The Power Knocks at the Courts’ Back Door: Two Waves of Postcommunist Judicial Reforms’, *Comparative Political Studies* 42.6 (2009): 816-840, 820; Kühn, *supra* note 3, 158-159.

<sup>45</sup> Cfr. Zirk-Sadowski M., ‘Uczestniczenie prawników w kulturze’ [Lawyers’ Participation in Culture], *Państwo i Prawo* 9 (2002): 3-14, 7.

<sup>46</sup> Cfr. Kaczmarek P., “Etyka odpowiedzialności prawnika” [Ethics of Lawyer’s Responsibility], paper presented at the 19th Congress of Chairs of Legal Theory and Philosophy of Law (Jastrzębia Góra, 19-22 September 2010), available online at: <http://www.prawo.univ.gda.pl/teoria/uploads/zjazd/Kaczmarek.pdf> (last accessed: 27/9/2013), 23.

sphere, hyperpositivism also helped to carve out an additional sphere of unchecked discretion in deciding hard cases. Such cases, which do not fall squarely under a specific legal rule, would still be officially decided under the simplistic syllogism, without the need of balancing the real interests at stake or inquiring into policies and purposes.<sup>47</sup> Hyperpositivism extended not only to practitioners, but to legal theorists too, who benefited from the escapism it offered, focusing on analytical philosophy of legal language, devoid of any social context, in order to steer clear of any conflicts with the official ideology of state Marxism.<sup>48</sup> Finally, hyperpositivism was *bona fide* treated as adherence to the West: behind the iron curtain, Polish lawyers could not have followed closely the anti-formalist evolution of continental Western European legal cultures, thereby relying on its outdated, formalist image.<sup>49</sup>

#### B. INSTITUTIONAL CONTINUITY

Institutional continuity of the Socialist Legal Tradition – understood as continuity of legal institutions such as courts, the prosecution service or bar associations – was remarkable in Poland. The transition did not entail any revolutionary change in the structure or staffing of courts or the bar<sup>50</sup>, save for three exceptions: a re-staffing of the Supreme Court,<sup>51</sup> a re-appointment of

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<sup>47</sup> Kühn, *supra* note 29, 558; Kühn, *supra* note 3, 160.

<sup>48</sup> Zirk-Sadowski M., *Wprowadzenie do filozofii prawa* [An Introduction to the Philosophy of Law] (2011), 88; M Smolak, ‘Contemporary Polish Theory and Philosophy of Law’, in W. Dajczak *et al* (eds), *Handbook of Polish Law* (2011): 59-82, p 63.

<sup>49</sup> Cfr. Leszczyński L., *Stosowanie generalnych klauzul odsyłających* [The Application of General Reference Clauses] (Kraków: Zakamycze, 2001), 205; Kühn, *supra* note 29, 538, 545; Mańko, ‘Proprietary Right to a Cooperative Apartment: A Survival of the Socialist Legal Tradition in Polish Private Law’, forthcoming in: *Public Interest and Private Interest in the European Legal Tradition*, ed. Bronisław Sitek, Jakub J. Szczerbowski, Aleksander W. Bauknecht; author’s pre-published version already available at SSRN: <http://ssrn.com/abstract=2170845>, 4 (of the PDF) (27/9/2013).

<sup>50</sup> Piana, *supra* note 44, 820.

<sup>51</sup> As regards the the Supreme Court, it used to be appointed for 5 year terms by the collective head of state (the Council of State) was now reappointed with permanent judges (sitting until retirement). However, many of the old judges got reappointed, for instance one third of the judges of the Civil Chamber originated from the last set of judges appointed by the Council of State in

prosecutors<sup>52</sup> and the *ipso iure* transformation of the Soviet-inspired State Economic Arbitration into economic courts.<sup>53</sup> The staffing of other courts was not changed at all, neither were the members of the two legal professions, advocates and legal advisors, exchanged in any way.<sup>54</sup> All courts of the Polish People's Republic simply became – as of 1 January 1990 – courts of the ‘new’ Republic of Poland.<sup>55</sup> A first ‘lustration’ act concerning judges was adopted only in 1997<sup>56</sup> and it covered only those judges who had collaborated with the secret service before 1990. There was no ‘verification’ of judges depending on broader political or ideological criteria. A similar tendency was observed in all post-socialist countries, save for the former GDR.<sup>57</sup>

An ongoing continuity of the personal substratum of the judiciary is being secured by the National Council of the Judiciary.<sup>58</sup> This body, being predominantly an emanation of judicial self-government (and partly appointed by the two other branches of government),<sup>59</sup> decides on new judicial appointments,

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1987. Other judges were drawn either from the academia or from judges of the ordinary courts. See Lityński A., ‘Historia Sądu Najwyższego’, <http://www.sn.pl/osadzienajwyzszym/SitePages/Historia.aspx> (last accessed: 27/9/2013).

<sup>52</sup> Prosecutors in office as of 1989 were reappointed in 1990, and those who were not – lost their posts, which allowed to eliminate those among them whose conduct under the *ancien régime* was considered to be inappropriate. See Act of 22.3.1990 (Dz.U. no. 20, item 121), Article 6.

<sup>53</sup> The Soviet-style State Economic Arbitration was a system of para-judicial panels deciding cases between state economic entities. In 1990 the arbitrators of the State Economic Arbitration became (almost) automatically judges of the newly-established Economic Courts; the same applied, *mutatis mutandis*, not only to the personnel of the Arbitration, but even to its buildings and other facilities. See Act of 24.5.1989 (Dz.U. no. 33, item 175), articles 8, 13.

<sup>54</sup> The dualism of the legal profession, consisting of advocates (*adwokaci*) and legal advisors (*radcowie prawni*) stemmed from the Socialist Legal Tradition. The legal advisor – an equivalent of the Soviet juriconsult, was originally an in-house lawyer of a unit of socialised economy. Although after 1990 the two professions have been converging, they still maintain their distinctiveness.

<sup>55</sup> Cfr. Act of 29.12.1989 (Dz.U. no. 75 item 444), art. 3-4 which allowed for a generous transition period with regard to the use of the socialist name of the state and its old emblem in official (also judicial) documents.

<sup>56</sup> See M. Safjan, ‘Transitional Justice: the Polish Example, the Case of Lustration’, (2007). 1.2 *European Journal of Legal Studies* 1.2 (2007), available online at: <http://www.ejls.eu/2/29UK.pdf> (last accessed: 27/9/2013), 9-10.

<sup>57</sup> Kühn, *supra* note 3, 188.

<sup>58</sup> Established by Act of 20.12.1989 (Dz.U. no. 73, item 435).

<sup>59</sup> See Act of 12.5.2011 (Dz.U. no. 126, item 714), articles 7-12.

thereby automatically ensuring that newly appointed judges fulfil the expectations of the old elite.<sup>60</sup> The progress of a judicial career depends not so much on qualitative factors but on quantitative ones – speed of deciding cases (the faster, the better) and amount of quashed judgments in the higher instance (the less, the better).<sup>61</sup> Professional training is secured by way of ‘apprenticeships’ (training organized by the professional associations themselves), thus creating the basis for a strong continuity of legal culture.<sup>62</sup>

### C. METHODOLOGICAL CONTINUITY

#### 1. INTRODUCTORY REMARKS

The formalist features of legal method, associated in the Polish context with the hyperpositivism of the Socialist Legal Tradition, can be easily detected in the contemporary style both of Polish judicial opinions and mainstream academic literature. 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 continuity 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.<sup>63</sup> The concept of law is still narrow;<sup>64</sup> preference for

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<sup>60</sup> Cfr. Uzelac, *supra* note 5, 395.

<sup>61</sup> For Poland see e.g. Sulikowski A., ‘Opresywność pozytywizmu prawnego i jego postmodernistyczna krytyka’ [The Oppressive Character of Legal Positivism and Its Postmodern Critique], in Machaj Ł. & P. Kaczmarek (eds), *Pozytywizm prawniczy i szkoła prawa natury: tradycje sporu i jego współczesne implikacje* [Legal Positivism and the Law of Nature School: Traditions of the Conflict and Its Modern Implications], (2010): 28-35, available online at: <http://www.bibliotekacyfrowa.pl/dlibra/docmetadata?id=35300&from=publication> (last accessed: 27/9/2013), 31; Kaczmarek P. *supra* note 46, 4; similarly in the Czech and Slovak Republics (Kühn, *supra* note 29, 556).

<sup>62</sup> Cfr. Uzelac, *supra* note 5, 396.

<sup>63</sup> Zirk-Sadowski, *supra* note 45, 6.

linguistic interpretation – strong;<sup>65</sup> even more sophisticated agents, such as Supreme Court Justices, still subscribe to the view that legal texts ‘contain’ legal norms which must be ‘decoded’;<sup>66</sup> judges are seen as those who ‘apply’ existing legal norms.<sup>67</sup> Judicial precedent, although increasingly accepted as a source of law (but not without controversy),<sup>68</sup> is understood in a superficial way,<sup>69</sup> 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.<sup>70</sup> Indeed, four decades of Soviet influence upon legal culture could not dissolve without trace.<sup>71</sup>

In order to illustrate the functioning of hyperpositivist legal methodology in practice, I will resort to a number of short case-studies which I will discuss in the following sections.

## 2. HYPERPOSITIVIST SUPREME COURT: ‘WAR OF THE COURTS’

Since the 1990s there has been an ongoing ‘war of the courts’ between the Supreme Court and the Constitutional Court concerning the binding force of the

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<sup>64</sup> Łętowska E. ‘The Barriers of Polish Legal Thinking in the Perspective of European Integration’, (1997) 1 *Yearbook of Polish European Studies* 1 (1997): 55-72, available online at: [http://www.ce.uw.edu.pl/pliki/pw/y1-1997\\_Letowska.pdf](http://www.ce.uw.edu.pl/pliki/pw/y1-1997_Letowska.pdf) (last accessed: 27/9/2013), 56.

<sup>65</sup> Stawecki T., ‘Precedens w polskim porządku prawnym. Pojęcie i wnioski *de lege ferenda*’ [Precedent in the Polish Legal Order: Notion and Proposals *De Lege Ferenda*] in Śledzińska-Simon A. & M. Wyrzykowski, *Precedens w polskim systemie prawa* (2010): 59-98, available online at: <http://en.zpc.wpia.uw.edu.pl/wp-content/uploads/2010/04/ZPC-WPiA-UW-precedens.pdf> (last accessed: 27/9/2013), 97.

<sup>66</sup> See e.g. Flemming-Kulesza T., ‘Czy w Polsce możemy mówić o prawie precedensowym’ [Is It Possible to Speak of Judge-Made Law in Poland?] in Śledzińska-Simon & Wyrzykowski, *supra* note 65: 15-22, 15.

<sup>67</sup> Łętowska, *supra* note. 64, 59.

<sup>68</sup> For an overview of positions in the Polish (theoretical) debate on precedent see Stawecki, *supra* note 64.

<sup>69</sup> Łętowska, ‘Czy w Polsce możemy mówić o prawie precedensowym?’ [Is It Possible to Speak of Judge-Made Law in Poland?] in Śledzińska-Simon & Wyrzykowski, *supra* note. 65, 9, 13.

<sup>70</sup> Milej, *supra* note 23, 69. Similarly in other post-socialist countries, e.g. Croatia (Uzelac, *supra* note 5, 383-385) as well as the Czech and Slovak Republics (Kühn *supra* note 29, 555).

<sup>71</sup> Cfr. Łazowski A., ‘Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)’, *Common Market Law Review* 48 (2011): 503-553, 552-553.

latter's judgments which do not annul a statutory provision but provide it with an interpretation in conformity with the Constitution. The arguments used by both sides are of a very different nature: the Supreme Court relies on a typically hyperpositivist preference for linguistic and 'logical' interpretation, whereas the Constitutional Court used policy arguments, a balancing of interests and teleological interpretation.

One of the battles in this ongoing war was fought after an overhaul of civil procedure, when the legislature left behind the Romanist model of cassation as right of the parties towards a system of *certiorari*. The intent of the legislature was to apply *certiorari* only to newly launched petitions for cassation. The Supreme Court was eager to apply *certiorari* retrospectively, in order to clear up its heavily burdened docket. In its decision interpreting the amending act in the latter way,<sup>72</sup> the Supreme Court pushed the linguistic and logical interpretation beyond its limits, distorting the plain meaning of the words in a way which was presented as nothing but a discovery of their literal sense. A dictionary of the Polish language from the 1960s as well as a painstaking overview of all uses of the terms in question in Polish legislation featured among the chief arguments resorted to by the Court.

The Constitutional Court, seized by individual constitutional complaints, consequently rejected the Supreme Court's twisted pseudo-literal interpretation, but not on account its failure on intentionalist or textualist grounds, but rather on the basis of a careful balancing of the public interest of speeding up civil proceedings (and getting rid of old cassations without hearing the cases) and the private interest of litigants in not having the rules of game changed by surprise.<sup>73</sup>

The Supreme Court defiantly rejected the Constitutional Court's rulings, pointing out that they interpret the statute instead of annulling it, hence are not binding on the Supreme Court which is bound – as the letter of the Constitution goes – only by 'the Constitution and statutes', and not by the Constitutional

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<sup>72</sup> SN 17.1.2001, III CZP 49/00, LEX no. 44995.

<sup>73</sup> TK cases: SK 37/01 and SK 12/03.

Court's precedent. When successful applicants, who had won before the Constitutional Court, came back to the Supreme Court to have their petitions for cassation analysed on the merits (as the Constitutional Court demanded), the Supreme Court dismissed their applications for reopening of proceedings on purely formalist grounds. It argued that according to the letter of the Code of Civil Procedure, a reopening is available only if a case ended with a judgment (on the merits) and not with an order (on formal grounds).<sup>74</sup> Because petitions for cassation were dismissed by an order, and not a judgment, the Supreme Court denied relief in the form of reopening.

Applicants came once again to the Constitutional Court, which urged the Supreme Court to follow an interpretation of the Code of Civil Procedure in conformity with the Constitution, and allow for reopening of proceedings also when cases ended with 'orders' and not 'judgments'.<sup>75</sup> This did not, however, persuade the formalist Supreme Court and in the end, the Constitutional Court was forced to declare the relevant rule of the Code of Civil Procedure unconstitutional<sup>76</sup> and urged the legislature to enact a new one, whereby reopening would be available also in cases ending in 'orders', which the legislature eventually did.

### 3. HYPERPOSITIVIST LEGISLATURE: (UN)SYMPLIFIED

#### SMALL CLAIMS PROCEDURE

An example of hyperpositivism in legislation was the introduction, in 2000,<sup>77</sup> of a simplified and accelerated small claims procedure in civil cases which entailed an obligatory use of official forms. However, the forms were extremely complicated and any (even the smallest) mistake was to result in a rejection of the claim or defence, without any possibility of requesting the parties

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<sup>74</sup> SN 6.5.2003, I CO 7/03, LEX no. 79606.

<sup>75</sup> TK 2.3.2004, SK 53/03.

<sup>76</sup> TK 27.10.2004, SK 1/04.

<sup>77</sup> Act of 24.5.2000 (Dz.U. no. 48, item 554).

to introduce necessary corrections. These extremely formalist rules were struck down by the Constitutional Court as violating the right to a court enshrined in the national constitution and in the European Human Rights Convention.<sup>78</sup>

#### 4. HYPERPOSITIVIST ACADEMIA: DEBATE ON THIRD-PARTY EFFECTS OF COURT DECISION CONDEMNING UNFAIR TERMS

Hyperpositivism in scholarship can be illustrated by the academic debate on the third-party effects of a judicial decision declaring a particular term of a standard-form consumer contract to be unfair.<sup>79</sup> In essence, the legal question boils down as to whether such decisions should have third-party effects vis-à-vis some or all consumers and some or all traders using an identical or substantially similar unfair term. Apart from raising obvious policy arguments (considered also by Western European lawyers), some Polish authors, opposed to third-party effects, argued that allowing for such effects would actually amount to giving judges law-making powers, whereas the Polish constitution does not specifically enumerate judicial decisions as ‘sources of law’. Indeed, a flagrant example of hyperpositivism in practice, especially after Poland's accession to the EU, where a culture of precedent is part and parcel of the legal order taking into account that the European Court of Justice has, from the outset, regarded its own decisions as a source of precedent<sup>80</sup>.

#### *D. NORMATIVE CONTINUITY*

##### 1. INTRODUCTION

Continuity of the Socialist Legal Tradition exists not only on the level of institutions (mainly inherited from the previous period) and methodology, but also

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<sup>78</sup> Constitutional Court (hereinafter: ‘TK’) judgment of 12.2.2002, Case P 9/01.

<sup>79</sup> For a more ample discussion and detailed references see R. Mańko, ‘Resistance Towards the Unfair Terms Directive in Poland: the Interaction Between the Consumer *Acquis* and a Post-Socialist Legal Culture’, in J. Devenney & M. Kenny (eds), *European Consumer Protection: Theory and Practice* (2012): 412-434, p 427ff. Also available at SSRN: <http://ssrn.com/abstract=2161525> (last accessed: 27/9/2013).

<sup>80</sup> Arnall A., *The European Union and Its Court of Justice* (2nd ed., 2006), 627-628.

concrete legal solutions. As a preliminary remark it must be emphasised that there was no clear legal breakthrough between socialist and post-socialist Poland. A symbolic date could be 1 January 1990, when the name and official emblem of the state was changed (from ‘Polish People’s Republic’ to ‘Republic of Poland’), but nevertheless the identity of the state and the continuity of its legal system was not thereby put into question. An in-depth survey of all forms of normative continuity with the period of Actually Existing Socialism would undoubtedly exceed the scope of the present paper, therefore I will limit myself to highlighting some of the most salient examples of normative continuity of the Socialist Legal Tradition in contemporary Polish private law, including substantive law and civil procedure.

## 2. NORMATIVE CONTINUITY IN CIVIL PROCEDURE

Perhaps the most striking aspects of normative continuity with the *ancien régime* are to be found in the law of civil procedure. One of the most prominent ‘legal survivals’<sup>81</sup> in this field is the *locus standi* of the prosecutor in civil proceedings. Although in some systems of civil procedure in the Germanic and Romanic family, a public prosecutor enjoys certain limited powers to participate in narrowly defined types of procedures in order to represent the public interest, prosecutors do not enjoy a general and practically unlimited *locus standi* in all civil proceedings. In contrast, in the Soviet model the prosecution service was an independent, hierarchical agency of government entrusted with the task of controlling all other powers, defending ‘socialist legality’ and enjoying, for this purpose, the powers of protest, proposal and prosecution.<sup>82</sup> Specifically, within the realm of civil proceedings, a Soviet prosecutor had the power to participate in all hearings, file lawsuits and applications, give opinions on the case to the court,

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<sup>81</sup> On the notion of ‘legal survivals’ see Mańko, *supra* note 23, 215-216, where I define them 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.’

<sup>82</sup> Butler, *supra* note 21, 192.

as well as challenge judicial decisions before a higher court.<sup>83</sup> In 1950, this model of the prosecution service became the object of a legal transfer to Polish law as part of a wider reform of civil and criminal procedures.<sup>84</sup> Under the new legal framework prosecutors enjoyed a general and unlimited *locus standi* to join or initiate any civil proceedings, as well as to challenge any judicial decision. These powers were thoroughly independent from the will or interest of any private party to the civil proceedings, however, had full legal effects *vis-à-vis* such parties. A judicial decision handed down in such a procedure was binding on such parties. Prosecutorial intervention was unanimously treated by Polish scholars as a characteristic feature of socialist civil procedure, responsible for actually making socialist civil procedure socialist.<sup>85</sup>

After 1989 numerous scholars began to criticise the generalised prosecutorial *locus standi*;<sup>86</sup> some of them even argued that such an institution actually violates the right to an impartial court as guaranteed by international human rights instruments.<sup>87</sup> Nevertheless, despite numerous amendments to the Code of Civil Procedure, the prosecutor's general *locus standi* remained unaffected. The legal framework regarding the prosecutor's *locus standi* in civil proceedings is by no means a dead letter of the law, a fact which can be ascertained both on the basis of the Internal Rules of the Prosecution Service which specify in detail the types of civil cases in which a prosecutor should

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<sup>83</sup> Butler, *supra* note 53, 106-107.

<sup>84</sup> For details see Mańko, *supra* note 4, 92-94.

<sup>85</sup> See e.g. Smoleński J., *Prokuratura Polskiej Rzeczypospolitej Ludowej. Komentarz do ustawy o prokuraturze PRL i innych przepisów dotyczących prokuratury* [Prosecution Service of the Polish People's Republic. A Commentary to the Act on the Prosecution Service of the Polish People's Republic and other Provisions Concerning the Prosecution Service] (2nd ed., 1981), 127. Cf. Kühn, *supra* note 3, 43-44.

<sup>86</sup> Ereciński T., 'O potrzebie nowego kodeksu postępowania cywilnego' [On the Need of a New Code of Civil Procedure], *Państwo i Prawo* 59.4 (2004), 8; Pogonowski P., *Realizacja prawa do sądu w postępowaniu cywilnym* [The Realisation of the Right to a Court in Civil Proceedings] (2005) 73ff; F. Zedler, 'Głosa do wyroku SN z dnia 14 września 2005 r. III CZP 58/05' [Case-note Supreme Court 14.9.2005, III CZP 58/05] (2006) 50.10 *Orzecznictwo Sądów Polskich* 516, 518.

<sup>87</sup> Zedler, *supra* n. 85, 518.

intervene,<sup>88</sup> as well as statistical data,<sup>89</sup> according to which prosecutors participate in around 100,000 civil cases per year, filing themselves approximately 20,000 civil lawsuits yearly.

Another strong public-law element of Polish civil procedure, also of Soviet origin, is the institution known during the socialist period as the ‘extraordinary revision’ (*rewizja nadzwyczajna*).<sup>90</sup> It was a special form of appeal against a judicial decision which had already obtained the force of *res judicata* (including decisions of the Supreme Court). This appeal could be brought exclusively by certain high public officials (Attorney General, Minister of Justice, First President of the Supreme Court) but was unavailable to private parties. The extraordinary revision survived, in unmodified form, until 1996, when it was abolished with effect from 1998. However, in 2000 a functionally similar form of appeal (but now under a different name) was reintroduced.<sup>91</sup>

Finally, one should mention as a legal survival of the socialist period the Guidelines of the Supreme Court. 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. In Poland the Guidelines were abolished in 1989<sup>92</sup> and in 1990 the Supreme Court officially proclaimed<sup>93</sup> that they are no longer binding. Nevertheless, they are still frequently cited and relied on by judges, not excluding, the Supreme Court itself.<sup>94</sup>

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<sup>88</sup> The Internal Rules of the Prosecution Service currently in force have been promulgated by a regulation of the Minister of Justice of 24.3.2010 ( Dz.U. z 2010 r. no 49, item 296). See in particular, §§ 374, 378-379 thereof.

<sup>89</sup> The official statistics are available online; for 2011 see [http://www.pg.gov.pl/upload\\_doc/000002780.doc](http://www.pg.gov.pl/upload_doc/000002780.doc) (last accessed: 27/9/2013) and for 2012 see [http://www.pg.gov.pl/upload\\_doc/000003686.rtf](http://www.pg.gov.pl/upload_doc/000003686.rtf) (last accessed: 27/9/2013).

<sup>90</sup> For details see Mańko, *supra* note 4, p 94ff.

<sup>91</sup> For details see Mańko, *supra* note 4, p 96-98.

<sup>92</sup> By act of 20.12.1989 (Dz.U. no. 73, item 436).

<sup>93</sup> SN 5.5.1992, KwPr 5/92, LEX no. 3805.

<sup>94</sup> See SN: 18.7.2002, IV CKN 1249/00, LEX no. 80269; 22.5.2003, II CKN 96/01, LEX no. 137609; 29.11.2007, III CZP 94/07, LEX no. 319929; 10.3.2010, II PK 261/09, LEX no. 588001; 26.1.2011, II CSK 329/10, LEX no. 794955.

Whereas a typical feature of the Common Law Tradition is trial by jury, and of the Romanic and Germanic Legal Traditions trial by a single professional judge,<sup>95</sup> the Socialist Legal Tradition had its own position: trial by a mixed bench, composed, as a matter of principle, of one career judge and two lay assessors.<sup>96</sup> As a rule, Polish pre-socialist law provided for trial by single judge or by jury (in serious criminal cases).<sup>97</sup> A reform of the court system in 1950 – drawing on the Soviet model – provided that all cases in first instance proceedings were to be heard by a mixed bench of one professional judge and two lay assessors.<sup>98</sup> This rule was later enshrined in the Code of Criminal Procedure 1969<sup>99</sup> and the Code of Civil Procedure 1964.<sup>100</sup> After 1989 the participation of lay assessors was gradually reduced, but the mixed bench of Soviet origin has not been eradicated completely. Lay assessors still hear civil cases concerning crucial matters of labour law and family law,<sup>101</sup> as well as all criminal cases with felony charges.<sup>102</sup>

### 3. NORMATIVE CONTINUITY IN SUBSTANTIVE PRIVATE LAW

The most prominent legal concepts inherited from the Socialist Legal Tradition are the general clauses (standards) of ‘principles of social intercourse’ and ‘socio-economic purpose’.<sup>103</sup> Both are of Soviet origin and both replaced, at

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<sup>95</sup> O. G. Chase & V. Varano, ‘Comparative civil justice’ in Bussani & Mattei, *supra* note. 17: 210-240, 220-21.

<sup>96</sup> Kühn, *supra* note 3, 35.

<sup>97</sup> Law on the Organisation of the Courts 1928, articles 14-15, 23-24. A mixed bench was available in commercial cases, where a professional judge sat together with two ‘commercial judges’, recruited from among non-lawyers with economic education, and not remunerated, as lay assessors - see especially regulation of the Minister of Justice of 24 December 1928 on the appointment of commercial judges (Dz.U. 1928 nr 104 poz. 939).

<sup>98</sup> Act of 20.7.1950 amending the Law on the Organisation of the Common Courts (Dz.U. no. 38 item 347).

<sup>99</sup> See articles 19-20 of the Code of Criminal Procedure 1969.

<sup>100</sup> See Article 47.

<sup>101</sup> This covers, *inter alia* cases regarding the existence of a labour relationship and dismissal, discrimination and mobbing at the workplace, divorce, separation, ineffectiveness of recognition of fatherhood and dissolution of adoption. See Article 47 of the Code of Civil Procedure 1964 (as of 2013).

<sup>102</sup> See Article 28 of the Code of Criminal Procedure 1997 (as of 2013).

<sup>103</sup> For a more ample discussion see Mańko, *supra* note 34.

the outset of the socialist period, traditional Western general clauses, such as ‘good faith’, ‘fair dealing’, ‘good morals’ and ‘equity’.<sup>104</sup> And both persist in the Civil Code and are used by the judiciary. Although since 1999 two traditional general clauses are being gradually reintroduced (‘good morals’ and ‘equity’), the socialist ones remain in place, leading to the creation of a patchwork system of general clauses.<sup>105</sup>

The persistence of socialist general clauses is not only a matter of legal terminology, but also of a much deeper continuity. Courts rely on pre-1989 case-law interpreting the ‘principles of social intercourse’,<sup>106</sup> as well as follow methodological approaches regarding their application developed in the post-Stalinist socialist period, such as the rejection of an ‘inner system’<sup>107</sup> of the general clause,<sup>108</sup> or its treatment as a question of fact, rather than question of law.<sup>109</sup> The ‘socio-economic purpose’, first codified in the Soviet Russian Civil Code of 1922<sup>110</sup> and was subsequently transplanted to Polish law in 1946<sup>111</sup> is also by no means a dead letter of the law: there are contemporary judicial decisions refusing the protection of a private right with reference to its socio-economic purpose.<sup>112</sup>

Normative legal survivals can also be found within property law and contract law. Within the former one can mention specific, socialist *iura in re aliena*, such as the “proprietary right to an apartment in a cooperative”<sup>113</sup> and the “right of

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<sup>104</sup> *Ibid*, p 543.

<sup>105</sup> *Ibid*, p 549-553.

<sup>106</sup> A characteristic example is the ongoing reduction of *pars legitima* on the basis of the principles of social intercourse. See e.g. SN 7.4.2004, IV CK 215/03, LEX no. 152889; Court of Appeal (‘SA’) in Warsaw 9.9.2009, VI ACa 286/09, LEX no. 1120244; SA/Szczecin 22.4.2009, I ACa 459/08, LEX no. 550912.

<sup>107</sup> As the German ‘inner system’ of *Treu und Glauben*, whereby a series of legal rules are ‘inferred’ by the courts from the general clause and later systematised by the doctrine.

<sup>108</sup> r SN 25.5.2011, II CSK 528/10, LEX no. 794768.

<sup>109</sup> See e.g. SN f 25.5.2011, II CSK 528/10, LEX no. 794768.

<sup>110</sup> R.S.F.S.R. Civil Code of 31 October 1922, in: V. Gsovski, *Soviet Civil Law*, vol. 2 (1948): 15-235.

<sup>111</sup> Decree of 12.11.1946 - General Provisions of Civil Law (Dz.U. No. 67, item 369), Article 5 § 1.

<sup>112</sup> See e.g. SA/Warsaw 2.2.2009, VI ACa 606/08, LEX no. 530990; SA/Poznań 3.11.2010, I ACa 578/10, LEX no. 756672.

<sup>113</sup> For a detailed discussion see Mańko, *supra* note 49.

perpetual usufruct”.<sup>114</sup> In contract law one can mention two types of nominate contracts introduced to the socialist Civil Code of Poland under the influence of Soviet law – the supply contract and the cultivation contract. Originally, both could be concluded either only between two entities of socialised economy (the supply contract) or at least one of the parties had to be such an entity (the cultivation contract). The supply contract was a contract whereby one entity of the socialised economy (the supplier) undertook to produce generic goods and deliver them in parts or periodically to another unit of socialised economy in exchange for price.<sup>115</sup> A cultivation contract was a typified contract whereby a farmer undertook to produce and sell certain quantity of agricultural produce to an entity of the socialised economy in exchange for a fixed price. The social function of the contract under Actually Existing Socialism was the integration of the mainly privately held Polish agricultural sector with the socialised economy.<sup>116</sup>

When the Civil Code underwent a sweeping reform in 1990, neither of the two contracts was removed. They were, however, adapted to the new economic conditions in that the requirement that a unit of socialised economy be party to the contract was removed. Both types of contracts are still used in practice within the private sector.<sup>117</sup>

#### IV. TENTATIVE HYPOTHESIS: A ‘CENTRAL EUROPEAN LEGAL FAMILY’?

##### *A. THE IMPORTANCE OF LEGAL TAXONOMY*

I depart from the assumption that the classification of legal systems into legal families, has not only a great theoretical value, but also can be useful in

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<sup>114</sup> See e.g. Winiarz J., *Prawo użytkowania wieczystego* [The Right of Perpetual Usufruct] (1970); Cisek A., ‘Użytkowanie wieczyste’ [Perpetual Usufruct] in *System prawa prywatnego* [System of Private Law], vol. 4: *Prawo rzeczowe* [Property Law], ed. E. Gniewek (2005).

<sup>115</sup> See Article 605ff of the Civil Code.

<sup>116</sup> W. Czachórski, *Prawo zobowiązań w zarysie* [Law of Obligations in Outline] (1968), p 473. See also SN: 7.8.1975, III CRN 179/75, LEX no. 7732; 25.5.1988, II CR 129/88, LEX no. 8884 .

<sup>117</sup> See recent cases on delivery contracts: SN 7.11.2007, II CSK 341/07 LEX no. 485860; SN 9.2.2005, II CK 423, LEX no. 152293, and on cultivation contracts – SN 18.3.1998, I CKN 576/97, LEX no. 746161; SN 27.6.2002, IV CKN 1165/00, LEX no. 80264; SN 17.12.2003, IV CK 303/02, LEX no. 599555; SN 19.2.2009, III SK 31/08, LEX no. 503413.

practice. First of all, if a frontier of a legal family is defined, following David, as the frontier of the interpretive community, a delimitation of legal families is of immense methodological importance, pointing to the limits of a given comparatist's epistemic competences. Secondly, taxonomy guides the choice of legal systems to compare, resting on the presumption that a member of a family is representative of that family.<sup>118</sup> Thirdly, for any project aiming at the harmonisation or unification of laws, the existence of distinct legal families is of paramount importance for the drafting of uniform or harmonising legislation. Legal texts do not have any 'inherent' meaning: perhaps the lesson of comparative law and the twisted histories of legal survivals are the best cure against the illusion of textualism. If, therefore, we accept that legal texts have any meaning only for a determined interpretive community,<sup>119</sup> and we posit the notion of an interpretive community at the heart of the notion of a legal family (in line with David's approach) the practical importance of taxonomy becomes evident. A unifying or harmonising text will attain its effect not if its *literal content* is the same in all jurisdictions, but only if its *understanding* by scholars and judges in those jurisdictions will go in more or less the same direction. Legal taxonomy is of immediate practical relevance: on the basis of general features of legal families it can help to predict what interpretation will be given to a certain rule in a different legal family, whose legal cultures are based on a different historical background, which apply different methods of interpretation, recognise different sources of law and rely on different ideological premises.<sup>120</sup> All this makes it all the more pertinent to enquire as to where do Central European countries – for almost a decade now, members of the European Union – stand in terms of legal families.

To answer this question in definite terms, would certainly exceed the scope of the present paper, which offers only a view from the Polish perspective.

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<sup>118</sup> Zweigert & Kötz, *supra* note 1, 64.

<sup>119</sup> Cfr Winter S. L., *A Clearing in the Forest: Law, Life and Mind* (2001), ch. 9-12.

<sup>120</sup> Cfr Pozzo B., *supra* note 18, 104.

Nevertheless, relying on Uzelac's paper on the continuity of the Socialist Legal Tradition in Croatia and on Kühn's groundbreaking monograph on the evolution of the legal method in Central and Eastern Europe (covering mainly Czech and Slovak legal cultures, and to a lesser extent Hungarian and Polish legal cultures)<sup>121</sup> it seems feasible, though, to put forward a tentative hypothesis, open to further qualifications, as well as verification or falsification with regard to each analysed jurisdiction.

### *B. A CENTRAL EUROPEAN LEGAL STYLE*

At this point it is worth recalling once again the criteria put forward by Zweigert and Kötz for the identification of a distinct legal style as criterion of division into legal families: first, the historical background and development; second, the predominant and characteristic mode of legal thought, third, the acknowledged sources of law and fourth, ideology understood as a religious or political conception of society.<sup>122</sup> A useful addition to Zweigert and Kötz's formulation is the criterion of functional interoperability used by David, whereby lawyers from one legal family can fairly easily understand the working method of lawyers from other jurisdictions of the same family, but cannot easily grasp the functioning of the law within a jurisdiction from outside their family.

If by 'Central European' countries we understand the 11 former socialist countries, which have joined the EU between 2004 and 2013,<sup>123</sup> it is immediately evident that prior to the inception of Actually Existing Socialism the region was influenced by different legal traditions within the then existing legal families. There are, however, more common traits that could seem at first blush. First of all, Central Europe was characterised – in contrast to continental Western Europe – by

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<sup>121</sup> Kühn, *supra* note 3, *passim*.

<sup>122</sup> Zweigert & Kötz, *supra* note 1, 68-72.

<sup>123</sup> Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Romania, Poland, Slovakia, Slovenia.

the lack of a formal reception of Roman law in the Middle Ages.<sup>124</sup> Secondly, during the 19th century the entire region was subject to legal transfers from both legal families of the continental West – the Germanic one (in its Austrian and German varieties) and the Romanic one.<sup>125</sup> Not uncommon was the admixture of influences of Austrian, German, Swiss and French law, as in the case of Poland.<sup>126</sup> The wholesale reception of continental Western laws in the 19th century lead, as a rule, to the erasure of traces of earlier local legal cultures.<sup>127</sup>

An even stronger factor bringing the jurisdictions of the region together was the impact of the Socialist Legal Tradition, which encompassed the region during the period between World War II and the fall of the Soviet block. The Socialist Legal Family, as it then was, was relatively homogenous,<sup>128</sup> owing to the leadership of the Soviet Union and the one-sided direction of legal transfers: from the USSR to other countries, rather than the other way. The legacy of the Socialist Legal Tradition is present above all in legal methodology and can be identified with what I refer to as ‘hyperpositivism’ in legal thinking, as extensively discussed above.

But does the hyperpositivist working legal thought, presumably dominant in the region, amount to a barrier to interoperability, thereby fulfilling David’s test for distinguishing legal families?<sup>129</sup> To answer this question, it must be emphasised that the evolution of Western European continental legal families after World War II has lead to a fundamental restructuring of legal discourses, the demise of the ideology of bound judicial decision-making, and an acknowledgment of the law-making powers of the courts.<sup>130</sup> But Central European

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<sup>124</sup> Giaro, *supra* note 7, 4-5.

<sup>125</sup> For an overview see especially T. Giaro (ed), *Rechtskulturen des Modernen Osteuropa: Traditionen und Transfers* (2006), vol. 1.

<sup>126</sup> Cfr Mańko, *supra* note 36, 115-116.

<sup>127</sup> For Poland see Mańko, *supra* note 36, 115.

<sup>128</sup> Despite Yugoslavia’s independence *vis-à-vis* the Soviet Union, its legal culture belonged to the Socialist Legal Family. Cfr Uzelac, *supra* note 5, *passim*.

<sup>129</sup> David & Brierley, *supra* note 11, p 12.

<sup>130</sup> Kuhn, *supra* note 3, 86-88.

legal communities have not been participating in this change of discourse: Soviet domination mummified legal development, insulating the evolution of legal cultures for four decades.

This, indeed, can create barriers between the respective interpretive communities, as best evidenced by such situations in which the implementation of EU law in Central Europe is understood in a hyperpositivist reductionist manner as merely the enactment of statutes (which are considered as ‘the law’), whereas the actual judicial and administrative practice is treated as irrelevant (not being ‘the law’ but merely its ‘application’, therefore having a different ontological status).<sup>131</sup> The case study of the Europeanised Polish Constitutional Court talking over the head of the traditionalist and hyperpositivist Polish Supreme Court is also a case in point. Although this aspect certainly requires further investigation, it seems plausible to hypothesise that lawyers from Central European countries are capable of understanding each other much better than they understand lawyers from Western Europe. This would be a strong argument in favour of assuming that a Central European Legal Family should be identified and discerned from the recognised legal families of Western Europe (the Romanic, Germanic, Scandinavian and Common Law).

Finally, the element of ideology, acknowledged both by Zweigert and Kötz, as well as by David as a key factor in identifying legal families must also be inspected. At least speaking from the Polish perspective, it must be underlined that neoliberal ideology enjoys hegemony in the region, and any forms of critical thought or socialist ideology are dismissed as attempts of re-instating Actually Existing Socialism, considered as a failed experiment.<sup>132</sup> This hegemony, far stronger than in Western Europe, is a direct consequence of the identification of any leftist ideas with the Soviet Union, an identification which is typical for Central Europe owing to its historical experience.

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<sup>131</sup> Cfr. Łętowska E., *Rzeźbienie państwa prawa 20 lat później* [Sculpting a State of Law 20 Years Later] (2012), 16.

<sup>132</sup> See e.g. Mańko, *supra* note 23.

A crucial unifying factor of the proposed Central European Legal Family is, of course, membership in the European Union and the resulting experience with EU legal texts and judicial dialogue with its Court of Justice.<sup>133</sup> Without delving into the details of the Europeanisation of Central European legal culture, a topic of analysis in its own right, it must be emphasised that precisely the impact of EU legal culture is a factor which sharply divides the former Socialist Legal Family into two distinct legal families – the Central European one, composed of post-socialist EU member states, and the Eastern European one,<sup>134</sup> which, despite a common past of Actually Existing Socialism has retained many more features of the Soviet *ancien régime* and has not been exposed to Europeanisation.<sup>135</sup>

#### V. CONCLUSIONS

The Socialist Legal Family may well be dead and buried, but the same cannot be said of the Socialist Legal Tradition. Its impact upon Polish legal culture remains visible, especially in the sphere of legal methodology, dominated by the legacy of hyperpositivism. A basis for this continuity was created by the unbroken link of legal institutions – courts, the prosecution service, the bar – as well as by the general principle of legal continuity between the Polish People's Republic (until 1989) and the Republic of Poland (from 1990). The path chosen by Polish leaders was one of gradual legal reform, rather than complete abolition of the law of the *ancien régime*. But even if such a task had been accomplished, the very continuity of the personal substratum of legal culture would have ensured conditions for the endurance of hyperpositivism, transmitted through legal education and promoted by institutional arrangements regarding judicial appointments. Only the former East Germany could afford to abandon completely

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<sup>133</sup> See e.g. Łazowski, *supra* note 71.

<sup>134</sup> Understood as comprising the former USSR republics save for the three Baltic states.

<sup>135</sup> Cfr Ajani, *supra* note 20, p 123ff.

its socialist legal culture, but at the price of exchanging almost entirely its legal personnel.<sup>136</sup>

The Socialist Legal Tradition's continuity is also visible in the normative sphere – in concrete substantive and procedural legal arrangements, which were analysed in this paper with regard to private law. The persistence of such legal phenomena bears witness to the inertia of the legal system *vis-à-vis* the political and socio-economic systems, which in the meantime had undergone radical changes.

Whether the differences in historical experience, dominant working legal thought, views on the sources of law and the underlying ideology amount to a qualitative difference of legal style between Central European and Western European countries remains open to discussion and further analysis. It seems though, that the arguments for the recognition of a Central European Legal Family, put forward in this paper, make this hypothesis worth further exploration. If it proves viable, it will indeed be possible to speak of five distinct legal families within the European Union.

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<sup>136</sup> Cfr Kühn, *supra* note 3, 163.