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## **Subject, sovereign, Antigone: Judicial subjectivity and determination of the law**

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PRZEMYSŁAW TACIK\* 

### **Abstract**

In this paper I develop a theory of judicial subjectivity based on Lacan's psychoanalysis. This theory is enriched with a theoretical confrontation with the abyssal laboratory of populist governance which has been created by the far-right majority in Poland since 2015. By adding this empirical context, I enquire how agency of judges is being created by the split legal system. The subjectivity of the judicial function implies speaking modestly in the name of the law, but at the same time involves being addressed by the demands of the Big Other. Yet at the same time the judge holds in her hands the jouissance of the law: it is the judge that can ultimately – with the effect of recognition within the Symbolic – acknowledge or refused validity of the law. It is in the judge's subjectivity that the law can be recreated or can collapse. The peculiar link between the judge and her master is located in judicial conscience: the place where the subject's structural emptiness corresponds to the lack within the law. As I argue in the paper, this role comes to the fore in case of split legal systems – such as the Polish one – which address judges with contradictory norms. In such moment the judge becomes 'a judicial Antigone' in Lacanian interpretation: a person on whose personal self-identification the legal system itself depends. Such a judicial Antigone – with empirical examples of Polish judges – is both the utmost hero and the utmost victim of the law.

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\* Przemysław Tacik is Assistant Professor at the Institute of European Studies of the Jagiellonian University of Kraków, Poland, and Director of the Nomos: Centre for International Research on Law, Culture and Power. A philosopher, lawyer and sociologist by education, he holds PhDs in philosophy (2014) and international law (2016). He has been a visiting scholar at many universities and received international scholarships (including scholarships of the French government and of the DAAD). In his academic work he combines both philosophical and legal perspectives, attempting to approach them from an interdisciplinary angle. His main fields of interest are: in philosophy – contemporary philosophy, Jewish philosophy and animal studies; in law – critical legal studies, international law, human rights law. He has authored over 50 articles and five books. His most recent monographs are: *A New Philosophy of Modernity and Sovereignty: Towards Radical Historicization* (Bloomsbury 2021) and *Deconstructing the Right to Self-Determination in International Law: Sovereignty, Exception, Politics* (Brill 2023). Email address: [przemyslaw.tacik@uj.edu.pl](mailto:przemyslaw.tacik@uj.edu.pl)

### Key words

Jacques Lacan; psychoanalysis; subjectivity; judge; illiberal legality

### Resumen

En este artículo desarrollo una teoría de la subjetividad judicial basada en el psicoanálisis de Lacan. Dicha teoría se enriquece con una confrontación teórica con el laboratorio abisal de la gobernanza populista que ha creado la mayoría de extrema derecha en Polonia desde 2015. Añadiendo este contexto empírico, investigo cómo un sistema legal dividido está creando la agencia de los jueces. La subjetividad de la función judicial implica hablar modestamente en nombre de la ley, pero al mismo tiempo implica ser abordado por las demandas del Gran Otro. Sin embargo, al mismo tiempo, el juez tiene en sus manos el goce de la ley: es el juez el que puede, en última instancia -con el efecto del reconocimiento dentro de lo Simbólico-, reconocer o rechazar la validez de la ley. Es en la subjetividad del juez donde la ley puede recrearse o derrumbarse. El vínculo peculiar entre el juez y su amo se localiza en la conciencia judicial: el lugar donde el vacío estructural del sujeto se corresponde con la ausencia dentro de la ley. Como sostengo en el artículo, este papel pasa a un primer plano en el caso de los sistemas jurídicos divididos -como el polaco- que dirigen a los jueces normas contradictorias. En ese momento, el juez se convierte en “una Antígona judicial”, según la interpretación lacaniana: una persona de cuya autoidentificación personal depende el propio sistema jurídico. Tal Antígona judicial -con ejemplos empíricos de jueces polacos- es a la vez el máximo héroe y la máxima víctima de la ley.

### Palabras clave

Jacques Lacan; psicoanálisis; subjetividad; juez; legalidad iliberal

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## 1. Introduction

Judges are subjects of a peculiar nature: their subjectivity is profoundly enmeshed in the role and ideological functioning of the law. Lacanian psychoanalysis, in all the conceptual richness of its analysis of subjects, offers a promising avenue in theoretical attempts to theorise all kinds of subjectivity in relation to law (Caudill 1997, 66–67). Nonetheless, it will require important interpretative and theoretical work: Lacan's thought, incredibly variegated in itself, obviously cannot offer a "theory" that could be "applied" to judicial subjectivity. We need to set out on a theoretical journey; on this way we will use one empirical case, only to come back to the central riddle of this text: *how is judicial subjectivity constructed?*

If in Lacanian psychoanalytic theory the law is a crucial part – if not the epitome<sup>1</sup> – of the Symbolic, then there is no law without creation of a subject. This observation reverses the traditional argument according to which the emergence of the subject entails the existence of the law that participates in its creation.<sup>2</sup> In a broader perspective, both the law and the subject are part of the apparatus that binds the Real, the Symbolic and the Imaginary. Therefore it is not exactly accurate to claim that the law as such *creates* the subject; it rather seems that both emerge in the same process as parts of one complex structure. Crucially, however, forms of subjectivity must necessarily correspond to the law that co-conditions them.

In Lacan the law is understood quite liberally, well beyond the boundaries of what the law is for lawyers. It necessarily involves and creates desire,<sup>3</sup> which it, however, does not satisfy by itself (Salecl 1993, 16). The very structure of the subject in its relationship to language is based on the grid of forces that desire commands.<sup>4</sup> These characteristics are more difficult to adapt to the properly legal understanding of the law. The subject of the law is usually portrayed in abstraction from desire as a constitutive structure. Bernard Edelman notices:

Le droit ignore la jouissance – non pas la jouissance des choses, au contraire, car il n'y a rien de plus apaisant que jouir d'une chose –, mais la jouissance entre les hommes. L'Homo juridicus est un être froid, calculateur, quasiment dépourvu d'affects, c'est-à-dire l'être social idéal dont rêve une société bien organisée. (Edelman 2007, 16)

The Lacanian law and the law of jurists seem to clash here at their highest divergence. The former is a picture that depicts how the law creates and maintains desire through

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<sup>1</sup> Lacan variously referred to what can be the embodiment of the Symbolic, oscillating between the law (esp. in earlier stage of his thought) and different accounts of order, sometimes imagined mathematically. As he said in his 16<sup>th</sup> Seminar, "[q]u'est-ce qu'un ordre symbolique ? C'est plus qu'une loi seulement, c'est aussi une accumulation, et encore, numérotée. C'est un rangement." (Lacan 2006, 296).

<sup>2</sup> Bernard Edelman developed this thought into a whole theory of how human beings are juridically turned into legal subjects (Edelman 2001, 15, 22, 80-81, 123), assuming rather the principal agency on the part of the law.

<sup>3</sup> As Lacan claims in his 10<sup>th</sup> Seminar, "[l]e rapport de la loi au désir est si étroit que seule la fonction de la loi trace le chemin du désir. Le désir, en tant que désir pour la mère, est identique à la fonction de la loi. C'est en tant que la loi l'interdit qu'elle impose de la désirer, car, après tout, la mère n'est pas en soi l'objet le plus désirable." (Lacan 2004, 126).

<sup>4</sup> In this sense, desire is an ontological tissue of reality, co-extensive with it like two sides of the Möbius strip. In his 14<sup>th</sup> Seminar Lacan claims: "Le désir, qui est au centre de cet appareil, de ce cadre, que nous avons appelé *réalité*, est aussi bien, comme je l'ai articulé depuis toujours, ce qui couvre ce qui est à proprement parler le réel." (Lacan 2023, 20).

prohibition (Lacan 2006, 90); ungraspable *jouissance* is a by-product of this structure (at least during a certain period of Lacan's theorising, until *jouissance* was opposed to desire). The latter, according to Edelman, evacuates *jouissance*, wanting to turn human beings into a cold machinery that epitomises a "well-organised society". In the light of Lacan's theory we can therefore rightly ask: what does the law of jurists want by creating its subjects as cold machines? What does it castigate? And, most importantly for this paper, can it ever crack in a way that the inner structure and desire of this machinery would be revealed?

In the light of these questions the contradiction between Lacan and Edelman is just a semblance. The actual law as a form of the Symbolic organises subjects according to a very particular form of desire. That it deprives human beings of their *jouissance* – at the same time elevating *jouissance* of things to the level of a proper legal form – is quite akin to the process of symbolic castration in psychoanalysis. In both the intervention of the Symbolic produces a semblance of the primal lost *jouissance* (Braunstein 2005, 25–26). Subjects to which human beings are reduced – either psychoanalytical subjects, the empty positions within language,<sup>5</sup> or properly legal subjects, also formal points on the map produced by the law – retain only a warped form of *jouissance* through which they are mired in the endless craving for the lost unity. What Marx describes as torments of a human being split between *homme* and *citoyen* – the "properly" human and its abstract legal counterpart (Marx 1843) – is not far from the ordeal that a human animal experiences through its subjection to language. Parenthetically, it is the same structure of split that allowed Lacan to appropriate Marx' theory of surplus value in *Séminaire XVI* (Lacan 2006, 17–19).

It is therefore crucial to understand how the actual law produces its subjects. A particularly interesting case concerns judges: these subjects who are elevated by the law to the rank of speaking in its name and taking decisions. In this paper I am going to undertake a Lacanian study seeking the understanding of the process of subjectification that the law performs on individuals performing the judicial function. In order to find a crack in the edifice that through its own inertia tends to obfuscate this subjective position, I will pick a unique example of a bifurcated legal system under the Polish version of illiberal populism. As I will demonstrate, Polish law lost its fundamental unity and foothold in the unifying agency of the sovereign. Such a position offers a unique glimpse into the more universal theorisation of judicial subjectivity. Polish judges found themselves in a peculiar position of deciding which of the two competing legal systems in Poland – the legitimate one and the one upheld by the apparatus of the state – is to be applied. This demonstrates how subjectification may be transformed in a way that makes subject deeply entangled in the very construction of the Symbolic. Accordingly, I will use the Polish example in order to develop a more nuanced theoretical account of judicial subjectivity in general, based on Lacanian foundations.

The aim of this paper is neither to hermeneutically interpret Lacan nor to explain the empirical case of the current Polish judiciary. It uses Lacan in order to develop an

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<sup>5</sup> Lacan identifies the "I" as a logical short circuit that covers an act of subjectification: "le *Je* apparaît d'abord devant l'Autre comme permettant de cerner une défaillance logique, comme lieu d'un défaut d'origine porté dans la parole en tant qu'elle pourrait répondre. (...) Le *Je* apparaît premièrement comme assujetti, comme *assujet*." (Lacan 2006, 81).

autonomous theory of legal subjectivity, while using the Polish case to illustrate a peculiar moment of it. At no point would I aspire to “explain” the situation of Polish judges exhaustively – this, naturally, would require addressing other perspectives, from political to ideological. This paper is going to be nothing but a theoretical expedition fuelled by Lacan’s thought.

## 2. Law and its *jouissance*

Before we proceed to analysing empirical examples, let us first conceptualise in general the conditions of subjectification within the law.

There is one particular moment in Lacan’s seminars in which he approaches the question of the actual law in its functions as part of the Symbolic. At the beginning of Seminar XX Lacan – making references to the place in which he had been holding his lectures for a couple of years, the Faculty of Law at Panthéon-Sorbonne – puts the actual law on the map of his concepts:

... au fond, le droit parle de ce dont je vais vous parler – la jouissance. (...) [J]’éclaircirai d’un mot le rapport du droit et de la jouissance. L’usufruit – c’est une notion de droit, n’est-ce pas ? – réunit en un mot ce que j’ai déjà évoqué dans mon séminaire sur l’éthique, à savoir la différence qu’il y a de l’utile à la jouissance. L’utile, ça sert à quoi ? C’est ce qui n’a jamais été bien défini en raison du respect prodigieux que, du fait du langage, l’être parlant a pour le moyen. L’usufruit veut dire qu’on peut jouir de ses moyens, mais qu’il ne faut pas les gaspiller. Quand on a l’usufruit d’un héritage, on peut en jouir à condition de ne pas trop en user. C’est bien là qu’est l’essence du droit – répartir, distribuer, rétribuer ce qu’il en est de la jouissance.

Qu’est-ce que la jouissance ? Elle se réduit ici à n’être qu’une instance négative. La jouissance, c’est ce qui ne sert à rien. (Lacan 1975, 10)

What Lacan outlines here is a complex relation between the law and *jouissance*. On the one hand, the former *speaks* about the latter. A certain instance speaking – truth, for example (Lacan 2006, 24) – is one of Lacan’s favourite conceptual gestures. In his mouth speaking always connotes internal expropriation and displacement of the speaking agent, unable to reveal the truth otherwise than by the impossibility of its position. If the law speaks about *jouissance*, it is because their relation is defined by their mutual inaccessibility. The law aims to curb and pacify *jouissance* by turning it into something positive: usufruct. This properly legal term connotes in Lacan first and foremost *preservation*. What is being used must be preserved; the boundaries of usage are determined by maintenance of what is used. In contrast, *jouissance* is a negative quality that breaks coherence and totality of preservation and usufruct. Moreover, whereas usufruct frames the used object in the relation of utility and purpose, *jouissance* does not serve anything. Impossible in its essence, being a short-circuit between two sides of the split Symbolic, it stands for destruction.

Consequently, the actual law speaks about *jouissance* by the way in which it tries to pacify and distribute it into usufruct. *Jouissance* would thus be located at the point that reveals the law as a fundamental fiction based on the task of preservation of its own structures and, amongst these, objects created by the law. Lacan notices: “je parle sans le savoir. Je parle avec mon corps, et ceci sans le savoir. Je dis donc toujours plus que je n’en sais” (Lacan 1975, 108). If this remark is juxtaposed with his earlier considerations on the

actual law, then we can claim that *the very corpus of the law speaks about jouissance that it both fears and pacifies*. Within the internal language of the law *jouissance* – as the category that connects both with the very foundations of the law and augurs its collapse – seems banned, hence the language of usufruct. But *jouissance* is spoken about by the whole position that the corpus of the law occupies.

In such a perspective these Lacanian remarks square well with Marxian critiques of the law. In *Debates on the Law on the Theft of Wood* Marx (1842) addresses the emergence of the modern law as aiming to produce universal legal acts. Their imminent injustice consists in converting effective politico-economic decisions into terminological and logical disputes. In this critique of legal formalism, the very act of *translation* is already an act of violence and *adikia*. As soon as the law establishes itself as a universal symbolic system, a decision on whether to punish a certain group of citizens for the actions they have traditionally been performing is veiled in its political character and begins to be perceived just as the “neutral” legal decision on how to “classify” a given case. In this respect, the universal law is masked class violence.

What Marx and Lacan would agree upon is that the contradictions (and, Marx would add, injustice) of the law cannot be seen within its language, but in its relation to the outside of the law. *Legal jouissance would be then nothing but the enticing vision of the law overcoming itself*. In this sense, the whole Marxist legacy of getting rid of the law – through “withering away of the state” or similar concepts (Pashukanis 2003, 61–62, Lenin 2015, 51) – would be equivalent to following the impossible *jouissance* of the law.

The task of turning *jouissance* into usufruct is crucial in capitalist economy. As noted by Pierre Bruno, capitalist discourses

instrumentaient l'égalité de droit entre individus pour accréditer l'idée d'une égalité potentielle au niveau de l'avoir qu'offrirait le capitalisme. (...) en annulant la barrière de la jouissance et en laissant entrevoir le mirage d'une consommation qui saturerait le désir (définition possible de la jouissance), le discours du capitaliste affirme une équation entre *a*, cet objet en plus, fondamentalement anidémique, et l'argent qui, lui, est par excellence comptabilisable. (Bruno 2010, 59)

The law would thus be a crucial part of the capitalist system that bars *jouissance* and creates the mirage of desire satiated by consumption. The legal illusion of equality criticised by Marxist scholars (Bodenheimer 1952, 66, Hunt 1976, 178–182, Boyd 2009, 594) is a fiction aiming at creation and maintenance of the vision of *jouissance*. In this sense, the vision of *homo iuridicus* that we outlined at the beginning after Edelman is a construct based on usufruct that – through its very position – speaks about *jouissance* around which it is created. Whereas *jouissance* means perishing, usufruct – and the law – promise preservation. Therefore it is of no accident that modern law is focused on biopolitical prolongation of life: death penalty is replaced by prison while human rights tend to make life a solid inviolable totality. The mirage of *jouissance* is to be located elsewhere, outside of the legal system, in the promise of capitalist consumption.

To sum up, this Lacanian interpretation of the actual law demonstrates the deep entanglement of *jouissance* and usufruct in the operation of the legal system. The law creates objects as taken out from the realm of *jouissance* and thrown into the condition of safe usability. In this sense, whatever it absorbs into its field of operation is exempted from the realm of life-or-death fight and thus *preserved by rendered usable*. Hence from the

point of view of the law its constructs are properly eternal: just as the unconscious, the law never disappears in its own logic (Tacik 2022, 28–36). It may perish, of course, but through a coup that comes from the outside. *Jouissance* in turn awaits the law outside of its field as both a permanent lure and an existential threat.

### 3. Subjectification of judges and the *jouissance* of the law

How do these features affect the position of subjects within the law? Self-evidently, judges occupy a complex position in the legal order: they are subjects who speak in the name of the law. Yet whereas the position of ordinary speakers of language is mystified and they not necessarily need to recognise themselves as empty subjects, the role of judges vis-à-vis the law clearly makes them empty subjects. They are instruments of the law, its instances put up by the law so that it gains a voice. Yet the decision-making of judges is mystified: through a very particular legal fiction it seems that the law, not them, takes the decision. The judicial subject is thus just an operational field in which the law activates its instances in order to take and issue the decision. What is perhaps most interesting is how the law produces subjectivity of judges in order to make this process possible. As we will see, the concept of judicial conscience is a unique device through which judges are subjectivised, while the fiction of the law deciding itself is upheld.

In order to explore these issues let us first enquire how the *jouissance* of the law translates into the role of judges. Just as in Lacanian psychoanalysis speaking human beings belong necessarily to the Big Other (see Lacan 2023, 136), so – and even more explicitly – judges belong to the law.<sup>6</sup> Nestor Braunstein notices à propos Lacanian *jouissance*:

Mon corps m'appartient-il ou est-il consacré à la jouissance de l'Autre, d'un Autre du signifiant et de la loi, qui me dépouille de cette propriété, laquelle ne peut être mienne que si je l'arrache à l'ambition et au caprice de l'Autre ? (...) D'où la dialectique et l'affrontement entre l'absolu de la jouissance et la relativisation des échanges. (Braunstein 2005, 13)

The subject is, in this perspective, necessarily expropriated by the law that upholds its position. If, as Braunstein re-claims after Lacan, “[i]l n’y a de jouissance que dans l’être qui parle et parce qu’il parle ; et il n’y a de parole qu’en rapport avec une jouissance qui, à son tour, n’existe que par la parole, tout en la limitant (Braunstein 2005, 7)” then speaking – a pivotal role of the judge within the system of the law – is tantamount to being created an object of the law’s *jouissance*.

Here we encounter a crucial binding that will open the exploration of judges’ subjectivity. The law has its *jouissance* barred, pacified and distributed into the realm of usufruct. At the same time, it appears to subjects speaking within it as the powerful master of *jouissance*. Just as in Lacan’s theory the lack in the subjects correlates with the lack in the Big Other (Lacan 2023, 21) – neither having the fullness of knowledge and both being tied to the other one – so is the *jouissance* of the law inaccessible both to the law and the subjects speaking in the name of the law. The law is created as a bar to

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<sup>6</sup> The peculiar case of President Schreber, analysed by generations of psychoanalysts after Freud, demonstrates the psychosis occurring when the judge becomes fully engulfed by the law as a result of taking the office. Nonetheless, addressing Schreber’s psychosis and its subsequent interpretations would greatly exceed the scope of this paper, so I leave it for another occasion.



jouissance and distributor of usufruct; but for the speaking subject it appears as the holder of jouissance. Thus the judges belong to the law in a particular form of reduced subjects whose subjectification assumes being entirely subjugated to the law's commands. Particularly in continental systems – especially those of a more positivist hue – the role of the judge is to remain a replaceable and predictable speaker of the law itself. In such a position, the judge is permanently addressed by demands of the law as her Big Other.

The judge is to follow the law and speak in the name of the law. Appearances of her own subjectivity are typically expected to be modest and reduced to minimum. The judge assumes the role of speaking as her own Big Other, bordering on the properly psychotic position. It is the utmost level of symbolic castration, through which the judge's own jouissance is renounced in the name of jouissance possessed and granted by the law (Braunstein 2005, 26). Thus whoever is subjectified as a judge, cannot experience jouissance within its symbolic function otherwise than in the law and through the law. Maintenance of the law as one's master and owner of jouissance is therefore a condition of upholding the role of the judicial subject.

The judge depends on the law as its subjectivising agent. Yet at the same time the law needs the judge to speak; the preservation of its pacified jouissance depends on judicial activity. That the law depends on judges in its very existential dimension demonstrates that the barring of the law's jouissance is precisely there, in the modest figure of the judge. It in this role the law confronts its reproducibility. In every judicial act the law finds itself maintained and renewed, but at the same time this act remains an existential threat. If jouissance of the law could be materialised, it would be nothing but a collapse of the law through the judge's refusal to acknowledge it. The impossible figure of a subject who is still subjectivised by a form of the symbolic but, at the same time, refuses to recognise its existence and follow its demands, is the full realisation of the jouissance of the law. In this perspective the day-to-day reproduction of the law through judicial decisions is the limited pleasure that the law obtains, but the pleasure that covers up the abyss of possible jouissance that can open at any moment.

Therefore despite being a subject of the law – and, upon closer scrutiny, precisely for this reason – the judge holds the very existence of the law in her hands. The judicial function, octroyed by the law, should be used in order to speak in the name of the law – and it usually is. Yet there is a tiny crack between these two instances, the one in which precisely the possibility of the law's jouissance appears. It is through judges that the law could fully collapse in jouissance. All other subjects of the law can just refuse to obey the law, violate it or disregard it; this in itself does not entail the collapse of the law, but at best its ineffectiveness or disappearance. The judge, however, as the subject of the law, holds the key for the law's possible collapse.

This thick entanglement of the judge's subjectivity and the existence of the law manifests itself clearly in the category of judicial conscience. First, it needs to be remarked that it is not omnipresent in legal systems; it seems to belong to particular areas of continental law rather than to the general conceptuality of the judicial function. Nonetheless, it is quite exemplary in demonstrating how the judge is subjectivised. In Polish law – to which I will refer in the following parts of the paper – judicial conscience plays a significant role (Zajadło 2017, 31–41). Upon being sworn in, every judge pledges to

“administer justice according to law, impartially and in compliance with [her] own conscience”.<sup>7</sup> Judicial conscience proves particularly instrumental when hard cases are at stake – for example, when the judge needs to decide about someone’s guilt in an unobvious criminal case.<sup>8</sup> The Polish Criminal Code demands that finding someone guilty must be supported in the judge’s own “conviction”. Both conscience and conviction are concepts that bridge the law and morality, entangling the judge’s own agency and subjectivity into the operation of the law. It is a place where the commanding instance of the law leaves the judge and deposes itself in her own hands. In cases where conscience is the ultimate decision-making faculty, the law does not give clear clues as to what decision needs to be taken. The most intimate part of judicial subjectivity is to intervene, supplementing for the impasse within the law and taking upon itself its own voice.

In Lacan conscience is a category understood primarily in opposition to the unconscious. Nonetheless, judicial conscience in the above-mentioned sense is the place where the two positions of the judge – as subject and object of the law – become confounded. Judicial conscience corresponds to the lack within the law. In Seminar X Lacan notices:

L’Autre intéresse mon désir dans la mesure de ce qui lui manque et qu’il ne sait pas. C’est au niveau de ce qui lui manque et qu’il ne sait pas que je suis intéressé de la façon la plus prégnante, parce qu’il n’y a pas pour moi d’autre détour à trouver ce qui me manque comme objet de mon désir. C’est pourquoi il n’y a pas pour moi, non seulement d’accès à mon désir, mais même de sustentation possible de mon désir qui ait référence à un objet quel qu’il soit, si ce n’est en le couplant, en le nouant avec ceci, le \$, qui exprime la nécessaire dépendance du sujet par rapport à l’Autre comme tel. (Lacan 2004, 31)

In this sense, judicial conscience is the place where the lack within the law and the lack within the judge as a subject of the law meet and overlap. It is for this reason that the decision that needs to be taken based in the last instance on judicial conscience is properly extra-legal, based on a cocktail of morality, conviction and political bias. Interestingly, this is an extra-legal zone at the very heart of the law. In other words, the law itself – analogously to the device of the state of exception in Agamben’s portrayal (Agamben 1998, 17–18; 2005, 1–2) – envisages a zone in one of the crucial areas of its operation that is decided by instances that exceed the legal system. Judicial conscience is a faculty that in Lacanian parlance remains extime: at the same time most intimate and radically exterior.<sup>9</sup> In this zone the judge leaves the safety net of the law dictating her decisions or, at least, giving them a neutral cover-up of legal argumentation. A decision based on conscience is properly groundless: in Lacanese, it is based on the master’s discourse rather than university’s discourse (Lacan 1991, 31–39). At the same time the system of the law is lost in its logic and needs to rely on a subjective decision of the judge. Crucially, however, this decision crosses the boundaries of individual arbitrary will:

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<sup>7</sup> Law on the Organisation of Ordinary Courts (*Prawo o ustroju sądów powszechnych*) OJ 2001, No. 98 at 1070, Art. 66.

<sup>8</sup> Polish Criminal Code (*Kodeks karny*) OJ 1997, No. 88 at 553, Art. 4 § 1.

<sup>9</sup> Lacan defines extimity as follows: “Il est ici à une place que nous pouvons désigner du terme d’extime, conjoignant l’intime à la radicale extériorité. C’est à savoir que c’est en tant que l’objet a est extime, et purement dans le rapport instauré de l’institution du sujet comme effet de signifiant, et comme par lui-même déterminant dans le champ de l’Autre une structure de bord” (Lacan 2006, 249).

while relying on her conscience, the judge stands in the place that supplements the law. Ultimately then the whole rational and complex system is bound to rely on an instance within subjectivity that it produces – an instance that exceeds and supplements the law itself.

To sum up, the process of subjectification of judges demonstrates – in line with Lacanian theory – the deep entanglement between the subject and the symbolic (the law) in which this is located. The judge is created as a speaker of the law strictly bound by its principles and permanently addressed by its demands. At the same time, however, the judge finds herself in a position that may reveal the correlation between the two lacks: in the law and in its subject. The concept of judicial conscience demonstrates one of these fragile zones in which the undecidability of the law finds its counterpart in the loneliness of the judicial subject who needs to decide beyond her argumentation or principles.

#### **4. Bifurcation of the legal system and the role of the judge**

Judicial conscience or its counterparts in other legal traditions occupy a special, although predictable place within the law. The lack within the law to which they correspond seems stable and settled. Nonetheless, there may be situations in which the legal system becomes manifestly ineffective and afflicted by a systemic lack due to extra-legal means introduced in order to colonise it. As I will demonstrate in this chapter, it is in such situations that the role of judges as subjects of the law becomes particularly crucial. The example I will use comes from an almost Frankensteinian laboratory of legality: the Polish populist state, which since 2015 transformed its legal system into an effectively bifurcated structure (cf. Dzięgielewska 2022, 94). Let us then begin with outlining its unique hybridity.

The transformations that happened in the previous decade in at least two European countries identified as populist until 2023 – Hungary and Poland – still seem to puzzle legal scholarship. Both states underwent a complex series of political and legal alterations that are usually grossly summarised with generic terms borrowed from political science, with “populism” being the notion of preference (Müller 2016, Mudde and Kaltwasser 2017, De Cleen and Stavrakakis 2017, 301, Pappas 2019, 70–74, Prendergast 2019, 246–252, Pin 2019, 227–230, Daly 2019a, 10–26, Bugarič 2019, 603–608). In this line, it might be claimed that the Hungarian and Polish reforms lead from liberalism to some form of authoritarianism (Ágh 2017, 7–32, Nagy 2017, 447–455, Kelemen 2017, 211–238, Gdula 2018, Sadurski 2020, 64), or, in the parlance of Viktor Orbán, from liberal democracy to “illiberal democracy” (Halmai 2014, 497–514, Palombella 2017, 5–19, Pech and Scheppele 2017, 4).

Yet upon closer scrutiny this characterisation proves very general and hardly explanatory, let alone able to grasp adequately significant differences between the two states. In a nutshell, Hungary underwent a transformation towards a semi-authoritarian state through largely legal means, anchored in the new constitution adopted in 2011 (Tóth 2012, Scheppele 2014, 111–124, 2018, 551–553, Magyar 2016, Bugarič 2019, 608). In contrast, the Polish populist coalition was not able to reach constitutional majority and instead settled for adopting a number of unconstitutional laws whose compliance with the Constitution was no longer practically assessable, because the ruling party intercepted the Constitutional Court and through its nominees began to carry out a

political agenda in the court.<sup>10</sup> As a result, the Hungarian regime remains “internally legal”, whereas the Polish one exhibits traits of intrinsic irreconcilable incoherences already in its internal dimension.

Both regimes, however, clash with EU norms and norms of international origin – especially the European Convention on Human Rights. Hungary and Poland are still members of the European Union. Neither have they withdrawn from the Council of Europe and, consequently, denounced the ECHR, although the Polish Constitutional Court found – in a move of retaliation against the ECtHR – that Art. 6 of the Convention, used by the Strasbourg Court to denounce the demise of the Polish judiciary, was allegedly incompliant with the ECHR.<sup>11</sup> As corroborated by numerous rulings of the CJEU<sup>12</sup> and the ECtHR,<sup>13</sup> the legal systems of both countries are “externally illegal”, that is, some of their crucial norms, especially those pertaining to the organisation of the judiciary, clash with norms of external origin. Still, the Constitutional Court engages in a legal war with the European courts, trying to shield the Polish legal order from the effects of their scrutiny (see Dziegielewska 2022, 97–98; Nelson 2023, 417–439) and playing the controversial card of constitutional identity (Sajo 2019, 3263, Avbelj 2020, 1025–1027, Scholtes 2021, 535–536, 545, Baudoin 2022, 25–34).

Gábor Halmai dubbed this feature “hybridity” (2014, 512), as these systems mix liberal and illiberal norms, being still members of the EU, parties to the ECHR and yet building some form of non-liberal democracies. Perhaps “hybridity” is too gentle a term, especially in relation to the Polish system: what it exhibits are proper traits of *monstrosity*, in which heterogenous elements co-exist and clash within the very same legal system. Consequently, its form and self-identification become disfigured and no longer match the actual functioning of the legal system. Elements of opposing legal traditions become mixed in one and the same system which for this reason loses its coherence and self-defining features.

In contrast to Hungarian populism, illiberal Poland represents a very particular kind of populist legal system which arose due to a specific conjecture in which the far right-wing coalition came to power – with properly revolutionary attempts, but without a constitutional majority that would be required to carry them out. It did not, however, resign from its programme: what was needed to this purpose was an effective dismantlement of the constitution-based rule of law. By this observation I abstract from the real politico-economic role of the rule of law in Poland that has been for years criticised by critical legal theory.<sup>14</sup>

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<sup>10</sup> A good overview of the key developments in the Polish constitutional crisis can be found in: Koncewicz 2018, 116-173, Sadurski 2019a, 62-65; 2019b, 63-84; 2020, 63-64; Calleros 2020, 75-83, Boryslavska and Granat 2021, 14-16.

<sup>11</sup> Judgment of the Constitutional Court K 7/21 (10 Mar 2022).

<sup>12</sup> The crucial rulings of the CJEU in this respect are the following: *EC v. Poland* C-619/18 (24 Jun 2019) ECLI:EU:C:2019:531; *Kuba v. KRS* (19 Nov 2019), C-585/18, C-624/18 and C-625/18 ECLI:EU:C:2019:982; *Żurek* (6 Oct 2021) C-487/19 (6 Oct 2021) ECLI:EU:C:2021:798; *EC v. Poland* (5 Jun 2023) C-204/21, ECLI:EU:C:2023:442.

<sup>13</sup> See for example ECtHR judgments: *Reczkowicz v. Poland* (22 Jul 2021), App. no. 43447/19; *Advance Pharma SP. z o.o v. Poland* (3 Feb 2022), App. no. 1469/20; *Grzęda v. Poland* (15 Mar 2022), App. no. 43572/18.

<sup>14</sup> For an overview of this critique see the following special issue: Mańko 2019.

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This process, which I once dubbed “a revolution without a revolution” (Tacik 2021, 275–300), had two fundamental dimensions. First, independent institutions of control were intercepted – with courts at the centre of populist onslaught (Scholtes 2019, 353–354). Most crucially, the Law and Justice gained control over the Constitutional Court, thereby disabling the possibility of declaring laws unconstitutional against its will. The rest of the judiciary was next in the line: in a long meandric process, marked by numerous makeshift measures introduced in order to nominate political candidates or to produce a chilling effect for the already sitting judges, the ruling coalition gained considerable sway over the judiciary (Śledzińska-Simon 2018, 1839–1869; Filipek 2018, 177–196). As of 2023, the fight in the field of the judiciary has not been entirely won by the ruling majority, even though new nominees already make significant part of courts of all instances. In the Supreme Court, they already dominate.

Second, the far-right coalition began to rule through adopting unconstitutional laws. Once step one was complete, especially in regard to the Constitutional Court, it became possible to effectively change the country’s regime through ordinary laws that the CC would no longer assess objectively (Scheppele 2018, 561–563). The constitution formally remained – and still remains – in force, unamended; yet it lost its effectiveness in eliminating from the legal system norms that are incompatible with it. Nominally, the country is still a liberal democracy, but its often targeted ordinary laws extend the scope of power of the executive and the legislative, thereby marking an authoritarian drift (Tóth 2019, 50–52, Sadurski 2020, 64–68) often addressed through the category of “backsliding” (Daly 2019b, 758–759). Crucial constitutional norms are thus both valid and suspended, since their applicability is shattered by sovereign decisions of law-applying institutions that prefer ordinary laws instead of constitutional ones. In addition, a whole “constitutional counter-narrative” was created (Dzięgielewska 2022, 93), by which the ruling populists aimed to bend the Constitution to their goals. As a result, the system began to evolve in the direction that Kim Lane Scheppele dubbed “autocratic legalism” (2018, 548).

This stupefying, “hybrid” form of legality appears even more complex if we take into account that Poland – being still an EU country and a party to ECHR – is bound to respect norms of international or European origin that guarantee some crucial elements of liberal democracy, such as the independent judiciary. That opens up a critical abyss of contradictions at the heart of the legal system: whereas EU law and the ECHR remain applicable, they clash with unconstitutional and non-liberal norms of ordinary laws. Since the Constitutional Court and much of the domestic judiciary are controlled by the ruling majority, this incompliance can be declared only by international institutions, such as the CJEU and the ECtHR. Naturally, the history of their involvement in the battle for the Polish independent judiciary is a tale in itself, which we cannot reiterate here for the sake of brevity. Suffice it to say, however, that their rulings – apart from pecuniary fares and compensations – are addressed also (or, in case of EU law, chiefly) at the domestic judiciary which is supposed to implement them. And here we are back to square one: the domestic judiciary, being under the assault of the ruling majority, might be structurally unable to do it. As a consequence, two different sets of legal norms – to simplify a bit, the European-constitutional one and the one based on sub-constitutional laws – compete with each other within one legal system.

Such a legal system – aporetic as it appears both in its ideological dimension and practical functioning – is marked by unique features (see also Landau 2018, 527–537). First, the populists in power rightly identified that the role of determining of what the law says might be equally, if not less important than having the influence over who applies the law. The 1997 liberal Constitution may still be in force and, as such, determine unconstitutionality of many statutory laws adopted since 2015. This is, however, an “idealist” legal order to which some judges may pledge loyalty, but it is not unproblematically applicable. A parallel system, in which unconstitutional laws are applied and constitutional norms at best ignored has been constructed. It has its pillars in the intercepted institutions. Judges and illegal nominees with whom the Constitutional Court has been packed since 2015 recognise this other legal system. As a consequence, Polish courts found themselves occupying precisely the battlefield between two normative systems that compete within the Polish legal area. Each time a court decides on whether either a European-constitutional or a domestic-unconstitutional norm applies to a given case, it exercises some form of sovereignty – by taking an effectively political decision on which the very existence of the legal depends. *Whenever the unconstitutional laws are at stake, the very content of the law has become uncertain and dependent on the decision of the judge.* Such a situation obviously eats away at legal certainty. The parties need first of all to guess the political orientation of a judge in order to make their expectations about which law this judge is going to apply. They can never be sure, however, which part of the bifurcated legal system shall find application to their case.

Secondly, this system runs counter to the popular conviction that populist governments turn the law into their “instrument” – a mere tool in wielding power in abstraction from constitutional values (Halmai 2019, 259). The Polish legal system has become an overloaded set of norms whose applicability is always uncertain. The coalition led by the Law and Justice thus constructed an unwieldy form of legality that eats away at legal certainty and is unable to deliver their political goals. Even if the populists adopt legal provisions to paralyse courts and other institutions, the overall effects for a complex legal system are much more multi-faceted than it could seem at first sight. In other words, a legal order of an EU country which is also party to the ECHR cannot be simply turned into a set of “tools” for the ruling majority. Every such attempt produces unexpected and undesirable effects that trouble the simplistic vision of the “means to an end” relation. In this manner the position of the ruling majority is always contested and confronted with an excess inherent in law, to which it reacts with further oppressive measures without being able to stabilise its identity.

A very representative example of this position the law through which the ruling majority aimed to curb the excess of legality by subjugating judges to their rule. Dubbed “muzzle law”,<sup>15</sup> it had its roots in the problem that the populist majority encountered when it attempted to gain control over the Polish judiciary. The first step of this process consisted in intercepting the National Council of the Judiciary (NCJ)—a constitutional organ that opines and proposes candidates for judges, subsequently nominated by the President of the Republic. The Polish constitution (Art. 187 (1)) stipulates that the majority of its

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<sup>15</sup> *Ustawa z dnia 20 grudnia 2019 r. o zmianie ustawy—Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw*, OJ 2020 at 190.

members (15 out of 24) are judges, but does not explicitly establish how they are elected. Previously these 15 judges were elected by judges themselves, as a form of their self-government (Śledzińska-Simon 2018, 1839–1851). By adopting the new Law on the National Council of the Judiciary<sup>16</sup> the competence to elect 15 members of the Council was transferred to the lower chamber of the Polish parliament. As a result, the elected judges proved loyal to the ruling majority; since April 2018 they began to nominate new judges of common courts. A special Disciplinary chamber was established within the Supreme Court; the NCJ nominated there the staunchest supporters of the ruling majority.

As a reaction, the Supreme Court requested a preliminary ruling of the Court of Justice of the EU asking whether the new Law on the NCJ complies with EU law. The Polish courts are also courts of EU law and, as a consequence, their independence is not solely a domestic matter. For this reason the CJEU in its preliminary ruling from 19 November 2019<sup>17</sup> declared that Art. 47 of the Charter of Fundamental Rights

must be interpreted as precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal, within the meaning of the former provisions. That is the case where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. It is for the referring court to determine, in the light of all the relevant factors established before it, whether that applies to a court such as the Disciplinary Chamber of the *Sąd Najwyższy*. (Supreme Court)

If that is the case, the principle of the primacy of EU law must be interpreted as requiring the referring court to disapply the provision of national law which reserves jurisdiction to hear and rule on the cases in the main proceedings to the abovementioned chamber, so that those cases may be examined by a court which meets the abovementioned requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field.<sup>18</sup>

Consequently, EU law—benefitting from the principle of primacy vis-à-vis domestic law<sup>19</sup>—allowed the Supreme Court to investigate whether particular judges appointed after April 2018 were truly independent. If not, EU law—due to the principle of primacy—gave the Supreme Court a mandate to disapply the unconstitutional provisions of domestic legislation. Normally, supremacy of the Constitution and an action of the Constitutional Court should pose an obstacle to this “reform” of the NCJ. But after the CC was intercepted by the ruling majority, this was no longer an option

<sup>16</sup> *Ustawa z dnia 8 grudnia 2017 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw* [Law Amending the Law on the National Council of the Judiciary and Some Other Laws], 8.12.2017, O.J. 2018, at 3.

<sup>17</sup> CJEU *Kuba v. KRS*.

<sup>18</sup> *Ibid.*, § 172.

<sup>19</sup> Judgment of the Court of Justice of the European Communities in *Costa v. ENEL* (15 Jul 1964) 6/64 ECLI:EU:C:1964:66.

and the Supreme Court needed to defend the independence of the judiciary with a reference to EU law.

The above-mentioned CJEU's judgment disconcerted the populist majority, as it allowed to undermine the position of each judge nominated after April 2018. Consequently, all the measures adopted in violation of the Constitution, principles of EU law and Art. 6(1) ECHR could be questioned. Here the populist strategy of re-defining the state's regime with subconstitutional laws encountered an obstacle posed by Poland's being part of the EU. Measures adopted against the Constitution or EU law—despite the interception of the CC—provoked unexpected consequences in a complex legal system of an EU member state.

The populist majority reacted with preparing the aforementioned muzzle law. Its key provision is Art. 2(6), can be summarised as follows: (1) it is enough for a judge of the Supreme Court to be sworn in by the President, regardless of how he/she was appointed, (2) the Supreme Court cannot control the legality of other courts and tribunals, (3) it is inadmissible for the Supreme Court or any other organ of the state to investigate whether any judge was appointed legally. Judges who do not respect this provision run the risk of disciplinary proceedings. Despite a veto from the opposition-controlled Senate, a negative opinion of the Venice Commission (CDL-PI(2020)002-e), and mass protests the muzzle law was nonetheless adopted.

The muzzle law confronted every Polish judge with a dilemma. They can either follow the legality adopted by the populists – and thus violate the Constitution, EU law and international law – or they can invoke the Constitution as well as EU law in order to disregard unconstitutional norms. The second path involves disciplinary proceedings and being barred from the judicial profession. It is precisely in this bifurcation that the new role of judicial subjectivity opens up. It can be fruitfully analysed through the lens of the category of disobedience, harking back to Thoreau, as in Pilich's interesting account (2021, 600–607), but Lacan's *Antigone* offers more theoretical conclusions.

## 5. The judge as an Antigone

A continental judge is trained to be a humble subject who – in all her modesty – speaks in the name of the law. But what happens if the law is no longer a coherent system that can be spoken for? What is at stake is not a tiny crack in the system, a contradiction or a tension that can be solved through means of legal interpretation. If legality becomes bifurcated, then the judge assumes a transient role of the sovereign deciding on which legal system is effectively applicable. At the same time this decision affects the judge's subjective position by the risk of disciplinary proceedings and being expelled from the law. The speaker, if retaining her loyalty to the law, runs the risk of being ejected from it. This is a unique position that on the one hand invokes the Lacanian figure of *Antigone* and, on the other hand, preserves the unique relation of the judge vis-à-vis the law and elevates it to an almost inhuman dimension.

While analysing *Antigone's* unconditional loyalty to divine law Lacan pointed out that she turned into “an inhuman being”; *Antigone* “*sorte ainsi des limites humaines*”, notes the psychoanalyst (Lacan 1986, 304). There is indeed something inhuman in adherence to the law that transcends the earthly one. The essence of *Antigone's* position relies in her unconditional following of desire (Lacan 1986, 290): instead of settling for the



principles of pleasure and reality, she reveals that *desire transcends the established order*. By following it – and risking death administered by earthly law – she sees herself as already dead and pursuing death (Lacan 1986, 327). Desire is its own law that traverses the law of the country. In this sense, desire is unearthly: what it assumes is clinging to the law that exists transcendentally, with the risk of punishment that becomes the threshold of loyalty towards it. The real law begins beyond the earthly one, precisely where the latter establishes its firm boundaries.

Translating these considerations onto the subjective position of the judge in a bifurcated system, it seems crucial to notice that what she needs to choose not only to which law she is loyal, but which legal system *effectively applies*. This is a moment of deepest personal engagement, self-recognition and self-identification as the agent of the law that *should be*. Formal validity is eternal in itself; no earthly law prohibiting, deforming or obfuscating the correct legal order can eat away at its force. In a bifurcated system such as the Polish one it is not enough to claim that the judge chooses which law is valid; by this choice she defines herself through allegiance to a particular order. Naturally, the price paid for adherence to the constitutional legal system is not as high as in the case of Antigone – yet it is equivalent insofar as the judge risks being evinced from the law which, in this profession, is tantamount to civil death. Still, there have been many Polish judges who proved willing to pay this price. A judge who risks her own position as speaker of the law in order to act for the law that is formally valid, but no longer applicable, assumes an unearthly role. As Žižek rightly notices, Antigone's act splits her own subjectivity and will – in this sense, it appears unearthly to herself (1997, 223). Antigone's role acquires a peculiar materiality, as she falls out of the Symbolic (Žižek 2000, 160–161). Indeed, if the validity of the law depends on judicial subjectivity, then it must be anchored in an extra-legal, unearthly material substratum.

Once again the role of judicial conscience comes here to the fore. Being a place in which – as we noticed earlier – the lack in the law corresponds to the lack in the judge, it is a point where *the constitutional law can preserve its validity*. If in ordinary times judicial conscience is a category that rarely comes into play, in exceptional bifurcated system it becomes the focal point where the fragility of undermined constitutional law corresponds to the frailty of the judicial subject who can lose her position for being loyal to the valid law. The two lacks are supplemented only as long as they correspond to each other: constitutional law can have its validity recognized only insofar as the judge risks her own position. If she makes a compromise with the unconstitutional legal order in order to protect herself, the constitutional law loses one of footholds of its recognition. In this point the *jouissance* of the constitutional legal order reaches its proper threshold: properly constitutional legal system can be applied only insofar as the judge who does it is going to lose her position. Thus the law demands the highest price from the judge and, at the same time, maintains itself in a place that borders on its own impossibility. Antigone becomes a position in the law itself, the subjective locus on which the existence of the legal order depends (see Swiffen 2010, 50–51). At this extreme point the law can no longer manage to sustain itself by managing and regulating its own violations, which Žižek holds for the real power of the law (2022, 162–163). The law does not supplement itself with any higher authority, because precisely here the gap in its Big Other corresponds to the abyss of judicial subjectivity.

Consequently, the borderline situation in which the Polish legal system found itself – as a result of a very peculiar path of a hybrid transformation to illiberalism – brings out the link between the law and judicial subjectivity sealed by *jouissance*. Once the Polish law was bifurcated into its constitutional and unconstitutional branches, the preservation of the former depends entirely on judges.<sup>20</sup> In this sense, constitutional law deposes itself in their hands. At the same time, its preservation depends on the self-identification of judges with the valid legal order against the unconstitutional one – with the risk of being evinced from the legal apparatus of the state. It is properly in this state that the impossible of the law's *jouissance* becomes palpably real and materialised in the figure of its subject, the judge.

## 6. Conclusions

The subjectivity of the judicial function is particularly complex. A subject of the law, but a peculiar one – speaking in the name of the law – is forced to occupy a modest position permanently bombarded by the demands of the Big Other. Yet at the same time the judge holds in her hands the *jouissance* of the law: it is the judge that can ultimately – with the effect of recognition within the Symbolic – acknowledge or refused validity of the law. It is in the judge's subjectivity that the law can be recreated or can collapse. The peculiar link between the judge and her master is located in judicial conscience: the place where the subject's structural emptiness corresponds to the lack within the law. It is through judicial conscience that the judge can make the final act of application of the law to a difficult case. Thus it acts as the final suture between the law and reality to which it is to apply.

The peculiarity of judicial subjectivity is most visible when the legal system undergoes a transformation. The case of Polish legality – since 2015 thrown into the condition of bifurcation, with two parallel systems competing for recognition – demonstrates to which extent the law is dependent on the subject that it maintains. If a judge finds herself thrown into the situation of deciding which of the two competing systems is to be applied – with the simultaneous threat of disciplinary proceedings that may end her judicial career – his conscience becomes a particular nexus in which the properly constitutional law maintains itself at the price of eliminating its subject. The law speaks about *jouissance*, claims Lacan. Yet its true *jouissance* manifests itself when the subject from whom the maintenance is demanded *disappears by declaring the law valid*. Such a “judicial Antigone” is both the utmost hero and the utmost victim of the law.

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<sup>20</sup> On the Polish courts engaging in judicial constitutional review in lieu of the intercepted Constitutional Court after 2016 see Radziejewicz 2022, 38-43.

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