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Legal Survivals and the Resilience of Juridical Form

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Abstract

Legal institutions are created at a certain point in time, intended to be applied to 'life' as it is perceived at the specific moment when they are elaborated and cast into legal form. As a result, legal institutions always already refer, in their original design, to a certain normality, but between the moment of creation of a legal institution and its application to future situations there is always a certain time lag. Some legal institutions—referred to in the paper as "legal survivals" –outlive the epoch in which they were created and continue their legal life long after the conditions which lead to their creation had, in the meantime, disappeared. The aim of this paper is to put forward an archaeologico–genealogical perspective on legal survivals not only as a method of studying continuity of law and the resilience of juridical form, but also as a line of enquiry capable of enriching our understanding of the juridical in its relation to the changing circumstances of life. The study of legal survivals allows to combine three aspects of legal continuity: firstly, the continued use of the same legal forms in different circumstances and for different purposes, whereby the same juridical form is filled with different socio-economic substance; secondly, the gradual adaptation of legal forms to new circumstances; thirdly, the emergence of new legal forms in close reference to old ones. The study of legal survivals allows to address the foundations of law's claims to authority, based on stability and predictability of juridical forms. It also reveals the complex and multilayered nature of legal form which effectively has the structure of a palimpsest.

Keywords Legal form · Continuity of law · Legal survivals · Legal tradition · Legal innovation · Legal change · Legal pluralism

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> …the exception explains the universal and itself, and if one really wants to study the universal, one only needs to look around for a real exception; it discloses everything far more clearly than the universal itself.
>
> --- *Søren Kierkegaard*[1]
>
> Legal rules, once created, live on. (…) One of the most striking features of legal rules is their power of survival. Many, many rules endure for centuries with only minor modifications.
>
> --- Alan Watson[2]

Introduction

Legal institutions[3] are created at a certain point in time, intended to be applied to 'life' as it is perceived (by the legislators or judges or jurisprudents who create them) at the specific time when they are elaborated and cast into legal form.[4] As a result, legal institutions always already refer, in their original design, to a certain normality (Fusco 2023, p. 91), to what Schmitt referred to as the 'normal situation' (Schmitt 2005, p. 12). But (with the notable exception of the first application of a new judge-made doctrine in common law), between the moment of creation of a legal institution and its application to future situations there is always a certain time lag. It may be shorter or longer, and it may sometimes involve such a profound change of the normality of life that the legal form, dating back from before such a change, may seem patently out of joint with the new times.

However, some legal institutions—which I propose to call 'legal survivals'[5]—prove to be so exceptionally durable that they outlive the epoch in which they were created and continue their legal life long after the conditions which lead to their creation had, in the meantime, disappeared, testifying to the resilience[6] of juridical form. Being a flagrant exception to law's adaptation to changing circumstances (Táíwò 1996, p. 152) and its general discontinuity after revolutions (Kelsen 1997, p. 209), legal survivals—placed, as they are, at the interstices of law's continuity and discontinuity—are a properly 'borderline concept', i.e. 'one pertaining to the outermost sphere' (Schmitt 2005, p. 5) of the juridical form. It is due to this *intensity* with which legal survivals embody law's features, as well as the fact that they

[1] Kierkegaard (1983, p. 227), altered after Agamben (2002, p. 48).

[2] Watson (2001, p. 8).

[3] I define the notion in Sect. 3.

[4] I define the notions of 'legal form' and 'juridical form' in Sect. 2.

[5] The *term* 'survival' is taken from Althusser (2005, p. 114) and was apparently first deployed to denote 'legal rules [that] still exist even though they were first established under a former model of production' by Hugh Collins (1980, p. 52). The *concept* of a legal survival is much older, and can be traced (at least) back to Renner's 1929 monograph (Renner 1976).

[6] Understood as the capacity to endure despite unfavourable external circumstances. The concept has made a fantastic journey from physics, through the social sciences to legal history. For an applicaton in juridical science, see e.g. Borisova (2017, pp. 112–113) with further references.

represent a borderline case, rather than the routine,[7] that their study can illuminate our understanding of the juridical phenomenon more generally and the resilience of legal forms in particular. If, following Agamben (2002, p. 50), we concede that 'philosophy can be defined as the world seen from an extreme situation that has become the rule', legal survivals are a privileged gate to the philosophy of law.

The aim of this paper is to put forward an archaeologico–genealogical[8] perspective on legal survivals not only as a method of studying continuity of law and the resilience of juridical form, but also as a line of enquiry capable of enriching our understanding of the juridical in its relation to the changing circumstances of life. I start the discussion by putting forward my understanding of law-as-form, before introducing the concept of a legal survival. Following that, a provide a preliminary mapping of examples of legal survivals, geared towards establishing a typology. This allows me to formulate seven working hypotheses on the implications of legal survivals for the philosophy of law. I conclude by highlighting the importance of the concept of legal survivals not only for the understanding of patterns of legal development, but also for analysing its claims to legitimacy and authority, and exploring its profoundly palimpsestic nature, where various layers of traditions coincide and overlap.

The concept of a 'legal survival' put forward in this paper provides an innovative account about legal continuity and legal change thanks to its focus on individual legal institutions (sets of legal rules), rather than continuity or discontinuity of the law and legal culture in general, which are much broader phenomena (Mańko 2016a). Thus, in contrast to the concept of a 'legal tradition' (as a token of continuity) or 'legal change' (as a toke of discontinuity), the concept of legal survivals enables to 'zoom in' on the lowest functional level of the law, and therefore to switch perspective from a global view of the legal system to a more detailed one (Mańko 2015a, pp. 18–19). The concept of a legal survival does not put into question the utility of other concepts, but is intended to supplement them. In this sense, the 'legal survival' is, for legal history and sociology of law, comparable to a 'legal transfer' (or 'legal transplant') in comparative law and comparative legal history, precisely in its move away from broad and overarching accounts ('legal tradition', 'reception of

[7] Schmitt (2005, p. 5). Cf. Agamben (2002, p. 49).

[8] Drawing loosely on Foucault (2022, pp. 155–156), I understand 'archeological' research as that which allows to displace the consciousness of the agents (such as legislators or judges) and focus, instead, on the unconscious operation of a discursive formation (such that of the juridical Likewise drawing on Foucault (2020), I understand 'genealogical' research as that which, drawing on philosophical archaeology, emphasises the contingency in development (for instance, of legal form) rather than contenting itself with a finalist vision of *ex post* rationalisation. Giorgio Agamben consciously styles his work as archeological, understanding this approach as a 'science of signatures [*segnature*]' which allows to 'follow the signatures that displace the concepts and orient their interpretation towards a different field' (Agamben 2011, p. 112). The goal of Agambenian archaeological research 'is to liberate something that rested covered and crystallised in the forms of our thought' and to 'investigate and destabilise some of the original categorial structures of our form of life' (Fusco 2023, p. vii, 5). In Agamben's work, the archeological method shows how concepts moved between various discourses, e.g. from law to theology, or from theology to political theory. The concepts of archaeology and genealogy apply to the study of legal survivals *mutatis mutandis*—understood as a counter-hegemonic enquiry into legal forms which aims at disclosing their obscure origins and cotingency.

law', 'legal continuity') towards the specific conditions of possibility of transplantation, adaptation and survival of individual legal institutions. In this way, the concept of a legal survival provides the tools to study legal continuity in the context of social change in a way which opens up the research perspective towards extra-legal phenomena of an economic, political, ideological, and cultural nature (Mańko 2015b, pp. 205–207).

In building an account of legal survivals as a new theoretical concept the paper blends, in a deliberately eclectic manner, a variety of intellectual traditions, including Marxist legal theory, comparative law theory, legal history, sociology of, as well as general jurisprudence, including the philosophical insights of the Schmittian-Agambenian tradition. In drawing from a variety of perspectives, my goal was to combine different vantage points on the same socio-legal phenomenon in the hope not only of putting forward an innovative concept, but also considering its broader implications for general jurisprudence.

Law-as-Form

This paper adopts a law-as-form approach, whereby law is treated as a 'form' in which other social relationships (economic, political, personal, etc.) are expressed (Pashukanis 1983; Balbus 1977; Mańko 2017, 2020a, pp. 23–30). Echoing the fundamental distinction[9] between the juridical (order) in general—i.e. the '*ius*' (*Recht*, *diritto*, *pravo*)—on one hand, and concretely existing positive law—the '*lex*' (*Gesetz*, *legge*, *zakon*),[10]—on the other hand, I likewise differentiate between 'juridical form' as form of the *ius* and 'legal form' as form of the *lex*. Thus, by 'juridical form' I mean the form of law *generally* (as a historically overarching phenomenon), and by 'legal form' I mean specific forms of the positive law, such as legal rules, principles, institutions and so forth, expressed in codes, statutes, precedents, scholarly treatises etc., comprising not only the bare texts of law (*lex lata*), but also the intepretation of those texts (*lex interpretata*), and the actual law applied by the courts (*lex interpretata*).[11] In all cases the notion of 'form' is conceived of as pointing (by opposition) to the 'substance' of socio-econonomic, political, ideological etc. life which the juridical/legal form is cast upon.

Although the contemporary tradition of looking at the juridical in terms of the notion of forms is usually associated with Marxism,[12] in fact thinking of law-as-form

[9] 'Fundamental' for the Western legal tradition, drawing upon Roman law where the concept of *ius* as existing independently of concrete *leges* was first devised. The Greeks, with their *nomos*, did not know such a distinction. Cf. Schiavone (2012, p. 202).

[10] Cf. Hegel (1970, p. 373) (§ 219): 'Das Recht, in der Form des Gesetzes in das Dasein getreten, ist für sich…'.

[11] This tripartite distinction is loosely inspired by Jerzy Wróblewski's distinction into enacted law, its logical and intepretive consequences, and the operative law as applied by courts (Wróblewski 1992, pp. 76–77, 84).

[12] One can speculate that Marx took this approach from Hegel's *Principles of the Philosophy of Law*, where the notion of form is used on many occasions both to *ius* and *lex*.

is deeply rooted in the Western legal tradition stemming from Roman law where the juridical form was born (Schiavone 2012, pp. 202–203). Historically speaking, the *concrete* legal forms (a concrete transaction, expressed in a ritual) predate the *abstract* legal forms which constitute the proper matter of the juridical order in its Western sense (Pashukanis 1983, pp. 88–89; Zartaloudis 2018, p. xviii). The birth of law is perhaps the moment in which the legal form becomes distinguishable from the life it seeks to express and regulate (Zartaloudis 2018, p. xxxviii). The linkage between a concrete legal form—a will, a contract, a judgment—on one hand, and abstract legal form—the legal rules on wills, the contract-type in a civil code, the rules on judgments in a code of civil procedure—on the other hand, has something deeply ritualistic about it; by following the precepts of abstract legal form, legal subjects are 'allowed … a total participation in the sphere of the sacred and the magical' (Schiavone 2012, p. 75), the sphere of the law. As Pashukanis correctly emphasised, the grounding principle of juridical form is that of *abstraction*: just like labour and physical objects are abstracted as commodities, so human being are abstracted as 'legal subjects', human relations as 'legal relationships' and 'subjective rights', and all physical objects become 'things' (*res*) as objects of rights (Pashukanis 1983, pp. 43, 57, 64, 99–100, 113–114, 118, 120–122, 176; cf. Arthur 1983, pp. 14–15, 23–24). Apart from abstraction, the second principle of juridical form is that of *reductionist selectivity*: out of the richness of real life, only some facts or aspects, sometimes unexpectable for the layman, count from the point of view of the law (Collins 2003, pp. 15–16; Mańko 2020a, pp. 29–30).

Importantly, from the internal point of view of participants of the juristic community, juridical form and legal forms (both abstract and concrete ones) are endowed with existence—for jurists, they are 'actual beings' (Savigny 1831, p. 45) 'real entities endowed with life of their own and an inescapable objectivity, which legal knowledge limit[s] itself to mirroring' (Schiavone 2012, p. 202). The jurist's inquiry is therefore ontological (Kozak 2010a, p. 84; cf. Mańko 2020b, p. 364). Of course, it is a properly Platonic existence in the world of abstract ideas—forms (Schiavone 2012, p. 202). 'Lawyers—as Artur Kozak wrote—who have at their disposal esoteric knowledge may […] represent the social existence of law' which occurs 'through the construction of a specific institutional world, the structure of objects whose reality is obvious and available only to subjects shaped in a specific regime of legal education' (Kozak 2002, p. 140). This transforms law into what Kozak called 'a secular religion', where only a believer in law's dogmas can be a genuine jurist (Kozak 2010b, p. 68).

Furthermore, the quality of law as form is important for its own legitimacy and social authority. In fact, the law's justification for its own existence is its difference from all other discourses, lies precisely in the fact that it assumes *juridical form* as a specific way of interpreting the world, and not merely in its inherent prescriptiveness or normativity, which are shared with other discourses, notably ethics, religion, custom, etc. (Mańko 2020b, pp. 348–349). The specificity of the juridical lies, therefore, 'in the formal aspect of law, whereas aspects related to its content (matter) have a secondary character' (Kozak 2002, pp. 158–160). As a consequence, what the law has to offer to society is its reliance on 'purely formal values' (Kozak 2010a, p. 155) i.e. precisely the legal form as such. Therefore, law's formality is not only the basis

of its autonomy, but also the basis of its claims for political legitimacy (Pichlak 2012, p. 68). In this context, the stability of legal forms certainly contributes to the legitimacy and social authority of juridical form as such.

Finally, a word about the relationship of law-as-form to Marx's famous spatial metaphor of 'base' and 'superstructure' (Marx 1903, p. 12), especially in the context of Pashukanis's statement that legal form 'has a parallel, real history which unfolds not as a set of ideas, but as a specific set of relations which people enter into … because the conditions of production compel them to do so' (Pashukanis 1983, p. 68). My position on this vexed question relies on the tripartite division into juridical form, abstract legal forms and concrete legal forms, on one hand, and the substance (content) with which those forms are filled, on the other. The 'real history' that Pashukanis hints at is neither the history of juridical form or that of of abstract legal forms (such as legal institutions found in our civil codes) but rather the history of the linkage between concrete legal forms (such as concrete labour contracts) and the socio-economic content (substance) those concrete legal forms are filled with. In fact, any approach to the question whether law belongs to the base or to the superstructure (if at all considered valid and in any meaningful way useful) needs to take into account law's nature as form, which opposes it, for instance, to politics (Mańko 2020a, pp. 30–36). The fact that, ontologically speaking, law *is* form and *nothing but* form, profoundly impacts its relation to any economic or other content it expresses. As Head lucidly summarized the views of Marx:

> Form is not merely the outward expression of content. On the contrary, once content takes a certain form, the form can impart on the content definite qualities ansd characteristis. It is through form that content exists an develops. (Head 2008, p. 171)

Pashukanis's remark on the 'real' life must be, therefore, put into the context of this dialectical relation between form and substance which overdetermines the relation between base and superstructure, as far as the juridical is concerned.

Legal Survival: A Legal Transplant Travelling in Time

Legal Survivals as Legal Forms

Legal forms come in various sizes and shapes, from its smallest units (i.e. Sacco's 'legal formants' [Sacco 1991], or the more traditional 'legal provisions' as units of text, and 'legal norms' deducted from them [Bogucki 2020, p. 618]) to entire legal systems (e.g. the form of classical Roman law, or nineteenth century French law). In between these two, which we may term the 'micro legal form' and the 'macro legal form', lies a whole set of 'mezo legal forms', most notably legal institutions (e.g. the contract of sale, the right of usufruct, the institution of marriage), which are grouped in branches (e.g. law of obligations, law of property, family law) which in turn are part of entire sub-systems of positive law (e.g. private law, criminal law, administrative law).

In looking for an appropriate level of specificity of the legal order for the study of legal survivals, the concept of a 'legal institution' understood as a set of mutually interconnected, relatively consistent and intederdependent legal norms that regulate a certain fragment of social life and thereby jointly fulfil a certain social function (Mańko 2016a, b, c)[13] seems to be the best unit on which to focus. Thus, the typical object of study of legal survivals would be legal institutions such as types of contracts, types of property rights, types of testaments, types of legations, and all other clusters of legal norms, such as those pertaining to *causa*, or consideration, or prescription, or possession, and so forth. This does not exclude the treatment of smaller legal forms as legal survivals, especially if they play an important role in the functioning of a concrete legal order.

The Same, the Different and the Similar: The Question of 'Identity'

Whereas in the case of legal transplants the key element differentiating a 'transplant' from other normative material is the bare fact of *transplantation* from one jurisdiction to another, in the case of legal survivals that element is replaced with continuity of the legal form over time and its *resilience* to adverse changes in law's environment. This brings us to the key issue of *identity of a legal form*, either between two jurisdictions (donor and recipient), as is the case with legal transplants, or between two epochs, as is the case of legal survivals. Although, admittedly, continuity in time and similarity in space are quite different questions, there is, nonetheless, a certain similarity between the two, especially that legal borrowing necessarily also takes place in time (e.g. a legal institution created in Germany in 1896 is borrowed into Polish law in 1964), and the factor of identity in time, besides identity across space, is also of the essence. In the case of legal survivals the situation is, therefore, easier, because there is only the factor of time, with the jurisdiction remaining, in principle, the same.

In the case of legal transplants, it is usual to speak of an 'original' and a 'copy' in the borrowing system, and openly to discuss the adjustments already at the very moment of borrowing, differences following even from mere translation, not to mention differences in scholarly and judicial interpretation even of rules which are worded identically (Fedtke 2006, pp. 434–436). Thus, Alan Watson (1993, p. 27) spoke of the transplant's '[s]ubsequent development in the host system' , and Uwe Kischel (2019, p. 61) differentiates between 'original legislative reception, and the succeeding practical reception'. Based on this well-known fact that a transplanted legal institution may be interpreted differently in the recipient system, not least due to a different legal culture, Pierre Legrand (1997) claimed that legal transplants are impossible as such. However, as Kischel (2019, p. 63) correctly points out, 'Legrand's argument does not establish the impossibility of legal transplants, but rather raises one already-familiar issue: namely, the question of how and to what extent legal rules are changed by transplantation'.

What the argument of Legrand actually touches upon, is, therefore, the question of *identity of legal forms*. A legal transplant is a legal form which can be said to be

[13] This (technical) understanding is not to be confused with the usage of the term 'institution of law' by legal theorists such as Neil MacCormick (2007).

'the same' both in the donor and recipient legal system, if it is, inevitably, different (Foljanty 2015, pp. 2–3). However, even if the legal form is not *exactly the same*, it is also neither completely different. It would make no sense to speak of a legal transplant if the legal institution in question were modified beyond recognition. In fact, this would be the very opposite to legal transplantion.

The same applies, *mutatis mutandis*, to the identity of legal survivals. Whereas, within comparative law, the question is about the cross-jurisdictional identity, which allows to speak of 'the same', though not 'exactly the same' legal institution in the donor and recipient state, likewise as regards the study of legal survivals the question is concerned with 'the same' legal institution over time, even if it will not be 'exactly the same'. The question of identity can be viewed on the level of pure *lex lata* (whether the texts, their form of words, are the same), on the level of the *lex intepretata* (whether the actual normative content, which can be deduced from the *lex lata*, remains the same, even if texts have changed), and finally on the level of *lex operativa* (whether continuity can be detected in the established case-law of the courts). The fact that legal survivals can exist at all those levels at the same time, or only on some of them, will be taken into account in the typology I propose in the next section. At all three levels the question of 'identity' should not be approached in an absolutist manner (as per Legrand), but rather should be conceptualised as placed on an axis spanning from complete identity (where the legal institution, analysed in two points of time, is considered fully identical) down to a liminal situation where the origins of the institution are still present in the legal survival as a mere trace, but the normative content has been thoroughly modified (even if the pedigree of the institution is still discernible). However, this very trace—perhaps the name of the institution, or a form of words, or an element in its dogmatic structure—will be a proper *signatura* in the strict Agambenian sense, which 'does not merely express a semiotic relation between a *signans* and a *signatum*' but rather 'displaces and moves' what it pertains to 'into another domain, thus positioning it in a new network of pragmatic and hermeneutic relations' (Agamben 2009, p. 40).

A Tentative Typology of Legal Survivals: Putting Theological Metaphors to Work

The notion of legal survivals, advanced in this chapter as a method for studying the resilience of juridical form, would remain dry and abstract were it not illustrated by concrete, 'empirical' examples taken from an actual jurisdiction. In what follows I put forward a tentative typology of seven patterns of continuity of legal forms. In order to describe them, I have resorted—drawing on the conceptual metaphor theory[14]—to theological metaphors. This choice of source domain is not arbitrary: it draws on structural points of convergence between the two domains. After

[14] Lakoff and Johnson (2013), Kövecses (2010). For applications to the domain of the juridical see e.g. Larsson (2012, 2017) Vespaziani (2010), Carpi (2012), Mańko (2012b), Zalewska (2017), Wojtczak and Witczak-Plisecka (2019).

all, Roman Catholic theology shares a great deal of its intellectual apparatus with Roman law and Canon law, and these domains developed largely in symbiosis, with legal thinking penetrating into theological thinking and vice versa, and even juridical rituals influencing liturgical ones (Agamben 2011, pp. 170, 188; Agamben 2013, pp. 35–36, 105–106, 119–120; Zartaloudis 2011, p. 90). If, as Schmitt said, '[a]ll significant concepts of the modern theory of the state are secularized theological concepts' (Schmitt 2005, p. 36), it is certainly also true that many Roman Catholic theological concepts are, in turn, sacralised juridical concepts, with theology resorting to 'a specific juridical logic' (Schmitt 2016, p. 12), and the Church itself being 'the consummate agency of the juridical spirit and the true heir of Roman jurisprudence' (ibid. 18), characterised by a 'formal juridical character' (ibid., 29). Whichever specifically came first, given the original theologico-juridical complex from which *ius* was born (Johnston 1999, p. 5), it is not surprising that juridical and theological concepts do come in pairs, such as state of exception/miracle (Schmitt 2005, p. 36); juridical act/sacrament (as regards their form, validity, effects); judge/priest (formal concept of *officium* as independent of individual charisma) (Schmitt 1996, p. 14; Agamben 2013, p. 65–88); supreme court/Pontiff (as highest authoritative interpreter of doctrine); 'rational legislator'[15]/God; not to mention moral theology which is structured *par excellence* juridically (with concepts such as fault, intent, penalty etc.). And more specifically, the fact that the form/substance dichotomy is at work in the concept of legal survivals, the insistence of theology on the same dichotomy, and its generally formalistic way of thinking (cf. Schmitt 1996, p. 8), as revealed for instance in the doctrine of efficiency of Sacraments (*ex opere operato*) (Agamben 2013, pp. 19–26) makes its apparatus all the more useful for the study of resilience of juridical form. However, the typology presented hereunder should not be understood as definitive, and the examples of specific forms of continuity should not be treated as exhaustive, but rather as tentative and illustrative. This is more of an invitation to explore the archive of the law with a new conceptual apparatus in mind, than a fully developed account of such a possible future exploration. For this reason, I focus more on the patterns and their underlying metaphors more than on the illustrative examples themselves, which are drawn mainly from the domain of private law.[16]

Transsubstantiation: Change of Socio-Economic Function

What I propose to call 'transubstantiation' of legal form is the paradigmatic example of a legal survival, going back to the exploratory work of Karl Renner (1976), whereby the legal form receives a new substance. Thus, the essence of this first pattern of endurance of a legal survival is, in terms of the dialectic of form and substance, a change of the substance, hence the theological term 'transsubstantiation'

[15] A concept developed in Polish legal theory, see e.g. Krotoszyński (2018).

[16] Future research on legal survivals may reveal different, additional patterns of endurance of legal institutions, and the application of the categories proposed below to examples drawn from different epochs and different areas of the law may reveal further complexities of the phenomenon.

that I apply to this pattern. In its original setting, transsubstantiation means exactly what is at stake here: the very substance of wine and bread changes into the body and blood of Christ, but nonetheless it retains the external and visible *form* of bread and wine.[17] This is a rather sophisticated rendering of the idea of the Eucharist that obviously would not have been possible without the notions of substance and form in the first place (how to explain, otherwise, that bread and wine remain visible and tangible following the sacramental action?).[18]

Roman law provides examples of legal survivals which underwent a full transsubstantiation, for instance the institution *emancipatio*, initially conceived of as an instrument protecting sons from abusive father by imposing a sanction of loss of paternal authority in the case of a three-time sale of a son, becoming, in classical Roman law, an instrument of wilfully liberating sons from paternal authority and granting them full legal capacity (see e.g. Johnston 1999, p. 32–33). The initial protective and sanctioning functions gave way to a ritual enabling to liberate sons from paternal authority based on a common understanding between the father and son. Interestingly, however, whereas the legal form changed its social function (i.e. its link to life was replaced by a different one), it retained its *efficacy* (i.e. the extinction of paternal authority), and it is actually due to this efficacy that the legal form in question was retained. The example of the transsubstantiation of *emancipatio*, enabling its survival despite the demise of the initial social conditions for the birth of the instiutions, illustrates the intimate link between legal form (*opus operatum*) and efficacy (*ex opere operato*) (Agamben 2013). The analogy to sacraments of the Catholic church could not be more striking.

Consubstantiation: An Additional Socio-Economic Function

The notion of 'consubstantiation' was championed by Petrus Lombardus (Sojka 2016, p. 59), and later adopted by the Anglican High Church to express the joint presence of the substance of bread/wine *and* that of Christ's body/blood in the Eucharist (Vogan 1871, pp. 53–54). Indeed, in the case of legal survivals, it is easier to find institutions that have retained some fearures of the old substance, and adopted new ones to accompany them, rather than dropping the old substance altogether, as was the case with *emancipatio*, discussed above. The transformation of Poland's private law after the 1989 restoration of capitalism abides with examples of consubstantation of legal institutions. For instance, the cooperative member's proprietary right to an apartment (Mańko 2015c), a right *in rem* created in the 1950s, originally served exclusively the purpose of guaranteeing individuals a permanent right to an

[17] Denz. 1642, 1651–1652. The Catholic teaching, as adopted at the 4th Council of Lateran and repeated at the Council of Trent, is clear on this point: the *entire* substance of bread, and the *entire* substance of wine, become *fully* transsubstantiated into Christs's body and blood, including His soul. Nothing remains, thus, of bread and wine *qua* substance.

[18] Thus, without the form/substance distinction, what remains is a purely symbolic rendering of the Eucharist, whereby the 'sacramental signs of bread and wine, however closely united to the body and blood of Christ which they signify and represent, are not to be identified with the actual or natural body and blood of Christ' (Venema 2001, p. 149).

apartment, alienable both *inter vivos* and *mortis causa*, and protected *erga omnes* as proper *ius in rem* (although at the same time a *ius in re aliena*, the cooperative remaining the owner of the building, and the land usually belonging to the State). However, the initial legal form provided merely for satisfying individuals' housing needs and, through precise rules, prevented the hoarding of apartments, their treatment as an object of speculation, or as a tool for extracting capital rent. Following 1989 the old socialist *ius in rem* survived, but besides the ethically unobjectionable function of satisfying one's genuine housing needs, the right now became capable of being hoarded (plural rights held by one person), treated as a speculative asset (ease of buying and selling) and as a tool for extracting rent (facilitation of letting for profit). Thus, the old, socialist legal form was retained, but at a price of accommodating a foreign, capitalist substance.

Transfiguration: Reproduction of the Legal Form

Transfiguration (metamorphosis)[19] is, in a sense, the opposite of transsubstantiation (or conssubstanitation)—it is *a change of form* which does not entail a change of substance. Under this scenario, the original legal form is abrogated, but elements of it are preserved in other legal forms (i.e. in other legal institutions, which are called differently, and are codified in different legal provisions). In the case of transfiguration, the continuity of the legal survival may be concealed and, in order to be uncovered, a properly genealogical research into its origins may be necessary. Only upon closer inspection it may transpire that the essence of an earlier legal form has in fact been preserved, even if not immediately visible to the reader of legal texts. A prime example of such a form of continuity is the institution of the 'extraordinary revision' (Mańko 2007, pp. 94–102), a public-interest form of appeal against decisions which had become final, available to certain public officials, introduced into Polish law in 1950 following the model of the Soviet 'supervisory instance'. Looking at the external (linguistic) level of Polish law, one can note that the extraordinary revision was simply abolished in 1996 (with effect from 1998). But on a closer examination of various legal institutions which succeded the abolished socialist extraordinary revision it becomes evident that the core (essence) of the old legal institution has resurfaced under the guise of new legal forms which allow, by an large, to achieve the same aims, i.e. to allow certain privileged public officials to challenge final judgments. Thus, technically speaking, the extraordinary revision, abolished in 1996, exists no more after the last petitions for revision were decided upon by the Supreme Court towards the end of 1998. Nonetheless, it is the similarity, entailing to a large extent genuine *identity*, of the old and new legal institution that allows to speak, in this case, of continuity of legal forms.

[19] The term 'transfiguration' is drawn from the Biblical concept of transfiguration of Moses (Ex. 34: 29–34) and of Jesus (Mk 9: 2–8, Mt 17: 1–8, Lk 9: 28–36). Neither Moses nor Jesus changed their substance (i.e. what they were), but rather, by changing appearance (i.e. external form), they revealed their true substance (Trites 1979).

Such *translationes* of a legal institution from one legal form to another, with the maintenance of the essential elements of that form, are known through history: characteristic examples include the institution of the so-called Polish mortgage, based on a public register of mortgages, with the presumption of legality of entries into the register, and the order of priority of creditors based on the time of entry of their debt (*prior tempore potior iure*) (Szpringer 2003, pp. 299–300). Those principles were first enacted in an Act of Parliament of 1588,[20] and then perpetuated in Acts of 1818[21] and 1825, further in a Decree of 1946[22] and finally in an Act of 1982[23] which remains in force until today. The survival of the basic core of the 'Polish mortgage' over 400 centuries and through so many different political and economic systems is truly remarkable.

Jurisprudential Palingenesia: Legislative Abrogation and Survival in the Case-Law

A legal survival may be purged by the legislator from the codes and statutes, but it can be reborn again in what I propose to call 'jurisprudential palingenesia', i.e. the rebirth of an institution in the *lex operativa*, following its formal abrogation from the *lex lata*. Under this scenario, the registering of a legal survival is even more difficult for the reader of legal texts than in the case of transfiguration. This is especially so because courts, in order to achieve the same results *as if* the rule in question were not abrogated, reconstruct exactly the same legal norm on the basis of more general provisions which they can find in the *lex lata*, such as general clauses. Jurisprudential palingenesia can, therefore, be described as a form of judicial resistance towards the decision of the formal legislator, thanks to which the institution in question actually continues to exist, contrary to the 'will' of the legislature which had abrogated the rule in question. A telling example is that on the rules on prescription of claims: prior to 1990, courts in Poland were allowed to decide, on the basis of discretion, whether to accept a counter-claim of prescription or to reject it. Despite the abrogation of Article 117 § 3 of the Civil Code, which had given that power to courts between 1965 and 1990, judges now found its justification in Article 5 of the Code which prohibits the 'abuse of rights' (Kuźmicka-Sulikowska 2019, pp. 144–145; 2021, p. 291). The disappearance of the relevant legislative formant from the *lex lata* did not prevent the continuity of an identical jurisprudential formant in the *lex operative*. Even if concealed, the institution in question has continued to exist, and in the end the legislature even decided partly to revive it explictly (in consumer cases). A well known example from German legal history is the survival, within the

[20] Act 'O ważności zapisów' [On the Validity of Entries], in *Prawa, konstytucye y przywileje Królestwa Polskiego* (1733) 1219–1220.

[21] 'Prawo o ustaleniu własności dóbr nieruchomych, o przywileiac i hypotekach w miejsce tytułu XVIII. księgi III kodexu cywilnego' [Law on the Determination of Real Estate Property, on Privileges and Mortgages Replacing Title XVIII of Book III of the Civil Code], *Dziennik Praw Królestwa Polskiego* vol. 20, no. 5.

[22] Decree of 11 October 1946 – Property Law (Dziennik Ustaw no 57, item 319).

[23] Act of 6 July 1982 on land register and mortgage (Dziennik Ustaw no 19, item 147).

case-law of the *Reichsgericht*, of the Pandectist *clausula rebus sic stantibus* despite its conscious non-inclusion in the BGB (Luig 1999, pp. 171–186).

Ideological Repentance: Cutting Off the Politico-Ideological Roots

Some legal institutions come into being as a result of a specific politico-ideological setup under which the law is required to be modified to accommodate to such, largely ideological needs. This is most prominent in fascist and state-socialist systems, where the ideological function of the law was most visible and is commonly acknowledged, although of course other legal systems are not ideologically free either (Douzinas 2019, p. 226). But following transformation it is not only lawyers who repent and pledge their allegiance to the new ideological hegemonies. Also legal institutions can 'repent', and become absolved of their ideological sins. This model of survival means that a legal institution which was connected to an earlier ideological setup becomes divorced of it. This can entail a merely symbolic negation of the ideological entanglements attending to its emergence, or may also affect, to a smaller or greater degree, the actual content of the institution, especially in the context of a general clause.

A most prominent example of ideological purification or 'repenting' is the general clause of 'principles of social life', echoing the famous concept found in Lenin's works (Lenin 1992, pp. 74, 80, 86–88) which made its way to Polish law in 1950 (Mańko 2012a, pp. 543–556). The concept is now commonly recognized as a legal transfer from Soviet law (Kalus 2018, para. 2), and legal scholars at the time highlighted that the principles of social life are a genuinely socialist general clause which is, as concerns its ideological orientation, is a proper expression of orthodox Marxism-Leninism, in stark contrast to bourgeois general clauses such as 'good faith' and 'good morals', hitherto present in Poland. Also the judges contributed to this impression by making use of the new general clause often in a way aimed at subverting the content of pre-socialist legislation. Today, the ideological connotations of the principles of social life are downplayed by the doctrine and judiciary. Most authors simply state that principles of social life mean the same as good faith and good morals, whereas others even say that they should be understood as referring to 'Christian values'. Whereas the entire 'inner system' of the general clause, comprising a complex set of judge-made norms concerning the use of principles of social life in practice, has been retained after 1989 (and thus constitutes a genuine legal survival on the level of the *lex operativa*), its Leninist origins and early revolutionary practice of application have fallen into oblivion, securing a safe survival of the general clause. German legal history also knows similar examples, as when the *Treu und Glauben* clause, initially introduced to the BGB (1900) to express liberal principles, was then reinterpreted as an expression of Nazi ideology (1933–1945) (Rüthers 2022, pp. 219–260) to return to its liberal origins after World War II.

Forgotten Reliquiae: Quiet Survival

Catholics and Orthodox venerate parts of saints' bodily remnants, known as '*reliquiae*' or relics. These act as signatures in the Agambenian sense, pointing to the person of the saint, and are oftentimes the object of a largely developed public worship. But some relics escape public veneration and are forgotten in some village chapel, without pilgrimages but also free of the risk of pillage. This is also the case with some forgotten legal survivals which, thanks to a very limited use in practice are not considered worthy of abrogation.

An example are the concepts of 'socio-economic purpose' and 'socio-economic destination', present in a number of rules of the Code, in particular in Article 5 defining the abuse of rights (Mańko 2012a, pp. 544–545, 549). Whereas the principles of social life, mentioned in the previous section, are widely applied and broadly discussed, and indeed treated by the majority of scholars as controversial, although now 'repainted' (and repented) to suit the new ideologico-political climate, the notions of 'socio-economic purpose' and 'socio-economic destination' are referred to only rarely in the case-law (Sylwestrzak 2022, para. 5). Their sparing use by judges has, therefore, spared them from the legislature's guillotine, and enabled their survival in the Code.

Resurrection: Abrogation and Re-Enactment

The final scenario—conceptualised by reference to the theological concept of 'resurrection'—refers to those situations where the existence of a legal survival was interrupted: for a period, it did not exist (no formants comprising it were present in the actual legal system), nonetheless later it resurfaced. This is different from the scenario of jurisprudential palingenesia, analysed above: in the case of palingenesia, the insitution is abrogated from the *lex lata*, but maintained on the level of *lex operativa*. Therefore, it exists as a concrete legal form, even if it is expressed through different formants (only jurisprudential, but not legislative). The scenario of resurrection goes further, and indicates a survival which, for a time, was not present at the level of any formants of the legal system. An example from Poland's twentieth century private law is the institution of separatio (*separatio a mensa et thoro*), known in the family law codifications in force until 1945 and, in large parts of the country, the only available form of formalizing the breakup of marriage between Catholics who were denied the right to divorce (Habdas 2021, paras. 1–2). Following World War II, the socialist government decided to do away with separation when unifying family law in 1945,[24] and did so for ideological reasons: in order to promote the secular character of family law, and to show Catholics (who were denied the right to divorce until then) that a broken-up marriage need not be juridically continued but may be

[24] Art. 24–35 of the dekret z dnia 25 września 1945 r. Prawo małżeńskie (Decree of 25 September 1945 – Law of Marriage), *Dziennik Ustaw RP* no. 48, item 270. Curiously enough, the decree still provided for *sponsalia* (*zaręczyny*).

dissolved by divorce.[25] In 1999 the institution of separation—which did not exist *in any form whatosever*—was resurrected, likewise for politico-ideological reasons (Habdas 2021, para. 8). Resurrection is, admittedly, a liminal category of resilience of legal survivals, because it encompasses the possibility of a temporal non-survival.

Juriridical Form, Legal Continuity, and Time

What legal survivals bring to the fore is law's unique relationship with time. Law is always already a phenomenon of the past (Watson 1993, p. 95) (and legal survivals are only *more intensely* part of the past than other legal institutions), yet it unwaveringly brings claims to controlling the future in what is its demand of unlimited application (cf. Tacik 2021, p. 39). This demand belongs to the very essence of the juridical form: a command which is intended to be followed only once or which is not intended to be followed at all will be ostensibly outside the sphere of the juridical.

Given that the law represents always already a claim from the past extending towards the future, legal survivals show that the juridical (*ius*) has, in fact, the *structure of tradition*.[26] Tradition understood as the act of passing the past towards the future, an act which inevitably entails not passing the same, but adapting it in the very act of passing (cf. Glenn 2010, pp. 12–13; cf. Krygier 1988, p. 68). Thus, law's identity is not found in it being *the same* in the past and in the future, but *within the very act of reproducing itself anew again and again*. Legal survivals are institutions from the past which, owing to their entanglements with long defunct socio-economic, political or ideological conjectures ought to have disappeared. And yet, they survive, testifying to the vitality of juridical form and its capacity of resilience in the face of adverse circumstances—changes in law's environment.[27] This resilience would not have been possible without the juristic community which guards the eternal fire of the *ius* and sustains the on-goingness of juridical form, embedded in professional juristic culture (Kozak 2010a, p. 248). The 'climate' of the *ius*, with its *complexiones oppositionum* (cf. Schmitt 1996, p. 7–8) such as insistence on form combined with pragmatism; propensity towards tradition and ongoingness combined with a desire of adaptation; 'emphasis laid on the requirement of continuity as a basis for justifying decisions in the present' (Mousourakis 2019, p. 134), even after a revolution or other radical transformation, combined with ingenuous innovativeness—all this creates, amongst the various spheres of social being which are more one-sided,[28] a 'microclimate' which allows legal survivals to endure. In Thomas

[25] Ibid., para. 4.

[26] This does not mean that law is the *product* of tradition or that it is *reproduced* or *transmitted* through tradition; I intend here very precisely to convey the idea that law's *innermost structure* is that of tradition, that it operates *qua* tradition, that is always already tradition per se.

[27] An extreme example is the survival of juridical form under state communism, despite the declared 'withering away' of the law. See e.g. Cercel (2018), pp. 97–120; Lukina (2022, pp. 147–151).

[28] Agains the background of the economic sphere focused uniquely on profit, the political uniquely on power, and the artistic uniquely on aeasthetics, the juridical (*ius*), as born in Rome and cultivated until today, represents a reserve of unique diversity warranting its capacity of mediation between the other spheres.

Duve's words, one can speak even of a 'tragic adaptability of jurists and the law to changing contexts, tasks and political winds' that contributes to the 'stability of the legal system' and thereby to the continuity of legal culture (Duve 2014, p. 20). Juridical form, and the concrete legal forms it encompasses, is resilient precisely because it is structured as tradition (cf Mańko 2021, p. 240).

Legal survivals reveal the law's deeply dynamic and ever-changing dimension. Even if a legal institution—i.e. a cluster of legal norms—remains *identical* on the textual level (same words used in the same code), it will never be the same on the semantic level (Legrand 2003, p. 277). The meaning of the law is produced in confrontation of text and reader (Paybio and Lindroos-Hovinheimo 2010, p. 408, 410; Mańko & Łachacz 2013, p. 82), embedded in his or her epistemic community (Kozak 2002, p. 122–123), and a legal form finds life through its application to ever changing circumstances (Łakomy 2020a). All those who are called upon to interpret the law are 'inevitably cognitively situated in a specific interpretational horizon' which makes all interpreters 'equally and inevitably "prejudiced" from the cognitive point of view' (Łakomy 2020b, p. 98). This is in tune with Artur Kozak's claim that the effective moment of creation of the law is not the moment when the legal norm is enacted but the moment when the norm is actually interpreted by lawyers (Kozak 2010a, pp. 62–63).

Legal survivals have, moreover, the structure of an exception in the precise sense of the concept used by Agamben. They are an exception from the more general principle according to which law follows life, or—in classical Marxist terms—that '[w]ith the change of the economic foundation the entire immense superstructure is more or less rapidly transformed', including the 'legal, political, religious, aesthetic or philosophic—in short ideological forms in which people become conscious'of their economic conflicts and 'fight [them] out' (Marx 1903, p. 12, translation altered; cf. Táíwò 1996, p. 57). But this assumption is not exclusive to Marxism, and the view of an adequation of law to changing conditions is shared by various authors (e.g. Friedman 1973, p. 14) although it was challenged by Alan Watson (2001) who claimed that law is generally out of tune with social change. Without entering, at this point, the debate whether law is indeed, generally out of tune, as Watson claims, or whether it rather follows, although more or less rapidly, social development, or whether the situation varies from case to case (Gurvitch 1947, p. 235), legal survivals undoubtedly constitute characteristic examples of *continuity of legal forms*. Whereas Watson focused on private law within two legal systems which functioned within a realtively stable environment (Roman and English law), the examples of legal systems of Central and Eastern Europe, which underwent two transformations in the course of one century, would rather point to making legal discontinuity as the rule, and to legal survivals—as an exception (Mańko 2016c). Furthermore, if we understand the form vs. substance distinction as one opposing the normative shape of a legal institution (form) to the social uses it is put to (substance), then the question of adequation of law and life, posited by Marx and other thinkers, could be understood, in many cases, as ocurring on the level of *substance*, with continuity maintained only on the level of juridical form. Assuming that, indeed, legal survivals are exceptions which, it seems, is correct for revolutions and profound transformations, then they are, in Agambenian (1998, pp. 18–22) terms, *inclusive exceptions*, because although the

law refuses to change and insists on keeping a certain institution in place, despite it being apparently out of tune with life (Watson 2001, pp. xviii, 5–6, 130), at the same time the survival of such an institution represents law's colonizing drive towards life. Even in the exception to being in tune with life, law remains applicable to it. As such, legal survivals—just like the sovereign decision in the Schmittian sense—concern 'neither a *quaestio iuris* nor a *questio facti*, but rather the very relation between law and fact' (Agamben 1998, p. 26).

Legal survivals are prime examples of law's colonizing drive, its eternally unsatiated desire to control and regulate everything that is outside of it. As Agamben notes, the force of law 'consists in [the] capacity of law to maintain itself in relation to an exteriority' (Agamben 1998, p. 18). Juridification is not only a phenomenon of contemporary societies—the sheer extent of the *Corpus Iuris Civilis* and its depth testify to similar tendencies accompanying us from the very cradle of Western law. In the case of legal survivals, it is the legal system itself which expands its scope of application, as a self-propelling vehicle, without the intervention of the legislature. As Agamben points out in *Homo Sacer*:

> …the juridical order (*diritto*) has a regulative character and is a "norm" [*norma*] (in the proper sense of a "set square" [*squadra*]) not because it orders and prescribes, but to the extent that it must, above all, create the area of its own reference in real life, *to normalize it* [*normalizzarla*]. Therefore, to the extent that establishes (*stabilisce*) the conditions of this reference and, at the same time, presupposes it, the original structure of a norm is of the type: "If (real fact, *e.g. si membrum rupsit*), then (juridical consquence, *e.g. talio esto*)" (...). (Agamben 1995, p. 31, my translation)

Moreover, law not only needs to include within itself a certain external reality in order to subsist, it also must seek to maintain its effectiveness upon that reality (Agamben 2013). A law that would withdraw from any claims to effectiveness would cease to exist. Legal institutions are there not just to be contemplated, but to be actually applied. This drive of effectiveness, inherent in law's very essential structure, explains why those who discovered and started studying the *Digest* of Justinian in the eleventh century soon sought to apply it to contemporary life, or why comparatists-at-law are often the promotors of legal transplants. Legal survivals not only continue to exist, but also reappear after decades or even centuries of absence, such is the strength of law's claims to effectiveness which is an inherent feature of juridical form.

Legal survivals, especially those which have continued hidden, either thanks to ideological camouflage, or thanks to non-application, are an indicator of legal form's double existence. On one hand, there is the external, patently visible layer of legal form, as seen in codes, recent legislative acts or well-known leading precedents. On the other hand, there is the hidden layer of law, often obscure even to lawyers themselves, especially when it regards the order of facticity (as opposed to normativity) behind legal institutions as we know them. It is in this hidden dimension that the resilience of legal form finds it force and foundation.

Artur Kozak once wrote about the tradition of an annual Pentecost pilgrimage in the village of Kleczanów in central Poland (Kozak 2010a, pp. 91–92; cf. Mańko

2015c, p. 193–194). The ostensible purpose of the tradition was to celebrate the Christian feast of Pentecost. But archaeologists revealed that the route of the pilgrimage actually coincided with an ancient, pre-Christian custom, as it lead to *kurhans* of old Slavic ancestors of today's inhabitants of Kleczanów. Lawyers dealing with legal survivals in their daily work are oftentimes like the Kleczanów pilgrims: they repeat a form of which genesis they have no idea. It is the task of the legal theorist to unearth those layers of the law in an effort which can *inter alia* lead to the destabilization of our belief in its normality by revealing its historical contingency. A mere study of law as an emanation of a 'legal tradition' legitimizes law's adherence to the past; the analysis of legal survivals can, in contrast, open an avenue to the critique of contemporary legal institutions which repeat past normative patterns without much reflection. This hidden dimension of juridical form is, ultimately, a matter of representation and a purposeful hermeneutic intervention (cf. Legrand 2003, pp. 252–254). Under the practitioner's and doctrinal researcher's gaze, legal institutions are seen as part of a living legal system, backed by the fiction of a 'rational law-maker', and are enquired from the point of view of making them 'work', either in a coherent theoretical framework, on in the day-to-day business of the courts. Conversely, under the simultaneously archaeologico-genealogical gaze of the researcher of legal survivals, the same familiar institutions suddenly appear as uncanny traces of the past, the closely-knit and apparently homogenic legal form turns out to be a patchwork of legal forms emerging from various moments in the past, ever-changing, and not necessarily well-connected. The vision of the juridical as a 'system' perishes, and the historical contingency of legal form is brought to the fore, thereby opening a space for critique. Both visions, the doctrinal and the 'archaeological' one, are of course, necessarily selective (cf. Legrand 2003, p. 254).

Finally, the study of legal survivals confirms the crucial importance of the form vs. substance distinction in legal studies (Mańko 2020a, pp. 23–30). The distinction is part and parcel of the *ius* as such, created by the Roman jurists and brought forward to our times. As Aldo Schiavone (2012, p. 202) points out, legal forms have 'become the protagonists on an invisible and in a certain sense spectral stage, yet capable of exerting a decisive influence upon the concrete reality of life (…).'Law's 'spectral stage'—so uncannily reminiscent of the 'other stage' of psychoanalysis—is, speaking precisely, that of *juridical form*, that combination of fictitiousness and necessity (cf. Douzinas and Gearey 2005, p. 17). Legal survivals, as *legal forms*, are seen, within the legal discourse (the discourse of law's 'other stage'), as real concepts. If we follow closely Savigny when he noted that legal innovation in Roman law ocurred through the linking of new legal forms with old ones (Savigny 1831, p. 49), it will become evident that legal survivals are not *just* liminal phenomena, aberrations, and exceptions (which they, indeed are), but also that they are, in essence, the fundamental path of legal innovation. In line with juridical's *complexio oppositionum*, this innovation occurs always already within a tradition which combines a transmission of form from the past with its enrichment with content from the present. It is in juridical form and its resilience that lies the secret of law's unique distinctiveness when compared with other social discourses.

Conclusions: Law as Palimpsest

The study of legal survivals allows to combine, under the umbrella of one archeologico-geneaological approach, three phenomena of legal continuity. Firstly, the continued use of the same legal forms in different circumstances and for different purposes, whereby the same juridical form is filled with different socio-economic substance. General clauses provide, perhaps, the most obvious example, given their inherent open-endedness. Secondly, the gradual modification of legal forms, especially when the level of *lex lata* remains the same, but the *lex intepretata* and *lex operativa* are gradually adapted to new circumstances, but with maintaining the essential identity of the institution in question. Thirdly, the study of legal survivals is a way of conceptualising the tradition-minded innovativeness of juridical form, whereby new legal forms are shaped in a way which refers to the old ones. The transfiguration and palingenesia of legal forms are examples of this kind of cultural continuity in law.

In broader terms, the study of legal survivals touches upon two further important aspects. Firstly, the legitimacy of law's authority, which is built, among other factors, on the stability and predictability of juridical form. The continuity of legal forms and the general tendency of jurists to adhere to tradition is not only a product of pure inertia, as Watson would have it (Watson 2001, pp. xviii, 8, 29, 131), but can be seen as part of a more or less consciously pursued legitimacy strategy. Secondly, given that legal survivals function as *signaturae* of the times in which they were first conceived, they reveal juridical form's complex, multilayered structure, a structure which is not as impermeable as legal practitioners and adherents of positivist legal theories might want to admit. Each of these layers has its specific presuppositions and entanglements which, in the processes of interpretation and application of the law, can give rise to unexpected configurations and short-circuits, effectively revealing that law has the structure of a palimpsest (cf. Asbury 2009).

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