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# LEGAL THEORY AS A BRIDGE BETWEEN THE SOCIOLOGY OF LAW, LEGAL HISTORY AND COMPARATIVE LAW: SOME METHODOLOGICAL REFLECTIONS FOLLOWING THE INTERNATIONAL WORKSHOP ON "LEGAL SURVIVALS AND GLOBAL LEGAL PLURALISM" (INTERNATIONAL INSTITUTE FOR THE SOCIOLOGY OF LAW, OÑATI, SPAIN, 8–9 MAY 2025)

## Abstract

The recent International Workshop on "Legal Survivals and Global Legal Pluralism", held at the International Institute for the Sociology of Law (IISL) on 8–9 May 2025, brought new insights into the development of the theory of legal survivals. A legal survival is a legal form which was functional towards an earlier context of political, economic, ideological, and socio-cultural relations, but which nonetheless survived the more or less abrupt change of that context, in particular a change having the nature of a socio-economic and/or political transformation, transition or revolution. The paper briefly presents the concept, theory and methodology of legal survivals, based on the existing literature (section 2), it provides an analytical overview of the papers presented at the workshop (section 3), and it discusses – in a synthetic manner – the recurrent methodological questions addressed during the workshop (section 4).

**Key words:** legal survivals, post-imperialism, post-colonialism, Oñati International Institute for the Sociology of Law

## 1. Introduction

The methodological reflections put forward in this paper have been inspired by the rich discussions that took place during the recent International Workshop on "Legal Survivals And Global Legal Pluralism", held at the Oñati International Institute for the Sociology of Law (IISL), Oñati, Spain, 8–9 May 2025, and coordinated by Rafał Mańko (Central European University), Piotr Eckhardt (Ignatianum University) and Ewa Górska (University of Wrocław). This was a second consecutive workshop on legal survivals – an emerging theme of socio-legal research – following an earlier one on "Legal Survivals in Central and Eastern Europe: Socio-Legal Perspectives on Public and Private Law" held at the Riga Graduate School of Law (RGSL) on 15–16 June 2024, and organised by Adam Czarnota (RGSL), Rafał Mańko (Central European University) and Piotr Eckhardt (Centre for Legal Education and Social Theory, Wrocław).[1] Indeed, the theme of legal continuity – in a broader sense – was also discussed at the 2nd Annual Conference of the Central and Eastern European Network of Legal Scholars (CEENELS) titled "An Uneasy Legacy: Remnants of Socialist Legal and Political Thinking in Central and Eastern Europe", held at the Jagiellonian University in 2017.[2]

The goal of this paper will be to briefly present the concept, theory and methodology of legal survivals, based on the existing literature (section 2), to provide an analytical overview of the papers presented at the workshop (section 3), and TO discuss – in a synthetic manner – the recurrent methodological questions addressed during the workshop. Section 3 will not only contain a presentation of the recurrent methodological themes, but it will also suggest solutions to the posed questions. Furthermore, it provides a brief overview of a wide variety of case studies that may be helpful not only in understanding the concept of legal survivals, but also in launching further inquiries about other cases in the reader's own area of research.

1 P. Eckhardt, R. Mańko, *Conceptualising the Continuity of Legal Systems and Cultures: International Workshop on "Legal Survivals in Central and Eastern Europe: Socio-Legal Perspectives on Public and Private Law" (Riga Graduate School of Law, Riga, 15–16 June 2024)*, "Acta Universitatis Lodziensis. Folia Iuridica" 2025, vol. 110.

2 W. Zomerski, *Conference Report: 2nd Annual Conference of the Central and Eastern European Network of Legal Scholars (CEENELS): "An Uneasy Legacy: Remnants of Socialist Legal and Political Thinking in Central and Eastern Europe", Jagiellonian University, Faculty of Law and Administration, 7–8 January 2017*, "Wroclaw Review of Law Administration & Economics" 2018, vol. 7, no. 2.

Thus, the present paper goes beyond the genre of a classic "conference report" and it also contains original scientific reflections of a methodological nature, at the same time closely discussing the research presented during the workshop.

In section 2, we recall the concept of a "legal survival" emphasising its two founding fathers: Oliver Wendell Holmes and Karl Renner. In section 3, we provide a detailed overview of the papers presented at the Oñati workshop. Section 4 contains an analytical account of the discussions. It does not proceed chronologically (as section 3), but is grouped around specific scientific problems that were addressed. Section 5 contains the conclusions.

## 2. Legal survivals: concept, theory, methodology

The *concept* of a "legal survival" is to be credited to the American judge and eminent jurist, Oliver Wendell Holmes.[3] As regards the *theory* of legal survivals, there can be no doubt that it emerged in one of the foundations pieces of the sociology of law, namely Karl Renner's *Institutions of Private Law and their Social Functions*, firstly published (under pseudonym in 1909) and then published in a definitive version in 1929.[4] It was Renner who introduced the backbone of the legal survivals theory, namely the distinction between the legal form and its social function. Seminal elements of the *methodology* of studying legal survivals were already present in Renner's work, but have been gradually elaborated on in contemporary literature.[5]

[3] O.W. Holmes, *The Common Law*, Harvard 2009 [1881].

[4] K. Renner, *The Institutions of Private Law and Their Social Functions*, London–Boston 1976 [1929].

[5] See e.g. R. Mańko, *Legal Survivals: A Conceptual Tool for Analysing Post-Transformation Continuity of Legal Culture*, [in:] *Tiesību efektivitāte postmodernā sabiedrībā*, ed. J. Jānis Rozenfelds, Rīga 2015; idem, *Relikty w kulturze prawnej – uwagi metodologiczne na tle pozostałości epoki socjalizmu realnego w polskim prawie prywatnym*, "Przegląd Prawa i Administracji" 2015, vol. 102; idem, *Transformacja ustrojowa a ciągłość instytucji prawnych – uwagi teoretyczne*, "Zeszyty Prawnicze UKSW" 2016, vol. 16, no. 2; idem, *Legal Transplants, Legal Survivals, and Legal Revivals: Towards a Reconceptualisation of The Circulation of Legal Forms in Time and Space*, "Acta Universitatis Lodziensis. Folia Iuridica" 2024, vol. 109; idem, *Legal Survivals and the Resilience of Juridical Form*, "Law and Critique" 2025, vol. 36.

To put it briefly, a legal survival is a legal form (i.e. a set of interconnected legal norms belonging to operative law, reconstructed on the basis of legal provisions and actual judicial, administrative or contractual practice) which was functional towards any context of political, economic, ideological, and socio-cultural relations, but which nonetheless survived the more or less abrupt change of that context, in particular a change having the nature of a socio-economic and/or political transformation, transition or revolution.[6] The theory of legal survivals postulates the possibility of such survival notably through the change of their social function, i.e. through their functional adaptation.[7] The element of formal continuity vs. functional adaptation is the key to the theory of legal survivals.[8]

The fundamental form of functional adaptation is a change in the social function of a given legal form in response to the changing external political, social or economic circumstances, which may take place without any change in the legal form itself. Karl Renner wrote about this as early as in the beginning of the 20th century. In his work *The Institutions of Private Law and Their Social Functions*, he described how various institutions of civil law (including family and inheritance law, but above all the institution of ownership) arose during the period of simple commodity production and then, without any change in the content of the regulations, completely altered their function with the emergence of industrial capitalism. Renner summarised it as follows:

> We see that property [the right of ownership – authors] at the stage of simple commodity production endows the worker with the detention of his means of production, making man the master of matter. Now property [the right of ownership – authors] changes its function without a corresponding change in the law. It gives the legal detention of the means of production to the individuals who do not perform any labour, thus making them the masters of labour.[9]

As regards the methodology of studying legal survivals, it is by definition pluridisciplinary and indeed requires the methods of doctrinal legal research (legal dogmatics), comparative law and legal history to study the continuity of the legal form, on one hand, and the methods of the sociology of law, anthropology of law

[6] R. Mańko, *Relikty*…, op. cit., pp. 191–192.
[7] R. Mańko, *Transformacja*…, op. cit., pp. 22–30.
[8] R. Mańko, *Transformacja*, op. cit.
[9] K. Renner, op. cit., pp. 117–118.

and possibly even political science and other empirical social sciences in order to study the changing social function, on the other hand. The concept of "social function" must be understood broadly here as encompassing not only those functions which were intended by the law-maker (legislator, judge, scholar) but also those which were unintended.[10] In those sociological approaches in which "social function" is used in an evaluative (positive) manner, the better term would be the "actual social effects" of the legal form.[11]

An important component of the legal survivals concept, theory and methodology is the hylomorphist concept of the "legal form" – borrowed from Evgeniy Pašukanis[12] – that enables to contrast the continuity of form with the discontinuity of matter and content.[13] Indeed, what is characteristic of legal survivals – as already noted by Karl Renner – is the continuity of the legal form coupled with the change of its social function, that is, its content.[14] Without the hylomorphic apparatus, introduced into legal theory by Pašukanis, the conceptualisation of this dialectic would be difficult. This is because without the concept of form, law could be wrongly identified with its content, as was the case, for instance, with the approach of Hugh Collins who, for this very reason, erroneously negated the possibility of legal survivals.[15] Obviously, Collins' position was untenable because law, by definition, *is not* identical to its social function: the normative content of the law (the legal norms reconstructed on the basis of legal provisions) are something analytically distinct from the effects that the application of such norms produces in society.[16]

10 R. Mańko, *Transformacja*…, op. cit., pp. 22–23.

11 Cf. D. Šulmane, *Versatility of Effects of Legal Provisions*, in: *Quality of Legal Acts in Contemporary Legal Space*, ed. J. Rozenfelds, Riga 2012, pp. 438–439.

12 Е.Б. Пашуканис, *Общая теория права и марксизм*, [in:] idem, *Избранные произведения по общей теории права игосударства*, Москва 1980 [1924].

13 R. Mańko, *Problem autonomii prawa w świetle hylemorficznej teorii J.B. Paszukanisa*, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2024, no. 2; idem, *Pašukanis on Ideology and the Juridical (A Note On The General Theory of Law and Marxism)*, [in:] *Legal Form: Pashukanis and the Marxist Critique of the Law*, ed. C. Cercel, G.G. Fusco, P. Tacik, Abingdon 2024.

14 K. Renner, op. cit., pp. 293–299. Renner used the term "substratum" to denote the content of the legal form.

15 H. Collins, *Marxism and Law*, Oxford 1982, pp. 52–54; cf. R. Mańko, *Relikty*…, op. cit., pp. 190–191.

16 Cf. A. Redelbach, S. Wronkowska, Z. Ziembiński, *Zarys teorii państwa i prawa*, Warszawa 1994, pp. 269–270, 275; D. Šulmane, op. cit., pp. 438–439; R. Mańko, *Transformacja*…, op. cit., pp. 22–24.

## 3. Overview of the papers presented at the workshop

The workshop consisted of nine sessions held over two days at the 16th-century historical bulding of the University of the Holy Spirit (*Universitas Sancti Spiritus*), which is the seat of the IISL. The event was attended by 26 researchers (including three online), who presented a total of 25 papers. In addition to presenting their research findings, the participants also served as moderators and discussants in particular sessions.

The organisers managed to bring together researchers from all over Europe. The participants represented research centers from Western Europe and the British Isles (including the University of Ghent, Belgium; the University of Augsburg, Germany; Universities of Oxford, Kent and Warwick, England; and the Universities of Edinburgh and Aberdeen, Scotland; the University College Dublin, Ireland), Central and Eastern Europe (including the University of Gdańsk, the Ignatianum University in Cracow, the University of Silesia, Katowice, the Nicolaus Copernicus University, Toruń; and the University of Tartu, Estonia) as well as the Balkans (University of Zagreb and the Saint Cyril and Methodius University in Skopje, North Macedonia).

An interdisciplinary approach was also ensured thanks to the participation of sociologists of law, legal historians, comparative law experts, and specialists in civil and commercial law. The detailed affiliations and academic positions of individual participants will be provided when discussing their presentations of research results below.

The Workshop started with welcoming remarks by Maite Elorza Plazaola, IISL Administrative Director, and with information from Leire Kortabarria, IISL Publications Officer, on the rich opportunities for publishing the research results presented during the workshop offered by the Institute. Following that, Rafał Mańko and Piotr Eckhardt introduced the theme of the Workshop on behalf of the organisers.

The first session was moderated by Professor Paul du Plessis (University of Edinburgh, Scotland), with Dr Gian-Giacomo Fusco (University of Kent, England) as the discussant. The first of three presentations was prepared by one of the workshop organisers, Dr. habil. Rafał Mańko from the Democracy Institute at the Central European University in Budapest. His presentation, titled “Legal Survivals: Concept, Theory, Methodology”, provided a conceptual and methodological framework for the entire workshop,

recalling the fundamental features of legal survivals, their proposed typology, and the mechanisms of their emergence. The speaker emphasised the importance of the social function and its change for the sociological analysis of legal survivals, and explained that the typology he proposed[17] is an open-ended one, which can be – if need may be – still refined or expanded. In his paper, Rafał Mańko used the example of the English trust and its changing social functions from the Middle Ages until today in order to illustrate the phenomenon of legal survivals.

The second speaker was Professor Tomasz Giaro from the Law Faculty at the University of Warsaw, who gave a presentation on "Legal Survivals and the Fear of Empty Space". Professor Giaro referred to the works of Savigny and Kantorowicz, pointing out that legal survivals, alongside legal transplants, can be a way of avoiding a legal vacuum, which is always feared (*horror vacui*). He illustrated this with examples of changes in legal systems following the destruction of the Holy Roman Empire by Napoleon and the collapse of the Ottoman Empire in the Balkans in the 19th century.

The third presentation was given by Professor Cosmin Sebastian Cercel from the University of Ghent, principal investigator in the project titled "Rethinking Emergency from a Legal Historical Perspective: Contexts, Actors, Practices, 1914–2020", whose research team was well represented at the workshop. Professor Cercel discussed the topic "Crisis, Dissent, and Legal Hybridity: The State of Siege in Historical Perspective". He discussed the suitability of the theory of legal survivals for examining the intellectual and practical entanglement of the French concept and practice of the "state of siege" with the Romanian constitutional history. Professor Cercel's paper was an important voice regarding the applicability of the theory of legal survivals for research on public law and its history.

The second session, moderated by Rafał Mańko, included two presentations. Professor Tomasz Giaro was the discussant. Professor Paul du Plessis discussed the topic "Something Old, Something New: The Fate of Roman-Dutch Law in the Law of South Africa in the Twentieth Century". Professor du Plessis explored the trajectory of the Roman-Dutch law in South Africa throughout the 20th century, focusing on the shifting role of this legal heritage, from its position in the apartheid-era legal framework to its

17 R. Mańko, *Legal Survivals and the Resilience*…, op. cit.

reinterpretation under the democratic constitution adopted in 1994. Although concrete legal institutions originating in Roman-Dutch law, and ultimately classical Roman law, still survive in contemporary South African law, references to Roman and Roman-Dutch sources have been dwindling in recent years. Rather, courts nowadays tend to refer to South African case-law as authority.

Next, Professor Péter Cserne from the University of Aberdeen, Scotland, presented the topic "Patterns of Legal Survival: Is Scots Law Exotic or Ordinary?" As a unique mixture of indigenous, Roman, and English laws, Scots law has been perceived as a rare case of legal survival after the 1707 political union with England, later a matter of national pride and scholarly research. Professor Cserne addressed this issue in a post-imperial and post-federal context, and illustrated his argument with a number of contemporary cases from Scottish and English courts.

The third session, entitled "Transplants as Legal Survivals", consisted of four presentations. This particularly rich panel was moderated by Professor Tomasz Giaro, and Dr Ivan Tot was the discussant. The first to present the results of her research was Dr. habil. Dorota Miller from the Universities of Gdańsk and Augsburg. She discussed the issue of "Soviet Law in 21st Century Society: the Intestate Rights for Cohabitants". Dr. habil. Miller used the example of recent changes in the Czech Civil Code to discuss a situation in which, for purely pragmatic reasons, it was decided to retain certain legal solutions originating from a completely different political system, despite the fact that an amendment was being carried out with the objective of getting rid of precisely this type of influence.

This was followed by a paper titled "Principles of Socialist Coexistence, Good Manners and Dark Secrets of the Bulgarian Law on Obligations and Contracts of 1950: What Conclusions for the Survival of Law?". This topic was presented by Dr. Radosveta Vassileva from the University College Dublin, Ireland (presenting online). The scholar discovered that the Bulgarian Law on Obligations and Contracts, dating back to the times of the state socialism and still in force today, is not an original Bulgarian creation, but was largely based on the "fascist" Italian Civil Code of 1942. This is an example of how the transplantation of law can become a legal survival, and how different ideological layers tend to be concealed, awaiting to be discovered by researchers.

The third scholar presenting his research findings during this panel was Elias Dessantis, a PhD candidate within the EMERGE project led by Professor Cercel at the University of Ghent. The issue he examined was "Reviving the Past or Enduring Continuity: French Emergency Laws in Belgian Constitutional History". He presented the Belgian history of the application in 1914 of state of siege provisions dating back to the French rule at the turn of the 18th and 19th centuries, which can be considered a case of legal revival.

At the end of this session, Dr. Raza Saeed, Associate Professor at the University of Warwick, England, discussed the topic of "Colonial Transplantation of the Legal Form in South Asia and Its (Post)colonial Remnants". These case studies show that legal survivals, which have been studied most extensively in the context of post-socialism in Central Europe, could emerge at different periods of history, under various political systems, and in diverse parts of the world. Indeed, in this context not only specific legal forms, but even the form of law (as a specific, formalised type of normativity), were transplanted by the colonisers in the 18th and 19th century, and constitute today legal survivals of the colonial rule.

The first day of the workshop ended with the fourth session, which focused on "Legal Survivals and Interpretation of Law" and consisted of three presentations. This part of the workshop was moderated by Dr. Marko Bratković, with Rafał Mańko acting as the discussant. The first paper was presented by Dr. Paulina Konca, Assistant Professor at the University of Silesia, Katowice, who addressed the issue of "How to Deal with Legal Survivals: the Role of Courts in Adapting Legal Provisions to Changing Circumstances". Dr. Konca analysed the possibility of judicial updating of legal survivals to new circumstances, taking into account constitutional review, dynamic methods of interpretation, and the scope of statutory and constitutional powers of the judiciary in different countries. In her paper, she included not only survivals which became outdated due to socio-economic and political changes, but also those which were out of tune with technological advancements.

Next, Dr. Anna Piekarska, a post-doctoral researcher in the EMERGE project at the University of Ghent presented the topic "The Formalistic View of Law and Legal Survivals. The Case of Polish Legal Theory". Dr. Piekarska examined and conceptualised the possible relations between legal survivals and the formalistic (also known as "hyperpositivist" – Mańko 2013b) view of law which is the one of the main

approaches in legal philosophy and plays a significant role in the reproduction of both juridical and legal forms. She highlighted the (dis)continuities within formalistic theoretical underpinnings and goals in two different socio-political contexts: the socialist Polish People's Republic and the post-1990 capitalist Republic of Poland.

The fourth session, as well as the first day of the workshop, ended with a presentation by Dr. Denis Preshova, Assistant Professor at the Ss. Cyril and Methodius University in Skopje, who presented the results of his research on "Surviving and Thriving: The Authentic Interpretation of Statutes in the Western Balkans as a Legal Survival of the Yugoslav Socialist Legal Tradition". He discussed a legal institution originating in Yugoslavia that is present in Slovenia, Croatia, Serbia, and North Macedonia. It consists of parliaments directly intervening in the manner in which statutes are applied and interpreted in practice under the banner of securing uniform application of the law.

The second day of the workshop began with the fifth session, which was a continuation of the presentation of the results of research on "Legal Survivals and Interpretation of Law". The first of the three participants was Dr. Marko Bratković, Associate Professor at the Faculty of Law, the University of Zagreb. He addressed the issue of "Judicial Interpretational Statements in Croatia: Does the *Hann-Invest* Judgment Mark the End of Authoritarian Legal Survival?". Dr. Bratković analysed the criticism contained in the CJEU judgment of the continuing existence in Croatia of a procedural law institution limiting judicial independence, which originated in the socialist Yugoslavia.

Next up was a paper on "Codifying the Non-Existent: How Yugoslav »*Uzance*« Persist as Legal Survivals in Croatian Commercial Law" by Dr. Ivan Tot, an Associate Professor at the Department of Business Law, the University of Zagreb. In Yugoslavia, "codified trade usages" were not in fact codified customary norms, but a set of rules created by a group of legal experts in 1954 to address specific needs after World War II. In present-day Croatia, despite the absence of such needs, "*uzance*" continue to be in use and thus constitute an example of the legal survival.

The last speaker in the fifth session was the co-organiser of the workshop, Dr. Piotr Eckhardt, assistant professor at the Ignatianum University in Cracow. Dr Eckhardt described the case of "Article 138 of the Polish Code of Petty Offences as a Legal Survival: Changing Doctrinal and Judicial Interpretations". This is an institution

introduced during the period of state socialism with the objective of combating circumvention of state regulation of prices for services in a centrally planned economy, and after the political transformation, in a free market economy, became a tool for combating discrimination. It is therefore a particular example of a legal relic – a legal institution that completely changed its function with the change of the political system.

Three papers were presented during the sixth session, entitled "Legal Survivals, Politics and Ideology." The panel was moderated by Dr. Anna Piekarska, with Dr. habil. Dorota Miller serving as the discussant. The first to present the results of his research was Dr. Gian Giacomo Fusco, Lecturer in Law at the University of Kent. His presentation, "The Remnants of the Roman Dictatorship: for a Mythography of the Exception," contained an analysis of the oldest legal survival discussed at the workshop. Dr. Fusco sought to answer the question regarding the extent to which the Roman model of dictatorship shaped thinking about emergency laws and states of exception in contemporary constitutionalism. He pointed out that the Roman dictatorship had all the most important elements of emergency laws: specific threatening circumstances, authorisation for the ruler to act outside the bounds of the law, and a limited period of time.

Next, another PhD candidate working as part of the EMERGE project at the University of Ghent, Louis Marius Bremond, presented his analysis entitled "From the Indigenat to the State of Emergency – Post-colonial Legal Survivals of French Regimes of Exception". He explored how the legal legacy of colonial legal regimes created and enforced by the French empire of the 19th and 20th centuries, from Algeria to New Caledonia, influenced the institutions of emergency laws in the states that emerged in these areas during the process of decolonisation, and whether they can therefore be called legal survivals.

The sixth session of the workshop was closed by Botakoz Kazbek, PhD candidate at the University of Ghent and visiting lecturer at the UBI Business School, Brussels, with a presentation on "Soviet Legal Survivals in the Dashing 1990s Russia: History, Myths, and Tragedies". The researcher analysed the persistence of various institutions of Soviet law in the Russian Federation during the period of political transformation following the collapse of the USSR.

The next two sessions were devoted to the topic of "Legal Survivals and Historical Layers of Legal Culture". The seventh panel was moderated by Dr. habil. Dorota Miller and the discussant was Professor Cosmin Sebastian Cercel. The first of the three presentations was given by Professor Michał Gałędek, the University of Gdańsk and Dr. Tomasz Kucharski, Assistant Professor at the Nicolaus Copernicus University in Toruń. The scholars discussed "*Neminem Captivabimus* as a Legal Relic in the Liberal Constitution of the Kingdom of Poland of 1815". They attempted to answer the question of whether the inclusion in the Constitution of the Kingdom of Poland of 1815 of a 15th -century privilege of the nobility, while extending its application to all citizens, was indeed a legal survival, since it could be argued that it was merely a modern legal institution dressed up in historical garb.

Next James Campbell, a DPhil candidate at the University of Oxford (presenting online), discussed the results of his research on "Law's Oxbow Lakes: Of Deep Pasts, Syncretism, and Desuetude in the Common Law Tradition". He focused on various symbolic objects used in English legal contexts, such as notably the "mace". In the context of this topic, questions arise about the potential differences in the mechanisms of legal survivals in the common law system.

At the end of the seventh session, one of the workshop co-organisers, Dr. Ewa Górska, post-doctoral researcher at the University of Wrocław, gave a presentation on "Ottoman Land Law: Contemporary Applications and Implications in the Israeli Judicial System". The scholar presented the results of her empirical fieldwork on the Ottoman-era land laws that have been pragmatically retained by the State of Israel. She discussed their application in practice, claiming that it is selective and geared towards furthering the interests of Israeli settlers, but to the detriment of the Palestinian population. In her view, this case study may be considered to be an example of the instrumentalisation of a legal survival.

After the break, the same topic was continued in the eighth session, during which two scientists presented their research outcomes. Dr. Ewa Górska acted as the moderator, and Dr. Piotr Eckhardt was the discussant. At first, Dr. Katre Luhamaa, Associate Professor at Tartu University School of Law (presenting online), discussed the issue of "Lay Judges in the Estonian Court System as a Legal Survival?" This is an element of the justice system that has not changed in Estonia since the collapse of the USSR and the country's regaining of independence, even though various regulations

concerning professional judges have evolved significantly. With the transformation of the political system, the ideological reason for introducing lay judges during the Soviet era also disappeared.

Next, Kamil Zyzik, affiliated with the Jagiellonian University and the University of Łódź, presented an analysis of the issue of "Socialist Cooperative Lawyering in Poland. The Idea and Survival of Advocate Teams". The researcher from Poland discussed the results of his empirical fieldwork (interviews) constituting a form of ethnography of legal survivals. It concerned lawyers who, more than three decades after the collapse of state socialism, continue to practice in an institutional form that was created in a centrally planned economy as a substitute for private law firms.

The last, ninth session was dedicated to the problem of "Legal Survivals and the Limits of Legality". It was moderated by Dr. Fusco, and Professor Gałędek was entrusted with the role of the discussant. The session consisted of two presentations by two doctoral researchers working on the EMERGE Project at the University of Ghent. First, Alastair James Hannaford presented the results of his study on "The Inheritance of Martial Law in 20th Century Northern Ireland: The Transfiguration of a Legal Imaginary". It was an analysis of the gradual transformation of the extraordinary institution of martial law into a well-developed legal institution, Military Aid to the Civil Authorities. This case study raises the question of how far the evolution of a legal institution can still be called legal survival.

The last presentation of the workshop was given by Mihai-Claudiu Dragomirescu. He discussed the issue of "Anticonstitutional and Transconstitutional Survival: the Case of Prince Alexandru Ioan Cuza's State of Siege Law of 1864". He presented the history of a legal institution that was used for many decades despite its formal removal from the legal system, and later returned to it, showing that the history of legal survivals can be complex and involve many stages.

The second and final day of the workshop was concluded with a discussion on publications that could potentially result from this scientific event. A joint decision was made to work simultaneously on two projects, which should take on a more concrete shape at the turn of this and next year.

## 4. Recurrent methodological questions addressed in the discussions

### 4.1. The borders of the concept of a legal survival

One of the themes recurrent in many of the papers and in most of the discussions on the papers was the question of the borders of the concept of a legal survival – i.e. what *is* and what *is not* a legal survival. The following positions were taken by the workshop participants in the discussion: Ivan Tot repeatedly argued for a narrower understanding, requiring that the element of a socio-economic transformation (such as that from state socialism to capitalism) be required in the definition as an obligatory element.

By contrast, Dorota Miler argued for taking into account also a broader array of contextual changes, including a broader legal change, such as the change of the regime of property law, which was the background to the legal survival studied in her paper. Some discussants also raised the issue of the changing social function, arguing that there is no legal survival if the legal form in question does not change its function. However, as other participants pointed out, the lack of change of social function is indeed inherent in the concept of a "relic" or "quiet survival"[18] which by definition subsists but does not change its function.

In fact, the bulk of the papers presented by the team of researchers on states of exception at the University of Ghent were concerned with legal forms which, despite disappearing and reappearing (undergoing transfiguration, revival or even resurrection) permanently kept the same social function, namely that of suspending the normal constitutional guarantees of a liberal state and passing executive and judiciary functions into the hands of the military (papers by Cercel, Bremond, Dragomirescu, Hannaford).

During the discussion Rafał Mańko promised to come up with a new definition of the concept of legal survivals that would be constructed more along the lines followed in psychological definitions, as those used in DSM-5, where many conditions are defined by reference to a certain minimum number of symptoms (out of a larger number) that need to be present for a certain minimum period of time.

[18] R. Mańko, *Legal Survivals and the Resilience…*, p. 80.

## 4.2. The ontology of legal survivals: legal ideas, positive law, operative law

Many discussions revolved around the question of ontology of legal survivals – the question *where* should a legal survival be located. In her paper, Anna Piekarska argued in favour of treating a feature of legal theory as a legal survival, which coincides with Rafał Mańko earlier concept of a "meta-normative survival".[19] Other participants agreed with this approach.

A more problematic issue, raised *inter alia* in the discussions over the papers of Michał Gałędek, Tomasz Dragomirescu, James Hannaford and Cosmin Cercel, was the question of the *ontological level* at which legal survivals occur. During those discussions Rafał Mańko – referring to his forthcoming work[20] – put forward the distinction between the level of legal ideas, the positive law (*lex lata*) and the operative law (*lex operativa*), the latter category – borrowed from Jerzy Wróblewski[21] – referring to the law as actually applied in judicial, executive and contractual practice (including also the drafting of other juridical acts, such as trusts, wills, etc.).

Indeed, these three types of *lex operativa* correspond to Rodolfo Sacco's concept of formants (legislative, judicial and doctrinal), although it differs in that it refers also to the actual practice of the non-judicial authorities (e.g. the executive declaring a state of siege, as discussed in the papers of Cercel and Dragomirescu) and the actual drafting practice of lawyers (drafting of contracts, wills, trusts, etc.). As Katharina Pistor has shown, this drafting practice actually determines the *real* content of law,

19 R. Mańko, *Survival of the Socialist Legal Tradition? A Polish Perspective*, "Comparative Law Review" 2013, vol. 4, no. 2, pp. 10–22; idem, *Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome*, "Pólemos: Journal of Law, Literature and Culture" 2013, vol. 7, no. 2, pp. 215–216; S. Forić, M. Dokić, D. Vuković-Ćalasan, *Historical Trajectories and Shared Destiny as a Basis for Common Legal Identity: The Case of Bosnia and Herzegovina*, [in:] *Law, Culture and Identity in Central and Eastern Europe: A Comparative Engagement*, ed. C. Cercel, A. Mercescu, M.M. Sadowski, Abingdon–New York 2024, p. 257; R. Mańko, *Legal Transplants…*, p. 105.

20 R. Mańko, *Juridical Form, the Economy and Ideology: Pašukanis's Hylomorphist Legacy and the Autonomy of Law*, [in:] *Constitutionalism and Political Economy: New Trajectories and Opportunities for Socio-Legal Scholarship*, ed. M. Stambulski, I. Kampourakis (volume in preparation).

21 J. Wróblewski, *Judicial Application of Law*, Dordrecht 1992, pp. 76–77, 84.

given that litigation will always occur long after the fact, and the vast majority of private legal acts will never be subject to any litigation at all.[22]

Indeed, the shape of the *lex operativa* is often different from the *lex lata*, not least due to the fact that many issues are never addressed by legislators or judges (in Common Law countries) and there is theoretically "no law" on a given issue. The distinction between *lex lata* and *lex operativa* is also relevant to the question of the survival of Scots law, and was raised within the discussion on Péter Cserne's paper – Paul du Plessis noted that the idea of Scots lawyers that they need a case to create a new rule (which would refer to the *lex operativa*) is very English, because they can always deduce such rules from the existing law (*lex lata*). This would indeed correspond, within Jerzy Wróblewski's typology, to the interpretive consequences of the legal system (LSIC), also known as the *lex interpretata*.[23]

The persistence of legal survivals on the level of ideas – noted in the discussion on numerous papers within the workshop – provides the ontological bridge especially in the cases of revival and resurrection, but also in the cases of spectral and mythical survivals (see below, section 4.5).

### 4.3. The essence and identity in the study of legal survivals

A number of discussants returned to the question of identifying the essential core of a given legal form, and to the requirement that such essential core be preserved in order to be able to speak of a legal survival.[24] Cosmin Cercel, within his paper, commented that – based on his research on the state of siege in Romania – the concept of essence could be "misleading" because legal institutions (such as the state of siege) have a "hybrid" character. To this Rafał Mańko replied that the concept of essence applied to legal survivals should be treated as an analytical tool that should not be reified. Indeed, it follows the notion of *essentialia* as opposed to *accidentalia*, applied to juridical acts already by the Commentators.

22 K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality*, Princeton 2019.
23 R. Mańko, *Legal Survivals and the Resilience...*, op. cit., p. 70.
24 R. Mańko, *Transformacja…*, op. cit., pp. 20–21.

### 4.4. The functions of legal survivals

In the discussions concerning a number of papers, the question of the function of legal survivals was raised. Ivan Tot recalled the definition according to which a legal survival has to be *functional* towards an earlier formation, such as state socialism.[25] Cosmin Cercel, by contrast, drew attention to the different approach to the concept of "function" in the legal discourse and in the sociological discourse, and opted for adopting the latter one. Rafał Mańko recalled that the notion of function in the study of legal survivals should be approached empirically, and should encompass the *actual* functions of legal survivals, i.e. their effects upon society, rather than what the legislator intended to be the *telos* of the legal form in question.[26]

Therefore, not only those effects that were officially planned and desired, but also those which were not planned or officially announced, should be taken into account in the study of legal survivals. Rafał Mańko also added that in the research on legal survivals undertaken hitherto, the functions were understood as generally falling into one or more broad types, including political, economic, ideological (symbolic) and socio-cultural functions.[27]

### 4.5. The typology of legal survivals

The typology of legal survivals, presented recently by Mańko[28], was the object of many discussions and, for some participants of the workshop, turned out to be controversial. Thus, Giaro and Górska were critical of the use of theological metaphors; Górska argued that they are exclusive and Eurocentric, whereas Giaro expressed a more general critique of typologies as such, giving the example of a typology proposed by Canaris which – despite the overall success of his theory – has been forgotten by the German doctrine.

Whereas for Górska the typology would be acceptable if it did not use theological metaphors, for Giaro building a typology as such is problematic. Mańko responded to these objections noting that the "Eurocentric" or "West-centric" character of the

25 Ibidem, p. 22.
26 Ibidem, pp. 22–23.
27 Ibidem, pp. 25–27.
28 R. Mańko, *Legal Survivals and the Resilience…*, op. cit., pp. 74–81.

tool is a simple consequence of the fact that juridicity – the legal phenomenon centred on the *ius* – was born in Rome[29], and therefore it is quite natural to use categories which are fitting to the origins, nature and very essence of the phenomenon.

Concerning Giaro's objections, Mańko recalled that "the typology […] 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."[30] The utility of the typology rests in the invitation of scholars towards searching for new examples of legal survivals, rather than urging them to put everything they find into specific boxes.

Other participants were not critical of the idea of the typology as such or with the names of the types of legal survivals, but they mainly discussed whether a given legal survival fits into one or more categories, and if the typology as such should not be expanded. An important voice in the discussion on the typology of legal survivals was raised by Radosveta Vassileva who pointed out that the general clause of "principles of socialist community life" in Bulgarian law[31] actually fits into all the proposed seven types; in her view, this does not undermine the typology but rather strengthens it.

Ivan Tot expressed, in numerous discussions, praise for the typology, noting that due to it, a researcher is able to notice legal survivals where they would be otherwise invisible or hard to notice. The researchers from the Ghent team working on the state of exception were referring mainly to the concept of transfiguration,[32] although in the discussion of their papers also the concepts of revival[33] and resurrection[34] were raised.

During the final discussion Gian-Giacomo Fusco remarked that the research on legal survivals should not go down the route of taxonomy, but rather use the concept as a tool for developing critical legal history.

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29 A. Schiavone, *Ius. L'invenzione del diritto nel Occidente*, Torino 2005.
30 R. Mańko, *Legal Survivals and the Resilience*…, op. cit., p. 75.
31 See R. Vassileva, *Bulgarian Private Law at Crossroads*, Cambridge–Antwerp–Chicago 2022, pp. 65–66.
32 R. Mańko, *Legal Survivals and the Resilience*…, op. cit., pp. 77–78.
33 R. Mańko, *Legal Transplants*…, pp. 98–105.
34 R. Mańko, *Legal Survivals and the Resilience*…, op. cit., pp. 80–81.

## 4.6. Spectral and mythical legal survivals: two new types?

The papers by Cercel and Fusco, devoted respectively to the importance of the Romanian act of 1864 on the state of siege (Cercel) and the role of the figure of the Roman dictatorship in modern times (Fusco) raised a number of important methodological questions concerning the phenomenology of legal survivals. Commenting on Cercel's paper, Mańko expressed the view that the constant invocation of the Act of 1864 in the later Romanian practice, despite the fact that it was no longer in force, precisely amounted to what he described as a "spectral presence", with the Act of 1864 "haunting" Romanian public law in the decades to come.

What is crucial here, is that the spectral survival of the Act of 1864 amounts to something more than a mere transfiguration: the Act was not only replicated (transfigurated) but it was also *invoked* in all instances of introducing the state of exception in Romania, even if it was clear that it is no longer in force.

As regards Fusco's paper on the Roman dictatorship, the presenter himself invoked two theoretical concepts borrowed from anthropology and cultural theory, namely *myth*[35] and *second-order discourse*.[36] As Mańko commented during the workshop, indeed, the Roman figure of *dictatura*, as presented by Machiavelli, served to justify and legitimise the use of the state of exception in modern times. At the same time, it is not so much a direct revival of the Roman legal form, but its spectral, mythical presence. It survives, but not so much as a legal form but as a legal idea.

Commenting on the concept of myth in the context of legal survivals theory, Cosmin Cercel emphasised the importance of myth for law in general. In his view not only legal survivals are examples of myths, but also myth is the very substratum of survival, and indeed the continuity of law is itself a myth.

## 4.7. The importance of *Begriffsgeschichte* for legal survivals

During the discussion on Dragomirescu's and Hannaford's papers, Mańko highlighted the importance of Reinhart Koselleck's *Begriffsgeschichte* (history of concepts)

35 F. Jesi, *Materiali mitologici. Mito e antropologia nella cultura mitteleuropea*, Torino 1979.
36 R. Barthès, *Mythologies*, London 1973, pp. 117–157.

as a potential source of inspiration for the study of those legal survivals which are at the same time concepts – such as martial law, state of siege, principles of socialist coexistence, and the like. Mańko indicated that Koselleck's theory can be useful especially as regards its emphasis on the dynamic nature of concepts, which, whilst mediating between language and social reality, at the same time embody layers of meaning shaped by historical events, political struggles and cultural shifts.[37] They consitute the meeting point of the space of experience, looking towards the past, and the horizon of expectations, looking towards the future, at the same time remaining deeply contested.

## 5. Concluding remarks

The second successful workshop on legal survivals shows that legal theory can provide a bridge enabling the dialogue of such disciplines as the sociology of law, legal history and comparative law. The theoretical notion of a legal survival brings together representatives of those disciplines who, due to its innovative explanatory potential, are able to notice aspects and nuances within their field that would have otherwise remained obscure. Two forthcoming volumes on legal survivals in Central and Eastern Europe – *Private Law in Former Socialist Countries: Legal Survivals in Central and Eastern Europe* and *Civil Procedure in Former Socialist Countries: Legal Survivals in Central and Eastern Europe* are forthcoming with Routledge as an outcome of the Riga workshop. Whereas they will explore the specific type of socialist legal survivals in a specific region – Central and Eastern Europe – the publications that will follow the second workshop in Oñati are geared towards a broader geographical and temporal approach.

The concept, theory and method of legal survivals definitely offers promising avenues for innovative research at the interstices of legal history, comparative law and the sociology of law, which not only warrants additional insights for those three disciplines, but also provides the basis for making new, generalised claims about the juridical phenomenon as such – thereby providing new perspectives for the philosophy of law.[38]

[37] R. Koselleck, *Sediments of Time*, Stanford 2018.
[38] Cf. R. Mańko, *Legal Survivals and the Resilience…*, p. 69.

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## SUMMARY

**Legal Theory as a Bridge Between the Sociology of Law, Legal History and Comparative Law: Some Methodological Reflections Following the International Workshop on "Legal Survivals and Global Legal Pluralism" (International Institute for the Sociology of Law, Oñati, Spain, 8–9 May 2025)**

The second international workshop devoted to legal survivals showed that the concept, theory and methodology of legal survivals resonate well with the sociologists of law, legal historians, comparative lawyers as well as legal theorists. The idea of studying the continuity of legal institutions that maintain their identity across different epochs, in spite of deep societal changes, appeals to representatives of different sub-disciplines of the legal science. The rich methodological discussions during the workshop revealed that the concept and theory of legal survivals are equally important as their practical

application with regard to the empirical legal materials (legislation, case-law, legal literature). The study of legal survivals offers promising avenues for innovative research infusing legal history and comparative law with the perspective of the sociology of law, thereby not only offering additional insights for those three disciplines, but also providing the basis for making new, generalised claims about the juridical phenomenon as such which are relevant for the general jurisprudence.