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Chapter II

Legal survivals as an approach to continuity in law

1 From 'legal transplants' to 'legal survivals'

The metaphorical³⁰ concept of 'legal transplants',³¹ put forward by the Scots comparatist and legal historian Alan Watson, revolutionised the comparative method in legal studies. Instead of just searching for differences and similarities between legal systems, the metaphor of legal transplants permitted to isolate units of legal culture (legal models) that 'circulate in space', moving from a donor jurisdiction to a recipient jurisdiction. The legal transplants approach allowed to underline that most of legal change in legal systems is actually a result of borrowing from foreign legal systems, that transfer of legal rules between societies is relatively easy (contrary to what *Volksgeist* proponents speculated) and that transplants are part of lawyers' strategy of justifying their decisions or proposals by authority (if something works abroad, it should work at home).³² Clearly, Watson's metaphor opened up a fresh perspective of approaching the field of comparative law, which enabled new conclusions to be drawn from already known sources.

One of the aims of this dissertation is to put forward a parallel metaphorical concept: that of a 'legal survival', which I consider to have a comparable reconceptualising potential within the fields of legal history and comparative law, as Watson's 'legal transfer'. Just like Watson's notion of legal

³⁰ I am using the notion of 'metaphor' in the understanding of the conceptual metaphor theory (see note 20, above).

³¹ Alan Watson, *Legal Transplants: An Approach to Comparative Law* [1974] (2nd ed., Athens-London: Univ. of Georgia Press, 1993), esp. p. 21-30, 95-101.

³² *Ibid.*, 95-99.

transfers, the notion of a 'legal survival' is capable of opening up new perspectives on legal continuity, shifting the focus from continuity in general to the endurance of concrete entities of legal culture, such as legal rules, institutions, concepts or even methods. Whilst Watson's concept of legal transfers is applicable at any historical time, I conceive legal survivals as a tool which is particularly well-suited for a period following a more or less abrupt socio-economic and/or political change, that is the passage from one system to another, owing to an abrupt modification of the economic system (e.g. introduction or abandonment of central planning) or the political system (e.g. colonisation or decolonisation).

In the sections that follow I will first analyse the historical genealogy of the concept of a 'legal survival' (section 2), present legal survivals as conceptual metaphors in the light of the conceptual metaphor theory (section 3), give a detailed definition of legal survivals (section 4), outline my methodology of analysing legal survivals (section 5) and finally enquire whether the 'form vs. substance' dichotomy in legal theory can be applied to legal survivals (section 6).

2 Genealogy of 'legal survivals'

'Survivals' as a theoretical concept originate not in legal scholarship, but in anthropology and sociology. The Polish anthropologist Bronisław Malinowski (1884-1924) drew attention to the fact that a condition of endurance of a survival (in culture) is that it gains a new function under the changed circumstances.³³

³³ Bronisław Malinowski, *A Scientific Theory of Culture and Other Essays* [1944] (New York: OUP, 1961), p. 29.

Malinowski mentioned the example of a fireplace in an English home which, in modern times, fulfils symbolic, rather than heating, functions.³⁴

Another scholar who analysed survivals, referring to them as ‘traditional’ or ‘routine actions’ was German sociologist Max Weber (1864-1920).³⁵ Summarising Weber’s understanding of ‘traditional actions’, Polish sociologist Piotr Sztompka has pointed out that we

‘act in a certain way simply because people always acted in this way or because everyone in our community acts in this way. [...] Such [routine] actions [...] [u]nburden us from having to take decisions, make choices and ponder each time [we act].’³⁶

Lawyers’ insistence on preserving legal frameworks borrowed from an earlier socio-economic system certainly has this ‘unburdening’ function, just as the institution of law as such.³⁷ It should also be mentioned that Weberian traditional actions sometimes are

‘cut off from any purposes, they remain as survivals of actions which used to be purposeful, but lost their purpose under the modified circumstances. It is

³⁴ As a matter of fact, Malinowski was actually opposed to using the notion of a ‘survival’ in anthropology, owing to the fact that it allegedly lead researchers to a certain automatism in that they always looked to the past in order to elucidate the meaning of contemporary rituals, instead of performing fieldwork which could reveal their actual social function in the present (Malinowski, *A Scientific Theory...*, p. 29-31). However, this reservation need not bother us in the context of legal survivals – their origins can be easily revealed by legal-historical research, and their contemporary function – on the basis of an analysis of legal practice, especially case-law. Similarly, the original context of the notion of a ‘survival’ in anthropology, where it was linked with evolutionism, is without significance for our present purposes

³⁵ Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley-Los Angeles: University of California Press, 1978), p. 25, 69-71.

³⁶ Piotr Sztompka, *Socjologia. Analiza społeczeństwa* [Sociology: The Analysis of Society] (Kraków: Znak, 2007), p. 60.

³⁷ Cfr. Artur Kozak, *Granice prawniczej władzy dyskrecjonalnej* [The Limits of Lawyers’ Discretionary Power] (Wrocław: Kolonia Limited, 2002), p. 166

also possible that they now serve a different purpose, having changed their function.³⁸

Those remarks seem to be fully applicable to legal survivals which often endure exactly thanks to a change of their social function. Probably the first legal scholar who analysed survivals in law in a systematic way was the Austrian sociologist of law Karl Renner (1870-1950). Although Renner did not use either the notion of a 'survival', or that of a 'traditional/routine action', he devoted an entire monograph to the topic. In his work on *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion*³⁹ he pointed out that although the way in which the institution of private ownership is regulated in European civil codes has not been modified, the social function of the institution in question changed.⁴⁰ Renner phrased his analysis in terms of a conceptual opposition between the 'legal norm' and its 'form' on the one hand (which remain the same), and that legal norm's 'substratum' or 'function', on the other hand, (which change).⁴¹ In my analysis of legal survivals, for the sake of clarity and in order to avoid potential misunderstandings stemming from the form vs. substance distinction,⁴² I will refer to Renner's legal norm/form as 'legal framework' and to Renner's substratum/form simply as 'social function'.⁴³

The topic of legal survivals has been discussed, within the context of legal theory, by British legal philosopher and private lawyer Hugh Collins in his book

³⁸ Sztompka, *Socjologia...*, p. 60.

³⁹ Renner, *The Institutions...*

⁴⁰ *Ibid.*, p. 87.

⁴¹ *Ibid.*, p. 295, 299.

⁴² For a discussion of this distinction with regard to legal survivals, see *infra* section 6.

⁴³ For a detailed exposition of my terminological and conceptual choices, see *infra* section 4.

on *Marxism and Law*,⁴⁴ published in 1982. In that work Collins defines legal survivals as:

‘legal rules [which] [...] were first established under a former mode of production.’⁴⁵

In defining survivals, Collins drew not only on Renner, but also on French Marxist philosopher Louis Althusser (1918-1990). Notably, Althusser used the notion of a ‘survival’ in his 1962 essay on ‘Contradiction and Overdetermination’,⁴⁶ where he pointed out that after the Russian Revolution (1917) many ‘survivals’ have remained in place. Among such survivals Althusser enumerated economic survivals (such as small scale peasant production), as well as:

‘other structures, political ideological structures, etc.: customs, habits, even “traditions”, such as the “national tradition” [...]’⁴⁷.

Althusser did not do, however, build a deeper theory of the concept, noting only – following his usual habit – that it deserves further investigation.⁴⁸

It must be emphasised here that both Collins and Althusser, to whom he referred, approached the issue of survivals in the broader context of Marxist theory which emphasises a bi-polar antagonism in society (e.g. bourgeoisie vs. proletariat), and attempts at downplaying the importance of other conflicts (such as conflicts within one social class, or the role of groups which Marxists do

⁴⁴ Hugh Collins, *Marxism and Law* [1982] (Oxford-New York: Oxford University Press, 1988), p. 52-55.

⁴⁵ Collins, *Marxism and Law*, p. 52.

⁴⁶ Louis Althusser, ‘Contradiction and Overdetermination: Notes for an Investigation’ [1962] in Louis Althusser, *For Marx* [1965] (London-New York: Verso, 2005): 87-128.

⁴⁷ *Ibid.*, p. 114.

⁴⁸ *Ibid.*, p. 114-115.

not consider to be classes, such as lawyers). Therefore, arguing from a Marxist perspective, Collins attempted to downplay the role of legal survivals which, as he considered in his book, posed a challenge to the Marxist account of history and society. This is also because under the doctrine of ‘class instrumentalism’ Marxists maintain that the law is a ‘superstructure’, determined by the ‘base’ of socio-economic relationships. In that optic it seems inappropriate that the legal framework ‘produced’ by an earlier socio-economic base could be maintained under a further one. This would undermine the superstructural character of law and, henceforth, undermine the whole base/supestructure doctrine. Therefore, Collins warned that ‘[i]t is [...] easy to exaggerate the frequency of the occurrence of survivals’ and advised care ‘to distinguish the form of words constituting the legal rule from their meaning when applied to particular circumstances.’⁴⁹ On this basis, he argued that:

‘The same legal concepts may still be in use, but that does not prove the existence of a survival, for *the words may now be interpreted differently*. Thus, although English lawyers speak in the feudal language of property tenure [...], owners of real property may rest assured that this *continuity of language conceals major substantive reorientations* of the law [...] [as] required by the capitalist mode of production.’⁵⁰ (Emphasis added)

Collins tacitly adopted the view that the interpretation of legal texts is a dynamic, rather than a static phenomenon, and therefore the same texts (‘continuity of language’) stemming from an earlier political and socio-economic system can be reinterpreted in a completely new way (‘major *substantive* reorientations of the law’) to suit the needs of the new

⁴⁹ Collins, *Marxism and Law*, p. 53.

⁵⁰ Ibid.

socio-economic system (or 'formation' as Collins referred to it). Collins expressly dismissed Karl Renner's view that a given legal rule may remain constant but its social function may change⁵¹ by pointing out that:

'In fact, only in a trivial sense has the rule endured whilst its social function has changed. The *words or symbols* used to express the rules have remained constant, but their *meaning* has surely altered since they are being applied in novel contexts. For Renner's thesis to be significant, it must be supposed that a rule can have a meaning independent of its effects on social behaviour.'⁵²

In essence, on the basis of legal theory (of interpretation) Collins made an argument against the existence of legal survivals. He tacitly rejected both intentionalism (whereby interpretation is understood as second-guessing the original intent of the drafter of a legal text) and textualism (whereby a text is said to have some inherent, objective meaning which awaits to be decoded by the interpreter). Although Collins did not make an explicit statement as to what theory of (legal) interpretation he relies on, we can assume that it is somewhat close to the hermeneutic model, which emphasises the role of the interpreter as a member of a given epistemic community in the investment of meaning in a text.⁵³ As American legal theorist Steven L. Winter put it, '[m]eaning is not a matter of words, but of minds'⁵⁴, and the assumptions with which interpreters

⁵¹ Renner, *Institutions...*, p. 76.

⁵² Collins, *Marxism and Law*, p. 54. Emphasis added.

⁵³ Cfr. Kozak, *Granice...*, p. 122-123; Tomasz Stawecki, 'O praktycznym zastosowaniu hermeneutyki w wykładni prawa' [The Practical Application of Hermeneutics in Legal Interpretation] in *Teoria i praktyka wykładni prawa* [Theory and Practice of Legal Interpretation], ed. Piotr Winczorek (Warszawa: Liber, 2005): 89-116, p. 96-97; Elina Paunio and Susanna Lindroos-Hovineimo, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU law', *European Law Journal*, 16.4 (2010): 395-416, p. 410.

⁵⁴ Steven L. Winter, *A Clearing in the Forest: Law, Life and Mind* (Chicago-London: University of Chicago Press, 2001), p. 303.

approach a legal text are certainly of paramount importance for the meaning they will invest in a text.⁵⁵ In other words, readers coming from different backgrounds (other epistemic/interpretive communities) may understand the same text (set of signs) in a different way, because they will understand the words, concepts, ideas in the text in light of their own experience (individual or collective). This serves to emphasise that texts don't 'have' meaning (meaning is not 'inherent' in texts), but that meaning is the product of an interplay between text and reader.

Whereas I concur with Collins's tacit assumptions about the nature of (legal) interpretation, and join him in rejecting intentionalism and textualism as misleading, rather than helpful, legal fictions, especially in post-modern fragmented societies where legislation is drafted by hundreds of actors and meanings of texts cannot be viewed as stable,⁵⁶ I cannot follow him in assuming that Karl Renner was a textualist. Let me reiterate that Collins stated that

'[f]or Renner's thesis [on legal survivals] to be significant, it must be supposed that a rule can have a *meaning independent of its effects* on social behaviour.' (Emphasis added).

In my opinion, this assumption is a distortion of Renner's view. I stipulate that what Renner wanted to draw attention to in his monograph on legal continuity was that the *texts* stay the same (e.g. the text of the Austrian Civil Code regarding property) but their *social functions* change. Renner only claimed that

⁵⁵ Winter, *A Clearing in the Forest...*, p. 316. See also Norman Fairclough, *Critical Discourse Analysis* (Boston: Addison Wesley, 1995), p. 9, who states that: 'The interpretation of texts is a dialectical process resulting from the interface of the variable interpretative resources people bring to bear on the text, *and* properties of the text itself.' Emphasis in the original.

⁵⁶ Jeremy Waldron, 'Unintentional Legislation' in *Law and Interpretation: Essays in Legal Philosophy*, ed. Andrei Marmor (Oxford: Clarendon Press, 1997): 329-356, p. 329-356.

the *texts* as such stays the same and nowhere did he make the statement that the *meaning* of the text also remains static. To the contrary, to my mind a tacit assumption in Renner's reasoning is that texts are actually capable of being invested with different meanings, depending on circumstances. In other words, Renner's contribution can be read as a case-study of dynamic interpretation of a legal texts. On an ontological level it should be clarified that the legal survivals that Renner studied are *texts*, not their *meanings*. He focused his attention exactly on the adaptation of meanings invested in texts to the changing socio-economic conditions. To use the language of Selznick and Nonnet, we could say that Renner's contribution was devoted to 'responsive' legal interpretation.⁵⁷

In order to clarify the ontology of legal survivals, it will be perhaps useful to rephrase the Collins/Renner controversy in the language of critical discourse theory. According to British linguist Norman Fairclough

“discourse” is use of language seen as a form of social practice, and discourse analysis is analysis of how texts work within sociocultural practice.⁵⁸

Furthermore, critical discourse analysis focuses on three dimensions of analysing discourse – it analyses

‘texts, [...] discourse practice (processes of text production, distribution and consumption) and [...] discursive events as instances of sociocultural practice.’⁵⁹

⁵⁷ Philippe Selznick and Philip Nonet, *Law and Society in Transition: Toward Responsive Law* [1978] (New Brunswick-London: Transaction Publishers, 2009), p. 73ff.

⁵⁸ Fairclough, *Critical...*, p. 7.

⁵⁹ *Ibid.*, p. 2.

By applying the conceptual framework of critical discourse analysis, one can emphasise the distinction between the text (in Renner's case: the legal rules on property) and discourse practice, i.e. the way that this text is dealt with ('consumed') by lawyers (e.g. judges), and used for producing further texts (e.g. judicial decisions 'applying' the rule of the Code). By conceptually separating the text ('letter') of the Code from the order of legal discourse (i.e. the 'social order in its discursual facet',⁶⁰ here – its legal facet) understood as rules of dealing with the text within legal discourse, it is possible to dismiss Collins' objections to Renner's narrative of legal continuity despite socio-economic discontinuity. What Renner's story is ultimately about, is a change in the order of discourse, allowing to use old texts (e.g. the Austrian Civil Code of 1811) to suit new purposes. What Renner described and analysed is precisely a 'remaking' of the order of legal discourse through discursual practices.⁶¹

Furthermore, the analogy between legal transfers and legal survivals, invoked at the beginning of this chapter, could also be of assistance here. Legal comparatist Watson has no objections in studying legal transfers and applying this concept despite acknowledging that when a legal rule or entire code is transferred from one jurisdiction to another, it very often changes its meaning, sometimes even radically – to the extent of being 'totally misunderstood'.⁶² If geographical transfers of legal texts across jurisdictions merit attention as 'legal transfers' despite the fact that recipient communities of lawyers often invest different meanings in those texts, departing from those invested by the donor

⁶⁰ Ibid., p. 10.

⁶¹ Cfr. *ibid.*, p. 11

⁶² Watson, *Legal Transfers...*, p. 97, 99.

communities, then the endurance of legal texts, despite changes in their meaning over time, also merits attention as ‘legal survivals’.

The study of legal survivals is therefore, ultimately, an analysis of practices of legal discourse and the changes in the way texts or their fragments are used by legal communities. The proposed methodology of studying legal survivals draws attention to those texts which remained unchanged, and seeks to explain how this endurance was possible by enquiring into the social context, in line with one of the leading principles of critical discourse analysis that the

‘analysis of texts should not be artificially isolated from analysis of institutional and discursual practices within which texts are embedded.’⁶³

Another insight of critical discourse analysis which can be fruitfully employed for constructing the tool of legal survivals is the distinction between ‘centripetal pressures’ and ‘centrifugal pressures’ upon discourse.⁶⁴ Centripetal pressures, stemming from ‘a historically particular structuring of discursive (text-producing) practices’, are a factor favouring continuity of the legal discourse. Centrifugal pressures, on the other hand, which stem from the ‘fact that situations do not endlessly repeat one another, but are, on the contrary, endlessly novel and problematic in new ways’ is a factor favouring change within legal discourse. At a time of gradual evolution of the social system, the balance between centripetal and centrifugal pressures is tilted in favour of the former; however, following a fundamental socio-economic transformation, the external pressures pushing towards an analogous transformation of legal discourse are much stronger. Nevertheless, as the examples of legal survivals indicate,

⁶³ Fairclough, *Critical...*, p. 9.

⁶⁴ *Ibid.*, p. 7.

a modification of the order of legal discourse takes place within a dialectical process where continuity still has its role to play.

3 'Legal survivals' as a conceptual metaphor

The term 'legal survival' hints at the metaphorical nature of the underlying concept. It must be kept in mind that conceptual metaphors are not rhetorical devices, but rather the normal way of understanding the world around us.⁶⁵ Metaphorical concepts serve to highlight some aspects of a given phenomenon, but to hide or downplay others.⁶⁶ A conceptual metaphor is based on a link (a number of 'mappings') between the target domain (which we try to conceptualise and understand) and the source domain (which provides us with familiar structures or cues).⁶⁷ The metaphorical expression 'legal survival' links the target domain of 'continuity in law' with the source domain (in natural history) of 'survival of a species despite a mass extinction event'. By building a metaphorical link between these two apparently distant spheres, the concept of a 'legal survival' allows to highlight a number of features of legal continuity.

First of all, it focuses our attention on the identity of a certain entity which survives, be it an institution, rule, doctrine or an entire legal Code. The otherwise somewhat amorphous concept of continuity is thereby re-structured to focus on concrete examples of such continuity, just like continuity in evolutionary biology focuses on concrete species (such as crocodiles) which have survived, despite the extinction of their fellow species (such as dinosaurs).

⁶⁵ Lakoff and Johnson, *Metaphors...*, p. 3-5.

⁶⁶ *Ibid.*, p. 10-13.

⁶⁷ Kövecses, *Metaphor...*, p. 7-10, 77ff.

Secondly, the metaphor draws our attention to an 'extinctive event', a change of circumstances external to the legal survival itself, based on a mapping regarding a change of the environment (e.g. a change of climate which triggered the extinction of dinosaurs). That change of climate was something external to the dinosaurs and beyond their control. The same applies within the target domain: the socio-economic transformation of 1989 was something which occurred due to political and economic factors, which lay outside the hitherto existing system of socialist law and were essentially outside the control of the legal community. Judges, practitioners and legal academics of the Polish People's Republic had no choice but to adapt themselves to the new conditions. The Polish transformation did not occur from within the legal system – it was rather witnessed by and reflected in the legal system.

Thirdly, the metaphor of a 'legal survival' emphasises the diachronical dimension. A legal survival is an element of the legal past which survives within the present, just like crocodiles are the surviving next-of-kin of extinct dinosaurs. A legal survival can thus be compared to a 'living fossil' in evolutionary biology. It is at the same time a 'fossil', that is a part of the past, but it is also 'living', that is it is still used in legal practice, rather than being merely confined to dust-covered chronicles of legal history.

Fourthly, the metaphor draws attention to the close links between the analysed phenomenon and the previous socio-economic conditions, under which it appeared. Dinosaurs were adapted to the climatic conditions prevalent in their era. Crocodiles, which can be said to be living fossils of dinosaurs, survive now *despite* being (or having been) adapted to the conditions of the past. The same can be said of legal survivals: at the time of their appearance, they were functional towards the then existing socio-economic system (i.e. that their

appearance was not merely accidental, but somehow linked to the reality of that system).

Finally, survival is not possible without adaptation. Crocodiles and other living fossils endured not because they were still adapted to the conditions prevailing at the time of the appearance of their species, but, in a way, despite that – thanks to the adaptation to new conditions.

4 A definition of legal survivals

A Overview of the elements of the definition

The metaphorical mappings analysed in the previous section allow to delineate the contours of the concept of a 'legal survival' as against a more general background of continuity in law and legal culture. Therefore, I will define a legal survival as:

- (1) a legal institution, expressed through a certain legal framework (comprising both legal provisions and an established case-law);
- (2) which originates in an earlier socio-economic system (e.g. feudalism, actually existing socialism);
- (3) which, at the time of its appearance, played a specific function within that socio-economic system (i.e. that its appearance was not merely accidental, but somehow linked to the reality of that system, in the sense of fulfilling an identifiable social function);
- (4) which endured despite a profound socio-economic and political transformation; the legal framework in question may have changed its social function under the new system and it may have required to be adapted in order to fulfil that new function.

I will explain each of the elements of the definition in the subsections that follow (B to E).

B The notion of a 'legal framework'

(a) definition of legal framework

The notion of a 'legal framework' used in the context of legal survivals refers predominantly to a legal text or set of legal texts, in the Polish context usually codified in one or more articles of the Civil Code or Code of Civil Procedure. However, the legal framework is usually also fleshed out in (established) case law, especially if the text of the Code is rather vague or basic. This is the case, for instance, with the doctrine of 'principles of social life' (studied in Chapter IV), where the provision contained in the Civil Code is merely a starting point, and more detailed rules regarding the application of the standard in question are contained in established case-law of the Supreme Court. The same applies to the institution of preliminary references to the Supreme Court (studied in Chapter V), where the succinct rule allowing for such references has been concretised in the established case-law of that Court. On the other side of the spectrum lie examples of legal frameworks which are set out in a detailed manner in legislative texts, such as the institution of a cooperative right to an apartment or the right of usufruct (both studied in Chapter IV) or the institution of prosecutor's standing in civil proceedings (studied in Chapter V). In the case of the latter, an already detailed legal framework in the Code of Civil Procedure is additionally supplemented in the Act on the Prosecution Service and the Internal Rules of the Prosecution Service.

(b) 'standards', 'competence rules' and 'clusters of rules'

Drawing on American critical legal philosopher Duncan Kennedy's division of legal norms into 'standards' and 'rules',⁶⁸ I will divide the legal survivals analysed in the present dissertation into three categories: *standards*, *competence rules* and *clusters of rules*. This categorisation does not necessarily reflect the typical approach of a (Polish) private lawyer, but as it will be seen later on, it is useful for the purposes of formulating more general conclusions on the nature of legal survivals.

Kennedy's distinction is based on the element of 'formal realizability' of a legal norm: standards require the assessment and evaluation of facts on the basis of a value judgment, whereas rules prescribe a specific conduct if certain facts occur, without the need of evaluating them in light of broader considerations. Kennedy mentions, as a typical rule, the minimum age for legal capacity, and, as a typical standard, good faith.

However, Kennedy's typology requires a certain adaptation in order to be useful for the analysis of legal survivals. Whilst the concepts of 'principles of social life' and 'socio-economic purpose' are undoubtedly *standards* according to Kennedy's categorisation, the category of 'rules' is not directly useful. This is because the examples of legal survivals that are analysed in this dissertation are either single rules of a special character (competence rules) or clusters of rules (comprising the legislative framework of a legal institution). Therefore, for the purposes of this dissertation I will, building on Kennedy's notion of a rule, carve out two categories: 'competence rules' and 'clusters of rules', leaving aside the notion of an (individual) rule.

⁶⁸ Duncan Kennedy, 'Form and Substance in Private Law Adjudication', *Harvard Law Review* 89 (1976): 1685-1778.

I will understand ‘competence rules’ as those rules which empower a given public official or body (e.g. a court, a prosecutor) to undertake a certain action, leaving that official or body a more or less broad margin of discretion as to the exact way of making use of the competence. Competence rules are rules, not standards, in Kennedy’s understanding, because they are ‘formally realizable’: whether and when a court or prosecutor may undertake a certain action follows from a simple analysis of facts, and not from their evaluation in the light of broader considerations (e.g. a prosecutor may intervene in *any* civil proceedings;⁶⁹ a second-instance court may file a preliminary reference in *any* civil case⁷⁰). However, despite their formal realisability, competence rules share something in common with standards owing to the margin of discretion enjoyed by the empowered official or body.

As to ‘clusters of rules’, I will understand them as a set of rules (in Kennedy’s understanding) which, taken together, regulate a given legal institution, such as a property right or a nominate contract. The rules in question set out, in particular, the rights and duties of the right holder or the contract parties.

Applying this threefold division onto the examples of legal survivals that I will study in the dissertation, I will analyse two *standards* (principles of social life, socio-economic purpose); three *competence rules* (prosecutor’s standing in civil proceedings; Prosecutor General’s and Ombudsperson’s right to challenge final judicial decisions; preliminary reference mechanism); and three *clusters of*

⁶⁹ For details see below, Chapter V section 2.

⁷⁰ Of course, whether the Supreme Court will admit the reference and respond to it by a formally binding ‘resolution’, or dismiss it in the form of an order depends on a standard (whether the issue raised by the lower court is sufficiently complex on a point of law to merit the Supreme Court’s attention). For details see below Chapter V section 4.

rules (the right of perpetual usufruct, the cooperative member's right to an apartment and the cultivation contract). I will deal with the impact of the form of the legal framework upon the mechanism of endurance of a legal survival in the conclusions (Chapter VI, section 5).

C The notion of a 'socio-economic system'

In my definition of a legal survival I use the notion of socio-economic systems, such as 'feudalism', 'state socialism' or a '(neoliberal) market economy'. Obviously, the notion of such a 'system' consciously serves to underline the differences between historically existing socio-economic and political arrangements, rather than to emphasise the smooth passage between them.⁷¹ I use the notion of such a 'system' as encompassing the entirety of political, social, economic and legal arrangements existing at a given period in a given place (e.g. state).

Following Italian legal philosopher Monateri, I subscribe to the view that insisting on continuity or discontinuity in the historical process is a matter of

⁷¹ In resorting to the notion of 'socio-economic systems', and emphasising the difference between them I cannot agree with Polish legal historian Tomasz Giaro, who asserts that: 'Today, after the failure of both progress-oriented philosophies, the positivistic and the Marxist, which divided human history into distinct compartments, both the contrast and the continuity approach seem equally exaggerated' [Tomasz Giaro, 'Roman Law Always Dies With a Codification', in *Roman Law and European Legal Culture*, ed. Antoni Dębiński and Maciej Jońca (Lublin: Catholic University of Lublin Press, 2008): 15-26, p. 22]. To the contrary, the notion of 'transition' (e.g. from actually existing socialism to a market economy and democracy) has had an immense impact upon legal thought, as evidenced by the emergence of an entire field of study on 'transitional justice' (see, for instance, the contributions in *Rethinking the Rule of Law After Communism*, ed. Adam Czarnota, Martin Krygier and Wojciech Sadurski (Budapest: Central European University Press, 2005). Researchers in this field undoubtedly emphasise the *differences* between an earlier system and a later one, and base their analytical approach on this fundamental contrast, i.e. discontinuity, as opposed to accounts emphasising continuity.

perspective and underlying (political/ideological) agendas.⁷² Having Monateri's remark in mind, the insistence on a clear-cut notion of a socio-economic system (and the concept of a 'transformation' which follows therefrom) is a natural consequence of a methodological approach focusing on identifying legal survivals. Furthermore, as I remarked earlier in this dissertation (Chapter I, section 4.B), presenting the 1989 transformation as a change *within* the same system rather than a *transition* from one system to another, would be possible only with a material distortion of the fundamental political, social and economic data, which I synthetically discuss in Chapter III below.

D The notion of a 'social function'

My definition of a legal survival also relies on the concept of 'functionality' to introduce a causal link between the socio-economic system, during which a certain legal arrangement emerged, and that legal arrangement itself as a legal survival. I use the notion of functionality to eliminate from the scope of my research any accidental legal developments which coincided historically with a certain socio-economic system but were not conditioned by that system (left vs. right hand side driving being a case in point) or even run contrary to its logic (the introduction of constitutional review in Poland during the last phase of state socialism in 1985).

Without entering a debate on functionalism in the social sciences,⁷³ I am using the notion of a 'function' in a simple and descriptive way, as an answer to the question 'what do legal actors (lawyers, citizens, judges) do with a legal

⁷² Pier Giuseppe Monateri, 'Black Gaius: A Quest for the Multicultural Origins of the "Western Legal Tradition"', *Hastings Law Journal* 50 (2000): 479-555.

⁷³ For a brief discussion of the main types of functionalism in the context of legal theory see e.g. Brian Z. Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Oxford: OUP, 1997), p. 105-107.

framework?’ or ‘how do legal actors use a legal framework?’ or ‘what does the legal framework in question serve in practice?’. Therefore, the notion of ‘function’ serves as a link between the abstract legal framework (of a textual nature – a set of rules in a Code, or a line of established case-law), and actual, real-life socio-economic behaviours of human subjects. Conceived in this straightforward manner, ‘social function’ is a shorthand reference to the practical use of a legal framework in real-life situations (whether it be in business, in litigation, in private life). Therefore, the notion of ‘function’ as used in this dissertation comprises both the intended function (purpose) of a legal institution, and its actual function, i.e. the actual effects of a legal institution, regardless of the intent of the drafters.⁷⁴

A most obvious example illustrating the understanding of ‘function’ deployed in this dissertation is the PACS (the civil solidarity pact) in French family law.⁷⁵ Originally conceived as a solution for homosexual couples (not allowed to conclude a marriage), the PACS became increasingly popular among heterosexuals, and as a result many more heterosexual PACSes are being concluded than homosexual ones.⁷⁶ Rephrasing it in the language of ‘legal framework’ vs. ‘social function’ I am using there, the legal framework (the rules on PACS in the *code civil*) were originally conceived of as fulfilling the social

⁷⁴ In Tamanaha’s terms, therefore, I am adopting the position of ‘Functional Realism’, that is paying attention to the legal ‘reality’ and the ‘actual behaviour’ of legal actors (as evidenced, in particular, in the case-law), rather than focusing on a *a priori* conceptions and abstract constructions (as in classical ‘Functionalism’) (Tamanaha, *Realistic Socio-Legal Theory...*, p. 106).

⁷⁵ Art. 515-1 et seq. of the French *Code civil*.

⁷⁶ See e.g. Scott Sayare, Maïa de la Baume, ‘In France, Civil Unions Gain Favor Over Marriage’, *New York Times*, 10/12/2010, available online at: <http://www.nytimes.com/2010/12/16/world/europe/16france.html?pagewanted=all& r=0> (last accessed: 17/3/2014).

function of formalising (legalising) the common life of *homosexual* couples; however, in practice, the social function of creating a parallel, more liberal regime for *heterosexual* couples (as opposed to the more rigid legal framework of traditional marriage) prevailed. Or, to rephrase the distinction between legal framework and social function in the language of Norman Fairclough's critical discourse analysis, the legal framework represents the *text*, whereas the social function represents the *use* made of this text in discursual practices and events.

In line with this approach, and drawing direct inspiration from Karl Renner, I analyse each example of a legal survival (in Chapters IV and V) from the point of view of its social (socio-economic) function, that is the use that people make of a given legal framework in their socio-economic relationships,⁷⁷ or, in other words its 'economic and social effect'.⁷⁸ Following Renner, I make a clear distinction between the legal framework and its social function.⁷⁹ I do so precisely because a legal framework – as illustrated by the PACS example referred to above – is often capable of fulfilling various functions. If I collapsed the notions of legal framework and social function into one, this noteworthy phenomenon would be blurred, and it would be impossible for me to underline the capability of the same (often even identical) legal framework to play sometimes very different roles in the legal life of a given society.

⁷⁷ Cfr. Renner, *Institutions...*, p. 53: '...legal institutions have a two-fold nature, according to their constituent norms on the one hand and their social significance on the other.'

⁷⁸ *Ibid.*, p. 55.

⁷⁹ *Ibid.*, p. 75. Cfr. Ludwig Raiser, *Die Zukunft des Privatrechts* (Berlin: Walter de Gruyter, 1971) cited after Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, transl. by William Rehg (Massachusetts: MIT Press, 1996), p. 398: 'The institutions of private law [...] – such as contract, property and possession, membership, tortious liability – may be the same, nevertheless they change their function and their legal valuation depending on the typical situation and the publicity content of the affected domain.'

Finally, when discussing the function of a legal institution I will sometimes refer to its ‘macro-social’ and ‘micro-social’ function. This distinction will allow me to refer, on the one hand, to the role played by the institution in question in the general political and socio-economic arrangements of society (the ‘macro-social function’), and, on the other hand, to its role seen from the perspective of ‘users’ of the legal system, that is parties entering into contracts, going to courts etc. (the ‘micro-social function’). This purpose of the distinction is to fine-tune the analysis, pointing for instance to the change of a macro-social function of a given legal survival, coupled with the endurance of one of its micro-social functions. I will rely on this distinction especially in the concluding remarks (Chapter VI, section 4).

E The notion of ‘endurance’ of a legal survival and ‘legal practice’ regarding the survival

The final element of my definition of a legal survival is what I refer metaphorically as its ‘endurance’ after the respective transformation. For this criterion to be meaningful in any way, I require that a legal survival preserve not only in its mere legal framework (e.g. as a text in a Code) but also still be made use of in actual legal discourse practice (e.g. relied upon in contracts or judgments). If we look upon the legal field through the optic of critical discourse analysis, ‘law’ can be referred to as a specific order of discourse, that is the rules governing the legal discourse (the discourse of the legal community⁸⁰). The legal discourse itself is the use of language as a form of legal practice, i.e. a specific social practice.⁸¹ The law (understood as an order of discourse) can be therefore

⁸⁰ The *notion* of a ‘legal community’ refers here to an epistemic community of lawyers, usually of a given jurisdiction (e.g. the Polish legal community, the German legal community), or of a given transnational specialization (e.g. the community of international investment lawyers, the community of public international lawyers).

⁸¹ Cfr. Fairclough, *Critical...*, p. 5-7.

compared to a language (containing the rules how to communicate), whilst individual legal practices (e.g. the pronouncement of a judgment) can be compared to conversations (conducted in that language).⁸² The notion of 'legal practices', as I will use it, will therefore include all social practices governed by the order of legal discourse, that is both legal discursive practices in the strict sense (i.e. the processes of production, distribution and consumption⁸³ of legal texts of all sorts), as well as legal discursive events,⁸⁴ such as the pronouncement of a judgment or the enactment of a new law.⁸⁵ To stipulate the endurance of a specific legal survival, I will therefore not limit myself to the continuity of existence of the legal framework (understood as a text in a code of law), but will specifically require the endurance of discursive events in which that text is relevant.

Thus, for instance, the institution of special usufruct established for the benefit of farming cooperatives – for want of any legal practice making use of this legal framework – will not count as a legal survival. The text itself remains in the Civil Code, unabrogated,⁸⁶ but it does not give rise to any discursive practices or events. This is because on the basis of an act adopted in 1991, the right became extinguished by the end of 1993, and its establishment is no longer

⁸² Cfr. Kozak, *Myslenie...*, p. 132: 'Within the discourse we construct the law, but the practice of discourse is not the law. The discourse is a network of relations between speakers. Law crystallises itself in those relations, but it cannot be said that it is identical with them. That is why I insist on the metaphor of language, not conversation.'

⁸³ The metaphor of 'consuming' texts is taken from Fairclough, *Critical...*, p. 2.

⁸⁴ Cfr. Fairclough, *Critical...*, p. 2.

⁸⁵ Cfr. *ibid.*, p. 23.

⁸⁶ Art. 271-279 k.c.

enabled by the relevant provisions of administrative law.⁸⁷ Conversely, the prosecutor's standing in civil proceedings will count as a legal survival, because prosecutors in Poland do intervene in around 100,000 civil cases yearly, as evidenced by the official statistics.⁸⁸ Thus, a rule of the order of discourse of civil procedure, which gives 'voice'⁸⁹ to prosecutors, is applied in actual discursal events (civil law suits, in which prosecutors participate).

Finally, I would like to emphasise that the endurance of a legal survival as conceived of in this dissertation does not exclude a modification (even fundamental) of the social function of that legal framework. This was exactly the idea behind Karl Renner's study of legal survivals – continuity of the legal framework despite a change in its social function. In fact, I expand Renner's notion of a legal survival by including also those institutions, which, despite maintaining their identity, have required a certain adaptation of their legal framework in order to enable them to fulfil new functions, such as in particular the cooperative member's right to an apartment or the right of perpetual usufruct, both analysed in Chapter IV.

5 Method of analysis

In chapters IV and V, I will apply a uniform methodology for purposes of analysing concrete legal survivals. Each legal survival will be analysed from the point of view of five analytically distinct, but closely interconnected, aspects,

⁸⁷ Stanisław Dmowski, 'Władanie nieruchomościami rolnymi przez rolnicze spółdzielnie produkcyjne' [Control of Agricultural Real Estates by Agricultural Production Cooperatives] in *Ars et usus. Księga pamiątkowa ku czci Sędziego Stanisława Rudnickiego* [Ars et Usus: Essays in Honour of Judge Stanisław Rudnicki] (Warszawa: LexisNexis, 2005), p. 74-76.

⁸⁸ For details see Chapter VII below.

⁸⁹ Cfr. Fairclough, *Critical...*, p. 14.

which draw heavily on the definition presented in section 4 above. Those aspects are as follows:

- (1) the circumstances of introduction of a given institution (with particular emphasis on the connection between the legal survival in question and the socio-economic system prevalent at the time of its introduction);
- (2) the legal framework and its possible adaptation to the new circumstances;
- (3) the legal practice making use of the legal framework (whether that framework is not only present within the law-in-books (in codes of law), but whether it is also invoked in actual legal discursive practice, e.g. in contracts, judgments, etc.⁹⁰)
- (4) the social function (and its possible evolution) of the legal framework and its possible changes; and
- (5) the mechanism of endurance, that is an explanation of how it was possible for the legal survival in question to remain in place despite the transformation.

Analysing specific legal survivals, I adopt the hypothetical assumption that the condition for the endurance of a legal survival is its adaptation to the new socio-economic conditions, and therefore I enquire about the exact area of such an adaptation. I will come to the conclusion that it can be identified either within the legal framework or the social function.⁹¹ The legal framework can be adapted explicitly (e.g. by an amendment) or implicitly (by a new interpretation

⁹⁰ See above, section 4.E. of this chapter where I discuss the notions of 'endurance' and 'legal practice' as parts of the definition of a legal survival.

⁹¹ Renner, *The Institutions...*, p. 76.

given by scholars and courts). Of course, metaphorically I speak here of an 'adaptation' as if I were discussing the evolution of species. Nevertheless I would like to underline once again that a conceptual metaphor, as the one at work here, aims at conceptualising, framing and understanding a phenomenon in the terms of another one. This implies selective mappings between two domains, geared towards gaining a better picture of the more abstract phenomenon (the 'target domain').⁹² Needless to say that the conceptual metaphor does not in any way obscure the fact that a legal survival is a certain legal framework (ultimately – a text or set of texts) and not a plant or animal, and that 'adaptation' is understood not as genetic mutations over generations, but as modifications to the legal framework introduced by legislators or judges. Such modifications can take either the form of a fresh interpretation of the same legislative text, or the form of amendments introduced to the legislative text itself, but preserving the identity of the legal institution in question (e.g. the institution of a 'right of perpetual usufruct' was not totally abolished after 1989, as some proposed, but adapted to a market economy).⁹³

An important distinction that I make with regard to those legal survivals whose legal framework was subject to adaptation is one into a 'core' (which distinguishes the legal framework in question from other legal frameworks) and a 'penumbra'⁹⁴ (connected legal rules which can be modified without affecting the identity of the legal survival). The core, as I will understand it, relates to the

⁹² On 'mappings' and 'domains' in conceptual metaphor theory, see above, section 3.

⁹³ For details see below, Chapter IV.

⁹⁴ It should also be mentioned that the core/penumbra metaphor has also been applied by H.L.A. Hart to elucidate his notion of legal interpretation, by opposing a core of commonly accepted, obvious meanings of a legal text towards the penumbra of possible but disputed meanings. See e.g. Hart, *The Concept...*, p. 123: 'Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rule.'

principal function of a legal framework as it can be identified on the basis of the relevant rules which make up that framework. For instance, in the case of a cooperative member's right to an apartment, I identify the 'core' with the member's right of exclusive enjoyment of the apartment. In the case of perpetual usufruct, I identify the 'core' with the usufructuary's right of enjoyment of the land in question, and so forth. Conversely, the 'penumbra' of those two institutions would be made up of the detailed rules laying down specific modalities of acquiring and enjoying and alienating the right, including, but not limited to, the formalities, such as e.g. whether the right arise out of contract or of administrative decision, or whether the right-holder may sublet the apartment or land without permission etc.

This core/penumbra distinction within legal survivals draws upon a metaphor from the philosophy of mathematics, where an initially proposed theorem is, in the course of a dialectic of proofs and refutations, gradually reduced to its 'hard core' which resists falsification, allowing to speak of a

'contracting sequence of the nested *domains of successive improved theorems*; these domains shr[i]nk under the continued attack of global counterexamples in the course of the emergence of hidden lemmas [...].'⁹⁵

In the case of legal survivals, the need of drawing the line between a legal survival (a form of continuity) – and a 'legal non-survival' (a form of discontinuity) is fundamental for delineating the scope of the enquiry into legal survivals. If a given institution is modified to an extent affecting its 'core', we can no longer speak of a legal survival.

⁹⁵ Imre Lakatos, *Proofs and Refutations: The Logic of Mathematical Discovery* [1976] (Cambridge: CUP, 1999), p. 64.

Although the core/periphery distinction, at least with regard to legal survivals, may seem, at first blush, to be an arbitrary interpretation imposed upon the legal framework by the researcher, it is not so. This is because I identify the ‘core’ on the basis of the legal framework (concrete rules), approaching it from the point of view of the typical user of that legal framework. In practice, the typical holder of a cooperative right to an apartment acquires such a right in order to live in the apartment; a typical user of the cultivation contract enters into a contract (as a farmer) to grow crops and sell them, and so forth. By adopting the perspective of the typical user of the legal framework (in light of that framework), I ensure that the core/periphery distinction is not an arbitrary imposition, but a legitimate way of analysing the legal survivals in question.

6 Legal survivals and the ‘form’ vs. ‘substance’ dichotomy

Undoubtedly, the form vs. substance distinction ‘is an important part of legal reasoning in the Western world’,⁹⁶ making it worthwhile to reflect upon the place of legal survivals with regard to this dichotomy. In particular, one could ask whether legal survivals are ‘substantive’ or ‘formal’, and whether this distinction is relevant for the study of legal survivals at all. However, there are many understandings of the form vs. substance distinction in legal scholarship, and not all of them are relevant for the study of legal survivals.

First of all, the distinction is used to describe legal arguments, whereby ‘formal’ arguments refer to authoritative texts (e.g. statutes, precedents), whilst ‘substantive’ ones refer to the underlying moral, social, and economic considerations, as well as to actual outcomes of various possible interpretations

⁹⁶ Matti Ilmari Niemi, ‘Form and Substance in Legal Reasoning: Two Conceptions’, *Ratio Juris* 23.4 (2010): 479–492, p. 479.

for real-life situations to which the law is applied.⁹⁷ Depending on the relevant importance of formal and substantive arguments in a given legal culture, it can be described either as formalist (dogmatic)⁹⁸ or anti-formalist (realist,⁹⁹ anti-dogmatic,¹⁰⁰ pragmatic¹⁰¹). This understanding of form vs. substance does not seem to have any bearing on legal survivals as they are understood in this dissertation.¹⁰²

Secondly, the form vs. substance dichotomy can be understood as an opposition between legal doctrine (the form) and the underlying socio-economic relationships (the substance). The treatment of law as ‘form’, and the socio-economic relationships as its ‘substance’ has been characteristic for Marxist legal theorists,¹⁰³ as well as for the Critical Legal Studies movement.¹⁰⁴ Under this understanding, legal survivals would belong exclusively to the (legal) form, and their endurance would take place despite the change of

⁹⁷ Ibid., p. 479-480; Patrick S. Atiyah, Robert Summers, *Form and Substance in Anglo-American Law* (Oxford: OUP, 1987) p. 23; Hesselink, *The New...*, p. 9; Robert Summers, *Form and Function in a Legal System* [2006] (Cambridge: CUP, 2009), p. 61

⁹⁸ Hesselink, *The New...*, p. 9, 20, 25.

⁹⁹ Ibid., p. 23.

¹⁰⁰ Ibid., p. 26.

¹⁰¹ Thomas C. Gray, ‘Judicial Review and Legal Pragmatism’, *Wake Forest Law Review* 38 (2003): 473-511.

¹⁰² This is because this dissertation focuses on legal survivals understood as legal institutions, not features of legal culture, modes of reasoning, judicial methodologies and the like. Under the latter understanding, the ‘formalism’ or ‘anti-formalism’ of a given legal culture could be a legal survival in itself. For an application of this approach to Polish legal culture see Rafał Mańko, ‘Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome’, *Pólemos: Journal of Law, Culture and Literature* 7.2 (2013): 207-233.

¹⁰³ See e.g. Evgeny B. Pashukanis, *Law and Marxism: A General Theory. Towards a Critique of the Fundamental Juridical Concepts* [1929], transl. by Barbara Einhorn (London: Pluto Press, 1983), p. 53-64; Isaac D. Balbus, ‘Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of the Law’, *Law and Society* 11 (1977): 571-588.

¹⁰⁴ Kennedy, ‘Form and Substance...’, *passim*.

the (socio-economic) substance; therefore, they would be indiscriminately 'formal' in this sense.¹⁰⁵ This approach to the form vs. substance dichotomy, especially its application by Duncan Kennedy in his study on rules and standards in private law adjudication,¹⁰⁶ is useful from the point of view of analysing legal survivals.

Although they all count as 'formal' in this understanding, the form still matters, especially with regard to the mechanisms of endurance. A point I will make in the concluding remarks,¹⁰⁷ drawing on the case studies of individual legal survivals, is that the form of the legal framework (whether it is a standard, a competence rule or a cluster of rules)¹⁰⁸ has an impact upon the mechanism of adaptation of a legal institution after transformation.

Finally, the form vs. substance distinction can be understood as contrasting the wording of a legal text (the form) and the normative meaning conveyed by that text (the substance).¹⁰⁹ Under this understanding, the 'form' of a legal survival would be the wording of the legal provisions defining a given

¹⁰⁵ Therefore, whatever research into their nature would be conducted, owing to the character of this conceptual framework and terminological convention, it would not be possible to describe some legal survivals as 'formal', and others as 'substantive'.

¹⁰⁶ Kennedy, 'Form and Substance...', *passim*. In his essay Kennedy enquired into the relationship between the form of a legal norm (rules vs. standards) and its socio-economic substance (understood as competing visions of the social order on the continuum between 'altruism' and 'individualism'). Whereas I will not enquire into the altruism vs. individualism aspect of legal survivals, I consider Kennedy's reflections on the variety of legal forms as useful. See section 4.B(c) above and Chapter VI, section 5 below.

¹⁰⁷ See Chapter VI, section 5 below.

¹⁰⁸ I have introduced these notions, inspired by Kennedy, in section 4.B(c) above.

¹⁰⁹ It seems that exactly this understanding of the notion of 'form' is at work in Collins's criticism of Renner (Collins, *Marxism and Law*, p. 53-54), as well as in the works of American legal theorist Robert Summers, who understands the 'form of a [legal] rule and its constituent formal features' as 'prescriptiveness, completeness, definiteness, generality, internal structure, manner of expression, and mode of encapsulation' (Summers, *Form and Function...*, p. 7).

legal institution, and its ‘substance’ would be the prevalent interpretation of that legal institution within the legal community, as evidenced e.g. in the case-law. The notion of ‘substance’ in this understanding would correspond, therefore, to the notion of ‘application of the legal framework in practice’ in my analysis of legal survivals.¹¹⁰

Following this understanding of legal survivals, they would be both formal and substantive at the same time, in line with the requirement (see section 4.E above) that for a legal institution to count as a survival it is necessary not only that it endures as a legal text (‘formal’ survival), but also that there be a legal practice making use of it (‘substantive’ survival). Merely formal survivals in this sense, such as the institution of special usufruct for agricultural cooperatives (mentioned in section 4.E above) would not count as a legal survival at all for want of any ‘substance’, i.e. relevant legal practice making use of the institution.

However, the interplay between the (textual) form of a legal survival and its (normative) substance is more nuanced. In particular, some legal survivals have retained the exact wording of their legal framework (such as the principles of social life,¹¹¹ the socio-economic purpose,¹¹² the standing of a prosecutor in civil proceedings¹¹³), whilst in the case of others the wording (i.e. the textual form) of the legal framework was totally revamped (no formal continuity), but the normative substance was partly retained (partial substantive continuity). This has been the case with of the ‘extraordinary’ revision/cassation ¹¹⁴ and the

¹¹⁰ Sub-section ‘C’ in each of the sections devoted to individual legal survivals (see Chapter IV, sections 2.C, 3.C, 4.C, 5.C and Chapter V, sections 2.C, 3.C, 4.C).

¹¹¹ See below Chapter IV section 2.

¹¹² See below Chapter IV section 3.

¹¹³ See below Chapter V section 2.

¹¹⁴ See below Chapter V section 3.

cooperative right to an apartment.¹¹⁵ The original texts dating from the socialist period have been completely abrogated, nevertheless the new rules bear witness to a substantive continuity of the normative content. Finally certain other legal survivals, despite maintaining formal (textual) continuity, have nevertheless been subject to an adaptation of the wording of the legal framework (the form) whereby the normative substance was adapted too. This has been the case of the right of perpetual usufruct¹¹⁶ and the cultivation contract.¹¹⁷

¹¹⁵ See below Chapter IV section 5.

¹¹⁶ See below Chapter IV section 4.

¹¹⁷ See below Chapter IV section 6.