ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 109, 2024

https://doi.org/10.18778/0208-6069.109.06

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LEGAL TRANSPLANTS, LEGAL SURVIVALS, AND LEGAL REVIVALS: TOWARDS A RECONCEPTUALISATION OF THE CIRCULATION OF LEGAL FORMS IN TIME AND SPACE

Abstract. When Alan Watson introduced, back in the 1970s, the concept of a legal transplant, also known as a legal transfer, he revolutionised comparative law and comparative legal history by showing that most of legal development takes place through borrowing. However, his notion of a legal transplant conflates two quite different realities: on the one hand, the borrowing of legal forms from other, simultaneously existing legal systems (such as the transplant of the Swiss Civil Code to Atatürk's Turkey) and, on the other hand, the rediscovery of old legal forms and their "borrowing" from long defunct legal systems (such as the rediscovery of Justinian's *Corpus Iuris Civilis* by medieval lawyers in Western Europe, and the infusion of Roman ideas about contract law into existing customary rules). Although there are certain formal similarities between the two phenomena, this article will argue that they should not be conflated, especially given the sharp socio-legal difference between borrowing from a living legal system (with a functioning judiciary and legal academia) and the cultural appropriation of historical legal material for contemporary legal purposes. In this vein, the present paper – drawing on Theo Mayer-Maly's concept of "return of juridical figures" and Tomasz Giaro's concept of a legal "resurrection" or "borrowing from the past" – proposes to introduce a new notion of "legal revivals" and carefully delimits them from legal transplants, on the one hand, and legal survivals, on the other. One of the characteristic features of legal revivals is the use of the resources of legal history for the purposes of contemporary legal innovation.

Keywords: legal transplant, legal survival, legal revival, legal form, juridical anabiosis

PRZESZCZEPIANIE, TRWANIE I WSKRZESZANIE INSTYTUCJI PRAWNYCH: PRÓBA NOWEGO UJĘCIA OBIEGU FORM PRAWNYCH W CZASIE I PRZESTRZENI

Streszczenie. Kiedy Alan Watson wprowadził w latach 70. pojęcie przeszczepów prawnych (*legal transplants*), zwanych też transferami prawnymi (*legal transfers*), zrewolucjonizował komparatystykę prawniczą i porównawczą historię prawa, pokazując, że rozwój prawa odbywa

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I would like to express my gratitude to Dr Piotr Eckhardt (University of Wrocław), Dr Liviu Damşa, and the two anonymous peer reviewers for their immensely helpful comments. All views presented in this paper are purely personal and do not present the official position of any institution.

Received: 3.10.2024. Verified: 16.10.2024. Revised: 20.08.2024. Accepted: 10.10.2024.

się główne poprzez zapożyczenia. Jednak jego pojęcie przeszczepów prawnych łączy w sobie dwie zupełnie różne rzeczywistości: z jednej strony, zapożyczanie form prawnych z innych, jednocześnie istniejących systemów prawnych (takich jak przeszczepienie szwajcarskiego kodeksu cywilnego do Turcji Atatürka), a z drugiej strony, ponowne odkrywanie starych form prawnych i ich „zapożyczanie" z dawno nieistniejących systemów prawnych (takich jak ponowne odkrycie *Corpus Iuris Civilis* Justyniana przez średniowiecznych prawników w Europie Zachodniej oraz przenikanie rzymskich idei dotyczących prawa zobowiązań do istniejących systemów prawa zwyczajowego). Chociaż istnieją pewne formalne podobieństwa między tymi dwoma zjawiskami, niniejszy artykuł będzie argumentował, że nie należy ich łączyć, zwłaszcza biorąc pod uwagę wyrazistą społeczno-prawną różnicę pomiędzy zapożyczeniem z żywego systemu prawnego (z funkcjonującym sądownictwem i doktryną) a kulturowym przyswojeniem historycznego materiału prawnego w celu jego wykorzystania do współczesnych celów prawnych. W tym duchu niniejszy artykuł proponuje – w nawiązaniu do zaproponowanego przez T. Mayera-Malego pojęcia „powrotu figur prawnych" oraz przez T. Giaro pojęć „zmartwychwstania" lub „pożyczania z przeszłości" – wprowadzenie nowego pojęcia *legal revival* (tj. odradzania się czy też przywracania do życia dawnych instytucji prawnych), precyzyjnie oddzielając je od pojęć *legal transplant* (tj. przeszczepiania instytucji prawnych) i *legal survival* (tj. reliktowych instytucji prawnych). Tym, co charakteryzuje *legal revivals* to sięganie do zasobów historii prawa w celu opracowania nowatorskich rozwiązań prawnych we współczesności.

Słowa kluczowe: przeszczepy prawne, relikty prawne, wskrzeszanie instytucji prawnych, forma prawna, anabioza prawna

1. INTRODUCTION

From times immemorial, legal forms[1] have been borrowed from foreign jurisdictions (legal transplants)[2] and carried over – with modifications, especially through reinterpretation – from previous epochs (legal survivals). In Polish legal history, one is very familiar with the wholesale reception of French law in the Duchy of Warsaw, Austrian law in southern Polish lands, Prussian law in the West and Russian law in the east – all during the period of the partitions (1795–1918),

[1] In this paper, I understand "legal forms" as legal rules, legal norms, legal institutions (sets of norms), legal principles, or legal concepts perceived from a formal angle, i.e. in abstraction from their aimed or actual social function or purpose. The substratum of any legal form is a certain idea, which may be expressed in a concrete text (e.g. a fragment of the *Digest*, an article or set of articles of a civil code, a court judgment which contains an important precedent), but equally may be expressed in many texts (such as the actual meaning of a legal principle of concept). We should keep in mind that the Greek word for "form" is εἶδος which is etymologically cognate to the verb "to see" (ἰδεῖν) and the noun "idea" (ἰδέᾳ). Cf. Kraut 1992, 7; Zartaloudis 2019, xv. Cf. the notion of "legal doctrine" understood by Cotterrell (2018, 4) as "rules, principles, concepts, values" and placed at the core of his programme of a sociology of legal ideas as part of sociological jurisprudence.

[2] Defined by Watson (1993, 21) as "the moving of a rule or a system of law from one country to another, or from one people to another". I leave aside here the question whether the notion of a legal transplant/transfer can be effectively used both for the cross-border borrowing of individual legal institutions and entire codes or even entire legal systems. I would like to express my gratitude to Dr. Piotr Eckhardt for raising this methodological issue – one which certainly requires further reflection.

when an independent Polish state did not exist. There is also no shortage of global examples: for instance, the English common law was exported to British colonies and still exists there – as in the United States, Canada, or Australia. But also independent nations have voluntarily imported foreign law – amongst the most well-known cases are the transplantation of French civil law to Romania, Swiss civil law to Turkey, or German civil law to Japan.

Likewise, the phenomenon of *endurance* of legal forms over time has also been present since times immemorial. As Alan Watson put it: "A society makes law; the society changes, politically or economically, but the law remains the same or little changed" (Watson 2000, 1). Already in Roman law the institutions known from the *Lex XII Tabularum* survived until the end of the Empire. Legal survivals abound also in our modern legal systems. For instance, the English law of property with regard to immovables (land law) still resorts to purely feudal legal institutions, such as "freehold estate," which date back, as legal forms, to the Norman conquest of the 11th century. Over time, these institutions evolved and changed their social functions many times (Rahmatian 2022). The same can be said of the English doctrine of "consideration," which initially represented an element of actual synallagma or *quid pro quo* (Homes 1885, 171; Laske 2020, 85), but over time became a mere "badge of enforceability" (McKendrick 2019, 74) having nothing to do with the actual cause underlying a contractual obligation. In Polish law, we also find numerous examples of socialist legal survivals, such as the right of perpetual usufruct (Mańko 2017b), the legal regime of housing cooperatives (Eckhardt 2024, 283–336), the concept of the principles of social community life (Mańko 2012), and many others.

However, the existence of a given phenomenon is one thing, and its conceptualisation by legal science is another. While legal transplants and legal survivals have existed since Antiquity, the notion of a legal transplant was explicitly introduced only in 1974 by Alan Watson (Watson 1993[1974]), and the concept of a legal survival is to be credited to American judge Oliver Wendell Holmes (2009 [1881]) and to Austrian sociologist of law Karl Renner (1976 [1929]).[3] Although research into legal transplants – sometimes referred to as "legal transfers"[4] – has already become well established in comparative law (Trikoz, Gulyayeva 2003), the research on legal survivals is only developing, with a number of recent publications exploring their theory (Mańko 2015a; 2015b; 2016a; 2017a; 2023) and a slowly growing body of literature applying the theory and the ensuing methodology (Mańko 2016b; 2016c; 2017b; Kuźmicka-Sulikowska 2019; Stetsyk

[3] A very specific type of legal survivals, namely the change of function of archaic Roman formal acts was already noted in the 19th and early 20th century, and referred to as "apparent transactions" (Ger. *Scheingeschäfte*) or "reshaped juridical acts" (Ger. *nachgeformte Rechtsgeschäfte*). See Jhering 1858, 540–555; Rabel 1906/1907.

[4] The term "legal transfers" is used, *inter alia*, by legal historian Tomasz Giaro (2007; 2011a, 3–4; 2024).

2019; Ernst, Sadowski, Sadowski 2024; Preshova, Markovikj 2024).[5] Moreover, the importance of legal transplants and legal survivals for the legal identity of certain regions – notably, of Central (and Eastern) Europe – is being recognised (see e.g. Uzelac 2010; Mańko 2019, 69–73; Mańko 2020b, 34; Forić et al. 2024; Sulikowski, Mańko 2024, 258–259).

In 1971, in a short text published in the German *Juristenzeitung*, Austrian Romanist Theo Mayer-Maly drew attention to the phenomenon of the "return of legal figures" (Mayer-Maly 1971). In the context of a discussion on the reform of legal education, Mayer-Maly contrasted two metaphors used to account for legal change: evolution, on the one hand, and the permanence of return (*Permanenz der Wiederkehr*), on the other (Mayer-Maly 1971, 1). The Austrian Romanist focused on two examples, the *arbitrium boni viri* (the determination of performance by an independent third party) and *fiducia cum creditore contracta* (a transfer of ownership as security for a loan). On the bases of these case studies, Mayer-Maly noted that the return of legal figures is "not a regression (*Rückfall*) but a *Renaissance*" (Mayer-Maly 1971, 3). This is because a returning legal figure always contains new elements. On a more general note, the Salzburg professor of Roman Law noted that "[l]egal development occurs on a straight line much more rarely than evolution in nature. The return of structures is much more frequent than their final extinction" and that "[t]his tendency for the renaissance of the juridical has its grounds in the limitations of the juridical inventory. According to the hitherto experience (…) it is so small that a frequent return towards juridical figures developed long ago seems inevitable" (Mayer-Maly 1971, 3).

Mayer-Maly's idea of the "return of legal figures" was taken up again in 2007, when Tomasz Giaro's essay pointed out that such situations as the drawing up of the *Corpus Iuris Civilis* under Justinian – or later its reception in medieval Western Europe – can be described as instances of legal "borrowing from the past" or legal "resurrection" (Giaro 2007, 288). When Justinian ordered the *Digesta* to be compiled, it was a "transfer of law in fact no longer in force, originating from a no longer existing state," and the same was, of course, true with the reception of the *Corpus Iuris* in medieval Europe. However, despite the awareness of these phenomena and the proposal of an apt concept by Giaro,[6] it seems that sociologists of law, legal historians, and comparative lawyers have not yet taken

[5] Legal survivals have also been explicitly discussed during a recent focused research workshop held at the Riga Graduate School of Law (Mańko and Eckhardt, forthcoming) and had also been addressed during previous conferences organised under the auspices of the Central and Eastern European Network of Legal Scholars (CEENELS) (Zomerski 2016; 2017; Mańko 2020b, 33–34). Other CEENELS conferences were devoted to closely related questions of Central European legal identity (Szymaniec 2018) and Central European legal innovations (Szymaniec 2021).

[6] As a matter of fact, Giaro mentioned "resurrection" *en passant*, within a paper devoted to the concept of a legal transplant (transfer), and he did not argue for clearly delineating legal revivals from legal transplants.

up legal revivals seriously as an object of study, in contrast to the established scholarship on legal transplants and the emergent literature on legal survivals, referred to above. In this context, the present paper aims at drawing attention to the need of using a distinct concept to denote instances of legal borrowing from the past, and proposes a slightly less theologically-charged term – that of a "legal revival"[7] (by analogy to a legal *sur*vival)[8] or the "anabiosis"[9] of a legal form.

The paper will argue for a clear differentiation of legal revivals from legal transplants and a conceptual delineation from the bulk of legal survivals. I will argue that legal revivals can be treated, in some situations, as special cases of legal survivals (if the identity of the legal system and its corresponding legal culture are maintained), but more often legal revivals should be perceived as a distinct phenomenon, which testifies not so much to the capacity of the *endurance* of legal forms, but, rather, to their *universality and versatility* (Watson 1993, 96), which is – as it will be hypothesised – a consequence of their abstractness and generality (Mańko 2021, 40).

Being well aware of Alan Watson's warning that "[i]t is up to those (if any) who would wish to elaborate types of transplantation to show what new light the classification would cast on the data" (Watson 1993, 30), I hope that this paper will not only succeed in identifying the phenomenon of legal revivals, but also persuade the reader that this concept can bring new added value for the discussion of the circulation of legal forms in time and space, and become a path through which we can come to appreciate even more the intrinsic worth of juridical form based, as it is, on its formal values (Kozak 2010, 155). Indeed, the opting for one scientific concept over another one is also of significance. For instance, as Giaro points out, "in the study of circulation of legal models, if we banish the time-honoured concept of 'reception' replacing it with 'transfer' of legal rules or institutions, the reciprocity of influence and the active role of the taker will be stressed" (Giaro 2011a, 3–4). Likewise, speaking of "legal survivals" rather than "legal tradition" shifts the focus from the entirety of legal culture towards concrete legal institutions (Mańko 2015, 18). In this vein, the new concept of a "legal revival" can – as I will try to show – draw attention to different aspects of the same phenomenon than those which would normally be in focus. The present paper can also be seen as a response to Roger Cotterrell's call for developing a sociology of legal ideas, specifically focused on the sociology of what he calls "legal doctrine" (Cotterrell 2018, 4).

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[7] Etymologically, the English noun "revival" stems from the verb "to revive," which, in turn, is derived from the Latin verb *revivere* (Onions 1966, 764).

[8] The English noun "survival'" stems from the verb "to survive," which also has a Latin etymology coming from *supervivere* (Onions 1966, 890).

[9] From the Greek ἀναβίωσις, etymologically derived from ἀνα- (equivalent of "re-'") and βίος ("life").

Given that the present paper aims at proposing an entirely new theoretical concept on the basis of legal experience – and, therefore, inductively moves "form law to philosophy" (Zirk-Sadowski 2011, 19) – the main focus will be on examples of legal revivals (section 2), followed by an outline definition of the new concept (section 3) and a delineation from already existing concepts of legal transplants and legal survivals (section 4), followed, in turn, by an overview of possible research questions of a socio-legal and legal-historical nature (section 5). Considering that the concept of a legal revival is new, further research will still be necessary to explore its theoretical implications. Some of them will be addressed in a preliminary fashion in section 6. The examples provided in section 2 are taken from various jurisdictions and epochs rather than one legal system from a single period. This is a conscious choice, because the goal of the paper is to argue for a universally applicable and valid concept rather than one which would be limited to explaining only a single phenomenon in one legal culture.

In methodological terms, the paper spans between legal history, comparative law, the sociology of law, and legal theory. This interdisciplinary approach is dictated by the phenomenon of legal revivals itself. Just like the concepts of legal transplants and legal survivals also engage various legal disciplines, so too the phenomenon of legal revivals requires to move between various perspectives and adopt an eclectic approach. However, if one perspective were to be described as the leading one, it would be the historically-informed sociology of law in the classical sense: the goal of the paper is to *identify* a distinct phenomenon, *propose a new concept*, and *delineate* it *vis-à-vis* other existing concepts.

2. SOME EXAMPLES OF LEGAL REVIVALS

The most well-known and well-documented series of legal revivals arise from the so-called "reception" of Roman law in Western Europe from the 11th century onwards. It is important to stress that the source material for this process was a body of legal texts that came to be known in the West as the *Corpus Iuris Civilis*, a text that had been formally enacted by the Byzantine Emperor Justinian in the 6th century. However, it was not a compilation of Byzantine law of its period, but, rather, a reflection of earlier Roman law, chiefly of the period of the Principate (classical law), though with modifications (Watson 2000, 1–43). Thus, the intellectual influence of the *Corpus Iuris Civilis* in medieval Western Europe was neither a transplant of Byzantine law (which, by that time, had been codified in the *Basilicae*), but a rediscovery of a Byzantine collection of earlier Roman law – not a law that (simultaneously) *was* but a law that *had been* (cf. Giaro 2007, 288). For those reasons, it cannot – I argue – be described as a legal transplant: the donor system (Byzantine law) had changed in the meantime (between Justinian and the 11th century), and the original donor system (classical Roman law) had ceased

to exist centuries before. As Raoul Van Caenegem (1987, 126) put it, medieval Western Europe

> suddenly accepted the great law book of a society that had been gone for centuries as its ultimate authority and entirely reshaped its own law through scholastic glosses, disputations, and commentaries on this venerable relic of a defunct world.

The penetration of the *Corpus Iuris Civilis* differed from region to region. Thus, in some areas – such as southern France or Italy – it was officially accepted as the law of the land. The same occurred in Germany as of 1495 (Tigar 2000, 141; cf. Van Caenegem 1987, 44), i.e. much later. In other areas, such as notably northern France, where Frankish customary law remained officially in force, individual legal forms taken from the *Corpus Iuris* were nonetheless introduced, for instance in the process of restating the customary laws in written form (Tigar 2000, 138–141; cf. Van Caenegem 1987, 59) and their later official "homologation" (Van Caenegem 1987, 105–106). Michael E. Tigar points out that the main reason behind this revival of Roman law was the development of commerce and the need for effective solutions in the area of contract law (Tigar 2000, 76). In those areas where Roman law was not officially in force, such as northern France or England, its revival took place tacitly, without being cited or referenced (Tigar 2000, 142). An important inroad was – from the very outset – the practice of drafting commercial contracts (Tigar 2000, 72–75, 146–148). Another telling example of a legal revival is the reinstatement – following Greece's independence from the Ottoman Empire – of the *Hexabiblos* (itself based on the *Basilicae*), dating back from 1345, as the revived Greek civil law of the 19th century (Giaro 2007, 302).

However, the revival of legal forms is not restricted solely to the impact of the *Corpus Iuris Civilis* in medieval and early modern Europe. Examples of legal forms being effectively revived after decades of absence can also be adduced from today's legal culture. To refer to the Polish context, a characteristic example is the "extraordinary revision" [Pol. *rewizja nadzwyczajna*], i.e. a legal form of special appeal introduced into Polish law in 1949 (criminal procedure) and 1950 (civil procedure), transplanted most directly from Soviet law (Jodłowski 1951, 45–46). Yet, in 1996, as part of the post-communist legal reforms, the extraordinary revision was abolished, precisely on account of its Soviet pedigree (Mańko 2007, 96). However, 30 years after it had been abolished, the legislator decided to revive it under the similar sounding name of "extraordinary complaint" [Pol. *skarga nadzwyczajna*],[10] effectively copying the old legal form's most important features (Ereciński, Weitz 2019, 8–9; Zembrzuski 2019, 35–37; Stasiak 2020, 1).

The same can be said about the revival of separation (*separatio a mensa et thoro*), known e.g. in Austrian law and imperial Russian law, which had been in force in Poland until 1945, but was unknown to Polish family law as

[10] Articles 89–95 of the Supreme Court Act 2017 (Ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym, *Dziennik Ustaw* 2018, item 5), in force as from 3 April 2018.

of its unification in 1945 (Lasok 1968, 100) and introduced to it only in 1999[11] (Fiedorczyk 2007, 61). It would be somewhat artificial to speak of a "survival" of the *legal form* of separation during the 50 years it did not exist in Polish law, nor to describe it as a transplant from abroad, given that the new rules were rather inspired by Professor Lutostański's pre-War draft)[12] (Fiedorczyk 2007, 59). Thus, one can certainly speak of the survival of the *idea* of the legal institution of separation (provided for, notably, in Professor Lutostański's draft), especially since conservative circles demanded its reintroduction, for instance on the occasion of the drafting of the Family Code of 1965 (Fiedorczyk 2014, 687).

There is also a host of examples of the revival of old legal forms within Polish public law, for instance the revival of the Supreme Administrative Court [Pol. *Naczelny Sąd Administracyjny*] in 1980 (modelled on the pre-War Supreme Administrative Court of Justice [Pol. *Naczelny Trybunał Administracyjny*]) (Banaszak, Wygoda 2014, 167), the revival of the institution of the President of the Republic in 1989 (following 48 years of a collective head of state – the Council of State [Pol. *Rada Państwa*]) (Kowalski 2008, 129), or the revival of the Senate also in 1989 (Leszczyńska-Wichmanowska 2021, 79–80).

Obviously, examples of legal revivals are not restricted to the Polish context. One can mention the revival of the Latvian pre-War constitution of 1922 (Pleps 2016; Pleps et al. 2022, 11–12; Cercel, Pleps 2024, 179–181) and its pre-War Civil Law of 1937 (Bolodis 2013) after it had regained independence from the Soviet Union. The revival of these legal acts, thrown into an entirely different social context after 50 to 60 years of not being applied,[13] created unprecedented challenges for the judiciary and doctrine.[14] In particular, the Latvian constitution of 1922 was considered by many as obsolete, and its restitution in 1990 was initially coupled with a suspension of most of its provisions; however, as of 1993, the entire constitution has been in force and applicable (Pleps 2016, 35–36). In Estonia, the pre-War constitution was partly restored (a legal *revival*) (Pleps 2016, 38), but, by contrast, the Soviet-era civil code was initially retained (a legal *survival*) (Kull

[11] Ustawa z dnia 21 maja 1999 r. o zmianie ustaw Kodeks rodzinny i opiekuńczy, Kodeks cywilny, Kodeks postępowania cywilnego oraz niektórych innych ustaw (Dz.U. 1999 nr 52 poz. 532).

[12] Projekt prawa małżeńskiego uchwalony przez Komisję Kodyfikacyjną w dniu 28 maja 1929, available at: https://www.bibliotekacyfrowa.pl/dlibra/publication/29355/edition/35389 (accessed: 25.07.2024). Cf. Dworas-Kulik 2020.

[13] The Constitution of 1922 was suspended already in 1934 due to a military coup and the ensuing period of authoritarian rule (Pleps 2016, 33; Pleps et al. 2022, 11; Cercel, Pleps 2024, 179).

[14] These issues were discussed in the papers presented at the International Workshop "Legal Survivals in Central and Eastern Europe: Socio-Legal Perspectives on Public and Private Law," Riga Graduate School of Law, 15–16 June 2024 (see Mańko and Eckhardt, forthcoming) – papers by Prof. Jānis Pleps ("Influence of the Socialist Legal Tradition on the Application of the Satversme") and Dr. Alexandrs Fillers ("A Relic of Days Gone By: The Latvian Civil Law in Contemporary Latvia").

1999, 158 n. 3). In Lithuania, the pre-War authoritarian constitution was reinstated in 1990 (Pleps 2016, 37–38), only to be replaced by a democratic one in 1992.[15]

Thus, although the anabiosis or revival of legal forms might seem *prima facie* something extremely rare and exceptional, the examples provided above clearly indicate that such processes have occurred both historically and in contemporary legal cultures.

3. JURIDICAL ANABIOSIS: TOWARDS A NEW CONCEPT OF A LEGAL REVIVAL

Assuming that there is a certain class of events pertaining to the circulation of legal forms in time and space which escapes the distinction into legal transplants and legal survivals, I propose to add a new category – that of a "legal revival" and the process of revival, i.e. "juridical anabiosis." I propose to define a "legal revival" as a: (1) legal form introduced into the reviving legal system; (2) which existed in a different legal system in force in the past, which is – as a rule – already defunct at the time of revival; (3) which was not taken over from an existing legal system, but, rather, (4) was revived from the past on the basis of knowledge about the defunct legal system (defunct donor system).

Ad 1. A legal revival is – just like a legal transplant or legal survival – a legal form which presents certain specific features. As mentioned earlier, the notion of "legal form" is used here in the sense of a legal norm, rule, institution, principle, or concept which is analysed from a *formal* angle, abstracting from its concrete social function or purpose. In this meaning, the legal system in force in any given time and place is made up of a certain number of *abstract legal forms* (such as the contract of sale, codified in Title XI of Book III of the Polish Civil Code,[16] or divorce, codified in Article 56 of the Family and Guardianship Code),[17] which – when referred to in legal practice – can give rise to *concrete legal forms* (such as a concrete contract of sale, which is considered to be a contract of sale under Title XI of Book III of the Civil Code, or a concrete divorce judgment rendered under Article 56 of the Family and Guardianship Code, etc.).[18] An abstract legal form is, therefore, a certain social relationship regulated *in the abstract* in legal norms in force. A concrete legal form is the "legal cloaking" of a concrete social relationship. Thus, the entire legal system reflects social reality in legal forms.

[15] Constitution of the Republic of Lithuania (approved by the citizens of the Republic of Lithuania in the Referendum on 25 October 1992). Available at: https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=rivwzvpvg&documentId=TAIS.211295&category=TAD.

[16] Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny (Dz.U. 2024 poz. 1061).

[17] Ustawa z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy (Dz.U. 2023 poz. 2809).

[18] On the abstract vs. concrete legal form distinction, see e.g. Mańko 2023, [5]. (Given that the cited article is an "on-line first" version, not yet attributed to an issue of the journal, the pagination [in square brackets] refers to the on-line PDF.)

Ad 2 and 3. By contrast to legal transplants, which occur between simultaneously existing legal systems, a legal revival is a legal form which is – to say it metaphorically – *revived* from the past. However, by contrast to legal survivals, we are not speaking here about the continued existence of a legal form over centuries *within the same legal system*, but, rather, about the revival of a legal form from from a legal system which existed in the past, but which no longer exists at the time of the reintroduction. While the continued existence and progressive evolution of *emancipatio* within Roman law (Giaro 2011b, 45; Longchamps de Bérier 2011a, 214) – from its archaic to its post-classical period – can be said to be a legal survival, the revival of Roman law rules on contract law in medieval France or England cannot be described as such survivals. The key difference is the *identity of the legal system* – a legal survival is a phenomenon which is limited to the same legal system, as perceived by its participants and seen externally. Roman jurists of the Republic or Empire considered that they were operating the same legal system as in the past, and considered the Law of XII Tables as part of their legal system, not of a foreign and/or defunct one (Watson 1995, 124). By contrast, Philippe de Beaumanoir, borrowing from Roman law in his (creative) restatement of the customary law of Beauvais (Tigar 2000, 124, 138–141), does not treat the legal system of Beauvais as *identical* to Roman law or as being *in formal continuity* with it. To the contrary, given that the region of Beauvais is part of northern France, where the "reception" of Roman law was never officially decreed or recognised, the revival of Roman law takes place tacitly, as an intellectual inspiration, but not as an official reception (Tigar 2000, 138). By contrast, if today's English jurists are interpreting the institution of consideration, they operate on the assumption that today's English law has maintained identity with 19th- or 18th-century English law (that it is still *the same* legal system), even if – as to the substance – it has changed a great deal (see e.g. McKendrick 2019, 74–75). Thus, today's English jurists assume that there is an *identity and continuity of the form of English law* over the centuries, just like Roman jurists assumed the continuity of the legal system of the Kingdom of Rome, Roman Republic, and, later, Roman Empire, with the political transformation not affecting the continuity of the legal system as such.

Ad 4. Most typically, the material basis of a legal revival is not the continuity of legal culture – such as the knowledge and continuous transmission of legal texts – but, rather, the rediscovery of a past legal system through its study. Italian, French, and English lawyers of the Middle Ages borrowed a great deal of ideas from Roman Law, not because *the form of* Roman law (expressed in the text of the *Corpus Iuris Civilis*) continued to be in force, but, rather, because they rediscovered those texts. While the Byzantinians claimed continuity with the Roman Empire and, therefore, legal continuity with Justinian's codification of Roman law (viewed as a legal form), the Western kingdoms of the time had broken that kind of link, having replaced Roman law with customary laws, or never even had one (if we think of territories that never belonged to the ancient Roman Empire). More recent examples of legal revivals

– such as the aforementioned extraordinary revision or separation in Polish law – are, obviously, based on the transmitted knowledge of a not so distant past, although the restitution of those legal forms was certainly a question of reviving something from legal history (such as separation in a pre-War draft, or the Soviet-style institution of extraordinary revision as part of history of the law of People's Poland), in contrast to the resurrection of the legal form of a judicial assessor [Pol. *asesor sądowy*][19] in 2015,[20] following its earlier disappearance in 2009,[21] which occured within a relatively short timeframe. In fact, the history of the latter legal form can be treated as *one single legal survival*, beginning with its introduction in 1928 (Chmielarz-Grochal et al. 2022, 21–22), despite an interval between 2009 and 2015.[22]

4. LEGAL REVIVALS *VIS-À-VIS* LEGAL TRANSPLANTS AND LEGAL SURVIVALS

As I have already remarked in the previous section on the occasion of formulating the definition of legal revivals, they need to be conceptually contrasted to legal transplants, on the one hand, and to legal survivals, on the other. If a given legal form is effectively revived within the same legal system, and especially after a relatively short period of absence, it will be more appropriate to classify the phenomenon in question as a legal survival within the figure metaphorically known as the "resurrection" of a legal form (Mańko 2023, [14]–[15]), as is the case with judicial assessors.

These and other examples might suggest that the border between a resurrected legal survival, on the one hand, a legal revival, on the other, could be at times fuzzy. However, if we look carefully into the definition of a legal revival proposed above (in point 3), it will become clear that a legal survival originates, in principle, from a *defunct legal system*, such as that of ancient Roman law, or within an earlier legal system which has been separated from the current one by a revolution, or demise and recreation of statehood. There could be, of course, a certain degree of intellectual continuity between that defunct system and contemporary law, but such "continuity" should not be perceived as a formal continuity of statehood and legal system – even if, as part of the legitimising ideology, such a continuity

[19] A judicial assessor is a junior judge appointed for a definite period, who is to be evaluated before receiving a final appointment. Judicial assessors were provided for already in the Judiciary Act of 1928.

[20] By virtue of Act of 10 July 2015 (Dz.U. 2015 poz. 1224), which entered into force on 1 January 2016. Cf. Chmielarz-Grochal et al. 2022, 50–51.

[21] By virtue of Constitutional Court judgment of 24 October 2007, Case SK 7/06, which abrogated rules on assessors as from 5 May 2009.

[22] This legal form is an interesting survival of a pre-World War II institution which was creatively developed during the socialist period, when assessors were given the power to perform adjudicatory functions, just as judges (Chmielarz-Grochal et al. 2022, 27–28).

is claimed (e.g. that the "Holy Roman Empire of the German Nation" was a continuation of the Roman Empire, and the like). Thus, regardless of how the revival of Roman law was framed – as an allegedly legal continuity (e.g. in Italy or southern France), as a "reception" (as in Germany), or as a merely tacit, indirect source of inspiration (as in northern France or England) – from the sociological point of view, what happened was its *revival* in an entirely new historical and – in the case of most of Germany – geographical context. Therefore, in the case of legal revivals, if we speak of continuity with a defunct legal system, this should be understood not as formal (juridical) or sociological (genuinely legal-cultural) continuity, but as an instance of *intellectual continuity*, understood as taking up ideas, concepts, and trains of thought from the past – a rediscovery rather than a reception or endurance of past legal forms.

The story of Roman law in South Africa is a telling example of how legal revivals, legal transplants, and legal survivals are in practice intertwined, at the same time providing arguments in favour of explicitly acknowledging legal revivals as a distinct phenomenon. Thus, in the first step, Roman law was *revived* in the Netherlands as part of the *ius commune*, and later adapted and further developed by the School of Elegant Jurisprudence, giving rise to what has been since known as "Roman-Dutch law" (Van Caeneghem 1987, 70–71). This system of Roman-Dutch law was then *transplanted* to what was a Dutch colony, the Cape Country (Fagan 1996; Giaro 2007, 294),[23] and, later on, despite the takeover by the British and the ultimate independence and subsequent democratisation of the Republic of South Africa, Roman-Dutch law – including its deepest layer, the revived Roman *Corpus Iuris Civilis* – has *survived* (Mańko 2003; cf. Kleyn, Van Niekerk 2014) and is still applied by the courts (Mańko 2004a; cf. du Toit 2014). Even today, it can be said that: "In South Africa, Roman law institutions are still of vital importance" (Nicholson 2011, 107). However, the legal survivals of Roman law present in contemporary South African law are not a direct survival from the times of the Romans (because there was no legal continuity between Rome and Holland), but, rather, a survival of Roman-Dutch law, itself transplanted to South Africa by the Dutch, based on a legal revival in the times of replacement of customary law by revived Roman law in the Netherlands. The distinction becomes crucial because all three phenomena based on rather different processes in legal culture may be externally similar, but, are in fact quite different when perceived from a sociological angle. In particular, the sociological dynamics of legal transplants, survivals, and revivals is essentially different owing to the peculiar situation where the jurists of the defunct system are not available to be consulted on its functioning, where there is no case-law or modern textbooks available, and the only sources that one can rely upon are purely historical.

[23] Interestingly, the legal transplant of Roman-Dutch law to Cape Country led to an additional *legal revival* of Roman law of slavery, which was not in force in the Netherlands (Giaro 2007, 294). That part of Roman law applied until 1834, when the British abolished slavery in South Africa.

Finally, with regard to the relationship between the proposed concept of a legal revival and the concept of a legal survival, it should be noted that legal survivals are divided either (α) on account of their *structural place within the legal culture*, scil. into (1) normative, (2) methodological (metanormative)[24], and (3) institutional (organisational) (Mańko 2013a, 10–22; Mańko 2013b, 215–216; Forić et al. 2024, 257), or (β) on account of the *mechanism of their survival*, scil. into instances of (1) transsubstantiation (change of social function); (2) consubstantiation (the addition of new social function); (3) transfiguration (a change of legal form which preserves the essence of the old one); (4) palingenesia (judicial reproduction of an abrogated legislative form); (5) ideological repentance (cutting of ideological roots);[25] (6) resurrection; and (7) relics ("quiet" survivals which do not require any significant adaptation) (Mańko 2023, [8]–[15]). It seems that the first (α) typology is certainly applicable to legal revivals – within a given legal culture, it is possible not only to revive legal forms corresponding to substantive or procedural legal institutions, but also to copy historical examples of organising the judiciary or methods of legal reasoning. Paradoxically, metanormative (methodological) aspects of legal culture may be out of tune with the normative ones – for instance, whilst the substance of Roman private law was revived in medieval Europe, the methods of legal reasoning were henceforth based on the exegesis of Roman texts (methodological aspect) rather than on the methods of legal reasoning used by the ancient Roman jurists (cf. Van Caeneghem 1987, 55–56).

Concerning the second (β) typology, I have already mentioned that the figure of a legal revival comes at times close to the figure of a legal survival *per resurrectionem*, and indeed some cases can be described as being properly "liminal" (Mańko 2023, [15]). What could be explored, however, is the *vehicle* of juridical anabiosis and, notably, the respective role of the legislator (the political factor), the judiciary and legal academia in reviving a concrete legal form from a more or less distant past.

5. LEGAL REVIVALS: KEY RESEARCH QUESTIONS

The phenomenon of legal revivals, contemplated and conceptualised in this paper, lends itself to a number of promising socio-legal questions which can be asked with regard to both contemporary legal culture and the historical phenomena of legal revivals (socio-legal history). These questions are similar to those that are

[24] Even if normative legal survivals are scarce and are relatively easy to eradicate, the persistence of metanormative (methodological) survivals in the legal thinking and working methods of lawyers can be genuinely persistent (see e.g. Kühn 2004; Milej 2008; Uzelac 2010; Kühn 2011).

[25] Cf. Preshova and Markovikj 2024 (p. 130), who propose, in this context, a further distinction into legal survivals which are compatible and incompatible with the new axiology of the legal system after transformation.

being researched with regard to legal transplants and legal survivals, though given the specificity of legal revivals, they are distinct from them. Thus, first of all, there is the (1) *epistemological* question, namely how and where did the jurists operating the legal revival find out about the defunct legal system.

Secondly, there is the (2) *ideological and axiological* question, namely about how and why was the defunct system considered valuable and worthy of imitation. Was it because of the system's perceived superiority, or because its solutions were seen in other countries? Referring to the aforementioned example of the romanisation of Western European commercial law in the Middle Ages, Tigar (2000, 76–77) makes the claim that Western Europeans came into contact with living Roman law in the Byzantine Empire during the Crusades. Furthermore, both the Catholic Church and the French monarchy had a political interest in promoting Roman law and Roman law scholarship not so much on account of its contract law, but due to its utility for their own political goals (Tigar 2000, 116, 126).

Thirdly, one should enquire about the (3) *change of social function of the revived legal forms*. Were the legal institutions and individual rules used with the same purpose and for achieving the same results as in their original context of defunct ancient Roman law? Or were they taken "out of context" and used for entirely different purposes? This is the same question that can be asked with regard to legal transplants and legal survivals. To some extent, a change of social function is probably inevitable, given the changed circumstances, but research on concrete examples could reveal not only the extent of such change, but also the juridical mechanism of it. Most importantly, was change effected through a *reinterpretation* of the legal form, through its *application* in an entirely new context, or through the *modification* of the form itself? Questions concerning the changed social function and reinterpretation can and should be analysed also with an eye to the ideological and axiological context of the revived legal forms. Indeed, ideology can have a great impact upon the way that identically worded legal provisions are understood and applied (Collins 1982, 67; Kennedy 1997; 2008; Mańko 2016d; 2022).

Answering these and other research questions on legal revivals will also serve to highlight their distinctiveness from legal transplants and legal survivals. In broad terms, it could be said that a legal transplant arises whenever the law of a foreign country is considered superior and the benefits of its introduction considered to outweigh not only the social and economic costs but also the risk of an incoherence of the recipient system, which will need to integrate the incoming legal transplant. As Alan Watson (2003, 607) put it: "Borrowing is much easier than thinking. It saves time and effort. Not only that, it helps the new law to become acceptable because it has a recognized pedigree."

In the case of legal survivals, their continuity is based on a long-standing assumption formulated by Ulpian in the words: *In rebus novis constituendis*

evidens esse utilitas debet ut recedatur ab eo iure quod diu aequum visum est.[26] Here, the balancing of costs and advantages (*utilitas*) is done primarily in the domestic context on the assumption that old law should stay in place unless the advantages of reform clearly (*evidens esse*) outweigh the costs. Incidentally, the balancing can also include the option of a legal transplant which could replace the existing legal survival. However, if the balance is tilted in favour of keeping the old law, jurists – the judges and the jurisprudes – need to work out methods of adapting it through interpretation and careful application to the changed social reality. The balance will most probably remain clearly in favour of keeping the survival if such adaptation is minimal or not necessarily at all, *scil.* if the social conditions have not changed or have changed little.

In the case of a legal revival, the situation is quite different. What is compared on the one side of the scale is either a possible legal novelty (*ius novum*), or the keeping of existing law (legal survival), or a legal transplant from abroad, and – on the other side of the scale – of reviving a legal institution from the past. This entails a positive evaluation of the legal past, especially when compared with the present, and presupposes a specific situation of legal culture which, in the eyes of its contemporaries, is viewed as inferior to some past legal system. Legal revivals are, therefore, not very frequent.

In order to answer such questions, the researcher would have to trace all available sources for all three practices of legal culture (legislation, adjudication, scholarship) in search of hints of arguments and counter-arguments formulated by the relevant actors. The added value of such socio-legal research on the revival of past legal forms – conducted with questions of ideology and social function of legal institutions in mind – is a better understanding of the mechanisms of legal change and continuity, complementing the findings based on the paradigms of legal transfers and legal survivals.

6. THEORETICAL IMPLICATIONS: A PRELIMINARY SURVEY

Any novel concept in social sciences and the humanities has its theoretical and philosophical underpinnings and implications. The goal of the present paper was to introduce the new concept, provide examples of phenomena which correspond to it, and indicate the empirical research questions that the new concept entails. The exploration of the concept's theoretical and philosophical presuppositions and implications will undoubtedly require additional research. Therefore, in this section, I will only provide a preliminary survey of the possible lines of future inquiry along these lines.

[26] D. 1, 4, 2 (*Ulpianus libro quarto fideicommissorum*).

First of all, following Artur Kozak, one can claim that the phenomenon of legal revivals confirms the observation that the institution of law has the function of *cognitive unburdening (relieving)*, in the sense that a solution from the past can be applied to the present, without the need of inventing it again (cf. Kozak 2010, 173–174, see also Mańko 2020c, 352). Just like legal survivals continue to exist even despite adverse social conditions (revolutions, transformations, and other transitions), and just like legal transplants are popular because they offer ready-made solutions from abroad, so, too, legislators oftentimes prefer to reintroduce a legal form from the past rather than "invent the wheel" from scratch. This clearly has to do with the unburdening function of the law, whereby a legal form which had already existed in the past or abroad is preferred to creating an entirely new one.

Secondly, the phenomenon of legal revivals can be analysed theoretically from the point of view of law's *legitimacy and legitimation* (Berger, Luckmann 1991[1966], 110–146; Nonet, Selznick 2009[1978], 55–57) as well as the closely connected question of law's *authority* (Nonet, Selznick 2009[1978], 13–14). By referring to old legal forms, the legislator insists on the law's autonomy and its internal, institutional logic which – by reference to legal tradition – provide law with the necessary legitimacy and authority. Furthermore, a previously existing legal form which is brought back to life can also benefit from the value of legal experience, especially if it was applied over a longer timespan, managed to generate case-law and doctrinal literature, etc. Thus, for instance, the partial revival of the Commercial Code[27] after 1990 in Poland, following its abrogation in the socialist period (Frąckowiak 2015), could benefit from case-law and literature from the 1930s (Radwan, Redzik 2009, 6–7).

This brings us to the third theoretical question concerning legal revivals, namely the question of *knowledge transmission*. If we agree with H. Patrick Glenn that legal tradition is, ultimately, about the transmission of information (Glenn 2010, 13–16), using a legal form taken from the past and reviving it is a way of accessing information and knowledge from the past, making a short-cut to access it, in line with what was said above about the unburdening function of the law.

The fourth theoretical aspect of the phenomenon of legal revivals is the question of the *axiological foundations of the legal system* (cf. Pałecki 1997, 20–26). If a legal institution from the past is revived, it can probably be assumed that the legislator accepts the axiological entanglements of that institution, namely that he wishes to protect the same values as had originally been protected (cf. Longchamps de Bérier 2011b, 18). However, one should also keep in mind that the axiological preferences of the lawmakers may be different from those of the law's addressees (Pałecki 1997, 22).

[27] Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27 października 1933 r. – Kodeks handlowy (Dz.U. nr 82 poz. 600).

The fifth theoretical question regarding legal revivals is the problem of their *binding force* (validity). Once again, it is an aspect which is common to legal transplants, survivals, and revivals. In all three cases, a given legal form is part of the legal system in question, because it is *in force* (valid) due to the will of the legislator (or other law-giver)[28], or – more interestingly – sometimes even despite his will (as in the case of jurisprudential palingenesia *contra* or *praeter legem* – see Mańko 2023, [11]–[12]). In the case of legal revivals, the moment of the legislator's will is crucial (cf. Giaro 2007, 295), but the actual functioning of the revival cannot be addressed abstracting from the context of the axiological foundations mentioned above. On top of formal validity, one cannot escape the question of factual (social) validity, the fact that a legal revival actually becomes part of the living law (cf. Giaro 2007, 281–282).

The sixth and final theoretical question that will need to be addressed as regards legal revivals is the problem of the *identity* of legal forms (legal institutions), a question discussed concerning both legal transplants (Legrand 1997; cf. Giaro 2007, 281) and legal survivals (Mańko 2023). Just like a legal transplant, moved from one jurisdiction to another, or a legal survival which continues to exist despite a revolution or transformation, a legal revival, too, can be analysed from the point of view of its identity and continuity despite the differences between the epoch when it had first existed and the period when it was revived. Obviously, the questions of the axiology of the legal system and the broader socio-economic, political, cultural, and ideological context will play their role, but, nonetheless, these should be analytically distinguished from the identity of the *legal form* as such (cf. Giaro 2007, 277). Questions of the identity of legal revivals could also benefit from insights of conceptual history, which emphasises the structures of repetition (Koselleck 2018[2006]). Identity and conceptual repetition are also closely connected to questions of *intentionality* – well illustrated by the Soviet marriage laws of 1917, which resembled the Roman *libera matrimonia* – but can we say that it was a revival of Roman law (cf. Giaro 2007, 281)? Or, rather, a mere coincidence? Is it important if the authors of the Bolshevik decree or those who enacted it knew that they are, in fact, returning to Roman law (e.g. Lenin surely knew it, as he received a proper legal education)?

The above are just some of the examples of the most pressing theoretical questions implied by the concept of legal revivals. As research on this socio-legal phenomenon, treated as a distinct area of inquiry, progresses, many more questions may come to the fore.

[28] Depending on the concept of the sources of law in a given legal system, this may include the judiciary, the doctrine, or the formation of a legally-binding custom. Thus, in terms of analytical legal theory, the question boils down to the "rule of recognition" in a given system (Hart 1994 [1961], 110–123) and how it enables a legal revival to be brought back to binding force.

7. CONCLUDING REMARKS

Abstraction is both the *causa causans* and the *raison d'être* of juridical form in general, and of individual legal forms – such as the contract of sale, of *locatio conductio* or the right of emphyteusis or perpetual usufruct. There can be no legal form without abstracting from the concreteness of the "real life" situations which give rise to the formal categories of the juridical. If law is to deliver on its promise of isonomy ("equal law for all"), it must operate with abstract and general categories. Law's abstract formality is essential to law's social legitimacy (Kozak 2010, 155). However, abstraction comes also with additional benefits, namely the possibility for legal forms to "travel" in time and space. Legal forms, once freed from their original socio-economic context in which they were first born, can be moved from place to place and survive over many centuries. Research into these specific features of juridical form is of primordial importance for understanding the fundamental dimension of law's ontology. What *is the law*, if it can be relatively easily "transplanted" from Rome to medieval France, from Germany to Japan, or from the United States to Poland? How can the law *be* if it is detached to such an extent from its underlying conditions? Is it pure form, or is its materiality also part of its essence? These and other fundamental ontological questions of the law can be answered not only through purely philosophical speculation, but also – concurrently – by resorting to an empirical examination of contemporary and past legal cultures. For this examination to yield useful results, it must proceed through the application of appropriate theoretical categories, allowing to arrange, understand, and interpret the empirical socio-legal material. The goal of this paper was to add a new scientific category – the *legal revival* – that would complement the existing conceptual framework and, in a sense, fill the gap existing between the well-known figure of the legal transplant and the recently conceptualised figure of the legal survival. The need for this kind of conceptualisation arises not only from the differences between legal revivals and legal transplants, but also from the historical importance of the revival of ancient Roman legal institutions in medieval Western Europe for the development of the European legal identity. Indeed, the revival of the institutions of ancient Roman law in Western Europe during the Middle Ages – which gave rise to the so-called *Ius Commune* – is considered by many scholars as one of the prime sources of (Western) European legal identity (Zimmermann 1996; 2001; 2004; Mańko 2002, 114–115; 2004b, 112; for a critique see e.g. Cercel 2010). The nature of the mechanism which led to such a development of such paramount importance certainly deserves attention.

In this way, the modalities of *the development of legal forms* can be neatly conceptualised, with a *summa divisio* into: (i) pure legal innovation – the creation of new legal forms from scratch; (ii) legal borrowing (the importation of legal forms) – the transplantation of legal forms from other jurisdictions, both

synchronically (legal transplants) and diachronically, through a rediscovery of legal forms from the past (legal revivals); and (iii) legal adaptation – understood as the fine-tuning of existing legal forms to suit new purposes and fulfil new functions (legal survivals). Drawing this kind of conceptual grid enables one to grasp the ways in which the law changes and adapts to new circumstances, at the same time making use of the existing forms – either borrowed abroad, rediscovered in the past, or adapted to new needs. Through legal revivals, the resources of legal history are put at the service of contemporary legal innovation.

Specifically, the new concept of a "legal revival," put forward in this paper, makes it possible to focus on the characteristic feature of "borrowing from the past" as opposed to transplanting functioning legal forms from any currently existing legal system. Despite the similarities between legal revivals, on the one hand, and legal survivals as well as legal transplants, on the other, the act of juridical anabiosis – the reviving of a legal form (sometimes originating in a long defunct legal system) – is accomplished through very different socio-legal practices, and it certainly merits to be studied in its own right rather than being conflated with other phenomena.

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