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FORM AND SUBSTANCE OF LEGAL CONTINUITY

1. Introduction

The continuity of legal institutions despite a socio-economic and political transformation was noted already by the Austrian sociologist of law Karl Renner at the beginning of the 20th century. In his groundbreaking monograph on *The Institutions of Private Law and their Social Functions*[1] Renner analysed the possibility of the continuity of legal rules despite a change of their social function. Renner himself used the term 'legal form' to denote the linguistic appearance of a legal rule in the Code, and contrasted this unchanged 'form' with the 'social function' of the institution in question. The demise of 'actually existing socialism' in Central Europe at the turn of the 1980s and 1990s sparked a fresh interest in the continuity of certain elements of the old communist 'legal form' despite the change of its social functions in the new socio-economic and political environment.[2] I have proposed to refer to such

* This article presents the Author's personal views and does not represent the position of any institution.

[1] K. Renner, *The Institutions of Private Law and Their Social Functions*, translated by A. Schwarzschild, London and Boston 1976 [1929].

[2] This topic was analysed by the participants of a recent international conference in Brno. See W. Zomerski, *Conference Report: 1st International Conference of the Central European Network of Legal Scholars (CENELS) on "25 Years After the Transformation:*

institutions which 'survived' the transformation (e.g. from actually existing socialism to capitalism) as 'legal survivals,'[3] drawing inspiration from Bronisław Malinowski's notion of 'survivals' in culture,[4] and from Hugh Collins's discussion of 'survivals' in law.[5]

An issue which requires additional clarification with regard to the notion of 'legal survivals' is their relationship to the dichotomy of form vs. substance, as used in contemporary jurisprudence.[6] This is because, as the Finnish legal theorist Matti Ilmari Niemi has rightly observed, the form vs. substance distinction 'is an important part of legal reasoning in the Western world.'[7] It cannot therefore be ruled out that the distinction in question may be relevant for the analysis of legal survivals by casting a new light on their nature. Questions which could be asked include the following: Are legal survivals 'merely formal,' or are they also 'substantive'? Should 'merely formal' continuity count for the purposes of establishing the existence of legal survivals? Does the form vs. substance distinction matter at all in the analysis of legal continuity?

Law and Legal Culture in Central and Eastern Europe. Between Continuity and Discontinuity", Masaryk University, Brno, Czech Republic, 16-17 April 2015, «Wrocław Review of Law, Administration and Economics» 4.2/2014 [2015].

[3] R. MAŃKO, *Relikty w kulturze prawnej – uwagi metodologiczne na tle pozostałości epoki socjalizmu realnego w polskim prawie prywatnym* [Survivals in Legal Culture: Methodological Remarks Against the Background of Remnants of the Period of Actually Existing Socialism in Polish Private Law], «Przegląd Prawa i Administracji» 102/2015; IDEM, *Legal Survivals: A Conceptual Tool for Analysing Post-Transformation Continuity of Legal Culture*, [in:] *Tiesību efektivitāte postmodernā sabiedrībā*, ed. J. ROZENFELDS ET AL., Rīga 2015; IDEM, *Transformacja ustrojowa a ciągłość instytucji prawnych – uwagi teoretyczne* [Systemic Transformation and the Continuity of Legal Institutions: Theoretical Remarks], «Zeszyty Prawnicze» 16.2/2016.

[4] B. MALINOWSKI, *A Scientific Theory of Culture and Other Essays*, New York 1961, p. 29-31.

[5] H. COLLINS, *Marxism and Law*, Oxford-New 1988, p. 52. Collins, in turn, relied on Althusser, from whom he borrowed the term 'survival'. See L. ALTHUSSER, *For Marx*, London and New York 2005, p. 114.

[6] This paper will not refer to any (possible) senses of the form vs. substance dichotomy outside of legal scholarship, e.g. in philosophy, theology, economics, sociology etc.

[7] M. ILMARI NIEMI, *Form and Substance in Legal Reasoning: Two Conceptions*, «Ratio Juris» 23.4/2010, p. 479.

From a methodological standpoint, the present paper is an exercise in legal theory, and the research it presents is purely conceptual and analytical, even if illustrated by concerete examples. By referring to the ways in which the 'form vs. substance' dichotomy is understood in academic legal discourse, and confronting them with the notion of 'legal survivals' and legal continuity in general, I attempt to answer the question: in what sense can legal continuity be termed as 'formal' and in what sense as 'substantive'? The analysis performed in the present paper should provide for greater conceptual and terminological clarity with regard to legal continuity, and to legal survivals in particular. Furthermore, despite my theoretical approach, my findings are intended to be applicable also to empirical legal research, in particular in the disciplines of legal history and sociology of law, with regard to research on legal continuity and discontinuity under conditions of a socio-economic transition.

I will address the potential ways this dichotomy may be understood as follows: firstly, the form vs. substance distinction as applied to legal arguments, and thereby treated as a feature of legal discourse (section 3.1); secondly, form vs. substance understood as legal doctrines (form) vs. socio-economic relationships (substance) (section 3.2), thirdly, form vs. substance understood as the abstract (form) vs. the concrete (substance) (section 3.3) and finally, form vs. substance understood as text (linguistic form) vs. meaning (normative substance) (section 3.4). My discussion will lead up to conclusions (section 4). However, before I embark upon a detailed analysis of the relevance of the form vs. substance distinction for legal survivals, I will first briefly recapitulate the definition of legal survivals (section 2).

My main argument will be that the form vs. substance dichomoty *is relevant* for the study of legal continuity, however, only provided that the notion of 'form' refers to the 'form of law,' and the notion of 'substance' refers to the socio-economic reality which the law strives to regulate. This leads to the ultimate conclusion that the study of legal continuity despite a socio-economic transformation is, ultimately, the study of interaction between the (unchanged) form and (changed) substance.

2. The notion of 'legal survivals': a definition and some examples

2.1. Definition

The continuity of selected legal institutions despite a profound change of the socio-economic system deserves particular attention from legal scholars.[8] However, the existing research tools, namely the notions of 'legal continuity' or 'legal tradition,' despite their value and utility for other purposes, are not fully adequate to address the issues involved.[9] Therefore, in order to remedy this lack of an appropriate methodological tool, the concept of 'legal survivals' has been introduced to jurisprudence. It denotes individual legal institutions which have 'survived' a socio-economic transformation.[10] In this sense, a 'legal survival' is a phenomenon of legal culture which encompasses the following four features, constituting its essence:[11]

(1) it is a specific *legal institution*, i.e. a set of mutually interconnected legal norms, contained both in legislation and fleshed out in established case-law;[12]

(2) which *was introduced under an earlier and different socio-economic system* (e.g. feudalism, actually existing socialism);[13]

(3) which, at the time of its appearance, *fulfilled a specific function*[14] within that socio-economic system, i.e. its appearance was not merely

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[8] R. Mańko, *Legal Survivals…*, *passim*.

[9] Ibidem, p. 18-19; R. Mańko, *Transformacja ustrojowa…*, p. 8-11.

[10] R. Mańko, *Relikty w kulturze prawnej…*

[11] For an earlier definition (comprising only three elements) see R. Mańko, *Legal Survivals…*, p. 21.

[12] R. Mańko, *Transformacja ustrojowa…*, p. 11-17.

[13] On the relevance of the notion of a system (formation) see R. Mańko, *Relikty…*, p. 192-193. For an opposite approach, whereby the notion of a formation or system became outdated with the fall of Communism see T. Giaro, *Roman Law Always Dies With a Codification*, [in:] *Roman Law and European Legal Culture*, ed. A. Dębiński, M. Jońca, Lublin 2008, p. 22.

[14] Function is understood here as the actual social role of a given legal institution, taking into account its impact upon social life. Cf. K. Renner, *The Institutions…*,

accidental, but somehow linked to the reality of that system, in the sense of fulfilling an identifiable social function;[15]

(4) and which *has endured* despite a profound socio-economic and political transformation, in the sense both of the texts comprising the legal framework *and* its application in practice.[16]

In line with the above definition, the notion of a 'legal survival' refers to a legal institution (point 1), introduced under one socio-economic system (point 2) and functional with respect to it (point 3) which – notwithstanding a radical transformation – has survived within the legal system and has not been the subject of *desuetudo* (point 4).

2.2. Some examples

Examples of legal survivals can be drawn from practically all legal systems of all periods. In particular, various institutions of Roman law which survived the demise of Rome and were later applied in Civil Law countries can certainly be considered and examined as legal survivals. Some of them are still applied today. For instance, South African law still knows the *edictum de nautis, cauponibus et stabulariis*[17] or the *actio redhibitoria*. But we do not need to look as far as South Africa to search for legal survivals. The Roman institution of the *fideicomissum* operates in many legal systems.[18] Likewise, institutions such as servitudes (*servitutes*) or usufruct (*ususfructus*) have been taken over from Roman law and survive in the modern civil codes of countries belonging to the

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p. 55; A. Redelbach, S. Wronkowska, Z. Ziembiński, *Zarys teorii państwa i prawa* [An Outline of the Theory of the State and Law], Warszawa 1994, p. 270; I. Bogucka, *Funkcje prawa. Analiza pojęcia* [The Functions of Law: An Analysis of the Concept] Kraków 2000, p. 27-50, 67-93.

[15] R. Mańko, *Transformacja ustrojowa…*, p. 22-28.

[16] R. Mańko, *Transformacja ustrojowa…*, p. 18-21.

[17] B. Sitek, *Stosowanie edyktu «de nautis, cauponibus et stabulariis» w systemie prawa Republiki Południowej Afryki*, «Zeszyty Naukowe Uniwersytetu Szczecińskiego» 274 «Roczniki Prawnicze» 11/1999; R. Mańko, *Sądowe Sądowe stosowanie 'Corpus Iuris Civilis' w Afryce Południowej w świetle wybranego orzecznictwa*, «Zeszyty Prawnicze» 4.3/2004, s. 151-155.

[18] F. Longchamps de Bérier, *Podstawienie powiernicze*, «Kwartalnik Prawa Prywatnego» 8.2/1999.

Civilian Tradition. Also smaller legal formants, such as for instance the *actio redhibitoria* or the *actio quanti minoris* still exist in modern European commercial law.[19] The same can be said of certain general clauses, such as good faith (*bona fides*).[20]

Polish private law is a particularly interesting resource of legal survivals, especially if one takes into account the fact that Poland underwent two fundamental socio-economic and political transformations over the timespan of a single century. After World War II, Poland experienced the transformation of its political system into 'actually existing socialism' ('state socialism'), which was installed at the latest by 1948. This had an immense impact upon Polish law, nonetheless many legal institutions typical of its previous liberal and capitalist system survived.[21] The communist Civil Code of 1964 can even be said to have been 'Janus-faced' or 'mixed,' with institutions of liberal private law coexisting side-by-side with institutions of state-socialist law.[22] Under the state-socialist regime many of the legal survivals of capitalism endured by changing their social functions. An interesting example is the private ownership of the country's residential property.[23] Except for the housing facilities

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[19] See e.g. F. Longchamps de Bérier, *Skargi edylów kurulnych a dyrektywa 1999/44/EC Parlamentu Europejskiego i Rady w sprawie określonych aspektów sprzedaży i gwarancji na dobra konsumpcyjne*, «Studia Iuridica» 44/2005.

[20] See e.g. W. Dajczak, *Doświadczenie prawa rzymskiego a pojęcie dobrej wiary w europejskiej dyrektywie o klauzulach niedozwolonych w umowach konsumenckich*, «Zeszyty Prawnicze» 1/2001.

[21] This was due, among other things, to the fact that the communists who took power in 1944 consciously decided to rely on pre-1939 legislation in order to legitimise their rule.

[22] W. Wołodkiewicz, *I cambiamenti del codice civile polacco dopo 1989 possono essere trattati come segno del ritorno alla tradizione romanistica?'*, [in:] *The Roman Law Tradition in Societies in Transition*, ed. P. Bělovský, M. Skřejpek, Praha 2003, p. 130; N. Reich, *Transformation of Contract Law and Civil Justice in the New EU Member Countries*, «Penn State International Law Review» 23/2005, p. 597; R. Mańko *The Unification of Private Law in Europe from the Perspective of Polish Legal Culture*, «Yearbook of Polish European Studies» 11/2008-2009, p. 118-122.

[23] A. Mączyński, *Dawne i nowe instytucje polskiego prawa mieszkaniowego* [New and Old Institutions of Polish Housing Law], «Kwartalnik Prawa Prywatnego» 11.1/2002.

in Warsaw, residential properties which were rented out were never nationalised. Nevertheless, the legal survival of private ownership underwent a deep transformation of its socio-economic functions, mainly as a result of public law rules. However, the fact that it did survive (as an institution of private law) in practice enabled the owners to reclaim actual enjoyment of their property after 1989 without the need for formal reprivatisation.

Likewise, not all the 'socialist' institutions of civil law and civil procedure were abolished on Poland's transformation from actually existing socialism back to capitalism in 1989. Many survived, some are still in operation today. Examples include the right of perpetual usufruct,[24] the cooperative member's proprietary right to an apartment (this can no longer be created, but it still exists),[25] the cooperative member's tenancy right to an apartment (this can be still be created today), general clauses relating to 'principles of social life' and 'socio-economic purpose,'[26] as well as the state-socialist types of *contractus nominati*, i.e. the cultivation contract and the supply contract.[27] In civil procedure we still have

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[24] R. Mańko, *'We Do Not Recognise Anything "Private"': Public Interest and Private Law Under the Socialist Legal Tradition and Beyond*, [in:] *Private Interest and Public Interest in European Legal Tradition*, ed. B. Sitek et al., Olsztyn 2015, p. 41-42, 53-54, 60-61.

[25] R. Mańko, *The Cooperative Member's Proprietary Right to an Apartment: A Legal Survival of the Period of Actually Existing Socialism on Polish Private Law*, «Zeszyty Prawnicze» 15.4/2015.

[26] M. Pilich, *Zasady współżycia społecznego, dobre obyczaje czy dobra wiara? Dylematy nowelizacji klauzul generalnych prawa cywilnego w perspektywie europejskiej* [Principles of Social Community Life, Good Customs or Good Faith? Dilemmas of Amending the General Clauses of Civil Law in a European Perspective] in *Europeizacja prawa prywatnego* [The Europeanisation of Private Law], ed. M. Pazdan et al., Warszawa 2008, II; A. Stawarska-Rippel, *O klauzulach generalnych w pierwszych latach Polski Ludowej słów kilka* [A Few Words on the General Clauses in the First Years of People's Poland], «Miscellanea Iuridica» 6/2005; R. Mańko, *Quality of Legislation Following a Transition from Really Existing Socialism to Capitalism: A Case Study of General Clauses in Polish Private Law*, [in:] *The Quality of Legal Acts and Its Importance in Contemporary Legal Space*, ed. J. Rozenfelds et al., Rīga 2012.

[27] R. Mańko, *'We Do Not Recognise…'*, p. 43-45, 51. Cfr. A. Stelmachowski, *Kontraktacja* [The Cultivation Contract], [in:] *System prawa prywatnego* [The System of

the prosecutor's unlimited *locus standi* in civil proceedings,[28] and the preliminary reference procedure.[29] All these legal institutions – introduced during the period of actually existing socialism – played specific functions under that regime. As a matter of fact, usually they served the promotion of the public interest, understood in a collectivist spirit, at the expense of the private interest.[30] Many of those functions changed after 1989.

3. Different meanings of the form vs. substance dichotomy in the context of law and the phenomenon of legal survivals

3.1. Form vs. substance as a feature of legal discourse

In its first, arguably its most frequently occurring meaning, the form vs. substance distinction in law is used to characterise legal arguments. According to the Finnish legal theorist Matti Ilmari Niemi, this meaning draws

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Private Law], VII: *Prawo zobowiązań – część szczegołowa* [Law of Obligations: General Part], ed. J. Rajski, Warszawa 2004.

[28] R. Mańko, *Is the Socialist Legal Tradition 'Dead and Buried'? The Continuity of Certain Elements of Socialist Legal Culture in Polish Civil Procedure*, [in:] *Private Law and the Many Cultures of Europe*, ed. T. Wilhelmsson, Alphen aan den Rijn 2007, p. 92-94. Cf. Z. Zawadzka, *Pozycja procesowa prokuratora w postępowaniu cywilnym* [The Procedural Position of the Prosecutor in Civil Proceedings], «Prokuratura i Prawo» 6/2010. See also A. Stawarska-Rippel, *O politycznych założeniach procedury cywilnej w Polsce Ludowej* [On the Political Foundations of the Civil Procedure in People's Poland], «Miscellanea Iuridica» 7/2005.

[29] R. Mańko, *Is the Socialist…*, p. 99-102. Cfr. M. Grochowski, *Uchwały Sądu Najwyższego a jednolitość orzecznictwa. Droga do autopojetyczności systemu prawa?* [Supreme Court Resolutions and the Uniformity of Case-Law: The Road Towards the Legal System's Autopoiesis?], [in:] *Jednolitość orzecznictwa. Standard – instrumenty – praktyka* [Uniformity of Case-Law: Standard, Instruments, Practice], ed. M. Grochowski et al., Warszawa 2015.

[30] R. Mańko, *'We Do Not Recognise…'*, passim.

> … on the distinction between authoritative and non-authoritative sources of the law. Authoritative sources of law mean certain positions of source-texts. These positions constitute the formal element of the law. Substance refers to the contents of reasons. A statute has an authoritative position, and appealing to the status of a statute as such is formal reasoning.[31]

This meaning of form vs. substance 'is connected with legal positivism,'[32] in that it makes a sharp distinction between arguments from texts of positive law (e.g. statutes) and all other arguments. Therefore, a 'formal' legal argument can be described as one which relates to the linguistic, logical and systemic aspects of a legal text, whereas a 'substantive' argument is one which relates to the underlying moral, social, and economic considerations, as well as actual outcomes of various possible interpretations for real-life situations to which the law is applied.[33] In consequence, a legal culture in which formal arguments prevail or even are the only ones acceptable is described as a 'formalist' or 'dogmatic' legal culture,[34] whereas a legal culture which is characterised by a 'pragmatic focus on consequences of rules,' which adopts an 'external and critical perspective of the law' and which removes the allegedly 'artificial boundaries between [law and] the social sciences'[35] is

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[31] M. I. Niemi, '*Form and Substance…*', p. 480.

[32] Ibidem, p. 479.

[33] P.S. Atiyah, R. Summers, *Form and Substance in Anglo-American Law*, Oxford 1987, p. 23; M.W. Hesselink, *The New European Legal Culture*, Deventer 2001, p. 9; R. Summers, *Form and Function in a Legal System* [2006], Cambridge 2009, p. 61. The 'substantive' legal arguments are sometimes referred to as 'external to the law' or 'extra-legal'. See D. Galligan, M. Matczak, *Formalism in Post-communist Courts. Empirical Study on Judicial Discretion in Polish Administrative Courts Deciding Business Cases* [in:] *Judicial Reforms in Central and Eastern European Countries*, ed. R. Coman, Bruges 2007, p. 236-237; R. Mańko, *Use of Extra-Legal Arguments in the Judicial Interpretation of European Contract Law: A Case Study on Aziz v Catalunyacaixa (CJEU, 14 March 2013, Case C-415/11)*, «Law and Forensic Science» 10.2/2015.

[34] M.W. Hesselink, *The New…*, p. 9, 20, 25.

[35] M.W. Hesselink, *The New…*, p. 26.

described as anti-formalist, 'realist,'[36] 'anti-dogmatic,'[37] or 'pragmatic.'[38] In sum, formalism emphasises consistency, systemic coherence and deductive reasoning,[39] whilst a substantive approach (anti-formalism) focuses on 'the relative merits of one possible solution or the other.'[40]

Undoubtedly, in this sense the form vs. substance (and formalism vs. anti-formalism) dichotomy refers not to legal institutions but to the features of the legal discourse in a given legal culture. Form and substance are therefore contrasting, but not mutually exclusive features of legal discourse.[41] The analysis of a given legal culture as more formalist or more realist (pragmatist, anti-formalist) is an interesting academic exercise, and has been taken up by Central European,[42] including Polish scholars,[43] who tend to emphasise the prevalence of formalism over anti-formalism in our region.[44]

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[36] M.W. HESSELINK, *The New…*, p. 23.

[37] M.W. HESSELINK, *The New…*, p. 26.

[38] T.C. GRAY, *Judicial Review and Legal Pragmatism*, «Wake Forest Law Review» 38/2003, p. 473-511.

[39] M.W. HESSELINK, *The New…*, p. 23.

[40] M.W. HESSELINK, *The New…*, p. 9.

[41] Analysing the discourse of European Private Law, Hesselink points out the coexistence of both substance-oriented *and* formalist trends (M.W. HESSELINK, *The New…*, p. 65).

[42] A. UZELAC, *Survival of the Third Legal Tradition?*, «Supreme Court Review» 49/2010 (an analysis of formalism in the Croatian legal culture); Z. KÜHN, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transition?*, Leiden-Boston 2011 (an analysis of formalism in the Czech and Slovak legal cultures, with references to the Hungarian and Polish legal cultures).

[43] E. ŁĘTOWSKA, *Kilka uwag o praktyce wykładni* [Some Remarks on the Practice of Interpretation] «Kwartalnik Prawa Prywatnego» 11.1/2002 (a qualitative analysis of formalism in Polish legal culture *inter alia* on the basis of the author's own experience as a judge); M. MATCZAK, *'Summa iniuria'. O błędzie formalizmu w stosowaniu prawa* ['Summa iniuria': The Formalist Error in Applying the Law], Warszawa 2007 (a qualitative and quantitative analysis of formalism in Polish legal culture on the basis of empirical data regarding administrative law adjudication).

[44] But see P. CSERNE, *Formalism in Judicial Reasoning: Is Central and Eastern Europe a Special Case?* [in:] *Central European Judges under the European Influence: The Transformative Power of the EU Revisited*, ed. M. BOBEK, Oxford 2015.

Viewed from this perspective, the form vs. substance distinction may be successfully applied to legal continuity understood broadly as not only continuity of the (positive, operative) law but also as the continuity of legal culture (and in particular, the continuity of legal methodology).[45] However, the usefulness of this approach is limited to the analysis of the continuity of methods of legal reasoning, e.g. it can be stated that the continuity of formalism in Central Europe is a result of its exposure to the formalist legal culture which was in operation under actually existing socialism, and hence that the continuity of this approach to legal reasoning is a survival of legal culture.[46]

However, apart from that, there is no clear link between the notions of 'form' and 'substance' as features of legal discourse on the one hand, and the notion of legal survivals, understood as legal institutions which have survived the demise of a specific socio-economic formation (system).[47]

3.2. Form vs. substance as the law vs. socio-economic relationships

Another, though in a way similar understanding of the form vs. substance distinction in legal reasoning has been put forward by American critical legal scholar Duncan Kennedy.[48] He used the notion of 'form' to refer to the level of specificity of legal norms (whether they are formulated as open-ended 'standards' or as precisely formulated 'rules'). The

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[45] Cf. the remarks by Tomasz Giaro, according to whom 'the ongoing differences between legal life in East and West [of Europe – R.M.] are a matter of *legal culture* and of *juristic style* rather than of substantive law' (T. Giaro, *Legal Tradition of Eastern Europe. Its Rise and Demise*, «Comparative Law Review» 2.1/2011, p. 21, emphasis added).

[46] Cf. R. 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, where the continuity of formalism in Polish legal culture is treated precisely as a survival from the period of actually existing socialism and as a form of continuity of the former Socialist Legal Tradition. In a similar vein, see T. Milej, *Europejska kultura prawna a kraje Europy Środkowej i Wschodniej* [European Legal Culture and Central Eastern European Countries], 15.1 «Przegląd Legislacyjny» 15.1/2008; A. Uzelac, *Survival…*; R. Mańko, *Survival of the Socialist Legal Tradition? A Polish Perspective*, «Comparative Law Review» 4.2/2013.

[47] R. Mańko, *Transformacja ustrojowa…*, passim.

[48] D. Kennedy, *Form and Substance in Private Law Adjudication*, «Harvard Law Review» 89/1976, p. 1685-1778.

opposite of form in this sense is 'substance,' understood as competing visions of the social order (on the continuum between 'altruism' and 'individualism' in Kennedy's typology). The aim of his approach is to examine the interaction between the *legal form* (standards vs. rules) and the underlying *social goals* (altruism vs. individualism).[49]

Kennedy's understanding seems to coincide with those approaches in legal philosophy which metaphorically describe law as a 'language' which serves human subjects to articulate their social, economic or political conflicts, interests and relationships (as in a contract, or in a pleading, or in a judgment).[50] Understood in this way, law (the legal discourse) is a special *form* which social agents can use to communicate, resolve conflicts etc. As such, the *juridical* form of representing real-life situations could be contrasted with the *economic* form (if the conflict is represented in the language of economics), *ethical* form etc. In other words, the same situations and relationships can be approached from the point of view of different institutional worlds[51] (the juridical world, the economic world etc.), and the same 'raw facts' of life can be invested with different meanings depending on the form in which they are narrated. The discourses of the various institutional worlds can interact, and, for instance, the legal form can absorb ethical or economic considerations (for instance, through general clauses), but also ethics can absorb economic or legal modes of thinking etc.

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[49] There are some similarities between Kennedy's and Robert Summers's approach, described below in section 3.4. However, as I will show, there is an important difference between them: whilst both agree that 'form' refers to the linguistic form of the legal norm, they differ in their understanding of 'substance' – for Kennedy it is the social outcome of the application of the norm, whilst for Summers it is in the normative content encoded in the legal rule.

[50] Cf. A. Kozak, *Myślenie analityczne w nauce prawa i praktyce prawniczej* [Analytical Thinking in Legal Science and Legal Practice], Wrocław 2010, p. 132: 'We construct the law within discourse, but the practice of discourse is not the law. Discourse is a network of relations between speakers. Law crystallises out in those relations, but it cannot be said to be identical with them. That is why I insist on the metaphor of language, not conversation [to describe the law].'

[51] The notion of an 'institutional world' is used here following P. Berger, T. Luckmann, *The Social Construction…*, p. 65ff.

A strong tradition of treating law as 'form' ('the legal form') and contrasting it with the 'substance' of socio-economic relationships may be observed in Marxist legal theory.[52] According to Isaac D. Balbus:

> The fully developed legal form . . . entails a common form which is an abstraction from, and masking of, the qualitatively different contents of the needs of subjects as well as the qualitatively different activities and structures of social relationships in which they participate. Thus the legal form, in Marx's words, 'makes an abstraction of real men' which is perfectly homologous to the abstraction that the commodity form makes of 'real products.'[53]

There seems to be a link between the understanding of form vs. substance in critical legal studies (Kennedy) and in Marxist legal theory (Pashukanis, Balbus) on the one hand, and the first sense I discussed above. The more an argument is related to real-life outcomes and the impact of adjudication upon actual social, economic and political relationships, the more 'substantive' it is. Conversely, the more an argument is detached from real-life situations but is presented rather as a linguistic, logical or systemic deduction from legal texts, the more it is described as 'formal,' because it is focused on the *legal form* as such, and not on the underlying socio-economic and political considerations.

Now it is time to answer the question whether this understanding of form vs. substance may have any bearing on the analysis of legal continuity conceptualised as the presence of legal survivals following a socio-economic and political transformation. It must be observed at the outset that legal survivals – as part of the legal 'superstructure' –belong indistinctively to the *form*, whilst their changing socio-economic functions constitute the *substance*. In this sense, any legal continuity is *ex definitione* 'merely formal,' and changes of the social function of legal institutions are *ex definitione* 'substantive.'

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[52] See e.g. E.B. Pashukanis, *Law and Marxism: A General Theory. Towards a Critique of the Fundamental Juridical Concepts*, transl. by Barbara Einhorn, London 1983 [1929], p. 53-64; I.D. Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, «Law and Society» 11/1977.

[53] I.D. Balbus, *Commodity Form*…, p. 576.

But does this make the study of 'formal' legal continuity irrelevant as a research topic? It does not seem so. As a matter of fact, in this sense the form vs. substance distinction is relevant to the notion of legal survivals in that as an analysis of legal survivals it entails the study of the interplay of the legal form with the underlying socio-economic infrastructure.[54] In this sense, therefore, research on legal continuity (conceptualised through the notion of legal survivals) is concerned precisely with the *continuity* of the (legal) form, despite the *change* of the (socio-economic) substance. The fact that, if the dichotomy is understood in this way, all legal survivals are *ex definitione* formal (as a consequence of belonging to the sphere of law, as opposed to economics), does not in any way undermine the utility of research on legal continuity.

3.3. Form vs. substance as abstract vs. concrete

A further sense of the form vs. substance distinction in the legal field can be derived from Aristotelian philosophy, whereby 'formal means conceptual and general, and substantive means concrete and individual.'[55] In line with this, Niemi proposes a way of understanding the form vs. substance division in law according to which

> . . . the basic structure of law is constructed by concepts. Appealing to these concepts is formal reasoning. Legal rules and decisions as the substance of the law are applications of concepts.[56]

In this sense, legal survivals – as legal institutions codified in positive law or at least present in operative law – would belong to the form. Their application in judicial practice (i.e. in concrete and individual decisions applying the law to a case) would be classified as substantive. Thus for something to qualify as a legal survival, it would have to be both formal (i.e. exist on the level of law-in-the-books) *and* substantive (i.e. continue to exist on the level of law-in-action). This is in line with the definition of legal survivals proposed above (section 2), whereby legal institutions subject to *desuetudo* should not count as legal survivals, as

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[54] R. MAŃKO, *Transformacja ustrojowa…*, p. 28ff.
[55] M.I. NIEMI, *Form and Substance…*, p. 479.
[56] Ibidem, p. 480.

their continuity is merely apparent (formal) in the sense used in the present section, but they lack the necessary substance of legal practice.[57]

3.4. Form vs. substance as the linguistic formulation of a legal text vs. the normative meaning of a legal text

A final understanding of the form vs. substance distinction which can be discerned in the legal field is one which identifies the notion of form with the legal text (as a *set of signs*) and the notion of substance with the *meaning* of that text. In this sense, the form vs. substance distinction is just another way of discussing the issue of meaning in legal theory. It seems that this was the understanding of the notion of 'form' used by the British legal theorist Hugh Collins when he questioned the existence of legal survivals, proposing 'to distinguish the *form of words* constituting the legal rule from their *meaning* when applied to particular circumstances,'[58] and noting that 'the *words or symbols* used to express the rules have remained constant, but their *meaning* has surely altered.'[59]

An apparently similar sense of the form vs. substance distinction is applied by the American legal theorist Robert Summers, who understands[60] 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.'[61]

This sense of 'form' is distinguished from content, which Summers seems to identify with 'policy.'[62] He illustrates his approach with the example of a speed limit, which is set at 65 mph. The *form* of the rule is the definiteness (explicit designation of the maximum allowed speed,

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[57] For examples of such 'apparent legal survivals' see R. Mańko, *Relikty…*, p. 196-199.

[58] H. Collins, *Marxism and Law*, p. 53. Emphasis added.

[59] H. Collins, *Marxism and Law*, p. 54. Emphasis added.

[60] Summers applies the notion of 'form' not only to rules, but also to distinct entities such as courts, legislatures, contracts, sanctions, legal methodology and even the legal system as a whole. In the following treatment I will limit myself to the form of rules, as the legal survivals studied in this dissertation are composed of such rules, rather than courts, legislative bodies etc.

[61] R. Summers, *Form and Function in a Legal System*, Cambridge 2009, p. 7.

[62] E.g. R. Summers, *Form and Function…*, p. 188. Cf. P. Soper, *On the Relation between Form and Substance in Law*, «Ratio Juris» 20.1/2007, p. 58-59.

instead of a standard of 'reasonable speed'), whereas its *substance* is the policy of limiting the speed to 65 mph.[63] Summers's approach would differ from Kennedy's in that whilst both seem to understand more or less the same by referring to the notion of 'form,' Kennedy uses the notion of 'substance' to refer to the actual impact of law upon society (promotion of altruism or individualism), but Summers uses the notion of 'substance' to refer to the normative content of a rule. However, it is questionable whether such a content can be separated conceptually from the form in which it is enunciated,[64] and Summers's presentation of the relationship between form and purpose (substance) has been the subject of criticism.[65] To quote Maksymilian del Mar, in discussing the relationship between form and purpose, 'Summers appears to be pulling himself up by his bootstraps.'[66]

Perhaps Summers's understanding of the form vs. substance distinction could be rephrased in the language of the so-called 'derivational approach' to legal interpretation which has been discussed in Polish analytical legal theory, whereby 'legal rules' (understood as textual units) are opposed to 'legal norms' (understood as normative statements *deduced* from legal texts).[67] The consequence of this approach is the proposition that the same legal norms (normative content or substance) can be expressed by resorting to different legal forms (different wording, different structure of the rules etc.). Whilst this may seem *prima facie* plausible, the problem with the derivational approach to legal interpretation is that on an ontological level it presupposes the existence of ideal entities – 'legal norms' – as distinct from empirically existing legal

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[63] Cf. P. Soper, *On the Relation*…, p. 59.

[64] This is because the normative is unthinkable without its form. One cannot speak of a substance of '65 mph' without actually writing down (or saying, or imagining) the number '65 mph.' Likewise, one cannot think of the 'content' of 'reasonable speed' outside the linguistic form of using the adjective 'reasonable' to indicate which speed is legal.

[65] See e.g. M. del Mar, review of: R. Summers, *Form and Function in a Legal System* Cambridge 2006 «Cambridge Law Journal» 65.3-2006, p. 723-726.

[66] M. del Mar, review of Summers, *Form and Function*…, p. 725,

[67] See e.g. K. Płeszka, T. Gizbert-Studnicki, *Dwa ujęcia wykładni prawa. Próba konfrontacji* [Two Approaches to Legal Interpretation: An Attempt at their Confrontation], «Zeszyty Naukowe Uniwersytetu Jagiellońskiego» 677/1984, p. 17-27.

texts. Even if we suppose that legal scholars could endeavour to deduce all the possible legal norms from all possible legal texts, this endeavour could not be accomplished in practice.[68] A more realistic approach, closer to actual legal practice, is one which does not presuppose any 'legal norms,' understood as ideal entities existing somewhere outside empirically available legal texts, but which focuses on the way in which judges actually work with such texts to decide real-life cases.[69]

Regardless of the above reservations about Summers's theoretical position on the form vs. substance distinction, the question arises whether that distinction, understood as one concerning 'the form of words vs. normative substance,' can be applied to legal survivals. *Prima facie* the answer seems to be in the affirmative: the notion of 'form' could apply to the linguistic formulation of legal rules or established case-law. For instance, the 'form' of the legal survival of the principles of social life would be the relevant rules in the Polish Civil Code, as well as the relevant propositions, extracted from established case-law of the Supreme Court of the Republic of Poland.[70] However, if the legal texts constituting the relevant legal survivals are the 'form,' what could the 'substance' of those survivals be, if it is not to be identified either with the underlying socio-economic reality (as in section 3.2), nor with legal practice making use of the legal framework (as in section 3.3)? Is there any 'substance' or 'content' of legal survivals, as opposed to their 'form' in this understanding? A prompt which may be useful to answer this question is provided by Soper's comment on Summers's example of the speed limit. Soper noted that 'in the case of the legal precept, *the*

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[68] K. Płeszka, T. Gizbert-Studnicki, *Dwa ujęcia…*, p. 24.

[69] Cf. K. Płeszka, T. Gizbert-Studnicki, *Dwa ujęcia…*, p. 25-26.

[70] As is the case, for instance, with the legal survival of the 'principles of social life' which not only encompass a number of articles of the Civil Code (notably, Article 5 which prohibits the abuse of subjective rights), but also a well-developed line of case-law on how to apply Article 5 in concrete cases. For details see R. Mańko, *Quality of Legislation Following a Transition from Really Existing Socialism to Capitalism: A Case Study of General Clauses in Polish Private Law*, [in:] *The Quality of Legal Acts and its Importance in Contemporary Legal Space*, red. J. Rozenfelds et al., Riga 2012.

substantive policy decision—65 mph should be the maximum speed—*automatically carries with it the correlative form*. Substance, it seems, carries form in its wake.'[71]

If substance carries form 'automatically' and already 'in its wake,' can we speak of substance as divorced from form in the first place? Unless we accept the idealistic approach that entities known as 'legal norms' exist somewhere outside legal texts, the answer seems to be in the negative. Indeed, if we adopt a realist approach to the juridical field (and the legal survivals therein) and limit the analysis to the empirically existing world, it seems that the only phenomena regarding legal survivals which are capable of being analysed are, first of all, *texts* (empirically cognisable strings of signs, as in the Civil Code); secondly, the *social practices* of legal and non-legal actors (empirically cognisable human behaviour, as for example judicial decisions); and thirdly, *people's beliefs* about those texts and practices (as empirically cognisable, e.g. by psychology).

The opposition between the form of legal rules and the alleged substance of normative content ('legal norms') can be resolved, in an empirical and pragmatic spirit, by resorting to Rodolfo Sacco's theory of legal formants.[72] From the very outset scholars of comparative law, of whom Sacco was a prominent representative, faced problems created by limiting the comparative enterprise merely to the side-by-side analysis of various legal texts. Comparing the texts of the civil codes of Germany, Austria, Poland or Romania can be a futile enterprise if comparative law is conceived as a comparison of the law as it exists as an empirical phenomenon, and not merely as a linguistic exegesis of legislative texts. Hence Sacco's solution to the problem: the introduction of a new theoretical tool which he dubbed 'legal formants'. According to him, the comparison of two (or more) legal systems must focus on three basic types of formants: legislative (what rule is announced in the code), scholarly (what rule is presented in scholarly writings), and jurisprudential (what

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[71] P. Soper, *On the Relation*…, p. 59, emphasis added.

[72] R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)*, «American Journal of Comparative Law» 39.1/1991; Idem, *Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II)*, «American Journal of Comparative Law» 39.2/1991.

rule is contained in the case-law). However, this division is then further refined, and each formant is subdivided: the legislative and scholarly are divided into 'general' and 'specific' formants, whilst the jurisprudential ones into the 'rule announced' and the 'rule applied.'

To align Sacco's theory with Jerzy Wróblewski's conceptual framework,[73] one could say that legislative formants belong to the 'system of positive law,' the scholarly formants to the 'system of interpreted law,' whilst the jurisprudential formants are part of the the 'system of operative law'. The essential point in the two theories is not to limit the notion of 'law' merely to legislative formants ('positive law' in Wróblewski's terminology).

Referring these findings back to the form vs. substance distinction, it should be observed that either Summers's 'content' simply does not exist (or cannot be analysed empirically), or it must be treated as equivalent to the subjective legal consciousness of human subjects, be they legal actors (e.g. legislators, adjudicators, attorneys etc.) or non-legal actors (citizens, business executives etc.). In the second meaning, the 'content' of a rule, as opposed to its (linguistic) form, is what people *think it means*.

However, different people in different contexts may hold very different beliefs on the meaning of a rule. What is more, the beliefs of legislators may not coincide with that of adjudicators. Or legislators may not have even given any thought to the meaning of a given legal rule, but simply adopted it following a suggestion from lobbyists or borrowed it from abroad. Some judges may understand a rule in one way, others in another way. Furthermore, there can be a gap between the way that people *think* about a legal rule, and the way people *act* with regard to a rule. For instance, a judge may *think* that a rule means *X*, but he will issue a judicial decision giving it meaning *Y*. There may be various reasons for this: either the judge wants to follow the higher court's case law, or he thinks that applying the 'true' meaning in the case at hand would be unfair, or he is simply corrupt.

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[73] As set out e.g. in J. Wróblewski, *Sądowe stosowanie prawa* [The Judicial Application of Law], Warszawa 1988.

Without resorting to more examples, two conclusions can be drawn already at this stage. First of all, even if we adopt the view that legal texts are (mere) 'forms,' and the meaning of those texts is the (real) 'substance' of the law, this 'substance' is not something that can be easily pinned down; on the contrary, it is elusive, intangible and constantly variable.

Therefore, in the analysis of legal continuity, and specifically legal survivals, one ought to focus not on what is *subjective* (psychological meaning), but what is *objective* – i.e. texts and social practices. Methodologically, this implies a limitation to the analysis of legal texts (the 'legal framework' of survivals) and to the *objectively existing* practice of human subjects relating to those texts (as evidenced e.g. by reported case-law, annual reports of judicial bodies, such as the Prosecutor General, Supreme Court, available statistical data, etc.), viewed within the broader context of socio-economic arrangements, which allows for the analysis of the social function of legal survivals.[74] Interesting as the notion of 'substance' or 'content' as opposed to 'form' may be in Summers's understanding, its direct application to legal survivals does not seem feasible for the reasons presented above.

On the other hand, this does not exclude the need for an approach to legal institutions which have survived despite a socio-economic transformation from the point of view of what Summers refers to as the 'constituent formal features' of a rule, such as its 'prescriptiveness, completeness, definiteness, generality, internal structure, manner of expression, and mode of encapsulation.'[75] If such a perspective is adopted it could be interesting to analyse how different 'formal features' of the individual rules building up a legal institution are more or less responsive to socio-economic change in the sense of being more open to the possibility of changing their social function. In other words, it would be a study of the interrelation between legislative technique (or the techique of formulating so-called 'tests'[76] in case-law, which is typical for Common Law jurisdictions) on

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[74] R. MAŃKO, *Relikty…*, p. 196.

[75] R. SUMMERS, *Form and Function in a Legal System* [2006], Cambridge 2009, p. 7.

[76] See e.g. the so-called '*Lemon* test', formulated by the U.S. Supreme Court in the case of *Lemon v Kurtzman*, 403 U.S. 602, at 612-613: 'Every analysis in this area [i.e. the Establishment Clause of the First Amendment – R.M.] must begin with consideration

the one hand, and the flexibility of a given institution's social functions on the other hand. However, in such an investigation the utmost care would need to be taken so as not to confuse the changing *normative content* of a legal institution (especially with regard to jurisprudential formants of judge-made law) and the change of its *social function*. The two should not be confused. A change in an institution's social function could occur because its normative content is modified (amendment of legislation; reinterpretation in the case-law, possibly following a changed *communis opinio doctorum*), but it could also occur with no change in the normative content. Precisely because of the need to avoid confusion between a legal institution's normative content (and its possible changes) and the social function of that legal institution (and its possible change), reference to notions such as 'form' and 'substance' in this context could be misleading.

4. Conclusions

The above review of the possible meanings of the 'form vs. substance' distinction in jurisprudence for legal survivals leads to the general conclusion that this dichotomy is not crucial for the analysis of such legal institutions. In some cases, the dichotomy is simply inapplicable to legal survivals (section 3.1), meaning that they cannot be described either as 'formal' or as 'substantive.' In another sense, the notion of legal survivals is completely absorbed by the notion of 'form' (section 3.2), meaning that all legal survivals are formal *ex definitione*, simply because they belong to the 'legal form.' In yet another sense, legal survivals belong to the 'form' because they are part of the law (positive and operative), but they endure because they belong to the 'substance' (of individual decisions

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of the cumulative criteria developed by the Court over many years. . . . First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . , finally, the statute must not foster 'an excessive government entanglement with religion.' Cf. T. Zieliński, *Prawne ramy ekspresji religijnej w amerykańskich uniwersytetach publicznych* [The Legal Framework for Religious Expression in American Public Universities], «Studia z Prawa Wyznaniowego» 11/2008, p. 34-35.

handed down by courts). Finally, an attempt to treat 'form' as a question of legislative technique, and 'substance' as the actual normative content of a legal institution (section 3.4) is objectionable on theoretical grounds which make it hard to apply in practice.

The analysis has led to a more general conclusion, namely that individual legal survivals should not be described as being 'substantive,' 'formal' or 'mixed.' Such a description, be it in the form of a classification or typology, would not at all enhance our understanding of the processes of legal continuity and change. As a consequence, it must be concluded that the concept of legal survivals is unitary.

Nonetheless, this does not mean that an analysis of legal continuity must completely avoid references to the 'form' vs 'substance' distinction. On the contrary. It seems that from among the various possibilities of using the terms 'form' and 'substance' in relation to legal institutions (not only legal survivals), the most useful one is the one discussed in section 3.2, whereby the notion of 'form' refers to the 'form of law,' whereas the notion of 'substance' refers to the socio-economic reality which the law strives to regulate. In this sense, the study of legal continuity despite a socio-economic transformation is, ultimately, the study of interaction between the (unchanged) form and (changed) substance.[77] The notion of 'function,' which I have not analysed in depth in this paper,[78] acts as a mediator between the legal form and socio-economic substance. Whilst strictly speaking it does not belong to the legal form as such, it does not come from the socio-economic substance either, being rather an extension of the legal form into the underlying substance of socio-economic reality.

Finally, despite the objectionability of the use of the terms 'form' and 'substance' with regard to legal survivals in the sense analysed in section 3.4, it is still worth pursuing research on the interplay between the

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[77] Likewise, the study of legal *discontinuity* also entails an analysis of the form/substance relationship, but this time focusing on the impact of the socio-economic substance upon the legal form, including situations in which the socio-economic substance has not changed (continuity) but the legal form has (discontinuity).

[78] For a more detailed treatment of the notion of function in the context of legal continuity see R. MAŃKO, *Transformacja ustrojowa…*, p. 22-30

linguistic formulation of a legal institution (including not only legislation, but also case-law) and its responsiveness to socio-economic transition in terms of a change in its social function.

Form, Substance and Legal Continuity

Abstract

The distinction between form and substance (content), which is derived from philosophy, plays a significant role in contemporary scientific legal discourse. Therefore, it seems important to confront the phenomena of legal continuity with the various understandings of the form vs. substance distinction, found in scientific legal discourse. The analysis is justified by the fact that in scientific legal discourse the indication that a certain form of reasoning is 'formalist' or that a certain phenomenon is 'simply formal' but not 'substantive' has a strong evaluative aspect. In his earlier works the author of the article has proposed, by referring *inter alia* to the works of K. Renner and H. Collins, to use the concept of 'legal survivals' in order to conceptualise the phenomenon of legal continuity ocurring in the case of continued existence of concrete and determined legal institutions, despite a change of the political and economic system, accompanied often by the change of socio-economic function of those surviving legal institutions. This allows to formulate a research question as to whether legal survivals are of a 'formal' or 'substantive' nature. Referring to four distinct ways of understanding the form vs. substance dichotomy in contempoary scientific legal discourse, the present paper replies to the research question by indicating in which sense of the distinction can legal continuity be described as 'formal', and in which as 'substantive'.

Forma i materia a natura ciągłości prawnej

Streszczenie

Rozróżnienie na formę i materię (treść, substancję), wywodzące się z filozofii, odgrywa znaczącą rolę we współczesnym naukowym dyskursie prawniczym. Z tego względu istotne wydaje się skonfrontowanie zjawiska ciągłości prawnej z zastanymi w naukowym dyskursie prawniczym rozumieniami rozróżnienia na formę i materię. Celowość podjętej analizy uzasadniona jest faktem, że w naukowym dyskursie prawniczym wskazanie, że pewien sposób rozumowania ma charakter „formalistyczny", lub też że dane zjawisko jest „czysto formalne", lecz nie „materialne" ma silny charakter ocenny. We wcześniejszych pracach autor zaproponował, w nawiązaniu do prac m.in. K. Rennera i H. Collinsa, posługiwanie się koncepcją „reliktów prawnych" (*legal survivals*) w celu konceptualizacji zjawiska ciągłości prawnej poprzez odwołanie się do trwania, pomimo transformacji ustrojowej, konkretnych i określonych instytucji prawnych, które w nowych warunkach częstokroć zmieniają swoją funkcję społeczno-gospodarczą. Daje to asumpt do sformułowania pytania badawczego, czy relikty prawne mają charakter „formalny" czy „materialny". Odwołując się do czterech różnych sposobów rozumienia dychotomii forma/materia we współczesnym naukowym dyskursie prawniczym, praca odpowiada na tak postawione pytanie badawcze, wskazując, w jakim znaczeniu ciągłość prawna może zostać określona jako „formalna", a w jakim – jako „materialna".

Słowa kluczowe: ciągłość prawna; relikty prawne; forma; materia.
Keywords: legal continuity; legal survivals; form; substance.

Bibliography

Althusser, L. *For Marx*, London-New York 2005

Atiyah, P.S., Summers, R. *Form and Substance in Anglo-American Law*, Oxford 1987, p. 23

Balbus, I.D. *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, «Law and Society» 11/1977

Berger, P., Luckmann, T. *Social Construction of Reality: A Treatise in the Sociology of Knowledge*, London 1991 [1966]
Bogucka, I. *Funkcje prawa. Analiza pojęcia* [The Functions of Law: An Analysis of the Concept], Kraków 2000
Collins, H. *Marxism and Law*, Oxford-New 1988
Cserne, P. *Formalism in Judicial Reasoning: Is Central and Eastern Europe a Special Case?* [in:] *Central European Judges under the European Influence: The Transformative Power of the EU Revisited*, ed. M. Bobek, Oxford 2015
Dajczak, W. *Doświadczenie prawa rzymskiego a pojęcie dobrej wiary w europejskiej dyrektywie o klauzulach niedozwolonych w umowach konsumenckich*, «Zeszyty Prawnicze» 1/2001
Del Mar, M. review of: R. Summers, *Form and Function of a Legal System*, Cambridge 2006, «Cambridge Law Journal» 65.3/2006
Galligan, D., Matczak, M. *Formalism in Post-communist Courts. Empirical Study on Judicial Discretion in Polish Administrative Courts Deciding Business Cases* [in:] *Judicial Reforms in Central and Eastern European Countries*, ed. R. Coman, Bruges 2007
Giaro, T. *Roman Law Always Dies With a Codification*, [in:] *Roman Law and European Legal Culture*, ed. A. Dębiński, M. Jońca, Lublin 2008
Giaro, T. *Legal Tradition of Eastern Europe. Its Rise and Demise*, «Comparative Law Review» 2.1/2011
Gray, T.C. *Judicial Review and Legal Pragmatism*, «Wake Forest Law Review» 38/2003
Grochowski, M. *Uchwały Sądu Najwyższego a jednolitość orzecznictwa. Droga do autopojetyczności systemu prawa?* [Supreme Court Resolutions and the Uniformity of Case-Law: Road Towards the Legal System's Autopoiesis?], [in:] *Jednolitość orzecznictwa. Standard – instrumenty – praktyka* [Uniformity of Case-Law: Standard, Instruments, Practice], ed. M. Grochowski et al., Warszawa 2015
Hesselink, M.W. *The New European Legal Culture*, Deventer 2001
Kennedy, D. *Form and Substance in Private Law Adjudication*, «Harvard Law Review» 89/1976
Kozak, A. *Myślenie analityczne w nauce prawa i praktyce prawniczej* [Analytical Thinking in Legal Science and Legal Practice], Wrocław 2010
Kühn, Z. *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transition?*, Leiden-Boston 2011
Longchamps de Bérier, F. *Podstawienie powiernicze*, Kwartalnik Prawa Prywatnego 8.2/1999

Longchamps de Bérier, F. *Skargi edylów kurulnych a dyrektywa 1999/44/EC Parlamentu Europejskiego i Rady w sprawie określonych aspektów sprzedaży i gwarancji na dobra konsumpcyjne*, «Studia Iuridica» 44/2005

Łętowska, E. *Kilka uwag o praktyce wykładni* [Some Remarks on the Practice of Interpretation] «Kwartalnik Prawa Prywatnego» 11.1/2002

Malinowski, B. *A Scientific Theory of Culture and Other Essays*, New York 1961

Mańko, R. *Sądowe Sądowe stosowanie 'Corpus Iuris Civilis' w Afryce Południowej w świetle wybranego orzecznictwa* [The Judicial Application of the *'Corpus Iuris Civilis'* in South Africa in the Light of Selected Case-Law], «Zeszyty Prawnicze» 4.3/2004

Mańko R., *Is the Socialist Legal Tradition 'Dead and Buried'? The Continuity of Certain Elements of Socialist Legal Culture in Polish Civil Procedure*, [in:] *Private Law and the Many Cultures of Europe*, ed. T. Wilhelmsson, Alphen aan den Rijn 2007, p. 92-94

Mańko R., *The Unification of Private Law in Europe from the Perspective of Polish Legal Culture*, «Yearbook of Polish European Studies» 11/2008-2009

Mańko, R. *Quality of Legislation Following a Transition from Really Existing Socialism to Capitalism: A Case Study of General Clauses in Polish Private Law*, [in:] *The Quality of Legal Acts and Its Importance in Contemporary Legal Space*, ed. J. Rozenfelds et al., Rīga 2012

Mańko, R. *Survival of the Socialist Legal Tradition? A Polish Perspective*, «Comparative Law Review» 4.2/2013

Mańko, R. *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

Mańko, R. *The Cooperative Member's Proprietary Right to an Apartment: A Legal Survival of the Period of Actually Existing Socialism on Polish Private Law*, «Zeszyty Prawnicze» 15.4/2015

Mańko, R.*'We Do Not Recognise Anything "Private"': Public Interest and Private Law Under the Socialist Legal Tradition and Beyond*, [in:] *Private Interest and Public Interest in European Legal Tradition*, ed. B. Sitek et al., Olsztyn 2015

Mańko, R. *Relikty w kulturze prawnej – uwagi metodologiczne na tle pozostałości epoki socjalizmu realnego w polskim prawie prywatnym* [Survivals in Legal Culture: Methodological Remarks Against the Background of Remnants of the Period of Actually Existing Socialism in Polish Private Law], «Przegląd Prawa i Administracji» 102/2015

Mańko, R., *Legal Survivals: A Conceptual Tool for Analysing Post-Transformation Continuity of Legal Culture*, [in:] *Tiesību efektivitāte postmodernā sabiedrībā*, ed. J. Rozenfelds et al., Rīga 2015

Mańko, R. *Use of Extra-Legal Arguments in the Judicial Interpretation of European Contract Law: A Case Study on Aziz v Catalunyacaixa (CJEU, 14 March 2013, Case C-415/11)*, «Law and Forensic Science» 10.2/2015

Mańko, R., *Transformacja ustrojowa a ciągłość instytucji prawnych – uwagi teoretyczne* [Systemic Transformation and the Continuity of Legal Institutions: Theoretical Remarks], «Zeszyty Prawnicze» 16.2/2016

Matczak, M. *'Summa iniuria'. O błędzie formalizmu w stosowaniu prawa* ['Summa iniuria': The Formalist Error in Applying the Law], Warszawa 2007

Mączyński, A. *Dawne i nowe instytucje polskiego prawa mieszkaniowego* [New and Old Institutions of Polish Housing Law], «Kwartalnik Prawa Prywatnego» 11.1/2002

Milej, T. *Europejska kultura prawna a kraje Europy Środkowej i Wschodniej* [European Legal Culture and Central Eastern European Countries], «Przegląd Legislacyjny» 15.1/2008

Niemi, M.I. *Form and Substance in Legal Reasoning: Two Conceptions*, «Ratio Juris» 23.4/2010

Pashukanis, E.B. *Law and Marxism: A General Theory. Towards a Critique of the Fundamental Juridical Concepts*, transl. by B. Einhorn, London 1983 [1929]

Pilich, M. *Zasady współżycia społecznego, dobre obyczaje czy dobra wiara? Dylematy nowelizacji klauzul generalnych prawa cywilnego w perspektywie europejskiej* [Principles of Social Community Life, Good Customs or Good Faith? Dillemas of Amending the General Clauses of Civil Law in a European Perspective] [in:] *Europeizacja prawa prywatnego* [The Europeanisation of Private Law], ed. M. Pazdan et al., II, Warszawa 2008

Płeszka, K., Gizbert-Studnicki, T. *Dwa ujęcia wykładni prawa. Próba konfrontacji* [Two Approaches to Legal Interpretation: An Attempt at their Confrontation], «Zeszyty Naukowe Uniwersytetu Jagiellońskiego» 677/1984

Redelbach, A., Wronkowska, S., Ziembiński, *Zarys teorii państwa i prawa* [An Outline of the Theory of State and Law], Warszawa 1994

Reich, N. *Transformation of Contract Law and Civil Justice in the New EU Member Countries*, «Penn State International Law Review» 23/2005

Renner, K. *The Institutions of Private Law and Their Social Functions*, translated by A. Schwarzschild, London-Boston 1976

Sacco, R. *Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)*, «American Journal of Comparative Law» 39.1/1991

Sacco, R., *Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II)*, «American Journal of Comparative Law» 39.2/1991

Sitek, B. *Stosowanie edyktu «de nautis, cauponibus et stabulariis» w systemie prawa Republiki Południowej Afryki*, «Zeszyty Naukowe Uniwersytetu Szczecińskiego» 274 «Roczniki Prawnicze» 11/1999

Soper, P. *On the Relation between Form and Substance in Law*, «Ratio Juris» 20.1/2007

Stawarska-Rippel, A. *O klauzulach generalnych w pierwszych latach Polski Ludowej słów kilka* [A Few Words on the General Clauses in the First Years of People's Poland], «Miscellanea Iuridica» 6/2005

Stawarska-Rippel, A. *O politycznych założeniach procedury cywilnej w Polsce Ludowej* [On the Political Foundations of the Civil Procedure in People's Poland], «Miscellanea Iuridica» 7/2005

Stelmachowski, A. *Kontraktacja* [The Cultivation Contract], [in:] *System prawa prywatnego* [The System of Private Law], VII: *Prawo zobowiązań – część szczegołowa*[2] [Law of Obligations: General Part], ed. J. Rajski, Warszawa 2004.

Summers, R. *Form and Function in a Legal System* [2006], Cambridge 2009

Uzelac, A. *Survival of the Third Legal Tradition?*, «Supreme Court Review» 49/2010

Wołodkiewicz, W. *I cambiamenti del codice civile polacco dopo 1989 possono essere trattati come segno del ritorno alla tradizione romanistica?'*, [in:] *The Roman Law Tradition in Societies in Transition*, ed. P. Bělovský, M. Skřejpek, Praha 2003

Wróblewski, J. *Sądowe stosowanie prawa* [The Judicial Application of Law], Warszawa 1988

Zawadzka, Z. *Pozycja procesowa prokuratora w postępowaniu cywilnym* [The Procedural Position of the Prosecutor in Civil Proceedings], «Prokuratura i Prawo» 6/2010

Zieliński, T.J. *Prawne ramy ekspresji religijnej w amerykańskich uniwersytetach publicznych* [The Legal Framework for Religious Expression in American Public Universities], «Studia z Prawa Wyznaniowego» 11/2008

Zomerski, W. *Conference Report: 1st International Conference of the Central European Network of Legal Scholars (CENELS) On «25 Years After The Transformation: Law and Legal Culture in Central and Eastern Europe. Between Continuity and Discontinuity», Masaryk University, Brno, Czech Republic, 16–17 April 2015*, «Wrocław Review of Law, Administration and Economics» 4.2/2014 [2015].