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THE CONDITIONS OF POSSIBILITY FOR NOMOSTASIS: A CONTRIBUTION TO THE THEORY OF LEGAL SURVIVALS

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All views presented in this paper are entirely personal and do not present the position of any institution.

Abstract: *The purpose of this paper is to provide for a theoretical reflection concerning the continued use of certain legal institutions, concepts, rules or principles outside the socio-economic or political context in which such legal morphemes (known as "legal survivals"), were created. In order to refer to the phenomenon of endurance of legal survivals following a transformation, transition or revolution, the paper will use the term "nomostasis," coined from the Greek words denoting "law" (nomos) and "resistance to change" or "stability" (stasis). The goal of the present paper is to formulate a number of hypotheses concerning the conditions of possibility of nomostasis with view to creating a theoretical scaffolding to be later filled with empirical, sociohistorical case-studies. For this purpose, the paper isolates and groups two types of factors enabling or favouring nomostasis: (1) endogenous ones, i.e., those pertaining to the juristic community as such and (2) exogenous ones, i.e., those pertaining to the environment within which that community functions, most notably the political and ideological climate. By contrast, the present paper does not address the question of intrinsic features of legal morphemes that may or may not favour nomostasis. The main theoretical hypothesis advanced in the paper is that for nomostasis to occur, one can typically expect there to be a need for a favourable combination of endogenous and exogenous factors. The paper is intended to provide elements of a theoretical framework for further empirical sociohistorical research on nomostasis within the broader framework of the historical sociology of law as a specific sub-discipline at the interstices of sociology of law and legal history.*

Key words: *Nomostatis; Legal Survivals; Historical Sociology of Law; Theoretical Sociology of Law; Social Theory*

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1. INTRODUCTION

The purpose of this paper is to provide for a theoretical reflection concerning the continued use of certain legal institutions, concepts, rules or principles outside the socio-economic or political context in which such legal morphemes[1] (known as "legal

[1] The term "morpheme" borrowed from linguistics (cf. Wierzchowski, 1981; Kowalik, 2024, p. 253), is used here—as legal morpheme—to denote any self-contained unit of legal form that can survive, or be transplanted, or revived, such as in particular a legal institution, principle, concept, doctrine or a legal rule (cf. Mańko, 2024b, p. 94 n. 1). In contrast to the concept of a legal formant, developed by Rodolfo Sacco (1991, pp. 343-384), and in contrast to the linguistic concept of a morpheme as the smallest unit of language (Kowalik, 2024, p. 253), a legal morpheme—as understood here—does not necessarily have to be the smallest unit of legal form (e.g., a legal institution is a complex of functionally interconnected legal rules governed by a number of common

survivals"),[2] were created. In order to refer to the phenomenon of endurance of legal survivals following a transformation, transition or a revolution , this paper will use the term *nomostasis*, coined from the Greek words denoting "law" (*nomos*) and "resistance to change" or "stability" (*stasis*).[3] Thus, under conditions of nomostasis, legal morphemes are taken out of their original context (Watson, 2000), and oftentimes, as a result, they come to fulfil new, previously unknown, social functions (Renner, 1976, pp. 293, 252; Mańko, 2016a, pp. 22-30). In fact, nomostasis is apparently a ubiquitous phenomenon in the history of legal development (Watson, 2001, pp. xviii, 5, 8; Mańko 2024b, p. 95). Therefore, it certainly requires further study, both theoretically and methodologically rigorous.

To briefly illustrate the phenomenon, let me turn to the Central European context.[4] Here, nomostasis, that is, the presence of legal survivals, was noted both after the creation of independent Central European states, such as Poland, Czechoslovakia or Yugoslavia, which continued to apply earlier imperial laws, typically until World War II. Following the latter war and the introduction of state socialism (communism) in the region, pre-War legal forms often persisted despite the changed political and economic regime. One can mention here the Polish Code of Obligations,[5] which remained in force until 1964, or the Austrian Civil Code (ABGB) of 1811,[6] which remained in force in the Czech part of Czechoslovakia until 1964. Following the third grand transformation—the fall of communism in 1989—much of the socialist-type legislation remained in place too. Suffice it to mention that Hungary had used its socialist Civil Code of 1959[7] right up to

principles). The emphasis is rather on its self-contained nature, and the possibility of it to become integrated as a building bloc of a legal system. Therefore, it is possible to speak of simple legal morphemes (legal rules, legal principles, legal concepts) and complex legal morphemes (legal institutions, legal doctrines).

[2] The phenomenon of legal survivals was discovered independently within the Common Law tradition by Oliver Wendell Holmes (2009 [1881], 7) and within the Civil Law tradition by Karl Renner (1976 [1929]). The term "survival" has been popularised by Jean Gaudemet (1955) and Hugh Collins (1982). The concept of legal survivals has been developed in more recent literature in theoretical sociology of law (see, e.g., Mańko, 2015a; 2015b; 2016a; 2024b; 2024c; 2025a). See also Eckhardt and Mańko (2025); Mańko and Eckhardt (2025).

[3] More specifically, the proposed term "nomostasis" [νομόστασις] is a neologism formed from the Classic Greek nouns 'νόμος' (nómos), denoting "law," and 'στάσις' (stásis), denoting "stability" and "resistance to change." It is also a conscious reference to the concept of homeostasis used in systems theory to describe how a system maintains its internal coherence despite external disturbances (see, e.g., Billman, 2020, 2), a concept that has been also applied to law (see, e.g., Kozak, 2003). However, it must be emphasised that nomostasis (the endurance of legal institutions despite social change) is only one aspect of law's homeostasis, which is a much broader concept.

[4] On the specificity of the Central European context when it comes to transformations and nomostasis, see, e.g., Giaro (2007; 2011a; 2013; 2024); Mańko (2019a; 2020); Mańko, Cercel and Tacik (2024).

[5] Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27.10.1933 – Kodeks zobowiązań [Decree of the President of the Republic of 27 October 1933 – Code of Obligations] (Dz.U. nr 82, poz. 598). Original text available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19330820598/O/D19330598.pdf (accessed on 16.12.2025).

[6] Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der österreichischen Monarchie [General Civil Code for all German Hereditary Lands of the Austrian Monarchy] (JGS Nr. 946/1811). Original text available at: https://alex.onb.ac.at/cgi-content/alex?aid=jgs&datum=10120003&seite=00000275 (accessed on 16.12.2025)

[7] 1959. évi IV. Törvény a Magyar Népköztársaság Polgári Törvénykönyvéről [Act IV of 1959 on the Civil Code of the Hungarian People's Republic] (MK 1959/82). Original text of 1959 available at: https://iura.uj.edu.pl/Content/4390/SKAN/Civil%20Code_HUN.pdf (accessed on 16.12.2025).

2013,[8] Czechia replaced the socialist Czechoslovak Civil Code[9] only in 2012,[10] and Slovakia is still using that Code, although preparing to replace it with a new one.

On the other hand, even within the same legal system, nomostasis is not an evenly distributed phenomenon. Some legal morphemes endure following societal change to become legal survivals, whilst others disappear, either because of a conscious decision of the legislator (*abrogatio*), or simply fall into disuse and remain legal forms exclusively on paper (*desuetudo*). For instance, in Poland, the rules on socialist rights to land (*perpetual usufruct*) and to apartments (cooperative member's right to an apartment) survived long after the transformation (Mańko, 2015c; 2017b), but rules on contracts between state-owned enterprises[11] or about the special legal capacity of legal persons[12] were removed already in 1990.[13]

The phenomenon of nomostasis certainly requires further study, especially in the guise of granular, empirical[14] case studies of concrete legal institutions and their changing social functions, despite the endurance of their original form.[15] Such studies could be framed as contributions to the *historical sociology of law*—i.e., the analysis of law's historical development with an eye to its social conditions (Bucholc, 2022). Especially in the context of Central and Eastern Europe, the study of the exact role of law in the post-socialist transformation is one of the emerging topics of sociohistorical research (Bucholc, 2022, pp. 670-671; cf. Mańko, 2017d). Due to neoinstitutional conceptual framings, transformation studies have hitherto displayed a tendency to neglect the self-standing importance of law as a factor in the transition from socialism to capitalism (Bucholc, 2022, p. 671). The study of nomostasis can contribute to strengthening what Marta Bucholc (2022, p. 671) describes as the "cultural turn" in historical sociology and thereby turn focus to a more granular analysis of legal-cultural aspects of socio-economic and political transformations. At the same time, besides the

[8] 2013. évi V. törvény a Polgári Törvénykönyvről [Act V of 2013 on the Civil Code]. Available at: https://njt.hu/jogszabaly/2013-5-00-00 (accessed on 16.12.2025). English translation available at: https://jogkodex.hu/doc/8089567 (accessed on 16.12.2025).

[9] Zákon č. 40/1964 Zb., Občiansky zákonník [Act no. 40/1964, Civil Code]. Original text available at: https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/1964/40/?ucinnost=01.04.1964 (accessed on 16.12.2025).

[10] Zákon č. 89/2012 Sb., občanský zákoník [Act no. 89/2012, Civil Code]. English translation available at: http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf (accessed on 16.12.2025).

[11] Articles 397-494 of the Polish Civil Code of 1964, within Book III ('Obligations'), Title IV ('Duty of Concluding Contracts Between Units of the Socialised Economy'). See ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [Act of 23 April 1964 – Civil Code] (Dz.U. nr 16, poz. 93). Original text available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19640160093/O/D19640093.pdf (accessed on 16.12.2025).

[12] Article 36 of the Polish Civil Code of 1964 (original wording): "*The legal capacity of a legal person shall not include the rights and duties excluded by statutory law or by-laws based on it. Neither shall it include the rights and duties that are not linked with the scope of tasks of a legal person; this shall not, however, impact the validity of a juridical transactions, unless the other party knew that the transaction was concerned with such rights or duties.*"

[13] Ustawa z dnia 28 lipca 1990 o zmianie ustawy – Kodeks cywilny [Act of 28 July 1990 amending the Act – Civil Code] (Dz.U. nr 55, poz. 321), known as the "July Novella." Full text available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19900550321/O/D19900321.pdf (accessed on 16.12.2025).

[14] Nomostasis lends itself primarily towards qualitative analysis. Thus, the empirical material could include, in particular, court archives (to analyse case-law of ordinary courts, not just published case-law of supreme courts), and—for more recent developments—interviews with practitioners, legislators and judges. Moreover, discourse analysis could penetrate the continued usage of certain phrases coined in older case-law and doctrinal writings as a manifestation of nomostasis in its own right.

[15] Some initial research has been done already, see, e.g., Mańko (2016c; 2017b); Kuźmicka-Sulikowska (2019); Stetsyk (2019); Ernst, Sadowski and Sadowski (2024); Preshova and Markovikj (2024); Somby (2025).

empirical studies postulated above, the *theory* of nomostasis also needs to be developed,[16] understood as a contribution to the theoretical sociology of law, and thereby as the basis for the conceptualisation of case studies analysed within historical sociology of law.

Against this background, the present study is intended to move precisely in the latter direction by offering a theoretical analysis of the *conditions of possibility of nomostasis*, understood as the necessary prerequisites (premises) enabling the phenomenon of nomostasis to take place. After all, there is always the possibility of changing the law each time the social context changes and abrogating the old law altogether. Nomostasis is not, therefore, a necessary phenomenon but—in the light of its empirically proven presence—it is certainly a *possible* one, and, as mentioned above, a rather common one, at least in some areas of the law and in some jurisdictions. The theoretical approach of the present contribution means that, although aiming to provide conceptual tools of particular relevance to the sociohistorical study of Central and Eastern European legal cultures, it will nonetheless operate on a sufficiently high level of abstraction, making its findings potentially relevant also outside the region. Situations where, following a profound socio-economic or political transformation, the old law persists, are not only a specific feature of Central and Eastern Europe, but are also highly relevant in the post-colonial legal context (Bucholc, 2022, p. 672; Somby 2025; cf. Xavier et al., 2021). This is because "*the relics of the past continue to remain within the law and the legal architecture created since the legal process of decolonization*" (Xavier and Hewitt 2021, p. 1). Old legal forms, brought with the colonial settlers, still rule modern day Global South countries from the grave of colonisation.[17] Vestiges of Roman-Dutch law in South Africa (Kleyn and Van Niekerk, 2014; Mańko, 2003; Mańko, 2004), Dutch law in Indonesia (Gautama and Hornick, 1972), French law in Francophone Africa (Gasparini, 2022), or English law in Anglophone Africa (Iheme, 2025) require a proper theoretical framework for their in-depth sociohistorical investigation. How is this possible, and how can law be that flexible to be used in such disparate contexts—the metropolis, the colony, and then the independent post-colonial state? This is one of the pressing questions that research on nomostasis seeks to answer.

In this vein, the goal of the present study is to formulate a number of hypotheses concerning the conditions of possibility of nomostasis with a view to creating a theoretical scaffolding to be later filled with empirical, sociohistorical case studies. For this purpose, the paper isolates and groups three types of factors enabling or favouring nomostasis: (i) *endogenous* ones, i.e., those pertaining to the juristic community as such (examined in section 2); and (ii) *exogenous* ones, i.e., those pertaining to the environment within which that community functions, most notably the political and ideological climate (examined in section 3). By contrast, the present paper does not address the question of intrinsic features of legal morphemes that may or may not favour nomostasis.[18]

The main theoretical hypothesis advanced in the paper is that for nomostasis to occur, one can typically expect there to be a need for a favourable combination of

[16] See, e.g., the semiotic theory of legal survivals proposed recently by Ánde Somby (2025).

[17] Moreover, as Sámi legal philosopher Ánde Somby has convincingly shown, post-colonial legal survivals are also of great practical relevance in non-Global South post-colonial jurisdictions, such as Australia, Canada or Norway, where they directly affect the property rights of Indigenous people – the victims of Western European colonialism and imperialism (Somby 2025).

[18] For instance, it has been claimed that legal concepts are particularly prone to survival, more than entire legal institutions or norms (Giaro, 2008, p. 77). Karl Renner (1976 [1929]), in turn, analysed the survival of legal institutions drawing attention to the change of their social function. However, these issues remain outside the scope of the present enquiry.

endogenous and exogenous factors. It further puts forward a more detailed hypothesis that endogenous factors are, in fact, decisive (*sine qua non*), whereas exogenous factors must at least not block nomostasis. Nonetheless, the ultimate *locus* of nomostasis is in the collective consciousness and the imaginary of the juristic community, and its capacity to think creatively about old legal morphemes. This kind of reflective approach, which allows to adapt the social functions of legal institutions whilst maintaining their normative continuity does not, of course, exclude an entirely unreflective approach, in which the juristic community upholds old law despite its dysfunctionality under changed conditions. Although the focus of this paper is on the first scenario (reflective nomostasis), some of its findings may be also relevant for the second one (unreflective nomostasis).

Given the status of the claims put forward in this paper as *generalised research hypotheses*, they are intended to be verified or falsified in future sociohistorical legal research, based on the detailed analysis of specific case studies of legal survivals. The broad historical examples cited in the paper are indicated purely illustratively and are intended to give some initial foundations to the hypotheses put forward in the paper. However, such a preliminary overview cannot replace proper research on case studies which will be capable of verifying or falsifying the claims made in this paper. Moreover, different contexts (e.g., post-socialist Central and Eastern Europe vs. post-colonial Global South) may give rise to different findings that will enrich the theory and make it more sophisticated.

2. ENDOGENOUS CONDITIONS OF NOMOSTASIS

2.1 Epistemological Conditions – Morphonomism as Approach to Law

If law is to persist as form, but to change its content (social function) at the same time, it must be conceived of and perceived (by lawyers at least) *as form*. The concept or term of "form" does not have to be necessarily used, but there must be a consensus within the juristic community that law *is not identical to its content* (its social function, or effects) but that its essence is constituted by a certain formal framework that can be filled with various (and varying) content, as the need may be.[19]

In order for this to be possible, lawyers need to operate—at least unconsciously—within the hylomorphic distinction of form vs. content (or its variations: form vs. matter, form vs. substance) and apply that distinction to the juridical phenomenon to the effect that law is considered as form (cf. Mańko, 2017a). I propose to refer to this "law-as-form approach" (Mańko, 2025a, pp. 70-72) with the shorthand reference of "morphonomism."[20] It must be emphasised that morphonomism, as a *practical* understanding of the nature of law by lawyers is much older than any *scientific theory* of legal form.[21] By contrast, the *scientific theory of legal form*—which could be referred to as "morphonomics"[22]—appeared

[19] This is not relevant for unreflective nomostasis, where old legal morphemes persist without being adapted in any way despite their dysfunctionality.

[20] Derived from the Greek 'μορφονομισμός' [morphonomismós], coined from μορφή [morphḗ] – "form" and νόμος [nómos] – "law," with the suffix -ισμός [-ismós] used to denote a system or doctrine.

[21] Thus, to put it in Thomas C. Grey's (2003, p. 478) terms, morphonomism belongs to the sphere of "working legal thought," whereas morphonomics—to the sphere of "jurisprudential legal theory".

[22] Derived from the Greek 'μορφονομική' [morphonomikḗ], coined from the same two nouns as nomomorphism, but with the suffix -ική [-ikḗ] used for naming disciplines of knowledge (e.g., economics, physics, etc.).

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only in the 20th century in the writings of Evgeny Pashukanis (Pashukanis, 2002[1924]),[23] and is only gradually being further developed today (see, e.g., Cercel, Fusco and Tacik, 2025a; 2025b; Mańko, 2024e; Wilén, 2025). To sum up: morphonomics (the science of legal form) is one thing, and morphonomism (the approach to law as being a form), is another—just like the existence of any given phenomenon needs to be distinguished from its conceptualisation by legal science (Mańko 2024b, p. 95). We must remember that a given juristic community may well be morphonomist (i.e., intuitively treating law as form) without having any clue about morphonomics (scil. the theory of legal form).

As Aldo Schiavone (2012, pp. 202-203) has pointed out, morphonomism as an approach to juridicity can be traced back to Roman law, where legal form emerged from the sphere of the sacred and magical (Schiavone, 2012, p. 75). In the words of Friedrich Karl von Savigny, the forms of law (i.e., legal morphemes) were treated by the Roman jurists as "actual beings" (Savigny, 1831, p. 45), as "*real entities endowed with life of their own and an inescapable objectivity, which legal knowledge limited itself to mirroring*" (Schiavone, 2012, p. 202). The ontological consequences of this approach, which persists until today, have been well captured by Artur Kozak who observed that the lawyers "represent the social existence of law through the construction of a specific institutional world, the structure of objects whose reality is obvious and available only to subjects shaped in a specific regime of legal education" (Kozak 2002, p. 140).

If we agree with Thanos Zartaloudis (2018, p. xxxviii) that the birth of law occurred at the precise moment when the legal form became distinguishable from the life it seeks to express and regulate, we can point out that this distinction between abstract legal form on one hand, and the real-life circumstances to which that legal form is then applied, constitutes the foundation of nomomorphism and, as a result, a necessary condition of nomostasis.

2.2 Nomogenetic Autonomy and Interpretive Authority

In order to develop old (existing) legal morphemes through their creative reinterpretation, the juristic community must enjoy sufficient nomogenetic (law-making) autonomy. In other words, lawyers (especially judges) must feel empowered to make and change law through interpretation, i.e., perform acts of nomogenesis, doing so on their own authority. Nomogenetic autonomy has two sides: an internal (endogenous one), focusing on the juristic community's self-perception, and an external (exogenous one), pertaining to the political legitimacy of juristic law-making. That external aspect will be discussed below in section 3.

Within legal cultures based on jurisprudential law, as was the case with Classical Roman law, or based on judge-made case law, as is the case with contemporary Common Law, this condition is most visibly fulfilled. For instance, Roman jurists, creatively elaborating the old legal morpheme of *mancipatio* to produce out of it such new legal institutions as *emancipatio* (the liberation of the child from the father's authority) or *testamentum per aes et libram* (a type of testament) (Watson, 1995, pp. 188-191) enjoyed sufficient autonomy to make the law. Formally, they were only reinterpreting old legal morphemes and putting them to new uses. Substantially, however, they were indeed *making* the law, i.e., engaging in a nomogenetic activity. However, examples of entirely new legal norms being created (i.e., acts of proper nomoneogenesis) were reserved—besides the obvious case of legislation—to the Praetor, who could establish

[23] Evgeny Pashukanis is commonly considered the father of the theory of legal form (see, e.g., Bowring, 2025; Lukina, 2025).

new actions in his Edict, thereby acting *iuris civilis adiuvandi, supplendi, corrigendi gratia*[24] (with the goal of supporting, supplementing and correcting the civil law). In this context, the disputed border between faithful vs. creative interpretation becomes particularly important. In fact, certain theories of interpretation, such as hermeneutic universalism, claim that any text needs to be interpreted, and that the line dividing creative and reproductive interpretation cannot be drawn (see, e.g., Łakomy, 2019a; 2019b; 2020). However, if we think about the passage from simple *mancipatio* as a direct act of sale, to *emancipatio* as the act of terminating paternal authority (*patria potestas*), there can be no doubt that the interpretation of the old legal morpheme was highly creative. These kinds of reinterpretations have been referred to as instances of what Watson describes as a "pragmatic use" (Watson, 1995, p. 190), Johnston as a "juristic invention" (Johnston, 1999, p. 32), and Lewis as a "jurists' scheme" (Lewis, 2015, p. 159).

Clearly, the autonomy of the juristic community must also encompass sufficient interpretive authority, i.e., the capacity of jurists to engage in interpretive activity which leads to the generation of normative novelty (innovativeness). Thus, in terms of Luhmann's and Teubner's systems theory, the legal system must achieve the level of *autopoiesis*, and be capable of being reproduced within a hyperloop, for this to be possible. In other words, the legal system must have at its disposal the necessary means to reproduce and modify itself, and in this way to react to external changes on its own terms, thus modulating the effects of challenges emanating from its changing environment. Being capable to do so, the legal system may then opt for nomostasis, rather than for outright change of legal form, as the method for coping with external pressures due to socio-economic, political, ideological or cultural changes. From the legal system's internal perspective, the choice between nomostasis and statutory reform is, in fact, a question of *alternative means to the same goal*: whether to modify the law at the level of application or, if necessary, judicial interpretation (nomostasis) or whether to modify the legal provisions (statutory reform). In systems theory terms, in both cases the adaptation will be autopoietic—either the new rules are enacted in line with legislative procedures (statutory reform), or the case-law will take into account the changes without a modification of the statutory rules (nomostasis). The difference is a question of level (depth) of the normative system that is to be affected by the change in law's environment.

Whereas in Classical Roman Law or in contemporary Common Law the juristic interpretive authority is recognised, in the Civil Law tradition, especially in its Central European version, which is often described as being ultra-formalist and hyperpositivist,[25] the necessary scope of authority may be problematic. However, this does not block the jurists from continuing to apply existing legal morphemes, as long as their necessary adaptation occurs through the input of facticity—as is, most notably, the case with general clauses.

[24] Dig. 1, 1, 7, 1.

[25] The degree to which Central European legal cultures are excessively formalist is an object of debate. Much depends on the *tertium comparationis*, whether it is the pragmatist American version of the Common Law, or the more rigid version of English Common Law, or is it one or another Western version of the Civil Law, e.g., the more pragmatic Dutch one, or the more formalist French one, and so forth. For a classic account, see Kühn (2011). For national perspectives, see Uzelac (2010) on Croatia, Łętowska (1997), Matczak (2007) and Kusik (2025a; 2025, pp. 262-264) on Poland. For a cultural studies approach, drawing on Lacanian psychoanalysis, see Mańko (2013), and for a sceptical approach to the entire narrative about CEE exceptional formalism, see above all Cserne (2020; 2024).

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2.3 Axiological Conditions – Legal Tradition as an Intrinsic Value

For the juristic community to desire preserving old legal morphemes and filling them with new content as society changes, it is also necessary that it actually values (or at least tolerates) legal tradition as such, as opposed to sheer innovation. Here, we speak of an axiological condition—pertaining to the values of the juristic community. It can also be described in terms of juristic ideology, i.e., the professional guild ideology of lawyers (Mańko, 2025b, pp. 66-75). Why such an ideology or axiology is adopted is an entirely distinct question. It may well be part of a strategy for strengthening the juristic community's legitimacy in society, or it may be a consequence of a generally traditionalist mindset prevalent in a given time and space. Whatever its root cause, the juristic community's preference for an incremental or even organic development of the legal system through its gradual, at times creative, reinterpretation, appears to be a necessary condition of nomostasis.

From the point of view of law's consistency over time, statutory reform vs. nomostasis is a choice with high stakes. In fact, the longevity of the old *Ius Commune*, last modernised by the Pandectists in the 19th century, and of the Common Law, still applied in the Anglo-American legal world, is based on the preservation of old legal forms and the progressive change of their content. Under the *Ius Commune*, this continuity was textual: the text of the *Corpus Iuris Civilis* remained as a sign of unity and tradition. Under the Common Law, this continuity is also textual (with reference to the text of precedents),[26] but is based on the concept of working in a "chain"[27] of interpretation: every new judicial decision adds to earlier decisions, it is conditioned by them, but also conditions *ex post* their interpretation.

3. EXOGENOUS CONDITIONS OF NOMOSTASIS

3.1 Political Legitimacy to Reinterpret the Law

Besides autonomy, i.e., the capacity to create and modify the law, the juristic community must also enjoy sufficient political legitimacy for its nomostatic interventions to enjoy authority. This is because law-making authority, at least in its statutory form (legislation) is typically reserved, by the legal system itself, to the political authorities (today, typically, the parliament). This is considered the core of a system based on the division of powers, even if material law-making is an inevitable element of adjudication.

Once again, in a system based on jurisprudential law (as Rome was) or on judge-made law (as Common Law countries are) this element is fully recognised. In today's United Kingdom or United States, although Parliament or Congress are considered to be the legislative power, the legitimacy of judicial law-making is not questioned. More specifically, judges are entitled to reinterpret old legal morphemes and give them new meaning. This happens on a daily basis and constitutes the fundamental mechanism of legal development. Legislative intervention in the form of acts of Parliament or Congress is present, but the day-to-day management of legal adaptation is left in the hands of judges.

On the Continent, the Civil Law tradition has embraced, especially from the times of the French Revolution, a different understanding of the division of tasks between lawyers and legislators. It has been traditionally understood that only legislators make the law, whereas judges interpret it and apply it. However, despite this limitation (when

[26] On the doctrine of precedent in English law see, e.g., Samuel (2013, pp. 79-88).
[27] On the metaphor of the "chain" see Fish (1982).

compared to Classical Roman Law or Common Law), the concept of "dynamic interpretation" (Konca, 2025) has provided a helpful tool allowing for the proliferation of nomostasis. Moreover, the analytical distinction between interpretation and application (as two different actions undertaken by judges), coupled with the law vs. fact distinction,[28] also allows for greater flexibility. The change of social function of a legal institution can be conceived of as being a consequence of applying the same legal rules to different facts.[29] Thus, for instance, the concept of principles of social coexistence (the main general clause in the Polish Civil Code) can be considered as remaining the same as regards legal form, but assumes new content due to the changed circumstances to which it is applied (cf. Leszczyński, 2021, pp. 192-195). In this perspective, judges are not perceived as changing the law, but rather as applying the same law in new circumstances. It is the context, under this optic, which changes the legal outcome, without any change in the law, along the formula *societas mutatur, ius manet* (society changes, but the law remains the same). This relieves judges from the politically unacceptable burden of law-making and presents changed outputs of the legal process as an obvious consequence of changed inputs, rather than the effect of (arbitrary) judicial decision-making. It also allows to escape the question of legitimacy of judicial law-making.

If the judges working with legal survivals lack the courage or capacity to reinterpret them to suit new conditions, nomostasis can lead to a dysfunctionality of the legal system. For instance, as Iheme argues, African judges in former British colonies, due to an "*intellectual overdependence on English law*" are displaying "*the frequent inability (…) to effectively interpret or adapt English-originated contract concepts to suit local (African) experience*" (Iheme, 2025, p. 67).

3.2 Role of Politico-Ideological Climate and Culture

Besides enjoying sufficient autonomy (comprising autopoiesis), authority and political legitimacy, the juristic community—in order to favour nomostasis—must also operate in a political and ideological environment that will at least tolerate, and ideally promote, the continuity of legal form despite deep societal change. This does not always need to be the case. In what follows, I will consider both examples in which nomostasis was favoured by the political and ideological climate (3.2.1), those, where it was not (3.2.2), as well as ambiguous situations (3.2.3).

3.2.1 Nomostasis Favoured by Politico-Ideological Climate

Characteristic examples of a politico-ideological climate favourable to nomostasis include: classical Roman law; early modern *Ius Commune*; and the Common Law. Within Roman law, it was typical to show veneration to the legal traditions, especially the Law of Twelve Tables. Legal innovation was always cloaked in old forms, which were

[28] As Tomasz Giaro points out, the law vs. fact distinction became engrained in the Civil Law tradition due to the division of the civil procedure into a law-focused phase *in iure* (before the Praetor) and the fact-focused phase *apud iudicem* (before the private judge) (Giaro, 2008, p. 70; 2011b, pp. 217-218).

[29] In Renner's terms, one would speak of a different "substratum" of the legal norm leading to different outcomes in terms of its social function: "*…in spite of the norm, the substratum changes, yet this change of the substratum takes place within the forms of the law; the legal institutions automatically change their functions which turn into their very opposite, yet this change is scarcely noticed and is not understood. (…) [T]he economic substratum dictates the functions of the norm, (…) it reverses them; but the norm itself remains indestructible*" (Renner, 1976 [1929], pp. 293, 299).

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ostensibly developed in an incremental manner. The authority for legal change was usually to be found in some cues taken from existing law, rather than forged anew. The Romans did not have a taste for formal novelty, did not use legislation much (at least in private law), and their attachment to tradition also meant that old legislation (*leges*) was not formally repealed, rather continued to be formally in force, even if superseded by new *leges*.

Medieval *Ius Commune* emerged on the basis of the revival of Roman law, as enshrined within the *Corpus Iuris Civilis* comprising of four books: the Institutions, the Digest, the Code, and the Novellae.[30] Medieval and early modern jurists developed the *substance* of the law by creatively interpreting the *form* of Roman law, as found in the *Corpus*. A similar task was undertaken, in parallel, by Canonists, who subjected the *Corpus Iuris Canonici*, comprising church laws, to the same interpretive operations. Thanks to a dialectical model of interpretation, inspired by Greek philosophy, the content of interpreted norms could be innovative and could correspond to the needs of time. However, the form was bound within the venerated, ancient texts, which provided the entire enterprise with both intellectual and politico-juridical authority.

The Common Law system emerged in England, and until today it is split (in England) into two normative sub-systems: Common Law *sensu stricto* and Equity. Common Law *sensu stricto* was developed by the royal courts (King's Bench and Court of Common Pleas) ostensibly as a unification of customary law. Equity was developed by the Chancellor, and later by the court of Chancery, ostensibly as the application of the rules of conscience to legal cases, and thereby to mitigate the harshness of the formalist and rigid Common Law. The distinction between Law and Equity is still present in the internal organisation of the legal system, even if, in the US and increasingly in England, the distinction between courts applying the two sub-systems has become blurred or even outright abolished.

The method adopted by the Common Lawyers in the development of law can be rightly described as casuistry, and as such it owes much to the method developed by Canon lawyers and moral theologians (Douzinas and Gearey, 2005, p. 170). The casuistic method is based on proceeding *a casu ad casum* and treating the law as a thread of cases. More recently, American philosopher of law Stanley Fish (1982) called this "working on the chain gang". Rules are not formulated abstractly, but arise in cases, and become binding for the future as precedent (principle of *stare decisis*, i.e., "standing by [past] decisions"). The very structure of *stare decisis*, which is applicable both at Law and in Equity, is decidedly favourable towards nomostasis, because any legal innovation must stem from existing case-law, and may be induced principally by distinguishing and creatively filling the gaps within the intellectual structures laid down by existing case-law. A judge does not "make the law" outright, but is considered as working within an existing framework of case law, which at the same time constrains him (principle of *stare decisis*) but at the same time empowers him to make minute, incremental modifications (thanks to the possibility of distinguishing, which is a logical consequence of the strong systemic link between the legal aspects of a case—its "holding"—and the facts against the background of which the holding was made) (cf. Kennedy, 1986). Certainly, a precedent-based legal system, in which judges are expected to frame their argument within existing case-law, is strongly favourable towards nomostasis.

In this context it comes as no surprise that in modern English law the legal form feudal system of land ownership has been retained (Rahmatian, 2022). Even though feudal property became transformed into capitalist property along the same lines, both

[30] For a comprehensive discussion, see, e.g., Berman (1983).

in England, on the one hand, and in France and Germany, on the other hand, the latter two Continental legal systems returned to the Roman legal form of unitary property (*Eigentumsrecht*, *droit de propriété*), whereas the English legal system has retained the feudal forms: the *dominium emergens* remains with the King as sole proprietor of land in England, whereas other people can only enjoy *dominium utile*—known as "fee simple absolute in possession" (Rahmatian, 2022, p. 287). Moreover, in some cases there are still intermediary owners (the "mesne lords") (Rahmatian, 2022, pp. 285-286), although most landowners today hold their estates directly of the Crown, not of mesne lords. The fact that England has retained the legal forms of feudal land law, whereas France and the German states have abolished it in the 19th century, Scotland in the 2004[31] (Rahmatian, 2022, p. 295) and Ireland in 2009,[32] is surely an example of the role of the politico-ideological climate. Given that feudalism is a fusion of private and public law,[33] King Charles' title to ruling the country still remains directly based on Norman the Conqueror's conquest and his *debellatio* of England in 1066. As Andreas Rahmatian points out: "*The English feudal property system is in fact still a constitutional pillar for the whole of Great Britain, which is why it will probably continue to exist for some time as an example of living legal history, even though the actual core of feudal law has almost disappeared*" (Rahmatian, 2022, p. 301).

The case study of English legal survivals is certainly an extreme example, perhaps even the most extreme one among modern legal cultures. However, it certainly allows—precisely through its liminal character—to develop the necessary conceptual tools for studying the phenomenon of nomostasis also in less extreme cases, such as Central and Eastern Europe or the Global South.

3.2.2 Nomostasis Despite Unfavourable Politico-Ideological Climate

As regards the phenomenon of nomostasis occurring despite an unfavourable politico-ideological climate, let us consider three examples. Firstly, the example of post-revolutionary law in France (after 1789) and Russia (after 1917). In both instances, the general political climate was against continuity of legal form, and in favour of a revolutionary breakthrough. Indeed, many legal institutions were destroyed, never to be introduced again. For instance, France abolished feudalism, including serfdom, and introduced secular marriage, formal equality of all citizens, as well as formal freedom of contract; Russia abolished the private ownership of land (Bílková, 2017, pp. 147-148),[34] inheritance (Gsovski, 1947, pp. 295-297)[35] and religious marriage (secular marriage exists until today). Thus, important and politically significant legal institutions were subject to change—the legal system gave in to political pressure. However, despite that, large tracts of the lawscape remained the same, even if they had to be externally presented as being new. Thus, the *Code civil*, whilst encompassing the aforementioned revolutionary

[31] Abolition of Feudal Tenure (Scotland) Act 2000 (in force since 2004). Available at: https://www.legislation.gov.uk/asp/2000/5/contents (accessed on 16.12.2025).
[32] Land And Conveyancing Law Reform Act 2009, section 9(2): "In so far as it survives, feudal tenure is abolished." Available at: https://www.irishstatutebook.ie/eli/2009/act/27/enacted/en/html (accessed on 16.12.2025).
[33] Which of the two prevails has been an object of long-standing debate: whether title to political power stems from ownership of land, or ownership of land—from political power. In conceptual legal terms it seems, however, to be a "hen or egg" debate: Charles' title to rule England stems from his right of property just as his right of property stems from his status as king. Cf. Rahmatian (2022, pp. 297-300).
[34] Obviously, after the fall of state socialism, the institution of private property was fully revived in Russia (Sukhanov, 2001).
[35] However, inheritance was reintroduced already in 1923 (Gsovski, 1947, p. 298).

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novelties, nonetheless in all other aspects presented a compromise between the pre-revolutionary Romanic laws of southern France (the *pays du droit écrit*, influenced directly by Roman law) and the Germanic laws of northern France (the *pays du droit coutoumier*, in principle Germanic, but indirectly influenced by Roman law) (Sójka-Zielińska, 2009, p. 199). As for Russia, the Civil Code of 1922, which was officially presented as being new, was in fact nothing else than a digest of the pre-revolutionary draft of Digest of Civil Law, completed in 1914, but never enacted (Kuznetsov, 2022). Most notably, despite ideological visions of "withering away" of the law, the legal system in the Soviet Union was never dismantled, and instead of disappearing altogether, a socialist legal system was constructed (cf. Borisova, 2012; 2017; Cercel, 2018, pp. 97-120; Lukina, 2022).

Thirdly, the survival of colonial law in the Global South is another typical example of nomostasis under an unfavourable politico-ideological climate. Despite being the law of the oppressor, the colonial power, the legal system brought by the Dutch, French, or English colonisers has generally been retained and subject to reforms, rather than abolished outright. As Iheme points out, within former British colonies in Africa "*many [members of the] African intelligentsia recognised the sociological abnormality of legal transplants from England, viewing them as aberrations and remnants of colonial oppression rather than tools of justice*" (Iheme, 2025, p. 69). Despite that, the Common Law—despite the "*mismatch between English legal principles and local African customs, values and social structures*" (Iheme, 2025, p. 70)—remains in force and applicable.[36] Such a situation can certainly be described as a dysfunctionality of legal culture, because *"English legal concepts are rooted in English social norms, mindsets and traditional practices, and for that reason are inherently unable to resonate with African societies"* (Iheme, 2025, p. 70).

These examples show that, despite an official climate in favour of legal discontinuity, nomostasis proved to be stronger, although (in the French and Soviet cases) legal tradition had to be hidden behind a façade of innovativeness. Therefore, it can be concluded that an appropriate political and ideological climate can certainly favour nomostasis, but it is not a *condicio sine qua non* of the continuity of legal forms despite a deep societal transformation. Other factors, such as notably the lack of a ready-made new legal system to replace the old, are of equal importance.

3.2.3 Nomostasis under an Ambiguous Politico-Ideological Climate

Finally, in some situations one can speak of an ambiguous climate for nomostasis. This seems to be a characteristic feature of the Central European legal experience, where nomostasis occurred not because it was favoured by the political elites, but also not despite a strong hostility of those elites. Rather, they took an ambiguous stance of tolerating nomostasis for the time being, whereby this "time being" could have lasted 20 or more years.[37]

Let me focus, as examples, specifically on the Polish legal experience. Following World War I, when a sovereign and fully independent Polish state was established after 123 years of foreign domination, it was a political order of the day to get rid of foreign imperial law (German, Russian, French, and Austrian) and to replace it with Polish law (Gałędek, 2025). Already in 1919, the interim head of state, Józef Piłsudski, established a Codification Commission for this purpose. But the Commission's work progressed

[36] Moreover, legal survivals from the Common Law are followed by new legal transplants from the same legal family (e.g., United States) which are not adapted to local conditions (see, e.g., Iheme 2021). In this way, nomostasis generates path dependence (Kusik, 2024, p. 55).

[37] Further research could address, in a comparative fashion, the ambiguity of the Central and Eastern European political and legal elites with the situation in post-colonial Global South nations.

slowly, and after 10 years of work it could boast only the adoption of two acts on internal and external conflicts of law (private interregional law and private international law). Work accelerated somewhat in the second decade, when a Code of Civil Procedure was adopted in 1930, followed by a Criminal Code in 1932, a Code of Obligations in 1933, and a Commercial Code in 1934. But large areas of the law remained subject to foreign legislation of the former occupying powers, including property law, succession law and family law. The slow pace of work was due to the high quality of the drafting work: the professors and legal practitioners involved in it strived at finding the best solutions and formulating them with utmost precision and elegance. The outcome of their work still impresses with its drafting quality, but this quality came at a price—the price of time. This approach, where the politico-ideological will to unify the law swiftly gave way to the juristic tendency to high quality drafting, created—for a certain period—a climate favouring legal continuity, even if it was not desirable for symbolic and axiological reasons.

This climate of ambiguity surrounding nomostasis repeated itself in Poland also after World War II and after the 1989 transformation. When state socialism was introduced, the legal system of pre-1939 Poland was generally retained (Gałędek and Machnikowska, 2025, p. 161). A swift unification of private law was conducted over two years (1945-1946), with the result that no survivals of foreign imperial law (French, German, Austrian, and Russian) remained in place. However, the drafting was now done within the Ministry of Justice, and the drafters—who were much fewer in number and worked more hastily—heavily relied on advanced pre-war drafts (Gałędek and Machnikowska, 2025, pp. 162-163). This ensured a great deal of legal-cultural continuity with the pre-War period. The unified Polish private law was, therefore, very deeply anchored within the Western legal tradition, but—to the dismay of the political authorities—it was not in line with the requirements of state socialism. Piecemeal reforms of private law and civil procedure took place in 1950, alongside the enactment of a new Family Code (prepared jointly with Czechoslovakia), but it took until 1964 for the new Civil Code, Code of Civil Procedure as well as Family and Guardianship Code to be adopted. Nevertheless, despite the officially declared innovativeness, the gist of those codes remained very deeply rooted in Poland's post-war unified private law and, thereby, in the Western legal tradition. The socialist innovations were few and could easily be removed after 1989 (cf. Machnikowska, 2025). In this way, an ambiguous political climate—combining socialist ideology with a respect for legal culture and for Polish national legal tradition—allowed to preserve tangible elements of Polish legal culture and thereby favoured nomostasis even under conditions of a socialist transformation of the country.

Following the 1989 transformation, a similar climate of ambiguity *vis-à-vis* the legal survivals of the previous period has prevailed. On the one hand, the legal system of People's Poland has been entirely preserved (even the Constitution, as amended, remained in place until 1997). On the other hand, existing legislation, especially the codes, were gradually amended and replaced. The Civil Code of 1964 was most heavily amended twice – first in 1990, when most of the socialist "accretions" (Jodłowski et al., 2003, p. 33) were removed, and then in 1996. Following that, it has been amended quite frequently, although its core legal institutions, as laid down in 1964, have not been fundamentally altered. Deeper changes touched the Code of Civil Procedure, which was subjected to a first profound amendment in 1996. Since then, the system of appellate procedures has been virtually in constant flux. Nonetheless, numerous legal survivals have been retained or even revived: one can mention here the general legitimation of the prosecutor's office in all types of civil proceedings (Mańko, 2016c, pp. 80-84); the power of second-instance

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courts to submit preliminary references to the Supreme Court (Mańko, 2016c, pp. 84-85), a socialist legal innovation dating from 1950; and finally the extraordinary revision, i.e., the power of the Prosecutor General and certain other officials to challenge judgments after they have become *res judicata*, a power modelled on the Soviet *nadzornaya instantsiya*, imported to Poland in 1950, abolished in 1996 with effect from 1998, but then reintroduced *tout court* in 2017 as part of sweeping judicial reforms undertaken by the Law and Justice government (Ereciński and Weitz, 2019, pp. 8–9; Zembrzuski, 2019, pp. 35–37; Stasiak, 2020, p. 1; Mańko, 2025a, p. 77). In this climate of ambiguity towards nomostasis, numerous examples of legal survivals have managed to endure.

4. CONCLUSIONS AND OUTLOOK

The goal of this study was to pursue a theoretical enquiry into the conditions of possibility of nomostasis, i.e., the phenomenon of the endurance of old legal forms (morphemes) despite profound societal changes, such as, notably, transformations, transitions, revolutions, the breakup of empires, decolonisations, and the like. The goal of the paper was to prepare a theoretical research framework, composed of a number of hypotheses, designed to guide future empirical, sociohistorical research on nomostasis. In particular, it drew attention to the need for distinguishing between endogenic and exogenic factors of nomostasis and assessing their relative weight. It did not address the question of intrinsic features of legal form as a factor favouring or precluding nomostasis, which requires further theoretical and empirical research.

Even if, as observed at the beginning of the paper, the phenomenon of nomostasis can be described as ubiquitous (just like the phenomenon of legal transplants),[38] a claim can be made that post-socialist and post-imperial legal survivals play an important role in the legal culture of contemporary Central and Eastern European countries (Mańko, 2020, p. 34; Mańko and Sulikowski, 2024, pp. 258-259). This is because the region was, at least for the last two centuries, a recipient, rather than a donor, of legal transplants originating from former Empires and the Soviet Union (Mańko, 2019, pp. 72-3). In fact, in more recent history, the condition of *receptio necessaria* of foreign legal models – i.e. of "externally dictated" legal transplants (Kusik, 2024, p. 55; Kusik, 2025, pp. 169-170) – has not essentially changed, or has even intensified (Micklitz, 2015, p. 5; Mańko, 2019, p. 73; Tacik, 2019, p. 35; Mańko, 2020, p. 19; Kusik, 2025, p. 291). In this context, Central and Eastern Europe can be said to constitute a "laboratory of nomostasis"—especially with regard to remnants of the law of former empires, as well as of former socialist law. The same claim can be made with regard to the post-colonial states of the Global South which still cope with the relics of colonial legal form (cf. Iheme, 2025).[39]

Deeper research into such legal survivals should ideally focus on concrete legal institutions, analysed in a multidimensional way—combining "*historical, dogmatic, and sociological research*" (Eckhardt and Mańko, 2025, p. 178). As Swedish sociologist of law Håkan Hydén has rightly pointed out, the sociology of law "*uses inductive methodology aimed at relating empirical findings to theory. (....) The more empirical findings that can be added, the richer its contours become*" (Hydén, 2023, p. 2). At this stage, whereas the foundational conceptual framework for studying nomostasis has already been laid down,

[38] On legal transplants, see e.g.: Watson (1993 [1974]); Trikoz and Gulyayeva (2003); Kusik (2025b, pp. 45-220).

[39] Sulikowski and Wojtanowski (2018, pp. 79-80) have made the claim that there are certain analogies between the situation of CEE countries and the Global South that might justify the use of postcolonial legal theory also to the CEE region.

more research focused on concrete case studies will enable to test the hypotheses put forward in this paper and provide a deeper understanding of this theoretically capturing and practically relevant socio-legal phenomenon. In this way, a more nomocentric approach will enable scholars of historical sociology of law to gain a better understanding of the autonomous role of law as a factor involved in socio-economic and political transformations. Undoubtedly, such research will have to be programmatically multidisciplinary, combining not only the methods and sources used, on the one hand, by sociology of law, and, on the other hand, by legal history, but also any other relevant approaches, such as, notably, those of economics, political science and anthropology. Moreover, dogmatic (doctrinal) and comparative legal research will also be necessary. Nomostasis, as a complex phenomenon at the interstices of the legal and the social demands, requires adequately complex research methods.

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