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# Ius Patrium and Roman Law in Hungary[1]

*The development of Hungarian law has many links with European legal culture. Primary among these is Hungary's adherence to Western Christianity from the time of the foundation of the Hungarian state and the influence of the Roman legal tradition in shaping legal culture, both directly and indirectly through canon law. In this paper – as a summary of my previous works on this topic – I will show in which phase of the development of Hungarian law between the 11th and the 20th century the Roman legal tradition influenced the development of Hungarian law, how this influence manifested itself, who were the mediators of this influence, to which scientific trend they belonged and to what extent Roman law shaped Hungarian legal thought.*

***Keywords:*** *Roman law, ius patrium, ius canonicum, Formularium, Tripartitum, Summa legum Raymundi, Historische Rechtsschule, Roman law specialists in Hungary, codification*

## 1. Roman law and medieval Hungarian customary law[2]

Although Hungary (*regnum Hungariae*) stood in connection with the Byzantine Empire (*Imperium Romanum Orientis*), the fact that King *Stephen I* [*St. Stephen*] (1000–1038) and his country assumed western (Latin) Christianity made the penetration of Byzantine law (*ius Graeco-Romanum* or *ius Byzantinum*) into Hungary impossible.[3] It was only *Justinian's* codification (528–534), especially the *Codex Iustinianus* and some novels (*Novellae*), that made its impact felt in the laws (*decreta*) of *St. Stephen*, even if indirectly.[4]

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1 The study was carried out in the framework of the research project *'The Legal Relevance of the Vetus et Novum Testamentum. Parallels between the Jewish-Christian and Roman Law Roots of our Legal Culture'* (No. 138899).

2 Vécsey, A római jog története hazánkban és befolyása a magyar jogra; Pázmány, Il diritto romano in Ungheria; Zajtay, Sur le rôle du droit romain dans l'évolution du droit hongrois; Bónis, Einflüsse des römischen Rechts in Ungarn; Bónis, A jogtudó értelmiség a Mohács előtti Magyarországon; Bónis, Középkori jogunk elemei; Zlinszky, Ein Versuch der Rezeption des römischen Rechts in Ungarn; Kapitánffy, Römisch-rechtliche Terminologie in der ungarischen Historiographie des 12–14. Jh.; Szabó, Die Rezeption des römischen Rechts bei den Siebenbürger Sachsen. For the role of Roman law in the medieval Hungarian State see: Gerics, A korai rendiség Európában és Magyarországon.

3 See more: Komáromi, A bizánci hatás kérdése a középkori magyar jogban.

4 Hamza, Szent István törvényei és Európa; Hamza, Szent István törvényei és a iustinianusi római jog; Jánosi, Törvényalkotás Magyarországon a korai Árpád-korban.

The Transdanubian part of Hungary stood under Roman control for almost four centuries. The provinces of Pannonia prima and secunda, Savia and Valeria belonged to the western part of the Roman Empire. Romanization also included the sphere of law as testified by several inscriptions.[5] The direct influence of Roman law appeared in Hungary only in the age of the Glossators.[6] Hungarian students attended the University of Bologna by the thirteenth century. There was even a separate 'Hungarian nation' (*natio Hungarica*) there in the framework of which about eighty Hungarian students attended the lectures of the Glossators before 1301.

Other Hungarian students learned canon law in Paris and became acquainted with Roman law. A small number of Hungarians attended the faculty of law at the universities of Padova, Oxford, and Cambridge among others. Hungarian students continued to go to universities abroad under the *Angevin* kings (1308–1387). The first Hungarian university functioned at Pécs (*Civitas Quinqueecclesiensis* in Latin) from 1367 where Roman law was probably taught as well.[7]

As a consequence of all this, the book of *formulae* (*Formularium*) by *János Uzsai*, rector of the University of Bologna around 1340, and *Bertalan Tapolczai* reflected the influence of Roman law to a certain extent. The terminology of the legal documents issued at that time also showed the influence of Roman law, as well as the chronicles written during the *Árpád* and *Angevin* dynasties, especially the *Gesta Hungarorum* of *Simon Kézai* at the end of the thirteenth century. The impact of Roman law was much less marked in the *ius scriptum*, i.e., the royal statutes (*statuta*) and decrees (*decreta*). At the same time certain principles of Roman public law (*ius publicum Romanum*) can be observed, for example, in references to the *plenitudo potestatis* serving as a justification for the preponderance of royal power at the time of the *Anjous* (dynasty of the *Angioini*) and later during the reign of King of the *regnum Hungariae Sigismund* (1387–1437) or King *Matthias* (1458–1490).

From the fifteenth century it was only the wealthier layer of intellectuals (churchmen) who could afford to study in Italy. The less well-to-do students went to Cracow or Vienna to study primarily canon law (*ius canonicum*) and become acquainted also with Roman law. Tradition has it that King *Matthias* himself took up the question of the reception of Roman law in Hungary. King *Matthias* made an attempt at the codification of Hungarian law by issuing Act VI of 1486 (*Decretum Maius*) the preamble of which follows the structure and terminology of the *constitutio Imperatoriam maiestatem* and contains several elements and terms of Roman law. The great Spanish humanist of Valencia, *Juan Luis Vives* (1492–1540) maintains that the Hungarian king i.e. king *Matthias* (*Matthias rex*) intended to place native i.e. vernacular law (*ius patrium*) on new foundations through the reception of Roman law. Seeing, however, the difficulties inherent in this process, he gave up his plan. Although *Imre Kelemen* still found this view credible in the early nineteenth century, *Ignác Frank* denied it as a statement lacking any foundation in the sources. However, it cannot be doubted that King *Matthias*'s attempt at strengthening royal power (*regia potestas*), especially in the last decade of his reign, was theoretically based on the principles of Roman law.

5 Visky, A római magánjog nyomai a magyar földön talált római kori feliratos emlékeken.

6 Hamza, La Bible dans les oeuvres des adhérants de l'École des Glossateurs et de l'École des Commentateurs 130–140.

7 For the Hungarian peregrinatio academica directed at the faculties of law at European universities see: Szabó, Előtanulmány a magyarországi joghallgatók külföldi egyetemeken a XVI–XVII. században készített disputatióinak (dissertatióinak) elemzéséhez. For the beginnings of Hungarian higher education see: Csizmadia, A pécsi egyetem a középkorban.

Also, a few Hungarian law-books surviving from the Middle Ages contain technical terms of Roman law and refer to its institutions, especially those of Buda and Pozsony (now Bratislava in Slovakia) written in German in the fifteenth century.

## 2. István Werbőczy and the Tripartitum

The law-book of chief justice *István Werbőczy* (c. 1458–1541) systematizing feudal customs (*consuetudines*) in Latin, language of administration of the Hungarian kingdom (*lingua patria*) was entitled *"Tripartitum opus iuris consuetudinarii inclyti regni Hungariae".* Showing the impact of Roman law in many respects, this general and comprehensive *decretum* was the first to put native custom into writing. It was accepted by the Diet of 1514 and sanctioned by the king, *Wladislaw II* (1490–1516), but was never promulgated so it never formally became source of law (*fons iuris*). However, *Werbőczy*'s *Tripartitum* achieved authority despite its failure to be enacted.

A law-book (*Rechtsbuch* in German, *jogkönyv* in Hungarian) anyway, *Werbőczy's* work contained contemporary feudal customary law (*ius feudale*) and the royal decrees (*decreta*) using predominantly the terminology of Roman law. However, the passages i.e. texts taken from *Justinian's* codification (compilation) were probably included only to increase the prestige of the *Tripartitum*. The links between the *Tripartitum* and Roman law are conspicuous in the following aspects[8]: 1) The division of the book into chapters on *de personis, de rebus,* and *de actionibus* follows the Roman law tradition. *Werbőczy* still had to admit that it was useless to try to force feudal Hungarian law into the framework of *personae–res–actions* (system of the *Institutes* of *Gaius*). 2) Similarly, the general terms known to Roman law (such as *ius naturale*, *ius publicum*, *ius privatum*, *ius civile*, and *ius gentium*) and its legal principles (e.g., *ius est ars boni et aequi*) were taken over only formally, mostly in the *Prologus*, but are not incorporated into the concrete regulations concerning the Hungarian *ius consuetudinarium* contained in the *Tripartitum.* 3) The impact of Roman law on the *Tripartitum* can also be observed in its legal terminology not always used according to its original meaning and in several legal institutions taken over from Roman private law (e.g., the division of guardianship into testamentary, statutory, and commissioned versions, certain rules concerning wills (*testamenta*), paternal power (*patria potestas*), etc.).

Where *Werbőczy* studied Roman law and from where he took the texts of Roman law included in the *Tripartitum* is still a subject of debate among legal historians. His principal source must have been the textbook of Roman and canon law written by Master *Raymundus*[9] at Naples in the thirteenth century that must have been taken to Hungary and to Poland in the course of King *Louis I the Great*'s military campaign/s/ to Naples around the middle of the fourteenth century. In Poland it even became a national statute.

8 Földi, A római személyi és családi jog hatása a Tripartitumra; Földi, Werbőczy és a római jog; Hamza, Werbőczy Hármaskönyvének jogforrási jellege; Hamza, A Tripartitum mint jogforrás.

9 Experts are in doubt as to the author of the textbook as the name *Raymundus* appeared first only as late as 1506 in a Cracow manuscript. See: Seckel, Über die »Summa legum« des Raymund von Wiener Neustadt; Gál, Die Summa legum brevis, levis er utilis des sog. Doktor Raymundus von Wiener Neustadt; Bónis, Der Zusammenhang der »Summa Legum« mit dem »Tripartitum«.

The so-called *"Summa legum Raymundi"* contained the customary law of the South Italian towns and the penal laws of the *Angevin* kings and became part of the law-books of several royal free cities in Upper Hungary (such as Bártfa and Eperjes). Manuscript versions of it were also at Cracow and Wiener Neustadt. Recent research maintains that *Werbőczy's* source must have been the one from Cracow, which leads us to the conclusion that *Werbőczy* must have studied there.

## 3. Hungarian private law from 1514 to the 19th century[10]

At the time when the *Tripartitum* was written, the economic development of Hungary was restricted mostly to towns, but production for the market was already increasing on the estates of the nobility. These changes must have contributed to the compilation of the *"Formularium Posoniense"* by Prebend *Imre Pápóczi* in the 1530s. This collection of laws was intended to be a textbook and to regulate the ever-livelier economic conditions of the day by its formulas of contracts resembling the ones of Roman law and its endless commentaries. The impact of Roman law can be felt also in the laws passed in the first half of the century.[11]

*Werbőczy's Tripartitum* containing feudal private law, applying Roman law mostly only formally and not so much in merits, became 'the Bible of the nobility' for the following three centuries, paralyzing both the development of law and legal science alike. Although in the sixteenth century the Hungarian humanists made an attempt at least at a partial reception of the *Corpus iuris civilis*, they failed to break the power of custom.

*Iohannes Honterus* (1498–1549) published his work of didactic nature *"Sententiae ex libris Pandectarum iuris civilis"* in Brassó (now Braşov in Romania, Kronstadt in German) in 1539 aiming to acquaint the public with Roman law. In its preface he emphasized the advantages of Roman law in contrast with the often uncertain municipal custom. *Honterus's* work based on Roman law and entitled *"Compendium iuris civilis in usum civitatum ac sedium Saxonicarum collectum in Transsilvania"* (1544) later served as a basis for the municipal statutes of the Saxon towns of Transylvania. These statutes remained valid on the Királyföld (King's Land, *Königsboden* in German, *Fundus Regius* in Latin) for the following three centuries after 1583. *Iohannes Sambucus* (*János Zsámboki*, 1531–1584) was responsible for the first edition of the *Corpus iuris Hungarici* in 1581. *Zsámboki* included in this edition (as an appendix to the *Tripartitum*) the legal principles to be found in the last title of the *Digesta* (50, 17) under the subtitle *"Regulae iuris antique"*, which indicated their formal reception in the Hungarian legal system. The work of *Iohannes Decius Barovius* (*János Baranyai Decsi*, c. 1560–1601) entitled *"Syntagma institutionum iuris imperialis sive Iustiniani et Hungarici"* (1593) introduces the institutions of the *ius patrium* in the framework of *Justinian's Institutiones.*

In the seventeenth and eighteenth centuries, Roman law was primarily a subject to be taught at the universities, mostly at Nagyszombat (today Trnava in Slovakia). The impact of Roman law also could be felt also in works dealing comprehensively with Hungarian law.

The work of *János Szegedy* (1699–1760) entitled *"Tripartitum iuris Hungarici tirocinium"* (1734) compared the institutions of Hungarian and Roman law. Also, *Imre Kelemen* (1744–1819), an outstanding civilist, referred to Roman law, especially in his *"Institutiones iuris Hungarici private"* (1814).

10 Degré, Elemente des römischen Rechts im Vermögensrecht der ungarischen Leibeigenen; Klein, Der Humanist und Reformator Johannes Honter.

11 Act XLIII of 1542 about affiliation shows, for example, the direct impact of the *SC Plancianum* of Emperor *Vespasian*; see: Vécsey, Az 1542. évi pozsonyi országgyűlés 43-ik t-czikke 305–312.

## 4. The science of Roman law and private law in the 19th century[12]

The first significant change in Hungarian legal life was brought about by the influence of *Savigny's* branch of *Pandektistik.* It could be felt first in the works of *Ignác Frank* (1788–1850), the first noted civilist of the nineteenth century, who can be considered — in *László Szalay*'s words — 'the pioneer of a new era' despite his protest against codification. In his *"Specimen elaborandarum insitutionum iuris civilis Hungarici"* of 1823 still reflecting the influence of natural law (*ius naturale*), especially *Christian Wolff*, *Frank* used the terminology of Roman law to describe relations of land ownership. Roman legal terms can be found in several of his other works as well when speaking of phenomena in Hungarian law. *Frank's* pupil, *Gusztáv Wenzel* (1818–1891) was a dedicated follower of the Historical School of Law (*Historische Rechtsschule*) and often referred to Roman law in his writings.

From the second half of the nineteenth century the Pandectist School, especially *Rudolf von Jhering*'s trend, made its impact felt to an ever-greater extent through the works of *Gusztáv Szászy-Schwarz* (1858–1920), a civilist of universal scope, on Hungarian jurisprudence and the practice of the courts. Since almost all Hungarian Romanists and civilists had been pupils of German pandectists: *Szászy-Schwarz* and *Mihály Biermann* (1848–1889), a professor of law at Győr and Nagyszeben (now Sibiu in Romania, Hermannstadt in German), attended the lectures of *Jhering,* and *Elemér Balogh* (1887–1953), an outstanding expert of comparative law, was a disciple of *Heinrich Dernburg*), they contributed to the spread of several elements of German Pandect law (*Pandektenrecht*) in the legal practice.

## 5. The role of Roman law in the codification of Hungarian private law[13]

Act XVIII of 1791 was the first step towards the codification of the Hungarian *ius privatum* by charging a legal committee with preparing a draft civil code (*"Proiectum nonnullarum utilium civilium legum"*). The draft was ready in two years but was put in print only in 1826. Neither its structure, nor its content reflected the impact of Roman law and it could not be called a draft code anyway. The reception of the *Code civil* in Hungary could naturally not take place, though *László Szalay* thought it to be an ideal model for Hungarian codification. The developments in political life made even the second attempt at codification ordained by Act XV of 1848 impossible.

The Abgb was put into force in Hungary and Transylvania in 1853, so a work of codification was out of the question until the Austro-Hungarian Compromise (*Ausgleich* in German) of 1867. The general part of the *General Code of Private Law* (1871) was prepared by the Romanist *Pál Hoffmann* on the model of the *Saxon Civil Code* of 1863 reflecting the influence primarily of *Georg Friedrich Puchta*. This code was practically the codification of all pandectist writings.

12 Pólay, A pandektisztika és hatása a magyar magánjogtudományra; Zlinszky, Wissenschaft und Gerichtsbarkeit. For *Ignác Frank* see: Villányi Fürst, Jogi professzorok emlékezete. For *Gusztáv Wenzel* see: Ujlaki, Wenzel Gusztáv 65–75. For *Gusztáv Szászy-Schwarz* see: Szladits, Magyar jogászegyleti értekezések. For *Elemér Balogh* see: Hamza, Elemér Balogh (1881–1955): European Romanist and Scholar of Comparative Law 112–119.

13 Dell'Adami, A nemzeti eredet problémája, Dell'Adami, Az anyagi magánjog codificatiója, vol. 1; Dell'Adami, Magánjogi codificatiónk és régi jogunk, vol. 1; Meszlény, Magánjogpolitikai tanulmányok különös tekintettel a magyar általános polgári törvénykönyv tervezetére; Szászy-Schwarz, A magánjogi törvénykönyvről; Mádl, Kodifikation des ungarischen Privat- und Handelsrecht im Zeitalter des Dualismus; Csizmadia, Ungarische zivilrechtliche Kodifikationsbestrebungen im Reformzeitalter.

The draft of the law of succession by *István Teleszky* (1836–1899) of 1882 is based on the *Saxon Civil Code* both in its structure and its theoretical basis which, in turn, relied on the particular Saxon law of succession in its institutions. *István Apáthy*'s (1829–1889) draft law of obligations of 1882 influenced by the Draft of the Law of the Obligations for the German States (*Dresdner Entwurf*) of 1866 preparing the way to the future Bgb, followed *Savigny*'s theory of will concerning legal transactions, similar to *Hoffmann*'s suggestion. The same applies to the draft of the general part by *Elek Győry* (1841–1902) prepared in 1880. The impact of the Pandectist School is not so marked in the partial draft of the law of things by *Endre Halmossy* (1882) and in the draft concerning matrimonial law, the law of persons, and property law by *Benő Zsögöd* (*alias Béni Grosschmid*, 1852–1938).

The idea of a comprehensive civil code became prevalent from 1895. One of its most consistent representatives was *Gusztáv Szászy-Schwarz*, who wished to realize codification in Hungary on the basis of Roman law. The draft of 1900, the structure and institutes of which resemble those of the German Bgb, broke with the idea of partial codification. It consisted of four parts (the law of persons and family law, the law of obligations, the law of things, and the law of succession) but had no general part, replacing it by the first few titles of the law of obligations. As regards legal transactions, it followed the theory of declaration (*Erklärungstheorie*). The impact of the Bbg was more manifest in the case of the following draft of private law of 1913 which was shorter and had no general part, similar to the former one. The draft civil code of 1928, considered by the courts as a *ratio scripta* (Mtj.), and in the drafting of which *Béla Szászy* (1865–1931) played an outstanding part, reflected the strong impact of the Swiss Civil Code (*Zivilgesetzbuch* – Zgb) and Law of Obligations (*Obligationenrecht* – Or).[14]

## 6. Eminent Roman law specialists in Hungary in the 19th and 20th centuries[15]

Roman law has been taught at the Hungarian universities ever since the establishment of the faculty of law at the university of Nagyszombat in 1667. The first professor of Roman law at the university was *Ádám Takács* (*Textor*). The first surviving scholarly writings on the subject were written by *Ernő Frigyes Someting* during whose professorship (1691–1695) the first open disputations on Roman law were held. Between 1733 and 1749 important contributions were written by *János József Rendek*, the author of the oldest textbook of Roman law in Hungary published in 1734. For a long time education was based at Nagyszombat (after 1777 in Buda and finally in Pest) on commentaries on the *Institutiones* and the *Digesta* by foreign authors. *Mihály Szibenliszt*, professor in Pest, published a high-level textbook in 1829 (*"Institutiones iuris privati Romani"*) comparable to ones written in other parts of Europe. The first textbook on Roman

14 It is quite edifying to survey the influence of the Pandectist School concerning objective (strict) responsibility. Based on the Bgb though not on its literal translation, the draft Hungarian civil code of 1900 regulated responsibility on the basis of guilt (culpa). Para. 1486 of the draft of 1913 (based on the first draft of the Bgb of 1887) spoke of damages on an objective basis. The famous § 1737 of the Draft Civil Code (*Magánjogi Törvényjavaslat*, abbreviated Mtj). of 1928 regulating responsibility on the basis of equity followed the second draft of the Bgb, however indirectly, making responsibility for damages on an objective basis possible as a subsidiary regulation.

15 Móra, Über den Unterricht des römischen Rechts in Ungarn in den letzten hundert Jahren; Pólay, A római jog oktatása a két világháború között Magyarországon (1920–44); Hamza, A római jog oktatásának és művelésének története.

law written in Hungarian one by *János Henfner* of the University of Pest under the title *"Római magánjog"* (*"Roman Private Law"*) and was published in 1855–1856.

The first professor teaching Roman law on the Western European level was *Pál Hoffmann* (1830–1907), a follower of *Savigny*. He called it a 'school of legal thinking'. In the second half of the 19th century the education of Roman law consisted of two parts: an institutions course containing the history and short summary of Roman law and a pandects course in the beginning containing German *Pandektistik*.

The textbook of *Alajos Bozóky* (1842–1919), professor at the Academy of Law at Nagyvárad (now Oradea in Romania), followed the system of teaching Roman law in the 19th century and dealt with institutions and pandects separately. Some Romanists — e.g., *Pál Hoffmann* from Budapest and *Lajos Farkas* (1841–1921) from Kolozsvár (now Cluj-Napoca in Romania), both of whom were *Savigny*'s followers — emphasized the importance of legal history, while others — like *Gusztáv Szászy-Schwarz* from Budapest and *Mór Kiss* (1857–1945) from Kolozsvár, the followers of *Rudolf von Jhering* — introduced Roman law on the basis of the modern theory of the pandects as distinct from the German Pandectist School, thus bringing by this Justinian's work of codification nearer to everyday practice. *Tamás Vécsey* (1839–1912), professor at the University of Budapest, stood between these two trends. The unfortunately unfinished book by *Károly Helle* (1870–1920) helped students get acquainted with the sources of Roman law.[16]

*Fig. 1: Tamás Vécsey* (source: collection of *Gábor Hamza*)

16 For *Pál Hoffmann* and *Tamás Vécsey* see: Hamza, Adalékok a történeti jogi iskola magyarországi hatásához: Hoffmann Pál életműve 539–543; Hamza, Vécsey Tamás és a jogi szemináriumok alapítása 51–68.

After World War I the dual teaching system of the institutions and the pandects ceased to exist, and only the former were taught. The same happened in relevant jurisprudence. *Géza Marton* (1880–1957), an expert of responsibility at private law well-known all-over Europe, taught the dogmatics of Roman law with a historical approach. His textbook served as a basis for teaching Roman law at almost all Hungarian universities and academies of law for almost four decades. *Kálmán Személyi* (1884–1946), the master of the critic of interpolations, was professor at Szeged and at Kolozsvár. In the years before World War II other professors of Roman law were the following: *Albert Kiss* (1873–1937), *Nándor Óriás* (1886–1992), *Zoltán Pázmány* (1869–1948), *Márton Szentmiklósi* (*Kajuch*) (1862–1932), and *Zoltán Sztehlo* (1889–1975). *Pázmány* and *Sztehlo* dealt also with juristic papirology, similar to *Géza Kiss* (1882– 1970), who was professor of Roman law at Nagyvárad (now Oradea in Romania) in the years prior to World War I and later at Debrecen, and *András Bertalan Schwarz* (1886–1953), professor in Zurich, Freiburg, and Istanbul.[17]

Outstanding scholars dealing with Roman law after World War II were *Károly Visky* (1908–1984), *Róbert Brósz* (1915–1994), *Elemér Pólay* (1915–1988), *Ferenc Benedek* (1926-2007) and *György Diósdi* (1934–1973).[18]

## 7. Conclusions: characteristic features of the development of private law in Hungary

With the foundation of the Hungarian State, as early as the reign of King *Stephen I* some rules of written law (*ius scriptum*) also appeared, viz. the statutes (*decreta*) of King *Stephen I*, a code of laws comparable, like all primitive codes, to the Salic law (*lex Salica*) or the *Russkaya Pravda*. Its main aim was to stop the blood-feud as then practised, by the award of a money compensation by the courts, since the free exercise of the blood-feud was inconsistent with the existence of an orderly State, but it also contained other dispositions by which it hoped to modify the prevailing customs.

Thus the written law enacted exceptions to the customary law, abolished some customs but left customary law to regulate all aspects of life. Customary law also remained of such basic importance that in following centuries even reforms were proclaimed to be restorations of the good old customs. For example, the Golden Bull (*Bulla Aurea*) of 1222 merely conferred more privileges to royal servants (*servientes regis*) and in part to the members of the aristocracy. The introduction of the Golden Bull presents it as thereby restoring the freedom granted by the king *Stephen I* who later, at the end of the eleventh century, became canonized.

The first conscious effort to make the compilation of law in existence was the *Decretum Magnum* of King *Matthias* promulgated in 1486. It is characteristic and an unfortunate fact that this statute was repealed six years later.

In the last centuries of the Middle Ages customary law retained its importance, and we may see that within the hierarchy of sources of law it actually took dominance over legislation. This is seen from the series *Corpus Juris Hungarici* in which one volume, admittedly of 853 pages, covers the period from the year 1000 (the foundation of the Kingdom) to the Mohacs Disaster in 1526,

17 For *Géza Marton* see: Hamza, Tanítványok Marton Gézáról. For *Nándor Óriás* see: Gátos, In memoriam Óriás Nándor (1886–1992). For *András Bertalan Schwarz* see: Hamza, Schwarz András Bertalan emlékezete 523–525.

18 For *Károly Visky* see: Hamza, Visky Károly 126–132. For *Róbert Brósz* see: Földi, Flosculi professori R. Brósz oblate. For *Elemér Pólay* and *György Diósdi* see: Hamza, In memoriam Elemér Pólay 183–186; Hamza, Emlékezés Diósdi Györgyre 95–99.

i.e. practically the whole mediaeval period, while in the succeeding centuries, though for a time still cautiously, the volumes containing the legislation keep growing (first covering 100 and then 50 years at a time). From this it appears that even in the more modern age right up to the 1848 bourgeois rebellion the flow of legislation remained small. The legislative activity of Hungarian capitalism, starting from the Austro-Hungarian Compromise (*Ausgleich* in German, *Kiegyezés* in Hungarian) of 1867, presents a very different picture, when the volumes of the *Corpus Juris Hungarici* appear every two or three years and, later, from the beginning of the twentieth century, every year.

It was not always easy to ascertain the rules of customary law; no doubt local customs also existed. In principle customary law lived on in the 'convictions of honest men' and mainly served the object of having the numerous assessors serving with the judge inform the judge what the customary law prescribed in the question before the court.

Obviously, the more highly developed social and economic relations became, the greater the complication in the customary rules. Hence it became necessary to reduce them to writing. About two centuries after the production of the famous German compilation of customary law, the *Sachsenspiegel, István Werbőczy*, a master of the supreme court, after several unsuccessful attempts, put down the customary law in force in Hungary in a royal document. The compilation of *Werbőczy*'s work, the *Tripartitum (Hármaskönyv)* was the result of a sincere attempt to summarise the customary law still *(ius consuetudinarium)* in force, but at times he diverged from that aim in order to subordinate it to the cause of advancing certain' political principles (the development of the lesser nobility into a decisive power factor).

On the other hand, he wrote in the introductory section of his book a general legal theory influenced by books on Roman law. He therefore measured the force of customary law as against statute, explaining that I customary law had three roles to play, viz. to explain, supplement and impair statute law. This third effect was restricted to the case where the statute was older and a conflicting custom grew up later. Here he regards statute law as the main rule and the force of customary law as related to it.

Mediaeval Hungarian legal theory always treated customary laws as by nature unwritten law, which was in no way altered by the fact that it had been reduced to writing. But they regarded customary law as a law defined by its uniform operation, a law possessing public authority to enact legislation According to this theory every nation can create its own customary law. However, in order that a custom be effective, certain requirements had to be satisfied. The *Tripartitum* refers to three of these. The first is that the customary law be reasonable. It was treated as reasonable if it was directed towards and strove for the realisation of the aims of law. They held that if a custom was directed to spiritual happiness I it followed that it was reasonable by canon and divine law but it would be unreasonable if it was inconsistent with the eternal destiny of Man. According to civil law a custom was reasonable if aimed at the public good. In general all customs were deemed reasonable if not contrary to natural law, the law of nations or positive law (*ius positivum*).

The second requirement was that the custom be prescriptive, viz. have lasted a sufficient time and been in force for the period required for prescription. But this was only required by canon law and only when it conflicted with established law. According to civil law ten years sufficed to establish a custom, i.e. after the lapse of ten years even if it conflicted with civil law. If the custom was in conflict with ecclesiastical law a period of forty years must have expired. If the custom arose outside the field of legislation then, according to the ecclesiastical law, ten years appears to have been sufficient. This ten-year period began to run from the first moment when people observed the custom. In civil law the ten year period did not apply in matters reserved for the Prince. In such cases customs were only effective if their origins were immemorial.

The third requirement was the regularity of the act creative of the custom. Frequent acts we re not by themselves required for the introduction of a custom, since approval by the people appears from practice and cannot be deduced from a single act. Frequency of acts is a cause and custom is an effect. It is clear that the action required is such that the custom appears to have been accepted into popular legal consciousness. Hence it is not the act itself so much as the implicit approval of the people which establishes the custom. Since this implicit approval may be deduced from circumstances it is unnecessary for acts to be frequent or numerous. One act may be sufficient to create a custom if its uninterrupted effect and consequences last for the whole period of evolution of the custom. If, for instance, someone builds a bridge and collects tolls on it, the building of the bridge is a single act but its continuous effect clearly appears through the long period of collection of tolls.

As to the possible reception of Roman law in Hungary the researcher of mediaeval Hungarian law who concentrates on this issue, comes to the conclusion that a *receptio in complexu* or a *receptio in globo* of Roman law was totally absent in Hungary, even in the taking over of general principles. Canon law was in force throughout the feudal period in Hungary in its own field, primarily the ecclesiastical jurisdiction. Civil (Roman) law enjoyed great respect as a kind of law of nature but was not regarded as a binding system. This does not exclude a manifold effect which became manifest with the evolution of Hungarian society.

*Werbőczy* did include Roman law rules among the binding legal rules, e.g. with respect to the legal consequences of a river changing its bed, and also in guardianship law. But in practice these were not accepted. We may add that the greatest effect was in the law of the cities. Here the major influence was exercised by German law, which had itself received Roman law rules, especially in the law of obligations.

Never again was Hungarian diplomatic to be raced by such rich Roman legal terminology as then. The civilising influence of Roman law scarcely failed to affect every part of the customary law and its terms of art became typical for it. But with the passing, in the last decades of the Arpad dynasty, of a learned generation, this temporary Romanisation suddenly came to an end. At the same time canon law was the system in force in the well-organised vicarial courts and therefore maintained a firm hold in the ecclesiastical court system.

It is notable that the decline in Roman law influence coincides with the regime of the House of *Naples-Anjou*. Though *Charles Robert* (1308–1342) and his son *Louis I* (1342–1382) also made use of the Roman law doctrine of *plenitudo potestatis* his left the basis of customary law untouched. The well known Hungarian legal historian, *György Bónis* (1914–1985) considered that the reason for this peculiar phenomenon was the development and strengthening of the Hungarian legal intelligentsia. At that time the jurist, the administration of justice and public administration figured largely in the royal courts and chanceries. When, therefore, a fresh wave of Roman law influence arrived in the second half of the fifteenth century it collided with a defensive wall of national law. Yet some stones in that very wall were of ancient Roman masonry. The second wave of Roman law influence took the form of early humanism, but its progress was combined with a simultaneous contraction of the sphere of canon law. King *Matthias* wished to reduce the extensive powers of church courts and sacred instances, in previously secular questions, by legislative action (1462, art. 3). Already at the very beginning of his reign he limited by statute the cases to be tried by church courts to wrongs against divine reverence and sacraments, cases regarding religious faith and heresy, wills and testaments and connected matters, matrimonial cases and related dowry matters, betrothal gif its, the daughter's portion (but not in inheritance of land), real and personal tithes, usury, widows

claims (provided the case did not turn on the acquisition of land), breach of oaths, in sum all such matters as fell within the sanction of excommunication. The King further continued all these restrictions in later statutes. Thus he declared in his *Decretum Maius* (1486, art. 28) that prelates or ecclesiastics who started a lawsuit against secular nobles might not during the pendency of the lawsuit issue ecclesiastical prohibitions. Elsewhere he forbids any one to presume to start a suit before the Papal Curia in any case of tithes or other matters, but to bring tithe disputes involving lands before the King (1486, art. 45).

King *Matthias* also drew a parallel in the famous *Decretum Maius,* 1486 which he declared to be eternal, beside the Roman law, with the introduction to the *Institutes* of the Emperor *Justinian* (527–568), saying in article 1 that it is fitting that Kings and Princes, who by disposition from on high are made models of supreme dignity, be glorified by laws as well as arms. Apart from this antiquated sentiment, national law was raised in *Matthias'* reign to a scientific level in state life, in the field of criminal law and procedural law, whereas civil (Roman) law remained silent as a subsidiary source – it was only after the Mohács Disaster (Battle) in 1526 that it gained some application in the town laws already mentioned.

*István Werbőczy*'s *Tripartitum* remained till our own times the recognized source for Hungarian customary law and was used as a "Bible" by the nobility. Having drawn up the *Tripartitum,* by royal direction, in 1514, he laid it before the national diet where it was accepted, but it never became law, for want of certain constitutional requirements (the royal seal was not attached to the decree and it was not circulated to the counties for promulgation). Probably the higher nobility at the royal court prevented the sealing, and thereafter the King, after the conclusion of the session of the diet, left the country and died soon afterwards, so that the missing requirements were never supplied. The higher nobility apparently disliked proclamation of 'one single liberty' with which *Werbőczy*, as leader of one of the parties of the lesser nobility, wished to reinforce the privileges of these. Though the higher nobility succeeded in sabotaging the promulgation, *Werbőczy* had the *Tripartitum* printed in Vienna in 1517 and himself sent it to the county towns. Since the county town tribunals *(sedes judiciariae)* were generally in the hands of the lesser nobility, within a few decades, especially when it was translated into Hungarian, the *Tripartitum* became widely used in court practice and became part of the customary law.

In Transylvania, the 'second Hungary' which had since 1541 been an independent principality, under a Hungarian prince for 150 years after the feudal period, ruled by the *Szapolyai*, of whom *Werbőczy* was a leading partisan, the *Tripartitum* went into immediate operation. Indeed, after the dissolution of the independent Hungarian principality, King *Leopold I* (1657–1705) of Hungary having acquired the princedom, the constitutional charter *(Diploma Leopoldinum)* of 1691 lists the *Tripartitum* among the sources of Transylvanian law. The leading circles in Transylvania consisted, especially in the 16th century, exclusively of the 'new men'; progressives were teaching law at the University of Padua, and the humanistic act of state government, so this became adapted for the further development of the existing national customary law (*ius patrium*).

Judicial practice in Hungary also necessitated the inclusion of the *Tripartitum* specifically among the legal sources of the country, and this happened in such a way that the publishers of the legal compilation of Hungarian law, the *Corpus Juris Hungarici,* in its 1628 edition, and thence-forward, constantly drew on it.

In the following centuries Roman law exploited further opportunities though, as we have seen, never received into general Hungarian law. Its principles and terminology came primarily to be incorporated in Hungarian decisions through the works of the *Quadripartitum* which were to succeed the *Tripartitum.*

The Diet of l790-1791 set up a legal committee (*deputatio juridica*) to prepare the necessary reforms, among which were a criminal code (*codex de delictis eorumque poenis*) and a draft civil code (*projectum legum civilium*) for debate in the following Diet.

The author of the book on private law, *Imre Kelemen* (1744–1819) followed new paths. In the first volume of a four-volume work he deals with the history of private law according to the Kings and diets; in the second volume he follows *Werbőczy's* order and in the same place his Roman law (*De personis* – Persons, *De rebus* – Things and *De actionibus* – Actions). He defends the independence of Hungarian law against Roman law. Hungarian law had been nourished by decisions enjoying legal effect, was harmonious in its parts and contained far fewer contradictions than Roman and other laws. In his view there were, however, general sources of Hungarian law which we re common to other legal systems: the law of nature, the positive divine law, i.e. law resting on Holy Scripture and statutes revealing it. Special sources were statutes, customs, privileges, decisions and particular legal rules. This well-grounded work naturally also refers to the influence of Roman law (e.g. the chapter dealing with paternal power; betrothal and marriage were pure canon law). *Kelemen* also translated his book from Latin into Hungarian, and a translation into German by Jung was then prepared.

The most notable scholar of Hungarian private law, and hence of an important part of the national law in the feudal period, was *Ignác Frank* (1781–1850), professor at the University of Pest, who, after a short work, *"Specimen elaborandarum institutionum iuris civilis Hungarici",* which was published in Kassa (Cassovia in Latin, now Kosice in Slovakia) in 1823, expounded his principles in a major work in two volumes which appeared in Pest in 1829, the *Principia Iuris Civilis Hungarici.* In *Frank*'s works, having examined the origins of Hungarian law, he considered that it had been affected by Roman and canon law and also by French and German law. The Germans had been able to transmit to the country their civilization and institutions. He cites as examples of this the holding of a National Assembly, legislative procedure, the principle of national defence, the privileges of the nobles, the status of the serfs (*servientes*) the institutions of feudal fiefs and grants, the mortgaging of lands, the rights of dowry, the use of the blood-price, and the various types of court procedure. On the basis of *Werbőczy* he considers that during the reign of *Charles* (*Károly* in Hungarian) *Robert* (1308–1342) was brought the system of civil procedure to Hungary from his French territories.

*Ignác Frank* took the learning on Hungarian private law of the feudal period to its peak. The *Principia iuris* was the most thorough and lucid of all works on private law up to that time, so that, as the highly reputed Hungarian legal historian *Ferenc Eckhart* (1885–1956) properly pointed out, it may be regarded as the classic work of the old private law literature, one which, if we wish to learn about that law, makes it superfluous, so to say, to consult any work written before it. Frank further developed the statements in the *"Principia Iuris Civilis Hungarici"* in a work published in Buda in 1846 in Hungarian, which was by no means a mere translation of the original Latin text, but which supplemented it with new legislation and made use of historical documents published in the meantime. With the help of these he tried to set out the evolution of some rules of customary law (*ius consuetudinarium*), sometimes criticising the surviving rules of that law, explaining that they originated under quite different circumstances an with other objectives.

The work of the universities was deeply affected by the teaching reform of the Empress *Maria Theresa*, the *Ratio Educationis* (1777), which aimed to include legal history, private law, criminal law and procedural laws in the teaching of Hungarian law (*ius patrium*), while now elevating public law to an independent subject. The first treatise on the national law for universities was also produced, in 1751, by the pen of *István Huszty*, professor at the Law Academy in Eger. This work

did not further develop basic customary law, though it was used for half a century as a university textbook. The second *Ratio Educationis* published by the emperor and king of Hungary *Francis I* (1792–1835) in 1806 did advance the teaching of Hungarian law (*ius patrium*) at university by separating the teaching of criminal law (*ius criminale*) from that of private law (*ius privatum*).

Treatises by *Kelemen* and *Mátyás Vuchetich* (1767–1824) – *Vuchetich* as a follower of the ideas of *Martini* and *Zeiller* was the author of the books *"De origine civitatis"* (1806) and *"Elementa juris feudalis"* (1824) of major significance – on private and criminal law were also written, and the evolution of the customary law, exploiting the judicial practice of the Supreme Court (*Curia*), continued. Hungarian private law writing reached its peak in the works of *Ignác Frank*, professor at the University of Pest, which must be regarded as a classic scholarly work of the feudal private law (*ius privatum feudale*).

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