CUSTOM AND LAW IN CENTRAL EUROPE

Edited by Martyn Rady

With an Introduction by János M. Bak

Centre for European Legal Studies
Occasional Paper no 6
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Front Cover: from the original 1517 edition of Werbőczy's *Tripartitum*

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Preface

Stephen Werbőczy's account of Hungary's laws and customs, the *Tripar-titum Opus Juris Consuetudinarii Inclyti Regni Hungariae,* was presented to the Hungarian diet in 1514 and printed three years later in Vienna. Although it never received the royal seal, the *Tripartitum* rapidly acquired authority and was republished in more than fifty editions. Until 1848, it retained a largely unimpaired influence in respect of Hungarian law and legal procedures.

The present volume is a collection of essays drawn from papers delivered at a conference held in Cambridge in April 2003 under the title, 'Werbőczy, Custom and Hungarian Law'. The conference formed part of a much larger and continuing project, led by Professor János M. Bak of the Department of Medieval Studies of the Central European University in Budapest, which is aimed (among much else) at publishing an English-language translation and critical edition of Werbőczy's *Tripartitum.* The conference was supported by most generous funding from the British Academy and the Central European University. The organizers also gratefully acknowledge the help and support provided by the Faculty of Law of Cambridge University, Corpus Christi College, the Centre for the Study of Central Europe of the School of Slavonic and East European Studies, University College London, and the Faculty of Laws of University College London.

This collection of essays, all of which have been substantially rewritten since they were first delivered as conference-papers, brings together much of the latest research on law and legal institutions in the kingdom of Hungary and in its sister-kingdom, the triune monarchy of Croatia, Slavonia and Dalmatia. Some of the contributions aim to bring to scholarly attention the legal sources, principal institutions and procedural developments relating to the history of this part of Central Europe. Others touch upon the nature and meaning of custom and of the relationship between custom, law and statute. All are, however, bound together by their recognition of the lasting importance of Werbőczy's *Tripartitum* for the legal history of Hungary and Croatia. The contributions offer a variety of different perspectives and, sometimes, contradictory assessments. The aim of the volume is not, however, to present a 'common front' but instead to offer new insights on the work, context and legacy of Hungary's 'Tribonian and Bracton'.

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Martyn Rady

Contents

Introduction

János M. Bak

1. The DRMH and the *Tripartitum*

The present collection of papers has its origins in the series *Decreta Regni Mediaevalis Hungariae / The Laws of the Medieval Kingdom of Hungary* (DRMH), which is a Hungarian and Croatian project led by the Central European University and supported by British, German and North American colleagues, friends and foundations.

DRMH is itself part of a much larger project, which was originally conceived by the publisher of Slavonic and East European literature and of a number of journals, Charles Schlacks, Jr (now located, after several moves, in Idyllwild, California). Almost twenty years ago, Schlacks set in motion an ambitious publishing enterprise, the aim of which was to bring into print the laws of Central and Eastern Europe, both historical and contemporary.[1] For Hungary, he won the cooperation of Peter Hidas of Montreal, a historian of nineteenth-century Hungary, who agreed to serve as editor. In turn, Peter Hidas found the best person to start the series off with the laws of medieval Hungary. This was György Bónis, the most distinguished historian of law and institutions, and pupil of Ferenc Eckhart. Bónis had the additional advantage of being able to utilize the notes and readings of the late Ferenc Dory, who had long before planned a new edition and Hungarian translation of the medieval laws. In turn, György Bónis turned for help to James Ross Sweeney (of Pennsylvania State University), whom he knew from Sweeney's work on the Hungarian implications of the decretal *Intellecto*. Having surveyed the material prepared by Bónis, Sweeney decided that yet more help was required, and it was through this route that the present author was enlisted to the task. (He, in turn, knew Sweeney from their time in Germany, when the latter,

1 Besides DRMH, two volumes of Russian laws (incorporating the early laws of Kievan Rus' and the Ulozhenie of 1649) were published.

a Tierney-pupil, was working on his dissertation as a Humboldt-Stipen-diat). To make an already long story short, we realized that a volume of the 'laws' (the quotation marks will be explained below) of the first historical period of the kingdom, the so-called Árpádian Age (1000-1301) needed further refinements over and above what Bónis had been able to achieve. The first volume of DRMH appeared, after several years of work by the original Bak-B6nis-Sweeney 'triumvirate', in 1989 but sadly a few months after Bónis's own death.[2]

For DMRH 1, we tried to sort out what was traditionally regarded as 'law', legal norm and practice in the first three centuries of the kingdom. Had we been purists, we would have had to make a very slim volume and to content ourselves with the decrees passed by king and noble assemblies in the late thirteenth century (under Andrew III, 1290-1301). For, by the rigorous definition of, for example, Armin Wolf, earlier texts could not be termed 'legislation' in the strict sense.[3] Nevertheless, a part of the collections *(libri)* of legal texts attributed to the founder king, St Stephen (1000-1038), survive in a late twelfth-century manuscript; others from thirteenth-century collections. Moreover, references to the 'laws of the holy king' were frequent from the late eleventh century. So, we finally included the collections of St Stephen, as also of Ladislas I (1077-95) and Coloman (1095-1116), as well as the 'privileges' of Andrew II (1205-35), the so-called 'Golden Bulls' (1222, 1231, and their addition in 1267). In the Appendix, we edited synodal statutes of the eleventh and early twelfth centuries which contained both spiritual and secular matters, a charter issued for the nomadic Cumans even though we suspected it to be a forgery,[4] and a text that was dated by Döry and Bónis (although known only from a later formulary) to 'c. 1300'.[5] Whether the relegation of the synodal statutes under King Ladislas I and Coloman into the Appendix was well founded is debatable. (György Györffy, a leading medievalist of Hungary in the last decades of the twentieth century queried this decision of ours in a review which he planned to write, but which was not, as far as we know, published.) Annotations, glossary and

2 *The Laws of the Medieval Kingdom of Hungary/Decreta Regni Medicevalis Hungarian,* vol. 1 (1000-1301) with an essay on previous editions by Andor Csizmadia, (ed. and trans.) János M. Bak, György Bónis and James Ross Sweeney, Salt Lake City, 1989.

3 See thus Armin Wolf, *Gesetzgebung in Europa 1100-1500. Zur Entstehung der Territorialstaaten,* Munich, 1996, p. 266.

4 As since convincingly argued by Nora Berend, *At the Gate of Christendom: Jews, Muslims and Pagans in Medieval Hungary, c. 1000 - c. 1300,* Cambridge, 2001, pp. 89-92.

whatever else belonged to a scholarly edition were included. And, while the contents were praised, the format, the typos and layout were criticized – and rightly so. To set the record straight, however, this was one of the earliest attempts at computerized typesetting, printing, and production, and under these circumstances glitches were bound to occur. (We were ten years later fortunate enough to obtain financial assistance for a corrected and revised edition, which we offered gratis to all owners of the first).[6]

The subsequent volumes followed in due course: one for the 'Age of Kings of Diverse Houses' (as the old category ran), that is from 1301 to 1457, and one for the reign of Matthias I Corvinus, 1458-90.[7] These were initially supported by the National Endowment for the Humanities Translation Projects (in the USA), and some other grants. They were much less problematic than the first as they could be based on the critical edition previously published by Bónis and others in two volumes.[8] In the meantime, we had also acquired some additional expertise in editing and publishing matters. The editors changed from volume to volume, involving experts on the given period. Thus did we arrive at the threshold of the 'age of tumultuous diets' (my own term), under the Jagiello rulers, which ran from the death of Matthias Corvinus in 1490 to the end of the independent kingdom after the battle of Mohács in August 1526. During these less than three decades, kings and diets passed more laws than those of the entire 500 years preceding them while – and this is significant – little of what they passed actually went over into practice. Diets

5 This dating has now been – I feel successfully – challenged by Pál Engel ('Az "1300 körüli" tanácsi határozat keltezéséhez', in *Magyarország a nagyhatalmak erőterében. Tanulmányok Ormos Mária 70. születésénapjára,* ed. Ferenc Fischer et al, Pécs, 2000, pp. 125–32) who suggests that it originates from the second half of the fourteenth century. Admittedly, we also had some doubts (some of the same that were discussed by Engel), but bowed to the expertise of Bónis. Thus it should by rights be in the second volume of DRMH, most probably in the Appendix.

6 DRMH 1 (1000–1301), Second revised edition in collaboration with Leslie S. Domonkos, Idyllwild, CA, 1999.

7 DRMH 2 (1301–1457), ed. and trans. János M. Bak, Pál Engel, James Ross Sweeney, in collaboration with Paul B. Harvey, Salt Lake City, 1992; DRMH 3, ed. and trans. János M. Bak, Leslie S. Domonkos, Paul B. Harvey, Jr, in collaboration with Katalin Garay, Los Angeles, 1996.

8 *Decreta Regni Hungariae. Gesetze und Verordnungen Ungarns,* vol. 1 (1301–1457), eds Franciscus Döry, Georgius Bónis, Vera Bácskai, Budapest, 1976 (Publicationes Archivi Nationalis Hungarici II, Fontes 11), and vol. 2 (1458–1490), eds Franciscus Dory, Georgius Bonis, Geisa Erszegi, Susanna Teke, Budapest, 1989 (Publicationes Archivi Nationalis Hungarici II, Fontes 19).

met occasionally twice a year, one cancelling the decrees of the other, but all of them repeating innumerable *articuli*, very often of a merely temporary and 'political', rather than legal value. How should we publish this vast body of material? One solution discussed was to make a radical selection. But this would necessarily contradict the unquestionably good principle of presenting the entire extant corpus of legal acts of a medieval kingdom, a claim that we had made at the outset. In order to give ourselves some time to think – and gather support for such a fourth volume, which could run into many hundreds of pages – we decided to 'jump', and to prepare instead the annotated bi-lingual edition of the 'summary' of medieval law, *i.e.* the famous *Tripartitum opus iuris consuetudinarii inclyti regni Hungariae* of the lawyer and politician Stephen (Istvan) Werbőczy, compiled in 1514.[9]

This choice was not as subjective as it may sound. Surveying the 'legislation' between 1490 and 1526, we realized that the most valuable parts of it refer to procedure and these found their way, often verbatim, into Werbőczy's collection of the custom of the realm. Thus, once we have – *Deo propitiente* – a new edition of the *Tripartitum* (based on the 1517 printing and properly translated and annotated), as volume five of DRMH, we should be able to cut the bulk of the *decreta* by cross-referencing (or small-printing) repetitions without breaking the principle of completeness. Moreover, the *Tripartitum* was for the subsequent centuries also highly important; it may thus count on the interest of a readership wider than just medievalists. Being, as it more or less is, a 'final' summing up of medieval Hungarian legal development, this volume may also be useful for those who do not wish to scrutinize in detail the preceding centuries' legal documents.

9 The first edition was printed by Singrenius in Vienna in 1517. Subsequently, the *Tripartitum* was reprinted more than 50 times, usually as part of the *Corpus Juris Hungarici.* A facsimile edition of the 1517 book has been published in the series *Mittelalterliche Gesetzbücher in Faksimile,* with a preface by György Bónis, in 1969 (Frankfurt/M). For a list of the editions of the *Tripartitum,* see István Csekey, 'A Tripartitum bibliográfiája', in (eds) Elemér P. Balás, István Csekey, István Szasz, György Bónis, Werbőczy István, *Acta Juridico-Politica* 2, Kolozsvár, 1942, pp. 141–94. Csekey's bibliography was more widely circulated as an offprint of the Kolozsvár publication under the title *Werbőczy és a magyar alkotmányjog... a Tripartitum bibliográfiájával.*

2. The *Tripartitum:* Text and Translation

The *Tripartitum* is an account of Hungarian customary law arranged in three books of respectively 134, 80 and 36 chapters. The volumes are preceded by a prologue and other introductory materials. The most recent edition of the *Tripartitum* runs in its Latin text to over 200 closely-printed pages. As Martyn Rady discusses (below, p. 47) the *Tripartitum* was compiled by order of the Hungarian diet and is the work of the Hungarian lawyer and judge of the royal curia, Stephen Werbőczy. Within only a short time of its presentation to the diet in 1514, Werbőczy's law book was regarded as the definitive law of the Hungarian nobility. It remained until 1848 the first resort of lawyers and judges in the kingdom of Hungary and in the principality of Transylvania. A Hungarian translation was published as early as 1565, a Croatian (by Ivan Pergošić, for which see the article by Nataša Štefanec below, pp. 71–85) in 1574, and a German version (by August Wagner) in 1599.[10] Court manuals[11] and other guides to customary practices published in the intervening centuries are without exception summaries or clarifications of the text of the *Tripartitum.* As Katalin Gönczi discusses below (pp. 87-89), the *Tripartitum* remained both at the centre of Hungarian legal scholarship and also an insurmountable block to Hungarian legal development until well into the last century.

In his preface to the *Tripartitum*, Werbőczy attempted to rest Hungarian customary on Roman Law principles and promised to divide his work according to the civilian distinctions of *personae, res* and *actiones.* However, he proved unable to keep to this scheme and to the other theoretical distinctions he had lifted from legal scholarship, mainly from Bartolus (or an intermediary text), as demonstrated by David Ibbetson (pp. 16-20, below). He instead divided his text according, first, to the law of noble landholding; secondly, to the procedures followed in the courts; and, thirdly, to all that failed to fit into the

10 Several partial Greek translations of the *Tripartitum* are also known from the eighteenth century, apparently intended for the use of merchants. See Tamás Vécsey, 'Werbőczy görögül', *Századok*, 28, 1894, pp. 485–9.

11 As for instance, Joannes Kitonich, *Directio Methodica Processus Judiciarii*, Nagyszombat, 1619.

preceding categories. It has been established,[12] that Werbőczy frequently used formularies of the courts, often unchanged, thus basing his collection more on actual practice than any type of legal theory. It was for this reason that Bónis called the lawyers of Werbőczy's type 'practical jurists.'[13]

Werbőczy always claimed that his text merely replicated the customs of the Hungarian nobles as they had developed over the course of the previous centuries. Evidently, however, he impressed his own interpretation on the law as he found it. In some cases he sought to iron out inconsistencies; in others to improve upon matters as he found them. Despite these shortcomings, the *Tripartitum* is the most important legal document to come out of East-Central Europe in the medieval and early modern period. It is thus substantially fuller than the sixteenth-century Lithuanian Statutes and the Moravian 'Law of Fiefs' published in 1538. Poland produced no comparable volume, relying instead mainly on collections of decrees of the diet.

The principal modern edition of the *Tripartitum* was published in a Latin-Hungarian parallel text in 1897 and is defective.[14] No edition has yet been published which attempts to explain the terms Werbőczy used, to relate them to usage elsewhere, or to elucidate the procedures he describes. It is this, in particular, which renders translation difficult but which also makes it uniquely important. By obliging consideration of individual terms and of the best way of translating them, their meaning is teased out and opportunities for comparative study presented. The work of translation undertaken so far has highlighted many such examples – in

12 György Bónis, *Kozepkori jogunk elemei. Romai jog, kdnonjog, szokdsjog,* Budapest, 1972, esp. pp. 237–63. There Bónis also discusses the most often assumed 'source' of Werbőczy, the *Summa Legum* (see *Die Summa Legum brevis, levis et utilis des sog. Doctor Raymundus von Wiener-Neustadt,* ed. A. Gal, 2 vols, Weimar, 1926). Bonis suggested that a printed version of this legal text (Cracow, 1506) may have been known to Werbőczy, but points to many other textbooks and formularies that may have been used by him. See thus György Bónis, 'Der Zusammenhang der Summa Legum mit dem Tripartitum', *Studia Slavica Acad. Scient. Hung.,* 11, 1965, pp. 379–85. We have not yet explored this avenue in any detail, but will plainly have to do so before completing our work.

13 See György Bónis, *A jogtudó értelmiség a Mohács előtti Magyarországon,* Budapest, 1971, a summary of which appeared as 'Men Learned in the Law in Medieval Hungary', *East Central Europe/L'Europe de centre-est,* 4, 1977, pp. 181–91.

14 The so-called 'Millennium' edition, published in Budapest, 1897, in the series *Corpus Juris Hungarici 1000–1895,* edited by Sándor Kolosvari, Kelemen Óvári and Dezső Márkus.

respect, for instance, of the rules governing female inheritance, warranties on sales of land, and institution to estates. And there are clearly other matters of the same kind. How should, for example, we describe and explain the procedure of *repulsio* (see below, p. 68) which involved the physical obstruction of a court bailiff but which was entirely legal? Was this a uniquely Hungarian custom, born of conditions of lawlessness, or does it have parallels elsewhere in Europe? How also should we translate and interpret Werbőczy's use of the term *impetrare* (apply for) in respect of a royal donation? Werbőczy clearly implies that once an estate was requested from the king, it was automatically granted to the applicant. Only later, so it appears, was it sorted out whether the property was indeed the king's to give away.

It seems that we succeeded in convincing a good number of eminent legal historians that Werbőczy's *Tripartitum* was worthy of their interest. With the support of the research committee of the Central European University, Budapest, and the Hungarian National Research Fund OTKA, we were in December 2001 able to hold a workshop in a hunting-lodge near the western Hungarian town, Sárvár, on the former estate of the Nádasdy family. Besides the 'Budapest team' (János Bak, Péter Banyó, Zsolt Hunyadi, Damir Karbić, Tamás Pálosfalvi and Frank Schaer), David Ibbetson (Cambridge), Andrew Lewis and Martyn Rady (both of University College, London), Katalin Gönczi and Armin Wolf (both of the Max Planck-Institut für Europäische Rechtsgeschichte, Frankfurt), Richard Helmholz (Chicago), DeLloyd Guth (Winnipeg) and the publisher attended and spent three and a half days (and evenings) poring over the intricacies of Hungarian legal Latin and the peculiarities of Werbőczy's text.

Even though we started out with the 'minimalist' aim of consulting our colleagues for the most appropriate English words for *institutio* (the act of introducing a new owner into a holding), *fassio* (a legally-binding declaration), *fratres condivisionales* (kinsmen with the right to inheritance of joint property) and so on – we ended up discussing the legal and theoretical sources and implications of Werbőczy's work. We were able to establish that the traditional assessment of the 'Romanist' element in the *Tripartitum* was not entirely correct. Although the passages of the Prologue extensively citing Justinian and his predecessors do, indeed, have little to do with the rest of the work, the author regularly borrows civilian terms, often to describe matters entirely different from their original meaning. We also learned that we should be even more careful than we had been with applying English and Anglo-Norman legal terms (such as *seizin)* to acts and institutions that were in fact peculiar to the kingdom

of Hungary-Croatia. Sometimes they have their parallels in the British Isles, but never (or rarely) are these close enough to be given the same name. Finally, in discussing procedures and concepts – if only at the outset to find the right word for them – we all learned much about medieval Hungarian legal practice, or at least what Werbőczy thought it was or ought to be.

Having done all this and more with *Pars Prima* of the *Tripartitum*, it became clear that it was worth pressing on in the same manner with the *Partes Secunda* and *Tertia.* As Martyn Rady had been able to obtain additional support – besides the last portion of the CEU grant – from the British Academy, we met in April 2003 in London and Cambridge for our second workshop. Of the original Sárvár group, Helmholz, Wolf, Schaer and Pálosfalvi were unable to attend, but we were joined by Nataša Štefanec (Zagreb), László Péter (University College), Magnus Ryan (Warburg Institute), Chris McNall (Cardiff) and Toshiya Kikuchi (Cambridge). This time we combined work on the translation of the text with a conference on matters related to customary law. The present work reflects the results of this conference, which was generously hosted by the Faculty of Law of Cambridge University and Corpus Christi College.

3. The *Tripartitum:* 'Norm' and Reality

One of the major subjects that we wanted to clarify was the relation between 'law' and 'custom' in the context of the medieval kingdom of Hungary. In a fifteenth-century formulary recovered from one of those convents that served as 'place of authentication' (about which we can read in Zsolt Hunyadi's contribution, pp. 25–35, below), namely the Benedictine monastery of Somogyvár in south-western Hungary (although the text was most probably compiled in one of the royal courts of justice), there is a gloss on law and custom.[15] The gloss suggests much about medieval perceptions of the relationship between statute and usage. In essence, the gloss prescribes that the judge should apply either local custom or *lex*, according to the plea of the plaintiff. *Lex* here does not mean positive law, but general custom based on 'ancient legislation'. Statute law, it continues, cannot be expected to be familiar to all; hence, it may not be applied unless so requested, and no penalty is to be imposed

15 See György Bónis, 'A Somogyvári Formuláskönyv', in *Emlékkönyv Kelemen Lajos születésének 80. évfordulójára,* Bucharest, 1957, pp. 117–33. The manuscript is now in the Bolyai-Library, Ttrgu Mureş, MS 374.

for the lack of its knowledge. The gloss continues to explain that the plaintiff has the right to request judgment according to received custom, local usage, royal *decretum* or 'general justice'. (In the preceding sentence the plaintiff was given only two choices; apparently the last two depended on the judge's consent being obtained). Royal decisions, if called upon, have to be applied because of the obligatory submission to secular authority, even if, so it seems, they contradict 'good old' custom. Finally, *ius*, divine or natural law, has to be followed above any other prescription, for it expresses those higher values which no medieval person would challenge.[16] Thus, both the hierarchy and the competition of sources of law were notions familiar to Hungarian practitioners of the administration of justice. That custom (at least in one of its meaning, as Ibbetson explains below, pp. 13–23) remained supreme in Hungary – well beyond the Middle Ages – is fully demonstrated here by László Péter (see below, pp. 101–11).

Nevertheless, in Hungary no record of customary law other than the *Tripartitum* has survived. To be sure, there is frequently reference in charters and judgments to the *consuetudo regni*, which seems to have been comprehended as 'self-evident'. (Just as the author of the above-quoted gloss infers.) Beyond this, however, we have no opportunity of comparing the 'real' customary tradition with the one summarized (and, as we said above, adjusted) by Werbőczy. In the other constituent part of the medieval kingdom, Croatia, the situation was different. As Damir Karbić has shown (below, pp. 37–45), several customary law-codes were written down there at different times and for different reasons. Naturally, as soon as it is put into writing, custom – by definition based on oral tradition and collective memory – changes its character. Still, it is very valuable to have a few of these records, which in general support the usage recorded by Werbőczy with relatively little local variation.

Another comparison that suggests itself is between the norm as formulated by Werbőczy and actual legal and administrative practices. This has been done in respect of medieval Hungarian noble society by both Erik Fügedi[17] and Martyn Rady.[18] Elsewhere, Pál Engel, Marija Karbić, and Péter Banyó have addressed the questions about the filial quarter and the

16 The gloss is published in *Decreta Regni Hungariae* (see above, n. 8), pp. 24–5. Bónis additionally argued in *Középkori jogunk elemei* (pp. 240ff) that the formulary was extensively used, although altered and augmented, by Werbőczy.

17 See Erik Fügedi, *The Elefánthy: The Hungarian Nobleman and His Kindred*, ed. Damir Karbić, Budapest, 1999, esp. pp. 20–64.

18 Martyn Rady, *Nobility, Land and Service in Medieval Hungary*, London and Basingstoke, 2000.

division of estates.[19] There are several points where Werbőczy clearly tried to avoid matters of social and legal reality in favour of the 'ideology' of the noble estate. The tenet that all nobleman enjoyed the self-same liberty *(una eademque libertas)* – typical for both Hungary and Poland – had been written into law much earlier, but became through the *Tripartitum* the 'cornerstone' of the estates' collective privileges. (It has been convincingly argued that the first formulation in 1351 was not meant to be a 'constitutional foundation', but emerged in the context of a redefinition in the status of several categories of nobleman. While it may have been increasingly understood in Werbőczy's sense, it was he who 'carved it in stone'). It is, for example, in the sense of this tenet that the *Tripartitum* almost entirely overlooks a very widespread practice (if not institution) of medieval and early modern Hungarian social practice: the dependence of lesser nobles on their more wealthy and powerful fellows.

Usually referred to as the *familiares* (sometimes simply *homines*, later also *servitores)* of a magnate or a locally mighty lord, these nobles did not lose their noble status, and their own (or their kindred's) property was not touched by these arrangements. In this respect, Werbőczy was correct not to spend time discussing the legal implications of *familiaritas*, for these implications were few. Nevertheless, a significant segment of the nobility earned their living not from their own (usually fairly small) holding, but from serving in the household of a royal official, commander of a private army, or other kind of office-holder, mostly for a reward in cash or kind. They were the *vicecomites* of the counties, the judicial personnel of higher and lesser courts, the bailiffs and administrators of the great estates, commanders and fighters in the greater lord's *banderia* ('private' armies in the service of the king or a magnate). Social mobility through these channels proved significant, and many a later well-known family's ancestor started out as the *servitor* of a magnate. On the other hand, accepting service voluntarily (and sometimes, in the case of more aggressive lords, not so voluntarily) was an important strategy against impoverishment and helped compensate for the declining incomes produced by the system of partible inheritance. In spite of all this, the *Tripartitum* does not treat this arrangement anywhere explicitly, and only once or twice

19 Pál Engel, 'Erbteilung und Familienbildung', in *...The Man of Many Devices, Who Wandered Full Many Ways... Festschrift in Honor of János M. Bak*, eds Balázs Nagy and Marcell Sebők, Budapest, 1999, pp. 411–21; Martyn Rady, 'The Filial Quarter and Female Inheritance in Medieval Hungarian Law', in ibid., pp. 422–31; Péter Banyó, *The Female Quarter in Medieval Hungary: Inheritance of Noblewomen in the Medieval Kingdom of Hungary*, unpublished MA thesis, CEU, Budapest, 1999.

does a remark slip from Werbőczy's pen, as for instance when he refers to a nobleman who carelessly loses his lord's castle, or to a noblewoman who is married off 'from a lord's household'.

In similar fashion, Werbőczy insists on the principle that the so-called filial quarter (the inheritance of female descendants from an estate otherwise inherited only by men) should be paid out in cash, except in the case when a noble woman marries a non-noble. In this event, she receives a piece of land, so that her status (as landowner) be sustained. Her husband, so Werbőczy avers, will not become noble by this. In this way, the borders of the noble estate were guarded against intruders. In fact, as the extant manuscript material demonstrates, it was a quite widespread practice to give out the filial quarter in land. In the noble community of the *campus Zagrabiensis* (in Slavonia), for example, it was the de facto rule.[20] And, as Fügedi has shown, there were a good number of commoners who acquired noble status (if not for themselves, for their sons) and were even referred to (for a while) as *nobiles quartales.* Their acceptance into the nobility seems to have entirely depended on the judgement of their fellows in the county and not on statute law or *consuetudo regni*. Closer scrutiny of Werbőczy's teachings reveals several inconsistencies of this type, where Werbőczy is quite clearly making rules in accordance not with actual practice but with how he thought things ought to be.[21]

To be sure, neither the present volume of essays nor the larger project from which it derives can comprehensively examine details of this sort, for such would amount to nothing less than a re-writing of the history of law and legal procedure in the medieval kingdom of Hungary-Croatia. Nevertheless, future workshops and conferences will – so we hope – address some questions of legal norm *versus* legal reality, if only to help us decide on the annotations in the planned edition of the *Tripartitum.* The contributions in the present publication are valuable *Vorarbeiten* for these tasks.

20 See thus Marija Karbć, 'Heiratsstrategien des Kleinadels von Turopolje (Slawonien) im späten Mittelalter', *East Central Europe /L 'Europe du Centre-Est: Eine wissenschaftliche Zeitschrift*, 29, 2002, pp. 167–76.

21 See thus for the *assumptio oneris*, Martyn Rady, 'Warranty and Surety in Medieval Hungarian Land Law', *Journal of Legal History*, 23, 2002, pp. 23–36 (p. 33).

Custom in the *Tripartitum*

David Ibbetson

Custom can be a troublesome notion for a lawyer. The recognition that law is a reflection of social practice, which is what the granting of legal status to custom amounts to, is a very obvious threat to the lawyer's claim to have arcane knowledge. A claim to expertise in the identification of everyday practice is something of a hollow one, hardly justifying the enhanced social status and financial rewards typically demanded by the lawyer.

It is not always problematic, of course. The legal practitioner whose expertise lies in the manipulation of legal processes rather than the identification of normative rules, has nothing to fear from it. The scholar taking a disinterested standpoint may unconcernedly identify social practice as lying at the root of legal rules without feeling professionally threatened by the revelation. The lawyer operating in a highly developed system can nod in the direction of custom having a marginal role to play as a formal source of legal rules, without undermining his claim to expertise in identifying the other rules of the system and in co-ordinating the operation of customary rules, which are presumptively generally known, with those derived from other authoritative sources.

The difficulty is felt most acutely by those articulating the rules of a legal system for the first time. How are they to justify their statements as to what the law is? How are they to demonstrate their truth? Some of the rules of the system may be legislative in origin, and an authoritative source for those can easily be given (so long, that is, as the legislator can be regarded as having the requisite degree of authority). Some of the rules of the system may be explicitly derived from books treated as valid sources in themselves: for example, the Bible or some other religious text, the Canon law, or Justinian's *Corpus Iuris Civilis.* Most of the rules of the system, though, cannot be attributed to any such authoritative source. From an external point of view we may say that they are rules whose only base lies in custom, but for the lawyer writing from inside the system it is

not so easy. He can say that the rules are the rules because they represent the way in which things are done; but this leaves him open to a denial that things are in fact done this way, and hence that his statement of the rule is false.

There are a number of possible alternatives. The classical Roman lawyers simply did not acknowledge custom as a source of law; in the *Institutes* of Gaius, the first pedagogic overview of the Roman legal system that has survived, the opinions of jurists, provided they are in agreement, are explicitly treated as having authoritative status in themselves.[1] We would ourselves say that all that the jurists were doing was giving verbal form to customary rules, but by the time that their verbalizations get into the books the underlying customary basis of the rules has been etched away and made irrelevant. A second approach is that of the classical Common law in England, giving authoritative weight to judicial pronouncements. At heart we may recognize that this is in reality little more than a mask; in reality what lies behind these judicial utterances is the articulation of social practices, but – as with the Roman lawyers' analysis – this is concealed by their refraction through some body with the power to transmute descriptive statements into normative rules.

There is a third alternative, simply to ignore the problem. This is essentially the strategy of Werbőczy. Though he pays lip service to custom as a source of law in the Prologue to the *Tripartitum*, in the substantial core of the work there is almost no reference to it whatsoever. The rules are, in the main, simply described as law, without any attempt being made to show their source. There are occasional references to formal legislative acts or other sources, but the vast preponderance of the law described in the text is unsourced. It is simply a description of the way in which the system works, or is said to work.

1. The Idea of Custom

Before embarking on a discussion of Werbőczy's treatment of custom, a general observation might usefully be made. Custom is a slippery notion, and in the early modern sources we may distinguish three different senses in which it is used.

First of all, it expresses the way in which things are done. This is the central meaning of the word today, and was probably equally the central meaning in the early sixteenth century. In itself it says nothing about the

1 Gaius, *Institutes*, 1.7.

way in which things were in fact done in the past, but it implicitly or explicitly calls upon past practice as evidence of what the custom is if the matter is in doubt; and the more long-standing the practice can be shown or asserted to be, the more conclusive it is. The operation of this form of argument from custom can be illustrated by a homely example which recently arose in my Cambridge College. It is the custom for Fellows of the College to wear scarlet gowns on the Sunday after Candlemas; that is to say, they habitually do so in the belief that they ought to do so. What, though, if Candlemas falls on a Sunday? Is scarlet to be worn on Candlemas itself or on the Sunday following? When the question arose, nobody could remember for certain what had happened on the previous occasion that this had occurred, some six years earlier. Recourse was had to the oldest Fellow, who 'recalled' what he had been told some sixty years previously by an elderly Fellow. No attempt was made to verify whether or not this was true, nor even to find out what had happened on the last occasion. The appeal to past practice, or statements of what practice was said to have been around a century ago, is in this sense little more than a rhetorical device to provide an authoritative answer to a question whose answer would otherwise be ambiguous.[2]

Secondly, custom may be offset against law, *consuetudo* against *lex*. Typically, although not necessarily, *lex* will be written, a formal legislative act, while *consuetudo* will be oral, not enshrined in any formal legal source, and inherently less sharply defined than *lex*. Any legal system substantially made up of formally identified rules can allow interstitial force to custom: modern English law does so, for example, at least to a limited extent. Sometimes, custom can stand against law, as where legal force is given to the custom of particular groups (the custom of merchants, for example) or to particular places (as where non-standard local inheritance rules are given legal force). An important example of this usage found in the early modern period occurs in the opposition between the formal written texts of the learned laws (that is, the Canon law and the developed Roman Civil law) and the informal customary laws of particular places.

Thirdly, more specifically, custom or *consuetudo* may describe local laws, whatever the origin, in contradistinction to the European *ius commune* derived out of the learned laws. Custom in this sense does not necessarily refer to norms derived out of social practice at all. The rules

2 Perhaps the best example of this in late medieval and early-modern legal practice is provided by the German *Schöffen*, whose pronouncements on custom had authoritative force.

might have been legislated in the most formal way possible, but against the background of a pan-European common law they could none the less be described as customary because they were of purely local application. All of these senses can be found in Werbőczy, as in other legal writers of the time. To some extent it is the slippage between them, as well as the difficulties of articulating that rules are only social practices, that makes custom such a difficult concept to grasp hold of.

2. Custom in the *Tripartitum:* the Prologue

It is only in the Prologue to the *Tripartitum* that Werbőczy provides the reader with any reflections on the nature of custom. In its first sentence he announces that he is going to describe the laws and approved customs, *leges et consuetudines approbatas,* of Hungary, apparently setting custom up as one of the two sources of the rules which go to make up Hungarian law.[3] References to custom abound throughout the Prologue, and it is discussed specifically in three sections, one entitled *Quid sit consuetudo: et quae sunt necessaria ad consuetudinem firmandam?* one *Quomodo differt lex a consuetudine: et de triplici virtute consuetudinis,*[5] and one *De lege et statuto: ac consuetudine contraria quid sit sentiendum.*[6]

Werbőczy's treatment of custom is nothing if not unoriginal. It is substantially derived from Bartolus,[7] whether directly or through some intermediate source, and probably bears no relation at all to any specifically Hungarian rules relating to the subject. Werbőczy's definition of custom, for example, borrows from Bartolus: *Consuetudo est ius quoddam moribus institutum, quod pro lege suscipitur, cum deficit lex*.[8] Central aspects of Werbőczy's description of custom are equally Bartolist, whether or not they quote him directly. Its legal force stems

3 It seems here to be used in the second of the three senses just described.

4 Prologue, [10]. For the text of the *Tripartitum,* I have used the 1517 edition, published in facsimile in 1969, while retaining the numbering given in the 'customary' (i.e. *Corpus Juris Hungarici)* version.

5 Prologue, [11].

6 Prologue, [12].

7 On the use of custom in Bartolus, see W. Ullmann, 'Bartolus on Customary Law', *Juridical Review,* 52, 1940, p. 265.

8 Prologue, [10], cf. Bartolus, *Commentarius ad Digestum Vetus,* (hereafter, Bartolus), *Repetitio* ad D.1.3.31 (32 in modern editions of the Digest), no. 6. 1 have used the edition of 1577, and followed the numeration used by Bartolus.

from the tacit consent of the people, but this can only be discerned by looking at continuous or repeated usage:

> *Actus frequens de se non est necessarius ad consuetudinem inducendam, sed quia per usum colligitur consensus populi, qui plerumque non potest ex uno solo actu colligi, igitur frequentia actuum est ut causa, consuetudo vero ut causatum?*

The same idea is found in Bartolus, although more precisely expressed: use *(usus)* is the *causa remota;* the tacit consent of the people the *causa proxima* of the recognition of custom as law.[10] A lapidary statement of Werbőczy distinguishing *consuetudo* from *lex – tanquam tacitum et expressum,*[11] as tacit and express – makes little sense on its own, but can be understood against the backőnd of Bartolus' position that both legislation and custom derive their authority from the will of the people, the difference between them being that the consent was tacit in the case of custom and express in the case of *lex.*[12] Some lawyers had said that the difference between *lex* and custom was that the former was written whereas the latter was oral; Bartolus (among others) had denied this, for the so-called *Libri Feudorum* was customary law, but had been reduced to writing and added on to Justinian's *Corpus Iuris.*[13] Werbőczy refers to the distinction between written and unwritten, but says that it is not the essence of the difference between *lex* and custom, taking also as his counter-example the *Libri Feudorum,* which was customary but which had come to be written down.[14] Custom for Bartolus (and, indeed, generally in the writings of the glossators) might accord with the law, go beyond the law, or contradict the law;[15] so too Werbőczy.[16] And so on.

The core sense of *consuetudo* used by Werbőczy in the Prologue appears clearly from his section *Quid sit consuetude.*[17] In essence it is the first definition given above:[18] the recognition of legal force in some social practice, justified by reference to past usage. Along with *lex,* it was a

9 Prologue, [10. 7]. Werbőczy attributes this to the *communis sententia doctorum.*
10 Bartolus, *Repetitio* ad D.1.3.31, nos. 11, 12. As Ullmann shows, the idea can be traced back well before Bartolus. See 'Bartolus on Custom', pp. 268–269.
11 Prologue [11].
12 Bartolus, *Repetitio* ad D. 1.3.31, no. 7.
13 Bartolus, Ad D.l.3.31, no. 4; *Repetitio* ad D.l.3.31, nos. 7, 8.
14 Prologue, [11. 1].
15 Bartolus, Ad D.l.3.31, no. 5; *Repetitio* ad D.l.3.31, no. 5.
16 Prologue, [11.3–5].
17 Prologue [10].
18 Above, pp. 14–15.

source of *ius*. Three conditions are given for its recognition. First of all, defmitionally, it must be capable of being law: something that could not be made *ius* by an act of legislation could not be made *ius* by customary adoption.[19] In Werbőczy's language, it must be rational, in the sense that it must tend to further the true end of *ius.* If the true purpose of Canon law or Divine law was the well-being of the soul, then a custom which led towards this end would hence be rational; if the true end of human law was the public good, then equally a custom which tended towards that would share in its rationality. Though important to an understanding of the nature of the legal force of custom, such a definition did not mean a great deal in practice. There was no need to demonstrate a custom's rationality in one of these ways; so long as it did not go against the *ius naturale,* the *ius gentium,* or the *ius positivum*[20] it would be presumed to be rational. The operation of such a presumption meant that a potentially wide scope could be allowed to custom. There was no need to show in every case that a practice was rational in one of the senses defined above; unless it was demonstrably irrational it could be upheld.

The second requirement which had to be satisfied before a custom could count as law was that it should have been established by a sufficiently long usage.[21] There is an ambiguity in Werbőczy's analysis here, an ambiguity shared with Bartolus and other medieval lawyers. The period of usage which might be relied upon was, in normal circumstances, fixed at ten years dating from the time that the act was first performed.[22] Custom became law by prescription, in the same way as a person might become owner of property prescriptively by long possession. This was a simple mechanistic test, operative as a matter of law purely because the requisite period of time had passed. On the other hand, the reason for the requirement of long usage was to enable the tacit consent of the people to be discerned.[23] Werbőczy recognized that there was no need for

19 Prologue, [10. 3–4]. The same idea appears in Bartolus, *Repetitio* ad D.l.3.31, no. 11.

20 This is essentially the trichotomy of laws given by Justinian in *Institutes* 1.2.1: *ius naturale* is that which nature teaches to all animals; *ius gentium* those precepts which are observed to be common to legal systems; *ius positivum (ius civile* in the Institutes) the particular laws of any state. The same division is found at the start of the Prologue to the *Tripartitum.*

21 Prologue, [10. 5–7], Werbőczy sees two separate points: the length of usage and the discernment of tacit consent.

22 Prologue, [10. 5–6]; Bartolus, *Repetitio* ad D.l.3.31, nos. 14,15 (note that Bartolus says that one counts from the second performance of the act rather than the first).

23 Prologue, [10. 7].

frequency of use if the tacit consent could none the less be identified. Normally *(jplerumque)* he says that it cannot be identified from a single act and there must be some degree of repetition. A continuous state of affairs might suffice – he gives the example of a bridge being constructed over a public road, which might simply be there, without objection, for the required period – but there is no consideration of the possibility that a single act might be enough in itself, provided that the circumstances were such that popular consent could be inferred. The ambiguity inherent in the combination of these two positions is in essence the corollary of the flexibility that lies within this notion of custom as a backward-looking justification for the adoption of some particular practice as a rule.[24]

Werbőczy's second discussion of custom in the Prologue relates to its relationship with *lex*.[25] Mention has already been made of his reproduction of the commonplace distinctions between the express or tacit nature of the underlying consent and the written or unwritten form.[26] More interesting – though no less commonplace – is his explication of the qualities of custom in relation to *lex.* All of this is pure Bartolus, but it brings out a different aspect of the nature of custom than that which has just been examined. First of all, custom is the best interpreter of *lex:* if the words of the law are of uncertain application, then recourse should be had to custom in order to interpret them.[27] Secondly, a customary practice contrary to the requirement of a *lex* might have the effect of abrogating, or removing legal validity from, the *lex.*[27] Thirdly, a custom operating in the absence of any relevant *lex* would be an *imitatio legis,* acting exactly as if it were a *lex.*[29] No longer are law and custom, *lex* and *consuetudo,* being treated as two independent sources of *ius.* Instead they form a single organic whole capable of supplementing and interacting with each other. The force of this becomes clear if we take account of Bartolus's view that the underlying basis for the force of both *lex* and *consuetudo* was the consent of the people; the only difference was whether that consent was express or tacit. Given this basic unity, the complementary relationship between them followed automatically. Werbőczy does not himself make explicit that both forms derive from the consent of the

24 Above, p. 15.
25 Prologue, [11–12].
26 Above, p. 17.
27 Prologue, [11. 3]; Bartolus, Ad. D.l.3.9 no.2; *Repetitio* ad D.l.3.31, no. 5; ad D. 1.3.32.
28 Prologue, [11. 4]; Bartolus, *Repetitio* ad D.l.3.31, no. 2.
29 Prologue, [11. 5]; Bartolus, *Repetitio* ad D.l.3.31, no. 5.

people,[30] but if his approach in the Prologue is to be treated as a coherent whole the only way to make sense of his position here would be to adopt the theoretical starting point of Bartolus.[31]

Werbőczy's third discussion of *consuetudo* follows on from this. In the section *De lege et statuto: ac consuetudine contraria quid sit sentiendum* he touches on the resolution of conflicts between custom and law. This he reduces to two straightforward rules: a custom will be abrogated by a subsequent *lex* of general application; and, by parity of reasoning, a *lex* will be abrogated by a subsequent custom.[32] Throughout this section a careful balance is maintained between the two different sources of law. Neither is given automatic precedence over the other, either absolute or provisional; each has exactly the same weight as the other. Again, this is straightforwardly Bartolist;[33] again it brings into play Bartolus's approach to the relationship between custom and law, and it seemingly commits Werbőczy to an acceptance of that position (if, that is, we are to take the material in the Prologue at all seriously).

3. Custom in the *Tripartitum:* the Main Text

Turning from the Prologue to the main text of the *Tripartitum,* two features are at once visible. The first is that there is now remarkably little reference to custom at all, and certainly no hint of any theoretical consideration of its operation. Secondly, in so far as there is any explicit reference to it, the word seems to be used in a different sense from that in which it has been used in the Prologue.

The theoretical slippage is signalled right at the beginning of Part One. The title (found also heading the second and third parts) half picks up on the division between law and custom found in the Prologue: *De Tripartita Divisione Iurium et Consuetudinum inclyti Regni Hungarie in Generali.* But it is only half picked up: in the Prologue *ius* forms an overarching

30 He says that this was once the case, but that now power is vested in the prince: *Tripartitum,* II. 3. 311 should say that I am not at all convinced that we should treat the Prologue as coherent in this way; it might easily be read as no more than a ragbag of pieces lifted from Bartolus (or some other source) without any real thought as to how they fitted together.

32 Prologue, [12]. A *lex* of special application would abrogate the custom within its own range of application (eg within the place where it applied), but the custom would continue to operate outside this range.

33 Bartolus, Ad D.l.3.31, nos. 4, 5; *Repetitio* ad D.l.3.31, no. 5.

category of 'law' made up of *lex* on the one hand and *consuetudo* on the other, whereas here *ius* is set in opposition to *consuetudo.*[34] The theoretical register has shifted; though the main shift is in the meaning of *ius* rather than of *consuetudo,* the sense in which the latter is used is wholly uncertain. Matters are made less opaque in the first sentence of the opening section: having dealt with the general reflections in the Prologue, now is the time to turn to a particular study of the customs of Hungary *(consuetudines inclyti Regni Hungariae).* The same usage is found in the second sentence: borrowing the standard trichotomy made familiar by the Roman institutional structure, Werbőczy says that every Hungarian legal custom *(omnis consuetudo iuris qua utimur)* relates either to persons, to things, or to actions. Clearly, the meaning of *consuetudines* here has changed considerably from that found in the Prologue: it is now being used in the third sense noted above, designating the particular law of the Kingdom of Hungary in contradistinction to the learned *ius commune.* Legislation, *lex,* is now part of *consuetudo,* not something to be set in opposition to it or complemented by it. A few paragraphs later, usage has slipped again. At the beginning of the third title, Werbőczy apologizes for a brief excursus into history: his real subject is not this, but the *consuetudines et peculiares approbatasque huius regni leges,* the customs and the particular and approved laws of this Kingdom.[35] *Consuetudo* is now, as at the start of the Prologue, set in opposition to *lex,* and apparently used in the second of the three senses earlier described. It is simply that part of the law which is not legislative in origin.

There is only one other place in the *Tripartitum* where Werbőczy provides any treatment of custom, in chapter six of the second part, *Unde Traxit Originem Consuetudo Nostra in Iudiciis Observanda.*[36] Clearly this must refer to the third sense of *consuetudo,* the law of Hungary as distinguished from the *ius commune,* for the first source given is official legislation, the *constitutiones* and *decreta publica* of the Kingdom.[37] The

34 Contrast Werbőczy's reference to the *consuetudinarium ius* of Slavonia and Transylvania: *Tripartitum,* III. 3.

35 *Tripartitum,* 1, 3. Compare the same dichotomy, though in a slightly different form, at the start of Part III: the *leges et dudum approbatae consuetudines* of Dalmatia, Croatia, Slavonia, and Transylvania differ in certain details from the *leges et consuetudines* of Hungary (*Tripartitum,* III. 2).

36 *Tripartitum,* II. 6.

37 And see too *Tripartitum,* II. 44 [8], explaining the circumstances in which a capital sentence can be passed on an ecclesiastic person: 'Et haec constitutio ex generali maxime decreto ... excerpta est atque processit. Quae etiam in generali modemo decreto nostra roborata habetur, et confirmata.'

second source, privileges granted by rulers, is on the face of it no less formal, though there is greater hesitation about its legitimacy and Werbőczy goes on to place limits on its effectiveness.[38] Thirdly, there is legal practice, which derived only in small part from legislation or other formal sources. Beneath the surface of this threefold division, though, Werbőczy seems to be making use of the duality which lies behind the Prologue, the distinction between authority stemming from the written text and authority stemming from long usage. *Constitutiones* and *decreta*, in the main, get their force from the legislated text; but there is a problem with those that are so old that they have been repealed or varied by subsequent decrees. Some part of these provisions has none the less remained in use for a hundred years and more: that part has taken its place in *consuetudo nostra* – our law – by long usage. In the same way, when dealing with the slightly awkward case of privileges, Werbőczy justifies their position by reference to the fact that they have been treated as part of the law by the long usage of judicial practice. Somewhat paradoxically, when treating of the third of his sources – the practice whereby lawsuits are begun, prosecuted, considered, and determined – he does not refer expressly to long usage as the source of legal validity. He does, though, attribute the origins of the system within which this practice operates to the fourteenth-century Angevin kings, Charles Robert and Louis the Great. Two hundred years, we might suppose, would be long enough for a custom to be established, but the fact that the system has been in operation for such a time in no way entails that any particular practice has been. There is no hint that this might matter. On the contrary, it is said that the rights of the nobility depend on the continuity of this system; in a later age, we would simply say that due process and respect for the Rule of Law were essential to the protection of the rights of the individual.

4. Werbőczy and Custom

Werbőczy is not consistent in his use of custom throughout the *Tripartitum*. In so far as he could be said to have a theory, it is to be found in the substantially Bartolist treatment given to the topic in the Prologue, where custom is seen as that set of legal rules which are derived from long usage, getting their force from the tacit consent of the populace. It would be misguided to put too much weight on this, though. However Bartolist the individual pieces of Werbőczy's argument are, he never locks them

38 *Tripartitum,* II. 6–18.

together in the way that Bartolus does, and never sets in place the essential foundation principle on which Bartolus builds, the idea that all law stems from the consent of the people. Quite the contrary: though it might once have been the case that legislative power was vested in the people, he says, now it belongs to the prince. Werbőczy would not have been the first or last legal scholar to pepper his preface with learned allusions without thinking through the theoretical implications of what he is saying.

Moreover, whatever the theoretical slant of the Prologue, when we come to the (sparse) references to custom in the text of the *Tripartitum* we find that, although his meaning is not quite stable, the thrust of his analysis is very different from that of the Prologue. In the text, custom refers substantially to national law: the law of Hungary in the first and second parts; the law of Dalmatia, Croatia etc in the third. While this might be customary in the sense of the Prologue, it might equally be legislative in origin. We cannot therefore conclude that when he describes the law of Slavonia and Transylvania as customary law *{consuetudinarium ius)* he is meaning to say that the laws of those places derive purely from the usage of the people.

Perhaps the most interesting feature of custom in the *Tripartitum* is just how little use is made of it. Practically everything that is described in the work is customary in all of the senses described at the beginning of the present essay. It is an articulation of social practice which derives its legal force from usage, and probably long usage; it takes the form of law which has no legislated base; and it is local law rather than the learned law of the *ius commune.* It was given royal approval as *consuetudines approbatae.*[39] It is hard not to draw the comparison with the *Institutes* of Gaius, which similarly conceal the customary origin of most of their contents, or with the *Doctor and Student* of Werbőczy's English near-contemporary Christopher St German, for whom custom did have some part to play in the foundation of the law but who seems none the less to have been at pains not to undermine too heavily the special learning of the lawyers.[40]

39 *Tripartitum,* Regis Consensus.

40 T. F. T. Plucknett and J. L. Bartons, eds., *Doctor and Student* (Selden Society, vol. 91), London 1974, pp. 44–47, 56–59.

Administering the Law: Hungary's *Loca Credibilia*

Zsolt Hunyadi

'The notary's function was essentially that of witness: he had been present, and had written down what happened; or he had seen a document and drawn up a copy of it' – so wrote Robert Swanson on the role of England's public notaries in the thirteenth century.[1] He could have written almost the same words in respect of the uniquely Hungarian institution of the *loca credibilia:* an institution which for several centuries co-existed in Hungary with that of the public notaries.[2] The *loca credibilia* were, however, rather more than *scriptoria,* 'copying shops', or institutions of witness. Besides their role in recording and verifying transactions and in drawing up deeds, the *loca credibilia* performed a vital function in discharging the tasks of royal government and in undertaking judicial and administrative duties on behalf of the ruler and of his principal agents.

The aim of the following brief survey is to indicate the principal characteristics of this particular vehicle of 'private' legal literacy. The so-called 'places of authentication' (*loca credibilia*) were institutions which witnessed legal transactions mainly by issuing upon request charters under their own authentic seal.[3] The background to this activity may most immediately be linked to a decree of Pope Alexander III in 1166. This

1 Robert Swanson, 'The Church and its Records', in (ed.) Richard Britnell, *Pragmatic Literacy, East and West, 1200-1330,* Woodbridge, 1997, pp. 147–64 (p. 160).

2 For the most recent summary (with a survey of the relevant literature), see Tamás Kőfalvi, 'Places of Authentication *(loca credibilia)', Chronica,* 2, 2002, pp. 27–38. For a detailed overview, see also Martyn Rady, *Nobility, Land and Service in Medieval Hungary,* Basingstoke and London, 2000, pp. 62–78.

3 Cf. György Bónis, 'A közhitelűség szervei Magyarországon és a magyar hiteleshelyi levéltárak', *Levéltári Szemle,* 14, 1964, pp. 118–42 (p. 125). See also by the same author, 'Les auctorités de "foi publique" et les archives des "loci credibiles" en Hongrie', *Archivum,* 12 (1962), pp. 97–104; Imre Szentpétery, *Magyar oklevéltan,* Budapest, 1930, pp. 118–20; János Bak, György Bónis, Pál Engel, James Ross Sweeney, Paul B. Harvey, Leslie S. Domokos (eds), *The Laws of the Medieval Kingdom of Hungary, 1000–1490.* Decreta Regni Mediaevalis

decree laid down that, after the death of witnesses, only those documents might be considered valid which had been drawn up by public notaries *(manu publica),* or else which carried an authentic seal.[4]

Studies of legal literacy indicate that sealed charters had acquired in large parts of Europe a legal character even as early as the second half of the eleventh century and that a fundamental distinction arose around this time between sealed and unsealed instruments.[5] In contrast to the Mediterranean region, in England and northern France new vehicles of legal literacy were pressed into existence which were in several respects similar to the Hungarian one. There were, thus, no public notaries in England before the late 1250s.[6] Consequently, at the Council of London in 1237, Otto, the papal legate, increased the number of institutions (among others, chapter houses and convents) whose seals might henceforward be deemed authentic.[7] This development should, of course, be viewed as part of a much longer process during which 'the use of seals extended down the social scale from princes and barons through the gentry to smallholders and even serfs'.[8]

In accordance with the precepts of canon law, in France the seals of the pope, of the king, and of the various religious houses as well as of persons having jurisdictional competence, were considered authentic. Contrastingly, in Germany, all sealed documents retained a *fides plenaria.*[9] Despite the apparent congruence between French and

Hungariae 1000–1526, Series I, 3 vols (in progress), Salt Lake City-Los Angeles-Idyllwild, 1992-1999, (hereafter: *DRMH),* 2, p. 250; Ferenc Eckhart, *Magyar alkotmány és jogtörténet,* Budapest, 1946, pp. 176–83. The best concise work on this topic remains Franz (Ferenc) Eckhart, 'Die glaubwürdigen Orte Ungarns im Mittelalter', *Mitteilungen des Instituts für osterreichische Geschichtsforschung* (hereafter *MIÖG),* Ergbd. 9 (1915), pp. 395–558.

4 Cf. L. Bernát Kumorovitz, *A magyar pecséthasználat története a középkorban,* Budapest, 1993, p. 14; *Scripta vero authentica, si testes inscripti decesserint, nisi forte per manum publicam facta fuerint, ita quod appareant publica, aut authenticum sigillum habuerint, per quod possint probari, non videntur nobis alicuius firmitatis robur habere:* Wilhelm Ewald, *Siegelkunde,* Munich, 1914. p. 42.

5 George Declercq, 'Originals and Cartularies: The Organization of Archival Memory (Ninth-Eleventh Centuries)', in (ed) Karl Heidecker, *Charters and the Use of the Written Word in Medieval Society,* Turnhout, 2000, pp. 147–70 (p. 166).

6 Christopher Cheney, *Notaries Public in England in the Thirteenth and Fourteenth Centuries,* Oxford, 1972, p. 15.

7 L. Bernát Kumorovitz, 'Az authentikus pecsét', *Turul,* 50,1936, pp. 45–68 (p. 47).

8 Michael T. Clanchy, *From Memory to Written Record: England 1066-1307,* London, 1979, p. 245.

9 Kumorovitz,' Authentikus pecsét', p. 49.

Hungarian practices, a critical difference existed. As László Mezey has shown, *officiates* in France issued documents in their own names. In Hungary, by contrast, chapter houses and religious institutions always published documents as corporations.[10] We may infer from this that the ecclesiastical character of Hungary's *loca credibilia* lent these institutions their credibility as well as, perhaps, providing some sort of financial guarantee for the parties concerned. Moreover (and as we will see), while the French *officiales* exclusively administered private legal affairs, the Hungarian *loca credibilia* also acted at the behest of the royal curia.

The origins of Hungarian legal literacy can be traced back to the beginning of the eleventh century. Although most charters attributed to St. Stephen are of dubious provenance,[11] it is widely accepted that the royal court attracted learned and erudite men from Germany. The number of charters issued by the royal court scarcely rose over the course of the eleventh century. Nevertheless, a respect for the written record is evident during the reign of King Ladislas I (1077–95). Evidence of legal literacy is suggested by surviving or reconstructed charters (although at this time they were issued without seals).[12] The canons of the Council of Esztergom, published around 1100, provide further evidence of a wider reception of literacy.[13]

The next step was the appearance of sealed private charters at the turn of the twelfth century, which partly originated from the statutes of Ladislas I and of Coloman (1095–1116).[14] Although only one (reconstructed) *cartula sigillata* is so far known, it has been shown that such documents were used in commercial transactions between Jews and Hungarians as proof of purchase or of a loan.[15] During the late eleventh

10 László Mezey, 'A pécsi egyetemalapítás elözmenyei (A deákság és a hiteleshely kezdeteihez)', in (ed) Ándor Csizmadia, *Jubileumi Tanulmányok*, Pécs, 1967, p. 68. See also Mezey, 'Anfänge der Privaturkunde in Ungarn und der glaubwürdigen Orte', *Archiv für Diplomatik*, 18, 1972, pp. 290–302. See, for instance, the charter issued by an episcopal *officialis* of Paris in 1254: Imre Szentpétery, *Középkori oklevélszövegek*, Budapest, 1927, pp. 37–38.

11 Six of the ten charters analysed proved to be forgeries while the rest have been interpolated or reformulated in the course of time.

12 From the years 1051, 1061, 1067, 1079 — given in György Györffy (ed.) *Diplomata Hungariae Antiquissima ab anno 1000 ad annum 1131*, Budapest, 1992, pp. 169, 182–85, 225–26.

13 Arts. 20, 21, 32: *DRMH*, 1, pp. 63–4.

14 Art. 7. (1077): ibid, p. 14; *De Judeis*, Art. 3: ibid, p. 66.

15 See L. Bernát Kumorovitz, 'Die erste Epoche der ungarischen privatrechtlichen Schriftlichkeit', *Studia Historica Academiae Scientiarum Hungaricae*, 21, 1960, pp. 253–90.

and twelfth centuries, the majority of sealed charters were issued at the request of the beneficiaries involved. Doubtless they felt it important to have their rights and obligations recorded in writing. In this respect, Hungarian usage conformed to wider European norms.[16] The other significant category of record consisted of charters drawn up by royal scribes.[17] A characteristic feature of documents of this type was that their authenticity was based on the attached royal seal which symbolized the king himself.

The final impulse which brought the places of authentication into existence was the reform of the royal chancellery introduced by King Bela III (1173–1196). During Béla's reign, beneficiaries ceased to be responsible for drawing up charters recording transactions; this task was instead apportioned to the clerks of the royal chancellery. According to a widely received opinion, Béla III was most probably influenced by Western European models, partly French and, to a certain extent, English, but there is no agreement on this point. László Mezey, for instance, has pointed out that French private legal literacy flourished only after 1220–1230 and, thus, could not have influenced Béla Ill's reforms.[18] Instead, Mezey and others trace the origin of Béla's reforms to the Byzantine court.[19] It may well be that the 'pragmatic literacy' introduced by Béla's uncle, Manuel I, served as an inspiration, especially in respect of the formal establishment in Byzantium at this time of defined vehicles and instruments of authenticity *(demosiosis).*[20]

16 Cf. David Postles, 'Country *clerici* and the Composition of English Twelfth- and Thirteenth-Century Charters', in (ed) Karl Heidecker, *Charters and the Use of the Written Word in Medieval Society*, Turnhout, 2000, pp. 27─ 42 (p. 29).

17 L. Bernat Kumorovitz, 'A középkori magyar magánjogi írásbeliség első szakasza (XI-XII. század)', *Századok*, 97, 1963, pp. 1─35 (pp. 11─12); Cf. Philippe Depreux, 'The Development of Charters Confirming Exchange by the Royal Administration', in (ed) Karl Heidecker, *Charters and the Use of the Written Word*, pp. 43─62 (pp. 54, 56).

18 Cf. Ferdinand Lot and Robert Fawtier, *Histoire des institutions françaises au moyen age*, Paris, 1958, vol. 2, pp. 164─65: quoted by Mezey, 'A pécsi egyetemalapítás', pp. 63─64; Istvan Hajnal, 'Universities and the Development of Writing in the 12^{h}─13^{h} Century', *Scriptorium*, 6, 1952, pp. 177─95; László Mezey, 'Ungarn und Europa in 12. Jahrhundert. Kirche und Kultur zwischen Ost und West', in *Probleme des 12. Jahrhunderts. Reichenau-Vorträge 1965─1967*, Vorträge und Forschungen 12, Stuttgart, 1968, pp. 255─73.

19 For instance, Géza Érszegi and Árpád Varga.

20 László Mezey, 'A hiteleshely a közhitelűség fejlődésében és III. Béla szerepe', in (eds) János Horvéth and György Székely, *Középkori kútfőink kritikus kérdései*, Budapest, 1974, pp. 315─32 (pp. 329─31).

A second group of scholars – including Ferenc Eckhart, Imre Szentpetery, L. Bernát Kumorovitz and György Bónis – have argued that the places of authentication evolved as autocthonous institutions and that they originated out of the office of *pristaldus* (usually translated as bailiff)[21] and of the role played in the eleventh and twelfth centuries by the major chapter-houses in administering ordeals.[22] The importance of the *pristaldi* in acting as a living record of transactions was reduced by the aforementioned decree of Pope Alexander III which, as we have seen, emphasized that after the death of the witnesses, all other instruments except for sealed documents lost their validity. Moreover, these bailiffs were regularly bribed (or at least said to be) by the parties involved. The renewal of the Golden Bull in 1231 regulated and restricted the role of the *pristaldi.* As Article 21 laid down, 'because many people suffer harm from false bailiffs, their summons or testimony shall not be valid without the witness of the diocesan bishop or the chapter'.[23]

This provision of the Golden Bull of 1231 indisputably assisted the development of the places of authentication. Nevertheless, an equally important influence was the administration of ordeals. The ordeal was 'a medieval method of legal proof based on the belief in direct divine intervention in the determination of guilt; the accused was bound to carry a hot iron for a definite distance or had to put his/her hand in hot water, and was deemed innocent if s/he emerged unharmed'.[24] The business of establishing guilt or innocence was overseen by the church. As a consequence, ecclesiastical institutions were vested with an authority in determining proof which served as the basis for their further accumulation of *a fides plenaria.* Moreover, in the course of proceedings, the injured hand of the accused person was bandaged and closed with a seal, which demanded the use of seals in the churches concerned. It should, however, be noted that the earliest charters issued by the *loca credibilia* were unsealed: that is to say, sealing was not regarded as an indispensable element of the private legal documents *ab ovo.*[25] Still, in the thirteenth century, the witnesses

21 Cf. *DRMH,* 1, p. 141; ibid, 2, p. 249.

22 Cf. ibid, 1, p. 148. The expression derives from the Slavonic 'pristav' — 'to be present'.

23 Ibid, l,p. 38.

24 Ibid, 1, p. 148. See also Rady, *Nobility,* pp. 65—66; Cf. R. C. van Caenegem, *The Birth of the English Common Law,* 2nd ed., Cambridge, 1989, pp. 62–74.

25 Ferenc Eckhart, 'Hiteles helyeink eredete és jelentősége', *Századok, 41* (1913), pp. 640–55 (p. 650); see also I. Borsa, 'Zur Beurkundstätigkeit der glaubwürdigen Orte in Ungarn', in (eds) Kálmán Benda, Tamás Bogyay, Horst Glassl, *Forschungen über Siebenbürgen und seine Nachbarn. Festschrift für Attila T. Szabó und Zsigmond Jakó, 2* vols., Munich, 1988, 2, pp. 143–47.

(testes) to a transaction acted as the principal means of evidence and they might subsequently be called upon to tell what they recalled. As such, the witnesses were separately named and listed as *presente* or *presentibus* in the eschatocols of charters.

In short, the origin of the places of authentication may be attributed to (1) the activity of the royal chancellery which served as a model, (2) the development of customary practices most notably in respect of the ordeal, and later (3) the use of the authentic seal. Documents sealed with an authentic seal *(sigillum authenticum)* had complete authenticity *(fides plenaria):* that is, they were to be given full credit by all parties concerned.[26] Certainly, in respect of (3), Hungarian practice diverged from West European norms. In Hungary, no one's seal was considered authentic in respect of his own affairs. Indeed, even the places of authentication turned to each other to record their own legal transactions. Nevertheless, the conventions governing Hungarian practice served to confirm and reinforce the authority and weight given to the seals of the principal religious houses.

Which religious houses constituted places of authentication and when did they acquire this role? The earliest were the leading chapter houses: Veszprém in 1181, Székesfehérvár in 1184, Buda (subsequently known as Óbuda) in 1211, and Arad in 1221; and soon thereafter, from the mid-thirteenth century, the Benedictine abbey of Pannonhalma, the Premonstratensian priory of Jászó, the Stephanite commandery of Esztergom, and the Hospitaller commandery of Székesfehérvár. These constituted – along with the other religious houses belonging to these orders – an embrionic institutional structure.

According to recent studies, there were almost seventy places of authentication in the medieval kingdom of Hungary and by the beginning of the fourteenth century these institutions covered the entire realm. Besides the cathedral and collegiate chapters,[27] one may also find the convents of the Benedictines,[28] the Premonstratensians,[29] the

26 Cf. Eckhart, 'Hiteles helyeink eredete', pp. 654-55; Eckhart, *Magyar alkotmány és jögtortént*, p. 181; Kumorovitz, *A magyar pecséthasználat*, p. 13, p. 69; Ferenc Szakály, 'A szekszárdi konvent hiteleshelyi és oklevéladó működése 1526-ig', *Tanulmányok Tolna megye történetéből*, 1, 1968, pp. 9–60 (p. 13).

27 According to Eckhart *(Magyar alkotmány- és jogtörténet*, p. 182) fifteen cathedral and nine collegiate chapters acted as places of authentication before 1526. By contrast, Zoltán Miklósy has detected 28 chapters: Miklósy, 'Hiteles hely és iskola a középkorban', *Levéltári Közlemények*, 18–19, 1940–41, pp. 170-78.

28 Thirteen convents: see Bónis 'A közhitelűség szervei', p. 132.

29 Six convents: ibid.

Hospitallers,[30] and the Canons Regular of St. Stephen. There is, however, no sign of similar activity among either the Cistercians or the mendicant orders. Some scholars have pointed out that the lack of a conventual seal hindered such activities.[31] It is known, however, that the Cistercians played an important role in charter production in Poland.[32]

As a result of the development and consolidation of these institutions, the 'written record' had superseded 'memory' by no later than the last third of the thirteenth century. In respect of church affairs, however, ecclesiastical courts did not accord full recognition to charters issued by the *loca credibilia?*[3] This fact paved the way for the first public notaries appearing in Hungary at the turn of the thirteenth and fourteenth centuries. In contrast to the places of authentication, the public notaries had a much reduced role and their competence was largely confined to the field of canon law.[34] Certainly, there was much trespassing across legal spheres. For instance, suits concerning filial quarters and dowers were often raised before an ecclesiastical court but, inasmuch as they also concerned landed property, cases of this type were usually 're-routed' to the secular courts.

Since the owners of proprietary churches and monasteries were able (or so it was alleged) to influence the business of record-keeping, King Louis I (1342-1382) ordered in 1351 that the seals of the smaller religious houses *(conventus minuti)* be withdrawn and broken.[35] The process of 'down-sizing' was completed by 1353. As a direct consequence, from the mid-fourteenth century, several ecclesiastical establishments ceased activity as *loca credibilia* while several chapter houses and convents – most notably, the chapters of Székesfehérvár and Óbuda, the Bosnian chapter, and the

30 Zsolt Hunyadi, 'The *Locus Credibilis* in Hungarian Hospitaller Coramanderies', in (eds) Anthony Luttrell and Léon Pressouyre, *La Commanderie: institution des ordres militaires dans I'Occident médiéval*, Paris, 2002, pp. 285–96.

31 E.g. László Solymosi, 'Észrevetelék a Ciszterci Rend magyarországi repertóriumáról', *Levéltári Közlemények*, 55, 1984, pp. 237–51 (pp. 242, 248–50).

32 Anna Adamska, 'From Memory to Written Record in the Periphery of Medieval *Latinitas:* the Case of Poland in the Eleventh and Twelfth Centuries', in (ed.) Heidecker, *Charters and the Use of the Written Word*, pp. 83–100 (p. 91).

33 Eckhart, *Magyar alkotmány és jogtörténet*, pp. 176–83; Bónis, 'A közhitelűség szervei', p. 127; Kálmán Juhász, *A csanádi székeskáptalan a középkorban (1030–1552)*, Makó, 1941, p. 101. See also Kálmán Juhász, 'Das Kapitel von Arad als glaubwürdiger Ort', *MIÖG*, 62, 1954, pp. 406–24.

34 István Barta, 'Középkori közjegyzőségeink történetéhez', in (eds) L. Bemát Kumorovitz and Loránd Szilágyi, *Emlékkönyv Szentpétery Imre születése hatvanadik évfordulójának ünnepére*, Budapest, 1938, pp. 31–46.

35 11 December 1351 (Art. 3): *DRMH, 2*, p. 10.

Székesfehérvár Hospitaller commandery — were given a country-wide authority to issue charters in respect of private transactions.[36]

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The activities of the places of authentication can be categorized as either 'internal' or 'external'. Internal activities included (1) the issue of *litterae fassionales* recording private legal transactions (e.g. the conveyance of estates, divisions of property, pledges); (2) the publication of *litterae relationales* which were reports sent to the curia concerning the administration of out-of-court procedures; and (3) the transcribing of letters of record *(litterae transcriptionales),* usually for the purpose of their safe-keeping. As to their formal characteristics, three types of charters can be distinguished: *litterae privilegiales, patentes,* and *clausae.* According to the type (or content) of the given document, different set phrases — in fixed order — can be found.[37]

	LITTERAE PR1VILEGIALES	*LITTERAE PATENTES*	*LITTERAE CLAUSAE*
/. *PROTOCOLLUM*	*inttlulatio*	*intitulatio*	*intitulatio*
	inscriptio		*relatio — address*
	salutatio		*relatio — salutatio*
II. CONTEXTUS	*arenga*		
	promulgatio	*promulgatio*	*promulgatio*
	narratio	*(narratio)*	*(narratio)*
	dispositio	*dispositio*	*dispositio*
	clausulae	*clausulae*	*clausulae*
	sanctio	*sanctio*	*sanctio*
	corroboratio		
III. ESCHATOCOLLUM	*datatio (datum* or *actum)*	*datatio (datum* or *actum)*	*datatio (datum* or *actum)*
	series dignitatum sor testes		

The general structure of the formulaic set of the charters issued by the places of authentication

36 Recorded by Werbőczy in the *Tripartitum,* II. 21 [2]: *Tripartitum opus iuris consuetudinarii inclyti regni Hungariae,* Corpus Juris Hungarici, 1000-1895, (trans, and ed.) Sándor Kolosvári, Kelemen Óvári, Dezsó Márkus, Budapest, 1897, (reprint: Budapest, 1990) p. 282.

37 Cf. Zsolt Hunyadi, 'Regularities and Irregularities in the Formulae of the Charters issued by the Székesfehérvar Convent of the Knights of St. John (1243–1400)', in (ed.) Michael Gervers, *Dating Undated Medieval Charters,* Woodbridge, 2000, pp. 137–49.

Other characteristics of the charters published by the *loca credibilia* include the use of either parchment or paper, handwriting, graphic symbols and ornamentation, the seal itself and whether the deed was recorded in the manner of a chirograph. The scribes *(notarii),* headed by the *lector* of the chapter, and the *custodes* (or the priors)[38] of the religious houses ensured that on each occasion the type of charter which was issued befitted its content. Their work was aided by the use of model charters and, later, formularies which contained set patterns for many types of deeds.

The 'external' activity of the places of authentication included (1) the perambulation of boundaries *(reambulatio),* (2) the institution of new owners to estates *(statutio, introductio),* (3) the recording of last wills in homes, and (4) the performance of inquests (either the *inquisitio simplex* or the *inquisitio communis').* The procedure in respect of this 'out-of-court' business started either in the immediate vicinity of the place of authentication or before one or more of its members and was performed for the most part orally. In the case of mandates received from the curia or a royal judge ordering a *reambulatio, statutio* or *inquisitio,* the competent official of the house opened the letter of instruction and read it aloud in front of the canons or brethren. In most cases, a canon or brother was then sent to the property or place named in the mandate to accomplish the job on the spot (he was usually accompanied there by a royal bailiff or *homo regius*). From the mid-fourteenth century, it became general practice for the scribes who wrote up the charters to name the cleric who was appointed to perform these external services and to give an indication of his rank. As recent studies have shown, in many instances the clerics appointed were senior clergy and not simply choir priests. Receivers of substantial prebends were supposed to be better equipped to resist temptation and to be less open to bribery. The members of the *loca credibilia* sent to perform these external tasks were supposedly also familiar with both local custom *(consuetudo terrae)* and custom of the realm *(consuetudo regni),* notwithstanding their origin or mother-tongue. Having completed the task in hand, the canon(s) or brother(s) returned to the chapter-house or the convent and delivered an oral report. This was subsequently included in the letter of relation which was sent back to the curia or judge. The letter of relation reported that a *statutio* or *reambulatio* had been undertaken or, if it was contested, gave details of whom had opposed it. In the case of an inquest, the letter of relation would summarize the evidence which had been taken there. Sometimes, the

38 Zoltán Miklósy, 'Hiteles hely és iskola', p. 171.

places of authentication also issued on request copies of the letter to the parties concerned. The letter of relation, once received by the curia or judge, served as evidence in ongoing legal actions. It might be used, therefore, to demonstrate that a property was held unlawfully, that a boundary was incorrectly laid, that a violent trespass had taken place, or that an owner's claim to his estate was not certain. If further evidence was needed, the curia or judge might instruct the place of authentication to perform additional tasks or to summon the parties to court.

Places of authentication were very similar to each other with regard to the revenue they obtained from their work (especially the fees received for issuing a charter, performing an inquest and so on). It is difficult to estimate accurately the overall income of these houses, for there is no reliable information available on the number of matters transacted by any single *locus credibilis.* Fortunately, there are several articles in decrees enacted during the thirteenth and fourteenth centuries which fixed the fees for procuring charters and for performing other services.[39] Although many of these passages refer to the fees which were due to the royal chancellery, they still provide some indirect evidence as to the costs charged by the *loca credibilia.* It is apparent, for instance, that ornate or painted initials increased the price of a privilege. Even on relatively simple charters a gap *(sigla)* can sometimes be found which was left for the (missing) initials. This suggests that the writing and the decoration of the charters represented different phases in their production. In respect of the Székesfehérvár Hospitaller commandery, for instance, all evidence of spectacular ornamentation disappears after 1280. This was presumably due either to the relative poverty of the parties who turned to this particular place of authentication, or to the increased number of charters issued by its *scriptorium.* From the middle of the fourteenth century the decorative initials reappeared but never reached the previous level. Another factor was the appearance in the first half of the fourteenth century of paper which replaced parchment at least in the case of letters close and patent. It certainly made charter production cheaper.[40]

It is, however, difficult to calculate the exact proportion of income received by those members of a chapter or convent who played a role in

39 1290 (Art. 16): *DRMH,* 1, p. 44; circa 1300 (Art. 19): ibid, pp. 74-75; circa 1300 (Art. 20): *ibid.* p. 74–75. These fees remained valid until at least 1435. See *DRMH,* 1, p. 138; 1351 (Art. 21): ibid, 2, pp. 12–13.

40 Zsolt Hunyadi, 'The Knights of St. John and the Hungarian Private Legal Literacy up to the Mid-Fourteenth Century', in (eds) Balázs Nagy and Marcell Sebők, *...The Man of Many Devices Who Wandered Full Many Ways... Festschrift in Honor of János M. Bak,* Budapest, 1999, pp. 507–19 (p. 514).

the business of authentication. It is unlikely that the analogy of the chapters can be applied to the monastic sites, since the leaders of the chapter's chancellery, the *lector* and his deputy, the *sublector,* as well as the choir priests, received their fees as part of their prebends. In respect of the monastic orders it seems that the *custos* and/or prior, even though they had a clear role in the authentication,[41] did not derive any separate revenue from this activity. Additionally, with respect to the Hospitaller commanderies, it should be noted that only a few commanderies profited from this type "of legal business — most notably Sopron, Újudvar, and Szekesfehervar. In this respect, the status of Szekesfehervar was significant, since it was the only Hospitaller place of authentication which was allowed to continue its activity after the reforms of King Louis I in the early 1350s.[42] The Székesfehérvar commandery was one of the four most important places of authentication and it continued its activity up to the mid-sixteenth century, until the Turkish occupation of this part of the Hungarian kingdom.

In conclusion, it is worth noting that the non-Hungarian reader may find the *loca credibilia* less unique as an institution than Hungarian scholarship has traditionally allowed. Despite the many differences, there are numerous similarities to be found in the activity of other European medieval institutions which had a role in charter production and in administering the law. Much new information has been unearthed since the publication of Ferenc Eckhart's seminal work in 1915. Not only his students but also a new generation of medievalists have contributed to our understanding of the institutional history of the places of authentication. The important task now is to couple the work of Hungarian scholars with the wider European literature on charters, scriptoria and procedural law, and to achieve thereby a truly comparative perspective.

41 Mezey, 'A pécsi egyetemalapitás', p. 77.

42 In the case of the commandery of Dubica, matters were arranged differently. See Hunyadi, *'Locus Credibilis'*, p. 292.

Hungarian and Croatian Customary Law: Some Contrasts and Comparisons

Damir Karbić

The relevance of the laws of the medieval kingdom of Croatia to medieval Hungarian law should be obvious. After all, both Hungarian and Croatian law originate from within very much the same historical milieu and from within the same 'state complex'. At the very least, the Croatian codes of law might be expected to provide some interesting analogies and additions. Nevertheless, the Croatian codes have been largely neglected by legal historians. For the most part, scholars have preferred to analyse them either from a philological point of view[1] or by reference not to Hungarian practices but instead to the idea of a common Slavonic legal inheritance.[2] Only very recently have the Croatian legal codes been given the attention and context which they deserve.[3] In the first part of this essay

1 See, for example, Eduard Hercigonja, 'Neke jezično-stilske značajke Vinodolskog zakona (1288) i Krčkoga (Vrbanskoga) statute (1388)', *Slovo*, 39–40 (Zagreb), 1990, pp. 87–125.

2 Russian historians have invested particular effort in the study of some of these law codes, but their interest has mostly been directed towards comparisons of Croatian law codes with Russian and Slavonic codes in general. See, for example, the works of the Russian scholar Boris Dimitrijevič Grekov: *Vinodol'skij statu! ob obščestvenom i političeskom stroe Vinodola*, Moscow-Leningrad, 1948; and *Polica*, Moscow, 1951 (includes a Russian translation of the law code of Poljica). For a German version of the latter, see Grekov, *Die altkroatische Republik Poljica: Studien zur Geschichte der gesellschaftlichen Verhältnisse der Poljica vom 15. bis 17. Jahrhundert*, Berlin, 1961.

3 The first contributions in that direction are recent articles by Maurizio Levak and myself. See Levak, 'Podrijetlo i uloga *kmetâ* u vinodolskom društvu XIII. Stoljeća', *Zbornik Odsjeka za povijesne znanosti Zavoda za povijesne i društvene znanosti Hrvatske akademije znanosti i umjetnosli*, 19, 2001, pp. 35–81 (with English-language summary); Damir Karbič, 'Hrvatski plemićki rod i običajno pravo', *Zbornik Odsjeka za povijesne znanosti Zavoda za povijesne i društvene znanosti Hrvatske akademije znanosti i umjetnosti*, 16 1998, pp. 73–117 (with English-language summary). The latter is a slightly amended version and translation of my MA thesis, *The Croatian Noble Kindred*, Department of Medieval Studies, Central European University, Budapest, 1994.

I shall give some brief information on the Croatian codes and on Croatian customary law in general, while in the second I shall comment on some particular issues regarding the character both of this material and of its relationship to medieval Hungarian customary law.

There are in all six codes of customary law from medieval Croatia dating from the end of the thirteenth century to the middle of the fifteenth. Two of these, the law codes of Poljica and Novigrad, have a more general character, while the remaining four, the law codes of Vinodol and Vrana and the statutes of the *ligae* (*i.e.* allied districts) of Nin and Zadar, are specific to particular social groups. Three (those of Vinodol, Poljica and the *ligae* of Nin) are extant in the Croatian vernacular, two (those of Novigrad and Vrana) are composed in Italian, while the remaining single instance (that of the *ligae* of Zadar) is written in Latin.[4]

The oldest of the six codes is from Vinodol and was drawn up at the end of the thirteenth century.[5] As has been demonstrated by the recent research of Mauricio Levak, the code of Vinodol was in the first place the customary law of the castle-warriors *(iobagiones castri)*[6] of Vinodol, which was a frontier area characterized by the existence of numerous castles manned by members of this particular military group.[7] The code was composed in 1288 following the transfer of the area from the authority of the king to that of magnates, the counts of Krk. Since no other code of customary law relating to castle-warriors within the kingdoms of Croatia and Hungary is extant (or indeed ever probably existed), close study of the law code of Vinodol sheds new light on their condition in general.[8]

4 The law code of Novigrad was apparently written in Latin and translated into Italian in the sixteenth century, approximately one hundred years after its original composition. In respect of the statute of the *ligae* of Nin, it is hard to establish the original language as it survives only in an eighteenth-century copy. Other law codes survive in their original form and language.

5 Because of its importance for Croatian legal history, this law code has been edited several times. For the most recent critical edition of the law code of Vinodol, see (ed) Josip Bratulić, *Vinodolski zakon 1288*, Zagreb, 1988. For an English translation of this text, see (ed) Lujo Margetić, *Vinodolski zakon — La legge del Vinodol — Das Gesetz von Vinodol — The Vinodol Law*, Rijeka, 1998.

6 For the institution of castle-warriors in Hungary, see Attila Zsoldos, *A szent király szabadjai. Fejezetek a várjobbágysag történetéből*, Budapest, 1999; Martyn Rady, *Nobility, Land and Service in Medieval Hungary*, London and Basingstoke, 2000, pp. 20–22, 79–82; Pál Engel, *The Realm of St. Stephen: A History of Medieval Hungary, 895–1526*, London, 2001, pp. 70–73.

7 Levak, 'Podrijetlo'.

8 For further details on the law code of Vinodol, see Lujo Margetić, *Iz Vinodolske prošlosti*, Rijeka, 1980, and Tomislav Raukar, *Hrvatsko srednjovjekovlje*, Zagreb, 1997, p. 193 (with literature cited).

The law code of Vrana was intended for another group of privileged warriors, the so-called *feudatarii* of the castle of Vrana. These consisted of lesser noblemen of varying origin (Croatian, Italian, some even Hungarian),[9] who served as the garrison of Vrana and were recompensed for their service with landed estates in the district.[10] The statutes of the *ligae* of the districts of Nin[11] and Zadar[12] differ from the other codes because they do not relate to some particular privileged group, but to village communities *(universitates villarum)* in the districts belonging to the cities of Nin and Zadar.'[3] The laws of Vrana and of the *ligae* of Zadar were compiled in the mid-1450s as part of a greater wave of legislative codification initiated by the Venetian government in the Croatian territories under their control (which at that time consisted of the districts of Dalmatian cities and parts of Croatian counties in the hinterland of Zadar). The exact dating of the statute of the *ligae* of Nin cannot be established with any certainty. Nevertheless, scholars are mostly agreed that it (or at least its substance) belongs to the same period or a little later: that is the late 1460s or early 1470s.[14]

9 Among these, the *de Fiorenzo* family were of Hungarian origin. The family descended from *ser Ferençus, filius domini Petri.* Peter was the son of Martin of Szentmárton and in the 1370s a *vicebanus* of Croatia. For the *de Fiorenzo* family, see *Albert genealogici Zaratini,* unpublished MS, Biblioteca Marciana, Venice (It. CI. VI Cod. 530 [12324]). The MS was acquired through the bequest of the Zaratin historian, Giuseppe Praga.

10 The best edition of the law code of Vrana is provided by Stjepan Antoljak, 'Vransko običajno pravo', *Radovi Filozofskog fakulteta u Zadru,* 18, 1979, pp. 167–219. See also Miren Marevič Frejdenberg, '"Vranski zakonik". Novi spomenik hrvatskog običajnog prava', *Radovi Instituta JAZU u Zadru,* 18, 1971, pp. 323–341, and Tomislav Raukar, 'Marginalije uz novootkriveni "Vranski zbomik" iz godine 1454', *Historijski zbornik,* 25–26, 1972–1973, pp. 369–375.

11 The statute is edited by Petar Karlič, 'Statut lige kotara ninskog', *Vjesnik Hrvatskog arheološkog društva,* N. S., 12, 1912, pp. 287–298. The text of the statute was re-edited by Karlič with corrections (but without the introductory study) under the same title in the journal *Mjesečnik pravničkoga društva u Zagrebu,* 39, no. 1, 1913, pp. 394–402.

12 The statute is inserted in the sixteenth-century edition of the statute of Zadar as a 'reformation' (Ref. 137). For the text, see *Statuta Iadertina cum omnibus reformationibus in hunc usque diem factis,* Venice, 1564, pp. 121–129. Modern edition: (eds) Josip Kolanovič and Mate Križman, *Zadarski statut,* Zadar, 1997, pp. 626–633.

13 For further details on these statutes and local organizations, see: Đuro Ljubić, 'Lige i posobe u starom hrvatskom pravu i njihov odnos prema Poljičkom statutu', *Rad JAZU,* Zagreb, 1931, pp. 1–104 (pp. 1–3, 42–69); Marko Šunjić, *Dalmacija u XV. Stoljeću,* Sarajevo, 1967, pp. 178–183; Raukar, *Hrvatsko srednjovjekovlje,* pp. 192, 218.

14 For the *ligae of* the district of Nin in this period, see Sunjić, *Dalmacija,* p. 181. The code may, however, be dated even a little later, to the end of the fifteenth century or the very beginning of the sixteenth, since the Ottomans are mentioned several times, but the chronology needs further investigation.

On the evidence of the earliest extant copy, the date of the law code of Novigrad has usually been ascribed to the early 1550s.[15] The recent research of Nikola Jakšić shows, however, that the code originated in the early 1450s, and thus in the same period as two of the three law codes previously discussed.[16] The code was composed by members of the lesser nobility of the district of Novigrad, a part of the county of Luka which came under Venetian rule together with the cities of Zadar and Nin and the castle of Vrana in 1409. According to the text of the law code, it sought to record the customary law of Croatia and, in particular, of the area between Nin and Knin.[17]

The last extant law code of Croatian customary law is that of Poljica, a region (a district or a county dependant on chronology) situated south-east of Split.[18] The law of Poljica was apparently codified in the second

15 For an edition of the law code of Novigrad and an introductory study, see Miho Barada, *Starohrvatska seoska zajednica*, Zagreb, 1957, pp. 149–177. A monograph with a more modern discussion is still missing. For some comments on the law code of Novigrad, see Lujo Margetić, *Hrvatsko srednjovjekovno obiteljsko i nasljedno pravo*, Zagreb, 1996, p. 245; by the same author, *Srednjovjekovno hrvatsko pravo — obvezno pravo*, Rijeka, 1997, p. 287. Mladen Ančić is currently working on a study of this law code. Discussion with him helped me clarify some ideas on the codification of the law codes mentioned in this article, for which I owe him my sincere gratitude.

16 Nikola Jakšić, 'Nastanak novigradskog zbornika hrvatskog običajnog prava', in Jakšić, *Hrvatski srednjovjekovni krajobrazi*, Split, 2000, pp. 170–180.

17 ... Qui *de sotto scriveremo le consuetudini che sono state net paese di Croatia, cominciando da Tnin afin a Nona* ...: Barada, *Starohrvatska*, p. 158.

18 Some elements of Croatian customary law may also be found in the statutes of certain Dalmatian and Croatian communes (for example, in those of Krk, Senj, Skradin, Šibenik, Brač and Hvar), but in this paper I shall concentrate only on the law codes mentioned above, which express Croatian customary law more directly. Among the codes of Croatian customary law might also be included the law code of the Vlachs of the Cetina county (*Vlaški zakon*), confirmed in 1436 by Count John (Anž) Frankapan, who was at that time the count of Cetina. This law code relates, however, to a population living in a rather different social system (the society of transhumants within the borders of a great estate) as opposed to the law codes discussed in this paper. For an edition of this code (with an introductory study), see Radoslav Lopašić, *Hrvatski urbari. Urbaria lingua Croatica conscripta*, Monumenta historico-juridica Slavorum Meridionalium 5, Zagreb, 1894, pp. 1–12. For the Vlachs in Croatia generally, see Nada Klaić, *Povijest Hrvata u razvijenom srednjem vijeku*, Zagreb, 1976, pp. 607–610, and Raukar, *Hrvatsko srednjovjekovlje*, pp. 138–139.

half of the fourteenth century,[19] but the extant version is 'the new statute' of the 1440s, which was recorded only shortly before the submission of the county to Venice.[20] The code was promulgated by the organs of local noble autonomy, most probably in order to stress their autonomous legislative status. Until the fall of the Venetian Republic in 1797, the law code of Poljica remained the principal legislative document of the area and it acquired, albeit on a more limited and local level, a position and reputation similar to that enjoyed by Werbőczy's *Tripartitum* in Hungary and northern Croatia.[21]

In respect of the brief survey given here, it is worth noting several points. The first is connected with the manner and timing of codification. Historians generally agree that the Croatian codes were compiled at signal political moments.[22] In the case of the law code of Vinodol, codification was certainly influenced by the fact that the area passed from royal authority to the rule of the counts of Krk.[23] In the case of the 'new statute' of Poljica, codification was followed hard upon by the transfer of the region from royal to Venetian authority and was undertaken during the conflict between the supporters of King Wladislas I and those of Queen Elisabeth, the Duke Stephen Kosača of Hum/Herzegovina, and Venice.[24]

19 On this matter, see Ante Nazor, 'Granica između Splita i Poljica i splitsko-poljički sukobi u XIV. i XV. stoljeću (Dio prvi — Izdvajanje Poljica u zasebnu jedinicu i pitanje pripadnosti Primorja tijekom srednjeg vijeka)', *Zbornik Odsjeka za povijesne znanosti Zavoda za povijesne i društvene znanosti Hrvatske akademije znanosti i umjetnosti*, 20, 2002, pp. 29–57 (pp. 42–44).

20 For an edition of the law code of Poljica, see Miroslav Pera, *Poljički statut*, Split, 1988. There is an English translation of the text by Edo Pivčević ('The Statute of Poljica' published for the British-Croatian Society in *BC Review*, 11–12, Bristol, 1978), but this was unavailable to me at the time of writing. For more information on the law code of Poljica, see the bibliography published in Pera, *Poljički statut*, pp. 555–581.

21 Because of this, the law code of Poljica was continually revised until the eighteenth century, but sometimes in such a manner as to obscure the original version of its text. However, most of the additions are dated, which facilitates its use.

22 Thus for instance, Josip Kolanović, 'Hrvatsko običajno pravo prema ispravama XIV. i XV. Stoljeća', *Arhivski vjesnik*, 36, 1993, pp. 85–98 (p. 87).

23 The exact dating of the transfer of authority is still debated. See Nada Klaić, 'Kako i kada su knezovi krčki stekli Modruš i Vinodol?', *Vjesnik Historijskih arhiva u Rijeci i Pazinu*, 16, 1971, pp. 129–168; Margeti6, *Iz vinodolske proslosti*, pp. 15–26; Levak, 'Podrijetlo', pp. 39–40.

24 On the establishment of Venetian authority over Poljica, see Šunjić, *Dalmacija*, pp. 67–69; Ante Laušić, *Postanak i razvitak Poljičke kneževine (do kraja XV stoljeća)*, Split, 1991, 105–107. For the broader political context, see Engel, 77ie *Realm*, pp. 280–288; and Elemér Mályusz, 'The four Tallóci brothers', *Quaestiones Medii Aevi Novae*, 3 (Warsaw), 1998, pp. 137–175 (pp. 155-157, 165–169).

In respect of the other law codes, it has usually been argued that they were drawn up as a result of the transfer to Venetian rule of the territories to which they applied. Closer examination suggests, however, that they were in fact composed at a time of relative political and social stability, having already been for about forty years under Venetian rule.[25] It is, nevertheless, undeniable that they were recorded at a time when Venice was actively promoting legislative and administrative reform both within Venice itself and in some of the Dalmatian cities which lay under its sway (most notably Zadar, the statute of which achieved its final form at this time).[26] To an extent, therefore, codification resulted from efforts by the central authority to introduce order and coherence to existing legal practices by putting the law into writing.

Another issue relates to the manner in which these law codes were recorded. Only those of Vinodol and Poljica were formally promulgated by their respective local magistracies (although, of course, with the subsequent approval of their superiors). The remaining four were essentially 'private' compilations which were put together by well-informed members of the local establishment. In the case of the law code of Vrana and the statutes of the *ligae*, these were then promulgated by representatives of the Venetian authorities. We do not know, however, what happened in the case of the law code of Novigrad. We may infer, however, that it received general acceptance from the fact that its content was officially transcribed a century later by the count of Zadar. At the time when the transcript was made, the Novigrad area was already threatened by the Ottomans and, indeed, a part of Novigrad's territory lay under Turkish occupation.[27]

The interest shown by the Croatian lesser nobility of the Littoral in writing down their customs was probably influenced by the more developed legislative practices of the neighbouring Dalmatian cities. The legally literate culture of the Littoral contrasted with the predominantly

25 Zadar, Nin, Vrana and Novigrad came under Venetian authority in 1409. For further details, see Šunjić, *Dalmacija*, pp. 40–47; Engel, *The Realm*, pp. 234–235.

26 For further details, see Tomislav Raukar, Ivo Petricioli, Franjo Svelec, Sime Pericic, *Zadar pod mletackom upravom 1409–1797*, vol 3 of the series *Proslost Zadra*, Zadar, 1987, pp. 46–47.

27 For further details on the political situation in the mid-sixteenth century as it affected Novigrad and its district, see Ivna Anzulovic, 'Razgranicenje izmedu mletacke i turske vlasti na zadarskom prostoru 1576. godine, nakon Ciparskog rata', *Zadarska smotra*, 47, no. 1–3, Zadar, 1998, pp. 53–148 (esp. pp. 57, 98). It is possible that the copy was made because the Venetian authorities still entertained hopes in the early 1550s of repopulating the area.

oral culture of the hinterland. Moreover, the reason often given by historians that the codes were drawn up as a way of informing Venice as to what local customs and practices were followed is unconvincing. First, the Venetian authorities were cautious about involving themselves in the local affairs of their subject territories.[28] Secondly, the laws with which we are dealing here were applied not by the Venetian authorities but instead by local courts that were administered by local judges and assessors. In short, there was simply no need to inform or to be informed. Nevertheless, whatever the motives behind codification, the fact remains that the Croatian codes have provided historians with abundant material, which enables comparisons with the customary law of Hungary.

In respect of Hungarian customary law, Werbőczy did his best to provide a distillation of what he knew and to make such revisions and adjustments as he thought appropriate. The compilers of Croatian customary law were less educated than Werbőczy and consequently less ambitious, but the codes which they drew up cannot be considered as simple renditions of local custom as it really was. Legal historians have demonstrated that the Croatian authors also drew on such authorities as Justinian's *Digest*,[19] the acts of ecclesiastical councils (in the first place that of Lateran IV of 1215 and of Lyons of 1245), the *Decretum* of Gratian, the *Sextae* of 1298, and so on.[30] Sometimes they even quote (or translate) these sources *verbatim*, but they seldom refer explicitly to their sources. Unlike Werbőczy, it does not seem, therefore, that they were trying to impress their readers by showing off their knowledge. Of course, it may be that they trusted their readers to recognize the sources for themselves and thus to give them the credit anyway. It is more likely, however, that the passages involved had by this time worked their way into common legal thinking and that they had acquired a customary character. The penetration of Croatian customs by elements of the European *ius commune* carries important implications not just for this region but also for our understanding of how Hungarian law itself may have developed.

Croatian and Hungarian customary law did not differ much from one another — at least in respect of property and family law (with which the present author is most familiar). The congruence between the two is not surprising given that the social systems of both countries were practically

28 On this matter, see Šunjić, *Dalmacija*, pp. 80–81, 178–184.

29 See, for example, art. 49c of the law code of Poljica, which is almost a direct translation *of Novella* 115 (from 542 AD). For further details, see Margetić, *Hrvatsko srednjovjekovno obiteljsko*, pp. 269–271.

30 For further details, see Pera, *Poljički statut*, pp. 392–394.

parts of one more or less unified structure. This was particularly the case in respect of the Croatian and Hungarian nobilities in whose rights both Werbőczy and the Croatian law codes were primarily interested. Nevertheless, there were some slight differences. For instance, Croatia did not recognize the institution of the filial quarter and it preferred the dowry to the dower.[31] On the other hand, the differences between the customs of Croatia and other regions (including Hungary) were frequently emphasized at the time.

Despite this apparent congruence, differences between the customs of Croatia and those of other regions (including Hungary) were frequently remarked upon during the course of the later Middle Ages.[32] The most famous example of this arose in 1361 in the context of a law suit between the Zaratin nobleman James de Cesamis (by origin a member of Croatian nobility) and the Glamočani kindred. During the course of the suit, King Louis transferred the case to the court of the Croatian ban, Nicholas Szécsi, instructing the ban to proceed according to Hungarian and not according to Dalmatian or Croatian custom.[33] Louis's decision has provoked astonishment among historians, since both King Louis and Ban Nicholas usually acted to promote Croatian customs, as indeed did the royal Angevin officials in Croatia.[34] Moreover, it does not seem that in this particular issue there was any significant difference between Hungarian, Croatian and Dalmatian customary arrangements. Almost certainly, Louis's decision was taken on pragmatic grounds and had nothing to do with any supposed primacy of Hungarian law. Since James was a Dalmatian who might reasonably expect to be judged by his own law, and since the Glamočani counted as Croatian, Hungarian customs might be seen as a neutral set of principles which favoured neither side.

A comparable instance was recorded in 1375, although on this occasion it worked to the advantage of Croatian customs. In that year, Charles of Durazzo, duke of Croatia-Dalmatia, set aside a judgement previously

31 For further details, see Karbić, 'Hrvatski plemićki rod'.

32 For further details, see Kolanović, 'Hrvatsko običajno pravo', pp. 90–95. See also the case regarding differences of customary law of Croatia and Slavonia in an inheritance dispute in 1499 (Karbić, 'Hrvatski plemicki rod', p. 101, esp. note 121).

33 Tadija Smičiklas, *Diplomatički zbornik Kraljevine Hrvatske, Dalmacije i Slavonije. Codex diplomatics Regni Croatiae, Dalmatiae et Slavoniae*, 13, Zagreb, 1915, no 127, pp. 185–190 (p. 188).

34 As an example, see Stjepan Antoljak, 'Izumiranje i nestanak hrvatskog plemstva u okolici Zadra', *Radovi Instituta Jugoslavenske akademije znanosti i umjetnosti u Zadru*, 9, 1962, pp. 55–115 (p. 55).

passed in his court on the basis of Sicilian law and returned the case to the ban's court in Knin to be adjudicated according to Croatian customs.[35] Sicilian customs and procedures were plainly at odds with Croatian practice: hence the decision to rehear the case according to Croatian legal norms. Moreover, in this case Sicilian customs had been followed almost coincidentally as the duke, being himself a South Italian Angevin prince, relied in his chancellery on legal experts drawn from his Italian dominions.

There are several additional cases of this type where actions were moved from one sphere of customary law to another, including one which contrasted the custom of Poljica to that of the whole of the kingdom of Croatia.[36] It seems, however, that in all these cases — just as in the two outlined above — the reasons for moving the case were pragmatic and were not bound up with any such notion as there being a hierarchy of customary laws in which local codes assumed an inferior or subsidiary position. Cases were moved on grounds of expediency and suitability. Thus, even this brief survey suggests that we should consider customary provisions as they were followed in the different kingdoms and parts of Hungary and Croatia not in terms of a hierarchy or of a competition for priority but instead in terms of the coexistence of complementary legal

35 See for example Kolanovic, 'Hrvatsko običajno pravo', pp. 95–97.

36 For further details, see Nazor, 'Granica', pp. *Al–A'i.*

37 For further details on the acceptance of this principle in the fourteenth- and early fifteenth-century kingdom of Hungary in general, see: János M. Bak, Pál Engel, James Ross Sweeney, 'Statute Law and Custom', in (eds) Bak, Engel, Sweeney, *The Laws of the Medieval Kingdom of Hungary*, vol. 2, Salt Lake City, 1992, pp. xlv–xlviii.

Hungarian Procedural Law and Part Two of the *Tripartitum*

Martyn Rady

1. Introduction

The *Tripartitum* was presented to the Hungarian diet in 1514 and published in 1517. Although some alterations were made in the course of the intervening period (most notably in respect of III. 25 [2], on the legal condition of the peasantry), the vast bulk of the work as well as its internal organization remained unchanged. The *Tripartitum* is, as its name suggests, arranged in three principal parts, to which are attached a Prologue and a number of smaller items: a preface, dedication to the reader, the text of the royal *approbatio,* several poems, and so on.[1] As Werbőczy explained in the opening chapter of Part One, he had originally sought to arrange the main body of the text in three parts according to the civilian distinctions of *personae, res* and *actiones,* but had been unable for practical reasons to keep to this scheme. Thus, Part One is concerned with both *personae* and *res,* Part Two with procedures and sources of legal authority, and Part Three with those subordinate jurisdictions (counties, cities, Transylvania, Croatia, Slavonia, and so on) from which a case might be moved to the royal courts. In what follows, we are principally concerned with Part Two of the *Tripartitum* and with what it conveys in respect of Hungarian procedural law.

The second part of the *Tripartitum* is formally divided into two sections of unequal length. The first of these extends from chapters two to seventeen and treats primarily upon the sources of legal authority. The second section, which is entitled the 'Continuation' *(Prosecutio),* deals

1 Although it received the royal approval, the *Tripartitum* never obtained the royal seal and was not formally communicated to the counties. Although later referred to as 'the Decretum', the *Tripartitum* lacked the legal character of a *decretum.* Its authority rested instead on use and custom.

exclusively with procedure and extends from chapter eighteen to the end of Part Two — almost seventy chapters in all. The opening chapter of Part Two serves an introductory purpose and announces the ordering of the text which follows. In this first chapter, Werbőczy explains that, with Part One of the book now complete, he will remark on 'the procedures used in actions and suits, the execution of judgements and the order in which sentences are to be passed in these matters' *(de causarum, et litium processibus, et executionibus, ac sententiarum super his ferendarum serie).* He goes on to indicate, however, that before embarking upon this task, he will discuss not only how a 'constitution or general decree of the prince should be understood' but also the origin of the custom and unwritten law 'which at this time all of us use'. This prefatory account occupies the first section of Part Two, while 'the procedures used in actions and suits' and their accompaniments make up the Continuation.

2. Sources of Legal Authority

Werbőczy gives no explanation for his decision to include at the beginning of Part Two a lengthy discussion on the origins of Hungarian customary law, on the rights of the ruler in respect of legislation, and on the relationship between privilege and statute *{decretum)}* At first sight, these chapters might be thought to belong more properly within either the Prologue or the opening chapters of Part One.[3] This would seem to be particularly the case in respect of Werbőczy's tortured account of the translation of authority from the *populus* to the *rex* under St Stephen (1000–38) — a translation which apparently did not deprive the *populus* of its law-making capacity (II. 3).[4] There was, however, some logic

2 A *decretum* was a law passed by the diet which received the royal assent.

3 Indeed, such a rearrangement was subsequently undertaken in the early eighteenth-century *Novum Tripartitum.* See National Széchényi Library, Budapest (hereafter OSzK), *Fol. hat.,* 559. The mid-sixteenth century *Quadripartitum,* by contrast, dispensed with a Prologue. Some of Werbőczy's own Prologue was, however, retained and conjoined with the discussion of custom given in Part Two of the *Tripartitum.* This combined account formed the opening chapters of Part Three of the *Quadripartitum.* See *Quadripartitum Opus Juris Consuetudinarii Regni Hungariae,* Zagreb, 1798.

4 Apologists of Habsburg absolutism were swift to identify the contradictions in Werbőczy's account. See Izdenczy's 'Etwas von Verböcz', discussed in Ferenc Strada, 'Izdenczy József. Az államtanács első magyar tagja', *A Gróf Klebelsberg Kuno Magyar Történetkutató Intézet Évkonyve,* 10, 1940, pp. 54–149 (pp. 69–70); László Kövesdy, *Examen Verböczyanum,* Pest, 1785, p. 58.

behind Werbőczy's broad arrangement. The rights and obligations which were tested in the courtroom rested on legal instruments which included *decreta,* customary provisions, royal privileges and other types of deed. The weight attaching to these, their validity, and the correct priority to be accorded to the one over the other were vital matters in assessing any individual legal claim.

Werbőczy's interest in establishing a hierarchy of legal authority, by reference to which claims might be assessed, compelled him to tackle anew the relationship of statute to custom. In the Prologue, Werbőczy had presented custom and statute as being separate, equal and competing repositories of law. In Part Two, by contrast, he achieved a formulation which comported more with contemporary Hungarian notions of legal authority.[5] As he asserted, the provisions of statute law were only good in so far as they were approved by use; indeed, statute might be invalidated by contrary practice — 'for actual and continuous use often overturns a law' (II. 2 [9]). In contrast to the Prologue, where he had declared that a later statute might unconditionally overturn an earlier custom, in this part of the work Werbőczy suggests that only the most recently-enacted statute might do so, for it was not yet possible to determine whether it was framed for good or for bad and thus, by implication, whether it carried the sanction of custom (II. 2 [10]). As Werbőczy argued, however, the relationship between statute and custom was reflexive. The efficacy of a statute rested on use, but at the same time statutes might themselves mould and shape custom. Accordingly, even elements of the oldest laws of the kingdom had 'flowed down and been carried over into our custom' (II. 6 [9]). Likewise the procedural innovations of the fourteenth-century Angevin kings had by use acquired a customary character sufficient to make them inviolable, impervious to any subsequent alteration by statute, and indeed the bedrock of the nobility's privileges (II. 6 [12–13]).

Nevertheless, custom was more than statute confirmed by use. To demonstrate this point, Werbőczy turned his attention to those other sources which shaped and determined Hungarian customary law. To begin with, Werbőczy asserted that the broad principles of Hungarian law rested almost entirely on Roman and canonical legal sources: *ex pontificii, caesareique juris fontibus* (II. 6). He did not, however, dwell upon this observation. Instead, he moved smartly on to identify two sources of

5 See in particular the important discussion by the editors of *The Laws of The Medieval Kingdom of Hungary ISO 1–1457 {Decreta Regni Mediaevalis Hungariae,* vol 2), eds János M. Bak, Pál Engel, James Ross Sweeney, Salt Lake City, 1992, pp. xlv — xlviii.

custom which were additional to statute but which, by his arrangement of the text, seem to be imbued with an almost equal efficacy. The first of these was royal privilege. As Werbőczy explained, rights extended by the ruler and upheld repeatedly in court acquired a customary character (II. 6 [10]). They thus ceased to rest on the sanction of privilege but aquired efficacy through use. By the same token, rights given in a privilege, but not exercised, lost over time their validity (II. 12 [6]).[6]

The second source of authority comprised in Werbőczy's account the decisions of judges. As Werbőczy put it, 'custom has come out *[emanavit]* of the verdicts of the judges ordinary of the kingdom and from repeated letters of adjudication passed and delivered and composed in one and the same order, manner and process on many occasions, and confirmed by their lawful execution' (II. 6 [11]). Werbőczy gives no indication as to whether he understands by this anything akin to a declaratory theory of the law.[7] Nor does he suggest how many judicial decisions might be needed to make a custom — this would be left to later commentators.[8] It is certainly the case that, in the earliest years of the sixteenth century, the diet retained an interest in the content of judicial decisions and in their relationship to the customs and laws of the realm.[9] Indeed, it is from this time that we have the earliest evidence of the compilation of something resembling a court report — the so-called *Decisiones Tabulae tempore Wladislai R. in Curia Regiae Majestatis*,

6 A common enough civilian view. See Peter Stein, 'The Civil Law Doctrine of Custom and the Growth of Case Law', in *Scintillae Iuris. Studi in memoria di Gino Gorla*, 3 vols, Milan, 1994, i, pp 371–81 (p. 373).

7 On the declaratory theory of the law, see Rupert Cross and J.W. Harris, *Precedent in English Law*, 4th edition, Oxford, 1991, pp. 25–8.

8 Stephen Huszty, *Jurisprudentia practica seu Commentarius novus in Jus Hungaricum*, Nagyszombat, 1766, p. 27 (ad I. 4); János Szegedi, *Tripartitum Juris Hungarici Tyrocinium*, Kassa, 1764 (first published in 1734), pp. 53 (ad pro. 11), 237 (ad II. 2), 276 (ad II. 6); Andreas Huszti, *Iurisprudentia Hungarico Transilvanica*, Szeben, 1742, p. 60; *Commissio Systematica. Observationes in Tripartitum*, OSzK, *Qu. Lat.*, 2378, fol 57v. We do not wish to enter here into the issue of judge-made law in Hungary. Plainly, as Szegedi pointed out (ibid, pp. 13–4, *Ad lectorem)*, the absence of anything resembling the reports of the Roman *Rota* or of the *scabini* of Leipzig must qualify all arguments in this direction. Szegedi preferred to see the law as deriving from *praxis* and learned by wrangling *in patvariis: i.e.* that the law was made by lawyers and not by judges. Cf. the fourteenth-century *Ars Notarialis* which similarly noted that the law was learned *ex auditu — iuvenes a senioribus et compares a comparibus*, cited by György Bónis, *Középkori jogunk elemei. Római jog, kánonjog, szokásjog*, Budapest, 1972, p. 161.

9 1505: 10 (5). Discussed by József Illés, *Bevezetés a magyar jog történetébe. Aforrások története*, Budapest, 1910, pp. 84–5.

judicialiter per sententiamfactae.[10] In contrast, however, to later writers (most notably Kitonich), Werbőczy does not cite specific *decisiones* to make a point. At the very most, all he gives us are reminiscences and reflections derived from his own experience as a judge.[11]

Having addressed the three sources of legal and customary provision — namely, *decreta,* privileges and judicial decisions — Werbőczy turned to more practical matters and, specifically, to the question of the content and context of privileges, for in these were recorded those rights belonging to individual noblemen which were most likely to be contested in court (II. 7–12). Werbőczy listed the ways in which privileges could be rendered invalid — namely, by statute; by their formal revocation; by their repeated repudiation by judges; by their harming the rights of others; by not conforming in their content to the principles of law and custom; and by failure on the part of the recipient to exercise the rights included in the privilege. Thereafter, Werbőczy's account logically passed to a brief discussion of seals which led in turn to a list of the kings of Hungary whose privileges might be deemed authentic, as well as to the types of seal which might be expected to be found on charters issued by individual rulers. In several cases, extensive extracts are given in the text, taken from surviving charters, as further tests against which an individual instrument's validity might be judged. The whole point of this exercise was to communicate the formal marks of proof by reference to which the authenticity of a privilege could be established. Hereafter ensued a discussion of forgeries. Werbőczy indicates the very large number of forgeries which had been produced in the middle decades of the fifteenth century, and he reproduces in its entirety a letter of judgement issued by the royal council in 1448. This document condemned to death the notorious forger, Gabriel Litteratus, and listed several dozen of his most conspicuous forgeries with reference to the purported issuing agency, the recipient and the contents of the forged deed (II. 13–4).

Even documents which were not forged might, however, lack legal authority in a court of law. In respect of these, Werbőczy discusses two categories (II. 15). The first consisted of transcripts of privileges, in respect of which Werbőczy repeated the provisions of article 96 of the *decretum* of 1492., According to this enactment, transcripts were not

10 OSzlC, *Fol. Lat.*, 4023, Codex Ilosvay, fols 122r–124v. A garbled version of this text is given in J.N. Kovachich, *Notitiae Praeliminares,* Pest, 1820, pp. 400–6. See also György Bónis, *Közepkóri jogunk elemei. Római jog, kánonjog, szokásjog,* Budapest, 1972, pp. 218–22.

11 II. 14. [49]; II. 27 [4–5]; II. 83 [9].

considered valid instruments unless they had been copied from the original document either in the presence of an ordinary of the realm or, upon the mandate of a judge, in any one of the kingdom's places of authentication *(loca credibilia).* Werbőczy permitted, however, copies of original charters which were retained in the depositories of *loca credibilia,* to retain a fully legal authority (II. 15. [3]). This more fully conformed to customary practice, although in several other respects both Werbőczy's account and the law of 1492 diverged both from custom and subsequent use.[12] The second category of legally dubious deeds, as identified by Werbőczy, consisted of charters drawn up in *loca credibilia* on behalf of someone of whose identity the authenticating agency had no firm knowledge. Privileges of this type, which were conspicuous by the formula, *de cujus, vel quorum notitia nos talis homo certificavit, aut assecuravit* (II. 16), were automatically invalid unless the chapter or convent was satisfied that the person on whose behalf the deed was issued actually existed and was known to have given their consent to its publication. Impersonation and 'ghosting' *(larva)* were evidently recurrent problems in cases proceeding before Hungarian courts, particularly those affecting the alienation of land where the consent of relatives was required, and stiff penalties were threatened in the event of any chapter or convent colluding in this crime.[13]

The final chapter (II. 17) of the first section of Part Two is addressed obliquely to judges of the realm and it reviews the methods and type of investigation which they should undertake in order to establish the veracity of deeds brought before them. Judges are specifically enjoined to pay heed to the language of the document, to its seal (but not worry overmuch if its broken), to specific references contained within the document, and to pursue any suggestion of falsification or fabrication. Noblemen of the realm are similarly told to disclose attempts to impersonate them or to have false deeds issued in their name.

12 Imre Hajnik, *Okirati bizonyitás a középkori magyar perjogban,* Budapest, 1886 (Értekezések a társadalmi tudományok köréből, viii/5), p. 39.

13 My colleague, Zsolt Hunyadi, tells me that in all five cases of *larva* which he has uncovered, the culprits are women. This would coincide with my own finding in respect of the ghosting of an *alienam mulierem* — Hungarian National Archive, *Collectio Antemohácsiana* (hereafter, *Dl), Dl* 17171. The explanation must surely be that women were less likely to be recognized in court on account of their seclusion and so their impersonation was easier. See also 1492:97.

3. The 'Continuation' and its Limits

The Continuation of Part Two is strictly dedicated to matters of procedure, as followed in the central curia courts of the realm.[14] It is, however, unusual in its arrangement. Because of its chronological treatment of the stages of an action, the Continuation resembles at first glance any one of the many *ordines judiciariae* which were published widely in Europe as guides to procedure in ecclesiastical courts.[15] Whereas, however, the *ordines judiciariae* usually aimed at a comprehensive review of procedures, Werbőczy's account is selective and it leaves out large chunks of the judicial process. Instead, therefore, of taking us through the various stages of an action, Werbőczy moves briskly from the summons to the proof, and thence to the sentence and remedies. Although there are indications in the text with respect to the procedures to be followed in the courtroom, these are not discussed by Werbőczy in any detail but are only alluded to. At no point in the text does Werbőczy fulfil the promise given in the first chapter to explain the *series sententiarum* (that is, the passage of interlocutory judgements) which moved the case within the courtroom. Moreover, unlike later commentators, Werbőczy discusses neither the personnel who might be present in the court, nor even which of the several courts in the curia were the most appropriate for specific types of action. In respect of the last point, all we are given is a short account of the relationship between secular and ecclesiastical courts, the purpose of which is to explain that actions involving debt or land should not be brought before church tribunals (II. 52). Elsewhere, as for instance in his

14 Several courts functioned in the curia. The most important was the court of the *personalis* who represented the king's 'personal presence'. The court of the *personalis* was a collegiate court on whose bench or *tabula* sat the other principal judges of the realm together with assorted dignitaries and noblemen. The justiciar, palatine and tavernicus had their own courts, the competences of which partly overlapped with the *personalis* court. Unscrupulous litigants might accordingly start the same case in several courts to run concomitantly (see 1.70 [10]). In the late sixteenth century, the palatine as *locumtenens* substituted for the king's *propria persona, i.e.* his 'real' self. The court which he headed was later renamed the *Septemviralis*, and counted as the kingdom's supreme court of appeal. Since, however, the palatine was usually too busy to attend, the *Septemviralis* court was in reality most often presided over by the justiciar *(országbiró).*

15 See thus, A-M. Stickler, 'Ordines Judiciarii', in *Dictionnaire de droit canonique*, vi, Paris, 1957, cols 1132–43; also, Ludwig Wahrmund, *Quellen zur Geschichte des Römisch-kanonischen Processes im Mittelalter*, 5 vols, Innsbruck and Heidelberg, 1905–31.

discussion of inquests, Werbőczy presumes his audience to be already familiar with the differences between the institutions which he describes.

The explanation for Werbőczy's abbreviated treatment of procedure lies in respect of his audience. From the fourteenth century onwards, legal actions in Hungary were not only largely determined by written instruments but also conducted in the main by attorneys acting on behalf of the individual litigants. As elsewhere in Europe, in Hungary also, 'the parties disappeared behind their advocates and lawyers'.[16] In many cases, there was no longer any need for the parties to attend court at all — indeed, the whole business might be wrapped up in private discussions between the lawyers and the judge in the inn.[17] Under these circumstances, Werbőczy evidently saw little point in discussing procedural matters which would normally be handled on a nobleman's behalf by his agents. Instead, he confined his account to what he regarded as the most important parts of the action where the noble litigant was most likely to be directly involved. Indeed, towards the end of Part Two, Werbőczy provided his noble audience with a 'check list' which itemized those particular matters which should be attended to in order to prevent a suit from failing (II: 82). In short, the Continuation is addressed to noblemen who are presumed to understand the broad outlines and vocabulary of procedure but not the details in which they might be personally involved, and less so to the attorneys who actually managed their suits in court.

In order, thus, to reconstruct Hungarian procedure as followed in the early years of the sixteenth century, we must look beyond Werbőczy's account. Fortunately, there are other sources on which we may rely. The most important of these are surviving formularies and the various types of record issued during the course and at the conclusion of cases passing through the courts. Although the *litterae judiciales* and *sententionales* issued by the courts are themselves also terse and abbreviated, the

16 John Gilissen, 'La preuve en Europe du XVIe au début du XIXe siècle', *Recueils de la Société Jean Bodin*, 19, 1965 *{La Preuve*, vol 2), pp. 755–833 (p. 762).

17 By the eighteenth century, the collegiate structure of the courts had become so akin to a private committee that it was exceptional for the parties even to be called to give oral evidence. The entire proceedings were handled on the basis of the documents submitted, even in the case of criminal suits. In the 1790s, therefore, Ferenc Kazinczy did not attend the sessions of the *Tabula Regia* which handed down the death penalty to him for high treason, but he seems to have peeked into the evidently shambolic meeting of the *Septemviralis* court which upheld the judgement. See Kalman Benda, *A magyar jakobinusok. Iratok, levelek, naplók*, Budapest, 1957, esp. pp. 261–2. (Kazinczy's sentence was later commuted by Francis II.)

signaturae or notes which often accompany them yield important clues with regard to the stages of an action.[18] Additionally, we may work backwards from later records and court manuals which survive in large quantities from the seventeenth and eighteenth centuries, as also from the mid-sixteenth century *Quadripartitum* which was intended (in vain, as it turned out) to replace the *Tripartitum.* Obviously, this material should be treated with caution, for additional procedures later entered Hungarian court practice, particularly in respect of remedies in law. The reconstruction which folldws is intended to supplement and explicate Werbőczy's own abbreviated account of procedure. It will, however, be clear from the start that an action in Hungarian law broadly adhered to practices followed in ecclesiastical courts in Catholic Europe. Certainly, some local peculiarities will be evident. These should not, however, obscure Hungary's general conformity to Romano-canonical procedural law and the extent to which, as Werbőczy explained, Hungarian practice drew its inspiration *ex pontificii, caesareique juris fontibus.*

4. Commencing an Action

Despite the wealth of material on which we may rely, the precise method of commencing a suit remains far from certain. The surviving charters imply that the action was begun by verbal petition to the ruler or to one of his principal judges: hence the formulae in letters introducing an action, *exponitur nobis [id est: regi, iudici], expositum est nobis, dicitur nobis,* and so on. Seventeenth-century materials suggest the use of oral *supplicationes* which were subsequently written up in the vernacular.[19] Indeed, right up until the nineteenth century, oral *(szóbeli)* petitioning was considered normal in respect of minor pleas brought before county courts.[20]

In view of the importance attaching to the written record, it is, however, implausible that most petitions brought before the central courts of the realm were delivered orally. Surprisingly, an oblique clue to the commencement of an action is given by Werbőczy. In his discussion of

18 These were most commonly entered on the dorse of charters issued by the court. See *Dl* 63239, *Dl* 20424–5 and, most notably, *Dl* 10008, fol 18r-v. Discussed by Imre Hajnik, *A magyar birósági szervezet és perjog az Árpad- és a vegyes-házi királyok alatt,* Budapest, 1899, pp. 227–8.

19 Hungarian National Archive, Section O (hereafter, MOLO), Birósági Levéltár, 3, *Mandala Judiciaria,* Bundle 1, file for 1652.

20 Discussed at length in the invaluable manual of Ignácz Zsoldos, *A szolgabirói hivatal. Törvénykezési resz,* 2nd edition, Papa, 1844, esp. p. 44.

how suits might fail, Werbőczy drew attention to the importance of framing letters of summons accurately. The examples which he provides, however, are not framed in the fashion of a letter of summons at all, but instead in the form of a petition: for example, that the plaintiff s adversary 'sent out and forth X and Y, his men, to this place or village of mine and he did and caused there this and that damage to my peasants'; or that, at the adversary's behest, 'X and Y, his servants and peasants, having found or come across such and such a servant of mine in such and such a place beat him sorely and severely' (II. 82).

It would seem that what Werbőczy is describing here is not a summons at all but instead a *libellus* or *Klageschrift.*[21] These were clearly being used in Hungarian ecclesiastical courts by no later than the fifteenth century.[22] In respect of secular suits, however, they only survive, in any significant quantity from the seventeenth century. Nevertheless, the earliest extant Hungarian case-file, dating from 1588, refers unmistakeably to information, now lost, which had been previously entered *in papiro in modum libelli.*[23] In later Hungarian practice, the *libellus* was indeed a 'little book', being a folio folded lengthways, on the first side of which was written the names of the plaintiff and defendant, the charge, the circumstances of the dispute, as well as any relevant dates and places: in short, all those matters which Werbőczy urged should be most carefully entered on the 'summons'. We will, moreover, occasionally find the *libellus* appearing in the text of the *Tripartitum* under quite different names: most notably as the *actio, declaratio actionis, series actionis* or *acquisitio* (II. 26 [pr]; II. 82 [1] & [4]), although these terms are not consistently applied.[24]

Nevertheless, the question must arise: why should Werbőczy conflate the petition with the summons? The answer must surely be that the petition once it had been received, read and approved by the protonotaries of the curia, *was recast in the fashion of a letter of summons.*[15] Possibly, as in the eighteenth century, agents working on behalf of the plaintiff were responsible for this recasting, with officials of the court simply giving approval to the draft. We may guess, however, that, as in later centuries, the *libellus* was at this point filed and served no further legal purpose. It

21 Generally, on this subject, see Willibald M. Plöchl, *Geschichte des Kirchenrechts,* 2nd edition, 5 vols, Vienna and Munich, 1960–9, 2, pp. 355–6.
22 M.G. Kovachich, *Formulae Solennes Styli,* Pest, 1799, pp. 404–6.
23 MOLO, Birósági Levéltár, 1, *Processus Octavales,* Bundle 4, no 183.
24 The point is also made by Alajos Degre in respect of the *Quadripartitum.* See Degre, *A Négyeskönyv perjogi anyaga,* Budapest, 1935, p. 119.
25 See thus Hajnik, *A magyar birósági szervezet és per jog,* p. 413.

was certainly not passed on to the defendant. Instead, the defendant responded to the information and charges which were communicated to him in the letter of summons. Accordingly, when the suit eventually came to court, the charges and circumstances laid in the letter of summons provided the substance of the claim. They could not be emended or added to without the case collapsing. Additionally, the summons determined, according to its date of issue, the relative position of the case on the court list. This list was, however, subject to change as more pressing cases might be moved to the top.[26]

The importance attaching to the summons explains Werbőczy's insistent advice that it must be drawn up carefully. If composed ambiguously, then it could all too easily result in the action being lost. Indeed, in order to ensure that the right vocabulary and information was included, one mid-sixteenth century Transylvanian formulary included for the benefit of clerks no less than 34 different versions of a summons: summons by reason of the non-fulfilment of an obligation, summons on account of the kidnapping of a nobleman, summons for beating a royal bailiff, and so on.[27] Moreover, the plaintiff had to take care that the defendant named was legally capable, for a summons addressed to a dead man or minor misjoined the action and automatically rendered it void. The letter of summons did more, however, than just serve to give notice to the defendant that a suit had being brought against him. It also determined the speed with which the case would be heard for it laid down when the matter in hand might be expected to come to court. Cases involving violence or where an urgent solution was thought expedient were essentially hurried through the courts, to be commenced within a matter of weeks.[28] Other litigation proceeded at a more leisurely pace and it might, indeed, take several years before a less urgent case was heard at one of the standard octave sessions of the courts.[29]

26 Degré, *A Negyeskönyv perjogi anyaga*, pp. 134–6. See also II. 3 on the priority which should be given to retrials.

27 Anna Pécsy, 'Az erdélyi fejedelmi kancellária elso formulariumos kézirata', *Emlékkönyv Szentpétery Imre*, Budapest, 1938, pp. 385–95.

28 Thus matters concerning debt and pledge, the rights of widows and daughters, division of property among heirs and retrials, even if opened by an *evocatio simplex* were concluded *brevi termino* (II. 18 [3]).

29 Several years or four octave terms — by the early sixteenth century, the principal courts of the realm only operated two octave courts annually. Each octave term lasted approximately fifty to seventy days. See Hajnik, *A magyar birósági szervezet és perjog*, p. 255.

By the second half of the fifteenth century there were two principal types of summons employed in Hungary: the *evocatio simplex* and the *insinuatio.* The *evocatio simplex* was usually delivered in respect of property actions where the ownership of the estate or the lie of its boundaries was contested (II. 18 [4]). Normally, three summonses, each setting a time to appear in court, were issued, the last of which involved the summons being read aloud at three markets. For every occasion on which the defendant failed to attend court he would be fined and, eventually, the case would be heard in his absence. After 1486, the 'proclamation at three markets' was replaced by the *insinuatio* ('terminal summons'), which formally notified the defendant in writing that the case would proceed irrespective of his own attendance (II. 18 [7]). Cases introduced by the *evocatio simplex* were usually 'protracted' and several years might elapse before they were concluded. They were invariably heard at the standard octave sessions of the curia courts. Plainly, their resolution was not considered pressing.

In cases where violence was involved or where a speedy resolution of property claims was thought appropriate, an *insinuatio* might be issued on the first occasion of summons. This would usually be combined with the setting of a date for a hearing which was only a fortnight or month distant: the so-called *evocatio brevis* or *sine procrastione.* Indeed, Werbőczy and, subsequently, Kitonich, understand the *insinuatio* automatically to involve a *brevis* date (II. 18 [3]).[30] The use of the *brevis* necessitated the curia courts sitting in virtually permanent session, i.e. outside the standard octave terms. Almost certainly, the speed with which the *brevis* forced actions to court explains why litigants should often allege minor acts of violence — the slaughter of a sheep or the theft of a beehive — in their plaint. For a claim that violence had been done had the automatic consequence of hurrying the matter to trial. By the same token, those summoned at short notice were often obliged to attend court unprepared and at great personal inconvenience. Indeed, they might not receive the summons until it was too late. Unsurprisingly, therefore, several attempts were made to restrict the use of the *brevis.* Clearly though, its benefits were thought to outweigh its disadvantages and it continued in practice to be widely used.[31]

30 Kitonich, ii. 3 (1619 edition, p. 40). For full reference, see back, p. 5, note 11.

31 1464: 4; 1486: 7. See also *Laws of the Medieval Kingdom of Hungary 14.58–1490 (Decreta Regni Mediaevalis Hungariae,* vol 3), eds János M. Bak, Leslie S. Domonkos and Paul B. Harvey, Jr, Los Angeles, 1996, pp. 91, 107, 133.

A further and quite different procedure for summoning lay in regard to the 'personal summons, notice and prohibition' *(personali citatione, admonitione, et prohibitione).* This dispensed with all legal formalities and was principally intended to be used when both parties were able by prior arrangement to come to court and have their case heard on the spot. It appears principally to have been used in cases of debt (II. 20).[32]

5. The Summons and Out-of-Court Procedures

The letter of summons might not be delivered personally by the plaintiff to his adversary. Instead, the plaintiff was obliged to convey it to the place of authentication, chapter or convent, named in the letter (II. 21). The chapter or convent appointed one of the handful of royal bailiffs, usually noblemen of the relevant county, specified in the letter of summons as well as one of its own number who was charged with overseeing the bailiff and completing the relevant paperwork. It was the bailiffs responsibility to have the summons delivered properly to the defendant — a procedure which Werbőczy discusses in detail since failure to present the summons properly carried the automatic consequence of halting the suit (II. 19). The letter of summons might be read by the defendant, but he could not retain it. He was, however, permitted to make a copy.[33]

In the majority of cases, the letter of summons also instructed the bailiff and cleric to perform additional, 'out-of-court' tasks which were related to the business of the summons.[34] The two most common instructions of this type were to hold an inquest or to deliver notice. The first of these *(litterae inquisitoriae)* ordered the bailiff and cleric to hold an inquest which would determine whether the plaint had any substance and thus whether a summons should be delivered at all. This type of investigation was most usually employed in cases of violent trespass. The *inquisitio simplex* took evidence of neighbours, abutters and local noblemen. If the inquest found the plaint justified, then it followed this up by communicating the relevant summonses and specifying a date for the hearing. Should it establish that other parties were involved in the dispute who had not been named in the original letter, the bailiff and cleric were empowered to issue out additional summonses. Upon completing the inquest, the

32 See also Kitonich, ii. 4 (1619 edition, p. 44). The *Quadripartilum* regards this procedure as being, however, discontinued: *Quadripartitum,* pp. 261–3 **(111.** 15).

33 Degré, *A Négyeskönyv perjogi anyaga,* pp. 124–5.

34 Hajnik, *A magyar birósági szervezet és perjog,* p. 194.

cleric who had performed the inquest reported back in writing to the court which had delivered the mandate, commenting briefly on the outcome of the inquiry and stating whom had been summoned *(cum nominibus evocatorum).* [35] The report of the inquest would constitute evidence which might be relied upon in court. On account, however, of the cursory nature of the investigation, often two, three or even more inquests might be separately sent to take evidence and command attendance at court.[36]

Letters of notice *(litterae ammonitoriae)* served largely as a catch-all for almost all other business — as a form of notice and warning in respect of impending legal business or as an injunction.[37] The plaintiff would explain in his *libellus* that he wished to engage in a transaction or to prevent parties infringing his legal rights. His *libellus* was accordingly recast in the form of *litterae* which mandated a bailiff and cleric to notify all parties affected. These most typically included neighbours and relatives of the plaintiff who considered themselves to have concurrent rights in respect of the business under transaction. It was the task of the bailiff and cleric to hunt these out. If they indeed objected to the transaction, then they were subsequently summoned to court to explain their position. Likewise, those served with an injunction, most typically to vacate a property or to hand over deeds in their possession, but who objected that this was unjust were also summoned to court to explain their position (II. 24).[38] Similar procedures accompanied institutions to properties and review of boundaries. If the institution or boundaries were contested, then summonses were duly issued by the bailiff and cleric. Summonses involving institutions and boundaries were invariably simple *evocationes* rather than *insinuationes* as the matters arising were considered insufficiently pressing to justify an early hearing.

These out-of-court procedures allowed exceptional discretionary powers to the bailiff and cleric. Not only were they responsible for investigating the facts of the case but they were also charged with establishing the identity of all parties who might have an interest in any subsequent

35 *Relationes* of this type are invariably formulaic. They record the charges laid in the mandate of instruction, report that the bailiff and cleric took evidence *palam et occulte,* and that they *omnia premissa et quevis premissorum singula sic et suo modo facta et patrata fuisse rescivissent sicuti et quemadmodum eidem vestre serenitati [id est recte, iudici] expositum extitissent.*

36 Hajnik, *A magyar birósági szervezet és perjog,* pp. 291–2.

37 For the *ammonitioladmonitio* as a *notitia,* see *Commissio Systematica. Observationes in Tripartitum,* fol 27v.

38 The instruction to hand over deeds was usually given in *litterae ammonitoriae et exhibitorae.*

transaction or litigation. Moreover, they were expected to decide whom to summon and to ensure that the summons so issued was both accurately phrased, correctly delivered and returned in time to them. In view of these functions and responsibilities, it is not surprising that Werbőczy should consider the bailiff to be *tanquam iudex* (II. 22 [2]). By the same token, it was perhaps inevitable that bailiffs and their supervising clerics should on occasions be violently attacked by aggrieved parties and even murdered.[39]

6. The Trial

Let us imagine that the defendant, having received the summons, actually attended the court. (We say 'actually' because all too frequently the summons was ignored or not received in time). In advance of the case opening, there would be much time spent waiting for the other party actually to attend. In the event of an *evocatio simplex*, the summons specified only the octave term at which the case would be heard. It was thus entirely possible to spend several weeks or even months waiting for one's opponent or his lawyer actually to turn up.[40] Quite how court listings operated under such uncertainties must remain a mystery.

With both parties eventually in attendance, the text of the summons was entered into the court record and the case formally *levata* or 'taken up'. At this point, however, proceedings were frequently adjourned to permit the defendant to recover documents relevant to his case, to have copies made of those in the plaintiffs possession (the so-called *petitio parum)*, or to summon warrantors. It was often only much later that the case was formally resumed and the *proclamatio* which called the parties to order read out.[41] The proceedings which followed were conventionally divided into two parts. The first of these, the *pars exceptiva*, usually involved the defendant's lawyer delivering reasons as to why the action should be abandoned.[42] Doubtless many of these were, as Werbőczy

39 József Vagner, *Adalékok a nyitrai Székes-káptalan történetéhez*, Nyitra, 1896, pp. 120–3 (recording the murder of a canon in 1544).

40 *Dl* 66970; *Dl* 124705; *Dl* 172171; *Dl* 84907 (recording a wait of no less than 70 days).

41 In the late seventeenth and eighteenth centuries, the delay between the *levata* and *proclamatio* might amount to several or more years.

42 *Exceptiones* were later divided into two categories — *dilatoriae* which forced a delay in proceedings, most typically to recover deeds, and *peremptoriae* which, if proven, had the effect of collapsing the case. See Szegedi, *Tyrocinium* (Kassa 1764 edition), pp. 611–2 (ad II. 82).

indicates, *exceptiones frivolae* (II. 83 [6]) and might include many tiresome claims all of which had to be disproved by the plaintiff — for instance, that the plaintiff was a minor or not a nobleman, that his descent and thus property-rights were uncertain, and so on. One fifteenth-century formulary suggests additional ruses which good lawyers were expected to use — that the incorrect seal was impressed on the summons, that a scribe had made a mistake, or even that the judge himself was *suspectus.*[43] On each of these points, the judge was expected to rule, delivering *decisiones interlocutoriae.* During this part of the proceedings, other parties might enter the action as co-plaintiffs *(ingerentes),* and be subject to the same barrage of *exceptiones. Ingerentes* of this type were usually kinsmen of the plaintiff who had a concurrent interest in the property to which the plaintiff laid claim (II. 84).

Once the case had moved beyond the phase of *exceptiones,* it entered the *pars allegativa* or *litis contestatio.* At this point, the instruments of proof were submitted. In property cases, these usually involved the deeds belonging to one or both parties. Invariably, the authenticity of the instruments became the object of scrutiny and debate, and might involve the examination of deeds which were several centuries old — in one case a charter issued by King Coloman at the beginning of the twelfth century, which was almost certainly a fake.[44] Requests that the originals be submitted and not just transcripts were a frequent cause of delay. During this part of the trial, evidence and arguments would be exchanged. In the early eighteenth century, the trial record of this part of the proceedings might run to several hundred pages.

In cases of violent assault or seizure, however, documentary evidence often played only a secondary role and much depended instead on the evidence of witnesses and on the taking of oaths. Under these circumstances the report of any previous *inquisitio simplex* was important but was often judged to need corroboration. Moreover, there might be matters which had arisen in the course of the trial which needed clarification. With the consent of the parties, the case would then be adjourned and a 'common inquest' *(inquisitio communis)* held under the supervision of a bailiff and cleric in the locality where the alleged crime had taken place. The inquest took evidence of witnesses under oath, recording their individual testimonies in detail together with their names and status. Normally, the inquest was held at the county seat and the *ispán* (county sheriff) and his deputy made responsible for enforcing attendance. As an

43 Kovachich, *Formulae Solennes Styli,* pp. 408–9.
44 D/3852.

alternative, an inquest might be appointed to hold a view *(oculata revisio)*, the primary purpose of which was to ascertain who was in physical occupation of a contested estate. Under these circumstances, the inquest was held near the site of the property (II. 41). Once the record of the inquest was submitted to the court, it was possible there to challenge its findings, particularly by disputing the status of witnesses and thus the value of their evidence. If the challenge was upheld, then — depending on whether the challenge had been made by the defendant or plaintiff — either a fine was payable or the case lost (II. 36). In subsequent centuries, challenges of this type might prompt the inquest to be reheard.[45]

With the inquest complete, the litigants were expected to take oaths of their own and to enlist a sufficient number of local noblemen in support of their claim. The number of oath-helpers varied according to the quality of the evidence previously submitted. If the evidence favoured one party more than another, then he was expected to deliver a decisory oath, being supported by forty-nine noblemen. If, however, the common inquest was inconclusive, then the evidence of the earlier *simplex* inquest was brought. This by its very nature favoured the plaintiff, for had it not then the case could hardly have come to court in the first place. The defendant, however, was entitled to summon oath-helpers of his own in order to overturn the findings of a *simplex* inquest. Their number depended on how many inquests had been held. It is clear from Werbőczy's account, moreover, that on occasions oath-helping took place independently of a common inquest. This would appear to be the case when one of the parties refused to give his consent to the holding of a common inquest (II. 32). Clearly, the business of gathering oath-helpers and have them attend the church where this solemn business was conducted might occupy several or more days.[46]

The record of the common inquest and of the oaths submitted, once they had been delivered to the court, usually provided ample evidence of guilt or otherwise. It should, however, be noted that many of the internal workings of the court at the time of trial remain obscure. The *litterae judiciales* and *sententionales* composed by the court at the close of the case seldom give details of the *exceptiones* and *allegationes* and the terms of their rebuttal. Instead they simply list the instruments brought to the court's attention and the outcome of the inquest. Moreover, because proceedings in both the *pars exceptiva* and *litis contestatio* were conducted orally, they are neglected in the formularies.

45 MOLO, Birósági Levéltár, 18, *Processus Tabulares*, Bundle 4, no 19 (dated 1732).

46 *A nagykárolyi gróf Károlyi-család oklevéltár*, ed. (Kálmán Géresi, 5 vols, Budapest, 1882–97, (hereafter *Károlyi)*, vol 3, pp. 57, 62.

In many cases, the action never reached the stage of the judge delivering a final sentence. Instead, the parties, having asked for an adjournment, put together a compromise arrangement which the court formally recorded. Although frequently described as *amicabilis,* compromises of this sort invariably included a *vinculum,* usually in the form of a money payment that had to be discharged by whichever party failed to abide by the terms of the compromise. Alternatively, the parties might consent to the appointment of arbitrators. As we will argue, a negotiated settlement was indeed the preferred outcome in disputes and, in many cases the aim of the sentence itself.

If the suit indeed reached the stage of a final sentence, this would be pronounced by the judge. The judge was expected to base his decision on the exchanges and arguments of the parties and with reference to the documents and other evidence produced during the course of the trial (II. 75 [8]). In the case of the principal curia courts, the judge would take advice of those other judges who were in attendance and of the growing number of noble assessors whose presence in the courtroom was demanded by the diet.[47] The judge's decision was subsequently written up in the form of a privilege with hanging seal. The privilege recorded the names of the parties, the nature of the dispute, the various sittings of the court, the principal elements of proof, and the judge's decision. In cases where violence or wrongful seizure had been proven, and this was frequently the case in disputes over property, very severe sentences were imposed. At the very least, the penalty would be a fine of 200 florins, by payment of which the defendant 'redeemed his head', combined with the confiscation of his entire estate. More usually, however, full sentence of execution was laid and the maldoer's property ordered to be seized. Estates so seized were then either divided between the judge and plaintiff, or handed over to the crown.[48] The guilty party was then delivered to the plaintiff who was responsible for carrying out sentence of death.

47 The principal courts of the realm sat as collegiate bodies. Indeed, in respect of personnel, there appears to have existed in the curia but a single *tabula,* the presidency of which determined the court's formal designation. 48 Werbőczy alleges the former which may be demonstrated by *Oklevéltdr a Tomaj nemzetségbeli losonczi Bánffy család történetéhez,* eds Elemér Varjú and Béla lványi, vol 2, Budapest, 1928, p. 376; *Dl* 14392–3. See, however, *Károlyi,* vol 3, p. 67 where the property of the defendant passed to the royal fisc, *secundum antiquam et approbatam consuetudinem atque legem* (1510).

The capital penalty was, however, never enforced. For if the plaintiff actually killed his adversary, the estate of the defendant was saved and passed on to his heirs. There was clearly, therefore, a strong disincentive to carrying out the sentence. Instead, and Werbőczy describes this alternative procedure in detail, the plaintiff was recommended to take hold of the defendant and bring him before the judge. The judge might sequester the nobleman for up to three days, and within this time the defendant was expected to agree to a solution. Thereafter, he might be detained by the plaintiff until agreement was reached, with sentence of death and full confiscation of his property still hanging over him. A final remedy lay with the king. Quite frequently the king commuted the death sentence and order of confiscation on condition that the defendant come to terms with the plaintiff and reach an amicable arrangement. Should it come to the worst, and the estate of the defendant be confiscated, then his heirs had the right to redeem it at an artificially low price.

Similar procedures aimed at forcing a compromise attended the payment of fines imposed for lesser acts of violence. If the defendant was unable or unwilling to pay, he was first taken before the judge and then held in the home of the plaintiff until his relatives could produce the necessary cash. During this period, however, the nobleman was not to be harmed but had, indeed, to be treated like anyone else in the plaintiffs household (II. 68).[49] It might well be, however, that the plaintiff simply seized the property of the defendant holding it in pledge until the money was paid, or that a compromise was worked out whereby the defendant paid only a lesser sum.[50]

8. Legal Remedies

Hungarian procedural law allowed a variety of legal remedies, all of which had the consequence of prolonging the legal process. The number of remedies available in Hungarian law was a consequence of three factors. In the first place, Hungarian procedural law rested to a large degree on practices followed in the ecclesiastical courts where legal delays were seen as 'an essential device to protect all concerned'.[51] Secondly, there was the sheer problem of enforcement which meant that

49 Lower courts might, however, choose to keep the nobleman in gaol. See *Dl* 26948.
50 *Dl* 107151;*Dl* 67061.
51 Jane E. Sayers, *Papal Judges Delegate in the Province of Canterbury, 1198–1254,* London, 1971, p. 99.

methods of obstruction became institutionalized and accommodated within procedural law. This was particularly the case, as we will see, in respect of the legal device known as the *repulsio.* Finally, in Hungarian law, procedures for appeal were underdeveloped and still depended at the time of the *Tripartitum* upon a mandate being obtained from the king.[52] As a consequence, additional remedies had to be built into procedure in the court of the first instance, particularly in relation to having the case reheard at the same venue. By the mid-sixteenth century, the capacity of Hungarian law to accommodate the retrial or *novum* was considered one of its most signal marks.[53]

The principal instrument used to force a retrial was the *prohibitio.* The term *prohibitio* was, however, a broad one and covered a whole range of legal devices.[54] By the early seventeenth century, the *prohibitio* had been broken down into the separate remedies of the *prohibitio* proper, the *prohibita* and the *inhibition* In respect of rehearings, the first and most obvious use of the *prohibitio* lay in relation to the summons. Defendants frequently failed to receive these in good time or else were delayed in their journey to the court. In their absence, they might be found guilty of contumacy and the case go against them. Under these circumstances, the unlucky defendant was allowed to protest the *litterae judiciales* issued by the judge and, if his *prohibitio (Jnhibitio)* was accepted by the court, the case would be retried with him in attendance. A *prohibitio (prohibita)* might additionally be made after a full trial by either party if they disagreed with the judge's verdict. The party making the *prohibitio* was expected to provide a reason for this either in the court or in the inn, and

52 Werbőczy deals with appeals in Part Three of the *Tripartitum* (III. 6–7, 10) only in the context of the movement of cases from cities and counties to the central courts. The extant records of appeals moved to the curia in the seventeenth and eighteenth centuries reflect the continuing underdevelopment of appeal procedures. The surviving case notes are thin and usually record only the *decisio.* The principal appeal court of the realm, the *Septemviralis,* only started to record its deliberations and sentences in 1791. The appeal in Old Hungarian law constituted a *revisio causae* and not (as partly today) a cassation.

53 *Quadripartitum,* p. iv.

54 *The prohibitio* might also be used to launch a legal action — see II. 20 [4].

55 Kitonich, chapter 5 (1619 edition, pp. 103–27). By the early 17th century, the *prohibitio* was used exclusively to launch an action. The *inhibitio* was used to quash *litterae judiciales* issued on grounds of non-attendance and the *prohibita* to overturn a verdict delivered after a full trial. Evidently, though, the terms lacked consistent application and were even a bone of contention among lawyers. See Kitonich, chapter 8 (1619 edition, p. 200). Transylvanian terminology differed: see György Bónis, *Erdélyi perjogi emlékek,* Kolozsvár, 1942, p. xx.

to do so promptly. If a retrial was refused, then the aggrieved party might personally appeal to the king and he enforce a *novum.*[56] The aggrieved party was, however, expected in the mean time to comply with the initial verdict, even to the extent of vacating a property (II. 77).

We know that few cases proceeding before the courts were actually handled by the judges ordinary of the realm. The palatine, judge royal *(országbiró)* and tavernicus (judge of the towns) were for the most part illiterate thugs who were appointed to office on account of their martial qualities and loyalty to the ruler. Although the extant judicial records hardly ever betray the fact, cases were handled almost in their entirety by protonotaries of the court — the so-called *itélőmesterek* or 'masters of judging'.[57] In similar fashion, we may suspect that the vast majority of cases proceeding before the courts were managed exclusively by lawyers and that the parties were only seldom present in person.[58] It was, however, the case that his own attendance benefited the litigant, for it permitted use of a device borrowed from ecclesiastical law known as the *revocatio procuratorum.* The *revocatio* worked in two ways. It might be used either to countermand a statement made by the lawyer, even to the extent of revoking an entire legal argument if this appeared to be going against the litigant's interest. Secondly, in cases which were brought *brevi termino* to the court, it was possible to dismiss the lawyer after the delivery of the verdict and thus reopen the case anew. Depending upon the stage which the action had reached, *revocatio* carried either no penalty at all, a six florin fine or a two-hundred florin fine. The last of these was reserved for cases of *revocatio* which involved reopening the case well after it had been concluded, or else forced the abandonment of an *inquisitio communis,* oath-taking or search for documents. As an alternative, the plaintiff, if he felt the case to be going badly, could simply demand that it be abandoned and recommence the action at a later date (II. 82 [22]).

The execution of judgements also provided an opportunity for further remedy. Where the defendant in an action was proved in court to be holding a property unlawfully, the procedure for enforcement always involved a *(re)statutio* or (re-) institution. A cleric and bailiff were instructed by the court to visit the property and to see that the new owner took up his rightful possession. The cleric and bailiff might also record protests to the institution made by those who considered that they had a

56 M.G. Kovachich, *Formulae Solennes Styli,* Pest, 1799, pp. 175–6; see also, pp. 163,360.

57 The term first arises in the sixteenth century.

58 This is implied in II. 20 [1]. See also above, note 17.

superior claim to the property. The defendant was usually forbidden from making a protest at his own eviction and thus from launching an action against the new owner. Instead, though, he had the option of simply refusing to leave. In this case, the defendant had to follow a quite specific procedure, brandishing a drawn sword before the cleric and bailiff and refusing them leave to enter the property. From Werbőczy's own account, it is clear that the *repulsio* by sword was intended to proceduralize more casual acts of violence aimed at impeding the legal process. The act of *repulsio* had the consequence of forcing the plaintiff once again to summon the defendant to court and of reopening the case from the beginning. According to Werbőczy and to several royal decrees, the *repulsio* could only be used once. If it was repeated, the defendant incurred the charge of *nota infidelitatis* or treason, and was liable to lose all his estate (II. 73–4). It is plain, however, that in the succeeding centuries defendants often performed the *repulsio* on several occasions, forcing — apparently without penalty — the case to be reopened.[59]

Of course, it might well be that, with all remedies exhausted, the defendant still refused to leave the property. In this case, he had to be physically ejected by a posse of the local nobility or by military force. Even so, he might subsequently descend upon the property and reoccupy it. For this he would, according to the *decretum* of 1507, be summoned to court on charges of treason.[60] Over the course of the succeeding centuries, however, the *reoccupatio* was increasingly proceduralized. Although for its performance a fine of 200 florins was payable as well as compensation for any damage done, the *reoccupatio* had, nevertheless, the consequence of forcing a retrial.[61]

The examples of the *repulsio* and *reoccupatio* indicate the practical difficulties accompanying enforcement which provided a spur to negotiating a compromise rather than imposing a court judgement. Werbőczy knew this only too well from personal experience. In 1511, Werbőczy had been granted by King Wladislas II lands in Bihar county which had previously belonged to Francis Jako, but which had been confiscated by royal

59 Endre Varga, 'Polgari peres eljarasa a kiralyi curián 1724 – 1848/49', *Lévéltari Közlemények*, 1968, pp. 269–309 (pp. 288–300).

60 1507 (Wladislas II: *Decretum* VII): 2.

61 Varga, 'Polgari peres eljarasa', pp. 303–4. The 200 florin penalty remained despite inflation — MOLO, Birósági Levéltár, 8, *Protocolla Tabulae Septemviralis*, vol 10, fol 5 (dated 1800). Also by this time exemptions might be made for *reoccupationes* which were considered as done *legali ratione* — ibid., 116, *Protocollum Inclytae Tabulae Districtualis Judiciariae Transdanubianae*, vol 15, fol 6 (1799).

order on account of Francis's bigamous marriage. Werbőczy was never able, however, to take up secure occupation of Francis's properties, for his entry to the estate was consistently obstructed by Francis's kinsmen, who were members of the powerful Thordai and Bajoni families of Bihar county. After six years, during the course of which Francis died, Werbőczy was obliged to strike a deal. He resigned his immediate rights to Francis's estate, accepting instead only the right of reversion in the event of the (improbable) expiry of the Bajoni and Thordai lines. In return, he asked simply that the kinsmen accept that Francis had contracted an illegal marriage and, thus, by implication, that they accepted the terms of the estate's original confiscation.[62] Although couched about in the language of the law, the arrangement which Werbőczy made with Francis's relatives spells out only too clearly the limits of the law and the limits of enforceability. Unable to make good his rights to the estate, Werbőczy was obliged to conclude a much inferior arrangement.

9. Conclusion

The extent of legal remedies available had the consequence of prolonging cases, sometimes over many decades. We know of one case from the later fifteenth century that dragged on for more than sixty years and Werbőczy himself remarked that some suits might be protracted for 'more than a human lifetime' (II. 71 [5]).[63] By the eighteenth century, individual cases might take years to come to court and decades finally to resolve. Change was slow in coming. The royal commission established in 1827 to reform the law noted that procedures in Hungary 'were easily the longest in Europe' and that 'the entire procedural order was corrupt'.[64] Responsibility for this state of affairs was variously apportioned. The royal government accused the nobility of hiding behind its entrenched privileges and of resisting initiatives for reform. The nobility for its part blamed the government for meddling and for confusing the established order. Both sides, however, were in agreement that the lawyers served justice ill by

62 *Károlyi*, iii, pp. 78–82, 91, 105–9; Dezsö Csánki, *Magyarország történelmi földrajza a Hunyadiak korában*, i, Budapest, 1890, pp. 629, 641.

63 Kovachich, *Formulae Solennes*, p. 158. And yet Werbőczy notes with disapproval that a whole year may be spent in litigation (II. 76 [1]). The present author is not convinced that litigation in the late medieval period was especially slow and will seek to demonstrate this in a separate article.

64 Varga, 'Polgári peres eljárása', p. 308.

deliberately prolonging cases so that they might pocket more fees. In this respect, the Josephinist Izdenczy proposed that the best way to speed up justice was simply to abolish the class of lawyers.[65]

These criticisms, however, largely miss the point. As far as Werbőczy was concerned, the problem was not that cases might take a long time to reach any conclusion but that the verdicts reached should be fair and just. Without there being a sufficient raft of remedies then it was all too easy for just cases to fail and for guilty parties to prosper, even at the expense of their own salvation. In Werbőczy's words, justice denied 'is the two-edged sword which pierces the hearts of orphans and widows and of other poor people. This is the grief which robs the spirits of the oppressed. This is the snare which drags many into the pit of eternal damnation. Many are the reasons for suits failing unjustly which, as the tinderbox of sin, are always to be avoided' (11.83 [8]).

65 Dénes Jánossy, 'Reformtörekvések a polgári peres eljárás terán a xviii. században' *Századok*, 77, 1943, pp. 41–77 (p. 75).

Pergošić's Translation of the Tripartitum into Slavonian [1]

Reliable information on Ivan Pergošić and on the printing house at Nedelišće is scarce. For the most part, it comes 'second hand' from sources which have long since vanished. What survives in respect of the extant material has been 'recycled' by historians for decades and new documentary evidence is difficult to uncover. Accordingly, one has frequently to make do with assumptions and inferences. The aims of this essay are: to outline the circumstances in which there first appeared the Slavonian translation of the *Tripartitum,* or, as Pergošić called it, the *Decretum;* to review its possible purpose; and to establish the identity of who it was that inspired its translation.[2] In the course of what follows, we will explore the principal hypotheses while presenting, albeit tentatively, several explanations of our own.

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With the death of Ivan Ungnad in 1564 the printing house in Urach near Tubingen came to an end. Its demise brought to an end the earliest phase in the publication of works in the Slavonic languages. By this time, the

1 Pergošić uses the term *szlouienski* in respect of the kajkavian spoken in Slavonia *(Windischland)* and distinguishes it from *horuatzki,* that is chakavian. In this context, I will use the term 'Slavonian' as distinct from 'Croatian'.

2 The exact title of the translation is 'DECRETVM KOTEROGAIE VERBEWCZI 1STVAN DIACHKI POPISZAL A POTERdilghaie Laβlou katerie za Mathiassem Kral bil zeuβe Ghoβpode i Plemenitih hotieniem koteri pod Wugherβke Corune ladanie βlisse. OD IVANVSSA PERGOSSIcha na Szlouienβki iezik obernien. ... STAMPAN V Nedelischu Leto nassegha zuelichenia 1574'. So far, two critical editions of the *Decretum* have appeared: Karlo Kadlec, *Stefana Verbecija Tripartitum* (Srpska kraljevska akademija. Zbornik za istoriju, jezik i književnost srpskog naroda. Knjiga 5), Belgrade, 1909, and a more recent edition by Zvonimir Bartolić, which was printed in Čakovec in 2003 by Matica Hrvatska.

printing house in Ljubljana was on account of its Protestant sympathies under constant surveillance by the Catholic authorities. The printing houses in Senj, Zagreb and Rijeka had already been banned during the earliest decades of the sixteenth century, namely in 1508, 1527 and 1531. In particular, the Catholic authorities feared that the use of Glagolitic letters, of Old Church Slavonic or, even worse, of the vernacular and printing of Protestant works in Glagolitic letters would assist the spread of the Reformation.[3] As Croatian historians have pointed out, with the end of the Ungnad printing house, it was only the travelling presses of Rudolf Hofhalter in Nedelišće and Johannes Manlius in Ljubljana and Varaždin which, despite their Protestant inclinations, prevented the complete disappearance of printing and literary activity in the Croatian-Slavonian kingdom. Moreover, this activity was for decades threatened by the unfavourable military and political situation that transformed what was left of Hungarian-Croatian Kingdom into the Military Border.[4]

In respect of these printing houses and the authors whose work they attracted, the achievements of several writers of the 'Northern' or 'Varaždin Literary Circle' have been examined by a number of linguists and historians of literature. The Varaždin circle consisted of a group of educated men and office-holders living in Varaždin, including, for instance, Antun Vramec, Blaž Škrinjarić, Blaž Antolovic, Ivan Pergošić, Mihajlo Bučić (about whom otherwise little is known), and so on. Some of these were accused of flirting with Protestantism.[5] Research on the

3 Krešimir Georgijević, *Hrvatska književnost od XVI. do XVII. stoljeća u sjevernoj Hrvatskoj i Bosni*, Zagreb, 1969, pp. 12–36; Josip Bratulić, 'Glagoljaštvo i protestantizam', in *Rad Zavoda za slavensku filolologiju*, 27, 1992, pp. 231–235. See also numerous works on Stjepan Konzul Istranin and Antun Dalmatin (both glagolitic priests/popovi *glagoljaši* and Protestants).

4 A map of the military border in the second half of the sixteenth century is given in Drago Roksandić and Nataša Štefanec (eds), *Constructing Border Societies on the Triplex Confinium*, Budapest, 2000, p. 92.

5 Bučić's parents were Catholic, and two of his cousins were priests in Zagreb. To begin with, around 1565, he held a parish in Stenjevec, near Zagreb, and from 1567 to 1571 he was parish priest in Belica, in Međimurje. See Vjekoslav Klaić, *Povijest Hrvata*, 5, Zagreb, 1973 (reprint), p. 666. Bučić probably published three Calvinist books in Nedelišće, none of which have survived. These were: *Contra praesentiam corporis et sangvinis Christi in Sacramento Eucharistiae*, Nedelišće , 1573; *Kerstjanski nauk (Catechismus)*, Nedelišće, 1573; *Novi Zakon*, Nedelišće, 1573, which was dedicated to Maximilian 11; Károly Szabó (ed.), *Régi Magyar Könyvtár*, 2, Budapest, 1885, nos 133–135. Szabó here relies on Kukuljević, *Agramer Zeitung* (1881) as his source. Bučić was convicted of heresy and excommunicated in March 1574 by the synod of Zagreb diocese, which was convened and presided over by Juraj Draškovič, bishop and ban. Rumour has it that, after his excommunication,

Varaždin circle and its members remains to a large extent both incomplete and not comprehensive.[6] The lack of information on this period is to a large part due to the destruction of the fruits of these printing houses during the Counter-Reformation.

Nedelišće, the small market town where the *Tripartitum* was printed, was one of the main customs offices in the Hungarian-Croatian kingdom, collecting the tricesima customs due (tridesetnica, Dreissigst, harmincad). As such, it was also one of the most frequented places in the Croatian-Slavonian kingdom. The town was situated in the Međimurje (Muraköz) region, which belonged at that time to the Zrinski (Zrinyi) family and lay midway between Varaždin and Lendava (Alsólendva). The first printer to appear in Nedelišće was the well-known Protestant printer, Rudolf Hofhalter.[7] It is still not yet clear when exactly and why he came to these parts from Nagyvárad, whence he was expelled on 17 September, 1571, by order of the emperor.[8] What is

Bučić found shelter on the estate of Juraj Zrinski in Međimurje. According to Klaić, Drašković even wrote a *Constitutio* against Calvinist doctrine and, more specifically, against Bučić's teaching. During a synod in 1570 he ordered that in addition to the Latin liturgy, there should every morning be a mass in the 'Croatian language' *{croatica lingua).* See Klaić, *Povijest Hrvata,* 5, pp. 666–667.

6 See the works cited here by Zvonimir Bartolić, Gedeon Borsa, Franjo Bučar, Neven Budak, Franjo Fancev, Krešimir Georgijević, Alojz Jembrih, Ivan Kostrenčić, Mijo Mirković, Valentin Putanec, Károly Szabó.

7 Rudolf's father was a famous Viennese printer, Rafael Hofhalter, a Polish nobleman, previously known as Skrzeutsky. He lived in Zurich and the Netherlands, where he worked in various printing houses. Rudolf was born in Zurich. In 1555/56 father and son moved to Vienna, where Rafael founded his own printing house. In 1562 they had to flee Vienna on account of their religious beliefs. They settled in Debrecen and, thereafter, in Nagyvárad (Oradea). In 1566/67 Rafael moved to Gyulafehervar (Alba Iulia) after which all trace of him is lost. See Josef Benzing, *Die Buchdrucker des 16. und 17. Jahrhunderts im deutschen Sprachgebiet,* Wiesbaden, 1963, pp. 455—456; Pál Gyulás, 'Die Wiener Buchdrucker Rafael Hoffhalter und sein Sohn in Ungam', *Gutenberg Jahrbuch,* 1930, pp. 198–204. Rudolf worked in Nagyvárad from 1567 until 1570. In September 1571 he left the Partium. According to Borsa, he came to Lendava only in 1573. His activity between 1571 and 1573 and between the end of 1574 and 1577 is still not known. See Gedeon Borsa, 'Rudolphus Hoffhalters Typographie in der Gegend von Mur und Drau (1573–1574)', in *Vjesnik bibliotekara Hrvatske,* Vols 1–2, Zagreb, 1968, pp. 26–34 (p. 28).

8 Zvonimir Bartolić, 'Nedelišće — staro hrvatsko književno središte', in (ed.) Josip Buturac, *Nedelišće,* Nedelišće, 1993, pp. 210–227. See also Bartolić, 'Hrvatski književni i neknjiževni tekstovi na tlu Međimurja do 1918', in *Hrvatski dijalekoloski zbornik,* 6, Zagreb, 1982, pp. 23–53; Bartolić, 'Hrvatska tiskara u Nedeišću u doba Zrinskih', in Bartolić, *Sjevernohrvatske teme,* Čakovec, 1980, pp. 5–24;

known, however, is that he was active in printing both in Bánffy's Lendava and Zrinski's Nedelišće.[9]

Miklos Bánffy was married to Ursula Zrinski, sister of Juraj Zrinski (IV). At the time he was *ispán (župan)* of Zala County. Since their properties were adjacent, the Zrinski and Bánffy families often visited each other.[10] Both families owned extensive properties in south-western Hungary and Slavonia, and, being Protestant, both also welcomed Hofhalter. In Lendava there was a strong Protestant community led by Juraj Kulčar (György Kulcsár) which was supported by Miklos Bánffy. During Hofhalter's stay in Lendava, Kulčar published three religious books in Hungarian: the first in August 1573, the second two months later, and the third in May 1574.[11] He dedicated two of these works to Miklos Bánffy, and the other to the brothers Juraj, Nikola and Krsto Zrinski. One may conclude from this third dedication that the Zrinski family also encouraged and supported Kulčar.

Building on the recent work of Zvonimir Bartolić, we may make several more educated guesses.[12] The earliest surviving book coming from Hofhalter's workshop was published in Lendava. We have, however, indirect evidence of at least three Calvinist works written by Mihajlo Bučić which were printed by Hofhalter in Nedelišće in 1573. This suggests that Hofhalter may have gone to Nedelišće first, at the invitation of Juraj Zrinski. On the basis of a rather long and convoluted argument, Gedeon Borsa has sought to demonstrate that Hofhalter may have printed two further books in Nedeli§ce in 1573 before departing for Lendava later that year.[13] Since none of Bučić's works survive, Borsa's speculation must, however, remain just that.

A few stray words written by Ivan Pergošić additionally suggest that it was Juraj Zrinski who invited Hofhalter from Nagyvarad. In the preface to his Slavonian translation of the *Tripartitum*, Pergošić writes, referring

9 For Juraj Zrinski's life, see Nataša Štefanec, *Heretik njegova Veličanstva. Povijest o Jurju IV. Zrinskom i njegovu rodu, 1549–1603,* Zagreb, 2001, p. 316.

10 Hungarian National Archive (Budapest), Section P (Archive of Families, Corporations and Institutions), 1314/ 53571–2.

11 *Az halálra valo keszöleteröl rövid tanossag,* Lendava, 1573; *Az ördögnec a penitencia tarto bünössel való vetekedéseröl,* Lendava, 1573; *Postilla az az evangeliomoknac, mellieket esztendö által a keresztyénec gyöleközetibe szoktac oluasni es hirdetni,* Lendava, 1574. See Borsa, 'Rudolphus Hoffhalters Typographic', p. 27; Bartolić, 'Nedelišće', p. 194.

12 Bartolić, 'Nedelišće', pp. 203–204.

13 These were a *Herbarium* of Peter Melius Juhász and a song of Ferenc Töke on the siege of Sziget, written in 1566 in Lendava. See Borsa, 'Rudolphus Hoffhalters Typographic', p. 32.

here to Juraj Zrinski, that he, Pergošić, wanted his work, 'to be printed by the printer of His Lordship [i.e. respectively Hofhalter and Zrinski], who was brought by His Lordship to the benefit and dignity of these few remnants of land [i.e. Croatia-Slavonia]'.[14] Pergossic's statement permits the following sequence of events. First, Juraj Zrinski invited Hofhalter from Nagyvárad to this area, that is to Međimurje and to Nedelišće. Next, Hofhalter moved on to Lendava where he printed Kulčar's books. Finally (and as we will see), he returned to Nedelišće to print the *Decretum.*

In respect of the *Decretum*, it can hardly be coincidental that Rudolf Hofhalter's father, Rafael, had eight years earlier, in 1565, printed in Debrecen a Hungarian translation of Werbőczy's *Tripartitum.* The translation was done by Balázs Veres. Having arrived in Nedelišće, Rudolf printed a similar edition — a Slavonian translation of the *Tripartitum* in the kajkavian dialect. Rudolf inherited his father's printing works, which meant that the same letters and the same woodcut on the title page might be used in the Slavonian version as in the 1565 Hungarian edition.[15] Even though settled on the Zrinski estates, the Hofhalter press retained its itinerant character, printing manuscripts in a variety of separate locations.[16]

Having briefly described the circumstances in the region and the background of the Hofhalter press, we will now turn to Ivan Pergošić, notary of Varaždin and translator of the *Tripartitum.* According to Pergošić's own words, 'Encouraged by some good people who seek the integrity and good reputation of their motherland, I took on this little task of translating the Decretum written by Istuan Verböczy ... into the Slavonian language as best as 1 understood it, to benefit those wishing to read these books in

14 *Koiegha iaaz hotech vchiniti stampati Vassegha Ghoßpocztua Stamparem koiega Vasse Ghoßpocztuo dopelia na koriβt i na odychenie oueh neuolinih zauersenih oβtankou orβagha.. Da od togha nye tottu potrebno ghouoriti, Ier to vβaki koi ima kakou razum vydi daby to byl praui fundamentum praue plemenite i ghoßpoczke nature noßiti paßku na odychenie riechi Bosie, i na obrambu od nepriatelieu βuoie domouine: kotero chiny vasse ghoßpocztuo gledaiuchi stoßu dobra perua kerβtianβka ghoßpoda chinyla. A akobi i na nikogha vasse ghoßpocztuo ne ghledalo ima naasto doma ghledati na pokoinogha i βrechnogha βpomeneniáa i dobra ghlaßa ghoßpodina i occza βuoiegha Zrinβkogha Miklouussa, koi tern orβaghom i u Banβtue poßlussi, i u kraissniem Szigheczkom ghradu zeunoghimi kerscheniki i vitezi teh orβaghou polagh vere kerβtianβke i Czeßaroue βuelloßti kakoie Boghu bylo vghodno vmre.*

15 Borsa, 'Rudolphus Hoffhalters Typographic', p. 33; Georgijević, *Hrvatska književnost*, pp. 45–47.

16 The notion of a travelling printing house was introduced by Franjo Fancev in 1922 (Franjo Fancev, 'Počeci kajkavske književnosti i štampanje prvih kajkavskih knjiga', in *Jugoslavenska njiva*, VI, knj. 1, Zagreb, 1922).

Slavonian'.[17] At the end of the book, in his address to the reader *(Lectori bono)* Pergošić also stated that '...in some places you will find some abbreviations in chapters, especially in those in which there was no need to translate from Latin into Slavonian, where I partly followed Balas Veres who translated this *Decretum* into Hungarian'.[18]

The *Decretum* was dedicated to Juraj Zrinski, and from the dedication it is plain that Pergošić and Zrinski knew each other well. Pergošić was highly appreciative of Zrinski, his deeds and his patronage. The book starts thus — 'To a great and powerful gentlemen, Lord Juraj Zrinski, Perpetual Count of Zrin, Tavernicus, Counsellor and Captain of the Illustrious Emperor and King in the Hungarian Land, he [ie Pergošić] wishes all the goodness of God to his merciful lord'.[19] Pergošić's words may of course be taken at face value. He and his lord were engaged in a joint-activity the aim of which was to render the *Tripartitum* available in a language which might be understood by Zrinyi's Slavonian subjects. Nevertheless, a few issues remain which require clarification.

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At the time of Hofhalter's arrival, Juraj Zrinski was only 24 years old. As Pergošić remarked, his father had died a hero's death before Sziget in 1566, when Juraj was only 17-years old. Juraj immediately had to take over the management of the family estates. By 1574, he had already spent eight years looking after a swathe of properties which stretched in an unbroken line from the Adriatic coast to Kőszeg in western Hungary. Moreover, in the same year, 1574, Juraj was appointed Supreme Captain of the Lower Hungarian Border and Captain of Kanizsa. Living up to his father's international reputation cannot have been easy. Juraj also held the

17 *Po opomeneny nekih dobrih liuudi koiße ßuoie domouine pochteniu i dobru ghlaßu raduiu: prieh ta mal truud, da od Verbevczi fstuana popyßan Decretom (koteroghaie Laßlou krali otecz Laiussa kralia koterie na muhachu poghinul ghdabiße pyßalo od Bosiegha poroda 1514 leto zeuße ghoßpode i obchine volium poterdil) na ßlouienßki iezik kolikoßamgha moghal razmeti ißpyssem, onem na haßan koteribi radi ßlouenßki te khnighe chtali.*

18 *Neghde ter neghde naides Titulusse okraachene, poimene* v *oneh poßleh koterih nie bilo potriebno zdiachkogha na ßlouenßko preobrachati, vkomßarn v nekih malih meßteh Veres Balasa koterie na Wgherßki iezik te Decretom pretumachil naßledoual.*

19 *Velikomv i Zmosnomv Ghoszpodinv Ghoszpodinv luriu Zrinßkomu vekouechnomu knezu od Zrinia Czeßaroue i Kralieue ßuetlosti na Wgherßkom orßaghu Tarnikmestru, Tolnachniku i Capitanu yße dobro od Bogha ßuomu miloßtiuomu ghoßpodinu selye.*

hereditary title of *Tavernicus*, which by now served a purely honorific purpose. He did not know Latin.[20] Indeed, it is probable that his schooling was rudimentary. So far, I have not been able to trace any evidence of regular education, although his younger brother, Nikola, was registered in the Law School in Padua in 1584, at the age of 25.[21] Doubtless, the family needed a lawyer.

Juraj was not able to survey all his huge possessions by himself, let alone settle the many legal disputes that arose on properties that stretched along the contested Ottoman-Christian border from the Adriatic Sea to the Burgenland. He had to rely almost entirely on managers, although he did so reluctantly. In judicial matters, he often authorized his noble retainers to judge in his name acting in the capacity of his *locumtenentes.*[22]

In the course of managing the Zrinski estates, both Juraj and his father resettled numerous subjects and *familiares* from their lost possessions in Pounje to Vas and Zala counties in western Hungary, where different customary provisions prevailed. At this time, moreover, the remnant of the Croatian-Slavonian kingdom was subject to large population inflows from the south-east. The Zrinski estates and Međimurje did not escape this immigration, as may be demonstrated by the large number of alien surnames, including the ethnonym ' Vlach' .[23] Often the newcomers were awarded privileges by noble landowners (for instance, tax exemption over a period of 12 years or more); others were removed entirely from seigneurial jurisdiction and permitted to retain their own customary law and institutions. Vinodol, a substantial maritime property of the Zrinski family, had for centuries had its own legal codes. The Vinodol law code

20 Croatian State Archives, *Arhiv obitelji Čikulini Sermage,* Kutija 79. 1.2. The letter is incorrectly dated in Emil Laszowski, *Izbor isprava velikih feuda Zrinskih i Frankopana,* Zagreb, 1951, pp. 15–16.

21 *1584. 16. 8-bris. Insani ferians scire cursus secundus dabit. Nicolaus Comes de Zrinio supr. Dedit coronatum:* Endre Veress, *A paduai egyetem magyarországi tanulóinak anyakönyve és iratai (1264–1864). Matricula et acta Hungarorum in universitatibus Italiae studentium,* Volume 1 (Padua: 1264–1864), Kolozsvár, 1915, p. 92.

22 In Krašić, on November 30, 1581. *Wa toy Prawdy zydyly zw* w kipw (my emphasis). *G[ospo]d[i]na m[ilostivog] knez my Herendych I knez Jwray Hrelyacz;* at the bottom, Herendić signed with Glagolitic and Hreljac with Latin letters. See Ivan Kukuljević Sakcinski, *Acta Croatica - Listine hrvatske,* Zagreb, 1863, pp. 283–284.

23 See thus Drago Roksandić's paper delivered at the 'Triplex Confmium' international conference (given at Krizevci, June 26–28, 2002): 'Ethno-confessional changes in the Križevci County and the Varaždin Generalate, 1450–1750' (forthcoming).

(Vinodolski zakonik) was first compiled in 1288. *Urburaria,* recording the obligations of the urban communities of Vinodol were revised and rewritten several times between the fifteenth and seventeenth centuries — always, so it would appear, at the instigation of the counts of Vinodol, respectively the Frankopan family and, after 1550, the Zrinskis.[24] These legal codes were all characterized by strong elements of Croatian customary law.[25] Throughout the Zrinski's numerous properties, migration had the consequence of spreading a complex mosaic of different legal practices and customary laws. Juraj, who spent most of his time fighting the Ottomans, surely felt himself obliged to sort out this situation. In this respect, he probably welcomed the *Tripartitum* as a way of bringing order and legal homogeneity to his far-flung possessions and their diverse populations.

While Juraj Zrinski may not have been able to read the original Latin text of the *Tripartitum,* he did know Hungarian and thus it is quite possible that he was aware of the text through Veres's Hungarian translation. As a consequence, he invited Rudolf, the son of the man who had originally put Veres into print, to come to Nedelišće to print Pergošić's Slavonian translation. As we have seen, Pergošić's own words demonstrate this point. Moreover, we know that the Slavonian translation of the *Tripartitum* was not without legal consequence, but acquired — as indeed we have suggested was Juraj Zrinski's intention — a wider currency. The judicial protocols of Krapina, which were also written in the kajkavian dialect, include on at least two separate occasions statements taken from Pergošić's *Decretum.* Further research will doubtless yield other examples.[26]

We should, however, note one signal curiosity. Juraj Zrinski and his brother-in-law, Boldizsár Batthyány — a distinguished Hungarian nobleman, humanist, patron of the arts, and an old friend of Juraj's father — corresponded for decades, discussing a broad range of topics and everyday events and problems. Yet nowhere .in their correspondence is there any reference to the translation and printing of books, of either a

24 In 1574 the Zrinski brothers and Stjepan Frankopan sent commissioners to survey all possessions and towns in Vinodol. Thereafter, they issued their demand that *dijak* Mihalj Grandić should transcribe the decisions *(odredbe)* of Bemardin Frankopan as recorded in *stare i razdrte hartije* in order thus to preserve the laws of Bakar and Grobnik *(bakarske i grobničke zakone).* See Laszowski, *Izbor isprava velikih feuda Zrinskih,* p. 4. In 1605 a number of urburarial registers were transcribed once again (those of Grobnik, Hreljin, Drivenik, Grižane i Bribir): ibid.

25 See thus the studies of Miho Barada, Nada Klaić and Lujo Margetić.

26 Franjo Fancev, 'Beitrage zur historischen serbokroatischen Dialektologie', in *Archiv für Slavische Philologie,* 31, 1910, pp. 367–381 (p. 375).

secular or religious type. This is indeed odd, especially in view of the difficulties which Juraj encountered on account of the activity of the Tridentine bishop of Zagreb, Juraj Drašković, upon which he often remarked.[27]

In view of the above, it must still remain an open question whether Juraj had any larger plans for Pergošić's *Decretum*, beyond using this edition for his own purposes on the family estates in a vernacular version. Perhaps Pergošić's translation just came fortuitously to him. Perhaps he simply wanted to emulate the rich literary activity of Batthyány's court.[28] In view of his life, it is quite reasonable to assume that he was simply too occupied with military affairs to plan anything more serious or long term in respect of the *Decretum.*

The history of Pergošić's *Decretum* suggests that our last observation may not be too far from the mark. Difficulties of language and text were evident even at the time of its printing. Of the five remaining copies of Pergošić's *Decretum* (one in Zagreb, four in Budapest),[29] there were three different editions. Each was composed using different dialectal versions

27 On Juraj Drašković, see Ivan Kukuljević Sakcinski, *Poviest porodice Draškovića Trakošćanskih*, Zagreb, 1887, p. 14; Klaić, *Povijest Hrvata*, 5, pp 665–667.

28 Manlius first worked in Ungnad's print-shop in Urach. In 1562 he moved to Ljubljana and established his own printing house with the encouragement of Juraj Dalmatin. Although at first opposed by the Carniolan Estates, with Dalmatin's help he managed to print his first book in 1575. In 1580, the Counter-Reformation started in earnest in Carniola and Carinthia and the Archduke Charles began attacking Protestant printers. Nevertheless, having one of the few printing houses in the region, Manlius did not print only Protestant books. With the support of the bishop of Zagreb, Juraj Drašković, in 1578 Antun Vramec printed with Manlius his *Chronicle* in the Slavonian language, dedicating it to Slavonian Estates. In 1582 Manlius was expelled from Carniola and was invited to the court of Boldizsár Batthyány. In Németújvar (Güssing), he printed sixteen books. In 1585, Juraj Zrinski invited him to his court in Monyorókerék. Over the next two years, Manlius also travelled to Varaždin where he printed four books: the *Postilla* in two parts of Antun Vramec in kajkavian (1586), Pergošić's *Praefationes et epistolae dedicatoriae* (1587), and a book by Blaž Škrinjarić, *De agno paschali* (1587). In 1587 he moved to the Zrinski estates. He worked until 1592/93 in Monyorókerék (14 books) and Deutsch Schützen / Njemačke Šice (12 books). These books were mostly in Hungarian. Thereafter he returned to Németujvár, and in 1597 he finally moved to the Nádasdy estates, at Sárvár and Deutschkreutz, where he died. See Alojz Jembrih, *Antun Vramec i njegovo djelo. Prilog proučavanju starije hmatske književnosti i povijesne dijalektologije*, Čakovec, 1981, pp. 70–84, 242–245; Jembrih, *0 Vramcevoj kronici*, Zagreb-Varaždin, 1992; Karl Semmelweis, *Der Buchdruck auf dem Gebiete des Burgenlandes bis zu Beginn des 19, Jahrhunderts (1582–1823)*, Eisenstadt, 1972, pp. 7–15.

29 See the comprehensive study by Karlo Kadlec (1909), above, note 2.

of the same text: one more kajkavijan part, an ikavian part, and a second or *koine* kajkavian part.[30] Linguistic analysis has offered some possible answers in regard to the origins of these dialectical forms and mixtures and I will briefly give the basic results of this research. According to the latest scholarship, the text in all three editions is the same after the 51st chapter. It is a kajkavian dialect taken from Moslavina region rather than from Međimurje. As Pergošić said in his Preface, he translated the text into *Slavonian,* not into the Croatian language, 'as best he understood it'. Up to the 51st Chapter of Book One, what we are actually reading is a mechanical ikavization of the text. This conforms to the language of the so-called 'Ozalj Literary Circle', which was that used both in the Protestant literature of central Croatia (also supported by the Zrinski family) and which was spoken by the people living south of Zagreb and the River Sava. This ikavization of the text was probably undertaken by someone from the area of Ozalj who knew the language, and not by Pergošić himself. According to Putanec's hypothesis, someone probably saw the kajkavian translation as a first draft and told Pergošić that people living south of the Sava would not understand it. Pergošić accordingly rewrote this part of the text.[31]

At the same time, however, Pergošić was probably aware that even his kajkavian was not 'standard' enough. He originated from Moslavina, had lived in Zagreb, and then moved to Varaždin. Each place differed in respect of its form of the kajkavian dialect. In a small part of the text, Pergošić even began to employ some sort of *koine* kajkavian redaction, although it is still not clear how the redaction actually worked.[32] As there exist today only five preserved copies of Pergošić's *Decretum*, representing no less than three separate editions, we may conclude that the work was incomplete and tentative in respect of the forms in which it survives today.

Perhaps the work of editing and refining the text was never completed. Mihajlo Bučić, probably the first person to have been printed in "Nedelišce, was excommunicated in 1574. A fierce post-Tridentine persecution of Protestants loomed, and Rudolf Hofhalter had to leave the area

30 Valentin Putanec, 'Jezik "Decretuma" (1574) Ivana Pergošića', *Hrvatski dijalektološki zbornik*, 6, 1982, pp. 269–277.

31 Ibid, pp. 269–277.

32 Ibid, pp. 274–276; Kadlec, 1909 (analysis of Juraj Polivka — see above: note 2); Putanec, 1983, pp. 333–334.

as soon as possible.[33] A letter of Maximilian II to Ladislas Bánffy, brother of Miklos, in February 1574 testifies to the intensification of religious conflict. Maximilian wrote that he had learned that there was a printer on Ladislas's estate in Lendava, who had been expelled from Transylvania for embracing the Arian heresy, but who persisted in printing and selling Hungarian heretical books.[34] Under this sort of pressure, Pergošić was probably obliged to finish his own work quickly and to submit his text to the printing house. If so, his haste was not unwarranted, for it would be thirteen years before the next printer, Manlius, came to Varaždin.

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While it is certain that it was Juraj Zrinski and not the Bánffy family who invited Hofhalter and supported the printing of the *Tripartitum*, it is less sure who actually promoted the work of translation. Could it have been Juraj Zrinski or was Ivan Pergošić acting alone? In his foreword to the *Decretum*, Pergošić initially said that 'there were several good people' who urged him to translate the *Tripartitum*. In the next sentence he mentions Juraj, but solely in the context of bringing a printer to the area. If Juraj Zrinski had been behind the translation and had invited the printer, would Pergošić not have connected these two actions and attributed them both to Juraj? On the contrary, he clearly distinguished between the 'several good people' and Juraj Zrinski. It should be recalled that Juraj was a young gentleman with no established educational record at the time when the translation started, which might have even been begun several years before 1574.[35] So, who could those 'several good people' be? Was it Pergošić himself, modest enough not to mention himself as the initiator, but vain enough not to credit it to some other person by name? Or were they the people from Pergošić's immediate surroundings, the so-called 'Varaždin literary circle'?

33 Putanec, 'Jezik "Decretuma"', pp. 274–276. Mihael Bučić is mentioned as a priest *(plebanus)* without an office in the list of priests who participated in a synod of the Zagreb diocese held on 8 March, 1574. In addition to him, eleven priests from Međimurje were mentioned, and Belica and Turnišće parishes recorded as vacant. See the Archives of the Archbishopric of Zagreb (Nadbiskupski arhiv u Zagrebu), *Acta Ecclesiastica*, 8/25.

34 Bartolić, 'Nedelišće', p. 194.

35 1 agree with Bartolić that Pergošić most probably began his translation before Hofhalter's arrival, possibly even several years earlier: Bartolić, 'Nedelišće', p. 196.

And who actually was Ivan Pergošić? Valentin Putanec[36] and Franjo Fancev have indicated some aspects of Pergošić's life and career. Basing his research on two charters from the Academy Archives in Zagreb, Putanec partially reconstructed Pergošić's family tree from the fifteenth century onwards. He established that Ivan Pergošić's predecessors were *praediales* of the bishop of Zagreb in Mikulinci.[37] They remained *praediales* until at least 1586 when we have the last written confirmation of their status by the bishop of Zagreb, Juraj Drašković. Putanec also pointed out that the language of the *Decretum* might be a version of the kajkavian dialect from Moslavina region and not from Međimurje or Varaždin.

According to Putanec's calculations, Ivan Pergošić was probably born some time after 1521 as a sixth child in one of the branches of the Pergošić family. Due to major Ottoman offensives in the second half of the sixteenth century, the village of Mikulinci and indeed the whole area was plundered and the Pergošić family was obliged to flee. It is not known where Pergošić acquired his education, but he became a *diak* or *litteratus.* We find him first in Zagreb, than in Varaždin. For a short time Pergošić was rector of the lyceum in Zagreb,[38] and some time after 1564 he came to Varaždin with his sister Agata. In Varaždin he began a judicial career and was connected to members of the 'Varaždin literary circle' such as Antun Vramec, Blaž Skrinójarić, Blaž Antilović and others. Many small clues, though mainly from the 1580s onwards, indicate that he was an influential member of this group.

Antun Vramec (1538–1588),[39] who was perhaps the most famous member of the Varaždin circle, published his *Chronicle* in 1578, which he dedicated to the Slavonian estates, and his two-part *Postilla* in 1586. Both

36 Valentin Putanec, 'Porijeklo moslavačkih Pergošića i povezano s tim porijeklo kajkavskog pisca Ivana Pergošića', in *Čazma u prošslosti i danas*, Čazma, 1979, pp.123–136.

37 A *praedialis* belonged to a category of vassal retained on the estates of church dignitaries who held a *praedium* (arable land, pastures, buildings). A *praedium* was awarded to free men, as an inheritable right in the male line. The vassal had a duty to serve under the flag of his benefactor. The right to award a *praedium* belonged to prelates in Hungary and Croatia. See Vladimir Mažuranić, *Pravno-povijesni rječnik*, 2, Zagreb, 1908–1922, p. 1089. Mikulinci is a now vanished village in the district of Ivanić in Moslavina, which used to lie between Božjakovina and Ivanić.

38 In *Monumenta historica liberae regiae civitatis Zagrabiae*, ed. Emilij Laszowski (vol. 16, Zagreb, 1939, p. 184), we find the following entry. *1564. Solutio rectoris s(chole). Feria secunda proximo post Quasimodo magistro Ioanni Pergwssych, qui seruiuit in officio rectoratus afesto Blasii, vsque festum Ascensionis domini, cui dedi flor. 3. den.*

39 He was born in Styria, studied in Rome and Vienna, and having made a successful church career as a canon of the chapter of Zagreb, married. On Vramec, see Jembrih, *Antun Vramec i njegovo djelo;* Jembrih, *O Vramčevoj kronici;* Vjekoslav Klaić, *Antonii Vramecz. Kronika*, Zagreb, 1908.

were composed in Slavonian. Vramec was generously supported by Bishop Juraj Drašković, who encouraged use of the vernacular and fought at the Council of Trent for the abolition of celibacy. After Trent, however, all printing in the vernacular was considered problematic and Vramec was attacked on account of his writing in Slavonian. He was even suspected of heresy. In the preface to his book, *De agno Paschali,* printed in 1587 by Manlius, Blaž Škrinjarić expressed fears for the reception of his own, anti-Calvinist writings in a situation where everything was viewed with suspicion, where even Vramec's work had run into disapproval, and where there were so many envious and malevolent people around.[40] The situation was such that any literary activity which was connected to Manlius or which set store on the use of the vernacular might be the subject of malicious tittle-tattle and even of the accusation of heresy.[41] Pergošić also found himself in trouble on this account. In 'his'[42] second book, *Praefationes et epistolae dedicatoriae,* a commentary on the epistles of Erasmus of Rotterdam printed in 1587, Pergošić confessed that, 'he did not want to translate it into the vernacular as he did not want to have to experience the same ingratitude again'. For all this though, he again had it printed in the Protestant printing house of Joannes Manlius, although this was probably because Manlius's was the only press available.[43]

It is not known whether Pergošić held office in Varaždin at the time when he was making his translation of the *Tripartitum.* Apart from the *Decretum,* where he is mentioned by date and name as the translator, information on him only starts to appear in 1581. In that year, Pergošić

40 Franjo Fancev, 'Ein Beitrag zur Geschichte des Schrifttums in Kroatien', *Archiv für Slavische Philologie,* 34, 1913, pp. 464–483 (p. 469); Olga Šojat, 'Pregled starije hrvatskokajkavske književnosti', in *Kaj,* Nos. 9–10, Zagreb, 1975; Georgijević, *Hrvatska književnost,* p. 50; Kukuljević Sakcinski, *Poviest porodice Draškovića Trakošćanskih,* p. 14.

41 One should recall that at the Council of Trent even the highest members of the Catholic clergy (such as Andrija Dudić and Drašković) fought for the abolition of celibacy. Antun Vramec was married, and Dudić married later on in life. The relationship between the vernacular and heresy was only clarified at the Second Vatican Council.

42 Fancev, 'Ein Beitrag', pp. 468–469. According to Fancev, Pergošić should not be considered the author of the *Praefationes,* as this work is actually a compilation. See Fancev, 'Ein Beitrag', pp. 470ff.

43 Putanec, 'Jezik "Decretuma"', pp. 275–276. Pergošić in his *Praefationes* says, *in qua a Translatione in linguam domesticam ob id abstinere volui, ne similem gratiam, quae mihi in versione Decreti Trypartiti ab aemulis olim accidit, consequerer.* See Fancev, 'Ein Beitrag', p. 469.

signed a charter as a notary *{notarius civitatis warasdiensis)* but it is not known when exactly he assumed this role.[44] In 1587, Škrinjarić occupied the position of a judge and Pergošić was referred to *asjuratus civis* like Blaž Antilović and several others *(Georgius Flaijsman, Lucas Jakopchijch, Leonardus Pethrowijch Pileator, Franciscus Barber Zwerssijch).* During that period he was always referred to as a *testis judicis et auditor causarum.* In 1587 he participated in the distribution of Christmas gifts.

In 1587/1588 Pergošić went to Pozsony as *nuntius* of Varaždin with 'Zwerssijch'. Zveršić was judge of Varaždin in 1592, 1594, 1596 and again in 1600, the year of his death. (During his office, in 1592, he produced oath formulas in kajkavian). While Škrinjarić was *judex civitatis* from 1586, Antilović acted as his notary. Antilović became a judge in 1588/89 [45] Already in 1561 Blaž Antilović had translated the Rules of the Weavers' Guild from Latin into kajkavian.[46] After 1588, Pergošić was involved as a witness in a trial against Škrinjarić on grounds of his adultery. He died in 1591/92 as *notarius comitatus ex civitatis Varasdiensis.* Although married, he left no heirs and his property passed to his nephew, Tomo Siprak, who was the son of his sister, Agata.[47]

The biographical information given here indicates the people with whom Pergošić communicated.[48] In this circle of writers, lawyers and judges, Pergošić was prompted to publish something on his own. Perhaps he thought his *Decretum* might be widely used and thus would further his career. Possibly he even started to translate the *Tripartitum* as a way of launching his career in the Varaždin magistracy. A translation of, the *Tripartitum* would in this respect serve to secure his reputation, which was exactly what he, as a newcomer to Varaždin, needed.

In respect of what we have seen, I would not connect the translation of the *Tripartitum* to Juraj Zrinski but instead, albeit tentatively, to Pergošić's own circle and to the particular circumstances prevailing among the intellectual elite in the city of Varaždin.

44 Putanec, 1983, p. 334; Putanec, 'Porijeklo moslavackih Pergošića', p. 124.
45 Fancev, 'Ein Beitrag', pp. 472–475.
46 Putanec, 'Porijeklo moslavackih Pergošića', p. 123.

47 Fancev, 'Ein Beitrag', pp. 472–475.

48 Valent Putanec has also drawn attention to the relationship between Pergošić and the leading Hungarian lawyer, Ivan Kitonić, who at one time owned one of the five extant copies of Pergošić's *Decretum.* See Valent Putanec, 'Kajkavski pisac Ivan Pergošić kao Varaždinac (novi prilozi za njegovu aktivnost u gradu Varaždinu i za njegove veze s pravnikom Ivanom Kitonićem', in *Varaždinski zbornik,* Varaždin, 1983, pp. 333–337.

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In Croatian historiography, the genesis of the Pergošić Slavonian translation of the *Tripartitum* has been the subject of much debate. It has not yet been possible to find sufficiently reliable sources to enable us to resolve some outstanding questions concerning this text. By utilizing the results of other researchers as well as my own, I have sought to bring together what information we have, to present some of my own conclusions relating to the historical context in which the translation appeared, and to outline-some of the possible motives of the main players. In summary, I consider that the translation owed its inspiration to Pergošić himself and to the immediate circle of Varaždin office-holders among whom he moved. Juraj Zrinski, owner of the huge Međimurje estate set beside the free royal city of Varaždin and patron of Protestant printers, only created the background against which the *Decretum*, as well as many other works, might be printed.

Werbőczy's Reception in Hungarian Legal Culture

Katalin Gönczi

Introduction

Werbőczy aimed to create a law that would last, and he did so. His achievement came about not through statute (for the *Tripartitum* failed to acquire the necessary royal seal) but instead through customary use, through its role in the burgeoning legal literature, and as a part of Hungarian national mythology. Werbőczy's law code dominated Hungarian legal culture for centuries. First, the courts applied his rules as if they were law and thus they acquired authority from jurisprudence. Secondly, his scheme and categorization of the law dominated legal writing, to such an extent indeed that even nineteenth-century commentaries adopted his approach and borrowed his language. In the age of nation-building, the Hungarian translation of the *Tripartitum* provided the first step towards establishing a national legal language. Thirdly, in respect of national identity, Werbőczy was instrumentalized. His name not only became a synonym for the law of the nation, but also served as a symbol and source of patriotic emotion.

1. Social and Political Background

The house of Habsburg acquired the royal dignity in Hungary in the sixteenth century. In 1687, after the Habsburg rulers had liberated the territories hitherto controlled by the Ottomans, the Hungarian nobility gratefully recognized the hereditary right of the Habsburgs to the Hungarian throne.[1] This right was extended to the female line in 1723 in

1 Peter F. Sugar, Peter Hanák, Tibor Frank (eds), *A History of Hungary*, Bloomington, 1990, p. 117; Andras Gergely, Gábor Máthé (eds), *The Hungarian State 1000–2000*, Budapest, 2000, pp. 66–67.

exchange for a guarantee of the Hungarian nobility's continued freedom from taxation.[2] The so-called 'Pragmatic Sanction' created an indissoluble constitutional connection between Austria and Hungary as an *inseparabilis et indivisihilis unio.*

The Pragmatic Sanction of 1723 constituted a high point in the age of royal absolutism during which time Austria established its supremacy in the economic organization, trade and commerce of the Hungarian kingdom. In respect of politics, the Habsburg rulers governed the land on their own, and no other power influenced their decisions. The Hungarian diet might be called upon to accept new forms of taxation, but otherwise no discussion of national needs took place at this supposedly 'national' forum. The nobility was effectively bought off by promises to conserve its privileges. What debate there was took place in the county assemblies.

Austria's political dominance was reflected in cultural geography. Hungary did not have a proper capital city. Although the diet customarily met in Bratislava (Pozsony), the city lacked such national cultural institutions as a theatre, opera house, museum or library. There was only one national university in Trnava (Nagyszombat), which had been established in the seventeenth century as an episcopal foundation, and which lay under the control of the Catholic church.[3] The intellectual centre of the Monarchy remained, therefore, Vienna. The premier Hungarian noble families thus maintained their own palaces in the centre of the imperial city, usually next to each other on the *Herrengasse*.

Although Buda Castle constituted the royal residence, the Habsburg rulers preferred to govern Hungary from Vienna, and they were not really interested in showing up on Buda's Castle Hill, even though it was the traditional residence of the Hungarian kings. Indeed, when Maria Theresa transferred the university from Nagyszombat to Buda and put it under state control, she offered the royal castle to the university because — as she saw it — Vienna was the true centre of Habsburg government and Buda Castle a royal irrelevance. The offices of the absolutist government resided in Buda. These included the principal administrative organ, the Lieutenancy Council *(Consilium Regium Locumtenentiale Hungaricum)* which had been appointed for Hungarian affairs by King Charles IV (Emperor Charles VI). The Lieutenancy Council was headed

2 This right was originally derived from the *Tripartitum:* István Werbőczy, *Tripartitum opus juris consuetudinarii regni Hungariae,* I, 9 [5].

3 Ferenc Eckhart, *A Jog- és Államtudományi Kar története 1667–1935,* Budapest, 1936, pp. 43–44.

by the palatine and was responsible for all matters relating to Hungary.[4] Between meetings of the diet, it functioned as the sole institution of government. The official language was Latin.

In order to counter-balance Viennese cultural supremacy, some princes sought to establish their own cultural institutions in Hungary. Prince Miklós Esterházy, for instance, brought Joseph Haydn to his palace at Fertod. For his part, Count György Festetich established a kind of private academy for literature and the arts (Helicon) and a college for higher studies (Georgicon) in Keszthely.[5] Unlike in Prussia, England and France, where royal government took the lead in the cultural construction of the nation, the development of national culture in Hungary had to do without royal support.

2. Legal Culture in the Eighteenth Century

In the eighteenth century, Hungarian legal culture was based on Werbőczy's *Tripartitum.* The *Tripartitum* governed Hungarian civil law, particularly in respect of the terms of landownership and succession. Austrian codes had an additional impact in respect of the criminal law and procedure. The *Praxis Criminalis,* an Austrian collection of customary law from the late seventeenth century, was applied by the county courts in Hungary. It was the courts, however, which determined what the law actually was. As a consequence, jurisprudence played an outstanding role in shaping the Hungarian legal system.

Hungarian legal scholarship in the eighteenth and even in the early nineteenth century was characterized by its descriptive methodology. The legal works of this period generally gave an overview of the institutions of Hungarian law in the form of glosses and commentaries.[6] These books sought to elucidate what laws, procedures and practices retained validity through use — an approach typical in a system where customary law prevailed. They were composed for practical purposes, for use in court

4 Sugar et al., *A History of Hungary,* p. 140; Holger Fischer, *Eine Heine Geschichte Ungarns,* Frankfurt/M. 1999, pp. 80–81. Gergely and Máthé's *The Hungarian State 1000–2000,* written for general use by the current leading legal historians of Hungary, unfortunately overlooks the constitutional changes which took place in the age of absolutism.

5 Andrew C. Janos, *The Politics of Backwardness in Hungary,* Princeton, 1982, p. 36.

6 Imre Kelemen, *Institutiones juris privati Hungarici,* 4 vols, Pest, 1814, and Pál Szlemenits, *Elementa Juris Hungarici Civilis Privati, 2* vols, Pozsony, 1819.

and in legal training. Partly on account of the strict censorship maintained during the absolutist period, they eschewed both critical analysis and theoretical expositions.

The preeminent institution for study of the law was the Hungarian University, which was attended by the sons of Catholic families. Legal education was until 1844 conducted exclusively in Latin and consisted of Hungarian, Canon and Roman law. The content and programme of studies at the University was dominated by the methods and views of Maria Theresa's adviser, Carl Anton Martini. Legal education thus came under state control and the ruler determined both the curriculum and all teaching appointments. Under these circumstances, it is not surprising that the Hungarian University was little influenced by the ideas of the Enlightenment.

Maria Theresa founded several Schools of Administration, which sought to give a practical legal training suitable for state officials. To balance the Catholic hegemony at the state university, the Protestant church also founded its own institutions of legal education. Contacts with the Protestant universities in northern Germany, the Netherlands and Switzerland were close and many graduates attended courses abroad. Jena, Halle, Wittenberg, Göttingen, Leipzig and Leiden were the universities most frequently attended by Hungarian students. Students also travelled abroad to take advantage of courses in philosophy and theology as well as to receive the type of systematic training in jurisprudence which was otherwise unavailable in Hungary.

As a consequence of these contacts, Hungarian students became familiar with new intellectual trends, particularly in respect of statistics, cameral science and political economy. These ideas fed into legal education and contributed to the development of a more scientific approach towards the law, and to a keener apprehension of its nature and purpose. The development of public legal science during the last decades of the eighteenth century is particularly associated with the University of Göttingen. New approaches towards the law and its study were transferred through the *peregrinatio academica* into Hungarian legal culture and contributed to the development of modem legal science in Hungary.

The new generation of Hungarian legal historians and scholars concentrated in the first place on hunting down, collecting and publishing legal material preserved in family archives. Theirs was a movement similar to the *Monumenta Germaniae Historica* school in Germany. Martin Kovachich and his son, Joseph, were in this regard the most distinguished and prolific scholars. Martin Kovachich, supported by the palatine and a committee of the diet, travelled around Hungary

and Transylvania, searching for and publishing manuscript sources which bore on Hungarian legal history.[7] Martin Kovachich was also in contact with the German historians, Christoph Friedrich Nicolai, Johannes von Müller and Georg Heinrich Pertz, who initiated the *Monumenta Germaniae Historical A* further critical collection of charters was edited by György Fejer.[9]

3. Werbőczy's Reception in the Age of Reform (1825–1848)

Meanwhile the Hungarian nobility had been aroused by the harsh centralization and Germanization undertaken by Joseph II (1780–90). Joseph's administrative reforms alarmed the Hungarian nobles, and provoked widespread opposition. Nevertheless, the spirit of Enlightenment persisted during the short reign of his successor, Leopold II (1790–92), together with the notion of modernization through legal reform. In 1790, nine separate commissions were established with the consent of the diet and enjoined with the task of elaborating new legal codes to regulate commerce, the criminal law, the laws of contract and property, and so on. Constitutional law was not included, lest it upset the delicate balance of ambiguities enshrined in the Pragmatic Sanction. The movement for reform faltered, however, with Leopold's premature death and with the unmasking by his successor of the so-called 'Jacobin conspiracies'. Reform gave way to a period of conservative reaction. As a consequence, the customary framework embodied in Werbőczy's *Tripartitum* received a second wind.

In 1825 the Hungarian Diet met for the first time in thirteen years, and debate was renewed over the issue of reform. On this occasion, the ruler proved more tractable. Over the preceding years the movement for national liberation in Italy had gathered pace and, under these circumstances, the ruler had no wish to put Vienna on a collision course with

7 Martinus Georgius Kovachich, *Vestigia Comitiorum apud Hungaros ab exordio regni eorum in Pannonia usque ad hodiernum diem celebratorum*, 3 vols, Buda, 1798–1801; by the same author, *Formulae solennes styli*, Pest, 1799; and Josephus Nicolaus Kovachich, *Sylloge decretorum comitialium inclyti regni Hungariae, quae in vulgaio corpore juris Hungarici erepta sunt*, 2 vols, Pest, 1818.

8 Gusztáv Wenzel, *Kovachich Márton György, Horváth István és Fejér György mint magyar történetmíivelök*, re-published and edited by István Soós, *Fons*, 3, no 1, 1996, pp. 51–71 (p. 58).

9 Georgius Fejér, *Codex diplomaticus Hungariae ecclesiasticus ac civilis*, 8 vols in 42 parts, Buda 1829–1832.

Hungary. Accordingly, the political attitude of the Austrian government towards Hungary took on a new direction and the reform of the legal system was put once more on the agenda of the Diet. Discussion of the drafts of 1790 recommenced.

As a consequence of the movement for reform, the prevailing legal literature in Hungary had already changed its character. Although the descriptive method was maintained in the state-contolled, conservative environment of the University, elsewhere a critical legal literature had emerged which sought to contribute to the debates of the Diet. The legal literature drew on the latest ideas abroad and championed reform of the law as an instrument of modernization.

In addition to the University and Schools of Administration, several new institutions were founded in which discussion of the law was promoted. The most important of these was the Hungarian Learned Society (Magyar Tudós Társaság — known after 1845 as the Hungarian Academy of Sciences), in respect of which the Royal Society in Britain served as a model.[10] The Academy's most important activity was to develop a national vocabulary of science and scholarship which would serve to establish the cultural community of the nation.[11] The commission for legal sciences, which commenced work in the 1830s,[12] sought to compile a lexicon of Hungarian legal terms. Among its first activities was the translation of the most important Latin legal works, amongst which was Werbőczy's *Tripartitum.* The assembly of the Academy also decided to compile a law dictionary, and in 1843 the first vocabulary of 20,000 Latin legal terms was published together with their Hungarian equivalents.[13] The first translation of Werbőczy in the Age of Reform was completed in 1830 by János Perger.[14] Although the work of a single scholar, Perger's translation was inspired by the larger endeavour of founding a national scientific language. Additionally, Perger wanted to make

10 György Fejér published a paper on this topic in 1809. See Sándor Kónya (et. al.), *A Magyar Tudományos Akadémia másfél évszázada 1825–1975,* Budapest 1975, p. 22.

11 The language law was passed in 1844 and affected the rights of the non-Hungarian speaking minorities in the kingdom of Hungary. See János Varga, *A Hungarian Quo Vadis. Political Trends and Theories of the Early 1840s,* Budapest, 1993, pp. 174–175.

12 Geza Magyary, 'A Magyar Tudományos Akadémia es a magyar jogtudomany', in *A Magyar Tudományos Akadémia első evszázada,* Budapest, 1926, vol. 1, pp. 55–80 (pp. 56–57).

13 *Törvénytudományi müszótár,* (ed.) Magyar Tudós Társaság, Buda, 1843.

14 János Perger, *Werbőczy István magyar forditása némely jegyzetekkel megvilágositva,* Pest 1830.

Werbőczy accessible in a modern edition, which might be read and understood by all.

The most important developments in respect of the *Tripartitum* in the Age of Reform are indissolubly linked with the person and programme of Count Istvan Széchenyi.[15] Széchenyi had been inspired by the economic theories of Adam Smith, and he sought ways of adapting Smith to Hungarian circumstances.[16] Accordingly, he questioned the special privileges which Werbőczy accorded to the nobility and, in particular, their relevance to a modern industrial society. Werbőczy had affirmed the nobleman's freedom from taxation[17] and he had put all sorts of obstacles in the way of his being taken to court. Additionally, the system of *aviticitas*, and of the collective rights to land vested in the family, made it hard to sell or mortgage property in order to obtain working capital for investment. Széchenyi questioned the rationale behind these privileges and customs, and he demonstrated that they were inimical to commerce and to the economic development of the country.[18]

Széchenyi's comment that, as the first step in creating a new legal order, nine-tenths of the *Tripartitum* should be burnt[19] is often cited in Hungarian historical literature.[20] This was, however, an age given to romantic exaggeration — and to word-play. What Széchenyi actually meant here was that the 'ninth' and the 'tenth' should be abolished: the 'ninth' or *nona* being the service-rent due to the landowner from his peasants, and the 'tenth' being the tithe payable to the Church. In short, he

15 Sugar et al, *A History of Hungary*, pp. 190–193.

16 See istvan Széchenyi's three leading works on social, political and economic affairs: *Hitel*, Pest, 1830; *Világ*, Pest, 1832; *and Stádium*, Leipzig, 1833. For further details, see Katalin Gönczi and Thomas Henne, 'Leipziger Verlage, liaisonmen und die Anfänge der modemen Rechtswissenschaft in Ungarn', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Germanistische Abteilung, 118, 2001, pp. 247–272 (p. 258).

17 Martyn Rady, *Nobility, Land and Service in Medieval Hungary*, Basingstoke and London, 2000, pp. 144–146.

18 István Széchenyi, *Hitel*, Pest 1830, pp. 188–192.

19 Széchenyi, *Hunnia*, Pest, 1858, pp. 78–79.

20 Tamas Vecsey, *Széchenyi és a magyar magánjog*, Budapest, 1895, p. 2 (cited by Ferenc Mádl, 'Das erste Ungarische Zivilgesetzbuch — das Gesetz vom Jahre 1959 — im Spiegel der Geschichte der zivilrechtlichen Kodifikation', in Gyula Eörsi (ed.), *Das ungarische Zivilgesetzbuch in fünf Studien*, Budapest 1963, pp. 9–112 (p. 96, fh. 99) and János Zlinszky, 'Ungarn', in Helmut Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, München 1986, vol 3, part 2 *(Gesetzgebung zum Allgemeinen Privatrecht und zum Verfahrensrecht im 19. Jahrhundert)*, pp. 2141–2213 (p. 2160).

advocated that the *nexus subditelae* and ecclesiastical privilege should be abolished and not that the *Tripartitum* be literally consigned to the flames. Indeed, Széchenyi stood for gradual, organic change. In his work *On Credit,* Széchenyi railed against those who would seek to have the entire Hungarian *Corpus Juris* torn up.[21] It was Széchenyi's conviction that a reformed Hungarian legal system should be built upon the *Tripartitum,* but with the elements relating to manorial service and noble privilege stripped from it. Accordingly, he pressed at meetings of the Hungarian Learned Society for a modern scholarly translation of the *Tripartitum*.[22]

In 1840 the process of legal codification reached an intensive phase. New laws on commerce had been passed, and a committee was set up to draft a reform of the criminal law.[23] This burst of legislative activity rested, however, on the conviction that historical and customary provision might be set aside and entirely new regulations imposed through statute. Consequently, the relationship between these two separate repositories of law came to the forefront of scholarly enquiry. As the preeminent source of customary provision, Werbőczy's *Tripartitum* accordingly became a subject of particular interest. Several legal studies dealt with the author of the *Tripartitum.* A biography of Werbőczy was, for instance, published in 1842,[24] and, in the yearbook of the Academy, the leading legal historian, Pál Szlemenits, published a paper on the *Tripartitum.*[25]

At the same time as the language laws became a leading topic of debate at the diet, Jozsef Ponori Thewrewk compiled in 1844 a dictionary which translated into Hungarian Werbőczy's Latin terminology.[26] The list he produced showed that legal terms were elastic and that the Hungarian language was insufficiently nuanced. Thewrewk was unable, for instance, to distinguish between *ius* and *iustitia,* both of which terms he rendered in Hungarian as *igazság*. Legislative acts were described by another term, *törvény.* Precisely the same difficulty was encountered by Ignac Frank in the title of his famous commentary, 'The Law determining the Law [Justice] in Hungary' *(Az osztó igazság törvénye Magyarhonban* — the

21 Széchenyi, *Hitel,* p. 48.
22 Mádl, 'Das erste Ungarische Zivilgesetzbuch', p. 96.
23 Katalin Gönczi, 'Wissenstransfer bei den Kodifikationsarbeiten im ungarischen Vormärz', *Ius Commune. Zeitschrift für Europäische Rechtsgeschichte,* 25, 1998, pp. 261–290 (pp. 273–278).
24 Imre Palugyay (the younger), *Werbőczy István rövid életrajza,* Buda 1842.
25 Pál Szlemenits, 'Werbőczy István hármas könyvérol', *Magyar Tudományos Akademia Evkönyvei,* 7, Buda, 1846.
26 József Ponori Thewrewk, *Werbőczy István deák műszavai régi magyaritásokkal,* Pozsony, 1844.

title is almost incomprehensible in English translation; in respect of legal terminology the English language is even less subtle than Hungarian!).[27]

At the behest of the diet, the Academy resolved in 1840 to translate the *Corpus Juris Hungarici* into Hungarian. A committee of lawyers was accordingly set up, among whose members were two leading figures in the legal developments of the 1840s, László Szalay and Lőrinc Tóth. Both were members of the Academy and former students of law, although after graduation neither had had any contact with the University — typically, the law faculty of the University had no part in these discussions. Having completed their own work, the translators discussed the terminology which they had used from the vantage-point of the 'history of Hungarian law', 'the linguistic comprehension of the medieval laws', and 'the rules and spirit of the Hungarian language' .[28] The final draft was supervised by the lawyers Antal Sztrókay and Pál Szlemenits, while the poet Mihály Vörösmarty was appointed responsible for matters of linguistic coherence. The first fruit was a new translation of the *Tripartitum,* published in 1844.[29] In 1844–47 the Latin text of the *Tripartitum* was included in a new three-volume edition of the Hungarian laws.[30] The purpose of this edition was to provide a definitive Latin version of the laws and customs of Hungary, resting on the thorough and critical reading of the extant manuscript sources, from which a translation might subsequently be made. At this time, the laws of the kingdom (including the *Tripartitum)* existed in several versions — the 'historically authentic' account, as determined by Martin and Joseph Kovachich, and the 'customary recension' which, although at odds with the historical version and inaccurate in its transcription, had at least been sanctified by use.

A second edition of the *Tripartitum* was published in 1864. The extremely short preface to the second edition was written by László Szalay in May 1864,[31] at that time General Secretary of the Academy. A third edition was completed in 1894, translated by Sándor Kolosvári and Kelemen Óvári, and introduced by the General Secretary of the Academy, Kálmán Szily.[32] The Kolosvári- Óvári translation was subsequently

27 Ignac Frank, *Az oszto igazsdg torvenye Magyarhonban,* Buda, 1845.

28 Ferenc Schedel, 'Eloszo az elso kiadashoz', in *Werbőczy Istvdn Hdrmaskonyve,* 2nd edition, Pest 1864, unpaginated.

29 *Werbőczy Istvdn Hdrmaskonyve,* Pest 1844.

30 *Decretum generate inclyti regni Hungariae partiumque eidem annexarum. Tomus primus continens opus Tripartitum juris consuetudinarii ejusdem regni auctore Stephano de Werbocz [...],* Buda 1844–1847.

31 *Werbőczy Ish'dn Hdrmaskonyve,* 2[n<i] ed., Pest 1864.

32 *Werbőczy Ist\>dn Hdrmaskonyve,* 3[rd] ed., Budapest 1894.

included in the 'Millennium' edition of the Hungarian laws, where it was reproduced under the editorship of Dezső Markus in 1897.

4. Instrumentalizing the *Tripartitum*

In the period following the War of Independence in 1848–49, Hungary laboured under the Bach regime and, thereafter, under the rule of the Austrian Civil Code. During this time, Werbőczy became a symbol of national identity, and his work was considered to embody those Hungarian values which 'neo-absolutism' and the 'illegal' rule of Franz Joseph sought to excise.[33] Werbőczy became a symbol of national independence and the *Tripartitum* a codeword for anti-Habsburg sentiment.[34] The *Tripartitum* thus symbolized the common desire for 'our old Hungarian law', while Werbőczy himself joined Kossuth as one of the leading embodiments of the national will. In a portrait painted in the second half of the nineteenth century, we may thus see Werbőczy wearing a traditional Hungarian military costume and bedecked with fur, but with facial features uncannily close to Kossuth's own.[35]

The re-moulding of Werbőczy as a national hero necessarily involved the downplaying of his obligation to a larger, European legal literature. His formulation after the peasant uprising of 1514 concerning the origins and noble character of the Hungarian nation was reinterpreted in such a way as to give the Magyar nation exclusive national hegemony within the otherwise multi-national Hungarian state. Likewise, Werbőczy's 'doctrine of the Holy Crown' was recast in terms of public law and of the rights of the Hungarian state to complete independence within the Habsburg Monarchy. The *Tripartitum* was thus re-worked so as to suit the pseudo-democracy and pseudo-statehood of *Ausgleich* Hungary.

The *Tripartitum* was incorporated in the millennial edition of the *Corpus Juris Hungarici*, and is usually considered the last volume of this series. But, as it turned out, the 'last' volume was in fact published first, for the *Tripartitum* left the printing house earlier (1897) than the first volume of the decrees (1899), which published the earliest laws of Hungary from 1000 to 1526. The publication of the *CJH* was timed to

33 György Szabad, *Hungarian political trends between the Revolution and the Compromise (1849–1867)*, Budapest, 1977, p. 34.

34 László Szalay, 'Werbőczy és Verancsics Antal', *Budapesti Szemle*, 1857, pp. 164–90.

35 See thus the very first page of the 1864 Hungarian edition of the *Tripartitum: Werbőczy István Hérmaskönyve*, 2nd edition, Pest, 1864.

coincide with the Millennium and the dazzling celebration of the thousand-year anniversary of the 'home-taking' *(honfoglalás).* (The year of the invasion was, incidentally, decided by an act of parliament which overrode the opinion of historians.) In the introduction to the millennial edition of the *Tripartitum,* Werbőczy's achievements were described in passionate terms. The reader was told that Werbőczy had 'signed his name in the book of fate', that he had a 'burning love for his home-land' and 'enormous power as an orator', and that 'he noticed every beat of the heart in the body of the nobility'.[36]

These tendencies persisted in the interwar period. Following the break-up of the historic kingdom, which left large Hungarian minorities living outside the boundaries of the new state, nation and territory no longer coincided. Accordingly, the idea of the nation had to be refashioned in terms of a cultural and linguistic community which transcended political borders. The search for a new identity drew scholars to re-examine Hungary's legal inheritance. On the one hand, the relationship between Hungarian law and the English common law tradition was investigated and parallels between the Magna Carta of 1215 and the Hungarian Golden Bull of 1222 drawn. Béni Grosschmid, in particular, stressed the close similarity between English civil and public law as it had developed in the Middle Ages and the provisions of Hungarian customary law as contained in the *Tripartitum.*[31] On the other hand, Hungarian historians extolled the uniqueness of Hungarian customary law as the embodiment of the national character and spirit of the *Volk.* This second trend comported with contemporary approaches in German legal thinking and contributed to the increasingly nationalist content of discourse in the social sciences.

As Werbőczy was ever more intrumentralized for political purposes, his dress turned increasingly 'red, white and green'. His reputation and legacy were accordingly refashioned to fit in with a nationalist agenda. During the interwar period, he was most often cited in connection with the doctrine of the Holy Crown, and his work was used to buttress the national-conservative myth of the 'Thousand-Year-Old-State of St. Stephen'.[38] During the Second World War, the 400th anniversary of István Werbőczy's death was celebrated by a conference at the University

36 Sándor Kolosvári and Kelemen Óvári, Preface of the translators, in *Werbőczy István Hármaskönyve, Corpus Juris Hungarici /Magyar Törvénytár 1000–1895,* Budapest, 1897, pp. xi–xxxii (p. xvii).

37 Beni Grosschmid, *Werbőczy és az angoljog,* Budapest, 1928.

38 István Csekey, 'Werbőczy és a magyar alkotmányjog', in (eds) Elemér P. Balás, István Csekey, Istváan Szászy, György Bónis , *Werbőczy István,* Acta Juridico-Politica 2, Kolozsvár 1942, pp. 43–81. Also published as an offprint.

of Kolozsvar (Cluj). The 1941 conference took place only a year after Hitler had given southern Transylvania to Hungary and was intended to legitimize the Hungarian presence at the former University of Cluj, which had by this time worked under Romanian sovereignty for more than twenty years. The Law Faculty of the University of Kolozsvár had started in 1940 a new series of publications, and the papers given at the 1941 conference were reproduced in the second volume of the series.[39]

The legend of Werbőczy retained sufficient efficacy to provoke a fierce reaction by communist historians. In 1947, even before the takeover, the Marxist ideologist and historian, Erik Molnar, reinterpreted Werbőczy's role in accordance with the mechanical Marxist adaptation of history.[40] Werbőczy was accordingly consigned to a closed chapter of Hungarian history. He was held to have no relevance in Hungarian history, except as a persecutor of the peasantry, and his *Tripartitum* was treated as an antique curiosity. In western scholarly circles, however, Werbőczy was considered differently. In 1969, the Max Planck Institute for European Legal History in Frankfurt initiated a facsimile edition of the *Tripartitum.*^ The medievalist, György Bónis, who had helped organize the 1941 conference, wrote the preface.

After 1989, Werbőczy made his latest renaissance. It is surely no wonder that in the turbulent years of the Hungarian transition two new editions of the *Tripartitum* should have appeared.[42] A preface by the director of a Pécs printing factory, Imre Bodnár, encapsulates precisely the prevailing views on Hungarian national culture in 1989. In patronizing fashion, Bodnár criticizes the new media for their destructive effect on the cultural aspirations of young people. Bodnár explains that by publishing the *Tripartitum* he aimed to reassert Hungarian values for the intellectual benefit of Hungarian youth. Bodnár's private initiative was followed by a new scholarly edition in 1990 which was published under the supervision of György Bónis . From then on, Werbőczy was rediscovered by legal historians.[43] Nevertheless, as János Zlinszky has

39 Elemér P. Balás, István Csekey, István Szászy, György Bónis (eds), *Werbőczy Islván,* Kolozsvár, 1942 (see note immediately above).

40 Erik Molnár, 'Werbőczy és a rendi jog', *Társadalmi Szemle,* 1947, pp. 109–114.

41 *Tripartitum opus iuris consuetudinarii inclyti regni Hungariae per Stephanum de Werbewcz editum Wien 1517,* (Faksimiledruck mit einer Einleitung von György Bónis), Frankfurt/M, 1969.

42 *Tripartitum,* Pécs, 1989, and *Tripartitum,* Budapest, 1990.

43 Gábor Hamza (ed.), *Tanulmányok Werbőczy Istvánról,* Budapest, 2001.

pointed out, our understanding of the full complexity of Werbőczy's work is still far from complete.[44]

Conclusion

The history of the *Tripartitum* and of its editions over the last two centuries indicates the close correlation between its publication and the decisive stages of Hungarian legal history. In the 1840s, the *Tripartitum* contributed to Jhe formation of a national legal culture; in the 1860s, it was used as a tool against 'foreign' Austrian legal supremacy; in the 1890s, the *Tripartitum* acquired its special place in national mythology, a role which it held until the communist take-over, after which it was pushed to the sidelines. In 1989, the *Tripartitum* was rediscovered. The period after 2004, the year of Hungary's accession to the European Union, will be a challenging one. National individuality in respect of legal traditions will have to sit within the framework of the European Union. In this respect, the need for a modern edition of the *Tripartitum*, just as of other important legal sources,[45] is beyond question.

44 János Zlinszky, 'Werbőczy jogforrástana', *Jogtudományi Közlöny*, 48, 1993, pp. 374–376 (p. 374).

45 See thus the new edition of Buda's medieval *Stadtrecht:* László Blazovich and József Schmidt (eds), *Buda város jogkönyve*, 2 vols, Szeged, 2001.

The Primacy of *Consuetudo* in Hungarian Law

László Péter

Introduction

Hungary's ancient constitution, as elsewhere in medieval Europe, was generated by custom. However, the Middle Ages lasted longer in some parts of Europe than in others; in Hungary they lasted well into the nineteenth century when, in sharp contrast to Austria,[1] custom was still the dominant source of law. *Consuetudo regni*, as a legal source, possessed greater vitality than royal decree, *decretum* enacted by the king with the consent of the estates at the diet, royal privilege, or the judgement of a law court.

The single work which lent shape to Hungarian law more than any enactment for over three centuries was a customary,[2] which did not explicitly include the *decreta*, the statutes. Werbőczy, a sixteenth-century Hungarian Bracton, in the Prologue of the *Tripartitum*, treats *consuetudo* and *decretum* as having the same force of law. He argues, not unlike Bartolus and many before him, that if statute law is subsequent to contrary custom, then the statute should annul the custom. If, however,

1 In nineteenth-century Cisleithania, custom even in civil law was not a recognized source of law (except when the law expressly referred to it — which it hardly ever did): *Allgemeines bürgerliches Gesetzbuch*, Vienna, 1811, para. 10. The 1811 code refers to custom and use on two occasions only — in respect of local pasturing rights and of procedure for reporting 'lost and found' property.

2 István Werbőczy, *Tripartitum opus juris consuetudinarii inclyti regni Hungariae* (hereafter *Trip.)*, Syngrenius, Wien, 1517. I have used the 'Márkus edition', Budapest, 1897, which is the 'customary' rather than the 'historically authentic edition' (the two differ in respect of several thousand minor particulars). The diet commissioned Werbőczy, protonotary of the High Court, to collect the country's laws. The draft, approved by a committee, attained royal *approbatio*, but the work was never promulgated by the king in a *decretum.* The *Tripartitum* was to become the book in Hungary which, apart from the Bible, attained the highest number of editions (fifty-four to date).

the statute precedes established custom, the latter prevails over the former. Approved general custom cancels the statute everywhere; local custom sets aside the statute only locally.[3] Custom interprets, complements and may supplant statute law.[4] We need not follow the large literature on Werbőczy's foreign sources: what he took from Roman Law (passages from the *Digests)* and from Canon Law. These influences were secondary. Hungarian law was overwhelmingly vernacular in form and content. Indeed, after the Prologue Werbőczy abandons the learned distinctions he has made.[5] He does not maintain the view that custom and statute are different and equal sources of law. *Consuetudo* lies behind and is paramount over all other forms of law. royal edicts, letters of privilege, judgements of the court and *decreta regni.*[6] Law is not made or created; it is not an expression of will — not even the will of the community. Law is *ius,* right, which exists as the approved habits and usages of the community.[7] The statutes only record and promulgate customary rights recognized as already binding.

Ius, for Werbőczy, is not unchanging: it adapts to varying circumstances. But the adaptation is not judicial. *Ius* is not judge-made law: judicial practice is merely evidence rather than the cause which generates

3 *Tripartitum,* Prologue, 12.

4 Ibid, 2 [3–5].

5 On the conflict between the Prologue and the rest of the work, see József Illés, *Bevezetés a magyar jog történetébe,* Budapest 1910, p. 144 f. passim; György Bónis, *Középkori jogunk elemei,* Budapest 1972, pp. 237 ff. In the past the Prologue was seen as the foundation of the work; Bonis, by contrast, emphasized that the 'true Werbőczy' could be found in the three parts, ibid., p. 261.

6 E.g. *Trip.* II, 6. Werbőczy used *consuetudo* in the title in a generic sense for law: cf. paras 1–3 and esp. 9 *(consuetudo* accepted some of the *decreta).* The Hungarian equivalent of *consuetudo* used to be *törvény (lex)* as well as *szokás;* see further examples in Grosschmid, *Magánjogi előadások,* Budapest, 1905, pp. 405, 410, 543; also see György Bónis, *Törvény és szokás a Hármaskönyvben,* Kolozsvár, 1942, esp. p. 8.

7 József Illés held that until 1848 customary law was 'the most powerful source of law', *Bevezetés,* p. 213. The *Tripartitum* itself was the best example: a private publication (cf. note 2 above), it became 'law' and was frequently republished together with the *decreta regni,* which sometimes referred to it, as Werbőczy's work had acquired general approval even before its publication in 1517. Yet, notwithstanding its authority, the *Tripartitum,* being a private publication, allowed open debate on the law. János Kitonich's work, for instance, from 1619 generated a literature well before the nineteenth century, giving a good start to the growth of Hungarian jurisprudence.

ius .[8] For Werbőczy and for his successors over three centuries, the authority behind *ius non scriptum* as much as written law is the approval of the community, *tacitus consensus populi* which the 'lawmaker' is to discover and express[9] and the judge merely to apply.[10] Political authority, as much as all the other concerns of law, was founded on *ius.* It could not have been otherwise because 'public law' was not even a distinct branch of the legal system before the nineteenth century.[11] Succession in the royal office,[12] the coronation, the royal oath, the Inaugural Diploma, the constitution of the diet and also the ambit of the diet's authority were largely regulated by custom.[13] And so were the rights of the king to rule and govern as much as the rights of the nobles, of the other privileged groups, of the counties and *sedes* of the districts.

After the Habsburg dynasty had acquired the throne in 1526 the authority of the diet and that of the *decretum* increased without, however, leading to a statutory system of law. The *decreta regni*, the statute laws, which had accumulated in manuscript collections for centuries, were published for the first time by two bishops in 1584 in Nagyszombat (Trnava).[14] Like the *Tripartitum*, this was a private edition, although

8 Judges took decisions without reference to statute law *juxta antiquam et approbatam consuetudinem.* See Ferenc Eckhart, 'Jog- és alkotmánytörtenet' in (ed.) Bálint Höman, *A magyar történetirás új utjai*, Budapest, 1931, p. 283.

9 On this view *consuetudo* may or may not maintain a *decretum* after the death of its promulgator.

10 Art. X of 1492 ordains the judges to administer justice *juxta regni antiquam et approbatam consuetudinem.* As the royal courts were dependent on the king, the estates were most reluctant to accept judicial decisions as a source of *consuetudo.*

11 A learned man, Werbőczy distinguished in the Prologue *jus publicum* from *jus privatum* (2 [3]), only to disregard the distinction in the rest of his work.

12 Despite the introduction of agnatic succession in 1687 and that of cognatic succession in 1723, the Hungarian Pragmatic Sanction limited by *decreta* the acceptance of the rules of succession to specified branches of the dynasty. The estates, however, preserved 'the approved customary right' to elect the king should these branches become extinct. See Art. Ill of 1687 and Art. II of 1723, para. 11.

13 Cf. Eckhart, 'Jog- és alkotmanytörtenet', p. 279

14 Zakariás Mossóczy and Miklós Telegdi, *Decreta, Constitutiones et Articuli Regum Inclyti Regni Ungariae.* The work was based on codex collections and the appendix of a published historical work by Bonfini. See Béla Iványi, *Mossóczy Zakariás és a magyar Corpus Juris keletkezése*, Budapest, 1926 (on the background, the sources of the work and on Mossóczy), esp. pp. 62 f; Mihály Pámiczky and János Bátyka, *A magyar corpus juris*, Budapest, 1936, esp. p. 42 ff; Zoltán Kérészy, *A Corpus Juris Hungarici mint irott jogi kútfő*, Budapest, 1935, pp. 5, 30, 35; Ándor Csizmadia, 'Previous editions of the laws of Hungary', in János M. Bak, György Bónis, James Ross Sweeney, *The Laws of the Medieval Kingdom of Hungary*, vol. I (1000–1301), Salt Lake City, 1989, pp. xxiv f.

issued under royal licence as were all the many other editions that followed. The Jesuit Márton Szentiványi's edition of 1696 fitted the title *Corpus Juris Hungarici* to the collection.[15]

The principle that the diet and the king make and unmake laws was not yet accepted for at least another century. The nobility stubbornly fought against the so-called *Revisions-clausel* which the court had inserted in Joseph's coronation oath and the text of the Inaugural Diploma in 1687. The *neo-rex* promised to observe the nobility's 'immunities, liberties, rights, privileges and approved customs as the king and the assembled estates will agree on the interpretation and application thereof.[16] The clause was left out of Maria Theresa's coronation oath, albeit not from her Inaugural Diploma. Art. VIII of 1741 expressly exempted, however, the cardinal privileges of the nobility from the implication of the 'revision clause' so that fundamental rights could not even be brought before the diet for discussion. Basic customary rights were subject neither to revision nor even to interpretation by the diet. The *decreta* did not set out the recognized rights and obligations: they presumed their existence; they alluded to, referred to and frequently plainly borrowed their legal authority from rights held in *consuetudo.* Béla Grünwald shrewdly observed that in the eighteenth century both the king and the nobility had vested interests against much statute-making. Statutes created duties for someone; they restricted power.[17]

It would, however, be a grave error to conclude from all this that rights in Hungary were set in stone and that politics drifted towards stagnation. The dominant role of a set of hypothetically unchangeable customary

15 Future editions of the *CJH* added the new *decreta* to the corpus without, however, deleting those which were no longer regarded as being in force. In this sense the *CJH* soon became a 'corpus clausum'. The *Tripartitum* was usually published together with the *decreta,* and most editions contained various supplementary legal material: Párniczky and Bátyka, op. cit., pp. 66–67."I have used the Markus or 'Millennium' edition of *Magyar törvénytár,* Budapest, 1897–, without giving reference.

16 The contended passage ran: *prout super eorum intellectu, et usu, regio a communi statuum consensu diaetaliter conventum fuerit;* in Art. 1 of 1687, para. 2 (the text of the oath), the word *diaetaliter* was added after the coronation. See Gustav Turba, *Die Grundlagen der pragmatischen Sanktion,* Vienna, 1911,1, pp. 48–63, 249–50, 258–59; István Ereky, *Jogtörténelmi és közigazgatási jogi tanulmányok,* Eperjes, 1917,1, p. 184 n 2; Béla Baranyai, 'Hogyan történt az 1687/88, évi 1–4, tc. szerinti törvényszöveg becikkelyezése', *A gróf Klebelsberg Kuno Magyar Történetkutató Intézet évkönyve,* (ed. Dávid Angyal) Budapest, 1933, esp. p. 70 and n 16.

17 Béla Grünwald, *A régi Magyarország,* Budapest, 1910, p. 373. Indeed both sides were primarily interested in preserving the system of free bargaining.

rights did not lead to political immobility. On the contrary — the immutability of custom went hand in hand with a high degree of volatility in the relationship between the two possessors of *iura:* the crown, representing the royal office, and the nobility, organized in the *ország.* For mixed constitutions, like the Hungarian, were unstable affairs.[18]

Although the influence of the Enlightenment, and in particular that of Montesquieu, was considerable among educated Hungarian nobles in the late eighteenth century,[19] even Art. XII of 1790 *de legislativae et execu-tivae potestatis* did not change the position of statutory to customary law.[20] In the renowned Art. X of 1790, Leopold II recognized *(benigne agnoscere dignita est)* that Hungary is 'to be ruled and governed' by its king *propriis legibus et consuetudinibus.* The immutability of basic rights was reaffirmed in Art. Ill of 1827 and in Ferdinand's Diploma of 1830. The decisive change came in 1848 when most of the fundamental rights of the nobility were abolished and the country's constitution was transformed by the April Laws.

1. Legislation and *Consuetudo*

Between 1790 and 1848 a major shift occurred: the principle of legislation, that laws might be made and unmade by the diet, acquired general acceptance. It could be argued, by reference to Werbőczy's work, that Hungarian law now moved from the assumptions of the main text of the *Tripartitum* to the declared principles of the Prologue: statute became an independent source of law which existed alongside custom. The emergence of liberal nationalism was the political background of this change. Legislation became the central concern of the diet in the 1830s. Széchenyi, Kölcsey, Deak and their associates, later Kossuth, aimed to

18 László Péter, 'Die Verfassungsentwicklung in Ungarn', in (eds) Helmut Rumpler and Peter Urbanitsch, *Die Habsburgermonarchie 1848–1918,* 7, Vienna, 2000 (hereafter, 'Verfassungsentwicklung'), pp. 239–540 (p. 257).

19 Cf. László Péter, 'Montesquieu's Paradox on Freedom and Hungary's Constitutions, 1790–1990', *History of Political Thought,* 16, 1995, pp. 77–104 (p. 80).

20 The import of Art. XII of 1790, a widely misunderstood law, was that those royal decrees which the Court feared would in Hungary be deemed to be in conflict with *ország* rights and were enacted as patents rather than being sent to the counties for promulgation, had no legal force; patents could not replace *decreta.* The executive power had to be exercised *nonnisi in sensu legum.*

reform Hungarian society by making statute laws.[21] None, however, asserted a dogmatic statutory view of the law. Deak, for instance, repeatedly and consistently held the view that 'our national rights' *{nemzeti jussaink)* were partly based on customs and partly on written laws and that 'we have always respected the lawful customs maintained unimpaired as laws' *(törvények).*[22] Deák did not change his view after 1848. He used customary as well as statutory arguments in demanding that the constitutional settlement with the monarch should be founded on the 1848 Laws rather than on the basis of the '1847 constitution', the March Constitution of 1849 or the October Diploma.[23] Likewise, in the prologue to Law XLIV of 1868 Deák inferred the claim to an 'indivisible unitary Hungarian nation' from 'the basic principles of the constitution': essentially a customary concept. The most authoritative enactments on the constitution right up to the end of the Monarchy maintained a two-track view of Hungary's laws. It was not lipservice paid to the past that prompted Francis Joseph, in his coronation oath and in the Diploma, to promise to maintain Hungary's and its associated Lands' 'exemptions, privileges, lawful customs ... and statutes'.[24]

The continuity of Hungarian law was broken in 1849, creating uncertainties for decades to come. Imperial patents, issued in 1852 and later, introduced the Austrian Penal Code and the Civil Code. Although these enactments unified Hungarian law and established legal equality,[25] their validity became uncertain in 1860 and again in 1867 because they had been instituted by 'octroyed' alien laws. The Lord Chief Justice Conference

21 A great achievement of Count István Széchenyi's *Hitel* was that it created a public opinion which rejected the notion of immutable laws. See Béla Iványi-Grünwald (ed.), *Gróf Széchenyi István összes munkái,* Budapest, 1930, pp. 422 ff

22 On 25 May 1833 in the Lower House on the religious issue, which also involved the position of the House as regards the Upper House: Manó Kónyi, *Deák Ferencz beszédei* (hereafter *DFB),* Budapest, 1903, I, p. 14. On occasions, Deák even suggested that the source of every right of the nation, including the right to legislate at the diet, was the county (which provided the deputies with instructions): on 16 June 1835 at a *circularis* sitting; ibid., p. 163. In 1842 Deák (influenced by a review which had appeared in the *Athenäum* on his report to County Zala) began to use the more abstract and flexible new word 'jog' instead of 'jus', *DFB,* I, p. 553. Leading jurists were reluctant to accept the word 'jog': see Ferenc Eckhart, *A jog- és államtudományi kar története, 1667–1935,* Budapest 1936, pp. 362–364 (Ignácz Frank's arguments).

23 See Peter, 'Verfassungsentwicklung', pp. 301–3.

24 Law II of 1867, para 1.

25 Cf. László Péter, 'The Aristocracy, the Gentry and their Parliamentary Tradition in Nineteenth-Century Hungary', *Slavonic and East European Review,* 70, 1992, p. 82 n 20.

restored parts of Hungarian customary law by the composition of the Provisional Judicial Rules in 1861,[26] The enactment itself had force of law on a customary basis because the king, not yet crowned, could not lawfully promulgate statute law. Statute law came into its own after 1867.[27] The sudden increase in legislation was made possible by a procedural reform. The *decretum* system, the joint promulgation of all statutes agreed at a diet, was, on the basis of the enabling Law IV of 1848 (para. 2), abandoned after 1867. A statute was promulgated as soon as parliament and the king concurred on its text. Politics was the crucial factor in the swell of legislation that followed. The Andrássy government, backed by a large liberal majority in the House of Representatives (hereafter the House), had a clear programme: the creation of a single Hungarian society of citizens out of the disparate segments of the old order. Codification became the new canon. Impressively large areas of law were brought under statutory control in property, contract, commerce, credit and in industrial laws. The Penal Code, enacted as Law V of 1878, established the twin principles of *nullum crimen sine lege* and *nulla poena sine lege?*[28] Civil marriage was introduced by Law XXXI of 1894. The underside of this development was, however, that *ideiglenes*, provisional, became the legislator's most frequently used qualifier. Moreover, much was left outside statutory provisions, like the whole gamut of civil rights, the police, the position of civil servants and even a part of the penal law. And this was how *consuetudo* in the liberal age, after 1867, obtained a second wind. The government *motu et potestate proprio* regulated by decree, *rendelet*, wide swathes of social life and ministers issued orders to settle specific cases. For instance, the Interior Ministry, in supervising associations, exercised customary rights of the State *praeter legem* or, so to say, outside statute law. Also, statute law could even widen the orbit of ministerial power. Law XL of 1879, an adjunct of the Penal Law, authorized ministers to establish by *rendelet* new offences at their discretion. This summary jurisdiction was largely administered by ministry and local officials rather than by the law courts.[29] Social legislation rarely embellished the *Corpus Juris Hungarici.* Labour laws,

26 Károly Szladits, *Az osztrák polgári törvénykönyv hatásában a magyar magánjogra*, Budapest, 1933, pp. 24–35.

27 Whereas all the *decreta* promulgated between 1740 and 1835 made up a single volume of 511 pages and those between 1836 and 1868 another one of 600 pages, the Laws of 1869–71 produced a volume of 508 pages and the next one, for 1872–74, contained 390 pages.

28 These principles were weakened, however, by the passing of Law XL of 1879 on Offences which enabled the government to institute offences by *rendelet.*

29 See Peter, 'Verfassungsentwicklung', pp. 370–82.

laws on the press and on church-state relations were inadequate. In general, laws lacked proper procedural rules: the customary rules of office practice were enough. The Civil Code, on which scores of jurists and civil servants worked for decades, went through several drafts and was discussed at diverse conferences, but it remained a ministerial draft. Like Werbőczy's *Tripartitum,* the Code was, after the turn of the century, applied by the law courts as a customary.[30] This blemish was not put right even after 1918. Amazingly, Hungary's first statutory Civil Code was passed by a toothless Communist parliament in 1959.[31]

In sum, customary law was flourishing in the liberal era. Together with government *rendelet-decree* (which in the Hungarian system should be regarded as the 'customary law' of the State), it retained a formidably strong presence in the legal system. This position was recognized by statute law which ordained in 1869 that judges in the law courts must apply statute law, government decree and local government order (the last two could not conflict with statute) as well as lawful custom.[32]

2. Jurists and the Two-track View of Legal Sources

Not surprisingly, the relationship of custom to statute law preoccupied jurists.[33] Did each possess the force of law to the same extent? Which one was to give way if conflict arose? Ignacz Frank did not think that custom could annul statute in property law, but otherwise it might, and the presumption of the law was always on the side of custom.[34] Antal Cziraky emphatically argued that the most important dispositions of public law were based solely on tradition and that *consuetudo,* as it had the

30 See Károly Szladits, 'Codificatio', in Dezső Markus (ed.), *Magyar Jogi Lexikon,* Budapest, 6 vols, 1898–1907, (hereafter, *MJL),* 2, pp. 552–4.

31 It went into force on 1 May, 1960.

32 Law IV of 1869, para 19.

33 Ernő Nagy believed this problem to have been one of the thorniest for a Hungarian jurist: *Magyarorszdg közjoga,* Budapest, 1891, p. 18. This might have been the reason why in the 1870s many jurists dodged the question of whether or not custom could annul statute. There was, however, general consent on the point that local custom could no longer stand in the way of statute law.

34 *A közigazság törványe,* Buda, 1845,1, pp. 76–78 and 80. Frank's two volumes set out Hungarian private law. Most of the other authors quoted below were jurists of constitutional (public) law. My account ignores the earlier literature in which views diverged. After the enactment of Art. XII of 1790 some jurists, Georch llles for instance in the 1830s, expressly repudiated the principle that *consuetudo derogat legi*.

'continuous tacit approval of the legislator', possessed the same legal force as statute.[35] Anton von Virozsil listed among the sources of public law *consuetudo juris* after *decreta* and the pacts between the king and the estates, and put them above the *Tripartitum* and other sources. Custom, he argued, had the same force as written law.[36] Emil Récsi also listed the statutes first and custom second, but he made it clear that the legal authority of the latter, as an expression of the 'national will', was complete.[37]

The influence of German scholarship on Hungarian jurists was strong throughout the, nineteenth century. But German influence did not pull them in the same direction. Both the historical law school and the so-called dogmatic method had disciples in Hungary. In the end, however, the influence of Hugo, Savigny and Puchta proved more enduring than Laband's. It was a short and obvious step to take from the assumption that law was based on *tacitus consensus populi* to the view that law was the expression of the *Volksgeist*, the *nemzeti szellem?*[%] The change was compatible with the Hungarian outlook that recognized custom as an independent source of law. The historic law school did not, however, have it all its own way. In 1887 Ernő Nagy published the first edition of his text-book on public law,[39] which was hailed by Gusztáv Schvarcz, jurist and liberal politician, as the work which blew away 'the traditional fog accumulated by history' on constitutional law.[40] Nagy, under the influence of Laband, predicated Hungarian public law on the concept of the State from which it followed that legislation had primacy over custom which it could set aside, whereas custom could not replace parliament-made law.[41] But the promoters of the dogmatic method in public law asserted the strictly statutory view of law rather selectively,[42] and

35 *Conspectus Juris Publici Regni Hungariae ad Annum 1848*, Vienna, 1851, Tom. 1, para. 34 (Observantia Regni).

36 *Das Staats-Recht des Königreichs Ungarn*, Pest, 1865, vol. I, para. 3.

37 *Magyarország közjoga a mint 1848–ig s 1848–ban fenállott*, Buda-Pest, 1861, pp. 6, 15–19.

38 Ibid., p. 125. Récsi gets close to saying that the *Volksgeist* lends legal force to statute.

39 *Magyarország közjoga, Államjog*, Budapest, 1887.

40 'Tanulmány a magyar államjogi irodalom ujabb termékeiről', *Magyar Igazségügy*, 1888, p. 34. Schvarcz also praised the book in the House. See Csekey, *Nagy Ernő*, p. 169, n 2.

41 Ernő Nagy, *Közjog*, 1891, pp. 18–19. In later editions Nagy somewhat softened his strictly statutory view. See, op. cit., 1907 edition, pp. 27–28.

42 The statutory view was applied to the reserved rights of the crown, the interpretation of the 1867 Settlement and the relationship of Croatia to Hungary, as defined in Law XXX of 1868. It was not applied to *ország* rights.

they shied away from theoretical arguments. The Civilians, however, demanding codification, boldly attacked Savigny and Puchta's historical method. Rezső Dell' Adami and particularly Gusztáv Szászy-Schwarz,[43] 'the Hungarian Jhering', advanced general arguments against the *Volksgeist*, that 'miraculous something made by nobody'. Bódog Somló's critical examination of the concept of customary law was probably the best,[44] and Géza Kiss's was the most comprehensive.[45] Kiss argued that statute was the single source of law and that 'customary law' was an empty fiction.[46] The believers in the historical method and the customary law followed the *Gestaltungstheorie* willy-nilly.[47] Like Laband, Kiss scoffed at the idea that custom could conceivably annul statute law.[48]

Nevertheless, the promoters of the dogmatic method did not break the dominance of the traditional view of customary law.[49] The doyen of Hungarian legal history in the last years of the Monarchy, József Illés, a firm adherent of the two-track view of Hungarian law, concluded that custom could, as it had in the past, annul statute law and that the jury was still out on the question of the exact relationship between the two sources of law.[50] And so argued Béni Grosschmid, the most influential Civilian of the period.[51] The six-volume Hungarian Legal Encyclopedia also took the traditional view on customary law.[52]

Before 1918 the adherents of the two-track view of legal sources were on the defensive. After the restoration of the monarchic constitution in 1920 they occupied the moral high ground. Jurists now generally endorsed the view, forcefully argued for instance by Zóltan Kérészy, that

43 *Uj irányok a magánjogban*, Budapest, 1911.
44 *A szokásjog*, Kolozsvár, 1914.
45 *A jogalkalmazás módszeréről*, Budapest 1909.
46 Ibid., pp. 115,207.
47 Ibid., pp. 105 f. The theory holds that customary law is rooted in the implied permission of statute law. While the *Gestaltungstheorie* is too contrived to explain Hungarian law, the postulate of the traditional view that legal rules exist which may or may not be in conflict with statute law, and which, because they have acquired general consent, the judge is merely to apply, brings the argument dangerously close to Humpty Dumpty's claim about the use of words.
48 Ibid., pp. 219–20, 224–27; the question, he insisted, was in fact that of interpretation of statute law.
49 Géza Kiss recognized this in 1916, 'A desuetudo tanához', in *Jogi dolgozatok*, ed. *Jogtudományi Közlöny*, Budapest, 1916, pp. 368, 373.
50 József Illés, *Bevezetés a magyar jog történetébe*, Budapest, 1910, pp. 50–1; repeated in the 2nd edition, 1930, pp. 108–9.
51 Grosschmid, *op. cit.*, pp. 398 ff.
52 Béla Ladányi, 'Szokásjog', in *MJL*, 6, pp. 438–44.

lawful custom could destroy statute law.[53] The 1920 constitutional *provizórium* was a response to an intractable legal problem which, inadvertently, enlarged the scope of customary law arguments. Legal continuity, ruptured in 1918, could not be restored in 1920, not because of the interruption of the short-lived Károlyi and Kun regimes, but because legality could only be restored by an act based on the concurring will of king and parliament.[54] The king was not available in 1920, a case of *vis major*. Rump Hungary had to make do with a rump constitution based on a single actor: the assembled representatives of the nation, hence the label, *provizórium*. Jurists, particularly Kalman Molnar, thought that the 'temporary constitution' was legitimate by resorting to customary legal arguments.[55] Even in a post mortem of Hungary's historical constitution, written in 1945, Molnar introduced his lament with the famous passage from Julian, 'the great Roman jurist', who had established the principle that unwritten law, as much as written law derived its authority from the consent (tacit or express) of the people.[56] When the curtain fell on Hungary's historic constitution, the jurist arrived back after four hundred years where Werbőczy had started.

53 Zoltán Kérészy, *A jogszokás derogatorius erejének kérdése a magyar jogi irodalomban*, Szeged, 1935. He emphatically denied, however, that state officials could institute lawful custom contrary to statute law, pp. 27–28. Conceivably, the dissolution of the Habsburg Monarchy and the Hungarian-Croat Nagodba in 1918 weakened the case for the strictly statutory view of constitutional law. see note 42 above.

54 Deák and Csemegi's view on legal continuity, by reference to Art. XII of 1790, made possible the restoration of the legal order in 1867 by king and parliament acting together after 19 years of interruption.

55 *Alkotmányos jogrendünk és a közjogi provizórium.* Pécs, 1926, reprinted in his *Magyar közjog*, Pécs, 1929, pp. 720–43. The gist of Molnár's thesis was that, as the authorities were habitually obeyed by the population, the legal order had acquired the 'tacit consent' of the nation. Molnár's views, shared by many, were criticized by others (e.g. József Bölöny, *Ideiglenes államjogi berendezésünk jogalapja*, Budapest, 1938, pp. 26–40). But even the detractors of Molnár's view on legitimacy believed in the derogative power of lawful custom: József Bölöny, *Magyar közjog*, Budapest, 1942, I, pp. 65–69; also see Gyula Vargyai, *A legitimisták és szabad királyválasztok közjogi vitájáról az ellenforradalmi államban*, Budapest, 1964, pp. 32–40.

56 *A két világháború közötti provizórium közjogi mérlege.* Pécs, 1945, p. 6; cf. *Digests*, 1. 3.32 (in older editions 1.3.31).

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