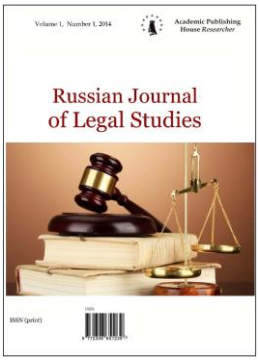
Published in the Slovak Republic
Russian Journal of Legal Studies
Has been issued since 2014.
E-ISSN: 2413-7448
2020, 7(2): 69-76

DOI: 10.13187/rjls.2020.2.69
www.ejournal25.com



The History of Old Hungarian Private Law. An Unexpected Answer to Modern Challenges?

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Abstract

The paper discusses the old Hungarian private law and its development, an issue regretfully virtually non-existent in the present Western legal scholarship. Its peculiar character, intertwined with a vital role played by custom and judge-made law, atypically in a civil-law system. The authors recount the history of the Hungarian laws and its oldest sources, beginning with Tripartitum. Afterward the turbulent history of Hungarian law in the 19th century is described, specifically the efforts to introduce and force upon Hungarians the then-modern Austrian law after the demise of the 1848 Spring of Nations upheaval, as well as the Hungarians' efforts to resist such endeavours, successfully completed with the restating of the old legal system as executed by Judex-Curial Conference of 1861 through the Provisional Judicial Rules. Finally, the law-making role of the Hungarian courts is discussed. All that shows, when compared to other systems, that Hungarian private law, though it may seem obstructed from the interests of legal scholars in the West, is a creation of an exceptional character, whose careful examination may prove more and more expedient in the context of the decodifying and globalizing of law in 21st century.

Keywords: Hungary, Hungarian law, customary law, civil law, Tripartitum, Judexcurial Conference, legal history.

1. Introduction

For centuries, from the perspective of mainstream Western legal thought, Hungarian private law was a remote system, virtually unknown outside of Central Europe where it was born. That was the case even though it had remained in force in the Hungarian territories for a long time, until the mid-20th Century, formally until 1957; the system was one of a kind in Europe, not only because of its almost thousand years of continuity, but particularly in that it was deeply rooted in medieval law. Characteristic of it were also certain properties, peculiar in the civil law tradition, that make way for analogies with common law systems: namely, the key role the Hungarian system has given to custom and judge-made law, both of them being core tenets of this text. Nevertheless it has not, as of now, generated the interest it would deserve – much unlike other atypical systems, especially the mixed jurisdictions like Scotland, Quebec, Louisiana or South Africa.

The authors aim, therefore, to try and fill this gap. It is submitted that examining the process of development of Hungarian private law from a contemporary perspective may be of value reaching beyond purely historical purposes. We believe that the originality of the Hungarian approach to law may serve as a fruitful inspiration for contemporary jurisprudence, forced to deal with the dynamic changes pertaining to economy and morals, the key elements of social fabric,

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changes that incessantly undermine the validity of a purely positivist approach to law. We opted to have used the notion of "legal positivism" in its everyday, practical meaning in the language of the law. We are aware that using "legal positivism" as a catch-all phrase encompassing all problems and issues related with excessive formalism and the blindness of contemporary jurisprudence, especially in the West, to moral argumentation and other concepts that imply a legal-natural viewpoint, may be ahistorical and simply not give justice to the original positivists (Sebok, 1995: 2054 et seq.).

2. Materials and methods

Hungarian law, and even more its history, is a barely known issue among European scholars of law. Undoubtedly, the key reason for that is the language barrier – the difficulty and peculiarity of Hungarian language results in a small number of foreigners speaking it, even more so: scholars using it at proficiency levels necessary to read legal literature. This obviously hinders the research on Hungary's legal system. Nevertheless, numerous sources and materials concerning Hungarian law are also in English, German, Polish and Slovak languages – including 19th century sources. Also, where needed, texts of the original legal acts will be analyzed.

Legal scientific research methods applied by the authors include: the historical method (also in its systematic version), comparative legal research, critical and systematic analysis, formal-dogmatic method, and critical-legal methods.

3. Discussion

3.1. Collections of Hungarian customary law. Tripartitum

The first feature delineating the uniqueness of traditional Hungarian law is its continuity, dating from the establishment of Hungarian statehood till the 20th Century. Deemed to be the oldest sources of Hungarian law are collections of laws and decrees, the oldest of them supposedly drafted in 11th – 12th century (Dziadzio, 2009: 100-101). However, as these are known only from Latin collections made subsequently – the authenticity of these oldest sources of law is questionable. The Codex Admontenzis, recovered in 19th century in Styria, is considered to be the oldest of the collections, believed to date back to the 12th century. Among other collections Codex Turocianus or Codex Colarianus deserve a mention, both drafted probably in the 15th century (Luby, 2002: 66).

The development of medieval Hungarian customary law was crowned with its comprehensive codification – Tripartitum opus iuris consuetudinarii inclyti regni Hungariae (*Hármaskönyv), usually abbreviated as Tripartitum. It was made between 1510 and 1514, owing to King Vladislaus II Jagiellon's inspiration, and its author was a Hungarian jurist and a judge of the royal curia, István Werbőczy. The Tripartitum was intended by its author to be a collection of laws as well as a manual for practitioners of law. It aimed to encompass all biding laws of Hungary; laws that were not included in the Tripartitum were to be repealed (*Luby, 2002: 53*). Werbőczy's work comprised three parts: the first encompasses the private law of nobility, including personal, inheritance (statutory) and property law; the second part included mainly property and procedural law; and the third, in addition to procedural law, encompassed the so-called particular laws, systems pertaining to burghers, serfs (peasants) as well as Transylvanian and Croatian laws.*

In 1514 Tripartitum was enacted by the Hungarian diet, but did not eventually receive the royal assent, mostly due to the opposition of the magnates. However, Werbőczy managed to publish Tripartitum in print (in Vienna, initially as private venture) and send counterparts to all counties of Hungary. As a result, his work quickly became the fundamental to legal practice, becoming a key element of customary (yet written and systematized) Hungarian law. As a matter of paradox, an official collection of customary laws thus became customary law itself.

Tripartitum undoubtedly managed to fulfill the aims that guided its creation – it systematized existing Hungarian law and secured the position of the nobility against the magnates' ambitions, and – potentially – also those of the monarch or lower classes (inter alia by confirming all privileges granted in the Hungarian Golden Bulls and by sanctioning serfdom of peasants). Such development was arguably in line with the theory of the Holy Crown (Szent Korona), according to which the Crown of St. Stephen is a symbol of the mystically conceived Hungarian statehood, integrally encompassing the " Lands of the Crown of Saint Stephen", and

*whose personification were the king and the nobility; the Hungarian state thus "consisted of" the king, the ruling class and its territory. Efforts of Hungarian scholars of Roman law aimed at introducing and acquainting the public with this legal system failed to even undermine the position of Tripartitum, especially among lower and middle nobility (*Hamza, 2014: 383-393*).*

*The above should not obstruct the realization that Tripartitum was but a swan song of the Hungary of yore. It was collected in the ultimate years of the state's existence. A little over a decade later, as a result of the defeat at the Battle of Mohács in 1526 and the demise of King Louis II, large areas of the country fell under the Turkish rule, in the eastern part a separate principality of Transylvania was established, and the royal crown was taken over by the Habsburgs. However, the existence of the Tripartitum contributed greatly, by consolidating and systematizing it, to the preservation of a distinct and vivid Hungarian law. Tripartitum remained the main part of subsequently edited collections of Hungarian law, primarily the Corpus Iuris Hungarici – published as a private venture from the 17th century onwards. This collection was supposed to encompass all binding laws; it therefore fulfilled the role of a law gazette, which had only begun to be published in Hungary in its contemporary form in 1882 (*Beňa, Gábriš, 2015: 24*).*

There were subsequent attempts at a formal codification, however these were obstructed by the Hungarian elite. These attempts were initiated by the Venna authorities: centralist, absolutist and German, thus standing in complete opposition to the spirit of the Crown of Saint Stephen, conservative and looking up to its nobility. Thus, even though during the reign of Emperor Leopold II, projects for the codification of, inter alia, civil, commercial and bills of exchange and promissory notes law were set forth, they did not enter into force. It was only in the 1840s that the partial codification of commercial law was successfully completed (Beňa, Gábriš, 2015: 72). As a result, subsequent compilations of laws played a vital role, such as the Planum Tabulare of 1800, which contained i.a. the rules of judicial procedure and practice or the justice system in cities (Visegrády, 2013: 8). In this period, moreover, a significant linguistic change happened, a sign of future ethnic conflicts to rock Hungary. Until 1832, all laws were promulgated in Latin; that year a parallel promulgation of a Hungarian version was introduced, and as soon as in 1836 Latin was abandoned altogether.

As a result, a system based entirely on private collections of laws both customary and judge-made operated in Hungary undisrupted until 1848. This state of affairs was only changed as a result of the failed national liberation movement of 1848, the Hungarian chapter in the story of the Spring of Nations upheaval.

3.2. Hungarian law in 19th century. Austrian challenges and domestic tradition

The Hungarian Revolution and the War of Independence of 1848-49, whose aim was to create a sovereign Hungarian state, ended in a total and disastrous Hungarian defeat at the hands of the Austrians and Russians. Throughout the entirety of the Habsburg monarchy a ten-year period of neo-absolutism began, known as the "Bach era" (After the name of the then prime minister, Alexander von Bach). It proved to be particularly harsh in Hungary, then a pacified and subjugated country, whose legal and political distinctiveness was to be completely abolished.

To this end, pursuant to the imperial patent of 29th November 1852, the Austrian Civil Code of 1811 (ABGB) was extended to Hungary, and, in the following years, a set of other Austrian laws (bills of exchange law, mining law, insolvency law) (Gábriš, 2011: 49 et seq). Unsurprisingly, an attempt to forcefully and immediately revoke an indigenous legal system and have it replaced with foreign laws aroused livid resistance and, ultimately, proved to be only ephemeral. The Hungarian society remained unconvinced by the fact that Austrian law was unquestionably more modern and better suited to contemporary social challenges than the archaic legal system of Hungary.

The disastrous defeat in the Italian War of Independence of 1859 and the growing internal crisis forced deep changes in the Habsburg state (Bokwa, 2012). One of the elements of the resulting transformations was the establishment of a dualistic Austro-Hungarian monarchy in 1867, in which Hungary obtained the status of a de facto independent entity, linked with Austria by a real union – thus achieving a complete reversal of the neo-absolutist practice. This process needed the necessary support of Hungarian elites, for whom, the sine qua non condition of an agreement (Ausgleich) with the Habsburgs was, among other issues, that the old legal system in Hungary be restored.

To this end, Emperor Francis Joseph ordered the restoration of a separate Hungarian Supreme Court, i.e. the Royal Curia (Curia Regia), under the leadership of the supreme royal judge (in Hungarian: Országbíró, in Latin: iudex curiae). This position was assumed by an outstanding Hungarian national leader, Count György Apponyi. Under his leadership, a convention was held in Pest from January to March 1861, which went down in history under the name of the Judex-Curial Conference (Országbirói értekezlet, in German: Judexkurialkonferenz). Several dozen prominent figures of Hungarian legal, economic and public life participated therein, including more than forty leading judges and lawyers, as well as merchants, politicians, scientists, mining experts and clergymen (Gábriš, 2011: 51).

The Conference was aimed to determine how the old Hungarian law was to be restored. It managed to work out a document that would form the basis of the Hungarian legal system in the coming decades. These were the "Provisional Judicial Rules" (Ideiglenes törvénykezési szabályok); they were intended to provide a manual to the judiciary as to how and which law to apply before a separate Hungarian codification is carried out. The Provisional Judicial Rules were divided into eight parts, pertaining to particular areas of law; civil law (both substantive and procedural) was dealt with in the first part (Gábriš, 2011: 119). The regulation of civil law matters was based on three principles (Gábriš, 2014: 475-476):

1. in general, the old private Hungarian law and its sources from before 1848 were fully reinstated, while the regulations introduced by the Austrian authorities after 1849 were revoked, declared invalid and non-existent (Almási, 1924: 20); in particular, the old family and inheritance law based on the Tripartite (including status differences, absent in ABGB) was fully reinstated;
2. ABGB's rules regulating the manner and validity of real property transfer, as well as Austrian legislation on land registers, mortgages, etc., in particular the Land Registry Act of 1852, remained in force;
3. the Austrian Mining Law remained in force.

The Provisional Judicial Rules were accepted by resolution of both chambers of the Hungarian Parliament and received the royal assent, and the Royal Curia passed en banc a resolution that the Rules would immediately apply to all court cases until new legal regulations were passed. Finally, copies of these were sent to all municipalities in Hungary, which in turn generally opted to recognize the Provisional Judicial Rules as a binding source of law (Almási, 1924: 19). However, their legal nature remains controversial, as they were not included in the Hungarian catalogue of sources of codified law, which included statutes, regulations, bylaws and privileges.

Absent other options, it may therefore prove appropriate to treat the Provisional Judicial Rules either as customary law (Almási, 1924: 19-20) or as a sui generis source law having no equivalents in other systems (Gábriš, 2011: 55 et seq.). This is an acceptable solution, given the customary nature of former Hungarian law, entailing an open catalogue of sources of law. As a result, the Provisional Judicial Rules must be recognized as an exceptional example of not only stopping, but also reversing of the course of events that took place in the whole of Europe in the 19th century. Pursuant to these Rules, the law was effectively and permanently "de-unified" (Gábriš, 2011: 50) in a large area of the Habsburg monarchy, moreover: by returning to archaic customary law.

The Provisional Judicial Rules, as is often the case with provisional solutions, proved to form the cornerstone of Hungarian private law for nearly a century – having survived the First World War they remained in force in Hungary, after the 1920 Treaty of Trianon, in their entirety, up until the Soviet occupation in 1945, and – formally – until the introduction of the communist Civil Code in 1957. That private law in Hungarian lands was codified that late is a unique feature in continental Europe. This situation resulted from the failure of the projects to codify Hungarian substantive civil law (Civil proceedings were codified by Act No. LIV of 1868. and then by Act No. I of 1911), despite the efforts made and the considerable progress made in the codification work, which had been going on since the 19th century but were cut by the outbreak of the Great War in 1914.

3.3. Stare decisis and judge-made law in Hungarian history

The importance of custom in Hungarian law was accompanied by its dependence on judge-made law (Luby, 2002: 86). It had grown particularly since 1723, when a coherent, centralized judicial system was first introduced in the lands of the Crown of Saint Stephen (Luby, 2002: 92). The role of the courts equipped with the authority to provide binding precedent was obviously

excluded during the Spring of Nations and the period of Austrian law's dominance (1848–1861). The reforms of the 1860s brought about not only the restoration of this law-making competence but also a new, unified structure od judiciary.

The law-making role of judges was confirmed by the Act № IV of 1869 (The Hungarian legal tradition is to mark statutes (starting from the Middle Ages, which emphasises the continuity of the legal system) by the year of their promulgation and a Roman numeral. This convention is maintained in this article), issued after the establishment of the Austro-Hungarian Empire, which in its § 19 stated that a judge was to adjudicate on the basis of statutes, followed by customs, to which statutory power is attributed, and finally – subordinate legislation. In the following years, the law-making powers of the courts were extended and confirmed by statute. And so, in 1881 (Act № LIX of 1881), it was stated that the decisions of the Royal Curia, made in hard cases (cases controversial or otherwise unresolved), in plenary sessions of the civil senates, were to have, from that moment on, a universally binding legal force – guaranteed by statute. Act № XXV of 1890 extended these powers to appellate courts (tabulae), which from then on were authorized to pass resolutions dealing with certain matters. Such resolutions would then form precedent to which the principle of stare decisis would apply, binding only, however, on lower courts within the circuit of the appellate court in question.

In particular, the provisions of Act № LIV of 1912 are indicative of the desire to strengthen and sanction the role of judge-made law. The statute in question significantly reformed the law-making role of the judiciary, reserving the authority to set precedent to the Royal Curia, at the same time significantly broadening its competences. Within the Curia four senates were created, tasked with the purpose of unifying the different branches of law (civil law, land law, commercial law, criminal law), each with a chief and ten justices.

These Senates could issue five types of resolutions (Luby, 2002: 96-97):

1. ordinary resolutions – on individual issues, effective only in a given case but indirectly influencing the case law – hence, tantamount to typical cassatory decisions of modern continental systems;
2. basic resolutions (elvi határozat) - selected resolutions on individual issues, published in a set of rulings (Polgárjogi Határozatok Tára) and binding on the Curia itself – in order to change the precedent established in the holding of a basic resolution, a unificatory resolution had to be passed;
3. unificatory resolutions (jogegységi döntvény) – universally binding, disposing not of an individual case but resolving a specific, general legal issue; issued by the relevant unification senate, they created a norm placed on equal footing with a statute that could only be amended by a plenary resolution, by statute or by custom;
4. plenary resolutions (teljesülési határozat) – issued by the formation of combined Senates; such resolutions could resolve a general legal issue or amend a unification resolution, and their importance was higher than that of unification resolutions because a plenary resolution could only be amended by a qualified resolution;
5. qualified plenary resolutions – adopted by a supermajority of votes of the merged senates, they could repeal or amend the plenary resolutions.

The resolutions described in points 3-5 had been generally binding – a new type of sui generis source of law, referred to as "decision", of equal footing to statute; they established precedent that had to be observed by all courts in Hungary (Beňa, Gábriš, 2015: 25). However, due to the outbreak of the First World War, the system thus established (undoubtedly unique and original) survived only six years in majority of the territories of the Crown of Saint Stephen.

3.4. Hungarian law in light of other systems. Comparative remarks

An issue of striking resemblance between common law and old Hungarian law is, obviously, their being based heavily on custom and customary law. Though common law scholars would probably prefer to say that customs in their system were not law proper unless they gained such footing in and owing to a court decision – i.e. an application of customs as law while resolving and actual controversy. Only then, by being featured in a court decision's holding, may a rule becomes law. However, the practice of common law and its development was such that it never lost touch with custom and customary law, rooted in rules and suggestions of morality (which predominantly shaped customary law).

As O. W. Holmes famously underlined: "the life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed" (Holmes, 2009: 3 et seq). In English law, the existence of "ancient custom", moreover, is deemed sufficient to operate as far as to include rules of international law in the country's legal system (Rayner v. DTI, 1989). Similarly, medieval customary law was also based on experience, on decoding the practice of previous generations (Ibbetson, 2007). Hungarian law was no exception as regards the utmost respect for tradition and custom.

Another readily identifiable similarity between ancient Hungarian law and common law systems is that both systems were based on the notion that the law and legal practice be based on precedent. The principle of "stare decisis" ("let the decision stand") is a vital rule according to which judges are bound by holdings established in decisions made in prior cases – not matter if such decisions rule on issues requiring statutory interpretation or decoding legal rules from existing custom (see *supra*).

As explained by a US judge: "A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy" (Allegheny General Hospital v. NLRB, 1979). The rules of precedent under Hungarian law operated in a very similar manner. The main difference being that the developed system of precedent in Hungary, created in the 19th Century law, was in fact introduced by statute.

Polish medieval law of the nobility was similar, heavily based – unlike burgher laws, usually codified – on custom. Polish early medieval law was not gathered in collections similar to leges barbarorum (Collections of early Germanic laws followed by Germanic tribes), hence it may nowadays only be decoded from partial sources, often rooted in legal practice (Bardach et al., 2009: 47 et seq.). The most important sources of Polish medieval law are the Book of Henryków (Liber fundationis claustri sanctae Mariae Virginis in Heinrichow), and, predominantly, the oldest collection of Polish early medieval law, drafted in German, probably for the purposes of Teutonic Order – the Book of Elbing (Known in Polish as Najstarszy Zwód Prawa Polskiego (NZPP), in English: the Oldest Scroll of Polish law), whose only surviving counterpart, unfortunately, is not complete (it is torn mid-sentence). When, after Kingdom of Poland emerged reunified after Poland's feudal fragmentation, Polish regional assemblies (sejmiks - Diminutive of „sejm", a Polish word denoting "diet" or "parliament", often translated to English as "dietine" – a local legislature in the Kingdom of Poland) took up the task of codifying Polish law (drafting statutes known as lauda – Bardach et al., 2009: 129), they concentrated on collecting existing customary laws of a given region. Polish private law remained predominantly customary up until the period of the Polish-Lithuanian Commonwealth (Bardach et al., 2009: 211, 275), with the Polish nobles being distrustful of Roman-law influences, which they perceived as potential instruments of monarchs' absolutist tendencies (Bardach et al., 2009: 275). Such tendency is similar to Hungarians' being wary of Germanistic influences and their perception of their own, national law as guaranteeing their freedoms. It was only when the old Polish law was revoked by the partitioning powers (Austria, Prussia and Russia), substituted with their codifications. Nowadays, after the great codification projects of 19th century – as it seems, permanently – reshaped the realm of Polish law, the long-lasting age of customary law's dominance is over, save for but a few general clauses in Polish codes that refer to local customs.

On the other hand, the peculiar properties of Hungarian law – decentralized, rooted in privately made collections – put it in direct opposition to the legal systems of Russia and of the German states, whose laws were initially customary, yet, with the emergence of absolutist modes of ruling, became centralized and subject to ambitious projects of codification (i.a. Austrian ABGB). German law was also characterized by another significant feature, that was – a deep influence of Roman law, adopted as 'gemeines Recht' (ius commune). This created a framework for the development of a dogmatic (pandectistic) legal school, which then resulted in creation of a systematic model of private law, incorporated in German Civil Code of 1896 (BGB). All those processes, essential for modern civil law of the continental Europe in 18th-19th centuries, did not happen in the Hungarian legal area.

4. Results

The Hungarian legal system outlined in this paper, with its peculiarities, its predilection toward judge-fashioned law and respect for custom, nowadays belongs exclusively in the realm of legal history. What was its significance for Hungary and how can it be significant for contemporary lawyers? We agree with the statement that "Hungary has (...) the full right to treat its customary law, leaving full appreciation owing to Germanic influences, as a product of its own national spirit – because of its content, development and composition, but also because due to the thousand years of creative work that the Hungarian people and their scholars have devoted thereto" (Almási, 1924: XI).

5. Conclusion

As regretful as the demise of a rich and unique legal tradition may be, it has not entirely gone extinct: undoubtedly analyzing and reflecting constructively upon on it may prove fruitful for European lawyers of early 21st century – when, on the one hand, there is an on-going convergence of legal systems belonging to both the common law and civil law traditions, while, on the other hand, virtually all civil law systems witness a process of decodification (Longchamps de Berier, 2019: 19-53; Giaro, 2017: 13-38).

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