Krakowskie Studia z Historii Państwa i Prawa
2018; 11 (4), s. 467–479
doi: 10.4467/20844131KS.18.039.9481
www.ejournals.eu/Krakowskie-Studia-z-Historii-Panstwa-i-Prawa

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The *Opus Tripartitum* as an Original Source of Law as well as a Source of Knowledge about Custom in Light of Late Modern Age Hungarian Jurisprudence

Abstract

The objective of the study is to introduce late modern age legal opinions on custom and its place among sources of law in the Hungarian legal system. It focuses especially on the characteristics and functions of custom and clarifies the relationship between custom and the law as such (*lex*, act) as another source of law. The Hungarian modern age is characterised by a symbiosis between custom and the law and by a related dispute about how they relate to eachother. The authors of the study focused their attention on a dispute over the derogatory function of custom in relation to the law and highlighted the trend of a major effort towards codification and the related growing importance of *lex* as a source of law. At the same time custom was losing its "folk character" and gradually gained a forensic form (custom formally included as a basis for court decisions). In Hungarian legal history, custom held an irreplaceable position among sources of law in the legal system, and modern age jurisprudence scholars attempted to develop or reformulate the theoretical principles enshrined in the *Opus Tripartitum* (1514) (J. Szegedi, S. Huszty, E. Kelemen, A. Kövy, P. Szlemenics, I. Frank, etc.).

Abstrakt

Opus Tripartitum jako oryginalne źródło prawa i źródło wiedzy o zwyczaju w świetle węgierskiej jurysprudencji epoki późnonowożytnej

Artykuł wprowadza do zagadnienia stanowisk prawnych dotyczących zwyczaju (prawa zwyczajowego) i ich miejsca w systemie źródeł prawa w okresie późnonowożytnym. Zwrócono uwagę zwłaszcza na cechy i funkcje zwyczaju oraz wyjaśniono relację między zwyczajem a prawem stanowionym (*lex*, ustawa) jako odrębnymi źródłami prawa. Węgierski okres nowożytny cechuje symbioza zwyczajów

i prawa stanowionego oraz ich specyficzne wzajemne relacje. Autorzy artykułu omawiają znaczenie derogacyjnej funkcji zwyczaju oraz rolę kodyfikacji jako wyrazu wzmacniania znaczenia *lex* jako źródła prawa. W tym samym czasie zwyczaj tracił swój „ludowy charakter" i uzyskiwał nowe formy (zwyczaj spisany w formie orzeczeń sądowych). W węgierskiej historii prawa zwyczaj miał niezastąpioną pozycję, a teoretyczne zasady określone w *Opus Tripartitum* (1514) były rozwijane lub przeredagowane przez uczonych prawników dobry nowożytnej (J. Szegedi, S Huszty, E. Kelemen, A. Kövy, P. Szlemenics, I. Frank i in.).

Keywords: Sources of Law, *Opus Tripartitum*, custom (*consuetudo*); the Law (*lex*), legal practice (*usus fori*), Hungarian jurisprudence of the Modern Age Period

Słowa kluczowe: źródła prawa, *Opus Tripartitum*, zwyczaj (*consuetudo*), ustawa (*lex*), praktyka prawna (*usus fori*), jurysprudencja węgierska okresu nowożytnego

Introduction

At the end of the 15th century codification attempts were strengthened in Hungary and were achieved in three ways; firstly, by collecting and systemising Hungarian laws with a goal of creating a comprehensive collection of law (*collectio decretorum*),[1] secondly, by collecting and transcribing customary law – mainly the law of the nobility (*Tripartitum*), and thirdly, by collecting court decisions.[2] The most significant attempt to write down and systemise the unwritten Hungarian unwritten customary law was the publication produced by the protonotary of the Hungarian Supreme Court[3] (the Curia Regia) called Stephen Werbőczy[4] at the beginning of the 16th century (1514). His work was called

[1] The first private law collection, published as a supplement to Bonfini's publication about the history of the Hungarian Kingdom, *Rerum Ungaricorum decades quatuor cum dimidia*, was issued in 1581. It was created by John Sambucus (1531–1584), who was a great humanist and court historian of Rudolph II, as well as a native of Trnava (Nagyszombat). A more detailed collection was made by Zachary Mošovský, who was Bishop of Nitra (Nyitra), and Nicolas Telegdy, who was provost of the Roman Catholic Archdiocese of Esztergom. Telegdy's collection, which was called *Decreta, Constitutiones et Articuli inclyti Regni Hungariae* [Decrees, Constitutions, and Laws of the Glorious Kingdom of Hungary] was issued in Trnava in 1584. The second edition of this collection, published in Vienna, dated back to 1628 and enshrined the whole *Tripartitum*. The apex of the attempts to create a unitary collection of law in Hungary came in 1696 with the creation of the collection of law, called Corpus Iuris Hungarici (CIH) which at first was private, at the historical Trnava University (Universitatis Tyrnaviensis). The chief editor was Martin Szentiványi. K. Malý, F. Sivák, *Dejiny štátu a práva v Česko-Slovensku do roku 1918* [The History of the State and Law in Czechoslovakia Until 1918], Bratislava 1992, p. 234.

[2] The collection of court decisions called *Decisiones Tabulae* was issued during the reign of Vladislaus II of Hungary and the collection of court decisions called *Planum tabulare* was compiled during the reign of Maria Theresa and issued in 1800.

[3] M. Rady, *Stephen Werbőczy and his* Tripartitum [in:] *Stephen Werbőczy: The Customary Law of the Renowned Kingdom of Hungary in Three Parts (1517*), eds. and transl. J.M. Bak, P. Banyó, M. Rady , Budapest 2005, p. xxvii.

[4] Already J. Szegedi (1699–1760), who was a professor at the historical Law Faculty of the Trnava University, had already indicated that the author of the *Tripartitum* was "[…] the most renowned expert [of law – author's note] of his age, who revised it, discussed it, and scrutinised it [the *Tripartitum* – author's note] together with other legal experts pursuant to the instruction of the king, Vladislaus II, for the sake of all the people in the Kingdom, in order to make it a permanent law." J. Szegedi, *Tripartitum iuris hungarici tyrocinium* [*Introduction to the Hungarian Tripartitum Law*], Tyrnaviae 1734, p. 42.

Opus Tripartitum iuris consuetudinarii inclyti regni Hungariae partiumque adnexarum (Eng. *The Customary Law of the Renowned Kingdom of Hungary in Three Parts*, hence, the *Tripartitum*). Werbőczy was charged with recording valid customary law of the nobility pursuant to laws no. 6 of 1498 and no. 10 of 1500. It took several years to complete this publication, as the existent customary law was extensive and the task difficult because Werbőczy also took court practice, laws, royal regulations, privileges and statutes into consideration. The publication was completed in 1514, consequently submitted for review by the special committee and on November, 19th, 1514 informally sanctioned by the King. However, the king did not grant the *Tripartitum* the royal seal, so it did not enjoy official sanction, and hence was not in accordance with constitutional law. The reasons for the king's decision continue to be disputed to the present day. The most probable reason is that the upper class nobility was opposed to the *una et eadem nobilitas* principle (equality of all noblemen). However, the *Tripartitum* notetheless gained validity through customary law. It was first printed in Vienna in 1517, and from 1628 became an inseparable part of the Hungarian law collection called Corpus Iuris Hungarici.[5]

The structure[6] of *Tripartitum* is as follows; the dedication (*comendatio*) in which the author recommended the publication to the King; the royal approbation (*approbatio*); the introduction (*prologus*), which is divided into 16 chapters (articles) and contains contemplation which are more theoretical than normative about the concepts of law, justice, legislation, custom, and the rendering of judgements; the first part (*prima pars*) consisting of 134 chapters about the private law of the Hungarian nobility, specifically the donation law, the law of obligations, *ius in re*, the law of succession, etc.; the second part (*pars secunda*) divided into 86 chapters containing the provisions about remedial law and the sources of law; the third part (*pars tertia*), which is divided into 36 chapters and contains particular laws such as city law, vassal law, Croatian law, and Transylvanian law; the conclusion (*operis conclusio*), which is comprised of the author´s notes regarding terminology and the language used; the conclusion of the royal approval decree, and the greeting to readers (*salutatio*) written by Werbőczy, subsequently, after the imperfect royal sanctioning, and describing the relevant reasons and the necessity for issuing the publication in a written form. Among the idea sources to the *Tripartitum*, important for theoretical contemplations about custom as a source of law, was, according to Martyn Rady, the *Summa Legum of Raymundus Parthenopeus*, published in Cracow in 1506. Other portions were taken from Gratian, the *Digest* and *Institutes*, St. Thomas Aquinas, and Italian civilian texts of the thirteenth and fourteenth centuries, most notably those of Accursius and Bartolus.[7] Werbőczy was also inspired also by rhetorical and predicatory publications, e.g. by Pelbart of Timişoara (1435–1504).[8]

Generally, it can be stated that the *Tripartitum* is the fundamental publication of Hungarian medieval law. Even though it did not become *lex*, it was widely used and

[5] M. Laclavíková, A. Švecová, *Pramene práva na území Slovenska I (Od najstarších čias do roku 1790)* [Sources of Law in the Slovak Territory I (From Ancient Times Till 1790], Trnava 2007, pp. 192–193.

[6] See T. Gábriš, *Kodifikácia práva v predmoháčskom Uhorsku* [Codification of Law in pre-Mohács Hungary] [in:] *Právní a ekonomické problémy současnosti I. Sborník prací*, Ostrava 2007, p. 159.

[7] M. Rady, *Werbőczy´s Prologue and Its Sources*, "The English Historical Review" 2006, vol. 121, issue 490, p. 104.

[8] J. Beňa, T. Gábriš, *Dejiny práva na Slovensku I (Do roku 1918)* [The History of Law on the Slovak Territory I (Till 1918)], Bratislava 2015, pp. 95–96.

generally recognised as a source of law in court practice, legislation (the *Tripartitum* was called the *Decretum generale*), jurisprudence, and literature. The change it brought into the legal life of the Kingdom of Hungary was profounf as what had previously been unwritten customary law was transformed into written customary law. A short time after the publication of the *Tripartitum* demands for revision of the publication occurred, pointing out discrimination against the upper class nobility in favour of the middle and lower class nobility. The revision attempts, known as *Quadripartitum opus iuris consuetudinarii regni Hungariae* and subsequently also as *Novum Tripartitum*, were not sanctioned and did not affect the exclusivity and importance of the *Tripartitum* for the Hungarian legal order in the modern age.

In this study we will take a closer look at the introduction of the *Tripartitum* (*prologus*) and the theoretical principles enshrined within it, about custom, its functions, and its place in both the Hungarian legal system and in daily life in Hungarian society.

1. Theoretical Principles Governing Custom Enshrined in the Tripartitum

The first scientific approach to custom as a source of Hungarian medieval law can be found in the introduction of the *Tripartitum* (*prologus*), where Werbőczy, inspired by Bartol de Saxoferrato,[9] formulated the first definition of custom, even though it was an imperfect one from a contemporary point of view. According to Werbőczy, custom was the fundamental source of Hungarian law. Under chapter 10 (1) of the *Tripartitum's* prologue:

> Custom may (for our purpose) be defined thus: it is that certain ius, introduced through the practices of whosoever can by public authority enact laws. Therefore, custom also falls within the name of ius, and if a prince orders that one should judge according to ius, then a judge can pass judgment according to custom and the statutes of the place. Contrariwise: a common law falls within the name of custom. Thus, if someone makes mention of custom in his plaint, then a common law may be seen as meant.[10]

The historical primacy of the definition of Hungarian custom can be found in chapter 10 of the *Tripartitum's* prologue. Under this provision:

> Custom is a certain law, arising from practise, taken for law where law is deficient.[11]

> It does not matter whether it is based on writing or on reason, since reason also supports laws. Moreover, if law is built upon reason, then everything that is built on reason is law, providing

[9] D. Ibbetson, *Custom in the Tripartitum* [in:] *Custom and Law in Central Europe*, ed. M. Rady, Cambridge 2003, p. 20.

[10] *Tripartitum*, *prologus*, chapter 10 (1). J.M. Bak, P. Banyó, M. Rady (eds. and trans.), *Stephen Werbőczy: The Customary Law of the Renowned Kingdom of Hungary in Three Parts (1517)*. Budapest 2005, p. 33.

[11] *Tripartitum*, *prologus*, chapter 10: "Consuetudo est ius quoddam moribus institutum, quod pro lege suscipitur cum deficit lex".

> it agrees with religion, comports with order, and serves salvation. It is called custom, for it is, as it were, common practice and human use because it is in common use.[12]

The *Tripartitum* subsequently established the characteristics of custom thus:
1) rationality (*ratio*);
2) prescription (*praescriptio*);
3) repetition of actions (*frequentia actuum*).

Ad 1. Rationality was for a long time perceived as the elementary, inner attribute of custom, and modern age jurisprudence accepted and stemmed exclusively from Werbőczy's theory (*Tripartitum*, *prologus*, chapter 10 (3)): "It must be reasonable. It is reasonable when it aims and advances the goal of law. […] According to civil law, a custom is reasonable if it aims at the common weal".[13]

Ad 2. Prescription (*praescriptio*) was the characteristic, which Werbőczy took from canon law and made into an outer characteristics of custom. Except when accepting a custom as being created tacitly, out of silence (*Tripartitum*, *prologus*, chapters 10 and 11),[14] Werbőczy required that the custom endure for a certain time[15] as any new custom had to be introduced into life slowly, over a certain period of time, and not instantly (*Tripartitum*, *prologus*, chapter 11 (2)).[16]

Ad 3. Repetition of actions – not only did the Tripartitum broadly define the repetition of behaviour, there was actually even some controversy apparent:

> Repetition of the act is needed (requiritur frequentia actuum). Say, however, that a repeated act is not in itself necessary for the establishment of a custom. But because the consent of the people cannot be deduced from one single act, the repetition of the act can be seen as the cause and custom as the effect. And it is necessary to have so many and such well known acts that it becomes in all likelihood known to most of the people, for it is not the act but the tacit consent of the people that established custom. Thus, when the tacit consent of the people can be deduced, then the great

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[12] *Tripartitum*, *prologus*, chapter 10 (1). J.M. Bak, P. Banyó, M. Rady (eds. and trans.), *Stephen Werbőczy: The Customary Law...*, pp. 31–33.

[13] *Tripartitum*, *prologus*, chapter 10 (3). *Ibidem*, p. 33.

[14] *Tripartitum*, *prologus*, chapter 11: "And the law differs from the custom in three ways. First: as tacit and express (tacitum et expressum)." *Ibidem*, p. 35. *Tripartitum*, *prologus*, chapter 10 (7): "And it is necessary to have so many and such well known acts that it becomes in all likelihood known to most of the people, for it is not the act but the tacit consent of the people that establishes custom." *Ibidem*, pp. 33–35.

[15] *Tripartitum*, *prologus*, chapter 10 (5): "Secondly, custom must be prescriptive, i.e., it must last for an appropriate time and must receive force in the course of that time required for prescription. But this holds only for cannon law and is not required even by that law unless it contradicts positive law. According to civil law, a decade, that is the passage of ten years, is sufficient for the introduction of a custom, even if it contradicts civil law. If, however, a custom contradicts canon law, then the space of forty years is required. Yet, if a custom is introduced in the absence of law, then, even in respect of cannon law, a decade seems to be sufficient. The passage of ten years begins from the time the first act is performed by the people." *Tripartitum*, *prologus*, chapter 10 (6): "What I have said concerning civil law, that ten years is sufficient overall, is limited to cases where custom is invoked in matters that are not reserved to the prince as the mark of his supreme power. For then a custom cannot be introduced except after so long a time that no one can recall when the custom started."*Ibidem*, p. 33.

[16] *Tripartitum*, *prologus*, chapter 11 (2): "Third: as momentary and continual; because custom cannot be introduced in an instant. What is tacit, progresses at a slower pace than what is expressly stated. Nor is that, which emerges from inference as certain as that which is expressed. Therefore, custom cannot be introduced by the people at once, but only gradually (ideo consuetudo proprie non potest statim induci per populum sed successive)". *Ibidem*, p. 35.

> recurrence of acts is important. What is more, a custom can occasionally be introduced by a single act (ex uno actu) with a repeated cause lasting for as long as it takes to establish a custom […].[17]

The relation *consuetudo versus lex* was also expressed also in the effects (functions) of a custom among which were the explanatory function, thevsubstitutive function, and the derogatory function. The explanatory function enabled the custom to explain a disputable provision of the law.[18] According to the derogatory/abrogatory function, if the custom was in conflict with the law created earlier, such a law was derogated or abrogated by the custom.[19] In the modern age, polemics were held about such a wide derogatory and abrogatory function of custom, and experts advocated either for or against it. In the modern age, there was a fundamental change as this wide derogatory and abrogatory function of custom was narrowed. As we will highlight later, local custom could not derogate a law that was valid in the whole Kingdom. Related to the derogatory function, the *Tripartitum* (*prologus*, chapter 12) differentiated between two types of custom – general custom and local custom:

> If a law precedes a contrary custom that followed later, then the custom, if it is general, overrules the law in general and totally. If a custom is only local, it does not overrule a law in general, but only in that place where the custom is in force. If, however, a custom precedes a contrary law that came after it, then the custom does not overrule the law, in fact, the later law abolishes that custom. [20]

The substitutive function of custom[21] was important for filling in gaps in the legal order; mainly as the *per analogiam* view was extensively accepted in law in those times. These chapters of *Tripartitum* were the theoretical foundation for the regulation of custom in the Kingdom of Hungary which was inspired by middle age theoretical knowledge and was at the centre of attention of modern age jurisprudence polemics. Interestingly enough, custom, as redefined in the modern age, survived until the 19th century.[22]

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[17] *Tripartitum*, *prologus*, chapter 10 (7). *Ibidem*, pp. 33–35.

[18] *Tripartitum*, *prologus*, chapter 11 (3): "Custom has threefold value. Namely, explanatory, as it is the best interpreter of the law, so when law is doubtful, we have to refer to the custom of the place, and if it is clear from that there is no need to deviate from the meaning given by custom." *Ibidem*, p. 35.

[19] Tripartitum, prologus, chapter 11 (4): "Secondly it has abrogatory value, because it supersedes law when it contradicts custom." *Ibidem*.

[20] *Tripartitum*, *prologus*, chapter 12. *Ibidem*.

[21] *Tripartitum*, *prologus*, chapter 11 (5): "Thirdly, it has substitutive value, because it replaces law where this is deficient." *Ibidem*.

[22] "However, the Middle Ages lasted longer in some parts of Europe than in others, in Hungary it lasted well until the nineteenth century, in sharp contrast to Austria, where customary law had faded away. Consuetudo regni, as a legal source, possessed greater vitality than royal decree, a decretum enacted by the King with the consent of the Estates, royal privilege, or the judgment of the law court." L. Pétér, *The Irrepressible Authority of the Tripartitum* [in:] *Stephen Werbőczy: The Customary Law...*, p. xiii.

2. The Development of Werbőczy's Teachings on Custom in Hungarian Jurisprudence Publications of the Modern Age

Hungarian jurisprudence of the modern age stemmed from Werbőczy's teaching, even though it has been revised and disputed since the 16th century. Jurisprudence scholars optimised their opinions and statements according to the modern age reality of the day, where custom was gradually granted a weaker position within the system of formal sources of law, in favour of the stronger *lex*.

When speaking about Hungarian jurisprudence, we herein refer to the jurisprudence of the late modern age (approximately from the end of the 17th century to the first half of the 19th century) and authors such as Ján Kitonich[23], John Szegedi[24], Stephan Huszty[25], Emeric Kelemen[26], Alexander Kövy[27], Paul Szlemenics,[28] or Ignác Frank[29]. In certain

[23] Ján Kitonich (Kitonič, Kithonich) (*1560 – †20 XII 1619 Trnava (Nagyszombat)), was the sub-leader of the administrative unit called the *župa*, namely the Moson (Mošov) county. He subsequently served as a royal financial prosecutor. He was an expert in both procedural and substantive law, especially an expert on Tripartitum and his legal opinions were very well respected among the other legal experts. He was author of following publications: *Directio methodica processus iudiciarii iuris consuetudinarii, inclyti regni Hungariae...* (1619) [Guidelines for Certain Problematic Provisions of the Tripartitum] and *Centuria certarum contrarietatum et dubietetem ex decreto Tripartito deputarum et resolutatum* (1619) [A Hundred Disputable Cases and Doubts Resulting from the *Tripartitum*].

[24] John Szegedi (Segedi) (1699–1760) was a lawyer, and Professor of Canon Law at the Trnava University and the Academy in Buda. He was an influential legal theorist whose herein cited work *Tripartitum Iuris Hungarici Tyrocinium* (1734) [Introduction to the Hungarian Tripartitum Law] was during the modern age considered as one of the most respected works regarding the *Tripartitum*. It can be partly considered as a commentary on the *Tripartitum* and partly as an original work on Hungarian law.

[25] Stephan Huszty (Husty) (1717–1772) – Professor at the Law Academy in Eger, lay judge in Heves county. His tripartite publication called *Jurisprudentia practica seu commentarius novus in jus Hungaricum* (1745) [Practical Jurisprudence or the New Commentary on Hungarian Law] immediately after publication, became a frequently cited and reedited work, widely used by Hungarian scholars (e.g. E. Kelemen often referred to it).

[26] Emeric Kelemen (1744–1819) – lawyer and legal scholar, Professor of Law in Győr, Pécs, and Pest, dean at the Pest University and dean of its Law Faculty. His most important publication was *Institutiones iuris hungarici privati* (1814). [The Institutions of Hungarian Private Law]. This was the first textbook of Hungarian private and procedural law. The work of Prof. Kelemen was based on the work of Prof. Ignac Frank.

[27] Alexander (Sándor) Kövy (1763–1829) – lawyer and Professor of Law at the Law Academy in Sárospatak. He worked at the royal court in Pest, and also passed also the attorney exams. However, he devoted most of his professional life to an academic career in Sárospatak where he became a reputable scholar, mainly due to his publication *Elementa iurisprudentiae Hungaricae* (1800) [The Basics of Hungarian Jurisprudence].

[28] Paul Szlemenics (Slemenič) (1783–1856) – lawyer, legal scholar, and a member of the Hungarian Academy of Sciences. He earned his title in law in Pest in 1804 under the supervision of Profs Kelemen and Markovics. In 1809 he became a Professor of private and criminal law at the Law Academy in Bratislava (Poszony, Pressburg). In 1830 he was elected by the Hungarian Academy of Sciences as a member of the Committee for Legal Sciences. His first publication of significant importance was *Elementa iuris criminalis Hungarici* (1817) [The Basics of Hungarian Criminal Law]. In 1817 and in 1819 he published *Elementa iuris Hungarici civilis privati* [The Basics of Hungarian Civil Law] and *Elementa iuris Hungarici iudiciarii civilis* [The Basics of Hungarian Civil Procedural Law].

[29] Ignác Frank (1788–1850) – lawyer, member of the Hungarian Academy of Sciences (1847), and member of the historical school of jurists. From 1819 he was a Professor at the Law Academy in Košice (Kassa), where he taught criminal and private law. During 1827–1850 he worked as a professor at the Pest University, where he taught private law (before him E. Kelemen taught there). His work about public law

theoretical questions and topics these Hungarian jurists (called *iuris consulti* in those times) diverged from or even rejected". Werbőczy´s teachings. On the other hand, they simultaneously maintained, and *de facto* preserved, fundamental legal-theoretical teaching on custom. Differently said, late modern age Hungarian jurisprudence was based mainly on Werbőczy's teaching on custom as a primary source of law in the modern age Kingdom of Hungary and also in the pre-codification modern era. The principal change came in the second half of the 19th century, as law became codified (an exception was the civil substantive law which remained uncodified).

2.1. Definition of Custom and Its Place Among other Sources of Law in the Legal System

When scholars of the jurisprudence of the Hungarian late modern age jurisprudence attempted to redefine what they meant by custom, they reaffirmed Werbőczy´s characteristics (rationality, prescription, repetition of actions), because they strongly cherished historical legal tradition and wanted to preserve the theoretical basics. It is appropriate herein to cite the jurisprudence scholar Huszty: "Custom can be defined as unwritten law, used in the people´s traditions, as the law must be created by the public authority, and for the creation of custom the legislator´s assent is enough (citing Tripartitum, introduction, chapter 10)."[30] The privileged states (representing the Hungarian people, in the sense of the Werbőczy defined *populus*), delegated in the Hungarian assembly (together with the King) were regarded as legislators. These were the characteristics of custom, more or less generalised in modern age jurisprudence, according to Huszty:

1) universality;

2) independence from other sources of law (*specifice sumitur)*, mainly differentiation from the law;

3) mainly unwritten character;

4) permanency and stable frequency;

5) legitimacy granted by the legislature (represented by privileged groups of people).[31]

The essential theoretical and practical problem was custom's position in the legal order and its relation to other sources of law, primarily to the law itself (*lex versus con-*

(*A közigazság törvénye*) was one of the first university textbooks issued in the Hungarian language. Another famous publication of Frank's was *Principia iuris civilis Hungarici* (1829) [The Basics of Hungarian Civil Law].

[30] S. Huszty, *Jurisprudentia practica seu commentarius novus ius hungaricum*, Eger 1778, p. 40. See also A. Kövy's definition: "Custom is law which became law due to long-term and frequent usage by physical or legal persons with lawmaking competencies." A. Kövy, *Elementa iurisprudentiae hungaricae*, Cassovia 1807, p. 14; also P. Szlemenics, *Elementa iuris hungarici iudiciarii civilis*, Posonii 1829, pp. 27–28.

[31] S. Huszty, *Jurisprudentia practica seu commentarius novus in jus Hungaricum*, p. 40. Szegedi added that " […]only the ideal society which has the lawmaking right or is capable of this right can act this way. Such society can also create customary law, at least on the basis of tacit consent of the King or legitimate legislator." J. Szegedi, *Tripartitum iuris hungarici...*, p. 52.

suetudo). The key approach was the distinction between general[32] custom and local custom.[33] Already Werbőczy had already made such a distinction, which played an important role in attempts to limit the derogatory power of custom. Kelemen, who inspired a whole generation of jurists, stated about the types of customs, that except for "the general and particular custom – one flourishing in the whole Kingdom and one only in its part, its district, its city or in a smaller society," there also existed "court custom (judicialis, named also as stilus curiae) and out-of-court custom (extraiudicialis), depending on whether it was created/strengthened by the court decision."[34] Kelemen stated about court custom that it was created or strengthened by court practice.

A less disputed question in the modern age was the form that the custom would take. The statement that any recognized custom belonged to *ius non scriptum* was no longer true, as customary law was written up in the *Tripartitum*. Werbőczy himself (*prologus*, chapter 11 (1)) answered the question about what distinguished custom from law: "As written and unwritten, though, this is not an essential difference."[35] Such a question was irrelevant, as Frank,[36] and others before him others, accepted custom in both a written and unwritten form, and as custom gained written form for a certain time after the publication of the *Tripartitum*, but, at the same time, was not deprived of the possibility of further development, and so new, even unwritten customs could come into existence. In the court practice in the Kingdom of Hungary in the modern age the application of the *Tripartitum*, as a form of written custom, for a certain (relatively long) time stabilised legal relations and the courts referred to it as to the *decretum generale*. In late modern age jurisprudence, custom was formally granted an equal position with the law, however the commentaries (tractates) unambiguously placed custom after the law, as a secondary source of law. It is therefore evident, that in subsequent modern age development, custom lost its supremacy among the sources of law in the legal system, specifically its supremacy over the law – theoretically created by Werbőczy.[37] Kövy already awarded custom a secondary position *expressis verbis* among Hungarian sources of law (*secundum principium*) and, at the same time, stressed its subsequent, successive creation (*successive introducantur*), accepted either by explicit or presumed consent of the lawmaker.[38] At the same time, both János Jung and Ignác Frank[39] stated: "The major part of the civil law employed by the masses, comes from custom, not only orally handed down, but also introduced by the customary law to these masses." So, taking into account the amount of regulated legal relations, custom continued to have the factual supremacy in

[32] "If somebody refers to custom in their action in court, they refer to general law." J. Szegedi, *Tripartitum iuris hungarici...*, p. 52.

[33] Distinction was made between a) general custom named as *ius commune*; b) special or particular (local) custom binding for a certain community and usually created by the people of this community. J. Szegedi, *Tripartitum iuris hungarici...*, p. 52.

[34] E. Kelemen, *Institutiones iuris privati Hungarici (Institutiones iuris privati hungarici, quas nobilis Juventutis Hungariae conscripsit Emericus Kelemen*, Pestini 1818, p. 100.

[35] J.M. Bak, P. Banyó, M. Rady, (eds. and trans.), *Stephen Werbőczy: The Customary Law...*, p. 35.

[36] I. Frank, *Principia iuris civilis Hungarici*, I. tomus, Pestini 1829, p. 12.

[37] Already J. Szegedi and later other scholars (Huszty, Kelemen, Jung, Kövy, Frank) had already deemed custom as a secondary source of law, right after *lex*, and they included the chapter about the theory of custom just after the chapter about the theory of the law.

[38] A. Kövy, *Elementa iurisprudentiae Hungaricae*, Cassovia 1807, p. 14.

[39] I. Frank, *Principia...*, p. 12.

late modern age Hungarian private (civil) law. Acceptance of any customs by the State (e.g. by explicit reference to the custom in the concrete law) was not a prerequisite for the custom's validity, which was dependent on meeting the three below-mentioned characteristics and on the will of the lawmaking society.[40]

2.2. Characteristics of Custom

Rationality as one of the characteristics set out by Werbőczy was understood, during the whole modern age period, understood as the essential, inner characteristic of custom. Referring to rationality, Huszty and Szegedi stated that custom could not oppose divine law, natural law, or the rights of third persons. Frank, at the beginning of the 19th century, amended this by the statement that law and not only natural justice were also supposed to be sources of rationality because justice was supposed to be the goal and the law was supposed to be the means.

Werbőczy's teaching about the second characteristic of custom – the so called prescription, was more thoroughly analysed under modern age jurisprudence, mainly as statutes of limitations were rigidly established in the *Tripartitum*, which created real problems in the application of many laws. It was not possible to precisely date the creation of particular custom and so to count a time limit of *longus tempus*, since the execution of the first customary action. Because of this, the time limits set out in the *Tripartitum* were impeached during the modern age, and scholars of jurisprudence scholars emphasized the following: "The diversely long lapsus temporis is necessary, accordingly to the kind of rule, to the territory, to the frequency of occurrence of the rule, etc."[41] Concerning the statutes of limitations recommended by Werbőczy, P. Szlemenics said: "He never said that 10 years is required."[42] The prevalent modern age approach was that no inspection of prescription (statutes of limitations) was needed, and it had to be evaluated in the light of the concrete case.

The third characteristics, which was the repetition of actions, was respected by Hungarian modern age jurisprudence, and its scholars emphasized a tacit presumed consent[43] with its usage (maintenance) by the masses. It was *unisono* confirmed by Szegedi, Huszty, Kelemen, Szlemenics and Frank[44], who consistently claimed: "Not the deed but the silent consent of the masses is necessary for creation of the custom as even with one act (e.g. building a bridge over the royal road and collecting the toll there) is the

[40] Š. Luby, *Dejiny súkromného práva na Slovensku* [The History of Private Law on the Territory of Slovakia], reprint, Bratislava 2002, p. 61.

[41] *Ibidem*.

[42] "Et reipsa Werbőczy nuspiam dicit, 10 annorum curriculum ad valorem consuetudinis necessaium esse." P. Szlemenics, *Elementa iuris hungarici...*, p. 29.

[43] Szlemenics spoke about it expressly: "Also the presumption of such an act is sufficient, this act must be in the consciousness of the people (ut sufficiant ad gignendam illam praesumptionem, quod res ad populi notitiam pervenerit, isque in eiusmodi actus consencerit)." P. Szlemenics, *Elementa iuris hungarici...*, p. 28.

[44] J. Szegedi, *Tripartitum iuris hungarici...*, p. 53; P. Szlemenics, *Elementa iuris hungarici...*, p. 28; S. Huszty, *Jurisprudentia practica...*, pp. 41–42, 45; I. Frank, *Principia iuris civilis...*, p. 58.

custom born."[45] The modern age jurists were again aware of the problem of proving the repetition of actions, important for the creation of any custom, and so Huszty and Kelemen added that "the clever judge has to decide."[46] They referred to an already formulated thesis about the impossibility of proving a first action and the repetition of actions. Furthermore, Szlemenics confirmed that for custom to gain the power of the law, it had to be binding (literally it had to "have the will to be binding"), because he realised that "there are different repetitious actions of the masses which are only habits but not customs."[47]

2.3. Value (Functions or Effects) of Custom

Werbőczy briefly characterised what the functions of custom were in chapter 11 of the Tripartitum, while Hungarian scholars fought bitter battles over the concepts. Neither the substitutive nor the explanatory functions of custom in relation to the law were problematic. The real theoretical and practical problems were bound with custom's derogatory function, as late modern age jurisprudence engaged in controversy with the original opinion of Werbőczy and even resisted it. It can be concluded that the results of polemics of the Hungarian jurists distorted the crucial position of custom and opened the way for a different hierarchisation of the sources of law in the Hungarian legal order. It was already Kitonich who criticised mainly the derogatory effect of custom on the law.[48] Late modern age science chose a restrictive approach towards custom's having any broad derogatory function, and settled on the theory that only general custom was equal to law (had equal legal force). However, this was not generally accepted, and e.g. Szegedi, Huszty, and Kelemen advocated Werbőczy's theory about custom's derogatory function. Szegedi stated that: "However, Kitonich, even though innocently, challenged this statement when in chapter 1, question 9 [he] stated: «If we allow custom to be a full-valued law, then it can as well derogate it.»"[49] The fight about custom's derogatory function was at the same time a fight for modernisation on one hand and for Hungarian traditionalism on the other. The ideological background of this fight was the debate between the historical school of jurists (in the Kingdom of Hungary represented by Gusztáv Wenzel and Béni Grosschmid) and the natural school of jurists. This debate fundamentally stigmatised the Hungarian legal system and endured until the time of the creation of modern law.

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[45] S. Huszty, *Jurisprudentia practica...*, pp. 41–42.

[46] *Idem*, *Jurisprudentia practica...*, p. 45; E. Kelemen, *Institutiones iuris privati...*, pp. 100–101.

[47] P. Szlemenics, *Elementa iuris hungarici...*, pp. 27–28.

[48] Ján Kitonich referred also to later Hungarian legislation which accepted neither the creation of new customs in concrete cases, nor customs' derogatory function (e.g. the law no. L of 1498, XVII of 1644, LXXVIII of 1647, XVI of 1715, XXIX of 1848); Š. Luby, *Dejiny súkromného práva...*, p. 61.

[49] J. Szegedi, *Tripartitum iuris hungarici...*, p. 55.

Conclusion

The position and importance of custom was in the middle age legal order was determined by its superiority over other sources of law. The theory of customary law was enshrined in the late middle age publication called *Opus Tripartitum,* written by Werbőczy in 1514. The significance of custom started to change in 1514. The jurisprudence of the Hungarian late modern age jurisprudence and the jurisprudence of the modern Kingdom of Hungary dealt with the sources of law, defined which Werbőczy had already defined in the middle ages, albeit in light of ideas about the state and law which were newly born in those times. On one hand, custom was seen as a relict of the middle-ages, and on the other hand as a legacy handed down from the ancestors and an expression of national identity.[50] Polemics among jurists concerned the position of custom in the legal order, incorporating problems of proving its existence, and limiting its broad derogatory function vis-à-vis the law. Late modern age scholars opted for restriction of custom's broad derogatory function and settled on the approach that only general custom and the law became equal sources of law, having equal legal force. At the same time, custom was gradually losing its supreme position among sources of law, while the importance of other sources of law and of the law (*lex*) itself started to rise. So custom remained at the centre of both Hungarian and Czechoslovak (Slovak) scholarly attention.

In Czechoslovakia (due to the legal dualism in Slovakia and Carpathian Ruthenia) it was a source of civil substantive law until January 1st, 1950, when the first Czechoslovak Civil Code (law number 141 of 1950, Coll.) entered into force and definitively abolished custom as a source of law.

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[50] K. Gönczi, *Werbőczy's Reception in Hungarian Legal Culture* [in:] *Custom and Law in Central Europe* (ed. M. Rady), Cambridge 2003, p. 89.

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