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Private Law in Transylvania as Part of the Kingdom of Hungary

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Abstract. Transylvania was part of the mediaeval Kingdom of Hungary beginning from the founding of this kingdom and until the year 1540, when, due to historic circumstances, it became for a time a separate entity. The development of private law in this historical space was therefore in the beginning in large part convergent with that of Hungary. However, having a multi-ethnic population consisting of Hungarians, Szeklers, Saxons, and Romanians, with the first three nationalities benefitting from different, autonomous forms of administrative organization, a lot is to be said of specific Transylvanian private law. This study presents those elements and sources of private law which characterized legal relationships in Transylvania beginning with the founding of the Kingdom of Hungary and until the separation of this region from Hungary due to Ottoman conquest. We examine the major sources of law, consisting of customary law, statutory law, and acts of royal power. We then present in summarized form the main characteristics and provisions of the law applicable to persons, the family, immovable and movable property but also inheritance. Some specific private law regulations applicable to Szeklers and Saxons are also presented as well as the perspective of Romanian legal literature regarding the private law applicable to Romanians.

Keywords: legal history, Transylvania, Kingdom of Hungary, feudal property, nobility, serfdom

1. Introduction

Transylvania as a historical space was characterized from the perspective of the history of private law by the dominance of the law of the mediaeval Kingdom of Hungary, beginning from its founding and until the year 1540, when the international situation resulted in the break-up of that kingdom. However, due to the multinational composition of the Transylvanian population, the laws of

Hungary were just one of several sources of private law applicable, the Saxons and the Szeklers living in this region being subject to differing legal regimes, with a high degree of regulatory and administrative autonomy.

In this study, we attempt to present and to examine the major sources of private law applicable in Transylvania as part of the mediaeval Kingdom of Hungary. Due to the multi-ethnic and diverse population of Transylvania, however, the laws of Hungary would only offer us an incomplete view of private law. Therefore, the private law applicable to Szeklers, Saxons, and Romanians in this region shall also be a subject of our inquiry.

This study shall be followed up in this issue of *Acta Universitatis Sapientiae – Legal Studies* by a second part, which examines the private law of Transylvania as part of the Habsburg Monarchy in both its imperial (absolutist) and dualist forms.

2. Sources of Law

Legal development throughout the centuries following the establishment of the Hungarian state was founded in the Kingdom of Hungary on two defining sources of law: customary law and statutory law. Habits with legal content, formed over time and transmitted from generation to generation, having binding effect allowed the existence and continued use of old customs as rules of *customary law* (*consuetudinary law*). In addition to these customs, the acceptance and consolidation of the king's legislative power meant the strengthening of royal authority. The coexistence of the two sources of law can already be seen during the reign of King Stephen I (Saint Stephen) of Hungary, a fact also demonstrated by the two codices of laws issued by him. Analysing the content of the laws, the fact is apparent that the ruler intervenes in the world of customary law only in connection with those social relations which are meant to ensure the consolidation of royal and state authority. The king is also the one to strengthen the norms meant to facilitate the Christianization of the population by developing new laws in this area.

The situation is different regarding the habits that regulate private law relations between persons. These customs survive without the intervention of the king and are applicable before various courts by the parties who invoke the old customs. These characteristics of the two sources of law had as a result that István Werbőczy in his *Tripartitum* – the collection of noble customary laws compiled by him – recorded already at the beginning of the 16th century the fact that the norms of customary law may be classified as customs that exist to explain the law, to supplement the law, and even to deprive the law of its effects.[1] This interaction between law and custom is manifested especially in the territory of

1 Werbőczy 1897. *Introduction*, title 11, para. 3.

Transylvania. In areas inhabited by the *Three Nations*,[2] which, starting with the second third of the 13th century, can be clearly determined from an administrative point of view, the role of customary law was decisive because in the Hungarian counties of Transylvania the same Hungarian customary law was used as in the royal counties of Hungary; the Szeklers kept and were determined to protect their ancient Szekler rights that are also mentioned by Werbőczy in his *Tripartitum*,[3] while the Saxons, based on their charter of privileges received in the year 1224 (the *Diploma Andreanum*), could still live according to the old Saxon law and could elect judges to enforce the rules of their customary law.

In addition to customary law and statutory law, the documents attesting royal privileges gained more significance as sources of law from the 13th century on. On the one hand, these documents secured the privileges of some or the other of the Three Transylvanian Nations, such as the already mentioned *Diploma Andreanum* or the *Charter (Letter) of privileges issued by King Vladislav II of Hungary in 1499*, which defined the rights and obligations of the Szeklers.[4]

Finally, the statutes of the Hungarian counties of Transylvania, the constitutions of the Szeklers and Saxons, and the village laws of the Szeklers, which, in turn, were sources of 'local laws' – even if only sporadically – had in their content norms regarding the regulation of legal relations under private law.

3. The Law of Persons

Given that the differentiation of the branches of law known in today's sense had not yet taken place during the centuries of the Middle Ages – at best, only groups of norms belonging to public law and private law being separated – within the legal system of private law, the rules regarding the status of persons and patrimonial relations were primarily established by customary law. This approach is also justified by the classification used by Werbőczy, which is found in *Tripartitum*.

Although Transylvania formed a distinct geographic area in the Kingdom of Hungary by way of the person appointed by the king, the so-called *voivode*, the law of the kingdom was imposed in Transylvanian counties. This goes without saying because the counties were populated by Hungarians, and their social stratification developed according to this situation. In the 10th/11th centuries, a significant part of the society was composed of freemen. As a social stratum that separated from the latter as a consequence of military service, including in

2 The Three Nations of Transylvania, also referred to as the 'three estates' of Transylvania, were the Hungarians, the Szeklers, and the Saxons. Members of these nationalities benefited from political rights.

3 Werbőczy 1897. Part III, title 4.

4 Béli 2004. 55–63; Egyed 2016a. 351.

Transylvania, the *serjeanty* (*servientes*), the soldiers of the king, directly subject to his authority or subordinate to him indirectly, through the voivode, had to be taken into account. Besides the king's soldiers, the men-at-arms in the service of the church and of the aristocracy also belonged to this social stratum.[5]

The apex of society was made up of aristocrats (also called *magnates*) who had several extensive private estates, including in Transylvania.[6] The royal donations of estates and the privileges acquired from the king resulted in the transformation of social relations. The Golden Bull to the issuing of which king Andrew II was constrained by the barons ensured to the aristocracy and the serjeanty of Transylvania those privileges which subsequently came to be considered to form the basic rights of the nobility. They too were directly subject to the authority of the king or the voivode and owed exclusively military obligations, in exchange for which they were exempted from taxes, could not be detained or imprisoned without a legally rendered judicial decision, and enjoyed the right to insurrection. All this resulted in the formation and consolidation of feudal order, which took place in Transylvania in the same way as in the other territories of Hungary. On the basis of these noble privileges, the royal counties of Transylvania, which gained autonomous administrative authority, were allowed to elect two judges on their own initiative. Thus, the rules of private law regarding the Transylvanian nobility as an estate were in principle consistent with the norms that regulated the legal relations between the members of the nobility in the rest of the Kingdom of Hungary.

With the formation of the noble estate, the decline of freemen began, and at the turn of the 13th/14th centuries serfdom was formed as a unitary social class from the point of view of the legal regime applicable to it. The serfs' fundamental obligations were stipulated by the Decree of 1351, which also entered into force in Transylvania. Still, the resistance of Transylvanian serfs also showed the capacity of this class for the acquisition of political rights, which were enshrined in the *Convention of Cluj-Mănăştur of 1437*.[7]

The formation of the feudal regime affected legal relations of private law in the sense that *full legal capacity and its exercise* were reserved for Hungarian men of noble birth, born in legally concluded wedlock. The rules regarding the legality of marriage were defined by canon law. The norms of Protestant denominations, which appeared towards the end of the analysed epoch as an effect of the Protestant Reformation, had not yet influenced the rules applicable to marriage during this period. Children born out of wedlock could be legitimized either by the subsequent conclusion of the marriage between the parents or by the grace of the king or the prince. The latter measure was conditional on the father not having any male children born of a legal marriage. If, following legitimization,

5 Kelemen 1927. 9–10.
6 Kelemen 1927. 7–8.
7 Demény 1987.

a new male descendant of the father was born, this time legitimately – that is, resulting from a legal marriage –, the patrimonial rights of the latter could not be prejudiced. Thus, the legitimized child would only retain his noble status, as a personal effect of legitimation, but could no longer benefit from the patrimonial effects of legitimation, not having the right to inherit the estates of his ancestors and those received by donation from the Crown by his family.[8]

The ways of acquiring noble titles were identical to those provided by the rules applicable in the rest of the kingdom. First, we must mention the royal donations of estates, which conferred by right (*ipso iure*) upon the donee the quality of nobleman. The rights of other persons could not be prejudiced as a result of the donation – a rule embodied in the principle *salvo iure alieni* –, and for this reason the Szeklers insisted on maintaining their privileges so that in the Szeklerland *ius regium* (the law of the king/kingdom) would not become applicable. Therefore, Szekler estates were not transmitted by right to the royal treasury in case of conviction for treason or extinction of the male family lineage, and they could not be donated by the king to persons other than Szeklers.[9]

The rule according to which the granting of the right to use a coat of arms, the so-called donation of coats of arms, conferred the rank of noble on the donee, even if it was not accompanied by a donation of land, was also applicable in Transylvania.

A nobleman whose family would have been on the verge of extinction regarding the male lineage had the possibility to adopt any person, the adopted being thus admitted among the nobility, with the king's assent. In the event that a legitimate son had been born to the nobleman after this adoption, only the personal effects of acquiring noble status would have been retained in favour of the adopted person.

The institution of the legal fiction of the declaration as a son introduced by King Charles I of Hungary was also used in Transylvania. In the absence of legitimate male descendants and seeing the imminent extinction of his male lineage, the father could declare with the king's assent a daughter or other female member of his family to be a son. If subsequent to this, from the legally concluded marriage of the person declared by fiction to be a son, a legitimate son had been born, the latter son would have inherited directly after his grandfather his noble title, the family estates, and those acquired by royal donation alike.

Apart from these, a person had to have the quality of *a son of the homeland*[10] (in modern terminology: citizenship) to acquire full legal capacity. A child born to a Hungarian, Szekler, or Saxon father was considered to be a son of the homeland in Transylvania. At first, by donation of estates, the ruler could elevate any person to the quality of son of the homeland, even if he was a foreigner. Following the

8 Werbőczy 1897. Part I, 108; Dósa 1861. 70–71.
9 Béli 2004. 58; Egyed 2016a. 362–364; Kordé 2001.
10 Dósa 1861. 148–151.

issuance of the Golden Bull by King Andrew II of Hungary, the Royal Curia (Royal Council) acquired the right to be consulted in such decisions. After the *Diploma Andreanum* had been issued, donations of royal estates, and thus conferring the title of son of the homeland, were forbidden in regions previously donated to the Saxons (the so-called *Königsboden*, or *Fundus Regius*, translated as the 'King's Land') and also in the Szeklerland. Thus, following this normative act, conferring the quality of son of the homeland by the king on a foreigner could take place only in the Hungarian counties of Transylvania.

In addition to the above shown factors, the exercise of legal capacity was influenced by age, discernment, and honour of the person. According to provisions recorded by Werbőczy, children under the age of 12 years were considered underage (impuberant) and thus incapable of exercising any legal capacity at all, while persons aged between 12 and 24 years were considered to be juvenile (pubescent) and therefore had limited exercise of their legal capacity. Upon reaching a certain age, pubescents acquired *locus standi* in court proceedings as defendants or respondents (so they could stand as defendants), could conclude certain deeds, and could even dispose by way of wills, reaching the age of majority at the age of 24, acquiring what is in today's language the full exercise of their legal capacity.[11] From that time on, men could enter into marriage without the consent of their legal representatives and could acquire an estate separate from that of their father, thereby acquiring an independent legal status (*sui iuris*). A large number of minutes are available dating from the 16th century, which were drawn up by the so-called Commissions (or Courts) of Partition, from Cluj and the Szeklerland, their practice preserving the customary law of previous centuries. According to these, if the partition of the family estate had not taken place between the father and the eldest son due to the subsistence of the state of property indivision over the paternal estate, not even an adult man could acquire the status of an independent person, retaining the quality of *aliens iuris* (under the power of another), therefore being subject to the authority of the head of the family.[12]

In the conditions of feudal private law, it was of special importance for the individual to maintain a good reputation, to be considered as honourable. Each person had an obligation to keep his honour spotless, so that if a person considered himself injured in his honour by another person, the injured party had the obligation to seek to restore his honour in court. If he failed to do so, any person could invoke a lack of honour, the fact that one had a tarnished reputation, that he was dishonourable. In such cases, the testimony of a dishonoured person as a witness could not be taken into account; he could not conclude certain deeds, did not have active procedural capacity (could not stand as plaintiff in civil proceedings), and could even find himself in the situation of becoming a

11 Werbőczy 1897. Part I, title 111 paras 2–3; Dósa 1861. 5–6.
12 Werbőczy 1897. Part I. 51; Dósa 1861. 12.

defendant for certain offences due the fact that his honour had been tarnished.[13]

Private law relations between persons were influenced by family standing and kinship. These relationships could be related to consanguinity (blood kinship), where the kinship in a straight line or in a collateral line from a common ancestor not only forms the basis of paternal power relations or those of tutelage over a ward but could also influence the validity of the marriage and was of major significance in matters related to inheritance. With regard to ownership and possession, of special significance were the relatives who descended from the male members of the family, because only men could benefit from a royal donation of estates, and family property, the original estate of the noble family could be inherited only by the sons, while the rights of female descendants were mainly limited to paraphernal property rights such as the *douaire* (also called the *brideprice*, or *dos* in Latin, the wedding gift that was given to the wife from the husband's property), the *dowry* (endowment, goods brought by the woman into the marriage), and the *quarta puellaris* (i.e. one quarter of the value of the father's landed estate reserved as the common inheritance for all daughters).

In the customary law system, both the children and the wife were under the power of the head of the family, the father (in the case of the wife, this manifested itself in the institution of *coverture*). The father was responsible for the welfare of the family, was bound to raise and support his children, and the family estate was in his care. As a result of the authority of the husband as head of the household, during the existence of the marriage, he could freely dispose of the dowry of his wife, which was additionally meant to ease the spouses' economic difficulties imposed by marriage. After the marriage had ended, however – if its contents had not been exhausted during the marriage –, the dowry was returned to the wife (in case of annulment of the marriage) or passed on to her heirs.

The father had the right to *appoint a guardian* for his minor children. Guardianship was meant to replace paternal authority when instituted. In Hungarian feudal law, three types of guardianship could be distinguished. The first was the so-called *testamentary guardianship*. If the father desired the appointment of a guardian, this could be done by means of his last will. In this case, the guardian so appointed had priority over those who would be appointed by other methods of designation. If the father did not desire or could not appoint a guardian by his will, appointment of the so-called legal guardians followed. Thus, all male relatives of the father with a valid claim to the (future) inheritance of the orphaned minor would be appointed as guardians at once and jointly – hence the important role of blood kinship in the system of customary law. There could be several legal guardians, and their main obligation was the administration of the orphan's estate, the raising of the minor being left in the mother's care. If no such legitimate male relatives existed either due to illness or other reasons

13 Werbőczy 1897. Part II, title 72; Dósa 1861. 13.

of incompatibility (such as when the person entitled to exercise guardianship is in enmity with the family of the ward or already administers the estate of several orphans), they could not exercise guardianship over the orphan's estate. Consequently, a guardian was appointed by the king if the ward was a member of the aristocracy, by the county if he was only an ordinary nobleman, or by the lord if he was a serf. By the end of the era, a custom began to take shape, according to which the guardians – regardless whether they were chosen by the father's will or were legitimate relatives designated by law as guardians – were obligated to give an account regarding their administration of the assets of the ward.

A defining element of family law is the law that governs the *conclusion of marriage*. The early effects of canon law on civil law were felt in this field because the church was able to rapidly propagate Christian ideas regarding the family. Formal rules that regulated marriage in these centuries were based on the norms formulated at the Synod of Esztergom by Coloman, King of Hungary (also called Coloman the Learned or Coloman the Bookish). It stipulated that a valid marriage could be concluded before the parish priest determined according to the domicile of one of the future spouses, in the presence of two witnesses (Coloman II. 15.). This rule was not always adhered to by the parties, and in the event of a dispute as to the validity of the marriage covenant, the forum with jurisdiction established by the Holy See could be called upon to settle the dispute.

Impediments to marriage were established by old customs, of which it was of special significance that only persons having the exercise of full legal capacity could conclude a valid marriage. With paternal consent, however, girls of at least 14 years of age and boys of at least 18 years of age could validly conclude a marriage. Upon entering into marriage, women were released from under the authority of their father to be subjected to the authority of the husband, becoming by the effect of marriage adults at the same time. In contrast, men did not acquire *sui iuris* status by the effect of marriage unless they also partitioned at the same time the family estate with their father, the head of the family. The ancient rule according to which the marriage could not be concluded between blood relatives was applied. Over the centuries, the sphere of relatives excluded from marriage has, however, been restricted to collateral relatives of at most the fourth degree of kinship to each other. The impediments to marriage provided by canon law were established only at the end of the period studied in this part of our paper, at the Council of Trent (also known as the Council of Trento, *Concilium Tridentinum*).

Marriage was terminated *ipso iure* by the death of one of the spouses. The canon law of the Catholic Church declared marriage to be a sacrament; therefore, its dissolution by court decision was not possible.

The *matrimonial regime* (the marital property system) also played a significant role in the private law of Transylvania. Both among the Hungarian Transylvanian nobility and among the Szeklers, the presumption that during marriage the

husband is the main acquirer of the goods of the estate was applied. In contrast, in the case of marriages between Saxons, the regime of community property was used, based on ancient Germanic law.

During marriage, the wife enjoyed certain special rights. One such right was that of the *dowry* (*allatura*), which constituted the property of the wife during the marriage, although only the husband was entitled to dispose of it. The *engagement gifts* (*res parafernales*) included movable property granted to the bride, which was naturally in the property of the wife, who also had the right of free disposal over such movables. The noble women of Transylvania were entitled to the *brideprice* (*dos*, known in the legal literature by its name in the French language as *douaire*), which, according to Werbőczy's teaching, constituted the price of the wife's virginity. Its origin is considered by some authors to be found in the customary institution called the *Morgengabe* (a husband's gift marking the consummation[14] of the marriage). In the customary system of law, the wife's claim to the *douaire* was born at the moment of the valid conclusion of marriage, but it became enforceable only upon the termination of the marriage. The amount of this right was determined in accordance with the *homage* (a fine set for persons who would harm a nobleman) applicable to the husband and was intended to improve the financial situation of the widow. Given that the *homage* applicable to the nobles of Transylvania was less than the one applicable to the rest of the nobles in the kingdom – 66 forints –, the *douaire* of the noble wives of Transylvanians was also lower than that owed to noble wives in the rest of Hungary. If the wife did not fulfil her obligations arising out of marriage or was convicted of infidelity, she would lose the right to claim the *douaire*. 'To the baron's wife, however, the *douaire* must be provided as in Hungary.'[15] The *douaire* had to be handed over in currency by the heirs of the deceased husband to the widow, a norm modified in Transylvania – according to Werbőczy – to grant the possibility of paying the *douaire* in a proportion of 2/3 in currency and in a proportion of 1/3 in kind, in the form of movable property.[16]

The information found in the documents preserved from this period, along with the Golden Bull issued in 1222, demonstrates that from the family estate of their father a *quarta puellaris* was owed to women of noble lineage. Its value was usually paid to these women in currency, but exceptionally it could also be released in kind if the woman, with her father's consent, married a nobleman without an estate or a man who did not have the title of a nobleman. The *quarta puellaris* was owed to all the daughters of the head of the family, taken together. Of this heritage, they could dispose freely.[17]

14 Mosher Stuard 2013.

15 Werbőczy 1897. Part III, title 3, para 5. Translation by the author. Unless otherwise specified in the footnotes, all translations are by the author.

16 Werbőczy 1897. Part III, title 3, para 9.

17 Banyó 2000; Kelemen 1929. 69; 1926.

The rights of the widow, to which widows were entitled as inheritance after their deceased husbands, were applicable also in Transylvania, according to the laws of Stephen I of Hungary. This meant that, following the death of her husband, a widow could claim from the heirs of the estate left by the deceased maintenance and provisions in accordance with her social status on the one hand, and, so long as she kept the family name of her deceased husband, she could keep possession of the goods that made up the deceased husband's estate on the other hand.

4. Immovable Property and Contracts Used in Connection with It

As far as real estate law relations are concerned, it was of decisive importance whether the estate to which they referred constituted family property or was constituted of holdings (estates) donated by the king. After the Hungarian conquest of the Carpathian Basin, people settled in certain geographical areas according to their tribal affiliation, and within these regions according to their *gens* (extended family, clan). Resulting from the communal regime of land ownership, the areas of residence thus formed constituted the property of the *gens*, the families who composed the respective *gens* having 'only' possession of the land. The Transylvanian territories were settled during the Hungarian conquest by the tribes of Gyula and Tétény. Thus, from the perspective of immovable property law, we can consider as a starting point that the areas inhabited by Hungarians, including those in Transylvania, constituted the property of the *gens*. All this meant that without the consent of the entire extended family no disposal over the land was possible, and as a result the inhabited land was inherited by the men of that *gens*. This ancient system was modified by King Coloman the Learned when he ordered that by law the estates donated by the Crown should form the exclusive property of the donee, the right of any heirs to inherit it being established solely by the donation charter itself. Through this, King Coloman insured for the case of extinction of the donee's bloodline the retransmission of the estate to the Crown and the possibility of its subsequent donation to another donee. The main property right of the Crown was thus fully enshrined in the legal relations governing immovable property in Hungary, separating the regime of the property of the *gens* from the system of donations by the Crown. Due to legal provisions adopted by King Coloman, these two systems of ownership, or, more specifically, systems of restricted transfer of rights over immovables, need to be taken into account including in Transylvania. The legal regime of immovables applicable to the nobility of Transylvania was governed by rules applicable to the property of the *gens* and those instituted by Crown donation charters. Due to the omission from the confirmation decree issued in the year 1351 by King Louis I of Hungary

(known also as Louis the Great) of the provisions of Article 4 of the original text of the Golden Bull of 1222, which initially revoked the right to free disposal granted earlier to the serjeanty deceased without a male heir, in its place the institution of property of the *gens* was consecrated by the effect of statutory law.

However, we must not forget that – especially under the Árpád dynasty – lands resulting from deforestation were acquired into private property. Thus, during this period, we can identify the existence of the right of free private property.

Concomitantly with the development of serfdom, a third restrictive element appeared among legal relations governing immovable property: the feudal system. Thus, the triple restriction on the legal circulation of rights over immovables was brought to completion also in Transylvania, the *system of divided* property having been instituted. This is why we cannot speak of property in the modern sense of the notion in the system of customary law in relation to the epoch studied; the sources instead record possession, which is a state of affairs visible and obvious to all.[18] Mainly possession and the possessor were the ones protected by law. Whenever the entire *gens* or the donee mentioned in the royal donation letter could prove their right to property, the latter right could be invoked against others and imposed if needed. The documents regarding the donation of the estates were for this reason subject to repeated transcriptions by noble families in order to ensure the establishment of adequate means of proof for the purpose of preserving their rights.

Consequently, according to the system of triple restriction on the circulation of rights over immovables, which was also applied in the Hungarian counties of Transylvania, we must distinguish between the estates in the property of the *gens*, those owned as a result of a donation from the Crown, and lands subject to feudal relationships. The *property of the gens*, the community of blood relatives, and their ownership rights acquired legal embodiment, this system regulating the circle of relatives descending from a common ancestor in the lines of ascending and collateral kinship and the regime legally applicable to immovable property acquired by the ancestors and then transmitted by the effect of legal norms regarding inheritance to the members of their family. This estate, regardless of whether it was owned and used simultaneously or was in fact divided between coheirs to create lots used by each one, remained in indivision (co-ownership), and such heirs could not dispose of it either by deeds *inter vivos* or *mortis causa* without the consent of the entire *gens*, of the members of the extended family entitled to inherit such family property. Only in case of conviction for treason, called infidelity to the Crown (*nota infidelitatis*), or in case of extinction of the *gens* was this ancient estate transmitted to the royal treasury.

In parallel with this regime, an entire *system of estate donations* was established by the Crown, based on the good offices rendered to the king. After the law decreed by King Coloman the Learned, the estates received as donations

18 Zalán 1931. 25.

could be inherited exclusively according to the order established by the charter of donation, which meant primarily inheritance on the line of male descendancy. In addition to the estates donated in exchange for good offices, *mixed donation* was also applied, when the donee paid a certain amount of money in exchange for the donated property to the Crown. This was in fact a disguised sale and purchase. At the end of the epoch, the donation of disputed (litigious) rights also appeared. In these cases, the king would donate to the donee only the right to stand in court as claimant. On condition of success of this claimant in proving during the trial that the property of the disputed estate belonged to the king, the valid donation of such estate to the claimant occurred (with retroactive effects). Within the system of Crown donations, the title under which the donation was granted was defined early on. In addition to the good offices rendered to the king or country, the donation of an estate could be justified also on the ground of extinction of the family bloodline of the previous holder or his infidelity to the Crown. Moreover, cases of binding royal assent appeared, the king's consent being compulsory for transmission of property over donated estates by inheritance, along with property of the *gens* in cases of *perpetual assignment* (*fassio perennalis*) of the estate received by donation, its *pledge* (transmission of the usufruct of the mortgaged property to the creditor), and, where appropriate, *alienation* by private donations on the one hand and in the case of legitimation by the grace of the king, of the declaration as a son, and in cases of adoption on the other hand.

In addition to the estate of the *gens* and the estates received through donation, together with the formation of serfdom, the feudal property right also appeared, based on which part of the immovable property in the possession (*possessio*) of the nobility entered into *de facto possession* (*sessio*) and into the use of serfs as feudal property. Serfs would owe the payment of a fee of 1/10 from each harvest,[19] obligations of labour (called – by a word of Slavic origin – 'robot' also in Hungarian), and other contributions in kind and in currency to the landowner. One of the underlying causes of the Bobâlna Uprising (1437) was the fact that, owing to inflation, Transylvanian Bishop György Lépes (1375–1442) refused to accept payment when due of the ninth part and the tithe (already owed in currency by the mid-fifteenth century), and following the issuance of new, higher-value coinage, he requested that these fees be paid retroactively at their nominal value. So, it is no coincidence that by the point of the Convention of Cluj-Mănăştur, it had been stipulated that the peasantry was to continue to owe tithes to the church, but it could pay this obligation both in currency and in kind.[20]

The serfs had no right to dispose of the feudal lands they worked although they could dispose of the house built on these lands and their movable property.

19 This was referred to as 'the ninth part' in the Hungarian language, meaning the penultimate tenth percentile of the harvest, the last tenth percentile of it being the tithe owed to the church.

20 Demény 1987.

Immovable property could be acquired primarily through inheritance, donation from the Crown, perpetual assignment, and settlement of litigation. At the same time, in the built-up areas of the few royal free cities – for example, Kolozsvár (Cluj, Klausenburg, Claudiopolis) –, only burghers could acquire property rights. If a nobleman wanted to buy a house in such a city, he had to relinquish his noble title.[21]

In addition to the rules of customary law preserved in documents, the first written legal rule regarding contracts is related to the name of King Matthias Corvinus, who in his so-called Major Decree (*Decretum Maius*) issued in the year 1486 set forth the principle of *pacta sunt servanda*, meaning that the contracting parties must perform exactly the obligations they have stipulated in their contract. 'And with regard to obligations, the law must be obeyed in order to receive a right and justice before the first octave [a council of the royal curia] according to those to which they were bound, after they have been legally summoned to court' (Act 17 of the year 1486).

The exercise of the right of disposition by *inter vivos* deeds, to which an owner was entitled, was limited – according to the limitations presented above. The estate of the *gens* could be alienated or encumbered only with the consent of all members of the descendancy in the ascending and collateral lineages of the original owner, they being entitled to exercise a right of pre-emption (first refusal) in case of sale and having priority also when a pledge was established over the estate. The rules of customary law to this effect were recorded in Werbőczy's *Tripartitum* and can be demonstrated by the use of documents regarding the perpetual or temporary assignment of estates which were preserved from the studied epoch. Perpetual assignments were intended to transfer ownership due to the regime applicable to the property of the *gens,* being necessary to prove the well-founded nature as well as the reason for the alienation[22] on the one hand and the agreement of all coheirs of the ancestor to this alienation of ownership on the other. Lack of these conditions entailed the annulment of the contract.[23] In case of alienation of estates received by donation from the Crown, the king's assent – with immediate effect on alienation – was also required. Preservation of the estate for the *gens* was also ensured by the applicability of the right of redemption. Upon reaching 24 years of age – within one year of reaching this age –, the son had the right to repurchase from the buyer the estate previously alienated to such buyer by his father. For the security of rights of the buyer, the *nil iuris*[24] clause was developed at the turn of the 15th/16th centuries, also recorded in Werbőczy's *Tripartitum*, by which the father, upon alienating the property of the *gens*, also waived the right of regaining

21 Várady 1910. 70.
22 Werbőczy 1897. Part I. 70–73.
23 Werbőczy 1897. Part I. 60.
24 Werbőczy 1897. Part I. 69.

it on behalf of his sons. Also, for the protection of the interests of the buyer, two contractual warranties were formed for the enforcement of perpetual assignments: *assuming encumbrances* (*onus asumare*)[25] as an obligation of compensation and the *guarantee against eviction* (*evictio*)[26] as an obligation to defend the buyer in case of dispute with third parties. Already in the era of the Árpád dynasty, perpetual assignments were known and used to guarantee the performance of contracts in the form of a bond, or *vinculum* (*contractual penalty*), which consisted of an amount of money stipulated by the parties in the contract, owed by the party which failed to perform its contractual obligations. The transfer of ownership took place only through the drafting of a document, a written instrument (*diploma*) concluded before so-called *authentic places* (*loca credibilia authentica*), under the seal of the authentic place in question. Based on this document, the new owner could be put in possession. Granting possession was a condition *sine qua non* of the acquisition of ownership, not only in the case of perpetual assignments but also in the case of acquiring the right of ownership through inheritance or even by donation.

The other major class of contracts consisted of the so-called *temporary assignments*, when the transfer of title took place temporarily over an element of the person's estate. From this category, two types of significant contracts were the *contract of pledge* and the *contract of lease*. The contract of pledge was developed to secure loan agreements. In mediaeval law – mainly under the influence of canon law –, the stipulation of interest was initially prohibited so that, in order to compensate creditors, the debtors would cede possession of income-generating estates. According to the testimony of the documents that were preserved, in the beginning, this contractual form used to be concluded for a period of one or two years, later the repayment term of the loan being extended gradually until in the 15th/16th centuries the practice of concluding contracts of pledge over a period of 32 years became commonplace. As in the case of perpetual assignments, the coheirs of the estate of the *gens* had priority in this case as well when concluding a pledge, in order to ensure that possession of the estate remained in the hands of the *gens*. Because in the case of pledges real estate had for a long time been removed from the possession of the owners, the status of the creditor developed through the intervention of judicial practice. During the existence of the contract, the creditor acquired possession of the pledged property; being able to use it and harvest its fruits, he could undertake investment in the estate, but he was forbidden from damaging it and was obliged to bear the tax contributions established for the estate. The debtor did not have the right to repay the debt due prior to the expiration of the term stipulated by the contract, having this possibility only after the duration set forth in the contract had expired, being obliged to return – above the amount borrowed – also the value of the necessary and useful investments

25 Werbőczy 1897. Part I. 59.
26 Werbőczy 1897. Part I. 74–75.

performed on the estate by the creditor, but only to the extent and in the amount in which these investments were useful to the debtor. The debtor was entitled to decrease the total amount owed with the equivalent value of damages caused to the estate by the creditor either intentionally or negligently. The protection of the rights of the coheirs of the estate of the *gens* was served by the rule according to which the creditor could not acquire the property of the estate received in a pledge by means of usucaption. If the debtor did not repay the owed amount, the creditor could retain possession of the property received in pledge, having the right to continue to harvest its fruits. Besides this, the lender had the right to request repayment of the loan also in court.

> Our old law, therefore, is trying to strengthen the position to the owner who guarantees the pledge in relation to the object of the pledge; more precisely, it wants to protect the estate of the gens from possible diminution as a result of the pledge. One of the most powerful weapons through which this protection manifests itself is the imprescriptibility of the right of redemption.[27]

The practice of everyday business developed on the basis of the pattern of contracts of pledge, also with respect to the rules applicable to leases, the differences being that these latter contracts were always concluded for shorter periods by the parties on the one hand, and the rent had to be paid in the manner established by the contract, but most often in advance for each semester on the other hand. A *vinculum* (a penalty set in currency, imposed for non-performance) was usually stipulated as collateral in the case of temporary assignments as well.

5. Inheritance Law

The third category of property law regulations was formed by the norms of inheritance law. Originally, due to the relations between the members of the *gens*, the paternal estate was inherited in equal shares by sons, based on the principle of equal division (division by heads or *pro capita*). Daughters had the right to inherit only from the estate and property acquired by the deceased during his lifetime (so-called acquired goods) by inter vivos deeds. However, due to the special inheritance rights of women, the *douaire*, the engagement gift and the dowry could be transmitted by women as an inheritance; they even had the right to dispose of these goods by *mortis causa* deeds.

The appearance of property resulting from donations received from the Crown was also favourable to male offspring because the king made such donations

27 Zalán 1931. 28.

at first in exchange for (bravery shown during) military service, and this title excluded women from acquiring goods through such donations.

In addition to legal inheritance, over time, the need arose for the possessor to dispose of the estate in his possession due to death, by drafting a will. Disposal by will was also encouraged by the church, this possibility being mentioned for the first time in Article 4 of the Golden Bull.[28] This provision of the charter of privilege granted to the feudal nobility in reality records the ancient rule of legal inheritance by allowing for disposal by will only in the absence of male heirs on the one hand and if the one who leaves the inheritance does not exercise his right of disposal, providing that his closest relatives would inherit his property on the other hand. If the estate remained masterless, its contents were inherited by the Crown. The rules of legal inheritance, which are more detailed than those described here, were developed on the basis of daily practice in customary form and were finally recorded by Werbőczy.

The legal inheritance involved the division of the father's estate which he left as legacy in equal shares, the so-called 'division by heads' (*pro capita*). Since the legal relations in the field of property were restricted by the triple limitation resulting from the feudal concept of property rights, a rule arose (only gradually) that heirs should benefit from every type of goods found in the estate in equal shares, so from the estate of the *gens*, from that received as a donation from the Crown, and from those purchased during the life of the deceased. The *paterna paternis*, *materna maternis* principle was applied, according to which the paternal estate was inherited by the father's heirs, first of all by the sons, and the maternal estate was inherited by the mother's children, in equal shares, being divided *pro capita*. Formation of lots of goods that represented the shares of the inheritance could be accomplished by the heirs themselves, or they could appeal to the officials of an authentic place in order to have the lots established. It should be noted that the partition of the estate could take place even during the life of the head of the family, even on his own free initiative, but the opposite case could also be encountered, when the sons did not divide their inheritance into shares, even after the death of their father. This case is called *fraternal indivision*. At all times, prior to the formation of the lots, the dowry had to be handed over, along with the *douaire*, to the widow. The rights of the widow also had to be granted her and for the unmarried daughters the rights of the unmarried daughter secured. This meant that male heirs had to provide, according to their social standing, maintenance and provisions to the daughters, granting them a dowry appropriate to the daughter's social standing, before the conclusion of any marriage. Following the division, the paternal house was always left to the youngest son because he had the obligation to maintain, care for, and bury his elderly parents. For the other sons, houses or lots for building houses of a similar

28 Érszegi 1990. Supplement page.

value had to be awarded.[29] If the one who left the inheritance died without having any descendants, his estate was inherited by his ancestors and by closer collateral relatives. According to the rules of parentelar-linear inheritance, the deceased person's property was to be returned to the (living) blood relatives it was originally acquired from, before its transmission to the person who left the inheritance took place. Only in cases when no heirs would inherit in this way could the Crown (the Treasury) inherit.[30]

The one who left the inheritance was entitled to dispose *mortis causa* of his estate, but only according to his free uncorrupted will (in the sense of freely made disposition). The formal requirements of the last will were not regulated through legal norms, having been developed instead through the effect of everyday practice, as a custom of substantive law the right of disposal having been limited to movable and acquired goods. However, this did not rule out that a testator's will may also refer to the property owned by the *gens* or to goods received by donation. Testamentary provisions relating to these goods, however, had to include solely provisions that were consistent with the rules governing legal inheritance.

In Hungarian law, legal and testamentary inheritance have coexisted because, due to the restrictions applicable to the property regime, the possibility had to be established for the testator to dispose of the goods acquired by some testamentary provisions which derogate from the provisions of the rules of legal inheritance, in compliance with ancient legal custom.

6. The Law of the Szeklers

From the information available to researchers, the reasons and circumstances for settling the Szeklers in Transylvania cannot be precisely established, but what can certainly be said is that they were colonized in this region in order to defend the eastern borders of the kingdom in a process that was long lasting, leading them to occupy the areas permanently inhabited by them today only in the 13th century. This fact is known in connection with the provisions of the charter of privilege associated with the royal donation granted to the Transylvanian Saxons.[31] The Szeklers gained many privileges in return for the military burdens to which they were subjected, but these privileges were not compiled together and codified in the same way as the privileges of the Saxons in the *Diploma Andreanum*. Regardless of this shortcoming, the Szeklers have always successfully invoked their ancient rights and privileges, which in many respects differed from Hungarian customary law. This is recorded by Werbőczy in Part III, title 4 of *Tripartitum*.

29 Werbőczy 1897. Part I, title 40.
30 Werbőczy 1897. Part I, title 47.
31 Kordé 2001. 67.

The sources of Szekler law are also constituted by customary law and numerous privileges created by various legislative acts. 'However, the summarization from a historical perspective of Szekler law is not an easy task because even today the sources of customary and positive Szekler law have not been gathered together.'[32] The first collections date back to the 15th/16th centuries, which also bear witness to the rules of customary law in previous centuries.[33] One of the most significant of these is the diploma of privileges awarded by King Vladislaus II of Hungary in 1499.[34] In this diploma, in addition to the military burdens imposed on Szeklers, the payment of a tax was recorded, which consisted in giving an ox from each household on the occasion of festive events such as the coronation of the king, the marriage of the king, and the birth of the king's first son, also called 'burning the oxen' (*ökörsütés* in the old Hungarian of the time, meaning the marking of the ox with a hot branding iron). The diploma also records rights pertaining to procedures before the court. The supreme judge of the Szeklers was the count of the Szeklers appointed by the king, who 'exercised his judicial function, such as [...] the palatine in the counties of Hungary and the voivode in the counties of Transylvania, on the occasion of the judicial assemblies'.[35] The basis of the judicial court system formed until the beginning of the 15th century was constituted by the *courts of the seats* (the seat, or *szék* in Hungarian, was a unit of territorial-administrative organization in the Szeklerland, different to Hungarian counties in its organization structure), to which the Szekler inhabitants of the different seats elected their judge and his aids, the jurors. The decisions of the courts of each seat could be appealed to the court of the Seat of Odorhei, and then the dissatisfied party could address the count of the Szeklers; according to the charter of privilege, this order of appeals could not be avoided as it was not possible to address the voivode or the king directly. The Szekler *magistrates* (senior officials) could be elected exclusively from among the aristocracy ('great lords', members of the high nobility, referred to as *primori*) and the equestrian class (lieutenants, named in Latin *primipilus*), while some of the jurors had to be elected from the social stratum of common Szeklers.[36] The formation of the Szekler judicial system and in connection with it of the Szekler administrative autonomy – which began through the assemblies convened in Odorheiu Secuiesc and later in Lutița – allowed for the application of their own law and their own customs even if these legal and customary rules have not been compiled into an independent code.[37] The customs governing their law of succession were recorded only in 1555, in the Constitutions of the Szeklers (*Székely Konstitúciók*

32 Egyed 2016b. 348.
33 Bónis 1942, Kordé 2001.
34 Béli 2004. 55–63; Bónis 1942. 17–20.
35 Béli 2004. 56.
36 Egyed 2016b. 350.
37 Egyed 2016b. 353.

in Hungarian), which resumed and transmitted[38] their ancient customary law on the one hand and, to some extent, also altered these customs on the other hand.[39]

The existing private law relations between the Szeklers were also marked by the fact that the entire Szekler nation was considered from a legal standpoint as being composed entirely of nobles (even the common Szeklers). Among the ranks of this nobility, distinctions could be made – primarily based on material wealth – between three social strata: the aristocracy, the equestrians, and the common Szeklers. This noble status meant that the rules which were applicable to the Hungarian nobility produced their effects over the Szeklers with some derogations known collectively as 'Szekler law', or *ius Siculicale*. This manifested itself primarily in the regime applicable to property rights over the Szekler estate and secondly in the law of succession.

The Szekler estate (which can also be translated as the Szekler heritage, *haereditas siculica* in Latin) in particular meant that the Szeklers were free in their persons and at the same time noble, and the lands in their possession – similar to the property of the *gens* in Hungary – were entirely owned by them. The Szekler estate meant initially:

> that body of property which the Szekler acquired or occupied at its establishment or later, but due to military service. [...] The bulk of the estate subject to inheritance [...] was formed by the immovables: the house [...], the household annexes: the barn, the stable, the hearth, the gardens, the ponds, the mills, or other industrial units intended for specific services, and the land.[40]

Land ownership in the Szeklerland could not be conferred upon persons outside the Szekler people, and *ius regium* was not applicable to it.[41] A rule in this respect was already formulated in the provision of the charter of privilege of 1499, according to which if a Szekler was guilty of infidelity to the country or to the ruler, his fortune, which was retained by the royal treasury, could be donated by the king exclusively to another Szekler, thus preventing the exiting of the Szekler estates from the property of the Szekler people.[42] The regime of Szekler land ownership stems from the communal property system in which the *gens* as a village community were considered to be the owner, and the families belonging to the *gens* were only in possession of the land they worked. Communal land ownership existed among the Szeklers for a longer period than

38 Tüdős 2008. 208.
39 Bónis 1942. 26–27; Rüsz-Fogarasi 2012. 11.
40 Tüdős 2008. 210.
41 Szabó 1890. 182–187; Degré 2004. 299.
42 Béli 2004. 58; Egyed 2016b. 351.

among the Hungarians and was preserved due to the framework provided by the institution of the Szekler estate. According to an ancient custom, arable land was divided between families by drawing lots using the shafts of arrows, while pastures and forests were shared. In this way, we can understand the freedom of disposition over land ownership by *inter vivos* deeds if they were concluded between Szeklers and without prejudice to the rights of the men in the *gens*. Laws adopted in the 15th century established that if an aristocrat or equestrian did not initially own land in a village community, the consent of the village community was also required in case of a purchase.[43]

In addition to the lands subject to the Szekler estate, there were the lands resulting from deforestation, over which the one who cultivated them had full rights of disposition, being able to dispose of them by will, in a way similar to movable property.

In the Szeklerland, the Crown's donation system was not applied in practice because the whole of the Szeklerland belonged to Szekler communities. Diplomas attest that the Szeklers succeeded in opposing manifestations contrary to this principle by the Crown. This may explain the provision of the Diploma of 1499 regarding the fate of the estate of the person convicted of infidelity.

A strict order of inheritance was formed regarding the land property of the Szeklers. Similar to the inheritance of the *gens* of the Hungarian system, the land ownership of the Szeklers was inherited primarily by sons, being obliged in return to contribute to the marriage of the unmarried daughters of the deceased. If no sons were born to the deceased, the daughters inherited after the deceased by law, but in such a way that if later a son as well as a daughter was born to the inheriting daughter, the latter's son was to have priority at inheritance before the daughter, being obliged in turn to contribute to his sister's marriage. This type of inheritance by daughters was called 'inheritance by a daughter as if she were a son' (*praefectio* in Latin).[44] In the absence of descendants, the ascendants and collateral relatives, members of the *gens* inherited the estate of the deceased, always keeping in mind the priority of the male lineage.[45] In case of the extinction of the *gens*, the neighbours were called upon to inherit.[46] In reality, this normative solution allowed the preservation of land ownership within the Szekler nation.

At the division of the Szekler estate, the duration of the term required for acquisition by prescription (sometimes also called usucaption) was also 32 years, as recorded in the case of Hungarian law applicable to the nobility by Werbőczy.[47]

43 Egyed 2016c. 365.
44 Szabó 1890. 193–194.
45 Bónis 1942. 72–85.
46 Degré 2004. 299.
47 Tüdős 2008. 206.

Among the Szeklers, the institution of widow's rights also existed with regard to the right of use of the property of the deceased by the widow.

7. The Law of the Saxons

It is a generally accepted thesis that the Saxons settled in Hungary due to the privileges conferred on them by the diplomas of Hungarian kings. (The name 'Saxon' was given to this population by the Hungarians, but this does not mean that these German settlers arrived in Hungary only from what was at the time Saxony.) Among these, the diploma issued by King Andrew II of Hungary in 1224, the *Diploma Andreanum*, is especially worthy of mention because it not only allowed them to settle on the territory of Hungary, but the king also handed over the city of Sibiu and its surroundings to the exclusive possession of the Saxons on the basis of royal privilege, this land being later named the King's Land (*Königsboden* in German, *Fundus Regius* in Latin). This territory had to be abandoned by members of all the other nations, Szeklers and Hungarians, and even by the Teutonic Order, which had originally settled there. Based on the right of *hospes* (guests of the king), the *Diploma Andreanum* awarded the Saxons the privilege of electing the parish priests and the county judges and living in accordance with the rules of their ancient law. Although the Saxons of Transylvania existed under the name of *Universitas Nobilium, Saxonum et Cumanorum* – as attested by a diploma issued in 1298 –, their 'social and community relations were only later regulated generally and uniformly, on the basis of specific national institutions'.[48] The *Diploma Andreanum* ensured over the centuries the autonomy of the Saxons settled in Transylvania. 'Autonomy was one of the basic tenets of the political life of the Saxons in Transylvania.'[49] The rights and privileges granted to the Saxons settled in the surroundings of Sibiu were later also granted to the Saxons settled in the area of Braşov (*Kronstadt*) and in Ţara Bârsei (*Burzenland*). The privileges acquired through the diploma made the social and political development of Saxon cities possible.[50] The *Diploma Andreanum* exempted the Saxons from 'any kind of foreign jurisdiction',[51] thus making it possible for them to choose from among themselves judges who were familiarized with ancient customary law. According to the generally accepted position formulated in the literature, the basis of this customary law was the Mirror of the Swabians (*Schwabenspiegel*), a collection of laws written around 1275 in Augsburg. The diploma awarded the Saxons the right to hold fairs and the right of free trade. As early as the 13th

48 Wenzel 1873. 6.
49 Szabó 2004. 26.
50 Benkő 1994.
51 Szabó 2004. 26; Blazovich 2005. 1–17.

century, various guilds were founded in the cities inhabited by the Saxons; thus, in addition to the development of trade, also that of industry began. This allowed the formation of the bourgeois order. The collection of Transylvanian Saxon laws took place relatively late, only in the second part of the 15th century, when Thomas Altenberger, who would later become the Mayor of Sibiu, compiled a textbook of law, the so-called *Codice Altenberger*, in which elements of the Mirror of the Swabians, of Magdeburg law, and even elements of Iglau law can be found.[52] Altenberger attempted to unify the judicial practice of Saxon cities.[53] This code was often invoked as a source of customary law before the count's court in Sibiu. Altenberger's code can be considered as a retrieval, or reception of foreign laws, of which certain passages may be also discovered in later works of legal literature.[54]

The creation of the Saxon National University as a form in which the administrative autonomy of Saxons manifested itself made the unification of law necessary because the Altenberger Code was effectively utilized only in Sibiu. The unification of Saxon law in Transylvania took place in the 16th century. In 1544, *Johannes Honterus* created a collection of legal norms,[55] which was strongly influenced by the provisions of Roman law, and after a longer period of preparation *Matthias Fronius* completed his code[56] in 1570 with the title *Eigenlandrecht der Siebenbürgischer Sachsen*, confirmed in 1583 by Prince Stephen Báthory (1533–1586). In addition to the norms of customary law, elements of Roman law were also transplanted into this work. Besides the rules of procedural law and criminal law, he also brought together the rules of family law and the law of successions as well as those of the law of obligations. It becomes unequivocally clear from this book of law that, according to the old customs, a matrimonial community of property is formed in the Saxon family between husband and wife after the conclusion of the marriage. The wife would receive one third of the estate resulting from the dissolution of this community following the death of her husband. This estate was not acquired by the widow under the title of inheritance but as her own property resulting from the dissolution of the community of property, the wife being a co-owner for the time of the marriage.[57] This code was used until the entry into force of the Austrian Civil Code in 1853.

52 Wieland 2013. 124; Lindner 1884. 161–204.
53 Gönczi 2013. 101.
54 Szabó 2001. 49.
55 Vogel 2001. 11; Szabó 2001. 28–54.
56 Szabó 2004. 30; Rüsz-Fogarasi 2012. 14.
57 Rüsz-Fogarasi 2012. 14; Gönczi 2013. 101.

8. Perspectives of Romanian Legal Literature on the Private Law Applicable to Romanians in Transylvania during the Examined Period

Regarding the law of Romanians in Transylvania, we have very little information from the period studied. The life of the Romanians in Transylvania, as that of other populations belonging to the various nationalities in this historical region, was governed largely by customary law in the period between the reign of King Stephen I of Hungary (997–1038) and the conquests of the Ottoman Empire, which began with the defeat suffered during the Battle of Mohács (1526). These rules bore various names (*consuetudo*, *jus valachicum*, *lex Olachorum*).[58] They were gradually complemented, even replaced, by the decrees of certain kings of Hungary who endeavoured to differentiate the laws of the king from the legal custom of the region; the decrees of 1298 and 1239 are specifically mentioned as well as the 1486 decree of King Albert of Hungary, known more widely as Albert II of Germany, the first king of the Habsburg dynasty, and the decree of Vladislaus II from the year 1492 (the latter being of public law character).[59]

The codification undertaken by Werbőczy affected the legal life of the Romanian community in Transylvania from the point of view of private law, similarly to that of other nationalities.

Given the relations – underpinned specifically by their common religion – between the Romanians of Transylvania and those from the extra-Carpathian principalities, a continuous exchange of ideas and legal regulations developed. A telling example of this exchange is the reference to Transylvania in some copies of the *Pravila de la Govora* (1640), which can be loosely translated as the *Rules (or Laws) of Govora* in a form adapted to refer to the Metropolitan (Christian Orthodox religious leader) of Transylvania, Ghenadie, in the place of the Metropolitan of Muntenia, Teofil.[60] The translation of the codex bearing the title *Îndreptarea legii*, compiled in 1722 by Petru Dobra, falls within the same pattern of communication of legal ideas.[61]

In what concerns the legal capacity of persons, the legal literature in Romania shows that the personal situation of Romanians in Transylvania, like that of other nationalities, was influenced by their social status, the social class to which the person belonged, but also by the person's position within these social classes. 'With rare exceptions, Transylvanian Romanians belonged in the feudal period to the inferior, productive classes, deprived of privileges and holding only civil rights and no political rights, namely to the categories of free peasantry (to a

58 Berechet 1933. 298.
59 Berechet 1933. 298.
60 Berechet 1933. 155.
61 Berechet 1933. 301.

lesser extent) and to the serf peasantry (to a greater extent) (...)'.[62] In particular, in the case of the Romanian ethnicity, an additional circumstance that affected the status and implicitly the legal capacity of persons was constituted by the religion of the population, mostly Christian Orthodox, given that the exercise of certain occupations required professing the Catholic religion.[63]

The nobility, the social class that enjoyed the quasi-totality of civil rights allowed to individuals during the Middle Ages, showed significant differences in the complexity of its internal structure compared to the prevailing nobility in the regions outside the Carpathians. The rights of this social class were enshrined in numerous legislative instruments, such as the Golden Bull (1222), the *Approbatae Constitutiones*, and the *Compilatae Constitutiones*, and included in Werbőczy's *Tripartitum*.[64] The nobility's privileges fundamentally affected the legal status of this class both in political and economic terms, including in the field of the exercise of legal capacity. Although it was a social class whose relative unity was maintained by the indivisibility of the noble privilege, being considered that, regardless of social status, the nobles enjoyed one and the same freedom (*una et eadem libertas*), the economic power of its members still often determined the ability of some nobles to participate in economic and political life. Persons of Romanian origin were at times co-opted among the nobility.

Members of the clergy – initially the Catholic clergy and after the Reformation also the clergy of the politically accepted Protestant denominations – enjoyed privileges similar to those provided for the nobility; the status of the Eastern Orthodox clergy, however, remained inferior, this state of affairs constituting a means of coercion in order to compel Romanians to join the politically accepted ('received') denominations (initially and unsuccessfully Calvinism, then Catholicism).[65]

The burghers – similar to the status of the Transylvanian nobility when compared with that of the nobility from the extra-Carpathian regions – also had a more complex internal structure than the urban population of the extra-Carpathian regions. The burghers of Transylvania could be divided into two significant groups: the patricians and the commoners. Regarding the effects of personal status on legal capacity, burghers enjoyed broader rights to participate in trade, in the field of immovable property rights and of freedom to transfer rights over their own property *mortis causa* in testamentary form. The Romanian historical literature shows that Transylvanian cities have been reluctant to grant the status of accepted burgher to Romanians during the feudal period,[66] without, however, indicating historical sources in this regard.

62 Hanga–Marcu 1980. 476.
63 Hanga–Marcu 1980. 476.
64 Hanga–Marcu 1980. 478–479.
65 Hanga–Marcu 1980. 480–481.
66 Hanga–Marcu 1980. 482.

The free peasantry in Transylvania (including the Romanians in the region inhabited by the Saxons, called the King's Land) as a social class benefited from a different status to that of the peasantry in the principalities of Moldova and Wallachia in terms of legal capacity, benefiting from a wider right of disposition, being allowed to alienate immovables and being granted a wider contractual capacity.[67]

Serfs – grouped according to their economic standing into *serfs with one lot*, *serfs with one and a half a lot* but with a house (*inquilini*), and *houseless serfs* (*subinquilini*) –, who made up the dependent peasantry of Transylvania, were subjected to an inferior social and legal status when compared to the free peasantry, which was also reflected in the extent of their legal capacity. They were subject to prohibitions regarding the acquisition and transfer of land ownership. Their succession capacity, both under the aspect of acquiring goods through inheritance as well as regarding the right to dispose *mortis causa* by a will, was also restricted by rules during the analysed period. The serfs' freedom of movement was also severely restricted.[68]

Historical literature shows that, similar to the extra-Carpathian regions of present-day Romania, a social class of 'slaves' existed also in Transylvania and was subject to a separate legal regime. This legal regime, somewhat different to slavery in the proper meaning of the word, was attenuated over time. Slavery in the sense of servitude, in which slaves (*servi*, *ancillae*) had the status of movable property (chattel) by destination, fell into disuse as early as the 13th century. By the Constitution granted in 1423, Sigismund of Luxembourg ensured the legal capacity of free persons to slaves (a notion which at that time referred in particular to the Roma population) but deprived them of their political rights. The situation of slaves in the extra-Carpathian regions of today's Romania was much harsher. The regime applicable to their legal capacity in the studied historical period seems tantamount, according to all appearances, even equal to slavery in the initial meaning of the word.[69]

In addition to belonging to one of the social strata analysed above, three coordinates determined the legal capacity of persons, both in terms of the existence and the exercise of this legal capacity: age, sex, and the existence of a form of guardianship applicable to the person. In terms of age, custom and *Tripartitum* presented certain inconsistencies.[70]

67 Hanga–Marcu 1980. 482.
68 Hanga–Marcu 1980. 483.
69 Hanga–Marcu 1980. 486–489.
70 The various regimes applicable for protecting the minors' (or the incapable adult's) person and property when these were unable to conduct their own affairs, in the form of guardianship and curatorship, were often used due to the large number of minors in need of such protective measures. See: Hanga–Marcu 1980. 491–493.

Depending on the sex of the person, three states of legal capacity could be determined. Due to impuberty (*illegitima aetas*, *pupillaria aetas*), girls up to the age of 12 years and boys up to the age of 14 years (12 years according to *Tripartitum*) were completely deprived of the exercise of their legal capacity. Restricted exercise of legal capacity occurred along with the status of puberty (*legitima aetas*), after reaching the age at which impuberty has ceased. The status of puberty allowed persons to undertake certain acts of estate management (initiation of litigation, contracting of attorneys), while certain acts of disposal were also allowed: contracting loans secured by a pledge after reaching the age of 12 for girls and 14 for boys; concluding contracts related to valuable movable property and valuable metals for 16-year-old boys. Adulthood, or coming of age (*perfecta aetas*) occurred at the age of 24 in the case of men and at 16 years in the case of girls, and it provided these persons with the right to dispose of their own assets and in the case of married women of the assets known collectively as paraphernalia.[71]

Regarding the effects of a person's sex on civil capacity, the legal system of the Middle Ages usually granted only a marginal role to women in legal operations of a patrimonial character, apart from such current operations, of low value, which are usual in the everyday conduct of a household. However, in the matter of the law of succession, the fiction of *praefectio* (inheritance by a daughter as a son), in effect a form of trust, the conferment of inheritance rights upon a female descendant was permitted in view of the retransmission of these rights to her male child.

In matters of inheritance law, the imperative to transmit and divide the deceased person's estate and the need for his property not to remain masterless were universal. Thus, in the absence of a will, the transmission of the inheritance usually took place to certain classes of heirs, in particular to legitimate descendants, ascendants, and collateral relatives of the deceased. A child born out of wedlock could not inherit from his father, but he would inherit from the mother. The widow or widower must be listed as heir as well as public institutions such as the royal Treasury, the Crown, and the local poor. As a particularity of the transmission of property in the form of an inheritance, in Făgăraş County, the principle of gender equality was preserved (a system that was also applicable in Wallachia) along with the privileges of male heirs up until the 17th century.[72]

In accordance with the priorities of the age and regardless of the specific regulations applicable, Transylvanian inheritance law concentrated on the preservation of the elements of the deceased person's estate – to the extent of possibilities – within the family of the deceased. Thus, on the one hand, the goods acquired by ancestors through occupation, known as avitic property (ancestral

71 Hanga–Marcu 1980. 490.
72 Hanga–Marcu 1980. 521.

property), the goods acquired from the king or prince by way of donation, and those acquired by the deceased in other ways during his lifetime were subjected to different regimes of transmission during the procedure of succession, and, on the other hand, the privilege provided to male heirs played a significant role.[73] To ensure the unitary transmission of certain types of property in consideration of their economic utility, the principle of *primogeniture* (the privilege of the first-born) was used to differentiate the rights of descendants of the same sex.

Heritage was organized according to the social class the person leaving the inheritance (also called *de cuius*) belonged to.

In the case of noble inheritance, the avitic property could be transmitted exclusively according to the rules of legal inheritance (the youngest son gaining the parental home, the eldest son the deeds conferring rights on the remaining land holdings, the weapons being divided among the male heirs). Estates resulting from donations by the Crown were transmitted as part of the inheritance or returned to the Crown upon the death of the holder, according to the provisions of the donation deed, and *de cuius* was entitled to dispose by his last will only with regard to the acquired goods; in the case of *ab intestat* succession (when no last will existed), the rules of legal inheritance remained applicable. The main classes of heirs who came into the deceased person's inheritance in the absence of a will were made up of blood relatives of various degrees, descendants, ascendants, and collateral relatives, who inherited in this order. The division of inheritance between the descendants took place on an equal basis (*pro capita*) when no privileges were applicable, and in case of the predecease of a descendant who in turn left descendants of his own, these descendants of a more distant degree would inherit the share of their predecessor by representation (*per stirpes*), dividing this share among them. Female descendants acquired from the avitic property and from donations (in the latter case, under the conditions of the deed of donation) together – no matter the number of female descendants of equal degree – only the *quarta puellaris* (*ius quartilitium*), which was in almost all cases the value expressed in currency of a quarter of the estate, being due only by equivalent and not in kind. With regard to the goods acquired, women participated equally in the inheritance with men. The institution of the *quarta puellaris* remained in place in Transylvania until 1848, later being repealed. In the absence of descendants, the ascendants came into the inheritance according to the principle of proximity of the degree of kinship, and in the absence of ascendants collateral relatives were next in line. Women were allowed to dispose by will only in connection with their dowry. The widow was still entitled to sustenance from the heirs of her deceased husband. The testamentary inheritance was governed by various rules on the forms of the will.[74]

73 Hanga–Marcu 1980. 530.

74 Hanga–Marcu 1980. 530–531.

In the case of burghers, the rules of legal and testamentary inheritance were much more similar to modern regulation. The townspeople could dispose of their movable and immovable property by a will, in the absence of which the norms of legal inheritance becoming applicable (the order of the classes of heirs being identical with the inheritance of the nobles). The right of *de cuius* to dispose of his assets by means of a will was limited by the existence of a legal reserve in favour of certain relatives (*portio legitima*). In the case of Saxon cities, norms were preserved that excluded the inheritance of real estate within the city by persons who did not hold the citizenship of the respective city, the sale of the property and then assigning the equivalent value to the heir being required in such situations.[75]

Inheritance law among the free peasantry was governed in a different way, depending on nationality, place, and time. Among the Romanian peasantry, historical sources attest to the existence of the custom of dividing an inheritance up between:

> (...) both sexes; in some regions, girls have to be contented with the dowry consisting of clothing and other items for household use as well as with gifts consisting of various valuables received on the occasion of the wedding; the surviving spouse received, in some places, a third, in others an equal share with that of the sons in movable and immovable property; upon the death of a person without children, the inheritance belonged to his/her brothers and sisters in equal parts (the home and fields usually belonged to male successors).[76]

Among the serfs, inheritance was divided among the legal heirs in the absence of a will. Vacant inheritances reverted to the lord's estate. The acquired real estate of the deceased could be transferred only in a proportion of 1/2 by will, the rest being returned to the lord. The widow's rights were recorded as having the extent of 1/3 of the inheritance in respect of movable property, female descendants having no inheritance over any movables other than clothes in the absence of an authorization from the lord.[77]

The inheritance of the clergy was governed by rules of lay and canonical law.[78]

75 Hanga–Marcu 1980. 531–532.
76 Hanga–Marcu 1980. 532.
77 Hanga–Marcu 1980. 532–533.
78 Hanga–Marcu 1980. 532–533.

9. Conclusions

We have seen in the course of our study that Transylvania as a historical space was characterized during the existence of the mediaeval Kingdom of Hungary by diverse norms of private law applicable to the various nationalities of this region and to the various administrative entities within it. This diversity may, however, be summarized by drawing the following conclusion: while the laws of the Kingdom of Hungary made up a significant part of the private law environment, especially the fields of family law, the law applicable to property as well as inheritance law presented specific elements for each nationality in turn.

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