



Customary Law in Hungary: Courts, Texts, and the Tripartitum

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Custom and Law in the Modern Period

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Abstract and Keywords

At the end of the eighteenth century, in the wake of Joseph II's reforms, the diet began to assume the initiative in legal reform, although only a few of its proposals were converted into statute law. The revolution of 1848 saw the dismantling of seigneurial jurisdiction and the structure of noble land holding, as well as the effective repudiation of the *Tripartitum*. A phase of rapid reform was introduced in the neo-absolutist period of the 1850s, inaugurated by Franz Joseph. With the collapse of the neo-absolutist experiment, a legal vacuum occurred, into which the High Judge Conference reintroduced parts of the pre-1848 structure. Despite the inauguration of a parliamentary regime, statute law proved inadequate. It was augmented by judicial activism and ministerial decree. These extra-legal recourses were justified by reference to their embedding in customary practice. Thus customary law continued to maintain a rhetorical authority into the twentieth century.

Keywords: Joseph II, 1848, neo-absolutism, Franz Joseph, High Judge Conference, Országbirói Értekezlet ministerial decree, statute law

The Limits of Reform

The customary law and its institutions were torn up by Joseph II in the 1780s. In the decade of his rule, Joseph pushed through an experiment in enlightened absolutism that turned the established legal order on its head. Joseph's measures aimed (among much else) at the emancipation of the peasantry through the monetization of seigneurial obligations, the taxation of noble land, the introduction of new civil and penal codes that eliminated both *aviticitas* and the privileges of the nobility, and the separation of justice from administration

through the reorganization of the kingdom's lower courts. Joseph's reforms were all introduced by decree or patent, without any involvement of the estates. His assault on the privileges of the Hungarian nobility was combined with a propaganda offensive that both disparaged the *Tripartitum* and demonstrated that Hungary's historic arrangements of public law had been perverted by noble self-interest.¹ It brought the kingdom to the verge of rebellion and of a new Prussian invasion. In anticipation of an imminent change of regime, one Hungarian conspirator (Remigius Franyó) sent Frederick William II of Prussia a copy of the *Tripartitum* for his edification.²

On his deathbed, Joseph II retracted most of his legislation for Hungary. In order to pacify the kingdom, Joseph's successor, Leopold II, hastily summoned a diet, the first in thirty-five years. Leopold hoped to convince the diet to agree to a broad measure of reform.³ Most deputies to the diet that met in 1790 aimed only, however, at a *restitutio in integrum*, but there were some who argued that Joseph's rule had broken the contract between the political nation and the house of Habsburg and had thus severed the thread of succession (*filum successionis*). They accordingly (**p.216**) advocated the restoration of an elective monarchy, the reinstatement of the right of resistance, and the prosecution of Joseph's Hungarian advisors on the (dubious) grounds of *crimen laesae nationis*.⁴ In order to recapture the middle ground, Leopold enlisted firebrands from within the nobility to urge a radical programme that aimed at the empowerment of the 'fourth estate' and the taxation of the nobility. Some of these would later go on to embrace the cause of revolution, ending their lives on the executioner's block.⁵

Consensus could, however, be reached on a scheme that aimed to render impossible any repetition of Joseph's rule. Joseph's reforms had all been introduced by patent. There was nothing unusual about the use of mandates of this type, which were deemed to flow from the supervisory role that the monarch discharged. Previous statutes had sought to hem in the use of royal mandates, confirming that they might not be used against the rights and laws of the kingdom.⁶ Most mandates and patents were, indeed, purely administrative instruments, of only temporary significance, dealing with routine business—prognostication in markets, the excessive use of post horns, the hooding of pipes for smoking tobacco, and so on.⁷ In this respect, they were as unexceptionable as the vast bulk of *normalia* addressed to the courts. Some, such as Maria Theresa's patents that had forbidden torture, eliminated the crime of witchcraft or regulated peasant obligations, comported less happily with the laws and practices of the kingdom—and in the case of the last of these, published in 1767, might be considered a direct assault upon the established rights of the nobility. Joseph's patents belonged unequivocally, however, in the category of mandates that were *illegitima* insofar as they were self-evidently *contra jura et leges regni*, *contra Decreta regni*, and not in conformity with the kingdom's customary law. In order to prevent any further abuse of patents, the diet as a first step obliged

Leopold to confirm that he would not use these instruments, unless they were in line with the kingdom's laws—*nonnisi in sensu legum*. Leopold agreed to this.⁸

The problem was that the laws to which the diet appealed were by no means established. Their content was uncertain and their applicability not obvious. Hungarians had, however, recently learned from Montesquieu that the bundle of customs and conventions that governed the rights of the nobility amounted to a constitution. (The 1792 Transylvanian diet subsequently opened in Cluj with a trio sung by personifications of the three powers.)⁹ Many noblemen accordingly demanded a comprehensive written settlement, in the manner of a constitution, **(p.217)** which would fill in the legal gaps wherein royal patents might otherwise intrude, thus guaranteeing their liberties against any future erosion.¹⁰ Leopold was supportive of their request, for he hoped through a revision of the laws to effect the modernization of Hungary's institutions.¹¹ Because, however, Joseph's reforms had been so comprehensive, involving most aspects of the kingdom's life, the idea of a constitutional settlement was rapidly eclipsed by the more ambitious plan of defining the legal scope and character of every institution in the country. The diet accordingly appointed no less than nine committees of the estates or, as they were known, *Deputationes Regnicolares* to work out a thorough legislative settlement. This was to include not only the elaboration of codes of criminal, civil, commercial and procedural law, but also public administration, taxation, peasant obligations, the national economy, mining, ecclesiastical matters, education and culture, and the miscellaneous complaints of the diet.¹² The plan, as originally envisaged, was for the committees to work together to produce a body of draft legislation that would be put to a future diet for approval, as 'a single uniform scheme [...] all parts of which should make up an orderly and coherent whole'.¹³

The committees had completed their work by 1795. By this time, however, the repression attending the Jacobin trials had rendered all talk of reform not only otiose but also politically dangerous. Their draft legislation was accordingly consigned to the archives. Although they were occasionally dusted down, it was not until 1827 that the diet instructed their investigation and revision. A further round of consultation took place and amended versions of the drafts, with minority reports added in, were duly published. On this occasion, the stumbling block was the conviction that the drafts needed to be made into law simultaneously, as an organic whole, but no consensus could be obtained on what the corpus, in its entirety, should contain. Once again, therefore, the work of the *Deputationes* was consigned *ad acta*.¹⁴

Although its scope was immense, the draft legislation drawn up by the committees was generally cautious. Certainly, the *Deputatio* entrusted with economic affairs came up with an ambitious scheme of free trade, predicated on the removal of the customs barrier between Hungary and the rest of the Monarchy.¹⁵ Its ecclesiastical counterpart drove a noticeably Josephinist agenda

that fell short of restoring church property, and the cultural committee made some thoughtful recommendations for the establishment of commercial and agricultural colleges.¹⁶ Likewise, the **(p.218)** Deputatio Juridica entrusted with the renewal of the CJH produced some impressive work in respect of the commercial law. Its *Codex Cambio-Mercantil* was not the first attempt to institute a comprehensive commercial code, for Joseph had previously urged the Curia to devise legislation in this regard and had sent for the judges' instruction a code that he had commissioned to regulate bills of exchange.¹⁷ Nevertheless, the *Codex* was thorough and wide-ranging, including draft legislation on bills of exchange, bankruptcy, partnerships and companies, including limited liability and joint-stock.¹⁸ Its text was, for the most part, derivative of foreign laws, on account of which it forbade the use of 'dry bills' (*trockene Wechsel; cambiales siccae*), where the drawer and payer were identical, on the grounds that these instruments were potentially usurious. In fact, as a type of promissory note, dry bills were a vital ingredient of capitalist transformation.¹⁹

In most areas of the law, the Deputatio Juridica adopted a conservative position. Its draft on the criminal law eliminated the distinction between 'private wrongs', which included many types of violence, and the large number of acts that had been brought under the heading of *nota infidelitatis*, thus constituting *publica delicta*.²⁰ The substantive part of the text divided offences into the categories of crimes against public security, the person, property and morals.²¹ Nevertheless, the code admitted that there was a range of lesser offences that it had not had time to consider, such as gambling, breaking quarantine restrictions, diverting watercourses and so on. The prosecution of these crimes was left to judicial discretion, thus vitiating the code's claim to be both comprehensive and motivated by the principle of *nulla poena sine lege*.²² This deficiency subsequently passed into the Hungarian criminal law, when it was eventually codified in 1878-9.²³

In its treatment of the procedural and civil law, the Deputatio Juridica embraced the opinion that the existing laws were good and only needed to be better arranged. Advice received from the counties and from other agencies of government confirmed the view that the law's application, rather than the law itself, was at fault, mainly on account of judicial negligence and the wrangling of lawyers.²⁴ The Deputatio Juridica's recommendations on procedure thus amounted to little more than a rewriting of *Kitonich* and to detailing the stages of an action.²⁵ When it **(p.219)** came to the civil law, the Deputatio confined its activity to a reorganization of the *Tripartitum*, adding in material gathered from the CJH. In a few places, as for instance the law of treasure trove, the Deputatio Juridica was inventive.²⁶ Nevertheless, it failed to elucidate several tricky areas of law, such as what to do with the goods of a priest who had died intestate or whether prefected daughters might freely dispose of their inheritance as *acquisita*.²⁷ Its brief foray into bankruptcy failed to acknowledge procedures as actually followed and contradicted the *Codex Cambio-Mercantil*.²⁸ It retained

the distinction between *delictum privatum* and *delictum publicum*, even though this had been removed in the draft criminal code.²⁹

It would be a mistake, however, to conceive of the work of the Deputatio Juridica as a further instance of a failed blueprint. First, the content of the drafts provided elements that might be deployed to support a programme of reform. Once the notion of organic, comprehensive change had been abandoned, individual parts of the Deputatio Juridica's work might accordingly be converted piecemeal into legislation. This decoupling of the parts from the whole was embraced by the diets of 1832–6 and 1839–40 and resulted in the adoption of single legislative items that introduced chunks of the *Codex Cambio-Mercantilis* into law. In 1840, Hungary thus obtained its first statutes regulating bills of exchange, commercial transactions, factories, companies, transportation, and bankruptcy (although not limited liability).³⁰ Four years later, the law on property holding was changed to permit non-nobles the right of landownership.³¹ Secondly, the work of drafting, both in the 1790s and in the late 1820s, had been undertaken by committees of the diet, at the diet's own commission. It thus put the diet at the forefront of the legislative process, charging its representatives with the business of initiating legislation, rather than of responding to the royal propositions by advancing counter-proposals and grievances (*gravamina*). From this point onwards, legislation by statute would become the instrument of choice for reformers and the means of Hungary's modernization. In these respects, Kossuth's praise for the work of the committees as laying down the foundations for the reform movement before 1848 was not rhetorical.³²

The achievements of the reform diets of the 1830s and 1840s should not, however, be over-estimated. In respect of the criminal law, the trials of Lovassy, Kossuth and Wesselényi in the late 1830s, on grounds of *lèse-majesté*, indicated the procedural deficit under which the criminal law worked.³³ Deák's plan presented in 1843 for a criminal code proved, however, stillborn, mainly on account of its abolition **(p.220)** of the death penalty and the concomitant expense of imprisonment.³⁴ Likewise, the redemption of services proceeded slowly. This was not only because peasants saw no reason to commute future dues into costly lump-sum payments, but also because the reform of seigneurial relations aroused a visceral response among supporters of the old order.³⁵ As one of their spokesmen at the diet put it in the 1830s, 'What is my freedom worth if all the people are free?'³⁶ The same objections frustrated the introduction of a new civil code, which might have laid the foundations of the modern 'civil society', to which reformers inclined, since its discussion necessarily called into question the privileges of the nobility. Even though Széchenyi had shown how *aviticitas* impoverished noblemen by denying them complete ownership of their estates and thus the collateral upon which to obtain

credit, the association of *aviticitas* with noble status rendered its abolition politically impossible.³⁷

We may, nevertheless, discern a rhetorical shift. The *Tripartitum* and Hungary's ancient law had long been considered emblematic of noble liberty and the country's main bulwark against Habsburg centralization and misrule. Increasingly, however, the *Tripartitum* was widely perceived, from no later than the 1830s, as locking the kingdom in immobility and preventing even the sort of measured change to which conservative reformers aspired. In the counties and in preliminary meetings of the diet (where a good part of legislative business was first hammered out), nobles and deputies inveighed against the dead hand of tradition, while in the burgeoning Hungarian literature and letters of the period, the antique nobleman, a Don Quixote with *Tripartitum* in hand, was rendered an object of ridicule or disgust.³⁸ István Széchenyi's celebrated ambition to consign nine-tenths of the *Tripartitum* and *Corpus Juris* to the flames may well have been a legal pun on the ninth and the tithe, but it articulated a mood that was prepared to sacrifice the old rural order for economic improvement, and privilege for the 'ennoblement of the nation'.³⁹ In this respect, it is telling that the diet of 1839–40 was ready to dispense with its adherence to the existing law even to the extent of actively seeking out foreign legislative models that could be adapted to meet Hungarian conditions.⁴⁰

(p.221) Reform, however, foundered on the sheer scale of what was required. The good noblemen of Satu Mare County may thus in 1841 have urged a thorough-going reform of institutions, including the abolition of *aviticitas* and of seigneurial obligations, but what they proposed involved nothing less than the destruction of the three pillars upon which the social order was considered to stand—the system of land donation and noble privilege, the rights of the noble kindred, and the historic relationship of the tenant peasantry to their lords.⁴¹ The hope, therefore, remained that the existing law and legal institutions might be modernized in such a way as to provide the foundation of a renovated society rather than cast aside entirely. In this spirit, the diet commissioned in 1840 the newly founded Academy to translate the CJH into Hungarian, a work which was overseen from a literary point-of-view by the poet, Mihály Vörösmarty. The first fruit of this labour was a new translation of the *Tripartitum*, published in 1844.⁴² A dictionary of Werbőczy's legal vocabulary was published in the same year, with the original Latin terms translated into their supposedly Hungarian equivalents.⁴³ Meanwhile, conservative lawyers, such as Ignác Frank, busied away at adjustments to Hungarian legal institutions, such as the application of the *praescriptio* to inherited noble property, which might put rights in land upon a surer footing, without the need to abolish *aviticitas*.⁴⁴ In similar vein, András Michnay and Pál Lichner published in 1845 an edition of the fifteenth-century Buda *Stadtrecht*, with the aim of grounding future commercial legislation on historical foundations, 'since all laws rest upon older laws and customs'.⁴⁵ The

collapse of Habsburg rule in the spring of 1848 put paid, however, to all these attempts and ushered in a period of rapid and radical change.

Neo-Absolutism and the High Judge Conference

Between 1848 and 1859, Hungary underwent a succession of constitutional and legal revolutions. The April Laws of 1848 converted Hungary's 'real union' with the rest of the Monarchy into a personal union between kingdom and king, and Hungary acquired for the first time a recognizably parliamentary form of government. (For this reason, we will now speak of Hungary's parliament rather than of **(p.222)** its diet.) The old system of *tractatus* and of exchanging propositions and counter-propositions was henceforth replaced by the laying of individual bills for the royal signature. Executive authority was, moreover, to be vested in a ministry that was responsible to the new parliament as well as to the monarch, and decrees of the ruler henceforward required ministerial counter-signature. Transylvania's separate status within the Hungarian crown lands was abolished. Besides their constitutional provisions, the April Laws implicitly put an end to the status of the nobility, unravelled the seigneurial nexus, creating thereby a free peasantry, and abolished the traditional system of noble landholding that rested on the principle of *aviticitas*.⁴⁶ The details whereby these measures were to be implemented were not enunciated at the time, being left over for future discussion. The intended legislation was not, however, forthcoming. On account of Ferdinand V's disregard for the April Laws and the machinations of his generals, war instead broke out between Hungary and the monarch. In December 1848, Ferdinand was dethroned in a coup and replaced as king and emperor by his talentless nephew, Franz Joseph.

Following Hungary's defeat in 1849, its constitutional relations with both the other lands of the Monarchy and the ruler were dramatically reversed. Relying on the doctrine of forfeiture, Franz Joseph declared Hungary to have lost the right to its own laws on account of its rebellion and thus to be subject to the royal will. Accordingly, Hungary was deprived both of its parliament and of its local organs of self-government. Following Franz Joseph's decision to forego any semblance of constitutional rule as Emperor and to extend the practice of 'neo-absolutism' throughout the Monarchy, Hungary was governed in the manner of his other lands and kingdoms and administered centrally from Vienna. Hungary's absorption into the Austrian *Gesamtstaat* was, however, accompanied by measures that carried forward the legal revolution begun in 1848. Although centralizing and despotic in the practice of its government, the neo-absolutist regime was radical in its social and economic policies. In 1852, new principles of landownership were enunciated that laid down how, following upon the abolition of *aviticitas*, properties were in future to be transferred, inherited and given in pledge, adumbrating transitional arrangements. The next year, the Urbarial Patent adumbrated the terms under which land was to be assigned to the peasantry and former landlords to be compensated. In 1855, the institution of the land registry was established and regional offices set up to record all

property holdings as well as the mortgages and liens attaching to individual portions. The early 1850s also saw the introduction of the Austrian Civil Code as well as the imposition of a new criminal law.⁴⁷ The highest court for Hungary, the Supreme Court and Court of Cassation, now sat in Vienna, administering Austrian law, although to overcome the barriers of language its Hungarian **(p. 223)** business was overseen by a dedicated Hungarian section.⁴⁸ These measures were carried forward by over 100 supplementary patents and by a centralized bureaucracy that was governed by ministries in Vienna. Their implementation in Hungary was accompanied by a 'state of siege' lasting until 1854 that brought crimes of obstruction or dissent before military tribunals, and by a press law imposed in 1852 that put in place savage penalties for criticism of the *Gesamtstaat* and of its sovereign.⁴⁹

The 1850s witnessed some spectacular illustrations of Hungary's modernization—new institutions of education, post and telegraph offices, a modest railway boom, credit banks for industry and agriculture, the standardization of weights, measures and clock-time, *Trafik* shops for the sale of tobacco, and so on.⁵⁰ In this respect, neo-absolutism achieved more of lasting consequence than Joseph II's reforms, many of which had not been implemented in Hungary at the time of their withdrawal. Nevertheless, direct rule achieved rather less than both contemporaries and later historians have often averred. On the ground, much of the work of daily administration had to be performed by low-paid Austrian bureaucrats, who struggled to comprehend both the artless country folk over whom they were appointed and the welter of regulations coming out of Vienna.⁵¹ The distribution of land to the peasantry proceeded slowly, partly because peasants held back from coming into final accord with their lords in the hope of negotiating a better deal.⁵² In similar fashion, most disputes involving land held under *aviticitas* were postponed (many had been rumbling for decades and so further delay was little hardship).⁵³ The application of Austrian law did, however, facilitate the breakup of communally held property when no agreement on division could be reached by the *compossessores* (a not uncommon situation).⁵⁴ Even so, there were the usual stories of wards being cheated out of their inheritance.⁵⁵ For its part, the registration of land, although generally regarded by property holders as a beneficial development since it gave added security to ownership, proceeded slowly. By 1861, under a half of the kingdom's properties had been registered and, even then, many entries were believed to be either fictional or fraudulent.⁵⁶ The difficulty of reconciling entry in the land register with the *praescriptio* and property held in mortgage **(p.224)** created additional uncertainties.⁵⁷ The confusion of laws, and the uncertainty of the courts as to which law to follow, was likened to conditions in the American Wild West.⁵⁸

The crisis provoked by Franz Joseph's military humiliation in Italy in 1859 obliged the ruler to don the mask of constitutionalism. In the October Diploma of 1860, Franz Joseph promised to restore the institutions that he had abolished only a decade before and to make law by ostensibly parliamentary means rather

than by decree. A Hungarian parliament duly assembled in April the next year. Since it had not been convoked according to the terms of the April Laws, it spent most of its brief life debating its own existence and how best to translate *indignatio* into Hungarian.⁵⁹ Dismayed at its obduracy, Franz Joseph eventually closed the parliament down in August.

The convocation of the parliament was accompanied by a meeting held in close parallel to debate the restoration of the kingdom's laws. The legislation of the previous decade had been introduced by decree, without counter-signature, and was thus by the terms of the April Laws invalid.⁶⁰ Its content in respect both of substantive and of procedural law was, however, so far reaching that it could not be simply declared void in the manner of Joseph II's decrees. It was, nevertheless, not at all obvious which of the innovations introduced under neo-absolutism were worth keeping and what sort of mechanism was needed to give these a basis in law. The meeting, which included some sixty former judges and lawyers, was convoked under the presidency of the former chancellor, György Apponyi, who had been appointed to the restored office of High Judge in January 1861.⁶¹ To begin with, Apponyi seems only to have envisaged the High Judge Conference (Országbirói Értekezlet) reaching agreement on some temporary arrangements that would then be authorized by a royal patent.⁶² Apponyi did not understand that the legality of these arrangements had to rest on **(p.225)** something other than this type of royal instrument, the constitutional invalidity of which had brought the Conference into being in the first place. A flood of petitions from the counties as well as a congress of lawyers meeting in an unofficial capacity thus reminded Apponyi that 'the making, abolition and determination of the law can only take place with the agreement of a legally convened parliament' and that Hungary already had its own laws in the form of those enacted in April 1848.⁶³

Notwithstanding doubts about the Conference's competence and deliberate attempts to sabotage its proceedings, a consensus of sorts prevailed.⁶⁴ A *restitutio in integrum* of Hungary's laws was not possible. Social and economic developments since 1848 had moved too fast and too far to permit this beguiling expedient. But the legislation introduced under neo-absolutism was not welcome either. Certainly, no one opposed land registration which, despite its faults and the tardiness of its introduction, was generally acknowledged to be a good thing and, indeed, 'a daily necessity'.⁶⁵ The Austrian Civil Code, however, was deemed overly cumbersome and to permit too many ways by which cases might be prolonged. The Austrian Criminal Code had, for its part, many uncertain clauses, particularly in respect of political crimes.⁶⁶ The solution that gradually emerged was to review all aspects of the law, balancing the demands of the new age and the spirit of the April Laws with the traditions of Hungarian law, although not to the extent of 'restoring its medieval institutions'.⁶⁷

A compromise between national traditions and current needs suited members of Hungary's nascent historical law school, whose exponents gave intellectual grist to the Conference's discussions. Paradoxically, the ideas of the historical law school had been fostered during neo-absolutism by the work of the education minister, Leo Thun-Hohenstein, who had introduced to the university curriculum approaches to legal enquiry borrowed from the German lands.⁶⁸ For Hungary's historical law school, the study of legal institutions disclosed the spirit of the people and their cultivation promoted the organic growth of the nation. As Tivadar Pauler explained, 'The law develops out of the life of the nation in the manner of a plant, whose roots rest in the conviction of the people and evolve through customary practices.'⁶⁹ In its rejection of codification and its distrust of legislative solutions that hindered the development of the national will, the historical law school came near to the *Tripartitum's* earlier account of the relationship of statutory law to customary law.⁷⁰ Nevertheless, it qualified the derogatory power of statute over custom, affirming instead that the law which emerged voluntarily **(p.226)** from the moral unity of society, constituted the true expression of the nation's historic nature and purpose.⁷¹

The problem now became to identify the traditional law of the nation. Rapidly, both in the committees that looked into individual branches of the law and in the plenary sessions, the search for the historic springs of Hungarian law became conflated with ideas of the 'national genius' and the 'inheritance of a thousand years'.⁷² As with all attempts to ground national identity on objective modes of conduct, establishing the marks of exceptionalism proved hard. Was it that Hungarian law exempted women from the birch?⁷³ That it obliged those who had lost a suit to vacate a contested estate and appeal for recovery while *extra dominium*?⁷⁴ (Hungarian law actually provided a myriad of ways by which to circumvent this obligation.) That it was chivalrous (*lovagias*) in its treatment of widows?⁷⁵ That the disposition of property in the absence of direct heirs followed the principle of *paterna paternis, materna maternis*? (A commonplace civilian expression.)⁷⁶ That Hungarian law prevented foreigners, such as Austrian officers, laying hands on ancestral land? As it turned out, in respect of relations of private law, this last consideration, voiced by Deák, proved particularly compelling.⁷⁷

The Austrian Civil Code had, with certain safeguards for heirs, permitted the free ownership and disposition of property, as well as the widow's right to inherit a part of the landed estate of her dead husband (and so, by extension, allow any second husband to obtain possession of that part, should she predecease him). *Aviticitas*, by contrast, vested property in the extended family and incorporated strict rules of inheritance that kept the estate within the kindred. Increasingly, as the pressure mounted to define the national genius as manifested in Hungary's legal institutions, *aviticitas* became viewed as the most enduring legacy of Hungary's millennial history—'the inheritance of our ancestors', 'the pillar of the nation' and so on.⁷⁸ Only a short time before, *aviticitas* had been

jettisoned as an impediment to the nation's improvement and its abolition feted by many as one of the triumphs of the April Laws. Some deft legal footwork was accordingly required and this became one of the major achievements of the High Judge Conference.

The solution adopted was to confirm the abolition of the following: first, the distinction between noble and non-noble land (although a rear-guard sought to restore it);⁷⁹ secondly, the principle that all land had its origin in the ruler's gift and so might eventually return to him; and, thirdly, all preferential arrangements laid **(p.227)** in respect of the property rights of daughters and spinsters. In other respects, however, the decision of the Conference was to retain the principle of 'familiness' (*családiság*) that underscored the 'legal and blood community' of *aviticitas* while making nods in the direction of the *Tripartitum* and of Hungary's historic arrangements of landholding.⁸⁰ Thus, the alienation of land was permitted, but not if it was to be squandered; at that point a closure (*zárlat*) on further sales might be imposed. In wills, at least a half of the estate was bound to go to direct heirs; in the absence of these the half went to parents and then to collateral branches of the kindred.⁸¹ Tellingly, this reserved part of the estate was not referred to as the 'obligatory portion' (*köteles rész*) but as the 'divisional portion' (*osztályrész*), thus harking back the vocabulary of *aviticitas*.⁸² Most remarkably, in its treatment of the rights of widows, the Conference revived the distinction between 'ancestral' and 'acquired' goods, which both the April Laws and the Austrian Civil Code had removed.⁸³ A widow might thus inherit the acquired goods of her late husband, but not the ancestral property unless there were no direct or collateral heirs. In this way, Austrian officers might be prevented from laying hands on Hungarian land even at the price of a less than chivalrous regard for the welfare of Hungarian widows.⁸⁴

In respect of other branches of law, the Conference maintained a largely conservative stance. Older commercial laws were revived, although in respect of mining activity the terms of the 1854 Mining Patent (which had controversially introduced some elementary safety regulations) were carried over intact.⁸⁵ Land registration and the 1855 Patent on its adoption were preserved. In its treatment of the criminal law, however, the Conference eschewed any substantive considerations, confining its work to an elaboration of procedure, and Deák failed in his attempt to reintroduce the draft he had presented to the diet in 1843.⁸⁶ Nevertheless, the Conference skilfully retained the exemption from birching for nobles and their families, extending their privilege to members of the professions (*Honoratioren*) and Jews.⁸⁷ The retention of corporal punishment for the labouring classes provoked outrage among liberals at home and foreign correspondents.⁸⁸ As it turned out, corporal punishment was later withdrawn as a penalty in Law LII of 1871, but restored in Law XXVI of 1920 for lesser infractions, although the courts refused to impose it.⁸⁹

(p.228) The deliberations of the High Judge Conference were completed at the beginning of March and the draft it had composed was reworked by a committee of the re-established Septemviralis Court, to be shortly thereafter published as the 'Provisional Judicial Regulations' (ITSz: *Ideiglenes Törvénykezési Szabályok*).⁹⁰ The ITSz was celebrated at the time as achieving a settlement between older Hungarian foundations and new legal outlooks, forms and landed relations, and as bringing the Hungarian law of property and persons into accord with the spirit of the age. Later writers would indeed compare it to the *Corpus Juris*.⁹¹ In fact, for all the cleverness of some of its parts, the ITSz was regarded by the imperial counsellors in Vienna as a shambles, full of contradictions and inconsistencies.⁹² They were right. Great gaps existed in the inheritance law that the Conference had crafted, as for instance in regard to the allocation of estate within the 'divisional portion'. Likewise, by confirming the institution of the land registry and referring back to the Austrian Civil Code as explanatory of this, the ITSz provided a gateway through which further provisions of the Code might be deemed applicable to Hungary.⁹³ On 22 March, Apponyi excused the ITSz as a 'lesser evil' to the current legal confusion, but Franz Joseph was unconvinced. It was only Apponyi's threat of resignation that brought the king round.⁹⁴

The imperial counsellors—principally the Archduke Rainer and the interior minister, Anton von Schmerling—had, however, identified a further and obvious problem with the ITSz. How was it to be enacted? Incredibly, despite all the criticism voiced by the Conference at its opening session and amplified in the petitions of the counties, Apponyi still thought it possible to publish the ITSz in the form of a royal patent. How could the king actually do this, the counsellors asked, given the constitutional irregularity of a patent?⁹⁵ It was, indeed, at their insistence that the ITSz was laid before the Lower House of the Hungarian parliament where, in June, it was cursorily debated and approved by 152 votes to 70. (It passed through the Upper House unanimously.)⁹⁶ Yet, of course, this was not a properly convened parliament, on account of which it considered itself incapable of making legislation but only of advancing recommendations. Notwithstanding parliament's approval and the grudging consent of the ruler, therefore, the ITSz still lacked a basis in law. In a stroke that might be considered masterful were it not that its implications were clearly lost on him, Apponyi sent on 23 July the text of the ITSz **(p.229)** to the lower courts on behalf of the Curia. Recommending that it be henceforth regarded as a guide (*zsinórmértékül*), he advertised that its provisions 'be considered by litigants and judges alike as temporary instruments of assistance and direction'.⁹⁷ Even so, while some litigants and judges considered that the ITSz should be 'used from this day on as legally valid', there was considerable disquiet over the manner of its introduction, which smacked of an octroy.⁹⁸

The ITSz was regarded to begin with as a purely provisional measure that would be replaced in short time by fuller legislation and a civil code, authorized by a properly constituted parliament. Although, following the establishment in 1867 of a lawful parliament, legislation was passed that superseded portions of the ITSz, much of its text remained in force until the implementation of the Communist Civil Code in 1960. Once it had been issued, however, no difficulty arose in respect of finding authority for the ITSz. The parallel between Werbőczy's decision to send out the *Tripartitum* to the counties, even though it lacked the royal seal, and Apponyi's own decision to publish the ITSz, even though it had no legislative authority, were obvious and compelling.⁹⁹ The validity of the ITSz was thus deemed customary and it might accordingly be listed among those instruments and practices the weight of which rested upon custom. Law IV of 1869 on 'The Exercise of Judicial Power', therefore noted in its fourth paragraph that 'The judge shall proceed and pass judgment on the basis of the laws, decrees that rest on the law, and custom having the force of law.' Insofar as the ITSz was neither a law nor a decree, it had already been apprehended within the broad category of 'custom having the force of law'.

As Béni Grosschmid later observed, the contents of the ITSz were not customary but were instead a medley of norms taken mainly from Austrian law, fleshed out with some of Hungary's legal traditions.¹⁰⁰ In fact, Grosschmid observed, the High Judge Conference might as well have adopted the Austrian Civil Code, except that it was important for the nation to believe that it lived by its own law. For Grosschmid, the importance of the ITSz as a customary instrument rested not with its content but in the manner of its introduction, which presupposed the right of the courts to determine the content of custom on the basis of what they chose to observe.¹⁰¹ In order to retain custom's roots in popular observance, the first commentator on the ITSz hesitantly invoked a *tacitus consensus populi*, by which court practice became embedded over time in the people's habits, but even he was unconvinced.¹⁰² Grosschmid's conclusion was thus inescapable—that the manner (**p.230**) of the ITSz's introduction had judicialized custom to the extent that customary law and the law of the courts were now synonymous. Or, as it was later perversely explained, custom was the practice of the courts, which originated in what the courts practised.¹⁰³

Courts and the Legislative Deficit

The ITSz had restored the organization of the kingdom's courts as it had been before 1848 with only a few modifications. The principal adjustments lay in regard to the administration of the land registers and land use, which resulted in tens of thousands of suits coming before the courts every year.¹⁰⁴ The ITSz had also allowed the principal instrument of local justice, the county court, to operate as autonomously as possible, even to the extent that 'the maximum number of members of the court shall not be laid down, but be requisite with the administration of justice, for the court to decide.' Although membership of the county courts had become less numerous in the first decades of the nineteenth

century, their tables often still included more than a dozen judges, county officials and assessors. The courts of the Curia, which the ITSz restored, continued to be packed with barons, prelates, assessors and others.¹⁰⁵ The ITSz did, however, confirm the reduction in the size of village and other local courts, where procedures were only oral, to just three officers.¹⁰⁶ Seigneurial courts were not, however, reinstated. Most of their work was taken over by courts in the ridings or járásbiróságok (there were 360 of these by 1871), the competences of which had been expanded during the period of neo-absolutism.

Following the Settlement or Compromise of 1867, by which Franz Joseph gave Hungary home rule, laws were introduced by the Hungarian parliament for the modernization of the kingdom's judicial administration. These aimed in the first instance at creating a career judiciary, appointment to which was by special examination. The function of the judges as civil servants was qualified by measures intended to ensure their impartiality, but since judicial appointments rested on ministerial approval, the judges were a generally compliant lot.¹⁰⁷ Judges were, moreover, paid badly in comparison to practising lawyers, on account of which their reputation suffered. Their background and education were also generally poorer, and their previous experience usually lay in clerking and not in litigation.¹⁰⁸ At the same time, **(p.231)** however, the role of the judge was enlarged by the removal of assessors and other officers from the courts. The Royal Curia court (which superseded the Septemviralis court) generally operated with between five and seven judges in attendance; the two (later eleven) courts of the Royal Table had five (later three) judges; and the city and county courts had three. Courts in the ridings were headed by single judges.¹⁰⁹

Behind the changed status of the judiciary and the slimming down of court membership lay the assumption that jurisprudence was a mechanical act that simply required the facts before the court to be fitted to the relevant piece of legislation. As is typical in continental jurisdictions, judges were considered no more than, as Montesquieu had put it, 'the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigour'.¹¹⁰ It was only where the quality of the facts was in dispute, most notably in respect of whether an article in the press was defamatory or seditious, that a wider constituency of opinion, in the form of a lay jury, was considered necessary.¹¹¹ The principle of judicial subsumption, which guides many continental jurisdictions, requires, however, that the law be both known and scrutable. In Hungary, however, this was not the case. Law IV (para. 19) of 1869 had, as we have seen, required that judges adjudicate by reference to statute, lawful decrees and custom having the force of law. It was moreover now specified that the lawful text of any statute was the one proclaimed in parliament and deposited in the National Archive, and thus not by implication any customized version.¹¹² Nevertheless, there was no obvious way of measuring the legality of a decree or custom by reference to its relationship to statute or to the force of

law, for large areas of the law continued, as before, to remain without any regulation or guidance in statute.

Hungary's parliaments were never less than busy. Between 1870 and 1890, a thousand bills became law, a number that would more than double by 1930.¹¹³ Some of these were intended to lay the liberal foundations of a modern civil society—regulating the rights of members of national minorities (before 1918, less than half of Hungarians were native Hungarian-speakers), establishing religious toleration, renewing the kingdom's commercial legislation, establishing a new criminal code, and so on. Nevertheless, statutory legislation tended to be piecemeal rather than comprehensive. Large parts of the law, particularly those affecting legal equality and the remaining encumbrances on peasant tenures were dealt with in a **(p.232)** fragmentary fashion.¹¹⁴ Still, at the beginning of the twentieth century, there were categories of woodland where rights of peasant usufruct had not been legally resolved.¹¹⁵ The overwhelming share of legislation passing through parliament was given over to measures of only fleeting significance, being mainly nuts-and-bolts administrative and budgetary provisions. Possibly as much as eighty per cent of parliamentary legislation fell into this category.¹¹⁶

Legislation was not only partial, but it was also often derivative. It was much easier to borrow foreign legislative acts than to draft bills from scratch. The problem was that the importation of models from abroad introduced a vocabulary and distinctions in law that were not applicable to Hungary. In copying the German *Strafgesetzbuch* of 1871, the criminal code of 1878–9, devised by Károly Csemegi, introduced a threefold classification of crimes, dividing these between *bűntett*, *vétség* and *kihágás* (corresponding to the German *Tat*, *Verbrechen* and *Vergehen*), that had no basis in Hungarian practice.¹¹⁷ The commercial legislation of the late 1870s was similarly taken from German law and smuggled in provisions of consumer protection without establishing a context for their implementation.¹¹⁸ A further round of borrowing during the 1880s saw the establishment of a financial-administrative court for the resolution of disputes over taxation, fines and exemptions. Its competence was extended to other branches of the administration in 1896 and included most cases for legal redress against excesses or derelictions of duty by organs of state and local government. The inspiration for this development came primarily from the examples of the Austrian Reichsgericht (1869) and Verwaltungsgerichtshof (1875). Even at the time, however, the introduction of administrative courts was considered contrary to established Hungarian practice. Hitherto actions against officials had fallen within the purview of the ordinary courts.¹¹⁹

The establishment of administrative courts created an artificial distinction between public and private law that opened up new problems of jurisdiction and of the appropriate forum for adjudication. This is precisely what we might expect, given that the 'continental distinction' was as foreign to Hungary then as

it is to England today.¹²⁰ Rather than tackle the problems of competence head on, however, successive governments chose not to legislate at all. Whole areas of activity were thus not covered by legislative provision, particularly in respect of the rights **(p.233)** that belonged to individuals and their relationship to the offices of state power. Of these, the most signal involved rights of association and assembly. There was, however, a similar legislative void in respect of the burgeoning number of land trusts (an individual right gifted by the monarch on the advice of the Minister of Justice) and the post office (a public body trusted with the delivery of private communications).¹²¹ The law of mortmain (*holtkéz*), which affected the individual right to give property to the churches, which were conceived of as public bodies, remained notoriously without any guidance in modern statute. It was ultimately left to the Curia to determine that the restrictions on mortmain inherited from the Middle Ages had lapsed through desuetude.¹²²

Even though the ITSz had been intended only as an interim measure, no civil code emerged to take its place. For decades, committees staffed by some of Hungary's most respected academic lawyers busied away at preparing drafts, but these never acquired legislative sanction. The composition of the committees and the scrupulous way that they went about their business partly explains their failure. Too many intellectual constituencies needed to be satisfied—the historical law school that conceived of the law as reflecting national traditions; the school of *Interessen-Jurisprudenz* that, under the influence of Jhering, saw the role of the law as reconciling interests in such a way as to permit the transformation of society; and an Anglophile group that pushed for the development of jurisprudence based on precedent and a yet-to-be-developed Common Law. Since, moreover, any new code required parliamentary approval, the lawyers had to be alert to political trends and accommodate, in particular, the conservatism of the Upper House.

The failure of the committee charged with drafting the civil law can be briefly told.¹²³ Established in 1869, but only really active from 1873, the committee divided up its work between its members. These produced individual sections on general principles and on the laws of property, obligations and inheritance.¹²⁴ The parts, however, did not mesh and were widely condemned as a medley of haphazard borrowings taken from other continental codes. In particular, the section on inheritance law, published in 1876, satisfied no one, since it assumed a midway position in respect of the contentious issue of collateral succession, while at the same time lifting parts of its text from the Saxon Civil Code of 1863. Its contents were the subject of earnest, but fruitless discussion for more than a dozen years, with the usual claims being raised that collateral inheritance at several degrees had to be acknowledged in law since it formed part of the national genius.¹²⁵ Meanwhile, **(p.234)** a marriage law that recognized civil unions eventually passed through parliament in the early 1890s (bringing down two governments on its way). By considering marriage separately, the

parliament made it a domain of the law that operated outside the private law—a situation which unusually for continental jurisprudence prevails in Hungary today. For this we must partly blame the author of the marriage law, Béni Grosschmid, who pressed for its separate legislative treatment as a way of entrenching in statute some of the principles upon which any future civil code should rest.¹²⁶ Confusingly, however, the marriage law omitted consideration of marital property rights which continued to be treated as part of private law.

In 1894, a second committee was formed with the brief of ‘elaborating a unified and systematic draft of the Civil Code, taking into consideration Hungary’s statutes affecting the private law and its customary laws, the drafts that have been already compiled, Hungarian judicial opinion and literature, and legal developments in other civilized states’.¹²⁷ The committee took five years to produce a text running to more than 2,000 paragraphs. This was then published in a five-part edition, in 1901–2, and sent out for comment. A revised draft was commenced in 1909, which on account of the need to accommodate criticisms resulted in an expanded text—the section on inheritance law doubled to 1980 paragraphs. The amended version was put before the Lower House in 1913 and revised by a parliamentary committee in 1915, but on account of the war it never received legislative sanction.¹²⁸ An attempt undertaken after 1922 to rework the drafts into a new civil code ‘reflective of the thousand-year development of our law’, which was presented to parliament in 1928, similarly perished on account of the legislature’s inertia.¹²⁹

The failure to produce a code of civil law that regulated private legal relations was partly compensated for by textbooks. These, pre-eminently Imre Zlinszky’s *Hungarian Private Law as Currently in Operation* (1880, and many subsequent editions), attempted to make sense of the law by welding together its fragments by reference to the Austrian Civil Code and other instruments that otherwise had no ostensible validity in Hungary.¹³⁰ The result was a mishmash of provisions that aimed at comprehensiveness but was epistemologically shallow. As Szászy-Schwarz observed of Zlinszky’s text, ‘Here he advances a genuine proposition in Hungarian law, here an old dead statute pulled from another context, here a recommendation taken from Hesse or Dresden.’ Szászy-Schwarz recommended burning the lot, but his own solution was equally perverse—to re-found Hungarian private law on the **(p.235)** basis of case law, thus forcing it to become akin to the English Common Law.¹³¹ As it happened, a different way was found upon which to build the law and it was in this context that the idea of customary law re-emerged as a guiding principle in Hungarian jurisprudence. This was, however, a quite different type of customary law to the one that had prevailed in the kingdom before the mid-nineteenth century.

Rendelet, Court Practice and Rhetoric

With the advent in 1867 of constitutional rule, the executive power was apportioned to ministers, who might henceforward issue decrees or *rendelets* of their own volition.¹³² This was considered a necessary means of empowering the administration in such a way as to achieve a balance within the constitution. From the very start, however, the system of legislation by ministerial *rendelet* was abused. First, parliamentary law making was invariably sloppy and more concerned with establishing general principles than with providing a thorough explication of the way in which the law should be applied. It was intended that ministerial *rendelet* would make up for deficiencies in the drafting process, fleshing out on an ad hoc basis the details that the legislative instrument lacked. The law of hunting illustrates this approach. The two statutes published in 1883 that regulated hunting and hunting grounds consisted of just a few pages of text, altogether just over 100 short paragraphs. Within eight years their statutory content had been amplified by several hundred ministerial interventions and *rendelets* that ran to almost 200 pages.¹³³ Year after year, issues of the *Woodland Gazette (Erdészeti Lapok)* and the *Hunting Almanach (Vadászati Zsebnaptár)* carried pages of further administrative orders with which the dutiful huntsman and forester should comply. He was well advised to do so. Csemegi's criminal code of 1878–9 had not defined the offences that fell within the category of *kihágás (Verbrechen)*. These were left blank, to be filled in by ministerial *rendelet* as the occasion arose.¹³⁴

Secondly, *rendelet* was used not only to supplement existing legislation but also in place of it.¹³⁵ Whereas the French Revolutionary understanding of the law was that where the law was silent the citizen was free, in Hungary the reverse situation (**p.236**) applied.¹³⁶ In the legislative gap, ministerial regulations held sway, which almost always worked to the state's advantage. Since ministerial regulations of this type were not explanatory of an existing legislative instrument, their legality could not be challenged in any court, which permitted all sorts of abuses. The ministerial requirement that associations fulfil only single purposes was therefore used to harass trade unions and to ban societies that promoted the cultural interests of national minorities.¹³⁷ Restrictions on assembly, imposed at ministerial discretion or on the Interior Minister's behalf by local police chiefs, often led to violent confrontations and deaths.¹³⁸ Parliamentary challenges to the discretionary power wielded by ministers almost invariably came to nothing.¹³⁹

Where statute and *rendelet* were silent, the courts self-consciously filled the void.¹⁴⁰ It was their determinations that established the basic rules of commercial and domestic liability, the obligations of a mortgagee, rights to water, presumption of death in the event of disappearance, the period of legal prescription, that the obligatory portion applied to acquired as well as to inherited land, and so on.¹⁴¹ The principle of mechanical jurisprudence thus

gave way to judicial creativity, turning on its head the assumptions of the 1869 law. As a satirical verse of the time put it:

We have many new laws, modern to a tee,
It's to preserve social order, don't you see?
Should something be lacking in any one line,
The Curia will fill it, in record time!¹⁴²

It was partly in recognition of the inventiveness of the courts that the publication of judicial decisions, which had begun episodically in the 1820s, gathered pace, in editions that aimed to be comprehensive and which often amounted to several or more volumes each year.¹⁴³ These were accompanied by the publication of shorter compendiums, which contained decisions of the courts that were thought to be weightier, or else rearranged their content under convenient headings.¹⁴⁴ It was not intended, however, that these summaries of cases and judgments should act in the manner of case law, for Hungarian courts generally held to the conviction that similar judgments in similar cases needed to be given over a period of time to acquire cogency.¹⁴⁵ Nor was it at all obvious, moreover, what the grounds of (p.237) individual judgments were, for courts continued to eschew statements of principle lest these should subsequently prove restrictive. Their explanations for decisions were correspondingly vague, being usually confined to 'It is the understanding of judicial practice that *etc.*' or 'According to our public laws and received custom *etc.*' As Szászy-Schwarz lamented, the many volumes of decisions published from the 1870s barely ever disclosed legal reasoning that might serve to elucidate the law's actual content. He thus contrasted Hungarian judicial practice unfavourably with its English and German counterparts where an explanation *aus der Gründen* was an accepted part of the court's judgment.¹⁴⁶

Certainly, by perusing sufficient cases, a mood or approach of the courts might be determined. On the whole, the courts tended towards the same sort of judicial expediency that had prevailed before, aiming at a balance between contending claims. This was particularly the case in respect of the estimation of damages, where the responsibility of the two parties tended to be weighed against each other rather than the matter resolved by reference to proximate cause.¹⁴⁷ It was impossible, however, to convert a mood into a substantive principle of law, particularly since courts retained the right to reject previous rulings.¹⁴⁸ The problem additionally arose that divergent practices began to emerge in the several layers of the judicial hierarchy or between courts. No attempts were made, however, to give the judgments of higher courts a binding authority, for these were limited to a 'guiding influence'.¹⁴⁹ Only a full session of the Curia, acting at the request of the president of the court or the Minister of Justice, could publish a decision to which other courts should yield.¹⁵⁰ Even so, since these Curia decisions still failed to give judicial grounds, their contribution to the development of substantive principles was slender.¹⁵¹ It was only after the

Second World War that judicial reasoning became an accepted part of court practice.¹⁵²

In order to compensate for the absence of an alternative body of substantive law, the courts turned instead to the drafts that had been composed by the various committees as part of their work on the civil code. The volumes on the private law, published in 1901-2, were thus adopted by the courts, and subsequently influenced their judgments, especially in regard to the law of obligations. The revised 1928 draft was used in its turn during the inter-war period to guide judicial decisions. A similar use of draft instruments affected the criminal law. In 1871 **(p.238)** Csemegi had written a proposal on criminal procedure, with the aim of replacing Tivadar Ortvy's textbook on criminal law, which had until this time been all that there was to guide the courts.¹⁵³ The draft proposal went to the parliament but was held up in committees. Rather than allow Ortvy's manual to retain its pre-eminence by default, the Justice Minister sent out Csemegi's draft to the courts, with the recommendation that they follow its advice on a temporary basis. For almost thirty years, the so-called 'Yellow Book' (*Sárga könyv*) determined the manner of proceeding in criminal cases, and was primarily responsible for introducing to Hungary the institution of the investigating magistrate. It was finally superseded in 1896 by a statutory code of procedure, which came into effect in 1900.¹⁵⁴

Hungarian law in the late nineteenth- and early-twentieth centuries consisted, therefore, of two types. The first was statutory law that had received parliamentary sanction. The second was extra-statutory. It comprised a variety of sources—rendelet, the decisions of the courts, and what might broadly be understood as juridical opinion, either in the form of the ITSz or of various drafts of intended legislation that had never made it onto the statute book. The authority of these non-statutory sources was not at all obvious and, indeed, they should by the terms of the 1869 Law on the Exercise of Judicial Power have been inefficacious. The 1869 Law had said nothing about the role of Curia judgments or legal drafts in guiding judgments. In respect of rendelet, the Law had presumed that ministerial decrees would be explanatory of statute rather than a substitute for it.

The solution was actually quite straightforward. The 1869 Law had permitted judgments by reference to custom, and so it was under this heading that non-statutory instruments were now conceived. There was a precedent for this, for the ITSz had similarly been a non-statutory instrument that was subsequently deemed to have gathered its authority from customary use. Lawyers and commentators were also able to use Werbőczy's statement on the way in which judgments were constitutive of customary law and the manner of the *Tripartitum's* own reception to press home the point. Others found in the *Planum Tabulare* a bridge between the *Tripartitum* and their own time, thus demonstrating a spurious historical continuity in respect of the role of court

decisions in determining arrangements of law.¹⁵⁵ The practice of the courts thus became conceived as identical to customary law. The ways that the courts sought to administer the law and the texts that they chose to use were accordingly given the legal sanction that they otherwise lacked. As Grosschmid (who really knew better) asked, were not judgments both the source and driving force of the law as well as its proof?¹⁵⁶ A few legal scholars realized that judicial practice needed to be embedded in something more than just what the courts did. Their response was either to consider court judgments as **(p.239)** reflexive, slowly shaping popular practice, or to invoke a new form of the *lex regia*—since the people were incapable of expressing themselves, their collective will was now articulated by the judiciary.¹⁵⁷ It belonged, however, to Károly Szladits, to point out the paradox that after centuries of being founded on written texts, and he included the *Tripartitum* in this category, Hungary's law was now being shaped by the unwritten law of judicial decision.¹⁵⁸

A similar brand of intellectual legerdemain was applied to *rendelet*. Since executive orders had long been in use, they were considered to retain a customary authority in law. Moreover, so it was argued, the provisions of individual *rendelets* might in time become rooted in popular practice and thus accumulate a customary authority that gave them an additional persuasiveness in law. Nodding to the *tacitus consensus populi*, but plainly confusing tacit consent with dumb compliance, Gejza Ferdinandy averred that even those instruments published during the period of neo-absolutism might have 'silently' gathered authority in daily observance in much the same way as the provisions of the ITSz.¹⁵⁹ Gyula Moór put the case for the customary authority of *rendelet* even more strongly: 'Rendelets of the administration have their origin in the practice of government and retain a power that is equivalent to custom.'¹⁶⁰

The explanation that non-statutory legislation held a customary authority was an attractive solution. It lent the kingdom's legal institutions a supposedly historical continuity, both emphasizing Hungary's unique place within the Habsburg Monarchy and comporting with the studied medievalism of the millennial celebrations of 1896. Whereas in the earlier part of the nineteenth century, the legislation of diet and parliament had been understood as providing the main vehicles for national renewal, the customary law was now invoked as the manifestation of Hungary's national mission. Werbőczy's memory was celebrated and his work in 'unifying' the nation admitted him to membership of the overcrowded pantheon of Hungarian heroes. Some portraits even gave him Kossuth's full beard, although this feature was missing from the statue erected in 1908 by the gift of Franz Joseph on what is now the Franciscans' Square.¹⁶¹ In the Millennium edition of the CJH, which commenced its series with the *Tripartitum*, those parts of Werbőczy's text that were still deemed pertinent were printed in bold letters, thereby emphasizing their continued contribution to the living law of the nation. The entirety of the Prologue and about 70 of the 160 pages of the main text were rendered in this way.¹⁶² Not a few jurists still held

to the dogmatic view of statute as the proper **(p.240)** embodiment of the state and the single source of law, beside which customary law was an empty fiction. An increasing share, however, identified the customary law with national traditions and affirmed its equivalence or even superiority to statute law, the provisions of which it might annul.¹⁶³ By conflating customary law with the Common Law, a spurious parallel with the English constitutional tradition was even invoked. The customary law of which Hungarian lawyers now spoke was not, however, the same as Werbőczy had explained in the *Tripartitum*. It comprised extra-statutory instruments that proceeded out of the work of government and the courts, upon which the title of custom had been rhetorically bestowed.

There is nothing unusual in this. From no later than the sixteenth century, the name of customary law has often been attached in Europe and elsewhere to legislation imposed from above. Norms promoted by courts or by government are given the sanction of the past and, as in early modern France or more recently in Korea, legitimized by reference to historic practice.¹⁶⁴ During the nineteenth century, an analogous process of state-building and of the modernization of institutions resulted in Hungary in the expansion of the law. The law was built not only on statutory instruments but also on non-statutory ones and the legal system depended for its coherence on the successful coordination of the two spheres. In order to buttress the authority of non-statutory legislation, its origin was explained by reference to customary law, which had the advantage of comporting with notions of historic identity and traditions. The solution was effective and beguiling, but unconvincing in so far as it confused the customary authority of an instrument with the customary character of its content, and mistook obedience for consent. It remained, nevertheless, the proud contention of many Hungarian jurists until the period of Communist rule.¹⁶⁵

Notes:

⁽¹⁾ See thus (László Kövesdy), *Examen Verböczyanum, quod hactenus sub titulo Regni Anti-Verböczyani, per amicos tres, Tripartitum inter se dividentes* (Pest, 1785); also (József Izdenczy), *Etwas über Werbőcz*. The *Etwas* was published in 1795 in *Statistische Aufklärungen über wichtige Theile und Gegenstände der österreichischen Monarchie*, i, ed. G. Grellmann (Göttingen, 1795), 459–68, but as a reprint of an earlier, undated, pamphlet. Izdenczy's many publications in support of Joseph's reforms are listed in Ferenc Strada, 'Izdenczy József. Az államtanács első magyar tagja', *A Gróf Klebelsberg Kunó Magyar Történetkutató Intézet Évkönyve*, 10 (1940), 54–149 (69). Strada and others continue to ascribe the *Irrthümer in den Begriffen der meisten Ungarn* (1790) to Izdenczy, even though it was recognized in the 1920s as the work of Franz Matthäus Grossinger. See Derek Beales, 'The False Joseph', *Historical Journal*, 18, no. 3 (1975), 467–95 (489–90).

⁽²⁾ Robert Gragger, *Preussen, Weimar und die ungarische Königskrone* (Berlin and Leipzig, 1923), 9.

⁽³⁾ On the reform movements during Leopold II's reign, see Gábor Pajkossy, 'West European models and national traditions: reform projects in late eighteenth-century Hungary', *Transactions of the Seventh International Conference on the Enlightenment*, i (Oxford, 1989), 349–52 (349–50).

⁽⁴⁾ Gyula Mérei and Károly Vörös, eds., *Magyarország története tíz kötetben, 1790–1848*, 2 vols. (Budapest, 1980), i, 88; Lajos Hajdú, *Az első (1795-ös) magyar büntetőkódex-tervezet* (Budapest, 1971), 60. See also, Adam Wandruszka, *Leopold II*, 2 vols. (Vienna and Munich), ii, 275–314.

⁽⁵⁾ Ernst Wangermann, *From Joseph II to the Jacobin Trials* (Oxford, 1959), 86–8.

⁽⁶⁾ 1543: 31; 1563: 80; 1608: 6; 1625: 5. Discussed in BAR-CJ, MSS, U523/F, *Omnia ad Majorem Dei Gloriam*, 701. Despite its current location, this mid-seventeenth century work was intended for a Hungarian audience.

⁽⁷⁾ Epitomes of royal decrees are given in Ignác Kassics, *Enchiridion seu Extractus Benignarum Ordinationum Regiarum*, 3 vols. (Pest, 1825).

⁽⁸⁾ Wandruszka, *Leopold II*, ii, 332.

⁽⁹⁾ László Péter, 'Montesquieu's Paradox on Freedom and Hungary's Constitutions 1790–1990', in Péter, *Hungary's Long Nineteenth Century: Constitutional and Democratic Traditions in a European Perspective. Collected Studies* (Leiden and Boston, 2012), 152–82 (157). First published in *History of Political Thought*, 16 (1995), 77–104.

⁽¹⁰⁾ Elemér Mályusz, *Sándor Lipót főherceg nádor iratai 1790–1795* (Budapest, 1926), 13–14.

⁽¹¹⁾ Wandruszka, *Leopold II*, ii, 275.

⁽¹²⁾ The remit of the nine committees is given in 1790–91: 67.

⁽¹³⁾ Mályusz, *Sándor Lipót főherceg*, 120.

⁽¹⁴⁾ George Barany, *Stephen Széchenyi and the Awakening of Hungarian Nationalism, 1791–1841* (Princeton, NJ, 1968), 200, 282–5.

⁽¹⁵⁾ Éva Hoós, *At the Crossroads of Ancient and Modern: Reform Projects in Hungary at the End of the 18th Century* (Budapest, 1996), 4–5; Katalin Gönczi, *Die europäischen Fundamente der ungarischen Rechtskultur* (Frankfurt a/M, 2008), 147–8.

(¹⁶) Éva H. Balázs, *Hungary and the Habsburgs 1765–1800: An Experiment in Enlightened Absolutism* (Budapest, 1997), 314–15.

(¹⁷) MNL OL, O 11, *Rescripta Regia*, Bundle 1, fol. 327 (1781). See also MJL, iv, 649, which suggests an even earlier plan for a commercial code, originating in 1779.

(¹⁸) János Zlinszky, 'Hungarian Private Law in the 19th and 20th Centuries up to World War II', in András Gergely and Gábor Máthé, eds., *The Hungarian State: Thousand Years in Europe* (Budapest, 2000), 305–34 (312).

(¹⁹) Larry Neal, *The Rise of Financial Capitalism: International Capital Markets in the Age of Reason* (Cambridge, 1990), 7–8. The *Codex Cambio-Mercantil* is printed in an amended version as the fifth, repaginated part of *Opinio Excelsae Regnicolaris Deputationis ad Deputationem Juridicam Relata* (Pest, 1831).

(²⁰) Hajdú, *Az első (1795-ös)*, 224, 297.

(²¹) The text is given in Hajdú, *Az első (1795-ös)*, 389 et seq.

(²²) Hajdú, *Az első (1795-ös)*, 37. Given in Part 4, para. 54 of the code.

(²³) See thus Law XL of 1870, para. 12. Discussed in Béni Grosschmid, *Magánjogi előadások. Jogszabálytan* (Budapest, 1905), 151–2.

(²⁴) See thus MNL OL, N 105, *Deputatio in Juridicis*, Lad. MMM, Bundle 5.

(²⁵) *Ordo processualis in xxviii sections digestus*, in MNL OL, N 105, *Deputatio in Juridicis*, Lad. MMM, Bundle 5, fols. 281 et seq.

(²⁶) Mária Homoki-Nagy, *Az 1795. évi magánjogi tervezetek* (Szeged, 2004), 113–14.

(²⁷) Homoki-Nagy, *Az 1795. évi*, 41–2, 90.

(²⁸) Homoki-Nagy, *Az 1795. évi*, 204.

(²⁹) Homoki-Nagy, *Az 1795. évi*, 210–13. Homoki-Nagy sees this inclusion as contributing to the law on damages.

(³⁰) 1840: 16–22. Limited liability was only fully admitted in law in 1930.

(³¹) 1844: 4.

(³²) Lajos Kossuth, *Felelet Gróf Széchenyi Istvánnak* (Pest, 1841), 13.

(³³) Gönczi, *Die europäischen Fundamente*, 241.

(³⁴) Gönczi, *Die europäischen Fundamente*, 169; György Ráth, *Az országbirói értekezés a törvénykezés tárgyában*, 2 vols. (Pest, 1861), i, 60, 192.

(³⁵) Only two per cent of villages had reached redemption agreements with their lords by 1848.

(³⁶) István Barta, Gábor Pajkossy and István Sinkovics, eds., *Kossuth Lajos összes munkái*, 15 vols. (Budapest, 1948–89), iii, 719 (Károly Lamotte).

(³⁷) Ferenc Mádl, 'Kodifikation des ungarischen Privat- und Handelsrecht im Zeitalter des Dualismus', in Andor Csizmadia and Kálmán Kovacs, eds., *Die Entwicklung des Zivilrechts in Mitteleuropa* (Budapest, 1970), 87–119 (96–8).

(³⁸) Lóránt Czigány, *The Oxford History of Hungarian Literature* (Oxford, 1984), 160–78. For this description of a Hungarian nobleman, see Gyula Mérei and Károly Vörös, eds., *Magyarország története tíz kötetben, 1790–1848*, 2 vols. (Budapest, 1980), i, 106. For the changing nature of political discourse in the 1830s, see József Takáts, *Modern magyar politikai eszmetörténet* (Budapest, 2007), 14–21.

(³⁹) Tamás Vécsey, *Széchenyi és a magyar magánjog* (Budapest, 1895), 2–3; Katalin Gönczi, 'Werbőczy's Reception in Hungarian Legal Culture', in CLCE, 87–99 (93); Gönczi, *Die europäischen Fundamente*, 155.

(⁴⁰) Gönczi, *Die europäischen Fundamente*, 165–6.

(⁴¹) Mária Homoki-Nagy, 'A magyar magánjog kodifikációja a 19. században', *Jogtörténeti Szemle*, (2004, no. 1), 4–8 (5).

(⁴²) *Verbőczy István Hármaskönyve* (Pest, 1844). The translation of the statutes was only published much later beginning in 1899, with the first volume giving the laws up to 1526. The initial five volumes of the so-called Millennium collection, taking the laws up to 1835, were published over the next two years by Franklin (Budapest).

(⁴³) Gönczi, 'Werbőczy's Reception', 95; József Ponori Thewrewk, *Werbőczy István deák műszavai régi magyariságokkal* (Bratislava, 1844).

(⁴⁴) Ignác Frank, *Ósiség és elévülés* (Buda, 1848), 17. In fact, Frank's suggestion had been partly anticipated by the Deputatio Juridica in 1795. See Homoki-Nagy, *Az 1795. évi*, 177.

(⁴⁵) Andreas Michnay and Paul Lichner, *Ofner Stadtrecht von MCCXLIV–MCCCCXXI* (Bratislava, 1845), p. v. Discussed in Gönczi, *Die europäischen Fundamente*, 259–60; János Zlinszky, 'Die historische Rechtsschule und die

Gestaltung des ungarischen Privatrechts im 19. Jahrhundert', *Acta Juridica et Politica*, 33, no. 30 (1985), 433–45 (437).

⁽⁴⁶⁾ The status of nobility was not abolished by the April Laws, although legal equality (*jogegyenlőség*) is alluded to in the provision joining Transylvania to Hungary (1848: 7. 5).

⁽⁴⁷⁾ On the impact of the Austrian Civil Code on aspects of Hungarian private law, see Mária Homoki-Nagy, 'Az Osztrák Polgári Törvénykönyv hatása a magyar magánjogra', in Péter Antalóczy et al., eds., *Kormányzás és kodifikáció. Tanulmányok az újkori Európa jogfejlődéséről* (Budapest, 2006), 227–47.

⁽⁴⁸⁾ Oszkár Sashegyi, 'A neoabszolutizmus rendszere 1849–1867', in Ferenc Pölöskei and György Ránki, eds., *A magyarországi polgári államrendszerek* (Budapest, 1981), 81–139 (102).

⁽⁴⁹⁾ MNL OL, O 142, Justizministerium. Akten-Ungern, Bundle 1, file marked '800-as'. I know the decree on the press only in MS form; there is doubtless a printed version somewhere. For distributing materials dangerous to common security the penalty was a week to six months in gaol; for advocating resistance to the 'united Austrian empire' up to twenty years of hard labour.

⁽⁵⁰⁾ Ágnes Deák, *From Habsburg Neo-Absolutism to the Compromise 1849–1867* (Boulder and Highland Lakes, NJ, 2008), 125–42.

⁽⁵¹⁾ See thus, Anon. (Josef Wizdalek), *Acht Jahre Amtsleben in Ungarn von einem k.k. Stuhlrichter in Disponsibilität* (Leipzig, 1861), 6–24.

⁽⁵²⁾ Károly Kecskeméti, *Tök község parasztsága az Urbáriumtól az úrbéri per végéig 1770–1879* (Tök, 2009), 68. See also Endre Kovács and László Katus, eds., *Magyarország története tíz kötetben, 1848–90*, 2 vols. (Budapest, 1979), i, 673.

⁽⁵³⁾ János Balogh, *A magyar magánjog visszaállításának kérdései* (Pest, 1861), 11.

⁽⁵⁴⁾ Homoki-Nagy, 'Az Osztrák Polgári Törvénykönyv', 238–9.

⁽⁵⁵⁾ Balogh, *A magyar magánjog visszaállításának kérdése*, 12.

⁽⁵⁶⁾ Balogh, *A magyar magánjog visszaállításának kérdése*, 13; Ráth, *Az országbirói értekezéslet*, ii, 189.

⁽⁵⁷⁾ Imre Zlinszky, *A telekkönyv intézmény befolyása a tulajdonjog szerzésére* (Budapest, 1876), 24, 44. Because the right in land rested on the entry in the register, and not on formal possession, the *praescriptio* applied from the time of the written entry. There was no requirement to adjust the entry in the event of a mortgage being contracted upon the right. For further inadequacies,

approvingly explained by reference to a Cheshire Cat, see Charles Szladits, 'A Comparison of Hungarian Customary Law with English Case Law', *Journal of Comparative Legislation and International Law*, 3rd series, 19, no. 4 (1937), 165-78 (171-2).

(⁵⁸) Endre Nizsalovszky, 'Deák Ferenc és a magyar polgári magánjog kialakulása', *Tanulmányok Deák Ferencről (Zalai Gyűjtemény, 5)* (Zalaegerszeg, 1976), 61-84 (74). The American analogy became increasingly powerful in Hungarian discourse. See Gwen Jones, *Chicago of the Balkans: Budapest in Hungarian Literature 1900-1939* (Oxford, 2013), 1-4.

(⁵⁹) *Az 1861-ik évi magyar országgyűlés*, 3 vols. (Pest, 1861), ii, 102-3. The exchanges between monarch and parliament are conveniently given in *The Addresses of the Hungarian Diet of 1861, translated and presented to Members of Both Houses of the British Parliament* by J. Horne Payne, MA (London, 1862).

(⁶⁰) The October Diploma had also limited the monarch's right to issue patents.

(⁶¹) Apponyi was very much a last resort. Franz Joseph had previously approached Deák and János Cziráký. See György Szabad, *Forradalom és kiegyezés választóján (1860-61)* (Budapest, 1967), 319.

(⁶²) MNL OL, O 125 Országbirói Hivatal, Bundle 1, fols. 30-2.

(⁶³) MNL OL, O 125 Országbirói Hivatal, Bundle 1, fols. 118, 121-4, 148, 152.

(⁶⁴) For Hungarian attempts at sabotage, see Szabad, *Forradalom és kiegyezés*, 321.

(⁶⁵) Ráth, *Az országbirói értekezéslet*, i, 54.

(⁶⁶) Ráth, *Az országbirói értekezéslet*, i, 19, 187.

(⁶⁷) Ráth, *Az országbirói értekezéslet*, i, 56.

(⁶⁸) Andor Csizmadia, ed., *Magyar állam- és jogtörténet* (Budapest, 1978), 17.

(⁶⁹) Katalin Gönczi, *Die europäischen Fundamente der ungarischen Rechtskultur* (Frankfurt a/M, 2008), 260.

(⁷⁰) Noted by Gönczi, *Die europäischen Fundamente*, 263.

(⁷¹) We paraphrase here Károly Szász (1798-1853). See Géza Kiss and Sándor Turnowsky, eds., *Szász Károly* (Bucharest, 1955), 106-8, 113.

(⁷²) Ráth, *Az országbirói értekezéslet*, ii, 219-20.

(⁷³) Ráth, *Az országbirói értekezéslet*, i, 250.

(⁷⁴) Ráth, *Az országbirói értekezéslet*, i, 37.

(⁷⁵) Ráth, *Az országbirói értekezéslet*, ii, 248.

(⁷⁶) Ráth, *Az országbirói értekezéslet*, ii, 220.

(⁷⁷) Endre Nizsalovszky, 'Deák Ferenc és a magyar polgári magánjog', 77; Ráth, *Az országbirói értekezéslet*, ii, 221.

(⁷⁸) Mádl, 'Kodifikation des ungarischen Privat- und Handelsrecht', 102-3.

(⁷⁹) Ráth, *Az országbirói értekezéslet*, ii, 217.

(⁸⁰) Ráth, *Az országbirói értekezéslet*, ii, 248.

(⁸¹) *Ideiglenes Törvénykezési Szabályok* (1861), I, paras 4, 7. The principle is retained in Hungarian civil law. See Act V of 2013, 7.75-82.

(⁸²) The term *köteles rész* had originally been used during the Conference.

(⁸³) Mór Katona, *A mai érvényű magyar magánjog vezérfonala* (Bratislava, 1899), 30.

(⁸⁴) *Ideiglenes Törvénykezési Szabályok* (1861), I, para. 14. The 2013 Civil Code adopts the same precautions in respect of matrimonial property rights. See Act V of 2013, Section 4. 38.

(⁸⁵) *Az 1861-ik évi magyar országgyűlés*, 3 vols. (Pest, 1861), ii, 66-7.

(⁸⁶) Ráth, *Az országbirói értekezéslet*, i, 60, 190-2. Deák's critics mainly feared the expense of establishing prisons with individual cells.

(⁸⁷) Ráth, *Az országbirói értekezéslet*, ii, 305-9; *Ideiglenes Törvénykezési Szabályok* (1861), II, para. 5.

(⁸⁸) Szabad, *Forradalom és kiegyezés*, 353-4.

(⁸⁹) Salamon Beck, 'Peschka Vilmos. Jogforrás és jogalkotás', *Állam- és Jogtudomány*, 9, no. 3 (1966), 480-7 (484). The attempt by Hungary's first female MP, Margit Slachta, to extend corporal punishment to women on humanitarian grounds (!) was defeated in the Lower House.

(⁹⁰) Albert Berzeviczy, *Az absolutizmus kora Magyarországon 1849-1865*, 3 vols. (Budapest, 1922-32), iii, 187-8.

(⁹¹) Berzeviczy, *Az absolutizmus kora*, iii, 189; Gusztáv Beksics, *Ferencz József és kora* (Budapest, 1898), 593.

(⁹²) *Idősb Szögyény-Marich László országbíró emlékiratai*, eds. by his sons, 3 vols. (Budapest, 1903–18), iii, 88.

(⁹³) Gusztáv (Szász-) Schwarz, *Magánjogi felépítése* (Budapest, 1893), 10–11.

(⁹⁴) *Idősb Szögyény-Marich László*, iii, 88–90. Franz Joseph needed a High Judge in office to give one of the addresses at the opening of the parliament, scheduled for April.

(⁹⁵) *Idősb Szögyény-Marich László*, iii, 88.

(⁹⁶) Speeches opposing the ITSZ are not given in *Az 1861-ik évi magyar országgyűlés*, but published separately in Balogh, *A magyar magánjog visszaállításának kérdése*, which also gives detail of the vote in the Lower House. For the vote in the Upper House, see MNL OL, O 125, Országbírói Hivatal, Bundle 1, fol. 342.

(⁹⁷) MNL OL, O 125, Országbírói Hivatal, Bundle 1, fol. 344.

(⁹⁸) MNL OL, O 125, Országbírói Hivatal, Bundle 1, fols. 378, 400 et seq.

(⁹⁹) Imre Zlinszky, *A magyar magánjog mai érvényében*, 4th edition, ed. Sándor Dárday (Budapest, 1891), 40.

(¹⁰⁰) His comment was not hyperbole, but a criticism also voiced in the 1861 parliament. See *Az 1861-ik évi magyar országgyűlés*, iii, 136–7; also, János Zlinszky, in *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, ed. Helmut Coing, 3 vols. in 8 parts (Munich, 1973–88), iii/2, 2153.

(¹⁰¹) Grosschmid, *Magánjogi előadások*, 868–9.

(¹⁰²) János Suhayda, *A magyar polgári anyagi magánjog rendszere az Országbírói Értekezlet által megállapított ITSz-hoz alkalmazva* (Pest, 1862), 34.

(¹⁰³) Gyula Paraszky (ifj.), *A birói gyakorlat mint jogforrás* (Miskolc, 1929), 17, offprint of *Miskolci Jogászélet* (1929, no. 6).

(¹⁰⁴) Some later figures for disputes over land registration are given in Lajos Králik, *A magyar ügyvédség. Az ügyvédi kar*, 2 vols. (Budapest, 1903), i, 265–8. Králik surely confuses the act of registration, which was notarial, with an action over registration, although both proceeded in the first instance before the same forum.

(¹⁰⁵) György Bónis, Alajos Degré and Endre Varga, *A magyar bírósági szervezet és perjog története* (Zalaegerszeg, 1996), 215.

(¹⁰⁶) Originally laid down in 1836: 20, but in a different context. This provision was routinely ignored.

(¹⁰⁷) Bónis, Degré and Varga, *A magyar bírósági szervezet*, 216.

(¹⁰⁸) Králik, *A magyar ügyvédség*, i, 245–8, 255. The requisite education and professional experience of judges was described in Law IV of 1869 (para. 7).

(¹⁰⁹) István Stipta, *A magyar bírósági rendszer története*, 2nd edition (Debrecen, 1998), 126–33.

(¹¹⁰) Montesquieu, *The Spirit of the Laws*, eds. Anne M. Choler et al. (Cambridge, 1989), 163 (11. 6).

(¹¹¹) Jury trials were established in 1867 for press trials and extended in 1897 to include the most serious criminal and political offences. They were suspended in 1914 and not reinstated. See Tamás Antal, 'The Codification of Jury Procedure in Hungary', *Journal of Legal History*, 30, no. 3 (2009), 279–97; also Rieko Ueda, 'The Hungarian Jury System under a Dual Monarchy System', *Slavic Studies*, 47 (2000), 218–300 (in Japanese, with English-language summary).

(¹¹²) Law III of 1868.

(¹¹³) Zoltán Magyary, *The Rationalisation of Hungarian Public Administration* (Budapest, 1932), 11.

(¹¹⁴) László Péter, 'The Aristocracy, the Gentry and their Parliamentary Tradition in Nineteenth-Century Hungary', in Péter, *Hungary's Long Nineteenth Century: Constitutional and Democratic Traditions in a European Perspective. Collected Studies* (Leiden and Boston, 2012), 305–42 (311–13). First published in SEER, 70 (1992), 77–110.

(¹¹⁵) Ferencz Szilárd, 'Az úrbéres erdők ügye', *Erdészeti Lapok*, 49, no. 21 (1 November 1910), 809–20.

(¹¹⁶) Magyary, *The Rationalisation of Hungarian Public Administration*, 11.

(¹¹⁷) Law 5 of 1878 established the first two categories; Law 40 of 1879 added the third. For a summary of the Csemegi code, see Krisztina Karsai and Zsolt Szomora, *Criminal Law in Hungary* (Alphen aan den Rijn, 2010), 35–6.

(¹¹⁸) Zlinszky, 'Hungarian Private Law in the 19th and 20th Centuries', 311; Gusztáv Schwarz, *Magánjogunk felépítése* (Budapest, 1893), 14.

(¹¹⁹) János Martonyi, *A közigazgatási bíráskodás bevezetése, szervezete és hatékonysága Magyarországon (1867–1949)*, *Acta Juridica et Politica*, 20, no. 2 (Szeged, 1972), 3–4.

⁽¹²⁰⁾ See generally on this point, J.W.F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford, 2000).

⁽¹²¹⁾ Mór Katona, *A magyar családi hitbizomány* (Budapest, 1894), 65–6; Gábor Kertész, 'A magyarországi postaszabályozás fejlődése a kezdetektől a rendszerváltásig', *Jogtörténeti Szemle*, (2008, no. 2), 31–41 (33–4).

⁽¹²²⁾ MJL, iv, 175–6; on the status of the churches, see Andor Csizmadia, *Rechtliche Beziehungen von Staat und Kirche in Ungarn vor 1944* (Budapest, 1971), 26–8.

⁽¹²³⁾ For this and much of what follows, see Helmut Coing, ed., *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, 3 vols. in 8 parts (Munich, 1973–88), iii/2, 2165–88 (János Zlinszky). See also, Károly Szladits in MJL, ii, 551–5.

⁽¹²⁴⁾ The work of this committee and of a separate drafting commission for parliamentary bills is frequently confused. The latter was established in 1872 but survived only two years.

⁽¹²⁵⁾ Elemér Pólay, *Kísérlet a magyar öröklési jog önálló kodifikációjára a XIX. század végén*, *Acta Juridica et Politica*, 21, no. 4 (Szeged, 1974), 8; János Zlinszky, 'Die historische Rechtsschule und die Gestaltung des ungarischen Privatrechts im 19. Jahrhundert', *Acta Juridica et Politica*, 33, no. 30 (1985), 433–45 (443).

⁽¹²⁶⁾ Coing, *Handbuch der Quellen*, iii/2, 2168, 2187–8 (Zlinszky).

⁽¹²⁷⁾ Coing, *Handbuch der Quellen*, iii/2, 2169 (Zlinszky).

⁽¹²⁸⁾ Coing, *Handbuch der Quellen*, iii/2, 2170–1 (Zlinszky).

⁽¹²⁹⁾ Charles Szladits, 'Le Projet de code civil hongrois', *Acta Juris Hungarici*, 1, nos. 3–4 (1932), 213–21 (215).

⁽¹³⁰⁾ Imre Zlinszky, *A magyar magánjog mai érvényében, különös tekintettel a gyakorlat igényeire* (Budapest, 1880, and many subsequent editions).

⁽¹³¹⁾ Gusztáv Schwarz, *Magánjogunk felépítése*, 9, 16–23; Bernát Besnyő, *Szászy-Schwarz Gusztáv emlékezete* (Budapest, 1933), 31–5. On the larger cultural context, see László Országh, "'Anglomania' in Hungary, 1780–1900', *Angol-Filológiai Tanulmányok*, 12 (1979), 19–36.

⁽¹³²⁾ The king might still issue decrees in the form of privileges for private persons or corporations, but these required ministerial counter-signature. See Katona, *A mai érvényű magyar magánjog*, 6–7.

⁽¹³³⁾ Gyula Egervári Egerváry, *Vadászati ügyben hozott kormány-rendeletek*, 3rd edition (Budapest, 1891).

⁽¹³⁴⁾ László Péter, 'The Autocratic Principle of the Law and Civil Rights in Nineteenth-Century Hungary', in Péter, *Hungary's Long Nineteenth Century: Constitutional and Democratic Traditions in a European Perspective* (Leiden and Boston, 2012), 281–304 (289–90), first published in *CEU History Department Yearbook, 1997–98* (Budapest, 1999), 11–34.

⁽¹³⁵⁾ Gábor Máthé, *A magyar burzsoá igazságszolgáltatási szervezet 1867–1875* (Budapest, 1982), 64–5.

⁽¹³⁶⁾ István Kovács, 'A törvény és törvényerejű rendelet problematikájához', *Állam- és Jogtudomány*, 16, no. 3 (1973), 333–91 (349–51); Máthé, *A magyar burzsoá igazságszolgáltatási szervezet*, 64–5.

⁽¹³⁷⁾ Emil Vita, *Egyesületi jog* (Budapest, 1906), 21–2, 27–38.

⁽¹³⁸⁾ Attila Horváth, 'A gyülekezési jog elméletének és gyakorlatának története Magyarországon 1989-ig', *Jogtörténeti Szemle*, (2007, no. 1), 4–15 (10–11).

⁽¹³⁹⁾ Péter, 'The Autocratic Principle of the Law and Civil Rights', 294–301.

⁽¹⁴⁰⁾ See thus Dezső Márkus's introduction to *Felsőbiróságaink elvi határozatai*, ed. Márkus, 24 vols. (Budapest, 1891–1914), i, iii.

⁽¹⁴¹⁾ Márkus, *Felsőbiróságaink elvi határozatai*, i, 436, 439, 442; Márkus, *Felsőbiróságaink elvi határozatai*, ii/2, 379–80, 389, 397; Márkus, *Felsőbiróságaink elvi határozatai*, iii, 203.

⁽¹⁴²⁾ Albert M. Kóssa, *Talmi aranykorunk. Tréfás szatirák versekben* (Budapest, 1886), 209.

⁽¹⁴³⁾ Some of these are listed in János Zlinszky and B. Szabó, 'Ungarn', in Filippo Ranieri, ed., *Gedruckte Quellen der Rechtsprechung in Europa (1800–1945)*, (Frankfurt a/M, 1992), 953–64 (957–8).

⁽¹⁴⁴⁾ Zlinszky and Szabó, 'Ungarn', 958–60.

⁽¹⁴⁵⁾ Zlinszky, *A magyar magánjog mai érvényében*, 37.

⁽¹⁴⁶⁾ Gusztáv Schwarz, *Magánjogunk felépítése*, 18–22.

⁽¹⁴⁷⁾ Ernő Wittmann, 'Tanulmányok az angol magánjog köréből. Kárterítési jog', *Jogállam*, 5, nos. 7–8 (1906), 513–28, 588–608, 682–99, 736–63 (753–4); Martyn Rady, 'England and Hungarian Jurisprudence: Questions of Public and Private Law', in László Péter and Rady, eds., *British-Hungarian Relations since 1848*

(London, 2004), 315–27 (324). See also Márkus, *Felsőbiróságaink elvi határozatai*, i, 439, on cesspits.

(¹⁴⁸) Márkus, *Felsőbiróságaink elvi határozatai*, i, 209.

(¹⁴⁹) Grosschmid, *Magánjogi előadások*, 782–803.

(¹⁵⁰) See Law LIV of 1912, para. 76.

(¹⁵¹) Gyula Eörsi, 'Richterrecht und Gesetzesrecht in Ungarn. Zum Problem der Originalität eines Zivilrechts', *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, 30 (1966), 117–40 (122–7); *Polgári Jogi Határozatok Tára* (Budapest, 1918 etc.).

(¹⁵²) See thus Mihály Antalffy, Dezső Nagy (ifj.) and Miklós Újlaki, eds., *Magánjogi Döntvénytár*, NS, i (1946–7) (Budapest, 1948).

(¹⁵³) Tibor Király, 'Das Strafgesetzbuch von 1878. Der Csemegi-Kodex', in Gábor Máthé and Werner Ogris, eds., *Die Entwicklung der osterreichisch-ungarischen Strafrechtskodifikation im xix.–xx. Jahrhundert* (Budapest, 1996), 221–36 (222).

(¹⁵⁴) Barna Mezey, *Magyar jogtörténet*, 2nd edition (Budapest, 1999), 378–9.

(¹⁵⁵) Suhayda, *A magyar polgári anyagi magánjog rendszere*, 37; Zlinszky, *A magyar magánjog mai érvényében*, 37; Gyula Paraszky, ifj., *A birói gyakorlat mint jogforrás* (Miskolc, 1929), 6–7, offprint of *Miskolci Jogászélet* (1929, no. 6).

(¹⁵⁶) Grosschmid, *Magánjogi előadások*, 727.

(¹⁵⁷) Katona, *A mai érvényű magyar magánjog*, 8.

(¹⁵⁸) Károly Szladits, 'A magyar magánjog jellegváltozásai az utolsó száz év alatt', in Ferenc Eckhart and Alajos Degré, eds., *Emlékkönyv Dr. Viski Illés József* (Budapest, 1942), 486–95 (490). Szladits typically overstates his case.

(¹⁵⁹) Gejza Ferdinandy, *Magyarország közjoga* (Budapest, 1902), 89.

(¹⁶⁰) Moór, *A különböző jogforrások, azok egyensúlya es rangfokozata a magyar jogrendszerben* (Budapest, 1932), 10.

(¹⁶¹) DRMH 5, xlv. The statue was pulled down 'spontaneously' (a brass band in attendance) by a Communist gang on 6 May 1945, and has not been replaced. The name of Werbőczy Street (now Táncsics Mihály Street) has not been restored either, but retains its Communist designation.

(¹⁶²) *Magyar Törvénytár. Werbőczy István Hármaskönyve*, eds. Sándor Kolosvári and Kelemen Óvári (Budapest, 1897).

(¹⁶³) László Péter, 'The Primacy of *Consuetudo* in Hungarian Law', in CLCS, 101-12 (110-11).

(¹⁶⁴) Jacques Krynen, 'The Absolute Monarchy and the French Unification of Private Rights', in Julius Kirsher and Laurent Mayali, eds., *Privileges and Rights of Citizenship: Law and the Juridical Construction of Civil Society* (Berkeley, 2002), 27-55; Marie Seong-Hak Kim, *Law and Custom in Korea* (Cambridge, 2012), 299.

(¹⁶⁵) Péter, 'The Primacy of *Consuetudo* in Hungarian Law', 110-11.

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