CHAPTER THREE

THE IRREPRESSIBLE AUTHORITY OF WERBŐCZY'S *TRIPARTITUM*

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

Werbőczy's *Tripartitum*, the work which for well over three centuries lent shape to Hungarian law more than any enactment, was a customary that made only passing nods to law as a deliberate expression of will, the so called ‘written law’, referred to by the author either as *decreta* or *statuta* or, more frequently, as *constitutiones*. These terms appear to be synonyms rather than exact equivalents, for they are not interchangeable. For statutes and *constitutiones* could be either general or local, whereas decree is invariably general and enacted by the king either on his own authority or with an assembly of the nobles.

Notwithstanding these divisions, *leges* (*törvények*) were, in the Hungarian legal system, essentially customary precepts, a fact that has had far reaching consequences which may not yet have been sufficiently appreciated by modern scholarship. There are many reasons which could explain this omission, and the perplexities of Werbőczy's use of terms provide an important one. Yet too much should not be made of

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1 This paper is an extended version of ‘The Primacy of *Consuetudo* in Hungarian Law’, in Martyn Rady (ed.) *Custom and Law in Central Europe* (hereafter: Rady, *Custom and Law*), Centre for European Legal Studies, Occasional Paper no. 6, University of Cambridge, 2003, pp. 101–111. In writing this paper, I am grateful for the advice received from János Bak, Lóránt Czigány, Robert Goheen and Martyn Rady.

2 In nineteenth-century Cisleithania, custom even in civil law was not a recognized legal source (except when the law expressly referred to it—which it hardly ever did): *Allgemeines bürgerliches Gesetzbuch* (Vienna: Aus der k.k. Hof- und Staatsdruckerey, 1811), Section 10. The 1811 code refers to custom and use on two occasions only—in respect of local pasturing rights and of procedure for reporting 'lost and found' property.
the valid observation that Werbőczy introduced learned distinctions in
the Prologue of the Tripartitum only to disregard them in the rest of his
work. This criticism may be unduly severe at least in one respect: the
Prologue contains an adequate frame of reference for the corpus as a
whole. The conceptual basis of the Tripartitum is simple and consistent,
although its consistency may partly be obscured by the medieval abun-
dance of synonyms that adorn its three parts.

The scholastic legal culture, already brought to its apogee by the
‘Angelic Doctor’ in the thirteenth century, inspired the selection of
Werbőczy’s vocabulary. Accordingly, justice is the foundation and ‘endur-
ing will’ that renders everyone his right (Prologus, Tit. 1.) Notably, in
Hungarian somebody’s jussa, igaza, igazsága conflate justice and truth –
an indispensable feature (even today) of the Hungarian mental outlook.
Werbőczy stresses that ius (right) is a nomen generale and therefore law
is a kind of right which could be either a declared norm or custom, or
to put it in practical terms, either statute (decretum) of some kind or
unwritten law (consuetudo). But which is superior of the two? In the
Prologue, Werbőczy, a sixteenth – century Hungarian Bracton, treats con-
suetudo and decretum as having the same force of law. He argues, not
unlike Bartolus, that if a statute law is subsequent to contrary custom,
then the statute should annul the custom. If, however, the statute pre-
cedes established custom, the latter prevails over the former. Approved
general custom cancels the statute everywhere; local custom sets the
statute aside only locally. Custom interprets, complements and may
supplant statute law. We need not follow the large literature on Werbőczy’s
foreign sources: what he took from Roman Law (passages from the Digest
and so on) and from Canon Law. These influences were secondary.
Hungarian law was overwhelmingly vernacular in form and content.
Indeed, the Latin terms adopted from the Canonists and the Civilians
sat rather uncomfortably on Hungarian social relations and indigenous
procedures. Characteristically, Werbőczy in the so-called Operis Conclusio,
which follows directly upon the Third Part, affirmed that his work
was written non nisi nostratium usui futura erant. For this reason he
did not shrink from bringing in words used in Pannonia rather than

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3 György Bónis, Középkori jogunk elemei [Elements of Our Medieval Laws] (Budapest:
Közgazdasági és Jogi Könyvkiadó 1972), pp. 237ff. In the past the Prologue was seen as the
foundation of the work; Bónis, by contrast, emphasized that the ‘true Werbőczy’ could be
found in the three parts, ibid., p. 261.
4 Prologue, Tit. 12.