Acta Univ. Sapientiae, Legal Studies, **9**, 2 (2020) 195–204

DOI: 10.47745/AUSLEG.2020.9.2.01

Historical Context of the Application of Private Law in the Geographic Space of Transylvania in Antiquity and the Middle Ages[1]

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Abstract: The following contribution constitutes a short primer for the studies contained in the present issue of *Acta Universitatis Sapientiae – Legal Studies*. We present the historical, legal, and administrative context for the development of private law in the geographic region known as Transylvania during antiquity and the Middle Ages. We make reference to the major questions of private law which shall be analysed by the various authors of this thematic issue.

Keywords: Transylvania, private law, Roman law, mediaeval law, legal development

1. Introduction

Issue no 2 of 2020 of the journal *Acta Universitatis Sapientiae – Legal Studies* is dedicated to the topic of private law applicable throughout history in the geographic space constituted by Transylvania, a region which had varying boundaries – depending on the sources used to define them – throughout history and which belonged to several polities, benefiting at times from various degrees of administrative and legislative autonomy.

In this introductory study, we aim to provide a short primer to readers of this issue, familiarizing them with the historical and public law contexts in which the development of private law unfolded during antiquity and the Middle Ages in this

1 The content of this introductory paper to the thematic issue no 2 of 2020 of *Acta Universitatis Sapientiae – Legal Studies* is based on the historical analyses found on pages 29–43 (Szabó–Szeredai 2018), 99–111 (Mezey 2018), and 175–180 (Kisteleki 2018) of the volume *Erdély jogtörténete* [History of Law in Transylvania], published in Cluj-Napoca by Forum Iuris Publishing House in 2018. The second edition of the book is forthcoming in 2020.

historical region. We leave to the subsequent writings the detailed presentation of the chronology, the basic concepts, and the most significant norms of private law in Transylvania. We shall not provide here any supplementary context for the Early and the Late Modern Period as much more accessible source material and a more generalized knowledge of events in this more recent period justify such an omission.

Our paper is structured into two main parts. The first part presents the historical, international, and public law status of the province of Dacia, the administrative entity in the Roman Empire which to a significant part comprised the geographic area of what would later become known as Transylvania. Provincial organization, pertinent to private law, is also presented here. The second part provides the historical and public law context for the organization of Transylvania during the Early, High, and Late Middle Ages, as a multiethnic region with a complex administrative and political structure, which forms the substrate for the development of various systems of private law applicable to the ethnicities inhabiting this region.

2. The Roman Law Context

2.1. The Notion of Roman Law and Its Reflection in the Relevant Source Material

Between the years 106 and 271, Dacia was a Roman province comprised of the western and southern parts of today's Transylvania along with what is now Oltenia and a part of Banat, geographic regions in modern-day Romania. It was one of the last provinces to be conquered by the Roman Empire and among the first to be abandoned. Still, the period of about 170 years of Roman rule meant the integration of this province into the empire, including from a legal standpoint.

In the study contributed for this issue by Tamás Nótári, which presents the private law applied in the province of Dacia, the notion of *Roman law* is oftentimes used. By *Roman law* in this context we should understand firstly the civil law of ancient Roman origin (the law applicable to Roman citizens) but also the *ius honorarium* (*ius praterium* by another name), which is the law developed by officials, especially by the *praetors*, contained in the so-called *edicts*, in order to complement or correct applicable civil law; thirdly, the *provincial law* adopted by the Roman legislators at various administrative levels, applicable to the inhabitants of the provinces who do not hold Roman citizenship, and, fourthly, the law of the *peregrini*, or local customary law (permitted to remain in force after the Roman conquest of some provinces). Thus, the meaning of Roman law can only be elicited based on the *principle of territoriality* on the one hand and on the

principle of personality on the other hand: the law applicable to the inhabitants of a certain region or province not being identical, to each person being applied his/her own law in accordance with his/her personal status (or, more precisely, according to the *status civitatis* attributed to him/her).

Roman law knew three forms, or degrees of *status civitatis* (personal status). In order to exercise the plenitude of civil rights (to exercise one's full legal capacity in the modern term), that is, to have the capacity to enter a contract or dispose of one's possessions by way of a will, it was necessary to bring all three states together: freedom (*status libertatis*), citizenship (*status civitatis*), and standing as head of the Roman family (*status familiae*); *status libertatis* constituted the precondition of the two subsequent states, while *status civitatis* was in turn a precondition for standing as the head of the family. Distinguishing according to *status libertatis*: we can note that free persons (*liberi*) and slaves (*servi*) are the two main categories. According to their *status civitatis*, we can distinguish between *Roman citizens* (*cives*), *Latins* (*latini*), and *conquered peoples*, or *peregrini* (lit. wanderers). According to family status, persons had full exercise of their legal capacity (*personae sui iuris*) or were persons under the power, or authority of another (*personae alieni iuris*). From the point of view of private law, the Roman citizen had the capacity of disposal over patrimonial rights (*ius commercii*), which referred both to the right to conclude deeds *inter vivos* (*commercium inter vivos*) and to dispose of possessions for the cause of death (*commercium mortis causa*).

Initially, the citizens of the Latium region were the ones considered to be under the rule of Latin law and enjoyed a form of restricted legal capacity (being, for example, excluded from the exercise of public authority while still benefiting from *ius commercii*). This legal category later fell into desuetude: on the basis of *lex Iulia de civitate Latinis et sociis danda* from the year 90 BC, the Latin peoples and other faithful allies of Rome have acquired access to civil law, without acquiring Roman citizenship.

According to Roman law, any person who was neither a citizen of Rome nor subject to the law of Latins was considered a *peregrinus* (wanderer). Initially, any foreign person who was the subject of a state which was not in alliance – or party to a similar covenant – with Rome was considered an enemy (*hostis*). With the expansion of the empire, however, Rome allowed conquered peoples to retain the possibility of using their national law, conferring upon them a kind of 'imperial citizenship' of a lesser degree, even while excluding them from the exercise of civil rights ('civil' in such context being taken in the meaning of one's ability to employ – and benefit from – the institutions of Roman civil law). With the passage of time, the *peregrini*, individually or collectively, could gain the benefits conferred by Latin law (*ius Latii*) or even obtain Roman citizenship (*civitas Romana*), but these categories were largely emptied of content by the

adoption of the *Constitution of Antoninus* (sometimes also translated as the *Edict of Antoninus*) in AD 212.

Civil, praetorian, and provincial customary law have found their application in the following two situations: 1° if at least one party to a legal relationship subject to Roman civil law was a Roman citizen, 2° if both parties were *peregrinus* (so neither benefited from Roman civil law), but the dispute did not take place before a provincial court but before a Roman forum.

With regard to this dual legal system (application of civil law and praetorian law in parallel with the law of the *peregrini*), three periods can be distinguished: 1° the period from the beginning of Roman expansion until 90 BC, when the *lex Iulia* (*de civitate Latinis et sociis danda*) was adopted, which extended civil law to every free subject of the Roman Empire who lived on the Italian Peninsula; 2° the period between the adoption of *lex Iulia* and the year AD 212, the year in which the *Constitution of Antoninus* was adopted, which extended application of civil law to almost all free inhabitants of the empire; 3° the period subsequent to the entry into force of the *Constitution of Antoninus*.

Regarding the province of Dacia, the object of our inquiry, the first period should be ignored, Dacia not having fallen under Roman domination until AD 106. In the light of historical sources, the second period, starting from the conquest of the province at the beginning of the 2nd century AD and until the beginning of the 3rd century AD, is subject to a more detailed examination in this issue of our journal. Due to the increasing rarity of historical source material, only very general conclusions shall be drawn regarding the third period. The subsequent analysis will therefore be largely limited to private law, and in this framework to the law of obligations (and within the latter category mainly to contract law), due to the nature of the credible historical sources available for the province of Dacia, taking into account that deeds recorded on wax tablets known as *triptychs* (*triptychon*) – or readable and intelligible fragments thereof – arose almost singularly in connection with contractual obligations from the point of view of legal history. With regard to other areas of law (the law of persons), these only allow for general conclusions to be drawn; in other areas of legal science (family law, inheritance law, etc.), we do not even benefit from indirect grounds for conducting a thorough analysis.

2.2. The Effects of Provincial Organization on Legal Life

In the field of property relations, the creation of the *province* as an effect of imperial expansion resulted in the applicability of Roman law to the inhabitants of the newly acquired lands. The territory of the province as a legal unit became the property of Rome itself. Although the previous owners were often left in factual possession of their respective lands, a new form of property was established,

distinct from the one based on the notion of *dominium*, the property right in the strict sense applicable to the lands situated in what is today Italy (*fundus Italicus*). The existing form of ownership on this newly acquired imperial land, *possessio et ususfructus* (possession and usufruct, i.e. the right to possess an immovable and to retain its fruits for oneself), was called by another name and also regulated differently.

According to Roman law, property based on the law applicable to citizens (*quirites*), called *dominium ex iure quiritium*, constituted civil (in the sense of citizenly) property within the meaning of civil law. For this form of property to exist, three preconditions had to be met concomitantly. The owner of civil property 1° could only be a Roman citizen who 2° was not under the authority of another person and 3° who had access to *ius commercii* (or, as the case may be, a person benefiting from both *ius Latii* and *ius commercii*). The property of the provincial land (*fundus provincialis*) did not meet the second ownership requirement based on civil law. Therefore, ownership of such land was considered to be a veritable property right due to its object (which already constituted state property). The provincial land in the property of the Roman state was in the temporary possession of its 'owners' in exchange for the payment of a tax, the 'owner' having the possibility of harvesting its fruits and of transmitting the right of possession by way of deeds or as an inheritance. This arrangement – although allowing for almost all the rights of ownership – barred the possessor from degrading (destroying) or substantially transforming the possessed property. In the case of the *peregrini*, the first requirement of ownership based on civil law was absent: the personal side of this right. The possessor was not a citizen of Rome. In a formula developed over time to resolve such cases, the *praetor* ordered – by way of a fiction – that the *peregrinus* be considered as a Roman citizen. During the classical era, these differences were preserved, but the reasons for their existence disappeared: the legal distinction between provincial land and the property of the *peregrini* ceased to exist as a result of the Constitution of Antoninus.

Unlike Italian lands, provincial lands were subject to taxation by the Roman state. In the oldest provinces, acquired during the Republic (*provinciae populi Romani*), the name of this tax was *stipendium*, the lands themselves being called *praedia provincialia stipendiaria*. In the newer provinces – called imperial provinces (*provinciae Caesaris*) –, the tax was called *tributum* (tribute), the lands were designated as *praedia provincialia tributaria*, and they were regulated under this name.

This structure of the notion (or more precisely the effects) of property should not be lost sight of whenever we contemplate Roman contracts having as an object an immovable, especially agricultural land.

The free inhabitants of the provinces – at least those who remained free after the Roman conquest – did not acquire access to Roman civil law, being subject to

the unconstrained authority of the governor (the *Rector provinciae* by the generic term used for this office). The *imperium* of the governor (the plenitude of the sovereign power of the state) can be conceived of as a delegation of the power of the emperor, the governor being accountable only to the emperor himself. The governor's imperium did not mean only the exercise of powers in the field of central and local administration but also jurisdictional activity in criminal and civil cases (ancient Romans not knowing the institution of the separation of the branches of government).

It can be therefore concluded that in all elements of the legal life of the province, which were tangential to the exercise of imperial power (hence related to public administration and largely criminal law) on the one hand and to civil legal relations of Roman citizens living in that province on the other hand, Roman law was mainly applied. (By the time of the empire Roman law was understood in the sense of *ius civile*, the law developed by jurisconsults, which merged ancient civil law as well as praetorian law and which included provincial law developed for the given province by the legislator.)

At the same time, because the population of the provinces did not acquire Roman citizenship, most inhabitants retained their status as a *peregrinus* (only certain persons gaining Roman citizenship and access to Roman civil law, as a privilege). In the provinces, when local law was compatible with Roman public law and did not hinder the legal relationships of the citizens of Rome who lived in the respective provinces, the imperial administration allowed for the existence and application of local law, usually taking the form of customary law, formed before the incorporation of the province into the empire. This latter law governed relations established between persons who did not hold Roman citizenship, and thus they did not benefit from civil law on the one hand and the disputes between them on the other, and it also manifested itself in less significant issues related to the local administration of some communities.

In the era from the last century of the republic to the *Constitutio Antoniniana*, there existed legal systems in the Roman provinces that were applied in parallel with imperial law. These legal systems differed substantially from imperial law, the differences being without a doubt caused by the radically different level of development of some provinces when compared to those in Italy or Rome itself or to other provinces. Such differences can be observed in the most acute way in the field of family law and inheritance law. Within these branches of law, the regulated social relations, by their very nature, led to the continued application of local customs. For this reason, these branches of law are more static, and they oppose in the most lasting way any attempt at modification or any external, artificial intervention. Certain local laws, such as the Greek legal systems, retained their emphasis on written instruments, unlike the much more widespread system used by the Romans, which permitted concluding contracts

in verbal form, something obvious from the contracts recorded on the wax tablets from Dacia, which were drawn up under Greek influence.

In the case of the provinces, the governor was vested with all the power of the Roman state, with *imperium*, being the one who determined which legal system was to be applicable to whom in each case. Because the Romans considered from the outset that the application of Roman law by subjects who did not have access to Roman *ius civile* was excluded, it depended only on the discretion of the one exercising power in the provinces if he permitted maintaining the local legal system or repealed that system. At the same time, it is worth noting that the imperial administration had no interest in totally abolishing the local legal systems for so long as these systems did not prove to be to the detriment of imperial interest; so, it usually intervened only in case of the existence of local norms which were in sharp contradiction with imperial law.

On 11 July 212 AD, Emperor Caracalla (Marcus Aurelius Severus Antoninus) promulgated his decree in the form of an edict, the so-called *Constitutio Antoniniana*, by which he extended access to Roman civil law to almost all free subjects of the empire – except peoples forced to unconditional capitulation during conquests –, the so-called *peregrini dediticii*.

The *peregrini dediticii* were those who saw their statehood abolished and themselves turned into subjects of the Roman Empire, but this took place without them having been enslaved. Persons in this category could not acquire *ius civile* by the *Constitutio Antoniniana*, a situation which remained unchanged until much later, when Emperor Justinian granted them access to Roman civil law. The edict was not proclaimed with the intention of establishing equal rights between peoples of the empire; the emperor actually desired to extend the *vicesima hereditatum* – the tax levied on estates left after the death of Roman citizens, recently increased at the time of the edict from 5% to 10% – to almost all citizens of the empire.

The question arises as to whether the *Constitutio Antoniniana* retained or not the personal right of the *peregrini* to invoke the rules of local legal systems against other subjects who have become Roman citizens or whether the extension of civil law abolished the application of these local systems. According to Mitteis, Caracalla's edict abolished the possibility of applying local systems of law, those he deemed 'Volksrecht' ('popular law'), while Schönbauer and Kunkel considered that the edict of Emperor Caracalla conserved the *peregrina civitas*, so that it conferred on the onetime *peregrinus* turned Roman citizen the opportunity, for example, to choose between the two legal systems equally applicable in connection with a particular dispute.

In the light of all these aspects, the question arises: to what measure did the *Constitutio Antoniniana* influence the material and procedural law of the provinces? To what extent could the customs of the inhabitants (the *peregrini*)

be preserved after acquiring Roman citizenship? The study contributed by Tamás Nótári in this issue aims in part to answer this second question, based on the available source material.

3. Historical Context for the Early, High, and Late Middle Ages

With the founding of the western-style Hungarian state (in AD 1000) by King Stephen I of Hungary (997–1038), the Kingdom of Hungary sought to adopt the Western European model of state organization and legal regulation. As a result of this process, its laws were modelled in part on the Roman-German legal system. Consequently, canon law produced its effects especially on the institution of marriage but also on other institutions of family law and testamentary inheritance, as the first study contributed by Mária Homoki-Nagy to this issue of *Acta Universitatis Sapientiae – Legal Studies* attests. Roman law, due to its character of scholarly law, in turn facilitated the modernization of Hungarian private law. *Ius commune* has become such a source of Hungarian private law from which the deciding judge could always take inspiration. In Transylvanian private law, *ius commune* would come to occupy a special place not only for its significance as a source of inspiration but also due to its near-complete adoption by some of the Saxon free cities, as apparent from the study contributed to this issue by Attila Horváth. Institutions of private feudal law began to form already during the time of the kings of the Árpád dynasty. The most significant of its rules were compiled in turn by István Werbőczy in his famous work, *The Tripartitum*, which was to define the rules of Hungarian private law for the next 300 years. All throughout the mediaeval period and even during the Early Modern Age, this source of law would be of paramount importance. Most studies published in this issue will reference its major rules.

In the Middle Ages, most of the European population was forced to organize economically in conditions of self-reliance. Most goods produced in such circumstances were usually of inferior quality but cost very little to manufacture. Commercial exchange, trade was an almost exceptional phenomenon. People were producing only what they themselves also consumed. The artisan who strove to increase his profit was exceptional; this behaviour ran contrary to mediaeval ethics. For these reasons, people rarely needed or used money. Agriculture was considered to be the only reliable source of income. Estates were constant in their extent, the main mode of their acquisition not being enterprise but more usually merit earned in battle. Therefore, any gain of wealth was considered possible only to the detriment of another. Borrowing of money would take place only subsequent upon absolutely exceptional situations: disasters, poor harvests,

wars, etc. Those who by speculation profited from such situations and acted in their selfish interest risked not only moral condemnation but also criminal conviction. Therefore, private law, especially in the Early Middle Ages, was mostly unconcerned with relationships of trade, limiting itself to the regulation of real property and obligations pertinent to its transfer.

In the economic-political system based on land ownership, the priesthood, the leadership of the military, and the officials of public administration were composed almost exclusively of members of the nobility as well as of other notables, who were not regularly remunerated for the exercise of these functions but instead ensured their existence from the emoluments of their own estates. Thus, public service was possible due to the estates donated by the king, and the remuneration of the service was also made by granting of domains, and not in monetary form. The social structure apparently remained completely unchanged during the Middle Ages. Thus, the main purpose of the legal system was not to ensure the security of contract and other civil law relations but to preserve the function of landed property and to regulate the behaviour of subjects in relation to this form of land ownership. The property and power structure resulting from this state of affairs, including what concerns the exercise of legal capacity and inheritance rights, is analysed in the studies contributed to this issue by Mária Homoki-Nagy as well as Attila Horváth.

The economic development of the Principality of Transylvania was not hindered during the Middle Ages and early modern times by near-constant wars alone but also by the fact that the Ottoman Empire endeavoured to close the access of the Transylvanian economy to the markets of the West. For this reason, the capitalization of agricultural products was hampered. The penury of currency in certain periods was of such extent that grain became the general means of exchange. Landowners paid the salaries of craftsmen, soldiers, and servants in grain.

Until the end of the 18th century, in almost all states of Europe (including in England), one of the most important functions of the institutions of private law was the protection of the interests of the nobility who benefited from inherited wealth, against the competition of upwardly mobile social strata. Most of the rights were based on long-term possession, on the continuation of the exercise of a right for several generations, giving birth to the institutions of feudal property (such as property of the gens) and to institutions formed in the law of obligations to accommodate the little amount of lending that existed (such as the pledge). The dismantling of these institutions was necessary on the path to modernity; the process by which this was achieved through a series of legal reforms in Transylvania is presented in this issue.

Until 1526, the private law of the Principality of Transylvania was based on laws identical to those in force in Hungary, and the trend towards this type of continuity was preserved even later. In spite of the fact that after the Kingdom

of Hungary had been broken up into three segments the legislative power of its Transylvanian part became separate from that of the other remnants of the kingdom (until the adoption of Act VII of 1848 and of Act I of 1848 from Cluj as well as of Act XLIII of 1868), private law continued to be based on identical principles in the two lands of the Crown of Saint Stephen. The science of law and legal life continued to pay attention to the constant development of the law of the other state. Interactions between norms of Hungarian and of other foreign origin and the private law of Transylvania as well as the development of the modern legal environment at the end of the 19th century are some of the objects of analysis in this issue.

References

KISTELEKI, K. 2018. Történeti háttér. In: Veress, Emőd (ed.), *Erdély jogtörténete*. Cluj-Napoca: Forum Iuris. 175–180.

MEZEY, B. 2018. Történeti áttekintés. In: Veress, Emőd (ed.), *Erdély jogtörténete*. Cluj-Napoca: Forum Iuris. 99–111.

SZABÓ, Á.–SZEREDAI, N. 2018. Dacia Provincia. In: Veress, Emőd (ed.), *Erdély jogtörténete*. Cluj-Napoca: Forum Iuris. 29–43.