EVERYDAY LAW IN THE MIDDLE AGES*

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In the spring of 1827, the Hungarian diet debated whether some cities had the right, as they claimed, to tax noblemen. In his capacity as president of the Lower House, the personalis judge, György Mailáth (the younger), summarized the relevant legal arguments.[1] He explained that cities might indeed have royal privileges allowing them to tax nobles, but that these carried no legal weight insofar as they were prejudicial to previously established rights. This was a fair point and it comported with Werbőczy's discussion in the *Tripartitum* on the restrictions that applied more generally to privileges.[2] Mailáth went on—some cities claimed a right deriving from practice that permitted them to tax noblemen. In Mailáth's opinion, however, a practice could not prevail unless it was rooted in law and accorded with 'the positive laws of the country', by which he meant the kingdom's written statutes. In support of his contention he referred the Lower House to the laws of 1647, 1723 and 1741, as well as to Werbőczy's celebrated *primae nonus*, which had declared noblemen free from all imposts.

Mailáth was on less certain ground here, for Werbőczy had been emphatic that practice might indeed have a derogatory power, since, as Werbőczy explained, 'real and continuous use often invalidates a law.'[3] Nevertheless,

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1 *Diarium Comitiorum Regni Hungariae*, vol. V (Bratislava, 1825–1827), 447.

2 *Tripartitum opus iuris consuetudinarii inclyti regni Hungariae per Stephanum de Werbewcz editum* (Vienna, 1517, hereafter, Trip.), II. 19–12; given with English translation in *Decreta Regni Mediaevalis Hungariae—The Laws of the Medieval Kingdom of Hungary*, ed. János M. Bak et al., vols I–V (Budapest, Los Angeles, Salt Lake City, Idyllwild, CA, 1989–2012, hereafter DRMH), V, 236–243.

3 Trip., II. 2 [9] (DRMH, V, 228–9). See also Trip., II. 12. [9] (DRMH, V, 242–243).

Mailáth's observation was typical of a generation that considered the written law to consist of a series of commands that hemmed in and directed both society and the ruler. Throughout the course of the diet of 1825–27 a committee under the chairmanship of Anton Cziráky busied away with the work begun in the 1790s to review and unite all Hungarian law in a ten-part code which would then obtain the legislative sanction of the diet.[4] The very reason, however, for the committee's labour shows the difficulty of Mailáth's contention that rights and practices needed to be grounded in statute, for it was the opaque shambles of the kingdom's written law that had brought the committee into being in the first place. The *Corpus Juris Hungarici*, which allegedly contained Hungary's statute law, was a mishmash of omissions, accretions and misprints. It was estimated at the time that it contained no less than 13 000 individual errors, including even the length of the bar which determined the kingdom's scheme of measurement, and much of its content was otherwise disputed or deemed no longer relevant.[5] Until it was reformed, the kingdom's statute law was inadequate for unravelling the complexity of rival and interlocking rights that provided the grounds for most litigation.

The written law was even more uncertain and unstable in the Middle Ages. The kingdom's statutes or *decreta* constituted treaties between the king and his noble subjects, and much of their content was of only fleeting significance. The texts of the laws were often also garbled in their transmission. Some statutes were lost while others had been inadequately circulated on account of the cost of copying. The efficacy of the written law was, moreover, contested, for only those laws which had passed into customary use were considered to retain authority.[6] For this reason, courts in passing judgment seldom referred back to statutory provision, but appealed instead to a more general customary law of the realm.

The customary law of the kingdom was, however, equally indeterminate. Customary law was what the courts said it to be and it was thus determined by the judges and assessors who sat together to make judgments. Even in the higher courts, most of these were illiterate and had to be guided by the case managers or protonotaries.[7] The protonotaries could at least read and they knew from experience what the content of the law might be thought to be. We will therefore find appeals to customary law which fit in with the general pattern of judgments and

4 *Acta Comitiorum Regni Hungariae* (Bratislava, 1825–1828), 63–66.

5 Éva V. Windisch, *Kovachich Márton György, a forráskutató* (Budapest, 1998), 184.

6 György Bónis, "Einleitung," in *Decreta Regni Hungariae, Gesetze und Verordnungen Ungarns 1301–1457*, ed. Ferenc Döry, György Bónis and Vera Bácskai (Budapest, 1976), 9–37 (25).

7 1500: 11 (DRMH, IV, 144–145).

with the way in which we know the courts conducted their business. We may consider these to be settled norms. Many of these touched upon procedure, such as the mode of summons, the performance of inquests and the manner of taking oaths, which being rooted in Romano-canonical practice and reiterated in the texts of formularies, remained consistent over time.[8] Some elements of the substantive law can also be shown to have been fixed in common observance and to be regularly advertised by the courts as customary—thus, for instance, the period of limitation in respect of noble property, which was regularly put by the courts at about three decades—either thirty or thirty-two years (opinion differed on the precise number of years).[9]

In other matters, however, we will note slippage and far less certainty. The daughters' quarter, being the goods given to girls on the death of their father, was notoriously unstable. Some courts deemed it the rule that the goods be given in land; others that the daughters might only receive cash and movables. Even so, statements regarding the way the daughters were in individual instances to be paid off were invariably accompanied by reference to custom of the realm—possibly as a deliberate ploy intended to make up for the gap in the established law.[10] In other areas there was also indeterminacy and flux. The right of pre-emption belonging to neighbours was regularly described in the Middle Ages as customary, but from the mid-fifteenth century it plainly fell into desuetude, seldom featuring in charters.[11] On one occasion, it was noted as uncertain whether a practice was custom of the realm or simply a local custom.[12] On others, a custom might be invoked that was not customary at all or a new practice justified as customary.[13] Vice-versa, it might be that practices

[8] *Anjou-kori oklevéltár*, ed. Gyula Kristó et al., in progress (Budapest and Szeged, 1990 etc., hereafter, A-k. Okl). IV, no 658; A-k. Okl., IX, no 28; A-k. Okl, XX, no 69; A-k. Okl., XXVI, no 160; *Hazai okmánytár*, ed. Imre Nagy et al., vols I–VIII (Győr and Budapest, 1865–1891, hereafter, HO), VII, 457–8; *Árpádkori új okmánytár*, ed. Gusztáv Wenzel, vols I–XII (Pest, 1860–1874), V, 230.

[9] *Codex Diplomaticus Hungariae ecclesiasticus et civilis*, ed. Georgius Fejér, vols I–XI in 44 parts (Buda, 1829–1844, hereafter CD), IX/2, 94; CD, IX/3, 42.

[10] A-k. Okl., VIII, no 48; A-k. Okl., IX, nos 62, 535; A-k. Okl. XXIII, nos 19, 120, 230, 388. The relevant literature is indicated in Martyn Rady, *Customary Law in Hungary: Courts, Texts and the Tripartitum* (Oxford, 2015), 91–93.

[11] Alajos Degré, "A szomszédok öröklése és a szomszédi elővásárlási jog kialakulása," in Degré, *Válogatott jogtörténeti tanulmányok* (Budapest, 2004), 299–311.

[12] A-k. Okl, XXIII, no 315.

[13] *Monumenta Ecclesiae Strigoniensis*, ed. Nándor Knauz and Lajos Dedek, vols I–III (Esztergom, 1874–1924), II, 624 (1310), in respect of conditions restricting the subsequent alienation of inherited movables (in this case, bonded servants). See also CD, X/6, 967 (1418) where, by buying up vineyards and houses in Bratislava, the local chapter was accused by Sigismund of *novam consuetudinem inducentes, quam pro vestra lege servare velletis*.

which were widely followed were never described as belonging to the kingdom's customary law.[14]

All of this is to be expected in customary regimes. When practices change, so will the understanding of what constitutes custom. By the same token, practices may become so routinized that describing them as customary seems otiose, or they may fall into disuse. The instability of the law was, however, compounded by the failure of the courts to adopt methods that lent consistency to judgments. Yearbooks and case reporting were unknown in Hungary, so the lawyerly conversion of the customary law into something approaching the English Common Law did not happen. Werbőczy might well write that Hungary's customary law partly had its origin in 'the verdicts of judges and in repeated letters of adjudication',[15] but there was neither a tradition of reporting repetitive determinations nor a mechanism for disseminating judgments. Much depended on what those attending court chose to recall—so much so that Matthias Corvinus pressed for courts to meet frequently lest their accumulated knowledge be forgotten.[16] Right through to the twentieth century, Hungarian lawyers would rue the failure of the judiciary to develop case law.[17]

For all its imprecision, customary law did have some benefits. The archaizing aspect of customary law, evident in its appeal to past conduct, permitted assemblies a *de facto* legislative capacity. By reference to customary practice, their spokesmen could claim that they were not making law at all but only putting forward ancient rights for confirmation.[18] In 1451, for instance, an assembly of Székelys in Târgu Mureș recommended to the royal judges-delegate that the existing regulations on inheritance which applied to their community be brought into line with 'the praiseworthy law of all the Székelys and the custom as observed of old.'[19] The rules relating to fines and penalties in force among the Romanian nobles of Făgăraș were in 1508 similarly determined by an assembly whose members impressed upon the local castellan that they originated in customary observance – *prius erat consuetudo*, *ante erat consuetum*, *consuetum erat prius*, and so on.[20]

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[14] István Tringli, "A magyar szokásjog a malomépitésről," *Analecta Mediaevalia 1*, ed. Tibor Neumann (Budapest, 2001): 251–268 (259).

[15] Trip., II. 6 [11] (DRMH, V, 234–5).

[16] György Bónis, *Középkori jogunk elemei* (Budapest, 1972), 161, 225.

[17] Gusztáv Schwarz, *Magánjogunk felépitése* (Budapest, 1893), 18–23; Bernát Besnyő, *Szászy-Schwarz Gusztáv emlékezete* (Budapest, 1933), 31–2; Ernő Wittmann, *Tanulmányok az angol magánjog köréből*, (Budapest, 1907), 5–14, 44–45.

[18] See here more generally, Simon Teuscher, *Lords' Rights and Peasant Stories: Writing and the Formation of Tradition in the Later Middle Ages* (Philadelphia, 2012), 151–64.

[19] *Hunyadiak kora Magyarországon*, ed. Jozsef Teleki, vol. X (Pest, 1853), 301–302.

[20] *Corpus Statutorum Hungariae Municipalium* (*A magyar törvényhatóságok jogszabályainak gyüjteménye*), ed. Sándor Kolosvári and Kelemen Óvári, vol. I (Budapest, 1885), 169.

By the same token, appeals to customary law were often made to lend legitimacy to judgments that were expedient or equitable but that otherwise had no legal justification. On occasions, we will find some very unusual decisions being described as being in accordance with the customary law—that in cases of violence where the litigants were not of the same sex, capital sentence was always commuted to a cash payment, or that a matter that had gone to arbitration could not be heard in the Curia courts.[21] We might even aver that the more the court appealed to custom, the less likely it was that its judgment coincided with established norms of adjudication. A plainly political judgment from the 1360s, delivered by the ban of Croatia, was thus mischievously described as consonant with both 'the custom of the kingdom of Hungary … and the established law of the kingdom of Croatia as communicated by the judges and nobles of the realm of Croatia sitting with us.'[22]

Examination of specific instances in which custom of the realm was invoked in the course of litigation suggests the extent to which reference to it was used for rhetorical effect. Appeal was made to custom of the realm on forty separate occasions in legal correspondence relating to Timiș County between 1400 and 1470. Eight of these occasions related to procedure (the manner of performing an inquest, instituting to property, estimating the value of an estate, making a will, and so on). Eleven concerned the rights belonging to widows, daughters and minors—in particular matters of dower and of the grant of the quarter to female successors. On no fewer than fifteen occasions, however, the term was used in connection with the royal sequestration of noble property on grounds of perfidy (*infidelitas*), of death without male heirs, or of the illegal conversion of royal land into private property.[23] Of course, this is a small sample. It is nevertheless suggestive of the way custom of the realm might be invoked in litigation to reinforce, on the one hand, the rights of the vulnerable and, on the other, to justify the crown's seizure of private property. In this respect, appeals to custom of the realm constituted part of an officializing strategy, designed to

[21] Magyar Nemzeti Levéltar, Országos Levéltar (hereafter MNL OL), DL 29920; MNL OL DL 30266. It would make sense that arbitration should conclude a suit, but plainly it might not. See Tibor Neumann, *Bereg megye hatóságának oklevelei (1299–1526)* (Nyiregyháza, 2006), nos 252, 259.

[22] Lajos Thallóczy and Sándor Horváth, *Alsó-szlavóniai okmánytár* (Budapest, 1912), 69–75.

[23] Tivadar Ortvay and Frigyes Pesty, *Oklevelek Temesvármegye* és *Temesvárváros történetéhez*, vol. I: *1183–1430* (Bratislava, 1896); Frigyes Pesty, Livia Magina and Adrian Magina, *Diplome privind istoria comitatului Timiș* și *a orașului Timișoara – Oklevelek Temesvármegye* és *Temesvár város történetéhez*, vol. II: *1430–1470* (Cluj-Napoca, 2014). We omit from our count textual duplications relating to the same action. The remaining references deal with ecclesiastical exemptions, the right of peasants to move, grant of *ius sanguinis*, and so on.

lend legitimacy to a judgment in circumstances where the judgment might be either disregarded or politically contested.[24]

Juristic opinion worked from the assumption that there was a customary law and that it was both consistent and discernible. On this account, jurists and others believed that the customary law was capable of being ordered and codified as the hitherto 'unwritten' book of the law—hence Wladislas II's commission to Werbőczy to put into writing the kingdom's customary law.[25] In Hungary, however, the customary law to which the jurists appealed did not comprise a coherent body of concrete propositions. It constituted some customary rules, many of which altered according to time, circumstance, and the mood of the courts. In this respect, there was not a customary law or *Gewohnheitsrecht* in Hungary, but separate, and often fleeting and dissonant, legal customs or *Rechtsgewohnheiten*.[26] Even after publication of the *Tripartitum* in 1517, this circumstance persisted. Werbőczy's *Tripartitum* standardized only a part of what was now understood to be the customary law, while sections of its text were ignored by the courts in favour of competing practices. Moreover, since it was believed that Hungarian law rested on custom, legislative acts and court judgments that aimed to fill the gaps in legal provision depended for their efficacy on the degree to which they passed into actual practice.

Although courts might appeal to the customary law in support of their judgments, they mostly adjudicated by reference to a quite separate legal scheme, which had little to do with customary law or even legal customs. The predominant term used by the courts in determining suits was *ius*, meaning a right, and it was usually rendered in its concretized ablative form. Behind its use was the supposition that groups, communities and individuals were possessed of rights and that their deprivation without good cause was mostly unlawful. The idea of *ius* as the bedrock of the legal structure is amply demonstrated in the texts of (mostly royal) charters. In their arengas, these often repeated the Roman Law adage that justice was about giving everyone the right that was their due (*ius suum cuique tribuens*). In chancellery practice, however, the notion of a general right was rendered less abstract and replaced by reference to the maintenance of rights already conferred—hence it was the obligation of royal majesty *cuique*

[24] On the hopelessness of trying to reconstruct the late medieval law from the pronouncements of courts, see more generally Karl Kroeschell, *Deutsche Rechtsgeschichte 2 (1250–1450)* (Reinbek bei Hamburg, 1973), 125. Repeated in 9th ed. (Cologne, Weimar and Vienna, 2008), 129.

[25] Teuscher, *Lords' Rights and Peasant Stories*, 57–58. The text of the royal commission to Werbőczy is given in DRMH, V, 5–11.

[26] This circumstance was hardly unique to Hungary. See Martin Pilch, "Rechtsgewohnheiten aus rechtshistorische und rechtstheoretischer Perspective," *Rechtsgeschichte* 17 (2010): 17–39.

iura integra conservare, or to ensure that *suum cuique ius salvum maneat*.[27] In an illuminating passage that was repeated on a number of occasions in the late thirteenth century, 'Equity exhorts and justice requires that whatever is given to anyone for just and lawful reasons should be maintained forever whole.'[28]

Ius operated the other way round as well. Since rulers had no idea what lands they owned, they frequently allocated property that belonged to others, mistakenly believing it to pertain to the royal fisc. Kings were, nevertheless, aware that mishaps of this sort might occur. Royal charters of conveyance thus invariably had attached to the eschatocol, *salvo iure alieno*, 'saving the rights of others'. If it was shown that the royal award infringed another's right of possession, then it voided the king's gift. The anterior rights of the possessor thus trumped the rights of the latest beneficiary of the royal grace.[29] It was to this principle that György Mailáth appealed in 1827—cities might have royal charters that allowed them the right to tax noblemen, but since this right had been conveyed to the detriment of pre-existing right holders, it had no force.

If no one's rights could be shown to be at stake, then it was possible for courts and litigants to be inventive. In 1632 the widow Galia asked the court of the castle and district of Făgăraş to allow her to pass on her property to her two daughters. She appealed to the 'old practice and privilege of this country', which, as she explained, entitled her to leave her goods to her daughters. Galia's was another officializing discourse, which was intended to lend authority to a transaction that otherwise existed in a legal void. The court played along, approving her plea as being in accordance with the 'manner and custom of the land of Făgăraş'. More important from the court's point-of-view, however, was the fact that nobody's rights had been harmed and, as the court took pains to point out, that none had objected when its judgment had been publicly proclaimed at three of its sessions.[30]

Ius, therefore, became the issue upon which the courts focused—whether by pursuing a certain course the rights of others were impaired and, in the event that they were, which rights were the more grounded and, therefore, the more

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[27] CD, III/1, 400; Jenő Házi, *Sopron szabad királyi város története*, vol. I, part 7 (Sopron, 1929), 162.

[28] *Oklevéltár a Tomaj nemzetségbeli losonczi Bánffy család történetéhez*, ed. Elemér Varjú, vol. I (Budapest, 1908), 35. See also CD, VI/2, 58; HO, IV, 44; *Az Árpád-házi királyok okleveleinek kritikai jegyzéke*, ed. Imre Szentpétery and Iván Borsa, vols I–II (Budapest, 1923–87), II, no 4113.

[29] Discussed in Trip., II. 9 [2] (DRMH, V, 236–237). On the origin of this phrase, see Gerhard Baaken, "Salvo mandato et ordinatione nostra. Zur Rechtsgeschichte des Privilegs in spätstaufischen Zeit," *Zeitschrift für Württembergische Landesgeschichte* 40 (1989): 11–33.

[30] Magyar Tudományos Akadémia, Könyvtár, fond Veress Endre, MSS, 451, Boeri, fols 47–48 (original in Gyulafehérvári Káptalan Országos Levéltára, F 2 Protocolla, vol. XVII, fols 253–255). I am grateful to Livia Magina for sending me a transcription of this judgment.

efficacious. Some cases could be resolved straightforwardly—land had been illegally occupied to the detriment of the owner's rights and the nobleman in possession could not justify his presence, or a new mill had been built whose weir flooded farmland upstream. Other cases often, however, proved difficult to resolve. Contending rights were advanced; boundaries, leases and descents had all to be examined; much paperwork was produced, and the opportunistic claims raised by newcomers needed to be determined. The normal routine was for the courts to identify whose rights might be supported by relevant evidence and eliminate the parties whose claims could not be justified. At this point, with the case reduced to manageable proportions and the points of contention established, the parties would often go to arbitration. The arbitrators would usually render a judgment which was not legally principled but instead a midway position between the competing rights of the litigants. The arbitrators' decision was then communicated to the court. In this respect, litigation in court and arbitration were part of the same judicial process.

Contending rights might thus be reconciled in the interests of social cohesion. Likewise, noblemen might agree to adjust their rights to property in their own mutual interest. All the textbooks will tell us that property passed through the male line unless a royal charter affirming the right of females to inherit had been obtained. Noblemen from the same kindred might, nevertheless, agree among themselves to permit female inheritance. They thus established over time a practice, which acquired legal authority irrespective of whether it had received royal sanction. In the early 1520s, therefore, one branch of the Gyakfalvai family of Ugoča County expired without sons, and collateral heirs related through the maternal side laid claim to the estate. To test their rights, the palatine ordered an inquest to establish whether the estate might pass down through the female line. His interest was not whether the Gyakfalvai had a privilege permitting female descent but instead whether or not the neighbours would affirm that there was a tradition within the family of daughters' inheritance. Had there been such, it would have overturned the more general, customary right of male succession through collaterals.[31]

An analogous case occurred several centuries later in respect of the Haller family's estates in Transylvania. Barbara Haller contested her brother's right to inherit the family's estate, claiming that portions of it were assigned to the female line. The case, which lasted 25 years, revolved around the inspection of descents in regard to the individual parts of the estate to see whether female succession had been practised at any time over the previous 400 years and,

[31] Norbert C. Tóth, *Ugocsa megye hatóságának oklevelei (1290–1526)* (Budapest, 2006), nos 143, 145.

if so, in relation to which properties.[32] In much the same fashion, the right belonging to the Tybold family to succession through the female line was considered, when it came to court, to depend not on a royal privilege but on the frequency with which daughters had previously inherited portions of the estate. Documents several centuries old were pored over in court for instances of female succession.[33]

By at least the eighteenth century, an adage had passed into Hungarian legal parlance, which amply demonstrates the way that rights might be negotiated to construct a new legal norm between the parties. The tag—*Contractus contrahentibus ponit legem*—looks Romanist but is almost certainly not.[34] We can interpret contract in a number of ways, but for our purposes there are two that are particularly relevant—first, as a *contractus* meaning a mutual inheritance pact, and, secondly, as a commercial exchange. *Contractus* was the term usually employed in late medieval Hungary for agreements whereby families adopted each other as heirs of last resort.[35] So, if one family expired through lack of male successors, the other inherited the estate. Since the royal fisc would otherwise obtain the land of an heirless man, it made sense to have the deal approved by the king. Much of the time, however, the parties did not bother to obtain this, reckoning instead their mutual agreement sufficient. They had coordinated their *iura* and that was enough to validate the *contractus* and, indeed, to permit *post-mortem* possession.[36]

In respect of commercial transactions, similar considerations applied. According to what was always declared to be customary, the alienation of inherited estate required the consent of kinsmen since, as potential heirs, they were deemed to have an active and concurrent legal interest. If they objected, then the alienation was void. There were ways round this obstacle, but in the case of commercial contracts even these were thought to be unnecessary.[37] A nobleman might thus put up his property as security on a loan without

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[32] Serviciul Judeţean al Arhivelor Naţionale, Sibiu, Colecţia Brukenthal, Q1–4, no 209.

[33] Magyar Nemzeti Levéltar, Országos Levéltar, E 14 *Acta Hungarica*, vol. 4, 365–406.

[34] The history of this adage would be worth investigating. It is sometimes erroneously ascribed to Papinian (Dig. 16. 3. 24). It is variously quoted only by Central European authors, mostly Hungarian, but also Serbian and Croatian, and it is always described as being of Romanist provenance. There may be some muddling with Dig. 16. 3. 1 (6): *Contractus legem ex conventione accipiunt*.

[35] See thus Trip. I. 66 (DRMH, V, 142–143).

[36] See thus HO, III, 256–8. See further HO, IV, 245–6; HO, V, p. 286–268; *Zsigmondkori oklevéltár*, vol. X, ed. Norbert C. Tóth (Budapest, 2007), no 226.

[37] For the *assumptio* device and its use in accomplishing the alienation of inherited land, see Martyn Rady, "Warranty and Surety in Medieval Hungarian Land Law," *Journal of Legal History* 23 (2002): 23–36 (31–32).

obtaining his relatives' agreement. If he defaulted on the repayments, then the lender took possession. So, in 1451, John Perényi pledged his palace in Buda to the Jew Farkas, for the trivial sum of thirty-two florins with accrued interest. Perényi had inherited the palace, but he did not obtain his relatives' consent to the contract. Indeed, his own kinsman, the Magister Tavernicorum, officially recorded the transaction, promising that he would instruct a bailiff to see to Farkas's institution to the property in the event that the loan was not discharged.[38]

Ius and *iura* prevailed. By the negotiation of rights, parties could create their own separate legal spheres that were determined by agreed rules. These new rules might even set aside some of the customary laws of the kingdom, including ones that otherwise appear to be the bedrock of the legal order. All this seems shocking, but only because we have been educated to see the law in the same way as György Mailáth. The positivist, monistic concept of the law conceives of the law as an expression of state power, imposed from above, uniform in its application, and distinguished by its universal, written dissemination. In respect of the Middle Ages, we should probably think of the law in more plural terms—as norms proceeding out of agreements about rights, settled at various levels, but in the manner of 'a plethora of seemingly incompatible things that can count as law.'[39]

DREPTUL COTIDIAN ÎN EVUL MEDIU

Rezumat

În Evul Mediu, instanțele au avut puține lucruri la dispoziție pentru a se ghida în luarea deciziilor. Legea scrisă a fost subțire, iar dreptul cutumiar instabil. Atunci când instanțele se refereau la dreptul cutumiar, de cele mai multe ori au făcut acest lucru pentru un efect retoric, emițând judecăți ce erau de folos ori echitabile dar considerate având rădăcini în dreptul cutumiar. Prin apel la legea cutumiară, adunările au putut acționa, de asemenea, într-o formulă legislativă, avansând propuneri de drept obișnuielnic ce urmau a fi confirmate. Pentru a emite decizii, curțile de judecată au apelat de multe ori fie la echilibrarea drepturilor sau *iura* ale părților, fie au luat o poziție de mijloc între revendicările respective și stabilirea vechimii unor drepturi care, în acest sens, ofereau prioritate. Dar, se putea, de

[38] *Magyar-Zsidó oklevéltár*, ed. Fülöp Grünvald and Sándor Scheiber, vol. V, part 1 (Budapest, 1959), 50–51; András Végh, *Buda város középkori helyrajza*, vol. I (Budapest, 2006), 295. For a similar case, involving nobles, where the rights of kinsmen were set aside in favour of the dead man's creditors, see Imre Nagy, *A Pécz nemzetség örökösödési pere 1425–1433* (Budapest, 1892), 28–49.

[39] Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Farnham and Burlington, VT, 2009), 47.

asemenea, ca litiganții să ajungă la un acord între ei și să adapteze dreptul în interesul reciproc, creându-se astfel o sferă juridică separată, care funcționa în afara convențiilor cutumiare normale. Pentru a înțelege modul în care a funcționat dreptul medieval, istoricii ar trebui să renunțe la viziunea pozitivistă asupra dreptului, văzut ca ceva transmis de sus, iar în loc de asta să gândească asupra normelor ce decurg din înțelegerile cu privire la drepturi, stabilite la diferite niveluri, dar asta în maniera „unei serii de lucruri aparent incompatibile care pot conta ca lege".