BETWEEN LAW AND CUSTOM: LEGAL NORMS AND PRACTICES IN ROMANIAN COMMUNITIES IN MEDIEVAL AND EARLY MODERN BANAT[*]

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An ordinary document from 1579, issued by the authorities of Severin County, brings to the fore the seizure of some goods in the area of Caransebeș. The nobleman John Gaman, by virtue of his neighbourhood and kinship, collected from John Josika a pledge of 190 florins that he had held for several years from the nobleman Balthasar Csulay. That member of the Gaman family wished to take possession of the property in question on the basis of an established formula, i.e. according to the law of the kingdom (*iuxta legem regni*).[1] This seemingly common and unimportant mention made me wonder: what kind of kingdom law is referred to in the text, knowing that in that mountainous area of Banat the so-called Romanian customary law had been in use since the Middle Ages? Moreover, what was the legal practice of the Romanian communities in Banat in the early modern period (16th–17th centuries)?

A border province of the medieval Hungarian kingdom, the territory between the Mures-Danube-Tisza and the Carpathians preserved a series of specific legal practices and rules until its total integration under the Ottomans in mid–17th century. The current name of the province, Banat/Bánság/Банат, was established in the 18th century and was promoted especially after the

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[1] Published in Adrian Magina, "Pledges and debts. Prices of goods in the Banat of the 16th–17th centuries," *Banatica* 26 (2016): 393 and also in Costin Feneşan, *Diplomatarium Banaticum* II (Cluj-Napoca: Mega, 2017), 92–94 (with Romanian translation)

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integration into the Habsburg Empire after 1718. In medieval times, the generic name of the area was the lower parts (*partes inferiores regni Hungariae*) or between Timiș rivers/Timișana (Temesköz), the latter referring mainly to the plain area crossed by the Timiș and Bega rivers (Timișul Mic/Kys Temes).[2] Administratively, this area was divided between the counties of Arad, Cenad, Timiș, Torontal and, for a short time, Keve/Cuvin. The eastern part of the province, mountainous and more difficult to access, was organised in the form of a border region known as Banat of Severin.[3]

In the 16th century, the political situation of the Hungarian kingdom changed under increasing pressure from the Ottoman Empire. The Turkish advance into the Hungarian realm had unfavourable consequences, especially for the lower parts of the kingdom, which also underwent a series of structural changes. Following a violent campaign in 1552, the Ottomans occupied the towns of Timișoara, Lipova and part of the lowland territories, areas that had belonged to the former counties of Timiș, Torontal, Arad and Cenad. Outside the Ottoman control remained the mountainous and compact Romanian areas near the towns of Caransebeș and Lugoj. After 1552, the upper territory was integrated into the autonomous Principality of Transylvania in the form of the Banat of Caransebeș-Lugoj, in which form it remained until 1658, when the Transylvanian prince Acatius Barcsay, following strong pressure, ceded it to the Ottoman Empire, together with a sum of money and the fortress of Ineu in the county of Zărand.[4]

The mountainous area around Caransebeș and Lugoj, which, as we have seen, remained outside the Ottoman occupation and was integrated for more than a century into the autonomous Principality of Transylvania (1552–1658), had several special characteristics, the most significant of which, perhaps, being ethnically a compact Romanian one. The only non-Romanian communities could be found in the urban area of the two significant centres (Caransebeș and Lugoj), without changing the proportion of the Romanian speaking population in that area. The large share of the Romanian population also influenced legal practice, as the communities in the highland area traditionally used Romanian

[2] For the name of Banat in the Middle Ages see István Petrovics, *A középkori Temesvár. Fejezetek a Bega-parti város1552 előtti* (Szeged, 2008), 21–25 and Zoltán Iusztin, *Politică și administrație în Banatul medieval* (Cluj-Napoca: Academia Română, Centrul de Studii Transilvane, 2018), 33–37.

[3] The administrative organization of the territory between Mures, Danube and Tisa in the medieval period is illustrated by the book of Iusztin, *Politică și administrație*.

[4] For the integration of the territory of Banat into the structures of the Transylvanian Principality see Frigyes Pesty, *A szörényi bánság és Szörény vármegye története*, vol. I (Budapest, 1877), 433–441. The territorial changes of 1658–1660 are documented by Imre Lukinich, *Erdély területi változásai a török hóditás korában 1541–1711* (Budapest, 1918), 322–335.

customary law, the so-called *ius valachicum*. It is precisely from this high area of Banat that most of the testimonies about the use of this customary law in the Middle Ages come, a territory on which I have focused my attention in the following, but for the early modern period (16th–17th centuries).[5]

The use of custom was closely linked to the Romanian districts, territorial entities (appurtenances) of some strongholds, in which local communities enjoyed the privilege of using their own legal rules, the only superior forum of appeal being the king. For the medieval period, the situation is relatively well known in historiography, with numerous studies and articles referring to the case of the Banat region.[6] In two different studies, one published in the volume coordinated by Professor Martyn Rady in 2013[7] and the other published in 2019[8], I analysed the use of Romanian customary law in the highland communities of the province of Banat and its impact on society, with particular reference to the medieval period. *Ius valachicum*, as mentioned in the documents, was used in cases of criminal, civil or property-related nature, in the latter case benefiting relatives or neighbours, who enjoyed the right of pre-emption in case of sales or purchases. In the Romanian historiography of the communist period, the medieval examples related to the *ius valachicum* come, to a large extent, from the area of Banat.[9]

It should be noted that examples of its use in Banat multiplied exponentially after 1457, when the Romanian districts in the mountainous area of the province obtained the royal privilege confirming their rights. Even if there was a specific legal formula, which the Romanian population of Banat probably used on certain occasions, after the aforementioned royal privilege this usage gained official recognition and a pre-eminent position in legal disputes in the Romanian communities.[10]

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[5] Ioan Aurel Pop, "Judecăţi după „Dreptul Ţării Româneşti în Banat," in *Vilaetul Timişoarei* (*450* de *ani* de *la întemeierea paşalâcului*) *1552–2002* (Timişoara, 2002), 27–33.

[6] A good example is Goerghe Ciulei, Gheorghe G. Ciulei, *Dreptul românesc în Banatul medieval* (Reşiţa, 1997).

[7] A. Magina, "From Custom to Written Law: Ius Valachicum in the Banat," in Martyn Rady, Alexandru Simon, eds. *Government and law in medieval Moldavia, Transylvania and Wallachia* (UCL SSEES: London, 2013), 71–77.

[8] A. Magina, "Universitas Valachorum. Privilege and Community in the medieval Banat," in *Reform and Renewal in Medieval East and Central Europe: Politics, Law and Society*, edited by Suzana Miljan, Éva B. Halász, Alexandru Simon (Cluj-Napoca – Zagreb – London, 2019), 493–502.

[9] It suffices to open the book of Ştefan Pascu, *Voievodatul Transilvanei*, vol. IV (Cluj-Napoca: Dacia, 1989), 192–195, to see the multitude of examples from Banat in the research on the old Romanian law in the medieval Hungarian kingdom.

[10] For instance, is a document from the end of the 14th century in which the cnez Bogdan from

Essentially, Romanian customary law involved oral testimony before representatives of both sides or officials. Oral testimony, reinforced by an oath on the cross or the relics of saints, was crucial. Anyone who refused to testify before the officials, or refused to take the oath, was considered guilty. A simple oath could instead exonerate someone, even if there were indications that they were guilty. Another aspect of the procedure in the *ius valachicum*, but common throughout the kingdom, involved the presence of witnesses to certify whether or not someone was guilty.[11]

In previously published studies, based on late examples from the 16th–17th centuries, I considered that this type of law survived into the early modern period, more precisely until 1658, when Upper Banat fell to the Turks. The question is: how long did this customary law survive and how was it integrated into the official legal norms of the time?

The 1579 document, mentioned at the beginning of this study, does not distinguish between the two levels of legislation in use: the kingdoms official one and the other at the local level, the custom, which in one form or another overlapped. It is clear that Romanian law was influenced in several aspects by the official or customary law used throughout the Hungarian kingdom. In some respects, the two customary laws (Hungarian and Romanian) simply overlapped because, in essence, their origins were the same in Roman law.[12]

After the devastating Ottoman impact in the 16th century, which led to the dissolution of the medieval Hungarian kingdom after 1526, the autonomous Principality of Transylvania and western (Habsburg) Hungary were the areas that perpetuated the previous legal tradition. Even though there was continuity in the use of customary law inspired by István Werböczy's Tripartite, the elements of modernity in Transylvanian society also brought changes in legal perception.

In this sense, in terms of legislation, the modernization of society was also reflected in the banat of Caransebeș and Lugoj with the introduction of new norms and procedures, in line with those already used in the Principality of Transylvania. The legislation of the country's assemblies, summarised in the 17th century in *Approbatae Constitutiones* and *Compilatae Constitutiones*,

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the district of Cuiești (today Bocșa, Caraș-Severin County) requested that one of his men be judged according to Romanian law (*iuxta legem Olachorum*) – *Documenta historiam Valachorum in Hungaria illustrantiam*, ed. Antonius Fekete Nagy, Ladislaus Makkai (Budapest, 1941), 400–401.

11 Ciulei, Ciulei, *Dreptul românesc*. The mechanisms of customary law in the Romanian communities, including Wallachia and Moldavia, are well illustrated in Vladimir Hanga, *Les institutions du droit coutumier roumain* (București: Editura Academiei Republicii Socialiste România, 1988).

12 Pop, "Judedecăți," 31.

increasingly made its presence more and more visible in judicial practice in the Banat of Caransebeș and Lugoj. The enforcing of Transylvanian legislation was achieved in two ways: on the one hand it was taken up organically by the Banat officials, on the other hand there was pressure from the Transylvanian princes for the administrative authorities in Severin County to use the legislation adopted in the Diet. A such example can be found in a document of Prince Sigismund Báthori from the end of the 16th century. Addressed to the local authorities of Severin County, the document requested that a cause between two nobles "be debated without delay according to the decisions of the country's Diet and the content of the articles of the assembly".[13] The case is not unique, Transylvanian princes, in texts intended for the area of Banat, have also mentioned on other occasions that the legislation adopted in the country's Diet should be respected. These stipulations indicate that, beyond the official legislation of the Principality, certain traditional judicial procedures of medieval origin remained in use. Some of them can be recognised as based on the tradition of Romanian customary law. While in the 14th–15th centuries we have numerous cases in which the phrase *ius valachicum* is used to indicate the type of customary law used in Romanian communities, in the following centuries there is no such specification. Almost always, reference is made to "the old and recognised custom", "according to the old recognised custom" or "according to the old law of our district", etc., without, however, indicating a direct link with *ius valachicum*.[14]

In the early modern era, official law came to predominate, replacing to a large extent the solutions offered by customary law. If the medieval procedure of the *ius valachicum* accepted oral testimony as the deciding factor, in the 17th century it was the written act that formed the basis of the judicial system. However, oral testimony did not disappear altogether, and it retained its probative value in many trials in the Transylvanian Principality, especially where written evidence did not exist. On the basis of the witness testimonies, the competent authorities then drew up the documents to be submitted to the court. Witnesses' testimonies were used to supplement, support or, on the contrary, refute certain cases brought before the local authorities. In the border area of banat of Caransebeș and Lugoj, it seems that oral depositions have retained as much probative value as in the Middle Ages. Thus, in a trial from 1613, the depositions of six officials from Caransebeș were to be the deciding factor in establishing the guilt or innocence of the former head judge of the town. "If they will testify in favour of the plaintiffs, it's fine, if not, the defendant should

[13] Feneșan, *Documente medievale bănățene (1440–1653)* (Timișoara: Facla, 1981), 65–66.

[14] A. Magina, "Politică și administrație la frontiera sud-vestică a Principatului Transilvaniei. Funcționarea comitatului Severin în secolele XVI–XVII," *Banatica* 32 (2022): 129–132.

be exonerated"[15] is the phrase which, in my opinion, expresses the perpetuation of the old custom inherited from Romanian law, despite the fact that the town protocols, receipts and other fiscal documents were presented as incriminating evidence before the court. In this case, the taking of the oath was unfavourable to the former Caransebeș town judge, who is seriously accused of embezzling funds. But what would have happened if the witnesses were sworn in favour of the accused? The question is, of course, rhetorical, but the consequences of such a gesture would have presented us with an interesting situation regarding the correct application of customary law principles.

The simultaneous use of Diet legislation and Romanian customary tradition has sometimes led to complicated situations. The implementation of the new Transylvanian legal norms sometimes even met with resistance from those involved in the trials. One such testimony comes from 1649, when Grigore Tivadar and his wife Ana Kastrucz declared themselves against the new judicial procedure adopted in Caransebeș, at the local ban tribunal, to the detriment of the old privileges recognized until then. The couple do not accept and do not recognize the new procedure, which, in their opinion, would be prejudicial to them and would violate the old laws, usages and customs (*antiquis ipsorum legibus, usibus, consuetudinibus*).[16] It is an unusual stance, a member of the elite disagreeing with a collective decision of the urban authorities and the county of Severin. The call to respect the old customs seems to have been dictated by the considerations of the moment, by the lawsuits in which the nobleman from Banat had been involved, lawsuits that could have been lost by the new judicial customs coming into force. Also, an element of medieval tradition, also used in the *ius valachicum*, was the summoning of three judges. It is not a procedure typical of the Romanian communities, being a common practice throughout the Hungarian kingdom. The person who did not show up at these court hearings was declared the defeated party, even though the opponent may not have brought any evidence to support his case. This procedure was used when a pledge, sale/purchase or other legal act was issued. Often this document was not considered valid unless it had gone through the three calls to court and no one objected or disagreed.

Although it complied with all the formal aspects, the document issued by the authorities did not have legal value unless it went through the three-judge procedure. If the decision was challenged in one of the three instances, the

15 Feneșan, *Documente medievale*, 140.

16 A. Magina, "O sursă pentru istoria Banatului în secolul al XVII-lea: Protocoalele capitlului de la Alba Iulia în Multiculturalism," in *Identitate și Diversitate. Perspective istorice. In honorem prof. univ. dr. Rudolf Gräf la împlinirea vârstei de 60 de ani*, coord. Ioan Marin Balog, Ioan Lumperdean, Loránd Mádly, Dumitru Țeicu (Cluj-Napoca: Mega, 2015), 178–179.

document lost its legal value and a trial was opened to determine the truth. In this sense we must understand the requirement in the document presented at the beginning (that of 1579), whereby a relative (and neighbour) wished to use his right of pre-emption to seize certain properties, which otherwise would have been in the possession of persons outside the circle of kinship or neighbourhood. The day on which the sessions of the court are held in the banat of Caransebeș and Lugoj has also medieval roots, although it is not part of the procedure. Mentioned as such for the first time in the 14th century, the day on which the court met was Thursday (sometimes Friday) for Caransebeș (*szek napian czeterteökön*) and Tuesday for Lugoj.[17] At least in the case of Caransebeș, Thursday overlapped with the towns weekly fair. The custom took root and was perpetuated until the middle of the 17th century, when documents record that meetings were held on Thursdays or Tuesdays according to the old custom of our or the town (*regy dicziretes zokassa zerinth*).[18] It must be said that at least one medieval aspect has survived to this day, namely the functioning of the Caransebeș fair on Thursdays, an everyday reality which, in some cases, can provide a good example of how the functionality of a medieval fair (especially when we talk about the sale of animals) was perpetuated.

In conclusion, it can be considered that in the early modern period, in the highland area of Banat, i.e. the area institutionally overlapped by the banat of Caransebeș and Lugoj, two legal systems were used in parallel: one official, connected to the legislation of the Principality of Transylvania and another customary, originating from the medieval tradition of *ius valachicum.* The two customs complemented each other, managing to coexist until the Ottoman conquest of the Caransebeș and Lugoj in the mid–17th century.

ÎNTRE LEGE ȘI OBICEI: NORME ȘI PRACTICI LEGALE ÎN COMUNITĂȚILE ROMÂNEȘTI DIN BANATUL MEDIEVAL ȘI MODERN TIMPURIU

Rezumat

Banatul este denumirea actuală pentru o zonă cunoscută în epoca medievală drept de jos sau *partes inferiores* ale regatului maghiar, o provincie de frontieră aflată la intersecţia civilizaţiei de tip bizantin cu cea occidentală. Până la integrarea totală în Imperiul Otoman,

[17] For the meeting days of the courts in Caransebeș and Lugoj until the middle of the 16th century, see the numerous examples mentioned by I. A. Pop, *Instituții medievale românești. Adunările cneziale și nobiliare (boierești) în secolele XIV–XVI* (Cluj-Napoca: Dacia, 1991), 130–157.

[18] A. Magina, "At the border of Transylvania: The County of Severin/ district of Caransebeș in the 16th–17th centuries," *Transylvanian Review* XXII, suppl. no. 4 (2013): 301.

la mijlocul secolului al XVII-lea, Banatul a păstrat o serie aparte de practici și reguli juridice. Unele documente din secolele al XVI-lea și al XVII-lea indică faptul că în comunităţile românești din zonă erau folosite în egală măsură atât dreptul scris, cât și dreptul cutumiar. Era o tradiţie medievală, comunităţile românești folosind *ius valachicum*, dar cu puternice influenţe preluate din dreptul cutumiar maghiar. În același timp, românii din Banat au folosit și norme juridice scrise, astfel că în comunităţile din Caransebeș și Lugoj era folosit un sistem juridic dublu. Analiza comparativă a documentelor emise în secolul al XV-lea și la începutul epocii modern timpurii oferă indicii asupra evoluţiei practicii juridice într-o zonă bine definită. Aceste documente ne oferă posibilitatea de a observa cum funcţionau instanţele de judecată (cauzele, și cum erau soluţionate), dar și modul în care cutuma a fost adaptată și integrată într-un sistem juridic scris. Practica a supravieţuit în comunităţile urbane și printre nobilii din Banat până în 1658, când provincia a fost ocupată de otomani.