


Legal Reform Efforts and the Legal Traditions of the Transylvanian Saxons up to the End of the 16th Century

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ABSTRACT

In 1583, the Transylvanian Saxon community obtained from the Transylvanian prince István Báthory the ratification of its own law book, *Eygen-Landrecht*. For quarter of a millennium, the law book essentially defined everyday law in this unique community in Transylvania, a multiethnic region that has undergone many constitutional changes. The law book can be seen as a compilation of genetically different legal regulations, containing and combining indigenous legal traditions and legal customs with the “scholarly” law (*ius commune*) developed by university jurisprudence of Italian origin. The present study describes the Saxons’ determined quest for laws in the 15th and 16th centuries, relegating to the background the reception paradigm typical of research on the history of law and relying on the theoretical model of the transfer of legal rules and legal irritants. It examines the external and internal circumstances that impacted the Saxons’ attempts at legal renewal, and the number of phases involved. It also investigates the temporal, locally bound, and legal-cultural factors that may have played a role in the success or failure of transfer of legal approaches from abroad, and the extent to which what can be regarded as the traditional law of the Saxons was able to resist attempts at renewal. In the last section of the present paper, examples are given that illustrate the encounter between Germanic legal traditions and the transferred *ius commune* solutions in the Saxons’ law book of 1583, highlighting the durability of certain traditional and typical solutions.

KEYWORDS

Transylvanian Saxons, legal transfer, legal irritants, customary law, *ius commune*

It is a well-known fact in the history of law that in 1583 the Transylvanian Saxon community obtained confirmation of its own law book, the *Eygen-Landrecht*, from Prince István Báthory,

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and that for quarter of a millennium the law book essentially determined the everyday legal life of this unique community in Transylvania, a multiethnic region that has undergone many constitutional changes. The law book can be seen as a compilation of genetically different legal rules, containing and combining indigenous legal traditions and legal customs with “scholarly” Roman law, while also revealing (traces of) the influence of certain approaches found in Hungarian nobiliary customary law.

The law book, which was the outcome of the Transylvanian Saxons’ law-summarizing and law-making efforts in the 15th and 16th centuries, can be seen as a unique example of “formal” reception in the history of Hungarian law, which can be ranked among the “great achievements” of Hungarian legal scholarship of the day. In this context, “formal” reception refers to the fact that the law book can be regarded as the only successful attempt to formally recognize Roman (German imperial) law (in a broader sense European *ius commune*¹) as a subsidiary law in the territory of the former Hungary. In other words, at the end of a century that began with the compilation of Hungarian nobiliary private law in Werbőczy’s *Tripartitum*, the “determined legal quest” of the Saxons, whose population at the time numbered a hundred thousand and who had converted to the Lutheran faith in 1540s, culminated in a law book that represented the most important fundamental ideas and efforts towards systematization in European jurisprudence at that time, combining the traditions and achievements of Italian academic jurisprudence, and — to a much smaller extent, of course — legal humanism, with the centuries-old Saxon traditions of customary law.²

Since the reception paradigm long used in legal history research has increasingly been relegated to the background in the modern history of law in recent decades, to be replaced by models referred to as “legal transfer” and “legal transplants,” we will endeavor to describe the Saxons’ quest for law with the help of the transfer approach, which I believe is more appropriate for our purposes.

But can arguments formulated in the context of legal transfers (e.g., the theory of “legal irritants”) really reflect the relatively well known medieval and early modern events in the course of Transylvanian Saxon legal development? What external and internal circumstances influenced the adoption of foreign laws by the Saxons, and how many phases did this involve? What temporal, local, and legal-cultural factors may have played a role in it?

At the same time, it may also be interesting to examine in greater detail — by means of a few examples — the extent to which the legal solutions derived from traditional customs were resistant to these processes, and how certain “Germanic” legal traditions clashed with the

¹The very complex notion of *ius commune* here refers to a body of law that encompassed a set of legal principles, tenets, and values, based on common sources in Europe between the 12th and 18th centuries, and which were also put into practice alongside other local, provincial laws and local customary laws (*ius municipale*, *ius proprium*). It was primarily scholarship — and in some periods the related administration of justice — that played a decisive role in its development. Its source was the medieval legal collections of the Catholic Church (later known as the *Corpus Iuris Canonici*) and the collections of Roman law created on the orders of the Eastern Roman (Byzantine) Emperor Justinian in the 6th century. The latter was known as the *Corpus Iuris* in the 12th century, and as the *Corpus Iuris Civilis* from the 13th century. See [LUIG 2012](#); [LEPSIUS 2012](#).

²On the concept of customary law, see [KRAUSE – KÖBLER 2012](#), and on its relationship to academic law, see [BERGH 1994:11–13](#).



“transplanted” legal solutions in the case of the Saxons (DILCHER 2012; KORPIOLA 2018:411–414; RUSZOLY 2011:25–38).

I will attempt first to briefly outline the theoretical framework of my investigation (I), before surveying certain relevant events in the medieval history of Saxon law (II), while at the same time I will try to connect theory and historical reality in such a way that Saxons’ “traditional” law remains to some extent in the foreground. Finally, I will attempt to illustrate by means of examples the encounter between Germanic legal traditions and the transferred *ius commune* solutions in the Saxons’ law book of 1583, highlighting the endurance of certain traditional approaches (III).

I

In order to acquire a theoretical grasp of the question of legal transfer — by simplifying the multitude of positions presented in the infinitely rich literature — we might use three different semantic models, which can be referred to using the notions of reception, legal transfer, and legal transplants. In the specialist literature, which has expanded enormously in recent decades, significant differences have been elaborated in order to distinguish between these semantic approaches,³ and a preference for one term or the rejection of the other two can be traced back to different starting points and hypotheses.

For the sake of clarity, we must also choose between the models in the present framework. Due to certain shortcomings⁴ in the other two approaches, the legal transfer model (FRANKENBERG 2021; GRAZIADEI 2019) appears to be the most suitable for evaluating the legal processes that took place among the Transylvanian Saxons. The selection of this approach remains valid despite the general acknowledgement in the literature that, since the Middle Ages, the phenomenon of the so-called European reception of Roman law might also be appropriate for emphasizing the inevitable duality between existing legal traditions and transferred law. In relation to reception as a process of social-historical and cultural-historical importance, this also encompasses the question of the confrontation between indigenous, traditional, “Germanic” laws and the foreign, transferred, scholarly legislation that was occasionally imposed on the community by force (STOLLEIS 2012:72–75).

In the present framework, our starting point should be the assumption that the law within a community is (and perhaps was already, even in the Middle Ages) a separate social system with

³On the many differences in terminology, see STOLLEIS 2012:72. To eliminate this diversity, Stolleis proposes the term “transfer of normative orders” (*Transfer normativer Ordnungen*). Ibid. 75.

⁴The older concept of reception has been displaced in the literature, since it generally implies an asymmetric “giver–recipient” relationship that has recently come to be seen as implying a cultural gap between the two parties and as suggesting a unilateral perspective in terms of adoption (STOLLEIS 2012:75; KIEFNER 1990). The concept of “legal transplants” is based on the idea that the insertion of an element into a foreign body should be unproblematic, and thus not influenced by the external factors (temporal, local, and legal-cultural) or “environment.” The differences in social relationships behind the two systems of norms are not sufficiently taken into account in this theory; all that matters is that transplantation, the successful integration of the legal rule into the host legal order, is achieved despite all the differences. According to this attempt at explanation, the law does not respond to or reflect (political, economic, or sociocultural) changes in society (WATSON 1993, 1996). For a criticism of the latter approach. cf. LEGRAND 1997, 2003.



a specific purpose. In order to maintain the community, a separate and specific legal tradition is generally developed, which, however, can be static only in a small number of cases. It must gradually undergo renewal. In some cases, a tradition that was established earlier is able to renew itself, without the need to adopt foreign solutions. Even in this case, of course, the requisite renewal of the given legal system cannot be independent of the environment — that is, of social processes, economic relations, and cultural events. In other cases, the inherent strength of a legal system is not sufficient for it to renew itself and attain its objectives and it becomes necessary to acquire momentum through the transfer of a foreign law. Naturally, these “environmental factors” within the community, which are permanently and structurally connected to the law, can also affect the possibility, success, or failure of the legal transfer. However, legal order in a community, despite its long-term relationship with its environment, may also be subject to random events that affect the existing legal system, setting it in motion and forcing it to reflect in unpredictable ways (FÖGEN – TEUBNER 2005:39).

In light of this, legal transfer can be described as a process by which an existing, traditional legal system that has developed in its own way is confronted with organizational concepts and legal techniques previously unknown or “alien” to it to some extent. The transfer process may be based on long-term or suddenly emerging impulses, disruptive phenomena, and irritants originating from the environment of the given legal system (TEUBNER 1998, 2001). These irritant impulses may stem from politics, the demands of economic life, or even from academia, and may generate demands or bring about changes — considered necessary by those emitting the impulses — that may culminate in the intensive, accelerating development of the given legal system.

Such processes may lead to at least two results: on the one hand, since the law as such tends to be conservative, the old structures may be long-lived and powerful and able to expel any solutions that are foreign to them. On the other hand, irritants can also set a particular legal system in motion by means of alien norms and legal communication — that is, foreign legal norms can be processed and, where possible, integrated. This never happens on a one-to-one basis, of course, since legal norms necessarily undergo changes when transferred from one community to another, or from one era to another. But whatever the outcome of the encounter between the two sets of norms, the failure or success of the legal transfer always depends on the “traditions” of the given legal system: either the old system is strengthened, or it is transformed to some extent. Even in the latter case, since systems tend to move towards a state of equilibrium, the legal system stabilizes after a certain time following the transfer process. At the same time, the movement that takes place before stabilization naturally affects the other systems that make up the legal system’s environment, including society, the economy, and academia, as part of a co-evolutionary process (FÖGEN – TEUBNER 2005).

Below, my aim is to demonstrate the appositeness of this brief and superficially described model in terms of the legal ambitions of the Transylvanian Saxons in the 15th and 16th centuries.

II

We can conjecture that the Germans who settled in Transylvania in the 12th century during the reign of Géza II (*hospites Theutonici*) had a more or less elaborate legal system that was not summarized in writing. Newcomers arriving from different regions of Western Europe



brought with them the laws and customs of their former homelands.⁵ These became customary law once transplanted into Transylvanian life. Royal privileges ensured the much-favored settlers the same or similar rights to those they had enjoyed in their old homes (*iudicium consuetudinarium*).⁶

However, it is safe to assume that, rather than being uniform, the legal practice of these settlers was rather fragmented from community to community, and this situation may have persisted up until the late Middle Ages. It is only from this period that we can presume a certain unification of the Saxons' everyday law. What is certain, however, is that the sometimes convergent and sometimes — despite the gradual development of a uniform supreme jurisdiction — divergent “imported laws” (*consuetudines*) were for a long time sufficient to regulate the lives of the Transylvanian Saxon peasantry, thus a unique legal tradition was consolidated by the legal practice passed on from generation to generation.

Social changes, the emergence of civic, urban strata that were increasingly built onto Saxon peasant society, the appearance of a mercantile-professional patriarchy whose power was consolidated in the second half of the 15th century, and the enforcement of their interests also resulted in a certain degree of change in the applicable law (KŐPECZI 1989:228–233; SZÜCS 1955; MELTZL 1892; DAN – GOLDENBERG 1967; GÜNDISCH 1993:233–340; CZIRÁKI 2006:58–64). The mercantile-industrial stratum became dominant in the Saxon community, and this was reflected in the development of customary law.

From this point on, the customary law that they had brought with them from their homelands, and which had remained dominant until the middle of the 15th century as a result of the privileges granted to them, was no longer suitable either for the increased trade in goods — even though the guilds are known to have represented a powerful constraint in terms of free trade — or for the increased legal requirements governing the practicing of crafts (SZABÓ 1993:107; MOLDT 2003:64). It was here that the first irritant thus emerged.

Economic development and the growth in trade also required the elimination of a number of legal uncertainties that had existed until then. This legal uncertainty was caused by the absence of written law, besides the autonomy of the administrative seats and their customary law that had been divergent from the outset, as well as differences in the practice of the judges and courts.

⁵Unfortunately, we know almost nothing about what is encompassed within the details of these particular legal customs. It is not, therefore, surprising that opinions in the literature are divided in terms of the origin of the settlers' “maternal right” — if indeed anyone does take a position on this issue. According to some theories, the settlers brought Saxon law with them, hence their recognized name: “Saxons.” According to others, from the point of view of origins, the rights to self-determination of the Lower Franconians should be taken into account (MÜLLER 1941:2). Still others see traces of the *ius Italicum* of Cologne and the laws of Eastern and Western Westphalia in the customary law of the Transylvanian settlers (SUTSCHEK 2000:16). In addition, there are claims that the settlers' rights originated in Flanders and Luxembourg. There were, of course, minor differences within this legal tradition, but overall we can talk about German law: *ius Teutonicum*, *ius* or *mos Saxonum* (ZIMMERMANN 2003:7). Others have found traces of Riparian law in medieval Saxon documents (AUNER 1913:71). Due to the very scant (or poorly researched) sources, other scholars believe that the law brought by the settlers of Sibiu remains unknown and undefinable (LINDNER 1885b:101). Recent research suggests that Eike von Repgow's *Sachsenspiegel* may at least provide some clues as to the content of the “maternal right” among the Transylvanian settlers, since German local laws did not differ significantly in the 12th century (MOLDT 2003:62–63).

⁶Issued in 1224 by András II, the *Andreanum*, or Golden Charter, contained the following decree: “Si vero quocumque iudice remanserint, tantummodo iudicium consuetudinarium reddere teneantur, nec eos etiam aliquis ad praesentiam nostram citare praesumat, nisi causa coram suo iudice non possit terminari.” See URKUNDEBUCH 1 1892:35. On the *Andreanum*, see MOLDT 1999; on early law development, see MOLDT 2008:41–69.



Although it is generally accepted that a *consuetudo terrae Cibiniensis* existed, which influenced life in the entire Saxon Lands, it must have been somewhat vague. Pressure to reform the law was also exerted by the central powers, since the *lex consuetudinaria regni* was supposed to apply in disputes between the Saxons and the Hungarian nobles, and in 1463 King Mátyás made it clear that the Saxons were also subject to the laws of the country.⁷

In response to these demands, practicing lawyers took steps to end legal uncertainty in the Saxon community in the second half of the 15th century (LINDNER 1884:175). Their most notable endeavor, and one that had a significant impact on subsequent “codification,” was the so-called *Altenberger Codex*,⁸ which was probably intended to accommodate certain German urban and national rights in addition to customary law in the Saxon Lands and the *lex consuetudinaria regum* that governed relations between the nobility and the Saxons, this last being designated by King Mátyás as the law to be followed by the Saxons (LINDNER 1885b:108).

The *Codex*, which incorporated not only civil law but also criminal legal regulations, may indeed have been used in the high court in Sibiu (Nagyszeben).⁹ This is proved by the fact that the councilors of Sibiu swore the oath on it. The high court thus adopted these laws as a supplementary source of Saxon customary law and kept them in force for many years. According to some, the *Codex* was used by the high court of Sibiu as a secondary source for many decades alongside the *consuetudo terrae Cybiniensis*, the local customary law, about which very little is known (MOLDT 2003). If this was indeed the case, the impact of the regulations contained in the *Codex* can be attributed to the close relationship that the Transylvanian Saxons cultivated with the cities of the German Empire through their intermediary trading partnership. Certain passages of the law book were transferred unchanged, or with certain modifications, into the subsequent codification of Saxon customary law and the codified law book (LINDNER 1884:180–182). The *Altenberger Codex* must therefore be accepted as the first attempt to transfer a “foreign” law in an attempt by the “recipients” to fill gaps in their local customary law.

The attempt — the primary purpose of which must be seen as the creation of a *ius scriptum* — was not therefore entirely unsuccessful, although, as indicated by the determined efforts made in favor of the reception of Roman law after only half a century, the almost pure German customary law did not truly gain acceptance in the Saxon Lands (or did not meet the respective needs).

Although, as mentioned above, certain questions regarding the practical significance of the *Altenberger Codex* have not yet been fully clarified, it can be seen as an attempt, inspired by economic, cultural, and judicial impulses, to embed norms that were not entirely alien into the legal system of a Saxon community that was becoming gradually more politically isolated. Whether this can be regarded as legal transfer, or rather as the transfer of the application of the

⁷“Nam, quum membrum huius regni sitis et legibus eius vivatis...” See LINDNER 1885b:108.

⁸Publication of the full text of the *Codex*: LINDNER 1885a. See CONSTANTINESCU 1988.

⁹The *Altenberger Codex* consisted of three parts. These summarize the laws of the various German imperial cities and territories. The first part is the *Landrecht* [land law] of the so-called *Schwabenspiegel* [“the mirror of the Swabians”] (also known as the Nuremberg Law), which contained poorly organized German rules on inheritance, guardianship, lawsuits, criminal law, public law, and the principles of fealty, obligation, and injury to animals, under 562 headings. The second part is the *Weichbild* of Magdeburg, which sets out the principles of public, administrative, inheritance, marriage, and criminal law, summarized under 159 headings. The 143 headings in the third part cover the rules of Iglau-Jihlava on mining, legal proceedings, and criminal law. See LINDNER 1885b:113; BALÁS 1977:65.



law, needs to be clarified by further research. However, what is clear is that the new norms, especially in the field of family and inheritance law, were unable to supplant the traditional “Old Saxon” regulations.¹⁰

However, the process of legal quest, driven by a variety of factors, did not stop here. The creation of the *Universitas Saxonum*, which is generally associated with the date 1486, meant the unification of the Saxon regions not only in terms of public administration but also with respect to jurisdiction (MÜLLER 1928, 1941; TONTSCH 1990). The *Universitas* naturally also encompassed efforts to eliminate legal uncertainties, since, in the first half of the 16th century, legal practice in the Saxon communities was unequivocally in need of reform. Since judges had for centuries made their decisions on the basis of oral customary law, many misunderstandings had arisen due to the lack of clear and uniform legal regulations.

The Saxons may have regarded the diversity of legal sources used in the eastern part of the Kingdom of Hungary, and the non-written nature of Saxon legal sources, as burdensome due to the fact that in cases in which their supreme judge, the Saxon count based in Sibiu (together with the General Assembly), was unauthorized or unable to decide, the king of Hungary was the highest forum of appeal (BÓNIS et al. 1996). On these occasions, the judge in the royal court of appeal faced a very difficult task: decision making on the basis of the non-written Saxon customary law was out of the question, since the predominantly Hungarian or Hungary-based judges and their assistants would not have been familiar with it. In this context, we come up against another irritant.

Bearing in mind the lack of legal sources within the Saxon communities, the resulting confusion on the part of the central power, and the need to eliminate legal uncertainty, the obvious solution was to summon the help of a “common denominator” — Roman law, the medieval European *ius commune*. The setting down of customary law in writing and increasing the role of Roman law were after all already European phenomena in the 15th and 16th centuries.

Development in certain regions of the Holy Roman Empire in particular served as an example for the German-speaking Saxons, as a demand for the writing down and reform of local (provincial and municipal) customary laws could also be observed in the big cities of the Empire in this period. The aim of such efforts was to unify the law, to modernize urban laws, and to bring them into line with the *ius commune*. As a result of this process, and as a characteristic legal source of the time, a series of statutes, or *reformatio*, were created throughout the Empire (RUSZOLY 2011:68; SCHULZE 1990). Since the statutes that encompassed criminal and private law were largely drafted by legal scholars, Roman and canonical regulations played a significant role as “customary law” in the legal life of the provinces and cities that applied the new legal sources.

The Saxons’ orientation towards Roman law in the field of private law, and consideration of the German imperial developments influenced by Italian jurisprudence, thus in fact resulted not only from the requirements of the Saxon community and judiciary but also from the “spirit of

¹⁰It should also be mentioned that the transfer of German law in Transylvania may also have been partial, and may have taken place via various intermediary channels, in several stages, and “by stealth.” Although Moldt’s recent research is not conclusive, it is easy to imagine that the rulings of the *Sachsenspiegel* and the Saxon–Magdeburg municipal and market law — that is, the “most modern law” of the late Middle Ages and early modern period — were applied in practice among the Transylvanian *hospes* [settler] communities to a greater extent than can be proved today. See MOLDT 2008:229; EBEL 2009:40–41.



the times.” This emerged in the form of a new impetus among the Saxons, and among the Saxon intelligentsia.

Interestingly, these “irritants” thus proved sufficient for the Saxons to adopt a new direction in the renewal of their law, despite the fact that the economic recovery of the Saxons had come to a standstill at the beginning of the 16th century. This stagnation had been caused by the reduction in transit trade, the disappearance of economic contacts due to the great discoveries in the New World, and the expansion of Ottoman rule.

In the context of this deteriorating economic and political situation, the *Universitas Saxonum* decided in 1540 to revise both the written and unwritten law¹¹ and to incorporate Roman law into these norms to a greater extent. The decision therefore sprang both from necessity and from the spirit of the times. Since the Saxon community was largely isolated in economic terms, the *Universitas* was able, as it were, to pursue an ideal legal reform, especially in the field of contract law, which could primarily provide a more secure framework than earlier for internal trade.

For the Saxons, the academically based requirement for legal unification and modernization was manifested in the first half of the 16th century in the legal works of the great Saxon reformer Johannes Honterus, which can be regarded as the definitive precursors of a European-style legal reform (SZABÓ 1999; ACKER 1974; HANGA – TONTSCH 1974). His first textbook-style work (*Sententiae*) was a collection of Justinian quotations, which, in terms of their spirit, formed the initial Roman law backbone of the private and criminal law elements of the later “Saxon codification” (HONTERUS 1539). His second work (*Compendium*), which can be interpreted as an “experimental legal text,” is the most comprehensive summary of Roman law that has ever appeared in print in Hungary (HONTERUS 1544).

Honterus’s *Compendium* was, in fact, the second reception experiment among the Saxons and the first attempt to provide a uniform law book for the Saxon population as a whole. However, it did not really take root among the Saxons, possibly because it lacked any nationally characteristic features. As a result, it was not used directly as a legal regulation,¹² but, like the *Altenberger Codex*, served as a basis for subsequent codification. Thus, for the time being, resistance proved stronger than the irritant.

The religious reformer Honterus was the apostle not only of spiritual and ecclesiastical renewal but also of the improvement of the life of the community, and, as the reformer of the Braşov school, the *Studium Coronense*, he accomplished the great innovation of establishing “departments” of medicine and law at the institution. The school thus became an institution that not only directly prepared students for university studies but also enabled them to acquire basic knowledge in these two disciplines (NUSSBÄCHER 1985, 1996). With this in mind, and also taking into account the contemporary rise of the *peregrinatio academica* (SZABÓ – TONK 1992), although we have only unreliable data regarding the proportion of law students involved, we are obliged to acknowledge that the outlines of a Saxon intelligentsia with expertise in academic law had begun to emerge in the second half of the 16th century.

¹¹Saxon sources in the 15th and 16th centuries gave different names to their own law: *consuetudo seu lex provincialis, ordenung des rechten und laewelicher gewonhat, gemeines landtbrauch*.

¹²However, judges in some Saxon seats regarded the work as of significant assistance. Its wider application was also thwarted by the fact that the German translation commissioned by the University of Saxony was not completed.



The fact that the political will of the Saxon community was able to lead to significant renewal in legal life can ultimately be associated with the names of these two figures, who were well versed in European jurisprudence. However, after the earlier extreme experiments, the officials tasked with compiling the legal regulations endeavored to achieve a certain synthesis. Firstly, in the early 1560s, a manuscript compiled in German and Latin by the Sibiu councilor Thomas Bomelius¹³ outlined the legal customs of the Saxons and the applicable principles of Roman law, being subsequently revised and finalized in Latin and German by Braşov senator Matthias Fronius¹⁴ in the 1570s. This version was then elevated to the status of legal source by Prince István Báthory in 1583, and was immediately printed¹⁵ in both languages (SCHULER VON LIBLOY 1853:3–4; LAUFS 1973:IX–XI; SZABÓ 1993:176–177, 2015:325–327).

The bilingual printed document, the *Statuta / Eygen-Landrecht*, became the main legal source for the Saxons after 1583. The prince confirmed that its regulations “apply to the land and the jurisdiction of the Saxons.” (“Saxonum Nostrum terras iurisdictionemque tantum concernunt.”) The rules contained in the *Statutes* were to be accepted “if they are not in conflict with common law” (“in quantum iuribus publicis non derogant”), although this principle — as evident from the regulations — was often ignored.

It is worth noting that disquisitions on the legal sources of the *Statutes* reveal an interesting dichotomy that also demonstrates how the *Eygen-Landrecht* had emerged somewhere “on the border between two eras.” The judges were obliged to make their decisions according to the written law, but if the written law — in which the regulations encompassing the rulings of customary law were also partly included — did not provide any guidance,¹⁶ the rulings of morality and customary law were to be followed, on the one hand, while on the other hand the regulations of Roman law (imperial law) were to be applied in the case of matters not covered by the *Statutes*.¹⁷ It thus becomes clear that those responsible for drafting the legal book attributed huge importance not only to written legal sources but also to customary law.¹⁸

¹³*Statuta Iurium municipalium civitatis Cibiniensium reliquarumque civitatum et universorum Saxonum Transilvaniæ collecta per Thomam Bomelium 1563. Statuta oder Satzung gemeiner stadrechten der Hermentstadt und ander stedte, Und aller Deutscher in Sybenburgen, durch Thomam Bomelium zusammen bracht.* Im Jar. 1560. Bomelius’s work can be found in the manuscript archive of the National Széchenyi Library: Fol. Lat. 1789.

¹⁴On the lives of Bomelius and Fronius, see, most recently, DERZSI 2016.

¹⁵*Statvta Ivrivm Mvncipalivm Saxonvm in Transsylvania: Opera MATTHIAE FRONI reuisa, locupletata et edita.* Impressum in Inclvta Transylvaniae Corona. Cum gratia, et priuilegio decennali. 1583. *Der Sachsen in Siebenbürgen Statuta: Oder eygen Landrecht.* Durch MATTHIAM FRONIUM vbersehen, gemehret vnd mit Kön. Maeist: inn Polen gnad vnd Priuilegio in Druck gebracht. Anno M.D.LXXXIII. The texts are quoted on the basis of these versions, using the abbreviation “St.”

¹⁶St. 1.1.5. “Tragen sich aber solche sachen vnd fa’lle zu / daru’ber kein geschrieben recht nicht gefunden wu’rde / sie sollen sich noch des Landes langwiriger gewonheit richten.”

¹⁷St. 1.1.7. “Quicquid autem his legibus specialiter non est expressum, id veterum legum constitutionumque regulis, imperatorio iure comprehensis, omnes relictum intelligant.” In the German version, it reads: “Was nu in sonderheit inn diesem kurtzen Auszug der rechte{n} / nicht ausdrü’cklich verfastet ist / sol aus den alten Kayserlichen rechts regeln vnnnd satzungen / so fern sie vnser Landschafft gema’ss / erholet werden.” Here, attention should be drawn to a clause that is not included in the Latin text: “so fern sie vnser Landschafft gema’ss” — that is, “if in compliance with our national law.” On the concept of imperial law (*Kayseliches Recht*), see KRAUSE 1952.

¹⁸In the Latin version of the law book, the *consuetudo* is referred to under 15 different legal provisions, while in the German version the same proportion of references are devoted to customary law (*Gewohnheit, Brauch*).



Summarizing the efforts made in relation to Saxon legal reform using the chosen theoretical framework, it should be emphasized that the reception of the European *ius commune* was in fact determined in advance by the Saxons' social and economic development. Even their legal development in the Middle Ages had been related to the changes in their economic role and activities, and to their social structure, although not always in a straightforward trajectory. The "irritants" produced by these changes ultimately became so strong that, following the partly successful adoption of Germanic written law, development continued in the direction of Roman commodity exchange law, despite the fact that the Saxons had partially returned to an agrarian economy and had become industrially self-sufficient, thus reverting to the economic conditions they had enjoyed in the 15th century (P. SZABÓ 2015:328). As the Saxons had undergone social and economic development that (although unique) was somewhat similar to that of the communities in the central countries of Europe, there was essentially no conceptual obstacle to the partial adoption of the *ius commune* solutions (TONTSCH 1990:39).

Secondly, it seems clear that the strongest impetus at the time came from the direction of politics. The *Universitas Saxonum* was led by those who, in the 15th century and again in the 16th century, had felt the need for legal renewal. The political objective is impossible to deny: the permanent pursuit of legal security, political autonomy, and the strengthening of judicial independence certainly played an important role.

Thirdly, as in the case of other legal communities, for the Saxons, too, the phenomenon of legal transfer was not only related to political institutions: changes in communication structures, including the teaching of law, may also have played a major role (PIHLAJAMÄKI 2009:19). Perhaps the most interesting "disruptive factor" in the creation of the *Eygen-Landrecht* was thus the decisive role played by intellectuals with expertise in academic law. Bomelius, and especially Fronius, who drew on the works of Honterus, can be seen as importers of legal norms. However, in order to succeed in his mission, Fronius, who was a practicing lawyer, had to take into account the realities of his country. On the one hand, he had to take into consideration his people's powerful respect for traditions, and, on the other hand, he needed to ensure that his legal messages were heeded. This led, where necessary, to a simplification in the process of academic legal transfer.

This perceptible simplification is typically the inevitable result of the standards that are too complex for the recipient legal system being either not accepted by the members of the community or having to be adapted to existing circumstances in the transfer process. In the case of the Saxons, this was typically what happened with certain Roman legal institutions (community of property, testamentary succession — see below) that the Saxon codifiers attempted to import into Transylvania. In their case, too, norms that were difficult for the recipient to accept needed to be simplified, modified, or simply rejected. In the last case, the community thus preserved and relied on its "own traditions" as opposed to the transferred law. Interestingly, an examination of the regulations of the *Eygen-Landrecht* in this respect shows that some of the older Germanic solutions were far more enduring than those found in the "more modern" *Altenberger Codex*.

It seems certain that the centuries-long efforts towards legal reforms made by the Transylvanian Saxon nation were completed with the promulgation of the law book that was, in many respects, ahead of its time. Although this work, comprising layers of norms with different origins, was not complete, it stood the test of time: for two and a half centuries it was the basis of Saxon law. There can thus be no doubt that it had a significant and lasting impact on the lives of the Saxons.



III

As the third element in our investigations, I would like to highlight a few examples — perhaps an arbitrary and simplified selection — based on the *Eygen-Landrecht*, which demonstrate the resilience of traditional, customary law solutions to the legal reforms generated among the Transylvanian Saxons by “irritants.” In my examination of some of the peculiarities arising from the encounter between the two legal worlds, I endeavor to present examples from different areas of life.

Among the regulations on court procedures and judicial organization, which make up an entire book of the *Eygen-Landrecht*, besides the direct adoption of Justinian regulations we find a number of regulations that, although they also correspond in terms of content to the principles of Roman procedural law, have clearly been shaped by developments in customary law. The rules related to summons are simple and clearly originate from customary law. The medieval legal concept is reflected mostly in the procedural role of the oath (SS. 1.9.2.), although models of its various forms were already to be found in the time of Justinian. The law book reflects the transition from a concept that considers private law and criminal proceedings as uniform, towards the separation of these two proceedings. However, compared to this brief glimpse, far more important from the further perspective of Saxon law is the fact that the Saxon procedure remained consistently oral and vernacular¹⁹ according to the law book (SS. 1.4.2.), in contrast with developments in both Transylvania and royal Hungary (SCHULER VON LIBLOY 1868b:176; ECKHART 2000:340).

Undeniably, legal relations governing the family and inheritance remained perhaps the most traditional among private legal affairs. In general, these areas of law are the most difficult to change, and it is here that we can expect the greatest resistance to legal transfer. The Saxons, who were slowly being welded together as a national community, also formed a unique territorial legal community adhering to certain community characteristics that were especially evident in the norms concerning legal relationships associated with property. I will mention just two of them here: the reversionary right of settlements (St. 2.2.13),²⁰ and the prohibition on the sale of houses and land to foreigners (St. 3.6.5.).²¹

The extent to which customs, and the resulting legal concepts, were able to resist the influence of academic law is well illustrated by the regulation concerning the viability of a newborn child, which is unparalleled in Roman law. In a significant proportion of Germanic customary law, a child was considered viable, and thus able to inherit, if it cried after the birth, and if its cries filled the room in which it was born and were even audible outside (*Beschreien der vier*

¹⁹For this reason, we quote Fronius’s law book in German in the few places below, although in many cases there are significant differences between the Latin and German versions.

²⁰This custom was already referred to in a charter issued by Mátyás I, dated 1470. See URKUNDEBUCH 6 1981:472–473; TEUTSCH 1883:89–90.

²¹The essence of this restriction, which is not known in the *ius commune* but which is known in feudal laws, including Hungarian nobiliary private law, was that, in the event of the sale of property in Saxon communities, relatives and neighbors had the right of pre-emption or redemption over outsiders. See SCHULER VON LIBLOY 1853:221; BECKER 2016; DRW-lemma: Naherrecht.



Wände). There is no trace of such a ruling in academic law, where the baptism of a newborn baby acquired increasing importance in this context.²²

In the field of family law, and the closely related norms of inheritance law, the legal regulations governing marital property could be considered the most specific and the most resistant to external influences. According to the old Saxon customary law, there was general community of property between spouses, which applied both to the goods brought into the marriage and to the goods acquired during the marriage. However, the spouses did not have an equal share in the community of property: two-thirds went to the husband and one-third to the wife (*Drittellung*).²³

This would not in itself be peculiar, since, in the case of community of property, one typically finds in various Germanic customary laws solutions in which the joint property is divided between the heirs and the surviving spouse, where the latter — should it be a woman — receives not half but only one-third.²⁴ However, the *drittellung* had further legal consequences among the Saxons in terms of inheritance: in their law book, the principle of unequal division into thirds between the (paternal and maternal) hereditary branches was applied in a number of specific provisions, regardless of the degree of kinship.²⁵ If, for example, in the absence of a will and descendants, the testator's paternal grandfather and maternal grandfather inherited simultaneously, the former would receive two-thirds and the latter only one-third (St. 2.2.7.). If the estate was to be divided between the testator's half-brothers and half-sisters, a patrilineal brother received two-thirds (*bes*) and a matrilineal brother only one-third (*triens*) (St. 2.2.10.). Furthermore, as mentioned above, the principle of *Drittellung* did not apply only in cases where the claimants stood in the same degree of kinship. Distinction according to lineage existed even if heirs of different classes — in the academic legal sense — inherited jointly: if the testator's paternal uncle were to inherit jointly with the testator's maternal half-brother, the former would

²²St. 2.2.3. “Geba^hret ein Ehefraw ein Kind / welches bald in der geburt stu^rbe / wirts bewehrlich / das es ein solch kinds geschrey gethan hat / welches inn vier ecken des Gemachs hat mo^egen geho^ret werden / vnnd stu^rbe drauff / es wird fu^r einen lebendigen Menschen gerechnet / vnnd ist erbpfahig.” 2.2.3. “Geba^hret ein Ehefraw ein Kind / welches bald in der geburt stu^rbe / wirts bewehrlich / das es ein solch kinds geschrey gethan hat / welches inn vier ecken des Gemachs hat mo^egen geho^ret werden / vnnd stu^rbe drauff / es wird fu^r einen lebendigen Menschen gerechnet / vnnd ist erbpfahig.” Both the *Sachsenspiegel Landrecht* (I. 33) and the *Lehnrecht* (c. 20) contain references to this. Cf. [REPGOW 2005:136–137, 269](#). The ruling can also be found among the Saxons of Spiš. The expectation featured in several German law books in the early modern era. See [EBERT 2008](#); [BRUNNER 1895](#); [DRW-lemma: beschreiben II](#).

²³St. 2.4.1. “Bey den Sachsen aber ist es in brauch kommen / das aus allen gu^tteren / so sie beide haben zusamen gebracht / dem man das zweiteil / vnd der frawen das dritte teil / gebu^hren sol / vnd werden allerley fu^rgaben / so zwischen man vnd weib geschehen / abgeschlagen.” The Latin text is less ambiguous when it talks about the properties concerned: “ex universis bonis.”

²⁴St. 2.4.2, 2.4.4–7. See [DRW-lemma: Drittel A III 4 a](#). The husband's share was called the *Schwerttheil* in the German law books, while the woman's share was the *Kunkel-* or *Spindeltheil*. See [DRW-lemma: Schwertteil](#); [DRW-lemma: Kunkelteil](#); [OGRIS 1990](#). In the literature, many trace this unequal division back to the *Lex Ribuarica*, which subsequently became one of the principles for the division of property between spouses. See [SCHROEDER 1871:258](#); [FICKER 1896–1903:54–55](#); [STOBBE 1884:106](#). It has been implemented in a number of German regional laws, which cannot be listed here. See, in detail, [SCHROEDER 1863, 1868, 1871](#).

²⁵The rules of the *Eygen-Landrecht* concerning inheritance law appear somewhat arbitrary, and in order to validate the principles of customary law Fronius accepts many inconsistencies that cannot be traced back to Justinian inheritance law.



be entitled to two-thirds and the latter to one-third, while in the reverse situation the maternal uncle would be entitled to one-third and the paternal half-brother to two-thirds.²⁶

There are other reasons, too, that make the inheritance law of the Saxons, as regulated in the *Eygen-Landrecht*, a fascinating combination of Roman principles and consistently preserved customs. In the transfer of Roman legal solutions, one can detect a certain uncertainty on the part of Fronius, since the legal order of succession itself, as it appeared in Roman legal sources, was not entirely uniform. Nevertheless, Fronius endeavored to elaborate a more or less consistent legal order of inheritance, in which the classes of heirs appear to be defined as follows: descendants, forebears and siblings living in a community of property with them, the children of the siblings, and other collateral relatives. This is similar to the order of succession defined in Novel 118 of Justinian, although not entirely consistent with it (St. 2.2.1–4, 6–7). The differences, as already indicated, can be understood as concessions to traditional legal notions.²⁷

According to what can be seen as one such custom-based ruling, a house that formed part of a paternal bequest would pass to the youngest son, or, in the absence of sons, to the youngest daughter, with the following choice: either they retained the house and paid the other heirs their share in cash, or they shared in the entire inheritance as co-heirs, in just the same way as the other siblings (St. 2.4.11). Legal sources, primarily in Saxony, generally referred to this principle as *Khurgerechtigkeit* (ZEDLER 1737). What was unique to the Saxons was that the option was also granted to daughters, albeit only in the absence of a male heir.²⁸

The intriguing coexistence of traditional and adopted norms can also be observed in the rules on testamentary succession. Through the influence of the clergy, the canon law possibilities for determining the fate of property in the event of death came to be recognized among the Saxons. The institutions elaborated in detail in Roman law — the will, the codicil, and the *legatum* — were already universally accepted among Saxons in the 14th and 15th centuries, thus the consistent transfer of Roman legal institutions appeared quite unproblematic to the compilers of the *Eygen-Landrecht*. However, looking more closely at the norms related to wills (and the *legatum*), we can see that traditional customary law was able to maintain a very strong position even in this area. Almost all the rulings in the chapter on wills in the *Eygen-Landrecht* (St. 2.5.) are consistent with one or another Justinian fragment. Worth emphasizing in particular is the fact that, in the event of uncertainty, the intention of the testator was to be taken into account as fully as possible in the interpretation of the will (the principle of *favor testamenti*) (St. 2.5.15.).

²⁶St. 2.2.11. “Stu^rbe auch einer ohne erbgema^ech / vnd liesse halbe brü^der als nemlichen / vom Vatter allein / vnd darneben seiner Mutter rechts geschwestriget / der halbe bruder vom Vatter / erbet von ihm das zweyteil / so vom Vatter : vnd der mutter bruder das dritteil / so von des verstorbenen Mutter auff jn kohmen war : Also erbet widerumb / der Bruder von der Mutter das dritteil / vnd des Vatters bruder (wo kein geschwister vom Vatter vorhanden ist) das Va^tterliche zweyteil / ohne vermengung der gu^tter.” Julius Ficker has compared this peculiarity of Transylvanian Saxon inheritance law with Friesian (Flemish) and Rhaetian (South Bavarian) inheritance laws. FICKER 1895:298–300; Z. 1893:113–114.

²⁷The Saxons themselves were so unsure about the rules to be applied in the case of the inheritance of siblings and half-siblings that in 1555, two national resolutions were passed calling on the seats and towns to clarify the rules. The result of this can perhaps be seen in the rulings of St. 2.4.9–11. See CORPUS STATUTORUM I 1885:528–529.

²⁸The Transylvanian Saxons — overwriting their earlier customs — issued a national statute in as early as 1524, with the intention of bestowing the entire paternal bequest, with the possibility of choice, to the youngest son, or, in the absence of sons, to the youngest daughter. The *Eygen-Landrecht* limited this right to a house inherited from the father. See CORPUS STATUTORUM I 1885:509.



However, the absence of certain rules suggests that the Saxons were not entirely serious about the transferring of Roman law in this area. There is no provision, for example, on the indispensability of the *heredis institutio* (the naming of an heir) or on the distinction between the “opening” of the estate (*delatio*) and the “acquisition” of the inheritance (*acquisitio*) (SCHULER VON LIBLOY 1868a:244–245).

The amount of the compulsory share is set relatively high in the Saxon legal book, at two-thirds of the lawful share.²⁹ This is one of the factors indicating how, for all their progressiveness, Saxon citizens were still extremely attached to their traditional solutions. Although they adopted modern rulings with respect to trade, they also clung to their customary traditions in many areas. They possibly felt a sense of uncertainty due to their isolation and economic development, which was perhaps alleviated by adherence to such time-honored customs as keeping property within the family circle, among the lawful heirs.

The rules related to the *legatum* (the possibility to make individual gifts from the estate) are identical, word for word, to those found in Roman law (St. 2.6.1), although two exceptions preserved Germanic traditions in this area, too. On the one hand, the heirs who were entitled to a compulsory share had the right of redemption in respect of property given to outsiders by way of *legatum* (St. 2.6.2).³⁰ On the other hand, the bequest (if not revoked) had to pass to the heirs of the legatee, even if the legatee died before the testator who had transferred the property, which would have meant the subsequent invalidity of the *legatum* (St. 2.6.5) according to Roman law.

In inheritance law, we can thus observe the interplay of conservative customs and the contrasting rulings of modern customary law. Nevertheless, the freedom of testamentary disposition, the principle of *favor testamenti*, and the relatively advanced regulation of legal succession meant that this inheritance law was centuries ahead of the inheritance laws of Transylvania and royal Hungary.

In the economic context of the 15th and 16th centuries, the need for a modern contract law naturally arose in the upper Saxon stratum. The transfer of the rulings of the *ius commune* is perceptible throughout this contract law (SZABÓ 1993:182–186). However, even in this area adherence to traditions can also be observed. One striking example of this is the old Saxon custom — probably influenced by Hungarian customs and laws — according to which the parties had to drink a toast (*Almesch*) when selling a property. The seller was obliged to inform their next of kin and neighbors about the sale, and if none of the parties concerned exercised their right of first refusal, they would drink the *Almesch* in the presence of witnesses and neighbors to symbolize the transfer of ownership (St. 3.6.8).³¹ This ratified the legal transaction and at the same time indicated the approval of the community. The custom was known among the Saxons from as early as the 14th century and can be identified with the *áldomás* toast that was also widespread among the Hungarians (TEUTSCH 1883:73; TIMON 1904:52, 405, SCHILLER

²⁹St. 2.5.9. “Die Elter mu^sssen von rechts wegen / jre kinder oder ire Enckel / in iren Testamenten zu erben setzen / oder in irem erbge^ma^ch also versehen / damit ihnen ihre gebu^re vngeschwecht bleibe / das zweiseit nemlich des gantzen Erbfals: vom vbrigen dritteil aber haben sie macht vnd gewalt / irem gefalle{n} nach wohin sie wolle{n} / zu bescheiden.” Similar principles are apparent in the 16th-century attempts in Frankish law, for example in the *Hochlöblichen Stifts Würzburg und Herzogtums Franken kaiserliche Landgerichtsordnung*, compiled in 1580. See FICK 1895:205–206.

³⁰A similar provision from 1525: CORPUS STATUTORUM I 1885:510.

³¹Other expressions include: *aldemasch*, *almusch* (German); and *aldamasio*, *almasium*, *marcipotus*, *symposium* (Latin). See DRW-lemma: Almesch. The Saxon term originated from the Hungarian *áldomás*. SCHULERUS 1924:76–78.



1898:390–392). The *Almesch trinken* was customary among the Saxons not only when selling property but also when selling horses, for example, right up until the 20th century (St. 3.6.11).³²

As mentioned above, the Saxons tried to make it difficult for foreign ethnic groups to infiltrate their territory by means of a number of provisions (i.e., private legal regulations) governing buying and selling. If a foreigner wished to purchase a property in Saxon territory, the intention to sell had to be announced in the marketplace on three consecutive Sundays before the contract was signed, and if a neighbor or relative was willing to pay the negotiated price, the property had to be relinquished to them (St. 3.6.5–7). Thus, for social and national political reasons, the mercantile Saxons went against the principle of freedom of contract as outlined in Roman law.

Of course, not all the statements formulated in the first part of the present paper have been corroborated. This is owing not to a flaw in the concept, but to the inadequacy of the evidentiary process. Ultimately, we have seen that in the 15th and 16th centuries, the Saxons were forced by various “external circumstances” to reform their legal system almost entirely. With the help of Roman law, but drawing on their own traditions, they laid the foundations for their own *usus modernus*.³³ This process of renewal, which is attributable to a variety of reasons, lasted for only a few decades and undoubtedly represented a certain “irritant” for the Saxon legal system, which, as a result of the earlier struggle for a written law, had already incorporated various “Germanic legal” traditions. Some of these traditional norms proved resistant to attempts at renewal for various reasons, and this affected the overall outcome of the legal transfer. I have attempted to demonstrate this by means of a few examples, although, because of space limitations, I have not been able to include a detailed presentation of the sources. The areas in which the Saxons’ traditional legal knowledge was insufficient to fend off the transfer of modernizing solutions might perhaps form the subject of a later study.

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³²From 1554, the *Universitas* also called for the drinking of the *Almesch* when purchasing a horse at a fair. *CORPUS STATUTORUM I* 1885:526.

³³On the phenomenon of the *usus modernus*, see *LUIG* 1998.



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