Beiträge

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The Tripartitum and the European ius commune, with special regard to the commentators

For the quincentenary of a Hungarian law-book

I. Introduction: II. The primeval and secondary law of nations in the Prologue; III. The custom in the Tripartitum; IV. The definition of judicial power in the Tripartitum; V. The self defense in the Tripartitum III. 21–24; VI. Conclusions.

I. Introduction

In 1514 Stephen Werbőczy presented the Tripartitum opus iuris consuetudinarii inclyti regni Hungariae to the Hungarian legislative assembly, the diet. The Tripartitum was sent to inspection to committees, and the diet authorised the king to seal and distribute it. Finally, the king approved the text. Although the Tripartitum was not sealed and distributed, it acquired legal authority by the force of use and custom. In 1517 it was printed in Vienna.

The Tripartitum is the most important Hungarian law-book from the Middle Ages. This law-book retained legal authority until 1945. It was an important part of the customary Hungarian constitution, an unchangeable monument of the fundamental rights of the Hungarian nobility and the symbol of the independence of the Hungarian State.

The sources of the Tripartitum have been researched since the 19th century, at least in modern times. The first historian who engaged himself in this field, was an Austrian, Johann Adolf Tomasek. In 1883 he published an extensive study on the Summa legum Raymundi and its relationship to Werbőczy’s Tripartitum1). Tomasek stated that the Summa legum was a compilation of an Austrian author, and important parts of the Tripartitum were copied from this Summa.

Hungarian legal historians have firmly rejected any speculation about the influence of any foreign legal system on Hungarian law, be it Austrian or European (ius commune). As they explained, the Tripartitum was a law-book of specifically Hungarian legal institutions, and was not influenced by foreign legal systems. The Kingdom of Hungary did not receive Roman law at all, its legal system remained essentially customary and Hungarian2). If there are some copied sentences from Roman law in the Prologue, it is because Werbőczy intended to impress his audience by a display of legal knowledge, but the remaining three parts are the true Tripartitum, the true compilation of Hungarian law, where there is no trace of Roman law or foreign influence3).

2) A. Timon, Ungarische Verfassungs- und Rechtsgeschichte, 1904, 326.
3) For further elements see G. Bónis, Der Zusammenhang der Summa Legum mit dem Tripartitum, in: Studia Slavica Hungarica 11 (1965), 375; R. György, Középkori jogunk elemei, Budapest
After the dissolution of the Habsburg Monarchy, perhaps, we can fully appreciate the merits of Tomaschek without any nationalistic influence. I think, he did not want to undermine the authority of the Tripartitum.

Although the main conclusions of Tomaschek were confuted by German and Italian legal historians, he deserves praise, because he discovered this unpublished manuscript, and he called our attention on it. Certainly, the anonymous author of the Summa legum has nothing to do with Austria or Wiener-Neustadt, as it is a derivative compilation from the Summa decretalium of Goffredo Tranensis, as it was shown by Besta.

After Tomaschek, the sources of the Tripartitum remained a very debated question. Seckel demonstrated that the Summa legum was widely diffused in Eastern Europe. József Félegyházy wrote a book on the influence of canon law on the Tripartitum, where he tried to identify not only canonical, but Roman law sources, as well. He found citations from Gratian, Liber Extra, Hostiensis, Thomas Aquinas, all authors from the 12–13th centuries. Recently, David Ibbetson and Martyn Rady have made some valuable contribution, but these regard only the Prologue of the Tripartitum.

Is it thinkable that Werbőczy did not use other than 12–13th century sources? Is it thinkable that there are “two Tripartitum”, the Prologue and the remaining three parts, the true Tripartitum?

In the 500th anniversary of the Tripartitum, I think, it is time to pay attention to Italian commentators, as well, if we want to paint a more detailed picture regarding the sources of the Tripartitum. It is obvious that we cannot pretend to do all this huge work in this paper, and we can only highlight some interesting points from the Tripartitum, and we cannot publish here our investigations on the whole Tripartitum, but, I think, it is worth trying.

II. The primeval and secondary law of nations in the Prologue

The distinction made by Werbőczy between primeval and secondary natural law is one of the evidences of Bartolus’ influence on the Tripartitum. The ancient Romans did not know this distinction, as it is explained by Ulpian: “Natural Law is that which nature has taught to all animals, for this law is not peculiar to the human race, but applies to all creatures which originate in the air, or the earth, and in the sea. Hence arises the union of the male and the female which we designate marriage: and hence are derived the procreation and the education of children; for we see that other animals also act as though endowed with knowledge of this law.”

The definition of Ulpian seemed strange to the glossators and commentators of the Roman law. In fact, it may be deduced from the definition of Ulpian that humans and animals can stipulate contracts, since according to Ulpian they are in the same community of rights.

To eliminate the theoretical difficulties, Bartolus declared in accordance with the Gloss, that natural law and ius gentium can be considered in two ways. He asserted that only the primeval natural law is shared with animals, but the secondary natural law is shared only with humans.

Bartolus divided the ius gentium into primeval and secondary one. The primeval ius gentium is what all people have applied, but the secondary ius gentium derives from the international agreements.

In the Tripartitum Werbőczy did not borrow the definition of Ulpian, but he adopts the definition of the ius commune. Werbőczy did not refer to the Romans’ ius gentium, but he speaks about the ius gentium interpreted by Bartolus, one of the greatest commentators of the 14th century.

As Werbőczy stated, “the law of nations is of two kinds, namely, primeval and secondary. The primeval law of nations is what all peoples have applied since the beginning of time and what was created by natural wisdom, without any establishment by the people, such as not to hurt anyone, and so on. And that is not different from natural law, except in the way it is perceived. For it is called both natural law and the law of nations, but from different perspectives: natural, insofar as it emanates from natural reason; and of the law of nations, because the peoples have applied it without any specific establishment since the beginning of the world. And by this law, a slave has a free status, because according to natural law all men are born free.”

As Werbőczy asserted, “the secondary law of nations is the law that peoples have introduced not by natural reason but by reason of the public good and for common use. And it is oftentimes different from natural law. For by natural law everything was common and everyone free; but by the law of nations the division of land and the separation of property was invented which brought about war, captivity, slavery and other such things, contrary to natural law. This law of the nations brought about almost all contracts, such as buying, selling, lease and similar things.” These theoretical positions are identical with Bartolus’ one.

The concordance of the two sources is evidenced below:

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5. D. 1.11.pr-2. Ulpiamns (Trans by Scott).
7. The English translation of the Tripartitum is quoted in this article from S. Werbőczy, The Customary Law of the Renowned Kingdom of Hungary in Three Parts (the Tripartitum), ed and transl by János M. Bak, Péter Bonyö and Márton Rady, Budapest and Idyllwild 2005.
8. GL. sed naturalia ad Inst. 1.1.1., de iure naturali, gentium et civit. § 6 sed naturalia (Lugduni 1618. coll. 24): “Hic § potest intelligi de iure naturali primaevo, quo moventur omnia animalia ad ali- quid faciendum.”
9. Bartolus, Comm. in D. 12.6.64., de conditione indebiti, l. si quis (Lugduni 1560, fol. 73ra).
10. The English translation of the Tripartitum is quoted in this article from S. Werbőczy, The Customary Law of the Renowned Kingdom of Hungary in Three Parts (the Tripartitum), ed and transl by János M. Bak, Péter Bonyö and Márton Rady, Budapest and Idyllwild 2005.
Tripartitum and European ius commune

According to Bartolus the custom has three requirements: a) the reasonableness (rationabilitas), b) prescriptivity (praescripta), c) the frequency of use (frequentia actuum)\(^{12}\).

Among these, the reasonableness was an important requirement of the custom even in Justinianic law. This requirement means according to the glossators\(^{13}\) that the custom, which is expressly disapproved by the legislator, cannot be held reasonable, because it cannot be reasonably presumed to be in accordance with the purpose of the legislator\(^{14}\).

The time required for prescription was a well-known requirement already before Bartolus. This requirement means that custom must receive force in the course of that time required for prescription. This requirement was never always necessary. E.g. Johannes Teutonicus denied it (ut sit praescripta)\(^{15}\). Glossators had discussions on what time is necessary for the custom. The civilians required ten or 20 years, but the canonists required 40 years in case of a consuetudo contra legem.

For Bartolus, the customary law has another requirement, the frequency of use, which was unknown to the glossators and commentators before Bartolus, except perhaps Hostiensis. This requirement means that the customary law needs to be repeated, because the consent of the people cannot be deduced from one single act. According to him, it does not suffice, if the custom is only prescriptive.

It was Bartolus who connected these three requirements for the first time, and made them the necessary condition of the customary law\(^{16}\). Werbóczy has also mentioned these three requirements, it is, therefore, evident that he accepted the teachings of Bartolus, even though he did not cite him word for word. The non-literal citation may be an evidence of that Werbóczy has not used Bartolus directly, and he might have used an indirect source. In fact, Bartolus was an influential, widely known jurist whose impact on civil and canon law was enormous.

Werbóczy defines customary law\(^{17}\) in accordance with Johannes Andreae, and not following Bartolus’ definition after mentioning Gratian’s one. This is an evidence for the use of an indirect source. Bartolus quoted a lot of definitions of various authors in his

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\(^{12}\) Bartolus, Comm. in D. 1.3.32... de legibus senatusque consultis et longa consuetudine, l. de quibus causis, n. 11 (Ludogni 1550, fol. 22rab).

\(^{13}\) Around 1234 cfr. for the requirements GL legitime sit praescripta ad X.1.4.11., de consuetudine, c. cum tanto (Ludogni 1584, coll. 95): “Ad hoc ut ergo consuetudo iuri communi praeident, requiritur primo quod rationabilis sit, et quod sit praescripta, ut hic, et c. cum exc. Item quod ex certa scientia, et non per errorem sit indacta, ut. de leg. l. quid non ratione, et sciente illo qui potest iuris condere, et quod non sit contra iuris naturale, etc. Item requiritur quod sit usus illa consuetudine sive vieibus illis quibus usus est eo animo ut intendat, sive credas te iuris habere, etc. Item requirit quod maius pars populi usus sit ea consuetudine ad hoc ut secundum eam iudicaret.”

\(^{14}\) GL rationabilis ad X.1.4.11., de consuetudine, c. cum tanto (Ludogni 1584, coll. 95): “Et quam consuetudinem dices rationabilis? Illam dices rationabilis, quin non improstant iura.”

\(^{15}\) GL contra ad D. 12c. 7 (Ludogni 1584, coll. 411): “Sed longum est illa, quod est decem vel xx annorum... Non ergo requiritur quod consuetudo... sit prescripta.”

\(^{16}\) Bartolus, Comm. in D. 1.3.32... de legibus senatusque consultis et longa consuetudine, l. de quibus causis, n. 11 (Ludogni 1550, fol. 22rab): “Et leges videntur ponere tria, silicet frequentes actus, ut C. c.I et C. de aedl. pri. i an in totum et hic et in rubri supra eo. illi. Secundo temporis diuturritas, ut hic in gl. Tertia quod principium sit rationabile.”

\(^{17}\) Trip. Prologus, tit. 10: “Quod consuetudo est ius quoddam moribus institutum, quod pro lege suscipitur, cum defici lex.”

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III. The custom in the Tripartitum

The source of the treatise on customary law in the Prologue of the Tripartitum was unknown for the legal historians for a long time. In recent times, David Ibbetson identified the source of this part of the Tripartitum as borrowed from Bartolus\(^{19}\). We cannot but agree with him, but it should be also added that Werbóczy used other sources in the treatise on common law, as well, not only Bartolus.

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commentaries, and finally he gave his own definition. However, Werbőczy does not accept Bartolus’ definition of customary law, and he mentions another one, saying that “custom is a certain ius, introduced through the practices of whomsoever can by public authority enact laws”\(^1\). This definition is borrowed from the *Tractatus de consuetudine* of Johannes Andreae, and not from Bartolus or Gratian. This tractatus of Johannes Andreae was printed as a part of his commentary on the Liber Extra, but sometimes it circulated separately\(^2\). This long treatise on customary law reflects a huge influence of Bartolus, but Johannes Andreae does not always accept the views of Bartolus. It is probable that Werbőczy read the treatise of Johannes Andreae, or another civilian treatise depending from it. In the medieval ius commune this borrowing of contents was well-known between civil and canon law.

In the tit. 10 of the Prologue of the Tripartitum, Werbőczy quotes the definition of Gratian (or Isidorus) which recites: “Custom is a certain law, arising from practice, taken for law where law is deficient.” This definition was borrowed by Gratian from Isidorus. The following sentence was cited from the *Summa legum*: “It is called custom, for it is, as it were, common practice and human use because it is in common use.”

After this Werbőczy provides another definition: “But to be more clear: custom may (for our purpose) be defined thus: it is that certain ius, introduced through the practices of whomsoever can by public authority enact laws.” This definition was not borrowed from Gratian, as Félegyházy\(^3\) stated, but from the *Tractatus de consuetudine* of Johannes Andreae. Werbőczy used a source deriving from Johannes Andreae who drew on Bartolus’ commentary. Félegyházy stated falsely that after the definition of Gratian there is Werbőczy’s own definition, because it comes not from Werbőczy, but from Johannes Andreae. Szászy held it the most precious and original part of the Prologue, but he was wrong, because its real author was Johannes Andreae. Describing the three requirements of custom, Werbőczy repeats the doctrine of Bartolus, as Johannes Andreae did so. According to him “first: custom must be reasonable. It is reasonable when it aims and advances the goal of law. The goal of canon and divine law is the beatitude of the soul. The goal of civil law is the common weal. Therefore, if a custom aims at the beatitude of the soul, it is reasonable by canon and divine law; and if it opposes an eternal goal, it is unreasonable. According to civil law, a custom is reasonable if it aims at the common weal”\(^4\). This above-cited definition of reasonableness of custom does not come from Bartolus. It derives from two decretalists of the 15th century, namely Antonius de Butrio and Dominicus de Sancto Geminiano, who stated that the goal of civil law is the common weal, therefore, if a custom aims at the common weal, it is reasonable by civil law; and if it opposes the common weal, it is unreasonable\(^5\). The glossators stated only that a custom may be regarded as reasonable, if it does not contradict natural law, the law of nations or human law.

As Werbőczy\(^6\) asserted, “secondly, custom must be prescriptive, i.e., it must last for an appropriate time and must receive force in the course of that time required for prescription. But this holds only for canon law and is not required even by that law unless it contradicts positive law. According to civil law, a decade, that is the passage of ten years, is sufficient for the introduction of a custom, even if it contradicts civil law. If, however, a custom contradicts canon law, then the space of forty years is required. Yet, if a custom is introduced in the absence of law, then, even in respect of canon law, a decade seems to be sufficient. The passage of ten years begins from the time the first act is performed by the people”\(^7\). Thirdly, as Werbőczy asserted, according to the common opinion of the doctors, repetition of the act is needed. Say, however, that a repeated act is not in itself necessary for the establishment of a custom. But because the consent of the people cannot be deduced from one single act, the repetition of the act can be seen as the cause and custom as the effect. And it is necessary to have so many and such well known acts that it becomes in all likelihood known to most of the people, for it is not the act but the tacit consent of the people that establishes custom. Thus, when the tacit consent of the people can be deduced, then the great recurrence of acts is unimportant. What is more, a custom can occasionally be introduced by a single act with a repeated cause lasting for as long as it takes to establish a custom; for example, a custom can be introduced if someone has a bridge on the public road or something of this kind”\(^8\).

As Werbőczy stated, customary law has three effects. Namely, explanatory, as it is the best interpreter of the law, abrogatory, because it supersedes law when contradicts custom, and substitutive value, because it replaces law, where this is deficient. As to the three effects of customary law, we can say that these derive from the civilian glossators, e.g. from Azo, and not from Hodiensis\(^9\), as it was stated by Félegyházy.


\(^{11}\) Trip. Prologus, tit. 10: “Secundo quaeso, ut si praescripta, id est, habeat tempus debitum, et per cursum illius temporis ad praeinscriptionem requiratur firmetur.”

\(^{12}\) Trip. Prologus, tit. 10: “Sed clarius, consuetudo (prout nostrum propugitum t actionem) sic definienda videtur: Est jus quodam. moribus illius introductum, qui autenticus vitae legem concenter potest. Ideo apellatione juris, venit etiam consuetudo.”

\(^{13}\) J. Andreue, Tractatus de consuetudine, post Comm. in X, 14, 11. de consuetudine et credenda (Venetiis 1581, fol. 62vb): “Consuetudo est jus quodam, illius moribus introductum, qui autenticus vitae legem concender potest.”


\(^{15}\) Trip. Prologus, tit. 10: “Primo, ut si rationabilis. Est autem rationabilis, cum tendit et accedit ad fines iuris. Finis autem juris canonie, et divini: est felicitas animae. Finis vero juris civilis, est bonum publicum. Ideo si consuetudo tendit ad felicitatem animae, est rationabilis secundum ius canonicum, et divinum; si autem repugnat finem aeterni, est irrationabilis. De iure vero civilis consuetudo est rationabilis, si tendit ad bonum publicum. Et quia in hoc non sunt specialae regulae, dic quod consuetudo, quae non est contra naturae, gentium, vel scriptum, praesumitur rationabilis.”
IV. The definition of judicial power in the Tripartitum

One of the most spectacular, although less important evidences of the adherence of Werböczy to Bartolus is the Titulus 14 of the Prologue. In this part, Werböczy states that "the office of the judge is the relevant right granted to the same judge to carry out those things that he is held to do as a judge. The office of the judge relates to jurisdiction as a plain to obligation. As one obtains by plain what comes from obligation, so what is brought into effect through the office of judge comes from jurisdiction, and he puts it into action."

Petrus de Bellapertica defined the iurisdicton as a right, and the office of judge as an exercising of this right (iurisdicton est ius, officium est exercitum ipsius iuris). As Bartolus has it, the office of the judge is the relevant right granted to the same judge to carry out those things that he is held to do as a judge.\textsuperscript{27}

The officium iudicis was an equivocal term in the ius commune. It had various meanings. Sometimes the officium iudicis was implored (implorare jucdiciis officium), if an actio was not granted by law to the plaintiff, especially when there has not been an obligation before. Therefore, the actio and the officium iudicis were two alternative ways of obtaining legal remedy, but in the same time there was a need to distinct one from another. However, Werböczy did not use this citation in its original context, and for this reason, we can suppose that he did not use directly Bartolus, but an indirect source. The concordance of the two sources is evidenced below:

<table>
<thead>
<tr>
<th>Tripartitum, Prologus, Tit. 14</th>
<th>Bartolus, Comm. in D. 2.1.1., de iurisdicton, l. ius dicentis officium, n. 10. (Lugduni 1550, fol. 56ra)</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Officium autem iudicis est jus competens ipsi iudicii ad ea, quae sibi ut iudicii facienda incumbunt, peragende praestitum. Differt auctem officium iudicis a iurisdictione, sic actio ab obligatione. Nam ut per actionem quis consequitur, quod in obligatione venit; ita per officium iudicis ad effectum perducitur, quod in iurisdictione venit.&quot;</td>
<td>&quot;Officium iudicis est ius competens ipsi iudicii, et est ius dicentis iudicato ea, quae sibi ut iudicii facienda incumbunt (...), et differt a iurisdictione, sic actio ab obligatione. Nam sicut per actionem consequitur quod in obligatione devenit; ita per officium iudicis ad effectum producitur, quod venit in iurisdictione.&quot;</td>
</tr>
</tbody>
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V. The self defense in the Tripartitum III. 21–24

The issue of the legitimate self-defense has been one of the most debated questions in criminal law for centuries. The ancient Romans’ criminal law was rather rude and penal law was not a separate branch of law in Rome. In the Middle Ages, the glossators made a new branch of law of which one of the first text-books was the Tractatus maleficiorum of Albertus Ganivius.\textsuperscript{28} Penal law reached a considerable scientific level at the time of Werböczy, and many treatises of penal law were available to him. The chapters on self-defense indicate that Werböczy was acquainted with this legal literature, at least as to the legitimate self-defense.

In accordance with the Glossa\textsuperscript{29}), any person attacked by another, should have the right to counteract aggression against his own person or his goods, only if a controlled amount of blameless force (cum moderam inculptae tute) was used. Self-defense, therefore, requires a) proportionality, b) immediacy, c) intention of defending.

Aggression can be repelled by many ways. The defender was required to choose the less harmful way of defending. The ratio communis requires that the harm to be prevented significantly outweighs the harm that will be inflicted. The defender has to estimate the dangerousness of the assailant. Proportionality is assessed mainly by establishing which instruments and weapons were used, what was the physical force of the defender and aggressor like. An unarmed attack is not permitted to be fended off with arms, but a person may defend himself with weapons against an attack with arms. The legitimate defense ought to take into consideration the physical force of the attacker, and for this reason, if an assailant can cause such a harm, that could be prevented by the weaker defender only with arms, it is deemed that the legitimate defense is conducted in due proportion, if he uses a sword. It is very difficult to assess the proportionality, because on the other side there is only a potential harm, as the attacked person is not obliged to expect the end of the attack, in order to know clearly what is the real intention of the attacker. As Bartolus stated, approaching another one with an unsheathed sword entitles the other person to counteract danger. Werböczy has a similar opinion, when he states that “if a person approaches another with an unsheathed sword it may at once be presumed that he plans either to kill him or to inflict a wound”\textsuperscript{30}).

According to the Gloss stated, the second requirement of the legitimate self-defense is the immediacy of the defense. The legitimate self-defense situation lasts as long as the unlawful attack. It ceases, if the unlawful attack ends. The defender, therefore, must be exposed to attack, when the self-defending action is going on. According to the Gloss, returning the blow after interruption is not an act of self-defense, but rather of vengeance. Those actions that aim to revenge, and not to self-defense, do not fall within the scope of legitimate self-defense. If someone has been struck, and the attacker runs away, but the offended person starts to pursue him, to return the blow, this is not an act of legitimate self-defense, but rather of revenge. According to Werböczy, "if he has already struck, and the striking stopped for a time, then he had no right to return the blow after the interruption; for by doing so, it may be considered and judged that the return blow was not an act of defense but rather of vengeance: unless, the person struck was perhaps acting to escape other fresh blows which his attacker intended.

\textsuperscript{27} GL. moderam in C. 8.4.1. unde vi. l. possidenti (Lugduni 1627, coll. 2054.): "Moderamen circa tria attentari. Primum, ut si armis inferatur violenter, et armis repellatur. Si sine armis, simili modo repellatur. ... Secundum, ut in continentie flagrante adhuc maleficio violente invasor repellatur. ... Tertium, ut ad defensionem, non ut ulimur seu vindicetam. ... Item circa illud quod dixi de moderamine, primo quatuor: Quod si pugnus armis plusquam alterius ensis percipiat. Respondeo: defendat se ene propter iniquitatem virum, cum vi repelle materia iva praelatum. ... Item namquid est necessit pries periculis expecti? Item dicunt quod sic. ... Ita dicit quod sufficit armorum, vel tacitato percussione." 30

\textsuperscript{28} 29) Tripartitum III. 21.1: "Nam, qui gladio evinuato alterum aggreditur, statim praesumitur, quod aut necem illi infert, aut lethalia vulnera infligere machinatur."
ded to repeat and continue. In other words, there is a difference between defense and vengeance: defense takes place at once; vengeance after a delay (3). It appears clearly, Wörbozyj adheres to the Gloss.

It is an act of legitimate self-defense, if the unlawful attack has not yet been started, but there is a possibility that it can be carried out. If somebody has been threatened to be killed, then the possibility of an unlawful attack is actual. Therefore, it was deemed as a self-defense situation by the Gloss, if the person was of the habit of putting his threats into effect. But if he was a weaker person or without arms, it was not deemed a self-defense situation. This was the opinion of Balduin, as well (4).

Balduin had a different opinion. He stated that a person who threatens to attack, did not start the commission of the crime, the verbal menace, therefore, can be only proportional with the verbal self-defense, but with the physical one not. According to Balduin, in the case of verbal threats, everybody should expect, and it is not permitted to react (5). There is only one exception, which is unknown to the Gloss. According to Balduin, it is permitted to carry out self-defending action against a verbal menace, only if the delay would be dangerous, because the person who threatens to attack is waiting for others to join him.

Wörbozyj dedicates a separate paragraph to the question. As Wörbozyj has it, "it must be said that although it is not permitted by the law and approved custom of our realm to attack another in response to threats or menaces (except in case and act of arson, where the person who threatens to set fire to and burn down a city, village, or another person's house is usually punished by death), nevertheless, by common law, if the man who threatened to kill another usually puts his threats into effect, and especially if he is powerful and has the habit of beating others, then (because the same act can be presumed again from his side) self-defense as well as attack is allowed, in order to avoid being killed. However, if the person is not the habit of beating others or of putting his

Threats into effect, then it is permissible to argue with him and resist him by words, and not by arms or sword. Except perhaps if he is waiting for others to join him (6)."

It is clear from the Tripartitum that Wörbozyj has accepted the doctrine of the ius commune on self-defense. Wörbozyj refused to adhere to the Gloss, and he did not accept the views of Balduin, either, but he followed the doctrine of a later commentator, Baldus. Wörbozyj did not accept the teachings of the Gloss or Balduin, because it was not sufficient for him that the assailant is able to put his threats into effect, as it sufficed for the Gloss or Balduin. Wörbozyj mentions an important exception, which was formulated by Baldus, because according to Wörbozyj it is legitimate to repel the defender, who is waiting for others to join him, because the delay would be dangerous.

The use of these words makes it undeniable that Wörbozyj was acquainted with the commentary of Baldus on the Codex Justinianus, or at least he used a textbook drawn on Baldus. We could mention here the commentary of Angelus Aretinus (7) on the Institutes, which is not entirely identical, but many keywords are the same.

As the Gloss states, the third requirement of the legitimate self-defense is the intention of defending. If there is no intention of defending, the counteracting conduct amounts to revenge. The intention of defending may be inferred from the circumstances. The unproportional defense is always an indication of revenge. The Gloss presumed the intention of defending, if the unlawful attack was going on. Wörbozyj requires the intention of defending, as well, as he states that "regarding the protection of body and person, self-defense can be done and is allowed only immediately and before the wrong is completely finished or in the same fight and struggle during the commission of the first crime: that is, before the attacker (or the person who struck first) departs from the scene. For, as previously explained, if it is done afterwards, it cannot be called self-defense but vengeance (8)."

Another important question treated by Wörbozyj in the Tripartitum was the duty of retreat. The unlawfully attacked person is often able to escape or to withdraw, but in these cases the self-defending action would be unnecessary and unproportional. It

3) Tripartitum III.216: "Sic autem fuit jam percussus, et cessavit actus persecussi per aliquum morant; tum non essi sibi iuris reperiret rem moram. Quia hoc modo non defensis, sed vindex potius illa reperisse censetur atque indicatur. Nisi forte persecussus faceret, ut evadaret alias persecussiones, quis agens de novo facere et continuare praetendebat. Et sic differentia est inter de fensum et vindexa, quia defensa sit in continent., vindexa autem post moram infritur."

4) Balduin, Comm. in C. 2.19.9, de his quod metus causa, l. metum (Ludgini 1552, fol. 95va): "Quando minae inferuntur, debet inspici persona inferens minas. Sunt enim quidam potentes et in mal quod illud quod dicunt, consueti sunt facere, tunc esset iustus metus ex minus et inictationius, ut supra eo. 1. si donasionis. Si vero erat quidam homo, quod consuevit multerm dicere et medium facere, tunc non esset iustus metus."

5) Balduin, Comm. (rep.) in C. 8.4.1, unde vi, i. possessi, n. 16 (Veniensis 1615, fol. 134vb): "Sed numquid solis minus minus possit percerecare minore? Glossa dicit quod sic: si consecutis minus suas minae inspici minias, nam tales minae iterum inferunt, ut i. j. si quacumque et l. 1. si rec. proxim. Nonum consecutae et qualitas personae debet attendi in inferior, l. j. quia insign. l. i. de act. et obl. factit quod notum. et. ab. l. iecet (D. 4.8.15). Mihi videtur contra, quia licet minas, non incipit delinquare facto, sed tantum verbo, nec procedit ad actum proximum, et idoio verbis resistit contrario verbo debet, non ad manus et ferrum venire, facit quod non. in Spec. de. sec. var quid si vocavi te latronem. Veramenten si in mora expectationis esset periculum, ex quo licuit de animo, starem cum glossa."

6) Tripartitum III.23.253: "Dicendum, quod licet de regni nostri legi et approbata consulta, propter minus et comminaciones non sit licet cuiusvis lucri autem offendere (praeter combustiones, ambitus minas, et quidam iuris accipere). Necesse est que iniuria velit aut无人 est, vel aliquis dominus, sibi sunt execuntae."

7) Angelus Aretinus, Comm. in Inst. 1.2.2, de iure naturali, genitu et civili, s. sed ius quodum civil, n. 9 (Veniensis 1609, fol. 15va): "Quod si minatus eum mili, an possum cum liquet offedere? Bar. in d. i. metum C. quod me can. dicit, quod si ille erat homo concusus minus suas executiones mandare, quod est iustus metus, alius non, facit quod notat Bar. in d. de papillo s. qui ipsi praetor, df. de no. op. Sed Baldus in l. 1. unde vi, iecet, quod inacio verbis est resistendum, et non ferro, nisi ille expectaret socios, et mora esset pecunia allatula."

8) Tripartitum III.22.1: "Quantum igitur ad corporis et personae tutam: debet fieri et admissi defensor suum ab hoste. Exercitatem aggressor vel primus percussor de loco recedat. Nam si posuit fieret: non defensor (prout praenarratur est), sed vindexa dicetur."
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and to strike a blow.\textsuperscript{(40)} Werbőczy's opinion is identical with the teachings of Angelus Aretinus\textsuperscript{(41)}.

In Tit. 24 of Part III, Werbőczy puts a further question: whether one can come to the help of another unlawfully attacked person. This chapter is fully in accordance with the ius commune. According to natural law, only an attacked person has the right to defend. The legislator must carefully weigh, if he extends or not the right to defend to other by-standing people. However, this can be dangerous, because these violent fights and firing can result in an all-in-wrestling. The commentators of the ius commune were aware of this danger, and hesitated to extend the right to defend to everybody. A special affection was required by the Gloss\textsuperscript{(42)}, and it was the reason why the Gloss acknowledged the right to defend the son, the parents, the spouse or the concubine. However, according to the Gloss, a stranger who is called on for assistance, cannot come to the aid of an attacked person.

As Baldus taught\textsuperscript{(43)}, if the attacked person is asking for help, every person, even a stranger is permitted to come to the aid of another to defend him from attack, as Bartholus taught already. Werbőczy follows the doctrine of the commentators saying that "anyone, even a stranger, who is called on for assistance, can always come to the help of a person he sees placed in mortal peril"\textsuperscript{(44)}. The source deriving from the ius commune is betrayed by a sentence where there is a reference to the defense of property rights, as a justification, because applying the Roman norm regarding the defense of property to personal self-defense was an often used argumentation by the glossators and commentators.

VI. Conclusions

Which conclusions can be deducted from this research? Above all, it became clear that the source of the Tripartitum was not the ancient Roman law, because Werbőczy did not quote and use the sources of Roman law, but the authors of the ius commune, that is the glossators and commentators who were the most up-to-date legal sources of that time. Glossators and commentators have substantially transformed and changed Roman law.

\textsuperscript{(39)} Huguccio Pisanus, Summa Decretorum, Tom. I. Distinctiones I-X, Vatican City 2006, 42: "Ex his omnibus patet quod nullus debet repercutere."

\textsuperscript{(40)} Goffredo Trasone, Summa in X. 5.12, de hominibus, n. 6 (Venetiis 1586, fol. 235ra): "Ad hoc dieunt quidam quod licet laici, clericis vero non.

\textsuperscript{(41)} Bartholus, Comm. in C. 8.4.1, unde vi, I. possidenti, n. 8 (Lugduni 1552, fol. 119r): "Si ego potui evadere fugiendo, et noli, sed volui resistere, an licet? Et quidam distinguunt: Aut: est persona cui fuga est verea vincula, aut non. Hic videtur indistincte dicendum, quem non debere fugere, nam aliquem fugatam esse est inuria, ut J. item apud, § 45. de infmr., ergo propulsanda ista infuria."


\textsuperscript{(43)} Gil. sibi ad D. 9.11.11, si quadrupes pauperem fecisse dicatur, I. cum arietes (Lugduni 1627, coll. 1014.): "Sed quid si non apparat quis fuerit aggressum? Responde: neuter alteri tenetur, arg. infra ad legem Aquil. I. sciantum § cum instrumenta."

\textsuperscript{(44)} Tripartitum III.21.27: "Si autem non apparat ex testimoni vel aliunde, quac percussio praecessit illam, tunc culpa in ilium praesumatur, qui alterum de conservatione ac persecutione provocavit;"
man law. In the Tripartitum there is no close adherence to Roman law. Roman terms are used to describe medieval institutions. The texts of the commentators are applied to produce arguments to answer the needs of the Hungarian medieval society.

We have shown that Werbőczy used the legal sources of his own time, he was not behind his time. He was not backward or behind his time regarding canon law sources, as well. He used not only 12–13th century old canonical literature, but he studied decreetalists from the 14–15th centuries, e.g. Johannes Andreae, Antonius de Butrio, and Dominicus de Sancto Geminiano. However, the proportion of canonical sources was not as important as Félegyházy and other Hungarian legal historians thought. Werbőczy paid much more attention to the civilian sources than the canonical ones. Bartolus and Baldus exerted much more influence on Werbőczy than the canonists did, whose importance is represented by the fact that they intermediated the doctrines of the civilians, instead of giving his own contribution.

The above-mentioned and discussed sources of Werbőczy are evidences that Werbőczy was not a half-educated and isolationist jurist of a backward country, but he was fully acquainted with the European legal science. The legal knowledge of Werbőczy was a modern and up-to-date legal knowledge.

We have shown, as well, that there is no reason to discriminate between the Prologue and other parts of the Tripartitum. Important citations from the ius commune, from Bartolus and Baldus were incorporated not only in the Prologue, but also in the three other parts of the Tripartitum. We have shown that the self-defence doctrine of ius commune was incorporated in the third part of the Tripartitum, and these legal ideas from the learned law had a huge importance in the everyday legal practice. It was not a display of legal knowledge and learning\(^4\).

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