Dorián DEME: Mortmain in the Hungarian legal system

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1. The emergence of legal institutions restricting the marketability of property in Europe

Following the edict about religion of Theodosius I in 380, Christianity became the sole leading religion, if not of the world, then of Europe for several centuries. However, we can see that after the very moment that the Christian church became able to acquire property within the Roman Empire and expanded its dominion, a tendency emerged in Western European countries to limit the alienability of property and with it the ability of the church to acquire it in various ways. These limitations of alienating property are called entailment and mortmain.

However, sources mention various forms of entailment prior to the emergence of feudal Christian Kingdoms, for example by the time of Germanic tribes, French customary law, or even English law. The Germanic tribes had a law of descent and distribution in form of the *Lex Salica* as early as the 500s, pursuant to the law the estate called *terra salica* passed *ipso iure* to the son of the testator upon his death, and if he had no male heir, it passed to the nearest male relative.[1] The Burgundian law can also be mentioned here, which similarly limited the testamentary rights of the father of the family for the purpose of keeping his property together.[2]

With the rise of Christianity in Western Europe, a much more detailed system of entailment was established. At the beginning of the 12th century, Henry I, King of

[1] CSEMEGI, Károly: *Az egyházi holtkéz a magyar törvények szerint [The mortmain of the church according to Hungarian law]*. Magyar Jogászegyleti Értekezések, Volume 14, No. 1. Budapest, 1897, Franklin-Társulat Könyvnyomdája, pp. 12–13.

[2] *Ibid.*, pp. 13–14.; DAEMPF, Sándor: *A holt-kézi törvény (lex amortisationis) Magyarországon: Magánjogi tanulmány [The lex amortisationis in Hungary. A private law study]*. Pécs, 1891, Engel Lajos, p. 20.

England, followed the trend and revised the system of succession in his country by classifying estate into two groups. These were the self-earned assets and the inherited Bockland, which bore the characteristics of entailment. The Bockland, similarly to the aforementioned terra salica, was inherited "from father to son, and from the son to his son".[3] Within the framework of this legal institution, in the absence of a male heir, the brother(s) of the testator was(/were) favoured. Almost all the kings within the Christian-dominated territories made similar provisions. The purveyors of the ideas without which entailment could never have taken such deep roots were the ius commune, the ius cannonicum and their powerful influence.

Similar provisions were enacted in Hungary as well, but with a certain delay regarding this area. The Golden Bull of 1222 cannot be omitted as a predecessor of the Hungarian entailment laws also known as the aviticitas. The Golden Bull of Andrew II, issued in Székesfehérvár, is the first decree issued by a Hungarian king, which establishes the rights of the Hungarian nobility. However, one currently-disputed cornerstone of the provision goes against the ongoing trend of Western Europe. It does not limit the right of family fathers to make wills, but gives them a concession. Under this provision, a legator who died without children was free to leave his property to anyone, even to the Church.[4] Hungary had to wait more than 100 years to get back on the "right" track, when the ideas and laws that had pervaded the West for centuries arrived with the accession of the Anjous.

In the 9th year of his reign, the second Anjou king, Louis the Great renewed the Golden Bull of András II almost completely: instead of the testamentary concession introduced in 1222, he introduced restrictions, thus creating the Hungarian law of aviticitas. With the Decree of 1351, Louis the Great wanted to strengthen the nobility and prevent their impoverishment. This was also due to one of the ideas imported from the West, the new military system called the banderium. King Charles Robert reorganised the army, making the nobility its backbone, so a weak nobility also meant

[3] CSEMEGI, 1897, pp. 16–17.
[4] DAEMPF, 1891, pp. 48–58.

a weak Hungarian kingdom. Therefore, the Anjous had a clear interest in making the Hungarian nobility strong and wealthy.[5] The Decree of 1351 was considered by many to be the first mortmain law, i.e. the first law that restricted the churches' ability to acquire property, since a noble testator could not leave his property to the church, among others. However, this provision was not aimed exclusively at the churches, nor was it in Louis the Great's interest to see his relationship with the church deteriorate. The main reason for this was the circumstances surrounding the accession of the House of Anjou. In 1301, the House of Árpád died out, the throne became vacant, and an interregnum set in. From the struggle for the Hungarian throne, Charles Robert of Anjou emerged victorious. His success was largely due to the support of the Christian church, which he had good relations with. The good relations between the house and the papacy were maintained by his son, therefore he had neither the interest nor the power to weaken the Church which supported him. [6]

Consequently, the laws of entailment and the laws of mortmain cannot be mentioned in the same group, but both institutions have in common that they aim to restrict the right of the nobility to dispose of property.

2. The development, history and application of mortmain laws in Hungary until the 19th century

2.1 Prelude of the first mortmain law and the law itself

Similarly to the entailment, the development of the mortmain laws started in Western Europe. The church in the Roman Empire was originally a forbidden society, so it could not acquire property. This only ceased later, when it became the state religion, however

[5] CSEMEGI, 1897, pp. 20–22.
[6] *Ibid.*, pp. 16–17.

following that, gradual restrictions on their ability to acquire property came in force, but we cannot speak of mortmain laws yet.[7]

The mortmain laws became necessary after the strengthening of the Church and its wealth. In accordance with Church teachings and in the hope of salvation in the afterlife, people left their property both during their life and at their death in such a way that it would be transferred to the Church and to various Church officials. This had two effects. The noble fathers, disregarding their families and their members, left all their property to the Church in their wills. After their deaths, the will came into force, their assets were removed from the family and the new fathers had to manage without a penny to their name. Needless to say, this phenomenon led to the ruin and disappearance of many noble families. The weakening of the noble families weakened the kingdom itself, so kings had to stand up strong-handedly.

Thanks to the provisions and disposals to the Church, the Catholic Church has acquired great wealth. This fuelled the greed of the priests and other church leaders even more. Contrary to the teachings of the church, they lived in splendour and luxury, which resulted in the power and wealth of the church competing with the state and the king. In some areas, the authority of the Church was already greater than that of the ruler. The biggest problem, however, was that the church's estates were in a state of mortmain, which meant that the church itself was not allowed to alienate estates, in other words what once became the property of the church fell out of the economic cycle.[8] Thus, one of the most important institutions of the feudal system could not prevail, since the Church, unlike the dynasty and the family, could not "die out", go extinct, and therefore the estates could not be passed back to the Crown. Including this reason, the kings of the feudal age could not afford to allow the church to continue growing and gaining more ground.

[7] DAEMPF, 1891, pp. 19–21.; Hoffmann, Pál: *Közönséges és magyar részszerű katholikus egyházjog alapvonalai [Common and Hungarian Catholic Church law basics]*. Pozsony, 1865, p. 244.
[8] DAEMPF, 1891, p. 17.

Nevertheless, we cannot speak of direct aims to weaken the church until the 14th century, when the balance tipped in favour of the state. This was due to the great Western schism, or schism, in which two popes, whose authority could not be asserted in all the Catholic countries, were elected after the 70-year-long „Avignon Captivity". Europe became divided and the situation became so dire that by the beginning of the 15th century there were three elected popes. The Council of Constance put an end to this in 1417, but by then the damage was already done, the negative effects of the previous period had become irreversible. The papacy, and with it the whole Church, lost its prestige, could not fully assert their authority and was all in all weakened.[9] This gave Christian rulers the perfect opportunity to stop the flow of wealth to the church for good. One by one, laws were introduced which made the promulgation of papal bulls subject to royal permission or restricted the acquisition of church property.

The Kingdom of Hungary was not left out of the new trend sweeping across Europe, as in Hungary, like in Western European countries, it was necessary to limit the acquisition of property by the Church. The first law of mortmain dates back to 1498. However, the law was the preceded by a lengthy process. Compared to the rest of Europe, the Church had even greater influence in Hungary, which led to various movements that tried to oppose the clericity. The precursor of Act 1498:55 was also such a movement, which was headed by István Báthory the elder, who not only acted as patron of the impoverishing nobility, but also had personal motives against the most influential man in the Hungarian Christian Church, Tamás Bakócz.[10] The pressure exerted by István Báthory and his movement was so impactful that it could no longer be ignored. Thus, in 1498, the first law of mortmain was enacted, which remained part of the legal system until the end of the 19th century.[11] According to the law, all contracts with the church and ecclesiastical persons concerning property and the right to property are null and void. It is important to note that the law also covers all contracts

[9] CSEMEGI, 1897, p. 27.
[10] DAEMPF, 1891, pp. 80–83.
[11] *Ibid.*, pp. 84–85.

concluded by church persons as individuals, and applies to both inter vivos and mortis causa. In addition to Act 55, it is necessary to mention Act 1498:65, which stated that such contracts were null and void, even in case of payment of money, and with retroactive effect. After the introduction of these two acts of law, no property could be transferred to the church and not even a royal approval could help that.

2.2 Mortmain law during the reign of the Habsburgs in Hungary

The rules of 1498 proved to be only a temporary solution as people broke them regularly and they failed to have the intended effect of weakening the church. The possibility of introducing new rules was caused by the Reformation wave in Europe, following the rise of a new branch of the Christian church, namely Protestantism, which began to take hold in 1517 after the actions of Martin Luther. The new trend spread like wildfire among the Hungarian nobility in the 16th century thanks to which the Catholic Church lost its primacy as Protestantism proved to be a worthy opponent. As result the nobility became divided. This division provided an opportunity to take further and more assertive actions against the clergy. As the leaders of the new movements, it is important to mention István Bocskai and Gábor Bethlen. Bocskai is responsible for the Assembly of Korpona and its conclusion, Act 1608:1, in which the Protestant Church was recognised as a denomination. Furthermore, Gábor Bethlen weakened the position of the Church at the Diet of 1619 in Pozsony. [12]

Nevertheless, the greatest changes came about thanks to George I Rákóczy and the 30-year war. The clashes, also known as the world war of the 17th century, were dominated by the Protestant-Catholic conflict. Most countries in Europe, including the former Principality of Transylvania, were drawn into the war and as the Prince of Transylvania, George I Rákóczy, came to the defence of the Protestants. The war was doubtful for a long time, but this changed with the external defeats of the Habsburgs, when Ferdinand III lost his favourable position and was forced to negotiate a peace

[12] *Ibid.*, pp. 96–97.

deal with the Transylvanian parties. He had to give in to the pressure in his peace treaty with György Rákóczy. Following the peace treaty of 1646 and the closely related Diet of 1646/47, the right of Protestants to practice their religion freely was guaranteed. In addition, the Parliament passed Act 1647:17, which completely renewed the acts of 1498.[13] This was the second attempt in Hungarian history to weaken the churches, but as we can see from the events of the following centuries, similarly to the first mortmain law, it was not successful.

Even after the renewal of the mortmain laws in the 17th century, the provisions of the laws could not be enforced for various reasons. This stems from the relationship between the Habsburgs and the Ottomans as similarly to the previous years, the two sides were in constant conflict. Until the beginning of the next century, Hungary was divided into several parts between the Ottomans, the Habsburgs, and the Transylvanian Principality. Logically, the laws of the Hungarian kings could only be enforced in the territories, which were dependent from them. This period was characterised by sovereignty problems that arose from the constant border feuds. The problems could only be resolved in the early 18th century, when the Habsburgs managed to recapture the Ottoman-controlled territories of the Hungarian Kingdom (1699) and to take back the Transylvanian Principality after the defeat of Rákóczy's War of Independence (1711).

In the following period, King Charles III of Hungary, in addition to his many measures, also put emphasis on the laws of mortmain. The main purpose of his laws was to relax the relatively high degree of severity while maintaining the existing laws. This is how, among other things, Act 1715:16 was born, which also restricted the churches' ability to acquire property, but unlike the previous laws of mortmain, it provided certain concessions. Thus, property could be finally transferred to the churches in exceptional cases, however, the consent of the highest dignitary, the king, was required for this to be valid, otherwise it was not allowed to leave property to the

[13] *Ibid.*, pp. 98–100.

church.[14] In addition to this act, two other ones were enacted in the same year. The first of them being act 1715:71, which regulated a special case of the transfer of property to the Church. Specifically, when the person with the claim to the property joins a monastic order. This was mainly problematic because of the triple vow of the monks, who, among other things, had taken the vow of poverty of Jesus, so that they had to give up all their property, usually for the benefit of the monastic order. Thus, according to the law, they could claim only one tenth of their inheritance, exclusively in cash and only up to five thousand forints.[15]

Act 97 of the same year, however, also took contrary measures, since the law stated that "The chiefs of the monks shall also be bound to keep the contracts of their predecessors with the laity, duly and solemnly concluded and confirmed by authentic writing." At first sight, this is a provision that runs counter to previous laws, and to the essence of the laws enacted in the previous 200 years. At the same time, it may be concluded that this provision applies only to other contractual relationships outside the law of mortmain. The purpose of the law was to prevent clergymen from using the provisions of the mortmain laws as an excuse to evade their obligations.[16] From the laws of 1498 onwards, one of the main aims of the jurisprudence in the field of the laws of mortmain was to limit the alienation of property to the Church, and therefore it would be absurd to assume that, in the same year there were laws of mortmain enacted, and paradoxically, another law would abolish the institution. Hence, the conflict between Act 97 and the preceding acts of law does not exist.

2.3 The effects of the Hungarian civic transformation on the laws of mortmain

For the next more than hundred years, the mortmain laws remained relatively untouched in the legal system. Only one royal decree, issued in 1774, imposed a specific limit on the maximum annuity allocated to monastic orders. After that, there

[14] *Ibid.*, pp. 102–104.; CSEMEGI, 1897, p. 31.
[15] DAEMPF, 1891, pp. 107–108.
[16] *Ibid.*, p. 113.

was no mention of new laws on the alienation of estate, considering both the aviticitas and the mortmain laws, until the high point of the Hungarian reform era, the 1848 legislative period. The most important aim of the reform era from 1825 onwards was to modernise Hungary, which had lagged behind, was old-fashioned compared to Western countries, and to bring it up to European standards. Achieving these goals were impossible without abolishing the laws that had severely hampered the Hungarian economy and were still in force. These laws were the laws restricting the alienation of property, i.e., the aviticitas laws for almost five centuries and the mortmain laws of 1498. These were attempted to be remedied at the Diet of 1848/48, but as the strict, backward orderly legislative process was still in place at that time, it would have proved impossible to fully develop new laws within the system. Despite the strict procedural requirements, the National Assembly succeeded in getting Ferdinand V to sanctify, among other provisions, the Act 1848:15. The aim of the law was to dismantle the system of entailment, but it was only partially successful, as it was declarative and undeveloped. The detailed law was intended to be drafted under the reformed system, but the events that followed the Diet, the Revolution and the War of Independence, made this impossible. The legislation of 1848 made no provision regarding the mortmain laws, so they remained part of the legal system after the failure of the War of Independence. [17]

In the period following the restoration of the legal system after 1848, several attempts were made by the Habsburgs to reform the legal system, including provisions on the marketability of estate. However, these were met with resistance from the Hungarian side, as in the name of passive resistance, they did not recognise the new Austrian regulations and refused to implement them, but the attempts are still worth mentioning. One of the most important of these attempts occurred on 13 November 1855, when the Josephine reforms were annulled in the Austrian Empire, after which the Roman Catholic Church regained its primacy within the empire. It made the

[17] *Ibid.*, p. 131.

Church's property inviolable and restored its freedom to acquire property. It de facto repealed all laws that contradicted it as well, including the laws of 1498, 1647 and 1715.[18] However, the above-mentioned passive resistance caused the same problem, so the provisions never became part of the legal system. Similar aims could have been achieved by the introduction of a land register in December 1855.[19] The main purpose of the legal institution was to create a registration system in which the most important information about real estate could be kept. The land register system did not recognise any restrictions on the acquisition of property by churches and church officials, which would have allowed them, among others, to acquire property freely, but for the reasons already mentioned, this was not accepted by the Hungarians.

When the Austrian Emperor Franz Joseph realised that Hungary could not be governed as part of the Austrian Empire and its legal system, he realised that something had to be done. This was attempted by the Lord Chief Justice Conference of 1861, convened by György Apponyi, at which the country's intellectuals drew up the Provisional Judicial Rules.[20] These rules, made outside of Parliament, were not laws due to their lack of legitimacy, but they were able to become part of the legal system. The rules re-enacted the entire Hungarian legal system, with the addition of a few provisions from the neo-absolutist era that proved useful. There was no explicit provision for mortmain laws and since they were not contradicted by the new Austrian provisions, it can be concluded that the mortmain laws remained part of the legal system. An interesting situation arose where the laws of the mortmain were in a legal grey area. De facto, they were still in existence, but they also encountered obstacles in principle and in practice, as well as some provisions were repealed or rendered obsolete by the changed legal system. For example, the mortmain violated the principle of equal rights, as the laws distinguished monks and clerics in a discriminatory way. Moreover, the provision of the laws of the mortmain preventing churches and

[18] *Ibid.*, pp. 130–130.
[19] CSEMEGI, 1897, pp. 43–44.; DAEMPF, 1891, p. 131.
[20] DAEMPF, 1891, pp. 132–133.

ecclesiastical persons from acquiring noble goods as royal donations became irrelevant, since the imperial patent about the entailment of 1853 abolished the donations of the king and the palatine.

After more than 30 years, the mortmain laws were revisited, namely at a plenary session of the Royal Curia No. 63 held on 1 February 1896, at which the laws were abolished by a case-law decision.[21] By their reasoning, the restrictions on the mortmain, and therefore the mortmain laws, are obsolete. They are no longer needed in the present circumstances, and therefore Acts 1498:55, 1498:65, 1647:18 and 1715:16 have been repealed by the customary law.

3. The justification for mortmain laws

The laws of the mortmain tried to create a balance between the churches and the nobles, as well as between the churches and the state. Their importance was invaluable in the age of feudalism, when the nobility constituted the military power of countries and the bulk of the state apparatus. However, in practice, for various reasons, they have not been able to take hold. The lack of state coercion, questions of authority and the everyday importance of Christianity all played a part in preventing the laws of the mortmain from taking root. In Hungary, thanks to this, the laws relatively quickly disappeared from the jurisprudence, formally when the aforementioned session of the Curia declared them obsolete, but we can say that they failed to have their intended effect already in the previous years. This process happened relatively quickly compared to other countries. For instance, in the United Kingdom, dead-hand laws were formally repealed in 1960, and in some Commonwealth countries, they are still in force.[22]

[21] NÓTÁRI, Tamás: A magánjog fejlődése és kodifikálása Magyarországon [Codification of private law in Hungary]. In: OSZTOVICS, András: *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja I. kötet [Act 5 of 2013 on the Civil Code and related legislation. Volume I]*. Budapest, 2014, OPTEN Informatikai Kft., p.14.

[22] Charities Act 1960.

However, we can also talk about different alternatives to the Mortmain laws, which were designed to solve the same problem. The most successful of these attempts was carried out by Henry VIII when he dissolved all monastic orders by 1541 and deprived many members of the Church of their lands.[23] The bishops were still left with a relatively large amount of land, but he managed to tip the scales permanently in favour of the state and solved the problem. However, in the Kingdom of Hungary, such a thing could never have been done, because of the head of state's close ties to the Church. Because of the founding works of the Church of St Stephen, Hungarian kings were entitled to the title of Apostolic King, and the king in Hungary functioned as the head of the Church, so a radical solution such as the one in England would have weakened his position completely.

Finally, the question arises as to whether, without the problems of feudalism, there would be a place for the law of the mortmain in the modern legal system. In spite of the fact that the technical conditions are met, it would probably quickly disappear from the modern legal system. The main reason for this is that the original purpose of the Mortmain laws has already been fulfilled. The church and Christianity have lost their central role and their everyday relevance. Atheism, or even anti-churchism, is gaining popularity, while Christianity is becoming increasingly deserted. Hence, the churches are no longer a "threat" to families, and there is very little chance of them becoming impoverished by leaving their assets to the church in their wills. Thus, in my opinion, the fate of the mortmain laws in the modern legal system would be similar to that was laid down by the Curia in 1896.

[23] GASQUET, Francis Aidan: *Henry VIII. and the English monasteries*. Fine facsimile edition. San Francisco, 1972, Ayer Company Publishers, pp. 244–246.