# Abolishment of the institution of *aviticitas* and the establishment of modern private law in Hungary

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**ABSTRACT**
Only few such, directly private law-related, institutions are known in world history which had in themselves become the symbol of an outdated era. Aviticitas was definitely such an institution. Political and legal thinkers of the Hungarian enlightenment and the Reform Era, committed to the transition from a mostly feudal society to a modern one, unanimously considered it as one of the remnants of the Middle Ages and also an obstacle to social and economic development. As the legal historian József Illés stated: it was "the most expressive institution" of the legal ancien regime.[1] The present study wishes to highlight that, even if such critique was at times exaggerated and the institution itself was not as much the devil's work as some contemporaries saw it, the in rem aspect of aviticitas[2] became outdated by the end of the 18th century and the beginning of the 19th century.
**KEYWORDS**
aviticitas, civil law, Hungarian legal history, legal modernization, private law, property law.

## Abolirea instituției dreptului avitic și crearea dreptului privat modern în Ungaria

**REZUMAT**
Puține instituții aflate în legătură directă cu dreptul privat sunt cunoscute în istoria lumii pentru a fi ajuns să simbolizeze o epocă apusă. *Aviticitas* a fost în mod cert o asemenea instituție. Gânditorii politici și juriștii din perioada Iluminismului și a Erei Reformelor din Ungaria, hotărâți să desăvârșească tranziția de la o societate preponderent feudală la una modernă, au considerat-o în mod unanim ca fiind o rămășiță a Evului Mediu și un obstacol în fața dezvoltării sociale și economice. Așa cum afirmase istoricul dreptului, József Illés, a fost „cea mai expresivă instituție" a *ancien regime*-ului legal. Prezentul studiu dorește să scoată în evidență faptul că, deși asemenea critici erau câteodată exagerate, iar instituția în sine nu avea caracterul diabolic sesizat de mulți contemporani, aspectul in rem al *aviticitas*-ului a căzut în desuetudine până la sfârșitul secolului al XVIII-lea și începutul secolului al XIX-lea.

1 József Illés (1910): *Bevezetés a magyar jog történetébe. A források története*, Révai Károly kiadása, Budapest, p. 210.
2 Béni Grosschmid (1897): *Öröklött s szerzett vagyon*, Politzer Zsigmond kiadása, Budapest, p. 81.

**CUVINTE CHEIE**
aviticitas, drept civil, istoria dreptului din Ungaria, modernizarea dreptului, drept privat, drepturi reale.

## I. INTRODUCTION

The enlightened writer *György Bessenyei* depicts the following in his work *Magyarországnak törvényes állása* ("The Standing of the Laws in Hungary") written between 1802 and 1804:

> There is no other country in this world where the members of the same kindred are at such a constant war against each other as they are in Hungary. All this is based on inheritance and division of heredity for all times. Every death causes a new war that is going to continue until another death occurs, but new deaths will cause new wars thereinafter. Our nation is drowning in a sea of litigation, and the insatiable stormy waves of this sea are made of blood of kinsmen.[3]

Count *István Széchenyi*, the leading Hungarian reformer of the early 19th century, had set up a twelve-point programme in order to establish a modern financial environment. In this programme he mentions at the second place – after the issue of credit – the "final and definitive abolition" of *aviticitas*.[4] At a later point he discusses in detail why he considers this radical step necessary:

> I may not do anything with my property what I want, so there is nothing that is really mine, I am not the true owner of anything. As a nobleman, I have the honour to be a member of the Holy Crown, but for having this honour I may not be an owner but only a usufructuary.

He adds also: „*aviticitas* would have to be abolished even if it were not a barrier for lending. It would have to be abolished in itself as the most harmful creature ever to have existed repressing the human ambitions".[5]

3 György Bessenyei (1987): Magyarországnak törvényes állása [1804], in Ferenc Bíró (ed.): *Bessenyei György válogatott művei*, Szépirodalmi Könyvkiadó, Budapest, p. 742.
4 István Széchenyi (1833): *Stádium*, "Z" kiadása, Leipzig, p. 30.
5 Széchenyi (1833): p. 73-75.

## II. DEFINITION AND LEGAL CHARACTERISTICS OF *AVITICITAS*

According to the common – but, as we shall see, incomplete – definition, *aviticitas* (or *avicitas*) is a strict order of succession, meaning that an asset once passing "from father to son", i.e. being inherited according to the rules of intestate succession, must not be subject to testate succession any more. Until the extinction of the family, this property may be inherited according to the rules of intestate succession, and in the case of extinction, its ownership shall revert to the Holy Crown.[6] This is the definition taught in school education, substantiated with the provision of the Decree of 1351 of Louis the Great (of Hungary) which repealed Article 4 of the Golden Bull of 1222 (also known as "the Hungarian *Magna Carta*") on the free disposition of property upon death.

This definition is fair enough to offer some familiarity to the seekers of general knowledge, however *aviticitas* was a much more ancient and complex legal institution. Contrary to the commonly held opinion – represented by, among others, the civilists *István Teleszky* and *Tamás Vécsey*, or expressed in the relevant article of *Pallas Great Lexicon* written by the Budapest high court judge *Fausztin Heil* (later a member of the Hungarian Royal Administrative Court established in 1896)[7] – *aviticitas* was in no way a foreign institution introduced by the Angevin kings in the 14th century in contrary to the Golden Bull (and the laws of the kings of the Árpád dynasty), but was actually derived from the ancient Hungarian legal tradition, the legal order of a society based on kinship (tribal forms of organisation), from times before the establishment of the Christian state in Hungary.[8]

As *Elemér Pólay* stated, the Decree of Louis the Great "seems indeed to refer to the fact that the difference between the succession in ancient and acquired property was not unknown at the time of the Golden Bull".[9] According to *Mária Homoki-Nagy*, the Decree of 1351 emerged as the result of the legal battle between the *descensualis* (based on the right of the kindred) and the donated land (an institution alien to the ancient law, introduced during the of reign of King Coloman): by the recognition of the *aviticitas* "the kindred has laid its hands on the donated lands as well".[10] Other present-day legal historians, such as *Barna Mezey* and *László Pomogyi* are on the same position.[11] The detection itself is very probably due to Ferenc Eckhart and his disci-

6 See e.g. Vanda Lamm, Vilmos Peschka (1999): *Jogi lexikon*, KJK Kerszöv Kiadó, Budapest, p. 477.

7 See: Fausztin Heil (1896): Ősiség (Aviticitas), in *Pallas Nagy Lexikona*, Pallas, Budapest, p. 678; István Teleszky (1876): Öröklési jogunk törvényi szabályozásához, *Jogtudományi Közlöny* 1876, p. 307; Tamás Vécsey (1895): *Széchenyi és a magyar magánjog*, Magyar Tudományos Akadémia, Budapest, p. 13.

8 István Kállay (1982): Kötetlen kötöttség a feudális magánjogban, *Jogtudományi Közlöny* 7/1982, p. 527.

9 Elemér Pólay (1974): Kísérlet a magyar öröklési jog önálló kodifikációjára a XIX. század végén, *Acta Universitatis Szegediensis de Attila József Nominatae. Acta Juridica et Politica*, Tom. XXI, Fasc. 4, p. 8.

10 Mária Homoki-Nagy (2001): *A magyar magánjog történetének vázlata 1848-ig*, JATE Press, Szeged, p. 51-52 and 73.

11 Barna Mezey (2015): A birtokról és a birtoklásról a feudális-rendi magánjogban, in József Szalma (ed.): *A magyar tudomány napja a Délvidéken 2014*, Vajdasági Magyar Tudományos Társaság, Novi Sad, p. 21; László Pomogyi (2008): *Magyar alkotmány- és jogtörténeti kéziszótár*, Mérték Kiadó, Budapest, p. 77-78.

ple, *Antal Murarik* – unfortunately deceased all too early –, especially to the excellent study of the latter published in 1938.[12]

It is remarkably interesting to have an overview of the definitions, and the attempts to discern a definition for *aviticitas*. According to the excellent legal scholar *Béni Grosschmid*, the substance of *aviticitas* is "the protection of blood bonds by means of property law",[13] while in the interpretation of the legal historian *Attila Horváth* it means "the encumbrance of the assets of the family inherited from the first owner according to the rules of intestate succession, or based on a will confirming the order of intestate succession, in relation between living persons and for the case of death as well".[14] The English professor of history, one of the most eminent foreign researchers of medieval and early modern Hungarian legal history, *Martyn Rady* defines *aviticitas* as "the law of collective rights over properties inherited from a common ancestor or *avus*".[15] The already mentioned Antal Murarik also defined it as "the complexity of material law rules concerning the encumbrance of property".[16]

Indeed: *aviticitas* embraces more than one private (civil) law institution. From the point of view of inheritance law, an order of heredity restricted to the intestate succession – as Grosschmid calls it, "succession against the will",[17] or with Murarik's words: „a *cogens* version of intestate succession".[18] In practice it means that the ancient properties (*bona avita* or *bona avitica*) were inherited by the descendants, and in the lack thereof that branch of the family whom the assets derived from. Thus, in line with the objective of the institution, the property must have remained in the hands of the kin until its extinction, i.e. until any of the descendants of the originator of the property (the *avus*)[19] is alive.[20] Should the extinction occur, the "ancient property" shall revert to the Holy Crown as the source of all rights. This way the prohibition of leaving a will against the order of intestate succession[21] remained valid and applicable to the last living member of the kindred as well.

Furthermore, *aviticitas* had another civil law side as well, the property law branch,[22] i.e. the restriction of the right of disposal among living persons. We can already read in the Decree of Louis the Great that, according to Article 4 of the Golden

12 Ferenc Eckhart (2000): *Magyar alkotmány- és jogtörténet*, Osiris Kiadó, Budapest, p. 296.; Antal Murarik (1938): *Az ősiség alapintézményeinek eredete*, Budapesti Tudományegyetem, Budapest, p. 111-112.
13 Grosschmid (1897): p. 98.
14 Attila Horváth (2014): A magyar magánjog története, in Attila Horváth (ed.): *Magyar állam- és jogtörténet*, Nemzeti Közszolgálati Egyetem, Budapest, 399-504, p. 439.
15 Martyn Rady (2000): *Nobility, Land and Service in Medieval Hungary*, Palgrave, London, p. 97.
16 Murarik (1938): p. 10.
17 Grosschmid (1897): p. 96.
18 Murarik (1938): p. 11.
19 Martin Rady (2015): *Customary Law in Hungary: Courts, Texts, and the Tripartitum*. Oxford University Press, Oxford, p. 85.
20 Homoki-Nagy (2001): p. 79-80.; István Teleszky: Öröklési jogunk törvényi szabályozásához, *Jogtudományi Közlöny* 1876, p. 248.; Gyula Zachár (1912): *A magyar magánjog alaptanai*, Grill Károly Könyvkiadóvállalata, Budapest, p. 61-62. and 332.
21 Homoki-Nagy (2001): p. 77.
22 Grosschmid (1897): p. 97.

Bull all noblemen "had the right and liberty to sell and alienate their lands [...] at their free choice", but at the same time it abolished this freedom (of disposal *inter vivos*): "on the contrary, *they should actually not do it* [part highlighted by the author], they shall let their property be inherited by their closest kinsmen within their kindred, clearly and unconditionally, as the law says" (see Preamble of the Decree of 1351, Article 11).

*István Werbőczy*, the great compiler of the customary law of Hungary, had elaborated the elements and legal consequences of this restriction of disposal in details in Titles 58 and 59 of Part I of his *Tripartitum opus iuris consuetudinarii inclyti regni Hungariae* (literally "A Work in Three Parts on the Customary Law of the Renowned Kingdom of Hungary"), based on which rules the legal practice of *aviticitas* against the right of free disposal was formed over centuries and was still adhered to by the Hungarian court in the first half of the 19th century. First of all, Title 59 set up an important distinction among indispensably necessary (*necessaria*); not indispensably necessary but still "reasonable" (*rationabilis*) and other, simple (*simplex*) cases of sales of property (in the specific contractual form of *fassio*, in Martyn Rady's translation "recognizance" or verbal undertaking).[23]

A property sale was considered "necessary" if the seller (*fatens*) could this way rescue himself from a death penalty imposed in a criminal case of *actus maioris potentiae* (unlawful enforcement of private justice by one nobleman against the other) or from captivity. These cases were qualified as distress, so not only the consent of the members of the broader kindred, not even that of the closest descendants (sons) had to be obtained for such sale.[24] This exception was later extended by the court practice to the reasonable (*rationabilis*) sale contracts as well, i.e. when the *fatens* could save a more valuable ancient property by selling the less valuable one; or he could otherwise not sustain himself because of deprivation without any fault of his own; or he could otherwise not bear the expenses of a so-called "noble uprising" (*insurrectio*, i.e. an obligatory participation of noblemen in a war), or the costs of a "hazardous but inevitable litigation".[25]

Whereas neither distress nor such other important legitimate reasons could be established, the contract of sale was a simple recognizance (*fassio simplex*), and the consent of the heirs was necessary to be obtained for the alienation of the ancient property. In lack thereof the heirs and their successors could ask the court for the annulment of the recognizance (*invalidatio fassionis ex praejudicio*) referring to the infringement of their right for intestate succession (*praejudicium legitimo haeredi*).[26] In this sense a simple recognizance related to an asset of ancient property was a contract depending on the approval of third persons, and the institution of *aviticitas*

23 Ignác Frank (1845): *A közigazság törvénye Magyarhonban, vol. I*, Magyar Királyi Egyetem, Buda, p. 353; Rady (2015): p. 38.

24 Eckhart (2000): p. 279 and 283; Frank (1845): p. 361; Homoki-Nagy (2001): p. 43; Pál Szlemenics (1823): *Közönséges törvényszéki polgári magyar törvény. 3. A köteleztetést szülő tettekről*, Snischek Károly kiadása, Pozsony (Bratislava), p. 57.

25 Frank (1845): p. 353.

26 Frank (1845): p. 352.

itself resembles the prohibition of alienation and encumbrance known to modern civil law.[27]

In other respects *aviticitas* resembles more the characteristics of joint ownership (co-ownership), and the rights of the *fratres condivisionales* (members of the kindred of the same common ancestor from whom the ancient property had once been inherited in accordance with the rules of intestate succession) deriving from *aviticitas* resembles the right of pre-emption of the co-owners as they still have it today.[28] We agree with *Gábor Béli*'s finding: the "community of law and blood" (*communio juris et sanguinis*) serving as the basis of *aviticitas* meant that the father and his sons, in broader sense the original owner and all his respective successors were actually in "a status of co-ownership with each other".[29]

This community of law is defined by Grosschmid as "common property" (i.e. co-ownership) as well, "belonging to the living and future members of the kindred".[30] The early 19th century legal scholar *Ignác Frank* who, as a practising lawyer, could look at *aviticitas* as a living institution of law, described very precisely the substance of this very specific perennial co-ownership in his famous work published in 1845 in Hungarian called *A közigazság törvénye Magyarhonban* (Law of Public Justice in Hungary):

> An ancient property does not belong to that person only who currently possesses it, but to all members of the kindred, including all those who may claim the heredity to themselves based on the original deed of acquisition or other legal reason, i.e. not just those living now but their future remainder as well.[31]

Moreover, this was a physically divided form of co-ownership, since *divisio* of the ancient property did not actually mean a division as it does today – termination of co-ownership and formation of individual property – but only a kind of separated possession, use and usufruct.[32] Citing Ignác Frank again: "the aim of *divisio* is never

27 Gábor Béli (2000): A tulajdonátruházásra vonatkozó kötöttségek és formaságok felszámolása az ősiségi nyíltparancsban, in *150 év. A magyar polgári átalakulás alkotmányos forradalma. Jogtörténészek 1848-ról*, Logod Bt., Budapest, p. 120; Gábor Béli (2009): *Magyar jogtörténet. A tradicionális jog*, Dialóg Campus Kiadó, Budapest – Pécs, p. 71; Béni Grosschmid (1905): *Magánjogi előadások. Jogszabálytan*, Athenaeum, Budapest, p. 649; Éva Jakab (2015): Glosszák a Tripartitumhoz, in Zoltán Csehi et al. (eds.): *A Hármaskönyv 500. évfordulóján*, Pázmány Press, Budapest, p. 132; Murarik (1938): p. 36-38; Pomogyi (2008): p. 915.

28 See: Homoki-Nagy (2001): p. 94; Pomogyi (2008): p. 915; Ferenc Raffay (1909): *A magyar magánjog kézikönyve. II. kötet. Dologjog, kötelmi jog és öröklési jog*, Benkő Gyula Cs. és Kir. Udv. Könyvkereskedése, Budapest, p. 76; János Ede Szilágyi (2006): A termőföldek törvényes elővásárlási jogának alakulásáról, különös tekintettel a rendszerváltás utáni jogfejlődésre, in *Sectio Juridica et Politica, Tom. XXIV*, Miskolc, p. 512.

29 Béli (2000): p. 120.

30 Grosschmid (1897): p. 90. See also: Murarik (1938): p. 49.

31 Frank (1845): p. 502.

32 Eckhart (2000): p. 301; Frank (1845): p. 502; Gábor Vladár (1939): Bevezetés (Introduction), in Károly Szladits (ed.): *Magyar magánjog. VI. Öröklési jog*, Grill Károly Könyvkiadóvállalata, Budapest, 1939, p. 31.

as broad as to terminate the common right (*juris communionem*) [i.e. community of law]";[33] or (from his inaugural lecture at the Hungarian Academy of Sciences): "the ancient heredity remains in common ownership of the sharing parties, common in the sense that should the branch of any one of them become extinct, its share in *divisio* shall pass to the surviving members of the branch of the other parties".[34]

In the case of sale of an asset of ancient property, the kinsmen had to be advised prior to the transaction on the intention of sale, and at the same time the terms and conditions thereof had to be notified to them as well.[35] Such notification was called *praemonitio*, interpreted by Frank as a selling offer.[36] As the partial private law draft code of 1795, *Projectum legum civilium* says: „*praemonitio* means right of pre-emption that is nothing else than the possibility of purchasing the goods to be sold with the same conditions as offered by the buyer".[37] The word *praemonitio* itself actually meant a preliminary warning, in so far as by virtue of Part I Title 60 of the *Tripartitum* it had to take place before the *fassio* concerning the ancient property.

It is worth mentioning that, in addition to *praemonitio*, the traditional right of *admonitio* (simple warning) of the neighbours and possessors of bordering lands was also recognised, which in fact meant a right of pre-emption similar but subsequent to that of the kinsmen.[38] The omission of *admonitio* had also similar legal consequences to those of lack of *praemonitio* of kinsmen, and it was indeed not limited to ancient property but it was to be respected in the case of properties acquired in any other way than by royal donation.[39] (In the following this study will not cover this matter, however we would like to mention that even the right of pre-emption of neighbours could have derived from the presumption that they happened to live in the neighbourhood because once upon a time they had been relatives as well.)

The kinsmen could exercise their right of pre-emption according to the order of intestate succession,[40] within fifteen days from the *praemonitio*;[41] and in lack of *praemonitio* they could bring a court action for the annulment (nullification) of the contract (*invalidatio fassionis ex neglecta praemonitione*).[42] Should they exercise their right (or win the subsequent litigation), they may buy (back) the property for themselves at the same price that the purchaser had paid, having at the same time to reimburse the investments eventually made by the latter.[43] (Part I Title 60 Article 2 of the *Tripartitum* originally indicated the so-called "common value" as the repurchase price, but

33 Frank (1845): p. 505.
34 Ignác Frank (1848): *Ősiség és elévülés*, Magyar Királyi Egyetem, Buda, p. 5.
35 Frank (1845): p. 363; Homoki-Nagy (2001): p. 94; Pomogyi (2008): p. 913.
36 Frank (1845): p. 360; see also: Horváth (2014): p. 439.
37 Draft No. XXVII of 1795. Cited by Homoki-Nagy (2001): p. 95; see also: Szlemenics (1823): p. 53.
38 Szlemenics (1823): p. 50.
39 Béli (2009): p. 72; Szilágyi (2006): p. 512.
40 Béla Händel (1944): A tehervállalás középkori jogrendünkben, *Századok* 1944, p. 373; Szlemenics (1823): p. 50.
41 Frank (1845): p. 363.
42 Frank (1845): p. 360; Pomogyi (2008): p. 915; Szlemenics (1823): p. 49.
43 Frank (1845): p. 354-355; Homoki-Nagy (2001): p. 97.

in the court practice of the 18th century a more equitable approach evolved from the original purchaser's point of view.)[44]

The claim based on the omission of *praemonitio* could be submitted by the non-notified kinsman or, after his death, by his successors as well.[45] If the sale itself was in favour of a kinsman, the others had no right of pre-emption (as the pre-emption of co-owners in today's property law is also valid in the case of sale to external persons only), because in such a case – as the reasoning of a decision of the Royal Court of Appeal made it clear – "the property had not been alienated from the family".[46] *Ex neglecta praemonitione* lawsuits were not recognised by the courts if the sale of property had taken place partially or in whole by exchange, in the form of "exchange of goods".[47]

*Tripartitum* defined the general duration after which legal actions became time-barred, as thirty two years (*praescriptio*, see: Part I Title 79 Article 3) which was "also in itself a very long period",[48] resulting in an uncertainty on the side of the purchaser of the recognizance (*fassionarius*). Moreover, in some cases time-barring was excluded (for example in the case of undivided properties, or if the recognizance was not a sale but a pledge, see Part I Title 46 Article 6, Part I Title 78 Article 5 and Part I Title 79 Article 3).[49] In other important cases the period could be suspended for several decades (e.g. if the owner was in captivity, or if the Diet specifically suspended it on account of a war).[50]

Furthermore, the period for time-barring could be interrupted by the submission of the claim before the court and, also without bringing any claim, by the contradiction or "tacit protest" of the persons having the right to object to the transaction.[51] This was developed by the courts to the extent that on the one hand – as the *Planum Tabulare* (a famous compilation of the relevant decisions of the Royal Court of Appeal in the 18th century ordered by Queen Maria Theresa) shows – a generally expressed contradiction, i.e. protest against all possible sales transactions of a given seller (relative) was also recognised,[52] and on the other hand the Royal Court of Appeal accepted the expanded interpretation that, if the "contradiction or protest" had been made within the deadline for time-barring, the legal action could be brought "at any time thereafter".[53]

Therefore, the court actions based on the infringement of rights incorporated in *aviticitas* were either not subject to becoming time-barred or, as the case may be, even if the defendant could invoke prescription, the claimant had a good chance to tackle

44 Frank (1848): p. 20; Homoki-Nagy (2001): p. 46.
45 *Planum Tabulare* IX. 488. (Decision No. 6).
46 *Planum Tabulare* IX. 491. (Decision No. 9).
47 *Planum Tabulare* IX. 494. (Decision No. 12).
48 Frank (1848): p. 17.
49 Béni Grosschmid (1901): *Fejezetek kötelmi jogunk köréből. I. kötet. 2., javított kiadás*, Wigand F. K., Pozsony (Bratislava) – Budapest, p. 452-453; Homoki-Nagy (2001): p. 103.
50 Béli (2009): p. 71; Kinga Bódiné Beliznai, Attila Horváth, János Zlinszky (2004): A magyar magánjog története, in Barna Mezey (ed.): *Magyar jogtörténet*, Osiris Kiadó, Budapest, p. 110; Händel (1944): p. 389.
51 Bódiné, Horváth, Zlinszky (2004): p. 99; Frank (1848): p. 39-40.
52 *Planum Tabulare* IX. 488. (Decision No. 6).
53 See: Elek Dósa (1861): *Az erdélyhoni magyar magánjogtan harmadik része. Erdélyhoni magyar pertan*, Ev. Ref. Főtanoda, Kolozsvár (Cluj), p. 128.

this argument. As Ignác Frank established in his academic essay dedicated to this subject matter (*Ősiség és elévülés*, in English: *Aviticitas and time-barring*): "the deadline of thirty two years is in itself very long, but according to dominant opinions it could even be extended by different means".[54] The legal historian József Illés reached the following conclusion in his textbook of legal history published in 1910:

> It was possible to challenge the [new] holder of the land even after centuries, and to expel him from his possession after a long litigation. For example, if the seller had once failed to warn all his relatives on the sale of the ancient property, the subsequent claim could be enforced after centuries as well.[55]

## III. CRITICISM OF *AVITICITAS* AND THE ABOLITION OF ITS INSTITUTION

Two most important principles of modern private law are equal rights and free property. The former is the foundation of the law of persons, the latter is that of property law in its broader sense (i.e. including the law of obligations and inheritance law). Ownership as "the full and exclusive right to control property" (see Article 5:13 of the current Civil Code of Hungary)[56] incorporates the three fundamental rights of the owner as defined by the German Pandectists (the well-known "ownership triad"), the right to possess, the right to use and enjoy benefits, and the right of dispose over property.[57] As we could see, the latter was completely missing with regard to ancient goods (*bona avitica*).[58] Over such kind of assets only a *dominium utile fundi* (a „usage property") existed.[59]

This characteristic made *aviticitas*, notwithstanding its original, legitimate aim (i.e. the protection of the hereditary rights of the relatives against wasting ancient property of the kindred) to be seen as an outdated institution by the end of the 18th century and the beginning of the 19th century, at the time when modern economic

54 Frank (1848): p. 17.
55 Illés (1910): p. 208-209; see also: Horváth (2014): p. 439; Attila Horváth (2006): *A magyar magánjog történetének vázlata*, Gondolat Kiadó, Budapest, p. 39-40; Pomogyi (2008): p. 915; Rady (2015): p. 93. and 136.
56 Jakab (2015): p. 126.
57 The Romanist lawyer, Professor András Földi points out that possession was not regulated in the Austrian Civil Code within the institutions of property but in a separate part. Therefore, he suggests using the term *ius habendi* instead of *ius possidendi* as a partial right of ownership. See: András Földi (2005): Adalékok a "tulajdonjogi triász" kérdéséhez, *Acta Facultatis Politico-Iuridicae Universitatis Budapestinensis,* XLII, p. 47-48.
58 Grosschmid (1897): p. 95; Händel (1944): p. 373; Horváth (2006): p. 54-55; Horváth (2014): p. 438.
59 Ignác Frank (1823): *Specimen Elaborandarum Institutionum Juris Civili Hungarici*, Wigand Ottó kiadása, Kassa (Kosice), p. 75. Cited by Horváth (2006): p. 55.

and social circumstances began to appear in Hungary. As Béni Grosschmid wrote: „it was crushed by times".[60] Quoting the words of Tamás Vécsey:

> Something that had already seemed obsolete in the time of Joseph II, had aged at least a hundred more years during the French revolution. However, maybe there is nothing that survived so long as *aviticitas* did, which represented restrictions and distortions against the spirit of movement, of the freedom which creates a new order and a new life for the entire world.[61]

Accordingly, criticism was already raised against it during the Enlightenment, at the end of the 18th century. *József Hajnóczy*, in his work *Unpartheysche Gedanken über den 1790 abzuhaltenden Landtag* published in 1790, proposed to the Diet convoked after 25 years the introduction of the right of free disposal and the abolition of the litigation for *invalidatio,* saying that "a real proprietor will cultivate the land more diligently than someone who cannot freely dispose over his property".[62] However, the Diet did not accept any such particular measure, only a reference was made to "the necessity of some useful civil acts in order to provide a more complete safety for landowners, and to remove the causes from which unreasonable litigation arises".[63]

The abolition of *aviticitas* was urged with similar determination, explicitly in order to establish modern credit institutions, by Count *István Széchenyi* in his work called *Hitel* (Credit) of 1830. In another book published three years later, *Stádium* (Stage), he decided to set up a complete legislative programme he called "the XII laws". In the third point of this programme, we can read the following: "The right for *aviticitas* (*jus aviticitatis*) shall be abolished forever. [...] Should anyone sell any good with the knowledge of the parties concerned, the property may not be recovered, nor by the seller, neither by his kinfolk, from the buyer or his successors, by any legal title, and perennial sale shall never be annulled".[64]

Széchenyi even presented a bill at the Diet of 1843/44 he had prepared with the knowledge of the two senior officials of the Kingdom (after the King), *Archduke Joseph*, Palatine of Hungary (1795–1847) and *György Mailáth*, Justice of the Realm (1839-48).[65] "As far as *aviticitas* is concerned, I was the first to raise the necessity of the change on this floor, and I must admit that *aviticitas* is somewhat like an axis to my policy. How it should be abolished, it does not really matter to me, because there can be many

60 Grosschmid (1897): p. 121.
61 Vécsey (1895): p. 15.
62 Cited by Horváth (2006): p. 39.
63 Point 6 of Act LXVII of 1790/91 (on the tasks of the legal commission).
64 Széchenyi (1833): p. 30.
65 The second highest office of the realm in medieval Hungary (after the *Palatine*). In Pál Engel's translation: "Judge Royal", see Pál Engel (2001): *The Realm of St. Stephen: A History of Medieval Hungary, 895-1526*, Bloomsbury, New York, p. 92; while in Martyn Rady's translation: "High Judge", see Martyn Rady (2012): Judicial Organization and Decision Making in Old Hungary, *The Slavonic and East European Review* 2012, p. 465. Actually, the Hungarian word "országbíró" means "Justice of the Realm", while the literal translation of the original Latin denomination of the position (*Iudex Curiae*) would be "Judge of the [Royal] Court".

methods of abolition: a house can be demolished by cannon, or brick by brick by competent bricklayers" – he said in this speech at the session of the Upper Chamber on July 12, 1843.[66] However, the Diet, even if it made important decisions on some significant questions, "dissolved, leaving the matter of *aviticitas* outstanding".[67]

As it is well known, the abolition of *aviticitas* finally took place in the wake of the revolutionary events of March 1848, on the last traditional Diet held in 1847/48, in quite unusual circumstances. On the one hand, this question was not enumerated among the legislative proposals,[68] on the other hand it was unexpectedly raised by a conservative member of the Diet,[69] *Pál Somssich*, *ablegatus* (noble representative) of Baranya County, at the session of the Lower Chamber on March 19, 1848: "in such a moment when everyone in this country, and especially the landed nobility has to face significant sacrifices, the noblemen's land is necessary to be released from the chains of *aviticitas*".[70] A day later he intended to withdraw the proposal, but the Lower Chamber instructed him "again" by a majority decision "to formulate a bill".[71] He already complied with this resolution on the same day, in cooperation with *Ferenc Deák*, a leading jurist of the reformers, and the proposal was accepted by the Lower Chamber at the session continuing at 7:30 PM, with only a few votes against.[72]

The Upper Chamber of the estates placed the bill on its agenda on March 29, 1848, and agreed to it "without any objection".[73] This is how the law known as Act XV of 1848 was enacted, that legal source which can be considered as the fundament of modern Hungarian private law.[74] Beyond the declaration of the abolition of *aviticitas*, this act contained two further provisions as well: the immediate cancellation of all related pending litigations (Article 2), and an instruction to the government to prepare a draft Civil Code and to present it to the Diet (Article 1).

Although the preamble of the act was quite clear ("Abolition of the *aviticitas* being hereby declared…"), the leading representative of contemporary civil law scholarship, Ignác Frank took a cautious position in his inaugural speech held on September 11, 1848 at the Academy of Sciences. Essentially, his opinion was that it is not indispensable to wind up the institution itself completely, it is sufficient to restrict it reasonably.[75] In his opinion the *de facto* impossibility of time-barring of the litigations based on *aviticitas* is not derived from the institution itself but from a misinterpretation of Werbőczy's

66 *1843. május 14-én rendeltetett magyar Országgyűlésen a méltóságos Főrendeknél tartatott országos ülések naplója. I. kötet* (1843), Landerer & Heckenast, Pest, p. 122.
67 Vécsey (1895): p. 17.
68 Judit Balogh (2008): Grosschmid Béni és a magyar öröklési jog, in *Közjegyzői Füzetek – Studia Notarialia Hungarica*, Tom. VIII, Budapest, IX–XX, p. IX.
69 Vécsey (1895): p. 18.
70 *Pesti Hírlap*, March 23, 1848, p. 247.
71 *Pesti Hírlap*, March 23, 1848, p. 248.
72 *Pesti Hírlap*, March 30, 1848 (on the title page).
73 *Pesti Hírlap*, April 1, 1848 (on the title page).
74 Mária Homoki-Nagy (2004): A magyar magánjog kodifikációja a 19. században, *Jogtörténeti Szemle* No. 1/2004, p. 5; István Kajtár (2003): *A 19. századi modern magyar állam- és jogrendszer alapjai*, Dialóg-Campus Kiadó, Budapest – Pécs, p. 219.
75 Tivadar Pauler (1850): Emlékbeszéd Frank Ignácz lt. fölött, *Magyar Academiai Értesítő* 1850, p. 301.

*Tripartitum*, however he held the original thirty-two years period of time-barring also as being excessively long.[76] "The decisive lawsuit (on the subject matter of *praemonitio*) should be time-barred by two or three years of silence; in this way we could gain a lot for litigations and for the economic development as well" – he expressed.[77]

In July 1849, Austrian minister of foreign affairs *Anton von Schmerling* invited Deák to Vienna, to the newly established Committee for Hungarian Legal Affairs. Not surprisingly, as the Hungarian Revolution and War of Independence was still being fought, Deák declined the invitation, but Ignác Frank travelled to Vienna and prepared there the proposal which later served as the basis of the *Avitizitäts-Patent* (the Emperor's Edict on the Abolition of *Aviticitas*). However, seeing what happened to Hungary in the meantime, on March 4, 1850 (three weeks before his 62nd birthday) which was also the first anniversary of the introduction of the octroyed constitution promulgated by Emperor Franz Joseph I of Austria in Olmütz, Ignác Frank committed suicide.[78]

As it is known, Emperor Franz Joseph finally issued his edict called *Avitizitäts-Patent* on November 29, 1852. According to leading Hungarian legal historians like Ferenc Eckhart or Gábor Béli, this edict can be considered as a kind of (unconstitutionally adopted) implementing regulation of Act XV of 1848.[79] In the preamble of the Patent the Emperor obviously refers to Ignác Frank saying he was "convinced [by lawyers] that the above-mentioned rules had exposed the right of property to different offenses and had been reasons of some legal complications and long-lasting litigation, thus constituting the main barrier to the creditworthiness of a considerable part of the lands".

Rather than a backslide, the *Avitizitäts-Patent* even exceeded the rules of Act XV of 1848, declaring not only *aviticitas* itself eliminated but the entire system of royal donations as well (see Chapter I, Articles 1-4.). It has abolished any differences between "ancient" and "acquired" property (including the difference between *bona donationalia* and *extradonationalia*), and between inheritance rights of peasants and landed nobility or those of men and women (Chapter II). In the third chapter it made clear that sale and purchase contracts (*fassio*) concluded before the introduction of the Austrian Civil Code (ABGB) in Hungary on May 1, 1853 cannot be challenged before the courts for of lack of *praemonitio*, and *ex praejuditio* either (Article 16).

Article 18 stated that "the right of pre-emption of relatives and neighbours as it was to date, and all other legal right of pre-emption shall cease for the future, and at

76 László Fürst (1935): Frank Ignác, in *Jogi professzorok emlékezete*, Sárkány Nyomda Rt., Budapest, p. 54; Elemér Pólay (1976): A pandektisztika és hatása a magyar magánjog tudományára, *Acta Universitatis Szegediensis de Attila József Nominatae, Acta Juridica et Politica*, Tom. XXIII, Fasc. 6, Szeged, p. 100.

77 Frank (1848): p. 31.

78 Fürst (1935): p. 54; Vécsey (1895): p. 19.

79 Béli (2009): p. 309; Eckhart (2000): p. 354. For a Hungarian translation of the Patent, see: Endre Nizsalovszky (1928): *Magyar magánjog mai érvényében. Törvények, rendeletek, szokásjog, joggyakorlat. II. kötet: Dologi jog*, Grill Károly Könyvkiadóvállalata, Budapest, p. 259-272. On the reception of the unconstitutionally introduced Austrian regulations in Hungary see: Ágnes Deák: Társadalmi ellenállási stratégiák Magyarországon az abszolutista kormányzat ellen 1851–1852-ben, *Aetas* No. 4/1995, p. 27-59, especially p. 34-38.

such legal titles no further litigations may be initiated concerning the above-mentioned sale and purchase transactions". Chapter IV ordered the obstacles to mortgage to be abolished, while the fifth chapter thoroughly regulated the questions emerging from the termination of ongoing litigations, judgments already rendered but not executed and pending legal remedies. Thus, the *Avitizitäts-Patent* has filled all those gaps that were left due to the premature adoption of Act XV of 1848, while the provision of Article 1 of the Act (about drafting a Hungarian Civil Code) has been implemented by the Emperor by forcibly introducing the ABGB to Hungary.

As the *Avitizitäts-Patent* – thanks to the work of the tragically deceased Ignác Frank – was in entirety in conformity with the expectations of the contemporary Hungarian law, we cannot be surprised that not even the Conference of 1861 on Reinstating Hungarian Jurisdiction (also called the "Conference of the Justice of the Realm", in Hungarian: *Országbírói Értekezlet*) could hold necessary to effectively annul it. More precisely: the conference did declare this patent to be void (together with all the other "octroyed" norms of Austrian law unconstitutionally brought into force in Hungary), but at the same time preserved its effect saying (at the very last session held on March 4, 1861) that the fact that *aviticitas* had been abolished in 1848 had to be taken in consideration.[80]

Parts of the act drafted on the basis of the recommendations of the conference, called Provisional Judicial Regulations (*Ideiglenes Törvénykezési Szabályok*, ITSz)[81] remained in force until May 1, 1960, when the introduction of the first Hungarian Civil Code, Act IV of 1959[82] took place. As customary law (similarly to the *Tripartitum*), these have maintained in force the provisions of the *Avitizitäts-Patent* and the property law regulations of the Austrian Civil Code. As Martyn Rady says: "the ITSz provided a gateway through which further provisions of the [Austrian] Code might be deemed applicable to Hungary".[83]

There is only one material difference between the system of free inheritance of the Patent (and the Austrian Code) and the Provisional Judicial Regulations: the introduction of the so-called "branch inheritance" (*ági öröklés*). This institution was seen by many of the contemporaries as „a remnant of *aviticitas*",[84] and was strongly criticised,[85]

80 Judit Balogh (1997): Az osztrák magánjog hatása a magyarországi kodifikációra a XIX. században, in *Publicationes Universitatis Miskolciensis, Sectio Juridica et Politica*, Vol. XIV, p. 63; Béli (2009): p. 314; Homoki-Nagy (2004): p. 6; Rady (2015): p. 225.

81 Rady (2015): p. 228. Prof. János Zlinszky called the document in an earlier publication in English "Provisional Rules for Administration of Justice", see János Zlinszky (2000): Hungarian Private Law in the 19th and 20th Centuries, up to World War II, in András Gergely, Gábor Máthé (eds.): *The Hungarian State. Thousand Years in Europe*, Korona Kiadó, Budapest, p. 307. (In this study we prefer Professor Rady's translation, because the document was formulated in order to assist the judiciary in general, not specifically the administration of justice.)

82 Béli (2009): p. 314; Horváth (2006): p. 65; Rady (2015): p. 228-229; Lajos Vékás: Magánjogi kodifikáció kultúrtörténeti tükörben, *Magyar Tudomány* No. 1/2014, p. 87.

83 Rady (2015): p. 228; see also: Balogh (1997): p. 63.

84 Béli (2009): p. 314; Ferenc Mádl (1960): Magyarország első polgári törvénykönyve – az 1959. évi IV. törvény – a polgári jogi kodifikáció történetének tükrében, *Az MTA Társadalmi-Történeti Osztályának Közleményei* 10(2009), p. 56.

85 See especially: Teleszky (1876).

however the most eminent Hungarian civil law scholar of the end of the 19th century, Béni Grosschmid has justified its legitimacy as the survival of the "positive side" of *aviticitas*, i.e. the part defending the legitimate interests for succession of the family.[86] Grosschmid was so successful in protecting the rationale behind branch inheritance that the latter has remained a living institution of our inheritance law to date.[87]

## IV. CONCLUSION

As a conclusion, we may establish that *aviticitas* had become an extremely outdated institution of Hungarian private law by the end of the 18th century and it had also become in the eyes of the reformers of that era – as the obstacle to free disposal over property, alienation and encumbrance thereof (more simply said: an impediment to working capital) – a symbol of the vanishing age of "feudalism". Thus, the abolition thereof was not the result of an external force, a pressure of an external power, but of an explicitly internal need for change.

The categorical decision on the abolition was made by the last traditional Hungarian Diet without any external influence as well, moreover, it was the positive reaction to the speech of a conservative noble *ablegatus,* Pál Somssich on March 19, 1848. It is true indeed that the Austrian occupying forces were also committed to the legal modernisation and capitalist transition of Hungary for its own economic interest (see the customs union introduced on October 1, 1850),[88] and maybe that is the main reason why they agreed to the abolition of *aviticitas*, however we could also see that the *Avitizitäts-Patent* of November 1852 itself was prepared with the significant contribution of the leading contemporary Hungarian scholar and conservative legal thinker, Ignác Frank.

Finally, when the Conference of the Justice of the Realm reverted to the traditions of the old Hungarian law in 1861, by establishing the institution of the "branch inheritance" it could preserve the family-protecting side of *aviticitas* in a way that its "property-law side" (restricting the right of free disposal and creating a legal uncertainty to an extent that would be unacceptable in a modern legal system) had not been re-installed. The author of this study is profoundly sharing the view of the great Hungarian civilist Elemér Pólay: "branch inheritance is a specific institution within the norms of intestate succession in Hungary that was created by the Conference of the Justice of the Realm by utilising the legal forms of the feudal institution of aviticitas, [...] being a good corrective of the succession rights of the spouse".[89]

86 Grosschmid (1897): p. 98.
87 See: Act V of 2013, Book 7, Part 3, Title IX, Articles 7:67-71.
88 Horváth (2006): p. 57.
89 Pólay (1974): p. 45.