INSTRUMENTS FOR PRESERVING THE UNITY OF FAMILY BUSINESSES AND AGRICULTURAL ASSETS: PERSPECTIVES OF LEGAL HISTORY

INSTRUMENTS FOR PRESERVING THE UNITY *of* FAMILY BUSINESSES AND AGRICULTURAL ASSETS

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ARGUMENT

EMŐD VERESS

1.

Succession exposes private law to recurring pressures: the need to distribute value while preserving the viability of productive assets. At the point of succession, assets that have been organised as a working unit (land, buildings, machinery, a firm's shares and management prerogatives) are reclassified as distributable value. What has been held together by a single will, or by a stable governance arrangement, becomes exposed to the ordinary logics of inheritance: division among heirs, valuation and compensation, compulsory shares, creditor claims, and, not least, the centrifugal pressures of family disagreement. A farm may remain "in the family" and yet become economically non-viable once it is broken into parcels or burdened with compensation obligations. A family company may survive the transfer of ownership only to be immobilised by fragmented shareholding, conflicting strategic preferences, or the absence of a recognised centre of decision-making. These outcomes are rarely intended; they are frequently the predictable by-product of legal structures that treat productive assets as ordinary property at precisely the moment when their organisational character matters most. As Alexis de Tocqueville (1805–1859) stated in his Democracy in America (1835),

Veress, E. (2026) 'Argument' in Szilágyi, J.E. – Ilyés, K. (eds.) *Instruments for Preserving the Unity of Family Business and Agricultural Assets: Perspectives of Legal History*, pp. 11–22. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2026.jeszik.ipufbaa_0

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> *in virtue of the law of partible inheritance, the death of every proprietor brings about a kind of revolution in property; not only do his possessions change hands, but their very nature is altered, since they are parcelled into shares, which become smaller and smaller at each division. This is the direct and, as it were, the physical effect of the law. It follows, then, that in countries where equality of inheritance is established by law, property, and especially landed property, must have a tendency to perpetual diminution. The effects, however, of such legislation would only be perceptible after a lapse of time, if the law was abandoned to its own working; for supposing the family to consist of two children (and in a country such as France the average number is not above three), these children, sharing amongst them the fortune of both parents, would not be poorer than their father or mother. But the law of equal division exercises its influence not merely upon the property itself, but it affects the minds of the heirs, and brings their passions into play. These indirect consequences tend powerfully to the destruction of large fortunes, and especially of large domains. Among nations whose law of descent is founded upon the right of primogeniture landed estates often pass from generation to generation without undergoing division, the consequence of which is that family feeling is to a certain degree incorporated with the estate. The family represents the estate, the estate the family; whose name, together with its origin, its glory, its power, and its virtues, is thus perpetuated in an imperishable memorial of the past and a sure pledge of the future. When the equal partition of property is established by law, the intimate connection is destroyed between family feeling and the preservation of the paternal estate; the property ceases to represent the family; for as it must inevitably be divided after one or two generations, it has evidently a constant tendency to diminish, and must in the end be completely dispersed.*

This book addresses this problem directly. It does not proceed from nostalgia for older social orders, nor from a romantic defence of family wealth. Its point of departure is analytical and comparative: legal

systems have long recognised the disruptive potential of succession for productive assets, and they have responded with a repertoire of techniques designed to preserve unity, or at least functional integrity. The focus is therefore on instruments in the strict sense: identifiable legal forms: trusts, foundations, fideicommissary devices, substitution mechanisms, specialised farm succession regimes, shareholders' agreements, and the contractual architectures that supplement or counterbalance statutory rules. These forms invite a recurrent question of principle: to what extent should law permit one generation to structure the ownership and governance of assets for the next, and how should such permission be reconciled with alienability, equality among heirs, and the claims of third parties? Jeremy Bentham (1748–1832) wrote that "property and law are born together, and die together".

2.

"Unity" is itself an ambiguous objective, and the contributions in this volume treat it accordingly. Unity may denote an undivided title and a single owner. It may also refer to unity of control, governance, and strategy: a stable allocation of decision-making power, even where beneficial interests are distributed. A holding can remain formally intact while becoming functionally divided through overlapping rights of use, competing expectations, or financing structures that require leasing and external capital. Conversely, a business may pass to a single successor and nevertheless deteriorate if managerial authority is contested, if knowledge transfer fails, or if indebtedness forces liquidation. Unity, in short, is not reducible to the distribution of property rights: it is an organisational condition that law can facilitate but never secure on its own.

For this reason, the volume's instructive chapters approach legal instruments *as compromises* rather than as solutions. Each technique for preserving integrity trades one set of risks for another: continuity against circulation, intergenerational planning against the moral and political claims of equal treatment, private autonomy against public policy constraints, stability against the capacity to adapt. The chapters

range across jurisdictions and periods, but they repeatedly return to the same structural dilemma. A legal system must decide whether productive assets are to be treated primarily as commodities, freely divisible and transferable, or as socio-economic units whose survival and functionality justify forms of continuity that constrain individual choice. The oscillations observed in many systems, like abolition of restrictive institutions followed by the emergence of new, more limited continuity mechanisms, are best understood as a response to the fact that neither pole fully answers the demands placed on property law.

The category "family business" can obscure rather than clarify these issues. It suggests a small, domestic enterprise, whereas family-controlled firms and farms often represent central components of employment, local development, land use, and long-term investment. Their governance relies in part on informal norms (trust, reputation, obligation, deference) whose operation is difficult to translate into legal categories. When such norms hold, they reduce transaction costs and encourage patient investment. When they falter, disputes are filtered through legal frameworks frequently designed for other settings: arm's-length transactions, liquidation and insolvency, the equal division of estates, or the abstract shareholder. One of the book's recurrent themes is the friction produced by this mismatch between the lived structure of family production and the categories through which law organises property and succession.

3.

The historical perspective offered here is especially valuable because modern legal forms have not eliminated the aspiration to continuity; they have altered its vocabulary and its techniques. Older instruments commonly justified restrictions through lineage and status, often sustained by formal hierarchies of gender and birth order. Contemporary instruments more often invoke stability, sustainability, employment, and long-term stewardship. The shift in language has been substantial, yet the underlying concern remains recognisable: the prevention of

dissipation, whether by partition, forced sale, or (corporate) governance paralysis, of assets that function as coherent productive units.

4.

The common law contribution by Andreas Televantos illustrates this continuity of concern through the distinctive flexibility of the trust. As the jurist and historian Frederic William Maitland (1850–1906) considered: "if we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea." In common law settings, restraints on alienation have long been viewed with suspicion, but the trust has provided a means of reorganising ownership incidents by separating legal title from beneficial interests. The historical use of testamentary trading trusts, allowing a business to continue for the benefit of a widow and children until a successor could take over, demonstrates how continuity could be secured without openly repudiating liberal property ideals. The chapter is equally attentive to the externalities of such arrangements, particularly the distribution of risk in insolvency and the implications for creditors. It therefore places the trust in its proper analytical setting: not as a technical device, but as a site where competing claims, between family continuity and third-party protection, must be weighed.

A similar ambivalence can be traced across civil law traditions, where continuity instruments have often been criticised as residues of feudal privilege, impediments to market development, or mechanisms that entrench inequality. Yet those same traditions repeatedly generated functional equivalents to mitigate the economic and social costs of fragmentation. The Austrian report by Gerald Kohl makes this pattern visible by moving from peasant inheritance laws and agrarian communities to entailed estates (*Fideikommiss*) and, in modern times, to private foundations. The narrative highlights the interaction of legal sources, such as custom, statute, contract, and the shifting alliances that shape them. Particularly instructive is the change in justificatory language:

dynastic continuity and social order give way to sustainability and long-term stewardship. The underlying problem remains constant, while the terms on which a legal order is willing to address it change with constitutional and political context.

From the German perspective, Martin Löhnig sharpens the analysis by contrasting the elaborate regulation of agricultural succession with the relative absence of a special statutory regime for non-agricultural family businesses. Agricultural law displays a long and complex development: hereditary farm laws, the Reich Hereditary Farm Act, post-war regional frameworks, and a contemporary mix of the Höfeordnung (a special inheritance regime for certain agricultural and forestry holdings to prevent farms from being broken up through succession and to keep them economically viable) and Civil Code mechanisms aimed at preserving viable farms while limiting excessive compensation burdens and indebtedness. In practice, the chapter underlines the importance of notarised *inter vivos* transfers, the agreements that combine succession planning with retirement provisions, sibling compensation, and waivers. Outside agriculture, by contrast, continuity depends largely on private ordering: wills, compulsory-portion arrangements, family foundations, and corporate governance tools. The comparison raises a point of general significance: legal systems appear more willing to treat land essential to production as basis for an exceptional regime, while hesitating to extend comparable exceptionalism to business assets, where the public interest is harder to articulate in traditional doctrinal terms.

These contrasts suggest that continuity becomes politically and legally defensible when it can be expressed in general terms: food security, rural stability, environmental protection, employment, and the avoidance of economically destructive fragmentation. Where such rationales command broad agreement, legislatures craft specialised regimes. Where they remain contested or diffuse, continuity is pursued primarily through important private instruments, like trusts, foundations, shareholders' agreements, and "family constitutions", that operate in the shadow of mandatory inheritance rules. The boundary between statutory exceptionalism and private ingenuity therefore reflects differences in the publicly recognisable grounds on which a

legal order is prepared to accommodate constraints on alienability and equal division.

5.

The Italian chapters provide a particularly instructive demonstration of how ideology shapes the legal imagination of unity. Giacomo Pace Gravina follows the transformations of fideicommissary substitution from its liberal rejection in the nineteenth century, through its limited reappearance in the 1942 Civil Code under the political climate of fascism, to its reorientation after the 1975 family law reform as a mechanism directed primarily toward protecting vulnerable relatives rather than consolidating estates. The form survives, but its justification changes. Francesco Ciccolo complements this by examining how Italian private law, especially in the first half of the twentieth century, negotiated the relationship between property, production, and the family through emergency wartime measures, fascist ruralism, and doctrinal debates concerning the "function" of property. The chapter draws attention to a broader point: unity is protected not only through succession rules, but also through the legal conception of property itself, whether property is treated as a sphere of individual dominion or as an institution tied to social and productive aims.

Romania's experience adds a further dimension by showing how continuity mechanisms may be prohibited as anachronistic and later revived in adapted forms. Kinga Ilyés examines fiduciary substitution as a device capable of preserving family control over business assets across at least two generations and of being embedded in a "family constitution" that combines legal commitments with normative expectations. The trajectory described, respectively abolition in the name of liberal circulation, followed by a recent but selective reintroduction under different socio-economic pressures, resembles developments in other European systems, but it also shows a practical point: such instruments are rarely self-executing. Their effectiveness depends on governance design, enforceability, and a legal and family culture capable of sustaining them.

The Spanish *mayorazgo*, analysed by Marta Cantín Larumbe, returns the reader to one of the paradigmatic European institutions of unity: the entailed estate linked to lineage and primogeniture in the Crown of Castile. Its historical function was direct: to prevent partition and dismemberment and to exclude third-party intrusion, even at the cost of inalienability and formal inequality. Its abolition under liberal reforms illustrates the standard critique of dynastic property forms, while also clarifying why such devices were so persistent. Read against contemporary debates, the *mayorazgo* is less a historical curiosity than an illustration of the long-standing connection between continuity instruments and the social hierarchies they can sustain.

6.

The more contemporary regulatory approaches to agricultural holdings bring these themes into sharper policy focus. Zsófia Hornyák's account of Hungary's "farm transfer contract" (introduced by a 2021 Act and effective from 1 January 2023) shows an attempt to facilitate generational change through an *inter vivos* mechanism designed to keep holdings "in one hand", while regulating eligibility, continuity of production, and transitional cooperation. The chapter also highlights a conceptual difficulty familiar in comparative perspective: land-focused rules do not automatically produce a coherent holding-focused regime. If the aim is to preserve viable production units, succession policy must address not only parcels, but the organisational integrity of the holding as such.

7.

The volume's case studies, finally, show that continuity instruments operate under conditions of political and economic contingency that may overwhelm even the most careful planning. David Kolumber's study of the Baťa company analyses moments at which ownership and control were reorganised under severe external pressures: succession after Tomáš Baťa's death, the disintegration of Czechoslovakia, war, tax

measures, offshore structuring, post-war accusations and disputes, and ultimately nationalisation. The study demonstrates that preserving unity may require a shifting portfolio of legal strategies rather than a single instrument. It also illustrates the ambivalence of some techniques: structures that protect assets against confiscation or political risk may generate opacity that later destabilises family governance and fuels litigation.

My chapter on the Renner Leather Factory offers a similarly concrete picture from interwar Transylvania, centred on the 1926 syndicate (shareholders') agreement. In a corporate environment marked by bearer shares and fluid ownership, unity was pursued through private governance: coordinated voting, transfer restrictions, deposit of share certificates with a custodian, and alliance structures designed to preserve control even as shares dispersed. The syndicate agreement appears here as a functional constitution of the enterprise, supplementing corporate law through contract. Yet it also illustrates the fragility of such arrangements: they require renewal, presuppose enforceability, and remain vulnerable to broader economic and political disruption.

8.

The closing expert opinion by Mircea-Dan Bob-Bocșan makes explicit what is already implicit throughout the volume: unity is never only a matter of doctrinal design. By revisiting interwar Romanian proposals for an inalienable and unseizable "family property" regime, and by tracing the reasons for their failure, the opinion places the problem in its political and institutional setting: agrarian reforms, shifting state priorities, and the limits of legislative will. The lesson is a sober one. Continuity mechanisms require not only technical feasibility, but also political support, administrative capacity, and a social consensus about the purposes of property.

9.

Several general conclusions emerge from these materials.

First, the unity problem is structural rather than exceptional. It arises whenever assets that function as productive organisations are embedded in households and transferred through inheritance rules designed primarily to *distribute* value. The organisational character of farms and businesses, requiring coherent decision-making, investment horizons, and managerial authority, creates vulnerabilities that are not captured by the ordinary language of partitions and shares. Recognising that organisational character is necessary, but it must be done without converting the family into a privileged constitutional subject whose internal hierarchy displaces individual rights.

Second, continuity instruments redistribute burdens. They may shift burdens among heirs through delayed or reduced compensation, shift risks onto creditors through asset shielding, or shift costs onto the state through supervision and registration. This distributive dimension is central, not incidental. Any legal accommodation of unity must be justified by a defensible allocation of costs and protections among those affected.

Third, the contemporary defensibility of unity depends increasingly on transparency and accountability. Private ordering can stabilise control but can also conceal it. The case studies show how opacity may protect assets in one phase and destabilise governance in another. Modern legal systems, especially in environments shaped by anti-abuse norms and financial transparency requirements, are cautious toward structures that combine long-term control with limited visibility. Sustainable continuity therefore depends on governance arrangements compatible with credible oversight, whether through registries, fiduciary duties, disclosure obligations, or internal mechanisms that reduce opportunism.

Fourth, durable arrangements tend to be hybrid and adaptive. Testamentary planning alone is often inadequate in the face of conflict, debt, and the practical problem of managerial transition. *Inter vivos* transfers can be more effective, but only if they anticipate changes in family

structure, migration, remarriage, and market conditions. Foundations and trusts can preserve assets, but they risk freezing governance unless they incorporate amendment mechanisms. Shareholders' agreements can coordinate decision-making, but they require enforceability and periodic renewal. Across jurisdictions, promising designs are those that combine continuity with revisability: staged succession, conditional transfers, respectively calibrated compensation, governance frameworks, and time-limited restrictions subject to review.

Fifth, legal history is best read here not as a repository of templates. Instead, we should conceive it more as a record of consequences. According to Oliver Wendell Holmes, Jr. (1841–1935), "the life of the law has not been logic: it has been experience." The abolition of entails and fideicommissary forms did not merely "liberate" assets; it also produced patterns of fragmentation, indebtedness, and vulnerability that later prompted corrective legislation. Conversely, the reintroduction of continuity mechanisms has repeatedly generated new forms of conflict and inequality. The value of comparative legal history lies in its capacity to clarify what problems instruments were meant to solve, what incentives they created, what patterns of circumvention emerged, and why reforms were later demanded.

10.

A reader may therefore approach the volume as a set of dialogues across time. The trust and fideicommissary chapters illuminate different ways of structuring split ownership and the externalities such structures generate. The Austrian, German, and Hungarian materials show distinct models of preserving agricultural viability and the tradeoffs they entail. The *mayorazgo* and the Romanian regulation place continuity mechanisms within their political conditions of possibility. The Renner and Baťa case studies test doctrinal possibilities against historical volatility.

Underlying these dialogues is a question that remains unavoidable: when law preserves the unity of a family asset, what interests is it protecting? Sometimes the aim is functional viability, such as placing

control with the person capable of sustaining production. Sometimes it is protection of vulnerable family members. Sometimes it is a public interest in stable employment and rural continuity. Historically, it could also be the preservation of rank and power, at the expense of those excluded. The same form may serve different ends, and the evaluation of continuity cannot be separated from the purposes it serves and the burdens it imposes.

These considerations apply with particular force to contemporary family structures. Families are plural and often unstable over time. Instruments that presuppose a single line of authority risk injustice or failure; instruments that are too permissive risk governance paralysis. The more defensible understanding of unity, in the context of this volume, is not the concentration of rights for its own sake, but the maintenance of functional control together with fair participation, credible compensation, and workable exit options. There is also a temporal question. Many older institutions aimed at indefinite control. Modern systems, wary of the dead hand, are more receptive to time-limited continuity and to mechanisms of revision. Time limits and review clauses are drafting choices, but they also express a normative stance that later generations retain a claim to shape their own economic life.

The chapters that follow do not present a uniform prescription, and they need not do so. Their contribution lies in assembling, with historical depth and comparative breadth, the principal ways in which legal orders and private actors have attempted to maintain the integrity of productive assets across generations, and in clarifying the costs and implications of each approach. Continuity in this field is neither a natural fact nor a simple good. It is a legal and institutional achievement, sometimes justified and sometimes not, whose conditions and consequences require the kind of careful analysis that this volume provides.

GENERAL STUDIES

TRUSTS OF FAMILY BUSINESSES: HISTORICAL AND MODERN PERSPECTIVES

ANDREAS TELEVANTOS

ABSTRACT

This paper examines how the device of the "trust" can be used in common law systems to preserve family business assets. At a broad level, it examines the common law's rules which sought to prevent restrictions on the alienation of assets and shows how these rules could be subverted using the device of a trust. It then looks at a particular example of this subversion in the context of family businesses. It shows how, historically, it was common for testators in their wills to settle business assets on trust for children, ultimately making provision for children to take over the business. Such a device could allow a settlor control over how the family business was run after their death and even provide a degree of limited liability trading protection to their children: before limited liability was recognised more generally. Turning to contemporary practice, it considers the conceptual issues surrounding trusts of businesses today, in particular, the difficulties trading trusts can create for creditors and in the insolvency context.

Keywords: *trusts, restraints on alienation, insolvency, legal history, creditors.*

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This short chapter addresses the theme of the volume – instruments for preserving the unity of family businesses – by looking at trusts of family businesses in England and the Commonwealth today and historically. It comprises three main parts. Part 1 provides an overview of English legal history's confused approach to the kinds of restraints on alienation which can help preserve the integrity of family property. Part 2 sets out English law's rules restraining limits imposed on the free alienability of property. Part 3 explains what a trust is; how trusts could be used to circumvent rules limiting restraints on alienation; and the flexibility of this doctrinal form. Part 4 then moves on to look at the historical use of trusts in family businesses in England in the eighteenth and nineteenth centuries. Part 5 then examines how lawyers today have taken inspiration from this historical model to create "trading trusts" for family businesses, which are particularly popular in jurisdictions like Australia. It also considers the problems such trusts can cause.

1. AN INTRODUCTION TO RESTRAINTS ON ALIENATION IN ENGLISH LAW

Like other legal systems discussed in this volume, the development of English property law can be seen as the product of a tug-of-war between different conceptions of property. On one hand, we have the liberal conception of property, according to which property is freely alienable, circulates within the market with standardised incidents,[1] and can be claimed by creditors in satisfaction of outstanding debts. On the other hand, we have feudal and dynastic ideas of property, whereby a legal system allows a property owner to impose bespoke conditions and limitations on its use or disposition by his descendants, thereby ensuring that the property will remain within the family for generations. The most famous example of the latter is the so-called "strict settlement", through which the property of wealthy English families was passed intact between generations in the seventeenth,

1 For a modern theoretical discussion, see Merrill, 2012.

eighteenth, and nineteenth centuries.[2] Nonetheless, English law lacked a coherent policy regarding the extent to which property could be subject to such encumbrances. As Joshua Getzler explains:[3]

> *English law across the centuries seems to have run contradictory policies simultaneously: land holders could use limitations and trusts to entail their property and proof it from judgments, but the law also created actions facilitating the assignment of real interests and allowing recovery of debts against land and trusts. English law was thus a mixture of pro-creditor and pro-debtor norms, of rules for free assignment and rules allowing property to be removed from the operation of the market. Moreover, the law in operation was so opaque, so lacking in clear, rational rules, that it was difficult and costly to work out which policy applied. And how to operate the machinery in any given circumstance.*[4]

2. RULES PROMOTING FREE ALIENABILITY OF PROPERTY IN ENGLISH LAW

As Getzler acknowledges, English law historically had several rules intended to encourage the free alienability of property and its circulation in the market. First, English law has historically recognised a "rule against repugnancy", which prevented restrictions on future alienation being placed on estates in land.[5] Similarly, the rules against mortmain dispositions imposed restrictions on donating land to the church, which might hold it forever. Originally, Magna Carta only prohibited dispositions to the church to evade feudal incidents,[6] but later alienations to religious houses were banned.[7]

2 See e.g. Habbakuk, 1994.
3 Getzler, 2009.
4 Ibid., p. 357.
5 Co. Litt. at 223a; Bl. Comm. Vol. II at 156. See e.g. *Brandon v Robinson* (1811) 18 Ves. Jun. 429, 34 E.R. 37 (Ch.); *Re Rosher* (1884) 26 Ch. D. 801 at 812 (Ch.).
6 Magna Carta (1215) c. 36.
7 Statute *De viris reliogiosis* (1279).

English law also had a restrictive approach to attempts to settle property on descendants without power of alienation, as a way of keeping property within a family indefinitely. The Statute *De Donis* of 1285[8] did allow land to be entailed – so, for instance, a gift in tail restricted to A and the heirs male of his body would pass the land to male descendants, none of whom would have the power to alienate the land.[9] However, lawyers devised a way to allow those who took land under an entail to "bar" the entail, thereby allowing an heir to sell it. Typically, this was done by way of a collusive court action between purchaser and vendor called a "common recovery" – where a court order would give the purchaser good title to the land.[10] Further, the rule against perpetuities limited the effectiveness of dispositions designed to provide for several generations. At common law, a will bequeathing an estate in land to an unborn person, with a remainder to that person's future children, would be void as a perpetuity.[11] As Anderson explains, "The common law allowed only one generation of unborn persons to inherit".[12] Further, any executory interests in movables or immovables created by a disposition had to vest within the perpetuity period.[13]

It is clear, then, that English law had plenty of rules protecting the free alienability of property. Indeed, it is notable that even under the strict settlement, family property would need to be resettled every generation – the eldest son of the settlor, if he came of age during the father's lifetime, would need to be induced not to break the settlement. This pressure would often come from his bride's family upon marriage.[14]

Finally, English law also limited attempts to put assets beyond the reach of creditors, including the Elizabethan statutes on fraudulent conveyances, 13 Eliz I c 5 (1571) and 27 Eliz I c 4 (1584-5). Both these

8 Statute De Donis, Stat. Westminster II (1285) c. 1.

9 Baker, 2019, pp. 293–294.

10 Ibid., pp. 300–303.

11 E.g. see *Whitby v. Mitchell* (1890) 44 Ch. D. 85 (Ch.).

12 Anderson, 2010a, pp. 18–19.

13 Ibid., pp. 19–20, noting that what this period was changed over time. For an example of the historical rule see *Cadell v. Palmer* (1832) 1 Cl. & F. 372. For the modern position see the Perpetuities and Accumulations Act 2009.

14 Baker, 2019, p. 314.

statutes allowed certain dispositions of property – dispositions made fraudulently to avoid creditors[15] or to make preferences,[16] and voluntary settlements of land, respectively[17] – to be challenged by creditors and disponees of the disponor unless made for "good consideration". During the eighteenth century, courts came to interpret these statutes more strictly – they came for the first time to treat "good consideration" as requiring the payment of value.[18] Another such restriction was the reputed ownership rules under statute 21 Jac 1 c 19, section 10. This provided that personal property in the possession of a bankrupt debtor would vest in their bankrupt estate –essentially prohibiting non-possessory security of personality.[19] As Willems argues, this rule seems to have had a civilian origin.[20] As with the Elizabethan statutes, this reputed ownership doctrine also came to be treated as stricter in the eighteenth century, when judges stopped treating fraudulent intent as necessary to engage the statute.[21]

We can see then, on its face, English law showed a considerable commitment to a more liberal version of property law – one under which property was freely alienable and available to creditors. This picture though is an incomplete one because, as Getzler recognizes above, these rules could be avoided by using an appropriately drafted trust.

15 The disposition would have to be for value and bona fide to avoid the statute. Actual fraud was required to trigger the statute, and a sale at an undervalue would not per se be fraudulent, though it might evidence fraud; see *Copis v. Middleton* (1818) 2 Madd. 410, 56 E.R. 386 (Ch.).

16 *Twyne's case* (1601) Co. Rep. 80, 76 E.R. 809 (K.B.); Alderson v. Temple (1768) 4 Burr. 2235, 98 E.R. 165; 1 Wm. Bl. 660, 96 E.R. 384 (K.B.).

17 *Doe d. Otley v. Manning* (1807) 9 East 59, 103 E.R. 495 (K.B.); Buckle v. Mitchell (1812) 18 Ves. Jun. 100, 34 E.R. 255 (Ch.).

18 Getzler and Macnair, 2005, pp. 263–265.

19 21 Jac. 1 c. 19 (Bankrupts Act 1623-24), s. 10.

20 Willems, 2015.

21 The landmark case was Ryall v. Rolle (1750) 1 Ves. Sen. 348, 27 E.R. 1074; 1 Atk. 165, 26 E.R. 107; 1 Wils. K.B. 260, 95 E.R. 607 (H.L.). For further discussion see Televantos, 2020, pp. 123–128.

3. WHAT IS A TRUST?

At its most simple, a trust is a legal institution for the holding of property, distinct from company law or agency. It functions as a way of dividing up the typical incidents of ownership in a manner not possible in most legal systems that do not recognise trusts – and it does so generally without the need for registration or extensive formalities.[22]

Historically, trusts evolved out of the division between courts of law and equity in England. Originally, England had courts of law only, which would administer the king's justice, as embodied in the common law. However, the Chancery, which originated as the royal secretariat rather than a court, eventually emerged as a distinct legal jurisdiction.[23] This jurisdiction seems to have evolved principally from bills of complaint made to the King's Council when the petitioner could not obtain relief in the royal courts.[24] Bills of complaint were dealt with by the Chancellor, who came to issue process and grant remedies himself.[25] While the Chancellor in such cases was not originally seen as applying a body of law – he was granting ad hoc relief according instead to "conscience" – the decisions of Chancery ultimately evolved into a body of jurisprudence known as "equity".[26] This body of rules was "supplementary" to the common law, as F.W. Maitland put it: "*we ought to think of equity as supplementary law, a sort of appendix added on to our code, or a sort of gloss written around our code, an appendix, a gloss*".[27]

This flowed from the fact that suits in equity were brought when a suitor could not obtain justice in the common law courts. Chancery would often order the holders of common law rights to use them in

22 In English law only declarations trust of land need to be "manifested and proved" in signed writing, see Law of Property Act 1925, s. 53(1)(b), substantively re-enacting the Statute of Frauds 1677 (29 Car. 2 c. 3), s. 7.

23 Baker, 2019, p. 107.

24 Maitland and Brunyate, 1939, pp. 4–5.

25 Baker, 2019, pp. 109–110.

26 Ibid., pp. 114–116, 118–119; Maitland and Brunyate, 1939, pp. 9–10. Note too that equity was also administered by other courts, in particular the equity side of the exchequer (see e.g. Bryson, 1975).

27 Maitland and Brunyate, 1939, p. 18.

particular ways.[28] For instance, in cases of fraud, a person with legal rights might be ordered to transfer their rights to another or be restrained from exercising those rights in particular ways, on penalty of imprisonment.

The Chancery emerged as "inseverably connected with the Trust".[29] Maitland saw Chancery's intervention here as arising in response to the medieval common law's refusal to recognise a will of land.[30] As such, it came to enforce bargains where a father transferred an estate in land to a friend on the understanding that the friend would convey the estate to the father's children upon the father's death. Such an arrangement was later interpreted as creating a trust over the land.[31] The terms of the agreement between the father (the settlor) and his friend (the trustee) determined how and in what way the settlor's children were to benefit from the trust. Importantly for our purposes, trusts originated as a form of contract, Chancery came to enforce them against an increasing number of people, and so an interest under a trust came to resemble a proprietary right. Maitland famously explained that developmemt in the following way:

> *In this development we may trace several logical stages:*
> *(I) The first is reached when the cestui que trust (beneficiary) has a remedy against the person who has undertaken to hold land or goods on trust for him.*

28 For a modern theoretical discussion of the implications of this today, see Smith, 2021.

29 Maitland, 2004b, p. 84.

30 Ibid.; Baker, 2019, pp. 285–288. The position was changed by statute but only in the Tudor period, by the Statute of Wills 1549 (32 Hen VIII c 1).

31 Originally these arrangements were called "uses". In Henry VIII's time "passive" uses of land, those under which the trustee agreed to act as a passive custodian, were by statute "executed", thus giving legal title to the land to the intended beneficiary; see the Statute of Uses 1536, 27 Hen. VIII, c. 10. However, later lawyers devised a way of bypassing the statute through using the device of a "use upon a use", in relation to which the second use was not executed. These became trusts, and the extent to which they were the same as the earlier uses is controversial. For discussion, see Jones 2002.

(II) *The second step is easy. The use or trust can be enforced against those who come to the land or goods by inheritance or succession from the original trustee [...] Such persons may be regarded as sustaining wholly or partially the person of the original trustee and being bound by his obligations as regards the proprietary rights to which they have succeeded.*

(III) *The third step is to enforce the trust against the trustee's creditors [...]*

(IV) *[...] The right of the cestui que trust was enforced against any person who came to the thing [held on trust] through or under the trustee as a volunteer – i.e. without valuable consideration, even though he had no notice of the trust.*

(V) *[...] The trust was enforced against one who purchased the thing from the trustee if he at the time of the conveyance knew of the trust [...]*

(VI) *[...] We arrive then at this result, equitable rights will hold good even against one who has come to the legal ownership by purchase for value, if when he obtained the legal ownership [from the trustee] he had express or constructive notice of those rights [i.e. he knew, or ought to have known about the trust].*[32]

In other words, beneficiaries of a trust have rights against both the trustee and third parties.[33] Originally Chancery only enforced the trust against the person who had agreed to hold assets on trust (stage (I)),[34] but it soon came to enforce the trust against those who inherited the trust assets from the original trustee (stage (II)) and indeed his creditors (stage (III)). This latter point means that a trustee's creditors cannot levy execution against trust assets,[35] nor, if the trustee becomes bankrupt, do the trust assets vest in his bankrupt estate.[36] Instead, the beneficiaries will be able to claim the assets, either taking a transfer of them directly or having them transferred to a new trustee. The key point is

32 Maitland, 1939, pp. 112–114.

33 Nolan, 2007.

34 See e.g. Re *Massingberd's Settlement; Clark v Trelawney* (1890) 63 L.T. 296 (Ch.D.).

35 For a very early example, see Lord Nottingham LK's judgement in *Medley v Martin* (1673) Rep. t. Finch 63; 23 E.R. 33 (Ch.).

36 *Re Morgan* (1881) 18 Ch. D. 93, 101 (Ch.).

that beneficiaries are not treated as unsecured creditors of the trustee. Finally, where a trustee disposed of the assets without authority under the trust's terms to a third party, the beneficiary could recover the asset from that third party who had not paid the trustee value (stage (IV)), had paid value but knew of the trust (stage (V)), or ought to have known of the trust (stage (VI)). The famous Oxford jurist Peter Birks described this claim as the equitable equivalent of the *vindicatio* in Roman law.[37] Further, today, a beneficiary of a trust is not only able to "follow" trust assets into the hands of disponees but also "trace" substitutes of these assets held either by the original trustee or a disponee and claim those substitutes as part of the trust fund. This is justified by reference to the beneficiary's property right in the original trust assets.[38]

In that way beneficiaries' equitable rights appeared proprietary. However, Maitland considered this "resemblance to rights *in rem*"[39] to be "misleading",[40] in particular, since a good faith purchaser for value of legal title without notice will take free of prior equitable interests.[41] While Maitland's argument still has some academic support,[42] the proprietary language remains very common.[43]

This combination of rules is important in understanding the trust's ability to subvert the common law's restrictions on imposing fetters on the free disposition of property. By declaring a trust, a settlor was able to create bespoke property-like interests in both movables and immovables without infringing the common law rules that prevented the imposition of restrictions on powers of alienation. The extent of a settlor's ability to create bespoke equitable proprietary interests has led Paul Matthews to argue that English law lacks a *numerus clausus* of property rights in the civilian sense.[44]

37 Birks, 2000. See also McBride, 2016.

38 *Foskett v. McKeown* [2001] 1 A.C. 102 (H.L.).

39 The use of the term "rights" or "*ius in rem*" (in the accusative) as opposed to "*in re*" (in the ablative) is conventional in British scholarship.

40 Maitland, 1939, p. 117.

41 Fox, 2018.

42 See e.g. McFarlane and Stevens, 2010.

43 For a recent example of the equitable proprietary language, see *Byers v. Saudi Bank* [2023] U.K.S.C. 51.

44 Matthews, 2013.

Moreover, such control could manifest in various ways. The terms of a trust, for instance, could provide that a beneficiary's interest would only come into existence upon the occurrence of a condition precedent, or even that the beneficiary's interest will come to an end in favour of some other named party upon a specified event.[45] Rather differently, the terms would also serve as a management regime, outlining how the trustee was to invest the trust property, what payments were to be made from the fund and to whom, and how benefits were to be allocated between capital and income.

Crucially, it should be emphasised that the "proprietary" interests of beneficiaries do not generally allow them to disrupt the operation of the trust. The trust assets themselves are owned by the trustee. For that reason, if a third-party tortfeasor interferes with the goods, it is the trustee who must bring the claim, for it is the trustee's right to possession that has been interfered with,[46] though if the trustee fails to act, the beneficiaries may be able to compel them to do so,[47] provided a sufficient indemnity for the trustees is available.[48] The beneficiary's claim is rather different: the basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law,[49] and beyond that they have no right to demand the trustees use their powers in any particular way.[50] Commentators have therefore conceived of a beneficiary's rights as a proprietary right to due administration of a fund.[51] The only exception to the rule that beneficiaries are limited to what the terms of the trust give them is the rule in *Saunders v Vautier* (1841).[52] This provides that, where all the beneficiaries of a trust are sui juris, they can collectively collapse the trust and call for the trust assets from the trustee.[53]

45 Anderson, 2010b, pp. 246–268.
46 See e.g. *M.C.C. v Lehman* [1998] 4 All E.R. 675.
47 Under the procedure recognised in *Vandepitte v. Preferred Accident Insurance Co. of New York* [1933] A.C. 70.
48 *Concord Trust v. Law Debenture Trust Corporation* [2005] U.K.H.L. 27.
49 *Target Holdings Ltd. v. Redferns (A Firm)* [1996] A.C. 421, 434.
50 *Re Brockbank* [1948] Ch. 206.
51 See e.g. Nolan, 2004.
52 *Saunders v. Vautier* (1840) 4 Beav. 115, 41 E.R. 482; (1841) Cr. & Ph. 240 (Ch).
53 For discussion see Matthews, 2006.

The law of trusts therefore allows settlors the power to contractually tailor beneficial interests while, at the same time, giving those beneficiaries property-like protections of a kind which can very seldom disrupt the trust's operation. For this reason, trusts have been used in English legal history as "a liberal substitute for a law about personified institutions":[54] trusts have been used in the structure of the stock exchange, joint stock companies, the Inns of Court, charities, minority religious sects, social clubs, and family (strict) settlements.[55] As such, Maitland saw the trust as "the greatest and most distinctive achievement performed by Englishmen in the sphere of jurisprudence".[56]

4. TRUSTS OF FAMILY BUSINESSES HISTORICALLY

We now turn to historical uses of trusts of family businesses, examining cases of what I've elsewhere called "testamentary trading trusts".[57] These made use of both the flexibility of trusts and their proprietary effects. While a considerable body of scholarship has examined the extent to which a trust of a business could be used historically in common law jurisdictions to emulate the effects of a joint stock corporation with limited liability and tradeable shares,[58] trusts of small family businesses historically have received far less attention. They are briefly described by Chantal Stebbings in *The Private Trustee in Victorian England*[59] as part and parcel of family trusts:

> *The second and most common form of trust was the family or mercantile trust. These trusts were [...] complex, often demanding a great deal of time and effort by the trustees, and requiring the exercise of discretion, for they necessitated the running of a business, or the supervision of the*

54 Maitland, 2003a, p. 57.
55 Maitland 2003b.
56 Maitland, 2003a.
57 Televantos, 2020, pp. 53–55.
58 E.g. see Lobban, 2016, pp. 613–619; Getzler and Macnair, 2005; Harris, 2000, chs. 5 and 6; Morley, 2016.
59 Stebbings, 2002.

> *education and upbringing of infant children as well as the management of the trust fund.*[60]

How did such trusts work? Imagine we are in 1800, and a husband and wife run a business that supports their family. They have no substantial assets outside the business. They have an infant son, who they hope will take over the business when he grows up. The father is drafting his will and wants to make sure that the business continues to operate after his death so that his son can take it over.

A complicating factor is that the business is unincorporated. In England general incorporation was not introduced until the mid-nineteenth century, before then it was only available via Royal Charter or Act of Parliament, and was usually only granted to overseas trading companies (like the East India company) or for public infrastructure projects (such as navigating canals or building railways).[61] What legal structure could a business owner use in his will to make sure the business continued to provide for his family after his death?

The most obvious solution would have involved a trust with the following terms:[62] First, the business owner would appoint trustees to hold legal title to the trade assets for the benefit of the testamentary estate.[63] These trustees might be relatives or family friends. Second, the business owner would provide who was to run the business until his son reached 21 years of age.[64] The business would sometimes be run by the trustees themselves, but in other cases it might instead be run by the widow or a third-party manager. Thirdly, the will would provide that, until the eldest son reached 21 (or sometimes 25), the profits of the business would be used to discharge pre-existing trade debts and provide for the family.[65] Fourthly, upon reaching 21, the son was to have the option to purchase the trade assets from the trustees, typically on credit.[66] Finally, the

60 Stebbings, 2002, pp. 9–10.
61 Hunt, 1936, pp. 9–13, 22–29.
62 For more detail on this structure, see Televantos, 2020, pp. 53–55.
63 *Smith v. Starkey* (1825) P.R.O. C 33/736, ff. 1761r-1765v (Ch.).
64 *Stodhort v. Ryle* (1825) PRO C 333/736, ff. 2762r-64v, C 33/737, ff. 2025r-2026r (Ch.).
65 *Caffrey v. Darby* (1801) 6 Ves. Jun. 488, 31 ER 1159 (Ch.).
66 *Wilkinson v. Stafford* (1789) 1 Ves. Jun. 32, 30 ER 216 (Ch.).

purchase price of the business was to be used to provide dowries for daughters and make provision for younger sons.[67]

This structure offered several benefits for business owners. The first was control: the business owner was able to keep the business trading as a going concern after death and even direct how the business was run. The second was that the structure allowed provision to be made for family members: where a business was the family's major source of wealth, the business could be charged with payment of sums to maintain the widow and other family members. Thirdly, the structure allowed flexibility. The trustees chosen by the testator could be given discretions to wind up or sell the business – for instance if the family needed money; if there was a market downturn; or if the trustees thought that the business owner's children were not fit to take over the trade.

Fourthly, and perhaps most importantly, the trust structure protected the family from creditor claims. Such trusts effectively allowed a form of limited liability trading, long before limited liability corporations were recognised by English law.[68] We see this from the case of *Ex parte Garland* (1804),[69] decided by Lord Eldon LC. On the facts, Henry Ballman owned a farm and mill. He created a trust of the business in his will. He appointed trustees to hold legal title to the business assets and appointed his wife as a manager to run the business, allowing her to take £600 from his other assets to use for business purposes. Henry Ballman died, and his widow ran the business until she was declared bankrupt – having used more than £2000 of estate assets to run the business. The surviving trustee of the business argued that the trade creditors should be allowed to be paid from Henry Ballman's remaining non-business assets. Because his testamentary estate had taken the profits of the business, it should be fully liable for its debts. In other words, the creditors of the business should be paid from the legacies Henry Ballman had left to his children.

Lord Eldon LC rejected this argument, ruling that the creditors had no claim. The business creditors had dealt with the widow, and so their

67 *Humble v. Bill* (1703) 2 Vern. 444, 23 E.R. 884 (Ch.).
68 Televantos, 2020, pp. 55–60.
69 *Ex. p. Garland* (1804) 10 Ves. Jun. 110, 32 ER 786 (Ch.).

rights to Henry Ballman's estate were limited to hers. Furthermore, the will explicitly prohibited the widow from using more than £600 of the testamentary business. As the widow had already used more than this in the business, she had no claim against Henry Ballman's estate in respect of the business. The creditors could be in no better position than the widow, and so they had no claim against the estate, even though the estate had been taking the profits of the business. The historical trading trust therefore offered real advantages to business owners by allowing a form of limited liability trading before such trading was generally recognised by the law.[70]

5. THE USE OF TRUSTS OF BUSINESSES TODAY

As we see above, historically much of the reason business assets were settled on trust was the lack of a generally available corporate law, and so it is perhaps surprising that such trusts exist today. Nuncio D'Angelo's book on *Commercial Trusts* identifies the basic form employed by such entities.[71] Business owners create a limited liability corporation to act as a trustee. The business assets are then transferred to the corporation, which holds all the assets on discretionary trust for family members. The terms of the trust allow the corporation to trade with the assets and incur liabilities for the purposes of the business. The corporate trustee has no other assets except for trust assets – and so holds no property for its own benefit – and engages in no transactions except for those related to the business.

What are the advantages of this structure today? Why not simply incorporate the family business and have family members as shareholders in whose favour dividends can be declared? The possible advantages vary by jurisdiction. In Australia, where trading trusts are most common, the main motivator for this kind of structure in small family

70 By the Limited Liability Act 1855 (18 & 19 Vict. c. 133), replicated thereafter by the Joint Stock Companies Act 1856 (19 & 20 Vict. c. 47).

71 D'Angelo, 2014, Ch. 2.

businesses is tax.[72] Essentially, paying family members as beneficiaries of a trust is more tax efficient than paying them as shareholders. Further, structuring a family business as a trust can involve fewer regulatory requirements – trusts involve no need to register or file accounts, though if the trustee is a corporation, obviously it will need to do this.[73]

Finally, as we saw with historical trading trusts, a trust structure can provide protection from creditors. Specifically, a modern trust structure can even protect *business assets* from creditors in cases of mismanagement. This requires some explanation. As discussed earlier, creditors of a trustee *cannot* claim trust assets.[74] This principle includes "trust creditors" – where a business is held on trust, as a matter of law the creditors of the business are simply the personal creditors of the trustee.[75] As such, if they are unpaid, they cannot claim the trust assets directly. The underlying point is that the trust has no legal personality and cannot hold rights or liabilities independently of the trustee.[76] A trust, in civilian terms, does not classically constitute a separate patrimony, though it is sometimes described in that way.[77]

That being said, a trustee who incurs liability with authority under the terms of the trust acquires a right to be indemnified from trust assets.[78] This means either that the trustee can use trust assets directly to pay the trust debts or, if the trustee pays the debts from his own beneficially held property, he can be reimbursed from the trust assets.[79] These are sometimes respectively called a power of exoneration and a power of recoupment.[80] This indemnity is important not only for the trustee but for creditors too. Trust creditors can claim trust assets by being "subrogated" to a trustee's right of indemnity, so long as the

72 Evans, 2019.
73 D'Angelo, 2014, paras. [2.98]–[2.110].
74 *Medley v. Martin* (1673) Rep. t. Finch 63; 23 E.R. 33 (Ch.).
75 *Re Morgan* (1881) 18 Ch. D. 93 (Ch.).
76 *Re Johnson* (1880) 15 Ch. D. 548 (Ch.).
77 See e.g. Vaslan, 2015.
78 *Re Johnson* (1880) 15 Ch. D. 548 (Ch.).
79 *Carter Holt Harvey v. Commonwealth* [2019] H.C.A. 20 at [29] to [32].
80 See e.g. *Chief Commissioner of Stamp Duties (N.S.W.) v. Buckle* [1998] H.C.A. 4; (1998) 192 C.L.R. 226, paras. [47]–[50].

liability was incurred with authority under the terms of the trust.[81] In other words, the trust creditors can indirectly claim trust assets through a trustee's right of indemnity.

However, there are severe limits on this mechanism. First, trust creditors cannot claim trust assets where the liability was incurred without authority under the terms of the trust – even if the trustee appeared to have authority to enter into the transaction.[82] The underlying point here is that a trustee is not an agent or *procurator* of the beneficiaries, and so the doctrine of apparent authority does not apply simply because of the existence of a trust relationship.[83]

Secondly, and perhaps more troublingly, a creditor might be unable to claim trust assets even where that creditor's claim is authorised by the terms of the trust. Where a trustee has committed an unrelated breach of trust and incurs liabilities to the beneficiaries in respect of that breach, any indemnity the trustee is entitled to is offset against the trustee's liability for breach – and so potentially extinguished altogether. Where a trustee's indemnity is destroyed in this way, the trust creditors are unable to claim trust assets at all. As Lord Hodge explains in *Investec v Glenalla Properties* (2018):[84]

> *Because the creditor's recourse to the assets is derived from the trustee's right of indemnity, it is vulnerable. It is exercisable only to the extent that that right exists. It may be defeated if there are insufficient trust assets to satisfy his debt, or if the trustee's right of indemnity is defeated, for example because the debt was unreasonably or improperly incurred and the indemnity does not extend to such debts, or because the trust deed excludes it on account of the trustee's wilful default or gross negligence.*
>
> *More generally, a breach of trust by the trustee, even in relation to a matter unconnected with the incurring of the relevant liability, will, to the extent*

81 *Re Johnson* (1880) 15 Ch. D. 548, 552 (Ch.).
82 *Re Johnson* (1880) 15 Ch. D. 548, 552 (Ch.).
83 Televantos, 2016.
84 *Investec Trust (Guernsey) Ltd v. Glenalla Properties Ltd* [2018] U.K.P.C. 7.

> *that it creates a liability to account on the part of the trustee, stand in the way of the enforcement of the indemnity.*[85]

These rules can be particularly problematic for creditors of modern trading trusts. As above, where a business is run through a corporation which holds all its assets on trust, there are no assets for business creditors to claim other than trust assets. Accordingly, where a trading trustee acts in breach of trust, the creditors of the business might find there are no assets that they can claim at all. Concerns about these rules, have led to some academic arguments that the rules in this area are unjustifiable – and that a trustee's unrelated breach should not affect creditor claims to trust assets.[86] For instance, D'Angelo argues there is a real risk of the law undermining normal commercial expectations in cases of this kind, given that such expectations today are invariably shaped by the very different risk allocation provided by corporate law.[87]

By and large, judges tend to defend the existing rules, as Lord Hodge does in *Investec*:

> *As has been frequently observed, this can be hard on the creditor, who will usually have no knowledge of the state of account between the trustee and the beneficiaries. But the creditor can, in principle, protect his position, for example, by taking a fixed charge over the trust assets or, as in the present case, by stipulating for a personal guarantee from the principal beneficiary.*[88]

In other words – the fact that a creditor can contract for proprietary or personal security when dealing with a trustee means that the law does sufficiently allow trust creditors to protect themselves. Presumably, though, this reasoning is limited only to contract creditors; for instance, if a trustee incurs a tortious (i.e. delictual) liability while executing the

85 *Investec v. Glenalla Properties* [2018] U.K.P.C. 7 at [59](III) (per Lord Hodge).
86 See e.g. Ollikainen-Read, 2018, pp. 69–74.
87 D'Angelo (2014), para. [5.84].
88 Lord Hodge in *Investec v. Glenalla Properties* [2018] U.K.P.C. 7 at [59](III). See too *Equity Trust (Jersey) Ltd v Halabi (Jersey); ITG Ltd and Others v. Fort Trustees Ltd (Guernsey)* [2022] U.K.P.C. 36 at [257].

trust's terms, the victim certainly would not have been capable of bargaining for security. Likewise, should the trustee incur a liability in unjust enrichment in the execution of the trust, the claimant would never have been able to bargain for security.

Before finishing it is worth mentioning one final difficulty trusts of family businesses can give rise to in the insolvency context.[89] If a trading trustee becomes insolvent, do statutory insolvency distribution rules apply in respect of trust assets? So if the insolvency regime gives priority claims to certain kinds of employees of a bankrupt, for instance, do employees of a business held on trust have a priority claim upon the trustee's bankruptcy?[90] There is no English authority on point, but the leading trusts law textbook, *Lewin on Trusts*, says that the employees would not get a priority claim.[91] The reasoning is that since trust assets do not vest in an insolvent trustee's estate, statutory rules of distribution are irrelevant. Trust assets should be distributed *pari passu* amongst trust creditors, without reference to any priority creditor claims conferred by the statutory insolvency regime.

However, in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth*,[92] the High Court of Australia ruled that the statutory rules of distribution would apply. The facts of the case concerned whether insolvency legislation should govern the priority of the distribution of the assets of a trading trust. In the leading judgment, Bell J, Gageler J, and Nettle J explained the position in the following way:

> *To the extent of [the trustees] right of indemnity, [the trust] property would have yielded proceeds of realisation from which [the trustee] would have been entitled to discharge properly incurred trust liabilities. […] That*

89 For deeper discussion of this point, see Televantos, 2025.

90 Such priority in English law exists for unpaid contributions to occupational pension schemes (Pension Schemes Act 1993 Sch.4; Insolvency Act 1986 Sch.6, para.8) and unpaid remuneration (Insolvency Act 1986 Sch.6, paras 9–15).

91 Tucker and Le Poidevin and Brightwell, 2023, para. [27-057].

92 *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20

property yielded proceeds of realisation from which the [...] [trustee] would have been, entitled to discharge properly incurred trust liabilities.[93]

Put differently, the trustee's right of indemnity permitted it to utilise trust assets to meet trust liabilities, for example, to meet debts owed by the trustee. Consequently, the assets subject to the indemnity vested in its insolvent estate. Additionally, those assets could only be distributed amongst trust creditors, and the priority of their distribution should be governed by the statutory priority regime. It is certainly hard to see, as a matter of policy, why the fact a business is settled on trust should make a difference to how the assets of the business are distributed amongst business creditors.

6. SUMMARY OF CONCLUSIONS

In conclusion, English law has long had an inconsistent approach to imposing restrictions on the free alienation of property. On the one hand, the common law had various rules against such restrictions, but the law of trusts allows those restrictions to be evaded. This is because trusts allow the creation of bespoke equitable proprietary interests which bind trustees, their creditors, and some disponees. A fortiori, the flexibility of the trust device means that it is possible to settle business assets on trust, the terms of which can allow the business to be run for the benefit of family members and managed flexibly. The trust structure can protect beneficiaries from creditors, especially in cases of mismanagement – thereby preserving the unity of business assets. In part, this explains the use of trusts in businesses historically and today. The deeper question, though, is whether this is desirable. The trust means that creditors of a business might be unable to claim business assets, especially as trust law shifts the risk of mismanagement onto creditors over owners, unlike corporate law. Trusts established by businesses serve as an excellent example of modern lawyers drawing inspiration

93 *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20, para. [98].

from historical legal structures in family business planning, and they also exemplify how historical rules persist even as the surrounding world and legal system undergo significant changes.

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INSTRUMENTS FOR PRESERVING THE UNITY OF (FAMILY) PROPERTY: A REPORT FROM AUSTRIA

GERALD KOHL

ABSTRACT

The desire to protect (family) assets from fragmentation is timeless and can be found in all social classes; motives and methods vary. Focusing on Austria, the paper provides an overview, ranging from the peasant inheritance laws and the old agrarian communities to the early modern entailed estates (fideikommiss) and 19th-century family foundations; additionally, it addresses private foundations that emerged at the turn of the millennium – thus making visible the various interrelated factors. The overview will also show that the target can be reached by means of customary law, statutory regulations and contractual agreements based on private autonomy.

Keywords: *private foundations, family foundations, entailment, fideicommiss, peasant inheritance laws, agrarian communities.*

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1. INTRODUCTION – GENERAL REMARKS

In Austrian legal history,[1] there are numerous objects, properties and rights that should not be divided, and the instruments used to bring about such indivisibility are just as diverse as the underlying motives and purposes. Later, this paper will deal with the various factors interacting. But first, in order to gain an impression of possible parameters, and because a perspective based on the historical dimension needs a starting point anyway, we will begin by looking at two instruments that are used for preserving the unity of property in modern Austria. For the agricultural sector, a special peasant inheritance law, usually known as "Anerbenrecht", will be examined; for the non-agricultural sector, the private foundation.

2. PRIVATE FOUNDATION AND FAMILY FOUNDATION

The private foundation of modern law is a relatively young institution; it dates back to the 1993 Private Foundations Act ("Privatstiftungsgesetz").[2] The purpose of establishing a private foundation is to make an estate independent and preserve it in the long term so that it can serve a purpose determined by the founder even after his death. This purpose can (as an "end in itself", so to speak) lie in the preservation of the assets, especially if the assets consist of companies or shares in companies. In this case, the main purpose is to establish a permanently independent organisation that (unlike mere co-ownership) is not threatened by the explosive force of conflicting individual interests. However, the purpose can also be to benefit certain individuals; this can also be the founder himself. These objectives are very often combined.

1 In general: Kohl et al., 2024. I would like to thank StudAss Felix Nachtlberger for his valuable support.

2 More on the Private Foundations Act BGBl 694/1993; popular source of information: *Privatstiftung Definition, Organe, Firmenbuch*, 2024. On the history of the Private Foundation: Pendl, 2022, p. 191.

A private foundation is a legal entity without shareholders or owners. It is created based on a "declaration of foundation" (Stiftungserklärung) inter vivos or by testamentary disposition, in either case by notarial deed and entry in the commercial register. In the context of the Private Foundations Act, there is notable flexibility regarding content requirements. The act mandates a minimum asset of EUR 70,000, along with essential information about the foundation's duration, purpose and the beneficiaries. Moreover, the declaration of foundation can encompass comprehensive regulations pertaining to the governing bodies – a board of at least three people and various supervisory bodies. The establishment of the private foundation and annual fees for the foundation bodies are cost-intensive, so that in practice the statutory minimum assets are not sufficient.

The "Austrian Association of Foundations", which represents the interests of private foundations, indicates that the history of private foundations only seems to go back to the preparatory work for the Private Foundations Act in the 1980s. Accordingly, the foundation association proclaims:[3] "The private foundation has been a success story in and for Austria for 30 years."[4] This is because there are over 3,000 private foundations in Austria today. Their purpose is described as "anchoring companies, jobs, and capital in Austria"[5] and defending them "against short-term profit-seeking and speculators".[6] "The private foundation as the holder of the shares in the endowed (family) company secures its future. In this way, foundations contribute to the sustainable development of the Austrian economy".[7] "The entrepreneurial families, who in most cases are behind the foundations, think long-term. This gives them the space and opportunity to develop and promote innovative

3 The following quotations are taken from *Stiftungen sind Verankerung. Nachhaltigkeit. Innovation. Stiftungen sind Österreich*, 2024.

4 "Die Privatstiftung ist seit 30 Jahren eine Erfolgsgeschichte in und für Österreich".

5 "Unternehmen, Arbeitsplätze und Kapital in Österreich verankern".

6 "[G]egen kurzfristiges Gewinndenken und Spekulanten".

7 "Die Privatstiftung als Trägerin der Anteile am verstifteten (Familien-)Unternehmen sichert seine Zukunft. Dadurch leisten Stiftungen einen Beitrag zur nachhaltigen Entwicklung der österreichischen Volkswirtschaft".

solutions and new product and process innovations. Foundations shape our future".[8] The transfer of assets to a foundation therefore does not appear to be motivated by (equally legitimate) selfish considerations, such as the preservation of family wealth or even tax savings; the unity of assets is not seen as an end in itself but as a way for achieving socially acceptable goals.

Orientation to the future as well as sustainability could perhaps become even clearer if the history of the private foundation is viewed in a broader context and does not just begin with the preparatory work for the current law. The Austrian General Civil Code (ABGB) already knew about "foundations" but referred to the "political ordinances"; § 646 said:

> *Foundations are distinguished from substitutions and entailed estates, whereby the income from capital, land or rights is designated for charitable institutions, such as ecclesiastical benefices, schools, hospitals, or poor-houses, or for the maintenance of certain persons for all subsequent times. The regulations on foundations are contained in the political ordinances.*[9]

From the punctuation, two different types of foundation could in fact be distinguished, namely on the one hand the charitable foundation with a generally defined but specifically unknown circle of beneficiaries, and on the other hand the foundation that was set up "for the maintenance of certain persons" ("zum Unterhalt gewisser Personen"). It appeared to be confusable with the entailed estate regulated in the ABGB itself, which motivated the differentiation and reference by § 646 ABGB. In contrast to the entailed estates, the foundations were regulated outside the ABGB

8 "Die Unternehmerfamilien, die in den meisten Fällen hinter den Stiftungen stehen, denken langfristig. Das gibt Raum und Möglichkeit zur Entwicklung und Förderung von innovativen Lösungsansätzen und neuen Produkt- und Prozessinnovationen. Stiftungen gestalten unsere Zukunft".

9 § 646 ABGB: "Von den Substitutionen und Fideikommissen unterscheiden sich die Stiftungen, wodurch die Einkünfte von Capitalien, Grundstücken oder Rechten zu gemeinnützigen Anstalten, als: für geistliche Pfründen, Schulen, Kranken- oder Armenhäuser; oder, zum Unterhalte gewisser Personen auf alle folgenden Zeiten bestimmt werden. Die Vorschriften über Stiftungen sind in den politischen Verordnungen enthalten".

and were also subject to supervision by the political authorities, whereas the entailed estates were subject to the courts' jurisdiction.

It was not until the second half of the 19th century that foundations were integrated into civil law, when the dogmatics of the historical school of law invented the "legal person" ("juristische Person") and subsumed corporations (covered by the ABGB as "moral persons"/ "moralische Personen") as well as institutions and foundations under it.[10] This brought the purpose more to the fore; it appeared as the "characteristic feature" of the legal person, which Herrnritt therefore described as a "purpose subject" ("Zwecksubjekt"). For the foundation, the question of its purpose emerged in the aftermath of its emancipation from church life (i.e. its opening up to non-religious purposes). While the church was originally in charge of the foundation system, such as charitable foundations, benefice foundations, foundations for the poor, and hospital foundations, secular purposes gained importance in the modern era. In addition to the promotion of art and science, foundations for the benefit of family members now also emerged. As a result of the "secularisation of the foundation system",[11] which was characterized by the broadening of foundation purposes, a princely foundation supervisory authority was established in the interests of expanding state sovereignty. It assessed the legitimacy of the foundation's purpose according to its "policy" interests and made the approval of the foundation dependent on this. Under the influence of rational law, the assessment of foundations was then reoriented towards the standard of the individual, whose private autonomy was expressed in an act of foundation: the purpose of the foundation merely had to be "morally possible and not contradicting any laws".[12] This was based on the conditions of the "moral person" in Section 26 ABGB.[13] The non-profit status (which was assumed or at least implied in the ABGB, depending on the interpretation of the punctuation) receded into the background; although it was occasionally mentioned, it was often not considered mandatory in practice.

10 Brauneder, 1982, p. 308.

11 Herrnritt, 1896, p. 46.

12 Originally "sittlich möglich sein und keinem Gesetze widersprechen". Herrnritt, 1896, p. 47 (with further references).

13 Stammer, 1983, p. 51.

For example, towards the end of the 19th century, the Supreme Court ruled several times that the foundation's purpose had to be "a permissible, permanent, general one".[14] Despite the mention of the characteristic of charitable status, it did not appear to be "necessarily excluded by the fact that [the purpose] is only carried out within a narrow circle of people (family, members of a community)".[15]

It is therefore not surprising that there was considerable confusion about the term "family foundation" because it was supposed to refer to "essentially different institution[s]" ("wesentlich verschiedene Institution[en]"). From one perspective, scholars knew the "German-law family foundation"[16] as a "family fideicommiss of the bourgeois circles".[17] This institution, which was "not very common in Austria", was dominated by private law: the assets were owned by the family, which was also responsible for their administration; there was no state supervision of the foundation and any disputes were brought before the courts. From another perspective, administrative legislation and practice understood the term "family foundation" to mean precisely those foundations for specific administrative purposes "whose enjoyment […] is restricted to the members of a family".[18] In this sense, Mayerhofer's handbook for the political administrative service distinguished from "pure family foundations" those foundations "which aim to promote a specific administrative task (care of the poor, supporting studies) within a particular family".[19] This "family foundation under Austrian administrative law" thus corresponded to the second type of foundation indicated in § 646 ABGB, in which "certain persons" were beneficiaries.

14 Originally, the purpose was described as "ein erlaubter, dauernder, allgemeiner". *Cf.* Herrnritt, 1896, p. 47.

15 Ibid., p. 50, footnote 6: "nicht nothwendigerweise dadurch ausgeschlossen, daß [der Zweck] nur innerhalb eines engen Personenkreises (Familie, Angehörige einer Gemeinde) durchgeführt wird".

16 Ibid., pp. 54–57 ("deutschrechtliche Familienstiftung").

17 Ibid., p. 55 ("Familienfideicommiß der bürgerlichen Kreise").

18 Ibid., p. 55 ("deren Genuß […] nur auf den Kreis der Mitglieder einer Familie beschränkt ist").

19 Mayerhofer and Pace, 1901, p. 185; *cf.* Stammer, 1983, p. 53 ("welche die Förderung einer bestimmten Verwaltungsaufgabe (Armenpflege, Studium) innerhalb einer bestimmten Familie bezwecken").

While family affiliation was sufficient for the "German law family foundation" and only an order of succession under family law applied, a further qualification had to be added to the "family foundation under Austrian administrative law" in order to trigger beneficiary status; this special administrative task differentiated it from the first-mentioned foundation, which was intended to serve "general purposes" of the family and was therefore similar to the family fideicommissum (entailment).[20]

3. EXCURSUS: FIDEICOMMISS (ENTAILMENT)

Even though the details of the roots of the modern family entail are disputed, the history of the institution in general can be assumed to be known, especially as its detailed description would go beyond the scope of this overview. Suffice to say that in the case of the Familienfideikommiss, the assets of a family – in reality a noble family[21] – were also bound by a written legal transaction[22] in the male line. The aim was "to grant the families of the nobility, especially the high nobility, permanent economic support and thus initially the opportunity to secure a social position commensurate with their noble status".[23] The rights of the respective entail holder were limited by the

20 *Cf.* for the modern Private Foundation Scheuber, 2004, p. 931.

21 At the end of the 18th century being part of the nobility was not a requirement for establishing a family entail; this arises from a court decree from 21.08.1784, whereupon the local courts are competent for family entails of common people: Fraydenegg-Monzello, 1979, p. 789, footnote 62. Even though the ABGB formulates the section for family entails without reference to class, this was an example for the neo-corporative character of the codification (cf. Brauneder, 2014, p. 192–197), in practice "the establishment of family entails was mostly only approved for the nobility": court decree from 12.06.1838; *cf.* Mayerhofer and Pace, 1901, p. 166, footnote 2; Fraydenegg-Monzello, 1979, p. 796 (with further references).

22 If the property was tied by customary law, it was instead a (family-)estate.

23 Mayerhofer and Pace, 1901, pp. 164–165 ("den Familien des Adels, insbesondere des Hochadels, einen dauernden ökonomischen Rückhalt und damit zunächst die Möglichkeit gewähren, eine dem Adelsstande entsprechende gesellschaftliche Stellung gesichert einzunehmen").

rights of the claimants;[24] the use of the entail followed predetermined rules (primogeniture, majorate, minorate, and seniorate).[25] The idea of family property ties, which originated in Austrian customary law, was thus continued in the family entail by means of common law. In Austria,[26] from around 1600 – presumably also under Spanish influence – there was an increase in the establishment of entailed estates. As early as the 17th century, the sovereign claimed the right to "confirm" such foundations in order to be able to influence which noble families should be given the opportunity to consolidate their position.[27] Maria Theresian absolutism was then particularly hostile to real estate entailments, while capital could also be tied up in entailments without authorisation;[28] at almost the same time, entailments were also subject to ongoing state supervision.[29] Under Joseph II, first the indebtedness of the entailments was made easier, then the conversion of real estate entailments into capital entailments, and finally the legal position of the claimants was worsened – all of which showed a tendency to reduce the constraint of the land and to weaken the position of the estates, which had been promoted by entailment. More than half a century later, neo-absolutism once again relied more heavily on the nobility, and a phase of pro-entailment policy began again, which was expressed in the detailed regulations of the 1854 Non-controversial Proceedings Act ("Außerstreitgesetz").[30] In some provincial electoral regulations of the 1860s, the holders of entailed estates still formed a separate electoral body within the large estates.[31] As a result of constitutionalisation, the establishment of a family entailed estate required approval under

24 Ebert, 2008, pp. 1503–1504; Erler, 1971, pp. 1071–1073; Kohl, 2020, pp. 145–146.
25 Rühl, 1847, pp. 699–701.
26 Fraydenegg-Monzello, 1979, pp. 777–808.
27 Ibid., p. 785.
28 Hofentschließung 22.1.1763 (Codex Austriacus IV, p. 371); Fraydenegg-Monzello, 1979, pp. 787–788.
29 Hofentschließung 9.1.1762 (Codex Austriacus VI, p. 81); Fraydenegg-Monzello, 1979, p. 788.
30 Fraydenegg-Monzello, 1979, pp. 796–797; on the Non-controversial Proceedings Act 1854 *cf.* Rechberger, 2006.
31 Fraydenegg-Monzello, 1979, p. 798.

imperial law from 1868[32] onwards – which was granted 24 times up to 1898.[33] However, the last third of the 19th century saw a declining interest in entailed estates. Parallel to this eventful legislative history, the issue of entailed estates had been repeatedly discussed from various perspectives since the French Revolution and throughout the 19th century, but this did not lead to their abolition. After sectoral measures against certain entailed estates (1929)[34] and facilitating their dissolution (1932),[35] family entailed estates in Austria were ultimately abolished when Nazi law came into force; only traces of this remained in the Austrian legal system after 1945, in particular "a kind of special monument protection law" for former entailed estates (buildings, collections, and archives).[36]

4. FOUNDATION AND ENTAILMENT

The overview has already shown several differences between foundations and entailed estates: as an amendment to the general law of succession, the establishment of an entailed estate as a result of constitutionalization from 1868[37] required approval under imperial law, while foundations were approved by the administrative authorities (governors).[38] In addition, the foundation only knew an obligatory right of claim, which the beneficiary asserted against the foundation, which was beyond his control, while the holder of the entailed estate had a right in rem to the entailed estate's assets. In this regard, the holder of the

32 RGBl 1868/61 concerning the approval for creating and the indebtedness of family entails*; cf.* Mayerhofer and Pace, 1901, pp. 165–166.

33 Overview: ibid., pp. 166–167, footnote 2; according to Fraydenegg-Monzello, 1979, p. 799, there were 25 approvals granted until 1897, of which only 8 were newly created ones.

34 Ibid., pp. 802–803.

35 Ibid., p. 803.

36 § 6 Abs 1 and 2 FidErlG 6.7.1938, dtRGBl I 1938 p. 825; *cf.* Fraydenegg-Monzello, 1979, p. 807 ("eine Art Sonderdenkmalschutzrecht").

37 RGBl 1868/61 concerning the approval for creating and the indebtedness of family entails; *cf.* Mayerhofer and Pace, 1901, pp. 165–166.

38 Herrnritt, 1896, p. 57.

entailed estate possessed a degree of influence over asset management, unlike the beneficiary of the foundation.

Knowledge of these differentiations may have slowly declined in the 20th century. In any case, the view of family foundations seems to have been influenced by the abolition of fideicommisses (1938/39).[39] And the "family foundation of Austrian administrative law" was also successively pushed back because the literature increasingly emphasised the criterion of charitable status. This tendency can be understood as a late consequence of the above-mentioned focus on purpose: Accordingly, the foundation would have to go beyond an individual interest, and this was seen as synonymous with charitable status, as it were – although intergenerational thinking would also go beyond mere individual interest. Finally, the Supreme Court stated in 1966:

> *Foundations other than pious and charitable foundations – in particular pure family foundations – can never be approved by the state and thus acquire legal personality. However, the purpose of such a family foundation can, under certain circumstances, be achieved by establishing a real charge on an inherited property.*[40]

Nevertheless, an examination of practical legal situations reveals that this view was more recent than some of the existing foundations. For example, "Dr. Georg Wimmer'sche Wohltätigkeitsstiftung für Verwandte des Stifters" (Dr. Georg Wimmer's Charitable Foundation for Relatives of the Founder) approved by the Lower Austrian governor's office (Niederösterreichische Statthalterei) in 1900, intended to "support poor, old or sick relatives of the founder". According to Stammer in his handbook published in 1983, the foundation authorities would have had to check "whether this was not a pure family foundation, which is

39 In general, Eckert, 1992.

40 OGH 16.11.1966, 6 Ob 232/1966 ("Andere als fromme und gemeinnützige Stiftungen – insbesondere reine Familienstiftungen – können niemals staatlich genehmigt werden und damit Rechtspersönlichkeit erlangen. Der Zweck einer solchen Familienstiftung kann aber unter Umständen durch Begründung einer Reallast auf einer Nachlaßliegenschaft erreicht werden").

inadmissible according to today's legal situation".[41] The reason for this critical attitude was apparently the unspecified purpose of the "support". In contrast, the "Therese Baumgarten Heiratsgutstiftung" (Therese Baumgarten Marriage Foundation) approved in 1909, which aimed to provide "marriage grants for poor female relatives of the founder",[42] seemed just as acceptable to Stammer as the "Johann Wilhelm Ritter von Managetta-Stiftung" (Johann Wilhelm Ritter von Managetta Foundation) approved in 1662, which awarded "study grants to blood-related descendants of the founder".[43] However, the latter foundation was also justified by the fact that it also benefited other "Roman Catholic pupils of a higher educational institution or university".[44]

The Federal Foundation and Fund Act BGBl 1975/11 then followed this change in sentiment; charitable status was established as a characteristic of a foundation. Foundations in the predominantly private-family interest were thus denied ground because the legislator no longer wanted to see this need. In the following years, interested parties turned to the Liechtenstein Family Foundation, for example, before the passing of Private Foundations Act in 1993.

5. PEASANT INHERITANCE LAW

At best, the private foundation can be used as a legal entity for large estates. In the common agricultural sector, the unity of farms should primarily be preserved through a special peasant's inheritance law (Anerbenrecht), which has been well known as customary law since the Middle Ages; statutory regulations could be met since about 1700.[45] When, in 1812, the ABGB provided for "deviations from the [...] statutory

41 Stammer, 1983, p. 56 ("ob es sich nicht um eine nach der heutigen Rechtslage unzulässige reine Familienstiftung handelt").

42 "Heiratsausstattung für mittelose weibliche Verwandte der Stifterin".

43 Stammer, 1983, pp. 54–55 ("Studienbeihilfen an blutsverwandte Nachkommen des Stifters").

44 Ibid., p. 55 ("römisch-katholische Schüler einer höheren Lehranstalt oder Hochschule").

45 Mack, 2009, p. 57; Brauneder, 1994, pp. 357 ff.

succession with regard to farm estates" ("Abweichungen von der [...] gesetzlichen Erbfolge in Rücksicht auf Bauerngüter": § 761 ABGB), such deviating rules already existed. In certain cases, they were literally identical for individual crown lands or governorate districts. In his handbook, Michel[46] cites patents for Bohemia (1791), Carniola (1793), Styria (1793), Tyrol and Vorarlberg (1795/1816) and Salzburg (1826) in addition to a patent issued for the German hereditary lands in 1790.[47] Following the land relief (Grundentlastung), doubts about the continued existence of restrictions under inheritance law arose: In July 1850, the Ministry of Justice issued a decree clarifying that the "special provisions existing in several crown lands with regard to succession to peasant estates must continue to exist until [...] a special law is enacted".[48] In addition to land relief and the abolition of differences between Dominical and Rustic lands (Dominikal- und Rustikalland), the equality of citizens before the law was also cited as an important factor. The neo-absolute turnaround was therefore also expressed in a provision of the "Constitutional Principles" of 1851/52: "In the case of the peasantry, where special regulations exist for the preservation of their property complexes, these are to be maintained".[49]

After returning to constitutionalism, the "division of estates" was a difficult issue, not least because private law was a matter of imperial competence, while agriculture was a matter of provincial (Länder) competence. The provisions of provincial law, which were intended to prevent the division of farm estates, therefore had to be accounted for when shaping (imperial) inheritance law. With this in mind, RGBl 1868/79

46 Michel, 1856, pp. 218–224, 54–55 ("Studienbeihilfen an blutsverwandte Nachkommen des Stifters").
Stammer, 1983, p. 55 ("römisch-katholische Schüler einer höheren Lehranstalt oder Hochschule").
Mack, 2009, p. 57; Brauneder, 1994, pp. 357 ff.

47 Justizgesetzsammlung Nr. 72.

48 Originally: "in mehreren Kronländern bestehenden besonderen Bestimmungen rücksichtlich der Erbfolge in Bauerngüter noch in so lange zu bestehen haben, bis [...] ein besonderes Gesetz erlassen wird".

49 "Bei der Bauernschaft sind dort, wo besondere Vorschriften zur Erhaltung ihrer Güterkomplexe bestehen, solche aufrecht zu erhalten." RGBl 1852/4, Nr. 34 of the constitutional principles; *cf.* Michel, 1856, p. 218.

repealed the "special norms on the inheritance of peasant estates", but only "in those countries or parts of the country in which the division of peasant estates is no longer restricted".[50] The effects of this liberal legislation based on the principle of equality were seen as controversial. While, it was said that the liberalisation of the agricultural system had led to "an excessive fragmentation of peasant property" and to an "over-indebtedness" of farms resulting in forced auctions and that the "inheritance law of the a.b.G.B." had led to "overburdening with inheritance debts" (i.e. debts resulting from dividing the inheritance),[51] by comparison, negative consequences of liberalisation were denied. This was justified by the continued existence of "tradition and custom", which were not covered by the legal abolition of restrictions on division. Intestate succession had only occurred on farms in exceptional cases anyway, so that the unity of the farm had continued to be preserved through succession by a legal transaction (rechtsgeschäftliches Erbrecht) or by transfer agreement (Übergabevertrag).[52] The Upper Austrian provincial committee (Oberösterreichischer Landesausschuss) had commissioned statistical surveys on the consequences of the abolition of a special right of inheritance for farmers: In the first decade after liberalisation (i.e. between 1868 and 1877), 260 farm estates (accounting for 0.65%), covering 2,113 hectares (0.3%), were impacted by secession out of approximately 40,000 farm estates with around 700,000 hectares. However, most of this land was reunited with other farm estates, so that effectively only 0.04% of agricultural land (313 hectares) "lost its character of peasant's land" each year. The number of farms whose size had fallen below 10 acres as a result of separating parcels was only 98 per year (0.24%) – whereby this also included "all those parcelling-offs which became necessary due to the expansion of towns and health resorts, the construction of roads and railroads etc. or which were carried out for the purposes of

50 Schiff, 1905, p. 93 ("Sondernormen über die Vererbung der Bauerngüter […] in jenen Ländern oder Landesteilen, in welchen die Teilung von Bauerngütern nicht mehr beschränkt ist").

51 Originally: "zu einer übermäßigen Zersplitterung des bäuerlichen Besitzes"; "Erbrecht des a.b.G.B. […] Überlastung mit Erbteilungsschulden bewirk[t]".

52 Schiff, 1905b, p. 95.

consolidation".[53] The loss of farmland caused by the inheritance law of the ABGB was therefore negligible.

Despite this, the government endeavoured to counter the potential economic dangers and to create a new legal framework for a special peasant inheritance law. After a bill in 1884 had provided for the introduction of an "Anerbenrecht", RGBl 1889/52 finally provided for a regulation that was dependent on the enactment of implementing provincial laws. The provincial parliaments reacted very differently to government bills (which were different in terms of content); in the end, however, they rarely made use of this option.[54] Exceptions were Carinthia, which introduced an inheritance law for hereditary estates ("Hereditary Farmsteads Act", Erbhöfegesetz) in 1903,[55] and Tyrol. Here, in 1900, a "Farmsteads Act" ("Höfegesetz") not only enacted inheritance distribution regulations similar to the "Anerbenrecht", but also regulations that restricted the owner's freedom of disposal. This generally restricted the freedom of partition if the so-called "closed farm" was registered in a special section of the land register.[56]

Ultimately, this is also the reason why the legal situation is still rather confusing today.[57] Special norms of peasant inheritance law are currently contained in various laws that differ from province to province: In Tyrol there is the "Farmsteads Act" ("Höfegesetz"), in Carinthia the "Hereditary Farmsteads Act" ("Erbhöfegesetz"), and in the other provinces ("Länder") the "Peasant Inheritance Act" ("Anerbengesetz") of 1958 comes into effect today. However, all laws have the common purpose of maintaining efficient farms with economically viable farm sizes and avoiding the division of agricultural assets. To this end, the farm is bequeathed undivided to one person, the so-called "preferred heir"

53 Ibid., pp. 98–99.

54 Schiff, 1905a, pp. 102–103.

55 Ibid., 1905a, pp. 103–104; Provincial Law dated 16.9.1903, LGBl 1903/33.

56 Law dated 12.06.1900, regarding the special legal status of closed farms, effective for the principality and earldom of Tyrol: GVBlTirVbg 1900/47; Tiroler Grundbuchsanlegungslandesgesetz dated 17.3.1897, LGBl 1897/9, § 3; *cf.* Schiff, 1905a, pp. 104–105.

57 For the sake of brevity, the German Hereditary Farm Law, which was in force from 1938 to 1945, will not be covered here; *cf.* Ordinance dated 27.7.1938, dtRGBl I p. 935; StGBl 1945/174; BGBl 1947/85; Trattner, 2012, p. 8.

("Anerbe"); the heirs only receive compensation payments in the amount of their inheritance portion respectively their compulsory ortion. However, the calculation basis is not the income value and not the market value of the farm, but the ability of the heir to pay; the preferred heir must be "well able to survive" ("wohl bestehen können"). If there are several children, all but the preferred heir are therefore fobbed off with a payment that is far below the regular inheritance share and also falls short of the usual portion; this unequal treatment serves the interest of the continuing existence of the farm.

However, the "Peasant Inheritance Act" applies specifically to commonly designated "hereditary farms", not to every agricultural asset. They are distinguished by a certain farm size and the ownership structure, respectively – Hereditary farms are owned by a natural person, spouses or a parent together with a child. Notably, farms run jointly by siblings are therefore not subject to the "Peasant Inheritance Act".[58] Regulations concerning the farm size mirror the change in agricultural structures: Since 2019, hereditary farms must provide for the "reasonable maintenance of one adult" but may not exceed forty times this rather vague income value.[59] Before 2019, the "reasonable maintenance of two adults" was necessary, and the upper limit was twenty times this value.[60] These provisions had been introduced in 1989 to take account of the structural changes in agriculture; originally, in 1958, the yield had been based on a family of five. Concurrently, as the lower limit was reduced to a two-person household, the upper limit was raised from seven times the minimum to twenty times. Originally, the status of a hereditary farm was therefore intended to fit a medium-sized farm; today, the scope of application has also been extended to farms that probably serve as an additional income source only.

58 For farms run by siblings, Tyrolean law has special provisions: Schiff, 1905a, p. 105; Eccher, 2018, §17 THG.

59 BGBl I 2019/38 (Zivilrechts- und Zivilverfahrensrechts-Änderungsgesetz 2019, ZZRÄG 2019); *cf.* Explanations on the government bill: 560 BlgNR XXVI GP.

60 Differing and partly more concrete are the provisions of the Carinthian Peasants Inheritance Act, which stipulates a minimum size of 5 hectares: Eccher, 2018, § 2 KtnErbhöfeG.

The "Peasant Inheritance Act" is dispositive law; voluntary succession takes precedence. This applies in both directions: If a testamentary succession meets certain minimum standards of future indivisibility, it takes precedence over the idea of consanguinity. In other words, if the testator makes a provision that appears favourable to the undivided continuation of the estate, an heir not related by blood takes precedence over any relatives. However, the testator can go even further by expressly or tacitly excluding the application of the "Peasant Inheritance Act" altogether. In this case, testamentary freedom therefore takes priority over the public interest in maintaining productive farms.[61]

In legal practice, one rarely waits for the inheritance to occur but instead regulates the succession of the farm within the framework of a transfer agreement. However, the provisions of the Peasants Inheritance Act also apply, at least to hereditary farms within the meaning of the Act, if the farm is passed on during the lifetime of the owner and if there are (other) persons entitled to a compulsory portion in addition to the transferee. However, it is disputed whether the Peasants Inheritance Act is applied here by analogy or whether a general customary farming law – recognised as a legal source by the judiciary until the 1990s – comes into play. Such a customary law would then also affect other farms (with different farm sizes).[62] In practice, the transfer price is in any case based on the "ability to survive" of the transferee; those entitled to a compulsory portion receive compensation payments that are measured in the same way as compulsory portions. The benefits (agreed within the transfer agreements or separately from them) for the children of the transferor who do not take over the farm therefore fall far short of an equal share of the inheritance.[63] A certain justification for this unequal treatment could lie in the fact that the farm transferees often provide benefits for the farm transferors. However, the effective value of these benefits decreased in view of the existence of

61 Eccher, 2018, § 8 AnerbenG; Trattner, 2012, pp. 10–11.

62 Ibid., pp. 20–31; Mack, 2009, pp. 56–60.

63 For the legal nature of the peasant transfer agreement as a contract: Trattner, 2012, pp. 31–38; Mack, 2009, pp. 174–178, 263.

social insurance for farmers;[64] today, they are more an expression of traditional life concepts of peasants.[65]

However, the goal of maintaining an undivided farm is getting under increasing pressure, resulting from the structural changes in agriculture. Although many farms would be subject to peasant inheritance law, they are still too small to be economically viable and efficient. Because farms are preserved as units by both inheritance law and legal practice, it is almost impossible to expand agricultural assets by acquiring new land. The viability of farmsteads is therefore achieved almost exclusively by leasing additional land belonging to farms that are no longer economically viable. The legal conviction of preserving the existing farm units, which historically goes back into the past far beyond the Peasant Inheritance Act, therefore works against structural changes, which would be expedient for establishing an efficient agricultural system. One could put it very pointedly: Against the background of changed framework conditions, the law has turned against its own goal. However, it should not be overlooked that a concentration of property ownership on a few large farms would have undesirable social effects.

Today, land transfer laws – favouring farmers in the acquisition of land – are also intended to serve the original purpose of the special peasant inheritance law, that is, preserving viable farms.[66] In this way, the legislator attempts to ensure that agricultural land remains in the ownership of farmers ("farmlands in farmers' hands"/"Bauernland in Bauernhand").[67] However, this purpose is undermined by traditional statutory inheritance, or inheritance by legal transaction, which aims to preserve family assets. The two goals of preserving family assets and maintaining an economically viable farming structure, which once went hand in hand, have therefore diverged.[68]

64 Trattner, 2012, pp. 75–77.
65 Mack, 2009, pp. 121–122.
66 Holzer, 2012, pp. 673, 678.
67 Lechner, 2024.
68 The author draws on experiences from his own personal and family environment, e.g. District Court Hollabrunn GZ 1A375/21m.

6. FACTORS

The history of private foundations, entailed estates and peasant inheritance law reveals the key factors that play a role in preserving the unity of assets and, in different combinations, shape the various instruments that are intended to achieve this goal. The interplay of these various parameters can be used to explain almost all instruments that serve the purpose of economic unity – in the following this is illustrated by way of example: a) First and foremost, the sources of the law, customary law, statutes, and contract, must be distinguished. While customary law was successively displaced by statutory law, its basic ideas remained relevant in legal practice – which repeatedly proved the legislator wrong. In both "Anerben" inheritance law and foundation law, the legislator had abandoned the idea of preserving family assets and prioritised considerations of freedom and equality. Then in both cases, a period of inappropriate or even absent regulations began: In the case of peasant inheritance law, there were twenty years of legal freedom of division (between 1868 and 1889); in the case of private foundations, it took considerably longer before the legislator could no longer evade the needs of practice. This could be due to the fact that, on the one hand, the circle of people potentially affected by the private foundation was significantly smaller than in the case of peasant inheritance law and, on the other hand, it was much easier to avoid the issue in practice: In the absence of peasant inheritance law, an ordinary transfer agreement was sufficient, as it had already been possible and common in the past, whereas in the case of the foundation, the use of a Liechtenstein family foundation was a considerably higher hurdle in practical and financial terms; b) In terms of substantive law, the unity of assets is achieved by means of inheritance law, property law, family law, or the law of obligations; c) In terms of duration, the instruments are usually effective for an unlimited stretch of time. Occasional restrictions are either expressly formulated or arise implicitly from other factors; for example, if only a surviving spouse is the beneficiary or if the foundation's assets are so small that the foundation's purpose cannot be financed from the income alone – in such a case, time runs out automatically.

d) For those affected, two aspects could be distinguished: Beneficiaries are usually family members related by blood, but they may also be spouses or neighbours. However, these persons are not necessarily identical to those in whose interest the unity of the asset is to be preserved. There may be a conflict, for example, between the current beneficiary of the entailed estate and the interests of the claimants. Especially, interests of society as a whole or of the state should be mentioned here, such as that of maintaining a viable agricultural system, which – in the case of the peasant inheritance laws – coincides with the interests of just one single descendant. If legislation today attempts to achieve this goal by means of agricultural land transfer law, it will be limited by legal practice. The legal measures against the splitting of the so-called "minimum share" in modern apartment ownership also showed such ambivalence: On the one hand, they seemed to favour the surviving "owner partner" (from the WEG 1975[69] to the WEG 2002, the spouse), who took over the half share of the deceased at a more favourable price (since 2002, only if the surviving partner is entitled to a compulsory portion).[70] On the other hand, limiting the divisibility of the minimum share also meets the interest of the other apartment owners, the municipal administration and the land register management – in this respect, the term "minimum share" alone is quite treacherous.[71] This is a significant difference from the otherwise similar mediaeval "co-ownership upon survival" (Miteigentum auf Überleben, also located in property law), in which the surviving co-owner (in practice: the surviving spouse) automatically acquired ownership of the predeceasing co-owner's share upon their death.[72] However, this "co-ownership upon survival" lacked any official interest. e) As an asset (object), real estate naturally dominates because this category of property provides a lasting benefit; especially private foundations are used to preserve industrial or commercial assets. Instruments to secure the unity of an asset are particularly necessary if a division would promise short-term or

69 BGBl 1975/417.

70 For details, see Explanations on the government bill concerning § 14 WEG 2002: Stabentheiner and Schernthanner, 2002, pp. 69–75.

71 Faistenberger, Barta and Call, 1976, § 3 WEG 1975.

72 Kohl et al., 2024, p. 60.

disproportionate benefits, for example, in the case of forests that could be cut down (see below 7), or in the case of collections that are valuable in terms of art history or monument conservation. f) Finally, the role of the state or pre-state authority deserves attention. Although the concept of unitary ownership may not be present in mediaeval customary law, the authorities at least provide a legal framework (e.g. apartment-owning partnerships, peasant inheritance law, agrarian communities) by means of provisions under public or private law (according to modern understanding). Furthermore, there is the requirement for special approval by legislation (in the case of entailed estates) or administration (in the case of foundations) as well as ongoing monitoring; registration (in the case of foundations in the company register; in the case of Tyrolean "closed farms" in a special section of the land register), or the decision on the existence of preconditions (on the existence of an inherited farm under the "Anerben"-Inheritance Act as part of the probate proceedings; on the qualification of an inherited farm under the Carinthian Inherited Farm Act by the probate court[73]) should also be mentioned in this context. State interference is less severe in the case of private-autonomous legal succession arrangements with only a limited time effect (transfer agreement). Only seldom is the state to be recognised as a directly involved party that establishes undivided assets in its own interest (see below section 7).The influence of the state or the pre-state authorities in shaping the instruments discussed herein is ambivalent. The problem of special peasant inheritance rights, for example, became more important with the end of the manorial lordships (which had previously provided for economically expedient farm units), brought about by state legislation. Therefore, the divisibility problem stemmed, in the first instance, from state legislation. With their own endeavours to achieve indivisibility – the Golden Bull, the Privilegium maius or the Pragmatic Sanction come to mind – the sovereign dynasties were probably exemplary for the establishment of entailed estates. However, what was beneficial to the sovereigns in maintaining their established position could not be equally free for the aristocratic estates; therefore, as early as the 17th century, a sovereign's authorisation was required to establish an

73 *Cf.* Eccher, 2018, §3 Abs 5 KtnErbhöfeG.

entailed estate. However, the authorisation in individual cases depended on the political framework and changing objectives; the history of the entailed estates therefore reflects the periods of constitutional history in which different political interests determined the attitude towards the entailed estates. Later, the republican rejection of all instruments that cemented a traditional social supremacy radiated from the entailed estates to the foundations but could not be maintained in the long term in view of the evasion possibilities of an increasingly globalised economy. Changing objectives can also be observed in the history of peasant inheritance law (freedom and equality realisation versus preservation of a viable agricultural sector); here too, however, the state's will to shape the system has reached its limits.

7. THE STATE AS A FOUNDER OF UNDIVIDED ASSETS – DEALING WITH FORESTS AGAIN…

Finally, a historical event should be mentioned in which the state not only set the legal framework or limited itself to authorisation and control but also established uniform third-party assets as an actor in its own interests. In the so-called "Tyrolean forest regulation" ("Tiroler Forstregulierung") of 1847, the ownership of Tyrolean forests was reorganised. Prior to this action, most of Tyrol's forests were reserved for the sovereign, but his property was encumbered by countless different utilisation rights (timber rights) of the common people. These limited rights in rem, affecting the forests overall, were now to be converted into free ownership of only a part of the forests, while the rest of the state forests were to be unencumbered. This was therefore a typical form of servitude redemption, i.e. a legal transaction against payment, in which restricted rights in rem to an entire area are converted into an unrestricted right in rem (ownership) to a restricted part of the area. The servitude rights were held by individual farmers as owners of their farmsteads. It would have been obvious to convert these individual servitude rights into individual property rights. However, this was not to happen: On the one hand, this would have required individual negotiations, which would have been just as time-consuming and

resource-intensive as the subsequent registration acts required in the land register. On the other hand, this would also have led to a myriad of small forest plots lacking infrastructural development and therefore provoking disputes between the new owners. All the more so, as animosities and jealousies were to be expected anyway, it was hardly to be expected that all new owners would have been equally satisfied with the outcome of their respective negotiations. All these problems were to be avoided: the servitudes were not redeemed individually, but rather in conjunction with all authorised parties, who were coerced into forming a "community entitled to timber" ("holzbezugsberechtigte Gemeinde"). In the end, the individual farmers lost their individual servitude rights and gained membership in a compulsory community. This "community", as defined under the ABGB, had the advantage of not establishing a regular co-ownership relationship as per the ABGB, which meant it could not be dissolved through a partition action. This appeared desirable in the public interest and in terms of sustainable management concerning the property – the forest. The unity of the asset was therefore not in the immediate interest of the beneficiaries.[74] The further course of history shows this particularly clearly; here it is not possible to describe in detail how the state interest of the 19th century proved fatal for the heirs of the former beneficiaries at the beginning of the 21st century: However, as the same German word "Gemeinde" was used, the compulsory community "Gemeinde" was confused with the "local political municipality", also called "Gemeinde", which was only established from 1849. This meant that the legal position of the former servitude beneficiaries deteriorated once again.[75]

Incidentally, the preference for indivisible forests was also reflected in the way in which corporate owners, who had previously been referred to as "parcels", were treated when the Tyrolean land register was

74 Kohl, 2010, pp. 130–132 (with further references); dissenting Barbacetto, 2023, pp. 15ff.

75 About this: Kohl and Oberhofer and Pernthaler, 2010; Kohl et al., 2012; Kohl and Oberhofer and Pernthaler, 2014, pp. 425–435; dissenting Schennach, 2012, pp. 369–390; Schennach, 2016, pp. 30–59.

created.[76] Despite initially being given the same name, alpine pastures (which did not promise any direct benefit in individual parts, meaning that there was little fear of lawsuits for division) tended to be understood as co-ownership, while in the case of forests, under the name of "fraction", a type of legal entity was registered as owner.[77] This protected the forest from being divided and avoided the threat of smaller plots being cut down.

The special significance of forests as undivided assets was not new. It was already evident in the 18th century when Maria Theresia put the entailed estates under greater control in 1763 and laid down the duties of the entailed estate trustees. They were to ensure that "excessive usufruct" did not take place and, in this sense, were to be "particularly mindful of the preservation of the forests" ("auf die Erhaltung der Waldungen insonderheit bedacht"). This was the first time that the connection between entailed estates and forests was formalised.[78] The 1932 "Entailed Estates Regulation Act" ("Fideikommissregelungsgesetz"), which was intended to promote "liberation from the entailment" ("Befreiung vom Fideikommissband"), was also aimed at "the creation of larger units offering the guarantee of permanent forest management".[79] When the entailed estates were dissolved, measures to create "protective forests" (Schutzwälder) were promoted:[80] Even in case of a division of ownership, such "protective forests" had to be managed uniformly.[81] It was not until 1966 that the Constitutional Court cancelled the protective forestry provisions as being contrary to equality

76 On its legislation history: Kohl, 2006, pp. 248–256; on the Austrian land registration in general: Kohl, 2018, pp. 93–111.

77 Kohl, 2012, pp. 216–217.

78 Fraydenegg-Monzello, 1979, p. 788.

79 Ibid., p. 804 (cited § 20 BGBl 1932/258 – "Schaffung größerer, die Gewähr für eine dauernde Waldwirtschaft bietende Einheiten").

80 Ibid., pp. 805–806.

81 Ibid., p. 806; Ordinance dated 21.12.1939, dtRGBl I 1939, p. 2459, on forest protection during the dissolution of family entails (forest protection regulation). – *Cf.* the parallel phenomenon of the "hunting community" ("Jagdgemeinde") since 1849: Kohl, 1994, pp. 253–262; Kohl, 1998, pp. 755–767.

because they only applied to former entailed forests, regardless of the size of the forest in question.[82]

8. SUMMARY

Instruments for preserving the unity of certain assets can be found in great variety since the Middle Ages. They were an expression of intergenerational thinking that brought economic and social benefits to the families concerned but at the same time stabilised and cemented societal relations. For this reason, the corresponding instruments were criticised both in the light of the physiocratism of the enlightened absolute monarchy and against the background of the principle of equality of the revolutionary-democratic movements. The liberalist legislature did not pursue a clear line; the abolition of institutions serving the preservation of undivided property was followed by new laws intended to counteract the negative consequences of divisibility. At the same time, legal practice repeatedly demonstrated the limits of legal liberalisation. While the freedom of the individual gradually pushed back traditional community-based thinking, the idea of sustainability[83] was already emerging as a new legitimisation narrative.

82 VfSlg 5120/1965; subsequently the Minister of Justice enacted the Regulation of 16.6.1966, BGBl 1966/89, which repealed the forest protection regulation; *cf.* Fraydenegg-Monzello, 1979, p. 807.

83 *Cf.* Klippel and Otto, 2008, pp. 39–59; Rödel, 2013, pp. 115–141; Schennach, 2026, pp. 30–42, 94–116.

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INSTRUMENTS FOR PRESERVING THE UNITY OF FAMILY BUSINESSES AND AGRICULTURAL ASSETS: THE GERMAN PERSPECTIVE

MARTIN LÖHNIG

ABSTRACT

This article traces the evolution of German agricultural succession regimes, from state-level hereditary farm laws and the Reich Hereditary Farm Act (1933–1947) to the post-war reinstatement of regional frameworks, showing a persistent doctrinal tilt toward testamentary freedom constrained by public-interest aims. It analyses the contemporary mix of the Farm Inheritance Acts (e.g., the Northwest German Höfeordnung), the Civil Code's special rules (§§ 2049, 2312 BGB), and the Real Property Transactions Act allocation procedure, all designed to preserve viable family farms while limiting fragmentation and over-indebtedness. In practice, continuity is chiefly secured through notarised inter vivos arrangements (farm transfer agreements with retirement portions, calibrated sibling compensation, and related waivers) supplemented by the 2024 reform of the Northwest Höfeordnung, which ties minimum compensation to 0.6× the property-tax value and permits liability deductions up to 80%. By contrast, non-agricultural family businesses lack a special statutory regime, so effective transmission

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depends on private ordering (wills, compulsory-portion waivers, and family foundations) within the enduring tension between enterprise continuity and equal-heir protection.
***Keywords**: Agricultural Inheritance Law, Farm Inheritance Act (Höfeordnung), farm transfer agreement, compulsory-portion waiver, family foundation.*

1. INTRODUCTION

German law historically provides a range of regulations aimed at preserving agricultural assets through inheritance processes. This article shows the history of the development of these regulations, analyses the current legal situation and opens up a view of development perspectives and private autonomous structuring options. German law still does not provide any specific rules for the preservation of family businesses by inheritance. The article therefore highlights a number of structuring options that are regularly utilised by legally advised testators.

2. AGRICULTURAL INHERITANCE LAW

2.1. EMERGENCE OF REGULATORY DIVERSITY AND OBJECTIVES

After the founding of the German Empire in 1871, numerous German states, starting with Prussia, introduced their own agricultural inheritance legislation (Anerbengesetzgebung) as an instrument of state agricultural policy.[1] The laws of Baden, Württemberg, Hesse and Bremen are still important today. These agricultural inheritance laws can be divided into those that are directly effective by law on the one hand and those in which a farm is only registered upon application by entry in a register

1 *Cf.* Rösener, 2012, p. 103; Fastenmayer, 2009, p. 22; Mertens, 1970, p. 115; Miaskowski, 1884, pp. 466 f.

on the other.[2] A further distinction can be made between optional/dispositive and obligatory agricultural inheritance laws, i.e. laws that place the decision as to whether inheritance law is to be applied in the hands of the landowner and those that are mandatory.[3]

In the period before the creation of the German Civil Code in the late 19th century, inheritance law was a much-discussed issue[4] in the area of conflict between private autonomy and mandatory law. In the end, a compromise was reached, but ultimately in support of private autonomy.[5] The question of whether a standardised imperial law of inheritance was desirable, given the widely disparate regional regulations and customs, was already controversial. This question was linked to the question of whether various individual states would agree to the creation of a codification as a whole. For this reason, the individual states were ultimately still in charge of regulating agricultural property law, which made it easier for them to agree to the plan for a standardised codification of civil law.[6]

Editor Schmitt's partial draft on inheritance law from 1879 addressed agricultural inheritance law in the Introductory Act draft in §§ 12, 13.[7] In § 12 (1) TE-ErbR, it is stated that the state legislation on agricultural inheritance law remains unaffected by the entry into force of the BGB. § 13 (2) TE-ErbR stipulates that the owner of an estate can, on the one hand, exclude the application of an agricultural inheritance law and, on the other hand, cancel the existing inheritance status of an estate by means of a court or notarised declaration.

According to Schmitt, this reservation in favour of individual state law contradicts two basic principles of the new inheritance law, namely universal succession (Universalsukzession) and the equality of all heirs. However, the consequence that would result from the application of

2 Pesl, 1932, p. 23; Huppertz, 1939, p. 31; Wagemann, 1930, p. 8; Kroeschell, 1978, p. 147; Pflaumer-Resenberger, 1939, p. 32; Klunzinger, 1966, pp. 65 f.

3 *Cf.* Ibid., p. 67.

4 *Cf.* Kroeschell, 1978, pp. 152 ff.

5 *Cf.* Schubert, 1978, p. 4; Kroeschell, 1978, pp. 154 f.; Klunzinger, 1966, pp. 44 f.; Fastenmayer, 2009, pp. 62 f., 279 f.

6 *Cf.* Krüger, 1935, pp. 25 ff.

7 *Cf.* Schubert, 1984a, pp. 92 f.

these principles to agricultural estates, namely the auctioning of the estate out of the material interest of the heirs, does not correspond to the interests of the farmers, who also have an emotional interest in the farm. The wave of newly enacted inheritance laws, the preservation of a conservative farming class, the separating of this class from social democracy and, ultimately, the custom of inheritance also argued in favour of retaining the right of inheritance.[8] This partial draft thus already contains not only many of the problems discussed later but also the compromise between the desire of the individual states to retain their agricultural inheritance legislation, which is expressed in §§ 12, 13 (1) TE-ErbR, and the freedom of testation laid down in § 13 (2) TE-ErbR, which takes precedence over this inheritance law even in an area with direct agricultural inheritance law.

It is already clear at this stage that the compromise between inheritance law and testamentary freedom will ultimately be in favour of testamentary freedom. Even though extensive debates took place during the legislative process, it was Schmitt's line that ultimately found its way into law: Art. 64 EGBGB reads (and so it still reads today):

> *The provisions of state law on the right of inheritance in respect of agricultural and forestry land together with its appurtenances shall remain unaffected. The provincial laws may not restrict the right of the testator to dispose of the land subject to the right of inheritance upon death.*

Of course, it should not be overlooked that between1933 and 1947, the Reich Agricultural Inheritance Act (Reichserbhofgesetz - REG) applied throughout Germany as a standardised agricultural inheritance law. In the Third Reich, this law had largely eliminated the testator's freedom of testation for certain farms (Erbhöfe) and severely restricted the rights of the heirs in favour of the farm heir (Hoferbe). Agricultural or forestry land of the size of arable land was subject to the REG (cf. § 2 (1) REG). According to § 2 (2) REG, this was defined as the amount of land necessary to feed and clothe a family independently of the market and the general economic situation. The legislative objective, the creation

8 *Cf.* Schubert, 1984b, pp. 449 ff.

and preservation of viable small and medium-sized farms, was to be achieved primarily by modifying the succession regulated in the Civil Code (§§ 19 ff. REG). The REG stated the following guiding principles in its preamble: The inherited farm passes undivided to the heir. The rights of the co-heirs are limited to the remaining assets of the farmer. Descendants who are not appointed as heirs receive vocational training and equipment commensurate with the farm's resources; if they get into difficulties through no fault of their own, they are granted "homestead refuge". The right of inheritance cannot be excluded or restricted by disposition on death. The farm owner was only granted a certain degree of testamentary freedom within narrow limits when selecting the heir (§ 25 REG). However, only those who had German citizenship and were of German blood could become heirs (§§ 12 f. REG). These regulations could not be circumvented by inter vivos dispositions. Although the farmer still had the legal status of owner of the farm, his freedom of disposal was radically curtailed. The hereditary farm was – according to the preamble to the REG – in principle inalienable and unencumberable. The Allied Control Council Law No. 45 of 20 February 1947 repealed this law and reinstated the state laws in force on 1 January 1933. In some cases, new state laws (North German farm regulations = Höfeordnung, Rhineland-Palatinate farm regulations) were passed after the Second World War.

The objectives of agricultural inheritance law have not changed to this day: In a fundamental ruling, the Bundesverfassungsgericht[9] makes it clear that the special agricultural inheritance law does not serve the private interests of the farm heir but the public interest. Namely the interest in maintaining productive farms in farming families in order to ensure the national food supply. Accordingly, appropriate regulations should prevent the break-up of farms, the fragmentation of the land and the risk of over-indebtedness of the farm when compensating the departing heirs. This also draws a line: it does not apply to farms that are not viable due to their small size or to part-time farms. If, on the other hand, the farm is viable, it generally goes its own way under agricultural inheritance law (insofar as individual state law rules apply) by

9 BVerfG NJW 1963, 947.

being removed from the estate and bequeathed separately as a legally independent estate. In Rhineland-Palatinate and Hesse, however, the prerequisite is entry in the farm roll, which has only been done for a small number of farms. Even so, this does not apply in northern Germany in the area of the Höfeordnung, i.e. the former British occupation zone with Hamburg, North Rhine-Westphalia, Lower Saxony and Schleswig-Holstein, as well as Brandenburg, which adopted its own Höfeordnung in 2019 (BbgHöfeOG).

Subsidiarily, the German Civil Code provides for a few special regulations (§§ 2049, 2312 BGB). These are supplemented by a special allocation procedure in accordance with §§ 13 et seq. GrdstVG, namely, a procedure for the allocation of a farm to an individual heir if a farm belongs to the joint assets of a community of heirs by virtue of intestate succession. These regulations apply in Bavaria, Berlin, Bremen, Mecklenburg-Western Pomerania, Saarland, Saxony, Saxony-Anhalt, Thuringia and Württemberg. European law does not preclude the regulations on agricultural inheritance law in federal and state laws (Art. 30 of the EU Succession Regulation).

2.2. INTER VIVOS CONTRACTS

In legal practice, however, all of these regulations have a comparatively limited scope of application. This is because most farms are either handed over inter vivos (farm transfer agreement = Hofübergabevertrag) or inherited by way of intestate succession. In this way, farming families show that they are aware of their special responsibility for their farms and that they do not like to be talked into succession planning but instead follow certain customs and agreements. This has been the case for centuries, and there are very different regional customs, although these may have become less binding in recent times. Within the family, it must be decided at an early stage who should (and wants to) take over the farm, as these persons must familiarise themselves accordingly and work on the farm. The siblings, on the other hand, should be able to make other arrangements at an early stage. The farmer, on the other hand, should not reasonably wait too long before handing over the farm;

otherwise, he risks the intended successor dropping out. Inheritance according to legal rules is therefore only possible in the event of the unexpectedly early death of the farm owner or failure of the transfer. However, it should not be overlooked that in earlier times precise customs were required to determine the legitimate successor as soon as there were several descendants, whereas today potential successors are often no longer interested in taking over the farm.

The farm transfer agreement to be notarised is, as it were, the breeding ground from which the contract type of anticipated succession developed for other areas of society, including in the area of other family businesses. It is a contract for which the German Civil Code contains practically no regulations and which has therefore been developed in practice. A farm transfer agreement is usually a contract by which the parents transfer their farm assets, in particular their land, to one of their descendants during their lifetime with a view to future succession. At the same time, the parents' sufficient livelihood is secured (retirement portion = Altenteil), and, if necessary, agreements are made with siblings of the transferee (Abfindung). There is a wide range of possible arrangements.

If the transfer agreement – as is customary – regulates the retirement provision of the transferor and his or her spouse by means of a life annuity or retirement portion, numerous provisions of individual state law on retirement portion agreements apply via Art. 96 EGBGB, which exist for almost all "old" (before 1990) federal states. These regulations primarily concern issues relating to the provision of services and the legal consequences of any service disruptions. In evaluating the interests of both the transferor and the transferee – often a member of the subsequent generation – the process of contract reversal is rendered more complex than what is stipulated by the frustration of performance as outlined in the BGB. This is based on the consideration that the generation of transferees, which bases its existence on the farm transfer, is dependent on increased legal certainty. The retirement portion typically includes a right of residence for the transferor, pension payments by the transferee and certain rights of recovery, for example, in the event of

the death of the transferee. Case law generally qualifies these contracts as a gift with conditions.[10]

The following is usually agreed with regard to the transferee's siblings: (1.) Compensation payments based on the value of the farm in terms of amount and due date. (2.) A waiver of the compulsory portion, since otherwise the transferee would be subject to payment claims under §§ 2325 ff. BGB, could thwart the entire succession planning. (3.) A speculation clause in the event that the transferee sells the farm or parts of it at a profit within a certain period of time after the inheritance, for example, as building land. As a rule, the notarised transfer of the farm is preceded by a long period of preparation within the family, during which the future transferee needs legal certainty. The binding promise to hand over the farm without notarisation (Hofübergabeversprechen) is the mechanism of structuring this.[11] The following requirements are recognised by case law: The farm owner must have promised a descendant the subsequent transfer of the farm, and the descendant must have worked on the farm free of charge for many years in reliance on this promise. The legal consequence is that the descendant is entitled to the conclusion of a notarised farm transfer agreement.

2.3. SUCCESSION BY WILL

As shown, the owner can bequeath his farm as he wishes, confirming his freedom to make a will. To be more precise, he cannot bequeath the farm as such, but only fractions of his entire estate. If he appoints multiple heirs, a community of successors is created, which must then be divided. The allocation of the farm to a specific person can be made by way of a division order (§ 2048 BGB), but the farm can also be the subject of a legacy. In both cases, however, it is not possible to assign the farm to the successor with in rem effect. The community of heirs must be divided up, and the farm transferred from the community of heirs to the successor. Under German law, a legacy has no effect in rem;

10 *Cf.* for example BGH NJW 1989, 2122 f.; OLG Cologne FamRZ 1994, 1242.
11 BGHZ 12, 286; BGH NJW 1988, 710; BGH NJW 1993, 267.

the legatee therefore only has a transfer claim under the law of obligations against the heir(s).

The aforementioned provisions of § 2049 BGB and § 2312 BGB also play a role in the context of the voluntary succession (and only in this case!). § 2049 BGB regulates the valuation of the farm unless the testator has stipulated otherwise: The capitalised earnings value, which is based on the net income that the farm can sustainably provide in accordance with its previous economic purpose under proper management, will be utilised. This valuation privilege prevents the higher market value from having to be compensated by the transferee of the farm in the course of the settlement, and the farm can be continued. The same applies to the calculation of the compulsory portion of disinherited persons, § 2312 BGB.

2.4. VALIDITY OF STATE LAW IN THE CASE OF STATUTORY SUCCESSION

The individual state law mentioned at the beginning only applies if statutory succession applies, specifically, if there has been neither an inter vivos transfer nor the establishment of a testamentary disposition. The most important inheritance law is the northwest German Höfeordnung in the four states of the former British zone, namely Schleswig-Holstein, Hamburg, Lower Saxony, and North Rhine-Westphalia. However, the Höfeordnung is not an individual state law. Rather, it is to be understood from the historical situation as "particular federal law" according to Art. 72 (2) No. 3 GG, because it came into force as occupation law. The Control Council Act No. 45 repealed the Reich Heritage Act in 1947, restored the pre-1933 legal framework, and authorised the zone commanders to issue amending and implementing provisions. This authorisation was only used in the British zone. The Höfeordnung is an optional agricultural inheritance law. According to § 1 HöfeO, all farms with a certain economic value are subject to the Höfeordnung without the need for entry in a register (Höferolle). However, the Höfeordnung works with an opt-out model: the special status of a farm is lost if the owner makes a "negative declaration" and the entry is cancelled in the land register

(§ 1 (4) – (7) HöfeO). Conversely, there is an opt-in model for smaller farms (§ 1 (1) HöfeO). According to the Hessian Landgüterordnung and the Rhineland-Palatinate Höfeordnung, the owner can decide whether or not to have his farm entered in the register (Höferolle). Only the Baden agricultural inheritance law, the oldest of all such laws still in force, made around 4,400 farms in the Black Forest subject to compulsory agricultural inheritance law.

How is the heir to the farm determined? According to all regulations, the owner can freely determine the heir by disposition on death. There are only restrictions in § 7 (2) HöfeO, which generally requires the farm heir to be economically viable, and § 15 (4) RhPfHöfeO, according to which the farm heir "should" be suitable for the proper management of the farm. In the absence of a provision, the farm heir is to be taken from the respective regulation. Most laws establish a sequence of stages: If the testator makes no other provision, the heirs to the farm are appointed by law in the following order: (1) the deceased's children and their descendants, (2) the deceased's spouse, (3) the deceased's parents if the farm originates from them or their families or was acquired with their resources, and (4) the deceased's siblings and their descendants. But what if there are several descendants? As an exception, the HessLandgüterO allows the agricultural court to determine the estate heir. Section 6 (1) HöfeO primarily designates the person to whom the deceased has permanently transferred the management of the farm at the time of the inheritance, then the person in respect of whom the deceased has indicated by training or by the nature and extent of employment on the farm that he or she is to take over the farm. Otherwise, the eldest, or the youngest if such is the local custom.

And when the inheritance occurs? In most federal states with special agricultural inheritance law, the farm then goes directly to the heir. However, the BadHofGG and the HessLandgüterO have not adopted this system of "in rem succession to the farm". § 10 (1) BadHofGG merely gives the heir a claim against the remaining members of the community of heirs to take over the farm estate as a whole at the capitalised value. § 11 HessLandgüterO grants the same entitlement to the transferee appointed by the agricultural court. The departing heirs each receive a

compensation claim against the farm heir, which is calculated according to the value of the farm and is often not easy to assess.

In March 2024, the Federal Ministry of Justice published a draft bill to reform the northwest German Höfeordnung, which was passed in November 2024. Even after the reform of the regulations, it should still be possible to transfer agricultural and forestry businesses within the family as a whole to a farm heir, while the other family members only receive a minimum settlement. The main aim of the new regulation is to ensure that affected farm owners and their families can easily determine whether the farm is subject to the Höfeordnung and what compensation claims exist. In future, the farm value from which the minimum compensation for the departing heirs is calculated will be 0.6 times the property tax value. If special circumstances arise in individual cases, making additions or deductions to the compensation at one's own discretion will be possible in the future (Section 12 (2) HöfeO). Until now, liabilities encumbering the farm have reduced the farm value, which is relevant for the transfer and the compensation, by a maximum of two-thirds. In future, up to 80% of the farm value is to be deducted due to liabilities.

2.5. VALIDITY OF FEDERAL LAW IN THE CASE OF INTESTATE SUCCESSION

As already mentioned, the BGB does not contain a special inheritance law for farms. Moreover, the two most important provisions, §§ 2049 and 2312 BGB, only apply (as we have seen) if there is a disposition of property upon death. The lack of a statutory special succession for farms in the BGB meant that land inheritance law therefore had to be cushioned by the allocation procedure in accordance with §§ 13 ff. GrdstVG. This is because, as a result of the intervention of intestate succession, the farm often belongs to a community of heirs consisting of a widow and children, whereby each co-heir can demand the division of the estate at any time (§ 2042 BGB). This usually ends with the liquidation of the farm. For this reason, in areas lacking agricultural inheritance state law, provisions exist that allow for the allocation of a farm to one co-heir as sole

property, upon their request, thereby establishing closed and undivided ownership among the heirs. At the same time, the procedure serves the aforementioned public interest in maintaining healthy farms; meanwhile, the will of the testator should nevertheless be respected as far as possible. While the testator can render this procedure inapplicable by drawing up a testamentary disposition, and even in the absence of a testamentary disposition, the farm may only be allocated to a co-heir "to whom it was intended in accordance with the actual or presumed will of the testator" (§ 15 (1) GrdstVG).

3. CORPORATE INHERITANCE LAW

3.1. NO LEGAL REGULATIONS

Except for agriculture, Germany has no special regulations for transferring family businesses to the next generation. Other businesses must therefore be transferred inter vivos or, for example, transferred to a family foundation (which, however, requires a certain economic volume). Otherwise, normal inheritance law applies, which should then be adapted, at least by way of a testamentary disposition, if possible, with the participation of the next generation (instruments: waiver and compensation). However, what applies to agricultural businesses also applies here: The basic problem of enabling the takeover by a single heir in an economically sensible way without disregarding the claims of the (equal) co-heirs still marks the area of tension in which the parties involved operate and in which a legislator might have to act. Unlike in the case of farms, the legal transfer of the family business in practice regularly takes place upon death, even if the next generation will of course already be working in the business, at least the people who are to inherit it one day.

Unfortunately, it is all too rare for a proper will to be drawn up that safeguards the company and avoids disputes. This is particularly often, but not only, the case when the next generation is not sufficiently involved. Conflicts that have already been smouldering often escalate

after the death of the deceased or when the nature and extent of the assets bequeathed in the will are seen as an expression of affection for or rejection of the deceased parent. In entrepreneurial families, this risk exists quite regularly, as one child (or some of the children together) usually receives the company, while the other children are compensated with other assets or are relegated to future shares in any company profits. It is not uncommon for successful entrepreneurs to live in non-traditional family constellations, causing deceased's children from different marriages or relationships to quarrel with each other. The company can play the role of both a trophy and a burden, and the allocation of the remaining assets can be viewed as an expression of disdain or as a gain for nothing in return.

If there is to be a dispute, it should, if possible, take place during the entrepreneur's lifetime and not only when he is already terminally ill, for example. He must therefore lay his cards on the table, involve all the children in finding a solution, disclose his considerations and motives, and also be open to the needs and life models of the next generation. Of course, it takes effort and is highly conflict-prone. If this transparency model is successful, there is a much greater chance that a company can actually pass on to the next generation. This is because disputes are avoided, given that those involved feel that they have been treated fairly and actually treated fairly (i.e. it does not turn out after the succession that a waiver was bought far too cheaply compared to the value of the overall estate).

3.2. THE RIGHT TO A COMPULSORY PORTION AS A DECISIVE POINT OF LEGAL ORGANISATION

Under German inheritance law, spouses and children are generally entitled to a compulsory portion that cannot be withdrawn. This monetary claim goes against the heirs and it amounts to half the value of a fictitious intestate inheritance share of this person. This means that the value of the compulsory portion claims can total up to 50% of the estate, which generally requires the sale or liquidation of an existing company in the estate in order to satisfy these claims.

Business wills that provide for the disinheritance of certain children will therefore regularly have to be accompanied by notarised waivers of compulsory portions. The object of a waiver can be individual assets, namely the company. A value limit or the agreement on a different quota is also conceivable. In addition, any modalities can be agreed, as the waiver can, for example, merely be a waiver of the immediate maturity of the compulsory portion claim. The claim is, therefore, deferred and can be fulfilled in instalments or, subject to certain conditions, such as company profit. In addition, compensation in return for the waiver can be freely agreed upon between the parties. However, it should be noted that recent case law[12] measures the waiver of a compulsory portion against the standard of immorality. It is therefore not an instrument for "ripping off" potential heirs. All of this shows once again that an appropriate arrangement cannot be reached without the involvement of the family. With the involvement of the family and with the advice of a competent lawyer or notary, however, this is possible, although not against a child who is opposed to the testator for reasons of principle and has already fallen out with him or her.

3.3. THE MODEL OF THE FAMILY FOUNDATION[13]

Increasingly, companies are being transferred to a family foundation in order to secure the existence of the company and its continuity within the family. Of course, this requires the company to be of a certain size and have a certain financial strength, as otherwise the model does not pay off or the establishment of a foundation is not authorised. This model is particularly suitable for more complex family structures. Establishing a foundation is also a promising option for more complex company structures that do not allow the company to be managed by (just) one member of the family. The same is true if family members are reluctant to take on the responsibility of managing the company and instead want to participate economically in its success. At the same

12 For example, OLG Hamm NJW 2017, 576 = NotBZ 2017, 192 with comment by Löhnig.
13 Theuffel-Werhahn, 2022, pp. 67 ff.

time, setting up a foundation prevents the company from being sold or broken up in the long term. In addition, all (or at least certain) family members are appointed to the foundation's executive bodies through appropriate provisions in the articles of association so that they can set the parameters of company policy in a binding manner and also avoid disputes that could arise if the company is transferred to a particular family member. This is an ordinary foundation under civil law (§§ 80 ff. BGB), which is admittedly not tax-privileged because it does not serve the common good but only the good of the family members. However, inheritance tax advantages can be generated in certain cases.

Here as well, it is crucial that the business owner (and testator) should act in good time and with foresight. He should set up the foundation during his lifetime (even if this could also be done in his will), initially only endowing it with a small amount of assets, specially, just enough to be recognised by the foundation's supervisory authority and the tax authorities. The main part of the assets, the company, is then transferred to the foundation upon death. The testator cannot use this model to avoid the compulsory portion claims, so the above explanations also apply here. At best, he can unilaterally include penalty clauses in his will – anyone who demands the compulsory portion will not become a beneficiary of the foundation.

If it is foreseeable that no agreement can be reached on the waiver of the compulsory portion, it may be possible to move to Liechtenstein, which offers protection under civil law against claims to a supplementary compulsory portion based on the assets received by the foundation. This is because under Liechtenstein law, only gifts made within the last two years are taken into account for claims to a supplementary compulsory portion. However, prudent action must be taken here,[14] and the company must be transferred to the foundation during the owner's lifetime.

14 Scherer and Bregulla-Weber, 2016, pp. 382 f.

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STRATEGIES FOR THE CONSERVATION OF FAMILY WEALTH IN ITALIAN LEGAL EXPERIENCE BETWEEN THE 19TH AND 20TH CENTURIES: THE CASE OF THE FIDEICOMMISSUM

GIACOMO PACE GRAVINA

ABSTRACT

The fideicommissary substitution has long been used as a suitable means to preserve wealth within the same family for generations: 19th-century codes opposed it in the name of economic liberalism and the freedom of the testator. Substitutions were included in the Italian civil code of 1942, albeit with strong limitations, to maintain at least part of the estate within the family, in line with the fascist government's policy to promote this institution. After this protective concept faded away, following the reform of family law in 1975, substitutions now survive only in an assistive version aimed at providing support, during their lifetime, to individuals deemed vulnerable.

Keywords: *fideicommissum, fideicommissary substitutions, codes, successions.*

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1. THE "METAPHYSICS OF LEGISTS"

The eternal aspiration of humans to attain immortality has always clashed with bodily transience, with the inexorable ageing process, the gradual weakening of cognitive faculties, and the progressive loss of senses.

However, over the centuries, a different form of immortality has emerged and established itself, at least partially compensating for the awareness of one's inevitable disappearance: that of the family. If a person's fate is death, the lineage could certainly continue with descendants who would perpetuate the name; the sons and the progeny could recount the deeds of their ancestors. But such descent needed to be well-endowed with economic fortunes, wealth, and possessions; otherwise, the name would regress to the obscurity from which it had arduously emerged through the endeavours of courageous or fortunate forebears. Those who had managed to amass enormous wealth trembled at the thought of it dissipating into a thousand streams: it was essential to achieve reasonable security that the estate remained within one's family. Ensuring that one's assets could pass intact to sons, and from them to their descendants, and so on indefinitely, allowing the testator's will to project its shadow far beyond death, for centuries. This is the form of immortality that legal systems have sought to guarantee to those nearing the end of life, chasing the illusion that their name and lineage would not extinguish, thanks to the complete maintenance of the inheritance. This prevents the physiological depletion of the inheritance by careless heirs or pleasure-seekers, dreadful threats to the mentality of the *bonus pater familias*, now forgetful of youthful dissoluteness.[1]

Thus, the fideicommissum of the mediaeval and modern ages was born and perfected, along with the connected system of fideicommissary substitutions, provisions by which the testator imposed on the heir

1 In this essay, I have also translated the sources from Italian to English so that the reader can more easily understand the normative context: this is, of course, a free translation, in the awareness of its arbitrariness (translator/traitor...) from a philological and legal interpretation point of view.

the obligation to preserve the received assets to return them, upon their death, to another person designated by the testator.

This legal instrument spread widely: present in ancient Roman sources, it was revived in the Middle Ages[2] by the glossators and later by the commentators;[3] practical jurists in the 15th century associated the fideicommissum with the prohibition of alienation as a tool for protecting family assets, showing preference for firstborns. By the end of the 15th century, the elaboration of the fideicommissum was defined, and its validity was commonly established up to the fourth generation, in favour of male descendants. In numerous instances, however, the testator wanted to extend the effects of their will until the complete extinction of their family.[4] The examples of feudal houses attracted the urban patricians and property-owning classes, who adapted to the noble model they aspired to; at the same time, they looked to the rural world where agricultural contracts benefited emphyteutas and tenants, with grants in perpetuity or for multiple generations.

It was precisely the encounter with the peculiar characteristics and needs of modern feudalism that led to a notable development of the fideicommissum in Western Europe between the 16th and 17th centuries, when, with the expansion of territories linked to the Iberian monarchy, the "Spanish" model of the fideicommissum spread and established itself, connecting it to the feudal estate and male primogeniture, the *mayorazgo*,[5] in line with the mediaeval prohibition of alienation.[6] The perpetual succession of male firstborns from male firstborns was the dream of ancient lords, ensuring eternal continuity of extensive wealth for their house and preventing damaging property divisions, binding younger sons to the family's fate, which was expanded according to contemporary concepts, in the illusion that their coat of arms would forever adorn the ancient and imposing buildings where they resided.

2 Trifone, 1914; Trifone, 1961; Padovani, 1983.
3 Treggiari, 2002.
4 Calonaci, 2005.
5 Clavero, 1989.
6 On fideicommissum in the Modern Age, see Brugi, 1895; Cosattini, 1940; Tria, 1945; Trifone, 1961.

This was a most useful means for the purposes of the Spanish viceroyalty society, especially concerning the most representative assets, such as the city palace, the villa in the suburbs, and the rural estates. These were important elements of social and economic power to be preserved unblemished across generations, without suffering the disgrace of a sale that would forever tarnish the respectability of the house, and to prevent perilous property divisions within the family in favour of younger sons, daughters, or the surviving spouse – a threat that materialised during legitimate or testamentary successions.

The volume of fideicommissa and the problematic cases they generated quickly led to significant litigation in modern times, which began to feed the treatises of practical jurisprudence while also deepening doctrinal elaboration on the topic,[7] favouring the family fideicommissum with the connected right of primogeniture. The fideicommissum could be natural, civil, regular (following the established principles of the preeminence of lineage, degree, sex, and age), or irregular; heirs were recognised with a usufruct right with some peculiarities, such as the obligation of inventory, as evidenced by the works dedicated to the subject by Marco Antonio Pellegrini, Francesco Mantica, and Giovan Battista De Luca. Beyond Roman laws and those of specific legal systems, in addition to the scientific elaboration of jurists and that of the court jurisprudence, customary law also retained a non-secondary role in various local realities.[8]

The 17th century saw the greatest expansion of the fideicommissum, particularly in Southern Italy, Sicily,[9] and Lombardy,[10] regions traditionally linked to the Iberian monarchy, as well as in the Papal States:[11] fideicommissa were widely used not only by noble families but also by other wealthy individuals aiming to emulate aristocratic families or to achieve specific goals, including philanthropic or religious ones, although their assets were not always sufficient to support the heavy burdens imposed.

7 Rossi, 2009.
8 Trifone, 1961.
9 Laudani, 2012.
10 Padoa Schioppa, 1982; Zorzoli, 1989.
11 Piccialuti, 1999.

The cultural revolution of the Enlightenment strongly attacked the system of fideicommissa, deemed one of the major obstacles to the free circulation of goods, their marketability, and agricultural investments. Indeed, burdened heirs had no incentive to improve their holdings, as they had to transmit most of the estate intact to heirs already designated by the testator, often centuries earlier, according to the complicated system of fideicommissary substitutions: they preferred instead to enjoy the fruits of the encumbered estate without effort. Montesquieu, Muratori, Genovesi, Beccaria, and Filangieri railed against these archaic provisions that crystallised estates, preventing their fruitful use for society at large.

The consolidations of the 18th century received these new ideas, attempting to downsize and limit fideicommissa: the *Laws and Constitutions of the Kingdom of Sardinia* in 1723 established their duration for only up to four generations and only concerning real estate and rents;[12] in Austrian Lombardy, in 1786, Joseph II prohibited the establishment of new constraints and ordered the capitalisation of existing ones; Francesco I of Lorraine, Grand Duke of Tuscany, with a law of 1747 inspired by the Savoy regulations, "restricted the effectiveness of existing fideicommissa and subjected the establishment of new ones to numerous conditions". His successor, Grand Duke Peter Leopold, in 1782 limited their duration to only four generations, and then with a law of February 23, 1789, "established the dissolution of all already established fideicommissa and prohibited any person, on any subject, for any title or period, even if brief, from establishing new ones".[13]

Enlightenment ideas on the fideicommissum, as with many other legal cases harshly attacked by the *philosophes*, found concrete realisation during the time of the French Revolution: a law of November 14, 1792, abolished fideicommissary substitutions, prohibiting the establishment of new ones, thus favouring property owners who would no longer be obliged to return the property to the substituted.

12 Bonzo, 2007.

13 Galligani, 2014.

2. BETWEEN LIMITATIONS AND ABOLITIONS

The first age of codification saw various strategies regarding the fideicommissum. The *Code civil* of 1804 explicitly prohibited it in Article 896, rejecting a perpetual obligation that would heavily condition the transmission of wealth: as the famous novelist Henri Beyle, better known as Stendhal, acutely wrote, "le code civil arrive rapidement à tous les millionaires, il divise les fortunes, et force tout le monde à valoir quelque chose et à vénérer l'énergie".[14] The world of security, in which wealth had to remain intact forever within the same family unit, was to be definitively eclipsed by the new system of the code, which preferred free circulation of goods and rewarded those who created wealth at the expense of traditional models of property ownership. However, in 1806, Napoleon himself reintroduced rights of primogeniture for the new nobility he created – favouring duchies and hereditary fiefs – and later added a third paragraph to Article 896 in 1807 that included the possibility of establishing fideicommissa. Subsequently, a law in 1826 re-admitted the right of primogeniture. Later, however, two laws in 1835 and 1849 repealed that paragraph, restoring the original system of the *Code civil.*[15]

In contrast to the latter, the Austrian Civil Code of 1812 (ABGB) maintained the existence of the family fideicommissum and substitutions.[16]

The codes of the pre-unitary Italian states during the Restoration, after the definitive fall of Napoleon, re-established fideicommissa and primogenitures but with certain limits: in the Papal States, a *motu proprio* of Pope Pius VII in 1816 allowed new fideicommissa with a limit of four degrees, a provision later abolished by Pope Leo XII in 1824; in 1834, Pope Gregory XVI "granted anyone the right to establish fideicommissa, primogenitures, and fideicommissary substitutions".[17]

14 Beyle, 1854, pp. 297–330.
15 Trifone, 1961, p. 205.
16 Ibid.
17 Ibid.

In the Code of the Kingdom of the Two Sicilies of 1819, substitutions, prohibited by Article 942, were allowed only for one degree: the code also established the need for royal authorisation for the establishment of *maggioraschi*[18] (the fideicommissum had already been abolished in the Kingdom of Naples occupied by the French by a law of 1807[19] and in Sicily by the Constitution of 1812 and a law of August 10 of the same year,[20] confirmed with another law of 1818); the Code of the Duchy of Parma of 1820 allowed fideicommissa and primogenitures, following the Austrian model, but required the sovereign's authorisation, which was not necessary for nobles.[21] In the Kingdom of Sardinia, the Albertine Code of 1837 permitted the establishment of rights of primogeniture (a system later followed by the Code of the Duchy of Modena in 1852), but subsequently, the reformist policy of the government launched a heavy attack on the faltering system of fideicommissa: with a law of February 18, 1851, these were abolished, attributing half of the assets to the instituted heir and the other half to the substituted.[22] In the Grand Duchy of Tuscany, the restrictive law of 1789 by Peter Leopold was again applied, while in the Duchy of Lucca, the *Code civil* remained in force with the connected prohibition of the fideicommissum in Article 896.[23]

The Unification of Italy witnessed, among the first bills presented by Parliament, a project in 1861 intended to establish the abolition of fideicommissa, primogenitures, and *maggioraschi* in the Lombard, Neapolitan, and Sicilian provinces, a project later withdrawn in 1864. Meanwhile, the process leading to the promulgation of the first Civil Code of the new Kingdom had begun. The proposals of ministers Cassinis and Miglietti were inspired by the discipline of the Code of the Kingdom of Sardinia, but the following Pisanelli draft included an absolute prohibition of fideicommissary substitutions, a ban also adopted by the Senate Commission.[24] This led to the promulgation of the Italian Civil

18 Buccino Grimaldi, 1988, p. 439.
19 Buccino Grimaldi, 1988.
20 Laudani, 2012.
21 Trifone, 1961, p. 205.
22 Bonzo, 2014.
23 Trifone, 1961, p. 205.
24 Zorzoli, 1993, p. 631.

Code of 1865, which prohibited substitutions in Articles 899, 900, and 901[25] (while maintaining the value of the institution of heir, contrary to French law).[26] The code provided for the dissolution of existing fideicommissa, attributing ownership of the assets equally between the current holder and the first heirs (with usufruct of the holder).

Doctrinal efforts aimed to limit the abolition effects of the new code,[27] asserting the validity of the fideicommissum *de residuo*, that is, concerning assets not alienated during the lifetime of the instituted heir, which thus remained in the inheritance, in favour of a third party (generally children or spouse). As Maria Carla Zorzoli stated,

> *in the practice of bourgeois families in united Italy, it is still common to resort to instruments very close to the prohibited fideicommissary substitution, in the name of defending family property, the affectionate bonds between parents and children, and the economic cohesion of the household. Moreover, the codified discipline of successions also confirms the idea of property as a right to possess not only for oneself but also for others, as something that the individual pursues for the happiness and security not only of themselves but of their family, and of which the individual cannot completely deprive their descendants.*[28]

No longer a fideicommissum of noble origin aimed at upholding the prestige of a house; instead, it became a "bourgeois" fideicommissum, intended more prosaically to protect family wealth.

Elsewhere, in Europe and America, the fideicommissum underwent significant transformations. In Spain, it was included, in the form

25 "899. Any disposition by which the heir or legatee is burdened with any expression to retain and return to a third person is a fideicommissary substitution. Such substitution is prohibited. 900. The nullity of the fideicommissary substitution does not affect the validity of the institution of the heir or legatee to which it is added: but all substitutions, even of the first degree, are void. 901. The disposition, by which the usufruct or other annuity is left to several persons successively, has effect only in favour of the first persons called upon to enjoy it at the death of the testator".

26 Trifone, 1961, pp. 205–206.

27 For example, Paternò Castello di Bicocca, 1896.

28 Zorzoli, 1993, p. 633.

of fideicommissary substitution, for one generation or thirty years, in the *Código civil* of 1889; in Germany, the *Bürgerliches Gesetzbuch* of 1900 (BGB) admitted fideicommissary substitution only within thirty years following the succession of the disposer; the Swiss Civil Code of 1907 prohibited the establishment of new fideicommissa but left intact those already in force. A version akin to the Iberian one was adopted in some South American codes, such as those of Argentina, Colombia, and Guatemala.

3. IN DEFENCE OF ARTISTIC COLLECTION

Numerous important collections of artworks have remained intact thanks to the fideicommissum, which has safeguarded them from the risks of fragmentation and dispersion.[29] This particularly concerns the collections of the high Roman aristocracy, established in the modern age.[30] These collections contributed to the representation of the importance and power of aristocratic families, who aimed to be generous patrons of artists, enhancing the image of their members as refined connoisseurs and art experts. The conquest of Rome in 1870 and the inclusion of the former Papal States in the Kingdom of Italy raised the issue of applying the abolition of the fideicommissum, already established by the new Civil Code of 1865, to the art collections of the Eternal City. Thus, the Royal decree of November 27, 1870, No. 6030, was promulgated, "which ordered the suspension, concerning the Roman provinces, of Articles 24 and 25 of the transitional provisions of the Civil Code related to the repeal of fideicommissa, until a special law provided otherwise".[31] A subsequent law in 1871 reinstated the aforementioned articles but mandated the preservation of the unity of collections until a specific protective law was enacted, which would only occur in 1902, followed by the Rosadi Law of 1909, which maintained the suspension

29 Pallastrelli, 2015.

30 Like the collections '*Colonna, Barberini, Borghese, Torlonia, Albani, Boncompagni-Ludovisi, Doria Pamphilj, Spada-Veralli, Rospigliosi-Pallavicini e, da ultimo, quella del banchiere Vincenzo Valentini*'. Carpentieri, 2022.

31 Ibid.

decreed by the 1871 law, thus further perpetuating the fideicommissum as a means of protecting artistic collections.[32]

Even in the drafts of the new Civil Code, there were attempts to include this possibility, as we will see in the next paragraph: however, this provision was not included in the final project, delegating the protection of collections to sector-specific legislation (shortly thereafter, a new law on the matter was published, Law No. 1089 of 1939).

4. THE RESURRECTION OF THE FIDEICOMMISSUM

When the fideicommissum seemed destined for disappearance, or at least for significant downsizing, the historical-political context partially favoured its resurrection. The rise of fascism, with its peculiar conception of the family as an institution with strong solidarity and economic connotations, led to a rethinking of certain legislative choices, including the condemnation of succession agreements and the fideicommissum. The succession model linked to individualistic bourgeois mentality, with the associated fragmentation of assets in every generation, was challenged to preserve family wealth, especially agricultural property. The preparatory works for the new civil code, initiated in the 1920s, were moving toward completion, with projects involving the Book of Successions.[33] The preliminary draft for Book III was presented in 1936 by Mariano D'Amelio, the chairman of the Royal Subcommittee for the Reform of Codes, to Justice Minister Arrigo Solmi.[34] Among the elements highlighted by D'Amelio was adherence to "*the orientations of the new law of the regime*", with a focus on family interests.[35]

32 Ibid.

33 Zorzoli, 1993, pp. 652 ff.

34 Rondinone, 2003, p. 62. About Solmi, see Mattone, 2013.

35 Rondinone, 2003, p. 63.

Fulvio Maroi[36] was the rapporteur for Chapter VI, dedicated to substitutions:[37] according to the jurist, who was deeply aware of the historicity of law,

> *the project aimed on the one hand to bring greater simplicity, and on the other hand, by mitigating the rigour of our code, to reconcile the needs of free circulation of goods with a greater respect for the wishes of the deceased, provided that these were not inspired by selfish motives, but by a superior family or social interest deemed worthy of protection.*

Maroi asserted that "*social consciousness*" was in favour of restoring the fideicommissum, as was the case with jurisprudence and part of the doctrine: but he particularly believed, opposing the exclusion of the fideicommissum in the 1865 civil code, that

> *in the new political climate of fascism, the inheritance of an institution so decidedly inspired by principles of intolerant economic liberalism is unjustifiable, as it contradicts not only the demographic policies of the regime, but also all measures aimed at defending and economically strengthening the family unit, granting it new expansionary strength. Hence the provision of the project (art. 287) that allows first-degree fideicommissary substitutions in favour of the sons of sons and the sons of siblings.*

Thus, the deep bond uniting them was once again recognised: a "corporate family" was even envisioned, in line with the economic model established by the fascist regime. The project allowed, upon the death of the testator, a first-degree fideicommissary substitution in favour of the subjects, but only within the limits of the disposable quota.[38]

36 About Maroi, see Alpa, 2012; Costato, 2013. Fulvio Maroi set out his contribution to civil law codification in a lecture delivered at the Magyar Társadalomtudományi Társulat – Szociálpolitikai Intézet (Hungarian Association for Social Sciences - Institute of Social Politics) on August 24, 1940, later published in Italy: Maroi, 1941 (*cf.* Alpa, 2012, p. 95).

37 Ministero di Grazia e Giustizia, 1936, pp. 71 ff. About the Maroi report, *cf.* Zorzoli, 1993, pp. 655 ff.; Rondinone, 2003, p. 64.

38 Art. 287 of the draft, Zorzoli, 1993, p. 656.

The instituted person would hold a complex of rights and obligations similar to those of a usufructuary, almost as if they were an "administrator" of the assets to be passed on to the substituted,[39] while avoiding in any case obstructing the free circulation of goods for too long.[40] Furthermore, Maroi also underscored a peculiar aspect of art. 288 of the project – that permitted imposing a prohibition on the alienation of the heir for one generation – regarding collections of historical, artistic, and family interest.[41] The prohibition of subsequent usufruct already provided for in art. 901 of the 1865 civil code was maintained,[42] but the possibility, provided for in art. 902, of establishing annual awards for merit or aid to the poor was also foreseen, in the "spirit of charity and social solidarity that inspires the new legislation in the current historical moment".[43]

This project was then submitted to the higher courts, universities, and bar associations for their opinions. The observations and proposals published in 1937 highlighted some inconsistencies, but the recovery of the fideicommissum was generally regarded positively: some

39 Zorzoli, 1993, p. 657.

40 Rondinone, 2003, pp. 64–65 nt. 89.

41 Maroi Report, p. 73: "Article 288 provides for the avoidance of tacit fideicommissum substitutions that occur when the testator prohibits the heir from disposing of the hereditary property by will (§ 610 of the Austrian Civil Code). However, a temperament is provided in that such prohibitions of alienation are permitted if they do not exceed the term of one generation and as long as they relate to objects or collections of historical or artistic value or family interest. Since it is the judicial authority that ultimately decides whether such an objective prohibition corresponds to an interest worthy of protection, there is no need to fear that such restrictions will jeopardise the free movement of goods. Conversely, family interests of a moral nature worthy of protection and the integrity of collections of considerable artistic or historical value are protected by preventing their piecemeal sale".

42 Ibid., p. 74: "Article 295 reproduces in full the provision contained in Article 901 of the Civil Code. The discussions to which this provision has given rise in doctrine are well known (*cf.* Venezian, 1920), but it seemed appropriate to leave the prohibition of successive usufructs and subsequent annuities resembling them in place, since a succession of several usufructs, which could last for long years, would practically nullify the value of the property, constitute an obstacle to land improvements, and render it de facto unmarketable".

43 Maroi Report, p. 74.

jurists, such as Cicu, called for simplification of the legislative text.[44] Minister Solmi, assisted by a committee of experts, drafted the final project, which was submitted to a parliamentary commission, chaired by D'Amelio himself, in December 1937. In its report, some technical modifications were proposed:

> *The innovation with which the preliminary draft has embraced the institution of fideicommissary substitution, abolished by the 1865 code, has been widely debated. Crucially, the innovation has been positively received overall. Concerns raised about the potential risk of excessive immobilisation*

44 Zorzoli, 1993, pp. 659 ff.

of assets are considered unfounded, given the limited constraints within which the institution is permitted.[45]

The revision of the project did not approve the wording of art. 288 that protected artistic collections:

The second paragraph of art. 288 of the preliminary draft was then deleted because the protection of objects or collections of historical or artistic value

45 Ibid., pp. 669–670. Ministero di Grazia e Giustizia, 1937, pp. 94–95: "175. Widely debated was the innovation whereby the preliminary draft incorporated the institution of fideicommissary substitution, abolished by the 1865 Code. It was noted that the innovation was generally welcomed. The concerns expressed by some about the danger of excessive immobilisation of assets do not seem well-founded, given the narrow limits within which the institution is permitted. From the economic point of view, the fideicommissary substitution, as it is regulated, does not produce effects different from those that under the current code can occur when property is disposed of (as does not infrequently happen) in favour of children born or unborn by a living person, leaving the usufruct to that person. These considerations have led us not to change the lines of the preliminary draft, both about the possibility of a substitution in favour of public entities and about the invalidity of a substitution in favour of only some of the instituted person's sons. The changes introduced by Article 230 to the text of Article 287 of the preliminary draft tend essentially to emphasise the principle that, outside the limits expressly provided for, fideicommissary substitution is null and void. 176. More important changes were made to Art. 288 of the preliminary draft, which is now the last paragraph of Art. 230. The text adopted by the Royal Commission had seemed unclear and was misunderstood by many. In the report, however, it was made clear that the first paragraph was intended to declare null and void the so-called tacit fideicommissary substitutions, such as those that are inferred from the prohibition of alienation imposed on the heir. It was therefore considered that to make this concept clear, it was appropriate to dispense with the stipulation of abstract rules, limiting itself to explicitly establishing the nullity of the prohibition of alienation. On the appropriateness of such a prohibition, there was no lack of perplexity in the sense that, while there is a general need to declare void prohibitions of alienation for acts between living persons, the sanction of nullity seems to some excessive when the prohibition refers to dispositions of last will. This affects the so-called fideicommissum *de residuo*, which under the current code, despite the opposition of doctrine, is widely admitted by jurisprudence. However, the opinion prevailed to maintain the rigid criterion of the preliminary draft, considering that the fideicommissum *de residuo* responds to selfish sentiments not deserving of protection".

> *is guaranteed by laws that protect the nation's artistic heritage, and it is not appropriate to give importance to vague and imprecise family interests, which could lead to dangerous immobilisations.*[46]

The definitive project of Book III was published in the same year, titled "On Successions due to Death and Donations".[47] From January 1938, the parliamentary commission, still chaired by D'Amelio, worked on the revision of the project until 1939.[48] The newly-appointed Minister, Dino Grandi, who succeeded Solmi in 1939, aimed to publish the Book of Successions by a significant date, October 28, the anniversary of the March on Rome. He specifically convened the jurist Rosario Nicolò[49] for the revision, who worked on it during August 1939, in agreement with Filippo Vassalli,[50] who coordinated, at the minister's request, a small working group for the final revision of the legislative text.[51] Among the main issues to be resolved, the professor identified the problem studied here in a letter to Vassalli:

> *I am working intensively, perhaps more than on previous occasions, and I have already concretised many things that I think deserve consideration, but which mostly relate to technical issues. I would be very happy to have an exchange of ideas with you and to present the results of my studies, also because I have the impression that there are three institutions (which I have not yet addressed), namely dormant inheritance, separation of estates, and fideicommissary substitution, whose regulation seems absolutely inadequate to me.*[52]

46 Ibid., p. 95.

47 Rondinone, 2003, p. 150.

48 *Atti della Commissione parlamentare chiamata a dare il proprio parere sul progetto del Libro Terzo del codice civile – "Delle Successioni a causa di morte e delle donazioni"*, 1939; Zorzoli, 1993, p. 672.

49 On Nicolò, see Rodotà, 2013.

50 About Filippo Vassalli, see at least Ferri, 2013, pp. 2022–2025.

51 On Vassalli's activity in the civil code laboratory, see Rondinone, 2003; Chiodi and Massironi, 2026.

52 Nicolò's letter to Vassalli del 18 agosto 1939, Archivio Filippo Vassalli, Università di Milano Bicocca, published by Rondinone, 2003, pp. 184–185.

Nicolò's proposals were discussed starting September 6, 1939.[53] At the conclusion of this phase, Grandi submitted the text to Mussolini and the king, which was ultimately approved with R.D. October 26, 1939, no. 1586 – the Book came into force on April 21, 1940.[54] As Nicola Rondinone recalls,

> *Despite having been until then qualified as Book III, this definition is carefully avoided in the official publication, and from now on it will be implicitly considered as Book II, ceasing to generally qualify the Book on things and real rights in this way.*[55]

Within his report addressed to the king, Grandi spoke of "the protection of superior social interest", also regarding the economic and social relations of the family.[56] The function of the fideicommissum was exalted precisely in this light:

> *An example of this greater empowerment of the family, always under vigilant care by the fascist State, is also the fideicommissary substitution, which, contained within just and well-defined limits, no longer constitutes a dangerous constraint of unavailability of goods, but represents an effective means to ensure the members of the family the preservation of the hereditary estate.*[57]

The main problem that arose – *de iure condendo* – was the attribution of ownership of the assets and the associated qualification: in the commission, there was talk of limited and revocable ownership or recognition of useful ownership. For the Minister of Justice, the instituted person would not be the owner of the goods, still recognising a close relationship with the usufructuary: "*A perfect assimilation between the usufructuary and the instituted with the fideicommissary constraint would be theoretically inaccurate, although it cannot be denied that there exists*

53 Archivio Filippo Vassalli, Università di Milano Bicocca.
54 Ibid.
55 Ibid.
56 Zorzoli, 1993, p. 675.
57 Rondinone, 2003, p. 188 nt. 5.

a profound analogy between the two positions".[58] The fideicommissum *de residuo* was swept away because it "*responded to selfish interests not worthy of protection*", even though it often served to benefit the surviving spouse when the usufruct was insufficient for their maintenance. As Maria Carla Zorzoli has noted,

> *Drawing on suggestions that were already preparing for the recovery of the institution in the last years of the 19th century, inspired by foreign experiences, the fascist regime, in an attempt to define the characteristics of the 'new order', planned the fideicommissary substitution among the institutions aimed at the needs of collective interest, for the defence of the national economy through the consolidation of family economies.*[59]

The Civil Code, which was promulgated in 1942, thus resurrected the fideicommissum, in its familial and charitable form, in Book II, Chapter VI, Section II, specifically titled "On fidei-commissary substitution",

58 Ministero di Grazia e Giustizia, 1943, p. 72, "Of fideicommissary substitution. 330. The reappearance, within clearly circumscribed limits, of fideicommissary substitution was welcomed. There were few specific comments on the relevant provisions. It was proposed to specify that the substitution may be made in favour of a charitable or cultural organisation, rather than a public organisation. But such a restriction seemed unjustified and in conflict with the purpose of the rule, which is inspired by the protection of every higher social interest. 331. Another observation reflects Article 693, which determines the rights and obligations of the instituted. One would have preferred the wording of the corresponding article in the preliminary draft, in which the rights and obligations of the instituted were set out analytically. I essentially accepted the proposal also because it seemed to me that a perfect assimilation between the usufructuary and the instituted person with a fideicommissum bond would have been theoretically inaccurate, although it cannot be denied that a profound analogy exists between the two positions. I therefore considered it opportune to indicate in Art. 693, albeit briefly, the content of the instituted person's right by highlighting his power to make useful innovations, as well as improvements in the strict sense, on the property and to sue for all actions relating to the property, and therefore also for actions concerning the right of property".

59 Zorzoli, 1993, p. 677.

in articles 692–697.[60] Substitution was permitted within the limits of the disposable quota of the inheritance in favour of all sons of the instituted person or, possibly, of grandsons, but only for one generation.

60 "Article 692 (Limits). A disposition by which the testator imposes on his son the obligation to conserve and return at his death all or part of the goods constituting the disposable quota in favour of all the sons of the instituted person or in favour of a public body is valid.
A disposition that imposes on a brother or sister of the testator the obligation to preserve and return the property left to them in favour of all the sons born to them or in favour of a public body shall also be valid.
In any other case the substitution is null and void.
Likewise, any provision by which the testator prohibits the heir from disposing of the estate by an act between living persons or by an act of last will shall be null and void.
Article 693. (Rights and obligations of the instituted). The instituted shall have the enjoyment and free administration of the property that is the subject of the substitution and may take legal action in all actions relating to the said goods. He may also make all innovations aimed at better use of the goods.
The rules concerning the usufructuary are common to the instituted person, insofar as they are applicable.
If the institution neglects to observe its obligations, the judicial authority may appoint an administrator, even ex officio.
Article 694. (Alienation of property). The judicial authority may permit the alienation of the assets that are the subject of the substitution in the event of evident usefulness, ordering the reuse of the sums obtained. It may also be permitted, with the necessary precautions, to set up mortgages on the same assets to guarantee credits for land improvements and conversions.
Article 695. (Rights of the personal creditors of the instituted). The personal creditors of the instituted may only act on the fruits of the assets that are the subject of the substitution.
Article 696. (Transfer to the substituted). The inheritance shall devolve to the substituted upon the death of the instituted person.
If the substitution is in favour of the sons of the substituted and the latter dies without leaving any offspring, the assets shall be transmitted to his legal or testamentary successors.
If the substitution is in favour of a public body and the latter dies before the death of the instituted, he definitively acquires the ownership of the assets.
If the instituted person dies before the testator or is incapable or unworthy or renounces, the inheritance shall devolve to the substituted, with effect from the time of the testator's death.
Art. 697. (Fideicommissary substitution in legacies). The rules set out in this section shall also apply to legacies".

The substitution could also be made in favour of a public entity for assistance and charity purposes, aligning with the fascist vision of the preeminent role of the State.[61]

However, the regulation of the new Civil Code of 1942 did not enjoy much success; the use of the fideicommissum *de residuo,* or conditional fideicommissum, continued for some time after the promulgation of the code.[62]

This system remained in force[63] until the major reform of Italian family law in 1975, which was enacted with Law No. 151, allowing the survival of the family fideicommissum by transforming it into a welfare fideicommissum, thus no longer for the preservation of the estate within the family unit, henceforth solely focusing on protecting "incapable" relatives, in a new perspective of safeguarding the most vulnerable individuals. The 1975 reform states that the testator can impose on the heir or legatee (incapable instituted person) the obligation to preserve what is attributed to them (not only for the disposable quota, as under the 1942 Code, but also for the legitime portion, a problematic provision concerning potential heirs-at-law[64]), to be delivered upon their death to the person who took care of them during their lifetime (the substituted). Upon the death of the incapable instituted person, the assets thus automatically pass to the substituted. The rationale is to protect incapables relatives for the period following the death of the testator, aiming to encourage care for these individuals, allowing for the possibility of designating as substituted those who have actually provided assistance.[65] This configuration must be related to the recent emergence (2004) in the Italian legal system of the so-called "support administrator" to protect vulnerable persons, which has significantly reduced the scope for interdiction.[66]

61 Casulli, 1970.
62 Zorzoli, 1993, p. 678.
63 On fideicommissary substitutions under the above legislation *cf.* Ricca, 1968; Casulli, 1970.
64 Ruscello, 1982.
65 Bianca, 2010, pp. 922 ff.
66 Troiano, 2024.

What does remain of the fideicommissum today, beyond this marginal possibility, which is in fact little used in practice? The need to manifest a personal ideal of family and the associated socio-economic order *post mortem* has certainly not vanished, despite legislative prohibitions. While the traditional wealth arrangements have profoundly evolved, certain contexts still highlight the desire to preserve specific family assets within their ties, such as cultural heritage, historic buildings, artistic collections, and renowned vineyards: for such purposes, attention is now turned to the establishment of foundations or to the Common Law practice regarding the Trust (recognised in Italy thanks to the Hague Convention of 1985, enacted with Law 364 of 1989), a figure more open to listening to concrete family experiences, which remain present and relevant, and with significant analogies to the ancient fideicommissum.

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AGRICULTURAL GOODS AND FAMILY BUSINESS: LEGAL AND ECONOMIC DYNAMICS IN THE FORMATION OF THE ITALIAN CIVIL LAW MODEL IN THE FIRST HALF OF THE 20TH CENTURY

FRANCESCO CICCOLO

ABSTRACT

This chapter traces how wartime emergency legislation and fascist ruralism reconfigured Italian private law by elevating the farming family from a sociological fact to a juridically meaningful subject and by redefining ownership for the purpose of production. Centring on Francesco Ferrara and Filippo Vassalli, it shows how World War I measures reshaped agrarian contracts, normalised state intervention, and exposed the gap between the comunione tacita familiare and codified categories. It then reconstructs the 1930s debate (Enrico Finzi versus Salvatore Pugliatti), demonstrating methodological divergence (asset-based vs. subjective-right approaches) yet convergence on the social function and limits of property within an ideological climate of fascist

Ciccolo, F. (2026) 'Agricultural Goods and Family Business: Legal and Economic Dynamics in the Formation of the Italian Civil Law Model in the First Half of the 20th Century' in Szilágyi, J.E. – Ilyés, K. (eds.) *Instruments for Preserving the Unity of Family Businesses and Agricultural Assets: Perspectives of Legal History*, pp. 119–140. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2026.jeszik.ipufbaa_5

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"ruralism". A close reading of the travaux préparatoires and enacted provisions reveals that the 1942 Civil Code consolidated a new paradigm (arts. 832, 834, 838, and 846–851), introducing productive-aim expropriation and minimum cultivation units while relegating family enterprise to custom (art. 2140). The conclusion explains why full juridical recognition of the family business was deferred until the 1975 reform (art. 230-bis) and reflects on the lasting implications for agrarian law and governance.
Keywords: *social function of property, fascist ruralism, Italian Civil Code of 1942, Francesco Ferrara, Filippo Vassalli, Finzi–Pugliatti debate.*

1. THE FARMING FAMILY AT WAR: THE ROLES OF FRANCESCO FERRARA AND FILIPPO VASSALLI

In May 1936, in the control room of Palazzo Venezia in Rome, the prize-giving ceremony of the "*Fedeli della terra*" (*Faithfuls to the Land)* was being held. An initiative promoted – at least according to the rhetoric of the fascist regime – to pay tribute to the sacrifices of those families of colonists and peasants who have lived and prospered on the same piece of land for generations. The master of ceremonies was the Head of Government, Prime Minister Secretary of State Benito Mussolini, who welcomed the winners at the opening of the celebration with the following words:

> *This greeting goes out to all the Italian rural people, to all the peasants of Italy, to all those who work the land and, because of this fact, are particularly dear to me – seeing as how the land and the race are inseparable. The history of the race is made through the land, and the race dominates and develops the land fruitfully.*[1]

The theme of "ruralism" – intended as the recovery of the traditional values of peasant society – was widely successful in Italy in the 1930s, exerting a significant influence not only on the economic and political

1 Piccoli describes this specific episode. Piccoli, 1936, p. 87.

level but also on the legal. In the same period, unprecedented reflections began on property, especially land ownership and family businesses, which were mainly applied in the land context of the time.

In fact, at the beginning of the century, Europe experienced a renewed interest in the world of agriculture amidst profound transformations such as industrialisation, urbanisation, technical specialisation, and commercialisation. These phenomena, while not entirely novel, had taken on greater intensity than in the past, to the point of imposing a re-evaluation of the relationship between capital and labour.[2] In this scenario, the growing importance of the social question, closely linked to the rise of the "*Quarto Stato*" *(Fourth Estate)*, made it necessary to take a more articulated and complex approach to the business world.[3]

In particular, the abandonment of a policy of repression and the consequent move towards a regime of trade union tolerance had contributed decisively to the emergence of a social pluralism that could hardly be contained within the traditional legal categories.[4]

This led to the overcoming of the nineteenth-century vision of business as the exclusive asset of an individual owner in favour of a perspective that recognised and valued the collective dimension of work. The "*collettività operaia*" (*working community)* had become the central role within the company structure, accompanied by growing attention to contracts and collective agreements, fundamental tools for regulating the rights and responsibilities of owners and workers in economic governance.[5]

In the face of such changes, the theoretical positions and political responses had, however, been antithetical. On the one hand, classical Marxist analyses had theorised the imminent advent of the large capitalist enterprise, which, from there, in a short time, through a process of collectivisation and socialisation of the land, would definitively sweep away the small family business. On the contrary, proposals had been

2 Tolaini, 2010, p. 361.
3 Cazzetta, 2007, p. 12.
4 Ibid., p. 13.
5 Ibid., pp. 17–18.

formulated to demonstrate emphatically the superiority of agriculture on a moral, and social, as well as technological and productive level.

In this sense, one may refer, for example, to the well-known, widely cited works of the Russian agricultural economist Alexander Chayanov, who, using a direct study of the Soviet countryside and the living conditions of its inhabitants, combined with the analysis of thousands of family business budgets, developed an autonomous scheme of economic behaviour of the peasant family as an alternative to the "*maximising of the agricultural business*". In particular, the family unit concentrated its efforts on meeting the annual needs of its members, reallocating, if necessary, internal resources, and also extra non-agricultural activities. Based on this logic, the size of the family business was more closely associated with the family's life cycle than with income growth.[6]

The thesis in question is useful for our discussion only because it reveals a particular attention to the mechanisms governing family businesses, a device firmly rooted even in the rural areas of the Peninsula in the nineteenth century.

Years before the political unification, which took place in 1861, the Italian countryside had been populated by peasants and sharecropper families who, although not formally owners, resided there permanently and derived their livelihood from it.

This reality was, however, completely ignored by the Civil Code of 1865 and later also by the Commercial Code of 1882. In the absence of precise normative coordinates, relationships within the family units continued to be regulated by an intricate customary network, the so-called "*comunione tacita familiare*" (*tacit family communion).* At the death of the head of the family, the heirs retained their assets undivided and continued to pursue the economic activity pursued by the deceased. The "*new*" family, thus, constituted and supported a community of life and shared interests and activities. It was led by a new head, selected by consensus, who also represented the various members of the family before third parties.[7]

6 Tolaini, 2010, p. 362.

7 Carrara, 1959, pp. 84–85.

The situation described above was also present in the years of the First World War. Although millions of peasants had been mobilised to the front, the Italian agricultural market managed to maintain almost stable levels of production.

This was facilitated by the state's intervention, which had adopted a targeted strategy to meet the growing demand for food, such as encouraging the use of agricultural machinery by developing uncultivated land and removing the obligation for farmers to pay rent, to the detriment of absentee property.[8] If, therefore, the national economy appeared to be stable on the political plane, there was, on the contrary, a growing tension destined to explode intensely in the immediate post-war period.

The main protagonists of these tumultuous events were the members of the labourer class, co-opted among the ranks of the White and Red Leagues, trade union organisations – of Catholic and socialist inspiration, respectively – which fought strenuously for the complete revision of the colonial pacts, previously stipulated with the landowners, in order to obtain more favourable normative and salary conditions.[9]

This season, referred to as the "*Biennio Rosso*" (*Red Two-Year Period)* from 1919 to 1920, was marked by a liberal ruling class incapable of channelling these tensions through effective reforms to meet the opposing demands of the parties involved.

The way out of this *impasse* would eventually be identified by the agrarians themselves, who, through fascist squads, would suffocate with force the peasants' and sharecroppers' trade union movements, thus putting an end to the ongoing social tensions in action.

Beyond the violence, the tragic parenthesis of war represents a crucial point destined to irreversibly upset the existing equilibrium, especially those between public and private.[10]

The war brings with it new needs and urgencies, as well as priorities never known in peacetime, which require immediate responses; to meet these needs, a series of innovative and pervasive regulatory

8 Fano, 1975, pp. 474–475.
9 Ibid., p. 475.
10 Sordi, 2020, pp. 154–165.

interventions were adopted, able to shake the foundations of the ground "*until then substantially quiet private law*".[11]

The awareness of the profound changes in progress emerges clearly from the reflections of contemporaries, who observe and comment with great attention on growing state interventionism.

But why are they the ones having to deal with it? The answer to this question is found in the very nature of war legislation, which is the result of contingent requirements rather than a rational design. It insinuates itself into the folds of the Civil Code of 1865, modifying it at its roots to the point of altering established principles and institutions.

The science of civilisation, for its part, feels the need to confront such an event, perceiving in it a force that undermines the traditional legal order and, therefore, worthy of careful and profound reflection.

It is not possible to dwell here on the numerous contributions developed in these years; we will therefore confine ourselves to two particularly important examples of which the clarity of their presentation and analysis bear witness to that lively intellectual season.

Specific references are made to the reflections of Francesco Ferrara and Filippo Vassalli, the latter of whom later became a protagonist in the drafting of the Italian Civil Code of 1942.

In his inaugural speech for the academic year 1918-1919, at the "*Institute of Social Sciences Cesare Alfieri*", Ferrara wondered whether the "*law of war*" represented a simple "*anomaly*" dictated by the moment or whether one could see into it "*the seeds of new rights*", which is intended to be applied even after the "*extraordinary state of affairs*"[12] had ceased. He favoured the latter hypothesis, believing that the "*temporary measures* of *war*" contained principles capable of offering insights and solutions designed to influence future regulations. Among the subjects in which the first signs of change could be detected was that of agrarian contracts, formally regulated by the Civil Code of 1865 as agreements between the landowner and the settler. However, Ferrara observed that in practice, such contracts involved the whole farming family, represented by the head of the family. Nevertheless, the head of the family

11 Grossi, 2000, p. 130.

12 Ferrara, 1954, p. 70.

could be replaced following changes in the family composition, such as marriages or deaths, highlighting a much more articulated scheme than the normative one. In support of this view, he recalled the Lieutenancy Decree No. 1480 of the 2nd of November 1916.

The measure, in one respect, granted the surviving heirs of the settler who had died in the war the right to request an extension of the contract. In another respect, it allowed both the landowner and the farming family to integrate the workforce on the estate by employing outside workers to compensate for absences caused by military services or incapacities. The provisions under consideration, in the opinion of the jurist who came from the city of Avola, had therefore sanctioned the emergence of a completely different figure: The farming family is no longer understood as a simple aggregate of individuals but rather as an organic and cohesive entity founded on solidarity, which will ensure the continuity of work and the stability of the land's means of production.[13] Also, for Vassalli, the wartime rules had produced "*lasting and profound*" consequences, implications that would be felt long after the war ended.[14] Whether it was the constraints imposed on land ownership, the concession of agricultural machinery purchased by the Government, the forms of assistance to fighters and their families, or the prohibitions on import and export, the dominant note always remained, in the opinion of the Roman civilist, the prevalence of public reasons over private ones.[15] Taking as a starting point the decree of the 10th of May 1917, No. 788, which gave the prefect the power to impose on anyone who managed an agricultural holding the extension of areas intended for food crops, the lawyer emphasised the unprecedented role of the State as a key player in agricultural activities. It was particularly striking to him the complex system of control and regulation introduced by the decree under consideration, which involved administrative and political bodies: appeals against prefectural provisions had to be submitted to the Minister of Agriculture after consulting a technical section of the Agricultural Committee; any disputes between owners and tenants

13 Ibid., p. 94.
14 Vassalli, 1960, p. 339.
15 Ibid., pp. 343–344.

were referred to an arbitration board, whose decisions were final and unappealable; even the application of penal sanctions for violations was entrusted to an administrative authority, the intendant of finance, with the possibility of submitting it to the Minister of Agriculture.[16] This was seen by Vassalli as a very eloquent example of the progressive capacity of the state to reshape the traditional relationship governing agricultural property and management. To put it differently, this act was not just a regulation to meet extraordinary needs but a greater change, able to redefine the boundaries of private property and to orient the aims of the institute in rational and collective exploitation of the land.[17]

2. THE ITALIAN LEGAL DEBATE IN THE 1930S ON AGRICULTURAL PROPERTY, LAND AND FAMILY: ENRICO FINZI AND SALVATORE PUGLIATTI

Well, Fascism will be the one to take up this legacy.

In the years of its rise to power, the political interference which we have just mentioned becomes increasingly evident, with the state assuming the role of "*supporter of companies in crisis*", "*competitor of private individuals*", and "*director and controller of their activities*".[18]

Every part of society is affected by this process, including the agricultural sector, where the government intervenes with various significant legislative measures, such as remediation, agricultural credit, the regulation of civic uses and the enactment of the new forestry law.[19]

Of course, this renewed ideological system also benefits the legal discipline: while on the one hand, it reopens the site for the adoption of a new civil code to replace that of 1965, on the other hand, the provisions in the agricultural field not only stimulate reflection but also consolidate and decisively promote the emergence of a new branch of law, the agricultural one.

16 Ibid., pp. 350–351.
17 Grossi, 1997, pp. 377–405
18 Alpa, 2018, p. 425.
19 Iannarelli, 1999, p. 666; Marinelli, 2020, pp. 22–27; Volante, 2018, pp. 1073–1078.

Examining the agricultural reflection of those years reveals significant transformations in certain civil law institutions, and among these, property – both real estate and land – whose functional and productive roles have become evident.

This final point will be discussed again shortly. First, though, a clarification is required: the space reserved by the regime for agriculture throughout the twenty years is not uniform, since two distinct periods may have distinct phases, with the year 1927 representing a watershed.

At first, the main objective of the fascist party was to exalt the importance of the peasant role and its virtues in the wake of a nineteenth-century approach that can easily be homologated to the category of "*Catonismo*" (*Cathonism*). Thus, the most decidedly propagandistic aspects prevail, the emphasis is being placed on the "*moral virtues of those who work the land, their ability to endure any deprivation and their strong spirit of* sacrifice".[20]

In Mussolini's Ascension speech, presented to the Chamber of Deputies on May 26, 1927, a significant shift began, reshaping the concept of "agriculture" through an ideologically driven perspective that emphasised the exaltation of lineage.

The rural world is, in practice, an emblem of physical health, morality and prolificacy, proposing, in the structure of the "*traditional and extended*" sharecropping family,[21] a prototype that not only embodies these values but also stands as a guarantor of the instances of order and social cohesion desired by the new state apparatus.

This family model is defined by the "*Carta della Mezzadria*" *(Charter* of the *Sharecropper)*, a measure adopted in 1933 to regulate working relationships between landowners and sharecroppers. It prescribed that a sharecropper was to be the head (ruler) of an entire cohabitation dependent on him, composed of his spouse, ascendants, descendants and relatives-in-law, and of all those who cohabited in the house as permanent employees on the farm and were listed in the farm colonial. The sharecropper was also responsible for the exclusive representation of

20 Di Michele, 1995, p. 250.

21 Cavina, 2007, p. 263.

the family, both in the management of the farm and in negotiations with the grantor, acting as sole contractor and irrevocable tacit agent.[22]

Among the many interpreters who took an interest in the subject was also Fulvio Maroi, a lawyer very close to the regime, who, in his scholarly production, devoted particular attention to the theme of the farming family, as shown by the reflections he gave in a speech in June 1935 at the Fascist Cultural Institute. In the analysis presented by Maroi, who has a background in legal history, it is possible to see an obvious sign of rupture with the Civil Code in force at the time, particularly with regard to two institutions that, according to the author, are intimately linked: family and property. He begins by criticising the selfishness that characterised private property in the old system, defined as a "*granitico macigno*" (*granitic boulder*), from which only Fascism had succeeded in drawing a new "*linfa*" *(sap),* transforming it into an instrument of social and family solidarity. According to Maroi, the first form of solidarity had been implemented mainly through the "*Labour Charter*", which assigned property as a "*function of national interest*" and imposed on the owner, holder of an activity or of an enterprise, a direct responsibility towards the state. Regarding the second one, the family property, he pointed out that it had been promoted through a series of provisions – among them the abolition of inheritance tax within the family unit – introduced by Royal Decree No 3770 of the 30th of April 1930.

The latter measure was, in his view, crucial since it aimed to preserve the unity and cohesion of families, particularly agricultural families, by strengthening the communion between members and preventing the division of assets that would compromise the integrity of the patrimony and the solidarity within the nucleus.[23]

Three years later, Maroi would return to these ideas in an essay published in the "*Rivista di Diritto Agrario*"*(The Journal of Agrarian Law)*, reaffirming his criticism of the Civil Code of 1865, which he accused of having sacrificed in the name of a petty individualism: "*All that cohesion and cooperation, fraternity and patriarchalism*" that was still alive in the rural family. On that occasion, the lawyer outlined the principles which

22 Passaniti, 2011, pp. 414–419.

23 Maroi, 1935, pp. 27–33.

he said should have guided the new Civil Code, with particular attention to "*the rights of the land*". These included the protection of agricultural holdings in the context of succession, the normative recognition of tacit family communions in the rural areas, and the adoption of measures to guarantee the continuity and stability of the agricultural business within the family unit.[24]

Indeed, as will be seen in the following pages, some of the criticisms made by the lawyer were shared by most. The Italian Civil Code of 1965 had, in fact, immediately made clear its links/debts – of architecture and content – with the "*Code Napoléon*" (*Napoléon Code*), assigning property an absolute central role, such as "*the right to enjoy and dispose of things in an absolute manner with the sole limitation that they shall not be used of them contrary to the law and regulations*" (art. 436). Moreover, the discipline of family ties, traditionally based on a hierarchical and central conception of the individual, was defined by the same individualism. This vision tended to privilege the head of the family as the sole reference, ignoring the interdependencies that defined family life, especially in peasant communities and was distanted from the actual collective and solidaristic dynamics of the rural community. And yet, during the Great War itself, some lawyers' reflections – including those already mentioned by Vassalli and Ferrara – had highlighted the first signs of the collapse of this approach, highlighting its inadequacy because of the socio-economic transformations of the time.

By the mid-twentieth century, this awareness had already been consolidated: the relationships which regulated family businesses, historically anchored to the so-called tacit family communion, could no longer be entrusted exclusively to a customary system, the inadequacy of which was increasingly evident concerning the changing demands of rural society.

Concurrently, the concept of agricultural property was also profoundly changed: the rustic estate evolved from a simple object of property to a "*vital reality*", a dynamic entity carrying its own rules and requirements.[25]

24 Maroi, 1956, pp. 264–267.
25 Grossi, 2012, p. 23.

The changes underway were highlighted, with the clarity and lucidity of analysis typical of those who are able to anticipate the times, by two civil servants, Enrico Finzi and Salvatore Pugliatti, who once again spoke at the "*Primo Congresso Nazionale di diritto agrario*" (*First National Congress of Agrarian Law*), held in Florence in 1935.

For the former, the event represented a propitious occasion to review the conclusions from a long course of study, having already previously dedicated heartfelt pages to the institution of property[26] in 1922 and 1933.[27]

In his speech entitled "*Diritto di prorietà e disciplina delle produzioni*" (*Property Law and the Regulation of Production*), he reinforced the idea that it was in the regulation of property that the best changes in property law were taking place. First, by doing so, a distinction regarding the proprietary institution was introduced, highlighting the different relationship between property and the individual, with some goods grouped within the classical dominical scheme and others more intensely linked to a general or public interest, for example, land meant for socially relevant production. In second place – this was a real novelty compared to the previous reflections of the '22 and '23 years – the differentiated regulation of property made it possible to grasp a conceptual distinction to be made between the purely static profile of property linked to productive assets and the dynamic profile of exploitation; it is intended to include subjects other than the bare owner, such as that concerning the mere user of the thing.[28] According to the lawyers from Mantua, the progressive functionalisation of property found its full expression in the introduction of limits on the owner's powers, whose sovereignty over the property, once untouchable and absolute, was now reformulated in the service of the collective interest. In this new perspective, it was not unreasonable to speak of "legal figures" such as abuse or misuse of power concerning the proprietary paradigm.

26 Grossi, 2008, pp. 19–45; Grossi, 2013, pp. 377–433.
27 Iannarelli, 2018, pp. 12–14.
28 Ibid., p. 15.

After the presentation by Finzi, it was up to Salvatore Pugliatti to take the floor during the conference, offering a profound and articulate reflection on the institution of property.

While the former had placed assets at the centre of his analysis, considering them the cornerstone of a new perspective of ownership, the civilist from Messina, anchored to the traditional approach, privileged the subjective dimension of the law under consideration by emphasising the superiority of the individual element over the objective element of things.

This divergence was inevitably reflected also in the question of the "*proprietà funzione*" (*property function*). Due to the owner's positive obligations, the legislation on land reclamation that raised the question of the social function of property provided again a tangible basis for comparison. According to Pugliatti's methodological approach, Finzi's thesis,which interprets this legislation as the "*tendency of the legislator to carry the social purpose of property into the content of the law*", turned out, in his opinion, to be merely descriptive, and, above all, it would be unnecessary to apply more rigorous hermeneutic criteria. As an alternative, he suggested a reading of the discipline of the reclamation divided into two levels: the first relating to the typical legal relationship of property, where the owner was considered to have the absolute right but always within the limits set by the legal system; the second, more complex, concerning the personal relationship, completely foreign to the right of ownership, which interacted between a private subject, as owner of a certain thing, and the public administration.[29] On the contrary, this did not compromise the unitary character of the proprietary institution. Pugliatti argued that the system should be conceived as a complex entity, similar to a system of concentric circles. Firstly, the largest circle, relating to consumer goods, would guarantee the owner an absolute and unlimited right. Secondly, as the world moved on to the smaller circles concerning goods of collective interest, the limitations became more and more evident in a careful balance between individual rights and social needs.

29 Ibid., p. 17.

Beyond the different theoretical and methodological approaches, the reflections of the two lawyers converged on a crucial point: the definitive overcoming of the nineteenth-century individualistic conception of ownership[30] and the simultaneous emergence of a different type orientated towards collective and social interests.

Having thus briefly summarised the main developments of the Italian legal debate on agricultural property and the Italian family in the

30 The Italian Civil Code of 1865, inspired by the Napoleonic codification and in line with the pre-unification codes, assigned a role of absolute centrality to property – so much so that it devoted two of the three books of which it was composed of – what is surprising, however, is that there is no specific regulation of agricultural property and how goods are moved. This absence is even more significant, especially if one considers the value, however appreciable, that agriculture held in the social and economic structure of the time. Furthermore, this regulatory omission was not remedied even by the 1882 Commercial Code, Article 5 of which merely excluded, in a pleonastic manner, the commercial nature of the alienation of agricultural products by farmers or landowners. In the final analysis, the reference to the standard, far from solving the problem, paradoxically generated two others: the first was that by establishing the non-commerciality of the agricultural activity without clearly specifying – except for the sale of the products of the fund – which operations fell under this exclusion, the interpreter was forced to redraw in the absence of precise regulatory coordinates the boundaries of commercial matter. From here the second was born. For one part of the doctrine, this meant, in fact, bringing agricultural activity back to the traditional patterns of ownership, and in particular to those of "real estate by destination" provided for by Art. 413 of the Civil Code of 1865. Thus, assets such as livestock, tools and stocks necessary for agricultural operation were considered an integral part of the estate and destined exclusively for enjoyment, without adequately taking into account complementary activities, such as livestock breeding or the transformation of agricultural products (e.g. grapes into wine, olives into oil, and milk into cheese), which, although were not directly linked to the cultivation of the land, constituted a fundamental part of it. In the end, the thesis most widely accepted by contemporary doctrine was based on the so-called criterion of ancillary nature, in the application of which the processing and sale of agricultural products fell under civil law, except where such operations had an autonomous economic purpose separate from the cultivation itself and did not possess an instrumental character concerning the cultivation of the land. On the other hand, it was excluded; therefore, the reference to Art. 5 c.co. – whenever economic activities are governed by a purpose different from that pursued through the cultivation of the fund. On this subject, see Bione, 1978, pp. 449–454.

mid-twentieth century, it remains to be seen to what extent these ideas have found a place in the Civil Code of 1942.

3. AGRICULTURAL PROPERTY AND THE FAMILY BUSINESS IN THE CIVIL CODE OF 1942: THE CONSOLIDATION OF A NEW OWNERSHIP PARADIGM

The first phase (1924–1939) of the preparatory work for the Civil Code of 1942 was marked by a rather slow pace, which had struggled to translate into concrete results.[31] Indeed, progress proceeded in a piecemeal way, at least until September 1930, when the project of the First Book, "*Delle persone e della Famiglia*" (*Of the People and the Family*), was finally completed. This achievement marks a crucial moment, paving the way for new milestones. Following some "*stormy discussions*" before the Parliamentary Commission tasked with reviewing it[32] and incorporating the changes imposed by the racial legislation were adopted,[33] it was finally approved by Royal Decree No. 1852 of the 12th of December 1938, which went into effect on the 1st of July 1939.

In the interim, in 1936, the drafting of the Third Book, "*Successioni e Donazioni*" (*Successions and Donations*), had been finalised. It explicitly exhibited the intention to "*protect and strengthen the family organism*", with particular attention to the rights of heirs, the importance of

31 In fact, as recalled in retrospect by Vassalli himself, as early as June 1918, the "*Commissione per il dopoguerra*" *(Commission for the post-war period),* appointed by legislative decree no. 1519 of the 16th of September 1917, had already begun the first studies of reform on the Civil Code of 1865 in order to make technical amendments. The European Commission had also been involved in the work of the International Criminal Court and, in particular, in the field of personal and family law, which would have been used, to varying degrees, by the subsequent Commissions; however, the growing political instability during the *Biennio Rosso* (*Red Two-Year Period)* had made it impossible to reach concrete solutions. See Rondinone, 2003, pp. 17–19.

32 Ibid., pp. 119–127.

33 Ibid., pp. 153–162.

inventory, and the succession of spouses and legitimate children, all intended to protect the so-called family patrimony.[34]

In the following year, a further step was taken with the drafting of the Second Book entitled "*Delle cose e dei diritti reali*" *(Of Things and Real Rights).*

Well, was there any news on the ownership? Indeed, more than expected.

In presenting the report, Mariano D'Amelio, chairman of the Commission responsible for drafting the Second Book, already pointed out the main differences compared to the regime contained in the 1965 Code. In the opening, he stated:

> *The Royal Commission considered that, in accordance with the provisions of the Labour Charter, it could not and should not disregard the function of private property itself and emphasised this character both in defining it and in regulating it, in the application of the Fascist principle, that property is a right, but it also implies the duty to use it in such a way that the exercise and enjoyment of it satisfies individual needs without causing harm and, indeed, favouring the interests of production, which are those of the Nation.*[35]

This was followed by the explanatory report of the draft, which reaffirmed the Neapolitan lawyer's assertion that general and production interests prevailed over individual interests, while also highlighting the inclusion of a specific chapter dedicated to family communion.[36]

Once the examination was completed, the draft was sent, as usual, to the technical bodies for the necessary observations, which were then collected in three thick volumes for a total of two thousand three hundred and ninety-six pages. In essence, it is an operation of considerable importance, further confirming the importance and complexity of the subject matter. It is not surprising, therefore, that Filippo Vassalli, reflecting on those events later on, wrote a letter in November

34 Ibid., pp. 62–63.
35 Ibid., p. 144.
36 Ibid., p. 145.

1940, addressed to the then Keeper of the Seals, Dino Grandi, emphasising that:

> *The observations were all of greater importance for this book than for the others, both because of the importance of the institutes perceived by a wider circle of interested parties and because of the different degree of elaboration achieved by the project concerned, some parts of which had been fully examined by the Royal Commission, while others represented little more than the formulation of personal proposals by the rapporteurs.*[37]

Between 1938 and 1939, along with the observations of the "official bodies", additional reflections from various lawyers and organisations were included, particularly the *Confederazione Fascista dei Lavoratori dell'Agricoltura (Fascist Confederation of Agricultural Workers),* which in 1939 published the volume "*La concezione fascista della proprietà private*" (*The Fascist Conception of Private Property).* In this paper, the relationships between the agricultural business and land ownership were examined in depth, focusing more and more on the conceptual autonomy of the agricultural business and its intrinsic link with the land itself.[38]

The debate among agrarians had been centred on these ideas for a long time, as they had already been addressed at the "*Secondo Convegno Nazionale di Diritto Agrario*" *(Second National Conference on Agricultural Law*) in 1938.[39] Examining the literature of the time, it is clear not only that a more dynamic view of land ownership is gradually consolidated but also the obvious inability of the legal language at that time to provide adequate responses to the emerging needs and ongoing changes.

Among the misunderstandings of terminology that had to be urgently resolved and, at the same time, which had to be appealed while waiting for legislative intervention, stood out the difficulties related to the definition of concepts such as "funds", "enterprise", and "rural fund".

Although, for some authors, the former was destined to take an atypical dimension in order to include activities not necessarily connected

37 Ibid., p. 147.
38 Ibid., p. 175.
39 Ibid., p. 177.

with the cultivation of the land. For others, on the other hand, it was identified as business in both its subjective and objective aspects.[40]

Upon a closer inspection, the year 1939 is also notable for another reason, namely the appointment of Grandi as "The Keeper of the Seal", under whose direction the approval of the Book dedicated to the property was finally achieved with the Royal Decree No. 15 of the 30th of January 1941.

Having thus briefly outlined some of the salient stages of the approval process of the Civil Code of 1942, let us now examine its contents, with particular reference to property in general.

The rupture with the past was already apparent from the general provisions (art. 832-839), which established that the owner retained the full and exclusive right to enjoy and dispose of the property, but always in compliance with the limits and obligations defined by the legal system (art. 832). Furthermore, the legal system introduced the concept of expropriation for the benefit of the public (art. 834 sec. 1).

And what about agricultural property? Of course, even there, it was possible to see further aspects worthy of note.

In relation to the topic of expropriations, Art. 838 of the legislation stipulated that, for specific categories of goods deemed relevant to the context of "*national production*", such a transaction could be carried out if the owner failed to maintain them or did not ensure appropriate cultivation or management practices, thus negatively impacting the production process itself (art. 838.1). Articles 846-847 then stipulated that in transactions involving the transfer of ownership, divisions, assignments "*for any reason whatsoever*" or the constitution of real rights concerning the property of land intended or suitable for cultivation, the owner was forbidden to proceed with fractionations that did not respect the "*minimum cultivation unit*".

What specifically made up this limit? And what did this mean for the owner of a right of ownership? The second paragraph defined it as the sufficient land area for a family's agricultural work or, in the case of uncultivated land, for example, that is already part of an agricultural holding, the extent required to ensure adequate cultivation in

40 Iannarelli, 1999, pp. 668–669.

accordance with the principles of good agricultural practice (art. 846 par. II).

This was followed by Article 847, which mandated the administrative authority, after consulting with the professional associations, the determine the minimum cultivation units area by area, with the production system and the local demographic situation serving as guidelines.

With Article 850, it was finally established that, at the request of the interested parties or on the initiative of the same authority, consortia could be set up for the purpose of land recomposition, with a view to greater exploitation of the land, the possibility of proceeding with expropriations, compulsory transfers, rectifications, and finally, rounding up of land (art. 851 par. II).

The considerations so far made assume decisive importance not only in order to fully understand some of the challenges that the civil codification of 1942 had to face but also to justify the circumstance that the introduction of unpublished elements on the subject of agricultural property and family holdings had found its main place in the final version of the Third Book of the new Civil Code, the one devoted to real rights.

Indeed, it was in this very area that, in the course of the preparatory work, a considerable effort was made to regulate by law the tacit family communion, a pivotal institution that had always been the historical and legal foundation of the family business.

In this context, in the preliminary draft of the book dedicated to real rights (art. 330-340), Maroi drafted an outline that sought to generalise the institution in question to the exercise of extra non-agricultural activities, which, at the same time, was regulated in a comprehensive manner.

However, the proposal quickly ran aground due to the numerous objections raised by the bodies responsible for formulating their personal opinions, especially those put forward by some Parliamentary Commission members, who reiterated the greater suitability of local customs to regulate family business.[41]

41 Flore, 1961, pp. 288–289.

In the drafts that followed, the rules dedicated to tacit communion were even reduced to a single article, namely 2140 of the Civil Code, which stated, with reference only to agricultural activities: "*The family communions in the exercise of agriculture are regulated by customs*".

In the long run, a truly modest result for such a phenomenon as lively and present in the Italian social fabric as family businesses, especially if one considers that a decisive change of course would have had to wait for the 1975 reform of family law, which, by introducing it into the Civil Code provision 230 bis, entitled "*family business*", would have guaranteed adequate legal recognition of the work carried out in the context of the family community.

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HISTORICAL BACKGROUND TO THE CURRENT REGULATION OF FIDUCIARY SUBSTITUTION IN ROMANIA

KINGA ILYÉS

ABSTRACT

The legal institution of fiduciary substitution has undergone significant transformations in Romanian law, reflecting changes in civil codes and legislative priorities. Initially regulated under the Calimach Code (1817-1865), fiduciary substitution was omitted from the Civil Code of 1864 and remained absent for over a century. With the enactment of the current Civil Code in 2011, this legal mechanism was reintroduced in a modernised form, addressing contemporary legal needs. This article examines the historical evolution of fiduciary substitution in Romania, analysing its origins in Roman law, its status under past civil codes, and its present-day regulation – highlighting the objectives of fiduciary substitution, including facilitating transgenerational property transmission and preserving family assets while maintaining core legal principles.

Keywords: *fiduciary substitution, family law, succession planning, transgenerational transfer.*

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1. INTRODUCTION

The legal concept of fiduciary substitution has a complex history in Romanian law, evolving through various civil codes and reflecting shifts in societal and legal priorities. Fiduciary substitution was initially regulated under the provisions of the Calimach Code (1817-1865).[1] However, this legal institution was not included in the Civil Code of 1864,[2] which remained in force until 2011. With the introduction of the current Civil Code of Romania,[3] fiduciary substitution has been reintroduced and regulated in a completely new form, reflecting modern legal principles and contemporary needs. This reestablishment marks a significant evolution in Romanian inheritance law, reinstating a mechanism that had been dormant for over a century. For centuries, the Romanian legislators have lacked a lucid perspective for developing the legal mechanism of fiduciary substitution. The objectives of fiduciary substitution were the contribution to smooth transgenerational property transmission, the protection of relationships between family members, and keeping certain assets within the family. The proposed aims had to be without prejudice to the general principles of law, such as establishing by law an order of succession, ensuring full freedom of disposal by will, prohibiting covenants on future inheritance, ensuring flexible prerogatives for holders of rights subject to conditions, etc. The aim of this article is to examine the historical background of the regulation of fiduciary substitution and provide a comprehensive analysis of the evolution of this legal institution in Romania. In the first part of the article, I will investigate the origins of this legal institution in Roman law, followed by an analysis of the status of fiduciary substitution as outlined in the

1 The Calimach Code was a civil code of Moldavia, drawn up by Christian Flechtenmacher and Anania Cuzanos, with the help of Andronache Donici, Damaschin Bojincă and other jurists, on the initiative of the ruler Scarlat Callimachi (Calimach), who promulgated it in 1817.

2 The Civil Code of 1864, or Cuza's Civil Code, or Codicele Civil of 1864, was the Civil Code in force in the United Romanian Principalities and later Romania from December 1, 1865, until October 1, 2011.

3 Civil Code of Romania. Published in the Official Gazette No. 505 of 15 July 2011.

Calimach Code and the Civil Code of 1864. Then I will present the regulation of fiduciary substitution under the current Romanian Civil Code.

2. HISTORICAL BACKGROUND

Fiduciary substitution was permitted by the Calimach Code[4] but was prohibited by the Civil Code of 1864. Fiduciary substitution was viewed as an outdated institution with no place at the dawn of modernity. By its very nature, it proposed measures that were sometimes too conservative in the context of the new social realities. However, almost a century and a half later, the legislator's opinion has changed with regard to this institution, regulating it in the context of the current Civil Code. After almost a century and a half, this institution has been placed under review, and with the entry into force of the new Civil Code, not only has it been removed from the sphere of prohibited institutions, but it has also been given an appropriate regulatory framework. However, in order to better see how this completely new situation came about, we need to retrace the path that this institution has followed, from the Romans, through the Romanian and European Middle Ages, to the present day.

Fiduciary substitution is a legal institution with roots in Roman law. During the Roman Classical Age, the restrictive inheritance conditions led testators to customarily leave important legacies to the emperor to ensure that the will of a person would not be annulled. This practice leveraged the emperor's presence in the will and his authority to validate and protect the testator's final wishes. Additionally, this practice was exploited by the forgers to shield their illegal actions and prevent forged wills from scrutiny. They would leave important legacies to the emperor or to persons of high standing so that the people in authority

4 Chap. X, Art. 770 Calimach Code: "*După întîia orînduire de moştenitori, poate testatorul să facă şi subrînduire (substituţie), adecă a doua, a treia, a patra ş.c.l. orînduire de moştenitori. Cel întîi scris moştenitoriu se numeşte rînduit şi moşteneşte, trăind ori voind sau nefăcîndu-se nevrednic moştenirei; iar cel al doilea se numeşte subrînduit şi moşteneşte, intîmplîndu-se a nu moşteni rînduitul, murind sau lepădîndu-se de moştenire ori făcîndu- se nevrednic, şi aceasta se numeşte obicinuita subrînduire.*"

did not dare to attack the wills. The development of trade relations was also an impulse for the emergence of the new legal instrument. Since the dominant class of merchants relocated to distant countries, they were therefore unable to complete the forms required for the will. It was against this backdrop that the fideicommissum was created, an institution that allowed for the disposal of property after death on much more favourable terms than a will.[5] The *fideicommissum* (a trust-like arrangement) was an indirect and precautionary way of bequeathing. A third person (*fiduciarius*), as the term itself indicates (usually a person from the group of friends, who was in turn gratified by testamentary legacies or by being established as testamentary successor), received from the disponor a disposition of inheritance (*hereditas fideicomissa*) relating to his entire estate, a part of it or only to a specific asset which he was to place at the disposal of a beneficiary (*fideicomissarius*). The trustee did not have a property right regarding the asset which he was obliged to return but was merely a trustee and depositary of the related estate, having no personal obligation in respect of the property administered.[6] The absence of formal and substantive restrictions – allowing it to be established orally and permitting any beneficiary of the estate, whether an heir, legatee, trustee, or intestate heir, to serve as a fiduciary – contributed to the rapid expansion of fideicommissum.

Since it was used as a means of circumventing the law, trusts suffered numerous restrictions along the way. Initially it could operate even between incapable persons; then it consisted in the gratification of a person capable of receiving, with the task of transmitting the property to the incapable person, who was the true recipient. Later, it was recognised that only those capable of receiving by will could claim the execution of fideicommissum and that only those capable of testament could make such a donation. Jurisprudence has also applied certain substantive rules from the field of legacies to the institution of fideicommissum, as well as the flexibility of the form of fideicommissum to legacies. Thus, what was lacking in the nature of legacies was supplemented by what the nature of trusts offered and what the nature of

5 Tomulescu, 1958, pp. 446–449.

6 Alexandresco, 1900, p. 529.

legacies had in addition to the rules on fideicommissum; finally, under Justinian, they were merged and assimilated.[7]

Initially, fideicommissum was not binding, allowing the entrusted individual to betray the disponor's trust by refusing to transfer the property to the rightful beneficiary. Fideicommissum was not recognised as a source of obligations, being based solely on fides, a relationship of trust.[8] In other words, it was not governed by civil law but only by the will of the testator and therefore, in principle, without any action. However, during the reign of the emperor Augustus, the institution of fideicommissum became *extra ordinem* legally binding.[9] The practical utility of fideicommissum lies in its ability to exist independently of whether the inheritance was distributed under a will or, in the absence of a will, under intestate inheritance. Additionally, unlike legacies, a fiduciary – initially required to be an heir – could also be an individual with no prior connection to the estate. The evolution of fideicommissum has led to the classification of the institution into family fideicommissum and hereditary fideicommissum. As regards the first category, it referred to the transfer of assets viewed in *ut singuli*. Hereditary fideicommissum, on the other hand, was for the transmission of a share of the testator's estate or even for the transmission of the entire estate.

It should be noted that, during the reign of Emperor Justinian, they were reformed, with private trusts being assimilated to legacies. All persons who had *testamenti factio passive* (i.e. could receive a legatee or an inheritance) could be beneficiaries of a fideicommissum (*fideicommissa dari possunt his quibus legari potest*). In mediaeval French law, the family fideicommissum mechanism led to the emergence of a new institution known as fiduciary substitution (fideicommissum).[10] Alongside other legal constructs, such as the privilege of primogeniture, it played a key role in preserving assets within noble families, despite gradually

7 Hanga, 2009, p. 191.

8 Földi and Hamza, 1996, p. 659.

9 Ibid.

10 In Roman law, the fideicommissum was a precursor to fiduciary substitution. It was a legal mechanism allowing a testator to impose an obligation on an heir (fiduciary) to transfer property to a third party (substitute) after a certain event, such as the death of the fiduciary.

revealing its limitations. Over time, fiduciary substitution took shape, evolving in response to the historical and social dynamics that influenced its development for more than two millennia. Fiduciary substitution emerged as a response to the inflexibility of the legal formalism of the Roman Classical Age.[11] Modern Romanists recount the factors that brought *fideicommissum* into being. Thus, when a *pater familias* wished to donate, but the future beneficiary did not have the capacity to receive it, he entrusted (*fidei committo*) the property to an heir and asked him, in the future, to remit the property to the person who, for various reasons, could not receive it at that moment. Fideicommissum could be ordered without any formality: verbally or in writing (*codicillus*), or even tacitly (by a nod of the head). Through fideicommissum, a testator could create a will without formalities, even within the framework of legal succession. They could instruct a designated individual (fideicommissarius) to grant a specific benefit, either in writing or verbally, even without witnesses. This instruction was directed at the fiduciary, who could be the testamentary or legal heir or any other beneficiary of the estate. The fiduciary, in turn, was required to provide a benefit to another person concerning the inherited property or to grant freedom to a slave.[12]

2.1. THE FRENCH REVOLUTION OF 1789 AND THE PROHIBITION OF FIDUCIARY SUBSTITUTIONS

Fiduciary substitution had been practised in France since the 12th century but underwent reforms beginning in the 16th century. A notable consequence of the French Revolution of 1789 was the prohibition of fiduciary substitution. This decision was justified by the fact that, for centuries, the French nobility had used this mechanism to retain feudal estates and domains within their families, consolidating their social power.

On 14 November 1792, fiduciary substitutions were completely banned, and the ban had a retroactive effect, abolishing previously

11 Macovei, 2011, p. 224.

12 Földi and Hamza, 1996, p. 659.

stipulated substitutions. The French Code of 1804, the fruit of the victory of the rising bourgeoisie, prohibited fiduciary substitutions under sanction of nullity.[13] It must be recalled that during the Napoleonic Caesarism, as during the short period of the restoration of the monarchy in France, the need to consolidate the throne through the revival of a powerful aristocracy brought about, in one form or another, fiduciary substitutions that were temporarily revived. The Napoleonic Civil Code of 1804 permitted fiduciary substitution only in two specific and narrowly defined cases, aimed at safeguarding family interests. First, it was allowed for a single degree and strictly for a noble purpose or to preserve social status. For instance, a testator (*de cuius*) could instruct his son to pass on certain documents or valuables that attested to the noble origin of the family. Second, fiduciary substitution was permitted to protect grandchildren in cases where the testator identified prodigal tendencies in their parents. If a testator observed that their son was prone to squandering his inheritance, they could impose a restriction ensuring that assets would pass directly to the grandchildren, preventing the dissipation of family wealth. These provisions reflect the Code's careful balance between inheritance flexibility and the preservation of family stability.

Fiduciary substitution was a well-established institution in Romanian law, influenced by Byzantine legal traditions and codified in local legislation. It was specifically acknowledged in Moldova under the Calimach Code (Chapter X, Article 770) and in Wallachia under the Caragea Code. However, with the advent of modern civil legislation, this legal mechanism was formally abolished. The first modern civil law codification in Romania, the Civil Code of 1864, expressly prohibited fiduciary

13 Article 896 of the old French Civil Code provided that "*Substitutions are prohibited. Any provision by which a donee, heir or legatee is charged with the obligation to conserve and transmit to a third person is null and void even against the donee, heir or legatee.*" The attitude of the French legislator in 1804 towards this institution is fully illustrated by the words of Jean Bigot de Préameneu, one of the drafters of the Civil Code, who stated that "*in the families in which substitution ensured the preservation of the greatest wealth, each generation was stained by a shameful bankruptcy.*"

substitution under Article 803,[14] marking a significant departure from earlier legal traditions and aligning Romanian inheritance law with contemporary legal principles.

The restriction of fiduciary substitution was largely influenced by the French Civil Code, which served as a model for the Romanian Civil Code. The historical context of its adoption played a crucial role, as the legal reforms sought to promote the free circulation of property and prevent the long-term accumulation of wealth within certain families. By prohibiting this mechanism, legislators aimed to align inheritance laws with modern principles of equality and economic flexibility. Fiduciary substitution developed particularly widely in feudal society. The primary source of wealth in this system was the land, or estate, which the owner wanted to pass on to his descendants undivided from generation to generation. Fiduciary substitution emerged as a significant obstacle, primarily due to its restrictive effects on property ownership and economic development. One major issue was the immobilisation of landed property across generations, as it prevented alienation, directly conflicting with the principle of the free movement of goods. Additionally, since beneficiaries were required to transfer the property upon their death, they had no incentive to invest in its improvement. Instead, this often led to the excessive exploitation of the land, as owners sought to extract maximum short-term benefits without regard for long-term sustainability.

The institution of fiduciary substitution was therefore a form of landownership which hindered the growth of agricultural production at a time when, on the contrary, the birth of modern industry called for an increase in production. The prohibition of fiduciary substitution was primarily driven by its conflict with fundamental legal principles, particularly the free movement of goods. A mechanism that restricted the alienation of assets (*pactum de non alienando*) was seen as a direct

14 Article 803 of the 1864 Civil Code: "*Substitutions or fideicomissums are forbidden; any disposition by which the donee, the heir or legatee is charged to preserve and remit to a third person shall be null and void, even as regards the donee, the heir or legatee.*" ("*Substitutiunile sau fidei'comisele sînt proibite; ori ce dispositiune prin cari donatoariulu, eredele instituitu sau legatariulu, va fi insarcinatu de a conserva şi a remite la o a treia persona, va fi nulă, chiar în privirea donatariului, a eredelui numitu sau a legatarului.*").

violation of this principle. Although the old Civil Code eventually recognised the validity of inalienability clauses under certain conditions – namely, when justified by a serious and legitimate interest – fiduciary substitution was deemed to lack such justification and was expressly prohibited by law. Additionally, the establishment of a predetermined order of succession (*ordo successivus*) by a testator seeking to keep property within the family was viewed as an excessive restriction on individual liberty. This further reinforced the argument for its prohibition. By the early 20th century, Romanian courts, influenced by trends in French case law, ruled that fiduciary substitutions included in testaments under previous Romanian laws were invalid, as they could not be justified under the theory of acquired rights.

Consequently, starting from 1864, fiduciary substitution was considered a feudal and, as such, an anachronistic institution. However, it was established by the courts that certain legal mechanisms did not constitute genuine fiduciary substitutions and could therefore not be prohibited, even if their content was "closely related" to the content of the institution itself (moral, not legal, obligation of the institution to pass on the property received to the beneficiary).

2.2. THE FIRST MODERN LAWS AND THE NEED TO REGULATE FIDUCIARY SUBSTITUTION

In the early modern era, fiduciary substitution played a significant role in maintaining social classes, especially among the Romanian nobility. Thus, this institution appeared more as a necessity in Romania. At the beginning of the modern era, fiduciary substitution operated through two legal figures specific to the historical context in which they were regulated: substitution of heirs and the fideicommissum.

Substitution of heirs was regulated for the first time in Moldova in 1817, in the legislation of the ruler Scarlat Callimachi. The Calimach Code included provisions on testamentary matters such as inheritance upon death, the forms of wills, their revocation, and nullity. Additionally, it addressed fiduciary substitution in Articles 770-784. Article 770 stated that

after the first appointment of heirs, the testator may also make a sub-appointment (substitution), that is to say, a second, third, fourth, etc., appointment of heirs. The first written heir is called the ordained heir and inherits by living or wishing to or by not becoming unworthy of inheriting, and the second is called the subordained heir and inherits by dying or renouncing the inheritance or by becoming unworthy of inheriting, and this is called the ordinary subordainment.[15]

The Caragea legislature recognised the validity of fiduciary substitution, although it did not contain any provision concerning fiduciary substitutions.

The Callimach Code stipulated that

the testator may oblige his heir to give either the whole inheritance or a part of it to the sub-inheritor and the first sub-inheritor to give it again to the second sub-inheritor, or at his death or for other determined events, that is, if he does not marry or if he chooses the monastic life or if he dies without children and the like.[16]

Thus, the testator could pass on all or only part of the estate with the help of the subordination. The heir established during his lifetime had the rights of a trustee of the property to be passed on, called the "grantee of the estate", until the property became the property of the

15 "*După întîia orînduire de moştenitori, poate testatorul să facă şi subrînduire (substituţie), adecă a doua, a treia, a patra ş.c.l. orînduire de moştenitori. Cel întîi scris moştenitoriu se numeşte rînduit şi moşteneşte, trăind ori voind sau nefăcîndu-se nevrednic moştenirei; iar cel al doilea se numeşte subrînduit şi moşteneşte, intîmplîndu-se a nu moşteni rînduitul, murind sau lepădîndu-se de moştenire ori făcîndu- se nevrednic, şi aceasta se numeşte obicinuita subrînduire.*"

16 Art. 774 of the Calimach Code: "*The testator may oblige the heir to give all or part of the inheritance to the second heir, and the first heir to give it again to the second heir, either at his death or for other determined events, that is, if he will not marry or if he will choose the monastic life or if he dies childless and the like.*" ("*Testatorul poate îndatori pe rînduitul său moştenitoriu, ca să deae sau toată moştenirea sau o parte la subrînduitul moştenitoriu şi cel întîi subrînduit să o deae iarăşi la al doilea subrînduit, ori la moartea sa sau pentru alte hotărîte întîmplări, adică dacă el nu se va căsători sau dacă va alege viaţa monahicească ori dacă va muri fără copii și alte asemine.*").

beneficiary (subordinate), who in turn was also a trustee of the property until the next suborder acquired the property. Sub-assignment ended either when none of the designated heirs remained alive or when the purpose for which it was established was no longer applicable.

In addition to this legal figure of sub-ordainment, the Calimach Code regulated, only in the matter of estates, the fideicommissum, stipulating that

> *fideicomis is the ordainment, by which the testator, leaving his family an estate over and above his lawful share, commands that he shall never alienate it or entrusts his heir to leave to another the whole or part of that estate.*[17]

It should be noted that the rules governing estates are much more drastic, stipulating a permanent inalienability of the specific individual asset, without providing an express indication of the beneficiary. In this specific "trust" law, a trust designated to a family member only applies to the testator's "heirs", meaning his descendants. If there are no descendants, the trust will be allocated to other family members. If the trust was left "unclaimed" to the family, it passed "by common consent to all".

The trust concerning estates remained in effect until the last heir of the family had no children and no prospect of having any. At that point, the justification for preserving significant assets within the family was no longer valid. In this context, the legislators of the old Romanian legislation understood the role of certain assets kept for centuries in the family and regulated effective levers through which they could be preserved for the lineal descendants. Moreover, the existence of certain assets (in most cases, large land estates) in the patrimony of certain individuals indicated the social class to which they belonged.

17 Art. 781 of the Calimach Code: "*Fideicomis is the ordainment by which the testator, leaving an estate to his family (§ 71) over and above the lawful portion, commands never to alienate it; or he binds his heir to leave to another the whole or part of that estate.*" ("*Fideicomis este orînduirea, prin carn testatorul, lăsînd familiei sale (§ 71) o moşie peste partea legiuită, porunceşte, ca să nu o înstrăineze niciodată; sau îndatoreşte pe moştenitoriul său, ca să lase altuia moştenirea aceia întreagă sau o parte dintr-însa.*").

2.3. FIDUCIARY SUBSTITUTION UNDER THE OLD CIVIL CODE

The Civil Code (old Civil Code), which went into effect on 1 December 1865[18] was Alexandru Ioan Cuza's probably greatest achievement of the legislative reform. Inspired by the modern legislation of European countries such as France, Belgium and Italy, the Romanian Civil Code to some extent retained the imprint of the old Romanian law. However, it seems that the regulation of fiduciary substitution has not considered the legislation of European states nor the historical tradition of the state. Article 803 of the old Civil Code stated that fiduciary substitutions are forbidden; any disposition by which the donee, the heir or the legatee is charged to preserve and remit to a third person shall be null and void, even as regards the donee, the heir or the legatee. The person who makes the donation, as we have seen, can dispose of both by *inter vivos* (gift) and *mortis causa* (bequeath). What characterised testamentary fiduciary substitution is therefore a manifestation of a will which involves a double disposition of the same object, implying that the object of the legacy is not transferable to the estate of the legatee during his lifetime. The prohibition of fiduciary substitution was based not only on political (suppression of nobiliary power) and legal (inability of future persons to receive free of charge) considerations but also, and above all, on economic considerations relating to the promotion of credit and the free movement of goods, which are incompatible with the inalienability implied by fiduciary substitution. To identify a legally prohibited fiduciary substitution, it was necessary to establish the presence of two successive gifts, an obligation for the initial grantee (fiduciary) to preserve and transmit the legacy to the second grantee (substitute), and the postponement of this transmission until the death of the institute.[19]

I believe that, under the old Civil Code, even though fiduciary substitution was prohibited, there were many situations that, even if they did not enjoy legal protection, kept this institution alive.

18 Romanian Civil Code of 1864. Published in the Official Gazette No. 271 of 4 December 1864.

19 Chirică, 2003, p. 61.

First, a moral obligation was not prohibited by law, so that, broadly speaking, substitutions operated based on the faith that the beneficiary had in the one he was instituting. Thus, where goods were of considerable value and had been handed down from generation to generation, legal texts could not break a tradition that had been perpetuated for centuries. The transfer of property based on faith and devoid of legal protection has been termed in the doctrine as fideicommissary substitution without obligation. Its validity was, however, controversial, but most of the doctrine considered that this mechanism could not fall under the prohibition stipulated for fiduciary substitutions, because the grantee could freely dispose of the asset, being limited only by a moral obligation. However, sometimes, the moral obligation was much stronger than the legal one, and those who received the assets passed them on to the family.

A second mechanism was the bequest of remainder (*legacy de residuo*), where the testator leaves certain assets to a beneficiary who possesses the right to dispose of them during their lifetime, either freely or for compensation. Upon the beneficiary's death, any remaining assets are assigned to a second person, also designated by the testator.

A third mechanism is the double conditional bequest, a testamentary transfer in which the testator granted an asset to two persons under the identical condition – resolutory for the first legatee and suspensive for the second. This arrangement was valid when the testator specified that the property would pass to one individual, with the condition that if they died without heirs, the property would then transfer to another. In this case, the individual's death without heirs acted as a resolutory condition for the first beneficiary and a suspensive condition for the second.

Such mechanisms have been used to circumvent the prohibition of fiduciary substitutions.

3. REVIVAL OF FIDUCIARY SUBSTITUTION

When the current Civil Code was being drafted, one of the legislator's major concerns was to regulate the matter of fiduciary substitutions appropriately. Among several working variants, finally the one adopted by the French legislator when amending the Napoleon Civil Code prevailed. The provisions of the Civil Code of 1864 had long become outdated, as reflected in the efforts of both legal science and case law to reinterpret unclear will provisions in a way that avoided classifying them as fiduciary substitutions. Furthermore, mechanisms such as moral obligation, bequest of remainder, and double conditional bequest were validated to narrow the scope of fiduciary substitution. With the adoption of the current Civil Code, the legislator acknowledged the obsolescence of the previous legislation, which had completely prohibited fiduciary substitution.[20] The need to regulate fiduciary substitution was seen when the current Civil Code entered into force, from the perspective of protecting family law relationships, more specifically, protecting the family of the fiduciary. The new rules balance the need to protect the family of the disponor against other important values such as the reserved portion of the estate or the free movement of assets. The legislator's "compromise" on this institution outlines its new architecture, which is designed to offset the disadvantages that underpinned the prohibition under the old Civil Code.

The current Civil Code defines fiduciary substitution as an act of disposition by which a person, referred to as an "institute", is entrusted with the administration of the property or items in property constituting the object of the liberality and transfers it to a third party, referred

20 Deak and Popescu, 2014, pp. 227–228.

to as a "substitute", designated by the disponor.[21] Further on, art. 994 of the Civil Code states that a gratuitous act may be encumbered with a charge consisting in the obligation of the institute, donee or legatee to administer the property forming the object of the liberality and to pass it on, upon their death, to the substitute appointed by the disponor. Unlike the old provisions, under which the fiduciary was obliged to preserve the assets received, the current Civil Code requires the fiduciary to administer the assets with which he has been gratified.[22] The practical importance of this legal institution is given by the possibility of transferring rights to a person (the substitute) who is not yet able to make effective use of the property which is the subject of the donation/will at the time of the conclusion of the contract or at the time when it produces its effects (e.g. opening of the inheritance). A fiduciary substitution may also be used where the substitute cannot yet dispose of the subject-matter of the donation/will, even if he would be capable of receiving it (e.g. in the case when the beneficiary is a minor), or where it is not desirable for him to receive the property which is the subject-matter of the stipulation until a certain moment. In such situations, fiduciary substitution ensures that the condition and value of the donated property are preserved until the substitute is entitled to receive it or the transfer becomes appropriate.[23]

Fiduciary substitution entails, thus, a dual liberality with the same object, where the fiduciary is the initial beneficiary followed by the substitute.[24] The two beneficiaries of the substitution are the fiduciary and the substitute. It has to be highlighted that there is a significant difference between the two dispositions: the rights of the fiduciary are

21 Art. 993 of the Romanian Civil Code: "*An act of disposition by which a person, referred to as an institute, is entrusted with the administration of the property or items in property constituting the object of the liberality and transfers it to a third party, referred to as a substitute, designated by the disponor, shall have effect only if permitted by law.*" ("*Dispoziţia prin care o persoană, denumită instituit, este însărcinată să administreze bunul sau bunurile care constituie obiectul liberalităţii şi să le transmită unui terţ, denumit substituit, desemnat de dispunător, nu produce efecte decât în cazul în care este permisă de lege.*").

22 Soeaţă, 2013, p. 81.

23 Veress and Székely, 2020, p. 87.

24 Ibid.

encumbered by a duty – the administration of the property and its delivery to the substitute on the death of the fiduciary – whereas the rights of the substitute are subject to the suspensive condition of his survival of the fiduciary. In addition, the performance of the two dispositions is separated by a period of time, the first – in favour of the fiduciary – being executed on the death of the fiduciary (if the substitution is contained in a legacy) or on the conclusion of the contract of donation (if the substitution is made by donation), and the second, "in favour of the substitute", being executed on the death of the fiduciary. This legal tool aims to ensure that the property is preserved and eventually passed to the final beneficiary, maintaining the disponor's intent beyond the lifetime of the fiduciary. It introduces a mechanism for orderly and controlled succession of property, thereby protecting the interests of the ultimate beneficiary.[25] The non-performance of the task by the fiduciary, consisting in the obligation to transmit the assets received from the disponor to the substitute, will entail the revocation of the donation

25 Article 994 paragraph (1) of the Romanian Civil Code: "*A liberality may be encumbered with a charge consisting in the obligation of the institute, donee or legatee to administer the property forming the object of the liberality and to pass it on, upon their death, to the substitute appointed by the disponor.*"("*O liberalitate poate fi grevată de o sarcină care constă în obligaţia instituitului, donatar sau legatar, de a administra bunurile care constituie obiectul liberalităţii şi de a le transmite, la decesul său, substituitului desemnat de dispunător.*").

or of the legacy.[26] The incapacity to dispose is assessed concerning the disponor, ensuring that the person creating the fiduciary substitution has the legal capacity to do so. Similarly, the incapacity to receive is evaluated concerning the fiduciary and the substitute, ensuring that both are legally capable of accepting and managing the property. This provision ensures that all parties are legally qualified, thus maintaining the transaction's validity and protecting the interests of all parties.[27]

26 Arts.1.027 and 1.069 of the Romanian Civil Code: "*Actions in Case of Non-Execution of a Charge - (1) If a donee fails to execute the charge undertaken as such, a donor or their successors in title may request either the execution of the obligation or the revocation of the donation. (2) Where the charge has been stipulated in favour of a third party, such third party may only request the execution of the charge. (3) The right to bring an action for the execution of a charge or for the revocation of the donation shall be time-barred within 3 years as of the date on which the charge was to be executed*"; "*Judicial Revocation - (1) Judicial revocation of the bequest may be requested in the event of failure to execute, without justification, the charge established by the testator. Fortuitous non-execution of the charge may lead to revocation only if, according to the testator's will, the effectiveness of the bequest is conditional upon the execution of the charge. (2) Judicial revocation of the bequest may also be requested by reason of ingratitude in the following cases: a) if the legatee has made an attempt on the life of the testator or of a person close to them or, knowing that others intend to make such an attempt, has failed to notify the testator; b) if the legatee is found guilty of criminal offences, cruelty or serious insults against the testator or serious insults against the testator's memory.*" ("*Acţiunile în caz de neexecutare a sarcinii - (1) Dacă donatarul nu îndeplineşte sarcina la care s-a obligat, donatorul sau succesorii săi în drepturi pot cere fie executarea sarcinii, fie revocarea donaţiei. (2) În cazul în care sarcina a fost stipulată în favoarea unui terţ, acesta poate cere numai executarea sarcinii. (3) Dreptul la acţiunea prin care se solicită executarea sarcinii sau revocarea donaţiei se prescrie în termen de 3 ani de la data la care sarcina trebuia executată.*"; "*Revocarea judecătorească - (1) Revocarea judecătorească a legatului poate fi cerută în cazul neîndeplinirii, fără justificare, a sarcinii instituite de testator. Neîndeplinirea fortuită a sarcinii poate atrage revocarea numai dacă, potrivit voinţei testatorului, eficacitatea legatului este condiţionată de executarea sarcinii. (2) Revocarea judecătorească a legatului poate fi solicitată şi pentru ingratitudine în următoarele cazuri: a) dacă legatarul a atentat la viaţa testatorului, a unei persoane apropiate lui sau, ştiind că alţii intenţionează să atenteze, nu l-a înştiinţat; b) dacă legatarul se face vinovat de fapte penale, cruzimi sau injurii grave faţă de testator ori de injurii grave la adresa memoriei testatorului.*").

27 Article 994 paragraph (3) of the Romanian Civil Code: "*The incapacity to dispose shall be assessed in relation to the disponor, and the incapacity to receive in relation to the institute and the substitute.*" ("*Incapacităţile de a dispune se apreciază în raport cu dispunătorul, iar cele de a primi, în raport cu instituitul şi cu substituitul.*").

To address the primary criticism of fiduciary substitution, where a single individual could organise the transfer of property *mortis causa* for multiple deceased persons, the current legislator has implemented a solution in Article 996 of the Civil Code.[28] This provision stipulates that the rights of the substituted person are acquired directly from the disponor. As a result, both the fiduciary and the substitute are considered successors of the disponor, meaning that property transfer can only be ordered to the disponor, not to another individual. Furthermore, by prohibiting the substitute from being bound by the same obligations as the fiduciary, the legislation effectively bans gradual substitutions, which would otherwise allow one person to control the property transfer upon the death of another.

Any kind of asset – movable or immovable, tangible or intangible, fixed or determinable – that will be identified in the fiduciary's estate at the time of his death can generally be the object of the fiduciary substitution. These assets may be fungible but non-consumable since they will be subject to retransfer so that they cannot be consumed during the administration of the substitution. This further reinforces the essence of fiduciary substitution, which is to maintain the continuity of property within the family.[29] Fiduciary substitution shall have effect only in respect of assets which were the subject-matter of the donation and which, at the date of death of the beneficiary, are identifiable and are part of his estate. Where the gift is in respect of transferable securities, the charge shall also have effect in respect of the securities which replace them. Where the donation relates to rights which are subject to publicity formalities, the charge shall comply with the same formalities.

28 Article 996 of the Romanian Civil Code: "*Rights of the Substitute - (1) The rights of the substitute shall arise upon the death of the institute. (2) The substitute shall acquire the property which is the object of the liberality as a result of the will of the disponor. (3) The substitute may not, in turn, be subject to the obligation of administration and transfer of the property.*" ("*Drepturile substituitului (1) Drepturile substituitului se nasc la moartea instituitului. (2) Substituitul dobândeşte bunurile care constituie obiectul liberalităţii ca efect al voinţei dispunătorului. (3) Substituitul nu poate fi, la rândul său, supus obligaţiei de administrare şi de transmitere a bunurilor.*").

29 Popa, 2016, pp. 122–123.

In the case of immovable property, the charge shall be subject to notarial entry in the land register.[30]

Only a natural person can serve as the disponor or fiduciary, while both natural and legal persons are eligible to act as the substitute. This distinction is based on the fact that the core of a fiduciary substitution relies on the condition precedent of the beneficiary's death, which can only occur in the case of a natural person. As such, both the disponor and the fiduciary must be natural persons. However, there is no legal barrier preventing the substitute from being a legal person, who may receive the property either through a donation or a will.[31]

According to the doctrine, primary aim has been to harmonise family relationships, with at least three situations in mind. First, the fiduciary substitution has been given the role of a family strengthening tool, supporting parents who wish to provide not only their children but also their grandchildren with a certain financial security. It should be noted that the Civil Code does not allow substitution in more than one degree so that the assets which are the subject of it cannot be seized indefinitely. In this regard, Art. 996 para. (3) of the Civil Code stipulates that "the substitute may not be subject to the obligation to administer and transfer the property".[32] The purpose of this provision is to prohibit the establishment of a perpetual inalienability clause in respect of certain assets and, consequently, to practically remove them from the legal circulation. However, I believe there is nothing to prevent the substitute from transferring the assets in question, on the death of the fiduciary, to another person, on his own initiative, by way of fiduciary substitution. This could happen in the case of certain movable property whose sentimental value outweighs its pecuniary value or in the case of certain property of high value, for the same reasons as those set out above. Article 996 para. (3), therefore, leaves it to the substituted party to decide whether he will transfer the assets again by way of fiduciary substitution or dispose of them in his capacity as owner. In the example given, the nephew who will be the beneficiary of the fiduciary

30 Veress and Székely, 2020, p. 88.

31 Genoiu, 2012, pp. 153–154.

32 Art. 996 para. (3) of the Romanian Civil Code.

substitution will decide whether to pass on the assets to his nephew or to dispose of them freely.

A second argument highlights the role of fiduciary substitutions in protecting descendants with certain health problems or disabilities. It has been shown that they can be set up, in respect of certain assets, to have a much easier life during their lifetime and then, on their death, pass on those assets to their other descendants. It should be mentioned, nonetheless, that these assets may not infringe the surviving spouse's or the other descendants' forced heirship of the institute. In this respect, Article 998 of the Civil Code enshrines the principle of the inviolability of the forced heirship of the institute, stipulating that the charge may not encroach on the forced heirship of the institute.

A third argument concerns the surviving spouse who comes into competition with descendants from the testator's previous marriage. Thus, by means of fiduciary substitution, the testator can dispose of certain property in favour of the surviving spouse, ensuring that he or she has the use of certain property during his or her lifetime, which the testator will pass on to the testator's children from the first marriage on his or her death. It can be seen that, at least in the last two cases, but not only in these, the institution uses the asset until it passes it on to the beneficiary. This is possible because of the way in which this institution has been rethought, precisely to protect family relationships. Thus, whereas under the old Civil Code, in matters of substitution, we were told about the preservation of the property that was the subject of the substitution, the Civil Code talks about its administration. The difference is a major one. While the purpose of acts of preservation is to preserve or conserve an asset, the purpose of acts of administration is to enhance the value of the asset. Under the power of a conservation act, the institution could only take measures for property preservation whereas, under the power of the administration act, it can exploit the property without preserving its substance by renting it out, leasing it, etc. Under the new rules both the beneficiary and the institution are adequately protected, and, as noted previously, the institute can administer the property for its own use until it transfers it to the beneficiary.

3.1. REWARDING NON-CONCEIVED PERSONS BY MEANS OF FIDUCIARY SUBSTITUTION

An interesting hypothesis, set forth in the French doctrine and subsequently taken up by the Romanian doctrine, concerns the possibility of gratification of non-conceived persons by means of fiduciary substitution. Article 999 of the Civil Code[33] stipulates that the substitute may accept the offer of donation even after the death of the donor, so the question has arisen to what extent the as yet unclaimed persons may be gratified. Some authors consider that there are no serious arguments that could invalidate this solution, pointing to the similarity between the institution of fiduciary substitution and the institution of stipulation for another.

By way of example, one can imagine the situation where the disposer, suffering from a serious illness and wishing to resort to the mechanism of fiduciary substitution in order to protect his future grandchild, realises that he will probably not live until his son marries and has a child. Meanwhile, realising his grandson might not enjoy the assets he has acquired because of his son's prodigal nature, he arranges these assets for the benefit of his first as yet unborn child. However, the strongest argument against this solution remains the genuine *intuitu personae* character of gifts. This issue was not raised before the entry into force of the current Civil Code, since fiduciary substitution was forbidden and the practical usefulness in solving it would not have existed. However, under the old Civil Code, the case law held that a testamentary stipulation requiring a person to leave property to one of his or her grandchildren on death, who will see fit, cannot be classed as a fiduciary substitution and is therefore not prohibited.

In this case, the failure to specify a potential substitute for the property arises not from the absence of a substitute idea but from the decedent's intent to keep the property within the family. The decedent,

33 Article 999 of the Romanian Civil Code: "*Acceptance of the gift after the death of the settlor: An offer of gift made to a substitute may be accepted by the substitute even after the death of the settlor.*" ("*Acceptarea donației după decesul dispunătorului - Oferta de donație făcută substituitului poate fi acceptată de acesta și după decesul dispunătorului.*").

valuing equal relationships with his grandchildren, entrusted the fiduciary with the discretion to select the grandchild deemed most deserving of receiving the property.

3.2. TRANSGENERATIONAL TRANSMISSION THROUGH DONATION

The first form of transgenerational property transmission of property through the mechanism of fiduciary substitution is donation. This donation is concluded between the disponor and the fiduciary together (or not) with the substitute, the secondary beneficiary of the donation. If the substitute does not participate in the conclusion of the contract, he may nevertheless accept the offer of donation made in his favour by a separate act, even after the death of the disponor.[34] Acceptance of the offer by the substitute is necessary for the success of the substitution. Any delay in accepting the offer of donation gives the disponor the possibility of revoking the offer and issuing a new offer. The first beneficiary of the gift is vested with a resolvable property. If the asset transferred to the fiduciary is proprietary or other real right in an immovable, the

34 Ibid.

deed of donation will be provisionally entered in the land register,[35] under a double condition: resolutory for the fiduciary and suspensive for the substitute. The provisional registration will become definitive as the substitution operates: either the property will be definitively registered in favour of the substitute, following the success of the fiduciary substitution, in which case the provisional registration in favour of the fiduciary will be cancelled by the realisation of the resolutory condition, or the property will be definitively acquired by the fiduciary, following the predecease of the substitute resulting in the non-existence of a void substitution.

The fiduciary thus acquires a resolvable property, entered as such in the land register. The fiduciary has the prerogatives of a resolutory owner in respect of this property, being able to alienate for valuable consideration or encumber the property thus acquired with charges in rem. Certainly, any acquirers will take the transferred property subject to the same resolutory condition, meaning that if the condition is realised the transferor's rights will end and, automatically, the acquirers' titles will

35 Under the conditions of Art. 898, paragraph 1 of the Romanian Civil Code: "*Provisional Registration - Except in other cases provided by law, provisional registration in the land register may be requested: 1. if the acquired real right is affected by a suspensive or resolutory condition or if it concerns or encumbers a future construction; in the case of provisional registration concerning a future construction, its justification shall be made in accordance with the law; 2. if, by virtue of a judgement which was not yet rendered enforceable, the party who is the subject of the claim has been ordered to relocate, create or extinguish a registered right, or the person administering the property of another person was ordered to give a hypothecary security; 3. if the debtor deposited the amounts for which the hypothec has been registered; 4. if a provisionally registered right is acquired; 5. if both parties consent only to a provisional registration.*" ("*Înscrierea provizorie - În afara altor cazuri prevăzute de lege, înscrierea provizorie în cartea funciară se va putea cere: 1. dacă dreptul real dobândit este afectat de o condiţie suspensivă ori rezolutorie sau dacă priveşte ori grevează o construcţie viitoare; în cazul înscrierii provizorii având ca obiect o construcţie viitoare, justificarea acesteia se face în condiţiile legii; 2. dacă, în temeiul unei hotărâri care nu este încă definitivă, partea căzută în pretenţii a fost obligată la strămutarea, constituirea sau stingerea unui drept tabular ori cel care administrează bunurile unei alte persoane a fost obligat să dea o garanţie ipotecară; 3. dacă debitorul a consemnat sumele pentru care a fost înscrisă ipoteca; 4. dacă se dobândeşte un drept tabular înscris provizoriu; 5. dacă ambele părţi consimt doar pentru efectuarea unei înscrieri provizorii.*").

also end – so the loss of title cannot come as a surprise. The alienability of the assets by the fiduciary can be prevented by the disponor, who can stipulate in the donation contract an inalienability clause (especially when there are movable assets in the fideicommissary estate, with the risk for the substitute that these assets will no longer be found in the patrimony of the fiduciary when the substitution will be opened). Clearly, the inalienability clause must be supported by a serious and legitimate interest[36] of the disponor, but the entire mechanism of the fiduciary substitution and its purpose fully justify the inclusion of such a clause in the content of the donation.[37]

36 In the terms of Article 627 of the Romanian Civil Code: "*Inalienability Clause. Conditions. Scope – (1) The alienation of property may be prohibited by convention or will, but only for a maximum period of 49 years and if there is a serious and legitimate interest. The term starts to run on of the date when the property was acquired. (2) The acquirer may be authorised by the court to dispose of the property if the interest that justified the inalienability clause of the property no longer exists or if a superior interest requires it. (3) The nullity of the inalienability clause stipulated in a contract entails the nullity of the entire contract if it was decisive upon the conclusion of such contract. In onerous contracts, the determining nature is presumed, until proven otherwise. (4) The inalienability clause is implicit in the conventions giving rise to the obligation to transfer the property in the future to a determined or determinable person. (5) The transfer of property by way of succession may not be prevented by stipulating the inalienability.*" ("*Clauza de inalienabilitate. Condiţii. Domeniu de aplicare - (1) Prin convenţie sau testament se poate interzice înstrăinarea unui bun, însă numai pentru o durată de cel mult 49 de ani şi dacă există un interes serios şi legitim. Termenul începe să curgă de la data dobândirii bunului. (2) Dobânditorul poate fi autorizat de către instanţă să dispună de bun dacă interesul care a justificat clauza de inalienabilitate a bunului a dispărut sau dacă un interes superior o impune. (3) Nulitatea clauzei de inalienabilitate stipulate într-un contract atrage nulitatea întregului contract dacă a fost determinantă la încheierea acestuia. În contractele cu titlu oneros, caracterul determinant se prezumă, până la proba contrară. (4) Clauza de inalienabilitate este subînţeleasă în convenţiile din care se naşte obligaţia de a transmite în viitor proprietatea către o persoană determinată sau determinabilă. (5) Transmiterea bunului pe cale de succesiune nu poate fi oprită prin stipularea inalienabilităţii.*").

37 Popa, 2016, p. 127.

3.3. TRANSGENERATIONAL TRANSMISSION THROUGH LAST WILL

In the case of fiduciary substitution concluded in a last will, the testator directs in the will that the assets are to be administered by the beneficiary during his lifetime, and after the death of the beneficiary, the assets are transferred to the substitute, designated by the testator in the will. The fiduciary substitution in a last will implies that the testator appoints a legatee to administer the property left by the will during his lifetime. Upon the fiduciary's death, the assets specified in the will are transferred to the substitute appointed by the testator. The testator specifies the person who will administer the property and the person who will subsequently inherit it in the will through a fiduciary substitution. Fiduciary substitution in the last will ensures continuity of property administration until the final transfer to the substitute in accordance with the testator's wishes. This form of substitution gives the testator control over how his or her assets are managed and distributed after death through a legally defined mechanism.

4. CONCLUSIONS

As my main research focus is on family businesses, I consider the current Romanian legislation as highly favourable for facilitating generational change within such entities. As evidenced, fiduciary substitutions in family companies help maintain the family's control and ownership of the business for at least two generations, thus preserving its familial nature. This legal mechanism allows family members to designate successors who must meet specific conditions before they can take over ownership or control of the company's assets. By doing so, fiduciary substitutions prevent external parties from gaining influence, helping to protect the company's familial legacy and core values. These provisions can be further formalised through family constitutions, establishing clear succession guidelines and reinforcing a moral obligation to pass the business along to future generations. Incorporating fiduciary substitution clauses into the family constitution can provide stability,

ensure a seamless leadership transition, and safeguard the long-term continuity and identity of the family business.

Fiduciary substitution was an institution considered outdated in the 19th century. It was viewed as an antithesis to the interests of the bourgeoisie, a remnant of feudalism that obstructed the free movement of goods. A complete ban followed, which was, however circumvented in some instances in the second half of the 19th and first half of the 20th centuries. The perspective on fiduciary substitutions has shifted, leading to their revival in a modern form that serves the interests of the modern middle class. This legal mechanism allows estates and businesses to remain under family control for an extended period through mandatory provisions. Furthermore, when incorporated into a family constitution, it can establish a lasting moral obligation, ensuring continuity across generations.

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A LEGAL-HISTORICAL APPROACH TO THE MAYORAZGO: ORIGINS, EVOLUTION, AND CURRENT IMPLICATIONS

MARTA CANTÍN LARUMBE

ABSTRACT

Even though the mayorazgo is not a figure specific to commercial or business law, it maintains in common the main characteristic of family businesses: the concern to preserve and guarantee the control of the company by the family, avoiding the entry as partners of third parties who are not part of the family. The Mayorazgo, a legal institution of the Crown of Castile in the Ancien Régime, played a crucial role in the preservation of properties and noble titles, effectively preventing the partition and dismemberment of lordships. The origin of the mayorazgo dates back to the 13th century, although it was definitively regulated only in the Laws of Toro in 1505. In this sense, the institution of the mayorazgo was essential to preserve the inheritance, as the assets were immutable; they could not be sold, alienated or censured, except with royal authorisation. The institution of the mayorazgo was abolished – as a consequence of the Spanish liberal revolution – by the Decree of 27 October 1820. However, noble lordships still exist – not jurisdictional – with mere consideration of titles of the Kingdom.

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It is important to note that the purpose of this paper is not to delve into the detailed study of the origins or to present the doctrinal debates. Instead, it aims to provide a first approach to the Spanish institution of the mayorazgo.
Keywords: *Mayorazgo, entailment of property, nobility, lineage, primogeniture.*

1. INTRODUCTION

The *mayorazgo* cannot be explained without reference to the conception of the family that prevailed during its existence, insofar as it was an institution strongly linked to the family's vision during the Middle Ages.

Strongly linked to the sense of lineage, the mediaeval family played a fundamental role in the early mediaeval period's the feudal society (5th –10th century).[1] Property and goods belonged to the family, so the laws protected and encouraged the indivisibility of the family patrimony. The same author considers that "the strengthening of kinship ties that occurred was due to a need for protection, like these other forms of human relations and dependence: the vassalage, the common lordship, and the peasant community."

On the other hand, endogamous marriage was well regarded, as it made it possible to increase the family patrimony or, where appropriate, to reunite what had previously been dispersed.[2] Therefore, mediaeval marriage was primarily characterised by the continuity of family and patrimony, which gave rise to the figure of the mayorazgo arose.

1 Ariés, 1987, pp. 464–472.

2 Gimeno Casalduero, 1988, pp. 203–218.

2. THE *MAYORAZGO*

The *mayorazgo* was a legal institution in which patrimonial and inheritance aspects converged.[3] While it was a specific kind of property, the holder of the *mayorazgo* benefited from the fruits of the entailed assets but had no right of disposal over such assets; he could not alienate, donate or mortgage them, nor dispose of them mortis causa. Moreover, it was a system of succession: on the death of the holder of the *mayorazgo*, the estate was to be passed on undivided to a single predetermined heir, generally the first-born male. This is the origin of the concept of the institution: maior natu, the eldest by birth.[4]

3 In this sense, both Bermejo and De Molina define the *mayorazgo* by its succession regime, which is more functional to the order of primogeniture. According to De Molina, the *mayorazgo* can be defined as "the right of succession to the assets left by the founder with the condition that they are perpetually preserved in their entirety in his family to be carried and possessed by the next first-born in successive order." Clavero, on the other hand, understands the *mayorazgo* as a *patrimonial regime*, due to its particularly rigorous degree of entailment, eliminating emphyteutic concessions or the unconfiscability of assets.

4 López Nevot, 2021, pp. 2757–2758.

The purpose of the *mayorazgo*, according to the foundation formulas of Diego Pérez[5] and Luis De Molina (Molina y Morales, *De primogeniorum Hispanorum origine, ac natura, Lugduni,* 1749),[6] was to "preserve the house and not to dissipate or diminish the goods and estates, because, as the Gospel says, every divided kingdom will be destroyed".

2.1. DIFFERENTIATION WITH OTHER FIGURES

First, we wanted to deal with the terminological distinction between *mayorazgo*, trust and feudal system, as it was common in legal practice to distinguish between these figures. As Catalá Sanz points out, this was because the doctrine did not establish a categorical opposition between

5 We transcribe below part of the Testament of Diego Pérez, which provides for the creation of a *mayorazgo*: "And he wills, and it is his will, that the fruits of the said fifth be obligated to the said alms of the said two masses without being able to be sold or taxed, nor all the other goods of his use referred to; that he wills that they are all in one body and that they are carried and enjoyed and possessed by a single heir perpetually, which is first the said Sancho his son and after his son the first lexítimo male son born and procreated from the lexítimo marriage, and after his eldest grandson and more descendants. Only one heir perpetually, the first being the said Sancho, his son, and after his first son, the first lexítimo male son born and procreated from the lexítimo marriage, and after his eldest grandson and more descendants in the male line, in such a way that the first male in days prefers the second, and the second to the third, in such a way that the first male in days prefers the second, and the second to the third, and the last in days to the first female in days, and with the said conditions, the said goods shall be perpetually succeeding among the said sons, grandsons and descendants in perpetuity, in the title and voice of *mayorazgo*, without being sold or alienated, donated or exchanged, The said possessors are only to be considered as usufructuaries of the said goods with the right that the possessors of the *mayorazgos* of these kingdoms of Spain have and in the same form and manner in such a way that when the last possessor dies without any other apprehension of possession, the natural and civil possession of the said goods will pass to the next one in degree". Own translation from Pardo y Pérez Sanjulián, 2013.

6 Molina y Morales devoted the 12th chapter of book III of his *De hispanorum primogeniis* to the treatment of the way and manner in which, once the last holder of the *mayorazgo* had died, the domain and the civil and natural possession of the goods of the *mayorazgo* were transferred, *ipso iure,* to the next successor.

them as long as two common and essential features were not disputed: the singular succession and the perpetuity of the encumbrance.[7]

2.1.1. THE *MAYORAZGO* AND THE ROMAN TRUST

The common characteristics between the *mayorazgo* and the trust are so significant that some authors consider the trust as the origin of the *mayorazgo*.[8]

The *fideicommissum* was a contract *mortis causa* whereby one person-called the settlor – conveys to another – the trustee – the ownership of property or rights so that the latter, in turn, transmits them, within a certain time or upon fulfilment of the condition imposed by the settlor, to the person established in the beneficiary contract.

This institution arose, according to D'Ors,[9] "to gratify foreigners, as they lacked *testamenti factio*,[10] necessary to receive legacies. Subsequently, it was used to circumvent the limitations of the Furia and Voconia laws and to leave liberalities to cities and *personae incertae*".

This was also the opinion of Jiménez y Jiménez, who stated that the trust's origin was "transmitting the inheritance to those who could not receive it by will".[11]

When defining the institution, Melchor Peláez De Mieres published his work in 1575, stating that "the *mayorazgo* is a succession of trusts".[12] However, one of the greatest exponents of the treatise on *mayorazgo*, Luis De Molina, pointed out the similarities between the *mayorazgo* and the Roman trust while establishing their differences.[13]

7 Catalá Sanz, 2011, p. 68.

8 De Castro, 1787, p. 63.

9 D'Ors, 1992, p. 193.

10 By *testamenti factio* we mean the suitability to testate. "This suitability refers not only to the conditions of the subject himself but also to the other persons who appear in the will (heirs, legatees, tutors, etc.). Thus, in Rome, wills could be made by *sui iuris* citizens who had reached puberty and had not been disqualified as insane, prodigal or untestable. Women needed, in principle, the *auctoritas* of their guardians." Ibid., p. 172.

11 Jiménez y Jiménez, 1846, p. 7.

12 D'Ors, 1992, p. 238.

13 De Molina, 1588.

Thus, if the trust did not require a special form – they could be made not only in a will but in any kind of codicil, even by word of mouth – the *mayorazgo* could be constituted by will or contract. Nonetheless, the trustee could not take the trust on his authority. However, as soon as he fulfilled the institution's condition, the *mayorazgo's* successor acquired possession of it.

In this sense, Bartolomé Clavero considers that the doctrine's appeal to the trust is a way of legitimising the *mayorazgo*.[14]

Jiménez y Jiménez had already expressed it in these terms: "There was a time, gentlemen, when nothing good was seen in any civil or political institution, unless it was believed to be intimately linked to Roman Law or the Bible".[15]

2.1.2. THE *MAYORAZGO* AND THE FEUDAL SYSTEM

Feudalism describes the dominant social system in mediaeval Europe, in which the nobility held Crown lands in exchange for military service, and the vassals were in turn tenants of the nobles. The peasants (villeins or serfs), on the contrary, were obliged to live on their lord's lands and to pay homage, labour and a share of the produce, theoretically in exchange for military protection.

Historically, the origin of feudalism dates to when Charles Martel, to confront the Arab cavalry at Poitiers (732), took land and gave it to his soldiers for their benefit so that they could maintain their horses and weapons. However, the beginning of feudalism is still an ongoing debate among the academic community.

From the 9th century onwards, these feudal institutions were consolidated, with the great lords rendering vassalage to the king and receiving land or a fief in return. In turn, fiefs became hereditary or could be bought and sold, so the reversion to those given them was limited.

Although fiefs were territories granted by the monarch to a nobleman for being his vassal, and most of the fiefs were removable and for life, they could not be assimilated to the *mayorazgo* because the fiefs

14 Clavero, 1989, pp. 55–56.

15 Jiménez y Jiménez, 1846, p. 6.

could be divided among sons and could not be passed on beyond the grandchildren.[16]

As discussed above, the *mayorazgo* cannot assimilate with trust or feudalism, since the purpose of these two systems responds to different realities. Suppose the ultimate purpose of the trust was to allow those who did not have, a priori, the capacity to testate and feudalism to guarantee relations between the monarch and the nobility. In that case, we must now ask ourselves, what was the origin, then, of the appearance of the mayorazgo?

2.2. ORIGIN OF THE *MAYORAZGO*

Jiménez y Jiménez considers that the *Mayorazgo* appeared during the reign of Fernando III (known as "the Saint"), as a consequence of the victory of Murcia and "the flower of Andalusia":

> *The reward for the exploits of the many warlords who accompanied him in his glorious triumphs were some of the acquisitions made at the expense of the Arabs. This, in my opinion, is what gave rise to the mayorazgos.*[17]

The appearance of the *mayorazgo* as a prize after the conquests coincides with the opinion of Sempere y Guarinos, who considers that:

> *Without great encouragement, there is no patriotism, no fidelity, no courage, no accuracy in the discharge of duties. To think that men are to labour, to trouble themselves, to sacrifice their goods and their lives for the State, or to sacrifice their hopes of great rewards, would be to know nothing of the heart and history of all nations. Even David, being a saint, prophet and king, was inclined to fulfil the precepts of God for retribution.*[18]

16 Ibid., p. 8.
17 Ibid., p. 8.
18 Sempere y Guarinos, 1805, p. 117.

However, before Alfonso X's reign, son and successor of Ferdinand III, the *mayorazgos* existed as per Law 44, Title V of *Partida* V:

> *In his will, if any man defends that his castle or tower, or house or vineyard or any other part of his inheritance can be sold or alienated, showing some reason for what he defends, as if he said that I want such a house, naming it in particular, that it shall not be alienated in any way, but that it shall always be left to my son or to my heir because he is more honourable and more feared.*[19]

In 1291, King Sancho IV established a *mayorazgo* 'over all the places and possessions and inheritances that Juan Mathe has today and that he had on the day of his death'. The king ordered, in turn, that the said goods shall be succeeded by a line of primogeniture, that, in the event of lacking male or female descendants 'by right line of legitimate marriage, the said goods shall be returned to the royal coronal of Castile'. Finally, the monarch stipulated that the assets subject to the entail could not be disposed of:

> *on condition that neither he nor his eldest heir may give or sell or pledge or touch or alienate the said goods or any part of them to any person, nor may he take them away from his eldest heir.*

However, as Bartolomé Clavero points out,[20] in the *Mayorazgo* of Juan Mathe, only the goods that he held by concession of Alfonso X and Sancho IV were bound, so that Mathe's wish that the totality of his patrimony remain indivisible in his eldest son did not become a reality, given the allegations of the rights opposed to the binding, that is, the hereditary rights and the rights of the widow.

For its part, part of the doctrine considers that with the testament of Henry II, the figure of the *mayorazgo* began to take shape.

19 *Las siete partidas del Rey Don Alfonso el Sabio: cotejadas con varios códices antiguos por la Real Academia de la Historia. Tomo 3: Partida Quarta, Quinta, Sexta y Séptima*, 1807, p. 197.

20 Clavero, 1989, p. 25.

In fact, the monarch made certain conditional concessions of feudal property – called Enrico grants – in which he established a rigorous order of substitution – based on primogeniture – in order to guarantee the effectiveness of the rights reserved by the grantor and, especially, the continuity of the vassal relationship.[21]

These grants were subject to a reversion clause, which meant that, in the absence of legitimate children, the entail reverted to the Crown:

> *We do not confirm them as we gave them and confirmed them and ordered them to be kept in the Cortes that we made in Toro, but that they still have them as a mayorazgo and that they remain in their eldest legitimate son in each of them; and if they should die without a legitimate son, that the places of the one who should die in this way be returned to the crown of our kingdoms.*

We cannot state categorically that this contract clause (no. 23) configured the *mayorazgo* as it later became known, as the reversionary clause was in direct opposition to the lifelong nature of the *mayorazgo*.

Likewise, despite Luis de Molina's assertion that this will was the point of origin, many other scholars[22] believe that the way Enrique spoke about the *mayorazgos* suggests that it was already a consolidated legal instrument,[23] and therefore it could hardly be the genesis of the *mayorazgo*.

In this sense, the *mayorazgo* was introduced by custom and – as we have stated above – was founded in the *Partidas*, when, by dictating the rules on succession to the crown, they systematised this new state of property, thus structuring the basis of the regular *mayorazgos*.

However, it was the Laws of Toro (1505) that finally regulated this institution. Until the promulgation of this body of laws, Spanish legislation was immersed in legislative chaos, given the diversity of opinions of the jurisconsults, often conflicting.

21 Ibid., pp. 28–29.

22 See Castro 1, 4, 3 quoted in Clavero, 1989, p. 33: "but the mayorazgos are undoubtedly [...] older than this period since (Enrique II) speaks of the mayorazgos as something known".

23 Ibid., p. 33.

The Laws of Toro prescribed eight specific provisions on entailments and *mayorazgos*, numbered 27 and 40 to 46 inclusive.

The first of these (27) granted parents the power to bind in their children or legitimate descendants, and in their absence their ascendants, collaterals, and even strangers; the improvements made to them in the third and fifth of their property, even forever, even for as long as they wished, without limiting themselves to a specific generation.

For its part, Law 40 established the right of representation, establishing the same order of succession in the *mayorazgos* as in the crown:

> *In the succession of an estate, even if the eldest son dies during the lifetime of the holder of the estate or of the one to whom it belongs, if the eldest son leaves a legitimate descendant son or grandson, such descendants of the eldest son shall in their order prefer the second son of the holder.*

The remaining Acts, which will be dealt with below, prescribed the manner of proving the mayorazgos (Act 41); established the requirements for their foundation (Act 42); the extension of these requirements (Act 43); the circumstances that had to be met for the perpetuity or revocation of some (Act 44); and the manner of transmitting natural and civil possession (Act 45).

However, the Laws of Toro did not put an end to the arbitrariness of the lawyers when it came to resolving the issues raised by the *mayorazgo*:

> *The kingdom noticed the evils caused by the laws of Toro, and particularly by those relating to the mayorazgos, whose remedy was requested several times in the Cortes [...]. Far from clearing up the doubts, the curiales invented a thousand ways of perpetuating the mayorazgo lawsuits.*[24]

Some of the doubts raised, according to the work of Sempere y Guarinos,[25] revolved around the division of the fruits of the mayorazgo when

24 Sempere y Guarinos, 1805, p. 169.
25 Ibid., pp. 169–171.

the possessor died (Cortes de Valladolid of 1548), as well as the succession of the females (Cortes de Madrid of 1552).

2.3. CHARACTERISTICS OF THE MAYORAZGO

Thus, the institution of the *mayorazgo* has three main characteristics: perpetuity, the prohibition to alienate assets, and primogeniture.

2.3.1. PERPETUITY

The entailed involves the perpetual entailment of certain assets to a specific family. This perpetuity is understood insofar as the founder is succeeded and not the last possessor, and this is because the bond that subsists between the founder and the one called to succeed is perpetual.

However, Law 44 of Toro allows the revocation of the foundation of the *mayorazgo*, unless the possession has already been transmitted:

> *Whoever shall make any mayorazgo, even by our authority, or that of the Kings who shall come to us, or by way of contract or in any last will, after the fact, may revoke it at his will, except he who shall make it by contract intervivos shall have delivered the possession of the thing or things contained in the said mayorazgo to the person in whom he shall make it, or to whom his power shall have, or who shall have delivered it in writing before a notary .*

2.3.2. THE PROHIBITION ON THE ALIENATION OF PROPERTY

Since the purpose of this institution was to ensure that certain assets remained perpetually in the family lineage – a characteristic that we have just described – it seems coherent that these same assets could not be disposed of.

However, in my view – and as part of the doctrine – it raises two questions:

First, to whom do these assets belong?

Second, what would happen to the rights to a reserved share?

Regarding the first query, it would be a matter of resolving the question of the ownership of the right. In this sense, the legal relationship is composed of three elements: the subjects, the object, and the content.

After the foundation of the entailed property right, the so-called *ius abutendi,* that is, the right to dispose of the right, is taken away from the entailed property right. In addition to this prohibition, the obligation to follow a certain order of succession also exists.

Finally, the creation of an entail led to the dismemberment of the real right of ownership by means of which the original owner "takes to his grave forever" the right to transfer property to third parties. The legal fiction that the holder of this right remained the founder was necessary for the estate to be indivisible. Now, is the *mayorazgo* a right of decendants? It is not the object of my work to resolve this question, so I leave this question open for further work.

Many authors haved drawn attention to the discourse on the right to a legitimate share. In this sense, Bermejo Castrillo stated that

> *the indivisibility of the mayorazgo caused important problems of conscience to those who thought that the legitima should be respected, regardless of the fact that the quota could vary according to the quality of the persons and the entity of the assets involved.*[26]

2.3.3. BIRTHRIGHT

The general inheritance law of primogeniture is established according to the order of primogeniture with the right of representation. This means that "the eldest child" is not the first of the living children at the death of the deceased but the eldest descendant of the line of progeny. In the succession of primogeniture "the line is to be considered first, then the degree, thirdly the sex and fourthly the age".[27]

26 Bermejo Castrillo, 2009, p. 552.

27 Rule 4. Oaks, 2, 30, 41.

Depending on whether primogeniture is followed or not, a distinction is made between regular and irregular *mayorazgos*.[28] Within the irregular ones, De Sala distinguished nine subtypes: firstly, the rigorous agnation entailing the calling of male children with the perpetual exclusion of females; as opposed to these, we find those of artificial or feigned agnation, to whose succession the founder first calls a cognate of his, a stranger or a woman, with the condition that afterwards his male descendants succeed him.

Thirdly, there were the male *mayorazgos*, in which only males succeeded each other, whether they were of the male or female line. There were also female *mayorazgos*, in which only women succeeded or were preferred over men. By the term "*mayorazgo de elección*" was understood that in which each successor was granted the power of election among the consanguineous line or when, as is the most general case, in one of the previous ones this power is defined, in order to establish a new line, for the last of those expressly called or whenever the case arises that there is no successor according to the order formulated in the foundation.

In the alternative entail, the founder called a person from one line to succeed him while he lived; as soon as he died, he called another person from another line. Conversely, the salute entailed a *mayorazgo,* in which the oldest of all the founder's relatives was considered, rather than the rule of primogeniture. It was called "saltuario" because this entailed a succession that did not follow lines, but jumped from one to another, always looking for the oldest person. In the "secondgeniture", the second sons were always called, "second-born" in successive order.

On the other hand, we find incompatible *mayorazgos*, which could not be held jointly by the same person.[29] According to this author, this type of mayorazgo originated after the promulgation of the pragmatic decree of 22 December 1543. It forbade the consolidation of two *mayorazgos* through marriage if one was of a certain amount, ensuring that they could not devolve upon the same son; instead, they were being divided between the first-born and the one who followed him.

28 De Sala Bañuls, 1820, p. 205.

29 Gonzáles, 1833, p. 353.

Despite the existence of the female *mayorazgo*, women were fundamentally excluded from this relationship of a political nature since they lacked legal recognition and capacity, due to the *imbecillitas* of their sex, to represent, in their person, the blood link that unites the patrimony of a family to the *nobilitas*.[30]

This order of succession of primogeniture, which gave men a privileged position over women, was not without conflict.[31] For this reason, a Royal Pragmatic Decree of 1615 established the capacity of women to inherit entailed in *mayorazgos*:

> *it was agreed that we should command and declare, as we have declared and commanded, that females of better lineage and rank are not to be excluded from the succession of mayorazgos, bonds, patronages and anniversaries that shall hereafter be founded: rather, they are to be admitted and preferred to the more distant males.*

However, the enactment of this norm did not imply the equalisation of women with men on this issue.

3. THE FOUNDATION OF THE *MAYORAZGO*

3.1. THE ROYAL LICENCE

Although the will of the founder is the fundamental law of the order of the *mayorazgo*, there are limits to this principle.

As we have pointed out at the beginning, the origin of the Mayorazgo dates to those concessions that the Monarch gave to the Nobility as a prize or spoils of war. In this sense, and as stated in the Laws of Toro (Law 42), a royal licence was required to bind the assets:

30 Lagunas, 2007, p. 3.

31 In this sense, various lawsuits were held on the succession of *mayorazgos* in terms of agnation and representation, on the priority of the most distant males over the closest females.

> *We order and command that the King's licence to make a mayorazgo shall precede the making of a mayorazgo; so that even if the King gives a licence to make a mayorazgo, by virtue of such licence the mayorazgo which has already been made shall not be confirmed, unless in such licence it is expressly stated that he approves the mayorazgo which has already been made.*

When the royal licence is necessary, the Laws of Toro establish that it must precede the foundation of the *mayorazgo*, unless being later, it expressly confirms it.[32] Legally, there were no restrictions on the King granting the power to find a *mayorazgo*. In principle, anyone could benefit from this royal concession. However, the doctrine insisted on the relationship between nobility and *mayorazgo*. The *mayorazgo* was not only founded in the interest of the nobility, insofar as it received with the title the privilege of the bound property, but also in the interest of the crown, since the mayorazgo was consigned to the payment of the rights of lances and half-anathemas that bound the title.[33]

For its part, Law 43 of Toro prescribed the irreversibility of licences:

> *The licences which We have not given or will not give hereafter, or the Kings who after have not come to make mayorazgos, do not expire by the death of the King who gave them, even if those to whom they were given have not used them during the life of the King who granted them.*

However, the observation of the royal licence was not always mandatory. Thus, Law 27 of Toro allows the foundation of the *mayorazgo* without royal licence if it is imposed on the *third of improvement* and on the fifth of free disposal. Therefore, the royal licence is only required when the foundation of the entailed legitimate rights:

> *When the father or mother improves any of his or her legitimate children or descendants in the third of his or her property, in a will or in any other last will, or by contract between widowers, he or she may place any lien he*

32 Law 42 of *Toro*.

33 Clavero, 1989, p. 227.

or she wishes, whether of restitution or of fidei commisso, and may make in the said third any bonds, submissions and substitutions he or she wishes, with both, that they may do so among their legitimate descendants, and in the absence of the said descendants, that they may do so among their descendants and legitimate descendants who have the right to inherit, and in the absence of the said descendants, that they may do so among their ascendants, and in the absence of the said, that they may do the said submissions among their relatives, and in the absence of relatives, among strangers; and that otherwise, they may not place any encumbrance or condition on the said third: Which said bonds and submissions, whether made in the said third of improvement, or in the fifth, We order that they shall be valid for ever or for such time as the testator may declare, without making any difference of fourth or fifth generation.

3.2. GROUNDS FOR EXCLUSION

Meanwhile, certain conditions were required to succeed in a *mayorazgo* and to be its holder.

In this sense, the aforementioned *Law 40 of Toro* required the condition of legitimacy for children. However, the recently exposed Law 27 of Toro allowed that, in the absence of legitimate children, children born out of wedlock or legitimated subsequently could enter the succession.

A case that caused controversy was the one reported by Bermejo Castrillo[34] in which an adulterous son acceded to the ownership of a mayorazgo, a situation unknown at the time of entering the succession. In these cases, the principle of presumption of paternity was invoked.

Another frequent cause of exclusion was that of being a cleric, a religious or a member of a military order professing a vow of celibacy. This was not only because of their status but also because of their inability to procreate legitimate descendants. This cause responds to the purpose of the *mayorazgo*, which is none other than to perpetuate the lineage and patrimony of a family.

34 Bermejo Castrillo, 2009, p. 151.

3.3. FORMAL REQUIREMENTS

As stated in Law 41 of Toro, the existence of an *mayorazgo* could be proved by means of a public deed, by means of a deed stating the granting of the royal licence, or by means of custom:

> *We order that the mayorazgo may be proved by the deed of its institution, with the deed of the licence of the King who gave it, such deeds being those that attest, or by witnesses who testify in the form that the law requires of the tenor of the said deeds, and likewise by immemorial custom proven by the qualities, which conclude that those of the past have had and possessed those goods by mayorazgo.*

Likewise, although entailed succession *mortis causa*, it was articulated as an *inter vivos* legal business and could be constituted either by will or by contract.

The traditional formula for founding *mayorazgos* was compiled by Gabriel de Monterroso y Alvarado in his work *Práctica civil e criminal e instrucción de escribanos (Civil and criminal practice and instruction for notaries) of 1573*. Given the length of this work, we will not transcribe it here, although we will highlight the most notable features.

From the formula we can see how important it was at that time to keep the family patrimony together in order to maintain the family prestige and honour, for as the Gospel says, "If a nation is divided into factions, it destroys itself; and if a city or family is divided into factions, it will not be able to survive". In terms of content, each and every one of the assets that would constitute the mayorazgo had to be indicated.

4. FROM THE CONSOLIDATION OF THE *MAYORAZGO* TO ITS DISAPPEARANCE

From 1503 to 1775, the *mayorazgo* regime was consolidated. In this sense, during the 16th century there was a quantitative explosion of foundations of *mayorazgos*, continuing the binding trend in the following centuries. For this reason, and as we have seen, after the promulgation of

the laws of Toro, a legal storm was unleashed to regulate the institution and settle the disagreements generated around the *mayorazgo*.

The pragmatic enacted by Charles I in 1534, which sought to prevent the accumulation of *mayorazgos* was of particular relevance. The monarch stipulated that, if by marriage two bonds were to be united whose income exceeded certain limits, they were to be divided, with the possession of one of the *mayorazgo* passing to the first-born son, as chosen, and the second-born son succeeding to the other.

In the 18th century, the institution was subject to very strong criticism from the new enlightened thinkers, because of the conflict between the nobiliary class and the incipient bourgeoisie, which began to demand a greater liberation of private property.

Between 1762 and 1789, part of the doctrine criticised the institution of the *mayorazgo*, suggesting it should be reformed. In this sense, in 1765, Pedro Rodríguez Campomanes published the *Tratado de regalía de amortización* (Treatise on the royalty of amortisation), in which he proposed – against the abuse of the new foundations of *mayorazgos* – the prohibition of new foundations of *mayorazgo* while preserving the old ones. In contrast to Campomamnes' reform proposal, Ramón Lazaro de Dou advocated the general abolition of entailed property.

For his part, Juan Francisco de Castro would say, in the prologue to his critical discourse, published in 1787:

> *The prejudices which I observed some years ago in the multitude of mayorazgos resolved me to publish this third volume [...] the blood [...] circulates through the whole natural body whose perfect health depends on the correctness of this circle. The blood of the civil body is the goods, and to the mayorazgo it has no other effect than to impede its course and deprive its benefit from flowing among the members who constitute it: it fixes them in a single person of a large family, thus impoverishing and sterilising its branches for lack of this nourishing succour: the population dwindles because the dowries and inheritances are diminished; there is a lack of arms or means for agriculture, with which it falters; commerce is exhausted without the circulation where it has its support; and finally the arts and the managements that serve civil society decay and come to a total paralysis, because the spirits that animate it do not revolve.*

Finally, the report drafted by Jovellanos (Informe de la Sociedad Económica de Madrid al Real y Supremo Consejo de Castilla en el expediente de la ley agraria) had a significant influence on the reform and later abolition of the mayorazgo and other related properties. Thus, he would state that

> *to grant a citizen the right to transmit his fortune to an infinite series of possessors, to take away forever the communicability and transferability of his property, to attribute this endowment to the chance of birth [...] [are] [...] not only repugnant to the dictates of reason, but also to the principles of the social pact and to the general maxims of legislation and politics.*

In this regard, during Charles III's reign, numerous provisions were issued on matters related to the *mayorazgo*. Under the impulse of the Count of Floridablanca, the institution of the *mayorazgo* was reformed.[35] In 1789 a general reform of the *mayorazgo* regime was proposed by Floridablanca's instruction, which expressed the convenience of prohibiting the goods from being made perpetually inalienable or unsaleable without royal licence, revoking the doctrinal interpretation of Law 27 of Toro.[36]

In 1795, the *mayorazgos* were taxed at a rate of 15% to compensate for the commercial damage they caused; in 1798, the sale of the mayorazgos was authorised, and further facilities were granted to dispose of the estates in 1802 and 1805.

However, the definitive suppression of the *mayorazgo* did not take place until the promulgation of the Statute of Bayonne (1808) and, subsequently, the Constitution of Cadiz of 1812.

Indeed, articles 135 to 139 of the Statute of Bayonne abolished trusts, *mayorazgos* or substitutions whose assets did not produce an annual income of 5,000 dead pesos. Furthermore, no *mayorazgo* could be founded without a royal licence:

35 Clavero, 1989, p. 296.
36 Ibid., p. 297.

> *Article 139: No trust, mayorazgo or substitution may henceforth be founded except by virtue of grants made by the King for services rendered in favour of the State, and for the purpose of perpetuating in dignity the families of the persons who have contracted them.*

However, opposition from the nobility and the War of Independence brought the disassociation programme to a standstill. According to Bermejo Castrillo, this disassociation policy did not come about as a result of a change in general sentiment but rather due to the influence of Napoleonic ideas, which were eager to extirpate the feudal structures of our country and make the liberal conception of property a reality.[37]

During the liberal triennium, the Royal Decree of 11 September 1820, or the "law of dissociation of 1820", allowed the possessors to acquire the free ownership of the *mayorazgo* while reserving half of it for their successor after their death. Article 1 stated:

> *All entailments, trusts, trusteeships, patronages, and any other kind of ties of real estate, movable or movable property, censuses, juros, forums, or of any other nature, which are henceforth restored to the class of absolutely free, are hereby abolished.*

Subsequently, the *mayorazgos* and other ties were reinstated by the Royal Decree of 11 March 1824:

> *The mayorazgos and other entailments are restored to the status and state they had on 7 March 1820; and the assets that were dismembered by virtue of the orders and decrees of that government ('the so-called constitutional government') are immediately restored to the current holder of the said mayorazgos or entailments.*

Additionally, "damages caused to the property due to the fault of the holders" were to be reimbursed.

With Mendizábal's victory in 1836, the disentailment programme was resumed, re-establishing the disentailment law of 1820:

37 Bermejo Castrillo, 2009, p. 613.

> *Desiring to provide the nation with the great advantages that should result from the disentailment of all kinds of entailments, I have come, in the name of my august daughter Queen Isabella II, to decree the following: The decree of the Cortes of 27 September 1820, published in the Cortes as a law on 11 October 1820, by which the entailments of all kinds were suppressed and the property of whatever nature comprising them was restored to the class of absolutely free, is restored in all its force and effect.*

However, as Clavero notes, this decree was not always enforced.[38] The law of 1841, ultimately, resolved the issue of the private ownership of untied property.

The draft Civil Code of 1851, specifically Article 636, established a prohibition against any dispositions that declared all or part of an inheritance as inalienable or those who intended to leave all or part of the inherited assets to be applied or invested in accordance with the testator's directives.

5. CURRENT IMPLICATIONS OF THE *MAYORAZGO*

Nowadays, the institution of *mayorazgo* no longer exists. So much so that article 785 of the Spanish Civil Code establishes that they have no effect: (1) Trustee substitutions which are not made expressly, either by giving them this name or by imposing on the substituted party the definitive obligation to hand over the assets to a second heir; (2) Provisions containing a perpetual prohibition on alienation, and even a temporary prohibition, outside the limit set out in Article 781; (3) Those that impose on the heir the obligation to pay a certain income or pension to several persons in succession, beyond the second degree; (4)Those whose purpose is to leave a person all or part of the inherited assets to be applied or invested in accordance with reserved instructions given to him/her by the testator.

Nonetheless, today the only thing exists of the *mayorazgo* – the system designed to preserve a patrimony within the family – are the noble

38 Clavero, 1989, p. 384.

titles. As Clavero states, the validity in Spain of the Laws of Toro in the case of titles of nobility does not mean in any way the validity of the regime of the *mayorazgo*.

In fact, both institutions are intrinsically linked, as the *mayorazgo* is the necessary economic support for the social prestige that the holding of a noble title required. The STS 27 September 1984[39] considered that both elements were so closely linked that the possession of one or more noble titles depended to a large extent on the economic data of the *mayorazgo*:

> *That although it is true that one thing are the entailments or entailments which, as constitutive of 'dead hands' or unproductive goods, extra commercium, were suppressed by the nineteenth-century laws and another the noble and honorary titles, grants awarded by the Crown, it is also true that both institutions were intertwined and united, the first as the necessary economic support for the prestige or social prestige (dignity) of the title according to the characteristics of the stratified society that gave rise to it, circumstances that cannot be forgotten and even less so, as is done in the appeal, to dissociate what at that time was united and socially assimilated and thus distort the authentic historical interpretation.*

In this context, the Constitutional Court, in a judgement of 3 July 1997, would say that:

> *The linking of certain goods and revenues to a lineage or family aimed to reduce them to a single unit for their transmission to the successors of the founder of the link, who had to keep them, as is the case with the title of nobility, an intangible asset constituting a nomen honoris, which is also a unit and, as such, indivisible among the descendants of the person who received the grant from the* King.[40]

39 STS 517/1984 of 27 September 1984.

40 Judgement STC 126/1997 of 3 July 1997.

Regarding the current validity of the legislation regulating the *mayorazgo*, the Spanish Constitutional Court stated, in the same judgement, that:

> *In the period of transition from the Ancien Régime to the liberal State, the Law of 11 October 1820 referred to historical law by declaring in Article 13 that 'the titles, prerogatives of honour and any other pre-eminences of this kind' which the current holders of the mayorazgos and other ties suppressed by Article 1 enjoy as annexed to them, shall subsist on the same footing and shall follow the order of succession prescribed in the grants, deeds of foundation and other documents of origin.*

Therefore, in the event that no *mayorazgos* or other links can be established, the existing ones will be regulated in accordance with the concessions, deeds or any other document that accredits them.

Finally, in 2006, a law was published establishing equality between men and women in the right to succeed to the Grandezas de España and titles of nobility, with no preference being given to persons on the basis of their sex in the regular order of callings.[41] The explanatory memorandum of this law declares that these titles are entirely honorary and are, in effect, associated with the lineage of the beneficiaries of the mercy:

> *In the granting of noble dignities of a perpetual nature, to their honorary nature must be added the purpose of keeping alive the historical memory to which their granting is due, which is why succession to the title is linked to persons belonging to the lineage of the beneficiary of the grant. It is this purely symbolic value that justifies that perpetual noble titles survive in today's democratic society, governed by the principle of equality of all citizens before the law.*

41 Law 33/2006 on equality of men and women in the order of succession of noble titles. Published in Official State Gazette (BOE) No. 260 of 31 October 2006.

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POSSIBLE WAYS OF TRANSFERRING AGRICULTURAL HOLDINGS IN HUNGARY

ZSÓFIA HORNYÁK

ABSTRACT

Agricultural holdings were typically established by farmers who acquired land ownership through agricultural land auctions in Hungary during the regime change; they have been farming in these areas ever since. As they approach retirement age, which is only a few years away for many, they are considering transferring their farms. But this process without special rules is extremely difficult. For this reason, it is necessary to facilitate the change of generations and reduce the administrative burden of the transfer of agricultural holdings. Recognising this phenomenon, the legislator developed a new legal instrument, the farm transfer contract, in order to make the generational change much smoother. The question is, what can the legislator possibly take over from the regulations of the past? I examine the rules of fideicommissum in the past in Hungary, and I try to find the connection between the two legal institutions and highlight the points of the former legislation that can serve as a guideline for the Hungarian legislator today.

Keywords: *agricultural holding, fideicommissum, generational change, farm transfer contract, Hungarian land policy.*

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1. INTRODUCTORY THOUGHTS

The study originated from a conference titled "Instruments for preserving the unity of family businesses and agricultural assets – perspectives of legal history". In connection with this subject, I would like to highlight its agricultural law dimensions. I specifically focus on how the so-called agricultural holding can stay together over time. How does the legal regulation treat this totality of assets in the event of legal transactions inter vivos and mortis causa? I want to draw attention to the special regulations of agricultural law concerning the ownership transfers, stressing that the fundamental unit of Hungarian law is agricultural land,[1] rather than agricultural holdings.[2] For this reason, there is currently no specific succession regulation for agricultural holdings, and I must point out that the succession regulation for agricultural land – which is an element of the holding – is not sufficiently coherent. Since holding regulation in the classical sense[3] is absent in Hungary, I cannot comment on a coherent holding-specific regulation in relation to legal transactions between living persons. Nevertheless, in recent years, certain legal institutions have been introduced, according to which, despite the possibility that the components of agricultural holding will be fragmented in connection with succession – that is definitely a matter requiring future legislative resolution. To ensure these elements

1 Land Transfer Act Art. 5, point 17: Agricultural, forest land shall mean any parcel of land, irrespective of where it is located (within or outside the limits of a settlement), registered in the real estate register as cropland, vineyard, orchard, garden, meadow, permanent pasture (grassland), reed bank or forest or woodland, including any parcel of land shown in the real estate register as non-agricultural land noted under the legal concept of land registered in the Országos Erdőállomány Adattár (National Register of Forests) as forest.

2 Land Transfer Act Art. 5, point 20: Agricultural holding (=farm) shall mean the basic organisation unit of production equipment and other means of agricultural production (land, agricultural equipment, other assets) operated with the same objective, functioning also as a basic economic unit by way of economic cohesion.

3 For possible holding regulation solutions, see: Kurucz, 2010, pp. 151–176; Kurucz, 2013, pp. 66–70; Kocsis, 2014, pp. 105–106; Kurucz, 2001, p. 229; Kurucz, 2007, pp. 41–86; Kurucz, 2008, pp. 5–124; Kurucz, 2005, pp. 68–70.

remain unified, and specifically to maintain the cohesiveness of agricultural holdings and promote generational change, the legislator has developed a concept in the form of farm transfer, for which the relevant regulation entered into force on 1 January 2023. The farm transfer regime is basically intended to avoid the application of succession rules, but it does not replace the sui generis farm succession rules.

In the context of Hungarian legal regulation,[4] it is reasonable to presume that significant changes occurred in the regulation in the 2020s for the preservation of the unity of family farms from an agricultural law perspective. Act CXXIII of 2020 on Family Farms[5] was enacted, the purpose of which is to define agricultural and forestry activities carried out with the participation of family members, the joint use of their resources and the results of their work in order to ensure their joint prosperity, as the forms of operation and the rules of operation of family farming. In addition, Act LXXI of 2020 on the Liquidation of Undivided Common Ownership of Land (hereinafter, "Co-ownership Land Act")[6] was also enacted, which basically regulates the liquidation of undivided common ownership on agricultural lands. The latest legislation is Act CXLIII of 2021 on the Transfer of Agricultural Holdings (hereinafter, "Farm Transfer Act"),[7] which is specifically intended to promote generational change in relation to agricultural holdings. These acts have been incorporated into the system of provisions laid down by Act CXXII of 2013 on the Transfer of Agricultural and Forest Land (hereinafter,

4 See about it: Szilágyi, 2022b, pp. 145–197.

5 See about the previous regulation on family farms: Bacskai, 2013, p. 11; Cseszlai, 2020.

6 See about it: Szinay, 2022, pp. 29–34; Andréka, 2020, pp. 6–11; Nagy, 2022, pp. 112–113.

7 See about it: Nagy, 2023; Olajos, 2022a, pp. 29–36; Olajos, 2022b, pp. 56–75.

"Land Transfer Act"),[8] which has been totally in force since 1 May 2014. The Land Transfer Act essentially establishes rules for the acquisition of ownership and use of agricultural land. With regard to succession, it can be stated that the Land Transfer Act basically excluded from its scope the acquisition of ownership of land by intestate succession, thus bringing the acquisition of ownership of land by intestate succession under the general rules of the Civil Code. In contrast, succession by testamentary disposition is covered by the Land Transfer Act and subject to the conditions for acquisition of ownership introduced by the Act, which prefers to maintain the land as a whole and its acquisition by a competent person. Meanwhile, the Land Transfer Act treats testamentary disposition as a special title and provides for differences from the general conditions for acquisition of land ownership.[9] The situation that there are special rules for the succession of land by testamentary disposition, while the general rules of succession apply in the case of intestate succession, has changed somewhat since 1 January 2023, as the special provisions on the intestate succession of land, introduced later into the Act on the Liquidation of Undivided Common Ownership on Land, in the case that several people inherit the land jointly, came into force.[10] But all these provisions apply only to agricultural land, and in relation to the agricultural holding, we encounter a concept between the living persons by means of a farm transfer contract, transferring the ownership of the agricultural holding, and within the framework of this publication, I intend to deal with this legal institution, since it is the only legal institution that specifically wishes to keep assets belonging to the agricultural holding in the hands of the family, facilitating its transfer under certain conditions.

8 For analysis of this and its background, see: Andréka, 2010, pp. 7–19; Bobvos and Hegyes, 2015; Csák, 2018, pp. 19–32; Csák, 2010, pp. 20–31; Csák and Szilágyi, 2013, pp. 215–233; Fodor, 2010, pp. 115–130; Horváth, 2013, pp. 359–366; Jani, 2013, pp. 15–28; Kapronczai, 2013, pp. 79–92; Kecskés and Szécsényi, 1997, pp. 721–729; Korom, 2013, pp. 11–24; Mikó, 2013, pp. 151–163; Nagy, 2010, pp. 187–197; Olajos, 2002, pp. 13–17; Olajos and Szilágyi, 2013, pp. 93–110; Prugberger, 2012, pp. 62–65; Raisz, 2017a, pp. 434–443; Raisz, 2017b, pp. 68–74; Vass, 2003, pp. 159–170; Zsohár, 2013, pp. 23–24.

9 See about it: Hornyák, 2019.

10 Co-ownership Land Act Art. 18/A, Art. 18/B; See about it: Kiss, 2022, pp. 39–43.

2. HISTORICAL APPROACH

As I have already indicated, the starting point of the research is that, in the current Hungarian agricultural law regulation, the subject of the transfer transactions is the agricultural land, not the agricultural holding. It is a unique set of assets, with agricultural land forming only one part of this holding. In this relation, the regulation addresses not the agricultural holding but the agricultural land.[11] But Hungary has specific legal institutions to protect the unity of agricultural holdings during ownership transfers, applicable only in special cases. These distinct legal institutions are components of a new regulation in Hungary designed to facilitate the transfer of the agricultural holding's ownership. In this publication, I attempt to establish a link between the current Hungarian rule and the historical legal approach. Furthermore, I will focus on just one historical facet within this framework and examine the legal institution of fideicommissum,[12] but solely from the standpoint of Hungary's current land policy. This discourse draws attention to some of the purposes the legislator previously highlighted regarding this legal institution. The analysis concludes that, on the one hand, the primary aim of the current Hungarian land policy is to retain the agricultural land in the transfer scenarios as a single unit. On the other hand, the ownership of the land by a competent individual is a crucial additional aim. As Hungarian regulation seeks to prevent fragmentation, the next objective is to keep the agricultural assets within the family. Additionally, my work involves analyzing the fideicommissum under earlier regulation. The essence of a fideicommissum is that the founder exempts a certain portion of the acquired property from the general succession rules by determining a special succession regime, prescribing its undivided succession, and also placing it under the prohibition of alienation and encumbrance. The family fideicommissum,

11 But in most Western European countries, the focus of the regulation is the agricultural holding, not the agricultural land. Hornyák, 2018, pp. 381–395; Hornyák, 2017, pp. 182–188; Kronaus, 2022, pp. 75–92; Prete, 2022, pp. 141–154; Muñiz Espada, 2020, pp. 171–183.

12 See about it: Peres, 2014.

a legal institution originating in Roman law, was regulated in Hungary by Act IX of 1687. It fitted perfectly into the tied estate system of mediaeval Hungary. The purpose of the creation of fideicommissums was to exempt large estates from the free disposal of the transfer of the ownership. Thus, the special succession rules were used to protect the unit of the holding.[13] The foundation of the fideicommissum could have been done in several ways. On the one hand, between living persons, by unilateral declaration of will, which was practically done either in a public document or in a private document with full probative value. This method of foundation required the approval of the prince. Another method of foundation was the testamentary disposition, when the founder intended to create a fideicommissum from his free wealth after his death. In this case, it was the task of the heir to submit the founding letter – which the testator either prepared during his lifetime or left the principles of its preparation to the heir in his will – to the monarch for approval.[14] The most important element of a fideicommissum is the asset that forms its subject, since keeping it together and passing it down within the family through generations means the family's well-being. The most typical of these assets is land, which is usually covered under the fideicommissum along with other related elements (e.g. economic equipment). The reason I highlighted this legal institution is that in Hungary, the agricultural holding encompasses the agricultural land, movable and immovable properties, equipment, and associated rights and obligations, resulting in a comprehensive entity. From this standpoint, the current definition of the agricultural holding and the fideicommissum's definition in the past are moderately analogous. The Council of Ministers' 5200/1919 Decree prohibited the establishment of new fideicommissums. With Act XI of 1936, the reform of the fideicommissum became law. The act freed the affected assets – except for a few cases – from the limitation of the fideicommissum. This act made it possible to create a smallholding of fideicommissum and a tied succession system to protect smallholders and prevent the fragmentation of estates. The act also imposed specific restrictions on

13 Sebess, 1933, p. 131.

14 Katona, 1894, p. 60.

the fideicommissum smallholders, allowing only those who undertook farming as an occupation to be eligible.[15] At this point, we can identify a connection with the present Hungarian agricultural regulation.

As early as 1933, Dénes Sebess drew attention to the fact that the protection and perpetuation of the holding unit could be achieved by introducing special succession rules in case of death. During this period, it was the institution of fideicommissum that protected the permanence of the holding by prohibiting unequal succession and the transfer between living persons. Only one heir could inherit the agricultural holding, and exceptional rules had to be established to satisfy the co-heirs. This was the essence of special succession rules. In his opinion, the extreme freedom of transfer of land ownership and the absence of barriers to prevent the fragmentation of land led to the fragmentation of the holding. During this period, many considered the parcel minimum to be the solution for safeguarding land capital and the territorial unity of the land under production.[16] According to Dénes Sebess, without the enactment of special rules of agricultural succession, it is not possible to strengthen the farming class, which is the strongest support of agricultural production.[17] In his opinion, special land succession rules should serve the following purposes: a) they should prevent excessive fragmentation of land ownership; b) to allow the land to be owned by the person most suited for it; and c) to reduce the burdens on the permanent heir upon taking over the land so that the interests of the co-heirs are not jeopardised. These goals permeate the legal institution of succession ubiquitously, which essentially replaces the fideicommissum institution of large estates, because even in areas that do not fall under the category of fideicommissum, it seeks to achieve the land preservation along with special succession rules. However, it does not violate the principle of equal class to the same extent and is more consistent with the principle of family property than fideicommissum. From an economic standpoint, it is critical to provide agricultural stability, which can be

15 But the Hungarian peasantry was averse to this legal institution and preferred to remain with traditional estates, not taking advantage of the opportunity to establish a smallholding of fideicommissum.

16 Sebess, 1933, p. 118.

17 Ibid., p. 244.

achieved through the unity, permanence and immutability of the land or agriculture holding.[18]

In the first third of the 1900s, it was also stated what objectives legislation aimed at protecting the unit of holding should pursue, namely, to prevent the improper and economically harmful division of agricultural land and the splitting up of the unit of the holding and to allocate agricultural land or holding to the most suitable person for proper production, and the unity of land and holding should be protected by introducing special succession rules.[19]

However, we still do not encounter such special succession rules in relation to agricultural holdings in Hungary – except for one provision in the Civil Code[20] – but we can find regulation on legal transactions between living persons that are intended to ensure the unity of the holding during the promotion of generational change.

18 Ibid., p. 281.

19 Ibid., p. 117.

20 Civil Code Art. 7:89(2): The heir shall be entitled to separately disclaim inheritance of a farmland and/or its equipment, accessories, livestock, and tools and implements if he is not engaged in agricultural production by profession.

3. CURRENT SITUATION IN HUNGARY

It was typical during the regime change that farmers[21] who acquired land ownership through agricultural land auctions established agricultural holdings and farmed them. The regime change occurred roughly 35 years ago, and as we counted the years, these farmers are nearing the retirement age and considering transferring their farms. In this situation the legislator is tasked with helping them to transfer the ownership of the agricultural holding to the next generation. But the process of this without special rules is extremely difficult, because Hungary has a land transfer regulation, so it doesn't have a holding transfer regulation. This means that there are some very strict restrictions on the acquisition of ownership of agricultural land in Hungary but no strict regulation for the transfer of ownership of agricultural holdings. It is necessary to facilitate the change of generations and reduce the administrative burden of the transfer of agricultural holdings. Hungary has a new legal instrument, the farm transfer contract, which is regulated in a quite new act, Act CXLIII of 2021 on the Transfer of Agricultural Holdings, which came into force on the 1st of January 2023. This act gives the possibility to the elder farmer to transfer the ownership of the agricultural holding, the farm, to the next generation. The act has two main aims:

21 According to the rules currently in force: Land Transfer Act Art. 5, point 7: "Farmer" shall mean any domestic natural person or EU national registered in Hungary, who has specific vocational skills or professional qualifications in agricultural or forestry activities as provided for in the decree adopted for the implementation of this Act, or, in the absence thereof, who:
   a) has been verifiably engaged in the pursuit of agricultural and/or forestry activities and other secondary activities in his/her own name and at his/her own risk in Hungary continuously for at least three years and has verifiably produced revenue by such activities, or revenue did not materialise for the – completed – agricultural or forestry investment project has not yet turned productive, or
   b) verifiably holds membership for at least three years in an agricultural producer organisation in which he/she has at least a 25 per cent ownership share and who personally participates in agricultural and forestry operations, or in agricultural and forestry operations and the related secondary activities.

one is to facilitate the generational change, and the other is to keep the holding in the hand of the family. The farm transfer is considered an inter vivos institution, indicating that it is not a special succession rule. Importantly, Hungary lacks special succession regulation for the agricultural holdings, though it has certain special succession rules for the agricultural lands which are not coherently regulated.

What is the definition of the farm according to the Act? The aa) agricultural and forest land, including farmstead, owned or used by the transferor of the holding, ab) other immovable properties owned or used by the transferor of the holding necessary for carrying on agricultural and forestry activities, ac) movable properties owned or used by the transferor of the holding for carrying on agricultural and forestry activities, in respect of which the transferor has the right to organise production and – with the exception of production of seed for hire, hired breeding, hired fattening and the keeping of exposed animals – the right to use the results of production, ad) rights in rem in respect of agricultural and forestry activities belonging to the transferor of the holding, ae) a share in the assets of a business association related to the agricultural and forestry activities carried out on the holding, a share in a cooperative society, a corporate interest in an association of forest holders , and af) rights and obligations relating to the assets set out in points (aa) to (ae), which are serving the operation of the farm.[22] The farm transfer contract has four types: farm transfer sale contract,[23]

22 Farm Transfer Act Art. 2, point a).

23 Farm Transfer Act Art. 3(2) a) Based on the farm transfer contract, the farm transferor is obliged to transfer the ownership of the farm and the rights in rem related to the farm, and the farm transferee is obliged to pay the purchase price and take over the farm.

farm transfer gift contract,[24] farm transfer maintenance contract,[25] and farm transfer life-annuity contract.[26] The farm transferor can decide which one to utilise; however, this contract can also be used in combination. The parties to this contract are the farm transferor and the farm transferee. Both the transferor and the transferee must be primary agricultural producers or individual entrepreneurs engaged in agricultural and forestry activities. The farm transferor is someone who has reached the age limit for retirement or will reach it within 5 years from the conclusion of the contract.[27] The farm transferee is under 50 years of age, at least 10 years younger than the transferor, and must either (a) be in the chain of relatives defined in the Family Farms

24 Farm Transfer Act Art. 3(2) b) Based on the farm transfer contract, the farm transferor is obliged to transfer the ownership of the farm and the rights in rem related to the farm free of charge, and the farm transferee is obliged to take over the farm.

25 Farm Transfer Act Art. 3(2) c) Based on the farm transfer contract, the farm transferee is obliged to provide care and maintenance in accordance with the circumstances and needs of the farm transferor or the person designated by the farm transferor until the death, and the farm transferor is obliged to transfer the ownership of the farm and the rights in rem related to the farm.

26 Farm Transfer Act Art. 3(2) d) Based on the farm transfer contract, the farm transferee is obliged to periodically provide a specified sum of money or other replaceable thing until the death of the farm transferor, and the farm transferor is obliged to transfer the ownership of the farm and the rights in rem related to the farm.

27 Farm Transfer Act Art. 2 b) the farm transferor can be a primary agricultural producer or an individual entrepreneur engaged in agricultural and forestry activities, who has reached the age-limit for retirement or will reach it within 5 years from the conclusion of the contract, who a) for at least 10 years, including the period of activity of himself or his legal predecessor, in his own name and at his own risk, he has carried out agricultural and forestry activities or additional activities, and has proven sales revenue derived from this, and b) more than three-quarters of the agricultural and forestry land area defined in the farm transfer contract has been the owner of the land for at least 5 years prior to the date of the farm transfer – with the exception of agricultural and forestry land acquired within 5 years – or has been registered in the land use register for at least 5 years under another legal title a land user, a forest manager registered in the forest management register for at least 5 years, a close relative of this person or the owner of at least 25% of the agricultural production organisation registered as a land user or forest manager.

Act with the transferor or (b) have been employed or have been in other employment relationship[28] with the transferor for at least 7 years.[29]

It can be seen from the rules that not only family members can enter into a contract. A critical constraint is that only one person can be the transferee. Holding the land in one's possession is one of the primary objectives of Hungarian land policy. According to the Act, another viable option is a cooperation term, when the transferor and transferee co-operatively operate the farm for a maximum of 5 years. It is one aspect to transfer ownership of the holding, but another is knowledge transfer that can occur during the cooperation period. The farm transferor will instruct the farm transferee in farm management during this time, and following the collaboration term, the farm transferee will become the owner of the holding. The transferee replaces the transferor in the civil law contracts relating to certain elements of the farm, as defined in the farm transfer contract, without the consent of the third party remaining in the contract. The transferee shall, by means of the farm transfer contract, replace the transferor as the holder of any prior authorisation required for the pursuit of the economic activity related to the farm, as defined in the farm transfer contract, provided that they comply with the legislation laying down the conditions for pursuing that activity.

Act CXXIII of 2020 on Family Farms is another recent law in Hungary.[30] It establishes that a family farm is a production community rather

28 Farm Transfer Act Art. 2 d) Other employment relationships are employment as an outworker and business association activities involving personal participation.

29 Farm Transfer Act Art. 2 c) The farm transferee can be a primary agricultural producer or an individual entrepreneur engaged in agricultural and forestry activities who is at least ten years younger than the farm transferor, under the age of 50, and who meets the conditions prescribed by law for the operation of the farm to be taken over and must either (a) be in the chain of relatives defined in the Family Farms Act with the transferor or (b) have been employed or have been in another employment relationship with the transferor for at least 7 years.

30 Based on the opinion of János Ede Szilágyi, the Family Farms Act was the one in the Hungarian legislation that brought about a marked regulation of agricultural holdings in relation to land transactions, and thus, according to his point of view, introduced a conceptual change in Hungarian land law. Szilágyi, 2022a, p. 407. For the effect of the introduction of the Family Farms Act on the Land Transfer Act, see: Olajos, 2022c, pp. 105–117.

than a legal entity,[31] emphasising it does not denote the unity of the assets, which means it cannot be classified as an agricultural holding. The family farm of primary agricultural producers is defined as a collective production community formed by at least two relatives who are primary agricultural producers. This entity does not possess legal personality or assets independent of its members. The agricultural activities within this framework are carried out collectively on the individual farms of the members, relying on the personal contributions of each participant and a coordinated approach to manage their operations.[32] This defines the "family farm", and I would like to reiterate that it is merely a production community. The current regulation states that if the farming occurs within the parameters of the family farm and the farm transferor, the owner wishes to transfer ownership of the farm; in this situation, the farm transferee must also fulfil the requirements of the family farm in order to maintain the production under the family farm. The criteria state that the transferee must be in the same chain of relations[33] as the other members of the family farm.

4. CLOSING THOUGHTS

At present, I consider the farm transfer contract to be both a significant opportunity and a meaningful step toward establishing classical agricultural holding regulation in Hungary. With the farm transfer contract, the owner of the farm (the farm transferor) has the opportunity to transfer only a part of this farm. So, the transferor has the right to define freely what belongs to this farm – within the legal conditions

31 See about it: Bányai, 2023, pp. 142–143.

32 Family Farms Act Art. 6(1).

33 Family Farms Act Art. 2. b). Chain of relatives is the group of natural persons who are close relatives *(close relative shall mean spouses, direct relatives, adopted children, stepchildren, foster children, adoptive parents, stepparents, foster parents, and siblings*) within the meaning of the Civil Code, as well as relatives (*relative shall mean close relatives, domestic partners, spouses of direct relatives, spouse's direct relatives and siblings, and spouses of siblings*) of these persons and direct relatives of these relatives.

– and he or she can transfer only a part of it to the next generation. But the farm transferor cannot continue his agricultural activity afterwards, because he will be deleted from all registers[34] after the farm transfer. The question is, in this case, how will the unit of the farm be developed in the future? It is a very interesting part of the regulation because the Hungarian legislator would like to keep the agricultural land together in the legal transactions, and it would be useful if the regulation also kept the unit of the agricultural holding. But this act and this regulation made it possible to transfer only the part of the agricultural holding – defining it as an agricultural holding.

In the past, the fideicommissum was a tied estate, with a predetermined order of succession, which restricted free disposal of ownership and hindered transfer of property but kept holdings together in the family. I think the notion of having a separate succession rule for agricultural holdings is extremely desirable and vital in Hungary, but I believe we also need cohesive sui generis legislation for the succession of agricultural lands and holdings. The fideicommissum was significantly distinct, and it would be difficult to implement in modern Hungarian legislation, but the concept of a separate succession rule for agricultural holdings should be explored. At present, the Hungarian agricultural succession regime is incoherent and land-specific, as Hungary has some peculiar rules for agricultural land succession. In my opinion, Hungarian regulation is progressing well, though it has not yet reached its conclusion. The farm transfer contract is one of the tools that can keep the agricultural holding in one hand, and the other tool could be a special agricultural holding succession regulation. In addition, keeping the existing, well-functioning farms together, either between living persons or, in the case of death, could be a worthwhile objective from an economic perspective.

34 Farmers, primary agricultural producers.

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CASE STUDIES

THE BATA EMPIRE AT CROSSROADS

DAVID KOLUMBER

ABSTRACT

This study delves into the pivotal moments in the history of the Baťa (Bata) company and the Baťa family, with a keen focus on the first half of the 20th century. It scrutinises seven critical "crossroads" that significantly influenced the company's trajectory – including the death of Tomáš Baťa, the disintegration of Czechoslovakia, the threat of war, a tax amnesty, the creation of offshore entities, accusations of collaboration, and post-war nationalisation. Through an interdisciplinary approach that intertwines legal, historical, and economic perspectives, the paper aims to present a comprehensive view of the intricate relationships and decisions that shaped the Baťa family's business amidst dramatic social changes. Key themes include the strategic responses to political and economic threats, legal structures safeguarding family wealth, and the complex legacy of the company post-WWII, including accusations of collaboration with Nazi Germany and subsequent legal battles over property and reputation. The study underscores the remarkable resilience of the Baťa business, its profound influence on the Czechoslovak economy, and its global expansion despite significant political upheaval.

Kolumber, D. (2026) 'The Bata Empire at Crossroads' in Szilágyi, J.E. – Ilyés, K. (eds.) *Instruments for Preserving the Unity of Family Businesses and Agricultural Assets: Perspectives of Legal History*, pp. 215–243. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2026.jeszik.ipufbaa_9

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Keywords: *Tomáš Baťa, Jan Antonín Baťa, Tomáš Jan Baťa, Baťa company, Czechoslovakia, WWII, offshore entities, collaboration accusations, nationalisation, legal battles.*

1. INTRODUCTION

The protection of property has long been considered a fundamental value, particularly during the era of humanism.[1] Beyond its constitutional implications, individuals have an inherent interest in safeguarding their own and their family's assets. The Baťa family was one of the wealthiest Czech families, if not the wealthiest.

This study analyses critical moments in the history of the Baťa Group and the Baťa family during the first half of the 20th century. It delves into the legal, economic, and political factors that influenced their business. The research examines seven pivotal "crossroads" in the company's history, including events such as the passing of Tomáš Baťa, the dissolution of Czechoslovakia, the looming threat of war, the tax amnesty, the establishment of offshore entities, allegations of collaboration, and post-war nationalisation. Methodologically, the study relies on a critical analysis of primary historical documents, legal statutes, court rulings, and contemporary correspondences, complemented by secondary literature and scholarly works addressing the history of the Baťa Concern (enterprise) and its impact on the Czechoslovak economy. This interdisciplinary approach integrates historical, legal, and economic perspectives to furnish a comprehensive understanding of the complex interrelations and decisions that influenced the destiny of the Baťa family and their business within the context of significant societal transformation.

1 Koldinská, 2002, p. 612.

2. BATA AS A THEME

The Baťa family rose to prominence as one of the most affluent families in Czechoslovakia during the 1930s. While some sources went as far as to claim that Baťa was the wealthiest Czech,[2] there is no conclusive evidence to support this assertion. Nonetheless, there is no denying that the Baťa family, alongside the Petschs and Schwarzenbergs, wielded significant economic influence. Additionally, Baťa represented Czechoslovakian capitalist success during the interwar period, when the country was among the world's leading economies.[3]

The origins of the Baťa family during WWII were impeded by a mix-up between Wallachia (in Czech Valašsko) and Italy (in Czech, historically Vlašsko[4]), which led to a diversion in research efforts. Records indicate the presence of the Baťa family in Zlín dating back to the period just after the Thirty Years' War, beginning with Lukáš Baťa (1645?-1708?) and spanning five subsequent generations [Pavel (1669?-1724), Martin (1697?-1761), Šimon (1755-1830), Antonín (1802-1858)],[5] ultimately leading to Antonín Baťa (1844-1905). His marriage to Anna Minaříková (1839-1884) in September 1870 is noted;[6] she was a widow at the time, her first husband František Bartoš (1830-1867) having met a violent death. Before their union, František Bartoš had been widowed and had two sons from his first marriage to Františka Baťová (1833-1861). Their younger son, Josef (1859-1942), fathered eight children, and his daughter Marie Bartošová (1896-1989) married František (Frank) Muška (1892-1942) in May 1922. Following Františka's passing, František Bartoš then married Anna Minaříková, with whom he had twin daughters, Josefa (1864-1916) and Františka (b./d. 1864). Josefa, through her second marriage to Hubert Klaus (1863-1918), had three children, while Božena (1896-1978) married Dominik Čipera (1893-1963) in February 1920.[7]

2 *Czech Shoe King Has Free Hand*, 1939, p. 10.
3 Kolumber, 2023, p. 199.
4 Huml, 1863, p. 17.
5 Kolumber, 2024, sheet 1.
6 Ibid., sheet 3.
7 Ibid., sheet 5.

The marriage of Antonín Baťa and the widowed Anna Minaříková gave rise to five children: Ludvík (b./d. 1870), Anna (1872-1936), Antonín (1874-1908), Tomáš (1876-1932), and Marie (1878-1880). Subsequently, after Anna's demise, Antonín entered into marriage with Ludmila Hrušťáková (1857-1939) in 1885. Their union bore several offspring, including Leopold (1887-1920), Bohumila (b./d. 1889), Bohuslav (1895-1959), Jan Karel (later Jan Antonín; 1898-1965), Ludvík (1891-1893), Rajmund (1894-1897), Jindřich (1900-1946), and Marie (1903-1954). Marie married Josef Hlavnička (1897-1943) in February 1924.[8]

Alongside Dominik Čipera, František Muška, and Josef Hlavnička, the Baťa family lineage also included Hynek Baťa (1898-1968) and František Malota (1900-1984). Hynek's grandfather, František (1840-1912), was the brother of Tomáš and Jan's father, Antonín. Notably, František Malota's great-uncle was Tomáš Baťa, through the line of Anna Minaříková. Interestingly, on the brink of WWII, Hugo Vavrečka (1880-1952) stood as the lone member of the top management of the Baťa Concern who lacked a blood relation.[9] Despite the family ties, internal relations within the closest management quarters (except Hlavnička) were frequently tense, if not outright cold.[10]

The roots of the Baťa Concern trace back to September 1894, when Antonín Baťa (1874-1908) established an independent trade.[11] Both Anna and Tomáš played significant roles in the business, contributing financially and personally. However, it was Antonín's name that formally represented the enterprise. This entity later evolved into a public trading company in 1900, with Tomáš Baťa's official involvement. In 1931, through an agreement with the Czechoslovak government and the Ministry of Finance, Tomáš Baťa founded in Zlín a joint stock company (Baťa, a. s.), assuming the position of sole shareholder.[12]

8 Ibid., sheet 3.
9 Kolumber, 2021, p. 71.
10 Wohlmuth Markupová, 2022, p. 54.
11 Kolumber and Kolumber, 2023, p. 134.
12 Kolumber, 2016, pp. 14–17.

3. CROSSROADS ONE: DEATH OF TOMÁŠ BAŤA

Fifteen months after the establishment of the joint-stock company, on 12 July 1932, Tomáš Baťa was scheduled to inaugurate the factory in Möhlin, Switzerland. Möhlin is an emblem of Baťa's response to trade restrictions and tariffs. When protective measures hindered product exports from Zlín, the Zlín concern shifted its focus to exporting entire factory complexes. Consequently, factories were established in various locations, including Borovo Naselje (Yugoslavia, today Croatia), Ottmuth (Germany, today Poland), Chełmek (Poland), Möhlin, Bataville–Hellocourt (France), East Tilbury (Great Britain), Batadorp–Best (the Netherlands), Batanagar (British India, today India), Batawa (Canada), Belcamp (USA), and Martfű (Hungary).[13]

Despite adverse conditions, Tomáš Baťa intended to travel to Möhlin via a private plane from Baťa's airport in Otrokovice (near Zlín). Tragically, the plane crashed into a factory chimney in fog soon after take-off,[14] resulting in the loss of a pilot and Tomáš Baťa, who was referred to as a "super-salesman tycoon" by *Time* magazine.[15]

There was consternation in the group's inner circle. The economic crisis was reaching its peak, and it was clear that the inheritance fees for the survivors could not be paid, as none of the survivors (and the company itself) had such liquidity.[16] The stoic Dominik Čipera, who was one of the top managers, spoke of the hopeless situation after the news of Tomáš's death and destroyed equipment at home. However, he returned a few hours later – icy calm.[17] Tomáš Baťa had a solution to the situation.

On the day of Tomáš's tragic death, Dominik Čipera, in the presence of notary Hugo Förster, Tomáš's brother-in-law Alexander Menčík, Hugo Vavrečka and Jan Antonín Baťa, opened Tomáš's safe, which had been inaccessible during his lifetime. The safe also contained two envelopes,

13 Ševeček and Jemelka, 2013, p. 35.
14 Holan, 1935, p. 89.
15 *End of Bata*, 1932, p. 20.
16 Kolumber, 2018, p. 68.
17 Kolumber, 2022a, p. 77.

"My will" and "J. A. Baťa", containing documents dated May 1931 (a letter issued on 10 May 1931 and a will made on 19 May 1931). Then, Tomáš was to undergo a medical procedure. The letter's contents were a statement that Tomáš Baťa was selling all his property to Jan "even if not listed here", except for real estate, for CZK 54 300 000. Jan stamped the letter with the addendum "I agree, and I buy, or I agreed, and I bought", as he was advised by others present.[18]

Tomáš's last will provided for a contractual claim against Jan Baťa. Jan was to pay 8, respectively, 22 million crowns to Tomáš's surviving wife Marie (Marie T. Baťová; 1893-1954) and son Tomáš Jan (1914-2008). Jan then had the company pay them significantly more.[19]

In December 1932, Jan Antonín Baťa notified the tax authorities about the property acquisition. The local tax office turned to the Ministry of Finance because the amount seemed unreasonably low. The Ministry's investigation valued the property between CZK 210 million and CZK 690 million. On 6 June 1933, the widow Marie T. and Tomáš J. Baťa announced that they 'accepted the contract of 10 May 1931 and have no objection to it'. A few weeks later, on 20 June 1933, the Ministry concluded an agreement with Jan on payment of the fee, thereby accepting Jan A. Baťa's ownership of the property.[20]

Under the Austro-Czechoslovak doctrine of civil law, the letter from T. Baťa constituted an offer, to which J. A. Baťa gave his acceptance, thereby validly establishing the contract upon the offeror's acknowledgement of the acceptance.[21] Given T. Baťa's decease, it is imperative to consider his legal successors. The presence of the widow, Marie T. Baťová, at the safe's opening, as documented by the notary,[22] indicates her immediate awareness of the acceptance, while the surviving son was likely informed shortly afterward. It should be noted that in July 1932, the surviving son was still a minor, necessitating an evaluation of events subsequent to his attainment of legal age as determined by the court. Evidently, both legal successors, namely the surviving wife

18 Kolumber, 2016, pp. 82–83.
19 Kolumber, 2022a, p. 78.
20 Kolumber, 2016, pp. 83–85.
21 Kolumber, 2022a, pp. 77–78.
22 Förster, 1932, p. 3.

and son, affirmed the contract's effects in a statement to the Ministry of Finance in June 1933. This indirectly substantiates the receipt of the acceptance. Despite some non-legal sources disputing the sale's implications on the grounds that J. A. Baťa purportedly used company funds for the purchase, such contentions lack legal significance, as the origin of the funds is immaterial.[23] Furthermore, non-payment of the purchase price does not render the sale void but may entitle withdrawal from the contract. Consequently, Jan A. Baťa lawfully acquired all of T. Baťa's assets (except real estate) and assumed ownership thereof.

Moreover, the widow and son repeatedly confirmed Jan's ownership after 6 June 1933, notably at the general meetings in April 1934, June 1934, November 1940, and December 1941. Jan even authorised Tomáš Jan Baťa to vote as part of his exercise of rights.[24] Thus, ownership was not disputed by any of the relevant actors.

4. CROSSROADS TWO: THE DISINTEGRATION OF CZECHOSLOVAKIA AND THE THREAT OF WAR

While the Czechoslovak elites in the second half of the 1930s believed in fostering ideal relations with minorities, though, some minorities experienced a contentious relationship with the state, which Adolf Hitler exploited in his broader plans.[25] The Group's directorate began to analyse the potential threat of another war conflict in 1936. Near year's end, the Swiss attorney[26] George Wettstein wrote Jan A. Baťa that in the event of war complications, there were two main areas where Baťa's foreign interests needed to be protected, namely the claims of Baťa a.s. (Zlín) on foreign Baťa companies and the capital participations in these companies in which Jan Antonín Baťa was president or vice-president

23 Kolumber, 2022a, p. 78.

24 Kolumber, 2016, pp. 85–86.

25 Kolumber, 2022b, pp. 352–362.

26 The term "attorney" is used here in the sense in which it appears in the cited sources (primarily U.S. usage), i.e. as a general designation for a legal professional. In UK terminology, the closest equivalents would be "solicitor" or "barrister", depending on function.

of the board of directors. The lawyers did not foresee issues in neutral countries such as Switzerland, the United States, the Netherlands, and Scandinavian countries but stressed vigilance in other regions where complications could arise. In countries where Baťa had not yet secured his interests, the lawyers advised him to resign as president of the company and entrust management to competent, caring, and trustworthy citizens of the countries concerned. These individuals should be authorised to act on behalf of the company. In certain situations, it was advised that Baťa consider resigning from his role as vice president and potentially from the board of directors if national conditions necessitated such action. Concerning Baťa a.s.'s claims abroad, the attorneys recommended expediting their collections. If immediate collection was not possible due to the financial situation of foreign companies or clearing problems, they proposed two alternative strategies. The first option was to sell the receivables to a bank in a neutral country, which would provide a guarantee for their repayment. This guarantee would be notarised, and the bank would take legal ownership of the receivables and only pay once it had received payment. The second option was to negotiate with the Czechoslovak National Bank, which could assist in resolving these claims. The lawyers also suggested that Baťa should consider setting up a holding company in Switzerland or the USA, similar to what his competitor Bally had done. Such a company could serve to protect the company's shares and assets. Whether the Czechoslovak, Swiss, or U.S. national banks could be included in this holding company remained a question. Regarding shares in foreign companies, the lawyers warned that if Baťa wished to keep his shares, he would have to consider the question of confiscation in the event of war. To avoid this, these shares were proposed to be transferred to a neutral holding company, such as Switzerland. Setting up such a company in Switzerland might have had the advantage of arranging to relocate some of the employees from Zlín to live and work in Switzerland.[27]

Right after the Sudeten Crisis escalated in September 1938, the Baťa Concern management, at that time comprised of Jan Antonín Baťa, Dominik Čipera, Hugo Vavrečka, Josef Hlavnička, František Malota,

27 J. A. Baťa personal archive, 1936, pp. 1–4.

and Hynek Baťa, started taking measures to protect the organisation's interests.

As early as 24 September 1938, the concern transferred its properties in the border region to its employee Friedrich Kröner. His family was also involved because, after his death on the Eastern Front in 1944, his survivors dragged out the inheritance proceedings until the end of the war. Then, the transfer was declared invalid; a dispute then arose over whether the property should fall under nationalisation, as it belonged to Baťa, a. s., or confiscation as the property of an ethnic German.[28]

On 29 September 1938, the concern requested the possibility of transferring Jan's shares from Czechoslovakia to Switzerland by a plane. The concern had excellent relations with the central bank and even had foreign exchange autonomy. At an extraordinary National Bank of Czechoslovakia meeting on 4 October 1938, the governor, Karel Engliš, announced that the shares had already been sent "when we thought there was going to be a war so that they would be across the border". The transfer was arranged by Johannes Gammeter from Möhlin on 30 September 1938. While the unspecified banking house was not allowed to transfer, Baťa, because of its "enormous assets", was given permission, but on the condition that the values were to be deposited with the Swiss National Bank in the name of the lawyer Charles Jucker and that the National Bank of Czechoslovakia had the right of disposal. The list indicated that they were shares in foreign companies, primarily several versions of Baťa and notably a company called Bavé.[29] On 11 October 1938, the company Cikta was established in Komárno, to which the Baťa shops in the territory that was to be part of the Hungarian occupation were transferred a few days later.[30]

28 Kolumber, 2016, pp. 17, 134.
29 J. A. Baťa personal archive, 1970, pp. 2–7.
30 Kolumber, 2016, pp. 18, 74.

5. CROSSROADS THREE: PRESIDENT

In early October 1938, Czechoslovak President Edvard Beneš abdicated, plunging the nation into a period of uncertainty. The hunt for a new president was initiated, but the president's election was (unconstitutionally) delayed due to Slovak political representation demands.[31] The nation awaited a strong individual who would bear the weight of extraordinary responsibility in the present difficult circumstances.[32] It was widely speculated that this candidate would be Jan Antonín Baťa, a realistic contender as suggested by a concerned periodical.

Jan A. Baťa responded to the offer by calling together six of his closest associates (it is known that among them were Dominik Čipera and Marie T. Baťová), with whom he consulted on the matter. He then decided not to accept the post,[33] and he spoke pretty strongly against other similar incentives. Baťa's candidacy, however, caught the attention of the Germans. The German authorities in Prague suggested in early November 1938 that it would be appropriate for Baťa to request an audience with Hermann Göring. The pretext was to address the concern's interests in the Sudetenland. Baťa did indeed meet with Göring, and Baťa himself described the content of the negotiations as unimportant but reported them to the government.[34]

Three weeks later, at the end of November 1938, Baťa was arrested by the Gestapo in the Sudetenland. The Sudeten German newspaper Die Zeit broke the sensational news that the arrest was due to the attempted smuggling of 164,000 pounds from Litoměřice to Czechoslovakia.[35] Baťa was transported to Karlovy Vary, where it turned out that he had been arrested on the basis of earlier instructions. Here it was shown how Baťa (himself as well as the concern) could exploit the German mentality. Baťa, showing remarkable resilience, resisted sharply during the interrogation, pointing out that it made no sense to him why he had

31 Kolumber, 2015, p. 803.
32 Baxa, 1938, p. 1.
33 Cekota, 1985, pp. 144–146.
34 Baťa, 2008, pp. 143–146.
35 Schuhkönig Bata als Devisenschmuggler, 1938, p. 3.

been greeted by an honour guard at Tempelhof in early November and met with Göring, only to be arrested three weeks later. As soon as the Germans verified the information, he was released, claiming that there had been an "unpleasant oversight",[36] and the German media immediately denied the news of Baťa's arrest.[37] This incidence was not unique; Baťas were referred to a meeting with Göring, the details of which the Germans never dared to verify. The negotiations' content and the Germans' demands were later adjusted to suit the demands of the time,[38] which eventually backfired in the post-war period.

6. CROSSROADS FOUR: TAX AMNESTY

In 1939, the World Exhibition was to take place in New York, and the Baťa Concern ensured that the Czechoslovak pavilion was sufficiently representative. Czechoslovakia, however, ceased to exist in the meantime, with Slovakia declaring independence on 14 March 1939, Carpathian Ukraine following on 15 March, and on 16 March, the Protectorate of Bohemia and Moravia was established as an "autonomous" part of the German Reich. Because of this development, the Group's exhibition became the dominant feature of the "Czech-Slovak" pavilion.[39] Jan Antonín Baťa also headed to the World Exhibition and arrived in New York by ship on 5 July 1939.[40]

During the early stages of WWII, a decree was enacted on 3 October 1939 (RGBl. I, 1939, p. 1997), specifying that individuals holding membership in the Protectorate of Bohemia and Moravia and residing abroad could have their membership revoked if their actions were deemed detrimental to the interests of the Reich or the reputation of the German nation. Upon receipt of the summons to return, their assets could be seized and forfeited to the Reich. The seizure and forfeiture process was

36 Baťa, 2008, pp. 157–158.
37 *Bata auf Geschäftsreisen*, 1938, p. 2.
38 Kolumber, 2016, p. 20.
39 Štýbrová, 2008, pp. 189–191.
40 *New York City Immigration Records: List or Manifest of Alien Passengers for the United States*, 1939.

publicly announced through official gazettes and required the approval of the Reich Protector in collaboration with other Reich ministers. Properties seized in this manner were deemed non-negotiable and could not be disposed of without approval from the authorities.

In July 1939, the Protectorate government announced a tax amnesty aimed at stabilising the Protectorate's public finances, which had been significantly disrupted by the autumn of 1938 events. This amnesty allowed for the declaration of property values from any point in the past.[41]

Jan Antonín Baťa had no intention of returning to the Protectorate, and German representatives hinted at the application of the German regulation to the company. On 10 October 1939, the management of the concern in the Protectorate, mainly represented by Malota and Vavrečka, approached Jan Baťa from Trieste with the request that he sell all or part of his shares to them. However, a more advantageous solution was devised by Čipera, a member of the government in Prague since December 1938, due to the tax amnesty. Subsequently, on 13 October 1939, Josef Hlavnička sent a telegram to J. A. Baťa, referencing an arrangement conceived in the summer of 1932, which led to the transfer of a 25% stake in the company to several individuals based in the Protectorate.[42]

Despite this, the Germans remained dissatisfied, and on 25 October 1939, Malota contacted Jan A. Baťa again, intimating that the transfer was insufficient and expressing further concerns. It was insinuated that a family member should return to the Protectorate with more shares. As a result, before the conclusion of the tax amnesty, Marie T. Baťová was announced as the owner of another block of shares, supported by a document dated 20 July 1932, claiming that J. A. Baťa had granted her 25% of the company's shares. Subsequently, a declaration was to be signed by Marie T. Baťa, Čipera, Vavrečka, Malota, and Hynek Baťa, affirming that the shares would be returned to J. A. Baťa after the war.[43]

41 Leipert, 1939, pp. 765–769.
42 Kolumber, 2022a, pp. 72–73.
43 Ibid., p. 73.

As of the end of October 1939, Jan A. Baťa owned 40% of the shares of Baťa, a.s., Marie T. Baťa had 25%, and each of Dominik Čipera, Hugo Vavrečka, Josef Hlavnička, Hynek Baťa, and František Malota held 7%. The demise of Josef Hlavnička had repercussions on the ownership structure, with his heirs transferring his share to Čipera, H. Baťa, F. Malota, and H. Vavrečka as per the agreements, a process finalised in January 1946 during the succession proceedings.

The share transfers from J. A. Baťa to his associates in July 1932 raised several questions, as printed shares remained unavailable until 1940. The apparent reward given to employees who were not part of the top management at the time is of particular interest. In contrast, Josef Blažek, the sole top manager with the official title of director, did not receive a similar allocation. On the other hand, by the late 1930s, Blažek held an honorary position as a liaison with official offices in Prague, essentially sidelined and performing a redundant, purely formal role.

Following WWII, Malota denounced the transfer as fictitious, asserting J. A. Baťa as the valid owner. Additionally, Vavrečka, Hynek Baťa, and Dominik Čipera expressed their willingness to either return the shares to the state or waive compensation. In a separate statement, Čipera claimed ownership of the shares and refuted any knowledge of the alleged fictitious transfer. Further complicating matters, Interior Minister Nosek reported a notarised agreement to transfer the shares back to Jan Baťa after the war.[44] While references to a 1940 deed are frequent,[45] the original document remains undiscovered. Speculation exists that the absence of this document may be linked to the unrecorded extractions from former archives during the communist era by the State security.

7. CROSSROADS FIVE: OFFSHORE ENTITIES

In 1929, Tomáš Baťa teamed up with Georg Wettstein, a lawyer and financier from Zurich, Switzerland. Under the instructions and guidance of

44 Kolumber, 2016, p. 87.
45 Vojta, 1980, p. 29.

Tomáš Baťa and his successor Jan A. Baťa, Wettstein and his legal associates, Charles Jucker, Hans Berger, and Wilhelmine Meier (known as "Swiss Trust"), acted as depositary for the funds received from Tomáš Baťa and others whose names have never been made public.[46] During WWII, Tomáš J. Baťa himself stated that he was not aware of the circumstances of the creation of the trust,[47] nor were there any other documents relating to its creation. Although Tomáš Baťa was undoubtedly an extraordinary businessman, it can be assumed that the whole construction must have been devised by someone more legally orientated, probably someone from the New York law firm Campbell, Harding, Goodwin & Danforth, with which Baťa had already cooperated through the establishment of the Lynn plant (1919, but soon closed[48]) and which had long represented the Baťa interests in the USA.

The Swiss Trust had the means to provide financial assistance for the development of existing Baťa companies and the organisation of later Baťa companies in various countries worldwide. This association of lawyers was also involved in the organisation and management of the various Baťa companies. The Swiss Trust acted under the instructions of and on behalf of Tomáš Baťa until July 1932 and, after that, respected the succession of Jan Antonín Baťa.

Shortly after the formation of the Swiss Trust, Wettstein formed a Partnership and a Consortium, both of which were to be used to implement the plans of the Swiss Trust. In general, Partnership and Consortium have the same legal meaning. The Partnership and the Consortium had members identical to those of the Swiss Trust. The policy of the Swiss Trust was to organise various companies to serve as holding companies for the shares of Baťa's operating companies. The first of these holding companies was Leader AG, established on 5 February 1931 in St. Moritz, Switzerland. The capital of this corporation was two million Swiss francs, all provided by Tomáš Baťa. Shortly after the formation of Leader AG, the Swiss Trust organised another holding company,

46 J. A. Baťa personal archive, 1943, p. 2.
47 J. A. Baťa personal archive, 1942, p. 13.
48 Ševeček and Jemelka, 2013, p. 38.

Transoceanique SA, which was established under Luxembourg law but also operated in St. Moritz, Switzerland.[49]

The officers and directors of Leader AG and Transoceanique SA were the same personnel as those in the Swiss Trust – the Partnership and the Consortium – specifically Wettstein, Jucker, Berger, and Meier. Later, the Swiss Trust established other holding companies: N.V. Hollandsche Handelsmaatschappij Bavé (Bavé) in the Netherlands to hold shares in Baťa's operating companies in Europe and New World Investment Ltd. in London to hold minority interests in Transoceanique SA, Bavé, and later in Westhold Corporation. Before 1940, Leader AG, Transoceanique SA, and Bavé became crucial elements of the holding company structure that controlled shares of operating companies in continental Europe and the British Empire.[50]

On 21 February 1938, Swiss Trust formed Anchor Mercantile Company Inc. under the State of New York laws, with its principal place of business in New York City. This company was formed initially to conduct import and export business for the Baťa companies but also traded in various commodities for various accounts in this country and South America. In April 1938, a few months after the founding of Anchor Mercantile Company, Inc., the political situation in Czechoslovakia was uncertain. Representatives of Kotva (in English, Anchor), an export company controlled by Baťa, a. s. (Zlín), were trying to move as many Baťa assets out of Czechoslovakia as possible. Representatives of Kotva sent large quantities of leather and other goods to Anchor Mercantile Company, Inc.

In March 1939, representatives of the Bata Shoe Company, Inc., New York, and Baťa, a. s. (Zlín), consulted in Zlín on the construction of a factory in Belcamp, Maryland. Agreements were made whereby Baťa, a. s. (Zlín), which was controlled by Jan A. Baťa, transferred loans and supplied raw materials, equipment and machinery to establish the plant in Belcamp, Maryland. Shortly after its completion, various loans were obtained from Leader AG and other Baťa companies through Jan A. Baťa and František (Frank) Muška, who acted on behalf of Jan A. Baťa as

49 J. A. Baťa personal archive, 1943, pp. 2–3.
50 Ibid., pp. 3–4.

financial advisor to the Baťa companies. These loans soon represented 67% of the liabilities of Bata Shoe Company, Inc.[51]

In 1939, Britain entered the war. Baťa, a. s. (Zlín) supplied grants to numerous Baťa companies in the British Empire to purchase hides, skins, rubber, and wool. At the outbreak of war, Jan A. Baťa and Frank Muška ordered the transfer of these claims to Jan A. Baťa ($537,289.14), expecting the British would seize these assets because Baťa, a. s. (Zlín), was considered an enemy concern.[52]

On 3 October 1940, the Swiss Trust formed the North River Securities Corporation under the laws of the State of New York, with its principal place of business in the offices of the Baťa Companies on Wall Street in New York City. This corporation was to manage the stock held by Transoceanique SA and Leader AG. The shares of North River Securities Corporation were held in a voting trust whose trustees acted for and on behalf of the Consortium as members of the Swiss Group. On 25 January 1940, the Swiss Trust established Hidena Inc. and Ataman Inc. as operating companies in Belcamp, Maryland. Hidena Inc. was formed to serve the Baťa Companies in purchasing raw materials and equipment. Ataman Inc. was formed to provide technical and financial consulting services to Baťa companies in the United States and Canada.

Fearing a Nazi occupation of the Netherlands, the Swiss Trust arranged for the transfer of all Bavé assets from the Netherlands to the United States. On 5 April 1940, the Swiss Trust, through Wettstein, founded the Westhold Corporation in accordance with Delaware state laws. Its principal place of business was in the offices of Campbell, Harding, Goodwin & Danforth – the Baťa Company's lawyers on Wall Street in New York. Immediately upon its formation, Westhold Corporation issued 1,000 shares of stock, which it sold for $10 to Leader AG, Transoceanique SA, and New World Investment Ltd. in exchange for all of the Bavé capital held by these companies. Bavé's assets, consisting of shares in Baťa's operating companies in Europe, were transferred to Westhold Corporation, which assumed Bavé's liabilities and agreed to pay Bavé $212,520. Subsequently, Bavé turned into a corporate shell with a

51 Ibid., p. 8.
52 Ibid., p. 9.

claim of $212,520 against Westhold Corporation. In addition to the stock of the Baťa companies previously held by Bavé, Westhold Corporation acquired from the Swiss Trust in June 1940 the entire stock of Hidena Inc., and Ataman Inc., the operating companies of Baťa in the United States. Westhold Corporation then effectively replaced the Swiss Trust in providing financial assistance to the existing Baťa companies in the United States. Although Westhold had nothing formally to do with Baťa, the company's president, Edward N. Goodwin, stated that he recognised that Jan A. Baťa controlled the Westhold Corporation and the law firm had a duty to accept his instructions.[53]

To transfer funds between Baťa's companies in Canada and the USA, Muscamo Corporation was formed on 4 April 1941, based on powers of attorney from Jan A. Baťa and Baťa, a. s., František Muška. However, this corporation's activities ceased after Muška's death in July 1942.[54]

Tomáš and later Jan Antonín Baťa were, therefore, the owners of a considerable concern, some parts of which were controlled through offshore companies. During WWII, however, the Swiss trust ceased to respect Jan Antonín Baťa's instructions thoroughly, and the situation was further complicated by the sudden death of František Muška and, in 1945, by the death of Wettstein. In November 1946, Jan A. Baťa invited Jucker to confirm Jan's ownership of Leader AG, which Jucker refused. The fundamental issue was that the 1931 contract did not explicitly mention any of the major companies, which is unsurprising, given that Tomáš Baťa's assets were sold as a whole, with only minor exceptions. It undoubtedly included the individual holding companies, which, for obvious reasons, were neither listed nor could have been listed, as doing so would have contradicted their purpose – to conceal the actual ownership structure. It should be added, however, that according to the notary Förster's protocol from July 12, 1932, in the safe, in addition to the mentioned envelopes containing the will and the offer for J. A. Baťa, there were also 1,800 shares of the company Leader AG.[55]

53 Ibid., pp. 6–11.
54 Ibid., p. 6.
55 Förster, 1932, p. 2.

8. CROSSROADS SIX: "HE THAT HAS AN ILL NAME IS HALF HANGED"

Following the Nazi takeover in Germany, the company had to restructure its operations in the Reich. In August 1938, the Baťa family was still identified as Czech Jews,[56] and their alleged Jewish origin likely contributed to Jan's brief internment a few months later.

During the construction of Belcamp, Baťa received support from Senator Millard Tydings, whom Baťa in turn financially and publicly supported in the presidential primaries against F. D. Roosevelt. Baťa encountered significant opposition from local American shoemakers, which gained further official backing following Roosevelt's victory, resulting in close and unfavourable scrutiny of Baťa's activities.[57] In the late 1930s, Baťa proposed a project in Czechoslovakia to support forty million people while expressing a belief in Brazil's greater development potential. Subsequently, Baťa, a. s. (Zlín), acquired commercial companies from the Sloman brothers of Hamburg, thereby securing extensive land ownership in Brazil. At the invitation of Brazilian President Vargas, J. A. Baťa moved from the U.S. to Brazil, assuming control of Brazilian companies, while the Baťa of Zlín paid the brothers in Germany 2.6 million marks.[58]

The representation of Czechoslovak exile sought support from Baťa; however, it did not align with the expectations of the exile government.[59] Throughout WWII, J. A. Baťa and his company expressed support for foreign action and anti-Nazi resistance. Nevertheless, Jan A. Baťa refrained from openly endorsing the exile representation, leading to tensions with the Czechoslovak government-in-exile.[60] Baťa's employees engaged in international initiatives to obtain passports for business activities were met with disapproval from the government-in-exile.

56 *Aryan Footwear*, 1938, p. 31.
57 Ševeček and Jemelka, 2013, p. 79.
58 Kolumber, 2016, p. 99.
59 Němeček et al., 2011, p. 324.
60 Němeček et al., 2014, p. 798.

In June 1941, Jindřich Baťa was even interned in Africa,[61] and many Baťa employees conducted themselves in the foreign military forces more as commercial agents than as true allies fighting for the cause.

Although Jan A. Baťa cited concerns for his family and employees in occupied Europe, the government-in-exile dismissed his reasons and highlighted other similar situations of those who supported the exile.

In May 1940, Jan Baťa and his companies were considered enemies of Britain in Latin America following the scrutiny of intercepted cablegrams and correspondence. Later, in 1941, Wettstein cautioned Baťa against actions that could harm the governments, as the British government had become aware of Baťa's activities through intercepted correspondence.[62] The British authorities believed that Baťa's loyalty and actions were driven solely by his personal interests and saw no issue with his company trading with Czechoslovakia, Hungary, and Southeastern Europe. They cited instances of Baťa's deceptive practices, like labelling shoes as "Made in Yugoslavia" when they were actually produced in Zlín, and manipulating intercompany accounts to receive payments from England under Dutch or Scandinavian pseudonyms. The British expressed doubts about the validity of powers of attorney granted to Baťa's agents and were convinced of his determination to do business with the enemy while opposing cooperation with the British.[63]

In May 1942, the government-in-exile labelled Baťa as Hitler's assistant and prohibited embassies from assisting Jan and his associates.[64] A December 1942 report from the U.S. Consulate General in São Paulo, Brazil, revealed that a German bank had provided Jan A. Baťa with a significant loan and that he had received a passport from the German Reich in June 1939.[65] However, based on information provided by U.S. immigration officials in early summer 1939, it can be inferred that Baťa was considered a Czechoslovak citizen and possessed a passport issued in Paris on June 24, 1939. From the combination of these details, it can be deduced that Baťa's passport likely followed the original Czechoslovak

61 Ibid., p. 736.
62 J. A. Baťa personal archive, 1941, pp. 1–2.
63 J. A. Baťa personal archive, 1943, p. 13.
64 Kolumber, 2016, p. 89.
65 J. A. Baťa personal archive, 1943, pp. 13–14.

template; otherwise, he would have been considered German during the immigration process, since during the Protectorate, German passports with Protectorate stamps were used. The claim that Baťa supported the German regime based solely on his passport is misguided, as the Czechoslovak foreign resistance had not yet been established in June 1939.[66] Although not conclusively proven, it is highly likely that Baťa held a Czechoslovak passport in the summer of 1939.

In 1940 and 1941, the Baťa, a. s. (Zlín), along with Jan A. Baťa, found themselves included in the so-called blacklist, initially compiled by the British and subsequently by the Americans. This registry primarily targeted entities suspected of consorting with the enemy; however, in the case of Baťa, it is conceivable that the desire to eliminate competition also played a contributing role.[67]

Jan Masaryk and Vladimír Hurban felt that Jan A. Baťa had seriously damaged the Czechoslovak cause and set a negative precedent for others by refusing to publicly support it after Munich and March 1939, despite being a prominent Czechoslovak industrialist.[68] It is important to mention that Baťa made a substantial anonymous financial donation to the exiled government.[69] The Zlín Company, with the probable consent of Jan A. Baťa, also extended support to the national liberation movement, notably the Slovak National Uprising.[70]

Moreover, critical investigations of Baťa's actions and decisions during WWII have been conducted by different authorities, focusing on their perceived impact on the Czechoslovakian cause. Jan A. Baťa, declining to endorse the resistance publicly, faced post-war censure from his nephew Tomáš Jan Baťa and his own close associate, Jiří Udržal. Following WWII, several Baťa representatives were subjected to reprisals, with Jan Antonín Baťa being convicted in absentia and sentenced to 15 years on May 2, 1947. Despite an error in the convict's date of birth, the sentence was based on a notably unusual trial.[71] In 2007, the court

66 Kolumber and Beňa, 2022, pp. 11–18.
67 Honsová, 2013, pp. 60–62.
68 J. A. Baťa personal archive, 1943, p. 15.
69 Honsová, 2013, p. 70.
70 Kolumber, 2017, p. 639.
71 Letková, 2017, pp. 437–447.

invalidated the 1947 National Court judgement and dismissed the criminal case. However, a legal conundrum emerged when the National Court issued its ruling based on a decree applicable solely to the Czech lands, which Slovakia, having been subject to the application of the Czech judgement during the Czechoslovakian era, declined to annul.[72]

In the post-WWII context, Jan A. Baťa faced allegations regarding his Brazil development initiative, which purportedly formed part of an arrangement with Göring.[73] The attempt to use this encounter to advance the interests of the concern ultimately had adverse repercussions. Nevertheless, despite the peculiar evidence presented at the National Court, no conclusive proof of Jan's involvement in the Nazi resettlement planning was established. The advancements in Brazil did not escape notice, and in 1957, because of that, J. A. Baťa was even considered a candidate for the Nobel Peace Prize.[74]

9. CROSSROADS SEVEN: NATIONALISATION

Following WWII, the Baťa shoemaking empire experienced a significant decline, particularly in Eastern Europe due to waves of nationalisation. In the autumn of 1945, Baťa Concern companies were nationalised in Czechoslovakia under the Presidential Decree No. 100/1945 Coll., marking the largest nationalised complex in the country. This resulted in the creation of 34 new national enterprises from the original Baťa assets, with 107 other entities being incorporated into Svit (the name of the Baťa shoe part from 1949).[75] In Poland, nationalisation occurred in three phases, starting in 1946. Baťa's Polish enterprises were nationalised in the second and third phases, during 1946 and 1947, resulting in the rebranding and integration of Baťa factories into newly established state-owned enterprises.[76] In Yugoslavia, the nationalisation process began in 1946, leading to the expropriation of Baťa enterprises,

72 Kolumber, 2016, pp. 89–94.
73 Budín, 1947, p. 159; Kisch, 1949, p. 15; Kubáň, 1970, p. 8; Brož, 2002, pp. 54–57.
74 Svatopluk, 1957, pp. 16–17.
75 Kolumber, 2016, p. 135.
76 Ibid., pp. 75–78.

including the factories in Borovo.[77] In December 1947, legislation was put into effect to nationalise 36 industries in Bulgaria, encompassing the local companies of Baťa.[78] In Hungary, the process of nationalisation differed slightly, as the Hungarian state obtained ownership of the Cikta Company, in which Baťa held a stake, through a confidential additional protocol negotiated with Czechoslovakia.[79] Similarly, in Romania, the nationalisation process commenced in June 1948, with the Drata Company being the primary Baťa enterprise to be nationalised. Furthermore, several enterprises were confiscated without formal procedures but later recovered through interventions.[80]

Notably, compensation for nationalised property was expected to be received by the former owners, except for those who were punished in retribution or who allowed such individuals in leadership. As a result, Jan A. Baťa and later Čipera, Malota, and Vavrečka were convicted in retributions in peculiar trials between 1947 and 1948, rendering them ineligible for compensation.

Meanwhile, in the Western sphere, former owners of nationalised companies claimed compensation, asserting that nationalisation represented a punitive confiscation without adequate compensation for their properties.[81] This argument was also presented in the case of Baťa, a. s.[82] Finally, in December 1948, Jan held a general meeting in Belcamp that relocated the headquarters of Baťa, a. s. from Zlín to Batatuba, Brazil. However, this move was declared null and void by the Czechoslovak authorities, despite confirmation by the Brazilian authorities.[83] In the USA, disputes involved the national administration of Baťa, a. s. (the legal shell of the original company), Svit, n. p. (the property substrate of the original company), and Baťa SA (the company transferred to Brazil).

77 Ibid., pp. 68–73.
78 Ibid., pp. 66–67.
79 Ibid., pp. 74–75.
80 Ibid., pp. 78–81.
81 Ibid., pp. 110–111.
82 Ibid., pp. 87–94.
83 Ibid., pp. 100–102.

10. CROSSROADS EIGHT: FAMILY DISPUTES

From 1933 to 1942,[84] Marie T. Baťa and Tomáš J. Baťa consistently affirmed that Jan Antonín Baťa was the rightful owner of the Baťa Empire following the passing of Tomáš Baťa. When Muška, whom *Time* referred to as an "obscure Czech refugee",[85] died suddenly, it was discovered that he had various securities stored in safe deposit boxes around the world. It was only many years later that it was discovered that these nameless companies were actually the key to the Baťa Empire and the basis of the Baťa family feuds.

In 1945, Tomáš Jan Baťa was granted admission to the Swiss Trust by Swiss lawyers following discussions with British officials to ensure compliance with Allied objectives and secure removal from British and American blacklists. However, this move was contested by Jan Antonín Baťa, sparking a dispute over the beneficial ownership of assets stemming from Tomáš Baťa and administered by the trust. The management of the organisation descended into disarray, leading to a stalemate, as both Tomáš J. Baťa and Jan A. Baťa were unable to access the trust assets until the ownership matter was settled in court.[86] The involvement of North River Securities Corporation representatives Donald Hill Sr. and Donald Hill Jr. added another layer to the conflict by aligning with Jan A. Baťa's interests.[87]

In subsequent years, a series of legal disputes ensued, resulting in varied outcomes.[88] Despite uncertainties raised by American courts, Jan A. Baťa appeared to have the upper hand in certain instances.[89] Jan's final procedural shortcoming stemmed from insufficient evidence. Based on current knowledge, it can be inferred that Jan A. Baťa was the owner of the concern and offshore companies. However, post-1945, he encountered challenges related to tax optimisation (property

84 J. A. Baťa personal archive, 1942, p. 13.
85 *Mystery of Muska*, 1950, p. 77.
86 J. A. Baťa personal archive, 1949, pp. 2–3.
87 J. A. Baťa personal archive, 1953, p. 2.
88 Kolumber, 2019, pp. 378–388; Kolumber, 2022a, pp. 73–76.
89 Fondy ABS, 1958, p. 38.

acquisition in 1931/32) and an attempt to conceal his legal ties (offshore companies).[90] Notably, the case law in the American Baťa disputes contributed to the development of collateral estoppel jurisprudence.[91]

The family disputes irritated the Czechoslovak authorities as well. They feared that a possible victory for Tomáš Jan Baťa could result in the challenges of the acts against Jan Antonín Baťa. Specifically, they were concerned that Tomáš Jan Baťa might be entitled to financial compensation for the nationalised property. Correspondence among various ministries, including Finance, Interior, and the Central Bank, revealed efforts to prevent Jan Baťa from successfully claiming against the nationalised factory while simultaneously resisting the acknowledgement of Tomáš Jan Baťa's ownership status.

11. CONCLUSION

The research meticulously documents the evolution of the Baťa Concern and its family during the first half of the 20th century, focusing on the legal, economic, and political forces that shaped their operations within Czechoslovakia and internationally. The aim was not only to analyse pivotal events impacting the company's destiny but also to provide a comprehensive context, elucidating why the specific circumstances of that era often influenced the Baťa family's decisions. The research establishes the Baťa family as one of Czechoslovakia's most significant business dynasties, emblematic of successful capitalist entrepreneurship in the 1930s.

The transfer of leadership to Jan Antonín Baťa following Tomáš Baťa's tragic demise in 1932 marked a critical juncture in the company's trajectory. The text confirms that Tomáš Baťa's foresight legally safeguarded the succession, empowering Jan to assume control and continue the company's expansion, albeit amidst challenges. The material delves into the method by which succession and financial stability were preserved in the face of the economic crisis and the associated inheritance fees.

90 Ibid., pp. 76–79.
91 Ibid., p. 79.

The document demonstrates that the company's leadership transition proceeded smoothly through meticulous planning and the collaboration of pivotal managers such as Dominik Čipera, Josef Hlavnička, and Hugo Vavrečka.

Furthermore, the research comprehensively examines the political and economic landscape in the latter half of the 1930s, when the Baťa Concern grappled with the escalating spectre of war. It showcases the adaptability of the company's leadership, which began implementing procedures to protect overseas assets in the mid-1930s, using a variety of legal and financial structures, including offshore companies and trusts. These measures proved instrumental in upholding the company's stability during WWII, despite some controversial aspects of the strategy, particularly the links with German markets and production for Nazi Germany, which post-war triggered accusations of collaboration.

The study also delves into the intricate post-war scenario when the Baťa Concern underwent partial nationalisation as part of Czechoslovakia's retributive processes, and Jan Antonín Baťa was convicted of alleged collaboration with the Nazi regime. Despite his conviction and subsequent asset forfeiture, the study indicates that the trial was marred by political pressures and lack of evidence, culminating in his posthumous rehabilitation in 2007. Within this context, the study addresses the pivotal issue of post-war intra-family dynamics, marked by extensive litigation between Jan Antonín Baťa and Tomáš Jan Baťa over the concern's ownership. It is documented that these legal disputes, spanning the globe, were complicated by the structure of offshore companies and the absence of direct evidence of property rights, ultimately leading to the fragmentation of the Baťa Empire.

The work further underscores the significance of foreign legal structures and financial operations deployed by the Baťas to shield their assets. The formation of the Swiss Trust and other legal entities in offshore markets enabled the Baťas to safeguard a substantial portion of their assets from state authorities. These measures played a pivotal role in their management strategy during and after the war, mitigating the impact of confiscations, nationalisations, and legal disputes, albeit engendering protracted legal battles spanning several decades.

In conclusion, the paper accomplishes its objective by offering a comprehensive analysis of pivotal legal, economic, and political aspects influencing the operations of the Baťa Concern. It unveils the crucial mechanisms employed by the Baťa family to protect their business during uncertainty, delineating the repercussions of these measures on their post-war prospects. The study contributes to an enhanced understanding of the Baťa family's influence on the Czechoslovak and global economy while presenting invaluable insights for further research within business history and international legal frameworks.

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THE 1926 SHAREHOLDERS' AGREEMENT OF THE RENNER LEATHER FACTORY – HOW TO GOVERN A LARGE TRANSYLVANIAN (MULTI)FAMILY COMPANY IN TURBULENT TIMES

EMŐD VERESS

ABSTRACT

This chapter examines a unique and advanced instance of early 20th-century corporate governance in East-Central Europe: the 1926 shareholders' agreement of the Renner Leather Factory (subsequently referred to as Dermata) in Cluj. The founding families created a private legal system to keep their groups together and maintain strategic control during major political and territorial changes, such as the fall of the Austro-Hungarian Empire and the addition of Transylvania to Romania. The agreement, signed by members of the Farkas, Hecht, and Renner families, set rules for how to vote, how to transfer shares, how to choose leaders, and how to settle disputes. It put in place systems like bearer share deposits, fiduciary discipline, hand pledges, and arbitration to lower the risks of ownership dilution and political uncertainty.

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These arrangements worked with and sometimes outside of formal corporate law. This case provides a unique insight into how business elites employed legal ingenuity to maintain influence, cohesion, and continuity in a volatile geopolitical environment.
Keywords: *syndicate agreement, bearer shares, multi-family ownership, hand pledge, arbitration clause.*

1. HISTORICAL AND GEOPOLITICAL BACKGROUND

In 1911, during the final decades of the Austro-Hungarian Empire, a joint-stock enterprise specialising in leather manufacturing was established in Transylvania, a region long known for its ethnic and religious diversity. The founders were three prominent families of German and Hungarian-Jewish origin. The company was headquartered in the region's administrative center, now Cluj-Napoca (known historically as Kolozsvár in Hungarian, Cluj in Romanian, Klausenburg in German, and Klojznburg in Yiddish).[1]

Transylvania became part of Romania in 1918/1920, after the Austro-Hungarian Monarchy fell apart. This was part of a larger effort to redraw national borders after World War I. Even though there were important changes in politics and state frontiers, the leather company not only survived but grew. This resilience was tested again in 1940, when the Second Vienna Award moved Northern Transylvania back to Hungary. It was then returned to Romania at the end of World War II in 1944/1945. The changes in sovereignty weren't just fluctuations in how the company was run; they also caused important difficulties in how the company worked. Changes in the law that came with each change in state power made things even more complicated, which made the legal environment unstable and challenging for businesses in the area to adapt to.

1 The renaming of Cluj to Cluj-Napoca by State Council Decree No. 194 of October 16, 1974, was a politically symbolic act aligned with Nicolae Ceaușescu's national-communist agenda, with "Napoca" referencing the ancient Roman settlement once located in the area. For the broader context, see Verdery, 1995.

Another defining transformation was social and ideological. Owing to the Soviet military occupation at the end of World War II, the Transylvanian region (like much of Eastern Europe) underwent a radical political reordering. Capitalism gave way to a Soviet-modelled totalitarian regime intent on dismantling private enterprise through nationalisation and the elimination of private property.

The changing denomination ("identity") of the leather company mirrored these transformations. Initially named *Renner*, after the German family that introduced leatherworking expertise to the enterprise, the company was rebranded *Dermata* during Romania's interwar period of rule, coinciding with a phase of rapid expansion.[2] Following nationalisation, it was renamed "*Herbák János*", to honour a Hungarian

2 The name *Dermata* does not have a straightforward dictionary definition. Derived from Latin/Greek roots, the prefix "*derma*" (from Greek "δέρμα") means "*skin* or *leather*", fitting for a company in the leather and footwear industry. The name was likely chosen to sound modern, technical, and internationally recognisable, reflecting the company's focus on leather production and expansion during the Romanian interwar period.

communist[3] – a decision that reflected the town's ethnic makeup, which remained predominantly Hungarian until the late 1950s. In a later stage marked by intensified Romanian nationalism, the company received its final name: *Clujana*.[4]

This historical context raises critical questions: How could this company endure such dramatic geopolitical, legal, and ideological changes? What strategies enabled its persistence and development? This research commences with a brief history of the company and its significance to the economy and society (Section 2). The primary objective of this

3 Herbák János (1911–1940) was a communist activist of Hungarian origin in Romania, known for his early and determined involvement in the workers' movement and underground communist youth organisation in interwar Romania. He was born on February 2, 1911, in the Szilágyság (Sălaj) region (now part of northwestern Romania), the tenth child in a poor peasant family. Experiencing poverty from an early age, Herbák began working as a cobbler's apprentice at just 13, after his family relocated to Margitta (Marghita) in 1924. Herbák became politically active as a teenager, joining the underground Communist Youth Union, where he quickly emerged as an organiser and propagandist. He participated in clandestine meetings, distributed political literature, and transformed his home into a centre for political education among local youth. After moving to Cluj (Kolozsvár), he continued his political activism, eventually becoming a provincial secretary of the Communist Youth Union. In 1934, he led a bold propaganda action that involved raising the red flag of the Communist Party at the Dermata factory. Arrested in 1935 after attending a secret meeting of youth leaders in Bucharest, he was imprisoned, tortured, and sentenced to ten years by a military court. He was eventually transferred to Doftana Prison, infamous for holding political prisoners. On the night of November 10–11, 1940, a powerful earthquake caused the prison to collapse, killing Herbák along with many others. He was posthumously honoured as a martyr of the anti-capitalist struggle, and his name was given to the nationalised Dermata leather factory during the early phase of the Soviet-type dictatorship. For details see Mihálka, 1971, p. 4; Weisz, 1971, p. 2. In 1960, a statue of János Herbák was erected next to the factory, but it was stolen by metal thieves in 2008. The pedestal remains in place today. See Lakatos, 2015, pp. 118–119.

4 The name *Clujana* derived from the city's Romanian name, *Cluj*. The suffix "*-ana*" is often used in Romanian to create adjectives or demonyms, indicating origin or affiliation. So, *Clujana* roughly means "*the one from Cluj*" or "*belonging to Cluj*". The name change reflected a nationalist branding: adopted in the later communist period, it highlighted the Romanian identity, in contrast to earlier German or Hungarian associations.

chapter is to conduct a thorough investigation of a particular corporate governance[5] method employed by this multi-family enterprise. The emphasis is on the shareholders' agreement established in 1926, a legally binding internal accord among the founding families, crucial for governing ownership, decision-making, and collaboration inside the corporation (Section 3).[6] This agreement offers a distinctive and substantial viewpoint on how early 20th-century joint-stock companies with familial ownership in East-Central Europe sought to maintain internal unity and exert control amid a rapidly changing political and economic environment.

2. A BRIEF COMPANY HISTORY: FROM FOUNDATION (1911) THROUGH NATIONALISATION (1948), AND BEYOND (2022)

The origins of the company later known as *Dermata* reflect a convergence of artisanal expertise, legal entrepreneurship, and interethnic cooperation in a politically volatile region.[7] While the firm was initially registered under the name *Renner Brothers & Co. Leather Factory*, a title highlighting the German founders' contribution, its corporate structure and evolution were significantly more complex, involving strategic alliances with Hungarian-Jewish professionals and local financial institutions.

The Renner family, originally from Deggingen in Baden-Württemberg, was relocated to Transylvania in the late 19th century. Johann (János) Renner (1856–1920), a skilled tanner known as "Hanzi", settled in Reghin,[8] where he married the daughter of a local butcher, an arrangement that ensured a steady supply of hides for his craft. Though initially working within small local markets, Renner soon gained broader

5 "The term 'corporate governance' covers the entirety of regulations addressing the organisational and substantive design of the management and monitoring of enterprises." See Roth and Kindler, 2013, p. 93.

6 National Archives of Romania, Cluj-Napoca, Clujana fund, 1926, pp. 91 ff.

7 For a more detailed history of the company, see Veress, 2022a, pp. 109–123.

8 Szászrégen in Hungarian, Sächsisch-Regen in German.

recognition. In 1904, he was awarded a gold medal for leather quality at an industrial fair in Turda.[9] The decorative "golden rooster" emblem featured on the medal became later the company's long-standing trademark, enduring through regime changes and shifts in sovereignty.

Renner ultimately moved to Cluj, then an under-industrialised city with only a match and tobacco factory in operation. He established a tannery on the right bank of the Someș River,[10] using a rented property that provided essential water access. When this property faced foreclosure, Renner purchased both land and buildings to preserve the site, investing his personal capital. His sons, the brothers Frigyes and Emil, would later become the namesakes of the business.

The expansion of the enterprise into a corporate structure was driven largely by Mózes Farkas, a Hungarian-Jewish lawyer born in 1881 in Huszt/Khust (present-day Ukraine).[11] Educated at the Unitarian Gymnasium and Franz Joseph University in Cluj, he earned a law degree and became an attorney in 1907. Sources indicate that his family already had experience in the leather trade: his brother József operated a shoemaking workshop. According to memoirs by writer István Nagy and historian László Bányai, Mózes Farkas acquired hands-on training in shoemaking as a prerequisite for establishing a leather enterprise, an absolutely unusual path for a law graduate, but one that reveals his dedication to understanding the business from the ground up.[12]

The firm was formally established as a *Kommanditgesellschaft* (*betéti társaság*, i.e. limited partnership) in 1910, under Austro-Hungarian jurisdiction and based on Hungarian commercial law. The general partners with joint representation rights were Rezső Hecht, József Farkas, and Johann Renner's sons, Frigyes and Emil. Mayer Rosenfeld held power of attorney to sign on the company's behalf, while the *Polgári Takarékpénztár Részvénytársaság* (Citizens' Savings House Joint-Stock Company) was listed as the limited partner. Within a year, the firm transitioned into a joint-stock company (Renner Testvérek és Társai Bőrgyár Rt., *Brüder*

9 Torda in Hungarian, Thorenburg in German.

10 Szamos in Hungarian, Samosch in German.

11 For details of his life, see Fegyveresi and Székely and Vallasek, 2023, pp. 33–35.

12 See for details Veress, 2022a, pp. 111–112; Nagy, 1957, p. 251; Bányai, 1976, p. 302.

Renner & Companie Lederfabrik Aktiengesellschaft) in 1911, governed by the Hungarian Commercial Act of 1875. The initial capital stock was set at 200,000 crowns, distributed over 400 shares with a nominal value of 500 crowns each.

The enterprise acquired land in Cluj and received public subsidies for industrial development, likely secured through the influence of the Farkas and Hecht families. In 1912, the company constructed its first major factory building. The Hungarian government granted a ten-year tax exemptions and established the factory as a symbol of Cluj's nascent industrialisation. Although the firm failed to secure military supply contracts during the Balkan Wars, World War I brought a dramatic increase in production. During this time, the attorney Mózes Farkas assumed the position of general director,[13] exhibiting the qualities of a modern corporate manager. A 1924 external audit, commissioned by a bank, praised Farkas's leadership and managerial acumen.

Following the postwar territorial realignment formalised by the Treaty of Trianon (1920), which incorporated Transylvania from Hungary into Romania, Farkas successfully adapted the company to the new legal and political framework. He invited prominent Romanian politicians (former Prime Minister Alexandru Vaida-Voievod and the lawyer and later university professor Emil Hațieganu) to join the board of directors, facilitating a continuation of public support under Romanian jurisdiction. Remarkably, the firm retained and even expanded its tax-exempt status: the Romanian government renewed financial aid for another 30 years, transforming the original 10-year exemption into a long-term subsidy. The legal basis for this was Act III of 1907, a Hungarian statute still applicable in Transylvania, designed to foster regional industrial development. Despite legal objections arguing that the Hungarian statute allowed exemptions for a maximum of 15 years and criticisms that such aid was unnecessary given the firm's declared profit of 1,991,644 lei in 1920, the support continued.

13 "As far as companies have concentrated ownership, the dominant shareholders are likely to appoint board members who act on their behalf: e.g., in a family firm, members of that family. Thus, here, the directors are 'insiders', in contrast to firms with dispersed shareholder ownership where newly appointed directors tend to be 'outsiders' to the company in question." See Siems, 2018, p. 233.

By 1918, the factory employed nearly 800 workers. This number increased to over 1,200 by 1925, 2,000 in 1930, and close to 3,000 by 1938, highlighting the company's sustained growth. In 1930, under Farkas's initiative, the company acquired the Turul Footwear Factory from Timișoara, established in 1901. The company changed its name to Dermata Leather and Footwear Factories Joint-Stock Company (Dermata Fabrici de Pielărie și Încălțăminte S.A. – Dermata Művek Bőr- és Cipőgyárak Részvénytársaság). Turul had a unique legal status but was operationally integrated into *Dermata* (starting from 1937, functioning under the name "First Footwear Factory from Banat"). In 1926, Dermata produced 138,000 pairs of shoes, and this production number saw a significant increase by 1932, when 470,000 pairs were manufactured.[14]

According to the board's 1932 report, the firm declared a profit of 21,670,564 lei. Mózes Farkas possessed 25,124 bearer shares, representing the largest stake among 45 shareholders participating at the 1933 general meeting who collectively exercised 140,245 votes. Participants included investors from Vienna, Budapest, Bucharest, Munich, Prague, London, and Chernivtsi.

In 1932, Farkas drafted a will with a visionary goal: to place his shares in a foundation that would represent the interests of factory employees. The dividends were to be used to benefit workers, and clerks and labourers would be granted representation on the executive and supervisory boards. Board positions were to be divided equally between these two groups, elected by secret ballot from among long-term employees. However, this testamentary act was never executed. Legal revocation remained a possibility, but the reasons for the will's ineffectiveness remain unclear and merit further research. It is known that the shares ultimately passed to Farkas's widow and children in 1941. Even had the foundation been formed, it would likely have been nullified by the nationalisation of 1948, which transferred all ownership to the state without compensation.[15] Furthermore, nationalisation effectively

14 For detailed annual data, see Fegyveresi and Székely and Vallasek, 2023, p. 45.

15 For details of this last will, see Fegyveresi and Székely and Vallasek, 2023, pp. 35–40. This will "drawn up during the Great Depression", "aimed at establishing a social enterprise along lines that would be exemplary even today", as the authors of the cited article conclude. Fegyveresi and Székely and Vallasek, 2023, pp. 10, 35.

disrupted the intergenerational transmission of private enterprises, thereby preventing the emergence or persistence of capitalist dynasties' operation.

When a new law mandating the hiring of ethnic Romanians in enterprises was passed in 1934, minority workers became concerned. Rumours circulated that Dermata might soon lay off Hungarian employees or impose Romanian language exams as a prerequisite for employment. In an interview with the Hungarian-language newspaper *Ellenzék*, Mózes Farkas publicly denied any such discriminatory practices, affirming his inclusive hiring principles. He emphasised that political meddling should not impede industrial activity, asserting, "Leather and shoes are manufactured between the walls of our factory, not politics".[16]

The shareholder register from April 6, 1940, reveals 160,000 shares in circulation, with Mózes Farkas holding 26,647 (16.65%), József Farkas 21,037 (13.14%), Frigyes Renner 6,162 (3.85%), and Emil Renner 5,076 (3.17%). Internal corporate conflict emerged that year when Mihály Dávid, former director of the Raw Leather Center (ODAMP) and ex-Dermata official, filed a multi-million-lei lawsuit against the company, claiming wrongful dismissal. The case remained unresolved due to the Second Vienna Award (August 1940), which returned Northern Transylvania to Hungary. Romanian judicial proceedings were suspended or abandoned.

Dr Mózes Farkas died on August 17, 1941, in Budapest. His funeral in Cluj was attended by industrialists, public figures, factory representatives, and employees, underscoring his social and economic influence. He was interred in the Orthodox Jewish Cemetery on Tordai Street. His formal removal from the trade register occurred on November 15, 1941. In October 1944, the city of Cluj came under the control of the Soviet Red Army as part of the broader military operations in Eastern and Central Europe during the final phase of the Second World War. Subsequently, in March 1945, the Romanian state re-established administrative authority over Northern Transylvania (following its temporary reintegration into Hungary after the Second Vienna Award in 1940). These events marked the beginning of a radical political transformation. The ascent

16 *Világosság a Dermata üzemialkalmazottak helyzetében*, 1934, p. 3.

of the Romanian Communist Party, facilitated by Soviet military presence and political pressure, was already underway, foreshadowing the dismantling of liberal-democratic institutions and the establishment of a Soviet-style totalitarian regime.[17]

By October 1947, a confidential list of shareholders looking to sell their holdings included Frigyes and Emil Renner. At that time, the Soviet Union had acquired 980 shares (0.61%) as part of war reparations (taken over from German shareholders). Mózes Farkas's children retained shares, though only his niece, Magda, held a board position. Magda's fate captures the human cost of the postwar political transition. Married to Communist official Sándor Jakab (Alexandru Iacob), a deputy finance minister, she was arrested together with her husband during a wave of purges. She suffered psychological collapse and was later institutionalised in Israel, rescued only through the intervention of her Paris-based sister.

In 1948, the company became nationalised under Act No. 119/1948, following the enactment of Romania's first Soviet-style constitution. This marked a definitive shift in societal organisation: the law authorised the expropriation of productive assets without compensation. Article 11 of the new constitution omitted any requirement for "just compensation" in case of nationalisation, unlike Article 10, which governed expropriation for public utility. The ideological foundation of nationalisation was rooted in the Marxist objective of eradicating private ownership and the so-called "exploiting classes". Compensation would preserve the exploiters as a social class, so it was not conceivable. Nationalisation was not a legal transfer via contract, nor did it preserve corporate continuity. Rather, nationalisation – a unilateral act of state power – severed corporate legal personality, dissolved shareholder rights, and transformed the enterprise into a centralised, *sui generis* state structure (a Soviet-type state-owned enterprise).

Dermata was absurdly categorised under Annex 18 of the nationalisation law as a chemical enterprise, an emblematic distortion reflective of the regime's bureaucratic opacity. In this wave of nationalisation, altogether, 8,894 companies were acquired by the state, with 3,600 of

17 Lewis, 1994, pp. 49–75.

local interest. Dermata was a nationally significant company. The legacy of the founding Renner, Farkas and Hecht families, coupled with decades of entrepreneurial development, was expunged from the official narrative. The enterprise survived and even developed, but not as the company it once was. It was now merely a production unit in the command economy of a totalitarian state.[18]

Following the dissolution of the communist system in 1989, the former Dermata factory, named Clujana, became embroiled in the tumultuous wave of privatizations that transformed Romania's economy. The substantial real estate assets, essential to its operations, were progressively diminished, divested in fragments and transferred under dubious conditions: a clear case of asset depletion. In the subsequent years, the remnants of the company experienced intermittent periods of local governmental ownership. Numerous attempts were undertaken to restore production or repurpose the remaining assets; however, these projects were ultimately disjointed and ephemeral. In 2022, the factory was officially subjected to liquidation, terminating its corporate existence. But now we should focus on 1926 and on a truly interesting piece of contract related to the corporate governance of this corporation.

3. THE SHAREHOLDERS' AGREEMENT OF 1926

3.1. CONTEXT

The founding and evolution of the Renner Brothers & Co. Leather Factory Joint-Stock Company, later known as Dermata, offer a particularly instructive example of early 20th-century industrial enterprise in East-Central Europe structured on multi-family ownership. From its inception, the company was not the creation of a single capitalist actor but rather the product of collaboration between several families of distinct ethnic, religious, and professional backgrounds: the German-origin

18 For details on nationalisation, see Katzarov, 1964; Veress, 2014, pp. 185–201; Veress, 2022b, pp. 241–269.

Renner family of artisan tanners; the Hungarian-Jewish Farkas family, which brought legal and commercial acumen; and the Hecht family, likewise of Jewish descent, which played an essential financial role. Each family held a significant block of shares and was involved in both strategic decision-making and day-to-day management.

This pluralism, what might be called a *multi-family corporate architecture,* was a source of both strength and internal complexity. Maintaining cohesion among investors with diverse interests, histories, and strategic objectives was challenging; yet, the company reaped advantages from a broad spectrum of abilities, social capital, and risk tolerance. During the interwar period, the firm expanded rapidly in both physical infrastructure and market presence. As it progressed, its ownership structure grew increasingly ambiguous. By the mid-1920s, shares had been issued and transferred far beyond the circle of founding families. While the Renners, Farkas, and Hecht families remained important, their combined voting power was no longer sufficient to unilaterally control the decisions of the general assembly of shareholders.

It is in this context that one of the most fascinating documents in the company's archival holdings must be situated: a private shareholders' agreement concluded in 1926 between members of the founding families. Known under the Hungarian (and also Austrian) legal terminology as a "*szindikátusi szerződés*" (Syndikatsvertrag, "syndicate agreement"), this contract reveals how key shareholders sought to retain collective control in the face of ownership dilution. The discovery of this document in the Romanian historical archives is of considerable significance, first as a rare artefact of legal history and second as a window into the private ordering mechanisms used by early 20th-century business elites to consolidate authority within an increasingly fragmented shareholder structure. Moreover, Dr Mózes Farkas – a practising attorney as well as the corporation's general director – was plausibly the contract author.

In modern corporate law, shareholder agreements are binding private contracts that complement or modify public governance rules from a company's articles of association or national laws. They remain widely used today to align voting behaviours, prevent hostile takeovers,

regulate share transfers, and establish governance mechanisms.[19] In Hungarian and Austrian legal practice, from which much of Transylvania's legal infrastructure derived during the interwar period, the term "syndicate agreement" referred to precisely this type of private arrangement. Such agreements were typically informal, confidential, often secret,[20] and enforceable only among signatories.[21] Their legal validity rested not on corporate law but on the principles of the general law of obligations.

The 1926 syndicate agreement of the Renner Leather Factory can be viewed as a textbook example of such a coordination device. It was signed by six individuals: Dr Mózes Farkas, József Farkas, Jenő Farkas (representing the Farkas family), Dezső Hecht (of the Hecht family), and Frigyes and Emil Renner (founder Johann Renner's sons). Collectively, these signatories controlled a substantial portion of the company's shares. However, as they no longer held an outright majority, they sought to reassert their influence through unified voting and coordinated shareholder behaviour.

An in-depth analysis of the 1926 syndicate agreement among the Farkas, Renner, and Hecht families uncovers significantly more than only an internal coordination system among the original stockholders. This document, retained in the archives of the Renner Leather Factory (subsequently Dermata, Herbák, and Clujana), enables the reconstruction of a governance framework established through intersecting contractual agreements among different groups of shareholders. What seems to

19 As it was stated, "[t]hese agreements enjoy extensive use all over the world, as they assist shareholders more clearly to regulate their relationships with each other. The most common agreements cover voting rights, transfer restrictions, and exit rights, as well as the composition or remuneration of management or supervisory boards. Conceptually, they are separate contractual agreements between all or some of the shareholders that operate alongside the articles of association, as the Italian term 'patti parasociali' and the Spanish term 'pactos parasociales' suggest". See Fleischer, 2018, 690–691.

20 "In most jurisdictions, the existence and the content of shareholder agreements remain hidden from the curious gaze of outsiders." Ibid., p. 691.

21 "As a classical contract, it can only bind its immediate parties; in contrast to the articles of association, it can only be altered with the consent of all parties". See Ibid., p. 691.

be a singular private agreement implies the existence of at least two concurrent contracts and strongly indicates the presence of a third, thereby establishing a network of shareholder coordination that regulated the company during ownership dispersion. The preamble of the 1926 accord is notably earnest in this respect. The agreement specifically indicates that the contractual parties, collectively referred to as the Farkas Group, along with the Boros Group, represented by Gyula Boros of Vienna, possessed a shared majority of shares in the corporation. Importantly, it additionally states that "to ensure cohesive governance of company matters, the two groups have established a syndicate agreement, which will remain effective in the future".

This wording provides a key indication: alongside the current intra-group contract among Farkas-aligned shareholders, there must have been (1) a distinct internal agreement regulating the Boros Group and (2) a tertiary inter-group syndicate agreement between the two factions, affirming overlapping syndicate agreements and a multi-block shareholder framework. While these supplementary agreements have not yet been retrieved, the 1926 document under examination serves as indirect evidence of their existence and importance. It provides a rare insight into how shareholders of a significant East-Central European industrial firm structured themselves into formally distinct yet strategically interdependent coalitions, each regulated by its own internal voting protocols and disciplinary mechanisms, while concurrently participating in cross-group contractual coordination to secure a majority stance in the company's general assembly. This legal framework demonstrates a privately negotiated governance arrangement that both mirrored and enhanced traditional corporate entities. The Farkas and Boros groups operated as independent, internally consistent "political" entities inside the larger shareholder community. These groups were not merely transient coalitions. They possessed a legal (contractual) form and internal structure, while they were regulated by enforceable private contracts that dictated voting behaviour, fiduciary duties, penalties for disloyalty, and succession planning in cases of death or incapacity.

Shareholder considerations compelled these nominally independent groups to function with limited cooperation. Neither side held an autonomous majority of votes. Collective action was the sole means

by which they could influence the company's decisions at the general meeting. This required strategic collaboration alongside the intrinsic struggle for influence and future dominance. The Farkas Group's agreement implicitly acknowledges this fragile alliance: it mandates its members to adhere to a unified voting strategy both internally and in collaboration with the Boros Group (while simultaneously preserving the right to act independently if the inter-group agreement is violated or deemed void).

The resultant governance model can be defined as regulated cooperation among rival syndicates. The two sides were necessitated to engage in limited coalition-building to maintain control over essential decisions, including board appointments, dividend policy, and strategic acquisitions, but none was subordinate to the other. The language of the Farkas syndicate agreement suggests a pragmatic, commercial partnership rather than a deeply interwoven relationship. No evidence indicates a formal amalgamation of interests or any lasting consolidation of shares beyond what was needed to maintain a voting majority. Their joint dominance was pragmatic rather than ideological.

The lack of the Boros Group's internal agreement and the intergroup contract between the Farkas and Boros syndicates constrains our capacity to fully reconstruct the extent of strategic cooperation. Nonetheless, this omission emphasises the significance of the 1926 Farkas accord as a significant source. The clauses govern internal group discipline and establish the group's stance towards external allies and prospective adversaries. This agreement illustrates that business power in interwar Cluj was not exclusively wielded through shares or formal positions but rather through intricate private legal frameworks established inside and among privileged families.

The 1926 agreement, alongside its technological features, represents a comprehensive framework of interwar industrial governance, marked by a combination of contract, family, and company law, with control implemented through both informal methods and formal legislation. In this legal-cultural context, power originated not just from boardrooms and share registries but also from private agreements, familial gatherings, and enforceable yet undisclosed contracts.

It is essential to contextualise these arrangements within their geopolitical context. In 1926, Transylvania underwent a phase of consolidation within Greater Romania following the Treaty of Trianon. Political instability, evolving regulatory frameworks, and the necessity to re-establish economic credibility within a new national context may have intensified the demand for private shareholder collaboration. As external hazards escalate, internal cohesion has transformed into both a corporate necessity and a survival tactic.

The syndicate agreement concluded in 1926 is remarkable also for its linguistic and legal context. Strikingly, despite the *de facto* incorporation of Transylvania into Romania in 1918 and its formal annexation in 1920 under the Treaty of Trianon, the agreement was still drafted in Hungarian, six and eight years after those respective milestones. This language selection highlights the enduring pre-union cultural and professional practices within the Transylvanian bourgeoisie, especially within Hungarian-speaking elites. Moreover, it underscores the persistent implementation of Hungarian private law in the area. The legal regime governing this contract remained the Hungarian Act on Commerce No. XXXVII of 1875 (the Hungarian "Commercial Code"), which regulated joint-stock companies and was after 1918 locally referred to (somewhat fictionally) as the "Transylvanian Commercial Code" (*Codul Comercial din Transilvania* in Romanian). No such code was formally adopted under that name, as Transylvania had been part of the Kingdom of Hungary within the Austro-Hungarian Empire when the law was promulgated. The code's uninterrupted use until its repeal during the World War II attests to the resilience of private legal frameworks amid broader political realignments.

3.2. DURATION

Article 11 sets the start and end dates for the syndicate agreement as January 1, 1927, to December 31, 1932, providing the agreement a clear time frame and showing the contractual theory behind it. This kind of fixed-term validity clause is necessary in business contracts like this one because it combines the requirement for predictable governance

and coordinated control with the parties' right to change their strategic alignments over time.

A five-year period is lengthy enough to keep things going, make decisions easier for the shareholders, and stop anyone from taking advantage of the situation, but it is still limited and may be reviewed. Choosing a well-specified term instead of an indeterminate one or one that is tied to events that may or may not happen (i.e. the life of a shareholder or the length of their shareholding) reveals that you are thinking logically about how to coordinate shareholders. The agreement indicates that the parties involved believe its significance may diminish over time due to potential changes in business and family dynamics within the firm. If this occurs, the deal may be revisited or renegotiated.

The time limit is important because it protects the agreement from legal challenges that could happen if there were rules against long-term control arrangements. Fixed-term contracts are generally regarded as legal (under both commercial and civil law), respecting the idea of freedom of contract while maintaining market flexibility or enabling businesses' adjustments.

The selected period corresponds to a time of significant political and economic instability in East-Central Europe. The parties may have been seeking to gain greater control in the company by setting a term that lasted until the early 1930s, when the market and the law were changing. This condition also served a strategic purpose: it maintained the group's stability while allowing them change their minds or terminate the arrangement after five years. The fixed-term duration clause is a clever legal design that offers the syndicate a certain stability[22] and a built-in period for re-evaluating.

3.3. DEPOSIT OF THE BEARER SHARES

One particularly important feature of the Renner Leather Factory's corporate structure was its decision to issue bearer shares (*au porteur,*

22 "Family shareholding groups [...] are likely to see value in stability, particularly if their planning horizon is multi- generational". See Gordon, 2018, pp. 33, 54.

Inhaberaktien, bemutatóra szóló részvények, acțiuni la purtător). Unlike registered shares, which are issued in the name of a specific shareholder and entered into a share register, bearer shares confer ownership upon whoever physically holds the share certificate. As such, bearer shares are transferable by mere delivery, without the need for registration, notarisation, or board approval. This mechanism was entirely lawful and common under Hungarian commercial law (based on the 1875 Commercial Act), which permitted joint-stock companies to issue bearer shares under certain conditions.

The legal and strategic implications of issuing bearer shares were substantial. On the one hand, bearer shares facilitated liquidity and ease of transfer, making it easier for shareholders to sell or pass on their shares without regulatory friction, which could attract investors and enhance market flexibility. On the other hand, bearer shares exhibit limited transparency and traceability due to the lack of a full shareholder register maintained by the company for bearer instruments. Hence, it becomes challenging to ascertain the identity of individuals holding specific equity portions at any given time, leading to major consequences.

In the specific case of the Renner Leather Factory, the use of bearer shares meant that the ownership structure was, at least in formal legal terms, opaque and fluid. The company could only determine its shareholder base indirectly, based on who presented bearer certificates before the general meeting to exercise voting rights. The issuance of bearer shares amplified the importance of private ordering mechanisms in preserving control. Since shares could circulate without record, the founding families had to rely on extra-statutory contractual tools (e.g. depositing shares with a trustee, in this context, Dr Mózes Farkas) or pre-agreeing on voting behaviour to avoid fragmentation or capture by outside interests. The risk of unwelcome accumulations of voting power through silent acquisitions was ever-present, especially given the growing dispersion of ownership by the mid-1920s.

The Renner Leather Factory's issuance of bearer shares increased flexibility and anonymity but concurrently weakened internal corporate transparency and rendered the company more dependent on private, non-public governance structures to ensure control and coordination

among shareholders. The bearer share system thus helps explain why the founding families took elaborate measures to construct binding syndicate agreements and safeguard long-term strategic cohesion.

The 1926 agreement of Article 1 stated that the parties to this agreement hold the following quantities of shares in Renner Brothers & Co. Leather Factory Joint-Stock Company (hereinafter referred to as Renner Leather Factory):

- Dr Mózes Farkas: 30,464 shares
- József Farkas: 27,531 shares
- Jenő Farkas: 7,031 shares
- Dezső Hecht: 27,531 shares
- Frigyes Renner: 27,650 shares
- Emil Renner: 27,650 shares

All the members domiciled in Cluj, and we can see that this group is formed practically by the founders of the company. This article served not only as a disclosure of holdings, a recordkeeping measure, but also as an inventory of power, the basis for enforceable obligations under the syndicate agreement (voting coordination, penalties for breach, pledge arrangements). These figures set the baseline for fiduciary expectations and rights within the private governance framework. In a context where bearer shares obscured ownership transparency and allowed for fluid market circulation, this declaration was essential for maintaining the group's authority, internal discipline, and coordinated control.

This inventory must be read in close connection with article 2:

> *The members of the Farkas Group shall place all of the above-mentioned shares they own on deposit with Dr Mózes Farkas. These shares may only be disposed of in accordance with the modalities set forth in this agreement. They may not be alienated, pledged, or encumbered in favour of third parties. Dr Mózes Farkas shall hold the deposited shares in the safe of the Renner Leather Factory.*

The clause in question established a specific contractual deposit arrangement,[23] sometimes referred to in legal terms as escrow. The members of the Farkas Group committed to physically placing all of their shares (specifically bearer shares) in the custody of Dr Mózes Farkas. These share certificates, which conferred both ownership and voting rights through possession, were held by him in a secure location: the Renner Leather Factory's company safe. This arrangement was not just symbolic but, as we will see, functioned as a binding intra-group restriction with significant legal and strategic consequences.

The deposit created a functional equivalent of a private law encumbrance. While the shares remained legally owned by the individual shareholders, their control and use were collectively regulated. According to the text, the shares could only be disposed of in accordance with the modalities set forth in the agreement. No shareholder was entitled to sell, transfer, pledge, or otherwise encumber their shares for the benefit of third parties. These covenants introduced a negative obligation that limited the freedom of alienation, without, however, affecting the rights *in rem* of bona fide third-party acquirers of bearer shares. The enforceability of these restrictions rested entirely within the internal sphere of the syndicate agreement and was supported by penalty clauses found in later provisions.

The deposit itself served as a material guarantee to prevent unlawful or unilateral alienation of the shares. By requiring all members of the Farkas Group to place their bearer shares in the custody of Dr Mózes Farkas, the agreement effectively eliminated their immediate power of disposal, not just contractually, but physically. Since bearer shares confer ownership and voting rights solely by possession, relinquishing possession meant renouncing the capacity to exercise those rights independently. This provision transformed the deposit into a preventive device: as long as the certificates were locked in the company's safe under Dr Farkas's control, no group member could bypass the syndicate's collective decision-making structure. It ensured that no share could be transferred, pledged, or even shown to a third party for the

23 The depositary "kept the object not for his own but for the depositor's benefit". Zimmermann, 1996, p. 205.

purpose of securing rights or credit without the express, coordinated approval of the group under the terms of the agreement. The deposit was designed to guarantee internal loyalty, voting discipline, and long-term strategic cohesion.

Dr Mózes Farkas, as depositary and group leader, occupied a double role. First, he served as custodian of shares and, second, as the primary agent of enforcement. His possession of the bearer shares, combined with (as we will see later) the authority granted to him by the group to act on their behalf in shareholder meetings, ensured that internal discipline could be maintained.

The fact that the shares were to be held in the factory's own safe rather than in a bank or notary office added to the private and internalised nature of the arrangement. It localised control within the company's physical and symbolic space, reinforcing the group's autonomy or secrecy from external oversight.

Article 11 of the 1926 syndicate agreement played a conjunct and vital role in the functional operation of the deposit mechanism. According to this text, "upon termination of this agreement, the group leader shall return the deposited shares to each member, provided that no claims are outstanding against that member by the Renner Leather Factory or the group". First, this provision clarified the conditional nature of share restitution. The obligation of the group leader (Dr Mózes Farkas) to return the deposited shares was not absolute or assured. Rather, it was contingent upon the absence of any outstanding claims, either from the company (Renner Leather Factory) or from the shareholder group collectively against the individual member seeking restitution. The clause effectively transformed the deposit into a type of security interest, but it remained internal to the group and was founded on contractual rather than statutory rights. This signified that shareholders' rights to recover their property were subordinate to their duties to the collective or the corporation. This clause created a strong incentive to meet syndicate obligations, whether related to financial duties (such as outstanding payments) or procedural issues (like compliance with the agreement), to prevent the possible retention of their shares. Consequently, Article 11 served both as a contractual directive governing deposits and a retention mechanism, acting as a unique private enforcement instrument

that obviated the need for judicial intervention or formal enforcement measures.

Second, the clause reinforced the central authority of the group leader, who not only held the shares in deposit but also acted as gatekeeper to their return. This asymmetric power structure suggests a significant degree of internal hierarchy, despite the otherwise horizontal nature of shareholder or, in general, contractual relations. The leader's role was not purely representative but quasi-administrative and, to a degree, discretionary, especially in interpreting whether an "outstanding claim" existed.

Third, from a corporate governance perspective, the clause illustrated the group's intent to regulate exit in an orderly and enforceable manner. In a context where bearer shares could otherwise be anonymously transferred or sold, the retention of physical possession by the group leader and the conditioning of return upon internal clearance created a *de facto* restriction on alienation, even without creating a formal encumbrance *in rem*. This was essential to prevent destabilising departures or hostile transfers.

Finally, Article 11 must be read in conjunction with Article 2 (the establishment of the deposit) and Article 10 (establishing the deposit as a form of hand-pledge, to secure obligations, as it will be discussed below). Collectively, these provisions form a coherent system of private corporate discipline, substituting for more formalised legal or institutional safeguards that may have been absent or ineffective in a family-dominated, early-20th-century joint-stock company.

3.4. TRANSFER OF SHARES

According to Article 3, "the members of the group may sell their shares, in whole or in part, to each other". A careful legal analysis in conjunction with Article 2 strongly supports a *per a contrario* interpretation that transfers of shares outside the group were implicitly prohibited during

the term of the agreement.[24] While Article 3 affirms the permissibility of intra-group transfers, it does so in a narrowly formulated positive clause, granting members the right to alienate shares only to one another. In interpretation, such a provision often functions not just as an enabling clause but also as a delimiting clause, especially when read alongside Article 2.

The alienation, pledging, or encumbrance of the deposited shares was already completely prohibited under Article 2, with the exception of the modalities outlined in the agreement. Since the only express alienation modality provided was that of internal transfer among group members (Article 3), no other type of transfer would have been permitted without breaching the contract.

In consequence, the structure of the contract supported a closed-shareholding system within the syndicate. The shares were effectively locked in, and any exit was possible only by sale to another insider, thus preserving the integrity and coherence of the group's control over voting rights (voting power) and strategic direction. This logic is reinforced by the broader purpose of the agreement, which was to coordinate shareholder behaviour and consolidate control over the Renner Leather Factory. Allowing external parties, especially non-syndicate shareholders or hostile interests, to acquire shares would have defeated the agreement's purpose.

Given the fact that these were bearer shares, which were legally transferable by simple delivery, this internal contractual framework was the only barrier to free circulation. The deposit arrangement (Article 2) temporally neutralised the bearer nature of the shares by removing them from the actual possession of shareholders and assigning exclusive custodianship to the group leader, Dr Mózes Farkas. Thus, even if bearer shares in principle enjoyed unrestricted transferability, the contractual deposit mechanism rendered that freedom inoperative.

24 As it was stated, "restrictions on share transferability come in different shapes and forms. Despite their great variety, one can discern a certain standardisation around the world. The most common take the form of inalienability clauses, consent clauses, pre-emptive rights, and buy-sell agreements". See Fleischer, 2018, p. 697.

3.5. FUNCTIONING OF THE "SYNDICATE"

Article 5 outlines extensive regulations for the operation of this informal but structured framework:

> *In all matters which, under applicable law, company bylaws, or contracts concluded with other shareholder groups, fall within the competence of the general meeting, the board of directors, the executive committee, or the management committee, the members of the group shall first deliberate in an internal meeting. Resolutions shall be passed by majority vote. Each member shall have as many votes as the number of shares they hold.*

No formal requirements shall apply to the convocation of group meetings.

> *The parties agree that all decisions – including those matters listed in Article 7 of the syndicate agreement concluded with the Boros Group – shall be made by majority vote, unless a unanimous decision is reached.*

> *Each member of the group or the group's designated representative shall be bound to act and vote in accordance with the group's resolutions at all meetings of joint committees formed with other shareholder groups. Similarly, all members are obliged to vote in accordance with group decisions at general meetings and board meetings of the joint-stock company, provided such decisions do not conflict with agreements subsequently concluded with other shareholder groups.*

Evidently, the 1926 syndicate agreement's Article 5 provides a rich and detailed legal design demonstrating how an informal, contractually constituted shareholder group (here, the so-called Farkas Group) translated private coordination into collective corporate governance influence. The clause captures several core legal mechanisms, all of which reveal the sophistication of shareholder arrangements in the interwar period, particularly in closely held, family-dominated joint-stock companies.

The first sentence of Article 5 establishes a clear procedural rule. Before any corporate body (e.g. general meeting, board of directors, executive committee, or management committee) takes action on a matter, the Farkas Group must first convene internally and deliberate. This effectively inserted a pre-decision layer of internal filtering, transforming what would normally be a statutory public corporate decision into the outcome of a prior, private negotiation among syndicate members. This anticipatory mechanism can be compared to modern voting trusts,[25] with the difference that it seems the Farkas Group operated through prior collective deliberation rather than delegation of decision to a trustee. It ensured that the group, acting as a block, presented a united position in all formal decision-making forums, thus maximising its influence.

Such a contractual provision confirmed that internal decisions were to be taken by majority vote, with voting rights proportional to the number of shares held. This reinforces the view that the Farkas Group operated not as a simple partnership of equals, but much more as a quasi-parliamentary structure, where economic stakes translated directly into political weight.

25 A voting trust is a legal way for shareholders to combine their power by giving a trustee the formal ownership and voting rights of their shares for a set length of time. In exchange, they obtain trust certificates that show they have a beneficial interest. The trustee temporarily holds the legal ownership to the shares, but the original shareholders still have the economic rights to them. Depending on the conditions of the trust, the trustee may have to vote the shares according to instructions that were agreed upon ahead of time or use their own judgement in the best interests of the group. See for example, Cushing, 1915, p. 2.

Table 1. Shareholders in the syndicate agreement[26]

Shareholder	Number of Shares	Family/Group Affiliation
Dr Mózes Farkas	30,464	Farkas family (legal/managerial leadership)
József Farkas	27,531	Farkas family (commercial/shoemaking branch)
Jenő Farkas	7,031	Farkas family (minor stake)
Dezső Hecht	27,531	Hecht family (financial/strategic partner)
Frigyes Renner	27,650	Renner family (founder's son, technical background)
Emil Renner	27,650	Renner family (founder's son, technical background)

If we make a simple calculation, the power-relations are the following:

Table 2. Voting power in the syndicate[27]

Farkas family (combined)	**Hecht family** (Dezső Hecht)	**Renner family** (Frigyes + Emil)	**Total shares declared in agreement**
30,464 +27,531 + 7,031 = 65,026 shares	27,531 shares	27,650 + 27,650 = 55,300 shares	147,857 shares
→ 44.0% of total shares in syndicate	→ 18.6% of total shares in syndicate	→ 37.4% of total shares in syndicate	100%

This proportionality is especially important in light of the specific shareholding distribution detailed in Article 1: Dr Mózes Farkas held the largest single share block (30,464 shares), giving him structural dominance even within the group, unless coalitions formed against him. This likely gave him not just the leadership by designation (see Article 6) but also a functional veto power in many decisions, depending on attendance and alignment.

The clause stating that "no formal requirements shall apply to the convocation of group meetings" implies a high degree of internal flexibility. This informality likely reflects, first, the trust-based relations typical of multi-family or kinship-based capitalism, in which formal procedures were less necessary, and second, speed and agility, since binding internal decisions could be reached without waiting periods,

26 Author's own work based on the syndicate agreement.
27 Author's own work based on the syndicate agreement.

formal notices, or minutes (unlike corporate law procedures applicable to general meetings or board sessions).

In legal terms, this granted the group a "contractual shadow governance structure", one that operated parallel to and beneath the formal organs of the joint-stock company, probably akin to that of the Boros group.

One of the most significant aspects of Article 5 is the obligation imposed on all group members to vote in accordance with the group's internal decisions at all levels of the company's governance structure.[28] This mandatory voting discipline extended to joint committees created with other shareholder blocs (i.e. the Boros Group), general meetings, and board of directors' sessions. Legally, this transforms what is often perceived as discretionary shareholder or director authority into a duty-bound mandate. That is, members no longer acted independently, even when occupying corporate organs that would normally imply personal fiduciary duties. Instead, their corporate role was contractually subordinated to the will of the group, as determined by majority vote. This would raise interesting legal tensions in any jurisdiction: what happens when a director's fiduciary duty to the company[29] conflicts with the obligation to follow a private syndicate decision? The 1926 agreement

28 As it was stated, "the shareholder robustness allows to guarantee stability in the company, an element of fundamental importance contributing to the competitive advantage. The solidity of the property must be maintained also with the increase in the number of shareholders. The property must be united 'as one man'; this allows the speed of decision-making and the long-term vision that are the strength of companies owned by families". See Bertoldi, 2021, p. 91.

29 "The fiduciary or loyalty duty [...] is based on the requirement that members of the management body must subordinate their private interests to those of the business and may not use their management position to their own benefit. This also includes the duty to keep information and secrets of the company confidential [...]. In particular, the duty of loyalty includes a prohibition of competition [...]. Based on this prohibition, during their term of office, and in some circumstances for subsequent periods, the members of the management body may not engage in any trade or enter into any dealings in the same business as the company either for their own account or on account of a third party. Furthermore, a manager of a private limited company also breaches the duty of loyalty if he personally exploits business opportunities to which the company is entitled (business opportunity doctrine)". See Roth and Kindler, 2013, pp. 100–101.

seems to side clearly with syndicate discipline, a reflection of the fact that directors were often also major shareholders and that corporate governance was still deeply personalised. Anyway, the voting rules can be read only in close connection with Article 7, which is analysed in the following subsection of the present text.

The concluding clause of Article 5 enacted a limiting safeguard: members are only obliged to follow group decisions to the extent that those decisions do not conflict with later agreements concluded with other shareholder groups. This is a flexible conflict-of-norms provision, which recognizes that shareholders may be bound by multiple overlapping agreements (e.g. the Farkas-Boros syndicate) and that later contracts may supersede prior ones in case of inconsistency. This provision functioned as a temporal hierarchy of norms: if the Farkas Group reached a new understanding with another bloc (such as Boros), then any internal majority decision could not override that external, bilateral pact. This signaled that while internal group cohesion was critical, external coordination was no less important.

Article 5 provides a captivating example of how private law mechanisms (especially shareholders' agreements or occasionally the so-called family "constitutions"[30]) can construct a functional governance apparatus alongside and within the formal corporate structure. It blurred the boundary between public corporate decision-making and private contractual consensus, replacing statutory checks with voluntary, enforceable self-regulation. Article 5 demonstrated that in the interwar period (well before modern corporate governance theory matured), business and legal elites were already using refined private ordering techniques for ownership stability, coordinated strategy, and management of multi-family control in complex joint-stock environments.

30 For the possible criteria for delimitation between shareholders' agreements and family "constitutions", see Ilyés, 2023, pp. 57–71.

3.6. THE ROLE OF THE GROUP LEADER

Articles 6 and 7 of the 1926 syndicate agreement established a centralised leadership structure for the Farkas Group, grounded in both agency law and collective shareholder coordination mechanisms. These provisions are significant because they formalised a single-point representation model, vesting Dr Mózes Farkas with both internal authority and external agency, while introducing limited checks on that authority.

Article 6 designated Dr Mózes Farkas as both the group leader (vezető) and its authorised representative (meghatalmazott) vis-à-vis third parties and other shareholder blocs:

> *Dr Mózes Farkas shall act as the leader and authorised representative of the Farkas Group. He shall conduct the group's affairs and represent it in relation to third parties and other shareholder groups. His mandate shall last for the duration of this agreement.*

This clause effectively institutionalised his leadership beyond informal influence, granting it formal legal recognition for the entire duration of the syndicate agreement (1927–1932). Made Dr Farkas the sole point of contact for dealings with external actors, including other syndicates (like the Boros Group), company management, or external stakeholders. In general, the acceptance of such contractual terms by the other signatories also attests to confidence vested in him and perhaps his efficiency in promoting shareholder interest. From a legal perspective, this created a durable agency relationship that bound the entire group. Unlike typically revocable-at-will private mandates,[31] this mandate was

31 As a general principle, the Austrian General Civil Code (Allgemeines bürgerliches Gesetzbuch, ABGB), which remained in force in Transylvania until the 1940s, provided in §§ 1020 and 1021 that a mandate could be unilaterally and freely terminated at any time, either by the principal or the agent. The ABGB was applied in Transylvania since 1853. The unilateral terminability of the mandate contract is grounded in its foundational reliance on personal trust. As Zimmermann observes, such agreements are "based on personal confidence"; consequently, once that confidence is lost, the legal relationship can no longer be sustained. Zimmermann, 1996, p. 424.

contractually locked in for the term of the agreement[32] unless specific exceptional conditions were met (see art. 7). This structure reinforced group unity and strategic clarity, as no ambiguity could arise about who represented the group or exercised its will. At the same time, it entrenched Dr. Farkas's power, especially given his already dominant shareholding and the role he played as custodian of the deposited bearer shares (see art. 2).

Article 7 is even more relevant from this perspective because it gave Dr Farkas collective voting authorisation:

> *To ensure consistent and effective representation, the members hereby authorise Dr Mózes Farkas to exercise, in their names and on their behalf, all voting rights attached to their shares at general meetings of the joint-stock company for the duration of this agreement. This mandate may be revoked only jointly by the group, and only if Dr Mózes Farkas exercises voting rights in contradiction to a decision of the group.*

Article 7 is significant because it consolidates voting authority for the entire group into the hands of a single individual, Dr Farkas.[33] The members explicitly granted him the authority to exercise all voting rights tied to their shares, in their names and on their behalf, for the duration of the agreement.[34] This amounted to a general voting proxy, but with very specific features. First, irrevocability by individual members: no single member could withdraw the mandate unilaterally. Second, conditional revocability by the group: the mandate could only be revoked collectively and only if Dr Farkas acted contrary to a decision of the group. This created a strong presumption of loyalty and discipline within the group and a powerful enforcement mechanism for ensuring that the

32 It was stated that "generally, a proxy is revocable unless it is coupled with an interest." See Steinberg, 2018, p. 10.

33 The mandate itself is a guarantee that the voting agreement will not be infringed. The shareholders giving the mandate will not participate at the general meeting, or they will have a passive presence, and they cannot exercise their voting rights differently as agreed by the group.

34 This is more than a block of voting power (Steinberg, 2018, 253); this is a concentration of votes in one person.

group's internal decisions (see art. 5) were mirrored in the public fora of the company. The requirement of group-level consensus for revocation served a dual purpose. In one sense, it protected the continuity of leadership, shielding Dr Farkas from internal political shifts or isolated opposition. In another sense, it discouraged factionalism, forcing any challenge to leadership to be collective and based on a breach of agreed procedure (namely, acting against a group decision). Legally, this went beyond typical proxy voting mechanisms. It created a hybrid regime of representation and internal governance, where agency was granted as a mechanism of strategic governance consolidation. As a result, if Dr. Mózes Farkas violated the shareholders' group's voting structure, he would still be considered a group representative if any member of the group supported him.

Together, Articles 6 and 7 reflected an advanced understanding of shareholder syndicate dynamics and the need for institutionalised leadership in complex ownership structures. They also reveal how interwar shareholder blocs prefigured modern tools of corporate control, voting pools,[35] and coordinated governance. The single-representative model enhanced the group's bargaining position within the company and in negotiations with rival blocs. The conditional mandate framework balanced effective representation with minimal safeguards in case of breach of group will.[36]

3.7. SUCCESSION PLANNING

According to article 4 of the agreement, "in the event that any member of the group passed away, became incapacitated, or left the service of the Renner Leather Factory, this syndicate agreement remained binding upon such member or their legal successors for a period of one year.

35 "A voting coalition or voting pool consists of several shareholders joining forces and agreeing to vote in the same way." See Goergen, 2012, p. 48.

36 According to Article 8, "in the event of Dr Mózes Farkas's death or incapacitation, the group shall appoint a new representative. Until such appointment, the group shall be represented by its members in the following order: ..." Note: This section remained unfilled in the original archived document.

Upon the expiration of that term, such member or successor regained full rights of disposition over their shares." Of course, "a smooth intergenerational succession is in the best interests of the company".[37]

Article 4 of the 1926 syndicate agreement reflected a moderately restrictive yet ultimately liberal contractual approach[38] to shareholder obligations in the context of death, incapacity, or exit from company service. This clause stipulated that in three specific events, namely death, incapacity, or termination of employment with the company, the agreement remained binding for one year on the affected shareholder or their legal successors (e.g. heirs or legal guardians). After that one-year period, the shares were liberated from the contractual restrictions imposed by the syndicate agreement, and the holder regained full freedom to dispose of them.

This provision functioned as a temporary survival clause, ensuring that the syndicate agreement's strategic coherence was not immediately undermined by unforeseeable life events. The provision struck a compromise between contractual continuity and personal autonomy or testamentary freedom by putting in place a constraint that only lasted for a short time. This clause essentially established a provisional encumbrance on share ownership that was binding *inter partes* – meaning between the participants in the arrangement and their heirs. The condition restricted the shareholder's decision-making autonomy and disposal rights concerning the syndicate for one year following a qualifying event.

It avoided imposing a permanent lock-in, which could have resulted in a rigid and potentially contested limitation on successors' rights. In doing so, it adhered to private autonomy principles while safeguarding group interests during a transition phase. Under classic corporate and civil law principles (both in the Hungarian commercial tradition and more broadly), agreements that permanently restrained the alienation or voting rights of shares were subject to stricter scrutiny. Article 4 avoided that risk. The clause did not establish an indefinite trust,

37 Fleischer, 2018, p. 697.

38 This liberal approach planned for life but acknowledged the inevitability of death and change and sought balance between group cohesion and individual freedom.

usufruct, or encumbrance on the shares, nor did it create a right of first refusal or mandatory sale clause. Instead, it allowed a cooling-off period during which the group could adapt to the changed internal configuration. Therefore, from a "policy" perspective, this restriction was not "hard" but a soft, time-bound limitation intended to stabilise group dynamics while avoiding unnecessary interference with the free circulation of shares. This contractual clause also demonstrated a forward-looking and pragmatic approach to shareholder succession. The drafters realised that death or incapacity would eventually remove key players from the syndicate; they opted for a transitional model, which opened the possibility to convince the heirs to remain in the syndicate rather than attempting to perpetuate control indefinitely through estate mechanisms. It was significant that they did not bind heirs in perpetuity, nor did they require successors to join the syndicate as a precondition for retaining ownership.

Article 4 took a liberal and time-limited view of shareholder succession. On the other hand, a different approach that focused on long-term strategic governance and business stability would call for a structure that is more rigid but justifiable in certain cases. In high-stakes, closely held joint-stock companies, especially those run by family groups or syndicates, the death or incapacitation of a shareholder was of high risk. From this perspective, a year-long transition period may not have been sufficient to prevent destabilisation or possible foreign interference. This theoretically strict method could have included things like mandatory transfer clauses (which would require shares to be offered first to current syndicate members or the company before they could be inherited or sold to someone else), automatic accession clauses (which would require heirs or successors to agree to the agreement in order to get the inherited shares), or "perpetual" lock-in clauses (which would allow shares to be kept in the syndicate structure for a longer time to keep the group together). These rules, while stricter, can help a group by keeping voting power from being split up, reducing lawsuits between heirs, and stopping governance choices from being delayed by successors who were unwilling or ignorant. In family capitalism,[39] especially

39 James, 2006.

where management and ownership were intertwined, the ability to keep control and vision may have been more important than individual freedom of choice. These rigorous rules may be common in shareholder agreements in family companies. From this perspective, the Renner Leather Factory's 1926 agreement with the one-year sunset clause may not have been strong enough to protect the group's interests.

But the real Article 4 revealed a moderate governance mechanism: it ensured temporary stability in the event of shareholder departure while respecting the private autonomy of heirs and successors. We must consider this question also in the light of the agreement duration. In the context of succession planning, the 1926 syndicate agreement of the Farkas Group reflects a contractual orientation more concerned with medium-term strategic coordination than with comprehensive intergenerational governance. The limited five-year term of the agreement (effective from January 1, 1927, to December 31, 1932) significantly influenced the manner in which the parties addressed, or rather deferred, the legal implications of death, incapacity, or other succession-related events. The agreement revealed a focus on preserving cohesion among active members during a defined period of governance, rather than extending control over shareholding lasting beyond their lifetimes. The inclusion of Article 4 (which allowed heirs or legal successors to reclaim full autonomy over shares one year after the shareholder's death) emphasised this approach. It provided a short-term buffer to absorb transitional shocks, but it stopped short of establishing enduring structures of dynastic control. This agreement was designed as a renewable pact between contemporaries, not as a specific framework for future generations. Implicit in its scheme was the expectation of periodic renegotiation and adaptation, rather than perpetuity. In this respect, the agreement's logic diverged from that of more conservative or dynastic shareholder arrangements typical in family capitalism.

3.8. SANCTIONATORY MECHANISMS

The sanctionatory mechanisms rooted in Articles 9 and 10 of the 1926 syndicate agreement of the Farkas Group reflected a contractual effort

to reinforce internal discipline and contractual compliance among the signatories. These provisions combined monetary penalties with security mechanisms (in the form of pledged shares) to secure adherence to group resolutions and prevent deviation from collective will, especially in the context of company governance.

According to Article 9

> *If any member of the group votes against the group's decision at a meeting of the board of directors or the management committee, or obstructs the group leader from exercising the voting rights on their behalf at the general meeting, such member shall be liable to pay a contractual penalty of 500,000 lei – non-reducible by judicial discretion – to the benefit of the non-defaulting members.*
>
> *If Dr Mózes Farkas, or any other group leader acting in that capacity, acts or votes in contradiction to a group decision, he shall be liable to pay a contractual penalty of 1,000,000 lei – also non-reducible – to the benefit of the non-defaulting members.*

Article 9 established a dual system of liquidated damages[40] as contractual penalties for breaches of collective decision-making. This mechanism was critical for enforcing internal discipline and ensuring fidelity to collective decision-making within the Farkas Group. The contractual penalties targeted disloyal or obstructive behaviour, one aimed at regular group members and the other at the group leader. This provision's conception, structure, and enforceability demonstrate significant contractual expertise and a profound comprehension of intra-group governance.

The first paragraph of Article 9 provided that if a group member acted in contravention of the group's internal decision, specifically by

40 "Breaches of shareholder agreements are almost universally subject to liability sanctions. However, these are unlikely to be an appropriate remedy due to the difficulties in proving the damages incurred. As a result, practitioners [...] recommend liquidated damages clauses as an indirect enforcement mechanism." See Fleischer, 2018, p. 691. "In any event, breach of a shareholder agreement usually gives rise to relief in contract". See Koh, 2022, p. 145.

casting a dissenting vote at a board or management committee meeting or by obstructing the group leader's exercise of delegated voting rights at a general meeting, this member would be obligated to pay a penalty of 500,000 lei.[41] Crucially, the clause clarified that this amount was non-reducible by judicial discretion, thereby excluding any court from mitigating the contractual penalty based on proportionality, hardship, or general equity considerations.[42]

This first sanction targeted individual breaches of loyalty and voting discipline, ensuring that members could not use their shareholding autonomy to disrupt the group's unified strategy. It addressed both active disobedience (voting against group decisions) and passive obstruction (blocking the authorised representative's voting authority), or their combination, reflecting an expansive view of what constitutes harmful conduct in a syndicate setting. The remedy was not damages in the strict sense but a pre-agreed liquidated sum, which functioned as both a deterrent and compensation.[43] The provision was punitive in form and protective in substance, safeguarding the cohesion of the group.

41 Today approximately 35.000 euro.

42 This aligns with classic civil law doctrines concerning *penale* clauses, where parties may expressly agree to waive judicial review of penalties, provided this does not offend public policy. Of course, the law does not allow parties to fully waive judicial review of excessive penalties in advance. Even if a clause in the contract states that the penalty is "non-reducible by judicial discretion" (as in the Renner syndicate agreement), the courts would still retain the authority to reduce it if the penalty is manifestly disproportionate. But the interpretation of very high penalties has traditionally diverged in *civil* versus *commercial* contexts. Courts in civil cases were more inclined to scrutinise the proportionality of penalties to the actual harm suffered. In contrast, within the commercial sphere, very high penalties were viewed as legitimate instruments of risk allocation and discipline among professional, knowledgeable parties (especially merchants), meant to deter breach, not necessarily to reflect actual damage, and more likely to be upheld in full, especially when even the parties agreed that the penalty is "non-reducible".

43 Penalty clauses, on the one hand, "serve as a means of exerting pressure on the other party to behave or not to behave in a specific way; on the other hand, they relieve the creditor of the necessity of assessing and proving his claim for damages in case of non-compliance." Also, it is crucial that penalty clauses obviate "the need to adduce evidence, dispensing with the vagaries of judicial discretion and allowing parties to recover more safely, more speedily and more completely." See Zimmermann, 1996, pp. 95–96.

The second paragraph of Article 9 introduced a more severe penalty, 1,000,000 lei,[44] likewise non-reducible, for a breach committed by the group leader. If the leader (whether Dr Mózes Farkas or a successor in that role) acted contrary to the group's resolution, including by exercising delegated voting rights in a manner inconsistent with group decisions, this higher penalty would apply. This reflected a deep level of fiduciary responsibility borne by the group leader, whose delegated authority gave him greater capacity to affect outcomes at the corporate level. A breach by the leader, therefore, was viewed as a betrayal of the group's mandate and as a potentially destabilising act warranting a proportionately stronger response.

The structure of Article 9 placed emphasis on inter partes enforcement. The penalties were payable to the non-defaulting members, not to the company itself. This indicated that the clause operated strictly within the private contractual framework of the syndicate, rather than as a matter of corporate law. The agreement was a device to govern private shareholder relations, not to bind the joint-stock company or affect third-party rights.

Article 9 was a classic expression of contractual autonomy in the realm of shareholder cooperation. It provided the syndicate with an internal enforcement mechanism that substituted for public regulatory discipline, at a time when shareholder agreements were largely unregulated (still true today for both Hungary and Romania) and enforcement through courts was often slow or ineffective. Furthermore, by establishing penalties beforehand (*ex ante*), the clause prevented individuals from incurring substantial expenses on litigation for damages and facilitated the demonstration of breach of contract, as merely demonstrating the violation sufficed to render one liable.

Finally, Article 9 should be construed in conjunction with the rest of the agreement, particularly the vote coordination method outlined in Article 5 and the representation clause in Article 7. These regulations enabled a private consortium (the syndicate) of owners to establish a structured and enforced framework for managing their operations independently. Article 9 ensured that this framework included substantial

44 Today approximately 70.000 euro.

enforcement: violating the regulations would not be a symbolic gesture or a negotiable matter but would have significant and immediate pecuniary consequences. Article 9 served as the primary mechanism for the syndicate to maintain order and cohesion among its members. It employed expansive private law concepts to restrict individual liberties for the sake of maintaining group stability. By using this approach, it established an equilibrium between liberty and regulation, facilitating the functionality of the (in)formal shareholder coalition.

The enforcement mechanism established by Article 10 further strengthened these sanctions by linking them to a proprietary guarantee: the shares deposited (originally regulated under Article 2) also served as a hand pledge[45] (*kézizálog* in Hungarian) that secured both current and future obligations of each member toward the company and the group. According to Article 10,

> *The shares in deposit shall also serve as a pledge (hand pledge) securing any current or future obligations that a group member may have toward the Renner Leather Factory or toward the other members under this agreement. Each member's shares shall be pledged only to the extent of their individual obligations.*
>
> *If enforcement of the pledge becomes necessary, it may be carried out without judicial intervention under §306 of the Commercial Act, through public sale of the shares. The pledge shall be exercised on behalf of the Renner Leather Factory and the group by Dr Mózes Farkas or the group's acting leader.*

Article 10 of the 1926 syndicate agreement introduced a dual-purpose legal mechanism designed to secure compliance with both corporate and intra-group obligations: namely, the use of deposited shares as collateral in the form of a hand pledge. The pledge was an in rem right that

45 The pledge "entailed the handing over of a thing in order to secure a debt. Obviously the very same thing had to be restored by the creditor/pledgee to the pledgor once this underlying debt had been discharged (or otherwise extinguished)". See Zimmermann, 1996, p. 220.

created an enforceable security interest over the shares. This provision served as a powerful enforcement tool and a practical extension of the disciplinary system already established in Article 9, but it moved beyond sanction into the realm of asset-based security. Under this clause, the shares deposited with Dr Mózes Farkas (in accordance with Article 2) were not merely restricted in transferability; they were also formally pledged to secure obligations stemming from two separate sources. First, obligations owed to the Renner Leather Factory itself, whether existing at the time of agreement or arising in the future;[46] and second, obligations owed to the other members of the Farkas Group, under the terms of the syndicate agreement. This latter provision combined contractual penalties (Article 9) with secured performance (Article 10).

This orientation is significant because it clarified that the deposited shares were not just instruments of coordination; they were active security interests supporting enforceable claims. Such a pledge offered the group and the company a tangible method of risk management: if a member defaulted on any relevant obligation, enforcement could be carried out directly on the pledged shares. These mechanisms were tailored to the specificities of a bearer-shareholding regime. Today, in the world of nominative shares (bearer shares are prohibited now both in Hungary and Romania[47]), this technique would be more complicated but not unimaginable.[48]

46 The contract in this way also protected the interests of the joint-stock company, not only the interests of the shareholders' group members.

47 Bearer shares are mostly illegal in today's legal systems because of their opacity and because such shares can be used to avoid taxes, launder money, or commit corporate fraud. Hungary and Romania have both gotten rid of bearer shares to promote transparency. Also, we must state that bearer shares represent the most natural and original form of shareholding, rooted in the principle of negotiability, and their prohibition in modern legal systems arises not from corporate law concerns but rather from external regulatory imperatives.

48 Such as voting trusts (an agreement whereby shareholders transfer their shares or at least their voting rights to a trustee, who then exercises voting power according to the collective wishes of the trust participants); shareholder agreements with lock-up clauses (right of first refusal, approval requirements for transfer); registered pledge of nominative shares, and if the pledge is duly registered, it is enforceable against third parties, etc.

The provision further stipulated that the pledge would apply only to the extent of the pledgor's individual obligations, a rule consistent with proportionality principles in secured transactions. This avoided over-securitisation and protected the shareholders from having the full value of their shares encumbered for minor breaches of contract.

Most notably, Article 10 provided that if enforcement became necessary, it could proceed without judicial intervention, relying on §306 of the Hungarian Commercial Act of 1875, which at the time allowed for extrajudicial enforcement of hand pledges through sale of the pledged goods under tightly defined conditions.[49] Under §306, if the pledge was granted to secure a commercial debt, and the parties have a written agreement allowing the creditor to satisfy their claim without judicial intervention from the pledged asset, then, in the event of default by the debtor, the creditor is entitled to sell the pledged item publicly. Moreover, the provision includes an important exception: if the pledged items are marketable or exchange-traded, the creditor is free to sell them privately through a reliable intermediary at the prevailing market price.

Given that these were bearer shares in a joint-stock company, it is entirely reasonable to infer that they were capable of market valuation, informally tradable with a known and consensual price range among investors. In that sense, the drafters could plausibly rely on the second sentence of § 306, allowing private sale via a trusted intermediary. In a closely held company dominated by family and ethnic networks (Renner, Farkas, Hecht), with restricted shareholder circles and limited market exposure, the practical risk of a public sale would have been unacceptable: a public auction would have threatened the syndicate's power over

49 As it was stated, "ownership vested in the pledgor, and it did, of course, not pass to the pledgee simply by virtue of the fact that the underlying debt had not been discharged or that the pledgee/creditor had not otherwise been satisfied. Thus, the somewhat strange and hybrid situation could arise that the pledgee was entitled to keep the pledge indefinitely without, however, being able to use it as a means of obtaining satisfaction. In order to avoid this anomaly, the parties had to come to some arrangement regarding the consequences of non-redemption of the pledge". For example, "the pledgee should be authorised to obtain satisfaction by selling the pledge". See Zimmermann, 1996, pp. 223–224.

the company. A private, controlled, intra-group or vetted sale[50] was far more consistent with their interests.

The law also imposed certain safeguards for the debtor, who had to be informed of the sale without delay, where possible; failing this, the creditor became liable for any resulting damages. Furthermore, any surplus from the sale proceeds exceeding the amount of the debt had to be returned to the debtor. §306 reflected the merchant autonomy and liberal enforcement philosophy typical of 19th-century commercial codes across Europe. Revealed a fundamental trust in market mechanisms: that the market price of the pledged item was presumed to reflect objective value, removing the need for judicial oversight. Commercially sophisticated parties (including lawyers and businessmen) were trusted by the law to manage complex financial enforcement mechanisms themselves. The law "streamlined" the enforcement process and removed the delays and unpredictability associated with court/bailiff proceedings.

The article vested enforcement authority in Dr Mózes Farkas, or the acting leader of the group, who could exercise the pledge on behalf of both the company and the group. This confirmed the central coordinating role of the group leader. The group leader had fiduciary duties not only as a voting agent (Article 7), but also as the *de facto* enforcement officer for intra-group debt. Article 10 imported the logic of secured transactions into the private governance regime of the syndicate. The hand pledge mechanism transformed the shares into a form of movable collateral, creating a real security interest whose existence and enforcement were governed by commercial law. From a corporate governance standpoint, Article 10 reinforced the syndicate's internal control mechanisms. It introduced a material consequence for breach, beyond penalties: the risk of losing equity participation itself. For shareholders whose economic and managerial power derived from their shareholdings, this threat acted as a highly effective deterrent. It ensured that

50 "Vetted" sales refer to transactions involving outside individuals who have been carefully evaluated, screened, or pre-approved by the group and who were considered suitable not only in terms of trust and strategic alignment but also as potential future members of the group itself.

the alignment of interests was not just aspirational but was backed by material risk. Furthermore, Article 10 conferred the 1926 agreement enforcement power, and it merged contract law and commercial security law into a coherent framework, grounded in risk allocation and private ordering. The provision not only kept the group members from fighting with each other, but it also protected them against instability that could come from default, strife, or opportunism. It is an early and useful illustration of how shareholder agreements in family-run businesses might use all the legal tools of the time to create powerful private governance structures.

3.9. ARBITRATION CLAUSE

Art. 13 of the contract contains the following text:

> *Any disputes arising out of this agreement shall be resolved exclusively by arbitration. The parties and their legal successors agree to submit to the exclusive jurisdiction and competence of the arbitral tribunal. The arbitral tribunal shall consist of three members: one appointed by the claimant, one by the respondent, and the third – who shall serve as chair – shall be appointed by mutual agreement of the first two arbitrators or, failing such agreement, by drawing lots. The seat of the arbitral tribunal shall be in Cluj.*[51]

This clause of the 1926 syndicate agreement, which provided for exclusive arbitration, must be understood within the specific legal and sociopolitical context of interwar East-Central Europe, particularly in a region like Transylvania that had only recently become part of Romania following the Treaty of Trianon (1920). The provision reflects not only a preference for private and efficient resolution of disputes among

51 Article 12, which provides that "any applicable stamp duties or fees arising from this agreement shall be borne by the members of the syndicate in proportion to the shares they have placed under this agreement," falls outside the scope of the present analysis.

shareholders but also signals deeper underlying concerns, especially secrecy, elite autonomy, and a degree of mistrust in the newly established Romanian judiciary.[52] In general, it is suggested that "arbitration panels are, for a variety of reasons, in a better position to offer proactive solutions for shareholder disputes than state courts".[53]

The clause is carefully crafted: it mandates that "any disputes arising out of this agreement" fall under the "exclusive jurisdiction and competence" of an arbitral tribunal, consisting of three members, one chosen by each party and a chair appointed by mutual agreement (or by lot if no consensus is reached).[54] This procedural model was quite standard in commercial arbitration at the time, balancing adversarial symmetry with internal flexibility. What distinguishes this clause is less the form than the cultural and legal philosophy it enacts.

The parties to this agreement, members of the Farkas, Renner, and Hecht families, were from Jewish-Hungarian or German-Hungarian backgrounds. In the 1920s, these communities still largely operated in the Austro-Hungarian legal tradition, despite the shift to Romanian sovereignty. Arbitration, as envisioned here, allowed such elites to preserve a zone of legal autonomy, operating under familiar legal forms and avoiding entanglement with Romanian legal and court systems, often viewed by minorities as politicised, nationalistic, and unpredictable. Choosing Cluj as the seat of arbitration was likely both symbolic and strategic. By fixing the arbitration locally, the agreement rooted its dispute resolution in a milieu that was ethnically familiar, linguistically accessible, and commercially reliable for all parties.

The confidential nature of arbitration, shielded from the publicity and rigidity of state court procedures, would have been appealing not just for political and cultural reasons but also to protect sensitive financial and internal governance information.[55] The parties were

52 On the transition from the Hungarian to the Romanian court system, see Veress, 2020, pp. 151–173.

53 See Fleischer, 2018, p. 717.

54 This was and still is one of the most general model to create the arbitral tribunal.

55 One of the widely acknowledged strengths of commercial arbitration lies in its ability to protect the privacy of the proceedings, offering a level of discretion often unavailable in traditional court litigation. For details, see Noussia, 2010.

major shareholders, and the syndicate agreement itself was designed to coordinate their votes covertly, without alerting other shareholders or external actors. Public litigation would have exposed the very alliance the syndicate was formed to conceal. Thus, arbitration served as a functional dispute-resolution tool but at the same time as a structural element of the agreement's secrecy regime. The mechanism allowed the group to enforce internal discipline without state interferencewhile still providing a legally enforceable framework.

More implicitly, the clause can betray a degree of scepticism toward Romanian judicial institutions. The post-Trianon legal transition left Hungarian-speaking elites uneasy about the legitimacy and professionalism of Romanian civil courts, which were perceived to be infused with nationalist biases and less developed commercial jurisprudence. Opting for private arbitration over public adjudication offered a neutral buffer zone, where ethnic, linguistic, and political differences could be bracketed out.[56]

In this context, arbitration was a neutral efficiency mechanism, an instrument of legal continuity, preserving a zone of Austro-Hungarian commercial rationality under Romanian rule. Article 13 was more than a routine arbitration clause: it expressed the commercial elite's broader desire for autonomy, confidentiality, and legal continuity in a time of dramatic political and territorial change. It reflected a transitional and transnational legal culture, rooted in pre-World War I legal norms but surviving through interwar adaptation.

4. CONCLUSIONS

The 1926 syndicate agreement of the Renner Leather Factory (later Dermata) provides a profoundly instructive case study of how early 20th-century industrial enterprises in East-Central Europe utilised private legal instruments to manoeuvre through a complex and unstable environment characterized by geopolitical turmoil, legal fragmentation,

56 For insights into the functioning of the judiciary in interwar Transylvania, consult the personal memoirs of attorney Andor Fekete (Fekete, 2019).

and social change. The arrangement was not only a formality of partnership among important shareholders. Instead, it was a planned system of governance meant to keep things stable, impose discipline, and keep control of a joint-stock business whose ownership was dispersed and open to outside intervention.

The broader historical context, characterised by the disintegration of the Austro-Hungarian Empire, the annexation of Transylvania into Greater Romania, and the imminent challenges of economic nationalism, underscored the vulnerability of institutional continuity. In this unstable environment, the Farkas, Renner, and Hecht families created their own system of internal order: a syndicate agreement that could be enforced, and set standards for voting behaviour, collective representation, fiduciary duties, and sanctions inside the group.

This agreement is notable for its legal complexity and for its cultural and political importance. The people who wrote it were following the Austro-Hungarian commercial legal tradition and used Hungarian legal terms and ideas years after Romania took over the historical region of Transylvania. This shows how strong pre-union legal norms were among minority elites. The "syndicate" was a private "organisation" that operated within the larger legal structure of the joint-stock business. It had its own set of rules for leadership, coordinating votes, internal discipline, transfer limitations, succession planning, and settling disputes through private arbitration. It turned the family bloc into a disciplined governance coalition that could have a strategic impact on business decisions, even if it didn't possess the majority of shares.

Key provisions, like the deposit of bearer shares, the appointment of Dr Mózes Farkas as group leader with exclusive voting rights, the enforcement of penalties for breach, and the use of hand pledges and extrajudicial enforcement under §306 the Hungarian Commercial Act, show a deep understanding of both commercial and private law. These provisions changed what may have been a weak and informal partnership into a strong structure of governance that could stay coherent over time.

The agreement showed a two-layered logic: internally, it held family shareholders to a system of discipline and loyalty; externally, it protected the firm from dilution, hostile takeovers, and political instability.

It integrated leadership as a part of the system, ensured agreement within the organisation before acting outside of it, and used arbitration to keep national courts from getting political. They were part of a deliberate legal and strategic attempt to protect the company from the political instability and ethnic tensions of the time between the wars.

The syndicate agreement demonstrates that the group is taking a careful approach to time management. Its five-year term, along with the short binding period for heirs in the event of death or incapacity, shows a practical view of governance as something that may change and be renewed rather than something that is always set in stone. This agreement wasn't meant to be a long-term constitution for the family. Instead, it was a way for the founding families to work together in the short term and be able to change as needed when business or political conditions change.

The 1926 agreement is significant as it illustrates that power was maintained not just through conventional corporate mechanisms, such as boards of directors and shareholder registries at that time and place. It was also held by parallel private contracts, family ties, and informal enforcement structures. The Renner syndicate gives us a rare and very detailed look into the legal culture of Cluj during the interwar period, when ethnic, commercial, and legal plurality came together in a weak but working private system of control.

As we continue to examine each part of this agreement in greater detail, we find that it is a very useful source for people who study legal history, corporate governance, minority rights, and capitalism in Central Europe.

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EXPERT OPINION

WOULD IT BE USEFUL TO REGULATE FAMILY PROPERTY? BRIEF EXAMINATION OF A PROPOSAL EMPHASISING THE REFORM OF THE FORMER ROMANIAN CIVIL CODE

MIRCEA-DAN BOB-BOCȘAN

ABSTRACT

This expert opinion argues that keeping family farms and businesses intact in Romania is mainly a political, not a legal, issue. It revisits Constantin Hamangiu's 1931 bill and Alexandru Angelescu's 1934 study proposing an inalienable, unseizable "family property" and explains why the plan did not pass. The analysis intertwines these efforts in a broader narrative influenced by the 1865 Civil Code's equal division of inheritances, agrarian reforms, the 1907 peasant revolt, communist collectivisation, and the post-1989 transition. It shows that Angelescu's practical design – mandatory creation, size tied to family needs, and income-based payouts to co-heirs – was blocked by politics rather than legal doctrine. The Romanian case suggests that durable family assets depend on stable public policy and could benefit from modern, EU-compatible homestead-style protections.

* Bob-Bocșan, M.D. (2026) 'Would It Be Useful to Regulate Family Property? Brief Examination of a Proposal Emphasising the Reform of the Former Romanian Civil Code' in Szilágyi, J.E. – Ilyés, K. (eds.) *Instruments for Preserving the Unity of Family Businesses and Agricultural Assets: Perspectives of Legal History*, pp. 295–304. Budapest – Miskolc: Central European Academic Publishing. https://doi.org/10.54171/2026.jeszik.ipufbaa_11

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Keywords: *family property (homestead), Romania, inheritance and succession, agrarian reform, political determinants of ownership.*

This paper presents a perfect opportunity to pay tribute to Alexandru Angelescu, who served as a professor at the Faculty of Law in Cluj-Napoca. The faculty's new headquarters, inaugurated in spring 2025, was built using the estate left in a 1944 bequest. Gratitude is extended to all the professors at Cluj.

I must now shift my focus from cherished memories to politics, as the guiding thesis of this discussion is as follows: preserving the family agricultural or business assets is rather a political issue than a juridical one.

I will work on the specific Romanian example to demonstrate this thesis. As soon as Professor Veress told me about this conference, I remembered finding, during my earlier research, a booklet. It was an excerpt from one of the most important legal journals in Romania, which was published in the 1920s and 1930s: "Despre bunul de familie / On family property", published in Bucharest, in 1934. Its author is Alexandru Angelescu, the aforementioned former professor of Cluj.

In his study, Angelescu presented and critically analysed a reform, which was supposed to take place at the beginning of the 1930s in Romania. In 1931, the Minister of Justice, the famous Constantin Hamangiu (founder and the director of the legal journal where Angelescu's study was later published), sent to the parliament a project concerning the specific problem I am discussing here. How did they arrive at such a project, and what was the fate of it?

In order to understand, one must acknowledge the legislative context of that emphasised historical moment. The modern Romanian civil code was drafted in 1864 and got into force on the 1st of December 1865. Its provisions were a 70–75% translation of the French civil code. Why is such a detail important? Because we must consider those who were negatively impacted by this code in practice. Who were they? At the end of the 19th century, peasants represented more than 90% of the population. Such people did not welcome the modern civil code into their daily life and habits. They were quite reluctant to its appliance in practice because of the specific circumstances I shall detail later.

In April 1864, the Romanian Government, led by Mihail Kogălniceanu, issued an agrarian reform (it was enforced on the 23rd of April 1865), intended to consolidate the middle class: they expropriated a strong number of landowners in favour of peasants. The reform was, unfortunately, conceived in an unsatisfactory manner. One must consider that, at the end of the 19th century and beginning of the 20th century, a typical Romanian peasant had between 5 and 15 children. For the sake of example, let us say the agrarian reform of 1862 gave this peasant 10 hectares of land. Such a land surface was sufficient to support the entire family. When he died, the 1865 civil code provisions in the matter of *mortis causa* successions equally divided these 10 hectares, by the number of children he had; for example, if he had ten children, they were left with one hectare each, and it was difficult for them to survive out of one hectare. One more generation later, certainly, it was insufficient to survive economic circumstances. The poorness of the peasants (who had to pay for the land received in 1865!), the bad quality of the land they were given and the obsolete manner of practising agriculture contributed to the failure of this agrarian reform. It all led to the point where some sociologists are now considering these circumstances as being one of the causes igniting the 1907 peasant uprising. King Charles I and the government used the army to break it: 11,000 peasants were killed, and another 10,000 peasants were arrested. Such tragic outcomes may be considered as proving the (partial) inefficiency of the 1862 agrarian reform.

As mentioned before, the Civil Code of 1865 contained that egalitarian principle of division between heirs. Therefore, the partition of an agrarian family property would have been able to attract unwanted economic consequences. What did the peasants do in practice? They ignored the civil code and kept up with the old Romanian customary laws on successions. A survey of the decisions pronounced by the High Court of Cassation in Bucharest and of all the commentaries on these cases reveals how they were conducted between bankers, manufacturers, landowners, mine owners, oil field owners, etc. – but no peasants. The peasants lived aside the civil code, or beside the civil code, and avoided its appliance due to such less fortunate consequences he brought up.

Research conducted by the Romanian Academy in the XX century emphasised the non-partition of the family household and of its agricultural surrounding lands: the customs preserved all these for the eldest or, in some geographic regions, the youngest male heir. Why? Because the eldest son was the one who was supporting all his other siblings during their marriages in building their separate new houses. The alternative was to leave the family property to the youngest male heir, because he was the one who was taking care of his elder parents. In this manner, the family property lasted untouched and was governed by one of these two heirs mentioned above.

This situation lasted until 1919, when a much better agrarian reform was issued. At the beginning of WW1, politicians promised land to all the peasants to compensate their unselfish sacrifices during the war. The new king, Ferdinand I, previously considered it in 1917 as "an act of social justice but also a recognition of the contribution of peasants to the War of National Reunification". The same Romanian king issued, between 1919 and 1921, several decrees of expropriation: all landowners were expropriated, leaving them with a maximum amount of 100 hectares each. The extent of this expropriation threshold varied, depending on the circumstances in different areas of the country, but the peasants had to pay no compensation anymore.

As a result, a real agrarian reform took place, resulting in the consolidation of a new middle class. This was the main political purpose of the reform.

I have described the socio-political and legislative context so far. The conclusions that can be drawn from what has been presented will allow us to understand the proposal for regulating family property, which came after 1930.

In 1931, Constantin Hamangiu, the above-mentioned Minister of Justice, issued a complex and extensive programme of legislative reform in order to ensure the necessary legal unity in the provinces acquired by Romania after WW1. In December 1931, along with other unification measures (concerning the main codes, etc.), he published a project on the establishment of a family business property. Hamangiu's sources of inspiration were very interesting. The so-called Household Enactment Act of Texas of 1839, which followed the American Depression of

1837–1839, the French Reform of 1909, and the Swiss legislation that already held such provisions, served as inspiration for the project. For example, on this project it was stated (following the Swiss example) that, two months after its entering into force, each and every *pater familias* had to choose one hectare of agricultural land and designate it as a family business by a declaration given in front of a notary. This surface of maximum one hectare was designed not to be seized by any creditor, and it was mandatory to pass to all male heirs inside that family. As you can see, it had its limits, but it was an interesting starting point.

Hamangiu presented the project to the Parliament in December 1931, but he died unexpectedly in January 1932. His political enemies blocked the project. It was up to Alexandru Angelescu to revive it, with his study published in 1934 in a famous legal journal, founded by the same Hamangiu – "Pandectele Române".

In the beginning of his study (entitled "On family property"), the author presents the motivation of his research:

> *The unification of civil law, a need that has been increasingly emphasised in recent years, requires the resolution of many problems. Without a doubt, among these, family property, due to its complexity, constitutes one of the most difficult issues in legal life.*
>
> *The organisation of this property and the extent to which it responds to its social role require careful examination now more than ever.*
>
> *The excessive division of land, because of outdated inheritance laws, overcharging it with burdens that destroy any initiative and possibility of work, presents a true national danger. Social peace is, of course, based on a larger number of properties; the greater this number, the more secure the basis of property. But for this, it is necessary that each property should have an extent and value sufficient to allow, from its sole exploitation, the maintenance and development of a family.*
>
> *It must not be forgotten that the State is not a conglomerate of individuals; it has at its base the family, which remains today a vital organ of social*

collaboration. The normal development of the State will also depend on the family stability and good organisation.[1]

As one can notice, it is the abbreviated conclusion, drawn in the beginning of this paper, when presenting the context.

In comparative surveys of the legislative evolution of family property in the USA, France, Germany, and Switzerland, Angelescu discovers that the necessities related to credit in agriculture are the decisive argument for its regulation in Romania as well:

The agricultural industry, in order not to be destroyed, needs credit; however, this cannot be subject to an exceptional regime. The difficult situation in which the small farmer struggles seems to be due to much deeper causes: foreign competition and overproduction bring the price down to such a level that they make it impossible to remunerate any work. In addition, the stability of the family depends on new morals, which could not be removed by the creation of family property.

Without contesting that the hardships we suffer from today are due, at least in part, to foreign causes, independent of us, we nevertheless believe that family property is the only means capable of allowing the organic cell, which is the family, to survive the moments of crisis we are going through.[2]

On these argumentative bases, Angelescu goes on to define family property, its way of formation, its main characteristics, and the criticisms to which it may be subject.

The definition he settled on is simple and, like the legal regime he proposed, is inspired by the North American Homestead: "*Family property is the house and a stretch of land, variable according to different legislations, inhabited by the family and called to protect in times of crisis.*"[3]

In Angelescu's opinion, the establishment of family property is a matter of public interest, so it must be mandatory, and the property

1 Angelescu, 1934, p. 3.
2 Ibid., 1934, p. 11.
3 Ibid., p. 12.

must be inalienable. The owner must be the head of the family, regardless of whether it is a legitimate or a natural family. Only in 1943, paternity outside of marriage was legally recognised in Romania, whereas the equality between children issued from marriage and those born outside of it was legally accepted only in 1954. However, Angelescu considered that family property should also belong to the head of a natural family (i.e. having children who were not legitimised by the marriage of their parents), because

> *the need for the existence of a minimum of unseizable and inalienable patrimony is more important than ever. The instability that characterises such a family seems in contradiction with this constitution; but the education of children then requires the existence of such a patrimony more strongly.*[4]

Therefore, Angelescu proposes that the establishment of a family property is mandatory and has to be done *ex officio*, by the court, after consulting the heads of the family. This was the system designed by Hamangiu in 1931, and it was inspired by the North American Homestead: the heads of the family were to be summoned by the judge in order to indicate (in the presence of the mayor and of the notary) which part of the wealth would be identified as family property. If those summoned did not appear twice at the court dates, the judge would decide in their absence, with a two-month deadline for those concerned to contest his decision. The property thus designated had to then be registered in the real estate advertising registers.

Two practical difficulties are identified and addressed here by the author of the study: (1) upon the death of the head of the family, the family property, being indivisible, will revert in kind to only one of the heirs, who will be obliged to pay compensation (a remainder) to the other co-heirs. Angelescu observes that such a payment may burden the exploitation; consequently, he proposes an ingenious system of establishing compensations according to the income of the family property, not the capital represented by the real estate;[5] (2) the inalienability of

4 Ibid., p. 14.
5 Ibid., p. 25.

family property can produce the opposite of the expected effect if its value is too high compared to the value of the entire inheritance. The Hamangiu project established that the family property can have a maximum area of 1 arable hectare and a maximum value of 200,000 lei. Angelescu goes for the more judicious Swiss solution: only agricultural/industrial assets and residential houses can be designated as family property, without their size exceeding the maintenance/housing needs of the respective family. I also see this solution as being more suitable to the specific needs of each family in question.

Furthermore, neither the inalienability nor the unseizable character of family property can be absolute. Angelescu makes complex analyses of comparative law and of the local Romanian context in order to conclude that well-founded exceptions must be accepted.

As mentioned earlier, Angelescu published his study on the family property to revive the initiative of Constantin Hamangiu. He succeeded to some extent owing to the certain landowners' opposition and several problems at the level of agricultural administration. All discussion halted in 1938, when King Charles II established his dictatorship and manifested no real interest in the described issue.

After WW2, the communist regime imposed the creation of state-owned agricultural exploitations, following the Soviet *kolkhoz* model. Therefore, between 1950 and 1962, almost all peasants were gradually forced to give up all their land to the communist state. Any discussion on family-owned private property had no place anymore. Even after the fall of communism (December 1989), the discussion on establishing such a statute was never seriously renewed, despite the observations made by some authors.

In conclusion, until 1930, Romania did not need special legislation on family property; in practice, its citizens managed to have something similar – by means of old Romanian customary law. After 1930, the government took the initiative in establishing it, but various political circumstances prohibited its entering into force.

The debate on the family property is rather nonexistent now in Romania, and several failed reform projects did not succeed in breaking the unity of *mortis causa* transmission in Romanian civil law. What can happen nowadays in practice? This unity principle was inherited

from the French civil code of 1804 (art. 732 Code Napoleon). Its origin was found in the egalitarian slogan of the French Revolution of 1789, opposed to the privileges specific to feudalism. The legislative consequence was that the goods were viewed by the code strictly in terms of value, without considering their concrete destination. As a result, art. 732 of the Code Napoleon opened the possibility for all successors to receive a share of any kind of goods left by the deceased. Things are, apparently, in order. An undesirable practical consequence may arise in the partition of the inherited estate: through the random play of the value of the goods in relation to the inheritance share of each heir, the deceased's farm may return to the daughter, who is a writer, while the library ends up in the share of the son, a farmer. We will see what the future brings us in a country like Romania, one of the most important agricultural producers in the EU. Similarly, the family business will not necessarily survive the death of one of its founders. Only the future will give a complete answer to this aspect, too.

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