



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

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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 Ages² 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 vice-royalty 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 millionnaires, 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 1807¹⁹ 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 901²⁵ (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 Maroi³⁶ 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 Nicolò⁴⁹ 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 force⁶³ 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-law⁶⁴), 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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