



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

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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 Pérez⁵ 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 Cuarta, 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 scholars²² 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 descendants? It is not the object of my work to resolve this question, so I leave this question open for further work.

Many authors have 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 commissio, 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 Castrillo³⁴ 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 Campomanes' 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 1984³⁹ 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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