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**THE ENTAILED ESTATE IN POLISH LAW
FROM LATE 15TH TO THE 20TH CENTURY:
EXCEPTION FROM GENERAL SUCCESSION LAW
AND PERPETUATION OF ESTATE¹**

The usefulness of studying history of law has often been questioned. Particularly, the discrepancy has been pointed to between the tendency to utilise legal studies as a preparation to undertake legal profession (which diminishes the role of history, philosophy, or theory of law), and willingness to provide students of law with overall knowledge. In connection with this, the Polish legal doctrine of the turn of the 20th and 21st centuries presented numerous important arguments proving the necessity to teach and investigate the history of law as a way to the proper understanding of the modern law.

Such opinions prompted the research presented in this article, which aims at presenting the entailed estate² in the Polish law from late 15th to 20th century as an institution worth analysis. Although the entailed estate as such has no immediate successor, it does not mean that the problems similar to those solved with the use of this institution no longer exist. It could be even stated that the peculiarity of the current socio-economic situation makes those problems even more topical.

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² From the perspective of time and place of functioning of the institution, the factually alike institutions were named as family *fideicomisum*, fiduciary substitution, majorat, or primogeniture, see K. Sójka-Zielińska, *Fideikomisy rodzinne w prawie pruskim w XIX wieku i początkach wieku XX*, Warszawa 1962, p. 8. Cf. M. Kozaczka, *Ordynacja zamojska 1919-1945*, Lublin 2003, p. 108; and A. Meleń, *Ordynacje w dawnej Polsce*, „Pamiętnik Historyczno-Prawny” 1929, Vol. 7, issue 2, p. 44, who indicate the institution of seniority, alike to majorat and primogeniture. Cf. also other foreign law institutions enumerated by K. Sójka-Zielińska, *Fideikomisy...*, pp. 16-23. This article uses the notion of entailed estate (*ordynacja* in Polish) when referring to the Polish law institution, and family *fideicomisum* when referring to the institution in general.

1. LEGAL CONCEPT OF THE ENTAILED ESTATE

Entailed estate was a significant institution of the old-Polish law, which aimed to solve the problem of dissolution (dismemberment) of the family estate by means of inheritance (and division between heirs), or sale-out (by the successors willing to gain immediate profit). On the territories of Poland the institution was in force from the late 15th century up to the times of the land reform of 1944. It was based on the Roman law framework (mostly *fideicomisum*), which was complemented with the Germanic concept of family estates³.

Among numerous Polish entailed estates⁴, special attention shall be paid to the 1589 estate of family Zamoyski⁵ as the biggest⁶ and the one whose functioning has been the subject of the most thorough research⁷. At the same time, it was not the oldest one – it was established only after other significant entailed estates, i.e. those of the families Tarnowski (later Jarosławski, in 1471), Lubrański (in 1518), and Radziwiłł (in 1579)⁸. Thus, Zamoyski estate was capable to adopt the experience of its predecessors⁹.

³ K. Sójka-Zielińska, *Fideikomisy...*, pp. 33-36; at the same time it is stated a little differently (that it was partly based on the ancient Roman legal concepts of the late classical period, as well as on late-medieval European law) by A. Meleń, *Ordynacje...*, p. 55; only about Spanish origin, M. Drózdź-Szczybera, *Ordynacje rodowe w XIX i pierwszej połowie XX w. Wielkie posiadłości ziemskie i ich kształt prawno-organizacyjny w Polsce porzbirowej na przykładzie ordynacji łańcuckiej*, Kraków 1998, p. 5; G. Jędrejek, *Regulacje prawne dotyczące Ordynacji Zamojskiej*, „Roczniki Nauk Prawnych” 2012, Vol. 22, issue 3, p. 8; H. Świątkowski, *Ordynacje rodzinne. Zarys historyczno-prawny*, „Głos Sądownictwa” 1937, issue 5, p. 378; T. Zielińska, *Ordynacje w dawnej Polsce*, „Przegląd Historyczny” 1977, Vol. 68, issue 1, p. 18 (while K. Sójka-Zielińska, *Fideikomisy...*, pp. 48-50, recalls Spanish origin only as an incentive for development and popularity); only about Roman origin – S. Płaza, *Historia prawa w Polsce na tle porównawczym, I: X-XVIII w.*, Kraków 1997, p. 280; only about Western origin – J. Bardach, *Historia państwa i prawa Polski*, Vol. II, Warszawa 1966, p. 289.

⁴ In this article the specificity of the entailed estate will be, therefore, described either based on generalisations, or exemplified by the Zamoyski entailed estate. In case any other entailed estate is subject to analysis, it will be specifically mentioned.

⁵ See the content of the estate act – Statuta Ordynacji Zamojskiej, Warszawa 1902, pp. 11-30.

⁶ M. Kozaczka, *Ordynacja...*, p. 163; H. Świątkowski, *Ordynacje...*, p. 385. The fact that it was only one of the biggest, but without mentioning which one was the biggest, was pointed out by M. Kowalski, *Państwo magnackie w strukturach polityczno-administracyjnych Rzeczypospolitej Szlacheckiej na przykładzie Ordynacji Zamojskiej*, „Przegląd Geograficzny” 2009, issue 81, p. 174.

⁷ See e.g. G. Jędrejek, *Regulacje...*, M. Kowalski, *Państwo...*, R. Orłowski, *Ordynacja Zamojska*, (in:) K. Myśliński, (ed.), *Zamość i Zamojszczyzna w dziejach i kulturze polskiej*, Zamość 1969; R. Orłowski, *Szkice z dziejów Ordynacji Zamojskiej w XVIII wieku*, Zamość 2011.

⁸ K. Kościński, *Polskie ordynacje i związki rodzinne ze szczególnym uwzględnieniem ordynacji Książąt Sulkowskich*, Poznań 1906, pp. 3-10. The fact that the Radziwiłł entailed estate was the first one is mentioned by both M. Kozaczka, *Ordynacja...*, p. 10; and T. Zielińska, *Ordynacje...*, p. 19. However, A. Meleń, *Ordynacje...*, pp. 8-9, claims that the Radziwiłł entailed estate was only the first permanent one.

⁹ M. Kowalski, *Państwo...*, p. 182.

Entailed estates were created by the landowning nobles, usually hailing from among the young and rich nobility¹⁰. Most often they belonged to the families enjoying significant political influence¹¹.

The typical consequence of the entailed estate's formation extended to the exclusion of the organised part of the estate from the subjection to general principles of civil law. Such operation made the estate inalienable, unburdenable, and indivisible – which was supposed to ensure its perpetuation in an unchanged shape. Not only the *inter vivos* limitations on alienation were imposed (and extended to the prohibition to alienate even the smallest part of the estate, while their lease appeared as quite doubtful¹²), but also succession *mortis causa* was subject to specific regulation.

Entailed estates, like the above mentioned, were created by an one-sided, *inter vivos*, legal act of the founder¹³ upon acceptance of the Parliament¹⁴. The demand of the latter resulted from the fact that the entailed estate explicitly opposed the general law¹⁵. Thus, instead of intestate succession (in the old-Polish customary law by sons), in equal parts¹⁶, the succession of estate favoured one man only¹⁷, the oldest descendant of the founder, in the oldest line and of nearest proximity¹⁸, who became the entailed estate holder (in Polish – *ordynat*). This concept of estab-

¹⁰ J. Bardach, *Historia...*, Vol. II, p. 289.

¹¹ K. Kościński, *Polskie ordynacje...*, pp. 4, 12, proves this by the example of the Jarosławski or the Myszkowski (Pińczowska) entailed estates; similarly M. Kowalski, *Państwo...*, p. 177, connects entailed estates with magnates. See also T. Zielińska, *Ordynacje...*, p. 27, who extends this argument, showing that in old-Poland the institution was adopted differently than in the countries of its origin, where it served even the poor nobility.

¹² A. Meleń, *Ordynacje...*, s. 39.

¹³ K. Sójka-Zielińska, *Fideikomisy...*, pp. 10, 29-30, underlines the character of a founding act as founder's *inter vivos* act, and neither the benefit in favor of the third person, nor the last will.

¹⁴ The acceptance, according to A. Meleń, *Ordynacje...*, pp. 22-23 and H. Świątkowski, *Ordynacje...*, p. 380, contains both permission to exclude the validity of general rules to the estate in the founding act, and subsequent confirmation of the already established entailed estate (but both may take place after that). Further clarification by H. Świątkowski, *Ordynacje...*, p. 380, refers to the scope of permission as delineating the possible future changes of the entailed estate act. The possibility to indirectly accept the entailed estate, e.g. by demanding the military support from the estate, is, at the same time, pointed out by A. Meleń, *Ordynacje...*, pp. 29-32, who also argues that entailed estates could not have been accepted, when they were functioning irresistibly, e.g. when the founders and the holders had one son only.

¹⁵ A. Meleń, *Ordynacje...*, p. 22; S. Płaza, *Historia...*, p. 280.

¹⁶ J. Bardach, *Historia państwa i prawa Polski*, Vol. I, Warszawa 1964, p. 304; K. Kolańczyk, *Najdawniejsze polskie prawo spadkowe*, Poznań 1939, p. 15; H. Świątkowski, *Ordynacje...*, p. 379.

¹⁷ Female succession was, however, ensured in Sułkowski entailed estate, see K. Kościński, *Polskie ordynacje...*, p. 21; and that of Łańcut, see M. Kozaczka, *Ordynacja...*, p. 10. See also indirect function of women, who allowed to transfer succession from the expired generation to the new one, A. Meleń, *Ordynacje...*, p. 42.

¹⁸ *Statuta...*, p. 25.

lishing the succession resembles the primogeniture, and with regard to entailed estates was in fact most often adopted¹⁹. The particularities of succession could be, however, established otherwise, based on the principle of majorat (favouring the oldest descendant of the founder within equal proximity; in Polish – *majorat*), or seniority (favouring the oldest person in family, in Polish – *seniorat*)²⁰. Regardless of the principle adopted, the entailed estate act included the detailed description of such succession, and the conditions thereof, with consideration of numerous scenarios. Such predictability was caused by the rationale in the attempted permanence of their functioning, as well as by the fact that lacking subjection to general law, the entailed estate act had the sole regulatory power within its own succession²¹.

Further requirements, which must have been met by the estate holder, were e.g. the Catholic faith, lack of crimes committed or lack of mental illness²², but usually not age²³. Also the estate holder had to swear an oath²⁴.

Eventually, the subsequent entailed estate holder became the owner of the estate as understood by the property law, and the family was vested with neither controlling right, nor direct ownership (*dominium directum*)²⁵, as according to Austrian *Allgemeines bürgerliches Gesetzbuch* or Prussian *Allgemeines Landrecht*²⁶. The legal situation of the holder was, however, only partly privileged over his family members²⁷. This in particular regards the prohibition from alienating or burdening the estate (and eventually the obligation to maintain the substance of the wealth to the further descendants), while the entailed estate act explicitly regulated the way to dispose of the estate's benefits for the needs of its

¹⁹ *Statuta...*, p. 25; J. Bardach, *Historia...*, Vol. II, p. 289; R. Orłowski, *Ordynacja...*, p. 105; S. Płaza, *Historia...*, p. 280; H. Świątkowski, *Ordynacje...*, p. 380; T. Zielińska, *Ordynacje...*, s. 17. Similarly A. Meleń, *Ordynacje...*, p. 20; W. Uruszczak, *Historia państwa i prawa polskiego. Tom 1 (996-1795)*, Warszawa 2013, p. 313, who both claim that it takes place always, however the prior, on p. 44, also enumerates other possibilities.

²⁰ M. Kozaczka, *Ordynacja...*, p. 108; A. Meleń, *Ordynacje...*, p. 44.

²¹ A. Meleń, *Ordynacje...*, p. 24.

²² A. Meleń, *Ordynacje...*, pp. 52-53, who refers to the improper behaviour of the holder as illegal from the perspective of the entailed estate act, and thus leading to revocation of such holder; otherwise losing mental health resulted only in establishment of a curator.

²³ This is stated together with addition as to creation of a curator, A. Meleń, *Ordynacje...*, pp. 45-46.

²⁴ *Ibidem*, pp. 50-51.

²⁵ *Ibidem*, p. 36; S. Płaza, *Historia...*, p. 280; H. Świątkowski, *Ordynacje...*, p. 380; similarly as to conclusion, M. Drózdź-Szczybera, *Ordynacje...*, p. 7.

²⁶ K. Sójka-Zielińska, *Fideikomisy...*, pp. 27-28.

²⁷ T. Zielińska, *Ordynacje...*, p. 27; similarly as to conclusion, M. Drózdź-Szczybera, *Ordynacje...*, p. 7.

holder²⁸. Then, the holder could not have even managed the estate freely – also the methods of management of the estate were enacted²⁹. Additionally, further obligations were imposed on the holder – e.g. to support other relatives in a form of quasi-alimony, to gain education (which was supposed to lead to better management³⁰), or to bear the predecessors' surname³¹.

The male relatives of the holder (e.g. other sons of the predecessor) either inherited the estate outside entailed estate, or were vested with right to payments from the revenues of the entailed estate. The female relatives, otherwise, could have also obtained dower³².

The practical performance of the principles of the entailed estate was factually protected by the possibility to revoke the holder, who disobeyed them³³. Additionally, the legal acts against the estate act were null and void³⁴, while the losses resulting therefrom were subject to damages claims against the ex-holder and his private property (outside entailed estate)³⁵.

Additionally, it could be concluded that entailed estates involve a certain mysticism. At first, it can be traced back to the transformation of the individual property into the *sui generis* common, multi-generational estate³⁶. Secondly, each and every holder seems to be a true successor of the founder and the executor of his will, regardless of the current intents, which is, however, a theory difficult to be dogmatically proven³⁷.

It was usually deemed unnecessary to regulate the dissolution of the entailed estate, as it was supposed to function forever, thus expanded scenarios of succession were proposed instead. Sometimes it was, however, included, based on the possibility that the family ceases to exist. Then, the Ostrogski entailed estate act

²⁸ It is pointed out by T. Zielińska, *Ordynacje...*, p. 24-25, who reflects on the conflict between the current needs of the holder and the need to perpetuate the prominence of the family; the solution in favor of the latter threatens the financial stability of the holder, who may not dispose of his primary wealth and is bound by the estate act.

²⁹ A. Meleń, *Ordynacje...*, p. 50. At the same time, R. Orłowski, *Szkice...*, p. 35-36, points out that in the 18th century the management of the holder was replaced by a professional management, which, however, unlike presupposed, led to the care neither of the wealth, nor of the subordinates.

³⁰ R. Orłowski, *Ordynacje...*, p. 109, A. Meleń, *Ordynacje...*, p. 55.

³¹ It is underlined by K. Kościński, *Polskie ordynacje...*, p. 13, and exemplified by the Myszkowski (Pińczowska) entailed estate.

³² In the Zamoyski entailed estate the sons received other wealth, and the daughters – the dower, see *Statuta...*, p. 14; see also J. Bardach, *Historia...*, Vol. II, p. 288; A. Meleń, *Ordynacje...*, p. 55-56. Both authors indicate that this effect regarded the entail estates in general; see also T. Zielińska, *Ordynacje...*, p. 27.

³³ A. Meleń, *Ordynacje...*, pp. 57-58.

³⁴ *Ibidem*, p. 52; H. Świątkowski, *Ordynacje...*, p. 380.

³⁵ A. Meleń, *Ordynacje...*, pp. 52, 57.

³⁶ K. Sójka-Zielińska, *Fideikomisy...*, p. 24.

³⁷ *Ibidem*, pp. 93-94.

clarified that the estate should pass to the Sovereign Military Order of Malta, while the Sułkowski one – to the educational committee, under condition of sustained indivisibility, and within disposal of its profits onto education of noble youth³⁸. Also, it is claimed that the Parliament could have dissolved the estate at any time³⁹.

Even though on certain territories of Poland during partition (1795-1918) the Napoleonic *Code Civil* was a valid law, including its Article 896 prohibiting fideicommissary substitutions, specific legislation upheld the functioning of entailed estates⁴⁰. Therefore, the old-Polish right to establish entailed estates was regarded as a well-established one⁴¹.

The true dissolution of the estates took place in the 20th century⁴². On the territories of Poland the process began based e.g. on the 1921 bill on family good of the former Prussian district (in Polish – *ustawa o dobrach rodzinnych byłej dzielnicy pruskiej*)⁴³ and the 1939 bill on dissolution of entailed estates (in Polish – *ustawa o znoszeniu ordynacji rodowych*)⁴⁴. Both these bills did not, however, affect all entailed estates, taking into consideration the profits resulting from the estates to the state, in particular its culture and economy. Eventually all entailed estates were dissolved based on the 1944 decree of the Polish Committee of National Liberation on undertaking the land reform (in Polish – *dekret Polskiego Komitetu Wyzwolenia Narodowego [PKWN] o przeprowadzeniu reformy rolnej*)⁴⁵, which nationalised all larger estates (always over 100 hectares, and used for agricultural aims, see – Article 2, point 1, subpoint *e*), which certainly included all entailed estates. The practical side of execution of this act, however, did not adequately consider the advantages of the estates and the way the division of estates was proceeded led to decrease in agriculture and forestry on their lands⁴⁶.

2. FUNCTIONS OF THE ENTAILED ESTATES

The aim of the entailed estate was to uphold the family estate in its entirety. This could have perpetuated the prominence of the family⁴⁷, in particular by

³⁸ K. Kościński, *Polskie ordynacje...*, p. 24; A. Meleń, *Ordynacje...*, p. 59.

³⁹ A. Meleń, *Ordynacje...*, p. 60.

⁴⁰ H. Świątkowski, *Ordynacje...*, p. 381.

⁴¹ F. Longchamps de Bérrier, *Podstawienie powiernicze*, „Kwartalnik Prawa Prywatnego” 1999, issue 2, p. 333.

⁴² T. Zielińska, *Ordynacje...*, p. 23.

⁴³ Bill of 18 November 1921, published with No. 100, position 715.

⁴⁴ Bill of 13 July 1939, published with No. 63, position 417.

⁴⁵ Decree of 6 September 1944, published with No. 4, position 17.

⁴⁶ M. Kozaczka, *Ordynacje...*, p. 161.

⁴⁷ M. Drózdź-Szczybera, *Ordynacje...*, p. 7; F. Longchamps de Bérrier, *Podstawienie powiernicze...*, p. 334. A. Meleń, *Ordynacje...*, p. 19; S. Płaza, *Historia...*, p. 280; H. Świątkowski, *Or-*