



## ORIGINAL PAPER

# Fiducie and Fiducia (Terminological Peculiarities)

Irina Gvelesiani\*

### Abstract

The common law *trust* has become extremely popular since the beginning of the previous century. Many civil law countries have been oriented on the implementation of this legal institution in their jurisdictions. However, the “introduction of the trust (or analogous institutions) requires not only the translation of common-law rules into civil-law concepts but also a precise choice about the functions to be performed by these instruments” (Vicari, 2014: 3). The given paper is dedicated to the juridical and linguistic study of the French and Romanian *trust-like devices* (*fiducie* and *fiducia*). The main accent is put on their latest developments, comparative analysis and juridical-linguistic characteristics. The major results indicate that the contemporary Romanian *fiducia* has the French origin. However, its roots can also be found in the Roman law – in the Roman entrusting relationships. The paper aims at giving some terminological insights and proposes certain linguistic corrections, which answer to the demands of the modern epoch. The major method of the research is a comparative analysis.

**Keywords:** *Civil law, common law, fiducia, fiducie, juridical-linguistic study, trust-like device*

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\* Associate Professor, PhD, Ivane Javakhishvili Tbilisi State University, The Faculty of Humanities, English Philology specialization, Phone: 00995 5 93 32 70 07, E-mail: irina.gvelesiani@tsu.ge

## Fiducie and Fiducia (Terminological Peculiarities)

### The General Introduction

“The purposes for which we can create [common law] trusts are as unlimited as our imagination” (Devaux, Beckner, Ryznar, 2014: 112). Moreover, the *trusts* have a great variety of uses in the contemporary life. They are created not only for the private reasons, but for the charitable or business purposes as well. They are mainly used: for the benefit of private individuals (a *private trust*); for the management of business affairs (the *Massachusetts trust* or a *business trust*); “to benefit future generations of a family through the establishment of successive equitable interests in property, to benefit employees through the holding of a company’s shares or other assets in trust for their benefit, or hold funds for public investment (a *mutual fund* or *unit trust* )” (The philosophy of law, 2004 : 871) etc. These characteristic features of the *trust* have made this legal institution widely acceptable in the United States of America. Moreover, the same features popularized it in the non-common law jurisdictions during the 20<sup>th</sup>-21<sup>st</sup> centuries. Rapid popularization was facilitated by another significant factor – the growing tendency of globalization reflected in the intensified international economic competition and interoperability of the European countries within the European Union. Generally, the legal institution of the *trust* can be defined as “an obligation enforceable in equity under which a trustee holds property that he or she is bound to administer for the benefit of a beneficiary or beneficiaries (a private trust), or for the advancement of certain purposes (a purpose trust)... Trusts are established expressly by a settler in a trust deed or a testator in a will (an express trust) or by implication (a resulting trust). They may also be established by operation of law (a constructive trust)” (The philosophy of law, 2004: 870).

### The *Fiducie* – The History and Contemporaneousness

Some scholars believe, that the institution of the *trust* originated from the Roman *fiducia*. However, M. Grimaldi and F. Barrière indicate that the “Trust comes from the Danish *trost* (confidence), *troster* (faith)” (Grimaldi, Barrière, 2004: 570). It’s difficult to prove M. Grimaldi and F. Barrière’s idea. However, the study of the etymology of the word *fiducia* presupposes its relation with the concept of the *trust*. According to C. R. Dedu, the noun *fiducia* comes “from the Latin word “*fido*”, which means to trust (to have faith in someone or something), loyalty” (Dedu, 2015: 211). Hungarian Prof. I. Sandor expresses quite different opinion and states, that *fiducia* derived “from the Latin verb *fidere*, meaning trust” (Sandor, 2015: 25). It’s a well-known fact, that in the Roman law “*fiducia* was a pactum. It was an “appendage to a conveyance”. Its primary use was a direction to the holder of property concerning that person’s obligations in relation to the property” (Philosophical foundations of fiduciary law, 2014: 23). After the centuries “the institute of “*Fiducia*” has been taken over in the continental civil law by adaptation of the trust, regulated by the Anglo-Saxon law” (Dedu, 2015: 211. It played an important role (within a narrow scope) in the French law of succession. However, it was forgotten during the historical moment of French Revolution and especially, after the establishment of the Napoleonic Code (Civil Code of Napoleon of 1804 ). The French Revolution significantly changed French people’s life. It “contributed to laying the constitutional foundations of modern civil codification, which aimed at the abolishing of former feudal privileges, the elimination of feudal privileges in property law, and the introduction of a new definition of ownership” (Sandor, 2015: 309). Despite the above mentioned, the “oblivion” of the *fiducia* could be discussed as a temporary fact - although the Napoleon Code and “legal tradition rejected the very notion of *fiducie* as *prête-nom* under another name, the legislature implemented this very idea in a number of statutes dealing with

investment funds (fonds communs de placement), receivable financing (loi Dailly), and assets securitization (fonds communs de créances)” (Thévenoz, 2009: 36). In 2007 the *fiducia* reappeared. This fact can be explained “by the pressure exercised on the continental private law, by the British/American system, respectively, by Common law, system where the *trust* has born, which although it is not perfectly identified with “fiducia”, still it comes near very much, as legal-economical finality, to what we understand by “Fiducia” (Dedu, 2015: 212).

Before the reappearance of *fiducia* (at the end of the 20<sup>th</sup> century) French scholars expressed their concerns regarding the probability of the implementation of *trust-like transactions* in the French juridical reality. They named the following major reasons: firstly, the impossibility of the implementation of a “split ownership” ( or the duality of ownership ) in the French law; secondly, the general “disability” of allowing assets “to be set aside for a special purpose (*patrimoine d’affectation* ), thus ruling out the possibility of property forming a separate fund that cannot be reached by a trustee’s creditors” (Rémy, 1999: 131); the third reason lies in the fact, that at the end of the 20<sup>th</sup> century Prof. Ph. Rémy described the conditions of the transfer of the assets in the following way: a lot of fiduciary transactions “appear under the guise of unnamed agreements, or achieve their objectives by circuitous routes. One finds express *fiducies* or “crypto-*fiducies* ” which perform exactly the same roles as the trust in commercial, family and charitable matters” (Rémy, 1999: 134). Despite these concerns and circumstances, the *fiducia* was implemented in the French reality as a vivid category of a "legal transplant". Alan Watson defined such category "as moving/panning a legal rule or system from one country to another or from a person towards another" (Moreanu, 2015: 80).

The phenomenon of transplants emerged in the ancient times (in the Code of Hammurabi). However, different examples of transplantations have occurred throughout the centuries. We can discuss the *trust-like devices* under the umbrella term "*legal transplants of the 21st century*". The appearance of a growing number of such transplants was stipulated by the following significant factor: at the end of the 20<sup>th</sup> century several civil-law states were inspired to integrate the *trust* into their juridical systems. The given process occurred in various ways. In certain cases, the introduction of the *trust* was influenced by Pierre Lepaulle's idea considering the function of the *trust* in the segregation of assets and in the formation of the *patrimoine d’affectation*. As a result, in 1994 Quebec "introduced the fiducie in its Civil Code, under the form of *patrimoine d’affectation* - that is, an ownerless patrimony dedicated to a purpose, where the trustee is the administrator of property of another person, in a position not much different from that of the director of a company with legal personality" (Vicari, 2014 : 4 ). Pierre Lepaulle's idea regarding the civilian *trust* seems incorrect, because it doesn't deal with the major essence of the Anglo-American entrusting relationships, which focus on the form of a double or split ownership and make the *trust* incompatible with the civilian jurisdiction. The given fact can be asserted by the following statement: "while functionally equivalent to its common law cousin, Quebec's *fiducie* is structurally a very different arrangement. As long as it is not distributed to the beneficiaries, the trust fund has no legal owner. The *fiduciaire* (trustee) merely is vested with the power to administer the *patrimoine fiduciaire* (trust fund). The trust fund is a separate patrimony subject to the trustee's power to administer in the interest of the beneficiaries" (Thévenoz, 2009: 22).

The analysis of the common and civil legal systems vividly reveals, that “the basic idea of the common law trust and of the civil law *fiducie* is very similar in that the assets

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are going to be transferred so as to be used only for a certain purpose, an appropriation” (Grimaldi, Barrière, 2004: 797).

We can treat the French *fiducie* as a triangular relationship, which considers a transference of rights on a particular property for the fulfillment of a special purpose. The given transference implies the following: "the settlor (constituent) entrusts existing or future assets, rights or security to the trustee (fiduciaire), who manages these for the benefit of one or more beneficiaries. French law does not classify the legal status of the trustee; he is deemed to be either an agent or an administrator, only the manager (*agissant, actor*) of the trust property (*patrimoine fiduciaire*)" (Sandor, 2015: 313). In certain cases, the *constituant* appoints a *protecteur* (a protector), who controls the activities of the *fiduciaire*. However, in some cases, the *constituant* and the *fiduciaire* can be the beneficiaries.

Therefore, the contemporary French entrusting relationships consider the following participants:

*Constituant* - a transferor of the assets presented by any natural or legal person;

*Fiduciaire* - a transferee represented by "a banking, insurance, or financial professional, or an avocat (attorney), whose role contributes to ensure protection for the constituent" (Devaux, Beckner, Ryznar, 2014: 110).

*Bénéficiaire* - a receiver of the benefit derived from the management and exploitation of the property transferred to the *fiduciaire*. In some cases, the *constituant* or the *fiduciaire* can be the *bénéficiaire*;

Protecteur - protector, who controls the activities of the *fiduciaire*.

The object of the entrusting relationships is presented by the transferred assets – the *patrimoine fiduciaire*. Moreover, “if the transferred property - movables and immovables, corporeal or incorporeal – is appropriated to secure the repayment of a debt (with the creditor as beneficiary of the fiducie), the fiducie then has the role of a security” (Barrière, 2013: 101). We can distinguish two major forms of the French *trust-like devices*: 1) the “trust by way of security (*fiducie sûreté*), where the constituent-debtor transfers to the fiduciary properties, securities or rights for its debt to create security, and 2) management trust (*fiducie gestion*), where the transfer of assets is made in view of its management” (Devaux, Beckner, Ryznar, 2014: 112). The creation of the *fiducie sûreté* usually has a great variety of reasons: a trustee may be a debtor of a principle debt; a trustee “can, but need not, be a creditor in relation to the debt, thus combining the status of trustee with the status of beneficiary; the fiducie can, but need not, involve putting the trust property into the hands of a third party; the trust property can, but need not, remain available to be used by the settler” (Barriere, 2013: 101).

Moreanu denotes the *fiducie sûreté* by the term *fiducie-guarantee* and draws parallel between the former and *fiducia cum creditore* of the Roman law. The same scholar denotes the *fiducie gestion* by the word-combination *fiducie-administration/management* via describing it as an equivalent of the Roman *fiducia cum amico* represented by "a contract whose purpose is to ensure the assets' administration which, as a rule, holds also the capacity of beneficiary" (Moreanu, 2015: 85). The French *fiducie gestion* can also be characterized as “an instrument of syndicated loans management” (Lyczkowska, 2010: 2). Grimaldi distinguished one more French form of the property transaction – the *fiducie libéralité* (a fiduciary gift) – in which “the transfer of ownership is driven by the will of the settler to grant rights to a third party by the intermediary of the fiduciary, who, in turn, will transfer to the third-party, donor or legatee, the assets which he shall have received” (Grimaldi, 2011). Some scholars express different ideas in this respect. According to K.

Lyczkowska “apart from the general type, in French law there are also two independent modalities of *fiducie*: *fiducie-sûreté* and *fiducie-gestion*” (Lyczkowska, 2010: 2). A. Devaux gives a more precise description: “the French doctrine does not qualify the *fiducie* as a trust because of its prohibition of *fiducie libéralité*” ( Devaux, Beckner, Ryznar, 2014: 112). It must be noticed, that during the creation of the rules regulating *fiducie* “the French legislator used as a source of inspiration Articles 2,011-2,030 from the Quebec Civil Code” (Moreanu, 2015: 84). However, “the French *fiducie* was not enacted as an ownerless patrimony, as in Quebec, but as a segregated patrimony owned by the trustee” (Vicari, 2014: 4). The history of law gives us a useful information in this respect: in the beginning of the 19<sup>th</sup> century the institution of the *trust* became an integral part of the law of Canada. Many Canadian rules regulating the *trust* corresponded to the rules of the common law. However, nowadays, the legal rules of the province of Quebec - which is located in Canada - show certain variations from the regulations of the contemporary Anglo-American *trust*. Prof. I. Sandor directly indicates in this respect: “Although French law was introduced in 1663 in Quebec, including the *coutumes* of Paris and the earlier *ordinances*, in 1763 the province of Quebec acceded to Great Britain under the Treaty of Paris, and thus remained independent of Napoleonic legislation. The Quebec Act of 1774 introduced free testamentary arrangement under old French rules of succession ( Civil Code of Lower Canada ) ; it contained two provisions of old French law, which are deemed to be antecedents of the trust ” ( Sandor, 2015 : 231 ). As a result, the Civil Code of Quebec enacted the *fiducie* without the duality of ownership (or the so-called “*split ownership*”). A transferred property constituted “an independent patrimony without owner (“*patrimoine affecté*”), therefore it should constitute an entity, possibly a legal entity. Case law also moved in this direction, qualifying the trust as a *sui generis* ownership, which has an autonomous, separate entity” (Sandor, 2015: 235).

It must be noted, that generally, the notion of *patrimony* (the French *patrimoine*) comprises an institution through which individuals have rights to own things. According to Aubry and Rau's classic conception: “1. each person has a *patrimoine*; 2. every *patrimoine* belongs to someone; and 3. everyone has just one *patrimoine*” (Forti, 2011). Therefore, in civilian legal systems and especially, in France: “no person has one way of holding moveables and another for holding immoveables” (The philosophy of law, 2004: 267). Moreover, from a more general viewpoint: “the French notion of ownership implicates three cumulative rights: the right to use property (*usus*), the right to enjoy (*fructus*), and the right to exploit it (*abusus*)” (Devaux, Beckner, Ryznar, 2014: 101). Despite such circumstances, the implementation of the *fiducie* can be regarded as an important turning point, which “destroys” Aubry and Rau’s theory of the unicity of *patrimoine* and facilitates the introduction of the notion of *patrimoine d’affectation*. As a result, the contemporary French fiduciary acquires the right to hold one or more fiduciary patrimonies. He “exclusively exercises the prerogatives attached to the property. He is thus the sole qualified actor to undertake an action for the recovery of property against third parties, to use the benefits of the assets (*fructus*), and to dispose of them (*abusus*) unless there is a restricted clause in the contract” (Devaux, Beckner, Ryznar, 2014: 111). Moreover, Article L 526-17-I of the French Civil Code “provides the transfer, based on documents inter vivos, of the patrimony by appropriation, which can occur both under a document of onerous title and under a free of charge document, respectively: sale, donation, contribution to a company’s patrimony either to natural persons or legal persons” (Tuleaşcă, 2014: 13).

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### The *Fiducia* - Contemporaneousness

It's also worth mentioning, that the French law became a source of inspiration for the Romanian legislators. C. R. Dedu believes, that "there are two fiduciary patterns in the European private law, respectively the British pattern (trust), which has been taken over also by the Italian Civil Code and the French pattern (art. 2011-2031 French Civil Code) adopted also by the Romanian Civil Code of 2011, at the articles 773-791" (Dedu, 2015: 212). Despite a vivid influence of the French law, it can be supposed, that the Romanian term *fiducia* originated from the Latin word *fiducia* denoting the institution of the Roman law. However, "in the Roman law, the implementation of the "Fiducia" was limited to the inheritance field, and the third party acquirer (the successor) had only the possibility to exercise a strictly personal action against the fiduciary... The Fiducia of the modern age is different from the fiducia regulated by the provisions of the Roman law and also in the light of the separation of the patrimonial assets, in the meaning that, currently, the personal assets of the fiduciary should not be confused with the ones from the fiduciary assets, as was happening in the Roman law" (Dedu, 2015: 211).

The study of the contemporary Romanian law reveals that Article 773 of the Civil Code of Romania presents the innovative institution *fiducia* and defines it as the legal operation "whereby one or more settlers ( in Romanian language: "constituitori" ) transfer rights in rem, debt rights, guarantees or other patrimony rights or a combination of such rights, present or future, to one or more trustees ( in Romanian language: "fiduciar" ) which they carry out with a targeted purpose, for the benefit of one or more beneficiaries ( in Romanian language: "beneficiari")" (Moreanu, 2015 : 84).

The introduction of the Romanian *fiducia* stipulated the emergence of the divisibility of a patrimony and facilitated the appearance of an autonomous patrimonial mass allocated to a specific purpose (*afecțiune*). The given mass can be named as the patrimony by appropriation (*patrimoniul de afecțiune*) - a legal universality, which includes "rights and obligations connected through the purpose of their appropriation, created by the exclusive will of the general patrimony's owner and ascertained by the law" (Tuleașcă, 2014 : 96). The same patrimonial mass can be named as the *special-purpose patrimony* comprising the "totality of assets, rights and obligations of the authorized individual, of the holder of the individual undertaking, or of the members of the family undertaking, affected for the purpose of exercising an economic activity, set up as a distinct fraction of the patrimony of the authorized individual, of the holder of the individual undertaking, or of the members of the family undertaking, separate from the general pledge of his/their personal lenders" (Tuleașcă, 2011 : 156). The appearance of a *special-purpose patrimony* enables us to indicate to the possibility of the implementation of the *trust-like mechanism* in the civilian jurisdictions, where the impossibility of the duality of ownership is replaced by an autonomous patrimonial mass (*patrimoniul de afecțiune*) allocated from the "general patrimony". Therefore, the contemporary Romanian entrusting relationships consider the following participants:

*Constituitori* - a transferor of the assets;

*Fiduciar* - a transferee, who manages transferred rights in rem, debt rights, guarantees or other patrimony rights or a combination of such rights (present or future) for the benefit of one or more beneficiaries;

*Beneficiari* - a receiver of the benefit derived from the management and exploitation of the property transferred to the *fiduciar*.

The object of the entrusting relationships is presented by transferred assets (the *patrimoniul de afecțiune*) i.e. a fiduciary patrimony ("*masele patrimoniale fiduciare*")

(Tuleaşcă, 2011: 157)). The process of the transference is represented by the following phases: "transfer the patrimonial rights from the constitutor to the fiduciary; administration of these rights by the fiduciary in the benefit of the beneficiary and finally the transfer of the dedicated assets from fiduciary to the beneficiary" (Dedu, 2015: 213). The Romanian (*patrimoniul de afectare*) can be treated as a juridical universality, which has appeared not only in a legal sphere, but in the economic activities as well. Nowadays, the division of patrimony is authorized by "E.G.O. no. 44/2008 on the economic activities carried out by authorized natural persons (free lancers, self-employed persons), individual companies and family associations...

For the first time, the entrepreneurs carrying out economic activities as authorized natural persons, owners of the individual companies or members of a family association ( hereinafter natural person merchants ) can establish patrimony units assigned to carry out some activities, distinctly from the general lien of their personal creditors (Tuleaşcă, 2014: 96). Therefore, the *patrimoniul de afectare* is untouchable from outside. It is independent from a personal patrimony. After the split of the trustee's (fiduciary) patrimony by the legal operation of the *fiducie*, a patrimonial mass becomes protected against the hypothesis of a trustee's insolvency. Moreover, the *fiducie* can be deployed "in place of an association or a stand-alone company, throughout the possibility of sharing certain assets of a natural or legal person, without it being necessary to create separate legal entities" (Moreanu, 2015: 85). As a result, a trustor's liabilities for his/her other businesses cannot reach the patrimonial mass dedicated to the *fiducie*.

### The Major Terminological Insights

It has already been mentioned that the French law became a source of inspiration for Romanian legislators. This fact is seen during the analysis of the terminological units related to the entrusting relationships. The following French-Romanian pairs vividly reveal the similarity of the roots of the terms denoting the participants of the fiduciary transactions:

Constituant - Constitutori

Fiduciaire - Fiduciar

Bénéficiaire - Beneficiari

Patrimoine d'affectation - Patrimoniul de afectare

Moreover, a special attention must be paid to the terms "entitling" entrusting relations. The French language presents the word *fiducie* in this respect, while the Romanian scholars denote the Romanian *trust-like device* with *fiducia*. However, D. Moreanu uses *fiducie* instead of *fiducia*. The given facts indicate, that on the one hand, the contemporary Romanian *trust-like mechanism* originated from the Roman *fiducia*, while on the other hand, its roots must be searched in the French juridical reality. It's worth mentioning, that certain problems of interpretation occur in cases of the French terminological units, for instance, L. D. Egbert's "Multilingual Law Dictionary" presents the following French equivalents of the English terms denoting the legal institution *trust* and participants of entrusting relationships:

"trust

cartel (m); confiance (f); trust (m); fidéicomis (m)" (Egbert, Morules-Macedo, 1979 : 260);

"beneficiary

bénéficiaire (m)" (Egbert, Morules-Macedo, 1979 : 37).

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The existence of almost all the above mentioned equivalents makes obscure the essence of the French *fiducie*. We believe, that the equalization of the English term “*trust*” with the French word “*trust*” is the best way of the maintenance of the essence of the Anglo-American entrusting relationships. Moreover, it is preferable to denote the French term *bénéficiaire* with the word-combination “*French beneficiary*” instead of the English word *beneficiary*. This procedure will prevent the ambiguity caused by the merge of common and civil law concepts stipulated by the evident misinterpretation. Hungarian Prof. I. Sandor stated in this respect: “in the process of adopting the trust, special attention should be paid to the correct application of the rules of the given legal institution in term of both terminology and classification. In many cases, the trust or trust-like legal instruments used in civil law or in mixed legal systems are not recognized as trusts by Anglo-Saxon jurists” (Sandor, 2015: 25). Therefore, the terminology related to the trust-like mechanisms of the civil law jurisdictions must correspond to the above mentioned.

### The Major Conclusions and Proposals

All the above mentioned enables us to conclude, that the common law *trust* “made its entry into Romanian law through the most traditional source of influence that the Romanian law has had over time: the French law... Therefore, the reception of trust occurred... in a filtered way, and not following a direct confrontation of the Romanian legal tradition with the model of trust proposed by the common law systems” (Gheorghe, 2014: 276). The in-depth study of the French and Romanian *trust-like mechanisms* reveals their connection to the common law *trust* and enables us to single out the following similarities and differences:

*The major similarities:*

1. The *fiducie* and the *fiducia* similarly to the *trust* involve three parties - a transferor, a transferee and a receiver of the benefit. However, in case of the *fiducie*, “the constituent transfers property, rights, or securities to a fiduciary, who is in charge of realizing the objectives of the *fiducie*” (Devaux, Beckner, Ryznar, 2014: 110).
2. The French *constituant* similarly to the common law *trustee* appoints the *protecteur* (a protector);
3. The *fiducia* and the *trust* represent the tools contributing to the economic development.

*The major differences:*

1. The *trust* is oriented on the bifurcation of the ownership of property between a trustee (a receiver of a legal title) and a beneficiary (a receiver of an equitable title). The *fiducie* and the *fiducia* are not oriented on the bifurcation. They create only a *patrimoine by appropriation*;

2. In contrast to the *trust*, the registration of the *fiducie* is connected with the certain formalities - the *fiducie* must be registered in the National Register of Trusts;

3. The French legislator did not go through the logical consequences of *patrimoine d’affectation*, which would suggest that the fiduciary is solely responsible for the fiduciary debts like the American trustee;

4. The difference between the *fiducie* and the *trust* (existing in both Article 775 of the Romanian Civil Code 26, as well as in Article 2,013 of the French Civil Code) is the prohibition expressly stated, under the absolute nullity penalty, to constitute indirect donations (in Romanian language: “liberalități indirecte”) (or to be subject to a liberal intention) in the beneficiary’s favour” (Moreanu, 2015: 85).



Therefore, the implementation of the French *fiducie* and the Romanian *fiducia* can be regarded as an internationalization of the European legal systems in response to the contemporary globalizing processes. Although these legal transplants are not as flexible as the common law trust and they have not become entirely common in France and Romania, we can predict the increase of their popularity during the next decades. The major reason lies in the fact, that on the one hand, the *fiducie* and the *fiducia* are excellent tools for the protection of property or management of a private wealth. On the other hand, they present the *patrimony by appropriation* (the French *patrimoine d'affectation* and the Romanian *patrimoniu de afectatiune*) - a juridical universality, which “destroyed” Aubry and Rau’s theory of the unicity of *patrimoine* and facilitated the emergence of the notion of a “split patrimony” consisting of a patrimonial mass “impermeable” i.e. untouchable from outside.

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