Trusts as Ownerless Property

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Alexandra Popovici, *Trust in Quebec and Czech Law: Autonomous Patrimonies?*, 24 **Eur. Rev. Private L.** 6 (2016).

When comparing common law and civil law in the area of property, the trust is always presented as a legal institution of ownership typical for the common law and absent in the civil law. The trust, then, represents one of the major differences between these two legal traditions. While such a formal differentiation might be justifiable, the civil law indeed, like the common law, often generates institutions with some of the attributes of the common law trust but with varying characterizations of interest.

Alexandra Popovici's article discusses the unique characteristics of instruments with trust-like qualities in civil systems, and she reveals the drafting history around the Québec Civil Code treatment of the issue.

Since the French Revolution (1789), and the ensuing abolition of the feudal system with its "ownership" of the feudal lord ("dominium directum") and "ownership" of the person in possession ("dominium utile"), the civil law made a rigorous choice for a unified approach to ownership.

The French Declaration of Human and Civic Rights of 26 August 1789 stated in article 17 that the "right to property is inviolable and sacred." This was reflected in article 544 of the French Civil Code, which defines ownership as "the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations."[1] The consequence of this approach is that an object can only have one subject as owner (although several subjects can be co-owners, but they then share full ownership rights). All others who claim property entitlements are seen as having only a limited property right.

In the case of a trust, however, the trustee is entitled ("owner") at common law and the beneficiary has an entitlement ("ownership") in equity.

From a civil law perspective, this is a – forbidden – split ownership. Still, civil lawyers also accept the great advantages of trust law and have devised ways to achieve them: permitting someone to manage property (which is separate from the manager's other property) for the benefit of another, who is also seen as having a property entitlement. In order not to go against the basic premise of the unity of ownership, the solution chosen was that the "trustee" concluded a contract with either the "settlor" or the "beneficiary" under which the trustee agreed to use her property rights only for the benefit of the beneficiary. The beneficiary, however, is not given any property right.

Civil law systems differ in their approach as to how far they are willing to protect the beneficiary.[2] Québec, a leading civil law jurisdiction in North America, has chosen its own, rather fascinating, solution. The trust property is owned by no one, so the unitary concept of ownership is not violated, whereas at the same time both trustee and beneficiary seem to exercise what looks like property rights. In other words, exercise of property rights is separated from entitlement to property rights.

The Québec Civil Code (Article 1261) states that "(t)he trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right." In other words: according to Québec law, no one "owns" the trust property. It is a patrimony (in civil law the term for the whole of a person's assets and debts) managed by the trustee as a non-owner. Also, the beneficiaries are non-owners.

This approach to trust law was, until recently, very specific for Québec, but has now reached the European continent. The new Civil Code of the Czech Republic states in Article 1448, paragraph 3: "The rights arising from the right of ownership in the property in a trust are exercised by the trustee in his own name and on the account of the trust; however, the property in a trust is not owned by the administrator or the founder, or the person entitled to receive a performance from the trust." The text is clearly based upon the Québec model.

In her article, Alexandra Popovici gives an overview of the Québec Civil Code's drafting history, which is very intriguing. It appears that approaching the trust property as an "affected patrimony" is derived from ideas developed by the French author Pierre Lepaulle. His ideas were almost forgotten on the continent of Europe, partly because at the end of his career he came back on his earlier views and began to consider the trust as a legal person, but not in Québec.

Popovici explains that, in the final draft of the Québec Civil Code (as presented by the Québec Ministry of Justice), Lepaulle's older ideas suddenly resurfaced. It seems that this happened under the influence of a rather theoretical article by Pierre Charbonneau, a Québec notary, published in 1983, which was based upon German pandectist writings from the 19th century. The approach taken earlier by the Supreme Court of Canada in *Royal Trust Co. v. Tucker*, in which the court (Beetz, J.) qualified the trust as "a sui generis property right", was set aside.[3]

The Québec approach, although now followed in the Czech Republic, is not followed in the two leading civil jurisdictions in Europe: France and Germany. Their trust law is far more pragmatic and less based upon what seems an ideological desire, having its roots in anti-feudalism so characteristic of the French Revolution, to keep the civil law unaffected by the common law's fragmented ownership.

1. In the mixed legal system of Scotland feudal tenure (with its distinction between *dominium directum* and *dominium utile*) was abolished in 2004 by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and replaced by civil law unitary ownership.
2. Willem Loof, Of Trustees and Beneficial Owner: An Inquiry Into The Proprietary Aspects of Trusts and Trust-like Devices From a European Private Law Perspective (2016) (PhD Dissertation, Maastricht University) (on file with author).
3. *Royal Trust Co*. v. *Tucker*, [1982] 1 S.C.R. 250 at. 272. Beetz, J. stated: "That leaves only the trustee in whom ownership of the trust property can be vested. Clearly the right of ownership is not the traditional one, since, for example, it is temporary and includes no fructus. It is a sui generis property right, which the legislator implicitly but necessarily intended to create."

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