FIDUCIARY OWNERSHIP AND TRUSTS IN A COMPARATIVE PERSPECTIVE

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Abstract Ownership is an essential feature of trusts that serves as a useful analytical and comparative tool in order to cross legal traditions and compare different legal institutions, which to a greater or lesser extent serve similar socio-economic and legal functions. The concentration on ownership enables one to burrow down into the normative roots of different legal traditions. This article comprises three substantive parts: first, characterizing ownership and the manner in which this concept distinguishes the civil and common law traditions; second, contextualizing ownership in relation to trusts from different legal systems; and, third, conceptualizing some contemporary challenges arising out of the divergent nature of ownership in the phenomenology of the trust paradigm, the value of the trust to comparative law and its effect on the civil law as a distinct tradition. It is argued that trusts necessarily involve the fiduciary administration of property and that 'fiduciary ownership' is a better shorthand description of the encumbered nature of trust property, rather than 'dual' or 'split' ownership, which is misleading and mistaken.

Keywords: comparative law, fiduciary ownership, international private law, property, trusts.

I. INTRODUCTION

As in early English times, the trust continues to be an institution having a legal existence that is driven by pragmatic praxis. Trusts are now used as a vehicle for the management of vast financial wealth.[1] The evolution of trusts remains

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[1] See eg OECD, Directorate for Financial and Enterprise Affairs, *OECD Guidelines on Pension Fund Asset Management* (OECD 2006) (pension funds (or 'investment trusts') held US $15 trillion of assets in 2003, representing 80 per cent of GDP of the OECD area); cf OECD, *Pension Markets in Focus* (OECD Dec 2008, Issue 5).

[*ICLQ* vol 63, October 2014 pp 901–933] doi:10.1017/S0020589314000463

demand-led and the law pertaining to trusts continues to lag behind the realization of novel trust devices in contemporary financial and legal practice. Legal incursions in the field of trusts occur in the most acute cases to correct the trajectory of trust evolution from encroaching on mandatory rules of public policy. The inherent flexibility of the trust as a legal institution is perhaps the secret behind the trust pandemic that has spread in recent times. According to Lepaulle: '[trusts] are like those extraordinary drugs curing at the same time toothache, sprained ankles, and baldness sold by the peddlers on the Paris boulevards . . . What amazes the skeptical civilian is that they do really solve them!'[2] But, far from contenting ourselves that the trust is a magical elixir that will cure what ails you, we need to understand how trusts work and use appropriate terminology to describe the encumbered nature of ownership in trusts. To that end, this article does not promise further trust alchemy but takes a more sober look at the ownership structure of 'trusts' across different jurisdictions with a view to exposing the diverse treatment of ownership throughout those trusts and making some constructive comments regarding contemporary trusts law and practice in a comparative context. In doing so, it is hoped that this study will stimulate further debate on the larger questions of how the trust has influenced the civilian conception of 'ownership' and, in turn, the civil law as a distinct legal tradition.[3]

In terms of comparative methodology, this article does not conduct a functional analysis of trusts internationally in order to identify various legal arrangements that could be described as a trust in some particular respect or against some amorphous definition.[4] Rather, the ownership structure of different institutions are considered on the basis that they are expressly regarded as 'trusts' in certain jurisdictions or, as is the case in most of the jurisdictions considered, those institutions are expressly recognized as 'trusts' by the relevant legislature in codes or other enactments. Particular attention is paid to where academics, practitioners and judges in those jurisdictions situate 'ownership' in those 'trusts'—that is, in terms of who is regarded as the 'owner' of trust property. In doing so, this study reveals extensive fracturing of the concept of ownership internationally as various jurisdictions have attempted to embrace trusts in different ways. Thus, the ownership of trust property has been described as being in the beneficiary, settlor, trustee, and all or none of the trust parties in at least one jurisdiction. On the basis of this study, and further analysis of 'ownership' in trusts in the common law tradition, it is argued that 'fiduciary ownership' is a better shorthand description of the

[2] P Lepaulle, 'Civil Law Substitutes for Trusts' (1927) 36 YaleLJ 1126, 1126.

[3] See also L Smith (ed), *The Worlds of the Trust* (CUP 2013); D Clarry, 'The Worlds of the Trust' (2013) 27(3) Trust Law International 141 (review); L Smith (ed), *Re-imagining The Trust:* Trusts in Civil Law (CUP 2012); D Clarry, '*Re-imagining The Trust:* Trusts in Civil Law' (2013) 2(3) CJICL 665 (review).

[4] cf R Michels, 'The Functional Method of Comparative Law' in M Reimann and R Zimmermann, *The Oxford Handbook of Comparative Law* (OUP 2006).

encumbered nature of ownership of trust property, rather than 'dual' or 'split' ownership in trusts, which is the root cause of much ambiguity in comparative trust law and ought to be abandoned as being misleading and mistaken. 'Dual ownership' is misleading since it suggests that trusts comprise two contemporaneous owners of property, which in turn relies on an overstated historical division between the Common Law and Equity. 'Split ownership' in trusts is mistaken in that it implies that 'ownership' is divided into discrete incidents and apportioned between separate persons. The succinct phraseology of 'fiduciary ownership' better communicates the encumbered form of ownership of trust property and highlights the essential interplay between fiduciary loyalty and trusteeship.

II. CLASSICAL PERSPECTIVES ON OWNERSHIP AND TRUSTS

It is important to understand the different conception of 'ownership' in the civil and common law traditions, especially as it is perceived to be a fundamental point of distinction between them, before analysing how 'ownership' has been strained by trusts as a subject in comparative law. The present comparative study is predominantly concerned with legal systems within the broader civil law tradition, but that study will be undertaken against the backdrop of the ownership structure of trusts in the common law tradition. Notably, so-called 'mixed' jurisdictions—eg Louisiana, Quebec, Scotland, South Africa—together with China and the Latin American countries all embody Roman-based, or distinctly civilian-inspired, property law regimes, broadly adhere to the civilian concept of 'ownership', and have, for some reason, tried to locate 'ownership' of trust property in anyone but the trustee.

A. The Common Law Conception of 'Ownership'

From the mid-eighteenth century, the common law conception of ownership was influenced greatly by Blackstone, whose famous commentaries proclaimed the 'right of property' to be that 'sole and despotic dominium'.[5] The absolutist conception of property that was championed by Blackstone could not, however, be reconciled with the multifarious threads of proprietary interests that had been woven into the fabric of the common law tradition since feudal times: ownership itself could be encumbered and fragmented amongst many people in a variety of ways. Owing to the inability of the absolutist conception of property to explain the fragmentation of 'ownership', further attempts to define 'ownership' simply in terms of the relation between a person and a right, such as Salmond's analysis, failed to adequately deal with the content of the 'right' that is the subject of ownership or to explain the

[5] W Blackstone, *Commentaries on the Laws of England* (W Morrison ed, Cavendish Publishing 2001) vol 2, 3.

protection afforded to an owner of property as a matter of law vis-à-vis other persons (ie non-owners).[6] A further enquiry into the legal positions of other persons with respect to property owned by another person informs what 'ownership' practically meant as matter of law. But the single-minded view of ownership in terms of a person's relation to property of some amorphous 'right' did not engage with that enquiry and could not prevail as a comprehensive theory.

The common law was in need of a reconceptualization of ownership, which came by moving away from a physicalist notion of ownership *in* property to a metaphysical conception of intersubjective, juridical relations *in relation to* property.[7] The 'bundle of rights' theory of property was born, which remains the predominant view that informs ownership in the common law tradition.[8] In that account, it is not the relation to the thing itself that is important but the intersubjective relationships in relation to the thing that provides the analytical and conceptual framework of property in the common law tradition.[9] Thus, '[p]roperly understood then, "property is a bundle of rights" expresses the thesis that property constitutes a legal complex, of various normative relations, not simply rights'.[10] Indeed, Hohfeld exposed that correlative 'duties' exist *ipso facto* in the presence of 'rights'; 'rights' and 'duties' being two sides of the same coin, as it were.[11] For this reason, the 'bundle of rights' theory could just as well have been called the 'bundle of duties' theory or, even better, 'bundle of legal relations' theory. However, such a suggestion might be seen as scandalous in a legal tradition that reflects a Western culture possessed by its possessions and obsessed with what rights one has over things, rather than what duties we might owe one another in relation to things.[12]

Whilst the 'bundle of rights' theory made a significant contribution in the common law tradition by focusing on the relations between different persons with respect to property, it also brought with it the idea that constituent components of the 'bundle' could themselves be divided or 'split' between different persons in various property-holding devices, including the trust. Honoré gave the fullest account of 'ownership' by unpacking the concept into 11 constituent 'incidents': 1) the right to possess; 2) the right to use; 3) the right to manage; 4) the right to income; 5) the right to capital; 6) the right to security; 7) the incident of transmissibility; 8) the incident of absence of term; 9) the prohibition of harmful use; 10) the liability to execution; and 11)

[6] JW Salmond, *Jurisprudence* (4th edn, Stevens and Haynes 1913), 220–1 ('The Definition of Ownership'); cf J Austin, *Lectures on Jurisprudence* (4th edn, Robert Campbell rev and ed, John Murray 1879) 382–3.

[7] DR Johnson, 'Reflections on the Bundle of Rights' (2007) VtLRev 247, 249–50.

[8] See DWM Waters, M Gillen and L Smith (eds), *Waters' Law of Trusts in Canada* (3rd edn, Carswell 2005) 12. Compare JE Penner, *The Idea of Property in Law* (OUP 1997).

[9] JE Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 UCLALRev 711, 712–31. [10] Ibid 713. [11] WN Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning* (WW Cook ed, Yale University Press 1919) 36–41.

[12] cf E Fromm, *Man for Himself* (Holt, Rinehart and Winston 1969) 140–1.

residuary character.[13] The unity of those incidents of ownership monopolized property for the owner but, according to Honoré, the incidents could also be divided between two or more persons in different forms of property-holding—trusts, for example, 'split ownership' between two or more persons.[14] Even on this view, ownership is arguably even more complex than Honoré suggested, as the identified incidents could themselves be dealt with in different ways and assigned to different persons unequally. However, in Honoré's account,

> Ownership is important in our economic and legal culture because in the standard case the owner combines a number of rights that together amount to a monopoly over the thing owned, in particular the exclusive right to manage, enjoy, and alienate it . . . But when the incidents of ownership are divided so that one person administers and another person or object benefits from the property, *as is the case with a trust*, this monopoly does not exist.[15]

Fratcher similarly wrote, '[t]he trust is a legal device developed in England whereby ownership of property is split between a person known as a trustee, who has the right and powers of an owner, and a beneficiary, for whose exclusive benefit the trustee is bound to use those rights and powers.'[16] Allied to the notion that the incidents of ownership are themselves divided or split between a trustee and beneficiary is another fracturing of ownership in jurisdictional terms, with the common usage of the terms 'beneficial owner' and 'legal owner' to describe the position of beneficiary and trustee, respectively.[17] Although the pairing of those terms combine the functional ('beneficial' owner) with the jurisdictional ('legal' owner), the trust is firmly situated in the traditional jurisdictional division between the Common Law and Equity by the familiar expressions 'equitable owner' or 'equitable ownership', as synonymous with 'beneficial ownership'.[18] The jurisdictional dichotomy that divides 'ownership' into legal and equitable ownership is tied to the historical notion that only a Court of Equity will take notice of a trust and, therefore, the Common Law treats the trustee as the (legal) owner of the trust property, especially in the trustee's dealings with third parties, as though the trustee were the owner of the relevant property.[19] The beneficiary

[13] T Honoré, *Making Law Bind* (Clarendon Press 1987) 166–79. [14] Ibid 187–9.

[15] T Honoré, 'Trusts: The Inessentials' in J Getzler (ed), *Rationalizing Property, Equity and Trusts* (LexisNexis 2003) 10 (emphasis added).

[16] WF Fratcher, *International Encyclopaedia of Comparative Law* (JCB Mohr 1973) vol 6, [11].

[17] TG Watkin, 'Changing Concepts of Ownership in English Law during the Nineteenth and Twentieth Centuries: The Changing Idea of Beneficial Ownership under the English Trust' in M Dixon and GLLH Griffiths (eds), *Contemporary Perspectives on Property, Equity and Trusts Law* (OUP 2007) 139–61.

[18] J Mowbray *et al.* (eds), *Lewin on Trusts* (8th edn, Sweet & Maxwell 2008) 106.

[19] eg *Sturt v Mellish* (1743) 2 Atk 610, 610; 26 Eng Rep 765, 765 per Lord Hardwicke LC; *MCC Proceeds v Lehman Brothers International (Europe)* [1998] 4 All ER 675, 691 per Mummery LJ.

must hold the trustee to account for the administration of trust property in Equity.[20] In this sense, the dualistic conception of ownership is an historical relic of the great dualism between the Common Law and Equity, in which the trustee is the 'legal owner' of trust property and the beneficiary is concurrently the beneficial or equitable owner of that property.[21]

On this footing, trusts are impossible in civilian or mixed legal systems that do not owe their heritage to the historical quirk of the English legal system. When combined with the functional description of trusts splitting the incidents of ownership, a powerful prophylactic is produced to prevent the reception or transplantation of trusts.[22] The dualistic conception of ownership in which trust property has two contemporaneous owners is virtually ubiquitous in the academic and judicial discourse in the common law tradition concerning trusts, including many prominent trust commentaries.[23] Indeed, in *Ayerst v C&K Construction Ltd*, Lord Diplock began his speech in a unanimous House of Lord's judgment:

> My Lords, the concept of legal ownership of property which did not carry with it the right of the owner to enjoy the fruits of it or dispose of it for his own benefit, owed its origin to the Court of Chancery. The archetype is the trust. The "legal ownership" of the trust property is in the trustee, but he holds it not for his own benefit but for the benefit of the cestui que trust. Upon the creation of a trust in the strict sense as it was developed by equity the full ownership in the trust property was split into two constituent elements, which became vested in different persons: the "legal ownership" in the trustee, what came to be called the 'beneficial ownership' in the cestui que trust.[24]

This dualistic conception of ownership will be revisited in the final section of this article, with a view to exposing the common misconception found in this notion and suggesting a move away from this description toward fiduciary ownership of trust property.

[20] T Lewin, *A Practical Treatise on the Law of Trusts and Trustees* (Maxwell 1837) 15; EHT Snell, *The Principles of Equity: Intended for the Use of Students and the Profession* (Stevens & Haynes 1868), 48; G Spence, *The Equitable Jurisdiction of the Court of Chancery* (Stevens & Norton 1846) vol 2, 39.

[21] See Salmond (n 6) 227–32.

[22] C Raffenne, 'Why (Still) No Trust in French Law?' in A Harding and E Örücü (eds), *Comparative Law in the 21st Century* (Kluwer 2002) 75, 77. See also T Frankel, *Fiduciary Law* (Fathom Publishing 2008) 283.

[23] eg GS Alexander, 'The Dilution of the Trust' in Smith, *The Worlds of the Trust* (n 3) 305, 306; GE Dal Pont, *Equity and Trusts in Australia* (5th edn, Lawbook Co 2011) 483; AH Oosterhoff *et al.* (eds), *Oosterhoff on Trusts: Text, Commentary and Materials* (7th edn, Carswell 2009) 36–7; MS Amos, 'The Common Law and the Civil Law in the British Commonwealth of Nations' (1936) 50 HarvLRev 1249, 1264.

[24] *Ayerst v C&K Construction Ltd* [1976] AC 167 (HL), 177 per Lord Diplock (with whom Viscount Dilhorne, Lord Kilbrandon and Lord Edmund-Davies agreed). See also *Abdul Hameed Siti Kadija v De Saram* [1946] AC 208 (PC (Ceylon)), 216–17 per Lord Thankerton (with whom Viscount Simon and Sir John Beaumont).

B. The Civil Law Conception of 'Ownership'

Not long after Blackstone had penned his classic *Commentaries* in England, on the Continent the French Revolution brought a socio-political upheaval that saw the reintroduction of an absolutist conception of property. Accordingly, it is evident from art 544 in the *French Civil Code*—'[*l*]*a propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements.*'[25]—that a robust conception of ownership was intended by the drafters of the Napoleonic code. A protected sphere was created in which one could be the master of one's own domain. This brought with it an impassioned form of absolute ownership, being the collective of the *usus* (right to use of the thing), *fructus* (right to its fruits) and *abusus* (right to alienate or destroy the thing).[26] The collective force of these three features of civilian ownership is complete domination of the particular thing and, for this reason, is considered to be the modern formulation of *dominium* from Roman law.[27] In the civil law tradition, ownership then fundamentally evolved even more distinctly by the notion of *patrimony*: every person has one, and only one, patrimony in which the rights (or assets) of a person answer for the obligations (or liabilities) of that person.[28] Thus, in Quebec, we find the parallel provision on patrimony: *'*[*t*]*oute personne est titulaire d'un patrimoine*'; '[e]very person has a patrimony'.[29] Aubry and Rau's theory of patrimony was so profound to French legal heritage that one French jurist claimed that French lawyers could not think about law at all without it.[30] Although 'patrimony' has no meaning in the common law tradition, it has usefully been defined as the '[u]niversality of rights and obligations having a pecuniary value in which rights answer for obligations'.[31] Matthews neatly said, 'patrimony is an expression of economic personality.'[32] But not all real rights in the civil law are absolute: there exists a limited category of recognized exceptions. The final feature of the civilian conception of ownership is the *numerus clausus* of real rights, which sets out a limited

[25] Code civil des français, art 544 (translation by author: 'ownership is the right to enjoy and dispose of things in the most absolute manner, provided the usage is not prohibited by law or regulations').

[26] See B Akkermans, *The Principle of Numerus Clausus in European Property Law* (Intersentia 2008) 91–9; Waters, Gillen and Smith (n 8) 1340–1.

[27] WW Buckland, *A Textbook of Roman Law from Augustus to Justinian* (3rd edn, P Stein (ed), CUP 1963), 186–95; B Nicholas, *An Introduction to Roman Law* (Clarendon Press 1961) 153–7; JAC Thomas, *Textbook of Roman Law* (North-Holland Publishing 1976) 131–7.

[28] N Kasirer, 'Translating Part of France's Legal Heritage: Aubry and Rau on the Patrimoine' (2008) 38 RGD 453, 464–5.

[29] Code civil du Québec/Quebec Civil Code, art 2.

[30] F Zenati, 'Mise en perspectives de la théorie du patrimoine' (2003) 4 RTD civ 667, 667; Kasirer (n 28) 457.

[31] Quebec Research Centre of Private and Comparative Law, *Private Law Dictionary and Bilingual Lexicons* (Les Éditions Yvon Blais 1991) (Bilingual Lexicons) 223.

[32] UK House of Lords: European Union Committee, *The EU's Regulation on Succession: Report with Evidence* (6th Report of Session 2009–10) 14.

category of real rights to exist over things.[33] A 'real right' is tied to 'patrimony', with a 'real right' being defined as a 'right of a patrimonial nature that is exercised directly upon property'.[34]

Traditionally, trusts have not been included in this closed list of real rights, which leaves autonomous and indivisible ownership as a basic obstacle to the acceptance of trusts in the civil law systems—this is the classical objection to civil law trusts.[35] According to Glenn, this individual and exclusive form of civilian ownership made the trust impossible in Continental law.[36] Put another way, 'the ownership of the trustee is not quite complete, not quite *full* enough' for civilians, according to Matthews and also Lupoi.[37] Bolgár neatly stated the three main 'obstacles' to the reception of civil law trusts: *first*, the unitary conception of ownership ('inconsistent with duplication or division of rights *in rem* in the same thing'); *secondly* , the doctrine of *numerus clausus* ('public registration of rights *in rem* involves taxative codification of such rights'); and, *thirdly*, the existence of similar devices already in the civil law that facilitate, to some degree, the purposes of trusts ('calculated for practical reasons to escape the procrustean bed prepared for the evolution of property law by the imperious logic of these conceptions').[38] The combined force of these so-called 'obstacles' was said to furnish a 'striking antinomy between the common law and the civil law'[39] and presented an 'impassable chasm' between the two traditions.[40] That approach has, and those objections have, permeated contemporary trust law such that the manner in which trusts are adapted in civil law systems 'reveals and exacerbates the particularity of a certain civilian way of understanding, articulating and regulating ownership'.[41] Indeed, in order to escape the notion that a trustee is the owner of property encumbered by the terms of the trust, civil law and mixed jurisdictions have fragmented ownership in trusts in such a way that the civilian conception of ownership is no longer a point of distinction, but rather disintegration.

[33] See Akkermans (n 26) 6–7; A Braun, 'Italy' in J Glasson and G Thomas (eds), *The International Trust* (Jordan Publishing 2006) 811. cf J Smits, *The Making of European Private Law* (Intersentia 2002) 249–52.

[34] Bilingual Lexicons (n 31) 254.

[35] V Bolgár, 'Why No Trusts in the Civil Law?' (1953) 2 AmJCompL 204, 210; LA Wright, 'Trusts and the Civil Law: A Comparative Study' (1964) 6 UWOLRev 114, 116. cf Waters, Gillen and Smith (n 8) 15.

[36] See HP Glenn, *Legal Traditions of the World* (4th edn, OUP 2010) 150.

[37] P Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property' in Smith, *The Worlds of the Trust* (n 3) 335; M Lupoi, *Trusts: A Comparative Study* (Simon Dix trans, CUP 2000), 81–2, 179–83.

[38] Bolgár (n 35) 210.

[39] Bolgár (n 35) 204.

[40] RJ Alfaro, 'The Trust and the Civil Law with Special Reference to Panama' (1951) 33 JCompLeg 25, 25.

[41] Raffenne (n 22) 77.

III. CONTEMPORARY PERSPECTIVES ON OWNERSHIP IN TRUSTS

Despite the linguistic lacuna in the prominent civilian languages of French and German of there being no particular word 'own',[42] one nevertheless finds a fixation on ownership in comparative trusts law, especially in the English literature. The different ownership structures in various civil law 'trusts' will be considered in this section.[43] The different 'trusts' are grouped together according to who is considered to be the owner of the trust property: 'ownership' might be said to be in the trustee or one or none of the other trust parties. The focus will be on civilian legal institutions that are actually called 'trusts' by academics, legislators and judges, rather than 'trust-like devices', with enough trusts being considered to show that the location of 'ownership' in these trusts shifts around so much that the full complement of ownership permutations are represented: in the settlor, the trustee, the beneficiary, all and none of the trust parties. To balance the analysis of peculiar ownership structures in civil law 'trusts', the final 'trust' that is considered in this section is one in which independent legal personality is conferred upon a 'trust' in the common law tradition, thereby enabling it to own property, with the example of a 'statutory trust' from the United States.

A. Trusts with Ownership in the Trustee

The first group of trusts vests ownership in the trustee, but permits the trust property to be held or managed for the benefit of another person. Historically, the *use*, *usufruct* and *fideicommissum* have this common trait. For example, the *fideicommissum* has been unpacked into its constituent parts being 'the entrusting of an object (*commissum*) to the good faith (*fides*) of the recipient, for the benefit of another person',[44] which does sound 'trust-like' to a common lawyer.[45] Other Roman law variants, such as *use* and *usufruct*, in which the full incidents of ownership (*plenum dominium*) were temporarily suspended and only a bare or nominal ownership (*nuda proprietas*) was held by the owner (*dominus*), with the other incidents of ownership being in the usufructuary during that time, have also been likened to common law trusts.[46] Interestingly, in the *substitution fideicommissaire*, the fiduciary and the beneficiary are regarded as 'full owners'.[47] Similarly, the *fiducia* is 'full ownership with the obligation in described circumstances to restore the asset to the transferor'.[48]

[42] G Gretton, 'Owning Rights and Things' (1997) 8 StellenboschLRev 176, 176, n 6.
[43] cf Honoré (n 15) 9–11.
[44] D Johnston, *The Roman Law of Trusts* (Clarendon Press 1988) 9.
[45] See eg Oosterhoff *et al.* (n 23) 52–3. cf RW Lee, *Introduction to Roman-Dutch Law* (3rd edn, 1931) 372.
[46] RD Melville, *A Manual of the Principles of Roman Law* (3rd edn, Green & Son 1921) 279–82; Matthews (n 37) 331–5.
[47] Ibid 332–3.
[48] D Waters, 'The Future of the Trust from a Worldwide Perspective' in Glasson and Thomas (n 33) 865.

Interestingly, the *fideicommissum* of Roman times survives in a number of civilian jurisdictions today.[49]

In modern times, a number of civilian jurisdictions accommodate trusts that vest ownership in the trustee. The most notable example is Scotland, where a 'trust' exists within a property framework with a civil law persuasion.[50] Scotland has accommodated the trust since the seventeenth century without codification and without a separate equitable jurisdiction.[51] Ownership is in the trustee, with the trust property constituting a separate trust patrimony segregated from the trustee's personal patrimony.[52] As early as 1681, the prominent Scots law commentator, Viscount Stair, wrote that 'the property of the thing intrusted be it land or moveables, is in the person of the intrusted, else it is not a proper trust'.[53] Despite this clear statement on ownership in the Scottish trust, the courts toyed with the idea of ownership being elsewhere. In 1892, it was stated that the beneficiary was the 'true owner as against all persons and for all purposes', the role of the trustee merely being that of an administrator.[54] In 1898, it was considered that the beneficiary held concurrent ownership with the trustee.[55] Indeed, the confusion over the ownership structure of Scottish trusts persisted for much of the last century.[56] Whilst legislation was enacted in 1921 to regulate the proper functioning of the Scottish trust, the Act did not attempt to clarify the precise nature of ownership in the Scottish trust.[57] Indeed, the term 'trust' was used within the definition of 'trust', which admits of a certain circularity of logic: '"Trust" shall mean and include . . . any trust . . .'.[58] Other provisions did, however, imply that the trustee was the owner of the trust property—eg upon resignation, the trustee is 'divested of the whole property and estate of the trust, which shall accrue to or devolve upon the continuing trustees or trustee'.[59] In any event, the position has since been authoritatively realigned with the earlier view that the beneficiary does not own the trust property, but simply has a personal

[49] See eg Quebec Civil Code, arts 1240–1255.

[50] See DL Carey Miller, 'Transfer of Ownership' and G Gretton, 'Trusts' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (OUP 2000) 269–304 and 480–517, respectively.

[51] Gretton (n 50) 480–517; Gretton, 'Trusts without Equity' (2000) 49 ICLQ 599, 605.

[52] Gretton (n 51) 608–15, 619; KGC Reid, 'Patrimony not Equity: the Trust in Scotland' in JM Milo and JM Smits (eds), *Trusts in Mixed Legal Systems* (Ars Aequi Libri 2001) 19, 22–4, 27; RG Anderson, 'Words and Concepts: Trust and Patrimony' in A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (OUP 2013) 355–64.

[53] J Dalrymple, 1st Viscount of Stair, *Institutions of the Law of Scotland* (I, 13, 7, 1681); Reid (n 52) 21.

[54] *Govan New Bowling-Green Club v Geddes* (1898) 25 R 485, 492 per Lord McLaren; Reid (n 52) 21.

[55] *Heritable Reversionary Co Ltd v Miller* (1892) 12 R(HL) 43, 46 per Lord Watson; Reid (n 52) 21.

[56] Reid (n 52) 21.

[57] Trusts (Scotland) Act 1921 (UK) 12 Geo 5, c 58.

[58] Trusts (Scotland) Act 1921, section 2.

[59] Trusts (Scotland) Act 1921, section 20.

right against the trustee; the trustee being restored as the true and full legal owner.[60]

South Africa has also had a remarkable experience with the trust. Owing to its English and Dutch heritage, South Africa has developed two parallel and conceptually distinct trusts: the 'normal trust' or 'ownership trust', in which ownership is vested in the trustee; and, the 'bewind trust', in which ownership is vested in the beneficiary.[61] The history of the first of those trusts (ie the so-called 'normal trust' or 'ownership trust') in South Africa is of interest to comparative lawyers.[62] Essentially, the English settlors widely used and employed trust terminology in the colony without any recognizable legal infrastructure to accommodate the trust *per se*.[63] This continued for a little over a century until, in 1915, the South African Supreme Court of Appeal was called upon to enforce one of these 'trusts'. The Court held that South African law had indeed adopted the English trust terminology (eg 'trust' and 'trustee'), but the English law of trusts did not form part of South African law nor had the corpus of English trust law arrived on the shores with the settlors, who had brought the trust with them in praxis.[64] The South African Supreme Court of Appeal held, '[t]he [trust] idea is now so firmly rooted in our practice, that it would be quite impossible to eradicate it' and gave effect to the relevant trust by equating it with a more familiar civilian legal institution, the *fideicommissum*.[65] The difference between trusts and *fideicommissum* was resolved, rather bluntly, as being a mere matter of 'phraseology'.[66] Thus, the South African experience of the trust provides an excellent example of a jurisdiction that has not only embraced the trust, but has made the trust its own by accommodating it within the broader schema of South African law.[67] Importantly, the trustee was regarded as the owner of the trust property and the beneficiary had a personal right vis-à-vis the trustee with respect to the administration of the trust ('[i]t is trite law that the assets and liabilities in a trust vest in the trustee').[68] In 1984, the Supreme Court of Appeal finally unravelled the Gordian knot it had tied earlier as a result of equating the *fideicommissum* with the trust.[69] And, in 1988, a trust explicitly vesting ownership in the trustee—the so-called 'ownership trust'—found legislative endorsement.[70]

[60] *Inland Revenue v Clarke's Trs* (1939) SC 11, 22 per Lord President Normand; *Sharp v Thomson* (1995) SC 455, 475 per Lord President Hope (reversed on a different point: (1997) SC (HL) 66); Reid (n 52) 22.

[61] Trust Property Control Act 1988 (S Afr) No 57 of 1988, section 1; T Honoré, '*On Fitting Trusts into Civil Law Jurisdictions*' (2008) Oxford Legal Studies Research Paper 27/2008) 10–11.

[62] F du Toit, 'Jurisprudential Milestones in the Development of Trust Law in South Africa's Mixed Legal System' in Smith, *The Worlds of the Trust* (n 3) 257.

[63] MJ de Waal, 'The Reception of the Trust in South African Law' in Milo and Smits (n 52) 43, 47–8.

[64] *Estate Kemp v McDonald's Trustee* [1915] AD 491 (S Afr SC).

[65] Ibid 508.

[66] ibid 499.

[67] D Clarry, 'The Offshore Trustee *en bon père de famille*' (2014) 18(1) Jersey and Guernsey Law Review 5, 26–35.

[68] *C I R v MacNeillie's Estate* (1961) 3 SA 833, 840 G–H per Steyn CJ.

[69] *Braun v Blann and Botha NNO* (1984) 2 SA 850, [65] per Joubert JA.

[70] Trust Property Control Act 1988 (S Afr) No 57 of 1988, section 1.

In Latin America, a number of countries have embraced the notion of 'fiduciary ownership' of property that is intended to benefit another person or fulfil some specific purpose—arrangements that are commonly translated as 'trusts'. Three brief examples will be given. In Argentina, a 'trust' (*fideicomiso*) exists where a person (*fiduciante*) transfers fiduciary ownership (*propiedad fiduciaria*) of certain assets to another person (*fiduciario*), broadly translated as a 'trustee', for the benefit of the person identified in the relevant contract (*beneficario*), with the title to property being registered in the name of the trustee.[71] The introduction of that fiduciary institution brought with it a reform of the full, civilian conception of 'ownership' (*dominio*) in the Argentinian Civil Code to introduce the notion of 'fiduciary ownership' (*dominio fiduciario*), as an encumbered form of ownership that is created when property is registered in the name of one person to be administered for the benefit of another.[72] In Colombia, a trustee cannot 'acquire definitely the possession of [trust] assets', with possession of trust assets returning to the 'fiduciant or his heirs' unless some other provision is made for conveyance to some other person.[73] In Panama, a trust is a 'juridical act' whereby certain property is 'transferred by a person named the settlor to a person named the trustee, for the purpose of managing or disposing thereof in favour of a cestui que trust or beneficiary, who may be the settlor himself'.[74] Very little is said in the Panama Trust Law regarding ownership in the Panamanian trust, but commentators consider 'the trustee has all the rights and powers inherent to ownership'.[75] Indeed, the trustee as the 'regular and real owner', as well as the 'true owner', has been the prevailing view in Panama for some time, even under prior legislative enactments.[76] Trust property may be used and disposed of subject to the terms of the trust; thus, ownership is encumbered by the trust.[77]

In the Channel Islands, we find similarly encumbered forms of ownership in trusts in the bailiwicks of Guernsey and Jersey. In Jersey, 'a trust exists where a person (known as a trustee) holds or has vested in him or is deemed to hold or have vested in him property (*of which he is not the owner in his own right*)'.[78] Thus, the trustee *is* the owner of the trust property *but* only in his capacity as trustee; put another way, 'ownership' of the trust property is encumbered by the terms of the trust and by Jersey law.[79] The pervasive

[71] Law No 24, 441 (Argentina, adopted 22 December 1994; enacted 9 January 1995) arts 1, 13 (translated by Marcos Zunino).

[72] Ibid, art 73; Argentina Civil Code, art 2662 (translated by Marcos Zunino).

[73] Colombian Commercial Code, art 1244 (translated by Juan Pinto).

[74] Republic of Panama, Law No 1 of January 5, 1984 (Panama Trust Law) art 1; Executive Decree No 16 of October 3, 1984 (Panama) art 2a.

[75] R Owens, 'Panama' in C Gothard and S Shah (eds), *The World Trust Survey* (OUP 2010) 471.

[76] Alfaro (n 40) 29.

[77] Panama Trust Law (n 74) art 26.

[78] Trusts (Jersey) Law 1984, art 2 (emphasis added).

[79] Trusts (Jersey) Law 1984, art 24; P Matthews and T SowdenQC , *Jersey Law of Trusts* (3rd edn, Key Haven Publications 1993) 8, 99.

English notion of dual ownership seeped into the drafting of the Trusts (Jersey) Law 1984, where '[a] bona fide purchaser for value without actual notice of any breach of trust . . . may deal with a trustee in relation to trust property *as if the trustee was the beneficial owner* of the trust property'.[80] As early as 1896, one finds a reference to the notion of a 'beneficial owner' in a Jersey trust and a conveyance of property to 'trustees who thus became, according to the law of Jersey, the owners of the [property]' in the Privy Council, where the Royal Court of Jersey had earlier found that different persons 'had between them, the one in law [*en droit*], the other in equity [*en équité*], entire possession of the [trust property].'[81] Similarly, in Guernsey, '[a] trust exists if a person (a "trustee") holds or has vested in him, or is deemed to hold or have vested in him, property which does not form or which has ceased to form part of his own estate' for another person or purpose—interestingly, 'purpose' is defined as including the 'holding or ownership of property', which is not ordinarily regarded as a purpose of a trust in itself.[82] Again, the treatment of the trustee's powers admits the notion of 'beneficial ownership': '[s]ubject to the provisions of this Law and to the terms of the trust, a trustee has, in relation to the trust property, all the powers of a beneficial owner';[83] and '[a] bona fide purchaser for value without notice of a breach of trust . . . may deal with a trustee in relation to trust property *as if the trustee were the beneficial owner thereof*.'[84] Thus, similarly to Jersey, a Guernsey trustee owns property, which is encumbered by the trust and Guernsey law.[85]

B. Trusts with Ownership in the Beneficiary

In the next grouping of trusts, we find similar functionalities, but ownership in the trust property is in the beneficiary and managed by the trustee.[86] Such 'trusts' are found in the so-called mixed jurisdictions of South Africa and Louisiana. In the preceding section of this article, it was observed that South African law accommodates two trusts: one with ownership being in the trustee (having English heritage); the other with ownership being in the beneficiary (having Dutch ancestry).[87] Although the two kinds of South African trusts have been dealt with separately for present purposes, both trusts are treated as a 'single institution' in South African law with ownership in the beneficiary

[80] Trusts (Jersey) Law 1984, art 55(1) (emphasis added).
[81] *Hawksford v Giffard* [1896] UKPC 63, 2, 5, 6.
[82] Trusts (Guernsey) Law 2007, sections 1, 80(1).
[83] Trusts (Guernsey) Law 2007, section 30.
[84] Trusts (Guernsey) Law 2007, section 75(1)(a) (emphasis added).
[85] G Dawes, *Laws of Guernsey* (Hart Publishing 2003) 138; R Ashton, *An Analysis of the Guernsey Law of Trusts* (Key Haven Publications 1998) 1–3, 21–5.
[86] See Waters, Gillen and Smith (n 8) 15.
[87] Trust Property Control Act 1988 (RSA), section 1.

or the trustee.[88] Control by the trustee, rather than ownership, is seen as the essential feature of a trust and '[o]wnership is merely the form such control most commonly and conveniently takes'.[89] Despite enabling settlors to choose whether the beneficiary or the trustee will 'own' trust property, 'the form in which trusts are in practice overwhelmingly frequently encountered' is in the trustee.[90] The South African 'bewind trust' is, nevertheless, a 'trust' with ownership in the beneficiary.

In Louisiana, 'title' to trust property is held by the trustee.[91] While the Louisiana Trust Code is silent on who 'owns' trust property, and says nothing of the beneficiary having 'title' to trust property, ownership of the trust property is considered to be in the beneficiary.[92] The prevailing academic view is also that 'the "title" of the trustee is merely a power of administration and disposition rather than ownership'.[93] This is perhaps supported by certain provisions of the Louisiana Trust Code, which provide that a natural person enjoying 'full capacity to contract' can be a trustee, whereas a natural person, corporation, partnership or other legal entity having the 'capacity to receive property' can be a beneficiary—the combined effect of which reflects the distinct roles of trustee and beneficiary, as administrator and owner of the trust property, respectively.[94] But curiosities arise with other provisions of the Louisiana Trust Code on that view. From the beneficiary's perspective, a person can become a beneficiary of a trust in Louisiana without knowledge or notice of the existence of the trust;[95] additions to the trust property can be made simply with the approval of the trustee;[96] and a beneficiary may refuse an interest at any time after creation of the trust, which refusal operates *retroactively*, such that it is considered that the beneficiary never received any interest in the trust or the trust property.[97] The combined force of these provisions is such that a person is regarded the owner of trust property, even though they are unaware of the trust or the property the subject of the trust.

[88] Ibid; Cameron *et al., Honoré's South African Law of Trusts* (5th edn, Juta & Co 2007) 272–7; Honoré (n 61) 10–11; Waters, Gillen and Smith (n 8) 1345. Compare DJ Hayton, SCJJ Kortmann and HLE Verhagen (eds), *Principles of European Trust Law* (Kluwer 1999) 13.

[89] Trust Property Control Act 1988 (RSA), section 1. See also Waters (n 48) 870–1; Cameron *et al.* (n 88) 7.

[90] Cameron *et al.* (n 88) 276.

[91] Louisiana Civil Code, 2006 RS 9, arts 1731 and 1781. 'Title' is not defined in the 'Definitions' section of the Louisiana Trust Code, which is contained in art 1725 of the Louisiana Civil Code.

[92] DW Gruning, 'Reception of the Trust in Louisiana: The Case of Reynolds v Reynolds' (1982) 57 Tulane LR 89, 102–21. cf *Reynolds v Reynolds* (1980) 388 So 2d 1135, 1138–39 per Summers CJ (plurality) and 1140 per Dennis J (dissent).

[93] AN Yiannopoulos, 'Trust and the Civil Law: The Louisiana Experience' in Milo and Smits (n 52) 55, 67; AN Yiannopoulos, 'Property', *Louisiana Civil Law Treatise* (4th edn, St Paul West 2001) vol 2, 480. cf EF Martin, 'Louisiana's Law of Trusts 25 Years after Adoption of the Trust Code' (1990) 50 LaLRev 511; M McAuley, 'Truth and Reconciliation: Notions of Property in Louisiana's Civil and Trust Codes' in Smith, *Re-imagining the Trust* (n 3) 130, n 13.

[94] Louisiana Civil Code, arts 1783 and 1801, respectively.

[95] Louisiana Civil Code, art 1808.

[96] Louisiana Civil Code, arts 1931 and 1989.

[97] Louisiana Civil Code, arts 1981 to 1986.

Furthermore, if a beneficiary disclaims their status under a Louisiana trust, the beneficiary is not regarded as the owner of trust property retrospectively, even though that person was deemed to be the owner of the trust property before that time.[98] In retrospect, the location of 'ownership' is anomalous after disclaimer by the beneficiary as it is unclear who is to be regarded as the owner of the trust property, even though the trustee held 'title' to the trust property during the life of the trust. Indeed, a trustee of a Louisianan trust must: 'take, keep control of, and preserve the trust property'; keep trust property separate from their own property and other property not subject to the trust; and deliver trust property to those entitled at the expiration of the trust or the trustee's involvement.[99] If the trustee is not the owner of the trust property, how can the trustee perform these functions? Again, although 'title' to the trust property is transferred to the trustee, 'ownership' is strained in order to say that the beneficiary is the 'owner', rather than conceptualizing an encumbered form of ownership in the trustee (ie 'fiduciary ownership'), which would chime better with the statutory definition of 'trust'.[100]

C. Trusts with Ownership Remaining in the Settlor

In China, 'ownership' is similarly strained in such a way that ownership is reserved in the settlor of a Chinese trust.[101] Under the Chinese Trust Law, 'trust refers to that the settler, based on his faith in trustee, entrusts his property rights to the trustee and allows the trustee to, according to the will of the settler and in the name of the trustee, administer or dispose of such property in the interest of a beneficiary or for any intended purposes'.[102] The idea that the settlor reserves ownership of trust property is perhaps supported by certain provisions of the Chinese Trust Law providing for the segregation of trust property from other property of the settlor and empowering the trustee to 'entrust' another to handle trust business—if the latter 'entrust' does not convey ownership to a third party then the initial entrusting by a settlor ought not convey ownership to a trustee either, if 'entrust' has a consistent meaning.[103] However, other provisions raise

[98] Louisiana Civil Code, arts 1982 and 1983.

[99] Louisiana Civil Code, arts 2091, 2094 and 2069, respectively.

[100] Louisiana Trust Code, art 1731 ('[a] trust. . . is the relationship resulting from transfer of title to property to a person to be administered by him as a fiduciary for the benefit of another'). Compare McAuley (n 93) 163–82.

[101] L Huixing, *The Draft Civil Code of the People's Republic of China* (Martinus Nijhoff Publishers 2010) 73–107 (especially arts 270–404); R Lee, 'Conceptualizing the Chinese Trust' (2009) 58(3) ICLQ 655, 661–3; L Ho, 'The People's Republic of China' in Glasson and Thomas (n 33) 825–38; Waters (n 48) 872.

[102] Trust Law of the People's Republic of China (Order of the President, No 50, adopted at the 21st Meeting of the Standing Committee, Ninth National People's Congress, 28 April 2001 and in effect 1 October 2001) (Chinese Trust Law), art 2 (official translation at <http://www.gov.cn/english/laws/2005-09/12/content_31194.htm>).

[103] Chinese Trust Law (n 102) arts 15 and 30. cf n 177 (below) and accompanying text for the English position.

some oddities with this reading. *First*, the trustee's power to administer and dispose of property 'in the name of the trustee' is difficult to reconcile with the idea that ownership of the trust property remains with the settlor.[104] *Secondly*, the requirement that certain trust property be segregated from other trust property provides that, if the settlor is a co-beneficiary and the settlor's legal existence ends, then the 'trust shall subsist', with the settlor's right to benefit from the trust being his legacy or liquidation property.[105] If such a settlor remains the owner of the trust property, this gives rise to the absurdity that a person who dies, is dissolved or cancelled according to law, or is declared bankrupt, can and must continue to own trust property for the life of a Chinese trust.[106] *Thirdly*, Article 16 of the Chinese Trust Law, which provides for the segregation of trust property from other property owned by the trustee, would be superfluous if the settlor remains owner of the trust property.[107] *Fourthly*, it is curious that a trustee must 'at regular intervals each year, report to the settlor and beneficiary on the administration *and disposition* of the trust property'.[108] Thus, the Chinese settlor, who is supposedly the owner of the trust property, does not know between reporting intervals what property he 'owns' and may be told after the fact that he has been divested of all or part of that property. Again, a strained interpretation of ownership arises in the Chinese trust, with ownership being in the settlor, rather than any fiduciary ownership in the trustee, even though the broad term 'entrusts' in Article 2 of the Chinese Trust Law supports that conclusion and avoids those ambiguities.[109]

D. Trusts without Owners: Suspended Ownership and Free-Floating Patrimony

The conceptual framework for this ownership structure is largely attributable to Lepaulle, who believed that the true essence of the trust was the 'segregation of trust property from the *patrimonium* of individuals, and the devotion of such assets to a certain function, a certain end'.[110] In isolation, those statements are reasonably apt to describe the organizational structure of trusts—that is, the fiduciary office of trusteeship. However, Lepaulle took this notion much

[104] Chinese Trust Law (n 102) art 2.
[105] Chinese Trust Law (n 102) art 15.
[106] Ibid.
[107] Chinese Trust Law (n 102) art 16.
[108] Chinese Trust Law (n 102) art 33 (emphasis added).
[109] Compare Lee (n 101) 661–3; L Ho, 'Trust Laws in China: history, ambiguity and beneficiary's rights' in Smith, *Re-imagining the Trust* (n 3) 183, 184–85, 192–217; R Lee, 'Convergence and Divergence in the Worlds of the Trust: Duties and Liabilities under the Chinese Trust' in Smith, *The Worlds of the Trust* (n 3) 406, 408–10; L Ho, 'The Reception of the Trust in Asia: Emerging Asian Principles of Trust?' [2004] SingJLS 287, 293–6.
[110] P Lepaulle, 'An Outsider's View Point of the Nature of Trusts' (1928) 14 CornellLQ 52, 55. See also P Lepaulle, 'Civil Law Substitutes for Trusts' (1926) 36 YaleLJ 1126; P Lepaulle, 'Trusts and the Civil Law' (1933) 15 JCompLeg 18. cf L Smith, 'Trust and Patrimony' (2009) 28 ETPJ 332; H Battifol, 'Trusts: The Trust Problem as seen by a French Lawyer' (1951) 33 JCompLeg 18.

further and overstated various aspects of trusts such that if full, unencumbered ownership cannot be in any of the trust parties 'the only solution left is to attribute title to the trust itself'.[111] And voilà: *patrimoine d'affectation* or 'patrimony by appropriation', in which trust property has no owner at all.[112] In Cantin Cumyn's view, patrimony by appropriation is 'the logical consequence of a necessary separation between trustee and title to the property in the trust'.[113] The gravamen of this claim is that trusts will continue irrespective of the existence of any of the trust parties and, therefore, none of these characters is essential to a trust.[114] The fallacious common law foundation for that argument has been persuasively exposed elsewhere.[115] Nevertheless, the reasoning of Lepaulle proved persuasive to Ethiopia, Mexico and Quebec.[116] The structure of Quebec trusts is orientated around specified purposes and the appropriation of a trust patrimony to a purpose.[117] While 'title' to the trust property in a Quebec trust is in the name of the trustee,[118] 'the trust patrimony . . . is autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right'.[119] Further, '[t]he trust is the owner of the property included in the patrimony' and '[b]eneficiaries have no title or right in the property of the trust'.[120]

The current approach to 'title' in the Quebec trust (or *fiducie*) differs from the old *fiducie* that existed prior to recodification in 1994, in which the Supreme Court of Canada surveyed multiple approaches to ownership, whereby different trust parties were considered owners of the trust property, and through a process of elimination held that, due to 'title' being in the trustee in the Quebec trust, ownership was vested in the trustee.[121] Similarly, despite the 'dedicated fund' logic being accepted in Mexico in 1932, the Mexican courts later held that ownership of the trust property must still be in someone and that someone was the trustee.[122] It has been said that the logic of patrimony by appropriation in the Quebec trust 'circumvents the pitfalls of dual ownership, *numerus clausus* and other such real or imagined impediments',[123] but at what cost to conceptual clarity? The notion that no one owns trust property for the life of a Quebec trust, despite title to such property being vested in the trustee for that time, is a curious result. It seems strained to say that trust property has no

[111] M Cantin Cumyn, 'The Quebec Trust: a Civilian Institution with English Law Roots' in Milo and Smits (n 52) 73, 76.
[112] Code civil du Québec/Quebec Civil Code, art 1261.
[113] Cantin Cumyn (n 111) 80.
[114] Smith (n 110) 336.
[115] Smith (n 110) 336–7; DWM Waters, 'The Institution of the Trust in Civil and Common Law' (1995) 252 Rec des Cours 113, 449.
[116] Hayton, Kortmann and Verhagen (n 88) 4.
[117] Quebec Civil Code, art 1266.
[118] Quebec Civil Code, art 1278.
[119] Quebec Civil Code, art 1261.
[120] Cantin Cumyn (n 111) 76, 78, respectively. See also M Cantin Cumyn, 'Reflections regarding the diversity of ways in which the trust has been received or adapted in civil law countries' in Smith, *Re-imagining the Trust* (n 3) 20–2.
[121] *Royal Trust Co v Tucker* [1982] 1 SCR 250, 264–273 (SCC).
[122] Waters (n 48) 875; RM Pasquel, 'The Mexican Fideicomiso: The Reception, Evolution and Present Status of the Common Law Trust in a Civil Law Country' (1969) 8 ColumJTransnatlL 54, 62–75.
[123] Cantin Cumyn (n 111) 81.

owner at all, rather than use a unique expression that reflects the encumbered nature of ownership in which title to property is held for the fulfilment of a purpose (ie fiduciary ownership).[124]

E. Trusts with Ownership in Any of the Trust Parties (at the Election of the Settlor)

This grouping of trusts relies on the private international law enforcement and recognition of foreign trusts in domestic law. Italy was one of the first three States, together with Luxembourg and the Netherlands, to sign the Hague Trusts Convention and was the second country to ratify the Convention.[125] Following ratification, Lupoi developed the concept of the *trust interno*, in which entirely domestic trusts—having Italian settlors, trustees and beneficiaries and comprising Italian assets—can be governed by foreign law at the election of the settlor.[126] The *trust interno* is not merely an academic vision, but has found considerable judicial support in Italy, according to Braun and Lupoi.[127] The only foreign element of the *trust interno* is the applicable law, which the Italian settlor has chosen to import when establishing the trust. Although it may be doubtful whether this was intended when the Hague Trusts Convention was drafted,[128] this interpretation finds fairly firm footing on a plain reading of Articles 6 and 8 of the Hague Trusts Convention, which provide that '[a] trust shall be governed by the law chosen by the settlor' and that law 'shall govern the validity of the trust, its construction, its effects, and the administration of the trust'. Assuming the law chosen by the settlor provides for trusts or the category of trust involved, settlors have a very broad discretion to choose the applicable law to govern the trust.[129] Thus, 'Italian citizens are allowed to set up trusts entirely based in Italy but governed by a foreign law chosen by the settlor in absolute freedom.'[130] Although the Hague Trusts Convention contains provisions to lessen the settlor's discretion as to the choice of law, those provisions have been neutralized by States when enacting domestic law to give effect to the Hague Trusts Convention.[131]

Italy is not the only State to have been swayed by the notion underlying the *trust interno*. Switzerland is also amenable to the concept of the *trust interno*. Although Switzerland ratified the Hague Trusts Convention in 2007, it did not take advantage of the opt-out provision, which permits States the freedom

[124] cf Quebec Civil Code, art 947 ('Ownership may be in various modes and dismemberments.'); Y Emerich, 'The Civil Law Trust: A Modality of Ownership or An Interlude in Ownership?' in Smith, *The Worlds of the Trust* (n 3) 21.

[125] Convention on the Law Applicable to Trusts and on their Recognition (1985) (Hague Trusts Convention).

[126] Lupoi (n 37) 201–5, 327–66, 368–86; M Lupoi, 'The Hague Convention, the Civil Law and the Italian Experience' (2007) 21 TLI 80, 834.

[127] Braun (n 33) 806; Lupoi (n 37) 83.

[128] AE von Overbeck, *Explanatory Report on the 1985 Hague Trusts Convention* (Bettmeralp 1985) 383–4, 397–400.

[129] Hague Trusts Convention (n 125) arts 6 and 7.

[130] Braun (n 33) n 34.

[131] Hague Trusts Convention (n 125) arts 13, 15, 16, 18.

not to 'recognise a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved'.[132] Instead of making that escape clause available to allow Swiss courts not to recognize trusts, the settlor's choice of law applies where 'under art 13, the State is not obliged to recognize a trust'.[133] This gives Swiss settlors a broad empowerment in the choice of law to govern Swiss trusts. In Braun's view, 'unlike Italy, Switzerland has decided not to transpose article 13 of the [Hague Trusts Convention] … Hence, Swiss judges will not be able to deny the recognition of a *trust interno* on the basis of article 13'.[134] A peculiar situation potentially arises in the United Kingdom, which has ratified the Hague Trusts Convention, but also failed to include the non-recognition clause (Article 13), which potentially gives English settlors the ability to subject their domestic trusts to foreign law in order to avoid orthodox mandatory rules in English trust law, such as the prohibition on private purpose trusts, with the English courts being obliged to enforce the foreign choice of law.[135] English settlors have been cautious thus far. Although, in extreme cases, '[t]he provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy (*ordre public*)'.[136]

Trusts created pursuant to the Hague Trusts Convention are difficult to characterize from an ownership perspective where 'trust' refers to 'the legal relationships created when … assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose' and includes the following characteristics: 'the assets constitute a separate fund and are not a part of the trustee's own estate'; 'title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee'. Although the definition of 'trust' only refers to 'control' of assets being in the trustee—a rather loose definition that has drawn criticism[137]—the characteristics of the trust are more narrowly drawn and point to fiduciary ownership of trust property being in the trustee. Again, like many civil law trusts considered thus far, title is in the name of the trustee or an authorized nominee. Mindful of the comparative study of ownership in trusts undertaken in this article, which has shown that 'ownership' moves around considerably in civil law trusts, 'ownership' could conceivably be in any of the trust parties or in none of them, depending on the settlor's choice of law. One would expect, however,

[132] Hague Trusts Convention (n 125) art 13.

[133] Swiss Private International Law Act (1987) art 149c; L Smith, 'Stateless Trusts' in Smith, *The Worlds of the Trust* (n 3) 93.

[134] A Braun, 'The Framing of a European Law of Trusts' in Smith, *The Worlds of the Trust* (n 3) 282, n 20.

[135] cf Smith (n 133) 94; Recognition of Trusts Act 1987 (UK); J Harris, *The Hague Trusts Convention: Scope, Application and Preliminary Principles* (Hart 2002) 343.

[136] Hague Trusts Convention (n 125) art 18.

[137] eg Lupoi (n 37) 81.

that settlors would choose a recognized trust jurisdiction as the applicable law to govern trust administration with fiduciary ownership and title in the trustee accordingly (eg England, Guernsey or Jersey).

F. The Indivisibility of 'Ownership' and the Outright Rejection of 'Trusts'

Despite permutations of the trust finding broad acceptance in many mixed legal systems, traditional Continental civil law systems have been more reluctant to embrace 'trusts'. In the Netherlands, the future of trusts looked reasonably bright in the early twentieth century with a burgeoning form of 'fiduciary ownership'.[138] In 1929, the Dutch Supreme Court affirmed the validity of this new ownership structure in a case involving the well-known beer company, Heineken, in which the complete inventory of a bar had been notionally transferred to Heineken for securitization purposes without the loss of possession of those assets, allowing the owner of the bar to continue running the business.[139] Although this pragmatic solution was not part of the Dutch law of pledges and was not mentioned in the Dutch Civil Code, the Supreme Court of the Netherlands recognized 'fiduciary ownership' *sui generis*.[140] The notion of 'fiduciary ownership' in Dutch law significantly influenced English law by means of the so-called '*Romalpa* clause', which was drafted in a contract for the supply of aluminium foil by a Dutch company, Aluminium Industrie BV (AIV), to an English partnership that was later transferred to an English company, Romalpa Aluminium Ltd (Romalpa). Two interesting features of the original Romalpa clause was that it allowed AIV to retain ownership over property it supplied to Romalpa unless and until payment had been received from Romalpa and that Romalpa became the 'fiduciary owner' of any property that was made from, mixed with or constituted by AIV's property. Initially drafted in Dutch, the contract was expressly agreed to be governed by Dutch law, with exclusive jurisdiction being conferred upon the Amsterdam court and the contract deposited with the district courts in the Netherlands.[141] Although there was no evidence before the court in relation to Dutch law, and particularly whether the Dutch courts would have enforced such a clause, the retention of title was enforced by the English Court of Appeal. The Romalpa clause, with its Dutch origins, has had a profound influence on commercial law in the common law tradition.[142]

Despite the fertile ground for the growth of trusts having been sown in the Netherlands in the early twentieth century with the notion of 'fiduciary ownership', the field was rendered barren in 1947 when Professor Meijers was assigned the task of drafting a new Dutch civil code. Meijers was an outspoken

[138] R Wibier, 'Can a Modern Legal System Do without the Trust?' in Smith, *The Worlds of the Trust* (n 3) 67. [139] Ibid–70. [140] ibid.
[141] *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676, 684 (CA).
[142] eg H Anderson *et al.*, 'The Evolution of Shareholder and Creditor Protection in Australia: An International Comparison' (2012) 61 ICLQ 171, 197–8.

antagonist of the trust, especially ownership in trusts. 'The English notion that, he who manages property for the benefit of another and has the right to dispose of that property qualifies as the legal owner, is without a doubt inferior to our view that the person for whose benefit the property is being administered is the exclusive owner of that property', Meijers declared.[143] In 1954, Meijers completed a framework for the new code and died a few months later. His vision was nevertheless realized over the following 40 years, culminating in 1992.[144] The new Dutch Civil Code contains provisions that seem designed to repel the reception of the trust by invalidating any transfers of property that do not convey full ownership on the transferee and prohibiting the recovery of property from assets available to creditors upon the bankruptcy of a would-be 'trustee'.[145] Of course, one should be careful not to administer a prophylactic that is worse than the affliction. In this vein, Wibier has provocatively asked whether a modern legal system can do without the trust?[146] Wibier considers that the Dutch legal system has proved remarkably adaptive and intuitive in dealing with trust-like scenarios on a case-by-case basis and that there is no reason to expect that this will not continue.[147] Whether conventional trust fact patterns ought to be dealt with in an *ad hoc* manner is debatable, as a fully-functional law of trusts would provide a greater degree of certainty and accord with the civilian persuasion of codification. Furthermore, a fully-functional theory of ownership with 'fiduciary ownership' might better explain existing legal institutions in the Netherlands in more coherent, neutral terms.

Recent European law reform projects have attempted to develop a uniform set of principles to govern 'trusts' and to introduce the notion that the trustee is the owner of trust property, albeit encumbered by the trust. Indeed, the Principles of European Trust Law exclude all 'trusts' in which 'the assets are not owned by the trustees.'[148] Thus, art 1(1) of those Principles states, '[i]n a trust, *a person called the "trustee" owns assets* segregated from his private patrimony and must deal with those assets (the "trust fund") for the benefit of another person called the "beneficiary" or for the furtherance of a purpose.'[149] Ownership of trust property by the trustee is considered 'fundamental to a trust' and, further, 'a trust cannot exist without a fund owned by a trustee.'[150] Another recent unification project adheres broadly to the notion that 'ownership' and 'title' to trust property must be in the trustee. In Book X of the *Draft Common Frame of Reference* (on 'Trusts') one of the 'indispensable elements of the trust concept' is that a 'trustee [is] the owner or right-holder

[143] Wibier (n 138) 69, quoting Professor Meijers.
[144] See MW Hesselink, 'The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience' (2006) 12 ELJ 279.
[145] Wibier (n 138) 68–72, citing Dutch Civil Code, Book 3, arts 84(3), 276, 277(1).
[146] Ibid.
[147] ibid.
[148] Hayton, Kortmann and Verhagen (n 88) 13, 38–43. cf Smits (n 33) 264.
[149] Hayton, Kortmann and Verhagen (n 88) 13 (emphasis added).
[150] Hayton, Kortmann and Verhagen (n 88) 38–39, 43, respectively.

in whom title to the trust fund is vested'. In relation to the indispensable 'trustee', the drafters state:[151]

> An essential feature of a trust is that *title to the trust fund is vested in the trustee*. For the purposes of performing the trust *the trustee is cloaked in the mantle of an outright owner*. It is the ability of the trustee to dispose of the fund (derived from that title) which distinguishes a trust from other relationships in which assets are placed under the control of a non-owner – for example, the relationship arising from a contract for storage.

Whilst ambitious, there is much to commend these attempts to develop a uniform set of principles concerning trusts at a European level, especially in view of the ambiguous manner in which ownership and title are dealt with in civil law trusts elsewhere, and also to strengthen the European common market.[152] Whilst there is scope for civil law institutions to emulate some of the functionalities of trusts, a difficulty is encountered when trusts are equated with contracts. Trusts are not contracts, even if extended for the benefit of a third party.[153] Notably, contracts fail to accommodate the proprietary effects that trusts have on third parties.[154] Furthermore, there is no contractual counterpart to the broad supervisory jurisdiction over trust administration that is exercised by the court to ensure that trusts are lawfully performed. As such, 'trust-like devices' that take the form of hyper-extended contracts and fall short in the proprietary department are unlikely to be as attractive as common law trusts.[155] Rather than expect that a European trust will be embraced across Europe in the near future, though, it is perhaps more likely that civil law systems on the Continent will continue to adapt more familiar legal institutions, such as *fiducia*,[156] which has recently undergone recodification in France,[157] Luxembourg,[158] Romania[159] and traces of which still exist in the Netherlands.[160] But not all civilian jurisdictions will look pragmatically toward trusts to develop their own home-grown institutions, as Waters observed 'others like Germany are hostile to [the trust] as a potential cuckoo in the nest'.[161]

[151] C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (2009) vol 6, 5691 (emphasis added).

[152] Clarry, 'The Worlds of the Trust' (n 3) 145–6. Compare A Braun, 'Trusts in the Draft Common Frame of Reference: The "Best Solution" For Europe?' (2011) 70 CLJ 327; Braun (n 134) 277.

[153] cf Contracts (Rights of Third Parties) Act 1999 (UK).

[154] cf S Grundmann, 'Trust and *Treuhand* in the 20th Century' in R Helmholz and R Zimmermann (eds), *Itinera Fiduciae:* Trust and Treuhand in Historical Perspective (Duncker & Humblot 1998) 469–93.

[155] Smits (n 33) 264–5.

[156] See P Matthews, 'Fiducia and the Hague Trusts Convention: The New Luxembourg Law' (2003) 18 TLI 188. See also M Grimaldi and F Barrière, 'Trust and Fiducie' in A Hartkamp *et al.* (eds), *Towards a European Civil Code* (3rd edn, Kluwer 2004) 787–805.

[157] *Loi du 19 fevrier 2007 of France*, Interview in *Les Echos*, 26 June 2006, quoted and cited in P Matthews, 'The French fiducie: And Now for Something Completely Different?' (2007) 21 TLI 17, 18, 19.

[158] *Loi du 27 juillet 2003*, quoted and cited in Matthews (n 157) 18.

[159] Romanian Civil Code, arts 773–91.

[160] Hayton, Kortmann and Verhagen (n 88) 196–8.

[161] Waters (n 48) 875.

A number of functional analyses have been undertaken with a view to identifying 'trust-like devices' in Germany and elsewhere—that is, legal institutions in non-trust jurisdictions, principally civil law systems, which could in some practical sense be described as a trust. In Germany, the comparison is principally made between the *treuhand* and the trust.[162] One must be careful not to overstate the 'functional equivalence' of such institutions on the basis of such comparisons between them. Simply because some institution can, at a high level of abstraction, permit one person to hold property for the benefit of another does not mean that it is equivalent to a 'trust' in a meaningful sense—that would be to oversimplify the trust as a fundamental legal institution in the common law tradition and the manner in which it is regarded as a matter of law in trust jurisdictions—for example, having regard to the supervisory jurisdiction over trust administration. It is informative to see, however, the manner in which some recent institutions emulate trusts. A good example of this is found in the security *fiducie* in France, which Barrière has described as 'a variety of title-based security' that involves the transfer of property from one person to another, each of whom is broadly described as 'settlor' and 'trustee' respectively, for the fulfilment of a particular purpose, and which plainly does not involve absolute ownership of the property in the sense of art 544 of the French Civil Code, but rather 'fiduciary ownership'.[163]

G. Trusts with Independent Legal Personality That Own Property

Returning to the common law tradition, we find that one of the cardinal rules in trust law is occasionally broken by statutory draftsmen: a trust does not possess distinct legal personality that enables it to own property independent of the trustee nor, for that matter, can a trust sue or be sued in its own right.[164] Nevertheless, the final permutation of ownership is for a trust to be established as a separate legal entity, so that it can own property. A notable example of this kind of 'trust' is found in the Uniform Statutory Trust Entity Act 2009 (US), which provides in the Prefatory Note that, in contrast to a 'common law trust', 'a statutory trust is a juridical entity, separate from its trustees and beneficial owners, that has capacity to sue and be sued, own property, and transact in its own name.'[165] Thus, section 307 of that Act provides, '[a] statutory trust may hold or take title to property in its own name, or in the name of a trustee in the

[162] See eg Grundmann (n 154); H Würdinger, 'The German Trust' (1951) 33 JCompLeg 31; S Grundmann, 'Trust and Treuhand at the End of the 20th Century' (1999) 47 AmJCompL 401.

[163] F Barrière, 'The Security *Fiducie* in French Law' in Smith, *The Worlds of the Trust* (n 3) 101, 103–8, 119–23, 140. See also F Barrière, 'The French *fiducie*, or the Chaotic Awakening of a Sleeping Beauty' in Smith, *Re-imagining the Trust* (n 3) 222; B Mallet-Bricout, 'The Trustee: Mainspring, Or Only a Cog, in the French *fiducie*?' in Smith, *The Worlds of the Trust* (n 3) 141.

[164] cf DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) 2.

[165] Uniform Statutory Trust Entity Act 2009, Prefatory Note.

trustee's capacity as trustee, whether in an active, passive, or custodial capacity.' The Comment to that section is also revealing. It states: '[b]y providing that a statutory trust may transact and hold property in its own name, this section implements the concept that a statutory trust is an entity separate from its trustees and beneficial owners. The *property of a common-law trust*, by contrast, *must be held* in the name of the trustee *in the trustee's fiduciary capacity*.'[166] Although that description acknowledges fiduciary ownership in trusts as an orthodox rule in trusts law, this statutory trust creates another permutation of ownership of trust property—that is, the notion of a trust having a separate legal personality and attributing ownership to that artificial person.[167] Again, this violates the cardinal rule that trusts are not legal persons—in Maitland's words, a trust is an '*un*incorporate body', quite distinct from a corporation (aggregate or sole).[168] In accordance with the present methodology, whether such a 'trust' ought to be regarded as a trust properly so-called or some other entity (eg a corporation) will not be further considered, even though that institution is potentially mislabelled.[169]

IV. FUTURE PERSPECTIVES ON FIDUCIARY OWNERSHIP IN TRUSTS

Having undertaken a comparative study of ownership in various 'trusts' in the broader civil and common law traditions and shown the diverse ways in which ownership is conceptualized in 'trusts'—with ownership potentially being in any of the trust parties or none of them—we can return to the root cause of the ambiguity. 'Ownership' is a difficult term to master in English law and in the common law tradition. In the common law, the full sense of ownership of land is expressed by the clunky phrase of 'fee simple absolute in possession', which unifies a number of constituent elements that can be encumbered and fragmented. For example, A might be regarded as the 'owner' of land situated in England ('Blackacre'), despite a mortgage over Blackacre in favour of B, a lease of a house on Blackacre in favour of C, a *profit-à-prendre* in favour of D to cut down and remove trees on another part of Blackacre, an easement across Blackacre in favour of E, a restrictive covenant not to run a business on the land and public rights of way to the world at large. Despite all of this, A might proudly declare himself to be the 'owner' of Blackacre. The situation is further complicated by Blackacre being settled on trust with the income arising therefrom to F for life and the remainder to G. This situation reflects

[166] Uniform Statutory Trust Entity Act 2009, section 307 (Comment) (emphasis added).

[167] cf H Hansmann & R Kraakman, 'The Essential Role of Organizational Law' (2000) 110 YaleLJ 387, 390–8, 405–6, 416–17; R Sitkoff, 'An Agency Costs Theory of Trust Law' (2004) 89 CornellLRev 621, 631–3, 641–3.

[168] FW Maitland, 'The Unincorporate Body' and 'Trust and Corporation' in Fisher (ed), *The Collected Papers of Fredrick William Maitland* (Cambridge 1911) 271–84 and 321–404, respectively (emphasis added).

[169] See L Smith, 'Mistaking the Trust' (2010) 40 HongKongLJ 787, 800–2.

a 'market-based, client-driven approach (where the client is the original megalomaniac owner of all the rights in the thing, who wished to do lots of different things, and benefit different people in different ways).'[170] Even though calls have for a long time been made to the effect that '[t]he technical basis of the law of ownership should be restated in terms of actual fact',[171] it is difficult to synthesize 'actual fact' in this field in order to sensibly reform ownership. Nevertheless, attempts ought to be made to do so as there is no logical or rational basis underlying the ambiguity in the status quo. At the very least, such attempts stimulate debate and assist in providing further clarity.

As a general legal construct, the concept of 'ownership' has the content that we choose to ascribe to it in law and legal theory. As 'merely a convenient figure of speech',[172] ownership operates at a higher level of abstraction than the complex aggregate of legal relations that comprise ownership. For that reason, ownership will differ according to the circumstances and will not have a precise or static meaning divorced from a particular proprietary context. Nevertheless, it retains value as a useful shorthand description that indicates the person with a present, superior claim over property.[173] The comparative study of ownership in trusts in this article has shown that the term 'title' introduces significant ambiguity as to who is regarded the owner of trust property, even though title is commonly recorded in the name of the trustee. As Fox observed, '[t]he definition of "title" is elusive since the sense in which the word is used varies with the context. Sometimes it is used in a very loose sense as a synonym for ownership.'[174] The sense in which 'title' is here delineated from 'ownership' is a conventional one, as being *prima facie* proof of ownership. 'Title: the evidence of a person's right to property' is a close approximation, even though 'right to property' is inexact and undefined.[175] Turning then to title in a trust context, the traditional rule in English law is that trust property must be and remain under the control of the trustees and, where there are two or more trustees, 'title' to the trust property must be vested in their names jointly.[176]

[170] Matthews (n 37) 316.

[171] JE Hogg, 'Why Not Restate the English Law of Ownership of Land' (1921) 30 YaleLJ 581.

[172] Salmond (n 6) 220.

[173] JW Harris, 'Reason or Mumbo Jumbo: The Common Law's Approach to Property' (2002) Proceedings of the British Academy 445, 454–70.

[174] D Fox, 'Relativity of Title at Law and in Equity' (2006) 65 CLJ 330, 332 (Fox goes on to say, 'title is best understood as referring to a claim to an asset arising from a proprietary interest' (333), but that usage of 'title' in a trust context would pit the trustee (with legal title) against the beneficiary (with equitable title) in a rivalrous relationship with respect to trust property, which does not adequately describe property that is the subject of trust administration nor the roles played by each of the beneficiary and trustee in active or open trusts—see eg *McPhail v Doulton* [1971] AC 424, 456–457 per Lord Reid, Viscount Dilhorne and Lord Wilberforce).

[175] Sir R Megarry, *A Manual of the Law of Real Property* (AJ Oakley (ed), 8th edn, Sweet & Maxwell 2002) lxxix (cf '[a]bstract of title: an epitome of documents and facts showing ownership' (lxxv, 158); 'ownership' is not defined; however, 'beneficial owner: [is] a person entitled for his own benefit and not, *e.g.* as trustee' (lxxv) (original emphasis)).

[176] *Re Flower and Metropolitan Board of Works* (1884) 27 ChD 592, 596 per Kay J*; Wyman v Paterson* [1900] AC 271, 288 per Lord Davey; WF Fratcher, *Scott on Trusts* (4th edn, 1987) [175].

Co-trustees will be liable for a breach of trust if they allow trust property to be vested in the name of one trustee or to be controlled by a third party and thereafter lost.[177]

Despite the strained interpretation of 'title' that is applied across different civilian jurisdictions, as not being synonymous with 'ownership', 'title' is frequently recorded in the name of a trustee. This evidences a convergence of some form of ownership of trust property in the trustee, if we treat 'title' as being *prima facie* proof of ownership. Indeed, efficient trust administration commonly requires that a trustee has the powers associated with 'title' and that the trustee or the trustee's authorized agent is able to deal with trust property, especially in the case of the complex management of trust property. Joint delegation of specific functions to agents, custodians and nominees furthers diligent and prudent trust administration, with such arrangements reviewed periodically by the trustees. If a trustee has title to trust property, which is an important practical requirement for the fluid administration of trust property, 'ownership' inevitably gravitates toward the trustee—such is the importance of having title vested in a person and held in their name because a function of title is that title itself represents who is the owner of the relevant property, at least in some capacity. As the present study has shown, 'title' to trust property is in the name of the trustee in China, Louisiana and Quebec, but ownership of the trust property is said to be in the settlor, beneficiary and in none of the trust parties, respectively. This begs the question of why all of these ownership permutations in civil law trusts are to be preferred over a unique conception of ownership that better reflects the encumbered nature of ownership when 'title' is vested in a trustee. As Honoré observed, '[t]o [civilian lawyers] the title to a thing prima facie entails ownership of it and ownership carries with it the implication of a beneficial interest in the asset, even if not coupled with present enjoyment of it'.[178] Another way to approach the problem might be to say that title ought still carry with it the *prima facie* implication of ownership, but a closer analysis may reveal the specific, encumbered form of ownership if that title attaches to trust property (ie 'fiduciary ownership'); therefore, title need not carry any further implication of beneficial enjoyment. If left unchecked, permutations of 'ownership' in the broader civil law tradition have the potential to cause further confusion going forward and risk certain 'trusts' not being recognized as 'trusts' properly so-called in other jurisdictions when it comes to enforcing those 'trusts' under the Hague Trusts Convention. In order to accommodate 'trusts', and also to better explain how domestic legal arrangements in civil law systems already challenge the unitary conception of 'ownership', the civil law is in need of a new modality of ownership.[179]

[177] *Browne v Butter* (1857) 24 Beav 159, 161–162 per Romilly MR; *Lewis v Nobbs* (1878) 8 ChD 591; *Webb v Jonas* (1888) 39 ChD 660.

[178] Honoré (n 15) 11.

[179] Compare Emerich (n 124) 21.

Apart from recasting 'ownership' where title to property is vested in the trustee, a more difficult situation arises in determining where the description of fiduciary ownership fits a particular civilian legal arrangement. Categorization of particular legal arrangements must be a question of law, quite irrespective of the label attached by a person in purportedly settling a 'trust' or even by a legislator in codifying a 'trust', at least in comparative trust law and for the purposes of private international law.[180] For some leading jurists, the location of 'ownership' is determinative of whether different civil law 'trusts' are really trusts at all.[181] On this basis, one pre-eminent work excludes the Quebec 'trust' (*fiducie*) and the South African 'bewind trust' due to trust property not being owned by the trustee.[182] Although there is no common law claim to the use of the word 'trust' nor copyright in that term,[183] the mere attachment of the word 'trust' to a legal arrangement does not make that arrangement a trust as a matter of law in the common law tradition nor does it, by extension to comparative trust law, command that a particular arrangement is functionally-equivalent to a trust.[184] A difficult task confronting comparative trust lawyers is in determining what legal arrangements are trusts properly so-called, which can be enforced as trusts internationally under the Hague Trusts Convention, despite its somewhat vague definition. If, for example, the Chinese trust, with 'ownership' in the 'settlor' and management powers in the 'trustee', and the South African bewind 'trust', with 'ownership' in the beneficiary and management powers in the 'trustee', are 'trusts' properly so-called under the Hague Trusts Convention, this gives rise to the unintended result that other private law institutions, especially agency, may be 'trusts' in comparative trust law or private international law and enforceable under the Hague Trusts Convention.[185] Thus, recognizing all 'trust-like devices' as trusts may generalize the concept so much as to the leave the very concept of a trust amorphous or 'shapeless'.[186]

Turning back to the common law, the notion that concurrent ownership exists in trusts in the common law tradition is misleading and mistaken.[187]

[180] cf Glenn (n 36) 431–2, 435–8.

[181] eg Hayton, Kortmann and Verhagen (n 88) 38–9, 43. See also (n 148) and accompanying text.

[182] Hayton, Kortmann and Verhagen (n 88) 13. cf Smits (n 33) 264.

[183] Smith (n 169) 788; Waters (n 115) 449; Waters (n 48) 864. See also D Fox, 'Non-Excludable Trustee Duties' (2011) 17 Trusts & Trustees 17, 18.

[184] Compare D Hayton, 'When is a Trust not a Trust?' (1992) 1 JITCP 3; D Brownbill, 'When Is a Sham Not a Sham?' (1993) 2 JITCP 13.

[185] Hague Trusts Convention (n 125) arts 1, 2; Overbeck (n 128) 376–9. cf Convention on the Law Applicable to Agency, art 1, art 3(b); IGF Karsten, *Explanatory Report on the Hague Agency Convention* (Hague Conference 1978) 414–15. The Hague Trusts Convention (with 12 signatories) is relatively successful, compared with the Hague Agency Convention (with only four signatories from civilian jurisdictions—ie Argentina, France, the Netherlands and Portugal), which suggests a general unwillingness of States, especially in the common law tradition, to recognize and enforce agency relationships internationally. That same reticence is not present in the case of trusts, though.

[186] M Lupoi, 'The Shapeless Trust' (1995) 1 Trusts & Trustees 15.

[187] cf *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623, 629 per Young J; *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510, 519.

The dualistic conception of ownership in trusts, including the beneficiary's 'equitable ownership' of trust property, has caused confusion in comparative trust discourse for some time.[188] Beyond misleading, the dualistic conception of ownership is mistaken because the incidents of ownership are not neatly divided when 'one person administers and another person or object benefits from the property'.[189] To take a few of Honoré's incidents of ownership, neither the trustee nor the beneficiary may have rights to possess or use trust property, if the terms of the trust dictate that the property must be leased to a suitable third party, with the income derived therefrom accumulating until some later time. By extension, the beneficiary may have no present entitlement to receive capital or income from the trust. These are not features that are essential to the existence of a trust, but may be the subject of the settlor's intent in shaping the trust and will not be overridden by any notion that the beneficiary must have certain rights (ie present entitlements) to benefit or enjoy trust property.[190] Thus, it is not essential that the beneficiaries have the 'complex bundle of beneficial relations which may be called ownership'.[191] It is equally misleading to speak of trusts comprising any kind of 'split ownership', as though the genius behind the trust is in the fracturing of the incidents of full, unencumbered ownership, or in any concurrent ownership existing at Common Law and in Equity.[192] As Maitland observed, 'Equity did not say that the *cestui que trust* was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust*.'[193] By extension of Maitland's logic, trustees are accountable for the administration of trust property and it is of little use for a trustee to proclaim his status as the 'legal owner' of that property in order to obfuscate accountability in trust administration as a matter of law.[194] As Rudden said, '[t]he orthodox explanation, given in terms of the traditional distinction between law and equity, provides only an historical and not a rational account of the trust'.[195] There is no need for any conceptualization of the beneficiary as being the owner of trust property in order to give a rational account of trusts and delineate trusts from other private law categories (eg agency).

A further reason for a reconceptualization of ownership in trusts in the common law tradition is that the traditional explanation of ownership in trusts dictating that 'title' must be 'in the trustee' is outmoded and largely redundant. In modern times, trust property is commonly held by one person—usually

[188] eg Maitland (n 168) 272–3.
[189] cf B Rudden, 'Things as Thing and Things as Wealth' (1994) 14 OJLS 81, 82, 86; Smith (n 110) 333.
[190] See eg *McPhail v Doulton* [1971] AC 424, 456–457 per Lord Reid, Viscount Dilhorne and Lord Wilberforce and above n 174.
[191] *Glenn v FCT* (1915) 20 CLR 490, 497.
[192] cf R Tunnicliffe, *Offshore Trusts: Tax Rules & Trust Concepts* (CCH 2003) 6.
[193] FW Maitland, *Equity and the Forms of Action* (CUP 1910) 17 (original emphasis).
[194] Senior Court Act 1981, section 49; Judicature Act 1873, section 25; Maitland (n 193) 17–18.
[195] B Rudden (n 189) 89.

a company incorporated for that purpose—and managed by others, which protects the trust property from the vicissitudes of natural persons, including bankruptcy, divorce and succession. The separation of the holding and management functions alleviates the ongoing need for title documents to be continually altered and vesting orders to be made in those common scenarios. Not only has the traditional view of joint ownership been relaxed by trust-drafting in terms of one trustee being nominated as a custodian or nominee of the trust property in whom title is registered, that position has also been altered by statute in order to allow normal market dealings and to enable trustees to appoint, and vest trust property in, certain authorized persons, such as custodians and nominees.[196] The vesting of trust property in a 'custodian', 'nominee' or only one of the trustees relaxes the rule that all trustees must 'own' trust property jointly and further undermines the dual and split ownership metaphors in trusts that assume joint ownership. In custodian trusteeship, for example, 'title to trust property is vested in the custodian trustees, but the powers of management remain in the ordinary trustees … Strictly speaking, in such a case, the ordinary trustees are not trustees at all; they lack one of the four elements of a trust, since no trust property is vested in them.'[197] Although fiduciary ownership of trust property with title being vested in the trustee is the prevailing ownership structure in comparative trusts law, the orthodox English position has moved closer to the essential feature of trusts being the fiduciary administration of trust property, rather than adhering to a dogmatic rule that title must remain jointly in the trustees at all times during trust administration.[198] Practical developments shown by custodian trustees and nominees underscore the importance of developing an autonomous conception of fiduciary ownership that can be abstracted from the strict notion that title must be held in the name of every trustee and better reflects the reality of modern trust administration. As such, it is an appropriate time for the theory regarding ownership in trusts to adapt to reflect contemporary trusts practice.

A description of ownership in a trust context that better reflects the encumbered nature of trust property would further the objective of conceptual clarity in comparative trust law. 'Fiduciary ownership' does not rely on any postulation of split or divided ownership, which imply that every trustee jointly and severally owns trust property and is simply not true of a large number of modern trusts in which one person—usually a custodian, nominee or 'trust company'—is designated as the person in whom 'title' to the trust property is held. Trusts involve the fiduciary administration of property for the fulfilment

[196] Stock Exchange (Completion of Bargains) Act 1976, section 5, as amended by Financial Services Act 1986, section 194(1); Trustees Act 2000, Part IV.

[197] See JD Heydon and MJ Leeming (eds), *Jacob's Law of Trusts in Australia* (7th edn, Butterworths 2006) 49–50.

[198] cf Honoré (n 61) 7; The Law Commission and the Scottish Law Commission, *Trustees' Powers and Duties* (Law Com, No 260; Scot Law Com, No 172) 61, n 3.

of an ascertainable purpose. The inextricable link between ownership and property is such that, unless we abandon 'ownership' taxonomy altogether, there must be a form of 'ownership' that describes the encumbered nature of property that is the subject of trust administration. The perceived difficulty, as Gretton observed, is that 'a system-neutral language is both necessary and impossible'.[199] 'Ownership' is, however, only useful as a general concept in its ability to explain and order legal thought. For that reason, we might say that trusts so challenge the concept of 'ownership' that the concept ought to be discarded.[200] But that would run away from, rather than confront, the conceptual problem in this modality of ownership and destabilize the general concept.[201] In one sense, it also might be seen to support Lepaulle's notion underlying the Quebec trust that ownership is suspended during trust administration. Furthermore, ownership derivatives—'own', 'owner', 'owning', etc—are not only entrenched in comparative trusts discourse, but in the general and statutory law applicable to trusts in many jurisdictions. For that reason alone, a better account must be given of ownership in trusts. In any event, moving away from the language of 'ownership' would only serve to shift the attention to 'title', which would likely be a distinction without a difference. As such, unless there is another solution to the ambiguity concerning the nature of ownership in trusts that surpasses the logic of fiduciary ownership, despite not being anchored in the safe harbour of fiduciary loyalty, or the 'dual' or 'split' ownership metaphors can otherwise be justified, which it has been argued they cannot, 'fiduciary ownership' is the preferred term to express the ownership structure of a trust in the civil and common law traditions.

In a general sense, fiduciary ownership exists whenever title is held by a person in respect of property that is designated for a purpose protected by law. In a trust context, the best shorthand description of the encumbered nature of trust property is found in the succinct phraseology of 'fiduciary ownership'.[202] The vesting of title to trust property in a person constitutes that person as the owner of that property, which is the function of 'title', but only in that person's (fiduciary) capacity as trustee and subject to the duties that person owes by virtue of that status in the general and statutory law as permissibly altered by the terms of the trust. In Hohfeldian terms, duties are necessarily attached to the powers of a trustee, quite irrespective of whether a trustee is regarded as having all the powers of a 'beneficial owner' by virtue of trust-drafting or any

[199] Gretton (n 51) 604.

[200] cf TS Schmidt, *Trusts and Trust-like Devices* (British Institute of International and Comparative Law, 1981).

[201] cf Harris (n 173) 454–70; AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) 107 ('Ownership is one of the characteristic institutions in human society.'); Honoré (n 13) 163 ('Ownership is one of the key institutions of human society. It is also, in Western culture, the most important legal conception.').

[202] Waters (n 115) 432, 449.

applicable legislation. It is this coupling of duties with powers that is at the heart of a trust and is the essence of 'fiduciary ownership'.[203] Hence, adding 'fiduciary' to the word 'ownership' serves as an indicator that the relevant property is held for the fulfilment of a purpose protected by law and triggers further enquiry as to the extent and nature of the encumbrance in the particular circumstances. Fiduciary ownership better communicates the encumbered nature of trust property than the dual or split ownership metaphors in the common law tradition and highlights the essential interplay between fiduciary loyalty and trusteeship.[204] The move to fiduciary ownership in trusts also shifts comparative trusts discourse beyond the impasse of other ownership metaphors, thereby removing a perceived barrier to the reception or transplantation of trusts in the broader civil law tradition and alleviating the further fragmentation of ownership in civil law trusts.[205]

VI. CONCLUSION

The trust was traditionally seen as the exemplar of incommensurability in comparative law. However, as the present study has shown, it is possible to cross different legal traditions and compare different legal institutions by moving beyond linguistic barriers and juridical differences in order to contrast the ownership structures in different 'trusts' internationally. One must, however, tread carefully: commensurability is not synonymous with equivalence. The conflation of the two concepts would be a grave error in logic. The diversity of species within the 'trust' genus is so great that it would be a bold claim to say that all of the trusts encountered in this article are 'functionally equivalent', albeit 'doctrinally different'.[206] The claim by a legislature to have a 'trust' in a particular civilian jurisdiction does not, *ipso facto*, demonstrate that such a trust performs the same functions as trusts in other jurisdictions nor that 'civil law trusts' do not conflict with underlying civilian assumptions and doctrines. Similarly, the introduction of statutory trusts in jurisdictions within the common law tradition that possess separate legal personality and enable such trusts to own property require further explanation of how those 'trusts' fit within some coherent classification of legal institutions, especially in terms of how those 'trusts' differ from corporations and why they are not simply a species of corporation. As such, trusts highlight the importance of developing a coherent classification of legal institutions and the characteristics used to distinguish one institution from another. 'Ownership' is a useful lens through which to view those different institutions.

[203] cf JW Harris, 'Trust, Power and Duty' (1971) 87 LQR 31, 48.

[204] cf R Sacco, 'Diversity and Uniformity in the Law' (2001) AmJCompL 171, 181, 182. On fiduciary loyalty, see generally PD Finn, *Fiduciary Obligations* (Thomson Lawbook 1977); M Conaglen, *Fiduciary Loyalty* (Hart Publishing 2010).

[205] See eg Waters, Gillen and Smith (n 8) 16.

[206] cf Hayton, Kortmann and Verhagen (n 88) 4; Honoré (n 61) 4.

The many and varied approaches to ownership in trusts that have been taken in the broader civil law tradition are indicative of an underlying tension in transplanting trusts in the civil law and the effect such transplantation has on the traditional civilian conception of ownership. In any event, what does it matter if there is such internal conflict? Change must occur within the civil law tradition as it does in any other tradition over time.[207] Although a number of civilian legal codes were, naturally, a product of the systematic rationality that so defined the Age of Reason and the Enlightenment,[208] Continental legal philosophy has since exposed the fallibility of the 'perfect author' and this alone would seem a sufficient justification for this conclusion.[209] It may well be that these doctrinal variations within the civil law tradition may cause greater fracturing over time in the tradition as a whole—that is, a kind of *butterfly effect*[210]—unless a more coherent and consistent approach is taken. There does not appear to be any underlying logic to justify the diverse approaches to ownership in civil law trusts nor the ongoing fragmentation of the concept of ownership in the civil law tradition that has been caused by different persons being regarded as the 'owner' of trust property in those 'trusts' in order to avoid perceived problems with dual or split ownership.

A more coherent and consistent approach to the encumbered nature of trust property in the common law tradition, as well as the broader civil law tradition, is to be found in the further development of the notion of 'fiduciary ownership'. To that end, ambitious, European-wide projects designed to develop a coherent set of essential principles and mandatory rules for trusts are to be welcomed. However, insofar as ownership is concerned, such ambitious projects ought to further the notion of 'fiduciary ownership', rather than perpetuate the mistaken and misleading metaphors of dual or split ownership in trusts or that a trustee is mysteriously 'cloaked in the mantle of an outright owner'. Absent some attempt to create a coherent set of principles to apply to trusts in the civil law tradition, especially as regards fiduciary ownership of trust property, only time will tell how the divergent approaches to ownership in civil law trusts will affect the civil law as a distinct legal tradition.[211] In 1928, Lepaulle said, '[i]f [the civilian jurist] tries to grasp [the trust concept in the common law], he will confront the same disappointing experience as that of the young Prince who runs after a Fairy: when he is on the point of reaching her, she has taken another form, ceases to be a beautiful lady, but has become a white bird, or an old witch!'[212] A return to doctrinal analyses

[207] Glenn (n 36) 155–60.

[208] M Vranken, *Fundamentals of European Civil Law* (2nd edn, Federation Press 2010) 41.

[209] ibid 41–65; TW Adorno, *Negative Dialetics* (EB Ashton trans, Routledge 1973) 19–24, 139–64, 174–7.

[210] cf EN Lorenz, 'Predictability: Does the Flap of a Butterfly's Wings in Brazil Set off a Tornado in Texas?' (American Association for the Advancement of Science 1972); EN Lorenz, 'Atmospheric Predictability As Revealed by Naturally Occurring Analogues' (1969) 26(4) Journal of the Atmospheric Sciences 623.

[211] See Glenn (n 36) 16.

[212] Lepaulle, 'An Outsider's View Point of the Nature of Trusts' (n 110) 52.

of the trust, with a concerted effort to move away from the use of 'dual' or 'split' ownership metaphors in trusts discourse toward the fiduciary ownership of trust property in both the common and civil law traditions, will further stimulate comparative trusts discourse and assist in grasping the concept in order to facilitate the coherent and rational reception of trusts internationally without misleading and mistaken metaphors.