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Trusts in Mixed Legal Systems: A Challenge to Comparative Trust Law

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Trusts in Mixed Legal Systems: A Challenge to Comparative Trust Law

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1. A conceptual dilemma

Scholars from the civil law world, that have their private law derived from Roman law, have long since struggled with the difficult conceptual problem which the Anglo-American common law concept of the trust poses. The dual ownership inherent in the common law, the separation of legal ownership and equitable ownership, stems from a basic procedural dichotomy in Anglo-American law, between the bodies of common law and equity. Such divided ownership does not exist in civil law, especially not since feudal was been abandoned. Civil law systems have more systematic barriers which prevent this trust concept from being dealt with within their civil law system. This can be considered to be unfortunate. Why?

Two recent issues have increased the need to reconcile the Anglo-American trust with principles of civil law. The first is the overall tendency of unifying or harmonising areas of private law, and especially commercial law, and therefore also trust laws, not only in Europe but also elsewhere. An example of research into comparative trust law is the book on European trust law principles, published in early 1999.1 The second is The Hague Convention on the Law Applicable to Trusts and on their Recognition, that has entered into force for Italy and The Netherlands, which makes questions regarding the effect of trusts recognised in a civil jurisdiction imminent. Of course civil law countries could codify specific trust constructions. Among others, Liechtenstein and Luxembourg have done so.2 But it can hardly be expected that

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legislation will be enacted in the short term in the whole of Europe. Therefore civil law courts and scholars need to be creative in the interpretation of private law as it stands. In this creativity we could use effective guidance, both from the past, and from the 'legal gene'-pool of our present time. As to the former, in 1998 Helmholz and Zimmermann published a book using this legal history approach: *Itinera Fiduciae. Trust and Treuhand in Historical Perspective*. As to the latter, we should take a look at those mixed legal systems that have a civil law system of property law, yet still make use of the trust.

In the following we will deal with the Anglo-American trust concept and the Europeanisation of trust law (2); we will then focus upon mixed legal systems (3). On the 18th of June 1999 we organised a seminar in Utrecht on Trusts in Mixed Legal Systems, under the auspices of the Dutch-Belgian *Ius Commune Research school*. Speakers from Scotland, South Africa and The Netherlands presented five papers, which are now published in this issue of *The European Review of Private Law*. In paragraph 4 we will introduce these contributions.

2. Trust, duplex dominium and other problems

A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he may himself be one, and anyone of whom may enforce the obligation.\(^3\) The Anglo-American trust concept, as defined above by Hayton, is entirely self-standing. It is not confined to the law of obligations or the law of property, or the law of legal persons, but contains aspects from each of these areas. Trust law in common law countries has a position of its own. It has specific rules regarding the creation of the trust, the trust fund, the liability of the trustee, the remedies of the beneficiary, and tracing rules.

In legal systems that have their property law derived from Roman laws, dual ownership is a difficult concept, and has been put forward again and again as the most serious obstacle to the trust. Other characteristics of civil property law that have been put forward as serious obstacles to the incorporation of the trust are the following. The unity of ownership makes it impossible for a proprietary right of the beneficiary to be accepted; from that it follows that property can be transferred only after the necessary requirements are fulfilled, at one single moment; a *numerus clausus* of proprietary rights only makes possible the vesting of recognised real rights (ownership or other real rights, derived from ownership, mentioned in legislation, or accepted in case law); in the case of a trust not all of the debtor’s goods will be accessible to the creditors; furthermore, the rule of *paritas creditorum*, in combination with a closed system of priorities applies.

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The common law trust does not conform with these characteristics: there is dual ownership; transfer of property is influenced by equity; the vesting of a proprietary right in a beneficiary encroaches upon the ranks of creditors; Tracing rules may be more far reaching compared as to what a civilian system would allow.

Reasons of economic integration but especially the Hague Convention make it clear that civilian systems need to give effect to a common law trust in their own property systems. This means that the trust property has to be recognised as a changing fund of assets, while not accessible to creditors of the trustee (in a private capacity); insolvency of the trustee shall not have any effect on the trust property. This means also that beneficiaries need to have sufficient remedies vis-à-vis the trustee or third parties; which in turn also means that national rules regarding substitution, *accessio*, *commixtio* and *confusio* have to be reconsidered and possibly adjusted. This is a scholarly exercise that has already been undertaken in many publications in The Netherlands and in Belgium.

Hayton’s metaphor for the trust: *like an elephant a trust is easy to recognise, but difficult to describe*, fails to illustrate the diversity (actually a biversity) in the *Proboscidea* that even more so exist in trusts. There are more trust concepts which the attention of lawyers from the civil law world should focus upon. These trust concepts are hidden in legal systems that combine common law and civil law: the so-called mixed legal systems.

3. Mixed legal systems

The adjective ‘mixed’ may mean many things. It could mean a combination of various legal sources. In this sense the old European *ius commune* was mixed, as it recognised Roman law, canon law, statute law and customary law as its sources. In the present age the law of all the member states of the European Community is mixed, since in a sense these have derived their law from Brussels as well. Mixed could also mean a combination of more than one body of law within one nation, restricted to an area or to a culture. Examples are, among many others, Scotland, Quebec, Catalonia, aboriginal law in Australia, native-American law and so on. It could also mean the existence of different bodies of law applicable within the whole territory of a nation, in which case we could think of South Africa, Sri Lanka and Israel. The difficulty in dealing with mixed legal systems is shown by Örücü,

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Atwood and Coyle, *Studies in Legal Systems: Mixed and Mixing* (1996), in which a general overview of important mixed legal systems is provided, and in which dazzling amalgams, and various levels of blending are shown.\(^7\) This makes any categorisation within legal families (David,\(^8\) Zweigert and Köt\(^9\)) rather cumbersome.

For our present purpose what we mean by a mixed systems is any system that on a substantive level demonstrates a combination of two legal systems, the Anglo-American common law and Romano-Germanic law.

Jurisdictions like those of Scotland, South Africa, Louisiana, Quebec and Mauritius, and maybe some jurisdictions, do show such a combination.\(^10\) Derek van der Merwe pointed to five characteristics of private law, which these jurisdictions have in common, which would provide a basis for a discussion on property law in these systems. Firstly these systems comprise *whole fields of law that have undergone a dialectical process of fusion of differently assimilated rules and doctrines and methods which reflect a legal apparatus composed of concepts that are distinct, to a greater or lesser degree, from their original and diverse component parts*. Secondly, the legal practitioner in a mixed legal system is an instinctive eclectic, seeking authority *largely uninhibited by rigid doctrinal boundaries*. In the third place, Van der Merwe notices a dominant systemic structure *upon which have been imposed (judicially or legislatively) elements of an initially foreign legal system*. In the area of property law the dominant system is civilian. In the fourth place, the purpose of the imposition has been either to reinforce existing doctrine or to mitigate rigidity in the dominant system. Lastly: judicial decisions are a more important source of law than would normally be the case in a civilian jurisdiction.\(^11\)

In some of these jurisdictions, especially in Scots law, the mixed character has not always been looked upon as a positive aspect, as becomes clear in the publications by Professor T.B. Smith in his *Studies Critical and Comparative*. Adjectives and metaphors which he uses in titles like The Common Law Cuckoo, and Strange


Gods, well illustrate this. This reception of English common law in the Scots civilian system may be illustrative of Koschaker’s thesis, reception being a question of power, not directly of quality; if our comparative use of mixed legal systems will lead to an (academic, to start with) reception, it will be triggered by quality-related criteria.

The importance of using mixed jurisdictions lies in the presence of concepts, theories and solutions, that have been formed in the light of the aforementioned characteristics of Van der Merwe, and which might be of use in the development of any legal system. Especially at the present time when lawyers are seeking to find a common denominator in a diversity of legal rules, these mixed legal jurisdictions and their experience may be very helpful. For our present purpose these mixed legal systems offer rather interesting material on the trust.

How do these legal systems succeed in combining the trust and civil law property? Writers from these jurisdictions have tried to bring this to our attention. Professor Hahlo from Witwatersrand University (South Africa) was cited by Professor T.B. Smith from Edinburgh University (Scotland):

*When lawyers anywhere in the world today speak of ‘the trust’ they almost invariably think of the trust of English law, with dichotomy of legal and equitable ownership… The trust of English law, however, is but one species of the genus ‘trust’.14*

Yet, for a long time the non-common law concept of trust has been embodied in civilian property law. Though the trust itself has been received in Scotland, South Africa, Sri Lanka and Quebec, the fragmentation of ownership in legal and equitable interest has not. This can be illustrated in the case of Scotland by Stair, who dealt with the trust in his *Institutions of the Law of Scotland* in 1693:

*Trust in the vulgar acceptation, comprehends all personal obligations, for paying, delivering or performing any thing, where the creditor has no real right in security.*15

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15 STAIR, *Institutions of the Law of Scotland* (1693, 1983), Book IV, title 6, 839. For references to Scots law see the following contributions by Prof. K.G.C. REID and Prof. G.L. GRETTON. For references to South African literature see the contribution by Professor M.J. DE WAAL. See also for referrals to South African law and Sri Lankan law, D. VAN DER MERWE in *Property Law on the Threshold of the 21st Century*, Intersentia, Antwerpen, 1996, 355-389.
Other issues related to the civilian system of property law that impose barriers to dealing with the common law concept of trust have been mentioned above. Mixed legal systems, of course, also had to deal with these matters.

European legal science focuses on the unification of private law, fuelled by economic reasons, or at least, as a scientific challenge, trying to get to the common core of the common and civilian systems of private law. Smits suggested a competition of legal rules as a means of bringing about a European private law.\(^\text{16}\) As a prerequisite to determining the most effective rule it is necessary that existing rules are accessible. It is precisely the accessibility of trust rules in mixed legal jurisdictions that this research project seeks to establish.

4. An introduction to the contributions

The issue whether dual ownership is necessary to a trust is addressed by Professor K.G.C. Reid of Edinburgh University (\textit{Patrimony not Equity: The Trust in Scotland}) by explaining the past confusion caused by the use in case law and jurisprudence of English terminology and the civilian reaction by underpinning the importance of adhering to a concept of a separate trustee’s patrimony under Scots law. South African law knows of the civilian concept of uniform and indivisible ownership; the \textit{numerus clausus} principle does not exist, however. Professor M.J. de Waal from Stellenbosch University deals with conceptualising the South African trust concept, in: \textit{The uniformity of Ownership, Numerus Clausus and the Reception of the Trust into South African Law}. The \textit{numerus clausus} principle turns out to be less of a barrier for the trust; furthermore, South African law makes use of a broad, functional trust concept, where control rather than ownership (in the trustee) is the essential feature of the trust. The historic origins of the trust concept are discussed by Professor Van Rhee of Maastricht University, The Netherlands, in a reflection on Helmholtz’ and Zimmermans’ book \textit{Itinera Fiduciae}, in: \textit{Trusts, Trust-like Concepts and Ius Commune}. In recent Dutch case law on unjustified enrichment a preference has been created on the grounds of reasonableness and fairness, very similar to the concept of constructive trust.\(^\text{17}\) In Scots law the constructive trust has only very reluctantly been incorporated, \textit{if}; that is, Scottish constructive trusts may indeed be found to exist. Professor G.L. Gretton explains this view in \textit{Constructive Trust and Insolvency}. In the last contribution, Professor H.L.E. Verhagen of the University of Nijmegen, The Netherlands, explores the technical issues of incorporating the trust along the lines of the law of obligations, the law of property and the law of legal persons (\textit{Trusts in the Civil Law: Making Use of the Experience of Mixed Jurisdictions}). Mixed legal systems turn out to be a Fundgrube.
