# TERMINOLOGICAL LANDSCAPE OF THE CONTEMPORARY EUROPEAN TRUST-LIKE MECHANISMS

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Abstract

*Contemporary legal norms regulating the transference of property often consider children as the major beneficiaries. The transference can be done under Hereditary Law, Trust Law or a mere donation. The Trust Law occupies an outstanding position in the contemporary juridical domain, because it deals with the lifelong (inter vivos) and after-death (testamentary) activities. Testators intentionally turn into trustors via transferring their property to trustees for the benefit of minor beneficiaries. The latter acquire protection, assets and a caretaker. An outstanding usefulness of a trust mechanism stipulates its popularity via the emergence of an increasing number of the European trust-like devices. However, popularization and a worldwide spread facilitate the occurrence of some problems related to the construction of the innovative trust-like mechanisms and their terminological naming. The given paper deals with the entrusting relationships of the modern European law. A special emphasis is put on the problems related to the lexical naming of the newly-emerged concepts. Certain suggestions are made regarding the "perfect" "flawless" formation of the terminological landscape.*

Key Words: *European law, hereditary law, jurisdictions, trust, trust-like mechanism*

JEL Classification: [K 11]

## 1. Introduction

Children are the future of every society. Legislations of different countries adopt special rules regulating their protection and intellectual development. The greatest attention is paid to the insurance of children's well-being via making transfers of property under the rules of Hereditary Law or Trust Law. The latter is regarded as more flexible and "utmostly modern". More generally, the Trust Law occupies an outstanding position in the contemporary juridical domain, because it deals with the lifelong *(inter vivos)* and after-death (testamentary) activities. Testators intentionally turn into trustors via transferring their property to trustees for the benefit of minor beneficiaries. The latter acquire protection, assets and a caretaker. An outstanding usefulness of a trust mechanism stipulates its popularity via the emergence of an increasing number of the European trust-like devices. However, popularization and a worldwide spread facilitate the occurrence of some problems related to the construction of the innovative trust-like mechanisms and their terminological naming.

The given paper deals with the entrusting relationships of the modern European law. A special emphasis is put on the problems related to the lexical naming of the newly-emerged concepts. Certain suggestions are made regarding the perfect and "flawless" formation of the terminological landscape.

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## 2. Common Law "Trust"

Famous scholar F.W. Maitland believed, that the ***trust*** was "the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence"[1]. Its original form appeared in the common law. It considered a juridical relation whereby the property was transferred from one person to another, who controlled it for the benefit of a third person/persons. The entrusting relationships comprised the following elements:

- A *trustor* - a creator the *trust*;
- A *trustee* - a physical person or a legal entity which held legal title to the trust assets;
- A *beneficiary* – an equitable owner of the assets.

The biggest feature of the *trust* was the separation between the common-law power and the equity power. For this reason, the civil law countries were unable to adopt this legal structure. Despite this fact, in the recent years, the *trust-like devices* have been introduced in certain legal systems of the world. The major purpose of the rapid implementation of these institutions was the perspective of increasing the international competitiveness of the world countries.

## 3. Canadian *fiducie*

Canada presents a unique example of a mixed legal system representing almost idyllic coexistence of civilian and common law jurisdictions. Despite the fact, that in contrast to the common law, the civilian legal tradition is based on the written or codified law, the major dissonance between these systems is caused by the representation of the concept of the *fiduciary ownership* – the so-called *patrimony by appropriation*.

The Quebecoise *trust/fiducie* and its *patrimony by appropriation* significantly differ from the common law *trust.* In "the *Civil Code of Québec*, the expression *fiduciary ownership* is less used, because the trustee does not have ownership of the property in trust (art. 1261 C.C.Q.), but a power over it"[2]. The power of a trustee comprises the acceptance, holding and administration of the transferred assets. Besides debasing a fiduciary ownership, Quebecoise entrusted property departs from the original civilian theory of patrimony, because "the traditional theoretical patrimony is identified only with a person, is composed of all his property (and obligations), and in which his ownership is singular and indivisible (*dominium*) to the exclusion of all other persons"[3]. Moreover, due to the classical conception, the

[1] Gallanis, T. P.(2012) *The trust in continental Europe: A brief comment from a U.S. observer*, [Online], Available: http://ir.uiowa.edu/law_pubs/1847/ [08 Feb 2016].
[2] *Fiduciary ownership,* [Online], Available: https://nimbus.mcgill.ca/pldddp/dictionary /show /45416?source = NEWPROPEN [20 Feb 2017].
[3] Claxton, J. B. (2002) '*Langage du Droit de la Fiducie',* Revue du Barreau, vol. 62, pp. 273-317.

patrimony represents the "aggregate composed of a person's property, considered as making up a legal universality"[4]. A patrimony may contain both the assets and the liabilities. It is strongly connected with the personhood – each person may hold only one patrimony, inalienable and indivisible. The Quebecoise law deviates from this rule. It recognizes a patrimony without a person as its head (impersonal patrimony) and therefore, presents a new method of holding/entrusting property-the assets are removed from the patrimony of a *trustor*, but they do not constitute a part of a trustee's or a beneficiary's ownership. The given method of entrustment results in the creation of an autonomous patrimony, which is named as the *patrimony by appropriation (patrimoine d'affectation).*

Besides naming of an autonomous patrimony, the greatest attention must be paid to other lexical units related to the entrusting relationships. During the study of the Canadian terminological reality, the major accent should be put on the correlation of the terms related to the common law *trust* and the Quebecoise *trust-like mechanism*. The following chart depicts the existed reality:

| *Definition* | *Common law (Anglo-American law)* | *Quebecoise law (English version)* |
|---|---|---|
| *Legal institution* | Trust | Trust |
| *A transferor of the property* | Trustor/Settlor | Settlor |
| *A transferee* | Trustee | Trustee |
| *A person who benefits from the exploitation of the trust property* | Beneficiary | Beneficiary |

The given chart vividly reveals that the English terms related to the Quebecoise *trust-like mechanism* coincide with the lexical units of the common law. This correlation seems impossible due to the fact that the Anglo-American *trust* and the Quebecoise *trust-like device* have different essence. The common law entrusting relationships are based on the duality of ownership, which is unacceptable to Quebec's law. It merely presents an ownerless patrimony. Therefore, for the purpose of avoiding terminological ambiguity we propose the renaming of Quebecoise lexical units in the following way:

| *Definition* | | *Quebecoise Law (English Version)* |
|---|---|---|
| *Legal institution* | | Quebecoise trust |
| *A transferor of the property* | | Quebecoise settlor |
| *A transferee* | | Quebecoise trustee |
| *A person who benefits from the exploitation of the trust property* | | Quebecoise beneficiary |

Another point of interest is the correlation of terms related to France's ***fiducie*** and the Quebecoise ***trust-like mechanism***. The following chart depicts the existed reality:

[4] Aubry, Ch., Rau, Ch-F. and Esmein P. (1964) *Cours de Droit Civil Français,* Paris: Librairies Techniques, p. 14.

| *Definition* | *France's Civil Law* | *Quebecoise Law (French Version)* |
|---|---|---|
| *Legal institution* | Fiducie | Fiducie |
| *A transferor of the property* | Constituant | Constituant |
| *A transferee* | Fiduciaire | Fiduciaire |
| *A person who benefits from the exploitation of the trust property* | Bénéficiaire | Bénéficiaire |
| *An object of entrusting relationships* | Patrimoine d'affectation | Patrimoine d'affectation |

The given chart vividly reveals, that the French terms related to the Quebecoise *trust-like mechanism* coincide with the lexical units related to France's entrusting device - *fiducie*. This correlation seems impossible due to the fact, that the French *fiducie* and the Quebecoise *trust-like device* have different essence. The French entrusting relationships are based on the segregation of the property, which is unacceptable to Quebec's law. It merely presents an ownerless patrimony. Therefore, for the purpose of avoiding terminological ambiguity we propose the renaming of Quebecoise lexical units in the following way:

| *Definition* | | *Quebecoise Law (French Version)* |
|---|---|---|
| *Legal institution* | | Quebecoise fiducie |
| *A transferor of the property* | | Quebecoise constituant |
| *A transferee* | | Quebecoise fiduciaire |
| *A person who benefits from the exploitation of the trust property* | | Quebecoise bénéficiaire |
| *An object of entrusting relationships* | | Quebecoise patrimoine d'affectation |

### 4. Russian *доверительное управление имуществом*

At the end of the 20th century, Russia faced an attempt of the implementation of the common law *trust* in its legal system. The attempt failed. The *trust* seemed alien to the civil law jurisdiction. Hence, it facilitated the formation of a new institution of the Russian law- *доверительное управление имуществом* - which considers the following major elements:

- *Учредитель управления* – an owner of the property or another person;
- *Доверительный управляющий* – an individual entrepreneur or a commercial organization;
- *Выгодоприобретатель* – a beneficiary.

"In cases, when the entrustment is exercised on the statutory grounds, an administrator can be presented by a citizen (who is not an entrepreneur) or by a nonprofit organization, with the exception of an institution"[5]. In contrast to the common law *trust*, the *contract of the estate trust management* (*Договор доверительного управления имуществом)* does not represent the right of

[5] *The Civil Code of the Russian Federation*, [Online], Available: http://lawtoday.ru/razdel /codex/graj-kod/index.php [02 Jan 2017].

ownership in a "split" form. It considers a mere delegation of authorities. It is worth mentioning, that the Russian terms related to the *estate trust management* greatly differ from the terminological units connected with the institution of *trust*. Therefore, the English terms have the following Russian equivalents:

- *Trust*-доверительная собственность;
- *Trustor*-учредитель траста,сеттлор;
- *Trustee*-доверительный собственник;
- *Beneficiary* - выгодоприобретатель,бенефициарий.

## 5. Conclusions

Therefore, all the above-mentioned enables us to conclude that Canadian, French and Russian legal systems have reflections of an original model. The innovative institutions - *fiducie*, *доверительное управление имуществом* - can be treated as the *trust-like devices*, which share some characteristics of the *trust,* but significantly differ from it. In contrast to the French language, the Russian terminological system makes distinction between the terms related to *доверительное управление имуществом* and words used for the nomination of the concepts related to the Anglo-American *trust*. Therefore, these two institutions are well-defined and split. The Russian model of nomination can serve as a significant example for the other world languages. Already indirectly allowed mechanisms similar to the unique Anglo-American *trust*. However, it is apparent, that the resulting instruments do not represent faithful.

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