The essential similarity of express trusts in England, Japan and Quebec

The trust is historically viewed as an institution unique to common law, notwithstanding the long pedigree enjoyed by the Roman institution of the *fiducia* and the German *Treuhand*.[1] In the civil law context, it is often in legal systems shaped by a dual legal heritage in both common law and civil lawwhere the trust has had the greatest impact.[2] Whereas in continental European countries such as France, the trust usually takes a contractual form—in other words, a contract inspired by the *fiducia* is often envisioned as a strengthened form of agency arrangements such as the mandate;[3] it is in jurisdictions which do not confine the trust within contract where local trusts with genealogical roots in the English trust are given full expression against the backdrop of civil law property systems. As a result of the choice to emphasise the "absoluteness" of the concept of ownership,[4] it is often difficult to accommodate the trust in civil law countries. What is striking about legal systems with a long historical exposure to the English trust, therefore, are the stronger mechanisms which exist for controlling the trustee. The availability of such mechanisms is vital for express trusts to perform effectively their role as agreement-based institutions designed to deliver flexibility to property owners.[5]

In emphasising the commonalities between trusts which transcend contract, this chapter does not suggest that there is a doctrinal unity to institutions which, after all, differ significantly in institutional design. To take the question of ownership: whereas ownership falls to the trustee in many trusts including in England and Japan, in the South African *bewind* the beneficiary is the legal owner of property.[6] In Quebec, the legislator has gone even further in declaring that there is no legal "owner" of the trust fund, by depriving any party of a property right.[7] Yet, from a socio-legal standpoint, what these systems share is a historical exposure to English law, which has been a

[1] Claude Witz, "La fiducie en Europe: France, Suisse, Luxembourg, Allemagne, Liechtenstein: analyse des lois existantes et des projets en cours" in Jacques Herbots and Denis Philippe (eds), *Le trust et la fiducie: implications pratiques* (Bruylant 1998); Hein Kötz, *Trust und Treuhand: eine rechtsvergleichende Darstellung des anglo-amerikanischen trust und funktionsverwandter Institute des deutschen Rechts* (Vandenhoeck & Ruprecht 1963).

[2] As Madeleine Cantin Cumyn observes, trusts in "mixed" legal systems including Scotland, Quebec and South Africa had taken shape by the nineteenth century, reflecting an earlier and deeper historical interaction with the English trust focusing on family and succession contexts. In doing so, they demonstrate greater conceptual coherence than continental European trusts used primarily in the commercial context. Cantin Cumyn, "Reflections Regarding the Diversity of Ways in which the Trust has been Received or Adapted in Civil Law Countries" in Lionel Smith (ed), *Re-imagining the Trust* (CUP 2012) 27. While Japan does not fall tidily into this group, its trust law is rooted in common law and the country is exposed to American legal and economic hegemony in the Western Pacific.

[3] Claude Witz, "Les caractères distinctifs de la fiducie" in STEP France (ed), *Trusts & fiducie: concurrents ou compléments? Actes du colloque tenu à Paris les 13 et 14 juin 2007* (Academy & Finance 2008) 67, 71. The new Italian proposal for a domestic trust to replace the *trust interno* is also strongly influenced by the mandate. Ilaria Caggiano, "A Trust Law for Italy? From the Chimera to the Phoenix" (Global Seminar in Private Law Theory, February 2022).

[4] See for example C civ (French *Code civil*), art 544, art 206 of the Japanese Civil Code and c 947 of the Civil Code of Quebec.

[5] Hanoch Dagan and Irit Samet, "Express Trust as the Missing Piece in the Liberal Property Regime Jigsaw" (22 December 2020) Philosophical Foundations of the Law of Trusts (Simone Degeling et al eds, Forthcoming 2021), Available at SSRN: https://ssrn.com/abstract=3753282

[6] Tony Honoré, "Trust" in Reinhard Zimmermann and David Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (Clarendon Press 1996) 865.

[7] Civil Code of Quebec (CCQ), CQLR c CCQ-1991, c 1261.

significant source of influence at the level of procedure as well as the style of legal thinking.[8] Even if these structural features may not be a conscious factor in everyday legal practice, the specific pathways underpinning the development of these legal systems explain the key role of legal history in shaping institutions such as the trust.[9]

My chapter suggests that the English express trust and trusts as found in Japan and Quebec are functionally similar.[10] It aims to highlight that express trusts work as a system of rules, where robust mechanisms to subject trustees to effective control form a core feature.[11] In understanding this system, I focus on a number of specific doctrinal features highlighted by Jessica Hudson and Charles Mitchell as central to the English express trust. These include: first, the trustee's holding of legal title to property; secondly, the restriction of the trustee's authority in dealing with the property; and thirdly, that the availability of the express trust always produces an impact on the property law of the host legal system.[12] The last point holds true whether property is defined pragmatically and relationally in the case of English law, or against a firmer taxonomical and intellectual commitment in the cases of Japan and Quebec. While not all these features perform control functions independently, they nonetheless operate as a system, where the interactions between components contribute to the goal of maximising the trustee's powers and discretion at the same time as restricting her authority. Significantly, this restriction is only possible where the trust's relationship with underlying property laws is put on a sound conceptual basis that is recognised beyond the confines of trust law.

At this point, I would like to briefly explain my choice of jurisdictions. First, the selection of the English trust is straight forward. The large number of users means that the English trust retains a central role in the global development of trust law, even if a variety of other trajectories also exist. Secondly, while Japan might not have experienced the kind of formal influences from England comparable to Quebec, especially at the level of procedural law,[13] Japan has nonetheless been subjected to a greater degree of common law (specifically American) influences than jurisdictions in continental Europe. In addition to US-led constitutional and commercial law reforms after the Second World War, the country's location in the Western Pacific leads to greater exposure to American rather than European commercial practices, and the US remains the jurisdiction of choice for Japanese attorneys' overseas study.[14] Thirdly, the intensity of doctrinal debates in Quebec is striking, as a result of Quebec jurists' allergic reaction to the trust's transplant in the province's

[8] Adrian Popovici, "Le droit civil, avant tout un style?" in Nicholas Kaisrer (ed), *Le droit civil, avant tout un style?* (Éditions Themis 2003) 214-218. In Japan, the direct influence of common law is more limited, and is confined to the greater discretion which courts enjoy relative to other civil law countries, and the role of scholars in moulding these judgements into doctrine (*hanrei kenkyū*).

[9] See for example Sylvio Normand, *Introduction au droit des biens* (Wilson & Lafleur 3rd edn 2020) 423-425.

[10] I embrace the modern version of functionalism which pays close attention to social and cultural factors, at the same time as seeking to evaluate the selected legal systems in terms of their effectiveness in achieving a stated goal. Ralf Michaels, "The Functional Method of Comparative Law" in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2nd edn 2019) 357-360, 379-382.

[11] By control, I mean that a trustee, unlike other titleholders of property, is not permitted to exercise her powers and discretion in any way she wishes, and an effective system of trust law must provide enforceable rules that circumscribe her authority to do so.

[12] Jessica Hudson and Charles Mitchell, "Justificanda" (Property Law Connections, Oxford, June 2021).

[13] For the contributions of civil procedure to mixity in Quebec, see Jacinthe Plamondon, "La procédure civile québécoise : à la recherche de la sérénité" (2020) 61 C de D 1017.

[14] See for example "Kigyō hōmu bengoshi no ryūgaku jijō" ("Concerning overseas study of corporate attorneys") https://law-trivia.hateblo.jp/entry/2021/07/01/225928 (Accessed 2 Mar 2022).

predominantly civil law system. This historical context explains the radical choices made by the Quebec legislator in the Civil Code of 1994 in declaring the trust "ownerless".

This chapter is divided into three parts. In the first part I explore the structure of the English express trust and introduce to the reader the basic features of the trust in Japan and Quebec. I go on in the second part to highlight two definitional components of express trusts, namely rules which allow the trustee as titleholder to enjoy full control over property and those which constrain her authority. The third part goes on to show that the ability to accommodate a modification of core property rules, whether defined relationally or according to strict taxonomical criteria, is crucial to the smooth functioning of the express trust.

Part I: The Structure of the Express Trust

The first section of my chapter provides an overview of the structure of the express trust in the three jurisdictions. As suggested above, express trusts are the most effective where doctrinal rules give beneficiaries and other parties effective mechanisms to enforce their interests. While there is no reason why such trusts cannot be created by contract, legal systems must ensure that, once a trust is constituted, the effects of trust rules stem not from contract law but from trust law. This point is important because trust law differs from contract law in important areas such as the standing of beneficiaries and remedies, and in Japanese law—the closest to contract among the three trusts—there are also important differences with respect to the rules on trusts' constitution.[15]

England

There is no consensus on the nature of the English express trust, which is a complicated question as the trust contains both personal and proprietary characteristics, and cuts across many different areas of law.[16] In recent years, the orthodox understanding of the beneficiary's interest as one stemming from split legal and equitable titles to property has largely fallen out of favour. As William Swadling points out, part of the problem of such a view is that the beneficiary's interest is simply not the equitable counterpart of the trustee's legal title: it contains a different kind of right, including the right in the due administration of the trust.[17] From a comparative standpoint, such a view is also unattractive because the reliance on equity's status as a source of law in justifying the trust strikes one as being excessively formalistic, and creates an unnecessary obstacle to the reception of the express trust outside common law systems.[18]

In England, with the exception of self-declared trusts, the creation of an *inter vivos* express trust involves the transfer of property from the settlor to the trustee, with the stipulation that the property is to be held in trust.[19] While the trustee's power to deal with property is *prima facie*

[15] Joyman Lee, "Settlor's Retention of Powers in Civil Law Trusts" (2021) 35 Tru LI 90, 99-100.
[16] Adam Hofri-Winogradow describes the trust as "a particularly complex and conflicted legal site… [found] at a crossroads of family law, the law of succession and the law of commerce". Hofri-Winogradow, "Zionist Settlers and the English Private Trust in Mandate Palestine" in Lionel Smith (ed), *The Worlds of the Trust* (CUP 2013) 253-254.
[17] William Swadling, "Trusts and Ownership: A Common Law Perspective" (2016) 24 Eur Rev Priv Law 951, 963-965; Charles Mitchell, "*Commissioner of Stamp Duties (Queensland) v Livingston* (1964): Rights of Estate Beneficiaries and Trust Beneficiaries Compared" in Brian Sloan (ed), *Landmark Cases in Succession Law* (Hart 2019) 274-276.
[18] Ben McFarlane and Robert Stevens, "The Nature of Equitable Property" (2010) 4 J Eq 1, 2, 28.
[19] *Milroy v Lord* [1862] 4 De GF&J 264 (Turner LJ). For self-declared trusts, see *Paul v Constance* [1977] 1 WLR 527; Sinéad Agnew and Simon Douglas, "Self-Declarations of Trust" (2019) 135 LQR 67.

coextensive with her powers as titleholder to property, she is disabled from dealing with property in any way she wishes. This is because she is restrained by wide-ranging duties which courts are willing to enforce, including the duties to comply with the terms of the trust, to act honestly and in good faith, to account for her stewardship of trust property, and the beneficiary's entitlement to the due administration of the trust. Remedies for a breach of these duties also go beyond contract law, and include a wide range of equitable remedies such as injunctions, and rules in tracing, dishonest assistance and knowledge receipt. Traditionally the trustee's duties are sourced from the settlor's intention to create a trust,[20] although the trustee and the beneficiary's consent also plays a role in creating the trust.[21] The fact that many trusts especially in the commercial context are created by contract has led John Langbein to argue that common law trusts are in fact contractual in nature.[22] This view, however, is difficult to apply to English trusts given its difficulty in explaining the beneficiary's *Saunders v Vautier* rights.[23]

While the English trust had always been a changing entity,[24] recent developments have changed the way English express trusts operate in significant ways. These changes are important because they show that the trust continues to function as a system in spite of the changing nature of trusts' use and juridical understanding of the institution. First, Langbein's theory of the trust highlights the important socio-legal reality that most express trusts are now found in the commercial context, where the trust's operation usually reflects an understanding based on parties' agreement rather than the donative intent of the settlor. Secondly, the proliferation of purpose trusts in offshore jurisdictions has increased both their profile and respectability, with significant implications for doctrinal developments in onshore jurisdictions.[25] Thirdly, recent English cases such as *Akers v Samba Financial Group*[26] have clarified the nature of the trust by demonstrating English courts' recognition of the bifurcated nature of the beneficiary's interests. As Mitchell has pointed out, in a discretionary trust the beneficiary cannot be said to enjoy any economic interest, let alone property rights in the trust.[27] It follows that the beneficiary's right to the due administration of the trust is the more important of her two sets of rights.[28]

As a result of these changes, it is important to update our view of the express trust as an institution which operates primarily outside the donative context. Such a shift in emphasis highlights the trust's obligational characteristics,[29] which brings it closer to the characterisation of trusts outside common law. Yet, at the functional level this change does not necessarily alter the beneficiary's level of

[20] Agnew (n 19) 87.
[21] Ying Khai Liew and Charles Mitchell, "The Creation of Express Trusts" (2017) 11 J Eq 133.
[22] John Langbein, ""The Contractarian Basis of the Law of Trusts" (1995) 105 Yale LJ 625.
[23] John Langbein, "Why the Rule in *Saunders v Vautier* Is Wrong" in PG Turner (ed), *Equity and Administration* (CUP 2016); Paul Matthews, "The Comparative Importance of the Rule in *Saunders v Vautier*" (2006) 122 LQR 266.
[24] David Foster observes that the trust in the sixteenth and seventeenth centuries was highly personal, and it was only in the nineteenth century when it came to acquire proprietary characteristics. Foster, "Historical Conceptions of the Express Trust, c. 1600-1900", in Simone Degeling, Jessica Hudson, and Irit Samet (eds), *Philosophical Foundations of Express Trust* (OUP) (forthcoming).
[25] Examples include the abandonment of perpetuity rules in some North American jurisdictions or the weakening of the beneficiary principle in Australia. Lionel Smith, "Give the People What They Want? The Onshoring of the Offshore" (2018) 103 Iowa L Rev 2155, 2166; Jessica Hudson, "Mere and Other Discretionary Objects in Australia" in Ying Khai Liew and Matthew Harding (eds), *Asia-Pacific Trusts Law: Theory and Practice in Context* (Hart 2021), vol 1.
[26] [2017] AC 424, [83] (Lord Sumption).
[27] Mitchell (n 17) 274-276.
[28] *Akers* (n 26), [83]; Ibid.
[29] David Hayton, "Developing the Obligation Characteristic of the Trust" (2001) 117 LQR 96.

economic interest in the trust. Rather, a pragmatic and relational view of property means that trust interests understood as personal rights continue to affect rules which stand at highly "interconnected" points within a legal system,[30] in other words express trusts have *de facto* even if not *de jure* property effects. Conversely, a trust which does not affect interconnected points within a legal system, or pragmatically-defined "property" rights, does not in fact perform the functions associated with the English express trust.

Japan

Unlike a number of European trusts, the Japanese trust has a clear English origin in the form of Indian and Californian trust statutes.[31] The Japanese trust was initially introduced to manage the proliferation of informal banking services in the first decades of the twentieth century.[32] As Japan emerged as a major world economy in the 1970s, the use of the trust increased greatly, especially in commercial settings including securitisation,[33] which mirrored trusts practice in the US and other parts of the world.[34]

In Japan trusts are usually created using contract, as permitted under article 3(1) of the Trust Act 2006.[35] However, article 3(2) and (3) also allow the creation of a trust by will or in the form of a self-declared trust.[36] Although the latter forms of trust creation are less common than contract, the overall effect is that it would be inappropriate to understand Japanese trusts as contract. Where a trust is created by contract, it takes effect upon the conclusion of the trust contract, which must have as one of its terms the transfer of property or another property right such as a security interest to the trustee.[37] The Trust Act does not confer specific powers on the trustee, but rather grants trustees the general power to perform tasks necessary for fulfilling the purposes of the trust.[38]

In contrast to trustee powers, provisions on trustee duties are much more extensive. As I have discussed elsewhere, these include the duties of loyalty, care, to follow the terms of the trust, to inform beneficiaries of their beneficial interest and to keep accounts and provide information.[39] Trustees acting in breach of trust come under the liability to compensate the beneficiary or to restore the trust property.[40]

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[30] Henry Smith, "The Persistence of System in Property Law" (2015) 163 U Pa L Rev 2055, 2067-2074; Yun-chien Chang, *Property Law: Comparative, Empirical,. And Economics Analyses* (CUP) (forthcoming).
[31] Stefanos Tofaris, "Trust Law Goes East: The Transplantation of Trust Law in India and Beyond" (2015) 36 J Legal Hist 299, 323-326.
[32] Akira Yamada, *Shintaku rippō katei no kenkyū* ("A study on the legislative history of the trust") (Keisō shobō 1981).
[33] Hiroto Dōgauchi, "Atarashii shintakuhō riron no tenbō to kadai" ("The prospect of and topics in new trust law theory") (2007) 1261 Kin'yū—shōji hanrei 6, 7.
[34] Lusina Ho and Rebecca Lee (eds), *Trust Law in Asian Civil Law Jurisdictions* (CUP 2013); Nicolás Malumián, *Trusts in Latin America* (OUP 2009).
[35] Act No 108 of Heisei 18 (2006).
[36] Although the self-declared trust is now available under certain conditions, practitioners view its availability to be premature. Lee (n 15) 99-100; Kōichi Kimura, "Shin shintakuhō no kadai" ("The subject of the new Trust Act") in Makoto Arai (ed), *Shin shintakuhō no kiso to un'yō* ("The foundations and use of the new Trust Act") (Nihon hyōronsha 2007) 359-361.
[37] Trust Act (n 35), arts 3(1), 4(1).
[38] Ibid., art 26.
[39] Ibid., arts 29-39; Joyman Lee, "The Irreducible Core of Trustee Duties in East Asian Trusts" (2021) 27 Trusts Trustees 302, 304-308.
[40] Trust Act (n 35), art 40.

Quebec

In Quebec, the Quebec Act 1774 guaranteed the freedom of testation at the same time as preserving the province's civil law system in private law in the aftermath of British conquest. The trust first arrived in the province as a result of testamentary practices by English settlers. The Quebec trust was later codified and, sensing staunch opposition from French-speaking legal scholars, courts did much to restrict the institution to family and succession contexts.[41] From an English perspective, this would have been an unusual situation, given that the demand from users and legal practitioners for the trust form was robust. In 1994, after decades of debate led by the Office de révision du Code civil, the Quebec legislator put forward the radical model of an "ownerless" trust. The trust was both unusual in its highly academic nature as an implementation of Pierre Lepaulle's heterodox theory,[42] at the same time that it reflected important continuities with the old Quebec trust.[43]

Whereas the pre-1994 trust was held to be a case of a *sui generis* property right where formal ownership rights reposed with the trustee,[44] Quebec's new "ownerless" patrimony is not built upon personal rights between parties, but is rather a mode of detaining property.[45] As no party has a property right,[46] a crucial element of the new Quebec trust is the trustee's role as the donee of a power.[47] Powers in the Franco-Quebec tradition of civil law are inherently fiduciary in nature,[48] and it is the notion of power which prevents the trustee from dealing with property in her own interest.[49] This move is important because, as explained further below, it is not possible for the holder of a right in Quebec law to be prevented from exercising the right in her own interest.[50]

Patrimony is a key idea underpinning the Quebec trust.[51] At the most basic level, patrimony refers to the totality of a person's assets and liabilities.[52] The Quebec and Scots trusts share the idea that the beneficiary's right is a personal right in a judicially-protected patrimony, which explains the

[41] For example, the unit trust for investment purposes was rejected in *Crown Trust v Higher* [1977] 1 SCR 418, 425-426 (De Grandpré J).
[42] Pierre Lepaulle, *Traité théorique et pratique des trusts en droit interne, en droit fiscal et en droit international* (Rousseau 1932).
[43] Pierre Charbonneau, "Les Patrimoines d'affectation: vers un nouveau paradigme en droit québécois du patrimoine" (1983) 85 R du N 491, 527-528.
[44] *Curran v Davis* [1933] SCR 283.
[45] Alexandra Popovici, "Trust in Quebec and Czech Law: Autonomous Patrimonies?" (2016) 6 Eur Rev Priv 929, 931.
[46] Civil Code (n 7), c 1261.
[47] Madeleine Cantin Cumyn and Michelle Cumyn, *L'administration du bien d'autrui* (Editions Yvon Blais 2nd edn 2014) 1; *Yared v Karam* (2019) SCC 62, [129] (Rowe J).
[48] Emmanuel Gaillard, *Le pouvoir en droit privé* (Economica 1985). As Alexandra Popovici notes, the fact that power in Quebec law exists only in a doctrinal rather than a codified form limits its force. Popovici, *Êtres et avoirs: les droits sans sujet en droit privé actuel* (Yvon Blais 2019) 82.
[49] Civil Code (n 7), c 1283.
[50] The holder of a right can only be attacked via the restrictive doctrine of the *abus de droit*. Cantin Cumyn and Cumyn (n 47) 76.
[51] Notably, a slightly different version of the idea underlies the trust in Scotland. George Gretton, "Trusts Without Equity" (2000) 49 Intl Comp Law Q 599; Kenneth Reid, "Patrimony Not Equity: The Trust in Scotland" (2000) 8 Eur Rev Priv Law 427.
[52] The idea has its roots in the Roman idea of *universitas*, which had a similar meaning to the one given above. By the eighteenth century, patrimony came to be associated in French law with the idea of a person's assets and liabilities which were accessible to creditors. Frédéric Zenati and Thierry Revet, *Les biens* (Presses Universitaires de France 3rd edn 2008) 23-26.

insolvency protection offered by the trusts.[53] However, unlike in Scotland, the Quebec trust is rooted in the idea that the holder of a right cannot be prevented from exercising it in her self-interest, and hence protection can only be effectively rendered by declaring the patrimony "ownerless". As explained above, an "ownerless" patrimony relies entirely on the exercise of fiduciary powers for its functioning. While the idea of "ownerless" property as permitted by article 2 of the Civil Code has not been further developed in practice, the Quebec trust's "postmodern" character destabilises the very notion of ownership.[54] For the purpose of my argument, the Quebec trustee's control (*maîtrise*) of property is functionally equivalent to legal title to property in the English sense.[55]

Part II: Powers of the Trustee

As Frederic Maitland famously remarked, "equity without common law would have been a castle in the air and an impossibility",[56] the English express trust cannot exist without the underlying rules of property found in common law. Legally, the trustee is the owner of property,[57] and in this capacity, she can exclude others from the property.[58] From the bundle of rights perspective popular in the US, the trustee enjoys a large number of rights associated with ownership.[59] For James Penner, the presence of a trust does not significantly affect the explanations offered by property theory because the trustee enjoys all the outward manifestations of an owner.[60] Even though "ownership" is not always clearly defined in English law, in part because the "owner" does not have special rights such as a monopoly of the ability to create subordinate property rights,[61] the trustee nonetheless holds all the legal rights associated with the interest held under trust. In particular, only the trustee is able to sue on behalf of "the trust",[62] and trustee actions outwith her authority are valid in law.[63]

It is perhaps for this reason that the French property jurist Frédéric Zenati-Castaing finds the removal of the "owner" in the Quebec trust to be particularly unnecessary.[64] For Zenati-Castaing, without being vested in the law of ownership, which connects the right in a thing with its holder, the Quebec idea of patrimony exists in an uncertain and destabilised state. While there is no intrinsic need for a thing to be owned, modern civil law has evolved in such a way where "ownership" is defined in relation to the capacity of its owner, rather than the physical attributes of the object.[65] Thus, the Quebec legislator's radical move is problematic because Quebec rules on patrimony are

[53] John Brierley, "Regards sur le droit des biens dans le nouveau Code civil du Québec" (1995) 1 RIDC 33, 48, 82; George Gretton, "Constructive Trusts" (1997) 1 Edinb Law Rev 281, 287.
[54] In particular, it attacks the idea of the *sujet de droit*, which is central to the organisation of private law in civil law countries. Popovici (n 48) 148-149; Geoffrey Samuel, "'Le droit subjectif' and English law" (1987) 46 CLJ 264.
[55] Civil Code (n 7), c 1278.
[56] FW Maitland, Equity: *A Course of Lectures* (CUP rev edn 1936) 19.
[57] For example, Trusts of Land and Appointment of Trustees Act (TOLATA) 1996, s 6(1) defines the trustee as the owner of property.
[58] Richard Nolan extends this idea to beneficiaries, arguing that the core function of equitable property is to exclude non-beneficiaries from trust assets. Nolan, "Equitable Property" (2006) 122 LQR 232, 264.
[59] Tony Honoré, "Ownership" in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) identifies eleven incidents of ownership.
[60] James Penner, "Purposes and Rights in the Common Law of Trusts" (2014) 48 RJTUM 579, 583-584.
[61] SE Bartels and JM Milo, "Contents of Real Rights: Personal or Proprietary. A Principled History" in Bartels and Milo (eds), *Contents of Real Rights* (Wolf Legal Publishers 2004) 19-20.
[62] *Vandepitte v Preferred Accident Insurance Corporation of New York* [1933] AC 70, 79.
[63] *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246, 303; *Akers v Samba Financial Group* [2017] AC 424, [51].
[64] Frédéric Zenati-Castaing, "L'affectation québécoise, un malentendu porteur d'avenir. Réflexions de synthèse" (2014) 48 RJTUM 623.
[65] Zenati and Revet (n 52) 26.

now potentially disassociated from the rules of ownership regulating the powers of the owner developed over the course of centuries.

In the absence of equity as a separate source of law, it is important for non-common law systems to ensure that the trustee is able to function as the legal owner of property, or at least as the party with the greatest custodial power over the property. This is not inherently difficult to achieve, although it may require the conferral of specific powers to trustees.[66] In the Roman *fiducia* it was the complex formalities associated with the transfer of ownership, rather than the notion that the transferee was the owner of property, which led to its replacement by more specialised methods.[67] Similarly, in medieval England, there was also no difficulty associated with the trustee's status as the owner of property at common law, rather equity's role was to ensure that the trustee's obligations to the beneficiary were respected.

In Japan, the trustee is the outright legal owner of property, and her obligations to the beneficiaries or the settlor are personal in nature. In Quebec, as explained above, the absence of property rights does not preclude the trustee's control of property. In making the trustee the legal titleholder of property or its functional equivalent, two rules are particularly important. The first rule requires the transfer of property to the trustee. The second is the idea that a curtailment of the settlor's powers is necessary in order to defeat the normative intuition in civil law systems that, as the provider of property, the settlor ought to enjoy direct and continuing control over the trust.[68] I also discuss the question of powers held by the trustee.

Transfer of Property to the Trustee

At one level, the importance of requiring the settlor to transfer property to the trustee should be self-evident, and this rule is generally respected by different trust laws. While article 4 of the Japanese Trust Act specifies that a trust is constituted when a trust contract comes into effect, jurists take the view that insolvency protection does not take effect until the trust property is transferred.[69] In Quebec, article 1265 specifies that the trustee's acceptance divests the settlor of property.[70]

Settlor's Retention of Control

The settlor's retention of control is rarely raised as an issue in England, in part because taxation considerations incentivise settlors torelinquish both the substance and appearance of continuing control. Where the issue appears, for example in the Privy Council appeal of *Webb v Webb* from the Cook Islands,[71] it is often in the context of the sham trust doctrine, which requires collaboration between the settlor and trustee in creating a device which is not intended to be a trust in a meaningful sense.[72] The settlor's retention of control through appointing a protector or non-binding letters of wishes is not usually viewed as problematic, as it does not diminish the scope of the trustee's powers.

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[66] For example Trusts (Scotland) Act 1921, ss 3-5. Alternatively, these powers can also be conferred through the trust instrument.
[67] Witz (n 1) 52.
[68] Adam Hofri, "Shapeless Trusts and Settlor Title Retention: An Asian Morality Play" (2013) 136 Loy L Rev 135.
[69] Makoto Arai, *Shintakuhō* ("Trust Law") (Yūhikaku 4th edn 2014) 124-125.[70] Civil Code (n 7); *Bank of Nova Scotia v Thibault* [2004] 1 SCR 758, 773.
[70] Civil Code (n 7); *Bank of Nova Scotia v Thibault* [2004] 1 SCR 758, 773.
[71] [2020] 8 WLUK 8.
[72] Matthew Congalen, "Sham Trusts" (2008) 67 CLJ 176; Simon Douglas and Ben McFarlane, "Sham Trusts" in Heather Conway and Robin Hickey (eds), *Modern Studies in Property Law*, Vol 9 (Hart 2017).

Outside common law systems, the question is more significant as the relative unfamiliarity with the institution raises the question of whether the trustee is really in control. In Japan, tax structures are not usually sensitive to the specificities of a trust structure, but rather the trust beneficiary is liable for paying tax on trust property, even in the case of a discretionary trust where trust property is not yet appointed to beneficiaries.[73] The lack of tax advantages means that there is no *a priori* incentive for settlors to relinquish control over trust assets. In the commercial context, there may also be a practical benefit relating to the settlor's reservation of an active role, for example by serving as a residuary beneficiary to absorb any shortfalls in trust income.[74]

Thus, in Japan, it was at the level of practical problems in securitisation which led the legislator to make changes to reduce the settlor's powers. In particular, it was the question of "true sale", more specifically the ability of the trustee in bankruptcy to deny a trust arrangement in the event of insolvency which gave the issue much of its urgency.[75] In the new Trust Act, the residual powers of the settlor now fall into the categories of a monitoring role over trustees, a power of veto over fundamental changes to the trust, and the settlor's residual interest.[76] These reductions are significant, given that it is difficult to justify the insolvency protection available in a trust where the trustee's exercise of her powers does not amount to overall control. Where the settlor is prepared to name herself a direct beneficiary, or to reserve to herself a power which is non-fiduciary in nature, there is enough clarity to suggest that the settlor is deriving benefit from her status as a beneficiary rather than as a settlor.

In Quebec too courts have been sensitive to the settlor's retention of powers, although the issues raised are largely the same as those covered under the sham trust doctrine. *In Bank of Nova Scotia v Thibault,* the Supreme Court of Canada held that the settlor's retention of full powers amounted to the "reverse" of a trust.[77] In Quebec, the fiduciary nature of the concept of power means that the settlor cannot reduce the trustee's powers by subjecting her to mandatory directions, given that a trustee who exercises a power in ways other than in the best interests of the trust's purpose would be acting outwith the scope of the power. In *Yared v Karem,* it was held that article 1283's nature as a rule of public order meant that it was impossible for the settlor to make himself a beneficiary through a power of appointment.[78]

Trustee Powers

Unlike in Scotland, in Japan the Trust Act does not confer specific powers on trustees, but rather confers a general power to achieve trust purposes.[79] This is itself a departure from the old Trust Act, where the concept of power was thought to be unnecessary in view of the trustee's full ownership of property.[80] Beneficiaries are entitled to rescind the trustee's actions in excess of her powers.[81] In

[73] Hideaki Satō, *Shintaku to sozei* ("Trust and taxation") (Kōbundō 2000).
[74] The Japanese practice is adopted from the American one described in Steven Schwarcz, "Commercial Trusts as Business Organizations" (2003) 58 Bus Law 559, 563.
[75] Machiyo Hamada, *Shōkenka no shinten ni tomonau shomondai: tōsan kakuri no meikakuka nado* ("Various problems related to the progress of securitisation: the clarification of bankruptcy remoteness, etc") (Nihon shōken keizai kenkyūjo 2004).
[76] Lee (n 15) 94.
[77] (n 70), 773-774 (Deschamps J).
[78] (2019) SCC 62, [121] (Rowe J).
[79] Trust Act (n 35), art 26.
[80] Hiroyuki Watanabe, "Jutakusha no gimu/sekinin (2)" ("Trustee duty/liability") (2019) 280 Shintaku 35, 35-36.
[81] Trust Act (n 35), art 27. One of the following requirements must be satisfied: the counterparty is aware that the property in question is trust property or the property is registered, or the trustee is acting in excess of her powers or grossly negligent.

Quebec, the Civil Code grants trustees control and exclusive administration of the trust property,[82] presumes that trustees hold the power of appointment,[83] requires her to make the property productive and allows her to alienate it,[84] and contains a set of criteria concerning sound investment.[85] The trustee's powers come with the obligation to conform to the object of the powers.[86]

Part III: Restriction of Authority: Trustee Duties

In all the jurisdictions studied, trust law's substantive intervention in the trustee's "ownership" of property takes place at the level of constraining her authority to deal freely with property. Trustee duties play a central role in this, both by defining how the trust is supposed to function and by guiding the trustee in her exercise of powers. While most duties are designated in the trust instrument, thus reflecting the intention of the settlor, there are also default duties which are imposed by general law. These rules, which apply unless parties opt out expressly, perform a gap filling function, and support the operation of the trust by pre-empting situations which parties might not have foreseen.[87] In aggregate terms, they add to the effectiveness and attractiveness of the express trust as an institution, by allowing users to benefit from a highly developed set of rules which are constantly adapted to changing circumstances and which benefit from significant network effects.

Although there is no agreement on their precise content, there is general agreement that duties including good faith and the duty to provide information stand at the "core" of the trustee's duties.[88] Where these duties do not exist, for example where the powers granted to the trustee are "limited to the point that they become something else entirely",[89] the existence of a trust can be called into question. The reason for this is that it suggests that the parties in question might not have intended to create a trust after all. However, as Hudson and Mitchell have observed, there is no suggestion by proponents of the idea of the irreducible core that core trustee duties are coterminous with "the trust".[90] From a comparative standpoint, the full set of features associated with trustee duties in English law is not required for the successful restriction of trustee authority.[91] Ying-chieh Wu, for example, has observed that the remedies associated with the constructive trust in common law are dispersed in civil law systems, which in his view present an "epistemological gap".[92]

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[82] Civil Code (n 7), c 1278.
[83] Ibid., cc 1282, 1283.
[84] Ibid., cc 1306, 1307.
[85] Ibid. cc 1339-1344; John Claxton, *Studies on the Quebec Law of trust* (Thomson Carswell 2004) ch 22.
[86] Cantin Cumyn and Cumyn (n 47) 283.
[87] Robert Sitkoff describes these as rules which a well-informed party is unlikely to bargain away. Sitkoff, "An Economic Theory of Fiduciary Law" in Andrew Gold and Paul Miller (eds), *Philosophical Foundations of Fiduciary Law* (OUP 2014) 205.
[88] Charles Mitchell, "Good Faith, Self-Denial and Mandatory Trustee Duties" (2018) 32 Tru LI 92; David Hayton, "The Irreducible Core Content of Trusteeship" in AJ Oakley (ed), *Trends in Contemporary Trust Law* (OUP 1996); Lee (n 39); Adam Hofri, "The Irreducible Cores of Trustee Obligations" LQR (forthcoming); New Zealand Trust Act 2019, ss 22-27.
[89] *Thibault* (n 70), 773 (Deschamps J).
[90] Hudson and Mitchell (n 12).
[91] By this I refer to areas such as tracing, dishonest assistance and knowing receipt, which are not usually available as a part of the express trust in civil law countries. In Japan, while Trust Act (n 35), art 27 (1) allows beneficiaries to rescind trustee actions in the case of bad faith or gross negligence, there is little discussion on counterparties' liability. For an overview of real subrogation as a concept similar to tracing in Quebec, see Lionel Smith "Unauthorized Dispositions of Trust Property: Tracing in Quebec Law" (2013) 58 McGill LJ 795.
[92] Ying-chieh Wu, "Constructive Trusts in the Civil Law Tradition" (2018) 12 J Eq 319.

Consequently, in this section I focus on the core set of trustee duties in the Japanese and Quebec trusts and the beneficiaries' ability to enforce these duties, rather than the features of the English trust which go beyond a narrow definition of the express trust.

Japan

In Japan a core set of trustee duties resembling the core duties in common law trusts exist. In spite of the reduction of core trustee duties under the 2006 Act, the fact that regulatory law applies to many trusts means that the level of duties has in fact not been lowered.[93] As explained above, these duties include the duties of loyalty and care not exceeding good faith, to register property where it is registerable and to keep it identifiable, and to provide information subject to restrictions.[94] While there is little explicit discussion on the prophylactic dimensions of fiduciary duties in Japan, the duty of loyalty captures some of the ideas inherent in the English concept.[95] Although there are concerns that such duties may not be enforced by courts in practice,[96] it has been argued elsewhere that good faith should be used to deny trustees' allegations that beneficiaries have in fact consented to a breach.[97]

As trustee duties are broadly similar to English trusts, another important point is that in Japan beneficiaries are able to enforce their interests. This stems from the muscular remedies which accompany the beneficiary's interest. Under the Trust Act, article 2(6) and (7) defines the beneficiary as the party with the power to require the trustee to transfer property to her, in addition to other rights such as standing to petition the court, to oppose compulsory execution against the trust fund and to access information relating to the trust.[98] A clear set of rules on the beneficiary's rights signals both to courts and users that beneficiaries have a strong interest in property, which helps to justify beneficiaries' ability to hold trustees to account at the normative level.

Quebec

In Quebec, default trustee duties are imposed by the chapter on administrators of the property of another (*administrateur du bien d'autrui*), which is rooted in the law of mandate but similar in content to English trustee duties.[99] According to article 1278, the trustee's control of trust property is explicitly subjected to the duties set out in the chapter.[100] These include the duties of prudence and diligence, to not enter into a situation of conflict, and powers may not be used for the trustee's own benefit.[101] Whereas under the old Quebec trust, the characterisation of the trustee as the "owner" of property meant that beneficiaries were unable to hold trustees to their duties;[102] under the new trust, the trustee's possession not of legal rights but of fiduciary powers means that the trustee's actions in breach of trust would be *ultra vires* and void. As Alexandra Popovici has observed, however, the granting to the settlor, the beneficiary and "any other interested" party of

[93] Lee (n 39) 304.
[94] Ibid. 304-308.
[95] See for example Hiroto Dōgauchi, Shintakuhō ("Trust Law") (Yūhikaku 2017) 203-221.
[96] Ibid. 305-306; Osaka High Court, Heisei 22-5-14, Kinho 1935–59 (2010).
[97] Joyman Lee, "Structure and Rulemaking in English, Japanese and Quebec Trusts" (PhD thesis, UCL 2022) ch8.
[98] Joyman Lee, "The Nature of the Beneficiary's Interest in English, Japanese and Quebec Trusts" (2021) 27 Eur Rev Priv Law 611, 617-618.
[99] While there had been disagreements concerning the extent to which common law fiduciary duties should apply in Quebec, in *Provigo Distribution Inc v Supermarché ARG Inc* [1998] RJQ 47 the Court of Appeal rejected the application of common law fiduciary duties under that name.
[100] Civil Code (n 7), cc 1299-1370 (Title VII); Cantin Cumyn and Cumyn (n 47).
[101] Ibid., cc 1309, 1310, 1283.
[102] Cantin Cumyn and Cumyn (n 47) 122.

the right of enforcement does not by itself achieve the goal of constraining the trustee's authority, given that "any other interested party" is not defined in the Civil Code.[103] Furthermore, in *Khouzam (succession de)* the Superior Court continued to require gross negligence, bad faith, malice or chagrin for imposing liability on trustees,[104] which demonstrated the limits of doctrinal reform as a way of controlling the trustee.

Conclusion on Trustee Duties

The similarities in the content of trustee duties between express trusts in England, Japan and Quebec are an important reason behind the institution's effectiveness. The imposition of a consistent set of trustee duties achieves the effect of restraining the trustee's authority to freely dispose of property. Without a coherent and relatively comprehensive set of duties, trust law would not be effective in transforming a claimed trust relationship from one of outright trustee ownership.

Part IV: Modification of Property Rules

Effects of the English Trust on Property

The express trust is an institution designed to facilitate property owners' intentions with respect to property. Even if many of the features of the trust pertain to personal rights,[105] it is a requirement that the subject matter of trusts takes the form of property rights, or property-like rights such as a chose in action over money.[106] Furthermore, the trust has important third party effects which lie beyond purely personal rights, such as the ability to exclude non-beneficiaries from enjoyment,[107] and the remedies associated with overreaching.[108] While trust rules have their origins in the law of obligations,[109] these rules came to acquire proprietary characteristics over the course of the seventeenth and eighteenth centuries. This historical process was expressed through the propertisation of rules on privity, which came to be strongly associated with the estate and allowed to bind the trustee's successors in title.[110] The association of the trust with the doctrine of estates was matched by the hardening of conscience into a body of technical rules which controlled norms of conveyancing. This not only gave conscience a different character as it came to be used to resolve priority conflicts,[111] but the Chancery's modelling of equitable ownership upon the common law also led to the development of a parallel system of equitable interests in land which rested upon the doctrine of purchaser for value without notice.[112]

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[103] Civil Code (n 7), c 1290; Popovici (n 48) 161.
[104] BE 2004Be-864 (CS).
[105] William Swadling, "Property: General Principles" in Andrew Burrows (ed), *English Private Law* (OUP 3rd edn 2013) para 4.140.
[106] As Ibid. (fn 216) notes, many trusts textbooks do not notice that very often trust property consists of personal rights.
[107] Nolan (n 58).
[108] David Fox, "Overreaching" in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart 2002).
[109] Lionel Smith, for example, has argued that the trust is best understood as a massive extension of rules against third party interference in the trustee's performance of *in persona* duties. Smith, "Transfers" in Birks and Pretto (n 123) 134-5, 138.
[110] Foster (n 24); David Fox, "Purchase for Value Without Notice" in Paul Davies, Simon Douglas and James Goudkamp (Eds), *Defences in Equity* (Hart 2018) 56-57; Maitland (n 56) Lectures IX.
[111] Fox (n 108) 69.
[112] AWB Simpson, *A History of the Land Law* (OUP 2nd edn 1986) 206-207. Note in this subsection "common law" is used in its narrow sense in opposition to equity, whereas in the rest of the chapter the term usually refers to legal systems with roots in English law.

What, then, are the effects of the English trust on today's property law? This question is important because it demonstrates both the implications of the successful restriction of the trustee's authority, and the requirement for trusts to destabilise underlying property rules in order to be effective. The Chancery's involvement in property disputes as a result of its recognition of the trust was in many ways responsible for the fundamental architecture of English land law as collections of legal and equitable interests, even though many of these interests have little to do with the express trust.[113] The codification of English land law in 1925 has not eliminated the role of the trust, which continues to govern areas such as co-ownership, albeit in a heavily modified form. Although this was in many ways a separate story, statutory regulation also curtailed the application of equitable doctrines to real property, such as notice which now exists only in an "attenuated" form.[114] In 1996, the English legislator codified the trustee's duties in relation to land based on the rules of the trust for sale.[115] While the statutory trust in relation to land may differ from the traditional trust; by giving land trustees the rights of an "absolute owner",[116] and restricting the trustee's authority by subjecting them to the duty to "give effect to the wishes of… beneficiaries",[117] the legislator's choices support the view of the express trust adopted in this chapter.

Although many of equity's influences in English property law lie outside the realm of the express trust,[118] courts' willingness to recognise and enforce a wide range of trustee duties took place at a deep level in English property law.[119] When English land law was put on a statutory basis in 1925, the statute controlled trusts only to the extent of providing a rule of evidence which allowed trusts to be proved solely through signed writing, which meant that the presence of a trust allowed the *de facto* circumvention of the burdensome formality requirements needed to evidence ownership of a legal estate.[120] In some cases, even if the writing requirement were not met, a constructive trust might arise on the basis of the trustee's breach of trust.[121] Similarly, the impact of equity on personal property is deep rooted and allows the circumvention of the principle that ownership cannot be divided.[122] While the impact of equity on these areas can be characterised as a legal technique needed to achieve outcomes which are generally necessary in a modern legal system, rather than having an organic relationship with the trust, one cannot completely dissociate the modern shape of English property law from the Chancery's intervention in property law, which the proprietarisation of the trust necessitated.

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[113] In English land law the trust has historically played a key role in regulating successive and concurrent interests, specifically through strict settlements and trusts for sale before 1926. Stuart Bridge, Elizabeth Cooke and Martin Dixon, *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell 9th edn 2019) ch 9.
[114] Fox (n 108) 74.
[115] Bridge, Cooke and Dixon (n 113) 11-002.
[116] TOLATA (n 57), s 6.
[117] Ibid., s 11.
[118] Examples include equitable rules which deal with defects in formalities or the doctrine of conversion. Martin Dixon, "Confining and Defining Proprietary Estoppel: The Role of Unconscionability" (2010) 30 Legal Stud 408. *Fletcher v Ashburner* (1779) 1 Bro CC 497. Significantly, conversion was abolished in TOLATA (n 57), s 3.
[119] While the use as a historical antecedent of the trust was the dominant form of landholding prior to its abolition in the Statute of Uses 1536, the precise reasons for the Chancery's willingness to enforce trusts in the subsequent periods remain unclear. In its new form, trusts became a common feature in conveyancing by the end of the seventeenth century. Simpson (n 112) 200.
[120] Law of Property Act 1925, s 53(1)(b).
[121] Ben McFarlane, "Constructive Trusts on a Receipt of Property Sub Conditione" (2004) 120 LQR 667; Simon Gardner, "Reliance-Based Constructive Trusts" in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010).
[122] Michael Bridge, *Personal Property Law* (OUP 4th edn 2015) 48-49.

It is important to emphasise that the above observations do not imply a commitment to the view that the English express trust as it currently operates affects ongoing changes in English property law; certainly, many of these influences are historical in nature. What they do highlight, however, is the inutility in English law of the taxonomical categories which preoccupy civil lawyers in understanding concepts such as property.[123] In the absence of an "absolute" owner, "ownership" in England is defined by the relativity of title, which leads some scholars to view equitable interests both within and beyond the trust as "a proprietary interest ranking at the bottom of a hierarchy of proprietary interests".[124] Furthermore, unlike in civil law, English property law had not experienced a redefinition of "ownership" from the perspective of a natural or legal person's capacity, but rather rights continue to be defined in relation to a thing.[125] Thus, the express trust's ability to achieve significant effects deep inside the structure of property is seldom posed as a problem because the idea of an absolute property right upon which the trust encroaches does not itself exist. That said, from a civil law or functional perspective, property structures are clearly modified in the very manner in which equity interacts with common law.

Patrimony and Property in Japan and Quebec

In contrast, in many non-common law systems property law has a unitary structure. Although historically property law in Europe was highly varied, the strong reaction to "feudal" and invisible forms of landholding led to the dominance of a singular and unitary vision of property law in the form of the French *Code civil* 1804.[126] At the same time, the restriction of property rights to a circumscribed list in the form of the *numerus clausus* principle has fundamental implications for legal systems' ability to accommodate the trust. In this context, it is simply not possible to have a right which circumvents ownership: lesser property rights such as usufruits or servitudes may bind third parties, but they are granted by and are subordinate to the rights of the owner. The "absolutist" view of property rights can also be detected in the approach taken by civil law towards agency-type arrangements. In the law of mandate, for example, the mandator's ability to revoke a mandate is central to the institution.[127] Where property is transferred permanently out of the settlor's control, this is equally problematic because the civil law jurist simply sees the new titleholder as the owner.

(i) Japan

In Japan the proprietary effects of the trust are found in rules preserving the integrity and content of the trust fund. In the old Trust Act 1922, article 31 provided the powerful remedy of rescission, which for the leading Japanese trusts jurist Kazuo Shinomiya could not be explained as a personal right.[128] Unlike English law, Japanese law does not provide extensive proprietary remedies against

[123] Foster (n 24) has argued that taxonomical classifications from Roman law ought not be applied to a "quintessentially common law concept as the English trust".
[124] Marcia Neave and Mark Weinberg, "The Nature and Function of Equities" (1978-80) 1 U Tas L Rev 6, 24, 38.
[125] Zenati and Revet (n 52) 26.
[126] See for example Anne-Marie Patault, *Introduction historique au droit des biens* (Presses Universitaires de France 1989).
[127] For example C civ, art 2004 (France).
[128] The right of rescission posed significant problems for many authors writing on the East Asian trust, for example Ying-chieh Wu, who suggested that the rule was hard to justify. Wu, "Trusts Reimagined: The Transplantation and Evolution of Trust Law in Northeast Asia" (2020) 20 Am J Comp L 1, 20-21. The rule is not fundamentally different from *Actio Pauliana* available under many civil codes, which allows creditors to void prejudicial acts where the debtor knew that her act would be detrimental to the creditor or was outrightly fraudulent. Under Trust Act (n 35), art 27, the right has been restricted by requiring the third party to know that the trustee was dealing with trust property or that she was either acting in excess of her powers or grossly negligent.

third parties such as tracing and claiming. As Shinomiya highlights, the proprietary effects of the Japanese trust are largely internal to the trust, and have relatively limited impact on the trust's relationship with third parties.[129] Furthermore, the beneficiary's right is explicitly defined as a personal right in the new Trust Act.[130]

Like other trusts which rely on the patrimony theory, Japanese law sees segregation as the core feature of trusts.[131] While patrimony is arguably a part of the law of persons,[132] the definition is semantic as the concept pertains to the way in which property is held, and can be classified either way. Particularly important is the idea of Hiroto Dōgauchi, who has argued based on the English trust concept that trust remedies should be extended to similar arrangements in civil law such as the mandate, so long as the arrangement meets the requirement of segregation.[133] Dōgauchi's argument focuses on the idea that segregation should lead to a right in a protected fund. Thus, whether or not a right is defined as personal or property, patrimony indicates a willingness to accept the express trust's intervention into legal relations at a structural and interconnected level, which subverts the static view embraced under the early nineteenth-century model of ownership in the *Code civil*.

(ii) *Quebec*

Developments in Quebec reveal a fundamental willingness on the part of the Quebec legislator to adopt radical notions of property, building upon a historically open approach to property rights (*numerus apertus*).[134] In spite of a shared intellectual heritage in private law, Quebec property law is far from identical to French law. In Quebec, "patrimony" has become the mainstream view of ownership rights in Quebec law, in the sense that property rights are now synonymous with patrimonial rights.[135] In any event, while it is possible to criticise Lepaulle's view of the English trust as a fundamental misunderstanding, it is difficult to dispute that the emphasis on *flexibility* as the trust's key attribute was his creative contribution to the trust discussion.[136]

Even if the practical effects of the new Quebec concept of the "ownerless" patrimony are unclear, the departure from the alignment of ownership with personal status is an important change, which reflects an indirect English influence in the form of the widespread use of the express trust. While the Quebec trust is not truly "ownerless" as the underlying personal rights constituting the patrimony must still be held by a natural or legal person,[137] the idea that purpose may replace legal subjects as "owners" of property is taxonomically radical. While a full discussion of its practical implications lies beyond the scope of the chapter, the idea that property can be owned by purposes rather than living beings may help us discover new solutions to contemporary problems, such as the

[129] Lee (n 98) 622.
[130] Trust Act (n 35), art 2(7).
[131] For Scotland see Reid (n 51) 431.
[132] Gretton (n 51) 614.
[133] Hiroto Dōgauchi, *Shintaku hōri to shihō taikei* ("The principles of trusts law and the structure of private law") (Yuhikaku 1996).
[134] One example is the possibility to create an innominate real right (*droit réel innommé*) beyond the list of property rights in the Civil Code. Normand (n 9) 348.
[135] Popovici (n 48) 166 (fn 649).
[136] Ibid. 45-46.
[137] Alexandra Popovici, "Le patrimoine d'affectation: nature, culture, rupture" (LLM thesis, Université Laval 2012) 93.

use of Quebec's version of the charitable trust (*fiducie d'utilité sociale*) to protect the environment or to provide social housing.[138]

The classification of the Quebec "ownerless" patrimony as property rather than a part of the law of persons supports the idea that an effective express trust *always* modifies property law. Whereas the weaker pre-1994 express trust had fewer effects on property, the modern Quebec trust has taken a largely contrary position. While it may be the case that such discussions are of limited interest to English trusts lawyers interested in *how* the trust operates; from a comparative perspective, the Quebec approach reveals powerfully the potential which the trust—rooted in the English express trust in its spirit of user-driven flexibility rather than in a specific set of codifiable rules—has in transforming private law.

Conclusion

In this chapter, I have attempted to show that the effects of the English express trust are reproduced in Japan and Quebec through a restriction of the trustee's authority and a modification of civil law notions of property. While the Quebec trustee does not hold *de jure* title to property, in functional terms one can identify clearly that the trustee's legal title to property, burdened by similar sets of trustee duties, provides the clearest explanation of the operation of the express trust in all three jurisdictions. Similarly, an effective express trust affects property relations deeply, in other words at a level where the trust interferes with interconnected parts of the system. For English law, the pragmatic definition of the very notion of property means that a strict distinction between property and personal rights is not necessary for appreciating the effects of the trust within property law. For Japanese and Quebec law, the absolutist view of "ownership", a feature shared by most civil law property systems, presents a prima facie insurmountable obstacle to the development of the trust, as was clearly the case in Quebec before 1994. It is interesting in this regard that the theory of patrimony, whether characterised as a property or personal right, can be used to better rationalise the trust's intervention into property law. In doing so, the express trust both in Japan and Quebec has a significant impact on the ways in which property is held in the two jurisdictions, given that patrimony as a protected fund is inherently amenable to classification as property.

[138] On the wider application of "*affectation*" in Quebec property law, see Sylvio Normand, "Affectation et biens communs urbains" (Les communs urbains saisis par le droit, Montreal, Feb 2022).