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The Trust Facing Chilean Law: An Approach from the Perspective of the 'Rights Against Rights' Theory

El *trust* frente al derecho chileno: Una visión desde la teoría de "derechos contra derechos"

ERNESTO VARGAS WEIL*

Abstract

Understanding the common law trust has traditionally posed mayor difficulties for civilian lawyers. This article submits that, to a relevant extent, these difficulties stem from attributing excessive importance to metaphors that describe trusts as a form of "double" or "divided" ownership. As an alternative, it proposes using theories that explain trusts as a case of "rights against rights", arguing that this is as conceptually more precise and adequate to explain this institution to a Latin American audience. Based on this, the article analyzes some classic functional equivalents of the trust in the civilian tradition, such as companies and agencies, and two specific institutions of Chilean law: pension funds and investment funds.

Keywords: *Trust, Comparative Property Law, Comparative Private Law, Investment Funds, Pension Funds.*

Resumen

El *trust* es una de las instituciones del *common law* de más difícil comprensión para los abogados de la tradición civil. El presente artículo argumenta que parte de esa dificultad deriva de atribuir excesiva importancia a metáforas que describen al *trust* como un caso de "doble propiedad" o "propiedad divida". Como alternativa, propone el uso de la teoría de "derechos contra derechos" como una aproximación conceptualmente más precisa y adecuada para explicar el *trust* a una audiencia latinoamericana. En base a ella, analiza algunos equivalentes funcionales clásicos del *trust* en la tradición civil, como la sociedad y el mandato, y dos instituciones específicas del derecho chileno: los fondos de pensiones y los fondos de inversión.

Palabras clave: *Trust, Derecho de Propiedad Comparado, Derecho Privado Comparado, Fondos de Inversión, Fondos de Pensiones.*

> *"If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence, I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea"*
>
> F. W. Maitland

I. THE TRUST IN COMPARATIVE LAW

The trust is considered one of the greatest contributions of English law to the world. Its almost infinite flexibility has made it a central cog in the way much of the world's wealth is

* Spencer-Fairest Teaching Fellow in Law, Selwyn College, Cambridge, UK; Universidad de Chile, Chile (vargasweil@gmail.com). ORCID: https://orcid.org/0000-0001-7726-5224. Article received on July 1st, 2022, and accepted for publication on November 24th, 2022. Translated by Beatriz Larraín, reviewed by the author. I thank two anonymous referees for their valuable comments. I am especially grateful to Ignacio Méndez Letelier and Felipe Corvalán Lagos for sharing with me their experience and knowledge about Chilean investment and pension funds. The mistakes are mine.

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legally structured, from family-owned real estate to corporate bonds. [1] It is therefore not surprising that the trust is often described as a source of envy for lawyers of the civilian tradition,[2] and that rivers of ink have flowed seeking to explain this institution from a comparative perspective.[3]

However, the trust is still a legal institution that is extremely hard to grasp for lawyers trained in the civil law tradition.[4] There are several reasons for this. The first is that the concept of a trust is itself misleading. Its extremely flexible and adaptable nature makes it difficult to capture "its essence" in a definition that lends itself to a smooth comparative analysis.[5] In fact, even in the common law, the conceptual nature of the trust is the subject of ongoing controversy.[6] Nonetheless, there is a deeper reason that explains the perplexity of continental lawyers who are faced with the trust: the civilian tradition and the commom law have different "ontologies" or "conceptual maps" of property law.[7] To a large extent, this results from the fact that Anglo-American private law contains within itself a legal "subsystem" known as "equity" that is alien to the civilian tradition.[8] This subsystem admits the creation of certain rights - generally understood as interests of a proprietary nature - that behave in ways that cannot be easily accommodated within the civilian concept of a "real right". The most important of these interests is the right of the beneficiary of a trust.

It is considered conventional wisdom in comparative law that the trust introduces a form of "split", "fragmented" or "double" ownership, [9] resulting from equity and common law[10] giving different answers to the question of who owns a particular asset.[11] In Chile, for example, in the 1960s, both Fernando Fueyo and Sergio Fuenzalida explained the trust by pointing out that it is based on the existence of two owners, one for the common law and one for equity.[12] Explicitly using the metaphor of "double ownership," Fuenzalida even argued that, although the trustee is the "legal owner" of the property held in trust, he or she owns the relevant asset for the sole purpose of fulfilling the objectives of the trust, and that "the true owner" is the owner in equity.[13] In a similar vein, Daniel Peñailillo[14] has recently described the trust as a case of "dual or split ownership" in which ownership of the object is handed over with "distributed or shared powers" to two different persons, the trustee and the beneficiary.[15]

The insistence of continental lawyers in using the metaphor of "divided property" or "double ownership" has been pointed out as one of the main causes that explains the misunderstanding of the trust in the civilian world.[16] On the one hand, the metaphor

[1] See PISTOR (2019), pp. 42–45, 81, 211, from a critical perspective.

[2] BRAUN (2017), p. 121.

[3] For an overview, see BRAUN (2017). For a contemporary panoramic, see SMITH (2013).

[4] For the case of Chile, see GARNHAM (2010), pp. 19-20.

[5] DE WAAL (2012), p. 929; BRAUN (2017), pp. 121–122.

[6] See sections III and IV.

[7] GRAZIADEI (2017), p. 80.

[8] See section II(a). Another reason is the theory of *Estates.* See Ibid 74, 76–81; VAN ERP (2019), pp. 1045–1047; UWE KISCHEL (2019), p. 306.

[9] GRAZIADEI (2017), p. 88. For example KISCHEL (2019), p. 312.

[10] In a broad sense, "*common law*" refers to the Anglo-American legal tradition. Strictly speaking, it describes one of the sources of law of that tradition, namely, the "common law of the realm" which, as opposed to local laws and customs, applies to all subjects equally. The *common law* in this strict sense, is different from other sources such as statutory law (legislated law) and equity (the law developed or derived from the case-law of the *Court of Chancery*). In this regard, see section II(a). In general, from a comparative perspective, see KISCHEL (2019), pp. 227–228.

[11] VAN ERP (2019), p. 1047.

[12] FUEYO (1961), p. 13.

[13] FUENZALIDA (1963), p. 24.

[14] PEÑAILILLO (2019), Part Three, Chapter II, [10 C]. For this article I only had access to the digital edition of Thompson Reuters, which does not include page numbers. Therefore, I am indicating the relevant section in square brackets.

[15] PEÑAILILLO (2019), Part Two, Chapter I, [56 e].

[16] BRAUN (2017), p. 140; SWADLING (2016).

undermines the clear separation between real and personal rights of the civil law systems,[17] and is strongly counterintuitive for lawyers accustomed to a binary answer to the question of who owns each asset, based on a unitary theory of ownership.[18] On the other hand, the metaphor of "double ownership" is simply an imprecise description of the trust.[19] In fact, Anglo-American scholars often call to avoid using the term "equitable ownership" because the conceptual nature of the right of the beneficiary of a trust is fundamentally different from that of the right of the legal owner.[20]

In view of these problems, this article attempts to bring the trust closer to the Spanish-speaking audience of the civilian tradition (particularly, the Chilean) by avoiding using the misleading metaphor of double ownership,[21] that is "as likely to confuse as it is to enlighten"[22] To this end, it uses theories recently developed in comparative law and, especially, in English legal scholarship, that seek to overcome the image of double ownership by explaining the trust as a case of "rights against rights".[23]

The methodology of this paper slightly deviates from the classical functionalist paradigm of comparative law.[24] Despite analyzing some institutions of civilian systems that seek to fulfill the same function as the express trust,[25] its primary objective is to emphasize the conceptual and doctrinal elements that explain *how* this function is fulfilled differently in each system. Following a current trend,[26] the article takes English law as its main reference point. This is because its emphasis on maintaining doctrinal consistency over achieving utilitarian objectives, makes the conceptual *apparatus* of the trust more visible in England than in the United States,[27] the jurisdiction that has traditionally served as a reference for Latin America on this topic.[28] Finally, this article focuses almost exclusively on the case of the express trust, that is, trusts voluntarily created by a settlor. The main reasons for this are that this is the paradigm from which both English doctrine and comparative studies[29] usually address the trust,[30] and the only type of trust that has actually been discussed by Chilean legal scholarship.[31]

This is a theoretically modest contribution, albeit not unimportant. After the 2008 economic crisis, the trust has been increasingly targeted as an instrument that facilitates tax evasion and the concealment of assets, motivating a renewed discussion regarding the reasons that legitimize its existence.[32] Although Chilean law does not recognize the trust as such, understanding its conceptual structure can be useful for a number of practical purposes, ranging from a better understanding and development of national law on pension funds and investment funds, to the application of domestic private international law rules and tax law.[33]

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[17] See MILO (2012), p. 734.

[18] VAN ERP (2019), p. 1047. In Chile, the unitary theory of ownership is often associated with the principles of "abstraction" and "elasticity" of ownership. In this regard, see PEÑAILILLO (2019), Part Two, Chapter I, [52].

[19] See sections III and IV.

[20] EDELMAN (2013), p. 66.

[21] MATTHEWS (2013), pp. 316–317.

[22] SMITH (2008), p. 381

[23] See IV(b).

[24] In this regard, see ZWEIGERT & KÖTZ (1998), pp. 32-47 and MICHAELS (2019).

[25] For the approach of this article to the function of the trust, see III(b). On functional equivalents of the trust in general, see HANSMANN & MATTEI (1998).

[26] BRAUN (2017), p. 136. For example in Chile, BANFI (2019).

[27] In this regard, see MCFARLANE, 'Equity' (2021), pp. 551–552.

[28] See MALUMIAN (2010) and (2013).

[29] See section III(a).

[30] Other cases, such as "imposed trust" (see note 57), have practically not been studied from a comparative perspective. Braun (2017), p. 136.

[31] For example, FUEYO (1961), p. 11, FUENZALIDA (1963), p. 24, PEÑAILILLO (2019), Part Three, Chapter II, [10 C] or BANFI (2019).

[32] In this regard, see DAGAN & SAMET (2022).

[33] Latin American countries are not parties to the 1985 International Convention on the Law Applicable to Trusts and their Recognition, see https://www.hcch.net/en/instruments/conventions/status-table/?cid=59

Considering that there are practically no studies addressing the trust from a Latin American perspective,[34] and that the approaches to this subject by Chilean commentators are old,[35] imprecise,[36] or do not sufficiently emphasize the problems in the existing literature,[37] the objective of this article requires revisiting some basic conceptual aspects of the trust. To this end, the following section briefly explains the distinction between equity and common law and its relevance for the understanding of the trust, and section III describes the operation of a trust and its functions. Based on this, section IV discusses some recent attempts to conceptualize the trust in Anglo-American scholarship, with emphasis on the theory of rights against rights. Next, section V uses this theory to briefly analyze the main institutions of the civil law tradition that have been proposed as functional equivalents of the trust, with special reference to Chilean law. Finally, Section VI uses the theory of rights against rights to examine two specific cases of Chilean law: pension funds and investment funds. The paper concludes with a brief comment on the relevance of having a better understanding of trusts.

II. EQUITY AND TRUSTS

2.1 Equity and Common Law

In comparative law the trust has traditionally been considered as an institution exclusive to the common law tradition because its origins and development derive from equity, this is, from a set of rules and principles endemic to legal systems that trace their origins to English law.[38] Indeed, the trust is a product of the courts that ruled in equity, especially, the Court of Chancery, and it is not possible to understand it without knowledge of the historical origin of this jurisdiction.[39] Therefore, even if some national systems have developed trusts without having an equitable jurisdiction,[40] it is essential to briefly account for the origin of equity and its relationship to the common law.

In the Anglo-American world it is accepted that equity can only be explained in historical and jurisdictional terms.[41] According to the standard explanation, by the late Middle Ages, the courts applying the "common law" of England and Wales (this is, common law in the strict sense) [42] had become excessively rigid and complex, resulting in decisions that were perceived as manifestly inadequate. In the absence of statutory reforms to the system, parties dissatisfied with these rulings directly petitioned the King to give them, as grace, the just and "equitable" solutions that the common law denied them. The petitions were heard by the most important official of the Crown, the Chancellor, who was soon deciding the cases on his own behalf, with the assistance of a group of professional judges who eventually became the Court of Chancery. Recourse to morally-loaded notions such as "good faith" or "conscience" quickly became characteristic of equity, leading to more flexible solutions than those provided by the common law, in which the court typically recognized that, despite the defendant having no legal

[34] BRAUN (2017), p. 137, mentioning for Malumian's work discussed below as an exception.

[35] E.g., FUEYO (1961) or FUENZALIDA (1963).

[36] For example, the treatment of the trust by Daniel Peñailillo has at least two problematic elements. First, it fails to realize that the terminology of "legal owner and the equitable owner" and "dual or split property" are only metaphors (see PEÑAILILLO (2019), Part Two, Chapter I, [56 e] and Part Three, Chapter II, [10 C]), in circumstances that, technically, in the trust, there is only one owner: the trustee (see sections III and IV). Second, Peñailillo resorts to the idea of the separation of patrimonies (separación de *patrimonios)* to explain the position of the trustee *vis a vis* creditors, but "patrimony" (which can be most closely translated as "assets" or "estate") does not have a precise correspondence in Anglo-American law (as the author points out T.N.) (Part Three, Chapter II, [10 C]. This is also technically imprecise: the *common Law* does not have the notion of patrimony equal to that of the civil law (see Section V).

[37] For example, Cristian Banfi, who closely follows contemporary English literature, particularly Virgo, does not incur in the errors of Peñailillo, but neither does he account for its problems. See BANFI (2019).

[38] For example, DE WAAL (2012), p. 927; KISCHEL (2019), p. 312.

[39] SWADLING (2013), p. 210.

[40] Typically mixed jurisdictions, such as Scotland. See GRETTON (2000).

[41] MCFARLANE, 'Equity' (2021), p. 549, referring to MAITLAND & BENTHAM. Accounts of this history can be found in standard works, such as HACKNEY (1987), pp. 15–20, 32–33 or WORTHINGTON (2006), Chapter 1.

[42] See note 10.

obligation to the claimant, it would "affect his conscience" not to fulfill what he had promised to the claimant.[43]

Today virtually all common law jurisdictions have consolidated the administration of both jurisdictions into a single court system.[44] However, from a substantive perspective, both sets of rules remain distinguishable. To quote a well-known metaphor, "the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters ",[45] and attempts to substantively merge both "streams" have not succeeded.[46] The discrepancies between the two currents are solved in favor of equity, giving rise to a dual system, composed of a general and self-sufficient subsystem (the common law), capable of answering all the questions that are presented to it, and a supplementary fragmentary and dependent subsystem (equity), which can only operate on the basis of the common law. Traditionally this is signified with the aphorism "equity is gloss to the common law". From a more conceptual perspective this has been described by pointing out that equity is a "meta-law.[47]

2.2 Trusts as Creatures of Equity

The general principle is that "equity follows the (common) law". Therefore, rights that have a proprietary nature according to the common law also have that effect in equity. However, the property rights recognized by both subsystems also have important differences. To begin with, the list of equitable property rights is longer than that of common law property rights. For example, the common law does not recognize the right of the beneficiary of a trust as a right with effect *vis-à-vis* third parties, but equity does. Second, in equity, proprietary rights behave differently than in the common law, since, in principle, equitable property are not enforceable *erga omnes*. Thus, in general, the rights of the beneficiary of a trust do not affect "strange" third parties, and only might become enforceable against "successor in title", if certain conditions are met.[48] Finally, the acquisition and loss of property rights recognized is more permissive in equity than in common law, because they require fewer formalities to be constituted and extinguished.[49] For example, a settlor may declare a trust without any formality, but the beneficiary is also exposed to losing her right in a multiplicity of scenarios, such as by the simple sale of the trust property by the trustee to a third party (see next section).

The origin of the trust derives from this interaction between common law and equity. At the end of the Middle Ages, for a series of practical reasons that cannot be explained here,[50] some owners (B) transferred their property to a person of their confidence (A) so that A holds it *for the use* of another party, either the same B or a third party (B_2). Legally, the transfer did not create any duty for A, who was only bound to B or B2 by his honor. In some cases, A betrayed this trust, refusing to return the property to B or transferring it to a third party (C), without B's authorization. When B or B2 resorted to the common law courts, such courts rejected their action, because according to the common law, A (or C) had no duty to B or B2. Faced with such grievance, the victims of A turned to the King and then the Lord Chancellor for a solution in equity, arguing that the conscience of A (or C) was compromised. Over time, the protection that this jurisdiction granted to victims on an *ad-hoc* basis (*i.e.*, as grace), became regular, recognizing a subjective right of an "equitable nature" to B or B2. By the XVI century, the widespread use of this technique to avoid feudal duties, hide the "true owner" of land and hide assets from creditors led Henry VIII to abolish the institution (*Statute of Uses* 1535).

[43] In general, see AGNEW (2018).

[44] For example, in New York, this happened in 1820, in England between 1873-1875 and in New South Wales in 1972.

[45] The metaphor is usually redirected to the first edition of ASHBURNER'S PRINCIPLES OF EQUITY (1902).

[46] For a classic discussion of fusion, see BURROWS (2002) and WORTHINGTON (2006), Chapter 1 (for) and SMITH (2017) and MCFARLANE & MITCHELL (2015), pp. 9-12 (against).

[47] For example, SMITH (2017) and (2021).

[48] In this regard, see note 63.

[49] Regarding the contribution of equity to English property law in general, see SWADLING (2013), p. 180.

[50] In Chile, the historical development of "uses" that preceded the *trust* has been accounted for by FUENZALIDA (1961), pp. 18-21.

However, in less than a century, the creativity of lawyers revived this practice in the form of the modern trust.

III. STRUCTURE AND FUNCTION OF THE TRUST

3.1 Functional Structure of the Trust

As a result of its eminently pragmatic and casuistic origins, the trust did not develop on the basis of clear and consistent concepts. Indeed, common law legal scholarship often states that there is no area of law where there is as much confusion about basic definitions as there is in the law of trusts. [51] An initial difficulty identified by doctrinal approaches is that there is no single concept of a trust, but a variable collection of institutions that in one way or another are described, at least sometimes, as "trusts". These can take a multiplicity of forms and be composed of different elements, so that establishing a single concept of a trust that covers all cases, risks not giving any clear indication of what is to be explained.[52] Therefore, instead of trying to define it from the outset, Anglo-American authors usually approach the trust by describing the operation[53] of a paradigmatic case, typically an express trust, to which elements of other types of trust are then added or subtracted.[54] This section follows a similar logic. A good starting point to explain the trust from this perspective is that, in common law jurisdictions, property rights can not only be held outright (*i.e.*, for the benefit of the holder), but "in trust" for another person[55]. The person who holds the right is called the trustee and the person in whose interest the right is held is known as beneficiary. Thus, in Graham Virgo's explanation, the trust would be composed of two elements: first, a person who holds a right in favor of the beneficiary and, second, the duty in equity of that holder to exercise that right in favor of the beneficiary.[56] In the case of the express trust, this situation arises from the intention of the holder of a right or "settlor" to declare herself as trustee of such right in favor of the beneficiary (self-declaration trust) or transfer it to a trustee so that the latter holds the right for the benefit of the beneficiary (trust by transfer). [57] As a result of an "unfortunate historical convention" the trustee is often called "legal owner" (in the sense of owner in common law) and the beneficiary "equitable owner" or "beneficial owner" (in the sense of owner in equity).[58] Hence the image of the trust as a case of "double " or "divided" ownership that has penetrated so deeply among the lawyers of the civilian tradition.

As owner, the trustee is entitled to manage and dispose of the trust property. However, because she holds the property for the benefit of the beneficiary, if she exercises that right negligently she may be liable to the beneficiary for breaching the trust.[59] However, this does not imply that the trustee does not own the trust property. A point that is often overlooked in comparative analyses is that it is of the essence of the trust that placing a right in trust does not

[51] For example, PARKINSON (2002), p. 657, referring to Australia and England.

[52] WEBB & AKKOUH (2017), p. 1. In the same line, VIRGO (2020), pp. 40 ff.

[53] For example, in Australia, MEAGHER & GUMMOW (1997), p. 3

[54] For example, in England, WEBB & AKKOUH (2017), pp. 1-2 and Chapter 2. Other standard works follow a similar approach, but describe the paradigmatic case as the "essence" of trust. For example, VIRGO (2020), p. 39.

[55] There are also others which are not relevant here, see WEBB & AKKOUH (2017), p. 210.

[56] VIRGO (2020), p. 40. I have omitted Virgo's references to the purpose trust. It is important to emphasize that rights had in trust don't necessarily have to be legal property rights. It is possible to have both personal and equitable rights in trust. The latter case gives rise to a *sub-trust*. For simplicity, I am focusing on the simplest case of legal property rights held in trust.

[57] In other cases, such as "imposed trust", the trust does not have its origin in the intention of a settlor, but in the direct operation of law. This category consists mainly of ways of protecting those who have made an economic contribution towards de acquisition of a property right to which they do not have legally title under the common law, *stricto sensu*. For example, the seller of movable property that has received the price but not yet transferred title to the buyer, holds those assets in trust for the latter (*The Aliakmon* (1986)). Similarly, where both spouses have directly financially contributed to the purchase price of immovable property, but only one of them appears as the owner in the land register, the latter hold legal title to the property for his own benefit and that of the other spouse (*Williams & Glyn's Bank v Boland* (1981).

[58] LAWSON & RUDDEN (2002), pp. 86–87.

[59] LAWSON & RUDDEN (2002), pp. 86–87..

alter the nature of such right.[60] Thus, although the beneficiary of a trust is entitled to the benefits of the trust, she is generally not able to access the trust property, except under the terms set out by the settlor. The beneficiary may only exceptionally gain direct access to those assets by terminating the trust under the *Saunders v Vautier* rule.[61] Under the same logic, the trustee also remains the sole owner of the property in trust against third parties, being (in principle) the only party with a right to exercise the proprietary remedies associated with it.[62] Thus, if an "alien" or "strange" third party (X) damages the property that the trustee (A) holds in trust for B, the latter cannot sue X. B only has a direct claim against A, derived from A's duty to protect the property, for example, by suing X for damages, in which case the compensation obtained will also be held by A in trust for B.[63] This characteristic of the beneficiary's right is obscured by the language of dual ownership. In reality, there is only one party with a title to the trust property: the trustee.[64] The implications of this will be developed in the next section.

The beneficiary can assert her right directly against third parties only in very limited circumstances. The first is when the trustee transfers the trust property in violation of its rules.[65] In this case, the general position is that the beneficiary has a direct action against the successor in title, unless the latter has acquired in good faith, for value, and without actual or constructive knowledge of the trust. However, the effect of this claim is limited: third parties do not assume the duties of the trustee but are only condemned to return the property to her or to the person designated for said purpose. Moreover, in many contexts, there are rules of statutory law that allow the purchaser to acquire the property free from equitable rights, even if the trust property has been transferred in breach of the rules of the trust.[66] For example, in England, the institution of overreaching allows the buyer of land to acquire free of any interest held in trust, by making payment of the price to two trustees.[67] The second scenario is the insolvency of the trustee. In this case, the rights that the insolvent debtor has in trust are nor not vested in the trustee in bankruptcy and, thus, are not liable to the payment of the trustee's debts.[68]

3.2 Practical Function of the Express Trust

Due to their versatility, trusts can be applied to a number of practical purposes. According to the classical method of comparative law, understanding the trust would require determining those functions and then investigating which institutions fulfil the same role in civilian systems. According to Hansmann and Mattei, the problem is that comparative studies have traditionally focused on understanding the doctrinal aspects of the trust rather than elucidating its function. In their view, this derives from the fact that common law scholarship has associated the trust with the creation and enforcement of fiduciary duties, in circumstances that its true function is to facilitate the partitioning of assets into bundles that can be conveniently pledged to different classes of creditors.[69]

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[60] In this regard, see SWADLING (2013), p. 211.

[61] *Saunders v. Vautier (1841)* established that an adult beneficiary, sound of mind and with an absolute right can wind up the trust and keep the property, even against the terms established by the settlor. This implies that, in a fixed trust, that is, when the trustee has no discretion as to the distribution of benefits, the beneficiary can only wind up the trust if her right can be determined and settled completely independently of the rights of the other beneficiaries. In any other case, including the discretionary trust, that is, when the trustee has discretion regarding the distribution of the benefits, the rule of *Saunders v. Vautier* can only be exercised by the unanimity of the beneficiaries, provided that all are adults and sound of mind.

[62] MATTHEWS (2013), pp. 316–317.

[63] See *Lord Compton's Case* (1568); *Earl of Worcester v Finch* (1600); *The Aliakmon* (1986); *MCC Proceeds Inc v Lehman Bros* (1998). In England, this rationality has recently been challenged in *Shell v Total* (2010). However, *Shell* has been widely criticized. See EDELMAN (2013); MCFARLANE ET. AL. (2021), p. 192.

[64] SWADLING (2013), pp. 211–212.

[65] If the property is transferred without violation of the trust, successors in title acquire free from rights held in trust thanks to the institution of overreaching. See note 134.

[66] SWADLING (2013), p. 213.

[67] ff. 2 and 27 Law of Property Act 1925. For *Overreaching* in general, see note 134.

[68] SWADLING (2013), p. 214.

[69] HANSMANN & MATTEI (1998)

The approach of this article is slightly different. Rather than focusing on the trust's ability to dissociate the assets the trustee holds in trust from those she hold for her own benefit, this article focuses on a more specific function of the express trust, namely, allowing arrangements to manage wealth through an administrator who also has legal title to the asset.[70] The practical motivations for separating economic benefit, on the one hand, from title and administration on the other, are varied. These include the management of pension funds, investment schemes, charitable purposes and care of vulnerable family members.[71] However, sometimes they also include less laudable goals, such as hiding assets from creditors or income from tax authorities.[72] The decisive point for this article is that the express trust allows the separation of the legal administration of an asset from the economic perception of its profits. The next section (IV) explains the conceptual apparatus that makes this split possible, and then compares it with the dogmatic structure of some institutions that fulfill a similar function in Chile (sections V and VI).

IV. THE PROBLEM OF THE LEGAL NATURE OF THE TRUST

In the Anglo-American context, the particular structure of the trust has motivated an endless debate about the best way to explain the trust from to conceptual perspective.[73] The heart of this controversy is whether the right of the beneficiary of a trust is best explained as a personal or a property right. To a large extent, this discussion results from the fact that the trust, especially the right of the beneficiary, cannot be comfortably categorized within an orthodox division between personal and real rights.

4.1 The orthodox view

In England, commentators usually characterize property rights by comparing them with personal rights and demonstrating that the former are capable of imposing duties on third parties where the latter fail, typically in cases involving successors in title.[74] Operating on the basis of this rationality, the so-called "orthodox approach"[75] holds that the rights of the beneficiary of a trust are property rights because they possess the two most characteristic "incidents" of these types of rights: first, while they exist, they can (eventually) be enforced against third parties who receive the trust property or come into contact with it and, second, in case of insolvency of the trustee, they give the beneficiary priority to access the trust property. For the orthodox view, this is sufficient to conclude that the right of the beneficiary of a trust is proprietary in nature and justifies describing it as an "equitable title" to the trust property. [76] At the same time, this explains the persistent use of property vocabulary ("*equitable estate*", "*equitable ownership*", etc.). to refer to the right of the beneficiary of a trust.[77]

However, the use of proprietary concepts is not entirely compatible with the way in which the right of the beneficiary of a trust behaves *vis-à-vis* other third parties, in particular extraneous or "strange" third parties who interfere with the trust property. If the rights of the beneficiary of a *trust* are proprietary, how is it possible that they are not enforceable against these third parties? This dilemma has led part of Anglo-American scholarship to describe the trust as a legal institution situated on the border between the law of property and the law of obligations.[78]

For the orthodox view, the rights of the beneficiary are not really an intermediate case. For example, Richard Nolan holds that it is wrong to attempt to subject the rights of the

[70] See SMITH (2008) and MATTHEWS (2013).
[71] SWADLING (2013), p. 214.
[72] See PISTOR (2010), p 211; DAGAN & SAMET (2022), pp. 2–3.
[73] HOHFELD (1913), p. 16.
[74] E.g, BRIGHT (1998), p. 529; MCFARLANE ET. AL (2021), pp. 151–153, 195–196.
[75] PATRICK (2002), p. 657, describing this approach.
[76] E.g, WEBB & AKKOUH (2017), pp. 22-24
[77] In this regard, see PATRICK (2002), p. 657.
[78] E.g., SWADLING (2013), p. 210. Another current, historically associated with Frederick Maitland, that is not addressed in this article, argues that the rights of the beneficiary are essentially personal.

beneficiary of a trust to the mutually exclusive categories of personal and real rights. Noting that, normally, the duties that trusts impose on successors in title only consist in the duty to return the trust property to the trustee (or the person appointed for this) when it was transferred in violation of the rules of the trust (see previous section), Nolan argues that the rights of the beneficiary are, in reality, a complex combination of property and personal rights. In his view, the beneficiary has, first, a negative right, of a proprietary nature, consisting in the power to exclude everyone else from the benefits of the trust property and, second, a positive right, which may or may not be proprietary, consisting in the power to access the benefits of the trust property, typically, only through the trustee.[79] According to critics of the orthodox view, the most obvious flaw of this thesis is that it is unable to explain cases in which the trust property consists of an intangible asset. For example, when the trustee holds a bank account in trust for the beneficiary, the former does not have a right over any form of tangible property. He merely has a claim against the bank; and to speak of a right of exclusion of the beneficiary in a case like this, does not make much sense. [80]

4.2 Relativization of orthodox doctrine and persistent rights theory

Other approaches relativize the distinction between property and personal rights. In England, Graham Virgo has argued that the rights of the beneficiary are of proprietary nature, but that they are "modified property rights", which are weaker and have a subsidiary nature with regards to legal rights. [81] In the United States, Merrill and Smith placed the trust on a *continuum* between real and personal rights they call the "property/contract interface." At one pole of the continuum are "pure" *in rem* rights, meaning rights that impose a duties (typically of abstention) on numerous and indefinite third parties. The other pole is composed of "pure" *in personam* rights, this is, rights that give rise to few and specific duty holders. Because numerosity and definiteness are contingent variables, the interface is made of two intermediate cases that Merrill and Smith explain using a Hohfeldian terminology.[82] One of these cases, which includes the rights of the beneficiary of a trust, are "*quasi-multital* rights", that is, rights that impose duties on singular persons that are indefinite at the time of their creation.[83]

Recently, a strand of theoretical and comparative research[84] has gone further, proposing a new conceptual understanding of equitable property rights that seeks to explains the particular nature of the trust without resorting to notions such as "double ownership", "modified property rights" or the logic of a *continuum*. In particular, in England, authors such as Ben McFarlane and Robert Stevens have argued that equitable property rights, including the rights of the beneficiary of a trust, should be considered as a third type of rights, called "persistent rights".[85] They argue that these rights are fundamentally different from both property rights (i.e., real rights recognized by common law) and obligations, and thus transcend the traditional property-obligations divide. The core of their view is that equitable rights are neither rights against things nor rights against persons, but "rights against rights": when B has a right against a right of A, *prima facie,* whoever then acquires the right of A may become subject to a duty to B.[86] In the words of the High Court of Australia,[87] equitable rights are better described as interests "impressed upon" a property right, than "carved out" of it.[88]

In this, McFarlane and Stevens see the key to explaining why the right of the beneficiary of a trust can bind successors in title (C), but not strangers (X). When A holds a property right on trust for a beneficiary (B), B does not hold a right in the thing, but a right against A's right

[79] NOLAN (2006).
[80] MCFARLANE & STEVENS (2010), p. 3.
[81] VIRGO (2020), pp. 51-52.
[82] See HOHFELD (1913).
[83] MERRILL & SMITH (2001), pp. 774, 777, 785.
[84] SMITH (2008), p. 392.
[85] See MCFARLANE (2008a), pp. 23–25; MCFARLANE, (2008b); MCFARLANE & STEVENS (2010).
[86] MCFARLANE & STEVENS (2010), p. 1.
[87] See DOUGLAS & MCFARLANE (2013), pp. 240–241.
[88] Per Brennan J., *DKLR Holding* (1982).

in the thing. Because B has no rights in the thing, B cannot exclude strangers (X) from it, critically depending on A for that purpose. However, B's right against the trustee (A) does, *prima facie*, bind a party who later acquires the right from A (i.e., C): in that case B has a right against the *right* of C in the thing.[89]

Over the past decade, the rights against rights theory has been widely discussed in England. While critics hold that it fails to explain some elements of the trust, especially the principle that "a trust will not fail for want of a trustee" and that it does not really make it easier to understand the trust, the rights against rights theory has been recognized for its ability to consistently explain the effects of the trust *vis-à-vis* different third parties. [90] This ability to explain (part of) the operation of the trust without resorting to the metaphor of double ownership, provides an extremely useful conceptual framework to approach this institution from a comparative perspective.[91] That is the purpose of the next two sections.

V. FUNCTIONAL EQUIVALENTS OF THE TRUST IN THE CIVIL LAW TRADITION

5.1 Trust and Civil Tradition

Just as the "anti-conceptualist" nature of common law property law facilitated the development of the trust for practical reasons, the highly conceptual structure of continental private law makes it difficult to accommodate the mechanics of this institution within its tradition.[92] In particular, the trust seems to violate elements that constitute real "taboos" of civilian systems, especially the unitary theory of ownership.[93] Beyond its different national formulations, this conception states that the owner is always one (even if in co-ownership) and that her right is absolute. The owner always has the broadest powers over the thing and is only subject to the limits established by law or the rights of others.[94] According to the principle of *numerus clausus* of property right, this absolute ownership can only be fragmented by the real rights authorized by law.

The idea that a full owner holds her property for the benefit of a third party seems an oxymoron for this way of understanding ownership: if the trustee is a full owner, then she must be able to exercise all rights "discretionally"[95] and the beneficiary cannot have any real right. Conversely, if the beneficiary has a proprietary right in the trust property, then the trustee cannot be a full owner. [96] For the same reason, some authors add that the trust is also incompatible with the civilian principle of *numerus clausus* of property rights.[97]

However, this view is not accurate.[98] As noted above,[99] under the rationality of the common law tradition, the trustee is the sole owner of the property she holds in trust and she can exercise her rights over it fully and completely. As the theory of rights against rights explains, this derives from the fact that the rights of the beneficiary do not affect the thing, but the way in which the trustee must exercise her rights in it. Therefore, contrary to what many lawyers of the civilian tradition tend to think, including Fueyo, Fuenzalida and Peñailillo, the trustee is no less owner than who holds property outright: the trust does not give rise to a case of "double ownership" or "concurrent properties" between a "legal" owner and an "equitable" owner, but imposes on the owner *a duty regarding how to exercise that right*.

For the same reason, the creation of rights behind the trust curtain does not affect the principle of *numerus clausus* either. As the rights against rights theory explains, the rights of

[89] MCFARLANE & STEVENS (2010).
[90] See WEBB & AKKOUH (2017), p. 22; VIRGO (2020) pp. 50-51
[91] For example, SMITH (2008).
[92] MATTHEWS (2013), p. 313.
[93] HANSMANN & MATTEI, (1998), pp. 435, 441; SWADLING (2016).
[94] See Art. 544 of the *Code Civil*, Art. 582 of the Chilean Civil Code or § 903 BGB.
[95] Using the words of Art. 582 of the Chilean Civil Code.
[96] MATTHEWS (2013) 318–321. In this regard, also see SWADLING (2016).
[97] Overall, SPARKES (2012); in Latin America, MALUMIAN (2010), p. 145.
[98] From a comparative perspective, referring to both unitary domain theory and *numerus clausus*, see BOLGÁR (1953).
[99] See III(a).

the beneficiary never affect "strange" third parties and only have limited and exceptional effects with respect to third parties who are "successors in title". Thus, the trust does not really give rise to atypical real rights:[100] the limitations that the trust imposes on the trustee are internal and do not affect her position *vis-à-vis* third parties. In other words, the trustee is a full owner "outwards", but she is a limited owner "inwards", because equity affects her "conscience", not the asset held in trust. Ultimately, this derives from the supplementary nature of equity: the (equitable) right of the beneficiary is not competitive with the (legal) right of the trustee, but derivative from it (it is a "right against a right"). Therefore, the trustee can only assert her right against third parties with a right in the trust property whose conscience is compromised, such as successors in title with knowledge of the trust or the private creditors of the trustee.[101]

5.2 Classic Functional Equivalents of the Trust

The absence of a supplementary system such as equity in the civilian systems makes it hard to accommodate the trust in within the conceptual structure of this tradition. However, this does not imply that civil law countries do not experience the same problems nor solve them with functionally equivalent methods.[102] Nowadays there is consensus that the most important functional contribution of the express trust is to provide private parties with a method to separate title to the economic benefits of an asset from its administration, and that much of this can be achieved through institutions of the civilian tradition such as agency (*mandato*), company law (*derecho de sociedades*), or the theory of special purpose patrimonies (teoría del *patrimonios de afectación*).[103] However, in order to bring the Latin American public closer to the trust, it is necessary to move from a purely functional analysis to a conceptual one. It is not enough to discover that an analogous result can be obtained by other means; what is critical is to determine *how* that outcome is achieved.[104] Such an approach reveals that none of the aforementioned civilian institutions has a conceptual structure similar to that of the trust.

A detailed analysis of each of these institutions exceeds the possibilities of this article, but their common denominator is that they all critically depend on the notion of patrimony, which is alien to the common law tradition.[105] In civilian systems,[106] including Chile,[107] the patrimony is traditionally conceived as a container distinct from its content, composed of the totality of a person's rights and obligations. This dogmatic construct is what allows the operation of agencies with powers to act on behalf of the principal (*mandato con representación*), companies (*sociedades*) and theories that propose the recognition of special purpose patrimonies, and is critical for the general right of creditors to hold all the assets of their debtor liable to pay their credits (*derecho de prenda general de los acreedores*).[108] The agency with powers to act on behalf of the principal is based on the idea that agents act directly on the patrimony of the principal, binding the assets of the latter and not their own.[109] In the case of agents without

[100] DOUGLAS & MCFARLANE (2013), pp. 240–241; MCFARLANE & DOUGLAS (2022).

[101] MATTHEWS (2013), pp. 316–318.

[102] MATTHEWS (2013), p. 331.

[103] HANSMANN & MATTEI (1998). In general, see MATTHEWS (2013), pp. 336–337; SMITH (2008). In Chile, it is tempting to think that "fiduciary property" regulated by Articles 733 to 767 of the Civil Code (*propiedad fiduciaria*) fulfills a function analogous to that of the trust. However, that is incorrect. Civilian fiduciary property is ownership subject to a condition subsequent and, thus, does not lend itself to separating administration from economic benefit. Before the condition occurs, the beneficiary does not really have any rights, but a mere expectation. If the condition is not met, full ownership consolidated in the fiduciary. It the condition is met, full ownership consolidates in the beneficiary. In comparative law the point has been made by MALUMIAN (2010), p. 153.

[104] MCFARLANE (2013), p. 512.

[105] SMITH (2008), p. 383, referring to the special purpose patrimony. This is often overlooked by authors seeking to explain the trust using the concepts of Chilean law. For example: FUEYO (1961), p. 13 or PEÑAILILLO (2019), Part Three, Chapter II, [10 C].

[106] GRETTON (2000) pp. 308–317; SMITH (2008), pp. 383–384.

[107] DUCCI (2010), p. 140.

[108] For Chile, see in general, DUCCI (2010), pp 144–148, 166–167.

[109] See Art. 1448 and 2151 Civil Code.

powers to act on behalf of the principal (*mandato sin representación*) in turn, the agent acts on her own patrimony and the principal has no right to the assets contained therein, until the account is settled and the relevant proceeds transferred to the principal.[110] Therefore in this case, the principal has no protection against the creditors of the agent nor right of persecution over the property held by the agent. Finally, in all cases of practical relevance, companies are legal entities distinct from its partners or shareholders which, as such, also have a separate patrimony, containing its own rights and obligations.[111]

In Latin America, the most explored route to explain the trust from a civilian perspective is based on the doctrine of special purpose patrimonies. The proponents of this theory seek to break with the classic idea[112] that a person can have only one single patrimony that responds for all her debts, in favor of a vision that accepts that the one person can have multiple separate patrimonies that are liable to different debts.[113] Authors such as the Frenchman Pierre Lepaulle[114] have seen in the special purpose patrimony theory a way to explain the trust from the civil law perspective. This idea had great influence in Latin America, where a number of jurisdictions have used it to create institutions that some authors have reputed as "true" trusts.[115] However, as Lionel Smith points out, the trust cannot be explained from this perspective for the simple reason that its legal nature only admits having *assets* in trust, but not *liabilities*.[116]

However, at first sight, the parallel with the special purpose patrimony is promising because, as in the case of the trust, the debtor's personal creditors cannot reach the assets that the debtor has in her separate patrimony. However, the same is not true of trust obligations. For example, if the trustee incurs debts in relation to the assets she holds in trust, the creditors do not have an action against the trustee, as such, that may be executed on the trust property. Creditors of debts acquired while executing the trust simply have an action against the trustee, as a person, executable in the assets that she holds in her own benefit. This does not imply that the trustee has to finally respond with her own assets of the debt incurred while managing the trust property, as she can pay with the assets she holds in trust or be reimbursed against them. However, creditors of the trust do not have direct access to them. In the event that the personal assets of the trustee are not sufficient to cover the debts she incurred by reason of the trust, the creditors may force the trustee to use those assets to pay their credits, but they cannot access them directly. [117]

On the other hand, the beneficiary also does not have a direct right to the assets hold in trust for her. Her right to these assets is derivative and dependent on the rights of the trustee. What the beneficiary has, is a *right against the rights* of the trustee which, ultimately, responds historically and conceptually to the distortion of an obligatory relationship operated by means of equity that cannot be explained by the notion of patrimony. Both the beneficiary of the trust and its creditors can only access the assets of the trust through the trustee:[118] the rights hold in trust are fully owned by the trustee, but they have the right of the beneficiary "printed"[119] on them and, therefore, are immune to the trustee's creditors, and, under certain circumstances, recoverable from third parties.

VI. Special Cases in Chile: Pension Funds and Investment Funds

In jurisdictions of the civil law tradition, classic institutions such as agency, companies or special patrimonies do not exhaust the tools that contemporary legal systems make available to

[110] Stitchkin (2008), pp. 433–436.
[111] For the case of Chile, see Ducci (2010), pp. 166–177; Puelma (2011), pp. 98–101.
[112] Generally attributed in Chile to Aubry and Rau.
[113] Figueroa (2008), pp. 97–98.
[114] Lepaulle (1931).
[115] See section VI.
[116] Smith (2008), p. 394.
[117] For this explanation, see ibid. 386–388.
[118] ibid. 390–393, 395, 398.
[119] Using the words of the *High Court* of Australia in *DKLR Holding* (1982).

parties that wish to separate the legal administration of an assets from its economic benefits. For decades, different civilian jurisdictions have adopted rules or accepted practices that, to a greater or lesser extent, allow to replicate patrimonial structures similar to the express trust.[120] According to Nicolás Maluminan, following the experience of the United States, a series of Latin American jurisdictions, not including Chile, have legislatively created a "*fideicomiso*" or "trust" based on the theory of the special purpose patrimony[121] that he describes as a case of a "true" trust.[122] Although Chile has not followed this trend, it has developed similar tools that should be considered.[123] Among recent legislative developments, probably the most interesting one are pension funds created by Legislative Decree 3,500 of 1980 (DL 3,500) and investment funds currently regulated by the Investments Funds Act 2014, commonly known as "Ley única de fondos" (LUF) (Act 20,712) .

6.1 Pension Funds

DL 3,500 introduced in Chile a pension system based on the capitalization of social security contributions in individual funds managed by professional pension fund administrators (*administradoras de fondos de pensiones)* or "AFPs" (Art. 1° DL 3,500). A central element of this system is that "*[each] Pension Fund is a patrimony independent and distinct from that of the Administrator, without the latter having ownership over it*" (Art. 33 DL 3,500). Therefore, although DL 3,500 does not expressly state that affiliates of the AFP have "ownership" over their pension funds, it is generally accepted that, from its rules it can be "*inferred, with crystal clarity, that (...) each affiliate owns the funds that enter his individual capitalization account and that these funds constitute an independent patrimony, different from the assets of the company managing those funds*".[124]

The ownership that affiliates have over the funds has two key implications for the structure of the Chilean pension system: first, it clearly separates legal ownership of the funds from its management and, second, it extends the constitutional protection of property to the rights of the affiliates in the funds. This design was part of a larger institutional framework that sought to protect this system from legislative reforms.[125] However, in recent years the property right of affiliates over their funds has been the cornerstone of at least two attempts to dismantle the AFP system: the public interest litigation of the group called "No + AFPs" and the constitutional reforms that authorized successive withdrawals from pension funds during the Covid-19 crisis.[126]

The technical aspects of the rules that regulate ownership over the funds and link them to specific patrimonies are conceptually confusing. On the one hand, the reference of Art. 33 DL 3,500 to funds as a "patrimony" suggests that pension funds are special purpose patrimonies,[127] which is consistent with the provisions of Art. 35 DL 3,500 that states that the value of the pension funds is expressed in shares or "quotas". According to this, title to the investments would be radiated in the pension funds as "special patrimonies" and the affiliates would hold shares or "quotas" in them. This also seems consistent with the tax treatment of the revenue of the funds.[128] However, this is not in line with the understanding of "patrimony" provided by DL 3,500 itself, according to which patrimony is simply "*the difference between*

[120] For example, the "*security fiducie*" in France. BARRIERE (2013).

[121] MALUMIAN (2010).

[122] MALUMIAN (2013). Regarding the meaning "propiedad fiducaria" or "fiedeicomiso" in Chile, see n 103.

[123] In the 1960s, Fernando Fueyo dealt with the case of trust commissions by banks (comisiones de confianza a cargo de bancos) (FUEYO, 1961) and, recently, Cristián Banfi has analyzed the implications of a correct understanding of the trust in *mortis causa* successions (BANFI, 2019).

[124] Constitutional Court, 21 June 2001, Role Number 334, paragraph 5th.

[125] In this regard, see LARRAÍN (2012).

[126] For a summary up to 2020, VARGAS (2020).

[127] This option has been explored in the degree thesis of FERNÁNDEZ (2006).

[128] Increases in pension fund contributions do not constitute taxable income. Art. 18, para. 3, DL. 3.500.

the value of total assets and receivable liabilities" (Art. 98) nor with the vocabulary of the courts.[129]

On the other hand, the Compendium of Rules of Chilean the Pensions Authority uses "the concept of fund or funds to refer indistinctly to mutual funds, redeemable investment funds, non-redeemable investment funds, national and foreign securities representing financial indexes and, in general, to all types of collective investment vehicles in which the AFP invests, regardless of their legal nature".[130] In other words, from the perspective of the Chilean Pensions Authority, a "fund" is simply the sum of the instruments in which the AFPs invest the contributions of their affiliates, not their continent.

Recent case law of the Chilean Constitutional Tribunal (*Tribunal Constitutional*, TC) seems to have a similar understanding. In one of the cases brought forward by the "No + AFPs" movement,[131] the court pointed out that the assets of a worker's individual capitalization account and their rentability is owned by the affiliate because they come from her salary.[132] In the view of the TC, the fact that money owned by the affiliate is paid into the account held by the affiliate in the AFP, does not alter the nature of her relation with it. Consistent with this logic, the TC considers that the affiliates are "owners of the accumulated pension funds",[133] not holders of quotas in a special purpose patrimony. This raises the question of how the money paid into the account is legally subrogated by the different investments.[134] One possible way to explain this phenomenon is through an agency with powers to act on behalf of the principal.[135] In this view, the AFP acts directly on the affiliate´s property as its agent. However, this is not consistent with practice. In fact, when investing the money contributed by affiliates, the AFPs act "for the funds" not "for the affiliates" and the affiliates do not receive a taxable income from the revenue earned by the funds either.[136]

This conceptual weakness of the relationship between affiliates and funds has played an important role in the erosion of the Chilean private pension system. Although the underlying reasons for this phenomenon escape legal analysis, the deficient conceptual structure of the link between the affiliate and the fund has played a decisive role in *how* this process has unfolded. Ultimately, both the "No + AFPs" movement and the withdrawals motivated by the Covid-19 crisis are based on arguing that the unitary conception of ownership as incompatible with the design of the pension system: if the affiliate *owns* the funds, then she must be able to use, enjoy and dispose of them with a relevant degree of arbitrariness. This argument would have no place in a system that structures pension funds on the basis of trusts: in this case, there is no doubt that the trustee (the entity that manages the funds) owns the assets contained in the fund, while the beneficiary (the affiliate) has a right against those rights, consisting in them being administered separately and in her interest, under the terms of the trust. In the absence of a clear structure like this, when reality put pressure on the AFP system, the chain was cut by its conceptually weakest link: the relationship between affiliate and fund.[137]

6.2 Investment Funds

Investment funds currently regulated by the LUF offer an interesting counterpoint to pension funds. Although investment funds do not respond to the conceptual structure of the trust, they are explicitly based on the notion of special purpose patrimonies (see Art. 1 ° LUF).

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[129] See below.

[130] Book IV, Title IV, letter A, available at https://www.spensiones.cl/portal/compendio/596/w3-propertyvalue-2658.html.

[131] Constitutional Tribunal, 14 May 2020.

[132] See paragraph 36th.

[133] See paragraph 37th.

[134] In the case of the trust, this occurs thanks to the institution of "overreaching": when the trustee disposes of the trust property according to the rule of the trust, the successor in title acquires free from the rights of the beneficiary, which are transferred to what is given in exchange for the trust property, typically, money.

[135] This option has been explored by the degree thesis of FERNÁNDEZ (2006), pp. 36–45.

[136] See n 141.

[137] VARGAS (2020).

Funds created under this act are special purpose patrimonies, with no legal personality, that are formed by the contributions of the so-called "participants" of the fund. The exclusive purpose of the funds is to invest in the instruments indicated in the act, under the management of special stock companies created for that purpose, which act on behalf of the participants.[138]

The purpose of the LUF and its predecessors is providing investors with access to professionalized capital management.[139] The way in which the LUF achieves this is by completely separating ownership over the investments from its management. The investments are vested on a special purpose patrimony, that legally operates through the management company, while its quotas are owned by the participants. Unlike other cases of wealth management on behalf of third parties,[140] the profits obtained by the funds are not taxed until the participants "rescue" (i.e., withdraw) or sell their quotas, that is, until the profit materializes in *their* patrimony.[141]

The functional similarity of investment funds created under the LUF (and its predecessor, Act 18,815)[142] and express trusts used as an investment vehicle is evident. First, in both cases the administration of a right is handed over to a party other than the one that is entitled to receive its economic benefits. Second, in both cases these rights are beyond the reach of the personal creditors of the party that actually manages the asset. Finally, in neither case does the interested party have direct rights over the managed assets: the trustee is not an agent of the beneficiary and the management company is not a representative of the participants.

However, trusts and investment funds have different conceptual structures. In their current configuration, investment funds are dependent on the acceptance of the doctrine of the special purpose patrimony: unlike the trustee, who administers the rights in the trust as a full owner, the management company does not act in its own name, but on behalf of the fund. In the same way, unlike the beneficiary of a trust, who, depending on how her interest is understood, has a "right against the right" of the trustee or a property right in the thing held in trust,[143] the participant of an investment fund takes de form of a property over share or "quota" in a special purpose patrimony. Thus, if the trust has been seen in the Anglo-American context as a distortion of the law of obligations, the structure of Chilean investment funds can be better explained as a distortion of the classical notion of patrimony. Further development of the implications of the above is urgent.

VII. Final Comments

Like other jurisdictions of the civilian tradition, Chilean law does not recognize the Anglo-American trust as such and is not able to comfortably accommodate its elements within its conceptual structure. In Chile, some authors have tried to explain the trust using the metaphor of double ownership and the doctrine of special purpose patrimonies. However, both routes are doomed to failure. Because these views do not accurately account for the conceptual structure of the trust, they fail to realize, first, that that the trustee is the sole owner of the right held in trust and, second, that the reason why the trust property is not liable for the personal obligations of the trustee is not based on the separation of patrimonies. Despite its flaws, the theory of rights against rights has the virtue of explaining both points clearly.

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[138] YEW (2021), p. 517. The act that preceded the LUF conceptualized funds in similar terms, but without directly using the terms of "special purpose patrimony or "patrimony of affectation" (*patrimonio de afectación*), see Art. 1 Act 18.815.

[139] VILLEGAS (2021), p. 80.

[140] For example, agencies regulated by Act 20,880

[141] Funds are not considered taxpayers of first category (Art. 81 No. 1 LUF).

[142] See n. 138.

[143] WEBB & AKKOUH, who follow the orthodox theory, explicitly point out that the beneficiary does not have a right in a fund of changing assets, because she can eventually claim direct access to the thing under the rule of *Saunders v Vautier* (1841) and claim the trust property transferred to certain successors in title in kind. WEBB & AKKOUH (2017), p. 34.

Although Chilean law does not recognize the trust, it has a battery of institutions that allow private parties to create structures that are, at least partially, functionally equivalent to the express trust. Some of them have a long history in the civilian tradition, such as agencies and companies. Others are more recent legislative creations, such as pension and investment funds. Does this mean that having a deeper understanding of the trust is irrelevant for Chilean legal scholarship? Not at all. Whether it is conceived as a property right or as a case of rights against rights, it is clear that the trust rests on a conceptual structure that is alien to Chilean law. Unlike the functional equivalents available in Chile, the trust is not based on distinguishing between patrimonies, but on a distortion of the law of obligations. Among other things, this forces to reconsider whether the "Latin American trust" *really* is a trust, as pointed out by Malumian.

Being clear about the conceptual difference between structures for the administration of other people's economic interests based on the separation of patrimonies and those that depend on the creation of "rights against rights" may be relevant both for the solution of specific cases and for the development of domestic law. In this regard, there are at least two practical questions that deserve to be studied from a conceptual perspective. The first is a problem of private international law: in the event of litigation before a Chilean court, who owns the rights held in trust? The second, so far, the only one addressed in Chile, is a tax issue:[144] who is taxed and for what concept in the case of income from assets held in trust?

Finally, a broader study of trust law can provide relevant experience for the legislative development of Chilean law. The trust's utility is not limited to being a vehicle for professional investment management. In common law jurisdictions, the trust also serves a variety of other purposes, ranging from the protection of parties that contribute financially to the acquisition of an asset, but who have no legal title to it (constructive and resulting trusts) to the pursuit of charitable or public interest objectives (purpose trust). Does this mean that Chilean law should adopt the trust? Probably not: the thoughtless transplant of foreign institutions has often been a source of problems.[145] However, a better understanding of the trust can be useful for Chilean law to develop its own solutions to the same problems.

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[144] For example GARNHAM (2010); LEIVA VILLEGAS (2021).

[145] See KAHN-FREUND (1974).

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