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## Translating the Charitable Affectation in Private Law

Anne-Sophie Hulin

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## TRANSLATING THE CHARITABLE AFFECTATION IN PRIVATE LAW

Anne-Sophie Hulin \*

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### RÉSUMÉ

*Traduire sans trahir, voilà la difficulté du traducteur comme celle du comparatiste. Comment garantir que les notions, une fois passées au filtre juridique, ne subissent pas une certaine altération, et ne perdent par là un peu d'elles-mêmes ? Cet article s'intéresse donc à un genre particulier de traduction où des concepts universels se voient convertis en notions juridiques. Dans le cas précis de la philanthropie, la traduction se révèle moins aisée en droit civil qu'en common law au point de s'interroger de la capacité de ce premier à accueillir les mécanismes philanthropiques. Il en ressort*

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*alors que les traditions juridiques n'ont pas la même capacité à accueillir certaines notions et rendre au mieux les éléments qui les caractérisent.*

Keywords: charitable gifts, charitable-purpose trust, philanthropy, Québec charitable trust, foundation (France), charitable affectation

## I. INTRODUCTION

This paper focuses on a specific case of translation where universal concepts travel across legal systems to be turned into legal concepts. The English language does not make any distinction between *la traduction* (meaning “to turn into another language”) and the idea of translation as a conceptual exchange.<sup>1</sup> The word “translation” here refers to the fact that familiar ideas need to be decoded to be imported into a legal system. So, translation means conversion and requires a transcription. It is an annexation by the law as determined by each legal system’s tradition and foundations.<sup>2</sup>

Sometimes, the most familiar idea reveals itself to be very unfamiliar as soon as we look at it from another perspective. Despite the wish to preserve as much as possible the intrinsic idea of the initial concept, frictions inevitably appear because of the subsequent encounter between two different language approaches. Where one is unspecialized and commonly understood, the other one may be both specific and technical. As perfect correspondence in the conversion is pure fantasy, the jurist—even more so the *comparatist*—will need to work on finding equivalency to give the concept a legal meaning that is as close as possible to its original meaning.<sup>3</sup>

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1. “The process of translating words or text from one language into another.” *Translation*, OXFORD DICTIONARY, available at <https://perma.cc/YZC8-DPJZ>.

2. Pierre Legrand, *Issues in the Translatability of Law*, in NATION, LANGUAGE AND THE ETHICS OF TRANSLATION 30, 31-32 (Sandra Berman & Michael Wood eds., Princeton University Press 2005).

3. LES INTRADUISIBLES EN DROIT CIVIL (Alexandra Popovici, Lionel D. Smith & Régine Tremblay eds., Éditions Thémis 2014).

This is exactly what is happening in civil law systems with the specific example of philanthropy. Philanthropy is “the desire to promote the welfare of others, expressed especially by the generous donation of money to good causes.”<sup>4</sup> So, philanthropy is an individual act of generosity for public benefit. Its legal translation is a pragmatic exercise<sup>5</sup> seeking to determine the most efficient way to be generous to the public good.

When we turn philanthropy into legally significant terms, philanthropy becomes a gratuitous transfer from a donor of all or part of his property for charitable purposes. Thus, the act by which a legal subject dedicates property to charitable purposes is a private law operation. Even though philanthropy corresponds to a private initiative with public impact and so is a kind of hybrid act, it always relies on a gratuitous transfer of ownership.

However, the mechanism behind generosity constitutes the key to its legal transcription. The deep and noble feeling common to all philanthropists must be considered as a distinctive test from ordinary gifts. Consequently, the operation to dedicate property to charitable purposes specifies the philanthropic act. A charitable affectation<sup>6</sup> emerges, which means that property is affected to a precise charitable purpose.

As it raises the ideas of “affectation”<sup>7</sup> and transfer of ownership, charitable affectation instantly challenges patrimony theory and property law. Further, it leads us to re-think them in an altruistic context, which may have disruptive effects with respect to the basics of civil law.

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4. *Philanthropy*, OXFORD DICTIONARY, available at <https://perma.cc/Z8TK-H5LU>.

5. Alexandra Popovici, *La fiducie québécoise, re-belle infidèle*, in *LES INTRADUISIBLES EN DROIT CIVIL*, *supra* note 3, at 139-141.

6. This translation for “*affectation d'intérêt général*” is an expression developed in my doctoral work.

7. SERGE GUINCHARD, *L'AFFECTATION DES BIENS EN DROIT PRIVÉ FRANÇAIS* 15 (Librairie générale de droit et de jurisprudence 1976); Sylvio Normand, *L'affectation en droit des biens au Québec*, 48 *REVUE JURIDIQUE THÉMIS* 599, 602-603, available at <https://perma.cc/7TZM-T4LK> (work presented at the *Colloque du Centre Paul-André Crépeau de McGill portant réflexions sur “l'affectation”*).

The private law of Louisiana, France and Québec<sup>8</sup> reveal three different scenarios for the translation of philanthropy. In Louisiana, the question has been taken up in the Trust Code,<sup>9</sup> and purposely outside of the Civil Code.<sup>10</sup> In France, there is no specific mention of charitable affectation in the Civil Code. The rules of ordinary gifts and obligations still apply. Nevertheless their charitable form is regulated by specific provisions of public law.<sup>11</sup> Accordingly, charitable affectation is mostly outside the Civil Code there as well. Only the Québec Civil Code offers a few specific provisions in the title “Certain Patrimones by Appropriation.”<sup>12</sup> However, it seems that donors in Québec also prefer the non-profit corporation vehicle subject to specific provisions of law, rather than the general civilian trust.<sup>13</sup>

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8. Edward F. Martin, *Louisiana's Law of Trusts 25 Years After Adoption of the Trust Code*, 50 LA. L. REV. 501 (1990), available at <https://perma.cc/NVA2-Q4FF>; Kathryn Venturatos Lorio, *Louisiana Trusts: The experience of Civil Law Jurisdiction with the Trust*, 42 LA. L. REV. 1721, 1726-28 (1982), available at <https://perma.cc/7KPJ-XNE7>; LOUIS BAUDOUIN, LE DROIT CIVIL DE LA PROVINCE DE QUÉBEC : MODÈLE VIVANT DE DROIT COMPARÉ 102-14, 375 *et seq.* (Wilson et Lafleur 1953).

9. See charitable trusts in Louisiana's "Trust Code," LA REV. STAT. § 9:2271 *et seq.*, available at <https://perma.cc/G9BJ-DDST>.

10. Michael McAuley, *Truth and reconciliation: Notions of property in Louisiana's Civil and Trust Codes*, in RE-IMAGINING THE TRUST: TRUSTS IN CIVIL LAW 119, 123-24, (Lionel D. Smith ed., Cambridge University Press 2012):

On the private law topic of property, the contemporary arrangement of Louisiana law is undeniably referential to the civil law tradition . . . with the singular exception of the law of trusts. Trust (bodies trust), as containers (funds, universalities, patrimonies) of things to which persons are entitled and over which powers are exercised in the discharge of duties, are not contemplated in this arrangement . . . . [O]wnership in the Civil Code and fiduciary administration in the Trust Code are assigned separate, distinct spheres of operation.

See also Martin, *supra* note 8.

11. RAYMOND SALEILLES, DE LA PERSONNALITÉ JURIDIQUE, HISTOIRE ET THÉORIES, VINGT-CINQ LEÇONS D'INTRODUCTION À UN COURS DE DROIT CIVIL COMPARÉ SUR LES PERSONNES JURIDIQUES 259 *et seq.* (La Mémoire du Droit 2003).

12. Civil Code of Québec (C.C.Q.) Title 6 of Book 4. See also John E.C. Brierley, *De certains patrimoines d'affectation*, in BARREAU DE QUÉBEC ET CHAMBRE DES NOTAIRES DU QUÉBEC, 1 LA RÉFORME DU CODE CIVIL 375 *et seq.* (Presses de l'Université de Laval 1993).

13. Most charities in Québec are registered as non-profit corporations. André J. Barette, Service de la formation continue du Barreau du Québec, *La fiducie*

Although charitable affectation is not thought of in the same way in these three legal systems, they all share the same difficulty of finding a place for charitable contributions in private law. Consequently, is private law an anti-charitable law?

In the light of social needs, the absence of charitable purposes in civil codes is questionable with respect to practical purposes and also with the need to establish a clear correspondence between civil law concepts and the simple idea of generosity toward society. By disregarding philanthropy as a private law concern, it seems that civil codes present just one kind of generosity and also impose a unique way to use property. In this regard, civil codes risk no longer being responsive to the needs of society.<sup>14</sup>

Therefore, what exactly does it mean to realize an “*affectation d'intérêt général*”? Can private law welcome this concept in its field? These are the questions I want to investigate by looking at the French and Québec examples. As such, I will question how charitable contribution is compatible with (II) the civil law tradition and (III) its mechanisms.

## II. ARE CIVIL LAW PRINCIPLES HOSTILE TO CHARITABLE AFFECTATION?

The legal filter operates against the translation of philanthropy because the civil law tradition does not allow translating without interpreting in this particular case. Misconception (A) and adaptations (B) could not have been prevented.

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*d'utilité sociale : réflexions sur un thème méconnu*, in FIDUCIES PERSONNELLES ET SUCCESSIONS (Yvon Blais 2007).

14. “Il [le Législateur] ne doit point perdre de vue que les lois sont faites pour les hommes, et non les hommes pour les lois ; qu'elles doivent être adaptées au caractère, aux habitudes, à la situation du peuple pour lequel elles sont faites...” Jean-Étienne-Marie Portalis, *Discours préliminaire au Premier Projet de Code civil*, in VOIX DE LA CITÉ 16 (Confluences 1999).

*A. Misconception in the Translation*

In charitable contributions, donors do not transfer property to the recipient for his own interest, but for the charitable cause that the recipient embodies. The charitable gift is made out of a force of action for charitable purposes.<sup>15</sup> Of course, the donor desires that people will benefit from his gift, but without a precise idea of who will actually benefit therefrom. The consideration of beneficiaries as particular persons is not relevant to donors; only the charitable cause is.

Thus, charitable contributions cannot be fully assimilated to ordinary gifts because they are not made *intuitus personæ* [in consideration of the person], but “*intuitus causæ*.” This is why this particular gift should be qualified as an objective gift, a gift in which the specific end being pursued by the donor is the principal consideration of the gratuitous transfer.

In civil law thinking, this scheme is somewhat surprising, as all subjective rights should imply a personal bond or a relationship between the creditor and the debtor of the obligation, even if the object of the right is another’s good. This personal character comes from the fact that all subjective rights are defined as prerogatives that the law attributes to a person in his or her interest. In the case of charitable affectation, the charitable cause is the preeminent element of the transfer, which is no longer motivated by any personal interest. So, as the relationship looks more non-personal, it seems impossible “*de construire le rapport d’affectation comme un droit réel*” [“to construe the relationship of affectation as a real right”].<sup>16</sup>

The only way to solve this paradox is to bring the charitable gift back into a relationship between two legal persons and therefore pre-

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15. Planiol used this expression of “*puissance d’action*” [force of action], see Christophe Vernières, *Les libéralités à trois personnes* 211 (Apr. 4, 2012) (unpublished Ph.D. dissertation, Université Paris II Panthéon-Assas) (on file with author).

16. JEAN CARBONNIER, *3 DROIT CIVIL : LES BIENS : MONNAIE, IMMEUBLES, MEUBLES* 14 (19th ed., Presses Universitaires de France 2000).

tend that the recipient is a donee. Still, the legal fiction that the recipient is a donee is a plain misconception of what charitable affectation is. In any translation exercise, concepts should be converted with only alteration, not denaturation.

This misconception may be reduced if the recipient effectively dedicates the property to the charitable purpose. Consequently, all charitable gifts should be assumed as a triptych, where each panel is occupied by the donor, the recipient or an administrator,<sup>17</sup> and the beneficiaries. The recipient becomes the central and balancing panel of the picture. He is the one to fulfill the charitable purpose while his hands are tied both by the donor's will and, most of all, by the beneficiaries' interest preservation. Only such a triptych structure will save charitable affectation from inconsistency, which is why finding an appropriate vehicle becomes crucial.

### *B. Adaptations to the Translation*

By separating the administration from the benefit of the title, the comparatist's first thought goes to the common law trust. The common law early on assimilated philanthropy in the charitable-purpose trust.<sup>18</sup> The trust, as a flexible device for holding property, effi-

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17. According to the GÉRARD CORNU, *DICTIONARY OF THE CIVIL CODE* (Alain Levasseur & Marie-Eugénie Laporte-Legeais trans., LexisNexis 2014), the administrator is “[h]e who is charged with the administration of a thing or of an aggregate of things that belong to another or to the administrator and some third person in indivision.” The French understanding of “*administrateur*,” however, is broader than its understanding in Québec. According to the well-established thesis of Professor Madeleine Cantyn Cumin, the administrator is the “[p]erson exercising powers over property or a patrimony that is not his or her own,” PAUL-ANDRÉ CRÉPEAU *CENTRE FOR PRIVATE AND COMPARATIVE LAW, PRIVATE LAW DICTIONARY AND BILINGUAL LEXICONS – PROPERTY* (France Allard et al. eds., Yvon Blais 2012) [hereinafter *PRIVATE LAW DICTIONARY – PROPERTY*]. This means that in Québec the administrator does not hold any right of ownership over property but he is only exercising power. This constitutes a notable point of divergence between the two civil law systems.

18. Charitable Uses Act 1601, 43 Eliz I, c. 4, available at <https://perma.cc/4S5V-7SAH>. The origins of the trust are deeply rooted in the practice of Christian charity, see H. Patrick Glenn, *The Historical Origins of the Trust*, in *AEQUITAS*



ciently embodies philanthropy. According to the fiduciary relationship, the trustee will have substantial control over the trust property. He is also bound to act entirely in the interests of beneficiaries with honesty, candor, and loyalty.<sup>19</sup> The selflessness that is subsumed within the fiduciary obligation introduces an altruistic way of holding property. The charitable trust corresponds clearly with the essence of the charitable contribution. It concretizes the desired triptych.

The legal translation of trust in civil law systems has been the subject of much debate. Beyond the split in the title of ownership, the other strong resistance resides in the theory of patrimony. According to the civil law tradition, no one can divide their patrimony into different sub-universalities to achieve specific purposes.<sup>20</sup> The only way to achieve charitable affectation, at first, was to form a legal person to carry out the charitable purpose.

As a result, French law introduced the foundation.<sup>21</sup> The foundation is a two-step operation: from an *inter vivos* or testamentary gift, an organization with legal personality will be formed on the condition that the Ministry of internal affairs approves its charitable rationale.<sup>22</sup> We must note that the foundation is positioned between private law and public law, making the charitable affectation more

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AND EQUITY: EQUITY IN CIVIL LAW AND MIXED JURISDICTIONS 749 (Alfredo Mordechai Rabello ed., Hammacabi Press 1997).

19. ALBERT H. OOSTERHOFF ET AL., OOSTERHOFF ON TRUSTS: TEXT, COMMENTARY AND MATERIALS 18 (Carswell 2009).

20. This refers to Aubry and Rau's essential theory of patrimony. CHARLES AUBRY ET AL., 9 COURS DE DROIT CIVIL FRANÇAIS D'APRÈS LA MÉTHODE DE ZACHARLÆ paras. 573-74 (5th ed., Étienne Bartin ed., Marchal et Billard 1917), available at <https://perma.cc/5YJQ-V22J>. Even though this theory knows many exceptions today, it still remains the fundamental theory that delineates the concepts of patrimony and legal personality in civil law. For a brief overview of this point, see HENRI MAZEAUD ET AL., 1 LEÇONS DE DROIT CIVIL, INTRODUCTION À L'ÉTUDE DU DROIT 279 *et seq.* (Montchrestien 1970); Yves Lequette, *Prolégomènes*, 77 REVUE LAMY DROIT CIVIL 63 (2010). See also Philippe Dupichot, *Le fabuleux destin de la théorie de l'unicité du patrimoine*, 2 REVUE DE DROIT HENRI CAPITANT (2011), available at <https://perma.cc/9MV8-64KX>.

21. SALEILLES, *supra* note 11, at 269.

22. Art. 18, *Loi n° 87-571 du 23 juillet 1987 relative au développement du mécénat*, available at <https://perma.cc/6DGS-TBGM>.

than ever a hybrid act. The initiative may belong to an individual, but the creation, administration, and even the entire regime of the foundation are in the hands of specific provisions of public law. In France, the dedication of property to a charitable purpose results in an original constellation of private and public law.

However, charitable affectation as a foundation is not particularly satisfactory. First, legal personality rides roughshod over the true objective nature of the act whereby property is devoted to charitable purposes. It turns the objective gift into a common subjective gift. Second, individual initiative is diluted by the administrative regime of foundations. This is a total eclipse of the charitable contribution's private origin.

The Québec Civil Code certainly offers the most faithful transcription of philanthropy in law. In emancipating itself from the civilian tradition of ownership and patrimony, it enacted a civilian trust by way of patrimony by appropriation.<sup>23</sup> Some argued that the Québec trust should have been another legal person<sup>24</sup> but, as argued, this alternative would have denatured its common law origin and the desire to introduce a flexible device.

This calls for three remarks. First, the Québec charitable trust essentially constitutes a private law matter, with most provisions being found in the Civil Code.<sup>25</sup> Its constituting act does not imply any formalities that would introduce any procedures that lie within the

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23. The Québec trust is “[p]atrimony by appropriation created for the benefit of a person or for the fulfillment of a purpose authorized by law,” and “patrimony by appropriation” is “[p]atrimony distinct from that of a person and assigned to a particular purpose recognized by law.” *Trust*, PRIVATE LAW DICTIONARY – PROPERTY, *supra* note 17.

24. Yves Caron, *The Trust in Quebec*, 25 MCGILL L.J. 421 (1980), available at <https://perma.cc/H58R-WUL6>. For a critical analysis of the assimilation of the trust to a legal person, see Lionel Smith, *Trust and Patrimony*, 38 REVUE GÉNÉRALE DE DROIT 379 (2008), available at <https://perma.cc/QK4K-V4YN>.

25. C.C.Q. art. 1256. First, contrary to the foundation as a legal person, no letters patent are required to establish a foundation-trust. Second, this relative lack of regulation stands in opposition to French law, in that all charitable devices are in between private and public law. The French State maintains a strong control over the constitution and the administration of all charitable contributions and activities.

field of public law.<sup>26</sup> In France, because the State is said to have a monopoly on the definition and achievement of public interest, all charitable activities fall in the scope of public law.<sup>27</sup> Contrary to Québec's regime, no charitable activity can fully be a private initiative in France. Beyond political rationales, charitable purposes appeared inconsistent with the object of private law. Despite these difficulties, charitable purposes finally found a way to exist in private law thanks to the Québec trust.<sup>28</sup> The symbolism is as important as the technical aspects.<sup>29</sup> There is no public law intrusion. The Québec charitable trust persists in being a private initiative ruled by private law, contrary to the French foundation, which externalizes charitable contributions from private law.

Second, the Québec trust is able to meet the needs of a wide variety of charitable contributions, from the outright gift to the creation

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26. In France, the creation of a foundation requires the obtaining of the “*reconnaissance d'utilité publique*” [recognition that it promotes the public good], which is evaluated and given by the State. A foundation cannot be granted legal personality without it. The procedure of “*reconnaissance d'utilité publique*” is within the competences of both the *Ministère de l'Intérieur* [Ministry of the Interior] and the *Conseil d'État* [Council of State]. See Olivier Binder, *La Fondation Reconnue d'Utilité Publique*, in GUIDE JURIDIQUE ET FISCAL DU MÉCÉNAT ET DES FONDATIONS À L'USAGE DES ENTERPRISES ET DES ENTREPRENEURS 130 (4th ed., Admical 2008); Gwenaëlle Dufour, *Legs et contrôle administratif*, in Le guide des associations & fondations : Legs et donations 20 (Philippe Carillon ed., LexisNexis 2011).

27. CONSEIL D'ÉTAT, RÉFLEXIONS SUR L'INTÉRÊT GÉNÉRAL – RAPPORT PUBLIC 1999 (1999), available at <https://perma.cc/9YBL-J646> (Last visited: March 22, 2014); Laurence Boy, *L'intérêt collectif en droit français – Réflexions sur la collectivisation du droit* (1979) (unpublished Ph.D. dissertation, Université de Nice) (on file with author); LA JUNIORCONSULTING – SCIENCESPO POUR L'INSTITUT PASTEUR, ÉTUDE SUR LA RÉNOVATION DE L'INTÉRÊT GÉNÉRAL EN FRANCE, POUR UNE DÉFINITION ÉVOLUTIVE ET CO-CONSTRUITE DE L'INTÉRÊT GÉNÉRAL, 78 (Philippe-Henri Dutheil & Antoine Vaccaro eds., 2013), available at <https://perma.cc/3BCR-MH7K>; Colas Amblard, *Intérêt général, utilité publique ou utilité sociale : Quel mode de reconnaissance pour le secteur associatif ?*, 315 REVUE INTERNATIONALE DE L'ÉCONOMIE SOCIALE 21 (2010), available at <https://perma.cc/KS9V-W8R6>.

28. Martin Boodman demonstrates how the Québec trust is the most adapted institution to operate charitable contribution. Martin Boodman, *Les libéralités à des fins charitables au Québec et en France* 146 (1981) (unpublished Ph.D. dissertation, Université Paris II Panthéon Arras) (on file with author).

29. Roderick A. Macdonald, *Reconceiving the Symbols of Property: Universalities, Interests and Other Heresies*, 39 MCGILL L.J. 761 (1994), available at <https://perma.cc/AZ29-C9A7>.

of a charitable organization. For example, French law requires gifts with charges (or restricted gifts) to operate every charitable contribution. The charitable purpose is covered by the restriction on the gift, and this is the only way to operate charitable gifts.<sup>30</sup> Further, the charitable contribution is conceptualized through principles of the law of obligations, which means that the charitable contribution represents a personal obligation between the donor and the recipient. This personal obligation is an accessory one,<sup>31</sup> and the mechanism of stipulation for another<sup>32</sup> applies. Still, how could this work efficiently when the beneficiary is a class of undetermined people?<sup>33</sup>

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30. See “libéralités *sub modo*” in MARCEL PLANIOL, GEORGES RIPERT & JEAN BOULANGER, 3 TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL : RÉGIMES MATRIMONIAUX, SUCCESSIONS, LIBÉRALITÉS paras. 3661 *et seq.*, 3715 (4th ed., Librairie générale de droit et de jurisprudence 1950); FRANÇOIS TERRÉ ET AL., DROIT CIVIL: LES SUCCESSIONS, LES LIBÉRALITÉS para. 348 *et seq.* (4th ed., Dalloz 2013). See also René Demogue, *La fiducie en droit moderne: rapports préparatoires et discussion* in 5 TRAVAUX DE LA SEMAINE INTERNATIONALE DE DROIT (Librairie du recueil Sirey 1937). The French solution remains the right of ownership restricted by a specific affectation.

31. Vernières, *supra* note 15, at 72.

32. C. civ. art. 1205. Generally, all references to the *Code Civil de France* in French are available at <https://perma.cc/RZ9S-EWKJ>. According to the Dictionary of the Civil Code, CORNU, *supra* note 17, stipulation for another corresponds to the:

agreement whereby one party (the stipulator) causes another (the promisor) to promise to perform an obligation in favor of a third party (the beneficiary); complex juridical device in which the stipulation may be revoked by the stipulator until such time as the beneficiary has not accepted it, but according to which the acceptance by the beneficiary prior to the revocation of the stipulation renders the latter irrevocable and, furthermore, it vests in the third party a direct right of action against the promisor for the performance of his commitment.

33. FRANÇOIS TERRÉ ET AL., DROIT CIVIL, LES OBLIGATIONS 571, para. 511, 588, 534. (11th ed., Dalloz 2013) (Il y a stipulation pour autrui lorsque, dans un contrat, une des parties, appelée le *stipulant*, obtient de l’autre, appelée le *promettant*, l’engagement qu’elle donnera ou fera quelque chose au profit d’un tiers étranger, le *bénéficiaire*, qui devient ainsi créancier sans avoir été partie au contrat.”); (“ On peut aujourd’hui poser en principe qu’une stipulation au profit de personnes indéterminées est valable, à condition que le bénéficiaire, indéterminé au moment de la stipulation, soit déterminable lorsqu’elle doit recevoir effet. Dans cette perspective, il faut, mais il suffit, que le contrat conclu entre le stipulant et le promettant comporte des éléments d’une détermination ultérieure.”). See also Henri Souleau, *L’Acte de fondations en droit français* 167 *et seq.* (1969) (unpublished Ph.D. dissertation) (on file with author).

The Québec trust made gifts with charges useless.<sup>34</sup> It introduced another dimension to giving<sup>35</sup> by offering a *corpus* of civil law rules<sup>36</sup> not only to allocate but also to manage the given property for the achievement of a specific charitable purpose. Thanks to the Québec trust, the charitable contribution moves from the subjective right stage to the institution stage.<sup>37</sup>

Finally, based on the objective theory of patrimony,<sup>38</sup> the Québec trust concretized a true patrimony by appropriation, charitable or not, wherein the trust assets constitute an “*autonomous and distinct*”<sup>39</sup> legal universality from the patrimonies of the settlor and trustee. Its purpose gives rise to its existence.<sup>40</sup> No actual beneficiaries necessarily seem needed,<sup>41</sup> contrary to the common law trust. This generates a major paradigm shift in civil law as the Québec

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34. The trust is much more efficient to determine the way of using property. So, except in the case of family matters, restricted charitable gifts disappeared in favor of the charitable trust. See John E.C. Brierley, *The Gratuitous Trust: A New Liberality in Quebec Law*, in MÉLANGES À PAUL-ANDRÉ CRÉPEAU 119 (Yvon Blais 1997).

35. *Id.*

36. C.C.Q. art. 1260 *et seq.*

37. Macdonald, *supra* note 29, at para. 20,

No longer simply a modality of gifts and wills, the device has achieved a separate existence as a legal institution: it may be created by onerous as well as gratuitous act; it may be created for public or private purposes; it may be created for charitable or for business purposes. The trust under the Civil Code of Québec must be detached from its historical origins as a device like the substitution, and must be reconceived as a facilitative institution, whose finalities are no longer substantive and external to it (e.g. the giving of a liberality) but procedural and internal (e.g. the management of property for the benefit of another person or for the achievement of an authorized purpose, by an independent third person, who acting as an administrator, manages the trust corpus or patrimony as a juridical universality).

38. For a summary of this particular point, see Frédéric Zenati-Castaing, *L'affectation québécoise, un malentendu porteur d'avenir*, 48 REVUE JURIDIQUE THÉMIS 623, 628-631 (2014), available at <https://perma.cc/N9VA-9CHK> (work presented at the *Colloque du Centre Paul-André Crépeau de McGill portant réflexions sur “l'affectation”*).

39. C.C.Q. art. 1261.

40. On the termination of a Québec trust, see C.C.Q. art. 1296.

41. C.C.Q. art. 1277. On this particular point, the Québec trust is very close to the *droit sans sujet* (“right without a subject”) enunciated by the German author Alois von Brinz. See SALEILLES, *supra* note 11, at 476.

civil law defines a new way to hold property<sup>42</sup> outside real rights.<sup>43</sup> Beyond the recognition of the patrimony by appropriation, this tends to weaken the domination of absolute ownership.

This solution at the same time revives and compromises Québec civil law. It revives Québec civil law because it creates a civilian trust and so increases the ways to allocate property. On the other hand, it also compromises Québec civil law because lawmakers did not define the precise nature of the trustee's power<sup>44</sup> or the beneficiaries' interest.<sup>45</sup> Since this casts a shadow over practice in this area of law, the Québec trust is relatively unused by those with philanthropic ambitions. Paradoxically, the presumed most adapted device to operate charitable contribution (under a technical perspective) is almost ignored by the bar. An historical and cultural overview would probably have explanatory power. Still, a main question arises: are private law mechanisms perhaps just unsuited to charitable affectation?

### III. ARE PRIVATE LAW MECHANISMS UNSUITED TO CHARITABLE AFFECTATION?

All charitable affectation requires (A) the trustee's selflessness and (B) an external oversight. Both requirements ensure the charitableness of the affectation device.

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42. C.C.Q. art. 2.

43. Madeleine Cantin Cumyn, *Le pouvoir juridique*, 52 MCGILL L.J. 215 (2007), available at <https://perma.cc/6SEP-M4AE>.

44. "Il [le fiduciaire] exerce une fonction qui lui accorde des pouvoirs et des devoirs," Alexandra Popovici, *Le patrimoine d'affectation : Nature, culture, rupture* 45 *et seq.*, 47 (2012) (unpublished LL.M. dissertation, Université Laval) (on file with author), available at <https://perma.cc/D25S-5RF9>.

45. C.C.Q. arts. 1284, 1290-91. On the nature of the beneficiary's interest, see Popovici, *supra* note 44, at 51-55.

### A. The Selflessness Requirement

The recipient's selflessness is required because no objective gift can be made if the trustee lacks altruism. Obviously, the trustee cannot hold property as an ordinary owner. Charitable contributions necessarily call for a reconsideration of absolute ownership.

At issue is not so much how ownership could be shared between the recipient and the actual beneficiaries, but rather the acceptance of a *non-individualistic* and limited ownership. Ownership must be selflessly and purposely executed in order to be consistent with the intrinsic nature of philanthropy.

Thinking of civilian ownership in relative terms has led exactly to the adoption of the patrimony of appropriation in the Civil Code of Québec instead of a *sui generis* ownership.<sup>46</sup> The prevailing doctrine claimed that the intrinsic nature of ownership in the civil law is to be self-oriented.<sup>47</sup> Thus, in no case could the ownership be purposely restricted in favor of someone else. By adopting the patrimony by appropriation, Québec lawmakers introduced a parallel way to hold property.<sup>48</sup> The concept of power<sup>49</sup> is in a separate category of prerogatives, one distinct from those of subjective rights.<sup>50</sup> Power is granted to the administrator to achieve a purpose and is limited by constraints.<sup>51</sup>

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46. This has been the case in Québec civil law since the decision of the Supreme Court of Canada in *Royal Trust Co v. Tucker*, [1982] 1 S.C.R. 250 at 272-73, available at <https://perma.cc/5CP8-V4Y4>, in which it was held that the trustee had "a *sui generis* property right, which the legislator implicitly but necessarily intended to create when he introduced the trust into the civil law."

47. Madeleine Cantin Cumyn, *La propriété fiduciaire : mythe ou réalité ?*, 15 REVUE DE DROIT DE L'UNIVERSITÉ DE SHERBROOKE 7 (1984).

48. LOUIS JOSSEMAND, *DE L'ESPRIT DES DROITS ET DE LEUR RELATIVITÉ : THÉORIE DITE DE L'ABUS DES DROITS* para. 420 (Daloz 1927); PIERRE LEPAULLE, *TRAITÉ THÉORIQUE ET PRATIQUE DES TRUSTS EN DROIT INTERNE, EN DROIT FISCAL ET EN DROIT INTERNATIONAL* 50 (Rousseau & Cie 1932).

49. EMMANUEL GAILLARD, *LE POUVOIR EN DROIT PRIVÉ* (Economica 1985); Camyn, *supra* note 43.

50. C.C.Q. art. 2. *See also* Macdonald, *supra* note 29, at 776 *et seq.*

51. "[L]e fiduciaire sera toujours soumis aux obligations imposées par le législateur d'agir avec prudence et diligence, honnêteté et loyauté dans le meilleur intérêt de la fin poursuivie," Popovici, *supra* note 44, at 46. "La codification des règles de l'administration du bien d'autrui met en lumière la singularité des



The French doctrine also moderated ownership, but its solution remains doctrinal, not formal. Doctrinal commentaries outlined that all ownership may be subject to conditions and restrictions without denaturing the fundamental nature of ownership.<sup>52</sup> Alongside inalienable ownership and common tenancy, we could easily admit a purposive ownership. Just like other modes of property rights, ownership may be modulated without being denatured.<sup>53</sup> Alongside individualistic ownership, the idea of a socially oriented ownership<sup>54</sup> emerges again, but outside the disposition of the Civil Code.<sup>55</sup>

As such, Québec law formalized two different and separate ways to hold property with the aim of preserving absolute ownership. The French doctrine splits ownership into two parts according to the purpose for which the right is performed. Both solutions generate a tremendous shift in civil law. They both demonstrate how ownership is limited by the individualism in which it has been inscribed. It also reveals how deep the disharmony between charitable generosity and the civil law tradition runs. The concretization of charitable giving could not be done without rethinking the place of ownership and real rights in civil law principles.

### *B. The External Oversight Requirement*

Now, I turn to the last part of my article, which focuses on the beneficiaries' position. Beneficiaries have a legal interest in the

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normes qui régissent cette activité. On constate, en effet, que d'importantes contraintes lient tout administrateur alors que ces contraintes sont absentes dans l'exercice d'un droit par son titulaire," Cumyn, *supra* note 43, at 222.

52. Vernières, *supra* note 15, at 160-83.

53. Sylvio Normand, *La notion de modalité de la propriété*, in MÉLANGES OFFERTS AU PROFESSEUR FRANÇOIS FRÉNETTE : ÉTUDES PORTANT SUR LE DROIT PATRIMONIAL 251 (Presses Université Laval 2006); Yaëll Emerich, *La fiducie civile : modalité de la propriété ou intermède à la propriété ?*, 58 MCGILL L.J. 827 (2012), available at <https://perma.cc/HQ6Y-UH45>.

54. LÉON DUGUIT, AUTOUR DE LA FONCTION SOCIALE DE LA PROPRIÉTÉ (Dalloz 1901); Simon Deploige, *La théorie thomiste de la propriété (suite et fin)*, 2 REVUE NÉO-SCOLASTIQUE 286 (1895), available at <https://perma.cc/487R-KQG4>.

55. C. civ. art. 544 still defines ownership as "the right to enjoy and dispose of objects in the most complete manner, provided they are not used in a way prohibited by statutes or regulations."



property's administration. While beneficiaries have no rights to the charitably affected property, they have a legal interest in the power that the administrator holds over the object.<sup>56</sup>

This is precisely where civil law systems find it difficult to translate the charitable affectation. All legal relationships are erected to satisfy personal interests. For this reason, the consideration of another, in private relationships, sounds paradoxical. Can the beneficiaries effectively require compliance with the gift impersonally made for them?

In France, two effective devices exist.<sup>57</sup> The first one allows donors to demand that the administrator be forced to perform charges.<sup>58</sup> The second one allows donors and their heirs to demand revocation for non-performance of charges.<sup>59</sup> Nevertheless, in both cases, there is no guarantee that the donors or their heirs are acting in the beneficiaries' interest instead of their own private interests.<sup>60</sup> The Québec Civil Code stipulates that any "*interested*" person may

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56. According to Lionel Smith, "[t]he trust beneficiary's rights are rights *in* the rights that the trustee holds in the object." Smith, *supra* note 24, at 392 (emphasis in original).

57. Still, as I have already mentioned, the mechanism of stipulation for another is ineffective as long as the beneficiary of the stipulation remains indeterminate, the situation which typifies beneficiaries in most charitable contributions.

58. The rule of C. civ. art. 1221 applies only to a donation with charge as it constitutes a synallagmatic (or bilateral) contract. C. civ. art. 1184 para. 2 also references specific performance of the contract. See Rafael Ibarra Garza, *Protecting the Trust fund in French and English Law*, 20 TRUST & TRUSTEES 421 (2014):

Specific performance of the breached contract has an effect to enforce the contract as the parties intended, therefore this remedy is the most respectful to the wishes of the parties to the breached contract; reason why specific enforcement is considered a right of the innocent party. So if he demands specific performance and this is still possible, the judge will have no discretion and will have to order specific performance of the contract.

59. C. civ. art. 954 provides as follows: "Dans le cas de la révocation pour cause d'inexécution des conditions, les biens rentreront dans les mains du donateur, libres de toutes charges et hypothèques du chef du donataire; et le donateur aura, contre les tiers détenteurs des immeubles donnés, tous les droits qu'il aurait contre le donataire lui-même." See also C. civ. art. 956, which provides that "[I]a révocation pour cause d'inexécution des conditions, ou pour cause d'ingratitude, n'aura jamais lieu de plein droit."

60. See the demonstration in Souleau, *supra* note 33, at para. 97 *et seq.*

claim for the execution of the trust.<sup>61</sup> There are many uncertainties around this provision. Can each beneficiary equally and indifferently bring the matter before the courts? Does any beneficiary have sufficient legal interest to engage his or her own assets in that case? No subjective right seems adapted to this situation because all beneficiaries share a mutual concern in the trust execution. They should be able collectively to protect their unique interest against any trustee's mismanagement.

Common law systems developed solutions that civil law systems should more readily consider.<sup>62</sup> These systems imagined a public institution to protect all beneficiaries' interest.<sup>63</sup> In many common law systems, the attorney general is in charge of representing and preserving the public good at law, while the charitable commission, whose role is much more specific, has control over the governance of charities and prevents the disrespect of beneficiaries' interests. Such institutions are suggested in the Québec Civil Code, but were never established.<sup>64</sup>

Of course, the hybrid nature of charitable affectations, as well as pragmatic concerns, seem necessarily to lead to the outsourcing of oversight from private law. Does this justify, however, private law's deficiency with respect to the adequate protection of beneficiaries' interests? One thing is for sure: developing external oversight would better achieve the conversion of philanthropy into law and offer a steady path to enshrining the charitable-giving triptych.

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61. C.C.Q. art. 1290.

62. The supervision from an external person or body designated by the law is mentioned at C.C.Q. art. 1288. This kind of supervision has never been in the case with a *social trust*. The composition of a French foundation's board of directors may include a member of the Government. The board's main role, however, is more to control the use of funds rather than to promote the public good as an Attorney General in many common law systems would do.

63. Kathryn Chan, *The Role of the Attorney General in Charity in Canada and in England and in Wales*, 89 CANADIAN BAR REVIEW 373 (2010).

64. C.C.Q. art. 1288.

## IV. CONCLUSION

*Le Code civil n'est pas une œuvre anti-affectation d'intérêt général dès lors que l'on admet une modération de ses principes fondamentaux. Notons que ces principes sont le fruit d'une doctrine circonstanciée et que rien aujourd'hui n'en impose une telle lecture hormis notre attachement à la tradition.*

*La traduction juridique des concepts universels s'avère parfois une tâche ardue et incertaine pour le juriste qui doit trancher entre la préservation originelle et la trahison forcée. Dans le cas présenté, la ligne de conduite ne semble pas encore être parfaitement dessinée, si bien qu'en attendant, l'affectation d'intérêt général demeure en quelque sorte... lost in translation en droit civil.*