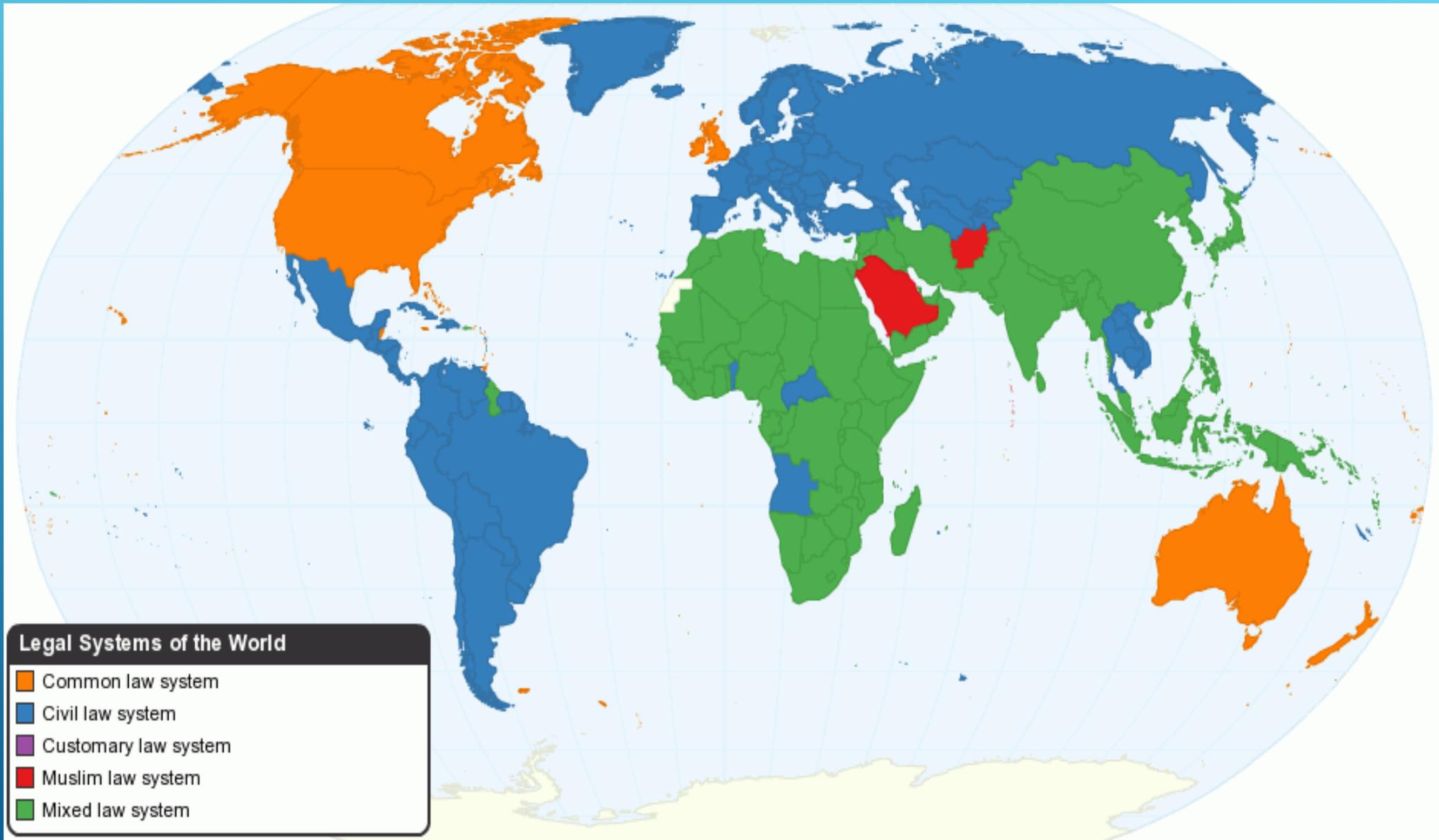


# THE FUTURE OF TRUSTS: SOME GLOBAL AND DOMESTIC PERSPECTIVES

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# THE COMMON LAW WORLD

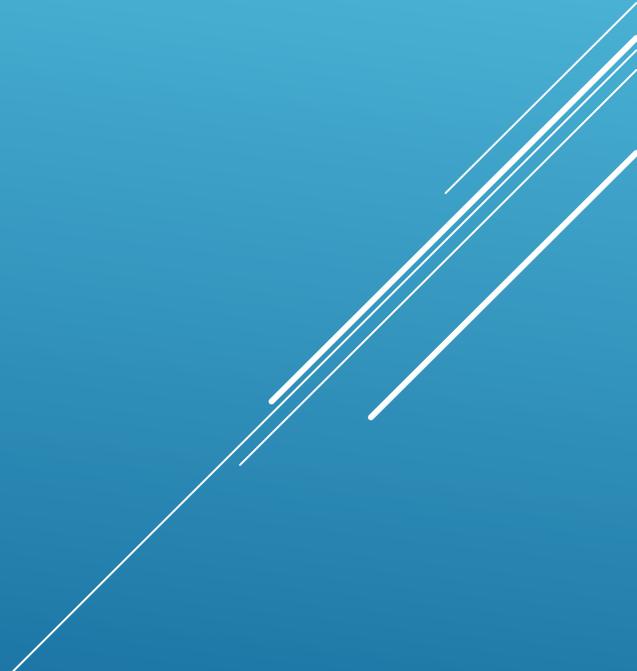
## The Anglo-American Trust

▶ Fredric Maitland, *The Unincorporated Body* (circa 1902):

“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.”

Divided or dual ownership is an important and unique characteristic of Anglo-American trust law

- ▶ The trustee is the legal owner of the trust property
  - ▶ The trustee has the right to possession of the trust property
  - ▶ The trustee has the privilege of the use of the trust property
  - ▶ The trustee has the power to convey these rights and privileges to others
- ▶ The trust beneficiary is simultaneously the equitable owner of the trust property
  - ▶ The beneficiary is entitled to receive the benefits of the trust property
  - ▶ The trustee owes the trust beneficiary a fiduciary duty to exercise the rights, privileges and powers for the beneficiary's benefit

- ▶ The Anglo-American trust is widely used for estate planning purposes
    - ▶ Asset protection trust
    - ▶ Protective or spendthrift trust
    - ▶ Trust for a vulnerable person
    - ▶ Off-shore or non-resident trust
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- ▶ The use of the trust for estate planning purposes in Common Law jurisdictions will certainly continue in the future
- ▶ The use of the trust for these purposes is enhanced by some (to us) peculiar features of the Anglo-American trust
  - ▶ An *inter vivos* trust of personalty (movables; not land or an interest in land) can be created informally (orally or through conduct): “[A]n *inter vivos* trust...can be created ‘without deed, without writing, without formality of any kind by mere word of mouth.’” (G Moffat, *Trust Law*, p122 (2009))
    - ▶ The South African position on oral trusts
  - ▶ An *inter vivos* trust can be created by a unilateral declaration of oneself as trustee for another
    - ▶ *Crookes v Watson* 1956 (1) SA 277 (A) 298B-C: “I can think of no principle of our law according to which the individual can during his lifetime unilaterally sequester a portion of his estate and dedicate it to certain ends.”

# THE CIVIL LAW WORLD

- ▶ Singular (unitary) ownership is a characteristic of the Civil Law
    - ▶ Ownership is absolute, autonomous and indivisible: a person either has full ownership or he/she does not
    - ▶ The Common Law notion of divided or dual ownership is thus irreconcilable with the Civil Law's conception of ownership
    - ▶ The Anglo-American trust and the law that governs it can therefore not be transplanted as is onto a civilian jurisdiction
  - ▶ The Civil Law recognises “trust-like” institutions that bear some of the characteristics of the Anglo-American trust
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## France: the *fiducie* (introduced to the French Civil Code in 2007)

- ▶ An entity transfers property to one or more fiduciaries who hold this property separate from their own property for the purpose of benefitting one or more beneficiaries
- ▶ The class of persons/institutions who may be fiduciaries is limited to, among others, credit providers and investment or insurance companies and, more recently, also attorneys
- ▶ The *fiducie* is by and large an instrument of commerce used in banking and other financial transactions, and not primarily an instrument of estate planning
  - ▶ A *fiducie* can only be created contractually and not in terms of a will
  - ▶ A *fiducie* cannot be created to benefit a vulnerable person
  - ▶ A *fiducie* has a maximum operational period of 99 years

- ▶ “Trust-like” institutions feature in many Civil Law jurisdictions:
  - ▶ Germany: *Treuhand*
  - ▶ Italy: *fiducia*
  - ▶ Russia: Доверительное управление имуществом
  - ▶ Mexico: *fideicomiso*

“Trust-like” institutions in the Civil Law world are frequently founded on the notion of the separation of patrimonies (or estates)

- ▶ For example, the property subject to a *fiducie* in France is identified by the term “*patrimoine d’affectation*”
  - ▶ A new patrimony (or estate) is created that is separate both from that of its creator (the “trust founder”) and the owner (the “trustee”) and is dedicated to (*affecté*) the person(s) or purpose(s) in whose/which favour the *fiducie* operates
  - ▶ As the notion of the separation of estates permeates the Civil Law world, an increasing number of “trust-like” institutions are likely to appear in legal and commercial practice in civilian jurisdictions in the future

# MIXED JURISDICTIONS

- ▶ Scotland
- ▶ Louisiana
  - ▶ F du Toit 'Trusts in mixed jurisdictions – aspects of the Louisiana and South African trusts compared' 2018 *Tulane European and Civil Law Forum* pp 1–40
- ▶ Quebec
- ▶ South Africa (Roman-Dutch law)
- ▶ Namibia, Lesotho, Swaziland, Zimbabwe (Roman-Dutch law)
- ▶ Sri Lanka (Roman-Dutch law)

- ▶ Trusts in mixed jurisdictions are by and large premised on the notion of the separation of patrimonies or estates
- ▶ G Gretton, 'Trusts without equity' 2000 *ICLQ* p 599 at p 620:

“A legal system which decides to have a trust concept which is to be functionally comparable to the English trust ... but which at the same time wishes to preserve its property law system and thus is not prepared to accept equity, really has only one direction to move in.”

## Scots law

- ▶ KGC Reid 'National report for Scotland' in DJ Hayton, SCJJ Kortmann & HLE Verhagen (eds) *Principles of European Trust Law* (1999) P 67 at p 68:

“A trustee...has assets of two distinct types. On the one hand there are his private assets, the assets to which he is beneficially entitled; and on the other hand there are the assets which are held in trust. Two sets of assets means two separate patrimonies (or 'estates'...). But both patrimonies are held by the same person, and from the point of view of property law the ownership of the trust assets is no different from the ownership of the private assets.”

## South African law

- ▶ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) para 10:

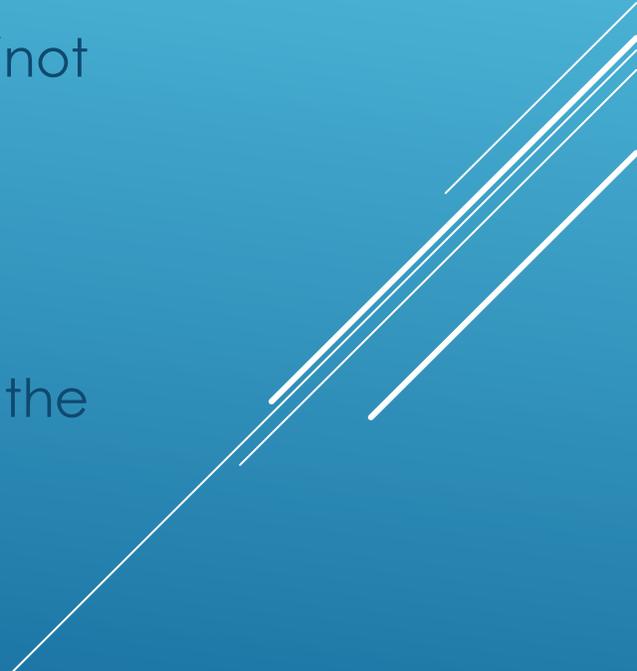
“[A trust] is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity...But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them...”

- ▶ S 12 TPCA:

“Trust property shall not form part of the personal estate of the trustee except in so far as he as the trust beneficiary is entitled to the trust property.”

- The South African trust remains an institution exceptionally well suited to estate planning

## The Hague Convention on the Law Applicable to Trusts and on their Recognition (the Hague Trust Convention)

- ▶ a multilateral treaty on the law applicable to trusts
  - ▶ concluded on 1 July 1985 and entered into force 1 January 1992
  - ▶ ratified by more than a dozen, principally European, countries (not South Africa)
  - ▶ provides a definition of a trust for purposes of the Convention
  - ▶ sets conflict-of-law rules for resolving difficulties in the choice of the applicable law
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## Art 2:

“For the purposes of this Convention, the term ‘trust’ refers to the legal relationships created - *inter vivos* or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics –

- (a) the assets constitute a separate fund and are not a part of the trustee’s own estate;
- (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
- (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.”

# THE ISLAMIC WORLD

## The *waqf*

- ▶ a property owner declares that the income of property must be permanently reserved for a specific purpose that is in accordance with Islamic law
- ▶ charitable (*khairiy*) *waqf*: income to be used for philanthropic purposes
- ▶ family (*ahli*) *waqf*: income to be used for the property owner's family members
- ▶ joint (*mushtarak*) *waqf*: income to be divided between family and philanthropy
- ▶ L Albertus, 'Comparing the *waqf* and the South African trust' 2014 *Acta Juridica* p 268

# CONCLUSION

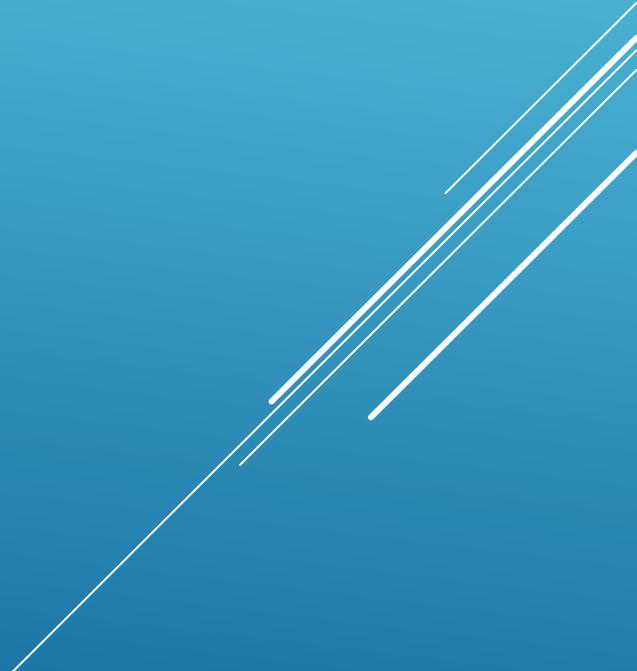
- ▶ The Anglo-American trust is well-established and will continue to be used for a variety of purposes in the Common Law world, including estate planning
- ▶ The “trust-like” institutions in the Civil Law world continue to be harmonised through cross-jurisdictional mechanisms such as the Hague Trust Convention and Book X of the European Draft Common Frame of Reference
  - ▶ MJ de Waal, ‘Is the DCFR trust a “proper” trust? An evaluation from a South African perspective’ 2014 *Acta Juridica* p 219:

“[T]here are signs that interest in the introduction of the trust (in either a general or a more restricted format) in continental Europe is growing...Book X of the DCFR constitutes yet a further model or template for a general European trust institution.”
- ▶ Trusts in mixed jurisdictions will follow the general trends set by the Anglo-American trust and also establish unique jurisdiction-specific trends
- ▶ Trusts remain important wealth-distribution mechanisms in the Islamic world

Thank you

Dankie

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