TRUST, THE KEEPERS OF THE TEMPLE AND THE MERCHANTS OF LAW : THE RIDDLE OF THE FIDUCIE

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ABSTRACT

This thesis is concerned with the 1992 attempt to legislate for the introduction into the French civil code of a "trust-like" device, the *Fiducie*.Through a study of the 1992 Bill's *Fiducie*, it is hoped to contribute to a socio-theoretical understanding of the workings of French legal culture, in the specific context of this recent confrontation with the common law trust.

On the basis of the works of Foucault, Lenoble and Ost, French legal culture will be theoretically constructed as an epistemic entity shaped by two types of discourses: the juridical discourse of sovereignty and the discourse of Governmentality. In the light of the works of Bourdieu and Dezalay, it will be argued that these discourses are connected to the conflictual dynamics of societal fields, identified as the juridical field and the field of Governmentality.

As a result of the operation of the juridical discourse of sovereignty, the *Fiducie* cannot reproduce the dual ownership structure of the trust. This is due in particular to the symbolic potency of the principle of absolute ownership, a product of the juridical discourse of sovereignty. This discourse forms the basis of the French epistemic tradition and is rooted in struggles amongst lawyers for the symbolic authority of law.

The second epistemic level relevant to our study is identified as Governmentality, a discourse concerned with the construction of the proper objects, means and ends of government, understood in the broad Foucauldian sense. The *Fiducie* 's limitations as regards tax planning result from the fiscal provisions of the Bill and the impossibility to fragment ownership rights. Such limitations illustrate the imperative of surveillance in French Governmentality. But the Bill also reflects a contradictory tension towards a more liberal understanding of the *Fiducie* as a flexible and almost unregulated contractual device destined to compete with the trust on the global market .

The conflicting tensions apparent in the legislative formulation of the *Fiducie* echo struggles within the juridical field and in the governmental field. These struggles involve an emerging elite of international legal experts seeking a dominant position internationally and within their own national fields.

On the basis of this analysis, it will be possible to formulate a number of concluding hypotheses as to the reasons for the 1992 Bill's failure and its possible future revival.

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To Herminia Cavallini

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INTRODUCTION

In a 1953 article, V Bolgár was already posing the question "Why no trusts in the civil law?", noting that "[i]n the field of property, the trust furnishes a striking antinomy between the common law and the civil law".[1] Indeed, there is still no trust in French law, despite an attempt in the early 1990s to introduce a Bill which would have incorporated into the Civil code a "trust-like" device, named *Fiducie.*

The Bill was entitled "De la Fiducie" and laid before the French Parliament on the 20 February 1992.[2] This was the first attempt to introduce the trust into French law, which had and still has no comparable device. Indeed, prior to the 1789 Revolution and the 1804 codification of private law, there were a few institutions and practices which resembled the trust. The substitution, for instance served similar purposes to the dynastic trust, and for this reason was expressly prohibited in the new Civil code. Other practices, such as the pre-revolutionary *Fiducie*, which were not expressly prohibited in the new codified law, did not survive the demise of the *Ancien Régime.*

There does not seem to have been a need for the trust, as a variety of other institutions can fulfil its numerous functions. The *fondation* for instance, can be used for the same functional purposes of the trust. This creature of Equity has traditionally been perceived amongst civilians as a curiosity typifying the common law systems. It is not until the early 1980s that serious academic thought was given to the necessity and possibility of introducing a trust-like device, the *Fiducie.* The idea was mooted by C Witz in an important

[1] "Why no trusts in the civil law", (1953), 2, American Journal of Comparative law, 204 at p 204.
[2] The Bill will be referred to as "the 1992 Bill". Its documentary reference is Doc. Ass. Nat. 2583.

doctoral study entitled, "La Fiducie en droit privé français".[3] The suggestion was the slow introduction by the courts of the new *Fiducie* device, for which Witz proposed a definition and a legal framework. Witz's study was used and referred to by the drafters of the 1992 Bill.

The Bill was never debated in Parliament and was finally withdrawn in late 1994. There has been no further attempt to introduce the *Fiducie*, although there is ongoing governmental research and academic and professional discussion on the subject. It is doubtful whether the 1992 Bill would have introduced an institution sufficiently similar to the trust to share the same functional applications. Indeed, the *Fiducie* lacks a fundamental characteristic of the trust: the distinction between legal title and beneficial interest.

Nevertheless, the Bill is of great intellectual interest to common law and civil law jurists alike. It reveals a certain civilian way of interpreting the trust and the stark differences in the legal modes of thinking, in particular as regards ownership. The Bill seems to be the result of a confrontation between the common law and French civil law. This is a sufficiently compelling reason to prompt research on the *Fiducie.*

There has not yet been any in depth-study of the 1992 Bill which is the empirical starting point and focus of this thesis. However, recent doctoral theses have included brief case-studies on the *Fiducie*. For instance, a 1998 theoretical thesis on the concept of ownership in French law referred to the *Fiducie,* amongst other institutions.[4] The study seemed to consider the *Fiducie* as part of positive law, although it has not yet been introduced. In the thesis, the argument was that a number of existing legal devices, including the

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[3] Economica, Paris, 1981.

[4] G Blanluet, *Essai sur la notion de propriété économique en droit privé français,* Thesis, Paris II, 1998.

Fiducie, demonstrate an evolution of the abstract idea of ownership towards a more pragmatic concept of economic ownership.

The present study is original in its chosen object, the 1992 Bill's formulation of the *Fiducie,* but also in its approach . It provides a socio-theoretical analysis of this technical and practitioner-oriented area of the law. As such, it is far removed from the traditional doctrinal, or even more practice-minded, doctoral work undertaken in France.

Within the latter perspective, the questions which could have guided a reflection about the 1992 Bill would have focussed on the technical shortcomings of the *Fiducie* and the possibility of improving on the Bill's framework for the device. The need for such a device could also have been assessed with regard to existing legal instruments or practices. A comparative survey of other trust-like devices could have been the basis of a proposed regulatory framework for a French trust...

The questions which the present study seeks to address reflect a very different approach and diverging assumptions. What can the *Fiducie* tell us about social processes pertinent to the workings of French legal culture? What is French legal culture?Why is the trust incompatible with French legal culture? Why this attempt to introduce it?

This thesis seeks to demonstrate that the 1992 Bill's *Fiducie* is the result of epistemic tensions inscribed in power struggles within French legal culture.[5] Indeed, the contradictions within the Bill can be explained in terms of the tensions in the workings of legal knowledge, but these tensions are both the stake and the outcome of the conflictual dynamics of social power struggles. The tensions exist at two epistemic levels: first, at the level of doctrinal knowledge and the French epistemic tradition, principles such as

[5] The word "epistemic" is a Foucauldian deformation and results from an interpretation of epistemology.

absolute ownership have constituted the basis of both the rejection of the trust, and of the legitimacy of the *Fiducie*- the latter does not reproduce the dual ownership structure of the trust. Secondly, as regards the epistemic processes concerning the constitution of the proper means and ends of government and the role of law within this problematic, the Bill expresses both a liberal and facilitative ethos, and an impulse to police through surveillance the opened-up space of (mainly fiscal) freedom.

These tensions and contradictions are the discursive counterpart of two types of struggles: the struggle amongst lawyers, doctrinal academics and practitioners for the ultimate authority and symbolic power of legitimate legal knowledge and discourse. Such authority can only be acquired if the rules of legitimate legal discourse are obeyed; hence, the *Fiducie* had to be incorporated in the mythology of French law, and thus reinforced it. The second struggle opposes an emerging international legal elite to French administrative technocracy. The *Fiducie,* if it could have fulfilled the same fund management functions of the trust, would have been one of the means of increasing the economic power (understood here as a broad notion of economic government) of international legal experts, marginalising that of French state technocrats. However, there is no clear victory of one type of agent, or of one type of knowledge, over another in the conflictual dynamics of the *Fiducie.*

The first chapter of this thesis lays down the empirical foundations of the present doctoral study by providing a description of the 1992 Bill and of the context of its emergence (Chapter I, Section I). It then explains the adopted approach, and in particular, the understanding of "legal culture" and its role as an analytical and structuring element in this thesis (Chapter I, Section II). The theoretical framework grants a central place to the epistemological processes in French legal culture. These processes are understood not as systemic

abstractions but as processes grounded in professional struggles and practices of power. The theoretical framework is built on Foucauldian discursive analysis, which will be complemented by P Bourdieu's understanding of social "fields", allowing to establish a connection between discursive sites and power struggles.

Within this discursive analysis, specific reference will be made to Lenoble & Ost's idea of "mytho-logic", according to which legal discourse uses reason and logic to reinforce its own mythology of law, represented as unitary and coherent. The Foucauldian notion of Governmentality will then be used to understand a second discursive dimension of French legal culture. Finally. Pierre Bourdieu's work on the notion of field will be referred to and complemented by Yves Dezalay's studies on the recent influence of international legal practice on the French fields of law and power.

Chapters II and III delve deeper into the French law's epistemic tradition, dominated by legal doctrine and shaped by the juridical discourse of sovereignty. Legal doctrine is understood here as a form of knowledge governed by certain discursive rules and traditionally produced by academic lawyers or professors. It is the knowledge of the "Keepers of the Temple" as Dezalay would put it, that is, the sacred mythology deployed to protect the God-like figure of law.[6] In our opinion, it does not belong to a certain type of agents as, to a certain extent, anyone can perform the function of "Keeper of the Temple".

The relevant discursive rules are those imposed by the juridical discourse of sovereignty, a mytho-logic rooted in history and in French law's origins in the medieval cross-fertilisation of the sacred and human law. The nature and power of such discourse is symbolic . Chapter II provides a general

[6] Dezalay, "Des Grands Prêtres du droit au marché de l'expertise juridique", Politiques et Management Public, vol 12, n 2, juin 1994, 203.

theoretical map for this discourse and then applies its theoretical findings to the specifics of doctrinal discourse on the trust and the *Fiducie.* The principle of absolute ownership, which grounds the rejection of the trust, is particularly illustrative of the functionings of the juridical discourse of sovereignty. This is why this concept and principle will be explored in detail in Chapter III. In particular, there will be a study of doctrinal arguments raised in other civilian jurisdictions which have been faced with the issue of introducing the common law trust: Louisiana and Quebec. The epistemological role and importance of absolute ownership will be described as one of the main reasons why the *Fiducie* fails to reproduce the split ownership of the trust.

The 1992 Bill also includes a detailed anti-evasion/avoidance tax section. The tax regulation is only one, albeit the most important, of the numerous illustrations on the imperative of surveillance which has dictated the rejection of the trust and the absence of any similar flexible screen-like devices in French law. The surveillance of ownership, the idea of a governable society and individual as transparent units, the theme of visibility are the product of a certain mentality of rule or Governmentality as Foucault would put it. proper means and ends of government. Chapter IV explores the notion of Governmentality and argues that it is historically rooted in Napoleonic rule. The statutory formulation of the *Fiducie*, explored in chapter V, provides an insight into the existing dialectical tensions in Governmentality between liberalism and the impulse to police and constrain freedom in a grid of visibility.

The 1992 Bill also indicates a transitional moment, a change in discursive equilibrium, as it seems that, as a whole, it is reflects an unspoken questioning of the very possibility of economic government. Indeed, the fiscal administration's anxieties, reflected in the tax section of the Bill, are symptomatic of a fear of loss of control over resources because of the

possibilities opened up by global financial management. Similarly, the Bill seems to indicate a certain resignation in the face of pressures on French law and lawyers to compete on a global level. The emerging globalization rhetoric which underlies the Bill is not a purely abstract discursive phenomenon.

Chapter VI seeks to establish a link between the discursive phenomena described above and recent changes linked to the internationalisation of law and legal practice, and the new deal this entails at the level of power struggles. The *Fiducie* is not simply the product of an abstract evolution of French law towards "global law". The emergence of this new institution is to be seen in the light of a changing equilibrium in relations of power within the juridical field of legal expertise, as well as in the light of the emerging role of a new legal elite in the field of economic power. The conclusion will consider, in the light of this thesis, what hypotheses can be formulated as to the reasons for the Bill's failure and the future of the *Fiducie.*

CHAPTER I

THE *FIDUCIE*, AN EMPIRICAL VEHICLE FOR A JOURNEY THROUGH FRENCH LEGAL CULTURE

This first chapter has two purposes. First, it seeks to provide sufficient information on the event which represents the empirical focus of this thesis: the 1992 legislative proposal to introduce the trust, under the name of *Fiducie*, into French law. The second aim is to sketch a clear picture of the theoretical inspirations and resulting framework within which the analysis of the *Fiducie* is developed in this thesis. The text and context of the Bill form the raw material of this doctoral study, and a clear conceptual map of the chosen theoretical approach of this technical topic will be provided in this chapter and developed in the subsequent chapters.

SECTION I - EMPIRICAL BASES

In this section we examine both the text and the context of the 1992 Bill entitled *"De la Fiducie"* and laid before the French Parliament on the 20 February 1992.[1]

1. Context

The genesis of the Bill is to be found in the interplay of three types of factors: (i) a persuasive doctrinal challenge to the orthodox view which established the incompatibility of the trust with French law, (ii) the 1985 Hague Convention on the law applicable to trusts and on the recognition of

[1] Doc. Ass. Nat. 2583.

trusts in "non-trust" countries, and in the late eighties, (iii) a proposal by professional organisations to integrate into French law fiduciary techniques under the generic term of *affidation.*[2]

The thesis of C Witz on the *Fiducie* which was published in 1981 and widely praised for its persuasive, thoroughly researched and grounded arguments, is an important landmark in the genesis of the *Fiducie.*[3] The drafters have referred to Witz's work to ground their proposal.[4] The thesis of C Witz subtly undermines the three-decade reign of the orthodox doctrinal view, established in 1948 by Motulsky, according to which the trust is incompatible with French law.[5] Witz does not directly challenge the orthodoxy and indeed reasserts the fact that, the rights created under a trust cannot fit into existing categories. However, he argues that it is possible to create and introduce a modern legal institution similar to the trust and inspired by the Roman law *Fiducia* and existing fiduciary practices. The new *Fiducie* proposed by Witz would, according to its creator, respond to a need linked to the deficiencies of existing techniques of management and provision of a security in business transactions. Witz defines the *Fiducie* as:

" a legal act by which a person, the fiduciary, who has become the holder of a property right, is restricted in the exercise of that right by a number of duties, amongst which there generally is a duty to transfer his right after a certain period has lapsed, to either the settlor or a third party beneficiary".[6]

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[2] The term "affidation" has the same Latin root as the *Fiducie*, that is "fides" which means "trust".

[3] *La Fiducie en droit privé français*, Economica, Paris, 1981. For a more detailed discussion see Chapter II.

[4] J de Guillenchmidt, "La Fiducie pour quoi faire? Présentation de l'avant-projet de loi relatif à la Fiducie", Rev ue de Droit bancaire, n 19, Mai/Juin 1990, 105.

[5] See discussion in Chapter II of Motulsky's "De l'impossibilité juridique de créer un trust anglo-saxon sous l'empire de la loi française", Revue Critique de Droit International Privé, 1948, 451.

[6] My translation of "La fiducie est un acte juridique par lequel une personne, le fiduciaire, rendue titulaire d'un droit patrimonial, voit l'exercice de son droit limité par une série d'obligations, parmi lesquelles figure généralement celle de transférer le droit au bout d'une certaine période soit au fiduciant, soit à un tiers bénéficiaire", in Witz op.cit. note 3 at p 15.

The definition proposed by Witz has not been adhered to by the drafters, who were much more influenced by the 1985 Hague Convention. Witz envisaged the introduction of the new device through practice and its progressive acceptance by the courts. Hence, his definition reflects this perspective and lacks legal precision. He does not define the nature of the fiduciary's and the beneficiary's rights, or that of the act from which the *Fiducie* would stem. His focus is on the limitation of the fiduciary's title by the beneficiary's rights. Witz's definition remains incomplete as it does not reflect the division of ownership into legal and equitable rights, which is unknown to French law and stands in conflict with the fundamental notion of absolute ownership.

One of the aims, also echoed in the 1992 Bill, was to provide a general framework upon which new techniques would develop independently of any legislative recognition or regulation. However, his definition is too imprecise to be included in a statute.

On the other hand, the 1985 Hague Convention provided a definition of the trust which was sufficiently precise to be included in a statute and does not contain any reference to the division of ownership into legal title and beneficial title.The aim of this private international law convention is to ensure the worldwide recognition of trusts, even in countries which do not have and may not wish to introduce this institution. The drafters of the Convention wanted to make it possible for civil lawyers to understand and think of the trust without the obstacle of fragmented titles and equitable rights. Their "translation" of the trust inspired the drafters of the 1992 Bill.[7]

The third factor in the genesis of the 1992 Bill was to be found in an initiative of the *Association Française des Entreprises Privées* (A.F.E.P).

[7] See Chapter VI for a detailed account of the Convention.

This body, representing private businesses in France, issued a draft legislative text proposing the introduction of an institution similar to the trust and named *affidation*. This text was not adopted. Another text, proposed by the C.S.N, the national Council of Notaries, also failed. Nevertheless, the pressure from the representatives of branches of business and of the legal profession was evident and increasing. As a result of these initiatives, a proposal for a new Bill was then issued by the French Ministry of Justice and presented by their drafters in December 1989, at a professional symposium organised by "Legal Studies and Services Limited" and chaired by a renowned practitioner.[8] This proposal was then formulated as a Bill and, after three years of discussions between the Ministry of Justice and the tax authorities,.the Bill was laid before the French Parliament in 1992.[9]

The inventors of the Bill's *Fiducie* clearly set out their aims and methodology in a presentation and commentary of the Bill for the benefit of practitioners and the business world.[10] The drafters of the part of the Bill which constituted the *Fiducie* as a new institution were J de Guillenchmidt and A Chapelle, in charge of the Commercial law section of the Civil Affairs department in the Ministry of Justice. The part of the Bill dealing with the fiscal regulation of the *Fiducie* was drafted separately and anonymously by the *Ministère des Finances*.

The drafters justified their proposal by referring to the implications of developments in the international context; the ratification of the 1985 Convention would allow an even easier recourse to common law trust techniques which would have to be recognised as valid by French courts.

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[8] This information stems from the drafters themselves, see "Trusts, business trusts et Fiducie" , Les Petites Affiches, n 76, 25.06.90, 4.

[9] See *Le Monde*, 19.02.1992

[10] See Chapelle, de Guillenchmidt, op. cit. note 8, see also an interview with J de Guillenchmidt in dissertation by T Clay, "La Fiducie au regard du Trust", D.E.A, Paris II, 1993.

There would be an even greater incentive to export business transactions to trust countries. Thus, a French trust would respond to the emerging needs of international legal practice in France in the face of the pressures on regulatory competition, that is, of competition to attract businesses on the basis of favourable legal and fiscal rules. It would also fit into a more general evolution of property and the use of full ownership as a security in commercial transactions.

The term *Fiducie* was preferred both to the English word "trust" and to "*affidation*" suggested by the world of practice. The word *Fiducie* has no pejorative undertone and suggests a connection with the Roman law institution named "*fiducia*". The single notion of *Fiducie* would cover a wide range of applications in the area of finance and banking, in labour relations and in most family situations, including the specific case of the transfer of a business unit from one generation to the next. The use of the *Fiducie* for charitable and public interest purposes would offer more flexible solutions than the foundation. The aim was to provide a general framework for this variety of possible applications, as opposed to a specific regulation envisaging all possible uses. The drafters asserted that they wanted to stand against the contemporary tendency of the legislature to provide a plethora of specific regulations.

The drafters reasserted the impossibility of transplanting the trust. In their view, this would have been impossible given the importance for the trust of equitable rights, the existence of specific means of enforcement in Common Law courts and of an organised body of professional trustees. The *Fiducie* had to be formulated as a French institution, fitting into its legal context. In particular, the *Fiducie* was constructed independently from the trust so as to respect fundamental principles in French law, i.e, the principle of unity of

patrimony, the protection of inheritance rights and the notion of absolute ownership.[11] The *Fiducie* was also to be required to fit into the general spirit and texts of the Civil Code. It was defined simply as a transfer of full ownership by the settlor to the fiduciary who must thereby act according to a specified aim or for a public interest purpose. The fiduciary would have full ownership rights and the settlor and beneficiary would have only *rights in personam* against the fiduciary.

The drafters chose to be more specific than the 1985 Convention in one important aspect: they preferred the notion of transfer of rights and assets, rather than just the legally unspecific idea of "control and powers" of the trustee over the trust fund. Under article 2 of the Convention, assets are placed under the control of the trustee who has "the power and the duty" to manage the fund. The drafters preferred to specify that a transfer of property rights determines the legal origin and nature of the fiduciary's rights. The fiduciary is the owner although his rights are limited by a general contractual duty of management of the assets transferred.

The *Fiducie*, although it was designed to fit into French positive law, would be a new institution which could not be compared to any existing corporate entities. It was not an artificial legal person. The constitution of this new institution was based on three key axes. First, the transferred rights and assets were to form an autonomous fund. Secondly, the function and liability of the fiduciary were to be precisely defined. Lastly, the protection of third party interests had to be ensured.We will look at each of these in turn.

The protection of the beneficiary's interest was organised around the idea that the assets and rights transferred to the fiduciary would form a

[11] See Chapter II for a full discussion of these principles.

separate and autonomous fund within the fiduciary's patrimony.[12] This is an exception to the rule of unity of patrimony, according to which each legal subject owns only one patrimonial unit. The fiduciary would have had two patrimonies and would have been obliged to clearly separate his/her own assets from those of the *Fiducie*. Even if the full ownership of the assets was transferred to the fiduciary, his/her prerogatives over the assets were to be limited by a number of duties and obligations defined in the instrument. The beneficiary's rights stemmed from these duties, which were to be enforceable and controllable by the courts. The constitution of an autonomous fund was intended to protect the beneficiary against the fiduciary's personal creditors. Furthermore, the autonomous fiduciary fund could not be part of the estate of the deceased trustee. The drafters did not go any further in the protection of the beneficiary, especially as regards the issue of third parties with notice of the beneficial entitlement. Such entitlements were not defined as a property right. It is unclear what rights a beneficiary could have had against a third party with notice to whom the trust property was fraudulently transferred.[13]

The drafters underlined that the second major axis of their new institutional construction was to be the central role of the fiduciary. The fiduciary was to be required to act with due regard to the confidence invested in him/her by the settlor. This goes further than the general requirement of good faith in legal relations and implies that this relation relies on the personal qualities of the fiduciary, who would not normally have been allowed to delegate his/her functions. There was no specific qualification required to be appointed as a fiduciary apart from the usual requirements of a minimum

[12] A patrimony is the totality of assets, rights and also liabilities and debts that a legal subject accumulates during his/her lifetime.

[13] The proposed legislation did not envisage the issue of tracing as a possible remedy for the beneficiary although the "droit de suite" of secured creditors could have provided an equivalent solution.

standard of competence and ethics common to most professions. The fiduciary's liability would have been determined according to existing general rules, except as regards criminal liability. Moreover, the court could have intervened to replace the fiduciary. Nothing more was provided regarding the the powers of the fiduciary. J de Guillenchmidt stated that the aim was to avoid a heavy and detailed regulation of the fiduciary contract. Case law and the courts would have provided a more detailed regulation. Following the tradition of codification, the *Fiducie* was to be a flexible and barely regulated contractual structure.[14]

The third organising principle of the new institution was the protection of third parties. The third parties who were to benefit from a special protection are the settlor's creditors as the *Fiducie* could be used to make the settlor appear insolvent. No specific registration scheme would have been set up as this would have increased the burden of formalities. However, a *Fiducie* could have been declared unenforceable by a court as a result of the application of three existing procedures: (i) The *action paulienne* of Article 1167 of the Civil Code would have allowed the settlor's creditors to challenge any fraudulent transfer by the settlor in order to defeat their rights. (ii) The settlor's secured creditors would be able to trace the property offered as a guarantee for their debt even if it had been transferred to a fiduciary. (iii) Any transfer of a company's assets during the *période suspecte*, that is a period of maximum two years before the company is declared bankrupt, could be held fraudulent.

In the face of this movement to create a sphere of contractual self-determination where the settlor could shape the future of his/her assets and freely organise their management, the fiscal administration imposed detailed restrictions. A 1992 budgetary statute illustrates this bureaucratic reaction. In

[14] See interview op. cit. note 10.

its article 55, it institutes a mechanism allowing the fiscal administration to take into account revenues produced by assets transferred abroad. The 1993 Budget generalised this principle; it provides that any French business acquiring a share of at least 10 percent of the capital of a company located in a tax haven will have to deal with the revenues of this company as if it were theirs. These revenues will be taxed.[15]

This budgetary initiative is an attempt to regulate techniques of *defeasance*, used by big companies such as Peugeot, that entail the setting up of a foreign trust and the transfer abroad of a debt and of a portfolio of assets intended to service the debt at a minimum fiscal cost. Article 55 of the 1992 statute provides that the revenue of such assets transferred to a trust are taxable. This illustrates the approach of the fiscal administration and explains its defensive attitude as regards the *Fiducie,* which was perceived as enabling the *defeasance* technique.

The hostile response of the fiscal administration was not countered by enthusiasm amongst the legal profession. Some have regretted that the Bill did not specifically attribute the drafting of fiduciary instruments to notaries.[16] It seems that the use and advantages of the *Fiducie* for the legal profession were not clearly or at least generally identified. It was perceived as an ideal way of organising the succession to small family businesses.[17] At the forefront of this activity would have been the *fiduciaire* and practitioners have identified this function as an emerging area of professional and deontologically organised practice.[18] The importance of this particular application of the device has

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[15] See J P Le Gall, "La 'butte témoin' de la Fiducie", JCP (E), 1993, n 1-2, 85.
[16] Jeantet, "Projet d'introduction du trust en France sous le nom de Fiducie", Revue Juridique et Politique, 1990, 280.
[17] P Decheix, "La Fiducie, mode de transmission de l'entreprise?" and Y Streiff "Le droit civil au secours de la transmission des entreprises; l'avant-projet de la loi sur laFfiducie", both in Les Petites Affiches, 9 Mai 1990, n 56, 18 and 23.
[18] D Desurvire, "Bientôt un trust franco-français?", Les Petites Affiches, 22.02.1993, n 23, 14.

been questioned by J de Guillenchmidt who has noted that the *Fiducie* would only be useful in the rare situations where the head of the family business retires or dies and there is no immediate successor.[19]

A further example of the weaknesses in the drafting concerned the specification of the rights of the beneficiaries. During the discussions prior to the formulation of the Bill, a group of experts in banking law pointed out this shortcoming in the proposal, which was not resolved in the later Bill.[20] The beneficiary's precise entitlements as regards third parties were unclear, as the Bill did not specify whether third parties with notice of the beneficiary's rights would be bound by them, let alone what type of notice (actual, constructive) would operate. The beneficiary's rights were ill-defined and seem less than the beneficial ownership protected by Equity.[21] The nature and extent of the fiduciary's obligations were also uncertain. Too much reliance was placed on the courts to regulate these issues.

The Bill, which was initiated by the French Ministry of Justice, was never debated in Parliament and was finally dropped from the legislative agenda in Autumn 1994. Despite some concern about the effect of the *Fiducie* on entrenched inheritance rights, there was no real opposition to the Bill, which was simply not perceived as a legislative priority and, eventually, forgotten. Nevertheless, the *Fiducie* remains a topic of discussion in professional and doctrinal literature. Professional symposia are still organised on the subject. Since 1994, the Bar has been ready to recognise the function of

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[19] See interview op. cit. note 10.

[20] "La Fiducie: Contributions à l'avant-projet de loi", Revue de droit Bancaire, sept/oct 1990, n 21,176.

[21] See also M cantin Cumyn, "L'avant-projet de loi relatif à la fiducie, un point de vue civiliste d'outre-atlantique", Dalloz, Chronique, 1992, 117.

trustee. Article 3-26 of the Internal Regulation of the Bar of Paris allows *avocats* to undertake duties as a trustee or a *fiduciaire.*[22]

The *Fiducie* has indirectly reappeared in Parliament on three recent occasions. In 1996, a parliamentary report, known as the *rapport Marini*, proposed a general reform of company law. The introduction of the *Fiducie* was included as part of a general framework of legislative reform and modernization. The primary objective would be to provide a piece of legislation ensuring the competitiveness of French law in years to come. This implies a questioning of the institutional structure of corporations and a return to the flexibility of contract, favourable to the interests of shareholders.[23] The *Fiducie* would be one of the more flexible contractual tools offered to corporate organization. More flexibility would not entail less regulation of corporate activity. Such regulation would be indirect and organised through means of internal control. Emphasis would be placed on informing shareholders and the use of accounting methods and professional controls. The *Fiducie* would fit into this new framework.

The second occasion where the *Fiducie* might be said to have appeared also occurred in 1996. In July, a short and technical text was passed which, in its article 49, allows the protection of assets deposited in a bank through a transfer of ownership to the bank holding the property for the depositor. The assets cannot be claimed by either the depositor's creditors or the banks. Whether this amount to a division of ownership similar to the trust's is debatable but similarities have been drawn. Indeed, it has been argued that it introduced the *Fiducie* by the back door.[24]

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[22] Droit et Patrimoine Hebdo., 20.12.94.

[23] Bonneau, Hovasse, Vidal "La Modernisation du Droit des Sociétés: le Rapport Marini", Jurisclasseur, Droit des Sociétés, nov .1996,4.

[24] Decheix, "La Fiducie ou du sens des mots", Dalloz, 1997, n 6, 35.

The same year, another proposal drafted by an organisation of regional businessmen located in the West of France was submitted to the Ministry of Economy and Finances.[25] The *Fiducie* was presented, once again, as a useful tool to ensure the survival of small and medium regional businesses through their preservation as economic entities over several generations. The *Fiducie* would enable this preservation of a family business as economic entity despite the French succession laws' requirement to divide ownership amongst protected heirs. The entrenched succession rights would be moved onto property placed in trust and producing revenue. The Minister welcomed this initiative and created a new study group on the *Fiducie*. However, the work of this think tank, directed by C Champaud, has still not been concretised because of the inertia of the tax authorities.[26]

At the doctrinal level too, academic interest in the *Fiducie* has not altogether disappeared. Recent doctoral studies have addressed the issue of the *Fiducie*. An important recent thesis has referred to the *Fiducie* to demonstrate the current evolution of the notion of ownership towards a recognition of its economic, as opposed to strictly legal, dimension.[27] This recent doctoral work adopts a traditional approach, focussing on the conceptualisation of ownership in French law, arguing that this central concept should and will adapt to current changes in order to take into account the reality of economic ownership. The *Fiducie* is, according to the thesis, one of the new institutions

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[25] See C Champaud, "La Transmission des Entreprises Patrimoniales", Revue Internationale de Droit Economique, 1998, n 1, 35.

[26] C Champaud who headed this study group claims in the above article that this may be linked to the strategy of state technocrats who intend to convert to a career in the private financial sector and are thereby preserving their future interest in business concentration.

[27] G Blanluet, "Essai sur la notion de propriété économique en droit privé français- Recherches au confluent du droit fiscal et du droit civil", Thèse, Paris II, 1998. See Intoduction and Conclusion.

which reflects a more economic understanding of ownership and which a more up-to-date doctrinal notion of ownership should be able to encompass.

At the level of practice too a process of reconceptualisation of well-established legal forms is emerging. Institutions which were not previously named as *Fiducies* are now being identified as fiduciary devices.[28] One of these is based on an well-established institution: the usufruct. *Le quasi-usufruit sur valeurs mobilières* is based on article 587 of the Civil Code, which allows the usufruct of moveable and consumable property. This quasi-usufruct of stocks and shares enables the title holder to dispose of the property and replace it by new securities, just as a trustee would. The freedom of management within this type of arrangement is only limited by the requirement that the assets of the usufruct be at least equal to their initial value when they have to be returned to the beneficiary of the usufruct. The beneficiary is the person to whom the property will be re-transferred after it has been managed and possibly increased in value by the *quasi-usufruitier*, the trustee-like temporary title holder.

As regards new fiduciary practices, it has been argued that there have been new discoveries in a variety of fields.[29] Even if the Bill did not focus on the possible charitable applications of the new device, there have been new applications of the law regarding foundations and associations which suggest a more trust-inspired approach to the field of charitable activity.[30]

New fiduciary mechanisms have been constructed by practitioners, such as the *defeasance* .Trust-like devices are also used in the context of legal practices relating to insurance services. Insurance policies are increasingly based on the insurer taking up the function of an investor, with the obligation

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[28] See Gobin, "Fiducies sans la Fiducie", J.C.P (N), n 44-45, 1994, 315.
[29] ibid.
[30] ibid, at p 318.

to return the invested sums if and when the risk realises. In the area of pensions, trust-like practices have become the basis of significant changes, with the increasing prominence of insurance policies as investment pension schemes.[31]

The Bill has widened the perspective of French legal analysis by adding to law a new conceptual element, a new way of analysing legal relations, despite its lack of regulated status. This could also indicate a pragmatic recourse to fiduciary devices despite the lack of a regulatory framework for the *Fiducie*.[32]

2. Text

The text of the Bill comprised 64 sections and was divided into four parts. It was presented with the usual introductory Preamble setting out the rationale and spirit of the proposed legislation. The following gives a descriptive account of the most important aspects of the Bill and Preamble.[33]

2.1 The Preamble and the legal classification of the Fiducie

The Preamble follows the structure of the Bill. It also has four parts; the first deals with the Bill's general provisions: the parties, the essential terms, the object of the *Fiducie*, the protection of third parties, the protection of entrenched inheritance rights and the role of control of the court. The second part explains the accounting provisions and the third, fiscal regulation. Finally the fourth part deals with consequential provisions.

The Preamble begins with an explanatory definition of the trust. It claims that the Civil Code contains no institution similar to the trust, through

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[31] ibid at p 322.

[32] See also Lucas,Thesis,1995, "Le Droit des Sociétés et le Droit des Contrats à l'épreuve des transferts temporaires de valeurs immobilières".

[33] The full text in French is given in appendix A.

which ownership of assets is transferred to a trustee with a duty of management. The specificity of this device is identified in the Preamble as the fact that the trust creates a patrimony or fund managed for a particular purpose, and independent from the personal patrimony of the legal owner (*patrimoine d'affectation*). As a result, this patrimony cannot be reached by the private creditors of the *fiduciaire* and will not be part of his estate.

The Preamble incorporates the policy arguments developed by the drafters and already set out in this chapter. In particular, it asserts the importance of the protection of third parties and protected heirs. It represents the *Fiducie* as a necessary measure intended as a response to the emerging needs of the legal profession. It underlines that the *Fiducie* was expected to be used primarily as an instrument of wealth management and as a security, replacing existing and more formal devices or complex and uncertain practices. The *fiduciaire* is put at the forefront of the proposed Bill. He was to be the "mainspring" of the device. The word *Fiducie*, derived form the Latin word *fides* (trust), was chosen to reflect the specific and inherent element of trust in the relationship between the settlor and the *fiduciaire*. This relationship is a contractual one: this is a central tenet of the proposed institution.

2.1.1 The *Fiducie* as a contract

The Preamble stresses that the *Fiducie* must fit into the existing legal order, and to this end, it was defined as an ordinary contract governed by the general principles of the law of contract. The classification of the *Fiducie* as a contract was an important aspect of its legitimisation and differentiation from the trust. C Witz, in his doctoral study, had argued that a modern *Fiducie* would nevertheless be rooted in the Roman contractual device called *fiducia*.

The drafters have clearly expressed that the *Fiducie* was inspired by the trust. The Preamble argues that the *Fiducie* reproduced one of the essential characteristics of the trust by entailing the creation of a patrimony or fund managed for a particular purpose and separate from the *fiduciaire*'s own assets *(patrimoine d'affectation).* As a result, this patrimony cannot be reached by the private creditors of the *fiduciaire* and will not be part of his estate.

However, the legitimisation of the *Fiducie* implicitly depends on distinguishing it from the trust as a structure of ownership and property institution. The drafters were even tempted to avoid any reference to a transfer of ownership at all, and instead, to mention only a transfer of rights and assets to the *fiduciaire.* Thus, the legal definition of the *Fiducie* as a contract is an attempt to embrace only certain aspects of the trust, whilst discarding the trust's conceptualisation of ownership. Underlying this complex and paradoxical characterisation is an implicit understanding of the trust as predominantly a means of splitting ownership.

2.1.2 The Bill's understanding of the trust and its limitations

The Bill's definition of the *Fiducie* betrays the following vision of the trust: a division of ownership between the trustee and the beneficiary, where the beneficiary has a definable right *in rem,* a type of ownership. In English law, this understanding of the trust reached its Zenith with the rule in *Saunders v Vautier.*[34] In this case, it was held that a beneficiary entitled to the full equitable interest can require the trustees to transfer the trust property to him and to end the trust. This rule seemed to indicate a recognition that the beneficiary's right is an entitlement to the property itself: the beneficiary's interest is ownership. This doctrine was taken one step further with the claim

[34][1841] 4 Beav 115.

that for a trust to exist, it must be possible to identify all the beneficiaries and therefore, ultimately, where the equitable ownership lies.

The post-war development of the discretionary trust brought about changes as regards this idea of equitable ownership. The tax-planning advantages of the discretionary trust depend precisely on the fact that the rights of the beneficiaries are kept vague and variable and are therefore more difficult to tax. To accommodate these developments in the use of trusts, the courts, in a series of cases culminating with the decision of House of Lords in *McPhail v Doulton*, considerably relaxed the certainty of object requirement.[35] Thus, the focus of trust law shifted from the ascertainable beneficiary to the trustee's duties and the ability of the courts to control and execute the trust. "Trustees' duties which, by being made more central to the institution of discretionary trusts, are coming to take the place once reserved as sacred to equitable beneficial interests".[36]

It seems that "[d]iscretionary trust powers are coming to colour the whole law of trusts and powers' and it has become "evident that the law is less firmly attached to the concept of trustees holding a legal interest and beneficiaries holding an equitable interest".[37] Hence, the traditional view of the trust as a "property receptacle" or a structure of divided ownership coexists with a vision and practice of trust centred on the duties of trustees, enforced and controlled by the courts without the need for a beneficiary with *locus standi*. With the development of the discretionary trust, trust law has adapted its understanding of trusts and granted more importance to the contract-like relationship binding the trustee to the settlor's wishes.[38]

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[35][1970] 2 All ER 228
[36]Davies [1970] ASCL 189.
[37]ibid.
[38]See chapter VI, from p 191 for similar developments in international trust law.

By refusing to model the *Fiducie on* the traditional property view of trusts, the Bill has, purposefully or not, constructed a device close to current trust practice and understanding. However, the unlike the trust, the *Fiducie* does operate a full transfer of ownership and as such, is unable to make the beneficial ownership disappear. Whereas in modern trust practice, beneficial ownership has become increasingly elusive, the *Fiducie* does not even enable its conceptualisation as a separate entity. With the *Fiducie*, beneficial ownership cannot be made to disappear as it can never exist.[39]

2.2 The Bill

The substance of the Bill has to be considered in order to fully appreciate how the Civil Code was intended to be amended and the *Fiducie* generally regulated. We will therefore look at the abridged translation (in italics) of key articles, sometimes commented, and a summary of less important provisions.

The Bill' s first section, which corresponds to the whole of Part I, details nine articles to be included in the Civil Code. In this first Part, it is provided that an additional 16th title (sixteenth bis) is incorporated in Book three of the Civil Code. It is named "*De la Fiducie* " and details articles 2062 to 2070-11 as follows:

Art 2062-*The Fiducie is a contract by virtue of which a settlor transfers all or part of his assets and rights to a fiduciary who, holding the same separate from his personal patrimony, deals therewith for a specific purpose benefiting one or more beneficiaries in accordance with the provisions therein contained. The settlor himself may be a beneficiary (...)*

[39]See chapter VI.

A *Fiducie* cannot be created by will or by a court decision. It is intended to be the equivalent of the *inter vivos* private express trust as the following provision confirms.

Art 2063- *To be valid the contract must contain a description of the property and rights transferred, the mission and the extent of the powers of the trustee, the names of the beneficiaries or the rules allowing their designation, (...) the duration of the Fiducie (not more than 99 years).*
The contract must be in writing and requires a notarial deed if created to donate assets.

The *Fiducie* can only be created expressly and cannot be implied.

Art 2064-*When the Fiducie is created for the purpose of donating assets, the name of the beneficiaries cannot be changed.*

Fiscal considerations underlie this provision.

Art 2066- *To hold a position as a fiduciaire or the director of a body with fiduciary duties, a person must not have been previously convicted or declared bankrupt or barred from any professional corporation on the basis of behaviour contrary to honour, honesty and morality.*

Art 2067- *The fiduciaire must perform his duties personally but may delegate specific tasks, for which he remains responsible.*

Art 2068- *In his relationship to third parties, the fiduciary is deemed to enjoy the fullest powers over the rights and assets of the contract, unless it can be proved that the third parties had notice of the limitations on his rights.*

Art 2069- *The fiduciaire has a duty to avoid any mixing of the assets of the Fiducie with his own assets or those of other Fiducies.*
Except as regards the settlor's creditors who have registered their security prior to the creation of a Fiducie and those who are the victim of a fraudulent transfer of assets, the assets of a Fiducie can only be seized as a result of non-

payment of the debts incurred in the process of the preservation or management of the assets in Fiducie.

The assets in the *Fiducie*, although they form an autonomous ensemble, are part of the *fiduciaire's* patrimony, unlike in The Hague Convention's article 2 trust, according to which the *patrimoine d'affectation* does not belong either to the trustee or to the beneficiary.

Art 2070- *Where the Fiducie comprises property which has to be transferred by registered conveyancing, the name of the fiduciaire in his capacity as such must be mentioned*

Art 2070-1- T*he fiduciaire must perform his duties in accordance with the trust invested in him by the settlor.*
If the fiduciaire acts in breach of trust or acts in conflict with the interests entrusted to him, the settlor or the beneficiaries may ask the courts to intervene to replace the trustee by a temporary administrator or a new fiduciary, or to terminate the contract.
This provision applies in case of breach of article 2066.

Art 2070-3- *The Fiducie cannot be used to deprive the protected class of heirs from their legally entitled minimum share in the estate. The fund held for the beneficiaries of a Fiducie may be reduced (...) in accordance with the rules in articles 2070-5, 2070-7 and 2070-8.*

Art 2070-5- *Where the Fiducie's assets constitute a business concern, such reduction does not need to target the business itself and can take effect by payment of a sum of money.*

Art 2070-10- *The Fiducie ends when its purpose has been fulfilled. Alternatively, it can be terminated by judicial decision where all the beneficiaries renounce their rights, or the fiduciaire dies, or the fiduciaire is declared bankrupt, or where the fiduciaire is a legal entity and is absorbed or liquidated.*

However, the courts, at the settlor's or the beneficiary's request, may take the necessary steps to ensure the survival of the contract.

The above articles constitute Part I of the Bill which reflects the drafters' concern to avoid envisaging all the possible practical applications of the *Fiducie*. This institution was intended to flourish organically according to the specific needs of the economy and the courts would have had the role of adapting the device.

Part II of the Bill deals with accounting duties. Section 2 provides that the *fiduciaire* must draw up two types of accounts. One is to describe the assets and liabilities of the fund, the other the income and outgoings and the dates of their payment into or out of the fund. According to Section 3, these accounts should be communicated to the beneficiaries upon demand. Section 4 requires that the *fiduciaire* registers the accounts as prescribed in the *Code de Commerce*. Sections 6, 7, 9 provide that the beneficiaries must appear as creditors of the *fiduciaire*, in the legally required statement of accounts. According to Section 10, a statutory instrument will specify the proper methods of drawing up such accounts.

Part III contains the fiscal regulation of the *Fiducie* and is by far the lengthiest and most complex part of the Bill. The principle of neutrality of the *Fiducie* is applied: according to this principle, for the purposes of taxation a *Fiducie* should not have any impact on the liability of the beneficiary or the settlor. The fiscal administration wants to avoid any situation of opacity as regards the ownership of assets. It has also taken this opportunity to make sure that international trust transactions involving French assets are covered by these anti-evasion/avoidance mechanisms.[40]

[40] "Fiducie et Fiscalité" J CP (E),1991, n 13, 150.

In Section 11, a distinction is established between the beneficiaries entitled to the income and those entitled to the capital. The remaining provisions are divided according to the specific form of taxation concerned.

Sections 12 to 22 deal with gift and registration duties and wealth Tax. According to section 12, if the *Fiducie* gives effect to a gift to a third party, payment of duty is required. Where the beneficiary is the settlor himself, no duty is owed and the fund is included in the calculation of the wealth tax owed by him. The rate of the gift duty depends on the proximity of kinship between settlor and beneficiary (Section 13). Where the beneficiary has not been designated before the death of the settlor the duty is owed and immediately payable at the maximum rate of 60% (Section 17).

According to Section 18, the calculation of wealth tax payable by the beneficiary of the income includes the assets in the *Fiducie*. Such beneficiary is deemed to be the owner of the capital. When the beneficiary is not yet born or designated, the *fiduciaire* must pay wealth tax at the highest rate. The creation, modification or termination of a *Fiducie* must be notified to the tax authorities. Such notification imports registration duties of FF. 5000 and FF. 1000 (Sections 20, 21, 22).

Sections 23 to 36 deal with direct taxation. The income from the *Fiducie* is taxable in the hands of the beneficiaries, according to the tax regime applicable to their activities. Where the beneficiaries entitled to the income cannot be identified, the *fiduciaire* must, on their behalf, pay income tax at its highest rate (Section 23). This provision is clearly intended to prevent tax avoidance through the use of a *Fiducie*. The principle of transparency is applied. It has been argued that such a provision would prevent accumulation-discretionary *Fiducies* from emerging.

Section 24 specifies that the income from the *Fiducie* is taxable in the settlor's hands, where the contractual instrument:

-provides for the use by the settlor of the capital or the income, or the return of the assets to him

-designates him as the beneficiary

The income of the *Fiducie* consists of the net proceeds of the management of the assets AND the realised capital gains(Section 25). The settlors or beneficiaries, except where the latter are corporations, are deemed to own the assets in the *Fiducie*, for the purpose of the calculation of Income tax (Section 26).

The *fiduciaire* must inform the beneficiaries of the implications of the *Fiducie* as regards their fiscal obligations. The *fiduciaire* must also provide to the tax authorities a statement as to the name and activities of the beneficiaries, the nature and value of the assets, the value and distribution of the income (Section 33).

The management of assets in the context of a *Fiducie* is considered a remunerated provision of services and the *fiduciaire* owes VAT as regards each *Fiducie.* An occupational tax targets the *fiduciaire* by reason of his/her activities, as a member of a professional body (Sections 40 to 42).The remuneration of *fiduciaire* is thus acknowledged.

In the part dealing with additional common rules, it is specified that the preceding fiscal provisions will apply to assets in trust (or other similar institutions), following the usual rules of territorial jurisdiction laid down in the Fiscal Code (Section 44). The tax authorities intended here to broaden its control through its recognition of foreign trusts.

Part IV covers a number of miscellaneous provisions for the modification of existing legislative texts. It addresses in particular the criminal

liability of the *fiduciaire.* Section 59 provides that article 408 of the *Code Pénal* is to be modified as follows:

Art 408-1: *A fiduciaire who has dealt with the fund in bad faith and in breach of the beneficiaries' interests is liable to a fine (between FF. 2000 and FF. 2,500,000) and to imprisonment for a term of 1 to five years.*

The onerous fiscal regulation of the *Fiducie* could be one of the major causes for the Bill's failure. Indeed, it did not gain the expected support amongst practitioners. The fiscal neutrality of the device had been widely perceived as a precondition of the success of a French trust.[41] The French fiscal administration claimed that neutrality would be a basic principle, which seemed to have been sacrificed where the risk of tax evasion/evasion needed to be prevented.

However, the fiscal restrictiveness of the Bill does not alone explain the failure of the Bill. It will be argued that one of the reasons for the 1992 Bill's failure is because the *Fiducie* would have been of little use in the international business context without the division of ownership of the trust.

It is not the primary purpose of this thesis to provide a functional account of the *Fiducie* and to explain its failure as stemming from its deficiencies as a practical instrument. Indeed the contention of the thesis is that the failure of the Bill does not stem solely or predominantly from such deficiencies. Therefore, this thesis does not either provide a conventional comparative study in order to evaluate the *Fiducie* as an instrument, or as an illustration of the ontological qualities of French law.

The 1992 Bill on the *Fiducie* provides an empirical starting point, one which has not yet been used in doctoral research; the first question posed is:

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[41] C Witz in his 1981 thesis recommended fiscal neutrality in his conclusion. Op. cit. note 3.

why did the attempt to introduce the trust into French law take the shape of the *Fiducie*? Answering this question will in itself enable us to formulate concluding hypotheses as to why the Bill failed. To provide an answer to this question, it is the contention of the thesis that an understanding of the processes of French legal knowledge and practice is necessary. The following section provides the theoretical grounding for this chosen focus.

SECTION II - COGNITIVE CARTOGRAPHY

The analysis of the *Fiducie* proposed in this thesis is based on the following two-fold hypothesis: first, the trust was translated into a distinct institution named *Fiducie* because it could not be accepted or reproduced in its common law form in the context of French legal culture; secondly, the *Fiducie* illustrates a tension in French legal culture between the impossibility to reproduce the trust and the necessity to introduce it. The basic premises of this thesis is, therefore, that there is such a thing as "French legal culture" and that it will be explored through this study of the *Fiducie*. This section seeks to address, rather than resolve, the following theoretical question: "what is (French) legal culture?".

The methodology chosen for this doctoral study is a Foucauldian discursive approach, defined shortly. The application of the discursive or archaeological method has necessary implications for the definition of the object of study. This object is identified as French legal culture. However, an exhaustive definition or account of this notion is not the aim of either this section or this thesis. More modestly and specifically, the objective is to show that the *Fiducie* can be interpreted as an epistemic event giving an insight into the workings of French legal culture as knowledge and site of struggles.

1. Archaeology as method

The following sub-section gives an account of the general theoretical context of Foucauldian archaeology and its link with the central philosophical question of the subject. This theoretical contextualisation will facilitate and understanding of the Foucauldian notions of discourse and knowledge deployed in the thesis. Further, the limits of Foucault's archaeology will be explored and the usefulness of complementary insights stressed.

1.1 Decentering the Subject

Michel Foucault's archaeological method was set out in *The Archaeology of Knowledge* .[42] According to him, this method had been informing his early important works without being clearly formulated until the methodological statement of *The Archaeology of Knowledge.*[43] It is based on what Habermas has called "the linguistic turn" which "has placed philosophisizing on a more secure methodological basis and has led it out of the aporias of the theories of consciousness.[44]

Indeed, in *The Archaeology of Knowledge*, Foucault asserts his aim "to define a method of analysis purged of all anthropologism".[45] Foucault nevertheless "wanted not to exclude the problem of the subject, but to define the positions and functions that the subject could occupy in the diversity of discourse".[46] Hence, discourse and its rules are placed at the centre of the archaeological approach. The subject is not completely excluded but does not constitute the starting point of the approach as s/he is an effect of discourse.

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[42]Tavistock, London, 1972.
[43] These books include *Madness and Civilization* (Tavistock, 1967), *The Order of Things* (Tavistock, 1970).
[44]*Postmetaphysical Thinking*, Polity Press, Cambridge, 1992 at p 8.
[45] op. cit. note 8 at p 16.
[46]ibid.

Language in its surface manifestation is the archaeological raw material, without reference to the subject as the origin of meaning. Discourse is not the outcome of subjective intentions, beliefs or personal psychology of identifiable authors; thus, discursive analysis does not seek to uncover meaning willed by the subject: "...discourse is not the majestically unfolding manifestation of a thinking, knowing, speaking subject, but, on the contrary a totality in which the dispersion of the subject and his discontinuity with himself may be determined".[47]

It seems that Foucault's archaeological approach defies any disciplinary classification. It rejects anthropology's focus on the human subject but it cannot be described as textual or semiotic. It wants to go beyond subjective consciousness but it does not embrace a psychoanalytical view of the subject as shaped by the unconscious. It is concerned with social phenomena but is not sociological. The archaeological method is more interdisciplianry than multidisciplinary but it remains essentially philosophical: it is located at the frontiers of many academic disciplines. Rather than defining it with reference to these, it is better understood through its central tool of analysis: discourse.

1.2 Discourse and discursive analysis: power and knowledge explored

An important element and source of confusion in Foucault's understanding of discourse is this concept's fluctuating meaning. Foucault accepts the "equivocal meaning of the term *discourse*, which I have used and abused in many different senses: in the most general, and vaguest way, it denoted a group of verbal performances; ...But I also meant a group of acts of formulation, a series of sentences or propositions. Lastly - and it is this

[47]ibid. at p 55.

meaning that was finally used... - discourse is constituted by a group of sequences of signs, in so far as they are statements, that is, in so far as they can be assigned particular modalities of existence...".[48]

Thus, Foucault uses the term discourse both in a conventional way, as a surface manifestation of speech, and in a very specific way: discourse is constituted of statements which do not exist at the surface level of speech acts, that is, of what is being said. A statement "is not presented to the perception as the manifest bearer of its limits and characteristics".[49] it is "neither hidden nor visible" and exists at the limits of language.[50]

A discursive analysis is concerned with how and according to what rules statements shape a discourse. Discursive rules or relations

"are, in a sense, at the limit of discourse...they determine the group of relations that discourse must establish in order to speak of this or that object....These relations characterize not the language (langue) used by discourse, nor the circumstances in which it is deployed, but discourse itself as a practice".[51]

It is therefore important to stress that discursive analysis and discourse are not only situated at the surface level of text or speech which constitute the raw material of such analysis. A discursive approach is not a textual analysis. Discourse, in the specific archaeological sense, operates

"at a kind of pre-conceptual level....the 'pre-conceptual' thus described is ...(at the level of discourse), the group of rules that in fact operate within it".[52]

Discourse is therefore a pre-conceptual set of rules and practices governing the production of objects, concepts, subject positions. It shapes these epistemological figures.

"[W]hat archaeology tries to describe is not the specific structure of science, but the very different domain of knowledge".[53]

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[48]ibid. at p 107.
[49]ibid. at p 110-111.
[50]ibid. at p 112.
[51]ibid. at p 46.
[52]ibid. at p 60 and 62.

Hence, discourse is an essential aspect of the Foucault's archaeological understanding of knowledge.

Discourse is to be understood as a deep-level epistemic phenomenon. Foucault has stressed that archaeology does not describe disciplines: discourse is not co-extensive with discipline. In fact, disciplines are the surface manifestation of discourse.[54] Discourse shapes deep-knowledge structures or *savoir*. "A discursive formation provides the pre-knowledge (savoir) necessary for the knowledge (connaissance)".[55]

Connaissances form surface-level units of knowledge such as disciplines and are the product of *savoir*/discourse which operates across disciplines.

In the proposed analysis of the *Fiducie*, we are examining the deep-level structures of French legal knowledge which form its cultural basis. We are going beyond a conceptual analysis of principles such as absolute ownership, to explore the underlying rules which determine its significance and role in French legal knowledge. This study is concerned with the various discourses at the cross-roads of which French law as a recognisable unit (constituted of legal knowledge-*connaissances* and rules) has emerged.

Archaeology explores discourse/savoir but also its relationship with non-discursive expressions of power.

"Archaeology also reveals relations between discursive formations and non-discursive domains (institutions, political events, economic practices and processes)...it tries to determine how the rules of formation that govern it...may be linked to non-discursive systems: it seeks to define specific forms of articulation".[56]

The relationship between the discursive and the non-discursive is complex, non-linear and cannot be reduced to a causal analysis.

Deleuze described this relation as follows:

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[53]ibid. at p 195.
[54]see ibid. pp 106-107.
[55]G Gutting, *Michel Foucault's Archaeology of Scientific Reason*, CUP, 1984, at p 251.
[56]op. cit. note 10 at p 162.

"discursive relations become associated with non-discursive milieux, which are not in themselves situated either inside or outside the group of statements but form...the specific horizon without which these objects would neither appear nor be assigned a place in statement itself".[57]

These non-discursive horizons are broad, perhaps vague; they are

"that whole domain of institutions, economic processes, and social relations on which a discursive formation can be articulated".[58]

Establishing this link is fundamental to the archaeology as

"the autonomy of discourse and its specificity nevertheless do not give it the status of pure ideality and total historical independence".[59]

Foucault is at pains to stress that the archaeology

"makes it possible to articulate...the analysis of social formations and epistemological descriptions"[60]

This is the aim embraced in the proposed study of the *Fiducie*.

1.3 The limits of archaeology

Foucault's careful methodological statement leaves a number of questions open. The first relates to Foucault's statement of the articulation between discourse and non-discursive social formations. How can this articulation be defined? Secondly, what is this 'pre-conceptual' level of discursive analysis?

The limits of Foucault's archaeology are indicated by its replacement with a genealogical approach which focused more explicitly on a historical account of the role of power in the constitution of subjectivities. A simplified understanding of discourse seems to allow for a greater focus on power and struggles, at the expense of abstract rules of discursive formation. Foucault's

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[57]*Foucault*, University of Minnesota Press, Minneapolis, 1996, at p 20
[58]Foucault, op. cit. note 10 at p 164.
[59]ibid. at p164-165.
[60]ibid. at p 228.

archaeological aim seemed too dominated by a desire to find a methodology which would enable a description of the abstract rules of truth production. This overshadowed the possibility of a social critique of discursive practices.

However, it is only the overly abstract and systemic aspects of discursive analysis which will be discarded here. Foucault's complex understanding of discourse and his powerful statement of the interdependence between the operation of power and the workings of knowledge have been echoed in the work of many important contemporary thinkers. Bourdieu provides a complementary sociological insight through his work on knowledge as practices enmeshed in the constitution of powerful ruling elites within given societal fields.[61] The *Fiducie* will not be understood as solely resulting from the abstract structures of French legal knowledge, as it is also the product of agents' strategies and their conditioning in the context of field struggles.

Another problem, rather than limit, of Foucault's discursive approach is connected to the shifting meaning of discourse and the ensuing difficulty in defining the level and nature of discursive analysis. In particular, Foucault asserts that it is "pre-conceptual". This has lead Deleuze to state that a discursive analysis explores the unconscious of knowledge. However, Foucault's analysis is not based on psychoanalytical theories. Nor is it an anthropological search for the pre-linguistic.

Discursive analysis is interpreted here as both an analysis of "surface-level" phenomena of discourse such as legal logic and underlying and unformulated (or rather, no longer formulated) myths and symbols. This

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[61]See L Wacquant (ed), *An Invitation to Reflexive Sociology*, Polity Press, Cambridge, 1992; P Bourdieu, *La Noblesse d'Etat, La distinction*, "La Force du Droit: éléments pour pour une sociologie du champ juridique", Actes de la Recherche en Sciences Sociales, n 64, p 3. It is Dezalay's application of Bourdieu's theoretical framework to and understanding of the French legal profession which will be relied upon in the following discussion and in chapter VI.

mythology is "neither hidden nor visible". Its symbols and imagery are the sedimented remains of pre-modern tradition and tales and constitute the pre-conceptual grounding of modern legal concepts, ideas and language.

2. French legal culture as object

2.1 Legal culture as an epistemic entity

Method and object are mutually constitutive. The election of Foucault's archaeology and Bourdieu's reflexive sociology - as applied by Dezalay - will entail a particular understanding of legal culture as object of study. Foucault and Bourdieu's work grant a privileged place to knowledge. The chosen approach privileges an analysis of the epistemic characteristics of French legal culture.

The *Fiducie* is the empirical starting point on the basis of which this analysis is constructed. It is understood as an epistemic event around which will be sketched "a 'polygon' or rather a 'polyhedron' of intelligibility, the number of whose faces is not given in advance and can never properly be taken as finite".[62] This polyhedron is French legal culture. There is no ambition to give an exhaustive description or anatomical picture of French legal culture. Hence, three faces of this polyhedron have been identified, and the following chapters are organised around these three aspects: the juridical discourse of sovereignty, governmentality and professional field struggles. These three aspect are interconnected but they do not form a coherent whole or system. The way these three elements relate to each other will be explored. It will be argued that the *Fiducie* is at the cross-roads of discursive practices

[62]Foucault in an interview quoted in Burchell, Gordon, Miller (eds), *The Foucault Effect: Studies in Governmentality*, Harvester Weatsheaf, England, 1991, at p77.

and epistemic changes embedded in power struggles between agents who construct and are constructed by their own legal culture.

2.2 The juridical discourse of sovereignty and epistemic tradition

The doctrinal rejection of the trust and the formulation of the *Fiducie* are governed by the rules of the juridical discourse of sovereignty. This discourse underlies the legal logic which structures doctrinal knowledge and which is taught and conveyed by Professors within French universities. This knowledge and type of logic dominate the French epistemic tradition. It constitutes the knowledge of the "Keepers of the Temple" of law.[63] In other words, it is a knowledge attached to the function of legitimisation of law destined to secure obedience to juridical authority. However, it does not belong to a pre-defined set of agents; one can become a "Keeper of the Temple" by fulfilling a number of discursive conditions and respecting the discipline of the discourse. Hence, the "Keepers of the Temple" are not pre-defined agents but subject "position[s] that may be filled in certain conditions by various individuals".[64] Discourse itself determines who can be a "Keeper of the Temple" although they have traditionally been academics.

The legal logic with stems from the juridical discourse of sovereignty is powerful because it combines reason with myth. This is the notion of "mytho-logic" proposed by Lenoble & Ost and examined in chapter II. The myth to which legal logic is subsumed is that of the unity, transparency and gapless of law, echoing the characteristics of the power of its mystical Originator - once God, or the King. The mytho-logic conveys a certain

[63] This expression is borrowed and translated from Dezalay's own in *Marchands de Droit*, Fayard, Paris, 1992.
[64] M Foucault, *The Archaeology of Knowledge*, Tavistock, London, 1972 at p 115.

codified representation of power: juridical power.[65] This symbolic code is rooted in history and in monotheistic Christian society.

Hence, the weight of absolute ownership as a principle of French law will be explained on the basis of its part in the ritualistic representation of power - the power of Man, in this case - as unitary and all-mighty. The juridical discourse of sovereignty is "pre-conceptual" because it provides a structure of representation of power which underlies and precedes legal and political concepts and ideas such as political, national, legislative or popular sovereignty. This pre-conceptual framework is nothing more than the pre-modern mythology of power which was once spectacularly displayed. Modern law unsuccessfully tried to cut itself free from the hold of traditional myths and symbols which have not been eradicated but repressed and pushed into the background. Paradoxically, they have become more powerful as the invisible epistemic core of French legal knowledge.

To summarise, the juridical is understood here as a discursive formation which is not coterminous with law as a discipline. It operates transversally and can shape other disciplines such as the political sciences. It is not a discourse about sovereignty as a concept or object. It constitutes the epistemic preconditions (*savoir*) of traditional legal knowledge-*connaissances*. This juridical *savoir* is nothing more than a codified representation of pre-modern power. This epistemic representation of power constitutes the mythological bases upon which the legitimacy of law lies. Obedience is the main stake in the juridical and is assumed to derive from a ritualised representation of power, perpetuated by law. Rationality and logic are employed to enhance the effect of mythology.

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[65] See V Tadros, "Between Governance and Discipline: The Law and Michel Foucault", (1998), 18, O.J.L.S. , 75.

The modern role of law in techniques of government, peacefully and purposelessly, co-exists with the juridical ritual of legitimisation to form the epistemic entity identified as French legal culture.

2.3 French legal culture and Governmentality

The trust, because it can be used as a screen to conceal ownership, conflicts with the vision of governable society and the individual as transparent entities, subsumed under the gaze of the state. This conception of the conditions in which government can be exercised and its proper objects is the product of Governmentality.

Governmentality is a combination of rationalities and techniques concerned with the understanding, construction and exercise of government as a form of power. Foucault's understanding of government is broad and is not limited to the exercise of the legislative power. Law is only one of the possible instruments of government, which can also involve power relations between individuals.

Governmentality's discursive and epistemological dimension is the following: it underlies the construction of the object, instrument, goals of government. French legal culture will reflect such Governmentality as the result of the modern inclusion of law in the more general technical and epistemological apparatus of governmental control.

But Governmentality does not reflect a coherent programme or conception of government. Indeed, there can be conflicting tensions within Governmentality as it results from a haphazard combination of techniques, procedures and rationalities. The Governmentality which seems to underlie French legal culture is characterised by a tension between an impulse to police and constrain freedom, through surveillance of ownership, particularly visible

in the fiscal provisions of the 1992 Bill, and a more liberal approach of enframing liberty.

Governmentality's penetration of law is evidenced by the notion of *Ordre Public* - which could be translated as Public Policy. This concept is a juridified expression of Governmentality. This "juridification" of Governmentality has two aspects. First, it entails a particular historical moment when the dominant rationality of rule, with all its inconsistencies, becomes fossilised into a juridical entity. This historical moment the weight of which is still being borne is that of the Napoleonic codification. Napoleonic Governmentality has been enshrined in legal knowledge and culture. However, and this is the second aspect of juridification, the substantive roots and content of *Ordre Public* are ignored and the notion is regarded as atemporal and adaptable to all epochal changes. This is part of the juridical mytho-logic, which interacts with the discursive aspects of Governmentality.

This is why it will be argued in this thesis that the rejection of the trust and even the lack of any comparable device in French law can be understood in terms of the integration and survival through law of the imperatives of surveillance and visibility in Napoleonic Governmentality.[66]

If the rejection of the trust can be explained in terms of Governmentality, so can the formulation of the *Fiducie* in its legislative form. The use of a statutory tool for the introduction of the *Fiducie* in the Civil Code entails that the proposed institution is shaped by governmental rationalities deployed in the context of the legislative definition of a new type of transactional freedom. A particularly interesting aspect of the new *Fiducie* is its apparent political neutrality. The Bill is what one could term a technical

[66] See Chapter III.

piece of legislation. However, the Bill reflects a deep-seated, cultural Governmentality.

The *Fiducie* has also entailed a reactivation of epistemological issues relating to the proper role and limits of government.[67] The *Fiducie* offers an insight into the workings of rationalities of government of the economy which operate at the deep epistemic level.[68]

2.4 French legal culture and field struggles

The non-discursive "horizon" without which the *Fiducie* could not have appeared or be assigned a place within French legal culture is constituted by what Bourdieu calls "social fields". Changes and tensions at the epistemic level are linked to changes and tensions in the power dynamics of the legal field. The epistemic (dis)order reflected by the *Fiducie* echoes the variable space of social struggles.

A field is a dynamic structure defined at any specific moment in time by a particular configuration of relations of power or distribution of capital:

"In analytic terms, a field may be defined as a network ... of objective relations between positions. These positions are objectively defined, in their existence and in the determination they impose upon their occupants, agents or institutions, by their present and potential situation (*situs*) in the structure of the distribution of species of power (or capital) whose possession commands access to the specific profits that are at stake in the field, as well as by their objective relation to other positions...".[69]

The dynamics of a field are conflictual and the conflict is located both within and at the margins of the field; "Each field is the site of struggles. That is, there are struggles within given fields, and there are struggles over the power

[67] See the Preamble of the Bill.
[68] See Chapter IV.
[69] Bourdieu , interview with L Wacquant in *An Invitation to Reflexive Sociology*, Polity Press, Cambridge, 1992, at p 97, original emphasis.

to define a field".[70] The aim of these struggles for the agents within a field is to improve their position, the value of the capital they are able to use, or to gain access to the type of capital that carries the most weight within the field.[71]

Agents' actions and perceptions as regards a particular field are determined and mediated by their *habitus*, which is defined as "the durable and transposable systems of schemata of perception, appreciation and action that result from the institution of the social in the body".[72] Like, knowledge-*savoir, habitus* operates on an unconscious plane. It is the basis of unformulated collective strategies of self-promotion of defined groups within a field. These strategies are not consciously formulated and expressed objectives, but find their expression in a logic of practice and the "relation of practical knowledge" of the agent to the field.[73] The plurality of *habitus* of lawyers and jurists and *savoir* interact to constitute legal culture.

Bourdieu identifies two fields relevant to a "field study" of law.[74] The *champ juridique, which* can be translated as the legal field or the juridical field, is the field within which different types of lawyers (mainly academic jurists and judges) struggle to obtain a monopoly over the symbolic power and authority of law, which Bourdieu also calls "legitimate symbolic violence". According to Bourdieu, to understand the dynamics of the legal/juridical field, it is also important to understand its relation to the field of power. This notion is ill-defined and seems to refer to state power. In our analysis, the field of

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[70] Bourdieu quoted in C Calhoun,LiPuma, Postone (eds), *Bourdieu, Critical Perspectives,* Polity Press, Cambridge, *1995,* at p 6.

[71] Bourdieu identifies three species of capital;

"...*capital presents itself under three fundamental species*...namely, economic capital, cultural capital, and social capital...To these we must add symbolic capital, which is the form that one or another of these species takes when it is grasped through categories of perception that *recognize* its specific logic", ibid. at p 119. He defines juridical capital as essentially symbolic.

[72] ibid. at p126-127.

[73] *dixit* Bourdieu op. cit. note 52 at p 128.

[74] P Bourdieu, "La force du droit. Eléments pour une sociologie du champ juridique", Actes de la recherche en sciences sociales, n 64, 3.

power will be interpreted more broadly as the field of Governmentality, in other words the field concerned with the particular form of power that is government, understood in the broad Foucauldian sense. Thus, the juridical field constitutes the non-discursive horizon of the juridical discourse of sovereignty, whereas the field of Governmentality is the material dimension of Governmentality.

The work of Dezalay is used to refine our understanding of the legal/juridical field and of its relation to the field of Governmentality.[75] Dezalay's work focuses on practitioners as major players in the legal/juridical field, and on their relationship with the French state technocracy. His analysis broadens Bourdieu's understanding of the legal/juridical field as involving mainly legal academics and judicial interpreters. Thus, legal rules and institutions are also the product of struggles and professional stakes within the field of legal expertise and knowledge. In particular, Dezalay has analysed the impact of the development of international legal elite on the power dynamics within the French legal field. The model of legal knowledge constituted by international business has an impact on the structure of the national legal/juridical field and on the process of creation of legal norms.

In the context of a "field analysis", the stakes involved in the legal definition and legislative consecration of the *Fiducie* are part of a broader professional strategy of self-promotion of an emerging elite of international legal experts. This elite seeks a prominent position in both the field of

[75] Y Dezalay, *Marchands de Droit*, Fayard, Paris, 1992; "Between the State, Law, and the Market: The Social and Professional Stakes in the Construction and Definition of a Regulatory Arena" in MacCahery, Bratton, Picciotto, Scott (eds),

governmental and economic power and within their own national legal field. Such strategies are not consciously formulated objectives but the result of professional pragmatism based on an emerging habitus. The workings of legal knowledge can be situated in terms of the social stakes of field struggles.

International Regulatory Competition and Coordination, Clarendon Press, Oxford, 1996.

CHAPTER II

THE EPISTEMIC PROCESSING OF THE TRUST IN FRENCH DOCTRINE: FROM MYTHO-LOGICAL REJECTION OF THE TRUST TO THE *FIDUCIE*'S GENEALOGICAL RESURRECTION

The question posed in the next two chapters of the thesis is: how was the trust received and processed into its acceptable counterpart, that is, the *Fiducie* ? The main hypothesis is that the *Fiducie*'s version of the trust has been shaped by epistemic contingencies and requirements. This new legal device's legal form and meaning are the result of how French legal knowledge operated to render the trust in terms which are understandable and acceptable to it. The consensus amongst French legal academics and practitioners was, and still is, that there is no equivalent of the trust's structure of ownership in French law. The trust as a property institution, that is an institution legally characterised by the proprietary rights it entails, has no equivalent in French law and needs to be processed and transformed in order to be received in the French legal system. This chapter will set out and describe the elements of the general workings of French law *qua* legal knowledge relevant to our study of the *Fiducie*. Chapter III will focus on the role and importance of absolute ownership as regards the French epistemic tradition on the one hand, and the processing of the trust in doctrinal writings and the resulting definition of the *Fiducie*, which avoids all reference to the split ownership of the trust.

The level of analysis of these two first chapters needs to be identified. We will focus on with the workings of the knowledge of the "Professors" or, as

Dezalay would have it, the "Keepers of the Temple". We are concerned here with the *savoir*, rather than the *connaissances* perpetuated by French legal academics. This distinction, introduced by Foucault, allows us to analyse deep-knowledge structures or law's *savoir*, which underlie and are necessary for the formation of law as a body of knowledge-*connaissances*, that is, as a discipline with its own objects, characteristics and content.[1] To understand the *Fiducie* in its epistemological context, we must focus our analysis on the discourses that constitute French law's *savoir*, and ultimately the legal rules which form the object of French law as a discipline.

The epistemic stratum which we are seeking to unearth relies on symbolic mechanisms primarily connected with the basic social stake and value of obedience to the law. Even if not all law has as its main function the individual's compliance to the authority embodied in law, all law is submitted to a political, and it is argued, epistemic requirement that it must be represented as legitimate to be obeyed. The *Fiducie* illustrates this point: the Bill could be described as an example of facilitative law designed to allow greater transactional freedom, rather than to secure obedience to a set of legal rules. However, the discursive way in which the *Fiducie* was framed in doctrinal, policy and legislative terms, reflects an underlying epistemic requirement of compliance with a certain model of legitimacy. This is perceptible in the fact that the *Fiducie* was carefully formulated and analysed in both doctrinal writings and policy terms, to avoid any reference to the split ownership of the trust, which would have threatened its legitimacy. The first section of the present chapter explores this model of legitimacy, encompassed in the epistemic workings of French law. It is thus

[1] See Chapter I for a more detailed account of Foucault's distinction between *savoir* and *connaissances*.

argued that it is this epistemic level, identified as the juridical discourse of sovereignty, which determined legal arguments regarding the *Fiducie.*

Doctrinal knowledge is shaped by the epistemic dynamics and logic identified above, and the analysis in this chapter is based on a study of doctrinal writings about the *Fiducie.* However, this logic can also be found in other types of legal discourse, and indeed the drafters of the Bill as policy makers, and practitioners commenting on the Bill, have endorsed doctrinal reasoning. They have thus become "Keepers of the Temple". This demonstrates that what Dezalay calls "Keepers of the Temple" are subjective positions, rather than embodied subjects or defined agents such as doctrinal academics. Anyone who has uncritically absorbed French law's powerful epistemic mythology can undertake the position of Keeper of the Sacred Temple of Law. Hence, these positions as subject of discourse can be adopted by policy makers, practitioners or anyone who becomes epistemologically captured in the type of legal discourse described in the following chapter.

To summarise, this discourse is defined here as the juridical discourse of sovereignty and constitutes the epistemic soil of French legal knowledge-*savoir* . Hence, this discourse operates at a deep epistemic level and follows a combination of rules of logic and a mythology of power. According to this analysis, French legal culture is shaped by a certain mythology perpetuated through legal logic. This mythology originates in the French history of the conceptualisation of power as unitary, eternal and sovereign. Section I lays the theoretical bases of this analysis of French legal culture as shaped by a juridical mythology of power perpetuated by logic. Section II applies this framework for a discursive analysis of the doctrinal assertions about the Trust and the *Fiducie.*

SECTION I - FRENCH DOCTRINAL KNOWLEDGE AND THE MYTHO-LOGICAL DISCOURSE OF SOVEREIGNTY

This section draws on the work of Michel Foucault on the idea of "the juridical" as well as on his archaeological method and understanding of knowledge as *savoir*. It seeks to reinterpret and combine Foucault's concepts with the notion of mytho-logic. The proposed hypothesis here is that the juridical discourse of sovereignty constitutes the basis of French law's epistemic tradition. This discourse mixes logical structures with mythological images of power and is enshrined at the institutional heart of the French law school.

Foucault's understanding of the juridical will be re-interpreted on the basis of the Foucauldian notion of discourse. What Foucault describes as a juridical theory of sovereignty will be understood as a juridical discourse of sovereignty. Once this discourse has been defined, its workings will be explained with reference to the idea of mytho-logic, developed by Ost and Lenoble.

1. The Juridical Discourse of Sovereignty as Mytho-logic

1.1 Foucault and the Juridical Discourse of Sovereignty

Recent writings, as well as the publication of a series of lectures given in 1976 at the *Collège de France* are the starting point of a re-interpretation of

Foucault's understanding of the juridical.[2] Foucault's project and thinking on power has been marked by an endeavour to move away from the dominant "juridical and liberal conception of political power".[3] According to this

"classical juridical theory of power, power is considered as a right owned like property which can be transferred and disposed of..."[4]

Juridical sovereignty epitomises this vision of power and constitutes the main focus of traditional political and legal theory. Foucault's project is to avoid such a focus and the correlated issue of power's legitimacy. His aim was to formulate an analytics of power reflecting the plurality and fluidity of power relations, as opposed to the unity and unidirectionality of power as sovereignty. Indeed, Foucault understands power as exercised

"in a network within which individuals circulate and are always in a position of exercising and undergoing power. They never are passive and consenting targets of power, but always its vehicle. In other words, power transits through individuals without being applied to them".[5]

Thus, an alternative to the juridical analysis of power

"will, rather than asking how the sovereign behaves at the top, seek to discover how, slowly and progressively, in real and material terms, subjects have been constituted".[6]

In the series of lecture referred to above, the main process of constitution of subjects is discipline. Foucault describes the relationship between discipline and the juridical vision of power as follows:

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[2] See M Foucault, *Il faut défendre la société*, Gallimard-Seuil, Paris 1997; Tadros "Between Governance and Discipline: The Law and Michel Foucault", (1998), 18, O.J.L.S,75.
[3]Foucault, *Il faut défendre la société*, at p 14, my translation
[4]ibid., my translation
[5] Ibid. at p 26, my translation.
[6]Ibid., my translation.

"This theory [of sovereignty]...has enabled the superimposition of a system of law over disciplinary mechanisms, thereby concealing the latter's processes and the fact and technique of domination linked to discipline...'[7]

This has lead some legal scholars to argue that Foucault views law as mere ideology masking the real functioning of disciplinary power, and seems to "expels" law from the scope of his studies.[8] However, Foucault has not expelled law from his various fields of study but he has chosen to avoid the focus, dictated by traditional legal and political theory, on the issue of juridical sovereignty, because of the traditional assumption that power is located in one main possessor, be it the State, Parliament or the Nation.

Foucault's focus is power rather than law but he does not ignore the importance of law in power struggles and clearly states:

"law generally is the instrument of ...domination...law (including ...institutions applying the law) conveys and implements relations which are not relations of sovereignty but relations of domination....the legal and juridical systems are permanent vehicles for relations of domination and polymorphous techniques of subjection...the question for me is to...avoid this central focus in the law on sovereignty and individual obedience of those subjected to this sovereignty, in order to reveal in the place of sovereignty and obedience, the problem of domination and subjection".[9]

It is quite clear that Foucault does not assert that law is an appropriate object for a study on power. He merely dismisses the "juridical" approach to the question of power. Moreover, Foucault does not equate law and legal discourse to the "juridical". According to Tadros,

"The term juridical...refers to the *conception of power relations* which one might call Austinian. It is neither the case that all law is necessarily 'juridical' in

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[7] Ibid. at p 33, my translation

[8] See Hunt, "Foucault's Expulsion of law...", (1992), 17, 1, Law and Social Enquiry, 1 but also a rediscovery of Foucault in *Foucault and Law*, Pluto Press, London, 1994. See Habermas *The Philosophical Discourse of Modernity*, Polity-Blackwell, Cambridge, 1987.

[9] *Il faut défendre la société*, at p 24-25, my translation.

Foucault's understanding of the term nor that the only way in which juridical power manifests itself is legal".[10]

What does Foucault actually understand by this notion of a "juridical theory of power"? This idea seems to have a number of synonymous expressions such as "law's discourse" or "the juridical and political theory of sovereignty". It can be argued that Foucault did not state very clearly in his writing what he meant by such expressions. At times, he seems to indicate, disappointingly, that the juridical theory of sovereignty is law's ideology. He states:

"Why has the theory of sovereignty persisted as the ideology and the main organising principle of the great legal codes?"[11]

However, he also offers a more convincing analysis of the juridical theory of sovereignty:

"this theory from which one must free oneself in order to analyse power dates back to the Middle Ages, it dates back to the revival of Roman law; it constituted itself around the problem of the monarchy and the monarch...historically, [it] has had four functions.
First, it described the real mechanics of power under feudal rule. Secondly, it was used as an instrument and as a mode of legitimation for the constitution of administrative monarchies. Then, from the sixteenth century and mainly during the seventeenth century...the theory of sovereignty was a weapon circulating between sides and used for one aim or its opposite, either to limit or on the contrary to reinforce royal power...Finally, in the eighteenth century, it is this very theory of sovereignty reactivated through Roman law, which you will find in Rousseau and his contemporaries, with a different fourth function: at the time, the stake was the construction, as against administrative, authoritarian or absolute monarchies, of an alternative model, that of parliamentary democracies".[12]

I propose to develop beyond Foucault's understanding of the "juridical theory of sovereignty", arguing that in some ways Foucault himself hinted that the "juridical" is more complex than ideology or false consciousness and more

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[10] Tadros, op. cit. note 10 at p 76.
[11] *Il faut défendre la société*, at p 33, my translation.
[12] Ibid. at p 31, my translation.

powerful. Indeed, what he describes as a theory has the attributes of a discourse: it is indistinguishable from the construction and exercise of power; it is strategically adaptable to different and even contradictory political projects. Foucault's analysis of historical discourse could be applied to his vision of "the juridical", better understood as a discourse comparable to historical discourse. Hence,

"[historical] discourse should not be understood as ideology...we are dealing with something else, which I am trying to identify, and which would be, if you will, a discursive tactic, an apparatus of knowledge and power which, precisely because it is tactical, can be transferred and become the law of formation of a knowledge and at the same time, the common form of political battles".[13]

Because Foucault did not analyse the juridical theory of sovereignty as a discourse, his observations must be re-interpreted and more specifically defined. This is done with the help of his own conceptual tools. What are the characteristics of the juridical discourse of sovereignty? It has been argued that it is a code or a description of an actual form of power. Indeed, Foucault "seems to use the term both to describe a discursive understanding of power...and to describe a particular network of power".[14] The juridical code, is a discursive formation which once was articulated to a juridical network and organisation of power; "The juridical, for Ewald, is a 'code that enabled monarchical power to constitute itself'".[15] This juridical code has greatly influenced the traditional vision of law. If we understand this code as a discourse, this entails that it operates not as a series of coherent propositions concerning the concept of sovereignty, but as an underlying and powerful murmur, shaping our surface conceptual understanding of certain forms of power, sometimes embodied in law. However,

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[13] Ibid. at p 169, my translation.
[14] Tadros, op. cit. note at p 81.
[15] ibid.

this code is inadequate to understand two important and modern forms of power with which law is now articulated: government and discipline.

The juridical code is still the code which shapes the imaginary of modern republican law. Law may not function any more on the juridical, Austinian model of rules and sanctions, but it is still legitimised according to this juridical code, which, I argue, constitutes law's epistemic imaginary.

> "Law's *symbolic representation* was as a monopoly of the *right to violence*, primarily exercised by a Sovereign. Power was symbolically represented as a possession which is ultimately given to the Sovereign by God...".[16]

The juridical discourse of sovereignty is based on this way of representing power which remains relevant to modern law because of its enduring symbolic and epistemic function.

The juridico-political theory of sovereignty formulates the legitimisation of power, centred around the unitary figure of the King. It is underlied by the separate, deep-level phenomenon of the juridical discourse of sovereignty, with which it should not be confused. The concepts of legislative sovereignty, state sovereignty are the surface effects, the tangible illustrations of a deep-level epistemic phenomenon based on a representation of monarchical power: this phenomenon has been called the juridical discourse of sovereignty and generates what Deleuze and Guattari have called arborescent or State form of thought.[17] The underlying structure of such thought is unitary and hierarchical. This form of thought has enabled the interiorisation by the subject of the form of the State.

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[16] ibid. at p 87, original emphases.

[17] See P Patton, referring to Deleuze and Guattari's *Anti-Oedipus: Capitalism and Schizophrenia, Athlone Press, London 1984,* in "Michel Foucault: The Ethics of an Intellectual", in B Smart, *Michel Foucault: Critical Assessments*, vol. 2, Routledge, London, 1995, at p 107.

The juridical discourse of sovereignty is not reducible to the discourse of law; it is a wider phenomenon, cutting across disciplines. However, it does not encompass all the statements resulting from or made about law. Furthermore, it constitutes only one aspect of the multiple discourses of law.

The juridical discourse of sovereignty is a deep-level, epistemic phenomenon which operates to produce, amongst other effects, concepts such as sovereignty (political, legislative...) which together perpetuate a conception of power as unitary, unidirectional and possessed by one sovereign figure- the individual, the state or Parliament. This discourse precedes legal conceptual formulations and determines them. It is "pre-conceptual" in the sense that it constitutes the pre-existing mythology which governs the validity of legal utterances. This does not mean that it is pre-linguistic or pre-discursive.[18] Rather, it is informed by an unspoken, or rather no-longer formulated, mythology of power. The work of Foucault does not provide a satisfactory description of these pre-conceptual elements.[19] His analysis will therefore be complemented by the notions of mytho-logic as developed by Ost and Lenoble.

1.2 The notion of mytho-logic

The notion of mytho-logic is proposed by J Lenoble and F Ost in their book, *Droit, Mythe et Raison - Essai sur la Dérive mytho-logique de la rationalité juridique*.[20] Their argument constitutes a challenge to the view that myth functions independently of logic or rationality. On the contrary, their argument is that reason

[18]see chapter I at p
[19]see chapter I at p
[20] Publication des Facultés Universitaires Saint-louis, Bruxelles, 1980. For a summary of the book, see the article by the same authors: "Founding Myths in Legal Rationality", (1986), 49, Modern Law Review, 530.

is subordinated to myth; the legitimacy and truth of law depends on a myth of rationality as an absolute guarantor of intelligibility and validity; such an absolute operates as a fantasy and necessitates an over investment of the imaginary. The legitimisation of law creates and relies upon a foundational myth of the unity, transparency, coherence and gaplessness of law and the legal system. With modern law, obedience to law appears as a necessary and logical outcome of law's rationality. However, it is still the product of the belief in law's mythology, a mythology which has its roots in pre-modern symbolics of sovereign power. Whose belief and obedience?

In their book, Ost and Lenoble explore the mytho-logical characteristic of law at three levels of legal discourse: judicial reasoning, legal logic primarily expressed in the doctrinal writings of legal academics, and the philosophy of law. I will focus on the arguments concerning legal logic. This chapter focuses on French doctrinal accounts of the *Fiducie*, as illustrative of French epistemic tradition which will be theorised to understand the particular conceptual apparatus used in the analysis of the trust and the *Fiducie* . Legal logic, taught and learned during university studies, is implemented by French legal academics but also by legal practitioners and policy makers, whose juridical reasoning has been determined by their many years as law students. Hence, legal logic is a typical manifestation and product of French epistemic tradition, which produces "Keepers of the Temple" whose main function is to ensure obedience to the law through belief in what can be argued to be a mythical ideal.

Ost and Lenoble argue that belief in the effectivity of legal logic depends on belief in a foundational ideal, that is the unity, transparency, coherence and gaplessness of the legal system. This analysis of legal logic can be summarised in

the following manner: legal logic operates "as if" law were transparent, coherent and unitary, and this assumption encourages the reconstruction and consolidation of general principles. The process of legal logic is one of systematisation and is characterised by its a priori reluctance to include novel principles. Although legislation is introduced to answer to specific and current problems, these problems have to be processed through a conceptual grid which is marked by the requirement of systematism. Thus, Ost and Lenoble's view support the idea that legal logic has to say and think the social in its own legal terms, eliminating heterogeneous and alien aspects and fitting the rest within acceptable classifications. For instance, Green and White Papers are the site of such transformation of the social into acceptable logical categories. Legal logic can be implemented by anyone who has been legally trained but legal academics and their doctrinal writings have a central part in the production and perpetuation of legal logic.

Ost and Lenoble refer to the work of P Legendre to suggest that institutionalised legal discourse is based on a symbolic structure the purpose of which is to communicate the existence of an idealised creator, a substitute of the Father or God. This symbolic structure is inherited from canon law's confusion of human law - Roman law - and the Divine order. The power of logic lies in its association with this mythological heritage.

The mytho-logical structure of legal knowledge is, according to Ost and Lenoble, historically determined and the authors include a historical account, echoing Legendre's own work, to support their views. The mediaeval legal scholars' rediscovery of the *Corpus Iuris Civilis* entailed a perception of Roman law as technically superior to custom and embryonic legislation. The belief was

that the *Corpus Iuris Civilis* contained the answers to any issue likely to arise. To deal with this Supreme text, the jurists developed their own scholastic method. Hence, before the rise of modern legal rationality, all the elements of the institutional apparatus propagating belief were in place: a sacred Text, an infallible method and the interpreters/Keepers of the Temple. The centrality of the Text remained throughout the *Ancien Régime* and through to the twentieth century.

Again according to Lenoble and Ost, the same intellectual approach was adopted by the post-glossators - the scholars who were the interpreters of the Justinian codification - in the fourteenth and fifteenth centuries. However, the increase in regal power meant an increase in legislation, the interpretation of which was the prerogative of the Prince. The jurists were to be allowed to share this prerogative and become the servants of the Prince. The Roman and Canon law tradition was thus connected with the legislative activity of the Prince.

This change is significant as it entails the combination of a national and secular legal discourse with the mythical aspects of the glossators' method. Gaps in the law were to be filled by referring to Roman and Canon law, and not to local customs. The symbolism of Sovereign power, despite its support in a secular national law, was derived from the romano-canon heritage. Ost and Lenoble see in Hobbes' Leviathan a perfect illustration of the mytho-logical dimensions of the notion of sovereign power.

"As a brilliant visionary of power, Hobbes hints at the intimate link between spiritual and temporal authority and the embeddedness of relations of force...in the symbolism of power, founded on the myth of the all-mighty Figure and implemented by the equally powerful weapons of logic and canons".[21]

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[21] *Droit, Mythe et Raison,* op. cit. note 2, at p 258 (my translation).

Hence, Ost and Lenoble's interpretation of Hobbes indicates that although the foundations of power are mythical, its consolidation and preservation relies on the proper use of logic. This is the task assigned to the jurists, as members and servants of the great Leviathan and Keepers of the Great Temple of Law. They have to "sustain the Republic" by constantly re-enacting the Text's rationality through legal logic, which chases away any contradiction and borrows the authority of the Sovereign.

In pre-revolutionary France, the opposition to Absolute monarchy was expressed by a questioning of both the King and the basis of his authority, that is, the legitimacy of his divine right. Revolutionaries had to find an alternative basis for the exercise of power. Hence, power was described as founded on the consent of each individual, the sole source of his/her subjection. This "subterfuge" was designed to generate faith and submission. It relied on law as a means of gaining the acceptance of rules perceived as an unbearable burden insofar and so long as they represented the domination of the Church and the Clergy. Law prompted a desire for submission to a new theology.

In order to be internalised by the subject, the revolutionary mechanisms renewing obedience to the rule needed a mythicising celebration power, incorporating the old mantra: the law must be obeyed because the law is just and its author is fair. The function of the guarantor of law's perfection was once God or the King. With modern power, this role is undertaken by Reason. Law was idealised as the expression of eternal Reason, freed from particular and conflicting interests.

A fundamental aspect of the revolutionary grounding of authority in law is the quasi-religious faith in the purity of the legal rule. Law, understood mainly as

legislation, may result from political struggles and debates, but it remains exclusively juridical. "Like those creatures of legend able to walk through fire without being burnt, law passes through the political melting pot unscathed."[22] This political immunity of law is a necessary corollary of the belief in eternal and immutable law. Article 1 of the draft Civil Code did invoke law as universal and immutable. The drafters have referred to the Code as "a sacred trust", a "holy ark". The post-revolutionary investment in law was accompanied by a mythological invocation of quasi-religious concepts.

Ost and Lenoble aim to show how the structure of legitimisation of modern law depends on the connection established in the Mediaeval period between myth and logic. The intermingling of the sacred and the secular endured as a way of ensuring the authority of revolutionary institutions. However, the desire to establish a break from the past has led to a denial of the mythical dimension of legal thought.[23]

Michel Foucault too has stressed the importance of the mythological representation of power in the construction of the juridical authority of the sovereign. According to him, the symbolic structure of legitimisation of modern law is rooted in the medieval revival of Roman law:

"The development of royal power was achieved on the basis of the model of Roman law's *imperium* and by reactivating the imperial laws codified in the era of Justinian".[24]

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[22] cited in *Droit, Mythe et Raison,* ibid., at p 267 (my translation).

[23] "Enlightened thinking has been understood as an opposition and counterforce to myth", Habermas cited in P Fitzpatrick, *The Mythology of Modern Law,* Routledge, London, 1992, at p 44.

[24] *Il faut défendre la société* op. cit. note at p 102, my translation.

Modern republican legal discourse has not rid itself of the monarchical structure of legitimisation of power and its symbolic reference to the unitary sovereignty of the Roman *imperium.*

According to Foucault, this symbolic structure of representation of power which in his view dominates historical discourse and, it is submitted juridical discourse, has two interconnected aspects:

"On the one hand, the juridical aspect: power binds through obligation and oath, through law, on the other hand, power has a function, a role, an efficacy which is magical: power dazzles and hypnotises".[25]

Moreover, this representation of power "is not only its image but also its procedure of re-invigoration".[26] This structure of representation which combines mythical and magical dimensions with the rigour of logic is the juridical discourse of sovereignty. As a result, modern law emphasises the predominance of rules of legal logic but is still silently informed by the non-longer spectacular symbolics of power inherited from the process of construction and canonisation of the monarchical state. Thus, the juridical discourse of sovereignty governs the French epistemic tradition at the level of surface rules of logic and through pre-conceptual symbols of power.

This is reflected in Ost and Lenoble's analysis which suggests that the logic operating at the surface level of knowledge-*connaissances*, is rooted in deep mythological phenomena. It is the juridical discourse of sovereignty which establishes this connection between a certain mythology of power and legal logic.

2 Legal Knowledge and Visions of Power: the Juridical Discourse of Sovereignty as French Doctrine's Epistemic Imaginary

[25]Ibid. at p 59.
[26]Ibid. at p 60.

The combination of the concepts of mytho-logic and juridical discourse of sovereignty allows us to recognise the importance of myth and its function in French legal tradition; it is connected to the legitimisation of law. Legitimisation is a performance, involving a ritualised representation of power.

2.1 The Juridical Discourse of Sovereignty as symbolic representation of power

The modern or post-revolutionary structure of representation rests on old mythological sediments. It still relies on a confusion between the sacred and temporal law which is inherited from the Mediaeval revival of Roman law and the work of the canonist. Such confusion did exist in ancient Roman law itself. It is interesting to note that collections of imperial laws published prior to Justinian's code, took the name "codex", which also referred to "a bound volume, such as the Christians used for their scriptures, rather than a roll of papyrus".[27]

The form of power that is being represented is that of the sovereign but the power of the sovereign was not stable and continuous throughout the ages. It seems that the image of sovereign authority which has endured is that of the absolute monarch, despite the fact that divine absolutism was a fairly recent phenomenon before the French Revolution. It has been argued that "the (French) modern state is nothing other than the king of the last few centuries, triumphantly

[27] T Honoré, "Justinian's Codification:Some Reflections", (1993), 25, Bracton Law Journal, at p29.

continuing his unrelenting project of smothering local freedom, unifying and evening out disparities".[28]

The myth of the unity of law is a representation of sovereign power in its embodiment in the unitary figure of the king. The symbolic constitution of the unity of power in the person of the sovereign was undertaken through the project of unification of law. In 1454, a royal decree ordered the official compiling of all existing customary law. The writing down of customs was intended to freeze them into a static body of rules, easier to harmonise in order to constitute a coherent body of state law. By the end of the sixteenth century, several projects of codification of local customs had been implemented.[29] The revolutionary endeavour to codify takes its roots in earlier visions of power, but drew on the mythical inheritance of Rome.

The cult of Rome and Antiquity is characteristic of the revolutionary theatrical staging of a democratic break with the recent past. However, the rediscovery of Roman law dates back to the Middle Ages. As Foucault has argued, monarchical power has used references to Rome to legitimise its power through its direct lineage from the Great Emperors.[30] This imagery of power as both eternal and genealogically legitimate was preserved by the modern juridical matrix. There is a degree of continuity in the symbolics of power. However, the

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[28] P Viollet, cited in op. cit. note 16, at p 167.

[29] See A Watson, *The Making of the Civil law*, Harvard Uni. Press, 1981.

[30] See his lecture of the 28.01.1976 where this point is made as regards historical discourse. "This discourse had justificatory, liturgical functions: it was the State telling its own past...establishing its legitimacy" *Il faut défendre la société*, op. cit. note at p200. See also V Azimi's account of "mythistory" according to which monarchical law used history as a justificatory basis for the King's power. He cites one of Louis XVI's advisors: "History is one of the sciences in which our Kings, as far back as François I, have found great interest for the purposes of government..." cited in, Azimi, "La Révolution française:déni de mémoire ou déni de droit", Revue d'Histoire du Droit, 68 (2), avril-juin 1990, at p 162.

Revolution was to bring certain changes in the imagery, but despite its claims, it would not totally break with the myths of the past.

The revolutionary effort to secularise power and ground it in law was of strategic and symbolic significance. It is partly to be understood as reflecting the importance of the Church as a competing public authority. Establishing a clear break from Clerical authority did not entail renouncing the symbolic and magical function of the sacred. Indeed, as a result of revolutionary partial iconoclasm, secular deities were created. They took the plural forms of Reason, the State, the Legislator. "During legislative debates preceding the enactment of the Civil Code, for example, Napoleon asked 'Who has the place of God on earth?' and answered, '[t]he legislator'".[31]

In order better to destroy what was to symbolise the past, the Revolution also constituted symbols of the past representing feudalism and the *Ancien Régime.*

" 'Our history is not our code': the phrase was coined by Rabaut Saint-Etienne and reflected the belief of the men of 1789. The passion expressed in the denial of a juridicised and legitimating past grows stronger with the invention of the Ancien Régime; the history of the kings argues against Reason".[32]

Law, as the expression of Reason, had to be ahistorical. It could not be supported by the past practice of mythistory. Law could not be grounded on myth as this would have been reminiscent of the king's divine power. However, power is inseparable from its mythical base.

The main features of the symbolics of power conveyed through the juridical discourse leads therefore to a conception of law in traditional legal terms,

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[31] S Herman, "From Philosophers to Legislators to Gods: The French Civil Code as Secular Scripture", (1984), 3, Uni. of Illinois law Rev., 597 at p 597.
[32] V Azimi, op.cit note 22, at p159.

as ahistorical but genealogically legitimised, and as unitary. The sacred and the mythical in legal discourse linger as an absent presence. Indeed, the Revolution did not destroy the existing mythology of power. It pushed it into the background, causing it to lose part of its visibility. This in turn has strengthened the power of myth which seems all the more able to shape legal logic's rituals of truth.

2.2 The Epistemic character and effects of the Mytho-logical Discourse of Sovereignty

The juridical discourse of sovereignty and its mythological structure form what could be recognised as the pre-conceptual discursive parameters for the formation of doctrinal legal *connaissances*. It is the underpinning of the French doctrinal tradition.[33] The juridical discourse assigns to legal logic a specific function: the celebration of the mythical through ritualised repetition of the founding myth. The underlying vision of power generates discursive closure, through the ordering of text to simulate the order and unity of power.

Indeed, in Deleuze and Guattari's interpretation:

"the essence ...of sovereignty in general is to constitute, by means of specific apparatuses of capture, a milieu of interiority. In these terms, the [arborescent] mode of theorising ..may also be regarded as reproducing in thought the form of the State. The injunction to totalise, the insistence upon theoretical homogeneity across a given domain may be seen as apparatuses of theoretical capture".[34]

Hence, the juridical discourse of sovereignty orders doctrinal knowledge to the effect that the latter not only reflects, but also mimics State or sovereign power. The interiorisation of the authority of such power by the knowing subject is expressed by a belief in and obedience to the sovereign unity of law.

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[33] See Chapter I at pp 30-31.

[34] P Patton, op. cit. note 16, at p107.

A further epistemic function of the mytho-logic of sovereignty is the anchoring of the knowing or speaking agent to a subject position within discourse. The juridical discourse of sovereignty is particularly relevant to the issue of the attachment of the jurist to the legal text.[35] What will be retained is the idea that the identification of the agent to the subject position of the jurist requires the play of imagination and belief in the emblems of power carried by the juridical discourse of sovereignty.

The juridical discourse of sovereignty grounds legal logic in myth, through its epistemic function anchoring the subject to its position as "Keeper of the Temple" of Law. As argued earlier, it is characterised by its closure, its ability to exclude unacceptable knowledge or types of arguments. However, it does co-exist with other epistemic configurations and is able to adapt in order to ensure its own survival.

The rejection of the trust as incompatible with French law is an illustration of the epistemic closure entailed by the juridical discourse of sovereignty. French law will reject anything that conflicts or challenges its mythological and symbolic figures. Notably, the trust's structure of ownership had to be discarded because of its challenge to the coherence of the symbolism of absolute ownership. The transposition of the trust as the *Fiducie* is an illustration of a discursive ability to adapt, albeit within the confines of its own ritualised processes. The mythology perpetuated by the juridical discourse of sovereignty has provided a legitimisation of the *Fiducie* through, for instance, its constructed Roman origins.

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[35] Legendre offers a psychoanalytical understanding, discussed by Lenoble and Ost, but beyond the scope of this discussion.

SECTION II FRENCH LEGAL DOCTRINE AND THE TRUST: FROM EPISTEMIC CLOSURE TO GENEALOGICAL REDISCOVERY

The purpose of this section is to examine the specifics of the doctrinal discourse on the trust and its reinvention under the guise of the *Fiducie*, in the light of the general theoretical arguments described in Section I. The rejection of the trust can be understood as an epistemic manifestation. Doctrinal discussions of the trust are governed by the epistemic necessity to reenact the Text as unitary and gapless. Hence, the absence in French law of an institution recognisable as the trust is not understood as an accidental gap, linked to historical factors. Instead, it is presented as resulting from an essential incompatibility between concepts of ownership. The absence of the trust in French law cannot point to any incompleteness in the body of the law, but must result from its unitary and logical ordering. Doctrinal discourse on the trust is thus conditioned by the epistemic process of representation of the unitary power of the Pontiff, the Legislator, or other imaginary figure. This entails a discursive closure, manifested in the rejection of the trust.

The first part of this section will explore the argument that the trust is incompatible with fundamental principles, which are viewed here as a ritualised representation of the "Sacred Unity" of French law, or in other words, the symbolism of law as a coherent and gapless whole. But French doctrinal epistemic closure is not total. As more recent writings show, the trust cannot be accepted in its original form as a structure of ownership. It will have to be modified and naturalised. The second part of this section therefore focuses on this process of

naturalisation. The equivalent of the trust in Roman law had to be constructed before French law could legitimately accept a new addition to its institutions. The conditional reception of the trust is governed by the same epistemic phenomenon which lead to its initial rejection. Hence, this acceptance must be rooted in the unitary and eternal characters of French law. These are expressed in the imagined genealogical roots in Roman law. Hence, the acceptance of the trust entailed the invention of a genealogically legitimate equivalent: the *Fiducie.*

1. The Trust's Incompatibility with Sacred Principles

The ritualistic reference to the sacred principles in French legal doctrine allows the jurist, that is, the legal academic, to maintain the mytho-logical and foundational "as if". The latter has three inter-connected aspects. First, doctrinal discourse must proceed as if law was unitary and coherent. Hence, law must be governed by consistent principles. This does not necessarily entail that there is a consensus in legal doctrine about what these principles are. When internal conflict arises between principles, it has to be resolved by deciding which principle prevails.

Secondly, the reference to sacred concepts also allows the jurist to proceed as if law embodied eternal and incontestable values. Although it is acknowledged that these principles are the expression of public policy - *Ordre Public* - , a distance is created between the substantive and historically contingent content of

the policy goals of the Napoleonian codification. The *Ordre Public* is an abstract, unitary and atemporal notion which refers to the new order established by post-revolutionary legislation, but also to the current order.[36] Discussion of the substantive values embodied in this notion is superficial. Indeed, the survival of the new order of law resulting from revolutionary change and Napoleonic rule seems to depend on ignoring its temporal contingencies and context. Sacred principles operate a canonisation of the public policies behind the Napoleonic Code. These are elevated from their mortal bodies to form, with the aid of legal logic, the fundamental principles of French law.

Thirdly, this process is aided by the genealogical link made between Napoleonic legislation and Justinian's Corpus iuris civilis. As argued in section I, reference to Roman law does not stem from a historical approach, but from a quest for the genealogical legitimacy of power. Reference to Roman law allows us to think as if the Napoleonic new order was the embodiment of eternal rationality.

The orthodox doctrinal approach, displaying the epistemic closure described above, is illustrated in H Motulsky's influential article: "Of the legal impossibility of constituting a trust under French Law".[37] The starting point of the article is a critique of a Belgian court decision which accepted the validity of a trust constituted by an Englishman living in Belgium. The law applicable to his succession was Belgian law, which does not know the trust. Nevertheless, the court decided, relying on French authorities, that a trust could validly be created under Belgian law. Motulsky argues that the decision was wrong as the principles and customs of English law cannot be transposed into French law or any other

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[36] See Chapter IV, at pp 106-110 for a full discussion of *Ordre Public.*

[37] "De l'impossibilité juridique de créer un trust anglo-saxon sous l'empire de la loi française", 1948, Revue Critique de Droit International Privé, p 451. My translation.

system based on the Roman law tradition. The trust is incompatible with French *Ordre Public*. His argument revolves around three legal principles.

First, he discusses the interpretation of the trust as patrimony by appropriation.[38] A patrimony by appropriation is a notion used to describe the formation of an autonomous fund for the fulfillment of a purpose. According to Motulsky, this notion is of Germanic origin and used to explain the theory of legal personality. A patrimony by appropriation can only be created with the concurrent constitution of a legal person as owner of the fund. The *numerus clausus* of real rights entails that there cannot be property without a personified owner. Although Motulsky does not expressly refer to it, the impossibility of creating an ownerless fund is also based on the principle of the unity of patrimony. According to this principle, each legal subject - be it an artificial or natural person - has only one patrimony, and every patrimony has to have a recognisable owner. Hence, a fund cannot be constituted to fulfil a purpose unless it has an identified owner.

English law does not refer to the notion of patrimony by appropriation to explain the trust. Indeed, according to Maitland, "the trust has given us a liberal substitute for a law about personified institutions".[39] Motulsky argues that the concept of trust relies totally on the notion of split ownership. Neither the beneficiary nor the trustee can be said to be absolute owners, on the basis of article 544's definition of ownership. The structure of ownership on which the trust relies is therefore incompatible with the principle of absolute ownership enshrined in the code. French institutions comparable to the trust do not operate a similar splitting of ownership between legal and equitable owners. The Roman

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[38] A patrimony is the totality of a person's assets and liabilities, a sort of virtual balance sheet.

[39] *Collected Papers,Vol III,* CAP, 1911, at p 279.

fiducia, which was the basis of some institutions of the *Ancien Régime*, is a contract by virtue of which the transferee is obliged to restitute or retransfer to a third party the property received. The transferee becomes the sole owner and is entitled both beneficially and legally. The *libéralité avec charge* is a gift which includes a collateral duty to retransfer the property. The donee obtains full ownership rights, limited by a personal obligation. Neither institutions operate on a structure of dual ownership and cannot be assimilated to the trust.

Although the code has enshrined the principle of absolute ownership, it also envisages a number of *démembrements*, or dismembered property rights.[40] However, the Code does not provide for the splitting of ownership between legal and equitable owners. This dismembering of ownership does not correspond to any of the dismembered real rights listed in the Code. Moreover, according to the principle of the *numerus clausus* of real rights, Article 543 exhaustively lists all possible property rights. The list is closed and no new and unknown real rights can be created by agreement between the parties. The creation of new real rights necessitates the intervention of Parliament as the *numerus clausus* principle prohibits the contractual creation of hybrid rights such as those entailed by a trust.

As already indicated, Motulsky's argumentation is constructed around the ritual repetition of three sacred principles: the principle of absolute ownership, the *numerus clausus* of real rights, and the unity of patrimony. These will now be examined in greater detail.

1.1 Absolute ownership

[40] "dismembered" property rights are real rights which do not comprise all three prerogatives of ownership, ie the usus (right to enjoy), the fructus (right to collect revenue or benefits in kind from the property), the abusus (the right to dispose).

The principle of absolute ownership is clearly stated in article 544 of the Civil Code, and is also enshrined in the French Constitution. Article 544 of the Civil Code declares: "Ownership (la propriété) is the right to enjoy and dispose of things in the most absolute manner, insofar as it is not used in a way prohibited by the law."

French legal doctrine, in its reverent treatment of this fundamental principle, portrays the principle as a symbol of the unity of the post-revolutionary new order, opposed to the multiplicity and fragmentation of the *Ancien Régime.*

On the basis of a study of important treatises on French Civil law, a comparatist observes: "In their respective codifications, Justinian and Napoléon both sought to simplify an intricate network of customs, precedents, and local ordinances. ... the Code Napoléon sought to consolidate the objectives of the Revolution, including notably the abolition of the feudal burdens of the ancien régime".[41]

The structure of ownership of the *Ancien Régime* is constructed as characterised by a multiplicity of estates and rights over land. It is also described as centred around the distinction between *dominium utile* and *dominium directum*, "which manifestly resembles the legal and equitable ownership of the common law".[42] The *dominium utile* was a form of ownership granting solely enjoyment of the land and was ultimately derived from *dominium directum* of the sovereign. Thus, in pre-revolutionary customary law,

"ownership was divided into two rights over two separate aspects of the property. These rights could, then, be called ownership rights as customary law did not understand ownership as the totality of prerogatives over a thing, including the

[41] V Bolgàr, "Why no trusts in the Civil Law?", (1953), 2, American Journal of Comparative law, 204 at p210.
[42] ibid, at p 207.

abusus. Indeed, in customary land law, the right to the enjoyment of the property is the essential element of ownership as....the land belongs to God who only grants man the use of the soil through the King".[43]

Hence, absolute ownership is a sacred symbol of the unity of the new order, opposed to the fragmented or dual *Ancien Régime*. It symbolises a break with the past, but it does more than that. It also symbolises the mythical unity of power which permeates the epistemic imaginary of French law.It echoes the mythical unity of the Text and of its author, identified by Legendre in the mythical figure of the Pontiff. The concept of absolute ownership is the product of the imaginary picture of unitary power which underlies French law's knowledge processes. Such processes also rely on legitimacy through the discovery of genealogical linkages with Roman law. Absolute ownership also provides a genealogical link with Roman Law, as the *Corpus iuris civilis* is said to contain a similar notion of absolute and indivisible ownership.

Yet absolute ownership as a principle operates as a fiction, a relic in which one must place faith with the awareness that it is a mere representation of an entity beyond questioning.The artificiality of this principle is quite evident to the jurist who, nonetheless, cannot challenge the principle on this basis. The notion of absolute ownership remains an unquestioned principle despite the fact that the code also contains the recognition of a number of property rights which do not confer the full array of ownership prerogatives and which therefore entail the dismembering of ownership over a thing.[44] This contradiction within the Code does not seem to pose a problem for the jurist's mind.

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[43] P Croq, *Propriété et Garantie,* Thesis, Paris II, 1992, at p 266 (my translation).

[44] For instance, the usufruct only provides a right to use and enjoy the property and any fruit or revenue thereof.

Absolute ownership remains above all an abstract and sacred principle, the substantive implications and bases of which have never been clearly established in French legal doctrine. Indeed, it might seem self-evidently clear that

"the Code Napoléon ...filled the vacuum created by the abolition of the complex and servile feudal law of property, with the simple concept of individual liberty, expressed as an absolute power of enjoyment and disposition vested in the owner."[45]

The implications of this principle are, however, disputed. According to Motulsky, absolute ownership prevents contractual parties from creating property interests which do not fit into the categories of rights listed in the Civil Code. Another doctrinal point of view is that absolute ownership entails the prerogative of disposition, allowing any possible dismembering of the owner's right.[46] However, the latter interpretation conflicts with the principle of the *numerus clausus* of real rights.

1.2 The Numerus Clausus

According to this principle, possible types of property interests are exhaustively listed in the Civil Code and it is impossible for parties to create new and unknown types of property rights. The origins of this principle are unclear. Motulsky, amongst others, grounds the *numerus clausus* in article 543 of the civil code. The article states that "A right over a thing can either be ownership, a mere right to the enjoyment of the thing, or a rentcharge" and seems to constitute a closed list of types of property interests.

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[45] Bolgàr, op.cit. note 33 at p219.

[46] See P Croq's discussion of this doctrinal opinion, op.cit note 35, at p 272.

The *numerus clausus* principle has been stated by some of the most prominent doctrinal writers such as Aubry and Rau, and Planiol.[47] However, the principle has not always been followed by the courts, as in the Caquelard decision.[48] It was stated in this case that article 543 did not set out all possible property rights, as the law does not prohibit the fragmentation of ownership. The principle has also been contested in more recent doctrinal writings.

The link between the text of the Code and the principle is tenuous but this does not prevent the upholders of the principle from investing their faith in it. This is so even though the bases of the principle remain unclear. Motulsky cryptically declares that

"the listing [of real rights]...is restrictive ... because the property regime of the civil code was intended by its authors to be a war machine against the fragmentations of feudalism and the Ancien Régime , and the will of the legislator cannot be changed ...but also because ownership is an absolute right...".[49]

According to Motulsky, the *numerus clausus* principle is a logical consequence of the principle of absolute ownership. Hence, to preserve absolute rights, the *numerus clausus* prohibits the concurrent existence of two rights of ownership over a same thing.

In French law, the only possible form of co-ownership takes the form of a shared single title, opposed to two simultaneously coexisting titles. The feudal system of ownership is said to be typified by the simultaneity of rights of ownership. The *numerus clausus* prohibits the constitution of rights reminiscent of the feudal tenures, such as those entailed by the trust.[50] The *numerus clausus* can

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[47] See Motulsky op. cit. note 29, treatises referred to in footnote 1 at p 463.
[48] Case cited in P Croq's thesis, op. cit., note 35 at p 271. Case reference: Cass.Req., 13 Février 1834, D.P, 1834, 1, 118.
[49] op. cit., note 29, at pp 462-463.
[50] See P Croq's discussion, op.cit, note 35, p 265-278.

thus be said to be grounded in the epistemic imaginary underlying legal doctrine. Indeed, it expresses the sovereignty and unity of the new order, fetishised through the notion of absolute ownership. It embodies the sacred will of the legislator who has envisaged all possible property relations.

Another way of justifying the principle of the *numerus clausus* is the argument according to which ownership needs to be protected by limiting the possibility of its fragmentation and therefore of its being weakened.[51] More specifically, it is argued that the abusus, or right to dispose, is the main prerogative of ownership and ultimately the main object of protection through the prohibition of fragmentation of ownership. Article 537 of the Civil Code enshrines the principle of freedom of alienation by asserting that "Individuals have the freedom to dispose of their property in accordance with the changes introduced by the law". The preparatory reports leading to the enactment of the Civil Code seem to indicate the intention to implement a policy of free trade.[52] The *numerus clausus* would therefore fit into the general policy orientation of the Code, encouraging trade in land through the legal protection of property rights.

The theme of free trade is also present in the interconnected argument, according to which the protection of property transactions requires that no unknown and unforeseeable rights can be freely created over the object of the transaction. The general policy of the security of property transactions lies behind the scheme of registration of real rights, which was introduced in 1855, over fifty years after the promulgation of the Civil Code. Indeed, what does not clearly appear in the doctrinal discussions of the *numerus clausus* is its Germanic origin

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[51] See P Croq's discussion of B Foex, *Le Numerus Clausus des droits réels en matière mobilière*, op .cit., note 35, at p 267.
[52] ibid, at p 266 footnote 4.

and its connection with the policy of comprehensive registration implemented in Germany.

According to V Bolgàr, the abstract principle of the *numerus clausus* was deduced from the rules of registration and first formulated by the German author of a treatise in 1888 and justified on the basis of:

"the allegedly strict division between iura in rem and iura in personam, which isolates the law of things (Sachenrecht) from the law of obligations....While party autonomy is largely allowed in the field of obligations, it is excluded in the field of property."[53]

The *numerus clausus* perpetuates the tension between the idea of the sovereignty of the individual in contractual matters, where party autonomy is encouraged, and the sovereignty of the law in property relations, where the law implements free trade at the expense of individual freedom.

Despite these various interpretations, the *numerus clausus* seems to be more easily understood as originating from the practical necessities of registration. It has been formulated as follows: "(a) all transactions creating *iura in rem* must be entered in the official register; (b) the types of *in rem* transactions are stated in the Code; ergo (c) transactions not contained in the Code cannot be entered , and (d) the number of *in rem* transactions is necessarily closed".[54]

The arguments explaining and justifying the *numerus clausus* are diverse and sometimes overlapping. The principle can be seen as a derivative of the notion of absolute ownership or of the property/contract dichotomy. It has also been associated with the policy behind the Code: free trade in land, the certainty of land transactions secured through registration. A dubious textual basis has even

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[53] op.cit., note 33, at p 213.
[54] V Bolgar, ibid, at p 213.

been found for this doctrinal creation. The inconsistencies and uncertainties surrounding this principle reinforce its status and strength as an abstract principle, unaffected by the vagueness of its origin and the inconsistencies of its grounding. Indeed, it operates as a sacred principle, floating above the multiplicity and materiality of social policy considerations. The link with the Code, however tenuous, is necessary; the Text is the central guarantor of the unity and consistency of the principles. The sacred character of the *numerus clausus* is derived from its grounding in the Text and its Latin denomination. The genealogical connection with Roman law, although superficial, is thus established.

1.3 The Unity of Patrimony[55]

In her presentation of the 1992 Bill, J de Guillenchmidt declared:

"The principle of unity of patrimony...does not seem today as inviolable as it was. This 'sacred dogma' ....(quoting) 'fascinates jurists because we belong to ...civilisations in which what is one is considered necessarily better than what is dual".[56]

The principle of unity of patrimony has been stated in several different ways but at its most basic formulation is the following: as patrimony is an emanation of personality, every person has one and only one patrimony, and every patrimony has one owner. In his treatise, referred to by Motulsky, Lepaulle argues that the trust constitutes a patrimony by appropriation.[57] The patrimony by appropriation would conflict with the unity of patrimony as it defines a patrimony without an

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[55] See Chapter IV, Section 2 for a more detailed account of this principle. The following discussion explains the historical emergence and current functioning of the principle *qua* "sacred dogma", whereas later developments will relate the principle to policy objectives and logic.

[56] "La Fiducie , pourquoi faire?", Revue de Droit Bancaire, n 19, 1990, p105.

[57] Lepaulle, *Traité Théorique et Pratique des Trusts,* 1932, cited in Motulsky, op. cit. note 29 .

owner. The new *Fiducie* contravenes the principle as it entails the constitution of a separate fund within the patrimony of the fiduciaire, who is therefore the owner of at least two patrimonial funds - his and the one(s) s/he manages.

The principle of unity of patrimony was formulated by Aubry and Rau .

"It is agreed on all sides that not the *Code Napoléon* but its commentators Aubry and Rau are responsible for the grand development of patrimonial theory, if not its origin, in the French civilian group. The climate is dependent upon the new code. They follow it in spirit: 'ils ont voulu, avant tout, faire ressortir l'idée maîtresse du Code civil, opposant l'unité à la diversité".[58]

The existence and perpetuation of the principle is dependent upon the academic process. The principle is interiorised during the first two years of legal studies, as a basic principle the practical basis of which remains unclear in the jurist's mind. An empirical study has indeed revealed that there is an automatic consensus amongst practitioners, as to the necessity of respecting this principle.[59] The dogma is established as self-sufficient and is transmitted through the oral tradition of university lectures, which construct the shared values and perceptions constituting French lawyers' *habitus*.[60] Professors and practitioners, as former students, remain wedded to the principle despite - or perhaps thanks to - its imprecise content.

The textual basis attributed to this principle is article 2092 of the Civil Code which reads: "Whoever contracts a personal debt commits his present and future movables and immovable belongings to the repayment of his debt". A corollary rule is found in article 2094 which consecrates the equality of unsecured

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[58] See C.B Gray, "Patrimony", Cahiers de Droit, 1981, n 22, at p 101.

[59] See the study "la Sociologie Juridique du Patrimoine", commissioned as part of the preparatory works on the *Fiducie* and conducted by M.A Frison-Roche, Paris II, 1992.

[60] The notion of *habitus* was elaborated by Bourdieu and refers to a shared schemata of perception which allows agent to understand and shape the social field in which they interact. For a more detailed discussion, see Chapter I, at pp 36-37.

creditors. The principle of unity of patrimony seemed to be linked to a policy of security of transactions, whereby each personal debt is legally secured against the whole of of the debtor's property and becomes part of his patrimony. A secured debt will guarantee the priority of the secured creditor over unsecured creditors. The substantive/policy dimension of the principle is not stressed as the principle is by definition abstract.

The principle has been described as a "dogma, which is the subject of Franco-French religious wars amongst legal scholars".[61] It is described as an obstacle to the incorporation and the constitution of personified institutions. It has therefore been asserted that "our law is a weapon against companies".[62]

The principle of the unity of patrimony has the hallmarks of a sacred principle of French law; it has a textual basis and its formulation as an abstract principle removes it from its material policy basis. The latter is unclear and this is unproblematic to the legal mind, which proceed "as if" this principle was coherent. Indeed, is the unity of patrimony about the protection of creditors or is it an expression of Napoleonic anti-corporatism? Are these linked? The principle also in its very formulation embodies the theme of unity, which dominates the legal epistemic imaginary.

The trust's proclaimed incompatibility with sacred principles of French law has stimulated and given a direction to research into comparable institutions known to French law, leading to the legislative proposal on the *Fiducie*. If the common law trust does not exist in French law, there must be some similar institution which can be constructed as an equivalent. Interest in the trust, coupled

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[61] C Champaud, "La Fiducie, ou l'histoire d'une belle juridique au bois dormant du droit français", Revue de Droit des Affaires Internationales, 1991, 689, at p 693, my translation.
[62] ibid, my translation.

with respect for doctrinal orthodoxy, has led to the genealogical rediscovery of the *Fiducie.*

2 The Genealogical Rediscovery of the *Fiducie*

Claude Witz's acclaimed doctoral thesis played an important part in this rediscovery.[63] His work has been referred to by the drafters of the Bill and inspired the denomination of the proposed new institution as *Fiducie*. The aim of C Witz's doctoral work is to provide a definition of a new institution called *Fiducie* and explore its possible regulation and applications. To construct this new *Fiducie*, C Witz refers to institutions existing in other jurisdictions. The trust is his starting point.[64] In his introduction, he concludes

" Several dangers threaten the development of the Fiducie...To be truthful, the enlightenment resulting from a positive law approach does not suffice. Any institution is more or less the product of its past...To allow the studied institution to be called Fiducie, it is important to demonstrate that French private law's Fiducie indeed is the descendant of the fiducia of the Antiquity".[65]

Hence the developments concerning the possible applications of the proposed *Fiducie*, and the rules governing it, are preceded by a preliminary part entitled: "The Fiducie throughout History".

It is argued that Witz's account is shaped by the double imperative of genealogical legitimacy: to uncover a paternity link between the new institution and Roman law, and to clearly distinguish this rooted institution from other institutions of the *Ancien Régime.*

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[63] *La Fiducie en Droit Privé français,* Economica, Paris, 1981, my translation.
[64] see ibid, pp 2-6.
[65] ibid, pp 17-18, my translation.

Witz defines his *Fiducie* as arising where an instrument transferring a patrimonial right to a fiduciary, limits the exercise of this right by imposing a series of obligations on the fiduciary. Amongst these obligations will usually be included an obligation to retransfer, after a period of time, the property right to either the settlor or a third party-beneficiary.[66] He identifies two similar institutions in Roman law: the *fiducia* and the *fideicommissum.*

The Roman *fiducia* was a pact which was appended to a solemn transfer of property. Unlike the trust, both *fiducia* and *Fiducie* are contracts. The *fiducia*'s pact contained a promise made to the transferor by the transferee to retransfer the property at the time and in the manner described in the agreement. At first, the *fiducia* was not enforceable and its execution depended solely on the good faith and word of the transferee. The *fiducia* was based on the *fides* which constituted a moral and religious basis for the parties' relationship. As this basis was proving more and more shaky, and less and less *fiduciae* were being complied with, new rights of actions were introduced. They enabled remedies to be obtained against the fiduciary or specific performance of the pact.

Gaius proposed a two-category classification of the *fiducia.* The *fiducia cum amico* operated as a bailment, where a friend would be chosen as the bailee. The *fiducia cum creditore* was a transfer of property for the purpose of providing a security for a creditor. The transferee would promise to retransfer the ownership rights once the debt had been redeemed. The development of both institutions was hampered by the excessive degree of formalism attached to the solemn transfer of property. The *fiducia cum amico* was replaced by bailment and the *fiducia cum*

[66] ibid, p 15.

creditore was the basis for the later development of mortgages. The Justinian codification confirmed the demise of the *fiducia* and does not refer to it at all.

Despite the fact that the *fiducia* is alien to post-classical Roman law, and is therefore not historically connected to French law, it is viewed by Witz as the genealogical basis and model for a contemporary *Fiducie*. This is so despite the fact that, in other analyses, the *fiducia* has been more adequately described as the ancestor of the mortgage or the bailment.[67] The feature of the *fiducia* which is of most importance to Witz is the fact that it realises a full transfer of ownership and does not entail the split ownership of the trust. It is also rooted in contract. It can therefore be argued that the Witz study has two interconnected priorities in mind: distinguishing the contemporary *Fiducie* from the trust, and establishing its genealogical legitimacy and link with Roman law. These priorities are not articulated and are epistemologically determined The mythical dimension of Witz's approach is betrayed by the fact that he does not establish an accurate historical account of the development of the *fiducia* into an institution of French law similar to the trust. But this does not matter, as the search is epistemologically directed towards genealogical legitimacy rather than historical accuracy. Witz's starting point is his own model of a fictional *Fiducie* and he has to go back in time to establish a mythical link between his construct and an institution which, it is argued, has little to do with the functionings of the trust or with the historical roots of French law. This does not seem to matter; the *fiducia* as, in our view, Witz's epistemologically determined endeavour is to endow the trust-like *Fiducie* with genealogical and etymological legitimacy.

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[67] International Encyclopaedia of Comparative Law, Vol VI, 1973, pp 84-108.

The other Roman law institution investigated by Witz bares a striking resemblance to the trust. However, it is also the ancestor of the *substitutions fidéicommissaires* which were amongst the institutions of the *Ancien Régime* targeted by the Revolutionaries. The *fideicommissum* is defined as "a mere request by which the testator asks the legatee ...to give something to or do something for a third party".[68] Similarly to the trust's ancestors, it was used to make testamentary gifts to persons who could not legally benefit from them, or hold property. Like the trust, the *fideicommissum* could not be enforced and its execution depended on the good faith of the entrusted transferee. The necessity to provide for the judicial enforcement of *fideicommissa* was gradually recognised and the Emperor Claudius instituted two *Praetors* whose task was to secure such enforcement. The *fideicommissa* were also eventually regulated and could no longer be used to avoid statutory prohibitions. The Justinian codification incorporated the institution which found its way into French law.

The fideicommissary substitution is described by Witz as the most prominent institution of family law during the *Ancien Régime*. Its primary function was to preserve wealth within the family. The first beneficiary of a testamentary gift operating through a substitution would have the obligation to manage and preserve the property and eventually transfer it to subsequent beneficiaries. Like the strict settlement, the substitutions ensured the conservation of family wealth across several generations. The use of substitutions was prohibited in article 896 of the Civil Code, which implements the revolutionary decree of 14-15 November 1792.

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[68] Witz, op.cit. note 55 at p51, my translation.

C Witz also describes the *Fiducie* of the *Ancien Régime.* This institution has to be distinguished from the Roman *fiducia* as, unlike the latter and like the substitution, it is a type of *fideicommissum.* It arises where the transferee is not intended to benefit from the property and has a mere role in the management of the property, intended to benefit a third party. Unlike the Roman *fiducia,* it was used in the context of testamentary gifts. The fiduciary was a fictitious legatee and the intended beneficiary was the real owner. The fiduciary was not considered as an owner but as a bailee.

Unlike the substitution, the *Fiducie* survived the *Ancien Régime* as it was not expressly prohibited. French legal doctrine and the courts established a distinction between the substitution and the *Fiducie*, arguing that the prohibition did not include the latter. However, the *Fiducie* fell rapidly into disuse. The reasons given by C Witz are as follows: as a surviving *Ancien Régime* institution, its legal grounding was shaky. Moreover, it could be attacked on the basis of the theory of simulation which condemns the use of legal devices as shams to disguise the real state of affairs. The legatee could be seen as a fictitious beneficiary acting as a screen for the real owner. Moreover, the transfer of ownership to the real beneficiary did not include the right to manage the property granted to the fiduciary. This could be perceived as a sui generis fragmentation of the prerogative of ownership, never envisaged in the Civil Code.

This discussion of the *Fiducie* of the *Ancien Régime* allowed C Witz to highlight the differences in his definition of a contemporary *Fiducie* and to reinforce the genealogical link. The old *Fiducie* was based on simulated ownership. The contemporary *Fiducie* should, like the Roman *fiducia*, operate a full transfer of ownership for the benefit of the fiduciary. Although the

contemporary *Fiducie* is inspired by the trust, it cannot rely on split or simulated ownership. This is the condition required by the epistemic necessities of genealogical legitimacy and the respect of the sacred principle of absolute ownership.

CHAPTER III

THE SOVEREIGN UNITY OF ABSOLUTE OWNERSHIP

"limit and infinity, unity and multiplicity, masculine and feminine, light and dark, good and evil" (list of Pythagorean oppositions given in Hegel's Lectures on the History of Philosophy, vol I).

According to French doctrinal orthodoxy, absolute ownership explains the incompatibility of the trust with French law. The observance of absolute ownership as a sacred principle has also functioned as a condition of the acceptability of the new *Fiducie*; the latter's most important distinguishing feature being that, like the Roman fiducia, it performs a full transfer of ownership in the hands of the fiduciary: The proposed *Fiducie* would not have reproduced the split ownership or division of property rights that characterises the trust.[1]

The proposed *Fiducie* was not the only possible approach. An alternative approach could have been to base a new trust -like institution on existing fragmented forms of ownership such as the usufruct.[2] However, it is argued that upholding absolute ownership as a working and fundamental principle was essential to the mytho-logical resurrection of the fiducia. The

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[1] The drafters of the Bill have expressly stressed the importance of avoiding the trust's fragmentation of title. They have followed the lead of the drafters of The Hague Convention 1985, who realised the weight of absolute ownership in most non-trust countries and provided a definition of the trust avoiding any reference to the equitable and legal ownership. For a detailed discussion of the Convention, see Chapter VI, pp 166-174.

[2] The usufruct is a form of fragmented and incomplete ownership recognised as valid by the Civil Code. Absolute ownership comprises three types of prerogatives: the *usus*, the *fructus* and the *abusus*. The usufruct combines the right to use the property with the right to the revenues from the property but excludes the *abusus*, the right to dispose of the property. The usufruct has been compared to the common law life interest ; "A can grant the usufruct in immovables or movables to B, retaining the naked title, which establishes property interests in B and A, respectively, virtually identical in all respects with the COMMON LAW life estate and reversion". International Encyclopaedia of Comparative Law, Vol VI, 1973, at p87.

importance of absolute ownership is also reflected in its role as foundation for other principles such as the *numerus clausus*.

It will be seen that absolute ownership is often described as the main conceptual difference in the field of property between the common law and the civil law.[3] This conceptual divergence would account for the absence of the trust in civil law jurisdictions. The emphasis by civil law jurists on split ownership as the trust's main characteristic reflects the prominence of absolute ownership in the civilian mind. However, can it be said that the notion of absolute ownership does not inform in any way the common law vision of property? Is absolute ownership as totally unintelligible to the common law lawyer, as the trust is meant to be to civil law jurists? How can the enduring conceptual role and power of absolute ownership be explained?

The following analysis is based on a distinction between the conceptual dimension of absolute ownership, that is, its existence and manifestation at the surface-level of legal knowledge, and the epistemic function of absolute ownership, rooted in the deep-level structures of the juridical discourse of sovereignty. If the concept of absolute ownership is not the exclusive property of French civilian legal culture, its epistemic function and importance are not echoed in the English common law.

Absolute ownership conceptually characterises French law's construction of property rights. Section I explores the conceptual differences, highlighted by comparative law scholars, between the common law conceptual basis of property rights and the civil law notion of absolute ownership. However, such a conceptual approach does not explain why absolute ownership should have such a powerful impact on civil, and more specifically

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It could be argued that the common law yers would define their specific conceptual system in opposition, and therefore in connection with, the civil law.

French, doctrinal discourse. The second section of this chapter addresses this issue and argues that absolute ownership functions at a deeper level than that of conceptual knowledge-*connaissances.*[4] Absolute ownership is more than an abstract, organising concept. It operates as an epistemic icon, rooted in the discursive soil of the juridical discourse of sovereignty. This does not preclude its conceptual role at the surface of knowledge, nor the relativity of property rights. The epistemic function of absolute ownership does not contradict the existence and legal recognition of a multitude of rights, such as creditors' or inheritance rights, which compromise the absolute exercise of ownership. Is absolute ownership therefore a mere legal fiction?

Absolute ownership cannot be so easily dismissed. It is a central structuring legal concept and, furthermore, has an important functional role connected to the epistemic workings of French law. This deep epistemic function, explored in the second section of this chapter, explains the enduring surface relevance of absolute ownership as a concept.

SECTION I - ABSOLUTE OWNERSHIP AS A CONCEPTUAL PARTICULARITY

First will be set out the ways in which the conceptual differences between the civil law and the common law notion of ownership are perceived in comparative literature. There will then be an attempt to go beyond the orthodox acceptance of absolute ownership as characterising the civilian tradition, by highlighting convergences between absolute ownership and the common law notion of radical title, the sovereign rights over land of the

[4] See Foucault's distinction between "savoir" and "connaissances", referred to in Chapter I, at pp 30-31.

Crown. These two concepts can be linked to a common juridical understanding of sovereignty.

1.Conceptual divergences in the notion of ownership and their rationales

"The civil law of property is based on a broad concept of 'ownership' as the 'fullest right a person can have over a thing' ".[5] One of the main characteristic of the civilian, and therefore French, notion of ownership, is its conceptualisation as a relationship between man and object. This characteristic is said to be inherited from the Roman law of things which "was ...originally contemplated as regulating the relations between human beings and material objects."[6] Ownership, a relation between man and thing, is absolute in that it entails "a right that can be invoked by the owner against any third party".[7] The meaning and implications of this absolute character will be examined next: the absolute nature of ownership is enshrined in the Civil Code and reflects an abstract ideal which defeats a precise definition of the prerogatives of an owner. But it has nonetheless the concrete implication of preventing fragmentation of property rights.

The absolute character of ownership was intended to be abstractly reflected in the unity of the powers it confers. Ownership is one and indivisible. Consequently, the owner cannot fragment his right into various limited interests, unless these are limited real rights recognised by the Code.

"The above mentioned principle of unity constitutes one of the essential differences between the CIVIL LAW systems and the ANGLO-AMERICAN law, in which ownership as a unitary concept plays a much less important role in consequence of a fragmentation of ownership".[8]

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[5] A Dyer H van Loon, *Report on trusts and analogous institutions*, drafted for The Hague Conference on private international law and presented in May 1982, at p 15.
[6] J H Beekhuis,in *International Encyclopaedia of Comparative law,* vol 6, 1973, at p 3.
[7] ibid, at p 8.
[8] ibid at p 10.

Absolute ownership confers prerogatives which are claimed to be of unlimited duration. Indeed, the eternal nature and permanence of absolute ownership is one of its most symbolic and essential characteristics. This is so even though the rights of an owner are limited by the concurrent rights after his/her death of his/her spouse and descendants!

The concept of absolute ownership is an abstraction. It has no predetermined substantive content such as specific rights of action. It is an abstract form of power - *dominium* - over things. It entails:

"the attribution of all conceivable powers relating to the object ...Seeing that it is impossible to enumerate all the powers inherent in ownership, one must, if one tries to define ownership, be content with this formal description".[9]

But although absolute ownership does not have a preestablished content, it is a right defined by statute. This has its own consequences. Codification of property rights "tends to freeze legal institutions and devices in the precise form in which they happen to be at the date of codification".[10] Thus, the concept of absolute ownership tends to be immutable and inflexible. This crystallisation of absolute ownership was performed in France not only through article 544 of the Civil Code, but also through constitutional enactments enshrining private absolute ownership. Absolute ownership as a sacred constitutional principle has been reaffirmed in successive constitutional reforms and is still enshrined in the Preamble of the current 1958 Constitution.[11]

To sum up therefore, from a civilian perspective, ownership is an absolute prerogative over things the integrity of which cannot be threatened by fragmentation over time or between individuals. The abstract nature of this

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[9] ibid, at p 12.

[10] "The trust and its counterparts outside the common law", in ibid, p 84.

[11] J Morange, "La Déclaration et le droit de propriété", Droits, vol 8, 1988, p 101. The Preambule incorporates the 1789 Declaration of Human Rights which, in its articles 2 and 17, refers to ownership as a fundamental human right.

character requires that ownership cannot be broken down into a list of defined attributes. Ownership is enshrined in the Civil Code and in the Constitution and as such, is a consecrated eternal principle. On the basis of such a description of civilian ownership, it has been argued that "[a]t common law, as opposed to the civil law, there is no right or concept of ownership".[12] However, it can be argued that the common law conceptual bases of property, and in particular land law, is no less abstract than civil/French law's absolute ownership.

"From its earliest origins land law has comprised a highly artificial field of concepts, defined with meticulous precision, with the result that the interrelation of these concepts is not unlike a form of mathematical calculus....The law of land is logical and highly ordered, consisting almost wholly of systematic abstractions...".[13]

The conceptual framework of land law is inherited from the mediaeval doctrines relating to estates and tenures. It also forms the basis of broader notions of property. Property or ownership in the common law sense is still connected to the historically and politically most important form of ownership: land tenure. This link has been severed in civil/French law through a more abstract and general notion of ownership.

To the extent that the concept can be said to exist in the common law, absolute ownership is a prerogative which can only belong to the Crown in the form of radical title to all land. The concept of radical title is the concomitant of sovereignty and is vested in the Crown, as the only true owner of land. Radical title results from the act of conquest and subjugation of a territory by the King, and originates in the Norman conquest. The feudal theory of tenure is founded on this act of conquest, consecrated in the concept of radical title as the source of all other limited rights.

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[12] J R Cortina, "The Jus Emphyteuticarium and the Trust: a Byzantine Solution to an Acadian problem", (1981), 8, 1, Southern University Law Review, 95 at p 102.
[13] K Gray, *Elements of Land Law,* second edition, Butterworth, London 1993, at p 51.

Whereas in the common law, absolute ownership could describe the relationship of the sovereign to territory, tenures form the basis of property relations between lord and tenant. Property rights are therefore conceptualised as a relation between grantor and grantee, defined by the conditions of grant: "In addition, those with land rights were not preoccupied with the right of ownership, which belonged to the sovereign".[14]

If the Crown is the only owner of land in the civilian sense, what do tenants own? According to the doctrine of estates, the tenant owns not the land itself but an abstract entity, the estate in land. The estate owned confers specific rights attached to the nature of the estate itself. These rights "represented a temporal 'slice' of the bundle of rights and powers exercisable in respect of land".[15] According to the doctrine of estates, property rights are temporally delimited and defined according to their temporal dimension. The element of eternity of absolute ownership does not inform the conceptualisation of property rights.

The concept of seisin, which informs the common law idea of relativity of title, explains the absence of ownership as an abstract and absolute title. "The notion of 'seisin' is part of the common law tradition that proprietary rights in land are based in physical possession rather than abstract title".[16] Factual possession, irrespective of right, evidenced a relationship between man and land amounting to ownership.

"[T]he preeminent position accorded to de facto possession in English law ensures that there is no such thing as 'absolute title' to land. All title is ultimately relative. The title of the present possessor will customarily be upheld unless and until a better claim is advanced on behalf of someone else".[17]

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[14] op. cit. note 12 at p 114.
[15] Gray, op. cit. note 13, at p 56.
[16] ibid, at p 61.
[17] ibid, at p 62.

To summarise, the common law conceptualises absolute ownership only insofar as this notion can be equated to the Crown's radical title. Property rights are conceived as relative relationships between persons, mediated through the concept of estates or limited interests. A property holder is not perceived as owning the land itself but an interest or estate. These abstract objects of ownership are flexible and can be divided into lesser interests. According to doctrinal theorisation, the conceptual framework of common law property has allowed the fragmentation and manipulation of ownership rights.

"The flexibility of the Anglo-American concept of estates in land has made much easier the development of the trust, as it was theoretically sound for a holder of a fee simple to divest himself of some of his interests".[18]

The fragmentation of ownership for the functional purpose of separating the management of land from its enjoyment was facilitated through the recognition of the beneficiary's right as an equitable estate.[19] It is therefore arguable that another conceptual difference between French law and the common law, it the ability of the latter to consider ownership functionally, rather than as an abstract prerogative.

The rationales explaining these conceptual divergences are of three main types. First, the differences are explained in terms of the different historical evolution of systems of property. The feudal system of ownership was violently uprooted in France during the Revolution. The radical changes were then consolidated by the nineteenth century codification. English law did not experience such a radical break and is still influenced by its feudal past. A second argument is that, in France more than in common law countries, the political dimension of the liberal notion of private property permeates the legal

[18] op.cit., note 12, at p 114. The statement suggests that fragmentation of title was the result of a flexible doctrine of estates, whereas it is probably the case that the latter was itself the result of an *ex post facto* rationalisation of pragmatical divisions of ownership in the interest of the beares of rights: see Gray, op. cit. note 13.
[19] see op.cit, note 5, at pp 16-17.

notion of ownership. A third argument is based on the epistemological and methodological differences identified between the civil law and the common law. Each of these arguments will be considered in turn.

First as regards the French system of property rights, feudalism as a political system was in ruins at the eve of the Revolution; the latter only confirmed the decline of the powers of feudal landlords. However, the structure of ownership was still based on the tenure system.[20] The prevailing position is well described by Herman:

"According to feudal tradition every manor owner enjoyed rights of 'eminent property' (*dominium directum*) upon all land in the manorial village. These rights permitted the manor owner to withdraw revenues and fruits from the land as a kind of homage or tribute. The lesser landowner also 'owned' the land in the sense that he could transfer or devise it, but his ownership was conditional. If the lesser landowner transferred the land with the lord's consent, the lesser landowner owed the lord certain rents as well as property transfer fees in recognition of the lord's eminent rights. To use the language of article 544, the lesser landowner's ownership was not absolute; the lesser landowner enjoyed only the useful (or profitable) estate (*dominium utile*)".[21]

By the time of the Revolution, the services owed by the tenants to the Lords had been considerably reduced but divided ownership remained. After the Revolution, this system of property holding was abolished and Article 544 established the basis of a new system.

"[T]he Code...replace[d] the old system with a system in which everyone subject to state imposed regulation could bargain freely regarding land ownership because each citizen owns property unqualified by the *dominium directum*....The property-holding system of the Civil Code stripped away the last vestiges of seigneurial privilege and united in the same hands both the control of assets and the benefits those assets yielded. A highly stylized, streamlined system of property ownership resulted".[22]

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[20] see A Leca, "Essai de synthèse sur l'état du droit féodal à la veille de la révolution", Revue de la Recherche Juridique, n 1, 1988, p 63.

[21] S Herman, "From Philosophers to Legislators, and Legislators to Gods: The French Civil Code as Secular Scripture", (1984), 3, University of Illinois Law Review, 597, at p 607.

[22] ibid, at pp 607-608.

The feudal system of property holding, characterised by a multiplicity of relations and ties, was replaced by a system based on a unitary and unconditional relation to the object of ownership.

As part of this reform of the system of ownership, other feudal institutions were targeted. The fideicommissary substitutions - the French equivalent of the entail - were abolished. The substitution had enabled the preservation of land within the family.

"[B]y the time of the French Revolution, almost the entire country was tied up by these substitutions. The first donee was owner only in name and appearance;...Thus the institution was despised because creditors were deprived of recourse against collateral and property was tied up indefinitely and kept out of commerce".[23]

The elimination of this institution has been identified as one of the reasons for the conceptual problems encountered by civilians as regards the trust:

"To this day, the concept of the trust is still virtually incomprehensible to the typical French jurist, thus indicating the measure of the Civil Code's uprooting of this feudal device".[24]

The second line of argument is based on the impact of political history on law. For instance, in the eyes of many, the replacement of the feudal system of ownership, characterised by a multiplicity of personal relations, by a system organised around the Roman law inspired concept of absolute ownership, illustrates the political and philosophical importance of ownership in the constitution of modern French law. In the common law, on the other hand,

"[m]etalegal considerations ...such as justification of the right to own land or preoccupations with the nature and essence of the right of ownership, were never the subject of theoretical scrutiny. This was not so at civil law, particularly after the natural law theories became popular. At civil law the theoreticians were and still are concerned with questions about the relationship

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[23] D Singer Jacobs, "Prohibited Substitutions", (1981), 56, Tulane law Review, at p359.

[24] op. cit., note 21, at p 609.

between man and his right to the ownership of land and ultimately, about man, property, and God".[25]

The French post-revolutionary codification has been described as performing the positivisation of natural law, thus inscribing philosophical thought into positive law. Natural law views ownership as the natural right of man, stemming from his occupation of and work on the land.[26] Article 544 implements the idea that man, by virtue of his human essence, has a natural right to appropriate and use for his sole benefit, the natural resources surrounding him.

Another interpretation, still based on the impact of modern political history on law, proposes that the legal notion of absolute ownership is a consecration of liberal individualism. Absolute ownership is nothing else than the glorification of individual property as an incentive for entrepreneurial initiative and creativity.[27] Absolute ownership secures individual freedom.

The third type of argument stresses that, although the common law has also been influenced by similar political and philosophical ideas, these have not become part of the law through codification. The concept of property in the common law remains more concerned with functional or pragmatic considerations. Hence, another reason given for the conceptual divergences between the common law and the civil/French law refers to epistemological or methodological differences.

"[T]he obsession for classification and definition, without any practical goal, irritates the common law jurists...the civil law is a sort of professional system, whereas the common law is essentially a practitioners' system; one developed not by professors and scholars, but by judges and by lawyers who give the judges the material for their decisions".[28]

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[25] op. cit., note 12, at p114.
[26] See J Morange's discussion of Turgot and Locke, op.cit., note 11, at p103-105.
[27] ibid.
[28] op. cit. note 12, at p 114.

These epistemological differences would explain why there is no unitary, abstract and regulative concept of ownership in the common law, which is instead more reactive to practical requirements.

"Common law chooses flexibility both in the creation of interests of property and in their manipulation; its way has been 'experiment'...it is fair to say that the system as a whole is not preoccupied with logic. As Maitland wrote, 'On juristic elegance we do not pride ourselves, but we know how to keep the roof weather-tight'...civil law proceeds in a fashion diametrically opposed to the common law. Instead of permitting individuals and their attorneys to discover what kinds of ownership and what objects of ownership are in their best interests, the civil law maps out the rules in advance".[29]

Different historical and political evolutions of the law and diverging legal methods are invoked to explain the conceptual differences between the common law's pragmatic vision of property and French law's principle of absolute ownership. This has lead some scholars to assert that "[a[t common law..there is no right or concept of ownership".[30] Moreover, the notion of title, preferred by the common law, should not be confused with ownership as the former is to be understood as relative and qualitatively on a par with the aggregated interests it represents.

The diverging conceptual approaches observed do not, however, allow us to assert that the concept of absolute ownership is unintelligible and non-existent in common law systems. Nor is it true that French law's notion of absolute ownership excludes the conceptual possibility of fragmented and lesser property interests.

"The CIVIL LAW systems recognize many types of split ownership, including those incident to co-ownership, joint ownership, servitudes, *usufruct, usus, habitation,* pledge, mortgage, *antichresis,* lease and *emphyteusis,* and modern FRENCH law permits the substantial equivalent of almost every type of future interest known to the COMMON LAW".[31]

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[29] D W Gruning, "Reception of the trust in Louisiana: The case of Reynolds v Reynolds", (1982), 57, Tulane Law Review, 89 at p 100.
[30] op. cit. note 12, at p 102.
[31] ibid..

Focus on the diverging conceptual bases of property law does not provide a space for the explanation of these convergences between the common law and French law. The emphasis on differences may be a key to the constitution of an identity for the common law, but there may be something to be learned from neglected conceptual convergences.

The proposed approach is to demonstrate that in English law, the concept of absolute ownership does exist but it is linked to the conceptualisation of the right of the sovereign over his land. In French law, ownership is a sovereign right, the right of the sovereign individual over things. The model for individual ownership is borrowed from a conception of sovereign power. In both English and French law, sovereignty and absolute ownership converge. Underlining this conceptual convergence allows us to go beyond the comparative focus on private rights.

Indeed, the concept of absolute ownership is connected to the concept of sovereignty in both French law and the common law. This illustrates the connection between sovereignty and absolute ownership. The purpose of establishing such a conceptual connection between ownership and sovereignty is to lay the foundation for the argument according to which these concepts belong to the same underlying discursive phenomenon: the juridical discourse of sovereignty. A second point to be made is the difference between the common law and the French civilian understanding of ownership does not lie at the conceptual level, as an equivalent of absolute ownership is found in the notion of radical title. The concept exists in the common law but was not given a place in the legal and political formulation of individual ownership. Why? We will argue in section 2, that the reasons are to be found in the deeper epistemic workings of legal culture.

2. Conceptual Convergences: Absolute Ownership, Radical Title and the Concept of Sovereignty

Radical title, the basis of the doctrine of tenure, is said to be the concept closest to the civilian notion of absolute ownership. In the common law, the Crown is the only entity capable of exercising absolute and unmediated power over land. The radical title grounds and symbolises the sovereignty of the ruler over its territory.

The notion of radical title illustrates the existence of an overlap in common law between property rights and political sovereignty. This overlap or conceptual connection is strikingly revealed in the Australian case law concerning the possibility of indigenous property rights. The Australian case *Mabo v. Queensland* is a potent illustration of the implications of the colonialist linking in the common law of the Crown's sovereignty and its absolute title to land.[32]

In 1879, the Meriam's people traditional land, the Murray Islands, were annexed as a settled colony to Queensland. The Meriam people brought an action against the state of Queensland for declarations that they were entitled to the Islands on the basis of their native title, as owners, possessors, occupiers or beneficiaries of usufructuary rights.

According to Brennan J, who delivered the majority judgement, "the chief question in this case is whether...[annexation] had the effect on 1 August 1879 of vesting in the Crown absolute ownership of, legal possession of and exclusive power to confer title to all land in the Murray Islands".[33] In other

[32] (1992) 175 CLR 1
[33] ibid. at p 25.

words, the main issue was whether the acquisition of sovereignty and of the radical title meant that absolute beneficial ownership of the land had vested in the Crown to the exclusion of any pre-existing native rights. The court (Dawson J dissenting) held that the Crown did acquire radical title to the land but that native title survived the Crown's acquisition of sovereignty which did not amount to absolute ownership and exclusive power to confer title.

The application of the English doctrine of tenures and of the concept of radical title to this relationship between the Australian state and Aboriginals stems from the theory established in Australian case law according to which Australia as a settled colony was *"terra nullius"*. It was regarded as uninhabited and submitted to no human laws. Hence, English property law, in the absence of any other, became the law of the colony. According to the English doctrine of radical title, the Crown enjoys absolute beneficial ownership of the land and no other right of interest in this land can exist unless specifically granted. The judicially established consequence of the application of this doctrine to Australia was that any indigenous interest did not survive British settlement. The recognition of a native title entails the drawing of a clear distinction between the notion of radical title, expression of the Crown's sovereignty and absolute beneficial ownership. Radical title cannot be questioned by the courts as this would entail a questioning of the Crown's sovereignty, but it could be interpreted so as to allow a sharing of the beneficial ownership between the Crown and Aboriginal peoples.
Hence, Brennan J did assert that radical title and the doctrine of tenure "could not be overturned without fracturing the skeleton which gives our land law its shape and consistency".[34] However, " it is not a corollary of the Crown's acquisition of a radical title to land in an occupied territory that the Crown

[34]ibid. at p 45.

acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants".[35]

This position was supported by Sir John Salmond J :, cited by Brennan "Territory is the subject-matter of the right of sovereignty or *imperium* while property is the subject matter of the right of ownership or *dominium*".[36]Brennan J concluded that radical title can be the basis of the exercise of sovereign power without it necessarily meaning that the Crown enjoys absolute beneficial title to the land. However, radical title is the expression of colonial sovereignty and therefore entails the power to extinguish native title.

The Australian case law regarding the issue of native title explicitly illustrates the conceptual connection between sovereignty and ownership in the common law; the political sovereignty of both coloniser and Aboriginal peoples entails the assertion of control over land. The *Mabo* case distinguishes ownership from sovereignty, and radical title from property rights, to reaffirm the sovereignty of the coloniser by maintaining the notion of radical title as entailing a prerogative of control over land through the granting and extinguishing of title.

The common law radical title was traditionally connected through the concept of absolute beneficial ownership to the supreme exercise of sovereignty of the Crown or the colonial ruler. In French law, the sovereignty of the juridical subject is expressed through the legal recognition of his/her property rights as absolute. Absolute ownership expresses the sovereign power of the individual over his property. Both radical title and absolute ownership encompass a species of power that can be identified as that of the sovereign over his territory. This species of power was already conceptualised in the

[35]ibid. at p 48.
[36]ibid. at p 44.

natural law tradition and stems from the theological tradition. It is man's *dominium*, modelled on God's *potestas absoluta* , the expression of His divine sovereignty.[37] As will be argued in the next section, the conceptual structure and roots of the modern concept of
absolute ownership are to be found in the medieval legal formulation of God's right and its later confusion between *imperium* and *dominium*. We have thus demonstrated the conceptual confusion between *imperium* and *dominium*, between radical title and beneficial ownership, between sovereignty and individual property rights illustrate that the same coded representation of power underlies these concepts. The power of the coloniser over his colony or of Man over things is sacred, unidirectional and sovereign. The symbolic importance and sacredness of the notion of radical title , and of the power of the colonial sovereign, can be gathered in Dawson J's dissenting judgement in *Mabo*, which altogether refuses any questioning of the notion of radical title.the conceptual links between absolute ownership and sovereignty; in both French and common law traditions, absolute rights over land/things reflect a certain juridical representation of power. However, in French law, as opposed to the common law, this representation is central to the conceptualisation of individual ownership. A key question remains: why has absolute ownership such a pivotal role in the French law's conceptual landscape?

SECTION II ABSOLUTE OWNERSHIP AND SACRED SYMBOLS

The differences in property laws, understood as systems of rules or disciplines, can be suitably explained in terms of conceptual divergences stemming from the historical, political and epistemological aspects

[37] see M-F Renoux-Zagamé, "Du droit de Dieu au droit de l'homme: sur les origines théologiques du concept moderne de propriété", Droits, I, 1985, 17.

characterising the legal cultures or systems compared. However, the enduring importance of absolute ownership in French legal doctrine remains unexplained. Why should absolute ownership be treated still today, despite political changes, as a sacred principle which shall not be compromised at the risk of fracturing the body of the law? The conceptual differences between French law and the common law may well explain why the trust has no exact and spontaneous equivalent in French law. They do not explain the doctrinal resistance, reflected in the proposed legislation, to introduce the trust's structure of ownership into the French Civil Code, and indeed, as will be seen, in those of Quebec and Louisiana.

It cannot be argued that absolute ownership has remained a bedrock principle on the basis that individual property is a supreme and unquestioned value. The importance of Welfare reforms in the second part of the twentieth century and the constitutional recognition of collective rights demonstrate that individual ownership has been compromised. But this does not lead us to the conclusion that role of absolute ownership is simply ideological, masking the reality of fragmented rights and the magnitude of state regulation of ownership. The further dimension, one that my argument focuses on, is the role of absolute ownership in the imaginary of French law. It must be emphasised here that concepts of "imaginary" and "ideology" are not synonymous.[38] It is argued that the persistent significance of absolute ownership in French law is mainly epistemic and symbolic. It is specific to the imaginary of French - and other jurisdictions' based on the *Code Napoléon* -

[38] Ost and Lenoble 's concept of imaginary is distinct from the Marxist notion of ideology. "These notes on the imaginary allow us to begin a debate with the concept of *ideology*. This confrontation is necessary if we are clearly to distinguish our own hypotheses from those analyses, from now on classical, of legal discourse that are proposed in terms of critique of ideologies". For further details see "Founding Myths in Legal Rationality",(1986), 47, M.L.R, at pp 537-538.

legal knowledge; absolute ownership's discursive role is quite independent from the non-discursive significance of individual property.

The enduring relevance of absolute ownership in French law is connected to its epistemic and symbolic function. As a symbol, absolute ownership participates in the ritualistic representation of power. The species of power represented has been identified as sovereign power. This function is not merely incidental or accessory, it is epistemic and therefore an essential part of the fabric and workings of doctrinal discourse *qua* legal knowledge. As regards the trust and the *Fiducie,* these workings are revealed by the arguments invoking the impossibility of importing the trust because of its structure of ownership.

Absolute ownership does not symbolise a specific power-holder - the King, God, the coloniser - but of a form of power. The representation reflects the characteristics of sovereign power rather than a character exercising power. The characteristics of sovereign power - unity, unidirectionality - have a regulative role in the production of legal knowledge. They define concepts and determine their central role. They also regulate the general form of legal thought.[39]

The convergences between sovereignty and absolute ownership in French law, highlighted by a comparison with the notion of radical title in the common law, stem from the grounding of both concepts in the same epistemic symbolism.[40] Absolute ownership and sovereignty are both effects of the juridical discourse of sovereignty. They both represent the juridical prerogative as a sovereign, unitary, unfragmentable and unidirectional power. The sovereignty of the property owning subject, as that of the Crown or the

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[39] See Chapter II.

[40] It could be argued that both the common law and French civil law traditions have been influenced, albeit in different ways, by the juridical discourse of sovereignty.

State, echoes God's *potestas absoluta.* It is in this resonance that lies the legitimacy of juridical power.

M-F Renoux-Zagamé has demonstrated the epistemic link between the modern concept of absolute ownership and mediaeval theological thought.[41]

"The idea that man, by his very essence, has a natural right to appropriate all things for his own use and enjoyment, implemented by the definition in article 544, owes its existence and part of its meaning to the efforts of the scholars of the Church to understand the legitimacy ...of human property over a world of which the Scriptures say that God, its creator, is the only master, the *solus dominus*".[42]

The author shows how the modern juridical notion of absolute ownership stems from natural law theories; however, the latter are rooted in an older intellectual tradition, arching back to the theological and juridical reflections of scholars on the Christian Scriptures and Roman law. She describes mediaeval scholasticism as "the theological prehistory of the so-called modern vision of ownership".[43]

The theological vision of human *dominium* which founds Man's right to property is organised around two key ideas: *dominium* over things can only belong to God and God has allowed humans to participate in his *dominium.* God is both the origin and model of human *dominium.* The term *dominium* refers both to God's power over His Creation and to the human exercise of property prerogatives. The term is borrowed from Roman law's vocabulary as a result of the mediaeval cross-fertilisation of juridical theories and Christian thought. "The progress of the term *dominium* therefore translates a slow evolution leading the theologians to perceive divine *dominium* as a type of

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[41] Doctoral study summarised in the article "Du droit de Dieu au Droit de l'Homme: sur les origines théologiques du concept moderne de propriété", op. cit., note 39.
[42] ibid., at p 17-18, my translation.
[43] ibid., at p19, "propriété" is translated as ownership and "domaine" as property or *dominium.*

right, and then to confuse *dominium*, law and the divine...this evolution is crucial...as it could be that the notion of subjective right is rooted therein".[44]

Divine *dominium*, the model and basis of human *dominium*, is interpreted as the site of divine sovereignty and expression of God's unlimited power of creation and ordering. Man's submission to God allows human participation in the divine *dominium.* The *dominium* of Man over things was thus interpreted as a way by which God allows humans to participate in His action, to share part of his power for the purposes He has assigned. According to the theologians, human *dominium* is confused with God's power and mission. In natural law theories, the role of God has been confined to the explanation of the origins of human *dominium;* the latter was no longer confused with God's own *dominium.* Accordingly, Man, in his worldly endeavours, was no longer constrained by God's will. *Dominium* was inscribed in human nature and man was born free. However, Man's natural right to property, expressed in absolute ownership, had the same content as its theological ancestor. "Freed from its ties with God...the moving divine *dominium* of theological thought became in a way a human right".[45]

The author concludes by noting that the theological human *dominium* resembles the absolute power of the King; in both cases, submission to God is the basis and the limit of these two types of power. Moreover, absolute ownership, grounded in the human/divine *dominium*, "could have been better named right of God, as it was modelled on the divine for Man conceived as the agent of God on earth".[46] The contradictions appearing in human rights theory are inherent in the idea that a multiplicity of beings could all be equal

[44] ibid., p 20.
[45] ibid., p 30.
[46] ibid., p31.

and yet exercise rights which were originally constructed for the sole and supreme God of Christianity.

M.F Renoux-Zagamé's study reveals that the modern concept of absolute ownership originates in theological reflections about God's power. It seems that, to express the omnipotence of Man, absolute ownership had to crystallise the attributes of divine and monotheistic power: unity, sovereignty, unidirectionality. Absolute ownership is part of the enduring epistemic and symbolic structure rooted in theological reflections on power and producing legal conceptualisations focused on sovereign power.

The role of absolute ownership as epistemic icon is further argued by a focusing on in its enduring importance in jurisdictions which have based their private law system on Napoleonic codification, but which also have been considerably influenced by the common law. Quebec and Louisiana both consecrated absolute ownership in their nineteenth century codification. They both have adopted their own equivalent of the trust through statutory reform. In both jurisdictions, absolute ownership has been the focus of doctrinal and judicial debates and analyses on the legal definition of the imported institution. Absolute ownership is also an epistemic symbol of identity in these jurisdictions. Unlike French doctrine, legal knowledge in these jurisdictions has been considerably influenced, or at least exposed to, common law concepts. However, the epistemic unity and uniqueness of Quebec's and Louisiana's legal identity seems to depend on reverence to the sacred epistemic symbols consecrated by Napoleonic codification. Absolute ownership in Quebec and Louisiana does not merely translate the conceptual particularity of a system of property law based on Roman law. It subsists, in the face of adversity, as a symbol of the law's identity. In Quebec and Louisiana, unlike in French legal doctrine, the issue of legal identity is at the

forefront of legal discourse and is formulated as a clash between legal traditions. In all three cases, legal discourse maintains its sense of identity and unity through the sacred symbols.

1. The Trust in Louisiana

The Louisiana Civil Code of 1870 is based on the French Civil Code and contains a similar prohibition on fideicommissary substitutions. As a result, the nineteenth century courts would not admit the validity of trusts created in Louisiana and governed by the codified rules. However, in 1882 charitable trusts for educational purposes were statutorily exempted from the Code's prohibition, in order to allow gifts made by Paul Tulane to Tulane University. Between 1882 and 1938, legislation was introduced to overcome the judicial and doctrinal hostility towards trusts. The first trust code, the Trust Estates Act, was enacted in 1938 and reformed in 1952. The current law is contained in the Louisiana Trust Code 1964. The purpose of this legislation was to ensure that the trust concept accords, as much as it is practically possible, with the civil law framework. Section 1781 of the Trust Code defines the trustee as "a person to whom title to the trust property is transferred to be administered by him as a fiduciary".

It has been argued that the 1938 and 1964 codifications amount to a capitulation of Louisiana to the common law.[47] The successive codifications constituted "an outright adoption of the Anglo-American Trust in its own common law and equity concepts by means of a comprehensive code".[48] However, "there remained the possibility that trusts in Louisiana would still

[47] JM Wisdom, "A Trust Code in the Civil Law", (1938),13, Tulane Law Review, 70 .
[48] op. cit. , note 12, at p106.

suffer in the courts because they embodied 'tenures alien to the civil law'".[49] Despite the importation of the notion of legal title, abbreviated to "title" in the 1964 Trust Code, the judicial and doctrinal analyses have remained faithful to the notion of absolute ownership and unable to construe the nature of the interests of the beneficiary and trustee. The search for an absolute owner remains the source and structure of debates about the trust.

The case of *Reynolds v Reynolds* [50], decided in 1980, has been interpreted by legal doctrine in Louisiana as raising the unsolvable question of whether "title" amounts to absolute and indivisible ownership.[51] Mrs Reynold's grandmother created in her will a spendthrift trust in which she bequeathed her farm. This will stipulated that the trustee was to hold the property in trust for her grandchildren until her youngest grandchild attained the age of 21. Then the trust corpus and the accumulated income would be distributed equally to all. before such time, the trustee used his discretionary power to distribute some of the income to the beneficiaries. Mrs Reynolds received payments from the trustee and applied them to household expenses. Mr and Mrs Reynolds divorced. At the time of the divorce Mrs Reynolds still held a balance of £ 555.18 of the distributed income and there remained £ 11,434.80 in the account of the trustee, representing undistributed income of the trust estate in which Mrs Reynolds had a proportionate share. Mr Reynolds argued that he was entitled to a half of the distributed income and of Mrs Reynolds proportionate share in the undistributed income. The basis of his claim was article 2386 of the Civil Code, according to which the fruits of a wife's separate property become community property, i.e. both spouses' property in equal shares, unless the wife executes and records a declaration

[49] op. cit., note 29, at p102.
[50] 388 So. 2d 1135 (La. 1980)
[51] K Venturatos Lorio, "Le trust en Louisiane: l'experience du trust par une juridiction civiliste", Revue Juridique et Politique, 1990, 240.

that she reserves all of such fruits for her own separate use and benefit. Mrs Reynolds did not make such a declaration. The main issue was whether the trust corpus could be considered as Mrs Reynolds' separate property and the trust income as the fruits of her property. The case offered an opportunity to settle the issue of the precise nature of a beneficiary's right and of the trustee's title. However, the case only revealed the great diversity of opinions and approaches amongst Louisiana judges.

"On a theoretical level, *Reynolds* shows that the Trust Code has not 'crystallized' the concepts of legal and equitable title. The court was at pains to discover what the beneficiary *had*'..The majority found that the beneficiary possessed some interest in the trust...".[52]

The Supreme Court held that whilst the undistributed trust income was not the fruit of Mrs Reynolds separate property and did not fall into the community, the trust income already distributed was. The judges were at pains to reconcile the idea of absolute ownership enshrined in article 489 of the Louisiana Civil Code with the rights of a beneficiary. Hence, for Summers CJ:

"When ownership is vested in the trustee with full powers as such it cannot be said that the beneficiary of the trust then has rights in the property which entitle her to its fruit...No statute in Louisiana confers upon a trust beneficiary the ownership of the corpus of the trust".[53]

Mrs Reynolds did not own the trust corpus as the trustee had full title. Hence, the undistributed income could not be regarded as the fruit of her property. Indeed, as a beneficiary "she had no right to administer the trust property...she was without even the slightest indicia of ownership".[54]

However, on rehearing, a more nuanced definition of the beneficial interest was sought, to reconcile opposing views as to "whether that beneficial

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[52] D W Gruning, "Reception of the trust in Louisiana: the case of Reynolds v Reynolds" (1982), 57, Tulane Law Review, at p 118.
[53] see case reference note 95, at p 1138
[54] ibid. at p 1139.

interest can be characterized as ownership of the trust corpus".[55] Dixon CJ concluded that:

"Mrs Reynolds' interest in the corpus of the trust did not constitute 'ownership' of separate property which could produce either income payments or undistributed income as 'fruits'....[as] Mrs Reynolds future and indefinite right is devoid of the indispensable element of ownership: immediacy, dominion, and authority ".[56]

However, the distributed trust income "was the materialization of the gift of a future interest in property".[57]

However diverse, the reasonings adopted granted a central role to the civilian notion of absolute ownership.

"The fundamental problem remains that the trust is essentially a device in which a search for an owner is inappropriate...The French Revolution fought to reintegrate ownership in order that land would remain in commerce, and this ideological origin may in part explain the supreme court's insistence that an owner in civilian terms be found notwithstanding the existence of a trust. But it is not merely ideology or even habit that compels this. Ownership is an essential, working part of the Louisiana civil law system, and numerous occasions ...require that an owner be found to answer concrete questions...To this extent, then, the reception of the trust in Louisiana remains incomplete. In many cases, the kind of uncertainty caused by *Reynolds* will discourage settlors and their attorneys from employing the trust device...".[58]

The search for an absolute owner may well be "inappropriate" but it seems to be the unavoidable consequence of the epistemic importance of absolute ownership in Louisiana civil law. Although the Louisiana courts have the conceptual apparatus to understand the trust, they are compelled to apply the civilian notion of absolute ownership. Absolute ownership is, as asserted by Gruning, a "working part of the Louisiana civil law system". How can its function be described? The proposed analysis is that absolute ownership is epistemic icon, guaranteeing the mytho-logical identity and unity of the Code. The reception of the trust and its own conceptual apparatus will have to

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[55]ibid. *per* Dixon CJ at p 1144.
[56]ibid. at p 1148 and 1147.
[57]*per* Dixon, ibid. at p 1150.
[58] ibid., at pp 120-121.

remain incomplete as absolute ownership cannot be compromised. In Quebec, absolute ownership is also at the centre of judicial and doctrinal discussions.

2. Quebec's *Fiducie*

Quebec's Civil Code of 1866 (Civil Code of Lower Canada) adopted aspects of the *coutumes de Paris*, one of the French pre-revolutionary systems of customary law. The *coutumes* had remained in force until Quebec's cession to Great Britain in 1763. Following the *coutumes*, the Code adopted a liberal view as to fideicommissary substitutions and allowed freedom of testation and *inter vivos* donations. It also included the notion of absolute ownership in its article 406, echoing the French article 544. It has been argued that Quebec's *Fiducie* has its roots in the provisions of the 1866 Code based on the *coutumes.* Article 869 allows a form of *Fiducie* for charitable testamentary gifts and article 964, unlike the French Code, preserves the testamentary substitution.[59]

In 1879, in order to respond to the practices of lawyers and their wealthy clients in the Anglophone community of Quebec, the "Act respecting Trusts" was enacted.[60] The provisions of this Act were introduced in the 1888 Civil Code as articles 981a to 981n. Article 981a allows "all persons capable of disposing freely of their property...[to] convey property, movable or immovable, to trustees by gift or will, for the benefit of any persons in whose favour they can validly make gifts or legacies". The scope of the *Fiducie* was therefore limited to the making of *inter vivos* or testamentary gifts. The 1879

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[59] See J Brierley, "De la Fiducie", in *La Réforme du Code Civil:Textes Réunis*,Tome I, Presse Uni. de Laval, 1991. O Waters, *Law of Trusts in Canada*, Carswell Co.Ltd., Toronto, 1984.

[60] See B Stapelton, "Codification of Trust law: Who needs it?", *Conférences sur le nouveau Code Civil du Québec: Actes des Journées Louisianaises de l'Institut Canadien d'Etudes Juridiques Supérieures,* Blais, Cowansville, Quebec, 1991.

rules focus on issues of administration, accounting and procedures. They are similar to common law rules. "However they are few in number and fall far short of constituting what could properly be described as a codification of trust law".[61] The 1879 *Fiducie* has been characterised by uncertainty as to its nature and application. These uncertainties are highlighted in the judicial interpretations of the 1879 rules.

A 1932 case, *Curran v. Davies*, sought to widen the scope of the *Fiducie*.[62] It had to be decided whether a settlor could unilaterally revoke a *Fiducie* set up for the benefit of his adopted son. This hinged upon the issue whether the gift had to be accepted by the donee in order to become irrevocable. This, in turn, depended on whether the codified rules governing gifts were applicable to a *Fiducie.* These rules required the acceptance of the donee for the gift to become perfect and irrevocable. The court concluded that the *Fiducie* was not merely the means of making a gift, but a contract for the transfer of property. However, the issue regarding the definition of the trustee's rights was left open.

Rinfret J attempted to define the nature of the *Fiducie* contact :

"This conveyance...is in the words of the deed itself declared to be 'irrevocable' by the donor himself...The trustees will however not be owners in the absolute sense. Although they are sole apparent owners with regard to third parties, the trustees will not have the *usus,* nor the *fructus* or the *abusus* of the trust property. [The beneficiary] has no right of ownership over the thing given. At the same time the trust was created, he simply acquired a claim against the trust".[63]

The trustee has all the rights of an owner but cannot be described as an absolute owner.[64] His rights and those of the beneficiary cannot be defined solely on the basis of Civil law notions of ownership. Indeed,

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[61] ibid. at p77.
[62] [1933] 1 S.C.R. 283.
[63] ibid. at p 293, translated in *Royal Trust Co. v Tucker* [1982] 1 S.C.R 250.
[64] Y Rossier, "Etude comparée de certains aspects patrimoniaux de la fiducie", (1989), 34, 4 McGill Law Journal, 817 at p854-856.

"it is hard not to conclude that the Code's section on the Fiducie has been inspired by the common law. It is certain that Roman law or French law did not transmit anything similar...It is therefore consistent with ordinary principles of interpretation...to seek a solution in the case law from which our own legislation originates. In English trust law, the beneficiary's acceptance is not necessary to the validity of the trust contract".[65]

On the basis of common law property concept, the case introduced the hybrid construct of fiduciary ownership, as a right without the advantages of enjoyment of the trust property. The idea of fiduciary ownership as a *sui generis* form of ownership was consolidated in the 1982 Supreme Court case *Royal Trust Co. v. Tucker.*[66]

In this 1982 case, Beetz J interpreted the significance of *Curran v Davies* as follows:

"the trustees were...recognized to have a limited right of ownership in the property conveyed to them in trust. It accordingly becomes possible to give the Quebec law on trusts a more liberal interpretation, one which is more in keeping with its English sources".[67]

Confirming the position taken in *Curran v Davies* and contradicting the Court of Appeal, the Supreme Court decided that the trustee is a *sui generis* owner, but this ownership could not be described as the legal ownership of the common law trust.

"The trust was known in the old French law, but...is of English inspiration, as appears from the English terminology of article 981 a..[however] the enactment of articles 981 a *et seq.* did not have the effect of introducing in Quebec the English distinction between legal title and beneficial ownership, a sort of dual ownership, and a foreign to Quebec law under which ownership is indivisible and vested in a single individual".[68]

The English law of trusts, bar the equitable-legal title division, had thus been incorporated into Quebec law by implicit reference.[69] The Supreme Court tied

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[65]op. cit. note 107 at p 302, my translation.
[66][1982] 1 S.C.R 250.
[67]ibid. at p 255.
[68]ibid. at p 256
[69] See M McAuley, J Talpis, "The Quebec Trust in the Real World", in op.cit. note 59.

to define the trustee's rights without reference to either the common law legal title or civilian absolute ownership.

"...ownership cannot remain in suspense...that leaves only the trustee in whom ownership of the trust property can be vested. Clearly the right of ownership is not the traditional one, since, for example, it is temporary and includes no *fructus*. It is a *sui generis* right, which the legislation implicitly but necessarily intended to create...".[70]

Doctrinal and judicial analyses and debates on the legal nature of the *Fiducie* have been structured around absolute ownership as a yardstick of the impact of the trust on the law's identity. The debates on the *Fiducie* have been analysed as unravelling three different approaches.[71] These are the pragmatic approach, the protectionist approach and the innovatory approach.

The pragmatic approach is illustrated mainly in the judicial analysis of the *Fiducie*, based on practitioners' views. It recognises the *Fiducie* as inspired by the common law trust. However, it is admitted that the conceptual backbone of the trust - the splitting of ownership in two titles - cannot be incorporated, as the notion of absolute ownership is a key element of the civil law of Quebec. The ownership of the trustee is of a specific and unique nature and cannot be identified as absolute ownership. It is not, however, to be analysed as the legal title of the English trust. As the trust property needs an owner, the ownership has to be located in the trustee, who does not enjoy the *fructus*, one of the three prerogatives of absolute ownership. The Fiducie is a hybrid derived from and modelled on the English trust, but influenced by its civil law epistemic environment. The pragmatic approach takes into account the fact that practitioners have used trust practice as a blueprint in their use of the Fiducie. The aim is to give effect to the intention of the parties, rather than to construct a general theory regulating the Fiducie.

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[70] op. cit. note at p 272.

[71] S Normand, J Gosselin, "La Fiducie du Code civil: un sujet d'affrontement dans la communauté juridique québécoise", Les Cahiers de Droit, vol 31, 1990, 681.

The protectionist and innovatory approaches developed in reaction to the pragmatic approach. The aim of the protectionists is to assert the dominance of Quebec's civil law tradition. Accordingly, the Fiducie is said to derive from pre-revolutionary French law. The trustee is a mere administrator and the notion of fiduciary ownership is an aberration which presupposes the importation of the common law property concepts.

The innovatory approach, adopted mainly by academics specialising in commercial law, accepts that civil law concepts are inadequate to explain the trust relationship. New concepts have to be introduced to construct a general theory of the Fiducie. Two theories have been influential: Faribault's institutional theory, which describes the Fiducie as a corporate body or artificial person, and Lepaulle's theory of the patrimony by appropriation.[72] According to Lepaulle, the Fiducie creates an autonomous fund over which no one has any property rights. Lepaulle's solution has influenced the Civil Code Reform Committee who sought to avoid reference to fundamental civilian concepts, such as absolute ownership, in their new definition of the *Fiducie*.

The new *Fiducie* is included in the reformed Civil Code of Quebec, in force since January 1994. The reformers sought to formulate a general and unified framework for the *Fiducie*, thereby widening its potential application. They elected to adopt Lepaulle's theory of patrimony by appropriation as a suitable umbrella concept to define the *Fiducie*. The notion of patrimony by appropriation avoids recourse to the civilian concept of ownership. The property in *Fiducie* constitutes an ownerless fund or patrimony. The notion of patrimony is typically civilian and thanks to it "the English trust is 'civilised' as it is formulated within a conceptual framework familiar to us".[73] Hence, the

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[72] See ibid. at pp 714-726.

[73] J Brierley, who participated in the drafting of the new legal provisions on the Fiducie, op. cit. note 58, at p 743.

Fiducie is seen as derived from the trust but constructed with the use of the civilian concept of patrimony. This allows us to assert the independence of the Fiducie from a complementary regulation by English rules on trust. However, although English or American law cannot constitute a formal source of law, "there is nothing to prevent the Quebec's courts and scholars to draw their inspiration from common law doctrinal writings and case law".[74]

Under the reformed code, the trustee does not acquire the ownership - or any other real rights - of the trust property. S/he will be granted powers of administration independently from any transfer of property. The beneficiary does not acquire any real rights either. His/her interest is protected as a personal right. There is no conceptual need for the notion of *sui generis* fiduciary ownership.

"The creation of a Fiducie does not entail a fragmentation of the settlor's ownership rights. This is simply to say that the Fiducie is not based on the notion of real rights but ...is shaped according to a different conceptual mould, that of the patrimony by appropriation".[75]

It seems that, in order to remain untouched, the civilian notion of ownership had to be altogether avoided.[76] By avoiding a definition based on real rights, the risk of introducing the notion of fragmented legal title, through the existing notion of fiduciary ownership, is curtailed. The conceptual limits of ownership will no longer be highlighted by this confrontation between the conceptual apparatus of the trust implemented by practitioners, and doctrinal and judicial analysis within a civilian epistemic framework. Absolute ownership is confined to its epistemic heights. By the same token, and somewhat paradoxically, it is hoped that the practioners' use of the *Fiducie* as a trust will no longer be hampered by its civilian epistemic context,

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[74] ibid., at p 744.
[75] ibid., at p748.
[76] This was the strategy also adopted by the drafters of the 1984 The Hague Convention on Trusts and their recognition. See Chapter V.

crystallised in the notion of absolute ownership. The recent reform of the Civil Code has strengthened the role of absolute ownership as an epistemic icon, by eliminating the incoherence of fiduciary ownership, and by removing the concept of ownership from the context of existing debates on and practices of the *Fiducie*.

A tentative conclusion for chapters II and III could be that the trust's legal structure of ownership cannot be introduced into French law and into the legal systems which share the same epistemic tradition. This is linked to the workings of legal *savoir* and the particular epistemic importance of absolute ownership and the juridical discourse of sovereignty in French legal tradition, as well as in Louisiana and Quebec, which share the same epistemic tradition. However, this does not entail that the trust cannot be introduced at all, or that its functions cannot be fulfilled by a domesticated equivalent. This chapter has not addressed the issue as to whether the civilian equivalents of the trust cannot perform the same functions as the trust because they lack the fragmented ownership structure. What a legal institution can or cannot perform and the manner in which it can be applied does not depend on its conceptual legal structure. It depends on the specific power-knowledge configuration in which it is rooted. Two dimensions of French law's power-knowledge structure will be examined in the remaining chapters of this thesis. First, the *Fiducie* in the context of French Governmentality will be addressed. Finally, the *Fiducie* in relation to the practice and knowledge of the French legal profession will be examined.

CHAPTER IV

THE TRUST'S INCOMPATIBILITY WITH FRENCH *ORDRE PUBLIC*: MISTRUST AND THE IMPERATIVE OF TRANSPARENCY IN NAPOLEONIC GOVERNMENTALITY

"...The state does not have an essence; in itself the state is nothing more than the 'mobile effect of a multiple regime of governmentality'"[1]

The orthodoxy established by H Motulsky and according to which the trust conflicts with French *Ordre Public* - which could be translated as "public policy" - was partly explored in Chapter two.[2] It was seen that this conflict takes the form of a challenge to abstract principles and theories defined as fundamental to French law. The identification of the notion of *Ordre Public* with a set of abstract principles entails that the historical and substantive content of this juridical concept remains unexplored in French doctrinal writings on the trust. Indeed, this reflects the tendency in French juridical mytho-logic to proceed "as if" law was a unitary set of coherent principles embodying a universal and eternal rationality.

The hypothesis here is that the Civil Code, and principles derived from it, far from perpetuating the universal and abstract rationality of Roman law, have enshrined aspects of governmental rationalities which influenced Napoleonic rule. It is argued that abstract principles, referred to in legal analyses of the trust and the *Fiducie,* are the juridified expression of

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[1] C Gordon citing M Foucault in "The Soul of the Citizen: Max Weber & Michel Foucault on Rationality and Government", in B Smart (ed), *Michel Foucault: Critical Assessment,* vol IV, (2), at p 437.

[2] See Motulsky's article, "De l'impossibilité juridique de créer un trust anglo-saxon sous l'empire de la loi française", Revue Critique de Droit International Privé, 1948, 451, discussed in Chapter II, Section II.

instrumental rationalities of rule. The latter have found a place in legal culture through juridical concepts such as *Ordre Public* . The trust's incompatibility with French law results from aspects of Napoleonic rationality of government enshrined in French legal culture through codification. The problems posed by the trust and the *Fiducie* are also recognisable as problems of government.[3]

It is suggested that French legal culture is shaped, not only by its epistemic tradition explored in the previous chapters, but also by a certain "mentality of rule" or Governmentality, as Foucault would put it. The focus of the next two chapters will be on the particular aspects of French governmental rationality which the legal analyses of the trust and the *Fiducie* have "activated". Those aspects concern the panoptic imperative of visibility and transparency in relations between individuals, and between the state and the individual. We are particularly concerned here with the focus on the trust's ability to create opacity, as regards an individual's actual wealth, in doctrinal and fiscal debates about the trust and the *Fiducie.*

The first section of this chapter explores the possible interpretation of *Ordre Public* as the juridical expression of Napoleonic Governmentality. It will focus particularly on Foucault's theoretical constructs: Governmentality, Panopticism, and his vision of the modern dynamics of power.The purpose of this approach is to establish the relevance of Foucault's vision of government to an analysis of the juridical concept of *Ordre Public* . Foucault's theoretical analysis allows us to argue that the reliance on principles and techniques of surveillance is part of modern French political culture, and has been incorporated into the law through the notion of *Ordre Public.*

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[3] The term government is to be understood according to Foucault's own interpretation, which will be explained in this chapter. It is not the equivalent of policy as it proposes a wider and more complex idea of government as determined not simply by intentional and political factors, but also technical and epistemological elements which are not necessarily mastered by the policy-maker.

The "panopticist" vision of governable society as a transparent machine characterises Napoleonic mentality of government; it is reflected in the legal application of *Ordre Public* which seems to exclude the creation of screen-like intermediary bodies such as the Trust. Section II explores the specific abstract principles with which the Trust stands in conflict, connecting them with the notion of Governmentality discussed in Section I. These principles reflect the role of surveillance and visibility as means of government. Hence, some principles are the juridified expression of policy aims regarding the protection of contractual transactions, creditors and credit, through the law's guarantee of the conformity of reality to appearances of solvency. The trust poses well known problems as regards the protection of creditors, and this concern is reflected in the Bill and doctrinal analysis of the *Fiducie*. Moreover, the authoritarian tendency in French legal culture towards the state surveillance of individual ownership hampers the introduction of a device which would allow the "dematerialisation" of ownership.The importance of surveillance in French political and legal culture will be first explained with reference to a few Foucauldian theoretical constructs.

SECTION I - *ORDRE PUBLIC* REVISITED: NAPOLEONIC GOVERNMENTALITY AND PANOPTICISM

This first section explores Foucault's theoretical constructs: Governmentality, Panopticism and his vision of the modern dynamics of power. It seeks to establish the relevance of Foucault's understanding to French legal discourse, by connecting the notion of Governmentality to the juridical concept of *Ordre Public*. These general and theoretical developments

will then be set in the specific context of the discursive treatment of the trust and the *Fiducie.*

1.*Ordre Public*, Governmentality and Panopticism

The concept of *Ordre Public* is wide-ranging and includes specific and current policy aims, as well as abstract bedrock principles of law. Motulsky argued that no trust can be created under and regulated by French law as this institution is incompatible with the French *Ordre Public* . Hence, the trust conflicts with French *Ordre Public* as it offends the *numerus clausus* principle, the concept of absolute ownership and the theory of the unity of patrimony.[4] C Witz, in his analysis of the possible regime of a rediscovered *Fiducie*, explores the issue of the validity of the fiduciary operation as regards *Ordre Public.*[5]

Arguing that his *Fiducie* cannot be declared void or unenforceable on the basis of a conflict with principles of *Ordre Public*, C Witz argues that the *Fiducie* does not fragment ownership, and is not contrary to the principle of free alienability of property. He argues that full ownership is transferred to the fiduciary whereas the settlor and the beneficiary only have personal rights against the fiduciary. Witz refers to devices similar to the *Fiducie* which have never been penalised on the basis that they fragment ownership.These devices are ways of managing a deceased's estate which do not rely on split ownership.[6] As regards the principle of free alienability, Witz stresses that the *Fiducie* does not always require the fiduciary to keep the asset, which can be disposed of. The primary fiduciary duty is to preserve the value of an asset,

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[4] See discussion in Chapter II, Section II.
[5] *La Fiducie en Droit Privé Français*, Economica, Paris, 1981, at pp 237-267.
[6] ibid pp 242-243.

not the asset itself which is therefore not rendered inalienable when it is placed in a *Fiducie*. Moreover, the inalienability would be justifiable on two grounds, if it is temporary and if it is destined to protect a legitimate interest. Witz argues that these two conditions would almost always be automatically fulfilled.[7]

Witz also assesses the principle according to which the security of commercial transactions is based on the appearances of solvency.[8] The immediate appearances should be preserved as the basis on which creditors assess the risk of lending. Any device allowing the fictitious representation of solvency would be contrary to *Ordre Public*. Witz focuses on the case law concerning the issue as to whether reservation of title clauses should bind third parties. These clauses are not binding on third parties but Witz argues that the principle of apparent solvency is not the main legal basis for this result. Apparent solvency is not an important guiding principle for the courts and could not defeat the validity of the *Fiducie*.

Witz also addresses *Ordre Public* issues regarding the fraudulent avoidance of rules forbidding the settlor from accomplishing certain acts, or prohibiting gifts to certain persons. The *Fiducie*, like the trust, could enable these persons to receive or act by hiding their identity behind that of the fiduciary.[9] Witz stresses that the use of the *Fiducie* in such circumstances would be automatically sanctioned as fraudulent. Existing rules would prevent the abuse of this device.

Finally, the author considers the *réserve héréditaire* - which entrenches inheritance rights for surviving descendants.[10] The *Fiducie* cannot be used as an instrument of fraud to avoid this statutory limitation on

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[7] ibid at pp 243-246.
[8] ibid at pp 254-258.
[9] ibid at pp 259-264.
[10] See Section II at pp 129-130. Ibid pp 264-265.

successions. The *Fiducie* can only be constituted for those assets which will not be legally automatically transferred to the settlor's protected heirs.

Thus, the elements of *Ordre Public* threatened by the trust are the following: the abstract principles of absolute ownership and of the unity of patrimony, free alienability of property, the protection of creditors and that of heirs. The juridical concept of *Ordre Public* appears as a mixed bag of principles and policy. The notion of *Ordre Public* is both an overarching abstraction and a reflection of substantive policies.[11] It has no predetermined and invariable content - Witz's understanding of *Ordre Public* in the light of the *Fiducie* is broader than Motulsky's. It is treated as series of fundamental and abstract principles, yet doctrinal analyses of these principles seem to spill over into consideration of Napoleonic and post-revolutionnary policies.[12] The juridical notion of *Ordre Public* translates into the law the general objective of Order, as an abstract notion which may vary in its manifestations. However, I wish to suggest that *Ordre Public* in fact enshrines the Napoleonic vision of Order and the means for achieving this broad objective. Legal analysis and questioning of *Ordre Public* Principles perpetuate Napoleonic substantive policy values, by treating these "as if" they did did not have a contingent and historical meaning. The notion of *Ordre Public* is the juridified and perpetuated expression of the Napoleonic rationality of rule.

The concept of *Ordre Public* can be found in Article 6 of the Civil Code, which states that there can be no exception to the application of rules which deal with *Ordre Public* and Morality. The concept of *Ordre Public* is a

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[11] In some respects, *Ordre Public* can suitably be translated as Public Policy, particularly as regards the concept used in conflict of laws rules. However, the notion of order as an eternal, atemporal and apolitical state is lost in this translation. This is why I have opted for a literal translation of *Ordre Public* as Public Order.

[12] See Chapter II, Section II, where the doctrinal approach to fundamental principles involves consideration of substantive policy issues, despite acting "as if" these principles were eternal, atemporal and abstract in form and content.

general juridical principle which is used in most branches of the law. However, Motulsky's application of this notion was made in the context of a conflict of laws discussion of the trust. We will therefore focus on the meaning given to*Ordre Public* in this particular legal discipline.[13]

The notion of *Ordre Public* is defined functionally as allowing the judge to exclude the application of a foreign law which "stands in total contradiction with our fundamental conception of what legal order is".[14] Hence, the *Ordre Public* exception allows the judge to avoid the application of foreign laws which would entail a solution contrary to natural law; it also allows to "defend principles which constitute the 'political and social foundations of French Civilisation'", and to safeguard various legislative policies.[15] The content of the notion and its precise coverage cannot be ascertained with precision. This has led certain scholars to assert that the notion of *Ordre Public* is "the *enfant terrible* of Private International Law" because it leads to uncertainties.[16]

The notion of *Ordre Public* in Private International Law has both national and international dimensions. It encompasses an idea of universality of principles common to all civilised nations, as well as a conception of the "moral, social and economic goals" inherent and particular to the French legal order. Hence the concept has a temporal and contingent dimension which has led the Cour de Cassation, the highest court, to assert in its decision of the 22 March 1944 that the definition of *Ordre Public* "depends to a large extent on

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[13] Conflict of laws scholars assert that the meaning of *Ordre Public* in their own discipline is to be distinguished from that given in purely domestic law. See Y Loussouarn, P Bourel, *Droit International Privé*, 4 e ed, Dalloz, Paris, 1993 at pp 265-278. P Mayer, *Droit International Privé*, 5 e ed, Monchrestien, Paris, 1994, pp 139-149.

[14] Loussouarn, Bourel ibid. at p 271 (my translation).

[15] Mayer, op. cit. note 12 at p 140-141 (my translation).

[16] ibid at p 141.

the opinion prevalent in France at any given time".[17] On the other hand, the notion of *Ordre Public* is also intended to encompass certain essential, durable characteristics of the French legal order as its function is to enable "the preservation of French public morality, social, political and economic trends which characterise our civilisation".[18] Hence the paradox of the juridical notion of *Ordre Public* lies in the fact that it is a juridical concept, operating on a certain abstract plane, but also conveying the reality of the dependency of law on governmental rationality, or Governmentality. This concept's abstract level realises the juridification of governmental goals, values and techniques.

The various legal interpretations of and debates on the notion of *Ordre Public* are not our primary focus. But this notion allows a more general and theoretical reflection on legal discourse. The work of Foucault on Governmentality provides a theoretical basis upon which it will be argued that, as reflected in the legal notion of *Ordre Public*, legal discourse incorporates governmental rationality.

The Foucaultian neologism Governmentality was invented to describe and constitute the mentality of governmental rule as an object of theoretical analysis . Foucault defines Governmentality as :

" The ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power [(government)], which has as its target population, as its principal form of knowledge political economy, and as its essential technical means apparatuses of security."[19]

Governmentality itself is the haphazard combination of techniques and substantive rationalities, whether or not leading to political programming.

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[17] D.C., 1944, 145, cited in Loussouarn, Bourel, op. cit. note 13 at p 276.
[18] ibid at p 275.
[19] "Governmentality", lecture given in 1978 and published in *The Foucault Effect: Studies in Governmentality*, Burchell, Gordon, Miller (eds), Harvester Weatsheaf, England, 1991, at p 102.

There can be conflicts. Governmentality is not a unitary programme, or intentional cohesive scheme. It is an accidental, complex and contradictory set of rationalities and technologies. N Rose has rightly pointed out that Governmentality is both a body of rationality governed by an epistemology and an *assemblage* of technical means of government, of which law is only one instrument.

"As *political rationality*, governmentalities are to be analyzed as...a kind of intellectual machinery or apparatus for rendering reality thinkable in such a way that it is amenable to political programming...political rationalities have an *epistemological* character, in that they embody particular conceptions of the objects to be governed - nation, population, economy society, community - and the subjects to be governed - citizens,subjects, individuals....."[20]

Governmentality also includes techniques of government, including law, which combine with others and with a system of knowledge and argumentation. Hence:

"As an array of *technologies of government*, governmentality is to be analysed in terms of the strategies, techniques and procedures through which different authorities seek to enact programmes of government in relation to the materials and forces to hand and the resistances and oppositions anticipated or encountered. Hence, this is not a matter of the implementation of idealized schema in the real by an act of will, but of a complex assemblage of diverse forces (legal, architectural, professional, administrative, financial, judgmental), techniques (notation, computation, calculation, examination, evaluation), devices (surveys and charts, systems of training, building forms) that promise to regulate decisions and actions of individuals, groups, organizations in relation to authoritative criteria".[21]

With the notion of Governmentality, Foucault refocusses his investigation on power's large-scale mechanics. Within this perspective of Governmentality , law is both an instrument amongst others and a discourse set in and determined by Governmentality. Law regulates or conducts behaviour and participates in the construction of society. Juridical concepts,

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[20] N Rose, "Governing Advanced Liberal Democracies", in Barry, Osborne, Rose (eds), *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government*, U C L Press, London, 1996, at p 42.
[21] N Rose, ibid.

such as *Ordre Public*, reflect a compound of rationalities of rule and their epistemology. Hence, *Ordre Public*, interpreted as encompassing Napoleonic Governmentality, enshrines in the law a mentality of rule and governmental technologies. This does not mean that French law follows the specific logic of the French State as established since the Revolution, or that, indeed, a specific and unchanged logic was fixed when the new Republican State emerged. The argument is simply that Napoleonic Governmentality forms part of French legal culture and influences the way legal issues are formulated and resolved.

A particular aspect of Napoleonic Governmentality, reflected in the values of *Ordre Public*, is Panopticism. Panopticism is a technology of government which is particularly relevant to the regulation of the trust and the *Fiducie* as both of these techniques can be used as screens, concealing the identity of the "true" owner. Panopticism is the title of one of the Chapters of Foucault's *Discipline and Punish.*[22]

In this book, the developments on Panoptic techniques are discussed in the context of a general historical and sociological analysis of the penal system and of its methods of control of social deviance. However, as will be argued further later, Panopticism is perceived by Foucault and many of his interpreters as a technology or diagram of power, which can be applied for the purposes of controlling behaviour, whether or not it is deviant or criminal.

In *Discipline and Punish*, the chapter on Panopticism offers a description of the workings of a particular form of power based on visibility and associated with disciplinary power. Bentham's *Panopticon* is the idealised architectural schema organising power through the principle of visibility. Bentham described his invention as "a new mode of obtaining power of mind over mind, in a quantity hitherto without example".[23] Its main advantages are

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[22] pp 195-228, Penguin Books, London, 1977.
[23] *The Works of Jeremy Bentham*, vol IV, Thoemmes Press, London,1995, at p 39.

two-fold: first, its adaptability to most institutional contexts and secondly, its efficiency as a mechanism of power.

As regards the first advantage, Bentham enthusiastically concluded:

"What would you say, if by the gradual adoption and diversified application of this single principle you should see a new scene of things spread itself over the face of civilized society? - morals reformed, health preserved, industry invigorated, instruction diffused, public burthens lightened, economy seated as it were upon a rock, the gordian knot of the poor-laws not cut but untied - all by a simple idea of architecture".[24]

Relying on the surveillance by one inspector in a tower and invisible to those being watched, Bentham insisted on the efficiency of the Panopticon:

"I flatter myself there can now be little doubt of the plan's possessing the fundamental advantages I have been attributing to it: I mean, the apparent omnipresence of the inspector (if devines will allow me the expression) combined with the extreme facility of his real presence".[25]

In his writings, Bentham proposed to apply the Panopticon to "penitentiary-houses, houses of correction, manufactories, mad-houses, hospitals, schools". He provided a lengthy description but the main features of the Panopticon are the following:

"The building is circular. The apartments of the prisoners occupy the circumference...the prisoners..[are] secluded from all communication with each other...The apartment of the inspector occupies the centre".[26]

According to Foucault, the Panopticon's major effect is

"to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power. So to arrange things that the surveillance is permanent in its effects, even if discontinuous in its action; that the perfection of power should tend to render its actual exercise

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[24]ibid. at p 66.
[25]ibid. at p 44.
[26] ibid. at pp 40-41.

unnecessary...that the inmates should be caught up in a power situation of which they are themselves the bearers".[27]

The Panopticon is a mechanism or "marvellous machine" of power, rather than a specific architectural utopia dedicated to the construction of prisons:

"..the Panopticon must not be understood as a dream building: it is the *diagram of a mechanism of power* reduced to its ideal form; its functioning, abstracted from any obstacle, resistance or friction, must be represented as a pure architectural and *optical system*: it is in fact a figure of *political technology* that may and must be detached from any specific use".[28]

Panopticism highlights the impersonal and mechanistic operation of power through the Gaze, which constitutes a "relation in which individuals are caught up" and implicated in their own subjection.[29]

Panopticism is associated with the problematisation of efficient power, be it disciplinary or governmental. It can interpreted as part of a general strategy and reflection on the efficiency of power. "The panoptic schema makes any apparatus of power more intense: it assures its economy(in material, in personnel, in time); it assures its efficacy by its preventative character, its continuous functioning and its automatic mechanisms. It is a way of obtaining from power 'in hitherto unexampled quantity', 'a great new instrument of government' ...(Bentham, 66)".[30] Panopticism is "a functional mechanism that must improve the exercise of power by making it lighter, more rapid, more effective...".[31] The goal is to create useful and efficient individuals. "There is a particular rationality...which goes along with the Panoptic technology, one which is self-contained, non theoretical, efficient

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[27] op. cit. note 22 at p 201.
[28] ibid, p 205, my emphases.
[29] ibid, p 202.
[30] ibid, p 206.
[31] ibid., p 209.

and productive".[32] Panopticism can therefore be connected to a mentality of rule primarily concerned with the efficiency of government.

The role of law as a connector between rationalities of government and governmental and disciplinary techniques is revealed by the juridical notion of *Ordre Public.* Within the context of an analysis of the trust and the *Fiducie, Public Order* values seem to reflect the role of panoptic techniques in governmental control: Visibility needs to be preserved and there is a fear, echoed in legal argumentation that the trust and the *Fiducie* might pervert appearances as regards solvency and actual wealth. The legal arguments regarding the compliance of the trust and the *Fiducie* with *Ordre Public* values seem to obey to conceptualisations which rely on the panoptical theme of control through visibility. The specificities of this legal argumentation will be further explored in Section II of the present chapter. However, the more general impact of Panopticism on Napoleonic Governmentality should be explored first.

2. Sketching Napoleonic Governmentality: A Panoptic Diagram

Foucault's concern in his studies in Governmentality was mainly theoretical and conceptual.[33] He did not attempt to provide a detailed empirical account of the French State after the Revolution. However, his work provides an insight into Napoleonic Governmentality which, it is argued, has left its mark on contemporary legal culture.

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[32] Dreyfus and Rabinow, *Michel Foucault*, Harvester, London 1983, at p 193.
[33] See C Gordon , "The Soul of the Citizen: Max Weber and Michel Foucault on Rationality and Government", in B Smart (ed), *Michel Foucault: Critical Assessment*, vol IV (2), at p 437..

Gordon argues that Napoleonic Governmentality can be characterised a mixture of structures of police administration and liberal strategies.[34] The Panopticon exemplifies the connection between the disciplinary techniques of the police State and the liberal art of government celebrated in post-revolutionary France. Gordon argues that Foucault observed that the police state took control of disciplinary mechanisms, "connecting the vigilance of the sovereign to the minute regulation and supervision of individual conduct".[35] This style of thinking and governing, which Foucault calls a "History of Detail in the Eighteenth century" "climax[ed] in the regime of Napoleon, who wished to arrange around him a mechanism of power that would enable him to see the smallest event that occurred in the state he governed".[36]

Foucault asserts:

"A fear haunted the latter half of the eighteenth century: the fear of darkened spaces, of the pall of gloom which prevents the full visibility of things, men and truths. [The French Revolution] sought to break up the patches of darkness that blocked the light, eliminate the shadowy areas of society, demolish the unlit chambers where arbitrary political acts, monarchical caprice, religious superstitions, tyrannical and priestly plots, epidemics and the illusions of ignorance were fomented".[37]

The Revolution dreamed up a new form of power "exercised by virtue of the mere fact of things being known and people seen...[the Panopticon] provided ...the formula for [this] 'power through transparency', subjection by 'illumination'".[38]

This new form of power was linked to one of the ways in which Enlightenment thinkers had thought of society itself.

"...Bentham was the complement to Rousseau...the Rousseauist dream ...was the dream of a transparent society, visible and legible in each of its parts, the

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[34] Gordon's introduction in op.cit., note 19 at p25.
[35] ibid.
[36] ibid.
[37] M Foucault, "The eye of power", *Power/Knowledge*, C Gordon (ed), Harvester Press, England, 1980, at p153.
[38] ibid, p 154.

dream of there no longer existing any zones of darkness, zones established by the privileges of royal power or the prerogatives of some corporation, zones of disorder. It was the dream that each individual, whatever position he occupied, might be able to see the the whole of society.".[39]

Panopticism is a technology deployed in the context of a rationality of rule concerned with maximising the efficiency of government. It is therefore not the only or predominant element in modern Governmentality.

" A Superb formula: power exercised continuously and..for a minimal cost...the gaze has had great importance among the techniques of power developed in the modern era, but, as I have said, it is far from being the only or even the principal system employed".[40]

It is a system that presumes, relies on, and generates mistrust between individuals. "In the Panopticon each person, depending on his place, is watched by all or certain of the others. You have an apparatus of total and circulating mistrust, because there is no absolute point".[41]

The Panopticon is based on a certain vision of society as an aggregate of atomistic individuals who can be controlled through their arms length relations. Panopticism has been linked to Liberalism. Bentham, the father of the Panopticon, is also known for his utilitarian theories. Colin Gordon asserts: "Bentham's Panopticon...is a liberal theorem of political security".[42]

There are continuities in the history of governmental rationalities and Liberalism, as the political rationality prevalent in the nineteenth century is connected to previous practices, explored by Foucault through the lens of discipline. Hence, "[l]liberalism indeed transforms the techniques of security inherited, in a great part of Europe, from the police state".[43] However, French Liberalism as political rationality practised and preached in the nineteenth century has to be defined further to understand the role of Panopticism.

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[39] ibid, p 152.
[40] ibid, p155.
[41] ibid, p 158.
[42] C Gordon, op. cit. note 19, at p 25.
[43] C Gordon, op. cit. note 30 at p 432.

It is here that the work of J-F Niort, exploring the particularities of the Napoleonic Code's Liberalism, is helpful.[44] Niort argues that there is a dialectical tension between philosophical and juridical principles on the one hand, and, on the other, the economic imperatives and those of the *Raison d'Etat* or State rationality. This tension is apparent in the philosophy behind certain of the Code's provisions. The author purports to focus on these provisions, together with the preliminary debates leading up to the enactment of the Napoleonic Codification. Through this documentary study, Niort argues that the drafters were influenced by political economy, but adopted a pragmatic approach, taking into account the political imperatives of the Napoleonic regime. The liberalism reflected in the Civil Code is therefore quite atypical and, in the author's words, "strange".

In his concluding section, Niort notes that, although there is no doubt that the Code's drafters were influenced by Liberal political economy, there cannot be a monolithic characterisation of the Civil Code.[45] Hence, the "autonomisation of economic activity from other social spheres and the state" is mitigated by the Napoleonic State rationality; ... "like all other types of freedom, asserts Bonaparte, free enterprise 'can only have the interest of the State as its limitation'".[46] Freedom is granted by the State in the interest of its own continuity.

"...economic liberalism and individual liberties are perceived, particularly by Bonaparte, less as values than as techniques of government...the economy in France is traditionally instrumentalised and subsumed by the State, whereas to [Adam] Smith it represents civil society's means of emancipation".[47]

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[44] "Droit, Economie et Liberalisme dans l'esprit du Code Napoléon", Archives de Philosophie du Droit, Tome 37, Sirey 1992, pp 101-119.
[45] The author, in his conclusion, states: "..it seems risky to definitively define as liberal 'the strong yet liberal government' under which the Code was created for the nation, given the wide variety of philosophies, ideologies and doctrinal theories which it synthesises, revives , sublimates..." translated from Niort, ibid., at p 119.
[46] ibid, p 116-117, (my translation).
[47] ibid, p 117, (my translation).

Emphasis is therefore laid on the composite nature of Napoleonic Governmentality, mixing liberalism and authoritarianism. This mixed influence could explain the enduring role of disciplinary panoptic techniques in the nineteenth century Liberal context. The specificities of nineteenth century Liberalism are explored by Niort through the legacy of the Code's key economic institutions.

The first institution to be described is credit. Niort notes the "socio-psychological dimension" of credit which, according to one of the Code's drafters, is based on the opinion one has of someone else's morality and wealth. One of the considerations in the Codification's preliminary debates was to ensure the security of credit transactions. The Napoleonic codification of regulations regarding credit and security are influenced by this key governmental objective.

This same concern is reflected in the Code's provision regarding ownership. As has been argued earlier, absolute ownership has a specific symbolic function and meaning. However, individual property is also intended to play a part in the codified economic government. The exercise of property rights must be for the benefit of all. The prosperity of the nation is to be fostered by a free market in land. However, absolute ownership could prove to be an obstacle to the operation of the market, and therefore, to the nation's prosperity. The freedom of the absolute owner was therefore intentionally curtailed to fulfil the governmental objective regarding the public interest. One of the main goals to be attained by a codified regulation of ownership was the constitution of a large class of small property holders. A fragmented property-owning class, unlike the proletarian class or the large hereditary estates of the *Ancien Régime,* would constitute a stable and supportive basis for the State.

These goals were implemented mainly through the codified regulation of successions, which considerably compromised freedom of disposition.

Niort's study reveals the influence of Napoleonic Liberalism on the Code and resulting legal culture. This Liberalism reflects a type of Governmentality mixing authoritarian disciplinary techniques and liberal aspirations. Panoptic techniques are particularly adapted to this dual imperative of Governmentality, ensuring both discipline and efficiency. The following section argues that the trust could not have developed as it did in the common law as it stands against a particular aspect of the organisation of power in French legal and political culture: the Panoptic schema.

SECTION II- OPACITY, THE TRUST AND THE FIDUCIE

The drafters of the Civil Code, echoing the dominant economic view of their times, placed great emphasis on the "spontaneous" functioning of the economy. Law's role was perceived as mainly concerned with ensuring the automatic operation of economic transactions; in this context, panoptic techniques would secure the visibility or conformity of appearances with reality of the situation, on the basis of which transactions could be made. For instance, it was thought that money lending would depend on the appearance of solvency of the parties involved. The role of law would only be to ensure the transparency and visibility of individual economic and legal situations. The role of law would be facilitative, oiling economic mechanisms thanks to panoptic techniques. In this context, trust techniques would hamper the proper and spontaneous functioning of credit transactions, because of its possible use as a screen to defeat creditors' claims.

The trust can create opacity in another respect. It can defeat the state's surveillance of individual assets, for fiscal purposes for instance. This concern was central in the debates about the *Fiducie*, in particular as regards the uncompromising fiscal regulation of this institution. The drafters were aware that visibility would be hampered by this new device but were prepared to compromise it, whilst on the surface respecting the letter rather than the spirit of principles implementing the requirement of visibility.

1.Security in Visibility: third parties, credit and the importance of appearances

Credit was one of the mechanisms thoroughly discussed by the Civil Code's drafters.[48] It was understood by the drafters as having two complementary meanings: first, as the loaning of money between economic agents, and secondly, as the trustworthiness and reputation of the citizen; "Credit results from the opinion one has of the morality and wealth of a citizen".[49] Economic transactions involving the loaning of money which were perceived as the main basis of economic prosperity, were believed to depend on the visible signs of the actors' probity and fortune. As for the role of law, it is clearly envisaged by the drafters as an "instrument capable of reestablishing trust and stability in economic relations, and, by increasing the security of

[48] See ibid, pp 103-106.
[49] One of the drafters, Treilhard, cited in op. cit. note 41, at p 103 (my translation).

transactions, of 'placing business within the confines of integrity'".[50] Credit was therefore a key economic institution which relied on the display of material and moral assets. The role of law was to provide a framework for the spontaneous functioning of credit through mechanisms of security, ensuring the reliability of appearances of prosperity and morality.

The abstract dogma of the unity of patrimony reflects the central concern for the security of credit, despite its doctrinal formulation "as if" it had no connection with the substantive policies behind the Code.

The theory of patrimony is central to the argument that the trust is incompatible with French law. It is was also taken into account in the drafting of the 1992 Bill; the drafters were concerned that the *Fiducie* should, as far as practicable, respect the rule of unity.[51] Hence, it was decided that the *Fiducie* should be understood as constituting an autonomous patrimony, reserved for a specific purpose, but included in the patrimony of the *fiduciaire.* This inclusion of an autonomous fund within the trustee's patrimony has been described as highly artificial and as a way of complying in appearance to the idea of unity.[52] The meaning of the theory and its connection with Panopticism will be discussed next.

The origins of Aubry and Rau's theory of the unity of patrimony are not to be found in the substance of the Code, which only rarely refers to the

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[50] ibid, at p 104, the author cites the drafters (my translation).

[51] See the report on the rule of the unity of patrimony and the *Fiducie*, commissioned by the Ministry of Justice and drafted by a research unit at the University Paris II: "*Sociologie juridique du Patrimoine; La Réalité de la Règle de l'Unicité du Patrimoine (dans la perspective de la Fiducie)*", 1992.

[52] See Grimaldi, "La Fiducie: Reflexions sur l'institution et sur l'avant-projet de loi qui la consacre.", JCP,(N), 1991, p 897. The *fiduciaire* only has one patrimony within which one or more fiduciary funds operate. This aspect of the Bill differs from the definition of the trust proposed in the 1985 international convention, according to which the trust fund is totally autonomous and does not form part of the trustee's patrimony. This is the solution adopted in the new Quebec Civil Code, which defines the *Fiducie* as an ownerless patrimony reserved for a specific purpose.

notion of patrimony.[53] The theory has three main propositions; first, only persons (natural or legal) can have a patrimony. Secondly, every person has a patrimony, whether or not he/she has any possessions. Patrimony is therefore an empty shell of potential rights and obligations connected to one's estate. Finally, a person can only have one patrimony. This is at the core of the idea of unity and is most problematic as regards the reception of the Trust and the formulation of the *Fiducie*. The trust is regarded as operating a division of patrimony. The principle of unity is said to derive from the connection between personality and patrimony. The patrimony is an emanation of personality and, just as a person is unique and indivisible, his/her patrimony must remain undivided.[54]

This grounding of the idea of unity in legal and philosophical rights theory has been questioned. However, the majority view amongst academics and practitioners remains that the unity of patrimony is an essential legal truth grounded in the text of the law.[55] The two legal provisions referred to as a basis of the theory are articles 732 and 2092 of the Civil Code.[56] Article 2092 is the most significant but, as article 732, it does not even mention the word "patrimony". It establishes a *droit de gage général des créanciers,* that is, the general right of all creditors to claim against their debtor's goods. Hence, there is

"here not an allusion to the institution of a cohesive patrimony, but only an intention to exclude the arbitrary withdrawal of some types of goods. That is, instead of pointing to the uniqueness of patrimony as a common pledge as

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[53] See C B Gray, "Patrimony", Cahiers de Droit, vol 22, 1981, p 81. See Chapter III.
[54] See ibid., and "Patrimoine et Vie Privée" , one of the headings in the report op. cit. note 48.
[55] See the report, op. cit. note 48, where an empirical study reveals that most lawyers, including practitioners, remain attached to this great principle which they have learned during the first two years of their legal studies.
[56] See op. cit. note 50.

against the multiplicity of creditors, what is stressed is the additive character of their pledge: every new item acquired feeds into them".[57]

The theory of unity of patrimony is, in the French lawyer's mind, connected to the Code's general objective of protection of creditors.[58] This goal would be achieved by ensuring that debtors cannot divide their patrimony, thereby protecting some of their assets by the creation of secret funds. The division of patrimony is equated with the creation of a situation of opacity in which the assets of the debtor become invisible to the creditors. The necessity to maintain the visibility of one's assets and the transparency of every patrimony seems to conflict with another - antithetical - value promoted in French law: privacy.[59]

There is a conflict between the transparency of patrimony through its unity, and the right to privacy as a right to protect one's fortune against the gaze of others by, for instance, hiding assets in secret funds constituting autonomous patrimonies. This conflict is characterised as

"a conflict of gazes: the gaze of the owner over the elements of his patrimony, against the third party gaze over the patrimony of others. ...Today, the unprecedented development of means of knowledge and information technology, the consequent demands for more information, and finally the concern to increase controls over people in power, are at the root of a conflict to be resolved by the law between secrecy as protecting the individual and transparence which protects society".[60]

The Trust, as could have the *Fiducie,* allows the protection of assets in secret funds. This stands against the imperative of transparency echoed in the requirements of the unity of patrimony, and connected to Napoleonic liberal

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[57] ibid, p 97.
[58] op. cit. note 48.
[59] "Patrimoine et Vie Privée" in ibid. Privacy seems to be the necessary dialectical counterpart of transparency and visibility. Is it surprising that in a society in which visibility is as a means of social control, privacy should be perceived as a fundamental civil right deserving vigorous legal protection?
[60] ibid, at pp 3-4.

Governmentality. It is against this background, and the general perception that the trust can be used in sham transfers of ownership, that the Bill was drafted.

According to C Witz, in pre-revolutionary law, the *Fiducie* was widely perceived as a sham transfer of property; the full transfer of ownership to the fiduciary was seen as contradicted by a separate secret agreement restricting the rights of the fiduciary. The sham or simulation theory has been deduced from article 1321 of the Civil Code and declares:

"There is a sham each time the parties hide their real intention behind false appearances: having entered into a visible agreement, they cancel, change or displace the effects of the former with another contemporaneous agreement which is intended to remain secret. The visible (or apparent or sham) agreement is countered by the secret instrument...".[61]

Witz's argument is that a new, modern *Fiducie* could be clearly distinguished from any pretence or sham transfer of property, and the *Fiducie* would not necessarily be in contradiction with *Ordre Public*.[62]

Witz identifies three categories of sham agreements. First, there is the fictitious agreement, where no transfer of property occurs at all. Secondly, there are agreements which do create a new legal relationship. However, the real and intended legal relation is not visible to third parties, who are misled by the apparent situation. The real legal situation is disguised by a fictitious apparent agreement. The third type of simulated agreement interposes a party to hide the real beneficiary of the transaction.[63]

Witz argues that the *Fiducie* cannot be regarded as a sham transaction and that the fiduciary transfer of property is genuine, albeit limited. The restriction on the *fiduciaire*'s prerogatives has a purpose other than the cancellation of the property transfer. Moreover, the *Fiducie* should not be

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[61] cited by C Witz in op. cit. note 5 at p 211.
[62] ibid, pp 211-228.
[63] This type of agreement is very pejoratively known as a *prête-nom* contract.

perceived as having as its purpose the interposition of a fictitious intermediary. A fictitious intermediary is intended to act as a screen protecting the real owner. The fiduciaire is not simply the apparent owner of the property but a genuine intermediary who has really acquired exercisable property rights. However, Witz notes that many de facto situations, which would have been recognised as trusteeships in Common law countries, have been sanctioned by French courts as simulated.[64]

Another legal argument that could have been deployed against the *Fiducie* is that the device could create misleading appearances of solvency. This notion of apparent solvency had been used to deny the validity of reservation of title clauses.[65] The argument is that the *Fiducie,* used to secure a debt by a fiduciary transfer of title to the creditor without dispossession of the settlor, contributes to maintaining the latter's apparent solvency. Witz stresses that the principle of apparent solvency is not a general principle on which the protection of creditors is based.

" It does not seem useful to insist on the antiquated character of the notion of apparent solvency: it goes against basic common sense to believe that the credit is granted on satisfactory inspection of the visible assets of the debtor.... What used to be the case at the beginning of the nineteenth century, in a small shopkeepers' economy, is obviously no longer valid...".[66]

Witz suggests that it is now unrealistic to rely on appearances of solvency when conducting business. Paradoxically, the 1992 Bill relied itself on appearances as a mechanism of protection for third parties dealing with the fiduciary. The proposed article 2068 reads:

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[64] See op. cit. note 5 pp 227-228. In the nineteenth century, it was common for a member of a religious congregation to hold property for the benefit of the whole community, as religious groups lacked the legal capacity to own property. The enactment of the 1901 statute on associations entailed that these groups could not be regarded as authorised and that their property holding could no longer be tolerated. Hence, the courts applied the theory of simulation to prohibit such property holding arrangements.

[65] Ibid, pp 254-258.

[66] ibid p 257.

"In his relationships with third parties, the fiduciary is deemed to have the widest powers over the trust property, except where it is demonstrated that the third parties knew about the limits of his powers".[67]

This article was intended to ensure that third parties would not need to investigate whether the fiduciary is dealing with his/her own assets or those s/he is managing. Hence, third parties who trusted appearances would be protected against the fiduciary's claims in bad faith that s/he did not actually have the power to complete a given transaction.[68] The security resulting from protecting trust in appearances contrasts with another mechanism; the transparency of a register.[69] However, the drafters rejected the idea of setting a specific system of registration of fiduciary instruments, as this would be too formal and inflexible and would thus deter the use of the *Fiducie*.

The rejection of the trust and its reformulation as the *Fiducie* have thus been understood here as determined by the underlying concern in French law for truthful appearances, transparent situations and visible solvency. These priorities are stressed in doctrinal writings but are attributed, in our analysis, to the importance of panoptic principles in French Governmentality. The protection of creditors, translated in legal argumentation as the principle of unity of patrimony, is illustrative of the role of Panopticism in French law. The unity of patrimony principle was of importance in the discussion of the *Fiducie*, which was therefore fashioned with regards to the imperative of security in appearances, although the latter may have been ultimately compromised.

2.Transparency and the State's Surveillance of Ownership

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[67] 1992 Bill, Doc A.N 2583 p14, my translation.
[68] See Jeantet, "Projet d'introduction du Trust en France sous le nom de Fiducie", Revue Juridique et Politique, 1990, 280.
[69] See ibid and practitioners' opinion in "La Fiducie: Contributions à l'avant-projet de loi", Revue de Droit Bancaire, Sept-Oct 1990, 176.

The relationship between individuals envisaged in Napoleonic Governmentality reflects an assumption that trust is based on appearances; on the other hand, the relationship between State and individual has to be as unmediated as possible. The individual must offer him/herself as a transparent unit, controllable through a centralised gaze. Hence, Maitland refers to the French attitude towards corporations as a

"pulverising, macadamising tendency in all its glory, working from century to century, reducing to impotence, and then to nullity, all that intervenes between Man and State...the work of the monarchy issues in the work of the revolutionary assemblies. It issues in the famous declaration of August 18, 1792: 'A State that is truly free ought not to suffer within its bosom any corporation...' That was one of the mottoes of modern absolutism: the absolute State faced the absolute individual".[70]

The Trust and the *Fiducie* constitute such intermediary bodies whose screen-like effect is problematic.

The suspicion of intermediary bodies is reflected, willingly or not, in the theory of patrimony, or at least in its interpretation and application. The corporation is a way of multiplying patrimonies, and a tolerated derogation to the rule of unity. The rule of unity is understood as preventing the constitution of intermediary bodies with their own patrimony, independent of their members'. Legal personality is described as a legal fiction and instrument destined to bypass the rigidity of this doctrinal dogma. Although the constitution of a legal person fragments and multiplies the patrimonies of the natural persons involved, the various patrimonies are fused into one, that of the legal person, which itself is understood to have a unique patrimony. The artificial rule of unity is maintained through the fiction of legal personality.[71] Hence, legal personality is the only way found in French law to accommodate

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[70] *Collected Papers*, Vol III, H A L Fisher (ed), Cambridge Uni. Press, 1911, at p 311.
[71] op. cit. note 48.

derogations to the unity of patrimony. The corporation is itself characterised by its unitary and autonomous patrimony which forms both the creditors' security and the basis of its governable character. Indeed, the attribution of a patrimony to this artificial entity entails that it is a full legal and governable subject.

Indeed, French law has had to accommodate the existence and formation of intermediary groups.

"The end of the nineteenth century witnesses a radical recasting of liberalism's politico-juridical heritage, a quiet legal revolution whose direction and apparent technical neutrality is, arguably, a measure of its strategic strength and influence....mediating between the poles of state and individual , law and sociology together strive *to construct a governable legal status* for the 'intermediary bodies' suppressed by the Revolution: this is the purpose of Maurice Hauriou's theory of the institution".[72]

The latter is central to the conceptualisation of legal personality in French Law. The institution is defined as "a group of individuals subjected to an organisation the purpose of which is obtaining an end".[73] The institution is headed by an authority figure whose task is to ensure the consensual and cohesive striving towards a common goal.[74]

In his discussion of the reality of legal personality, M Hauriou defines patrimony as "the always open books of a single account".[75] Like legal personality, patrimony is a fiction. "These fictions' role is to ensure continuity and identity to the 'organic individuality' of groups...Legal fictions give unity to this data by 'representing' it".[76] In other words, patrimony and legal

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[72] Gordon, op. cit., note 30, at p 32, my emphasis.
[73] ibid.
[74] See Normand et Gosselin, "La Fiducie du Code Civil: un sujet d'affrontement...", Les Cahiers de Droit, vol 31, n 3, Sep 1990, 681. The theory of the institution is key to one of two main theorisations of the *Fiducie* in Quebec. The influential M Faribault, a treatise writer and commercial lawyer, describes the *Fiducie* as a legal subject with an independent personality, much like a corporation. This interpretation was not retained in the new Quebec Civil Code.
[75] cited in op. cit. note 48, at p 156, (my translation).
[76] ibid (my transalation).

personality are used to give legal reality and a governable status to groups, by constructing them as single juridical subjects. Moreover, through the notion of patrimony, the subject is represented in examinable accounting terms as a balance sheet, a statement of account.

The notion of patrimony is at the heart of the juridical conceptualisation of the economic subject, be it individual or group. "Patrimony is the emanation of personality in the economic domain".[77]

> "...Patrimony - which was no more than a type of *image* - would be considered as the attribute of the subject's personality...As the emanation of personhood, patrimony was in a circular relation to the person supporting it; it also signified this very personhood: it *materialised,* actualised and designated personhood, to the extent that an author wrote 'behind the mysteries of its components and management, a way of being is to be discovered' ".[78]

Hence, patrimony is the legal representation of the economic subject. This representation is given in the static and accounting terms of assets and liabilities.[79] The notion of patrimony contributes to the constitution of the examinable economic subject. Hence, the imperative of unity, with its correlated restrictions on the creation of autonomous and fragmented funds, is connected to the objective of surveillance in Governmentality. The Trust and the *Fiducie* constitute a challenge to surveillance because they are intermediary bodies which do not fit into the grid of visibility of legal personality. They are not recognised as transparent and governable subjects. Indeed, Maitland noted that the trust form was preferred to the corporate form because it allowed more autonomy and freedom from the State.[80] This echoes my argument that the corporation is, in French law and may be even in

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[77] "Patrimoine et Vie Privée" in op. cit. note 48, (my translation).
[78] ibid, p 14 (my translation).
[79] In op. cit. note 48, the static notion of patrimony in civil law is contrasted with the focus on movements of funds in the financial culture. This reflects the legal emphasis on the localisation of assets and the financial understanding of patrimony as a fluctuating entity for the purpose of investment.
[80] op. cit. note 67, at p 388.

English law, a legally subjected form of association, whereas the trust remains a fluid entity.

The unity of patrimony limits *de facto* freedom of disposition, which seems to give way to more pressing imperatives. The necessity to keep "a close watch over individual ownership" was stressed by Napoleon during the drafting of the Code.[81] Succession laws were to be used as instruments of government; their aim was to channel the freedom of absolute ownership towards the common good. The goal of state intervention was to designate those entitled to inherit and to provide a predetermined structure for the distribution of succession assets. The *réserve héréditaire* was established to this end. It is a statutory encumbrance on all estates, creating entrenched inheritance rights for surviving descendants. It is in effect a statutory trust restricting the powers of free disposition by testament or donation to a fraction of the testator's fortune. This fraction is called the *quotité disponible.* The original egalitarian laws of 1792 did not allow any freedom of disposition but they were not included in the 1804 Code. The purpose of the *quotité disponible* was to maintain paternal authority and to preserve the economic integrity and efficiency of landholdings as cohesive production units. The intention was indeed to dismantle large dynastic holdings but without reducing these to a barely exploitable fragmented multitude.[82]

The freedom of disposition tied with absolute ownership is therefore both carefully monitored and instrumentalised for the purpose of government. The State is to exercise its oversight primarily through the regulation of successions. However, the family is preserved as an autonomous unit of government through the head of the family's limited freedom of disposition. Napoleonic Governmentality included a concern for the distribution of wealth

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[81] see section I *in fine*, and op. cit. note 41.
[82] op. cit. note 41 at p 109.

in the State's and the population's best interest. This goal is tied to a vision of the State as capable of overseeing and controlling the inter-generational movement of assets. An institution like the trust, which, according to Maitland, originated as a weapon against restrictions on freedom of testation, would clearly conflict with an essential aspect of Napoleonic Governmentality.

The only possible political grounds for the parliamentary opposition to the *Fiducie* was identified by the drafters of the Bill as being the threat to the *réserve*. It was therefore decided that a *Fiducie* can only transfer assets which are part of the disposable fraction - *quotité disponible*. Where the transfer of assets in *Fiducie* is of a value over and above that of the disposable share, the court would order a reduction of the value of the assets, but not necessarily a return to the bulk of the estate of specific assets.[83] Moreover, the Bill was widely marketed as aiming to benefit small to medium family businesses by ensuring the continuity of the business after the death of the head of the family-business.[84] This echoes the importance of the family as a stronghold of the economy and accomplice of the State in post-revolutionary Governmentality.

The doctrinal argument according to which the trust conflicts with French *Ordre Public* has been rendered as follows: the trust does not fit into French Governmentality's Panoptic schema; the next chapter will further demonstrate how, because of this and of the perceived applications of the trust

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[83] Articles 2070-3 to 2070-5. Where the assets in *Fiducie* form a business unit worth more than the disposable share, the reduction to the value of the share will be in value by payment of a sum of money, as opposed to the return of some of the business assets.

[84] See for instance the papers given at the 86th congress of Notaries P Decheix, "La Fiducie, mode de transmisssion de l'entreprise?", Y Streiff, "Le Droit Civil au secours de la transmission des entreprises" , both published in Les Petites Affiches, n 56, Mai 1990.

as a screen, the *Fiducie* was constructed following the requirements of the panoptic schema. Panopticism may not be the most prevalent technology of power in French legal culture, but it seems to be particularly relevant to the issue of reception of the trust in the shape of the *Fiducie.* It may be that the trust poses similar problem to panoptic imperatives in common law culture, which has also been concerned with the protection of creditors' rights and the policing of such enigmatic creatures as the purpose trust. However, it would seem that the panoptic imperatives in French law have been strong enough to subsume practices and lawyers' devices proposing to foster opacity. It will be seen in later developments that this is connected to the particular power-knowledge configuration which has shaped the French legal field and which places at the forefront the power of the Administration. Lawyers' practices, such as the trust, which may conflict with imperatives of transparency required for the efficient exercise of administrative power, were not allowed to flourish. They may have found a more favourable climate in the international arena. In Chapter Vi, it will be seen that the introduction of the *Fiducie* reflects the growing power of practitioners and their practices, developed at the interstices of the French legal order.

CHAPTER V

ENFRAMING TRUST: THE FIDUCIE, THE IMPERATIVES OF GOVERNMENT IN FRENCH LAW AND THE LIBERAL PROBLEM-SPACE

The present chapter investigates further the impact of what has been defined as "Governmentality" in Chapter IV, on the statutory formulation of the *Fiducie*. Thus, this chapter further develops the second line of argument of the thesis, according to which Governmentality constitutes one of the facets of French legal culture which has led to the doctrinal rejection of the trust and the parameters for its reformulation as the *Fiducie*. However, the 1992 Bill on the *Fiducie* is not simply the passive result of a certain epistemological configuration in French law. It interacts with this Governmentality's epistemic domain, bringing to the fore certain constructs at the expense of others. The vision of society, on which the Bill is based and which it perpetuates, contributes to modify Governmentality. How this is made possible cannot be solely explained through an analysis of epistemic and discursive phenomena. Hence, the final chapter of this thesis will assert the importance of changes in power configurations, and in particular, of the rise of commercial lawyers' practices, knowledge and power, in the genesis and impact of the 1992 Bill on the *Fiducie*.

The statutory formulation of a trust-like device is of significance to the distinct legal profile of the 1992 Bill's *Fiducie*. The process of "enframing" the trust, that is, of translating and formulating it as the *Fiducie* within a legislative framework, entailed not only the deployment of French law's governmental rationalities, but also a reactivation of the epistemological issues relating to the proper role and limits of economic government. Hence, it is

because the *Fiducie* was to be introduced via the legislative route that governmental rationalities and epistemology were particularly active elements in the shaping of the new device.The introduction of this trust-like device necessitated the framing of a new institution in terms of its purpose for the government of the economy, and the operation of knowledge-*savoir* regarding the objects of government: society and the economy.

The drafters of the 1992 Bill insisted that the new legislation would be characterised by its generality and flexibility; the dispositions would have allowed for the multiplicity of uses for the new device, which could not all be specifically provided for. The new statute would have been general and abstract, thereby

"breaking with the current trend ...to draft increasingly specialised statutes, which do indeed respond to pressing and specific needs but hardly fit into a coherent normative whole, and thus create problems of interpretation".[1]

The proposed new law was intended to be widely and generally relevant to practice. Its generality would have allowed it "to find its general place in the *Code Civil*".[2]

Although the claim that the new provisions would have fitted perfectly into the Code may be regarded as artificial, the proposed new law did reflect the purposive governmental rationalities shaping contemporary French legal and political culture. The general codified framework for the *Fiducie* is better understood in the light of French law's Governmentality (Section I). As argued in the preceding chapter, French Governmentality has been influenced by post-revolutionary Napoleonic rule and the latter's translation in the law through codification. Napoleonic Governmentality is itself a composite of

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[1] Guillenchmidt, Chapelle, "Trusts, business trusts et fiducie", Les Petites Affiches, 76, 25.06.90, 6, (my translation). See also an interview with J de Guillenchmidt in dissertation by T Clay, "La Fiducie au regard du Trust", D.E.A, Paris II, 1993. Generally, see Chapter I, Section I.

[2] ibid.

several governmental rationalities, a mixture of administrative rule - or police - and liberalism.[3] The imperatives of bureaucratic rule are particularly apparent in the third section of the Bill, which was issued by the Finance Ministry. The Bill was indeed drafted by two separate Departments, The Finance Ministry and the Ministry of Justice, which did not share a common view as to the aims of the proposed legislation; the former was keen to regulate the device to avoid fiscal losses, whilst the latter mainly intended to provide the business world and the French legal profession with a new flexible tool.[4] Beyond this divide between fiscal provisions and others, there was a generalised tension throughout the proposal, between the impetus to police this new area of transactional freedom, and the liberal aim to provide a minimalistic framework for the exercise of liberty.

The attempt to introduce the trust, which has traditionally been held in authoritative doctrinal writings as contrary to French law, and its failed incorporation in the Code, nevertheless entailed the implicit activation of questions relating to the proper role and limits of the state in economic government (Section II). Indeed, introducing the trust into French law would have gone against doctrinal orthodoxy and would have been hardly justifiable

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[3] The word "police" has a specific meaning in Foucault's writings. It refers to a rationality of government concerned with the broad and comprehensive aim of securing the welfare of the governed population. The theory of police - Cameralism - studied by Foucault, has emerged in Europe in the seventeenth and eighteenth century. Readers of Foucault "especially those brought up in the common law administration of Britain...are likely to think of the police as an organization whose role is essentially constabulary: keeping the peace, protecting innocent persons from harm...However, the word 'police' once had a much broader usage. It referred both to an area of government administration...and to the objectives of that administration. In effect, police was responsible for the comprehensive regulation of social life in the interests of the development of society and the improvement of individuals, and it was expected to pursue these objectives in the most rational fashion...
Foucault's treatment of ...[the theory of police] is not intended to suggest that this was ever the only, or even the most important, of the Western rationalities of government. His point, rather, is that this model has been, and still remains, an influential governmental rationality in the societies of the modern West...". B Hindness, *Discourses of Power*, Blackwell, Oxford, 1990, at pp 120-123.

[4] See the presentation of the Bill in Chapter I, Section I.

on the basis of a formal and internally rational evolution of law. A more instrumental vision of law legitimised the proposed new institution. Such an instrumental view was part of Governmentality. Moreover, fundamental constructs such as the economy and society underlie the arguments and rationales deployed to justify the introduction of the new Bill as a proper act of government.

SECTION I - ENFRAMING TRUST: BETWEEN SECURITY AND POLICE

Whilst the objective of the Ministry of Justice was to provide for the recognition and general organisation of a new trust-like device, fiscal considerations and the fear of tax avoidance and evasion brought into the Bill a conflicting ethos of regulatory policing.

1.Securing Trust in Commercial Practice

As already argued in Chapter IV, Foucault's analysis of the notion of security in liberal Governmentality is enlightening and particularly useful to an analysis of Napoleonic civil codification.[5] The polymorphous characteristics of the codified principles of economic government include what Foucault has termed a general liberal strategy of security.

"The objective of a liberal art of government becomes that of securing the conditions for the optimal and, as far as possible, autonomous functioning of economic processes within society or, as Foucault puts it, of enframing natural processes in mechanisms of security...At the end of the eighteenth century, the terms liberty and security have become almost synonymous...Liberty is thus a technical requirement of governing the natural processes of social life and,

[5] See Chapter IV at pp 114-119.

particularly, those of self-interested exchanges. The security of laws and individual liberty presuppose each other".[6]

Hence, securing the proper functioning of mechanisms of freedom is a technical means of government.

In liberal Governmentality, law is one of the possible means of government. The aim of liberal government, reflected to a certain extent in Napoleonic Governmentality, is to ensure the proper functioning of processes relying on the exercise of freedom, such as the market for instance. Law is the means through which processes of liberty are enframed by mechanisms of security. The *Fiducie*, as a contract which relies on and should generate trust, would have been statutorily set into a mechanics of security in four respects.

1.1 The Security of Interests

Aspects of the 1992 Bill are clearly concerned with the enframing of the free play of individual interest for the purpose of ensuring the proper functioning of economic and societal mechanisms, such as the free market. Hence, the new *Fiducie* would have allowed French lawyers to take part on a more equal footing in the international competition for the provision of legal services. The Preamble refers to the internationalisation of the economy, the opening up of borders and the delocalisation of economic transactions, as if these were spontaneous processes to which the national market in legal services had to be adjusted. According to the drafters, the recognition of the trust in the form of the *Fiducie* would have provided for this adjustment, and therefore for the security of French business interests.[7]

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[6] Burchell, "Peculiar interests...", in Burchell, Gordon, Miller,(eds), *The Foucault Effect..*, Harvester Wheatsheaf, England, 1991, at p 139.

[7] See Section II, sub-section 2 for further developments on the subject of interest.

1.2 The Security of Credit

The drafters identified another significant potential role for the *Fiducie: t*o ensure the security of credit transactions, and thereby their multiplication, by providing one of the most efficient means of guaranteeing a debt. Indeed, the full transfer of ownership of a thing to guarantee a debt to the creditor provides a powerful security. If things go wrong and the debt is not paid back, the creditor is sure to be able to realise his/her security and to avoid any loss.One commentator remarked that:

"the concern to legalise practices of transfer of title for the purpose of securing a debt, seems to have obscured...the fact that it is rather in the field of property management that the *Fiducie* is likely to play a significant and durable role".[8]

The Bill was shaped by a policy concern, the history of which dates back to the first Napoleonic codification: the security of credit.

The *Fiducie* was compared to already established techniques invented as a palliative for the insufficiencies of reservation of title, bailment and leasing techniques. One of these techniques is the *Cession Dailly* , a professional practice consecrated in a 1981 Statute. This technique is a transfer to a credit company of letters of credit belonging to a business client, to guarantee a business loan. Hence, "the fiducie already exists in our substantive law...its recognition in the Civil Code would appear as the consolidation of a partly tested institution, rather than as the reception of an alien device".[9] Whether this type of transfer amounts to a fiduciary transfer comparable to the transfer of ownership to the trustee is debatable. It is not our purpose here to settle this technical question. The point is that the drafters wanted to base the legitimisation of the new institution on the fact that it

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[8] M Cantin Cumyn, "L'avant-projet de loi relatif à la Fiducie....", Dalloz, 1992, 14, at p120, (my translation).

[9] Grimaldi, "La Fiducie: Réflexions sur l'institution et sur l'avant-projet de loi qui la consacre", JCP, (N), 1991, art 35085, 900 at p 908.

would echo existing techniques to increase the security of credit in the business world.

1.3 The Security of Practice

The 1992 Preamble certainly stresses that "using the *Fiducie* will avoid recourse to more formalistic devices or more complex and precarious practices".[10] Indeed, the *Fiducie* was intended to "provide a legal framework for practices which have not as yet received a legal definition".[11] Hence, the purpose of the Bill was not to provide a comprehensive regulation for a new device, but to enframe existing practices in a unifying framework which would grant them a principled validity. The *Fiducie* was to ensure security in the use of practitioners' devices, through their legal recognition.

Indeed, C Witz argued in 1981 that there are in French law numerous practices that could be characterised as types of *Fiducies.*[12] One of the drafters of the Bill referred to the work of Witz to argue for the legitimacy of the new *Fiducie,* as an already existing mechanism used in dispersed and as yet unidentified fiduciary transfers of ownership.[13] According to this view, shared by some doctrinal writers, there had long been in modern French law mechanisms comparable to the *Fiducie* for the purposes of management, or donations, or the provision of a security. However, these operations remained either unnamed or were legally recognised but under a different category.[14]

First, there is the *liberalité avec charge* , that is, a method of administration of a deceased's estate in the form of a gift to a fiduciary who

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[10] AN 2583, at p 6, (my translation).
[11] ibid, (my translation).
[12] *La Fiducie en Droit Privé Français,* Economica, Paris, 1981.
[13] J de Guillenchmidt, "Présentation de l'avant-projet de loi relatif à la Fiducie", Rev. de Droit Bancaire, 19, 1990, 105 at p 105.
[14] See Grimaldi, who distinguishes between practices recognised and regulated by a statute, and practices which have not been so validated, in op. cit note 9.

has a collateral duty to retransfer.[15] The donor transfers his/her estate to a person, who will manage it for the benefit of a third party to whom the ownership will ultimately pass. In other cases, the intermediary will have to transfer the estate directly to an existing legal person, or to create a legal person to which ownership can pass and which will fulfil the charitable purpose intended. The validity of such devices has been widely recognised by the courts. It has also indirectly been admitted by the legislator through the regulation of the *Fondation de France*, the equivalent of the Public Trustee. Hence, "the defenders of the fiducie are not so much proposing to modify existing mechanisms but to name them differently".[16]

It was also stressed that the *Fiducie s*hould be distinguished from the mandate. A mandate can be revoked and therefore "does not provide the security hoped for by those whose profession is to manage other people's wealth. The professional aspires to a long-term ...and exclusive mission of management...".[17] Hence, the shortcomings of the mandate stimulated recourse to *Fiducie*-like transactions, created by the legislator or generated in legal practice.

Business practice has come up with devices which, according to some commentators, involve fiduciary transfers, even without the *Fiducie*. *L'inscription de valeurs mobilières étrangères au nom de la SICOVAM*, is the registration of foreign shares and bonds, for the purpose of their exclusive management by a company, the SICOVAM, which acts as a fiduciary. The *sociétés d'investissement* and *fonds communs de placement* (F.C.P) are companies set up for the purpose of the collective and exclusive management of shares, but which do not acquire the ownership of the securities.

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[15] Motulsky's view is that this institution has nothing to do with the trust, as it is not based on split ownership. See Chap II, Section II.
[16] op. cit., note 9, at p902.
[17] ibid, p 903.

The *fonds communs de créances* are, like the F.C.Ps, investment funds set up for the management of securities issued by the fund and representing letters of credit for the benefit of credit companies. The corporate body managing the fund acts as if the securities belonged to it and has exclusive control, resembling very much a fiduciary. However, in law, the securities are regarded as owned solely by the credit companies and the fund manager is a mere agent.[18]

The *convention de portage* is a new practice and results from a contract by which a person undertakes to buy shares for the benefit of another, and to eventually transfer these, either to a third party, or to the other party to the contract. Such a convention is for the provision of services on the part of the intermediary, who often acts to protect the identity of the principal or to hold property for someone who cannot, for any reason, acquire the shares immediately. "The fiduciary nature of the [convention de] portage is self-evident..Although the courts have been hesitating, doctrinal law recognised the existence of a Fiducie in such cases".[19] With or without the *Fiducie*, some argue, practice will have recourse to fiduciary arrangements.

The legislative introduction of the *Fiducie* was thus justified on the basis that it would have brought together existing and developing practices responding to the needs and reality of business. The role of the legislation was therefore to ensure the security of these preexisting practices by providing a unitary framework and thus consistency in their legal interpretation and sanctioning.[20]

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[18] ibid, p 905.

[19] ibid, p 906.

[20] However, legal recognition also allows extensive regulation. This was not the aim of the Ministry of Justice but that of the fiscal administration which took advantage of the proposal by the Ministry of Justice to include a heavy fiscal control of the device, theatening the free and "secured" use of the *Fiducie*.

1.4 Security in Trusting

The remaining way in which the *Fiducie* would have fulfilled the liberal objective of security is by reducing the risk inherent in interpersonal trust. Article 2070-1 of the Bill specifies that a *fiduciaire* must act with due regard to the confidence reposed in him by the *constituant* (settlor). The Preamble stresses that the fiduciary is the mainspring of the new devices which originates from and rests upon trust - hence the chosen denomination of *Fiducie*, derived from the Latin word for trust, "fides". The fiduciary could not have a past conviction or have been declared bankrupt or barred from any professional organisation due to his/her prior activity, as these "would create doubt as to their capacity to manage property for the benefit of others or be inconsistent with the confidence invested in him by the Settlor".[21] Moreover, "this confidence requires that the fiduciary personally accomplishes his mission, except for a limited power to delegate...".[22] One of the purposes of the legislation, and further judicial or statutory intervention, would have been to secure and sanction a high standard of behaviour, to encourage and protect fiduciary relationships based on the *Fiducie.*

Liberal security constitutes a goal of government, relying on the proper steering of liberty as its principal means. Hence, in order to promote the security of newly arranged fiduciary relations, it was necessary to ensure that the *fiduciaire* would have made proper use of the freedom s/he had acquired as owner of the *Fiducie*'s assets.

"...[legal] controls are means of reducing the risk involved in a social relationship of trust since they legally reduce or contain the freedom of action of the trustee".[23]

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[21] Dyson, "The proposed new law of trusts in France", (1992), The Conveyancer and Property Lawyer, 407.
[22] AN 2583, at p4.
[23] R Cotterrell, "Trusting in law...", Current Legal Problems, 1993, at p 79.

Trust, as both a social and a legal relationship, could be secured by enframing the *fiduciaire*'s liberty within standards of proper conduct.[24] Fiduciary standards of conduct constitute

"an instrument of public policy...to maintain the integrity, credibility and utility of relationships perceived to be of importance in a society. And it is used to protect interests, both personal and economic, which a society is perceived to deem valuable".[25]

In English law, there are broadly two types of standards of fiduciary conduct and a

"possible source of tension created between, on the one hand, a concept of trusteeship rooted in moral obligation and, on the other, one which perceives trusteeship as a managerial function to be financially rewarded".[26]

One of the common functions of each standard is to regulate the behaviour of the trustee, thereby diminishing the risk of trusting by providing a safety net of sanctions. The two images of trusteeship can be seen as two extreme points in a spectrum developed by the courts. The traditional model

"is one of disinterested devotion to the gratuitous administration of a friend's or relative's property - and a burden undertaken usually out of a sense of obligation...To an increasing extent professional persons, such as solicitors or accountants, or trust corporations are appointed as trustees ...Seen from this perspective trusteeship is more akin to a contractual market-based relation:... trustees appear as 'professional managers of capital' administering another's property in exchange for a fee".[27]

Security in trust is achieved differently, that is, the conduct of the trustee is constrained in a different way, depending on which model of trusteeship is preferred.The way in which the 1992 Bill organised the role of the *fiduciaire* provides an insight into how the objective of security was implemented.

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[24] "..fiduciary law's concern is to impose standards of acceptable conduct on one party to a relationship for the benefit of the other where the one has responsibility for the preservation of the other's interest", P D Finn, "The Fiduciary Principle" (1989), at p 25..

[25] ibid, at p 26.

[26] G Moffat, *Trusts Law*, second edition, Butterworth, London,1994, at p315.

[27] ibid, at pp 316-317.

Models of trusteeship identified in the common law seem to be echoed in the Bill. R Cotterrell's three "ideal types" or models of trust - the moralistic trust, trust as property receptacle and trust as a capital management system - provide a useful insight.[28]

The moralistic standard of fiduciary behaviour relies on personal moral credibility, which may or may not be evidenced in the social or professional status of the individual. The law related to such a standard provides security through legally recognising the personal nexus between the parties and providing protection for the victim of a breach of confidence. This model encompasses the "prudent man of business" standard with its emphasis on security and avoidance of risk in the management of trust assets. It also explains the principle of non-delegation due to the personal nature of the relation. Whereas the moralistic model relies only incidentally on the professional credentials of the fiduciary, the managerial model of trusteeship relies on expertise as a main guarantee of the trustee's worth, and as the basis of trustees' wide discretion. This model emphasises the contractual basis of the fiduciary relationship and the necessary flexibility of the trust. Confidence is displaced from the person of the fiduciary to the legally guaranteed system of expertise, which s/he represents.[29]

The 1992 Bill incorporated both models of trusteeship, following two diverging paths towards securing trust. There was an emphasis on the personal nature of the fiduciary relationship; this is apparent in the Preamble, which insists on the moralistic dimension of trust, in the Bill's definition of the *fiduciaire*, which seems to assume that a physical person will fulfil the tasks, and in the specification, in article 2067, that establishes a limited power to delegate despite the personal nature of the obligations. The specificity of the

[28] See Cotterrell, op. cit., note 23.
[29] See R Cotterrell's proposed analysis in op. cit. note 23.

contract of *Fiducie,* and an essential starting point for achieving security through the legal control of the *fiduciaire,* would have been reflected in the moral dimension of the fiduciary tie.

The Bill also incorporated, to a lesser extent, a more professional model of trusteeship. In the Preamble, the contractual nature of trusteeship and the importance of freely defined fiduciary powers and mission are stressed. One of the ways in which the *Fiducie* would have distinguished itself from the trust is by its definition as a contract, although this would have posed problems as regards the interpretation of the beneficiary's rights and their role in the enforcement of the *Fiducie.* Indeed, the nature and extent of the beneficiary's rights remain ill-defined, and the *Fiducie* thus appeared as an autonomous mechanism under the main authority of the managerial *fiduciaire.* It was initially intended that only incorporated bodies could have performed the duties of a fiduciary. This idea was dropped and is not reflected in the Bill but does reveal the assumption that fiduciaries should be professionally organised entities. Commentators have described the *Fiducie* as a contract for the provision of professional services, rather than a mere transfer of title.[30] The Bill has also been described as constituting a new deontological framework. However, the moralistic model is predominant in the Bill, emphasising personal credentials as an essential means of policing the *Fiducie.*[31]

[30] A Bénabent, "La Fiducie", JCP, (N), n 26, 1993, pp 275-278.
[31] See Chapter I, Section I, the Bills drafters insisted on the importance of the fiduciary's role and on its moralistic dimension.

2. Policing Trust: the determinative role of surveillance

In conflict with the liberal and minimal aim of security was the administrative impulse to police the new device, particularly as regards its fiscal aspects. Some practitioners have attributed the failure of the Bill to its onerous fiscal regulation. Many of the Bill's general provisions were designed to complement the specific fiscal regulation contained in the third Part. A number of sections reflect anti-tax avoidance and evasion concerns related to discretionary trusts. Part III of the Bill contains almost 50 sections and is by far the longest. The fiscal rules influenced the general outline of the *Fiducie*. Fiscal policing through surveillance, to satisfy the imperative of preventing tax avoidance and evasion, has a profound impact on the private law aspects of the Bill regarding the role of the fiduciary and the limited flexibility of the new institution. The principle of fiscal surveillance will be examined first, and its impact on the legal constitution of the fiduciary subject will then be discussed.

2.1 Fiscal Surveillance

Tax evasion is defined in terms of concealment to defeat the State's surveillance of assets and the collection of information for the purpose of determining tax liability. Concealment is one of the few well established yardsticks of the evasion/avoidance distinction:

"...the essence of the distinction is that evasion commonly involves non-disclosure of relevant facts: 'the concealment of material facts, leading to an under-assessment, marks the point at which avoidance crosses the borderline and becomes evasion' (Keith Committee *Report of the Committee on Enforcement Powers of the Revenue Departments* (Cmnd 822, 1983) p 162)".[32]

[32] G Moffat, ibid. note 26, at p 53. This deals with the problem of the definition of tax avoidance and evasion in English law. Although there may be definitional differences,

The distinction between avoidance and evasion is a legal one and its purpose is to distinguish illegal practices from lawful tax-planning. In English law, it stems from a literalist judicial approach to the interpretation of tax statutes for the determination of fiscal liability. According to such an approach, tax liability should be determined by construing the language and form of the statute, rather than by referring to the policy underlying it. Hence, practices which are not contrary to the formal provisions of the statute can lawfully escape its application. However, tax avoidance has never been defined.

As regards the interpretation of tax statutes, the literalist approach has been questioned by the English courts. In *Pepper v. Hart* (Lord Mackay dissenting), the majority found that the interpretation of section 63 (2) of the Finance Act 1976, regarding the taxation of in-house benefits for employees, could be guided by reference to parliamentary materials containing statements made by the Financial secretary on the scope of these provisions.

Lord Browne-Wilkinson, delivering the main speech, stated that;

"the exclusionary rule should be relaxed so as to permit reference to parliamentary materials where: (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied on consists of one or more statements by a minister or other promoter of the Bill...(c) the statements relied upon are clear".[33]

This more flexible and purposive approach to the interpretation of fiscal statutes facilitates judicial questioning of the conventional distinction between avoidance and evasion, with the recognition of "unacceptable tax avoidance".[34]

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the general concern for the prevention and sanction of the concealment of assets is reflected in French taxation law.

[33] [1993] 1 All ER 42 at p69

[34] See G Moffat, *Trusts Law*, second edition,1999, at pp 63-67.

It is likely that the French fiscal administration intended to prevent avoidance as well as evasion, especially with regard of sophisticated tax-planning methods involving off-shore jurisdictions. These methods

"can render problematic the disclosure obligation....avoidance schemes are rarely simple and usually incorporate several distinct legal transactions involving the use of separate companies, trustees and, sometimes, jurisdictions. It is here that what has been termed 'non-disclosing disclosure' - 'disclosing the relevant facts but doing so in a way which makes it difficult...to recognise the presence or extent of a taxable transaction' - can be effective(McBarnett (1991) 42 British Journal of Sociology 323 at 331). A corollary of the complexity of schemes therefore is that the Inland Revenue may find it difficult to fit the parts of the jigsaw puzzle together and thereby discover the underlying legal and economic substance of the arrangement".[35]

The French *Ministère de l'Economie et des Finances* , in charge of the drafting of the fiscal provisions of the Bill, was primarily concerned to prevent the constitution of such unclear situations through the use of the trust's opacity, which, if introduced into French law, would generate a "black hole" for fiscal resources.[36] In order to avoid this, the fiscal regulation of the new *Fiducie* was to reflect the two central principles of transparency and neutrality.

Transparency entails that, for the purposes of determining tax liability, the fiduciary device would have been ignored, and the *fiduciaire* could not have been a subject of taxation. Hence, in the eyes of the fiscal administration, economic reality would have been privileged over legal form and the fiduciary, constituted in the rest of the Bill as the only owner and the main element of the new device, would be from the fiscal point of view, non-existent.[37] The fiscal construction of the *Fiducie* reflects concerns connected with the imperative of surveillance, such as the simplification of legal forms

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[35] G Moffat, ibid, at p 64.

[36] See analysis of the fiscal provisions of the Bill, "La Fiscalité de la Fiducie" , JCP, (E), vol 13, 1991, pp 150-160.

[37] Except where the beneficiaries cannot be identified.

into a decipherable economic reality; the intermediary level occupied by the fiduciary was ignored and the focus was on the traditional dyad, owner-thing.

The *Fiducie* would not have been allowed to be used as an instrument obstructing surveillance. The possible use of the *Fiducie* as a discretionary trust was perceived as particularly problematic and specifically targeted. Hence, section 23 of Part III states that where the beneficiaries cannot be identified, the fiduciary will have to pay income tax at its highest rate, on their behalf. Moreover, the names of the beneficiaries could not be changed (article 2064) and one condition of validity of the fiduciary contract was the existence of named beneficiaries or of clear rules determining their designation (article 2062).

The transparency of the *Fiducie* was to be ensured through legally required accounts, and the role of the fiduciary in drawing up and communicating such information. Section 33 of Part III would have introduced an obligation on the *fiduciaire* to provide the Inland Revenue with the names and activities of the beneficiaries, the nature and value of the assets and the value and distribution of the income of a *Fiducie*.

The principle of neutrality was also applied. Its meaning, in French doctrine and in the Bill itself, overlaps with the notion of transparency. It was advocated by C Witz in his 1981 thesis.[38] Witz argues that the transfer of ownership to a fiduciary is specific, and in cases where it is to guarantee a debt or to constitute a fund to be managed, should not be taxed. Indeed, the transfer should be regarded as neutral and exempted from any tax normally incurred as a result of transfer of ownership for consideration.[39] As regards the use of a *Fiducie* for the purposes of a gift, neutrality should entail that only the transfer

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[38] AN 2583.

[39] These include V.A.T, stamp duties connected to the sale of land, Capital gains tax. The exemption concerns only the transfer of ownership to the fiduciary.

to the real beneficiary is taxable. The transfer to the fiduciary should be ignored. Witz notes that, as regards *Fiducies* governed by pre-revolutionary law, nineteenth century cases and doctrine found that a *Fiducie* was taxable only once and submitted to an estate duty, the rate of which depended on the nature of the relationship between the settlor and the legatee. The basis of this rule was that the fiduciary was the owner only formally and in appearance and, therefore, the transfer of title to him/her was fictitious. Witz argues that a similar solution should be adopted for a modern *Fiducie*. However, it should be grounded on the principle of fiscal neutrality of a genuine, as opposed to apparent, transfer of ownership. Witz insists on the importance of fiscal neutrality to the potential success of a new *Fiducie*.

Indeed, the neutrality of the proposed new device was declared in the preamble of the 1992 Bill. The application of this principle comprised two aspects: the transparency of the device for the purpose of determining tax liability, and the lack of particular fiscal advantages connected with the use of a *Fiducie*. Hence, the constitution of a *Fiducie* would not have entailed inheritance or gift tax exemptions. The fiscal regulation of the *Fiducie* was not perceived as an instrument of public policy and a means of encouraging certain aspects of private activity. However, the fiscal rules were not seen as a way of redressing inequalities and market distortions resulting from the advantages of the *Fiducie* over a simple transfer of ownership. The transparency of the device, that is the invisibility of the *Fiducie* and *fiduciaire* in the eyes of the fiscal administration, would have posed problems in dealing with practices equivalent to the accumulation or discretionary trust, where the advantages of the interposition of a fiduciary would have had to be ignored.[40]

[40] See op. cit. note 35 and Moffat, op. cit., note 26, at pp 294-311.

It is to be noted that the French fiscal administration did not choose to introduce foreign fiscal rules, based on the numerous Acts on the taxation of trusts. The *Fiducie* was to be regulated within the framework of existing fiscal principles. Hence, the rationality of rule or Governmentality underlying tax regulation was brought to bear on the general profile of the *Fiducie*. The epistemological and practical dimensions of the French law of Public Finances are exalted in the fiscal construction of the *Fiducie*. The primary objective was to submit the economic subject, as distinct from the legal subject, to State surveillance. Moreover, one of the main aims of the tax authorities was to encompass foreign trusts involving economic subjects outside the State's jurisdiction, but at least partly operative in France. The recognition of trusts in accordance with the 1985 international convention would have entailed, thanks to the 1992 Bill, further revenues for the Public purse.[41]

The fiscal policing of the new device and the consequent application of the imperative of surveillance prevented the constitution of the *Fiducie* as a flexible instrument. Whilst the English "public law of taxation has conventionally been adapted to the private ordering of property law", the private freedom granted under the auspices of the *Fiducie* was structured and policed by the public imperative of surveillance.[42] Hence, the governmental rationality behind fiscal regulation still remains unaffected by the practices of French private lawyers, who, unlike their English counterparts, are not given the necessary epistemological and political space to structure the relationship between tax payers and the fiscal administration.

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[41] See op. cit. note 35.

[42] G Moffat, op. cit. note 26, at p 311.

2.2 The Fiduciaire and the Panoptic Diagram

The fiscal policing of the *Fiducie* at the same time ignored the fiduciary for the sake of transparency, and relied on this party as an effective means of surveillance. The *fiduciaire*, through the requirement to produce accounts to be submitted to the fiscal administration, was to become part of the Panoptic Eye. Surveillance plays a part in the control of fiduciary devices such as the English trust or Quebec's *Fiducie*. However, Panopticism is applied in different ways according to the main goal in the governmental rationality concerned.

The role of the fiduciary is to be understood as an effect of the Panoptic diagram, applied for the purpose of the fiscal policing of the *Fiducie*. Indeed, the legal definition of the *fiduciaire,* and its uncertainties, were in part determined by the importance of this new legal entity as an instrument of surveillance, that is, as an extension of the central Panoptic Eye. What is specific about the *fiduciaire* is not the application of panoptic techniques to control him/her, but the particularity of the Panoptic diagram applied, linked to the specific governmental concerns of the French fiscal administration.[43] A comparison with Quebec's *Fiducie* will show the differences in the organisation of the control of the fiduciary function, which, it is argued, are a reflection of differences in the application of panoptic techniques, and ultimately, in Governmentality.

Foucault has stressed that Panopticism is a form of power concerned with two instrumental or technical aims: the maximisation of power through

[43] As seen in Chapter IV, (pp 112-114) Panopticism according to Foucault is a neutral and adaptable disciplinary technique, which has been combined with various governmentalities and has never existed in its pure form. It has had various applications and connects governmental rationalities to discipline.

its exercise at the lowest cost, and the maximisation of the productive utility of docile bodies.[44] Accordingly, Panopticism is intended

" firstly, to obtain the exercise of power at the lowest possible cost (economically, by the low expenditure it involves; politically, by its discretion..., its relative invisibility, the little resistance it arouses); secondly, to bring the effects of this social power to their maximum intensity and to extend them as far as possible...; thirdly , to link this 'economic growth of power with the output of the apparatuses...within which it is exercised; in short, to increase both the docility and the utility of all the elements of the system".[45]

The maximisation of the efficiency and hold of disciplinary power is directly connected to the techniques for creating useful individuals. However, one aim can be privileged over the other and the way in which the panoptic schema was applied in the case of the *Fiducie* betrays the dynamics of police rationality in French Governmentality; the surveillance and maximisation of the sovereign's control - in the form of the fiscal administration - prevails over the maximisation of the fiduciary's utility as a fund manager.

Accounting is the panoptic mechanism formally set up in Part II of the Bill to control fiduciary funds through the *fiduciaire*. The application of panoptic techniques is part of the governmental practices of enfolding state authority.[46] Accounting techniques are used not so much to ensure that the fiduciary would have responded to the discipline of the market in his/her management function, but rather as a process of enfolding the principle of

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[44] See Chapter IV, pp 112-114..

[45] Foucault in *Discipline and Punish,* Penguin Books, 1977 at p 209 and p218.

[46] The expression "enfolding of authority" is borrowed from M Dean who describes in this way Foucault's notion of government. Hence, " Foucault's genealogies...allow us to analyze governmental and ethical practices as just such practices of enfolding authority...[one] aspect of these practices of enfolding concerns..the governing work. This refers to all the means, techniques, rationalities, forms of knowledge and expertise that are to be used to accomplish the enfolding of authority" in "Foucault, government and the enfolding of authority", in Barry, Osborne, Rose (eds), *Foucault and Political Reason: Liberalism, Neo-liberalism and Rationalities of Government,* U.C.L Press, London, 1996.

state surveillance of the fund and beneficiaries. The emergence of accounting as a panoptical technique will be briefly examined here.

One specific concern of Bentham, the creator of the Panopticon, in his reflection on disciplinary techniques of control, lead him to stress that the accounting technique

" 'must serve the dual purpose of control ...and decision making and that it could do this only by providing a complete and analytical account of the enterprise's use of resources' which required that... 'the accounts must disclose all mistakes and all misconduct occurring within the institution'.....Past and future, managers and the work force are all to become subject to an accounting eye, in what is one more expression of his Panopticon principle".[47]

On the basis of Bentham's own vision, a genealogy of accounting as a disciplinary technique has been written by Hoskins and Macve.[48]

The authors stress how disciplinary examination, accounting techniques and auto-regulation and legitimisation have merged in the twentieth century to constitute the notion of accountable professionalism or managerialism. Accounting techniques can be integrated into a disciplinary system of auto-regulation of conduct for the purpose of efficiency, and by the same token, can serve the end of professional self-legitimisation. The importance of the audit and accounting techniques in the current power-knowledge framework has been stressed in other writings.[49] The widespread use of techniques such as the audit and the growing societal importance of accounting and managerial experts reveals, it is argued, a greater dependency on autonomous agents through which advanced liberal government "acts at a distance". N Rose has stressed the privileged role of audit and accounting as neo-liberal techniques of government:

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[47] Bentham quoted in Hoskins, Macve, "Accounting and the Examination: A genealogy of Disciplinary Power", B Smart (ed), *Michel Foucault; Critical Assessments*, Vol VII, Part II, at p 99.

[48] ibid.

[49] See N Rose, "Governing Advanced Liberal Democracies", in op. cit. note 45.

"Within these new strategies of government, audit becomes one of the key mechanisms for responding to the plurality of expertise and the inherent controversy and undecidability of its truth claims...Audit, in a range of different forms, has come to replace the trust formulae of government once accorded to professional credentials....Despite the fact that its 'epistemological profile' is, if anything, even lower than the knowledges that it displaces, and that there is nothing novel in the techniques of audit themselves, the mode of its operation - in terms...of apparently stable and yet endlessly flexible criteria such as efficiency, appropriateness, effectiveness - renders it versatile and highly transferable technology for governing at a distance".[50]

Experts play a role in government at a distance and in the process of "de-statisation" of governmental authority. They are no longer submitted to centralised apparatuses of government; their accountability is determined by abstract accounting techniques and they are submitted to the sole authority of the market.

Accordingly, the most advanced applications of accounting techniques and their Panoptic effect are perceived to organise the auto-regulation, self-surveillance and legitimisation of armies of experts who perform acts of government, autonomously from the State, and in response to the purely abstract discipline of the market. Accounting replaces policing and prescribes efficiency and market discipline as standards of behaviour. However, the role attributed to accounting and to the *fiduciaire* in the Bill was a much more modest one and does not seem to have been inscribed in a liberal strategy of "de-statisation". The role of accounting in the Bill reflects the prominence of administrative and state control in French Governmentality. The panoptic schema applied is thus inscribed in French Governmentality's bias for the administrative policing of freedom. The fiduciary was mainly to act as a state intermediary, as the State's accounting eye. Accounting was not envisaged as a means of ensuring the self-regulation of the *Fiducie*, as it could have been envisaged in a more liberal application of the panoptic technique. To further

[50] N Rose, ibid, at p 55-56.

argue this point, a comparison with the Quebec trust will be made. In the case of Quebec, reliance on accounting techniques is more extensive, and seems more connected with the acceptance of a self-regulated trust, albeit in the shadow of the courts.

The French Bill was criticised by Canadian academics who are fully aware of the difficulties of translating the trust into Quebecois civil terms. M Cantin Cumyn, Professor at McGill University, criticised the first version of the Bill, which was very similar to the 1992 proposed legislation, for its vagueness and imprecision, particularly as regards the control of the performance of the fiduciary purpose and the rights of the beneficiary.[51] The author notes that the concept of beneficial title has two main purposes: first, it allows the beneficiary to obtain remedies against third parties - hence, the proprietary character of the beneficiary's rights; secondly, it constitutes the basis of the beneficiary's right to control the trustee's management and, to that end, to require him/her to account for his/her acts. The author notes that the rights of the beneficiary of a *Fiducie* were ill-defined. The beneficiary had no title or proprietary right; however, his/her rights could have been defined with more precision to include the prerogatives normally connected with beneficial ownership. As a consequence, no effective control of the *fiduciaire* was organised by the Bill. Hence, the surveillance of the fiduciary mission and of the *fiduciaire* was placed in the hands of the beneficiary, whose primary rights, even if they are not identified as a title, did not explicitly but should have included this ability to require the fiduciary to comply with the mission and to account for his/her acts.

The new Quebec trust is purposefully based on the notion of patrimony by appropriation in order to avoid, or "transcend the notion of property

[51] "L'avant-projet de loi relatif à la Fiducie, un point de vue civiliste d'outre-atlantique", Dalloz, chronique, 14, 1992,117.

rights".[52] Indeed, to avoid any recourse to the common law notions of legal and equitable ownership, the beneficiary's and the trustee's rights have not been defined with reference to categories of property law; instead, their prerogatives, rights and duties have been precisely listed, avoiding the shorthand qualifications of title or ownership. Hence, neither the beneficiary nor the trustee have any property rights. However, although the Quebec *Fiducie* is not recognised as a trust, the drafters have actively sought to integrate elements of the common law into the new statute.[53] They have expressly stated their intention to use common law concepts as an informal source of inspiration, particularly as regards the inclusion into the code of "the trust established by contract", intended to rival business trust techniques, already authorised in specialised statutes for specific uses, and widely used in Canadian common law states.[54] They have arguably attempted to reproduce, without naming it, the dynamics of the equitable-legal title distinction and the model of fiduciary relationship it entails.Hence, Professor Brierley, one of the members of the commission in charge of the drafting of the provisions on the *Fiducie* of the new Code, has asserted that "as regards the fiducie, [the new Code] is clearly modelled on the common law trust as regards several important aspects".[55]

Quebec's *Fiducie* is functionally defined and specific reference to its possible working modes is made in Section II, Articles 126 to 1273 of the New Civil Code. It is identified generally and primarily as a mode of administration; the relationship between the trustee and the beneficiary is

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[52] J Brierley, "Regards sur le droit des biens dans le nouveau code civil du Québec", Revue Internationale de Droit Comparé, 1, 1995, at p 42, (my translation).
[53] See B Stapleton, "Codification of Trust law: Who needs it?", in *Conférences sur le Nouveau Code Civil du Québec*, 1991; according to this author, the Quebec Trust will not be recognised as the common law trust by practitioners, clients and academics.
[54] See the drafters' commmentaries in *La Réforme du Code Civil-Textes Réunis*, Tome I, Presse Universitaire de Laval, 1991,at p 751.
[55] "De certains patrimoines d'affectation", in ibid., at p 739.

focused on this , rather than on relations of property. However, "the beneficiary is much more than an ordinary creditor [of the trustee]"; he/she is directly involved in the administration of the trust. Articles 1287 to 1292 constitute the third subsection of section III which is headed: "of the Administration of Trust". Some of these provisions are designed to remedy the past deficiencies regarding the rights of beneficiaries. The new code goes beyond the recognition of the established rules, allowing the beneficiary to enforce the trust or to require the replacement of the trustee. With the settlor, the beneficiary is granted a new right to supervise the administration of the trust.[56] It is made clear by the drafters that the right of a beneficiary to supervise the trustee is inherent in his/her legal position.

"As the beneficiary has no property right [under the new law], it is essential that his rights of action be explicitly established...the beneficiaries's rights of action are not deduced from the legal qualification of his rights as a personal or property....right...but are explicitly established by the statute,echoing the specificity of the legal position of the beneficiary of a trust".[57]

The rights of the beneficiary enunciated in articles 1290 and 1291 are "the counterpart of the duties of the trustee".[58] Hence, the beneficiary's prerogative of surveillance is directly connected to the trustee's function of administration and to the proper functioning of the *Fiducie.* The panoptic schema applied in the case of the Quebec trust is therefore essential to an understanding of the beneficiary's rights and relationship to the trustee. The beneficiary is a central element of the mechanism of auto-regulation of the Quebec trust.

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[56] Article 1287 of the New Quebec Civil Code: "The administration of a trust is subject to the supervision of the settlor or of his heirs, if he has died, and of the beneficiary, even a future beneficiary...". Article 1290: "The settlor, the beneficiary or any other interested person may, notwithstanding any stipulation to the contrary, take action against the trustee to compel him to perform his obligations or to perform any act which is necessary in the interest of the trust, to enjoin him to abstain from any action harmful to the trust or to have him removed".

[57] op. cit. note 53 at p 770, (my translation).

[58] ibid at p 772.

The panoptic schema applied in the case of the Quebec trust is very different from that observed in the case of the *Fiducie.* While panoptic techniques are relied upon in Quebec, in order to ensure a self-contained and relatively autonomous principle of regulation, the *Fiducie* also would have relied on panoptic surveillance, not as a means of disciplining the trustee, but as a device for the administrative control of private funds. As compared with the *Fiducie,* the Quebec trust relies on a more liberal application of panoptic techniques, which demonstrates the existence of a more organised professional body of trustees on which the self-regulation of the *Fiducie* can depend. The principle of surveillance may exist in the common law trust and in its interpretation in the Quebec Code, but it does not have the same function. This is a reflection of differences in governmentalities, the French mentality of rule granting more weight to administrative rule and control.

The French Bill is situated at the cross-roads of diverse political rationalities, all forming part of the Governmentality which underlies French legal culture. The legal profile of the *Fiducie* is thus better understood in the light of the purposive governmental rationalities - or Governmentality - that run through French legal culture. These have an impact which runs deeper than that of the intended aims and immediate policy concerns of the drafters. This is because Governmentality operates at the deep epistemological level.[59] This does not mean that there is a coherent logic at work and indeed the contradictions in the Bill reflect those of French Governmentality. A further epistemological dimension will be explored in the next section. The interpretation of the Bill as part of economic government and law-making

[59] The *Fiducie* cannot realistically be viewed as the implementation of a specific political programme. At the level of its intended role, it remains attached to technical rather than political preoccupations. Its revival in the *Marini* report does seem to claim the Bill as part of a wider neo-liberal project of de-regulation. However, it is quite clear that no such project was formulated in the early 1990s, in the context of the Bill's emergence. See Chapter I, p 16.

entails recourse to a particular discursive structure. Despite its apolitical, technical profile, the *Fiducie* can be situated within a Liberal problematic.

Not only has the *Fiducie* been "passively" determined by Governmentality, it also was an active, albeit minor, and symptomatic element in the ongoing contemporary reworking of Governmentality. Hence, a further dimension of our discussion of the relation between the *Fiducie* and Governmentality is the argument that the *Fiducie* is implicated in changes in the organisation and understanding of government. Foucault's interpretation of Liberalism allows us to establish a connection between the *Fiducie* and the Liberal critique of government.

SECTION II - LOCATING THE FIDUCIE IN THE LIBERAL PROBLEM-SPACE OF ECONOMIC GOVERNMENT

This section, in its second part, explains the relevance of the liberal problem-space to an epistemological and political understanding of the *Fiducie.* Indeed, the Bill was primarily technical and destined to respond to the particular needs of an economic sector. However, my argument is that the Bill has, despite its technical and instrumental characteristics, and its disconnection from any specific political reflection or programme, a fundamental political dimension. This political dimension is inherent to the epistemology of economic law, and therefore concerns the *Fiducie* in its formulation as a measure of economic government.

M Foucault has interpreted Liberalism as a rationality focused on the critique of government. Liberalism creates a "problem-space" as it questions the very possibility of economic government.The liberal problem-space constitutes a critical framework preoccupied with the limits of government. It

is independent from, yet co-extensive with Governmentality; rationalities of rule, which assume the possibility of implementing governmental ends through proper technical means, are outflanked by a knowledge-*savoir* questioning the very possibility of government. The first part of this section explores these Foucauldian constructs in greater detail.

1. Real Liberalism, Liberal Governmentality and Economic Law

In the first part of this chapter, as in previous chapters, the liberal dimension of Governmentality, reflected in French law, has been evoked. Liberal Governmentality is a purposive rationality of rule organised around the goal of private freedom through security. I have argued that the Governmentality reflected in French law is a hybrid which only partly reflects Liberal aims of government. Liberal Governmentality is distinguishable from what Foucault refers to as political economy or "Real Liberalism". "Real Liberalism" is co-extensive with Governmentality; it constitutes the lateral knowledge-base of purposive liberal rationalities of government. Hence, "Real Liberalism" - as C Gordon puts it - reflects Foucault's

> "concern to understand liberalism not simply as a doctrine...of political and economic theory, but as a style of thinking quintessentially concerned with the art of governing...[Foucault's notion of] [l]iberalism can thus be accurately characterized in Kantian terms as a critique of state reason, a doctrine of limitation and wise restraint, designed to mature and educate state reason by displaying to it the intrinsic bounds of its power to know".[60]

Rather than constituting a particular know-how guiding government, Real Liberalism proceeds on the basis of the assumed limits of government, which it seeks to explore.

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[60] C Gordon, "Governmental rationality: an introduction", in Burchell, Gordon, Miller (eds), *The Foucault Effect: Studies in Governmentality*, Harvester, Weatsheaf, England,1991, at pp 14-15.

"[P]olitical economy announces the unknowability for the sovereign of the totality of the economic process and, as a consequence, the *impossibility of an economic sovereignty*...what political economy cannot do for government is to generate a detailed, deductive programme for state action. Political economy assumes the role of a knowledge which is, as Foucault puts it, 'lateral' to...the art of governing: it cannot, however, in itself constitute that art".[61]

Rather than being a rationality of government based on the design of policy aims and means, "Real Liberalism", or political economy, is a particular ethos of critique of the very possibility of government. It is the dialectical counter-part of the idea and practice of governing, which it informs. Its "effect is to resituate governmental reason within a newly complicated, open and unstable politico-epistemic configuration. *The whole subsequent governmental history of our societies can be read in terms of the successive topological displacements and complications of this liberal problem-space*".[62] Gordon thus insists on the contemporary role of the liberal problem-space and its epistemological function; it is part of the dynamics of the problematisation of government. It incorporates within the problem of government the issue of the boundaries of competence.

The invention of Real Liberalism by theorists such as Adam Smith, is understood by Foucault as both a historical event to be explored, and an enduring problematic which preserves its importance as a vector of political construction. Hence, it entailed an epistemic shift which determined the very idea of government that we have today. The contemporary relevance of early Liberalism, that is Real Liberalism or political economy, is thus explained:

"...we live in a different world today, but a world, perhaps, in which a recognizably liberal form of questioning remains a constitutive element of contemporary political thought ...".[63]

Hence, the relevance today of early Liberalism is due to its epistemological role in the foundation of the problematic of modern

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[61] C Gordon, ibid, p16, his emphasis.
[62] ibid, my emphasis.
[63] G Burchell in op. cit. note 59 at p 144.

government. Its enduring presence is due to its fundamental place in the very conceptualisation of the notions of government, the economy and economic government. The particular importance of "Real Liberalism" was in its formulation of the incompatibility between a unitary juridical sovereignty and the multiplicity of economic interests.[64]

"What liberalism undertakes is something different: the construction of a complex domain of governmentality, within which economic and juridical subjectivity can alike be situated as relative moments..The key role which it comes to play in this effort of construction and invention is, for Foucault, the characteristic trait of the liberal theory of *civil society*".[65]

I agree with Gordon's view that Real Liberalism's epistemological task is therefore to constitute a domain of governmental intervention, which recognises both the impossibility of economic sovereignty, due to the multiplicity of interests and the opacity of the various processes informed by such multiplicity, and the possibility of government. This task is a never-ending questioning of the current set of boundaries. Hence, the enduring function of Real Liberalism lies in its role as a instrument of critique and its derived epistemological impact in the constitution of central and variable concepts connected to the notion of civil society and its proper government. Real Liberalism is seen by Foucault as focusing on law as the proper technical means of government.

The relevance of Real Liberalism to the *Fiducie* can be explained as follows: the proposed legislative introduction of the new device was caught, through the discursive medium of its existence, in a problematic of government which operates through preexisting concepts and questions. At the forefront of this problematic of government is the liberal problem-space and its conceptual apparatus. Hence, the *Fiducie* was placed at the heart of issues

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[64] See developments in the next sub-section
[65] C Gordon in op. cit. note 59 at p 22.

regarding the proper role of government in a (civil) society, more and more dependent on international transactions. Within this problematic, the instrumental function of legislation and its effectiveness are assumed; the legislative introduction of the *Fiducie* would have provided an answer to the specific economic problems faced by French lawyers on the international market for legal services, and by the French economy as regard the attraction of other jurisdictions for business and capital. At the same time, the limits of government are touched upon. Governmental rationality is assumed powerless before the pressures of the "internationalised" economy. The paradox of the Bill lies in its unformulated assumptions about, on the one hand, French economy as a governable entity, and on the other, the international sphere as both a constraint, and a renewed challenge for government. Hence the *Fiducie* indicated both the limits of government as an activity and a rationality confined to the national, and put at the forefront of the problematic of government, the almost mystical and non-governable entity of the global society; [66] the latter constitutes a focus for the renewal of the liberal problematic of government, with its dialectic tension between the definition of the governmental domain, and the questioning of the very possibility of government. The central conceptual apparatus of Real Liberalism finds a new lease of life through corresponding notions such as global society and the opacity of deterritorialised activities and actors.

[66] This is so although there is no specific reference in the Bill or related literature, to globalisation . This is arguably due to the fact that in the early 1990s, the notion had not yet penetrated the juridical field to any significant extent.

2. The *Fiducie* in a Professional and Global World : the Revival of Civil Society and Self-interest Subjectivity

The justification of the Bill as a rational act of government is underpinned by, and consolidates, specific representations which are, it is argued, those of Real Liberalism. Hence, the internationalisation and deterritorialisation of economic activity contribute to the depiction of an apparently new variable: global society. My point is that global society is little more than a reactivation of the Liberal epistemological construct of civil society. According to this Liberal paradigm, civil society is an aggregate of economic actors whose rational choices are guided by the imperative of maximisation of material self-interest. Similarly, the Bill's focus on the needs of practising lawyers and their clients emphasises the significance of the free-play of self-interest. The interest-maximising subject takes the new guise of the specialised professional, able to guide with his/her knowledge the activity of government. The latter is aided by law as an instrument subsumed to the good functioning of the economy, as opposed to an instrument of economic rule. In a slightly altered state, the epistemological constructs and themes of Real Liberalism, and in particular the idea of the impossibility of economic sovereignty, have shaped the rationalisation of the *Fiducie*.

The new *Fiducie* was justified on the grounds that it satisfies the needs of French lawyers and their internationally-minded clientele. The Bill was therefore portrayed as a validation of the interest of a certain group of subjects, on the basis of economic need.[67] But the *Fiducie* was not simply a political response to the demands of a specific pressure group. The Bill would have been an act of economic government justified on the grounds of the individual

[67] See Chapter I at p 10.

economic rationality behind the need for a French equivalent of the trust. Hence, the interest of the professional lawyer and his/her client, both understood more as market actors than as political agents, constitutes in itself the indicator of proper government. Individual economic rationality was transcended into the collective rationality of economic government.

This notion of government as validation of self-interest may seem a commonplace and neutral way of problematising governance. However, it belongs to a particular epistemology, that of Real Liberalism. This is emphasised by G Burchell, who writes:

"Government by *laissez-faire* is a government of interests, a government which works through and with interests, both those of individuals and, increasingly, those attributed to the population itself...the individual subject of interest is at once the object or target of government and, so to speak, its partner...This individual living being, the subject of particular interests, represents a new figure of social and political subjectivity, the prototype of 'economic man', who will become the correlate and instrument of a new art of government".[68]

Although this understanding of subjectivity as maximisation of one's own self-interest has crept into the epistemology of economic law and government, and could seem so familiar as to have become a-political, it is important to underline its ideological and political origin. Indeed, to Foucault this moment in political thought has deep and wide-ranging consequences.

"For Foucault, this isolation of interest-motivated choice and conduct represents a profound transformation in Western theories of subjectivity with critical consequences for how the individual's relation to the political is thought".[69]

The enduring influence of Liberalism resides in the possibility of thinking of subjectivity not as purely juridical and unitary but as multiple as the diversity of self-interests. The Bill was the opportunity to invoke this version of Liberal

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[68] op. cit. note 59 at p 127.
[69] ibid. at p130.

subjectivity in the guise of the professional, service providing lawyer and the businessman.

The notion of economic rationality as individual, opaque and greater than the sum of particular interests, remains central to Liberal epistemology and ideology, and stems from the conceptualisation of the political subject as also pursuing his/her own self-interest.

"Th[e] theme of the atomic particularity and localized conditions of interest-motivated choice is...an important element in the development of a model of economic rationality as a rationality of individuals...In their local situation individuals calculate and thereby connect themselves to other subjects similarly adjusting themselves to each other...the economic positivity and rationality of each individual's calculated actions...is possible only if the ultimate conditions and effects of the individual's actions escape his or anyone's knowledge and will. This, says Foucault, is the meaning of Smith's 'invisible hand': the identification of economic men with subjects of interest situated within a system of dependence and productivity which escapes their knowledge and will, but which constitutes the conditions for the economic rationality of their actions".[70]

Hence, the confusing political subjectivity with material self-interest has generated a certain corollary vision of society and the economy. The invisible hand points to the existence of self-regulating and mysterious mechanisms within society. Civil society and its economic processes form an opaque and fragmented entity defying the grasp of a totalizing economic rationality. Hence, a vision of subjectivity reduced to material self-interest

"goes together...with the epistemological and practical disqualification of sovereignty over economic processes. It is the opacity of economic processes, the necessary invisibility of a non-totalizable multiplicity of essentially atomic points of calculation and action, that founds the rationality of economic agents as individual subjects of interest...".[71]

Within the epistemology encompassing this narrow understanding of subjectivity can be located a certain vision of the role of law in government. Government cannot be the exercise of economic sovereignty, as the latter is

[70] ibid. at p 133.
[71] ibid. at p 134.

presumed to be a pointless aim. Economic law, as a tool of government, cannot be the expression of sovereignty over society's economic mechanisms. This does not exclude the intervention of law as a regulating mechanism. Law's aim is to facilitate the natural functioning of such mechanisms by allowing the variety of private interests to find a legitimate expression. Economic law is not shaped by the logic of economic sovereignty but seeks to govern or guide - in the Foucauldian sense of "*conduite*" - private interests. There is a capitulation in the face of the multiple movements towards the "internationalisation" of the economy, generated by rational economic agents and supported by national state authorities in their international relations. The skill and rationality of atomic economic agents - lawyers and businesses - are entrusted with the capability of acting in the best interest of the French economy. In this light, the Bill did not really attempt to protect the economic sovereignty of the French nation; it would have protected the individual interest of French lawyers and French businesses by increasing their choice and margin of action. The Bill was less an act of French economic protectionism than an attempt to protect the interests of certain French economic agents.

Self-interested economic subjects constitute civil society. It is precisely because of this individualistic, self-interested basis that society appears governed by its own regularities defying economic sovereignty. Moreover, s/he seems to live in a universe where the boundaries of national sovereignty are of little relevance.

"There is, as it were, an inevitable quotient of deterritorialization in the activity of subjects of economic interest. The abstract, isolated economic ego, the 'merchant' that, as Smith puts it, every man 'becomes in some measure', is not necessarily the citizen of any particular country".[72]

[72] ibid. at p 135.

It is admitted that the economic rationality of interest-motivated subjectivity expresses itself in a society which cannot confine it, a society which is not confined to the territory of sovereignty, a deterritorialised society. A global society? Like the notion of civil society, the global society hinted at in the Bill is characterised by its opacity and the fluidity of its boundaries. Like civil society, it casts doubt on the very possibility of economic government - at least in as much as government is a national activity - and yet, it calls for a new type of governmental intervention. As pointed out earlier, the *Fiducie* is caught in this paradoxical problem-space, which the notion of global society - or international and deterritorialised economy as it was referred to in the Bill - seem to encompass.

The revival of civil society and the liberal critique of government is not a purely discursive coincidence or the product of the internal evolution of French law's Governmentality. Global society, the self-interested subject and the liberal problem-space are discursive effects and weapons in power battles. These discursive elements are already given and need to correspond to acceptable formulations in French Governmentality; hence, we have argued in the preceding section and chapter, that the *Fiducie* was constrained by discursive limits and had to comply with certain themes and conceptions resulting from the Governmentality of French law. This shows that non-discursive battles have to be fought according to pre-existing discursive parameters.

Indeed, not everything is played and solved at the level of discourse and knowledge. The "topological displacements...of the liberal problem-space", referred to by Gordon, correspond to a strategic use of critique in the course of field power struggles, as will be seen in the next chapter. This is not to say that the 1992 Bill sought to implement a particular liberal logic or

strategy, for the benefit of a particular class. On the contrary, the Bill reflected numerous contradictory tensions. It was located at cross-roads of governmental rationalities; it echoed a subtle change in the equilibrium of power relations in the fields of government and law. These field struggles and their relevance to the legal argumentation of the *Fiducie* will be explored next.

CHAPTER VI

THE *FIDUCIE*, GLOBALIZATION AND FRENCH FIELD BATTLES

The purpose of this chapter is to complement the two lines of argument developed in previous chapters and based on a discursive analysis of the *Fiducie* in terms of its relation to the juridical discourse of sovereignty and Governmentality, with an analysis which brings together discursive and non-discursive developments. In the previous four chapters, the *Fiducie* was analysed in terms of epistemological processes which explained its legal form and the content of its regulation. In this chapter, we will attempt to connect the current workings of French legal knowledge with the power stakes and practices in the French and international fields of law. The notion of field, elaborated by Bourdieu and further investigated by Dezalay, will be used to show how the discursive dynamics of French law in the case of the *Fiducie* are dependent upon and evolve according to power struggles within national fields of legal/juridical power and government.[1]

The multi-faceted, if not confusingly plural, notion of globalization will be reappropriated, in the first section of this chapter, in order to establish this analytical link between the discursive phenomena observed in previous chapters and changes in the power relations between lawyers and government at the national and "global" levels. The *Fiducie* illustrates the impact of phenomena and events that can be interpreted as global, such as an

[1] The notion of "field" is also explained in Chapter I, Section II, at pp 35-36, as a network of relations between (discursive and non-discursive) positions defined by their situation as regards the structure of distribution of power, be it symbolic or economic.

international convention for the harmonisation of laws and the pressure of global financial practice. However, it is important to stress that the *Fiducie* is not the result of a systemic evolution linked to the "global phenomenon", understood as an all-encompassing evolutionary influence. It is connected to specific and definable national power struggles which largely contribute to globalization.

The first section of the chapter provides an interpretation of "globalization" which draws upon Bourdieu's proposed notion of "fields". Hence, "globalization" is not understood as a systemic phenomenon, resulting from the abstract laws of evolution. Globalization is to be placed in the context of struggles within national fields of juridical and governmental power.

The second section of this chapter establishes a connection between findings of chapters II and III on French juridical discourse, and the changes in the power structure of the juridical field which have been revealed by the troubled and reluctant acceptance of the possible introduction of the *Fiducie.*

The third section of this chapter argues that the epistemological tensions, echoed in the 1992 Bill and discussed in chapters IV and V, as regards the Governmentality of French law, reveal changes in the position of law and lawyers, or at least of a certain type thereof, in the field of governmental power.

SECTION I - THE *FIDUCIE* AND ITS GLOBAL CONTEXTUALISATION

Reference is made in this chapter to the contextualisation rather than the context of the *Fiducie.* The notion of "context" is avoided because it

suggests that globalization is the objective and material setting of current changes and evolution. The view here is that globalization is constituted by and constitutes discursive and non-discursive struggles and competitive conflicts. The "global phenomenon" is not a given state of affairs but is constructed to provide an explanatory context, i.e., to "contextualise" events and experiences. The following developments are based on an analysis of globalization as a power-discourse phenomenon, the elements of which are detailed below. The global contextualisation of the Fiducie takes into account the role of the The 1985 Hague Convention on Trusts (sub-section 1). In different ways, globalization, understood in both phenomenological and discursive terms, offers new opportunities in professional and political struggles at the national level (sub-section 2).

1. The Hague Convention and the Disembedded Trust Model

1.1 The Convention's aims and Strategies

In 1984, 32 states unanimously adopted a draft Convention on the Law Applicable to Trusts and on their Recognition (The Hague Convention). The Convention originates from a proposal put forward by the Permanent Bureau of the the Hague Conference on Private International Law in January 1980. One of the reasons invoked in favour of the Convention relates to European harmonisation . Hence,

"[t]he need for common rules of private international law on this subject is comparatively urgent among the EEC countries, given the fact that the Convention of 9 October 1978 on the accession of Denmark, Ireland and the United Kingdom to the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters presupposes that these countries

all have 'rules of private international law' dealing with the determination of the domicile of a trust".[2]

The specific mission of the Hague Conference, an organization created, in 1893, well before the European Union's beginnings, is precisely "to work for the progressive unification of the rules of private international law".[3] The aim of the 1985 Convention is to ensure the validity and the recognition of the trust in the non-trust countries which will have ratified the International agreement. This does not entail that the trust institution will be introduced into each non-trust country's national legal system. To ensure that trusts are recognised as such, the Convention adds the trust category into non-trust countries' private international law, thus avoiding the re-characterization or assimilation of trusts according to other domestic law categories. The Convention also unifies conflict of law principles, by defining the law which will be applicable to all international trusts in countries which have ratified. It is thus important to stress that the Convention deals only with the choice-of-law apparatus of non-trust countries' international private law.[4]

The declared approach of the Convention has two aspects. It seeks firstly to make the trust an acceptable legal category to all civil law countries, by giving a general explanatory definition of the common law trust. Secondly, it unifies conflict of law rules by establishing that the law applicable to all

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[2] Special Commission on the proposed Convention, report cited by A Dyer, Deputy Secretary General of the Hague Conference on Private International Law, in a paper "Creation and Progress of the Hague Convention on Trusts", presented at the Conference "Hot Topics In the World of Trusts", Nov 1994.

[3] Statute of the permanent Conference, quoted by A Dyer.

[4] For an account of The Hague Convention see D Hayton, "The Hague Convention on the Law Applicable to Trusts and on their Recognition",(1987), 36, International and Comparative Law Quarterly, 260; Gaillard and Trautman, "Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts",(1987), 35, 2, American Journal of Comparative Law, 307; Jauffret-Spinosi "La Convention de la Haye relative à la loi applicable au trust et à sa reconnaissance (1 Juillet 1985)", Clunet, vol. I, 27. For the text of the Convention see Underhill and Hayton, *The Law Relating to Trusts and Trustees,* 15 th ed., Butterworth, London, 1995, pp 939-956; and International Trust Laws, Statutes, 1993, Appendix 50.

international trusts will be the law chosen by the settlor. Moreover, the law chosen by the settlor must be that of a jurisdiction which knows the trust. No recognition of the trust will be imposed where the law chosen by the settlor is that of a non-trust country (article 6), or where the trust has no significant international dimension and is located in a non-trust country (article 13). The settlor is granted a broad freedom to choose the law applicable, but party autonomy is not allowed to entail the imposition of the trust institution in a civil law jurisdiction. It was intended that the ratification of the Convention be independent of the issue whether it is desirable for ratifying countries to have a trust device of their own.[5]

This cautious approach is also reflected in the definition of the trust provided in article 2 of the Convention which seeks to avoid provoking controversy. Indeed, the educational function of the Convention has been emphasised by Dyer, who justifies the convention on the basis that its role is "to show that the trust is not the enemy of the family values or fiscal health of countries making up a large part of the wealth-owning jurisdictions of the world".[6] However, these assumptions are debatable and have have not been accepted by France. Nevertheless, the Convention proposed to overcome skepticism by simply familiarising civil law jurists with the trust, to be explained in terms which are understandable and acceptable to them.

"The Hague Trusts Convention is a first and very important step in building a bridge between the trust and non-trust countries. The progress of the Convention depends on the perceived need to promote tolerance and acceptance of an unknown legal institution, even when its characteristics are out of line with the ownership concepts ...of the countries in question".[7]

Hence, the definition of the trust provided in article 2 of the Convention is a "gateway" definition, which purposefully avoids any reference to the trust's

[5] A Dyer op. cit. note 2.
[6] A Dyer, ibid.
[7] ibid.

equitable-legal division of ownership. The declared aim is to reconcile the trust with the civil law notion of ownership.

"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. ..."(Article 2)

The trust is thus not characterized by its ownership structure but by alternative criteria which give effect to the division of ownership between the trustee and the beneficiary. However, this approach brings the trustee and the trust assets into focus, with little reference to the rights of the beneficiary and the role of the court as regards the control of the trust and the protection of the beneficiary's rights.[8] No reference is made to the fiduciary nature of the relationship between trustee and beneficiary, and the obligations of the trustee have no source.

Article 3 specifies that the "Convention applies only to trusts created voluntarily and evidenced in writing". Although the Convention's claimed aim was to capture the universality and multiple identity of the trust, its application is clearly limited to express trusts - including charitable trusts and purpose trusts. Trusts arising by the operation of law or resulting from a judicial decision are not automatically covered, although it is left open for the ratifying countries to include these in their understanding of the Convention (article 20). Party autonomy principles are applied as regards the law applicable to a

[8] Where the settlor has not expressly designated the law applicable to the trust, the court will decide which law is most closely connecting having regard to a number of factors which concern mainly the trustee and the assets (article 7).

trust. Hence, as with contract, the law governing the trust will depend on the implied or express choice of the settlor (article 9). Although the trust is not categorised as a contract in the given definition, a particular functional model of the trust shapes the convention, one which grants great discretion to the settlor to choose favourable rules. Such discretion is particularly useful in the international business applications of the trust, especially those relying on off-shore havens.

1.2 The Fiducie,the "shapeless trust", and offshore/international trust practice.

It is perhaps no coincidence that the trust model invented for the purposes of the Convention and characterized by its shapeless, almost invisible, ownership structure, is also a suitable representation of the international business trust. D Hayton reminds us that the Convention, besides its general and theoretical aim to unify private international law, aims to provide a practical solution to contemporary problems.

"It is a fact of life that, with the increasing mobility of capital and persons, more and more trust assets, beneficiaries and trustees, are to be found in non-trust States. Currently, different non-trust States deal very differently with trust problems arising in their jurisdictions. ...Inevitably, a common lawyer from a trust State finds it very difficult to predict for a client what may happen if some aspect of a trust comes to involve a non-trust State..Trustees...have particular cause to be concerned over investing in non-trust States since, if they lose control of or diminish the value of the trust assets as a result of detrimentally subjecting them to some foreign law, they may be personally liable for breach of trust. It is in the best interests of States to adopt the Convention and harmonise their approach to trust issues, so...producing greater legal certainty and greater protection for property rights".[9]

The unilateral benefits of the Convention have often been stressed by legal writers, who pointed out that, whereas non-trust countries will have to

[9] Hayton, "The Hague Convention on the Law Applicable to Trusts and on their recognition",op. cit. note 4, at pp 260-261.

modify their laws to recognise the foreign trust, trust countries do not have any reciprocal obligation towards non-trust countries.[10] However, the Convention may also benefit countries which wish to introduce trust-like devices, following the Convention's article 2 blueprint. These new devices, like the French *Fiducie,* are not unproblematically recognisable as trusts, as they do not reproduce the split ownership structure of the trust. These new institutions will have to be recognised as trusts in trust-countries if they fulfil article 2 criteria and despite the lack of division of rights into legal and equitable rights.[11]

Hayton seems to suggest that, despite the apparent unilateral benefit for common law practitioners and their clients in the (almost) world-wide recognition of trust, non-trust countries will derive some benefit from the promotion of certainty and the protection of property rights. According to this author, trustees and other fund managers will be encouraged to invest in the countries, recently "civilised" to the virtues of the trust. However, the influence of offshore trust practices on the Convention's aims and the resulting "shapeless trust" has not been addressed by the drafters or doctrinal writers.

The non-charitable purpose trust is a fine example of recent developments in offshore trust practice.[12] There seem to be converging characteristics between the latter, the Convention's shapeless trust and the *Fiducie.* The trick of the purpose trust is to make beneficial ownership disappear. It does rely on the traditional division of ownership between the trustee and the beneficiary but

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[10] Gaillard and Trautman, op. cit. note 4, Jauffret-Spinosi op. cit. note 4.
[11] ibid.
[12] See Oakley (ed), *Contemporary Trends in Trust Law,* Clarendon Press, Oxford, 1996.

"the characteristic of the true non-charitable purpose trust is that it has no beneficiaries...the property the subject of the trust cannot, in strict law, be said to belong beneficially to *anyone.* Now there are estate-planning exercises and commercial transactions that can make good use of this phenomenon..".[13]

We have noted the Convention's and the 1992 Bill's fuzziness regarding the precise entitlement of the beneficiary. The *Fiducie* altogether avoids any formulation of beneficial ownership. This is probably due to the fact that the beneficiary's rights have no equivalent in French law. However, what is significant is the lack of concern for this missing element. Beneficial ownership was easily sacrificed as the definitional priority focused on the contractual characterisation of the relationship between the *constituant*/settlor and the fiduciary. The perceived importance of this relationship echoes off-shore trust practice and its emphasis on the protection of the settlor's interest and the lack of third party beneficiary.

The definition of the *Fiducie* also focused on the fact that the settlor would create a separate and autonomous fund albeit owned by the fiduciary. As we have seen, the constitution of a separate fund, within the fiduciary's patrimony is inconsistent with the principle of unity of patrimony.[14] The fiduciary's ownership is of course everything but beneficial and is, in strict legal terms, artificial, as a legal subject is only entitled to one patrimony. It could well be argued that the French *Fiducie* is not very different from Quebec's ownerless patrimony.

The offshore purpose trust could be said to epitomise the ownerless fund. The function of this device, as statutorily introduced and regulated in most offshore jurisdictions, is to provide a flexible and autonomous structure for asset management and protection. The autonomy of the purpose trust has

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[13] Matthews in Oakley, ibid. at p 19.

[14] See Chapter II, Section II for an account of why the trust is contrary to the unity of patrimony and Chapter III for an analysis of this principle in terms of the imperative of surveillance in French governmentality.

been furthered by the emergence of a new figure: the Protector.[15] The Protector is chosen by the settlor to oversee the trustee in the running of an offshore purpose trust. Recently, the Protector has become a "super trustee" with wide powers and unaccountable to anyone, especially not to any hypothetical beneficiary, except the settlor. A Protector is particularly useful to organise the moving of the seat of the trust swiftly to another offshore jurisdiction and the changing of the governing law of the trust. The Protector has therefore a central role to play in the global use of trusts. The self-regulating effects of the appointment of a Protector are the following: this figure is to replace the courts as regards the emergency administration of a trust, involving for instance the removal of trustees. Moreover, as the Protector does not seem to be accountable to beneficiaries, his actions are immune from litigation. This excludes the intervention of courts at the further level of protectorship trust management.

This may be a coincidence but the drafters of the 1992 Bill have arguably overestimated the ability of French courts to deal with issues relating to fiduciary administration. According to nineteenth century contractual theory, the principle of freedom of contract requires the non-intervention of the judge in the life of a contract. Thus, traditionally, French judges have not been encouraged to police contractual relations, except where a statute specifically provides for such an intervention. The 1992 Bill envisaged the role of the court in determining the standard of fiduciary duty, or the usual content of a *Fiducie* contract. It seems that, intentionally or not, the drafters had granted prominence to the judge in the life of the *Fiducie*. This contrasts with the non-interventionist ethos of French courts in contractual matters.[16]

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[15] See Waters, "The Protector: New Wine in Old Bottles?", in op. cit. note 12.
[16] See C Witz, "Rapport introductif - Les traits essentiels de la Fiducie et du Trust en Europe", Bulletin Joly, 1991, 9-20.

Some doubts have emerged amongst professionals as to the ability of courts to deal with litigation resulting from the *Fiducie*; so much so that it has been suggested that the *juges de paix*, all unpaid practitioners, be reinstated.[17]

Could it be that, on the basis of current international trust practice, much litigation was not anticipated? Was it simply hoped that the *Fiducie* will, like the purpose trust under protectorship, run itself as autonomously as the settlor wishes? After all the *Fiducie* was to be a contract and should have provided for its own administration - in the French tradition - independently of courts.

The *Fiducie* is a contractual structure. The drafters opted for this qualification in the second draft of the Bill. The reason given was that the *Fiducie* would thereby be clearly distinguished from the trust.[18] This seems to contradict judicial authority, according to which the trust is a contract.[19] However, it was observed by a Luxembourg court that the reason why the trust has been interpreted as a contract by French courts is that the type of trusts involved in conflict of laws litigation are international business trusts, and this type of trust can adequately be described as a contract.[20] Hence, the contractual qualification of the *Fiducie* echoes the French legal conceptualisation of the offshore trust.

This conceptual analysis of the *Fiducie*, as compared to the purpose trust and the shapeless trust supports our argument that the stakes here are the opportunities of local - i.e., French - practitioners to join an international legal elite, with the support of their national law. This particular political stake is

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[17] Decheix, "La Fiducie, mode de transmission de l'entreprise?", Les Petites Affiches, n 56, 1990, 18.

[18] See the discussions of the Bill's Preamble in Chapter I at pp19-22, and of C Witz's rediscovery of the Roman contractual fiducia, in Chapter II at pp 71-72.

[19] Court of Appeal case *Courtois c. de Ganay*, Paris, 10 Janvier 1970, Rev. crit. 1971, 518.

[20] Tribunal de Luxembourg, jugement du 21 Janvier 1971, Rev. crit. 1973, p 51.

reflected in both the Convention's and the Bill's embracing of the only globalisable element of trust law : offshore trust practice.[21]

2. Globalization: A Phenomenology of Instability and Opportunity

"All vogue words tend to share a similar fate: the more experiences they pretend to make transparent, the more they themselves become opaque".[22] It is with this view firmly in mind that the concept of globalization is referred to in this chapter. A narrow definition will be adopted; in this writer's opinion, globalization is not a useful all-encompassing explanatory device, but it cannot be dismissed as pure rhetoric. Although the discursive dimension of globalization is undeniable, its grounding in the reality of social and economic experience should not be overlooked. The globalization discourse(s) is sustained by, and maybe even rooted in, a growing awareness of the interdependence of markets and economies. Although globalization has been applied to many areas of societal experience, it is easier to apply where cross-border mobility is both structurally necessary and technically straightforward and assisted;[23] financial markets are without a doubt globalising, combining technology and high-speed communication, with dematerialised assets floating in cyberspace.

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[21] The 1992 Bill excludes judicially implied trusts and statutory imputed trusts.

[22] Z Bauman, *Globalization The Human Consequences,* Polity Press, Oxford 1998.

[23] See Featherstone, Lash, Robertson (eds), *Global Modernities*, Sage, London,1995, where the cultural dimension of globalization is stressed. See M Waters, *Globalization*, Routledge, London1995, who identifies four main areas where globalization discourses have developed: economics, international relations, cultural studies and environmental studies. See also S Silbey, " 'Let Them Eat Cake': Globalization, Postmodern Colonialism, and the Possibilities of Justice", (1997), 31 Law &Society Review, 1.

2.1 The Fiducie and Global Economic (dis)order

Globalization narratives cluster around various themes, one of the earliest and most decisive being that focused on the triumph of the global market.[24] Even if economic globalization can seem one of the most easily quantifiable and least questionable of all the globalization phenomena theorised about in the past decade, there is still no consensus as to the reality of economic globalization, nor as to the meaning to be given to such a broad notion as the global economy.[25] Purely quantitative criteria are often seen as insufficient.[26] Sometimes, the unique identifiable characteristic of globalization is described as a growing state of structural interdependence between national economies, which thereby tend to form a global economy.[27] The shallowness of globalization theories has been underlined by Hirst and Thompson, who also offer their definitional ideal type of the Global economy, in contrast with the international economy.[28] The most striking feature of a global economy would be the disintegration of national economies into one system through international processes. Such a new economic system would become autonomised and socially disembedded, yet powerfully influential on national social and political organisation. The global socially disembedded markets would be characterised by a systemic interdependence, which would affect the decision-making ability of political agencies. The authors conclude that, according to their definition, the international economy does not fulfil the criteria of a global economy.

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[24] see S Silbey, ibid.

[25] See Higgot and Reich "Intellectual Order for the Global Order: Understanding Non-State Actors and Authority in the Global System", paper given at the Conference on Globalization held at Warwick University in Autumn 1997.

[26] See ibid.

[27] J Dunning (ed), *Governments, Globalization and International Business,* Oxford University Press, Oxford,1997.

[28] *Globalization in Question,* Polity Press, Cambridge ,1996. See Introduction: "Globalization- A necessary myth?".

One type of international market seems to epitomise global economic processes, and to lead the way towards globalization: the virtual world of finance. There is a consensus that it is indeed within the financial sphere that globalization is the most developed. The reasons for the extent of global integration within the financial field have been well illustrated. Capital has become more and more mobile thanks to its fungibility and convertibility into multiple abstract forms. This is an important structural difference from other markets which will remain materially more space-tied.[29]

Financial markets have been more sensitive to globalising technological advances in communication, which have increased the inherent mobility and volatility of capital. P Cerny has described the "dynamics of financial Globalization", stressing the importance of technology as a structural element of financial world markets.[30] Accordingly, he argues that

> "the most important single independent variable in understanding the structural significance of financial globalization is neither the changing political context in which globalization is taking place nor the simple expansion of transnational market processes (and capital mobility) taken in isolation. What is central to understanding financial globalization is the changing infrastructure - especially the technological infrastructure - of the economic-institutional system within which not only financial exchanges but economic processes in general are taking place in the world today".[31]

Due to the abstract nature of finance and thanks to technological advances in telecommunication, trading in financial instruments has become instantaneous, defying space-time localisation. Globalization, understood as space-time contraction, is a structural characteristic of the financial world

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[29] See Bauman who stresses that investors and shareholders are less space-tied than workers, in op. cit. note 22. P Cerny, "The dynamics of financial globalization: Technology, market structure, and policy response", (1994), 27,Policy Sciences, 319.

[30] P Cerny, ibid .

[31] ibid, at p 325. P Cerny's overemphasis of the technological dimension of financial globalization is controversial as it seems to overshadow the power stakes and symbolic dimension of globalization, which, he also stresses, depends on political impetus. The technological dimension is not the only factor but it is particularly important as regards global financial markets.

market. However, markets are not natural systems but institutional structures dependent on political will. Hence, capital mobility is also connected to the deregulation of financial markets since the breakdown of the Bretton Woods system in the early seventies and the extensive implementation of neo-liberal policies in the eighties.[32] Financial globalization is the result of both technological developments and political responses to the economic crises of the 1970s.

The corollary to financial globalization has been identified as the diminished ability for national states to direct domestic economic policy.[33] The volatility of financial markets has had an impact on the stability of national economy, illustrating both the increasing autonomy of the financial sphere from direct regulatory intervention and its great influence on the remaining economic and social contexts. The paradox of financial globalization is on the one hand, its implementation at national policy level, and its disempowering and de-legitimising effect on the Modern National State. Nowhere more than in the financial sphere has globalization become the self-fulfilling prophecy of Neo-liberalism. The power of the quite simple and organisational process of financial globalization is visible in its impact on the rest of the economy, society and the social sciences. Globalization is after all a microcosmic phenomenon which has had repercussions in most fields of human life and understanding. How could the power in world finance be better illustrated?

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[32] See P Cerny, ibid.; Hirst and Thompson op. cit. note 28, and for account of situation in France see CA Michalet in J H Dunning (ed), *Governments, Globalization and International Business,* Oxford University Press, 1997, pp 311-333.

[33] In economic and political economy analyses of globalization, the opposition is often made between the nation- state and global markets, and between Welfare national policies and neo-liberal de-regulation of the world economy. See for instance, the importance of this dialectical tension reflected in the title *States against markets, The Limits of Globalization,* Boyer, Drache (eds), Routledge, London 1996. See also S Gill who opposes neo-liberal and globalising capitalism to State capitalism in *Global Transformation,* Y Sakamoto (ed), UN University Press, Tokyo, 1994.

So what of the trust and *Fiducie* ? The trust device has certainly contributed to financial globalization.[34] Both the Convention, and the later Bill intervene at a point when the volatility of financial markets have engendered a general feeling of instability and legitimisation crisis at the level of national economic and political structures. This diffuse and unspecific experience of instability generates political opportunities for those who have benefited from financial globalization and the spread of global legal structures of financial delocalisation.

2.2 Globalization and opportunities in national fields of power

Dezalay argues that the internationalization of economic and legal relations has raised political and professional stakes at the national level, by creating opportunities for those who have been so far marginalised in their own national field of power, and who are able to benefit from international developments:

" by shaking up the borders of markets and states, it [internationalization] compels the redefinition of these arenas, and more specifically of their interaction; thus it sets off a giant game of musical chairs which is also played on the field of discourse about governance".[35]

Dezalay prefers to refer to internationalization of law and international regulatory competition, rather than globalization. The former allows scope for new strategies in national struggles, for those who have a foot in the international field. International power struggles are played at the national level and the stake is the position of the international elite in the national

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[34] See Oppetit, "Trust dans le droit du commerce international", Revue Critique de Droit International Privé, Doctrine et Chroniques, 1973, 1, where the use of the trust in the context of euro-bond transactions is stressed. See also Oakley (ed), op. cit. note 12.

[35] Y Dezalay, "Between the State, Law, and the Market: The Social and Professional Stakes in the Construction and Definition of a Regulatory Arena", in Mac Cahery, Bratton, Picciotto, Scott (eds), *International Regulatory Competition and Coordination,* Clarendon Press, Oxford, 1996, at p 60.

equilibrium of power. Globalization is used as a rhetoric tool by this emerging international community of experts, to justify professional strategies which should increase their power at the local level.[36] Globalization would legitimise internationalisation strategies which also promote the interests of the new elite at the local level.

Dezalay focuses on internationalization as a social reality which opens up opportunities at the national level. In turn, this process is accelerated and consolidated by the local strategies of the professional elites which benefit the most from the constitution of an international field. Internationalisation, sustained by a globalization rhetoric, is in fact a "localised" process:

"a process of reconstitution of the internal power relationships of professional classes, in which a rising business bourgeoisie has claimed a new privileged position by investing in a new type of professional expertise".[37]

Internationalization is therefore both a random external process and a product of national professional strategies of a new cosmopolitan elite who benefit from a position at the interstices of the national and the international fields, and between the state and the market. However, Dezalay tends to see globalization as the result of the exporting of the American models of economic governance and business lawyering, by and for a dominant (North-American) global elite.[38] This limited perspective seems to be rooted in post-

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[36] Dezalay, "Vers une Sociologie de l'Internationalisation du champ de l'expertise: du marché du droit à la politique du droit", Research Report commissioned by the French Ministry of Justice and published in 1994.

[37] J Mac Cahery, Introduction, in op. cit. note 35. The "internal" relationships are, for Dezalay, French and the type of professional expertise may be new in terms of French legal practice but, on the contrary, traditional in terms of many common law jurisdictions.

[38] This view is stated in op. cit. 36 but also in *Marchands de Droit- La Restructuration de l'ordre juridique international par les multinationales du droit,* Fayard, Paris, 1992.

war fears of American colonization, also and paradoxically reflected in Motulsky's doctrinal rejection of the trust.[39]

Globalization, understood as a set of transformations in the financial sector of the economy, resulting in real and experienced economic instability, opens up the possibility of challenging existing power structures. Globalization offers opportunities regarding, in Dezalay's own terms, the restructuring of French national fields of power.

3. The *Fiducie* in the restructuring of French fields of power

In our view, globalization has roots in social and economic reality. It is more than a mere rhetorical device subsumed under professional strategies of Americanization of French law by a new legal elite. Dezalay's view according to which " '[g]lobalization' offers an excuse or a banner for strategies of symbolic imperialism", through which the American model of lawyering would be imposed, leaves unexplored a further consequence of globalization.[40] Globalization offers specific as well as indeterminate opportunities. The Hague Convention has been seized as an opportunity by a sector of the French legal profession to push for an adaptation of the law to their own professional needs and that of their international clientele.[41] This is part of a more general collective strategy to enhance the position of a new legal elite in the national fields of expertise and regulation. Whether this

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[39] Motulsky's article, discussed in Chapter II, was written in 1948, just after the war, when the reconstruction of Europe depended upon the american funds of the Marshall plan.

[40] Dezalay, op. cit. note 35 at p 80.

[41] See Chapter I, Section I, pp 9-10. The research on behalf of practitioners as regards the *Fiducie* started after the adoption of the Convention and with the 1992 deadline for the ratification in mind.The preamble refers to the necessity to introduce the *Fiducie* before the convention is ratified. However, the ratification does not necessitate the introduction of a trust-like institution. The convention is more likely an opportunity for the introduction of such an institution.

strategy is consciously formulated or the result of a concerted approach is doubtful. It is the result of an emerging *habitus,* that is, an emerging logic of practice adapted to dynamics of the legal field, in which practice is turned toward the survival and promotion of professional interests.[42]

Dezalay identifies two types of political and professional struggles currently occurring in France. The first places agents of political and economic power as opponents in the field of economic regulation. The second and parallel competition is a symbolic conflict of representations regarding the proper means and ends of economic regulation. The agents who, in the latter part of the twentieth century, have dominated the field of power in France are the state technocracy. As a consequence, their instruments and views as to proper government have been paradigmatic: the legislative and administrative regulation of the economy has been the paradigm of economic government in the twentieth century.

However, internationalization - or Globalization - has entailed a restructuring of economies which weakened the position of the Welfare state as an ideal and as an organisation.

" 'palace wars' both nourish and feed off the political battles provoked by a process of internationalization which upsets the revenue redistribution processes established by the welfare state to guarantee social peace. Thus, international competition provides a convenient excuse to justify the elimination of a wide range of regulations or of bureaucratic interventions..".[43]

The important technocratic structure around the French interventionist state has been challenged.

"[T]his state technocracy loses much of its political legitimacy...it is not only a regulatory model which is in crisis, it is also the credibility of those who embody it".[44]

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[42] For a discussion of the notion of *habitus* see Chapter I, Section II, pp 36-38.
[43] See Dezalay, op. cit. note 35, at p 81.
[44] ibid at p 83.

New strategies of government and new types of expertise have come to the fore. They are no longer centred around bureaucratic rule, but are inspired by American legalism and central role of law and the lawyer in the regulatory arena.[45]

Dezalay stresses the two levels of his analysis which address both the competition between experts as producers of rule in the national "field" of state power and in the international "field", and the competition as regards the structures of production and legitimacy of regulation in the field of symbolic power. His argument addresses several other "fields" where professional and political struggles are played out; struggles occur in the field of legal expertise at both national and international levels, but most importantly such turf wars have an impact in the national field of state power, which is embodied as a national regulatory space. It is regrettable that the structure and dynamics of the international legal field is not explained by Dezalay, who simply refers to a "cosmopolitan technostructure".[46]

According to this analysis, the international legal field stems from the interactions between national legal fields and Dezalay does not explore the possibility of global dynamics of legal fields, transcending the existing international dimension of all national legal fields. A strict application of Dezalay's approach to our domain would lead to the argument that the *Fiducie* is the product of the hegemony of one national field - the American - over another - the French - in the international legal arena. However, the *Fiducie* is arguably the product of the "civilisation" of the trust , that is, the processing of the trust in French civilian legal culture's own terms. The power of the epistemic structures of less commercially dominant legal cultures, such as the

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[45] ibid.
[46] po. cit. note 36.

French one, should not be underestimated.[47] The *Fiducie* is not understood in our analysis as the victory of one legal culture over another, but as a hybrid borne out of power struggles at the interstices of national laws.

Dezalay's analysis in terms of fields must be situated with regard to P Bourdieu's own socio-theoretical analysis of French law. Bourdieu addressed law as an empirical object of study in a 1986 article, in which he defined his understanding of the *juridical field.*[48] This field encompasses practices and discourses which result from a specific logic of power, in which the main stake is an official and legitimate exclusive right to state the law. The resource over which a monopoly is claimed is the symbolic power of the legal text. The struggle is played out between two types of agents: the theoretician and the practitioner. For Bourdieu, the the judge is a practitioner as s/he is concerned with the practical application of law. The role of the legal practitioners, which in France is distinct from the judiciary, is not identified. Dezalay's work has broadened Bourdieu's approach to include the practice of lawyers.

The societal significance of the juridical field can only be fully appreciated by exploring its external relationship to other fields, in addition to its internal dynamics. Hence, the object of Bourdieu's suggested analysis is two-fold; the internal struggles within the juridical field on the one hand, and the relation of the juridical field with the field of state power on the other.

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[47] Nor should it be overestimated. Professor P Legrand, for instance, argues that within the European Union, there seems to be a tendency towards the colonisation of the common law tradition through the typically civilian aim of creating a universal law for Europe. The common law would find itself absorbed by the civilian tradition. See paper given at the 1997 SPTL Annual Conference, at Warwick University, "Are Civilians educable?".

[48] "La Force du Droit", Actes de la Recherche en Sciences Sociales, vol 64, 1986, 3. I have translated "champ juridique" as "juridical field" rather than legal field. This is because Bourdieu's analysis defines this particular field as a site of discursive and power struggles in which the stake is the absolute prerogative over the truth of law. The object of the struggle is mainly symbolic and refers to the privileged position of juridical dogmatics and the jurist as the oracle, the truth-teller. This is similar to the dynamics of the juridical discourse, as defined in Chapter II.

Bourdieu's conception of law and the juridical field is almost Austinian and overemphasises the symbolic authority of law as capital. Very little attention is paid to the material or economic role of law. On the other hand, Dezalay seems to focus solely on the economic and political power of law, which seems to have been "commodified". The following interpretation bears these analytical shortcomings in mind. It attempts to connect the symbolic juridical force of law with the material and economic context of turf wars, so well described by Dezalay.

On the bases of Bourdieu's and Dezalay's analyses of the juridical/legal fields, the following describe this writer's own understanding of the fields involved in the emergence of the *Fiducie.* The attempt to adopt the trust in its adapted form as the *Fiducie* illustrates a change in the discursive and power dynamics of the French juridical field. The possibility of such change results from the opportunities opened up by the discursive construction and phenomenological impact of globalization at the local level. We have seen that these opportunities created by globalization are translated at the local level by the possibility to act on the existing structure of the juridical field and and its relation to the field of power. The term juridical should be understood as it was defined in chapter II. As in Bourdieu's definition, the agents of the juridical fields are struggling for the exclusive privilege of stating the law. These agents comprise the academic jurist-logician and the practitioner. This juridical field is in dialectical tension with what Dezalay calls the field of (state) power. For our purposes, the field of power will be identified as the governmental field. Its discursive and power dynamics are those of Governmentality, as defined in chapter IV. It is the arena of confrontations between diverse representations and rationalities of rule, and diverse agents of government.

Section II of this Chapter will locate the *Fiducie* in the current dynamics of the French juridical field, connecting the epistemic force of the juridical discourse of sovereignty to the structure of power of the juridical field. Section III will argue that the *Fiducie* also emerges from a restructuring of the French field of Governmentality in the "context" of globalization.

SECTION II - GLOBAL TRUST IN THE FRENCH JURIDICAL FIELD: THE *FIDUCIE* AND THE CHANGING FACE OF DOCTRINE

The argument here is that the movement from rejection to acceptance of the trust, albeit as the *Fiducie,* results from changes in the French juridical field. Chapter II has explored the epistemic rejection of the trust and its resurrection as the *Fiducie*. This paradoxical movement of rejection and acceptance reflects non-discursive tensions in the French juridical field, that is, tensions opposing agents and their own particular expertise in a particular struggle over symbolic power. The first part of this section defines the double dimension (discursive, and non-discursive) of the juridical field, and the particular internal tensions that the introduction of the *Fiducie* has brought to the fore. The second part explores the continuities and changes the new *Fiducie* seems to point to in this confrontation of the French juridical field with the global trust.

1. From discursive resistance to political overcoming: the *Fiducie* and tensions in the French Juridical field

The fact that the introduction of the trust into French law, even in a modified form, was for so long unthinkable, and that it suddenly became

possible for French doctrine to accept (or at least to attempt to accept) the *Fiducie,* is of significance. This opening up of French legal *connaissances* to the trust may be a detail in contemporary legal history, but it indicates a change or evolution in French law. However, this change does not result from a spontaneous, systemic evolution of French legal knowledge. It is linked to changes in the power of agents of legal expertise. The notion of juridical field, which will be defined in the following developments, enables us to establish the connection between epistemic change and power struggle between experts.

Bourdieu identifies the struggle within the closed universe of the juridical field as a struggle over symbolic power.[49] Symbolic power relies on the intangible force exerted by the legal Text and its icons over those who are captured in the discourse which supports such power. I would suggest that juridical capital relies on the symbolic and discursive power of law as truth, whereas legal capital is less discursively based and incorporates a vision of law as instrument and practical resource. The existence of different types of juridical/legal capital is recognised by Bourdieu, although the types are not defined by him; the social/cultural capital of practitioners is distinguished from that of the professors. Bourdieu also identifies the commercial stakes involved in the constitution of a juridical field which results from the establishment of a monopoly situation of legal experts over the production and commercialisation of legal services. The overall respective weight of legal formalism and legal pragmatism in a legal culture will depend on the relative status in the juridical/legal field of the legal doctrine, as a body of agents, as compared to that of the practitioners.

Dezalay's understanding of the legal/juridical field is much more focused on the role of legal experts as private sector professional lawyers. It

[49] Bourdieu, op. cit. note 48.

seems that the notion of *"legal"* field is more appropriate to Dezalay's interest in the role of the legal profession in the overall societal organisation of economic governance.[50]

It is argued here that professional legal expertise is becoming an increasingly valuable social capital, opening doors of private economic power structures as well as those of public governance. The struggle is less over law's means of "legitimate symbolic violence" - as Bourdieu would put it [51] - than over strategic positions of material power. However, securing a position in the field of power depends also on symbolic production, that is, in the constitution of representations wielding symbolic power

The French field of law, where different types of legal expertise and experts struggle and compete for a dominant position, is more juridical than legal. This is well illustrated in the "internal" debates about the trust and its necessary processing into the *Fiducie;* the ascendancy of doctrinal principles in the rejection of the trust and in the formulation of the *Fiducie* have been highlighted in Chapter II. The epistemological components of French law are dominated by the mytho-logical role of doctrine, as a body of works and men.[52]

The mytho-logical dimension of the French juridical field is supported by other legal experts such as judges and professional lawyers. Indeed, it is essential to the legitimacy of law, in which all lawyers need to invest. However, as the debate about the *Fiducie* shows, there is a tension between the doctrinal need to maintain the symbolic power of legal coherence and self-sufficiency, and the more materially based practical knowledge of experts. The

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[50] At least in Dezalay's previously cited works, notes 35 and 36. See also, Dezalay, Garth "Law, Lawyers and Social Capital: 'Rule of Law' versus Relational Capitalism", Social and Legal Studies, vol 6 (1), 1997, 109-141.

[51] Bourdieu op. cit., note 48.

[52] On French legal doctrine see Jamin, Jestaz, "The entity of French doctrine: some thoughts on the community of French legal writers", (1998), 18, 4, Legal Studies, 415.

resistance to change, the conservative character of legal knowledge is a necessary and logical aspect of the nature of the symbolic power in which law is inscribed. Doctrine, as men and knowledge, has invested in the immutability of law. On the other hand, legal practice, as men and knowledge, has based its legitimacy on its responsiveness to the changing needs of the wider society. On the one hand, the trust was rejected for as long as the doctrinal arguments remained unchallenged. The increasing weight of international legal practice in the French juridical field has allowed the slow and progressive questioning of the dogmatic rejection of the trust. The constitution of the *Fiducie* as a possible object of legal knowledge and as a possible element of French law results from a change in the division of legal labour.

Empirical research supports the view according to which practical knowledge is gaining unprecedented importance in the dynamics of the French juridical field; practice and practitioners have gained symbolic authority with the development of a new relationship between law professors and business law firms.[53] The *Fiducie*, it is argued, illustrates this evolution. The importance of convergent research by various professional organisations of legal, financial and business experts, and by young academics - particularly with the work of C Witz - has been stressed elsewhere.[54] This phenomenon fits into a wider trend regarding the production of knowledge in the area of commercial law.

Bancaud and Dezalay's empirical study argues that the internationalization of law has undermined the traditional model of production of commercial law doctrine, which was based on a rigid division of tasks

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[53] P Jestaz, "Déclin de la Doctrine?", Droits, 1994, 20, 85. Bancaud, Dezalay, "Des 'Grands Prêtres' du droit au marché de l'expertise juridique - Transformations morphologiques et recomposition du champ des producteurs de doctrine en droit des affaires", Revue Politiques et Management Public, vol 12, n 2, Juin 94, 203.

[54] The work of Witz was acclaimed by professional research in the late 80s by private business associations and the Council of Notaries. See Chapter I, Section I.

between professionals and academics. The latter formed a body of full-time and permanent professors who prided themselves in their autonomy from the world of practice. They traditionally dominated the production of legal knowledge.The emergence of a new breed of qualified professors-lawyers, *"avocats-agrégés"*, is illustrative of a structural transformation in the field of producers of doctrine, i.e. what we have called the juridical field.[55]

The authors show that big international law firms are currently investing in the training of lawyers as well as in legal research and publication. They also recruit young professors who combine their university (mainly teaching) duties with in-house production of legal research oriented toward international legal practice. This has an impact on the type of legal research being produced as well as as the structures of legitimisation of law. There are fewer theoretical works on fundamental and timeless legal concepts, and more short and technical texts on the latest legal innovations. Doctrinal work tends to become more obsolete. According to the authors, this has an impact on the grounding of the authority of legal knowledge, which is increasingly assessed on the basis of its relevance to business practice.

This state of affairs stands in stark contrast with the traditional view of the incompatibility between legal practice and academic knowledge in the French University system. Bancaud and Dezalay stress that it was usual for a candidate to a lectureship in law at the prestigious Parisian universities to give up any involvement in legal practice.[56] In fact, they gave up involvement in "bread and butter" cases but would ensure a doctrinal input in landmark cases. The autonomy from practice was never a reality. Renowned professors have

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[55] In France, it is possible to become a professor very early on in one's academic career through the *agrégation*, which is a state-run and nation-wide competition selecting new professors solely on their academic skills and knowledge, quite independently of publications and administrative management achievements.
[56] op. cit. note 53 at p 208.

always had contacts in the business arena. These contacts were concretised by consultancy work. The *consultation*, an argued opinion on a specific legal issue, was expensively sold by academic lawyers. This was a way of trading legal authority and symbolic power. The price for such abstract values depended on the reputation in the juridical field of the professor concerned.

Such a cohesive and self-regulated doctrinal body has long been undermined, particularly in the late 60s with the reform of the hierarchical and disciplinary university structure.The monopoly of university professors over doctrinal production is long gone. The constitution of a new breed of lawyers-professors attached to big business firms confirms this trend and exacerbates the struggle to recover a dominant position in the juridical field. However, Bancaud and Dezalay believe that the traditional "keepers of the temple" and privileged places of production of doctrinal knowledge have been definitively marginalised. The connection through *avocats-agrégés* of juridical/doctrinal legal knowledge with the world of (international) legal practice is the illustration, the result and the means of a reconstruction upon different bases of "the networks of information and power which ground doctrinal authority".[57]

There is no empirical evidence of the role of *avocats-agrégés* in the genesis of the *Fiducie*. However, this new institution illustrates the unprecedented status and influence of international legal practice. The latter has gained more symbolic authority as practitioners have become more involved in the production of doctrinal knowledge receptive to legal practice. The *Fiducie's* very existence is linked to the fact that practical legal knowledge has acquired a better status and a greater role in the juridical field's division of labour .

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[57] op. cit. note 48.

2. Reembedding Trust: (Dis)continuities in the mytho-logical labour of law

The notion of division of legal labour was posited by Bourdieu in his 1986 article and pursued by Dezalay. Bourdieu identifies on the one hand a monopoly of lawyers over the work of interpretation of the Legal Text, and on the other, a division between theoretical interpretation and practical adaptation. This division corresponds to a symbolic struggle between two types of interpreters, who embody different interests and approaches. There is, however, a functional complementarity between these two types of interpretation; theoretical interpretation ensures the legitimacy of law represented as an autonomous system of formal rationality; practical interpretation, understood by Bourdieu as the result of judicial activity, ensures that law is adapted to reality and changing circumstances. However, the legal effect of law in practice is :

"the result of a symbolic struggle between professionals with unequal social and technical abilities who are therefore unable to use legal resources in an equal way".[58]

The meaning and legal effect of a given rule at a given time reflect a particular configuration of power relations between legal experts and professionals, as well as between the clients they represent. Hence, the content and impact of a legal rule are by-products of professional struggles regarding legal/juridical capital. Such struggles no doubt echo client conflicts over economic and symbolic capital.[59] As an illustration of Bourdieu's point, it could be argued for instance that the potency of the doctrinal rejection of the

[58] Bourdieu, op. cit. note 48, at p 9, (my translation).
[59] See Chapter I, note 54 for definition of capital.

trust illustrates the dominant position of the orthodox jurist in the division of legal labour, and the relative weakness of international business and professional interests in the fields of power and law. This perspective will be further refined by looking at Dezalay's analysis.

Dezalay's chosen focus is on the production of legal expertise, which consists of two categories of knowledge: academic knowledge or traditional doctrinal knowledge and the practical expertise of business lawyers. Dezalay observes a "revolution" in the French division of legal labour with a restructuring of doctrinal work around the activity of the biggest and/or most prestigious business law firms.[60] The impact of the Anglo-American model of legal education and the emerging importance of practical legal knowledge, because of its direct involvement in regulation, are highlighted. The importation of such a model into French legal organisation is the result of the creation of a new class of international business lawyers who trained in France and in the US and who have realised the professional advantages that would result from recreating a structure similar to that of the Anglo-American lawyer's rule. Dezalay notices a fundamental change in the ways in which doctrinal authority is supported by new networks of information and power. Doctrinal knowledge is not totally marginalised or instrumentalised. There is still a mutual dependency between doctrine and legal practice:

"By investing in academic law, the big law firms secure their position in the location where the law's Policy is defined. At the same time, for the academics who have lost their privileged relationship with the field of power...., this coming together with new centres of power such as big international law firms represents a second chance to build on different bases, information and power networks founding doctrinal authority".[61]

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[60] Dezalay, op. cit. note 36, at pp 42-46, see above discussion.

[61] ibid., at p 46, (my translation). I translated "la politique du droit" as "law's Policy". The term policy should not be understood as a set of identifiable goals of intervention. It is used in the sense of a rather abstract political problematic.

The emergence of the *Fiducie* illustrates this change in the dynamics of the division of legal labour. It could even be argued that one of the causes of the attempt to introduce this new device is the outcome of a struggle to reinforce the power of practitioners in the juridical field - although the main stake is in the field of economic power, as will be argued next. The legitimacy of the new *Fiducie* has been established in doctrinal terms thanks to the emerging interaction between doctrine and business practice, as identified by Dezalay and described above. The process of "reembedding" the trust into the French legal system was partly successful because it confirms and feeds off current changes as regards the division of labour in the juridical field and the growing importance of international legal practice. Paradoxically, the limits of the "revolution" in the French juridical field are also made clear with the unchanging value given to mytho-logical legal function.

The reference to the reembedding is borrowed from Giddens' analysis of globalization as " the 'lifting out' [disembedding] of social relations from local contexts of interaction and their restructuring [reembedding] across indefinite spans of time-space".[62] Expert systems constitute one of the two main disembedding mechanisms identified by Giddens.

The trust, through its diverse applications in international business and financial transactions, can be said to have been 'disembedded'. Indeed, the very usefulness of the trust in the contemporary context lies in the fact that its basic conceptual fragmentation of rights allows, and always has allowed, the restructuring of ownership across time and space. The global use of trust exploits these two intangible resources of time and space, by lifting out ownership from its national (fiscal) context. The trust operates a "disembedding" of ownership relations and is also itself a disembedded

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[62] A Giddens, *The Consequences of Modernity,* 1990, Polity Press,Cambridge, at p 21.

institution: A particular model of the trust has been adopted as a global instrument in numerous off-shore jurisdictions. These jurisdictions have not adopted Equity's trust as it has grown out of the common law tradition, but the globalisable features of the disembedded trust.

The Hague Convention has formalised and formulated the disembedded trust in its definition of a 'universal' and minimalist trust. The construction of the *Fiducie* is a process of reembedding of the shapeless, global trust. This process has a discursive dimension, that is, the epistemic processing of the shapeless trust in French law's mytho-logical terms; the trust must be modified and formulated according to the requirements of epistemic legitimacy of French law.[63] The non-discursive dimension of this process of reembedding is the anchoring of trust as a system of expertise by generating trust in legal experts. The *Fiducie*'s aim is also to channel trust in the *fiduciaire*'s legal expertise by institutionalising trust and setting up a system of legally protected and controlled relations. Legal safeguards are provided against the risk of trusting. French law is called in to facilitate the operation of a legal device by providing legal guarantees of the trustworthiness of the experts involved. The beneficial by-product of reembedding the trust is a consecration of the function of legal experts involved in fiduciary management.

The reembedding of the trust was unsuccessful and our hypothesis is that this failure is due to the loss of a fundamental advantage for international trust practice: the division of ownership and its possible dissemination across borders and time. Before beneficial ownership can be made to disappear for business and fiscal purposes, it seems that, paradoxically, it must exist as a legal concept. The disembedding of the trust and its reembedding in French

[63] See discussion in Chapters II and III.

juridical soil was fatal to this concept. Without beneficial ownership, the *Fiducie* cannot compete with the trust in the global market for legal services.

On the basis of Dezalay's work, it has been argued here that the *Fiducie* is the product of international field battles; it is a stake in struggles for influence in the national and international legal arenas. The "naturalization" of the trust would have provided a tool for French lawyers to compete in the international area, but also to reinforce their role in enhancing the position of French law; the latter would have been brought up to date, through the introduction of the *Fiducie* which would have also validated French law's fundamental epistemic mechanisms.

Indeed, the attempted reembedding of the trust required an investment in the mytho-logical power of law. The legitimating function and symbolic power of law were thus consolidated. The investment of legal practice in the area of doctrinal and legislative work of validation illustrates a "re-legalization", a "restoration of the rule of law" which entails a valorisation of preexisting epistemic functions of legitimisation.[64] This is evidenced in the case of the *Fiducie* by the importance attributed to the notion of absolute ownership, the need to establish a genealogical link with Roman law and the reassertion of nineteenth century principles.

Legitimisation remains an important function of the labour of law; this function has not been totally "privatised" and remains closely connected to the workings of the state. It has been observed that "French doctrine remains a power allied to Power, which gives form and life to the creation of the latter...".[65] The "Power" referred to is that of the state and its administrative machinery. The mytho-logical work of doctrine, whether accomplished by

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[64] See Dezalay op. cit. note 35. "To sell legal services, they [legal experts] are indeed forced to invest in the legitimacy of law", at p 84.
[65] op. cit. note 52 at p 428.

academic jurists or business lawyers, is harnessed to a certain conception and form of Power: that of the State. The increasing influence of private and transnational economic interests that business lawyers may try to represent, has not yet undermined the mythical figure of the State in French law.[66]

SECTION III- THE *FIDUCIE* AND THE RESTRUCTURING OF THE FIELD OF GOVERNMENTALITY

One of the issues identified by Bourdieu in his attempt to define a sociological approach is the problem of the position of the juridical field as regards the field of power. It is related to the issue of the power of juridical capital. Bourdieu does not define precisely the agents and logic of the field of power. Dezalay, on the other hand, has specifically focused on the relation of legal experts with State "technocrats", the latter being identified as the main players in the French field of economic government and regulation.[67]

This analysis in terms of field will be supplemented by Foucault's conceptual innovations regarding Governmentality. This notion has been explored in Chapters IV and V. As previously seen, Governmentality crystallises both discursive and non-discursive aspects of government as a form of power. As such it can be interpreted as a field, as understood by Bourdieu, where symbolic representations and agents of power compete. The juridical/legal field interacts with the field of Governmentality. Its position in

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[66] The "Sociologie Juridique du Patrimoine", a 1995 report commissioned by the Justice Department as part od the on-going work on the *Fiducie,* highlights the attachment of practitioners to doctrinal principles and their reluctance as regards the trust, Legal education in France is the main way through which the mythology of law is perpetuated and incorporated in the habitus of the practitioners who will remain quite powerless to challenge the mytho-logical power of doctrine. See discussion on the principle of unity of patrimony in Chapter IV, Section II.

[67] op. cit. note 35.

the exercise of government as power is dependent on the outcome of two types of interconnected struggles.

Firstly, the power struggles between lawyers and other agents of government, of which the *Fiducie* is symptomatic, and the respective technologies of government they support are examined. The prevalence of a technology, and of its "technicians", depends on establishing the representations and symbolic constructions upon which this technology is built as paradigmatic. The second battle is thus one of representations and it will be asked whether the *Fiducie* signifies the victory of a certain technology and its accompanying societal model.

1. The *Fiducie*, the Globalization myth and competing representations of social spaces

As argued in the last section of the previous chapter, the notion of globalization, although not specifically invoked, underlies the "policy" reasons behind the 1992 Bill on the *Fiducie*.[68] Globalization, as understood by the promoters of the Bill, is not an entirely new notion as it seems to resurrect the nineteenth century Liberal vision of Civil Society. As such, it does not incur the risk of rejection as a transplant from a foreign, newer body of knowledge. By this is meant that the notion of globalization is comparable to the traditional liberal construct of Civil Society and thus, is less likely than a completely novel and culturally alien concept, to be rejected. The notion of globalization is connected to the political culture which forms the backbone of French legal *savoir*. However, it also is greatly influenced by economic and

[68] A N. 2583. In the Preamble, it is said that there is a need for the *Fiducie* because of the internationalisation of economic life; the opening up of borders has entailed a drain on French business with the delocalisation of numerous activities. Chapter I, Section I.

financial representations of reality. This shows the growing importance in the juridical field of a body of legal *connaissances* based on practice and extremely sensitive to financial and economic rhetoric. As the notion of field allows us to argue, the increasing influence of the mythology of globalization in the field of French Governmentality reflects the expanding role of business lawyers in the struggle for the power of government in France.

In one of the reports drafted by a sociological research unit and commissioned by the French Ministry of Justice as part of the process of drafting the 1992 Bill, it was argued that French law was slowly being colonised by financial and management culture.[69] The *Fiducie* is a response to a demand based on an instrumental vision of law, according to which law's legitimacy does not depend on its consistency as a system of self-sufficient rules, but on its adequacy as a set of flexible instruments adapted to the needs of reality. To the financial expert, this reality is globalization and the challenges it sets to the inventive financial mind. Indeed, "the financial expert would probably dream of a world without legal regulation, open only to his imagination and only submitted to a deontology of which he would be the master and expert".[70] According to its legitimisation in policy terms, the *Fiducie* fits the bill. As seen in previous chapters, it is aimed to provide a light-weight framework for an institution to be shaped through its practical application. One of the three main conceptual axes of the Bill are the legal guarantees relating to the vaguely defined function of the *fiduciaire.* The Bill seems to rely on the deontological self-regulation of the fiduciary function. It thus grants the financial wish by validating a certain vision of law, which is itself based on a certain vision of society. Such a vision has recently been dominated by the globalization myth.

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[69] op. cit. note 66.

[70] ibid at p 94 (my translation).

The myth of globalization is a counter-perspective, a negative ideal, one which implicitly stands against a paradigmatic representation of society. The economic discourse of globalization presupposes a society which transcends the limits of the modern, territorially defined political and economic unit of the State-governed society. The privileges of globalization lie in mobility, "and mobility means the ability to escape and evade".[71] What is being evaded? National legal orders and their territorial confines. The *Fiducie* fits into this logic of evasion, as the reaction of the fiscal administration demonstrates. It allows the possibility to exploit off-shore centres which are themselves organised as a negative mirror image of onshore markets's regulatory restrictions.

The international and national legal orders are not contradictory but mutually constitutive. Hirst and Thompson describe the process in the following way:

"The rise of the modern state, as a territorially specific and politically dominant power, ...[has] depended in part on *international agreements.* The doctrine of the 'sovereignty' of states in the new international law and the mutual recognition of their internal powers and rights by European states thus played a central part in the creation of a new relationship between power and territory, one of exclusive possession".[72]

The original impetus for this international constitution of the Modern State was the 1648 Treaty of Westphalia, which was the first international recognition of national sovereignty. Globalization stands in contrast to the interdependent national and international legal constitution of state sovereignty. It constitutes an anti-state ideal which is better anchored in economic and market narrative, and which, nonetheless, is colonising French legal discourse.

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[71] Z Bauman, op. cit. note 22, at p 125.
[72] Chapter 8, op. cit. note 28, at p172.

This discursive tension is echoed in a competitive relation in the French field of Governmentality between the State technocracy and the emerging international and stateless epistemic community of business lawyers. The mythical figure of the state is challenged as the established state technocrats have to face the growing influence and legitimacy as lawyers as brokers of rules and technologies of government.

2. The *Fiducie* or the victory of liberal legalism and business lawyers in the French field of Governmentality?

Dezalay has demonstrated the connection between the international restructuring of economies and the opportunity for the marginalised legal professionals to regain lost ground in the field of national governance.[73] This process of "recomposition of ruling elites" at the local level is accompanied by changes in legitimating representations of society, as seen previously, and an evolution as to the respective weight of technologies of economic government. The latter constitute a central stake in the epistemic and power struggles between technocrats and a new international legal elite.[74] The *Fiducie*, it is argued, can be understood in terms of such a struggle, although there is no clear victory of one technique or one type of agent over the others.

Dezalay observes that in France and in most European countries, the triumph of the Welfare State in the aftermath of the second world war has confirmed the traditional marginalisation of lawyers in the area of economic governance.[75] Moreover, this lack of power in politics also meant a loss of

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[73] op. cit., notes 35 and 36.

[74] Dezalay mentions the report of the European Working Group on Corporate Professionals, which highlighted that the competition between professionals is played mainly in the area of the reworking of national and international regulatory institutions and instruments, op. cit. note 36 at p 14.

[75] op. cit. note 35, pp 69-76.

influence in the area of private business as the role of intermediary between the State and the private sphere was no longer held by lawyers but by a State technocracy.

The ideology of neutrality which shapes the self-imagery of the French legal profession - traditionally, the Bar - is rooted in the post-revolutionary social composition and practice of this body of experts. This ideology underlies the intention to establish a clear distance between the world of law and that of business.

"Rejected by their peers, the lawyers who became interested in the business world had no option but to join it officially by themselves becoming 'men of affairs'...they acted as intermediaries in commercial transactions which they helped to 'put into legal form' but they remained rejects from the world who were largely responsible for the the rise of the processes of self-regulation 'in the shadow of the law' ".[76]

The French legal field is therefore historically marked by its marginalisation from the field of economic and business power.

The economic field was placed in the hands of a trained administrative elite. This state technocracy was constituted and trained independently from the world of lawyers, and was destined to strengthen the hold of the state on the economy and civil society. At the end of the nineteenth century,

"the creation of the Free School of Political Sciences (1872) demonstrates that the most intellectual and dynamic layers of the ruling class also are keeping remote from a world of law...".[77]

The constitution of a 'state bourgeoisie' through the the elitist training of the intellectual and urbane bourgeoisie into 'government professionals' was intended to be the opposite of the corporatism and doctrinal traditionalism of legal studies and career. However, the legitimacy of this emerging state aristocracy was being built on the juridical model. Law maintained its

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[76] ibid at p 73, (S. Picciotto's translation).
[77] ibid.

legitimating function despite these transformations in the juridical field and in the field of governmental power. This state technocracy's power and influence is ensured through its intermediate position between law, administration and business - or civil society.

"French-style planning perfectly illustrates this close interaction between the state and the economy where the legitimacy of the state nobility depends on its ability to handle the technological advances which underpin social progress".[78]

The singularity of French economic government reflects indeed the domination of a State technocracy in the field of Governmentality. The role of the state in economic management is deep-rooted and finds its origins in the seventeenth century.

Indeed, the hold of the of the state on economic management has been characterised as "Colbertist", because of its historical roots in this seventeenth century royal minister's policies. Michalet has summarised the Colbertist approach as follows:

"The Colbertist conception assigns a preeminent role to the state in the formulation and implementation of industrial policy...The French model fits quite well with the 'hierarchical-capitalism' type...what makes the French case so special is that in the areas of economics, industry and finance effective power is in the hands of an élite produced by the competitions held by the upper-echelon administration and the engineering schools. Technocrats head the major departments of the ministries, which is what they were recruited for, but they are also in charge of the large enterprises and the major banks".[79]

The contemporary position of the state technocracy has to be understood in the context of nearly 30 post-war years of striving for economic self-sufficiency through state planning. During this time, the state technocracy was a legitimate guarantor of economic stability and a main player in the field of government and economic power. But from the early eighties, the situation

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[78] ibid, p 75.

[79] C-A Michalet in *Governments, Globalization and International Business*, Chapter 10, in op. cit. note 27. The following developments are based on Michalet's views.

evolved to reveal a weakening of the paradigmatic model of government and of its elite.

From the 1960s to the early eighties, French economic policy was characterised by a general strategy of independence and the will to build a self-reliant economy through a productivist approach sustained by a strong national industrial system. Export performance was less important than controlling external constraints and maintaining monetary stability. Hence, foreign investment was viewed with suspicion and French investment abroad was discouraged.

Economic policy objectives were assigned to the State and a large public sector, large industrial projects and a high level of public spending were the main policy tools. "The industrial priority reflected the concerns of the technocratic élite, keen to secure independence...".[80] The model of economic government which dominated during this period echoed the strategies of professional power of the ruling élite of the time. The threat to this model, entailed by the growing necessity for the French economy to open up, represented also a threat to the structure of power within the field of Governmentality.

The current period, which started in 1982, a year after the socialist F Mitterrand's electoral victory, is characterised by a

"weakening of the economic role of the state....evident at two levels: first, in the economic orthodoxy adopted from mid-1982 onwards, which no longer tolerated the state interventionism that had characterized the previous period; and, secondly, in a shift in industrial initiative from the state to business as a consequence of the great upsurge of French investment abroad and the increased presence of foreign enterprises".[81]

A (neo)liberal model was to be preferred to the Colbertist tradition, as a result of the increasing importance of French investment abroad and the

[80] ibid, at p 315.
[81] ibid, at p 320.

associated need to attract foreign investment. In 1992, the year of the Bill, French investment abroad reached 18 percent of the world total. In the same year an official document was published advertising "Seven Reasons to Invest in France". Economic liberalization was thus a well-established promotional vehicle. There seems to be a long-lasting change in the structure of French government as "[s]uccessive governments, regardless of their ideological orientation, repeat that there is only one possible economic policy".[82]

The weakening of this French model of capitalism has also entailed a weakening of the technocratic élite on which the legitimacy, performance and very functioning of the Colbertist style of government relied. It is difficult to determine which one of these two phenomena came first, or whether one caused the other. There is no doubt that the two are interconnected. The challenge to the model of government and to its ruling élite within the field of Governmentality is rooted in international or global phenomena and its weakening of national structures of power. It allows emerging international élites, who have a foot in both the international field constituted by international business, and in the French national field of Governmentality, to seize the opportunity to challenge from within existing structures of power. Thus, the Colbertist model of government, with its reliance on bureaucratic rule, has been challenged by liberal legalism, advocated by a new legal élite supporting and supported by the needs of international business.

The experts involved in this recomposition of the French field of governmental power bring with them institutions and technologies with which they identify and "which they have helped to produce, and which define their means of intervention and their status in the power hierarchies".[83] The *Fiducie*

[82] ibid., at p 331.
[83] Dezalay, op. cit., note 35 at p 77.

is such an institution, caught in the competition between technologies of power in the context of opportunities created by globalization.

This chapter's purpose has been to demonstrate how the discursive phenomena linked to the problematic translation of the trust into the *Fiducie* (described in Chapters II and III, and IV and V), are connected to power struggles in the French juridical field, themselves directly implicated in changes in the French field of governmental power. The *Fiducie* is not simply the expression of a systemic adaptation of French law and legal knowledge to global change. It is the symptomatic outcome of the emergence of a new elite of lawyers who has exploited the opportunities triggered by the discursive and non-discursive development of globalization. However the introduction of the *Fiducie* was so problematic that the 1992 Bill failed, leaving a number of questions open as regards the real winners of the battles described above. Why this should have been the outcome is considered further in the Conclusion.

CONCLUSION
EPILOGUE OR EPITAPH?

It is hoped that this study has contributed to an understanding of French legal culture's epistemic processes and their social milieus, through the specific angle of its confrontation with the common law (and global) trust; the result of this confrontation was the 1992 Bill's *Fiducie*. The *Fiducie* crystallises a moment of change in the conflictual discursive and power dynamics of French legal culture. These dynamics are two-fold.

In the first place, the *Fiducie* illustrates the necessity for practical legal knowledge to combat doctrinal resistance against the trust. But this struggle must be conducted according to the rules of the juridical discourse of sovereignty. The trust must be reformulated into a new institution which fits into the mythology of the juridical discourse of sovereignty. Absolute ownership is an important figure in this mythology and cannot be dismissed or disregarded. Its symbolic power is such that the *Fiducie* could be envisaged only if it did not reproduce the dual ownership structure of the trust. Strict law conceptualisations of ownership were both an obstacle against and a means to the establishment of a new form of knowledge stemming from international legal practice. The epistemic tension described above echoes the struggle between "the Keepers of the Temple" and the "Merchants of law", as Dezalay would put it, for the ultimate authority and legitimacy of law's "symbolic violence". With the *Fiducie*, the stake was the acceptance by French legal culture of an instrument which would allow the emerging French international legal elite to compete in the global legal arena and gain more economic power. This goal was not achieved and the weight of doctrinal orthodoxy still seems

overwhelming. But the emerging economic power linked to international legal practice has an impact on doctrinal production.

Dezalay observes:

"To rekindle with the merchants, and become (again) the great brokers of the business world, the 'high priests of the law' must accept a radical questioning of their ideals and modes of functioning which goes well beyond mere textual refurbishment".[1]

Paradoxically, the *Fiducie* seems to reinforce the ascendancy of the juridical discourse of sovereignty but it also indicates that the pressures from a new legal elite and their knowledge cannot be and are not ignored. There is a will to accommodate this new knowledge which may lead to deep changes within the juridical discourse of sovereignty.

Changes in the juridical/legal field are therefore connected to the second level of power/knowledge dynamics, that is, those of Governmentality. Indeed, it is because the international legal elite is gaining power in the field of economic government, which we have called the field of Governmentality, that the terms according to which the "Temple" of law must be guarded are changing. It has been argued that the rejection of the trust and the regulation of the *Fiducie*, particularly regarding its fiscal aspect, were both heavily influenced by the imperative of surveillance in French legal culture. Fragmentation and concealment of ownership were not allowed by the 1992 Bill which seemed to reflect a bureaucratic impulse to firmly place any potential *Fiducie* user into a grid of visibility. However, the *Fiducie* also reflected a contradictory tension towards a more liberal problematic. Indeed, the *Fiducie* sought to provide a minimalistic framework for the recognition and organisation of a new area of transactional freedom. As a whole, the Bill reflected the liberal doubt about the possibility of economic sovereignty, in

[1] Dezalay, *Marchands de Droit*, Fayard, Paris, 1992, at p 19, (my translation).

particular as regards its overall rationale based on the discourse of globalization, just emerging at the time. Indeed, the introduction of the *Fiducie* was justified on the basis of the changing needs of the legal profession in the face of the internationalisation of the economy and the competition with other jurisdictions for legal business. But the power of such argumentation only reflects and consolidates that of those it benefits: the international legal experts.

The *Fiducie* fits into the liberal legalist rhetoric which favours technologies of government wielded by experts such as fund managers. It was intended to be a new contractual structure, offering new opportunities for businesses wishing to avoid the rigidities of the regulations governing corporations. It would have gone beyond the avoidance of bureaucratic constraints by allowing contractual self-regulation. It would have been more like a contract for the provision of a service, than one for the transfer of ownership.[2] As such, it would have put the *fiduciaire*, likely to be a lawyer with extensive commercial and financial experience, at the forefront of the fund management activity. The latter is likely to become the most profitable and stable activity of developed economies.

In many ways, the *Fiducie* illustrates the emerging power in the governmental field, as well as in the juridical/legal field, of a new epistemic community of business lawyers. It also highlights the limits of such emergence. Indeed, the Bill failed. This failure seems to signal the complex nature of the struggles involving legal entrepreneurs, technocrats and professors. Moreover, it may be that these agents at times work together rather than against each other.

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[2] Bénabent, "La Fiducie-Analyse d'un projet de loi lacunaire", JCP (N), 26, 1993, 275.

The reason for the failure of the 1992 Bill can be attributed to its fiscal regulation as well as to the fact that it lacked the dual ownership of trust. Without this and the possibilities of fragmentation and concealment it entails, the *Fiducie* cannot compete with the trust; indeed, this division of rights is functionally essential to the international/offshore applications of the trust. We have argued that it is in the perspective of such competition and of the rewards it entails for the emerging international elite, that the Bill was introduced. Why, within this perspective was the Bill unsuccessful? Two possible responses, which are not mutually exclusive, can be envisaged.

First, the Bill was unsuccessful as it did not manage to reproduce the trust. In turn, this could be explained by the fact that the emerging international elite in question does not benefit from an esprit de corps which would enable it to mobilise itself and act in a concerted fashion when an opportunity, such as the *Fiducie*, arises. The latter's chequered history seems to demonstrate that the emerging cosmopolitan legal elite in France does not as yet form a collective entity bound together by a defined and established *habitus* which could sustain a strategy of collective and professional self-promotion. The impact of legal studies on the *habitus* of French lawyers remains considerable. Indeed, the ascendancy of doctrinal principles such as absolute ownership demonstrates the hold of legal mythology on legal practice and practitioners.

It may be then, and it is the second proposed reason for the failure of the Bill, that this legal mythology needs to change from "within", abandoning absolute ownership as an ideal, rather than compromising the very functioning of myth by allowing it to be ignored or violated. This fundamental modification within legal mythology would have to be performed by those with sufficient discursive authority within the epistemic tradition, but with

also a stake in such change. The *avocat-agrégé* with one foot in academia and the other in practice, would be the right type of agent to influence legal mythology in favour of legal practice. Indeed, one such *avocat-agrégé* has, in a seemingly orthodox thesis, proposed to challenge absolute ownership with the concept of economic ownership; this concept could "contribute to the enriching and even the renewal of the [French] jurists's vision of property rights".[3]

G Blanluet observes that "the notion of economic ownership is starting to emerge in French private law and particularly in tax law".[4] This new concept is defined as:

"the relation of a legal subject to an asset of which he is not legally the owner; this relation, in the first place, results from a contract between this subject and the legal owner, and in the second place, grants him exclusive beneficial rights as regards the totality of the economic substance of the asset".[5]

This new notion of economic ownership is described as a general conceptual tool intended to reflect the reality of various legal situations, including that of the beneficiary of the *Fiducie*. Thus, French legal doctrine is starting to formulate the notion of beneficial ownership necessary to the introduction of an effective *Fiducie*. This is a sure sign that "high priests", described by Dezalay, are more than ever willing to accept a radical questioning of the ideal of absolute ownership and pave the way for a successful reception of the trust's divided ownership structure.

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[3] G Blanluet, *Essai sur la notion de propriété économique en droit privé français, Recherches au confluent du droit fiscal et du droit civil,* Thesis, Paris II, 1998. Extract of the abstract,(my translation).

[4] ibid.

[5] ibid., (my translation).

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APPENDIX

EXPOSÉ DES MOTIFS

MESDAMES, MESSIEURS,

Le code civil ne connaît pas d'institution analogue au «trust» des pays de droit anglo-américain qui permette à une personne, le constituant, de transférer la propriété de biens lui appartenant à un «trustee», avec mission de les administrer, non dans l'intérêt propre de ce trustee mais dans celui de bénéficiaires désignés à l'acte. La particularité essentielle de ce mécanisme est que les biens mis en trust constituent une forme de patrimoine d'affectation, insaisissable par les créanciers personnels du trustee comme par ceux du constituant. Certains pays de tradition romano-germanique, la République fédérale d'Allemagne, le Luxembourg, la Suisse notamment, parviennent à un résultat voisin avec la pratique, consacrée soit par la jurisprudence, soit par la loi, des contrats fiduciaires.

L'internationalisation de la vie économique a conduit les praticiens du droit français à se familiariser avec cette pratique et à en apprécier l'utilité, dans la vie des affaires comme dans la gestion et la transmission de patrimoines privés.

L'ouverture des frontières peut cependant faire craindre une délocalisation des opérations économiques vers des pays plus attrayants d'un point de vue fiscal comme d'un point de vue juridique. Au cours de ces dernières années, en effet, on a pu constater que les entreprises françaises, lorsque le besoin s'en faisait sentir, n'hésitaient pas à utiliser le mécanisme du trust, en effectuant, en toute légalité, leurs opérations juridiques dans des Etats connaissant l'institution.

La pratique du trust est aujourd'hui d'une utilisation si fréquente qu'une «convention internationale sur les effets internationaux des trusts et leur reconnaissance» a été élaborée dans le cadre de la conférence de La Haye et ouverte à la ratification le 25 juillet 1985.

La France, soucieuse notamment de mieux résoudre les problèmes de droit international privé qui se posent lorsque les juridictions françaises sont confrontées à un trust comportant un élément français, a participé à l'élaboration de cette convention et l'a signée. A ce jour, cette convention a été ratifiée par trois Etats, le Royaume-Uni, l'Italie et l'Australie, et est entrée en vigueur entre eux le 1er janvier 1992. L'autorisation de la ratifier ne pourra être demandée au Parlement que lorsque notre droit positif se sera effectivement enrichi de l'introduction du contrat de fiducie.

Le projet de loi se compose de quatre chapitres, consacrés respectivement aux dispositions générales, aux dispositions comptables, aux dispositions fiscales et à des dispositions diverses.

Chapitre premier - Dispositions générales

Le chapitre premier du projet formera au livre troisième du code civil relatif «aux différentes manières dont on acquiert la propriété» un titre XVI *bis* intitulé «De la fiducie». Il fixe les règles de base applicables à tous les contrats de fiducie, quel qu'en soit l'objet. La fiducie est définie comme «un contrat par lequel un constituant transfère tout ou partie de ses biens et droits à un fiduciaire, à charge pour celui-ci d'agir, dans un but déterminé, au profit de bénéficiaires. Le constituant peut être bénéficiaire».

Le projet ne précise que les particularités propres de ce contrat qui sera, s'il n'en est disposé autrement, soumis aux principes généraux du droit des obligations. La fiducie doit en effet s'intégrer dans l'ordre juridique préexistant, dont elle ne saurait bouleverser la cohérence.

I - Les parties

Le contrat de fiducie est passé entre un constituant et un fiduciaire. Le ou les bénéficiaires du contrat ne sont pas parties à celui-ci. Il est admis que le constituant peut faire une fiducie à son profit et être par conséquent le bénéficiaire.

En ce qui concerne les bénéficiaires, le contrat peut les désigner de façon précise ou prévoir seulement les règles de leur désignation. Lorsqu'il s'agit d'une fiducie ayant pour objet la transmission de biens ou droits à des bénéficiaires autres que le constituant, l'indication de ces bénéficiaires, au moment de la signature du contrat ou ultérieurement, ne peut plus être modifiée par le constituant. Il est indifférent que ces bénéficiaires aient ou non accepté la transmission décidée en leur faveur. Cette règle, qui devrait permettre d'identifier plus aisément le redevable de l'impôt, se justifie par le fait que les biens transmis sortent définitivement du patrimoine du constituant dès la signature du contrat.

Le fiduciaire, pivot de l'institution, peut être une personne physique ou une personne morale. Il ne doit pas avoir subi certaines condamnations pénales ou disciplinaires, qui feraient suspecter sa capacité à gérer des biens pour le compte d'autrui ou qui seraient incompatibles avec la confiance que le constituant place en lui. Cette confiance exige que le fiduciaire exerce personnellement sa mission, sous réserve d'une faculté de délégation pour des tâches ponctuelles à des personnes placées sous son autorité. Le mot fiducie, dérivé du mot latin *fides* - qui signifie la confiance comme le mot anglais *trust* - rappelle que la confiance nécessaire entre les contractants est inhérente à ce contrat.

Enfin, si les activités que le fiduciaire est appelé à exercer en cette qualité sont réglementées, le fiduciaire est soumis à cette réglementation.

Elles sont au nombre de six et concernent :

1° L'indication des biens et droits transférés.

A cet égard, il convient de préciser que la fiducie ne transfère pas une universalité avec une masse active et une masse passive mais seulement des actifs.

2° La mission du fiduciaire et l'étendue de ses pouvoirs.

La mission du fiduciaire constitue la cause du contrat, son mobile en quelque sorte. Cette mission pourra être de conserver les biens à titre de garantie, d'agir au mieux des intérêts pécuniaires d'un mineur, de procéder dans les meilleurs conditions à la transmission de l'entreprise confiée en fiducie.

La définition de la mission, terme souvent repris dans le projet (articles 2064, 2070), permettra au juge d'apprécier plus commodément la responsabilité du fiduciaire en vérifiant que les actes qu'il accomplit sont bien conformes à cette mission.

Quant à l'étendue des pouvoirs du fiduciaire, elle devra être précisée dans le contrat puisqu'elle est laissée à la liberté des parties.

3° La désignation des bénéficiaires ou les règles de leur désignation.

Le fiduciaire, bien que propriétaire, gère les biens transférés non pas dans son intérêt mais dans celui des bénéficiaires. Il est donc nécessaire que le contrat permette d'identifier ces bénéficiaires.

4° Le sort des biens à l'issue du contrat.

Il s'agit d'une information essentielle, ne serait-ce que pour l'application du dispositif fiscal, qui prévoit un régime différencié, en matière de droits d'enregistrement, selon que les biens reviennent au constituant en fin de contrat ou sont attribués à des tiers bénéficiaires.

5° La durée, limitée à 99 ans.

En droit anglais, le trust ne peut excéder 80 ans ou la durée de vie de l'une des personnes mentionnées à l'acte, à laquelle on ajoutera 21 ans après son décès. L'idée est qu'il ne faut pas favoriser le gel des patrimoines pendant une durée qui excéderait deux générations.

6° La forme du contrat.

Le contrat est passé par écrit. S'agissant d'une opération complexe, la preuve en est ainsi plus aisément rapportée. De plus, lorsque la fiducie est conclue à des fins de transmission à titre gratuit, le contrat doit être passé en la forme authentique.

III - L'objet du contrat

L'objet du contrat est un transfert de biens ou droits, accompagné d'une mission de gestion ou d'administration définie dans le contrat. Les biens transférés vont former un «patrimoine séparé», distinct du patrimoine personnel du fiduciaire. Les biens ne pourront être saisis ni par les créanciers du constituant, ni par ceux, personnels, du fiduciaire. Il s'agit donc d'un patrimoine d'affectation. C'est l'originalité essentielle de ce nouveau contrat qui peut être conclu aux fins les plus diverses, regroupées généralement autour de trois fonctions, celles de gestion, de sûreté et de libéralités.

C'est sans doute en matière de gestion ou de sûreté que les utilisations les plus nombreuses sont attendues. Le recours à la fiducie permettra bien souvent d'éviter de recourir à des institutions juridiques plus formalistes ou à des montages complexes et fragiles.

Elle constituera un cadre juridique adapté à des opérations, telles le portage ou la mise en pension de titres, qui n'ont pas à ce jour reçu de définition légale.

IV - Protection des créanciers

Le projet ne prévoit pas de publicité spécifique au contrat de fiducie. Pour les biens dont la mutation est soumise à publicité, celle-ci se fera selon le droit commun au nom du fiduciaire ès-qualités. Celui-ci est réputé, vis-à-vis des tiers de bonne foi, disposer des pouvoirs les plus étendus sur les biens transférés.

Les créanciers du constituant qui seraient lésés par le transfert en fiducie des biens de leur débiteur pourront recourir à l'action paulienne de l'article 1167 du code civil qui, selon la jurisprudence de la Cour de cassation favorable à la victime de la fraude, n'exige pas que le créancier apporte la preuve de la mauvaise foi de son débiteur. Ils pourront également faire annuler le contrat lorsqu'il aura été passé pendant la période qui sépare la date de la cessation des paiements de celle de l'ouverture d'une procédure collective. L'article 107 de la loi du 25 janvier 1985 relative au redressement et à la liquidation judiciaires des entreprises est aménagé pour faciliter le succès de cette action.

V - Protection des héritiers réservataires

La fiducie trouvera dans le domaine de la transmission du patrimoine à titre gratuit de nombreuses occasions de s'appliquer.

Un constituant pourra, par exemple, prévoir qu'à compter de son décès un de ses biens sera affecté au service d'une rente à son conjoint survivant. La fiducie pourra également être utilisée en matière de transmission d'entreprise dans le cas où le dirigeant qui souhaite se décharger de la gestion de celle-ci ignore quel sera l'héritier le plus apte à reprendre.

Afin d'offrir une plus grande souplesse en ce domaine, le projet de loi permet de subordonner les effets de la fiducie au décès du constituant. Ce faisant, le texte déroge expressément à trois principes énoncés par le code civil : interdiction des donations à cause de mort (article 893 du code civil), des substitutions (article 896 du code civil) et des pactes sur successions futures (article 1130 du code civil).

Toutefois, dans ce domaine comme dans les autres, la fiducie ne saurait constituer un instrument à l'effet de contourner les règles d'ordre public : la fiducie s'insère donc dans le droit des successions et des libéralités sans en modifier l'ordonnancement. C'est pourquoi le projet de loi prévoit que la fiducie ne peut en aucun cas porter atteinte aux droits des héritiers réservataires.

En conséquence, ces derniers pourront, dès lors que le contrat de fiducie porterait atteinte à la réserve, agir en réduction afin d'être remplis de leurs droits. Cette action pourra tendre à reconstituer la réserve face à des libéralités qui pourraient l'entamer. Tel pourrait être le cas lorsque le contrat de fiducie a pour objet la transmission de biens ou droits à titre gratuit ou lorsqu'il est conclu à des fins de gestion et que les biens n'ont vocation à réintégrer le patrimoine successsoral qu'en fin de contrat.

Quelques aménagements ont néanmoins été nécessaires pour tenir compte du caractère triangulaire de la fiducie, qui n'opère pas de transfert immédiat de biens au bénéficiaire.

Ainsi, le défendeur à l'action en réduction intentée par les réservataires sera le bénéficiaire du contrat de fiducie lorsque le contrat aura opéré transmission des biens et droits à son profit, ou le fiduciaire si cette transmission n'a pas encore eu lieu ou en cas de fiducie gestion.

De même, le texte a prévu les modalités d'application des articles concernant le calcul de la réserve et de la quotité disponible (article 922 du code civil) et la réduction des libéralités (article 925 du code civil) s'agissant de la fiducie.

Toujours dans le souci d'écarter toute atteinte aux droits des héritiers réservataires, le texte a choisi de ne pas déroger au principe général selon lequel la réduction se fait en nature.

Néanmoins, une dérogation à cette règle est prévue lorsque le contrat de fiducie porte sur le transfert à un fiduciaire d'une entreprise individuelle à caractère industriel, commercial, artisanal, agricole ou libéral, ou de parts ou actions de société ayant l'un de ces objets. Cette exception vise à faciliter la transmission des entreprises, laquelle se trouverait fortement compromise par l'action des héritiers réservataires si ceux-ci pouvaient demander la réintégration dans l'actif successoral de l'entreprise elle-même et non simplement d'un droit de créance représentatif de la valeur de celle-ci.

VI - Contrôle juridictionnel

Des droits concurrents sur un même patrimoine fiduciaire conduisent à organiser, en cas de conflit, un arbitrage entre eux. Cet arbitrage ne peut être à l'évidence que juridictionnel.

1° Responsabilité du fiduciaire.

Ainsi, en cas de manquements graves du fiduciaire à ses devoirs, le juge pourra être saisi par les bénéficiaires ou le constituant. Le projet lui donne le pouvoir de :

- désigner un administrateur provisoire ;

- remplacer le fiduciaire ;

- mettre fin à la fiducie.

Il faut noter que le texte prévoit une incrimination pénale spécifique, qui vise l'usage contraire à l'intérêt des bénéficiaires ou à des fins personnelles, par un fiduciaire de mauvaise foi, des biens transmis en fiducie.

2° Modification et fin du contrat.

Le projet renvoie aux articles 900-1 à 900-8 du code civil afin de permettre au juge de modifier le contrat lorsque l'exécution de celui-ci serait rendue difficile ou impossible par suite d'un changement de circonstances.

Outre la survenance du terme ou la réalisation du but poursuivi, le contrat pourra prendre fin par décision de justice pour les motifs mentionnés à l'article 2072 du projet, par exemple décès ou liquidation judiciaire du fiduciaire.

Cette fin de la fiducie est cependant supplétive de la volonté des parties, le contrat pouvant prévoir les conditions de sa poursuite. En outre, à la demande du constituant ou du bénéficiaire, le juge pourra prendre toute mesure permettant la poursuite du contrat.

Chapitre II - Dispositions comptables

Le mécanisme du transfert fiduciaire doit être accompagné de règles qui en assurent la transparence : pour la sécurité des tiers comme pour celle des bénéficiaires, il doit être possible de «suivre» les biens et d'apprécier les opérations que génère leur gestion.

Ainsi, le principe est posé que tous les fiduciaires devront établir, pour chaque contrat de fiducie, deux états : le premier décrivant les biens et droits transférés ainsi que les créances et les dettes liées à l'exécution du contrat, le second les produits et les charges afférents à ce contrat.

Le bénéficiaire pourra obtenir la communication de ces états sur simple demande.

Lorsque le bénéficiaire sera, pour une autre activité, soumis aux obligations comptables prévues par les articles 8 et suivants du code de commerce, les états fiduciaires seront compris dans ses comptes annuels. Des règles sont par ailleurs définies pour assurer la transparence de la fiducie conclue à des fins de gestion.

Chapitre III - Dispositions fiscales

L'introduction en droit français de la fiducie implique la définition de son régime fiscal. La stricte application de règles fiscales de droit commun aurait été un frein au développement de l'institution mais la fiducie ne doit pas non plus être un mécanisme favorisant l'évasion fiscale.

Les dispositions fiscales sont donc guidées par le souci de placer les opérations fiduciaires dans une situation fiscale aussi proche que possible de celle des opérations comparables.

La section 1 définit le régime applicable en matière de droits d'enregistrement. Lorsque le contrat prévoit la transmission des actifs mis en fiducie à une personne désignée autre que le constituant, les droits de mutation sont perçus immédiatement selon le barème applicable en fonction du lien de parenté du constituant et de la personne à laquelle les biens sont transmis. Les droits de mutation sont alors dus par le fiduciaire.

Lorsqu'aucun bénéficiaire n'est désigné, le contrat de fiducie n'entraîne pas de perception de droits. Mais dans cette hypothèse, les biens mis en fiducie font partie de la succession du constituant.

L'impôt de solidarité sur la fortune est dû soit par le bénéficiaire désigné de la fiducie, soit par le constituant. Toutefois, lorsque la fiducie opère une transmission et que le bénéficiaire n'est pas né ou nommément désigné, l'I.S.F. est dû par le fiduciaire au taux le plus élevé.

L'enregistrement d'un acte ou d'une déclaration constatant la formation d'une fiducie se fait moyennant la perception d'un droit fixe de 5 000 F.

La section 2 concerne les impôts directs. L'objectif de neutralité fiscale de la fiducie a conduit à retenir le principe selon lequel les résultats de la fiducie sont compris dans le revenu ou le résultat imposable de la personne bénéficiaire.

Mais, lorsque la fiducie se fait au profit du constituant ou de son foyer fiscal parce qu'il a droit au retour des biens transférés, parce que ces derniers sont consommés à son profit, ou qu'il a des pouvoirs importants sur la fiducie, son résultat est imposable entre les mains du constituant.

Dans l'hypothèse où aucun bénéficiaire n'est en vie ou constitué, le fiduciaire est imposable à l'impôt sur le revenu au taux maximum.

Les résultats de la fiducie sont déterminés et imposés selon les règles applicables à la nature de l'activité afférente aux biens ou droits en fiducie. Toutefois, lorsque le bénéficiaire est une entreprise, le résultat est déterminé selon les règles appliquées à l'entreprise (I.S., B.I.C., B.N.C., B.A.).

Lorsqu'une entreprise constituante est imposable, la plus-value ou la moins-value constatée lors du transfert des biens en fiducie n'est pas comprise dans le résultat imposable.

La rémunération du fiduciaire est imposable dans la catégorie des bénéfices industriels et commerciaux selon un régime de bénéfice réel.

La section 3 concerne la taxe sur la valeur ajoutée. Pour l'application de cet impôt, il est pleinement tenu compte des conséquences du transfert de propriété. Le fiduciaire est donc regardé comme l'exploitant du bien, éventuellement imposable à ce titre. En outre, le fiduciaire est considéré comme un prestataire de services imposable sur sa rémunération. Des précisions sont apportées sur le cas particulier des opérations portant sur des immeubles.

La section 4 précise que la taxe professionnelle, lorsqu'elle est due au titre d'une activité mise en fiducie, est acquittée par le fiduciaire, chaque fiducie faisant l'objet d'une imposition autonome. L'activité de fiduciaire est par ailleurs assujettie à la taxe professionnelle.

La section 5 traite de diverses dispositions à caractère fiscal.

Les fiducies sûretés entraînent la perception des impôts et taxes qui seraient dus en cas de cession à titre onéreux.

Les règles applicables en matière fiscale à la fiducie s'appliquent aux trusts selon les règles de territorialité prévues au code des impôts.

Les règles de recouvrement de l'impôt et notamment celles relatives à la solidarité entre le fiduciaire et le constituant sont précisées afin que la fiducie ne puisse permettre de faciliter des organisations d'insolvabilité.

Il est créé une sanction spécifique à l'encontre du fiduciaire qui aura contrevenu aux obligations déclaratives lui incombant.

Par ailleurs, pour permettre l'action de contrôle et de recouvrement de l'administration, le fiduciaire domicilié à l'étranger devra faire accréditer un représentant fiscal en France, tenu aux mêmes obligations et passible des mêmes sanctions.

Chapitre IV - Dispositions diverses

L'introduction du contrat de fiducie implique de modifier un certain nombre de textes pour éviter que cette institution soit utilisée à l'effet de contourner des réglementations d'ordre public.

I - Les articles du code civil, ci-dessous énumérés, sont complétés par l'adjonction des «transferts fiduciaires» aux opérations de disposition qui y sont mentionnées :

- l'article 220-1, qui concerne l'interdiction faite par le juge à un époux de faire des actes de disposition sur ses biens propres ou sur les biens communs ;

- l'article 389-5, qui concerne l'interdiction faite aux parents de disposer des biens d'un enfant mineur sans l'autorisation du juge des tutelles ;

- l'article 457, relatif aux actes que le tuteur ne peut faire sans autorisation du conseil de famille ;

- les articles 1422 et 1424, relatifs aux actes que les époux ne peuvent faire l'un sans l'autre sur les biens de la communauté ;

- les articles 1432 et 1540, relatifs au mandat tacite entre époux qui ne couvre pas les actes de disposition.

II - La loi n° 84-46 du 24 janvier 1984 est complétée pour éviter que le contrat de fiducie ne soit utilisé par des entreprises pour effectuer des opérations que seuls les établissements bancaires sont autorisés à réaliser. Ainsi les fonds reçus par le fiduciaire pour son activité propre sont assimilés à des fonds reçus du public.

III - La loi du 2 août 1989 a introduit en droit français la notion d'action de concert, qui sera présumée en cas d'accord conclu entre actionnaires, dirigeants ou sociétés cotées, en vue d'une action commune. Les conséquences attachées à cette présomption sont importantes puisqu'elles font peser sur les parties à l'action de concert l'obligation, notamment, de faire les déclarations de franchissement de seuil ou de déclencher une O.P.A.

Un contrat de fiducie pourrait permettre d'éluder ces obligations ; aussi la présomption s'appliquera-t-elle au fiduciaire, et au bénéficiaire lorsque ce dernier sera également le constituant.

D'une manière générale, la fiducie devrait être largement utilisée dans les opérations bancaires, financières et boursières. Il va de soi que la réglementation qui existe en ces domaines s'appliquera *ipso facto* en cas d'utilisation du contrat de fiducie, celui-ci ne pouvant déroger aux règles d'ordre public. Un balayage des textes existants en ces matières sera cependant nécessaire pour réduire autant que faire se peut les incertitudes d'interprétation.

IV - Enfin plusieurs dispositions de nature fiscale doivent être adaptées pour tenir compte de l'introduction de la fiducie :

- l'article 750 *ter* du code général des impôts est complété pour préciser les règles de territorialité des droits de mutation à titre gratuit pour les fiducies et trusts ;

- à l'article 762 du code général des impôts, le barème de l'usufruit est modifié en ce qui concerne l'usufruit à durée fixe. La valeur est désormais égale à un dixième de la propriété entière par période de cinq ans (au lieu de deux dixièmes par période de dix ans);

- les articles 784, 795, 1726 *bis* et 1649 A du code général des impôts sont modifiés pour tenir compte de l'introduction de la fiducie en droit français ;

- enfin plusieurs articles du livre des procédures fiscales précisent les conséquences de l'autonomie de la masse fiduciaire au regard du droit de contrôle de l'administration. Ils ont pour objet d'adapter les principes de droit commun (identification et accès aux comptes, droit de communication, droit de vérification, garanties des contribuables...) à la spécificité des opérations fiduciaires.

PROJET DE LOI

Le Premier ministre,

Sur le rapport du garde des sceaux, ministre de la justice,

Vu l'article 39 de la Constitution,

Décrète :

Le présent projet de loi instituant la fiducie, délibéré en Conseil des ministres après avis du Conseil d'Etat, sera présenté à l'Assemblée nationale par le garde des sceaux, ministre de la justice, qui est chargé d'en exposer les motifs et d'en soutenir la discussion.

Chapitre premier

Dispositions générales

Article premier

Il est inséré dans le livre troisième du code civil un titre seizième *bis* intitulé «De la fiducie» et comprenant les articles 2062 à 2070-11 rédigés ainsi qu'il suit :

«*TITRE XVI* BIS

«*DE LA FIDUCIE*

«*Art. 2062.* – La fiducie est un contrat par lequel un constituant transfère tout ou partie de ses biens et droits à un fiduciaire qui, tenant ces biens et droits séparés de son patrimoine personnel, agit dans un but déterminé au profit d'un ou plusieurs bénéficiaires conformément aux stipulations du contrat.

«Le constituant peut être bénéficiaire.

«Lorsque la fiducie est conclue à des fins de garantie, le fiduciaire peut être le bénéficiaire dans les conditions fixées au contrat.

«La fiducie est soumise aux règles ci-après énoncées sans préjudice des dispositions particulières d'ordre public propres à la matière concernée.

«*Art. 2063.* - Le contrat de fiducie doit comporter à peine de nullité les stipulations suivantes :

«1° il détermine les biens et droits qui en sont l'objet ;

«2° il définit la mission du fiduciaire, ainsi que l'étendue de ses pouvoirs d'administration et de disposition ;

«3° il désigne les bénéficiaires ou fixe les règles de leur désignation ;

«4° il indique les conditions dans lesquelles les biens et droits doivent être représentés ou transmis aux bénéficiaires ;

«5° il détermine la durée de la fiducie, qui ne peut excéder quatre-vingt-dix-neuf ans à compter de la date du contrat.

«Le contrat de fiducie est passé par écrit. Lorsqu'il est conclu à des fins de transmission à titre gratuit il est, à peine de nullité, passé devant notaire.

«La fiducie doit être expresse.

«*Art. 2064.* - Lorsque le contrat de fiducie a pour objet la transmission de biens et droits à un ou des bénéficiaires autres que le constituant, la désignation de ce ou ces bénéficiaires ne peut être modifiée.

«*Art. 2065.* - Si le contrat de fiducie conclu à des fins de garantie n'en a pas disposé autrement, la valeur du bien transféré au fiduciaire doit, en cas de défaillance du débiteur, être déterminée à dire d'expert, sauf s'il s'agit de sommes d'argent, de créances, de valeurs mobilières ou de contrats cotés sur un marché organisé.

«*Art. 2066.* - Nul ne peut être fiduciaire ou dirigeant d'une personne morale fiduciaire, s'il a été l'objet d'une mesure d'interdiction de diriger, gérer ou contrôler une entreprise ou d'une mesure de faillite personnelle, ou s'il a subi une condamnation pénale ou une sanction professionnelle pour des faits contraires à l'honneur, à la probité ou aux bonnes moeurs.

«*Art. 2067.* - Le fiduciaire doit exécuter personnellement sa mission. Toutefois, il peut déléguer l'accomplissement de certains actes à une personne restant sous son contrôle et sa responsabilité.

«*Art. 2068.* - Dans ses rapports avec les tiers, le fiduciaire est réputé disposer des pouvoirs les plus étendus sur les biens et droits objet du contrat, à moins qu'il ne soit démontré que les tiers avaient connaissance de la limitation de ses pouvoirs.

«*Art. 2069.* - Le fiduciaire doit prendre toutes mesures propres à éviter la confusion des biens et droits transférés ainsi que des dettes s'y rapportant, soit avec ses biens personnels, soit avec d'autres biens fiduciaires.

«Sans préjudice des droits des créanciers du constituant titulaires d'un droit de suite attaché à une sûreté publiée antérieurement au contrat de fiducie et hors le cas de fraude aux droits des créanciers du constituant, les biens transférés au fiduciaire ne peuvent être saisis que par les titulaires de créances nées de la conservation ou de la gestion de ces biens par le fiduciaire.

«*Art. 2070.* - Lorsque la fiducie porte sur des droits et biens dont la mutation est soumise à publicité, celle-ci doit mentionner le nom du fiduciaire ès-qualités.

«*Art. 2070-1.* - Le fiduciaire exerce sa mission dans le respect de la confiance du constituant.

«Si le fiduciaire manque gravement à ses devoirs ou met en péril les intérêts qui lui sont confiés, le constituant ou les bénéficiaires peuvent demander en justice la nomination d'un administrateur provisoire ou le remplacement du fiduciaire. Ils peuvent également demander qu'il soit mis fin à la fiducie. La décision judiciaire faisant droit à la demande emporte de plein droit le dessaisissement du fiduciaire.

«Les dispositions de l'alinéa précédent sont applicables en cas de violation des dispositions de l'article 2066.

«*Art. 2070-2.* - En cas de décès du fiduciaire, les biens et droits objet de la fiducie ne font pas partie de sa succession. En cas de dissolution d'une personne morale fiduciaire, les biens et droits objet de la fiducie ne font pas partie de l'actif partageable ou transmissible à titre universel.

«*Art. 2070-3.* - La fiducie ne peut porter atteinte aux droits des héritiers réservataires. Si, lors du décès du constituant, la valeur des biens et droits transférés au fiduciaire excède la quotité disponible, la fiducie est réductible suivant les règles applicables aux donations entre vifs, sous les particularités prévues aux articles 2070-5, 2070-7 et 2070-8.

«*Art. 2070-4.* - La valeur des biens et droits transférés au fiduciaire s'impute sur la réserve ou sur la quotité disponible de la succession du constituant selon les distinctions opérées aux articles 864 et 865.

«*Art. 2070-5.* - L'action en réduction est exercée contre le bénéficiaire lorsque les biens et droits lui ont été transmis et contre le fiduciaire dans le cas contraire.

«Lorsque le contrat de fiducie porte sur une entreprise à caractère industriel, commercial, artisanal, agricole ou libéral ou sur la majorité des parts ou actions d'une société ayant l'un de ces objets, la réduction peut toujours être faite en valeur.

«*Art. 2070-6.* - Lorsque le contrat de fiducie prévoit la transmission de biens et droits à titre gratuit au bénéficiaire, il peut être stipulé, par dérogation aux articles 893, 896 et 1130, que la transmission prendra effet au décès du constituant.

«*Art. 2070-7.* - Pour l'application de l'article 922, il est tenu compte, après en avoir déduit les dettes, de la valeur et de l'état des biens fiduciaires au jour du décès du constituant s'ils n'ont pas été transmis au bénéficiaire. Pour les biens transmis au bénéficiaire, il est tenu compte de leur état au jour de cette transmission et de leur valeur au jour du décès du constituant. Si les biens ont été aliénés par le bénéficiaire, il est tenu compte de leur valeur à l'époque de l'aliénation et, s'il y a eu subrogation, de la valeur des nouveaux biens au jour du décès du constituant.

«*Art. 2070.8.* - Pour l'application de l'article 923, il est tenu compte, pour les biens transmis au bénéficiaire, de la date à laquelle la désignation de ces derniers ne peut plus être modifiée et de la date du décès du constituant pour les biens non encore transmis aux bénéficiaires.

«*Art. 2070-9.* - Le fiduciaire peut demander la révocation ou la révision du contrat de fiducie dans les conditions des articles 900-1 à 900-8.

«*Art. 2070-10.* - La fiducie prend fin par la survenance du terme fixé ou la réalisation du but poursuivi, quand celle-ci a lieu avant ce terme.

«La fiducie prend également fin par une décision de justice, lorsque en l'absence de stipulations prévoyant les conditions dans lesquelles le contrat se poursuivra, se produit l'un des événements ci-après :

«1° la renonciation de la totalité des bénéficiaires ;

«2° le décès du fiduciaire ;

«3° la liquidation judiciaire du fiduciaire ;

«4° la dissolution de la personne morale fiduciaire, le contrat pouvant cependant se poursuivre jusqu'à la clôture des opérations de liquidation ;

«5° la disparition de la personne morale fiduciaire, par suite d'une absorption ou d'une cession prononcée dans le cadre d'un redressement ou d'une liquidation judiciaire.

«Toutefois dans les cas prévus à l'alinéa précédent, le juge peut, à la demande du constituant ou du bénéficiaire, prendre toutes mesures permettant la poursuite du contrat.

«*Art. 2070-11.* - Lorsque la fiducie prend fin, et en l'absence de bénéficiaires pour quelque cause que ce soit, les biens et droits subsistants font retour au constituant ou à ses ayants cause.»

Chapitre II

Dispositions comptables

Art. 2.

Le fiduciaire établit pour chaque contrat de fiducie :

1° un état des biens et droits ainsi que des créances et des dettes, concernant l'exécution du contrat. Cet état décrit séparément les éléments actifs et passifs de la masse fiduciaire ;

2° un état des produits et des charges afférents au contrat de fiducie sans qu'il soit tenu compte de leur date d'encaissement ou de paiement. Cet état fait apparaître, par différence après déduction des amortissements et des provisions, le résultat de la masse fiduciaire.

Ces états sont établis conformément aux règles définies par les articles 9 et suivants du code du commerce, pour le bilan et le compte de résultat.

Il ne peut être procédé à aucune réévaluation des éléments de la masse fiduciaire.

Art. 3.

Les états prévus ci-dessus sont communiqués au bénéficiaire à sa demande.

Art. 4.

Lorsque le fiduciaire est soumis aux dispositions des articles 8 et suivants du code de commerce, ses comptes annuels comprennent, outre le bilan, le compte de résultat et l'annexe prévus à ces articles, les états mentionnés à l'article 2 ci-dessus.

Le fiduciaire procède de manière autonome à l'enregistrement comptable des mouvements affectant la masse fiduciaire.

Art. 5.

Les personnes qui exécutent à titre habituel des missions fiduciaires sont soumises aux dispositions des articles 8 et suivants du code de commerce.

Art. 6.

Lorsque le constituant est soumis aux dispositions des articles 8 et suivants du code de commerce et que le contrat prévoit que les biens et droits lui font retour ou sont consommés dans son intérêt, il constate une créance à l'égard du fiduciaire lors du transfert des biens et droits à celui-ci. Le bilan fait apparaître distinctement, à la date du transfert, la valeur brute de la créance, égale à la valeur que les biens et droits avaient à l'origine ou après réévaluation, et les amortissements et provisions de toute nature afférents à ces biens et droits, tels qu'ils figuraient dans les comptes annuels du constituant.

Le fiduciaire inscrit sur les états mentionnés à l'article 2 ci-dessus les biens et droits tranférés ainsi que les amortissements et provisions de toute nature y afférents, tels qu'ils figuraient dans les comptes annuels du constituant.

En cas d'absorption du fiduciaire ou d'opération assimilée, les biens et droits en fiducie sont transférés à leur valeur dans les écritures du fiduciaire en mentionnant la valeur brute et les amortissements ou provisions de toute nature pratiqués à raison de ces biens.

Art. 7.

Lorsque le contrat prévoit que les biens et droits seront transmis à un bénéficiaire autre que le constituant et soumis aux dispositions des articles 8 et suivants du code de commerce, le bénéficiaire constate, lors du transfert au fiduciaire, une créance à l'égard de celui-ci égale à la valeur vénale des biens et droits transférés.

Art. 8.

Lorsque le contrat prévoit que les biens et droits seront transmis à un bénéficiaire et que celui-ci cède sa créance sur le fiduciaire, ces biens et droits sont inscrits dans les états fiduciaires mentionnés à l'article 2 à leur valeur vénale à la date de la cession.

Art. 9.

Le bénéficiaire soumis aux dispositions des articles 8 et suivants du code de commerce inscrit à son bilan les biens et droits qui lui sont transmis ainsi que les amortissements et les provisions y afférents, tels qu'ils figuraient dans les états fiduciaires mentionnés à l'article 2.

Art. 10.

Un décret précisera les modalités d'établissement des états fiduciaires.

Chapitre III

Dispositions fiscales

Art. 11.

Pour l'application des dispositions du présent chapitre :

1° le bénéficiaire est dit «bénéficiaire des biens» lorsqu'il s'agit de la personne à qui seront transmis des biens ou droits objet de la fiducie ;

2° le bénéficiaire est dit «bénéficiaire des fruits» lorsqu'il s'agit de la personne qui reçoit des fruits provenant de ces biens ou droits pendant la durée de la fiducie.

Section 1

Enregistrement, publicité foncière et impôt de solidarité sur la fortune

Art. 12.

I - Le transfert à un fiduciaire de biens ou droits de toute nature donne ouverture aux droits de mutation à titre gratuit lorsque le contrat de fiducie prévoit la transmission de ces biens ou droits, sans contrepartie équivalente, à une personne désignée par le constituant et distincte de ce dernier.

II - Lorsque le contrat de fiducie ne remplit pas les conditions prévues au I, les biens ou droits transférés à un fiduciaire et leurs fruits sont considérés, pour l'application des droits de mutation et de l'impôt de solidarité sur la fortune, comme demeurant la propriété du constituant.

Art. 13.

Les droits de mutation à titre gratuit exigibles lors du transfert en fiducie visé au I de l'article 12 sont assis sur les valeurs des biens ou droits transférés au fiduciaire. Ils sont liquidés en fonction du lien de parenté entre le constituant et le bénéficiaire des biens.

Lorsque le bénéficiaire des biens et le bénéficiaire des fruits sont différents, les droits sont liquidés en fonction de leur lien de parenté avec le constituant et selon les règles prévues à l'article 762 du code général des impôts, les droits du bénéficiaire des fruits étant assimilés à ceux de l'usufruitier et les droits du bénéficiaire des biens à ceux du nu-propriétaire.

Art. 14.

Lorsque le contrat prévoit des bénéficiaires des fruits successifs, l'impôt est liquidé en fonction des droits du premier bénéficiaire des fruits, sans tenir compte de ceux des bénéficiaires futurs des fruits.

L'ouverture des droits d'un nouveau bénéficiaire des fruits donne lieu au paiement des droits de mutation à titre gratuit sur la fraction de la valeur en pleine propriété, à la date de cette ouverture, des biens ou droits en fiducie qui correspond à la part de l'usufruit définie à l'article 762 du code général des impôts.

Le cas échéant, l'impôt acquitté lors du transfert en fiducie au titre des droits du bénéficiaire des biens donne lieu à restitution pour la fraction qui excède le montant de l'impôt qui aurait été acquitté d'après l'âge du nouveau bénéficiaire des fruits.

Art. 15.

Lorsque les biens ou droits sont transmis effectivement à une autre personne que le premier bénéficiaire des biens prévu ou ses ayants cause, il est procédé, en fonction du lien de parenté entre le constituant et le bénéficiaire effectif des biens, à une nouvelle liquidation des droits de mutation à titre gratuit sur la valeur que les biens ou droits avaient lors de leur transfert au fiduciaire.

L'impôt acquitté lors du transfert en fiducie sur les droits du premier bénéficiaire des biens est imputé sur celui qui est dû par le bénéficiaire effectif des biens. Le cas échéant, l'excédent est restitué.

L'impôt net résultant de cette nouvelle liquidation est majoré de l'intérêt de retard prévu à l'article 1727 du code général des impôts, calculé à compter de la date du transfert au fiduciaire.

Art. 16.

Lorsque le bénéficiaire des biens ou le bénéficiaire des fruits d'un contrat de fiducie visé au I de l'article 12 transmet ses droits à titre gratuit, l'impôt est liquidé en fonction de la valeur en pleine propriété des biens en fiducie au jour de cette mutation et selon les règles prévues à l'article 762 du code général des impôts, les droits du bénéficiaire des fruits étant assimilés à ceux de l'usufruitier, et les droits du bénéficiaire des biens à ceux du nu-propriétaire.

Art. 17.

I - Les biens ou droits faisant l'objet d'un contrat de fiducie visé au II de l'article 12 font partie de la succession du constituant, sauf lorsque le bénéficiaire des biens est désigné en cours de fiducie et avant le décès du constituant. Dans ce dernier cas, ils donnent ouverture aux droits de mutation à titre gratuit pour leur valeur en pleine propriété au jour de cette désignation, dans les conditions prévues à l'article 13.

II - Les libéralités consenties en exécution d'un contrat de fiducie mentionné au II de l'article 12 sont soumises aux droits de mutation à titre gratuit. L'impôt est liquidé en fonction du lien de parenté entre le constituant et le bénéficiaire de ces libéralités.

III - Lorsque le bénéficiaire des biens ou le bénéficiaire des fruits n'est pas désigné au décès du constituant, l'impôt est liquidé en fonction du tarif applicable entre non-parents au titre des droits du bénéficiaire des biens ou du bénéficiaire des fruits non désigné.

Il est procédé à une nouvelle liquidation de l'impôt sur la fraction de la valeur des biens ou droits correspondant aux droits du bénéficiaire des biens ou du bénéficiaire des fruits au jour de leur désignation, en fonction du lien de parenté entre ceux-ci et le constituant. La fraction de la valeur des biens ou droits retenue pour cette nouvelle liquidation est majorée du montant de l'impôt qui a été acquitté lors du décès du constituant en application des dispositions de l'alinéa précédent.

L'impôt acquitté du fait du décès du constituant, au titre des droits du bénéficiaire des biens ou du bénéficiaire des fruits non désigné, est imputé sur celui qui est dû lors de leur désignation. Le cas échéant, l'excédent est restitué au fiduciaire.

Art. 18.

Les biens ou droits transférés à une fiducie mentionnée au I de l'article 12 sont compris dans le patrimoine imposable à l'impôt de solidarité sur la fortune du bénéficiaire des fruits, qui est réputé propriétaire de ces biens ou droits.

Lorsqu'au 1er janvier d'une année, le bénéficiaire des fruits n'est pas né ou n'est pas nommément désigné, la valeur nette en pleine propriété des biens ou droits en fiducie est soumise à l'impôt de solidarité sur la fortune, quel que soit le montant de cette valeur. L'impôt est dû par le fiduciaire au tarif le plus élevé du barème prévu à l'article 885 U du code général des impôts.

Pour l'application des dispositions du premier alinéa du présent article, la réduction prévue à l'article 885 V *bis* du code général des impôts n'est pas applicable, lorsqu'au titre du premier alinéa de l'article 24 les produits des biens et droits transférés en fiducie sont compris dans le revenu imposable du constituant.

Pour l'application des dispositions du deuxième alinéa du présent article, les réductions prévues aux articles 885 V et 885 V *bis* du code général des impôts ne sont pas applicables.

Art. 19.

La mutation à titre onéreux des droits d'un bénéficiaire des fruits d'un contrat de fiducie donne ouverture aux droits proportionnels ou progressifs d'enregistrement sur la valeur des droits cédés et selon le régime qui serait applicable à la cession des biens ou droits en fiducie. Pour la liquidation des droits proportionnels et progressifs, la valeur des droits cédés est répartie au prorata de la valeur des biens et droits en fiducie au jour de la cession.

La même règle est applicable pour les mutations à titre onéreux des droits d'un bénéficiaire des biens. Toutefois l'impôt est assis sur la valeur des droits cédés, augmentée de la fraction du passif correspondant aux droits cédés.

Lorsqu'elles donnent lieu au paiement de la taxe sur la valeur ajoutée en vertu des dispositions du dernier alinéa du 1 du 7° de l'article 257 du code général des impôts, les cessions des droits d'un bénéficiaire des biens sont soumises à la taxe de publicité foncière ou au droit d'enregistrement au taux de 0,60 %.

Art. 20.

Doivent être enregistrés dans le délai d'un mois à compter de leur date les actes ou déclarations constatant la formation, la modification ou l'extinction d'un contrat de fiducie, l'ouverture des droits d'un nouveau bénéficiaire des fruits, les mutations par un bénéficiaire des biens ou un bénéficiaire des fruits de tout ou partie de ses droits et les libéralités visées au II de l'article 17.

Lorsque le contrat de fiducie prend effet au décès du constituant, il doit être enregistré, à la diligence des héritiers légataires ou fiduciaires, dans un délai de trois mois à compter du décès du constituant.

Art. 21.

Les actes ou déclarations énumérés à l'article 20 doivent être enregistrés à la recette des impôts du domicile du constituant ou des non-résidents si ce dernier n'est pas domicilié en France.

Art. 22.

Il ne peut être perçu moins de 5 000 F lors de l'enregistrement d'un acte ou d'une déclaration constatant la formation d'une fiducie et de 1 000 F lors de l'enregistrement des autres actes ou déclarations visés à l'article 20.

Pour la perception des droits de mutation à titre gratuit et par exception aux dispositions de l'article 676 du code général des impôts, les conditions suspensives stipulées dans les contrats de fiducie ou dans leurs avenants ne sont pas opposables à l'administration.

Section 2

Impôts directs

Art. 23.

Sous réserve des dispositions de l'article 24, les résultats de la fiducie sont compris dans le revenu ou le résultat imposable de la personne qui en bénéficie en application du contrat de fiducie.

Tant que les termes du contrat ne permettent pas d'identifier un bénéficiaire des résultats en vie ou constitué, ceux-ci sont imposés séparément au nom du fiduciaire, ès-qualités, selon les règles applicables à l'impôt sur le revenu et à son taux maximum.

Art. 24.

Lorsqu'un contrat de fiducie rend possible l'utilisation au profit du constituant, de son conjoint ou de ses enfants mineurs, de tout ou partie des biens ou droits en fiducie ou des résultats de la fiducie, ces résultats sont compris dans le revenu ou le résultat imposable du constituant pendant la durée de la fiducie. Il en est de même lorsque le contrat rend possible le retour au constituant de tout ou partie de ces mêmes biens ou droits ou résultats ou lorsqu'il confère au constituant des pouvoirs de décision ou d'administration.

Lorsque le contrat de fiducie désigne le constituant comme bénéficiaire des biens ou lorsqu'il rend possible l'utilisation à son profit des biens ou droits en fiducie, sans que l'intéressé bénéficie des résultats et dispose de pouvoirs de décision ou d'administration sur la fiducie, la cession par le constituant de tout ou partie des droits dont il est détenteur en vertu du contrat a pour effet de soumettre l'acquéreur au régime prévu au premier alinéa.

Nonobstant les dispositions du premier alinéa, si le constituant cède à titre onéreux ses droits sur les résultats des biens ou droits en fiducie, les résultats réalisés après la cession sont compris dans le revenu ou le résultat imposable du cessionnaire des droits ou, en cas de nouvelles cessions, des cessionnaires successifs.

Lorsqu'une fiducie est constituée par des tiers au profit d'une entreprise ou d'une exploitation non commerciale, celle-ci est considérée comme le constituant au sens du premier alinéa même si elle n'a pas cette qualité contractuelle.

Art. 25.

I - Les résultats de la fiducie sont constitués par les produits nets de la gestion des biens et droits en fiducie et par les plus-values résultant de leur cession. Ils sont déterminés et imposés selon les règles applicables à la nature de l'activité afférente aux biens ou droits en fiducie.

Toutefois si, en application des dispositions des articles 23 et 24, ces résultats sont imposables au nom d'une personne morale passible de l'impôt sur les sociétés dans les conditions de droit commun, ou d'une personne qui exerce une activité industrielle, commerciale, artisanale, agricole ou non commerciale et qui est passible de l'impôt sur le revenu selon un régime de bénéfice réel, ils sont déterminés selon les règles applicables au bénéfice réalisé par cette personne. Si le contrat de fiducie prévoit plusieurs bénéficiaires, cette disposition est applicable à la part du résultat imposable revenant à chacun d'eux.

Les dispositions de l'article 238 *bis* K du code général des impôts s'appliquent aux droits mentionnés à cet article qui sont en fiducie par référence à la qualité du redevable de l'impôt désigné aux articles 23 et 24.

II - Pour l'application du présent article, les amortissements et les provisions pratiqués par le fiduciaire ne sont pris en compte pour la détermination de la quote-part de résultat revenant au redevable de l'impôt que si, en application du contrat de fiducie, ce redevable supporte la charge effective de la dépréciation ou de la perte qu'ils sont censés couvrir.

III - Toute variation ou dépréciation du montant de la créance ou des créances sur le fiduciaire demeure sans incidence sur le résultat imposable du titulaire de la créance.

XV

IV - Les bénéfices professionnels sont soumis à un régime réel d'imposition.

V - Les résultats déterminés selon les modalités prévues au présent article sont imposés, au titre de chaque année ou de chaque exercice, au nom des personnes désignées aux articles 23 et 24. Dans la situation visée au deuxième alinéa du I du présent article, les résultats à prendre en compte sont ceux des exercices clos au cours de l'exercice du bénéficiaire ou de l'année au titre de laquelle il est imposé. Ils demeurent sans incidence sur les revenus ou les résultats imposables personnels du fiduciaire.

VI - Sauf dans le cas prévu au deuxième alinéa de l'article 23 :

a) il est fait masse, pour l'application des articles 69, 69 A, 72 et 96 du code général des impôts, de l'ensemble des recettes et, pour l'application de l'article 92 B du même code, de l'ensemble des produits de cessions réalisés par le redevable de l'impôt, tant à titre personnel ou comme associé d'un groupement ou d'une société non soumis à l'impôt sur les sociétés que dans le cadre de la fiducie, pour déterminer les règles de son imposition ;

b) le chiffre d'affaires qui provient de la gestion des biens ou droits en fiducie s'ajoute à celui qui est réalisé par le redevable de l'impôt désigné aux articles 23 et 24, pour l'application des articles 50-0, 151 *septies*, 302 *ter*, 302 *septies* A et 302 *septies* A *bis* du code général des impôts.

Art. 26.

Pour l'application de l'impôt sur le revenu, les constituants ou les personnes qui bénéficient des résultats, autres que les entreprises industrielles, commerciales ou agricoles et les exploitations non commerciales, sont considérés comme propriétaires des biens ou droits en fiducie dont les résultats sont imposables à leur nom.

Art. 27.

I - Lorsqu'une entreprise transfère à un fiduciaire des biens ou droits inscrits à l'actif immobilisé de son bilan, les plus ou moins-values correspondant à la valeur réelle des biens ou droits qui doivent lui faire retour ou être utilisés à son profit ne sont pas comprises dans son résultat imposable de l'exercice de transfert, si les conditions prévues à l'article 6 de la présente loi sont satisfaites.

II - Les moins-values ou plus-values définies au I ne sont pas comprises dans le résultat imposable de l'exercice de transfert :

a) du contribuable qui transfère son fonds de commerce à un fiduciaire, si l'intéressé produit chaque année, en annexe à sa déclaration de revenus, un bilan où sont inscrits, selon les modalités prévues au premier alinéa de l'article 6, la créance sur le fiduciaire et les amortissements et provisions de toute nature afférents aux biens ou droits mis en fiducie ;

b) du contribuable exerçant une activité non commerciale qui transfère à un fiduciaire des biens ou droits faisant partie de son patrimoine professionnel. Dans ce cas, la créance sur le fiduciaire dont il est titulaire est inscrite sur le tableau des immobilisations et réputée acquise pour un montant égal au prix de revient des éléments transférés sous déduction des amortissements pratiqués ;

c) de l'exploitant agricole soumis au régime du forfait qui met en fiducie des biens professionnels. La créance sur le fiduciaire dont il est titulaire est inscrite sur la déclaration prévue à l'article 65 A du code général des impôts et réputée acquise pour la valeur d'origine des biens ou droits mis en fiducie. L'exploitant agricole, qui a transféré à un fiduciaire des biens ou droits faisant partie de son patrimoine professionnel et devant lui faire retour ou être utilisés à son profit, et qui cesse d'être soumis au régime du forfait, inscrit à l'actif de son bilan la créance sur le fiduciaire dont il est titulaire, selon les modalités prévues à l'article 6.

Art. 28.

Lorsque la plus-value ou la moins-value correspondant à la valeur réelle des biens ou droits mis en fiducie est soumise au régime défini à l'article 27 :

1° les amortissements et provisions déductibles pour la détermination des résultats imposables résultant de l'exploitation de ces biens ou droits par le fiduciaire ne peuvent pas excéder ceux que le constituant aurait pu lui-même déduire s'il avait conservé ces biens ou droits ;

2° la fraction de la plus-value réalisée lors de la cession par le fiduciaire des biens ou droits en fiducie ou de la cession par le constituant des biens ou droits qui lui ont fait retour est considérée comme à court terme pour l'application des dispositions de l'article 39 *duodecies* du code général des impôts à concurrence des amortissements pratiqués sur ces biens ou droits tant par le constituant que par le fiduciaire. Le délai de deux ans prévu à cet article est déterminé à compter de la date d'acquisition par le constituant des biens ou droits mis en fiducie ou à partir de la date d'acquisition par le fiduciaire, pour les biens ou droits acquis en remploi.

Art. 29.

I - Lorsqu'une entreprise industrielle, commerciale ou agricole ou une exploitation non commerciale, bénéficiaire des biens, cède ou transmet à titre gratuit tout ou partie des droits qu'elle détient du contrat ou qu'elle a acquis, les résultats de la fiducie sont déterminés et imposés au nom du ou des redevables de l'impôt mentionnés aux articles 23 et 24, à la date de la cession ou de la transmission, dans les conditions prévues aux articles 201 et suivants du code général des impôts.

La différence entre le prix de cession des droits du bénéficiaire des biens et leur prix de revient n'a pas d'incidence sur les résultats imposables du cédant.

II - Lorsqu'un bénéficiaire des biens qui n'est pas au nombre de ceux qui sont mentionnés au I ci-dessus cède tout ou partie des droits qu'il détient sur les biens ou droits en fiducie en vertu du contrat ou qu'il a acquis ultérieurement, le gain net retiré de cette cession relève du régime d'imposition prévu pour ces biens ou droits. Le prix de cession s'entend de la valeur réelle du bien ou droit à la date de la cession ; le prix d'acquisition s'entend de la valeur du bien ou droit dans les écritures comptables du fiduciaire.

Toutefois, si les biens ou droits en fiducie sont affectés à une activité industrielle, commerciale, agricole ou non commerciale, les dispositions du I s'appliquent.

Art. 30.

Lorsqu'une entreprise industrielle, commerciale ou agricole ou une exploitation non commerciale est bénéficiaire des résultats afférents à des biens ou droits en fiducie, le prix de cession des droits sur les résultats qu'elle détient du contrat ou, en cas d'acquisition ultérieure, le profit résultant de la vente de ces derniers droits, est compris dans le résultat ou le revenu du cédant, imposable à l'impôt sur les sociétés au taux normal ou à l'impôt sur le revenu par application du tarif prévu à l'article 197 du code général des impôts.

Pour les autres contribuables, le gain net retiré de la cession de droits détenus sur la fiducie par le bénéficiaire des résultats est soumis à l'impôt sur le revenu dans la catégorie mentionnée au 1 de l'article 92 du code général des impôts.

Art. 31.

Lorsque les droits donnant vocation à l'attribution des biens ou droits en fiducie sont apportés dans le cadre d'une fusion ou d'une opération assimilée placée sous le régime spécial défini aux articles 210 A et 210 B du code général des impôts, les plus-values imposables en application de l'article 29 ne sont pas soumises à l'impôt sur les sociétés, si les résultats ultérieurs de la fiducie sont déterminés en tenant compte des engagements et obligations que la société bénéficiaire du transfert aurait dû respecter si les biens ou droits en cause lui avaient été directement apportés. Ces engagements ou obligations sont pris conjointement par le bénéficiaire des apports et le fiduciaire et satisfaits par ce dernier.

Art. 32.

La rémunération du fiduciaire est imposable annuellement à son nom dans la catégorie des bénéfices industriels ou commerciaux selon un régime de bénéfice réel.

Art. 33.

I - Dans le mois qui suit la conclusion du contrat de fiducie, le fiduciaire informe le ou les bénéficiaires, autres que le constituant lui-même, de leur qualité ainsi que des conséquences du contrat au regard de leurs obligations fiscales et leur en transmet une copie. Le fiduciaire détermine, pour chaque contrat de fiducie, le ou les résultats de l'exploitation des biens ou droits en fiducie dans les conditions prévues pour les exploitants individuels, compte tenu des règles prévues à l'article 24.

Chaque masse fiduciaire, correspondant à un contrat, est identifiée par une appellation permanente faisant apparaître sa nature fiduciaire.

II - Le fiduciaire produit au service des impôts dont il relève, avant le 31 mars, une déclaration qui mentionne la désignation et l'activité des bénéficiaires, la nature et la consistance des biens ou droits en fiducie ainsi que le montant, la nature et la répartition des résultats par redevable de l'impôt.

Le fiduciaire produit également, dans le même délai, en vue de l'établissement de l'impôt de solidarité sur la fortune, une déclaration faisant apparaître, au premier janvier de chaque année, la nature et la consistance des biens ou droits en fiducie.

III - Le fiduciaire est, en outre, tenu aux obligations qui incombent normalement aux exploitants individuels. Il exerce seul les options éventuelles.

IV - Un décret fixe les modalités d'application du présent article, notamment le modèle et le contenu des déclarations prévues au II, ainsi que la liste et le contenu des documents qui doivent y être joints.

Art. 34.

Pour l'application des dispositions du code général des impôts et du livre des procédures fiscales, les états mentionnés à l'article 2 tiennent lieu de bilan et de compte de résultats pour chaque masse fiduciaire.

Art. 35.

I - Les dispositions des articles 44 *sexies*, 44 *septies*, 208 *quater* A, 208 *quinquies* et 208 *sexies* du code général des impôts ne sont pas applicables aux activités exercées dans le cadre d'une fiducie ou à l'activité exercée par le fiduciaire ès-qualités.

II - Le redevable de l'impôt désigné aux articles 23 et 24 est considéré comme propriétaire des biens ou droits en fiducie ou réputé exercer directement l'activité en fiducie pour l'application des dispositions du code général des impôts prévues au 3° du 1 de l'article 39, à l'article 44 *sexies*, aux deux premiers alinéas de l'article 44 *septies*, aux articles 154, 202 *ter* pour ce qui concerne le changement d'activité réelle ou d'objet social, 208 *quater* A, 208 *quinquies*, 208 *sexies*, à la deuxième phrase du quatrième alinéa du I de l'article 209, au premier alinéa de l'article 209 B, à l'article 212, au troisième alinéa du c) et au deuxième alinéa du d) du II de l'article 220 *quater* A, au 5 de l'article 221 et à l'article 223 A pour ce qui concerne la détention du capital de la société mère du groupe.

Il en est de même pour l'application des articles 145 et 216 du code général des impôts si le contrat de fiducie prévoit que le bénéficiaire des titres ouvrant droit au régime prévu à ces articles est également le bénéficiaire des revenus de ces titres. L'engagement mentionné au c) du 1° de l'article 145 du même code est pris par le fiduciaire pour les titres acquis en fiducie ; si cet engagement a été pris par le constituant pour les titres transférés en fiducie, le fiduciaire s'engage à conserver ces titres jusqu'à la fin du délai de deux ans pour lequel s'était obligé le constituant.

III - Lorsqu'un contribuable transfère les éléments corporels et incorporels de son fonds de commerce à un fiduciaire en vue de son exploitation au profit d'un tiers qui est également bénéficiaire des biens, les dispositions du II de l'article 41 du code général des impôts sont applicables si les conditions prévues à ce dernier article sont satisfaites par le fiduciaire lors de la mise en fiducie et par le bénéficiaire des biens en fin de fiducie ; la transmission est à titre gratuit au sens de ce dernier texte si le contrat de fiducie ne prévoit aucune contrepartie à la charge du tiers.

Art. 36.

Le transfert à une personne ou à un organisme d'éléments de l'actif d'une entreprise industrielle, commerciale, artisanale ou agricole ou d'une exploitation non commerciale en vue de les gérer dans l'intérêt de cette entreprise ou exploitation ou d'assurer pour le compte de celle-ci un engagement existant ou futur est, sur le plan fiscal, considéré comme effectué dans le cadre d'une fiducie dont l'entreprise a la qualité de constituant et de bénéficiaire et la personne ou l'organisme celle de fiduciaire. L'entreprise est alors personnellement soumise à l'impôt à raison des résultats qui proviennent des placements ou de l'exploitation de ces actifs ou des biens ou droits acquis en remploi.

Section 3

Taxe sur la valeur ajoutée

Art. 37.

I - Le III de l'article 256 du code général des impôts est ainsi rédigé :

«III - Les opérations autres que celles qui sont définies au II, notamment la livraison de biens meubles incorporels, les travaux immobiliers, l'exécution des obligations de fiduciaire, les opérations de façon et les opérations de commission autres que celles qui portent sur des déchets neufs d'industrie ou des matières de récupération sont considérées comme des prestations de services.»

II - Le 1 du 7° de l'article 257 du code général des impôts est complété par un dernier alinéa ainsi rédigé :

«Les cessions de ses droits par un bénéficiaire des biens, lorsque les droits cédés portent sur un immeuble ou sur des actions ou parts d'intérêt dont la possession assure en droit ou en fait l'attribution en propriété ou en jouissance d'un immeuble ou d'une fraction d'immeuble.»

III - Le 2 du 7° de l'article 257 du code général des impôts est complété par un alinéa ainsi rédigé :

«Aux opérations visées au dernier alinéa du 1, lorsque les immeubles ou parties d'immeubles sont achevés depuis plus de cinq ans ou lorsque les immeubles ou parties d'immeubles, actions ou parts d'intérêts ont déjà fait l'objet, dans les cinq ans de l'achèvement de ces immeubles ou parties d'immeubles, d'une cession à titre onéreux à une personne n'intervenant pas en qualité de marchand de biens.»

XIX

Art. 38.

I - Le 1 de l'article 266 du code général des impôts est complété par un i ainsi rédigé :

«i. - Pour les prestations d'un fiduciaire, par la rémunération versée par le constituant ou retenue sur les recettes de l'exploitation des biens ou droits en fiducie.»

II - Au b) du 2 de l'article 266, après les mots : «La valeur vénale réelle des biens», sont ajoutés les mots : «ou des droits cédés par le bénéficiaire des biens en fiducie.»

Art. 39.

Il est ajouté au code général des impôts un article 285 *bis* ainsi rédigé :

«*Art. 285* bis. - Pour les opérations relatives à l'exploitation de biens ou droits constitués en fiducie, le fiduciaire est considéré comme un redevable distinct pour chaque contrat de fiducie, sauf pour l'application des limites de régimes d'impositions et de franchises pour lesquelles est retenu le chiffre d'affaires réalisé par l'ensemble des fiducies ayant un même constituant.»

Section 4

Taxe professionnelle

Art. 40.

I - Le 1° de l'article 1467 du code général des impôts est modifié ainsi qu'il suit :

«1° Dans le cas des contribuables autres que les titulaires de bénéfices non commerciaux, les agents d'affaires, les fiduciaires pour l'accomplissement de leur mission et les intermédiaires de commerce, employant moins de cinq salariés :» (*Le reste sans changement*).

II - Le 2° du même article est modifié ainsi qu'il suit :

«2° Dans le cas des titulaires de bénéfices non commerciaux, des agents d'affaires, des fiduciaires pour l'accomplissement de leur mission et des intermédiaires de commerce, employant moins de cinq salariés :» (*Le reste sans changement*).

Art. 41.

L'article 1476 du code général des impôts est complété par un alinéa ainsi rédigé :

«Les fiducies sont imposées distinctement au nom du fiduciaire.»

Art. 42.

Le code général des impôts est complété par un article 1518 C ainsi rédigé :

«*Art. 1518 C* -. Les transferts et transmissions résultant de l'exécution d'un contrat de fiducie sont sans incidence sur la valeur locative des biens concernés, sauf lorsqu'il sont soumis aux droits de mutation à titre gratuit ; dans ce dernier cas, pour la détermination de la valeur locative en application des articles 1469 et 1499, le prix de revient est retenu sous réserve des dispositions de l'article 1518 B.»

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Section 5

Dispositions communes

Art. 43.

La transmission définitive au créancier, par défaillance du débiteur, de biens constitués en fiducie à fins de garantie entraîne la perception des impôts et taxes exigibles en cas de cession à titre onéreux.

Art. 44.

Les dispositions du présent chapitre s'appliquent aux biens ou droits qui font l'objet d'une fiducie, d'un trust ou d'une institution comparable revêtant ou non la forme contractuelle et selon les règles de territorialité prévues au code général des impôts.

Toutefois, les biens ou droits transférés à un trust ou à une institution comparable à une fiducie, établie ou non par acte contractuel, avant l'entrée en vigueur de la présente loi sont soumis aux droits de mutation à titre gratuit lors de leur remise au bénéficiaire des biens si le constituant avait son domicile fiscal en France au sens de l'article 4 B du code général des impôts à la date du transfert de ces biens au fiduciaire ou à une personne exerçant une mission assimilable à celle de ce dernier.

Art. 45.

I - Le fiduciaire acquitte les droits de mutation dus lors de la formation du contrat de fiducie et dans les hypothèses prévues aux articles 14 et 17.

II - Il est solidaire pour le paiement des impôts dus par le constituant et le bénéficiaire qui correspondent aux biens en fiducie et à leurs fruits ainsi que pour le paiement des impôts de toute nature dus par le constituant au titre d'une période antérieure à la formation de la fiducie, ou, s'agissant des fiducies conclues à des fins de garantie, au titre d'une période antérieure à l'appropriation définitive des biens en fiducie par le fiduciaire.

III - En ce qui concerne les fiducies visées à l'article 24, la solidarité du fiduciaire s'étend à l'ensemble des dettes fiscales du constituant.

IV - La solidarité du fiduciaire est limitée aux biens et droits faisant l'objet du contrat de fiducie et aux biens acquis en cours de fiducie ainsi qu'à leurs fruits en sa possession.

Art. 46.

Pour les fiducies visées à l'article 24, le constituant ou ses ayants cause sont solidairement tenus au paiement des dettes fiscales dues par le fiduciaire au titre de la propriété, de la gestion et de l'exploitation des biens ou droits en fiducie.

Art. 47.

Lorsque le recouvrement des impositions de toute nature et des pénalités fiscales dues par le fiduciaire au titre des biens en fiducie a été rendu impossible par des manoeuvres frauduleuses ou l'inobservation grave et répétée de ses obligations fiscales, le fiduciaire peut être déclaré personnellement tenu au paiement de ces impositions et pénalités.

A cette fin, le comptable du Trésor ou le comptable de la direction générale des impôts assigne le fiduciaire devant le président du tribunal de grande instance dans le ressort duquel se trouve le service où doivent être acquittés lesdits impôts et pénalités, qui statue selon la procédure à jour fixe.

Les voies de recours qui peuvent être exercées contre la décision du président du tribunal de grande instance ne font pas obstacle à ce que le comptable prenne des mesures conservatoires en vue de préserver le recouvrement de la créance du Trésor.

Art. 48.

Le fiduciaire domicilié ou établi hors de France est tenu de faire accréditer au moment de l'enregistrement des actes ou du dépôt des déclarations énumérées au premier alinéa de l'article 18, un représentant domicilié en France qui s'engage personnellement à remplir les formalités incombant au fiduciaire et à acquitter pour le compte de ce dernier toutes les impositions et pénalités dues par celui-ci ; cette personne doit justifier qu'elle est en mesure de prendre cet engagement.

A défaut de désignation d'un représentant dûment accrédité, les impositions et pénalités sont dues :

1° pour les fiducies visées au I de l'article 12, par le constituant ou, en cas de disparition de celui-ci, par le bénéficiaire des fruits ou, lorsque le contrat de fiducie est arrivé à échéance, par le bénéficiaire des biens ;

2° pour les fiducies visées au II de l'article 12, par le constituant ou, en cas de disparition de celui-ci, par le bénéficiaire des fruits.

Art. 49.

I - Le fiduciaire qui n'a pas soumis à l'enregistrement les actes et déclarations visés à l'article 20 ou qui n'a pas désigné de représentant en France conformément aux dispositions de l'article 48 est personnellement passible d'une amende égale à 6 % de la valeur de la masse fiduciaire par période de douze mois écoulée de la date de conclusion du contrat à la date de constatation de l'infraction.

Pour le calcul de l'amende, la valeur de la masse fiduciaire est appréciée au jour de la transmission des biens et droits ou, si celle-ci n'est pas intervenue, au jour de la constatation de l'infraction.

II - Le taux de l'amende prévue au I est ramené à 1 %, sans qu'elle puisse être inférieure à 20 000 F ni supérieure à 50 000 F, lorsque le fiduciaire ou son représentant en France ont accompli dans les délais prescrits les obligations déclaratives qui leur incombent en application du II de l'article 33.

Art. 50.

En cas de non respect des obligations déclaratives prévues au II de l'article 33, le fiduciaire est redevable d'une amende égale à 6 % de la valeur de la masse fiduciaire appréciée comme il est dit au deuxième alinéa du I de l'article 49.

Le taux de cette amende est ramené à 1 %, sans qu'elle puisse être inférieure à 10 000 F ni supérieure à 30 000 F lorsque le fiduciaire apporte la preuve que les bénéficiaires de la fiducie ont régulièrement accompli leurs obligations de déclaration auprès de l'administration fiscale.

L'amende prévue au présent article ne peut être cumulée avec celle prévue au I de l'article 49.

Art. 51.

I - Pour l'application des amendes prévues à l'article 49, le délai de prescription prévu au deuxième alinéa de l'article L. 188 du livre des procédures fiscales court à compter du terme du contrat de fiducie, à moins que le fiduciaire apporte la preuve de la date à laquelle l'administration a eu connaissance certaine de l'existence de la fiducie. Le délai court alors de cette date.

II - L'application des amendes prévues au I est indépendante de l'exercice du droit de reprise par l'administration à l'égard des redevables légaux des impôts et taxes dûs au titre du contrat de fiducie, des biens et droits en fiducie et de leurs fruits.

Toutefois, lorsque l'administration a eu connaissance de l'infraction au plus tard un an avant l'expiration du délai de reprise prévu aux articles L. 169 et suivants du livre des procédures fiscales, le taux des amendes est fixé à 1 % par année non prescrite, dans les limites mentionnées aux articles 49 et 50.

III - Les amendes envisagées sont notifiées au fiduciaire dans les conditions prévues par la loi n° 79-587 du 11 juillet 1979 relative à la motivation des actes administratifs. Leur mise en recouvrement ne peut intervenir avant l'expiration d'un délai de trente jours pendant lequel le fiduciaire peut présenter ses observations.

Elles sont recouvrées et le contentieux est assuré selon les règles applicables aux taxes sur le chiffre d'affaires.

XXII

Art. 52.

Pour l'application des dispositions de l'article 2069 du code civil, les opérations se rapportant aux biens et droits en fiducie doivent être enregistrées sur des comptes financiers distincts et ne pouvant être rattachés à aucun autre compte professionnel ou privé ouvert au nom du fiduciaire ou d'une autre fiducie. L'intitulé du compte mentionne l'appellation définie à l'article 33.

Art. 53.

I - Au 1° et au 2° de l'article 750 *ter* du code général des impôts les mots : «, le constituant d'un contrat de fiducie» sont insérés après les mots : «lorsque le donateur».

II - Le II de l'article 762 du même code est remplacé par les dispositions suivantes :

«II - L'usufruit constitué pour une durée fixe est estimé à un dixième de la valeur de la propriété entière pour chaque période de cinq ans de la durée de l'usufruit, sans fraction et sans égard à l'âge de l'usufruitier.»

III - L'article 784 du même code est complété comme suit :

«Les dispositions du présent article s'appliquent aux parties à un contrat de fiducie.»

IV - L'article 795 du même code est complété par les dispositions suivantes :

«L'exonération dont bénéficient ces organismes s'applique, dans les mêmes conditions, aux libéralités effectuées en exécution d'un contrat de fiducie.»

V - Il est inséré au code général des impôts un article 1020 *bis* ainsi rédigé :

«Art. 1020 bis. - Les transferts et transmissions mentionnés au I de l'article 12 de la loi n° ... instituant la fiducie, qui portent sur des droits réels immobiliers, sont assujettis à une taxe de publicité foncière ou à un droit d'enregistrement de 0,60 %.»

Art. 54.

Le II de l'article 1716 *bis* du code général des impôts est remplacé par les dispositions suivantes :

«II - La procédure de dation en paiement prévue au I est applicable aux droits dûs sur les mutations à titre gratuit entre vifs, aux droits de mutations à titre gratuit exigibles à l'occasion d'un contrat de fiducie ainsi qu'au droit de partage.»

Art. 55.

I - Le code général des impôts est complété par un article 242 ter B ainsi rédigé :

«*Art. 242* ter *B.* - Lorsque les personnes définies aux articles 240 à 242 ter versent des sommes à une fiducie ou interviennent à un acte auquel est partie un fiduciaire, elles doivent porter sur les déclarations prévues à ces articles l'appellation mentionnée au I de l'article 33 de la loi n° du instituant la fiducie.»

II - Le premier alinéa de l'article 1649 A du même code est complété par les dispositions suivantes :

«Les comptes d'une fiducie et ceux qui sont utilisés pour sa gestion doivent porter l'appellation mentionnée au I de l'article 33 de la loi n° du instituant la fiducie.»

III - Le deuxième alinéa du même article est modifié ainsi qu'il suit:

«Les personnes physiques, les associations, les fiduciaires...» (*Le reste sans changement*).

Art. 56.

Le livre des procédures fiscales est complété et modifié ainsi qu'il suit :

. I - Le troisième alinéa de l'article L. 10 est complété par les dispositions ci-après :

«Les mêmes demandes peuvent être adressées au fiduciaire pour le contrôle des déclarations prévues à l'article 33 de la loi n° du instituant la fiducie.»

II - L'article L. 12 est complété par un alinéa ainsi rédigé :

«Lorsqu'un contrat de fiducie ou les actes le modifiant n'ont pas été enregistrés dans les conditions prévues à l'article 20 de la loi n° du instituant la fiducie, ou révélés à l'administration fiscale avant l'engagement de l'examen contradictoire de l'ensemble de la situation fiscale personnelle d'un contribuable qui y est partie ou en tient des droits, la durée d'un an est décomptée à partir de l'enregistrement des actes.»

III - Il est inséré un article L. 14 A ainsi rédigé :

«*Art. L. 14 A.* - Pour l'application des dispositions du présent livre, les procédures applicables à une fiducie, à chaque partie à un contrat de fiducie et à toute personne en tenant des droits sont indépendantes.

«Pour la vérification de tout ou partie des revenus ou résultats d'une fiducie, l'administration procède au contrôle des déclarations des fiduciaires prévues à l'article 33 de la loi n° du instituant la fiducie, des comptes financiers en fiducie et des états et comptes prévus aux articles 2 et 52 de la loi n° du instituant la fiducie dans les conditions prévues à l'article L. 13. Les dispositions de l'article L. 48 ne sont pas applicables à ces vérifications.

«Les dispositions des articles L. 50 et L. 51 ne font pas obstacle, pour une même période et un même impôt, au contrôle des revenus ou des résultats :

«- d'une ou plusieurs fiducies, puis de toute personne partie au contrat ou en tirant des droits ;

«- de l'une ou plusieurs de ces personnes, puis d'une ou plusieurs fiducies.»

IV - Il est inséré un article L. 54 A *bis* ainsi rédigé :

«*Art. L. 54 A* bis. - Les procédures de contrôle et de redressement des actes et déclarations incombant au fiduciaire sont suivies entre l'administration et le fiduciaire.

«Les conséquences des redressements sont notifiées, dans les conditions de droit commun, au bénéficiaire des biens, au bénéficiaire des fruits, au constituant ou au fiduciaire, chacun en ce qui le concerne.»

V - L'article L. 73 est complété ainsi qu'il suit :

1° Il est ajouté, avant le dernier alinéa, un 4° ainsi rédigé :

«4° Les résultats des fiducies, lorsque la déclaration prévue au II de l'article 33 de la loi n° du instituant la fiducie n'a pas été déposée dans le délai légal.»

2° Au dernier alinéa du même article, la mention : «1° et 2°» est remplacée par la mention : «1°, 2° et 4°.»

VI - Il est inséré un article L. 85 B ainsi rédigé :

«*Art. L. 85 B.* - Le fiduciaire communique à l'administration, sur la demande de celle-ci, tous documents relatifs aux biens et droits en fiducie.»

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Art. 57.

La loi n° 84-46 du 24 janvier 1984 relative à l'activité et au contrôle des établissements de crédit est modifiée ainsi qu'il suit :

I - Le premier alinéa de l'article 2 est complété par les dispositions suivantes :

«Sont considérés comme fonds reçus du public les fonds qu'une personne recueille d'un tiers, notamment sous forme de dépôts, avec le droit d'en disposer pour son propre compte mais à charge pour elle de les restituer, et les fonds reçus en qualité de fiduciaire et employés pour son activité propre...» (*Le reste sans changement*).

II - Le premier alinéa de l'article 3 est remplacé par les dispositions suivantes :

«Constitue une opération de crédit, pour l'application de la présente loi, tout acte par lequel une personne, agissant à titre onéreux pour son propre compte ou en qualité de fiduciaire, met ou promet de mettre des fonds à la dispositions d'une autre personne ou prend, dans l'intérêt de celle-ci, un engagement par signature tel qu'un aval, un cautionnement ou une garantie.»

Chapitre IV

Dispositions diverses

Art. 58.

I - Le deuxième alinéa de l'article 220-1 du code civil est ainsi rédigé :

«Il peut notamment interdire à cet époux de faire, sans le consentement de l'autre, des actes de disposition, même à titre fiduciaire, sur ses propres biens...» (*Le reste sans changement*).

II - Le troisième alinéa de l'article 389-5 du code civil est ainsi rédigé :

«Même d'un commun accord, les parents ne peuvent ni vendre de gré à gré, ni transférer à titre fiduciaire, ni apporter en société un immeuble...» (*Le reste sans changement*).

III - Le deuxième alinéa de l'article 457 du code civil est ainsi rédigé :

«Sans cette autorisation, il ne peut, notamment, emprunter pour la pupille, ni aliéner même à titre fiduciaire, ou grever de droits réels les immeubles...» (*Le reste sans changement*).

IV - L'article 1422 du code civil est ainsi rédigé :

«*Art. 1422.* - Les époux ne peuvent, l'un sans l'autre, même à titre fiduciaire, disposer entre vifs, à titre gratuit, des biens de la communauté.»

V - L'article 1424 du code civil est ainsi rédigé :

«*Art. 1424.* - Les époux ne peuvent, l'un sans l'autre, aliéner, même à titre fiduciaire, ou grever de droits réels les immeubles...» (*Le reste sans changement*).

VI - Le premier alinéa de l'article 1432 du code civil est ainsi complété : «ni les transferts à titre fiduciaire».

VII - Le premier alinéa de l'article 1540 du code civil est ainsi complété : «ni les transferts à titre fiduciaire».

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Art. 59.

Après l'article 408 du code pénal, est inséré un article 408-1 ainsi rédigé :

«*Art. 408-1.* - Sera puni d'un emprisonnement d'un à cinq ans et d'une amende de 2 000 F à 2 500 000F ou de l'une de ces deux peines seulement, le fiduciaire qui, de mauvaise foi, aura fait des biens qui lui auront été transférés par un contrat de fiducie un usage qu'il savait contraire à l'intérêt des bénéficiaires, ou au but déterminé dans le contrat, ou aura utilisé les biens à des fins personnelles ou pour favoriser une personne morale dans laquelle il était intéressé.»

Art. 60.

Le deuxième alinéa de l'article 356-1-3 de la loi n° 66-537 du 24 juillet 1966 sur les sociétés commerciales est remplacé par les dispositions suivantes :

«Un tel accord est présumé exister :

«1° entre une société, le président de son conseil d'administration et ses directeurs généraux ou les membres de son directoire ou ses gérants ;

«2° entre une société et les sociétés qu'elle contrôle au sens de l'article 355-1 ;

«3° entre des sociétés contrôlées par la même personne ;

«4° entre le fiduciaire et le bénéficiaire, s'il est le constituant, d'un contrat de fiducie lorsque des actions ou droits de vote de la société, objet de la prise de participation ont été transférées à ce fiduciaire.»

Art. 61.

I - Le 1° de l'article 107 de la loi n° 85-98 du 25 janvier 1985 modifiée relative au redressement et à la liquidation judiciaires des entreprises est modifié ainsi qu'il suit :

«1° Tous les actes à titre gratuit translatifs de propriété mobilière ou immobilière ainsi que les contrats de fiducie conclus à des fins de libéralité ;»

II - Le 6° du même article de la même loi est modifié ainsi qu'il suit :

«6° Toute hypothèque conventionnelle, toute hypothèque judiciaire ainsi que l'hypothèque légale des époux et tout droit de nantissement constitués sur les biens du débiteur pour dettes antérieurement contractées, tout contrat de fiducie conclu par le débiteur à des fins de garantie pour des dettes antérieurement contractées ;»

Art. 62.

Il est inséré, à l'article 38 de la loi du 1er juin 1924 mettant en vigueur la législation civile française dans les départements du Bas-Rhin, du Haut-Rhin et de la Moselle, un l° ainsi rédigé :

«l° constitution, modification ou extinction de fiducie".

Art. 63.

Il est inséré à l'article 28 du décret n° 55-22 du 4 janvier 1955 portant réforme de la publicité foncière, un c) ainsi rédigé :

«c) constitution, modification ou extinction de fiducie.»

Art. 64.

La présente loi est, à l'exception du chapitre III et de l'article 63, applicable dans les territoires d'outre-mer et dans la collectivité territoriale de Mayotte.

Fait à Paris, le 19 février 1992.

Signé : EDITH CRESSON.

Par le Premier ministre :

Le garde des sceaux, ministre de la justice,

Signé : HENRI NALLET.