**“Core” and “Non-Core” Trustee Duties in English and Asian Civil Law Trusts**

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This paper examines the bifurcation of trustee duties into “core” and “non-core” duties in English, Japanese and Chinese trusts, and seeks to ascertain whether the growing emphasis on good faith as the “core” trustee duty in the English trust finds a parallel in Asian civil law. Whereas in the common law a New Zealand Law Commission report (2013) translated hereto academic discussions into a concrete proposal for law reform; in Japan the passage of a new Trust Act (2006) led to a retreat from the old act’s (1922) stricter core duties. However, the extent of reduction of core duties under the new act is far from certain because regulatory law and general civil law concepts such as good faith continue to qualify the new act. There is a strong practical case for studying the topic, as ¥427tr ($3.7tr) were held in Japanese trusts in 2006. At the same time, Chinese courts have begun to interpret the Trust Act of 2001 more favourably in recent decisions, suggesting a high likelihood that the use of the trust will grow. A comparison between England and Japan is particularly interesting because functionally the Japanese business trust resembles the U.S. business trust (“Massachusetts Trust”), but unlike the latter it does not have de jure legal person status. Consequently, trustee duties based on traditional trust rules lie at the heart of Japanese business trusts, and the doctrinal coherence and integrity of the Japanese trust structure is vital to trusts’ ability to carry out their commercial functions.

Methodologically, my paper adopts a micro-comparative and hermeneutical approach that takes as the point of departure the existence of the trust as a legal and linguistic cognate in English and East Asian law. In contrast to the mainstream functionalist approach in comparative law, I do not presume that these institutions aim to produce a similar outcome. Rather, my goal is to rely on the relatively superficial genealogical similarities between English and Asian trusts as a starting point to assess whether trust mechanisms do in fact converge or diverge. Following Richard Hyland’s approach in his analysis of gifts, I take any divergence between the two laws as a signifier of deeper differences in legal mentalities which in turn can assist our contextualisation of doctrinal developments. Although my evaluation of any similarity between the two sets of law will follow the functionalist method, one of the goals of my paper is to use the greater flexibility that the hermeneutical approach entails to undertake a detailed doctrinal study of non-Western bodies of law, at the same time as making use of the rich doctrinal literature in Asian languages, which hereto has played a minor role in functionalist comparative research.

My paper builds on two related developments in private law and comparative law scholarship. In the trusts literature, the works of Lionel Smith (The Worlds of the Trust, Cambridge UP 2013) and Remus Valsan (Trusts and Patrimonies, Edinburgh UP 2015) have placed comparative trusts at the centre of the trusts debate, and Japan is a particularly key example not only owing to the richness of its trusts practice in a civilian context, but also because—uniquely among civilian jurisdictions—the Japanese trust plays a central role in the commercial arena including securitisation and pensions. Similarly, my work draws inspiration from the growing emphasis on the “new private law” in the American scholarship, notably the scholarship of John Goldberg (“Pragmatism and Private Law” [2012] 125 Harv. L. Rev. 1640), Shyamkrishna Balganesh (“The Constraint of Legal Doctrine” [2015] 163 U. Pa. L. Rev. 1843), and Henry Smith, who have placed legal concepts and doctrines at the centre of analysis. By focusing on trusts in the Asian civil law context, my study aims to address a misleading imbalance in the literature which has underemphasised the role of legal doctrine in non-Western contexts.

By highlighting the role played by “core” duties such as good faith under the new Japanese Trust Act, my paper shows that the Japanese trust—like its English counterpart—utilises a legal structure that successfully supports both commercial and private trust operations under a single legal framework. In particular, it allows settlors to maximise trustee powers in specific areas such as investment duties, without compromising the core trust structure. Finally, I argue that the coherence of the Japanese trust means that it is possible to have a highly developed trusts law that does not require extensive legislative and regulatory updating to operate successfully in the civilian legal and business environment.

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