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Kai Lyu, Re-Clarifying China's Trust Law: Characteristics and New Conceptual Basis, 36 LOY. L. A. INT'L & COMP. L. REV. 447 (2015).

Kai Lyu explains some of the unique characteristics of Chinese trust law in Re-Clarifying China's Trust Law: Characteristics and New Conceptual Basis. China's civil law basis makes for a strange soil in which to transplant (and codify) a common law concept such as the law of trusts, which owes its origins to Medieval England. But other jurisdictions (Japan and South Korea, for example) have adopted trust law without generating the odd mutations that China has. What happened and how can one approach an understanding of the unique creation that is Chinese trust law?

The two principle unorthodoxies with trust law in China are the ambiguous title to the trust res and the almost unrestrained retained powers of a settlor that the 2001 trust act (enacted by the National People's Congress after two false starts in 1996 and 2000) generated. Lyu grounds the thinking of the Chinese legislators in the law of contracts, and identifies how contract law falls short as a theory in explaining trusts, even—or perhaps especially—Chinese trusts. Instead, Lyu proposes, Roman law's patrimony theory provides a lens for understanding the unique characteristics of Chinese trust law.

The Anglo-American trust model contemplates that in most cases the settlor will exit the stage after conveying property to a trustee with the trustee's acceptance of the res. Following the conveyance, the trustee holds legal title while the trust beneficiary holds equitable title; a bifurcation of legal and equitable title in the property formerly held by the settlor occurs when a trust is created. Following the settlor's conveyance of property to the trustee, the settlor typically retains little or no further involvement. The tension between the fiduciary duties and expansive property management powers of the trustee and the rights—but rather limited powers—of beneficiaries, creates a dynamic which supports the common law trust and its administration.

Chinese trust law stands some of these basic principles on their heads. Chinese trusts are "shapeless," according to another recent article by Professor Adam Hofri. Some scholars (e.g., Lusina Ho) hold that the settlor continues to own trust property in a Chinese trust, while others (e.g., Zhen Qu) support the trustee-owned model. Others have concluded that the beneficiaries own trust property, or that the settlor and trustee, or even the settlor, the trustee and the beneficiary, co-own trust property.

Indeed, as Lyu points out, Chinese trust law does not even require a settlor to convey property to a trustee; the settlor can retain possession and merely "entrust" (weituo, 委托) her property to the trustee, invoking perhaps, something more in the nature of a bailment than a trust. The settlor of a Chinese trust does not want to let go; Chinese trust law contemplates trusts where settlors retain extensive rights: the right to accountings and information relative to the administration of the trust; the right to revoke and amend the trust or to intervene and correct a trustee's actions;

the right to dismiss and replace the trustee; the ability to approve self-dealing transactions and trustee fees; and the status of a remainderman upon trust termination.

In many ways, Chinese trust law's default provisions describe what Anglo-American law would characterize as a revocable or "living" trust with the settlor in essence retaining ownership of trust assets and the trustee merely idling, at least until the trust later becomes irrevocable.

The contract paradigm for Chinese trust law helps explain a 2004 decision by the Shanghai High Court, *Huabao Trust Investment Co. v. Shanghai Yanxin Shiye Investment Co*. which is explicated and criticized by Lyu.

There, a trust was created for commercial purposes (as indeed all Chinese trusts are at present) with the settlor transferring funds to the trustee which was directed to buy shares of the corporate settlor. The settlor transferred its interests to a third party, intending that its assignee step into its shoes. The trustee refused to recognize the transfer and litigation resulted.

The court held—consistent with contract law—that the settlor could assign its rights as a settlor (as well as its rights as a beneficiary) with the consent of the other contractual party, the trustee. Absent the trustee's consent, however, the assignment was invalid. Thus, the trustee prevailed. The holding contravenes two principles of Anglo-American trust law which would characterize the settlor's position in a trust as one of status and not contractual right (one's status cannot be assigned or transferred) and maintain that absent a spendthrift provision a beneficiary's interest is freely assignable without any requirement of trustee consent.

Lest one conclude that Chinese trusts are not trusts at all, Lyu explains that a trustee's creditors' cannot reach assets held in trust. Trust assets are also segregated from the settlor's separate assets; a settlor cannot truly retain ownership since a bankruptcy of the settlor will not affect trust property. Moreover, the Chinese law imposes genuine duties on trustees to distribute to beneficiaries, account to beneficiaries, protect the confidentiality of beneficiaries, and avoid conflicts of interest.

Into this troubled doctrinal thicket, Lyu introduces patrimony, a Roman law concept which describes the collection of all movable, immovable, real and personal property rights, debts and obligations of a person; their estate. As the French jurist Pierre Lepaulle asserted in the 1930s, special or separate patrimony is a rubric by which common law trusts in a civil law jurisdiction can be explained. A trust, Lepaulle claimed, is an ownerless special patrimony independent of the settlor, the trustee and the beneficiary.

Lyu concludes by showing that separate patrimony theory can explain why a trust can have its own creditors but retain immunity from the creditors of the settlor and the trustee. "The trust patrimony is like a juristic person to some degree," Lyu notes.

Lyu's article provides a comprehensive overview of Chinese trust law. Extensive footnotes provide ample support for the article's conceptualizations as well as its details.

Theoretical confusion is often the product of an examination of an area of the law thick with confusion. But Lyu's article dispels more cobwebs than it spins.

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