The Trust in an Ageing Japan: has commercialisation precluded the trust from reaching its welfare potential?

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Abstract

This article argues that recent reforms to Japan's trust law regime have not fully exploited the potential of the trust in an ageing society. It argues that the commercial emphasis of the reforms has intangible ramifications for the concept of the trust in Japan that render the trust of questionable suitability for welfare oriented applications. The article also explores the potential of the courts to rescue the welfare role of the trust, in part by developing doctrine responsively to a given trust arrangement. It concludes that in an evolving social, political, and economic climate (including the Global Financial Crisis and its effect on the demand for financial products involving securitization), it is the role of the courts in developing doctrine that may bring balance to the competing demands placed upon the trust in an ageing society.

KEYWORDS: ageing, Japan, trust law, welfare

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I. INTRODUCTION

Japan is one of the most rapidly ageing societies in the world.[1] The potential social and economic ramifications of such ageing are wide-ranging.[2] For example, without an increase in tax rates, a smaller workforce brings in lower tax revenues. A large retired population demands higher welfare, health, and medical related spending, and tends to spend rather than save, reducing capital for investment. The social ramifications include the challenge of meeting the day-to-day needs of elderly residents and isolation, especially in remote communities.[3] The urgency of the problem is compounded by the fact that, if 65 is taken as the retirement age, 2011 marked the beginning of a dramatic departure from the workforce of the relatively large cohort of workers born between 1946 and 1954.[4] The response to these problems will entail interrelated changes to policy, social behaviours, and law. One fruitful area of law reform is trust law. As explored in this article, the trust can play a variety of welfare-oriented functions.

Trust law has undergone significant reform in Japan in recent years. After two years of deliberations in the Legislative Council of the Ministry of Justice, the Japanese Diet revamped Japan's trust law regime through the enactment of the *Trust Business Act* in 2004, the *Trust Act* in 2006, and amendments to related

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[1] National Institute of Population and Social Security Research, *Population Statistics of Japan 2008* (2008), online: <http://www.ipss.go.jp/index-e.html>.

[2] The economic implications of demographic transition in Japan have been researched extensively in English and Japanese. See, for example, John Creighton Campbell, "Population Aging: Hardly Japan's Biggest Problem" in *Woodrow Wilson International Center for Scholars Asia Program Special Report, The Demographic Dilemma: Japan's Aging Society* (Washington: Woodrow Wilson International Center for Scholars, 2003) (hereafter *The Demographic Dilemma: Japan's Aging Society*); Paul Hewitt, "The Grey Roots of Japan's Crisis" in *The Demographic Dilemma: Japan's Aging Society*; Randall S. Jones, "The Economic Implications of Japan's Aging Population" (1988) 28(9) Asian Survey 958; Yoshihiro Kaneko, "Financing Social Security in a Low Birthrate Ageing Society (*shôshi kôrei shakai to shakaihoshô zaisei)*" (2005) 1282 Juristo 14; Takao Komine & Shigesaburo Kabe, *Demographic Change and the Asian Economy: Long-term Forecast of Global Economy and Population 2006-2050* (2007), online: <http://www.jcer.or.jp/eng/pdf/2006long_contents.pdf>; L. MacKellar, *Economic Impacts of Population Ageing in Japan* (Northhampton: Edward Elgar Publishing, 2004); A. Matsutani, *Shrinking-Population Economics: Lessons From Japan* (Tokyo: International House of Japan, 2006); Hiroshi Obuchi, *The Japanese Economy in an Age of Low Fertility (shôshika jidai no nihon keizai)* (Tokyo: Nihon Hoso Shuppan Kyokai, 1997); James H. Schulz, *Economics of Population Aging: the "Graying" of Australia, Japan, and the United States* (New York: Auburn House, 1991); Chikako Usui, "Japan's Aging Dilemma?" in *The Demographic Dilemma: Japan's Aging Society*; Atsuhiro Yamada, "The Effect of The Low Birth Rate and Ageing Society on the Economy (*shôshikôreika no keizai e no eikyô*)" (2005) 1282 Juristo 34.

[3] See John W. Traphagan & John Knight, eds., *Demographic Change and the Family in Japan's Aging Society* (Albany: State University of New York Press, 2003).

[4] National Institute of Population and Social Security Research, *Population Statistics of Japan 2008*.

laws.[5] These were the first significant reforms to the *Trust Act* since its enactment in 1922.[6] Policy makers explained the reforms as a necessary modernisation and liberalisation of the trust to meet diverse contemporary social and economic needs.[7] However, it is only in an indirect macroeconomic sense that these reforms can be said to be in response to rapid ageing. The reforms bring about a general commercialisation of the Japanese trust, in large part to facilitate innovation in financial products suited to a "society of investors". In this article, I argue that prioritisation of the commercial trust has had both tangible and intangible negative ramifications for the civil trust (*i.e.* a trust for purposes other than profit) in the reform process, especially in the field of welfare.

In Part II, this article explains the basics of trust law in Japan, arguing that while the Japanese trust differs from the common law trust, it is not so different that it cannot perform functionally similar roles, for example in the field of welfare. In Part III, the article traces the introduction and evolution of the Japanese trust to explain why there may be inertia associated with its reception that obstructs the application of the trust in welfare contexts. In Part IV, the article describes Japan's reformed trust regime to demonstrate the overwhelmingly commercial nature of the reforms. In Part V, the article argues that the reforms have ignored the potential of the trust in an ageing society and in Part VI contends that this is due to the sublimation of "grassroots' reformers" aspirations for the civil trust to the macroeconomic goals of the State and the sectional interests of the finance industry. In Part VII, the article describes the unexpected negative ramifications the commercial-oriented reforms may have for the civil trust in a welfare context, and in Part VIII explores the potential of the courts to rescue the welfare role of the civil trust by developing doctrine responsive to a given trust arrangement. I conclude that in this evolving social, political, and economic climate, it is the role of the courts in developing doctrine that may bring balance to the competing demands placed upon the trust in an ageing society.

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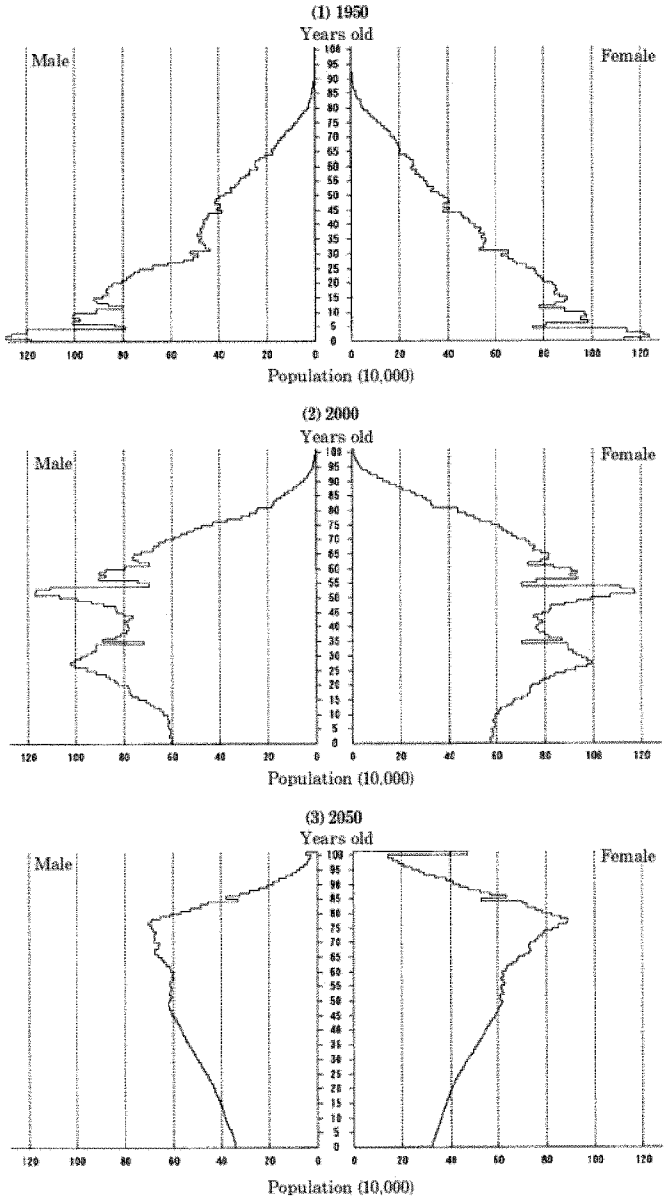
[5] *Trust Business Act* (*shintaku gyouhou*), Act no. 154 of 2004; *Trust Act* (*shintakuhou*), Act no. 108 of 2006.

[6] Masahiro Teramoto, "Outline of the New Trust Act (*atarashii shintakuhou no gaiyou*)" (2007) 1335 Juristo 2 at 2.

[7] Economic Legal Research Institute of Japan, *The Practice of the Reformed Trust Act (kaisei shintakuhou no jitsumu)* (Tokyo: ELRI, 2007) at 5.



Japan's population pyramid: 1950, 2000, and 2050[8]

[8] National Institute of Population and Social Security Research, *Population Statistics of Japan 2008*.

II. TRUST LAW IN JAPAN

In both theory and practice, trusts in Japan are categorised according to various overlapping distinctions, including purpose (civil versus commercial), trustee (natural versus juridical person), beneficiary (self benefit trust versus other benefit) and trust property (*e.g.* cash, land, or securities). In statute, the trust is defined as:

> [A]n arrangement in which a specific person, by employing any of the methods listed in the items of the following Article, administers or disposes of property in accordance with a certain purpose (excluding the purpose of exclusively promoting the person's own interests...) and conducts any other acts that are necessary to achieve such purpose.[9]

This very abstract definition seems distant from the common law definition, namely the relationship created by a settlor (or a court) between one or more beneficiaries and one or more trustees, who hold legal title to property and are bound by a fiduciary obligation to manage trust property for the benefit of beneficiaries, who hold equitable title to the property.[10] That the definitions diverge is unsurprising given that Japan has no tradition of equity, that typically the Japanese trust arises from a contract between settlor and trustee, and that the surrounding property law regime is modelled on civil law jurisdictions, predominantly Germany and France. Indeed, a large part of the story of the trust in civil law jurisdictions is whether it can be received "faithfully" to its common law origins.[11] This issue is made more pressing given global efforts that aspire towards legal harmonisation through instruments such as the *Hague Trust Convention*.[12]

Some commentators belonging to the "relativist" school of comparative law[13] argue that civil law jurisdictions such as Japan should not even aspire to fidelity to the common law model of the trust.[14] Instead, it is argued, civil law jurisdictions have a satisfactory statutory equivalent, the *fiducie*: "a contract [in] which a settlor transfers all or part of its assets, rights or securities to a fiduciary

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[9] *Trust Act,* s. 2(1).
[10] G.E. Dal Pont, *Equity and Trusts: Commentary and Materials* (North Ryde: LBC, 1997) at 399.
[11] See, *e.g.*, Frances J. Foster, "American Trust Law in a Chinese Mirror" (2010) 94 Minn. L. Rev. 602; Lusina Ho, "The Reception of Trust in Asia: Emerging Asian Principles of Trust?" (2004) Sing. J.L.S. 287.
[12] *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition,* 1 July 1985, HCCH 30 (entered into force 1 January 1992).
[13] Michele Graziadei, "Transplants and Receptions" in *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) at 469.
[14] Munehide Nishizawa, "The Status of the Trust under Japanese Law" (1990)(1) I.B.L.J. 7 at 26.

that, in maintaining them separately from its own *patrimoine* [*i.e.* property], acts according to a specific objective for the benefit of its beneficiaries or the settlor itself".[15] Indeed, conceptual equivalents to the trust existed as early as the 9th century in Japan[16] and other indigenous equivalents relating to succession obviated the need for a received trust until the early 20th century.[17] It is no great concern, it is argued, if the Japanese trust diverges from the common law trust.

Despite the apparent divergence between the common law and the Japanese trust, some commentators advocate a flexible conception of the core minimum of a universal trust definition that allows for functional equivalence.[18] Lusina Ho argues that the evolution of an "Asian trust" led largely by Japan, complies with this minimum core, namely "appropriate management powers – whether through transferring legal ownership or otherwise – to the trustee, subject to checks to prevent abuses [including] the duty of honesty and to keep account" and a "segregated fund [of trust assets] from the general assets of the trustee…free from the claims of his spouse, heirs, and creditors".[19] With this universal minimum core, there is no reason why the Japanese trust cannot play roles functionally equivalent to the common law trust, in the field of welfare for example. Indeed, as the welfare needs of Japan intensify, Japan may be a prime jurisdiction for innovation in the welfare-oriented civil trust.

III. The Development of the Trust in Japan

Welfare-oriented civil trusts in Japan face the obstacle of considerable historical inertia. Relative to the rest of the modern pre-War Japanese legal system,[20] the trust was anomalous in its common-law origins. Nevertheless, its appeal lay precisely in its commercial applications rather than to regulate the personal, fiduciary relationships associated with the common law trust. In the recovery effort after the Russo-Japanese War (1904-05), the trust was seen as a convenient means of bringing efficiencies to the bond market by entrusting multiple security

[15] Valerio Forti, "Comparing American Trust and French Fiducie" (2011) 17(28) Colum. J. Eur. L., online: <http://www.cjel.net/online/17_2-forti>.
[16] Makoto Arai, "Japan" in Alon Kaplan ed., *Trusts in Prime Jurisdictions*, 3rd ed. (London: Globe Law and Business, 2010) at 236.
[17] Nishizawa, "The Status of the Trust under Japanese Law", *supra* note 14 at 8.
[18] Indeed, Ho notes that "Asian trusts" may actually be closer to the prototypical common law trust than many purists would believe: Ho, "The Reception of Trust in Asia: Emerging Asian Principles of Trust?", *supra* note 11 at 302.
[19] *Ibid.* at 293.
[20] H. Oda, *Japanese Law*, 2nd ed. (Oxford: Oxford University Press, 1999) at 27.

interests to a single trustee.[21] This in turn facilitated capital raising from overseas as Japan continued its rapid transition from light to heavy industry.[22]

The selective, top-down manner in which the Japanese trust was introduced set the tone for its subsequent development. In the initial period (1920 to 1948), Japan's powerful modernising State carefully cultivated its commercial trust transplant away from "opportunists", including banks.[23] With the advent of the licensing system for undertaking trusteeship as a business under the *Trust Business Act* (and the definitional *Trust Act*),[24] the government weeded out almost 5000 businesses trading on the name of "trust".[25] While licensing for 45 "trust companies" (*shintaku gaisha*) was ostensibly designed to ensure the integrity and public interest character of businesses undertaking trust services,[26] "public interest" was predominantly regarded as a secure investment climate for the modernising State.[27]

This is not to say that the commercially focused regulatory system imposed by the State over the trust decided its evolution. In fact, the pre-War trust developed solely as a means of generating interest for large domestic investors, predominantly seeking to invest earnings from a growing export sector in "cash trusts" (*kinsen shintaku*).[28] This frustrated attempts by the Ministry of Finance to distance trust companies from banks through regulation, for example prohibiting short-term trusts resembling savings accounts.[29] Events overtook the Ministry in 1941 when all civilian capital was needed for the escalated war effort.[30] The Ministry thus abandoned its attempt to protect its favoured trust companies. The

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[21] Rights to collateral could be entrusted under the *Secured Bond Trust Act (tanpo tsuki shaken shintakuhou),* Act no. 52 of 1905, obviating the need upon default for individual beneficiaries to claim that collateral directly: Hiroto Dogauchi, "Theoretical Outlook and Issues of the New Trust Act (*atarashii shintakuhou riron no tenbou to kadai*)" (2007) 1261 Kinyuu Shouji Hanrei 6 at 6.

[22] Trust Companies Association of Japan website, online: <http://www.shintaku-kyokai.or.jp/trust/trust01_07_05.html>

[23] Trusts, it was thought, required protection from the cut-throat world of loans and investment brokering through special rules such as principal guarantees: Tsutomu Sato, "Trust Seminar: the History of Trusts (4) (*shintakuhou kouza 4: shintaku no rekishi*)" (2005) 641(21) Ginkou houmu 50 at 50.

[24] *Ibid.* at 50.

[25] *Ibid.*

[26] *Ibid.*

[27] Dogauchi, "Theoretical Outlook and Issues of the New Trust Act (*atarashii shintakuhou riron no tenbou to kadai*)", *supra* note 21 at 6.

[28] Sato, "Trust Seminar: the History of Trusts (4) (*shintakuhou kouza 4: shintaku no rekishi*)", *supra* note 23 at 50.

[29] *Ibid.*

[30] G. C. Allen, *A Short Economic History of Modern Japan*, 3rd ed. (London: Unwin, 1972) at 170.

Japanese Diet enacted the *Concurrent Operation Act* in 1943,[31] which provided the machinery for the Ministry to authorise some of the strongest banks (as trustees) to absorb the remaining trust companies.[32] As a result, from 1948 to 1980 the trust emerged as a staple retail investment product offered by the trust banks.[33]

As Japan's strong "developmental State" re-emerged with a singularly economic (rather than militaristic) focus, the Ministry of Finance reasserted its authority over the banking and investment industries. Initially, the trust banks offered individual "cash trusts" (*kinsen shintaku*), whereby small investors would entrust cash to the trust bank, which would return the principal and earnings after 3-6 months.[34] Regarding these as unhealthy competition to regional banks,[35] the Ministry allowed the trust to thrive only in a niche.[36] This was the "loan trust" (*kashitsuke shintaku*) created in 1952,[37] a unit trust that accumulated smallholder savings in a longer-term trust (2-5 years), which generated interest through long-term loans, distributed in regular dividends or a final lump sum. Moreover, the Ministry of Finance, through licences and premise approvals, granted a monopoly over these loan trusts to five trust banks from the dominant business conglomerates (*zaibatsu*).[38]

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[31] *Act on the Concurrent Operation of Standard Banking and Trust Business (Concurrent Operation Act) (futsuu ginkoutou no chokinginkou gyoumu mata wa shintaku gyoumu no renei to uni kan suru houritsu ((ren'eihou))*, Act no. 43 of 1943.

[32] In 1948, the seven surviving trust companies became "trust banks" (shintaku ginkou). Their "cash trust" business model had been destroyed by rapid inflation in the immediate post-war environment caused by scarcity of goods and the end of wartime price controls: Kenneth K. Kurihara, "Post-War Inflation and Fiscal-Monetary Policy in Japan" (1946) 36(5) The American Economic Review 843 at 843; Sato, "Trust Seminar: the History of Trusts (4) (*shintakuhou kouza 4: shintaku no rekishi*)", *supra* note 23 at 50.

[33] Sato, "Trust Seminar: the History of Trusts (4) (*shintakuhou kouza 4: shintaku no rekishi*)", *supra* note 23 at 52.

[34] The formal term was "individually operated designated money trust" (*tandoku unyou shitei kinsen shintaku*).

[35] The Ministry also regarded the returns offered by these cash trusts as inconsistent with its low interest rate policy introduced to combat rampant inflation.

[36] Sato, "Trust Seminar: the History of Trusts (4) (*shintakuhou kouza 4: shintaku no rekishi*)", *supra* note 23 at 52.

[37] *Loan Trust Act* (*kashitsuke shintaku hou*), Act no. 195 of 1952.

[38] Sato, "Trust Seminar: the History of Trusts (4) (*shintakuhou kouza 4: shintaku no rekishi*)", *supra* note 23 at 52. These were Mitsubishi Trust Bank, Sumitomo Trust Bank, Yasuda Trust Bank, Mitsui Trust Bank, and the Trust Bank of Japan. From 1951 to 1955, as stability and the demand for long term finance returned, trust deposits as a percentage of these banks' finances grew from 30% to 70%. In contrast, the banks outside this favoured group struggled to attract trust business and mainly serviced small scale agricultural cooperatives. These banks surrendered the trust licences that had been granted pursuant to the *Concurrent Operation Act* in exchange for favourable regulation (such as premise approvals) in the traditional banking sector.

It was not until the current period of deregulation starting in the 1980s that the trust began to emerge from its niche in retail unit loan trusts. Ongoing reforms have promoted a greater diversity of functions and players. Financial reforms in 1992 permitted the creation of subsidiary trust banks and reforms in 2002 permitted metropolitan banks and securities companies to enter the trustee business in their own right.[39] This deregulation is partly a result of a global resurgence of liberal economic thought since the 1980s. Yet it is also in recognition that the social and economic needs of a post-industrial society differ markedly from either a society undergoing rapid modernisation or a society engaging in or recovering from war. One key difference is a shift in government thinking (described further below) from the desire to direct savings into long-term investment to a need to manage and exploit the assets of an industrially and demographically mature society.

There are three key examples of asset management and exploitation trusts that emerged in the 1980s era of deregulation. The first of these is securitisation, whereby one party (typically a corporation) uses existing real estate and debts owed to raise capital. It does this by entrusting these assets to a trust bank, then selling the beneficial rights to investors.[40] Second, in 1980, the Ministry of Finance adjusted the tax environment in a way that facilitated the growth of securities-investing trusts.[41] From this time, securities-investing trusts were used mainly by corporations and banks to harness the investment expertise of trust banks and (later) securities investment companies.[42] Third, regulations that had hitherto frustrated the emergence of "land trusts" (*tochi shintaku)* were relaxed in 1984.[43] As evident below, the most recent round of reforms has been a continuation of this trend to stimulate trust diversity through deregulation, albeit for commercial purposes only.

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[39] Sato, "Trust Seminar: the History of Trusts (4) (*shintakuhou kouza 4: shintaku no rekishi*)", *supra* note 23 at 53.

[40] The investors thus receive a constant income stream and, depending on the terms of the trust, the original trust property on reversion. Incidentally, a prototype emerged in the early post-War period of the trust as a vehicle for securitisation and capital raising. On this model, private railcar manufacturers, unable to raise capital using their products as security because of (sole use) hire-purchase agreements with the government, entrusted the railcars to trust banks. Then, as beneficiaries, the manufacturers were able to sell their beneficiary rights to investors.

[41] *Ibid.* It did this by allowing a corporation to separate securities purchased with trust moneys from securities owned by the corporation itself for the purpose of the corporation's asset valuation (and therefore tax assessments).

[42] *Ibid.*

[43] *Ibid.* Under this model, a settlor-beneficiary entrusts land to a trust bank, which develops the property and to that end secures funds and manages tenants. The beneficiary then receives income in the form of distributions from the trust.

IV. JAPAN'S REFORMED TRUST REGIME

Recent reforms involved adjustments to each of the three pillars of Japan's trust law framework: the *Trust Act*, which provides general rules for trusts; the *Trust Business Act* relating to commercial trustees; and the *Financial Products Transaction Act,*[44] which regulates capital markets. The first reforms were those made to the *Trust Business Act* in 2004. These liberalised rules on entry to commercial trusteeship, expanded potential trust property (to include, for example intellectual property), and created relaxed rules on trustees' duties for commercial trusts (*i.e.*, the duty of loyalty and non-delegation), while strengthening disclosure obligations.[45] These amendments to the *Trust Business Act* were of a broadly deregulatory nature, designed primarily to make the trust form more useful as a component in a new, diverse range of commercial arrangements such as securitisation.

The reforms of 2004 also introduced many of the reforms subsequently incorporated into the general law, the *Trust Act,* in 2006. In other words, the explicitly commercial foundations of the "special law" now underpin much of the "general" trust law.[46] For example, the reforms of 2006 permit a "self declared trust" (*jikoshintaku*), in which the settlor is also the trustee, through a notarised "declaration of trust" (*shintaku sengen*).[47] This type of trust is often used in other jurisdictions in commercial contexts, for example liquidation of assets and securitisation.[48] The reforms also introduced limited liability trusts (*gentei sekinin shintaku*)[49] to protect trustees, for example in circumstances where the value of trust property falls below the value of debts that a trustee has taken on as part of a trust arrangement to develop land.[50] They also created "beneficiary-security issuing trusts" (*jueki shouken hakkou shintaku*),[51] where the income from the trust property (*e.g.* from receivables) constituting a beneficial interest is used to fund tradable securities issued to investors. The reforms also established new rules mirroring company law on trust modification, merger, and division, [52]

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[44] *Financial Products Transaction Act* (*kinyuu shouhin torihiki hou*), Act no. 25 of 1948.

[45] Economic Legal Research Institute of Japan, *The Practice of the Reformed Trust Act (kaisei shintakuhou no jitsumu)*, *supra* note 7 at 6.

[46] Hiroyuki Kansaku, "Recent Developments and Issues in Trust Law and Related Laws (*shintakuhou, shintaku kanrenhou no kinji no tenkai to kadai*)" (2010) 242 Shintaku 6 at 7.

[47] *Trust Act,* s. 3(iii). But a trustee who is also a beneficiary cannot transfer his or her beneficial interest of one year because of concerns that it would be abused to evade creditors: s. 163(1).

[48] Dogauchi, "Theoretical Outlook and Issues of the New Trust Act (*atarashii shintakuhou riron no tenbou to kadai*)", *supra* note 21 at 8.

[49] *Trust Act,* Chapter 9.

[50] Dogauchi, "Theoretical Outlook and Issues of the New Trust Act (*atarashii shintakuhou riron no tenbou to kadai*)", *supra* note 21 at 8.

[51] *Trust Act*, Chapter 8.

[52] *Ibid.*, Chapter 6.

liquidation,[53] assignment of beneficial rights,[54] and multi-beneficiary voting rights.[55]

The general deregulatory tenor of the recent reforms has been offset somewhat by re-regulation through legal and extra-legal measures. This is because the trust, by its nature, is vulnerable to abuse at the hands of settlors, trustees, and beneficiaries alike. The trust might be used by settlors and beneficiaries to evade laws, notoriously relating to tax for example.[56] Similarly, trustees might act for their own benefit against the interests of the beneficiary, especially now that the parties can pragmatically opt out of provisions regulating conflicts of interest.[57] Regulation is not merely necessary to protect vulnerable parties. It is an integral component of the trust's functionality in a variety of new commercial contexts.[58]

First, the reforms have sought to strengthen private law mechanisms, namely beneficiaries' rights and trustees' duties. For example, the new *Trust Act* permits a beneficiary to seek dismissal of a trustee with the consent of a settlor;[59] seek an injunction if a trustee is engaging, or is likely to engage, in an illegal act;[60] and receive regular reports from the trustee.[61] Furthermore, the *Trust Act* now officially imposes a duty of loyalty (*chuujitsu gimu*)[62] on the trustee[63] and has codified in detail the default rules on conflicts of interest.[64]

Second, the reforms have enhanced the oversight role of the courts. In contract law, Japanese courts have demonstrated a willingness to intervene in agreements on the basis of public policy (*koujo ryouzoku*),[65] public welfare (*koukyou no fukushi*),[66] good faith (*shingi*),[67] or abuse of rights (*kenri no ranyou*),[68] depending on the context of the particular relationship.[69] The new

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[53] *Ibid.,* Chapter 7.
[54] *Ibid.,* ss. 93-98.
[55] *Ibid.,* ss.105-122.
[56] Kansaku, "Recent Developments and Issues in Trust Law and Related Laws (*shintakuhou, shintaku kanrenhou no kinji no tenkai to kadai*)", *supra* note 46 at 14.
[57] *Ibid.*
[58] *Ibid.*
[59] *Trust Act*, s. 58(1).
[60] *Ibid.,* s. 44.
[61] *Ibid.,* s. 37.
[62] *Ibid.,* s. 30: "A trustee shall administer trust affairs and conduct any other acts faithfully on behalf of the beneficiary."
[63] *Ibid.,* s. 30. This was not clear under the previous Act.
[64] *Ibid.,* ss. 31-32.
[65] *Civil Code* (*minpou*), Act no. 89 of 1896, s. 90.
[66] *Ibid.,* s. 1(1).
[67] *Ibid.,* s. 1(2).
[68] *Ibid.,* s. 1(3).
[69] Veronica L. Taylor, "Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan" (1993) 19 Melbourne U.L. Review 371 at 378; Daniel H. Foote, "Judicial Creation of

Trust Act's extensive court powers to regulate the parties and property of a trust are at once an extension and a codification of this judicial practice. Examples include the powers to terminate a trust in the interests of the beneficiary or the public,[70] appoint and dismiss a trustee,[71] and appoint a trust auditor (*kensayaku*).[72] Other examples are orders respecting the management of trust property and to appoint an individual or corporate trust property administrator (*kanrisha*) until a new trustee is found.[73] Furthermore, where a beneficial interest would be reduced by a modification of the trust, a court may, at the request of a beneficiary, determine a fair value at which the trustee must acquire (*i.e.* "pay out") that beneficial interest.[74]

Third, the provisions of the *Trust Business Act* and other special acts, including the *Financial Instruments and Exchange Act* serve as licensing and regulating instruments over trustee companies and the trade in beneficial interests.[75] Finally, the reforms anticipate that companies and banks acting as trustees will engage in a degree of self-regulation through internal rules and compliance mechanisms.[76]

In summary, the reforms have sought to stimulate growth in commercial applications of the trust, including trusts over intellectual property, the security trust, trusts protecting businesses from the splintering effects of succession, trusts facilitating decoupling of cross-shareholding businesses, limited liability trusts, trust bonds, the use of beneficiary-security issuing trusts for Japan Depository Receipts (JDR) (foreign-issued shares traded in Japan), and trusts in the context of emissions trading and private finance initiative (PFI).[77] At the same time, new provisions attempt to manage the risks associated with these applications through various re-regulatory measures. As described below, however, largely absent from these reforms were measures to improve the functionality of the trust in non-commercial contexts, especially related to welfare.

Norms in Japanese Labor Law: Activism in the Service of - Stability?" (1996) 43 UCLA L. Rev. 635 at 637-638; Luke Nottage, "Changing Contract Lenses: Renegotiations in English, New Zealand, Japanese, US and International Sales Law And Practice" (2006), online: <http://www.law.usyd.edu.au/anjel/documents/ResearchPublications/NottageCLPE2006paper.pdf > at 15.

[70] *Trust Act,* ss. 165, 166.

[71] *Ibid.,* ss. 56, 62.

[72] *Ibid.,* s. 46.

[73] *Ibid.,* s. 64.

[74] *Ibid.,* ss. 103,104.

[75] Kansaku, "Recent Developments and Issues in Trust Law and Related Laws (*shintakuhou, shintaku kanrenhou no kinji no tenkai to kadai*)", *supra* note 46 at 13.

[76] *Ibid.* at 14.

[77] *Ibid.*

V. WASTED OPPORTUNITY TO PROMOTE WELFARE APPLICATIONS OF THE TRUST?

Largely absent from the reform process was consideration of the civil trust and resolution of the problems faced by charitable trusts. The following explains why this can be regarded as a wasted opportunity.

A. Civil Trusts

Japanese trust law jurisprudence has long maintained a theoretical separation between commercial (*shouji*) and civil (*minji*) trusts to decide whether a trust falls within the licensing provisions of *Trust Business Act*,[78] though for reasons described above, the civil trust has failed to take root in Japan. Some of the recent applications of the civil trust in Japan have been trusts for urban redevelopment, debt workouts, advance payments for public works, succession of businesses, and lump-sum child support payments. In addition, in 2002, Japan's Supreme Court deemed a trust contract to have been concluded between a local government (settlor) and a construction company (trustee) over an advance payment deposited in a bank by the company.[79] In this "constructive trust", the company trustee was bound by the purpose of the trust to apply the funds to the construction work ordered. This has raised the prospect that other arrangements where funds have been transferred to entities such as lawyers, insurance companies, and property management companies might also be found to constitute constructive trusts.[80]

Despite these applications and despite Japan's growing welfare needs, the potential of civil trusts to preserve, manage, and grow wealth for welfare and age-related purposes has been largely unexplored. By way of examples, the trust could be used to manage assets and secure income for the retired and the vulnerable, preserve lump sums or upfront fees for nursing home fees, probate, funerals, and memorial[81] services.[82]

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[78] Yasuhiro Akanuma, "The Potential for Development of the Civil Trust (*minjishintaku no hatten kanousei*)" (2010) 35 Shintakuho Kenkyu, online: <http://www.shintakuhogakkai.jp/activity/pdf/vol35_report04.pdf> at 1.

[79] Supreme Court Judgment 2002.1.17, 56(1) Minshuu 20.

[80] Dogauchi, "Theoretical Outlook and Issues of the New Trust Act (*atarashii shintakuhou riron no tenbou to kadai*)", *supra* note 21 at 7.

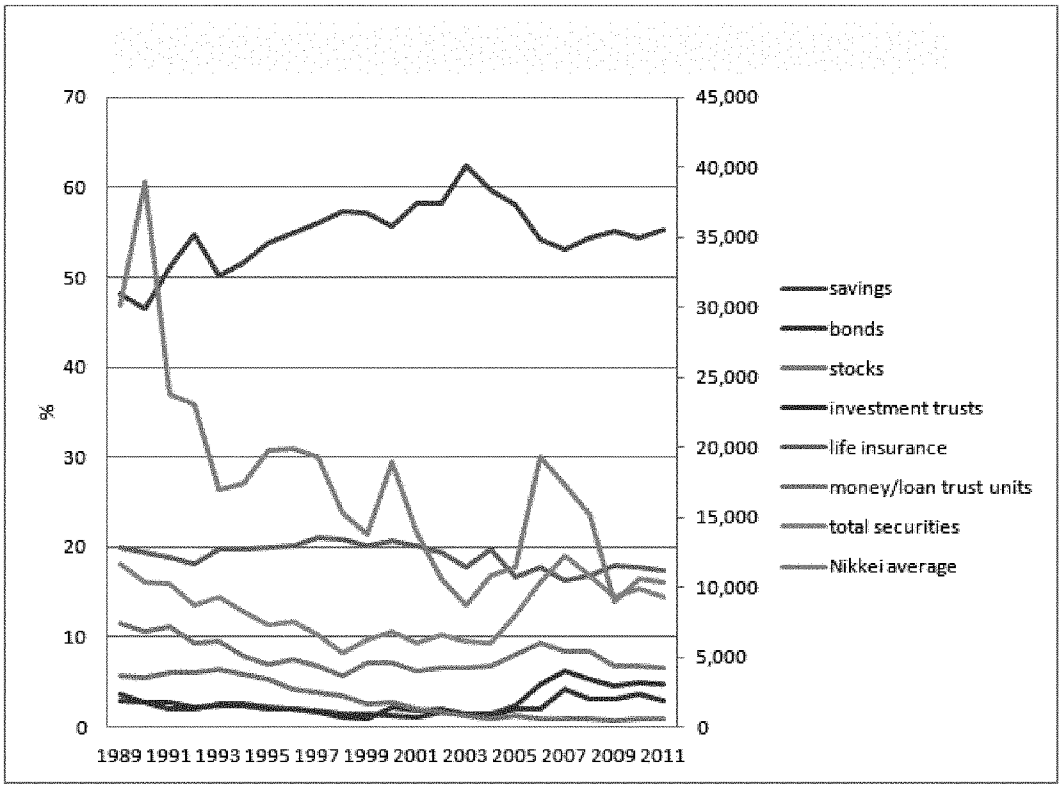
[81] Many Japanese hope that their surviving relatives will undertake Buddhist or Shinto memorial services for them.

[82] Other relevant applications are land trusts, real estate management trusts, and trusts for the disposition of real estate relating to reverse mortgage type loans: Toru Kobayashi, "The Potential of the Civil Trust in an Ageing Society (*koureishakai to minjishintaku no kanousei*)" in Makoto Arai ed., *Fundamentals and Practice of Trust Law (shintakuhou no kiso to unyou)* (Tokyo: Nihon Hyouronsha, 2007) at 160.

The term "welfare-related purposes" can be misleading, given its connotations of safety nets in the welfare State. In fact, much of Japan's private wealth resides in the hands of its older cohorts.[83] This is reflected in substantial differences in average savings, debt, and homeownership rates between younger and older cohorts.[84] This accretion of wealth is unsurprising given that many members of older cohorts have accumulated a lifetime of wages and retirement benefits in the high-growth era, and have discharged financial obligations related to child-raising and home loans. Moreover, with the passing of a generation that has enjoyed unprecedented life spans, cohorts below them have begun to succeed to substantial inheritances. Meanwhile, the form that household wealth takes in Japan is changing considerably. Except during the anomalous "bubble era" of the late 1980s, Japanese household wealth has continued to be heavily represented by savings (55% in 2011), relative to comparable countries.[85] Households saved more and avoided securities (stocks, bonds, and investment trusts) after the property and stock markets crashed in 1991. Yet when the stock market finally showed signs of recovery in 2004, households cautiously returned to investing in shares, a trend interrupted by the global financial crisis of 2008.

In sum, the potential demand for civil trusts to manage a larger, diverse pool of household assets cannot easily be disaggregated from the broader socio-economic changes that have spurred the deregulation of the commercial trust, namely the advent of a mature, wealthy post-industrial economy. Nevertheless, some commentators accuse reformers of overlooking the potential of civil trusts and charitable trusts.[86] The following section is an exploration of the potential and post-reform reality of welfare-related civil trusts.

[83] Kobayashi, "The Potential of the Civil Trust in an Ageing Society (*koureishakai to minjishintaku no kanousei*)", *supra* note 82 at 152.
[84] *Ibid.*
[85] Data from Central Council for Financial Services Information website, online: <http://www.shiruporuto.jp/finance/chosa/index.html>.
[86] Arai, "Japan", *supra* note 16 at 248.



Household finances 1989-2011 v NIKKEI average[87]

1. *Self-Benefit Trust*

The self-benefit trust (*jieki shintaku*), in which the settlor is also the beneficiary, predated the reforms. As a civil trust, it has largely unexplored potential in the field of welfare. One example is as an alternative or transition to adult guardianship (in Japan, a general term to describe a variety of arrangements whereby a "guardian", "curator", or "assistant" makes decisions for a ward relating to legal and financial matters). Like adult guardianship, the civil trust is one means of preserving income security as the physical and mental capacities of the settlor-beneficiary decline with age.

The trust is the surest way of protecting assets from predators such as unscrupulous traders and scammers,[88] and consumer credit lenders.[89] This is

[87] Data from Central Council for Financial Services Information website. online: <http://www.shiruporuto.jp/finance/chosa/index.html>.

[88] Kobayashi, "The Potential of the Civil Trust in an Ageing Society (*koureishakai to minjishintaku no kanousei*)", *supra* note 82 at 159.

because trust property is held in the name of the trustee and may only be used according to the terms of the trust. These terms might be to release money periodically into a standard bank account for automatic payments such as living costs, rent, or nursing home fees.[90] With the exception of "declaration of trust", the Japanese trust (being based on a contract) can ultimately be rescinded. However, even where the trustee is a trust bank, this cannot be accomplished without considerable procedural hurdles. In contrast, painful experience has taught many elderly citizens in Japan that savings in a standard bank account are easily targeted through duress or trickery.[91]

2. *Altruistic Trusts*

Altruistic civil trusts (*taeki shintaku*) include trust products provided by trust banks, testamentary trusts, and trusts receiving favourable treatment for tax purposes such as "special donation trusts" and educational expenses trusts. These trusts provide a means by which individuals can continue beyond retirement and death to provide for dependants or others, who may have dementia or other infirmities. The testamentary trust, which takes effect upon the settlor's death, predates the reforms.[92] A variant, also predating the reforms, is the "will substitute trust" (*yuigon daiyou shintaku*). This is where a self-benefit trust created during the life of the settlor becomes an altruistic trust upon his or her death.[93] This trust provides for surviving beneficiaries without the burden and delays of probate, which can be significant – up to six months if an executor is not nominated. It can also avoid the procedural burdens and costs in Japan associated with making a will, *i.e.* notarisation.[94]

The new "declaration of trust", in which the settlor is also the trustee, has the welfare-related applications seen in common law jurisdictions. For example, a settlor may gift a beneficial interest protected from bankruptcy and creditors to a person who does not have the capacity to manage money or property. An

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[89] For a discussion of attempts to regulate unscrupulous consumer credit lenders in Japan, see Nottage, Luke R. & Kozuka, Souichirou, "Lessons from Product Safety Regulation for Reforming Consumer Credit Markets in Japan and Beyond: Empirically-Informed Normativism" (2012) 34(10) Sydney L. Rev. 129.

[90] *Ibid.*

[91] "Con artists calling" *The Japan Times* (8 September 2008). In 2011, about US$11 million was lost in this manner: National Police Agency website, online: <http://www.npa.go.jp/safetylife/seianki31/higaijoukyou.html>.

[92] Kobayashi, "The Potential of the Civil Trust in an Ageing Society (*koureishakai to minjishintaku no kanousei*)", *supra* note 82 at 162.

[93] *Trust Act,* s. 90.

[94] Kobayashi, "The Potential of the Civil Trust in an Ageing Society (*koureishakai to minjishintaku no kanousei*)", *supra* note 82 at 165.

equivalent that predates the reforms is the "special donation trust" (*tokutei zouyo shintaku*). This is formed through a contract between the settlor and a trust bank for the periodic payment of living costs for a person falling within one of seven categories of serious disability.[95] This type of trust was created in 1975 through reform of the *Inheritance Tax Act* and can be used to avoid gift tax (relatively high in Japan) on property with a value of up to 60 million yen (approximately US$750,000).[96] Trust property under this type of trust can be cash, shares, monetary claims, and real estate.[97] The successive-beneficiary trust (*juekisha renzokugata shintaku*), discussed further below, may also be useful in an ageing society to provide for a family member after the settlor's death while also allowing the settlor-testator control over inherited property, for example a family business.[98]

3. *The Post-Reform State of Welfare-Related Civil Trusts*

Reformers did little to address the causes of the failure of the welfare-related civil trust to take root in Japan. Unsurprisingly given their historical monopoly and economies of scale, the primary "provider" of civil trusts in the welfare field has been trust banks. To do this, they have used a close relative of the unit trusts that developed in popularity as a result of post-War state guidance.[99] At present, however, trusteeships over non-cash assets such as the family home have not been commercially attractive to trust banks.[100] This is regrettable given that fraudulent dispositions of the family home and other assets have become a real risk for the elderly. As a rule, as transactions become more complex and less profitable, trust banks are reluctant to take on beneficiaries. This has also been the case for taking on adult wards, despite reforms in 2005 permitting trust banks to become guardians.[101] For altruistic trusts, while the new "declaration of trust" can obviate the need for a trust bank, these trusts are subject to a rigorous tax environment unless they meet the conditions of the "special donation trust", and require a level

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[95] *Inheritance Tax Act* (*souzokuzeihou*), Act no. 73 of 1950, s. 21-4.
[96] *Ibid.*
[97] *Inheritance Tax Regulations* (*souzokuzeihoushikourei*), Reg 71 of 1950, reg. 4-10. Although in the case of real estate, it must be either the residence of the beneficiary or capable of securing a reasonable income.
[98] Kobayashi, "The Potential of the Civil Trust in an Ageing Society (*koureishakai to minjishintaku no kanousei*)", *supra* note 82 at 166. A testamentary gift is specific property left to a specific person in a will.
[99] Kobayashi, "The Potential of the Civil Trust in an Ageing Society (*koureishakai to minjishintaku no kanousei*)", *supra* note 82 at 160.
[100] *Ibid.*
[101] Akihiko Kobayashi & Ichiro Otaka, *Understanding the New Adult Guardianship System (wakariyasui shin seinen kouken seido)* (Tokyo: Yuhikaku, 2000) at 26.

of personal long-term commitment and financial sophistication that may not be realistic for many aged settlor-trustees.

One solution to this problem may be a more liberal tax and regulatory environment for new business models, including special rules in bankruptcy (a trust in Japan can itself be subject to bankruptcy proceedings). As described below, despite the deregulatory tenor of the reforms, the regulatory environment for "trust businesses" remains difficult to penetrate for small companies who may wish to undertake for-profit and non-profit (*i.e.* management) trusteeship simultaneously. It appears that lawyers can, for civil trusts, undertake trusteeship beyond the strict regulatory regime of the *Trust Business Act.*[102] However, while increasing in number due to justice system reforms, given the fact that lawyers (*bengoshi*) in Japan have other staple jobs related to their small number and effective monopoly over litigation, it is questionable whether the legal profession will be interested in welfare-related trusteeship. Other law-related professions such as judicial scriveners (*shihoushoshi*) have greater potential, just as they have responded to new business opportunities in guardianship.[103]

Another possible solution would have been for reformers to take the lead in promoting the form of non-remunerated trusteeship prevalent in common law jurisdictions. There are a number of possible reasons why non-remunerated trusteeships (which include remuneration for reasonable expenses) have not emerged in Japan. The first reason is that – at least until fraud against the elderly reached epidemic levels – other legal forms, such as agency, may have sufficed for individuals who required others to manage their property.[104] The second reason suggested by some is that the average Japanese person, for cultural or structural[105] reasons (such as the cost of transactions), remains distant from the law and has shied from the formality of trust and contract. A related third reason may be a suspicion toward persons beyond the family, including NPOs. Again, this may be for cultural reasons, or structural reasons, for example lack of state support for NPOS in Japan in the form of tax-breaks.[106] The fourth reason is of course that such trusteeships have never received the imprimatur of the government.

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[102] Yasuhiro Akanuma, "The Potential for Development of the Civil Trust (*minjishintaku no hatten kanousei*)", *supra* note 78 at 5.

[103] Judicial scriveners have seen the largest increase in the share of guardianship appointees, reaching 10.5% in 2007: Supreme Court of Japan, *Summary of Adult Guardianship Related Cases (seinen kouken kankei jiken no gaikyou).*

[104] Arai, "Japan", *supra* note 16 at 236.

[105] For an early proponent of this view, see John Owen Haley, *Authority Without Power: Law and the Japanese Paradox* (New York: Oxford University Press, 1991).

[106] See Robert Pekkanen, *Japan's Dual Civil Society*: *Members Without Advocates* (Stanford: Stanford University Press, 2006).

As with adult guardianship,[107] networks of scholars, professionals (including lawyers, judicial scriveners, court officials, and social welfare officers), NPOs, and local government may ultimately rise to the task of working within the current legal framework to promote and finance non-remunerated trusteeships. Such groups appear frustrated, however, with the lack of leadership from commercially-minded reformers, who have failed to foster a balance between utility and the oversight required to maintain the integrity of the civil trust. This is in stark contrast to their endeavours toward revamping the commercial trust.

It may be objected that reformers did turn their minds to the successive-beneficiary trust. Yet this anomaly can be explained by the quasi-commercial application of this form of trust in business succession and lobbying from civil lawyers concerned with doctrinal purity rather than specifically welfare-related concerns. Demonstrating the challenges associated with the anomalous position of the trust in a civil law jurisdiction, tensions among specialists in distinct branches of civil law emerged in 1983 when a Japanese court used the trust to give effect to a testamentary gift to successive donees.[108] This challenged the orthodoxy that such a gift was invalid because the Civil Code does not recognise time limits on ownership. It also challenged many commentators' view that such gifts, like common law "fee tail", reinforced the anachronistic model of the patriarchal Japanese household (*ie*).[109]

Foreshadowing the flexible appeal of the trust in later years, on the doctrinal question (*i.e.* the validity of gifts to successive donees), trust jurisprudence succeeded where property and succession law had failed precisely because of its transformative effect on entrusted property.[110] For example, successive beneficial interests could be constituted by either principal or income.[111] By specifying the duration of such beneficial rights, it was possible to

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[107] See Sachiko Takagi, "Support Programs for Use of the Adult Guardianship System and Applications by Municipality Heads: View from the Front Line (*seinen kouken seido o riyou shien jigyou to shichou sonchou no moushitate: genba no shiten kara*)" (2005) 58(6) Houritsu no hiroba; Noriko Shirai, "Use of the adult guardianship system for contracts for nursing insurance (*kaigo hoken keiyaku ni okeru seinen kouken seido no riyou*)" (2005) 58(6) Houritsu no hiroba; Yasuhiro Akanuma, "Issues regarding the adult guardianship system and the role of lawyers (*seinen kouken seido no kadai to bengoshi no yakuwari*)" (2005) 58(6) Houritsu no hiroba; Masao Onuki, "The achievements of 'legal support' and the role of judicial scriveners (*riigaru sapooto niokeru jisseki to shihou shoshi no yakuwari*)" (2005) 58(6) Houritsu no hiroba; Keiji Furui, "Issues regarding the role and work borne by social welfare officers (*shakai fukushishi ga ninatte kita yakuwari to jitsumujou no kadai*)" (2005) 58(6) Houritsu no hiroba.

[108] By regarding the property as an encumbered bequest terminating upon the first beneficiary's death.

[109] Kobayashi, "The Potential of the Civil Trust in an Ageing Society (*koureishakai to minjishintaku no kanousei*)", *supra* note 82 at 166.

[110] *Ibid.* at 166-167.

[111] *Ibid.* at 167.

ensure that the second beneficiary's entitlement began on the conclusion of the first beneficiary's entitlement, *i.e.* upon the first beneficiary's death.[112] On the policy question (*i.e.* the spectre of the patriarchal family), the courts could impose time limits on this device using a catchall provision in the Civil Code requiring transactions to adhere to "public order and morals" (*koujo ryouzoku*).[113] Thus, a settlor-testator could achieve certain purposes, such as maintaining the unity of a family business or the right to use a family home, without necessarily perpetuating the rigid line of succession associated with older societal and familial norms.

Nevertheless, the courts could only go so far in reconciling this application of the trust to the wider civil law context. In addition to the quasi-commercial applications of this form of trust, reformers recognised that legitimate (albeit parochial) concerns from civil law scholars could be allayed by providing a limited statutory basis for beneficial interests that terminate and accrue upon the death of successive beneficiaries,[114] and clarifying that such interests are subject to tax laws[115] and succession laws relating to family provision (*iryuubun*).[116]

B. Charitable Trusts

With their flexibility, exemption from the general 20-year time limit for trusts,[117] and favourable tax treatment, charitable trusts may play a crucial role in Japan's transition to a "hyper-aged" society with diverse needs.[118] The charitable trust was introduced in 1922,[119] but was not used until 1977. At their peak in 2001, there were 566 charitable trusts responsible for administering approximately 74 billion yen.[120] As with all trusts, the advantage of the charitable trust is (in theory) its flexibility. One notable example of the utility of charitable trusts is the trust

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[112] *Ibid.*

[113] *Ibid.*

[114] No new transfer to a successive beneficiary is possible after 30 years from the establishment of the trust: *Trust Act,* s. 91.

[115] *Inheritance Tax Act* (*souzokuzeihou*), Act no. 73 of 1950, s. 9-2. Inheritance tax is imposed at the time on the first beneficiary obtains a present entitlement. Further beneficiaries are deemed recipients of testamentary gifts from the preceding beneficiary for tax purposes.

[116] The reforms also provided the machinery needed to reconcile these areas of law when a simple prioritisation is not possible because of the passage of time. It can be difficult to calculate such a claim when the property is divided both in nature and over time. In such cases, an appraisor is appointed by a family court: *Civil Code,* s. 1029(2).

[117] *Trust Act,* s. 259.

[118] Kobayashi, "The Potential of the Civil Trust in an Ageing Society (*koureishakai to minjishintaku no kanousei*)", *supra* note 82 at 162.

[119] *Charitable Trust Act (kooueki shintaku ni kan suru houritsu),* Act No. 62 of 1922.

[120] Japan Trust Association website, online: <http://www.shintaku-kyokai.or.jp/news/news230613.html>.

established by an organisation of "paralegal" judicial scriveners to ease the financial burden faced by the disadvantaged when using Japan's new adult guardianship system.[121]

Despite their potential, over the past decade welfare purposes have represented only 6% of total charitable trusts by value compared to 25% for educational scholarships and 17% for the promotion of science.[122] The domination of these categories reflects central government industrial policy priorities. The central government has great latitude to pursue its policy goals through the charitable trust. This is because there are significant regulatory hurdles for qualification as a charitable trust.[123] The new *Trust Act* preserves the provisions of the former Act relating to charitable trusts until reforms have been made to the separate *Act on Charitable Trusts,* which will bring this Act into line with recent liberalising reforms to the *Public Interest Corporation Act.*[124] Until the enactment of the *Public Interest Corporation Recognition Act 2006*,[125] central government recognition and supervision was required before a mere "incorporated association" could be characterised as a public interest corporation.[126]As part of a wider deregulatory trend, regulatory functions have been devolved to prefectural level governments and independent agencies.[127] Even still, this is only a partial devolution because, to receive favourable tax treatment, a public interest corporation must still meet government-issued guidelines and prove that the majority of its expenditures are dedicated to activities promoting a statutorily defined "public interest".[128]

The new "purpose trust" (*mokuteki shintaku*) seems to introduce a new degree of flexibility to the current charitable trust framework. However, until the

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[121] See Legal Support website, online: <www.legal-support.or.jp/public/month_report_doc/201102.pdf>. Of course, educational and welfare purposes can overlap, such as charitable trusts established to assist school-aged children affected by disasters (see, for example, the JCB East Japan Disaster Charitable Trust administered by Mitsubishi UFJ Trust Bank, online: <http://www.kodomo-ouenkikin.jp/ext/kikin.html>.

[122] Based on 2007 figures: Japan Trust Association website, online: <http://www.shintaku-kyokai.or.jp/news/news230613.html>.

[123] Kobayashi, "The Potential of the Civil Trust in an Ageing Society (*koureishakai to minjishintaku no kanousei*)", *supra* note 82 at 163.

[124] *Act on Charitable Trusts* (*kouekishintaku ni kan suru houritsu*), Act no. 62 of 1936; *Trust Act,* supplementary provisions 3, 4.

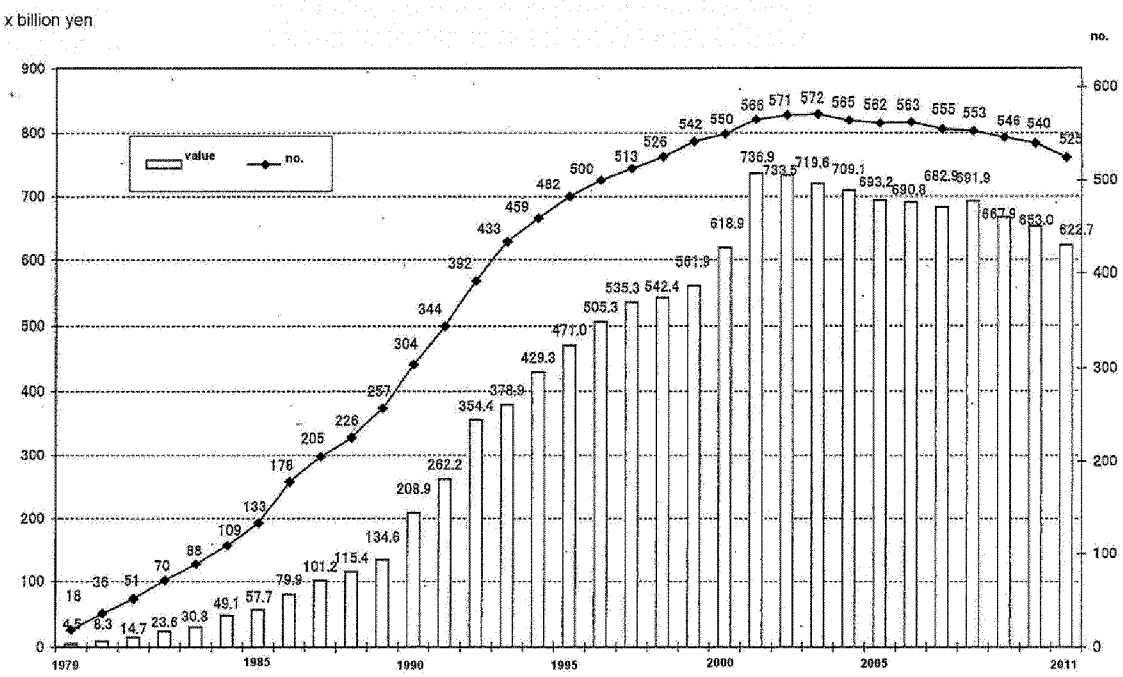
[125] *Act on Authorization of Public Interest Incorporated Associations and Public Interest Incorporated Foundations* (*kouekishadanhoujin oyobi koueizaidanhoujin no ninteitou ni kan suru houritsu*), Act no. 49 of 2006.

[126] Cabinet Administrative Reform Office website, online: <http://www.gyoukaku.go.jp/siryou/koueki/pdf/pamphlet02.pdf>.

[127] Cabinet Administrative Reform Office website, online: <http://www.kantei.go.jp/foreign/central_government/frame.html>.

[128] This includes contribution to the welfare of the elderly.

indefinitely deferred reforms to the *Charitable Trust Act*, only corporations handpicked by the government on the basis of an assessment regarding material and human resources can be recognised as trustees.[129] In the meantime, for an aspiring trust to secure recognition as a charitable trust for "academic activities, art, charity, worship, religion, or any other public interest", it is subject to a lengthy process of central government authorisation.[130] This is true even for the "general public interest trust" (*ippan koueki shintaku*), which does not even receive the beneficial tax treatment that so-called "designated public interest trusts" (*nintei koueki shintaku)* receive.[131]



Trends in number and total value of charitable trusts[132]

The reduced regulatory burden apparently in the offing may increase the utility of the charitable trust to respond to rapid ageing. Streamlining the gatekeeper role of the central government may increase the responsiveness of trusts to notions of "public interest" that emerge at a grassroots level rather than central industrial

[129] *Trust Act,* supplementary provisions 3, 4.
[130] *Ibid.*
[131] Kobayashi, "The Potential of the Civil Trust in an Ageing Society (*koureishakai to minjishintaku no kanousei*)", *supra* note 82 at 163.
[132] Japan Trust Association website, online: <http://www.shintaku-kyokai.or.jp/news/news230613.html>.

policy. In addition to adjustment of the tax environment for charitable trusts, deregulation may also paradoxically rescue many charitable trusts from financial ruin. Most charitable trusts in a near-zero interest rate environment have been unable to meet their objectives merely from the income derived from trust property. As shown in the figure above, the number and value of charitable trusts have declined significantly over the past decade after peaking (in value) in 2001. From 2007 to 2011, the number of charitable trusts for social welfare purposes declined from 43 to 39, as did the value (3.94 to 3.65 billion yen). The urgency of calls by the Japan Trust Organization for simplified rules on accreditation and donations to charitable trusts reflects the gap between the potential and the reality of this type of trust in an ageing society.[133] The indefinite postponement of anticipated reforms in this area reflects the fact that it was not a priority for reformers focused instead on exploiting the trust in the commercial sphere.

In summary, the post-reform reality of non-commercial trusts does not meet their potential. In some cases this is because of the surrounding policy context, such as a dearth of viable business models or incentives for commercial providers to offer trust products that exploit the full spectrum of welfare roles of the civil trust. Another example is the lack of public education regarding the utility of the civil trust. In the case of charitable trusts, the problem is directly related to the prioritisation of the commercial trust in the reform process, despite impassioned calls for reforms that make charitable trusts more responsive to community needs. The one reform that does seem to capitalise on the potential of the civil trust (the successive beneficiary trust) seems to have resulted from factors unrelated to a welfare agenda, namely commercial applications for family businesses and a desire to reconcile disparate branches of civil law. As a result, it was always unlikely that the reforms would address the legal, structural, or alleged cultural causes for the low diffusion rate of the welfare-related civil trust.

VI. WHY WERE CHARITABLE TRUSTS AND THE WELFARE-RELATED CIVIL TRUST OVERLOOKED?

Law and policy makers in Japan are cognisant of the need to establish legal and other infrastructure for a rapidly ageing society, as evident from recent reforms to a wide range of areas including housing, immigration, nursing care insurance, health, pension, adult guardianship, childcare, the labour market, and family policies.[134] That reformers overlooked charitable and civil trusts is in this sense

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[133] Japan Trust Association website, online: <http://www.shintaku-kyokai.or.jp/news/pdf/NR230613-6.pdf>.

[134] See National Diet Library Survey and Legislation Consideration Bureau, *Declining Fertility, Aging and Countermeasures (shôshika·kôreika to sono taisaku)* (Tokyo: National Diet Library, 2005).

puzzling. It is also inconsistent with a trend in Japanese welfare-related legal forms towards self-sufficiency. This trend, typically branded as "respect for autonomy", is manifest in the introduction of a partial consumer contract model of nursing care, childcare, pension funds, and adult guardianship, as examples.[135] In the context of adult guardianship, the new consumer-centred model allows individuals of sound mind to enter remunerated contracts with individuals or corporations (typically trust banks) for future adult guardianship should the need arise.[136]

These autonomy-enhancing reforms are starting from a relatively low base in Japan. For example, taking a will as an example of expression of autonomy through law, over 10% of Japanese people die with a notarised will (which does not require probate) and even fewer Japanese die with a non-notarised will (only 1% of the population).[137] Since the inception of the new adult guardianship system in 2004 only a relatively small number of voluntary guardianship contracts have been signed, and even fewer acted on, though usage is slowly increasing.[138] The significance of autonomy-enhancing reforms, however, may lie in the implicit rejection of earlier views that Japan was, as a matter of culture, a society disinterested in using legal machinery to order private affairs.[139] Accordingly, reformers point to surveys that indicate increasing desire on the part of the elderly to become legal "consumers", such as a growing desire to notarise wills and guardianship contracts.[140]

Trust law reform would seem to fit naturally into this picture of creating a suite of autonomy-based legal forms for use in a welfare context. More generally, they tally with the attempt to formalise social relationships through legal forms through recent wide ranging justice system reforms: "to transform both the spirit

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[135] Takashi Uchida, "Privatization and Contract: an Exploration of Institutional Contract Theory *(mineika to keiyaku: seidoteki keiyaku ron no kokoromi)*" (2006) 1305-1311 Juristo (1308) at 95-97, (1309) at 51-53; Tomoyuki Katou *et al.*, *Social Security Law (shakai hoshou hou)*, 3rd ed. (Tokyo: Yuhikaku, 2007) at 109.

[136] Akihiko Kobayashi & Ichiro Otaka, *Understanding the New Adult Guardianship System (wakariyasui shin seinen kouken seido)*, *supra* note 101at 50-3.

[137] Kobayashi, "The Potential of the Civil Trust in an Ageing Society (*koureishakai to minjishintaku no kanousei*)", *supra* note 82 at 156. Notarised wills do not need to pass through probate.

[138] See Supreme Court of Japan, *Summary of adult guardianship related cases (seinen kouken kankei jiken no gaikyou)*, online: <http://www.courts.go.jp/about/siryo/kouken.html>.

[139] For a good summary of "theories of Japanese law", see Eric Feldman, "Law, Culture, and Conflict: Dispute Resolution in Postwar Japan" in Daniel H. Foote, ed., *Law in Japan: A Turning Point* (Seattle: University of Washington Press, 2007).

[140] Kobayashi, "The Potential of the Civil Trust in an Ageing Society (*koureishakai to minjishintaku no kanousei*)", *supra* note 82 at 155.

of the law and the rule of law into the flesh and blood of this country".[141] It is the nature of reform, however, that outcomes reflect the goals and values of the agents of change. Where these agents are diverse, these values and goals can be difficult to disaggregate. This is true of the reforms in welfare described above. Different philosophies within the spectrum of liberal thought may place different emphases on the terms "autonomy" and "self-sufficiency". On the one hand, advocates of small government may emphasise the role of autonomy in reducing the State's welfare burden. On the other hand, adherents of "positive" liberty may read into these terms the need for some level of assistance from the State or a State surrogate, such as civil society. The former might be expected to prioritise the role of the commercial trust in allowing a deregulated finance sector facilitate the growth of an investor society. The latter might instead focus on the amenability of the civil trust to assist vulnerable and aged individuals to maximise control over assets without compromising the security of those assets.

Generally speaking, while not accounting for possible rent-seeking behaviour, associations of law-related professionals and NPOs fall within the latter camp. For the purposes of this article, these agents of change are called "grassroots reformers", given their proximity to the ageing or vulnerable individuals who face the day-to-day challenges of managing their affairs in a complex, information economy. This includes the legal professionals and NPOs[142] that have encouraged the diffusion of adult guardianship, wills, and the civil trust. Also loosely associated with this camp are scholars with conceptual and personal links to US academic Tamar Frankel.[143] Frankel and others associated variously with "reliance theory", [144] "relational theory", [145] "promissory theory", [146] communitarianism, [147] and post-modernism, [148] emphasise the mutual reliance, rather than self-sufficiency, required for societies to survive the fragmenting

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[141] Recommendations of the Justice System Reform Council, "For a Justice System to Support Japan in the 21st Century" (12 June 2001), online: <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>.

[142] There are over 50 registered NPOs in Japan that list the promotion of will-making as a purpose: see Cabinet Office website, online: <https://www.npo-homepage.go.jp/portalsite.html>.

[143] See Tamar Frankel & Norio Higuchi, "Trust Model and Contract Model: American Law and Japanese Law (*shintaku moderu to keiyaku moderu: amerika hou to nihonhou*)" (1998) 115(2) Hougaku kyoukai Zasshi 1.

[144] N. C. Seddon & M. F. Ellinghaus, *Cheshire & Fifoot's Law of Contract*, 9th ed. (Chatswood: LexisNexis Butterworths, 2008) at 1227.

[145] *Ibid.* at 1241.

[146] *Ibid.* at 1251.

[147] See Takao Tanase, *Community and the Law: a Critical Reassessment of American Liberalism and Japanese Modernity*, trans. by Luke Nottage & Leon Wolff (Cheltenham: Edward Elgar, 2010).

[148] M. Freeman, ed., *Lloyd's Introduction to Jurisprudence*, 8th ed. (London: Sweet & Maxwell, 2008) at 1411-1412.

forces of a post-industrial society.[149] Rather than classical contract, therefore, the civil trust and the fiduciary relationship bring legal endorsement and protection to reliance-based relationships.[150]

In contrast to these "grassroots" and Frankel-influenced reformers, trust reform has caught the attention of policy makers due to the government's explicit agenda of encouraging citizens to become welfare "consumers" rather than mere "recipients" and "investors" rather than mere "savers". This drive to create citizen investors results partly from a desire to bolster Japan's post-bubble era share market[151] and partly from policymakers' fears that the State may be overwhelmed by the welfare demands of an ageing society.[152] Typically structured as premium-based social "insurance" rather than tax-based welfare, welfare schemes in Japan have since their inception featured an element of self responsibility and reliance on the family as "Japanese-style welfare" (*nihon-gata fukushi*).[153] This has been intensified by waves of reform following the economic sustainability concerns raised first as Japan's high growth period ended with the oil shocks of the 1970s and then more recently as ageing has accelerated to due to the *en masse* retirement of a pronounced baby-boomer cohort.[154]

An example of the new push to create autonomous citizen investors as macroeconomic strategy can be seen in the aged pension system, which has seen a shift away from a government-supervised direct transition of wealth from current workers to current retirees ("pay-as-you-go").[155] Instead, an increasing share of retirement pensions come from individual "defined contribution" schemes managed by professional investors and exposed to the potential gains and risks of the share market.[156] This strategy also provides the context to deregulatory, market-based reforms in nursing care and child care,[157] and of course the commercial trust, due to its potential utility in the finance and investment sector.

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[149] Tamar Frankel, "Fiduciary Law in the Twenty-First Century" (2011) 91 B.U.L. Rev. 1289 at 1291-1292.

[150] Kansaku, "Recent Developments and Issues in Trust Law and Related Laws (*shintakuhou, shintaku kanrenhou no kinji no tenkai to kadai*)", *supra* note 46 at 10.

[151] See Sarah M. Ingmanson, *Corporate pension reform in Japan: big bang or big bust?* (2004), online: <http://lauder.wharton.upenn.edu/pages/pdf/SarahIngmanson_Thesis.pdf> at 41, 83.

[152] Tomoyuki Katou *et al.*, *Social Security Law (shakai hoshou hou)*, 3rd ed. (Tokyo: Yuhikaku, 2007) at 69.

[153] *Ibid.* at 13; See Goodman, Roger, "The 'Japanese-Style Welfare State' and the Delivery of Personal Social Services" in Roger Goodman, Gordon White & Huck-ju Kwon, eds., *The East Asian Welfare Model: Welfare Orientalism and the State* (London: Routledge, 1998).

[154] Tomoyuki Katou *et al.*, *Social Security Law (shakai hoshou hou)*, *supra* note 152 at 18-19.

[155] Ministry of Health Labour and Welfare, *General Outline for Japan's Defined Contribution Pension Law (kakutei kyoshutsu nenkin seido no gaiyou)*, online: <http://www.mhlw.go.jp/topics/0106/tp0628-5.html>.

[156] Tomoyuki Katou *et al.*, *Social Security Law (shakai hoshou hou)*, *supra* note 152 at 109.

[157] *Ibid.* at 19.

The deregulatory, diversifying impetus in trust law reform thus goes hand in hand with State-led diversion of household wealth toward riskier, more diverse assets. Indeed, even in the wake of the problems caused by so-called "collateralised debt obligations" during the global financial crisis, the trust retains its appeal as a vehicle capable of managing investment risk through securitisation.[158] As described above, the new diversity of trustees and trust forms is inseparable from broader deregulatory financial reforms. This has led to the diffusion of new financial products involving trusts, as seen in other jurisdictions.[159] Beyond mere deregulation, the recent trust law reforms also belong to a sustained law and economics-style attempt to achieve efficiency and responsiveness to the legal "consumer" by creating competition between legal forms themselves.[160] Key examples of this "menu approach" are the liberalising reforms in 2005 to the *Companies Act*[161] and reforms from 1999 to 2004 to the insolvency regime.[162] Accordingly, as in other jurisdictions, the trust is anticipated by top down reformers to rival the corporate form in various business contexts.[163]

The omission of the civil trust from the reform process may be explained by the sublimation of the goals of grassroots reformers to the fiscal and macroeconomic goals of the State and the sectional interests of its influential clients in the finance sector. This lopsided impact on the reform process might be traced to the composition of the Trust Reform Committee of the Legislative Council of the Ministry of Justice, a stakeholder body integrated into the drafting process of the new laws.[164] There were two lawyer-academics, one specialising in consumer law and the other the former chair of the Securitisation Association and former member of Ministry of Finance's Finance Council. There were two

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[158] See Kansaku, "Recent Developments and Issues in Trust Law and Related Laws (*shintakuhou, shintaku kanrenhou no kinji no tenkai to kadai*)", *supra* note 46 at 14.

[159] Aakash Desai, "Commercial Trusts and Securitisation: Lessons from the Global Financial Crisis" (2010) 28 Company and Securities Law Journal 10 at 10.

[160] Kansaku, "Recent Developments and Issues in Trust Law and Related Laws (*shintakuhou, shintaku kanrenhou no kinji no tenkai to kadai*)", *supra* note 46 at 12.

[161] Keiko Hashimoto, Katsuya Natori & John Roebuck, "Corporations" in Gerald McAlinn, ed., *Japanese Business Law* (Alphen aan den Rijn: Wolters Kluwer, 2007) at 91. See also Luke Nottage, Leon Wolff & Kent Anderson, eds., *Corporate Governance in the 21st Century: Japan's Gradual Transformation* (Cheltenham: Edward Elgar, 2008).

[162] Kent Anderson & Trevor Ryan, "Reorganization and Bankruptcy" in Gerald McAlinn, ed., *Japanese Business Law* (Alphen aan den Rijn: Wolters Kluwer, 2007) at 596.

[163] Steven Schwarcz, "Commercial Trusts as Business Organizations" 13 Duke J. Comp.& Int'l L. 321 at 335.

[164] Legislative Council website, online: <http://www.moj.go.jp/shingi1/shingikai_shintaku.html>. The influential roles of other groups such as the Trust Companies Association of Japan (*shintaku kyoukai*) and the broader-based Japan Association of the Law of Trust (*shintakuhou gakkai*) should also not be discounted.

officials from the Ministry of Justice. There were four in-house lawyers from Mitsui Sumitomo Bank, Chuo Mitsui Trust Bank, Sumitomo Corporation (a large business conglomerate engaged in international business investment), and Orient (a large manufacturing and construction company). Finally, there were four academics, all current or future faculty members of the elite Tokyo University.

Evidently, only two members of the Trust Reform Committee, including its academic chair Yoshihisa Noumi, specialised in non-commercial aspects of the trust in addition to commercial aspects. The others might reasonably have been expected to empathise with industry lobbyists advocating convergence between the Japanese trust and the flexible common law trust model that had elsewhere proved so useful in the design of innovative financial products. The influence of the finance industry presumably also extends into the bureaucracy itself in light of a 2004 private survey of "golden parachute" (*amakudari*) trends in 122 banks, which revealed that 7% of employees of these banks were former bureaucrats, of whom 40% had senior posts.[165] Two thirds of former bureaucrats employed were from either the Ministry of Finance or the Bank of Japan.[166]

VII. Intangible Consequences of Commercialisation of the Trust

In the following, this article explains why the omissions on the part of reformers relating to civil trusts cannot easily be remedied by subsequent complementary reforms due to the intangible consequences of the singularly commercial focus of the reforms. Ironically, one of the most damning critiques of the reforms comes from a reform "insider", none other than the chair of the Trust Reform Committee, Yoshihisa Noumi. A year after the passage of the *Trust Act*, Noumi expressed dissatisfaction with the theoretical compromises that had been required to secure the timely passage of the reforms.[167] Noumi revealed that the reform process did not involve extensive consideration of the fundamental concept of the trust.[168] The possible intangible consequences of the reforms noted by Noumi below flow indirectly from the commercial focus of the reformers.

A. The Trust Contract

One matter that goes to the heart of the trust in Japan is the status of the trust contract. The question is whether the contract itself creates the trust relationship, or whether the relationship begins only upon the transfer of trust property, as it

[165] Teikoku Databank survey, online: <http://www.tdb.co.jp/report/watching/press/p040903.html>.
[166] *Ibid.*
[167] Yoshihisa Noumi, "Theoretical Issues Regarding the New Trust Act (*atarashii shintakuhou no rirontekikadai*)" (2007) 1335 Juristo 8 at 14.
[168] *Ibid.* at 8.

does in the common law.[169] The reforms clarify that it is indeed the contract itself that creates the relationship.[170] This, according to Noumi, was due to reformers' concern to impose duties (such as loyalty) upon the trustee, who may be able to profit from insider knowledge about the trust property even before it is actually transferred.[171] In other words, the re-regulation described above that accompanied the commercialisation of the trust mandated that duties arise at the contracting stage. Noumi makes the point, however, that this also enables trustees to enforce the contract against a settlor to obtain the trust property.[172] This, he argues, detracts from a fundamental feature of the traditional trust, namely that it exists for the settlor and the beneficiary, not for the trustee.[173]

B. Beneficial Interests

Noumi also laments the weakened position of the beneficiary under the reforms.[174] In contrast to the status of the trust contract, the reforms did not resolve a longstanding debate in Japanese trust law jurisprudence regarding the status of beneficial interests. This debate was whether beneficial interests were, in a jurisdiction without a tradition of equity, non-propriety claims or something resembling a proprietary right, with the added security that brings to the beneficiary.[175] The new Act defines "beneficial interest" in the following way:

> [A] claim based on the terms of trust pertaining to the obligation of a trustee to distribute property that is among trust property to a beneficiary or to make any other distribution involving the trust property (hereinafter referred to as a 'distribution claim as a beneficiary'), and the right to request a trustee or any other person to carry out certain acts under the provisions of this Act in order to secure such a claim.[176]

Noumi observes that this definition, like a shareholder's interest in a company, comprises both individual and communal components (*i.e.* the shared interest in the trust property as a whole).[177] The individual component has its own sub-

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[169] *Ibid.* at 9.
[170] *Trust Act,* s. 3(1).
[171] Noumi, "Theoretical Issues Regarding the New Trust Act (*atarashii shintakuhou no rirontekikadai*)", *supra* note 167 at 9.
[172] *Ibid.*
[173] *Ibid.*
[174] *Ibid.* at 11.
[175] *Ibid.*
[176] *Trust Act,* s. 2(8).
[177] Noumi, "Theoretical Issues Regarding the New Trust Act (*atarashii shintakuhou no rirontekikadai*)", *supra* note 167 at 11.

definition: "distribution claim as a beneficiary" (*jueki saiken*), which uses the same language (*saiken*) as non-proprietary claims. However, the status of the entire beneficial interest is less clear from the Act.[178]

Though this debate remains unresolved, Noumi argues that reformers operated on the assumption that the beneficial interest was merely a non-proprietary claim, which in turn influenced other aspects of the reforms relating to beneficiaries.[179] An example of this is the fact that the reforms have clearly weakened a beneficiary's right to revoke an unauthorised transaction.[180] Under the former *Trust Act*, trust property that was registrable, for example land, was immune to claims by a bona fide third-party even if the trustee exceeded its powers if the fact that the property was under a trust was registered with the relevant authorities (in the case of land, a Legal Affairs Bureau attached to the Ministry of Justice).[181] For property that was not registrable, for example cash, general personal property, and monetary claims, a transaction would only be revoked if the third-party knew of, or was grossly reckless to, the trustee's lack of authority.[182] Commercial trustees criticised these provisions for jeopardising the security of transactions over registrable property and argued that stronger protection was needed for bona fide third parties.[183] Commercial trustees argued that a third-party requires at least as much protection when dealing with a trustee as with an agent under agency law. In neither case, it was argued, does registration of property guarantee open knowledge of the scope of the trustee or agent's authority. Indeed, the risks were even greater in the case of a trust because the transaction is made in the name of the trustee, rather than the principal in the case of agency.

In a blow to beneficiaries, the *Trust Act* was amended to apply the former lower standard for non-registrable trust property (*i.e.* knowledge of, or grossly negligent to, the lack of trustee authority) to registrable trust property.[184] In contrast to common law jurisdictions, which apply equity's general standard of a bona fide purchaser, Japan has applied differing standards according to legal form. For example, a beneficiary was protected if the third party was grossly negligent (*juudai na kashitsu*) to a trustee's lack of authority. In contrast, "ordinary" negligence (*kashitsu*) on the part of a third party sufficed for the protection of a principal should an agent exceed its authority. This lower standard for

[178] *Ibid.*
[179] *Ibid.*
[180] *Ibid.* at 12.
[181] Former *Trust Act,* s. 31.
[182] Noumi, "Theoretical Issues Regarding the New Trust Act (*atarashii shintakuhou no rirontekikadai*)", *supra* note 167 at 12.
[183] *Ibid.*
[184] The protection given to transactions over non-registrable property remains essentially unchanged.

beneficiaries was originally justified on the grounds that on the whole (*i.e.* when registrable property was added to the comparison) the standard of protection given to beneficiaries was comparable to principals. Noumi notes, however, that because this is no longer the case, the new amendments signal a substantial weakening of the beneficial interest.[185] This prioritisation of security of transactions at the expense of the special character of beneficial interests reflects the commercial imperatives of reformers and the indirect effect their assumptions have exerted on general trust jurisprudence.

C. Limited Liability Trust

As discussed above, commercial practitioners successfully lobbied for the creation of the "limited liability trust", which grants a trustee immunity even from tortious liability (to beneficiaries or third parties). Under the former Act, limited liability only arose exceptionally pursuant to a separate agreement between the trustee and a third party in the course of business.[186] Given the predominantly commercial application of the trust in Japan, trustees often engaged in frequent, high-value transactions, and thus bore significant personal liability risks.[187] Unlike the common law trust, Japan's original *Trust Act* was enacted on the premise that trustees would be commercial corporations. Given these origins, it was understandable that the limited liability trust was a long-standing goal for the trust "industry". The trust property rather than the trustee, it was argued, was what benefited from, and provided security for, the trustee's transactions.[188]

Now that limited liability has been officially recognised and systematised, it may have an indirect influence on the fundamental concept of the Japanese trust. The signal that this sends, according to Noumi, detracts from the regulatory effect that imposing personal liability has upon a trustee.[189] One important difference between the trust and the corporation has been that the trust does not have legal personality and is therefore not subject to the same governance mechanisms of a corporation. The "trustworthiness" of the trustee has traditionally compensated for this, given legal form through provisions of the former *Trust Act* or doctrine developed by the courts on trustees' duties. According to Noumi, part of the trustee's personal commitment to the trust is the personal stake (*i.e.* potential liability) that discourages inappropriate dealings and tortious conduct relating to

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[185] Noumi, "Theoretical Issues Regarding the New Trust Act (*atarashii shintakuhou no rirontekikadai*)", *supra* note 167 at 13.
[186] *Ibid.*
[187] *Ibid.*
[188] *Ibid.* Third parties could directly enforce claims against the trust property: former *Trust Act,* s. 16.
[189] *Ibid.*

trust property.[190] Noumi fears the indirect effect the creation of the limited liability trust may have on general trust jurisprudence. Despite its commercial utility, its creation signals that this personal commitment is no longer a fundamental aspect of the Japanese trust.[191]

Noumi thus provides three examples of how the recent reforms challenge traditional conceptions of the trust, not only in its common law form but in its received hybrid form. The new trust law regime has shifted away from a model that places the beneficiary's interests squarely at the centre. Instead, the new model facilitates and protects a new diverse range of trustee transactions to the general detriment of beneficiary protection. While this new model may be eminently suitable for commercial trust applications, it is questionable whether it is appropriate for civil trusts, especially of a welfare nature. The following section explores the possibility that courts may nevertheless offset this trend through the development of doctrine.

VIII. The Courts' Potential Role in Rescuing the Civil Trust

Some critics of the trust law reform process and outcome may be heartened by an increasing willingness on the part of elected lawmakers to depart from Japan's tradition of bureaucrat-driven law reform.[192] This trend has emerged in the wake of trust company scandals such as the covering up of non-compliance with capital requirements on the part of the Japan Digital Contents Intellectual Property Trust[193] and the concealment of substantial losses to corporate pensions by AIJ Investment Advisors.[194] These scandals have also prompted regulators to reassess the liberalising tenor of the reforms.[195]

In one sense, such renewed regulatory oversight may be unfortunate as its *ex-ante* approach has tended to displace consideration of the trust in Japan's courts for most of its history (and thus the development of trust law jurisprudence). The recent emergence of court-imposed constructive trusts indicated that this trend was reversing, though the detail of recent trust law

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[190] *Ibid.*
[191] *Ibid.*
[192] "External Audits for Private Investment Trusts, New Duties Through Private Members Bill Considered by Liberal Democratic Party (*shibotoushin ni gaibukensa, ginrippou de gimuka kentou, jimin)*" *Wall Street Journal Japan* (4 April 2012), online: <http://jp.wsj.com/Japan/Politics/node_419966>.
[193] *Ibid.*
[194] "One-month suspension for AIJ by Financial Services Agency for large-scale pension fund losses (*kinyuuchou, AIJ toushikomon ni gyoumuteishimeirei 1kagetsu kyogaku no nenkonshisan shoumatsu*)" *Nikkei.com* (24 February 2012), online: <http://www.nikkei.com/article/DGXNNSE2INK01_U2A220C1000000/?df=2&dg=1>.
[195] *Ibid.*

codification may actually create less scope for courts to impose constructive trusts on parties. Nevertheless, the extent to which the new commercial paradigm will affect the civil trust may ultimately be decided by the courts, especially in entirely new areas of doctrine such as the "declaration of trust".[196] Indeed, Noumi argues that even if the role of doctrine seems diminished by the sheer detail of the new Act relative to the old, the theoretically impoverished nature of the reforms strengthens the need for doctrinal development.[197] As in Japanese contract law and labour law, the courts may well exercise their newly enhanced oversight role responsively to the degree of commercial sophistication of the parties.[198] The following develops a tentative argument for how Japanese courts may develop trust law jurisprudence in a way that brings clarity to the confusion caused by the extension of a commercial paradigm over the fundamental of the Japanese trust and contribute to the development of a welfare-related civil trust.

A. Commercial vs. Non-Commercial Trusts

The distinction between commercial and non-commercial trusts is consistent with Japan's code-based legal system. Unlike common law equivalents, the Civil Code, and it is provisions on property, contract, tort, family, and inheritance, are not regarded as commercial law.[199] Instead, the Commercial Code and numerous special laws govern the constitution and activities of commercial entities. The distinction between commercial and non-commercial trusts is not always tenable. As duly recognised by reformers, loose controls on delegating trust activities to a third-party might be unsuitable for a civil trust.[200] Yet, in other areas commercial standards may suit a given civil trust arrangement, for example one weighted toward wealth creation rather than wealth preservation.

As discussed above, the successive beneficiary trust is an example of a civil trust imbued with a commercial character when used to maintain the integrity of a family business.[201] This may not be an anomaly. Hybridisation of commercial and non-commercial aspects is shared by others areas of law in Japan, precisely due to a sustained attempt by the government to introduce market

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[196] Kansaku, "Recent Developments and Issues in Trust Law and Related Laws (*shintakuhou, shintaku kanrenhou no kinji no tenkai to kadai*)", *supra* note 46 at 14.
[197] Noumi, "Theoretical Issues Regarding the New Trust Act (*atarashii shintakuhou no rirontekikadai*)", *supra* note 167 at 8.
[198] Kansaku, "Recent Developments and Issues in Trust Law and Related Laws (*shintakuhou, shintaku kanrenhou no kinji no tenkai to kadai*)", *supra* note 46 at 14.
[199] Arai, "Japan", *supra* note 16 at 233-234.
[200] Kansaku, "Recent Developments and Issues in Trust Law and Related Laws (*shintakuhou, shintaku kanrenhou no kinji no tenkai to kadai*)", *supra* note 46 at 14.
[201] *Ibid.* at 11.

principles into the everyday lives of citizens.[202] A key example is the blurring of boundaries between contract and administrative law.[203] The evident direction of one of the other six extant Legislative Council subcommittees (on the law of obligations, *i.e.*, contract, tort, and restitution)[204] is to continue the trend of "commercialisation" of the Civil Code.[205] Moreover, other jurisdictions have developed hybrid models such as the "charitable lead trust" and the "charitable remainder trust" in the United States, which combine charitable and overt tax-avoidance goals.[206]

The distinction between commercial and non-commercial corporations in Japan remains a clear one. Commercial and non-commercial corporations continue to be regulated quite differently, which as explained above, has not necessarily meant that a public interest corporation faces a lesser regulatory burden.[207] This distinction is increasingly relevant to the trust as it comes to resemble the corporate form.[208] Some potential benefits are shared by both forms, such as advantages in bankruptcy proceedings, tax avoidance, economies of scale, a reduction in transaction costs,[209] vesting control of assets to those with investment and management expertise and commercial credibility and, since the reforms, limited liability. The closer the trust comes to resemble the corporation the more regulators and courts are called upon to determine whether a trust, its trustee, and its beneficial interests fall within the sphere of the Commercial Code and other commercial law statutes, such as those regulating capital markets.[210]

On the other hand, the trust may be more susceptible than the corporation of transcending traditionally rigid civil law distinctions.[211] While the purpose of a trust typically places stronger limitations on a trustee than a board of directors,

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[202] See Toshikazu Yokoyama, *Marketisation and Commercialisation of Social Security (shakai hoshou no shijouka-eirika)* (Tokyo: Shin Nihon Shuppansha, 2003).
[203] A. Yamashita, J. Obata & H. Hashimoto, *Administrative law (gyousei hou)*, 2nd ed. (Tokyo: Yuhikaku Arma, 2005) at 159.
[204] See Ministry of Justice website, online:
<http://www.moj.go.jp/ENGLISH/ccr/CCR_00001.html>.
[205] Kansaku, "Recent Developments and Issues in Trust Law and Related Laws (*shintakuhou, shintaku kanrenhou no kinji no tenkai to kadai*)", *supra* note 46 at 10.
[206] *Ibid.* at 14.
[207] *Ibid.* at 8.
[208] Schwarcz, "Commercial Trusts as Business Organizations", *supra* note 163 at 326.
[209] For example, by interceding between beneficiaries (or shareholders) and third parties. An early example in Japan was the *Secured Debenture Trust Act 1905* (*tampotsuki shaken shintaku*), which permitted a trustee to manage a secured debenture for the debenture holder (beneficiary) and enforce the security interest in the event that the issuer (the settlor) defaulted: Kansaku, "Recent Developments and Issues in Trust Law and Related Laws (*shintakuhou, shintaku kanrenhou no kinji no tenkai to kadai*)", *supra* note 46 at 13.
[210] *Ibid.* at 10.
[211] *Ibid.* at 8.

that purpose may lie anywhere on the spectrum between pure profit and pure preservation of property. The trust enables settlors to pursue a variety of goals within the court-defined realm of "public morals" (*koujo ryouzoku*) (*i.e.* public policy) provided for in the Civil Code.[212] This flexibility is related to position of the trust as a received legal form that straddles the Commercial Code and the Civil Code. Its hybrid nature may therefore lend it itself to court endeavours to bring conceptual clarity to the apparent "colonisation" of general trust law by rules and principles that have developed around the commercial trust.

The approach of reformers to creating separate rules for management and profit-seeking trusts hint at possible distinctions open to the courts in developing doctrine responsively to the context of a trust relationship. The 2004 amendments to the *Trust Business Act* created a division between "asset management" (*kanrigata*) and "non-asset management" (*hikanrigata*) trusts, which are of a commercial nature nonetheless. Management trusts require registration rather than licensing and lower capital requirements.[213] The Act defines as a "management" trust either a trust where trust property is managed solely pursuant to the instructions of the settlor, or a trust in which the trustee merely preserves the trust property or uses or "improves" the property in a way that does not change the nature of the property.[214] Similarly, the reforms introduce a new conceptual separation between "special" trust contracts (*tokutei shintaku keiyaku*) predominantly for investment purposes and trust contracts that are not.[215] "Special" trust contracts now fall under general trading provisions of the *Financial Instruments and Exchange Act* (formerly the *Securities and Exchange Act*).[216] Moreover, a security interest issued by the newly created "security issuing trust" is treated under this Act as a tradable security.[217]

Similarly, courts may consider various criteria when determining when and how to intervene in civil trusts to protect vulnerable parties. These need not only relate to the legal form[218] or relationship of the parties (as emphasised in

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[212] *Ibid.*; *Civil Code* (*minpou*), Act no. 89 of 1896, s. 90.

[213] Five hundred million yen, rather than 1 billion yen for corporations and 20 billion yen for financial institutions: Trust Companies Association of Japan website, online: <http://www.shintaku-kyokai.or.jp/trust/trust03_01.html>

[214] *Trust Business Act,* s. 2(3)(ii); The effect of the distinction is that management trusts require registration rather than a license, and lower mandatory levels of capital and business insurance.

[215] *Trust Business Act,* s. 2-4; *Trust Business Act Enforcement Rules* (*shikou kisoku*) rule 30-2(1).

[216] Kansaku, "Recent Developments and Issues in Trust Law and Related Laws (*shintakuhou, shintaku kanrenhou no kinji no tenkai to kadai*)", *supra* note 46 at 7.

[217] *Ibid.* at 8. Even beneficial interests *not* intended for securitisation are now deemed a "second tier" tradable security by the *Financial Instruments and Exchange Act.*

[218] Some trusts such as the security-issuing trust and the limited liability trust are of an inherently commercial nature. Some trusts also entail acts that clearly attract the Commercial Code's provisions on "commercial acts" (*shoukouihou*). Section 502(13) of the *Commercial Code*

relational contract jurisprudence).[219] Other criteria occupy a spectrum and may assist the courts in determining whether a civil trust should be characterised as more or less "commercial".[220] The first "vector" is purpose, namely whether the trust is overtly designed to make a profit by pooling savings, bringing about a liquidation, facilitating investment, or actually running a commercial enterprise. A second, related vector is function. Some trust functions are inherently commercial, for example, creating layered beneficial interests for different "tranches" of investment. Others are not inherently commercial, but could be, for example creating economies of scale for multiple smallholders, shielding property from tax and bankruptcy, binding a trustee to a strict purpose, efficient use of property, borrowing the management expertise and reputation of professionals, and cross-generational transfer of wealth.[221] A third vector is the content, if any, of beneficiary rights, for example if they contribute to the "governance" of the trust, to borrow terminology from commercial law. This includes whether beneficiaries resemble shareholders in number, representation, and disposability rights.

Using these criteria, it is possible that courts may develop a jurisprudence that restores clarity to the blurred distinction between commercial and civil trusts that has developed as a result of government policy, growth and diversification of household assets, and an extension through recent trust reforms of a commercial paradigm over fundamental trust rules. This clarity would provide a much more secure environment for the welfare-related civil trust to flourish in an ageing Japan. In particular, the anti-positivist tradition of Japanese courts may allow them to play their codified supervisory role responsively to the circumstances of a given trust to shift the balance back to a level of protection to beneficiaries appropriate for a welfare-related civil trust.

IX. CONCLUSION

The Japanese trust is a product of hybridisation suited to an evolving social, economic, and political context. In many ways, this has resulted in a divergence from the traditional common law concept of the trust. The current context includes calls from the trust industry (typically commercial players such as institutional investors) to deregulate and liberalise the commercial trust. While not the only reason, a key driving factor is the demand to imbue the Japanese trust

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provides that becoming a trustee can be regarded as a commercial act if it is done in the course of business.

[219] See Veronica L. Taylor, "Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan" (1993) 19 Melbourne U.L. Rev. 371.

[220] Kansaku, "Recent Developments and Issues in Trust Law and Related Laws (*shintakuhou, shintaku kanrenhou no kinji no tenkai to kadai*)", *supra* note 46 at 12.

[221] *Ibid.* at 10.

with sufficient flexibility to facilitate the innovation in financial products seen in common law jurisdictions. The current context also includes voices from "grassroots" reformers and academia that advocate capitalising on the potential of the civil trust to contribute to meet the welfare needs of individuals in a rapidly ageing society.

The reforms to Japan's trust law regime in 2004 and 2006 are consistent with the long-term strategy of the government to introduce the forces of privatisation, deregulation, and competition to all aspects of social life, including welfare. In light of this strategy, the trust is seen as a means of combining the wealth-creating power of the market with the capacity of the trust to redistribute risk through, for example, securitisation. The reforms might be argued to have embodied a neutral attitude to the potential applications of the civil trust seen more prevalently in common law jurisdictions. However, this misses both the tangible and intangible ramifications of a reform process driven by commercial imperatives alone. The tangible ramifications include a failure to provide the legal forms, public policy settings, and public education required for charitable and civil trusts to flourish. The intangible ramifications, including empowerment of the trustee to the potential detriment of beneficiaries, have created a general framework of questionable suitability to civil trusts, including those related to welfare.

It is nevertheless possible that the Japanese courts will continue their tradition of interpreting statutory provisions responsively to social context. To this end, they can be expected to employ their new discretions and supervisory powers granted as part of the re-regulation integral to the functionality of the commercial trust. Moreover, there are a number of doctrinal criteria that the courts can rely on in determining whether to exercise their new powers in a way that may contribute to the sound development of the theory and practice of the welfare-related civil trust.

Trust reformers in government circles have not been satiated by the recent round of reforms, nor deterred from their fiscal and macroeconomic focus on trusts and financial innovation by the Global Financial Crisis. On the contrary, the Financial Services Agency continues to promote the utility of the investment trust to capitalise on economic growth in other parts of Asia as Japan's population declines and ages.[222] However, as the history of the Japanese trust makes clear, the intentions of policymakers are only one factor that shapes the development of the trust. With the assistance of a sympathetic judiciary, grassroots reformers need not despair that the potential of the welfare-related civil trust will be squandered in Japan's ageing society.

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[222] FSA website, online: <http://www.fsa.go.jp/singi/singi_kinyu/toushi/gijiyousi/20120307.html> at 12.

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Religious Pluralism, Personal Laws and Gender Equality in Asia: Their History of Conflict and the Prospects for Accommodation

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