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Is Japan Ready for Enduring Powers? A Comparative Analysis of Enduring Powers Reform

Abstract: This article seeks to understand why the uptake of "third generation" enduring powers in Japan has been disappointing from the perspective of reformers who introduced the powers in 2000. In addition to questions about optimum design of this particular legal instrument, it is an opportunity to explore deeper questions about regulation and the role of law and the market in ageing, post-industrial societies such as Japan. First, the article explains the form that enduring powers take in Japan. Second, it presents statistics on the uptake of enduring powers. Third, the article presents possible reasons for this low uptake, including unsuitable social norms, a lack of awareness, excessive regulation, unresponsive doctrine, and entrenched judicial values. Finally, the article concludes that while these reasons all have explanatory value and are not easily disaggregated, comparative analysis presents some promising developments in Japan such as the growth in candidates to take on enduring powers who are regulated and organised through legal professions, civil society, local government, and the court system. At a deeper level, the article concludes that the fate of enduring powers turns not only on regulatory and doctrinal levers but also on the relative strengths within Japan's continuing legal development of divergent views on the imposition of formal legal norms and market mechanisms upon relationships previously regulated by informal social norms or administrative decree.

Keywords: enduring powers, durable powers, lasting powers, ageing, dementia

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Age brings with it a greater likelihood of suffering from dementia, which has become a major global public health priority in an ageing world.[1] An enduring

1 World Health Organisation, *Dementia: A Public Health Priority* (2012), <http://www.who.int/mental_health/publications/dementia_report_2012/en/> (last accessed 4 October 2013).

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power of attorney, also known as a "durable power of attorney" or "lasting power of attorney", is a legal arrangement that a person may enter into when he or she is concerned about his or her future capacity to make decisions, typically regarding private rights such as entering into contracts and other transactions. In contrast to a general power of attorney, an enduring power maintains the representative's authorisation even if the represented person loses the capacity to make decisions about these matters. Civil law jurisdictions have a broadly equivalent concept called mandate. Examples of decisions that might be made are selling or renovating the family home and moving into a retirement village. In some jurisdictions, enduring guardianship is the equivalent instrument for personal decisions, such as where one lives and with whom one associates. This article uses the term "enduring powers" to encompass both types and "representative" and "represented person" to denote the immediate parties.

Enduring powers are an alternative to statutory adult guardianship, whereby a court or tribunal finds that a person does not have the capacity to make certain decisions and appoints another person to make substitute decisions or, in some jurisdictions, facilitate "supported" decisions.[2] Because of their appeal as a cheaper, easier, and less paternalistic and stigmatised alternative, enduring powers have become a popular tool in common law jurisdictions. Because historically they have been a private arrangement, it is often impossible to assess the uptake of enduring powers in a given jurisdiction. However, estimates suggest that a significant number of older residents in common law jurisdictions have issued enduring powers as part of their retirement and succession plans,[3] especially in the United States.[4]

2 See Robert D Dinerstein, "Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making" (2012) 19 Human Rights Brief 8; Kristin Booth Glen, "Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond" (2012) 44 Colum. H.R.L. Rev. 93.

3 Eleven percent of Australians according to Victorian Parliament Law Reform Committee, *Inquiry into Powers of Attorney* (2010) 21, citing the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*, The Parliament of the Commonwealth of Australia (2007) 71, citing Office of the Public Advocate, Queensland Government, submission 76 to the House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Inquiry into older people and the law (2006), 7; New Zealand Law Reform Commission, *Misuse of Enduring Powers of Attorney*, Report No 71 (2001) 5.

4 45% of persons aged 50 or older: AARP Research Group, *Where There Is a Will: Legal Documents among the 50+ Population, Findings from an AARP Survey* (2000) <http://assets.aarp.org/rgcenter/econ/will.pdf> 5 (last accessed 4 October 2013).

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Enduring powers are said to have experienced three stages of evolution.[5] The first, largely unregulated, form originated in the United States. The second is a system that requires registration of enduring powers and a degree of court monitoring. The third is the system adopted in parts of Canada and now Japan, which places enduring powers in a tighter framework of rights, duties and regulatory systems such as screened registration, regular mandatory reporting, and third party monitoring integrated into the court or tribunal's oversight role.[6] The stimulus for this evolution has been the apparently prolific misuse of powers of attorney, either by abusive family members or third parties who exploit the authority granted to manipulate and steal from vulnerable older people.[7] A consensus is emerging in many jurisdictions that a new balance should be struck between the convenience of this instrument and its regulation; between the autonomy it enables and the harm it can facilitate.

This article seeks to understand why the uptake of third generation enduring powers in Japan has been disappointing from the perspective of reformers who introduced the powers in 2000. In addition to questions about optimum design of this particular legal instrument, it is an opportunity to explore deeper questions about regulation and the role of law and the market in ageing, post-industrial societies such as Japan. First, the article explains the form that enduring powers take in Japan. Second, it presents statistics on the uptake of enduring powers. Third, the article presents possible reasons for this low uptake, including unsuitable social norms, a lack of awareness, excessive regulation, unresponsive doctrine, and entrenched judicial values. Finally, the article concludes that while these reasons all have explanatory value and are not easily disaggregated, comparative analysis presents some promising developments in Japan such as the growth in candidates to take on enduring powers who are regulated and organised through legal professions, civil society, local government, and the court system. At a deeper level, the article concludes that the fate of enduring powers turns not only on regulatory and doctrinal levers but also on the relative strengths within Japan's continuing legal development of divergent views on the imposition of formal legal norms and market mechanisms upon relationships previously regulated by informal social norms or administrative decree.

5 Makoto Arai, "Reconsidering the Voluntary Guardianship System and its Raison D'être (nin'i kouken seido no sonzaiigi, saikou)" (2013) 45 Jissen Seinenkouken 4, 8.

6 *Ibid*.

7 See John B. Breaux & Orrin G. Hatch, "Confronting Elder Abuse, Neglect, And Exploitation: The Need For Elder Justice Legislation" (2003) 11 Elder L.J. 207, 263; Margaret Hall, "Equitable Fraud: Material Exploitation In Domestic Settings" (2006) 7 Elder Law Review 4; New Zealand Law Reform Commission (2001), *supra* note 3 at 5.

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I. Enduring Powers in Japan

Japan's adult guardianship system was comprehensively reformed in 2000. In keeping with global trends, and drawing inspiration from the UK and German systems, Japan attempted to create a more responsive, accessible system with greater procedural safeguards and respect for autonomy.[8] In addition to two renamed pre-existing categories of plenary "statutory guardianship" (*houtei koukennin*) and "curator" (*hosanin*), Japan introduced the categories of helper (*hojonin*) and voluntary guardian (*nin'i koukennin*). The family court may appoint a plenary "statutory adult guardian" for "any person who constantly lacks decision-making capacity due to a mental disability" upon the application of the individual him or herself, or other specified parties.[9] Other than in "obvious" cases, the law requires a formal expert appraisal (*kantei*) of the individual's decision-making capacity (by a designated physician).[10] A full guardian has wide agency or "power of representation" (*dairiken*) and revocation rights and can undertake any legal activity, such as dealings with savings, major assets, and nursing contracts.[11] A "curator" provides substitute decision-making of a lesser degree than full guardianship.[12] A family court may appoint a curator over "any person whose decision-making capacity is extremely deficient due to a mental disability".[13] Other than in "obvious" cases, a formal expert appraisal is required for the appointment of a curator. A ward must obtain the consent of a curator for codified acts, such as the disposition of major assets, taking out a loan, or refurbishing a home.[14] A curator's power of

8 The two main Acts were the *Act to Partially Revise the Civil Code* (*minpou no ichibu o kaisei suru houritsu*), *Act no. 149 of 1999* and the *Act on Voluntary Guardianship Contracts (nini kouken keiyaku ni kansuru houritsu), Act no. 150 of 1999*.

9 *Civil Code* (*minpou*) *Act no. 89 of 1896*, s. 7

10 *Ibid*., s. 25.

11 *Ibid*., s. 9, s. 120(1), s. 859(1).

12 The term "curator" is derived from the civil law tradition, which has traditionally had a more gradated concept of guardianship: Mihoko Okamura, "The Adult Guardianship System (*seinen kouken seido)*", in National Diet Library, ed., *Declining Fertility, Ageing and Countermeasures (shoushi koureika to sono taisaku)* (Tokyo: National Diet Library Publications, 2005) at 198, 200.

13 *Civil Code*, s. 11. Note that this translation differs from official version. The same parties may apply for appointment as those who may apply for guardianship.

14 *Civil Code*, s. 13 (*Acts Requiring Consent of Curator*) states: (1) A person under curatorship must obtain the consent of his/her curator if he/she intends to perform any of the following acts...: (i) receive or use any [principal fund which can bear dividends or interest], (ii) borrow any money or guarantee any obligation, (iii) perform any act with the purpose of obtaining or relinquishing any right regarding real estate or other valuable property, (iv) take any procedural action, (v) make a gift, make any settlement, or agree to arbitrate..., (vi) accept or renounce any inheritance, or partition any

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representation is circumscribed to juristic acts specified by the court with the consent of the ward.[15]

The first innovation under the new regime – and the least intrusive form of guardianship – is "assistant" (*hojonin*). The family court may appoint an assistant for "any person who has deficient decision-making capacity due to a mental disability".[16] Unlike full guardianship and curatorship, the individual's consent is a precondition to the appointment of an assistant.[17] An assistant's consent (or the court, in lieu of this) is required for the same codified acts for which a curator's consent is required.[18] The assistant may revoke such transactions if that consent was not granted.[19] The court, with the consent of the ward, may specify juristic acts the assistant may undertake as an agent for the ward, for example dealings with savings, property, and nursing contracts.[20]

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estate, (vii) refuse an offer of a gift, renounce any bequest, accept the offer of gift with burden, or accept any bequest with burden, (viii) effect any new construction, renovation, expansion, or major repairs; or (ix) make any lease agreement..., (2)... the family court may make an order that the person under curatorship must obtain the consent of his/her curator even in cases he/she intends to perform any act other than those set forth in each item of the preceding paragraph; provided, however, that this shall not apply to [any act relating to daily life, such as the purchase of daily household items], (3) [The court may consent to an act in lieu if the curator's consent], (4) An act which requires the consent of the curator may be rescinded if it was performed without such consent[.]

15 *Civil Code*, s. 876-4 (*Order Granting Power of Representation to Curator*), states: (1)... the family court may make an order that grants power of representation to the curator, concerning specified juristic acts for the person under curatorship, (2) An order referred to in the preceding paragraph made upon the application of any person other than the person under curatorship shall require the consent of the person under curatorship, (3) The family court may rescind an order referred to in paragraph 1 in whole or in part[.]

16 *Civil Code*, s. 15(1). The same parties may apply for appointment as those for guardianship.

17 *Ibid*., s. 15(2). The person receiving assistance may request the family court to overrule, increase, reduce or remove the assistant's authority. If an assistant no longer has any agency or revocation right, the order comes to an end ensuring that only people who need legal protection are subject to an order. *Civil Code* (*minpou*) s. 17 (*Order Requiring Person to Obtain Consent of Assistant*) states: (1)... the family court may make the order that the person under assistance must obtain the consent of his/her assistant if he/she intends to perform any particular juristic act; provided, however, that the act for which such consent must be obtained pursuant to such order shall be limited to the acts [a curator is permitted to perform] provided in paragraph 1 of Article 13, (2) The order set forth in the preceding paragraph at the request of any person other than the person in question shall require the consent of the person in question, (3) [The court may consent to an act in lieu of the assistant's consent], (4) An act which requires the consent of the assistant may be rescinded if it was performed without such consent[.]

18 *Ibid*., s. 13(1), s. 17(1).

19 *Ibid*., s. 17(4).

20 With the exception of making a bequest or acknowledging a child. *Civil Code*, s. 876-9 (*Order Granting Power of Representation to Assistant*), states: (1)... an assistant, or a supervisor of an

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The second innovation, voluntary guardianship, equates to enduring powers (the terms will be used interchangeably from here on, except where indicated). Voluntary guardianship allows an individual to enter into an agreement with one or several persons or organisations to receive party-specified guardianship services at a time when that individual no longer has sufficient decision-making capacity.[21] As the name suggests, it is designed to be less paternalistic than traditional guardianship. Like assistance, it is consensual, though consent is given twice: in advance through contract, and upon the commencement of voluntary guardianship through the appointment of a guardian supervisor (see below). The standard applied by the court upon commencement is "deficient decision-making capacity due to a mental disability", though as described below, the consensual nature of the arrangement is typically regarded by the court to obviate the need for a formal evaluation of capacity.[22] Like assistance, the extent and nature of authority granted to the voluntary guardian is responsive to the individual. A voluntary guardian may perform a wide array of duties, but does not have any codified right of revocation.[23]

Voluntary guardianship differs from the first generation of common law enduring powers in the following ways. First, the arrangement is made by contract rather than by unilateral appointment. Like other civil law jurisdictions, this is called a contract for mandate (*i'nin keiyaku*). Mandate law resembles agency and fiduciary law, although without the same basis in equity. It broadly overlaps with the authority to represent (*dairi*) and brings with it internal implications such as duties of good management, reporting, and good faith, in addition to the external implications for third parties. The contract can be for personal and property-related decision-making, though not authorisation for

assistant, the family court may make an order that grants power of representation to the assistant, concerning specified juristic acts for the person under assistance, (2) The provisions of paragraph 2 [individual's consent required] and paragraph 3 [court may rescind] of Article 876-4 shall apply[.]

21 The legal status of the contract is regarded as a "contract for mandate" (*i'nin keiyaku*). In voluntary guardianship, this contract for mandate grants complete or partial agency over activity of a legal nature regarding health, nursing care, and management of property for a person who has insufficient decision-making capacity through a mental cause. Unlike a statutory guardian, the exact content of that agency depends on the individual contract. If the guardian is an attorney, for example, the contract might permit litigation to recover debts etc.

22 *Act on Voluntary Guardianship Contracts* (*nin'i kouken keiyaku ni kansuru houritsu*), *Act no. 150 of 1999*, art. 4(1).

23 Although s. 120 of the *Civil Code*, providing for revocation rights for "cooling off" periods, may be applicable to voluntary guardians.

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consent to medical treatment or to revoke transactions entered into by the represented person. The contract can limit and divide authority among multiple representatives.

Second, Japan's system differs from the first generation of common law enduring powers in the manner in which the power is activated. In "first generation" jurisdictions, a person who wishes to make an enduring power must have their signature to the instrument witnessed by one or more persons who can attest to the represented person's apparent capacity. The represented person (as principal) then instructs and monitors the representative (as agent or "attorney in fact") while the cognitive capacity to do so exists. When cognitive capacity declines to a certain level, the attorney continues effectively as an unsupervised agent and the relationship can no longer be revoked by the represented person.

In contrast, activation in Japan's system requires court intervention. The system anticipates that a competent individual will enter into a voluntary guardianship contract with another individual or incorporated body (there is no public guardian). Often the represented person will enter into separate general mandate contract with the representative (equating to a general power of attorney), which takes effect immediately and does not require registration. The voluntary guardian contract must be drafted (as a notarised document) by a notary public (*koushounin*), who is a quasi-public official attached to the Ministry of Justice, typically a retired judge, prosecutor, or public servant. The fee for having the document drafted is ¥11,000 (US$110).[24] For a fee of ¥1,400 (US$14),[25] the notary public then arranges registration of the agreement, which itself attracts a fee of ¥2,600 (US$26).[26]

The voluntary guardian's powers are activated only after the individual, the voluntary guardian, or a family member applies to a family court for the appointment of a third party monitor (*kantokunin*) when the individual is apparently in a "state in which decision making capacity is insufficient due to a mental disability".[27] The application fee is ¥3,780 (US$38)),[28] which can be

24 Japan National Notaries Association website: <http://www.koshonin.gr.jp/nin.html> (last accessed 4 October 2013).

25 *Ibid*.

26 Ministry of Justice website: <http://houmukyoku.moj.go.jp/yamagata/static/kaitei0401.pdf> (last accessed 4 October 2013).

27 *Act on Voluntary Guardianship Contracts*, s. 4(1).

28 Supreme Court of Japan website: <http://www.courts.go.jp/tokyo-f/saiban/koken/ninigo-ken_mousitake> (last accessed 4 October 2013).

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claimed from the principal's assets.[29] The family court hears the application and assesses capacity. It will typically accept a doctor's certificate rather than order a formal assessment of capacity because the order is dependent upon the represented person's consent.[30] The court then appoints a monitor, who is remunerated from the represented person's assets. Third party monitors are the "eyes" of the court and have a number of supervisory and administrative functions, such as submitting regular reports to the court. These are complemented by tools such as the right to demand reporting from the voluntary guardian or to request the court to overrule or remove the voluntary guardian.[31]

II. The Uptake of Enduring Powers in Japan

The number of applications for guardianship has steadily increased since the new system's inception.[32] By category, the overwhelming majority of applications are for full statutory guardianship (82% in 2012), followed by curatorship (12%), assistance (3.6%), and voluntary guardianship (2%). Statistics for extant guardianships reveal similar patterns: statutory guardianship (85% in 2012), followed by curatorship (10%), assistance (3.8%), and voluntary guardianship (1%). Statistics from the system's inception suggests that only about 6% of voluntary guardianship are ever activated through an application to the family court, although this is difficult to calculate because some will be activated in the longer term. In 2010, there were 8,904 new voluntary guardianship contracts registered and 602 applications for activation. The proportion of extant guardianships to the national population is 0.15%, lower than the estimated average in industrialised countries of 2.0%. The figure is 0.0015% for activated enduring powers, contrasting sharply with estimates of 11% for Australia, 45%

29 *Civil Code* (*minpou*), *Act no. 9 of 1898* s. 862.

30 Akihiko Kobayashi & Ichiro Otaka, *Understanding the New Adult Guardianship System (wakariyasui shin seinen kouken seido)* (Tokyo: Yuhikaku, 2000) at 63.

31 *Ibid*., 64.

32 Supreme Court of Japan, *Summary of Adult Guardianship Related Cases (seinen kouken kankei jiken no gaikyou)* <http://www.courts.go.jp/about/siryo/kouken.html> (last accessed 4 October 2013). Although the number of applications in 2007 (April 2007–April 2008) dropped by about 23% from the previous year, this aberration can be explained by a national program in 2006 related to the *Disability Autonomy Support Act* (*shougaisha jiritsu shien hou*) *Act no. 123 of 2005*, which caused a spike in the application for persons with severe disabilities.

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for the over 50 population in the United States,[33] and 1.25% in Germany (Figures 1–3).[34]

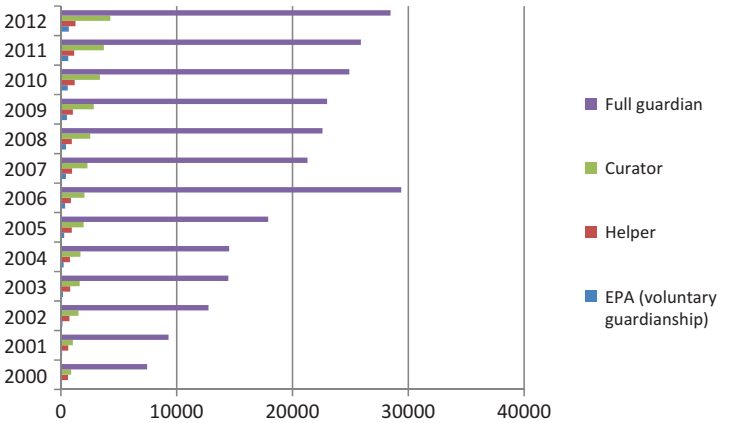

Figure 1: National applications for guardianships 2000–2012

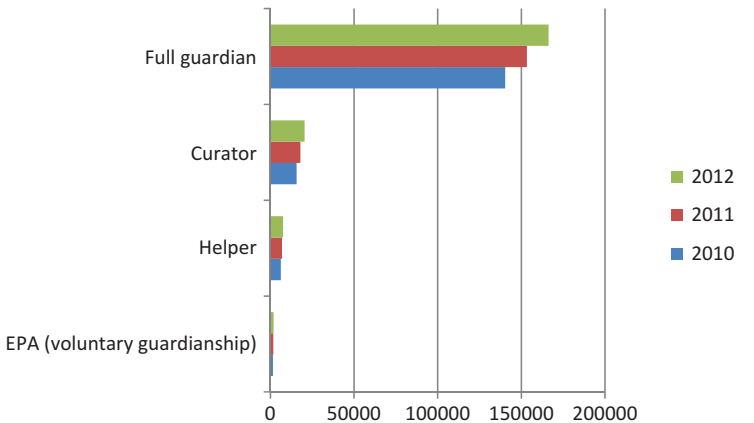

Figure 2: National extant guardianships 2010–2012

33 Victorian Parliament Law Reform Committee, *supra* note 3 at 21; AARP Research Group (2000), *supra* note 4 at 5.

34 Reisei Jinno, "The Operation of the Enduring Power of Attorney System in Germany (doitsu ni okeru nin'i kouken seido no unyou)" (2011) 41 Koushou Hougaku 1, 2.

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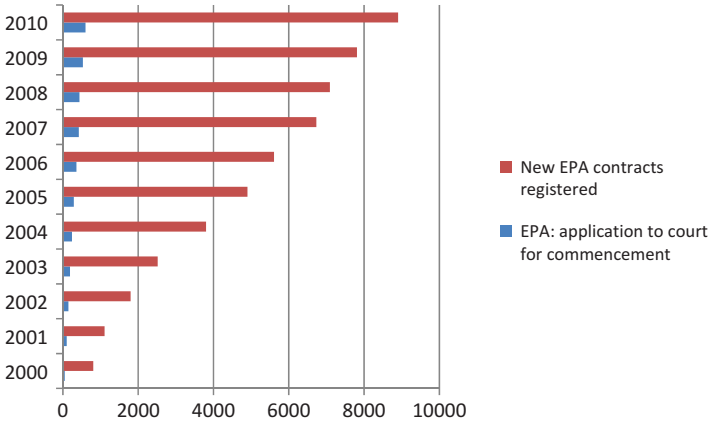

Figure 3: New EPA contracts registered vs actual applications for commencement

There are a number of factors that may explain the low uptake of enduring powers in Japan. These will be considered in turn.

III. Social Norms Unsuited?

Even considering the growth trend in registrations and applications for voluntary guardianship, these statistics are disappointing for reformers who had hoped that the consent-based forms of guardianship would begin to displace a judicial preference for coercive and plenary guardianships.[35] One reason that has been suggested is that Japanese social or cultural norms are unsuited or unready to allow these sensitive issues of managing family property and personal lives to be regulated by a formal legal mechanism.[36] Low awareness of legal forms and the preference for informal solutions to the issues raised by ageing and dementia is by no means unique to Japan.[37] Yet in rural Japan in particular, there remains a relatively strong preference for informal mechanisms such as de facto representation or shared pin numbers and, if formal, then kept within the

35 Arai (2013), *supra* note 5 at 4.

36 Okamura (2005), *supra* note 12 at 208.

37 Deborah Setterlund, Cheryl Tilse & Jill Wilson, "Substitute Decision making and Older People" (1999) 139 Trends and Issues in Crime and Criminal Justice 1, 3.

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family, such as joint bank accounts.[38] Enduring powers tend to be granted, if at all, to the family member designated to continue the three generation "*ie*" household/family line as part of a traditional succession plan rather than as an expression of individual autonomy.[39]

On the other hand, social and cultural norms are dynamic and have been under threat at least since the Occupation-imposed 1946 *Constitution* mandated substantial revisions to the *Civil Code*'s succession and family law provisions and other legal and social artefacts seen to be inconsistent with a modern, democratic Japan.[40] The more recent context for guardianship reforms is privatisation and an attempt to impose formal legal structures such as contract on relationships formerly governed by informal or administrative mechanisms.[41] Such areas include the provision, subject to continuing state assessment of need, of aged care, disability, and child care services by private providers funded partially by fees or compulsory insurance premiums.[42] They also encompass management of assets through enduring powers, which as an interface between private providers and their clients is intimately connected to the new contract-based market model of welfare.[43] It is unsurprising that many individuals will revert to the informal mechanisms that have worked in the past, such as de facto representation by relatives and neighbours, which is still reportedly overlooked by some banks.[44] Nevertheless, these informal mechanisms struggle to survive Japan's state-led project of spreading law's reach into social spheres and contract into modes of governance.[45] Banks, for example, increasingly

38 Shougo Iuchi, "Preliminary Report Relating to Promotional Activity for the Voluntary Guardianship System (*nin'i kouken seido kouhou katsudou ni kakaru chuukan houkoku tou*)" (2012) 733 Houmu Tsuushin 47, 48.

39 *Ibid*., 47–48.

40 Yukiko Matsushima, *Contemporary Japanese Family Law* (Tokyo: Minjiho Kenkyuukai, 2000) at 25.

41 Takashi Uchida, *Institutional Contract Theory: Privatization and Contract (seidoteki keiyakuron: mineika to keiyaku)* (Tokyo: Hatori Shoten, 2010) at 3; Takashi Uchida & Veronica L Taylor, "Japan's "Era of Contract", in Daniel H. Foote, ed., *Japanese Law: a Turning Point* (Seattle, WA: University of Washington Press, 2007) at 455; Toshikazu Yokoyama, *Marketisation and Commercialisation of Social Security (shakai hoshou no shijouka-eirika)* (Tokyo: Shin Nihon Shuppansha, 2003) at 31.

42 Yokoyama (2003), *supra* note 41 at 32.

43 Okamura (2005), *supra* note 12 at 199.

44 Iuchi (2012), *supra* note 38 at 54.

45 For a theoretical analysis of the "social disintegration through law" drawing from Habermas, see Gunther Teubner, ed., *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Anti-Trust, and Social Welfare Law* (New York: Walter de Gruyter, 1987) at 12.

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demand that representatives carry valid documentation such as the notarised document constituting an enduring power.[46]

Over time, there appears to be a symbiotic relationship between the imposition of modern formal legal norms in Japanese society and the social disintegration caused by the long term social and demographic shifts of modernisation. For example, caution on the part of banks is part of a broader legal response to the growing problem of financial abuse, consumer fraud, and other scams targeting the elderly.[47] In addition to the growing prevalence of dementia, these problems are connected to the breakdown of trust within family relationships,[48] the shrinking scale of families, and the decreased capacity of "strong informal controls" to regulate criminal behaviour in Japanese society.[49] To perceive this symbiotic relationship is not necessarily to endorse any general Weberian trajectory from "charismatic legal revelation" towards "increasingly logical sublimation and deductive rigor"[50] expressed in the Japanese context through Kawashima's so-called "modernisation thesis".[51] Nor does it reject the possibility that Japan will rediscover the capacity of informal and civil-society based mechanisms to regulate fraud and other exploitative behaviours.[52] But it does suggest that a renewed ideological commitment to formal, legal norms creates its own momentum and finds fertile ground in Japan's current social and (unprecedented) demographic situation.

Given these trends, it is tempting to conclude that while social norms have not evolved to a point at which the transplant of enduring powers may thrive as

46 Naohiro Noguchi, "The Situation of Voluntary Guardianship Appointments (*nin'i kouken juninsha no joukyou)*" (2013) 45 Jissen Seinenkouken 16, 17.

47 "Con Artists Calling", *The Japan Times* (8 September 2008); Okamura (2005), *supra* note 12 at 207.

48 Fukiko Nakayama, "The Current Situation and Issues of the Voluntary Guardianship System (*nin'i kouken seido no genjo to kadai*)" (2011) 22(4) Rounen Seishin Igaku Zasshi 400, 402.

49 David Johnson, "Criminal Justice in Japan", in Daniel H. Foote, ed., *Law in Japan: A Turning Point* (Seattle, WA: University of Washington Press, 2007) at 355.

50 Max Weber, *Economy and Society* (1968), in Michael Freeman, ed., *Lloyd's Introduction to Jurisprudence*, 8th ed. (London: Sweet & Maxwell, 2008) at 883.

51 For a discussion of Kawashima's work and influence, see Eric Feldman, "Law, Culture, and Conflict: Dispute Resolution in Postwar Japan", in Daniel H. Foote, ed., *Law in Japan: a Turning Point* (Seattle, WA: University of Washington Press, 2007).

52 Johnson (2007), *supra* note 49 at 367–368; Veronica Taylor, "Re-Regulating Japanese Transactions: the Competition Law Dimension", in Jennifer Amyx & Peter Drysdale, eds., *Japanese Governance* (London: RoutledgeCurzon, 2003) at 134, 150; Luke Nottage, "The Cultural (Re)Turn in Japanese Law Studies" (2008) 39 Victoria University of Wellington Law Review 755, 763; Kent Anderson & Trevor Ryan, "Japan: the Importance and Evolution of Institutions at the Turn of the Century", in E. Ann Black & Gary F. Bell, eds., *Law and Legal Institutions of Asia* (Melbourne: Cambridge University Press, 2011) at 120, 146; Zentaro Kitagawa, "Development of Comparative Law in East Asia", in Mathias Reimann & Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) at 237, 252.

it has in the common law, this will change over time. After all, there is growth in the number of enduring powers in Japan, even if this is dwarfed by the increase in plenary statutory guardianships. Yet before settling upon this conclusion, exploring structural and doctrinal impediments may have equal or better explanatory value for the disappointing uptake of enduring powers.

IV. Lack of Awareness?

Some commentators link the low uptake of enduring powers with the State's failure to promote the system adequately, emphasising a knowledge deficit among the citizenry, institutions, local government, and even among the legal fraternity.[53] For example, inertia from the old system continues to exert an influence on impressions about the new system in the form of stigma and mistaken assumptions such as the notion that a spouse is automatically appointed guardian (whether statutory or voluntary).[54] This may be one of the hazards of third generation enduring powers reform, which attempts to integrate consent-based and coercive guardianship arrangements.

Civil society and the professions may take on this educative role. In jurisdictions with larger per capita populations of solicitors and financial advisers, these professionals may be more active in educating the public (and their own members) about enduring powers, rendering state promotion less crucial to the system's uptake. Japan may see a similar trend as household assets become more complex due to a state strategy of creating "investor citizens" as a means of reducing the state's welfare burden.[55] This has involved the promotion of

53 Iuchi (2012), *supra* note 38 at 52; 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 22, 27; 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* 16, 17; 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 35, 36; 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 29, 29; Makoto Arai, Yasuhiro Akanuma & Masao Oonuki, *The Adult Guardianship System: The Theory and Practice of the Law (seinen kouken seido: hou no rinri to jitsumu)* (Tokyo: Yuhikaku, 2006) at 250.

54 Iuchi (2012), *supra* note 38 at 53.

55 Sarah M. Ingmanson, *Corporate Pension Reform in Japan: Big Bang or Big Bust?* (MA in International Affairs Thesis, University of Pennsylvania, 2004), <http://lauder.wharton.upenn.edu/pages/pdf/SarahIngmanson_Thesis.pdf> (last accessed 4 October 2013) 41, 83.

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securities, trusts, and other wealth management tools seen as necessary to manage and grow the unprecedented wealth of older generations in Japan.[56] Given this impetus, one might expect growth in the uptake of wills, family trusts, and enduring powers, albeit each from a low base in Japan[57] and dependent on additional factors including the disparate motives of reformers[58] and the regulatory framework for legal professionals discussed below.

V. Excessive Regulation and Costs?

The level of regulation through registration, screening, and monitoring of enduring powers in Japan and the associated costs (described above) presumably have the dampening effect on demand and uptake decried by critics of the UK's 2007 guardianship reforms, which also strengthened regulation through registration and court oversight.[59] This public involvement and regulation is no doubt crucial in combating exploitation and negligence in the system and thereby enhancing trust. One dilemma seems, therefore, to be how to achieve the optimum degree of regulation that preserves trust in the system without creating too many obstacles to matching demand with a constant supply of representatives. Jurisdictions that began with light regulation of enduring powers have an advantage here in that the convenience of the tool has earned widespread recognition, which creates a certain tolerance to occasional regulatory failure. Japan, without such tolerance, has needed to err on the side of overregulation, in the sense of regulation that creates strong disincentives to using the system through excessive cost and procedural burdens.

Without suggesting that Japan has ignored all of these, other regulatory options are available that can reduce the burden of regulation of registration, screening, and monitoring of enduring powers. These include investment in

56 Trevor Ryan, "The Trust in an Ageing Japan: Has Commercialisation Precluded the Trust from Reaching its Welfare Potential?" (2012) 7 As. J.C.L. 197, 217–218; Trevor Ryan, "Japan's 2004 Pension Reforms in Response to Demographic Change: a Legal Critique" (2006) 8(1) Asian Pac. L. & Pol'y J. 1, 3.

57 Ryan, "The Trust in an Ageing Japan" *supra* note 56 at 217.

58 For example, the influence of the financial world in skewing trust law reform towards commercial, securitisation purposes: *ibid*., 220.

59 See William Edwards, "Delivering A Verdict On Lasting Powers of Attorney", Mondaq (UK) (6 January 2009) paragraph 5; Jo Samanta, "Lasting Powers of Attorney For Healthcare Under The Mental Capacity Act 2005: Enhanced Prospective Self-Determination For Future Incapacity Or A Simulacrum?" (2009) 17(1) Med. L. Rev. 377.

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policing and enhanced criminal sanctions,[60] more efficient third party monitoring mechanisms that recruit parties from civil society (other than paid monitors) and financial institutions,[61] mandatory reporting regimes for fraud and financial abuse,[62] strengthened civil remedies,[63] public education,[64] the promotion of family trusts to protect assets,[65] and more efficient channels of court oversight such as Internet registration and reporting,[66] random audits, and escalated oversight in relation to certain types of arrangements or relationships associated with higher risks of abuse.[67] There is also scope for reducing the regulatory burden on performing the duties and activities authorised by enduring powers. Some of the activities that a lay guardian could perform in most common law jurisdictions are legally reserved to qualified lawyers or judicial scriveners under their respective regulatory statutes.[68]

Nevertheless, excessive regulation over registration, screening, and monitoring would not easily explain the contrast with the uptake in Germany, which has some common features in the enduring power regime it has developed since its inception in 1992 in addition to other historical and legal similarities. Both jurisdictions have faced substantial growth in the burden of statutory guardianship upon the court system, although in Germany the state burden has been larger because of relatively generous subsidies for impecunious wards.[69] There are important differences in the German system: registration fees for enduring powers are means tested, the appointment of a third party monitor is optional,

60 Noguchi (2013), *supra* note 46 at 21; Richard A. Starnes, "Consumer Fraud and the Elderly: The Need for a Uniform System of Enforcement and Increased Civil and Criminal Penalties" (1996) 4(1) Elder L.J. 201, 217.

61 See Peter N. Grabosky, "Using Non-governmental Resources to Foster Regulatory Compliance" (1995) 8(4) Governance: an International Journal of Policy and Administration 527; Naomi Karp & Erica F. Wood, "Guardianship Monitoring: A National Survey of Court Practices?" (2007) 37 Stetson L. Rev. 143, 190.

62 Breaux & Hatch (2003), *supra* note 7 at 262.

63 Starnes (1996), *supra* note 60 at 220.

64 *Ibid*., 215.

65 Ryan (2006), *supra* note 56 at 207; 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 150, 159.

66 Okamura (2005), *supra* note 12 at 208.

67 Karp & Wood (2007), *supra* note 61 at 184–191; Grabosky (2007), *supra* note 61 at 544.

68 Yasuhiro Akanuma, "Issues Surrounding the Voluntary Guardianship System and Directions for Reform and Revision (*nin'i kouken seido no kadai to kaizen kaisei no houkousei*)" (2013) 45 Jissen Seinenkouken 78, 83.

69 Jinno (2011), *supra* note 34 at 2.

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and courts do not otherwise become involved unless disputes arise or serious decisions such as institutionalisation or major purchases need to be made.[70] Germany has also made a more convincing attempt to make a clean break with the older guardianship system and the associated stigma through replacing declarations of incompetency with orders for "care and assistance" (*Betreuung*), which are intended to lean more towards support than intervention.[71]

Despite these differences, the crucial difference may lie with the pool of candidates to take on enduring powers. As already suggested above, in an ageing society with many elderly citizens who have no appropriate family member in proximity,[72] a key factor in increasing enduring powers uptake is finding an optimum regulatory balance that facilitates a supply of trustworthy, reliable candidates. This is not merely a matter of subsidising the fees of professional guardians. Some have called for a public guardian, or at least a semi-public corporate identity, to play a role as "guardian of last resort", as is the case in other jurisdictions such as some Australian states.[73] This is partly because trust in both lay and professional guardians has been eroded by negative treatment in the press, sometimes inaccurate and tending to focus on a handful of egregious regulatory failures.[74] Yet it is also reportedly because of the mutual psychological burden associated with entrusting matters of such importance and longevity to an individual, professional or otherwise.[75] Because the same mutual burden does not seem to impede the uptake of enduring powers common law world, unless one subscribes to essentialist notions of culture, there is no reason why Japanese society could not overcome this apparent preference for the authority of the State when the family system does not function as traditionally conceived. Moreover, the sense of burden could be alleviated through a simple reform enabling the formal registration of backup guardians, which at present can only be appointed through an informal prioritisation among multiple appointments.[76] Nevertheless, because of the close relationship between trustworthiness and uptake, particularly at the early stages of this legal transplant, something resembling a public guardian may be the catalyst the system needs.

70 *Ibid*., 3, 6.

71 Israel Doron, "Elder Guardianship Kaleidoscope: A Comparative Perspective" (2002) 16(3) Int'l J.L. Pol'y & Fam. 368, 378.

72 Okamura (2005), *supra* note 12 at 202.

73 Nakayama (2011), *supra* note 48 at 401.

74 Arai (2013), *supra* note 5 at 4.

75 Nakayama (2011), *supra* note 48 at 401.

76 Akanuma (2013), *supra* note 68 at 82.

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The closest thing to a public guardian in Japan is a guardianship NPO named Legal Support (*riigaru sapouto*) established by the Japan Federation of Judicial Scrivener Associations in 1999. Judicial scriveners, who perform many of the functions of a solicitor, have (at 38% in 2012) alongside *bengoshi* lawyers (27%), administrative scriveners (5%), and social welfare officers (19%) spearheaded the gradual displacement by professionals of the dominance of family-member guardian appointments, which have dropped to 48.5% from over 90% in 2001. This trend is accelerating, with judicial scrivener appointments in 2012 growing 31% (4,872 to 6,382) from the previous year.[77] Indeed, the new system has had a significant impact on the profession itself.[78] Legal Support has 50 branches and 6,000 members nationwide. It is funded by assets of the represented persons and donations.[79] It acts as a guardian, trains professional and lay guardians, provides administrative support and insurance for its members, and promotes and develops the guardianship regime.[80] Legal Support's deliberative (*i.e.* self-regulatory) committee and directorship is composed of individuals from a range of fields including medicine, academia, law, journalism, and welfare.[81]

In the absence of a public guardian or public advocate, Legal Support is a promising body capable of bringing additional oversight to the enduring powers framework.[82] The networking role that Legal Support plays among stakeholders has been a critical factor contributing to the viability of the guardianship system.[83] It has also begun to systematise public educational programs to create a pool of lay candidates beyond its 6,000 members.[84] Recently, local governments (another possible surrogate for a public guardian) have also shown initiative in regulating and fostering these so-called "citizen guardians" (*shimin koukennin*).[85] In an era of tight budgets, many local governments have been reluctant to allocate funds for guardianship programs. Recognising this, lawmakers have imposed new statutory duties upon prefectural and local

77 Supreme Court of Japan statistics: <http://www.courts.go.jp/about/siryo/kouken> (last accessed 4 October 2013).

78 Onuki (2005), *supra* note 53 at 22.

79 *Ibid*, 23. The organisation's website URL is <http://www.legal-support.or.jp> (last accessed 4 October 2013).

80 *Ibid*., 23–27.

81 *Ibid*., 23.

82 *Ibid*., 23.

83 *Ibid*., 25.

84 See <http://www.legal-support.or.jp/public> (last accessed 4 October 2013).

85 Unspecified, "Fostering Citizen Guardians and Supporting Their Activities (*shimin koukennin no yousei to katsudou shien*)" (2012) 9 Kaigo Hoken Jouhou 6, 6–14.

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governments to promote the (statutory) guardianship system.[86] Nonetheless this remains a small initiative: only 131 statutory guardian appointments in 2012 were identified as citizen guardians.[87] This is probably related to Japan erring on the side of overregulation. Local governments are reportedly extremely cautious in vetting citizen guardians, with reports of a three stage screening process and a 90% fail rate in some areas.[88]

Rather than enduring powers, these initiatives to grow the pool of professional and lay candidates are mainly servicing the statutory guardianship industry. This seems primarily because both Legal Support and local governments are integrated into statutory guardianship appointments through the provision to the courts of lists of vetted candidates. Without first contact with the court system, it is difficult for isolated individuals in an ageing society with smaller families to find a trustworthy representative through their own initiative. In Germany, "custodianship associations", which number approximately 800, have been much more successful servicing and facilitating others to service the demand for non-family candidates to take on enduring powers.[89] These are licensed according to statutory criteria relating to size, suitability, mechanisms for self-regulation, and their explicit role in education and promotion of enduring powers and guardianship.[90]

The success of decentralised networks of civil society and professional organisations in Germany suggest that incipient similar developments in Japan may contribute to a higher uptake of enduring powers. One Japanese equivalent, namely lawyers or judicial scriveners in their corporate capacity as firms, remain a small minority relative to individual professional appointments, as evident from the statistics for statutory guardianship appointments (4.6% for lawyers, 3% for judicial scriveners, together representing 2.4% of total guardianship appointments in 2012). The "other" corporate category, including Legal

86 *Elderly Welfare Act* (*roujin fukushi hou*) *Act 133 of 1963*, s. 32-2.

87 Supreme Court of Japan statistics.

88 "Property of the Elderly Targetted (*rougo no zaisan ga nerawareru*)", NHK Close-up Gendai (22 May 2008).

89 Jinno (2011), *supra* note 34 at 10.

90 Germany's BGB s. 1908f states: "(1)An association having legal personality may be recognised as a custodianship association if it guarantees that it 1. has a sufficient number of suitable employees and will supervise and give further education to these and insure them appropriately for damage that they may cause to others in the course of their activity, 2. methodically endeavours to acquire voluntary custodians, introduces them to their tasks, gives them further education and advises them and authorised representatives, 2a. methodically gives information on enduring powers of attorney and custodianship orders, 3. enables an exchange of experience between the employees."

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Support, trust banks, and welfare NPOs, constituted 5.2% of total appointments. Trust banks may only be an attractive option for those with the capacity to pay for the service.[91] However, the growth in this "other" category (from 13 in 2000 to 682 in 2009) is reportedly being led by small scale hybrid organisations of lawyers, social welfare officers and other professionals, which may be able to replicate the success of decentralised German custodianship associations.[92] Proposals for similar developments have been made in the US, which arguably reflects a greater scepticism there on the part of its citizens towards a public body, at least one tainted with the stigma of statutory guardianship.[93] In Japan, even if this scepticism were less acute, there seems little appetite on the part of the State to increase the public burden, for example by establishing a public guardian with an active role in taking on enduring powers. This does not mean that the State could not underwrite the development of indirectly regulated professional and civil society candidates for enduring powers. One means of doing this is through targeted funding and subsidies, which have already been codified and institutionalised for statutory guardianship through the reforms to local and prefectural government duties described above.

VI. Unresponsive Doctrine?

Much academic discussion of voluntary guardianship tends to focus on perceived doctrinal flaws and the indirect role this has on uptake through obstructing the responsiveness of the new system. First, enduring powers would have more utility were representatives given the right, as statutory guardians are in Japan, to revoke certain legal acts of the represented person without court action and, as agents with enduring powers are in other jurisdictions such as the UK, Australia, and Germany, the ability to consent to medical procedures.[94] This last point of differentiation seems to have contributed modestly to the uptake of

91 See Kouta Fukui, "Can Commercial Guardianship and Asset Management Suffice? A Report on Victoria, Australia's State Trustees Company (*seinen kouken zaisan kanri wa eiri jigyou tariuruka? Ousutoraria bikutoria shuu no State Trustees sha no chousa houkoku*)" (2007) 28 Shintaku kenkyuu shoureikin ronshuu 110.

92 *Analysis of the Current Situation of the Adult Guardianship System and a Consideration of Current Issues (seinen kouken seido no genjou no bunseki to kadai no kentou)* (Tokyo: The Japan Adult Guardianship Association, 2010) <http://www.minji-houmu.jp/download/seinen_kenkyuhoukoku.pdf> (last accessed 4 October 2013) 11; Nakayama (2011), *supra* note 48 at 400.

93 George J Alexander, "Durable Powers of Attorney As A Substitute For Conservatorship" (1998) 4 Psychol. Pub. Pol'y & L. 653, 666.

94 Arai (2013), *supra* note 5 at 9, 14.

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Scotland's health care and welfare powers,[95] though according to some commentators such enabling legislation has negligible effect on uptake.[96] Under the prevailing interpretation of the *Voluntary Guardianship Act*, even consent for non-invasive medical treatments such as influenza vaccinations, blood tests, and x-rays are beyond the authority of a representative.[97]

Second, the Japanese system contains unresolved issues relating to capacity. As in other jurisdictions,[98] some commentators fear that many enduring powers are both created and ostensibly monitored by individuals with impaired cognitive capacity, often strongly influenced by relatives or third parties.[99] This problem is exacerbated in Japan by two matters relating to doctrine, as developed by the courts and Japan's influential civil (private) law academic community. The first is the prevailing interpretation of the Civil Code that allows a general mandate to survive the loss of the represented person's capacity.[100] This creates the situation where representatives can neglect to activate the voluntary guardianship contract without any legal challenge to the validity of their actions, even where the represented person no longer has capacity to instruct or monitor the representative. This is in contrast to the common law, which saw the innovation of enduring powers precisely because general powers of attorney ceased to have effect in these circumstances. In the common law it is an assumption of the standard principal–agent relationship that the principal be able to hold the agent to account. Evidently, this is not an assumption shared by the Japanese *Civil Code*, which explicitly lists the death or bankruptcy of either party and guardianship over the representative (the "mandatary") as criteria for termination, but does not mention capacity of the represented person.[101] Despite the equivalent interpretive rule of *expressio unius est exclusio alterius* and the comprehensiveness and inertia of a *Civil Code* that has proven resistant to any amendment, some argue that the former regime should be considered to have been impliedly amended by the statutory innovation of voluntary guardianship,

95 Samanta (2009), *supra* note 59 at paragraph 44.

96 L.C. Hansen & E. Rodjman, "The Use of Living Wills at the End of Life: A National Study" (1996) 156 Archives of Internal Medicine 9, cited in Samanta (2009), *supra* note 59 at paragraph 44.

97 Arai (2013), *supra* note 5 at 14.

98 Julia Calvo Bueno, "Reforming Durable Power of Attorney Statutes to Combat Financial Exploitation of the Elderly" (2003) 16 National Academy of Elder Law Attorneys Quarterly 20, 21; Robert Smith, "Evaluating the Donor's Competence to Sign an Enduring Power of Attorney" (1996) 4 Journal of Law and Medicine 82, 82–83.

99 Akanuma (2013), *supra* note 68 at 80.

100 Makoto Arai, "Present Situation and Issues Regarding the Adult Guardianship System (*seinen kouken seido no genjou to kadai*)" (2005) 58(6) Houritsu no hiroba 4, 7.

101 *Civil Code* (*minpou*) *Act no. 89 of 1896*, s. 653.

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which seems incompatible with the prevailing interpretation of mandate contracts.[102]

From another perspective, mandate is a pre-existing functional equivalent of enduring powers that renders the voluntary guardianship regime redundant. Indeed, the fact that only a small proportion of registered enduring power contracts are actually activated by representatives suggests that many representatives are making a rational choice to avoid the cost (albeit claimable from the principal's assets, as indicated above) and procedural burdens of applications and the extra regulatory burdens of court and monitor oversight,[103] without necessarily being remiss in their substantive duties as a representative. This view is strongly rejected by reformers,[104] who explicitly rejected first generation enduring powers as a model due to the likelihood of extensive hidden abuses when relationships of such trust are opaque and unregulated. It is also, they emphasise, a failure to respect the autonomy of the represented person, who has entered into a formal arrangement on the understanding that this will be respected.[105]

This problem seems to have little prospect of judicial resolution. In Japan, as discussed below, capacity at the entry point of the enduring powers relationship can become one among a number of issues considered in a contest between applications for statutory and voluntary guardianship. Yet the relationship between capacity and contracts for mandate seems much more likely to face scrutiny by academics and lawyer commentators than the courts. In contrast, the relatively voluminous Australian case law on enduring powers typically figures capacity as a central issue.[106] This includes cases in which enduring powers are sought to be invalidated or revoked, at times where multiple powers have been issued.[107] More recently, they include cases of professional liability where lawyers who have witnessed enduring powers have not adequately investigated the proposed represented person's capacity.[108] Unlike Japan, Australian case

102 Arai (2005), *supra* note 100 at 7.

103 Nakayama (2011), *supra* note 48 at 403.

104 Akanuma (2013), *supra* note 68; Arai (2005), *supra* note 100 at 7.

105 Nakayama (2011), *supra* note 48 at 43.

106 See Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney: Sydney University Press, 2012), <http://www.worldlii.org/au/journals/SydUPLawBk/2011/12.html> (last accessed 4 October 2013) 10.3, 10.4.

107 *Ibid*.

108 See for example, *Legal Practices Tribunal v Ford* [2008] LPT 12, <http://www.lsc.qld.gov.au/Documents/FordLPT08-012.pdf> (last accessed 4 October 2013) discussed in Barbara Hamilton and Tina Cockburn, "Capacity to Make a Will and Enduring Power of Attorney: Issues New and Old" (2008) (December) Queensland Law Society Journal 14, 14.

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law has had an important guiding function in the evolution of enduring powers theory and practice precisely because of the clarity, certainty, and responsiveness it brings to the doctrine underpinning the system. Japanese courts have played similar role in areas of the law where there has been substantial litigation, such as employment law.[109] Yet, as with trust law,[110] the tendency for underused transplants to have their "day in court" stymies doctrinal development. This is compounded by a legal tradition in which disputes are channelled away from the courts by the state (depending on one's view) to coopt "subversive" parties into administrative solutions or settlements,[111] to achieve efficiency,[112] or to foster social capacity to resolve disputes without recourse to disintegrating formal adversarial means.[113]

The second doctrinal issue that exacerbates the problem of enduring powers created by represented persons without adequate capacity is the fact that drafters of the law in the Ministry of Justice explicitly endorsed a form of voluntary guardianship where the application to activate the power is made immediately following registration of the contract (the other two forms are the transitional form described above and the future form, which is not accompanied by a general mandate contract). According to one commentator, these drafters were well aware of naysayers in the civil law community and seemed to believe that this was a necessary compromise to secure a critical mass of users of the system.[114] Yet such pragmatic compromises to stimulate uptake call into question the assumptions of guardianship reformers in the Ministry of Justice. A preoccupation with quantitative indicia of success (uptake) over concern about whether the system is actually allowing individuals to extend their autonomy into a future of possible cognitive decline reflects the dilemma faced by

109 Daniel H. Foote, "Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of – Stability?" (1996) 43 UCLA L. Rev. 635, 637–638; Veronica L. Taylor, "Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan" (1993) 19 Melbourne U.L. Rev. 371, 378; Luke Nottage, *Changing Contract Lenses: Renegotiations in English, New Zealand, Japanese, US and International Sales Law and Practice*, <http://www.law.usyd.edu.au/anjel/documents/ResearchPublications/NottageCLPE2006paper.pdf> (last accessed 4 October 2013) 15.

110 Ryan (2006), *supra* note 56 at 225.

111 Frank K. Upham, *Law and Social Change in Postwar Japan* (Cambridge, MA: Harvard University Press, 1987) at 16.

112 J. Mark Ramseyer & Minoru Nakazato, "The Rational Litigant: Settlement Amounts and Verdict Rates in Japan" (1989) 18 J. Legal Stud. 263, 266–270.

113 John O. Haley, "The Paradox of Weak Power and Strong Authority and the Japanese State", in Richard Boyd & Tak Wing Ng, eds., *Asian States: Beyond the Developmental Perspective* (New York: RoutledgeCurzon, 2005) at 67.

114 Arai (2013), *supra* note 5 at 11.

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reformers trying to find the optimum balance among competing values of paternalism, autonomy, utility, public order, and efficiency.

VII. Entrenched Judicial Values?

Some proponents of enduring powers perceive another impediment, namely the entrenched values seen in other jurisdictions[115] on the part of judges and notaries public who appear biased towards more paternalistic, statutory guardianships.[116] Notaries public, for example, seem to demonstrate these values when they question the utility of voluntary guardianship and channel applicants instead towards the lightest form of statutory guardianship (appointment of a helper by consent, who has additional powers of revocation).[117] This may reflect a pragmatic strategy in light of the sometimes undermining treatment of voluntary guardianship contracts by competing family members and (as discussed below) the courts.[118] However, this attitude overlooks the autonomy-enhancing and individualistic underpinnings of enduring powers as a means of choosing and instructing one's own representative before representation becomes necessary.[119]

The clearest indicator of entrenched paternalistic judicial values is the continuing overwhelming dominance of full statutory guardianship appointments (83% in 2012) and the infrequency of dismissals of applications for guardianship (0.23% for full guardianship and 0.37% for curatorship in 2012).[120] These values also appear evident in the courts' treatment of voluntary guardianship applications. The *Voluntary Guardianship Act* states that a voluntary guardianship contract should take priority unless it is "especially necessary for the interests of individual" to impose a statutory guardianship.[121] The courts have tended to interpret this clause liberally, considering various matters such as the cognitive capacity at the time of entering into the contract, the

115 Alexander (1998), *supra* note 93 at 656. Terry R. Carney & David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Leichhardt: Federation Press, 1997) at 197.
116 Arai (2013), *supra* note 5 at 9.
117 *Ibid*.
118 *Ibid*.
119 *Ibid*, 10.
120 Supreme Court of Japan statistics.
121 *Act on Voluntary Guardianship Contracts (nini kouken keiyaku ni kansuru houritsu), Act no. 150 of 1999*, s. 10.

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explanation for why an application for the appointment of a monitor has not been made, the behaviour of the representative during any mandate contract period,[122] the suitability of the candidate (as provided in s 4(1)(iii) of the *Voluntary Guardianship Act*), and the content of the agreement including level of remuneration and scope of powers granted.[123] Admittedly, this exception is vaguely worded, but from the system's inception, reformers have stressed the autonomy-respecting hierarchy between voluntary and statutory guardianship.[124] A failure to confine the overriding of existing voluntary arrangements to a small exception of cases would seem inconsistent with the fundamental assumptions and goals of the system.

These assumptions, rather than judicial values per se, are problematic in the view of some commentators.[125] The frequency with which courts are being called upon to resolve competing applications for voluntary and statutory guardianship, it is argued, reveals deeper problems with the system.[126] These two opposing views reflect divergent attitudes about the larger process described above whereby the state has sought to impose formal, legal structures upon new frontiers, driven by a renewed commitment to liberal values of individualism, autonomy, and market ordering. Proponents of the voluntary guardianship system are dissatisfied with the direction of the courts, notaries public, and representatives who do not activate voluntary guardianships because these are seen as disregarding the intentions of the autonomous individual. This position is supported by Ronald Dworkin's theorising on advance directives and his concept of "precedent autonomy". This is the idea that the documented prior wishes of the competent individual should be prioritised over the "experiential interests" or perceived best interests of that individual when severe cognitive impairment occurs.[127] Using extended metaphors of authorship, narrative, and integrity employed elsewhere in his work[128] (in this context, over a human life rather than a legal tradition), Dworkin's reasoning seeks to reconcile the rational individual central to liberalism with the reality of cognitive decline.[129]

122 Nakayama (2011), *supra* note 48 at 404.
123 Akanuma (2005), *supra* note 53 at 20.
124 Kobayashi & Otaka (2000), *supra* note 30 at 74.
125 Nakayama (2011), *supra* note 48 at 404.
126 *Ibid*.
127 Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia and Individual Freedom* (New York: Alfred A. Knopf, 1993) at 221–229.
128 Ronald Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986), chapter 7.
129 Dworkin (1993), *supra* note 127 at 221–229.

A strong counterview has emerged in court practice and academic literature in law, psychology, and medical ethics.[130] This questions the ability to project autonomy into a future that is unknowable and holds that "precedent autonomy" is only one factor in an equation that should also consider externally imposed notions of best interest and the new expressed wishes of the person with cognitive impairment.[131] Some commentators note that advance directions regarding end of life decisions are routinely ignored by medical practitioners.[132] They account for this by suggesting that such decisions may by virtue of complexity and uncertainty not be amenable to the binary standards associated with legal formalism.[133] This position is not necessarily an anachronistic return to older forms of paternalism, at least where it allows for support for the represented person to form and express preferences in a way that is consistent with the emerging concept of "supported decision making".[134] In this sense, there is theoretical support for the behaviour of representatives and courts when they depart from enduring power agreements seeking to entrench prior expressions of autonomy. This anti-positivistic attitude has been ascribed to Japanese courts in other contexts such as employment law, tenancy, and contract law.[135] It is the precisely the attitude that has been problematised by those who gained ascendancy in reform processes from the 1990s who advocated dismantling the welfare state (or at least the "regulatory state") and erecting instead a "rule of law", market-based society.[136]

VIII. Conclusion

There are numerous possible reasons for Japan's relatively low uptake of enduring powers, just as proponents of this legal transplant in Japan are varied in

130 See for example, Susan Adler Channick, "The Myth of Autonomy at The End-of-Life: Questioning The Paradigm of Rights" (1999) 44 Villanova Law Review 577; Sarah Walker, "Autonomy or Preservation of Life? Advance Directives and Patients with Dementia" (2011) 17 University College London Jurisprudence Review 100; Rebecca Dresser, "Dworkin on Dementia: Elegant Theory; Questionable Practice" (1995) 25 Hastings Centre Report 32; Mary Donnelly, "Best Interests, Patient Participation and The Mental Capacity Act 2005" (2009) 17 Medical Law Review 25.

131 Channick (1999), *supra* note 130 at 631; Walker (2011), *supra* note 130 at 115.

132 Channick (1999), *supra* note 130 at 624.

133 *Ibid*., 631.

134 For a useful explanation of supported decision-making, see Dinerstein (2012), *supra* note 2.

135 Foote (1996), *supra* note 109 at 638; Hiroshi Oda, *Japanese Law*, 2nd ed. (Oxford: Oxford University Press, 1999) at 9–11.

136 Uchida & Taylor (2007), *supra* note 41 at 474.

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their motivations. Indeed, it may be impossible to disaggregate this cluster of reasons and motivations. For example, the promotion of autonomy figures in all reformers' justifications for enduring powers, yet it is difficult to determine when this is merely a rhetorical justification for state divestment of responsibility because the notion of autonomy is often intimately connected to liberal scepticism of state intervention in the life of the individual. Similarly, at a system level, paternalism and autonomy are not poles between which a perfect median can be found, despite the way discussions about guardianship are typically framed. The two concepts are bound together: individuals will only autonomously choose a system that offers reliable protection. Further, while it is tempting to conclude that social norms have not evolved to a state that is receptive to the formal legal norms of an enduring powers contract, it is difficult to ascertain the relationship of these norms to the State's failure to educate the public and to create a regulatory regime that fosters the development of this transplant in its vulnerable early stages.

The comparative analysis in this article suggests that the design of the instrument and the surrounding regulatory, economic, and policy framework play an important role in promoting uptake. It also provides a useful contrast of experimentation across jurisdictions, which in turn highlights promising parallel developments in Japan, such as the growth of self-regulating bodies and new networks that seek to meet the latent demand for representation and guardianship with a reliable supply of human capital. There is similar comparative value in analysing the relationship between doctrine and uptake. However, this inevitably leads to deeper questions about capacity and the assumptions underpinning reformers' push to make enduring powers a common means for individuals to order their future affairs in an ageing society. It is at this point that divergent positions on the appropriate role of law in society are exposed. Ultimately, the success of enduring powers in Japan will depend not only upon adjusting regulatory and doctrinal levers, but also the success of the larger project to impose formal, legal frameworks upon human relationships that have until the present been regulated through informal social norms or administrative decree and the related project of encouraging market mechanisms and civil society to take on some of the protective functions hitherto exercised by the State.