The Trust as Trojan Horse: A Comparative Perspective on Trusts' Role in Japanese Succession Law

James C. Fisher[*]

ABSTRACT: In Japan, as in other developed economies, demographic and social change is putting pressure on the established rules of inter-generational wealth transfer. This Article considers how the trust equips Japanese succession law to adapt to a changing society. The trust was adopted into Japanese law in the early 20th Century on the assumption that it would remain practically detached from the rest of Japanese civil law. However, it is now making good on its latent potential to disrupt foundational axioms of Japanese private law. In this sense, the trust is a Trojan Horse—although thought innocuous on its arrival, this fragment of the common law has begun to reconstruct Japanese private law from within. The significant—though unplanned—changes caused by the trust are re-orientating Japanese succession law, reproducing features characteristic of common law jurisdictions and challenging aspects of Japan's civil-law jurisprudence, such as absolute rights of succession. This Article argues that these developments represent a valuable and adaptive response to Japan's changing social and economic environment. The testamentary freedom so characteristic of the common law offers greater efficiency than the civil law's preference for absolute rights of succession. In bringing Japanese succession law closer to the common-law position, the trust is not just changing Japanese law, but improving it.

[*] Project Associate Professor, University of Tokyo Faculty of Law & Graduate Schools for Law and Politics.

I. INTRODUCTION

Like other developed economies, Japan is experiencing major social and demographic change. Its aging population and declining birth-rate mean an ever-increasing demand for pensions and medical care, but also a decreasing number of economically productive individuals who can provide the tax revenue on which social welfare depends.[1] This is also a time of social and cultural transition in Japan.[2] The nuclear, patriarchal family unit—itself the post-war successor to the traditional multi-generational home—is yielding to more varied family structures. The number of childless couples is rising, and increasing numbers of Japanese people are marrying later in life, or cohabiting unmarried, or indeed remaining single forever.[3] Divorces, re-marriages, and single-parent households are increasingly common.[4] Liberalizing views on sexuality have increased the number and visibility of same-sex relationships, although neither same-sex marriage nor a substantive equivalent exists in Japan.[5] All these developments invite careful scrutiny of

1. *See generally*, Ichiro Muto et al., *Macroeconomic Impact of Population Aging in Japan: A Perspective from an Overlapping Generations Model*, 64 IMF ECON. REV. 408 (2016) (discussing the economic effects of Japan's aging population); Nanako Tamiya et al., *Population Ageing and Wellbeing: Lessons from Japan's Long-Term Care Insurance Policy*, 378 LANCET 1183 (2011) (discussing the relationship between aging populations and the provision of publicly funded medical care).

2. *See generally* Minja Kim Choe et al., *Nontraditional Family-Related Attitudes in Japan: Macro and Micro Determinants*, 40 POPULATION & DEV. REV. 241 (2014) (discussing changing social attitudes, particularly with respect to family issues).

3. Robert D. Retherford et al., *Late Marriage and Less Marriage in Japan*, 27 POPULATION & DEV. REV. 65, 65 (2001).

4. *See, e.g.*, AKIKO S. OISHI, NAT'L INST. OF POPULATION AND SOC. SEC. RESEARCH, CHILD SUPPORT AND THE POVERTY OF SINGLE-MOTHER HOUSEHOLDS IN JAPAN 1 (2013), http://www.ipss.go.jp/publication/j/DP/dp2013_e01.pdf; James M. Raymo et al., *Marital Dissolution in Japan: Recent Trends and Patterns*, 11 DEMOGRAPHIC RES. 395, 397, 405 (2004).

5. Masami Tamagawa, *Same-Sex Marriage in Japan*, 12 J. GLBT FAM. STUD. 160, 161 (2016). The Civil Code provisions on marriage do not expressly prohibit same-sex marriage, but various articles (e.g., Article 159 on prescription of marital rights, Article 750 on marital names, and

traditional rules of succession. The world is changing, and the law must change with it—old assumptions must be reconsidered if private law doctrine is not to become inefficient and obstructive.

This Article considers how the trust is helping Japanese succession law adapt to a changing society. Particularly, it explains how the Japanese trust—understood by its architects as an exceptional outlier insulated from wider private law—is beginning to make good on its radical potential. Social change is providing the opportunity for the trust to disrupt foundational axioms of Japanese private law. In this sense, the trust is a Trojan Horse—although thought innocuous on its arrival, this fragment of common-law jurisprudence is beginning slowly to conquer Japanese private law from within.

Part II of this Article describes orthodox Japanese succession law, contrasting it with the archetypal common law position. Part III identifies the advantages that the common law offers over the fixed rights of inheritance characteristic of Japanese law. Part IV describes the significant—though unplanned—changes the trust has begun to produce within Japanese succession law, which reproduce a manifestly common-law position. These developments are applauded as valuable responses to Japan's changing social and economic environment—in bringing Japanese succession law closer to the common law, the trust is not just changing Japanese law, but improving it. Part V reflects briefly on the juridical nature of the Japanese trust, and Part VI concludes with final reflections on the trust's place in the changing Japanese law of succession.

II. RIGHTS OF SUCCESSION AND TESTAMENTARY FREEDOM

Aside from the presence of the trust, modern Japanese succession law is typical of the civil law tradition, characterized by what common lawyers pejoratively term "forced heirship"—statutory rights of succession that cannot be defeated by testation.[6] Although testation is recognized under Japanese law, the Civil Code guarantees to specific statutory heirs a secured portion of the deceased's estate.[7] The Code designates the deceased's spouse and children as heirs of the first order,[8] collectively guaranteed at least half the

Article 761 on joint liabilities) are phrased assuming an opposite-sex pairing. MINPŌ [MINPŌ] [CIV. C.] 1896, arts. 159, 750, 761 (Japan). Likewise, Article 74 of the Family Register Act 1947, concerning the procedure for effecting a legal marriage, is explicitly concerned with the "husband and wife." *Kosekihō* [Family Register Act], Act No. 224 of 1947, art. 74 (Japan).

6. MINPŌ [MINPŌ] [CIV. C.] 1896, art. 964. Statutory heirs with rights of succession may seek the abatement of dispositions where necessary to preserve their protected portion of the estate, and they have one year to claim their secured portions of the estate after learning of the testatrix's death and the infringement of their rights of inheritance. MINPŌ [MINPŌ] [CIV. C.] 1896, arts. 1031, 1042.

7. *Id.* art. 1028. *Cf. id.* arts. 887, 889, 890, 900 (describing the shares of the respective heirs in the event of the deceased's intestacy).

8. *Id.* arts. 890 and 887, para 1. As originally enacted in 1896, the Japanese Civil Code provided for primogeniture, but this was changed as part of the American Occupation's forcible

estate's total value notwithstanding the provisions of the deceased's will.[9] If the deceased is survived only by a spouse, the spouse is entitled to half the estate's value.[10] If the deceased is survived by both a spouse and children, the spouse is entitled to a quarter of the estate and each child is guaranteed an equal share of a further quarter.[11] If the deceased dies unmarried and childless and there are therefore no first-order heirs, second-order heirs—the deceased's lineal ancestors—have a collective protected entitlement to one third of the estate's total value.[12]

Japanese law's unexcludable minimum inheritance rights for immediate family members necessarily leaves less scope for individuals' specific desires regarding the disposition of their property on death than the more general power of testation recognized in most common law jurisdictions.[13] The common law generally permits—and indeed prefers—individuals freely to dictate the distribution of their property on death.[14] In the context of English law, the Law Commission has described civilian "forced heirship" as "alien to our legal tradition,"[15] which instead "leaves everything to the unfettered discretion of the testator."[16]

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democratization of Japan following its defeat in the Second World War. *See* Kurt Steiner, *Postwar Changes in the Japanese Civil Code*, 25 WASH. L. REV. & ST. B. J. 286, 288, 308–09 (1950).

9. MINPŌ [MINPŌ] [CIV. C.] 1896, art. 1028, para 2.

10. *Id.* art. 1028, para 2.

11. *Id.* arts. 890, 900, para. 4. Strictly, the Civil Code provides for the equal heirship of *legitimate* children. Illegitimate children have a protected entitlement equal to half that of a legitimate child. *Id.* art. 900, para. 4. However, the Supreme Court has recently declared this regime unconstitutionally discriminatory. Saikō Saibansho [Sup. Ct.] Sept. 4, 2013, 2012 (ku) no. 984, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1320, *translated at* http://www.courts.go.jp/app/hanrei_en/detail?id=1203.

12. MINPŌ [MINPŌ] [CIV. C.] art. 1028, para. 1.

13. The Civil Code allows derogation from these formulaic rules in some circumstances, but these derogations have no necessary connection with the intentions of the deceased regarding the distribution of her property on death. They respond instead to a judicial appraisal of the appropriateness of the heirs' inheritances in the circumstances. For instance, the Civil Code increases the entitlement of statutory heirs who provided special support or assistance to the deceased. *See* MINPŌ [MINPŌ] [CIV. C.] art. 904-2, para. 1. The heirs themselves can also apply to the Family Court for adjustment of their shares by reference to the heirs' respective contributions to the deceased's estate during her lifetime, or to gifts or benefits already bestowed on particular heirs before death. *Id.* arts. 903, 904-2, para. 2. An heir is also automatically disqualified on grounds such as killing or attempting to kill the deceased, failing to report her death, attempting to forge her will, or forcing her to make or alter a will. *Id.* art. 891.

14. Testamentary freedom has been reliably assured in English law for at least five hundred years. ROGER KERRIDGE, PARRY & KERRIDGE: THE LAW OF SUCCESSION 183 (13th ed. 2016). Indeed, free nomination of one's heir(s) had a long pedigree in England even before the emergence of the common law; the compulsory primogeniture associated with the early common law—before testamentary freedom was reasserted through uses—responded principally to the need for certainty in the royal succession. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 265–66 (4th ed. 2002).

15. LAW COMM'N, INTESTACY AND FAMILY PROVISION CLAIMS ON DEATH, 2011, HC 1674, § 1.21 (UK).

16. Banks v. Goodfellow [1870] LR 5 QB 549 at 564 (Eng.).

Although the common law provides default succession rules that apply in case of intestacy,[17] it demonstrates a "general ethos of encouraging people to make wills and therefore avoid the risk of intestacy."[18] This ethos manifests in several areas, such as the rules concerning testamentary capacity. At least in England and Wales, this remains the generous test established in *Banks v. Goodfellow*,[19] which recognizes capacity long into age-related mental decline,[20] and requires only an understanding of the will's direct consequences, not necessarily its consequential effects.[21] Behind these rules lies a policy of effectuating as far as possible the testatrix's particular wishes. Conscious that a finding of incapacity means "either that an earlier will prevails or that the rules of intestacy apply,"[22] the common law inclines to acknowledge the testatrix's capacity specifically to avoid "an outcome that appears to comply with the wishes of the testatrix even less than that produced by the will at issue."[23] The law of the United States has been described as even more accommodating than that of England and Wales,[24] with the threshold for testamentary capacity "deliberately kept artificially low"[25] to facilitate "the American commitment to individual preference and autonomy,"[26] such "that

17. With respect to England and Wales, these are contained in the Administration of Estates Act 1925, recently amended by the Inheritance and Trustees' Powers Act 2014. *See generally* Inheritance and Trustees' Powers Act 2014, c. 16 (Eng.) (illustrating the default succession rules that apply in case of intestacy); Administration of Estates Act 1925, 15 & 16 Geo. 5 c. 23 (Eng.) (same).

18. Juliet Brook, *The Neighbour, The Carer and The Old Friend—The Complex World of Testamentary Capacity*, *in* 9 MODERN STUDIES IN PROPERTY LAW 117, 121 (Heather Conway & Robin Hickey eds., 2017).

19. *See Banks* [1870] LR 5 QB at 563 (holding that English law gives testators "absolute freedom" in the disposal of their property). Recent authority suggests the law as stated in *Banks* remains unchanged notwithstanding statutory intervention in the area of mental capacity under the Mental Capacity Act 2005. *Re* Walker (Deceased) [2014] EWHC (Ch) 71, [35]. This is only a first-instance decision and has not yet received consideration at appellate level.

20. The rule in *Parker v. Felgate* regards a testatrix with severe dementia as nonetheless possessing testamentary capacity, even if she is unable to remember the contents at the time of signing, provided she understood the will to have been drafted in accordance with instructions she gave when she had capacity. Parker v. Felgate, [1883] 8 PD 171 at 173 (Eng.). This principle from *Parker* was applied recently in Perrins v. Holland [2010] EWCA (Civ) 840 [72], [2011] Ch 270 (Eng.). The law also requires only that a will be made in one of the testatrix's "lucid interval[s]." *Banks* [1870] LR 5 QB at 550, 557–58*; see also, e.g.*, Cartwright v. Cartwright (1793) 161 Eng. Rep. 923; 1 Phill. Ecc. 90 (Eng.) (among early cases dealing with the "lucid interval").

21. Simon v. Byford [2014] EWCA (Civ) 280 [44] (Eng.).

22. Gill v. Woodall [2010] EWCA (Civ) 1430 [26], [2011] Ch 380 [26] (Eng.).

23. *Id.*

24. *In re* Estate of Dokken, 604 N.W.2d 487, 494 (S.D. 2000) (finding "sufficient evidence to justify the trial court's decision finding [the testator] possessed testamentary capacity to execute his will"); Lawrence A. Frolik, *The Strange Interplay of Testamentary Capacity and the Doctrine of Undue Influence[:] Are We Protecting Older Testators or Overriding Individual Preferences?*, 24 INT'L J.L. & PSYCHIATRY 253, 257 (2001) ("Courts are quite willing to concede that the level of mental capacity required to executive a valid will are minimal.").

25. Brook, *supra* note 18, at 132.

26. Frolik, *supra* note 24, at 255.

the only effective challenge to a will is on the grounds of undue influence."[27] The preference for free testation also informs the law of private trusts. At least in English law, these are insulated from certain grounds of challenge—for instance, for discrimination in the selection of beneficiaries—thanks to the perceived importance of testamentary freedom.[28]

III. THE ADVANTAGE OF FREE TESTATION

Despite the common law's obvious commitment to testamentary freedom, commentators have been generally unsuccessful in articulating what is uniquely good about it. Advocates of free testation tend to concentrate on defending it against progressive demands—real or imagined—that the wealth of the dead should be severely taxed in pursuit of greater social justice. They are less concerned to explain why free testation is better than statutory rights of inheritance of the civil law kind.

A. NO NATURAL RIGHT OF FREE TESTATION

For some theorists, there is little need to distinguish between those two questions. Nozick, for example, regards free testation as an integral aspect of the absolute freedom intrinsic to ownership in a "system of natural liberty."[29] On this analysis, rules of forced heirship are not so different from the confiscation of property on death, because both violate an individual's natural right to dispose of her property as she wishes.

But there are problems with any attempt to defend free testation deontologically by reference to the natural rights of property owners. For one thing, this argument brings its typically capitalist-libertarian proponents into fatal tension with other propositions integral to their political philosophy. That philosophy typically claims that worldly success and the accumulation of wealth is meritocratic—that "[t]he system is fair and opportunity is limited

27. Brook, *supra* note 18, at 132.

28. Blathwayt v. Lord Cawley [1975] 3 All ER 625 (HL) 636 (Lord Wilberforce) (appeal taken from Eng.). However, other parts of the common law world have permitted the public interest in combatting discrimination to overcome attachment to testamentary freedom. *See, e.g.*, Can. Tr. Co. v. Ontario Human Rights Comm'n, 1990 CarswellOnt 486, para. 40 (Can. Ont. C.A.) (WL) (suggesting that a discriminatory term in a private (non-charitable) testamentary trust would be ineffective); *cf. id.* at para. 32 (Justice Tarnopolsky distinguishing between charitable trusts, whose terms required scrutiny from a public policy perspective because of the quasi-public nature of the law of charities, from "private, family trusts," where public policy less obviously justifies restricting testamentary freedom). The majority's opinion led ultimately to restrictions on a trustee's discretion in administering a private testamentary trust in a way that would have been religiously discriminatory. Fox v. Fox Estate, 1996 CarswellOnt 317, paras. 16–21 (Can. Ont. C.A.) (WL). Such decisions have been criticized specifically for failing to protect the supreme importance of testamentary freedom. *See, e.g.*, Lorraine E. Weinrib & Ernest J. Weinrib, *Constitutional Values and Private Law in Canada*, *in* HUMAN RIGHTS IN PRIVATE LAW 43, 68 (Daniel Friedmann & Daphne Barak-Erez eds., 2001).

29. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 160, 213 (1974).

only by the extent of one's ability"[30] —in order to deny the moral case for the coordinated redistribution of wealth. But that claim is transparently incompatible with unregulated rights of testation. Merit and inheritance "are incompatible ways to distribute valued resources in society" because "[t]o the extent that resources are distributed on the basis of inheritance, they are not distributed on the basis of merit."[31]

In fact, understanding testation as a natural right has a far less ancient pedigree than the contemporary popularity of this ideology might lead us to assume.[32] In his *Commentaries on the Laws of England*, Blackstone reasoned that, to the extent that natural rights exist at all, they could be held only by the living. While there might be a natural right freely to dispose of one's property while alive—a natural right that the official law could either honor or frustrate—the power to direct the distribution of property from beyond the grave derives solely from the artificial reason of positive law.[33] Seeing testation not as a natural right but as simply a creation of positive law invites a consequentialist enquiry about whether the law *should* permit individuals authoritatively to decide the disposition of their property on death.

Many consequentialist arguments have been offered in support of testation. Particularly enduring is the claim that it encourages industriousness during one's lifetime—and therefore the production of wealth—because of the natural desire to secure the material advantage of one's children.[34] But that kind of argument falls into the trap identified at the start of this Part—it does not relate specifically to *testation*, but to the logically prior and more fundamental question of whether inter-generational wealth transfer should be allowed *at all*, whatever particular regime the law might devise to effectuate it. In other words, this argument might show testation to be better than *some* hypothetical alternatives—such as a rule that the property of the dead must be used to entomb them in Pharaonic splendor or applied to the general public good—but it cannot explain why free testation is better than what is

30. Robert K. Miller, Jr. & Stephen J. McNamee, *The Inheritance of Wealth in America*, *in* INHERITANCE AND WEALTH IN AMERICA 1, 1 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998).

31. *Id.* at 1–2.

32. Defenses of testation appear in the works of John Locke and Grotius but are invariably qualified by a duty to provide for one's dependents. *See* HUGO GROTIUS, 2 DE JURE BELLI AC PACIS LIBRI TRES 265 (James Brown Scott ed., Francis W. Kelsey trans., Oxford Univ. Press 1925) (1625); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 134, 152 (Thomas I. Cook ed., Hafner Pub. Co. 1947) (1690). Locke's rendition is especially inconclusive, noting both a testator's right to bequeath and dependents' right to succeed. *Id.* at 66–68, 218.

33. 2 WILLIAM BLACKSTONE, COMMENTARIES *10–11. On Blackstone's treatment of inheritance with respect to the division between natural and positive rights, see Jessie Allen, *Law and Artifice in Blackstone's Commentaries*, 4 J.L. 195, 198–200 (2014). At least in the United States, testamentary freedom has long been understood as a posited right rather than a natural one. *See* Ronald Chester, *Inheritance in American Legal Thought*, *in* INHERITANCE AND WEALTH IN AMERICA, *supra* note 30, at 23, 23–24.

34. For another work containing statements to this effect, see generally 2 BRACTON DE LEGIBUS ET CONSUETUDINIBUS ANGLIÆ (George E. Woodbine ed., 1922).

actually the main competing alternative, namely absolute rights of inheritance that protect the deceased's immediate family. The natural human desire to provide for one's children hardly supports a succession regime that permits the *dis*inheritance of one's family (common law free testation) over one that guarantees the deceased's immediate family will inherit a large portion of the estate (civil law rights of inheritance). A successful consequentialist defense of free testation *per se* (in contrast to compulsory familial inheritance) must therefore specifically justify a testatrix's ability to leave wealth *other than* to the people "forced heirship" protects—in other words, her ability fully or partially to disinherit her nearest relations.

As the following section explains, testation as a basis for intergenerational wealth transfer does indeed offer a crucial advantage over absolute inheritance rights. And unlike the arguments discussed above, identifying this particular advantage does not commit us to any given position as to the moral legitimacy or practical utility of the inheritability of property *per se*. It is only that, as between the two main competing models of succession law, the common law's preference for testamentary freedom offers a compelling consequentialist advantage.

B. THE SUPERIOR KNOWLEDGE OF THE TESTATRIX

Problematically for the libertarian assertion of a natural moral right to unencumbered testation, the common law has long recognized "a moral responsibility of no ordinary importance" to provide for one's immediate family on death, breach of which will "shock the common sentiments of mankind[] and . . . violate what all men concur in deeming an obligation of the moral law."[35] Clearly, in denying protected interests, the common law does not deny that individuals have moral duties regarding the disposition of property on death. It merely declines to follow the civil law by transmuting this "moral law" into *positive* law in the form of unexcludable rights of inheritance. The common law "leaves everything to the unfettered discretion of the testator"[36] not because there are no moral pressures on testatrixes in the disposal of their estates, but because testamentary freedom is the best guarantee that such duties will be optimally—as opposed to merely approximately—satisfied.

Testation is attractive only when individuals think their contemplated disposition of property is better in some way than the disposition that would result if they died intestate. The common law permits free testation because it trusts that individuals do in fact know better than default rules of law. As Cockburn LJ reasoned in *Banks v. Goodfellow*:

> [T]hough in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the

35. Banks v Goodfellow [1870] LR 5 QB 549 at 563 (Eng.).

36. *Id.* at 564.

> neglect of claims that ought to be attended to, yet the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.[37]

While the common law accepts that moral duties apply to the disposition of one's property, it does not attempt to stipulate what precise dispositions will satisfy those duties, since the individual in question is uniquely well-placed to understand the needs of those around her. It denies the testatrix's family any rights of succession because the natural duties owed to one's immediate family are not conclusive of what the testatrix is morally obliged to do with her property. For instance, her relatives may not need the additional wealth, or their need may be highly unequal and in need of calibration more precise than anything compulsory rights of succession can achieve.

In short, the common law trusts that—notwithstanding a few ignorant or malicious cases—specific situational knowledge means a testatrix will generally distribute her property better than fixed rules would. This resonates with a powerful school of economic thought that emphasizes the incomparable efficiency of local knowledge. Particularly influential is the work of Friedrich Hayek, who famously insisted that diffuse social knowledge "cannot possibly be gathered together and conveyed to an authority charged with the task of deliberately creating order."[38] Since no organizing agent can hope to aggregate the sum total of local knowledge held by individual actors, individualized decision-making by those with relevant situational insights—and interests directly at stake in the decision to be made—will, *ceteris paribus*, produce the greatest overall efficiency.[39] With proto-Hayekian logic, the common law embraces testamentary freedom because it acknowledges that in the vast majority of cases the testatrix will know how best to provide for the individuals—and indeed causes—to whom she owes moral duties.[40]

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37. *Id.*

38. F.A. Hayek, *The Fatal Conceit: The Errors of Socialism*, *in* 1 THE COLLECTED WORKS OF F.A. HAYEK 1, 77 (W.W. Bartley III ed., 1988).

39. Although integral to modern *laissez-faire* economic thought, the sensitivity is far older than Hayek. John Stuart Mill likewise defended *laissez-faire* government on the basis that self-interested independent individuals better utilize dispersed knowledge throughout the economy. *See generally* JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY (1884).

40. Concerns about efficiency and knowledge management also justify at least some of the law's *restrictions* on a testatrix's ability to dictate the distribution and use of their wealth after death. One example is the rule against perpetuities. While a settlor's accumulated knowledge makes her decisions about the use of property presumptively the most efficient at the time they were made (and perhaps for some time afterwards), that knowledge loses relevance incrementally as the situation changes. At some point, present-day agents will have a more accurate informational basis for decision-making regarding the use of the property in question, and will

Free testation is, therefore, better than compulsory rules of inheritance for consequentialist rather than deontological reasons. It is therefore misleading to defend testation by reference to the rights of the testatrix. She is relevant to the defense of free testation not because of any intrinsic natural right to decide the disposition of her property on death but rather because she is the repository of the situational knowledge that permits dispositions more nuanced and beneficial than those dictated by compulsory rules of law.

C. NO MORAL RIGHT TO INHERIT

Hayek's postulates might be challenged either directly—by arguing that central planning is in fact more efficient than organic, decentralized decision-making[41]—or from an external, normative perspective, by identifying more compelling desiderata that trump concerns about efficiency and therefore justify a coordinating authority's intervention. Indeed, these are essentially the arguments that can be levied against testamentary freedom in favor of rights of succession. For instance, one might argue normatively that the deceased's immediate family has a moral right to inherit, which the law ought to protect notwithstanding concerns about inefficiency. However, it is difficult to see how arbitrary accidents of birth create moral entitlements to substantial windfalls of unearned and unneeded wealth. More plausibly, it might be argued that a statutory succession framework is *good enough* for most situations, since most people do in fact want to leave most of their wealth to their immediate family. Therefore, to invite widespread departure from this general schema through unrestricted testation risks complicating the law of succession in pursuit of diminishing returns.[42] However, it is only plausible that a statutory succession framework could be too widely satisfactory to justify

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therefore be able to set that wealth on more fruitful paths than the trajectory originally chosen by the original testatrix. At this point, efficiency demands the property be returned to the unencumbered use of the living and freed from the dead hand of the testatrix, so that fresh situational knowledge can be applied to its use and distribution.

41. These criticisms nonetheless typically adopt Hayek's emphasis on the relationship between efficiency and access to relevant knowledge. For instance, opponents of Hayek's free market idealism might suggest that in fact local decision-makers are ignorant of important factors that can only be known to a central planner. This contention has more or less force in differing contexts, but its application to the issue of testation—where the relevant information concerns principally the respective needs of people known to the deceased—is particularly weak.

42. It might be objected that, if the default rules are indeed generally good enough for most cases, the law invites diminishing returns—and extra complications and costs—in facilitating additional customization. A veteran commentator on the Japanese legal system has praised Japanese private law precisely because it achieves practical efficiency by prioritizing predictable, generally satisfactory rules over futile and counter-productive attempts at individuated perfection. *See* J. MARK RAMSEYER, SECOND-BEST JUSTICE: THE VIRTUES OF JAPANESE PRIVATE LAW 6–9 (2015). However, Ramseyer's argument concerns the *legal system's* behavior in response to private law disputes, not individuals' own attempts to achieve maximum efficiency in private ordering.

permitting derogation from it if family structures remain fairly homogenous. Rapid and accelerating social change makes this an unreliable assumption.[43]

Ultimately, whether a particular legal rule produces more efficient outcomes than another—whatever "efficient" is taken to mean in this context—is an empirical enquiry, requiring evidential economic analysis of a kind beyond the scope of this Article. But in the absence of empirical contradiction, logic suggests that Japan's absolute rights of succession obstruct the optimal distribution of property. The effect of absolute rights of succession is to reserve large amounts of wealth for people who may not need it. This is objectionable for reasons of distributive justice, but also increasingly perverse from a public policy perspective. On concluding that their family members have no need of a large inheritance, some individuals will prefer to leave their wealth to those in genuine financial need. By letting us apply the bulk of our wealth to alleviating a particular individual's poverty, or satisfying some pressing community need, testamentary freedom invites private individuals to participate in the provision of social welfare and public services. Conversely, rights of succession reduce the potential size and impact of testamentary bequests, which necessarily makes it harder for a public-spirited testatrix to remove somebody entirely from the care of the taxpayer through a transformative testamentary gift.

D. TESTAMENTARY FREEDOM & SOCIAL NEEDS

As described in Part II, Japanese law permits total testamentary freedom only if—very unusually—an individual dies with no surviving spouse, descendants or ascendants. Since most people are survived by either a spouse or a lineal descendant, the typical testatrix may freely distribute by will only half the value of her estate.[44]

In practice though, absolute rights of inheritance undermine free testation even more than is immediately obvious. This is because, as the following analysis shows, the presence of *any* protected entitlements reduces the characteristic advantage of free testation identified above—half testamentary freedom is far less than half as useful as full testamentary freedom.

In a legal system with absolute rights of succession, a testatrix can only ever *increase* the number of people that will inherit,[45] by allocating to them some of the undetermined portion of her estate. Any testamentary disposition to some person (or cause) other than the statutory heir(s) necessarily means the further fragmentation of the estate. Disposing of the undetermined

43. *See supra* notes 1–5 and accompanying text.

44. MINPŌ [MINPŌ] [CIV. C.] arts. 964 1028, para. 2 (Japan).

45. In Japan, testation can in fact disinherit the testatrix's siblings (and their descendants), who would be third-order heirs under the intestacy rules, even though testation cannot defeat the protected shares of first- or second-order heirs (the deceased's spouse, lineal descendants, and lineal ancestors). MINPŌ [CIV. C.] art. 1028.

portion of the estate's value among additional heirs is frequently undesirable because further proliferation of interests in the estate risks dissipating its value, reducing the impact of a legacy for every person that inherits. Widely distributed wealth means happy windfalls for many people, but legacies can have meaningfully transformative effects only if concentrated. Unexcludable rights of inheritance obstruct the concentrated application of wealth to the places the testatrix's situational knowledge suggests it is most needed.

Because a large portion of the estate is already consumed under absolute rights of inheritance, dispositions of the undetermined portion to anyone other than the existing statutory heirs are of diminished impact. Therefore, the obvious use of the undetermined portion for a testatrix wishing to maximize the impact of inheritance is to supplement the statutory entitlements of the mandatory heirs. But the mandatory heirs are the same people among whom the entire estate would anyway be distributed in the event of intestacy—the deceased's spouse, descendants or (sometimes) ancestors.[46] Therefore, the impact of testation is maximized by diverging relatively little from the results of intestacy, making testation largely futile. After all, the sole purpose of testation is to avoid the disposition of property that the general law contemplates. It is hardly surprising that the residual testamentary power recognized under Japanese law is seldom exercised, and that the vast majority of Japanese people therefore die intestate.

Japan already suffers from outrageously high sovereign debt, and the demographic challenges outlined in Part I of this Article[47] stand to intensify the state's fiscal challenges. Yet in apparent mockery of the troubled public finances, Japan has among the world's highest levels of private savings.[48] Replacing rights of succession with common-law-inspired testamentary freedom would permit the application of private capital to goals that would otherwise burden the public purse. This would mitigate the financial problems associated with the nation's aging population and declining tax

46. The deceased's spouse is always a first-order heir. MINPŌ [MINPŌ] [CIV. C.] art. 890. Therefore, under the intestacy rules, the deceased's spouse receives the whole estate if the deceased had no surviving lineal descendants, ascendants, or collateral descendants (siblings or the lineal descendants of siblings). If there are other first-order heirs (i.e., the deceased's children or more remote lineal descendants), the spouse receives half the estate and the other half is distributed among the deceased's descendants in the same proportions as the protected shares. *Id.* arts. 887, para. 2, 900, no. i. If there are no other first-order heirs but surviving second-order heirs (namely the deceased's lineal ascendants), the spouse receives two-thirds of the estate and the remaining third is distributed among the deceased's ancestors. *Id.* arts. 889, para. 1, no. 1, 900, no. ii. If there are neither first-order nor second-order heirs, the spouse receives three-quarters of the estate and the final quarter is distributed among the third-order heirs, namely the deceased's collateral descendants. *Id.* arts. 889, para. 1, no. iii, 889, para. 2, 900, no. iii.

47. *See supra* notes 1–4 and accompanying text.

48. James Mayger & Isaac Aquino, *Savings and Stocks Make Japanese Households Richer than Ever*, BLOOMBERG (Mar. 16, 2017, 9:01 PM), https://www.bloomberg.com/news/articles/2017-03-17/savings-and-stocks-make-japanese-households-richer-than-ever.

revenues, while also responding positively to the increasing variance in Japanese family structures.

Part IV of this Article records the way in which the practical law of succession in Japan is in fact responding to the public policy case for testamentary freedom, namely the evolution of the trust as a significant element in Japanese private law. Despite the endurance of the Civil Code's rules of forced heirship, the trust is poised to re-orientate Japanese estate planning along common-law lines, markedly increasing individuals' ability to achieve efficient and socially advantageous dispositions of wealth on death.

E. THE RESILIENCE OF TESTAMENTARY FREEDOM IN ENGLAND & WALES

Notwithstanding its superiority over rights of succession, common-law jurisdictions, including England and Wales, no longer adhere absolutely to the doctrine of testamentary freedom. In English law, the Inheritance (Provision for Family and Dependants) Act 1975 allows certain categories of person to challenge the terms of a will, or the effects of the deceased's intestacy,[49] where the deceased failed to make "reasonable financial provision" for them.[50] In the recent and high-profile case of *Ilott v. Blue Cross*, an estranged daughter in her fifties successfully claimed £50,000 from an estate of £500,000 that her mother had attempted to gift by will to various charities to the deliberate exclusion of her daughter.[51] In *Nahajec v. Fowle*, the first reported case to apply the decision in *Ilott*, a testator's estranged daughter successfully claimed £30,000—the amount necessary to fulfill her ambition of qualifying as a veterinary nurse—despite her father's clear wish, recorded in a written explanation, that none of his children should inherit any of his approximately £250,000 estate.[52] Indisputably, the availability of Inheritance Act claims reduces the scope of testamentary freedom. Claimants in the recent cases succeeded by demonstrating that their disinheritance was the result of ignorance or spite on the part of the deceased, but this is still a direct subversion of the traditional assumption, articulated by Cockburn LJ in *Banks*

49. The key potential claimants are surviving partners, former partners and children (including those who are not biological or adopted children, but for whom the deceased nonetheless at one time assumed the role of parent), but applications may also be brought by "any person . . . who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased." Inheritance (Provision for Family and Dependants) Act 1975, c. 63, § 1(1)–(1B) (Eng.), *as amended by* Civil Partnership Act 2004, c. 33, § 71, sch. 4.

50. *Id.* § 1(1).

51. *Ilott v. Blue Cross* [2017] UKSC 17 [6]–[10], [26], [42], [2017] 2 WLR 979 (Eng.), *reversing sub nom.* Ilott v. Mitson [2015] EWCA (Civ) 797 (Eng.); *see* Brian Sloan, Case and Comment, *The "Disinherited" Daughter and the Disapproving Mother*, 75 CAMBRIDGE L.J. 31, 31–33 (2016).

52. Nahajec v. Fowle, No. C30LS199, 2017 WL 03433336, at ¶ 4 (Cty. Ct. Leeds Ch. Bus. July 18, 2017) (Eng.).

v. Goodfellow, that the risk of malicious disinheritance is a price worth paying for the efficiency offered by testamentary freedom.[53]

However, too much should not be made of the recent high-profile Inheritance Act awards,[54] and English succession law is far from emulating the *ex ante* familial rights of succession found in civil-law jurisdictions like Japan. A particular relationship with the deceased is necessary for an award under the Inheritance Act, but not sufficient, in light of the additional requirement that the deceased failed to make "reasonable provision" for their needs.[55] As the Supreme Court emphasized in *Ilott*, there is no necessarily *correct* outcome to a valid claim.[56] The appropriate sum depends on judicial discretion, to which many factors are relevant.[57] "Reasonable financial provision," particularly for adult offspring, may not be much at all—possibly even nothing. So, although the Inheritance Act reduces testamentary freedom, its overall approach retains the common law's assumption about the efficiency of individual decision-making. It accepts that the satisfaction of a testatrix's moral duties is most reliably entrusted to the testatrix herself, and allows interference only when her decision is *unreasonable* in light of those duties. The Act provides for gentle *review* of a testatrix's discretion, rather than replacing it with rules akin to forced heirship. Indeed, the Inheritance Act can be understood as inoculatory—it mitigates the perceived excesses of testamentary freedom in order to secure that principle as the foundation of English succession law.

Developments in both Japanese and English succession law reveal the effect of social need and public policy. Particularly relevant in the English

53. Probing the testatrix's justifications for disinheriting her children necessarily assumes that such decisions *require* justification and are therefore not within "the unfettered discretion of the testator." Banks v. Goodfellow [1870] LR 5 QB 549 at 564 (Eng.). The judge in *Nahajec* seemed highly influenced by the fact that the father's stated reasons for leaving nothing to his children were objectively unsupported. *Nahajec*, 2017 WL 03433336, ¶ 4, 8. The father had accused his children of having cut off contact with him, but the court found as a fact that the claimant had tried to re-establish contact only to be rebuffed by her father. *Id.* ¶ 8, 59. Moreover, the father's claim that his children were of "independent means" was undermined by his daughter's lack of financial security. *Id.* ¶ 4, 33.

54. *Ilott* particularly drew significant popular media interest, but probably does not significantly change the law. There have certainly been more dramatic cases under the same legislation: *See, e.g.*, *In re* Land [2006] EWHC (Ch) 2069, [2007] 1 WLR 1009 [2]–[8], [10], [24]–[28] (Eng.) (holding that the deceased's adult son had successfully claimed "reasonable financial provision," notwithstanding that he had been disinherited by virtue of the Forfeiture Act 1982 § 1 as a result of unlawfully causing his mother's death by gross-negligence manslaughter). *Ilott* is more likely simply to change the advice to be given by solicitors in the drafting of wills to those who want to disinherit their children. Luke Tattersall, *On the Road to the Supreme Court: The Practical Implications of* Ilott v Mitson, 22 TR. & TRUSTEES 787, 790–91 (2016). Even before *Ilott* it was clear that estrangement was not sufficient to defeat a claim for reasonable provision. *See, e.g.*, Gold v. Curtis [2005] WTLR 673 (Eng.).

55. Inheritance (Provision for Family and Dependants) Act 1975, c. 63, § 1(1) (Eng.).

56. *Ilott* [2017] UKSC 17 at [16].

57. *Nahajec*, 2017 WL 03433336, ¶ 73.

context is the problematic concentration of wealth—especially property ownership—among the old. The prohibitive rise in property prices in relation to earnings has made a sizeable inheritance on the death of one's parents the only realistic route to property ownership for most young people,[58] incentivizing increased challenge to ungenerous testation, which may explain increased recourse to the Inheritance Act.[59] Nonetheless, there remains a crucial advantage to testamentary freedom that English law is unlikely to abandon in favor of protected entitlements of the Japanese variety,[60] and which Japanese law is right to emulate through the medium of the trust.

IV. THE ORGANIC RISE OF THE JAPANESE TRUST

Before Japan adopted a civil code on the continental European model in 1896, there was significant interest in the common law among Japanese scholars. That interest endured after the promulgation of the Civil Code but looked set to become purely an academician's pursuit. In light of this, the adoption of the trust into Japanese private law seems incongruous. Its reception was motivated entirely by economic considerations, which eclipsed juristic concerns about what its introduction might entail for the logical integrity of Japan's new civil-law system.

A. THE TRUST AS A FINANCIAL INSTRUMENT

Its military victory over Russia in 1905 is widely regarded as a critical moment in the history of the modern Japanese state, responsible for its recognition as a kindred power by the colonial states of Europe and America.[61] However, victory came at significant economic cost, endangering Japan's rapid industrialization. In an early example of the almost symbiotic intimacy between state and private capital now understood as characteristic of Japanese governance,[62] the authorities rapidly implemented a series of measures to increase (non-proprietary) foreign investment into Japanese

58. *See* Brook, *supra* note 18, at 119.

59. Claims nonetheless remain fairly low in number. *See* Barbara Rich, *Statistics and Headlines in Legal News: Controlling the Surges*, TRANSPARENCY PROJECT (Aug. 25, 2017), http://www.transparencyproject.org.uk/statistics-and-headlines-in-legal-news-controlling-the-surges.

60. In its most recent reflection on the Inheritance Act 1975, the Law Commission did not recommend change to the law but seemed to contemplate that any change would be to expand claims by disinherited children rather than to enhance parents' freedom reliably to disinherit them. LAW COMM'N, *supra* note 15, §§ 6.2–6.26.

61. *Cf.* DOUGLAS HOWLAND, INTERNATIONAL LAW AND JAPANESE SOVEREIGNTY: THE EMERGING GLOBAL ORDER IN THE 19TH CENTURY 125–26 (2016) (arguing that Japan's achievement of Great Power status derived ultimately from its conduct in international relations—and especially international law—in the 19th Century, even prior to its military triumph over Russia).

62. *See, e.g.*, CHITOSHI YANAGA, BIG BUSINESS IN JAPANESE POLITICS *passim* (1968); Bernard S. Silberman, *The Bureaucratic State in Japan: The Problem of Authority and Legitimacy*, *in* CONFLICT IN MODERN JAPANESE HISTORY: THE NEGLECTED TRADITION 226, 242–43 (Tetsuo Najita & J. Victor Koschmann eds., 1982).

infrastructure, industry, and commerce.[63] Influential business interests particularly supported the incorporation of the trust into Japanese law. The Secured Bonds Trust Act 1905 allowed banks to act as trustees for specific purposes associated with large-scale commercial investment.[64] "Trust bank" status quickly proved desirable, and by the early 1920s, there were around five-hundred companies that had adopted this label.[65] In reality, most of these did not conduct trust business and instead operated simply as money-lending institutions—often quite disreputable ones.[66]

Reform came in 1922 to remedy this, with two pieces of complementary legislation. The Trust Act provided the doctrinal architecture of the Japanese trust, something the rudimentary 1905 legislation had largely neglected, by stating in general—if sometimes imprecise—terms the legal effects of a trust and the parties' rights and obligations.[67] The Trust Business Act provided principally for the licensing and regulation of institutions that would act as trustees.[68] The Trust Act itself was the work largely of legal scholars and was of little interest to lawmakers.[69] The state's interest in the trust extended only to its role in a secure and well-regulated investment market,[70] to which juristic questions about doctrinal trusts law must have seemed largely incidental. The prime catalyst for reform was, after all, regulatory failings under the perfunctory 1905 statutory regime. During the legislative process, only the Trust Business Bill attracted serious attention—the Trust Bill passed almost undebated in both legislative chambers.[71] From the 1980s, a deregulatory ideology led to the loosening of administrative regulations enacted pursuant to the Trust Business Act 1922, which had constrained the use of trusts and the activity of trust banks even within the investment context.[72] These reforms have now been incorporated directly into the relevant primary legislation—the Trust Business Act was amended significantly in 2004, and the Trust Act

63. *See* Masayuki Tamaruya, *Transformation of Trust Ideas in Japan: Drafting of the Trust Act 1922*, 88 RIKKYO L. REV. 97, 98 (2013).

64. Tanpo-tsuki Shasai Shintaku Hō [Secured Bond Trust Act], Act No. 52 of 1905, arts. 3–4, translated in (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp (Japan).

65. *Origins of Trusts in Japan and the Enactment of the Trust Act and the Trust Business Act*, TR. COS. ASS'N JAPAN, http://www.shintaku-kyokai.or.jp/en/trusts/trusts02_01.html (last visited Apr. 4, 2018).

66. Tamaruya, *supra* note 63, at 98.

67. *Id.* at 103–08.

68. *Id.* at 99.

69. *See id.* at 99–101,110.

70. Hiroto Dōgauchi, *Overview of Trust Law in Japan*, GROUP FOR THE L. CONCERNING INT'L SALES OF GOODS & INT'L SERV. CONT., http://www.law.tohoku.ac.jp/kokusaiB2C/link/dogauchi.html (last visited May 8, 2018).

71. Tamaruya, *supra* note 63, at 109.

72. *Id.* at 110–11.

in turn amended in 2006 in order to adapt the doctrinal law of trusts to the new regulations concerning their use and operation.[73]

From its earliest days, therefore, the Japanese trust has answered to the interests of commerce, having been adopted at the specific demands of industry in order to give Japanese businesses a competitive advantage in the international scramble for investment capital.[74] The "official" law of trusts from 1922 to 2006, true to its origins as a *lex specialis* intended for commercial use, remained a peripheral aspect of Japanese law detached from wider private-law jurisprudence. The financial industry generally has continued to set the agenda for trusts reform, and almost all legislative and quasi-legislative reform to Japanese trusts has focused on making them suitable for an ever-increasing array of sophisticated investment products.[75] Tamaruya's contribution to this volume describes in detail how a desire to make trusts more applicable to new and emerging commercial needs has produced specific statutory changes to Japanese trusts law.[76] This Article likewise examines expansion in the law of trusts, but expansion produced by different means—namely the incremental and organic exposition of the implications of existing statute—and into the distinct arena of private estate planning.[77] While there has been conspicuously little *legislative* interest in bridging the gulf that divides the trust from wider Japanese private law, the trust has gained importance through non-legislative means as judges probe the logical implications of existing trusts doctrine for the wider private law.

B. JUDICIAL EXPOSITION & ITS CODIFICATION

Most of the 2006 amendments relevant to the trust's role in estate planning simply make explicit what was already implicit in the 1922 legislation. For instance, the 2006 reforms expressly allowed the use of trusts as will-substitutes,[78] but the 1922 Act was already fully compatible with the use of trusts in this way. Simply sanctioning expressly something trusts could always lawfully achieve does not, of course, change the law. Rather, the express inclusion of will-substitute trusts in the revised statutory framework shows that

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73. *Id.* at 111–13.

74. *See* Dōgauchi, *supra* note 70.

75. Another widespread use of trusts in recent years is as a mechanism for high-value real estate transactions. Rather than purchasing title to the land, a purchaser buys the beneficial interest to that land, which will have been placed in trust. This reduces transaction costs in many cases since the extra procedural expenses and trustee's fees will generally be outweighed by savings on registration costs and taxes engaged on the acquisition of title to real estate.

76. *See* Tamaruya, *supra* note 63, at 110–11.

77. Its effects on the rules of succession are just one part of the trust's unbidden impact on Japanese private law that have moved it toward a more characteristically common law position. The trust has midwifed bold developments in the wider law of property, which, although outside the scope of the present Article, corroborate the creatively disruptive potential of the trust device.

78. Shintaku hō [Shintaku hō] [Trust Act], Act No. 108 of 2006, art. 90, translated in (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp (Japan).

the trust industry has spotted a commercial opportunity. Indeed, explicit will-substitute trusts have proved popular, with around 150,000 such arrangements concluded since the industry began offering them in 2009.[79]

A further 2006 amendment closely linked with the use of trusts in lieu of testation is the explicit approval of successive beneficial interests,[80] a question on which the 1922 Act was silent. According to orthodox Japanese property law, subsequent interests cannot not be created by ordinary testation. The Civil Code does not recognize testation as creating property rights in any but the immediate disponee. A purported testamentary gift to "my husband for his life, and afterwards to my daughter" is effective only as a disposition to the testatrix's husband coupled with precatory words—non-legal guidance as to the husband's own dispositive decisions.[81] Following his death, the property would devise not according to the wishes of the original testatrix but according to the succession rules applicable to the husband's own estate—his own will, or the intestacy rules, as the case may be. Before the 2006 reforms to the Trust Act, a minority opinion maintained that successive beneficial interests under trusts must be invalid because the Japanese Civil Code does not recognize future property interests. Nonetheless, the better view is that successive interests were always possible under the 1922 legislation, such that this amendment too is not really a reform, but only a codification of existing trusts jurisprudence, making explicit potentiality that was anyway latent.[82]

From the early 1980s, Japanese courts upheld trusts with successive beneficiaries, notwithstanding that the Civil Code does not recognize future interests. The courts might have concluded that an attempt to create a successive beneficial interest must fail because the Civil Code—the repository of the axiomatic doctrines out of which Japanese private law is built—does not permit successive interests.[83] That the courts nonetheless upheld successive beneficial interests suggests they understood the Trust Act 1922 impliedly to derogate from the Civil Code's axiom that title cannot be temporally divided,

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79. Megumu Teramoto, *On the Recent Status of Will-Substitute Trusts*, 2 TR. F. 57, 58 (2014).

80. Trust Act, art. 91.

81. *But see* Saikō Saibansho [Sup. Ct.] Mar. 18, 1983, 36 3 KEIJI SAIBAN GEPPŌ (KEISAI GEPPŌV) 143 (Supreme Court decision in which the Court acknowledged that such language could have other legal effects (including a conditional disposition to the second heir, or a gift to the second heir and with the grant of a mere usufruct to first), such that the trial court should have investigated all these possibilities. However, none of the possible meanings matched what the testator seemed actually to want to effect, namely the simultaneous vesting of concurrent present and future interests in the same property in different persons).

82. The 1922 legislation did not explicitly address this issue, but the better view was always that it was possible as a matter of law to structure beneficial interests successively. This conclusion was suggested both by analogy with the Anglo-American trust that the 1922 legislation was meant to emulate, and simply on the grounds that the Act should be understood as permitting the creation of successive interests in any format that it did not actively exclude.

83. Article 90 of the Civil Code voids any judicial act contrary to public policy. MINPŌ [MINPŌ] [CIV. C.] 1896, art. 90 (Japan).

suggesting they understood the capacity for successive beneficial interests to be integral to the very idea of a trust.

The use of trusts in Japanese estate planning now largely presupposes the validity of successive beneficial interests. Estate planning generally involves not testamentary trusts—although these too are possible and can also circumvent the Civil Code's forced heirship provisions—but trusts made in lieu of testation. The settlor creates an *inter vivos* trust of which she is the life beneficiary, with named individuals—typically her spouse and thereafter her children—as beneficiaries after her death. What the spouse receives on the settlor's death is therefore not legal title to any property but only a beneficial life-interest under a trust of that property. On the spouse's death, he is replaced as beneficiary by the settlor's children in accordance with the wishes of the settlor as reflected in the trust terms.

Only in circumventing otherwise absolute rights of succession—including through successive beneficial interests—does the Japanese trust have any particular advantage over ordinary testation. Japanese succession law lacks most of the features that make trusts popular alternatives to testation in common-law jurisdictions.[84] At least in the United States, the desire to avoid probate explains much of trusts' popularity as estate planning devices,[85] given the inconvenience and publicity with which probate procedure is associated.[86] In Japan, wills seldom require probate to be effective.[87] Moreover, trusts offer no tax advantages over ordinary testation, because Japanese taxes are levied not on the estate but on those who inherit it, and a person receiving a beneficial interest in trust assets following the death of the settlor and original beneficiary is equally liable as if he had inherited legal title.[88] In Japan, the trust's value is to be found not in procedural or tax issues, but in the substantive core of succession law—the question of how fully an individual may control the distribution of wealth after death.

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84. *See supra* Part II.

85. A large volume of literature designed to help people avoid probate suggests it constitutes some kind of bogeyman in the American legal consciousness. *See, e.g.*, Bradley E.S. Fogel, *Trust Me? Estate Planning with Revocable Trusts*, 58 ST. LOUIS U. L.J. 805, 811–12.

86. For important skepticism on the power of revocable trusts to avoid probate, see *id.* at 811–15. Although avoidance of probate is presented as a key advantage of trusts as estate-planning tools, they seldom totally avoid probate. In most cases, the settlor will retain at least some property not subject to the trust, so the norm is to write a "pour-over will," which specifies only that any assets not already subject to the trust to be made subject to the trust on death. *Id.* at 814. As a testamentary disposition this will still require probate to be executed. *Id.*

87. In principle, wills must be probated. MINPŌ [MINPŌ] [CIV. C.] 1896, art. 1004, para. 1. But this requirement is waived if the will was made by notarization. *See id.* art. 969, para. ii. Since the vast majority of wills in Japan are made in this way, probate has a relatively minor role in the Japanese law of succession.

88. On the taxation of trusts, see generally Tadao Okamura, *Taxation and Trusts in the United States and Japan*, PROC. FROM THE 2009 SHO SATO CONF. ON TAX L., SOC. POL'Y., & THE ECON., https://www.law.berkeley.edu/files/sho_sato_tax_conf_web_paper—okamura.pdf.

It is difficult to prove direct causality between social change and the recognition of trusts' ability to supplant the Civil Code's rules of forced heirship. Nonetheless, other recent developments in Japanese succession law brought about by judicial re-analysis of statute demonstrably *do* result from judicial sensitivity to social change. Examples include a recent decision of the Japanese Supreme Court in which the Court reversed its own long-standing jurisprudence and made a rare declaration of statutory unconstitutionality,[89] invalidating the Civil Code provisions that made illegitimate children's inheritance rights half that of their legitimate siblings.[90] Judicial explication of the trust can be understood as part of the same trend. But although the organic development of the trust has profoundly affected Japanese succession law in ways that match a pressing public policy objective, this results largely from the internal expansive force of the trust device that Japan adopted in 1922, not judicial political agendas. Although the 1922 legislation did not expressly provide for many of the things that courts have accepted trusts can do, accepting this potentiality is not judicial activism—a label that describes judges changing the law to advance a political agenda or satisfy a social need to which the legislature has declined to respond. Rather, changing social needs have simply provided the opportunity for judicial exegesis, in which judges have taken the embryonic Japanese trust device to its logical conclusions. In that respect the courts have been acting as apolitically as judges ever can—applying not what the individual lawmakers of 1922 subjectively believed they were enacting, but what the Act that legislature in fact enacted entails as a matter of legal logic. The courts probed and expounded the unstated—and perhaps unintended—implications of the 1922 Trusts Act, albeit producing an exegesis that the legislature chose to incorporate into the revised statute in 2006. Changing social needs invited the trust to make good on its latent potential to propagate inwards from its place on the periphery of Japanese private law.

V. RATIONALIZING JAPANESE TRUSTS

It is widely believed that there are significant conceptual and practical obstacles in importing the trust into legal systems based on continental civil law. Many devote significant intellectual effort, therefore, to identifying a means of replicating the effects of the common-law trust in terms palatable to

89. Saikō Saibansho [Sup. Ct.] Sept. 4, 2013, 2012 (Ku) no. 984, 67 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1320 (Japan), *translated at* http://www.courts.go.jp/app/hanrei_en/detail?id=1203 (departing from, though not actually presenting as wrongly decided, the earlier decision of Saikō Saibansho [Sup. Ct.] Jul. 5, 1995, 1991 (Ku) no. 143, 49 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1789, *translated at* http://www.courts.go.jp/app/hanrei_en/detail?id=222); *see* Choe et al., *supra* note 2, at 251–52 (showing that, while having children out of wedlock remains rare in Japan (representing about two percent of births), social acceptance of the phenomenon is growing).

90. MINPŌ [MINPŌ] [CIV. C.] art. 900 (Japan).

civil-law jurisprudence. Others devote their efforts to demonstrating that any perceived obstacles are illusory, usually by showing that the "challenging" aspects of the common-law trust are historically incidental rather than intrinsic to the trust, and that the trust can therefore be accommodated in civil-law jurisdictions with comparatively little adaptation.[91] Particularly, scholars debate the compatibility of the division between legal and equitable title, from which the trust originates, and the indivisible nature of ownership in civil-law jurisdictions.

Prior scholarship on Asian trusts demonstrates that this issue is not particularly relevant to the practical success of trusts in civil-law jurisdictions, because the relevant rights can simply be legislated into existence.[92] Certainly the drafters of Japan's original trusts legislation were not unduly daunted by the questions that preoccupy comparative trusts lawyers today, particularly the issue of "fit" with the wider civil law. It was not thought problematic that a beneficiary would enjoy rights significantly more potent than ordinary personal rights.[93] But as the mechanism by which the Japanese law of succession is being reshaped to satisfy changing social needs, the trust is starting to make good on its latent potential to destabilize the neat edifice of Japanese civil law and its inflexible concept of property.

This Article has so far explored how the trust lets Japanese law emulate certain features of the common law of property and succession. However, this is not to suggest that the Japanese trust itself particularly resembles the trust as it exists in England or any other common-law jurisdiction. The Japanese trust is a creature markedly distinct from the English trust, whatever one's

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91. *See, e.g.*, Tony Honoré, *Trusts: The Inessentials*, *in* RATIONALIZING PROPERTY, EQUITY AND TRUSTS: ESSAYS IN HONOUR OF EDWARD BURN 7, 9–15 (Joshua Getzler ed., 2003).

92. Lusina Ho & Rebecca Lee, *Reception of the Trust in Asia: An Historical Perspective*, *in* TRUST LAW IN ASIAN CIVIL LAW JURISDICTIONS: A COMPARATIVE ANALYSIS 22, 22–23 (Lusina Ho & Rebecca Lee eds., 2013).

93. This is largely because of the early 20th century Japanese jurists central influence in the formation of the 1922 Trust Act. *See* Tamaruya, *supra* note 63, at 99–102 (discussing, *inter alia*, the work of Ikeda Torajiro, who played a key role in bringing trusts into Japanese law). Henry T. Terry echoed Maitland's account of the trust, who explained beneficial rights as "rights *in personam* . . . [with] a misleading resemblance to rights *in rem*." F.W. Maitland, *Lecture X: The Nature of Equitable Estates and Interests*, *in* F.W. MAITLAND, EQUITY: A COURSE OF LECTURES 117, 117 (A.H. Chaytor & W.J. Whittaker eds., 2d ed. 1936); *see* Tamaruya, *supra* note 63, at 100 (discussing Terry's work on trust law). Terry particularly ignored beneficial interests' proprietary indicia and moreover embraced the American trust, which was rapidly shedding anything that made beneficial interests look like property rights. *See* Tamaruya, *supra* note 63, at 100. For examples of the American trust's general disregard for the distinct nature of the beneficial interest *between* leading common law jurisdictions, see Shelton v. King, 229 U.S. 90, 97–98, 101 (1913); Nichols v. Eaton, 91 U.S. 716, 725 (1875); Clafin v. Clafin, 20 N.E. 454, 456 (Mass. 1889); *see also generally* Joshua Getzler, *Transplantation and Mutation in Anglo-American Trust Law*, 10 THEORETICAL INQUIRES IN L. 355 (2009) (discussing aspects of English trust law rejected by American courts); John H. Langbein, *Why the Rule in* Saunders v. Vautier *Is Wrong*, *in* EQUITY AND ADMINISTRATION 189 (P.G. Turner ed., 2016); Paul Matthews, *Why the Rule in* Saunders v. Vautier *Is Wrong: A Commentary*, *in* EQUITY AND ADMINISTRATION, *supra*, at 203 (providing a compelling rebuttal to Langbein).

understanding of the nature of trusts in their native jurisdiction. For one thing, Japanese law has always expressly permitted trusts for purposes rather than identified beneficiaries.[94] In many ways the juridical nature of Japanese and English trusts are drawing further apart, even as the *effect* of the trust is to bring Japanese succession law closer to a common-law position. The 2006 legislative reform recasts the law of trusts in light of contract law—for instance, by declaring that a trust is formed at the moment of agreement between the settlor and trustee, even before transfer of the trust property.[95] The legislative intention behind this reform was to widen the window in which the trustee is subject to (quasi-)fiduciary duties, on the basis that an entity selected as trustee may have commercially valuable knowledge about the trust property even before its transfer, and should not be free unscrupulously to profit from that knowledge.[96] However, the change has intensified a conception of trusts as a creature of contract law. Further echoing contract logic, the consent of the trustee is in all cases necessary to vary the terms of the trust.[97] Moreover, the identity of the beneficiaries cannot change during the trust's existence, unless the terms of the trust expressly so permit.[98] These changes distance the Japanese trust further from the "equitable property" that still represents the best account of the trust in English law. Conversely,

94. Shintaku hō [Shintaku hō] [Trust Act], Act No. 108 of 2006, art. 258, para. 1, translated in (Japanese Law Translation [JLT DS]), http://www.japaneselawtranslation.go.jp (Japan). Such trusts must be subject to third-party oversight. *Id.* Article 2 defines the trust as "an arrangement in which a specific person . . . administers or disposes of property in accordance with a certain purpose." *Id.* art. 2, para. 1. In English law, a trust not for purposes recognized by the law as charitable must be "for the benefit of individuals." Bowman v. Secular Soc'y Ltd. [1917] AC 406 (HL) at 441 (appeal taken from England) (Eng.).

95. Trust Act, art. 3, para. i. The Trust Act 1922 echoed English law in regarding the trust as formed only on transfer, before which the settlor had at most a contractual duty to the trustee to settle the property on trust, which gave no litigable right to a third-party beneficiary. *Id.* art. 1. This is in tension with the Japanese legal rule that title to the trust assets is necessarily vested in the trustee. *Id.* art. 2, para. 3. It also distinguishes Japanese trusts from other leading "modern" trust structures: for instance, the Chinese Trust Law leaves the locus of title to the trust assets conspicuously—indeed, deliberately—unstated, and the "shapeless trust" of the Hague Convention on the Law Applicable to Trusts and their Recognition leaves open the issue of transfer to a trustee. Trust Law of People's Republic of China, Order of the President of the People's Republic of China, No. 50, (promulgated by the Standing Comm. of the Ninth Nat'l People's Cong., Apr. 28, 2001, effective Oct. 1, 2001), art. 2, *translated at* http://www.gov.cn/english/laws/2005-09/12/content_31194.htm; Hague Convention on the Law Applicable to Trusts and their Recognition art. 2, Jul. 1, 1985, 23 I.L.M. 1388 (entered into force Jan. 1, 1992).

96. Trevor Ryan, *The Trust in an Ageing Japan: Has Commercialisation Precluded the Trust from Reaching Its Welfare Potential?*, 7 ASIAN J. COMP. L. 1, 28 (2012).

97. Trust Act, art. 149, para. 1. Such variation can occur by the mutual consent of the settlor, beneficiary, and trustee. *Id.* The trust can sometimes be varied by the trustee and beneficiary only, provided the modification is obviously not against the trust's purpose. *Id.* art. 149, para. 2, no. 1.

98. *Id.* art. 90, para. 1. In practice, however, trusts generally do permit this since beneficial interests are intended to be freely traded.

however, the 2006 reforms made it possible to create a trust by declaration,[99] specifically the "manifestation of an intention" to be a trustee and to apply the property "in accordance with a certain purpose."[100] This reform also responded directly to industry demands, and sought to simplify trust formation and save the transaction costs associated with enlisting a licensed trustee. Declarations of trust are unremarkable in the common law, but their entrance into Japanese law frustrates the rationalization of trusts as a species of contract—it is, of course, impossible to contract with oneself.

This joins other, longer-standing features of the Japanese trust that differentiate it from the wider law of obligations—the features that give beneficiaries certain indicia of a proprietary interest in the trust assets. For instance, a trust cannot make a beneficiary of someone disbarred by mandatory rules of law from owning property.[101] As in most other trusts jurisdictions, Japanese beneficiaries also have the power to rescind dispositions in breach of trust,[102] and Japanese trusts provide the familiar "ringfencing" phenomenon according to which trust assets do not form part of the trustee's estate in the event of his death, and are not available for the satisfaction of the trustee's personal debts.[103]

The various attempts to make the trust more commercially flexible and convenient have frustrated attempts to rationalize its nature and position in wider Japanese private law. In this sense the trust is becoming, as it is in England, a freestanding aspect of private law, as the practical need to expand its workings makes a satisfying account of its nature and relationship with the law of property and obligations elusive. However, this is not because the Japanese trust is becoming increasingly "English" in its shape. After the 2006 reforms, there is nothing to prevent a single settlor to declare herself trustee for herself as the single beneficiary. This outlandish feature is unapologetically functionalist—the legislative vision was that a supplier of investment products would declare itself trustee and initial beneficiary of assets then sell its own beneficial interest to investors.[104]

Many have already tried to describe the Japanese trust in terms consistent with the Civil Code. Adopting the analysis of the French comparativist Pierre Lepaulle,[105] Kazuo Shinomiya argued that, although legal title to trust

99. *Id.* art. 3, para. iii. This is subject to formality requirements, requiring a notarized deed, or some other writing, which can be an electronic record. *Id.*

100. *Id.*

101. *Id.* art. 9. That such a person is disbarred from receiving benefits under an ordinary contract between two other parties is, however, no impediment to that person being a beneficiary under a trust.

102. *Id.* art. 27.

103. *Id.* art. 25.

104. Such trusts automatically terminate after one year if the beneficiary is still same, sole individual.

105. The trust "est une institution juridique qui consiste en un patrimoine indépendant de tout sujet de droit." PIERRE LEPAULLE, TRAITE THÉORIQUE ET PRATIQUE DES TRUSTS EN DROIT

property lies with the trustee, neither the trustee nor the beneficiary *owns* the assets in a meaningful sense.[106] It follows that the trust assets are ownerless, and the trust itself must be must be regarded as a legal person against which the beneficiary has ordinary personal rights. This analysis does account for some features of Japanese trusts, such as the independence of trust property from the trustee's assets on death or bankruptcy[107]—this is axiomatic if the trustee and the trust are in fact distinct legal persons—and the fact that parties engaged by the trustee in service of the trust have similar rights to beneficiaries against the trust assets,[108] while the trustee's personal creditors do not.[109] The analysis sits naturally with the trust's legislative reshaping in accordance with commercial norms, since it regards trusts as highly analogous to companies. Many of the 2006 trust reforms were modeled explicitly on Japanese company law, and the relationship between beneficiary and trust has come to resemble that between shareholder and company, with trustees assuming roles similar to those of directors.[110]

Ultimately, the trusts-as-entity analysis fails,[111] but a softer rendition of the Lepaulle thesis avoids its fatal flaws. According to this view, "a trust [constitutes] a special patrimony" inhabited by whoever holds the office of trustee.[112] A trust patrimony is not a person, but "operates very like a person, as an autonomous, quasi-personal, fund."[113] The rights of the beneficiary of a trust "are personal rights against the trustee, enforceable against the special patrimony."[114] Consequently, it is wrong to see beneficiaries' rights in the

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INTERNE, EN DROIT FISCAL ET EN DROIT INTERNATIONAL 31 (1932). To understand the trust in civilian terms, "[l]a solution la plus efficace et la plus simple est de doter le trust de la personne morale." Pierre Lepaulle, *Review of Roberto Pasqual's La* Propriété dans le Trust, 4 REVUE INTERNATIONALE DE DROIT COMPARÉ 377, 378 (1952).

106. KAZUO SHINOMIYA, SHINTAKU-HO (TRUST LAW) (2d ed. 1989), 61–81.

107. Trust Act, art. 25, para. 1.

108. *Id.* art. 16.

109. A prominent example of a civil-law trust formulated on such lines is to be found in Quebec, where no person has real interests in the assets subject to *fiducie*. *Code Civil du* Québec [Civil Code of Québec] art. 1261 (Can.). Such assets are formally ownerless; the trustee merely has powers to administer the property under the articles of the Civil Code that permit administrators to deal with the property of others. *See id.* arts. 1299–1370.

110. Trusts can now issue certificates of beneficial interest to the beneficiaries, which are assignable as security on the stock market. *See* Trust Act, arts. 93–94, 207. Likewise, the revised rules permitting the modification, merger, and division of trusts in the 2006 Act are modeled on Japanese company law. Trusts can be split (taking effect either as "the transfer of a part of a trust's trust property into the trust property of another trust that has the same trustee" or "the transfer of a part of a trust's trust property into the trust property of a new trust that has the same trustee") or combined ("the consolidation of the whole of the trust properties of two or more trusts") *Id.* art. 2, paras. 10–11.

111. The account does not explain why or how trusts are exempt from the rules limiting the creation of non-human legal persons.

112. George L. Gretton, *Trusts Without Equity*, 49 INT'L & COMP. L.Q. 599, 610 (2000).

113. *Id.* at 614.

114. *Id.* at 612 (footnote omitted).

event of the trustee's bankruptcy as *special* compared with those of ordinary creditors—they are not special, they simply lie against a different patrimony than one against which the trustee's general creditors must claim. This idea explains many incidents of the trust in Japan, but is inapplicable to the English trust.[115]

VI. CONCLUSION: REFLECTIONS ON COMPARATIVE (TRUSTS) LAW

In the absence of a single theoretical model that can accommodate both Japanese and common-law trusts, it is clear that the two are not converging towards any central point. All that can be said is that the Japanese trust—whatever its precise doctrinal nature—is the mechanism by which other aspects of Japanese private law are being re-orientated in ways more adapted to changing needs and values. The result is that Japanese property and succession law is incrementally emulating the flexibility associated with the common law.

Speaking of Japanese law particularly, Tamaruya has elsewhere identified among Japanese jurists a "sense of resignation that fitting the trust idea into a neat conceptual model is an unattainable task."[116] This is not a frustration unique to *Japanese* trusts theorists: the trust continues to cause consternation to all private lawyers committed to taxonomical purity. Prominent scholars have defended the importance of reducing the trust to terms palatable to Civil Code logic,[117] and exhaustive taxonomies have a certain aesthetic appeal, but to prize classificatory completeness too highly is *anti*-aesthetic—akin to cutting down antique artworks to fit modern frames. The trust is doing good work in disrupting sub-optimal elements of orthodox Japanese private law, such as absolute rights of succession. It should be allowed to do that useful work, and the legislature should welcome and enhance the trust's potential still more radically to recalibrate wider Japanese private law. Already, the trust has been embraced far more warmly by Japanese commercial lawyers than those specializing in doctrinal Civil Code analysis, probably because they examine it in functional terms. Perhaps functionalism is the healthiest approach. It is certainly the approach responsible for the success of Japan's magpie-like reception of various foreign laws over the past 150 years.

115. A trust creditor (someone whom the trustee engages to perform services in fulfilment of the trustee's duties to manage the trust property) has no claim against the trustee in any special capacity, and "the trust creditor's access to the trust assets can never be stronger than the trustee's own claim to them." *See* Lionel Smith, *Trust and Patrimony*, 28 EST., TR. & PENSIONS J. 332, 341 (2009).

116. Tamaruya, *supra* note 63, at 112.

117. Gretton, *supra* note 112, at 618 ("[I]t may be said that if the trust does not fit into a traditional *ius commune* taxonomy, then so much worse for the taxonomy. But altering a taxonomic system is as inconvenient as changing the classification system in an ancient library. If we are serious about law, trusts must be located in the system.").