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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

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


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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


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.

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6 Ibid.

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. 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. Other than in “obvious” cases, the law requires a formal expert appraisal (kantei) of the individual’s decision-making capacity (by a designated physician). 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. A “curator” provides substitute decision-making of a lesser degree than full guardianship. A family court may appoint a curator over “any person whose decision-making capacity is extremely deficient due to a mental disability”. 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. A curator’s power of

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8 The two main Acts were the Act to Partially Revise the Civil Code (minpou no ichibu o kaisei suru horaitsu), Act no. 149 of 1999 and the Act on Voluntary Guardianship Contracts (nini kouken keiyaku ni kansuru horaitsu), 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).
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
representation is circumscribed to juristic acts specified by the court with the consent of the ward.\footnote{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”.\footnote{16} Unlike full guardianship and curatorship, the individual’s consent is a precondition to the appointment of an assistant.\footnote{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.\footnote{18} The assistant may revoke such transactions if that consent was not granted.\footnote{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.\footnote{20}

\footnote{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[.]

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

\footnote{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 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[.]

\footnote{18} Ibid., s. 13(1), s. 17(1).

\footnote{19} Ibid., s. 17(4).

\footnote{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
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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[].

\textsuperscript{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.

\textsuperscript{22} Act on Voluntary Guardianship Contracts (nin’i kouken keiyaku ni kansuru houritsu), Act no. 150 of 1999, art. 4(1).

\textsuperscript{23} Although s. 120 of the Civil Code, providing for revocation rights for “cooling off” periods, may be applicable to voluntary guardians.
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).\textsuperscript{24} For a fee of ¥1,400 (US$14),\textsuperscript{25} the notary public then arranges registration of the agreement, which itself attracts a fee of ¥2,600 (US$26).\textsuperscript{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”.\textsuperscript{27} The application fee is ¥3,780 (US$38),\textsuperscript{28} which can be

\textsuperscript{25} Ibid.
\textsuperscript{26} Ministry of Justice website: <http://houmukyoku.moj.go.jp/yamagata/static/kaitei0401.pdf> (last accessed 4 October 2013).
\textsuperscript{27} Act on Voluntary Guardianship Contracts, s. 4(1).
\textsuperscript{28} Supreme Court of Japan website: <http://www.courts.go.jp/tokyo-f/saiban/koken/ninigo-ken_mousitake> (last accessed 4 October 2013).
claimed from the principal’s assets.\textsuperscript{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.\textsuperscript{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.\textsuperscript{31}

\section*{II. THE UPTAKE OF ENDURING POWERS IN JAPAN}

The number of applications for guardianship has steadily increased since the new system’s inception.\textsuperscript{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\%
for the over 50 population in the United States, and 1.25% in Germany (Figures 1–3).


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.
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 Uns suited?

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. 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. 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. 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

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36 Okamura (2005), supra note 12 at 208.  
family, such as joint bank accounts. 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.

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. 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. 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. 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. 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. 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. Banks, for example, increasingly

42 Yokoyama (2003), supra note 41 at 32.
43 Okamura (2005), supra note 12 at 199.
44 Iuchi (2012), supra note 38 at 54.
demand that representatives carry valid documentation such as the notarised document constituting an enduring power.\footnote{\textbf{46} Naohiro Noguchi, “The Situation of Voluntary Guardianship Appointments (nin'i kouken juninsha no joukyou)” (2013) 45 Jissen Seinenkouken 16, 17.}


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
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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{55} This has involved the promotion of


\textsuperscript{54} Iuchi (2012), supra note 38 at 53.

securities, trusts, and other wealth management tools seen as necessary to manage and grow the unprecedented wealth of older generations in Japan.\textsuperscript{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\textsuperscript{57} and dependent on additional factors including the disparate motives of reformers\textsuperscript{58} and the regulatory framework for legal professionals discussed below.

\section*{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.\textsuperscript{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


\textsuperscript{57} Ryan, “The Trust in an Ageing Japan” supra note 56 at 217.

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

policing and enhanced criminal sanctions, more efficient third party monitoring mechanisms that recruit parties from civil society (other than paid monitors) and financial institutions, mandatory reporting regimes for fraud and financial abuse, strengthened civil remedies, public education, the promotion of family trusts to protect assets, and more efficient channels of court oversight such as Internet registration and reporting, random audits, and escalated oversight in relation to certain types of arrangements or relationships associated with higher risks of abuse. 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.

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. 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,


\footnote{Breaux & Hatch (2003), supra note 7 at 262.}

\footnote{Starnes (1996), supra note 60 at 220.}

\footnote{Ibid., 215.}


\footnote{Okamura (2005), supra note 12 at 208.}

\footnote{Karp & Wood (2007), supra note 61 at 184–191; Grabosky (2007), supra note 61 at 544.}

\footnote{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.}

\footnote{Jinno (2011), supra note 34 at 2.}
and courts do not otherwise become involved unless disputes arise or serious decisions such as institutionalisation or major purchases need to be made.\textsuperscript{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” (\textit{Betreuung}), which are intended to lean more towards support than intervention.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{70} Ibid., 3, 6.
\textsuperscript{72} Okamura (2005), supra note 12 at 202.
\textsuperscript{73} Nakayama (2011), supra note 48 at 401.
\textsuperscript{74} Arai (2013), supra note 5 at 4.
\textsuperscript{75} Nakayama (2011), supra note 48 at 401.
\textsuperscript{76} Akanuma (2013), supra note 68 at 82.
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. Indeed, the new system has had a significant impact on the profession itself. Legal Support has 50 branches and 6,000 members nationwide. It is funded by assets of the represented persons and donations. 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. 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.

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. The networking role that Legal Support plays among stakeholders has been a critical factor contributing to the viability of the guardianship system. It has also begun to systematise public educational programs to create a pool of lay candidates beyond its 6,000 members. 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). 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

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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.
governments to promote the (statutory) guardianship system.\textsuperscript{86} Nonetheless this remains a small initiative: only 131 statutory guardian appointments in 2012 were identified as citizen guardians.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 Support associations, which number approximately 800 and 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, has been much more successful servicing and facilitating others to service the demand for non-family candidates to take on enduring powers.

\textsuperscript{86} Elderly Welfare Act (roujin fukushi hou) Act 133 of 1963, s. 32-2.
\textsuperscript{87} Supreme Court of Japan statistics.
\textsuperscript{88} “Property of the Elderly Targetted (rougo no zaisan ga nerawarenu)”, NHK Close-up Gendai (22 May 2008).
\textsuperscript{89} Jinno (2011), supra note 34 at 10.
\textsuperscript{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.”
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. 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. 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. 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. This last point of differentiation seems to have contributed modestly to the uptake of

94 Arai (2013), supra note 5 at 9, 14.
Scotland’s health care and welfare powers, though according to some commentators such enabling legislation has negligible effect on uptake. 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.

Second, the Japanese system contains unresolved issues relating to capacity. As in other jurisdictions, 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. 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. 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. 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,

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95 Samanta (2009), supra note 59 at paragraph 44.
99 Akanuma (2013), supra note 68 at 80.
101 Civil Code (minpou) Act no. 89 of 1896, s. 653.
which seems incompatible with the prevailing interpretation of mandate contracts.\textsuperscript{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,\textsuperscript{103} without necessarily being remiss in their substantive duties as a representative. This view is strongly rejected by reformers,\textsuperscript{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.\textsuperscript{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.\textsuperscript{106} This includes cases in which enduring powers are sought to be invalidated or revoked, at times where multiple powers have been issued.\textsuperscript{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.\textsuperscript{108} Unlike Japan, Australian case

\textsuperscript{102} Arai (2005), \textit{supra} note 100 at 7.
\textsuperscript{103} Nakayama (2011), \textit{supra} note 48 at 403.
\textsuperscript{104} Akanuma (2013), \textit{supra} note 68; Arai (2005), \textit{supra} note 100 at 7.
\textsuperscript{105} Nakayama (2011), \textit{supra} note 48 at 43.
\textsuperscript{107} \textit{Ibid.}
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

110 Ryan (2006), supra note 56 at 225.
114 Arai (2013), supra note 5 at 11.
reformers trying to find the optimum balance among competing values of paternalism, autonomy, utility, public order, and efficiency.

**VII. ENTRANCED JUDICIAL VALUES?**

Some proponents of enduring powers perceive another impediment, namely the entrenched values seen in other jurisdictions\(^\text{115}\) on the part of judges and notaries public who appear biased towards more paternalistic, statutory guardianships.\(^\text{116}\) 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).\(^\text{117}\) 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.\(^\text{118}\) 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.\(^\text{119}\)

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).\(^\text{120}\) 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.\(^\text{121}\) 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

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\(^\text{117}\) *Ibid*.

\(^\text{118}\) *Ibid*.


\(^\text{120}\) Supreme Court of Japan statistics.

\(^\text{121}\) *Act on Voluntary Guardianship Contracts (nini kouken keiyaku ni kansuru houritsu)*, *Act no. 150 of 1999*, s. 10.
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, 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. Admittedly, this exception is vaguely worded, but from the system’s inception, reformers have stressed the autonomy-respecting hierarchy between voluntary and statutory guardianship. 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. 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. 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. Using extended metaphors of authorship, narrative, and integrity employed elsewhere in his work (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.

122 Nakayama (2011), supra note 48 at 404.
123 Akanuma (2005), supra note 53 at 20.
125 Nakayama (2011), supra note 48 at 404.
126 Ibid.
A strong counterview has emerged in court practice and academic literature in law, psychology, and medical ethics. 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. Some commentators note that advance directions regarding end of life decisions are routinely ignored by medical practitioners. 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. 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”. 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. 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.

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

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