

Articulating the Underlying Assumptions of English Trust Law: From Domestic Reforms to Cross-border Innovations

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English trust law is multi-faceted. On the one hand, trusts represent liberalism, as when a trust enhances a settlor's liberty to deal with his assets. On the other hand, they embody paternalism or communitarianism when they facilitate structuring of family assets in a way that binds following generations. In a similar vein, trust is almost synonymous with equity, but throughout their history, trusts have facilitated tax evasion, fraud upon creditors, or defeating of foreign forced heirship. Moreover, these law evading aspects of trusts have been a catalyst to various forms of law reform, such as overcoming the burden of feudal incidents, enabling married women to dispose of her assets, and giving rise to limited liability corporations.

Understanding this multi-faceted and dynamic nature of English trust law is a challenge for Japanese lawyers. It is all the more difficult because the dynamism must be understood along with the background shifts in the British society. Among the notable changes are: the decline of large-scale land holding by the aristocratic class, the coming of an egalitarian society in the post-World War Britain, and the globalization of trust businesses.

The development of non-charitable purpose trusts can best be understood in this context. From the 1970s onwards, various offshore jurisdictions have passed legislation enabling non-charitable purpose

trusts. In fact, they have been inspired by the 1969 decision of Denley's Trust Deed by the Chancery Division of the English High Court. The decision has arguably created a burgeoning niche market for offshore practitioners. And yet, forty years later, we do not know the answer to the basic question of whether such non-charitable purpose trusts can be enforced in England. The uncertainty has not been alleviated by the academic discussion on the irreducible core content of trusteeship.

Articulating the underlying assumptions of English trust law does not give us an exact answer to such concrete question as what the purpose trust's future will be. Nevertheless, the same exercise will go a long way to understanding where the modern trust law's dynamism comes from. From this, a very limited lesson might be drawn for Japanese trust lawyers. Despite Japan's elaborate trust legislation in 2006, which was made possible after extensive consultation, we should not regard the trust law as a fixed establishment. We need to be sensitive to the new potential of the trust law, while being alert to new forms of abusing trusts. We can take a long-term view on both the positive and negative sides of trust law, and we can be pragmatic and creative in dealing with particular evils. In fact, these are what the lawyers are doing still today in the motherland of trust law, England.