

**Reframing the Japanese legal system in  
comparative legal scholarship: recognising the role  
and function of socio-cultural regulatory norms  
through legal culture and critical legal pluralism.**

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**Abstract**

In traditional comparative legal studies, Japan has always been considered peculiar or *sui generis*. Few comparative studies go beyond a doctrinal appraisal of the Japanese legal system and as such this has led to an injurious assumption that Japan is different and strange. This thesis queries this assumption by critically examining the traditional tools of comparative law that create this misreading of Japan, namely taxonomies of legal systems, to demonstrate their underlying Anglo-European biases and ensuing limitations. This thesis then develops a critical comparative approach to the study of the Japanese legal system, underpinned by critical legal pluralism and legal culture, in order to identify and examine the multitude of socio-cultural norms that regulate everyday behaviour in Japan. This thesis contends that there is a tension at the heart of the Japanese legal system, created by a disconnection between its formal, Western-facing law and institutions, and its informal, ubiquitous and powerful socio-cultural norms. This tension is examined by contextualising a case study – lay participation (*saiban-in seido*) – in legal culture to discover and understand the complex array of interactions between formal law and informal socio-cultural norms.

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# 1 Introduction

In comparative legal studies, the Japanese legal system has always been considered idiosyncratic. Influential comparative law scholarship has framed Japan as the recipient site of foreign legal influences in a highly traditional society<sup>1</sup> with a broader gap between law in books and law in action compared to Western systems.<sup>2</sup> At the same time, there has also been a trend by some comparative law scholars that aims to ‘de-bunk Japanese exceptionalism’<sup>3</sup> and de-emphasise the anthropological focus on culture.<sup>4</sup> These competing narratives have dominated the discourse around the Japanese legal system in comparative legal studies, with little consensus or clarity as to the nature or workings of the system, leaving Japan as something as a ‘victim’ or casualty of comparative law.<sup>5</sup> Whilst this thesis does not seek to suggest an answer to this debate, it does query the injurious assumption made by both sides – that Japan is *sui generis*, different, and unusual. This thesis takes this assumption as its antagonistic starting point. Before outlining the specific contours and parameters of the research question, however, a brief overview of the base elements of the Japanese legal system is necessary to lay out the contours of its existence and begin the investigation in to why the system is considered peculiar.

First, the Japanese legal system comprises numerous formal legal structures and institutions. The basis of its formal laws are codified in the Six Codes, the implementation of which spans a century, from the Civil Code in 1896 to the Code of Civil procedure in 1996.<sup>6</sup> Included within these Codes is the Constitution, which was implemented in 1947.<sup>7</sup> Case law is also an important element of Japanese law.<sup>8</sup> Furthermore, despite a well-established and operational court system, with a highly trained and politically independent judiciary, the Japanese legal system also provides several routes for alternative dispute resolution,<sup>9</sup> particularly conciliation.<sup>10</sup> More recently, Japan has also

<sup>1</sup> For example, see R David and J E C Brierty, *Major Legal Systems in the World Today* (Free Press 1968) 456; K Zweigert and H Kötz, *An Introduction to Comparative Law*, Tony Weir (trs.) (3rd edn, Clarendon 1998) 300-302.

<sup>2</sup> H Oda, *Japanese Law* (3rd edn, Oxford University Press 2009) 5.

<sup>3</sup> S Givens, ‘The Vagaries of Vagueness: An Essay on “Cultural” vs. “Institutional” Approaches to Japanese Law’ (2014) 22(3) *Michigan State International Law Review* 839, 841.

<sup>4</sup> See J O Haley, ‘The Myth of the Reluctant Litigant’ (1978) 4 *Journal of Japanese Studies* 359; C F Goodman, ‘The Somewhat Less Reluctant Litigant: Japan’s Changing View Towards Civil Litigation’ (2000-2001) 32 *Law and Policy in International Business* 769.

<sup>5</sup> See G F Colombo, ‘Japan as a Victim of Comparative Law’ (2014) 22(3) *Michigan State International Law Review* 731.

<sup>6</sup> The Six Codes of Japan are the Constitution, Civil, Commercial, Criminal, Criminal Procedure, and Civil Procedure. The Civil, Criminal and Commercial Codes were all enacted around the turn of the 20<sup>th</sup> century, with the Constitution and the Procedural Codes enacted later in the 20<sup>th</sup> century.

<sup>7</sup> 日本國憲法 Nihon-Koku Kenpō (Constitution of Japan).

<sup>8</sup> H Oda, *Japanese Law* (3rd edn, Oxford University Press 2009) 27.

<sup>9</sup> For an overview of this, see K Funken, ‘Alternative Dispute Resolution in Japan’ (2003) 24 *University of Munich School of Law Working Paper*, available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=458001](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=458001)> 5-29.

<sup>10</sup> L Berat, ‘The Role of Conciliation in the Japanese Legal System’ (1992) 8(1) *American University International Law Review* 125, 125, 154.

implemented a system of lay participation in the criminal courts,<sup>11</sup> which emulates an array of features from several Western jury systems and brings the public in to the courtrooms in a manner not seen for 70 years.

Second, the Japanese legal system displays features that at first glance appear incongruent with its Western-facing legal framework. Previous scholarship has repeatedly highlighted these features, most prominent of which are low litigation rates<sup>12</sup> and low crime rates<sup>13</sup> relative to the national population (127.4 million), one of the highest in the world.<sup>14</sup> The criminal court system has consistently retained an almost perfect rate of conviction (between 97-99%)<sup>15</sup> due to many defendants confessing and submitting a guilty plea before the trial.<sup>16</sup> Despite this high conviction rate, very few defendants are sentenced to imprisonment, resulting in one of the lowest prison populations in the world.

Finally, the Japanese legal system exists within a broader context of social and cultural normativity<sup>17</sup> that exerts significant influence over every day behaviour. Although there is acknowledgement of this social and cultural context, much of the current scholarship on Japanese legal studies neglects to provide detail on these powerful regulators and thus an incomplete picture of the system is presented in the literature.<sup>18</sup> This thesis argues that it is this third element, so often forgotten in comparative legal studies, that is essential in constructing a richer contextual understanding of the Japanese legal system, one that goes beyond the doctrinal and the structural. Similarly, and while there are important scholarly works that discuss comparative law in context,<sup>19</sup> little work has been

<sup>11</sup> See I Weber, 'The New Japanese Jury System: Empowering the Public, Preserving Continental Justice' (2009) 4 *East Asia Law Review* 125; J McCurry, 'Trial by jury returns to Japan' (*The Guardian*, 3 August 2009), available at <<https://www.theguardian.com/world/2009/aug/03/japan-trial-by-jury-returns>> accessed 12 August 2019.

<sup>12</sup> K van Aeken, 'Civil court litigation and alternative dispute resolution' in D S Clark, *Comparative Law and Society* (Edward Elgar 2012), 230.

<sup>13</sup> Japan's post-war crime rate hit a peak of 2.85 million in 2002, and has since dropped to 915,111 (last recorded end of 2017) - Kyodo, 'Japan's crime rate hits record low as number of thefts plummets' (*The Japan Times*, 18 January 2018), available at <<https://www.japantimes.co.jp/news/2018/01/18/national/crime-legal/japans-crime-rate-hits-record-low-number-thefts-plummets/#.XVGoQiNKiUk>> accessed 12 August 2019.

<sup>14</sup> Despite this impressive population statistic, Japan's population has been declining rapidly over the last decade despite increased immigration. As of January 2019, the number of Japanese citizens is 124.7 million, and foreign residents number 2.6 million: Jiji, 'Japan's population continues to slide even as foreign resident numbers increase' (*The Japan Times*, 10 July 2019), available at <<https://www.japantimes.co.jp/news/2019/07/10/national/japanese-population-falls-10th-straight-year/#.XVGLCyNKiUk>> accessed 12 August 2019.

<sup>15</sup> J M Ramseyer and E B Rasmusen, 'Why Is the Japanese Conviction Rate so High?' (2001) 30 *Journal of Legal Studies* 53, 53; M Toshikuni and M Keiichi, 'Order in the Court: Explaining Japan's 99.9% Conviction Rate' (*Nippon.com*, 18 January 2019), available at <<https://www.nippon.com/en/japan-topics/c05401/order-in-the-court-explaining-japan%E2%80%99s-99-9-conviction-rate.html>> accessed 12 August 2019.

<sup>16</sup> P Murphy, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016), 81, 248-249.

<sup>17</sup> H P Glenn, *Legal Traditions of the World* (5<sup>th</sup> edn, Oxford University Press 2014), 345-346.

<sup>18</sup> See, for example, E J Hahn, 'An Overview of the Japanese Legal System' (1983) 5(3) *Northwestern Journal of International Law & Business* 517; V Taylor, R R Britt, K Ishida, and J Chaffee, 'Introduction: Nature of the Japanese Legal System' in L Nottage (ed) *Business Law in Japan* (CCH Asia Pacific 2008); M Ibusuki, 'Quo vadis: First year inspection to Japanese mixed jury trial' (2010) 12 *Asian-Pacific Law & Policy Journal* 24; C Hertel, 'Legal Systems of the World – an overview' (2009) *Notarius International* 128; E A Feldman, 'Legal Transplants, Organ Transplants: The Japanese Experience' (1994) *Social & Legal Studies* 71.

<sup>19</sup> See, for example, P Giliker, 'Comparative Law and Legal Culture: Placing Vicarious Liability in Comparative Perspective' (2018) 6(2) *Chinese Journal of Comparative Law* 265; C J Wallace, 'Law, culture and Euro-crime: using Spiral to teach French law' (2014) *Law Teacher* 154; D Rosen, 'The Koan of Law in Japan' (1990-1991) *North Kentucky Law Review*

conducted specifically on the Japanese legal system and society. This has resulted in a largely inaccurate portrayal of this complex system and one that threatens the underlying aims and purposes of comparative law – to communicate between systems,<sup>20</sup> to critically reflect on our own systems and culture,<sup>21</sup> to understand legal ideas<sup>22</sup> and the philosophies, concepts and reasonings that underpin them.<sup>23</sup> The thesis addresses these inaccuracies by taking a critical comparative perspective in order to challenge the current narrative in comparative legal studies on the Japanese legal system and offer suggestions for rethinking this position.

### 1.1 Research Question

The core concept of the research question is straightforward – in comparative legal studies, why is the Japanese legal system considered odd, peculiar and *sui generis*? In addressing the research question I investigate this assertion from the standpoint that this perspective of the Japanese legal system is ill-informed and even injurious. Legal regulation in Japan exists alongside a complex underlying network of social custom<sup>24</sup> that is apparently without the need for law,<sup>25</sup> influenced by several outside countries and yet still retaining a specific and unique identity as a highly noticeable ‘anomaly’.<sup>26</sup> Japan seems to exist on contradictions such as this,<sup>27</sup> on a double-edged axis of legal versus social control, internal and external, above and below. Distinguishing between that which is visible and invisible, said and unsaid, and the relationships between these apparently contrasting elements, are the primary challenges for understanding the Japanese legal system.<sup>28</sup> For the purposes of this thesis, the term ‘system’ is used holistically, inclusive of formal legal structures and institutions, as well as social and cultural contexts.

The prevailing perspective of the Japanese legal system in comparative law scholarship fails to acknowledge the strong regulatory influence of social and cultural norms on everyday life in Japan. Whilst sociological and cultural academic studies of Japan detail an intricate system of social responsibility arising from group living<sup>29</sup> (including saving

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367; A A Oba, ‘Juju Oaths in Customary Law Arbitration and Their Legal Validity in Nigerian Courts’ (2008) *Journal of African Law* 52(1) 138.

<sup>20</sup> U Kischel, *Comparative Law*, A Hammel (trs), (Oxford University Press 2019), 48-49, 53.

<sup>21</sup> E J Eberle, ‘The Method and Role of Comparative Law’ (2009) 8(3) *Washington University Global Studies Law Review* 451, 472.

<sup>22</sup> I Tourkochoriti, ‘Comparative Rights Jurisprudence: An Essay on Methodologies’ (2017) *Law and Method* 1, 1.

<sup>23</sup> W Ewald, ‘The jurisprudential approach to comparative law’ (1998) 46 *The American Journal of Comparative Law* 701, 705-706.

<sup>24</sup> C Kim & C M Lawson, ‘The Law of the Subtle Mind: The Traditional Japanese Conception of Law’ (1979) 28 *International and Comparative Law Quarterly* 491, 498-501.

<sup>25</sup> Y Noda, *Introduction to Japanese Law* (University of Tokyo Press 1976) 159-160.

<sup>26</sup> D Archer and R Gartner, ‘Homicide in 110 nations: the development of the comparative crime data file’ in L I Shelley (ed) *Readings in Comparative Criminology* (Southern Illinois University Press 1981) 90.

<sup>27</sup> R Benedict, *The Chrysanthemum and the Sword* (Houghton Mifflin 1946) 1-3.

<sup>28</sup> M Dean, *Japanese Legal System* (2<sup>nd</sup> ed, Cavendish Publishing 2002) 2.

<sup>29</sup> D J Gibbons, ‘Law and the Group Ethos in Japan’ (1992) 3 *International Legal Perspectives* 98; A Zander, ‘The Value of Belonging to a Group in Japan’ (1983) 14(1) *Small Group Behaviour* 3; L Peak, ‘Learning to Become Part of the Group:

face,<sup>30</sup> cooperation,<sup>31</sup> and honesty<sup>32</sup>), hierarchy,<sup>33</sup> obligation,<sup>34</sup> and kindness,<sup>35</sup> this is very rarely acknowledged in comparative legal scholarship on this system.<sup>36</sup> The dominant narrative on the Japanese legal system in comparative legal scholarship describes a system comprised of civil law instruments and many foreign elements which have been 'transplanted',<sup>37</sup> 'borrowed',<sup>38</sup> or 'assimilated'.<sup>39</sup> The research question challenges this assessment of the Japanese legal system by arguing that the legal system is extensively influenced by and comprised of cultural and social norms which cannot be ignored or excluded in a discussion of any aspect of the system. For Japanese people, social and cultural norms are an inextricable part of the everyday that guide and obligate behaviours in all aspects of life.<sup>40</sup> It is contended that these norms do not simply disappear where formal law and legal mechanisms are concerned and therefore the research question explores why these fundamental social and cultural norms are almost always excluded from comparative legal scholarship on Japan. The research question then seeks to demonstrate that a critical approach that encompasses social and cultural norms can produce a richer and more accurate examination of the Japanese legal system, specifically its system of lay participation, *saiban-in seido*,<sup>41</sup> and that a more in-depth critical comparative approach can be achieved.

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The Japanese Child's Transition to Preschool Life' in H Shimizu and R A Levine (eds.), *Japanese Frames of Mind: Cultural Perspectives on Human Development* (Cambridge University Press 2001).

<sup>30</sup> M Haugh, 'What Does 'Face' Mean to the Japanese? Understanding the Import of 'Face' in Japanese Business Interactions' in F Bergiela-Chiappini and M Gotti (eds.), *Asian Business Discourses* (Verlag Peter Lang 2005) 224; Y Matsumoto, 'Reexamination of the Universality of Face: Politeness Phenomena in Japanese' (1988) 12 *Journal of Pragmatics* 403.

<sup>31</sup> C Kim & C M Lawson, 'The Law of the Subtle Mind: The Traditional Japanese Conception of Law' (1979) 28 *International & Comparative Law Quarterly* 491, 499.

<sup>32</sup> G J D Trinidad, 'Honne and Tatemaie: Exploring the Two Sides of Japanese Society' (*Thesis, University of Iceland* 2014) 1.

<sup>33</sup> K Funken, 'Alternative Dispute Resolution in Japan' (2003) 24 *University of Munich School of Law Working Paper* 1, available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=458001](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=458001)> 6; C P A Jones, 'Seven lessons from a Japanese morality textbook' (*The Japan Times*, 7 August 2019), available at <<https://www.japantimes.co.jp/community/2019/08/07/issues/seven-lessons-japanese-morality-textbook/#.XWUkiSNKiUk>> accessed 21 August 2019.

<sup>34</sup> R Minamoto, *Giri to ninjō* [Social obligations and human feelings] (Chuo Koronsha 1969); M Yoshida, 'Giri: A Japanese Indigenous Concept' (*Cleveland State University*, 8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014.

<sup>35</sup> R E Watts, 'Briefing the American Negotiator in Japan' (1982) 16 *International Law* 597;

<sup>36</sup> Some notable exceptions to this are D Rosen, 'The Koan of Law in Japan' (1990-1991) *North Kentucky Law Review* 367; P Murphy, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016) and C Kim & C M Lawson, 'The Law of the Subtle Mind: The Traditional Japanese Conception of Law' (1979) 28 *International & Comparative Law Quarterly* 491.

<sup>37</sup> M Dean, 'Legal transplants and jury trial in Japan' (2011) 31(4) *Legal Studies* 570; H Kanda and C J Milhaupt, 'Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law' (2003) 51(4) *American Journal of Comparative Law* 887, 887.

<sup>38</sup> A Taylor von Mehren, 'The Legal Order in Japan's Changing Society: Some Observations' (1963) 76 *Harvard Law Review* 1170, 1172-1173.

<sup>39</sup> S R Thornton, 'An Examination of the Compatibility and Effectiveness of the Foreign Legal Systems Partially Adopted in Japan' (1999) 7 *Lawasia Journal* 84, 88-9; H G Wren, 'The Legal System of Pre-Western Japan' (1968) 20 *Hastings Law Journal* 217, 217.

<sup>40</sup> K Seki, 'Circle of On, Giri and Ninjo: Sociologist's Point of View' (1971) 19(2) *北海道大學文學部紀要 - The Annual Reports on Cultural Science* 99; G J D Trinidad, 'Honne and Tatemaie: Exploring the Two Sides of Japanese Society' (2014) *Thesis, University of Iceland* 1; Y Nakata, 'Uchi Soto and Japanese Group Culture' (GaijinPot, 25 September 2014) <<http://blog.gaijinpot.com/uchi-soto-japanese-culture>> accessed 12 November 2015; R J Davies and O Ikeno (eds.), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002).

<sup>41</sup> Of which there is currently no existing scholarship on the role and influence of social and cultural norms.

Thus far, the tools of doctrinal comparative law are lacking in their capability to achieve this understanding. Although contemporary comparative legal scholarship places great emphasis on contextualising legal studies, and draws on several fields to create rich interdisciplinary studies,<sup>42</sup> this rarely occurs for studies involving Japan. In particular, problems arise as the use of taxonomies of legal systems remains the primary tool of categorisation and assessment – such taxonomies lead to misconceptions of the Japanese system and perpetuate this notion of the system as unusual. The flaws of employing taxonomies in comparative legal studies will be discussed in chapter two, with the aim of demonstrating their Euro-centric focus and lack of utility. Few comparative legal studies of Japan go beyond the ‘law in books’ approach and what is needed is a contextualised look at ‘law in action’.<sup>43</sup> The thesis takes a critical comparative approach to its analysis of the Japanese legal system, focusing on social, political and cultural contexts of law to develop a richer understanding of the system and its idiosyncrasies.<sup>44</sup> This thesis proceeds on the basis that there are three main aspects to consider when thinking about the system: formal legal structures and institutions, features – such as observable trends of low litigation, high criminal conviction rate, and a low prison population (especially when compared to other developed nations) – and social and cultural norms.

The formal institutions and structures of the Japanese system include its legal Codes, its court system, and its Constitution. The core of the formal legal framework of Japan comprises six Codes.<sup>45</sup> The current Civil Code was developed by a committee led by three professors (Umi, Tomii, and Hozumi).<sup>46</sup> The German *Bürgerliches-Gesetzbuch* (*BGB*) code is popularly considered to be the model for the Japanese Civil Code, although closer engagement with the historical development of this instrument reveals influences of more than thirty foreign jurisdictions. Far from being a direct transplant, transfer or adaptation, therefore, the Japanese Civil Code can be said to combine the most socially appropriate elements in order to create an instrument uniquely developed to meet Japanese requirements.

The current Constitution was implemented in 1947. This document was imposed by the United States with the intention of pacifying Japan following military defeat in the Second World War.<sup>47</sup> Unlike the Civil Codes, Japan had little input on the content and form of the

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<sup>42</sup> P Giliker, ‘60 years of Comparative law Scholarship in the International and Comparative Law Quarterly’ (2012) 61 *International and Comparative Law Quarterly* 15, 18.

<sup>43</sup> P Giliker, ‘Comparative Law and Legal Culture: Placing Vicarious Liability in Comparative Perspective’ (2018) 6(2) *Chinese Journal of Comparative Law* 265, 289.

<sup>44</sup> I Tourkochoriti, ‘Comparative Rights Jurisprudence: An Essay on Methodologies’ (2017) *Law and Method* 1, 2.

<sup>45</sup> The Six Codes of Japan are the Constitution, Civil, Commercial, Criminal, Criminal Procedure, and Civil Procedure.

<sup>46</sup> S Ono, ‘Comparative Law and the Civil Code of Japan (1)’ (1996) 24 *Hitotsubashi Journal of Law and Politics* 27, 29.

<sup>47</sup> J Hall, *Japan: From Prehistory to Modern Times* (Delacorte Press 1970) 351-352.

Constitution,<sup>48</sup> a situation that arguably resulted in this document being largely ignored for over half a century. It carries several hallmarks of the American Constitution, including vesting sovereignty in the people<sup>49</sup> and granting inalienable enjoyment of fundamental human rights.<sup>50</sup> The Constitution has remained unchanged for over 70 years, however at the time of writing an amendment to Article 9 (often dubbed ‘the peace clause’ or the ‘self-defence clause’) is being debated in government.<sup>51</sup> Both the act of amending the Constitution and its implications proved extremely unpopular and have been met with protests from the public, who demonstrate a strong anti-war sentiment.<sup>52</sup>

The idiosyncratic character of the Japanese legal system becomes more apparent when its specific features are examined. With legal institutions that appear Western, comparative scholars have consistently expressed surprise that the Japanese legal system has features and patterns that are different to those observed in Western jurisdictions such as the UK and the US. The features most commonly highlighted in Japan are a low rate of civil litigation,<sup>53</sup> the high use of alternative dispute resolution,<sup>54</sup> a low crime rate,<sup>55</sup> a high conviction rate,<sup>56</sup> and a low incarceration rate<sup>57</sup> (and thus a low

<sup>48</sup> A C Oppler, *Legal Reform in Occupied Japan: A Participant Looks Back* (Princeton University Press 1975) 43-49.

<sup>49</sup> L Berat, ‘The Role of Conciliation in the Japanese Legal System’ (1992) 8(1) *American University International Law Review* 125, 144.

<sup>50</sup> 日本國憲法 Nihon-Koku Kenpō (Constitution of Japan), Article 11.

<sup>51</sup> Jiji, ‘Abe calls for constitutional amendments proposals to be debated in Diet’ (*The Japan Times*, 8 July 2019), available at <<https://www.japantimes.co.jp/news/2019/07/08/national/politics-diplomacy/abe-calls-constitutional-amendments-proposals-debated-diet/#.XXEUHDZKiUk>> accessed 30 August 2019.

<sup>52</sup> T Osaki, ‘Thousands protest Abe, security bills at Diet rally’ (*The Japan Times*, 30 August 2015), available at <<https://www.japantimes.co.jp/news/2015/08/30/national/thousands-protest-abe-security-bills-diet-rally/#.XXEUrzZKiUk>> accessed 30 August 2019; T Osaki and D Kikuchi, ‘Abe declares 2020 as goal for new Constitution’ (*The Japan Times*, 3 May 2017), available at <<https://www.japantimes.co.jp/news/2017/05/03/national/politics-diplomacy/abe-declares-2020-goal-new-constitution/#.XXEUpDZKiUk>> accessed 30 August 2019; Kyodo, ‘Poll shows 54% oppose revision of Japan’s pacifist Constitution under Abe’s watch’ (*The Japan Times*, 11 April 2019), available at <<https://www.japantimes.co.jp/news/2019/04/11/national/politics-diplomacy/poll-shows-54-oppose-revision-japans-pacifist-constitution/#.XXEVwzZKiUk>> accessed 30 August 2019.

<sup>53</sup> See C Wollschlager, ‘Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Legal Culture in Light of Judicial Statistics’ in H Baum (eds.), *Japan: Economic Success and Legal System* (Walter de Gruyter 1997), 89-134; J M Ramseyer & M Nakazato, ‘The Rational Litigant: Settlement Amounts and Verdict Rates in Japan’ (1989) 18 *Journal of Legal Studies* 263; J O Haley, ‘The Myth of the Reluctant Litigant’ (1978) 4(2) *Journal of Japanese Studies* 359; J M Ramseyer and E B Rasmusen, ‘Comparative Litigation Rates’ (November 2010) Discussion Paper No. 681, *John M Olin Center for Law, Economics, and Business*, available at <[http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/Ramseyer\\_681.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/Ramseyer_681.pdf)>.

<sup>54</sup> K Funken, ‘Alternative Dispute Resolution in Japan’ (2003) 24 *University of Munich School of Law Working Paper* 1, available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=458001](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=458001)>; N Iwai, ‘Alternative Dispute Resolution in Court’ (1991) 6(2) *Journal of Dispute Resolution* 201; J O Haley, ‘Dispute Resolution in Japan: Lessons in Autonomy’ (1991) 17 *Canada-US Law Journal* 443.

<sup>55</sup> Kyodo, ‘Japan’s crime rate hits record low as number of thefts plummets’ (*The Japan Times*, 18 January 2018), available at <<https://www.japantimes.co.jp/news/2018/01/18/national/crime-legal/japans-crime-rate-hits-record-low-number-thefts-plummets/#.XXEhHDZKiUk>> accessed 20 August 2019; Kyodo and Jiji, ‘Number of crimes reported in Japan in first half drops 8.7%; 2019 figure likely to hit lowest postwar mark’ (*The Japan Times*, 18 July 2019), available at <<https://www.japantimes.co.jp/news/2019/07/18/national/crime-legal/number-crimes-reported-japan-first-half-drops-8-7-2019-figure-likely-hit-lowest-postwar-mark/#.XbbRsPX7SUk>> accessed 20 August 2019.

<sup>56</sup> J M Ramseyer and E B Rasmusen, ‘Why is the Japanese Conviction Rate So High?’ (2001) 30 *Journal of Legal Studies* 53; M Toshikuni and M Keiichi, ‘Order in the Court: Explaining Japan’s 99.9% Conviction Rate’ (*Nippon.com*, 18 January 2019), available at <<https://www.nippon.com/en/japan-topics/c05401/order-in-the-court-explaining-japan%E2%80%99s-99-9-conviction-rate.html>> accessed 12 August 2019.

<sup>57</sup> D T Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (Oxford University Press 2002) 191; M Suzuki and A Otani, ‘Myths of restorative features in the Japanese justice system and society: the role of apology, compensation and confession, and application of reintegrative shaming’ (2017) 5(2) *Restorative Justice* 158; D Leonardson, *Japan as a Low-Crime Nation* (Palgrave Macmillan 2004).

prison population).<sup>58</sup> It is this very privileging of these specifically Western units of measurement for legal activity – the adoption of Western practices as the effective baseline – that this thesis will challenge. There is a presumption in much of the comparative law scholarship on these features that, because of its Western-facing legal framework, Japan would regulate its society in a similar way and thus produce similar observable trends.<sup>59</sup> This thesis argues that this approach creates several problems in the comparative legal study of Japan: first, that by using descriptors such as ‘low’ and ‘high’ to describe features of the legal system, Japan is necessarily juxtaposed against Euro- and Anglo-Western jurisdictions, which are presumed to be the ‘standard’, a practice that leads to Japan’s designation as an outlier, as *sui generis*, or even as ‘unusual’ or ‘strange’. Second, the selection of these features presumes that this is the way that law works, rather than focusing on what is actually happening. Third, these types of studies almost always privilege a formal, doctrinal approach to the comparative study of Japan’s legal system, an approach that does not reflect the contextual, interdisciplinary nature of critical comparative study, and thus neglects to acknowledge and understand the role of normative socio-cultural forms of ordering.<sup>60</sup> This thesis argues that it is these socio-cultural norms that contribute to the particularity of the Japanese legal system, and their inclusion is vital for quality critical comparative research on the system.

Socio-cultural norms in Japan have been extensively researched in sociological scholarship, but these feature infrequently in comparative law scholarship. This omission is problematic as, argued above, it leads to the observation of ‘unusual’ features in the Japanese system with limited contextualised understanding as to why and how they occur. What makes Japan distinctive from many other jurisdictions is that socio-cultural norms exert a significant regulatory effect on behaviour. These norms are powerful and ubiquitous in everyday life, governing relationships between individuals and mandating appropriate and acceptable behaviour in social contexts. Examples of these socio-cultural norms include *giri* – an informal system of social debt carried between individuals and society<sup>61</sup> – and *ninjo* – in which social significance is placed upon a person’s state

<sup>58</sup> As of July 2018, Japan’s prison population numbered 51,805, a 15% drop from figures obtained three years prior: R Walmsley, ‘World Prison Population List (12<sup>th</sup> edn)’ (2018) *World Prison Brief, Institute for Criminal Policy Research* 1, 2, 11.

<sup>59</sup> Example articles include K Rokumoto, ‘Legal Problems and the Use of Law in Tokio and London – A Preliminary Study in International Comparison’ (1978) 7(3) *Zeitschrift für Soziologie* 228; S Givens, ‘The Vagaries of Vagueness: An Essay on “Cultural” vs. “Institutional” Approaches to Japanese Law’ (2014) 22(3) *Michigan State International Law Review* 839; M J Wilson, ‘The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?’ (2007) 24(4) *Wisconsin International Law Journal* 835.

<sup>60</sup> Also, see generally G F Colombo, ‘Japan as a Victim of Comparative Law’ (2014) 22(3) *Michigan State International Law Review* 731.

<sup>61</sup> M Yoshida, ‘Giri: A Japanese Indigenous Concept’ (8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014; K Seki, ‘Circle of On, Giri and Ninjo: Sociologist’s Point of View’ (1971) 19(2) 北海道大學文學部紀要 - *The Annual Reports on Cultural Science* 99.

of kindness. Another important set of socio-cultural norms stem from the Japanese social emphasis on group belonging; where *honne* (inner-feelings, expressing truth and authenticity) is shared with members of one's *uchi* (the in-group, one's own group), such as family, and *tatemae* (a presentational face) is shown to those who are *soto* (outsiders, or the out-group).<sup>62</sup> Along with these are the vertical social hierarchy that organises Japanese society, and the belief that each person has their own role to fulfil in upholding a peaceful society.<sup>63</sup>

The circumstances of these three core aspects of the Japanese legal system – 1) formal legal institutions, 2) features including the litigation and conviction rates, and 3) socio-cultural norms – give rise to identifiable tensions between the formal legal codes and institutions and these normative socio-cultural practices. This tension is aggravated by the relative recency of the Codes and Constitution compared to the pre-existing traditional social and cultural norms, and the apparent preference by much of the Japanese populace for the latter over the former. This tension is an underexplored and underdeveloped issue within comparative legal studies, with little dedicated attention being paid to it. Instead, literature observant of the contrasts in the system has focused on litigation rates,<sup>64</sup> and has debated extensively on cultural<sup>65</sup> versus institutional<sup>66</sup> explanations for the discord. However, litigation is not the only aspect impacted by the tension at the heart of law in Japan; law and social norms simultaneously influence approaches to all manner of problems in Japan and their interaction in everyday encounters merits exploration in order to fully understand the workings of the system. Formal legal rules are internally imposed by the government and legislature but are not completely accepted by individuals within society because of the 'preference' for social and cultural norms.

The research question of this thesis explores the interaction of the 'top down' nature of formal law and institutions versus 'bottom up' informal socio-cultural norms, and argues that the relationship between these elements creates tension at the core of the Japanese legal system. In doing so, this thesis highlights the limitation of traditional comparative law tools, notably taxonomies of legal systems, as these neglect to acknowledge social

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<sup>62</sup> G J D Trinidad, 'Honne and Tatemae: Exploring the Two Sides of Japanese Society' (*Thesis, University of Iceland* 2014) 1; Y Nakata, 'Uchi Soto and Japanese Group Culture' (*GaijinPot*, 25 September 2014) <<http://blog.gaijinpot.com/uchi-soto-japanese-culture>> accessed 12 November 2015; S R Thornton, 'An Examination of the Compatibility and Effectiveness of the Foreign Legal Systems Partially Adopted in Japan' (1999) 7 *Lawasia Journal* 84, 92-3.

<sup>63</sup> K Funken, 'Alternative Dispute Resolution in Japan' (2003) 24 *University of Munich School of Law Working Paper* 1, available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=458001](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=458001)> 6.

<sup>64</sup> Litigation rates tend to be selected as similar comparators with focus on the levels of litigation, accessibility of legal institutions and decisions to litigate - E Blankenburg, 'Civil Litigation Rates as Indicators for Legal Cultures' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997).

<sup>65</sup> T Kawashima, 'Nihonjin no Hō Ishiki' (1967).

<sup>66</sup> J O Haley, 'The Myth of the Reluctant Litigant' (1978) 4 *Journal of Japanese Studies* 359; J M Ramseyer & M Nakazato, 'The Rational Litigant: Settlement Amounts and Verdict Rates in Japan' (1989) 18 *Journal of Japanese Studies* 263.



and cultural norms and the resulting tension, and are of little utility beyond asserting that Japan is *sui generis*. It will also illustrate the significance of social and cultural norms by examining them in a historical context, and show their continued normative influence alongside the development of formal, Western-facing law in Japan in the second half of the nineteenth century. This will lay the groundwork for a discussion of an alternative approach to understanding this tension between formal legal and strong socio-cultural norms in Japan – for which I will employ the term ‘legal culture’. This analysis will start from the theoretical bases of critical comparative legal studies, which are necessarily abstract, but will then move from the general to the specific by focusing on a case study, namely *saiban-in seido* i.e. lay participation in Japanese trials. This analysis will not only provide a much-needed insight into the operation of the legal system in contemporary Japan, but will also challenge the misunderstandings of this legal system generated by Western-centric comparative legal studies approaches. By highlighting and then analysing the tension (in the sense of ‘held in tension’, not aggravation) between these parallel normative regimes, this thesis will produce a rich and detailed account of the function and operation of *saiban-in seido* informed by the influence of socio-cultural norms in contemporary Japan.

## 1.2 Why Japan?

Law and the legal system in Japan have been studied extensively due to a combination of its dynamic history and varied Western influences. Japan’s increased interaction with the rest of the world following centuries of almost total isolation and the ‘westernisation’ of its domestic law<sup>67</sup> made it an appealing subject of study for legal comparatists, to the extent that it has been considered a laboratory of comparative law.<sup>68</sup> Much of the existing scholarship has been conducted on a comparative basis, with focus on objects such as, for example, the number of lawyers<sup>69</sup> and litigation rates.<sup>70</sup> Although there is socio-legal<sup>71</sup>

<sup>67</sup> H P Glenn, *Legal Traditions of the World* (5<sup>th</sup> ed, Oxford University Press 2014) 345-6.

<sup>68</sup> M Dean, *Japanese Legal System* (Cavendish 2002) 2.

<sup>69</sup> For example, S Ota and K Rokumoto, ‘Issues of Lawyer Population: Japan’ (1993) 25 *Case Western Reserve Journal of International Law* 315; R S Miller, ‘Apples vs. Persimmons: The Legal Profession in Japan and the United States’ (1989) 39 *Journal of Legal Education* 27; M Obe, ‘Japanese Lawyers’ Problem: Too Few Cases’ (*Wall Street Journal*, 3 April 2016) <<https://www.wsj.com/articles/japanese-lawyers-problem-too-few-cases-1459671069>> accessed 10 April 2017.; S Kamiya, ‘Scales of justice: Legal system looks for rights balance of lawyers’ (*The Japan Times*, 18 March 2008) available at <<http://www.japantimes.co.jp/news/2008/03/18/reference/scales-of-justice-legal-system-looks-for-right-balance-of-lawyers/#.VqyEPmLSUk>> accessed 28 January 2016.

<sup>70</sup> See generally T Kawashima, ‘Dispute Resolution in Contemporary Japan,’ in A T von Mehren (ed), *Law in Japan: The Legal Order in a Changing Society* (Cambridge: Harvard University Press, 1963) 41-72; J O Haley, ‘The Myth of the Reluctant Litigant’ (1978) 4 (2) *Journal of Japanese Studies* 359; J O Haley, *The Spirit of Japanese Law* (University of Georgia Press 1998) xviii; see generally, J O Haley, ‘Dispute Resolution in Japan: Lessons in Autonomy’ (1991) 17 *Canada-US Law Journal* 443.

<sup>71</sup> For example, see D Rosen, ‘The Koan of Law in Japan’ (1990-1991) *North Kentucky Law Review* 367; E Blankenburg, ‘Civil Litigation Rates as Indicators for Legal Cultures’ in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 41 – 68; P Langsing and M Wechselblatt, ‘Doing Business in Japan: The Importance of the Unwritten Law’ (1983) 17 *International Law* 647; C Kim & C M Lawson, ‘The Law of the Subtle Mind: The Traditional Japanese Conception of Law’ (1979) 28 *International & Comparative Law Quarterly* 491.

and comparative legal<sup>72</sup> scholarship on social and cultural intersections with law in Japan, there is little exploration in to Japanese law and culture beyond observing the apparently innate contradictions within the system.<sup>73</sup> This lack of attention without specific comparative study means that Japanese law, culture and society suffers from limited and inaccurate perceptions of its contours and function. Little attention has been given to Japanese law in context: for example, on issues such as how Japanese society's focus on organisation in groups influences the way in which law is viewed and practiced by the public.<sup>74</sup> Law does not have to be used to resolve disputes as frequently or in the same way as it does in the Western jurisdictions that the Japanese originally adapted it from. Social conduct and values can and must interact with law, and results in law having a Western aesthetic but a Japanese role and function. Exploring and understanding socio-cultural norms as they comprise elements of Japanese legal culture will therefore help to unpack and understand this interaction and comprehend the significance of social influences in the Japanese legal system.

In addition to the critical comparative analysis, this thesis undertakes to provide a contemporary study of Japanese legal culture – such a study is lacking from the field, and the existence of such becomes all the more imperative as Japan becomes progressively more internationalised. Japan's approach to law continues down a path of increasing Westernisation due to external political and economic forces, imposed upon a largely reluctant public. Though law is present in everyday events, it arguably does not have the same influence on decision-making in social contexts.

### 1.3 Research Perspectives

As with any critical comparative study, it is important to interrogate the bases and potential biases of the research, not least in terms of its theoretical underpinnings and methodologies.<sup>75</sup> In responding to the research questions posed, it is significant to highlight that this research is undertaken from a primarily Western perspective; it is acknowledged that the curiosity surrounding the 'special case' of Japan and its selection for this thesis stems from the Western (and more specifically English) background of the researcher. Indeed, whilst challenging the comparative law practices that have led to

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<sup>72</sup> See generally, E Blankenburg, 'Civil Litigation Rates as Indicators for Legal Cultures' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 41; H Wagatsuma and A Rosett, 'The Implications of Apology: Law and Culture in Japan and the United States' (1986) 20 (4) *Law & Society Review* 461.

<sup>73</sup> M Dean, *Japanese Legal System* (Cavendish 2002) 2.

<sup>74</sup> There are some highly detailed and useful scholarly works that do take a 'law in context' approach to the study of Japan, although these are all on specific areas. Examples include M D West, *Law in Everyday Japan: Sex, Sumo, Suicide and Statutes* (University of Chicago Press 2005); P Murphy, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016); L Berat, 'The Role of Conciliation in the Japanese Legal System' (1992) 8(1) *American University International Law Review* 125; D Rosen, 'The Koan of Law in Japan' (1990-1991) *North Kentucky Law Review* 367.

<sup>75</sup> P Giliker, '60 years of Comparative law Scholarship in the International and Comparative Law Quarterly' (2012) 61 *International and Comparative Law Quarterly* 15, 18.

misrepresenting the Japanese legal system as orientalist,<sup>76</sup> the thesis does what it criticises by asking the research question in the first instance. The question originates from an orientalist standpoint, and thus care needs to be taken in how the question is stated and explored.

Identifying the Japanese legal system as one which is 'unusual' is not only a product of much of the literature on the subject, but also arises from the researcher's own viewpoint on law, which has invariably been shaped by her background, legal education, and social and political ideas.<sup>77</sup> There is an inherent danger when studying jurisdictions different from the researcher's own, and care needs to be taken not to become trapped by the normative socio-legal contours of one's own background, as this can prevent the researcher from 'reflecting critically on the object of her study'.<sup>78</sup> Furthermore, the importance of not 'othering' and 'orientalising'<sup>79</sup> must be addressed; these factors are undoubtedly present to some extent in an unconscious form and influence the choices made when researching, analysing and writing.<sup>80</sup> In conducting critical comparative work, the researcher has a responsibility to 'overcome these internal limitations as best as he or she can'<sup>81</sup> to carry out research with reduced bias. As such, particular care is taken to ensure that Japan is the baseline for the research, placing it in its own context,<sup>82</sup> to view it as neutrally as possible,<sup>83</sup> whilst also acknowledging and accepting that taking a position when studying and analysing a normative subject is nigh impossible.<sup>84</sup>

Undertaking this reflection on research perspectives is important so as to avoid the pitfalls shown in some previous comparative scholarship on the Japanese legal system. Much of the previous work in this field has been written by Westerners, or in some cases by Japanese for a Western audience. The problem here originates from trying to compare Japan to other countries – particularly Western ones — with which it does not 'fit'.<sup>85</sup> Often the element of comparative focus is something which Japan has no equivalent of, or conversely the compared country has no equivalent of the Japanese comparative

<sup>76</sup> E Said, *Orientalism* (Penguin 1977) 1-2.

<sup>77</sup> P Giliker, 'Comparative Law and Legal Culture: Placing Vicarious Liability in Comparative Perspective' (2018) 6(2) *Chinese Journal of Comparative Law* 265, 289.

<sup>78</sup> I Tourkochorit, 'Comparative Rights Jurisprudence: An Essay on Methodologies' (2017) *Law and Method* 1, 14.

<sup>79</sup> Orientalism has been considered as the West emphasising the 'strangeness or otherness' of the East: S L Rosen, 'Japan as Other: Orientalism and Cultural Conflict' (2000) 4 *Intercultural Communication*, available at <<http://www.immi.se/intercultural/nr4/rosen.htm>> accessed 10 July 2015; E Said, *Orientalism* (Penguin 1977) 1-2.

<sup>80</sup> Non-Japanese studying Japan have been considered to create their own culture and this influences research choices: R H Minear, 'Orientalism and the Study of Japan' (1980) 39(3) *Journal of Asian Studies* 507, 507.

<sup>81</sup> P Giliker, 'Comparative Law and Legal Culture: Placing Vicarious Liability in Comparative Perspective' (2018) 6(2) *Chinese Journal of Comparative Law* 265, 289-290.

<sup>82</sup> See generally, C Kim & C M Lawson, 'The Law of the Subtle Mind: The Traditional Japanese Conception of Law' (1979) 28 *International & Comparative Law Quarterly* 491.

<sup>83</sup> D Rosen, 'The Koan of Law in Japan' (1990-1991) *North Kentucky Law Review* 367, 368-9.

<sup>84</sup> I Tourkochorit, 'Comparative Rights Jurisprudence: An Essay on Methodologies' (2017) *Law and Method* 1, 14.

<sup>85</sup> D Rosen, 'The Koan of Law in Japan' (1990-1991) *North Kentucky Law Review* 367, 368.

element.<sup>86</sup> Such clumsy comparison has generated some significant and influential misconceptions of Japan. When compared to a Western system, Japan is always framed as different and unusual to the comparator legal system, which is often presented as a 'standard' against which Japan is set. At worst this difference, and Japan by extension, is cast in a negative light.<sup>87</sup> An example of this is the continual criticism of the Japanese group ethos as suppressing individual rights, which fails to account for the negative impact on social bonding that results from a dogmatic focus on individual rights.<sup>88</sup> These perspectives are further sustained by the framework underpinning comparative legal scholarship, namely, the use of taxonomies to categorise legal systems. This approach, this thesis submits, is damaging on two counts – it undermines rigorous comparative scholarship in general by facilitating lazy categorisation and, more specifically, it facilitates reliance upon a purported 'baseline' or standard that does a disservice to 'different' legal systems such as Japan. This issue will be addressed in depth in chapter two and extend upon the critical reflection on research perspectives raised in this section.

#### 1.4 Contribution

This thesis makes a robust and original contribution to the field of comparative legal studies generally, and to comparative legal scholarship on the Japanese legal system and society specifically. This thesis is the first substantial work of scholarship to adopt a critical comparative perspective to the Japanese legal system – that is, a perspective inclusive of its formal legal institutions, features, and socio-cultural norms – with a view to achieving a richer understanding of how that system operates when contextualised in society. The tools of comparative law have so far led to the miscategorisation of the Japanese legal system, a miscategorisation which, in turn, perpetuates misunderstandings of that system within comparative legal scholarship more generally, not least because the categories within taxonomical frameworks applied to legal systems are relied upon expansively and are foundational to the discipline of comparative legal studies as a whole. Some taxonomical frameworks are more critically composed but there is none that is adequate for accurately categorising and portraying systems such as Japan.<sup>89</sup>

A critical comparative approach is therefore optimal for conducting an in-depth study of the Japanese legal system. Further, this methodological approach employs theoretical

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<sup>86</sup> See generally, G F Colombo, 'Japan as a Victim of Comparative Law' (2014) 22(3) *Michigan State International Law Review* 731.

<sup>87</sup> G F Colombo, 'Japan as a Victim of Comparative Law' (2014) 22(3) *Michigan State International Law Review* 731.

<sup>88</sup> T R Tyler and W Kerstetter, 'Moral Authority in Law and Criminal Justice: Some Reflections on Wilson's *The Moral Sense*' (1994) 13 *Criminal Justice Ethics* 44, 51.

<sup>89</sup> It is acknowledged that there are other systems, such as China, Indonesia, and Nigeria to name a few, that express similar issues to Japan in terms of tension between formal legal rules and non-codified traditional social and cultural norms, and these systems likewise suffer from miscategorisation and misunderstanding in comparative legal taxonomy.

insights drawn from critical legal pluralism<sup>90</sup> to embrace all of the normative regulatory phenomena within a system. This position then informs legal culture as a method through which to understand the relationship between law and society in Japan, revealing the disconnection between its different regulatory frameworks (top-down/bottom-up) and conducting an open exploration of the subsequent tension.

The critical comparative approach focuses first on the general – the Japanese legal system as a whole – and then on the particular, both with a view to, first, demonstrating the utility of such an approach and, second, to allow new conclusions to be drawn on a recent and significant development in the Japanese criminal justice system. As such, this thesis is also the only study to examine *saiban-in seido*, Japan's system of lay participation in criminal justice, in a contextualised way. In taking a critical approach to *saiban-in seido*, it is anticipated that the present research will avoid replicating the problems of traditional comparative law, including detaching from researcher bias and omitting essential social and cultural contextualisation. The case study of *saiban-in seido* has been selected for several reasons, outlined here.

First, previous works on *saiban-in seido* are heavily descriptive and doctrinal, relying on statistics to evidence its impact on the criminal justice system and to track public engagement. There is little explanation offered as to why the system has been developed in a particular way, why there has been a steady decline in public enthusiasm for the system, or what social and cultural norms – which govern everyday behaviour and interactions – are at play in both the courtroom and deliberation rooms. A critical comparative approach offers insight in to these questions by accounting for social and cultural norms as part of law in action<sup>91</sup> and discussing their role and function.

Second, *saiban-in seido* was selected as a case study as it relates closely to several of the features discussed earlier in this chapter – rates of litigation, crime, conviction, and incarceration – and social and cultural norms. It is part of the formal institutional framework of the Japanese justice system, and due to its function of directly involving ordinary citizens with legal process, provides a space in which social and cultural norms are brought into a formal legal space. The case study discussion will demonstrate the aforementioned tension at the core of the Japanese legal system and offer a new insight in to the role and function of lay participation.

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<sup>90</sup> See M Davies, 'The Ethos of Pluralism' (2005) 27 *Sydney Law Review* 87; M Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017).

<sup>91</sup> Law in action is defined here in contrast to law in books; the law that actually governs society as opposed to the law that is purported to govern. The idea was presented by Pound in his article: R Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12, and has since been expanded upon – see, for example J Halpérin, 'Law in Books and Law in Action: The Problem of Legal Change' (2011) 64(1) *Maine Law Review* 45; D Nelken, 'Law in action or living law? Back to the beginning in sociology of law' (1984) 4(2) *Legal Studies* 157.

## 1.5 Chapters

### 1.5.1 Chapter Two – Comparative Law Taxonomies and the Need for Critical Comparison

The second chapter of this thesis will build upon the ideas led in this introductory chapter and argue that comparative law relies on flawed taxonomies of legal systems. This chapter will begin by challenging the utility of taxonomies in terms of how such categories are selected, defined, and applied to legal systems. The chapter will argue that the categories themselves, and the reasons for the taxonomy, originate from classic comparative legal thinking that marginalises legal systems outside of Europe and America. The core questions in this area focus on the examination of categories commonly used in comparative legal studies – for example, legal traditions<sup>92</sup> or legal families<sup>93</sup> – why these are chosen, and the extent to which these are useful in facilitating improved understandings of the systems they seek to classify. The chapter then considers what happens when, and challenges in particular the response of the taxonomist comparatist approach of designating such systems as ‘hybrid’, ‘mixed’, or ‘miscellaneous’. This chapter will argue that this response is unsatisfactory due to inaccuracy and generalisation. It will also critically examine the overall utility of taxonomies of legal systems, posing the question as to whether any of these categories have continuing utility in an increasingly globalised legal world. It will query the value of the contemporary use of assorted taxonomies, especially when considering Asian legal systems, and what is to be achieved by their continued usage, contending that taxonomies of legal systems have outlived their usefulness in critical and rigorous comparative legal scholarship.

This chapter argues that an over-reliance on taxonomies has created problems in understanding Asian systems in particular due to its Euro-centric approach, which focuses on doctrinal means of identifying law in a given system. This is particularly the case with Japan, where the presence of Continental legal codes and an American-sourced Constitution has led to its erroneous categorisation as a hybrid system.<sup>94</sup> This categorisation of Japan as hybrid strips it of its unique social and cultural context, giving

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<sup>92</sup> H P Glenn, ‘Comparative Legal Families and Comparative Legal Traditions’ in M Reamann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006); H P Glenn, *Legal Traditions of the World* (5<sup>th</sup> edn, Oxford University Press 2014).

<sup>93</sup> R David and J E C Brierly, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (3<sup>rd</sup> edn, Stevens and Sons 1985) 21; E Özücü, ‘A General View of “Legal Families” and of “Mixing Systems”’ in D Nelken and E Özücü, *Comparative Law: A Handbook* (Hart 2007); J Husa, ‘The Future of Legal Families’ (2012) *Oxford Handbooks Online*, available at <<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-26>>.

<sup>94</sup> V Taylor, R R Britt, K Ishida and J Chaffee, ‘Introduction: Nature of the Japanese Legal System’ in L Nottage (ed) *Business Law in Japan* (CCH Asia Pacific 2008) 3; E J Hahn, ‘An Overview of the Japanese Legal System’ (1983) 5(3) *Northwestern Journal of International Law & Business* 517, 522; M Dean, *Japanese Legal System* (2<sup>nd</sup> ed, Cavendish Publishing 2002) 71, 129; ‘Japanese Law Research Guide: Legal System and Statistics’ (*UC Hastings Law Library*, 26 April 2017) <<http://libguides.uchastings.edu/japan-law/legal-system-stats>> accessed 3 May 2017.

rise to misunderstandings of the system that in turn lead to misleading perceptions, designating distinctive social normative practices as 'different' to assumed standards, and tricking the eye in to seeing an illusion of hybridity. It will contest the definition of hybrid in general and as it applies to Japan, and demonstrate that Japan's hybrid categorisation is at best, lazy and at worst, erroneous and misleading.

The exclusion of social and cultural contexts means that categorisations are assigned on the basis of the physical and procedural features of the legal system under scrutiny. As such, Japan's categorisation of 'mixed' or 'hybrid'<sup>95</sup> is made on the observation of its structural elements with their diverse European pedigree. Friedman remarks that these categorisations are *prima facie* useful but that, without knowledge or understanding of legal culture, the systems are no more than 'lifeless artefacts'.<sup>96</sup> On this basis, Japan's categorisation as 'mixed' or 'hybrid' will be challenged and rejected in favour of viewing the system holistically, including of its cultural and social norms, and understanding the tension at its core.

### 1.5.2 Chapter Three – Historical Contexts

The third chapter will employ a historical approach to contextualise Japanese law and society and develop understandings of the particular relationship between formal law and social and cultural norms. The historical method enables the research to achieve a deeper understanding of the specific context and to draw on a range of considerations, including legal, social, political, and theological change, to facilitate the subsequent critical comparative study. It will examine the last 200 years of Japanese history as these centuries encompass immense and dynamic variation in government, law, economy and politics through several periods of abrupt and significant change. Social changes have occurred considerably more slowly, with particular core socio-cultural normative values enduring the transformation of Japan's society into a global superpower. Social and legal changes are most notable in the post-feudal and post-world war periods and have been highly constitutive of both Japan's law and society. The chapter will analyse the social and legal dynamics of the feudal *Tokugawa* era, Japan's acquaintance with the rest of the world following the *Meiji* Restoration, and into *Shinto* State with Japan's involvement in World War II. Following this the post-war era will be considered, including the aftermath of the devastation of Hiroshima and Nagasaki, the impact of the threat of American colonialism and the unequal *Ansei* Treaties.<sup>97</sup> Throughout this discussion the

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<sup>95</sup> V Taylor, R R Britt, K Ishida and J Chaffee, 'Introduction: Nature of the Japanese Legal System' in L Nottage (ed) *Business Law in Japan* (CCH Asia Pacific 2008) 3; J Choy, 'Japan's Legal System on the Stand' (*Japan Economic Institute Report*, 15 September 2000), available at <<http://www.jei.org/Restricted/JEIR00/0035f.html>> accessed 27 February 2015.

<sup>96</sup> L M Friedman, *Law and Society: An Introduction* (Prentice-Hall 1977) 76.

<sup>97</sup> M Anderson, *Japan and the Specter of Imperialism* (Palgrave Macmillan 2009) 4-8, 12-13.

strength of social and cultural norms will be demonstrated and highlighted, not least because for the majority of Japanese prior to the end of Japan's isolationist policy, these were the primary source of regulation and security within society. Codified law is a relative newcomer, a tool of top-down authority, and thus is an uncomfortable fit within Japanese society and social values.

The chapter will then consider the latter half twentieth century economic boom and rediscovery/reinvention of national identity, including the 'Heisei Reforms',<sup>98</sup> and the development of contemporary Japan as the world's third-largest economy.<sup>99</sup> The first part of this historical context chapter will briefly consider the legal reforms developed at the beginning of the 21<sup>st</sup> century, before specifically focusing on *saiban-in seido* and the history of lay participation. This aims to show the excitement with which the re-introduction of lay participation in the early 2000s was greeted by providing a backdrop that covers, first, the exclusive nature of lay participation in feudal Japan, the controversial suspension of juries during World War II, and the political and social unrest caused by using juries in the Okinawan courts during American occupation. Charting this historical development will also demonstrate how those social and cultural values concerning participation in legal process in Japan are strained by these different historical experiences of lay participation, and further reveal the tension between law and socio-cultural norms in contemporary Japan.

### 1.5.3 Chapter Four – The Critical Legal Pluralist Approach and Social and Cultural Norms in Japan

Having established the problems generated from the use of taxonomies of legal systems, and the long history of socio-cultural norms that maintain their significance in contemporary Japanese society, the fourth chapter will begin by developing a critical legal pluralist approach to identify and justify the multitude of normative forms of ordering in Japanese society. For the purposes of this thesis, critical legal pluralism is informed by the researcher self-reflections detailed earlier in this introductory chapter, and departs from the researcher's own biases<sup>100</sup> to take an open, critical approach.<sup>101</sup> In doing so, this thesis subscribes to the 'unlimited' conception of law developed by Davies<sup>102</sup> and moves beyond the restricted, formalistic conceptions of law promulgated by Western

<sup>98</sup> K Rokumoto, 'Law and Culture in Transition' (2001) 49(4) *The American Journal of Comparative Law*, 545, 547-550.

<sup>99</sup> BBC News, 'Japan: Overview' (*BBC News*, 17 February 2015) <<http://www.bbc.co.uk/news/world-asia-pacific-14918801>> accessed 28 May 2015.

<sup>100</sup> P Giliker, 'Comparative Law and Legal Culture: Placing Vicarious Liability in Comparative Perspective' (2018) 6(2) *Chinese Journal of Comparative Law* 265, 289.

<sup>101</sup> I Tourkochoriti, 'Comparative Rights Jurisprudence: An Essay on Methodologies' (2017) *Law and Method* 1, 14.

<sup>102</sup> See M Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017).



ideas<sup>103</sup> to include the informal, yet powerful normative forms of social ordering that are ubiquitous in contemporary Japan.

The fourth chapter will then delve further into the social and cultural norms that are so important to developing a critical and comprehensive understanding of the Japanese legal system. These normative phenomena include *giri*, *ninjo*, and *on*,<sup>104</sup> a complex unwritten system of social debts and compassionate, selfless behaviour towards others. The chapter will also discuss the ubiquitous social customs that permeate every interaction of everyday life in Japan, including *tatemae* (public behaviour) and *honne* (inner feelings)<sup>105</sup> which not only provide considerable insight into the way in which citizens act and think about the law, but also opens the way to understanding the Japanese legal system as a whole when considering non-Japanese influences, along with an understanding of what is meant by *nihonjinron* ('Japanese uniqueness'<sup>106</sup>).<sup>107</sup> These social and cultural norms retain their power in contemporary Japanese society and effectively take on a legalistic quality – broadly understood – due to their normative role in regulating everyday behaviour. An initial look depicts much of Japanese society as obedient to the law, however closer inspection with awareness of social and cultural norms reveals obligations held by everyone contribute to the maintenance of a peaceful society through requirements of mutual support and role compliance.

#### 1.5.4 Chapter Five – Legal Culture in Japan

Equipped with the emancipating power of critical legal pluralism from chapter four, the fifth chapter will then move on to a discussion of legal culture as a method, that is to say, as a means of contextualising the legal order. The chapter opens with a review of the literature on the concept of legal culture,<sup>108</sup> as the term is contested in both comparative and critical legal studies. For the purposes of this thesis, legal culture is conceptualised as being innately informed by legal pluralism – this conception has optimum utility for an analysis of the Japanese legal system due to the significance of social and cultural norms

<sup>103</sup> M Davies, 'Legal Pluralism' in P Cane and H M Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012), 809.

<sup>104</sup> R Benedict, *The Chrysanthemum and the Sword* (Houghton Mifflin Company 1946); K Seki, 'Circle of *On*, *Giri* and *Ninjo*: Sociologist's Point of View' (1971) 19(2) 北海道文學雜誌 *The Annual Reports on Cultural Science* 99; M Yoshida, 'Giri: A Japanese Indigenous Concept' (8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014.

<sup>105</sup> T Doi, 'The Japanese Patterns of Communication and the Concept of *Amae*' (1973) 59(2) *The Quarterly Journal of Speech* 180, 184-185; T Doi, '*Omote* and *Ura*: Concepts Derived from the Japanese Two-fold Structure of Consciousness' (1973) 157(4) *Journal of Nervous and Mental Disease* 258, 259-260.

<sup>106</sup> J Clammer, *Difference and Modernity: Social Theory and Contemporary Japanese Society* (Kegan Paul International Ltd 1995) 15.

<sup>107</sup> Y Sugimoto, 'Making Sense of *Nihonjinron*' (1999) 57 *Thesis Eleven* 81.

<sup>108</sup> L M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975); L M Friedman, 'Total Justice: Law, Culture, and Society' (1986) 40(3) *Bulletin of the American Academy of Arts & Sciences* 24; D Nelken, 'Legal Cultures' in D S Clark (ed), *Comparative Law and Society* (Edward Elgar 2012); D Nelken, 'Defining and Using the Concept of Legal Culture' in E Örüçü and D Nelken (eds), *Comparative Law: A Handbook* (Hart 2007).

*within* this system. Legal pluralism, also an expansive and contested idea, enables informal influences to be considered 'legal' in nature on the grounds that normative regulatory influence is exerted on the conduct of a society.<sup>109</sup> By encompassing social and cultural norms in this manner, this conception of legal culture therefore provides for a rich account of the role and function of law in society, a heavily context-sensitive account the likes of which is completely omitted in a doctrinal study of legal order. It is an optimum way of contextualising the whole legal order and accounts for the development of the Japanese legal system (as detailed in the third chapter), the various moving parts of the system (institutions, features, social and cultural norms), and their interactions.

The chapter therefore argues that the Japanese legal system cannot be separated from the cultural context in to which it was transplanted, adopted, adapted and where it now functions.<sup>110</sup> This is largely due to the extensive history of legal borrowing<sup>111</sup> and transplantation<sup>112</sup> across the last 200 years and to the non-legal social influences that permeate every aspect of life for Japanese people.<sup>113</sup> A study of the Japanese legal system through a doctrinal approach would show the structural and judicial layout of the system and provide observations of its processes. This mapping of the legal system would also inform us of the scale and relationships between different elements in the system. However this approach would necessarily produce a 'misreading of reality',<sup>114</sup> causing us to fail to fully appreciate the influence of the social and cultural norms in operation within the system. The concept of legal culture as presented throughout this chapter is, as is argued, a valuable means of contextualising legal systems and understanding their operation,<sup>115</sup> a context without which law cannot come to life and remains merely words on paper.<sup>116</sup>

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<sup>109</sup> J Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1; S E Merry, 'Legal Pluralism' (1988) 22(5) *Law and Society Review* 869; M Davies, 'Legal Pluralism' in P Cane and H M Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012); M Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017).

<sup>110</sup> M Dean, *Japanese Legal System* (Cavendish 2002) 1-2.

<sup>111</sup> S R Thornton, 'An Examination of the Compatibility and Effectiveness of the Foreign Legal Systems Partially Adopted in Japan' (1999) 7 *Lawasia Journal* 84, 88-9.

<sup>112</sup> H Kanda and C J Milhaupt, 'Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law' (2003) 51(4) *American Journal of Comparative Law* 887, 887.

<sup>113</sup> I Kitamura, 'The Role of Law in Contemporary Japanese Society' (2003) 34 *Victoria University of Wellington Law Review* 729, 730, 737; D J Gibbons, 'Law and the Group Ethos in Japan' (1992) 3 *International Legal Perspectives* 98, 98, 102.

<sup>114</sup> B de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14(3) *Journal of Law & Society* 281-282.

<sup>115</sup> J J Toharia, 'Exploring Legal Culture: A Few Cautionary Remarks from Comparative Research' in R W Gordon and M J Horwitz (eds.), *Law, Society and History: Themes in the Legal Sociology and History of Lawrence M Friedman* (Cambridge University Press 2011) 90.

<sup>116</sup> L M Friedman and R Pérez-Perdomo (eds.) *Legal Culture in the Age of Globalization: Latin American and Latin Europe* (Stanford University Press 2003) 2.

### 1.5.5 Chapter Six – Case study: *Saiban-in Seido*

The fifth chapter centres on a case study which is demonstrative of the value and utility of legal culture and a contextualised approach to law and legal culture in Japan – *saiban-in seido* – lay participation in the criminal justice system. The research aim of this chapter is to show this mutual influence and how the tension within the legal system is exposed. The latter will be discussed with the assertion that, although the idea of lay participation in the criminal justice system has a Western pedigree, its execution in the Japanese context is quite different and serves the purpose of the Japanese criminal justice system. However, this is also contrasted with the conflicting sentiments of the Japanese public, which range from resistance and reluctance to participate to groups actively campaigning for the introduction of lay participation and its continued development in to a form that more closely resembles its Western origins. This case study has been selected for several reasons, namely: its comparative recency; its facilitation of the engagement of Japanese public with criminal justice and legal professionals; and the lack of existing scholarship considering the influence of social and cultural norms in its development, form, and function. At the time of writing, *saiban-in seido* has been part of the Japanese criminal justice system for ten years, and this elapsed time presents data from governmental reports and scholarly endeavours alike that inform the present study, allowing for conclusions to be drawn about its form, function, and reciprocal influence with and upon social and cultural norms. It provides an opportunity critically to examine the relationship of the ‘received’ law from institutions in Japan (top down) and the ‘organic’ social customs arising from society (bottom up). It is important to note that this thesis is not concerned with evaluating subjects such as the ‘effectiveness’ or ‘success’ of *saiban-in seido*. Asking these questions leads to a reliance on Western meanings of these terms and risks departing from the law in context approach that is central to this thesis.

*Saiban-in seido* facilitates direct contact between the public and formal legal process in a setting unusual for Japan as it facilitates participation in the criminal justice process with some authority. Historically, the populace of Japan has had little to do with formal process in the criminal justice system,<sup>117</sup> and thus recourse to the criminal courts is relatively rare, with many minor offences resolved through restorative measures including formal apology<sup>118</sup> and reintegration of the offender into their local community.<sup>119</sup>

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<sup>117</sup> The exception to this is participation in mainland trials prior to WWII – and only a limited selection of the population (the affluent and adult) were invited to participate. This will be expanded upon more in Chapter 4.

<sup>118</sup> H Wagatsuma and A Rosett, ‘The Implications of Apology: Law and Culture in Japan and the United States’ (1986) 20 (4) *Law & Society Review* 461.

<sup>119</sup> P Murphy, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016) 110, 121, 141, 170-171, 174.

The introduction of *saiban-in seido* puts some of the most crucial questions in the most serious of cases into the hands of citizens. Though Japanese academics, lawyers and judges have conducted research on lay participation models of Western legal systems,<sup>120</sup> *saiban-in seido* only comprises some ideological and aesthetic similarities to these models. The demand for its inclusion was far from unanimous, with the charge led by pro-jury groups and pressure from international stakeholders, including Japan's colleagues in the (then) G8.

It has since appeared to integrate successfully in to the criminal justice system; its usage is no longer novel<sup>121</sup> and it has received generally positive responses from lay judges. However, responses to summons and attendance of lay judges has been dropping and there is little marked difference in the number of convictions (still over 97%) – something lay participation supporters were hoping to change.<sup>122</sup> By requiring their direct involvement with courtroom activity, this thesis argues that *saiban-in* has had an impact upon the legal consciousness of the Japanese people and influenced the very legal culture that guided its formation and implementation. Its contrast between aesthetics and function is demonstrative of the core tension, on both a macro and micro scale, with an interesting balance of Western legal aesthetics and Japanese functionality.

Lay participation is an idea greatly supported in Western legal systems for its potential to make legal proceedings more transparent and accountable. Despite this pedigree, the Japanese approach sees considerable involvement from professional judges and a secrecy clause that prevents lay judges from sharing their experiences too freely. Furthermore, although lay participation, like litigation, appears as a familiar comparator with other systems, the nature of the Japanese courts, justice system and accompanying social and cultural norms results in a mechanism that is uniquely Japan's own. Its assimilation into the criminal justice system and largely tacit acceptance by both professionals and citizens has happened because, although the mechanism exists, it is used in a Japanese way. Citizens can also uphold the values of their own legal culture – and the legal culture of the criminal justice system comprises high conviction rates (mostly through high levels of confessions) combined with a focus on restorative techniques that help offenders reintegrate into society. The social values comprising Japan's legal culture – of *giri* and community in particular – underpin the rationale of the criminal justice system and again, relegate law to only a small part of the regulation of

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<sup>120</sup> R Lempert, 'A Jury for Japan?' (1992) 40 *American Journal of Comparative Law* 37, 38-9.

<sup>121</sup> The first trial involving *saiban-in* attracted mass-media coverage and huge queues of citizens awaiting tickets by lottery to sit in the public gallery. After a year, the coverage and attention had greatly decreased, indicating that it was now an accepted and ordinary part of the process.

<sup>122</sup> See A F Soldwedel, 'Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants' [2008] *Vanderbilt Journal of Transnational Law* 1417.

society. The development and implementation of *saiban-in* shows that changes in the law generate new and different tensions<sup>123</sup> and, more importantly, that the Western form and way of 'doing law' is created for Western problems, which do not exist in the same form, way or to the same extent in Japan.<sup>124</sup>

#### 1.5.6 Chapter Seven – Conclusion

The thesis concludes by returning to the core research question – in comparative legal studies, why is Japan considered to be odd, peculiar, and *sui generis*? It will summarise the approach taken to the research question, including the critical reflective awareness taken by the researcher in developing a critical pluralist approach, the historical contextualisation of Japanese law and society and the holistic contextualisation of the system made possible by legal culture. The originality of the thesis is demonstrated by this highly contextualised approach to studying the Japanese legal system, as classical comparative scholarship has regularly neglected to acknowledge and understand the significant influence of socio-cultural norms in every Japanese life. This approach to exploring and investigating the research question has enabled an in-depth, contextualised study of *saiban-in seido* – currently the only one conducted in critical comparative legal scholarship – which details the ubiquitous and powerful influences of socio-cultural norms alongside formal law and legal process.

The conclusion will also include a brief discussion on the ways in which this critical comparative approach could be scaled for use in other jurisdictions where there is distinct tension between formal law and socio-cultural norms. As this thesis has challenged Western-centric ideas of comparative legal scholarship, the findings of this thesis also have potential for impact on pedagogical approaches to comparative law. Finally, the conclusion will consider potential implications of the critical comparative approach developed in the thesis on future research in comparative legal scholarship.

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<sup>123</sup> See G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences' (1998) 61 *Modern Law Review* 11.

<sup>124</sup> M D West, *Law in Everyday Japan: Sex, Sumo, Suicide and Statutes* (University of Chicago Press 2005) 3-4.

## 2 Comparative law taxonomies and the need for critical comparison

Before embarking on a contextualised study of the Japanese legal system and the selected feature *saiban-in seido*, it is essential to confront the taxonomical frameworks that underpin much of comparative legal studies. It will be argued that these methods of 'sorting' legal systems privilege European and American understandings and forms of law and ignore other manifestations of legal regulation, thus presenting a simplified categorisation of legal systems that leads to misreadings detrimental to the discipline of comparative law. This chapter therefore critiques the method, rationale and form of comparative law taxonomies of legal systems, focusing on three core arguments to demonstrate how such taxonomies lack utility, before arguing, first, for the need for critical comparison and then showing how this will be used throughout the thesis.

First, existing literature on legal taxonomies will be reviewed to provide a comprehensive overview of and insight into the current landscape of this area, while also demonstrating the developments within and variance of this subject. The critical section of this section will focus on the problems of employing taxonomical frameworks for the 'sorting' of legal systems, arguing that both the assumption that systems can in fact *be* sorted and organised, and the dominant Anglo-European understanding of law and legal systems, serves to reduce their utility. This section will also highlight secondary problems that stem from these initial critiques of taxonomies, including the exclusion of informal legalistic regulation, unsuitability for (the analysis of) non-Western legal systems, the inability to satisfactorily categorise legal systems without resorting to simplicity (and often inaccuracy), and the static and a temporal presentation of legal systems.

Second, the critique will turn to the categories themselves, and will provide an in-depth analysis of how the Anglo-European bias prevalent within taxonomies of legal systems creates significant problems by only recognising those forms of legal regulation that align to a Western conception of law. Categories are thus limited to representing these Westernised forms of positive law, occasionally branching out to include formal religious laws, but ultimately ignoring informal regulation from social and cultural normative tradition. These social and cultural norms are identified through a legal pluralist approach, which will be discussed and developed in chapter four.<sup>125</sup> Any legal systems that do not fit within the pre-set 'descriptions' corresponding to these categories are then

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<sup>125</sup> Key works in legal pluralism include J Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1; M Davies, 'The Ethos of Pluralism' (2005) 27 *Sydney Law Review* 87; S F Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law and Society Review* 719.

either erroneously categorised, or relegated to a catch-all category of ‘mixed’ or ‘hybrid’, which exists ubiquitously in taxonomical frameworks.

Third, the critical discussion will turn to on these ‘mixed’ and ‘hybrid’ categories, arguing that they are in themselves problematic due to their often encompassing a diverse range of systems that have little in common with each other. For example, systems such as Quebec, Nepal, Singapore, Scotland, India, and Japan are always categorised as ‘mixed’ or ‘hybrid’, despite having almost no commonalities except for failing to fit into other categories. The categories of ‘mixed’ and ‘hybrid’ therefore lack any real critical utility, telling us very little, if anything, of the diverse systems placed within them. As a result the categories end up encompassing nothing and are thus emptied out - this thesis argues that they effectively fail to perform the purpose for which they were intended, that is, to create an effective and accurate quick reference tool for legal systems that serves as a starting point for comparative legal studies.

This chapter is exceptionally critical of the ‘mixed’ and ‘hybrid’ categories, as it is in these where Japan is often placed. Japan’s law and legal system are consistently miscategorised as being of European pedigree due minimal attention being paid to context, that is to say, relevant social and cultural circumstances. Taken without its cultural context, the Japanese legal system presents as a series of legal instruments and procedures, and thus appears as a ‘mix’ or ‘hybrid’ of other legal traditions.<sup>126</sup> This approach has created a misconception of the Japanese legal system, creating an illusion of hybridity between the formalised components of its legal system – the American-produced Constitution and the European court structure and Codes. This chapter contends that Japan does not operate as a hybrid system as commonly defined<sup>127</sup> and argues that an informed and comprehensive understanding of the system can only arise from consideration of its legal culture and social context, not its taxonomical placement. The Japanese legal system uses Western-sourced law but with struggles with disconnections between formal law and informal socio-cultural norms, even though much of this imposed, borrowed, or transplanted law has been carefully adapted by the Japanese for use in their system. It is contended that there is a subtle rejection of its Western-sourced law; there is a disconnection between its native forms of regulation, including customary and traditional forms, and Western formal legal influence (which in

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<sup>126</sup> H P Glenn, ‘Mixing It Up’ (2003) 78 *Tulane Law Review* 79, 80; M Dean, ‘Legal transplants and jury trial in Japan’ (2011) *Legal Studies* 31(4) 570, 570; V Taylor, R R Britt, K Ishida, and J Chaffee, ‘Introduction: Nature of the Japanese Legal System’ (2008) 1 *Business Law in Japan* 3, 3; F Kun, ‘Salient Features of International Commercial Arbitration in East Asia: A Comparative Study of China and Japan’ (2016) 5(3) *American University Business Law Review* 447, 457.

<sup>127</sup> Japan is considered hybrid in a range of scholarship that covers comparative law more generally, see M Bogdan, *Comparative Law* (Kluwer 1994) and K Zweigert and H Kötz, *An Introduction to Comparative Law* (3<sup>rd</sup>edn, Clarendon Press 1998). It is also considered hybrid in work specifically on legal taxonomies, such as V V Palmer, ‘Mixed Legal Systems: The Origin of the Species’ (2013) 28 *Tulane European & Civil Law Forum* 103, 118, and J du Plessis ‘Comparative Law and the Study of Mixed Legal Systems’ in Reimann, M and Zimmermann, R (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press 2006), 477-512.

some part, as mentioned in the introductory chapter, was externally imposed).<sup>128</sup> This disconnection and the resulting tension becomes clear when the system is studied with a contextualised approach.

Finally, this chapter closes by proposing an alternative to taxonomies, namely the use of a critical comparative approach premised upon the recognition that much of the discipline of comparative legal studies defaults to an Anglo-European perspective. Developing this awareness requires a de-centring of one's own point of view, and desisting the projection of personal assumptions about law and normativity on to the objects studied.<sup>129</sup> Through an awareness of this underlying partisanship, the thesis will avoid replicating the problematic biases of the discipline while also creating a critical space for a legally pluralist approach, and the recognition of multiple and varied forms of regulation within Japan's legal system. These premises will in turn allow for a critical contextual approach to be adopted for the case study of *saiban-in seido*.

## 2.1 Challenging Taxonomical Frameworks

### 2.1.1 *Origin and Purpose*

The origin of taxonomies lies in classic comparative legal scholarship; it is a 'conventional task'<sup>130</sup> intended to provide an organisational framework that can be applied to the numerous legal systems of the world. The intended purpose is to simplify identification of systems through grouping them based on common features, thus creating an easy frame of reference for those both experienced in and new to the area. Taxonomies can help to reveal normative aspects of legal systems,<sup>131</sup> facilitating the inclusion of characteristics such as history, culture and religion. When utilised in comparative legal study, taxonomy allegedly allows for greater understanding of laws foreign to the researcher<sup>132</sup> by focusing on differences between legal systems in the same group,<sup>133</sup> or differences between the law of the researcher's own system and their chosen foreign law of study.<sup>134</sup> Despite these claimed advantages however, any taxonomy of legal systems needs justification and explanation of its use, the purposes it serves and how it is applied to legal systems. The division of legal systems into categories and subsequent attempt to sub- categorise them are difficult endeavours which, at best, provide a rough

<sup>128</sup> A prime example is the Constitution of Japan, imposed upon the country in 1947 following defeat in the Second World War.

<sup>129</sup> G Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26(2) *Harvard International Law Journal* 411, 413.

<sup>130</sup> E Örucü, 'A General View of "Legal Families" and of "Mixing Systems"' in D Nelken and E Örucü (eds), *Comparative Law: A Handbook* (Hart 2007) 169.

<sup>131</sup> M M Siems, 'Varieties of Legal Systems: Towards a New Global Taxonomy' (2016) 1(3) *Journal of Institutional Economics* 1, 6.

<sup>132</sup> M M Siems, 'A Network-Based Taxonomy of the World's Legal Systems' (*Durham Law School Working Paper*, 22 March 2014). Available at SSRN: <<http://ssrn.com/abstract=2387584>> 1, 5.

<sup>133</sup> C Hertel, 'Legal Systems of the World – an overview' (2009) *Notarius International*, 128, 128.

<sup>134</sup> M Bogdan, *Comparative Law* (Kluwer 1994) 38.



guide.<sup>135</sup> Such endeavours have generally originated from Western standpoints that have sought to organise systems by identifying normative forms of law *in the West*, such as, for example, civil and common law traditions. Taxonomies have struggled to identify other legal or regulatory components beyond this, instead seeking to discover these elements in other systems regardless of whatever else may exist there or how they function. Taxonomies have inherent limitations in their ability to produce consistently accurate depictions of the legal systems they organise, but their simplicity has advantages, more obviously in terms of grouping summarised assumptions that can then be analysed.<sup>136</sup> However, this does not broaden either the scope or the utility of taxonomies.

The practice of developing and applying a taxonomy of legal systems is further flawed due to its focus on, first, the components rather than the whole and, second, form over function. Taxonomical approaches to legal systems have focused on *what* the system comprises rather than *how* it works, thus excluding vital social and cultural normative contextualisation. By categorising systems incorrectly, therefore, these taxonomical approaches can be seen as undermining their own purpose, and so the original simplification exercise becomes increasingly more problematic. An ancillary problem arises through how these categorisations become a regular point of reference for scholarly work – the categorisations themselves are labelled and described and thus these meanings are inscribed on to the systems within the category, rather than the systems generating their own description. Researchers and scholars who have developed taxonomies have regularly – and unconsciously – omitted fundamental elements of legal systems simply to avoid over-complicating the process of their development. Excluded elements are often those that are non-institutional, non-formal or non-structural, but ultimately are significant to the form and function of legal systems. Methodologically, taxonomies are often influenced by the perspective of the researcher employing them;<sup>137</sup> the next section will discuss this point in more detail.

### 2.1.2 Taxonomical Methods

There have been several frameworks of legal system taxonomy developed in both classic and contemporary comparative legal studies. Perhaps the most well-known of these is the category of ‘legal families’,<sup>138</sup> which has been a popular and prevalent means to classify legal systems from across the world. The word ‘families’ here is employed as

<sup>135</sup> K Zweigert and H Kötz, *An Introduction to Comparative Law* (3<sup>rd</sup> edn, Clarendon Press 1998), 72.

<sup>136</sup> M M Siems, ‘Varieties of Legal Systems: Towards a New Global Taxonomy’ (2016) 1(3) *Journal of Institutional Economics* 1, 5.

<sup>137</sup> R David and JEC Brierly, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (3<sup>rd</sup> edn, Stevens and Sons 1985) 21.

<sup>138</sup> H Glenn, ‘Comparative Legal Families and Comparative Legal Traditions’ in M Reimann and R Zimmermann (eds.) *Oxford Handbook of Comparative Law* (Oxford University Press 2006), 421-440.

a term to express the unity of certain legal systems through their commonalities;<sup>139</sup> a 'didactic device'<sup>140</sup> to facilitate sorting and grouping. It provides a taxonomy of legal systems by identifying common traditions – usually the form that the law takes – which can reveal similar and differentiating traits and help to draw connections and distinctions between jurisdictions.<sup>141</sup> Using the framework of legal families allows for a mapping of countries<sup>142</sup> and can constitute 'self-identity'<sup>143</sup> in a way that is meaningful to some countries.<sup>144</sup> The concept of legal families may also have utility for legal scholars and professionals involved in preparing for successful legal transplants through identifying commonalities, and how legal similarities and differences intersect with other disciplines, such as geography.<sup>145</sup>

Although this approach has held considerable weight in classic comparative legal thinking,<sup>146</sup> the taxonomy of legal families is not without issues and arguably has limited use when considering the Japanese legal system with its interplay of social and legal forms of regulation. As discussed above, the means used to develop these 'families' is markedly Western, and more critically, European,<sup>147</sup> which influences the parameters chosen to determine the categories. This has led to a reliance on private law as an identifying factor and an emphasis on common and civil law families,<sup>148</sup> with little detail concerning other identifiable markers. Such shortcomings have been recognised within the field and, in an attempt to address it, Husa has proposed several criteria for the basis of taxonomies of legal families.<sup>149</sup> The usefulness of this framework is limited by the quantity of criteria, however; in their multiplicity they did not always lead to consistent and clear categorisation.<sup>150</sup> Furthermore, these classifications are fixed, with the result that there is difficulty in accommodating new members within the respective families, as

<sup>139</sup> V V Palmer, 'Mixed Legal Systems: The Origin of the Species' (2013) 28 *Tulane European & Civil Law Forum* 103, 109.

<sup>140</sup> R David and J E C Brierly, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (3<sup>rd</sup> edn, Stevens and Sons 1985) 21.

<sup>141</sup> M Siems, *Comparative Law* (Cambridge University Press 2014) 6-7.

<sup>142</sup> Although Siems notes that this is not done graphically: M Siems, 'Varieties of legal systems: towards a new global taxonomy' (2016) 12(3) *Journal of Institutional Economics* 579, 580.

<sup>143</sup> U A Mattei, T Ruskola and A Gidi, *Schlesinger's Comparative Law: Cases, Texts and Materials* (7<sup>th</sup> ed., Foundation Press 2009), 263.

<sup>144</sup> Siems provides the examples of Hong Kong lawyers using common law to keep themselves separate from China, and English lawyers using the common law to show difference to other European countries: M Siems, *Comparative Law* (Cambridge University Press 2014) 74.

<sup>145</sup> M Siems, *Comparative Law* (Cambridge University Press 2014) 74.

<sup>146</sup> K Zweigert and H Kötz, *An Introduction to Comparative Law* (3<sup>rd</sup> edn, Clarendon Press 1998), 63-72; H P Glenn, 'Comparative Legal Families and Comparative Legal Traditions' in M Reiamnn and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006).

<sup>147</sup> E Örucü, 'What is a Mixed Legal System: Exclusion or Expansion?' (2008) 12(1) *Electronic Journal of Comparative Law* 1, 3.

<sup>148</sup> E Örucü, 'A General View of "Legal Families" and of "Mixing Systems"' in D Nelken and E Örucü, *Comparative Law: A Handbook* (Hart 2007) 170.

<sup>149</sup> J Husa, 'The Future of Legal Families' (Oxford Handbooks Online 2012), available at <<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-26>> 492-3.

<sup>150</sup> M Siems, *Comparative Law* (Cambridge University Press 2014), 75.

well as in re-evaluating legal systems that may have evolved away from their original placement.<sup>151</sup>

The ‘families’ approach to legal taxonomy has generated response arguments that seek to refine, amend or provide an alternative form of the classification. These criticisms however do not necessarily inhibit the development and use of a taxonomy of legal systems altogether, though the parameters of these require careful critical thought. Arising from the deficiencies of the monolithic categories of the legal families approach are those that attempt to depart from classifications solely based on ‘law as rules’.<sup>152</sup> Attempts at creating alternative taxonomies include identifying commonalities such as language families<sup>153</sup> and cultural groups,<sup>154</sup> and propositions have also been made for an evidence-based quantitative taxonomy of legal systems that offers a more robust basis for division than families or origins.<sup>155</sup>

One approach uses ‘law as culture’ as a basis to draw up four categories: African, Asian, Islamic and Western (or European) origin.<sup>156</sup> This approach certainly has merits as it can arguably be more inclusive of other influences on law, could comprise a ‘bottom-up’ approach, and synthesises well with a pluralistic conception of legal systems.<sup>157</sup> Culture has been argued to be a critically important component of legal systems;<sup>158</sup> its influence can be felt in the values enshrined in law, legal training, law’s relationship with politics and even the language used in law, to name a few.<sup>159</sup> However, this method suffers from the same Western bias that informs several other taxonomical methods, and the four broad cultural categories do little to accurately describe the systems contained within each one.

Another method places legal systems in ten groups based on a diverse range of criteria including official and intuitive law, monolithic and pluralist, and capitalist and communist social reality.<sup>160</sup> A further attempt to develop a less European-focused taxonomy draws its foundation from the intersection of law and economics, presenting a triangular network of categories – the rule of political law, the rule of professional law and the rule of

<sup>151</sup> K Zweigert and H Kötz, *An Introduction to Comparative Law* (3<sup>rd</sup> edn, Clarendon 1998) 66.

<sup>152</sup> E Özücü, ‘A General View of “Legal Families” and of “Mixing Systems”’ in D Nelken and E Özücü, *Comparative Law: A Handbook* (Hart 2007) 170.

<sup>153</sup> M P Lewis, G F Simons and C D Fennig (eds), *Ethnologue: Languages of the World* (17<sup>th</sup> edn, SIL International 2013).

<sup>154</sup> R Inglehart and C Welzel, ‘Changing Mass Priorities: The Link Between Modernization and Democracy’ (2010) 8 *Perspectives on Politics*.

<sup>155</sup> M M Siems, ‘Varieties of Legal Systems: Towards a New Global Taxonomy’ (2016) 1(3) *Journal of Institutional Economics* 1, 3.

<sup>156</sup> M van Hoecke and M Warrington, ‘Legal Cultures and Legal Paradigms: Towards a New Model for Comparative Law’ (1998) 47 *International and Comparative Law Quarterly* 495, 502.

<sup>157</sup> V V Palmer, ‘Mixed Legal Systems: The Origin of the Species’ (2013) 28 *Tulane European & Civil Law Forum* 103, 112.

<sup>158</sup> S Silbey, ‘Making a Place for a Cultural Analysis of Law’ (1992) 17 *Law & Social Inquiry* 39, 42-48; D Howes, ‘Introduction: Culture in the Domains of Law’ (2005) 20 *Canadian Journal of Law & Society* 9, 9-11.

<sup>159</sup> D Visser, ‘Cultural Forces in the Making of Mixed Legal Systems’ (2003) 78 *Tulane Law Review* 41, 50-60.

<sup>160</sup> A Podgorecki, ‘Social Systems and Legal System: Criteria for Classification’ in A Podgorecki, C J Whelan and D Khosla (eds), *Legal Systems and Social Systems* (Croom Helm 1985) 3.

traditional law - that maps out all of the world's legal systems.<sup>161</sup> Although these are helpful in their deviation from the Western biases of other taxonomical methods, there are still questions concerning the assumptions that inform their composition, what information the selected categories are meant to present to the reader, and why systems are allocated to those categories.

Another alternative approach that takes account of several sources of law has suggested the use of 'family trees' of legal systems,<sup>162</sup> which not only considers the number and type of 'ingredients' within any given legal system, but also the amount of influence that each component has in the system.<sup>163</sup> From this, legal systems are not strictly sorted into groups so much as mapped out in terms of relational similarity, an approach which provides a more useful framework through generating greater inclusivity of systems in South East Asia (often neglected by classic interpretations of 'legal families') and catering for systems in transition. This alternative approach is arguably more inclusive of the elements that would develop a more detailed taxonomy of legal systems, although does risk the same issues with prescription – which influences are chosen? How are they chosen? Why are they considered to be of significance? - as the traditional comparative approach.

Most critically, this multiplicity of attempts to create a comprehensive taxonomy of legal systems that evolves from the 'families' approach is evidence of the opposite. There is no agreement as to the criteria of categorisation, what perspective should be used, which non-legal influences (if any) should be taken into consideration, how systems are to be allocated to categories, and how fluid the framework should be. Ultimately, many attempts at creating a comprehensive taxonomy of legal systems are unable to break free from the 'families' archetype, regressing and suffering similar flaws experienced by the original method. The formalistic approach to law that predominantly informs these frameworks is too narrow and is further hindered by the researcher's own conceptions of law. This can serve to force the reality of legal systems into 'controllable cognitive categories'.<sup>164</sup> Despite the flaws of these frameworks, they are applied generally across systems, and thus create inaccurate projections and misreadings of the systems. The predominant idea that legal systems can be made to conform to some kind of ordering undermines the aims of quality comparative scholarship, and inhibits the researcher from

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<sup>161</sup> U Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) XLV *American Journal of Comparative Law* 1.

<sup>162</sup> E Özücü, 'What is a Mixed Legal System: Exclusion or Expansion?' (2008) 12(1) *Electronic Journal of Comparative Law* 1, 1-2, 9-10.

<sup>163</sup> E Özücü, 'What is a Mixed Legal System: Exclusion or Expansion?' (2008) 12(1) *Electronic Journal of Comparative Law* 1, 2.

<sup>164</sup> G Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26(2) *Harvard International Law Journal* 411, 421-422.

departing from their own bias. This idea then leads to the search for categories, which in turn are reflections of the researcher's conceptions of law and carry additional problems.

### 2.1.3 Problems with categories

Categories within taxonomies suffer from the same major drawback as taxonomies themselves; they are fundamentally artificial, selected from researcher's perspectives and ideas on how systems should be organised.<sup>165</sup> This artificiality obliges us to be critical of the boundaries of categories<sup>166</sup> and question their limitations. The categories selected for a given taxonomical framework, be they 'families' or 'groups' stem from the researcher's own conceptions of law and legal institutions which, given the dominance of Western scholars in comparative legal scholarship, places Western legal culture 'at the top of some implicit normative scale'.<sup>167</sup> Therefore, the categories in highly influential taxonomical models such as 'families', 'traditions' and 'groups' focus on law as formal and often codified rules, and that which is issued by governing bodies, reflecting a 'top-down' approach that all but ignores social and cultural aspects.<sup>168</sup> This produces categories that stipulate the presence and type of structure of a legal system as a defining factor<sup>169</sup> – again, this suits well those legal systems found in much of Europe and North America, but fails to accommodate countries outside these areas, whose systems draw on more pluralist and non-legal sources of regulation.<sup>170</sup> The selected objects of value in classification and the perspectives – national, global or regional – have a significant effect on the suitability of the classification itself,<sup>171</sup> and thus far it is evident that current approaches are limited. There are three outcomes for those legal systems that do not fit the prescribed taxonomical framework: incorrect classification, allocation to a category of 'mixed' (which could also be read as 'miscellaneous'), or non-categorisation and thus exclusion from the entire framework.

By focusing on formalistic, Western conceptions of law and legal order, informal social and cultural norms are frequently ignored. This is problematic because, and as this thesis will argue, the relationship between social and cultural norms and legal systems is of

<sup>165</sup> G Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26(2) *Harvard International Law Journal* 411, 422.

<sup>166</sup> J Hendry, 'Margaret Davies, Law Unlimited: Materialism, Pluralism, and Legal Theory' (2019) 46(1) *Journal of Law and Society* 169, 170.

<sup>167</sup> G Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26(2) *Harvard International Law Journal* 411, 422.

<sup>168</sup> E Özücü, 'What is a Mixed Legal System: Exclusion or Expansion?' (2008) 12(1) *Electronic Journal of Comparative Law* 1, 3.

<sup>169</sup> E Özücü, 'What is a Mixed Legal System: Exclusion or Expansion?' (2008) 12(1) *Electronic Journal of Comparative Law* 1, 3.

<sup>170</sup> R David and J E C Brierly, *Major Legal Systems in the World Today; An Introduction to the Comparative Study of Law* (3<sup>rd</sup>edn, Stevens and Sons 1985) 21; M Bogdan, *Comparative Law* (Kluwer Tano 1994) 1, 4-6.

<sup>171</sup> R David and J E C Brierly, *Major Legal Systems in the World Today; An Introduction to the Comparative Study of Law* (3<sup>rd</sup>edn, Stevens and Sons 1985) 21; M Bogdan, *Comparative Law* (Kluwer Tano 1994) 85.

critical importance.<sup>172</sup> For example, divorce proceedings in South Africa are conducted in different ways depending on social context – either by Western-origin formal law, Western style mediation, or traditional African family mediation.<sup>173</sup> If one were to take a comprehensive, inclusive approach, it would be far more informative and accurate than a structural approach alone, yet this is neglected in many taxonomical categories. However, even though some of the methods mentioned in the previous section endeavour to be more holistic and contextual in their approach, the categories selected are still too broad to be of any descriptive use. The answer to the problem does not lie in the creation of several small categories either, as this suffers effectively the same problem as an over-representative map with a 1:1 scale; accurate description means only one item in each category,<sup>174</sup> which causes the effective disintegration of the taxonomy.

The 'mixed' or 'hybrid' categories mentioned earlier in this chapter are particularly problematic. This is of particular relevance to this thesis, as this is the category within which the Japanese system tends to be placed. Although their rationale is usually to encompass those systems that arise from more than one legal 'type' or 'tradition' and group them together, these 'miscellaneous' categories instead create misconceptions of systems that inhibit in-depth, contextualised comparative study.

#### 2.1.4 'Mixed' and 'hybrid' systems

In the taxonomy of legal families, legal systems have broadly been categorised as belonging to families of either a 'civil law tradition', a 'common law tradition' or a 'third' family, which includes legal systems that are a mixture or hybrid of the two.<sup>175</sup> Historically the two former types of legal system were considered as standard, with the latter perceived as a kind of anomaly;<sup>176</sup> something to be addressed either as problematic or regarded with interest as to how it worked despite the mixture. Legal systems such as Scotland, Quebec, and Singapore, did not fit comfortably within the civil or common law traditions and so were placed in this third category. This section will critique the definition and function of the 'mixed' and 'hybrid' categories, in order to demonstrate the problems

<sup>172</sup> E Örcü, 'A General View of "Legal Families" and of "Mixing Systems"' in D Nelken and E Örcü, *Comparative Law: A Handbook* (Hart 2007) 170.

<sup>173</sup> See generally, A E Boniface, 'African-Style Mediation and Western-Style Divorce and Family Mediation: Reflections for the South African Context' (2012) 15(5) *Potschefstroom Electronic Law Journal* 377.

<sup>174</sup> B de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14(3) *Journal of Law Society* 279, 292-293.

<sup>175</sup> V V Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* (Cambridge University Press 2001); C van der Merwe, 'The Origin and Characteristics of the Mixed Legal Systems of South Africa and Scotland and Their Importance in Globalisation' (2012) 18 *Fundamina* 91.

<sup>176</sup> V V Palmer, 'Mixed Legal Systems: The Origin of the Species' (2013) 28 *Tulane European & Civil Law Forum* 103, 103.

this aspect of legal taxonomy creates for the critical contextual comparative legal study of Japan.

The origin of the terminology 'mixed' is 'an accident of history',<sup>177</sup> an entrenched Westernised viewpoint that could not accommodate systems that were not, as far as the legal cartographers of the British Empire could fathom, strictly common or civil law centred. This premise has characterised classic and mainstream comparative legal study, leading to the regular and normalised usage of 'mixed' and 'hybrid' labels despite critique.<sup>178</sup> These are the two of the most ubiquitous terms used in comparative legal study but they often appear with little explanation as to what they mean. As such it is important to give critical attention to the terms 'hybrid' and 'mixed', and to ask questions of them that explicate their nature, meaning and purpose. Such questions include asking what criteria a legal system must meet, if any, to be considered hybrid or mixed, and whether there is any distinction between these terms. As mentioned above, the number and variety of legal systems that are classically considered to fall in to the 'mixed' or 'hybrid' category is symptomatic of its lack of consistency, and how the same label can be applied to such a diverse range of subjects must be contested.

One conception of the 'mixed system' is that it requires the 'presence or interaction of two more kinds of laws of legal traditions'.<sup>179</sup> A more specific example states that these systems may be mixes of Anglo-American and continental law generally, either continental laws subsequently overlaid with Anglo-American law or continental private law joined to Anglo-American public and criminal law.<sup>180</sup> More recently, JuriGlobe's approach to 'mixed law' determines it to 'include political entities where two or more systems apply cumulatively or interactively, but also entities where there is a juxtaposition of systems as a result of more or less clearly defined fields of application'.<sup>181</sup> The same definition explains that 'mixed' should not be construed restrictively<sup>182</sup> (although there is little positive guidance on how it should be construed) and that the

<sup>177</sup> V Palmer, 'Mixed Jurisdictions' in J Smits (ed), *Elgar Encyclopaedia of Comparative Law* (Edward Elgar 2006) 467.

<sup>178</sup> See, for example: E Özücü, 'What is a Mixed Legal System: Exclusion or Expansion?' (2008) 12(1) *Electronic Journal of Comparative Law* 1; E Özücü, 'A General View of "Legal Families" and of "Mixing Systems"' in D Nelken and E Özücü, *Comparative Law: A Handbook* (Hart 2007); P S Berman, 'Global Legal Pluralism' (2006-2007) 80 *Southern California Law Review* 1155; W Menski, 'Beyond Europe' in D Nelken and E Özücü (eds), *Comparative Law: A Handbook* (Hart 2007); S P Donlan, 'Comparative Law and Hybrid Legal Traditions – An Introduction' in E Cashin-Ritaine, S P Donlan, and M Sychold (eds), *Comparative Law and Hybrid Legal Traditions* (Schulthess 2010).

<sup>179</sup> J du Plessis, 'Comparative Law and the Study of Mixed Legal Systems' in M Reimann and R Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 477; V V Palmer, 'Mixed Legal Systems ...and the Myth of Pure Laws' (2007) 67 *Louisiana Law Review* 1205, 1205.

<sup>180</sup> S P Donlan, 'Comparative Law and Hybrid Legal Traditions – An Introduction' in E Cashin-Ritaine, S P Donlan, and M Sychold (eds), *Comparative Law and Hybrid Legal Traditions* (Schulthess 2010) 13.

<sup>181</sup> Juriglobe, 'Mixed Legal Systems' (University of Ottawa, 2013) <<http://www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php>> accessed 04 March 2016. Within this definition, Japan is categorised under the 'Civil Law and Customary Law' classification.

<sup>182</sup> Juriglobe, 'Mixed Legal Systems' (University of Ottawa, 2013) <<http://www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php>> accessed 04 March 2016.

term is chosen ‘arbitrarily over “hybrid” or “composite”’.<sup>183</sup> This statement suggests that, although the terms appear to be used with a flavour of exclusivity, perhaps this is nothing more than a preferential choice of the author and they have the same meaning. Furthermore, throughout these definitions there is no detail on what qualifies these systems as mixed – is mere presence of more than one ‘type’ of law enough? – how they are mixed, and whether or not the extent to which these systems are mixed is any significance.

Palmer argues that mixed systems have three distinct characteristics – first, a mix of civil and common law with little influence from religious, customary or canon law; second, that objective observers can easily identify these civil and common law elements within one system; and third, that content and structure in these systems is predominantly private civil law and public Anglo-American law.<sup>184</sup> Although Palmer’s argument attempts to bring clarity to defining the category, it demonstrates that it forms more of a miscellaneous grouping with its members having little more in common than multiple sources of law for their systems. As this area of comparative law developed, many more legal systems have been determined as belonging to this third group, in spite of their varied sources of law. That this is the case even when the classification in question does not directly use the legal families approach demonstrates the pervasiveness of this category.<sup>185</sup>

The definition of the ‘mixed’ or ‘hybrid’ category is founded on the negative – what systems are *not*, rather than what they *are* – and is populated by those systems that do not fit in to other, more clearly defined and detailed classifications. They are bound only by a lack of conformity. At the outset, this is a poor method for developing and maintaining a robust framework of sorting legal systems; the systems within the category are only bound together through a tenuous descriptor that tell us nothing of use about them. If the category itself is not informative of the systems under its remit, its utility is severely limited. ‘Mixed’ or ‘hybrid’ does not offer a distinctive character that can be understood or utilised either for that system’s benefit or for rigorous academic research. The negative definition creates further difficulties in this regard as it fails sufficiently to

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<sup>183</sup> Juriglobe, ‘Mixed Legal Systems’ (University of Ottawa, 2013) <<http://www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php>> accessed 04 March 2016.

<sup>184</sup> V V Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* (Cambridge University Press 2001) 3-7.

<sup>185</sup> See S Ahmed, *What’s the Use? On The Uses of Use* (forthcoming Duke University Press 2019). In her public lectures on use, Ahmed makes reference to the continual use of a path, ‘the more a path is used the more a path is used.’ The concept of ‘use’ here refers to comings and goings, and the continual use of the path makes it easier to follow, and harder to deviate from. This idea could also be applied to the use of taxonomies, and the use of categories within taxonomies (particularly mixed and hybrid), to explain their continued usage in comparative legal studies, ‘the more the category is used the more it is used.’ See also S Ahmed, ‘Institutional As Usual’ (*Feminist Killjoys*, 24 October 2017), available at <<https://feministkilljoys.com/2017/10/24/institutional-as-usual/>> accessed 02 September 2019.



highlight those elements constituting the legal systems that it categorises other than an ambiguous mention that more than one 'type' or 'source' of law exists within the system.

As discussed earlier in this chapter, and with the exception of the cultural families approach, the forms of law recognised within the vast majority of legal taxonomies align with an Anglo and European perspective.<sup>186</sup> Some of these frameworks include categories for the influence of religious law, although it can be argued that the inclusion of religious rules corresponds to similarly Western notions of legalistic regulation due to a long history of religious dominance, the influence of canon law, and the codification of rules in scripture. By contrast, little to no recognition is given to non-legal elements that have an influence on regulation, such as unwritten, traditional rules or from culturally rooted normative values. An absence of attention to these elements undermines the coherence of this form of categorisation and compromises its utility. Legal systems that fall into the 'mixed' category in this way cannot be usefully identified beyond a label of 'mixed' or 'hybrid', as oftentimes no further elaboration is given. Thus the 'mixed' / 'hybrid' category simply creates another issue – this lack of detail is overridden by an assumption (largely arising from the 'mixed' or 'hybrid' label) that there is some level of cohesion expressed between constituent ingredients of given systems.

This assumption carries monist connotations<sup>187</sup> – that mixed / hybrid systems have similar approaches to law. It is argued that this is not the case – the systems commonly assigned to the 'mixed' category are varied and diverse, and this can be illustrated by reference to some examples. In Nepal, Western forms provide structure to Hindu formal law, and legal authorities consciously allow for customary regulation to mingle with law due to the diversity of Nepalese society.<sup>188</sup> Furthermore, the majority of Nepalese lawyers are educated outside of Nepal, primarily in India, England and the US.<sup>189</sup> This combination is considered to be an environment conducive to social and legal innovation<sup>190</sup> but is also not without limitation. Malta too is a system of many influences, comprising a mix of colonial and traditional law, and more recently European Union instruments. Through adaptation it has been considered to be a 'healthy grafted European mixed legal system',<sup>191</sup> where everything is unified in its function. Although these systems are considered to be 'mixed' under comparative law taxonomies and their

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<sup>186</sup> Although arguably the conception of 'culture' in the cultural families framework arises from a Western perspective, and thus certain aspects of culture outside of the researcher's own normative perspective may be excluded.

<sup>187</sup> P Gragl, 'The Pure Theory of Law and Legal Monism – Epistemological Truth and Empirical Plausibility' (2015) 70 *Zeitschrift für öffentliches Recht*, 665, 681-683.

<sup>188</sup> G N Kent, 'Law Tearing the Social Fabric: Lessons from Nepal' (2006) 64 *Advocate* 807, 810.

<sup>189</sup> L Heckendorn Urscheler, 'Innovation in a Hybrid System: The Example of Nepal' (2012) 15(3) *Potchefstroom Electronic Law Journal* 97, 99.

<sup>190</sup> See generally, L Heckendorn Urscheler, 'Innovation in a Hybrid System: The Example of Nepal' (2012) 15(3) *Potchefstroom Electronic Law Journal* 97.

<sup>191</sup> K Aquilina, 'Rethinking Maltese Legal Hybridity: A Chimeric Illusion or a Healthy Grafted European Law Mixture?' (2011) 4 *Journal of Civil Legal Studies* 261, 282-3.

various legal elements appear to be cohesive, the way in which they operate is quite diverse.

Another 'classic' example of mixing is Israel – Drummond argues that the 'mixed' system of Israel is made up of historical and contemporary elements of common and civil law. Closer inspection of family law, one of Israel's core formal legal disciplines, reveals a 'dizzying array of religious bodies of law and institutions compete, in asymmetric ways, with the secular law of the state'.<sup>192</sup> She underlines further that this approach to thinking about mixed systems challenges the binary of civil and common law.<sup>193</sup> Scotland is another system that expresses cohesion between its civil and common law elements,<sup>194</sup> originating from Roman and English influences respectively.<sup>195</sup> The Scottish legal system has been argued to be a 'special instances of the symbiosis of the English and Continental legal traditions'<sup>196</sup> and that it is typically 'mixed' as it 'retains private civil law within a surrounding system of Anglo-American public law'.<sup>197</sup> Van der Merwe argues that such a level of cohesion and seamless mixing in Scotland provides legal solutions suitable for adoption in harmonisation projects such as European private law.<sup>198</sup> However, it has also been argued that describing Scotland as 'a mix of common law and civil law' is inadequate,<sup>199</sup> as the presence of other influences, such as canon law, is also of significance.<sup>200</sup>

However, there are systems that comprise elements that, although they exist within the same legal system, have limited interaction and therefore are not necessarily mixed or combined. One of those systems, as this thesis will argue, is Japan; arguments for this will follow later in this chapter. Yet another example is China, which uses normative social phenomena derived from Confucian values such as *li* and *fa*, which operate parallel to an extensive body of codified law. The system of divorce in South Africa, mentioned above, combines formal procedures and traditional mediation.<sup>201</sup> Further examples include Indonesia, with *kekeluargaan* ('togetherness' or 'kinship') underpinning

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<sup>192</sup> S G Drummond, 'Dishing Up Israel: Rethinking the Potential of Legal Mixité' (2008) 26 *Windsor Yearbook of Access to Justice* 163, 166.

<sup>193</sup> S G Drummond, 'Dishing Up Israel: Rethinking the Potential of Legal Mixité' (2008) 26 *Windsor Yearbook of Access to Justice* 163, 166.

<sup>194</sup> S Reid and J Edwards, 'The Scottish Legal System' (2009) 9 *Legal Information Management* 9, 9-10.

<sup>195</sup> C van der Merwe, 'The Origin and Characteristics of the Mixed Legal Systems of South Africa and Scotland and Their Importance in Globalisation' (2012) 18 *Fundamina* 91, 102-3.

<sup>196</sup> K Zweigert and H Kötz, *An Introduction to Comparative Law* (3<sup>rd</sup> edn, Clarendon 1998) 204.

<sup>197</sup> M Bussani and V V Palmer, 'The Liability Regimes of Europe - Their Façades and Interiors' in M Bussani and V V Palmer (eds), *Pure Economic Loss in Europe* (Cambridge University Press 2003) 143.

<sup>198</sup> C van der Merwe, 'The Origin and Characteristics of the Mixed Legal Systems of South Africa and Scotland and Their Importance in Globalisation' (2012) 18 *Fundamina* 91, 114.

<sup>199</sup> C Himsworth, 'Scotland: The Constitutional Protection of a Mixed Legal System' in J C Oliveira and P Cardinal (eds), *One Country, Two Systems, Three Legal Orders - Perspectives Of Evolution: Essays On Macau's Autonomy After The Resumption Of Sovereignty By China* (Springer 2009), 122.

<sup>200</sup> S Thomson, 'Mixed Jurisdiction and the Scottish Legal Tradition: Reconsidering the Concept of Mixture' (2014) 7 *Journal of Civil Law Studies* 51, 78.

<sup>201</sup> See generally, A E Boniface, 'African-Style Mediation and Western-Style Divorce and Family Mediation: Reflections for the South African Context' (2012) 15(5) *Potschefstroom Electronic Law Journal* 377.

organisational culture<sup>202</sup> as a foundational aspect of business law and practice, and Nigeria, where justice is frequently administered by traditional tribe leaders outside of the formal system<sup>203</sup> and juju oaths are often central to customary arbitration.<sup>204</sup> A common problem with the 'mixed' category, as these examples show, is that only very general, formal aspects of a legal system are explained and for jurisdictions with significant influence from socio-cultural norms, such as those considered above, this formalistic approach is nonsensical.<sup>205</sup>

#### 2.1.5 *Assigning the label*

This brief overview of scholarship on the 'mixed' nature of the above legal system highlights another problem of the 'mixed' / 'hybrid' terminology - *how* this label is assigned. It is contended that 'mixed' systems are sometimes designated as such by reference to specific historical circumstances,<sup>206</sup> such as colonisation or occupation by another country. Although this historical context is important, it still risks misrepresentation of the system under scrutiny by framing it in terms of its reception of civil and / or common law,<sup>207</sup> further perpetuating the Euro-centric perspective of law and legal systems as the standard. Using this historical approach can create further problems if it is not done carefully, as significant internal factors, such as the growth of tradition and social and cultural norms, in the system's development may be inadvertently ignored due to the focus on outside influence.

As seen above with the variety of meanings given to the terminology, the ways in which systems are placed in these categories is similarly done with limited explanation or justification, and varies in method across the different taxonomical types. Compounding the issue is a lack of consistency in the application of such categorisations; while several systems are repeatedly classified as 'mixed' or 'hybrid', the use of diverse criteria cause other to fall variably within or outwith the category. For example, a recent study from the University of Ottawa examined jurisdictions worldwide and determined 91 systems as civil law, 42 as common law, and 92 as 'mixed',<sup>208</sup> which were then further divided in to

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<sup>202</sup> M S Hermawan and M K Loo, 'The Construction of *Keluargaan* as Indonesia's Organizational Culture' (2019) 31(1) *Humaniora* 1-13.

<sup>203</sup> B Arnot, 'How traditional justice in Nigeria is changing' (*British Council*, 24 February 2015) available at <<https://www.britishcouncil.org/voices-magazine/how-traditional-justice-nigeria-changing>> accessed 25 June 2019.

<sup>204</sup> A A Oba, 'Juju Oaths in Customary Law Arbitration and Their Legal Validity in Nigerian Courts' (2008) *Journal of African Law* 52(1) 138-158.

<sup>205</sup> A Harding, 'Global Doctrine and Local Knowledge: Law in South East Asia' (2002) 51 *International & Comparative Law* 36, 51.

<sup>206</sup> V V Palmer, 'Mixed Legal Systems: The Origin of the Species' (2013) 28 *Tulane European & Civil Law Forum* 103, 112.

<sup>207</sup> This has been argued to be one of the issues with considering Scotland as a 'mixed legal system'; Lord Rodger of Earlsferry, "'Say Not the Struggle Naught Availeth": The Costs and Benefits of Mixed Legal Systems' (2003) 78 *Tulane Law Review* 419, 422-423.

<sup>208</sup> Juriglobe, 'Mixed Legal Systems' (University of Ottawa, 2013) <<http://www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php>> accessed 04 March 2016.

ten subcategories in an attempt to more accurately reflect their nature.<sup>209</sup> However, little rationale was given for the selection of the categories, their meaning,<sup>210</sup> nor each country's allocation to them.<sup>211</sup> These issues are not limited to the Ottawa study, and the lack of precise meaning of the label given to the category, and limited justification for placement of systems in the category, raises very real concerns about the viability of its continued use.

When a system is placed into a 'hybrid' or 'mixed' category, there are inferences of some tightly bound combination that cannot easily be separated, such as the 'infusion'<sup>212</sup> or 'blending' of features, practices, and institutions.<sup>213</sup> This implies some degree of permanence to the combination, a premise that this thesis challenges, not least on the grounds that many, if not all, legal systems are in some state of transition or change.<sup>214</sup> This may come from either internal or international influences, such as accession to treaties that facilitate legal harmonisation,<sup>215</sup> a shift towards formal codification of law over informal regulation,<sup>216</sup> or the drastic overhaul resulting from political intervention or upheaval.<sup>217</sup> The interpretation of hybridity often used in comparative legal scholarship is strictly *legal* hybridity – exclusively concerning formal, positivised and institutionalised rules – rather than *normative* hybridity, which is inclusive of non-state or unofficial norms.<sup>218</sup>

Further to the straightforward meaning of the label, the placement of systems into the 'mixed' and 'hybrid' categories has another, more subtle connotation; in separating those legal systems it suggests that 'mixed' or 'hybrid' systems are somehow unusual or anomalous.<sup>219</sup> The presentation of categories in the classic families framework sets out common and civil law systems as the standard, with the third category presented as 'other' through its difference from these 'baselines', a distinction that harkens back to the

<sup>209</sup> N Mariana and G Fuentes, *World Legal Systems* (Wilson and Lafleur 2000).

<sup>210</sup> M Siems, 'Varieties of legal systems: towards a new global taxonomy' (2016) 12(3) *Journal of Institutional Economics* 579, 580.

<sup>211</sup> Japan's categorisation in this framework is 'mixed system of civil law and customary law'.

<sup>212</sup> D White, 'Some Problems of a Hybrid Legal System: A Case Study of St. Lucia' (1981) 30 *International & Comparative Law Quarterly* 862, 863.

<sup>213</sup> E Özücü, 'What is a Mixed Legal System: Exclusion or Expansion?' (2008) 12(1) *Electronic Journal of Comparative Law* 1, 11.

<sup>214</sup> H D Hazeltine, 'The study of comparative legal history' [1927] *Journal of the Society of Public Teachers of Law* 27, 33.

<sup>215</sup> For example, harmonisation of EU member states' domestic laws by ratifying agreements from the EU – see, for example D Valiante, 'Harmonising Insolvency Laws in the Euro Area: Rationale, stocktaking and challenges' (2016) 153 *CEPS Special Report* 1; J O G Öberg, 'The Legal Basis for EU Criminal Law Harmonisation: A Question of Federalism?' (2018) 43(3) *European Law Review* 366.

<sup>216</sup> For example, the codification of African customary law – see generally, L Juma, 'The Law of Leretholi: Law and Status of Codified Rules of Custom in the Kingdom of Lesotho' (2011) 23(1) *Pace International Law Review* 92.

<sup>217</sup> An example is Japan's rapid modernisation of its legal system following the fall of the military *shogunate* government in 1868 (this will be discussed in more detail in chapter three of this thesis). See H G Wren, 'The Legal System of Pre-Western Japan' (1968) 20 *Hastings Law Journal* 217, 220-221; K Takayanagi, 'A Century of Innovation: The Development of Japanese Law, 1868-1961', in A T von Mehren (ed), *Law In Japan: The Legal Order In A Changing Society* (Harvard University Press 1963) 27-31.

<sup>218</sup> S P Donlan, 'Remembering: Legal Hybridity and Legal History' (2012) 2(1) *Comparative Law Review* 1, 8.

<sup>219</sup> Historically, despite their perceived anomalous status, the so-called 'mixed' systems were still considered to be of immeasurable value, offering interesting and useful insights into the function and purpose of law and provide systems that are not 'mixed' with solutions to legal problems.

colonial origins of this method of categorisation. When systems are categorised through their lack of conformity to other 'standard' legal typologies, their distinct and meaningful characteristics are elided, while more generally systems are forced in to a 'marginal and uncertain position'.<sup>220</sup> The category could be named 'miscellaneous' and this nomenclature would serve the same purpose. The label has a homogenising effect on the systems it is attached to, denying their individuality by ignoring their social and cultural normative values, and marking them as unusual by way of their alleged mixedness / hybridity. The strangeness of this designation must be considered in the context of our increasingly globalised world,<sup>221</sup> not least as arguments can be made for all systems now being 'mixed' to some greater or lesser extent.

The influence of globalised legal features and forms is not just a recent development, however. Donlan's historical perspective claims that legal hybridity was in fact the norm prior to the nineteenth century, arguing that overlapping legal orders existed within the same geographical space.<sup>222</sup> It further claims that codified laws emerged and despite assertions to the contrary, legal monism never existed due to the multiplicity of influences that preceded and influenced the development of formal law.<sup>223</sup> The 'other' category becomes ever more encompassing<sup>224</sup> – and it is odd that it is assigned to the majority of systems, especially as they are not all 'mixed' / 'hybrid' in the same way. The world is ever more connected and multicultural and it is the contention of this thesis that it is not unreasonable to have a format that recognises the varied and variable *mixity* of legal systems.<sup>225</sup> Arguably even some of the systems considered to be wholly civil or common have elements of being 'mixed' in some way, whether this is due to the influence of social, cultural, religious or customary laws either at some point during that system's development or its current operation. Örüçü goes as far as to assert that the idea of a 'mixed system' is all but redundant at this stage and thus this 'special' category would be considered obsolete.

There is arguably a colonial filter to the perspective of comparative law –the problematic 'hybrid' / 'mixed' label is almost always applied to jurisdictions outside of the Anglo-European tradition. Many of these systems have historically been subject to colonialism and have subsequently become independent. This colonial influence came from several

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<sup>220</sup> L Moccia, 'Historical Overview on the Origins and Attitudes of Comparative Law' in B de Witte and C Forder (eds), *The Common Law of Europe and the Future of Legal Education* (Dordrecht: Kluwer 1992) 619.

<sup>221</sup> M Siems, 'Varieties of legal systems: towards a new global taxonomy' (2016) 12(3) *Journal of Institutional Economics* 579, 582.

<sup>222</sup> S P Donlan, 'Remembering: Legal Hybridity and Legal History' (2012) 2(1) *Comparative Law Review* 1, 12.

<sup>223</sup> N Rouland, *Legal Anthropology* (P G Planel trs, Stanford University Press 1994) 46.

<sup>224</sup> This is especially so considering that the most populated category in the study conducted by the University of Ottawa is the 'mixed' / 'hybrid' one: Juriglobe, 'Mixed Legal Systems' (University of Ottawa 2013) <<http://www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php>> accessed 04 March 2016.

<sup>225</sup> E Örüçü, 'What is a Mixed Legal System: Exclusion or Expansion?' (2008) 12(1) *Electronic Journal of Comparative Law* 1, 5.

Western states and inevitably affected the legal environment of those countries occupied.<sup>226</sup> It is curious how, even though now independent countries may influence the law of their colonisers through either transplants or advice on managing particular legal problems, this is not reflected in categories of hybridity or mixedness.<sup>227</sup> As Anglo-European systems and forms of law are privileged in comparative law more generally, there is an unspoken assumption in taxonomies that the reception of law is unilateral – namely that it moves from the *originating* Anglo-European systems to other *receiving* systems.<sup>228</sup> The upshot of this insight is that the accession of these originating systems to supranational bodies does not render them hybrid or mixed because the ideals and practices underpinning the supranational system are *in themselves* Western. Indeed, the 'mixed' label seems only ever to have applied to European systems in the specific instance of *mixité* – and even then this has resulted in the development of a new term, one that has the effect of differentiating European systems from others in neighbouring continents. In today's globalised and connected world, no system is without influence of other jurisdictions, or supranational institutions and regulations – there is no 'pure' system of law, and there is no system that is not 'mixed'. In spite of this, if we accept that all legal systems are considered mixed, then mixed becomes a null category. The study of legal systems can and must move beyond them simply being objects of interest – a 'legal laboratory' to study how law of different origins, or law with non-law sources, interacts and responds to the requirements of its society. There have been some attempts to tackle these issues and move beyond the strict framework of categories, and these are discussed in more detail below.

#### 2.1.6 *A positive definition?*

In addressing the problems outlined above, scholarly endeavour undertaken by Siems and Örüçü has focused on generating more inclusive and less doctrinally limited ways of building an organisational framework for legal systems. The first response to the effects of the negative definition of the 'mixed' / 'hybrid' group generates a positive definition that is more accurately descriptive of the systems it categorises. To reiterate the main problems: a positive definition would either lead to several additional categories – to the point of obviating the need for taxonomy at all – or fewer categories requiring an extensive description that includes every system but still does not aid in understanding

<sup>226</sup> This is true of ancient empires as well; for example, during Roman conquest many law of conquered countries were changed and Roman laws enforced, however the empire also assimilated the laws and customs of the people it ruled, and thus Roman law transformed as well. See V V Palmer, 'Mixed Systems ...and the Myth of Pure Laws' (2007) 67 *Louisiana Law Review* 1205, 1213-1215; V V Palmer, 'Mixed Legal Systems: The Origin of the Species' (2013) 28 *Tulane European & Civil Law Forum* 103, 114.

<sup>227</sup> An example of this is the proposals for the adoption of the fair use model in intellectual property by Australia and Hong Kong, which have in turn influenced the strategy of the UK to consider adopting fair use: P K Yu, 'Customizing Fair Use Transplants' (2018) 7(1) *Laws* 9, 10.

<sup>228</sup> W Twining, 'Diffusion of Law: A Global Perspective' (2004) 49 *Journal of Legal Pluralism* 1, 3-4.

them or serving its purpose as a framework of classification. This endeavour would likely be unsuccessful, given the diversity of systems currently categorised as 'mixed' or 'hybrid'. Even the more legally-pluralistic approaches, which commonly include non-legal sources as part of the overall system of regulation, have thus far had difficulty in usefully distinguishing and grouping the systems in the 'mixed' category.<sup>229</sup> Taxonomical approaches in general suffer from this difficulty; they are conjectures<sup>230</sup> that simplify the subjects of scrutiny, producing a misreading<sup>231</sup> that forces the omission of non-structural and non-institutional elements that are descriptively significant.

Siems proposes an alternative approach to traditional forms; he caveats that a single classification of legal systems would be unwise due to the subjectivity exercised in choosing the characteristics determinative of the classification,<sup>232</sup> and is even more problematic when considering those elements that are discarded.<sup>233</sup> Any taxonomy of legal systems must be carefully explained with regard to its purpose and how it organises legal systems, what it is intended to achieve, and why the systems within it are classified as such. Siems considers inclusion of non-legal elements, such as culture and history, of significance alongside and equal to legal ones - including 'law in books' and 'law in action' – as indicators of legal difference and of utility in classification.<sup>234</sup> In identifying four 'clusters' of legal systems, Siems presents graphical representation of these with the caveat of taxonomy of legal systems functioning mainly as a descriptor that does not necessarily apply universally to all legal concepts.<sup>235</sup> This stipulation reflects a further issue with imposing taxonomy on legal systems; that there is a continuing assumption by scholars that the legal systems of the world are 'laid out' and will neatly conform to a patterning and through this, be readily available for comparative study.<sup>236</sup>

Alternative theories of mapping and sorting legal systems have taken this approach, and are then concerned with the task of determining the extent to which a given system is mixed, what is contained within the mix, and, although less frequently, how it is mixed. The approach of mapping legal systems starts from the problems of traditional classifications based on 'law as rules', which are overly concerned with structure, and instead pursues a multi-disciplinary approach that recognises the importance of legal

<sup>229</sup> V Palmer, *Quebec and her sisters in the Third Legal Family*, (2009) 54 *McGill Law Journal* 321, 333.

<sup>230</sup> M Siems, *Comparative Law* (Cambridge University Press 2014), 74.

<sup>231</sup> B de Sousa Santos, 'Law: A Map of Misreading: Toward a Postmodern Conception of Law' (1987) *Journal of Law and Society* 14(3) 279, 282.

<sup>232</sup> M M Siems, 'Varieties of Legal Systems: Towards a New Global Taxonomy' (2016) 1(3) *Journal of Institutional Economics* 1, 6.

<sup>233</sup> A Peters and H Schwenke, 'Comparative Law Beyond Postmodernism' (2000) 49 *International & Comparative Law Quarterly* 800, 826.

<sup>234</sup> M M Siems, 'Varieties of Legal Systems: Towards a New Global Taxonomy' (2016) 1(3) *Journal of Institutional Economics* 1, 7.

<sup>235</sup> M M Siems, 'Varieties of Legal Systems: Towards a New Global Taxonomy' (2016) 1(3) *Journal of Institutional Economics* 1, 15, 19-20, 26.

<sup>236</sup> G Frankenberg, *Comparative Law as Critique* (Edward Elgar 2016) 5.

sociology.<sup>237</sup> These approaches accept that hybridity is ‘messy’ and instead of attempting to categorise and harmonise it – and in doing so avoiding the issue of forcing systems into frames that do not fit – efforts are better spent in managing it.<sup>238</sup> The task of these approaches is then to track and map the influences of systems on to one another, whether this is articulated through ‘contamination’<sup>239</sup> – conceptualised not wholly as a negative word, but useful in that it goes beyond ‘mix’ in explaining interactions and receptions between systems<sup>240</sup> – or ‘overlaps’ and ‘layers’, with consideration of how these may change over time.<sup>241</sup> This has the initial advantage that these systems are no longer considered strange or odd, normalising the mixed nature of legal systems, where the combination of legal influences yields solutions that can be adapted across jurisdictions.

Örücü gives a hugely useful overview of this influence and combination of components between legal systems, using the language of ‘families’ to describe this interaction.<sup>242</sup> She highlights the importance of the language used to describe legal systems – ‘overlaps, combinations, marriages and off-spring’<sup>243</sup> for example – in revealing the mixed nature of every system. This critical linguistic approach is an important initial step in better understanding that no legal system in the world has developed in isolation. The language used to describe categories in taxonomical frameworks has led to the misreading of many systems (Japan included), exemplified in the discussion on terminology above. One way (but not the sole way) to address this issue is to change the language used. However, care must be taken with which terms are chosen, and how they are applied – Örücü’s family tree approach considers notions of ‘blending’ and ‘overlaps’, and the idea of viewing mixed systems along a spectrum.<sup>244</sup> This idea of ‘spectrum’ presents an interesting alternative to previous attempts of literally mapping out systems, or grouping them according to formal, yet superficial criteria. By identifying two far ends of the spectrum – from cohesive to dysfunctional – and placing systems at these ends, the spaces in the middle are inhabited by systems at different levels of mixing. Örücü’s proposal here aims to determine the level of mixedness of all systems, instead of considering ‘mixed’ as a group in itself. Whilst this is a useful starting point,

<sup>237</sup> E Örücü, ‘A General View of “Legal Families” and of “Mixing Systems”’ in D Nelken and E Örücü, *Comparative Law: A Handbook* (Hart 2007) 170.

<sup>238</sup> P S Berman, ‘Global Legal Pluralism’ (2006-2007) 80 *Southern California Law Review* 1155, 1236.

<sup>239</sup> P G Monateri, ‘The Weak Law: Contaminations and Legal Cultures’ (2001) 1(3) *Global Jurist Advances*, available at <<http://www.bepress.com/gj/advances/vol1/iss3/art5>> accessed 10 September 2017.

<sup>240</sup> O Moréteau, ‘An Introduction to Contamination’ (2010) 3(1) *Journal of Civil Law Studies* 9, 10.

<sup>241</sup> E Örücü, ‘A General View of “Legal Families” and of “Mixing Systems”’ in D Nelken and E Örücü, *Comparative Law: A Handbook* (Hart 2007) 171.

<sup>242</sup> E Örücü, ‘A General View of “Legal Families” and of “Mixing Systems”’ in D Nelken and E Örücü, *Comparative Law: A Handbook* (Hart 2007) 171-2.

<sup>243</sup> E Örücü, ‘What is a Mixed Legal System: Exclusion or Expansion?’ (2008) 12(1) *Electronic Journal of Comparative Law* 1, 6.

<sup>244</sup> E Örücü, ‘What is a Mixed Legal System: Exclusion or Expansion?’ (2008) 12(1) *Electronic Journal of Comparative Law* 1, 12.



there is still a lack of consideration for the social and cultural underpinnings of legal systems, and the considerable influence these have, especially in South-East Asia. Furthermore, legal systems are rarely static – they constantly develop and change, and thus mapping systems out is likely to require regular updates. Although Örüçü has kept to types of law for her mapping (maps in the annex of her article demonstrate a variety of ways in which this might be envisaged),<sup>245</sup> there is still the risk that this way of thinking about systems does not fully address the issues with previous forms of taxonomy.

The continuing endeavour to create a perfect taxonomy consistently falls short of finding a successful method to catalogue legal systems without presenting inaccurate representations of those systems, particularly outside of the Anglo-European sphere. Additionally, taxonomies currently remain a foundational element in the teaching and scholarship of comparative legal studies, normalising and standardising the taxonomical way of thinking and the inaccuracies it produces. Although the categories and contours of taxonomies are regularly critiqued in the scholarship, the altogether different, and arguably more important question of whether taxonomies should be used at all is rarely raised. This thesis proposes a rejection of taxonomies of legal systems altogether; the core issues of shorthanding, misrepresentation, bias and erroneous management undermine their utility in rigorous comparative legal scholarship.

Rejection of taxonomies is not the sole solution to the issues raised and this thesis does not seek to provide an alternative framework to replace them. The loss of taxonomies has the potential to pose problems for comparative legal scholarship – taxonomical frameworks have been embedded as a fundamental element of comparative legal education and scholarship and to reject them leaves a theoretical gap in the discipline. The loss of taxonomies would shift what has become a normative view on organising and labelling legal systems and reveal the extent to which academic reliance on them exists. However, a lack of taxonomies also has the potential to encourage more critical engagement with legal systems and motivate scholarship on the complex interactions with between formal and informal legalistic regulation and reality (especially in the case of Japan). This increasingly attentive critical engagement with legal systems would seek to better understand their characteristics – especially including those systems comprising formal and informal legalistic instruments and mechanisms – and their identities – constructed through the social and the cultural as opposed to the purely legal.

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<sup>245</sup> E Örüçü, 'What is a Mixed Legal System: Exclusion or Expansion?' (2008) 12(1) *Electronic Journal of Comparative Law* 1, 16-18.

## 2.2 Japan and the difficulty of ‘fitting in’

Taxonomies of legal systems are endlessly problematic for scholarly study of Japan due to the centrist, positive, modern and Western – more specifically Eurocentric<sup>246</sup> – conceptions of law and legal systems which do not map well on to the Japanese conception of law in its form, role or function. This section will focus on theoretical comparative issues which highlight Japan’s lack of legal hybridity, and these theoretical issues will be substantiated in later chapters with salient examples of law in action in Japan. The Western origin of the idea of categorising legal systems is evident in the way it has grouped and labelled legal systems – as we have seen – into those two traditions with which Western law and legal thinking is most familiar, and then an extra category for all those systems that do not fit civil and common law systemic models. Taxonomies are often reliant on private law and struggles with those jurisdictions that do not overtly comprise this.<sup>247</sup> Little consideration was given to developing a means of describing those legal systems on their merits other than that they were not distinctly either civil or common. The categorisation is further hindered in its usefulness as it is contended that many legal systems are not simply a mix of the two other categories, but are distinctly something other, yet they do not have formal recognition as anything other than ‘mixed’ or ‘hybrid’. Some systems operate on a combination of more than two legal traditions or sources and would merit recognition as a functioning whole, more than the sum of their parts.

Japan’s placement within taxonomies has consistently constructed a perspective that it is ‘mixed’ or ‘hybrid’ in some way.<sup>248</sup> Not only have the mixed and hybrid categories proved to be problematic, lacking in cohesion, accuracy and utility, but the projection of Japan that this has created through its placement within these categories is an illusion of hybridity, a misconception of mixedness that has limited the scope of understanding the operation of the system. The framing of Japan as mixed or hybrid reduces the perception of the system to its formal, institutionalised – and recognisably Western - legal parts, with little focus on how the system works or on non-legal influences that ultimately affect the system’s functioning. This focus on formal legal institutions and mechanisms renders other influences invisible and results in only part of the system being considered. Non-formal influences of social order are generally not as strong nor as obvious in the

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<sup>246</sup> E Özücü, ‘What is a Mixed Legal System: Exclusion or Expansion?’ (2008) 12(1) *Electronic Journal of Comparative Law* 1, 3.

<sup>247</sup> E Özücü, ‘What is a Mixed Legal System: Exclusion or Expansion?’ (2008) 12(1) *Electronic Journal of Comparative Law* 1, 3.

<sup>248</sup> Max Planck Institute for Comparative and International Private Law (2016), ‘Research into Japanese Law’ <[http://www.mpipriv.de/en/pub/research/foreign\\_law\\_regional\\_centres/japan/law\\_in\\_japan.cfm](http://www.mpipriv.de/en/pub/research/foreign_law_regional_centres/japan/law_in_japan.cfm)> accessed 10 May 2016.

West; arguably this has been a factor in the lack of identification of these normative forces in Japan.

For Japan, taxonomy and categorisation limit perspectives of the form, role and function of its legal system and inhibit the understanding of the complex relationship between its law and society. It is contended that what sets Japan further apart<sup>249</sup> is that the system experiences a disconnection between its sources of regulation, and that the formal, institutionalised legal regulation exists alongside informal, normative social and cultural regulation. Part of this comes from the authoritativeness of law as a social regulator versus the ubiquitous nature of social and cultural norms, which have a significant effect on controlling behaviour with an underpinning philosophy of social harmonisation and efficiency. 'Mixed' and 'hybrid' legal systems have been depicted with the largely incorrectly assumed theme of cohesion and to a greater extent, all of the ingredients combining together (although not without problems) to create a functioning legal system. Categorisation as 'hybrid' or 'mixed' tells us nothing of this, and even Örüçü's spectrum of mixed systems still does not address this issue fully. However this perspective persists as one that is regularly used in legal scholarship and education – indeed, the term 'hybrid' is used to describe Japan's approach to many legal endeavours.<sup>250</sup> This results in a focus on the parts of the system and removes ownership of the Japanese legal system from its legal instruments and processes. This carries the implication that it creates nothing for itself, perpetuating an orientalist view of Japan with the implication that formal law remains in the Anglo-European domain.

### 2.3 Japan on its own merits

This view is maintained further as, on the face of it, Japan's formal law is largely Western-facing in both form and function due to the period of modernisation during the late 1800s, and occupation by Allied Forces following defeat in WWII.<sup>251</sup> The government of Japan creates statutes in a way and in a form not unlike that seen in Europe and America and operates a court system with binding precedent and semi-autonomous judges – again, not unlike Japan's Western counterparts. However, also within Japan is the underpinning social regulation including normative social phenomena such as *giri*, *tatemae*, and *honne* (which will be discussed in more detail in chapters four and five) that inform the interpretation and application of its laws and legal processes, the clarity of which is

<sup>249</sup> Although an argument is not made here for Japan's uniqueness in this respect, just that this is its experience.

<sup>250</sup> For example, in the development of lay participation in the court system: L Ambler, 'The People Decide: The Effect of the Introduction of the Quasi-Jury System (Saiban-In Seido) on the Death Penalty in Japan' (2007) 6(1) *Northwestern University Journal of International Human Rights* 1, 14; on developing legislation for protection of personal information: R L Waggoner, 'Privacy of Personal Information in the Financial Services Sectors of the United States and Japan: The Gramm-Leach-Bliley Act and the Financial Service Agency Guidelines (2008-2009) 4(3) *I/S: A Journal of Law and Policy for the Information Society* 873, 878; on the criminal laws in Japan: M Noguchi, 'Criminal Justice in Asia and Japan and the International Criminal Court' (2006) 6(4) *International Criminal Law Review* 585, 597.

<sup>251</sup> This will be discussed in more detail in chapter three.

markedly enhanced with a legal culture approach. The legal system functions but its elements are still largely separate.<sup>252</sup> This approach to analysing the Japanese legal system unveils not only the living character of these informal normative phenomena but also their interaction with formal legal instruments and processes.

Glenn makes compelling a case for bringing Confucian philosophy to the centre of understanding the Japanese system, stating that this foundational philosophy cultivates an 'east Asian tradition of persuasion'.<sup>253</sup> Awareness and recognition of this social philosophy enables the scholarly understanding that law in Japan does not operate alone, and that the system is comprised of more than formal legal sources, despite its prominent legal Codes, well-structured hierarchy of courts and American-made constitution. However, Glenn's approach does not go much further beyond an observation of components and furthermore, gives limited insight in to the relationship between the elements and how the system functions. This 'components approach' is the main inhibitor to comprehensive understanding of Japan's legal system – continually focusing on the individual pieces (even without only recognising those that have a Western pedigree) hinders our ability to see how they fit together (or not). Even in comparative scholarship on legal transplants,<sup>254</sup> Japan is not wholly receptive to these<sup>255</sup> — adaptation, modification and assimilation occurs instead. It is contended in this thesis the Japanese legal system needs to be viewed as a functioning whole to understand all of its influences, and although some elements can trace their roots back to the West, they have been transformed and adapted for Japanese use. Critically, this goes some way to explaining why certain phenomena occur, such as the low crime rate,<sup>256</sup> low imprisonment,<sup>257</sup> and a lack of legal intervention or structural regulation on issues such as noise complaints,<sup>258</sup> hate speech,<sup>259</sup> and apology as remedy,<sup>260</sup> even in criminal trials.

<sup>252</sup> C M Fombad, 'Managing Legal Diversity: Cameroonian Bijuralism at a Critical Crossroads' in V V Palmer, M Y Mattar and A Koppel, *Mixed Legal Systems, East and West* (Ashgate 2015) 118.

<sup>253</sup> H P Glenn, *Legal Traditions of the World* (5<sup>th</sup> edn, Oxford University Press 2014) 320-321.

<sup>254</sup> The pioneering work on legal transplants is A Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974); more specific work on this for Japan is: E A Feldman, 'Legal Transplants, Organ Transplants: The Japanese Experience' (1994) *Social & Legal Studies* 71; M Dean, 'Legal transplants and jury trial in Japan' (2011) 31(4) *Legal Studies* 570.

<sup>255</sup> This will be discussed in a later chapter.

<sup>256</sup> In 2017, Japan's crime rate fell to one of its lowest at 915,111, following a peak of 2.85 million in 2002: Kyodo, 'Japan's crime rate hits record low as number of thefts plummets' (*The Japan Times*, 18 January 2018), available at <<https://www.japantimes.co.jp/news/2018/01/18/national/crime-legal/japans-crime-rate-hits-record-low-number-thefts-plummets/#.W22tnF5KiUk>>, accessed 10 August 2018.

<sup>257</sup> Japan's incarceration rate is one of the lowest in the world – at the end of September 2016 there were 56, 805 people in prison – which averages to 45 people per 100,000 – World Prison Brief, 'Japan' (N.D, *World Prison Brief*), available at <<http://www.prisonstudies.org/country/japan>>, accessed 10 August 2018.

<sup>258</sup> M D West, *Law in Everyday Japan: Sex, Sumo, Suicide, and Statutes* (University of Chicago Press 2005) 107-112.

<sup>259</sup> See generally: N Koontz, 'The Potential for National Hate Speech Legislation and Japan: An International Consideration on Possibilities' (2017) 16(2) *Washington University Global Studies Law Review* 345; J Kotani, 'Proceed with Caution: Hate Speech Regulation in Japan' (2018) 45(3) *Hastings Constitutional Law Quarterly* 603.

<sup>260</sup> H Wagatsuma and A Rosett, 'The Implications of Apology: Law and Culture in Japan and the United States' (1986) 20 (4) *Law & Society Review* 461.

A formalistic approach to the system makes it very difficult to understand how and why these trends occur.

It is initially contended that the interaction between formal law and informal socio-cultural norms in Japan is not collaborative and is symptomatic of the disconnection at the core of the Japanese legal system. A primary example of this is the contrast between *giri*<sup>261</sup> and law in resolving disputes – where *giri* requires compromise in the pursuit of harmony and preservation of relationships and considers law as fatal to those relationships<sup>262</sup>. With its Western-facing law and legal process, participants in legal disputes in Japan are placed in an adversarial context with beneficial resolution for only one party. Furthermore, in terms of dispute resolution, law is not always the first port of call for Japanese authorities; there is often a preference for social forms of regulation, such as apology<sup>263</sup> or social debt obligation,<sup>264</sup> where reliance is placed on the pressure of social normativity and conforming.<sup>265</sup> However, this can be contrasted with instances where social norms cannot oblige conformist behaviour and law has been brought in (although to great unpopularity with the Japanese public) in a decisive manner.<sup>266</sup> These issues will be discussed in more detail throughout the later chapters of this thesis.

Beyond the composition and workings of the system, the prevalence of the hybrid categorisation of Japan has led to the perception that many of its legal mechanisms and instruments are also hybrid – even those that are more recent. For example, lay participation in Japan has been repeatedly characterised as hybrid to the extent where this branding is not critiqued nor challenged.<sup>267</sup> This categorisation arose from the aforementioned ‘components approach’ and focused on the different Western-facing parts of the Japanese system of lay participation, rather than looking at the complete, finished version that was first used in Tokyo in August 2009. Some of the scholarly work

<sup>261</sup> Essentially, social norms for governing good social behaviour – this is discussed in more detail in the next chapter.

<sup>262</sup> This will be covered in more detail in the next chapter.

<sup>263</sup> See H Wagatsuma and A Rosett, ‘The Implications of Apology: Law and Culture in Japan and the United States’ (1986) 20(4) *Law & Society Review* 461; P Murphy, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016).48, 81, 225.

<sup>264</sup> See R Minamoto, *Giri to ninjō* [Social obligations and human feelings] (Chuo Koronsha 1969); M Yoshida, ‘Giri: A Japanese Indigenous Concept’ (Cleveland State University, 8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014.

<sup>265</sup> See, for example, J Sack, ‘Shame in Japan’ (2004) *Theologia Diakonia* 111; A Zander, ‘The Value of Belonging to a Group in Japan’ (1983) 14(1) *Small Group Behaviour* 3.

<sup>266</sup> Japan is currently the only country that legally obliges married couples to share the same family name: T Shirakawa, ‘Allow different surnames for married couples’ (*The Japan Times*, 7 March 2018), available at <<https://www.japantimes.co.jp/opinion/2018/03/07/commentary/japan-commentary/allow-different-surnames-married-couples/#.W214PI5KiUk>> accessed 10 August 2018; J McCurry, ‘Japan upholds rule that married couples must have same surname’ (*The Guardian*, 16 December 2015), available at <<https://www.theguardian.com/world/2015/dec/16/japanese-court-rules-married-women-cannot-keep-their-surnames>> accessed 10 August 2018.

<sup>267</sup> A Dobrovolskaia, ‘Japan’s Past Experiences with the Institution of Jury Service’ (2010-11) 12(1) *Asia-Pacific Law & Policy Journal* 1; T Katsuta, ‘Japan’s Rejection of the American Criminal Jury’ (2010) 58 *American Journal of Comparative Law* 497; I Weber, ‘The New Japanese Jury System: Empowering the Public, Preserving Continental Justice’ (2009) 4 *East Asia Law Review* 125; M J Wilson, ‘Prime Time For Japan To Take Another Step Forward In Lay Participation: Exploring Expansion To Civil Trials’ (2013) 46 *Akron Law Review* 641; M Ibusuki, ‘Quo vadis: First year inspection to Japanese mixed jury trial’ (2010) 12 *Asian-Pacific Law & Policy Journal* 24.

in this area has focused on the combination of elements, taking a ‘mixing bowl’ approach to analysing the system.<sup>268</sup> However, there is little appreciation of the transformation these Western-sourced elements have undergone to make them fit for purpose in the Japanese criminal justice system, and again there is little detail on the *saiban-in seido* system as a functioning whole – namely, that includes observation of informal socio-cultural norms on the system. There has been some cursory engagement with its impact on social culture – for example, there has been some exploration in to lay judge satisfaction<sup>269</sup> – but little in terms of contextualising it further.

## 2.4 Concluding Remarks

This chapter has emphasised how taxonomies of legal systems suffer from numerous pitfalls that not only serve to inhibit quality comparative scholarship, but also promote a disciplinary bias that privileges an Anglo-European approach to identifying the institutions and mechanisms of law for comparative legal study. The discussion throughout this chapter has highlighted the simplicity and inaccuracy of taxonomies and their subsequent inability to facilitate critical comparison of legal systems. Japan is one system that is consistently subject to lazy categorisation, being relegated in every taxonomy to the category of ‘mixed’ or ‘hybrid’, which perpetuates its injurious imposed identity as peculiar and *sui generis*. Taxonomical methods also marginalise Japan’s traditional social and cultural norms, and provides limited information on how the system works. Developing a critical comparative approach is necessary to address these issues – to challenge the false neutrality of ‘culturally biased perspectives’<sup>270</sup> that characterises most of the discipline of comparative legal scholarship, and to include informal socio-cultural norms to facilitate a more complete and accurate portrayal of the Japanese legal system. This critical comparative approach is informed by the efforts of detaching from the researcher’s own inherent biases on ideas of law and legality, to ‘remove her Eurocentric spectacles’ and understand that ‘legal orders and social orders can live side by side’.<sup>271</sup>

This awareness ensures that the biases and drawbacks of comparative law tools are not replicated, and creates a critical space that makes room for legal pluralism, which

<sup>268</sup> See generally, S Miyazawa, ‘Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in International Perspectives’ (2014) 42 *International Journal of Law, Crime & Justice* 71; A Ortolani, ‘Reflections on Citizen Participation in Criminal Justice in Japan: Jury, Saiban-in System and Legal Reform’ (2010) 29 *Journal of Japanese Law* 153.

<sup>269</sup> Fujita has recently published a monograph that looks in to some of these issues - M Fujita, *Japanese Society and Lay Participation in Criminal Justice: Social Attitudes, Trust, and Mass Media* (Springer 2018). Other useful articles include: Kyodo, ‘Lay Judge System Reviewed After Auspicious Start’ (*The Japan Times*, 30 May 2012) available at <<http://www.japantimes.co.jp/text/nn20120530f2.html>> accessed 30 January 2017; S Kamiya, ‘Lay Judge Duty Sparks New Passion’ (*The Japan Times*, 21 June 2012) available at <<http://www.japantimes.co.jp/text/nn20120621fl.html>> accessed 30 January 2017.

<sup>270</sup> G Frankenberg, ‘Critical Comparisons: Re-thinking Comparative Law’ (1985) 26(2) *Harvard International Law Journal* 411, 411.

<sup>271</sup> E Örüçü, ‘What is a Mixed Legal System: Exclusion or Expansion?’ (2008) 12(1) *Electronic Journal of Comparative Law* 1, 14.

facilitates inclusion of normative informal phenomena that are not strictly legal in the positive, doctrinal sense, but have a regulatory effect on the behaviour of people living in a legal system. The fourth chapter will examine and define legal pluralism, demonstrating its utility in facilitating a critical comparative approach. It will develop a critical legal pluralist approach to be employed by this thesis, and then apply this approach in identifying and examining those socio-cultural norms in Japan. Before this, chapter three will take a legal historical approach to Japan to evidence the significance of socio-cultural norms throughout its recent history,<sup>272</sup> and show the beginnings of the complex interactions of its formal law and informal socio-cultural norms.

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<sup>272</sup> This is in support of Twining's idea that legal systems and traditions always interact throughout history, and that formal law developing in isolation from tradition is 'exceptional' - W Twining, 'Diffusion of Law: A Global Perspective' (2004) 49 *Journal of Legal Pluralism* 1, 6.

### 3 Historical Contexts

This chapter undertakes a legal historical approach to Japan in order to draw conclusions about the circumstances of her historical development, and contextualise her legal-historical development with reference to the environment of prevailing traditional social and cultural norms, as discussed in the introduction to the thesis. Japan underwent a series of significant and dynamic changes (due to both internal and external influences) in a relatively short period of time (1850 - present), and so in-depth and contextualised consideration of these is of particular importance for this thesis. These changes can be observed and understood from legal, social, political, and cultural perspectives – often many of these elements changed together and were mutually influential. Despite these developments, however, certain cultural and social practices remain consistent, and serve as cornerstones of Japanese social life. These social and cultural norms (in particular, *giri*,<sup>273</sup> *tatemaie* and *honne*,<sup>274</sup> group belonging through *uchi* and *soto*,<sup>275</sup> and shame<sup>276</sup>) will be examined in chapter four, a focused discussion that will build upon their historical origins as covered here; at this point it is sufficient to emphasise the longevity and steadfastness of these normative features in an otherwise rapidly changing country, as well as their significance in daily Japanese life.

Contemporary Japanese formal law, as the newcomer in the multitude of systems of social ordering in Japan, is perceived and practiced in a manner that has always drawn comment in comparative legal scholarship but little by way of detailed investigation and understanding. An analysis of the relationship between law and socio-cultural norms in Japan is, therefore, best underpinned by a critical historical perspective that reveals the prior existence of socio-cultural norms and the relatively recent arrival of formal legal rules, structures, and institutions in modern Japan. The historical grounding and contextualisation in this chapter will thus underpin and inform the subsequent discussion of Japanese legal culture in chapter four. Legal culture in Japan cannot be understood solely by consideration of its present form, as this continues to be informed and

<sup>273</sup> See generally K Seki, 'Circle of On, Giri and Ninjo: Sociologist's Point of View' (1971) 19(2) 北海道大學文學部紀要 - *The Annual Reports on Cultural Science* 99; M Yoshida, 'Giri: A Japanese Indigenous Concept' (8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014; Y Noda, *Introduction to Japanese Law* (University of Tokyo Press 1976) 174-183; R J Davies and O Ikeno (eds), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002), 95-102.

<sup>274</sup> See R J Davies and O Ikeno (eds), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002), 115-118; G J D Trinidad, 'Honne and Tatemaie: Exploring the Two Sides of Japanese Society' (Thesis, University of Iceland 2014) 1; L Carlet, 'Tatemaie a type of truth, not lie' (*The Japan Times*, 15 November 2011), available at <<https://www.japantimes.co.jp/community/2011/11/15/voices/tatemaie-as-truth-culture-clashes-and-arudous-dangerous-myth/#.XXJADTZKiUk>> accessed 15 August 2019; A Prasol, *Modern Japan: origins of the mind – Japanese traditions and approaches to contemporary life* (World Scientific Publishing Co. 2010) 101-104.

<sup>275</sup> See Y Sugimoto, *An Introduction to Japanese Society* (4<sup>th</sup> edn, Cambridge University Press 2014) 34-36; Y Nakata, 'Uchi Soto and Japanese Group Culture' (*GaijinPot*, 25 September 2014) <<http://blog.gaijinpot.com/uchi-soto-japanese-culture>> accessed 12 November 2015; R J Davies and O Ikeno (eds), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002), 217-232.

<sup>276</sup> M Dean, *Japanese Legal System* (2nd edn, Cavendish Publishing 2002), 15-16; P Kent, 'Shame as a Social Sanction in Japan: Shameful Behaviour as Perceived by the Voting Public' (1992) 3 *Japan Review* 97; J Sack, 'Shame in Japan' (2004) *Theologia Diakonia* 111.



influenced by historical developments, many of which comprise either one of the twin impetuses of tradition and advancement.

This chapter will begin with a brief survey of the history of Japan from the 1100s – during this time formal, codified law was introduced to the nation for the first time, and the distinction between formal law and socio-cultural norms as regulators of society began to become apparent. The chapter will then examine the history of Japan from the 1800s, as this date heralds the beginning of these dynamic changes; this is in contrast to Japan's tumultuous but comparatively static existence as an insular, often called 'feudal', state with little interaction with the outside world. To provide a backdrop for the massive impactful political and social change of the late 1860s, this chapter provides overview of the infamous *Tokugawa* period, a time of *shoguns* and *samurai* regularly glorified in media across the world. The dramatic structural shift from this traditional society to one with an overtly Western rule of law and a clearly established legal system had significant social impact.

Japan's rapid (yet still cautious) engagement with the outside world during the *Tokugawa*, *Meiji* and *Taishō* periods (1853 – 1926) brought huge changes to the lives of her citizens, with her newly formed imperial government struggling to deal with the threat of colonialism and/or occupation by Western powers, and to maintain Japan's socio-cultural distinctiveness. During the years 1868 – 1926 is when much of Japan's adaptation and assimilation of legal forms can be observed, although this practice is present right through her recent history. Although significant overhaul of formal law occurred first in the 1860s and 1870s, again in the late 1940s, and once more in the early 2000s, social and cultural norms have remained a constant in everyday Japanese life, with traditional mechanisms of regulating behaviour and resolving disputes continuing to serve as preferable options to the populace.

Finally, this chapter will also introduce the historical background of the case study to be examined in the sixth chapter – *saiban-in seido*, the system that facilitates lay participation in the criminal justice system. Lay participation has existed in Japan in various forms, although was suspended indefinitely during the conflict in World War II. It was then reintroduced in 2009 before a host of international spectators, all curious to see how this reinstatement of citizen participation would play out. Although it has often been referred to within the literature as a 'jury',<sup>277</sup> lay judges in Japan undertake their

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<sup>277</sup> Examples include M Dean, 'Legal transplants and jury trial in Japan' (2011) *Legal Studies* 31(4) 570; I Weber, 'The New Japanese Jury System: Empowering the Public, Preserving Continental Justice' (2009) 4 *East Asia Law Review* 125; M J Wilson, 'The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?' (2007) 24(4) *Wisconsin International Law Journal* 835; M J Wilson, 'Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time' (2009-10) 33 *Fordham International Law Journal* 487.

participation under the supervision of judges<sup>278</sup> and are sworn to silence after the conclusion of a case,<sup>279</sup> thus maintaining power in the judiciary. An extended campaign prior to the (re)introduction of *saiban-in seido* in 2009 made considerable effort to enthuse the population to participate, with the committees involved well aware that there would be great public reluctance to do so. This reluctance can be attributed to the public feeling that making decisions as lay judges would be too much pressure and responsibility, and that they were not trained to do so.<sup>280</sup> Furthermore, and although some citizens are convinced that serving as a lay judge is part of their social responsibility to the nation<sup>281</sup> (often referred to as *giri*), many others are averse to any involvement in the criminal justice process, citing it as being beyond their expertise, an undue and unwelcome responsibility, and a potentially unpleasant experience (this latter point due to the content of criminal cases). This chapter will discuss the historical development of lay participation in Japan in the context of these lasting social and cultural norms – particularly social harmony and group belonging – with a view to emphasising their significance to the development, form, and function of *saiban-in seido*, analysis of which will be continued in the dedicated case study chapter.

### 3.1 The Road to Feudalism (1192 - 1603)

Prior to the 12<sup>th</sup> century, Japan's codified law was based on the rules of the Chinese T'ang Dynasty.<sup>282</sup> These codes – named *ritsu-ryo* – introduced a strict social structure based on Confucian values, which mandated specific functions from each social class.<sup>283</sup> It did not impose legal rights and responsibilities on the people, but rather was intended by the government to ensure moral behaviour and values in accordance with Confucian teachings, with punishment inflicted on those who deviated.<sup>284</sup> The *ritsu-ryo* failed to successfully organise the populace and soon it was usurped by powerful, wealthy families and clans acquiring estates and offices through raw militaristic strength.<sup>285</sup> These private estates were known as *shōen*, and their rapid development and increase in both power and ambition soon destabilised the monarchy.<sup>286</sup> Although many Japanese adhered to the Buddhist aversion to violence, private soldiers protected the estates from

<sup>278</sup> D H Foote, 'Citizen Participation: Appraising the Saiban-in System' *Michigan State International Law Review* (2014) 22(3) 755, 756.

<sup>279</sup> See M Levin and E Tice, 'Japan's New Citizen Judges: How Secrecy Imperils Judicial Reform' (2009) 19-06-09 *Asia Pacific Journal* 1.

<sup>280</sup> The Associated Press, 'Lay judge system starts in Japan amid lingering concerns' (pddnet, 20 May 2009) available at <<https://www.pddnet.com/news/2009/05/lead-lay-judge-system-starts-japan-amid-lingering-concerns>> accessed 10 October 2016.

<sup>281</sup> Kyodo News, 'First lay judges hand killer 15-year term' (*The Japan Times*, 7 August 2009), available at <<http://www.japantimes.co.jp/news/2009/08/07/national/first-lay-judges-hand-killer-15-year-term>> accessed 10 October 2016; Kyodo, 'Lay Judge System Reviewed After Auspicious Start' (*The Japan Times*, 30 May 2012) available at <<http://www.japantimes.co.jp/text/nn20120530f2.html>> accessed 30/01/2017.

<sup>282</sup> G Sansom, *Japan: A Short Cultural History* (Cresset Press 1931) 156.

<sup>283</sup> G Sansom, *A History of Japan to 1334* (Stanford University Press 1958) 111.

<sup>284</sup> G Sansom, *A History of Japan to 1334* (Stanford University Press 1958) 111.

<sup>285</sup> R H P Mason and J G Caiger, *A History of Japan: Revised Edition* (Tuttle 1997) 74-75.

<sup>286</sup> G Sansom, *A History of Japan to 1334* (Stanford University Press 1958) 103-107.

attacks by neighbouring clans, leading to the emergence of a powerful new social class – the *samurai*.<sup>287</sup> Due to the reliance of land owners on their protection, *samurai* grew in power, gained control over extensive amounts of land, and eventually challenged the central government for control.<sup>288</sup> Whilst the *samurai* rebelled against both formal law and government authority, their behaviour was regulated by a ‘personal customary law’<sup>289</sup> (*bushidō*), which not only demanded chivalrous and honourable behaviour but also fulfilment of their responsibilities and duties.<sup>290</sup> Their fealty to their overlord was ensured by rewards of money and land, and in return the *samurai* owed their lord *on*, which became a core value of Japanese society which everyone owed to their superiors.<sup>291</sup>

This society of private landowners was shortlived, and several civil wars eventually culminated in the 1192 removal of the emperor as head of state,<sup>292</sup> and the transfer of rule to the highest military rank, *sei-i-tai-shogun*.<sup>293</sup> For the first 150 years of the *shogunate*, the preferred method of dispute resolution was conciliation via representatives,<sup>294</sup> which can be interpreted as an early indication of a preference for harmony over conflict (particularly following years of war), and even a desire to keep disputes out of the public sphere, perhaps to avoid social embarrassment. However, conflict arose again in the 1300s, and continued for almost 300 years until Ieyasu Tokugawa, the head of the powerful Tokugawa family, destroyed his opposition and was granted the title of *shogun*.<sup>295</sup>

### 3.2 The Tokugawa Era (1603 – 1868)

The 250 year rule of the Tokugawa *shogunate* is generally considered to be peaceful,<sup>296</sup> although it came with the almost total isolation of the country,<sup>297</sup> and the ruthless oppression of the lower classes by the nobility.<sup>298</sup> During this period formal, codified law

<sup>287</sup> M Hane and L G Perez, *Modern Japan: A Historical Survey* (5<sup>th</sup> edn, Westview Press 2013) 3.

<sup>288</sup> M Hane and L G Perez, *Modern Japan: A Historical Survey* (5<sup>th</sup> edn, Westview Press 2013) 3.

<sup>289</sup> L Berat, ‘The Role of Conciliation in the Japanese Legal System’ (1992) 8(1) *American University International Law Review* 125, 128.

<sup>290</sup> M Hane and L G Perez, *Modern Japan: A Historical Survey* (5<sup>th</sup> edn, Westview Press 2013) 24.

<sup>291</sup> M Hane and L G Perez, *Modern Japan: A Historical Survey* (5<sup>th</sup> edn, Westview Press 2013) 24.

<sup>292</sup> R H P Mason and J G Caiger, *A History of Japan: Revised Edition* (Tuttle 1997) 130.

<sup>293</sup> This title, often referred to as just ‘*shogun*’, was an existing rank awarded only to those in the upper echelons of the military. Prior to 1192, its holder was permitted to wage war on the Ainu (indigenous people of Japan) in a bid to capture their territory, and the rank was withdrawn from once a campaign was completed. However in 1192, the *shogun*, Yoritomo, was instated with the task of governance to preserve peace throughout Japan, and the position became hereditary. See R H P Mason and J G Caiger, *A History of Japan: Revised Edition* (Tuttle 1997) 130-131.

<sup>294</sup> L Berat, ‘The Role of Conciliation in the Japanese Legal System’ (1992) 8(1) *American University International Law Review* 125, 129.

<sup>295</sup> A Gordon, *A Modern History of Japan: From Tokugawa Times to the Present* (OUP 2019), 11.

<sup>296</sup> R H P Mason and J G Caiger, *A History of Japan: Revised Edition* (Tuttle 1997) 174-175.

<sup>297</sup> In 1639, *shogun* Iemitsu Tokugawa (grandson of Ieyasu Tokugawa) closed Japan off from the rest of the world, only allowing the Dutch and Chinese to trade in Dejima and Nagasaki respectively. This closure also came with banning Western books until 1720, and the country did not re-open its borders until 1853. M Hane and L G Perez, *Modern Japan: A Historical Survey* (5<sup>th</sup> edn, Westview Press 2013) 18.

<sup>298</sup> Ieyasu Tokugawa gave the *samurai* instruction to strike down any commoner who “behaved in a manner other than expected.” - M Hane and L G Perez, *Modern Japan: A Historical Survey* (5<sup>th</sup> edn, Westview Press 2013) 11.

was comprised of four main sources,<sup>299</sup> which were largely republications of the Hojo Institutes of Judicature, themselves written during the 13<sup>th</sup> century.<sup>300</sup> These rules were generally advisory in nature, guiding magistrates and judges on morality in their work, and not intended either to overrule or replace the existing customary law.<sup>301</sup> Although the Tokugawa legal system had codified law and an organised court structure, no single set of laws applied to the whole country.<sup>302</sup> Instead the unifying ideology manifested through adherence to Confucian values that in turn underpinned social and cultural norms, resulting in a disconnect between Tokugawa Japan's formal legal structures and the social practices of law and regulation. As such, Tokugawa laws reflected no conception of individual rights, and much of everyday behaviour and private law interactions was regulated by social custom.<sup>303</sup>

In accordance with Confucian philosophy, *Tokugawa* society was characterised by a rigidly hierarchical class structure that could not be transgressed,<sup>304</sup> and that was reinforced by strict geographical limitations.<sup>305</sup> This inflexible class structure was also upheld by the legal system; for example, although no formal restriction existed until the middle of the 18<sup>th</sup> century,<sup>306</sup> those from inferior social classes could not bring a suit against those in superior classes except under very limited circumstances.<sup>307</sup> This fixed social class structure, coupled with the geographical and political isolation of *Tokugawa* Japan, led to stasis: there was no (obvious need for) legal reform and thus formal laws remained almost completely unchanged.<sup>308</sup> Relationships were between social classes rather than individuals,<sup>309</sup> and individual was identified and regulated by their social class, and then their family or group<sup>310</sup> – indeed, the individual alone had no legal standing outside of their family.<sup>311</sup> The family unit therefore became the elemental unit of society, beyond which came the *mura* (village) – a close community reliant on one another to

<sup>299</sup> These sources were 1) *Kuge Hoshiki* (code for Imperial Court Nobles, enacted 1615), 2) *Buke Shohatto* (codes for the ruling warrior classes, enacted 1615) and *Shoshi Hatto* (for lower warrior classes, enacted 1632), 3) *Kosatsu* (laws for commoners, consisting of required and prohibited conduct, enacted 1711), and 4) *O-Sadame-Gaki Hyakkajo* (Edicts of 100 Articles, guidance for officials on criminal issues and proceedings, enacted 1742). A more detailed summary is given in D F Henderson, 'Some Aspects of Tokugawa Law' (1952) 27(1) *Washington Law Review* 83, 90; J C Hall, *Japanese Feudal Laws, Part III: The Tokugawa Legislation* (The Asiatic Society of Japan 1912), 272-285.

<sup>300</sup> D F Henderson, 'Some Aspects of Tokugawa Law' (1952) 27(1) *Washington Law Review* 83, 90.

<sup>301</sup> J C Hall, *Japanese Feudal Law: The Institutes of Judicature* (The Asiatic Society of Japan 1906).

<sup>302</sup> D V Botsman, 'Politics and Power in the Tokugawa Period' (1992) 3 *East Asian History* 1, 2.

<sup>303</sup> D F Henderson, 'Some Aspects of Tokugawa Law' (1952) 27(1) *Washington Law Review* 83, 91.

<sup>304</sup> D V Botsman, 'Politics and Power in the Tokugawa Period' (1992) 3 *East Asian History* 1, 6.

<sup>305</sup> A Gordon, *A Modern History of Japan: From Tokugawa Times to the Present* (OUP 2019), 9; D F Henderson, 'Contracts' in Tokugawa Villages' (1974) 1(1) *The Journal of Japanese Studies* 51, 57.

<sup>306</sup> This was eventually codified in Article 65 of the *Kujikata Osadamegaki* (公事方御定書), first introduced in 1742. This Article stated that a person who falsely accused their master or parents would be crucified. In cases involving the government, an investigation would be ordered, and where the accusations were found to be true, both the petitioner and the accused would be subject to punishment. For further details, see J Hall, *Japanese Feudal Law* (University Publications of America 1979) 223-4; Y Noda, *Introduction to Japanese Law* (University of Tokyo Press 1976) 31-39.

<sup>307</sup> L Berat, 'The Role of Conciliation in the Japanese Legal System' (1992) 8(1) *American University International Law Review* 125, 136.

<sup>308</sup> H Ooms, *Tokugawa Village Practice: Class, Status, Power, Law* (University of Washington Press 1996) 125.

<sup>309</sup> L Berat, 'The Role of Conciliation in the Japanese Legal System' (1992) 8(1) *American University International Law Review* 125, 130.

<sup>310</sup> J W Hall, 'Rule by Status in Tokugawa Japan' (1974) 1(1) *The Journal of Japanese Studies* 39, 45.

<sup>311</sup> J Hall, *Japan: From Prehistory to Modern Times* (Delacorte Press 1970) 359.

survive natural disasters, emergencies, and tax imposed by the ruling classes.<sup>312</sup> Around eighty per cent of the population of Tokugawa Japan lived in villages, which were almost completely self-governing on civil matters.<sup>313</sup> This self-governance manifested in the use of social custom to resolve disputes – which once more displayed a preference for reconciliation over violence in order to preserve ‘harmonious relationships’<sup>314</sup> – and often departed from the prescription of formal law.<sup>315</sup> Individuals within the village could rely on their neighbours for help,<sup>316</sup> however non-adherence to group values on the part of an individual or the perpetration of a crime by an individual led to physical and social exclusion – a practice that still enforces compliance in contemporary Japan.<sup>317</sup>

Group belonging and collective responsibility were essential to maintaining social order; occupants of villages were organised in to ‘five-man groups’, with all members of the group subject to punishment for the actions of a single member.<sup>318</sup> Collective responsibility was reinforced further through the practice of holding the family and community members of a convicted person as also responsible for their crime, and punishing them along with the perpetrator.<sup>319</sup> Custom meant that responsibility fell especially heavily on fathers who, as the head of the household, were responsible and accountable for the actions of their family and villagers under their authority.<sup>320</sup> Even now collective responsibility remains a strong normative motivator in contemporary Japan: this value is instilled from an early age and fortified throughout childhood and adolescence through responsibilities in the family home and in school.<sup>321</sup> Although there has been some erosion of this group-based consciousness in urban centres such as

<sup>312</sup> Y Zhang, ‘The Inheritances and Variation of Confucian Family Culture – Concept of Family Household and Group Consciousness in Japanese Social Culture’ (2017) 82 *Advances in Computer Science Research* 960, 963.

<sup>313</sup> D F Henderson, ‘“Contracts” in Tokugawa Villages’ (1974) 1(1) *The Journal of Japanese Studies* 51, 58-60.

<sup>314</sup> H G Wren, ‘The Legal System of Pre-Western Japan’ (1968) 20 *Hastings Law Journal* 217, 221.

<sup>315</sup> An example of this is presented in the management of adultery cases – instead of adhering to the written law, which gave a husband the right to kill his unfaithful wife and her lover, disputes would be settled privately through payment, demonstrating both a preference for peaceful settlement and avoidance of the expensive and difficult process of petitioning their case to the courts – A Stanley, ‘Adultery, Punishment and Reconciliation in Tokugawa Japan’ (2007) 33(2) *The Journal of Japanese Studies* 309, 325-327.

<sup>316</sup> More specifically, the whole village would be willing to help one of their members with any of the traditional “Village Eight”, a collection of ten tasks and eight sanctions. The ten cases are birth, adult ceremonies, marriage, visiting an ill patient, funerals, religious rites, fire, flood, travel, and building. Should a villager commit a transgression against the village, they and their family would be effectively cast out, and cut off from help with the ten cases, except for fire and funerals. See Y Zhang, ‘The Inheritances and Variation of Confucian Family Culture – Concept of Family Household and Group Consciousness in Japanese Social Culture’ (2017) 82 *Advances in Computer Science Research* 960, 963; Come and Haley explain that these sanctions of exclusion and ostracisation were for the *murahachibu* (eight parts village), eight aspects of life that were based in community - P H Come, ‘The Influence of Traditional Normative Mechanisms of Behaviour on the Japanese Legal System’ (1990) 12 *Sydney Law Review* 346, 347; J O Haley, ‘The Role of Law in Japan: A Historical Perspective’ (1984) 18 *Kobe University Law Review* 1, 12.

<sup>317</sup> J O Haley, ‘Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions’ (1982) 8 *Journal of Japanese Studies* 265, 275-9; D J Gibbons, ‘Law and the Group Ethos in Japan’ (1992) 3 *International Legal Perspectives* 98, 109; J O Haley, ‘Dispute Resolution in Japan: Lessons in Autonomy’ (1991) 17 *Canada-US Law Journal* 443, 447.

<sup>318</sup> J Leavell, ‘The policing of society’ in H Conroy, S T W Davis, and W Patterson (eds.), *Japan in Transition: Thought and Action in the Meiji Era* (Fairleigh Dickinson University Press 1984), 23.

<sup>319</sup> D V Botsman, ‘Politics and Power in the Tokugawa Period’ (1992) 3 *East Asian History* 1, 6.

<sup>320</sup> G Sansom, *Japan: A Short Cultural History* (Cresset Press 1931) 357-358; D F Henderson, ‘Some Aspects of Tokugawa Law’ (1952) 27(1) *Washington Law Review* 83, 104-105.

<sup>321</sup> See generally L Peak, ‘Learning to Become Part of the Group: The Japanese Child’s Transition to Preschool Life’ in H Shimizu and R A Levine (eds), *Japanese Frames of Mind: Cultural Perspectives on Human Development* (Cambridge University Press 2001).

Tokyo,<sup>322</sup> and in terms of Japan's aging (and increasingly isolated) population,<sup>323</sup> significant emphasis is still placed on group living and responsibility for others.<sup>324</sup> Students are organised in to 'han' – groups of four or five – as soon as they enter elementary school at six years old, carrying out tasks together and being encouraged to be responsible for one another.<sup>325</sup> Similarly to the five-man groups in *mura*, if one member of the *han* breaks the rules or stands out in any way, all members of the group are punished,<sup>326</sup> a practice that not only incentivises students to think of others before they act but also facilitates in-group 'policing' so that the other students act appropriately.<sup>327</sup>

As mentioned previously, the class structure, emphasis on family, and group consciousness and belonging all arose from observance of Confucian values. Loyalty to and compassion for others were primary values, while harmonious relationships were regarded as the route to achieving *jen* – 'a state of consciousness reflecting the individual's compassion'.<sup>328</sup> *Jen* was so important that it was prioritised over everything else in dispute resolution. Importantly, this was not just between individuals – the ability to restore and maintain harmonious relationships was crucial to the reputations of village leaders and directly impacted their standing in government.<sup>329</sup> Conciliation thus had many benefits,<sup>330</sup> including upholding the autonomy of the parties and minimising

<sup>322</sup> Jiji, 'Record 33 percent of Japanese put individual interests first' (*The Japan Times*, 9 April 2016), available at <<https://www.japantimes.co.jp/news/2016/04/09/national/record-33-percent-of-japanese-put-individual-interests-first/#.XWUQhSNKiUk>> accessed 21 August 2019; M Osumi, 'Many of Japan's growing number of singles claim they are comfortable facing death alone' (*The Japan Times*, 14 June 2018), available at <<https://www.japantimes.co.jp/news/2018/06/14/national/social-issues/many-japans-growing-number-singles-claim-comfortable-facing-death-alone/#.XWUQnSNKiUk>> accessed 21 August 2019; M Hoffman, 'Solitude appears to have an image problem in Japan' (*The Japan Times*, 11 August 2018), available at <<https://www.japantimes.co.jp/news/2018/08/11/national/media-national/solitude-appears-image-problem-japan/#.XWURWiNKiUk>> accessed 21 August 2019.

<sup>323</sup> R Yoshida, 'Japan census report shows surge in elderly population, many living alone' (*The Japan Times*, 29 June 2016), available at <<https://www.japantimes.co.jp/news/2016/06/29/national/japan-census-report-shows-surge-elderly-population-many-living-alone/#.XWUbmCNKiUk>> accessed 21 August 2019; Editorials, 'Rising numbers of elderly people are living alone' (*The Japan Times*, 3 May 2019), available at <<https://www.japantimes.co.jp/opinion/2019/05/03/editorials/rising-numbers-elderly-people-living-alone/#.XWUQlyNKiUk>> accessed 21 August 2019.

<sup>324</sup> Kyodo, 'Collective homes a solution for those in Japan who don't want to live alone' (*The Japan Times*, 30 August 2016), available at <<https://www.japantimes.co.jp/news/2016/08/30/national/social-issues/collective-homes-solution-japan-dont-want-live-alone/#.XWURYSNKiUk>> accessed 21 August 2019.

<sup>325</sup> C C Lewis, 'Fostering social and intellectual development: the roots of Japanese educational success' in T P Rohlen and G K LeTrendre (eds), *Teaching and Learning in Japan* (Cambridge University Press 1995), 87-88; J Singleton, 'The Tightly Regulated "Independence" of Japanese Children' (*Nippon.com*, 21 November 2015), available at <<https://www.nippon.com/en/nipponblog/m00096/the-tightly-regulated-independence-of-japanese-children.html>> accessed 21 August 2019.

<sup>326</sup> Interestingly, discipline in elementary schools often takes the form of 'appealing to feelings', such as telling children that their actions would make others upset, and reminding them of their responsibility to their school community - C C Lewis, 'Fostering social and intellectual development: the roots of Japanese educational success' in T P Rohlen and G K LeTrendre (eds), *Teaching and Learning in Japan* (Cambridge University Press 1995), 89-90.

<sup>327</sup> I Ushiku, 'Group responsibility drawback' (*The Japan Times*, 2 August 2012), available at <<https://www.japantimes.co.jp/opinion/2012/08/02/reader-mail/group-responsibility-drawback/#.XWUdfCNKiUk>> accessed 21 August 2019.

<sup>328</sup> L Berat, 'The Role of Conciliation in the Japanese Legal System' (1992) 8(1) *American University International Law Review* 125, 130.

<sup>329</sup> D F Henderson, 'Some Aspects of Tokugawa Law' (1952) 27(1) *Washington Law Review* 83, 98-99.

<sup>330</sup> Yoshiro Hiramatsu summarises these advantages: '(1) legal sentiment favored a particular concrete solution over a legalistic determination; (2) priority of community custom and discipline; (3) confucianistic ideas of respecting harmony in social discipline; (4) lack of development in the private law; (5) lack of facilities and efficiency in the hearing agencies; (6) the Shogunate's policy of non-interference with its territorial interests.' – Y Hiramatsu, 'Tokugawa Law' (1981) 14 *Law in Japan* 1 (D F Henderson trs.), 37-38.

resentment following the resolution of the dispute.<sup>331</sup> With a view to maintaining harmony within the community, disputes would only be referred to the *Tokugawa* courts as a last resort – indeed, this conflict-aversion is easily observed in the common contemporary Japanese practice of avoiding litigation.<sup>332</sup>

Although there was little interference from the *Tokugawa* authorities on civil disputes, there was considerable regulation on criminal matters. The eighth *shogun*, Yoshimune Tokugawa, created the *Hyakkajō* (One Hundred Articles), which listed crimes and corresponding punishments.<sup>333</sup> This constituted a penal code of sorts, which was intended to be the sole source of legal guidance when *daimyo* (local lords) were governing their regions.<sup>334</sup> Punishments were determined by the nature of the crime, and the convicted person's social class,<sup>335</sup> And a gruesome array of violent physical punishments was used: flogging,<sup>336</sup> mutilation (such as removing an ear or finger),<sup>337</sup> and execution, by methods such as beheading or the infamous *haritsuke*, which guaranteed a slow and painful death.<sup>338</sup> The the severity and brutality of punishments inflicted on those convicted of crimes further compelled obedience from the populace, not least because social groupings meant that that others would almost certainly be sanctioned for the transgressions of an individual; in this manner, the Tokugawa punishment regime further established collective responsibility as a highly effective tool of social control. This reliance on social groupings, and the individual's lack of legal status and inability to survive alone, also meant that banishment was one of the severest modes of punishment<sup>339</sup> – this effectively removed the individual from society, meaning that they could not rely on others for either support or protection.<sup>340</sup> To remind the populace of the sanctions that awaited them if they disobeyed, fatal and non-fatal punishments were

<sup>331</sup> Y Hiramatsu, 'Tokugawa Law' (1981) 14 *Law in Japan* 1 (D F Henderson trs.), 38.

<sup>332</sup> See K Funken, 'Alternative Dispute Resolution in Japan' (2003) 24 *University of Munich School of Law Working Paper* 1, available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=458001](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=458001)>.

<sup>333</sup> Y Hiramatsu, 'Tokugawa Law' (1981) 14 *Law in Japan* 1 (D F Henderson trs.) 5.

<sup>334</sup> D V Botsman, *Punishment and Power in the Making of Modern Japan* (Princeton University Press 2005) 15.

<sup>335</sup> Punishments differed depending on social class – there were different punishments for *samurai*, Buddhist priests, peasants, and women. A separate system of punishment was applied to outcasts - D V Botsman, 'Politics and Power in the Tokugawa Period' (1992) 3 *East Asian History* 1, 6.

<sup>336</sup> N Umemori, 'Politics of Flogging: The Making of Japanese Colonial Governmentality' (2006) 363 *The Waseda Journal of Political Science and Economics* 37, 37, 39.

<sup>337</sup> D V Botsman, *Punishment and Power in the Making of Modern Japan* (Princeton University Press 2005) 14.

<sup>338</sup> *Haritsuke* involved the convicted being tied to a post, speared with lances, and left to die over several hours. It was used to punish the crimes considered most severe in Tokugawa society: '1) Persons who murder their master; 2) Persons who murder their parents; 3) Persons who pay money to adopt an unwanted child and then commit infanticide; 4) Persons who injure their former master; 5) Women who secretly arrange to have their husbands murdered; 6) Persons who are involved in serious plots [against the authorities]; 7) Persons who injure their master; 8) Persons who murder their former master; 9) Persons who break through checkpoints; 10) Persons who help another to break through a check-point; 11) Persons who produce counterfeit money; 12) Persons who murder a doctor; 13) Persons who injure or beat their parents; 14) Persons who falsely accuse their master or parents of a serious crime and seek to have a law suit brought against them.' – K Kyokai, *Manuscript for history of Japanese prison administration in modern age*, Vol. 1 (Tokyo 1943), 720, in D V Botsman, 'Politics and Power in the Tokugawa Period' (1992) 3 *East Asian History* 1, 5.

<sup>339</sup> H Ooms, *Tokugawa Village Practice: Class, Status, Power, Law* (University of Washington Press 1996) 229.

<sup>340</sup> D V Botsman, *Punishment and Power in the Making of Modern Japan* (Princeton University Press 2005) 15.

highly visible and dramatic, with the bodies of criminals displayed in prominent places throughout the village, such as market places and major roads.<sup>341</sup>

By contrast to these capital and corporal punishments, incarceration was rare, and often took the form of house arrest<sup>342</sup> – and although there were a few prison-like institutions (the *rōya*), these only held between three and four hundred inmates on average across the Tokugawa period.<sup>343</sup> In fact, Japan's first prison institution, modelled on Western jailhouses and with room for over a thousand prisoners, was not completed until 1879.<sup>344</sup> Although many of the Tokugawa punishment practices are now obsolete, we can surmise that there is a distant memory of these harsh punishments that contributes to the low rate of crime in contemporary Japan. Similarly, and although there are a number of prison facilities across Japan, incarceration is still used as a last resort, often for repeat offenders and those who pose a danger to society. Within prison walls, strict conditions are imposed upon inmates including silence during work and meal-times, and exact adherence to the schedule of the day and instructions given by prison officers.<sup>345</sup> Failure to obey the rules results in punishment, such as beatings and extended periods of solitary confinement,<sup>346</sup> reflecting some of the harshness of *Tokugawa* punishment regimes<sup>347</sup> and these practices have been internationally condemned.<sup>348</sup> Japan has also retained the death penalty, which has popular national support,<sup>349</sup> while also being subject to criticisms for its continued violation of human rights,<sup>350</sup> its secrecy, and lack of

<sup>341</sup> D V Botsman, 'Politics and Power in the Tokugawa Period' (1992) 3 *East Asian History* 1, 3-4.

<sup>342</sup> D V Botsman, 'Politics and Power in the Tokugawa Period' (1992) 3 *East Asian History* 1, 8.

<sup>343</sup> Y Hiramatsu, 'History of Penal Institutions: Japan' (1973) 6 *Law in Japan* 1, 1-2.

<sup>344</sup> D V Botsman, *Punishment and Power in the Making of Modern Japan* (Princeton University Press 2005) 174.

<sup>345</sup> Fuchu Prison Regulations, available at Journalism Works Project (9 December 1999) 'Documents Detailing the Japanese Prison System: Prison Regulations' (*Fuchu Prison Regulations*) <[http://www.journalismworksproject.org/Japanese-Prisons-CD/cjsystem/behind\\_bars/1999/12/09/japan/documents/index.html](http://www.journalismworksproject.org/Japanese-Prisons-CD/cjsystem/behind_bars/1999/12/09/japan/documents/index.html)> accessed 10 August 2017.

<sup>346</sup> According to Vize's research, inmates can be punished for 'sitting or standing the wrong way in one's cell, such as leaning against the walls or pacing; putting an object in the wrong place in one's cell; failing to sleep in the prescribed manner, such as covering one's face, sleeping on one's stomach, or getting out of bed before the wake-up call; talking outside of designated times; and making eye contact with other inmates,' J Vize, 'Torture, Forced Confessions, and Inhuman Punishments: Human Rights Abuses in the Japanese Penal System' (2003) 20(2) *Pacific Basin Law Journal* 329, 336-337.

<sup>347</sup> The range of punishments, according to the 1979 Fuchu Prison rules, is as follows: '1) Reprimand; 2) Suspension of rewards for three months or less; 3) Abolition of reward; 4) Prohibition of reading, writing and drawing for three months or less; 5) Suspension of voluntary labor for ten days or less; 6) Suspension of the use of self-supplied clothing and bedding; for fifteen days or less; 7) Suspension of procuring extra food for fifteen days or less; 8) Suspension of exercise for five days or less; 9) Whole or partial deprivation of the calculated amount of remuneration; 10) Reduction of food for seven days or less; 11) Minor solitary confinement for two months or less,' Fuchu Prison Rules, 1979, cited in Human Rights Watch/Asia, Human Rights Watch Prison Project, 'Prison Conditions in Japan' (*Human Rights Watch* 1995) 30-31.

<sup>348</sup> Amnesty International, 'Amnesty International Report 2009: The State of the World's Human Rights' (*Amnesty International* 2009) 190-191.

<sup>349</sup> M Suzuki, 'Cruel, secretive and politically popular: Japan's death penalty' (*The Japan Times*, 12 September 2018), available at <<https://www.japantimes.co.jp/news/2018/09/12/national/social-issues/cruel-secretive-politically-popular-japans-death-penalty/#.XVvi8iNKiUk>> accessed 20 August 2019.

<sup>350</sup> At the time of writing, Japan executed two death row inmates on 2 August 2019: S Murakami, 'Hangings carried out for two Japanese death row inmates convicted of multiple rape-murders' (*The Japan Times*, 2 August 2019), available at <<https://www.japantimes.co.jp/news/2019/08/02/national/japan-executes-two-death-row-inmates-first-executions-since-last-december/#.XVvWxRyNKiUk>> accessed 20 August 2019. This was immediately condemned by Amnesty International: 'While the rest of the world increasingly turns its back on the death penalty, Japan remains stuck in the past by continuing with this ultimate cruel and irreversible punishment.' – Amnesty International, 'Japan: Two hanged in deplorable move' (*Amnesty International*, 2 August 2019), available at <<https://www.amnesty.org/en/latest/news/2019/08/japan-two-executed/>> accessed 20 August 2019.



advanced scheduling,<sup>351</sup> which causes psychological stress for inmates, their families, and prison guards.<sup>352</sup>

The self-imposed isolation of Japan ended in 1853, with the arrival of Commodore Matthew Perry and four warships from the United States.<sup>353</sup> Commodore Perry delivered a letter from US President Fillmore, demanding that Japan re-open her borders to the rest of the world.<sup>354</sup> By the end of 1858, Japan had signed commercial treaties with the US, the United Kingdom, Russia, and the Netherlands.<sup>355</sup> Referred to as the *Ansei*<sup>356</sup> treaties, these were asymmetric agreements that left Japan in a disadvantageous position both politically and economically. The treaties between Japan and the US, and Japan and Great Britain, enforced terms such as allowing foreign residents to live in the capital, the opening of ports to international trade, and allowing foreigners to live within a 25 mile radius of the capital. This was the beginning of a process of colonialism that so humiliated the Japanese government and threatened the security of the nation that in 1874 it eventually resulted in a unanimous national movement to revoke the treaties and retain independence.<sup>357</sup>

### 3.3 The *Meiji* Restoration (1868 - 1912)

In 1867, following a rebellion led by the regions of Chōshū and Satsuma, the *shogunate* was overthrown and the Emperor reinstated in 1868, a development that heralded the beginning of the *Meiji* era.<sup>358</sup> In resisting domination by the West, the new government, the Diet, sought to modernise the political and legal structures of society. The Diet dispatched scholars overseas to research their legal systems and return with their findings. The organisation and clarity of the French Codes appealed to the Japanese government, and a committee was formed to draft the new codes for Japan, chaired by a French professor, Boissanaide.<sup>359</sup> While a translation of the French Code was requested and delivered, this was ultimately not used;<sup>360</sup> instead Boissonade and his

<sup>351</sup> Reuters, 'Capital punishment in Japan: Unscheduled executions and hangings witnessed only by prison officials and a priest' (*The Japan Times*, 6 July 2018), available at <<https://www.japantimes.co.jp/news/2018/07/06/national/crime-legal/executions-japan-backed-80-public-2015-government-survey-found/#.XVvi8iNKiUk>> accessed 20 August 2019.

<sup>352</sup> M Suzuki, 'Cruel, secretive and politically popular: Japan's death penalty' (*The Japan Times*, 12 September 2018), available at <<https://www.japantimes.co.jp/news/2018/09/12/national/social-issues/cruel-secretive-politically-popular-japans-death-penalty/#.XVvi8iNKiUk>> accessed 20 August 2019.

<sup>353</sup> M Hane and L G Perez, *Modern Japan: A Historical Survey* (5<sup>th</sup> edn, Westview Press 2013) 64.

<sup>354</sup> W G Beasley, *The Meiji Restoration* (Stanford University Press 1972) 88-89.

<sup>355</sup> These treaties included the Convention between the United States of America and Japan, Regulating the Intercourse of American Citizens with Japan (17 June 1857); Treaty of Amity and Commerce, United States-Japan (29 July 1858); Treaty of Peace, Amity and Commerce, Great Britain-Japan, (26 August 1857); Treaty of Commerce and Navigation between Japan and Russia (7 February 1855); Dutch-Japan Treaty of Peace and Amity (30 January 1856); Additional Articles to the Treaty between The Netherlands and Japan of 1856 (16 October 1857).

<sup>356</sup> M Anderson, *Japan and the Specter of Imperialism* (Palgrave Macmillan 2009) 4-8, 12-13.

<sup>357</sup> E Bertolini, 'Western and Japanese Constitutional Thought in the Shaping of the Role of the Japanese Emperor in the 1889 and 1946 Constitutions' (2018) 19 *Historica Constitucional* 641, 642.

<sup>358</sup> H G Wren, 'The Legal System of Pre-Western Japan' (1968) 20 *Hastings Law Journal* 217, 220-221.

<sup>359</sup> K Takayanagi, 'A Century of Innovation: The Development of Japanese Law, 1868-1961', in A T von Mehren (ed), *Law In Japan: The Legal Order In A Changing Society* (Harvard University Press 1963) 27-31.

<sup>360</sup> K Takayanagi, 'A Century of Innovation: The Development of Japanese Law, 1868-1961', in A T von Mehren (ed), *Law In Japan: The Legal Order In A Changing Society* (Harvard University Press 1963) 27-31.

committee set to work on provisions for criminal and property law, which were adapted and accepted by the Diet in 1891. Implementation was delayed, however, due to arguments from Japanese lawyers about the lack of social and cultural suitability of the measures and, after two years, a new committee was appointed that departed from the French Code and instead drew inspiration from the German *Bürgerliches Gesetzbuch* Civil Code. The five-book code was implemented in 1898 and had at its core provisions from the German Civil Code, augmented by the work of Boissonade and his committee and supplemented with insights drawn from several other European systems.<sup>361</sup>

Among the most prominent of the laws enacted by the Diet during the *Meiji* era were the Family Registration Law 1871 and the Election Law for the House of Commons (1945). The Family Registration Law created a nationwide census and required citizens to be recorded as part of a family unit – only those who were so recorded could vote in and submit candidacy for elections.<sup>362</sup> Both pieces of legislation were enacted with the intention of building a democratic state in post-feudal Japan, yet were only implemented in Japan's 'home islands'.<sup>363</sup> The intention being this restricted implementation was to exclude as many colonial subjects as possible from Japanese democratic processes, further evidencing the renewed and continuing reluctance of Japanese authorities to concede power to outsiders.<sup>364</sup> This family registration system (referred to as the *koseki*), which records family members, serves as a source of official documentation for identity and status, and ingrains the conception of family as something generated through blood ties that is still strong in contemporary Japan.<sup>365</sup> The *koseki* serves an additional purpose through its commission of documents, that is, as an intermediary that allows citizens to avoid court processes for divorce and child custody,<sup>366</sup> and thus facilitates legal remedies while avoiding courtroom conflict and maintaining amicable and harmonious relationships.

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<sup>361</sup> Other systems that were considered included Austria, Belgium, California, Montenegro, the Netherlands, Portugal, Russia, Saxony, Spain and Zurich - L Berat, 'The Role of Conciliation in the Japanese Legal System' (1992) 8(1) *American University International Law Review* 125, 140.

<sup>362</sup> C Hahm and S H Kim, 'To make "We the People": Constitutional founding in postwar Japan and South Korea' (2010) 8 *International Journal of Constitutional Law* 800, 841.

<sup>363</sup> This excluded territories including Korea, China, Manchuria and Indonesia, colonised by Japan between 1894 – 1931 – K E Taylor, 'Japan: Colonization and settlement' (*The Encyclopedia of Global Human Migration*, 4 February 2013), available at <<https://onlinelibrary.wiley.com/doi/full/10.1002/9781444351071.wbeghm319>>; A Dudden, *Japan's Colonization of Korea: Discourse and Power* (University of Hawai'i Press 2005), 2-3.

<sup>364</sup> This phenomena is sometimes referred to as '*nihonjinron*' – meaning 'Japanese uniqueness'. This quality encompasses both national and ethnic identity and although the term is now used less frequently, it helps to provide insight in to the national unity in identity sought by Japanese in the *Meiji* Era - Y Sugimoto, 'Making Sense of Nihonjinron' (1999) 57 *Thesis Eleven* 81; H Cortazzi, 'Japan's prickly revisionists' (*The Japan Times*, 14 April 2015), available at <<https://www.japantimes.co.jp/opinion/2015/04/14/commentary/japan-commentary/japans-prickly-revisionists/#.XWVUQyNKiUk>> accessed 21 August 2019.

<sup>365</sup> P Brasor, 'Japan's rigid *koseki* system keeps it all in the family' (*The Japan Times*, 4 August 2018), available at <<https://www.japantimes.co.jp/news/2018/08/04/national/media-national/japans-rigid-koseki-system-keeps-family/#.XWUcdSNKiUk>> accessed 21 August 2019.

<sup>366</sup> C P A Jones, 'Japan's *koseki* system: dull, uncaring but terribly efficient' (*The Japan Times*, 22 June 2016), available at <<https://www.japantimes.co.jp/community/2016/06/22/issues/japans-koseki-system-dull-uncaring-terribly-efficient/#.XWUcYSNKiUk>> accessed 21 August 2019.

In 1881, constitutional development began and was initially modelled after both Prussian and French examples,<sup>367</sup> and the *Meiji* Constitution was adopted in November 1890.<sup>368</sup> In a significant departure from the *Tokugawa* era's treatment of its citizens, the Constitution enabled the Emperor to confer rights on those who had been born without them. It did, however, declare the Emperor's divinity, re-establishing him as a supreme sovereign leader<sup>369</sup> with no input from the populace;<sup>370</sup> in such a manner it thus vested considerable sovereign power in the State, and none in the people,<sup>371</sup> this latter on the grounds that delegation of political power to the masses would weaken the State at a time when strength was most needed.<sup>372</sup> Despite the formalistic, top-down nature of the *Meiji* Constitution, it did embed traditions of seeking out conciliation to resolve disputes, and created a judiciary that was little more than presentational as they oversaw few cases and interpreted the law so as to maintain power in the State.<sup>373</sup> In addition to the judiciary,<sup>374</sup> the *Meiji* Constitution created executive<sup>375</sup> and legislative<sup>376</sup> branches, including the Diet, but did not replicate the separation of powers that was common to Western systems.<sup>377</sup>

An overhaul of the court system followed swiftly after the 1890 adoption of the Constitution, and the court structure similarly followed the German example; in addition to the establishment of the *Daishinin* (Supreme Court) in 1875, the Court Organisation Law was drafted by a German jurist, Otto Rudolph, coming into force in 1890.<sup>378</sup> However, despite a well-organised court system and a proficient judiciary, the populace retained a preference for historical conciliatory dispute resolution for civil matters,<sup>379</sup> which was considered to be less expensive and more convenient than the new court system; and which had worked well in the past, ensuring that issues were resolved quickly, fairly, and peacefully – something that the court system could not guarantee. In response to this situation the Justice Ministry further encouraged recourse to conciliation by introducing the *kankai* procedure,<sup>380</sup> offering dispute resolution methods modelled

<sup>367</sup> G M Beckmann, *The Making of the Meiji Constitution* (University of Kansas Press 1957) 66-68.

<sup>368</sup> S Falsafi, 'Civil Society and Democracy in Japan, Iran, Iraq and Beyond' (2010) 43 *Vanderbilt Journal of Transnational Law* 357, 362.

<sup>369</sup> National Diet Library, 'The Constitution of the Empire of Japan: Birth of the Constitution of Japan' (3 May 2004), available at <<http://www.ndl.go.jp/constitution/e/etc/c02.html>> accessed 21 August 2019.

<sup>370</sup> K Takami, 'From Divine Legitimacy to the Myth of Consensus: The Emperor System and Popular Sovereignty' in Y Higuchi (eds.), *Five Decades of Constitutionalism in Japanese Society* (University of Tokyo Press 2001), 11.

<sup>371</sup> A Gordon, *A Modern History of Japan: From Tokugawa Times to the Present* (Oxford University Press 2003) 92-3.

<sup>372</sup> W G Beasley, *The Rise of Modern Japan: Political, Economic, and Social Change Since 1850* (3rd edn, Weidenfeld & Nicholson 2003) 77.

<sup>373</sup> See generally, G M Beckmann, *The Making of the Meiji Constitution* (University of Kansas Press 1957).

<sup>374</sup> *Meiji Kenpō* [Constitution], Article 5.

<sup>375</sup> *Meiji Kenpō* [Constitution], Article 4.

<sup>376</sup> *Meiji Kenpō* [Constitution], Article 3.

<sup>377</sup> J Maki, 'The Japanese Constitutional Style' (1968) 43(5) *Washington Law Review* 893, 896.

<sup>378</sup> L Berat, 'The Role of Conciliation in the Japanese Legal System' (1992) 8(1) *American University International Law Review* 125, 140.

<sup>379</sup> H See, 'The Judiciary and Dispute Resolution in Japan: A Survey' (1982) 10 *Florida State University Law Review* 339, 345-347.

<sup>380</sup> C Wollschlager, 'Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Legal Culture in Light of Judicial Statistics' in H Baum (eds.), *Japan: Economic Success and Legal System* (Walter de Gruyter 1997)

after *Tokugawa* practices, and implementing measures in 1875 that stated that *Tokugawa* customs would apply to civil suits where there was no alternative law. Even more conciliation procedures were implemented by the Diet in 1922, following conflict between the regulation of the landlord-tenant relationship under formal property law and traditional socio-cultural norms,<sup>381</sup> yet another development that can be seen as validating the continued use of informal normative mechanisms in the regulation of legal relationships.

### 3.4 The Rise of Modern Japan (1912 - 1990)

With a new legal system, constitution, and set of codes, Japan's interaction with the rest of the world rested on her self-portrayal as a Western(-facing) nation. Having participated in World War I through assisting the Allied Forces by attacking and conquering Pacific Islands under German rule, Japan became a member of the League of Nations, and was party to international dealings concerning the retention of control over territory captured during the war.<sup>382</sup> In 1931, Japan invaded Manchuria and, despite criticism from her peers in the League of Nations, continued to colonise more territory in China.<sup>383</sup> These militaristic endeavours caused the Japanese authorities to produce propaganda with a view to promoting a sense of righteousness, maintaining public support, and uniting the nation behind these actions. Although there were little changes to formal legal rules and institutions at this time, Japan's involvement with World War II led to the suspension of jury service in 1943<sup>384</sup>, as more troops were needed for action in overseas in Malaysia, Singapore and Hawai'i. During this time, the government presented Shinto ideology – which considers the Emperor to be a divine leader, directly descended from the sun goddess *Amaterasu Omikami* – as the state religion.<sup>385</sup> This was instilled in the education system by a document – the *Meiji Rescript* – which became the basis of all education institutions and commanded that fealty to the divine Emperor was the 'absolute moral standard for all Japanese subjects.'<sup>386</sup>

Religious values were thus mobilised antagonistically, with Western values presented as 'other' and Japanese society as good and righteous.<sup>387</sup> Other religions within Japan were

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100; M Yoshida, 'The Reluctant Japanese Litigant: A "New" Assessment' (*Electronic Journal of Contemporary Japanese Studies*, 13 October 2003) available at <<http://www.japanesestudies.org.uk/discussionpapers/Yoshida.html>>.

<sup>381</sup> L Berat, 'The Role of Conciliation in the Japanese Legal System' (1992) 8(1) *American University International Law Review* 125, 141.

<sup>382</sup> J L McClain, *Japan: A Modern History* (W W Norton and Company 2002) 335-336.

<sup>383</sup> R H P Mason and J G Caiger, *A History of Japan: Revised Edition* (Tuttle 1997) 266.

<sup>384</sup> This was made possible by the *Baishin Hō no Teishi ni kansuru Hōritsu* [Act on the Suspension of the Jury Act], Law No. 88 of 1943. Article 3 stated that the system would be reintroduced after the war, but did not provide any details on how this would be carried out. See also A Dobrovolskaia, 'Japan's Past Experiences with the Institution of Jury Service' (2010-2011) 12 *Asian-Pacific Law & Policy Journal* 1, 17.

<sup>385</sup> N Takizawa, 'Religion and the State in Japan' (1988) 30 *Journal of Church and State* 89, 96.

<sup>386</sup> W P Woodard, *The Allied Occupation of Japan 1945 – 1952 and Japanese Religions* (E J Brill 1972) 164-165

<sup>387</sup> J A Beckford and N J Demerath, *The Sage handbook of the sociology of religion* (Sage 2007), 699-700; W P Woodard, *The Allied Occupation of Japan 1945 – 1952 and Japanese Religions* (E J Brill 1972) 164-165; A Gordon, *A Modern History of Japan: From Tokugawa Times to the Present* (Oxford University Press 2013) 217-218.

ruthlessly persecuted as a 'threat' to public morals.<sup>388</sup> The Shinto religion quickly exerted an obvious influence upon social and cultural values, and declared that ultimate fealty to the Emperor must be shown, especially by those in military service, through abandoning the self and becoming part of the Emperor.<sup>389</sup> Populations of the West, by comparison, were described as selfish, with individualism being the source of their downfall, and during the early 1940s all Western media, products and other influences, such as borrowed words, were banned in Japan.<sup>390</sup> The 'self-interested' ways of the West were described by the Japanese authorities as a threat to the selfless and proper way of life conducted by the Japanese, while the argument was also made that war was necessary to liberate East from West and rebuild a harmonious Asia.<sup>391</sup>

By contrast, the devastation of the atomic bombing of Hiroshima (6 August 1945) and Nagasaki (9 August 1945), which killed over one million citizens, and the threat of colonisation from the United States left Japan in a state of 'psychological shock'.<sup>392</sup> Emperor Hirohito announced the unconditional surrender of Japan on 14 August 1945 and submitted to the allied Western powers, spearheaded by the Supreme Commander of the Allied Powers (SCAP).<sup>393</sup> Japan was occupied by the Allied Powers from 1945-1952, during which time a series of dramatic changes were imposed, including a ban on maintain armed forces, save for a small defence force,<sup>394</sup> liberalisation of government,<sup>395</sup> labour unionisation,<sup>396</sup> and independence granted to Japan's former colonies.<sup>397</sup> The Emperor was permitted to remain on the Imperial Throne as a figurehead, but was forced to forsake his divine lineage to the throne, thus destabilising a core element of State Shinto, which had been used to unite and control the populace during WWII.<sup>398</sup> These measures stripped Japan of its economic and military power and resulted in a loss of national and spiritual identity.<sup>399</sup> Due to their wartime campaigns, relations with their neighbours in South East Asia were frail, and Japan sought to contribute to the rebuilding of other nations by providing technology.<sup>400</sup> Efforts were focused on rebuilding the nation and re-establishing national identity; Japanese citizens continued to maintain strong

<sup>388</sup> S M Garon, 'State and Religion in Imperial Japan, 1912-1945' (1986) 12(2) *The Journal of Japanese Studies* 237, 299-300.

<sup>389</sup> This idea was called 'one heart, same body' and was proposed by Katsuhiko Kakehi, a legal and philosophical scholar who urged Japanese people to move in to the future as one – W A Skya and R Chow, *Japan's Holy War: The Ideology of Radical Shintō Ultrationalism* (Duke University Press 2009) 190-191, 195.

<sup>390</sup> A Gordon, *A Modern History of Japan: From Tokugawa Times to the Present* (Oxford University Press 2013) 217-218.

<sup>391</sup> A Gordon, *A Modern History of Japan: From Tokugawa Times to the Present* (Oxford University Press 2013) 217-218.

<sup>392</sup> N Takizawa, 'Religion and the State in Japan' (1988) 30 *Journal of Church and State* 89, 105.

<sup>393</sup> H Oda, *Japanese Law* (3rd edn, Oxford University Press 2009) 22.

<sup>394</sup> L G Perez, *The History of Japan* (Greenwood Press 1998), 150-151; 日本國憲法 Nihon-Koku Kenpō (Constitution of Japan), Article 9.

<sup>395</sup> E Takemae, *Allied Occupation of Japan* (A & C Black 2003) 241.

<sup>396</sup> K Henshall, *A History of Japan: From Stone Age to Superpower* (Palgrave Macmillan 2012) 144.

<sup>397</sup> E Takemae, *Allied Occupation of Japan* (A & C Black 2003) 109-111, 249.

<sup>398</sup> K Henshall, *A History of Japan: From Stone Age to Superpower* (Palgrave Macmillan 2012) 147-148.

<sup>399</sup> N Takizawa, 'Religion and the State in Japan' (1988) 30 *Journal of Church and State* 89, 106.

<sup>400</sup> F Quei Quo, 'Japan's Role in Asia: A United States Surrogate?' (1982-3) 38 *International Journal* 251, 253.

group bonds within families, schools and places of employment, placing group needs before individual desires to survive the harsh postwar conditions of the 1940s and 50s.<sup>401</sup>

It was only after regaining confidence and a sense of national identity in the 1960s,<sup>402</sup> and becoming a world economic superpower in the 1970s, that Japan began to reconnect more openly and assuredly with its traditional values and reassert identity in uniqueness and thought.<sup>403</sup> During this time, little had changed by way of the legal system aside from the introduction of the 1947 Constitution,<sup>404</sup> and in the 1990s this stagnation was addressed through the establishment of the Justice System Review Council (JSRC).<sup>405</sup> The core aims of the JSRC were elegantly expressed: to transform the Japanese people from governed objects in to governing subjects, and to develop the civil and criminal justice systems in to ones that better met the needs and expectations of the public.<sup>406</sup> The JSRC proposed a number of reforms to the overall justice system, organised into three pillars: the expansion of the institutional base of the system (speeding up procedures), the expansion of the human base of the system (recruiting more lawyers and judges), and the establishment of a popular base of the system (lay participation).<sup>407</sup> It was through this series of reforms that the contemporary Japanese legal system came into being; the specific institutions, notably the constitution, and features of that legal system will now be analysed in more detail.

### 3.5 Constitution

The current Constitution of Japan came into effect on 3 May 1947, following Japan's defeat in World War II. Unable to resist the power of the Allied Forces due to the devastation wrought by the bombings of Hiroshima and Nagasaki, the Emperor and Diet had little choice but to accept the imposition of a new Constitution, one that was drafted by the Allies, with primary input from the United States.<sup>408</sup> This new Constitution vested sovereignty in the people and enforced the separation of powers.<sup>409</sup> In doing so, it granted all Japanese people enjoyment of fundamental human rights,<sup>410</sup> including equal access to the courts,<sup>411</sup> equal protection under the law,<sup>412</sup> and freedom of thought and

<sup>401</sup> E K Tipton, *Modern Japan* (Taylor & Francis Ltd 2008) 154, 177-180.

<sup>402</sup> N Takizawa, 'Religion and the State in Japan' (1988) 30 *Journal of Church and State* 89, 105.

<sup>403</sup> N Takizawa, 'Religion and the State in Japan' (1988) 30 *Journal of Church and State* 89, 106.

<sup>404</sup> H Oda, *Japanese Law* (3rd edn, Oxford University Press 2009) 22.

<sup>405</sup> M J Wilson, 'The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?' (2007) 24(4) *Wisconsin International Law Journal* 835, 843.

<sup>406</sup> A Dobrovolskaia, *The Development of Jury Service in Japan: a square block in a round hole?* (Routledge 2017) 175.

<sup>407</sup> Judicial System Reform Council, 'Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the 21<sup>st</sup> Century' (12 June 2001), available at <[https://japan.kantei.go.jp/policy/sihou/singikai/990612\\_e.html](https://japan.kantei.go.jp/policy/sihou/singikai/990612_e.html)>.

<sup>408</sup> A C Oppler, *Legal Reform in Occupied Japan: A Participant Looks Back* (Princeton University Press 1975) 43-49.

<sup>409</sup> L Berat, 'The Role of Conciliation in the Japanese Legal System' (1992) 8(1) *American University International Law Review* 125, 144.

<sup>410</sup> 日本國憲法 Nihon-Koku Kenpō (Constitution of Japan), Article 11.

<sup>411</sup> 日本國憲法 Nihon-Koku Kenpō (Constitution of Japan), Article 32.

<sup>412</sup> 日本國憲法 Nihon-Koku Kenpō (Constitution of Japan), Article 14.

conscience.<sup>413</sup> In particular, the United States sought to end authoritarianism in Japan through processes of democratisation and demilitarisation;<sup>414</sup> the most well-known of these measures is Article 9 of the 1947 Constitution, often dubbed the ‘peace clause’.<sup>415</sup> The Constitution has since remained unchanged in the seven decades since its implementation, although in recent years the Diet, under the leadership of current Prime Minister Shinzō Abe, has been debating whether to amend Article 9.<sup>416</sup> This proposed change to the Constitution has been consistently unpopular with the Japanese people,<sup>417</sup> with a series of protests petitioning the Diet to focus on welfare and medicine, rather than working against international efforts to achieve peace.<sup>418</sup> Although the US forces sought to end authoritarianism in Japan and pacify their forces through Article 9, this appears to have been largely unsuccessful due to a general lack of engagement by the Japanese government and citizens with the Constitution. The proposed changes to Article 9, the only constitutional amendment considered in over 70 years, also seem to undermine the US forces’ reasons for imposing the Constitution on Japan in 1947. Whether these amendments will be successfully made remains to be seen, and it is uncertain what effect this will have on Japan’s socio-political and legal identity.

### 3.6 Features

Litigation levels in Japan, although steadily on the increase, are still relatively low compared to other legal systems with large populations. Close and contextual examination reveals how litigation is connected to other relevant factors and how these combine to provide insights into the system’s overall character. The most prominent theories for the low level of litigation are outlined clearly and concisely by Katja Funken<sup>419</sup> as being *traditionalist*, *revisionist*, *rationalist*, and *informalist*. *traditionalist* theories argue that Confucianist values cause Japanese people to avoid litigation;<sup>420</sup> *revisionist* theories argue that there are institutional and financial barriers that prevent access to legal advice

<sup>413</sup> 日本國憲法 Nihon-Koku Kenpō (Constitution of Japan), Article 19.

<sup>414</sup> J Hall, *Japan: From Prehistory to Modern Times* (Delacorte Press 1970) 351-352.

<sup>415</sup> 日本國憲法 Nihon-Koku Kenpō (Constitution of Japan), Article 9 states “Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized”.

<sup>416</sup> Jiji, ‘Abe calls for constitutional amendments proposals to be debated in Diet’ (*The Japan Times*, 8 July 2019), available at <<https://www.japantimes.co.jp/news/2019/07/08/national/politics-diplomacy/abe-calls-constitutional-amendments-proposals-debated-diet/#.XVwbbiNKiUk>> accessed 20 August 2019.

<sup>417</sup> Kyodo, ‘Poll shows that 56% of Japanese oppose amending Constitution under Abe government’ (*The Japan Times*, 24 July 2019), available at <<https://www.japantimes.co.jp/news/2019/07/24/national/politics-diplomacy/56-japanese-oppose-amending-constitution-abe-government-poll-shows/#.XVwcCyNKiUk>> accessed 20 August 2019.

<sup>418</sup> The Asahi Shimbun, ‘18,000 protest constitutional revision in front of Diet building’ (*The Asahi Shimbun*, 4 November 2018), available at <<http://www.asahi.com/ajw/articles/AJ201811040022.html>> accessed 21 August 2019.

<sup>419</sup> See K Funken, ‘Alternative Dispute Resolution in Japan’ (2003) 24 *University of Munich School of Law Working Paper* 1, available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=458001](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=458001)> 4-5.

<sup>420</sup> See T Kawashima, ‘Dispute Resolution in Contemporary Japan,’ in A T von Mehren (ed), *Law in Japan: The Legal Order in a Changing Society* (Cambridge: Harvard University Press, 1963); Y Noda, *Introduction to Japanese Law* (University of Tokyo Press 1976) 181.

and the courts;<sup>421</sup> rationalist theories claim that Japanese are rational in their choices to litigate – being well-educated and knowledgeable on their legal system, they choose a path of least expense and most efficiency to resolve their disputes;<sup>422</sup> while informalist theories argue that the role of law in Japan is informal, with its main functions being to suppress the populace and dissipate political tension.<sup>423</sup> These competing theories have all received considerable evaluation and critique, but this thesis argues that no one theory is more correct than the others – a single explanation does not reflect the complexity of the situation. A combination of these theories is a better way of explaining the low incidence of litigation, and how several disincentives are present when individuals are facing the decision on whether or not to litigate. This combination of theories reflects the contextualised approach to understanding the Japanese legal system that this thesis presents – that formal law and socio-cultural norms have simultaneous operation and influence in every life.

Beyond the popular theories explaining low litigation, alternative dispute resolution continues to be popular in contemporary Japan. The three main methods of alternative dispute resolution available are *chotei* (conciliation), *wakai* (compromise) and *chusai* (arbitration).<sup>424</sup> Conciliation, as mentioned above, has a long history in Japan, with the result that measures have been built in to the contemporary legal system to ensure this traditional practice is maintained. Notably in this regard, and despite the population of Japan more than tripling following the *Meiji* Restoration, the number of judges has remained at a similar level,<sup>425</sup> with the inevitable consequence that this operates as a structural barrier to access. When this state of affairs is taken in conjunction with the number of alternatives that have the potential to achieve fairer outcomes more quickly, a more detailed and complete picture of the state of litigation in Japan starts to emerge. Even though such institutional and financial obstacles exist, it is arguable that, due to the longevity of social and cultural norms, and the population's familiarity with and thus continued adherence to them, these norms play a significant role in shaping the public's engagement with the legal system.

For criminal matters, certain historically influenced trends can be observed as having continued in modern Japan, notably the ongoing practice of publicly announced

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<sup>421</sup> See J O Haley, 'The Myth of the Reluctant Litigant' (1978) 4 (2) *Journal of Japanese Studies* 359; J O Haley, *Authority Without Power: Law and the Japanese Paradox* (Oxford University Press 1991) 83-119.

<sup>422</sup> See J M Ramseyer, 'Reluctant Litigant Revisited: Rationality and Disputes in Japan' (1988) 14 *Journal of Japanese Studies* 111; J M Ramseyer and M Nakazato, 'The Rational Litigant: Settlement Amounts and Verdict Rates in Japan' (1989) 18 *Journal of Legal Studies* 262.

<sup>423</sup> F K Upham, *Law and Social Change in Postwar Japan* (Harvard University Press 1987) 47.

<sup>424</sup> See K Funken, 'Alternative Dispute Resolution in Japan' (2003) 24 *University of Munich School of Law Working Paper* 1, available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=458001](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=458001)>.

<sup>425</sup> H See, 'The Judiciary and Dispute Resolution in Japan: A Survey' (1982) 10 *Florida State University Law Review* 339, 340.



executions<sup>426</sup> (although this information is now distributed via the media, rather than displaying bodies in public places) and a focus on restorative justice as per the *mura* communities. With a revamped system of courts and clearer case reporting following the 1947 Constitution, there has also been considerable data and commentary on their activities. The contrast that draws the most attention is the high conviction rate<sup>427</sup> (largely due to confessions obtained prior to trial), and of those convicted, the low number of offenders that are incarcerated.<sup>428</sup> Much like the methods of alternative dispute resolution available to those with civil disputes, judges employ a variety of measures to respond to a convicted offender's crime. Usually this takes the form of a formal apology (usually written), to the victim and both the families of the victim and the offender,<sup>429</sup> suspended sentences,<sup>430</sup> and promises from the offender's family, friends, and/or employers to help them live as a good citizen in future.<sup>431</sup> The alternative is much more severe, with the aforementioned harsh treatment of prisoners in prisons, and the practice of capital punishment. Incarceration is reserved for repeat offenders, and for those who are considered to pose a danger to society, that is, for whom the social pressure of their peers is not enough to induce conformity. This gulf in severity between the responses to those convicted of criminal offences, the distress to the family and wider community through the removal of an individual, the difficulty in taking care of a large prison population, and the lost potential for reforming a citizen to become a productive member of society all seem to motivate a more restorative approach – both in terms of institutional goals and the values of the citizenry – to criminal justice. This observation demonstrates an aspect of the tension at the core of the Japanese legal system – by acknowledging the socio-cultural norms that influence the system, a more detailed account is presented that explains the *sui generis* approach to criminal justice in Japan.

<sup>426</sup> Recent news reports include S Murakami, 'Hangings carried out for two Japanese death row inmates convicted of multiple rape-murders' (The Japan Times, 2 August 2019), available at <<https://www.japantimes.co.jp/news/2019/08/02/national/japan-executes-two-death-row-inmates-first-executions-since-last-december/#.XVwXryNKiUk>> accessed 20 August 2019; M Osumi, 'Two Japanese death row inmates executed over 1988 robbery-murders of Cosmo Research president and employee' (The Japan Times, 27 December 2018), available at <<https://www.japantimes.co.jp/news/2018/12/27/national/crime-legal/japan-executes-two-death-row-inmates-thursday-morning-sources/#.XXKlvTZKiUk>> accessed 20 August 2019; S Murakami, 'Japan send last six Aum death row inmates to the gallows' (The Japan Times, 26 July 2018), available at <<https://www.japantimes.co.jp/news/2018/07/26/national/crime-legal/justice-ministry-begins-procedures-begin-execute-remaining-aum-members-death-row/#.XXKlzzZKiUk>> accessed 20 August 2019.

<sup>427</sup> M Toshikuni and M Keiichi, 'Order in the Court: Explaining Japan's 99.9% Conviction Rate' (Nippon.com, 18 January 2019), available at <<https://www.nippon.com/en/japan-topics/c05401/order-in-the-court-explaining-japan%E2%80%99s-99-9-conviction-rate.html>> accessed 12 August 2019; J M Ramseyer and E B Rasmusen, 'Why is the Japanese Conviction Rate So High?' (2001) 30 *Journal of Legal Studies* 53.

<sup>428</sup> World Prison Brief, 'Japan' (N.D., World Prison Brief), available at <<http://www.prisonstudies.org/country/japan>>, accessed 10 August 2018.

<sup>429</sup> H Wagatsuma and A Rosett, 'The Implications of Apology: Law and Culture in Japan and the United States' (1986) 20 (4) *Law & Society Review* 461.

<sup>430</sup> D H Foote, 'The Benevolent Paternalism of Japanese Criminal Justice' (1992) 80(2) *California Law Review* 317, 351-353.

<sup>431</sup> P Murphy, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016) 110, 121, 141, 170-171, 174.

Consequently, when compared to Western systems with similar institutions and features, engaging with formal legal processes to resolve civil disputes or criminal matters is not always mandated. Other options are available, such as alternative dispute resolution for civil matters, or police officers often choosing to verbally reprimand an offender and give them an opportunity to behave well in future. This is a significant aspect of the role that social and cultural norms play within the legal system, and why its codified laws, structures and institutions, although *prima facie* similar to her Western counterparts, function very differently and produce different trends and outcomes.

### 3.7 Social and Cultural Norms

Socio-cultural norms in Japan have a lengthy history that has embedded them in social life throughout the centuries, and the introduction of formal law and institutions throughout the last 200 years has barely impacted upon their significance in contemporary Japan. The coexistence of formal law and institutions of the Japanese legal system and these enduring socio-cultural norms have produced the features and trends outlined above. As this chapter has demonstrated, formal law is a relative newcomer in Japan compared to social and cultural norms. The *ritsu-ryō* system of earlier centuries largely applied to urban areas and the upper classes; most of the population, living and working in rural areas far from direct governmental control, regulated their everyday lives through social and cultural norms. The *Tokugawa* era, despite bringing a plethora of new codified rules, still relied heavily on traditional norms to regulate the population. Courts had very little to do with the affairs of anyone who was not part of the nobility or the *samurai*; indeed, in criminal matters, there was little by way of a formal court procedure, and considerable violence was instead employed to keep the masses compliant. For much of the population life in the *mura*, which was almost completely governed by traditional norms, was all-encompassing and certainly more immediate and thus important than the codified rules of the urban nobility. This divide persists today, as willingness to engage with law and legal institutions varies considerably between urban and rural places. In contrast to other situations, where such variations could be attributed to differing population levels across different geographic regions, in Japan the urban/rural divide has another cause: traditional socio-cultural norms are observed more in rural areas, where communities are more dependent on one another.

Chapter four will continue this analysis of social and cultural norms in contemporary Japan with a dedicated analysis of their role and function in the Japanese legal system. It will explore how law operates in everyday life in Japan, and will lead the argument that 'legal culture' serves as a useful method for considering the legal system *in context* in

order to provide a more comprehensive insight into the tension between formal rules and social and cultural norms at the core of the system. One of the oldest social normative forces in Japan is *giri*, which can be described as a debt of gratitude owed to others to the point of self-sacrifice.<sup>432</sup> These debts can be to others, or to society at large, and comprise unwritten rules for harmonious social relationships, which may include behaviour that is done against one's will.<sup>433</sup> Although this social practice has existed since ancient times, and was commonly practiced due to the high levels of cooperation required to complete the intense work of planting and growing rice,<sup>434</sup> the term '*giri*' did not come in to use until the feudal era [years]. This idea of social indebtedness was reinforced within the tightly knit communities of *mura* and underpinned relationships between master and servant – the master treated his servant well as thanks for his work, and the servant gave his best efforts as thanks for his masters benevolence.<sup>435</sup> This practice of social indebtedness persists in contemporary Japanese society and is most visible in its commercial manifestation, notably in the practice of giving *giri-choco* (chocolates) on Valentine's Day,<sup>436</sup> and *giri de kaku* written in New Year's cards.<sup>437</sup>

The feudal era also embedded the practices of *tatemae* (polite face) and *honne* (real intention) in the Japanese subconscious. Presented as two sides of the same coin, *tatemae* is shown to outsiders to maintain politeness and keep with societal standards, whilst *honne* enables true feelings to be shared with those who are trusted.<sup>438</sup> In particular, *samurai* were instructed to maintain a neutral presentational face to world, and to think carefully about their words so as not to reveal their true feelings to others.<sup>439</sup> The balance of *tatemae* and *honne* forms part of the upbringing of Japanese children,<sup>440</sup> who quickly learn the value of using *tatemae* to get along well with others and to solve problems unselfishly, and switch easily between the two practices.<sup>441</sup> Japan is certainly not unique in its duality of social interaction, however it does distinguish itself from other

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<sup>432</sup> J Gillespie and Y Sugiura, *Nihon bunka wo eigo de shōkai suru* [Traditional Japanese culture and modern Japan] (Natsumesha 1996) 150.

<sup>433</sup> R J Davies and O Ikeno (eds), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002) 95.

<sup>434</sup> R Minamoto, *Giri to ninjō* [Social obligations and human feelings] (Chuo Koronsha 1969) 42, 48.

<sup>435</sup> J Gillespie and Y Sugiura, *Nihon bunka wo eigo de shōkai suru* [Traditional Japanese culture and modern Japan] (Natsumesha 1996) 149.

<sup>436</sup> Y Miura, 'Confectioner's free "obligatory chocolate" machines prove subway hit' (*The Japan Times*, 10 February 2013), available at <<https://www.japantimes.co.jp/news/2013/02/10/national/confectioners-free-obligatory-chocolate-machines-prove-subway-hit/#.XXKqJzZKiUk>> accessed 20 August 2019.

<sup>437</sup> R J Davies and O Ikeno (eds.), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002) 97.

<sup>438</sup> G J D Trinidad, 'Honne and Tatemae: Exploring the Two Sides of Japanese Society' (*Thesis, University of Iceland* 2014) 1, 1.

<sup>439</sup> A Prasol, *Modern Japan: origins of the mind – Japanese tradition and approaches to everyday life* (World Scientific Publishing Co. 2010) 104.

<sup>440</sup> J Hendry, *Understanding Japanese Society* (4<sup>th</sup> edn, Routledge 2013) 44-45.

<sup>441</sup> R J Davies and O Ikeno (eds), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002) 116.

societies with both the labelling of the behaviour and the emphasis placed upon it in everyday social interactions.<sup>442</sup>

These social practices seem at odds with seeking a legal solution to a problem or formally asserting one's position over another. Powerful social practices such as these provide means of managing social relationships in a manner conducive to a peaceful life. Many social and cultural norms in Japan aim towards a single goal – social harmony, or *wa*.<sup>443</sup> This harmony is achieved through compromise, rather than drawing distinctions between right and wrong or good and bad,<sup>444</sup> as this would not achieve *jen*. The social norms of *giri*, *tatemae* and *honne* (among others) are essential to achieving this; their practice in contemporary Japan is widespread and adherence is high. Although many Japanese have a reasonable knowledge of the law,<sup>445</sup> cultural and social norms are preferable for everyday life. Formal law is generally viewed as good and moral, but it too has its appropriate role and place in Japanese society. This is articulated aptly by Noda: “*We want the law to reign, but not to rule.*”<sup>446</sup>

Arguably the most significant structure maintaining these enduring social and cultural norms is the strong hierarchical ordering of Japanese society – a feature that has been consistent throughout her history. Although the strict class structure of the *Tokugawa* Era no longer exists in Japan, it has been replaced with a vertical social hierarchy that still embraces some fundamental tenets of Confucianism.<sup>447</sup> Within this structure, the family unit remains central to social organisation and, although individuals now hold individual rights, it is still often the case that individuals are seen as part of a unit, such as their family, school, or place of work. This vertical hierarchy places the father at the head of the family, older students as superior to younger students, and longer serving employees as senior to newer ones. People are encouraged throughout life to obey the rules, first as children with observance of school rules (both written and unwritten), and later as teenagers and young adults to obey laws (and not query why they exist or what they do).<sup>448</sup> Hierarchy as the structure that compels obedience to both formal rules and informal socio-cultural norms means that those with specialised roles in society, such as lawyers and judges, are considered to be experts and are part of a prestigious and

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<sup>442</sup> R J Davies and O Ikeno (eds), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002) 116.

<sup>443</sup> C Kim & C M Lawson, 'The Law of the Subtle Mind: The Traditional Japanese Conception of Law' (1979) 28 *International & Comparative Law Quarterly* 491, 499.

<sup>444</sup> Y Noda, *Introduction to Japanese Law* (University of Tokyo Press 1976) 135.

<sup>445</sup> G Schumann, 'Beyond Litigation: Legal Education Reform in Japan and What Japan's New Lawyers Will Do' (2005-6) 13 *University of Miami International and Comparative Law Review* 475, 521.

<sup>446</sup> Y Noda, *Introduction to Japanese Law* (University of Tokyo Press 1976) 134.

<sup>447</sup> K Funken, 'Alternative Dispute Resolution in Japan' (2003) 24 *University of Munich School of Law Working Paper* 1, available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=458001](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=458001)> 6.

<sup>448</sup> C P A Jones, 'Seven lessons from a Japanese morality textbook' (*The Japan Times*, 7 August 2019), available at <<https://www.japantimes.co.jp/community/2019/08/07/issues/seven-lessons-japanese-morality-textbook/#.XWUklSNkiUk>> accessed 21 August 2019.

trusted institution, one that is necessarily separate from the whims and influences of the general population.<sup>449</sup> Although everyone has their own role to play in maintaining a peaceful society, the enactment and enforcement of the law is not considered to be the concern of the public. Consequently, the re-introduction of lay participation was arguably at odds with many of the traditional social and cultural normative practices discussed here. However, Japan's experience of juries was not too far in the past, and thus an interesting relationship between social and cultural norms and *saiban-in seido* becomes apparent.

### 3.8 History of citizen participation in the Japanese courtroom

Since its implementation in 2009, the current system of citizen participation in the courtroom in Japan, referred to as *saiban-in seido*, has been subject to some scrutiny in terms of its effects upon the criminal justice system and the experiences of its participants. However, there remain interesting features about the development, implementation and form of *saiban-in* that cannot be either investigated or understood through these reports alone. An historical and contextualised approach to this case study is most appropriate due to the recency of the introduction of the *saiban-in* system; exploring the first instances of citizen participation in Japanese courtrooms and the period of time without lay participation is critical to understanding the legal, political and socio-cultural contexts leading up to the introduction of *saiban-in*. This investigation will inform understandings of the development, form and function of *saiban-in*, its place in the Japanese court system, and the reasons for its introduction during the last decade. Decisions about the development of *saiban-in* are better understood when the history of lay participation in Japan is considered, as *saiban-in* differs from both Western forms of lay participation and those prior models utilised by the Japanese legal system before they fell into disuse in the 1940s.

Furthermore, it is argued that the unusual circumstance of the Okinawan trials, conducted whilst the island chain was under American occupation and jurisdiction, had an impact both on the re-introduction of lay participation to Japan, and on the form that it currently takes. The historical account and analysis contained in this section will consider three significant periods preceding *saiban-in*: the *Meiji* Era, within which lay participation was considered as part of the Japan's extensive legal reforms following the collapse of *shogunate* rule; the pre-WWII era, during which the first formal statute underpinning lay participation (Jury Act 1923) was passed; and the post-WWII era, which

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<sup>449</sup> J O Haley, 'The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust' in D J Foote (ed), *Law in Japan: A Turning Point* (University of Washington Press 2007) 29-30; M Dean, 'Trial by Jury: A Force for Change in Japan' (1995) 44 *International and Comparative Law Quarterly* 379, 388.

saw the discontinuation of jury trials first on the mainland and then from Japan completely following the abandonment of the American-led Okinawan trials. These analyses will consider the legal issues alongside the influence of political and socio-cultural factors in analysing the status of lay participation throughout recent Japanese history, and the effects of the legacies of these previous approaches in the development and implementation of *saiban-in*.

### 3.9 The Meiji Era

Japan has not always been a country without lay participation, however evidence of its existence is difficult to ascertain. The Japanese translation of English word ‘jury’ is ‘*baishin*’ (陪審) and this word was newly introduced to the Japanese language in the Meiji era.<sup>450</sup> The first record of this word in a Japanese text was in 2001 – a reprint of a Chinese-English text originally published in 1864<sup>451</sup> and in a publication observing Western traditions, where Fukuzawa Yukichi chose to use ‘*toraieru bai jûri*’ using *katakana* (written as トライエル・バイ・ジューリ)<sup>452</sup>, a set of characters used to denote non-Japanese words. These instances indicate from the very outset a resistance to citizen participation in Japan. The former example shows that only recently has this word permeated into written language and this only as a result of a significantly older text being made more accessible to Japanese readers. The latter example demonstrates this reluctance at the intersection of linguistics, culture and law: although the word was used in spoken language, its formal acknowledgement in written texts left the mechanism clearly marked as foreign. An opposition to legal transplantation is a prominent feature of Japanese legal culture, and these examples are both demonstrative of the marginalisation of external legal institutions, serving to emphasise their non-Japanese pedigree.

The Japanese approach to legal development has historically taken the path of observation, followed by a borrowing of the original form, which then undergoes an extensive process of assimilation and adaptation to make it more suitable for Japanese purposes and usage. This is also true of the introduction of citizen participation, which has always been heavily framed by the work of Kunitake Kume. His observations of European trials by jury led to the conclusion that bringing such a system to Japan would be extremely difficult. His reasoning for this was that a general lack of legal awareness

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<sup>450</sup> A Ortolani, ‘Reflections on Citizen Participation in Criminal Justice in Japan: Jury, *Saiban-in* System and Legal Reform’ (2010) 29 *Journal of Japanese Law* 153, 154.

<sup>451</sup> T Mitani, *Seiji seido toshite no baishin-sei* (The Jury System as a Political Institution) (Tokyo 2001) 93.

<sup>452</sup> Y Fukuzawa, *Seiyô jijô* [Conditions in the West], in: *Fukuzawa Yukichi zenshû* [Complete Writings of Fukuzawa Yukichi] 1 (Tokyo 1958) 357.

and training amongst the populace alongside social norms of hierarchy and obedience would ensure that any jury members chosen would be implicitly intimidated into compliance by authorities,<sup>453</sup> and that only the substance should be adopted whilst removing all trace of its origins.<sup>454</sup>

### 3.9.1 *The sanza system*

The *Meiji* Restoration brought with it suggestions by the Ministry of Justice for use of a jury, although these were initially rejected by the Great Council of State on the basis that juries (now referred to as *baishin*) originated in the West (the suggestions drew specifically on English and French models) and were not suited to Japan's social ordering and way of life. However, in the complex and economically motivated (1873) *Makimura* case the Great Council of State was convinced that citizen participation would be required to achieve some neutrality.<sup>455</sup> The Great Council mandated that transplanting a Western-style jury was not possible as the public sentiment of Japanese was incompatible with the concept of jury service. The Council also stated that the introduction of such a system could not be rushed so as to ensure its success.<sup>456</sup> As a response, the *sanza* system was developed (*san* meaning participation, and *za* meaning a seat or position),<sup>457</sup> which, although the judge would determine the gravity of the case and thus the punishment, held responsibility for determining guilt of the accused.<sup>458</sup> The *sanza* system did not involve lay people however, instead comprising bureaucrats and Government officials appointed by the Counselors of State, and thus not truly facilitating citizen participation but rather limiting it to those who held similar views and political motivations (including limiting the power of the public in regulatory processes). The *Makimura* trial opened with nine jurors (increased a month later to eleven), who at the end of trial on 31<sup>st</sup> December 1873 handed down a guilty verdict. The *sanza* system was not used again until 1875, this time in a complex case involving the assassination of Masaomi Hirose, the Counselor of State. New rules for the *sanza* system were drafted, expanding their responsibilities to include the consideration of pre-trial investigations and the appropriateness of the court's actions. At the commencement of

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<sup>453</sup> K Kume, G Healey, C Tsuzuki (eds.) 'The Iwakura Embassy, 1871-1873: A True Account of the Ambassador Extraordinary and Plenipotentiary Journey of Observation through the United States of America and Europe', A Cobbling et al (trans.) (Japan Documents 2002) 134.

<sup>454</sup> K Kume, G Healey, C Tsuzuki (eds.) 'The Iwakura Embassy, 1871-1873: A True Account of the Ambassador Extraordinary and Plenipotentiary Journey of Observation through the United States of America and Europe', A Cobbling et al (trans.) (Japan Documents 2002) 134-5.

<sup>455</sup> A Dobrovolskaia, 'Japan's Past Experiences with the Institution of Jury Service' 12 *Asia-Pacific Law & Policy Journal* 1 (2010-11) 1, 7.

<sup>456</sup> A Dobrovolskaia, 'Japan's Past Experiences with the Institution of Jury Service' 12 *Asia-Pacific Law & Policy Journal* 1 (2010-11) 1, 7.

<sup>457</sup> A Dobrovolskaia, 'Japan's Past Experiences with the Institution of Jury Service' 12 *Asia-Pacific Law & Policy Journal* 1 (2010-11) 1, 7.

<sup>458</sup> *Sanza Rules* 1873.

the trial, this *sanza* panel consisted of seven members, was raised to a total of twelve during the trial, and eventually delivered a verdict of not guilty.

The historical and cultural context of this system reveals a general reluctance on the part of the authorities for lay person involvement in the justice system, with the requirements in place for appointing a 'bureaucratic' jury indicating a desire to limit legal administration to authoritative circles of society.<sup>459</sup> In the 1870s and 1880s the population was still adjusting to the transition of the end of *shogunate* rule and the reinstatement of the monarchy, along with the plethora of new legal regulation that came with it. As previously observed, much of this new legal regulation took on a prima facie Western form, having been studied and adapted for Japanese use by scholars who had travelled to Europe specifically to study the operation of law within different jurisdictions. The decision to create a *sanza* system was multi-faceted; the selection of officials and bureaucrats reflected a perception that the public would not be ready to participate in legal process and as such this would prevent the general population from directly accessing the mechanisms of justice. This socio-cultural approach to the decision also gives consideration to *giri*, hierarchy, and the clear roles and responsibilities within Japanese society; in the Japanese context, deciding legal matters and dispensing justice was the role for legislators, judges and lawyers. Contrary to Western perspectives (and despite the idea of a jury being drawn from Western jurisdictions), it was not the role of lay people to be involved – rather, their duties lay in supporting of society through other forms of labour. Furthermore, the appointment of official and bureaucrats to the *sanza* demonstrates, alongside the view of public unreadiness to participate, a clear desire to retain power amongst the social and political elite. This trend is observable projecting forward through Japanese history to contemporary times, as professional judges have always been required to sit with lay judges. Even with the more open criteria for participation in *saiban-in seido*, lay judges are always under the supervision of one or more professional judges, thus there still appears to be little power entrusted to the public.

### 3.9.2 Statutory and Institutional Developments

Further proposals for the implementation of a jury were put forward by Boissonade, a French advisor to the government in the period following the restoration, in his draft preceding the Code of Criminal Procedure (*Chizai-hô*).<sup>460</sup> His proposal included a 'mixed system' based on the *Cour d'Assises* in use in France at the time, consisting of three

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<sup>459</sup> Sanza Rules 1873.

<sup>460</sup> A Ortolani, 'Reflections on Citizen Participation in Criminal Justice in Japan: Jury, *Saiban-in* System and Legal Reform' (2010) 29 *Journal of Japanese Law* 153, 155.



judges and ten lay persons, the latter of which would be chosen by lot and remain on a list of jurors and jurors in reserve for one year.<sup>461</sup> Before a trial, the prosecution and defence would agree which of those jurors on the list would serve and the role of these jurors would involve listening to the circumstances of the case and answering questions provided by the judges. These proposals were considered and approved by the *Genrōin*, a temporary *Meiji*-era quasi-legislative body,<sup>462</sup> but were ultimately rejected by the Great Council of State and excluded from the final drafts of the Code of Criminal Procedure, which came in to force in 1882. Mitani argues that one of the most influential people in the rejection of the jury provisions was Inoue Kowashi, who wrote two pamphlets in 1877 arguing against its introduction, the arguments of which have been cited in all major instances of debate about introducing citizen participation.<sup>463</sup> His reasons included that it was unfair to have randomly chosen citizens representing the nation in a criminal case, and that departure from the law, whether due to the influence of public opinion, personal feelings, or by the behaviour of the defendant, was more likely to happen should a jury be appointed.<sup>464</sup> Perhaps indicative of his influence, Kowashi's arguments were similar to those given by the Great Council of State for their rejection of trial by jury. Tomatsu Murata, the Grand Secretary for the Great Council of State, included among the reasoning that the lack of influence of the judge upon the jurors was cause for concern, as the Great Council felt that guidance from the judge was necessary for making decisions in court.

It seems here that adherence to the law and some level of professional training was of concern to both the bureaucrat Kowashi and the Great Council, which is illustrative of the emphasis placed upon the knowledge and skill required to pursue the legal discipline, which was (and still is) greatly valued in Japanese society. Further concerns were raised about the selection criterion for the jurors, namely that there was no way to ensure that the jurors were either educated or financially stable. These two qualities in particular were considered essential, as education facilitated understanding of both case facts and the courtroom process, whilst the requirement for financial stability ensured that jurors would turn up for service and demonstrated some evidence of work ethic and reliability. This caused a narrowing of eligible members to a specific demographic of society that largely excluded those of a lower socio-economic background, and although Japan's educational system was robust and comprehensive, the level of education desired by

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<sup>461</sup> G Boissonade, 'Projet de code de procédure criminelle pour l'Empire du Japon accompagné d'un commentaire' (Tokyo 1882) 611 in A Ortolani, 'Reflections on Citizen Participation in Criminal Justice in Japan: Jury, *Saiban-in* System and Legal Reform' (2010) 29 *Journal of Japanese Law* 153, 155; A Dobrovolskaia, 'Japan's Past Experiences with the Institution of Jury Service' 12 *Asia-Pacific Law & Policy Journal* 1 (2010-11) 1, 9-10.

<sup>462</sup> E O Reischauer (eds), *Japan: An Illustrated Encyclopaedia* (Kōdansha 1993) 450.

<sup>463</sup> T Mitani, *Seiji seido toshite no baishin-sei* (The Jury System as a Political Institution) (Tokyo 2001) 101.

<sup>464</sup> T Mitani, *Seiji seido toshite no baishin-sei* (The Jury System as a Political Institution) (Tokyo 2001) 101.

the Great Council exceeded that possessed by many of the public. Despite the lack of inclusion of citizen participation in the Code, there was still debate about introducing juries, including newspaper articles and consideration of its addition in drafts of the *Meiji* Constitution.<sup>465</sup> However, when the *Meiji* Constitution was finalised in 1889, there was no provision for lay participation within the justice system.

Ultimately no system involving participation of lay persons occurred during the *Meiji* era. The lack of implementation of such a system was due, in part, to political influences, with the newly founded government seeking stability and control in the wake of a long period of isolation and military governance and desiring little disruption to that goal. With the legal system emulating European jurisdictions and viewed as a means to effectively govern society, the notion of actively inviting the populace to participate in legal proceedings would have been seen as disruptive and nonsensical, given that it was already adequately (at least from the perspective of the Great Council) managed by an educated and trained judiciary. Furthermore, although the *Meiji* era saw significant adoption, adaptation and assimilation of European legislation and legal processes, it is important to remember that these were done on the terms of the Japanese government and legislators. While Boissonade was invited by the Japanese government to assist in the drafting of the Criminal Code, his proposals about juries were ultimately seen as too European, or more importantly, too non-Japanese, to be considered a safe option for the fledgling system. Japan was comfortable with the idea of judges overseeing courts and making decisions, and would go so far as to allow the *sanza* system to be used (albeit very infrequently), but the inclusion of laypeople was a step too far – especially with the risk of allowing uneducated and / or less financially stable persons to participate. The criminal justice system's integrity was not in question<sup>466</sup> and there was no apparent need to compromise this or its effectiveness by introducing lay persons and giving them responsibility over matters they were not trained for.

These political and social contexts meant that transplanted the jury 'feature' into the Japanese criminal justice system, despite Boissonade's best efforts, was simply unsuitable for Japanese law and society. Independent, untrained lay persons influencing the decisions of highly specialist judges and the work of lawyers and police officers contradicted the rigidly hierarchical and role-based structure of Japanese society. Emerging from hundreds of years of isolation and military rule, which had heavily enforced this social structure, Japan was unwilling to accept direct transplanted of

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<sup>465</sup> A Ortolani, 'Reflections on Citizen Participation in Criminal Justice in Japan: Jury, *Saiban-in* System and Legal Reform' (2010) 29 *Journal of Japanese Law* 153, 156.

<sup>466</sup> See J O Haley, 'The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust' in D J Foote (eds), *Law in Japan: A Turning Point* (University of Washington Press 2007).

legal codes and mechanisms, instead opting for an extended period of research and assimilation of Western forms of law – after careful adaptation – to ensure it would be compatible with her own social and cultural values. As such, the idea of the jury system, unchanged from its Western origins and developed from Western values of law and legal process, was (and to some extent, still is) greatly at odds with Japanese conceptions of the same. The *sanza* system represented the extent to which Japan was willing to involve lay participants in its criminal justice system at this time, and the accepted criteria for those lay persons excluded the majority of society. Boissonade was proposing a jury system with very little change to its Western form – a form that was developed from values and beliefs about how law should be practised and effected that were fundamentally different to those in Japan. The country had only recently emerged from *shogunate* rule and although measures had been taken to abolish the rigid social structure of *Tokugawa* rule,<sup>467</sup> the citizenry still relied on group-based organisation to order social life and were unaccustomed to asserting individual rights. Without significant amendment and adaptation, a mechanism for lay participation in the courtroom would not be accepted by the Japanese government, legislators, or legal professionals (especially given the focus on retaining power and limiting public access to that power by social and institutional means), or by the Japanese public.

The government's reluctance to introduce a system of citizen participation in the justice system continued to be challenged, particularly at the turn of the 20<sup>th</sup> century, both by various socialist movements and the Lawyer's Association, the latter of which published documents presenting fresh arguments for the introduction of a jury. A mutual reluctance can be observed here: as already noted, the government appear reluctant to give citizens access to such power, while the population in general was similarly reluctant to take on the responsibility for judgements involving fellow citizens' lives and liberty. However, those with legal training and active political interests campaigned for the introduction of a jury,<sup>468</sup> suggesting that the absence of support from the citizenry stemmed from their lack of legal knowledge and training. Furthermore, those involved in the legal profession and political movements likely occupied different positions within social and political hierarchies. Therefore they were used to making decisions and taking responsibility for other – something that the public were inexperienced with and thus not interested in changing. This tension existed throughout the development of citizen participation, premised upon a resistance to Western-style law, influence of socio-cultural norms, and campaigning by reform groups.

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<sup>467</sup> K Henshall, *A History of Japan: From Stone Age to Superpower* (Palgrave Macmillan 2012) 79-89.

<sup>468</sup> A Dobrovolskaia, 'Japan's Past Experiences with the Institution of Jury Service' (2010-11) 12 *Asia-Pacific Law & Policy Journal* 1, 11-12.

### 3.10 The Pre-War Era

#### 3.10.1 *Jury Act 1923*

Significant progress on the matter of juries did not occur until 1923, when the Jury Act was passed by the House of Peers (this formed part of the Diet, which had replaced the aforementioned *Genrōin*). The Act arose from nearly two decades of gathering political support for the idea and took two years to be passed through the House following several revisions. It included provisions for a very Anglo-American style of jury, comprised of a twelve lay person panel,<sup>469</sup> which would deliberate without the influence of a judge.<sup>470</sup> Those eligible for selection for jury service had to be male, over thirty years of age, have Japanese citizenship, have lived in the same area for at least two years, be literate and pay more than three yen (approx 0.02 pence) to national direct taxes each year.<sup>471</sup> A defendant could request a jury when their maximum sentence was over three years and the minimum available was one year, perhaps indicating something of an openness of the Diet towards citizen empowerment. The Jury Act was significant in the development of citizen participation as it was the first statute in Japanese history to officially invite laypersons who were not exclusively elite and/or wealthy (it was, however, still the case that only a limited amount of the population could participate). It represented a new willingness on the part of the government to involve the public in judicial decision-making and, despite the resistance to transplanted during the *Meiji* era, highlighted the government as being more receptive to Western forms of citizen participation.

#### 3.10.2 *Limitations and disincentives*

Despite this initial trend, there were provisions in place to ensure that the role of the judge, which in Anglo-American courts relinquished some powers to the jury (including those to convict or acquit) was not significantly affected. These included the judge retaining an active supervisory role in proceedings and submitting questions of fact for the jury to consider, rather than the panel deciding on guilt or innocence.<sup>472</sup> These reservations ensured that power was largely retained by the judge and gave the appearance of being less disruptive to court proceedings and social values of hierarchy and harmony. The judge could also request selection of another, replacement, jury and choose not to acknowledge the contributions of the first jury – this was most usually utilised in cases where the outcome was not to the judge's liking,<sup>473</sup> further reinforcing

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<sup>469</sup> *Baishin Hō* (Jury Act) Law No. 50 of 1923, Article 29.

<sup>470</sup> *Baishin Hō* (Jury Act) Law No. 50 of 1923, Article 82.

<sup>471</sup> *Baishin Hō* (Jury Act) Law No. 50 of 1923, Article 12.

<sup>472</sup> *Baishin Hō* (Jury Act) Law No. 50 of 1923, Article 88.

<sup>473</sup> M Ibusuki, 'Quo vadis: First year inspection to Japanese mixed jury trial' (2010) 12 *Asian-Pacific Law & Policy Journal*, 24, 27.

the clear power dynamic in the courtroom. Prosecutors and defenders retained the right to approve or exclude jury panel members,<sup>474</sup> ensuring power over court process was retained by professionals. The instances in which a jury could be used for a trial were limited; only those cases where the death penalty or life imprisonment were the maximum punishment were viable, and of those the case had to have had a preliminary investigation.

Additional limitations to the use of a jury included the highly incentivised right of a defendant to waive their right to trial by jury. The Act contained several benefits for their doing so, including reducing the costs of the trial (borne by the defendant – not having a jury would reduce costs) and preserving one's right to appeal on points of fact, which was not possible to do with a jury seated. Additionally, the scope of requests by defendants to be tried by jury was narrowed further by amendment of the law in 1929. Following some initial popularity of jury usage, cultural values joined statutory and institutional incentives for waiving the right to a jury. These included a preference for important legal decisions to be made by trained professionals, fear that a panel of lay persons, with little experience in the courtroom, would be harsher in their decision-making, and that the majority of legal professionals disliked the unfamiliar situation, thus making the trial process more difficult for the defendant.<sup>475</sup>

The statutory and institutional barriers and counter-incentives, along with a dislike for the jury expressed by legal professionals, again demonstrate the reluctance of the Japanese authorities to allow any real involvement of lay persons in the administration of justice. The role of the jury as outlined in the Jury Act is representative of this: although Western-presenting in its form, the jury in Japan is limited in its function and performs a markedly different role to its Western counterpart. The jury was considered by some as unfitting for the national character of Japan<sup>476</sup> and academics predicted a grim future for the Jury Act. Takigawa in particular critiqued the powerlessness of the jury (largely due to the requirement to be guided so closely by a judge, coupled with the judge's power to reorder a jury) with its utility undermined by limitations in independent decision-making, resulting in a participatory system that was little more than ceremonial.<sup>477</sup> The mechanism faced more issues concerning its adaptation to fit the Japanese courtroom due to its fundamentally different function from that of its Western counterparts: in the Western context, the most critical task for juries is to determine guilt or innocence of the defendant,

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<sup>474</sup> *Baishin Hō* (Jury Act) Law No. 50 of 1923, Article 64.

<sup>475</sup> R Lempert, 'A Jury for Japan?' (1992) 40 *American Journal of Comparative Law* 37, 38.

<sup>476</sup> P L Reichel and Y E Suzuki, 'Japan's Lay Judge System: A Summary of Its Development, Evaluation, and Current Status' (2015) 25(3) *International Criminal Justice Review* 247, 248.

<sup>477</sup> Y Takigawa, *Baishin Hō* [The Jury Act] (Nihon Hyoronsha 1936) 42, cited in A Dobrovolskaia, 'Japan's Past Experiences with the Institution of Jury Service' 12 *Asia-Pacific Law & Policy Journal* 1 (2010-11) 1, 16.

whereas this duty that was considered unsuitable for the socially obedient and hierarchically organised Japanese citizenry. Furthermore, the criminal investigations of the Japanese police force take a different course to those in the West; police and criminal prosecutors would almost always bring defendants to court with a confession already obtained, and this remains the case today. Therefore, there is little need for the Japanese courtroom and its actors to determine guilt or innocence. Its procedure is instead focused on confirming facts of the case and deciding on the appropriate punishment, once confession and any admission of remorse (usually in the form of a formal apology to the victim and / or their family) is heard. This historical trend continues through to Japan's contemporary legal state, with courtroom processes differing little and any existing form of lay participation requiring considerable adaptation in order to work effectively in the existing system. The measures used to adapt the institution of jury service under the Jury Act were a step in this direction, however these were too insubstantial to ensure the permanence of lay participation in the criminal justice system at that time.

Juries sat on several cases between 1928 and 1943<sup>478</sup> and despite scepticism from observers, often utilised their power to question witnesses, demonstrating intelligence and courage in scrutinising case facts and challenging detectives and prosecutors. The use of juries initially appeared to be popular with the Japanese public, with 143 criminal defendants opting for jury trials in 1929,<sup>479</sup> but this did not last: criticisms were plentiful, and usually stemmed from the limitations of the jury and its supporting statute to the extent that the number of trials in 1942 with juries present had dropped to just two.<sup>480</sup> Japan's involvement in the Second World War led to the suspension, in 1943, of the use of juries, with a statute stating terms for their use again once the war was at an end.

However, the use of lay persons in the courtroom under the Japanese administration was in fact delayed until 2009, with professional judges overseeing and deciding criminal cases with a near one hundred per cent conviction rate. The expenses involved with reinstating juries in criminal trials, along with the lack of necessary infrastructure in the post-war period were the two of the most prominent practical barriers to the return of juries. The lack of juries in post-war Japan resulted in a regression to judge-only courtrooms and a return to a more traditional form of Japanese legal culture: that is to say, placing trust and power in the hands of those trained specifically for the role, and removing the possibility of perceived interference of court procedure by untrained lay persons. This way of managing the courts was reflective of the preference given to a

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<sup>478</sup> K Shibahara, 'Participation of citizens in criminal justice in Japan' in V Kusuda-Smick (eds), *Crime prevention and control in the United States and Japan* (Dobbs Ferry 1990) 26-31.

<sup>479</sup> R Lempert, 'A Jury for Japan?' (1992) 40 *American Journal of Comparative Law* 37, 37.

<sup>480</sup> R Lempert, 'A Jury for Japan?' (1992) 40 *American Journal of Comparative Law* 37, 37-8.

hierarchical structure of society, with each person fulfilling a particular role in order to fulfil their *giri* to society. This situation was compounded by the operation of juries in US-occupied Okinawa, which were conducted in a manner construed as antithetical to Japanese social values. This experience is discussed below, where it is argued that this period not only significantly affected the delay in reintroducing citizen participation in the courtroom, but also the way in which the role and function of the current form of participation, *saiban-in*, was developed.

### 3.11 Post-War and the Okinawan Trials

Following Japan's defeat at the end of the Second World War, US forces established several bases in Okinawa, the island archipelago constituting the southernmost prefecture of Japan,<sup>481</sup> as part of a security arrangement between the two nations. To establish political and legal control, the US Forces formed the United States Civil Administration of the Ryukyu Islands (USCAR)<sup>482</sup> and the Government of Ryukyu Islands (GRI)<sup>483</sup>. Okinawa remained under the administration of the US government for 27 years, until near the end of the Vietnam War in 1972, with troops in excess of 50,000 stationed there for the duration of the occupation. During this time a system of justice quite different to that of the mainland was in operation, with both USCAR and GRI each having their own court system; the latter dealing with civil and criminal cases that did not involve American nationals and using the Japanese language for its proceedings.<sup>484</sup>

USCAR dealt with all trials involving American nationals, which were conducted in English (regardless of the persons involved) and, from 1963-4, used juries in the style of American courts. To be eligible for selection for jury service, fluency in the English language was required, which excluded the majority of the indigenous Okinawan population,<sup>485</sup> most of whom spoke a combination of standardised Japanese (the language of the mainland) and several indigenous Ryukyuan languages.<sup>486</sup> This exclusion also meant that many native Okinawan defendants in the USCAR system, with little or no English skills, were subject to trials they could not understand, and to the

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<sup>481</sup> Okinawa is made up of a chain of several hundred of the Ryukyu islands, hence the naming of the US political bodies including 'Ryukyu' rather than Okinawa.

<sup>482</sup> Establishment of the United States Civil Administration of the Ryukyu Islands, Civil Administration Proclamation No. 1 of 1950.

<sup>483</sup> Establishment of the Government of the Ryukyu Islands Civil Administration Proclamation No. 13 of 1952.

<sup>484</sup> A Dobrovol'skaia, 'Japan's Past Experiences with the Institution of Jury Service' 12 *Asia-Pacific Law & Policy Journal* 1 (2010-11) 1, 19.

<sup>485</sup> C P A Jones, 'Still dreaming of a Japan with juries – and without U.S. bases' (*The Japan Times*, 18 June 2014) available at <<http://www.japantimes.co.jp/community/2014/06/18/issues/still-dreaming-japan-juries-without-u-s-bases>> accessed 22 September 2016.

<sup>486</sup> Until 1879, Ryukyu (later named Okinawa by the Japanese) was a separate nation from Japan, hence the differentiation in language. Okinawans today do not generally speak much of the original Ryukyuan languages as standardised Japanese is used by the younger generations, but the languages do survive in the form of dialects and indeed the forms of Japanese spoken by Okinawans are distinct from those of the mainland.

judgement of an American judge and a majority American jury. There was little chance of acquittal for Okinawans, with harsher sentences issued to them than to their American cohabitants. By contrast, the Americans were often exonerated or given more moderate sentences.<sup>487</sup>

Despite this adversity, many of the Japanese who served on the few Okinawan jury trials took their responsibilities seriously and often contested other jurors' opinions and decisions.<sup>488</sup> This behaviour runs contrary to the ideas of social obedience and hierarchy that had been upheld by the Grand Council and the Diet in their development of previous citizen participation systems. These experiences led to some Japanese campaigning for the introduction of an impartial, Western-style jury system to be implemented throughout Japan.<sup>489</sup> However, it is also arguable that not all jurors left their service so enthused. The circumstances of the Okinawan trials were distinctly American – a way of doing law that was contrasting to Japanese ways and values (both social and legal), which left their own citizens at risk to a system of justice that neither acknowledged nor upheld those values. Furthermore, this miniature court system was imposed directly on Japanese citizens with little recourse for the Japanese government or legal system to give any contribution; jurisdictional matters made this a very difficult and frustrating situation. Okinawa remained a jurisdictional anomaly for the entire duration of US governance, and it is proposed that this experience considerably influenced both the delay in reinstating citizen participation in the Japanese criminal justice system and the current form that this takes in the *saiban-in seido* system.

This period arguably gave the distinct impression that juries (among other mechanisms) were a hallmark of American (US) justice and antithetical to Japanese methods of criminal justice. Along with the reluctance expressed for Boissonade's proposals during the *Meiji* era and the instability of the Japanese legal framework following defeat in WWII, the Okinawan courts contributed to a delay in any considerations of including lay participation while also arguably removed the possibility of juries appearing in the Japanese criminal justice system. Indeed, juries remained absent from the Japanese mainland for over 60 years, until the reforms proposed by the Judicial System Reform

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<sup>487</sup> C P A Jones, 'Still dreaming of a Japan with juries – and without U.S. bases' (*The Japan Times*, 18 June 2014) available at <<http://www.japantimes.co.jp/community/2014/06/18/issues/still-dreaming-japan-juries-without-u-s-bases>> accessed 22 September 2016.

<sup>488</sup> A Dobrovolskaia, 'Japan's Past Experiences with the Institution of Jury Service' 12 *Asia-Pacific Law & Policy Journal* 1 (2010-11) 1, 20.

<sup>489</sup> A Dobrovolskaia, 'Japan's Past Experiences with the Institution of Jury Service' 12 *Asia-Pacific Law & Policy Journal* 1 (2010-11) 1, 20-21; C P A Jones, 'Still dreaming of a Japan with juries – and without U.S. bases' (*The Japan Times*, 18 June 2014) available at <<http://www.japantimes.co.jp/community/2014/06/18/issues/still-dreaming-japan-juries-without-u-s-bases>> accessed 22 September 2016.



Committee, advising that setting up a system of civil participation in criminal trials was essential to improve the legal system, were published in 2001.<sup>490</sup>

### 3.12 Concluding Remarks

Lay participation has been an intermittent feature of the Japanese criminal justice system over the last 200 years. The limited scope for participation during the *Meiji* and pre-war periods meant that few people had any experience of serving on a jury, and there are even fewer records outside of Chihiro Isa's insightful and hugely meaningful book.<sup>491</sup> The introduction of *saiban-in seido* is a dramatic change, and one that seemed to place power in the hands of citizens, encouraging them to take an active role in criminal justice, and thus in the role of law and legal process. The sixth chapter will focus on the development and implementation of *saiban-in seido*, taking a critical and contextualised approach that encompasses the historical context of law and social and cultural norms discussed in this chapter. The discussion will be further supplemented by the consideration of social and cultural norms in contemporary Japan and the critical legal pluralist approach developed in chapter four, and the encompassing, contextualising approach to the system – legal culture – appraised in chapter five.

The discussion in the first part of this chapter highlighted the rich social context within which law in Japan has developed since the beginning of the rule of the *Tokugawa shogunate*. Although many social and cultural norms have medieval origins, they have not only shaped the development and role of law but *still* play a significant role in the everyday lives of Japanese and. The second part of this chapter focused on the historical context of lay participation in Japan, highlighting the difficulties with delegating power to citizens, and social and political uncertainty about the form and function of juries expressed during a series of proposals drafted throughout the decades. The continued presence of US military bases on Okinawan soil is a stark reminder of the difficulties caused by the post-war jury trials held there. Given the prevalence of social and cultural norms, their continued significance and influence, and the historical complications of lay participation in Japan, a critical, contextualised examination of *saiban-in seido* is needed so that a more precise understanding of its form, function and role can be developed, and current misconceptions can be dispelled.

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<sup>490</sup> Judicial System Reform Council, 'Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the 21st Century' (12 June 2001), available at <[https://japan.kantei.go.jp/policy/sihou/singikai/990612\\_e.html](https://japan.kantei.go.jp/policy/sihou/singikai/990612_e.html)>.

<sup>491</sup> C Isa, *Gyakuten* [Reversal] (Shōwa 1977); see also C P A Jones, 'Still dreaming of a Japan with juries – and without U.S. bases' (*The Japan Times*, 18 June 2014) available at <<http://www.japantimes.co.jp/community/2014/06/18/issues/still-dreaming-japan-juries-without-u-s-bases>> accessed 22 September 2016.

## 4 The critical legal pluralist approach and socio-cultural norms in Japan

Placing Japan and its legal system in historical context reveals the multiplicity of systems of regulation and ordering that governed the lives of the Japanese citizenry for several hundred years. Socio-cultural norms endure in their significance and relevance in contemporary Japanese society, but, many comparative legal studies neglect to mention or account for these influences. This thesis argues that this is, at least in part, due to the dominance of legal taxonomies and their concomitant Anglo-European biases. In providing an alternative conception, this thesis will take a legally pluralist approach. Legal pluralism, it argues, offers both a conceptual and methodological means of identifying and understanding these normative phenomena *alongside* formal nation-state law, which helps accurately reflect the multiplicity of systems of ordering in Japanese law and society. This chapter will first conduct an examination of legal pluralist scholarship in order to present a critical pluralist approach best suited to identify and understand socio-cultural normative forms of regulation in Japan. The second section of the chapter will then utilise this approach to discuss a number of these forms of social regulation and demonstrate their continued relevance in contemporary Japan beyond their historical grounding.

The definition of critical legal pluralism for this thesis is briefly outlined here, ahead of a more detailed discussion later in the chapter. The definition comprises a few elements; that within a given nation state, more than one form of legal ordering is possible; that formally state-endorsed regulatory structures are not the sole form of valid law in any given State, and that other normative orderings are afforded equal legitimacy and importance. The 'critical' aspect of this definition is underpinned by Davies' theoretical approach, aiming for an 'unlimited' conception of what can be considered 'law'. In this thesis, critical legal pluralism suspends any notion of fixed boundaries of law and encompasses informal social and cultural regulatory norms, focusing on the regulatory effect of norms on everyday life, rather than the forms they take. The second section of the chapter will then utilise this approach to discuss a number of these forms of social regulation and demonstrate their continued relevance in contemporary Japan beyond their historical grounding.

Legal pluralism is a 'deceptively simple idea'.<sup>492</sup> It is the view that, within the boundaries of one nation state, 'more than one source of "law", more than one "legal order" is

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<sup>492</sup> M Davies, 'Legal Pluralism' in P Cane and H M Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012), 805.

observable ...the social order of that field can be said to exhibit legal pluralism'.<sup>493</sup> At the same time it is diverse and contested concept,<sup>494</sup> valuing the openness and variety of legal systems,<sup>495</sup> and rejecting the quest for a *Grundnorm* or some other foundation that occupies much of the analytic study of legal systems.<sup>496</sup> It has been considered essential to reconceptualising and understanding the relationship between law and society,<sup>497</sup> and in contemporary critical legal study is a useful tool for broadening the scope of elements regarded as constitutive of a legal system. Legal pluralism has featured across a range of legal fields, including socio-legal studies, comparative law, legal theory, legal anthropology, and international law.<sup>498</sup> This diversity of disciplines results in disagreement as to the definition of the concept and how it is used, as those who use the concept 'have different motivations and purposes'.<sup>499</sup>

#### 4.1 Defining Legal Pluralism

Legal pluralism is defined in contrast to monist, centrist, or statist conceptions of law,<sup>500</sup> but locating a single definition is difficult due to the multitude of scholarly opinions on the subject. Following the early work of Malinowski, which included non-state forms of ordering in the definition of law,<sup>501</sup> pluralism challenges and expands the Westernised perspective of 'the singular system of law tied to a nation state'.<sup>502</sup> Given that there is a lack of a singular focal point for global norms,<sup>503</sup> an increasing number of legal theorists working in global and international contexts produce scholarship that presents a pluralistic view of law and legality.<sup>504</sup> The core claim of pluralism – that law is plural – also requires clarity on what is meant by both 'plurality' and 'law' for legal pluralism to have any utility.<sup>505</sup> Davies discusses the former through an analysis of Griffiths' seminal

<sup>493</sup> J Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1, 38; M Davies, 'Legal Pluralism' in P Cane and H M Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012), 805.

<sup>494</sup> See, for example, M B Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (OUP 1975); S E Merry, 'Legal Pluralism' (1988) 22(5) *Law & Society Review* 869; S F Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law and Society Review* 719; G Teubner, "'Global Bukovina": Legal Pluralism in the World Society', in G Teubner (ed.), *Global Law Without a State* (Aldershot 1997) 3–28.

<sup>495</sup> V P Tzevelekos and L Lixinski, 'Towards a Humanized International "Constitution"?' (2016) 29 *Leiden Journal of International Law* 343, 354.

<sup>496</sup> N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010) 5-6.

<sup>497</sup> S E Merry, 'Legal Pluralism' (1988) 22(5) *Law & Society Review* 869, 869.

<sup>498</sup> B Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375, 390; see also M Davies, 'The Ethos of Pluralism' (2005) 27 *Sydney Law Review* 87; E Melissaris, 'The More the Merrier? A New Take on Legal Pluralism' (2004) 13 *Social & Legal Studies* 57.

<sup>499</sup> B Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375, 390-391.

<sup>500</sup> M Davies, 'Legal Pluralism' in P Cane and H M Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012), 817-818; M Davies, 'Pluralism and Legal Philosophy' (2006) 57 *Northern Ireland Legal Quarterly* 577, 586-589.

<sup>501</sup> B Malinowski, *Crime and Custom in Savage Society* (Routledge and Kegan Paul 1926), 15, 58.

<sup>502</sup> M Davies, 'Legal Pluralism' in P Cane and H M Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012), 807.

<sup>503</sup> See B de Sousa Santos, *Toward a New Common Legal Sense* (Butterworths 2002) 163-311; M Davies, 'Legal Pluralism' in P Cane and H M Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012), 807.

<sup>504</sup> B Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375, 389-390.

<sup>505</sup> M Davies, 'Legal Pluralism' in P Cane and H M Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012), 817-818.

work,<sup>506</sup> arguing that it is important to be aware of how the social field of study is perceived.<sup>507</sup> In addressing the conception of 'law' Merry queries the utility of and purpose of labelling of non-state norms,<sup>508</sup> revealing the uncertainty in defining 'law' (both that which is formal and informal) for legally-pluralist purposes. Santos challenges the demands placed on legal pluralists to explain why non-state norms should be labelled 'law', arguing that a 'politics of definition' needs to be unpacked and examined in order to depart from narrow, state-endorsed conception of law.<sup>509</sup>

For the purposes of this thesis, legal pluralism is directed by an openness and critical awareness of the limitations of Western modes of legal theorising and categorisation, and is responsive to a call for *an even more pluralistic* conception of legal pluralism.<sup>510</sup> The salient insight of this thesis, which investigates the Japanese legal system in particular, is that providing an accurate description and in-depth analysis requires departure from the conventional monist idea that law is bound to the nation state, and that law itself must be narrowly defined as stemming from a state 'source'.<sup>511</sup> Instead, it is important to *expand* the conception of 'law'<sup>512</sup> with a view to identifying those different legal orders that co-exist in the same space.<sup>513</sup> It is worth noting at this stage that the terminology is not integral to the analysis: whilst certain normative phenomena in Japanese society may be considered 'legal' in character for their normative and regulatory influence on everyday behaviour, the label of 'law' is not important. It could be argued that this label in fact contributes to the Anglo-European reading of the system that this discussion seeks to avoid. The lack of the label 'law' does not matter materially to the critiques undertaken in this and later chapters – although this assertion is one that may be contested by other comparative scholars.<sup>514</sup> Moreover, the conception of legal pluralism for this thesis is concerned with the *effect* of informal social and cultural norms on everyday social behaviour – what these norms *do* rather than what they *are*. Fundamentally, if the social or cultural practice or belief in question has a normative effect, and regulates behaviour so that people do not transgress socially acceptable

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<sup>506</sup> See J Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1.

<sup>507</sup> Whether this is the jurist's analysis that attempts to manage pluralism through legal techniques, or the social scientist's approach that studies how social groups interact and order their lives - M Davies, 'Legal Pluralism' in P Cane and H M Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012), 819.

<sup>508</sup> S E Merry, 'Legal Pluralism' (1988) 22(5) *Law & Society Review* 869, 878-879.

<sup>509</sup> B de Sousa Santos, *Toward a New Common Legal Sense* (Butterworths 2002) 91.

<sup>510</sup> See M Davies, 'Pluralism and Legal Philosophy' (2006) 57 *Northern Ireland Legal Quarterly* 577; E Meliassaris and M Croce, 'A Pluralism of Legal Pluralisms' (*Oxford Handbooks Online*, 2017), available at <<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-22>>.

<sup>511</sup> M Davies, 'Legal Pluralism' in P Cane and H M Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (OUP 2012), 807.

<sup>512</sup> See J Griffiths, "What is Legal Pluralism?" (1986) 24 *Journal of Legal Pluralism* 1.

<sup>513</sup> M Davies, 'Pluralism and Legal Philosophy' (2006) 57 *Northern Ireland Legal Quarterly* 577, 578.

<sup>514</sup> See, for example, W Twining, *Globalisation and Legal Theory* (Northwestern University Press 2001); P S Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press 2012).

boundaries and behaviours, it can be considered legalistic in nature and is thus encompassed by the critical legal pluralism approach adopted by this thesis.

The utility of legal pluralism does not lie in its ability to provide a new taxonomy – especially given the conclusion in chapter two that the creation of a taxonomy of legal systems is a flawed exercise. Palmer supports this point, stating that ‘pluralism has yet to present a taxonomy that differentiates and arranges the hybrids into useful groupings’.<sup>515</sup> Rather, legal pluralism can be put to better use supporting the case that categorising legal systems according to traditional comparative law methods is inadequate and unsatisfactory; it provides a conceptual basis for understanding how systems operate in their ‘mixedness’ and facilitates the ‘management’ of this state of being.<sup>516</sup> Legal pluralism therefore broadens the scope of elements under consideration and thus helps to build a more critical and complete picture of legal systems, without falling foul of the futile exercise of developing organisational frameworks.

## 4.2 Pluralist Legal Systems

With the definitional ambiguity of the remit of legal pluralism, there has been contention within critical legal scholarship as to how, when, and to what extent a legal system can be considered pluralist. Broadly defined, the ‘legal system’ thus includes the formal system of courts and judges alongside normative informal means of social ordering;<sup>517</sup> this enables an inclusive and holistic approach to the system under study. Legal pluralism contends that ‘early modern societies were legal plural societies’<sup>518</sup> due to multiple regulatory influences that managed the affairs of the citizenry.<sup>519</sup> This demonstrates an open approach to both ideas of law and of plurality, and focuses on the regulatory effect of these phenomena, giving a rich insight in to coexisting systems of ordering. Indeed, the pluralist approach proposes that a ‘different type or source’ can originate from the indigenous, exogenous, religion, and custom to name a few.<sup>520</sup> It facilitates departure from the positivist conception of law that underpins many Western systems, thus enabling stronger engagement with systems outside the West.<sup>521</sup>

<sup>515</sup> V V Palmer, ‘Quebec and Her Sisters in the Third Legal Family’ (2009) 54 *McGill Law Journal* 321, 333.

<sup>516</sup> P S Berman, ‘Global Legal Pluralism’ (2006-2007) 80 *Southern California Law Review* 1155, 1156.

<sup>517</sup> S Henry, *Private Justice*, (Routledge and Kegan Paul 1983).

<sup>518</sup> L Benton, ‘Historical Perspectives on Legal Pluralism’ (2011) 3(1) *Hague Journal on the Rule of Law* 57, 59.

<sup>519</sup> A prominent example of this is the expansive Ottoman empire, which included self-regulation of non-Muslim societies, with access to qadi courts to resolve disputes, merchant diaspora communities in West Africa and widespread Armenian populations governed by their native community leaders. Another example is the Mughal empire, in which British law was applied to cases involving British subjects and officials of the East India Trading Company, and Hindu and Muslim law applied to the rest of the population. See L Benton, ‘Historical Perspectives on Legal Pluralism’ (2011) 3(1) *Hague Journal on the Rule of Law* 57, 59-61.

<sup>520</sup> V V Palmer, ‘Mixed Legal Systems: The Origin of the Species’ (2013) 28 *Tulane European & Civil Law Forum* 103, 113.

<sup>521</sup> M Bussani, ‘A Pluralist Approach to Mixed Jurisdictions’ (2011) 6 *Journal of Comparative Law* 161, 161.

Examples of the segregation of law from normative social ordering includes the secular customs, state law and religious law in India,<sup>522</sup> Confucian values of *fa* (rule from authority) and *su* (popular custom) in China,<sup>523</sup> and state law from customs and social values in Japan.<sup>524</sup> Any number and type of combinations is possible and, using a pluralist approach, even those systems that would be considered to be largely comprised of national laws under classic categorisation can be revealed to comprise of several layers and influences.<sup>525</sup> This is even the case with private national laws in Europe; these are not usually considered to be mixed but arguably are the product of a combination of several sources, such as Roman law, customary law and natural law.<sup>526</sup> More generally, pluralistic constitutional constellations exist in almost all legal systems: for example, devolution, federalism, and autonomous communities are all non-unitary arrangements.<sup>527</sup>

Legal pluralism therefore provides a useful platform for expanding the roster of elements that are constitutive of a legal system. It is more inclusive of those non-legal elements which nevertheless have considerable influence within and on a system in both its form and operation. Furthermore, and as Berman argues, a pluralist perspective can be used to develop frameworks through which normative conflicts can be resolved in a constructive way.<sup>528</sup> This approach is seen in critical legal pluralist scholarship, particularly in developing frameworks to support indigenous communities,<sup>529</sup> and can be extended to resolve issues of conflict even in jurisdictions without established native populations. Pluralist scholarship has advocated for recognition of the pluralist nature of almost all legal systems, despite a largely Western – characterised by a focus on positive and doctrinal definitions – approach to law in many fields of legal scholarship. Examples of this include the coexistence of largely non-codified indigenous law, custom and Roman-Dutch law (influenced by English law) in South Africa,<sup>530</sup> of customary and state

<sup>522</sup> W Menski, *Hindu Law: Beyond Tradition and Modernity* (OUP 2003), 121, 247.

<sup>523</sup> I Castellucci, 'Rule of Law with Chinese Characteristics', (2007) 13 *Annual Survey of International and Comparative Law* 58.

<sup>524</sup> K Rokumoto, 'Law and Culture in Transition' (2001) 49 *American Journal of Comparative Law* 545; E A Feldman, *The Ritual of Rights in Japan* (Cambridge University Press 2000) 6.

<sup>525</sup> V V Palmer, 'Mixed Legal Systems: The Origin of the Species' (2013) 28 *Tulane European & Civil Law Forum* 103, 113.

<sup>526</sup> R Zimmermann, *Roman Law, Contemporary Law, European Law* (Oxford University Press 2001) 159.

<sup>527</sup> See N Skoutaris, *Territorial Pluralism in Europe: Vertical Separation of Powers in the EU and its Member States* (Hart 2019); M Avbelj and J Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012).

<sup>528</sup> P S Berman, 'Global Legal Pluralism' (2006-2007) 80 *Southern California Law Review* 1155, 1179.

<sup>529</sup> See, for example, J M Fernández Ruiz, 'Indigenous peoples and immigrants: multicultural challenge of criminal law' (*PhD thesis, University of Glasgow 2018*), available at <<https://core.ac.uk/reader/211237870>>; J Hendry and M L Tatum, 'Human Rights, Indigenous Peoples, and the Pursuit of Justice' (2016) 34(2) *Yale Law and Policy Review* 351; D Howard-Wagner, 'Taking Justice to Aboriginal People: Everyday Access to Justice as a Promising Area of Indigenous Policy' in J Hendry, M L Tatum, M Jorgensen and D Howard-Wagner (eds.), *Indigenous Justice: New Tools, Approaches, and Spaces* (Palgrave 2018).

<sup>530</sup> G J van Niekerk, 'A common law for South Africa: Roman law or indigenous African law?' (1998) 31 *Comparative & International Law Journal of South Africa* 158, 160.

law in the South Pacific,<sup>531</sup> of customary, Islamic and English common law in Nigeria,<sup>532</sup> and cultural and traditional norms, Islamic law and state law in the Philippines.<sup>533</sup>

There is a common past shared by many of these systems, notably the subjugation of indigenous and local forms of law and social ordering by colonial rule from Western states. The imposition of invading state law from colonisers provides a stark example of clashing systems of normative ordering. That said, and although the pluralistic character of colonial and post-colonial systems seems easier to identify,<sup>534</sup> Merry argues that, given a sufficiently broad definition of ‘legal system’, every society is legally plural, regardless of whether or not it has a colonial past.<sup>535</sup> In an increasingly connected world, where almost all jurisdictions are affected by international treaties requiring adherence through adaptation of national law, it is possible to identify both regional and global forms of legal pluralism.<sup>536</sup> Far from being a unified concept, these draw their origins from both legal pluralism developed in anthropology and sociology, and theories of global and international law that have appended legal pluralism.<sup>537</sup> Indeed, on these different levels of local, inter- and supranationality, and across jurisdictions, ‘a uniform concept of law can no longer be maintained.’<sup>538</sup>

In identifying the pluralist character of a legal system, Griffiths determines two different conditions of pluralism – ‘strong’, in which law is ‘neither systematic nor uniform’<sup>539</sup> and ‘weak’, which is identified when other sources of order are only recognised as law by the State, and cease to be social phenomena,<sup>540</sup> or where the State has been either required or forced to codify socio-cultural and religious norms as official law.<sup>541</sup> This thesis is averse to the ideas of categorising of conditions of pluralism as its labelling implies a ‘good’ and ‘bad’ pluralism, as the boundaries of categories are open to critique,<sup>542</sup> and this raises questions as to how pluralism is understood in empirical and conceptual

<sup>531</sup> See J Corrin, ‘Exploring the Deep: Looking for Deep Legal Pluralism in South Pacific’ (2017) 48 *Victoria University of Wellington Law Review* 305.

<sup>532</sup> See A A Oba, ‘Religious and Customary Laws in Nigeria’ (2011) 25 *Emory International Law Review* 881.

<sup>533</sup> M O Matsura, ‘Legal Pluralism in the Philippines’ (1994) 28(3) *Law & Society Review* 461.

<sup>534</sup> Not least due to sharp distinction between state law and non-codified, traditional customs, or indigenous law, such as in Malaysia, where there are several coexisting systems of ordering, including formal state law, customary law that has been influenced by colonial powers and/or Islam, and customary law that has not – S Sharmin, ‘Plural Legal Systems in Malaysia’ (2012) 66 *The Journal of Legal Pluralism and Unofficial Law* 49, 62, 70.

<sup>535</sup> S E Merry, ‘Legal Pluralism’ (1988) 22(5) *Law and Society Review* 869, 869.

<sup>536</sup> See V Mak, ‘In Favour of Strong Legal Pluralism in European Private Law for the Platform Economy’ (*Oxford Business Law Blog*, 26 February 2019), available at <<https://www.law.ox.ac.uk/business-law-blog/blog/2019/02/favour-strong-legal-pluralism-european-private-law-platform-economy>>; R Michaels, ‘Global Legal Pluralism’ (2009) 5 *Annual Review of Law and Social Science* 1; P S Berman, ‘Global Legal Pluralism’ (2006-2007) 80 *Southern California Law Review* 1155.

<sup>537</sup> R Michaels, ‘Global Legal Pluralism’ (2009) 5 *Annual Review of Law and Social Science* 1.

<sup>538</sup> K Günther, ‘Legal pluralism or uniform concept of law? Globalisation as a problem of legal theory’ (2008) *NoFo* 5, available at <<http://www.helsinki.fi/nofonoFo5Gunther.pdf>> 6.

<sup>539</sup> J Griffiths, ‘What is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism* 1, 5.

<sup>540</sup> J Griffiths, ‘What is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism* 1, 5.

<sup>541</sup> W Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press 2002), 116.

<sup>542</sup> J Hendry, ‘Margaret Davies, Law Unlimited: Materialism, Pluralism, and Legal Theory’ (2019) 46(1) *Journal of Law and Society* 169, 170.

ways.<sup>543</sup> For example, although there are coexisting systems of ordering in South Africa, due to the imposition of Western law (state law) that forced subservience of indigenous law,<sup>544</sup> Niekerk argues that ‘true pluralism’ has never existed there.<sup>545</sup> This notion of ‘true pluralism’ is not helpful either, as it designates one type or conception of legal pluralism as ‘right’, and suffers from the biases of those who describe it as such. Without a pluralist conception of the South African legal system, recognition, appreciation and understanding of the normative influence of indigenous law, despite attempts of erasure by Western / State law, would not have been possible.

Despite this power asymmetry between State/non-State legal orders, Hendry and Tatum argue that the legal orders of the US and indigenous Native nations ‘exist in circumstances of legal plurality,’ but the issue lies in a scholarly and governmental failure to recognise it.<sup>546</sup> Although there is oppression and suppression of Native forms and institutions of law (and not just in the United States), this does not necessarily weaken their validity; acknowledging them in the pluralist sense is essential for the recognition of their legitimacy and thus to pave the way for empowerment. Although some laws of Native Nations in the United States are recognised by the state law (and thus apparently fit with Griffiths’ ‘weak’ categorisation), much of the body of indigenous laws exists independently and is significant in its governance of Native communities. This makes it clear that the pluralistic conception of law cannot be so easily demarcated. Davies asserts that weak and strong pluralism can be identified simultaneously in a legal system<sup>547</sup> and that researchers can take a pluralist approach to pluralism itself, by realising the interdependency of its socio-legal and theoretical underpinnings.<sup>548</sup> This expansion to a ‘pluralism of pluralisms’ will form the foundation of the critical pluralist approach developed for and used in this thesis, detailed in the next section.

### 4.3 The Legal Pluralist Approach

As mentioned in the opening of this chapter, the legal pluralist approach adopted by this thesis is informed by the (self-)reflections in chapter one, and so retains an awareness of those biases that influence the researcher’s perception of law,<sup>549</sup> thus facilitating an

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<sup>543</sup> M Davies, ‘Legal Pluralism’ in P Cane and H M Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012), 819.

<sup>544</sup> G J van Niekerk, ‘Harmonisation of Indigenous Laws in Southern Africa’ (2008) 14 *Fundamina* 155, 157.

<sup>545</sup> G J van Niekerk, ‘A common law for South Africa: Roman law or indigenous African law?’ (1998) 31 *Comparative & International Law Journal of South Africa* 158, 160.

<sup>546</sup> J Hendry and M L Tatum, ‘Justice For Native Nations: Insights from Legal Pluralism’ (2018) 60 *Arizona Law Review* 91, 93-94.

<sup>547</sup> M Davies, ‘Legal Pluralism’ in P Cane and H M Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012), 819-820.

<sup>548</sup> M Davies, ‘Legal Pluralism’ in P Cane and H M Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012), 824. See also E Melissaris and M Croce, ‘A Pluralism of Legal Pluralisms’ (*Oxford Handbooks Online*, April 2017), available at <<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-22>>.

<sup>549</sup> P Giliker, ‘Comparative Law and Legal Culture: Placing Vicarious Liability in Comparative Perspective’ (2018) 6(2) *Chinese Journal of Comparative Law* 265, 289.



open, critical approach to the subject.<sup>550</sup> This awareness enables the legal pluralist approach developed for this thesis to depart from narrow and constraining Western ideas of 'law',<sup>551</sup> and to draw from a range of scholarship to fortify the approach. Griffiths emphasises that the definition of 'law' for the purposes of legal pluralism is 'the self-regulation of a "semi-autonomous social field"'<sup>552</sup> and states that legal pluralism 'is a concomitant of social pluralism: the legal organization of society is congruent with its social organization'.<sup>553</sup> In doing so he rejects legal centrist conceptions that claim that all law should be state-sponsored and apply equally to all persons and groups,<sup>554</sup> and that other normative orderings, such as the church and family, are lesser and 'hierarchically subordinate to the law and institutions of the state'.<sup>555</sup> This definition forms the basis for the critical legal pluralist approach in this thesis, recognising that informal means of social ordering are not inferior to formal law and these exert significant influence on social life.

Critical legal pluralism, as employed by this thesis, also rejects formalist and centrist definitions of law; as evidenced by the discussions on taxonomy in chapter two, and the prevalence of non-state law forms of ordering detailed in chapter three, the Japanese legal system comprises formal and informal normative regulatory frameworks. In support of Davies' statement that 'all normativity is produced by interactions between human agents who are ...already situated in diverse contexts of social meaning',<sup>556</sup> socio-cultural norms in Japan manifest their power through the relationships people and groups have with one another, which confers a complex system of duties and responsibilities in pursuit of a peaceful society. If we understand that these informal, non-state systems of ordering are brought to life in the social interactions between individuals and groups, we must acknowledge that State forms allow for processes of development and renewal, moving further away from fixed conceptions of 'law'.

In expanding the scope of what is considered 'law', Merry highlights the risk of arbitrarily describing social normative orders as law,<sup>557</sup> however critical legal pluralism for this thesis is not concerned with ascribing significant meaning to labels. It is argued that this concern continues to subscribe to a limited binary view of 'law' and 'not law', in which the focus is on definition and not on an 'expansive and experimental' exploration of law.<sup>558</sup> Becoming too concerned with the facts and criterion of what law is (and is not) precludes

<sup>550</sup> I Tourkochoriti, 'Comparative Rights Jurisprudence: An Essay on Methodologies' (2017) *Law and Method* 1, 14.

<sup>551</sup> M Davies, 'Legal Pluralism' in P Cane and H M Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012), 809.

<sup>552</sup> J Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1, 38.

<sup>553</sup> J Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1, 38.

<sup>554</sup> S A Jackson, 'Legal Pluralism between Islam and the Nation State: Romantic Medievalism or Pragmatic Modernity?' (2006) 1 *Fordham International Law Journal* 158, 160.

<sup>555</sup> J Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1, 17.

<sup>556</sup> M Davies, 'Legal Pluralism' in P Cane and H M Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012), 823.

<sup>557</sup> S E Merry, 'Legal Pluralism' (1988) 22(5) *Law and Society Review* 869, 878-879.

<sup>558</sup> M Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017) 40.

a critical pluralist approach. The complexity of law and socio-cultural norms in Japan calls for a more expansive, progressive approach – looking at what norms and systems of ordering *do* – their effect – rather than what they *are*. Davies’ recent work on *unlimiting* the law is particularly helpful here – she argues for us ‘to suspend law’s conventional conceptual, doctrinal, and institutional boundaries in an effort to image different modalities for understanding law’.<sup>559</sup> By expanding horizons of law and departing from Western philosophical approaches to understanding law<sup>560</sup> there is space to consider those influences that have a normative effect in society. To a degree, this also means departing from the relative comfort of the structure and hierarchy of formal nation-state law, and immersing in the combination of normative influences characterised by their contingency and fluidity.<sup>561</sup> Davies also presents the idea of law as a pathway, in which there are routes trod more frequently and some that are more divergent, to connect abstract and everyday law and release it from being conceptually bound to a singular point of time and/or space.<sup>562</sup>

The critical pluralist approach in this thesis therefore follows this unlimited perspective of law, seeking to identify those forms of social ordering in Japan that regulate behaviour and prohibit transgression of socially acceptable boundaries. Although many of the historical social and cultural norms discussed in chapter three have developed over time yet retain their relevance and significance in contemporary Japanese society, the critical pluralist approach does not discard formal nation-state law, but rather seeks to understand it in a pluralist context.<sup>563</sup>

Equipped with the emancipating power of legal pluralism discussed in the first section of this chapter, and the critical historical perspective developed in chapter three, this thesis now progresses to an examination of social and cultural norms in contemporary Japanese society. The pluralistic approach facilitates identification and discussion of social and cultural norms that continue to have substantial influence in everyday life in contemporary Japan, and enables the discussion to focus on a number of prominent normative social and cultural traditions – these include *giri*, *tatemae*, *honne*, *uchi*, *soto*, and *ninjō* as ubiquitous regulators of everyday Japanese life. Although some of these have been mentioned in chapter three, in this chapter further detail will be given to their specific historic circumstances to provide a more comprehensive overview. The fifth chapter of this thesis will then take these findings forward and employ legal culture as a

<sup>559</sup> M Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017) viii.

<sup>560</sup> M Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017) 23.

<sup>561</sup> A Philippopoulos-Mihalopoulos, ‘The Sound of a Breaking String: Critical Environmental Law and Ontological Vulnerability’ (2011) 2 *Journal of Human Rights and the Environment* 5, 10-11.

<sup>562</sup> M Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017) 144-153. See also I Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge 2015) 12.

<sup>563</sup> M Davies, ‘Legal Pluralism’ in P Cane and H M Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012), 824.

contextualising approach to the legal system. Far from the limitations of taxonomies challenged in chapter two, Japan is viewed as a *sui generis* entity; delimiting the constraints of Anglo-European perspectives on law enables critical comparative study to be undertaken in the case study of *saiban-in seido* in chapter six.

#### 4.4 The *giri* phenomenon

An appropriate starting point for the examination of these particular elements, not least due to its prominence both in literature and as a unique cultural phenomenon<sup>564</sup> within Japanese society, is *giri*. It has also been well documented in academic literature; one of the earliest and most comprehensive starting points is Benedict's work,<sup>565</sup> which describes *giri* as one of the more prominent characteristics of Japanese patterns of behaviour.<sup>566</sup> Despite good reception and being well-respected by many Japanese scholars, Benedict's work also contains several shortcomings.<sup>567</sup> The origins of *giri* lie in Confucian philosophy and in *Tokugawa* history; at this time responsibility in a legal context transcended into representing honour of the self, the family and descendants.<sup>568</sup> *Giri* remains an omnipresent influence in the lives of Japanese, guiding and regulating conduct in many normative situations, including those involving the formal law of the state.<sup>569</sup> For this reason, it is a significant aspect of legal culture in Japan, and so merits extensive consideration.

##### 4.4.1 Understanding *giri*

When beginning analysis from a Western, English-speaking perspective, *giri* instantaneously becomes an element of curiosity due to the difficulty encountered with determining its meaning in English. This difficulty arguably arises from an English speaker's general expectation of straightforward definitions for words and concepts and, whilst *giri* can briefly and roughly be explained as meaning 'obligation',<sup>570</sup> 'burden',<sup>571</sup> or 'duty'<sup>572</sup> it is also *all* of these things simultaneously. More specifically, it has been

<sup>564</sup> R Kubota, 'Standardization of Language and Culture' in S Sato and N M Doerr (eds), *Rethinking Language and Culture in Japanese Education: Beyond the Standard* (Multilingual Matters 2014) 23.

<sup>565</sup> See generally R Benedict, *The Chrysanthemum and the Sword: Patterns of Japanese Culture* (Houghton Mifflin Company 1946).

<sup>566</sup> R Benedict, *The Chrysanthemum and the Sword: Patterns of Japanese Culture* (Houghton Mifflin Company 1946) 133.

<sup>567</sup> M Yoshida, 'Giri: A Japanese Indigenous Concept' (8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014, in which it is argued that Benedict's goal of creating an account of Japanese society for the US government limits the rigour of her work; R Benedict, *The Chrysanthemum and the Sword: Patterns of Japanese Culture* (Houghton Mifflin Company 1946) 5-6.

<sup>568</sup> P Langsing and M Wechselblatt, 'Doing Business in Japan: The Importance of the Unwritten Law' (1983) 17 *International Law* 647, 649.

<sup>569</sup> D L Uchtmann, R P Blessen, V Maloney, 'The Developing Japanese Legal System: Growth and Change in the Modern Era' (1987-88) 23 *Gonzaga Law Review* 349, 351.

<sup>570</sup> Y Nishikawa, *Japan's Changing Role in Humanitarian Crises* (Routledge 2005) 38.

<sup>571</sup> S Wright, *International Human Rights, Decolonisation and Globalisation* (Routledge 2001) 151-2.

<sup>572</sup> F G Wallner and M J Jandl, 'The Importance of Constructive Realism for the Indigenous Psychologies Approach' in U Kim, K Yang and K Hwang (eds), *Indigenous and Cultural Psychology: Understanding People in Context* (Springer Science and Business Media Inc 2006) 41; W Caudill, 'The Influence of Social Structure and Culture on Human Behaviour in Modern Japan' (1973) 1(3) *Ethos* 344, 350.

described as ‘duty and obligation, brought on through social interaction with another person’<sup>573</sup> and as something that comprises just and reasonable behaviour<sup>574</sup> that is ‘required’ between individuals ‘in consequence of their social status’.<sup>575</sup> It both embodies the essence of morality and constitutes a framework for a social order<sup>576</sup> that creates a peaceful society without the need for governance or further regulation by law.<sup>577</sup> There is little overt public enforcement of *giri*; it is a personal duty that every person owes to society.<sup>578</sup>

The definitional pursuit of *giri* is not entirely fruitless, as; these attempts at translation can yield some useful insights. It is important, however, to be mindful that *giri* is not just a word to be translated and understood directly, but rather a complex concept that embodies feelings of obligation and respect for others, and constitutes a normative form of social regulation that runs in parallel to regulation by formal law.

#### 4.4.2 Historical Perspectives of *giri*

This chapter will illustrate the significance of *giri* in society through, first, an explanation of its origins, followed by some contemporary examples, and then an examination of its influence and role with respect to the law. The presence of *giri* has influenced Japanese society since it came into being,<sup>579</sup> operating as a regulator of conduct outside of formal laws and external enforcement.<sup>580</sup> It is a normative source of regulation operating on the basis of tradition, shared experience, and honour<sup>581</sup> and therefore appears quite constraining, going so far as to dictate how a person should behave, leading to a ‘negation’ of choice.<sup>582</sup> Whilst this negation is often something that Westerners struggle to grasp, and perhaps even view as unfair, Japanese society values this approach to decision-making within relationships not only because of the consistency and harmony associated with it, but also because it is the ‘righteous way’.<sup>583</sup> Indeed, it may be the case that the act that *giri* requires is unwanted, but a person still wishes to fulfil their *giri*.<sup>584</sup> Herein lies a fundamental and significant part of the Japanese social psyche, often

<sup>573</sup> M Yoshida, ‘Giri: A Japanese Indigenous Concept’ (8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014.

<sup>574</sup> Y Noda, *Introduction to Japanese Law* (University of Tokyo Press 1976) 175.

<sup>575</sup> Y Noda, *Introduction to Japanese Law* (University of Tokyo Press 1976) 175.

<sup>576</sup> C Kim & C M Lawson, ‘The Law of the Subtle Mind: The Traditional Japanese Conception of Law’ (1979) 28 *International & Comparative Law Quarterly* 491, 500.

<sup>577</sup> S R Thornton, ‘An Examination of the Compatibility and Effectiveness of the Foreign Legal Systems Partially Adopted in Japan’ (1999) 7 *Lawasia Journal* 84, 88.

<sup>578</sup> Y Noda, *Introduction to Japanese Law* (University of Tokyo Press 1976) 176.

<sup>579</sup> Y Nishikawa, *Japan’s Changing Role in Humanitarian Crises* (Routledge 2005) 52.

<sup>580</sup> C Kim & C M Lawson, ‘The Law of the Subtle Mind: The Traditional Japanese Conception of Law’ (1979) 28 *International & Comparative Law Quarterly* 491, 500-501.

<sup>581</sup> Author Unknown, ‘Giri and the *shinigami*: obligation and “being Japanese”’ (02 June 2011) <<http://www.studyofanime.com/2011/06/giri-and-shinigami-obligation-and-being.html>> accessed 01 December 2014.

<sup>582</sup> M Yoshida, ‘Giri: A Japanese Indigenous Concept’ (8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014.

<sup>583</sup> R Benedict, *The Chrysanthemum and the Sword: Patterns of Japanese Culture* (Houghton Mifflin Company 1946) 133.

<sup>584</sup> A Wierzbicka, *Understanding Their Cultures Through Their Key Words: English, Russian, Polish, German and Japanese* (OUP 1997) 270.

overlooked and misinterpreted by Westerners, whom often perceive this practice as a denial of personal choice, leading on to a lack of access to individual rights.<sup>585</sup> As rights are held in such high regard in the West, it is logical to see why this idea cause discomfort for Westerners.<sup>586</sup>

Taking account of the historical context, it is important to understand that Japan's geographical position as an island, and a lack of accessible resources, coupled with many years of isolation all contributed to the development of an insular, unified<sup>587</sup> and homogenous society.<sup>588</sup> The main resources the population had access to were fish and rice, and the activities to grow and gather food required cooperation.<sup>589</sup> The people were bound together in *mura* (villages) in which they relied upon one another for survival.<sup>590</sup> Coupled with a large population, these circumstances cultivated a strong sense of cooperation and with it the idea that the continued survival of the community was superior to personal desires,<sup>591</sup> thereby limiting disputes.<sup>592</sup> This was further reinforced by the reality that in such a harsh environment, one person alone could not survive. Furthermore, at this point in time individuals had no legal significance; the smallest legal unit possible was the family.<sup>593</sup> To withhold one's assistance from working towards community based goals had negative effects on the success of that community, which attracted a stigma to the extent that such a rejection was considered gravely improper, even 'sinful'.<sup>594</sup> To achieve this social practice, people were encouraged to marginalise their own personal desires and to foster a sense of selflessness that focused on the satisfaction of other parties above that of the self. Once the basic needs of the community were met, personal needs and wants could then be considered, this form of social organisation was successful even in Japan's most turbulent times.<sup>595</sup>

Another plausible origin for the complex nature of *giri* has been an old business practice called *seken-tei*,<sup>596</sup> whereby merchants would ensure that they strenuously maintained

<sup>585</sup> See generally Y Higuchi, 'When Society is the Tyrant' (1988) 35 *Japan Quarterly* 350.

<sup>586</sup> See generally, J Waldron, '*Nonsense Upon Stilts: Bentham, Burke, and Marx on the Rights of Man* (Routledge 1987); D Kennedy, 'The Critique of Rights in Critical Legal Studies', in W Brown and J Halley (eds.), *Left Legalism/Left Critique* (Duke University Press 2002).

<sup>587</sup> S R Thornton, 'An Examination of the Compatibility and Effectiveness of the Foreign Legal Systems Partially Adopted in Japan' (1999) 7 *Lawasia Journal* 84, 86-7.

<sup>588</sup> W Caudill, 'The Influence of Social Structure and Culture on Human Behaviour in Modern Japan' (1973) 1(3) *Ethos* 344, 356.

<sup>589</sup> R Minamoto, *Giri to ninjō* [Social obligations and human feelings] (Chuo Koronsha 1969) 42; P Langsing and M Wechselblatt, 'Doing Business in Japan: The Importance of the Unwritten Law' (1983) 17 *International Law* 647, 648.

<sup>590</sup> S R Thornton, 'An Examination of the Compatibility and Effectiveness of the Foreign Legal Systems Partially Adopted in Japan' (1999) 7 *Lawasia Journal* 84, 87.

<sup>591</sup> D J Gibbons, 'Law and the Group Ethos in Japan' (1992) 3 *International Legal Perspectives* 98, 104.

<sup>592</sup> C Kim & C M Lawson, 'The Law of the Subtle Mind: The Traditional Japanese Conception of Law' (1979) 28 *International and Comparative Law Quarterly* 491, 494.

<sup>593</sup> D J Gibbons, 'Law and the Group Ethos in Japan' (1992) 3 *International Legal Perspectives* 98, 101.

<sup>594</sup> Author Unknown, '*Giri* and the *shinigami*: obligation and "being Japanese"' (02 June 2011) <<http://www.studyofanime.com/2011/06/giri-and-shinigami-obligation-and-being.html>> accessed 01 December 2014.

<sup>595</sup> J Campbell, *The Masks of God: Oriental Mythology* (Secker and Warburg 1962) 461-2.

<sup>596</sup> M Yoshida, 'Giri: A Japanese Indigenous Concept' (8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014.

both their personal and commercial appearance and status. The former is still considered to be part of the presentational self and self-awareness<sup>597</sup> and is of greater importance than wealth or materiality, with emphasis being placed on individual honour, as supported and evidenced by noble action.<sup>598</sup> The arrival of Confucianism from China – a philosophy within which personal desires are subverted by strengthening family and community,<sup>599</sup> with a focus on relationships<sup>600</sup> – served to strengthen this practice and was further endorsed with the rise of the *shogunate*.<sup>601</sup> This period of Japanese history has generally been viewed as turbulent and feudal, with the *daimyo* nobility continually engaged in territorial conflicts and infamously savage punishments inflicted on those who disobeyed the hierarchical order.<sup>602</sup> *Giri* was a prominent factor and operated within this hierarchical structure, although where this came into conflict from authority – even commands (or *chu*) from the *Shogun* – the fulfilment of *giri* was held to be of greater virtue, to the extent that it would be fulfilled even if it meant death for the person carrying it out.<sup>603</sup>

A less extreme example from old Japan depicts a widow's unending loyalty to her husband; traditionally upon her husband's death a woman would cut off most of her hair in order for it to be placed in her husband's coffin as a symbol of her connection to him, including the promise of chastity.<sup>604</sup> A traditional story exemplifying this loyalty explained that the woman, even though she was a young widow and had suitors, refused to marry as the birds in her garden would not find new mates after their first mate died. She argued that if this pledge of chastity was evidenced in nature then it would not only be disloyal to her late husband but also unnatural to behave differently and seek out another husband.<sup>605</sup> This could even be understood as *giri* not only operating in the context of human communities, but also that humans have *giri* to the community of the wider natural world.

At the end of the *Tokugawa* era in 1868, there was less conflict in society, but the patterns of social regulation remained, with Neo-Confucianism adapted to underpin the

<sup>597</sup> T S Lebra, 'Self in Japanese Culture' in N R Rosenberger, *The Japanese Sense of Self* (Cambridge University Press 1992) 106.

<sup>598</sup> R Benedict, *The Chrysanthemum and the Sword: Patterns of Japanese Culture* (Houghton Mifflin Company 1946) 145-6.

<sup>599</sup> E Andreasen, 'Japanese Religions – An Introduction' in I Reader, E Andreasen and F Stefánsson (eds), *Japanese Religions: Past and Present* (University of Hawaii Press 1993) 40.

<sup>600</sup> H G Wren, 'The Legal System of Pre-Western Japan' (1968) 20 *Hastings Law Journal* 217, 221.

<sup>601</sup> D J Gibbons, 'Law and the Group Ethos in Japan' (1992) 3 *International Legal Perspectives* 98, 102-3.

<sup>602</sup> Y Jun, 'Law Enforcement in the Edo Period' (2004) 31(3) *Japan Echo*, available at <<http://www.japanecho.com/sum/2004/310319.html>> accessed 08 July 2015.

<sup>603</sup> K Seki, 'Circle of *On*, *Giri* and *Ninjo*: Sociologist's Point of View' (1971) 19(2) 北海道大學文藝紀要 *The Annual Reports on Cultural Science* 99, 106.

<sup>604</sup> K Seki, 'Circle of *On*, *Giri* and *Ninjo*: Sociologist's Point of View' (1971) 19(2) 北海道大學文藝紀要 *The Annual Reports on Cultural Science* 99, 107.

<sup>605</sup> K Seki, 'Circle of *On*, *Giri* and *Ninjo*: Sociologist's Point of View' (1971) 19(2) 北海道大學文藝紀要 *The Annual Reports on Cultural Science* 99, 107, referring to a tale in the book *Konjaku-Monogatari*, written around 1070.

supporting pillar of State Shinto.<sup>606</sup> This new incarnation of Japan centred around national obligation, and interactions with the West served to bind Japanese people closer together through this obligation, driving the idea that the individualisation prized by the West was negative<sup>607</sup> as it threatened social harmony (*wa*).<sup>608</sup> The responsibility was viewed not only as completing the task at hand, but also as each individual having responsibility for the success of the larger unit – if they failed, the rest of the community suffered. Death for action in the name of the state was the most significant concept in fortifying the aim of Japanese unity and community.<sup>609</sup> The Shinto religion supplemented this belief as, according to Shinto tradition, the Emperor was descended from the sun goddess Amaterasu,<sup>610</sup> and created a profoundly powerful sense of nationalism,<sup>611</sup> with the Emperor as the father of Japan.<sup>612</sup> Obligations under *giri* ensured that the *samurai* remained devoted to their masters even unto death;<sup>613</sup> although their time was predominantly over, the role of the *samurai* was, and to some extent still is, perceived to epitomise loyalty and honour. In this context the *samurai* and their way of life (*bushido*) are arguably a representation of idealised Japan, with these qualities being ones that every Japanese person should aspire to have.<sup>614</sup>

#### *The situational role of giri*

*Giri* permeates every aspect of Japanese society and, beyond the initial suggested definitions, it is probably better explained in the context of a variety of social situations: for example, obstinacy, consideration for others, exchange of favours, community living, moral choices, and moral indebtedness.<sup>615</sup> *Giri* as obstinacy may be explained in the situation where a married couple, already looking after the infirm mother of the husband, learn that the wife's mother is also ill. The husband offers for his wife to go and care for her mother however under *giri* she refuses and stays to continue looking after her mother-in-law. In this same context, the offer of the husband for his wife to go was not done because he necessarily wanted her to go; it was again his duty under *giri* to do

<sup>606</sup> C Ives, *Imperial-Way Zen: Ichikawa Hakugen's Critique and Lingering Questions for Buddhist Ethics* (University of Hawai'i Press 2009) 15-16; W Matthews, *World Religions* (7<sup>th</sup> edn, Wadsworth 2013) 206.

<sup>607</sup> J Clammer, *Difference and Modernity: Social Theory and Contemporary Japanese Society* (Kegan Paul International Ltd 1995) 6.

<sup>608</sup> C Kim & C M Lawson, 'The Law of the Subtle Mind: The Traditional Japanese Conception of Law' (1979) 28 *International & Comparative Law Quarterly* 491, 500.

<sup>609</sup> Y Nishikawa, *Japan's Changing Role in Humanitarian Crises* (Routledge 2005) 38.

<sup>610</sup> J Brown and J Brown, *China, Japan, Korea: Culture and Customs* (Booksurge LLC 2006) 89.

<sup>611</sup> D McNeill, 'Back to the Future: Shinto, Ise and Japan's New Moral Education' (2013) 11(50.1) *The Asia-Pacific Journal*, available at <<http://www.japanfocus.org/-David-McNeill/4047/article.html>> accessed 02 July 2015.

<sup>612</sup> C Ives, *Imperial-Way Zen: Ichikawa Hakugen's Critique and Lingering Questions for Buddhist Ethics* (University of Hawai'i Press 2009) 46.

<sup>613</sup> Y Nishikawa, *Japan's Changing Role in Humanitarian Crises* (Routledge 2005) 38.

<sup>614</sup> J Campbell, *The Masks of God: Oriental Mythology* (Secker and Warburg 1962) 500.

<sup>615</sup> M Yoshida, 'Giri: A Japanese Indigenous Concept' (8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014.

so.<sup>616</sup> Favours under *giri* may take the form of reciprocal gifts<sup>617</sup> as representative of one's *giri*,<sup>618</sup> whereas community living may involve a person making a donation to a forthcoming community event, even if they do not necessarily wish to.<sup>619</sup> Moral choices can also connect with loyalty:<sup>620</sup> for example where a skilled worker with a long history in a particular company is offered a job at a new company with better pay, and he refuses due to *giri*.<sup>621</sup> A scenario of moral indebtedness might involve one person assisting another financially with a small loan. The person receiving the loan then, over the years, becomes rich, and under *giri* does not forget the kindness of the person who lent him money initially, and gives him a substantial amount of money and an important job within his business;<sup>622</sup> this is an example of the flexible and altruistic nature of *giri* and its effect in compelling people to help one another. *Giri* is almost never any single one of these feelings or actions; it is more accurate to say that it often operates as a combination, although the scenarios described above are a minimal attempt at teasing out more individual strains of its form.

These scenarios also help to convey another framing of *giri*, the understanding that it is the 'righteous way, the road human beings should follow',<sup>623</sup> and 'something one does unwillingly to forestall apology to the world'.<sup>624</sup> Although Benedict raised concerns about the 'unwilling' aspect of this translation,<sup>625</sup> it is argued here that, in this respect, *giri* can be considered as less about obligation and more focused on following a righteous path. This righteousness aspect is indicative of its moral status and by extension its normative dimension as a form of social regulation. *Giri* often involves an amalgamation of the behaviours in the scenarios listed above, a situation that might prove confusing for an individual when deciding how to act in a given situation; it is however fundamentally important to remember that the path chosen *must* be one that is *virtuous*. This righteous path interpretation, briefly put, involves acting in a selfless manner and putting aside personal desires in order to better fulfil one's role within the community.<sup>626</sup>

<sup>616</sup> M Yoshida, 'Giri: A Japanese Indigenous Concept' (8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014.

<sup>617</sup> H Befu, 'Gift-Giving in a Modernising Japan' in T S Lebra and W P Lebra (eds), *Japanese Culture and Behaviour: Selected Readings* (University of Hawaii 1986) 162.

<sup>618</sup> R J Davies and O Ikeno (eds), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002) 240.

<sup>619</sup> M Yoshida, 'Giri: A Japanese Indigenous Concept' (8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014.

<sup>620</sup> Y Nishikawa, *Japan's Changing Role in Humanitarian Crises* (Routledge 2005) 53.

<sup>621</sup> M Yoshida, 'Giri: A Japanese Indigenous Concept' (8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014.

<sup>622</sup> M Yoshida, 'Giri: A Japanese Indigenous Concept' (8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014.

<sup>623</sup> K Seki, 'Circle of *On*, *Giri* and *Ninjo*: Sociologist's Point of View' (1971) 19(2) 北海道大学学報 *The Annual Reports on Cultural Science* 99, 106.

<sup>624</sup> R Benedict, *The Chrysanthemum and the Sword: Patterns of Japanese Culture* (Houghton Mifflin Company 1946) 134.

<sup>625</sup> R Benedict, *The Chrysanthemum and the Sword: Patterns of Japanese Culture* (Houghton Mifflin Company 1946) 134-6, 140.

<sup>626</sup> Author Unknown, 'Giri and the *shinigami*: obligation and "being Japanese"' (02 June 2011) <<http://www.studyofanime.com/2011/06/giri-and-shinigami-obligation-and-being.html>> accessed 01 December 2014.



#### 4.4.3 *Giri, hierarchy and repayment*

The examples given above are by no means an exhaustive list of circumstances in which *giri* may exist between parties. Each person is subject to *giri* and this must be observed and fulfilled in order to repay *gimu*.<sup>627</sup> However, and perhaps not unsurprisingly, Japan's acutely hierarchical social system means that, whilst each person is subject to and must act to fulfil *giri*, the obligations of *giri* are not equal for everyone.<sup>628</sup> Furthermore, *giri* is not limited to acts of equivalent value; for example, a sum of money borrowed does not necessarily require repayment of the same amount, or even repayment in monetary form.<sup>629</sup> This lack of stringency in the operation of *giri* may well unsettle Western onlookers, whom are quite used to being subject to specific rules, especially in the case of debts in a variety of contexts, be they social, financial, or otherwise material. For example, this is especially the case in the disparity between American and Japanese business transactions, given the prominence attached to contracts for the former and the emphasis on informality<sup>630</sup> and good faith for the latter.<sup>631</sup> Of course, the lack of even remotely tangible guidelines can and does create issues in *giri* influenced relationships between Japanese people whereby the parties may have different ideas of what would constitute enough to fulfil *giri*.<sup>632</sup>

It is important to be aware that *giri* is only active in certain situations, such as the ones exemplified above. In these scenarios all of the people seek to fulfil *giri* by forgoing their own personal needs and desires, instead choosing to support others, with the ultimate aim of minimising conflict. Although *giri* is something of an omnipresent influence in Japanese society, it is important to understand that it does not automatically arise without circumstance or relationship between people; individuals either have *giri* towards someone or they do not. When people have *giri* to one another, parties will act, or even refrain from acting, to ensure that *giri* is fulfilled prior to any request for the act or omission being made.<sup>633</sup> Essentially, it is considered that the anticipation of the requirement of the recipient and the response of the contributor is much more important than the former

<sup>627</sup> *Gimu* relates to the duty requiring payment of never-ending debts in *giri*. Note however that although *giri* and *gimu* may both be translated as 'duty', they are fundamentally different; see generally K Azumi, 'Japanese Society: A Sociological View' in A Tiedemann (ed), *An Introduction to Japanese Civilisation* (Columbia University Press 1974).

<sup>628</sup> Y Noda, *Introduction to Japanese Law* (University of Tokyo Press 1976) 176.

<sup>629</sup> M Yoshida, 'Giri: A Japanese Indigenous Concept' (8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014.

<sup>630</sup> J O Haley, *Authority Without Power: Law and the Japanese Paradox* (Oxford University Press 1991) 165.

<sup>631</sup> For the Japanese, a business contract is only a small part of the whole transaction, as establishing trust and fostering the personal and social relationships between the individuals making the contract are of greater importance. By contrast, the American approach focuses on the contract itself, aiming to achieve the best possible terms with little thought of relations. Japanese prefer open-ended, informal means of doing business; Americans prefer detail and the binding nature of a legal document; P Langsing and M Weschelblatt, 'Doing Business in Japan: The Importance of the Unwritten Law' (1983) 17 *International Law* 647, 654.

<sup>632</sup> Author Unknown, 'Giri and the *shinigami*: obligation and "being Japanese"' (02 June 2011) <<http://www.studyofanime.com/2011/06/giri-and-shinigami-obligation-and-being.html>> accessed 01 December 2014.

<sup>633</sup> M Yoshida, 'Giri: A Japanese Indigenous Concept' (8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014.

asking for *giri*. The anticipation is so highly valued to the extent that it is considered indecorous to remind someone of their *giri* in the sense that it is owed by them to another; it is expected that they will not forget their *giri* and will satisfy its requirements.<sup>634</sup> Even though the issue will not be pressed by the person owed *giri*, this lack of reminding is never considered as *giri* being forgotten; it is always present and cannot be removed or switched off.<sup>635</sup>

#### 4.4.4 Community and Self-interest

At the opposite end of the social scale, there is the representation of those who favour their own desires over the needs of others. Although it may seem unusual to a Western observer, manifestations of selfishness and greed often take the form of evil spirits and monsters (sometimes referred to as *yokai*). These evil spirits are considered to be selfish desires refusing to depart after death of the body,<sup>636</sup> meaning that a self-centred person cannot proceed naturally and therefore such selfishness is unnatural and sinful. The Japanese understanding of 'sin' differentiates from Western conceptions in that it is not about breaching a divine code, but rather entering and existing in a state of impurity caused by succumbing to personal wants and diverging from the righteous path.<sup>637</sup> This would mean divergence from *giri* and the community, without which survival and fulfilment is impossible, and so acting only in the interests of oneself is toxic and unfulfilling. In this context, Western ideas and practices – including Christianity - were portrayed by the authorities as a direct opposition to Japanese values;<sup>638</sup> for example individuation and the lack of unity for social harmony, which were unfamiliar and unpleasant to the Japanese. In response to the difficulties that Western ideas presented, the Japanese government utilised *giri* and State Shinto to unify the people, reminding them of their duties towards one another and to the state, and ultimately developing the vision of supremacy through unity and an 'infallible' morality.<sup>639</sup> State Shinto was abolished in 1945 with the Shinto Directive<sup>640</sup> although there remains some covert support from the state through its preferential placement ahead of other religions.<sup>641</sup>

<sup>634</sup> Y Noda, *Introduction to Japanese Law* (University of Tokyo Press 1976) 175.

<sup>635</sup> M Yoshida, 'Giri: A Japanese Indigenous Concept' (8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014.

<sup>636</sup> M Iwasaka and B Toelken, *Ghosts and the Japanese: Cultural Experience in Japanese Death Legends* (Utah State University Press 1994) 79-83, 108-115.

<sup>637</sup> E Andraesen, 'Japanese Religions – An Introduction' in I Reader, E Andraesen and F Stefánsson (eds), *Japanese Religions: Past and Present* (University of Hawaii Press 1993) 40-41.

<sup>638</sup> C Ives, *Imperial-Way Zen: Ichikawa Hakugen's Critique and Lingering Questions for Buddhist Ethics* (University of Hawaii Press 2009) 18.

<sup>639</sup> C Ives, *Imperial-Way Zen: Ichikawa Hakugen's Critique and Lingering Questions for Buddhist Ethics* (University of Hawaii Press 2009) 16.

<sup>640</sup> 'Directive for the Disestablishment of State Shinto' in I Reader, E Andraesen and F Stefánsson (eds), *Japanese Religions: Past and Present* (University of Hawaii Press 1993) 173-4.

<sup>641</sup> H Hardacre, *Shinto and the State 1868-1988* (Princeton University Press 1989) 26.

Following the cessation of State Shinto, Japan's involvement in the Second World War and the bombings of Hiroshima and Nagasaki, Japan became subject to instructions from the United States that radical legal reforms should be developed and implemented.<sup>642</sup> Despite this assertive influence from the West, and responding to it with the drafting and actioning of a constitution (*Nihon-Koku Kenpo*), Japan retained its strong ideas of nationalism and unity. Although Japanese scholars had actively pursued Western forms of law for adaptation into their own system during the middle of the 20<sup>th</sup> century,<sup>643</sup> the Constitution and legal institutionalisation were a direct imposition by America that left no room for negotiation with existing Japanese social values – a tension which still exists today.

#### 4.4.5 *Giri in contemporary Japan*

With the radical onset of urbanisation in Japan and the increasing possibility of it becoming self-sufficient, there have been – perhaps unsurprisingly – some challenges to the influence of *giri* from younger generations.<sup>644</sup> However, the idea of 'obligation' is still very strong and is practiced amongst the older generations, who make up much of Japan's population.<sup>645</sup> As such, despite some resistance, it is arguable that *giri* is practiced by older members of the population, who – through the obligations of *giri* – have passed down those same customs to many of the younger generation. Rebellion against self-sacrifice is viewed as evidence of weakness, as succumbing to one's own desires is easily done, whereas wilfully fulfilling duties to others displays a much greater strength of character, honour and discipline; freedom is underpinned by selfishness and thus is negative.<sup>646</sup> This aim of maintaining good relationships at the expense of personal desires is indicative of the highly social nature of *giri*, and relates to its other aspects which are akin to reciprocity in social contexts, even if the parties cannot necessarily do so in equal amounts. It is perhaps a little ironic, then, to state that harmony and balance are seen to be achieved if both parties act to fulfil *giri*, even when the contributions presented differentiate based on the status of the parties.<sup>647</sup> The social framework provided by *giri* may be stronger amongst the older generations and those living in rural Japan, however this is not to say that it is necessarily weak in urban areas.<sup>648</sup>

<sup>642</sup> M Dean, *Japanese Legal System* (2<sup>nd</sup> ed, Cavendish 2002) 446-7.

<sup>643</sup> S R Thornton, 'An Examination of the Compatibility and Effectiveness of the Foreign Legal Systems Partially Adopted in Japan' (1999) 7 *Lawasia Journal* 84, 88-89.

<sup>644</sup> R E Cole, *Japanese Blue Collar: The Changing Tradition* (University of California Press 1971) 207.

<sup>645</sup> N Muramatsu and H Akiyama, 'Japan: Super-Aging Society Preparing for the Future' (2011) 51(4) *The Gerontologist* 425, 426.

<sup>646</sup> J Kim, 'Deregulation Reconsidered: Protecting Internet Speech in the United States, Germany, and Japan' (2002) 24 *Communications and the Law* 53, 69.

<sup>647</sup> H Befu, 'Gift-Giving in a Modernising Japan' in T S Lebra and W P Lebra (eds), *Japanese Culture and Behaviour: Selected Readings* (University of Hawaii 1986) 163.

<sup>648</sup> H Befu, 'Gift-Giving in a Modernising Japan' in T S Lebra and W P Lebra (eds), *Japanese Culture and Behaviour: Selected Readings* (University of Hawaii 1986) 162.

These assertions, along with the aforementioned difficulties in obtaining a specific definition in English are likely to serve to complicate matters of *giri* for Western observers. The state of *giri* observance – and especially reciprocity<sup>649</sup> – in Japan is still high, although there has definitively been some erosion, especially in urban areas<sup>650</sup> and amongst younger generations whom have grown up with more Western influences.<sup>651</sup> The effect of *giri* in the context of Japanese law and legal culture is nonetheless indicative of its continuing respect as a form of social regulation in Japanese society.

#### 4.5 Socio-cultural regulation: *on*

Whilst *giri* is certainly highly significant within Japanese society, it is important to acknowledge that it does not operate alone. There are other cultural concepts in action, some of which work directly with *giri* and others that are not so closely related, but which still influence the conscious decisions made by Japanese people about their behaviour and in turn their interactions with law. Critically examining these related concepts therefore further helps to explain aspects of Japanese legal culture.

The obligatory nature of *giri* is closely linked with the structure of debts referred to as *on*. These repayments are usually generational in nature and typically involve recompense by people to their senior family members, teachers, the state and the Emperor.<sup>652</sup> This repayment has no time limit and lasts for most of an individual's lifetime, as the care from senior family members often continues into the individual's adult life, leading to the consideration that *on* is never truly repaid.<sup>653</sup> Additionally, there is no tangible guide as to how *on* can be repaid completely.<sup>654</sup> Despite this seemingly unattainable objective, it is nevertheless considered important to maintain repayment, as if this duty is neglected, it is believed to create restless dead, hostile spirits, and haunting.<sup>655</sup> Although perhaps an odd superstition by Western standards, the prevalence and role of spirits in Japanese society has strong historical grounding and forms part of Japan's cultural tradition.<sup>656</sup> It is argued, therefore, that alongside the reinforcement of

<sup>649</sup> The Japan Times, 'What 2011 means for Japan in 2012 and beyond' (*The Japan Times*, 01 January 2012) available at <http://www.japantimes.co.jp/news/2012/01/01/national/what-2011-means-for-japan-in-2012-and-beyond/#.VZ1BDUZWV2A> accessed 01 July 2015. The significance of *giri* has been noticed by non-Japanese residents in Japan, especially during times of natural disaster.

<sup>650</sup> N Muramatsu and H Akiyama, 'Japan: Super-Aging Society Preparing for the Future' (2011) 51(4) *The Gerontologist* 425, 426.

<sup>651</sup> R E Cole, *Japanese Blue Collar: The Changing Tradition* (University of California Press 1971) 207.

<sup>652</sup> C Kim & C M Lawson, 'The Law of the Subtle Mind: The Traditional Japanese Conception of Law' (1979) 28 *International & Comparative Law Quarterly* 491, 499; R Benedict, *The Chrysanthemum and the Sword* (Houghton Mifflin 1946) 101-2.

<sup>653</sup> K Azumi, 'Japanese Society: A Sociological View' in A Tiedemann (ed), *An Introduction to Japanese Civilisation* (Columbia University Press 1974); A Wierzbicka, *Understanding Their Cultures Through Their Key Words: English, Russian, Polish, German and Japanese* (Oxford University Press 1997) 257.

<sup>654</sup> M Iwasaka and B Toelken, *Ghosts and the Japanese: Cultural Experience in Japanese Death Legends* (Utah State University Press 1994) 18-19.

<sup>655</sup> M Iwasaka and B Toelken, *Ghosts and the Japanese: Cultural Experience in Japanese Death Legends* (Utah State University Press 1994) 18-20.

<sup>656</sup> See A Martin, 'Death notes: Traditional rituals associated with curses persist in 21st-century Japan' (*The Japan Times*, 7 September 2019), available at <https://www.japantimes.co.jp/culture/2019/09/07/general/death-notes-traditional-rituals-associated-curses-persist-21st-century-japan/#.XX-y8jZKiUk> accessed 14 September 2019; A Martin, 'At death's door:

social expectations, the prospect of avoiding ill-fortune through incurring the malice of evil spirits would also motivate people to maintain their repayment of *on*.

The relationship created by *on* can be categorised as one of 'give and give' (again, perhaps a somewhat odd concept to Western observers), in which the person giving *on* only thinks of giving, and the recipient thinks of nothing save for returning *on*, and therefore, in the act of returning, they are giving.<sup>657</sup> The person who gave in the first instance does not expect any return for his actions either. In the Japanese social consciousness, this is considered the most ideal relationship,<sup>658</sup> as both parties forgo their own wants and instead focus entirely on others. This is still the case even if the recipient cannot do anything in return and, in this case, does not do anything. An individual is required to return *on* whenever he can with regard to his station, including social and financial standing. In the category of a 'give and give' relationship, *giri* is similar to *on* as individuals are always seeking to fulfil *giri* by acting in the interests of others. Unlike *giri*, however, *on* is more of an internal compulsion that the receiver places on oneself; it transcends the actions of merely giving and receiving specific things and, like *giri*, becomes something much more universal. Despite this apparently systematic approach however, *on* is often practiced with some spontaneity, and even Japanese can misconstrue the actions of others for something else.

In its relationship to the law, *on* is generally more difficult to relate than *giri*. It shares some similarities with *giri* as both involve governance and regulation of behaviours and interactions between people. However, if *on* is understood as a series of social debts between individuals in society, and even between an individual and the state, this generates some ideas when considering Japanese legal culture. Owing debts to others in society is another powerful social regulator; taking *on* in its social context, it then seems unlikely that a person owing debts to another would take legal action against them. This is not to say that a debtor would necessarily allow the person to whom the debt is owed behave unreasonably towards them, it is that recourse to law would not always be automatic, as there are social and cultural norms that govern the relationships and provide viable alternatives to formal legal action.

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The attraction of living in homes with ghastly pasts' (*The Japan Times*, 30 October 2018), available at <<https://www.japantimes.co.jp/news/2018/10/30/national/stigmatized-properties-living-homes-ghastly-pasts/#.XX-zNTZKiUk>> accessed 14 September 2019; Y Ogura, 'Days of the dead: O-bon and the ghosts of Japan' (*The Japan Times*, 11 August 2012), available at <<https://www.japantimes.co.jp/community/2002/08/11/general/days-of-the-dead-o-bon-and-the-ghosts-of-japan/#.XX-yyzZKiUk>> accessed 14 September 2019.

<sup>657</sup> K Seki, 'Circle of *On*, *Giri* and *Ninjo*: Sociologist's Point of View' (1971) 19(2) 北海道文學報 The Annual Reports on Cultural Science 99, PAGE.

<sup>658</sup> K Seki, 'Circle of *On*, *Giri* and *Ninjo*: Sociologist's Point of View' (1971) 19(2) 北海道文學報 The Annual Reports on Cultural Science 99, 104.

#### 4.6 Socio-cultural regulation: *ninjo*

The third aspect that complements *giri* and *on* is *ninjo*, another significantly influential cultural concept pertaining to social relationships and behaviours in Japan. Much like *giri*, there is no true English equivalent of the term but it may be described as ‘human affection’ or ‘kindness’.<sup>659</sup> A person who is described as ‘of *ninjo*’ or ‘having *ninjo*’ is somebody who is kind and loyal, who does not forget his fulfilments of *on* and *giri*. This is particularly important in saving face, or *mentsu*,<sup>660</sup> where the actions of an individual will reflect on others’ perceptions of them and, more importantly, their group.<sup>661</sup> Along with *giri*, there is some dispute as to the continued relevance of *ninjo*, but there is considerable evidence of its importance in governing the everyday lives of Japanese, from business<sup>662</sup> to sporting endeavours.<sup>663</sup>

It is arguable that, on the face of it, *ninjo* appears to have little impact in the space of legal culture as it relates more to a person’s state of kindness. However, given that Japanese are uncomfortable with the stark categories and damage to relationships that law incurs, it is contended that a person who would willingly engage in legal action would not be considered to have *ninjo*. The formal legal system of Japan, with its strict rules upheld by the system of courts, creates a space where *ninjo* cannot exist,<sup>664</sup> and those who fall in to that space will not have the benefit of the humanity that *ninjo* fosters. When this is taken alongside the pressure to maintain face and preserve social relationships, being seen as one who has *ninjo* is essential to remaining valued within the community. Therefore, although resolving disputes is a necessity within Japanese society, in order to adequately fulfil *giri* and *on* and retain *ninjo*, utilising alternate methods to preserve human goodness and kindness is of utmost importance.

#### 4.7 ‘We’ and ‘they’ – in- and out-group approach to law and society in Japan

*Giri* represents a universal behavioural code in Japanese society, with the aforementioned *on* and *ninjō* augmenting social conduct in pursuit of a continuing state

<sup>659</sup> R E Watts, ‘Briefing the American Negotiator in Japan’ (1982) 16 *International Law* 597, 600; Y Noda, *Introduction to Japanese Law* (University of Tokyo Press 1976) 176.

<sup>660</sup> M Haugh, ‘What Does ‘Face’ Mean to the Japanese? Understanding the Import of ‘Face’ in Japanese Business Interactions’ in F Bergiela-Chiappini and M Gotti (eds.), *Asian Business Discourses* (Verlag Peter Lang 2005) 224.

<sup>661</sup> Y Matsumoto, ‘Reexamination of the Universality of Face: Politeness Phenomena in Japanese’ (1988) 12 *Journal of Pragmatics* 403, 405.

<sup>662</sup> P Pringle, ‘Gifts, Favours and, Obligations in Japanese Business Culture’ (*Japan Intercultural*, 20 August 2013), available at <<https://www.japanintercultural.com/en/news/default.aspx?newsID=266>> accessed 14 September 2019.

<sup>663</sup> Kyodo, ‘Promise to parents keeps new ozeki Takakeisho pushing forward’ (*The Japan Times*, 27 March 2019), available at <[https://www.japantimes.co.jp/sports/2019/03/27/sumo/promise-parents-keeps-new-ozeki-takakeisho-pushing-forward/#.XX\\_JUDZKiUk](https://www.japantimes.co.jp/sports/2019/03/27/sumo/promise-parents-keeps-new-ozeki-takakeisho-pushing-forward/#.XX_JUDZKiUk)> accessed 14 September 2019.

<sup>664</sup> C Burgess, ‘Immigration showing signs of *ninjo*: more humane system may be on the horizon’ (*The Japan Times*, 27 October 2009), available at <[https://www.japantimes.co.jp/community/2009/10/27/issues/immigration-showing-signs-of-ninjo/#.XX\\_GLjZKiUk](https://www.japantimes.co.jp/community/2009/10/27/issues/immigration-showing-signs-of-ninjo/#.XX_GLjZKiUk)> accessed 14 September 2019.

of harmony (*wa*).<sup>665</sup> Japanese legal culture sits within this social context and reveals some of the difficulties created by the inconsistencies between social and legal regulation. Further to the hierarchical and social debt-based behaviours of the aforementioned social phenomena, one of the core characteristics of Japanese society is the emphasis on groups, belonging and proper behaviour towards members of particular groups. This approach to life in groups, as detailed below, is ubiquitous in everyday life in Japan. This social organising framework is powerful in influencing everyday behaviours and decision making, prescribing actions and words between individuals on the basis of whether they are in the same group or not. The normative nature of this phenomenon not only imbues it with a legalistic quality, similar to *giri* discussed above, but also arguably makes it an essential element of Japanese legal culture. It is argued that in- and out-group belonging can also be used to aid understanding of the relationship between law and society in Japan – that law is viewed as out-group, to be treated with caution and measure. This section even goes so far as to argue that the type of thinking associated with normative in- and out-group living underpins the way that many Japanese think about law and how to interact with it – that it informs legal consciousness as well as constituting a foundational element of legal culture.

#### 4.7.1 Group Society

As discussed in chapter three, the collectivist culture and group-orientated social structure of Japan finds its origins grown from Confucian philosophy and nationally represented most strongly in *Tokugawa* era history. Much like the community values underpinned through *giri*, Japan's isolative and insular position fostered a sense of survival and security in cooperation with others. The *Tokugawa* era's division of society into distinct hierarchical classes further served to strengthen group belonging and identity<sup>666</sup> – as discussed earlier, many people lived in *mura* (villages), in which each person had a role that was essential to the survival of the community.<sup>667</sup> As such, conflicts tended to be resolved to the benefit of all parties, as exiling any one person would put strain on the remaining members of the community, and ostracisation was fatal to any individual.<sup>668</sup> After Japan's period of rapid integration with the West during the late nineteenth and early twentieth centuries, Japan's economic structure transformed and the *mura*, as well as the mentality and behaviour associated with these, became less

<sup>665</sup> C Kim & C M Lawson, 'The Law of the Subtle Mind: The Traditional Japanese Conception of Law' (1979) 28 *International & Comparative Law Quarterly* 491, 499.

<sup>666</sup> D V Botsman, 'Politics and Power in the Tokugawa Period' (1992) 3 *East Asian History* 1, 6.

<sup>667</sup> Y Zhang, 'The Inheritances and Variation of Confucian Family Culture – Concept of Family Household and Group Consciousness in Japanese Social Culture' (2017) 82 *Advances in Computer Science Research* 960, 963.

<sup>668</sup> P H Come, 'The Influence of Traditional Normative Mechanisms of Behaviour on the Japanese Legal System' (1990) 12 *Sydney Law Review* 346, 347; J O Haley, 'The Role of Law in Japan: A Historical Perspective' (1984) 18 *Kobe University Law Review* 1, 12; H Ooms, *Tokugawa Village Practice: Class, Status, Power, Law* (University of Washington Press 1996) 229.

prominent. Values of group loyalty, interdependency and cooperation were however strengthened during the aftermath of Japan's defeat in WWII, the devastation of Hiroshima and Nagasaki, and the subsequent economic downturn, with the result that these values remain as key universal aspects of contemporary Japanese society.

As indicated by the above examination of *giri*, Japan is, broadly speaking, a group-based society, in which the concept of self is largely defined by the groups to which an individual belongs.<sup>669</sup> The interests and achievements of the group are of greater importance than those of the individual, and the interdependency with other members of the group is imperative to self.<sup>670</sup> Belonging to a group, and the arrangement of society into groups is a core element of Japanese society and of great importance to Japanese people. This begins early in childhood when an individual identifies first with the family group, then with their school and other activity groups (such as sports teams), then into adult life with belonging to a particular company or organisation.<sup>671</sup> At an early age, children learn that home and school are distinct environments for which different behaviours are appropriate; this is taught independently by parents and teachers on a foundation of cultural normative understanding.<sup>672</sup> Home is for real feelings and preferences, and school involves learning proper group behaviour, including enthusiastic, harmonious and selfless interaction with others – it is *shudanseikatsu* (life in a group).<sup>673</sup> Spending time in groups occurs in many contexts, including some personal endeavours, such as dating, in which young Japanese attend group parties known as *gokon*.<sup>674</sup> Identity therefore tends to be formed through connections with others, contrary to the Western notion of individual self-assertion. The idea of individuality<sup>675</sup> tends to be negatively viewed by most Japanese;<sup>676</sup> even the word *kojin* (個人 – individual) is viewed negatively,<sup>677</sup> as it can also be read as meaning 'corpse' or 'dead person'. The most

<sup>669</sup> It is important to note that although the broad categorisation of Western societies as individualistic and Eastern societies as collectivist appears to be in opposition, this is not strictly the case. Rather, it is contended that this should be viewed as a spectrum; that all societies are to some extent individualistic and collectivist, and although one category might be dominant it is not to the exclusion of the other. In Japan, the collectivist construct prevails and behaviours are closely linked to one's belonging to a given group, most particularly differing levels of openness.

<sup>670</sup> H C Triandis, 'Collectivism and individualism as cultural syndromes' (1993) 27 *Cross Cultural Research* 155-180.

<sup>671</sup> J Hendry, *Understanding Japanese Society* (4<sup>th</sup> edn, Routledge 2013) 44-45; L Peak, 'Learning to Become Part of the Group: The Japanese Child's Transition to Preschool Life' in H Shimizu and R A Levine (eds), *Japanese Frames of Mind: Cultural Perspectives on Human Development* (Cambridge University Press 2001) 144.

<sup>672</sup> L Peak, 'Learning to Become Part of the Group: The Japanese Child's Transition to Preschool Life' in H Shimizu and R A Levine (eds), *Japanese Frames of Mind: Cultural Perspectives on Human Development* (Cambridge University Press 2001) 144.

<sup>673</sup> L Peak, 'Learning to Become Part of the Group: The Japanese Child's Transition to Preschool Life' in H Shimizu and R A Levine (eds), *Japanese Frames of Mind: Cultural Perspectives on Human Development* (Cambridge University Press 2001) 144.

<sup>674</sup> J Spacey, 'What is a Gokon?' (*Japan Talk*, 10 October 2015) < <http://www.japan-talk.com/jt/new/gokon> > accessed 17 November 2015; C Clegg, 'The ugly truth of 'gokon', Japan's group blind dates' (*Japan Today*, 29 September 2014) < <http://www.japantoday.com/category/lifestyle/view/the-ugly-truth-of-gokon-japans-group-blind-dates> > accessed 17 November 2015.

<sup>675</sup> And especially the way said individualism manifests in Anglophile Western societies, which can be viewed as isolated and selfish.

<sup>676</sup> 'Most Japanese' is stipulated here to reflect the increasing trend of individualistic lives led by residents of major cities, especially by young Japanese who often struggle to afford property and build a family, leading quite different lives from that of previous generations.

<sup>677</sup> R Halloran, *Japan: Images and Realities* (New York 1972)



important group for many Japanese is the institution to which they belong for either work or education.<sup>678</sup> The former is particularly notable from behaviours of Japanese businessmen, who will often work many hours, followed by socialising with colleagues and rarely returning home to their families during the week (opting instead for budget hotels).<sup>679</sup>

#### 4.7.2 *Uchi and soto*

The above critical examination of *giri* also provides a valuable insight into the connectedness of Japanese society and its influence on Japanese legal culture. Japanese construct their identities and understanding of self on the basis of belonging (and not belonging) to particular groups within society and this occurs alongside *giri*. Such groups are one's family, friends and school or work colleagues; these groups are referred to as *uchi*,<sup>680</sup> the in-group with which an individual associates, and identity is formed by membership of these groups. Furthermore, *uchi* is defined as 'inside', 'my house and home' or 'the group we belong to'.<sup>681</sup> Everyone outside of these *uchi* is part of the *soto*, or out-group, defined as 'the outside', 'outdoors', 'other groups'.<sup>682</sup> Japanese take this distinction further with Westerners, referring to them as '*gaijin*' (outsider or foreigner) leading to difficulties in building relationships on an international level and differentiating between *gaijin* and other peoples because they are all *soto* to the Japanese.<sup>683</sup> *Giri* is always owed to people in the *uchi* group, as maintaining positive and harmonious relationships is of utmost importance, even if the individual's personal wants are not satisfied. However, it may not always be the case that a *giri* relationship is necessary in interactions with *soto* people, and only arises in particular situations as discussed in the above section. Even with *uchi* and *soto* groupings, Japanese are still instilled with a sense of belonging overall to a national group, and as such this aspect of culture obligates compliance with rules to ensure society runs smoothly and remains

<sup>678</sup> A Zander, 'The Value of Belonging to a Group in Japan' (1983) 14(1) *Small Group Behaviour* 3, 5-7; R Kopp, 'Thinking of working in Japan? It's good to know what you're in for' (*The Japan Times*, 30 January 2019), available at <<https://www.japantimes.co.jp/community/2019/01/30/how-tos/thinking-working-japan-good-know-youre/#.XbcLcPX7SUK>> accessed 10 September 2019.

<sup>679</sup> A Masui, 'Once aimed at salarymen, Japan's new capsule hotels reach out to tourists and women' (*The Japan Times*, 2 November 2016), available at <<https://www.japantimes.co.jp/news/2016/11/02/business/aimed-salarymen-japans-new-capsule-hotels-reach-tourists-women/#.XbcNhX7SUK>> accessed 10 September 2019.

<sup>680</sup> Y Nakata, 'Uchi Soto and Japanese Group Culture' (*GaijinPot*, 25 September 2014) <<http://blog.gaijinpot.com/uchi-soto-japanese-culture>> accessed 12 November 2015.

<sup>681</sup> R J Davies and O Ikeno (eds), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002) 217.

<sup>682</sup> R J Davies and O Ikeno (eds), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002) 217.

<sup>683</sup> R J Davies and O Ikeno (eds), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002) 219; Y Nakata, 'Uchi Soto and Japanese Group Culture' (*GaijinPot*, 25 September 2014) <<http://blog.gaijinpot.com/uchi-soto-japanese-culture>> accessed 12 November 2015.

harmonious.<sup>684</sup> This compliance and sacrifice of personal wants is rewarded with a largely safe, well-functioning society in which to live.

Although these above examples may give the impression of groups in Japan being quite distinctive, the process is more complicated and dynamic; group boundaries are flexible dependent on the context.<sup>685</sup> When *soto* members are present, they are honoured and shown deference, with the *uchi* members humbled and deprecated to enhance the respect shown to the *soto* people.<sup>686</sup> This is particularly true of business interactions, where the customer (*soto*) is treated with utmost respect, and members of the business, including the manager (*uchi*) are humbled.<sup>687</sup> Group belonging is also used by the Japanese to make sense of social structure, associating with some groups and avoiding others. Behaviour among in-group members involves affection, openness and sensitivity to the wellbeing of others in the group. There is a strong desire for harmony, cooperation and interdependency and, in pursuit of these goals, individual satisfaction and recognition is often put aside. The flexibility of these boundaries is exemplified again in the aforementioned socialisation of Japanese businessmen; during the working day, although working within the *uchi* of the company, respect is shown for the hierarchical structure of the organisation through deference to senior colleagues. However, once the company goes out to socialise in various bars, colleagues are much more honest with one another, with little harmonious disruption and little or no repercussions the following day.

Despite the importance of groups in Japan, values of individualism are gradually emerging, along with little desire to participate in community life. This is even starting to be reflected amongst the younger generation of business professionals, who are displaying less company loyalty and are seeking reward through financial incentive and lifestyle rather than through longevity and belonging.<sup>688</sup> This is further perpetuated by factors such as the high numbers of people living more isolated lives in apartment blocks,<sup>689</sup> fewer younger Japanese having families, and greater focus on achievement through pursuing a career. This erosion however is very gradual and community values

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<sup>684</sup> S Parsons, 'Is Japan the Land of Convenience and Politeness?' (*Japan in Perspective*, 9 November 2015) <<http://www.japaninperspective.com/is-japan-the-land-of-convenience-and-politeness>> accessed 02 December 2015.

<sup>685</sup> R J Davies and O Ikeno (eds), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002) 219.

<sup>686</sup> Y Nakata, 'Uchi Soto and Japanese Group Culture' (*GaijinPot*, 25 September 2014) <<http://blog.gaijinpot.com/uchi-soto-japanese-culture>> accessed 12 November 2015.

<sup>687</sup> Y Nakata, 'Uchi Soto and Japanese Group Culture' (*GaijinPot*, 25 September 2014) <<http://blog.gaijinpot.com/uchi-soto-japanese-culture>> accessed 12 November 2015.

<sup>688</sup> S Parsons, 'Cultivating a Culture Somewhere In Between Individualism and Collectivism' (*Japan in Perspective*, 9 March 2015) <<http://www.japaninperspective.com/cultivating-culture-somewhere-inbetween-individualism-collectivism>> accessed 02 December 2015.

<sup>689</sup> This is similar to the idea of organic and inorganic solidarity and social attenuation proposed by Durkheim – see E Durkheim, *The Division of Labour in Society* (S Luke ed, W D Hall trs., 2<sup>nd</sup> edn, Palgrave Macmillan 2013) 88-104.

remain strong, especially amongst older Japanese who then seek to reinforce these values amongst younger generations. Most Japanese still feel inclined to cooperate, even if the motivation for this manifests in wanting to avoid conflict with others rather than a sense of kindness or altruism. It is contended that groups are still important to many Japanese; arguably the social groups in contemporary Japan are transitioning away from traditional community ones due to developments in communication and increasing urbanisation. As such, there is likely to be more focus on family, friendship (perhaps those developed during University years, as many more Japanese now study at University) and work-based groups. Summarily, although there is evidence of greater levels of individualism among Japanese, especially younger people, compared to previous decades, the sense of structure and belonging through groups is still strong.<sup>690</sup>

#### 4.7.3 In- and out-group behaviours: *tatemae* and *honne*

In addition to *uchi* and *soto*, two further universal aspects assist in the understanding of Japanese legal culture: *honne* and *tatemae*, the behaviours that respectively accompany whichever group an individual is interacting with.<sup>691</sup> These concepts relate closely to *uchi* and *soto*, in which *honne*, the true internal thoughts and feelings of individuals, are shared with *uchi* members, and *tatemae*, the external facade, is practised with those who are in the *soto* group, and thus not privy to an individual's real intentions. These social ideas are best considered together as they are two sides of the same coin, and represent a legitimised 'double-code' of Japanese society.<sup>692</sup> These terms are used in Japan by way of explaining the internal thoughts and feelings and external behaviours of people, and understanding the reasons for the decisions people make. These aspects have also been explained as the 'presentational self', the outward self that one portrays to others,<sup>693</sup> and the 'inner self', which includes an individual's *kokoro* (heart, spirit or will) and allows for unblemished truthfulness.<sup>694</sup> A further means of expressing this duality is describing a flat object, with its face (*omote*) and its back (*ura*).<sup>695</sup>

It is important to recognise that these aspects are not exclusive to Japanese culture; many other cultures have very similar concepts (although it might not be named so specifically and recognised so overtly). What makes the Japanese social practice

<sup>690</sup> S Parsons, 'Japanese Collectivism versus Western Individualism-Can they work together?' (*Japan in Perspective*, 19 August 2014) <[www.japaninperspective.com/japanese-collectivism-vs-western-individualism](http://www.japaninperspective.com/japanese-collectivism-vs-western-individualism)> accessed 02 December 2015.

<sup>691</sup> Y Nakata, 'Uchi Soto and Japanese Group Culture' (*GaijinPot*, 25 September 2014) <<http://blog.gaijinpot.com/uchi-soto-japanese-culture>> accessed 12 November 2015.

<sup>692</sup> Y Sugimoto, *An Introduction to Japanese Society* (4<sup>th</sup>edn, Cambridge University Press 2014) 33-4.

<sup>693</sup> T S Lebra, 'Self in Japanese Culture' in N R Rosenberger (ed), *The Japanese Sense of Self* (Cambridge University Press 1992) 106-108.

<sup>694</sup> T S Lebra, 'Self in Japanese Culture' in N R Rosenberger (ed), *The Japanese Sense of Self* (Cambridge University Press 1992) 111-114.

<sup>695</sup> Y Sugimoto, *An Introduction to Japanese Society* (4<sup>th</sup>edn, Cambridge University Press 2014) 34; T Doi, *The Anatomy of Self: The Individual Versus Society* (Kodansha International Ltd 1986) 23-4.

distinctive is the perception in Japanese society that maintaining a facade of outer behaviours that misalign with internal feelings is essential for displaying good social etiquette and is quite acceptable.<sup>696</sup> This is the case even as early as elementary school, in which children are instructed to retain a *tatemae* face, a neutral, yet interested kind of expression regardless of the content of the class or their feelings on any given issue.<sup>697</sup>

For those non-Japanese who are aware of the *honne/tatemae* behavioural divide, the concept can appear a negative one, with accusations that *tatemae* is, at its most basic form, lying to those who are not members of an individual's *uchi*.<sup>698</sup> *Tatemae* behaviour involves apologising, showing remorse<sup>699</sup> and simulating sincerity in politeness and friendliness towards *soto* people.<sup>700</sup> In many cultures, directness in interactions is preferred; in Japan, using *tatemae* when interacting with *soto* groups is considered essential for avoiding conflict and maintaining face in front of the *uchi* group, and of the group itself.<sup>701</sup> To outsiders raised in cultures of more direct communication, this differentiation might seem unnecessary, however to Japanese, revealing one's true feelings in the wrong situation is *bakashōjiki* (stupid honesty).<sup>702</sup> This is reflected in all social contexts and has been shown to cause difficulties on a professional level for business managers whom have accidentally been too honest about government policy.<sup>703</sup>

Given some of the above situations described in the context of other social and cultural phenomena, it is not surprising to find that often this is a source of conflict for many Japanese. For example, a guest at a dinner party might, at the end of the evening, offer an invitation to dinner at his house on the next occasion, even if he does not really want others to come over. Furthermore, the person who receives the invite may know that their presence is not truly requested, and may feel conflicted about accepting or refusing the invite. Some of this is smoothed over a mutual understanding that these exchanges

<sup>696</sup> Y Nakata, 'The Honesty and Façade of Honne and Tatemae' (*GaijinPot*, 6 October 2014) <<http://blog.gaijinpot.com/honne-tatemae/>> accessed 10 July 2015.

<sup>697</sup> G J D Trinidad, 'Honne and Tatemae: Exploring the Two Sides of Japanese Society' (*Thesis, University of Iceland* 2014) 1.

<sup>698</sup> Y Nakata, 'The Honesty and Façade of Honne and Tatemae' (*GaijinPot*, 6 October 2014) <<http://blog.gaijinpot.com/honne-tatemae/>> accessed 10 July 2015; D Arudou, 'The costly fallout of *tatemae* and Japan's culture of deceit' (*The Japan Times*, 1 November 2011) available at <<http://www.japantimes.co.jp/community/2011/11/01/issues/the-costly-fallout-of-tatemae-and-japans-culture-of-deceit/#.VIWlir937Ou>> accessed 18 November 2015.

<sup>699</sup> E R McDaniel, 'Japanese Negotiating Practices: Low Context Communication in a High Context Culture' (*Doctoral Thesis, Arizona State University* 2000) 29.

<sup>700</sup> Y Nakata, 'Uchi Soto and Japanese Group Culture' (*GaijinPot*, 25 September 2014) <<http://blog.gaijinpot.com/uchi-soto-japanese-culture/>> accessed 12 November 2015.

<sup>701</sup> Y Nakata, 'The Honesty and Façade of Honne and Tatemae' (*GaijinPot*, 6 October 2014) <<http://blog.gaijinpot.com/honne-tatemae/>> accessed 10 July 2015.

<sup>702</sup> D Arudou, 'The costly fallout of *tatemae* and Japan's culture of deceit' (*The Japan Times*, 1 November 2011) available at <<http://www.japantimes.co.jp/community/2011/11/01/issues/the-costly-fallout-of-tatemae-and-japans-culture-of-deceit/#.VIWlir937Ou>> accessed 18 November 2015.

<sup>703</sup> The Economist, 'The *honne* and the *tatemae*: Big business in Japan publicly supports Abenomics whilst being privately wary' (*The Economist*, 9<sup>th</sup> November 2013) <<http://www.economist.com/news/business/21589412-big-business-japan-publicly-supports-abenomics-while-being-privately-wary-honne-and>> accessed 10 November 2015.

must be made to keep the relationship harmonious. It is contended that without interactions being governed by *tatemae*, there would be no interaction, no warmth and no human connection. *Tatemae* ensures that some communication, although based on obligatory politeness, occurs between people whom would not normally connect, and because this is reciprocated, it still fosters a relationship between *soto* people which could be relied upon in the event of a conflict.

This social sensitivity is made more complicated by the additional social expectation of avoiding being *kuukiyomenai* (空気読めない – meaning ‘cannot read the air’, abbreviated by young Japanese to KY - ケーワイ<sup>704</sup>) – by being expected to read a multitude of subtle social cues including roundabout spoken hints, body language and having common sense appropriate to the situation.<sup>705</sup> If someone is KY, the situation can become very awkward and embarrassing for all involved, and relates directly to the conflict-avoidant, ambiguous (*aimai*)<sup>706</sup> social behaviours of most Japanese. Being KY can also denote a person not understanding the differentiated behaviour shown to *uchi* and *soto* groups, or not realising when people belong to either one of those groups and then behaving in a manner that is either too standoffish or too open and honest. An awareness of these groups, the associated behaviours and KY is important to social and business survival in Japan, and arguably has strong bearing on Japanese legal behaviour and legal culture.

The situations in which *tatemae* is maintained have been perceived as people lying to each other,<sup>707</sup> saying something polite that they do not mean in order to give an impression of politeness to others. Again, to Western observers, this is confusing; it may well seem evasive, rude and a waste of time and energy.<sup>708</sup> However, due to the collective and sociable nature of Japanese society, this behaviour is undertaken to avoid conflict with others, even if both parties know that what is said and offered is not really meant. This understanding alone helps to avoid conflict, with the alternative being no offers made and relationships being left open and empty – a space without *ninjo*. The distinction and use of *honne* and *tatemae* is universal and automatic in Japanese social

<sup>704</sup> Or even ‘SKY’ - スーパー空気読めない – meaning ‘super kuki-yomenai’, which applies to exceptionally bad cases; Haruko, ‘Japan in a word: ‘KY’ – ‘Unable to read the air’” (*The Japans*, 12 October 2013) <<https://thejapans.org/2013/10/12/japan-in-a-word-ky/>> accessed 8 February 2017.

<sup>705</sup> J Spacey, ‘Why You Need to Read the Air in Japan’ (*Japan Talk*, 6 March 2009, updated 23 February 2015) <<http://www.japan-talk.com/jt/new/kuuki-yomenai>> accessed 26 January 2016.

<sup>706</sup> R J Davies and O Ikeno (eds), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002) 9-16.

<sup>707</sup> D Arudou, ‘The costly fallout of *tatemae* and Japan’s culture of deceit’ (*The Japan Times*, 1 November 2011) available at <<http://www.japantimes.co.jp/community/2011/11/01/issues/the-costly-fallout-of-tatemae-and-japans-culture-of-deceit/#.VIWlir937Ou>> accessed 18 November 2015; N Gattig, ‘In a world of pretense, are Japanese just more honest about lying?’ (*The Japan Times*, 23 April 2014), available at <[https://www.japantimes.co.jp/community/2014/04/23/voices/world-pretense-japanese-just-honest-lying/#.XX\\_PaDZKiUk](https://www.japantimes.co.jp/community/2014/04/23/voices/world-pretense-japanese-just-honest-lying/#.XX_PaDZKiUk)> accessed 15 September 2019.

<sup>708</sup> E R McDaniel, ‘Japanese Negotiating Practices: Low Context Communication in a High Context Culture’ (*Doctoral Thesis, Arizona State University* 2000) 29.

behaviour, and is employed without malice or sinister motives. *Tatemae* in particular is viewed as essential for maintaining good social relationships and its proper use is even considered virtuous.<sup>709</sup> Even when dealing with negative situations, such as delivering bad news, Japanese tend to use less confrontational language; many Japanese will state '*muzukashii desu*' ('it's difficult') instead of directly refusing a request or giving negative feedback.<sup>710</sup> This proper use of *tatemae* and *aimai* ensures that even when parties are feeling angry or upset, the proper resolution can be sought without recourse to formal, public forums, such as litigation in court.

#### 4.8 Concluding Remarks

The discussions in this chapter have drawn from the historical observations of socio-cultural norms pre-existing and developing parallel to formal law in Japan. In doing so, this chapter has developed a critical legal pluralist approach with which to identify socio-cultural norms that still exert significant influence over the everyday decisions and behaviours of Japanese people. These essential elements are excluded from legal comparative scholarship on Japan due to an overreliance on the traditional tools of comparative law – by utilising critical legal pluralism, these informal norms and their role and effect in Japanese law and society become apparent.

The following chapter will take the findings of the above discussions and employ the concept of legal culture to contextualise the legal system of Japan. The socio-cultural norms identified in this chapter will be contextualised in legal culture to demonstrate their influence in formal legal interactions, such as civil disputes over noise and criminal reparations. Underpinned by the critical legal pluralist approach developed in the first section of this chapter, legal culture demonstrates the tension at the core of the Japanese legal system by providing a rich and contextualised account of the complex interactions between its formal law and socio-cultural norms.

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<sup>709</sup> E R McDaniel, 'Japanese Negotiating Practices: Low Context Communication in a High Context Culture' (*Doctoral Thesis, Arizona State University* 2000) 29.

<sup>710</sup> John, 'KY and Ambiguity in Japan: It's "Difficult"' (*Tofugu*, 11 September 2012), <<http://www.tofugu.com/2012/11/19/ky-and-ambiguity-in-japan-its-difficult/>> accessed 26 January 2016.

## 5 Legal Culture in Japan

As this thesis has now established the numerous and varied social and cultural normative phenomena in Japanese society, this chapter will critically consider legal culture, both as a concept – by examining the extensive academic literature on the subject - and as a method that contextualises legal order. As a concept, legal culture is a controversial idea that has been debated in terms of its form and utility in critical legal studies. As a method, legal culture establishes parameters for a description, analysis or investigation, provides perspective on the issues at hand, and contextualises them for analytical observations. As the research question ventures, culture is a foundational component of regulatory normativity in Japanese law and society and exploring this phenomenon in depth cultivates a less partial approach to realising its form and role in Japan. This complements the critical legal pluralist approach in chapter four by observing that notions of culture can constitute law and legal regulation. This reflexion of more delimited and inclusive approaches to both law and culture underpins this chapter's conception of legal culture.

As with concepts in the preceding chapters, the approach to legal culture by this thesis is informed by an awareness of the researcher's own Western normative perspectives on law and culture in an effort to avoid 'reading into legal culture what one wishes to see.'<sup>711</sup> For the purposes of this thesis, legal culture is informed directly by the critical legal pluralist approach developed in chapter four, and unifies the diverse range of regulatory norms within the Japanese legal system. Legal culture is a flexible and open concept that enables conceptualisation and discussion of the compound of law and culture to show their reciprocal interactions and influences. These qualities render legal culture as an especially useful framework that facilitates understanding of the nexus of formal law and social and cultural norms, and the correlating legal-social behaviours and consciousness of the Japanese populace. It is both an inclusive and expansive concept and, as it is informed by legal pluralism, is essential for holistic contextualisation of legal systems.'

This chapter comprises three main sections; the first will open with a critical review of the concept of culture in recognition of the diverse understandings of this concept. The connection between law and culture will then be discussed to demonstrate the complexity of the relationship between these concepts. Legal culture is a compound concept comprised of a double variable of law and culture, the connection of which is overt, but the nature contested. In the second section, this chapter will unpack this

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<sup>711</sup> R Cotterrell, 'Comparative Law and Legal Culture' in M Reimann and R Zimmerman (eds.), *The Oxford Handbook of Comparative Law* (OUP 2006) 717.

relationship by undertaking a review of the literature on legal culture, examining legal culture and its relation to general culture, legal structure, and legal behaviour. The discussion will then move to a justification of legal culture and develop the understanding of legal culture to be used in this thesis. The third and final section of this chapter will draw on the definition of legal culture as developed, and the normative elements identified by the critical pluralist approach in chapter four, to provide a rich and comprehensive understanding of contemporary Japanese legal culture.

## 5.1 The Concept of Culture

The association between law and culture has long been recognised; although particular strains of legal philosophy preferentially sought to connect law with science and reason due to a preference for certainty in law,<sup>712</sup> others have found culture and law in a continuous state of circular influence on one another.<sup>713</sup> It is necessary to determine what is understood by the term 'culture' before 'legal culture' can be determined in relation to it. Culture exists as the creation of humans living together in a society,<sup>714</sup> additionally 'society' serves well as a broader term, so 'culture' in turn can be restricted to something more specific,<sup>715</sup> although even with this framing there is still considerable disagreement on what constitutes culture.<sup>716</sup>

It is initially contended that law is a component of culture,<sup>717</sup> as the choice to have laws, whether these be formally codified or an oral code<sup>718</sup> contributes to the culture of a society.<sup>719</sup> Indeed, law can be seen as a 'cultural carrier' that unites components of culture,<sup>720</sup> and likewise culture is transformed by legal action and reform.<sup>721</sup> Culture itself has been considered a 'deeply compromised'<sup>722</sup> and 'troublingly vague'<sup>723</sup> concept comprising many definitions and interpretations. The concern with vagueness stems from the inclusion of abstract aspects, including 'what is true, good or beautiful, ideas about the nature of reality, ideology, morality, law and aesthetic life'.<sup>724</sup> Culture is also commonly associated with artistic endeavour<sup>725</sup> and due to the prevalence of emotions

<sup>712</sup> S Douglas-Scott, *Law After Modernity: Legal Theory Today* (Hart Publishing 2013) 4.

<sup>713</sup> F George, 'Law and Culture' (2003) 1 *Ave Maria Law Review* 1, 9.

<sup>714</sup> T Eagleton, *The Idea of Culture* (Blackwell 2000) 34-5; A Igličar, 'Slovenian Legal Culture' (2008) 5 *Slovenian Law Review* 11, 11; C Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books 1973) 5.

<sup>715</sup> R Williams, *The Long Revolution* (Chatto and Windus 1961) 58.

<sup>716</sup> A Sarat and T R Kearns, 'The Cultural Lives of Law' in A Sarat and T R Kearns (eds), *Law in the Domains of Culture* (University of Michigan Press, 1998) 1.

<sup>717</sup> Z Zhang, 'Human Being and Culture and Law' (2005) 2(2) *US-China Law Review* 1, 1.

<sup>718</sup> J Kanwar, 'Preserving Gypsy Culture Through Romani Law in America' (1999-2000) 24 *Vermont Law Review* 1265, 1265, 1275.

<sup>719</sup> J O Haley, *Authority Without Power: Law and the Japanese Paradox* (Oxford University Press 1991) 4.

<sup>720</sup> F George, 'Law and Culture in the United States' (2003) 41 *American Journal of Jurisprudence* 131, 135.

<sup>721</sup> F George, 'Law and Culture' (2003) 1 *Ave Maria Law Review* 1, 9.

<sup>722</sup> J Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature, and Art* (Harvard University Press 1988) 10.

<sup>723</sup> A Sarat and T R Kearns, 'The Cultural Lives of Law' in A Sarat and T R Kearns (eds.), *Law in the Domains of Culture* (University of Michigan Press, 1998) 1.

<sup>724</sup> D Black, *The Behaviour of Law: Special Edition* (Emerald 2010) 61-2.

<sup>725</sup> R Williams, *Keywords: A Vocabulary of Culture and Society* (Croon Helm 1983) 90-91.



in artistic work,<sup>726</sup> a disassociation of culture from law was initially preferred – especially in Western culture, where reason and rationality was (and in some way still is) preferred over emotion.<sup>727</sup> Culture later came to be considered more as a ‘particular way of life’<sup>728</sup> and took on a more ‘social definition’<sup>729</sup> inclusive of meanings and values in art and in institutions and behaviours.<sup>730</sup> Another understanding frames culture as the world developed ‘by people in what they do and why they do it’<sup>731</sup> and even branches into the theological, claiming that people create culture based on ‘what they believe is true’.<sup>732</sup> A more unifying approach stipulates that culture as ‘any set of shared, signifying practices’<sup>733</sup> – where those practices relate to people’s understanding of a meaning and value of importance<sup>734</sup> – and that meaning is ‘produced, performed, contested or transformed’.<sup>735</sup>

However, adhering too closely to any definition of culture is problematic, as a fixed definition fails to reflect its complexity<sup>736</sup> and continuous change, in part due to the differences of opinion among those within and practicing a particular culture.<sup>737</sup> There is consensus on the idea that culture comes from people – as opposed to being given by nature – when rituals or beliefs are developed by people following reflection on a particular event or phenomena.<sup>738</sup> When referring to groups or societies, culture has been used to refer to some particular ‘distinctiveness’<sup>739</sup> that becomes an identifier of that community. However, this perspective is limited – the alleged distinctiveness is based on being continually recognisable, and thus changing very little or not at all. This perspective is problematic as it portrays a snapshot, representing only a temporary state of the given society, with little regard as to its ability to develop and change. It is important to be aware of the fluid boundaries of culture, the contestation of its meanings, and its propensity for change.<sup>740</sup> Societies, groups and communities, and their associated culture, are always in flux<sup>741</sup> and this living and shifting character of culture allows for its rich and deep explanations of social life.<sup>742</sup>

<sup>726</sup> S Douglas-Scott, *Law After Modernity: Legal Theory Today* (Hart Publishing 2013) 5.

<sup>727</sup> Z Zhang, ‘Human Being and Culture and Law’ (2005) 2(2) *US-China Law Review* 1, 4; S Douglas-Scott, *Law After Modernity: Legal Theory Today* (Hart Publishing 2013) 6.

<sup>728</sup> R Williams, *Keywords: A Vocabulary of Culture and Society* (Croon Helm 1983) 89.

<sup>729</sup> N Mezey, ‘Law as Culture’ (2001) 13 *Yale Journal of Law & Humanities* 35, 41.

<sup>730</sup> R Williams, *The Long Revolution* (Chatto and Windus 1961) 57.

<sup>731</sup> F George, ‘Law and Culture’ (2003) 1 *Ave Maria Law Review* 1, 2.

<sup>732</sup> F George, ‘Law and Culture’ (2003) 1 *Ave Maria Law Review* 1, 3.

<sup>733</sup> N Mezey, ‘Law as Culture’ (2001) 13 *Yale Journal of Law & Humanities* 35, 42.

<sup>734</sup> F George, ‘Law and Culture’ (2003) 1 *Ave Maria Law Review* 1, 3.

<sup>735</sup> N Mezey, ‘Law as Culture’ (2001) 13 *Yale Journal of Law & Humanities* 35, 42.

<sup>736</sup> R Williams, *The Long Revolution* (Chatto and Windus 1961) 59.

<sup>737</sup> J Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature, and Art* (Harvard University Press 1988) 277.

<sup>738</sup> G V Bradley, ‘Law and the Culture of Marriage’ (2004) 18 *Notre Dame Journal of Law, Ethics, & Public Policy* 189, 189.

<sup>739</sup> D Howes, ‘Culture in the Domains of Law’ (2005) 20 *Canadian Journal of Law & Society* 9, 19.

<sup>740</sup> S E Merry, ‘Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)’ (2003) 26 *Political & Legal Anthropology Review* 55, 69.

<sup>741</sup> N Mezey, ‘Law as Culture’ (2001) 13 *Yale Journal of Law & Humanities* 35, 42.

<sup>742</sup> D Black, *The Behaviour of Law: Special Edition* (Emerald 2010) 61-2.

## 5.2 Connecting Law and Culture

Compared to other disciplines, law and culture have been viewed as rather late arrivals to one another<sup>743</sup> with the connections beginning as reluctant and uneasy.<sup>744</sup> These beginnings were hindered by those advocating for a strict separation of law and culture on the basis that culture could be invoked in order to escape law's remit for the negative treatment of certain groups in society. Examples of this include negative treatment persons with disabilities,<sup>745</sup> Christians in China,<sup>746</sup> girls in rural regions of Africa,<sup>747</sup> or where travelling or indigenous societies prefer to remain outside the scope of nation state law.<sup>748</sup> This resulted in a negative framing of culture that, when posed against nation state law, can be problematic.<sup>749</sup> The result of this is an antagonistic juxtaposition is a misunderstanding of law and culture as oppositional instead of relational. It generated a perspective of culture as 'other', as irrational and imprecise, inferior to the proposed rationality and neutrality of formal nation state law. This was also reflected in practice – for example in the Privy Council of the UK court system, the court elected to enforce positive formal law and minimise reference to moral and religious rules.<sup>750</sup>

Empirical scholarship subsequently developed that focused on consciousness and cultural practice as a links between an individual's agency and the social structures they lived in, including systems of formal law.<sup>751</sup> The connection posited by cultural analysts of law, such as Susan Silbey, David Howes, Austin Sarat, and Jonathan Simon, argues that law is more than a doctrinal tool for formally documenting normative constructs – it is also a component of cultural processes that form, develop and maintain social relationships.<sup>752</sup> Scholarship also developed on legal consciousness and ideology<sup>753</sup> and recognition of the requirement for cultural awareness in legal practice, such as in the courts.<sup>754</sup> Discussions of the intersection of law and culture are more plentiful in

<sup>743</sup> Law as a 'latecomer' in cultural studies is observed by A Sarat and T R Kearns, 'The Cultural Lives of Law' in A Sarat and T R Kearns (eds.), *Law in the Domains of Culture* (University of Michigan Press, 1998) 5, whilst culture being considered only recently in the discipline of law is remarked by D Howes, 'Introduction: Culture in the Domains of Law' (2005) 20 *Canadian Journal of Law & Society* 9, 9.

<sup>744</sup> R Post, *Law and the Order of Culture* (University of California Press 1991) vii.

<sup>745</sup> M J Makulele, 'Culture, Tradition, Custom, Law and Gender Equality' (2012) 15 *Potchefstroom Electronic Law Journal* 1, 6-7, 9-12.

<sup>746</sup> See generally A N Baier, 'Enforceability Strategies for China's Human Rights Action Plan Found in the Intersections Between Asian History, Culture and International Law' (2010-11) 9 *Seattle Journal for Social Justice* 999.

<sup>747</sup> See generally M J Makulele, 'Culture, Tradition, Custom, Law and Gender Equality' (2012) 15 *Potchefstroom Electronic Law Journal* 1, 6-7, 9-12.

<sup>748</sup> J Kanwar, 'Preserving Gypsy Culture Through Romani Law in America' (1999-2000) 24 *Vermont Law Review* 1265, 1267-8.

<sup>749</sup> B Golder, 'Liberal Law's Fear of Culture' (2010) 35 *Alternative Law Journal* 194, 195-6.

<sup>750</sup> *Rao Balwant Singh v Rant Kishori* (1898) 25 IA 54 (PC); see also D Howes, 'Introduction: Culture in the Domains of Law' (2005) 20 *Canadian Journal of Law & Society* 9, 11-13.

<sup>751</sup> S Silbey, 'Making a Place for a Cultural Analysis of Law' (1992) 17 *Law & Social Inquiry* 39, 41.

<sup>752</sup> S Silbey, 'Making a Place for a Cultural Analysis of Law' (1992) 17 *Law & Social Inquiry* 39, 41; see also A Hunt, 'Foucault's Expulsion of Law: Toward a Retrieval' (1992) 17(1) *Law & Social Inquiry* 1; N Poulantzas, *State, Power, Socialism* (New Left Books 1978).

<sup>753</sup> For example, see S Silbey, 'Making a Place for a Cultural Analysis of Law' (1992) 17 *Law & Social Inquiry* 39, 42-48.

<sup>754</sup> D Howes, 'Introduction: Culture in the Domains of Law' (2005) 20 *Canadian Journal of Law and Society* 9, 9-11.

contemporary critical legal studies,<sup>755</sup> an approach that draws upon cultural studies' utility in examining the relationship between knowledge and power and embracing the mutual enrichment that law and culture provide to each another through their interaction.<sup>756</sup>

Both law and culture have received similar conceptual treatment as things apart and separate from ordinary, everyday practices<sup>757</sup> which have evolved to become thought of as more integrated with other disciplines. The combination of law with other fields has yielded high quality research and scholarship, providing a fresh and more detailed understanding of law, such as the utilitarian approach exhibited by law and economics, the broader umbrella of socio-legal studies,<sup>758</sup> or the more precise areas of law and gender<sup>759</sup> or legal geography.<sup>760</sup> Law can be seen as a cultural artefact,<sup>761</sup> a powerful institutional cultural actor,<sup>762</sup> and necessary in driving forward cultural change.<sup>763</sup> Culture can be employed to direct a research focus towards areas of law which would otherwise struggle without it – in the comparative sense, it not only allows for comparisons to be made between jurisdictions but to transcend geographical limitations and make comparisons between different normative forms of ordering, such as law and religion.<sup>764</sup>

Whilst engagement with formal law and legal process can be used as an indicator of a society's culture, there are also cultural institutions that have been adopted by formal law, such as marriage.<sup>765</sup> Scholarship identifying and analysing the relationship between law and culture has motivated further efforts among statutory and authoritative bodies to consider cultural influences in law-making and implementation. For example, law on marital rape in the UK was interpreted responsively to social and cultural values.<sup>766</sup> This is also the case at the international level, where developments in legal systems have

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<sup>755</sup> There has even been a call to use cultural studies as an 'epistemological corrective' to address problems of post-realist law and readings of law by the social liberal state – to embed cultural studies as a supplement to law, rather than an additional intersectional discipline – see A Sarat and J Simon, 'Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship' in A D Sarat and J Simon (eds), *Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism* (Duke University Press 2003) i.

<sup>756</sup> See generally, A D Sarat and J Simon (eds), *Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism* (Duke University Press 2003); C Sharp and M Leiboff (eds), *Cultural Legal Studies: Law's Popular Cultures and the Metamorphosis of Law* (Routledge 2015).

<sup>757</sup> Culture as something apart in by A Sarat and T R Kearns, 'The Cultural Lives of Law' in A Sarat and T R Kearns (eds), *Law in the Domains of Culture* (University of Michigan Press, 1998) 3, and law as separate by R Post, *Law and the Order of Culture* (University of California Press 1991) vii.

<sup>758</sup> See generally, A Norrie, 'From Critical to Socio-Legal Studies: Three Dialectics in Search of a Subject' (2000) 9(1) *Social & Legal Studies* 85; A Riles, 'Comparative Law and Socio-legal Studies' in M Reimann and R Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006).

<sup>759</sup> See generally, J Conaghan, 'Theorizing the Relationship Between Law and Gender' in J Conaghan (ed), *Law and Gender* (Oxford University Press 2013); R West, 'Jurisprudence and Gender' in K T Barlett and R Kennedy (eds.), *Feminist Legal Theory: Readings in Law and Gender* (Westview Press 1991).

<sup>760</sup> See generally, B Forest, 'Legal Geography' in D Richardson, N Castree, M F Goodchild, A Kobayashi, W Liu, and R A Marston (eds.), *The International Encyclopedia of Geography: People, the Earth, Environment, and Technology* (John Wiley & Sons 2017).

<sup>761</sup> P Khan, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago University Press 1999) 2, 13-14, 94-5, 113-4, 128.

<sup>762</sup> N Mezey, 'Law as Culture' (2001) 13 *Yale Journal of Law & Humanities* 35, 45.

<sup>763</sup> F George, 'Law and Culture' (2003) 1 *Ave Maria Law Review* 1, 6, 10.

<sup>764</sup> M Eppinger, 'Sages, Savages and Other Speech Act Communities: Culture in Comparative Law' (2012-13) 57 *St. Louis University Law Journal* 407, 427-8.

<sup>765</sup> G V Bradley, 'Law and the Culture of Marriage' (2004) 18 *Notre Dame Journal of Law, Ethics, & Public Policy* 189, 194.

<sup>766</sup> For example, the UK case of *R v R* [1991] 3 WLR 767 which set the legal precedent for criminalising marital rape in the United Kingdom and effected changes in subsequent statutes, such as the Sexual Offences Act 2003.

sometimes been made with regard to what is culturally compatible with the society in which it is placed<sup>767</sup> (not entirely dissimilar to the concept of legal transplants<sup>768</sup>) and that of countries/societies surrounding it. Some societies continue to prefer custom or tradition for regulation<sup>769</sup> although in many countries formal law and socio-cultural norms exist in the same space.<sup>770</sup> Normative cultural practices can operate in place of formal law and arguably in some instances produce better outcomes for parties involved.<sup>771</sup>

For example, the emphasis placed on group belonging and social cohesion in countries such as China,<sup>772</sup> Korea,<sup>773</sup> Japan<sup>774</sup> means that exclusion from society is the worst form of punishment. This is not only because of the significant psychological effects of exclusion,<sup>775</sup> uprooting and banishing the individual from the community – and sometimes this is also applied to their family<sup>776</sup> – but the community then suffers due to the disruption and refilling the role the banished person once took. These societies therefore often resort to informal normative means of reconciling situations of conflict, such as apology, and restorative measures to reintegrate the offender back in to the community. Indigenous societies like the Navajo Nation take similar approaches with a view to restoring harmony.<sup>777</sup> Western formal state law often does not facilitate this fluid, more benevolent approach to conflict, and the ability to make use of informal means of social ordering results in a more harmonious society. In these examples, cultural understandings of law contextualise the routes through conflict and provide a richer understanding of social and legal realities.

The above discussion elucidates that the connection between law and culture is one of reciprocal influence; cultural change can be driven by law, and legal change can be

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<sup>767</sup> A N Baier, 'Enforceability Strategies for China's Human Rights Action Plan Found in the Intersections Between Asian History, Culture and International Law' (2010-11) 9 *Seattle Journal for Social Justice* 999, 1018, 1040.

<sup>768</sup> Legal transplants can be briefly defined as moving a rule from one society or people to another; A Watson, *Legal Transplants* (2<sup>nd</sup> ed, University of Georgia Press 1993) 21. It is considered an important methodological technique of comparative legal studies; J W Cairns, 'Watson, Walton and the History of Legal Transplants' (2009) 41 *Georgia Journal of International & Comparative Law* 637, 638-9.

<sup>769</sup> F Pirie, *The Anthropology of Law* (Oxford University Press 2013) 57-8.

<sup>770</sup> Such as in China; J Chen, 'The Value of Chinese Traditional Legal Culture' (2004) 38 *Zbornik Radova* 17, 22-3.

<sup>771</sup> For example, I Lee, 'The Law and Culture of Apology in Korean Dispute Settlement (With Japan and the United States in Mind)' (2005-6) 27 *Michigan Journal of International Law* 1, 52.

<sup>772</sup> A N Baier, 'Enforceability Strategies for China's Human Rights Action Plan Found in the Intersections Between Asian History, Culture and International Law' (2010-11) 9 *Seattle Journal for Social Justice* 999, 1014-16.

<sup>773</sup> I Lee, 'The Law and Culture of Apology in Korean Dispute Settlement (With Japan and the United States in Mind)' (2005-6) 27 *Michigan Journal of International Law* 1, 26-7.

<sup>774</sup> H Wagatsuma and A Rosett, 'The Implications of Apology: Law and Culture in Japan and the United States' (1986) 20(4) *Law & Society Review* 461; T Osaki, 'Japan assures world that Reiwa is all about 'beautiful harmony' and has nothing to do with 'command' (*The Japan Times*, 3 April 2019), available at <<https://www.japantimes.co.jp/news/2019/04/03/national/japan-assures-world-reiwa-beautiful-harmony-nothing-command/#.XandgfVKiUk>> accessed 18 October 2019.

<sup>775</sup> See generally, K D Williams and S A Nida, 'Ostracism: Consequences and Coping' (2011) 20 *Current Directions in Psychological Science* 71; J O'Reilly, S L Robinson, S Banki, and J L Berdahl, 'Is negative attention better than no attention? The comparative effects of ostracism and harassment at work' (2015) *Organizational Science*.

<sup>776</sup> If the whole family is not banished along with the original individual, then the social stigma attached to that person being ostracised still remains and makes life difficult for the family. Responsibility in these societies then is not only for oneself, but also to one's immediate family to ensure all can leave peacefully in the society. For an example of this in Japan, see H G Wren, 'The Legal System of Pre-Western Japan' (1968) 20 *Hastings Law Journal* 217, 232.

<sup>777</sup> J Hendry and M L Tatum, 'Human Rights, Indigenous Peoples, and the Pursuit of Justice' (2016) 34(2) *Yale Law and Policy Review* 351, 361-362.

steered – and have greater acceptance – through culture. However this connection requires a more detailed approach. The particular link of interest here bridges the conceptual space between the relationships of law and culture; this is the concept of legal culture.

### 5.3 Legal Culture: A Review of the Literature

Legal culture has been lengthily debated as to its form, function, significance – even so far as to its existence at all. In particular, the way in which legal culture is defined needs attention in order for this concept to be robustly applied and understood within the Japanese legal system. Legal culture is a ‘highly contested’<sup>778</sup> concept, bringing with it extensive literature, debate and a variety of noteworthy aspects on its definition, role and purpose in comparative critical legal studies. It has been considered a term of nomenclature for patterns discovered within a legal system and as an independent term to be explained in its own right.<sup>779</sup> Although this thesis will largely interpret legal culture along the form of the latter suggestion, it is nevertheless important to acknowledge that legal culture is also recognisable through features, institutions, behaviours, and patterns within a legal system. It is argued that legal culture invariably becomes the term used when reference is made to specific elements or trends in a legal system,<sup>780</sup> because those things are components of legal culture, and these of course change within each given legal system. Despite these initial claims, legal culture nevertheless remains ‘an abstraction’ and ‘slippery’<sup>781</sup> with its inceptor Lawrence Friedman stating that, given a fresh opportunity, he would not likely use the term again.<sup>782</sup> Despite this, it is a term that, much like culture discussed above, and as I will argue, we cannot do without.<sup>783</sup>

#### 5.3.1 Defining Legal Culture

The terms ‘law’ and ‘culture’ themselves give rise to an enormous variety of possible interpretations about what is meant by law in culture or vice versa.<sup>784</sup> Without specific reference, legal culture invokes ideas of law within society, related to more general culture, and connected with behaviour influenced by, and consciousness of, law.<sup>785</sup>

<sup>778</sup> D Nelken, ‘Legal Cultures’ in D S Clark (ed), *Comparative Law and Society* (Edward Elgar 2012) 310.

<sup>779</sup> D Nelken, ‘Puzzling Out Legal Culture: A Comment on Blankenburg’ in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 72.

<sup>780</sup> Such as ever-popular litigation rates – see E Blankenburg, ‘Civil Litigation Rates as Indicators for Legal Cultures’ in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997); C Wollschlager, ‘Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Legal Culture in Light of Judicial Statistics’ in H Baum (eds), *Japan: Economic Success and Legal System* (Walter de Gruyter 1997).

<sup>781</sup> L M Friedman, *The Republic of Choice* (Mass 1999) 95.

<sup>782</sup> D Nelken, ‘Rethinking Legal Culture’ in M Freeman (ed) *Law and Sociology* (Oxford University Press 2006) 200.

<sup>783</sup> D Nelken, ‘Defining and Using the Concept of Legal Culture’ in E Örüçü and D Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) 109.

<sup>784</sup> P Fitzpatrick, ‘The damned word culture and its (In)compatibility with Law’ (2005) 1 *Law, Culture & Humanities* 2, 2-3.

<sup>785</sup> See, for example, D M Trubek, ‘Where the Action Is: Critical Legal Studies and Empiricism’ (1984) 36 *Stanford Law Review* 575;

Previous approaches to legal culture have involved a focus on society, the attitudes of the people and how law reflects social interests.<sup>786</sup> It has been considered as a union of the sociology of law and comparative law<sup>787</sup>, serving as an 'umbrella term' applicable to various trends at the intersection of various traditions including law, society, politics and philosophy.<sup>788</sup>

Friedman, who popularised the concept of legal culture,<sup>789</sup> proposes a series of 'definitions' or 'characterisations'<sup>790</sup> of legal culture, asserting that it takes the form of non-professional, public knowledge of and behaviours towards any given legal system,<sup>791</sup> 'bodies of custom organically related to the culture as a whole'<sup>792</sup> and elements of general culture that influence the way social forces bear closer to and further from the law.<sup>793</sup> In later writings he adds 'what people think about law, lawyers and the legal order';<sup>794</sup> however the progress of Friedman's thinking on legal culture has been charted as omitting the behavioural aspects and reducing to the ideational.<sup>795</sup> His focus is more specifically on thoughts rather than action, with 'attitudes'<sup>796</sup> ornamented with other notions such as 'ideas',<sup>797</sup> 'values'<sup>798</sup> and 'opinions'<sup>799</sup> and other concepts such as 'beliefs'<sup>800</sup> and 'expectations'.<sup>801</sup> The conceptual nature of these terms are problematic due to a variety of possible interpretations and overlapping meanings. For example, an idea and a belief about law arguably have striking similarity and thus the terms need to be carefully defined as to their distinctive meanings.

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A Sarat, "'The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor' (1990) 2(2) *Yale Journal of Law & the Humanities* 343; R Harding, 'Dogs are 'registered', people shouldn't be': Legal consciousness and lesbian and gay rights (2006) 15(4) *Social & Legal Studies* 511.

<sup>786</sup> L M Friedman, *The Republic of Choice* (University of Harvard Press 1990) 213; L M Friedman, *Total Justice* (Russell Sage Foundation 1985) 31; L M Friedman, 'The Place of Legal Culture in the Sociology of Law' in M Freeman (ed) *Law and Sociology* (Oxford University Press 2006) 189.

<sup>787</sup> R Cotterrell, 'The Concept of Legal Culture' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 13.

<sup>788</sup> L M Friedman, 'The Concept of Legal Culture: A Reply' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 34.

<sup>789</sup> D Nelken, 'Legal Cultures' in D S Clark (ed), *Comparative Law and Society* (Edward Elgar 2012) 312.

<sup>790</sup> R Cotterrell, 'The Concept of Legal Culture' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 15.

<sup>791</sup> L M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975) 193.

<sup>792</sup> L M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975) 194.

<sup>793</sup> L M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975) 15.

<sup>794</sup> L M Friedman, 'The Place of Legal Culture in the Sociology of Law' in M Freeman (ed) *Law and Sociology* (Oxford University Press 2006) 189.

<sup>795</sup> R Cotterrell, 'The Concept of Legal Culture' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 15.

<sup>796</sup> L M Friedman, 'The Place of Legal Culture in the Sociology of Law' in M Freeman (ed) *Law and Sociology* (Oxford University Press 2006) 189; L M Friedman, 'Total Justice: Law, Culture, and Society' (1986) 40(3) *Bulletin of the American Academy of Arts & Sciences* 24, 28.

<sup>797</sup> L M Friedman, 'Total Justice: Law, Culture, and Society' (1986) 40(3) *Bulletin of the American Academy of Arts & Sciences* 24, 28; L M Friedman, *The Republic of Choice* (University of Harvard Press 1990) 213; L M Friedman, *Total Justice* (Russell Sage Foundation 1985) 31; L M Friedman, 'The Place of Legal Culture in the Sociology of Law' in M Freeman (ed) *Law and Sociology* (Oxford University Press 2006) 189.

<sup>798</sup> L M Friedman, 'Total Justice: Law, Culture, and Society' (1986) 40(3) *Bulletin of the American Academy of Arts & Sciences* 24, 28.

<sup>799</sup> L M Friedman, *The Republic of Choice* (University of Harvard Press 1990) 213; L M Friedman, *Total Justice* (Russell Sage Foundation 1985) 31; 1994: 18; L M Friedman, 'The Place of Legal Culture in the Sociology of Law' in M Freeman (ed) *Law and Sociology* (Oxford University Press 2006) 189.

<sup>800</sup> L M Friedman, 'Total Justice: Law, Culture, and Society' (1986) 40(3) *Bulletin of the American Academy of Arts & Sciences* 24, 28.

<sup>801</sup> L M Friedman, *The Republic of Choice* (University of Harvard Press 1990) 213; L M Friedman, *Total Justice* (Russell Sage Foundation 1985) 31; L M Friedman, 'The Place of Legal Culture in the Sociology of Law' in M Freeman (ed) *Law and Sociology* (Oxford University Press 2006) 189.

The terms proposed by Friedman to describe legal culture infer a rationality of thinking which is appropriate to those trained in law, and indeed Friedman refers to an 'internal' legal culture of legal professionals.<sup>802</sup> An interesting note is the absence of examining the way people 'feel' about the law. There is some scope for less scientific means of thinking about the law with 'values' and 'beliefs', although more needs to be covered in pursuit of people's behaviours towards and feelings about the law. Indeed, while the terms Friedman proposes all relate to feelings in some form, it is also appropriate and helpful when investigating legal culture to consider feelings more directly. Legal culture has been held to be useful as it allows for an explanation of the role of law in attributing and articulating meanings and values in everyday life;<sup>803</sup> this includes the way people feel about law.

Rokumoto considers legal culture to be 'the characteristic features of a society's legal system, legal machinery, legal behaviour and legal consciousness',<sup>804</sup> encompassing a multitude of possible components and considerations that make up a country's legal culture. Additionally, he writes that legal culture gives 'certain common systematic features to them'<sup>805</sup>, identifying the capacity of legal culture to connect and bind together a legal system as a unifying device. This idea of legal culture as giving connection and cogency within a particular legal system is useful when considering the relevance of legal culture in effecting change in society, or when interpreting decision making and behaviours towards the law.<sup>806</sup> This becomes even more relevant when one considers the growing body of literature on regional legal culture, such as that of Europe (more specifically within the remit of the EU)<sup>807</sup> or the US,<sup>808</sup> and more widely, global legal culture.<sup>809</sup>

In light of these varied conceptions, legal culture has been cited as too complex to be considered merely as either formal, codified law or the behaviour and attitudes of legal actors, and instead best understood as a 'multi-layered concept'<sup>810</sup>. This thinking attributes an fitting level of complexity to it; legal culture should be considered as more

<sup>802</sup> L M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975), 223-268.

<sup>803</sup> S Silbey, 'Making a Place for a Cultural Analysis of Law' (1992) 17 *Law & Social Inquiry* 39, 42, 45.

<sup>804</sup> K Rokumoto, 'Cultural Factors in Comparative Socio-Legal Analysis' (1995) paper published in '*Legal Culture: Encounters and Transformations*', annual meeting of RSCL/ISA, 14.

<sup>805</sup> K Rokumoto, 'Cultural Factors in Comparative Socio-Legal Analysis' (1995) paper published in '*Legal Culture: Encounters and Transformations*', annual meeting of RSCL/ISA, 14.

<sup>806</sup> V Gessner, A Hoeland and C Varga, (eds.) *European Legal Cultures* (Aldershot 1996) 269-73; D Nelken, 'Using the Concept of Legal Culture' (2004) 26 *Australian Journal of Legal Philosophy* 1, 1.

<sup>807</sup> F Wieacker, 'Foundations of European Legal Culture' (1990) 38 *American Journal of Comparative Law* 1, 4-6.

<sup>808</sup> A Sarat, 'Studying American Legal Culture: An Assessment of Survey Evidence' (1976-7) 11 *Law & Society Review* 427, 429-32.

<sup>809</sup> C H Koch, 'Envisioning a Global Legal Culture' (2003-4) 5 *Michigan Journal of International Law* 1, 75-6.

<sup>810</sup> E Blankenburg, 'Civil Litigation Rates as Indicators for Legal Cultures' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 41.

encompassing, and as a bridge between several aspects of a legal system; it is relational and interconnected.

Other attempts at explaining the complex nature of legal culture have involved the proposition and discussion of 'units', with relation to how to work with legal culture in a more precise and comparative manner.<sup>811</sup> This demarcation begins on the basis of national jurisdictions<sup>812</sup> although this becomes increasingly difficult as territorial boundaries become blurred and transnational activities more commonplace.<sup>813</sup> Units of legal culture are sought out through identifying patterns on both a micro and macro level and through analysing transfers of law and legal mechanisms and studying differences and similarities of legal cultures.<sup>814</sup> What qualifies as a unit of legal culture is varied and differentiates across the subject of study, however broadly speaking what is required is culture and normativity within the group or society concerned. It may involve approaches to regulation or dispute resolution, or understandings on what law is and what it is for.<sup>815</sup> However, this approach is also influenced by Anglo-European normative ideas on law and culture, not least in the way that it claims organisational utility. Much like the taxonomies approach discussed in the previous paragraph, attempting to organise legal cultures presents difficulties in accurately representing and comprehending the concept, and underlying biases about the nature and form of law and culture risks forcing these concepts to fit in to narrow assessments that exclude significant elements, and/or generate readings of legal culture that conform to those biases.<sup>816</sup>

### 5.3.2 *Legal Culture and General Culture*

The discussion of general culture in the previous section represents something of a divide from legal culture. This in part stems from the arguments about the separation of law and culture, and even where law and culture are thought of positively together, assuming a 'fit' between law and its surrounding society or culture is often fraught.<sup>817</sup> Whether these are taken together as influencing one another, each integral to the other's existence, or whether they are considered separately will ultimately impact on considerations of legal culture as a phenomenon. There is some argument for the latter, in which it is considered completely unnecessary to refer to general culture at all when

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<sup>811</sup> D Nelken, 'Legal Cultures' in D S Clark (ed), *Comparative Law and Society* (Edward Elgar 2012) 315-7; D Nelken, 'Defining and Using the Concept of Legal Culture' in E Örüçü and D Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) 117-120.

<sup>812</sup> D Nelken, 'Defining and Using the Concept of Legal Culture' in E Örüçü and D Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) 117.

<sup>813</sup> D Nelken, 'Defining and Using the Concept of Legal Culture' in E Örüçü and D Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) 119.

<sup>814</sup> D Nelken, 'Legal Cultures' in D S Clark (ed), *Comparative Law and Society* (Edward Elgar 2012) 315-7.

<sup>815</sup> D Nelken, 'Thinking About Legal Culture' (2014) 1 (2) *Asian Journal of Law & Society* 255, 263.

<sup>816</sup> R Cotterrell, 'Comparative Law and Legal Culture' in M Reimann and R Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 717.

<sup>817</sup> D Nelken, 'Legal Cultures' in D S Clark (ed), *Comparative Law and Society* (Edward Elgar 2012) 317.



talking about legal culture, especially where one makes reference to the legal infrastructure in order to do so.<sup>818</sup> However, this perspective has been contested, and conflicting statements in the same body of work have pointed to an acceptance that legal culture always draws upon a wider contemplation of culture.<sup>819</sup>

There is an argument that legal culture and general culture can be considered as separate and non-interactive with each other in specific instances. For example, it has been argued that legal behaviour is not a direct expression of general culture;<sup>820</sup> laws are representative of a new set of social goals which are aspired to by those who are newly empowered separately from custom.<sup>821</sup> However, this thesis contends that cultural perspectives of a society always have some reflection on regulation, and in many contemporary societies at least some aspect of social regulation comes from law. The decision whether or not to engage in legal forms of social regulation, and the way in which it is done (for example, if this is done in a public or private manner) are expressions of the culture of that particular society.<sup>822</sup> Indeed, legal culture fits within a general culture of a society and forms part of it. As such it is almost impossible to consider any detailed work on examining legal cultures of any given society in which those legal cultures were not in some ways shaped and affected by other aspects of culture,<sup>823</sup> such as politics, economics and social movements. Indeed, the work of anthropologists assigning varying meanings and interpretations to 'culture' has arguably had (at least) an indicative effect on the various meanings of 'legal culture'. Of course, legal culture and general culture are not so inextricably wound together in all societies; there are multiple variations to the extent to which this occurs.<sup>824</sup>

That there is some kind of 'gap' between legal culture and general culture of any sort is a vital consideration in itself,<sup>825</sup> and reveals significant information about the general culture of the country or society we seek to identify and explain. This is the case when, for example, we interpret and analyse unique terms such as those mentioned in chapters

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<sup>818</sup> D Nelken, 'Puzzling Out Legal Culture: A Comment on Blankenburg' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 82.

<sup>819</sup> E Blankenburg and F Bruinsma, *Dutch Legal Culture* (Kluwer 1991).

<sup>820</sup> F Munger, 'From the editor' (1994) 28 (4) *Law & Society Review* 725, 726.

<sup>821</sup> S Diamond, 'The Rule of Law Versus the Order of Custom' in D Black and M Mileski (eds), *The Social Organisation of Law* (Seminar Press 1973) 327.

<sup>822</sup> F George, 'Law and Culture in the United States' (2003) 41 *American Journal of Jurisprudence* 131, 135.

<sup>823</sup> D Nelken, 'Puzzling Out Legal Culture: A Comment on Blankenburg' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 83.

<sup>824</sup> D Nelken, 'Puzzling Out Legal Culture: A Comment on Blankenburg' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 84.

<sup>825</sup> D Nelken, 'Puzzling Out Legal Culture: A Comment on Blankenburg' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 84.

two<sup>826</sup> and four,<sup>827</sup> as we invariably study what people intend and understand when they use these terms and in turn use these to gain some kind of knowledge about their perspectives of what culture is, what law is and how these apply to daily life and to each other. The terms can provide further insight into legal consciousness<sup>828</sup> and in turn, a particular perspective forming the composition of a given society's legal culture. However, this must be conducted with a degree of caution, as this risks 'flattening' of perspectives and over-generalising people's stance<sup>829</sup> and does not adequately reflect the variety of interpretations on differing facets of the subject.<sup>830</sup> Focusing too closely on these attitudes can restrict our concept of culture, constraining it to one particular version that is hard to shift<sup>831</sup> and when this is also done accidentally, it becomes harder to identify – vigilance is imperative. Incorrect impressions of countries are made and maintained in comparative legal scholarship, and this is especially the case with Japan.<sup>832</sup> This further evidences why these concepts need such careful consideration, and then a thorough but clear consideration of what contemporary Japanese legal culture consists of and does is required by necessity.

Japan is one such case; a specific example involves the threat of American colonialism resulting in the imposition of the Constitution<sup>833</sup> which remains in place to this day, but with little engagement with the Constitution by the Japanese, and no changes throughout the writing of this thesis.<sup>834</sup> Where a society has experienced colonisation of this sort, it is likely the imposed law has been received with hostility; the effect of change on the legal culture here has not occurred 'naturally' (for lack of a better term) and thus could result in abrupt and somewhat incoherent modification that does not sit well with the

<sup>826</sup> For example, *li* and *fa* in China - M Jian, 'Chinese Legal Culture: In A Western Scholar's Eyes' (2002) 4 *Journal of the History of International Law* 166, 171-172; and *kekeluargaan* in Indonesia - D Henley, 'Custom and koperasi: the co-operative ideal in Indonesia' in J S Davidson and D Henley, *The Revival of Tradition in Indonesian Politics: The deployment of adat from colonialism to indigenism* (Routledge 2007) 100.

<sup>827</sup> In particular, *giri*, and how it is not easily translated or defined in English – for attempts at definition, see Y Nishikawa, *Japan's Changing Role in Humanitarian Crises* (Routledge 2005) 38; S Wright, *International Human Rights, Decolonisation and Globalisation* (Routledge 2001) 151-2; W Caudill, 'The Influence of Social Structure and Culture on Human Behaviour in Modern Japan' (1973) 1(3) *Ethos* 344, 350; M Yoshida, 'Giri: A Japanese Indigenous Concept' (8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014.

<sup>828</sup> See M Hertogh, 'A "European" Conception of Legal Consciousness: Rediscovering Eugen Ehrlich' (2004) 31 (4) *Journal of Law & Society* 457.

<sup>829</sup> S E Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (University of Chicago Press 1990) 5.

<sup>830</sup> F Pirie, *The Anthropology of Law* (Oxford University Press 2013), 4.

<sup>831</sup> D Nelken, 'Puzzling Out Legal Culture: A Comment on Blankenburg' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 88.

<sup>832</sup> G F Colombo, 'Japan as a Victim of Comparative Law' (2014) 22(3) *Michigan State International Law Review* 731, 732-3, 735.

<sup>833</sup> E J Hahn, 'An Overview of the Japanese Legal System' (1983) 5(3) *NorthWestern Journal of International Law & Business* 517, 522.

<sup>834</sup> However, recent movements within the Japanese government have made proposals to amend Article 9 of the Constitution of Japan in response to the deaths of Japanese overseas: Kyodo, 'Constitutional Change Necessary to Protect Japanese Citizens: Abe' (*The Japan Times*, 3 February 2015) available at <<http://www.japantimes.co.jp/news/2015/02/03/national/politics-diplomacy/constitutional-change-necessary-protect-japanese-citizens-abe/#.VY5n2htVikp>> accessed 19 June 2015; J McCurry, 'Japan PM to overturn pacifist defence policy' (*The Guardian*, 30 June 2014) <<http://www.theguardian.com/world/2014/jun/30/japan-pm-overturn-pacifist-defence-policy-shinzo-abe>> accessed 19 June 2015; S Murakami, 'Abe's push to change Japan's Constitution hits roadblock as parties scrap Diet discussion' (*The Japan Times*, 21 November 2019) available at <<https://www.japantimes.co.jp/news/2019/11/21/national/politics-diplomacy/abe-constitution-hits-roadblock/#.XsadjpKjIU>> accessed 21 May 2020.

previous trends. Japan's social, legal and cultural composition was modified gradually on the country's own terms, with acquisition and adaptation of civil and criminal codes from predominantly European sources,<sup>835</sup> then dramatically with the pressure from the United States,<sup>836</sup> and it is partly due to this combination of historical-legal factors that constitutes the contemporary Japanese legal framework, and in turn, its legal culture.

### 5.3.3 *Legal Culture and Legal Structure*

Standing in contrast to the relationship between legal culture and general culture is the debated pairing of legal culture and legal structure. Much like general culture, legal structure – comprised of formal legal institutions, including the courts and formal law-making bodies – inform particular useful interpretations of legal culture. It is argued that the relationship between legal culture and legal structure is not unidirectional, the contextualising nature of legal culture means that they have reciprocal influence on each other. This has interestingly come out most prominently in discussions of the Japanese legal system. In particular, when litigation in Japan was initially studied,<sup>837</sup> there were arguments that the Japanese refrained from suing one another and participating in the courts due to cultural factors which meant that conflict was to be avoided.<sup>838</sup> Haley responded to this assertion, claiming that the low litigation rate was due to structural factors instead, such as inaccessibility of the courts, including judicial failure in persuading Japanese people of its utility, bureaucratic processes and governmental influences.<sup>839</sup> He ultimately rejected that the Japanese had any 'special legal consciousness' biased towards informal alternate dispute resolution.<sup>840</sup> In a conclusion very different to the one argued for in this thesis, Haley discussed a detachment of structure from culture more generally, especially where law is concerned, and that the interaction of people with the law is best explained by reference to either one or the other.

Steinhoff also commented on the value of recognising structures and institutions as explanatory measure for legal behaviour instead of utilising culture, in particular commending Miyazawa's work<sup>841</sup> for demonstrating people in Japan as 'thoughtful

<sup>835</sup> F Koichiro, 'Changing Culture and the Legal Culture in Japan' (1992) 4 *Japanstudien* 209, 209.

<sup>836</sup> E J Hahn, 'An Overview of the Japanese Legal System' (1983) 5 (3) *NorthWestern Journal of International Law & Business* 517, 522.

<sup>837</sup> For example, see J O Haley, 'The Myth of the Reluctant Litigant' (1978) 4(2) *Journal of Japanese Studies* 359; H See, 'The Judiciary and Dispute Resolution in Japan: A Survey' (1982) 10 *Florida State University Law Review* 339; R E Watts, 'Briefing the American Negotiator in Japan' (1982) 16 *International Law* 597.

<sup>838</sup> T Kawashima, "Dispute Resolution in Contemporary Japan," in A T von Mehren (ed), *Law in Japan: The Legal Order in a Changing Society* (Cambridge: Harvard University Press, 1963) 41-72.

<sup>839</sup> J O Haley, 'The Myth of the Reluctant Litigant' (1978) 4 (2) *Journal of Japanese Studies* 359, 378-81; J O Haley, *The Spirit of Japanese Law* (University of Georgia Press 1998) xviii; see generally, J O Haley, 'Dispute Resolution in Japan: Lessons in Autonomy' (1991) 17 *Canada-US Law Journal* 443.

<sup>840</sup> J O Haley, cited in D Nelken, 'Puzzling Out Legal Culture: A Comment on Blankenburg' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 85.

<sup>841</sup> The work in question here is S Miyazawa, *Policing in Japan: A Study in Making Crime* (SUNY Press 1992).

agents who create, reproduce and transform their culture in a dynamic and complex fashion'.<sup>842</sup> This notion of structure standing apart is challenged by the idea of its inherently social foundation, by which structure does not simply appear but instead is actively constituted by social practice.<sup>843</sup> It is also contended that it is important not to rely too heavily on institutions and practices as a means of explanation either, as this risks developing a view of culture with varying degrees of irrelevance to its total exclusion. Legal culture has an effect beyond small-scale decisions<sup>844</sup> as it affects everyone, ranging from individuals to organisations, parties in authority and large groups of the general public. Especially where the latter two are concerned, it is suggested that legal culture operates in ways which affects the limits and capabilities of entire legal systems, demonstrating a powerful interaction of structure and culture on a macro level.<sup>845</sup>

Legal structure cannot stand alone; it requires the influence of legal culture in its development, justification and organisation.<sup>846</sup> Both structure and culture engaged in this way invariably affects the way that micro-processes are resolved, and the influence of legal culture gives rationalisation and underpinning to legal structure, as well as potentially affecting how well it is accepted and how well it functions. Likewise, structural aspects will evolve and change in a manner that affects culture, such as a State's accession to an international organisation or signing of a particular treaty, which may confer duties, affect sovereignty or transfer powers. It is therefore contended that the relationship between structure and culture is a circular one and this mutuality of influence and support results in a more stable legal system on the whole.<sup>847</sup>

#### 5.3.4 *Legal Culture and Legal Behaviour*

The discovery of the key to legal culture has been sought by analysing and explaining legal behaviour - specifically litigation rates.<sup>848</sup> This approach has been used in many studies of Japanese legal culture, due to a perceived lack of litigation comparative to Japan's Western counterparts (usually the United States).<sup>849</sup> It is contended that legal culture is something apart from empirical methods and thinking, but not entirely within

<sup>842</sup> P G Steinhoff, 'Pursuing the Japanese Police' (1993) 27 (4) *Law & Society Review* 827, 829.

<sup>843</sup> S Silbey, 'Making a Place for a Cultural Analysis of Law' (1992) 17 *Law & Social Inquiry* 39, 43.

<sup>844</sup> V Hamilton and J Sanders, *Everyday Justice: Responsibility and the Individual in Japan and the United States* (Yale University Press 1992) 191-3.

<sup>845</sup> L M Friedman, 'The Place of Legal Culture in the Sociology of Law' in M Freeman (ed) *Law and Sociology* (Oxford University Press 2006) 195.

<sup>846</sup> L M Friedman, 'The Place of Legal Culture in the Sociology of Law' in M Freeman (ed) *Law and Sociology* (Oxford University Press 2006) 193-6.

<sup>847</sup> D Nelken, 'Puzzling Out Legal Culture: A Comment on Blankenburg' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 87.

<sup>848</sup> E Blankenburg, 'Civil Litigation Rates as Indicators for Legal Cultures' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 41 – 68; D Nelken, 'Puzzling Out Legal Culture: A Comment on Blankenburg' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 74.

<sup>849</sup> J O Haley, 'The Myth of the Reluctant Litigant' (1978) 4 (2) *Journal of Japanese Studies* 359, 359, 362.

the realm of the abstract either. Therefore, studying legal behaviour is important as it is an aspect of legal culture which is often ignored and neglected.<sup>850</sup> This approach allocates more attention to legal behaviour on the premise that actions dominate over words and are generally attributed more credence.<sup>851</sup> The behavioural approach is based in behavioural sciences – particularly psychology and economics – that ‘aims to explain the effects and contents of law’.<sup>852</sup> Behaviourist arguments about law hold considerable weight; we glean understandings about how the law works from observing how it is used by people and organisations that we would not ordinarily be able to determine through theoretical or philosophical thinking alone.

In contrast, it is possible to conceive of legal culture, and culture more generally, in a way that determines that normative expectations are more relevant than behaviourist descriptions, and arise out of a more social basis in which actions are considered ‘socially transmitted norms of conduct’.<sup>853</sup> This in part still subscribes to some idea of action or behaviour but departs from the notion that the behaviourist approach is largely based on engagement with or use of the law or legal institutions. Indeed, there are some jurisdictions and forms of legal culture in which actions (both social and legal) certainly have their merit, but words retain their power; for example, in Latin America words are nearly always more important than practice in social and legal dealings and consequently of great significance when one thinks about the associated legal culture.<sup>854</sup> Similarly, there is a great regard for apology in Korea and Japan,<sup>855</sup> and in many situations a formal apology is enough to allow parties to move to settlement rather than seeking recourse to litigation; again here the words, used in a legal context but not necessarily amounting to legal action, are of greater significance than more strictly associated legal behaviour.<sup>856</sup> This comparative shortage of formal legal action can be considered as an important feature of these specific legal cultures, and can be traced back to its manifestly cultural origins.

Despite this examination of legal culture scholarship, the concept arguably carries with it some problematic elusiveness,<sup>857</sup> not least in the respect that it is subject to a variety

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<sup>850</sup> D Nelken, ‘Puzzling Out Legal Culture: A Comment on Blankenburg’ in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 75.

<sup>851</sup> D Nelken, ‘Puzzling Out Legal Culture: A Comment on Blankenburg’ in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 76.

<sup>852</sup> C S Sunstein, C Jolls, and R H Thaler, ‘A Behavioural Approach to Law and Economics’ (1998) 50 *Stanford Law Review* 1471, 1474.

<sup>853</sup> G Bierbrauer, ‘Towards an Understanding of Legal Culture: Variations in Individualism and Collectivism between Kurds, Lebanese and Germans’ (1994) 28 (2) *Law & Society Review* 243, 243.

<sup>854</sup> D Nelken, ‘Puzzling Out Legal Culture: A Comment on Blankenburg’ in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 76.

<sup>855</sup> See generally, I Lee, ‘The Law and Culture of Apology in Korean Dispute Settlement (With Japan and the United States in Mind)’ (2005-6) 27 *Michigan Journal of International Law* 1.

<sup>856</sup> H Wagatsuma and A Rosett, ‘The Implications of Apology: Law and Culture in Japan and the United States’ (1986) 20 (4) *Law & Society Review* 461, 462; 488-9.

<sup>857</sup> R Cotterrell, ‘The Concept of Legal Culture’ in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 13.

of interpretations and purposes, and this creates difficulties that risk limitation of the concept. Furthermore, such imprecision jeopardises the utility of legal culture within legal theory as this causes its analytical capabilities to be questionable.<sup>858</sup> These issues mean that justification of the concept is vital for its use in this thesis and the utility it offers in contextualising the Japanese legal system.

#### 5.4 Justifying Legal Culture

Legal culture is an essential component of the methodology of this thesis; the contextualised dimension is inherent in the concept and, underpinned by a critical legal pluralist approach, this becomes even more holistic and inclusive. Although its definition is contested (not least due to the contested nature of legal culture within critical legal scholarship), legal culture for the purposes of this thesis takes account of several specific contextual influences, each of which has been discussed at length throughout the previous chapters. These influences include the historical, social, cultural and linguistic, the inclusion of which facilitates a capacious understanding of the Japanese legal system that goes far beyond the merely doctrinal and structural. It is therefore of great utility in presenting the *sui generis* nature of the Japanese legal system and exposing and exploring the tension at its heart and the problems it propagates.

Furthermore, it enables focused examination of the reciprocal engagement of people and the law and contextualises the role and function of law in society. Such an in-depth exploration of Japanese legal culture discloses a richer depiction of the Japanese legal system, attributing appropriate significance to non-legal influences by contextualising the whole legal order, and providing a comprehensive account of the role and function of normative legalistic influences in contemporary Japanese society.

The critical legal pluralist approach that underpins legal culture for this thesis also helps to address some of the critiques of legal culture outlined earlier in this chapter. As discussed, legal culture has been argued to provide a deceptive version of culture, portraying it as 'homogenous, tightly bounded, unchanging and determining'.<sup>859</sup> Use of culture as an explanation for social movement and action has been critiqued as thoughtless reductionism;<sup>860</sup> too quickly relied on without carefully deconstructing the motivators of such social action and without too much explanation of what that culture supposedly entails. Legal culture for this thesis takes a more expansive approach, using the unlimited conceptions of law presented by critical legal pluralism to develop a holistic contextualisation of legal systems that recognises the relational and reciprocal nature of

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<sup>858</sup> R Cotterrell, 'The Concept of Legal Culture' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 14.

<sup>859</sup> D Nelken, 'Legal Cultures' in D S Clark (ed.), *Comparative Law and Society* (Edward Elgar 2012), 313.

<sup>860</sup> P G Steinhoff, 'Pursuing the Japanese Police' (1993) 27 (4) *Law & Society Review* 827, 829-30.

law and culture. This approach also helps to avoid some of the pitfalls of scholarship that has examined legal culture solely through focus on legal events. One such example is litigation;<sup>861</sup> it is argued that this perpetuates a negative impression as it mandates a focus on legal culture versus legal structure. When litigation is the object of study, this restricts the research to decisions about whether or not to sue, and places this in the contextually confining environment of the court room.<sup>862</sup> Furthermore, this has the implication of incorrectly associating cultural explanations only with micro-processes, such as decisions undertaken by individuals, leaving macro-processes to fall under the remit of legal structure.<sup>863</sup>

Moreover, if we only focus on attitudes and behaviours towards law at the point where something has gone wrong, opportunities are missed to discover what people's preferences might be in the system when things work efficiently and well.<sup>864</sup> Attitudes towards the law in situations without conflict have consistently been omitted from the majority of comparative scholarship, especially Japan. Observance of people's behaviour and the law should be inclusive of the whole experience; the way people interact with the law in a non-litigious situation may have been considered to be of less interest, but it still yields useful insights into the legal culture of a society. Studies of legal culture that progress beyond this narrow conception are more inquisitive about generally held beliefs and values.<sup>865</sup> These produce rich, interesting and valuable conclusions about the legal culture of a given system and society, and seek to provide a more holistic outlook in which the law, people, legal system and their roles, relations and functions are more thoroughly understood.

The pluralistic and holistic understanding of legal culture used in this thesis enables it to reflect the complex interplay of the multiple normative forms of ordering the Japanese legal system and society.<sup>866</sup> Additionally, freeing the subject of study from the context of conflict expands the scope of perception for the ways in which law is lived in Japan. The application of legal culture to the case study of *saiban-in seido* in chapter six, whilst not definitively a conflict-free situation, is certainly a non-litigious one (in the sense that lay persons are not either of the parties directly involved in the case) and this will yield

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<sup>861</sup> See generally J O Haley, 'The Myth of the Reluctant Litigant' (1978) 4(2) *Journal of Japanese Studies* 359; E Blankenburg, 'Civil Litigation Rates as Indicators for Legal Cultures' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997).

<sup>862</sup> V Hamilton and J Sanders, *Everyday Justice: Responsibility and the Individual in Japan and the United States* (Yale University Press 1992) 192.

<sup>863</sup> V Hamilton and J Sanders, *Everyday Justice: Responsibility and the Individual in Japan and the United States* (Yale University Press 1992) 192.

<sup>864</sup> D Nelken, 'Puzzling Out Legal Culture: A Comment on Blankenburg' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 87.

<sup>865</sup> V Hamilton and J Sanders, *Everyday Justice: Responsibility and the Individual in Japan and the United States* (Yale University Press 1992) 195.

<sup>866</sup> A E Tay, 'Law and "Legal Culture"' [1983] *Bulletin of the Australian Society of Legal Philosophy* 15, 18; D Nelken, 'Puzzling Out Legal Culture: A Comment on Blankenburg' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997) 87.

valuable conclusions about legal culture, the interplay of the multitude of normative influences in Japanese law and society, and the experiences of lay persons and wider society.

## 5.5 Exploring Legal Culture in Japan

The previous sections have sought to critically consider the meaning of culture, to critically discuss the literature on legal culture, and to determine the utility, definition and scope of legal culture to be used in this thesis. This section will take these conclusions forward to ascertain what meaning and role legal culture has in Japan, drawing on the socio-cultural normative elements identified under the critical legal pluralist approach in chapter four. National *cultures* are arguably difficult to determine as a result of a rich makeup of historical, social, religious, political, and artistic influences, to name a few; such influences have been referred to as ‘aggregates’, which are unique to each country and as such difficult to compare with other ‘aggregates’.<sup>867</sup> As this research seeks to explore Japanese legal culture within its own context, some of the problems associated with this approach may be avoided. Much of the available literature has been written from a standpoint that Japan is unusual as the West is – although not always consciously – taken as the standard.<sup>868</sup> The neutrality expressed in the research aims and context of the introductory chapter of this thesis is consciously employed here in order to avoid repeating the orientalist perspectives<sup>869</sup> with which Japan is often viewed.

The legal system of Japan, with its largely Western basis, introduced a means of social regulation antithetical to much of the social behaviour discussed above. Formal legal processes often prescribe a way of behaving that is antithetical to the Japanese social norm, resulting in the commission of actions that are hurtful to others. Furthermore, the underpinning reasons for this behaviour – asserting one’s rights over another, resulting in sorting people in to categories of ‘winner’ and ‘loser’ – are contrary to the Japanese preference for maintaining social harmony and putting group interests first. Formal legal behaviours in the West typically involve acting in one’s own interest in order to assert some kind of right over another and require adherence to rules stricter than those of Japanese social regulation, where concepts such as *giri* and the common sense utilised in avoiding KY<sup>870</sup> are flexible depending on the situation. Legal behaviours, including

<sup>867</sup> L M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975) 209.

<sup>868</sup> M Smith, ‘Comparative Law and Legal Culture: A Tribute to David Allen and Mary Hiscock’ (2003) 15(2) *Bond Law Review*, 25, 39; K K Knapp, ‘Don’t Awaken The Sleeping Child: Japan’s Gender Equality Law And The Rhetoric Of Gradualism’ (1998-9) 8 *Columbia Journal of Law & Gender* 143, 148; R L Kidder and J A Hostetler, ‘Managing Ideologies: Harmony As Ideology In Amish And Japanese Societies’ (1990) 24 *Law & Society Review* 895, 898-9.

<sup>869</sup> See generally, E Said, *Orientalism* (Penguin 1977).

<sup>870</sup> An abbreviation of *kukeyomenai*, meaning ‘cannot read the air’ – see Haruko, ‘Japan in a word: ‘KY’ – ‘Unable to read the air’ (*The Japans*, 12 October 2013) <<https://thejapans.org/2013/10/12/japan-in-a-word-ky/>> accessed 8 February 2017; J Spacey, ‘Why You Need to Read the Air in Japan’ (Japan Talk, 6 March 2009, updated 23 February 2015) <<http://www.japan-talk.com/jt/new/kuuki-yomenai>> accessed 26 January 2016.



drawing up contracts, litigation, asserting individual rights and otherwise relying on formal legal statute blur the distinction between *uchi* and *soto* as law does not distinguish between these groups. Furthermore, legal behaviour does not differentiate to the extent of *tatemaie* and *honno* and thus regardless of one person's relationship to another, the same course of action will be employed if law is brought into use. Japanese legal culture therefore provides a means to contextualising and understanding the complex informal socio-cultural norms and formal legal rules that must be navigated by the citizenry in everyday interactions.

### 5.5.1 *The Nature of Japanese Legal Culture*

Due to the varied history of Japan's legal system, its legal culture comprises many influences including the institutional, cultural, traditional, and religion-philosophical,<sup>871</sup> and is arguably inextricable from these. Japan remains one of the most homogenous industrialised nations of the world and remains so through a shared history, culture, and language.<sup>872</sup> In Japan, formal law does not serve as the sole source of regulation or principles, nor is it the only forum in which to settle dispute.<sup>873</sup> Formal law and social practice are divergent<sup>874</sup> with a dualistic tendency to prefer formal appearances with informal values, leading to inconsistencies between law made and law applied.<sup>875</sup> This has led to the development of a paralleled legal system built upon strong Japanese cultural values of loyalty and group membership,<sup>876</sup> alongside a preference for informal enforcement. Japanese legal culture embodies a range of harmonious social customs<sup>877</sup> resulting in a 'cultural aversion' to law,<sup>878</sup> or even 'antilaw',<sup>879</sup> which has been contrasted with theories of institutional barriers to law<sup>880</sup> or political manipulation of the legal system.<sup>881</sup> It is considered 'ambiguous and flexible'<sup>882</sup> and characterised by low levels of litigation<sup>883</sup> and enforcement<sup>884</sup> and producing high rates of confession and conviction in

<sup>871</sup> G Farkas, 'From deity to symbol of the state: the constitutional status of the tennō, the Emperor of Japan' (2012) 11 *PhD Tanulmanyok* 271, 272.

<sup>872</sup> K K Knapp, 'Warriors Betrayed: How the "Unwritten Law" Prevails in Japan' (1995-6) 6 *Indiana International & Comparative Law Review* 545, 565.

<sup>873</sup> G Farkas, 'From deity to symbol of the state: the constitutional status of the tennō, the Emperor of Japan' (2012) 11 *PhD Tanulmanyok* 271, 272.

<sup>874</sup> K K Knapp, 'Warriors Betrayed: How the "Unwritten Law" Prevails in Japan' (1995-6) 6 *Indiana International & Comparative Law Review* 545, 564.

<sup>875</sup> L D Wardle, 'Crying Stones: A Comparison of Abortion in Japan and the United States' (1993) 14 *New York Law School Journal of International & Comparative Law* 183, 214.

<sup>876</sup> K K Knapp, 'Warriors Betrayed: How the "Unwritten Law" Prevails in Japan' (1995-6) 6 *Indiana International & Comparative Law Review* 545, 564.

<sup>877</sup> T Kawashima, 'Dispute Resolution in Contemporary Japan,' in A T von Mehren (ed), *Law in Japan: The Legal Order in a Changing Society* (Harvard University Press, 1963) 41-72.

<sup>878</sup> L Wolff, 'Litigiousness in Australia: Lessons from Comparative Law' (2013) *Deakin Law Review* 271, 280.

<sup>879</sup> R L Kidder and J A Hostetler, 'Managing Ideologies: Harmony As Ideology In Amish And Japanese Societies' (1990) 24 *Law & Society Review* 895, 898.

<sup>880</sup> See generally, J O Haley, 'The Myth of the Reluctant Litigant' (1978) 4 *Journal of Japanese Studies* 359.

<sup>881</sup> F K Upham, *Law and Social Change in Postwar Japan* (Harvard University Press 1987) 16-27, 124-65; J J Cavanaugh, 'The Profession Abroad: A Glance at Japanese Legal Education' (1959) 64 *Comparative Law Journal* 43, 44.

<sup>882</sup> B J Nicholson, 'Japanese Fair Trade Commission Guidelines For Licensing Agreements: An Overview And A Critique' (1991) 21 *Georgia Journal of International & Comparative Law* 1, 30.

<sup>883</sup> N Yamanouchi and S J Cohen, 'Understanding the Incidence of Litigation in Japan: A Structural Analysis' (1991) 25 *International Law* 443, 443.

<sup>884</sup> J O Haley, *Authority Without Power: Law and the Japanese Paradox* (Oxford University Press 1991) 265.

criminal law.<sup>885</sup> Permeated by a 'group ethos'<sup>886</sup> that leaves little room for individual rights,<sup>887</sup> Japanese legal culture has been viewed as one that does not encourage individual assertion, especially in the legal sense, with participation in lawsuits considered shameful.<sup>888</sup> Japan is thus a highly law-averse society<sup>889</sup> maintained as such by group cohesion and regulation by social custom.

These features of Japanese legal culture are contrasted with arguments premised upon examples such as the high numbers of law exam applicants, which allegedly suggest a desire of young Japanese to break free of the group-focused system.<sup>890</sup> This thesis argues, however, that the depiction of Japanese legal culture as one of avoidance is inaccurate due to the robust presence of law in the daily lives of Japanese and their approaches to social interaction.<sup>891</sup> It is also contended that simply designating Japanese legal culture as one that is culturally avoidant of, or institutionally opposed to law, is not representative of the whole situation. The Japanese view rules and compassion as completely compatible<sup>892</sup> and their interaction as less of an anathema. The idea of the rule of law and other non-Japanese legal mechanisms and instruments need to be viewed through the lens of Japanese language and values to be properly understood.<sup>893</sup> A focus solely on litigation is also relatively unhelpful for the reasons that, although this activity might occur in Japan, it arises from an Anglo-European reading of the system and only reveals certain aspects of the Japanese legal system, failing to shed light on alternative or supplementary social normative and regulatory practices. Japanese people do encounter law regularly, and often in forms concurrent with Western expectation due to the fact that formal law in Japan takes a Western form, but they both approach and respond to law in ways unexpected by Western observers. For example, karaoke complaints (a particularly Japanese problem) are almost always resolved by way of mediation,<sup>894</sup> and judges prefer to reintegrate offenders in to the community rather than

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<sup>885</sup> M Noguchi, 'Criminal Justice in Asia and Japan and the International Criminal Court' (2006) 6 *International Criminal Law Review* 585, 593.

<sup>886</sup> D J Gibbons, 'Law and the Group Ethos in Japan' (1992) 3 *International Legal Perspectives* 98, 98.

<sup>887</sup> T Kinoshita, 'The Reception in Japan of the American Law and its Transformation in the Fifty Years Since the End of World War II' (2000) 26 *Law Japan* 1, 11.

<sup>888</sup> Algičar, 'Slovenian Legal Culture' (2008) 5 *Slovenian Law Review* 11, 14.

<sup>890</sup> S Miyazawa, 'Legal Education and the Reproduction of the Elite in Japan' (2000) 1 *Asia Pacific Law & Policy Journal* 1, 24.

<sup>891</sup> M D West, *Law in Everyday Japan: Sex, Sumo, Suicide and Statutes* (University of Chicago Press 2005) 3-5.

<sup>892</sup> T R Tyler and W Kerstetter, 'Moral Authority in Law and Criminal Justice: Some Reflections on Wilson's *The Moral Sense*' (1994) 13 *Criminal Justice Ethics* 44, 51.

<sup>893</sup> A J Bolla, Jr., 'The (Im)Probable Future in Japanese Charter Parties: The Language of Law' (1998) 29 *Journal of Maritime Law and Commerce* 107, 114.

<sup>894</sup> M D West, *Law in Everyday Japan: Sex, Sumo, Suicide and Statutes* (University of Chicago Press 2005), 90-92.

incarcerating them,<sup>895</sup> while formal law underpins the goodwill associated with returning lost items to entitle the finder to a reward.<sup>896</sup>

These initial examples demonstrate the need for a holistic and pluralist approach to understanding law in Japan; the critical pluralist approach detailed in chapter four facilitates identification and inclusion of numerous elements of normative regulation in Japanese society. The phenomena identified in the latter part of chapter four are integral to Japanese legal culture and offer valuable insights into the complex interplay of socio-cultural norms and formal legal rules. This thesis argues that legal culture both bridges and contextualises these elements in order to provide a rich and comprehensive perspective of the Japanese legal system; the phenomena identified in chapter four will now be discussed in terms of their role in Japanese legal culture.

## 5.6 *Giri-ninjo*, law, and Japanese legal culture

In many circumstances the formal law is a barrier to successful *giri* relationships, simultaneously impacting on *ninjo* by introducing unnecessary conflict into what would otherwise be a harmonious interaction. Rules of formal law are considered cold and even abnormal, removed from the natural way of doing things.<sup>897</sup> *Giri* on the other hand offers a more gentle and socially sensitive way of governing relationships, resolving conflicts with the harmonious aim of satisfaction of both parties<sup>898</sup> and *ninjo* provides warmth and kindness that binds communities.<sup>899</sup> This fosters a conciliatory feeling in which the relationship between the parties settles the dispute, thereby avoiding the need to coerce agreement and create a negative feeling between parties.<sup>900</sup> The use of law in resolving disputes tends to operate by sorting parties into categories of winner and loser in the adversarial system; a concept with which Japanese are uncomfortable with at best.<sup>901</sup> This preference for resolving conflicts and generally managing relationships under *giri* instead of law has arguably generated a considerable gap between legal codes and practice. Even where legal disputes are concerned, it has been observed that the role of lawyers and the courts is somewhat diminished compared to Western legal action.<sup>902</sup>

<sup>895</sup> P Murphy, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016) 110, 121, 141, 170-171, 174.

<sup>896</sup> M D West, *Law in Everyday Japan: Sex, Sumo, Suicide and Statutes* (University of Chicago Press 2005), 10-12; J Adelstein, 'Honesty is the best policy for lost property' (*The Japan Times*, 4 February 2017) available at <[https://www.japantimes.co.jp/news/2017/02/04/national/media-national/honesty-best-policy-lost-property/#.XX\\_PZzZKiUk](https://www.japantimes.co.jp/news/2017/02/04/national/media-national/honesty-best-policy-lost-property/#.XX_PZzZKiUk)> accessed 14 September 2019.

<sup>897</sup> C Kim & C M Lawson, 'The Law of the Subtle Mind: The Traditional Japanese Conception of Law' (1979) 28 *International & Comparative Law Quarterly* 491, 502.

<sup>898</sup> R J Davies and O Ikeno (eds.), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002) 99.

<sup>899</sup> R E Watts, 'Briefing the American Negotiator in Japan' (1982) 16 *International Law* 597, 600; Y Noda, Introduction to Japanese Law (University of Tokyo Press 1976) 176.

<sup>900</sup> R E Watts, 'Briefing the American Negotiator in Japan' (1982) 16 *International Law* 597, 601.

<sup>901</sup> T Kawashima, 'The Status of the Individual in the Notion of Law, Right and Social Order' in C A Moore (ed), *The Japanese Mind* (East-West Center Press 1967) 266-7.

<sup>902</sup> Y Nobutoshi and S J Cohen, 'Understanding the Incidence of Litigation in Japan: A Structural Analysis' (1991) 25 *International Law* 443, 443-4; M Yoshida, 'The Reluctant Japanese Litigant: A "New" Assessment' (*Electronic Journal of*

Despite the prolific urbanisation – and in some cases Westernisation – of some areas of Japan, such as the highly modern cities of Tokyo and Osaka, *giri-ninjo* is still nonetheless observable, perceptible, and very much alive.<sup>903</sup>

The encompassing nature of *giri* in governing social relationships leads to the question of whether formal law is even needed in Japan at all. During earlier studies Japan was frequently viewed as not needing law.<sup>904</sup> Much of the Western law in Japan today was either developed out of a desire to modernise,<sup>905</sup> to evade Imperialism<sup>906</sup> and facilitate greater interaction with the West or, more recently, to avoid the threat of colonisation. As such, it is argued that Japanese formal law, in its current form and despite processes of modification and transformation, there remains an element of unease or tension due to its origins being markedly and undisguisably Western. Japanese have a certain pride of the ‘unique Japaneseness’ of things (*nihonjinron*)<sup>907</sup> with many Japanese referring to practices and products as being ‘Japanese’ – a particular quality in itself. The non-Japanese origins of much of Japan’s law therefore present an immediate difficulty to Japanese people engaging with it, as there is a continual preference for more mediatory means of conflict resolution. *Giri-ninjo* is integral to the idea of being Japanese and *nihonjinron* with the ideology of *giri-ninjo* represents the cultural and community idea of this.

The next challenge considers whether, if the Japanese approach includes these processes of modification and transformation, why does contemporary Japanese law not then incorporate elements of *giri-ninjo*? That question is more difficult to answer. It may have been the result of political strategy; that is, a deliberate plan to develop Western-looking, formal legal sources with little direct Japanese essence, which would mean less forced input from the USA and so more space for Japan to continue regulating and governing itself. A salient example in this regard was when Japan actively presented to the West that state Shinto was not a religion,<sup>908</sup> claiming it to be ‘suprareligious’ and applicable to all Japanese.<sup>909</sup> Japan continues to represent on both national and international levels as Western-facing, but is resistant to formal legal regulation on issues

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*Contemporary Japanese Studies*, 13 October 2003) available at <<http://www.japanesestudies.org.uk/discussionpapers/Yoshida.html>> accessed 15 August 2012.

<sup>903</sup> H Befu, ‘Gift-Giving in a Modernising Japan’ in T S Lebra and W P Lebra (eds), *Japanese Culture and Behaviour: Selected Readings* (University of Hawaii 1986) 162; The Japan Times, ‘What 2011 means for Japan in 2012 and beyond’ (*The Japan Times*, 01 January 2012) available at <<http://www.japantimes.co.jp/news/2012/01/01/national/what-2011-means-for-japan-in-2012-and-beyond/#.VZ1BDUZWV2A>> accessed 01 July 2015.

<sup>904</sup> Y Noda, *Introduction to Japanese Law* (University of Tokyo Press 1976) 159-160.

<sup>905</sup> K Henshall, *A History of Japan: From Stone Age to Superpower* (Palgrave Macmillan 2012), 81, 84-85.

<sup>906</sup> C Ives, *Imperial-Way Zen: Ichikawa Hakugen’s Critique and Lingering Questions for Buddhist Ethics* (University of Hawaii Press 2009) 13.

<sup>907</sup> See generally, Y Sugimoto, ‘Making Sense of *Nihonjinron*’ (1999) 57 *Thesis Eleven* 81.

<sup>908</sup> C Ives, *Imperial-Way Zen: Ichikawa Hakugen’s Critique and Lingering Questions for Buddhist Ethics* (University of Hawaii Press 2009) 15.

<sup>909</sup> H Hardacre, *Shinto and the State 1868-1988* (Princeton University Press 1989) 5.

such as the use of capital punishment.<sup>910</sup> This is not to say, however, that Japanese could not implement law whilst also using *giri*, but law is used rather as something of a last resort after other techniques have failed, and this still does not show *giri-ninjo* and law working together as such.

On many bases, law and *giri-ninjo* are incompatible, not least because of their differing origins and development. Their methods and philosophies of regulation are discordant, even so far as to be ontologically opposed. In spite of these differences, not to mention their lack of interaction as mentioned above, *giri-ninjo* and formal law effectively share the same legal space. Formal law demands that parties are categorised into winners and losers; *giri-ninjo* allows parties to settle amicably with both parties participating in a 'give and give' ideal type of relationship.<sup>911</sup> Litigation is a means of ordering what is owed while *giri* declares that to do such a thing violates one's own *giri* and honour<sup>912</sup> and leaves an individual void of *ninjo*. Figures of dispute resolution on everyday legal problems in Japan support this latter idea; yearly thousands of cases on karaoke noise are heard by complaint counsellors compared to a miniscule number of court cases.<sup>913</sup>

Despite this dissonance, the normative dimension of *giri-ninjo* cannot be ignored, and although it does not interact directly with formal law, it nevertheless provides guidance on the law. It does this by formulating part of Japanese legal consciousness in the choice whether or not to participate in the formal legal system, as well as helping to form ideas about the place and role of law within Japanese society. It also offers an insight into the reasons for the Japanese perspective on law and law's role and function in Japanese society. Indeed, the treatment of Western law in Japan has been significantly influenced by this social phenomenon, causing formal law to function rather differently compared to its country of origin.<sup>914</sup>

During the development of formal law, Japanese have shown a preference for legal interpretation over modification<sup>915</sup> and do not seek to distinguish between law's form and content, and do not try to separate the words of law from their social context.<sup>916</sup> Additionally, the continuing preference for upholding community values is indicative of the respect afforded to *giri* in socially elite circles<sup>917</sup> and further demonstrates its use in

<sup>910</sup> D T Johnson, 'Japan's Secretive Death Penalty Policy: Contours, Origins, Justifications, and Meanings' (2006) 7 *Asia-Pacific Law & Policy Journal* 62, 63, 123-4.

<sup>911</sup> K Seki, 'Circle of *On*, *Giri* and *Ninjo*: Sociologist's Point of View' (1971) 19(2) *北海道文學紀要* *The Annual Reports on Cultural Science* 99, 108.

<sup>912</sup> Y Noda, *Introduction to Japanese Law* (University of Tokyo Press 1976) 175.

<sup>913</sup> M D West, *Law in Everyday Japan: Sex, Sumo, Suicide and Statutes* (University of Chicago Press 2005) 90-91.

<sup>914</sup> C Pejovic, 'Japanese Corporate Governance: Behind Legal Norms' (2010-11) *Pennsylvania State International Law Review* 483, 518.

<sup>915</sup> G Farkas, 'From deity to symbol of the state: the constitutional status of the tennō, the Emperor of Japan' (2012) 11 *PhD Tanulmanyok* 271, 272.

<sup>916</sup> D Rosen, 'The Koan of Law in Japan' (1990-1991) *Northern Kentucky Law Review* 367, 375.

<sup>917</sup> J O Haley, *The Spirit of Japanese Law* (University of Georgia Press 1998) 179.

providing a social context to legal interactions. The sanction of *giri*, a 'loss of face'<sup>918</sup> and the psychological threat of ostracisation,<sup>919</sup> is a powerful social regulator, limiting use of law (in a Western style) by much of the public.<sup>920</sup> Combined with the numerous meditational tools built into the legal system,<sup>921</sup> such as emphasis on apology to restore relationships,<sup>922</sup> in many situations Japan operates both an institutional<sup>923</sup> and social<sup>924</sup> circumvention of formal law and – importantly – law's practices. The Japanese can and do engage with law daily in a variety of contexts,<sup>925</sup> but not in the way that Westerners expect – typically, for example, lawsuits are quite rare in the life of an average Japanese.<sup>926</sup> This differentiated interaction has developed the idea from the West that Japanese law and practice, and Japanese legal culture, is problematic. It is not – it is merely different from Western thinking.

In summary, there is an ideological and ontological clash between *giri-ninjo* and formal law, yet both regulate the same issues in Japanese society. The existence of both forms of regulation has led to the purported hybridisation of the Japanese legal system. However it is argued that the incompatibility of *giri* and formal law means that the system does not operate in a mixed or hybrid fashion. There are parallel systems of regulation that do not cooperate, with both inhibiting recourse to the other. Using formal law is contrary to the values of *giri* and, once formal law is used, *giri* relations are irreparably damaged.<sup>927</sup> Japanese legal culture displays the value of social relationships in Japanese society and explains the difficulties experienced by Japanese interacting with formal law. When there are interactions with Western-style law, these are conducted in a Japanese manner and hence further strains emerge. For those in Japan growing up with Western-style law, there are still conflicts with engaging with formal law because cultural values (including *giri* and *ninjo*) are embedded in everyday life. This is demonstrative of what this thesis argues is a tension at the core of the Japanese legal system, which in turn highlights the value of employing the concept of legal culture in exploring it. Though Japanese customs and culture are undoubtedly in transition, there remains a continuing strain between cultural and legal regulation in Japan.

<sup>918</sup> Referred to as '*giri* to one's name' in R Benedict, *The Chrysanthemum and the Sword: Patterns of Japanese Culture* (Houghton Mifflin Company 1946) 145-6; M Dean, *Japanese Legal System* (2<sup>nd</sup>ed, Cavendish 2002) 5.

<sup>919</sup> D J Gibbons, 'Law and the Group Ethos in Japan' (1992) 3 *International Legal Perspectives* 98, 109-110.

<sup>920</sup> M Dean, *Japanese Legal System* (2<sup>nd</sup>ed, Cavendish 2002) 5.

<sup>921</sup> M Dean, *Japanese Legal System* (2<sup>nd</sup>ed, Cavendish 2002) 5.

<sup>922</sup> See H Wagatsuma and A Rosett, 'The Implications of Apology: Law and Culture in Japan and the United States' (1986) 20 (4) *Law & Society Review* 461.

<sup>923</sup> See generally, J O Haley, 'The Myth of the Reluctant Litigant' (1978) 4 *Journal of Japanese Studies* 359.

<sup>924</sup> See generally, R B Parker, 'Law, Language and the Individual in Japan and the United States' (1988) 7 *Wisconsin International Law Journal* 179.

<sup>925</sup> M D West, *Law in Everyday Japan: Sex, Sumo, Suicide and Statutes* (University of Chicago Press 2005) 3-4.

<sup>926</sup> M D West, *Law in Everyday Japan: Sex, Sumo, Suicide and Statutes* (University of Chicago Press 2005) 1.

<sup>927</sup> F Koichiro, 'Changing Culture and the Legal Culture in Japan' (1992) 4 *Japanstudien* 209, 211.

## 5.7 Group society and Japanese legal culture

The binding power of *giri* and *ninjo* stem from the overwhelming presence of family as a primary social unit, and community, such as the local neighbourhood, school or workplace as the next most important social unit. As discussed in chapter four, in the social system governed by *giri* and *ninjo*, human feeling is not the inner feeling of an autonomous individual but the communally shared feeling. Irreducible to the duality of the public and the private, the opposition of *giri* and *ninjo* articulates the contradiction of the communal system, in which there is no place for an autonomous, individuated self.<sup>928</sup> Life in groups is fundamental to the ordering of Japanese society, stemming from strong historical tradition in which group living was essential for basic survival, to enabling a harmonious and cooperative way of life in contemporary times. Group living and its primary associated social and cultural norms, *tatemae*, *honne*, *uchi*, and *soto*, are ubiquitous and inform everyday behaviour and decisions. These social behaviours therefore have a complex interaction with formally legally proscribed behaviours in Japan. As both this and the preceding chapter have argued, formal law destroys the discreet nature of *honne* and *tatemae*; at this stage, examples need to be explored to substantiate this claim. The state of litigation in Japan has remained an area of academic scrutiny and although problematic due to the privileging of Western forms of legal activity in comparative studies, provides the most prevalent environment in which to begin analysis of this interaction. This frequently examined aspect of the Japanese legal system, as outlined on the basis of Funken's work in chapter three,<sup>929</sup> has been theorised by numerous scholars, but never examined in terms of group living and the unwritten norms of social interaction that underpin it.

It is contended, therefore, that the courtroom, within which proceedings of law take on a highly Westernised format, constitutes an environment in which the *honne* of a person is displayed in a public forum. When members of the public are engaged in a case in court, whether defendant or victim, claimant or appellant, their dispute is presented publicly and their inner feelings are exposed and scrutinised by all other people present in the courtroom. This public exposure of *honne* likely extends beyond the courtroom as well – recorded in court reports and, in high profile cases, displayed in the media. As discussed above, showing one's *honne* to *soto* people is undesirable and uncomfortable for many Japanese, going against all social and cultural norms. When formal use of the legal system via the courtroom appeals as the best option for conflict resolution, it is arguable that many Japanese face a discord between seeking justice on the one hand and, on the

<sup>928</sup> M Yoshimoto, *Kurosawa: Film Studies and Japanese Cinema* (Duke University Press 2000) 312.

<sup>929</sup> K Funken, 'Alternative Dispute Resolution in Japan' (2003) 24 *University of Munich School of Law Working Paper* 1, available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=458001](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=458001)> 4-5.

other, saving face through maintaining privacy. The courtroom environment also challenges an individual's ability to save face and approval of others – it inhibits the ability to face the 'audience of the world' – known as the *seken*.<sup>930</sup> If a dispute is exposed publicly and the individuals involved cannot easily employ their *tatemae* to maintain face, relationships are irreparably damaged and the individuals are socially shamed. Where the use of law does not involve the courtroom, for example, such as speaking to non-advocate legal personnel or the police, a similar issue may occur due to having to expose *honne* to a stranger in order to report a problem, and that this expression would be recorded.

Arising from this theorised conflict between law and *honne*, this thesis argues that processes and institutions of the formal law inhibits one's ability to behave properly through the forced disclosure of *honne* to outsiders. As they are part of the same double code, *tatemae* is also impacted. Just as *honne* is exposed, it may not be possible to present *tatemae* where the law is concerned as law also prescribes behaviour; if this is to display *honne* then *tatemae* cannot be maintained. Where *tatemae* might be upheld in legal situations, the purpose associated with law might be seen not to be fulfilled. This aspect of polite behaviours was raised in opposition to establishing jury trials in 2009, when it was argued that jury members would simply agree with the judge out of respect – employing *tatemae* with the goal of not disrupting the harmony of the situation and maintaining good relationships with social superiors and the rest of the jury.<sup>931</sup> By contrast, however, it could also be argued that behaviours stipulated by law fall outside the remit of *honne* and *tatemae*, and thus represent something outside the cultural norm for Japanese; the case study of *saiban-in seido* in chapter six will address this possibility.

This relationship between law and *honne* and *tatemae* arguably operates on both micro and macro levels of legal activity. For example, where Japanese use *tatemae* in everyday life and wish to avoid conflict with outsiders, and so opt for more peaceable methods of resolution, such as referring to a complaints commissioner about karaoke noise instead of taking formal legal action.<sup>932</sup> Where the complaint is against someone in *uchi*, the strong relationship fostered through *honne* interactions would mean that resorting to legal action is also less necessary. Conversely however, many Japanese make use of the formal, legally underpinned lost and found system,<sup>933</sup> whereby the law stipulates that items found must be handed in within a particular period and may be

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<sup>930</sup> T S Lebra, 'Self in Japanese Culture' in N R Rosenberger (ed), *Japanese Sense of Self* (Cambridge University Press 1992) 107.

<sup>931</sup> This idea will be explored further in the case study of *saiban-in seido* in chapter six.

<sup>932</sup> M West, *Law in Everyday Japan: Sex, Sumo, Suicide and Statutes* (University of Chicago Press 2005) 124.

<sup>933</sup> Lost Property Act (Act No. 73 of 2006); M West, *Law in Everyday Japan: Sex, Sumo, Suicide and Statutes* (University of Chicago Press 2005) 10-12; M D West, 'Losers: Recovering Lost Property in Japan and the United States' (2003) 37(2) *Law and Society Review* 369, 371-373.



returned to the finder after time has elapsed. This system has proved highly effective with many people recovering lost items such as money, laptops and jewellery, even in the busy urban environment of Tokyo. Japanese willingly engage in this system with incentives (such as monetary reward) rewarding their altruism; law here is highly facilitative and structures the system to ensure benefit for as many people as possible. As such, it could be argued here that some aspects of law for small, socially conducive actions are trusted by Japanese and are considered *uchi* to their social conduct. However, the highly incentivising reward scheme underpinning the lost and found system is a significant motivator for engagement with it. Those who hand in lost property are able to reclaim a finder's fee of 5-20% from the owner, or if the item remains unclaimed, the item itself.<sup>934</sup> Furthermore, West argues that the return of lost property does not necessarily arise from a normative trend of honesty or altruism in Japanese society; rather the formal legal structure has created and facilitated a value that virtue has a tangible reward.<sup>935</sup>

'However, it is contended that the system of group living in Japanese society underpins this lost and found system to a greater degree than West's observation suggests. Monetary reward is undoubtedly a great motivator for participating in the lost and found system, and there are certainly disincentives for being dishonest and keeping any lost property. In failing to hand in a lost item, such as a laptop, a finder commits the offence of embezzlement, incurring penalties of a fine up to ¥104,000 and up to one year's imprisonment with work.<sup>936</sup> As established earlier in this chapter and the preceding one, the harshness of formal law and legal processes destroys the authenticity, accommodations, and nuances of social and cultural normativity. Being subjected to the processes of the criminal justice system is punishment enough even before formal sanction. Whilst West argues that this 'carrot and stick' approach in the lost and found system is the main reason for its success,<sup>937</sup> it is argued that pre-existing social and cultural norms of cooperation, obligation to others (sometimes including strangers) through *giri*, and maintaining face through *tatemae* are foundational to the compliance of the citizenry with the system. With high value items frequently lost on Tokyo's vast subway network, finders have ample opportunity to appropriate items that are of far more value than the rewards and finder's fees offered by the system, and arguably a remote chance of being discovered by the police. Yet items are still returned by the thousands,

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<sup>934</sup> M West, *Law in Everyday Japan: Sex, Sumo, Suicide and Statutes* (University of Chicago Press 2005) 40-41.

<sup>935</sup> D H Bayley, *Forces of Order: Policing Modern Japan* (University of California Press 1991) 26.

<sup>936</sup> Criminal Code of Japan, Article 254.

<sup>937</sup> M West, *Law in Everyday Japan: Sex, Sumo, Suicide and Statutes* (University of Chicago Press 2005) 10-11.

with cash, which is less traceable than other belongings such as phones or keys, being one of the most common items handed in.<sup>938</sup>

The group-focused structure of Japanese society and the accompanying social norms of *giri*, *ninjō*, *tatemae* and *honne* mean that virtue and good deeds are rewarded by feelings of contentment due to doing the right thing and being a cooperative and helpful member of society. Finders also report an empathetic approach to handing in goods, saying that the lost item or money may be important or sentimental to the owner, and therefore it is even more imperative to return it.<sup>939</sup> Social responsibility, including returning lost items, is learnt and reinforced from a young age, with children as young as five handing in nominal amounts of money found on the street.<sup>940</sup> Their efforts are met with thanks and praise from police and thus children are encouraged to keep being good and well behaved citizens.<sup>941</sup> These extensive social and cultural underpinnings show that, rather than the law motivating compliance and superficial altruism, the lost and found system brings a further formal level of organisation to an already honest and cooperative social normativity.<sup>942</sup>

When considering the macro implications of this interaction, it is vital to recognise that the legal system is ultimately run by officials who abide by the social rules of *honne* and *tatemae*. As such, these have influence on Japan's international relations<sup>943</sup> and responses to international law. For example, Japan is among the more generous providers of Official Development Assistance (ODA) to assist developing countries; however, it is contended that this generosity is underlined by *tatemae* and *honne* – the former displaying altruism to conceal the latter – selfishness and commercial motivation.<sup>944</sup> Another example lies in Japan's presentation as a modern legal system with Western law, apparently Western-facing legal values in its development of law through the Diet, but it still has difficulties enacting and implementing laws such as those for equality (such as for gender, race, disability), continued resistance to repealing the death penalty and ambiguity on human rights. In this way, law itself is *tatemae*,<sup>944</sup> and

<sup>938</sup> T Fujjoka, 'Tokyo lost and found included ¥3.7 billion in cash last year' (*The Japan Times*, 16 March 2017) available at <[https://www.japantimes.co.jp/news/2017/03/16/national/tokyo-lost-found-included-%C2%A53-7-billion-cash-last-year/#.Xr\\_RcmhKjIU](https://www.japantimes.co.jp/news/2017/03/16/national/tokyo-lost-found-included-%C2%A53-7-billion-cash-last-year/#.Xr_RcmhKjIU)> accessed 16 May 2020.

<sup>939</sup> The Okinawa Times, 'Lose your wallet or cash in Okinawa? It's more than likely you'll get them back, police data shows' (*The Japan Times*, 12 March 2019) available at <[https://www.japantimes.co.jp/news/2019/03/12/national/lose-wallet-cash-okinawa-likely-youll-get-back-police-data-shows/#.Xr\\_T1mhKjIW](https://www.japantimes.co.jp/news/2019/03/12/national/lose-wallet-cash-okinawa-likely-youll-get-back-police-data-shows/#.Xr_T1mhKjIW)> accessed 16 May 2020.

<sup>940</sup> A Richarz, 'Japan's Lost-and-Found System Is Insanely Good' (*CityLab*, 10 February 2020) available at <<https://www.citylab.com/life/2020/02/japan-lost-and-found-phone-wallet-purse-tokyo-property-law/604645/>> accessed 16 May 2020.

<sup>941</sup> M Aoki, 'Lost: Struggling to cope with millions of unclaimed items in Tokyo' (*The Japan Times*, 27 May 2017) available at <[https://www.japantimes.co.jp/life/2017/05/27/lifestyle/lost-struggling-cope-millions-unclaimed-items-tokyo/#.Xr\\_RaWhKjIU](https://www.japantimes.co.jp/life/2017/05/27/lifestyle/lost-struggling-cope-millions-unclaimed-items-tokyo/#.Xr_RaWhKjIU)> accessed 16 May 2020.

<sup>942</sup> G J D Trinidad, 'Honne and Tatemae: Exploring the Two Sides of Japanese Society' (*Thesis, University of Iceland* 2014) 13.

<sup>943</sup> F Furuoka & I Kato, 'The 'Honne-Tatemae' dimension in Japan's foreign aid policy: Overseas Development Aid Allocations in Southeast Asia' (2008) *Electronic Journal of Contemporary Japanese Studies* <<http://www.japanesestudies.org.uk/articles/2008/FuruokaKato.html>> accessed 27 January 2016.

<sup>944</sup> M Dean, *Japanese Legal System* (2nd edn, Cavendish Publishing 2002) 5.

the Japanese approach to societal regulation through non-legal means is the *honne*.<sup>945</sup> Engagement with the Constitution also remains vague; it is referred to occasionally for guidance on legal issues, however it has been amended only once in 70 years<sup>946</sup> and was met with much public resistance.<sup>947</sup> It is contended from this overview that Japan and some of its law can be considered as *uchi/honne* and the rest of the world, particularly international legal organisations, are considered as *soto* and such have to be dealt with in a *tatema* manner.

In addition to *honne* and *tatema*, it is essential to focus on the in- and out-group organisation to which the behaviours relate. In examining the relationship of *uchi* and *soto* with law, it must be noted that these normally relate to people and not things. With this considered, it can be contended that the people that engage with law, either as professionals or clients, might be considered *soto* by others and thus there is scope for the application of the group categorisation to law. Given its Western-based origin, despite the adaptation applied by Japanese scholars in the *Meiji* Restoration, there is reluctance to engage with formal law, and even less so in the Western manner in which it is designed for. It could be considered that much of the formal law in Japan is determined to be *soto* and this aversion is represented in a variety of ways. This could be the continuing preference of the Japanese populace for informal methods of conflict resolution, or when formal methods are used, reliance on alternative dispute resolution (ADR). It could be shown in the confusion expressed by the number and quality of lawyers in the country,<sup>948</sup> or the uncertainty expressed by potential participants for *saiban-in* (lay judge) cases. Nevertheless, the lives of Japanese are constantly affected by formal state law as contemporary society, in many aspects, such as the increase in individualised lifestyles, moves closer to Westernisation.

The social edifice of *uchi* and *soto* provides an framework based around in- and out-groups in which to consider law in Japan.<sup>949</sup> Due to the extensive input of Japanese academics and legislators to the Civil and Criminal codes it is arguable that these forms of law, for the most part, are largely accepted and could be considered *uchi*. The 'Japaneseness' of these codes is reflected in the normative social means incorporated

<sup>945</sup> S R Thornton, 'An Examination of the Compatibility and Effectiveness of the Foreign Legal Systems Partially Adopted in Japan' (1999) 7 *Lawasia Journal* 84, 92-93.

<sup>946</sup> BBC News, 'Japan's lower house approves change to self-defence law' (*BBC News*, 16 July 2015) <<http://www.bbc.co.uk/news/world-asia-33546465>> accessed 20 July 2015.

<sup>947</sup> J McCurry, 'New generation of Japanese anti-war protesters challenge Abe' (*The Guardian*, 16 September 2015) <<http://www.theguardian.com/world/2015/sep/16/japanese-anti-war-protesters-challenge-shinzo-abe>> accessed 30 September 2015; C Martin, "'Reinterpreting" Article 9 endangers Japan's rule of law' (*The Japan Times*, 27 June 2014) available at <<http://www.japantimes.co.jp/opinion/2014/06/27/commentary/japan-commentary/reinterpreting-article-9-endangers-japans-rule-of-law/#.Vq9terKLSUk>> accessed 10 January 2016.

<sup>948</sup> S Kamiya, 'Scales of justice: Legal system looks for right balance of lawyers' (*The Japan Times*, 18 March 2008) available at <<http://www.japantimes.co.jp/news/2008/03/18/reference/scales-of-justice-legal-system-looks-for-right-balance-of-lawyers/#.VquyEPmLSUk>> accessed 28 January 2016.

<sup>949</sup> S R Thornton, 'An Examination of the Compatibility and Effectiveness of the Foreign Legal Systems Partially Adopted in Japan' (1999) 7 *Lawasia Journal* 84, 92-94.

in to the law. A significant example here are the family courts, which require mediation in almost all matters in order to settle issues without the need for adversarial action.<sup>950</sup> This is reflected strongly in divorce proceedings, which are carried out in a straightforward manner with little more needed than consent from the parties, resulting in little to no conflict. This requirement means that engagement with law, whilst compromising *giri* (of great importance here as it underpins much of family relationships and responsibilities), allows for discussion and co-operation between the parties that would not be possible with an adversarial approach. This system is more amenable to Japanese social norms and as such encourages its usage. Other forms of law in Japan, such as the USA-imposed Constitution, might be considered *soto* as they are imposed from the top with very little Japanese input, and thus do not clearly reflect Japanese social values. For example, although the family courts offer mediation and include a variety of claims within their remit, there is little action on the inclusion of same-sex couples, despite the equality provisions under Articles 14 and 24. Furthermore, until 2016, the Constitution was not actively engaged with by the people nor the government by way of amendment, indicating an 'outsideness' to its character. This lack of engagement can be seen as *tatemae* to the Constitution – it is too troublesome to try to amend or repeal it as this creates conflict, so the best approach is to acknowledge but politely avoid it.

This is further extended to other Western-origin legal mechanisms, particularly lay participation in criminal trials through *saiban-in seido*. Many legal sources in Japan are of non-Japanese origin, and in applying the concepts described above, this may help to explain why the Japanese treat their law and legal system in a particular way. Having a Westernised, formal legal structure and statutes represents a *tatemae* face, outwardly showing an attitude towards law that is somewhat cooperative to the Western powers Japan wishes to impress on a political and economic basis. However, the continued use of the legal system in a non-Western and inherently Japanese way represents the *honne*, the true inner feeling. *Honne* here shows a continued preference for non-formal means of social regulation and engagement with law only in specific circumstances.

The analysis of *tatemae* and *honne* reveals a core ontological clash in Japanese legal culture. The feeling of 'we' and 'they' continues to be strong in Japan – a country which employs a writing system specifically for words which are non-Japanese, which places particular emphasis on the word *gaijin* and the pride in *nihonjinron* - with enthusiasm

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<sup>950</sup> C P A Jones, 'In the Best Interests of the Court: What American Lawyers Need to Know About Child Custody and Visitation in Japan' (2007) 8(2) *Asian-Pacific Law & Policy Journal* 181.

about meeting foreigners but a reluctance to allow them into group circles. Western law has been allowed into Japan but it does not function in a Western way.<sup>951</sup>

## 5.8 Concluding Remarks

It is important to remember that, much with *giri*, the interactions of law with Japan's group socialisation and behaviours is always in transition. Japanese legal culture therefore is continually undergoing a state of change.<sup>952</sup> Discussion of the more prominent aspects of social and cultural norms within the Japanese legal system shows the complexities that operate in formal legal spaces, such as courtrooms, and in informal interactions in everyday life. Much like the general way of Japanese communication, Japanese legal culture is highly dependent on context, without sharp distinctions. It is contended that there are no distinctive assertions such as 'law is always in the out-group'; for example, trust in the police implies that some aspects of criminal law are considered useful and necessary. Furthermore, there is extensive reliance on formal legal procedure such as use of the lost and found system. However, there is a certainly more complex picture to unpack and although it is proposed that these social behaviours have a strong influence on Japanese attitudes towards law, this should also be considered as a means of understanding Japanese legal culture concerning interactions and engagement with law.

This 'in-group' and 'out-group' mentality, as shown above, exists between different social groups but there is evidence of its existence on a more national basis. Japan consistently resists pressures from its neighbours, from the West and from the United Nations on matters such as rights for minority groups, capital punishment, whaling, and hate speech. Although there is minimal ground being made in some areas<sup>953</sup> it appears that Japan continues to represent on an international basis that it has intentions to comply, yet does things its own way. This is true of much of the operation of the system and will be shown in a selected example in the following chapter – the case study of *saiban-in seido*. By using Japanese legal culture to study *saiban-in seido* in context, it shows that the development, role and function of lay participation is underpinned by social and cultural normative values, and demonstrates how these norms influence the interactions that people have with law; it offers explanations as to why and how Japanese both use and follow law. Furthermore, it facilitates understanding of law's role in contemporary

<sup>951</sup> On the concept of similar legal institutions and instruments being transferred to new host countries, and functioning differently to their country of origin, see G Frankenburg, 'Constitutional transfer: The IKEA theory revisited' (2010) *J•CON* 8 (3) 563.

<sup>952</sup> K Rokumoto, 'Law and Culture in Transition' (2001) 49 *American Journal of Comparative Law* 545, 560.

<sup>953</sup> Shibuya Ward voting on legalising equal marriage: J McCurry, 'Tokyo's Shibuya Ward is first in Japan to recognise same-sex marriage' (*The Guardian*, 31 March 2015) available at <<https://www.theguardian.com/world/2015/mar/31/tokyos-shibuya-ward-same-sex-marriage>> accessed 9 November 2015, and Osaka allowing first same-sex foster parents: Kyodo, 'Osaka the first city in Japan to certify gay couple as foster parents' (*The Japan Times*, 6 April 2017) available at <[http://www.japantimes.co.jp/news/2017/04/06/national/social-issues/osaka-becomes-first-japanese-city-recognize-sex-couple-foster-parents/#.WOUsv\\_nyuUk](http://www.japantimes.co.jp/news/2017/04/06/national/social-issues/osaka-becomes-first-japanese-city-recognize-sex-couple-foster-parents/#.WOUsv_nyuUk)> accessed 10 April 2017.

Japanese society and the extent of its effect on social norms. Western-style law does not necessarily have to be interacted with in a Western way, and the approach of Japanese legal culture illuminates how this can be done.

## 6 Case study: Saiban-in seido

The conceptual nature of this thesis has been exemplified in the previous chapters, demonstrating the lack of utility of legal taxonomies – particularly with regard to Japan – and creating space for a critical comparative approach informed by legal pluralism and legal culture. This chapter applies these conceptual foundations to the selected case study, *saiban-in seido* and demonstrates their utility in addressing contemporary issues in the Japanese legal system. *Saiban-in seido* is the system of lay participation that was introduced to the Japanese criminal justice system in 2009. It has been selected as a case study for this thesis because it represents a unique circumstance in which Japanese people interact with the law. It requires active participation in the legal system, with members of the public taking on legal and social responsibilities beyond their socio-cultural normative duties. We have already seen that legal behaviour and socio-cultural behaviours and values are largely antithetical<sup>954</sup> and, prior to the introduction of *saiban-in seido*, almost never crossed paths despite operating in the same space.<sup>955</sup> The normative values of *giri-ninjo*, *tatemae* and *honne* are of note here especially in so far as their general incompatibility with the Western forms of law in Japan are concerned. Involvement in *saiban-in* means that these values encounter law in a new and challenging way, and Japanese people have to negotiate the tension between fulfilling a duty to serve and adhering to lifelong values. This is especially important to consider given the general distancing of law from the daily lives of Japanese people. When Japanese citizens step in to the court room to act as lay judges, they are faced with law and legal process in an encounter unlike any other.

The chapter comprises several sections, the first of which justifies the choice of *saiban-in seido* as a case study for this thesis. This case study demonstrates the issues highlighted in the previous chapters – that the assumption of hybridity made by comparative legal studies is inaccurate and misleading, and that legal culture, underpinned by critical legal pluralism, facilitates understanding of both the form and function of this system, and offers insight in to the experiences of Japanese people – both those who have participated in it, and the public at large. It is also a recent development – 2019 marks its tenth anniversary, and this is an opportune time to both examine its impact on Japanese legal culture, and use Japanese legal culture to understand its place and role in the Japanese legal system. Examining *saiban-in seido* as a case study highlights some of the differing levels of mutual influence between

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<sup>954</sup> T Kawashima, 'The Status of the Individual in the Notion of Law, Right and Social Order' in C A Moore (ed), *The Japanese Mind* (East-West Center Press 1967) 266-7; C Kim & C M Lawson, 'The Law of the Subtle Mind: The Traditional Japanese Conception of Law' (1979) 28 *International & Comparative Law Quarterly* 491, 502.

<sup>955</sup> D Rosen, 'The Koan of Law in Japan' (1990-1991) *North Kentucky Law Review* 367, 375; M Dean, *Japanese Legal System* (2<sup>nd</sup> edn, Cavendish 2002) 5.

*saiban-in seido* and Japanese legal culture, and demonstrates how the disconnection between formal law and informal socio-cultural norms is multi-faceted and continually in flux.

The second section of this chapter examines the development of *saiban-in seido* and frames this within Japanese legal culture to show that the decisions made in its development were influenced by social and cultural norms. Whilst not entirely contentious, it is important to demonstrate that *saiban-in seido* was influenced considerably by legal and social culture, and not merely a selection and combination of different versions of layperson participation. This contextualisation will also show that *saiban-in seido* was not developed and implemented due to a perceived need from the Japanese public or authorities,<sup>956</sup> rather it was due to international pressure to introduce a 'modern' system of lay participation ie: one that emulated Western models.<sup>957</sup> Extensive efforts were undertaken to persuade the Japanese public to participate in the lay judge system, from wide-reaching media campaigns to the development of a video game to simulate the duties of a lay judge.<sup>958</sup> Despite these socio-cultural normative influences, much of the current literature casts *saiban-in seido* as a 'mixed' or 'hybrid' system of lay participation,<sup>959</sup> and it is argued that when applying the lens of legal culture, *saiban-in seido* is a different mechanism altogether, to the extent that calling it a 'jury' is erroneous.<sup>960</sup> The discussion will move to conclude that the stipulation of *saiban-in seido* as a 'hybrid' system is erroneous and misleading. This thesis contends that *saiban-in seido* is not a combination of transplants from numerous Anglo-European jury systems

<sup>956</sup> C P A Jones, 'A spotlight on Japan's criminal justice system' (*The Japan Times*, 13 December 2018), available at <[https://www.japantimes.co.jp/opinion/2018/12/13/commentary/japan-commentary/spotlight-japans-criminal-justice-system/#.Xbnmh\\_X7SUK](https://www.japantimes.co.jp/opinion/2018/12/13/commentary/japan-commentary/spotlight-japans-criminal-justice-system/#.Xbnmh_X7SUK)> accessed 10 October 2019.

<sup>957</sup> P L Reichel and Y E Suzuki, 'Japan's Lay Judge System: A Summary of Its Development, Evaluation, and Current Status' (2015) 25(3) *International Criminal Justice Review* 247, 259; R Lempert, 'A Jury for Japan?' (1992) 40 *American Journal of Comparative Law* 37, 38-9.

<sup>958</sup> S Murai, 'Computer role-playing game helps potential lay judges prepare for trial' (*The Japan Times*, 27 October 2014), available at <<http://www.japantimes.co.jp/news/2014/10/27/national/computer-role-playing-game-helps-potential-lay-judges-prepare-for-trial/#.WI9AaVOLSUK>> accessed 10 October 2019.

<sup>959</sup> P L Reichel and Y E Suzuki, 'Japan's Lay Judge System: A Summary of Its Development, Evaluation, and Current Status' *International Criminal Justice Review* (2015) 25(3) 247, 249; M Ibusuki, 'Quo vadis: First year inspection to Japanese mixed jury trial' (2010) 12 *Asian-Pacific Law & Policy Journal* 24, 28, 33; A Dobrovolskaia, 'Japan's Past Experiences with the Institution of Jury Service' 12 *Asia-Pacific Law & Policy Journal* 1 (2010-11) 1, 3; M Levin and E Tice, 'Japan's New Citizen Judges: How Secrecy Imperils Judicial Reform' (2009) 19-06-09 *Asia Pacific Journal* 1, 3; A Dobrovolskaia, 'An All-Laymen Jury System Instead of the Lay Assessor (*Saiban-in*) System for Japan? Anglo-American-Style Jury Trials in Okinawa under the U.S. Occupation' (2007) 12(24) *Journal of Japanese Law* 57, 58; A Plogstedt, 'Citizen Judges in Japan: A Report Card for the First Three Years' (2013) 23 *International & Comparative Law Review* 371, 393; S Miyazawa, 'Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in International Perspectives' (2014) 42 *International Journal of Law, Crime & Justice* 71, 74; H Fukurai, 'A Step in the Right Direction for Japan's Judicial Reform: Impact of the Justice System Reform Council (JSRC) Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation' (2013) 36(2) *Hastings International & Comparative Law Review* 517, 521, 523.

<sup>960</sup> See, for example, A Dobrovolskaia, *The Development of Jury Service in Japan: a square block in a round hole?* (Routledge 2017); A Ortolani, 'Reflections on Citizen Participation in Criminal Justice in Japan: Jury, Saiban-in System and Legal Reform' (2010) 29 *Journal of Japanese Law* 153; I Weber, 'The New Japanese Jury System: Empowering the Public, Preserving Continental Justice' (2009) 4 *East Asia Law Review* 125; M Dean, 'Legal transplants and jury trial in Japan' (2011) 31(4) *Legal Studies* 570.



– it has been shaped and influenced by normative social and cultural values that have developed it into a distinct system.

Building from this conclusion, the third substantive section of this chapter looks to the implementation of *saiban-in seido*, focusing on its form and function. The current state of *saiban-in seido*, after almost ten years of implementation, appears well-integrated in to the criminal justice system. It has received very little by way of update or amendment to both its form and function, although there are calls to expand their usage to civil trials. This period of apparent stasis allows for in-depth examination contextualised in legal culture, both in terms of the form, whereby a socio-cultural analysis of lay persons sitting alongside professional judges reveals interesting interplay of social etiquette, and function, in which lay judges are obliged to speak their minds in a stark adversarial environment.

The fourth section of this chapter will focus on reception and review of *saiban-in seido* and examine the hypothesised tension between formal legal regulation and social and cultural norms. Reports of *saiban-in seido*, both from official Japanese governmental sources,<sup>961</sup> and academic literature,<sup>962</sup> will be examined to demonstrate the limited focus on social and cultural norms and their role in the operation of the lay judge system. This will lay the foundation for discussion of *saiban-in seido* that considers these absent elements to draw out new observations of the system. This section will also consider how legal culture has been influenced and changed by the introduction and continued existence of *saiban-in seido* by examining the experience and interactions of of lay judges, legal professionals and the general public. Legal culture is a compound and fluid concept, and whilst in Japan it includes social and normative values in its makeup, it also accommodates the influence of legal change on these values. *Saiban-in seido* has affected the consciousness of the Japanese public, and as a considerable percentage of the public can be called to serve, it undoubtedly affects the way in which people interact with and think about the law. Once a distant and unlikely encounter, the obligations imposed by *saiban-in seido* bring law in to the everyday lives of Japanese people in a novel way, creating a lasting change in legal culture.

The fifth and final section of this chapter will consider potential future implications generated by the continuing co-existence of *saiban-in seido* and Japanese legal culture. As outlined in the introductory chapter of this thesis, the discussion is not concerned with

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<sup>961</sup> For example, The Justice System Reform Council, *Chūkan hōkoku* [Interim report] (2000), available at <[https://www.kantei.go.jp/jp/sihouseido/report/naka\\_houkoku.html](https://www.kantei.go.jp/jp/sihouseido/report/naka_houkoku.html)>.

<sup>962</sup> Such as A Plogstedt, 'Citizen Judges in Japan: A Report Card for the First Three Years' (2013) 23 *International and Comparative Law Review* 371; M Fujita, *Japanese Society and Lay Participation in Criminal Justice: Social Attitudes, Trust, and Mass Media* (Springer 2018);

the apparent 'success' or 'failure' of *saiban-in seido*,<sup>963</sup> as these claims are heavily influenced by Western biases that distort the discourses of comparative scholarship on the Japanese legal system. Moreover, this final section will consider the ideas for future directions of *saiban-in seido*, including expansion to civil trials,<sup>964</sup> increasing participatory democracy,<sup>965</sup> and having *saiban-in* panels for a greater range of serious crimes,<sup>966</sup> and the potential reciprocal influences with legal culture.

### 6.1 Why *saiban-in seido*?

There are several reasons for the selection of the *saiban-in* system as a case study for analysis; the first is its arguably unique status as the most major structural and cultural change to the Japanese legal system in recent years. Its introduction was instigated and then mandated by the Japanese government and continued to be developed despite repeated negative public feedback.<sup>967</sup> The system of lay participation therefore had to be developed whilst taking the consciousness of the Japanese public in to account, and this highlights the consideration of socio-cultural norms in the development of this institution from the outset. Despite this consideration, it is still demonstrative of the disconnection between law and socio-cultural values in Japan due to its lack of popular support and the continuing reluctance of the general public to engage with the system.<sup>968</sup> The *saiban-in seido* system presents a space in which the Japanese public actively participate in legal process. By receiving a summons to serve as a lay judge, the public are directly involved in court processes and decision-making alongside legal professionals. This alone has influenced the legal consciousness of the Japanese public and Japan's legal culture in new and diverse ways. It places a burden of legal responsibility upon the majority of the Japanese public and the possibility of being selected obligates greater consciousness of the criminal justice process.

<sup>963</sup> Such as in M J Wilson, 'The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?' (2007) 24(4) *Wisconsin International Law Journal* 835; D G Levin, 'Saiban-in seido: Lost in Translation? How the Source of Power Underlying Japan's Proposed Lay Assessor System May Determine Its Fate' (2008) 10(1) *Asian-Pacific Law & Policy Journal* 199, 234.

<sup>964</sup> See M J Wilson, 'Prime Time For Japan To Take Another Step Forward In Lay Participation: Exploring Expansion To Civil Trials' (2013) 46 *Akron Law Review* 641.

<sup>965</sup> H Fukurai, 'Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy' (2011) 86 *Chicago-Kent Law Review* 789; D H Foote, 'Citizen Participation: Appraising the Saiban-in System' (2014) 22(3) *Michigan State International Law Review* 755, 768-769.

<sup>966</sup> A Plogstedt, 'Citizen Judges in Japan: A Report Card for the First Three Years' (2013) 23 *International and Comparative Law Review* 371, 422-423.

<sup>967</sup> M J Wilson, 'Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time' (2009-10) 33 *Fordham International Law Journal* 487, 490; The Associated Press, 'Lay judge system starts in Japan amid lingering concerns' (*pddnet*, 20 May 2009) available at <<https://www.pddnet.com/news/2009/05/lead-lay-judge-system-starts-japan-amid-lingering-concerns>> accessed 10 October 2016.

<sup>968</sup> D H Foote, 'Citizen Participation: Appraising the Saiban-in System' (2014) 22(3) *Michigan State International Law Review* 755, 767-768; The Japan Times, 'Stressful hearings for lay judges' (*The Japan Times*, 30 April 2013) available at <<https://www.japantimes.co.jp/opinion/2013/04/30/editorials/stressful-hearings-for-lay-judges/#.XGAnBvn7SUK>> accessed 10 February 2019; The Japan Times, 'Reviewing the lay judge trial system' (*The Japan Times*, 24 January 2019) available at <[https://www.japantimes.co.jp/opinion/2019/01/24/editorials/reviewing-lay-judge-trial-system/#.XGAKn\\_n7SUK](https://www.japantimes.co.jp/opinion/2019/01/24/editorials/reviewing-lay-judge-trial-system/#.XGAKn_n7SUK)> accessed 10 February 2019; M J Wilson, 'Japan's Lay Judge System: Expectations, Accomplishments, Shortfalls, and Possible Expansion' (28 May 2014), available at SSRN: <<https://ssrn.com/abstract=2443208>> or <<http://dx.doi.org/10.2139/ssrn.2443208>>.

The Japanese system of lay participation presents some identifiable characteristics that are similar to its Western counterparts. Indeed, lay participation in Japan performs a similar role to juries in Anglo-European systems; it involves lay persons and allows their input in decision-making in the courtroom alongside professional judges.<sup>969</sup> It is however crucial to understand that the criminal courts in Japan have a considerably different function to the West; they are arenas of fact-finding and determining sentences, not for deciding upon guilt or innocence.<sup>970</sup> Contextualising the system through Japanese legal culture helps to understand why the courts hold this role, and by extension, the reasons for the form and function of the current system of lay participation. This approach also helps to challenge the regular categorisation of the lay participation system as 'hybrid'; by appreciating the cultural and social underpinnings of the criminal justice system, which directly impact on its role and function, it will be shown that the label of 'hybrid' to describe the lay participation system lacks utility and fails to facilitate a detailed understanding of the system and its continued usage.

The existing literature on lay participation in Japan primarily focuses on its institutional aspects and research on cultural and social aspects, especially within the context of Japanese legal culture, is limited.<sup>971</sup> Following its development and implementation, the system is also a useful case study for examining the changing nature of Japanese legal culture by considering its reception by the public and its influence on the court system. It is argued therefore that these influences operate as a two-way street; Japanese legal culture informs the form and function of *saiban-in seido*, and the existence of *saiban-in seido* influences and changes Japanese legal culture. This chapter will ultimately contribute original ideas about the socio-cultural underpinning and influences of the current system of lay participation in the Japanese criminal justice system and critically consider findings on the current status of Japanese legal culture as a result of this change.

<sup>969</sup> P L Reichel and Y E Suzuki, 'Japan's Lay Judge System: A Summary of Its Development, Evaluation, and Current Status' (2015) 25(3) *International Criminal Justice Review* 247, 249.

<sup>970</sup> P Murphy, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016), 226-228; A Plogstedt, 'Citizen Judges in Japan: A Report Card for the First Three Years' (2013) 23 *International and Comparative Law Review* 371, 404-405.

<sup>971</sup> See, for example A Ortolani, 'Reflections on Citizen Participation in Criminal Justice in Japan: Jury, Saiban-in System and Legal Reform' (2010) 29 *Journal of Japanese Law* 153; A Plogstedt, 'Citizen Judges in Japan: A Report Card for the First Three Years' (2013) 23 *International and Comparative Law Review* 371; M J Wilson, 'Japan's Lay Judge System: Expectations, Accomplishments, Shortfalls, and Possible Expansion' (28 May 2014), available at SSRN: <<https://ssrn.com/abstract=2443208>> or <<http://dx.doi.org/10.2139/ssrn.2443208>>; P L Reichel and Y E Suzuki, 'Japan's Lay Judge System: A Summary of Its Development, Evaluation, and Current Status' (2015) 25(3) *International Criminal Justice Review* 247; A Dobrovolskaia, 'Japan's Past Experiences with the Institution of Jury Service' (2010-11) 12(1) *Asia-Pacific Law & Policy Journal* 1; D Vanoverbeke, *Juries in the Japanese Legal System: the continuing struggle for citizen participation and democracy* (Routledge 2015).

## 6.2 Development

### 6.2.1 Criticism of the Criminal Justice System

From the suspension of jury trials in the 1940s to the extensive legal reforms of the early 2000s, the public had no involvement in the criminal justice system unless they appeared as a witness or defendant. Power lay exclusively with the judiciary and they maintained a reputation for honesty, integrity and professionalism, enjoying the absolute trust of the public in the execution of their duties.<sup>972</sup> Despite this, the legal system received criticism from academics, activists and international observers. The criminal justice system in particular received criticism for a multitude of reasons; trials took a long time to reach court and even then trials were not held on consecutive days.<sup>973</sup> Trials involved mediocre fact-finding and a close relationship between judges and prosecutors,<sup>974</sup> leading to a focus on confessions obtained prior to trial,<sup>975</sup> resulting in a 99% conviction rate and side-sweeping of defending counsel.<sup>976</sup> Miscarriages of justice, whilst possible in any criminal justice system, were brought to the attention of the public with high media coverage of four death penalty cases that had been found to be wrongful convictions.<sup>977</sup> At the turn of the 21<sup>st</sup> century, Japan was the only G8 country without a lay participation system<sup>978</sup> and, with her G8 colleagues all practicing Western forms of criminal justice, this reinforced exogenous criticisms of the Japanese system as an 'insular bureaucracy'<sup>979</sup> that was disconnected from the needs of its people.<sup>980</sup>

Despite the presence of campaign groups in favour of citizen participation,<sup>981</sup> the criticisms of criminal justice system and the concern about a lack of lay participation was

<sup>972</sup> J O Haley, 'The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust' in D H Foote (ed), *Law in Japan: A Turning Point* (University of Washington Press 2007) 99, 112-116.

<sup>973</sup> H Fukurai, 'Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy' (2011) 86 *Chicago-Kent Law Review* 789, 823.

<sup>974</sup> D H Foote, 'From Japan's Death Row to Freedom' (1992) *Pacific Rim Law and Policy Journal* 1, 81; D T Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (Oxford University Press 2002) 215-218; J M Ramseyer and M Nakazato, *Japanese Law: An Economic Approach* (University of Chicago Press 1998), 178-182; J M Ramseyer and E B Rasmusen, 'Why is the Japanese Conviction Rate So High?', (2001) 30 *Journal of Legal Studies* 53, 53-54; M J Wilson, 'Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time' (2009-10) 33 *Fordham International Law Journal* 487, 490, 507; F K Upham, 'Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary', (2005) 30 *Law & Social Inquiry* 421, 432-33.

<sup>975</sup> K Ito, 'Wrongful Convictions and Recent Criminal Justice Reform in Japan' (2012) 80(4) *University of Cincinnati Law Review* 1245, 1250-1251.

<sup>976</sup> B Wallace, 'Slow-to-Judge Japanese trials prompt anger, return of juries' (*Seattle Times*, 24 January 2005) available at <<https://www.seattletimes.com/nation-world/slow-to-judge-japanese-trials-prompt-anger-return-of-juries/>> accessed 24 January 2019.

<sup>977</sup> J Weber, 'The New Japanese Jury System: Empowering the Public, Preserving Continental Justice' (2009) 4 *East Asia Law Review* 125, 127.

<sup>978</sup> The Associated Press, 'Lay judge system starts in Japan amid lingering concerns' (*pddnet*, 20 May 2009) available at <<https://www.pddnet.com/news/2009/05/lead-lay-judge-system-starts-japan-amid-lingering-concerns>> accessed 10 October 2016.

<sup>979</sup> A F Soldwedel, 'Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants' [2008] *Vanderbilt Journal of Transnational Law* 1417, 1419.

<sup>980</sup> M J Wilson, 'The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?' (2007) 24(4) *Wisconsin International Law Journal* 835, 835-6.

<sup>981</sup> T Katsuta, 'Japan's Rejection of the American Criminal Jury' (2010) 58 *American Journal of Comparative Law* 497, 499; C P A Jones, 'Still dreaming of a Japan with juries – and without U.S. bases' (*The Japan Times*, 18 June 2014) available at <<http://www.japantimes.co.jp/community/2014/06/18/issues/still-dreaming-japan-juries-without-u-s-bases>> accessed 22 September 2016.

not shared by the majority of the general public. Additionally, the Japanese public have no obvious grievance with the judiciary,<sup>982</sup> and contrary to the comments of international critics, the almost-perfect conviction rate was viewed as an indicator of the consistency and success of the criminal justice system. The Diet was reluctant to state that anything was overtly 'wrong' with the criminal justice system and that the introduction of *saiban-in* was not to address any particular flaws; it was presented as something new – an addition to the current system rather than an amendment or repair of it.<sup>983</sup> The driver for development and implementation of lay participation did not solely arise from a Japanese need or requirement; the *saiban-in* system was not developed specifically to address any flaws in the previous system,<sup>984</sup> rather it is argued that its main purpose was to appease critics and international partners by facilitating greater public involvement with the justice system, whilst allowing the work of the criminal courts to continue relatively unhindered.

After a period of over sixty years with no juries on the mainland, and thirty years without juries in the whole of Japan, proposals for lay-participation in the justice system began to be realised with the development of the *saiban-in* system. In the late 1990s the government, led by the then Prime Minister Keizo Obuchi, set about the development of extensive legal reforms. These arose from a multitude of pressure points; as a result of economic pressure from the US during the Japanese economic crisis,<sup>985</sup> maintaining an increasingly modern international profile<sup>986</sup> and the interests of international bodies including the Ministry of Justice, the Secretariat of the Supreme Court and political parties.<sup>987</sup> In 1999, the Justice System Reform Council (JSRC) was formed with the view to facilitating an increase in public participation in the justice system as a final step in completing Japan's new legal framework.<sup>988</sup>

### 6.2.2 *The JSRC*

Much like the scholars of the *Meiji* restoration, extensive research was conducted by the JSRC into other jurisdictions to gain a comprehensive understanding of other criminal justice systems, including the structure and utility of juries. The Committee comprised thirteen members who, unusually for the trend of legal activity of Japanese authorities,

<sup>982</sup> See J O Haley, 'The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust' in D H Foote (ed), *Law in Japan: A Turning Point* (University of Washington Press 2007).

<sup>983</sup> S Kamiya, 'First lay judge trial kicks off in Tokyo' (*The Japan Times*, 4 August 2009), available at <<https://www.japantimes.co.jp/news/2009/08/04/national/first-lay-judge-trial-kicks-off-in-tokyo/#.XbnfxX7SUK>> accessed 10 October 2019.

<sup>984</sup> M J Wilson, 'Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time' (2009-10) 33 *Fordham International Law Journal* 487, 490.

<sup>985</sup> D Vanoverbeke, *Juries in the Japanese Legal System: the continuing struggle for citizen participation and democracy* (Routledge 2015) 21-23.

<sup>986</sup> G Schumann, 'Beyond Litigation: Legal Education Reform in Japan and What Japan's New Lawyers Will Do' (2006) 13 *University of Miami International and Comparative Law Review* 475, 479-80.

<sup>987</sup> A Plogstedt, 'Citizen Judges in Japan: A Report Card for the First Three Years' (2013) 23 *International & Comparative Law Review* 371, 384.

<sup>988</sup> P L Reichel and Y E Suzuki, 'Japan's Lay Judge System: A Summary of Its Development, Evaluation, and Current Status' *International Criminal Justice Review* (2015) 25(3) 247, 249.

were not only from the legal profession, but also included legal and non-legal academics, leaders from industry and labour, a consumer advocate and a famous novelist.<sup>989</sup> Even some Supreme Court judges took an interest in this research and travelled to other states including the US, the UK, Germany and France to study their jury systems and the role and function of lay persons in their different jurisdictions.<sup>990</sup> The JSRC was keen to formulate a solution that both maintained the level of trust and respect for judges but did not subvert their power too greatly.

The research of the committee concluded that all lay person juries were unsuitable for Japan due to the populace's high level of ethnic homogeneity, and expressed concerns that whilst expressing the diversity of society was important in a Western country, this was of little concern to Japan.<sup>991</sup> Their research had also informed them that in Western systems, particularly the United States, those trials with a jury seated often enjoyed higher rates of acquittal<sup>992</sup> and this validated their earlier concern that the high conviction rate (seen in Japan as a marker of the excellence of their criminal justice system) would drop should citizen participation be introduced in an exclusively Western style. This also created worries that an all lay person jury in Japan would follow the pattern in the United States, delivering inconsistent verdicts and making mistakes in their decisions.<sup>993</sup> This reinforced the decision to create an alternative system of lay participation, with the argument that simple importation of a jury framework from another system would not be suitable – the solution had to be inherently Japanese and fit with the existing system.

This follows the general pattern of development of law in Japan seen in the third chapter; the trend of extensive research followed by adaptation and assimilation of the required elements. As seen by the lack of engagement with the Constitution, importation and transplanted without any modification does not work well for the Japanese system of law due to the rich and complex social and cultural setting in which it resides. An example of this is the differentiation in language; English allows for individuals on a jury to address each other in equal terms, whereas Japanese has differential terms for referring to other people based on their age, gender and status.<sup>994</sup> Murphy states that even 'relaxed conversation is regulated ...by custom and the structure of language' and that 'almost every sentence carries a status marker: a word, the absence of a word, or a verb ending

<sup>989</sup> M J Wilson, 'Seeking to change Japanese society through legal reform' in J Kingston (ed), *Critical Issues in Contemporary Japan* (Routledge 2014) 267.

<sup>990</sup> R Lempert, 'A Jury for Japan?' (1992) 40 *American Journal of Comparative Law* 37, 38-9.

<sup>991</sup> T Katsuta, 'Japan's Rejection of the American Criminal Jury' (2010) 58 *American Journal of Comparative Law* 497, 499.

<sup>992</sup> J P McInahan, 'Citizen Participation in Japanese Criminal Trials: Reimagining the Right to Trial by Jury in the United States' (2012) 37 *North Carolina Journal of International Law and Commercial Regulation* 725, 763.

<sup>993</sup> J P McInahan, 'Citizen Participation in Japanese Criminal Trials: Reimagining the Right to Trial by Jury in the United States' (2012) 37 *North Carolina Journal of International Law and Commercial Regulation* 725, 762.

<sup>994</sup> R Lempert, 'A Jury for Japan?' (1992) 40 *American Journal of Comparative Law* 37, 40; Author Unknown, 'Saying "You" in Japanese' (*Nihonshock*, 3<sup>rd</sup> July 2012) <<http://nihonshock.com/2012/07/saying-you-in-japanese>> accessed 7 October 2016.

that indicates whether you are senior, junior, or equal in status to the person you are speaking with.<sup>995</sup> This element of language immediately divides people in the group by way of status and terms of address are dependent on the relationships people have with each other. These terms are normative in Japanese society and cannot be easily suspended, and to impose it artificially for the purposes of a jury would be awkward and difficult for participants to maintain. Thus it was clear that along with the other difficulties of introducing the system, the system itself clearly would not function in a purely Western way.

In order to be accepted by the Japanese people and correspond with social and cultural norms such as terms of address, something different would be needed from the offerings of the West. Even if the citizen participation system was made up of Western components, mere transplantation would not be enough for successful implementation.<sup>996</sup> Amendments and adaptations based on the culture of the Japanese legal system and social values were necessary for its acceptance by the government, legal professionals and the public. The JSRC needed to create a balance that did not strip judges and prosecutors of too much power, but enabled lay participants to effectively contribute, whilst also drawing the public to what was an otherwise eschewed part of society's framework. The findings of the JSRC resulted in the development of a unique model of citizen participation in the courtroom; a jury-like panel consisting of both lay persons and professionals who would deliberate together on the outcome of a case, named *saiban-in seido*.<sup>997</sup>

This move drew its blueprint from some European forms of lay participation,<sup>998</sup> but again differentiated on the specific duties undertaken by lay persons and in their supervision by professional judges. The JSRC considered the competency of the jurors in terms of their understanding of complex criminal cases, and their resilience in being exposed to violent and gruesome cases.<sup>999</sup> This was of concern as the proposals were to have *saiban-in* only for those trials where life imprisonment or a death sentence could be imposed.<sup>1000</sup> In respect to the latter sentence, there were also concerns about whether lay persons would convict with capital punishment as a possibility, and whether they

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<sup>995</sup> P Murphy, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016), 9.

<sup>996</sup> See generally, T Katsuta, 'Japan's Rejection of the American Criminal Jury' (2010) 58 *American Journal of Comparative Law* 497.

<sup>997</sup> 'Saiban-in' translates to 'lay judge', and 'seido' mean system: N Yanase, 'Deliberative Democracy and the Japanese Saiban-in (Lay Judge) System' (2016) 3 *Asian Journal of Law and Society* 327, 327.

<sup>998</sup> P L Reichel and Y E Suzuki, 'Japan's Lay Judge System: A Summary of Its Development, Evaluation, and Current Status' (2015) 25(3) *International Criminal Justice Review* 247, 249.

<sup>999</sup> The Associated Press, 'Lay judge system starts in Japan amid lingering concerns' (*pddnet*, 20 May 2009) available at <<https://www.pddnet.com/news/2009/05/lead-lay-judge-system-starts-japan-amid-lingering-concerns>> accessed 10 October 2016.

<sup>1000</sup> E M Sher, 'Death Penalty Sentencing in Japan Under The Lay Assessor System: Avoiding the Avoidable Through Unanimity' (2001) 20 *Pacific Rim Law & Policy Journal* 635, 636.

would be able to manage the responsibility.<sup>1001</sup> This was compounded by the strict requirement for secrecy during and after the trial – with criminal sanctions should the secrecy be breached.<sup>1002</sup> This requirement for such strict secrecy has fallen under criticism, arguing that it leads to detrimental effects for citizens in terms of mental and emotional health,<sup>1003</sup> does not allow for the discovery of unjust methods of decision-making<sup>1004</sup> and impedes the ability of the Japanese public to learn from their peers who have served on *saiban-in*.<sup>1005</sup> The terms are harsher for citizens than for career judges, the latter of whom do not suffer criminal sanction should they be found guilty of misconduct.<sup>1006</sup>

The value placed on carefully planning this new feature also presented the risk of implementing something that was untested and thus compromising the integrity of the courts. Although the Committee could find no effective ways of testing the system outside the courtroom, they carefully considered the format and function of the *saiban-in* system, along with the criteria for lay persons, in order to minimise the risk and facilitate smooth implementation. These measures were arguably underpinned by socio-cultural normative values in order to make *saiban-in seido* more appealing to the Japanese public – its success depended on public participation and thus the people needed to be reassured that partaking in formal legal process would not be too discomfoting. This thesis argues that the development and implementation of *saiban-in seido* is shaped by Japanese legal culture. This huge change to the legal system demonstrates a shift in the Japanese legal sphere initiated by political influence and legal professionals, which has significantly influenced Japanese legal culture as a whole due to extensive public awareness. The next part of this section will consider the socio-cultural context of the development of *saiban-in seido* in more detail.

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<sup>1001</sup> The Japan Times, 'Lay judges' moral dilemma,' (*The Japan Times*, 21 March 2014) available at <<https://www.japantimes.co.jp/opinion/2014/03/21/editorials/lay-judges-moral-dilemma/#.XGAnAPn7SUk>> accessed 10 February 2019.

<sup>1002</sup> See generally, M Levin and E Tice, 'Japan's New Citizen Judges: How Secrecy Imperils Judicial Reform' (2009) *Asia Pacific Journal* 1.

<sup>1003</sup> The Japan Times, 'Reduce the burden on lay judges' (*The Japan Times*, 24 November 2018) available at <<https://www.japantimes.co.jp/opinion/2018/11/24/editorials/reduce-burden-lay-judges/#.XGAKNPN7SUk>> accessed 10 February 2019; The Japan Times, 'Stressful hearings for lay judges' (*The Japan Times*, 30 April 2013) available at <<https://www.japantimes.co.jp/opinion/2013/04/30/editorials/stressful-hearings-for-lay-judges/#.XGAnBvn7SUk>> accessed 10 February 2019.

<sup>1004</sup> Such as flipping a coin, consulting a Ouija board or the internet – see M Levin and E Tice, 'Japan's New Citizen Judges: How Secrecy Imperils Judicial Reform' (2009) 19-06-09 *Asia Pacific Journal* 1, 6.

<sup>1005</sup> M Levin and E Tice, 'Japan's New Citizen Judges: How Secrecy Imperils Judicial Reform' (2009) 19-06-09 *Asia Pacific Journal* 1, 5-7.

<sup>1006</sup> E Yamamura, 'What discourages participation in the lay judge system (Saiban'in seido) of Japan?: an interaction effect between the secrecy requirement and social network' (2009) *Munich Personal RePEc Archive*, available at <<https://mpra.ub.uni-muenchen.de/15920/>>; M Levin and E Tice, 'Japan's New Citizen Judges: How Secrecy Imperils Judicial Reform' (2009) 19-06-09 *Asia Pacific Journal* 1, 6.



### 6.2.3 Culture and Consciousness in Developing Saiban-in Seido

Japanese social values and legal culture were arguably vitally important considerations in the development of its lay participation system. The Western legal cultures in which the jury system was developed were, and remain, starkly different from that of Japanese legal culture. At the outset, the idea of untrained individuals making decisions with legal impact is discordant with Japanese social norms of hierarchy, harmony and occupational specialism,<sup>1007</sup> and thus the introduction of any system for lay participation required meticulous attention for suitable adaptation into the Japanese system and culture. A general departure from the Western model of juries was developed and focus moved to involving lay persons in a more socially conventional and more regulated capacity in the form of *saiban-in*.

Given the culture of specialism in the Japanese workforce, public opinion polls found that there was little enthusiasm for placing lay persons in a courtroom where they did not have the necessary knowledge, skills or experience to match the standard that the judges and lawyers provided.<sup>1008</sup> Surveys conducted during the development of *saiban-in seido* yielded an almost wholly negative perspective of citizen participation. A 2005 poll revealed that 70% of those surveyed did not want to participate<sup>1009</sup> and a Supreme Court study found that those caring for children or the elderly did not want to serve either.<sup>1010</sup> A separate survey discovered the main reasons for this reluctance; too much responsibility to decide the fate of another person, worries over the lack of legal knowledge of the lay persons, and an inability of lay persons to deliberate on an equal footing with professional judges.<sup>1011</sup> These survey results reflect the significance of Japanese social and cultural values and provide evidence to support the straightforward assertion that these values are largely incompatible with law – especially in the mostly Western format in which it exists in Japan. Furthermore, these survey responses are demonstrative of the social aspects in Japanese legal culture – that although information about the law is accessible and knowing the law is available to all, administering and enforcing the law is only for specialists.<sup>1012</sup> This fostered the reluctance of the majority of the Japanese public to support the venture of *saiban-in seido*, threatening to destabilise

<sup>1007</sup> S Satoru, 'Defying Expert's Predictions, Identifying Themselves as Sovereign: Citizen's Responses to Their Service as Lay Judges in Japan' (2010) 43 *Social Science Japan* 8, 9.

<sup>1008</sup> Government Information Office, Minister's Secretariat, Cabinet Office, 'Public Opinion Survey On Jury System' (February 2005), available at <[http://www8.cao.go.jp/survey/h\\_16/hi\\_6-saiban/index.html](http://www8.cao.go.jp/survey/h_16/hi_6-saiban/index.html)>; M J Wilson, 'Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time' (2009-10) 33 *Fordham International Law Journal* 487, 490.

<sup>1009</sup> K Anderson and L Ambler, 'The Slow Birth of Japan's Quasi-Jury System (Saiban-in Seido): Interim Report on the Road to Commencement' (2006) 21 *Journal of Japanese Law* 55, 69.

<sup>1010</sup> K Anderson and L Ambler, 'The Slow Birth of Japan's Quasi-Jury System (Saiban-in Seido): Interim Report on the Road to Commencement' (2006) 21 *Journal of Japanese Law* 55, 69.

<sup>1011</sup> J P McInahan, 'Citizen Participation in Japanese Criminal Trials: Reimagining the Right to Trial by Jury in the United States' (2012) 37 *North Carolina Journal of International Law and Commercial Regulation* 725, 770.

<sup>1012</sup> S Ota and K Rokumoto, 'Issues of Lawyer Population: Japan' (1993) 25 *Case Western Reserve Journal of International Law* 315, 322, 327.

its foundations as, unlike other aspects of the legal system, which provided formal guidelines and regulated the populace with them, it was reliant on the cooperation of the public in order to succeed.

However, this reservation is not just held by the general public; as seen in chapter three, historically the authorities have been wary of giving the public too much access to the justice system (aside from being subject to it) for fear of an uprising.<sup>1013</sup> The reforms proposed by the JSRC were a momentous departure from these historical trends, and were fully focused on investing more power in the public and bolstering faith in the legal system. Despite the JSRC's ambitions, the introduction of a mechanism for citizen participation was difficult in a nation where much of the public have little interest in being involved due to the concepts of specialised roles and hierarchy in the society.

To address these issues, in the years prior to the implementation of *saiban-in*, an extensive effort was made to advertise the introduction of the system by the Supreme Court, the Federation of Bar Associations and the Department of Justice.<sup>1014</sup> These efforts were made to increase understanding and support for the system by the public and extended to the use websites, posters and mass media advertisements, as well as interactive advertisements including field trips, courtroom tours and demonstrations of mock trials. The latter proved particularly popular as the active engagement and interaction with the Japanese public seemed to facilitate understanding and enthusiasm from lay persons, even if the volunteer lay judges felt a little overwhelmed by the amount of information to consider.<sup>1015</sup> Furthermore, these mock trials also provided opportunities for legal professionals to change their approach to trials when working with lay judges.<sup>1016</sup> These endeavours were made in order to support the JSRC's underpinning philosophy in proposing the lay participation system – to transform the people of Japan from governed objects to governing subjects and to increase autonomy and social responsibility.<sup>1017</sup> The JSRC argued that the use of lay participation (and at the time, what the Committee hoped would take the form of a jury) would empower Japanese citizens and move the justice system from its place exclusively in the realm of legal professionals to be shared with the public. This sentiment was reflected by the then Justice Minister

<sup>1013</sup> A Gordon, *A Modern History of Japan: From Tokugawa Times to the Present* (Oxford University Press 2003) 92-3; W G Beasley, *The Rise of Modern Japan: Political, Economic, and Social Change Since 1850* (3rd edn, Weidenfeld & Nicholson 2003) 77.

<sup>1014</sup> These three are considered the pillars of the Japanese justice system.

<sup>1015</sup> S Kamiya, 'Mock trial provides look at judicial system's future' (*The Japan Times*, 10 June 2007) available at <[http://www.japantimes.co.jp/news/2007/06/10/national/mock-trial-provides-look-at-judicial-systems-future/#.V\\_dJ7OUrLMw](http://www.japantimes.co.jp/news/2007/06/10/national/mock-trial-provides-look-at-judicial-systems-future/#.V_dJ7OUrLMw)> accessed 07 October 2016.

<sup>1016</sup> P L Reichel and Y E Suzuki, 'Japan's Lay Judge System: A Summary of Its Development, Evaluation, and Current Status' *International Criminal Justice Review* (2015) 25(3) 247, 250.

<sup>1017</sup> Judicial Reform Council, *Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century* (2001), reprinted in 2002 *St Louis-Warsaw Transatlantic Law Journal* 119, 178-83, available at <<http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>> (last visited Mar. 29, 2007) at 127; M J Wilson, 'The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?' (2007) 24(4) *Wisconsin International Law Journal* 835, 843.

Eisuke Mori, who endorsed the lay judge system with hopes that public common sense would improve the justice system, and although he understood the difficulties the public faced in judicial decision-making, especially where the death sentence might be involved, he hoped that it would open up the area for more debate.<sup>1018</sup>

Later public polls conducted soon before the system's implementation revealed that these measures had been somewhat effective in changing public perspective on *saiban-in seido*. The majority of respondents said that they were in favour of a lay judge system,<sup>1019</sup> however they did not want to be summoned or to serve.<sup>1020</sup> Surveys indicated that some of the public would participate unwillingly through a sense of obligation to society (an example of their *giri* to society) but even so many felt that the responsibility of impacting another person's life so severely, with little or no legal training or experience, was too much responsibility.<sup>1021</sup>

These arguments from the JSRC and Mori demonstrated that the emphasis was on creating a system of lay participation that not only served the required purposes, but also one that would be accepted by the Japanese people, shifting perspectives to their taking a more active role in legal action. Greater participation of lay people would make for a more transparent system, foster greater public trust in the criminal justice process and address some of the issues around the exclusivity of legal power being held with legal professionals and introduce alternative perspectives to a system highly focused on conviction.

### 6.3 Implementation of *saiban-in seido*

#### 6.3.1 Form and Function

The finalised form of *saiban-in* comprises either four or (more usually) six members of the public sitting alongside three professional judges. Unlike previous attempts to limit those eligible for the role,<sup>1022</sup> financial situation nor education are relevant to be considered for service. Lay judges are chosen at random from the electoral register and have the right to refuse on the basis of age, if they are a student or a politician, have previously served on *saiban-in* or cannot attend during the trial for an 'unavoidable

<sup>1018</sup> F A Marikkar, 'The Lay Judge System: Its Role and Effects on Japanese Society' (2009) 國際經營論集 38, 189, 191.

<sup>1019</sup> F A Marikkar, 'The Lay Judge System: Its Role and Effects on Japanese Society' (2009) 國際經營論集 38, 189, 191.

<sup>1020</sup> F A Marikkar, 'The Lay Judge System: Its Role and Effects on Japanese Society' (2009) 國際經營論集 38, 189, 191; M Ibusuki, 'Quo vadis: First year inspection to Japanese mixed jury trial' (2010) 12 *Asian-Pacific Law & Policy Journal* 24, 35.

<sup>1021</sup> F A Marikkar, 'The Lay Judge System: Its Role and Effects on Japanese Society' (2009) 國際經營論集 38, 189, 190.

<sup>1022</sup> *Baishin Hō* (Jury Act) Law No. 50 of 1923, Article 82.

reason'.<sup>1023</sup> They are interviewed and the *saiban-in* panel is selected from a pool of around twenty people. They are paid for their time in service.

In terms of function, *saiban-in* sit on important cases involving offences such as rape, murder and arson, and those that can incur a death sentence or life imprisonment, or at least one year's incarceration.<sup>1024</sup> A initial look at their responsibilities reveals that *saiban-in* can do considerably more in the courtroom compared to their Western juror counterparts; they are able to question witnesses and defendants and are able to decide on the verdict and length of sentence.<sup>1025</sup> Along with the respect afforded to them by prosecutors and defence lawyers,<sup>1026</sup> *saiban-in* appear to have a degree of formal equality with their professional counterparts.

*Saiban-in seido* has been implemented in to a 120 year old criminal justice system, and it is vital to understand how the system works as a whole in order to build a comprehensive account of the role and function of lay participation. The underpinning socio-cultural norms of the criminal justice system emanate from the historically embedded Confucian values of the *Tokugawa* period, and it is critical to the criminal justice process. Defendants almost always write letters of apology to the victim and write essays of reflection. They, along with friends, colleagues and / or relatives make promises before the court to build a better life; a former employer or person of standing in the community may promise to offer the defendant a job once their trial or sentence is over, or the defendant will explain how they intend to find work and reintegrate in to society, often with the support of family members. Shame is also central to the system – this burden is shared by their defendant and family, with family members scolding the defendant in court and apologising for the disruption to harmonious life and making work for the courts.<sup>1027</sup>

The police are the underpinning force of the criminal justice system; they make arrests, hold defendants in custody, gather evidence, conduct interrogations and are present in the courtroom to accompany the defendant, sometimes also giving testimony in court. They work closely with prosecutors, who in turn work closely with professional judges.<sup>1028</sup>

<sup>1023</sup> P Murphy, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016) 226-7.

<sup>1024</sup> M Ibusuki, 'Quo vadis: First year inspection to Japanese mixed jury trial' (2010) 12 *Asian-Pacific Law & Policy Journal* 24, 28-29.

<sup>1025</sup> P Murphy, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016) 227.

<sup>1026</sup> P Murphy, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016) 227.

<sup>1027</sup> See P Kent, 'Shame as a Social Sanction in Japan: Shameful Behaviour as Perceived by the Voting Public' (1992) 3 *Japan Review* 97; M Suzuki and A Otani, 'Myths of restorative features in the Japanese justice system and society: the role of apology, compensation and confession, and application of reintegrative shaming' (2017) 5(2) *Restorative Justice* 158.

<sup>1028</sup> D H Foote, 'Diversification of the Japanese Judiciary' (2017) 27(1) *Washington International Law Journal* 7, 27; M Toshikuni and M Keiichi, 'Order in the Court: Explaining Japan's 99.9% Conviction Rate' (*Nippon.com*, 18 January 2019),

Prosecutors rarely bring a case before the court without a confession already obtained by the police;<sup>1029</sup> as such, determining guilt or innocence in the Japanese courtroom is often not required. Just as the foundations of the criminal justice process are so different to that of many legal systems in the West, Japan's professional and lay judges perform a different role in the pursuit of justice. Much of the work of judges and *saiban-in* is examining evidence in order to determine the appropriate sentence. *Saiban-in* therefore are almost never required to decide on a verdict, and where they do, it is rarely done independently of the judge.

When a verdict is required, *saiban-in* vote alongside professional judges to reach a majority outcome. Interestingly, *saiban-in* can outvote the professional judges on matters of verdict when acquitting a defendant – if five of the six lay judges vote for a 'not guilty' verdict, the professional judges cannot overturn it.<sup>1030</sup> At first glance, this seems somewhat incongruent with the trend of power largely being retained by the judges and concerns by the JSRC about the ability of the public to handle responsibility in the courtroom. However, when passing a guilty verdict, at least one professional judge must agree with the lay judges in order for it to be passed; in this way, lay judges alone cannot initiate sentencing of the defendant.<sup>1031</sup> This process represents a curious power asymmetry in the system – contextualising it in the socio-cultural dimension of legal culture reveals a more nuanced situation. As criminal prosecution and court appearances are a last resort in Japan, there is a strong public impression that defendants who appear in court deserve to be there. In rare cases where defendants protest their innocence, their chances of acquittal are low due to the effect of the reputation of the courts, which thus far has been emulated and reinforced by the lay judges (whose presence in court has notably done little in reducing the rate of conviction).<sup>1032</sup> It is argued therefore that giving the lay judges the power to outvote professional judge in terms of acquitting defendants lacks the authority that would be more present in Western systems, where there is an absence of such high levels of pre-trial confession and conviction. The real power lies with the ability to convict, which in the Japanese courtroom cannot be done without the vote of a professional judge – in this sense, little has changed and power is still retained by its historical bearer.

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available at <<https://www.nippon.com/en/japan-topics/c05401/order-in-the-court-explaining-japan%E2%80%99s-99-9-conviction-rate.html>> accessed 12 August 2019.

<sup>1029</sup> K Ito, 'Wrongful Convictions and Recent Criminal Justice Reform in Japan' (2012) 80(4) *University of Cincinnati Law Review* 1245, 1250-1251

<sup>1030</sup> P L Reichel and Y E Suzuki, 'Japan's Lay Judge System: A Summary of Its Development, Evaluation, and Current Status' (2015) 25(3) *International Criminal Justice Review* 247, 251.

<sup>1031</sup> Saiban-in Act, Article 40, cited in M Ibusuki, 'Quo vadis: First year inspection to Japanese mixed jury trial' (2010) 12 *Asian-Pacific Law & Policy Journal* 24, 31.

<sup>1032</sup> D H Foote, 'Citizen Participation: Appraising the *Saiban-in* System' *Michigan State International Law Review* (2014) 22(3) 755, 764.

*Saiban-in seido*, although beneficial in its influence on the legal consciousness of the Japanese, its effect on increased transparency of the judicial system and fostering a more benevolent relationship between the public and the judiciary, had to find its place amongst a system that was highly efficient and focused on rehabilitating offenders and maintaining social order. Suspended sentences are frequent and incarceration is used as a last resort; the prevailing view is that if a person is removed from society for a length of time due to imprisonment, it is much harder for them to re-join society and become a functioning member of the community. Furthermore, the system itself exists within a society for which social obedience, harmony and self-regulation are highly valued, with avoiding shame by others being a core motivator for adherence to these values. The performance of *saiban-in* so far largely supports adherence to that view and thus does little to change the overall direction of the justice system.

### 6.3.2 On hybridity

Despite the influences of socio-cultural norms, Japan's lay judge system is consistently considered 'hybrid'<sup>1033</sup> due to the Western pedigree of some of its parts – this labelling and the reasons for its unsuitability will be discussed here. As discussed in chapter two, the categories from which the so-called hybrid draws on are informed by an Anglo-European bias. Even if this is just semantics, the label of 'hybrid' still creates the assumption that it lacks belonging to any kind of legal 'tradition' or normative form. A label of hybrid suggests an inability to look beyond the components and see the whole as separate, as essentially Japanese and unique. It is quite regressive, suggesting that legal forms can only originate from Western systems, and at best does not acknowledge the ability of the Japanese system to be as independent as the systems from which it has made adaptations and assimilations. The label encourages focus only on Anglo-European elements that can be identified in *saiban-in seido*, such as lay judges sitting alongside professional judges, their secret deliberations, or their ability to vote for conviction or acquittal. Taking this formalistic, doctrinal, component-based approach to *saiban-in seido* fails to account for the multitude of socio-cultural norms – such as *giri* and harmony – that influenced its development and implementation, diminishing them

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<sup>1033</sup> P L Reichel and Y E Suzuki, 'Japan's Lay Judge System: A Summary of Its Development, Evaluation, and Current Status' (2015) 25(3) *International Criminal Justice Review* 247, 249; M Ibusuki, 'Quo vadis: First year inspection to Japanese mixed jury trial' (2010) 12 *Asian-Pacific Law & Policy Journal* 24, 28, 33; A Dobrovolskaia, 'Japan's Past Experiences with the Institution of Jury Service' 12 *Asian-Pacific Law & Policy Journal* 1 (2010-11) 1, 3; M Levin and E Tice, 'Japan's New Citizen Judges: How Secrecy Imperils Judicial Reform' (2009) 19-06-09 *Asia Pacific Journal* 1, 3; A Dobrovolskaia, 'An All-Laymen Jury System Instead of the Lay Assessor (*Saiban-in*) System for Japan? Anglo-American-Style Jury Trials in Okinawa under the U.S. Occupation' (2007) 12(24) *Journal of Japanese Law* 57, 58; A Plogstedt, 'Citizen Judges in Japan: A Report Card for the First Three Years' (2013) 23 *International & Comparative Law Review* 371, 393; S Miyazawa, 'Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in International Perspectives' (2014) 42 *International Journal of Law, Crime & Justice* 71, 74; H Fukurai, 'A Step in the Right Direction for Japan's Judicial Reform: Impact of the Justice System Reform Council (JSRC) Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation' (2013) 36(2) *Hastings International & Comparative Law Review* 517, 521, 523.

almost to the point of exclusion. The marginalisation of informal socio-cultural normative influences that originate from Japan infers that, much with the discussion on taxonomy of legal systems above, *saiban-in seido* cannot be considered on its own merit, artificially pulling it from its legal culture and presenting an incomplete picture of the system.

Socio-cultural normative influences were hugely significant in the development and implementation of the system and as such cannot be ignored. It is these influences that continue to shape the course of the system after just over a decade of use. The label of hybrid is detrimental to these contexts and thus it is contended that the *saiban-in* system should not be categorised in this way. Furthermore, a significant amount of scholarship on the system has consistently labelled it a 'jury' – a label that is also drawn from Anglo-European legal systems.<sup>1034</sup> Much like the label of 'hybrid', the term 'jury' presents assumptions about the form and function of *saiban-in seido* – namely that it is very similar to systems of lay participation found in the West. It is argued that due to the lack of independence of lay judges and the function of the criminal courts in determining sentences that it is erroneous to attach this label to *saiban-in seido*, and in comparative legal scholarship it is more accurate and helpful to use the term 'lay judges' or 'lay participation', as this more closely reflects the reality.

The discussion in the above discussion on development of *saiban-in seido* demonstrates the extensive efforts made in order to develop and implement the system. The social and cultural contexts of Japanese society were essential both in the formation of the system, and in its introduction to the public, which was regarded as critically important if the public were going to meaningfully engage with it, and thus ensure the success of the new system. This influence of social and cultural elements arguably transforms the system into something new and separate from its Western origins. One analogy is to consider Japanese and Western-based 'ingredients' being prepared and used in a Japanese style, to create a new product entirely by the end of the process.<sup>1035</sup> Some of the base ingredients – such as the concept and format of citizen participation in the courtroom – have Western origins, and others – the structures of the domestic criminal justice system, courtroom, and legal profession, and their social and cultural contexts – are Japanese. When in development, aspects of the criminal justice system and courts that had originated from Western systems were adapted and amended into new forms to be more acceptable to the Japanese legal and social framework. This thesis contends that the same has happened in the development and implementation of *saiban-in seido*.

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<sup>1034</sup> See, for example, A Dobrovolskaia, *The Development of Jury Service in Japan: a square block in a round hole?* (Routledge 2017); A Ortolani, 'Reflections on Citizen Participation in Criminal Justice in Japan: Jury, Saiban-in System and Legal Reform' (2010) 29 *Journal of Japanese Law* 153; I Weber, 'The New Japanese Jury System: Empowering the Public, Preserving Continental Justice' (2009) 4 *East Asia Law Review* 125; M Dean, 'Legal transplants and jury trial in Japan' (2011) 31(4) *Legal Studies* 570.

<sup>1035</sup> G Frankenburg, 'Constitutional transfer: The IKEA theory revisited' (2010) *J-CON* 8 (3) 563, 570, 571.

Indicators of this include the role of the lay judges in fact-finding and helping to determine the sentence (rather than the verdict), the guidance provided by the professional judges (as lay judges are not left alone to deliberate) and the secrecy of lay judge deliberation. This combination of elements, the way in which they function and the context in which they operate all uniquely exist here and creates a lay judge system that transcends the category of hybrid.

## 6.4 Reception

The first trial to use *saiban-in seido* commenced on 3rd August 2009 in Tokyo District Court, and was met with huge enthusiasm from the Japanese populace, with thousands turning up for the chance to witness the trial.<sup>1036</sup> The trial concerned seventy-two year old Katsuyoshi Fujii, a Japanese man charged with murdering his sixty-six year old South Korean neighbour Mun Chun Ja.<sup>1037</sup> The lay judges handed down a sentence of 15 years imprisonment on 6<sup>th</sup> August following a relatively straightforward trial; since Fujii had submitted a confession prior to the trial beginning, the role of the lay judges was focused on fact-finding with the goal of determining an appropriate punishment.<sup>1038</sup> The first trial to use *saiban-in* in West Japan began a month later in Kobe District Court, and again received considerable publicity and attention from media and public alike.<sup>1039</sup> At implementation it was projected that *saiban-in* would be used in around three thousand trials each year. This section will examine the lifespan of *saiban-in seido* over the past decade, contextualising its operation and reception by the public and professionals alike in legal culture to develop a rich and comprehensive account.

### 6.4.1 Formal review

Keen to measure the response of the public to the new system, several surveys and reports were produced by the Department of Justice in the years immediately following the first *saiban-in* trial. Although the numbers alone are limited in their capacity give a detailed account of the reception of *saiban-in* they nonetheless provide a useful starting point for analysis. Areas for concern prior to the introduction of *saiban-in* included a lowering of sentences and conviction rates, a reluctance to serve, a lack of understanding of the court process by lay judges, and that lay judges would struggle in the process overall due to the pressure of decision-making and working alongside

<sup>1036</sup> M J Wilson, 'Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time' (2009-10) 33 *Fordham International Law Journal* 487, 487.

<sup>1037</sup> Kyodo News, 'First lay judges hand killer 15-year term' (*The Japan Times*, 7 August 2009), available at <<http://www.japantimes.co.jp/news/2009/08/07/national/first-lay-judges-hand-killer-15-year-term>> accessed 10 October 2016.

<sup>1038</sup> Kyodo News, 'First lay judges hand killer 15-year term' (*The Japan Times*, 7 August 2009), available at <<http://www.japantimes.co.jp/news/2009/08/07/national/first-lay-judges-hand-killer-15-year-term>> accessed 10 October 2016.

<sup>1039</sup> S Miyazawa, 'Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in International Perspectives' [2014] *International Journal of Law, Crime & Justice* 71, 77.



professional judges. On a regional level, a one year review on the use of *saiban-in* in the Hyogo prefecture in West Japan saw that of the forty trials using *saiban-in* that year, all forty-three defendants were found guilty,<sup>1040</sup> concurrent with the district courts over the country, which collectively handed down 530 guilty verdicts and no acquittals.<sup>1041</sup> The Supreme Court also noted that the conviction rate had changed very little, with very few acquittals over the three year period, including only eight in the first year.<sup>1042</sup> Sentencing requests were met around 80% of the time, which corresponded closely with the national average, with sexual offences being punished more severely than other types of offences.<sup>1043</sup> This sentencing trend was also reflected nationally, along with greater variation on imprisonment penalties compared to those trials conducted with professional judges alone.<sup>1044</sup>

Despite the initial concerns about trials taking longer to conclude, the Supreme Court's three year review found that many trials were concluded in three to four days – considerably shorter than those trials previously conducted without lay judges.<sup>1045</sup> However, this timeframe was met with criticism from Japan's Supreme Court Chief Justice, Hisanobu Takesaki, who recommended that the courts should work harder to reduce the time taken to conclude trials with *saiban-in*.<sup>1046</sup> Despite projections of around three thousand trials using *saiban-in*, the first year saw them in just under two thousand trials, with just over eighteen per cent of those trials reaching completion before the end of the year.<sup>1047</sup>

In terms of sentencing, the surveys found that *saiban-in* trials delivered harsher sentences to defendants in rape, robbery and murder cases,<sup>1048</sup> and delivered more suspended sentences,<sup>1049</sup> and have even sentenced people to death.<sup>1050</sup> This is arguably reflective of the popular perception that Japan is a safe and well-ordered country, and

<sup>1040</sup> S Miyazawa, 'Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in International Perspectives' [2014] *International Journal of Law, Crime & Justice* 71, 77.

<sup>1041</sup> M Ibusuki, 'Quo vadis: First year inspection to Japanese mixed jury trial' (2010) 12 *Asian-Pacific Law & Policy Journal* 24, 36.

<sup>1042</sup> D H Foote, 'Citizen Participation: Appraising the Saiban-in System' *Michigan State International Law Review* (2014) 22(3) 755, 762.

<sup>1043</sup> S Miyazawa, 'Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in International Perspectives' [2014] *International Journal of Law, Crime & Justice* 71, 77.

<sup>1044</sup> M Ibusuki, 'Quo vadis: First year inspection to Japanese mixed jury trial' (2010) 12 *Asian-Pacific Law & Policy Journal* 24, 39.

<sup>1045</sup> Kyodo, 'Lay Judge System Reviewed After Auspicious Start' (*The Japan Times*, 30 May 2012) available at <<http://www.japantimes.co.jp/text/nn20120530f2.html>> accessed 30 January 2017.

<sup>1046</sup> This is in spite of the fact that *saiban-in* trials take a considerably shorter amount of time to conclude compared to traditional trials; M Ibusuki, 'Quo vadis: First year inspection to Japanese mixed jury trial' (2010) 12 *Asian-Pacific Law & Policy Journal* 24, 37-8.

<sup>1047</sup> M Ibusuki, 'Quo vadis: First year inspection to Japanese mixed jury trial' (2010) 12 *Asian-Pacific Law & Policy Journal* 24, 39.

<sup>1048</sup> The Japan Times, 'Reflecting citizens' views on justice' (*The Japan Times*, 29 July 2014), available at <[https://www.japantimes.co.jp/opinion/2014/07/29/editorials/reflecting-citizens-views-justice/#.XGAKZ\\_n7SUK](https://www.japantimes.co.jp/opinion/2014/07/29/editorials/reflecting-citizens-views-justice/#.XGAKZ_n7SUK)> accessed 10 February 2019.

<sup>1049</sup> D H Foote, 'Citizen Participation: Appraising the Saiban-in System' (2014) 22(3) *Michigan State International Law Review* 755, 766.

<sup>1050</sup> M J Wilson, 'Japan's Lay Judge System: Expectations, Accomplishments, Shortfalls, and Possible Expansion' 28 May 2014, available at SSRN: <<https://ssrn.com/abstract=2443208>> or <<http://dx.doi.org/10.2139/ssrn.2443208>> 6.

the most violent crimes are so antithetical to the views and values of the lay judges that they are keen to ensure that the safety and harmony of society is preserved. Arguably the high number of suspended sentences reflects the emphasis that Japanese society still places on groups and family. Therefore where less serious crimes are concerned, lay judges are keen to ensure that rehabilitation of the offender is made possible. This highlights another aspect of the social values that permeate Japanese legal culture; in a society which prioritises responsibilities of the individual to the group, handing out more suspended sentences shows a desire to keep groups together in the face of adversity, placing responsibility on the offender to work to reintegrate, and on others around them to accept and support them.<sup>1051</sup>

Formal reports also show interesting figures regarding the willingness of the public to serve on *saiban-in*. Ibusuki's one year report on use of *saiban-in* found that over 50% of people selected for *saiban-in* had declination approved, and of the remaining candidates, 82% responded to their summons by way of appearance in court.<sup>1052</sup> The Supreme Court conducted its own three year review of the system, in which one of its central findings reported an increased trend of people seeking to be excused from service, and an increase in people summoned who did not turn up to court.<sup>1053</sup> More recently, in 2018 over 65% of people selected as candidates for lay judges declined to accept the duty.<sup>1054</sup> Although the public were initially keener to serve at the outset, this has declined in the following years. *Saiban-in* are only present at trials for the most serious offences,<sup>1055</sup> and it is contended that this deliberate decision by the Diet could have been made with the intention of maintaining the conviction rate, and retaining the role of the courts for dealing with difficult issues so that the Japanese public do not have to.

#### 6.4.2 Experiences of Lay Judges

The past decade of *saiban-in seido* has brought thousands of lay judges to the courtroom. Although some insight to their experiences has been gleaned from surveys, contextualisation in legal culture and accounting for socio-cultural norms as part of the experience is vital to understanding the complete picture. This section will discuss a number of issues as part of the experience of lay judges in the courtroom – interactions

<sup>1051</sup> P Murphy, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016) 110, 121, 141, 170-171, 174.

<sup>1052</sup> M Ibusuki, 'Quo vadis: First year inspection to Japanese mixed jury trial' (2010) 12 *Asian-Pacific Law & Policy Journal* 24, 35-6.

<sup>1053</sup> D H Foote, 'Citizen Participation: Appraising the *Saiban-in* System' *Michigan State International Law Review* (2014) 22(3) 755, 762.

<sup>1054</sup> The Japan Times, 'Reduce the burden on lay judges' (*The Japan Times*, 24 November 2018), available at <<https://www.japantimes.co.jp/opinion/2018/11/24/editorials/reduce-burden-lay-judges/#.XGAkNPn7SUK>> accessed 10 February 2019.

<sup>1055</sup> Within the first five years, the most common cases heard by lay judges are robbery resulting in bodily injury, and murder: M J Wilson, 'Japan's Lay Judge System: Expectations, Accomplishments, Shortfalls, and Possible Expansion' 28 May 2014, available at SSRN: <<https://ssrn.com/abstract=2443208>> or <<http://dx.doi.org/10.2139/ssrn.2443208>> 5-6.

with legal professionals, conviction, sentencing, including a range of options from restorative justice to the death penalty, and life after *saiban-in seido*. At the outset, it is interesting to note that, according to a survey conducted by the court system in 2016, only 11% of *saiban-in* felt positive about being selected to serve, but that after completing their duties, almost 98% of *saiban-in* felt that they had had a good or outstanding experience.<sup>1056</sup> These figures indicate that the experiences of the criminal justice courtroom were not as difficult as many *saiban-in* and scholarly observers predicted. Given that *saiban-in* felt good about their experiences, this implies that socio-cultural norms were still observed and complied with in the courtroom, rather than the cold, adversarial atmosphere created by adherence to the rules and processes of formal law.

#### 6.4.2.1 Interactions with legal professionals

Early criticisms of *saiban-in* trials repeatedly stated an anticipation of lay judge's deference to professional judges (and the judge's dominance in deliberations<sup>1057</sup>), due to the hierarchical forms of social ordering that oblige respect to be afforded to those in specialist occupations and positions of authority. In contrast to this concern, legal professionals in the courtroom appear to have worked hard to enable lay judges to participate in the deliberations in an active and meaningful way.<sup>1058</sup> Over the past decade, judges have increasingly expressed an interest in being assigned *saiban-in* trials for the 'opportunity to exert their influence and develop their skills'.<sup>1059</sup> Lawyers have also made the effort to speaking steadily and clearly, addressing the whole panel of judges when they speak, and responding patiently and respectfully to questioning by *saiban-in*.<sup>1060</sup> Over half of *saiban-in* responding to surveys conducted by the court during 2016 said that the trials were easy to understand, with both prosecutors and defence lawyers considered comprehensible in their presentations in court.<sup>1061</sup>

The omnipresence of socio-cultural norms in these interactions yields some interesting observations. The efforts exerted by professional judges are indicative of *nemawashi*, a social practice of 'laying the groundwork' in order to reach discussions in an amicable and harmonious way.<sup>1062</sup> This preparation in *nemawashi* forms the foundation of many

<sup>1056</sup> M Fujita, *Japanese Society and Lay Participation in Criminal Justice: Social Attitudes, Trust, and Mass Media* (Springer 2018), 81.

<sup>1057</sup> K Anderson and L Ambler, 'The Slow Birth of Japan's Quasi-Jury System (Saiban-in Seido): Interim Report on the Road to Commencement' (2006) 21 *Journal of Japanese Law* 55, 67-68.

<sup>1058</sup> D H Foote, 'Citizen Participation: Appraising the Saiban-in System' (2014) 22(3) *Michigan State International Law Review* 755, 770.

<sup>1059</sup> D H Foote, 'Citizen Participation: Appraising the Saiban-in System' (2014) 22(3) *Michigan State International Law Review* 755, 772.

<sup>1060</sup> P Murphy, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016) 227.

<sup>1061</sup> M Fujita, *Japanese Society and Lay Participation in Criminal Justice: Social Attitudes, Trust, and Mass Media* (Springer 2018), 79.

<sup>1062</sup> R J Davies and O Ikeno (eds.), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002), 159-161.

business meetings in Japan – as a result, many decisions are made before the meeting begins, and speaking up causes discomfort in the group.<sup>1063</sup> The Western-facing courtroom structure and process in Japan makes *nemawashi* difficult, however there are aspects to the way in which justice is done that enable the process to run more smoothly. The most obvious example is the submission of confessions by the prosecutors – the decision of a guilty verdict is already decided, and facilitates a less conflictive discussion in courts around sentencing. Furthermore, the judiciary's practice of *nemawashi* enables *saiban-in* to speak more comfortably in an otherwise intimidating environment.

Given their specialist work and their close cooperation, it is argued that judges and lawyers (especially prosecutors) form an in-group, or *uchi*. This is unlikely to be as close-knit as the bonds of the nuclear family (a much more typical form of *uchi*), but it can be said with certainty that the public, defendants, and witnesses are definitely *soto* to the professional of the criminal justice courtroom. With the introduction of *saiban-in* to the courtroom, two possible explanations are offered for the group-based interactions. The first is that *saiban-in* have been welcomed to the in-group of the legal professionals, and are treated as such during courtroom processes. However, the more convincing explanation is that *saiban-in*, as far as legal professionals are concerned, are *soto*, given their infrequency in the courtroom – both as individuals and as a mechanism. The politeness and respect afforded to *saiban-in* by legal professionals mentioned above is arguably the presentational *tatemae* – the patient and accommodating behaviour shown to outsiders. Given the high-context culture of Japanese communication, lay judges would know that they are being treated with *tatemae*, and this is further substantiated given the serious and professional role each person in the courtroom undertakes. Of course, this has restrictions on *honne*, authentic communication, which is important for deliberations. This interplay is complex and will be discussed in more detail in the next section.

Finally, the deliberations of the panel of judges comprise a significant proportion of the interactions between *saiban-in* and professional judges. Despite the concerns that *saiban-in* would automatically defer to the professional judge's opinions, surveys indicated that *saiban-in* felt that they were able to actively take part in discussions.<sup>1064</sup> The requirement of secrecy of deliberations is intended to protect both professional and lay judges so that they are able to speak freely. However, the socio-cultural normative values of hierarchy and unwavering respect towards seniors (both in terms of age and

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<sup>1063</sup> R J Davies and O Ikeno (eds.), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002), 159-161

<sup>1064</sup> M Fujita, *Japanese Society and Lay Participation in Criminal Justice: Social Attitudes, Trust, and Mass Media* (Springer 2018), 80-81.

job experience), referred to as *senpai-kōhai*, permeate all areas of Japanese social and professional life.<sup>1065</sup> It seems unlikely that this social conditioning would cease to influence the thoughts and behaviour of *saiban-in*, especially when working alongside a professional judge. Indeed, Nakane posits that Japanese people ‘can neither be seated nor talk without considering the status and seniority of the other people around them.’<sup>1066</sup> The almost identical *senpai-kōhai* system that operates in Japanese schools and companies sees newcomers automatically delegated to the lowest rank – *kōhai* (junior), and the role of the *senpai* is to mentor them.<sup>1067</sup> Given the embedded and ubiquitous nature of this value, the establishment of a *senpai-kōhai* relationship between *saiban-in* and professional judges is almost certain and demonstrates a disconnect between assumptions of equality between the two roles made by formal legal rules – rather, it is contended that the interactions between *saiban-in* and professional judges are managed according to socio-cultural norms.

#### 6.4.2.2 Convicting Defendants

This thesis has consistently highlighted that Japan’s near-perfect conviction rate has attracted divisive commentary – it is either indicative of an effective and successful criminal justice system, or inhibits fair trials and due process. The former view represents the general consensus of the Japanese public, and is socially accepted as the standard way to conduct criminal trials. During the development of *saiban-in seido*, comparative scholarship proposed that the involvement of lay people in the courtroom had potential to lower the conviction rate, and ‘reduce the likelihood of wrongful convictions’ where confessions had been obtained prior to trial.<sup>1068</sup> During the first year of use, 836 people served as *saiban-in*, and all of the defendants in the 138 *saiban-in* trials were convicted.<sup>1069</sup> After three years, the acquittal rate of *saiban-in* trials was 0.5%,<sup>1070</sup> and has stayed consistently at that rate in subsequent years.<sup>1071</sup> The only exception is in drug cases, where the acquittal rate from *saiban-in seido* is higher than the (miniscule) average, and has been met with criticism that has requested that *saiban-in* be removed

<sup>1065</sup> R J Davies and O Ikeno (eds.), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002), 187-189.

<sup>1066</sup> C Nakane, *Tateshakai no ningenkankei* [The ranking of human relationships in society] (Kodansha 1967) 82-83.

<sup>1067</sup> L Carrigan, ‘Experiencing Japan’s Senpai-Kōhai System at Work’ (*Gaijinpot*, 10 May 2017), available at <<https://blog.gaijinpot.com/japans-senpai-kouhai-system/>> accessed 8 October 2019.

<sup>1068</sup> H Fukurai and K Kurosawa, ‘Impact of the Popular Legal Participation on Forced Confessions and Wrongful Convictions in Japan’s Bureaucratic Courtroom: A Cross National Analysis in the U.S and Japan’ (2010) 7(7) *US-China Law Review* 1, 16.

<sup>1069</sup> Nishi-Nippon Shinbun, ‘Kei 836-nin ga saiban-in keiken. Subete yūzai hanketsu, 28-nin kōso. Nennai no shinri shūryō.’ [A total of 836 people experience being a saiban-in. All defendants found guilty, 28 appeals. End of hearings for this year], (*Nishi-Nippon Shinbun*, 19 December 2009), available at <[http://www.nishinippon.co.jp/nnp/feature/2009/saibanin/kiji/kyushu/20091219/20091219\\_0001.shtml](http://www.nishinippon.co.jp/nnp/feature/2009/saibanin/kiji/kyushu/20091219/20091219_0001.shtml)>.

<sup>1070</sup> D H Foote, ‘Citizen Participation: Appraising the Saiban-in System’ (2014) 22(3) *Michigan State International Law Review* 755, 764.

<sup>1071</sup> S Steele, ‘Proposal to Reform the Japanese Saiban’in Seido (Lay Judge System) to Exclude Drug-related Cases: Context and Complexities from the Chiba District Court’ (2015) 16(1) *Australian Journal of Asian Law* 1, 4.

from those cases.<sup>1072</sup> Although the introduction of *saiban-in* has had little effect on conviction rates, the number of confessions obtained before trial has reduced since 2009 – likely because offenders hope to appeal to the *ninjo* of *saiban-in*.<sup>1073</sup>

#### 6.4.2.3 *The spectrum of sentencing*

Due to the common practice of confessions being obtained prior to trial, the role of *saiban-in* and professional judges is to determine the appropriate sentence based on the facts of the case.<sup>1074</sup> Prior to the implementation of *saiban-in seido*, the judiciary often used suspended sentences, a practice which resulted in a low prison population. *Saiban-in* have continued that trend, demonstrating a desire to preserve *shudanseikatsu* (life in a group)<sup>1075</sup> by not removing offenders from society by incarcerating them, and give them a chance at starting over. In a similar vein, *saiban-in* have expressed enthusiasm for greater use of the probation system, believing in its restorative potential and its ability to better reintegrate offenders back in society as useful citizens.<sup>1076</sup> Arguably, *saiban-in* are demonstrating their capacity for *ninjo* (human kindness) – making use of options for restorative justice and rehabilitation means that the criminal justice process can more closely align with socio-cultural norms, and put an end to social disruption by reintegrating the offender back in to society more quickly.<sup>1077</sup> This aligns with the ‘benevolent paternalism’ of the Japanese criminal justice system, which seeks to reform the offender, return them to society and maintain social order.<sup>1078</sup> However, this practice is not all pleasant; there is a degree of intrusiveness in requiring friends and family to monitor the offender which impacts on their autonomy.<sup>1079</sup> There is also extensive use of shame to comply individuals to conform,<sup>1080</sup> although this and the practice of saving face are commonplace in Japanese society to ensure compliance of individual group members.<sup>1081</sup>

<sup>1072</sup> A Plogstedt, ‘Citizen Judges in Japan: A Report Card for the First Three Years’ (2013) 23 *International & Comparative Law Review* 371, 423.

<sup>1073</sup> H Fukurai and K Kurosawa, ‘Impact of the Popular Legal Participation on Forced Confessions and Wrongful Convictions in Japan’s Bureaucratic Courtroom: A Cross National Analysis in the U.S and Japan’ (2010) 7(7) *US-China Law Review* 1, 18-19.

<sup>1074</sup> S Steele, ‘Elderly Offenders in Japan and the *saiban-in seido* (Lay Judge System): Reflections Through a Visit to the Tokyo District Court’ (2015) 35(2) *Japanese Studies* 223, 235-236.

<sup>1075</sup> L Peak, ‘Learning to Become Part of the Group: The Japanese Child’s Transition to Preschool Life’ in H Shimizu and R A Levine (eds.), *Japanese Frames of Mind: Cultural Perspectives on Human Development* (Cambridge University Press 2001) 144.

<sup>1076</sup> D H Foote, ‘Citizen Participation: Appraising the *Saiban-in* System’ (2014) 22(3) *Michigan State International Law Review* 755, 774.

<sup>1077</sup> K Shimpo, ‘Past participants in Japan’s lay judge system reveal its challenges’ (*The Japan Times*, 2 August 2019), available at <<https://www.japantimes.co.jp/news/2019/08/02/national/crime-legal/past-participants-japans-lay-judge-system-reveal-challenges/#.XbnLEPX7SUK>> accessed 10 October 2019.

<sup>1078</sup> D H Foote, ‘The Benevolent Paternalism of Japanese Criminal Justice’ (1992) 80(2) *California Law Review* 317, 321.

<sup>1079</sup> D H Foote, ‘The Benevolent Paternalism of Japanese Criminal Justice’ (1992) 80(2) *California Law Review* 317, 321.

<sup>1080</sup> See J Braithwaite, *Crime, shame and reintegration* (Cambridge University Press 1989).

<sup>1081</sup> A Zander, ‘The Value of Belonging to a Group in Japan’ (1983) 14(1) *Small Group Behaviour* 3, 12-13.

As *saiban-in* are only permitted to sit on the most serious of cases,<sup>1082</sup> they are often faced with more severe sentencing options including lengthy jail terms and the death penalty.<sup>1083</sup> In particular, *saiban-in* show a tendency to issue more severe punishments to sex offenders than other types of offenders,<sup>1084</sup> and more leniency towards elderly offenders,<sup>1085</sup> showing their respect for *sempai-kōhai* in the latter situation, even when the senior in question is a defendant in the criminal court. When *saiban-in* do hand down a long jail term or a death sentence, the secrecy requirement placed upon lay judges<sup>1086</sup> further exacerbates the emotional burden of sentencing. The prospect of sentencing an offender to death has understandably caused distress to many *saiban-in*, and has led to recommendations to change the number of votes required to issue a death sentence from a majority vote to a unanimous one,<sup>1087</sup> or for removing *saiban-in* from making the decision altogether. This is particularly due to the long-term emotional and psychological impacts that some ex-*saiban-in* have suffered from following difficult cases and deciding on capital punishment for an offender.

#### 6.4.2.4 Life after *saiban-in seido*

In the first few years of *saiban-in seido*, lay judges were given questionnaires upon completion of their service, and just over five thousand responses were collected, with the Supreme Court reporting that over the first three years, ninety-six per cent of respondents rated their experience as positive or extremely positive.<sup>1088</sup> One respondent even remarked that his service on *saiban-in* had ‘sparked his new engagement with society’,<sup>1089</sup> and another set up a non-profit organisation to support interactions between

<sup>1082</sup> A Goto, ‘Citizen participation in criminal trials in Japan’ (2013) *International Journal of Law, Crime and Justice* 1, 2.

<sup>1083</sup> C P A Jones, ‘Big winners in ‘jury’ system may be judges, bureaucrats’ (*The Japan Times*, 10 March 2009) available at <<http://www.japantimes.co.jp/community/2009/03/10/issues/big-winners-in-jury-system-may-be-judges-bureaucrats/#.WI9BDFOLSUk>> accessed 30/01/2016.

<sup>1084</sup> Kyodo and Jiji, ‘Japan Supreme Court chief says lay judge system well received but tweaks needed to spur interest’ (*The Japan Times*, 16 May 2019), available at <<https://www.japantimes.co.jp/news/2019/05/16/national/crime-legal/japanese-supreme-court-chief-justice-says-lay-judge-system-well-received-improvements-needed-spur-public-interest/#.XbnLFPX7SUk>> accessed 10 October 2019.

<sup>1085</sup> Although it may seem surprising that there are many elderly offenders in Japan, this is largely due to an ageing population in which elderly people do not wish to be a burden on their families, often appear in court having repeatedly stolen food from convenience stores – P Murphy, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016) 35-62. On sentencing of elderly offenders - S Steele, ‘Elderly Offenders in Japan and the *saiban-in seido* (Lay Judge System): Reflections Through a Visit to the Tokyo District Court’ (2015) 35(2) *Japanese Studies* 223, 229-230.

<sup>1086</sup> M Levin and E Tice, ‘Japan’s New Citizen Judges: How Secrecy Imperils Judicial Reform’ (2009) *Asia Pacific Journal* 1.

<sup>1087</sup> K Hirano, ‘Lay Judge Death Sentences Must Be Unanimous’ (*The Japan Times*, 25 March 2012), available at <<http://www.japantimes.co.jp/news/2012/03/25/national/lay-judgedeath-sentences-must-be-unanimous-jfba/#.UVYgu6KG2So>> accessed 10 October 2019. US groups have frequently criticised the use of the death penalty: Kyodo, ‘Lay Judge System Reviewed After Auspicious Start’ (*The Japan Times*, 30 May 2012) available at <<http://www.japantimes.co.jp/text/nn20120530f2.html>> accessed 30 January 2017.

<sup>1088</sup> M Ibusuki, ‘Quo vadis: First year inspection to Japanese mixed jury trial’ (2010) 12 *Asian-Pacific Law & Policy Journal* 24, 44; A Plogstedt, ‘Citizen Judges in Japan: A Report Card for the First Three Years’ (2013) 23 *International & Comparative Law Review* 371, 412.

<sup>1089</sup> S Kamiya, ‘Lay Judge Duty Sparks New Passion’ (*The Japan Times*, 21 June 2012) available at <<http://www.japantimes.co.jp/text/nn20120621f1.html>> accessed 30 January 2017.

families in communities to offer support to those in need.<sup>1090</sup> These early positive responses were encouraging for the JSRC, although it is argued that these responses need to be treated cautiously as at that time the lay judges called to serve represented a small and willing part of Japanese society.

However, as the trials involving *saiban-in seido* are the most serious, lay judges are often subjected to distressing accounts and images of violence and exploitation<sup>1091</sup> and this has generated concerns about the wellbeing of those who serve.<sup>1092</sup> Ex-*saiban-in* have stated their difficulties in understanding their emotions in the trials – ranging from ‘empathy to outrage’<sup>1093</sup> – and having little access to support to discuss their experiences afterward.<sup>1094</sup> A third of ex-*saiban-in* have reported their experiences as stressful,<sup>1095</sup> and longer trials prolong the period of emotional and psychological struggle for those affected.<sup>1096</sup> Since its introduction in 2009, over a million people have been selected to serve, with 91,000 serving in March 2019 alone.<sup>1097</sup> Despite not being able to reveal details of the cases they have presided over, ex-*saiban-in* have been able to share general experiences, which are in contrast to the overall positive results of the Supreme Court surveys, and their more challenging experiences have undoubtedly influenced public perceptions of the system, shown in the decline in interest in participating, and the few people who respond to summons. Although self-sacrifice is part of Japanese group consciousness<sup>1098</sup> and important to fulfilling one’s social obligations under *giri* and *on*,<sup>1099</sup>

<sup>1090</sup> K Shimpō, ‘Past participants in Japan’s lay judge system reveal its challenges’ (*The Japan Times*, 2 August 2019), available at <<https://www.japantimes.co.jp/news/2019/08/02/national/crime-legal/past-participants-japans-lay-judge-system-reveal-challenges/#.XbnLEPX7SUK>> accessed 10 October 2019.

<sup>1091</sup> Kyodo, ‘Third of Japan’s lay judges say experience was stressful, but system viewed positively overall’ (*The Japan Times*, 21 May 2019), available at <<https://www.japantimes.co.jp/news/2019/05/21/national/crime-legal/third-japans-lay-judges-say-experience-stressful-system-viewed-positively-overall/#.XbnLFvX7SUK>> accessed 10 October 2019.

<sup>1092</sup> The Japan Times, ‘Stressful hearings for lay judges’ (*The Japan Times*, 30 April 2013), available at <<https://www.japantimes.co.jp/opinion/2013/04/30/editorials/stressful-hearings-for-lay-judges/#.XGANBvn7SUK>> accessed 10 February 2019; K Shimpō, ‘Past participants in Japan’s lay judge system reveal its challenges’ (*The Japan Times*, 2 August 2019), available at <<https://www.japantimes.co.jp/news/2019/08/02/national/crime-legal/past-participants-japans-lay-judge-system-reveal-challenges/#.XbnLEPX7SUK>> accessed 10 October 2019.

<sup>1093</sup> K Shimpō, ‘Past participants in Japan’s lay judge system reveal its challenges’ (*The Japan Times*, 2 August 2019), available at <<https://www.japantimes.co.jp/news/2019/08/02/national/crime-legal/past-participants-japans-lay-judge-system-reveal-challenges/#.XbnLEPX7SUK>> accessed 10 October 2019.

<sup>1094</sup> K Shimpō, ‘Past participants in Japan’s lay judge system reveal its challenges’ (*The Japan Times*, 2 August 2019), available at <<https://www.japantimes.co.jp/news/2019/08/02/national/crime-legal/past-participants-japans-lay-judge-system-reveal-challenges/#.XbnLEPX7SUK>> accessed 10 October 2019.

<sup>1095</sup> Kyodo, ‘Third of Japan’s lay judges say experience was stressful, but system viewed positively overall’ (*The Japan Times*, 21 May 2019), available at <<https://www.japantimes.co.jp/news/2019/05/21/national/crime-legal/third-japans-lay-judges-say-experience-stressful-system-viewed-positively-overall/#.XbnLFvX7SUK>> accessed 10 October 2019.

<sup>1096</sup> The Japan Times, ‘Reduce the burden on lay judges’ (*The Japan Times*, 24 November 2018) available at <<https://www.japantimes.co.jp/opinion/2018/11/24/editorials/reduce-burden-lay-judges/#.XGAkNPn7SUK>> accessed 10 February 2019.

<sup>1097</sup> Kyodo and Jiji, ‘Japan Supreme Court chief says lay judge system well received but tweaks needed to spur interest’ (*The Japan Times*, 16 May 2019), available at <<https://www.japantimes.co.jp/news/2019/05/16/national/crime-legal/japanese-supreme-court-chief-justice-says-lay-judge-system-well-received-improvements-needed-spur-public-interest/#.XbnLFPX7SUK>> accessed 10 October 2019.

<sup>1098</sup> R J Davies and O Ikeno (eds.), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002), 195-197.

<sup>1099</sup> See K Seki, ‘Circle of On, Giri and Ninjo: Sociologist’s Point of View’ (1971) 19(2) 北海道大學文學部紀要 - *The Annual Reports on Cultural Science* 99.



it is argued that the burden placed on lay judges is causing Japanese to avoid fulfilling this particular social responsibility in order to have a peaceful and harmonious life.

#### 6.4.3 *Tatemae and honne in the courtroom*

The high-context communication culture in Japan reveals a complex network of socially appropriate and acceptable communication that Japanese learn to navigate whilst growing up. When considering *tatemae and honne*, the post-trial conferences held by the press are of particular interest, in which 75% of *saiban-in* members were reported to have spoken their thoughts in deliberations, which was interpreted as a display of confidence.<sup>1100</sup> This is important to investigate when considering the fourth chapter of this thesis and its later focus on the universal social values of *tatemae* and *honne*, which are still very much active in contemporary Japanese society. This report of *saiban-in* members speaking their thoughts in such a public forum raises complex questions of whether this legal space is one in which *tatemae* and *honne* cannot or do not operate, or function differently due to the lack of a social network.<sup>1101</sup> As highlighted in the previous section, it is likely that legal professionals, including the judiciary, treat *saiban-in* as *soto*, and thus always interact with them with *tatemae*. However, the courtroom and deliberation rooms are spaces in which *saiban-in* have never had to interact with others before, and it is contended that the added complication of these formal legal spaces cause people to use their *honne* and *tatemae* in more nuanced ways than in other situations.<sup>1102</sup>

The questions raised in examining this situation include: for *saiban-in*, is the proper thing to do to avoid losing face, in this situation, to expose one's *honne* in a public forum, but to do so in a way that fulfils the purpose at hand? This would certainly help to explain the feelings of *saiban-in* of feeling confident enough to speak and deliberate with the professional judge, and with other *saiban-in* who they do not know well. The importance of reaching a fair outcome in deliberations could mean that there is measured way in which *honne* is revealed, compared to the black and white approach of using *tatemae* and *honne* in social situations. It could also be the case that the courtroom is simply a spaces in which *honne* can and should be used, because it is one in which truth is required, and many Japanese take this value very seriously. In this latter conception,

<sup>1100</sup> S Miyazawa, 'Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in International Perspectives' [2014] *International Journal of Law, Crime & Justice* 71, 77.

<sup>1101</sup> E Yamamura, 'What discourages participation in the lay judge system (Saiban'in seido) of Japan?: an interaction effect between the secrecy requirement and social network' (2009) *Munich Personal RePEc Archive*, available at <<https://mpra.ub.uni-muenchen.de/15920/>>.

<sup>1102</sup> It is noted here that the rules of *tatemae* and *honne* do not apply to defendants in the same way – professional judges and lawyers ask the defendant direct and personal questions in a manner that would not be acceptable in social situations, and most defendants respond honestly and authentically – see P Murphy, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016) 9 -10.

*honne* could still be used in a measured way to achieve the required outcome, but in a way that does not compromise the lay judge on a personal level.

In this case is contended argued that a lay judge's willingness to move beyond *tatemae* in their role in the courtroom, and using *honne* even though it is in a public forum and certainly not within their *uchi*, does not involve the usual high risk of losing face. It could even be indicative of their suitability to be a lay judge, if what is wanted is their true feelings and opinion. It is difficult to say if this is carried out without approval from the professional judge, or if there is pressure from the other lay judges, or the whole group, to perform in a certain way that brings *tatemae* back in to play. Due to the secrecy involved there is also a possibility that some *saiban-in* can use *honne* more freely, and others may be pressured by a more conservative judge in to only using *tatemae* and thus being more restricted in their opposition to the judge. This is not to say that lay judges use *honne* all the time in the courtroom; they will inevitably use *tatemae* to interact politely, however they will not *exclusively* use *tatemae* – and that is where the distinction between this situation and the majority of other professional situations lies.

Although the foundational concept of lay participation is a Western one, there is a distinct and ancient concept of law and justice in Japan which is taken very seriously by the populace – hence the reluctance expressed by many to be involved and leave the work to those professionally trained to undertake it. As such, it may be that *honne* in the courtroom is, or is becoming, a normative social value. There is evidence for this in the honesty of accounts of defendants and witnesses in the courtroom<sup>1103</sup> and therefore there is certainly an argument for an existing culture of *honne* in the courtroom. It is suggested that Japanese legal culture, in comprising legal action and social values, could also now include this idea of *honne* in the courtroom from lay judges, demonstrating the transitional and fluid qualities of legal culture. Although there are limitations to this due to the silencing of lay judges on deliberation, nonetheless the questioning of defendants, witnesses and legal professionals by *saiban-in* ultimately takes place in a public forum, and as such can be viewed by other members of society. This viewing of *honne* in a public setting has considerable influence on Japanese legal culture, and its manifestation results in *tatemae* and *honne* no longer being entirely antithetical to law as has been observed historically. By placing Japanese citizens (who are actors of social and cultural values) in the physical legal space of the courtroom and obligating their interaction with law and legal process, a transition in legal culture is initiated as these elements are forced to interplay. Socio-cultural normative values and

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<sup>1103</sup> P Murphy, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016) 9.

behaviours are modifying as they are practised in new situations. The modification is a response to the difficulty of these values and behaviours suffering a disconnection with formal legal regulation. It is precisely this inseparable interaction, and the result of transition of legal culture in Japan that makes the experience of *saiban-in* so inimitable, and emphasises the value of holistic study in legal culture.

#### 6.4.4 *The Public*

Public awareness of *saiban-in seido* is very high – with 90 per cent of those surveyed by the Supreme Court in February 2019 stating their recognition of the system.<sup>1104</sup> In terms of the impact on the public, trials involving *saiban-in seido* have meant that courtrooms are easier for the public to access and understand. When a trial uses *saiban-in*, prosecutors, defending lawyers and judges ensure that their presentation to the courtroom is clear and understandable, taking measures such as speaking more slowly and making eye contact with the judge's bench.<sup>1105</sup> This is not only easier for the lay judges, but for people in the public gallery, for witnesses, and ultimately victims and defendants as well. The system has been hailed as a positive step for victim's rights in Japan as well; victim participation in trials has increased following the introduction of *saiban-in* and it has been argued that lay judges, as ordinary citizens, are in a better position than the judges to sympathise with victims as they are not 'hardened' to the criminal justice process.

Despite this apparent accommodation for the Japanese public, *saiban-in seido* has had a profound effect on Japanese legal consciousness, and in turn Japanese legal culture. This is not least explicit as it directly involves the public, and in doing so brings them physically and mentally in to a legal space that many have little to no experience with. Japanese are still generally reluctant to bring their grievances to a courtroom due to the shame and costs involved, with many defendants, and particularly families thereof, apologising profusely for the inconvenience caused. *Saiban-in* brings Japanese citizens in to the courtroom in a way that is novel for many (especially as the restrictions and unpopularity of previous mainland trials, and the intense localisation and limitations of the Okinawan juries) and encourages participation in law and legal process with responsibility and (albeit limited) power. In the years since its launch, hundreds of Japanese have served as lay judges and experienced the courtroom process in a way never previously practiced in Japan. Furthermore, the media campaign leading up to the

<sup>1104</sup> Editorials, 'Evaluating the lay judge system, 10 years on' (*The Japan Times*, 5 May 2019), available at <<https://www.japantimes.co.jp/opinion/2019/05/05/editorials/evaluating-lay-judge-system-10-years/#.XbnLCvX7SUK>> accessed 10 October 2019.

<sup>1105</sup> P Murphy, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016) 227.

implementation of *saiban-in* in 2009 was so intense that few Japanese do not know what *saiban-in* is, even if they have not experienced it first-hand.<sup>1106</sup> The legal consciousness of Japan's people is in this way changed forever.

The additional responsibility of *saiban-in* and an encounter with the previously avoidable criminal justice system arguably has influence on the social and cultural values of Japanese discussed in chapters four and five. The public know that lay judges deliberate on cases in which capital punishment is a sentencing option, creating intense feelings of guilt in those who have to deliberate.<sup>1107</sup> The possibility of having to deliver a death sentence to another citizen creates further tension in the public sphere; those who have not served as *saiban-in* know that if they are called, they will likely be faced with unpleasant and distressing issues<sup>1108</sup> – and a lack of available information further drives their aversion to serving.<sup>1109</sup> This also fuels a greater tension in Japanese legal culture – the conflict between wanting to fulfil one's social responsibility, one's *giri* to society, and the reluctance to serve as a lay judge. Although this social responsibility is considered as something many Japanese do unwillingly, it can be balanced out by a utilitarian notion that repaying one's debt to society will be beneficial in the long run.

By contrast, the requirement to serve on *saiban-in* creates tension for several reasons. First is its recency – it has simply not been established long enough to become normative in Japanese law and society. As evidenced throughout this thesis, social and cultural normativity is a strong motivator in Japanese culture, obliging Japanese people to commit to long work schedules,<sup>1110</sup> care for their elders,<sup>1111</sup> and visit war graves.<sup>1112</sup> Second, that it is a formal legal obligation, imposed specifically by law and government, and not by society in general. Whilst the Japanese public generally have no problem

<sup>1106</sup> Editorials, 'Evaluating the lay judge system, 10 years on' (*The Japan Times*, 5 May 2019), available at <<https://www.japantimes.co.jp/opinion/2019/05/05/editorials/evaluating-lay-judge-system-10-years/#.XbnLCvX7SUK>> accessed 10 October 2019.

<sup>1107</sup> The Japan Times, 'Lay judges' moral dilemma,' (*The Japan Times*, 21 March 2014), available at <<https://www.japantimes.co.jp/opinion/2014/03/21/editorials/lay-judges-moral-dilemma/#.XGAnAPn7SUK>> accessed 10 February 2019.

<sup>1108</sup> F A Marikkar, 'The Lay Judge System: Its Role and Effects on Japanese Society' (2009) 国際経営論集 38, 189, 191.

<sup>1109</sup> T Osaki, 'Provide details on hangings or halt them: ex-lay judges' (*The Japan Times*, 17 February 2014), available at <<http://www.japantimes.co.jp/news/2014/02/17/national/crime-legal/provide-details-on-hangings-or-halt-them-ex-lay-judges/#.Wl9APVOLSUK>> accessed 10 October 2019.

<sup>1110</sup> H Okunuki, 'Under Japanese law, breaks are sacred and standby counts as work' (*The Japan Times*, 25 February 2015), available at <[https://www.japantimes.co.jp/community/2015/02/25/issues/japanese-law-breaks-sacred-standby-counts-work/#.XbnpN\\_X7SUK](https://www.japantimes.co.jp/community/2015/02/25/issues/japanese-law-breaks-sacred-standby-counts-work/#.XbnpN_X7SUK)> accessed 10 October 2019.

<sup>1111</sup> Y Nohara, 'A woman's job in Japan: watch kids, care for parents, work late' (*The Japan Times*, 11 May 2015), available at <<https://www.japantimes.co.jp/news/2015/05/11/national/social-issues/womans-job-japan-watch-kids-care-parents-work-late/#.XbnpnPX7SUK>> accessed 10 October 2019.

<sup>1112</sup> This may seem like an odd example, but the visiting of war graves by Prime Ministers Koizumi and Abe was met with a negative international response. Even with the risk of offending neighbouring countries and international criticism, both Koizumi and Abe cited normative tradition for their choice – J McCurry, 'Japan's Shinzo Abe angers neighbours and US by visiting war dead shrine' (*The Guardian*, 26 December 2013), available at <<https://www.theguardian.com/world/2013/dec/26/japan-shinzo-abe-tension-neighbours-shrine>> accessed 10 October 2019.

complying with formal legal<sup>1113</sup> and informal social rules,<sup>1114</sup> this is one that requires them to interact with the law and legal process in an uncomfortable way. Third, as has already been mentioned, there was already a working system in place, and in a society where one's role is important, and emphasis is placed on specialism in one's discipline, imposing a formal responsibility on ordinary people to assist in enforcing the law in a direct way creates difficulties and tension. This is further exacerbated by trials taking much longer than when they were first introduced, placing more pressure on citizens and reducing the number of people who feel able to take time off work to serve as *saiban-in*.<sup>1115</sup>

It is argued that the obligations under *giri* may influence people's decisions to participate in *saiban-in*, although it is difficult to say whether this is done overtly, as the normative value of *giri* forms part of automatic and universal behaviour. Some Japanese, when surveyed, reported feeling as though they had an obligation to serve on *saiban-in*,<sup>1116</sup> which corresponds with the idea of *giri* manifesting as a debt to the nation and the authorities by the people for providing national structure and systems. To participate in such a system in this way is indicative of fulfilling one's *giri* to the nation by actively contributing to the legal system and repaying part of the endless debt to society. The criminal justice system arguably performs a critical role in maintaining the safety and stability of Japanese society and in its current form, requires support from the Japanese public in order to continue this tradition. Despite the reluctance to serve<sup>1117</sup> and the discomfort in feeling obliged to do so, surveys on the general public's feelings of trust in the criminal justice system after the introduction of *saiban-in seido* found a significant increase in positive attitudes.<sup>1118</sup> There is certainly a strain between the lack of willingness to serve as *saiban-in*, the pull of obligation in *giri*, and increased public trust

<sup>1113</sup> Such as the lost and found system, see M D West, 'Losers: Recovering Lost Property in Japan and the United States' (2003) 37(2) *Law and Society Review* 369; J Adelman, 'Honesty is the best policy for lost property' (*The Japan Times*, 4 February 2017) available at <[https://www.japantimes.co.jp/news/2017/02/04/national/media-national/honesty-best-policy-lost-property/#.XX\\_PZzZKiUk](https://www.japantimes.co.jp/news/2017/02/04/national/media-national/honesty-best-policy-lost-property/#.XX_PZzZKiUk)> accessed 14 September 2019.

<sup>1114</sup> Such as the responsibilities owed towards family members or respect shown to senior work colleagues – see Y Zhang, 'The Inheritances and Variation of Confucian Family Culture – Concept of Family Household and Group Consciousness in Japanese Social Culture' (2017) 82 *Advances in Computer Science Research* 960; L Carrigan, 'Experiencing Japan's Senpai-Kōhai System at Work' (*Gajinpot*, 10 May 2017), available at <<https://blog.gajinpot.com/japans-senpai-kouhai-system/>> accessed 8 October 2019.

<sup>1115</sup> The Japan Times, 'Reviewing the lay judge trial system' (*The Japan Times*, 24 January 2019), available at <[https://www.japantimes.co.jp/opinion/2019/01/24/editorials/reviewing-lay-judge-trial-system/#.XGAKn\\_n7SUK](https://www.japantimes.co.jp/opinion/2019/01/24/editorials/reviewing-lay-judge-trial-system/#.XGAKn_n7SUK)> accessed 10 February 2019; The Japan Times, 'Reduce the burden on lay judges' (*The Japan Times*, 24 November 2018), available at <<https://www.japantimes.co.jp/opinion/2018/11/24/editorials/reduce-burden-lay-judges/#.XGAKNPn7SUK>> accessed 10 February 2019.

<sup>1116</sup> Kyodo, 'Lay Judge System Reviewed After Auspicious Start' (*The Japan Times*, 30 May 2012) available at <<http://www.japantimes.co.jp/text/nn20120530f2.html>> accessed 30 January 2017.

<sup>1117</sup> In a 2019 survey, 70 per cent of respondents said they would not want to serve on *saiban-in seido* – Editorials, 'Evaluating the lay judge system, 10 years on' (*The Japan Times*, 5 May 2019), available at <<https://www.japantimes.co.jp/opinion/2019/05/05/editorials/evaluating-lay-judge-system-10-years/#.XbnLCvX7SUK>> accessed 10 October 2019.

<sup>1118</sup> M Fujita, *Japanese Society and Lay Participation in Criminal Justice: Social Attitudes, Trust, and Mass Media* (Springer 2018) 270.

in the system, and future research would be useful in tracking this relationship and its effect on Japanese legal culture.

## 6.5 The Future

Following a huge media-saturated beginning, *saiban-in* has thus far remained a part of the criminal justice system and, over the course of a decade, it appears to have become a more normalised aspect of the administration of justice. After a year, Tokyo district court had regularly conducted *saiban-in* trials but saw none of the huge crowds that had awaited tickets by lottery in August 2009.<sup>1119</sup> This initial detail could indicate that the prospect of lay participation is coming to be accepted by both legal professionals and lay people. Alternatively, the reality may be that in the face of the lay system being imposed by way of top-down control from the government, and with little recourse for opposition, the Japanese public are fulfilling their public duty, albeit unwillingly. When contextualised in legal culture, the reception and performance of *saiban-in seido* comes alive, yielding invaluable insights into a complex situation. Formal reports on the *saiban-in* system provide a gateway to understanding the incidence and engagement with the system, and these have revealed contrasting findings, such as a continuing reluctance to respond to summons, overall positive experiences of lay judges, increased trust in the criminal justice system, and distressing instances that have negatively affected the lives of some *ex-saiban-in*.

When *saiban-in* are not required for a trial, proceedings have changed very little, with the less transparent *chōsho* system being used. The primary feature of this involves the defendant's confession, written by the prosecutor, being submitted to court without being read aloud in court or publicly disclosed.<sup>1120</sup> It is contended therefore that *saiban-in* has had limited effect on the criminal justice system and its associated legal culture outside of those serious cases requiring a panel of *saiban-in* and professional judges. However, there is hope that *saiban-in seido* can positively influence the justice system in other ways. Examples include using *saiban-in* to promote more widespread and effective victim participation, and to empower victims in the criminal process.<sup>1121</sup> There have also been calls to extend *saiban-in* to civil trials to encourage greater public participation in another core aspect of the legal system<sup>1122</sup> and continue to realise the JSRC's goal of

<sup>1119</sup> M Ibusuki, 'Quo vadis: First year inspection to Japanese mixed jury trial' (2010) 12 *Asian-Pacific Law & Policy Journal* 24, 25.

<sup>1120</sup> D H Foote, 'Citizen Participation: Appraising the Saiban-in System' (2014) 22(3) *Michigan State International Law Review* 755, 773.

<sup>1121</sup> See generally S Miyazawa, 'Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in International Perspectives' (2014) 42 *International Journal of Law, Crime & Justice* 71; V P Hans, 'The impact of victim participation in *saiban-in* trials in Japan: Insights from the American jury experience' (2014) 42 *International Journal of Law, Crime and Justice* 103.

<sup>1122</sup> H Fukurai, 'A Step in the Right Direction for Japan's Judicial Reform: Impact of the Justice System Reform Council (JSRC) Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation'

fostering greater public trust in legal authorities as a whole. In addition to the existing scholarship on this area, this thesis contends that such future directions for *saiban-in seido* would also create new and fertile interactions between formal law and process and informal socio-cultural norms for future study.

## 6.6 Concluding Remarks

This chapter has conducted a contextualised case study of *saiban-in seido*, a task never before undertaken in critical comparative legal studies. It contends that the *saiban-in* system was developed carefully to facilitate lay citizen participation, but developed in to a form new and distinguished from its Anglo-European jury origins, largely in order to enable a smoother integration into the criminal justice framework and be more readily accepted by a reluctant public. Thus far, the integration of lay participation in to the Japanese criminal justice system appears, on the surface, to indicate an acceptance of this public involvement with law and legal process. However, there is a complex interplay between the formal legal rules of court process and the way in which they are interpreted and applied in accordance with powerful socio-cultural norms.

This case study has shown that by contextualising *saiban-in seido* in legal culture, more nuanced and detailed explanations and observations for the operation of the system are revealed and understood. It has demonstrated several instances of tension between formal legal rules and informal socio-cultural normative values, but also interesting examples of socio-cultural normative values and practices manifesting in an otherwise strict formal legal setting. Key examples of this include the extensive use of suspended sentences and probation measures encouraged by *saiban-in* to reintegrate offenders back in to society and promote social harmony, and the intricate interplay of *tatema* and *honne* in the courtroom. The critical comparative approach taken to *saiban-in seido* demonstrates the complex and idiosyncratic character of Japanese law and society and presents an innovative way to refresh the field of comparative studies of the Japanese legal system.

## 7 Conclusion

This thesis has investigated the research question, 'in comparative legal studies, why is Japan considered odd, peculiar, and *sui generis*?'. Whether the approaches in comparative legal scholarship sought to describe Japan as the recipient of a multitude of foreign legal influences, or to quash claims of uniqueness and exceptionalism, Japan has always been considered a jurisdiction that is strange, a casualty of competing (and often inaccurate) discourses. To begin the investigation, it was essential to critically reflect upon my own biases instilled from being raised in a Western jurisdiction to avoid unconsciously casting the same perspectives on to this research. A more questioning and open perspective ensured that the research, whilst not being completely free of researcher bias, allows for a more critical and thorough approach to be taken to the study of the Japanese legal system.

This thesis asserted that the traditional tools of comparative law – namely legal taxonomies – generate misreadings of legal systems because 1) there is an assumption that legal systems can be neatly organised, 2) the categories selected for taxonomies are predominantly influenced by an Anglo-European bias, and 3) these categories always include a 'mixed' or 'hybrid' classification, to which a number of diverse systems are allocated with little justification, and the label of 'mixed' or 'hybrid' does not offer any insight in to the nature and workings of any of those systems.

From this discussion, I identified a need for critical comparison of the Japanese legal system that could not be facilitated by the traditional tools of comparative law. This critical comparison began from a historical legal approach to Japan's law and society, following the thinking that law and tradition continually interact throughout history. This is certainly the case for Japan; the historical contexts explored in chapter three show that socio-cultural norms not only pre-date the introduction of formal law in medieval Japan, but that socio-cultural norms were relied upon by the vast majority of the population to ensure social cooperation and community survival under the military leader, the *shogun*, during the *Tokugawa* period. Even with the rapid modernisation and overhaul of the legal system in the 1860s and 1870s, and the occupation by the Allied Powers following defeat in WWII, Japanese socio-cultural norms remained embedded in the everyday lives of the people, governing behaviour to ensure a harmonious society.

Having established the need for critical comparison in chapter two, and the historical significance of socio-cultural norms, chapter four progressed to develop a critical legal pluralist approach. Informed by an open and unlimited conception of law, in which informal norms with ubiquitous effect on everyday social behaviours could be considered



as law, this critical legal pluralist approach enabled the identification of significant social and cultural norms in contemporary Japan. The norms discussed in chapter four included *giri*, a never-ending debt of social obligation to others and the state, *ninjo*, a state of human kindness essential for good relationships, *uchi* and *soto*, the fundamental mechanisms of the group organisation of Japanese life, and *tatemae* and *honne*, the presentational and authentic behaviours that accompanied one's interactions with people in their respective in- and out-groups. These norms are pervasive in everyday life for Japanese, and their influence is powerful, obligating acceptable social behaviour and providing several methods for resolving disputes, reducing the need for many Japanese to engage with formal law and institutions. However, the introduction of *saiban-in seido* in 2009 brought with it an obligation for ordinary citizens to be involved with the criminal justice system, thus sparking a curiosity in to how the complex interplay of socio-cultural norms interacts with formal law and legal institutions.

To understand this complex interplay, the fifth chapter explored and defined the concept to contextualise the elements of the Japanese legal system and the subsequent case study – legal culture. The chapter took a critical approach to culture to complement the discussion on understandings of 'law' in chapter four and examined a range of literature on the contested and slippery concept of legal culture. The use of legal culture for the thesis and the case study was justified on the grounds that it is inherently contextualising – a holistic approach to viewing law and society, and of particular use in the case study of *saiban-in seido* to identify and interpret the multitude of formal legal and socio-cultural influences at play.

The sixth chapter undertook a case study of *saiban-in seido*, drawing on the findings and approaches from previous chapters to produce a detailed interpretation of the system, contextualising it in Japanese legal culture and observing the interactions between its formal legal characteristics and socio-cultural norms. The case study asserted that socio-cultural norms were vitally important in the development and implementation of *saiban-in seido* in order to make the system more acceptable to the Japanese public. It also demonstrated the influence of socio-cultural normative values on several aspects of the Japanese justice system and socio-cultural norms by examining their interaction in several ways – through the experiences of lay judges in their interactions with legal professionals, in their role in sentencing, and life after service. The case study also discussed the complexity of Japanese trying to maintain the social edifice of *tatemae* and *honne* in the courtroom, and the reciprocal effect of these normative behaviours with formal legal process. Public perceptions of *saiban-in* revealed a high level of trust in the criminal justice system due to the reassurance of practising good social values and

maintaining social harmony, but this was contrasted with an increasing reluctance to serve as a lay judge. The future of *saiban-in seido* is filled with suggestions for refinement and review, including the expansion to civil trials and encouraging more effective victim participation in criminal trials. However, further research is required in order to examine the continued interactions between formal law and socio-cultural norms in this area of the Japanese legal system.

This thesis makes a robust and original contribution to the field of critical comparative legal studies by employing this critical comparative approach to the Japanese legal system. By investigating the research question, this thesis found that Japan's injurious treatment by comparative law scholarship largely resulted from a lack of contextualised study that departed from Anglo-Euro centric conceptions of law. The discussions throughout the thesis, especially during the case study, show that Japan is certainly idiosyncratic and *sui generis*, but this is not necessarily synonymous with 'weirdness' or 'peculiarity'. The critical comparative approach facilitated a detailed exploration of *saiban-in seido*, demonstrating the complex interactions of formal law and socio-cultural norms and the resulting tension that lies at the core of the Japanese legal system.

In addition, there are two core contributions presented by this thesis: first, the critical comparative case study of *saiban-in seido*, which is currently the only contextualised case study of the system in comparative law scholarship. This has yielded enriched understandings and explanations for the reciprocal impact of *saiban-in seido* on Japanese society and legal culture that breaks free from previous doctrinally focused research. Second, although Japan is idiosyncratic, there are other systems that comprise formal law and institutions and socio-cultural norms. The critical comparative approach developed in this thesis has potential to be applied to other jurisdictions to produce rich and detailed accounts of their features, trends and the interactions between their formal law and socio-cultural norms. By challenging the foundational aspects of the discipline, such as the use of taxonomies of legal systems, the way in which comparative law is taught can be enriched by pluralistic conceptions of law, enabling more contextualised studies on previously marginalised jurisdictions to be produced in future research endeavours.

## 8 List of References

日本國憲法 Nihon-Koku Kenpō (Constitution of Japan).

Adelstein J, 'Honesty is the best policy for lost property' (*The Japan Times*, 4 February 2017) available at <[https://www.japantimes.co.jp/news/2017/02/04/national/media-national/honesty-best-policy-lost-property/#.XX\\_PZzZKiUk](https://www.japantimes.co.jp/news/2017/02/04/national/media-national/honesty-best-policy-lost-property/#.XX_PZzZKiUk)> accessed 14 September 2019.

Ahmed S, 'Institutional As Usual' (*Feminist Killjoys*, 24 October 2017), available at <<https://feministkilljoys.com/2017/10/24/institutional-as-usual/>> accessed 02 September 2019.

Ahmed S, *What's the Use? On The Uses of Use* (forthcoming Duke University Press 2019).

Ambler L, 'The People Decide: The Effect of the Introduction of the Quasi-Jury System (Saiban-In Seido) on the Death Penalty in Japan' (2007) 6(1) *Northwestern University Journal of International Human Rights* 1.

Amnesty International, 'Amnesty International Report 2009: The State of the World's Human Rights' (Amnesty International 2009).

Amnesty International, 'Japan: Two hanged in deplorable move' (*Amnesty International*, 2 August 2019), available at <<https://www.amnesty.org/en/latest/news/2019/08/japan-two-executed/>> accessed 20 August 2019.

Anderson K and Ambler L, 'The Slow Birth of Japan's Quasi-Jury System (Saiban-in Seido): Interim Report on the Road to Commencement' (2006) 21 *Journal of Japanese Law* 55.

Anderson, , *Japan and the Specter of Imperialism* (Palgrave Macmillan 2009).

Andreasen E, 'Japanese Religions – An Introduction' in I Reader, E Andreasen, and F Stefánsson (eds), *Japanese Religions: Past and Present* (University of Hawaii Press 1993).

Aoki M, 'Lost: Struggling to cope with millions of unclaimed items in Tokyo' (*The Japan Times*, 27 May 2017) available at <[https://www.japantimes.co.jp/life/2017/05/27/lifestyle/lost-struggling-cope-millions-unclaimed-items-tokyo/#.Xr\\_RaWhKjIU](https://www.japantimes.co.jp/life/2017/05/27/lifestyle/lost-struggling-cope-millions-unclaimed-items-tokyo/#.Xr_RaWhKjIU)> accessed 16 May 2020.

Aquilina K, 'Rethinking Maltese Legal Hybridity: A Chimeric Illusion or a Healthy Grafted European Law Mixture?' (2011) 4 *Journal of Civil Legal Studies* 261.

Archer D and Gartner R, 'Homicide in 110 nations: the development of the comparative crime data file' in L I Shelley (ed) *Readings in Comparative Criminology* (Southern Illinois University Press 1981).

Arnot B, 'How traditional justice in Nigeria is changing' (*British Council*, 24 February 2015) available at <<https://www.britishcouncil.org/voices-magazine/how-traditional-justice-nigeria-changing>> accessed 25 June 2019.

Arudou D, 'The costly fallout of tatemae and Japan's culture of deceit' (*The Japan Times*, 1 November 2011) available at <<http://www.japantimes.co.jp/community/2011/11/01/issues/the-costly-fallout-of-tatemae-and-japans-culture-of-deceit/#.VIWlir937Ou>> accessed 18 November 2015.

Author Unknown, 'Giri and the shinigami: obligation and "being Japanese"' (*Study of Anime*, 02 June 2011) <<http://www.studyofanime.com/2011/06/giri-and-shinigami-obligation-and-being.html>> accessed 01 December 2014.

Author Unknown, 'Saying "You" in Japanese' (*Nihonshock*, 3rd July 2012) <<http://nihonshock.com/2012/07/saying-you-in-japanese>> accessed 7 October 2016.

Avbelj M and Komárek J (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012).

Azumi K, 'Japanese Society: A Sociological View' in A Tiedemann (ed), *An Introduction to Japanese Civilisation* (Columbia University Press 1974).

Baier A N, 'Enforceability Strategies for China's Human Rights Action Plan Found in the Intersections Between Asian History, Culture and International Law' (2010-11) 9 *Seattle Journal for Social Justice* 999.

Baishin Hō (Jury Act) Law No. 50 of 1923.

Bayley D H, *Forces of Order: Policing Modern Japan* (University of California Press 1991).

BBC News, 'Japan: Overview' (*BBC News*, 17 February 2015) <<http://www.bbc.co.uk/news/world-asia-pacific-14918801>> accessed 28 May 2015.

BBC News, 'Japan's lower house approves change to self-defence law' (*BBC News*, 16 July 2015) <<http://www.bbc.co.uk/news/world-asia-33546465>> accessed 20 July 2015.

- Beasley W G, *The Meiji Restoration* (Stanford University Press 1972).
- Beasley W G, *The Rise of Modern Japan: Political, Economic, and Social Change Since 1850* (3<sup>rd</sup> edn, Weidenfeld & Nicholson 2003).
- Beckford J A and Demerath N J, *The Sage handbook of the sociology of religion* (Sage 2007).
- Beckmann G M, *The Making of the Meiji Constitution* (University of Kansas Press 1957).
- Befu H, 'Gift-Giving in a Modernising Japan' in T S Lebra and W P Lebra (eds.), *Japanese Culture and Behaviour: Selected Readings* (University of Hawaii 1986).
- Benedict R, *The Chrysanthemum and the Sword: Patterns of Japanese Culture* (Houghton Mifflin Company 1946).
- Benton L, 'Historical Perspectives on Legal Pluralism' (2011) 3(1) *Hague Journal on the Rule of Law* 57.
- Berat L, 'The Role of Conciliation in the Japanese Legal System' (1992) 8(1) *American University International Law Review* 125.
- Berman P S, 'Global Legal Pluralism' (2006-2007) 80 *Southern California Law Review* 1155.
- Berman P S, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press 2012).
- Bertolini E, 'Western and Japanese Constitutional Thought in the Shaping of the Role of the Japanese Emperor in the 1889 and 1946 Constitutions' (2018) 19 *Historica Constitucional* 641.
- Bierbrauer G, 'Towards an Understanding of Legal Culture: Variations in Individualism and Collectivism between Kurds, Lebanese and Germans' (1994) 28(2) *Law & Society Review* 243.
- Black D, *The Behaviour of Law: Special Edition* (Emerald 2010).
- Blankenburg E and Bruinsma F, *Dutch Legal Culture* (2<sup>nd</sup> edn, Kluwer Law and Taxation 1994)
- Blankenburg E, 'Civil Litigation Rates as Indicators for Legal Cultures' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997).
- Bogdan M, *Comparative Law* (Kluwer Tano 1994).

Boissonade G, 'Projet de code de procédure criminelle pour l'Empire du Japon accompagné d'un commentaire' (Tokyo 1882) 611 in A Ortolani, 'Reflections on Citizen Participation in Criminal Justice in Japan: Jury, Saiban-in System and Legal Reform' (2010) 29 *Journal of Japanese Law* 153.

Bolla, Jr. A J, 'The (Im)Probable Future in Japanese Charter Parties: The Language of Law' (1998) 29 *Journal of Maritime Law & Commerce* 107.

Boniface A E, 'African-Style Mediation and Western-Style Divorce and Family Mediation: Reflections for the South African Context' (2012) 15(5) *Potschefstroom Electronic Law Journal* 377.

Botsman D V, 'Politics and Power in the Tokugawa Period' (1992) 3 *East Asian History* 1.

Botsman D V, *Punishment and Power in the Making of Modern Japan* (Princeton University Press 2005).

Bradley G V, 'Law and the Culture of Marriage' (2004) 18 *Notre Dame Journal of Law, Ethics & Public Policy* 189.

Braithwaite J, *Crime, shame and reintegration* (Cambridge University Press 1989).

Brasor P, 'Japan's rigid koseki system keeps it all in the family' (*The Japan Times*, 4 August 2018), available at <<https://www.japantimes.co.jp/news/2018/08/04/national/media-national/japans-rigid-koseki-system-keeps-family/#.XWUcdSNKiUk>> accessed 21 August 2019.

Brown J and Brown J, *China, Japan, Korea: Culture and Customs* (Booksurge LLC 2006).

Burgess C, 'Immigration showing signs of ninjo: more humane system may be on the horizon' (*The Japan Times*, 27 October 2009), available at <[https://www.japantimes.co.jp/community/2009/10/27/issues/immigration-showing-signs-of-ninjo/#.XX\\_GLjZKiUk](https://www.japantimes.co.jp/community/2009/10/27/issues/immigration-showing-signs-of-ninjo/#.XX_GLjZKiUk)> accessed 14 September 2019.

Bussani M and Palmer V V, 'The Liability Regimes of Europe - Their Façades and Interiors' in M Bussani and V V Palmer (eds.), *Pure Economic Loss in Europe* (Cambridge University Press 2003).

Bussani M, 'A Pluralist Approach to Mixed Jurisdictions' (2011) 6 *Journal of Comparative Law* 161.

Cairns J W, 'Watson, Walton and the History of Legal Transplants' (2009) 41 *Georgia Journal of International and Comparative Law* 637.

Campbell J, *The Masks of God: Oriental Mythology* (Secker and Warburg 1962).

Carlet L, 'Tatemaie a type of truth, not lie' (*The Japan Times*, 15 November 2011), available at <<https://www.japantimes.co.jp/community/2011/11/15/voices/tatemaie-as-truth-culture-clashes-and-arudous-dangerous-myth/#.XXJADTZKiUk>> accessed 15 August 2019.

Carrigan L, 'Experiencing Japan's Senpai-Kōhai System at Work' (*Gaijinpot*, 10 May 2017), available at <<https://blog.gaijinpot.com/japans-senpai-kouhai-system/>> accessed 8 October 2019.

Castellucci I, 'Rule of Law with Chinese Characteristics', (2007) 13 *Annual Survey of International and Comparative Law* 58.

Caudill W, 'The Influence of Social Structure and Culture on Human Behaviour in Modern Japan' (1973) 1(3) *Ethos* 344.

Cavanaugh J J, 'The Profession Abroad: A Glance at Japanese Legal Education' (1959) 64 *Commercial Law Journal* 43.

Chen J, 'The Value of Chinese Traditional Legal Culture' (2004) 38 *Zbornik Radova* 17.

Choy J, 'Japan's Legal System on the Stand' (*Japan Economic Institute Report*, 15 September 2000), available at <<http://www.jei.org/Restricted/JEIR00/0035f.html>>.

Clammer J, *Difference and Modernity: Social Theory and Contemporary Japanese Society* (Kegan Paul International Ltd 1995).

Clegg C, 'The ugly truth of 'gokon', Japan's group blind dates' (*Japan Today*, 29 September 2014) <<http://www.japantoday.com/category/lifestyle/view/the-ugly-truth-of-gokon-japans-group-blind-dates>> accessed 17 November 2015.

Clifford J, *The Predicament of Culture: Twentieth Century Ethnography, Literature, and Art* (Harvard University Press 1988).

Cole R E, *Japanese Blue Collar: The Changing Tradition* (University of California Press 1971).

Colombo G F, 'Japan as a Victim of Comparative Law' (2014) 22(3) *Michigan State International Law Review* 731.

Come P H, 'The Influence of Traditional Normative Mechanisms of Behaviour on the Japanese Legal System' (1990) 12 *Sydney Law Review* 346.

Conaghan J, 'Theorizing the Relationship Between Law and Gender' in J Conaghan (ed), *Law and Gender* (Oxford University Press 2013).

Corrin J, 'Exploring the Deep: Looking for Deep Legal Pluralism in South Pacific' (2017) 48 *Victoria University of Wellington Law Review* 305.

Cortazzi H, 'Japan's prickly revisionists' (*The Japan Times*, 14 April 2015), available at <<https://www.japantimes.co.jp/opinion/2015/04/14/commentary/japan-commentary/japans-prickly-revisionists/#.XWVUQyNKiUk>> accessed 21 August 2019.

Cotterrell R, 'Comparative Law and Legal Culture' in M Reimann and R Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006).

Cotterrell R, 'The Concept of Legal Culture' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997).

Criminal Code of Japan, Article 254.

David and Brierly J E C, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (3<sup>rd</sup> edn, Stevens and Sons 1985).

David R and Brierly J E C, *Major Legal Systems in the World Today* (Free Press 1968).

Davies M, 'Legal Pluralism' in P Cane and H M Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012).

Davies M, 'Pluralism and Legal Philosophy' (2006) 57 *Northern Ireland Legal Quarterly* 577.

Davies M, 'The Ethos of Pluralism' (2005) 27 *Sydney Law Review* 87.

Davies M, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017).

Davies R J and Ikeno O (eds.), *The Japanese Mind: Understanding Contemporary Japanese Culture* (Tuttle Publishing 2002).

de Sousa Santos B, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14(3) *Journal of Law Society* 279.

de Sousa Santos B, *Toward a New Common Legal Sense* (Butterworths 2002).

Dean M, 'Legal transplants and jury trial in Japan' (2011) 31(4) *Legal Studies* 570.



Dean M, 'Trial by Jury: A Force for Change in Japan' (1995) 44 *International and Comparative Law Quarterly* 379.

Dean M, *Japanese Legal System* (2<sup>nd</sup> edn, Cavendish Publishing 2002).

Diamond S, 'The Rule of Law Versus the Order of Custom' in D Black and M Mileski (eds), *The Social Organisation of Law* (Seminar Press 1973).

Dobrovolskaia A, 'An All-Laymen Jury System Instead of the Lay Assessor (*Saiban-in*) System for Japan? Anglo-American-Style Jury Trials in Okinawa under the U.S. Occupation' (2007) 12(24) *Journal of Japanese Law* 57.

Dobrovolskaia A, 'Japan's Past Experiences with the Institution of Jury Service' (2010-11) 12(1) *Asia-Pacific Law & Policy Journal* 1.

Dobrovolskaia A, *The Development of Jury Service in Japan: a square block in a round hole?* (Routledge 2017).

Doi T, 'Omote and Ura: Concepts Derived from the Japanese Two-fold Structure of Consciousness' (1973) 157(4) *The Journal of Nervous and Mental Disease* 258.

Doi T, 'The Japanese Patterns of Communication and the Concept of Amae' (1973) 59(2) *The Quarterly Journal of Speech* 180.

Doi T, *The Anatomy of Self: The Individual Versus Society* (Kodansha International Ltd 1986).

Donlan S P, 'Comparative Law and Hybrid Legal Traditions – An Introduction' in E Cashin-Ritaine, S P Donlan, and M Sychold (eds.), *Comparative Law and Hybrid Legal Traditions* (Schulthess 2010).

Donlan S P, 'Remembering: Legal Hybridity and Legal History' (2012) 2(1) *Comparative Law Review* 1.

Douglas-Scott S, *Law After Modernity: Legal Theory Today* (Hart Publishing 2013).

Drummond S G, 'Dishing Up Israel: Rethinking the Potential of Legal Mixité' (2008) 26 *Windsor Yearbook of Access to Justice* 163.

du Plessis J, 'Comparative Law and the Study of Mixed Legal Systems' in Reimann, M and Zimmermann, R (eds.) *The Oxford Handbook of Comparative Law* (Oxford University Press 2006).

Dudden A, *Japan's Colonization of Korea: Discourse and Power* (University of Hawai'i Press 2005).

Durkheim E, *The Division of Labour in Society* (S Luke ed, W D Hall trs., 2<sup>nd</sup> edn, Palgrave Macmillan 2013).

Eagleton T, *The Idea of Culture* (Blackwell 2000).

Eberle E J, 'The Method and Role of Comparative Law' (2009) 8(3) *Washington University Global Studies Law Review* 451.

Editorials, 'Evaluating the lay judge system, 10 years on' (*The Japan Times*, 5 May 2019), available at <<https://www.japantimes.co.jp/opinion/2019/05/05/editorials/evaluating-lay-judge-system-10-years/#.XbnLCvX7SUK>> accessed 10 October 2019.

Editorials, 'Rising numbers of elderly people are living alone' (*The Japan Times*, 3 May 2019), available at <<https://www.japantimes.co.jp/opinion/2019/05/03/editorials/rising-numbers-elderly-people-living-alone/#.XWUQIyNKiUk>> accessed 21 August 2019.

Eppinger M, 'Sages, Savages and Other Speech Act Communities: Culture in Comparative Law' (2012-13) 57 *St Louis University Law Journal* 407.

Establishment of the Government of the Ryukyu Islands Civil Administration Proclamation No. 13 of 1952.

Establishment of the United States Civil Administration of the Ryukyu Islands, Civil Administration Proclamation No. 1 of 1950.

Ewald W, 'The jurisprudential approach to comparative law' (1998) 46 *The American Journal of Comparative Law* 701.

Falsafi S, 'Civil Society and Democracy in Japan, Iran, Iraq and Beyond' (2010) 43 *Vanderbilt Journal of Transnational Law* 357.

Farkas G, 'From deity to symbol of the state: the constitutional status of the tennō, the Emperor of Japan' (2012) 11 *PhD Tanulmanyok* 271.

Feldman E A, 'Legal Transplants, Organ Transplants: The Japanese Experience' (1994) *Social & Legal Studies* 71.

Feldman E A, *The Ritual of Rights in Japan* (Cambridge University Press 2000).

Fernández Ruiz J M, 'Indigenous peoples and immigrants: multicultural challenge of criminal law' (PhD thesis, University of Glasgow 2018), available at <<https://core.ac.uk/reader/211237870>>.

Fitzpatrick P, 'The damned word culture and Its (In)compatibility with Law' (2005) 1 *Law, Culture & Humanities* 2.

Fombad C M, 'Managing Legal Diversity: Cameroonian Bijuralism at a Critical Crossroads' in V V Palmer, M Y Mattar, and A Koppel, *Mixed Legal Systems, East and West* (Ashgate 2015).

Foote D H, 'Citizen Participation: Appraising the Saiban-in System' (2014) 22(3) *Michigan State International Law Review* 755.

Foote D H, 'Diversification of the Japanese Judiciary' (2017) 27(1) *Washington International Law Journal* 7.

Foote D H, 'From Japan's Death Row to Freedom' (1992) *Pacific Rim Law and Policy Journal* 1.

Foote D H, 'The Benevolent Paternalism of Japanese Criminal Justice' (1992) 80(2) *California Law Review* 317.

Forest B, 'Legal Geography' in D Richardson, N Castree, M F Goodchild, A Kobayashi, W Liu, and R A Marston (eds.), *The International Encyclopedia of Geography: People, the Earth, Environment, and Technology* (John Wiley & Sons 2017).

Frankenberg G, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26(2) *Harvard International Law Journal* 411.

Frankenburg G, 'Constitutional transfer: The IKEA theory revisited' (2010) *I•CON* 8 (3) 563.

Frankenburg G, *Comparative Law as Critique* (Edward Elgar 2016).

Friedman L M and Pérez-Perdomo R (eds.) *Legal Culture in the Age of Globalization: Latin American and Latin Europe* (Stanford University Press 2003).

Friedman L M, 'The Concept of Legal Culture: A Reply' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997).

Friedman L M, 'The Place of Legal Culture in the Sociology of Law' in M Freeman (ed) *Law and Sociology* (Oxford University Press 2006).

Friedman L M, 'Total Justice: Law, Culture, and Society' (1986) 40(3) *Bulletin of the American Academy of Arts & Sciences* 24.

Friedman L M, *Law and Society: An Introduction* (Prentice-Hall 1977).

Friedman L M, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975).

Friedman L M, *The Republic of Choice* (University of Harvard Press 1990).

Friedman L M, *Total Justice* (Russell Sage Foundation 1985).

Fujioka T, 'Tokyo lost and found included ¥3.7 billion in cash last year' (*The Japan Times*, 16 March 2017) available at [https://www.japantimes.co.jp/news/2017/03/16/national/tokyo-lost-found-included-%C2%A53-7-billion-cash-last-year/#.Xr\\_RcmhKjIU](https://www.japantimes.co.jp/news/2017/03/16/national/tokyo-lost-found-included-%C2%A53-7-billion-cash-last-year/#.Xr_RcmhKjIU) accessed 16 May 2020.

Fujita M, *Japanese Society and Lay Participation in Criminal Justice: Social Attitudes, Trust, and Mass Media* (Springer 2018).

Fukurai H and Kurosawa K, 'Impact of the Popular Legal Participation on Forced Confessions and Wrongful Convictions in Japan's Bureaucratic Courtroom: A Cross National Analysis in the U.S and Japan' (2010) 7(7) *US-China Law Review* 1.

Fukurai H, 'A Step in the Right Direction for Japan's Judicial Reform: Impact of the Justice System Reform Council (JSRC) Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation' (2013) 36(2) *Hastings International & Comparative Law Review* 517.

Fukurai H, 'Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy' (2011) 86 *Chicago-Kent Law Review* 789.

Fukuzawa Y, 'Sei'yô jijô' [Conditions in the West], in Fukuzawa Yukichi zenshû [Complete Writings of Fukuzawa Yukichi] 1 (Tokyo 1958).

Funken K, 'Alternative Dispute Resolution in Japan' (2003) 24 *University of Munich School of Law Working Paper* 1, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=458001](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=458001).

Furuoka F & Kato I, 'The 'Honne-Tatemaie' dimension in Japan's foreign aid policy: Overseas Development Aid Allocations in Southeast Asia' (2008) *Electronic Journal of Contemporary Japanese Studies*.

Garon S M, 'State and Religion in Imperial Japan, 1912-1945' (1986) 12(2) *The Journal of Japanese Studies* 237.

Geertz C, *The Interpretation of Cultures: Selected Essays* (Basic Books 1973).

George F, 'Law and Culture in the United States' (2003) 41 *American Journal of Jurisprudence* 131.

George F, 'Law and Culture' (2003) 1 *Ave Maria Law Review* 1.

Gessner V, Hoeland A, and Varga C, (eds.) *European Legal Cultures* (Aldershot 1996).

Gibbons D J, 'Law and the Group Ethos in Japan' (1992) 3 *International Legal Perspectives* 98.

Giliker P, '60 years of Comparative law Scholarship in the International and Comparative Law Quarterly' (2012) 61 *International and Comparative Law Quarterly* 15.

Giliker P, 'Comparative Law and Legal Culture: Placing Vicarious Liability in Comparative Perspective' (2018) 6(2) *Chinese Journal of Comparative Law* 265.

Gillespie J and Sugiura Y, *Nihon bunka wo eigo de shōkai suru* [Traditional Japanese culture and modern Japan] (Natsumesha 1996).

Givens S, 'The Vagaries of Vagueness: An Essay on "Cultural" vs. "Institutional" Approaches to Japanese Law' (2014) 22(3) *Michigan State International Law Review* 839.

Glenn H P, 'Comparative Legal Families and Comparative Legal Traditions' in M Reimann and R Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006).

Glenn H P, 'Mixing It Up' (2003) 78 *Tulane Law Review* 79.

Glenn H P, *Legal Traditions of the World* (5th edn, Oxford University Press 2014).

Golder B, 'Liberal Law's Fear of Culture' (2010) 35 *Alternative Law Journal* 194.

Goodman C F, 'The Somewhat Less Reluctant Litigant: Japan's Changing View Towards Civil Litigation' (2000-2001) 32 *Law and Policy in International Business* 769.

Gordon A, *A Modern History of Japan: From Tokugawa Times to the Present* (Oxford University Press 2003).

Gordon A, *A Modern History of Japan: From Tokugawa Times to the Present* (Oxford University Press 2019).

Goto A, 'Citizen participation in criminal trials in Japan' (2013) *International Journal of Law, Crime and Justice* 1.

Government Information Office, Minister's Secretariat, Cabinet Office, 'Public Opinion Survey On Jury System' (February 2005), available at <<http://www8.cao.go.jp/survey/h16/hi6-saiban/index.html>>.

Gragl P, 'The Pure Theory of Law and Legal Monism – Epistemological Truth and Empirical Plausibility' (2015) 70 *Zeitschrift für öffentliches Recht* 665.

Griffiths J, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1.

Günther K, 'Legal pluralism or uniform concept of law? Globalisation as a problem of legal theory' (2008) *NoFo* 5, available at <<http://www.helsinki.fi/nofu/NoFo5Gunther.pdf>>.

Hahn C and Kim S H, 'To make "We the People": Constitutional founding in postwar Japan and South Korea' (2010) 8 *International Journal of Constitutional Law* 800.

Hahn E J, 'An Overview of the Japanese Legal System' (1983) 5(3) *Northwestern Journal of International Law & Business* 517.

Haley J O, 'Dispute Resolution in Japan: Lessons in Autonomy' (1991) 17 *Canada-United States Law Journal* 443.

Haley J O, 'Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions' (1982) 8 *Journal of Japanese Studies* 265.

Haley J O, 'The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust' in D J Foote (eds), *Law in Japan: A Turning Point* (University of Washington Press 2007).

Haley J O, 'The Myth of the Reluctant Litigant' (1978) 4(2) *Journal of Japanese Studies* 359.

Haley J O, 'The Role of Law in Japan: A Historical Perspective' (1984) 18 *Kobe University Law Review* 1.

Haley J O, *Authority Without Power: Law and the Japanese Paradox* (Oxford University Press 1991).

Haley J O, *The Spirit of Japanese Law* (University of Georgia Press 1998).

Hall J C, *Japanese Feudal Law: The Institutes of Judicature* (The Asiatic Society of Japan 1906).

Hall J C, *Japanese Feudal Laws, Part III: The Tokugawa Legislation* (The Asiatic Society of Japan 1912).

Hall J W, 'Rule by Status in Tokugawa Japan' (1974) 1(1) *The Journal of Japanese Studies* 39.

Hall J, *Japan: From Prehistory to Modern Times* (Delacorte Press 1970).

Hall J, *Japanese Feudal Law* (University Publications of America 1979).

Halloran R, *Japan: Images and Realities* (New York 1972).

Halpérin J, 'Law in Books and Law in Action: The Problem of Legal Change' (2011) 64(1) *Maine Law Review* 45.

Hamilton V and Sanders J, *Everyday Justice: Responsibility and the Individual in Japan and the United States* (Yale University Press 1992).

Hane M and Perez L G, *Modern Japan: A Historical Survey* (5<sup>th</sup> edn, Westview Press 2013)

Hans V P, 'The impact of victim participation in *saiban-in* trials in Japan: Insights from the American jury experience' (2014) 42 *International Journal of Law, Crime and Justice* 103.

Hardacre H, *Shinto and the State 1868-1988* (Princeton University Press 1989).

Harding A, 'Global Doctrine and Local Knowledge: Law in South East Asia' (2002) 51 *International and Comparative Law Quarterly* 36.

Harding R, 'Dogs are 'registered', people shouldn't be': Legal consciousness and lesbian and gay rights (2006) 15(4) *Social & Legal Studies* 511.

Haruko, 'Japan in a word: 'KY' – 'Unable to read the air'' (*The Japans*, 12 October 2013) <<https://thejapans.org/2013/10/12/japan-in-a-word-ky/>> accessed 8 February 2017.

Haugh M, 'What Does 'Face' Mean to the Japanese? Understanding the Import of 'Face' in Japanese Business Interactions' in F Bergiela-Chiappini and M Gotti (eds.), *Asian Business Discourses* (Verlag Peter Lang 2005).

Hazeltine H D, 'The study of comparative legal history' [1927] *Journal of the Society of Public Teachers of Law* 27.

Heckendorn Urscheler L, 'Innovation in a Hybrid System: The Example of Nepal' (2012) 15(3) *Potchefstroom Electronic Law Journal* 97.

Henderson D F, "'Contracts' in Tokugawa Villages' (1974) 1(1) *The Journal of Japanese Studies* 51.

Hendry J and Tatum M L, 'Human Rights, Indigenous Peoples, and the Pursuit of Justice' (2016) 34(2) *Yale Law and Policy Review* 351.

Hendry J and Tatum M L, 'Justice For Native Nations: Insights from Legal Pluralism' (2018) 60 *Arizona Law Review* 91.

Hendry J, 'Margaret Davies, Law Unlimited: Materialism, Pluralism, and Legal Theory' (2019) 46(1) *Journal of Law and Society* 169.

Hendry J, *Understanding Japanese Society* (4<sup>th</sup> edn, Routledge 2013).

Henley D, 'Custom and koperasi: the co-operative ideal in Indonesia' in J S Davidson and D Henley, *The Revival of Tradition in Indonesian Politics: The deployment of adat from colonialism to indigenism* (Routledge 2007).

Henry S, *Private Justice* (Routledge and Kegan Paul 1983).

Henshall K, *A History of Japan: From Stone Age to Superpower* (Palgrave Macmillan 2012).

Hermawan M S and Loo M K, 'The Construction of Kekeluargaan as Indonesia's Organizational Culture' (2019) 31(1) *Humaniora* 1.

Hertel C, 'Legal Systems of the World – an overview' (2009) *Notarius International* 128.

Hertogh M, 'A "European" Conception of Legal Consciousness: Rediscovering Eugen Ehrlich' (2004) 31 (4) *Journal of Law & Society* 457.

Higuchi Y, 'When Society is the Tyrant' (1988) 35 *Japan Quarterly* 350.

Himsworth C, 'Scotland: The Constitutional Protection of a Mixed Legal System' in J C Oliveira and P Cardinal (eds), *One Country, Two Systems, Three Legal Orders - Perspectives Of Evolution: Essays On Macau's Autonomy After The Resumption Of Sovereignty By China* (Springer 2009).

Hiramatsu Y, 'History of Penal Institutions: Japan' (1973) 6 *Law in Japan* 1.

Hiramatsu Y, 'Tokugawa Law' (1981) 14 *Law in Japan* 1 (D F Henderson trs.).

Hoffman M, 'Solitude appears to have an image problem in Japan' (*The Japan Times*, 11 August 2018), available at  
<<https://www.japantimes.co.jp/news/2018/08/11/national/media-national/solitude-appears-image-problem-japan/#.XWURWiNKiUI>> accessed 21 August 2019.



Hongo J, 'Law bends over backwards to allow "fuzoku"' (*The Japan Times*, 27 March 2008), available at <<https://www.japantimes.co.jp/news/2008/05/27/reference/law-bends-over-backward-to-allow-fuzoku/#.XWVqISNKiUk>> accessed 27 August 2019.

Hooker M B, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford University Press 1975).

Howard-Wagner D, 'Taking Justice to Aboriginal People: Everyday Access to Justice as a Promising Area of Indigenous Policy' in J Hendry, M L Tatum, M Jorgensen and D Howard-Wagner (eds.), *Indigenous Justice: New Tools, Approaches, and Spaces* (Palgrave 2018).

Howes D, 'Culture in the Domains of Law' (2005) 20 *Canadian Journal of Law & Society* 9.

Human Rights Watch/Asia, Human Rights Watch Prison Project, *Prison Conditions in Japan* (Human Rights Watch 1995).

Hunt A, 'Foucault's Expulsion of Law: Toward a Retrieval' (1992) 17(1) *Law & Social Enquiry* 1.

Husa J, 'The Future of Legal Families' (2012) *Oxford Handbooks Online*, available at <<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-26>>.

Ibusuki M, 'Quo vadis: First year inspection to Japanese mixed jury trial' (2010) 12 *Asian-Pacific Law & Policy Journal* 24.

Igličar A, 'Slovenian Legal Culture' (2008) 5 *Slovenian Law Review* 11.

Inglehart R and Welzel C, 'Changing Mass Priorities: The Link Between Modernization and Democracy' (2010) 8 *Perspectives on Politics* 551.

Isa C, *Gyakuten* [Reversal] (Shōwa 1977).

Ito K, 'Wrongful Convictions and Recent Criminal Justice Reform in Japan' (2012) 80(4) *University of Cincinnati Law Review* 1245.

Ives C, *Imperial-Way Zen: Ichikawa Hakugen's Critique and Lingered Questions for Buddhist Ethics* (University of Hawai'i Press 2009).

Iwai N, 'Alternative Dispute Resolution in Court' (1991) 6(2) *Journal of Dispute Resolution* 201.

Iwasaka M and Toelken B, *Ghosts and the Japanese: Cultural Experience in Japanese Death Legends* (Utah State University Press 1994).

Jackson B S, 'Towards a Structuralist Theory of Law' [1980] Vol II *Liverpool Law Review* 5.

Jackson S A, 'Legal Pluralism between Islam and the Nation State: Romantic Medievalism or Pragmatic Modernity?' (2006) 1 *Fordham International Law Journal* 158.

Jian M, 'Chinese Legal Culture: In A Western Scholar's Eyes' (2002) 4 *Journal of the History of International Law* 166.

Jiji, 'Abe calls for constitutional amendments proposals to be debated in Diet' (*The Japan Times*, 8 July 2019), available at <<https://www.japantimes.co.jp/news/2019/07/08/national/politics-diplomacy/abe-calls-constitutional-amendments-proposals-debated-diet/#.XVwbbiNKiUk>> accessed 20 August 2019.

Jiji, 'Japan's population continues to slide even as foreign resident numbers increase' (*The Japan Times*, 10 July 2019), available at <<https://www.japantimes.co.jp/news/2019/07/10/national/japanese-population-falls-10th-straight-year/#.XVGLCyNKiUk>> accessed 12 August 2019.

Jiji, 'Record 33 percent of Japanese put individual interests first' (*The Japan Times*, 9 April 2016), available at <<https://www.japantimes.co.jp/news/2016/04/09/national/record-33-percent-of-japanese-put-individual-interests-first/#.XWUQhSNKiUk>> accessed 21 August 2019.

John, 'KY and Ambiguity in Japan: It's "Difficult"' (*Tofugu*, 11 September 2012), <<http://www.tofugu.com/2012/11/19/ky-and-ambiguity-in-japan-its-difficult/>> accessed 26 January 2016.

Johnson D T, 'Japan's Secretive Death Penalty Policy: Contours, Origins, Justifications, and Meanings' (2006) 7 *Asia-Pacific Law & Policy Journal* 62.

Johnson D T, *The Japanese Way of Justice: Prosecuting Crime in Japan* (Oxford University Press 2002).

Jones C P A, 'A spotlight on Japan's criminal justice system' (*The Japan Times*, 13 December 2018), available at <[https://www.japantimes.co.jp/opinion/2018/12/13/commentary/japan-commentary/spotlight-japans-criminal-justice-system/#.Xbnmh\\_X7SUK](https://www.japantimes.co.jp/opinion/2018/12/13/commentary/japan-commentary/spotlight-japans-criminal-justice-system/#.Xbnmh_X7SUK)> accessed 10 October 2019.

Jones C P A, 'Big winners in 'jury' system may be judges, bureaucrats' (*The Japan Times*, 10 March 2009) available at <http://www.japantimes.co.jp/community/2009/03/10/issues/big-winners-in-jury-system-may-be-judges-bureaucrats/#.WI9BDFOLSUk> accessed 30 January 2016.

Jones C P A, 'In the Best Interests of the Court: What American Lawyers Need to Know About Child Custody and Visitation in Japan' (2007) 8(2) *Asian-Pacific Law & Policy Journal* 181.

Jones C P A, 'Japan's koseki system: dull, uncaring but terribly efficient' (*The Japan Times*, 22 June 2016), available at <https://www.japantimes.co.jp/community/2016/06/22/issues/japans-koseki-system-dull-uncaring-terribly-efficient/#.XWUcYSNKiUk> accessed 21 August 2019.

Jones C P A, 'Seven lessons from a Japanese morality textbook' (*The Japan Times*, 7 August 2019), available at <https://www.japantimes.co.jp/community/2019/08/07/issues/seven-lessons-japanese-morality-textbook/#.XWUkiSNKiUk> accessed 21 August 2019.

Jones C P A, 'Still dreaming of a Japan with juries – and without U.S. bases' (*The Japan Times*, 18 June 2014), available at <http://www.japantimes.co.jp/community/2014/06/18/issues/still-dreaming-japan-juries-without-u-s-bases> accessed 22 September 2016.

Journalism Works Project (9 December 1999) 'Documents Detailing the Japanese Prison System: Prison Regulations' (Fuchu Prison Regulations) [http://www.journalismworksproject.org/Japanese-Prisons-CD/cjsystem/behind\\_bars/1999/12/09/japan/documents/index.html](http://www.journalismworksproject.org/Japanese-Prisons-CD/cjsystem/behind_bars/1999/12/09/japan/documents/index.html) accessed 10 August 2017.

Judicial System Reform Council, 'Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the 21st Century' (12 June 2001), available at [https://japan.kantei.go.jp/policy/sihou/singikai/990612\\_e.html](https://japan.kantei.go.jp/policy/sihou/singikai/990612_e.html).

Juma L, 'The Law of Lerotholi: Law and Status of Codified Rules of Custom in the Kingdom of Lesotho' (2011) 23(1) *Pace International Law Review* 92.

Jun Y, 'Law Enforcement in the Edo Period' (2004) 31(3) *Japan Echo*, available at <http://www.japanecho.com/sum/2004/310319.html> accessed 08 July 2015.

Juriglobe, 'Mixed Legal Systems' (University of Ottawa 2013) <<http://www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php>> accessed 04 March 2016.

Kamiya S, 'Lay Judge Duty Sparks New Passion' (*The Japan Times*, 21 June 2012) available at <<http://www.japantimes.co.jp/text/nn20120621fl.html>> accessed 30 January 2017.

Kamiya S, 'Mock trial provides look at judicial system's future' (*The Japan Times*, 10 June 2007) available at <[http://www.japantimes.co.jp/news/2007/06/10/national/mock-trial-provides-look-at-judicial-systems-future/#.V\\_dJ7OUrLMw](http://www.japantimes.co.jp/news/2007/06/10/national/mock-trial-provides-look-at-judicial-systems-future/#.V_dJ7OUrLMw)> accessed 07 October 2016.

Kamiya S, 'Scales of justice: Legal system looks for right balance of lawyers' (*The Japan Times*, 18 March 2008) available at <<http://www.japantimes.co.jp/news/2008/03/18/reference/scales-of-justice-legal-system-looks-for-right-balance-of-lawyers/#.VquyEPmLSUk>> accessed 28 January 2016.

Kanda H and Milhaupt C J, 'Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law' (2003) 51(4) *American Journal Comparative Law* 887.

Kanwar J, 'Preserving Gypsy Culture Through Romani Law in America' (1999-2000) 24 *Vermont Law Review* 1265.

Katsuta T, 'Japan's Rejection of the American Criminal Jury' (2010) 58 *American Journal of Comparative Law* 497.

Kawashima T, "Dispute Resolution in Contemporary Japan," in A T von Mehren (ed), *Law in Japan: The Legal Order in a Changing Society* (Cambridge: Harvard University Press 1963).

Kawashima T, 'The Status of the Individual in the Notion of Law, Right and Social Order' in C A Moore (ed), *The Japanese Mind* (East-West Center Press 1967).

Kawashima T, 日本人の宝石木 '*Nihonjin no Hō Ishiki*' [*The Law Consciousness of the Japanese*] (Iwanami shinsho 1967).

Kennedy D, 'The Critique of Rights in Critical Legal Studies', in W Brown and J Halley (eds.), *Left Legalism/Left Critique* (Duke University Press 2002).

Kent G N, 'Law Tearing the Social Fabric: Lessons from Nepal' (2006) 64 *Advocate* 807.

Kent P, 'Shame as a Social Sanction in Japan: Shameful Behaviour as Perceived by the Voting Public' (1992) 3 *Japan Review* 97.

Khan P, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago University Press 1999).

Kidder R L and Hostetler J A, 'Managing Ideologies: Harmony As Ideology In Amish And Japanese Societies' (1990) 24 *Law & Society Review* 895.

Kim C & Lawson C M, 'The Law of the Subtle Mind: The Traditional Japanese Conception of Law' (1979) 28 *International & Comparative Law Quarterly* 491.

Kim J, 'Deregulation Reconsidered: Protecting Internet Speech in the United States, Germany, and Japan' (2002) 24 *Communications and the Law* 53.

Kinoshita T, 'The Reception in Japan of the American Law and its Transformation in the Fifty Years Since the End of World War II' (2000) 26 *Law Japan* 1.

Kischel U, *Comparative Law*, A Hammel (trs), (Oxford University Press 2019).

Kitamura I, 'The Role of Law in Contemporary Japanese Society' (2003) 34 *Victoria University of Wellington Law Review* 729.

Knapp K K, 'Don't Awaken The Sleeping Child: Japan's Gender Equality Law And The Rhetoric Of Gradualism' (1998-9) 8 *Columbia Journal of Gender and Law* 143.

Knapp K K, 'Warriors Betrayed: How the "Unwritten Law" Prevails in Japan' (1995-6) 6 *Indiana International & Comparative Law Review* 545.

Koch C H, 'Envisioning a Global Legal Culture' (2003-4) 5 *Michigan Journal of International Law* 1.

Koichiro F, 'Changing Culture and the Legal Culture in Japan' (1992) 4 *Japanstudien* 209.

Koontz N, 'The Potential for National Hate Speech Legislation and Japan: An International Consideration on Possibilities' (2017) 16(2) *Washington University Global Studies Law Review* 345.

Kopp R, 'Thinking of working in Japan? It's good to know what you're in for' (*The Japan Times*, 30 January 2019), available at <<https://www.japantimes.co.jp/community/2019/01/30/how-tos/thinking-working-japan-good-know-youre/#.XbcLcPX7SUK>> accessed 10 September 2019.

Kotani J, 'Proceed with Caution: Hate Speech Regulation in Japan' (2018) 45(3) *Hastings Constitutional Law Quarterly* 603.

Kötz H, 'The Value of Mixed Legal Systems' (2003-2004) 78 *Tulane Law Review* 435.

Krisch N, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010).

Kubota R, 'Standardization of Language and Culture' in S Sato and N M Doerr (eds.), *Rethinking Language and Culture in Japanese Education: Beyond the Standard* (Multilingual Matters 2014).

Kujikata Osadamegaki (公事方御定書) 1742.

Kume K, Healey G, Tsuzuki C (eds.) 'The Iwakura Embassy, 1871-1873: A True Account of the Ambassador Extraordinary and Plenipotentiary Journey of Observation through the United States of America and Europe', A Cobbling *et al* (trans.) (Japan Documents 2002).

Kun F, 'Salient Features of International Commercial Arbitration in East Asia: A Comparative Study of China and Japan' (2016) 5(3) *American University Business Law Review* 447.

Kyodo and Jiji, 'Japan Supreme Court chief says lay judge system well received but tweaks needed to spur interest' (*The Japan Times*, 16 May 2019), available at <<https://www.japantimes.co.jp/news/2019/05/16/national/crime-legal/japanese-supreme-court-chief-justice-says-lay-judge-system-well-received-improvements-needed-spur-public-interest/#.XbnLFPX7SUK>> accessed 10 October 2019.

Kyodo and Jiji, 'Number of crimes reported in Japan in first half drops 8.7%; 2019 figure likely to hit lowest postwar mark' (*The Japan Times*, 18 July 2019), available at <<https://www.japantimes.co.jp/news/2019/07/18/national/crime-legal/number-crimes-reported-japan-first-half-drops-8-7-2019-figure-likely-hit-lowest-postwar-mark/#.XbbRsPX7SUK>> accessed 20 August 2019.

Kyodo News, 'First lay judges hand killer 15-year term' (*The Japan Times*, 7 August 2009), available at <<http://www.japantimes.co.jp/news/2009/08/07/national/first-lay-judges-hand-killer-15-year-term>> accessed 10 October 2016.

Kyodo, 'Collective homes a solution for those in Japan who don't want to live alone' (*The Japan Times*, 30 August 2016), available at <<https://www.japantimes.co.jp/news/2016/08/30/national/social-issues/collective-homes-solution-japan-dont-want-live-alone/#.XWURYSNKiUI>> accessed 21 August 2019.

Kyodo, 'Constitutional Change Necessary to Protect Japanese Citizens: Abe' (*The Japan Times*, 3 February 2015) available at

<<http://www.japantimes.co.jp/news/2015/02/03/national/politics-diplomacy/constitutional-change-necessary-protect-japanese-citizens-abe/#.VY5n2htVikp>> accessed 19 June 2015

Kyodo, 'Japan's crime rate hits record low as number of thefts plummets' (*The Japan Times*, 18 January 2018), available at

<<https://www.japantimes.co.jp/news/2018/01/18/national/crime-legal/japans-crime-rate-hits-record-low-number-thefts-plummets/#.XVGoQiNKiUk>> accessed 12 August 2019.

Kyodo, 'Lay Judge System Reviewed After Auspicious Start' (*The Japan Times*, 30 May 2012), available at <<http://www.japantimes.co.jp/text/nn20120530f2.html>> accessed 30 January 2017.

Kyodo, 'Osaka the first city in Japan to certify gay couple as foster parents' (*The Japan Times*, 6 April 2017) available at

<[http://www.japantimes.co.jp/news/2017/04/06/national/social-issues/osaka-becomes-first-japanese-city-recognize-sex-couple-foster-parents/#.WOuSv\\_nyuUk](http://www.japantimes.co.jp/news/2017/04/06/national/social-issues/osaka-becomes-first-japanese-city-recognize-sex-couple-foster-parents/#.WOuSv_nyuUk)> accessed 10 April 2017.

Kyodo, 'Poll shows 54% oppose revision of Japan's pacifist Constitution under Abe's watch' (*The Japan Times*, 11 April 2019), available at

<<https://www.japantimes.co.jp/news/2019/04/11/national/politics-diplomacy/poll-shows-54-oppose-revision-japans-pacifist-constitution/#.XXEVwzZKiUk>> accessed 30 August 2019.

Kyodo, 'Poll shows that 56% of Japanese oppose amending Constitution under Abe government' (*The Japan Times*, 24 July 2019), available at

<<https://www.japantimes.co.jp/news/2019/07/24/national/politics-diplomacy/56-japanese-oppose-amending-constitution-abe-government-poll-shows/#.XVwcCyNKiUk>> accessed 20 August 2019.

Kyodo, 'Promise to parents keeps new ozeki Takakeisho pushing forward' (*The Japan Times*, 27 March 2019), available at

<[https://www.japantimes.co.jp/sports/2019/03/27/sumo/promise-parents-keeps-new-ozeki-takakeisho-pushing-forward/#.XX\\_JUDZKiUk](https://www.japantimes.co.jp/sports/2019/03/27/sumo/promise-parents-keeps-new-ozeki-takakeisho-pushing-forward/#.XX_JUDZKiUk)> accessed 14 September 2019.

Kyodo, 'Third of Japan's lay judges say experience was stressful, but system viewed positively overall' (*The Japan Times*, 21 May 2019), available at <<https://www.japantimes.co.jp/news/2019/05/21/national/crime-legal/third-japans-lay>

judges-say-experience-stressful-system-viewed-positively-overall/#.XbnLFvX7SUK>  
accessed 10 October 2019.

Kyokai K, *Manuscript for history of Japanese prison administration in modern age*, Vol. 1 (Tokyo 1943) in D V Botsman, 'Politics and Power in the Tokugawa Period' (1992) 3 *East Asian History* 1.

Kyokai K, *Manuscript for history of Japanese prison administration in modern age*, Vol. 1 (Tokyo 1943).

Lacey N and Zedner L, 'Discourses of Community in Criminal Justice' (1995) 22(3) *Journal of Law and Society* 301.

Langsing P and Wechselblatt M, 'Doing Business in Japan: The Importance of the Unwritten Law' (1983) 17 *International Law* 647.

Leavell J, 'The policing of society' in H Conroy, S T W Davis, and W Patterson (eds.), *Japan in Transition: Thought and Action in the Meiji Era* (Fairleigh Dickinson University Press 1984).

Lebra T S, 'Self in Japanese Culture' in N R Rosenberger (ed), *The Japanese Sense of Self* (Cambridge University Press 1992).

Lee I, 'The Law and Culture of Apology in Korean Dispute Settlement (With Japan and the United States in Mind)' (2005-6) 27 *Michigan Journal of International Law* 1.

Lempert R, 'A Jury for Japan?' (1992) 40 *American Journal of Comparative Law* 37.

Leonardson D, *Japan as a Low-Crime Nation* (Palgrave Macmillan 2004).

Levin D G, 'Saiban-in seido: Lost in Translation? How the Source of Power Underlying Japan's Proposed Lay Assessor System May Determine Its Fate' (2008) 10(1) *Asian-Pacific Law & Policy Journal* 199.

Levin M and Tice E, 'Japan's New Citizen Judges: How Secrecy Imperils Judicial Reform' (2009) *Asia Pacific Journal* 1.

Lewis C C, 'Fostering social and intellectual development: the roots of Japanese educational success' in T P Rohlen and G K LeTrendre (eds), *Teaching and Learning in Japan* (Cambridge University Press 1995).

Lewis M P, Simons G F, and Fennig C D (eds.), *Ethnologue: Languages of the World* (17<sup>th</sup> edn, SIL International 2013).

Lord Rodger of Earlsferry, "'Say Not the Struggle Naught Availeth": The Costs and Benefits of Mixed Legal Systems' (2003) 78 *Tulane Law Review* 419.



Lost Property Act (Act No. 73 of 2006).

Mak V, 'In Favour of Strong Legal Pluralism in European Private Law for the Platform Economy' (*Oxford Business Law Blog*, 26 February 2019), available at <<https://www.law.ox.ac.uk/business-law-blog/blog/2019/02/favour-strong-legal-pluralism-european-private-law-platform-economy>>.

Maki J, 'The Japanese Constitutional Style' (1968) 43(5) *Washington Law Review* 893.

Makulele M J, 'Culture, Tradition, Custom, Law and Gender Equality' (2012) 15 *Potchefstroom Electronic Law Journal* 1.

Malinowski B, *Crime and Custom in Savage Society* (Routledge and Kegan Paul 1926).

Mariana N and Fuentes G, *World Legal Systems* (Wilson and Lafleur 2000).

Marikkar F A, 'The Lay Judge System: Its Role and Effects on Japanese Society' (2009) *国際経営論集* 38.

Martin A, 'At death's door: The attraction of living in homes with ghastly pasts' (*The Japan Times*, 30 October 2018), available at <<https://www.japantimes.co.jp/news/2018/10/30/national/stigmatized-properties-living-homes-ghastly-pasts/#.XX-zNTZKiUk>> accessed 14 September 2019.

Martin A, 'Death notes: Traditional rituals associated with curses persist in 21st-century Japan' (*The Japan Times*, 7 September 2019), available at <<https://www.japantimes.co.jp/culture/2019/09/07/general/death-notes-traditional-rituals-associated-curses-persist-21st-century-japan/#.XX-y8jZKiUk>> accessed 14 September 2019.

Martin C, "'Reinterpreting" Article 9 endangers Japan's rule of law' (*The Japan Times*, 27 June 2014) available at <<http://www.japantimes.co.jp/opinion/2014/06/27/commentary/japan-commentary/reinterpreting-article-9-endangers-japans-rule-of-law/#.Vq9terKLSUk>> accessed 10 January 2016.

Mason R H P and Caiger J G, *A History of Japan: Revised Edition* (Tuttle 1997).

Masui A, 'Once aimed at salarymen, Japan's new capsule hotels reach out to tourists and women' (*The Japan Times*, 2 November 2016), available at <<https://www.japantimes.co.jp/news/2016/11/02/business/aimed-salarymen-japans-new-capsule-hotels-reach-tourists-women/#.XbcNhX7SUK>> accessed 10 September 2019.

Matsumoto Y, 'Reexamination of the Universality of Face: Politeness Phenomena in Japanese' (1988) 12 *Journal of Pragmatics* 403.

Matsura M O, 'Legal Pluralism in the Philippines' (1994) 28(3) *Law & Society Review* 461.

Mattei U A, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) XLV *American Journal of Comparative Law* 1.

Mattei U A, T Ruskola, and A Gidi, *Schlesinger's Comparative Law: Cases, Texts and Materials* (7th edn, Foundation Press 2009).

Matthews W, *World Religions* (7<sup>th</sup> ed, Wadsworth 2013).

Max Planck Institute for Comparative and International Private Law, 'Research into Japanese Law' (2016), available at <[http://www.mpipriv.de/en/pub/research/foreign\\_law\\_regional\\_centres/japan/law\\_in\\_japan.cfm](http://www.mpipriv.de/en/pub/research/foreign_law_regional_centres/japan/law_in_japan.cfm)> accessed 10 May 2016.

McClain J L, *Japan: A Modern History* (W W Norton and Company 2002).

McCurry J, 'Japan PM to overturn pacifist defence policy' (*The Guardian*, 30 June 2014) <<http://www.theguardian.com/world/2014/jun/30/japan-pm-overturn-pacifist-defence-policy-shinzo-abe>> accessed 19 June 2015.

McCurry J, 'Japan upholds rule that married couples must have same surname' (*The Guardian*, 16 December 2015), available at <<https://www.theguardian.com/world/2015/dec/16/japanese-court-rules-married-women-cannot-keep-their-surnames>> accessed 10 August 2018.

McCurry J, 'Japan's Shinzo Abe angers neighbours and US by visiting war dead shrine' (*The Guardian*, 26 December 2013), available at <<https://www.theguardian.com/world/2013/dec/26/japan-shinzo-abe-tension-neighbours-shrine>> accessed 10 October 2019.

McCurry J, 'New generation of Japanese anti-war protesters challenge Abe' (*The Guardian*, 16 September 2015) <<http://www.theguardian.com/world/2015/sep/16/japanese-anti-war-protesters-challenge-shinzo-abe>> accessed 30 September 2015.

McCurry J, 'Tokyo's Shibuya Ward is first in Japan to recognise same-sex marriage' (*The Guardian*, 31 March 2015) available at <<https://www.theguardian.com/world/2015/mar/31/tokyos-shibuya-ward-same-sex-marriage>> accessed 9 November 2015.

McCurry J, 'Trial by jury returns to Japan' (*The Guardian*, 3 August 2009), available at <<https://www.theguardian.com/world/2009/aug/03/japan-trial-by-jury-returns>> accessed 12 August 2019.

McDaniel E R, 'Japanese Negotiating Practices: Low Context Communication in a High Context Culture' (Doctoral Thesis, Arizona State University 2000).

Mclanahan J P, 'Citizen Participation in Japanese Criminal Trials: Reimagining the Right to Trial by Jury in the United States' (2012) 37 *North Carolina Journal of International Law and Commercial Regulation* 725.

McNeill D, 'Back to the Future: Shinto, Ise and Japan's New Moral Education' (2013) 11(50.1) *The Asia-Pacific Journal*, available at <<http://www.japanfocus.org/-David-McNeill/4047/article.html>> accessed 02 July 2015.

*Meiji Kenpō* [Constitution].

Meliassaris E and Croce M, 'A Pluralism of Legal Pluralisms' (*Oxford Handbooks Online*, 2017), available at <<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-22>>.

Melissaris E, 'The More the Merrier? A New Take on Legal Pluralism' (2004) 13 *Social & Legal Studies* 57.

Menski W, 'Beyond Europe' in D Nelken and E Örüçü (eds.), *Comparative Law: A Handbook* (Hart 2007)

Menski W, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press 2002).

Menski W, *Hindu Law: Beyond Tradition and Modernity* (Oxford University Press 2003).

Merry S E, 'From Law and Colonialism to Law and Globalization' (2003) 28(2) *Law & Social Inquiry* 569.

Merry S E, 'Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)' (2003) 26 *Political & Legal Anthropology Review* 55.

Merry S E, 'Legal Pluralism' (1988) 22(5) *Law & Society Review* 869.

Merry S E, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (University of Chicago Press 1990).

- Mezey N, 'Law as Culture' (2001) 13 *Yale Journal of Law & Humanities* 35.
- Michaels R, 'Global Legal Pluralism' (2009) 5 *Annual Review of Law and Social Science* 1.
- Miller R S, 'Apples vs. Persimmons: The Legal Profession in Japan and the United States' (1989) 39 *Journal of Legal Education* 27.
- Minamoto R, *Giri to ninjō* [Social obligations and human feelings] (Chuo Koronsha 1969).
- Minear R H, 'Orientalism and the Study of Japan' (1980) 39(3) *Journal of Asian Studies* 507.
- Mitani T, *Seiji seido toshite no baishin-sei: Kindai Nihon no shihō-ken to seiji (The Jury System as a Political Institution: Judicial Power and Politics in Modern Japan)* (Daigaku Shuppankai 2001).
- Miura Y, 'Confectioner's free "obligatory chocolate" machines prove subway hit' (*The Japan Times*, 10 February 2013), available at <https://www.japantimes.co.jp/news/2013/02/10/national/confectioners-free-obligatory-chocolate-machines-prove-subway-hit/#.XXKqJzZKiUk> accessed 20 August 2019.
- Miyazawa S, 'Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in International Perspectives' (2014) 42 *International Journal of Law, Crime & Justice* 71.
- Miyazawa S, 'Legal Education and the Reproduction of the Elite in Japan' (2000) 1 *Asia Pacific Law & Policy Journal* 1.
- Miyazawa S, 'The Politics of Judicial Reform in Japan: The Rule of Law at Last?' (2001) 2 *Asia-Pacific Law & Policy Journal* 89.
- Miyazawa S, *Policing in Japan: A Study in Making Crime* (SUNY Press 1992).
- Moccia L, 'Historical Overview on the Origina and Attitudes of Comparative Law' in B de Witte and C Forder (eds.), *The Common Law of Europe and the Future of Legal Education* (Devanter: Kluwer 1992).
- Monateri P G, 'The "Weak" Law: Contaminations and Legal Cultures' in Italian National Reports to the XVth International Congress of Comparative Law (Giuffré 1998).
- Moore S F, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law and Society Review* 719.

Moréteau O, 'An Introduction to Contamination' (2010) 3(1) *Journal of Civil Law Studies* 9.

Munger F, 'From the editor' 1994) 28 (4) *Law & Society Review* 725.

Murakami S, 'Abe's push to change Japan's Constitution hits roadblock as parties scrap Diet discussion' (*The Japan Times*, 21 November 2019) available at <<https://www.japantimes.co.jp/news/2019/11/21/national/politics-diplomacy/abe-constitution-hits-roadblock/#.XsadjpKjIU>> accessed 21 May 2020.

Murakami S, 'Hangings carried out for two Japanese death row inmates convicted of multiple rape-murders' (*The Japan Times*, 2 August 2019), available at <<https://www.japantimes.co.jp/news/2019/08/02/national/japan-executes-two-death-row-inmates-first-executions-since-last-december/#.XVwXryNKiUk>> accessed 20 August 2019.

Murakami S, 'Japan send last six Aum death row inmates to the gallows' (*The Japan Times*, 26 July 2018), available at <<https://www.japantimes.co.jp/news/2018/07/26/national/crime-legal/justice-ministry-begins-procedures-begin-execute-remaining-aum-members-death-row/#.XXKlzzZKiUk>> accessed 20 August 2019.

Muramatsu N and Akiyama H, 'Japan: Super-Aging Society Preparing for the Future' (2011) 51(4) *The Gerontologist* 425.

Murphy P, *True Crime Japan: Thieves, Rascals, Killers and Dope Heads: True Stories from a Japanese Courtroom* (Tuttle 2016).

Nakane C, *Tateshakai no ningenkankei* [The ranking of human relationships in society] (Kodansha 1967).

Nakata Y, 'The Honesty and Façade of Honne and Tatemaie' (*GaijinPot*, 6 October 2014) <<http://blog.gaijinpot.com/honne-tatemaie/>> accessed 10 July 2015.

Nakata Y, 'Uchi Soto and Japanese Group Culture' (*GaijinPot*, 25 September 2014) <<http://blog.gaijinpot.com/uchi-soto-japanese-culture>> accessed 12 November 2015.

National Diet Library, 'The Constitution of the Empire of Japan: Birth of the Constitution of Japan' (3 May 2004), available at <<http://www.ndl.go.jp/constitution/e/etc/c02.html>> accessed 21 August 2019.

Nelken D, 'Defining and Using the Concept of Legal Culture' in E Örüçü and D Nelken (eds.), *Comparative Law: A Handbook* (Hart 2007).

Nelken D, 'Law in action or living law? Back to the beginning in sociology of law' (1984) 4(2) *Legal Studies* 157.

Nelken D, 'Legal Cultures' in D S Clark (ed), *Comparative Law and Society* (Edward Elgar 2012).

Nelken D, 'Puzzling Out Legal Culture: A Comment on Blankenburg' in D Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997).

Nelken D, 'Rethinking Legal Culture' in M Freeman (ed) *Law and Sociology* (Oxford University Press 2006).

Nelken D, 'Thinking About Legal Culture' (2014) 1 (2) *Asian Journal of Law & Society* 255.

Nelken D, 'Using the Concept of Legal Culture' (2004) 26 *Australian Journal of Legal Philosophy* 1.

Nicholson B J, 'Japanese Fair Trade Commission Guidelines For Licensing Agreements: An Overview And A Critique' (1991) 21 *Georgia Journal of International & Comparative Law* 1.

Nishikawa Y, *Japan's Changing Role in Humanitarian Crises* (Routledge 2005).

Nishi-Nippon Shinbun, *Kei 836-nin ga saiban-in keiken. Subete yûzai hanketsu, 28-nin kôso. Nennai no shinri shûryô*. [A total of 836 people experience being a saiban-in. All defendants found guilty, 28 appeals. End of hearings for this year], (*Nishi-Nippon Shinbun*, 19 December 2009), available at [http://www.nishinippon.co.jp/nnp/feature/2009/saibanin/kiji/kyushu/20091219/20091219\\_0001.shtml](http://www.nishinippon.co.jp/nnp/feature/2009/saibanin/kiji/kyushu/20091219/20091219_0001.shtml).

Noda Y, *Introduction to Japanese Law* (University of Tokyo Press 1976).

Noguchi M, 'Criminal Justice in Asia and Japan and the International Criminal Court' (2006) 6(4) *International Criminal Law Review* 585.

Nohara Y, 'A woman's job in Japan: watch kids, care for parents, work late' (*The Japan Times*, 11 May 2015), available at <https://www.japantimes.co.jp/news/2015/05/11/national/social-issues/womans-job-japan-watch-kids-care-parents-work-late/#.XbnpnPX7SUK> accessed 10 October 2019.

Norrie A, 'From Critical to Socio-Legal Studies: Three Dialectics in Search of a Subject' (2000) 9(1) *Social & Legal Studies* 85.

O'Reilly J, Robinson S L, Banki S, and Berdahl J L, 'Is negative attention better than no attention? The comparative effects of ostracism and harassment at work' (2015) 26(3) *Organization Science* 774.

Oba A A, 'Juju Oaths in Customary Law Arbitration and Their Legal Validity in Nigerian Courts' (2008) *Journal of African Law* 52(1) 138.

Oba A A, 'Religious and Customary Laws in Nigeria' (2011) 25 *Emory International Law Review* 881.

Obe M, 'Japanese Lawyers' Problem: Too Few Cases' (*Wall Street Journal*, 3 April 2016) <<https://www.wsj.com/articles/japanese-lawyers-problem-too-few-cases-1459671069>> accessed 10 April 2017.

Öberg J O G, 'The Legal Basis for EU Criminal Law Harmonisation: A Question of Federalism?' (2018) 43(3) *European Law Review* 366.

Oda H, *Japanese Law* (3<sup>rd</sup> edn, Oxford University Press 2009).

Office of the High Commissioner of Human Rights, 'Status of Ratification' (OHCHR, 16 July 2018) <<http://indicators.ohchr.org/>> accessed 7 August 2018.

Ogura Y, 'Days of the dead: O-bon and the ghosts of Japan' (*The Japan Times*, 11 August 2012), available at <<https://www.japantimes.co.jp/community/2002/08/11/general/days-of-the-dead-o-bon-and-the-ghosts-of-japan/#.XX-yyzZKiUk>> accessed 14 September 2019.

Okunuki H, 'Under Japanese law, breaks are sacred and standby counts as work' (*The Japan Times*, 25 February 2015), available at <[https://www.japantimes.co.jp/community/2015/02/25/issues/japanese-law-breaks-sacred-standby-counts-work/#.XbnpN\\_X7SUK](https://www.japantimes.co.jp/community/2015/02/25/issues/japanese-law-breaks-sacred-standby-counts-work/#.XbnpN_X7SUK)> accessed 10 October 2019.

Ono S, 'Comparative Law and the Civil Code of Japan (1)' (1996) 24 *Hitotsubashi Journal of Law and Politics* 27.

Ooms H, *Tokugawa Village Practice: Class, Status, Power, Law* (University of Washington Press 1996).

Oppler A C, *Legal Reform in Occupied Japan: A Participant Looks Back* (Princeton University Press 1975).

Ortolani A, 'Reflections on Citizen Participation in Criminal Justice in Japan: Jury, Saiban-in System and Legal Reform' (2010) 29 *Journal of Japanese Law* 153.

Örücü E, 'A General View of "Legal Families" and of "Mixing Systems"' in D Nelken and E Örücü, *Comparative Law: A Handbook* (Hart 2007).

Örücü E, 'What is a Mixed Legal System: Exclusion or Expansion?' (2008) 12(1) *Electronic Journal of Comparative Law* 1.

Osaki T and Kikuchi D, 'Abe declares 2020 as goal for new Constitution' (*The Japan Times*, 3 May 2017), available at

<<https://www.japantimes.co.jp/news/2017/05/03/national/politics-diplomacy/abe-declares-2020-goal-new-constitution/#.XXEUpDZKiUk>> accessed 30 August 2019.

Osaki T, 'Japan assures world that Reiwa is all about 'beautiful harmony' and has nothing to do with 'command' (*The Japan Times*, 3 April 2019), available at

<<https://www.japantimes.co.jp/news/2019/04/03/national/japan-assures-world-reiwa-beautiful-harmony-nothing-command/#.XandgfVKiUk>> accessed 18 October 2019.

Osaki T, 'Thousands protest Abe, security bills at Diet rally' (*The Japan Times*, 30 August 2015), available at <<https://www.japantimes.co.jp/news/2015/08/30/national/thousands-protest-abe-security-bills-diet-rally/#.XXEurzZKiUk>> accessed 30 August 2019.

Osumi M, 'Many of Japan's growing number of singles claim they are comfortable facing death alone' (*The Japan Times*, 14 June 2018), available at

<<https://www.japantimes.co.jp/news/2018/06/14/national/social-issues/many-japans-growing-number-singles-claim-comfortable-facing-death-alone/#.XWUQnSNKiUk>> accessed 21 August 2019.

Osumi M, 'Two Japanese death row inmates executed over 1988 robbery-murders of Cosmo Research president and employee' (*The Japan Times*, 27 December 2018), available at

<<https://www.japantimes.co.jp/news/2018/12/27/national/crime-legal/japan-executes-two-death-row-inmates-thursday-morning-sources/#.XXKlvTZKiUk>> accessed 20 August 2019.

Ota S and Rokumoto K, 'Issues of Lawyer Population: Japan' (1993) 25 *Case Western Reserve Journal of International Law* 315.

Pace D, 'Structuralism in History and the Social Sciences' (1978) 30(3) 282.

Palmer V V, 'Mixed Legal Systems ...and the Myth of Pure Laws' (2007) 67 *Louisiana Law Review* 1205.

Palmer V V, 'Mixed Legal Systems: The Origin of the Species' (2013) 28 *Tulane European & Civil Law Forum* 103.

Palmer V V, 'Quebec and Her Sisters in the Third Legal Family' (2009) 54 *McGill Law Journal* 321.



Palmer V V, 'Two Rival Theories of Mixed Legal Systems' (2008) 12(1) *Electronic Journal of Comparative Law*, available at <<http://www.ejcl.org/12/1/art12l-16.pdf>>.

Palmer V V, *Mixed Jurisdictions Worldwide: The Third Legal Family* (Cambridge University Press 2001).

Palmer V, 'Mixed Jurisdictions' in J Smits (ed), *Elgar Encyclopaedia of Comparative Law* (Edward Elgar 2006).

Palmer V, 'Quebec and her sisters in the Third Legal Family' (2009) 54 *McGill Law Journal* 321.

Parker R B, 'Law, Language and the Individual in Japan and the United States' (1988) 7 *Wisconsin International Law Journal* 179.

Parsons S, 'BBC Radio 4: Misunderstanding Japan: Contrasts and Complexities' (*Japan in Perspective*, 20 August 2015) <<http://www.japaninperspective.com/misunderstanding-japan-contrasts-and-complexities>> accessed 02 December 2015.

Parsons S, 'Cultivating a Culture Somewhere In Between Individualism and Collectivism' (*Japan in Perspective*, 9 March 2015) <<http://www.japaninperspective.com/cultivating-culture-somewhere-inbetween-individualism-collectivism>> accessed 02 December 2015.

Parsons S, 'Is Japan the Land of Convenience and Politeness?' (*Japan in Perspective*, 9 November 2015) <<http://www.japaninperspective.com/is-japan-the-land-of-convenience-and-politeness>> accessed 02 December 2015.

Parsons S, 'Japanese Collectivism versus Western Individualism-Can they work together?' (*Japan in Perspective*, 19 August 2014) <[www.japaninperspective.com/japanese-collectivism-vs-western-individualism](http://www.japaninperspective.com/japanese-collectivism-vs-western-individualism)> accessed 02 December 2015.

Peak L, 'Learning to Become Part of the Group: The Japanese Child's Transition to Preschool Life' in H Shimizu and R A Levine (eds.), *Japanese Frames of Mind: Cultural Perspectives on Human Development* (Cambridge University Press 2001).

Pejovic C, 'Japanese Corporate Governance: Behind Legal Norms' (2010-11) *Pennsylvania State International Law Review* 483.

Perez L G, *The History of Japan* (Greenwood Press 1998).

Peters A and Schwenke H, 'Comparative Law Beyond Postmodernism' (2000) 49 *International & Comparative Law Quarterly* 800.

Philippopoulos-Mihalopoulos A, 'The Sound of a Breaking String: Critical Environmental Law and Ontological Vulnerability' (2011) 2 *Journal of Human Rights and the Environment* 5, 10-11.

Pirie F, *The Anthropology of Law* (Oxford University Press 2013).

Plogstedt A, 'Citizen Judges in Japan: A Report Card for the First Three Years' (2013) 23 *International and Comparative Law Review* 371.

Podgorecki A, 'Social Systems and Legal System: Criteria for Classification' in A Podgorecki, C J Whelan and D Khosla (eds), *Legal Systems and Social Systems* (Croom Helm 1985).

Post R, *Law and the Order of Culture* (University of California Press 1991).

Poulantzas N, *State, Power, Socialism* (New Left Books 1978).

Pound R, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12.

Prasol A, *Modern Japan: origins of the mind – Japanese traditions and approaches to contemporary life* (World Scientific Publishing Co. 2010).

Pringle P, 'Gifts, Favours and, Obligations in Japanese Business Culture' (*Japan Intercultural*, 20 August 2013), available at

<<https://www.japanintercultural.com/en/news/default.aspx?newsID=266>> accessed 14 September 2019.

Quei Quo F, 'Japan's Role in Asia: A United States Surrogate?' (1982-3) 38 *International Journal* 251.

*R v R* [1991] 3 WLR 767.

Ramseyer J M and Nakazato M, 'The Rational Litigant: Settlement Amounts and Verdict Rates in Japan' (1989) 18 *Journal of Legal Studies* 263.

Ramseyer J M and Nakazato M, *Japanese Law: An Economic Approach* (University of Chicago Press 1998).

Ramseyer J M and Rasmusen E B, 'Comparative Litigation Rates' (November 2010) Discussion Paper No. 681, *John M Olin Center for Law, Economics, and Business*, available at

<[http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/Ramseyer\\_681.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/Ramseyer_681.pdf)>.

Ramseyer J M and Rasmusen E B, 'Why is the Japanese Conviction Rate So High?' (2001) 30 *Journal of Legal Studies* 53.

Ramseyer J M, 'Reluctant Litigant Revisited: Rationality and Disputes in Japan' (1988) 14 *Journal of Japanese Studies* 111.

*Rao Balwant Singh v Rant Kishori* (1898) 25 IA 54 (PC).

Reichel P L and Suzuki Y E, 'Japan's Lay Judge System: A Summary of Its Development, Evaluation, and Current Status' (2015) 25(3) *International Criminal Justice Review* 247.

Reid S and Edwards J, 'The Scottish Legal System' (2009) 9 *Legal Information Management* 9.

Reischauer E O (ed), *Japan: An Illustrated Encyclopaedia* (Kōdansha 1993).

Reuters, 'Capital punishment in Japan: Unscheduled executions and hangings witnessed only by prison officials and a priest' (*The Japan Times*, 6 July 2018), available at <<https://www.japantimes.co.jp/news/2018/07/06/national/crime-legal/executions-japan-backed-80-public-2015-government-survey-found/#.XVvi8iNKiUk>> accessed 20 August 2019.

Richarz A, 'Japan's Lost-and-Found System Is Insanely Good' (*CityLab*, 10 February 2020) available at <<https://www.citylab.com/life/2020/02/japan-lost-and-found-phone-wallet-purse-tokyo-property-law/604645/>> accessed 16 May 2020.

Riles A, 'Comparative Law and Socio-legal Studies' in M Reimann and R Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006).

Rokumoto K, 'Cultural Factors in Comparative Socio-Legal Analysis' (1995) paper published in 'Legal Culture: Encounters and Transformations', annual meeting of RSCL/ISA.

Rokumoto K, 'Law and Culture in Transition' (2001) 49(4) *The American Journal of Comparative Law* 545.

Rokumoto K, 'Legal Problems and the Use of Law in Tokio and London – A Preliminary Study in International Comparison' (1978) 7(3) *Zeitschrift für Soziologie* 228.

Rosen D, 'The Koan of Law in Japan' (1990-1991) *North Kentucky Law Review* 367.

Rosen S L, 'Japan as Other: Orientalism and Cultural Conflict' (2000) 4 *Intercultural Communication*, available at <<http://www.immi.se/intercultural/nr4/rosen.htm>> accessed 10 July 2015.

Rouland N, *Legal Anthropology* (P G Planel trs., Stanford University Press 1994).

Sack J, 'Shame in Japan' (2004) *Theologia Diakonia* 111.

Said E, *Orientalism* (Penguin 1977).

Sansom G, *A History of Japan to 1334* (Stanford University Press 1958).

Sansom G, *Japan: A Short Cultural History* (Cresset Press 1931).

Sanza Rules 1873.

Sarat A and Kearns T R, 'The Cultural Lives of Law' in A Sarat and T R Kearnes (eds.), *Law in the Domains of Culture* (University of Michigan Press 1998).

Sarat A and Simon J, 'Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship' in A D Sarat and J Simon (eds), *Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism* (Duke University Press 2003).

Sarat A D and Simon J (eds), *Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism* (Duke University Press 2003).

Sarat A, "'The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor' (1990) 2(2) *Yale Journal of Law & the Humanities* 343.

Sarat A, 'Studying American Legal Culture: An Assessment of Survey Evidence' (1976-7) 11 *Law & Society Review* 427.

Satoru S, 'Defying Expert's Predictions, Identifying Themselves as Sovereign: Citizen's Responses to Their Service as Lay Judges in Japan' (2010) 43 *Social Science Japan* 8.

Schumann G, 'Beyond Litigation: Legal Education Reform in Japan and What Japan's New Lawyers Will Do' (2005-6) 13 *University of Miami International and Comparative Law Review* 475.

See H, 'The Judiciary and Dispute Resolution in Japan: A Survey' (1982) 10 *Florida State University Law Review* 339.

Seki K, 'Circle of On, Giri and Ninjo: Sociologist's Point of View' (1971) 19(2) 北海道大學文學部紀要 - *The Annual Reports on Cultural Science* 99.

Sexual Offences Act 2003 (UK).

Sharmin S, 'Plural Legal Systems in Malaysia' (2012) 66 *The Journal of Legal Pluralism and Unofficial Law* 49.

Sharp C and Leiboff M (eds), *Cultural Legal Studies: Law's Popular Cultures and the Metamorphosis of Law* (Routledge 2015).

Sher E M, 'Death Penalty Sentencing in Japan Under The Lay Assessor System: Avoiding the Avoidable Through Unanimity' (2001) 20 *Pacific Rim Law & Policy Journal* 635.

Shibahara K, 'Participation of citizens in criminal justice in Japan' in V Kusuda-Smick (ed), *Crime prevention and control in the United States and Japan* (Dobbs Ferry 1990).

Shimpo K, 'Past participants in Japan's lay judge system reveal its challenges' (*The Japan Times*, 2 August 2019), available at <<https://www.japantimes.co.jp/news/2019/08/02/national/crime-legal/past-participants-japans-lay-judge-system-reveal-challenges/#.XbnLEPX7SUk>> accessed 10 October 2019.

Shirakawa T, 'Allow different surnames for married couples' (*The Japan Times*, 7 March 2018), available at <<https://www.japantimes.co.jp/opinion/2018/03/07/commentary/japan-commentary/allow-different-surnames-married-couples/#.W214PI5KiUk>> accessed 10 August 2018.

Siems M M, 'A Network-Based Taxonomy of the World's Legal Systems' (22 March 2014, Durham Law School Working Paper), available at <<http://ssrn.com/abstract=2387584>>.

Siems M M, 'Varieties of Legal Systems: Towards a New Global Taxonomy' (2016) 1(3) *Journal of Institutional Economics* 1.

Siems M, 'Varieties of legal systems: towards a new global taxonomy' (2016) 12(3) *Journal of Institutional Economics* 579.

Siems M, *Comparative Law* (2<sup>nd</sup> edn, Cambridge University Press 2018).

Siems M, *Comparative Law* (Cambridge University Press 2014).

Silbey S, 'Making a Place for a Cultural Analysis of Law' (1992) 17 *Law & Social Inquiry* 39.

Singleton J, 'The Tightly Regulated "Independence" of Japanese Children' (*Nippon.com*, 21 November 2015), available at <<https://www.nippon.com/en/nipponblog/m00096/the-tightly-regulated-independence-of-japanese-children.html>> accessed 21 August 2019.

Skoutaris N, *Territorial Pluralism in Europe: Vertical Separation of Powers in the EU and its Member States* (Hart 2019).

Skya W A and Chow R, *Japan's Holy War: The Ideology of Radical Shintō Ultrationalism* (Duke University Press 2009).

Smith M, 'Comparative Law and Legal Culture: A Tribute to David Allen and Mary Hiscock' (2003) 15(2) *Bond Law Review*, 25.

Soldwedel A F, 'Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants' [2008] *Vanderbilt Journal of Transnational Law* 1417.

Spacey J, 'What is a Gokon?' (*Japan Talk*, 10 October 2015) < <http://www.japan-talk.com/jt/new/gokon>> accessed 17 November 2015.

Spacey J, 'Why You Need to Read the Air in Japan' (*Japan Talk*, 6 March 2009, updated 23 February 2015) <<http://www.japan-talk.com/jt/new/kuuki-yomenai>> accessed 26 January 2016.

Stanley A, 'Adultery, Punishment and Reconciliation in Tokugawa Japan' (2007) 33(2) *The Journal of Japanese Studies* 309.

Steele S, 'Elderly Offenders in Japan and the saiban'in seido (Lay Judge System): Reflections Through a Visit to the Tokyo District Court' (2015) 35(2) *Japanese Studies* 223.

Steele S, 'Proposal to Reform the Japanese Saiban'in Seido (Lay Judge System) to Exclude Drug-related Cases: Context and Complexities from the Chiba District Court' (2015) 16(1) *Australian Journal of Asian Law* 1.

Steinhoff P G, 'Pursuing the Japanese Police' (1993) 27 (4) *Law & Society Review* 827.

Sugimoto Y, 'Making Sense of Nihonjinron' (1999) 57 *ThesisEleven* 81.

Sugimoto Y, *An Introduction to Japanese Society* (4<sup>th</sup> edn, Cambridge University Press 2014).

Sunstein C S, Jolls C, and Thaler R H, 'A Behavioural Approach to Law and Economics' (1998) 50 *Stanford Law Review* 1471.

Supreme Commander for the Allied Power, 'Directive for the Disestablishment of State Shinto' reprinted in I Reader, E Andreasen and F Stefánsson (eds), *Japanese Religions: Past and Present* (University of Hawaii Press 1993).

Suzuki M and Otani A, 'Myths of restorative features in the Japanese justice system and society: the role of apology, compensation and confession, and application of reintegrative shaming' (2017) 5(2) *Restorative Justice* 158.

Suzuki M, 'Cruel, secretive and politically popular: Japan's death penalty' (*The Japan Times*, 12 September 2018), available at

<<https://www.japantimes.co.jp/news/2018/09/12/national/social-issues/cruel-secretive-politically-popular-japans-death-penalty/#.XVvi8iNKiUk>> accessed 20 August 2019.

Takami K, 'From Divine Legitimacy to the Myth of Consensus: The Emperor System and Popular Sovereignty' in Y Higuchi (ed), *Five Decades of Constitutionalism in Japanese Society* (University of Tokyo Press 2001).

Takayanagi K, 'A Century of Innovation: The Development of Japanese Law, 1868-1961', in A T von Mehren (ed), *Law In Japan: The Legal Order In A Changing Society* (Harvard University Press 1963).

Takemae E, *Allied Occupation of Japan* (A & C Black 2003).

Takigawa Y, Baishin Hō [The Jury Act] (Nihon Hyoronsha 1936) 42, cited in A Dobrovolskaia, 'Japan's Past Experiences with the Institution of Jury Service' (2010-11) 12 *Asia-Pacific Law & Policy Journal* 1.

Takizawa N, 'Religion and the State in Japan' (1988) 30 *Journal of Church and State* 89.

Tamanaha B Z, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375.

Tay A E, 'Law and "Legal Culture"' [1983] *Bulletin of the Australian Society of Legal Philosophy* 15.

Taylor K E, 'Japan: Colonization and settlement' (*The Encyclopedia of Global Human Migration*, 4 February 2013), available at <<https://onlinelibrary.wiley.com/doi/full/10.1002/9781444351071.wbeghm319>>.

Taylor V, Britt R R, Ishida K, and Chaffee J, 'Introduction: Nature of the Japanese Legal System' in L Nottage (ed) *Business Law in Japan* (CCH Asia Pacific 2008).

Taylor von Mehren A, 'The Legal Order in Japan's Changing Society: Some Observations' (1963) 76 *Harvard Law Review* 1170, 1172-1173.

Teubner G, "'Global Bukowina": Legal Pluralism in the World Society', in G Teubner (ed.), *Global Law Without a State* (Aldershot 1997).

Teubner G, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences' (1998) 61 *Modern Law Review* 11.

The Asahi Shimbun, '18,000 protest constitutional revision in front of Diet building' (*The Asahi Shimbun*, 4 November 2018), available at <<http://www.asahi.com/ajw/articles/AJ201811040022.html>> accessed 21 August 2019.

The Associated Press, 'Lay judge system starts in Japan amid lingering concerns' (*pddnet*, 20 May 2009) available at <<https://www.pddnet.com/news/2009/05/lead-lay-judge-system-starts-japan-amid-lingering-concerns>> accessed 10 October 2016.

The Economist, 'The honne and the tatemae: Big business in Japan publicly supports Abenomics whilst being privately wary' (*The Economist*, 9th November 2013) <<http://www.economist.com/news/business/21589412-big-business-japan-publicly-supports-abenomics-while-being-privately-wary-honne-and>> accessed 10 November 2015.

The Japan Times, 'Lay judges' moral dilemma,' (*The Japan Times*, 21 March 2014) available at <<https://www.japantimes.co.jp/opinion/2014/03/21/editorials/lay-judges-moral-dilemma/#.XGAnAPn7SUK>> accessed 10 February 2019.

The Japan Times, 'Reduce the burden on lay judges' (*The Japan Times*, 24 November 2018) available at <<https://www.japantimes.co.jp/opinion/2018/11/24/editorials/reduce-burden-lay-judges/#.XGAKNPn7SUK>> accessed 10 February 2019.

The Japan Times, 'Reflecting citizens' views on justice' (*The Japan Times*, 29 July 2014) available at <[https://www.japantimes.co.jp/opinion/2014/07/29/editorials/reflecting-citizens-views-justice/#.XGAKZ\\_n7SUK](https://www.japantimes.co.jp/opinion/2014/07/29/editorials/reflecting-citizens-views-justice/#.XGAKZ_n7SUK)> accessed 10 February 2019.

The Japan Times, 'Reviewing the lay judge trial system' (*The Japan Times*, 24 January 2019) available at <[https://www.japantimes.co.jp/opinion/2019/01/24/editorials/reviewing-lay-judge-trial-system/#.XGAKN\\_n7SUK](https://www.japantimes.co.jp/opinion/2019/01/24/editorials/reviewing-lay-judge-trial-system/#.XGAKN_n7SUK)> accessed 10 February 2019.

The Japan Times, 'Stressful hearings for lay judges' (*The Japan Times*, 30 April 2013) <<https://www.japantimes.co.jp/opinion/2013/04/30/editorials/stressful-hearings-for-lay-judges/#.XGAnBvn7SUK>> accessed 10 February 2019.

The Japan Times, 'What 2011 means for Japan in 2012 and beyond' (*The Japan Times*, 01 January 2012) available at <<http://www.japantimes.co.jp/news/2012/01/01/national/what-2011-means-for-japan-in-2012-and-beyond/#.VZ1BDUZWV2A>> accessed 01 July 2015.

The Justice System Reform Council, Chûkan hôkoku [Interim report] (2000), available at <[https://www.kantei.go.jp/jp/sihouseido/report/naka\\_houkoku.html](https://www.kantei.go.jp/jp/sihouseido/report/naka_houkoku.html)>.

The Okinawa Times, 'Lose your wallet or cash in Okinawa? It's more than likely you'll get them back, police data shows' (*The Japan Times*, 12 March 2019) available at <[https://www.japantimes.co.jp/news/2019/03/12/national/lose-wallet-cash-okinawa-likely-youll-get-back-police-data-shows/#.Xr\\_T1mhKjIW](https://www.japantimes.co.jp/news/2019/03/12/national/lose-wallet-cash-okinawa-likely-youll-get-back-police-data-shows/#.Xr_T1mhKjIW)> accessed 16 May 2020.



Thomson S, 'Mixed Jurisdiction and the Scottish Legal Tradition: Reconsidering the Concept of Mixture (2014) 7 *Journal of Civil Law Studies* 51.

Thornton S R, 'An Examination of the Compatibility and Effectiveness of the Foreign Legal Systems Partially Adopted in Japan' (1999) 7 *Lawasia Journal* 84.

Tipton E K, *Modern Japan* (Taylor & Francis Ltd 2008).

Toharia J J, 'Exploring Legal Culture: A Few Cautionary Remarks from Comparative Research' in R W Gordon and M J Horwitz (eds.), *Law, Society and History: Themes in the Legal Sociology and History of Lawrence M Friedman* (Cambridge University Press 2011).

Toshikuni M and Keiichi M, 'Order in the Court: Explaining Japan's 99.9% Conviction Rate' (*Nippon.com*, 18 January 2019), available at <<https://www.nippon.com/en/japan-topics/c05401/order-in-the-court-explaining-japan%E2%80%99s-99-9-conviction-rate.html>> accessed 12 August 2019.

Tourkochorit I, 'Comparative Rights Jurisprudence: An Essay on Methodologies' (2017) *Law and Method* 1.

Triandis H C, 'Collectivism and individualism as cultural syndromes' (1993) 27 *Cross Cultural Research* 155.

Trinidad G J D, 'Honne and Tatemae: Exploring the Two Sides of Japanese Society' (2014) Thesis, University of Iceland 1.

Trubek D M, 'Where the Action Is: Critical Legal Studies and Empiricism' (1984) 36 *Stanford Law Review* 575.

Twining W, 'Diffusion of Law: A Global Perspective' (2004) 49 *Journal of Legal Pluralism* 1.

Twining W, *Globalisation and Legal Theory* (Northwestern University Press 2001).

Tyler T R and Kerstetter W, 'Moral Authority in Law and Criminal Justice: Some Reflections on Wilson's The Moral Sense' (1994) 13 *Criminal Justice Ethics* 44.

Tzevelekos V P and Lixinski L, 'Towards a Humanized International "Constitution"?' (2016) 29 *Leiden Journal of International Law* 343.

UC Hastings Law Library, 'Japanese Law Research Guide: Legal System and Statistics' (26 April 2017) available at <<http://libguides.uchastings.edu/japan-law/legal-system-stats>> accessed 3 May 2017.

Uchtmann D L, Blessen R P, and Maloney V, 'The Developing Japanese Legal System: Growth and Change in the Modern Era' (1987-88) 23 *Gonzaga Law Review* 349.

Umemori N, 'Politics of Flogging: The Making of Japanese Colonial Governmentality' (2006) 363 *The Waseda Journal of Political Science and Economics* 37.

Upham F K, 'Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary' (2005) 30 *Law & Social Inquiry* 421.

Upham F K, *Law and Social Change in Postwar Japan* (Harvard University Press 1987).

Ushiku I, 'Group responsibility drawback' (*The Japan Times*, 2 August 2012), available at <https://www.japantimes.co.jp/opinion/2012/08/02/reader-mail/group-responsibility-drawback/#.XWUdfCNKiUk> accessed 21 August 2019.

Valiante D, 'Harmonising Insolvency Laws in the Euro Area: Rationale, stocktaking and challenges' (2016) 153 *CEPS Special Report* 1.

van Aeken K, 'Civil court litigation and alternative dispute resolution' in D S Clark, *Comparative Law and Society* (Edward Elgar 2012).

van der Merwe C, 'The Origin and Characteristics of the Mixed Legal Systems of South Africa and Scotland and Their Importance in Globalisation' (2012) 18 *Fundamina* 91.

van Hoecke M and Warrington M, 'Legal Cultures and Legal Paradigms: Towards a New Model for Comparative Law' (1998) 47 *International and Comparative Law Quarterly* 495.

van Niekerk G J, 'A common law for South Africa: Roman law or indigenous African law?' (1998) 31 *Comparative & International Law Journal of South Africa* 158.

van Niekerk G J, 'Harmonisation of Indigenous Laws in Southern Africa' (2008) 14 *Fundamina* 155.

Vanoverbeke D, *Juries in the Japanese Legal System: the continuing struggle for citizen participation and democracy* (Routledge 2015).

Visser D, 'Cultural Forces in the Making of Mixed Legal Systems' (2003) 78 *Tulane Law Review* 41.

Vize J, 'Torture, Forced Confessions, and Inhuman Punishments: Human Rights Abuses in the Japanese Penal System' (2003) 20(2) *Pacific Basin Law Journal* 329.

Wagatsuma H and Rosett A, 'The Implications of Apology: Law and Culture in Japan and the United States' (1986) 20(4) *Law & Society Review* 461.

Waggoner L, 'Privacy of Personal Information in the Financial Services Sectors of the United States and Japan: The Gramm-Leach-Bliley Act and the Financial Service Agency Guidelines (2008-2009) 4(3) *I/S: A Journal of Law and Policy for the Information Society* 873.

Waldron J, '*Nonsense Upon Stilts: Bentham, Burke, and Marx on the Rights of Man* (Routledge 1987).

Wallace B, 'Slow-to-Judge Japanese trials prompt anger, return of juries' (*Seattle Times*, 24 January 2005) available at <<https://www.seattletimes.com/nation-world/slow-to-judge-japanese-trials-prompt-anger-return-of-juries/>> accessed 24 January 2019.

Wallace C J, 'Law, culture and Euro-crime: using Spiral to teach French law' (2014) *Law Teacher* 154.

Wallner F G and Jandl M J, 'The Importance of Constructive Realism for the Indigenous Psychologies Approach' in U Kim, K Yang, and K Hwang (eds.), *Indigenous and Cultural Psychology: Understanding People in Context* (Springer Science and Business Media Inc 2006).

Walmsley R, 'World Prison Population List (12th edn)' (2018) *World Prison Brief, Institute for Criminal Policy Research*.

Warden Lee R, 'The Civil Law and the Common Law – A World Survey' (1915) 14 *Michigan Law Review* 89.

Wardle L D, 'Crying Stones: A Comparison of Abortion in Japan and the United States' (1993) 14 *New York Law School Journal of International & Comparative Law* 183.

Watson A, *Legal Transplants* (2nd edn, University of Georgia Press 1993).

Watson A, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974).

Watson I, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge 2015).

Watts R E, 'Briefing the American Negotiator in Japan' (1982) 16 *International Law* 597.

Weber I, 'The New Japanese Jury System: Empowering the Public, Preserving Continental Justice' (2009) 4 *East Asia Law Review* 125.

West M D, 'Losers: Recovering Lost Property in Japan and the United States' (2003) 37(2) *Law and Society Review* 369.

West M D, *Law in Everyday Japan: Sex, Sumo, Suicide and Statutes* (University of Chicago Press 2005).

West R, 'Jurisprudence and Gender' in K T Barlett and R Kennedy (eds.), *Feminist Legal Theory: Readings in Law and Gender* (Westview Press 1991).

White D, 'Some Problems of a Hybrid Legal System: A Case Study of St. Lucia' (1981) 30 *International & Comparative Law Quarterly* 862.

Wieacker F, 'Foundations of European Legal Culture' (1990) 38 *American Journal of Comparative Law* 1.

Wierzbicka A, *Understanding Their Cultures Through Their Key Words: English, Russian, Polish, German and Japanese* (Oxford University Press 1997).

Williams K D and Nida S A, 'Ostracism: Consequences and Coping' (2011) 20 *Current Directions in Psychological Science* 71.

Williams R, *Keywords: A Vocabulary of Culture and Society* (Croon Helm 1983).

Williams R, *The Long Revolution* (Chatto and Windus 1961).

Wilson M J, 'Japan's Lay Judge System: Expectations, Accomplishments, Shortfalls, and Possible Expansion' (28 May 2014), available at SSRN: <<https://ssrn.com/abstract=2443208>> or <<http://dx.doi.org/10.2139/ssrn.2443208>>.

Wilson M J, 'Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time' (2009-10) 33 *Fordham International Law Journal* 487.

Wilson M J, 'Prime Time For Japan To Take Another Step Forward In Lay Participation: Exploring Expansion To Civil Trials' (2013) 46 *Akron Law Review* 641.

Wilson M J, 'Seeking to change Japanese society through legal reform' in J Kingston (ed), *Critical Issues in Contemporary Japan* (Routledge 2014).

Wilson M J, 'The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?' (2007) 24(4) *Wisconsin International Law Journal* 835.

Wolff L, 'Litigiousness in Australia: Lessons from Comparative Law' (2013) *Deakin Law Review* 271.

Wollschlager C, 'Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Legal Culture in Light of Judicial Statistics' in H Baum (eds), *Japan: Economic Success and Legal System* (Walter de Gruyter 1997).

Woodard W P, *The Allied Occupation of Japan 1945 – 1952 and Japanese Religions* (E J Brill 1972).

World Prison Brief, 'Japan' (N.D, World Prison Brief), available at <<http://www.prisonstudies.org/country/japan>> accessed 10 August 2018.

Wren H G, 'The Legal System of Pre-Western Japan' (1968) 20 *Hastings Law Journal* 217.

Wright S, *International Human Rights, Decolonisation and Globalisation* (Routledge 2001).

Yamamura E, 'What discourages participation in the lay judge system (Saiban'in seido) of Japan?: an interaction effect between the secrecy requirement and social network' (2009) *Munich Personal RePEc Archive*, available at <<https://mpra.ub.uni-muenchen.de/15920/>>.

Yamanouchi N and Cohen S J, 'Understanding the Incidence of Litigation in Japan: A Structural Analysis' (1991) 25 *International Law* 443.

Yanase N, 'Deliberative Democracy and the Japanese Saiban-in (Lay Judge) System' (2016) 3 *Asian Journal of Law and Society* 327.

Yoshida M, 'Giri: A Japanese Indigenous Concept' (*Cleveland State University*, 8 October 1996) <<http://academic.csuohio.edu/makelaa/history/courses/his373/giri.html>> accessed 01 December 2014.

Yoshida M, 'The Reluctant Japanese Litigant: A "New" Assessment' (*Electronic Journal of Contemporary Japanese Studies*, 13 October 2003) available at <<http://www.japanesestudies.org.uk/discussionpapers/Yoshida.html>> accessed 15 August 2012.

Yoshida R, 'Japan census report shows surge in elderly population, many living alone' (*The Japan Times*, 29 June 2016), available at <<https://www.japantimes.co.jp/news/2016/06/29/national/japan-census-report-shows-surge-elderly-population-many-living-alone/#.XWUbmCNKiUk>> accessed 21 August 2019.

Yoshimoto M, *Kurosawa: Film Studies and Japanese Cinema* (Duke University Press 2000).

Yu P K, 'Customizing Fair Use Transplants' (2018) 7(1) *Laws* 9.

Zander A, 'The Value of Belonging to a Group in Japan' (1983) 14(1) *Small Group Behaviour* 3.

Zhang Z, 'Human Being and Culture and Law' (2005) 2(2) *United States-China Law Review* 1.

Zhang Z, 'The Inheritances and Variation of Confucian Family Culture – Concept of Family Household and Group Consciousness in Japanese Social Culture' (2017) 82 *Advances in Computer Science Research* 960.

Zimmermann R, *Roman Law, Contemporary Law, European Law* (Oxford University Press 2001).

Zweigert K and Kötz H, *An Introduction to Comparative Law* (2<sup>nd</sup> edn, Oxford University Press 1992).

Zweigert K and Kötz H, *An Introduction to Comparative Law*, Tony Weir (trs.) (3<sup>rd</sup> edn, Oxford University Press 1998).