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## Japan as a Postmodern Legal Reality

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## JAPAN AS A POSTMODERN LEGAL REALITY

*Rosemary L. Harding and Antonios E. Platsas*

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### I. INTRODUCTION

Japanese law is of postmodern essence. Subsequent to the end of the Tokugawa era and as awareness of Japan's legal environment grew, Japanese law began to be described as postmodern. When considered on an international basis, Japan is truly a unique society, engaging in extensive transnational activities while still retaining a distinctly 'Japanese' identity. This article posits that Japan has attained a state of postmodernity in many respects, but particularly in its approach to law and its legal environment. As evidence of this claim, this article will consider the historical and contemporary aspects of Japanese law, including the legal reforms since 1868 and the role of socio-cultural influences, such as the culture of apology and the profound concept of giri.

### II. THE RISE OF MODERN JAPAN

The conventional beginning of Japan as a modern legal reality must be that which commenced with the Meiji Restoration in 1868. There have been two parallel moves in Japan post 1868: one that moved Japan towards modernism, and another that moved Japan back

toward an imperial structure. In this exposition, the authors are interested in exploring the initial Japanese turn towards legal modernism, as this brought about a postmodern legal reality—the contemporary reality of legal Japan. Beyond this, it has to be stated that much of Japan's current legal state has arisen from its testing of other legal models, and either adapting or rejecting them in order to create something more suited to its requirements.

A brief historical exposition of the post-Meiji Restoration era indicates that the reinstatement of power to Japan's emperor resulted in the decision to modernise, ending the isolation of the *Tokugawa* period.<sup>1</sup> These multifaceted developments led to the adoption of the political and legal facets of the French and German systems,<sup>2</sup> and redefined the place of Japanese society in the world. This swift modernisation was crucial if Japan was to avoid colonisation<sup>3</sup> and, in order to recognize this goal, the authorities sought Western influences for a template from which to build the necessary institutions of government and law.<sup>4</sup>

The Meiji Restoration brought several developments to the Japanese legal system, beginning with its Constitution. With its inceptors looking to build on Western models of constitutionalism due to their perceived strength,<sup>5</sup> the masses formed political groups and campaigned for the establishment of a constitutional government in the hope of founding a democracy.<sup>6</sup> The aim of the citizens was to expand the rights and powers of the people, while limiting those of the emperor and the state; however, the Meiji oligarchs viewed this activism with deep suspicion and sought to disrupt them by prohibiting their activities.<sup>7</sup> Following further pressure from the allied political groups, named the Freedom and Popular Rights Movement

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<sup>1</sup> WILLIAM G. BEASLEY, *THE RISE OF MODERN JAPAN: POLITICAL, ECONOMIC AND SOCIAL CHANGE SINCE 1850* 52–55 (3d ed. 2003).

<sup>2</sup> Sean R. Thornton, *An Examination of the Compatibility and Effectiveness of the Foreign Legal Systems Partially Adopted in Japan*, 7 *LAWASIA J.* 84, 88–89 (1999).

<sup>3</sup> HIROSHI ODA, *JAPANESE LAW* 22 (2d ed. 1999).

<sup>4</sup> *Id.* at 22–23.

<sup>5</sup> Shiva Falsafi, *Civil Society and Democracy in Japan, Iran, Iraq and Beyond*, 43 *VAND. J. TRANSNAT'L L.* 357, 362 (2010).

<sup>6</sup> *Id.* at 362–63.

<sup>7</sup> *Id.* at 363.

(FPRM),<sup>8</sup> the oligarchs hurriedly drafted the Meiji Constitution, which came into effect in November 1890.<sup>9</sup> Following the conventional arrangement of the Prussian Constitution, the Meiji Constitution invested the majority of power in the state and little in the people.<sup>10</sup> However, it was also infused with Lorenz von Stein's theory of 'social monarchy', which, although largely rejected by the principal drafters, manifested in the preservation of social harmony.<sup>11</sup>

Beyond these detailed measures, the Meiji Constitution fell woefully short of declaring civil rights in a manner satisfactory to the people. It contained articles that allowed for freedom of speech, movement, and association, among others; however, when and how these rights were asserted remained squarely within the remit of the law, and thus the hands of the law-maker.<sup>12</sup> Although the formation of the Constitution and the Diet heralded a new era of democracy for Japan, the lack of effectiveness of civil liberties saw the public engaging in a series of protests and riots for over a decade.<sup>13</sup> Far from the American perspective that the Japanese were "undemocratic and feudal,"<sup>14</sup> these protests unified the people in a belief in their constitutional rights and advanced the nation further towards greater democratic reform.

Following defeat in WWII, Japan found itself a country deeply shocked and lost without a clear identity.<sup>15</sup> Relations between Japan and its Asian neighbours were fragile due to Japan's actions during its time of imperialism,<sup>16</sup> and Japan's only method of reparations was through industrial goods and services and transfer of technologies.<sup>17</sup> In

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<sup>8</sup> GEORGE M. BECKMANN, *THE MAKING OF THE MEIJI CONSTITUTION: THE OLIGARCHS AND THE CONSTITUTIONAL DEVELOPMENT OF JAPAN 1868–1891* 43 (2nd ed. 1975).

<sup>9</sup> Falsafi, *supra* note 5, at 363–64.

<sup>10</sup> ANDREW GORDON, *A MODERN HISTORY OF JAPAN: FROM TOKUGAWA TIMES TO THE PRESENT* 92–93 (2003).

<sup>11</sup> Beasley, *supra* note 1, at 77.

<sup>12</sup> Falsafi, *supra* note 5, at 365.

<sup>13</sup> *Id.* at 365.

<sup>14</sup> *Id.* at 367.

<sup>15</sup> Nobuhiko Takizawa, *Religion and the State in Japan*, 30 *CHURCH & ST.* 89, 105 (1988).

<sup>16</sup> F. Quei Quo, *Japan's Role in Asia: A United States Surrogate?* 38 *INT'L J.* 251, 253 (1982–83).

<sup>17</sup> *Id.* at 255.

later decades, ethnic self-confidence was restored with Japan's rapid economic growth and subsequent succession as a global superpower.<sup>18</sup> Despite competition from other Asian countries expectant of information on Japan's technological advancements,<sup>19</sup> Japan kept developing and stayed ahead of its competitors. However, this success was short-lived as the Japanese people realised the loss of their spiritual identity,<sup>20</sup> which had been a foundation of their society. Despite this setback, a distinct reaffirmation of Japanese uniqueness in their culture and traditions was later made,<sup>21</sup> retaining the rather enigmatic character of Japan to the outside world. On a domestic front, Japan sought to almost completely overhaul its legal system and related aspects with a plethora of reforms in the late 1990s.<sup>22</sup> Among these were extensive amendments to the Commercial Code,<sup>23</sup> the introduction of a new Code of Civil Procedure,<sup>24</sup> reintroduction of the lay jury system,<sup>25</sup> and expansion of the admission into the legal profession with the establishment of several specialised law schools.<sup>26</sup> These reforms were implemented with overarching aims of further modernising Japan concurrent with its participation in an increasingly globalised society,<sup>27</sup> increasing the legal consciousness of its population, and promoting greater fairness within all aspects of the legal system.<sup>28</sup> In international relations, the Japanese government was keen to ensure that the only contribution made was a strong message of peace, having

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<sup>18</sup> Takizawa, *supra* note 15, at 105.

<sup>19</sup> Quei Quo, *supra* note 16, at 258–59.

<sup>20</sup> Takizawa, *supra* note 15, at 106.

<sup>21</sup> *Id.* at 106.

<sup>22</sup> Matthew J. Wilson, *Failed Attempt to Undermine the Third Wave: Attorney Fee Shifting Movement in Japan*, 19 EMORY INT'L L. REV. 1457, 1458 (2005).

<sup>23</sup> Matthew J. Wilson, *The Dawn of Criminal Jury Trials in Japan: Success on the Horizon?* 24 WIS. INT'L L.J. 835, 842 (2006–2007).

<sup>24</sup> *Id.*

<sup>25</sup> Matthew J. Wilson, *Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time*, 33 FORDHAM INT'L L.J. 487, 488 (2009–2010).

<sup>26</sup> Peter A. Joy, Shigeo Miyagawa, Takao Suami & Charles D. Weisselberg, *Building Clinical Legal Education Programs in a Country Without a Tradition of Graduate Professional Legal Education: Japan Educational Reform as a Case Study*, 13 CLINICAL L. REV. 417, 418–19 (2006–7).

<sup>27</sup> Wilson, *supra* note 23, at 842–43.

<sup>28</sup> Wilson, *supra* note 25, at 492–93.

been the sole country to suffer an attack by atomic bomb, Japan had even greater incentive to keep the world powers settled.<sup>29</sup>

However, it is also important to remember that despite this apparent uniqueness, Japan is but one of a number of countries influenced by European colonial rule<sup>30</sup> and thus, Japan's novelty appears somewhat limited. Some argue that there is little that is peculiar to Japan with regards to its law<sup>31</sup> and that its upstanding character is largely a myth as it has more in common with its contemporary Western peers than its own past.<sup>32</sup> Indeed, with its recent history of technological advancement, economic expansion, and numerous legal reforms, Japan appears to have lost its identity amid a collage of foreign contributions. And yet there remains a continuous fascination with Japan and Japanese law—a curiosity not only to discover its mixed legal heritage, but also to ascertain those traits that are separate from all of the Western elements. Such characteristics may be the continually low incidence of litigation<sup>33</sup>, coupled with low incarceration rates<sup>34</sup> and a distinctive practice of maintaining traditional harmonistic values.<sup>35</sup> Although recent legal reforms have drawn considerable influence from the West and some aspects of the Japanese system are recognisably changing shape to reflect this, these aspects undoubtedly remain significant markers of Japanese uniqueness, and it is with this duality in mind that this Article will progress.

### III. MODERNITY AND POSTMODERNITY IN LAW AS A WHOLE

In order to provide an adequate explanation of postmodernism and its meanings in the context of this paper, it is first necessary to

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<sup>29</sup> Quo, *supra* note 16, at 260–61.

<sup>30</sup> JOHN O. HALEY, *THE SPIRIT OF JAPANESE LAW* xvi (1998).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at xx.

<sup>33</sup> Eric Feldman, *Legal Reform in Contemporary Japan* 1, 3 (2006). (Scholarship at Penn. Law, Paper 155, 3, 2006), available at [http://lsr.nellco.org/upenn\\_wps/155](http://lsr.nellco.org/upenn_wps/155) (last visited Feb. 20, 2012).

<sup>34</sup> Marc Mauer, *Comparative International Rates of Incarceration: An Examination of Causes and Trends*, *The Sentencing Project* 1, 2 (June 20, 2003), [http://www.sentencingproject.org/doc/publications/inc\\_comparative\\_intl.pdf](http://www.sentencingproject.org/doc/publications/inc_comparative_intl.pdf) (last visited Sep. 15, 2012).

<sup>35</sup> Hideo Tanaka, *The Role of Law in Japanese Society: Comparisons with the West*, 19 *U. BRIT. COLUM. L. REV.* 375, 387 (1985).

examine the features of modernism, both in general theory and then more specifically in law. Many developed countries bear the hallmarks of modernity, and some give the appearance of existing in a post-modern context. Although an initial look at the theories would place them as antitheses,<sup>36</sup> it is submitted rather that the two are complementary and that it is more effective to think of them in this manner.

To supplement the forthcoming discussion, it is important to draw out the distinctions between the various forms of the term 'modern' – 'modernism', 'modernisation' and 'modernity.' The former relates to a type of beginning. In particular, modernism relates to the ideas that drove people towards modernist developments and accompanied them throughout the structuring of modern societies.<sup>37</sup> Modernisation is interconnected with the rise of capitalism and is primarily concerned with the technological, economic, and social processes that developed during that time.<sup>38</sup> Modernity concerns the radical transformation of the lives of the people who live in this rapidly changing and industrialised world.<sup>39</sup> Chronologically, modernity has been charted as far back as 1500.<sup>40</sup> Despite its contemporary nature requiring it to constantly redefine,<sup>41</sup> it places human reason as its focus, determining rationality to be the key to mastering and understanding all aspects of life, such as justice, organisation, and morality.<sup>42</sup> Modernity is about an era of reason. Modernity is about the triumph of reason. This movement towards rationality stimulates society's progression and seeks eventually to liberate all people through its principles.<sup>43</sup> Indeed, reason produces logic and clarity, which are useful tools for consistency and understanding. However,

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<sup>36</sup> See JOHN FROW, *TIME AND COMMODITY CULTURE: ESSAYS IN CULTURAL THEORY AND POSTMODERNITY* 16–17 (1997) (providing an example of plotting the characteristics of modernism and postmodernism as opposites).

<sup>37</sup> BRENDAN EDGEWORTH, *LAW, MODERNITY, POSTMODERNITY: LEGAL CHANGE IN THE CONTRACTING STATE* 6 (2003).

<sup>38</sup> *Id.*

<sup>39</sup> TIM WOODS, *BEGINNING POSTMODERNISM* 6–7 (2d ed. 2009).

<sup>40</sup> MARSHAL BERMAN, *ALL THAT IS SOLID MELTS INTO AIR: THE EXPERIENCE OF MODERNITY* 16–17 (1982).

<sup>41</sup> MIKE FEATHERSTONE, *CONSUMER CULTURE AND POSTMODERNISM* 150 (2d ed. 2007).

<sup>42</sup> PETER CHILDS, *MODERNISM* 17 (2d ed. 2008).

<sup>43</sup> *Id.* at 18.

such universality also gives rise to rigidity and can become a means of social control, in which humanity loses purpose amid the mindless desire to constantly change.<sup>44</sup> This swift series of developments sees modernity regularly mapped through the revolutions of Western Europe.<sup>45</sup> As such, modernity and modernism can be perceived as chronological occurrences with powerful ideological extensions touching upon the very essence of the human being.

Modernism actively engages with the pursuit of finding new ways for exploring how we view the world<sup>46</sup> and looks to objective, yet rather superficial means of analysis, suggesting a move away from the spiritual.<sup>47</sup> The search for a 'grounding' philosophy is inherently characteristic of this theory<sup>48</sup> and it is this aspiration that drives modernist thinking towards its objectives. It is in this level of formalism that law and its practitioners seem to have found a great deal of security to the extent that the suggestion of law existing in a postmodern sense is rather unusual. It has been posited that there is no such thing as postmodern law, only postmodern commentaries on law,<sup>49</sup> because the systems of law and legal practice are founded on respect for authority and appropriate standards.<sup>50</sup>

What does it mean then to be 'modernist'? Modernism relates to the modernist preoccupation of *how*<sup>51</sup> the world is perceived, rather than what is seen in it.<sup>52</sup> Therefore while this determination to explore is creditable, it fails to move beyond the aesthetic into true merit and value. Doubtless, it appears that this 'modernist' way of thinking has heavily influenced the law and the way it is perceived by the majority of laypeople today. As such, formalism finds its place comfortably within the remit of modernism due to its clear structure and standards, alongside another common element of the western legal sphere's system, positivism.

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<sup>44</sup> *Id.*

<sup>45</sup> Featherstone, *supra* note 41, at 148–49.

<sup>46</sup> Woods, *supra* note 39, at 7.

<sup>47</sup> Childs, *supra* note 42, at 18.

<sup>48</sup> MARGARET J. DAVIES, *DELIMITING THE LAW* 3 (1996).

<sup>49</sup> Robert C. Post, *Postmodern Temptations* 4 *YALE J. L. & HUMAN.* 391, 396 (1992).

<sup>50</sup> Edgeworth, *supra* note 37, at 11.

<sup>51</sup> Emphasis added.

<sup>52</sup> Woods, *supra* note 39, at 7.



The law has always been inextricably involved with the medium of language,<sup>53</sup> and issues including representation, interpretation and connotation naturally arise. Misunderstandings on this front lead to unfavourable consequences, and thus the law has a universal requirement for clarity of meaning and purpose. The essence of modernism is useful to the law in that it provides a platform for challenging those provisions that are viewed as unsatisfactory and then legitimising amendments to a universal and absolute standard.<sup>54</sup> Furthermore, modernism operates at its best in the mode of a clear structure, which clearly defines laws via exclusivity<sup>55</sup> and thus serves the purpose of being a framework for civil society. However, it is also within this delineation that the apparent security of legal modernism is threatened. It leaves no room for movement beyond these boundaries and therefore invites challenges from those who consider that improvement is achieved through transgression of boundaries.<sup>56</sup> While this transgression is viewed negatively by the modern thinker,<sup>57</sup> there are arguably scenarios in which this transgression becomes necessary. Despite an initial notion towards the impossibility of such movement, this transgression is facilitated by the pursuit of liberation from limits.<sup>58</sup>

Arising from these shortcomings with modernism is the mode of thinking labelled 'postmodernism', which also operates in many fields, although it has only recently gained notable attention in social sciences and law.<sup>59</sup> Challengingly, there is no one body of ideas that can clearly be labelled as 'postmodern',<sup>60</sup> but there are several themes that continuously appear in discussion. On the surface it is considered as an extremely skeptical view of reality, meaning, and knowledge<sup>61</sup>

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<sup>53</sup> *Id.* at 264.

<sup>54</sup> *Id.* at 11.

<sup>55</sup> Davies, *supra* note 48, at 18–19.

<sup>56</sup> *Id.* at 16

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Woods, *supra* note 39, at 5.

<sup>60</sup> JOHN CLAMMER, DIFFERENCE AND MODERNITY: SOCIAL THEORY AND CONTEMPORARY JAPANESE SOCIETY 16 (1995).

<sup>61</sup> Calvin Massey, *The Constitution in a Postmodern Age*, 64 WASH. & LEE L. REV. 165, 166 (2007).

with characteristics such as depthlessness, parody, disposability, and pastiche at its fore.<sup>62</sup>

As with 'modernism' above, there are other terms in postmodern thinking that must be considered before any detailed discussion can commence; these are postmodernisation, postmodernism and postmodernity. The first refers to an advanced form of capitalism that has instigated, and resulted from, economical, technological and social change.<sup>63</sup> Postmodernism denotes those critical assessments of art and society<sup>64</sup> and looks to fragmentation as a source for these narratives, rebuffing modernism's prior attempts to house everything in a uniform manner.<sup>65</sup> Postmodernity then is the chronological environment in which the prior two aspects (that of postmodernisation and postmodernism) operate, serving as an overarching concept within which the interactions between society and culture are observed.<sup>66</sup> Postmodernity represents a shift away from modernity with new forms of organisation based on diversity,<sup>67</sup> ultimately leading to the fragmentation that modernity finds problematic.<sup>68</sup> This diversity leads to a lack of commitment to a "single truth,"<sup>69</sup> inviting exploration into a space in which the "complex interaction of economic, political and cultural processes" can be studied.<sup>70</sup>

Postmodern thinking applies extensively to social practices;<sup>71</sup> however, it is not understood to have identical meaning in all disciplines.<sup>72</sup> The extent of its worth in a field such as law, where any development is most often protracted, is questionable as postmodernism would appear to have had a comparably smaller impact than in a subject such as art or literature. Postmodern legal critics determine that

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<sup>62</sup> Clammer, *supra* note 59, at 16.

<sup>63</sup> Edgeworth, *supra* note 37, at 7.

<sup>64</sup> *Id.* at 7.

<sup>65</sup> Woods, *supra* note 39, at 14.

<sup>66</sup> Edgeworth, *supra* note 37, at 7.

<sup>67</sup> Featherstone, *supra* note 41, at 3.

<sup>68</sup> Berman, *supra* note 40, at 17.

<sup>69</sup> Myriam D. Cavelti & Victor Mauer, *Postmodern Intelligence: Strategic Warning in an Age of Reflexive Intelligence*, 40 (2) *Security Dialogue* 123, 137 (2009).

<sup>70</sup> Andrew Rathmell, *Towards Postmodern Intelligence*, 17 (3) *Intelligence and National Security* 87, 93 (2002).

<sup>71</sup> Massey, *supra* note 60, at 167.

<sup>72</sup> Woods, *supra* note 39, at 12.

instead of interpreting legal texts to find their meaning, it is critically essential to read any kind of text in order to discover its law that is important.<sup>73</sup> One greatly values this somewhat refreshing approach when considering the increasingly complex and ever-persistent problems that legal practitioners face, and having the law become an adaptable tool for utilisation in these situations arguably creates fairer outcomes. However, the modernist perspective would posit that the inconsistency created by such flexibility is greatly disconcerting; the same problem may merit two different solutions without any standard being used to regulate it. This practical application of the law, while somewhat satisfactory within the grasp of modernism, potentially creates unfavourable results through its limitations. Postmodernism may offer a certain opportunity potentially to go beyond these limitations and evolve into a new form better suited to the challenges that law continues to face from a rapidly transforming society.

We return then to the intrinsically complex relationship between these phenomena, which has revealed itself to be rather akin to a 'continuous engagement'<sup>74</sup> rather than a straightforward historical progression. The proposition is that postmodernism does not necessarily mean the end of modernism,<sup>75</sup> rather the opposite; that postmodernism relies on modernism for its survival<sup>76</sup>. Perhaps the most appropriate approach for understanding the distinction between modernism and postmodernism is by way of a transformation of attitude.<sup>77</sup> This complies with the notion that it is almost impossible to pinpoint a time when modernism and postmodernism transgressed one another.

Although at the head of our argument it is posited that the statement to be addressed is Japan's existence as a postmodern legal reality, there is thinking that most developed societies have already adopted a postmodern identity.<sup>78</sup> Equally, law may resist postmodernism in most Western developed societies, retaining the modernist

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<sup>73</sup> COSTAS DOUZINAS & RONNIE WARRINGTON, *POSTMODERN JURISPRUDENCE: THE LAW OF THE TEXT IN THE TEXT OF THE LAW* ix (1993).

<sup>74</sup> Woods, *supra* note 39, at 6.

<sup>75</sup> *Id.* at 6.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 9.

<sup>78</sup> *Id.* at 2.

devices of formalism and positivism. On the other hand, it is also of note that due to this apparently high occurrence of postmodern law in global society, “a new paradigm of law has emerged,”<sup>79</sup> which has resulted from renovations of economy, state structure, and societal values and considerations.<sup>80</sup> Considering the modern history of Japan as outlined above, this manner of thinking has the potential to match the Japanese state, and provide some explanation for its individualistic legal setting.

An initial consideration of the Japanese approach to law reveals their recognition of the requirement of adapting law over time in response to changing social conditions.<sup>81</sup> In 1923, Izutarō Suehiro considered legislation, being a product of man, as consistently imperfect and unsuitable for the changing world, and the best way to address this flaw was to remain open-minded in modifying legislation accordingly.<sup>82</sup> Such flexibility can be considered a clear marker of postmodern thinking on the mutable meaning of words and signs<sup>83</sup> – a refusal to be bound by static terms and acknowledgement of the limitations of the human mind. Japan’s growing number of statutes may signify an increasing preference for codification of law; however, a great deal of power still remains with the judges, who are able to interpret responsively to the circumstances of the case before them.<sup>84</sup> This implicit trust in judges, even in light of the introduction of the *saiban-in* jury system in 2009 (also known as the European mixed jury system of trial),<sup>85</sup> comes in part from the belief that power does not necessarily corrupt,<sup>86</sup> and places great faith in a fluid approach to law

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<sup>79</sup> Edgeworth, *supra* note 37, at 2.

<sup>80</sup> *Id.* at 3.

<sup>81</sup> Haley, *supra* note 30, at 2.

<sup>82</sup> Jo Izutarō Suehiro, *Preface to Case Law in the Field of Civil Law: 1921*, reprinted in *THE JAPANESE LEGAL SYSTEM: CASES AND MATERIALS* 146, 147 (Hideo Tanaka ed., 1976).

<sup>83</sup> Elizabeth Anderson, *Feminist Epistemology and Philosophy of Science* (Aug. 9, 2000), in *Stanford Encyclopaedia of Philosophy* (Edward N. Zalta ed., 2000), <http://www.science.uva.nl/~seop/entries/feminism-epistemology/>.

<sup>84</sup> Haley, *supra* note 30, at 3–4.

<sup>85</sup> Takuya Katsuta, *Japan’s Rejection of the American Criminal Jury*, 58 *AM. J. COMP. L.* 497, 517 (2010); Meryll Dean, *Legal Transplants and Jury Trial in Japan*, 31(4) *Legal. Stud.* 570, 581–85 (2011).

<sup>86</sup> Katsuta, *supra* note 84, at 509.

and justice. This view does not necessarily breed instability, but rather seeks to find an application of law most agreeable with Japanese customs and values, which are fixed at the core of society.

The hallmarks of modernism, as described above, apply immutably to Japan, with its industrial and technological advancements making it the third largest economy in the world.<sup>87</sup> Alongside Japan's recent legal reforms, it has made the appearance of engaging with other world superpowers, especially the United States, in a distinctly modernist manner as befitting developed Western countries. However, its social structure remains distinctly traditional, bearing practices and beliefs almost unchanged since the feudal *Tokugawa* era, running parallel to its sophisticated, capitalistic culture in a manner deemed 'inappropriate' by some commentators.<sup>88</sup> This dichotomy has been the centre of debate for many scholars, some of whom determine that Japan is indisputably *the* postmodern society<sup>89</sup> and others who contend that it has not yet reached modernity.<sup>90</sup> These views have been written with social considerations at their core. However, it is accepted that postmodernism is not a solely cultural phenomenon,<sup>91</sup> and its influence, among other fields, extends to law. As a preliminary finding, it is submitted that law is developed to suit the needs of the society it operates in, and those principles upon which it is formed are based upon social values.<sup>92</sup> In Japan, social values of group cohesion and mutual dependency<sup>93</sup> relate directly to legal practices of alternate dispute resolution<sup>94</sup> and the rehabilitative and restorative focus of the criminal justice system.<sup>95</sup> Despite the pre-modern origins of Japanese

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<sup>87</sup> *Japan Profile*, BBC NEWS (July 23, 2009), *Japan profile - Overview* (13 August 2012) available at <http://www.bbc.co.uk/news/world-asia-pacific-15219730> (last visited Aug. 24, 2012).

<sup>88</sup> Clammer, *supra* note 59, at 13.

<sup>89</sup> *Id.* at 4.

<sup>90</sup> Masao Maruyama, *Patterns of Individuation and the Case of Japan: A Conceptual Scheme*, in *Changing Japanese Attitudes Toward Modernization* 489, 489–531 (Marius B. Jansen ed., 1985).

<sup>91</sup> SCOTT LASH, *SOCIOLOGY OF POSTMODERNISM* 4 (1990).

<sup>92</sup> JOY HENDRY, *UNDERSTANDING JAPANESE SOCIETY* 231 (3d ed. 2003).

<sup>93</sup> See generally Dean J. Gibbons, *Law and the Group Ethos in Japan*, 3 INT'L LEGAL PERSP. 98 (1990–1992).

<sup>94</sup> Oda, *supra* note 3, at 78–80.

<sup>95</sup> Clammer, *supra* note 59, at 6.

society, these have been argued to be inherently postmodern in their quality, and may always have been so.<sup>96</sup> This brief analysis points towards a postmodern legal environment built upon the responses to the needs of Japanese society.

However, this approach needs substantial consideration before this position can be satisfactorily asserted. Of primary importance is the origin of modern and postmodern thinking – the West. It has been argued that modernisation of Japan did not necessarily breed definitive modernity.<sup>97</sup> Indeed, the extent to which a Western idea can apply to non-Western countries is limited. It is questionable whether it is entirely legitimate to impose these Western theories upon Japan in the first place,<sup>98</sup> and if the differences often discovered between the epistemological bases<sup>99</sup> are enough to merit postmodernism as a suitable medium of analysis. It will be argued that Japan falls in the postmodern legal sphere for a number of reasons, which will be expounded upon to fully assert the statement proposed.

#### IV. THE POSTMODERNIST LEGAL ESSENCE OF JAPAN: THE PRINCIPLE OF GIRI

An examination of the unique concept of *giri* allows a better understanding of its significant effect on the evolution of Japan's postmodern legal reality. *Giri* is a cultural phenomenon exclusive in its application to Japan and operating alongside other codified practices in everyday dealings. The combination of *giri* and formal legal doctrine results in Japan's postmodern legal reality. The principle of *giri* finds its roots deep in Japanese history, but manifests more clearly in this context of the *Tokugawa* period. At this time, Confucian code made ethics and law synonymous.<sup>100</sup> Contractual obligations went beyond legal responsibility to representing one's own honour, as well as the honour of one's family and descendants.<sup>101</sup> Within the current state of Japan's environment, *giri* can be seen as the fundamental philosophical

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<sup>96</sup> *Id.* at 14.

<sup>97</sup> *Id.* at 22.

<sup>98</sup> *Id.* at 15.

<sup>99</sup> *Id.* at 29.

<sup>100</sup> Paul Langsing & Marlene Wechselblatt, *Doing Business in Japan: The Importance of the Unwritten Law*, 17 INT'L L. 647, 649 (1983).

<sup>101</sup> *Id.* at 649.

underpinning that regulates behaviour in all manner of interactions as the main influence on the Japanese view of the role of law in society.<sup>102</sup>

Quintessentially, *giri* is a set of rules that governs social conduct and is often concurrent with the obligations of *on*, which represents the intangible debts that everyone in society is compelled to fulfil.<sup>103</sup> *Giri*, literally translated, denotes just and reasonable behaviour,<sup>104</sup> which is “required of one person to others in consequence of his social status.”<sup>105</sup> Noticeably, the obligations that each person is subjected to are not equal. However, it is acknowledged that each party still owes *giri* to the other.<sup>106</sup> In social interactions, *giri* requires that an individual may be called upon at any time by the benefactor, and whether he is willing or not, he is obliged to give aid to the benefactor.<sup>107</sup> *Giri* also functions in reference to those debts passively incurred by an individual to those of great importance, such as the emperor, the law, and one’s parents.<sup>108</sup> These debts can never be fully repaid, despite the individual’s *gimu*, or duty, to provide their greatest efforts in doing so.<sup>109</sup> This life-long responsibility seems to imbue the Japanese with a highly developed sensitivity of their actions towards others. It is logical to see how this manner of thinking provides the drive for *wa*, or harmony, the goal of Japanese society.

Together *giri* and *on* promote *wa*,<sup>110</sup> which in its most pristine state realises ideal human relationships through social roles which are properly performed.<sup>111</sup> The spirit of *wa* embodies benevolence and affection towards others<sup>112</sup> and gives rise to *ninjō*, which ensures that the rules of *giri* are properly observed and contain the necessary

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<sup>102</sup> Donald L. Uchtmann et al., *The Developing Japanese Legal System: Growth and Change in the Modern Era*, 23 GONZ. L. REV. 349, 351 (1988).

<sup>103</sup> Chin Kim & Craig M. Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 INT’L & COMP. L.Q. 491, 499 (1979).

<sup>104</sup> YOSIYUKI NODA, INTRODUCTION TO JAPANESE LAW 175 (1976).

<sup>105</sup> *Id.* at 175.

<sup>106</sup> *Id.* at 176.

<sup>107</sup> Koya Azumi, *Japanese Society: A Sociological View*, in AN INTRODUCTION TO JAPANESE CIVILIZATION 515, 526 (Arthur Tiedemann ed., 1974).

<sup>108</sup> Kim & Lawson, *supra* note 102, at 499.

<sup>109</sup> Azumi, *supra* note 106, at 525–26.

<sup>110</sup> Kim & Lawson, *supra* note 102, at 499.

<sup>111</sup> *Id.* at 500.

<sup>112</sup> R.E. Watts, *Briefing the American Negotiator in Japan*, 16 INT’L L. 597, 600 (1982).

emotional content of the conduct.<sup>113</sup> *Ninjō* is often referred to in the same instance as *giri-ninjō*<sup>114</sup> and it is this compassion to others that feeds *wa* and perpetuates an ideal society, free from conflict and dispute. However should dispute arise, it is these principles upon which the Japanese people can rely in order to resolve their problems in a harmonious manner. *Giri* stands for moral obligations while at the same time transcending morality into a framework to keep social order.<sup>115</sup> It is not codified but rather than constitute a weakness, this lack of externality towards the principle is something which seems to be greatly respected by the Japanese people and provides guidance for everything that is outside the traditional remit of the law.<sup>116</sup> Each member of society is trusted to be responsible for their own conduct, which causes regulation by law to appear virtually unnecessary.<sup>117</sup> The cultural expectation of *giri* illustrates why the Japanese feel intensely uncomfortable with resorting to law to resolve their disputes. A fundamental characteristic of *giri* is its lack of public enforcement;<sup>118</sup> it is very much an individual duty for the benefit of society as a whole. Failure to do so results in a loss of honour, and in some cases, an individual may even face separation from the community, from which there is little hope of re-integration.<sup>119</sup>

In an analysis of *giri*, one encounters difficulty when trying to determine the level to which the Japanese still practice its principles. There is commentary that suggests the decline of *giri* can be tied to the urbanisation of Japan and the resulting concentration of its population within the cities.<sup>120</sup> This claim seems to have merit when one considers how frequently people relocate in industrial societies. In the developed world, people seem divorced from regular social interaction and tend to live further from the place of their upbringing. Attachment to a particular social group becomes less likely. Because the obligations of *giri* and *on* require such a high level of engagement, it becomes even

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<sup>113</sup> NODA, *supra* note 103, at 176.

<sup>114</sup> *Id.*

<sup>115</sup> Kim & Lawson, *supra* note 102, at 500.

<sup>116</sup> *Id.* at 500–01.

<sup>117</sup> Thornton, *supra* note 2, at 88.

<sup>118</sup> See NODA, *supra* note 103, at 176.

<sup>119</sup> Gibbons, *supra* note 92, at 109–10.

<sup>120</sup> Kim & Lawson, *supra* note 102, at 512.



less likely that these traditions remain particularly prevalent in urban Japanese society. However, it is also true that cultural trends within society are slow to change. This is supported by the preference the Japanese have shown for their traditional roots, despite industrialisation.<sup>121</sup> The level of commentary on *giri* and its relevance to *nihonjinron* (the concept of 'Japanese uniqueness') also give convincing weight to its continued existence. The function of *giri* as an informal community law is largely binding, and consequences for noncompliance are severe enough to warrant its sustainability.

It can be said with certainty that *giri* is not a dead notion, albeit a reduced one in the last fifty years. *Giri* continues to be a powerful influence on Japanese law and society, evidenced by the consistent preferential treatment given to the community by the Japanese authorities.<sup>122</sup> On the other hand, for all *giri's* positive aspects, it does not give rise to individual needs<sup>123</sup> – although social security of the individual as provided by those who owe *giri* covers this to some extent – and thus can leave individuals frustrated. The courts have shown a consistent preference to uphold the values of the community at the expense of the rights of the individual. This alone implies that *giri*, which regulates social conduct, is still very much alive. This reinforcement of the relational view of the self arguably reduces one's autonomy to a significant degree, leading to a weak sense of self outside of the predominant social consortium.<sup>124</sup>

With members of society constantly striving to maintain the balance of *wa*, it would appear that this vast consciousness of other's feelings, and the shame brought on through lack of resolution in conciliation, essentially eliminates the need for law altogether. In the event of a conflict, apology is employed to repair the relationship between the parties.<sup>125</sup> This method appears to be given great worth in Japan, considering that company directors frequently make public apologies in the event of harm caused by that company.<sup>126</sup> If the vast

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<sup>121</sup> HENDRY, *supra* note 91, at 5–6.

<sup>122</sup> See generally Haley, *supra* note 30, at 179.

<sup>123</sup> Uchtmann et al., *supra* note 101, at 351.

<sup>124</sup> CLAMMER, *supra* note 59, at 17.

<sup>125</sup> Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461, 492 (1986).

<sup>126</sup> *Id.* at 487.

majority of the population follow the principles of *giri*, and respect their peers as much as the literature would make it appear, then surely law, as a formal authority, seems intrusive on matters which ordinary people would much prefer to settle privately, between themselves. In Japan, law seems to be introducing unnatural, precise measures, by which parties are sorted into winning and losing categories, forever dividing them into a state in which a harmonious relationship cannot be restored. Furthermore, legal measures bring into account details which the Japanese consider ugly and would rather avoid, and unnecessarily complicate the resolution beyond the simple matter of one person owing a debt to another. Although these debts – and their corresponding credits – may be prolific, the system is one with which the Japanese are apparently very familiar and they know well how to properly administrate it. One writer summarised the Japanese attitude towards law as one of unanimous dislike.<sup>127</sup> Although the truth is not so simplistic, it is likely that “unanimous dislike”<sup>128</sup> is not far removed from the attitude of the Japanese today.

How then is *giri* to be postmodern, if it is immovable in structure and application? The answer lies in the social context that *giri* falls within. *Giri*'s lack of codification makes clear that it has no formal influence in Japan's legal structure. The legal structure itself, as considered above, has modern Western origins and has been suitably adapted for Japanese use. Although these regulations are in place, *giri* still governs much of community activity. For example, in spousal relationships, which are covered in the Civil Code borrowed from the French legal system, issues are governed by *giri* to the extent that the Code is not even brought into peripheral consideration.<sup>129</sup> Furthermore, it symbolises the submission of the individual to society,<sup>130</sup> a concept that Western observers have struggled with. Nonetheless, it provides the Japanese a concept of rationalism that is far removed from the objective reasoning typical of modernity. The behavioural rationalism behind *giri* differs substantially from the logic of modernity, yet still remains embedded within the Japanese psyche,

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<sup>127</sup> NODA, *supra* note 103, at 159–60.

<sup>128</sup> *Id.*

<sup>129</sup> Thornton, *supra* note 2, at 88.

<sup>130</sup> Caslav Pejovic, *Japanese Corporate Governance: Behind Legal Norms*, 29 PENN. ST. INT'L L. REV. 483, 518 (2011).

governing decisions and conduct in everyday life. This extensive influence on the masses suggests that *giri* inevitably should come into conflict with formal law at some instance when both govern such similar issues. Certainly, this has demonstrated potential to become a troubling issue when non-Japanese are involved in civil matters, but when only Japanese natives are concerned, *giri* is the only method of resolution consulted.<sup>131</sup> The avoidance of conflict between law and *giri* within Japanese society is akin to two gardeners who tend the same garden, but who do not interact. They perform similar duties, and seal any lacunae left by the other gardener, but do nothing more complementary or confrontational. Modernity would require an intense focus on rationality, which is prevented merely by the presence of *giri* within, or even alongside, the Japanese legal system. It is the strength of this social custom that has largely caused transplanted Western law to function in an entirely different manner in the East.<sup>132</sup> Through this seamless blend of *giri* and the formal legal system, a version of Japan's legal reality emerges, which is distinctly postmodern in nature, in its pragmatism, pastiche and efficiency.

#### V. JAPANESE LEGAL CULTURE AND SOCIETY PER SE

Binding together all the legal considerations mentioned thus far is the complex environment that is Japanese society, and the cultural considerations it brings to the fore. It is necessary to discuss this subject, even though there is much codified statute in Japan, because the extent to which codified statute is appreciated by the Japanese is negligible compared to the importance of social customs. An analysis of *giri* has already shed some light on this issue, but further examination of Japanese societal attitudes towards law is necessary to understanding the postmodern in Japan's legal sphere.

Compared to its population density and status as a developed economy, Japan continues to report an unusually low rate of litigation;<sup>133</sup> a matter that Western observers have continually struggled with. This lack of engagement with the court system has

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<sup>131</sup> Thornton, *supra* note 2, at 88.

<sup>132</sup> Pejovic, *supra* note 128, at 518.

<sup>133</sup> John O. Haley, *Litigation in Japan: A New Look at Old Problems*, 10 WILLAMETTE J. INT'L L. & DIS. RES. 121, 123 (2002).

caused many observers to consider the Japanese as “reluctant litigants.”<sup>134</sup> There are two explanations for this that may be considered separately or conjunctively: lack of access to legal resources, and the power of social customs. The former considers that the majority of lawyers are focused in urban centres such as Osaka and Tokyo,<sup>135</sup> with no incentive to move out into rural areas. The result means that the quality of legal services is greatly inconsistent and has received heavy criticism.<sup>136</sup> Additionally, filing lawsuits is not profitable in Japan due to several reasons, including the high cost of attorney’s fees.<sup>137</sup> Therefore, instead of spending financial assets on a lawsuit that may eventually be lost, the Japanese instead choose to conciliate, intending to provide a more amenable outcome. The Japanese legal system has several methods of alternative dispute resolution built into its framework, and parties will be encouraged to make use of these before moving to formal litigation.<sup>138</sup>

The alternative explanation, power of social customs, has been given extensive consideration by a number of academics and certainly merits examination here, as social customs have already been shown to have considerable clout compared to the law. The strong, pyramid-like social structure maintained throughout the Tokugawa period made it the responsibility of the superior to resolve conflict in a manner most harmonious for the group,<sup>139</sup> and not to waste time litigating on a single matter.<sup>140</sup> In contemporary Japan, social customs and practices are distinctly reminiscent of historical values and oblige individuals to resolve disputes in a harmonious manner through informality,

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<sup>134</sup> See John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978).

<sup>135</sup> Tom Ginsburg, *Transforming Legal Education in Japan and Korea*, 22 PENN. ST. INT’L L. REV. 433, 436 (2004).

<sup>136</sup> *Id.*

<sup>137</sup> YOSHIO SUGIMOTO, *AN INTRODUCTION TO JAPANESE SOCIETY* 34 (3d ed. 2010).

<sup>138</sup> Andrew M. Pardieck, *Virtuous Ways and Beautiful Customs: The Role of Alternative Dispute Resolution in Japan*, 11 TEMP. INT’L & COMP. L.J. 31, 31–32 (1997).

<sup>139</sup> Langsing & Wechselblatt, *supra* note 99, at 649.

<sup>140</sup> Dan F. Henderson, *Some Aspects of Tokugawa Law*, WASH. L. REV. & ST. B. J. 83, 99 (1952).

consensus and co-operation.<sup>141</sup> Adhering to social customs that were effective during feudal times may seem odd; the industrial development of society has long dissolved the necessity of Tokugawa traditions, but these apparently pre-modern values have a significant impact on the way the Japanese approach law.

One of the more significant cultural developments consistent in almost all interactions in Japan is the practice of apology. A basic assumption is that apology is an integral part of every conflict,<sup>142</sup> and as the Japanese place great significance upon it. Evidence of this is seen in public apologies of corporate directors in the event of mass harm caused by company action,<sup>143</sup> and parties of conflicts regularly citing apology as one of the main outcomes of their resolution.<sup>144</sup> Apology also serves well when one considers the collective nature of Japanese society, and lack of enforcement through law is reinforced through the sanction of group exclusion.<sup>145</sup> Social order is far superior to individual rights,<sup>146</sup> and as such, apology is the mechanism by which the individual displays their commitment to group norms.<sup>147</sup> The "group ethos" has been written about extensively.<sup>148</sup> It does not require any purpose or direction,<sup>149</sup> but is reliant on the loyalty of its members to the group,<sup>150</sup> building ties of considerable strength through loyalty<sup>151</sup> and expectations of morality and trust.<sup>152</sup> Social morality determines what is right and wrong,<sup>153</sup> and in their anxiety over the idea of wrong, the Japanese become very wary of classifying others as wrong through

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<sup>141</sup> Bruce E. Aronson, *Changes in the Role of Lawyers and Corporate Governance in Japan – How Do We Measure Whether Legal Reform Leads to Real Change?*, 8 WASH. U. GLOBAL STUD. L. REV. 223, 223–24 (2009).

<sup>142</sup> Watsugama & Rosett, *supra* note 124, at 462.

<sup>143</sup> *Id.* at 487.

<sup>144</sup> Eric A. Feldman, *Law Across Borders: What Can the United States Learn from Japan?*, 32 HASTINGS INT'L & COMP. L. REV. 795, 797 (2009).

<sup>145</sup> John Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions*, 8 J. JAPANESE STUD. 265, 275–79 (1982).

<sup>146</sup> Langsing & Wechselblatt, *supra* note 99, at 653.

<sup>147</sup> Watsugama & Rosett, *supra* note 124, at 467.

<sup>148</sup> *See generally* Gibbons, *supra* note 92.

<sup>149</sup> Haley, *supra* note 30, at 15.

<sup>150</sup> Gibbons, *supra* note 92, at 105.

<sup>151</sup> *Id.*

<sup>152</sup> *See* Haley, *supra* note 30, at 15.

<sup>153</sup> *See id.* at 16.

incarceration or isolation.<sup>154</sup> This stark contrast of feelings is accepted as a part of social life,<sup>155</sup> as the Japanese maintain great respect and understanding for an individual's outer projection, *tatema*, and the inner, private feelings that constitute *honne*.<sup>156</sup> In concluding conciliation, whether the individual is happy with the outcome or not is not of particular significance.<sup>157</sup> The feelings of never-ending debt to others,<sup>158</sup> alongside the mental list of checks and balances and social obligations, do not give the average Japanese much opportunity to consider their own individual rights and satisfaction.

These social factors provide a convincing explanation for the low rate of litigation. Although there are some formalistic procedures for alternative dispute resolution, indicating an intentional reduction of litigation by the authorities, many conflicts appear to be avoided or resolved through adherence to social customs. Beyond the influence of *giri*, group cohesion is paramount to social survival, and to litigate would jeopardise this. The strength of these community values makes law unfamiliar and seldom employed, on a scale unlike many other countries. Traditional Japanese thought still places law on a pedestal; this may stem from the historical approach in which only magistrates were allowed to read legal texts as guidance, and thus the law summoned about it an air of mystery.<sup>159</sup> Many Japanese admit to owning a legal text and having a peripheral knowledge of the law,<sup>160</sup> but do not assert this knowledge when faced by legal professionals or the police. Instead, many Japanese choose to take an approach of deference and humility.<sup>161</sup> Professionally, the Japanese would rather do business with friends than businessmen, whose calculating nature

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<sup>154</sup> Tetsuya Obuchi, *Role of the Court in the Process of Informal Dispute Resolution in Japan: Traditional and Modern Aspects, With Special Emphasis on In-Court Compromise*, in *LAW IN JAPAN* 74, 80 (1987).

<sup>155</sup> See Watsugama & Rosett, *supra* note 124, at 465.

<sup>156</sup> *Id.*

<sup>157</sup> See Langsing & Wechselblatt, *supra* note 99, at 654.

<sup>158</sup> See Watsugama & Rosett, *supra* note 124, at 474.

<sup>159</sup> Kim & Lawson, *supra* note 102, at 504.

<sup>160</sup> George Schumann, *Beyond Litigation: Legal Education Reform in Japan and What Japan's New Lawyers Will Do*, 13 *U. MIAMI INT'L & COMP. L. REV.* 475, 521 (2006).

<sup>161</sup> See generally DAVID H. BAYLEY, *FORCES OF ORDER: POLICE BEHAVIOR IN JAPAN AND THE UNITED STATES* 50 (1976).

makes them uncomfortable.<sup>162</sup> This approach to laws, which is intended to resolve dispute, demonstrates the Japanese preference for informality and harmony, but also shows a desire for efficiency which litigation would ultimately slow. Following the rational path of modernist thinking and consistently resorting to laws would create numerous cases and stifle the growth of the economy; indeed, when Japan's economy experienced considerable growth, the incidence of litigation was low, and vice versa.<sup>163</sup> Thus these alternative methods are used, to great effect, in a manner that can be considered post-modern in nature.

Postmodernism finds its place quite comfortably within Japanese culture. In fact, its use as a descriptor of Japanese society and culture is rarely disputed.<sup>164</sup> Of particular note is the concept of community and the 'deindividualisation' of the people; indeed, the idea of being 'individualist' carries very negative associations,<sup>165</sup> contradicting the Western perspective which equates 'deindividualised' with dehumanised.<sup>166</sup> However, it is in this lack of individuality that the Japanese find themselves in a state of postmodernity. They are discouraged from an impractical attachment to their own individualism,<sup>167</sup> minimizing undesirable self-centredness and contributing to the collective of Japan. The Japanese view themselves in the context of being around others, developing a relational view of the world and a profound awareness of the impact of their actions upon others. This transcending of individualism features as one of the core characteristics of postmodern thought. The fact that it has emerged on a scale to become an identifying feature of an entire population is remarkable. This altruistic approach to everyday life has fostered a philanthropic foundation to the Japanese legal environment, where laws are administered with the greatest respect for humanistic values. The Japanese view of law is so highly integrated with values from society

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<sup>162</sup> KAZUO NISHIYAMA, *DOING BUSINESS WITH JAPAN: SUCCESSFUL STRATEGIES FOR INTERCULTURAL COMMUNICATION* 88 (2000).

<sup>163</sup> See Graham Mayeda, *Appreciate the Difference: The Role of Different Domestic Norms in Law and Development Reform; Lessons from China and Japan*, 51 MCGILL L.J. 547, 565 (2006).

<sup>164</sup> CLAMMER, *supra* note 59, at 14.

<sup>165</sup> *Id.* at 6.

<sup>166</sup> *Id.* at 19.

<sup>167</sup> *Id.*

that it appears to depart from rationality. Because regulation comes from the community, it is informal, uncodified, and without particular objective standards. It is true that formal law is present in Japan, but it is rarely acknowledged,<sup>168</sup> and would appear not to have fully permeated to the social sphere.<sup>169</sup> The preference for informality strengthens the Japanese tendency to avoid law. Because law is formalised and written down, trust in its power to protect is doubted.<sup>170</sup> Furthermore, the codified form of law is odd for the Japanese, as they place little value on written language in this context.<sup>171</sup> What people do is considerably more important than what they say. For example, the act of apology is what is valued, not the words that are spoken. The act of litigation, not the reasoning, is the focus of shame. This perspective seems quite simple, and the frequent complexities of modernity struggle to comprehend it as such, for it is always looking to challenge possible eventualities. Conversely, the Japanese can and do litigate, and as seen above these incidences are on the rise, although nowhere near on a par with Western states. Some take the low litigation rate to mean that the Japanese are rational litigants who pick their legal battles carefully,<sup>172</sup> suggesting some element of modernist thinking in their approach to law. This is unsurprising considering the Western origin of the legal system, and perhaps, the Japanese have not yet found an alternative to handling litigation in a non-modernist manner. However, the truth remains that the evidence of the postmodernity of Japan's society is overwhelming, and this has had considerable impact on their approach to law, constituting the foundation of the post-modern legal environment.

#### VI. DETERMINING THE STATE OF POSTMODERNITY: A LEGAL 'PASTICHE'

When addressing the question of postmodernism, it is clear that Japan has consciously chosen a significantly different path from other developed countries. The term 'consciously' is used here in

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<sup>168</sup> See Thornton, *supra* note 2, at 84.

<sup>169</sup> Ichiro Kitamura, *The Role of Law in Contemporary Japanese Society*, 34 VICTORIA U. WELLINGTON L. REV. 729, 733 (2003).

<sup>170</sup> Mayeda, *supra* note 161, at 565, 572.

<sup>171</sup> Richard B Parker, *Law, Language, and the Individual in Japan and the United States*, 7 WIS. INT'L L.J. 179, 180 (1989).

<sup>172</sup> Pardieck, *supra* note 136, at 33.



reference to the constant desire of Japan to learn about and from others. This is evidenced by the Judicial System Reform Council's research into other judicial systems<sup>173</sup> and legal curriculums.<sup>174</sup> In its development to its contemporary state as a whole, Japan has adopted an unmistakably modernist outlook, with capitalism interwoven into every level of society.<sup>175</sup> Indeed, the legal reforms implemented in the previous two decades have been founded on the essence of the modernist values of its Western counterparts. And yet the foundations of these movements have only been approved after careful consideration of the needs of society – which law is always built to serve – and it is this Confucian core that lies at the heart of an otherwise capitalist civilisation. The existence of this organisation has been the source of discontentment for many commentators,<sup>176</sup> a common theme throughout the greater part of this paper and ultimately the central point upon which the debate of this paper turns.

Postmodern characteristics that Japan exhibits are its eclecticism, impermanence, parody and a legal pastiche.<sup>177</sup> These traits have proven to permeate into every major legal consideration of the past few decades, including its social structure despite its traditionalist grounding.<sup>178</sup> However, one must not be too quick to equate being Japanese with being postmodern, as some of their traditions have an immovability that relates more directly to modernity, or even pre-modernity. The postmodern approach, to a great extent, still subscribes to a degree of logic, but is not bound by the stringent processes of rationality.

The ensuing concept denotes that the postmodern state of the Japanese legal environment is a 'pastiche'; that is to say that it is made up of many pieces that in some form parody their origin. There are some pieces, such as the principle of *giri*, which, although historically rooted, serve as an important foundation of society and regulate without definable limits – arguably a postmodern element. There are others, such as the greater incidence of litigation in recent years, that

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<sup>173</sup> Katsuta, *supra* note 84, at 522.

<sup>174</sup> Joy et al., *supra* note 26, at 420.

<sup>175</sup> CLAMMER, *supra* note 59, at 13.

<sup>176</sup> *See generally id.*

<sup>177</sup> *Id.* at 14.

<sup>178</sup> *Id.* at 15.

demand the precision and clear definition that modernism requires. These two examples, each of pre-modernity and modernity, make up part of the pastiche. Although the Japanese legal environment clearly contains these pre-modern and modern elements, which is not to say that it cannot be postmodern. Indeed, much of its postmodernism stems from this legal pastiche, as it does not entirely reject these other elements, but rather embraces them for the greater effectiveness of its legal setting as a whole. Japan may have developed a postmodern socio-cultural environment from its pre-modern origins, which, in its pursuit of eclecticism and contentment in fragmentation, comfortably received modernist developments in capitalism with little upheaval to its fundamental structures.<sup>179</sup> These quiet, sophisticated rebellions have characterised the more recent aspects of Japanese history without becoming markedly revolutionist.<sup>180</sup> The legal pastiche is further characterised in the apparently dualistic nature described by Benedict,<sup>181</sup> and it is these opposing traits, running concurrently together, that contribute to the state of Japan as a postmodern legal reality.

Although it has been established that modernity and post-modernity exist alongside each other, and in some respects have chronological progression, this may not necessarily be the case for Japan. To clarify, Japan may have always existed as a postmodern legal reality without ever having a period of legal modernity – indeed its tradition has been free from modernist influence,<sup>182</sup> despite a clear intention to come close to the ‘modernist’ West, post Meiji Restoration. It is only the influence of the West that has sought to analyse and label it so, and Japan has asserted some level of superiority in reaching realisation of a Western idea before its originators.<sup>183</sup> The entrenchment of Japan’s laws and social structures in history can be perceived as inflexible; although in contrast, it can be argued that these values are an integral part of what makes Japan appear postmodern in the first instance. Perhaps conforming to Western methods of law, given that most of the West still arguably exists in a state of legal modernity,

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<sup>179</sup> *Id.* at 14.

<sup>180</sup> RUTH BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD* 302 (1946).

<sup>181</sup> *Id.* at 2–3.

<sup>182</sup> CLAMMER, *supra* note 59, at 23.

<sup>183</sup> Mitsuhiro Yoshimoto, *Melodrama, Postmodernism, and Japanese Cinema*, 5 *EAST-WEST FILM J.* 28, 49 (1991).

would be regressive for Japan if followed too rigidly. As an island nation Japan has always found itself with some degree of isolation from others, but arguably it is this partial remoteness that has allowed it to effectively digest foreign influences<sup>184</sup> without becoming sickly from the ingestion. Isolation has also bestowed upon Japan continuous autonomy, refuting forceful imposition from outside influences and instead allowing for self-selection of legal tastes on its own terms.<sup>185</sup>

It is without doubt that Japan has changed extensively in many respects, especially in economic terms, over the past fifty years. Whilst traditional values still retain their roots in rural regions,<sup>186</sup> the frenetic activity of the cities has eroded the benevolent attitude that *giri* once abundantly bestowed amongst the population.<sup>187</sup> Ascertaining the extent to which *giri* still has influence in everyday life is rather difficult, although the number of texts which refer to its presence, and the respect tendered towards it by the Japanese people, is proof that it still holds considerable authority in contemporary society. Alongside these traditional values, the impact of legal reforms brings into question whether these changes have manifested in a postmodern manner considering the methods used to bring them about.

Much of the fascination with Japan stems from its rather idiosyncratic character and the challenge of fully understanding and sympathising with its personality. Likewise, postmodernism thrives on being uncontainable and without complete description,<sup>188</sup> and the practices of law that Japan operates reflect these qualities fittingly. They are logical without striving to make perfect sense. They go beyond the superficial and into the profound, and so perhaps it is fitting that for now they outpace comprehensive epistemological pursuit.

The Japanese approach of informality,<sup>189</sup> comprising of multiplicity in consensus facilitated by homogeneity of thought,<sup>190</sup> in

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<sup>184</sup> Kim & Lawson, *supra* note 102, at 493.

<sup>185</sup> Haley, *supra* note 30, at 11.

<sup>186</sup> NODA, *supra* note 103, at 179–80.

<sup>187</sup> Kim & Lawson, *supra* note 102, at 512.

<sup>188</sup> WOODS, *supra* note 38, at 3.

<sup>189</sup> Eiji Yamamura, *The Effect of Learning Varies According to Locality: Micro Data Analysis of the Lawyer Market in Japan*, 22 JAPAN AND THE WORLD ECONOMY 193, 197 (2010).

<sup>190</sup> Kim & Lawson, *supra* note 102, at 496.

which the judiciary are a respected source of law,<sup>191</sup> and that which is upheld by the people and less by authority, constitutes a unique outlook. For law, which makes its identity through being clearly determined, if not always understandable (especially in the West), this approach is perceived as liberating from its bindings.

Law is, according to Pound, a “science of words,”<sup>192</sup> a Wortwissenschaft, but clearly law can be more than language. Law is a spirit that pervades all activity. Whether this is through formal statute or the standards of *giri* in social conduct, law appears omnipresent in the everyday life and interactions of Japan.

To put the argument at its simplest, Japanese society has long been considered postmodern due to its reflection of those characteristics associated with the theory. Law, as is commonly accepted, is created to serve the interest of community. There have been questions raised regarding the necessity of formal law in Japanese society due to the presence of *giri* and its accompanying principles; however, it nevertheless follows that the law crafted by the considerate and vigilant Japanese authorities would also be postmodern in its essence. Although some of these have taken a modernist form, the spirit of postmodernism appears neatly integrated within it. Japanese legal morals, and the laws themselves, are developed on a line of thought and justification that flows responsively to the needs of society, while rejecting rigidity in discontinuous social and economic developments.<sup>193</sup>

Another important factor which throws these considerations into sharp contrast is that postmodernism, as a mode of thought, originated in the West, and until recently, the West has generally overlooked Asia.<sup>194</sup> It has already been considered whether it is legitimate to consider Japan in the context of these Western ideas, whether there are aspects of postmodernism in Japanese society that

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<sup>191</sup> Haley, *supra* note 30, at xviii.

<sup>192</sup> Roscoe Pound, *Modern Trends in Jurisprudence: A symposium held at the Thirty-First Annual Meeting of the Association of American Law Schools in Chicago, December 30, 1933: Law and the Science of Law in Recent Theories*, 7 AM. L. SCH. REV. 1057, 1057 (1930–1934) (referring to Kantorowicz).

<sup>193</sup> CLAMMER, *supra* note 59, at 21.

<sup>194</sup> *Id.* at 28.

are not perceived because they are not easily identifiable.<sup>195</sup> Are these features post-postmodern, or are they something else altogether? Whilst the application of postmodernism may seem increasingly inappropriate, it is submitted that this is the most appropriate medium to use in shaping an understanding of the Japanese legal environment when written from a Western perspective. The traditional elements of Japanese society bear the hallmarks of postmodernity, and these have come to be reflected in their law and legal practices. Law is created with the mindfulness of consensus and eclectic research, producing statutes and practices which are transparent in rationale and detailed in the utmost.

The rationality of law and modernity stipulates that laws are created for the purposes of society, and are made to be followed, and enforced when not followed. The Japanese often circumnavigate law in favour of regulatory community customs,<sup>196</sup> which are enforced through informal sanction.<sup>197</sup> This focus on community has given recourse to other methods of dispute resolution, which is fitting when one considers that despite harmonistic values, the Japanese have a competitive tendency and instigate regular conflicts.<sup>198</sup> Perhaps then, these alternative methods seek to address this characteristic, allowing the court system to be used only for the most serious of cases. Furthermore, modernism requires that law is written down for clarity and consistency, and in this, certain standards, including morality, are expressed. The Japanese exhibit a preference for actions over words, in which the application of community laws appears simplified and efficient. Morality can change based on context; the 'natural order' of things is preferred to a positivist perspective.<sup>199</sup> Modern law is also created to protect and regulate, promoting individual freedoms that are seen to a great extent in the European Union. The Japanese do not subscribe to this, given the dishonour brought by litigation and a general view of law as intrusive and unnatural. Asserting individual rights becomes uncomfortable as this changes the identity formed by

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<sup>195</sup> *Id.* at 6.

<sup>196</sup> Thornton, *supra* note 2, at 87.

<sup>197</sup> Gibbons, *supra* note 92, at 109–10.

<sup>198</sup> ROSS E. MOUER & YOSHIO SUGIMOTO, IMAGES OF JAPANESE SOCIETY 106–09 (Yoshio Sugimoto ed., 1986).

<sup>199</sup> Kim & Lawson, *supra* note 102, at 496.

considering one's relationships to others, and in turn threatens the identity of those others in the social group. Rather than declare individuality and risk isolation, it becomes the safer and more logical option to remain part of the group. This repeated dismissal of modernist rationality in favour of informal, malleable measures shows clearly the postmodern makeup of Japan's legal reality.

#### VII. CONCLUSION

The resulting edified perspective realises that many of the postmodern elements come from the values of Japanese society, but they are also reflected in the legal system; specifically, the methods of alternative dispute resolution built into the system.<sup>200</sup> That the Japanese are not compelled to use formal law is a distinct departure from modernity stemming from the authorities. This has developed from adaptation of foreign systems into the Japanese order and even so, it is plain to see that despite significant modernist influence, the system demonstrates postmodern facets in its fragmentation of dispute resolution options and their active promotion from legal officials. Modernity stipulates that laws should exist, and should be followed, but Japan, as a whole, seems to reject this. Formal laws were not created because Japanese society needed them or instigated them. These modernist tools have always been in the hands of a postmodern artisan and modernity cannot survive in this context. However, postmodernism thrives on this hybrid state of affairs and becomes a legal pastiche, which is the very basis of Japan's postmodern legal reality.

However, this state of affairs in Japan's legal postmodernity is a fragile one. Although the requirements of postmodernism in their ambiguity seem to secure some degree of longevity alongside a deep pride for *nihonjinron*,<sup>201</sup> Japan is increasingly reverting to modernist practices. Indeed, modern Japan as of the Meiji Restoration was a modernist legal project, and its overall modernist, formal legal outlook was largely achieved not by changing the traditional structure, but by

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<sup>200</sup> Pardieck, *supra* note 136, at 31–32.

<sup>201</sup> ROBERT C. CHRISTOPHER, *THE JAPANESE MIND* 48 (1983).

using it more effectively.<sup>202</sup> As Japan continues to engage with the West, factors such as the incidence of litigation and the erosion of community values are likely to intensify.<sup>203</sup> Presently, the Japanese do not generally consider themselves to be particularly postmodernist and those devoted to this view are difficult to find,<sup>204</sup> even though one could equally argue that the question of whether Japan is a post-modern legal reality is more of a question that relates to a postmodern factuality, rather than it being a choice or ideological devotion to postmodernism. At the present time, there seems little doubt that Japan's legal reality is inherently postmodern, despite an initial endeavour towards the legal modern and the formal. However, Japan's otherwise open-minded approach to law may lead it to sacrifice certain of its cultural traits, and in turn, the postmodern legal character which makes it unique, in favour of pursuing greater integration with the West.

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<sup>202</sup> Chris Payne, *Burying the Past: Nihonjinron and the Representation of Japanese Society in Itami's The Funeral*, 1 GRAD. J. ASIA-PAC. STUD. 13, 14 (2003).

<sup>203</sup> Pejovic, *supra* note 128, at 511–12.

<sup>204</sup> CLAMMER, *supra* note 59, at 21.