THE INFLUENCE OF TRADITIONAL NORMATIVE MECHANISMS OF BEHAVIOUR ON THE JAPANESE LEGAL SYSTEM

*PETER HOWARD CORNE**

INTRODUCTION

The legal codes that exist in Japan today are not the product of an organic evolution. They are Western in origin, having been adopted by the Meiji state in its push to westernise late in the nineteenth century. However, Japanese society retains a remarkable degree of social cohesion and extra-legal norms still play an extremely important role in regulating the day to day conduct of the people. One could almost say that Japan is a "dichotomous society" in a normative sense, since its legal codes did not originally derive from the customary norms of the people. To this extent, there have been claims that, in fact, "the gap between the legal norms and the judicial system on one hand (the formal law of the state) and the day to day conducts of the people on the other (the "living law"), has become one of the basic conditions determining the character of the modern legal system in Japan."[1]

The first section of this paper is devoted to an examination of the traditional normative mechanisms which serve to regulate the behaviour of the Japanese people and seeks to show why these mechanisms cause social norms to take on an "indeterminate" nature, a feature which is recognised as being quintessentially Japanese. Secondly, we will seek to deal with fears that the retention of these normative structures serve to subvert, hinder and retard the operation of the formal legal order. It will be shown that, far from being incompatible, the two systems are in fact now complementary and that upon analysis, the formal legal system, while

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* Asian Law Centre, University of Melbourne

[1] K. Rokumoto: "'Problems and Methodology of the Study of Civil Disputes, Part One", 5 *Law in Japan*, (1972), p. 97 at 101.

being heavily influenced at all levels in its operation by social norms, actually depends upon traditional normative mechanisms of social control for its continued viability. Thirdly, it will be argued that inbuilt institutional factors within Japan's legal system serve to encourage, and thus are partially responsible for, the continued strength of traditional value structures in modern Japan.

PART 1: TRADITIONAL NORMATIVE MECHANISMS OF BEHAVIOUR REGULATION

(a) The "Paradox" of Tokugawa Law

The Tokugawa regime which ruled Japan from 1603-1867 served to foster a structure of normative behaviour which was totally antithetical to the concept of autonomy of the individual. This was brought about in no small part by what has been referred to as the "paradox of Tokugawa law".[2] During the seventeenth century, the Tokugawa regime set up castle towns in which about 10% of the population, including all of the samurai class, resided. While urban Japan was densely administered,[3] the bureaucratic apparatus of the Tokugawa system did not directly penetrate the villages in which the remaining 90% of the population lived. The villages were required by overlord law to regulate their own internal affairs. So long as taxes were paid and peace prevailed, there was little to attract the attention of authorities. The prerequisite for self-governance was outside deference to authority. The result was that "the village had the freedom of the outlaw but within the security of the bureaucratic state."[4]

There was thus great incentive to maintain social cohesion for the sake of village autonomy.[5] Villages came to be governed virtually by consensus.[6] Individual interests were subsumed to family and community concerns. Over the two hundred and fifty year period of Tokugawa rule, a normative mechanism of behaviour based on familial and community bonds was fostered in order to keep outward signs of conflict to a minimum. The true deterrents of "stepping out of line" were the shame-based internal community sanctions of ostracism (murahachibu);[7] boycott and expulsion, all of which could be imposed vicariously on the family.[8] Such sanctions

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[2] J. O. Haley: "The Role of Law in Japan: A Historial Perspective", 18 *Kobe University Law Review*, (1984), p. 1 at 8.

[3] *Ibid.* p. 11.

[4] *Ibid.*

[5] *Ibid.* p. 12.

[6] D. F. Henderson: *Village "Contracts" in Tokugawa Japan*, (Uni. of Washington Press, Seattle, 1975), p. 10.

[7] "Murahachibu", or "eight parts village", signifies that out of ten aspects of life, the community is the basis for eight. Effectively, "murahachibu", as the expression of village ostracism, means that the victim is cut off from those eight parts of life.

[8] *Supra*, note 2, Haley, p. 12.

were reinforced by the Neo-Confucian structures of loyalty, fidelity and obedience on which the foundations of the Tokugawa regime were built.[9] The resulting situation has been summarised as follows:

> . . . the controls were even more socially ingrained and enforced by immobility and communal adhesion than affected by external law. In the home, workplace and neighbourhood, behaviour was so socially prescribed and enforced that state-imposed law was not only absent but quite superfluous in private dealings."[10]

(b) The "Giri" Mechanism

The mechanism of social control which arose out of the unique position occupied by the village in the Tokugawa State has been expressed as the "concept of giri". "Giri" constitutes a rule of conduct that functions to maintain the social order. "Giri" means "the manner of behaviour required by one person to others in consequence of his social status."[11] From a socio-legal perspective, "giri" can best be understood as a contra-factually stabilised mechanism of social obligations which operates to provide social stability. It is much more than a mechanism for maintaining continuity and handling disputes. It operates so that community members avoid facing the undeniable fact of life that conflicts of interest exist.[12]

The actor's expectations of the beneficiary's expectations has been identified by Luhmann as an important factor in the development of normative structure in society.[13] The "giri" mechanism has however had a curious and rather extraordinary effect on the society on which it has operated. "Giri" actually works against the clear delineation and objectification of social norms. Rokumoto pins this unprecedented feature down to the lack of direct and open communication that is implicit in the "giri" mechanism.

> "The distinctive psychological dynamics of 'giri' emerge right here. Since the details of the duty which one must perform in observance of the norm are not specified through open dialogues with the other party, he cannot be completely freed from doubt about the legitimacy of the duty imposed despite his 'voluntary' performance."[14]

This is in stark contrast to the situation in most societies where control mechanisms, particularly those which derive their force from the

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[9] K. Rokumoto, "Legal Behaviour of the Japanese and the Underlying Notion of Social Norms", *The Islamic World and Japan*, (Japan Foundation ed., 1981), p. 204 at 218.

[10] D. F. Henderson: "The Japanese Law in English: Some Thoughts on Scope and Method", 16 *Vanderbuilt Journal of Transnational Law*, 1983, p. 601 at 610.

[11] Y. Noda: *Introduction to Japanese Law*, (Uni. of Tokyo Press, Tokyo, 1975), p. 175.

[12] *Supra*, note 9, Rokumoto, p. 217.

[13] Luhmann: *A Sociological Theory of Law*, (Edward Arnold, London, 1985).

[14] *Supra*, note 9, Rokumoto, p. 217.

actor's perception of how other people will react, operate by means of explicit communication of values and norms which are thereby further delineated.[15] In Japan, since the underlying norm-consciousness does not tolerate positive demand for compliance with a social norm, social norms are left in an indeterminate state and are thus not given the opportunity to obtain autonomous binding force.[16]

Kawashima attempts to attribute this feature to the traditional emphasis in Japanese society on harmony ("wa"). Concern for harmony is manifested in the expectation that disputes will not arise. The mechanism of "giri" served to realise this expectation. It regulates the relationships of co-existing members of society so that they almost "ritualistically" avoid conflict through a series of ad-hoc adjustments. These adjustments are made on the basis of variables such as goodwill and the relative status of the parties concerned, rather than according to any fixed rule.[17] Social norms must vary according to the "reality to which man has to acquiesce";[18] they are thus left to exist in a general and flexible form so that they can be modified whenever circumstances dictate.

Noda, however, suggests that indeterminate and vague social norms are attributable to "ninjo" (human affection), the effective element of "giri".[19] This characteristic can be illustrated with reference to contracts in Japan. Contractual terms tend to be vague and indefinite when parties have conceived that their economic transaction is connected with another interest relation which involves human feelings. These other interest relations are not as clear or specific and by nature can change with unlimited diversity, so it follows that the parties will not wish the provisions of the contract to be definite or precise.[20] The prevalence of on-going dependency relationships in Japan[21] thus has had and will continue to keep domestic contracts vague.

Kawashima has noted that Japanese traditionally have been prepared to resort to lawsuits only where there is no ongoing relationship between parties and "only where a naked relationship of material exploitation exists."[22] In this case the court is used as an instrument of compulsion backed by power. However, where a relationship exists, the parties prefer

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[15] S. Roberts: *Order and Dispute: An Introduction to Legal Anthropology*, (Routledge & Kegan Paul, London, 1985), p. 42.

[16] *Supra*, note 9, Rokumoto, p. 217: This trait was partially the result of the influence of Neo-Confucianist philosophy, which as well as extolling the natural order of status in society, emphasised that the preservation of peaceful relations between individuals should be maintained.

[17] *Supra*, note 9, Rokumoto, p. 218.

[18] *Ibid.*

[19] *Supra*, note 11, Noda, p. 182.

[20] T. Kawashima: "The Legal Consciousness of Contract", 7 *Law in Japan*, (1974), p. 1 at 19.

[21] *Supra*, note 2, Haley, p. 16.

[22] T. Kawashima, "Shakai Kozo to Saiban", (Courts and Social Structure), "Kenri no Taikei", (System of Right), cited by Rokumoto, *op. cit, supra*, note 1 at p. 108.

to leave the rights or specific norms relevant to the situation undefined. The parties do not resort to a lawsuit because to do so would be to have the relationship's normative framework clarified by the court. The element of "ninjo" precludes an approach to the court to have norms defined.

The "giri" mechanism thus has left little room for the notion to develop that a set of rules binds all parties concerned and that one person can demand certain performances from another on the basis of these rules.[23] In other words, "giri" was antithetical to the development of a "rights consciousness". Although there is evidence that the samurai classes were prepared to vigorously defend something akin to rights during the Kamakura period and up until the seventeenth century,[24] at the village level the concept of "right" was never allowed to take root. As the "giri" mechanism became more and more refined during the two hundred and fifty years of peace and stability afforded by the Tokugawas, all classes became immersed in the self-perpetuating "giri" rituals through which harmonious relations were sustained.[25] So normative were the concepts of "giri" and "wa", that even after the Western legal codes were introduced, there was a movement to abolish the Civil Code and the "confrontationalist" system of litigation it embodied.[26]

"Giri" thus operated as a system of contra-factually stabilised expectations, allowing people to avoid the strain of making selections based on the true complexity of the environment. The "giri" mechanism does not delineate social norms within the structure it creates. Rather, it tends to blur the norms that exist already. This helps to explain why socio-legal theorist Yoshiyuki Noda saw fit to make his famous assertion that "the Japanese do not like the law",[27] meaning that they do not relate well to norms that are fixed, objective and universalistic in nature.

PART 2: DOES JAPAN POSSESS A "GENERAL LEGAL ORDER"?

(a) The "General Legal Order"

In 1964, in an article entitled "Evolutionary Universals in Society",[28] Talcott Parsons asserted that four evolutionary universals—bureaucracy, money and markets, democratic associations, and a general legal order—

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[23] *Supra*, note 9, Rokumoto, at p. 219.

[24] M. Oki: Nipponjin no ho-kannen—The Legal Consciousness of Japanese, (Uni. of Tokyo Press, Tokyo, 1983), at p. 218.

[25] H. Tanaka: "The Role of Law in Japanese Society: Comparisons with the West", 19 *UBC Law Review*, (1985), p. 375 at pp. 382-383.

[26] See J. O. Haley: "The Politics of Informal Justice: The Japanese Experience, 1922-1942", in R. L. Abel, ed., *The Politics of Informal Justice*, Vol. 2, (Academic Press, NY, 1982), p. 125 at 128.

[27] *Supra*, note 11, Noda, at p. 1.

[28] T. Parsons: "Evolutionary Universals in Society", 24 *American Sociological Review*, (No. 3), (1964), p. 339.

are necessary for the development of a modern society.[29] Out of all the four elements, Parsons states that "the most important single hallmark of a modern society" "is a general legal system", which he defines as "an integrated system of universalistic norms, applicable to society as a whole rather than to a few functional or segmented sectors, highly generalised in terms of principles and standards, and relatively independent of both the religious agencies that legitimise the normative order of the society and vested interest groups in the operative sector, particularly government."[30]

Parsons further argues that such a system is indispensible to a society that has reached a high social differentiation because, without it, a society would suffer from a static quality and would hence be unable to develop beyond a certain point because of an intrinsic lack of adaptive ability.[31]

Kahei Rokumoto, in his article "Problems and Methodology of the Study of Civil Disputes",[32] voices concern about the continuing existence in Japan of the discrepancy between the "formal law of the state" and the "living law". "Living law", a term conceived by Eugen Ehrlich, is used to describe norms which are directly relevant in organising the everyday lives of most people in a particular society. With reference to Parson's hypothesis, Rokumoto suggests that Japan still lacks a true universalistic legal order because its laws have yet to "become relevant to the reality as the basic principle of social organisation or social order."[33] The Western system of positive law only functions insofar as it is in accordance with the traditional normative behavioural patterns.[34] Noda has also reached the same conclusion, having claimed that "where the rules of 'giri' dominate, the rules of a purely legal nature have difficulty penetrating."[35]

Rokumoto has thus concluded that on a theoretical level, it is doubtful that the two systems are ultimately compatible.[36] The implications of this apparent incompatibility "assume a vital importance for the future of Japanese society whose economy is advancing to a still higher level of industrialisation."[37] Applying Parson's hypothesis, presumably the implications are that as Japanese society lacks a crucial "evolutionary universal", it is not truly adaptive and will eventually either stagnate or suffer from instability and possible retrogression.

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[29] *Ibid.* p. 347.
[30] *Ibid.* p. 351.
[31] *Ibid.* p. 341.
[32] *Supra*, note 1.
[33] *Ibid.* p. 98.
[34] *Supra*, note 9, Rokumoto, p. 219.
[35] *Supra*, note 11, Noda, p. 179.
[36] *Supra*, note 9, p. 221.
[37] *Supra*, note 1, Rokumoto, p. 98.

It is submitted that Rokumoto's fears are unfounded both on a theoretical and on a practical level. On a theoretical level, it is highly unlikely that Parsons meant his concept of a "general legal order" to be interpreted in precisely the same terms for every society. Japan's legal order since the adoption of its western-style codes, has taken shape according to the exigencies of its underlying social culture. Were Japan a multi-racial society, it is extremely likely that its legal codes, especially the Civil Code, would have a much greater role to play and exert more influence over the actions of ordinary citizens than it has done. Parsons makes the point that the Roman Empire fell because its legal order was not sufficiently institutionalised to adequately integrate the immense variety of peoples and cultures within the Empire.[38] On the other hand, a nation with a population as diverse as the USA continues to maintain social order purely through the direct application of its laws on the lives of its people.

The Japanese people however share a common racial and social heritage, having developed their own social normative structures over many hundreds of years. Although legal codes prescribing universalistic norms are in place, it has not been necessary for the sake of social order for formal laws to override an ostensibly incompatible social normative structure for an effective and an adaptive system to emerge.

On a practical level, the incompatibility to which Rokumoto refers only exists on the face of the law. What has in fact occurred in Japan is a gradual reinterpretation of the imported codes. Codes that were originally alien have come to generally reflect the factual organisational norms of Japanese social life. Thus it is submitted that the "living law" and the "formal law of the state" are actually complementary, operating together to form a singularly massive, integrated "evolutionary universal".

(b) Interaction Between the Two Structures

Evidence of interaction between the two structures abounds. For instance, it appears that far from being self-referential and thereby officially "sterilized" from normative social references, at all states of the legal process there are indications that social norms, with their preference for indeterminate solutions, play an important role in the resolution of civil and criminal matters.

In civil and family matters,[39] the Japanese legal system is distinguished by its use of conciliation ("chotei") as the first stage of the dispute resolution process. Conciliation has proved to be popular because it aims at effecting a settlement "consistent with reason and

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[38] *Supra*, note 28, Parsons, p. 352.

[39] Judicial Conciliation in these areas is regulated by the Civil Conciliation Law, (Law No. 222, 1951) and the Law for the Determination of Family Affairs (Law No. 152, 1947).

befitting to actual circumstances of the parties concerned."[40] This means in effect that parties are given an opportunity to resolve their dispute with reference to their community's non-legal customary norms. Indeed, the "chotei" system was originally introduced because it was thought that the hitherto adopted Western systems of formal trial "failed to maintain the beautiful customs of old" and was destructive to the hierarchical social order based on personal relationships.[41] Thus "chotei's" introduction and subsequent popularity can be explained in part because it does not seek to use as its point of reference fixed rules with which to decide who is right and who is wrong, thereby reflecting the preference for the "indeterminate" discussed earlier. By allowing the conciliator and the parties to use a broader frame of reference, "chotei" allows disputes to be resolved in ways consistent with the "giri" mechanism without undue reliance on unfamiliar imported legal concepts such as "rights".

The "compromise" procedure ("wakai") which is often utilised in civil court trials is another feature of the Japanese legal system which illustrates how specific social attitudes are at work in the judicial process. The process of compromise requires mutual concessions.[42] Judges may propose that the parties settle at any time during the proceedings.[43] Thus an avenue is provided for the normative mechanisms of "giri" to have an impact even here because against this background, judges are inclined to hesitate to expedite judicial decision[44] and encourage the parties to reconcile their differences by means of mutual agreement. Consistent with the rules of "giri", rights and obligations are left unspecified,[45] thus allowing an actual loser to escape impairment of his honour. The conflict is ended without clarifying who is right and who is wrong.

Despite the thrust of imported Western codes, Japanese courts seem to have encouraged the preservation of customary social norms by themselves adhering to a traditionalist scheme of values. The courts appear to first reflect the attitudes of the people and then attempt to rationalise the result by statutory reinterpretation,[46] thereby emphasising social

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[40] Civil Conciliation Law, Article 1.

[41] *Supra*, note 26, Haley, pp. 131.

[42] Civil Code, Article 695.

[43] *Ibid.*

[44] T. Kawashima: "Dispute Resolution in Contemporary Japan", in A. T. von Mehren, ed., *Law in Japan: The Legal Order in a Changing Society*, (Harv. Uni. Press, 1964), p. 41 at 45; Kawashima also suggests at page 45 that the acute delays in reaching judicial decision in Japan may be explained by the hesitancy on the part of the judges to attribute clear-cut defeat and victory to the respective parties.

[45] Ohta and Hozumi state that "insofar as settlement of dispute is involved, the respective rights and duties of the parties are clarified in the sense that the actions that are required of them are specified under the terms of the compromise and the matters so specified are safeguarded as legally recognised rights and duties. However the relationship of the rights and duties in dispute—in other words, whether or not the rights asserted by the plaintiff exist—does not have to be determined." . . . T. Ohta & T. Hozumi: "Compromise in the Course of Litigation", 6 *Law in Japan*, (1973), p. 97 at 100.

[46] *Supra*, note 44, Kawashima, p. 49.

obligations rather than legal rights, and giving priority to community welfare over individual interests. Kawashima cites for example the *Kochi Railway Case*[47] in which the defendant built a railway over the plaintiff's land without permission. Both the District Court and the Supreme Court rejected the plaintiff's claim on the ground that the railway served the welfare of the public in that specific locality and, if the railroad facilities in that area should be removed, the public would suffer.

Another illustration is the way in which the Japanese courts have developed the "abuse of rights doctrine" which had been adopted from German law. In most civil law jurisdictions, the doctrine attempts to prevent individuals from using their rights with the sole intent of harming another. In Japan, the Supreme Court has ruled that rights must be exercised only within "a scope judged reasonable in the light of the prevailing social conscience" and that one who purports to have a right must show "social reasonableness."[48]

It seems from these decisions that against the background of traditional social norms, the courts on occasions have attempted to "japonise" the concept of legal right. This has been made necessary because of the fundamental inconsistency between the Western concept of "right", as expressed in the imported legal codes, and with the Neo-Confucian value system[49] on which the traditional normative social mechanisms of behaviour are based. The original Western notion of "right" takes the existence of the sole autonomous individual for granted and treats the individual and the group as mutually exclusive concepts. In the traditional scheme of things, imperatives of loyalty and filial piety preclude any thought of asserting a claim as of right—one's awareness of self is contextual in that it is derived from the links one has with one's group, be it family, village or company.[50] Thus, it is submitted that the courts tended to have responded to this inconsistency between the "formal law of the state" and the "living law" by objectifying the notion of "legal right", thereby subsuming it to the interests of the community.

The attitude of the courts thus appears to have been derived from the traditional popular conception of social relationships, which are viewed not as something controlled by objective, fixed standards but as something indeterminate depending and changing with actual situations.[51] This allows the courts greater leeway to widen the meaning of a statute. For example, according to Article 739 of the Japanese Civil Code, unregistered unions

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[47] *Kochi Railway Case*, Great Court of Judicature Decision, October 26, 1938, cited in Kawashima, *ibid.*

[48] *Mitamura* v. *Suzuki*, 26 Saihan Minshu 1067, 1069 (Supreme Court Petty Bench, 1972), cited in M. K. Young, "Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan", 84 *Columbia Law Review*, (1984), p. 923 at 970.

[49] *Supra*, note 16.

[50] E. Hamaguchi: "Japan as a Society of Contextualism", *Japan Reports*, July/Aug., 1983, p. 4 at 5.

[51] *Supra*, note 44, Kawashima, p. 49.

are not valid marriages. However, since social custom admits a properly celebrated unregistered union ("naien") as a valid marriage, the courts have given wide protection to the parties to what in positivist terms can only be a de facto union.[52]

Similarly, the courts have long regarded sincere feelings of repentence and apology as factors that mitigate responsibility or exonerate a defendant, even though no mention is made of this in either Article 723 of the Civil Code or Article 248 of the Code of Criminal Procedure.[53] This again represents the importation of normative social references into the legal system. In a society that emphasises group membership as a basis for personal identity, it is important to maintain the sense of "insideness" after a rupturing conflict. In Japan an apology is thus regarded as an explicit acknowledgment of commitment to future behaviour consonant with group values, thus constituting an integral part of every resolution of conflict in Japan.[54]

No direct reference to apology is made in either Article 723 or Article 248, but the courts, against this social background, have managed to incorporate apology into their interpretation of these sections. In the field of civil law the courts have held that under Article 723, they can properly order that a person issue an apology.[55] In the criminal law, apology is so normative that the Japanese criminal justice system at every level emphasises confession and contrition as an undertaking that the offender will conform to socially acceptable normative patterns of behaviour.[56] Thus, the system is rehabilitative rather than punitive. Police, procurators and the courts respond to an offender's acknowledgement of guilt and expression of remorse, which includes compensation of the victim, with absolution as a gesture of benevolence.[57]

Interaction between the "living law" and the "formal law of the State" can also be illustrated with reference to how the formal law is enforced in Japan. Ironic as it may appear, the Japanese legal system appears to depend largely on "extra legal" or "social" sanctions for the enforcement of the formal laws of the State. This seems to be the result of a combination of factors.

Firstly, Japan lacks effective formal legal sanctions with which to enforce its laws. Secondly, the "groupist" nature of Japanese society and its consequent cohesion in all frames of reference still enable it to effectively

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[52] A. Angelo: "Thinking of Japanese Law: A Linguistic Primer", 12 *CILSA*, (1979), p. 83 at 88.

[53] *Ibid.*

[54] H. Wagatsuma & A. Rosett: "The Implications of Apology: Law and Culture in Japan and the US", 20 *Law & Society Review*, (No. 4, 1986), p. 461 at 467.

[55] *Okuri* v. *Kageyama*, (1956) 10 Minshu 785, reproduced in H. Tanaka, *The Japanese Legal System: Introductory Cases and Materials*, (Uni. of Tokyo Press, 1976) at pp. 320-330.

[56] See D. H. Bayley: *Forces of Order: Police Behaviour in Japan and the US*, (Uni. of Cal. Press, Berkeley, 1976), Chapter 7.

[57] J. O. Haley: "Legal v's Social Controls", 17 *Law in Japan*, (1984), p. 1 at 2.

sanction those who infringe legal norms in the respective groups. Thirdly, as we will reveal in part (3), public policy appears to have had as one of its priorities the maintenance of the traditional normative structures that are responsible for such group cohesion.

It has been asserted that no industrial nation has weaker law enforcement than Japan.[58] In civil cases the ultimate formal sanction is to attach property. However, the courts have no contempt powers with which to back this up. Lacking the power of contempt, a court has no power to enforce its decision where its decree has not been followed by voluntary compliance. Where legal sanctions do exist, the Japanese courts are reluctant to use them fully. For violations of the law, the courts rely on the criminal sanctions of penalties, fines and imprisonment. However, to cite an example, there have been only six prosecutions in over thirty years of anti-trust enforcement.[59] Moreover, because of the importance placed on confession, repentence and absolution in the criminal justice system, suspension of prosecution becomes standard procedure for almost all categories of crimes. Though the rate of conviction in the small number of cases that actually do go to trial is 99.99%,[60] gaol sentences are imposed on only 37% of these cases, two-thirds of which are suspended sentences.[61]

Laws appear to rely on the operation of extra-legal sanctions for their viability. Such sanctions, to be effective, in turn rely on a high degree of community and group cohesion. A high level of community consensus in favour of the legal norm is also necessary. On another level, the group must be prepared to accept these norms as legitimate. As a result, legal norms end up becoming almost indistinguishable from customary norms.[62] Because laws are dependent for their viability on community and group consensus, it could be said that the Japanese people have a greater say in the effectiveness of the norms that govern society than the inhabitants of legal systems which depend solely on legal sanctions for social control.[63]

As mentioned earlier, social sanctions in Japan are the shame-based sanctions of ostracism, refusals to deal and boycotts. In this process the concern of the group focuses more on the loss of reputation that results from the misdeed, rather than the conduct itself.[64] This is because reputation in fact is vicarious:

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[58] J. O. Haley: "Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions", *8 Journal of Japanese Studies*, (1982), p. 265.

[59] *Ibid.* p. 269.

[60] R. J. Smith, "Lawyers, Litigiousness, and the Law in Japan", 11 *Cornell Forum*, (No. 2, 1984), p. 53, citing *Summary of the White Paper on Crime*, 1978, pp. 23, 24.

[61] *Ibid.* Also note that the vast majority of suspects cooperate voluntarily with their own prosecution and are subsequently handled without arrest on an at-home basis. (*Supra*, note 56, Bayley, p. 146.)

[62] *Supra*, note 58, Haley, p. 276.

[63] *Supra*, note 2, Haley, p. 18.

[64] *Supra*, note 58, Haley, p. 280.

> "The conduct and reputation of the members of the group or the client affect that of the group or patron. Thus the benefits of group membership and clientage come to depend in part on the capacity of the group or patron to deny access or expel those who damaged reputation."[65]

Loss of reputation attracts such serious sanctions in Japan that mere threats to reputation are enough to induce conforming behaviour. In the field of anti-trust, firms will agree to Fair Trade Commission "recommendations" that their activity is unlawful, thereby tacitly admitting a violation, rather than prolonging the case for fear that their reputation will be harmed in the community.[66] At a more personal level, a policeman, having caught a petty offender, often will consider a simple admonition to be an effective constraint on the offender's future behaviour because of awareness of the severe embarrassment and social sanctions that would follow local community knowledge of his misconduct.[67] Thus it is not the awareness of punishment which serves to deter so much as knowledge of the impact that involvement in criminal proceedings would have on oneself and one's family.

Formal apologies are extensively utilised in Japan because they carry with them the stigma of lost reputation. Written apologies are widely used by policemen in connection with minor offences. Because communities are still so cohesive in Japan, the local policeman is able to judge from the personal circumstances of the offender whether a simple written apology will attract community sanctions.[68] In the criminal justice system, absolution is often granted on the condition that the offender compensate and apologise to the victim. Nothing in the law requires such action—the only sanction is the power of custom.[69] In well publicised cases in the civil law system, public apologies have been more difficult to exact from corporate defendants than millions of dollars in damages. In the SMON cases,[70] it was apparently much easier to reach agreement on an amount of damages than for the defendants to comply with a demand for apology.

In a system in which social controls rather than legal controls provide the most important mechanisms of enforcement, it has been suggested that the function of the law is more instrumental than normative, thereby

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[65] *Ibid.*

[66] *Supra*, note 58, Haley, p. 275.

[67] *Supra*, note 56, Bailey, p. 135.

[68] *Ibid.* p. 137.

[69] *Supra*, note 60, Smith, p. 54.

[70] A series of cases, listed by Haley, (*supra* note 56, p. 275), which involved suits brought over injuries sustained from using the drug dioquinol. (SMON = Subacute-Myelo-Optics-Neuropathy).

functioning as a critical element in the formation of consensus.[71] Upham's research shows that in the four landmark pollution cases dealt with by the Japanese courts, the chief motivation behind the plaintiff's suit was to demonstrate to society at large that the defendant companies had forfeited their moral prerogatives, thereby transmitting their outrage to society.[72] Similarly, cases continue to be brought against the Self Defence Forces in order to challenge their constitutional legitimacy, seemingly in the hope that the consequent publicity will help form a political consensus on the issue.[73] Cases periodically brought against the government seeking to demonstrate the unconstitutionality of the electoral system have followed the same pattern.[74] Conversely, fears over inducing a consensus on the political left in regard to the "burakumin" question have caused the government to refrain from bringing the Burakumin Liberation League to court over its usage of "denunciation sessions" against perceived opponents.[75] It thus seems that in Japan,

> "protracted litigation calls into question the legitimacy of the political system with consequently greater likelihood, albeit no certainty, of a political response. . . . As "tatemae" (a guiding principle), it (law) influences the formation of consensus and is thus a critical element of Japanese social and political life."[76]

PART 3: INSTITUTIONAL FACTORS CONTRIBUTING TO THE RETENTION OF TRADITIONAL MECHANISMS OF CONTROL

Indirect institutional discouragement of litigation appears to have contributed greatly to the retention of traditional normative mechanisms of social control in Japan. As mentioned in the first part of this paper, traditionally communities have ensured that disputes have been settled by mutually acceptable "big figures" in society without resort to external adjudication. Lack of meaningful access to the court system increases the incentive for communities to maintain the social organisation and values conducive to informal dispute resolution. In other words, meaningful access to the courts decreases the necessity to provide effective third-

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[71] *Supra*, note 57, Haley, p. 5.

[72] F. Upham: "Litigation and Moral Consciousness in Japan: An Interpretative Analysis of Four Japanese Pollution Suits", Law & Society, (Summer, 1976) p. 579 at 615; The suits are the *Yokkaichi Case*, (Tsu District Court, Yokkaichi Branch), July 24, 1972; The *Kumamoto "Minamata Disease" Case*, (Kumamoto District Court), March 10, 1973; *the Niigata "Minamata Disease" Case*, (Niigata District Court), Sept. 29, 1971; and the *Toyama "Itai Itai" Case*, (Nagoya High Court, Kanazawa Branch), Aug. 9, 1972.

[73] *Supra*, note 71.

[74] The "Reapportionment Cases", *supra*, note 57, Haley, p. 6.

[75] F. Upham: "Instrumental Violence and Social Change: The Buraku Liberation League and the Tactic of Denunciation Struggle", 17 *Law in Japan*, (1984), p. 185 at 205; The "Burakumin" are descendants of the outcasts of the Tokugawa period.

[76] *Supra* note 57, Haley, p. 6.

party mediation at the community level, and causes traditional normative structures responsible for group cohesion to also decline in importance. In Japan, many factors exist which reduce access to the courts and deprive the courts of the ability to give effective relief.

Although the population has tripled since the Meiji era, the number of judges active in the judiciary has remained fairly constant.[77] This factor, combined with the civil law practice of conducting hearings at monthly intervals, has caused acute delays and extreme backlogs in the number of cases waiting to be heard. Proceedings that continue for eight to ten years are not uncommon. In addition, the ratio of private attorneys per one million population is lower than it was even in the 1930s. Even more astounding is the total absence of law offices in many small cities where summary courts or branches of district courts are located.[78] This shortage of judges and lawyers is clearly the result of government policy. Irrespective of the number of applicants, the number of those who pass the bar exam in Japan has been restricted to only five hundred per year.

Lawyers' fees seem high and financial assistance in the form of legal aid to parties involved in civil trials is extremely limited.[79] Except in tort cases, lawyers' fees are not recoverable from the losing party.[80] In addition, court costs, especially filing fees, are expensive.

> "They are gradated by the amount of damages sought, so that to sue for one million dollars would cost over five thousand dollars in filing fees alone. The necessity for hazarding capital on the chance of winning the suit may well be a deterrent to civil action."[81]

The inability of courts to enforce the law themselves or to provide effective legal relief is another factor which reduces incentive to sue. Damages are awarded primarily as a method of compensating pecuniary loss and are never of a puntive nature.[82] Moreover, as discussed above, the power of legal sanctions is weak in Japan and to a great degree the courts must rely on social sanctions for enforcement. This also tends to buttress the cohesion of groups and contributes to the endurance of vertical, patron-client relationships,[83] thereby enabling traditional normative mechanisms of social control to retain their viability.

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[77] J. O. Haley: "The Myth of the Reluctant Litigant", 4 *Journal of Japanese Studies*, (1978), p. 359 at 381, citing Japan Federation of Bar Associations, "*Shiho Hakusho*", (White Paper on the Judiciary) (Tokyo, 1974), pp. 326-327.

[78] *Ibid.*

[79] *Ibid.* p. 382.

[80] H. Tanaka: "Jittei Hogaku Nyumon", (Introduction to the Study of Positive Law), in H. Tanaka, ed., *The Japanese Legal System: Introductory Cases and Materials*, (Uni. of Tokyo Press, 1976), p. 254 at 268.

[81] H. Tanaka & A. Takeuchi: "The Role of Private Persons in the Enforcement of the Law: A Comparative Study of Japanese and American Law", 7 *Law in Japan*, (1974), p. 34 at 43.

[82] *Ibid.*

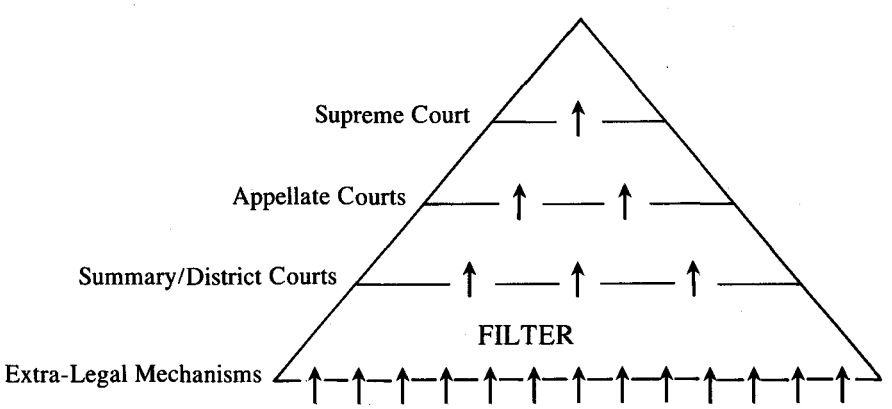
[83] M. Thomson: "Dispute Resolution in Japan: The Non-Litigious Way", 43 *The Advocate*, (July, 1985), p. 459 at 468.

Independence affords no advantages in a society in which meaningful sanctions, and thus stability and social order, can only be provided by the group or community.

It therefore appears that various institutional factors have done little to encourage the breakdown of traditional normative structures of behaviour in Japanese society. They have had a deterrent effect upon the development of "rights consciousness" and retard the movement for the creation of a more equitable order. Even in large urban centres where populations tend to be enormous, mobile and anonymous, traditional values have not eroded to the extent that one might have expected, although it must be conceded that attitudes towards informal means of dispute settlement have changed over time. As Yasuhei Taniguchi has pointed out, in conciliation proceedings over recent years there appears to have been a tendency towards demanding "not an unprincipled persuasion by elderly lay conciliators but persuasion by specialists with a clear understanding of the law and analysis of the facts."[84]

The strength of social tradition and the effectiveness of government policy directed at persuasion to settle disputes out of court should not be underestimated. The government has obviously perceived that it is in society's interest for traditional normative structures to be retained as far and for as long as possible. As the following diagram indicates, the result has been for such structures to operate as a very effective filter or screening mechanism for problems with legal references so that far fewer of these ultimately enter the institutional legal order than would be the case in Western industrial societies.

Selectivity of Legal System: Hierarchy and Hard Cases



[84] *Supra*, note 81, Tanaka & Takeuchi, p. 45.

[85] *Supra*, note 58, Haley, p. 278.

[86] Y. Taniguchi: "Dispute Resolution in Japan", Conference on *Dispute Resolution in the East Asia Region*, San Francisco, Sept. 11 & 12, 1986, at p. 7, cited by P. Condliffe, "Mediation and Conciliation: The Japanese Experience and the Australian Experiment", (Unpublished Manuscript, 1988).

CONCLUSION

The Tokugawa Shogunate, which ruled Japan from 1603-1867, fostered a structure of normative behaviour which was antithetical to the concept of autonomy of the individual. Behaviour came to be regulated by the indeterminate rules of "giri" which constituted a mechanism based upon the incurring and repayment of obligations within an intricate network of human relationships. This mechanism worked against the clear delineation and objectification of social norms, leaving little room for the notion to develop that a set of rules bound all parties concerned and that one could demand certain performances on the basis of these rules. Thus, the concept of "right" did not exist in Japan until after the introduction of Western legal codes for even under the Tokugawa Codes, all laws had been expressed as "duties" and never as "rights".

Concern has been expressed that since the legal codes now being used in Japan did not organically evolve from customary social norms, that they are incompatible with the "living law" of the people. It has thus been suggested that Japan lacks a true "general legal order" and that as a result, as it lacks a crucial "evolutionary universal", Japanese society will be hampered in its drive to reach a higher stage of evolutionary development.

This paper has shown that the formal legal system, while showing signs of being heavily influenced in its operation by the "living law", actually depends on the existence of traditional normative mechanisms of control for its viability. The procedures of conciliation ("chotei") and compromise ("wakai") import into the formal legal system the preference for the "indeterminate" which has been such a feature of the "living law". The approaches taken by the Japanese courts towards legal rights and statutory interpretation appear to have been derived from the popular conception of social relationships. Ostensibly Western-style statutes have been "japonised" by creative statutory interpretation so that they too reflect the "living law". Moreover, insofar as Japan's formal legal sanctions are weak, the Japanese legal system appears to depend on the continued potency of extra-legal or social sanctions for the enforcement of the formal laws of the state. Thus it has appeared to have been public policy to ensure that the institutionalised legal system detracts from the efficacy of traditional mechanisms of control as little as possible.

Evidence available as to the workings of the Japanese legal system therefore seems to suggest that there is a very high level of interaction taking place between the living law and the formal law of the state. The two structures have evolved so that they are now highly complementary. It thus appears that a highly integrated and adaptive system has emerged that will be adequate to the demands of a society undergoing rapid diversification. It is thus submitted that Japan does indeed possess a "general legal order" that, although somewhat anomolous, operates effectively in the Japanese context.