Understanding Legal Culture through the Intersection of Law, Culture and Gender — An Example from Japanese Family Law

SANDRA HOTZ
(Faculty of Law, University of Zurich and Collegium Helveticum, University of Zurich/ETH)

INTRODUCTION

This article discusses the concept of 'legal culture' in relation to the concept of 'intersectionality', deriving from legal gender studies.[1] First, I discuss the concept of intersectionality and the way it can be used to support the outcome of legal culture. I then illustrate this approach using an example from Japanese family law. Secondly, a short comparative discussion on Japanese, German and Swiss 'marriage contracts' (so called pre-nuptial contracts) shows how matters are dealt with differently. Thirdly, I consider Japanese marriage contracts — or rather the fact that there are no marriage contracts — more deeply from a legal, cultural and gender perspective. Using this example, I conclude with my findings on legal culture through the intersection of law, gender and culture as well as with some comprehensive remarks regarding the concept of legal culture.

LEGAL CULTURE AND THE CONCEPT OF INTERSECTIONALITY

Legal Culture

Legal culture is a concept with no exact definition. There is no general agreement on the meaning of it.[2] It has been used in many ways and has been criticised as being too imprecise,

[1] Based on a talk delivered at the workshop on 'The Uses of Legal Culture', Venice, May 2010.

[2] Friedman, LM (1969) 'Legal Culture and Social Development' (4) *Law and Society* 29 at 34; Friedman, LM (1994) 'Is there a Modern Legal Culture?' (7) *Ratio Juris* 117 at 118. By legal culture we mean the ideas, values, attitudes and opinions people in some society hold with regard to law and legal system. Greetz, C (1973) *The Interpretation of Cultures, Selected Essays* Basic Books at 6, 14: ideas, beliefs and values which form a conceptual framework. See today Nelken, D 'Defining and Using the Concept of Legal Culture' in Örucü, E and Nelken, D (eds) (2007) *Comparative Law. A Handbook* Oxford Publishing at 109; Nelken, D (2006) 'Legal Culture' in Smits,

obscure or all-inclusive.[3] Within comparative legal studies, some scholars consider it as a possible tool to explore and interpret foreign 'legal practice', which in this article will be the Japanese one.[4]

Japanese contract law is a fusion of European legal thinking dating back to the end of the 19th century (the actual Minpô 民法 [the Japanese Civil Code] dates from 27.4.1896/ No.89 and from 21.6.1898/No.9), the American legal thinking prevailing since the time after the Second World War (including political equality, reform of the family law), and traditional Japanese thinking and conventions. A certain reception of contemporary global laws (such as 'Committee on the Elimination of Discrimination against Women') must be taken into account as well.[5] Provisions on matrimonial property were enacted only after the Second World War, as a result of American influence. It was one of the scopes of the family law revision; before that, there was only some kind of consolation money for the divorced wife (手切れ金 *'tegi renkin'*).[6]

In effect, a study on 'legal culture' may amount to a study on borrowed and local laws, institutions, norms and legally oriented behaviour in general. The subject of marriage contracts is only one of many examples to investigate intersections of law, culture (including legal culture) and gender.

Intersectionality

Intersectionality as a Practical and Theoretical Concept against Discrimination

Like legal culture, intersectionality is a concept with no exact boundaries or definition. It was introduced by feminists and named by Kimberlé Crenshaw in the late 1980s, and is still used to outline multiple forms of discrimination against black women.[7] Intersectionality

JM (ed) *Elgar Encyclopedia of Comparative Law* Elgar Publishing at 372; Nelken, D (1997) 'Comparing Legal Cultures: An Introduction' in Nelken, D (ed) *Comparing Legal Cultures* Aldershot. Critics opt for other concepts, see eg Patrick H Glenn for 'legal traditions' (2004) and Roger Cotterrell for 'legal ideology': Cotterrell, R (1997) 'The Concept of Legal Culture' in Nelken *Comparing Legal Cultures* 13; Cotterrell, R (2006) 'Comparative Law and Legal culture' in Zimmermann, R and Reimann, M *The Handbook of Comparative Law* Oxford 709.

[3] Cotterrell 'The Concept of Legal Culture' supra n 1 at 29; Cotterrell, R (2004) 'Law in Culture' (17) *Ratio Juris* 1; Glenn, PH (2004) 'Legal Cultures and Legal Traditions' in Mark Van Hoeck (ed) *Epistomology and Methodology of Comparative Law* Oxford 7 at 16.

[4] Nicholson, P and Biddulph, S (2008) 'Expanding the Circle: Comparative Legal Studies in Transition' in Nicholson, P and Biddulph, S (eds) *Examining Practice, Interrogating Theory: Comparative Legal Studies In Asia* Brill 72.

[5] Hasegawa, K (2002) 'The Structuration of Law and its Working in the Japanese Legal System' in Moreteau and Vanderlinde (eds) *16. Congrès de l' Accadémie du droit international à Brisbane* Bruxelles 319. In the 19th century many European and other laws were consulted by the Meiji government in Japan in order to set up a civil law book that suited Western powers. Only with a Western-style civil law would Japan find international acceptance. The result was a reception of provisions and of the overall structure of the German Civil Code, the BGB (or to be precise, the structure of the first draft of the BGB from 1888): see Hotz, S (2006) *Japanische, deutsche und schweizerische Irrtumsregelungen im Verhältnis zu den besonderen verbraucherschützenden Vertragslösungsrechten [Remedying Errors in Japanese, German and Swiss Law in relation to Contract Dissolution Rights for Consumer Protection]* Tübingen at 6; Jansen, MB (ed) (1998) *The Cambridge History of Japan, Vol. 5: The Nineteenth Century* Cambridge at 432, 448.

[6] See n 65; Kawashima, Y (1983) 'Americanization of Japanese Law 1945-1975' (16) *Law in Japan* 57 at 62 'one can pinpoint the American influence on some particular aspects of family law such as division of marriage property and the Family Court's supervision of children'.

[7] Crenshaw, K (1989) 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' in Bartlett, KT and Kennedy, R *Feminist*

showed that black women were a non-issue in the public sphere and suffered not only from discrimination by gender but also from discrimination by race and class. Crenshaw analysed a controversial decision[8] which had turned down a discrimination claim by black women against General Motors automobile industry. Since the firm had hired white women there was ostensibly no gender discrimination, and because it had hired black men there was apparently no racial discrimination. Crenshaw pointed out that the intersection of the two perspectives discriminated against black women in particular. Intersectionality as a concept therefore first opened a door against 'gender essentialism' and revealed that a person can be discriminated against for multiple qualities.

Expanding Intersectional Approaches

Since then, the concept of intersectionality has been applied to further perspectives such as economics,[9] nation, history,[10] age or religion. For example, when discussing legal problems related to Muslim women wearing headscarves, one should simultaneously take into account the perspective of religion and the perspective of gender.[11] To neglect cultural group interests within this complex issue could even lead to the destruction of a 'group's identity'.[12] Intersectionality therefore offers a practical and theoretical basis to respect the complexity of all identities confronted with the law.

Because individual identities are formed by their specific social contexts, the concept can also be expanded to explore 'social identities' and processes or, as some call it, to explore more 'material questions'.[13] When, for example, dealing with contracts of Asian migrant dancers in Europe or East-European dancers in Japan at least three perspectives intersect: gender, labour law and nationality. This is because, first, most men do not perform as table dancers; second, the women in Japan or Switzerland hold similar short-term dancers' visas and suffer from bad labour contract conditions; and third, migration is not a national

Legal Theory Boulder 57 at 62.

[8] *DeGraffenreid v General Motors Assembly Division*, St Louis, CAMo 15.7.1977, cit. 558 F.2d 480.

[9] Spivak, G (1987) *In Other Worlds* London at 166: 'The complicity between cultural and economic value systems is acted out in almost every decision we make'.

[10] Gottfried, H (2008) 'Missing Subject in Japan: Intersectionality of Gender, Class, Race and Nation' in Klinger, S and Knapp, GA (eds) *Überkreuzungen* Münster at 230 or see Kremer, A (2003) 'Feminist History in Japan' (9) *Intersections of Gender History and Culture in the Asian Context* under http://intersections.anu.edu.au/about_inter.html, accessed 12 January 2011.

[11] The Swiss Federal Court decision (BGE) ['Bundesgerichtsentscheid'] 134 (2008) I 49 dealt with the problem only under the aspect of freedom of religion. But if wearing a headscarf is a symbol of womanhood too, we should consider gender discrimination as well; see Holzleithner, E (2008) 'Gendergleichheit und Mehrfachdiskriminierung. Herausforderungen für das Europarecht' ['Gender Equality, Multiple Discriminations. Challenge to European Law'] in Arioli, K and Cottier, M (eds) *Wandel der Geschlechterverhältnisse durch Recht* [*Changes of Genderrelation through Law*] Zürich/St.Gallen 305 at 316.

[12] Saharso, S (2008) 'Gibt es einen multikulturellen Feminsimus? Ansätze zwischen Universalismus und Anti-Essenzialismus' ['Is there a Multicultural Feminism? Thoughts between Universalism and Anti-Essentialism'] in Birgit Sauer and Sabine Strasse (eds) (2008) *Zwangsfreiheiten, Mulitkulturalität und Feminismus* [*Forced Freedoms, Multiculturalism and Feminism*] Wien 11 at 13, 23.

[13] Winker, G and Degele, N (2009) *Intersektionalität: Zur Analyse sozialer Ungleichheiten* [*Intersectionality. To Analyse Social Disparities*] Bielefeld at 63; Conaghan, J (2008) 'Intersectionality and Mapping the Feminist Project in Law' in Grabham, E et al (eds) *Intersectionality and Beyond* 2008 21 at 26, 27; Vieten, UM (2008) 'Intersectionality Scope and Multidimensional Equality within the European Union' in Schiek, D and Chege, V (eds) *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* Cavendish 104.

problem but a transnational one. If these three perspectives are not all considered from the very beginning, then the perspectives on culture and gender will probably be neglected.[14]

The concept also has a strong methodological spectrum. McCall[15] illustrated that the concept offers a frame to 'different methodological routes'.[16] It is certainly more than a tool to gather data on women, their ethnical origin and their status (although these are important: for example the question of who exactly is concluding a marriage contract or is undergoing cosmetic surgery[17]). It offers a general possibility to think about different intersectional approaches, all understood as parts of a current shift towards investigating and accepting the complexity of social phenomena.[18] In this sense intersectionality shares similarities with 'histoire croisée', initiated by Bénedicte Zimmerman and Michael Werner.[19]

The concept of intersectionality is, however, part of an ongoing debate.[20] One of the problems central to the concept is the choice of perspectives, which is, without a doubt, entirely personal[21] (see below). There are controversial questions as to what exactly should be intersecting, including whether the set of intersections should be unlimited or not.[22] There are a lot of references to 'categories' that intersect, but what is meant by 'categories' is not clearly defined. And can there be talk of categories when addressing gender issues in a time one actually wants to de-gender?[23]

Thus, I simply write about multiple perspectives that are intersecting and take the stance that these are a necessary starting-point[24] and basically unlimited. This can be illustrated by the simple example of looking at an object in red, blue or yellow light: when all the lights intersect we can see the object in white light. Or in other words, intersectionality

[14] Gottfried 'Missing Subject in Japan' supra n 10 at 230.

[15] Leslie McCall distinguishes an 'anticategorical', an 'intracategorical' and an 'intercategorical' approach: McCall, L (2001) *Complex Inequality* New York at 179; McCall, L (2005) 'The Complexity of Intersectionality' (30) *Journal of Women in Culture and Society* 1771; McCall, L (2008) 'The Complexity of Intersectionality' in Grabham et al *Intersectionality and Beyond* supra n 13 49 at 51, 59.

[16] Grabham, E et al (2008) 'Introduction' in Grabham et al *Intersectionality and Beyond* supra n 13 6.

[17] See for an example of empirical study Penz, O (2010) *Schönheit als Praxis, Über klassen- und geschlechtsspezifische Körperlichkeit [Beauty as Practice. Gendered and Class-related Body Understanding]* Köln.

[18] Winker and Degele *Intersektionalität* supra n 13 at 79.

[19] Werner, M and Zimmermann, B (2006) 'Beyond Comparison. Histoire Croisée and the Challenge of Reflexivity' (45) *History and Theory* 30; see for the integration of this concept: Hotz, S (2007) 'Gedanken zur Rechtsvergleichung als einer Kulturwissenschaft und über Europa hinaus' in Senn, M and Puskás, D (eds) *Rechtswissenschaft als Kulturwissenschaft?* Franz Steiner Verlag/Nomos at 201.

[20] Lykke, N (2010) *Feminist Studies, A Guide to Intersectional Theory, Methodology and Writing* Routledge at 70, 78; Conaghan, J (2008) 'Intersectionality and Mapping the Feminist Project in Law' in Grabham et al *Intersectionality and Beyond* supra n 13 21 at 27.

[21] Ludvig, A (2006) 'Differences between Woman?' (13) *European Journal for Women Studies* 246 at 247; McCall *Complex Inequality* supra n 15 at 179; McCall 'The Complexity of Intersectionality' supra n 15 at 59.

[22] Lykke *Feminist Studies* supra n 20 at 82.

[23] Lorber, J (2006) 'Man muss bei Gender ansetzen, um Gender zu demontieren. Feministische Theorie und Degendering' ['To de-gender one ought to start with gender'] (2/3) *Zeitschrift für Frauenforschung und Geschlechterstudien* 9. In German: 'Kategorien', 'Achsen' and 'Relationen' see Knapp, GA (2008) 'Verhältnisbestimmungen: Geschlecht, Klasse, Ethnizität in gesellschafts-theoretischer Perspektive' ['Setting the Relations: Critical Perspectives of Gender, Class and Ethnicity'] in Knapp, GA and Klinger, C (eds) *Überkreuzungen* Münster 138 at 139; others, eg Lykke *Feminist Studies* supra note 20, use the term of 'categories' throughout a book without discussing it.

[24] In McCall's terminology this would come close to an 'intracategorical approach' without accepting any material 'categories', but naming some perspectives as starting-points for the intersectional approach.

offers a methodological and theoretical approach to reveal neglected points or problems, which can (only) be seen when taking an intersectional approach.

Taking account all these extensions of the concept, intersectionality can be understood more generally as an adaptable concept to prevent essentialism or, as Conaghan puts it, to create a 'discursive sphere' preventing essentialism.[25]

The Two Concepts Confronted

The concepts of 'intersectionality' and 'legal culture' share the assumptions of plurality and complexity and the connections of law and society when compared with functionalism. The overall scope of the two concepts is similar. The use of the concept of 'legal culture' and a legal study (including comparison) at the intersection of law, culture and gender seeks to include cultural, social and gender factors to reveal the law in action, to put law in a larger framework and to go beyond its national dogmatic level and demonstrate its functioning.

The concepts have another point in common: the two most frequently articulated pros and cons. Intersectionality has been criticised as 'too blurred' by some while to others it is a 'handy catch-all'.[26] Nevertheless, in my opinion a multi-focused perspective from the very beginning is better than a mono-focused one. And an explicit and conscious research approach is to be preferred to an unconscious one. Furthermore, the 'blurredness' of the concept serves the purpose of not presuming the results (understood as presuming 'sameness' or 'differences' in comparative studies), which has always been one of the main points of criticism raised against the functional comparative approach. Intersectionality as a theoretical concept can help to prevent essentialism of culture and gender. And it promotes seeing the complexity of contractual relationships instead of reducing it to a model contract.

In a Japanese context, the 'uniqueness' of Japanese culture, social organisation, women and law (including the reception process) is broadly criticised throughout liberal arts society (in a Japanese context this discussion is called *'Nihonjinron'* ['discourses on Japaneseness', literally 'theory or theories of being Japanese'],[27] and in a German context called 'Exotisierung').[28] Therefore a multi-focused perspective seems especially fruitful in order not to freeze patterns and to see the different layers of laws, norms and cultures with their contextualising actors and institutions as an inductive hole, as the diverse hybrid it is.[29]

[25] Conaghan 'Intersectionality and Mapping the Feminist Project in Law' supra n 20 at 29.

[26] Poenix, A and Pattynama, P (2006) 'Intersectionality' (13) *European Journal for Womens Studies* 187 at 190.

[27] Befu, H (2009) 'Concepts of Japan, Japanese cultures and the Japanese' in Sugimoto, Y (ed) *Modern Japanese Culture* Cambridge 21 at 25; Sugimoto, Y (2009) 'Japanese Culture: An Overview' in Sugimoto, Y (ed) *The Cambridge Companion to Modern Japanese Culture* Cambridge 1 at 4; Sugimoto, Y (1996) *An Introduction to Japanese Society* Cambridge (2nd ed 1999), ch 1; Sugimoto, Y and Ross, M (1986) *Images of Japanese Society* Kegan Paul at 32.

[28] Eg Bälz, M (2008) 'Wider den Exotismus?' ['Against the Uniqueness?'] (25) *Journal for Japanese Law* 153.

[29] Fuchs, M (2005) 'Interkulturelle Hermeneutik statt Kulturvergleich, Zur sozialen Reflexivität der Deutungsperspektiven' ['Intercultural Hermeneutics instead of Cultural Comparisons. Of Social Reflexivity Interpretational Perspectives'] in Srubar, I, Renn, J and Wenzel, U (eds) *Kulturen vergleichen, Sozial- und kulturwissenschaftliche Grundlagen und Kontroversen* [*Comparing Cultures, Basics and Controversies in Social and Cultural Studies*] Wiesbaden 112 at 126.

If the concept is used as a tool to approach 'legal culture', seeking to include at least some of these non-static 'values, opinions, attitudes and beliefs about law',[30] it might take the discussion of 'legal culture' a step further. This means that not only does the bundling of values, opinions and so on form a 'legal culture', but values, opinions, attitudes and beliefs about law are also interwoven and at the specific intersections another understanding of a legal culture will be revealed.

It is thus not my aim to compare these two concepts. They are not really comparable because 'legal culture' is material, something 'thick', whereas 'intersectionality' — understood here as a research approach preventing potential essentialism — is more formal and has to be filled with contents. Knowing that any legal culture can be approached from different perspectives, to combine the two might serve the outcome of understanding specific Japanese legal culture. 'Legal culture' in itself does not say anything about how to approach research or to start a study on Japanese marriage contracts.

A Discussion within 'Comparative Legal Studies'

Understanding legal culture through the intersection of law, culture and gender can be the scope of any legal study, but mostly — looking at it from the discipline of law — it is probably the role of academics involved in comparative legal studies. I will investigate the proposed approach from this point of view, without denying its suitability for other legal studies. But 'comparative legal studies' suggest an approach beyond mere (functional) legal comparison. As proposed by Nicholson and Biddulph[31] I wish to distinguish between 'comparative legal studies' on the one hand (more likely to include, for example, intersections of law, culture and gender and concepts of legal culture) and the 'Comparative Law' taught in continental Europe on the other hand.

'Comparative Law' has a long tradition of analysing different ways by which legal systems have regulated similar functional problems. A look at the mainstream literature and the curricula of Comparative Law taught at continental European universities suggests that the traditional functional comparative law method as developed by Ernst Rabel and represented today by Zweigert/Kötz[32] — despite the criticism raised against it (for example that doctrinal analysis and system-level taxonomy are always historical and restricting, and functional equivalents are always culturally contingent[33]) — is still in one way or another widely accepted. However, 'Comparative Law' is not integrated with law and society studies and only a few continental European comparative works draw on social science work and the investigation of laws in action. Thinking in 'European terms' and

[30] Friedman, LM (1998) 'Some Thoughts on the Rule of Law, Legal Culture and Modernity in Comparative Perspective' in Institute for Comparative Law, Japan (ed) *Toward Comparative Law in the 21st Century* Chuo University Press at 1075.

[31] Nicholson and Biddulph *Examining Practice, Interrogating Theory* supra n 4 at 9.

[32] Zweigert, K and Kötz, H (1996) *Einführung in die Rechtsvergleichung* (3rd ed) Tübingen.

[33] Frankenberg, G (1985) 'Critical Comparisons: Rethinking Comparative Law' (26) *Harvard International Law Journal* 411 at 413 remains seminal to the position of this postmodern criticism. Of special relation to cultural difference is Grosswald Curran, V (1998) 'Dealing in Difference: Comparative Law's potential for Broadening Legal Perspectives' (46) *American Journal of Comparative Law* 657 at 667 and Grosswald Curran, V (1998) 'Cultural Immersion, Difference and Categories in US Comparative Law' (46) *American Journal of Comparative Law* 43 at 57. For an overview on the actual discussion see Michaels, R (2006) 'The Functional Method of Comparative Law' in Reimann, M and Zimmermann, R (eds) *The Oxford Handbook of Comparative Law* 339.

being restricted by 'Roman legal traditions' or the old dichotomies of common law and civil law might only be some of the reasons accounting for this reluctance. Even though it has to be admitted that the European integration process is in itself a challenging and ambitious project, it is supported by economic powers and the idea of a common market and the 'Roman legal traditions' are in favour of the approval of the power of today's well-educated traditional-dogmatic (comparative) lawyers. Adding an explicit focus on the intersections of law, culture and gender and legal culture therefore does not claim any new knowledge itself. However, it takes a less narrow comparative legal research perspective in order to attain a certain methodological approach beyond the functional one. 'Intersectionality' as a research perspective bears the potential to be multi-focused and in some sense might be a more systematic approach to understand 'legal culture'.

MARRIAGE CONTRACTS IN JAPANESE, GERMAN AND SWISS LAW AND SOCIETY

A 'marriage contract', in German *'Ehevertrag'* (or French *'contrat de mariage'*) is an agreement between spouses or couples planning to get married regarding the matrimonial property scheme, intended to enter into force on the date of their marriage. It is also called a 'pre-marital' or 'pre-nuptial' agreement, and in American family law the latter terms are exclusively used.[34] It defines the matrimonial property system the parties choose and, within the limits of law, to whom assets, debts and properties acquired during the marriage are to belong: are they to be owned jointly, or by one alone, or by each separately? And how is a community of property to be divided upon divorce?

On the one hand, 'private autonomy' and 'freedom of contract' are fundamental principles in most societies. Thus the Swiss, the German and the Japanese constitutional and civil law offer the relevant provisions.[35] Of particular interest in this context are the provisions contained in the matrimonial property laws.[36] Freedom of contract is explicitly stipulated by the German (§ 1408 BGB) and the Swiss Matrimonial Property Law (art 181 f CC)[37] and implicitly by the Japanese Matrimonial Property Law. Art 755 Minpô states:

[34] The EC-Commission Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes 17 July 2006, Com 2006(400), uses the term 'marriage contract' as well. See § 1 of the Uniform Premaritial Agreement Act of 1985 (UPAA), which is adopted by the majority of the US states; Ellmann, IM et al (2004) *Family Law: Cases, Problem, Texts* (4th ed) LexNexis at 734. The Japanese term used in doctrine actually comes closest to reality. They call the 'contract' according to art 755 Minpô *'fufu zaisan keiyaku'* meaning literally a contract on the spouses' properties.

[35] Protected by the Right of Personality: art 2 par1 of the German Basic Law and at the same time as an 'other right' protected in civil law under § 823 par1 BGB (case law since BGHZ 13, 334, 338), art 10 of the Swiss Constitution (Bundesverfassung, BV) art 13 of the Japanese Constitution (Kempô) and protected by the Right of Freedom of Trade: art 27 BV. In the ongoing revision of the Japanese Civil Code, a new article for 'Freedom of Contract' is provided for [3.1.1.01]: 'The parties decide of their own free will whether they want to enter into a contract and on its content.' See Special Edition of the *New Business Law Review* (2009) No. 126 at 89.

[36] Art 24 Kempô: '(1) Marriage shall be based only on the mutual consent of both sexes and it shall be maintained by mutual cooperation with equal rights of husband and wife as a basis. (2) With regard to the choice of a spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of sex" (Constitution of 3 November 1946, enacted as from 5 May 1947). The Japanese Family and Inheritance Law (book 4 and 5 of the Civil Code (Minpô) was revised completely on 22 December 1947, enacted as of 1 January 1948.

[37] § 1408 BGB: '(1) The spouses may provide for their matrimonial property arrangements by contract (marriage contract), and in particular even after entering into marriage terminate or alter the matrimonial

'If husband and wife have not, prior to the notification of marriage, entered into contract, which provides otherwise with respect to their property, their property relations shall be governed by the provisions of the next Sub-Section'.

However matrimonial properties cannot be left entirely to the discretion of the parties because normally couples do not form matrimonial property arrangements. Therefore, European continental civil law systems have adopted provisions on specific matrimonial property schemes to choose from and to restrict freedom of contract,[38] whereas common law systems face the respective questions more through jurisdiction.[39]

The number of provisions on matrimonial property in each of the three Codes is very different. The Marital Property Law of the German Civil Law Code has 200 articles, the Swiss Civil Code has 67, and the Japanese Minpô provides for no more than seven. Whereas Germany and Switzerland offer three schemes defining matrimonial property affairs — a joint ownership of acquired property/community of accrued gains ['Errungenschaftsbeteiligung', 'Zugewinngemeinschaft'], a community of property ['Gütergemeinschaft'] and a separation of property ['Gütertrennung'] — in Japan there is just one, the scheme of separation of property (art 762 Minpô). Accordingly, there are hardly any provisions in the Japanese Civil Code regarding the distribution of property when couples separate. Art 768 Minpô states in short that both partners' assets should be divided (see below n 61).

In all three civil laws the parties may choose to enter into a marriage contract (according to art 755 Minpô without any restrictions). Unless a couple entered into a marriage agreement, their marriage is governed by the statutory property regime. According to Swiss and German law this is the system of joint ownership of acquired property, while according to Japanese law this is the system of 'separation of property'. Since marriage contracts often have a great impact on the money and property situation during and after marriage — that is equalization claims ['Ausgleichsansprüche'] and maintenance questions ['Unterhaltsfragen'] — the courts in Switzerland and even more so in Germany have started to control and restrict the parties' private autonomy in respect of marriage contracts. In doctrine, even a compulsory content-control regarding marriage contracts is discussed.[40] Although Japanese law provides for the possibility to enter into a marriage

property regime. (2) If the spouses conclude agreements on the equalisation of pension rights in a marriage contract, sections 6 and 8 of the Equalisation of Pension Rights Act [Versorgungsausgleichsgesetz] are applicable in this respect' (transl German Minstry of Justice, Juris). Art. 181 CC: 'The provisions on the joint ownership of acquired property apply to spouses, unless they have arranged something else by a marriage contract or a extraordinary property schemes applies.' See Tuor, P, Schnyder, B, Schmid, J and Rumo-Jungo, A (2008) *Das Schweizerische Zivilrecht* [*The Swiss Law*] (13th ed) Zurich at 350.

[38] Ibid.

[39] § 3 UPAA eg does not foresee three different marital property schemes to choose within, but lists the 'possible contents' for a premarital agreement whereas the interpretation remains very wide and de facto 'public policy' will set the control.

[40] Swiss law: Schwenzer, I (2005) 'Grenzen der Vertragsfreiheit in Scheidungskonventionen und Eheverträgen' ['The Limits of Freedom of Contract within Marriage Contracts and Divorce Settlements'] *Familienpraxis Schweiz* 1 at 9; Schwenzer, I (1996) 'Vertragsfreiheit im Ehevermögens- und Scheidungsfolgenrecht' ['Freedom of Contract in the Laws of Legal Incidentals and Marital Property] (96) *Archiv für Civilistische Praxis* 88 (see too in (1996) *Aktuelle Juristische Praxis* 1157; Geiser, T (2002) 'Bedürfen Eheverträge der gerichtlichen Genehmigung?' ['Do Marriage Contracts Need a Court's Approval?'] in *Festschrift für Professor Heinz Hausheer* Bern at 217; Schwander, I (2003) 'Eheverträge zwischen ewigen Verträgen und Inhaltskontrolle' ['Marriage Contracts between an Ever-lasting Contract and Content-Control'] *Aktuelle Juristische Praxis* at 572; German Law: Schwab, D (2001) 'Aspekte der Vertragsfreiheit im Familienrecht im Lichte der Reformen' ['Reforms on

contract (art 755 Minpô), the literature suggests that most married couples in Japan do not have one.[41]

According to two surveys conducted in the 1980s, only 10 per cent of married couples enter into a marriage contract in Germany. In 90 per cent of the marriage contracts the couples agree on the 'separation of property'.[42] In Switzerland no survey has been conducted to date. However, according to the two largest notary's offices in Zurich (where one has to register marriage contracts) whom I consulted in summer 2009, less than 10 per cent of married couples enter into a marriage contract. The ones that do so usually wish for a 'best solution' practice for spouses. Couples within a second marriage having children from a prior one often choose the scheme of 'separation of property'.[43] The 'separation of property' scheme is also often chosen when one spouse is a foreigner.

There are no Japanese judgments regarding marriage contracts, nor with regard to contracts in breach of public policy ['gegen die guten Sitten' § 138 BGB] comparable to those that can be found in the German jurisdiction. However a Japanese civil law provision on contracts in violation of public order and morals (art 90 Minpô) does exist.[44]

The highest civil court in Germany ['Bundesgerichtshof'] declared a marriage contract void (§ 138 BGB)[45] because the contractual circumstances were an offence against public policy and morals.[46] The contracting woman in this case was already pregnant when signing the contract and was therefore no longer completely free in her decision on whether she wanted the disadvantageous marriage contract or not.[47] Another case concerned a foreign

Aspects of Freedom of Contract in Family Law'] in Hofer, S et al (eds) *From Status to Contract? Die Bedeutung des Vertrags im europäischen Familienrecht* [*Meaning of Contracts in European Family Laws*] Bielefeld and Dauner-Lieb, B. 'Reichweite und Grenzen der Privatautonomie im Ehevertragsrecht' ['The Scopes and Limits of Private Autonomy in Marriage Contract Law'] (201) *Archiv für Civilistische Praxis* 295 at 319; Dauner-Lieb, B (2003) 'Richterliche Überprüfung von Eheverträgen nach dem Urteil des BGH vom 11.2.2004' ['Judicial Review of Marriage Contracts after the Supreme Courts Decision vom 11.2.2004'] *Forum Frauenforschung* 65.

[41] Uchida, T (2007) *Minpô IV Kazoku-hô* [*Civil Law IV, Family Law*] Tokyo at 27; Ômura, A (2010) *Kazoku-hô* [*Family Law*] (3rd ed) at 61; Oda, H (2009) *Japanese Law* (3rd ed) Oxford at 204. According to colleagues, friends and the people I could ask during talks, 'nobody" had concluded a marriage contract. Some colleagues would try to explain that contracts in a Japanese marriage are rather 'unthinkable'.

[42] Sanders, A (2008) *Statischer Vertrag und dynamische Vertragsbeziehung* [*Static Contracts and Dynamic Contractual Relations*] Bielefeld at 98.

[43] Similar conclusions can be drawn from the appelate opinions in the US: the majority of the parties of a pre-nuptial agreement had been married before and wish to protect their children and/or are rich. In additon the contractor seem to be older than 40 years: see Ellmann et al *Family Law* supra n 34. As far as I found out, there are no US data on pre-nuptial agreements among divorced couples.

[44] § 90 Minpô: 'A juristic/legal act which has for its object such matter as is contrary to public policy and morals is null and void.' (transl by Eibun-Hôrei-Sha Inc 2007).

[45] § 138 BGB: '(1) A legal transaction which is contrary to public policy is void. (2) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgment or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance' (transl by German Ministry of Justice, Juris).

[46] Armbrüster, CH (2006) 'Commentary to § 138 BGB' in Säcker, FJ and Rixecker, R (eds) *Münchner Kommentar zum Bürgerlichen Gesetzbuch §§1-240, ProstG* (5th ed) München.

[47] A range of 'content-control' developed when it comes to marriage contracts: BGH of 11.2.2004, in *Neuer Juristischer Wochenzeitschrift* 2005 at 930; BGH of 25.5.2005 in *Neuer Juristischer Wochenzeitschrift* 2006 at 2331; BGH of 22.11.2006 in *Neuer Juristischer Wochenzeitschrift* 2007, 904, at 907; Oberlandesgericht ['State Court'] Hamm of 2.7.2003 in *Neuer Juristischer Wochenzeitschrift* 2003 at 1659 and see before that: Bundesverfassungsgericht [Federal Constitutional Court'] of 6.2.2001, in *Neuer Juristischer Wochenzeitschrift* 2001 at 957 and of 29.3.2001, in *Neuer Juristischer Wochenzeitschrift 2001* at 2248. Most important to control are regulations on the 'accrued gains', then follow the ones on 'basic alimonies', then the compensation claims for provisions of illness/age, then the 'ordinary alimonies': Brambrig, G (2007) '§ 24 Eheverträge' ['Marriage Contracts'] at n 23 in Schnitzler, K et al

woman with little knowledge of culture and language, who came to Germany to marry a German man who arranged a disadvantageous marriage contract for her. The court reasoned that there was an economic imbalance between the parties when they signed the contract and that the (economically weaker) woman was not in a position to make an independent decision.

Such content-based deliberations as to the interests of the parties, in particular the interests of the economically weaker party, based on the Swiss provisions on the control of content[48] cannot be found in the decisions of the Swiss Federal Court. On the contrary, freedom of contract in financial affairs is stressed.[49] To my knowledge, the Swiss courts have restricted freedom of contract only in cases of 'obvious inadequacy' of assets after a divorce or in cases of 'abuse of rights',[50] such as when appointing the surviving spouse as primary beneficiary for the sole purpose of defeating the interests of the other heirs.

This short comparative legal and factual survey of marriage contracts and possible restrictions of the freedom of contract[51] raises the following questions regarding the Japanese legal culture. Why do Japanese couples not conclude marriage contracts? Is the system of 'separation of property' regarded as the fairest solution between partners, and if so, why? In European civil law culture, the conviction prevails that women and men should have equal shares in property acquired during marriage, in particular if one partner is the breadwinner and the other one is the caregiver. Do the parties simply not give any thought to the possibility of a different contractual solution because the Japanese positive law provides for only one matrimonial property scheme? Does the system of separation of property mirror an imbalance of power and gender inequality or does it on the contrary stand for a recognition of individuality?

With these questions in mind I consider in the following section the fact that there are no marriage contracts in Japanese family law from the perspectives of law, culture and gender.

THROUGH THE INTERSECTION OF LAW, CULTURE AND GENDER

Choice and Definition of the Perspectives

I start by assuming that the three perspectives 'law', 'culture' and 'gender' intersect. The chosen perspectives, however, remain simplifications. However law may be defined, it will always be entangled with the institutions that make and/or enforce it. Assuming a

(eds) *Münchner Anwaltshandbuch zum Familienrecht* (2nd ed) Munich.

[48] Art 19 CO: '(1) The content of a contract is, within the limits of law, at the discretion of the parties. (2) Agreements deviating from what is provided by law, are valid only if the law does not provide (mandatory) provisions which may not be modified, or where such a deviation does not violate public policy, boni mores or basic personal'. Art 20 CO '(1): A contract providing for an impossibility, having illegal contents or violating boni mores, is null and void' (transl by American Chamber of Commerce, 1990).

[49] BGE 121 (1995) III 393 at 395 regarding the control and approval of incidental legal effects of divorce formulated in a marriage contract before marriage; BGE 122 (1996) III 97 at 98; unpublished decision of the Swiss Federal Court of 4.12. 2003 in: 5C.114/2003 and of 2.10.2008 in: 5A.599/2007.

[50] BGE 99 (1973) II 9 regarding freedom of contract and the limits to the abuse of rights among spouses (art 2 II CC): A marriage contract can not be enacted with regard only to death and the preferential treatment to the surviving spouse, because according to Swiss inheritance law (art 462 cif. 1, art 471 CC) the direct descendents and the spouse are beneficiaries by mandatory law.

[51] For more information see the forthcoming article cited in n 1.

'gender perspective' means neglecting the different forms of groupings within, such as ethnical group, class, education, family status, religious identity and individual criteria such as age, sexual orientation and constitution. The perspective here is taken from the very general viewpoint of 'married women'.

The phrase 'culture perspective' is complicated in itself, as it is difficult to find a reasonable definition of 'culture'. I would like to embrace an extensive understanding of culture which is not static, comprises values, beliefs, habits and expectations and determines the perspectives of an individual and of a community. At same time, it does not exclude other extra-legal aspects such as 'biological or psychological research aspects', which are always culturally biased too. Such a comprehensive definition of culture highlights the socialisation process, which again reinstates cultural values and traditions in society.[52] It is also necessary to assume a plurality of cultures. This is important to make transparent that there is always more than one culture depending on the content, the institutions (culture of the Supreme Court, University X, and so on) or the legal problem one investigates. Perceptions of law[53] and legal cultures are cultural phenomena too. In relation to 'marriage contracts', I understand 'culture' in reference to a legal problem, a special content, as culture of 'marriage and family life'.

Moreover between the three chosen perspectives, there can either be a hierarchical relationship or one perspective being represented by another. And the different perspectives gain in quality through these multiple perspectives.[54] This seems important to the approach of legal culture, because it will apply to all possibly chosen sub-perspectives, too. However, even on this basic level the entanglement of the perspectives becomes evident and this shows what is entailed by the complexity of the research questions. On the one hand, problems of injustice and disparity within marriage contracts cannot be solved by taking a legal or 'gender' perspective only, as culturally grown ideas on marriage and family life are relevant as well. On the other hand, cultural explanations can hardly satisfy either, because ideas on cultures (including legal cultures) and especially family culture may represent power practices. This results in the risk that women are not treated equally (for example because they don't have the contractual power as consequence of a existing general gender bias in Japan or as consequence of their personal situation before entering a marriage contract) or are even excluded from the research, because wives, for example, in the past counted as belonging 'to the family of the husband'.[55]

[52] The UNESCO definition of culture reads as follows: 'culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs.' Mexico City Declaration on Cultural Policies, World Conference on Cultural Policies Mexico City, 26 July-6 August 1982; often cited in doctrine is Tylor's old holistic definition of culture (eg Hoffmann, H (2009) *Juristenzeitung* at 1): Tylor, EB (1873) 'Primitive Culture, Researches to the Development of Methodology, Philosophy, Religion, Art and Custom' 1. For a critique of it, mainly because it neglects hybridities of cultures see eg Fuchs 'Interkulturelle Hermeneutik statt Kulturvergleich' supra n 29 at 126.

[53] Haley, JO (2006) 'Law and Culture' (27) *Michigan Journal of International Law* 895 at 896.

[54] To Glenn the concept of 'culture' is only descriptive and is wrongly, treated instead as a source of explanation in itself. 'Culture itself does not explain much, we want to know why something is': Glenn, PH 'Legal Cultures and Legal Traditions' supra n 3 at 16.

[55] This does not mean though, that pre-war marriage Japanese laws were exploitative: see Ramseyer, MJ (1996) *Old Markets in Japanese History: Law and Economic Growth* Cambridge ch 5.

From a Legal Perspective

Divorce Laws

From a functional legal comparative view, one cannot answer questions on marriage contracts or the fact that there are no marriage contracts without considering divorce, divorce procedures and maintenance issues as well.

Regarding the Swiss jurisdiction, for example, it is important to consider that according to Swiss civil law any divorce settlement must be approved by the court (art 140 1 CC). This is a requirement which does not exist in this general form in Germany.[56] According to Swiss courts, a marriage contract defining the incidental legal effects of divorce has therefore to be approved by the divorce court as well.[57] From this point of view, it becomes understandable that freedom of contract is more often under the courts' scrutiny in Germany than in Switzerland.[58]

Regarding the Japanese system of separation of property, from a legal perspective one would first have to consider that in Japan 90 per cent of marriages dissolved at the local ward-offices are done by mutual understanding. This can be without either party being present, despite the fact that there were and are many cases of abuse, as a result of the Japanese signature by stamp which means that the agreement to divorce can easily be simulated. Secondly, divorce rates in Japan have increased in the last few years, which means that there will be more households to divide in the future. Despite this, Japanese divorce rates today remain comparably low.[59] This is relevant, because under a property schema of separation all assets belonging to the husband belong exclusively to him, and a wife has to claim for any share of common assets. [60]

[56] For an exception see § 1578 BGB. There is a fairly new German law on family procedures and non-contentious matters from 17 December 2008 'Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit' (FamFG, in Bundesgesetzblatt = BGBl. I 2586), enacted in September 2009 with the exception of § 376 Abs 2 FamFG (BGBl. I 1102): §§ 133-150 FamFG mirror at first sight some ameliorations regarding the incidentals of divorce: eg spouses have to prepare beforehand for maintenance questions and the information obligations of all involved parties have been tightened. Whether this leads to a more extensive control or approval in praxi of the incidentials of divorce remains to be seen.

[57] See supra n 48.

[58] § 1408 par 2 BGB: 'If the spouses conclude agreements in a marriage contract regarding the equalization of pension rights, sections 6 and 8 of the Equalization of Pension Rights Act ['Versorgungsausgleichsgesetz'] apply in this respect.' And with respect to divorce §1587o par 2 BGB states for agreements on the equalization, that they shall be notarially recorded and require the approval of the family court. Marriage contracts and agreements on the equalization may intersect, but do not have to: Palandt, O; Brudermüller, G (2008) 'Commentary to § 1408 BGB note 19-20' in *Beck'sche Kurz-Kommentar zum Bürgerliches Gesetzbuch* (67th ed).

[59] In 2008, 726,000 couples married and the marriage rate was 5.8 per 1,000 population, whereas the number of divorces totalled 251,000, and the divorce rate was 1.99(per 1,000 population according to the Statistics of the Ministry of Health, Labour and Welfare (http://www.stat.go.jp, accessed 20 September 2009). See further Fuess, H (2004) *Divorce in Japan* Stanford at 149. Until the 19th century the divorce rate was higher in Japan than today (3.3).In 2008 the marriage rate in Switzerland was 5.4 and the divorce rate was 2.6 per 1,000 population: Broshure by Swiss Federal Bureau of Statistics, see below n 81.

[60] Fuess *Divorce in Japan* supra n 59 at 149; Fuess, H (2007) 'Ehebruch als Verbrechen, Der Europäische Beitrag zur Frauendiskriminierung in Japan' ['Adultery as Crime. The European Contribution to Gender Discrimination in Japan'] (24) *Journal for Japanese Law* at 107.

Property Distribution by Family Courts

There is a possibility of demanding the distribution of property before a family court (art 768 Minpô).[61] In Japanese family courts, established under American influence during the American occupation (1946-52), proceedings are normally held before a bench of three judges, one jurist and two laypersons (a social worker, economist or psychologist). The court can consider the entire family situation from the very beginning and in all details. It can then mediate between the parties or, where this is not possible, decide on the dissolution and all the relevant consequences according to its own findings.[62] According to art 768 para 3 Minpô the family judgment bureau will consider the sum of the properties owned by the husband and wife 'and all other circumstances' as well. According to jurisdiction and doctrine these are: the period of family life, the assets of the family, the occupations of the spouses, their mutual supports, whether one party loses income because of resignation after marriage, and the eventual properties obtained as gifts during the period of marriage.[63] Of further relevance to the court's decision is whether one party has been unfaithful.[64]

One can therefore argue that the thoughts of 'community of property' and 'equitable distribution' have made their way into the Japanese marital property law. Moreover the enactment of the amendment to the Employees' Pension Law[65] is one step towards a system offering more security to women, because it allows divorced women to receive up to half of the benefits from their divorced husband's employee's pension. However in practice only 5 per cent of all family court cases during the year 2003 were dealing with matrimonial property or money issues.[66]

The Japanese scheme of separation of property is therefore not as effectively based on an elaborate judicial adjudication as, for example, the British common law system.[67] An average property settlement of a family court in 2003 is said to be a lump-sum payment

[61] Art 768 Minpô: '(1) Husband or wife who has effected divorce by agreement may demand the distribution of property from the other spouse. (2) If no agreement is reached [...] the parties may apply to the Family Court for measures to take the place of such agreement; however, this shall not apply after the lapse of two years from the time of the divorce. (3) [...] the Family Court shall determine whether any such distribution is to be made or not, and if it is to be made, the sum as well as the mode of the distribution, taking into account the sum of such property as is acquired by cooperation of the parties and all other circumstances.' (transl Eibun Hôreisha Inc, 2007).

[62] Uchida *Minpô IV Kazoku-hô* supra n 41 at 43; Nakamura, H (1985) 'Familienrecht und Familiengerichtsbarkeit in Japan' ['Family law and family law procedures in Japan'] (4) *Waseda Bulletin of Comparative Law* 1.

[63] Kôsai Tokyo [High Court of Tokyo] 8 September 1983 in *Hanrei jihô* no 1095 at 106 regarding the relevance of the duration of the marriage, the contributions of the spouses, the sum of the pension of the husband and the fact that the wife still had a job and was therefore independent.

[64] Compensation on the grounds of 'emotional damage' and tort law has been paid to a divorced wife for a long time: Saikôsai [Supreme Court] 26 March 1908 in *Minroku* 14-7-340, Saikôsai 23 July 1971 in *Minshû* 25-5-26, Kôsai Tokyo 22 November 1989 in *Hanrei jihô* no 1330 at 48.

[65] Before, by law the husband received his entire employee's pension in addition to his national pension and the wife could only qualify to receive her own national pension, which is very limited. With the decision of the Chisai Sendai [District Court of Sendai] 22 March 2003 in *Hanrei jihô* no 1829, 119 a wife received for the first time 30% of her husband's pension.

[66] Haley, JO (1978) 'The Myth of the Reluctant Litigant' *Journal of Japanese Studies* 359; Feldman, EA (2000) *The Ritual of Rights in Japan. Law, Society and Health Policy*, Cambridge at 110. These show that Japanese people have a very fine sense of right and wrong, but that Western terms of 'law' might not always coincide with the Japanese views.

[67] Resetar, B (2008) 'Martimonial Property in Europe: A Link between Sociology and Family Law' (12) *European Journal of Comparative Law* 3 (www.ejcl.org).

from the husband to the wife of 4 million yen or US$48,000.[68] In addition, in the majority of cases mothers retain custody of the children after divorce, while the non-custodial fathers usually are not even ordered to provide child support. Hence, most often the mother must meet the costs of raising her children herself. As a consequence of this system it is often very difficult for a woman to obtain a settlement that is sufficient to cover her living expenses after divorce. The result is a general reluctance towards divorce, as well as an increasing number of divorced Japanese mothers living in poverty regardless of their ex-husband's financial status (see below).

Maintenance between Family Members

To secure the family's property situation, Japanese law provides for relatively extensive maintenance obligations among family members. According to art 877 Minpô the maintenance duties apply to all blood relatives in direct line and to all brothers and sisters. Such duties do not exist, for example, in Switzerland or Germany.[69] The court may even appoint further relatives within the third degree. Although a 'nuclear family' is the norm today in Japan, it is notable that 60 per cent of all people over the age of 65 in Japan live together with their relatives.[70]

From a Cultural Perspective of 'Family Life'

Family and Household

If one tries to answer the questions from a cultural perspective of marriage and family life in Japan, attention should be paid to the fact that the above-mentioned regulations reflect the historical and traditional idea of safeguarding the 'family' and mirror the power of the house community [household] and the social family order.

This house-system or so called *Ie*-system [家制度, ie seidô][71] developed during the Meiji Restoration as a hybrid between Japanese traditions and Western legal ideas on kinship.[72] It was legally in force until the Second World War, that is, until it was repealed by the American-influenced reforms of the Japanese Family and Inheritance Laws in 1945. However, the dismantling of the *Ie*-system had already started in the late 1920s.[73]

[68] Yuzawa, Y and Miyamoto, M (2008) *Family Issues — Reading the Data* (2nd ed) NHK Books, printed by Japan Ministry of Health Labour and Welfare at 28, 202.

[69] For further comparison of family support laws: Frank, R (2009) 'Family Solidarity in Support and Inheritance Law' in Verschraegen, B (ed) *Family Finances* Vienna 1 at 11.

[70] Neuss-Kaneko, M (1997) 'Vom 'ie' zu 'mai homu', die Entwicklung in Japan' in Mitterauer, M and Ortmayr N (eds) *Familie im 20. Jahrhundert. Traditionen, Probleme und Tendenzen im Kulturvergleich* Frankfurt 87 at 91; see further (3) *Jinko mondai kenkyû* [*Research on Population*] 2010 at 49 for data on the Japanese population from 2005 to 2030.

[71] '*Ie*' has different meanings: 'house' as a building; house and real estate; 'family' and the family members who live in 'the house'; family genealogy, where only the 'family stamp' matters and not the blood relationship.

[72] Shimada, S (2010) 'Biographie, Kultur, sozialer Wandel' in Cappai, G, Shimada, S and Straub, J (eds) *Interpretative Sozialforschung und Kulturanalyse* Bielefeld 159 at 163.

[73] It began in the 1920s and 1930s when economics led to Marxist-leftist thoughts which threatened the patriarchal family essence: Kano, M (1989) *Fujin, josei, onna* [*Wife Female Sex, Women*] Tokyo at 102; Ueno, C (1990) 'Kaisetsu fûzoku sei' ['Commentary on Sexual Morals'] in Ogi, S, Kumakura, I and Ueno, C (eds) *Nihon kindai shisô taikei* Vol 23 Tokyo 506.

The *Ie*-system is a patrilineal and patriarchal multiple-generation family system where the man's line sets the rules within the system and the family name. According to this previous form of family law, women who married into the house-system of their husbands lost all their property. Therefore, when the law was changed in 1945, the system of 'separation of property' was considered to improve the financial situation of women as it had in continental Europe. It was now possible for a woman to marry into her husband's family and nevertheless keep ownership of her belongings.[74] With the dismantling of the *Ie*-system a new couple relation within the household came up, which included the education and the role of a model housewife ['*shufu*', which is still the common expression for wife]. This role is an ideal which continues today.[75] Though there has been an increase of single-person households, the 'family' remains an institution to which individuals, especially wives, bow (see below).[76]

Handling of the Family Finances

Although 90 per cent of the main family breadwinners are men (see below), family finances are handled by women. This casts a different light on the matrimonial money and property situation. Moreover, it is the woman who decides on her husband's 'pocket money'.[77] And it is common practice that Japanese housewives act as 'asset managers' and provide for the family's future including opening their own saving accounts.

Feelings of Affection and Responsibility

Furthermore, according to Meryll Dean,[78] prior to marriage a relationship of feelings of affection (*ninjô*, literally natural human affections) and responsibility (*giri*) is established between the future spouses. This relationship is considered 'incompatible with monetary preoccupations'. A person wanting to regulate monetary affairs prior to marriage might even be called '*mizukusai*', literally somebody who stinks of water (the 'water business' is another name for the 'prostitution business'). This is a notion not unfamiliar to 'Western' thinking, because, as mentioned above, only about 10 per cent of couples enter into marriage contracts in Germany and Switzerland, and a number of cases in the US until

[74] Commentary to art 755 Minpô, Family Law Tokyo 1966 at 366.The situation is comparable to the Swiss situation before the Civil Code of 1907 (CC): whereas legal feminists opted for the 'separation of property' and their rights to govern and administrate their properties autonomously, Eugen Huber, the drafter of the CC, was in favour of the 'common property' scheme, which suited 'the' understanding of marriage: see Büchler, A and Cottier, M (2011 forthcoming) *Legal Gender Studies — Geschlechterstudien* StGallen.

[75] Silverberg, M (2005) *Erotic, Grotesque, Nonsense. The Mass Culture of Japanese Modern Times* University of California Press 143 at 147.

[76] Ueno, C (2007) *Gendai kazuko no seiristu to* [*Development of Today's 'Modern' Family*] Tokyo at 49; Yumiko, E (2001) *Gendâ no hitotsu kôsa* [*First (Legal) Gender Lectures*] Tokyo at 205, 219, 224; Coulmas, F (2005) [2003] *Die Kultur Japans, Tradition und Moderne* Munich at 53. The significance of marriage can be seen by looking at the out-of-wedlock birth rate, which lies below 5% in Japan, 30% in Switzerland and 25% in Germany, while in France and Britain it is around 40%: Frank, R (2009) 'Family Solidarity in Support and Inheritance Law' in Verschraegen *Family Finances* supra n 69 at 3.

[77] According to a survey by *Shinsei Financial* in June 2009 the average 'pocket money' of a *Sarariman* (white-collar businessman) amounts to about 300 Euro per month, while in the 1990s it was 460 Euro per month: career-cdn.oricon.co.jp/news/66671/full, accessed 12 November 2009.

[78] Meryll, D (2002) *Japanese Legal System* Blackwell (2nd ed) at 18.

the 1970s argued about whether pre-nuptial contracts were against 'public policy' issues or not.[79]

Generally it has to be taken into account that couples have a relatively firm common understanding of marriage and family life. Only 1.2 per cent of Japan's total population of about 127.77 million are foreign residents.[80] This is the main reason why there are hardly any 'international' marriages in Japan. (In Switzerland, for example, in almost 50 per cent of marriages concluded in 2009 at least one partner was a foreigner.[81]) Between 10 and 30 per cent of Japanese marriages are still arranged by a related third person ['*ô-miai*', the polite expression for literally 'meet and see'],[82] although the choice of partner has been entirely free for a long time. But other data confirm that the vast majority of husbands and wives share a similar background, especially the same level of education. This means, for example, that they often completed the same universities and/or school systems.[83]

According to this sense of family affections there is also a 'sense of responsibility' not to divorce and, further, not to go public with family affairs. Often the 'go-between' who had arranged the marriage is the first consultant in family matters. However the majority of the people surveyed in 2000 answered the question 'why would you not get divorced?' by saying that they refuse to separate for financial reasons. [84] Elderly divorced women especially struggle financially since they often lack employability and are therefore forced to survive on the national pension.

From a Gender Perspective

An analysis of the legal and cultural situation of the marriage contracts in Japan including gender perspectives reveals the following.

Gender Gap in General

Compared to its economic development, the international gender-related indices locate Japan in a very unbalanced position. According to the 2008 United Nations Development Program Report of 130 countries,[85] Japan has a 'gender gap index' of 98. The lowest gender

[79] *Volid v Volid* 286 NE2d 42 at 46 (Appeal 1972), *Scherer v Scherer* 292 SE2d 662 (Ga 1982), *Gentry v Gentry* 789 SW2d 928 (Ky 1990); some critics up to today see pre-nuptial contracts as a sign of the possibiltiy of distrust and future divorce: eg Ibrahim, DI (2008) 'The (Not So) Puzzling Behavior of Angel Investors' (61) *Vanderbilt Law Review* 1405 at 1441.

[80] (3) *Jinko Mondai Kenkyu* 2010 at 49.

[81] '*Die Bevölkerung der Schweiz*' (2010), a brochure by the Swiss Federal Bureau of Statistics on the Population of Switzerland by 31 December 2009, Neuchâtel and under http://www.bfs.admin.ch, accessed 12 January 2011: 22,2 % of the population of 7.7 million person are foreigners, whereas Germany has 8.8% foreigners (at 2, 13) and in 49% of all marriages in Switzerland in 2009 at least one person was foreigner (at 11).

[82] The numbers in this matter vary. Tachibanaki, T (2010) *The New Paradox for Japanese Women: Greater Choice, Greater Inequality* (transl Mary Foster) I-House Press at 104.

[83] Tachibanaki, T (2005) *Confronting Income Inequality in Japan* MIT Press at 172. In Japan this is more important than it is eg in Germany or Switzerland, because the choice of kindergarden, school and university is of great importance to the future work place.

[84] Tachibanaki *The New Paradox for Japanese Women* supra n 82 at 129 quoting from a survey of the Japan Institute of Life Insurance from 2000.

[85] Minamino, K (not published) 'Gender in the Continuing Legal Education, Interim Research Report' presented in February 2010 Hong Kong at 2.

gap index of 2 was reported for Finland. Germany has an index of 11, France 15 and the United States 27.

With respect to family law the government of Japan still maintains discriminatory provisions in the Civil Code, as shown by art 731, 733 par 1 and 750 Minpô regarding the different minimum age for marriage (16 years for women/18 years for men), the waiting period for women before they can remarry and the choice of surnames for married couples.[86] However, the latter, for example, was a heatedly discussed *'pièce de résistance'* in Switzerland as well, the new law will enter into force in 2013.

Another obvious example of gender-related discrimination in the context of partnership laws is that the Protection of Victims and the Public Housing Law and the Law for the Prevention of Spousal Violence and the Protection of Victims apply only to opposite-sex couples (either married or unmarried) and are not extended to same-sex couples. This demonstrates that heteronormativity is as predominant in Japan's society as it is in others. There is a certain societal pressure on unmarried women without children to get married. This is especially true for lesbians, bisexual women and transgender persons in their 30s or older.[87] The New Japan Women's Association[88] believes that one major cause of Japan's gender gap is the lack of political will on the part of the government, because international indexes clearly point out Japan's slow progress in achieving gender equality.

Roles of Breadwinner and Caretaker

According to doctrine, one of the most important reasons for a gender-based perception of work and family responsibilities is that family responsibilities (meaning child and family care) are for the most part borne by Japanese women.[89] In 90 per cent of the marriages in Japan the men are the main breadwinners. However, today just over 50 per cent of Japanese women (apart from those between the ages of 25 and 45) work part-time.[90] Women complete 17 times more hours of house-keeping than men. (In Switzerland this factor is 4 and in the United States it is 2.5.) Around 80 per cent of Japanese men between 20 and 80 hardly ever cook or purchase food.[91]

[86] Kyo, S (2010) 'Kazôku-hô kaisei o meguru giron no katei' ['Development of the Discourses on Family Law reforms'] (82) *Hanji* at 4; see for an overview on the discriminatory provisions in the Minpô: Oda, H (2009) *Japanese Law* (3rd ed) 2009 at 163. Since CEDAW 2003, there have been conservative forces that glorify not only Japan's war of aggression (eg 'comfort women' as a non-issue in textbooks), but also call for the revival of the pre-war family system, and take a generally hostile view on the CEDAW and any attempts to change gender-sensitive education and society: www2.ohchr.org/english/bodies/cbedaw/docs/ngos/Japan_NJWA_June09_japan_cedaw44.pdf.

[87] 30 years ago the pressure on women to marry started at 25 years. There are some lesbian women who have practically no choice but to marry a man in order to avoid further pressure from their family and society and possible speculation over their sexual orientation and/or gender identity.

[88] NJWA (*shinfujin*) was founded in 1962, with 200,000 members and 300,000 readers of its weekly newspaper, and a monthly magazine and special consultative status to the UN Economic and Social Council, see www.shinfujin.gr.jp.

[89] Japan Federation of Bar Association (JFBA) report as of 1 June 2010 on behalf of the 44th session of the UN Committee on Elimination of Discrimination against Women, July 2010 at 54 see http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/Bar_Association_June09_Japan_cedaw44.pdf.

[90] All the data relating to Japan are, unless cited otherwise, taken either from: Kinjô, K (2007) *Gendâ no Hôritsugaku* [*Legal Gender Studies*] (2nd ed) Tokyo, and Yumiko, E (2001) *Gendâ no hitotsu kôsa* [*First (Legal) Gender Lectures*] Tokyo at 205, 219, 224.

[91] Holloway, SD (2010) *Women and Family in Contemporary Japan* Cambridge at 92 and 171; see the Japanese Statistics 2008 by Ministry of Health, Labour and Welfare http://www.mhlw.go.jp/english/database/db-hw/

Today slightly more than 50 per cent of Japanese women work part-time outside the household. In fact 72 per cent of all part-time workers are women. Their labour conditions are usually bad and there is no job security (certainly not the still common — though decreasing — Japanese 'life-long-employment'). Compared to international standards the wages of Japanese women in relation to men's wages are low.[92]

The scheme of 'separation of property' in combination with this classical allocation of family roles and the current labour market situation restricts the economical self-determination of women. Whether they can acquire money or property during marriage is subject to their husband's goodwill and depends on how much time they are expected to spend on housekeeping and childcare. Women must rely on their own initiative if they wish to open a savings account, and opening such an account does not give them legal economic security. If women wish any share in property or money acquired during marriage, they must take legal action. However, as shown above, this has not yet met with a broad acceptance. From this perspective, there is something of an asymmetry of power between men and women.[93]

To overcome this dominance of men or imbalance of power,[94] law and lawmakers should take women and their way to life as a base for consideration. From a relational-feminist point of view (meaning that men and women don't have and don't follow the same values)[95] this would presuppose measures that improve the people's awareness in terms of this misunderstanding of a gender-based perception of responsibilities. The government should strive, for example, to increase the number and ratio of male and female workers taking childcare leave, whilst at the same time improving the working conditions of returning employees to facilitate their comeback.[96] It should also adopt measures to improve the status of housekeeping and childcare[97] as well as considering how to compensate women for their work as mothers and housekeepers.[98]

dl/81-1b2.pdf.

[92] Tachibanaki *Confronting Income Inequality in Japan* supra n 83 with reference to the 'Wage Structure Survey' of the Ministry of Welfare and Labour, several Japanese country studies and an international survey by Blau and Kahn (2000).

[93] Baer, S (2001) 'Komplizierte Subjekte zwischen Recht und Geschlecht. Eine Einführung in feministische Ansätze der Rechtswissenschaft' ['Complicated Subjects between Gender and Law. An Introduction to Legal Feminist approaches'] in Kreuzer, C et al (eds) *Frauen im Recht* Baden-Baden 9 at 12.

[94] Baer, S (2006) 'Gender Studies in der Rechtswissenschaft' in Braun, C and Stephan, I (eds) *Gender Studies, Eine Einführung* (2nd ed) at 160.

[95] Olsen, F (1994) *Das Geschlecht des Rechts, Differenz und Gleichheit* Conference of the Swiss Feminist Lawyers at 307.

[96] According to the Japanese Equal Employment Opportunity Law of 1986, as of 1997, women and men have the same legal opportunities to ask for childcare leave. According to the Employment Status Survey of the Ministry of Internal Affairs and Communications 2006/2007, the numbers of employees who either left their jobs or transferred to other workplaces to look after or provide family care for family members amounted to 144,800 persons with approximately 82% of them women. See for an introduction for a revised Child Care and Family Leave Law http://www.mhlw.go.jp/english/policy/affairs/dl/05.pdf, accessed 12 January 2011. The drastic demographic changes suggest that good childcare opportunities are essential to augment birth-rate, and even more precisely, the more hours the husbands spent on housework, the more likely it was that a family had a second child: 'Sixth Comprehensive Survey of Adults in the 21st Century' (2008) Ministry of Health Labour and Wealth.

[97] Holloway *Women and Family in Contemporary Japan* supra n 91 suggests a need for changes in the structure of the workplace and the education system to provide women with the opportunity to find a fulfilling balance of work and family life.

[98] Emmenegger, S (1999) *Feministische Kritik des Vertragsrechts. Eine Untersuchung zum schweizerischen Schuldvertrags- und Eherecht* [*A Feminist Critic to the Swiss Laws of Obligation and Marriage*] Freiburg in Ue. At 232;

OUTCOME FOR THE UNDERSTANDING OF 'LEGAL CULTURE'

Outcome for the Understanding of a Japanese Legal Culture

The conclusion of a marriage contract or the waiver to do so by a couple cannot be fully understood by means of legal comparison alone; cultural and gender perspectives are needed as well. This point can and should be made of all legal studies, but when it comes to comparative legal studies and the investigation of foreign legal practices it is especially necessary, because the cultural and gendered perspectives are even more unknown. Put another way, the functional legal comparison in this article would not have gone beyond a description of legal perspective. Because the Japanese civil law is a hybrid of traditional Japanese norms (as *ninjô-giri* is) on the one hand, and European and later American legal influences on the other hand, it can only be understood in the specific Japanese context.[99]

Even though the Japanese civil law provisions of the Minpô are generally very thoughtfully received,[100] some provisions remain 'black letters'. For example art 755 Minpô on the freedom to choose a marriage contract has not been applied so far, although freedom of contract is considered a fundamental legal principal in Japan. At the same time other provisions, as for example art 90 Minpô (against public policy), the institutionalised general clause to control freedom of contract, is in lively use.[101] Furthermore there are specialised family courts, which, although they would possess the special interdisciplinary knowledge and authority to handle family law cases, are not consulted. The Japanese divorce rate remains comparatively low and lawsuits before the family courts relating to matrimonial property are rare.

This indicates, first, that law-making and law-control are independent processes in Japan just like they are in Germany or Switzerland. Even if the first takes place the latter does not have to follow. An egalitarian code does not suffice, if it is incomplete or the law enforcement does not work. A legal comparison has therefore to include other legal rules and customary norms. Customary enforcement processes, again, do not involve the political authorities and/or sanctions, because they are inofficial and informal. Or in other words they are entailed by social disapproval. This then should lead to a deeper investigation of the relevant 'social group'. In the example of marriage contracts this is the 'Japanese family', however wide the circle of the 'Japanese family' is drawn.

Secondly, one has to take into account that the 'myth' of the Japanese and their 'reluctance to litigate' was deconstructed some decades ago by doctrine (and developed further). The idea has been replaced by the insight that institutional handicaps to litigation[102] and the fear of a trial exposing a person too much were and are more important factors,

Wheeler, S (2005) 'Going Shopping' in Linda, U and Wheeler, S (eds) 2005 *Feminist Perspectives on Contract Law* GlassHouse Press.

[99] Sugimoto 'Japanese Culture: An Overview' supra n 27.

[100] So called 'ideal typical reception' after Ibaraki (1983) in Schluchter, W (ed) *Max Webers Studien über den Konfuzianismus und Taoismus* Frankfurt at 46.

[101] Hotz, S (2008) 'Eine Annäherung an die japanische Generalklausel' ['An Approach to the Japanese General Clause of Public Policy'] (25) *Journal of Japanese Law* 105.

[102] Haley 'The Myth of the Reluctant Litigant' supra n 66; Ginsburg, T and Hoetker, G (2004) 'The Unreluctant Litigant? An Empirical Analysis of Japan's turn to Litigation' *University of Illinois College Law (14) Law and Economic Working Papers* with a very instructive overview on the development of this issue.

leading to Japanese to prefer to settle out of court.[103] There also seems to be some sense of shame about going public with family affairs and especially with a divorce case. But then again, more Japanese people say that they don't consider divorce because of the above-mentioned financial reasons. Reading the existing judgments on divorce cases supports the impression that the very few parties who end up at court were rather well off.[104] However, even couples who are wealthy enough to go to court and can afford to be divorced may not do it either, because they don't wish to publicise their family finances. One or both parties may feel ashamed to admit to the outside, their family or their employer that they no longer have anything in common with their spouse. They feel this as a form of failure.

Very recently 'divorce ceremonies' in a one-day trip have begun. The proceedings may be described as follows. First a guest of honour delivers a speech. Then one person is appointed to speak on behalf of the assembled friends, who will emphasise that divorce is another kind of beginning and that all the assembled friends will continue to be there. Then the couple or one of them expresses responsibility for their failure. Finally, the spouses smash their wedding rings with a hammer with a frog on it, demonstrating that they are 'changing' into singles again (*kaeru* for 'frog' and 'change' are homonyms).[105] This not only seems in line with the tradition that the former go-between who had helped to arrange the marriage will become the counsellor in divorce matters, but it seems a straightforward way to deal with a personal negative feeling and the negative feeling towards the institution at the same time: a social group whom one knows tells you it's 'ok' to divorce. Of course such a procedure does not settle the issue of finances.

Thirdly, the consideration of 'family matters' does not suffice either to understand or to solve the factual and normative situation. This is because social norms depend upon consensus in society and thus in the first place upon the people with the greatest political and economical power, who are traditionally men. For any family order to change there must be some kind of 'negotiated assent among all but the dependent or the subordinate actors'.[106] So, if we tried to reduce the fact that there is a marital property regime of 'separation of property' and at same time the fact that there are no marriage contracts in Japan (or an elaborate adjudication on property shares) to an enduring influence of the traditional Japanese *Ie*-system, we would neglect the represented gender power conditions and the general gender gap of today. Up to this time there is — in my opinion at least — no real contractual power for women to ask for a marriage contract and to draw up their ideas on marital property shares before marriage (according to art 755 Minpô a marriage contract is not possible after entering marriage).

[103] Eg Nottage, L (2001) 'The Still-birth and Re-birth of Product Liability in Japan' in Nelken, D and Feest, J (eds) *Adapting Legal Cultures* Oxford 147 at 158.

[104] Both parties are well-off, divorce claim was admitted: *Saikôsai* 8.12.1988, in *Katei Saiban Geppo* 44-3-145, *Saikôsai* 8.2.1994, in *Katei Saiban Geppo* 46-9-59. See for dismissal of divorce claimed by 'faulty' husband, because wife received public assistance and there was no prospect that husband would ever make a property division or pay support: *Saikôsai* 6. March 1990, in *Katei Saiban Geppo* 42-6-40.

[105] Personal reports of divorcee in Japanese: www.1daytravel.com, accessed 12 January 2011.

[106] Haley 'Law and Culture' supra n 53 at 901.

Using 'Legal Culture'

I have proposed an understanding of the Japanese legal culture regarding 'marriage contracts' through the intersection of law, culture and gender. At the same time I have adopted this intersectional approach as an additional method or tool to 'compare' beyond traditional comparison[107] along the chosen perspectives. The more perspectives we choose, the better and the 'thicker' the descriptions. In my view, there is no need for 'lighter' versions. The more coherent the chosen perspectives are, the better; but they should always adapt to new streams and actors, so we cannot come up with fixed perspectives, only suggest some. The responsibility to choose the perspectives of course remains. But once the perspectives are chosen, it will be easier to find the relevant different (legal) layers and to reveal the legal culture regarding marriage contracts. Investigating this legal culture in the context of marriage contracts is an important part of exploring and interpreting the Japanese legal practice, which is formed by Asian, European and traditional Japanese laws, as well as family cultures and gender perspectives all at once.

Of course this research could be broken down into many further intersecting perspectives depending on its focus. The outcome of the understanding of the 'legal culture' would then become more concrete and meaningful.

As a concept legal culture is (then) itself of value in recalling the complexity and the entanglement of law, culture and gender. This is still needed. The classifications known from classical euro-centric comparative law are outgrown in my view, whether we call them circles,[108] families[109] (including third family as static mixed jurisdictions[110]), family trees[111] or legal traditions.[112] Even if the family tree is growing, the circles expanding and the legal traditions are not firm, every classificatory label and taxonomy is descriptive and delays recognition and acceptance. Legal heritage is being superimposed somewhere by others, and it is clear that cultural pluralism and multi-layered legal structures, legal hybrids of different dimensions and legal culture are a fact today in East Asia and in Europe and that there was and will never be a end to their flow, diffusion, reception and transplantation. By this I do not mean to object to analysing or fragmenting legal problems or the idea of 'brick-building' in comparative contexts which enables comparative lawyers to solve problems within a reasonable period of time. Given the complexity of the legal and non-legal normative orders today, realistic comparative considerations can no longer pretend to be exogenous to the realm of culture. Legal comparative studies will need to

[107] Whether one wishes to give up 'comparison' completely in order to 'confront' is another discussion I cannot have here, but in my opinion there is not really a way out of 'comparison' as long as someone who is trained in one legal system investigates another.

[108] Recently even Legrand writes about 'expanding circles': Legrand, P (2008) 'Expanding Circles' in Nicolson and Biddulph *Examining Practice, Interrogating Theory* supra n 4.

[109] Zweigert and Kötz *Einführung in die Rechtsvergleichung* supra n 32 at 32.

[110] Palmer, VV (2001) 'Introduction to Mixed Jurisdictions' in Palmer, VV (ed) *Mixed Jurisdictions Worldwide — the Third Legal Family* Cambridge at 10: Palmer developed a theory of mixed legal systems while identifying a few precise features of the jurisdictions being part of the acknowledged group of 'mixed' legal systems worldwide. 'Mixed' is used in the 'classical' way in his book where these systems are considered as candidates for what he suggests might be called 'the third family': eg Scotland, Louisiana, the Philippines, South Africa, Israel and the usual few others.

[111] Orücü, E (2004) *The Enigma of Comparative Law* Martinus Lijhoff at 132.

[112] Glenn, HP (2008) *Legal Traditions* (4th ed) Oxford, see also n 2.

be interdisciplinary and will have to go beyond mere legal analysis. The concepts of legal culture and the concept of intersectionality will help to achieve this.

Legal culture as an entity cannot be easily researched: it needs both to be fragmented in its parts and investigated from different sub-perspectives. Using legal culture and the concept of intersectionality in comparative legal studies might in this sense be a way to approach and to influence the outcome of the former. If the two concepts are combined, it is possible to refer to legal culture as the result of intersecting perspectives, as the complex social phenomenon it is. To name and follow these perspectives helps to form an idea of a legal culture out of the bundles of practices, values and beliefs about marriage contracts.[113]

[113] Cotterrell 'The Concept of Legal Culture' supra n 2 at 33, 34.