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## On the Scarcity of Civil Litigation in Japan: Two Different Approaches and More

### 1. Preface

Let me start with one episode. When I met Professor Honma in university bookshop, and asked to make a speech in Hungary on some topics related to the legal foundation of Japanese high economic growth (in 60's–70's), my first reply was “Oh well... the shortest answer should be ‘nothing’”.

What did I mean by that? The point is that Japan is known to be a society with very scarce occasions in which law works, in both criminal cases and civil litigations. For instance in the United Nations statistics,<sup>1</sup> the number of homicide per 100,000 population in Japan is only 0.5, while in the United States it is 4.6. A part of reason could be of the States and its violent society, as often be criticized. However, considering the fact that the same numbers in the United Kingdom, France, and Germany lays around 1.5,<sup>2</sup> Japan seems to be very safe society even in comparison to these countries. On civil disputes, Wollschläger shows that there are 1.6 cases in Japan per 1,000 populations per a year, while the number is around 20 in France and Germany, over 50 in the state of Arizona, U.S. and the United Kingdom,<sup>3</sup> From these data, we could say

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<sup>1</sup> United Nations Office on Drugs and Crime, The 7th U.N. Surveys on Crime Trends & the Operations of Criminal Justice Systems (1998–2000), available at <http://www.unodc.org/unodc/en/data-and-analysis/Seventh-United-Nations-Survey-on-Crime-Trends-and-the-Operations-of-Criminal-Justice-Systems.html> (visited on 18th Feb., 2008).

<sup>2</sup> The accurate numbers are 1.6, 1.2, and 1.8 for U.K., Germany and France, respectively.

<sup>3</sup> Wollschläger, Ch.: Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Legal Culture in the Light of Judicial Statistics. In: Baum, H. (ed.): *Japan: Economic Success and Legal System*, Landsberg, 1997.

that there are very scarce legal cases in Japan, and the court has not so much importance in Japanese society. The problem is, why this phenomenon exists.

### **Kawashima These: cultural approach**

In 1960's, the main theory on this problem found its answer in cultural factors. For instance Professor Takeyoshi Kawashima<sup>4</sup> wrote in his famous book *Japanese Sense of Law*,<sup>5</sup> that the Japanese dislike to solve disputes by litigation. He said that in Japanese traditional sense of law, rights and duties were recognized as ambiguous beings, and the people hate to make it clear or definite, because it probably harms the harmony in community. He wrote, "Since there exists friendly or 'communal' relation, to 'make clear between black and white' destroys the foundation of this friendly 'communal' relation".<sup>6</sup> So in Japan "those who make civil litigations are branded as 'weird' or 'aggressive'. The attitude to avoid litigation is deeply fixed in our hearts".<sup>7</sup> For Kawashima, this feature shows the underdevelopment of Japanese society. In the developed countries, litigations are thought as "the struggle to rights", as Rudolf von Jhering said, not only just but also sacred means to protect their own rights. Because the Japanese still had very weak sense of rights, Kawashima thought, they did not want to fight by themselves. So, along with the development of Japan the Japanese will recognize their rights stronger, and make litigations more frequent. This prediction is often called "the Kawashima These".

### **"Kenka Ryou-Seibai Hou"**

There is one clear example often referred in this topic to show that the Japanese dislike disputes at all; the idea of Kenka Ryou-Seibai [put same sanction on both sides in dispute]. The idea is originally emerged as the Kenka Ryou-Seibai Hou [The law of Kenka Ryou-Seibai], which originally means that the both party in dispute are to equally sanctioned with death penalty. The first clear case is thought to be in the law of a Daimyo [feudal lord] in Sengoku Jidai

<sup>4</sup> Takeyoshi Kawashima (1909–1992) was professor of civil law in the University of Tokyo. He is famous for introducing legal sociological research into Japan.

<sup>5</sup> Kawashima, T.: *Nihon-jin no Hou-ishiki* [Japanese sense of Law], Iwanami Shoten, 1967.

<sup>6</sup> *Ibid.* 140.

<sup>7</sup> *Ibid.* 142.

[the age of war].<sup>8</sup> The Imagawa Kana Mokuroku [Law of House Imagawa]<sup>9</sup> article no. 8 provided “the persons to make violent disputes are both to be sentenced to death, without discussing right or wrong”. This kind of rule became widespread in the laws of Sengoku feudal lords, and in the age of Tokugawa Shogunate (1603–1867) sometimes thought to be “Tenka no Taihou” [the grand rule of the country]. At least in the Genroku Akoh case in 1703 (Genroku 15),<sup>10</sup> in which the late subjects of House Asano of Akoh made vengeance to Kira Yoshinaka who was believed to committed dispute with Asano Naganori their late lord in the Edo Castle, they justified their revenge referring to this law. In the dispute only their lord Asano was sentenced to commit Seppuku [the forced suicide with honor] while no penalty was put on Kira.

### **Haley’s Argument: systematic approach**

Against Kawashima, Professor John O. Haley pointed out the systematic problem in Japanese legal sphere. He called the belief that the Japanese dislikes litigation was a “Myth”.<sup>11</sup> He agreed with Kawashima, that the fact the Japanese introduced many arbitration systems before the 2nd World War has ended,<sup>12</sup> shows that there lies some hesitation to litigate. But he insists that the hesitation was of the governing elites, not of the ordinary Japanese. Haley wrote:

<sup>8</sup> Sengoku Jidai (c. 1467–c. 1573) is the age of warfare between two Shogunate, Ashikaga and Tokugawa. Along with the decline of power and authority of Ashikaga Shogunate, many Daimyo increased their independence from the Shogunate and governed their power realm by their own initiative.

<sup>9</sup> House Imagawa, a branch of Ashikaga Shogunate, was a powerful feudal lord governed Suruga and Toutoumi (around Shizuoka prefecture now). Imagawa Kana Mokuroku was the law issued by Imagawa Ujichika in 1526 (Daiei 6) independently from the Shogunate, to govern his realm. The law was consisted from 33 articles.

<sup>10</sup> Inside the parenthesis is the name and count of the year in Japanese traditional calendar. Since traditional calendar was in lunar system, the year Genroku 15 had some difference from 1703 A.D. in its range.

<sup>11</sup> Haley, J. O.: The Myth of the Reluctant Litigant. *Journal of Japanese Study*, 4, (1978) 359–390.

<sup>12</sup> E.g. the Land Lease and House Lease Conciliation Act in 1922, Farm Tenancy Conciliation Act of 1924, the Commercial Affairs Conciliation Act of 1926, the Labor Disputes Conciliation Act of 1926, the Monetary Claims Conciliation Temporary Act of 1932, the amendment of the Mining Act of 1939, The amendment of the Placer Mines Act of 1940, the Agricultural Land Adjustment Act of 1938, the Personal Status Conciliation Act of 1939, and the conciliation provisions of the Special Wartime Civil Affairs Act of 1942.

Kawashima relies heavily on the enactment of these statutes in arguing that the Japanese have been loath to litigate. Yet there is nothing to suggest that they were the product of popular demand for an alternative to litigation more in keeping with Japanese sensitivities. Rather it seems more accurate to conclude that they reflected a conservative reaction to the rising tide of lawsuits in the 1920s and early 1930s and a concern on the part of the governing elite that litigation was destructive to a hierarchical social order based upon personal relationships.<sup>13</sup>

For him, the largest factor for the Japanese to hesitate to litigate was the scarcity of lawyers in Japan. There are about 22 thousand practicing attorneys in 2006, after much increase from 1990's, which makes the number of lawyers per population of Japan around 1/20 of the United States, and 1/4 even to the France. Haley thought that this "institutional incapacity"<sup>14</sup> is the main reason, and "The failure of Japan to provide more judges and lawyers has been clearly a matter of governmental policy".<sup>15</sup> So which is the more reasonable answer to the problem ... cultural, or systematic?

### Recent Studies on the Actual Japanese Culture

First of all, I should point out that the Kawashima Thesis is proved to be almost false. The statistics of Wollschläger I have mentioned earlier is of 1990, i.e. after Japanese high economic growth (1955–1974) and no one would doubt that Japan is one of the highly developed countries in the world. There was much population movement from rural villages to urban areas in the process of the high economic growth, and thus mass-destruction of many customs or rules of agriculture-based communities. But still, the number of litigation has not increased.

Recent comparative study in legal sense also shows that there is not so much difference in that point between Japan and the United States.<sup>16</sup> According

<sup>13</sup> Haley: *op. cit.* 373.

<sup>14</sup> *Ibid.* 378.

<sup>15</sup> *Ibid.* 385.

<sup>16</sup> Hou-Ishiki Kokusai Hikaku Kenkyuu-kai [The Research Center for International Comparison of Legal Consciousness], "Keiyaku Ishiki no Kokusai Hikaku: 22-kakoku/chiiiki Jittai Chousa kara [International Comparison of Contractual Consciousness: from the Survey in 22 Countries/Areas]", *Nagoya Daigaku Houssei Ronshuu* [Nagoya University Journal of Law and Politics], 2003. 196.

the comparison of surveys in 22 countries/areas in Asia, Europe, Americas, Oceania, and Africa, “the countries/areas with relatively high attitude to comply contracts are Hong Kong, Israel, and Sweden, while relatively low are Taiwan and Brazil”.<sup>17</sup> Professor Masanobu Kato, chair to the survey, concluded that in the attitude to comply contracts, both the United States and Japan are in very mediate level. “We cannot conclude that the difference in the attitude to comply contracts is determined by difference between the East and the West”.<sup>18</sup>

From the comparison between the United States, China, and Japan as a part of the survey mentioned above, Professor Daniel H. Foote concluded that in all these three countries, people thought in general that the alternative conflict resolution methods are more favorable than making litigation. He wrote:

There is no clear result which country likes litigation and which dislikes in these three countries. (...) There are few people who find the litigation fun all around the world, except a few attorneys. In Japan, U.S., China, or whatever countries in the world, most people will try to solve the problem without making litigations.<sup>19</sup>

### **How Japanese acted before Kenka Ryou-seibai Hou**

Another point what I should emphasize is that recent historical research puts new light on the Kenka Ryou-Seibai Hou. Dr. Katsuyuki Shimizu, a historian who investigates the earlier feudal Japanese society, pointed out that the Japanese society in 15th century was, against the common image (and also our self-image), very violent and aggressive. Among many cases he has introduced in his book *The Emergence of the Kenka Ryou-Seibai Hou*,<sup>20</sup> the following two will show typical problem in that age.

One is the incident in 1432 (Eikyo 4), in which the monks of two very famous temples in Kyoto, i.e. Kinkaku-ji and Kitano Tenmanguu, crushed each other in front of Kinkaku and according to one document three monks were

<sup>17</sup> *Op. cit.* (“Introduction” by Kato, M.).

<sup>18</sup> *Ibid.*

<sup>19</sup> Foote, D. H.: *Saiban to Shakai: Shihou no “Joushiki” Saikou* [Litigation and Society: Rethinking the “Common Sense” in Judiciary]. Tokyo, 2006. 45.

<sup>20</sup> Shimizu, K.: *Kenka Ryou-Seibai Hou no Tanjou* [the Emergence of the Kenka Ryou-Seibai Hou]. Koudansha, 2006.

killed before the Shogun<sup>21</sup> himself tried to mediate. Surprisingly, the trigger to whole these trouble was that one monk of Kinkaku was laughed at by a boy accompanied by the Kitano Monks who visited Kinkaku for sightseeing.<sup>22</sup> Shimizu insists that the people in this period, whether he was Samurai or not, had very strong pride and was very sensitive to be abused.

Another problem was that under weak government at that era people tend to have many connections or lineages to make certain that he could have enough help at the time of trouble. For instance, in an incident of 1479 (Bunmei 11), a brewer in Kyoto killed his wife's paramour (the secret lover of his wife). It was widely admitted to kill him in that kind of affairs at that era, so there must not be any problem. But the trouble was, the paramour was a Samurai who subjected to the Samurai-Dokoro Tounin [Chief Inspector]<sup>23</sup> Akamatsu Masanori, and the lord tries to assault the brewer for vengeance under the name of the investigation of disorderly conduct. Another trouble was that the brewer himself had subjected to House Itakura who had subjected to another senior statesman of the Shogunate, Shiba Yoshikado.<sup>24</sup> Not only the members of House Itakura, but of House Kakiya, Ohtagaki, and Enya, other families of senior statesmen who had no direct connection with the brewer but some kinship with House Itakura, gathered to protect the brewer from Akamatsu. Kyoto suddenly faced the danger of war, which could split the whole Shogunate into two, from a simple secret love affair of the brewer's wife.<sup>25</sup>

Shimizu pointed out that in the feudal society in which existed various authorities with autonomous power, e.g. the feudal lords, old temples, or the group of blind persons who believed to have mysterious power, to discuss which parties are right or wrong could not give sufficient answer to finish the conflict. Of course the Ashikaga Shogunate at that era tried to make a reasonable system of conflict resolution, e.g. mediation by a third-party personnel, sending delegation to show apology, or Honnin Seppuku Sei in which the first person

<sup>21</sup> Ashikaga Yoshinori [1394 (Ouei 1)–1441 (Kakitsu 1)], the 6th Shogun of Ashikaga Shogunate (1336–1573), reign from 1428 to 1441. He himself was assassinated by one feudal lord later.

<sup>22</sup> Shimizu: *op. cit.* 12–15.

<sup>23</sup> Samurai-dokoro was one of three important organization of Ashikaga shogunate, which governed the military and police affairs. The chief of Samurai-dokoro ("Tounin" [Head]) was in rotation of four powerful houses including Akamatsu, the feudal lord reigned Harima (part of Hyogo prefecture now).

<sup>24</sup> House Shiba was a very powerful feudal lord, which reigned many provinces in north-western Japan. Shiba Yoshikado was Saki-no Kanrei [late Prime Minister] of the shogunate at that time.

<sup>25</sup> Shimizu: *op. cit.* 60–62.

who actually committed an attack was ordered to commit honorable suicide (Seppuku). None of them, however, could gain success until the emergence of the Kenka Ryou-Seibai Hou.

### **New view: Predictability Approach**

In this stage I think we could reach another approach to the scarcity problem: the predictability. Professors J. Mark Ramseyer and Minoru Nakazato asserted that the Japanese are rational in avoiding litigations.<sup>26</sup> Because of some features in Japanese litigation process, e.g. the adjudications are made by professional judge instead of unpredictable jury, the court session takes much time and it is easier for judges to suggest reconciliation between that long process, Ramseyer and Nakazato insists that it is very easy to predict the outcome (the adjudication) for both parties. Since the litigation needs some costs, i.e. time and money, both parties are to avoid it if they could get the same outcome. They wrote, “Analysts need not refer to cultural norms to explain how Japanese settle disputes over such accidents, for they will find, in fact, the Japanese bargain to their immediate advantage ‘in the shadow of the law’”.<sup>27</sup>

The most important feature will be that in Japan the norms and standards on which the courts rely in deciding the judgment are open and widely known. Typically in the traffic accident cases, “judges use detailed, clear, and public formulae to calculate comparative negligence percentages and the victim’s damages ... whether for death, disability, or simple injury”,<sup>28</sup> and these formulae are published as a book and open to the public. In the survey over the compensations the victims’ family got in traffic accidents with death results, “figures suggest that they recover, on average, about 80–110 percent of the amount that would earn if they sued and won against a fully insured defendant”.<sup>29</sup> So they concluded that in Japan avoiding the litigation is a result from the rational choice of each potential litigant. According to them, “Litigation is scarce in Japan not because the system is bankrupt. It is scarce because the system works”.<sup>30</sup>

<sup>26</sup> Ramseyer, J. M.–Nakazato, M.: The Rational Litigant: Settlement Amounts and Verdict Rates in Japan. *Journal of Legal Studies*, 18 (1989) 263.

<sup>27</sup> *Ibid.* 264.

<sup>28</sup> *Ibid.* 269–270.

<sup>29</sup> *Ibid.* 280.

<sup>30</sup> *Ibid.* 290.

### The Desire of Whom?

But the trouble still remains, on what purpose established such highly predictable system? Professor Takao Tanase pointed out the problem against Haley, and asserted that if it had failed to satisfy what the people expect in legal system, these must be another reason for it to maintain its existence.<sup>31</sup> TANASE insists that if the governing elite try to oppress the number of litigation, they should give proper alternatives to litigation --- “Clearly, the elite is not omnipotent. If the elite is to be effective in leading a society, it cannot depart too radically from the aspirations of the people”.<sup>32</sup> That is the case in Japan, he concluded.

In the case of traffic accident, (1) there are many free consultation service run by police, insurance companies, local governments and bar associations, (2) there is clear, unified, public standard to calculate the amount of compensation, and (3) there are alternative dispute resolution systems like conciliation of the court or the NGO like Koutsuu Jiko Hunsou Shori Sentaa [the Center for Conflict Resolution on Traffic Accidents], established in 1974. Since such processes absorb most of all conflicts, Tanase wrote, it became somewhat rare occasion for both parties to decide to bring the conflict to court. He called his theory as the management model.

If the differential weighting is so arranged as to make the disputants “find” judicial services less efficient and alternative services more satisfactory, then the state, without any coercion, can effectively induce the people to voluntarily use fewer services. (...) The people now believe that the system is created only to benefit them, not contrived by an ill-willed agent with a hidden agenda.<sup>33</sup>

Still there remains a problem: who are those elites? Haley insists that the governing elite dislike litigation because it will break the friendly, communal relationship on which their power relied. It could be an explanation why the Japanese government is very eager to keep the quality of bills and acts, and to maintain the unification of the whole legal system, through the strict audit process of the Cabinet Legislation Bureau. They tried to avoid litigations by making clear and highly predictable statutes. But what about judges? What are their incentives to avoid litigations? Wouldn't be the litigations their source of power?

<sup>31</sup> Tanase, T.: The Management of Disputes: Automobile Accident Compensation in Japan. *Law and Society Review*, 24 (1990) 651–692.

<sup>32</sup> *Ibid.* 656.

<sup>33</sup> *Ibid.* 656–657.



### **The Role of Courts: to avoid them to work?**

Foote describes the curious situation concerning this matter.<sup>34</sup> It is the judges themselves that established the highly predictable rules and standards about traffic accident compensations from which everyone could avoid litigation. He introduces the fact that in corresponding to the rapid increase of traffic accident, and thus increase of lawsuit filed to the court in early 1960's, the Supreme Court of Japan decided to establish the special division to solve them, i.e. the 27th civil division in the Tokyo District Court in 1962. Just after its establishment the judges in the division started eagerly to make new, highly predictable system to solve the problem: they persuaded the prosecutors' office to offer police inspection report on the accidents, organized workshops to investigate the substantive and procedural law relating this topic, and made the standard formulae for the attorneys to file a lawsuit and for the judges to adjudicate. In fact it was those judges that made the whole "detailed, clear, and public formulae to calculate comparative negligence percentages and the victim's damages",<sup>35</sup> which Ramseyer and Nakazato introduces. It is also notable that not only judges but also public prosecutors (referred above) and attorneys were cooperative in the process. If they didn't agree with the judges to bring high predictability to the courts and thus decrease its role, it would be totally useless to making standard formulae of petitions.

So there came to be another problem. Not only bureaucrats, but judges, prosecutors, and attorneys were eager to suppress the number of litigation through establishing high predictability in the whole legal process. But it is certain that this is not totally for their profit, especially in the case of attorneys who could earn from making litigations. Who wants these features in Japan?

### **Yet Another New Approach: the interaction of culture and system**

I suppose that there is only the people themselves are left. According to Tanase, there must be some reason if the system, which fails to satisfy the peoples' expectation, continued its existence. But what about the case if a system successfully satisfies what the people expect for the legal system at least to some extent? You may notice that the Kenka Ryou-Seibai Hou is also very predictable, especially with very law resource to investigate the cases: both parties are to be sentenced to death without discussing right or wrong.

<sup>34</sup> Foote: *op. cit.*

<sup>35</sup> Ramseyer-Nakazato: *op. cit.* 269–270.

Shimizu pointed out that the Kenka Ryou-Seibai Hou had established in the process of Ashikaga Shogunate to lose its political power, and its validity under Tokugawa Shogunate was limited only to wartime,<sup>36</sup> although the late subjects of House Asano insisted that the law was “the grand rule of the country”.

Thus, in my opinion, it could understand as a compromising rule to stop conflicts to escalate with limited resources, at least from the viewpoint of the governing elites. We could notice that the last thing left in there was the claim for predictability and equality, i.e. very simple rule which could be called as “the balance sheet of blood”, which is rumored to be still used in the underground world of Japanese mafia (Yakuza) to resolute the conflict.

They were the Japanese ordinary citizens who appraised on the vengeance of the late members of House Asano in the Genroku Akoh case. The case was later dramatized in the Kabuki “Chuushin-gura”, the most famous and popular program in Japanese traditional play. Since the members’ claim to gain balance of blood between two Houses conflicted with the Shogunate’s policy to regain peace within the society after long wartime of the Sengoku Jidai, all the members were sentenced to death. The only sign of concession from the Shogunate was that they were permitted to commit Seppuku instead of were beheaded, which usually applied to murder from personal fight. Their corpses were buried in Sengaku-ji temple of Edo, the same place as their late lord, where still the incense to pray for their souls never cease. Of course those incense were dedicated by the ordinary man-on-the-streets through the Tokugawa Shogunate, the Japanese Empire after the Meiji restoration, and post-war liberal democracy.

If we could find the cultural character special to Japanese, in my view it could be very strong concern with equality, unity, and thus predictability, shown in the emerging process of the Kenka Ryou-Seibai Hou.

## Conclusion

Let me summarize the point. Against Kawashima who thought that the scarcity of litigation was the direct expression of Japanese weak sense of rights, Haley pointed out that there could be some systematic problem behind the scene. Ramseyer and Nakazato, joined to Haley, asserted that under the existence of more effective alternative conflict resolution systems it is rather rational for the people to depend upon them. I would like to point out in addition, that it

<sup>36</sup> Shimizu: *op. cit.* 191.

should be better to start our inquiry from why the conflicts would occur. As Immanuel Kant suggests, if all the person could use his practical reason properly, everyone will come to know what is his due portion of goods, and thus there should be no conflict between persons.<sup>37</sup> I don't intend to say that the Japanese have such an ideal character, but it suggests also that if each of us know exactly what the law will provide, there would be no conflict, and there is rather strong law functioning in reality, than weak sense of law. Of course to what extent this hypothesis could explain the fact of the scarcity of litigation in Japan needs more detailed study, I would like to propose a little bit new framework to see the legal function in society, other than just a number of litigation brought into courts.

<sup>37</sup> Kant, I.: *Metaphysik der Sitten*, in: *Kant's gesammelte Schriften*. Berlin, 1907.