

Note

The Japanese Family Court and Family Court Mediation System*

Tomiyuki Ogawa

The Japanese Family Court and Its Characteristics

In this paper, I will describe and focus on Family Court Mediation, a system which has existed for the past 40 years in Japan under its Family Court System. Australia is presently contemplating introducing it into its Family Court System. I will briefly describe the strengths and weaknesses of this Japanese system.

After the end of World War II, as the New Constitution of Japan took effect, Japan engaged in a policy to democratize its laws and legal system. An important objective of this Constitution was to guarantee the fundamental rights of the Japanese people. As a step towards the realization of this objective, a Family Court, independent of the district courts, was established. It was formed by bringing together the Juvenile Court and the Domestic Relations Court which belonged to the Administrative Court and the District Courts, respectively. At that time, it was suggested by the GHQ of the Allied Power that because of

* This paper was presented at the 5th National Family Law Conference, Perth, Western Australia 8th–12th September 1992.

the close relationship between family disputes and juvenile delinquency, the functions of the Juvenile Court and Domestic Relations Court should be unified, and the matters be solved with one synthesized answer. The present Family Court was established on January 1, 1949. The Family Court is a judicial court ranked at the same level as the lower district courts and independent of the administrative branch.

The guiding principle behind the management of the Family Court is defined by the following characteristics: 1) independence; 2) democratic; 3) scientific; 4) educative; and, 5) social.

1) Independence

Under the circumstances of the Family Court's establishment —the short time in which to establish the system, and the need to establish a completely new system with new personnel, facilities and equipment— the characteristic of independence would seem to be quite natural. In relation to its operation in fulfilling social welfare and educational purposes, the Family Court, has proved to be an independent and autonomous judicial organ even after 40 years.

2) Democratic

Under the new Constitution, the second characteristic of being democratic, would also seem quite natural in that the Family Court was established for the very reason of supporting the newly established constitutional ideals, one being democracy. The Family Court is a court for the people in that its jurisdiction includes such matters as disputes in domestic relations, problems most common to the ordinary citizen. The judges and other personnel of the Court must be able to file through the problems as if they were their own, and must have a democratic sense of human touch in order to maintain close relationship to the people. Also, the Court has tried to make itself an accessible place for family and juvenile consultations. For this reason, the Court has chosen private citizens to be mediators. The Family Court House was designed with the notion of a soft touch in a way that people would have some familiarity with its exterior as well as its interior—not as intimidating as those buildings that house the district courts for civil and criminal trials.

3) Scientific

The Japanese Family Court is like that of the American Family Court which in a sense is scientifically managed by way of a mental hospital being attached to it. The Japanese Family Court stresses the promotion of the scientific-oriented settlement of both juvenile and domestic relation cases by applying human behavioral sciences such as psychiatry, psychology and sociology to these cases. From this concept, the Family Court has established a medical room, and has hired specialists in psychiatry. Among the inspectors of the Family Court, there are mainly those who specialize in social and behavioral sciences such as psychology, sociology, social welfare and education.

4) Educative

The characteristic of being educative is an important aspect of the Court in relation to the settlement of domestic relation cases and particularly cases concerning juveniles. The Court stresses not only that the procedure of the investigation of the juvenile delinquent in bringing him or her to trial be adjudicative, but also requires a discovery of methods to educate the juvenile under determination.

5) Social

The social characteristic is an important aspect in relation to the Court's aim and success in being dependent upon the application of various types of social resources. In other words, for the successful settlement of problems concerning domestic relations and juvenile delinquency, the cooperation and assistance of various youth support and social welfare agencies are necessary. A close relationship between the two groups must be maintained for a successful settlement of these cases.

The characteristics of the guiding principles have ensued since the establishment of the Family Court. To fully understand those characteristics, it is necessary to understand the mediation system, a system which aims to resolve disputes of domestic relations fairly and rationally based on the adjustment of the interests of the parties of the dispute

and situation at hand.

The Role of the Family Court

The powers of the Family Court are stated in the Court Organization Law, article 31, paragraph 3. Its role is to settle cases concerning domestic relations and juveniles. Here, I will explain about the Court's role in resolving cases concerning domestic relations.

There are two procedures in resolving cases. They are judicial decree and mediation. Judicial decree is a court procedure which is established in accordance with the Rules for Determination of Family Affairs. Mediation is a judicial procedure that requires a judge that has constitutional qualification to hear and judge law. However, from the consideration of eliminating the severity and harshness of the settlement of domestic relation cases, the Domestic Affairs Trial Law refers to these judges who reside over the judicial decree and mediation as "adjudicators".

According to the Domestic Affairs Trial Law, article 9, paragraph 1, cases under the jurisdiction of the judicial decree are listed as two different types, *Kou* type and *Otsu* type. Cases under *Kou* type include matters of high public interest and of non-adversarial character which are not appropriate for mediation methods, such as matters of incompetent declaration and judicial declaration of disappearance. Matters that fall under *Kou* type are those that require the maintenance of peace and domestic unity, in other words, those matters that require the Family Court to guard and hear those matters from a parental standpoint of the government.

Cases under *Otsu* type include matters that have an adversarial character, but do not have to be settled by judicial decree and may be

resolved by way of mediation, such as a claim for cohabitation with a spouse or problems concerning the distribution of inheritance.

Mediation of domestic relations is a system that involves a mediation committee, or as an exception, a single judge as an adjudicator that assists in mediating a dispute to bring into effect a long and rational agreement that can be independently resolved. A mediation committee consists of one judge who is called the "adjudicator", and two or more private citizens chosen as mediation committee members. Disputes concerning domestic relations involve husband and wife, parent and child, and other family related problem. All of these problems require a settlement for the future. Therefore, it is considered more appropriate to resolve the problem by realizing the actual situation and negotiating an understanding looking to the future, instead of resolving it in the manner of a normal legal suit by "a single slice of the sword." The character of the dispute itself is appropriate for mediation since no one party dominates in the mediation procedure and unlike that of normal civil procedure in that they are held behind closed doors in a mediation room. In expectation of the prior stated functions, a system that puts priority on mediation of domestic relations has been established. This mediation System is compulsory, and it requires all disputes concerning domestic relations to initially go through the process of mediation before going to judicial decree or going through the district court judgment.

Matters that are resolved by mediation include matters other than in *Otsu* type. They include legal disputes that concern human affairs, and other general domestic relation disputes. Those matters included under *Kou* type and under special judicial decree of the special law are considered not appropriate for mediation and so are excluded from the

list of matters that are under the jurisdiction of the Family Court Mediation.

Legal disputes that concern human affairs include nullity and cancellation of marriage, and so on; in other words, those cases that must be presented to the district court to be resolved through court decision. These legal disputes belong under the category of litigation, adversarial matters and so are not matters that can be resolved by judicial decree in the Family Court. However, since these matters concern legal disputes that are related to human affairs, they are also considered appropriate for the Family Court Mediation. Disputes arising from divorce are accepted as cases concerning the adjustment of the relationships between couples and are considered to amount to over half of the Family Court Mediation cases. Thus, it can be said that the Family Court has played a large role in resolving human affairs and domestic cases.

Before describing how mediation is advanced, let me mention the system of legal advice concerning domestic relationships and juvenile delinquency which plays an important role within the Family Court. Here, because of limitation of time, I will focus my explanation on the system of legal advice concerning domestic relationships.

The system of legal advice concerning domestic relationships administered by the Family Court has no formal provision specifying the details of it, but this system has existed since the establishment of the Family Court by a popular demand of the people. The system accepts over 300,000 cases annually. Over half of these problems for consultation concern marital problems between husband and wife. According to the statistics, there are numerous other problems concerning, parent and child, inheritance, and the family register. In recent years, it has

been noted that more women than men are utilizing the system of legal advice concerning domestic relationships. Those in charge of the consultation are the Family Court Inspector and the Family Court Secretary, other Family Court Consultants in partial charge of consultation include members of the Bar Association. Both the judicial decree and mediation systems accept oral applications and the administration of this is assigned to those administrators in charge of the system of legal advice concerning domestic relationships, however, since there are no provisions stating the specific details of the system, there are problems and difficulties in the area of personnel and material assistance.

The counsellors of the system of legal advice concerning domestic relationships can answer matters concerning the judicial decree and mediation procedure, how one would file a case with the Family Court, what documents are necessary to file a case, what the estimated expense will be if one files a case, and, what jurisdiction the case would fall under. However, counsellors must not give advice to disputing parties as to what the chances of winning the case would be or on how to win the case.

Strengths and Weaknesses of the Japanese Family Court Mediation System

The Japanese mediation system has been considered an important system in dispute settlement of family matters in that it takes into account future factors in forming concrete rational solutions. This system makes use of good general sense by assigning private citizens to become councilors and mediators. However, one weak point is that since this kind of dispute resolution involves legal issues, unless an

agreement can be made between the parties, the mediation does not succeed. I shall briefly comment on three problems concerning the Japanese Family Court Mediation System.

The first weak point stems from the fact that the mediation committee consists of a plurality. Because a setting of a date for each meeting requires a balancing of schedules of each member of the committee, a quick settlement is often difficult. To be sure, many cases that require a settlement in short time go unsettled for over half a month or so.

The second weak point stems from the fact that if one of the parties is not cooperative then the settlement of the dispute becomes impossible. Also, even if a judgment or decree is rendered by the Family Court, the dissatisfied party could apply for immediate appeal within two weeks of the judgment to invalidate it. In this manner, the time and effort put into the settlement of the dispute is lost by a somewhat simple procedure.

The third point concerns the securing of the execution of the agreed upon mediation and decree settlements. In mediation and decree cases it is difficult to secure execution of the agreement since most crimes involve small sum of money compared to the general civil claims, and since most payments are in installments it is not worth going through the Civil Execution Law and forcing payment because this would take longer and make the process more expensive. Also, problems develop because most claimants to family related cases usually are not familiar with procedure and are not economically well off. And furthermore, in family related matters it is difficult to coerce any of the parties involved.

Presently, the Family Court is attempting to alleviate some of the

problems by providing for several correcting systems. One of those correcting systems is called recommendation system for performance. The court surveys the part of the agreement that needs to be obeyed and notifies those obligated to the agreement to follow it. A second system is called the system for ordering performance. This system establishes an appropriate time limit for the obligated party to follow instructions and if the party does not follow the agreement, then the Family Court issues an order to that party to follow the agreement. A third system is called the system of money alignment. This system is used in mediation and decree cases involving the payment of monetary sums where one party will pay the other party indirectly by submitting the payment first to the Family Court. Since none of the systems mentioned have coercive power, strict observance of each settlement becomes difficult.

There are still many problems within the Japanese Family Court Mediation System. It is my hope that a comparative study between the Japanese system and the up-and-coming new Australian system will be useful in further improving the mediation system overall, and resolving family disputes of the 21st century.