

LAWASIA Keynote speech delivered on Sept. 19, 2017 at Hotel New Otani, Tokyo, by Yasuhei TANIGUCHI, Professor Emeritus of Kyoto University; Judge of Singapore International Commercial Court; Of Counsel, Matsuo & Kosugi, Tokyo

We are reminded that the legal system of Japan, as that of all other countries, is "history bound" so to speak. We have in this Conference many guests from outside of Japan, each of whom carries a dispute resolution culture of his or her own. I hope my talk has given the foreign guests as well as the Japanese participants some food for conversation over the drinks and actual food during this Conference. Now, let's start the LAWASIA 2017 conference!!
Thank you very much for your attention. END

Your Imperial Highnesses Crown Prince Naruhito and Crown Princess Masako, Honorable Chief Justices and, Associate Justices, Presidents and distinguished members of the bar from many Asian countries and ladies and gentlemen from all over the world, it is my great pleasure and honor to speak to you today about some aspects of the Japanese law. I taught civil procedure and insolvencies at Kyoto University for 39 years. I have also taught Japanese law in more than 10 universities outside of Japan. I would like to speak today on what I think characterizes Japanese law and legal life.

The foundation of Japanese culture was formulated even before the 10th century with a strong influence from China and Korea. Upon this basis, Japan developed its own identity. In spite of great modernization efforts since the mid-19th century and an overwhelming American influence after the defeat in the Second World War, Japan seems to have maintained its original dispute resolution culture more or less intact. All the lawyers gathering here from various parts of Asia and the Pan Pacific regions must have their own traditions of dispute resolution. I am not in a position to talk about all of them. I want to talk today about the Japanese dispute resolution culture and offer you some clues for comparison with your own.

I assume that many of the participants in this conference from abroad are more or less familiar with some aspects of today's Japanese law. But I wonder how many are familiar with the history of the Japanese law. Every culture is, after all, history-bound. By knowing the history of yesterday, we can better understand today. But I have no intention today to start from the 7th century when our written history really started. In order to explain our contemporary dispute resolution culture, we only need to go back to the 17th century, when the era of the powerful *Tokugawa Shogunate* started in 1603 and soon after adopted a policy of seclusion from the rest of the world.

This era ended only in 1868 when the Emperor regained political power and started the modernization or, more correctly, the Westernization of the country. The 250 years of seclusion from the rest of the world that came prior

inevitably fostered a certain type of culture which was unique to Japan but which had ties to the preexisting culture derived from China and Korea. Many forms of arts which are recognized today as typically Japanese, such as *Kabuki* and *Bunraku* theatre, woodblock prints called *Ukiyo-e*, the flower arrangement and the tea ceremonies, were either created or perfected during this period which is commonly called the *Edo* period because the capital at the time, which is today's Tokyo, was called *Edo*.

Legal culture could not be an exception. Some basic aspects of today's Japanese legal culture seem to have been firmly formed during this period. I like to rely on the study of the *Edo* legal culture by an eminent American scholar, John Henry Wigmore. Many of you may be reminded of Wigmore as a great authority in the law of evidence. His multivolume treatise on evidence is a standard open stack item in all American law schools. It is a little known fact, however, that he arrived in Tokyo around 1890 as a young lawyer fresh from Harvard Law School to teach at *Keio* University in Tokyo. He was directly invited by the university's founder *Yukichi Fukuzawa*, a great educator at the time whose face you see today on the 10,000 Yen bills. This was a time when Japan was in the process of modernizing its legal systems after the models of advanced Western European laws.

Wigmore arrived in Japan just after the Japan's first modern constitution of 1889 had been promulgated and the French styled Civil Code drafted by the French advisor Gustav Boissonade was rejected by the newly convened parliament under the new Constitution. Nevertheless, the German styled Code of Civil Procedure was adopted and a new draft of the civil code was going to be prepared by a group of Japanese scholars on the basis of the then draft German Civil Code. Many European scholars and lawyers had been invited to help with these legislative activities. There was, unfortunately, no chance for young Wigmore to get involved in these official projects for modernization of the Japanese legal systems, however. This is because not only was he a young American privately invited to Japan but the Anglo-American Law had already been excluded as a model for the revised Japanese legal system.

He was rather individually interested in the legal system which had existed before the Meiji restoration, namely the law and practice under the *Tokugawa* feudal regime which had existed for more than 250 years. This was the time when most Japanese were enthusiastic about learning the advanced

Western law and paid no attention to the now abandoned *Tokugawa* law. But it was an ideal time for collecting and studying the old legal materials because they were still abundantly available and many former legal officers were still alive to help him. He employed competent assistants to collect these materials and had them translated and explained. His project proved particularly fortunate for us Japanese because much of the then existing old papers were lost in the great Tokyo earthquake of 1923 and much later again by the bombing during the World War II.

He published a series of articles on the Tokugawa legal systems in various journals and much later included a chapter of Japanese law in his books called *Panorama of World Legal Systems* published in 1936. In one of the early articles I found, he wrote that as of 1800 there were only two countries in the world that strictly observed the principle of *stare decisis*. One was, of course, England and the other was Japan. He found the record of a judgment which cited a hundred years old precedent as justification. This, of course, not only shows the extremely conservative character of the justice system at the time but also evidences how well the judiciary of the time was organized.

As the most salient character of the Tokugawa justice system, Wigmore pointed out that their judicial activities were kept "clandestine" within the government. Unlike in England, the court judgments were not published and the running of a legal practice by commoners was strictly prohibited - although a *de facto* practice by the inn keepers specializing in long-distance litigants seemed to be tolerated. Accordingly there was no group of professionals who could study the judicial precedents and predict future decisions as so happened in England. But, a highly organized system must have existed so that a relevant old decision could be retrieved easily. Laws and legal procedures were not widely made known among the people but kept inside the government as internally binding guidelines. This was apparently derived from the ancient Confucian principle "Do not let people know but let them depend on you."

What interests us today is that the same authoritarian policy was adopted by the new Imperial government which took power in the second half of the 19th century. A Western styled constitutional government was established as a *façade* but in substance the ruling class basically did not change. They were all former *samurais* of lower ranks and their mentality to keep the governmental affairs clandestine did not change at all. Lack of transparency of the

governmental affairs even continued into the post-World War II period. As late as in the 1980s when economic friction between Japan and the United States heightened, Americans often criticized the lack of Japanese government transparency in the so-called US-Japan Structural Impediments Initiative Talks. The *Tokugawa* principle that the governmental affairs should stay clandestine was still alive, though to a much lower degree. Three decades later today, the situation is hopefully better thanks to various efforts at many levels.

Another principle of *Tokugawa* law which Prof. Wigmore emphasized was the principle of conciliation. By this he meant a strong governmental policy wherein any dispute in society should be settled amicably. Lawsuits were entertained but the judge's primary role was to bring about a conciliation by persuasion without making a decision. Good judges must not render a judgment quickly but should patiently try to induce conciliation between the parties. Even without the courthouses, all kinds of conciliation were practiced within every social unit and at all levels of society.

This tradition continued even after the new Western styled judiciary was established. Soon after the French styled judiciary was built in the early 1870s, the government created a court attached conciliation system called *Kankai* meaning "recommendation of conciliation." They justified this by relying on the French "*conciliation preliminaire*" which was included in the French "*Code de Procedure Civile*" of 1806. This system was adopted in France during the post-Revolution enthusiasm for the "fraternity" but soon became obsolete in practice although the provision remained in the Code. In Japan, the *Kankai* prospered and became synonymous with litigation, because both the parties and the judge were ready for conciliation.

When the German styled Code of Civil Procedure was adopted in 1890, *Kankai* was abolished because the German code did not have anything like it. An influential scholar at the time lamented in the preface of his book on the new Code of Civil Procedure that *Kankai* was now abolished in order to let the parties assert their rights contrary to the beautiful Japanese tradition. However, he did not have to lament too much because Japanese judges were ready to fully utilize the provision in the new Code which allowed them to suggest a settlement to the parties. The principle of conciliation was given further importance even later as follows.

The Post World War I economy affected Japan and a large population moved into large cities, giving rise to a large number of landlord-tenant disputes. In 1922, the government responded to this by creating a system of conciliation services provided by the judges together with citizen representatives appointed by the court. The new system was called *Chotei* meaning conciliation. Thus, the conciliation became an institution by itself established within the judiciary. Since then, every time a new social issue arose, the government tried to cope with it by creating a special *Chotei* system for it. After World War II, the pre-existing *Chotei* systems were integrated into the single Civil Conciliation Law of 1951 and a new chapter has since been added every time a new need arose.

For example, when we became worried about a rapidly increasing number of traffic accidents, a chapter of Traffic Accident *Chotei* was added to the Law. Most recently, an overheated consumer financing gave rise to many consumer bankruptcies, and a special *Chotei* legislation was passed to deal with the issue. Perhaps a better known *Chotei* is provided by the Family Court. One judge and two lay conciliators, a man and a woman, try to settle all kinds of family dispute. Most common are marital disputes and inheritance disputes. Incidentally, my wife was long active as a Family Court conciliator and she would be able to please Professor Wigmore by telling him how the conciliation culture is still alive and well in Japan.

Professor Wigmore would wonder, however, whether other characteristics of the Japanese legal systems still remain or have since disappeared. We already mentioned that the strict principle of *stare decisis* has disappeared as it has in the original England. How about the absence of practitioners of law? Of course, we do have plenty of practicing lawyers able to organize this big LAWASIA Conference. But it has taken a long time. Even today, the number of practitioners *per capita* is smaller than that in most of the industrialized countries. The number of lawsuits *per capita* in Japan has been considerably smaller than those of other industrialized countries. Japan's arbitration institution called JCAA was established in 1953 and for a long time it received less than ten cases per year and only recently increased to about 20 cases a year. This is in sharp contrast with Singapore and Korea, for example, where the number of arbitration cases skyrocketed in this century when international trade in Asia rapidly developed. Professor Wigmore might say, "That is what I anticipated. Japan is Japan. A society would not change rapidly."

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