

Mediation for Mediators?

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1. Introduction

When legal disputes arise among family members, most of them are usually dealt with¹ at a family court through Chotei procedure - in court mediation in Japan - according to the rule of compulsory Chotei prior to litigation².

The Chotei procedure has a long history since 1948 when the family court was established as a special court with nearly monopolising jurisdiction over family matters and started to provide legal services for citizens who got embroiled in family conflicts. It is indeed evident that parties taking Chotei procedure at a family court increased for more than half a century³. In this respect, the Chotei system is accepted in society as an accessible vehicle of dispute resolution for people involved in family conflicts. This paper aims at illustrating a brief picture of the Chotei system by showing its merits and demerits, and discussing one of the issues concerning what really happens during Chotei sessions - the problem relating to the commitment of Chotei commissioners (family court mediators).

Before delving into the main issues, it should be noted that the following discussion will be partly based on the author's personal im-

1 Cf. Kiichi Otuka and Yoshio Saishu (2002), 'Yoriyoi Chotei no Tameni (For better Chotei services)' Chotei Jiho Vol. 153, pp. 47-48 and 52.

2 Section 18 of the Family Affairs Proceedings Act 1947. (hereinafter cited as FAPA 1947).

3 Total number of Chotei cases increased from 39, 229 in 1949 to 133, 227 in 2004.

pression and experiences. As mentioned below, the Chotei proceeds in chamber for the purpose of protecting the parties' privacy so that it is difficult to obtain sufficient information what really happens at Chotei sessions except statistic data. In this respect, the discussion may be biased by my prejudice and lack of sufficient information.

Chart 1

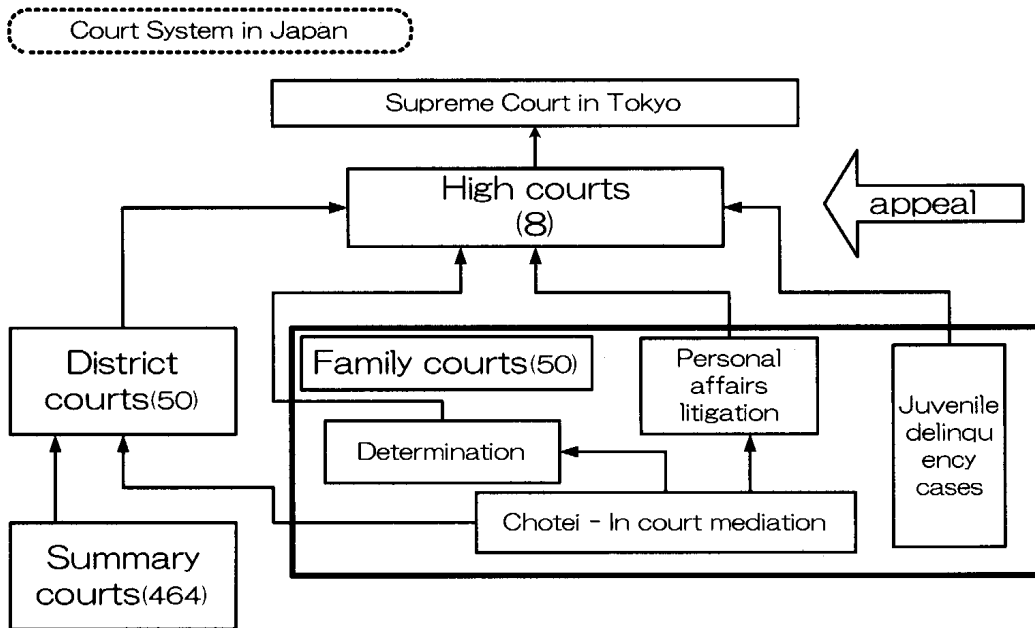
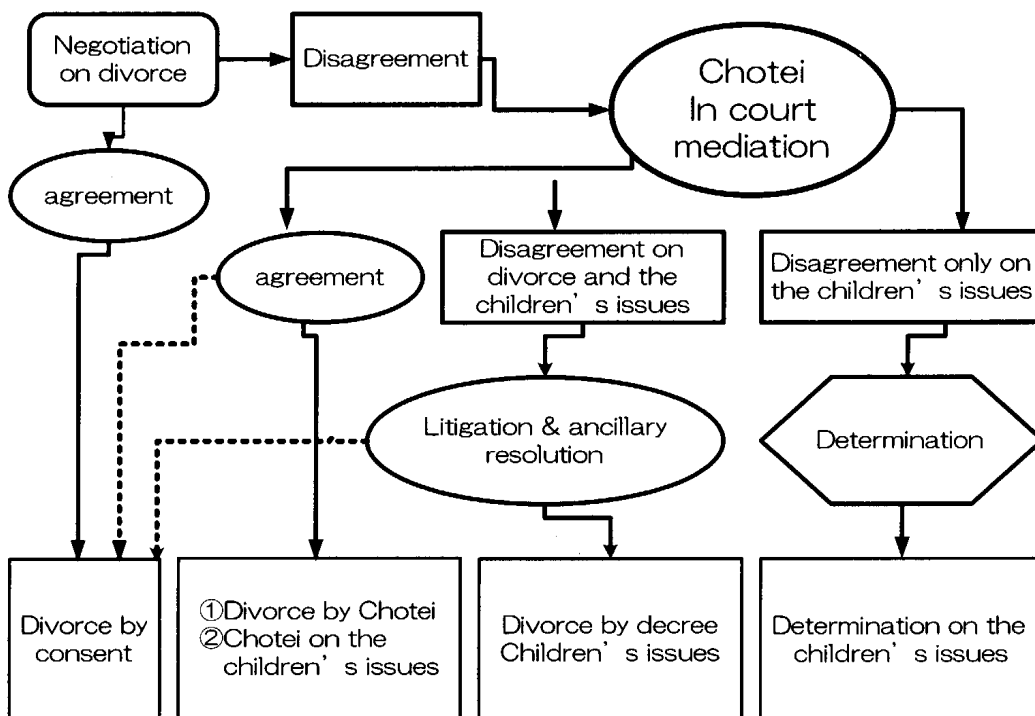


Chart 2



2. Characteristics of Chotei

2.1. Characteristics of Chotei

2.1.1. Voluntary agreement at a family court

Chotei is an autonomous procedure through which the parties resolve their disputes at a family court. For Chotei to commence, either party must simply go to a family court to make an application for Chotei. They need neither to consult nor hire a lawyer for the application and the following procedures. They can voluntarily make decisions after having spent a couple of sessions discussing the related issues with each other. They can reach agreements, terminate the case or accept a proposal of the Chotei committee, yet however the family court does not force them to make a decision that the court regards appropriate⁴.

2.1.2. Assurance of rights and duties of the parties during sessions and enforcement of agreements by the court

The parties are legally protected even if they do not hire a lawyer because a judge⁵, as a member of the Chotei committee⁶, is regularly vigilant at the Chotei process for the purpose of maintaining justice for the parties. If necessary, the judge may intervene in the process in order to avoid irregularity in the proceedings and unjust or unfair results for the parties⁷. In this respect, the parties do not have complete autonomy to make agreements

4 In some cases, the parties chose Chotei as an official forum where they legally confirm their agreements which has been already made before applying Chotei.

5 A part time judge appointed from the bar has authority over main Chotei jurisdiction (Section 26-2 of FAPA 1947).

6 A committee usually consists of one family court judge, one female and male commissioner (Section 22 of FAPA 1947).

such as 'going to perdition'. Once the agreement is reached and a Chotei document has been confirmed by the court, it has legal effect equivalent to the decree made by a court to bind the parties legally⁸. When either party breaches the agreement, a claimant party can apply for a family court to order the party in breach to comply with the terms of agreements⁹.

2.1.3. Easy access to the court – inexpensive, quick and close

The parties can enjoy good access to Chotei services provided at all family courts throughout Japan and they are merely required to pay approximately 2,000 yen (20 dollars) for all costs at family courts as a court fee even if the Chotei procedure lasts for many years. In addition, compared with ordinary civil litigation, the parties are able to finalise their disputes in a shorter time¹⁰. Therefore, Chotei is an accessible, inexpensive and quick procedure of family dispute resolution.

2.1.4. Specialists' assistance and support by court staff

Regarding specialists' support, a family court judge can order a family court investigation officer to submit a report in order to obtain more information on a case¹¹. In addition, a judge can also order the investigation officer to take actions for the emotional adjustment of the parties, to alleviate their acrimonious relationship and to help

7 See Rules 134, 135 and 138-2 of the Family Affairs Proceedings Rule 1947 (hereinafter cited as FAPR 1947).

8 Section 21 of FAPA 1947.

9 Sections 15-5, 15-6 and 28 of the FAPA 1947.

10 In the cases of matrimonial disputes including Chotei and Family Court Determination, 73% of all cases terminate in six months and 71% ends within three sessions (Supreme Court General Secretariat (2004) Judicial Statistics 2004 (http://courtdomino2.courts.go.jp/tokei_y.nsf) Chart21.

11 Rules 137-2 and 7-2 of FAPR 1947.

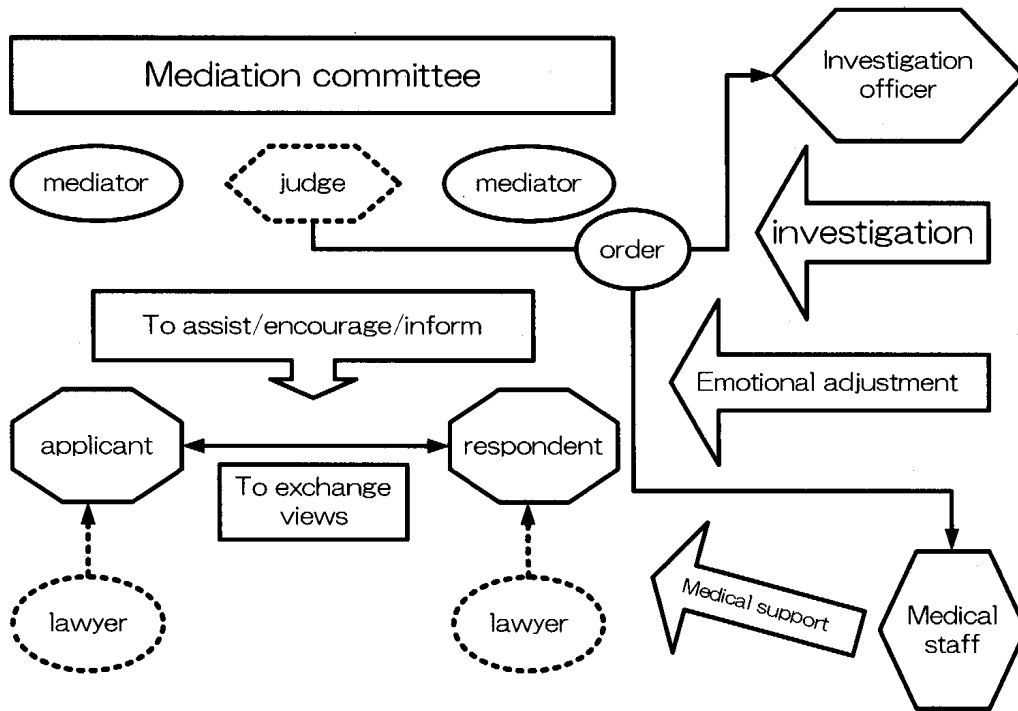
them exchange their views calmly and rationally. An investigation officer sometimes meets with a respondent who adamantly refuses to attend a session and encourages or persuades him/her to appear at the court to discuss with an applicant how their disputes can be solved. If a judge thinks it is necessary to offer medical support to a party who has severe emotional difficulties and is unable to attend Chotei sessions, s/he can order a member of medical staff of a family court to meet them and provide medical treatment (see chart 3)¹².

2.1.5. Support by peer group – Chotei commissioner

Chotei commissioners are expected to perform their role as an ordinary citizen with common sense, experience and knowledge in order to support, help and encourage the parties to understand each other and ultimately to reach agreements. Chotei commissioners carefully listen to the parties' voice and claims and they assist the parties to clarify the issues and exchange their views rationally and clearly in order to lessen difficulties in making their decisions and reaching agreements. At Chotei sessions the parties may benefit from the commissioners' support and assistance which is based on common sense and balanced understandings of the case in addition to legal protection by a judge (see chart 3).

12 Rule 7-6 of FAPR 1947.

Chart 3



3. Chotei committee and commissioners

3.1. Roles of a committee

3.1.1. Chotei committee

A Chotei committee aims to support and encourage the parties to understand each other and the issues in their dispute, and sometimes provides relevant information for solving the case. A committee may present a proposal of resolution for the parties after considering their knowledge accumulated throughout, whilst also taking all of the circumstances of the case in account¹³. The committee sometimes persuades the parties to reach agreements by suggesting that both parties would benefit more by reaching such agreements rather than by continuing their dispute. However, the committee has no authority to force

13 Section 21-2 of FAPA 1947.

either party to accept neither the committee's view nor the draft plan proposed by the committee. In order to obtain more detailed information on the case, a committee may order a commissioner to investigate a case if it thinks it is necessary¹⁴. Cases are dealt with by a committee consisting of at least three members, however a judge is entitled to reside individually in a Chotei case if necessary¹⁵. A residing judge has authority to proceed with the case¹⁶.

3.1.2. Authority of Chotei committee

A committee can issue a pre-session disposition before the commencement of the first session of Chotei if it thinks it is necessary for securing the interests and assets of the parties¹⁷. A committee can reject an application for Chotei if the nature of the case is foreign to the Chotei procedure or an applicant has abused the right of application. In addition, a committee can terminate a case should it find few possibilities of reaching agreements or should it regard the agreement made by the parties as unacceptable from the view point of the Chotei norm¹⁸. When agreements are made by the parties, a committee must confirm the authenticity of the parties' intention and the contents of the agreements¹⁹.

3.1.3. Chotei commissioner

Chotei commissioners resume mediation²⁰ of the parties by listening to them, gathering information about the case

14 Rule 137-4 of the FAPR 1947.

15 Section 3 of FAPA 1947 and rule 142 of FAPR 1947.

16 Rule 134 of FAPR 1947.

17 Rule 133 of FAPR 1947.

18 Rules 138 and 138-2 of FAPR 1947.

19 Rule 137-8 of FAPR 1947.

20 Section 22-2 of FAPA 1947.

from both sides, assisting them to understand the situation, and encouraging them to reach agreements. In some cases, they may suggest an idea of resolution to the parties when they think that if given a push, the parties are approaching the stage where an agreement can be reached.

3.2. Requirements for appointing a Chotei commissioner

3.2.1.1. Appointment of commissioners

Chotei commissioners who are over 40 years of age and under 70 years old are not required to hold special qualifications for taking their office²¹. All commissioners including some lawyers are appointed by the Supreme Court if they have sufficient social experience and a good reputation in the community. Their background varies from retired civil servants, executive members of companies, university professors, specialists in human relationships, to housewives²².

3.2.1.2. Term of office and reappointment

They are part-time civil servants and their office is two years from the date of appointment²³. No bar exists for reappointment. Commissioners must comply with the law regarding confidentiality of the case²⁴. When they violate such law, they will be dismissed. Furthermore, if a commissioner is judged by a court as having undertaken inappropriate conduct in day to day life which may harm his/her reputation as a commissioner, s/he is unlikely to be re-appointed for the next term even if the

21 Rule 1 of Civil and Family Chotei Commissioner Rule 1974.

22 A retired person may be classified as a househusband and a housewife.

23 See Rule 3 of Civil and Family Chotei Commissioner Rule 1974.

24 Sections 30 and 31 of FAPA 1947 and Rule 136 of FAPR 1947.

conduct is not illegal.

3.2.1.3. Training

Newly appointed Chotei commissioners start their tasks in Chotei sessions after a brief instruction course. To develop their skills and knowledge, they voluntarily hold regular seminars at each family court and the Family Court Chotei Commissioners Association regularly organises nationwide conferences for exchanging information among commissioners and improving their skills²⁵. Those courses however, are not statutory.

3.3. A family court judge

A family court judge has the authority to proceed Chotei sessions in the following ways: s/he can reject, transfer and terminate Chotei²⁶, order a family court investigation officer to submit a report on a case, to encourage the parties to restore calm relationships²⁷, and control Chotei commissioners and the parties throughout all sessions²⁸. A family court judge is appointed along with ordinary judges and it happens that a judge is appointed as a family court judge after s/he spent several years as a county court judge dealing with ordinary civil cases as the personnel exchange policy of the Supreme Court.

25 The Japan Society of Chotei Commissioners (Nihon Chotei Kyokai Rengokai) and the Family Affairs Study Association (Kateijiken Kenkyukai) organise study meetings regularly.

26 Sections 18, 19 and 24 of FAPA 1947 and see rule 138 of FAPR 1947.

27 Rules 137-2 and 7-2 of FAPR 1947.

28 Rule 134 of FAPR 1947.

4. What really happens at Chotei sessions?

4.1. Ordinary process of Chotei from the beginning to the end

4.1.1. The parties' appearance at family court

A party shall appear at a family court on the appointed date and wait in a room either for the applicants or respondents. In most cases, a party comes up to a family court individually for the first session at the time informed by the court. It may be that after the second session the appointment time is allocated separately, for instance, the appointed time for a respondent is thirty minutes later than the time for an applicant for the parties' convenience. In a domestic violence case, Chotei sessions shall be resumed in a separate room or at a different floor in the court. In addition, a Chotei committee usually adopts such practice as letting a perpetrator respondent leave the court room after it confirms that a victim applicant has already left the court premises in order to secure the victim's safety.

4.1.2. Chotei commissioners' explanation

At the first session, it is common practice for the commissioners to explain the Chotei procedure and roles of Chotei commissioners, thereby emphasising that it is the parties who are the principals at the Chotei sessions and therefore the parties shall make the final decision to terminate their disputes. In this respect, commissioners usually encourage and invite the parties positively to take part in expressing and exchanging their views throughout the sessions. In addition, they must state that they shall keep neutrality towards both parties and that they shall make efforts to avoid infringement on either the parties' rights at any stage of Chotei sessions. They shall tell the parties that they are under a duty of confidentiality in order to protect the privacy of both parties. They also ex-

plain that the agreements, once documented at the final stage, shall be equivalent to a court decree and for that reason both parties shall be bound to implement the agreements²⁹. In the case of a failure to comply with these agreements, a family court can take action either to recommend or order the obliged party to perform his/her obligation on the application of a claiming party³⁰.

4. 2. Solo appearance at Chotei sessions

The original purpose of the Chotei procedure was to make the parties jointly attend sessions, so that they could exchange their views with help from Chotei commissioners and other family court staff, and thus they make their final decisions. Some family court judges emphasise the importance of joint participation in sessions and go to considerable efforts to make such joint sessions possible. However, in reality, the parties in many cases choose to attend sessions by themselves and to talk to Chotei commissioners individually rather than attend joint sessions to exchange their views since one feels hostility against the other and they feel uneasy if they meet at a session. Solo appearance of parties at a session is inconsistent with and far away from the original principle of Chotei.

Under such circumstances, it rarely happens that parties make their decisions and reach final agreements since they have not had the opportunity to express their views to each other directly and thereby gauge the reaction of the other. Accordingly, both parties can obtain only limited information on the case while Chotei commissioners hold more information than the parties and consequently they can control all the relevant information of the parties.

29 Section 21 of FAPA 1947.

30 Sections 25-2, 15-5, 15-6 and 15-7 of FAPA 1947.

In other words, it often happens that Chotei commissioners made such a statement to the parties at sessions, 'You can tell us all what you want to achieve and tell us what you want to convey to the other party. Tell us what you do not want to tell the other and we will keep it a secret'. Using such an approach under the practice of solo appearance at Chotei sessions, Chotei commissioners can gather much information on the case from both parties. Such a method is useful in practical respects but may often infringe upon the parties' autonomy by controlling the information without the knowledge of the parties.

4.2.1. Providing relevant information

Chotei commissioners sometimes provide not only legal but general information relating to family dispute resolution for the parties. When they give the parties legal information, Chotei commissioners discuss and ask advice from the judge. In some cases, the judge appears at a session to present and explain legal information.

4.2.2. Supporting the parties to reach agreements

However, many parties are entrenched in such acrimonious relationships that they are unlikely to talk rationally and calmly. Chotei commissioners make efforts to alleviate the hostile relationships of the parties using a kind of counselling skills in order to prepare a rational environment for discussion between the parties.

4.2.3. Suggesting or showing a proposal to the parties

Chotei commissioners sometimes suggest or present an agreement proposal when the parties seem to be having difficulties in making their decisions because of a lack of information and knowledge. In theory, a proposal by Chotei commissioners has no binding force but in reality the parties may welcome such a proposal or feel coerced to accept such a proposal.

4.2.4. Rare attendance of a judge at sessions

It is commonly observed that a judge is absent from sessions because of their heavy workload. A judge is usually responsible for a couple of cases simultaneously and s/he is unable to attend all Chotei sessions. For instance, three judges are appointed for family and juvenile cases at Niigata Family Court³¹ to which applications for divorce Chotei and personal affairs litigation (mainly divorce cases) were 605 and 44 respectively in 2004³². In such circumstances, it is not realistic to expect a judge to attend all cases simultaneously. Instead, a judge discharges his/her duties by staying in his/her chamber and is ready to respond at any time to Chotei commissioners' inquiry or request.

5. Conflicts between Chotei commissioners ? — invisible struggle? —

5.1. Conflicts or discord between Chotei commissioners

A Chotei commissioner may be aware that the partner commissioner has a different understanding of the case, feels unsure about the partner's way of responding to the parties, and disagrees with the partner's views. Such conflicts can be categorised into two groups. One is related with the methods of procedure during sessions and the other is about the philosophy and value judgement of each commissioner. One survey disclosed that 44 commissioners out of 139 experienced discord with a partner

31 See <http://courtdomino 2. courts.go.jp/>. The numbers of the cases dealt with at six branches are excluded.

32 Applications for Chotei include claims for divorce, emotional damage by divorce, division of matrimonial property, custody and allocation of parental rights and duties.

commissioner with respect to Chotei³³.

5.1.1. Discordance on the methods

5.1.1.1. Methods taken by a commissioner - authoritative attitudes

The first example is the authoritative attitudes of commissioners. Chotei is a procedure based on the autonomy of the parties in resolving their disputes and Chotei commissioners, therefore, perform their roles as a neutral body to assist and encourage the parties to reach agreements. In theory, Chotei commissioners have no authority to force the parties to make decisions or agreements. However, it happens that a commissioner responds to the parties with authoritative attitudes such as preachy or pushy talking. Some commissioners claimed in a survey³⁴ that they witnessed a partner commissioner preaching to the parties. This sometimes causes strong resilience against the commissioner from the party, who may request the partner commissioner to find a replacement for the authoritative commissioner.

5.1.1.2. Manipulation by Chotei commissioner

The second is about the way in which cases can be manipulated. It sometimes happens that a Chotei commissioner directs either intentionally or unintentionally the parties to a particular conclusion that the commissioner believes reasonable and appropriate as a resolution of the dispute. This may create dissatisfaction on the part of

33 Kiichi Otuka and Yoshio Saishu (2002), *op.cit.*, p. 50. This survey aims to examine the reality of Chotei which includes not only family disputes but also ordinary civil property disputes. Therefore, it is not clearly distinguished which comment is related to family or civil property issues but I picked up comments which seem to be on family matters judging from the context of descriptions.

34 Kiichi Otuka and Yoshio Saishu (2002), *op.cit.*, pp. 49, 52 and 53.

the parties towards the result of the Chotei process because they feel forced or channelled to an end with which they are not fully satisfied. In addition, some commissioners fail to listen carefully and patiently to the parties while the partner commissioner is eager to listen to them as closely as s/he can. This again causes a disharmony between the commissioners³⁵.

5.1.2. On the neutrality of Chotei commissioner

Finally, it is observed in some cases that a commissioner treats one party with favour so that the partner commissioner has to struggle to restore trust in the other party who may feel that the Chotei process is unfair³⁶. In addition, some commissioners emphasise their own views towards family life during the sessions and induce the parties to reach agreements that are based on the commissioners' values standards. For instance, the survey shows various cases such as: a commissioner told a party in one case that he was not surprised to see a male commit verbal and physical violence, a male commissioner in another case stated that a wife should be tolerant towards the husband's affairs, and a female commissioner expressed strong sympathy towards a wife, etc³⁷. Such behaviour of commissioners brings about not only dissatisfaction among the parties but also discordance with the partner commissioner who believes Chotei commissioners to hold neutral and supportive stance toward the parties throughout the sessions.

35 Kiichi Otuka and Yoshio Saishu (2002), *op.cit.*, pp. 50-51.

36 Kiichi Otuka and Yoshio Saishu (2002), *op.cit.*, p. 50.

37 Kiichi Otuka and Yoshio Saishu (2002), *op.cit.* pp. 48, 50, 51 and 53.

5.2. Causes of conflicts and discord

5.2.1. Different wavelength between Chotei commissioners

There are a couple of reasons behind the cause of such conflicts between commissioners. Firstly, a commissioner may be on a different wavelength with the partner without any particular or clear reason such as the partner's difficult personality etc³⁸. This sort of phenomena occurs unavoidably in human relationships.

5.2.2. Different value standards between Chotei commissioners

Secondly, the different view towards family life and roles of both sexes causes conflicts between commissioners. Under the current law, the equality of both sexes and respect for individuality is taken for granted but in reality, Japanese society is still based on principles of male dominance. The majority of commissioners may understand the equality of both sexes and respect the individuality of each party during the proceedings of Chotei sessions yet it still happens that a male commissioner may dominate and manipulate Chotei sessions. When such an occasion occurs, a female commissioner who differs from the male commissioner's view, may in some cases take a step backwards and let him take the initiative throughout the Chotei sessions since she feels afraid that Chotei will deteriorate if she expresses different views in front of the male commissioner. This may reflect gender issues at Chotei sessions.

5.2.3. Different understandings on Chotei between Chotei commissioners

Thirdly, as for the measure of proceeding Chotei sessions, there are two different understandings among Chotei com-

38 Kiiichi Otuka and Yoshio Saishu (2002), *op.cit.*, p. 48.

missioners. Some commissioners believe that a paternalistic approach to the parties, such as presenting the parties with detailed proposals of resolution, will bring about appropriate and better results to the parties. For that purpose, they often adopt a positive commitment to Chotei sessions and they are likely to persuade the parties to reach a particular agreement or to push them to reach agreements. On the other hand, others take for granted a neutral commitment of commissioners so that the parties should make decisions independently only with impartial help or assistance from commissioners. Accordingly, such a different view point shall cause a split between commissioners. Furthermore, this issue may be complicated since there are some parties who regard the nature of self determination at Chotei sessions as crucial and prefer the neutral commitment, while others expect more and want a positive commitment of commissioners to Chotei sessions³⁹. As a result, a complex combination may arise when commissioners and parties polarise into two alliances such as one group for the neutral commitment and the other for the positive commitment.

5.2.4. Lack of recognition on possibility of conflicts between commissioners

Fourthly, it was not predicted at the time of introduction of the Chotei scheme nearly fifty years ago that commissioners would be in some cases entrenched in conflicts over a case during Chotei sessions. It may have been understood that commissioners would resume their tasks by helping each other and they would be able to cope with their differences in the ordinary course of events. In fact, the Chotei scheme is not equipped with either definite criteria or a procedure of adjusting and resolving con-

39 Kiichi Otuka and Yoshio Saishu (2002), *op.cit.*, p. 53.

flicts between commissioners. Once conflict occurs between the commissioners, it is difficult for them to exchange their views straightforwardly in front of the parties. A commissioner may therefore convey implicitly to the partner the message that s/he has different views from the partner or the commissioner may intend to shift the communication of the parties to the neutral direction where s/he thinks the parties will be able to feel free and make their decisions without any coercion. Another possibility is that s/he gives up everything and keeps silent at the rest of sessions. On limited occasions, commissioners may make efforts to discuss and resolve those problems outside of the Chotei room⁴⁰. In some cases, one of the commissioners may ask a judge to help and resolve their conflicts. However, such a request to the judge is likely to create further conflict between commissioners so the judge may be reluctant to intervene directly into the conflicts and decline the request. Instead, the realistic and last resort is that the court shall not re-appoint a commissioner whom the court regards inappropriate as a commissioner at the end of two years office.

6. Conclusion - How to overcome such problems?

6. 1. The importance of participation in the judicial scheme by a lay person as a Chotei commissioner

It has been said that Chotei has the merit such as a lay person – an individual with no legal qualification – taking part in the process of family dispute resolution with their well balanced common sense, experience and knowledge as an ordinary citizen. In this respect, the Chotei institution should be maintained since Chotei commissioners –

40 Kiichi Otuka and Yoshio Saishu (2002), *op.cit.*, pp. 51-52.

members of public or ordinary citizens – help and encourage the parties to reach agreements with their autonomy rather than using their professional ability to manipulate the parties.

6. 2. To give commissioners more opportunities to understand the real aspects of Chotei scheme and Chotei sessions

In order to utilise the merit of Chotei, what should we do in order to avoid this possibility of conflict between commissioners and to overcome discords during Chotei sessions? One resolution is that more training opportunities should be provided for mediators. The training aims to make Chotei commissioners learn the meaning and importance of the participation of a lay person in the Chotei procedure rather than studying professional skills and knowledge for conducting Chotei effectively. At such training courses, Chotei commissioners should understand the real process of Chotei more deeply, for instance, an avoidable possibility where they may be involved in conflicts with their partner and they may fail to act or make decisions rationally during Chotei sessions. In addition, they should learn and acquire the flexible attitudes by which they respect the partner's value standards and pay attention not only to the parties but also the partner during sessions.

6. 3. More participation of a judge and act as the mediator for Commissioners

Regular participation of a judge in sessions can help lessen conflicts between commissioners since the judge can watch the sessions carefully, and assist or lead the commissioners to resolve their conflicts.

6.4. To establish the claim reporting procedure from the parties and the evaluation scheme of Chotei services

Finally, the claim reporting procedure for Chotei services should be implemented in order to improve the quality of Chotei services. Under such a procedure if available, a Chotei commissioner will be able to examine and evaluate their services individually when the parties express their views toward all aspects of Chotei services including Chotei commissioners' behaviour and the premises of family court etc. Simultaneously, the family court can obtain information on how the parties regard the services provided by the family court and what the parties really need at the family court, and it can accommodate such information for providing better services in the future. Accordingly, the claim reporting procedure could contribute to the improvement of Chotei services.

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