Avoidance of Persuasion in Japanese Dispute Resolution

Yasunori Kasai

I Introduction -A Myth of Japanese Nonlitigiousness-

Ever since the late Professor Kawashima's classic work on Japanese attitudes towards law and litigation (Kawashima (1967)) appeared more than thirty years ago, questions of whether or not Japanese people are litigious, to what extent they are, and (if they are not) why they are not are continuously under discussion. Here the main line of the discussions can be summarized as follows.

Kawashima argues that Japanese people traditionally do not and cannot draw a distinction between social or personal relationship and legal relationship. To settle the dispute between the parties concerned by defining rights and duties at court through evidence and argument does not necessarily end in dispute resolution because people believe that they are intricately entangled in a web of obligations and the legal obligation is merely one of those obligations. Indeed, in Japan, to go to court sometimes magnifies the conflicts. Kawashima was one of the leading scholars of *Modern Law Theory* which promoted the analyses of Japanese law in practice from social, economic and historical points of view. Assuming that Japanese society was still a pre-modern society, Kawashima was optimistic enough in hoping that Japanese people would not hesitate to go to court any longer when their society reached the same stage as modern western societies.

However, as the statistic shows (cf., Haley (1991), 96-107),

the numbers both of litigation and lawyers such as judges, public prosecutors and (private) attorneys have not so substantially increased as one might expect from Japan's economic growth. If the increase of population is taken into account, the increase is further reduced. Even some statistical examples of decrease can be found. Kawashima's view has not been well supported by the facts although it seemed convincing when first appeared.

The second view is more empirical and first put forward by an American scholar of Japanese Law, Professor Haley. His recent book *Authority without Power* is to my knowledge the best contribution to the study of Japanese Law in recent years (Haley (1991), esp., 116-119). Haley argues as follows; Japanese people refrain from litigation because the machinery of justice is not effective, namely it is understaffed and it takes long time and costs a lot to settle a dispute at court. It is a deliberate policy of the government that keeps the court ineffective and unavailable. This view, first formulated in the article (Haley, (1978)), is critical not only of Kawashima's orthodox theory, but also of the whole policy on the modern Japanese judicial system of the government.

However, it should be reminded that until recently no serious discussion over the number of lawyers and the budget of Ministry of Justice including Legal Aid scheme has arisen from the side of the people and media. It has never become a major political issue. Haley would attribute this people's attitude to the policy of the government or the governmental bureaucracies in particular. However, we have a number of cases where the litigants? primary concerns are not monetary remedies, nor do they mind how long it takes to reach the judgement. They often reject the proposal of settlement by the judges. They seek the judgement from the court. In those cases the ineffectiveness of the judiciary does not necessarily hinder them from litigation.

Thirdly, backed by law and economics theory, and through the analysis of dispute settlements of automobile accidents, Professors Ramseyer and Nakazato argue as follows; Japanese people do not need to go to court because they can

work out the amount of compensation from the established precedents without difficulties. By way of out of court settlement by the hands of insurance company, which is called *Jidan*, they can get the approximating amount to what could be obtained from successful litigation (Ramseyer and Nakazato (1989)). Unlike the second theory, what the third offers is more than an explanation of why the litigation rate is considerably low in Japan in comparison with most of her western counterparts. It is a kind of justification for such Japanese attitudes towards law and court.

The third theory is essentially based on the statistical survey of traffic accidents. Therefore we sometimes encounter cases which seem to contradict this theory. A recent famous case is as follows; The father whose daughter was killed by the traffic accident sued the driver. The plaintiff, who is a professor of economics, went to court with informal legal advice from his attorney. He did not appoint any attorney at court. He heavily criticised the established precedents for their sex discrimination. According to those precedents life remedy for female victims is sharply underestimated in comparison with male victims. For example, the average amount of remedy for the loss of the female university graduate is less than that of the male junior higher school graduate. His daughter was, indeed, an undergraduate when she was killed. Based on his accurate knowledge of statistics as a professor of economics, the plaintiff openly condemns the standardization which is often taken to be one of the best achievements of Japanese dispute resolution at court (Futatsugi (1997), Chapter 7). It is the standardization that enables, as Ramseyer and Nakazato argue, Japanese people to settle the dispute out of court. Is this not ironical?

It would be not difficult to take this as an exceptional case. However, to be exceptional does not necessarily mean to be insignificant. I shall introduce another exceptional case which caused serious discussions among not only lawyers but al so Japanese people at large. That case is well known as *Neighbour vs Neighbour* case (cf., Haley (1991), 114).

II A Case of *Neighbour vs Neighbour*

Here I propose a different approach from the former ones mentioned above, which is, as I put it, a kind of socio-linguistic approach. This is based on the analyses both of social relationships between the parties concerned and of the usage of language. Firstly, by social relationship I mean by what kind of obligations the parties concerned are bound together. The obligation which I mean here is the one in its widest and unqualified sense. It can be identified not only by law, institution and custom, but also, more importantly, by the behaviour and speeches containing words of evaluation such as reproach, apology and praise. Secondly, as regards the usage of language I shall pay special attention to such evaluating words and various situations where the exchange of speeches takes place. Lastly, it is extremely important to consider how the social relationship in the sense above and the usage of language relate to each other, put it more exactly, whether the language and the situation together help to heighten or magnify disputes by imposing conflicting obligations, or to soften or reduce tensions between two parties.

This approach is developed from the works of one of my former colleagues, Professor Ryuzaki. He first took BA degree in comparative philology and became an academic lawyer after having practised as an attorney at law for some fifteen years. Based on his very unique backgrounds, he draws our attention to the structural difference of the usage of language and situation between at court and in everyday life. Among his numerous publications, in preparing this essay I was most benefited from his book *Saiban* to Giri-Ninjyo (Ryuzaki (1988)).

Among many cases he has been engaged in, what interests him most is a group of cases in which the parties concerned are well known to each other and often maintain very close relationships before their lawsuits are brought to court. Such cases include patient vs doctor, school teacher vs pupil and /or parents, company vs worker (as long as Japan maintains life-long employment system) and so on. Here I shall introduce a

famous case called *Neighbour vs Neighbour*. This case eventually resulted in the withdrawals on both sides. But it raised a wide range of discussion and criticism among lawyers and non- lawyers alike (cf., Haley (1991) 114).

The outline of the case is as follows; the plaintiffs and the defendants are both parents with a son of the similar year. However, the focus was put on each mother. So by the plaintiff and the defendant I mean each mother in my following discussion unless otherwise mentioned. They had been neighbours and friends since 1975. In 1977 each son began to go to the same kindergarten. On 8th May 1977, the accident happened. When the mother visited the defendant's house to pick up her son for shopping together. Her son did not want to go but to stay there to continue to play with the defendant's son. The defendants, both husband and wife, who were then busy at cleaning their house, said that they would not mind if the plaintiff's son was left because both sons were playing together. So, the mother went shopping on her own. However, soon after that, while the defendants got inside the house, both sons were playing near a backyard pond and unfortunately the plaintiff's son drowned.

On 2nd December 1977, the plaintiffs brought a lawsuit against the defendants for compensation, which amounted to about 28,850,000 yen. The article 711 of Japanese Civil Code says; A person who has caused the death of another person shall be liable for the damage for non-pecuniary loss to the parents, spouse and children of the victim, although their property rights were not affected. The lawsuits were also brought against the company which had dug the pond, and the local and central governments. But I shall not discuss them. The judgement of the District Court was given on 25th February 1983. As the contributory negligence was taken into account, the amount of compensation was reduced to about 5,260,000 yen. However, it became apparent that the defendants were liable for the damage. The case was brought to the high court.

What was by far more surprising than the judgement itself was that immediately after the judgement including the

names of both plaintiffs and defendants was publicized by newspapers, both plaintiffs and defendants, but plaintiff in particular, were troubled by annoying, harassing and bullying telephone calls and letters. The headline of the newspapers was something like 'Harsh Judgement for Neighbour's Favour' or 'Liability Even for Neighbour's Favour'. The father of the victim who was a self-employed electrician changed his job because of the shortage of orders of his clients. The sister of the victim was bullied at her school, being said that she made a profit from the successful litigation. Eventually the whole family moved to another city. And the plaintiffs withdrew the original lawsuit and the defendants withdrew the appeal. In this way this case wholly disappeared from the file of the court. Being struck by the withdrawals from both sides, Ministry of Justice very unusually made an official comment that no one should be deprived of the right to bring a lawsuit to court, which is guaranteed by the article 32 of the Constitution.

After this case was 'settled' or disappeared in legal terms, because of its social influence and reaction, various kinds of interview and conference took place. Here a couple of examples will suffice to illustrate how ordinary people reacted. Housewives who lived near the plaintiff and defendant said as follows; they were totally upset and could not make any comments on the case. They became very nervous and would not ask their neighbours to look after their own children any more. The prevailing view of other ordinary people was more or less the same as the newspapers? headlines stated above. It was critical of the judgement. However, it should be noted that there were a few exceptions which acknowledged the legal responsibility of the defendant.

Academics and critics, who are not lawyers, made the following comments; this is a difficult case. This case indicates the transition of Japanese society from the traditional to the modern. They are too general comments to say anything in particular. By contrast the comments of academic and practising lawyers were given in concrete terms; why did the attorneys of both

parties not try settlement before they went to court? Professor Toshitani, for example, suggests that compensation by money is not suited to this kind of case at all. He argues that the purpose of this lawsuit is a sort of restoration of the honour of the plaintiff (and the victim), therefore, the amount of compensation can be nominal particularly because the victim is a small child. I think this makes the best point.

Now I shall tackle this case from the following points of view, which I have already mentioned. First of all, what kind of obligations had the parties concerned been bound together up until the accident did happen? Secondly, how had their relationship been already changed before the lawsuit was brought? Thirdly, whether or not the lawsuit does help the parties concerned to settle their dispute and restore their former relationship? If not, why? Fourthly, does the usage of language at court affect their relationship? If so, why? What kind of difference in the usage of language between at court and out of court may cause the troubles between the parties concerned and also among the others?

Let me start with the first question. As is often pointed out, Japanese people maintain solidarity to much higher degree than westerners both in terms of society as a whole and, in particular, some parts of society such as company, school and neighbourhood etc.. When newcomers arrive and settle in a certain place, they usually visit their neighbours with small gifts, saying '*Dozo Yoroshiku Onegai Shimasu*'. This extremely common phrase is very difficult to translate into Japanese and can be heard on many other occasions when people ask someone to do something. Since their first visit, newcomers and their neighbours gradually begin to be bound together by reciprocal obligations through the exchange of gifts and deeds (As to gift exchange, see Mauss? classic study (Mauss, (1990)); as to reciprocity, Gouldner (1960) and Sahlins (1972), and also as regards reciprocity in Ancient Greece, Gould (1989; 1991) and Gill, Postlethwaite and Seaford (eds., 1998)).

It should be also remarked that each set of exchange of

gifts or deeds such as looking after children or going shopping for a neighbour is only part of continuous reciprocal activity and cannot be separated from the entire body of activity on which their social relationships are based and through which their solidarity can be maintained and cemented. Therefore the parties concerned believe that each offer of gift or deed is carried out not to meet any particular and identifiable legal or social obligation, but simply as a token of favour. The one party should not pay for a deed offered by the other. If he/she did, he/she would be called '*Mizukusai*'. On the other hand if he/she did return nothing at all, he/she would be given such a word as '*Hijyoshiki*'. In either case it would be difficult to maintain his/her neighbourhood for a long period.

This is a picture of everyday life in Japan and probably nothing new to the sociologist and the anthropologist. We can see many similar social relationships with the neighbourhood in terms of reciprocal obligations which bind its members together. What usually marks the neighbourhood is its symmetrical structure between two parties whereas in the other relationships such as school teacher and pupil, doctor and patient, the parties concerned are not equal and their relationships are asymmetrical. Of course, the reality is not simple. For example, the neighbours who live in so-called company flats cannot enjoy symmetrical relationships. These social relationships, which Ryuzaki draws our special attention to and have been described as traditional or pre-modern, do not seem to be disappearing as Japan has been highly industrialised since the Second World War. I do feel that in some areas of Japanese society such relationships have been well preserved and even fertilised by the increase in the cost and frequency of the exchange of gifts and deeds including various kinds of ceremony under the influence of commercialism.

Let me move on to the second question. The newspapers say as follows; when the defendant visited the plaintiff to attend the funeral ceremony, the mother apologized with tears. However, soon after that, both mothers became less friendly and even hostile to each other. When they met on the street, they

stared each other without words. We have contradicting pieces of information about their behaviour and speeches. The attorney of the plaintiff says that when the mother of the victim visited the defendant to hear about the accident, she was refused to see her. She got cross with her who said that she was able to have another baby. By contrast, the attorney of the defendant says that immediately after the funeral the plaintiff began to tape-record what other neighbours thought about the accident, which meant the preparation for the lawsuit.

It is evident that by the time when the litigation began, the relationship between both parties had been completely changed from close friendship to hostility. Why did it happen? On the part of the plaintiff she asked the defendant to look after her son because she often looked after the defendant's son. Therefore she does not believe that she has any responsibility for the accident. She considers that her neighbour is responsible and much more than that, the neighbour repaid kindness with evil. This is, I think, the very reason why the plaintiff feels that the defendant is worse than a person who is, for example, as a childminder paid to look after children.

On the part of the defendant, she looked after the plaintiff's son because she did so for her, but still she believes that she did so as a favour, not an obligation which for example a childminder must meet. In this sense she can trust that she is much less responsible for the accident. If she did look after the plaintiff's son more often than the plaintiff did, she would feel very little responsibility. But now the plaintiff began to ask her responsibility, which caused the defendant feel hostile against the plaintiff.

This is a logic of reciprocity behind their deteriorated relationship. Then, how did the usage of language affect their relationship? Unfortunately, there is very little evidence for that. This is simply because they stopped talking to each other soon after the accident. This is, however, in a sense a significant sign which already implies the limit to which the language between both parties can play a role in settling their contradicting claims.

As is often pointed out in the comments on this case, there appeared no third person or attorney who tried to reconcile the dispute.

However, we cannot overlook a speech of the defendant. She says that the plaintiff is young enough to have another child. Although the defendant denied this speech was her own, the plaintiff took it as a negation of her whole responsibility. At this stage, the plaintiff seems to have already decided to bring the case to court. Also, the possibility of the use of the language, which she as a neighbour might have out of court, has completely disappeared. The defendant also abandoned he possibility of her speech as a neighbour by negation of her total responsibility. Once both parties dismiss the use of out of court language, they cannot return to the former usage of language. What awaits them is the usage of language at court and the situation in which the court language is practised.

We come to the third question. Does the dispute resolution at court help the parties concerned to settle the dispute and restore their relationship? The case can, needless to say, be settled legally. That is what the court must and can do although we can make comments on the judgement from the legal point of view. However, when we talk about such issues as dispute resolution, the usage of language, advocacy, persuasion and rhetoric, we cannot confine ourselves to the legal aspect. If we consider the third question in wider aspects, the answer is definitely, 'No'. At court the background to which the case is brought can hardly be taken into account. It considers the background only in working out the amount of compensation. However, I discussed above, the neighbourhood is based on the continuous relationships in which both neighbours are bound together by reciprocal obligations. At court rights and duties are defined by interpreting relevant statutes and precedents. They are regarded as separated both from various kinds of other coexisting social obligations on the one hand, and preceding and forthcoming ones on the other. The neighbours cannot distinguish one from another. Therefore how much the amount of

compensation may be, neither the plaintiff nor the defendant will not be satisfied. For the former, the amount does not cover the whole compensation which should be paid for all the favour which she offered. For the latter, no amount need be paid because she did it for nothing.

Can we regard this case like Professor Futatsugi's case as exceptional and unworthy to be considered? My answer is 'No'. I do think that the implications of both cases for the study of Japanese dispute resolution are far-reaching, but in different ways. The case of Neighbour vs Neighbour is one of the cases in which the parties concerned (used to) form a continuous relationship and are bound together by reciprocal obligations. As Professor Ryuzaki pointed out, in such cases once they decide to choose lawsuit rather than out of court settlement, both the plaintiff and the defendant often pursue it regardless of expense and time.

Then, what was the result of this case? We are now reaching the fourth question. I suspect that the result was not satisfactory to both parties at all. Also, it should be emphasised here that any kind and any amount of compensation could satisfy neither of them. In Japan the majority of the successful plaintiffs say that they feel very exhausted and never go to court again. The reason for such dissatisfaction and tiredness comes rather from their experience of being involved in court procedure and communication with their attorneys than cost and time. It has been recently suggested that psychological and linguistic factors such as tension at court, breakdown of communication with the attorney are more influential in people's consideration of going to court than objective factors such as expense and time.

Haley suggests that revenge can appear as a motivating factor for litigation under the ineffective judicial system of Japan. What the plaintiff is seeking from the judgement is state-imposed sanctions (Haley (1991) 117-118, 217 n 139). Indeed, both cases of Futastugi and *Neighbour vs Neighbour* could be brought to court by the plaintiffs with motivation of revenge on behalf of

the victims rather than that of monetary remedy. However, their motivation could not be fulfilled by the court which turned out ineffective again because it offered mere monetary compensation. In this way the parties concerned sometimes feel frustrated twice, first by the breakdown of communication with attorneys during the course of procedure, second by the result of judgement.

It turns out that it is very important to try to fill gaps between the parties concerned and lawyers (judges and attorneys) in understanding of various factors such as former, present and future relationships of the parties concerned, the implications of compensation and revenge. I shall introduce you two examples of court management in which the persons involved work together to reduce these gaps as possible as they can.

Ⅲ Court Management

1 *Benron-ken-Wakai*

The Japanese style of court hearings is often described as *Samidare* which means intermittent shower in early summr in Japan. The average interval of each hearing of civil case at District Court is once every two months and each hearing lasts only few minutes, and witness examination one hour (twice) and the examination of the parties concerned themselves one hour(twice). About a half of some 49,000 civil cases at District Court in 1991 reached the judgement within one year. By contrast, some 8600 cases needed more than 2 years to obtain the judgement and, indeed, about 1500 cases more than 5 years.

The problems over the length of time to reach the judgement seem serious not only in Japan but also other countries including Britain (see, Zuckerman (1999), Wagatsuma (1998-2000)). But what annoys the parties concerned is also such *Samidare* style. It is said that each judge in Japan is often in charge of more than 100 cases simultaneously and the time allocated to

each case is very limited. That is why the court hearing is not carried out consecutively. But what should be asked here is why the attorneys have accepted this style for a long time although their clients are frustrated. The common explanation is as follows; most of Japanese law firms consist only of one or two partners with an assistant. They have not enough amount of human and substantial resources to collect evidence and witness on their own. And they also have handle many cases simultaneously and their cases do not always belong to the same jurisdiction. They cannot provide enough amount of well prepared materials for the court at the one time. Therefore, *Samidare* style is rather convenient even to attorneys.

The hearings are usually carried out without the attendance of the parties concerned. Being virtually excluded from the court proceedings, the parties feel extremely frustrated and alienated even if they win the case. If they lose, they are antagonized. Attorneys worry about parties' joining the procedure because they believe that parties sometimes give favourable evidence to opponents and cannot separate non-legal issues from legal issues. In this way attorneys and clients distrust each other.

Professor Tanase draws our attention to, what he calls, the court management. With the collaboration of judges and other court staff, he argues, the court can keep the percentage of litigation (judgement in particular) low by inventing various kinds of the court management (Tanase (1990)). I shall talk on *Benron-ken-Wakai,* which, as one of the most important techniques of the court management, seems to suggest Japanese attitudes towards law and litigation.

Benron-ken-Wakai (pleading and settlement) has become very popular since 1970s simply because it is useful and manageable for judges, attorneys and parties concerned. It is a complex or amalgam of ordinary litigation procedure and settlement procedure at court. To illustrate the differences between ordinary style and *Benron-ken-Wakai,* the following chart will be helpful.

	Ordinary Procedure	*Benron-ken-Wakai*
room	court room	preparation room or waiting room
open to public	open	(usually) closed
parties concerned	(usually) absent	(usually) present
formality	formal with judge robed	informal
structure	adversarial, both parties (attorneys) facing and arguing each other	round table, (often) judge talking with each party alternately

The strongest effect of *Benron-ken-Wakai* procedure is to help every person involved to concentrate and collaborate to reach a dispute resolution. Then, again, why is the ordinary procedure not effective? Also, what is wrong with the (ordinary) settlement? In other words, why do they need to invent a mixture of ordinary litigation and settlement? Some professors of civil procedure are critical of this court practice. They argue that it might lead Japanese people to a further subordinate position to the court as authority and return to a sort of inquisitorial system again although the Japanese Constitution and related law reforms after the Second World War promoted the adversarial system to elevate the role of the parties concerned. There are, of course, some technical and legal problems in this style. For example, is the judge allowed to rely on the pieces of evidence which are obtained in *Benron-ken-Wakai* procedure and could not have been found in the ordinary procedure. The judge here behaves both as judge and mediator.

Comparing the practices of arbitration and mediation between Japan and U.S., Professor Hayakawa has recently argued that in Japanese arbitration practice the persons involved are not clearly aware of the distinction between arbitration and mediation or reconciliation and arbitrator often behaves both as arbitrator and mediator. He tries to trace the reason for this practice back to the court practice which is often ready to combine the ordinary procedure with settlement as stated above (Hayakawa (forthcoming). However academic lawyers may be critical or sceptical of this practice, practising lawyers both

judges and attorneys have been quite welcoming it. It is understandable that judges favour it. But why do attorneys? A simple example would suffice for the explanation.

A quarrel happened on the steps in the flats. The plaintiff who was injured claimed the total amount of 27,000,000 yen for the compensation. Although the injury was not so serious, he was self-employed and could not work for some months. There seemed no complicated legal issues, but there was complete disagreement on the facts between the plaintiff and the defendant. The foot of the plaintiff was broken. But it is uncertain whether this injury was caused by the act of the defendant or the plaintiff fell down by himself. Unfortunately there was no witness for it. At the last stage of the inquiry the judge suggested settlement to both attorneys. The judge was not confident of the facts.

The attorney of the defendant wrote an essay on this case which is very helpful to understand why the parties concerned also welcomed *Benron-ken-Wakai* style. The essay writes as follows; he suspects that the judge has no confidence in which statement of the two parties is right. It is very delicate whether or not he should be satisfied with the judgement of a kind of comparative negligence. If this judgement were given, he believes that the defendant would be offended not mainly because of the compensation itself but rather because his pride would be hurt. The defendant is confident that he is not legally responsible for the injury of the plaintiff. But he does feel sorry for that and will pay the plaintiff for that.

In this way the attorney of the defendant accepted the judge's suggestion and proposed a proportional confidence of the judge on the condition that this proportional confidence did not mean the proportional responsibility, namely comparative negligence, of either party. As a result, the judge and the attorney of the plaintiff accepted the proposal. The proportional confidence was agreed to be 20 percent, according to which the plaintiff received 20 percent of the total amount of the compensation which he originally claimed.

In this case there can be seen a series of delicate and careful intercourse of feelings and speeches between the judge and the attorneys, also between the attorneys and their clients. One may ask why the judge did not shift this case from the ordinary procedure to that of settlement at the very early stage. But if he had done, the plaintiff (probably not his attorney) would have been offended because the latter firmly believed that the defendant was responsible, and the defendant would be also offended because he was firmly confident of his irresponsibility.

If by advocacy or persuasion of lawyers we mean their practice and ability of facing and arguing each other with evidence and witness in public such as at (open) court, we can hardly see it in the ordinary procedure as described *Samidare* style. It is true that in *Benron-ken-Wakai* style advocacy or persuasion at court in the sense above is carefully avoided. However, advocacy or persuasion in the sense of communication appears quite frequently between the judge and attorneys, attorneys and their clients, and also directly between the judge and the parties concerned. It should be noted here that in *Benron-ken-Wakai* the plaintiff and the defendant usually do not face each other at court nor does the judge talk to both of them simultaneously. Before we think of whether or not it is appropriate to regard this practice of communication as a kind of advocacy, we shall look at another example of the court management.

2 N-Court

N means 'natural and neutral', not the initial of the family name of the Judge Nishiguchi who invented this new style of court proceedings with the collaboration of his court clerks when he was at Osaka District Court in 1993. The main purpose of N-Court is to replace notorious *Samidare* style proceedings with a new type of proceedings which contains a careful preparation procedure and intensive examination procedure of evidence and witness. At every stage both attorneys and sometimes parties concerned themselves participate the procedure. In this way all

the persons involved are expected to collaborate to reach a goal which sometimes results in judgement and sometimes in settlement. One significant difference between *Benron-ken-Wakai* and N-Court lies in that in the former two parties are usually not present simultaneously whereas in the latter they are expected to attend the procedure together. The outline of the N-Court proceedings is as follows.

The first three hearings, each about 30 minutes long, which are called preparation procedure, are devoted to sorting cases into some types of litigation such as traffic accident, construction, etc., and clarifying the points of factual and legal disagreements between two parties. At the fourth, one hour long, the first attempt of settlement and the examination of evidence and witness are carried out. The fifth, three hours long, contains the main examination and the second attempt of settlement. The sixth, only 10 minutes long, is the last and after two weeks the judgement is given. The average interval between each hearing is two months except the last. Each case reaches the judgement within one year.

It does not seem difficult to understand why N-Court was most welcomed by every person involved. It is much more intensive and speedy than *Samidare* style. The capacity of advocacy and participation of the parties concerned is widened by this new style. At the stage of preparation the attorney must talk much more than before with his client on what evidence and witness including client himself is necessary, and also on a possibility of settlement. At the stage of examination the attorney does perform his advocacy not only towards his opponent attorney and judge, but also towards the parties concerned.

N-Court was initiated and navigated by the judge and his court clerks. In this sense it is accompanied by a kind of inquisitorial atmosphere. But at N-Court much more important and frequent roles than used to are given to the advocacy. In this very sense the difference between adversarial and inquisitorial system does not correspond to that in the range of advocacy. Lastly, it should be remarked that both *Benron-ken-Wakai* and N-Court

share a common function to fill the gap between in court communication and out of court communication. As mentioned above, this is a very significant point in Japan where one of the major reasons for people's reluctant attitudes towards court and litigation is a linguistic gap between in and out of court. Now we reach a conclusion.

Ⅳ Conclusion

Up to now I have not been strict with the usage of the terms of advocacy and persuasion. Now in order to return to the title of this paper, I use the term persuasion which is meant to include advocacy because it seems to cover a wider range of practice of language than advocacy.

The New Civil Procedure which was put into force on 1st January 1998 introduced the provisions of three types of preparatory procedures, i.e., ① *Junbiteki-Koto-Benron* (Arts. 164-167), ② *Benron-Junbi-Tetsuzuki* (Arts. 168-174), ③ *Shomen-niyoru-Junbi-Tetsuzuki* (Arts. 175-178). All of them have a common aim to prepare the basis for the intensive hearings by narrowing and identifying contested issues and examining evidence (cf., Hasebe (1999); Oda (1999); Wagatsuma (forthcoming)). Of those three types, the second is the developed and now legitimated procedure of former *Benron-ken-Wakai* procedure. At the present stage it is not possible to say whether or not *Benron-ken-Wakai* is still available. It is interesting to see whether the new preparatory procedures will be welcomed and developed in the future or not.

It should be reminded that although it was sometimes regarded as an illegitimate style and criticised, *Benron-ken-Wakai* procedure was welcomed because it allowed the lawyers to exercise their practice of persuasion in a much wider range of capacity and gave the parties concerned much more opportunities to join the procedure. It also paid careful attention to the communication and feeling of the parties concerned in the use of

out of court language. If we exclude this kind of persuasion from the concept of persuasion, Japanese persuasion in dispute resolution can be characterlised as avoidance of persuasion.

Recently, in the practice of mediation, the term of empower is becoming popular (Levin (1998)). It puts an emphasis on the role of the parties concerned in mediation procedure. They are expected not to be persuaded but to settle their disputes on their own. The mediator is expected to keep reserved. And as a means of dispute resolution mediation is widely used in Japan.

Do we still need to think that the genuine persuasion can be found only in the ordinary procedure? In the light of the development of the second type of preparatory procedures from *Benron-ken-Wakai*, it does not seem to me unreasonable to examine and compare various kinds of persuasion including even avoidance of persuasion in a wider range of the practice of dispute resolution.

Select Bibliography (written in English unless otherwise mentioned)

Futatsugi, Y. (1997) *Kotsushi* (*A Victim of Automobile Accident*), Iwanami Shoten, Tokyo (in Japanese)

Gill, C., Postlethwaite,N., Seaford, R. (eds.) (1998), *Reciprocity in Ancient Greece*, Oxford U.P.

Gould., J. (1989) *Herodotus*, London

Gould., J. (1991) *Give and Take in Herodotus*, Oxford

Gouldner, A. W. (1960) 'The Norm of Reciprocity: A Preliminary Statement', in *American Sociological Review*, 25, 161-178

Haley, J. H. (1978) 'The Myth of the Reluctant Litigant', in *Journal of Japanese Studies*, 4-2, 359-390

Haley, J. H. (1991) *Authority Without Power -Law and the Japanese Paradox* -, Oxford U.P.

Hasebe, Y. (1999) 'Civil Justice Reform: Access, Cost, and Expedition. The Japanese Perspectives', in Zukerman (1999) 235-262

Hayakawa, Y (forthcoming) 'Nihon no ADR no Hihanteki-Kosatsu-Bei-

koku no Shiten kara- (A Critical Study of ADR in Japan -from an American Point of View-), in *Rikkyo-Hogaku* (54, 62-114 in proofs) (in Japanese)

Kawashima, T. (1967) *Nihonjin no Hoishiki* (*Legal Consciousness of Japanese*), Iwanami Shoten, Tokyo (in Japanese)

Levin, H. (1998) *Choteisha Handbook* (*Mediator's Handbook*), Shinzansha, Tokyo (in Japanese)

Mauss, M. (1990) *The Gift: The Form and Reason for Exchange in Archaic Societies.* London, translated by Halls, W.D. from the article originally written in French (1950).

Oda, H. (1999) *Japanese Law* 2nd ed., Oxford U.P.

Ramseyer, J. M. and Nakazato, M. (1989) 'The Rational Litigant: Settlement Amounts and Verdict Rates in Japan', in *Journal of Legal Studies*, 18-2, 263-290

Ryuzaki, K. (1988) *Saiban to Giri-Ninjyo* (*Civil Justice and Giri-Ninjyo Obligations*), Chikuma Shobo, Tokyo (in Japanese)

Sahlins, M. D. (1972) *Stone Age Economics*, Chicago/New York

Tanase, T. (1990) 'The Management of Disputes: Automobile Accident Compensation in Japan', in *Law and Society Review*, 24-3, 651-691

Wagatsuma, M. (1998-2000) 'Eikoku ni okeru Kinji no Minji-Shiho-Kaikaku no Doko (1)-(4)' (Recent Reforms of Civil Justice in England and Wales), *Tokyotoritsu Daigaku Hogakukai Zasshi*, 39-1 (1998) 151-222; 39-2 (1999) 5-55; 40-1 (1999) 83-130; 40-2 (2000) 1-64 (in Japanese)

Wagatsuma, M. (forthcoming) 'Reform of Civil Procedure in Japan' (A Paper presented at Worldwide Advocacy Conference, organised by Inns of Court School of Law, London, June/July 1998)

Zuckerman, A. A.S. (1999) *Civil Justice in Crisis -Comparative Perspectives of Civil Procedure-*, Oxford U.P.

* This essay is based on my paper delivered at Worldwide Advocacy Conference, organised by Inns of Court School of Law, London, June/July 1998. Part of the earlier version was read at Essex University in October 1994. My special thanks are due to John Baker, Donald Cryan, Yoshihisa Hayakawa, Ian Neary, Kiichi Nishino, Robert

McPeake, Satoshi Minamikata, Toru Mizutani, Kisuke Ryuzaki, Richard Stone, Hiroko Tanaka, Manabu Wagatsuma, Andrew Watson. Ayako Oka and Teiko Tamaki helped me with references. Remaining mistakes are my own responsibility.