Justice System Reform in Japan: The Connection between Conflict Management and Realization of General Rules of Law[1)]

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Introduction

1) The Establishment of the Justice System Reform Council

These days, Japan is undergoing reform in its justice system. Because there have been few reforms since the radical change in the Japanese justice system after World War II,[2)] except for some minor changes, the idea of reforming the justice system has been removed from the public's expectations. It is often pointed out that the Japanese justice system is less accessible, less effective, less transparent, and that it cannot contribute to resolving various types of conflicts properly.

Certainly, there are some positive aspects to the traditional Japanese justice system. It is typical that the judge strives to achieve a proper and flexible conflict resolution, instead of the realization of the party's formal rights, by suggesting negotiation trade and reconciliation to the parties at various steps in the litigation.[3)]

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1) This paper is the rewrite of the conclusion of my book *HOURIRON NO LUHMANN* (Niklas Luhmann's Theory of Law), Tokyo (Keiso Shobo) 2002. I would like to thank Prof. Gunther Teubner and other colleagues, who read this paper closely and provided valuable feedback. As to grammatical and stylistic correctness, I owe thanks to Mr. Do Kim.

2) As a result of the radical change in the Japanese Constitution after World War II, the criminal justice system drastically changed from an authoritarian style into an American democratic style (though the real conditions of practicing criminal justice were not sufficiently changed into democratic style). The Japanese civil justice system, however, was not comprehensively changed in comparison to the criminal justice system.

3) It seems that the traditional style of the Japanese justice system emphasizes proper conflict resolution compared with the realization of rules of law. This theory of the aim of civil justice is strongly affected by the "Dispute Resolution Theory." See H. Nakamura, Zweck des Zivilprozesses- die japanische Theorie im Wandel, in: Eberhard Schilken et. al., *Festschrift für Hans Friedhelm Gaul zum 70. Geburtstag*, Bielefeld (Gieseking Verlag), 1997, pp. 463ff.

This style is suitable to traditional Japanese society. But at the same time, it brings less effectiveness and less transparency to the justice system. Under today's conditions of social transformation, people are expected to build a fair and more responsible society by mutual cooperation. Needless to say, the justice system should constitute the essential base for such a society. Thus, it is necessary to activate and expand the role of the justice system. Its defects should be minimized and its strengths should be enlarged. Therefore, in 1999, "the Justice System Reform Council" was established by the Japanese cabinet, and has begun to make a real effort in reforming the justice system under the direction of the Japanese government.[4] On June 12, 2001, *Recommendations of the Justice System Reform Council- for a Justice System to Support Japan in the 21st Century*[5] was presented as the final report of the Council.

2) The Fundamental Problem: The Contradiction between Demand for Proper Conflict Resolution and Realization of General Rules of Law

The *Recommendations* report generally claims that the judicial branch, which is based on the concept of the "rule of law" must, by properly resolving cases and contests in question through proper interpretation and application of law, be a pillar, along with the political branch, to support the "space of the public good."[6] The report addresses various themes, such as the legal education system, proper population of lawyers, accessibility to the justice system, public participation, response to globalization of law, and alternative dispute resolutions (ADR). The contents of the report with regard to the civil justice system are summarized as follows: (1) introducing the planned proceeding, enforcing the means of parties to collect evidence, and expanding the base of personnel, in order to reinforce and speed up the civil process;[7] (2) introducing the expert commissioner system, improving the court-appointed expert witness system, and strengthening the technical expertise of the legal profession, aimed at strengthening the case treatment requiring specialized knowledge;[8] (3) strengthening the comprehensive

4) The Justice System Reform Council was established in 1999 for the purposes of clarifying the role of justice in Japanese society for the 21st century and examining. Cf. Article 2, Paragraph 1 of the Law concerning Establishment of the Justice System Reform Council.

5) http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html.

6) See, *Recommendations*, op. cit., Chapter I, Part 2- 1.

7) See, *Recommendations*, op. cit., Chapter II, Part 1- 1.

8) See, *Recommendations*, op. cit., Chapter II, Part 1- 2.

response to cases related to intellectual property rights, for instance, by consolidating jurisdiction for patent cases and improving functions of specialized arbitration systems;[9] (4) strengthening the comprehensive response to labor-related cases, for instance, by strengthening functions of labor relations commissions for the treatment of smaller claims between individuals at the workplace;[10] (5) improving the functions of Family Courts and Summary Courts;[11] (6) strengthening the civil execution system to secure effectiveness of execution of rights, for instance, by introducing effective means for clearing illegal obstructions of real estate execution;[12] (7) employing measures to expand access to courts, for instance, by strengthening the system of deferral of litigation costs;[13] and (8) reinforcing and vitalizing the ADR in connection with the practice of civil court.[14]

Indeed, the report considers most of the significant issues of the Japanese justice system today. But, from the perspective of legal theory, the report still remains ambiguous, because it seems to discuss some contradictory purposes. The essential point seems as follows: While the report stresses the necessity to achieve clear and general rules of law in the justice system, it also strongly recommends the proper and delicate care for various types of conflict. There is more or less a contradiction between the demand for proper conflict resolution and the realization of general rules of law. The *Recommendations* report seems to neglect explaining theoretically

9) See, *Recommendations*, op. cit., Chapter II, Part 1- 3.

10) See, *Recommendations*, op. cit., Chapter II, Part 1- 4.

11) See, *Recommendations*, op. cit., Chapter II, Part 1- 5. Family Courts (KATEI SAIBANSHO) are competent to decide family-related cases, such as matters of parental authority or succession, which are the primary cases related to personal status. But some of the cases related to personal status are now treated also at the district court, making matters more complicated. *Recommendations* claims that the cases related to personal status should be consolidated into Family Courts, and in order to do this, the functions of specialized treatment of the cases related to personal status should be empowered by securing a diverse group of people to serve as conciliation members, judicial commissioners, and court councilors. Summary Courts (KAN-I SAIBANSHO) are competent to decide cases where the amount in controversy is less than 900,000 yen. The small-claim litigation system, which adjudicates the cases where the amount in controversy is less than 300,000 yen, is now rated highly by the parties, because the parties can receive the final judgment in principle on the first day of trial. From the viewpoint of making it easy for more people to use the small-claim litigation system, *Recommendations* claims that the upper limit of the amount in controversy for small-claim litigation should be increased greatly. As to the small-claim litigation, see Japanese Code of Civil Procedure, Part 6 (§ 368- 381).

12) See, *Recommendations*, op. cit., Chapter II, Part 1- 6.

13) See, *Recommendations*, op. cit., Chapter II, Part 1- 7.

14) See, *Recommendations*, op. cit., Chapter II, Part 1- 8.

how to resolve the contradiction.[15)]

Accordingly, this paper aims firstly to clear up the contradiction between such demands from the viewpoint of socio-legal theory, using the distinction between three legally-relevant communications (the communication of judges, the communication of parties involved in the conflict, the communication of indifferent members of the legal community), and the couplings between them. This discussion might make it clear what the conflict is in a sociological sense, and how difficult it is to resolve the real conflict properly by legal means. Secondly, this paper also aims to discuss how the problem of this contradiction[16)] could be dealt with within the framework of the Japanese civil justice system. The separate treatments of conflicts according to their classifications will be discussed.

1. Presetting of the Discussion

1) The Three Types of Legally-Relevant Communications

If we consider the relationship between the demand for proper conflict resolution and realization of general rules of law, it is helpful to distinguish between three types of legally-relevant communications as follows:[17)]

Communication A: the communication of judges.
Communication B: the communication of parties involved in the conflict.
Communication C: the communication of indifferent members of the legal

15) *Recommendations* states, "Justice is expected to ... provide a remedy for injured persons' rights in concrete cases and contests by properly resolving the cases and contests in question through proper interpretation and application of law." See, *Recommendations*, op. cit., Chapter I, Part 2-1. What should be questioned here is whether the proper resolution of cases and contests could be given only through proper interpretation and application of rules of law.

16) Such thinking is affected by the suggestive discussion about legal alienation by Prof. G. Teubner and Dr. P. Zumbansen. See G. Teubner & P. Zumbansen, Rechtsentfremdungen: Zum gesellschaftlichen Mehrwert des zwölften Kamels, in: *Zeitschrift für Rechtssoziologie* 21 (2000), Vol. 1, pp. 189- 215.

17) This is a simplified model of legal communications, but it is suitable for the purpose of functional analyses, because it is not only applicable for the analysis of the relationship between legal logics and social orders of activities, but also for the analysis of the relationship between legal logics and communications of parties under the conditions of conflict.

community.[18)]

Communication A is viewed as the typical communication of law. It is governed by legal dogma and many kinds of legal methods. The main demand for it is the consistency of legal reasoning. *Communication B* is a kind of interaction between the parties, who are directly involved in the conflict. It is not only a type of interaction, but also the autonomous and original unit of communication of parties. *Communication C* is that of the normal transactions or activities between indifferent members of the legal community.

These three types of legally-relevant communications are coupled with each other, and these couplings constitute the comprehensive whole of legal communications, while each communication respectively has its own different reproduction mechanism. For the aim of discussion here, it is helpful to analyze the two types of couplings as follows.[19)]

2) The Coupling between *Communication A* and *C*

Communication A is the typical mode of communication for legal reasoning. For this communication, the principle of generality of rules of law is the essential core. It is thought that law should be applied equally in spite of different people, time and place. *Communication C* is also based on the principle of generality of law. Therefore, it is assumed that, while *Communication A* provides the essential base of social activities for *Communication C*, *Communication C* provides the resource of trust for *Communication A*, which sustains the reproduction of *Communication A*. Communications are the prerequisite condition for each other.

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18) At first glance, *Communication C* includes *Communication B*, but it is significant to distinguish between both communications in order to analyze the particularity of communications of conflict.

19) In addition to the coupling between *Communication A* and *B* and that of between *Communication A* and *C*, there is still one more coupling between *Communication B* and *C*. The coupling between *Communication B* and *C* seems as follows. *Communication B* provides a variety of social expectations for *Communication C*, which is an essential condition of maintenance and evolution of the order of social activities. On the other side, *Communication C* provides the themes of conflicts for *Communication B*. For the purpose of this paper, it is not so significant to analyze the coupling between *Communication B* and *C*, because the main subject of this paper is analyzing *Communication A*. As to the function of conflict, see N. Luhmann, *Soziale Systeme; Grundriß einer allgemeinen Theorie*, Frankfurt/ M (Suhrkamp Verlag) 1984, pp. 530ff. English translation by John Bednarz Jr., *Social Systems*, Stanford (Stanford Univ. Press) 1995, pp. 389ff.

This kind of coupling seems rather simple at first glance. Its simplicity is apparent if one considers the interdependence between "norms for conduct" and "norms for judgment." But if one also considers the demand for proper conflict resolution in connection with the coupling between *Communication A* and *B*, it becomes clear that the coupling between *Communication A* and *C* is also not so simple, because the demand for proper conflict resolution reflects on the coupling between *Communication A* and *C*.

3) The Coupling between *Communication A* and *B*

The coupling between *Communication A* and *B* is as follows. *Communication B* provides the opportunities to apply the general rules of law for *Communication A*. It is the essential base for the reproduction of *Communication A*. On the other side, *Communication A* is expected to resolve the conflict properly through the application of rules of law. The proper conflict resolution is the main demand from *Communication B* to *A*; therefore *Communication A* is also the indispensable condition for *Communication B*.

The coupling between *Communication A* and *B* seems more severe than that of between *Communication A* and *C*, because it is confronted directly with the contradiction between the demand for proper conflict resolution and realization of general rules of law. The contradiction seems as follows. *Communication B* is originally a kind of interaction of conflict in a sociological sense.[20] If one sees it through the "color glasses" of legal observation, it could be seen simply as a "legal case." But behind the appearance of the "legal case," it contains still more non-legal (often irrational) factors. The reproduction of *Communication B* is triggered by such factors.[21] *Communication B* is a particular interaction and never can be generalized. As a result, if the judge strives to accomplish the aim of realization of general rules of law, the response to the demand for proper conflict resolution

20) See N. Luhmann, *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie*, Frankfurt/ M (Suhrkamp Verlag) 1981, pp. 92ff.

21) The real conflict is the "not-trivial system" in the sense of Heinz von Foerster. The legal system tries to change it into the "trivial system" through legal constructions and procedures. At the pretrial stage, the lawyers try to trivialize the real complex conflict into legal claims and legal conducts. But it cannot completely be trivialized in such a way. It remains trivialized only in appearance. Cf. N. Luhmann, *Die Politik der Gesellschaft*, Frankfurt/ M (Suhrkamp Verlag) 2000, pp. 218f. As to this point, see Heinz von Foerster, *Sicht und Einsicht: Versuch zu einer operativen Erkenntnistheorie*, Heidelberg (Carl-Auer-System Verlag) 1999, pp. 13f.

becomes harder. On the other hand, if the judge strives to accomplish the proper conflict resolution, the attainment of the aim of realization of general rules of law becomes almost impossible.

Such contradiction is hidden carefully. From the usual legal view, one can see this coupling only from the side of *Communication A*. Therefore, *Communication B* is seen only as an object, which passively accepts legal decisions. As far as whether such contradiction could be hidden, the law may appear that it resolves the conflict properly through the application of rules of law. But if one could see the real phenomena accurately, it ought not to be hidden.

2. Conflict in the Sociological Sense

1) The Traditional Theory of Litigation Process

Accordingly, it becomes apparent that it is necessary to analyze the mechanisms which make coupling easier between *Communication A* and *B*.[22] As the premise of the following analyses, we shall discuss how to deal with such contradiction between the demands for proper conflict resolution and realization of general rules of law.

The traditional theory of the litigation process not only hid the contradiction, but also coercively unified both of these demands. It unified both demands at the cost of demand for proper conflict resolution, which is the main demand from *Communication B* to *A*. An extreme version of such theory claims that the judge ought to enforce his/her judgment on the parties through the coercive power of the state, in order to realize the general rules of law, without any consideration of the demand for proper conflict resolution in the sociological sense.[23] This is indeed the extreme version, but a number of traditional theories are like this.

The modified version of this theory explains that the judge can make the parties

22) See N. Luhmann, *Legitimation durch Verfahren*, 3rd ed., Frankfurt/ M (Suhrkamp Verlag) 1993, pp. 107ff.

23) Before World War II, as the theory about the aim of civil action, the theory of maintenance of objective legal order was the accepted theory in Germany. It permitted the judge to declare the law at the cost of the subjective interest of the parties. See for example, O. Bülow, Klage und Urteil, in: *Zeitschrift für deutschen Civilprozeß*, Vol. 31, 1903, p. 191.

accept his/her judgment at the parties' own responsibility and expense.[24] The substantive and procedural laws prepare many conditions to claim, to testify and to justify the rights of parties. The parties have to accommodate their own original intentions or desires into legal claims, assisted by lawyers, if they want to win the case. In addition, the "principle of prohibition of contradictory acts" (the principle of estoppel) controls the litigation process. Under this principle, the parties gradually come to be bound through the litigation process by the results of their own performance. In spite of, or because of, such (less) freedom, it becomes inevitable for parties to accept the formal decision by the judge. This version seems rather reasonable, but it still presupposes a kind of coercive unification of those demands, because it cannot avoid cutting off the demand for proper conflict resolution in the sociological sense.

The litigation system cannot avoid cutting off the demand for proper conflict resolution in the sociological sense. Under the orientation of real proper result of judgment, it becomes too difficult for the judge to decide the cases. Because the prospect for the future from the viewpoint of the present could be quite different from the actual future, it cannot be expected that the judge is responsible to the real result of his/her decision.[25] Even if it is too difficult for the judge to decide without cutting off the demand for proper conflict resolution, still it seems necessary to reduce the gap between the demand for proper conflict resolution and realization of general rules of law.

2) The Conflict in the Sociological Sense

The second premise of the following analyses is what the "conflict" is in the sociological sense. In connection with the justice system, the conflict is to be dealt

24) The judgment is thought of as the result of the parties' own performance in the litigation process under the conditions of burden of proof. As to this point, see L. Rosenberg, *Die Beweislast: auf der Grundlage des bürgerlichen Gesetsbuchs und der Zivilprozessordnung*, 5th ed., München 1965, pp. 11 ff. Also, Luhmann explains the mechanism of parties in accepting a legal decision, borrowing from the role-taking theory of G. H. Mead. See N. Luhmann, *Legitimation durch Verfahren*, op.cit., pp. 82ff.

25) See N. Luhmann, *Das Recht der Gesellschaft*, Frankfurt/ M (Suhrkamp Verlag) 1993, pp. 378ff. Because the judge cannot be responsible to all of the results of his/her decision, the litigation system cannot avoid cutting off the demand for proper conflict resolution in the sociological sense. But I still believe that the judge can take the results of his/her decision into consideration as far as one can expect in the normal situation.

with at the level of interaction between parties, because it is unavoidable for the justice system to trivialize the real conflict at the level of the whole society into that of at the level of interaction between parties. Originally, the conflict appears in various forms, because it can be parasitic on almost all kinds of communications from economical, political, legal, scientific, religious, and moral; the communications, to which the conflict can parasitize, cannot be restricted to any type of communication.[26] Because the real conflict contains too much variety, it becomes unavoidable for the justice system to trivialize the conflict. Therefore, I will discuss here the "conflict" at the level of interaction.

According to the Niklas Luhmann's system theory of communication, the conflict is a type of realization of double contingency,[27] which is a kind of inter-dependence of the expectations of Ego/Alter, which will interact with each other. The problem of double contingency is as follows: if Ego orients to how Alter acts, and at the same time, Alter orients to how Ego acts, it comes to no action.[28] The social system makes the interaction possible through the reduction of double contingency. The alternatives of actions must be reduced to the extent that interaction is possible. The conflict system also makes interaction possible through the reduction of double contingency by "negation." Through negation, the communications are not only prevented, but also often activated or accelerated. The negation stimulates the double contingency, which remains behind the normal process of interaction; and by this, it removes the obstacles of possible actions in various directions. Therefore, it often activates the interaction between parties. The mechanism of (re)production of conflict connects with the activation process.

In this regard, the conflict is to be seen as the reproductive circulation of interactions between parties, which is triggered by their contradictory communicative offers. A number of trivial happenings in daily life might cause the conflict. Even the tiniest misunderstanding or trivial denial of another's communicative offer often causes serious conflict.[29] The factors which trigger the (re)production of such conflictive interactions are, for instance, emotions such as anger, pride, envy, and behaviors such as intolerance, antagonism, and the considerations between gain and loss. Most types of emotions or behaviors or

26) See N. Luhmann, *Soziale Systeme*, op. cit., pp. 532f. English translation, pp. 390f.

27) See N. Luhmann, *Soziale Systeme*, op. cit., pp. 530f. English translation, pp. 388f.

28) See N. Luhmann, *Soziale Systeme*, op. cit., pp. 148ff. English translation, pp. 103ff.

29) See N. Luhmann, *Soziale Systeme*, op. cit., p. 534. English translation, p. 391.

considerations for other people could cause the conflicts. These factors involve occurrence, continuance, and extinction of conflicts.

The reproductive circulation of conflict constitutes the dynamic complex of interactions of parties. It is highly integrated, because it is supported by antagonism against each other. The antagonism is an extremely integrative factor of conflictive interaction. Through the antagonism, the conflicts come to be highly integrated, and to be differentiated out from the communicative contexts around them. The conflicts are highly dynamic, but they are stabilized at their own original value (Eigenwert). The structures of (re)production of conflictive interaction consist of "conflict-themes" such as insult, falsity, damage etc., which decide the original value of conflicts. The conflict-themes shape the conflictive interactions of parties, but at the same time, often bring it into deadlock. When the conflictive interaction is deadlocked, the parties seek assistance from others.

3) The Conflict Resolution in the Sociological Sense

Based on the above analysis, we shall explain here what conflict "resolution" is in the sociological sense. The resolution process is dynamic because the conflict is reproductive circulation of interactions between parties. The conflict has its own way of occurrence, continuance, and extinction. The conflict resolution in the usual sense implies that anyone concerned in the reproductive process makes it extinct. It is often thought that the extinction of conflict is its resolution. However, as long as the interaction between parties continues, we cannot expect that the reproduction of conflict will be completely extinct.[30] At the very least, it is improbable that the conflict will go away as intended. The reproduction of conflict might continue independent from anyone's intention.

We cannot make conflict extinct completely, but it seems possible to make the conflict less problematic through intervention, allowing the parties to coexist with their own conflict. The mediator assists the parties to change the reproductive circulation of conflict. Even if the conflictive interaction comes to a deadlock, the mediator can change the situation by means of mediation, hearing or persuasion, though the possibility to make the conflict worse cannot be excluded. It may be

30) Conflict resolution is only the by-product of reproduction of conflict. It seems rather profitable to analyze such phenomenon from the point of conditioning mechanism of conflict system. See N. Luhmann, *Soziale Systeme*, op. cit., p. 537. English translation, p. 394.

better to assist the parties in learning the various aspects of their own state in conflict, and the better method for this seems to be the proper and fair hearing of the parties. If the conflict-themes of the parties are reframed, the reproductive circulation often becomes less problematic. Hence, the conflict resolution in the sociological sense consists in less-problematization of conflict, so that the parties are able to coexist with their own conflict.

Because the process of conflict resolution is similar to caring for a living being, it seems more suitable for us to use the term "conflict care" or "conflict management." The method of conflict management is like a type of therapy, whose mechanism is utterly different from that of legal procedure. Because of the character of conflict resolution (management), the contradiction between the demand for realization of rules of law and proper conflict management becomes unavoidable.

4) The Proper Conflict Management and Litigation Process

As mentioned earlier, it becomes clearer what the conflict resolution (management) is in the sociological sense. In order to manage the conflict properly, it is necessary to take care of it as if it were a living being. Indeed, the formal litigation processes are quite different from the adequate method for proper conflict management.[31] The substantive and procedural conditions to claim rights are constituted only for the purpose of application of general rules of law, and there are few considerations to proper conflict management. However, if the justice system ought to reduce the gap between the demand for proper conflict resolution and realization of general rules of law, then judges and lawyers must take the methods of proper conflict management into consideration as much as possible, at least behind the formal procedure[32] or within the permissible range of legal form.[33]

31) The traditional Japanese justice system seems to have treated the distinction between formal litigation process and adequate method of proper conflict management ambiguously. Therefore, the practice of the Japanese justice system has been less transparent. If we have to make the practice of the Japanese justice system more transparent, we ought to treat this distinction more articulately.

32) It sounds improbable and too expected of the usual judges and lawyers. Indeed, it may be burdensome. Therefore, such a practice of conflict management is carefully hidden. However, the judges often consider a good time to recommend settlement to the parties, especially in hard cases. The lawyers also prefer to settle the cases through reconciliation if the cases are bagatelle conflict or pro bono. At least in Japan, the preference is to settle the case through reconciliation,

Possibly, in some cases, the rigidity of the application of general rules of law should be loosened up in order to realize the proper conflict management.

Naturally, the formal litigation process also contains some effective aspects for proper conflict management. At first, the "party principle," which is an expression of private autonomy in the litigation process, is expected to empower the active interchanges between parties. Secondly, the duty of appearance and the burden of litigation act such as the burden of persuasion or that of producing evidence forces the parties to confront seriously the problems of their own conflict. Thirdly, exposed by the observations of others, including not only official staffs but also the court audiences, the parties are likely to sufficiently prepare their claim. Also, through the procedural act of proof, each party becomes aware of limits of his/her own prospects. These aspects allow the parties to learn about their own state of conflict. They seem to contribute to reducing the gap between the demand for proper dispute management and realization of general rules of law.[34] The merits of these aspects should be adequately taken into account.

5) The Expected Role of Judges

What is the expected role of judges for proper dispute management in the sociological sense? Needless to say, their main role is the rigid application of general rules of law, in order to realize the legal order. But they should also contribute to the aim of proper dispute management, behind formal procedure or within the permissible range of legal form. They seem to be forced to stand at difficult and risky states, in which they should not only apply the general rules of law rigidly (in relation to *Communication C*), but they should also manage the

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even after the beginning of the formal process of litigation. At the district court in 2001, about 30% of litigated cases ended by settlement, and about 13% of them ended by the withdrawal of complaints, most of which probably resulted from reconciliation out of court. See, *Annual Reports of Judicial Statistics*, edited by the General Secretariat of Supreme Court of Japan, the unit of count for civil and administrative court cases, Table 19. in:
http://courtdomino2.courts.go.jp/tokei_y.nsf/2d9f062bbe3217b049256b69003ae2b5/813d87b75e014d0349256c15000e4ffb?OpenDocument

33) The practice of legal reasoning seems to be the reconstruction of the past for the purpose of proper conflict resolution. Legal reasoning is not the method of finding the conclusion, but the method to justify the decision, which is the legal construction for proper conflict resolution. See U. Neumann, *Juristische Argumentationslehre*, Darmstadt 1986, S. 4f.

34) See N. Luhmann, *Legitimation durch Verfahren*, op. cit., pp. 114ff.

conflict properly (in relation to *Communication B*). In connection with the latter, they ought to hear the voice of parties sincerely, who are at a deadlock in their own conflict, and to be mindful of the situations which trigger the reproduction of conflict between parties. If a good time to recommend settlement becomes available, they should recommend it. At least, they ought to assist active negotiations between the parties. In the sociological sense, the expected role of judges seems to be that of a careful manager of conflict, under the conditions of rigid application of general rules of law.[35)]

6) The Right and Redress

As mentioned earlier, it is necessary to consider the gap between right and redress. The realization of right might not correspond to the redress of parties. If redress means proper conflict management, the realization of right seems to be more or less independent of the former. At least, there seems to be less direct connection between them. Many people, who have already realized their own right, still continue their own conflict.[36)] The crucial point is as follows: Because of the gap between right and redress, there is the risk that the conflict will become more severe through the realization of right. It might be better for the proper conflict management to consider the relation between them to be indirect and loose.

In this regard, the right should be considered just as a kind of frame of parties' interest. The frame itself should be rigidly dealt with, but the realization of its contents should be rather flexible in relation to the demand for proper conflict management. It is possible that the judge acknowledge the right of party with some conditions of execution. It is expected that even after the right is certified, the negotiations between the parties becomes more active, and as the result, it becomes unnecessary to execute.

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35) In this case, it seems significant that the proceedings between judgment and settlement are clearly separated. If these proceedings are mixed together, the legal treatment of cases becomes too difficult. But it is still indispensable that both separated proceedings are properly coordinated, and easily exchangeable between both.

36) The justice system often ignores continuation of conflict, because it contains a contradiction to the function of the realization of legal order. Indeed, the justice system should not officially take continuation of conflict into consideration. The rehash of conflict must not be permitted, except for very limited cases, in order to realize the legal order. The ignorance as such also connects with the fundamental function of the justice system. However, it should not avoid the effort to reduce such continuation of conflict.

7) The Effect of Final Judgment for Proper Conflict Management

From a legal point of view, the final judgment is the result of applying general rules of law to the case in question, and it also symbolizes the declaration of the end of the conflict between the parties. This declaration is essential in relation to *Communication C*. But from a sociological point of view, the conflict does not end completely by judgment. The reproductive circulation of conflict might continue independent of judgment. The judgment only alters the conflict. But the effect of such an alteration factor is often decisive in most cases of conflict, because the parties cannot officially be supported after judgment in connection with the same case. The judgment often only distorts the relations of parties with others. This engenders distrust of the justice system. Therefore, judges ought to be careful about the effect of their decisions on the reproductive circulation of conflict, and to consider the timing of final judgments. In addition, a substantial proper reasoning for the judgment is significant for the parties to accept the decision. Through such reasoning, the parties can often reframe their own conflict-themes in a positive way. It might contribute to less-problematization of conflict so that the parties are able to coexist with their own conflict.

3. Proper Conflict Management and Realization of General Rules of Law

1) The Relation between Proper Conflict Management and Realization of General Rules of Law

If we consider the judge as a careful manager of conflict, and at the same time, a rigid applier of general rules of law, it seems to be too burdensome for the judge. Indeed, it increases the risk of misusing general rules of law, and it might cause damage the coupling between *Communication A* and *C*. However, the expected extent of the rigidity of application of rules of law depends on whether and how *Communication C* is controlled by the application of rules of law. The cases which need the rigid application of rules of law might be relative small. In addition, compliance with rules of law is often independent of application. People often comply with rules of law even without application. So we have to analyze whether and how *Communication C* is controlled by the application of rules of law. I will analyze these questions mainly on the ground of Japanese socio-legal conditions today.

2) Whether and How *Communication C* is Controlled by Application of Rules of Law

We shall analyze whether and how *Communication C* is controlled by the application of rules of law. Common sense tells us that if there were less rigid application, it would also mean that there would be less compliance with rules of law. But the matters are not so simple. As I have pointed out, people often comply with rules of law independent of application. Most of the obligations that are fulfilled, which are viewed as complying with rules of law, are determined by various sociological factors, which are hidden behind the legal appearance of compliance.

Generally speaking, the consideration of costs and benefits is often the decisive factor in fulfilling obligations. Most people fulfill their obligations because of the merits of rules of law. In this regard, consideration of the demand for compliance with rules of law itself is only one factor in the cost and benefit calculation, and then the control by rules of law seems only indirect and subsidiary.

Also, the fulfilling obligations, which are seen as complying with rules of law, are sustained by trust or cooperation between members of society. At least in Japanese society, trust or cooperation is often the most decisive factor in fulfilling obligations, because the binding of community is considerably solid compared with other modern societies. For instance, in cases of long-term contracts, such as a lease[37] or employment contract,[38] the fulfilling obligations are determined decisively by trust or cooperation.[39] As for whether trust or cooperation is the most decisive factor, the fulfilling obligations is only the expression of determination by

37) In the realm of lease law in Japan, especially after World War II, the theory of trust relations has developed. This principle has been developed in relation to interpretation of § 612 of the Civil Code of Japan, which defines the prohibition against subletting to a third party without consent of the landlord or lender. It has now been expanded into other realms of long-term legal relations.

38) Recently, overtime work without pay became a serious problem in Japan. It is sustained by trust relations between the worker and firm. People have worked overtime in Japan for a long time. But because of the breakdown of lifetime employment in Japan, the problem came to the surface.

39) Recently in Japan, the theory of contractual relations is actively discussed in connection with Ian Macneil's contract theory. See T. Uchida, *KEIYAKU NO JIDAI* (The Time of Contracts) Tokyo (Iwanami-Shoten) 2000; T. Tanase (ed.), *KEIYAKU HOURI TO KEIYAKU KANKO* (The Contract Principle and the Contract Practice), Tokyo (Kobundo-Shoten) 1999; I. Macneil, The many futures of contracts, in: 47 *Southern California Law Review* 1974, pp. 691ff.

trust or cooperation, and it might be independent of the application of rules of law. And if it is controlled by the application of rules of law, it seems only indirect and subsidiary.

Even in cases of less cooperative social binding, the control by application of rules of law is not necessarily the predominant control factor over others. For instance, in cases of negotiation trade, not only between firms or corporations but also between lay persons, there seems to be the tendency to use the rules of law only as a means of goal attainment.[40] In this case, the rules of law are taken simply as the strategic "trump" in negotiation, and it is used by parties when negotiating in the same way as other negotiation tools such as money or social power. The rules of law are the convenient tools for the negotiator to get the other parties around the table, to make them flinch, and to have a greater outcome. Contrary to what we might think, in such cases, the real compliance with rules of law by the other party is often less significant than the effectiveness of rules as tools.[41] If the goal is attained, the demand for compliance with rules of law is often withdrawn. As for whether the rules of law are taken as a strategic trump in negotiation, the demand for compliance with rules of law seems directed only toward the aim for strategic use, and then the application of rules of law seems to be needed only when the negotiation drags on excessively, and the decision by authorities cannot be avoided, which often means catastrophe. Here also the control by application of rules of law remains rather indirect and subsidiary.[42]

Accordingly, it is presumed that the connection between application of rules of law and compliance with them seems only indirect and subsidiary in most cases. And there seems to still be room to consider the demand for proper conflict management. So the application of rules of law can often be less rigid, in order to realize the demand for proper conflict management. And if rigidity is needed, it is

40) See M. Abe, *KOMYUNITHII FUNSOU TO HOUTEKI SHORI* (The Conflict in Community and its Legal Resolution), in: *The Sociology of Law* (The Japanese Association of Sociology of Law), No. 49, 1997, pp. 34ff.

41) At the same time, there is also the strong incentive to avoid the offense from other people who use the rules of law strategically. Therefore, the normal activities, especially business transactions, tend to comply with rules of law.

42) I think that such tendencies ought not to be seen as the expression of weakness of consciousness of rules of law. The more the rules of law become widespread, the more often their strategic uses will be seen. In this case, people do not ignore the rules, but use them with keeping a fair distance.

needed only at more limited stages. The more significant question seems to be: what sort of activities needs the rigid application of rules of law.

3) The Distinction of Activities Which Need to Realize Rules of Law Rigidly or Not

Following this, we shall analyze what sort of activities belonging to *Communication C* needs the rigid application of general rules of law. Needless to say, some activities need the rigid application of general rules of law, while others do not. What sort of activities needs the rigid application of general rules of law?

a) Activities in Which the Application of Rules of Law is Essential

Generally speaking, as to the type of activities in which the competition is so severe that troubles with others are always worried about, it is important that people comply with rules which are rigidly applied by the court, in order to avoid any trouble with others. Recently in Japan, as to highly business-like transactions such as transactions around intellectual property or financial trade, the general rules of law are the main directives of transactions, which have been affected by the recent globalization of commercial trade. The essential task of the legal department of firms and corporations is to take preventative measures. Although this sort of activity is still not so extensive, its significance is growing considerably.

In this regard, people are concerned not only with the contents of legislation but also with the contents of applications of rules by authorities, including administrative ones, in order to avoid sanctions by any authorities. Also, people always try to avoid complaints about their own transactional activities by others. Sanctions by authorities or complaints by others are seen as an "accident" which ought to be avoided. These accidents discredit one's reputation among trade partners and increase the costs of transaction. The best way to avoid such "accident" is to comply with general rules of law. Even in such sort of activities, many conflicts are end in reconciliation.[43] Legal troubles should have been avoided. Therefore, as a precondition for compliance, it is essential that the rules of law are clearly applied and rigidly realized.

43) See, *Annual Reports of Judicial Statistics*, op. cit., Table 19.

b) The Type of Activities in Which the Application of Rules of Law is Less Significant

On the other hand, as to the type of activities in which trust or cooperation is the essential base, such as family, employment, or other less business-like long-term relations between people, it seems less important to apply the general rules of law than to maintain the trust or cooperation. People's conduct is based on ordinary trust or moral norms.

For instance, the family relationship is constituted by love, trust, and interdependence between its members and it is supported by social relations between other people around them. Normally, family obligations are voluntarily fulfilled, and there is little room in which the rules of law could intervene. If a conflict occurs within the family, it should be resolved voluntarily by its members, with the support of others around them. On the other hand, if a conflict has come to a deadlock, it becomes necessary to apply the rules of law. At this stage in the conflict, voluntary conflict resolution becomes almost impossible, and the rules of law are often the "final trump" to resolve the conflict. Even at this stage, the effort to maintain a cooperative relationship ought to be continued. Therefore here, the application of rules of law should also take the maintenance of cooperative relationship into consideration, and if the rigid application is needed, it should be applied after all other efforts have been exhausted.

The workplace relationship is similar to this. Indeed, the relationship is based on a labor contract between employer and employee, but the cooperative factors are also essential. Normally, activities at workplace are organized effectively toward the purpose of work, and the obligations of labor are voluntarily fulfilled. If the conflict does not damage the cooperative relationship, it is better that the general rules of law are not applied. Therefore, also here, the usual conflicts should be resolved voluntarily between members of the workplace or between employer and employee as much as possible. On the contrary, if such conflicts have come to a deadlock, legal resolution of conflicts becomes more significant because at this stage of the conflict, the breakup of the relationship between parties becomes unavoidable. As such, the demand for realization of general rules of law becomes superior to that of maintenance of cooperation. At this stage, the realization of rules of law seems to be essential, but at the same time, the care of the parties' future is still significant. Then the application of rules of law might be provisional, and if

rigid application is needed, it ought to be applied after all efforts have been exhausted.

4) The Compatibility between Realization of Rules of Law and Conflict Management

Based on our previous discussion about reducing the contradiction between the demand for proper conflict management and realization of general rules of law, it seems beneficial to separate the treatment of conflicts according to the characters of conflicts. The conflicts, which occur in connection with the type of activities a), strongly need the realization of general rules of law. On the other hand, for conflicts which occur in connection with the type of activities b), judges should emphasize the demand for proper conflict management compared with the demand for rigid application of rules of law. Such separation makes the special treatment possible and reduces the burden on the justice system. It also makes it easier to connect the litigation system with other means of conflict management. And I think that the conclusion of the *Recommendations* report is that there should be separate treatment between the different types of conflicts.

i) The conflicts, which occur in connection with the type of activities a), such as conflicts around business transaction, intellectual property, or the regulatory intervention, should be dealt with exclusively as formal legal cases. In order for actors to avoid legal accidents as much as possible, clear standards are necessary. Certainly, even in such cases, efforts to settle conflict through negotiation without a final judgment should still be respected, because private autonomy is also essential. But the center of gravity for treatment of such cases ought to be in efforts to provide clear standards.

Many of these cases require specialized knowledge for proper treatment, and they usually need the proceedings to be decided quickly; therefore, they need separate treatment according to the type of conflict. For instance, consolidating jurisdiction for special cases is an effective way to treat such conflicts. Also, the expert witness system ought to be improved, and the technical expertise of the legal profession should be strengthened. In addition, the means of ADR, such as specialist arbitration committees, should be expanded and revitalized, and ADR should be coordinated with litigation.[44] The strengthening of the civil execution

44) See *Recommendations*, op. cit., Chapter II, Part 1- 2, 3.

system is also significant, because the realization of general rules of law implies the reliability of execution.[45)]

ii) On the other hand, for conflicts which occur in connection with the type of activities b), cooperation is the main directive for practice. Judges should assist the parties to settle their own conflict. They should listen to the parties who appeal for help to settle their own conflict and they should assist negotiation between parties and maintain or restore cooperation between the parties, bracketing off legal thinking.

In this regard, the proper care of the relationship between the parties at an early stage is essential for the settlement of such conflicts, because the original values of conflict are still not consolidated. At this early stage of conflict, the efforts of the parties themselves are more effective in settling conflict than at a later stage. The proper care requires the special treatment according to types of conflicts. For instance, family-related conflicts should be treated carefully under the special conciliation system at an early stage, and it should be emphasized that the parties voluntarily settle their own conflict as much as possible. The functions of redress for family-related conflicts should be activated and empowered by the support of various specialists for conflicts in the family court. In connection with this, conflicts related to personal status should be consolidated with family courts as much as possible.[46)] It is also significant that conflicts at the workplace are settled, at least at an early stage, by negotiation between parties under the direction of labor conflict specialists. So the special conciliation committee and other special means of ADR for labor-related conflicts ought to be activated and empowered by increasing the specialist staffs and coordination between various means of ADR.[47)]

Even in cases of conflict between the parties to a transaction contract, if they emphasize the maintenance of good cooperation relation compared with the realization of formal right-obligation relations, the same explanation for the treatment of conflict seems to be true. So it is necessary in such cases to assist negotiations between parties to settle their own conflict, and for this aim, the ADR, which is suitable for such cases, seems more effective than the litigation system, especially when implemented at an early stage. The efforts to reinforce and vitalize

45) See *Recommendations*, op. cit., Chapter II, Part 1-6.

46) See *Recommendations*, op. cit., Chapter II, Part 1- 5.

47) See *Recommendations*, op. cit., Chapter II, Part 1-4.

suitable means of ADR for such cases should be made, so that they will become attractive options, along with the litigation system. In order to promote and improve various types of ADR, cooperation among the organizations concerned should be strengthened and a common institutional base should be established.[48)]

Also in these cases, if the negotiation between the parties comes to a deadlock, the application of rules of law becomes more significant, because the breakup of relations between the parties becomes apparent, and the demand for realization of rules of law becomes superior to that of maintaining cooperation. In addition, both parties often want strongly to gain a formal legal decision. As to such cases, the judge should make a decision by applying the rules of law, because the fundamental right of access to courts should be secured in various ways. In this regard, the expansion and enforcement of access to courts is essential.[49)]

iii) For the purpose of separate treatment of conflicts according to the type of conflict, the proper evaluation of conflicts at an early stage is essential. The intensive hearing for preparation of following process at an early stage should be effectuated by enforcing the means for parties to collect evidences; and related to this, it is also significant that the proceeding plan is established as early as possible.[50)] The role of lower courts for such evaluation practice seems essential, because evaluation affects the whole practice of treating conflict properly at the following stage. Needless to say, the expansion of personnel is essential to a complicated practice.

In this regard, the lower courts should take the demand for proper conflict management into account more than at the higher courts, because the efforts to settle conflicts properly seem more effective at lower courts. On the contrary, at higher courts, especially at the highest court, the demand for realization of rules of law is more significant than at the lower level, because most of the cases which are easy end by settlement between parties might have already been ended at the lower courts, and the rests of cases need to apply the rules of law rigidly. Therefore the higher courts should fulfill their expected role of realization of rigid application of rules of law.

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48) See *Recommendations*, op. cit., Chapter II, Part 1-8.

49) See *Recommendations*, op. cit., Chapter II, Part 1-7.

50) See *Recommendations*, op. cit., Chapter II, Part 1-1.

4. Conclusion

We have discussed the relation between demand for proper conflict management and realization of general rules of law, connected with the justice system reform in Japan today, by using the scheme of couplings of *Communication A* and *B*/ *Communication A* and *C*. It is said that the contradiction between the demand for proper conflict management and realization of general rules of law is hardly removable, but if the judges are sincere, it seems unavoidable that they should make efforts to reduce the gap between both demands. Accordingly, it becomes significant whether and how the demand for rigid application of rules of law may be loosen up.

Then we discussed the separate treatment of conflicts according to their types in order to reduce the gap between both demands, on the ground of Japanese socio-legal conditions. The conflicts which occur in connection with highly business-like activities such as transactions around intellectual property or financial trade need the general rules of law to be applied formally. On the other hand, the conflicts which occur in connection with the sort of trust related cooperative activities such as activities with family, at the workplace or other kinds of less business-like long-term relations between people, need enough respect for the demand for proper conflict management, compared with the demand of realization of general rules of law. For these types of conflicts, the judges should firstly take care of the cooperative relationship between the parties, and the application of rules of law should be realized after other efforts to assist the parties to settle their own conflicts have been exhausted. This separation makes it possible that the special treatment of conflicts are effectively carried out according to the matters, the burden of the practice of justice system is reduced, and the litigation system is connected properly with other means of conflict management.

Our analysis of this paper is an analysis of the scheme of recent justice system reform in Japan. The theoretical problems behind the proposals, which are manifested in the final report *Recommendations* seems roughly upheld. I believe that the civil justice reform seems to be realized along with such lines about which we have discussed here.