FAMILY MODELS, FAMILY DISPUTE RESOLUTION AND FAMILY LAW IN JAPAN

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I. INTRODUCTION

Since the late 1800s one model of "family" has dominated governmental policy in Japan.[1] In its barest structural form, that model, the *ie*, is a patrilineal, patriarchal chain of authority extending between the eldest sons of successive generations. Although prevalent among the samurai and some merchant families before 1872, this pattern of social organization was not common in practice or intellectual conception among other Japanese.[2]

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1. This idea is generally accepted by Japanese and non-Japanese scholars of Japan. For English language presentation of the historical origin and scope of this policy, see C. GLUCK, JAPAN'S MODERN MYTHS: IDEOLOGY IN THE LATE MEIJI PERIOD (1985); Michiko Nakayama, *Just Another Voluntary Association of Individuals? The Family in Japanese Constitutional Theory*, RIKKYO HOGAKKU 246, 239 (1995). For an extensive Japanese language description and analysis, see E. YAMANAKA, NIKON KINDAI KOKKA NO KEISEI TO "IE" SEIDO (1988).

2. Japanese and non-Japanese scholars from a variety of disciplines have noted the more flexible and less hierarchical structure of classes other than the samurai. *See, e.g.*, Joy HENDRY, MARRIAGE IN CHANGING JAPAN 14-15 (1981); R. Ishii, *The Status of Women in Traditional Japanese Society*, 29 JAPANESE ANNALS INT'L L. 10 (1986); Ramseyer, *Thrift and Diligence: House Codes of Tokugawa Merchant Families*, 34 MONUMENTA NIPPONICA 209 (1979); N. Toshitani, *Family Policy and Family Law in Modern Japan* I, 20 ANNALS OF THE INST. OF SOC. SCI. (U. of Tokyo) 95, 99 (1979). *See also* OTAKE, IE TO JOSEI NO REKISHI 233-34 (1977), who suggests that the samurai pattern was also used by wealthy Japanese families during the same time period. Further, the *ie* structure may have been an ideological ideal, since it was associated with the wealthy and prestigious elite, but that among other sectors, e.g., agricultural and small merchant families, men and women worked together such that strict maintenance of a hierarchical structure was not possible. Non-samurai Japanese women felt the impact of "samuraization" most strongly in that "[p]articularly in marriage, they were very free, never restricted by the confining doctrines of later years. In those years, no one criticized a woman's remarriage." Y. FUKUZAWA, *On Japanese Women*, *in* FUKUZAWA YUKICHI ON JAPANESE WOMEN: SELECTED WORKS 25 (E. Kiyooka ed, 1988).

Family Court mediation, which is a prerequisite to litigation of most types of family disputes in Japan, reinforces this ideology of *ie* and perpetuates the ideal of having one family model within Japanese society. This Article explores how and why this is true despite the fact that neither the laws regulating the family nor the legal system as it deals with dispute resolution requires the adoption of one particular model.

From 1872 the model of patrilineal connection for successive generations was impressed upon Japanese society through the requirement of family registration in which recordation of personal status events, such as marriage, birth, adoption, and death, links individuals together in social units by reference to a common "ancestral homesite" (*honseki*).[3] The requirement of family registration under the authority of the central, rather than local, Japanese government bypassed and weakened village governance by producing a chain of accountability in which the head of the household (usually the senior male link in the *ie*) had apparent control within the *ie* and was, in turn, accountable to the government for the acts of *ie* members.[4]

Although this structure proved convenient for the government in many ways, such as centralization of authority, collection of taxes, and disbursement of public goods, historical and anthropological data do not support the idea that the *ie* as conceptual-

3. When family registration was initiated in 1872, householeads (as defined by the new family registration system) registered the residence of the family as its *honseki*. There is no requirement that legal registration of *honseki* match domicile or remain the same throughout an individual's life. The very fact that individuals can change their *honseki* but choose to leave it as the male-linked ancestral homesite suggests the ideological strength of the *ie* as a patrilineal-based family structure. I have written extensively about the *honseki* and the family registration system in T. Bryant, *For the Sake of the Country, For the Sake of the Family: The Oppressive Impact of Family Registration on Woman and Minorities in Japan*, 39 UCLA L. REV. 109 (1991).

4. Legal historian E. Yamanaka wrote that family registration served primarily as a means of crime control, legal accountability of individuals through their family/house head, and reduction of local village autonomy. YAMANAKA, *supra* note 1, at 41-44. Family registration was not the only mechanism for accomplishing the goal of centralizing authority. Such governmental acts as school redistricting to cut across village boundaries served the same purpose. *See* M. Chiba, *Relations Between the School District System and the Feudalistic Village Community in Nineteenth-Century Japan*, 2 LAW & SOC'Y REV. 229 (1968). This view is supported also by the research of legal social historian Nobuyoshi Toshitani, who wrote that:

> [I]t was the family registration system that continuously reinforced the ideas of "household" or the nation-as-one-family, assuring their popular propagation, and thereby stabilizing the political system. . . . In this way, the closely linked 'household' system and the family registration system formed part of the governing machinery of the emperor system. This partially explains why prewar Japan managed to acquire enormous military power and attain capital accumulation at a fast tempo, while forcing the population to live in extreme privation.

N. Toshitani, *supra* note 2, at 99-100.

ized in the family registration system has ever been the exclusive or even predominant model of family structure, function, or ideology in Japanese society.[5] Western social scientists of the 1960s trying to understand and to describe Japanese society frequently portrayed the *ie* system as a rule of kinship-based familial organization,[6] but exceptions virtually overwhelmed the supposed rule of patrilineal tracing of descent, patrilocal residence, patriarchal control, and inheritance based on primogeniture.[7] Governmental as well as Western scholars' reduction of family models to one type may well have been the result of several factors: empirically driven research which focussed on compartmentalization and categorization,[8] confusion of empirical data about family structure with the ideology of "family,"[9] and utility of the model for governmental and explanatory purposes.[10]

Social scientists writing for English-speaking audiences in the 1980s and 1990s have adopted a more fluid concept of the *ie*, avoiding characterization of the *ie* as primarily patrilineal,[11] but

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5. *See* sources cited *supra* note 2.

6. For a general description of the research and problems associated with it, see Kathleen Uno, Questioning Patrilineality in Post-Nineteenth Century Japan, (1993) (unpublished manuscript, on file with author). For specific accounts of the *ie* as primarily family based, see, for example, RONALD DORE, CITY LIFE IN JAPAN 154 (1958); Edward Norbeck, TAKASHIMA, A FISHING COMMUNITY 4 (1965), T.C. SMITH, THE AGRARIAN ORIGINS OF MODERN JAPAN (1959); Harumi Befu, *Corporate Emphasis and Patterns of Descent in the Japanese Family*, *in* JAPANESE CULTURE: ITS DEVELOPMENT AND CHARACTERISTICS 34 (R.J. Smith & R.K. Beardsley eds., 1962).

7. The extent to which exceptions overwhelmed the rule or that the rules were always ambiguous is explored by Uno, *supra* note 6, and James Ito-Adler, Confessions of a Systems Fetishist: Reflections on the '4-P' Model of Japanese Kinship, (1993) (unpublished manuscript, on file with author). For specific examples of exceptions, see Befu, *supra* note 6, at 37-40 and DORE, *supra* note 6, at 100-101. *See also*, William Hauser, *Why So Few?: Women Household Heads in Osaka Chonin Families*, 11(4) J. FAM. HIST. 343 (1986).

8. Not all empirical research has this focus; some, for example, is designed to assist in development of theory. When Western researchers began to study family structure in Japan, however, their research took the approach of cataloging, which, in turn, exacerbated pre-existing confusion about the importance of how family or particular family types are exemplified in literature or anecdotal accounts of life in Japan. Mariko Tamanoi, *Symposium on Japanese Ie and its "Patrilineality" Reconsidered*, (unpublished manuscript, on file with the author).

9. Early research on Japanese family structure failed to meaningfully distinguish what people described as ideal from what they thought they did and from what they actually did in terms of family association. Part of the problem is that all three levels operate at once and in conjunction, which makes analysis difficult. However, it is also fair to say that early describers of the *ie* structure and its exceptions failed to try to isolate the different levels and their effects on classification.

10. Each of these problems is described by Tamanoi, *supra* note 8.

11. *See, e.g.*, HENDRY, *supra* note 2, at 14-26; DORINNE KONDO, CRAFTING SELVES: WORK, IDENTITY, AND THE POLITICS OF MEANING IN A JAPANESE FACTORY 122 (1990); Jane Bachnik, *Recruitment Strategies for Household Succession: Rethinking Japanese Household Organization*, 18 MAN 160, 177 (1983).

the notion of the *ie* as a social grouping based on patrilineal, patriarchal principles has continued nonetheless in Japanese and Western intellectual models of the Japanese *ie*.[12] The *ie* ideological model is visible in business and government bureaucracies, educational institutions, employment arrangements, and the arts. The overlay of a "family" model on other institutions and structures in Japanese society strengthened the model itself while lending consistency to the multiple associations within which individuals function. Indeed, this model ostensibly promotes stability, hierarchical ordering of relationships and a hierarchical structure within relationships. Social scientist Yasusuke Murakami argues that:

> what is unusual about Japan is not the mere diffuseness of the acknowledgement of interdependence and the emphasis on affiliation. Japan is unique in that people acknowledge or emphasize a certain specific pattern of interdependence and group affiliation that is adaptable, without much difficulty, to modern organizations, such as business firms, beyond the boundary of family or of kinship relations. This pattern is what I have called the *ie* principle.[13]

Clearly, any model which is only partially representative but adopted as real, can result in serious consequences for understanding the structure of psychologically and functionally significant groups in Japanese society. Adoption of such a model also impedes an understanding of the flexibility with which role and gender identification overlap in family and other social groupings. An even worse effect of intellectual and systemic commitment to a particular model is hindrance of social development and acceptance of a variety of viable types of family and social groupings.

Why, then, would government-sponsored, legally required mediation result in continuity of a pattern that may well be at odds with historical and current organizational patterns of the family? Convenience explains the fact that the family model most commonly favored through family court mediation is that suggested by the family registration system: patrilineal tracing of descent, predominance of male decisionmaking, and older-generation involvement in management of the affairs of the family and

12. The most likely reason for continuity of the kinship unit as a basis for definitions of the *ie*, which may include non-kinship-related members and be succeeded to by a non-relative, is that the pattern exists by example in the family registry and is easy to compare to Western principles of family organization. Perhaps the most widely read portrayal of the *ie* as kinship-based unit is continued in EDWIN O. REISCHAUER, THE JAPANESE 129-31 (1981). Reischauer is an American Historian and former U.S. Ambassador to Japan.

13. Yasusuke Murakami, *Ie Society as a Pattern of Civilization: Response to Criticism*, 11(2) J. JAPANESE STUD. 401, 413 (1985).

the resolution of disputes among younger generation members of the family? I conclude that convenience is, indeed, a factor, but that it is certainly not the only explanatory element.

A major source of data for this article is anthropological research I conducted in the Japanese family court during two periods: 1981-84 and the calendar year of 1992.[14] The literature on Japanese family court mediation suggests that dispute resolution is up to the disputants themselves, with some help from the mediators.[15] However, for those disputants intent on resolving their problems, mediators play an extremely important role in shaping solutions.[16] Mediators do not necessarily drive dispute resolution through overt, explicit requirements that a particular result obtain. Rather, the more typical impact is subtle, indirect, and premised on the model of the family as it appears in the family registry.

II. THE FAMILY COURT SYSTEM OF MEDIATION[17]

Family counseling, individual counseling, and private legal mediation services are practically nonexistent in Japan. While individuals may seek informal advice from friends, family, and work associates, they have recourse to only a few counseling services run by mental health professionals. Indeed, the few that exist are thought to be exclusively for the significantly disturbed.[18]

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14. During both periods of research, the Supreme Court authorized my presence for the entire length of the mediation cases I entered. Clients were always told the reason for my presence and given the option to refuse my attendance. I was very rarely asked to leave, which is not to say that I was welcome. Rather, it is to say that I was not apparently systematically excluded from any particular type of dispute such that my research data was skewed through that effect.

15. See, for example, the book with which all mediators (both civil and family) are expected to have familiarity. NIHON CHOTEI KYOKAI RENGOKAI [JAPANESE ASSOCIATION OF MEDIATORS], CHOTEIIIN HIKKEI [MEDIATOR'S HANDBOOK] 39-42 (1982).

16. Mediators rarely influence parties who do not wish to reach agreement through mediation. For example, such disputants may be in court against their will as respondents, or they may be accustomed to the conflict that exists.

17. Throughout this paper I have used the English terms "mediation" and "mediator" for the Japanese terms *chotei* and *choteiiin*, respectively. I have chosen those terms because, legally at least, the mediators cannot decide a dispute in the absence of client agreement. However, the reader should take note that use of the term "mediation" does not reflect congruence between any one model of mediation in the United States and *chotei* in Japan.

18. This assertion is based on interview data volunteered by mediators and academics working on family sociology and family law. In 1992, I was told of new government-sponsored counseling services available in the Tokyo metropolitan area. However, unavailability of services (both private and public) and an attitude that counseling is appropriate only for severe cases of distress or dysfunction are still important factors.

Private legal mediation services are limited due to the legal element of family disputes, which can be handled only by those authorized by the Japanese government to practice law.[19] Yet lawyers in Japan rarely specialize in family law matters, and few mediation services run by lawyers are available.

This configuration of restraints on those seeking help in resolving family disputes results in tremendous pressure on the one existent source of government-sponsored assistance: the family court system. It is significant that this assistance is located within the judicial system rather than within some other entity such as the social welfare system, for example. To the extent that they are using legal process as opposed to other governmental services, clients of the family court system think that they are litigating even when using mediation procedures. The Supreme Court of Japan administers family courts, and to all appearances, including a heavy reliance on mediation, the family courts look like other courts in Japan. Clients of the family court system often expect proceedings in which court officials will be empowered to order a solution; they enter the family court in a litigation posture.

One important difference between the family courts and other courts in the judicial system is that the jurisdictional range of the family court is quite broad. The family court handles any and all disputes between relatives, regardless of the existence of a legal basis for the dispute. For example, the family court will handle the case of a daughter who thinks that her mother calls her too frequently or that of brothers who do not agree about the division of proceeds from a sale of their jointly owned house. A legal problem may emerge later, as when the daughter rips the phone out of her mother's house, or a legal rule may be available to resolve the problem, as in the case of the brothers' dispute over division of sale proceeds. However, the family court will accept petitions from individuals who are not yet in a legal posture and whose problems have not yet taken on a strictly legal

19. In 1983 two private divorce mediation services were sued by two of the three Tokyo bar associations on grounds of illegal practice of law. According to the Family Affairs Division of the Supreme Court, which administers the family courts, closure of the services was necessary because of the possibility of strong-arm tactics used against a spouse reluctant to divorce. They contended that, since divorce by mutual consent requires no judicial supervision or review, only a governmental entity should handle cases of contested divorce. Interview with judges and court investigative officers, Supreme Court, Family Affairs Division, in Osaka, Japan (May 20, 1984). This contention has always seemed strange to me because forcing consent through mutual consent divorce is certainly not prevented through the prohibition of mediation services. However, the fact does remain that private mediation services are not generally available.

form.[20] Moreover, disputes need not be resolved according to any legal formula, although, of course, the court cannot approve any agreement that would violate existing Japanese law. Finally, the family court can exercise jurisdiction for purposes of mediation if the dispute involves people who could be or claim to be related by blood or marriage even if the individuals are not already determined to be relatives.[21] Examples of these disputes include paternity actions, alleged fraudulent marriage,[22] and petitions to dissolve a male/female relationship.

The family court system seems quite flexible in that any individual may file a petition about any problem as long as the disputants are relatives or could be relatives by birth, marriage, or adoption. However, the template for determining such relatedness is the family registry, through which the disputants are linked or could be linked, which must be filed with the petition.

The family court apparently excludes those whose relationships do not fit this template of an existing or potential familial relationship. Consider, for instance, a dispute between two older women who live together following their husbands' deaths. These women may share the intimacy of a family-like relationship, and their dispute may be one very much like that between relatives, but the family court is unlikely to handle this dispute.[23] The problem may be "family-like," but the relationship is not legally familial, according to legal definitions and requirements under the Civil Code or the Family Registration Law.

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20. The family court jurisdiction is intentionally broad as defined under Article 9 of the Law for the Determination of Family Affairs. It includes a category known as *otsu rui igai* or *ippan chotei* which covers non-legal disputes between relatives or legal disputes regarding whether a family relationship exists or should exist between the two parties. In both types of cases, mediation is available, but, if mediation is unsuccessful, there is no opportunity to litigate the dispute in the family court. If the dispute concerns whether a legally recognized family relationship exists (e.g., paternity disputes, fraudulent divorce disputes), the petitioning party has the option of filing a petition for litigation in the district court if mediation in the family court is unsuccessful. If the dispute is essentially non-legal but between relatives (e.g., two relatives won't speak to each other), mediation is available, but, if unsuccessful, litigation is not an option. These types of disputes and their relationship to other disputes handled by the Japanese family court are described in my dissertation. Taimie L. Bryant, Mediation of Divorce Disputes in the Japanese Family Court System 195-200 (1984) (unpublished Ph.D. dissertation, University of California (Los Angeles)).

21. *Id.*

22. Neither marriage registration nor divorce have to occur in person. One person can submit the documentation with a seal bearing the other's name resulting in a certain number of fraudulent registrations every year.

23. Family law and constitutional law scholars I interviewed for this research told me that they believe that the family court *could* handle these disputes but that they were unlikely to do so. I have found no legal provision for filing such disputes, nor have I ever observed or heard of such a case. Interview with Japanese constitutional law scholars, including M. Kamiya and Y. Matsuura, and representatives of the Family courts in Osaka and Kobe, in Osaka, Japan (June 4, 1994).

Another example of a dispute unlikely to be handled through family court mediation is that between same-sex partners: individuals who are not allowed to marry or to register a partnership under Japanese law. Because there is no "family" in accordance with government-approved family models that underlie the family registration system, there is no basis for bringing the dispute to the family court system.[24] Mediators interviewed for this research said that there is no apparent legal barrier to petitioning for mediation of disputes arising in the context of same-sex partnerships, regardless of family registration. Each disputant could meet the requirement of submission of a family registry. Nevertheless, these mediators had never heard of such a case and they surmised that such a case would be unlikely because of the reluctance of the petitioner to acknowledge to the mediators the homosexual nature of the partnership.

III. THE PRINCIPLE OF REQUIRED MEDIATION

For certain types of disputes, family court mediation is required before either party can file suit in the district court.[25] In such cases, the parties are captive to family court procedures.

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24. Same-sex partners sometimes register as adoptive parent and child so that a familial relationship will exist. While Japanese law does not recognize homosexuality as a legitimate basis for adoption, registration is accepted without proof or questioning, and the prevalence of adult adoption in Japan results in little suspicion of its use for this purpose. *See* Bryant, *Sons & Lovers: Adoption in Japan*, 38(2) AM. J. COMP. L. 299 (1990).

While the family court is unlikely to handle these types of disputes whether or not the partners have formalized their relationship through adoption, it is important to note that judges and mediators I interviewed stated that they believe that the family court should and would handle cases involving same-sex partners. However, no mediator or judge, could recall an instance of such a case. Nor could anyone report an example of a court-mediated dispute between two cohabiting friends. It could be that there have been, in fact, a few unreported cases, that petitions have been rejected by court clerks who take in and assign petitions, or that potential disputants themselves do not believe that they or their dispute would fit within the guidelines of a "family" court. Interview with scholars and representatives of Family Courts, *supra* note 23.

25. These are so-called Ordinary Mediation (*ippan chotei*) cases in which the dispute concerns whether a family relationship exists or should exist between the disputants. Examples include paternity, divorce, and dissolution of adoption disputes. It is important to note, however, that the family court does exercise jurisdiction in the adjudication of some types of family disputes. Class A (*ko rui*) cases are those in which mediation is unnecessary or impossible, such as change of a child's surname or renunciation of inheritance rights. Accordingly, they involve determination proceedings only. Class B (*otsu rui*) cases are those in which the kinship relationship is not at question; the dispute centers on allegations of non-performance of obligations attached to the relationship. If these disputes cannot be resolved through mediation, they must go through family court adjudication procedures; they cannot leave the family court without a resolution. Provision of financial support, change of custody following divorce, and post-divorce division of property are typical examples. *See* Bryant, *supra* note 20, at 194-200.

Clients have no choice of mediator or judge,[26] and they cannot use private legal mediation services to satisfy the "prior attempted mediation" requirement. The general lack of family counseling services also funnels a large number of cases into the family court. As a result the family court has a considerable impact on a wide variety of disputes and disputants. Through that impact, notions about appropriate definitions of "family" and appropriate resolutions of family disputes are shaped.

In a system such as this, one which handles a tremendous volume of disputes to the exclusion of other options, the qualifications, training, and perspectives of the mediators cannot help but influence the role of family court mediation in shaping concepts of the family. The mediation committee is formally composed of a male mediator, a female mediator, and a judge. The mediators are volunteers who need not have training in law, social welfare, or psychology.[27] Qualifications for the job require passing the age of forty and providing evidence of "good judgement" and "sound morals." Mediators are appointed by the Supreme Court primarily on the basis of letters of reference and an interview.

Particularly in urban courts, judges do not normally attend each mediation session. More often, the judge comes to the concluding session only. This results in mediator-managed mediation by mediators who do not always recognize important psychological or legal issues in the dispute. A lack of training in these areas also reduces the number of perceived psychological, legal, or social welfare avenues available for resolving disputes even if all psychological or legal issues are identified. Untrained individuals rely heavily on their own experience or notions of appropriate resolutions to family problems and they are encouraged to do so within a system in which they were selected according to indicia of good morals and common sense. Moreover, mediators rarely ask clients to participate assertively in the search for mutually satisfying solutions and they rarely encourage clients to look outside the family court mediation for assistance in resolving their disputes.

Mediators differ substantially from the clients of the family court. Mediators may be ordinary citizens in the sense that they have no specific expertise, but there is no pretense that they are ordinary in the sense that American jurors are imagined to be ordinary members of society. Japanese mediators are rarely the peers of the clients. They are selected by the Supreme Court pri-

26. CIVIL MEDIATION LAW, art. 7 (Japan).

27. Qualifications for becoming a mediator are set out in the [REGULATIONS FOR CIVIL AND FAMILY MEDIATORS], [hereinafter REGULATIONS] arts. 1, 2 (Japan).

marily on the basis of recommendations from people the Supreme Court respects. Thus, the pool of individuals eligible to become a mediator is drawn from a narrow socio-economic band of the population. Due to minimum and maximum age limitations on mediators, it happens that mediators are generally considerably older than the average age of the clients.[28] They are also, on average, more highly educated than clients and financially more privileged than the majority of clients.[29] The difference in social standing and background is clear to both clients and mediators through such manifestations as language use, style of dress, and level of self-confidence.

Many mediators appear to take a sympathetic view of the clients and their quandary. However, even if that sympathy is genuine, sympathy, unlike empathy, is a highly conservative force.[30] Clients recognize that it behooves them to evoke a sympathetic response, but in order to do that, clients must present their positions and the background of the dispute in terms that would meet with approval by wealthy members of a generation or two older than they. Mediators do not probe below the surface of disputes, primarily for fear that an agreement will not be reached as quickly as the mediators perceive the judge wants the dispute resolved. Moreover, because they are not systematically trained to do otherwise, mediators tend to propose and to accept agreement proposals on the basis of what they think is fair considering their own experience and their own background, untempered by the possibilities suggested by training in areas and problems with which they have no direct experience. A limited number of solutions and acceptable family structures is reinforced and replicated through this process.

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28. The age requirement of 40 proscribed by law in REGULATIONS, *supra* note 27, art. 1. Unless there is some obvious problem with their continuing in service to the family court, mediators are automatically reappointed every two years until they reach the retirement age of 70. REGULATIONS, *supra* note 27, arts. 1, 3.

29. The reason for this gap is not only that mediators are drawn from that sector of the population able to receive qualifying letters of recommendation from individuals trusted by the Supreme Court. This gap is also caused by the fact that more highly educated clients and clients with relatively greater financial resources will often resolve disputes without the use of the court system because they want to avoid any stigmatizing effect of using the courts or because they have the financial resources to reach some kind of settlement. Of course, there are wealthy, highly educated disputants in the family court. For example, child custody disputes and inheritance disputes are relatively frequently brought to the family court regardless of the resources of the parties. MINPO TOKEI NENPO (Annual Report of Judicial Statistics) 271 (1992).

30. *See* Comment, *Sympathy as a Legal Structure*, 105(8) HARV. L. REV. 1961, 1961-80 (1992).

IV. LUCK AS A VARIABLE IN SHAPING RESOLUTION AND EXPANDING THE DEFINITION OF "FAMILY"

If the mediators happen to be very sensitive, they may ask helpful questions and be of genuine assistance to the clients in reaching a resolution suitable and comfortable for the disputants. That is, some mediators can put aside their private view of the case or "proper family structure" in mediating a case.

In one case I observed, the mediators helped the clients reach a decision to divorce under circumstances that appeared to violate the primary notion of divorce as necessarily involving dissolution of the co-residential unit of the family. In that case, the husband sought a divorce because his wife was able to secure loans from loan sharks on the basis of her marital status, and she would then lose the money through compulsive gambling. The husband wanted a divorce so that he would no longer be vulnerable to the claims of creditors, so that their daughter would not be harassed at school by his wife's creditors, and so that loan sharks would less readily lend money to his wife.

The wife did not want a divorce because she was unable to support herself until she had an operation, which was, in turn, dependent upon her losing weight. The husband was unwilling to wait for the indefinite length of time it might take his wife to lose the necessary weight, but he agreed that she really could not support herself until she could work.

Ultimately, the mediators and the disputants hammered out an agreement that involved the family's continuing to live in their current residential arrangements following the divorce until the wife could support herself. The couple occupied two units in an old apartment building. One unit had a bath and the other, a kitchen. The entire family would eat in the unit with the kitchen, but only the wife and daughter slept there. Everyone bathed in the unit with the bath, but only the husband slept in that unit. If the family continued these arrangements, the husband would be able to afford to pay off all of his wife's high interest debts with a low interest loan from his company. Although the husband knew that his wife fraudulently used his name to acquire loans for personal purposes and not for family purposes, he chose to pay off the creditors and to continue to support her until she could support herself.[31]

The judge in this case was reluctant to accept the agreement because it violated her assumption that there should be no con-

31. Considering the lenders with whom he was dealing, his decision was probably based more on life-preserving than on magnanimous motives.

tact between divorced people.[32] However, eventually the mediators, in the absence of the clients, persuaded the judge by arguing that the arrangement would be temporary, only for the period prior to the wife's surgery. Despite this, the judge could not resist stating her disapproval of this arrangement even as she drew up the written agreement in the presence of the clients.

If all clients were equally lucky in having mediators who worked with them towards a solution that was manageable rather than correct in terms of what families are supposed to do, and if those mediators were willing to work to persuade the judge, then a variety of outcomes could result from mediation. Although mediation agreements are not published, gradually this variety of resolutions would become known through word of mouth among mediators and among former clients of the family court. Those reported resolutions would represent possible solutions when other disputants confronted the same problems. However, for reasons to be discussed in the next section, under the current system of mediation, most clients will not receive this kind of attention and commitment to the resolution process. If mediators themselves believe that a particular arrangement is strange because it does not conform to their images of families, or if they are unwilling to wrestle with a judge who harbors such a view, then the influence of the family court will be largely conservative rather than expansive in elaborating acceptable family patterns in Japan.

The clients may be lucky in another way: they may be assigned to mediators who recognize their own limits in assessing issues of psychology or law and who know when to ask for the assistance of a court investigator. Court investigators are rigorously trained in a number of fields such as social welfare, psychology, and law.[33] They may hold views based on their own

32. Perhaps the judge believed that people who would choose to live together did not really want a divorce but were trying instead to defraud creditors. However, this judge was not persuaded to accept the couple's agreement on the basis of the mediators' explanation that the husband would pay off all existent debts. She was persuaded primarily because the agreement seemed limited in time and unavoidable given the wife's physical condition and the economic state of the family.

The idea that divorce means the total dissolution of any relationship is firmly embedded in the Japanese legal and social mindset. That and poor enforceability of court orders underlie agreements for payments of child support and post-divorce maintenance in lump sums and child custody agreements that do not provide for continuing contact between the child and the non-custodial parent. I have addressed both of these issues in Bryant, *Marital Dissolution in Japan: Legal Obstacles and Their Impact*, 17 LAW IN JAPAN 73 (1984).

33. Family court investigators (*chosakan*) serve the family court in three capacities: (1) as an investigator seeking compliance with the summons to appear in court or with court orders; (2) as an advisor to mediators with respect to resolution alternatives, psychological perspectives, and financial information about on-going dis-

experience or suppositions about the world, but, perhaps due to their youth and training, many court investigators approach mediation with a more client-centered approach. When they were assigned to cases, I often observed court investigators helping clients reach new understandings of family life so that dispute resolution could progress in ways that benefitted the disputants rather than necessarily reifying an existing model of the family.

In one case I observed, the husband and his mother were estranged from the wife because she had failed to visit her father-in-law who was hospitalized with terminal cancer. The reason for the wife's lapse had to do with her responsibilities for looking after two children with severe medical problems, her belief that her mother-in-law and husband were providing sufficient emotional support for her father-in-law, and exhaustion due to her husband's lack of assistance with the children during his father's illness.

At first the wife could not believe that her husband wanted a divorce for such a reason; she suspected involvement with another woman. However, after a court investigator trained in psychology and client interviewing spent a number of hours with the mother-in-law, the husband, and the wife, the wife came to understand that her failure to visit her father-in-law had, indeed, become a major sore spot to her husband's mother and that her mother-in-law had convinced her son that his wife was not a good wife. The court investigator helped the son realize that his mother's view of his wife might not reflect all of his wife's qualities or the value of his marriage. Given the strength of the mother-in-law's personality, it is to the couple's credit that they could agree to put their divorce dispute on hold until the husband's father's health situation was resolved.

According to the mediators assigned to this case, this was an outstanding example of successful intervention by a court investigator. Had the court investigator not been involved, the husband might well have followed his mother's lead and insisted upon divorce or long-term separation. The wife might well have be-

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putes to which the investigator has been assigned; and (3) as a counselor to clients whose lack of cooperation in mediation appears to stem from psychological dislocation or misunderstanding of the process. They are not given the authorization or time necessary for counseling clients about underlying problems which may be causing or contributing heavily to the dispute. Court investigators must pass rigorous civil service exams in one of the primary areas of expertise required: psychology, social welfare, or law. They must also undergo two years of training provided by the Supreme Court's Family Affairs Division. During that training period, experts in all of the subjects important to family court mediation resolution are brought to the training institute in Tokyo where all court investigators receive their training. For more information about court investigators' role and their training, see Bryant, *supra* note 20, at 243-50.

lieved that her husband had left her for another woman or that her mother-in-law was more important to her husband than she was. Both of those outcomes would leave in place a fairly standard view that mothers-in-law are a primary source of marital discord. However, at the time of mediation, this couple chose not to follow that model's conclusion all the way to divorce. Possibly they were able to benefit from mediation in considering alternatives to a marriage broken along traditional lines of adherence to parental preferences. Surely if mediation did serve that liberating role it was largely due to the willingness of mediators to work with a court investigator and the willingness of the court investigator to spend considerable time with all of the parties, including the mother-in-law.[34]

The role of court investigators has not received much attention partly because there are so few of them that their involvement in family court mediation is necessarily extremely limited.[35] Mediators or the judge may decline to use court investigator services in a particular case because of their assessment of the probability of an ultimately positive impact on mediation. Moreover, court investigator involvement does not necessarily mean that a case will proceed or conclude differently because the investigator's work takes place largely outside the context of actual mediation.

In a 1992 case I observed, the petitioner was a woman who filed for divorce from a husband she had not seen for seven years. According to her own and her husband's statements, this woman had a pattern of marriage, childbirth, abandonment of the family, and subsequent return to secure a divorce. Her first husband had agreed to a divorce, and he retained custody of their two children. Her second husband also agreed to a divorce

34. Mediators sometimes resent the judge's assignment of a court investigator to the dispute they are handling. They believe that they can handle all aspects of the dispute. However, the mediators in this particular dispute seemed quite willing to rely on this court investigator's involvement. They were also willing to leave the matter unresolved if that appeared best for the clients.

The court investigator put forth considerable effort in this case. Since the mother-in-law refused to appear in court, the court investigator made repeated trips to the mother-in-law's home to discuss the dispute and her views. The court investigator also conducted several sessions with the husband and the wife separately. Probably all of those sessions amounted to more time than was consumed in mediation itself.

35. Fewer than 3000 court investigators have graduated from the Supreme Court's training institute since its establishment in 1957. This is the only training institute in Japan. Accordingly, all court investigators receive the same training and will be posted on a rotational basis to various family courts throughout Japan. Since there are more than 400,000 cases handled each year by the Japanese family courts, it is obvious that only a minority of those cases will receive special assignment of a court investigator.

and retained custody of their child. Her third husband, the respondent in this case, declined to agree to divorce unless his wife would pay compensation of two million yen.[36]

According to both the husband's and the wife's versions of their marital history, the wife had disappeared about one year after their son's birth. The husband was frantic. He had even appeared on a television show to find his "missing" wife. At first his relatives were willing and able to take care of the couple's son while the father worked nights. But, as the years passed, it became more and more difficult to justify the imposition, especially since the health of the caretaking relatives was fragile. At the time of mediation the child was living in an institution affiliated with a hospital from which he commuted to school. His father visited him on weekends. Clearly, the husband agonized about the consequences for his son from the disappearance of his son's mother. Never once had she attempted to contact the child or her husband during her seven year absence.

The wife had assumed an identity other than that recorded on her family registry. Given her inability to produce a family registry and her low educational level, her job opportunities were extremely limited. She was working at a golf course as part of a crew maintaining the greens. Her income was much too low to allow her to pay anything close to the sum her husband demanded. The mediators, who were appalled by the wife's behavior, supported the husband's position and told the wife that she would be unable to divorce unless she paid compensation. While it was true that, at that point in Japanese law, the wife's ability to divorce her husband under these circumstances was dependent on his consent, the mediators were not helpful in suggesting ways that the wife could eventually secure her husband's consent.[37] They believed that preventing her divorce and remarriage was an effective means of preventing her from bearing more children.

Actually, at that time the Ministry of Justice was considering a proposal to allow unilateral divorce on the basis of irretrievable breakdown as demonstrated by 5 years' separation, and there were already Supreme Court decisions that supported the idea of divorce in the context of long-term separation relative to the

36. As of publication date, two million Yen has an exchange value of approximately US$19,400.

37. For example, the wife could have been advised to pay a certain percentage of her current income as child support, even if the amount would be quite small, so that she could express remorse or good faith or simply appear more credible and responsible in requesting a divorce later. She could have been advised that divorce on the grounds of irretrievable breakdown might be possible within a few years, based on Supreme Court decisions and Ministry of Justice revisions of the divorce code provisions. She might have used that information as leverage to secure a divorce now with a lesser payment.

length of the marriage.[38] However, these ideas did not emerge during any of the mediation sessions.

During these sessions I wondered why a court investigator was not assigned to work with this woman on the issue of her repetitive childbearing and abandonment. But what would an investigator have done with this problem? An investigator might have counseled the woman about the pain she caused others. Yet that is not the primary role of court investigators. They are too limited a resource to engage in long-term or intensive counseling. The court investigator might have helped the mediators to view the problem as the combined effect of the lack of fit between this woman and the options her society afforded her, but where would that have led in the dispute resolution process? The fact is that there are very limited options for parents who cannot raise their children. Although court investigators and mediators can have positive effects in liberating thinking about families, logically they can push only so far beyond the world that contains the options for the families who come to them in the family court.

V. CLIENT PARTICIPATION IN MEDIATION AND THE RESOLUTION OF AGREEMENTS THAT SHAPE ACTUAL FAMILY PATTERNS

The family court system, the primary means of resolving family disputes in Japan, allows easy access because clients are charged only a small fee to initiate months, sometimes years, of mediation.[39] However, the system is not designed to allow client-directed participation in the mediation itself. Clients walk into such a tightly structured setting that they are not allowed to choose even the chair in which they will sit. Under most circumstances they must comply with a routine of only one disputant meeting with the mediators at a time.

Clients cannot receive counseling or other services simply by asking for them, even if they think to ask. Clients are not asked for their opinions of the procedure, of their mediators, or of their satisfaction with the outcome of mediation. There is no systematic follow-up research to find out whether the agreement actu-

38. *See, e.g.*, Judgment of Sept. 2, 1987, Saikosai [Supreme Court], 41 Minshu 1423 (Japan); Judgment of Nov. 24, 1987, Saikosai [Supreme Court], 1256 *Hanji* 28 (Japan); Judgment of Dec. 8, 1988, Saikosai [Supreme Court], 41 Kasai geppo 145 (Japan). For an analysis and discussion of these and other relevant Supreme Court opinions in this area, see Bryant, *"Responsible" Husbands, "Recalcitrant" Wives, Retributive Judges: Judicial Management of Contested Divorce in Japan*, 18(2) J. OF JAPANESE STUD. 407 (1992).

39. During both periods of research, the amount required to file a petition in the Japanese family court was 900 yen (less than US$12).

ally resolved the dispute or was implemented.[40] Nor do many clients or mediators volunteer their observations or suggestions for improving family court provision of services to clients.

Usually each client is preoccupied with enlisting the sympathies of the mediators with the hope of securing some mediator-proposed plan favorable to him or her. Only occasionally do clients approach mediation with their own solutions, requirements, and plans. In many of those cases the clients are represented by attorneys, who may enhance legal insight but rarely additional flexibility.

Interviews with judges, mediators, clients, and attorneys suggest several reasons for muted participation. Clients are sometimes intimidated by the mediators or by their image of the mediators. Clients are often weary of struggling with their problems on their own. The setting suggests to many clients that someone else, a judge or the mediators, is in the position to make a decision about their dispute. Finally, the disputants themselves may well be as unable to perceive of workable solutions as are the mediators.

A typical example of this is child custody/visitation agreements. Although increasing in number, these agreements are still few relative to the number of times noncustodial parents request visitation. The negotiations are arduous because the practice of noncustodial visitation is still infrequent in Japan, mediators have to be particularly motivated to help the clients overcome impediments to a visitation arrangement, and clients have to be willing to reach some kind of agreement in order to make the plan succeed. If clients were prepared for participatory mediation,[41] if all involved were educated as to workable solu-

40. Given the number of surveys conducted in Japan on all subjects, it is surprising to find that so little information is compiled on client responses to mediation or on compliance with agreements reached. Supreme Court and lower court officials claim that judges, mediators, and court investigators become aware of problems and convey those problems with the process to the appropriate place, the Supreme Court or administration of the particular court involved, such that extensive surveys are not necessary. Moreover, they contend that such surveys are not reliable because clients cannot distinguish systemic or procedural problems from the variables idiosyncratic to their dispute.

41. Clients are not given information about the process of mediation until their first session. Mediators spend approximately five minutes explaining that mediation is conducted individually with each disputant, that mediation involves monthly meetings, that mediators will not divulge the content of mediation to anyone outside of the mediation process, and that mediators maintain a neutral stance despite potentially differing amounts of time spent with each disputant. This information is provided orally. There is no written or video information with which clients can prepare themselves before mediation. Clients frequently fail to realize that the mediators are not arbitrators and that, therefore, they have no authority to resolve the dispute without the parties' agreement. Moreover, clients rarely, if ever, decide to avail themselves of family court mediation. Rather, one comes before the court

tions,[42] and if mediators were client-focussed rather than resolution-focussed, mediation might play a dynamic role in expanding the number of solutions to common social problems.

VI. MEDIATOR PERSPECTIVES

There are two serious impediments to mediators acting as change agents in social conceptions of the family. One has to do with the sector of society from which mediators are drawn. Given the age difference alone, there is likely to be a lag in the adoption of current ways of thinking about the family. Moreover, given their own relative success in society, it would be difficult for them to support outcomes that differ substantially from outcomes they could imagine for themselves; much conservative influence in mediation has to do with a lack of imagination borne of growing up and coping successfully with an existent structure.

An example of unconscious replication of available social patterns lies in the area of visitation and custody agreements. In addition to the general question of whether post-divorce visitation should exist in any post-divorce family, there is the specific problem in so-called "international" marriages as to retention of the child's bicultural or multicultural identity. When I first conducted research in the Japanese family court from 1981 to 1984, every agreement I observed that involved a divorce between a Japanese and non-Japanese carried with it elaborate provisions to protect the child(ren)'s Japanese identity at the expense of their non-Japanese identity. Usually the Japanese parent would retain custody, but, if the non-Japanese parent was the mother and the child was young, there were times when the non-Japanese parent retained custody with the condition that the child grow up with an exclusively Japanese identity.[43]

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voluntarily as a petitioner while the other appears reluctantly if at all. However, means of securing greater and more knowledgeable participation could be developed quite easily within the family court system as it is now structured.

42. While some clients have learned about the substantive law relevant to their dispute, most expect to be educated during the process of mediation. This may be an understandable expectation, but it is not realistic given the lack of training mediators receive, the lack of judicial involvement in on-going mediation, and the complexity of many of the issues involved in any given dispute. There is a wide variety of literature that would assist clients in considering alternative solutions to their problems, and lawyers are available at competitive rates. However, clients are actively discouraged from reading about the law or from retaining lawyers. They are advised that their disputes can and should be resolved from the perspective of "common sense" rather than legal rules. While one does not necessarily exclude the other, clients frequently perceive common sense and legal rules to be only overlapping, if not mutually exclusive, as bases for dispute resolution.

43. For example, the non-Japanese parent would agree that, in the event of his/her remarriage, he/she would not agree to an adoption of the child by a non-Japanese spouse. Another example is the provision that, in the event of remarriage to a

During the second period of research, the calendar year of 1992, I observed many more cases in which the non-Japanese mother retained custody, but those cases were still decided on the basis of which parent had greater mastery of the Japanese language and in which family the child would most likely retain an exclusively Japanese identity. Notions of "blended families" or "bicultural identity" did not factor into discussions of the post-divorce family conditions for the child(ren). No one—not disputants, mediators, court investigators, or judges—raised the possibility, perhaps because it is so beyond the existent cultural expectations surrounding divorce in Japanese society.

The second major impediment to having mediators function as change agents in social conceptions of the family is the mediators' preoccupation with their interactions with the judge assigned to their case. While there are cases like the initial example of the mediators who persuaded the judge to accept a couple's current living arrangements even after divorce, the more typical pattern of mediator behavior is to resolve cases as quickly as possible so that judges will be pleased with the speed of disposition. Mediators are reluctant to bring up issues that could result in delays in the conclusion of the case. There is such tremendous pressure on the family court that mediators do, in fact, receive praise when they conclude cases quickly.

Unfortunately, that does not always mean that the issues have been fully explored and resolved. Sometimes mediators will fail to report the preferences of the client to the judge. Ten years ago, I observed many cases in which parents, who were not going to obtain post-divorce custody of their children, wanted to have visitation rights clearly defined. The mediators consistently told them that this was impossible and selfish. Many mediators did and still do believe that post-divorce contact between non-custodial parents and children is harmful to the children. Others chose and still choose to avoid a potentially lengthy dispute resolution process.

Actually, it has always been legally possible to arrange post-divorce visitation between non-custodial parents and their children, and there were plausible reasons for arranging visitation in some cases.[44] However, even though the issue arose, some

non-Japanese or relocation outside of Japan, there would be another round of mediation to reassess custody.

44. For example, some children are old enough at the time of their parents' divorce to express their own desire for continued contact, some children are particularly attached to a parent who cannot provide the custodial care after divorce, and some children may benefit from at least transitional continuity because they will be receiving care from a non-family member for the first time following their parents' divorce.

mediators rarely reported it to judges because mediators convinced clients to drop the matter before concluding sessions with judges. The judge would not know that visitation had become a significant issue by virtue of the number of reported client proposals.[45] Similarly, no mention of the proposal remained in the record so that subsequent research would not uncover current non-custodial parents' requests for post-divorce contact with their children. Eventually visitation agreements became somewhat more common, but they are still unusual; change has been very slow because the request was characterized as "atypical" and "selfish" for such a long time.

During the 1992 research period, mediators exhibited the same reluctance to press forward the claim of a large number of wives who thought that they should receive a full 50% of the property accumulated during the marriage. Mediators told these wives that 50% awards are not likely in litigation and that they will ultimately have to agree to a lower amount if the divorce is to take place.[46] The wives' view that they are entitled to 50%, and the reasons for that view, are not recorded or reported to the judge perhaps because it is considered so unrealistic. And yet, since mediation precedes litigation, mediators' rejection of disputants' claims because of unlikely success in litigation actually retards litigation of claims with some possibility of success and change in judicial and public attitudes about divorce and post-divorce configurations of family structures.

When wives fail to agree to divorce and say that they will wait for their husbands to die so that they will legally collect at least 50% of the property upon his death, the mediators and the judge often mistake their position for *iji* (irrational obstinance). However, it seems completely rational for a person to wait to inherit 50% if it is impossible to reach the same result upon divorce.[47]

Since the mediators and judge often dismiss as mere *iji* the view of people who seek a resolution different from prevailing views, they do not consider seriously the fairness of the position proposed. Lack of experience with alternative resolutions and bias against certain solutions contribute to the relatively limited

45. Judges participate twice yearly in judicial conferences during which they discuss trends they observe in mediated family court cases. The information and views of the judges filter into the legislative branches of government where they can be reflected in proposed legislation.

46. This is actually a correct assessment of probable success in litigation.

47. While there are some differences between the contexts of death and divorce, e.g., the income earner's ability to use the property him or herself, there are some points of similarity, such as the sense of entitlement arising from the non-income earner's contributions that facilitated income-earning.

range of mediation outcomes, but, especially in crowded urban courts, mediator preoccupation with the speed of disposition is a highly significant factor.

Mediators not only try to dispose of cases quickly, they also try to have the parties reach agreement. The pernicious effect of that concern with getting an agreement is that mediators frequently apply pressure to the weaker client so that he or she will move in the direction of the stronger client. If the stronger client presents a relatively new solution, e.g., visitation arrangements or a 50/50 property division, that client might prevail simply because of mediators' tendency to side with the stronger party. While this could potentially result in more variety of outcome by virtue of the randomness of the stronger party wanting the more unusual outcome, compliance is less likely when one party has been strong-armed. Since mediated outcomes are not published and have little influence on other mediations, one of the only mechanisms through which mediated results have force in the community is compliance.

The fact that most mediators lack legal training could lead to optimism that mediators are not overly bound to solutions "by the book." However, it is at least equally likely that that lack of training allows more mediator manipulation in accordance with prior conceptions of appropriate resolutions. The following two cases illustrate this point.[48]

A. MRS. Y

Mrs. Y submitted a petition for divorce. Her husband was a compulsive gambler, and, although he was employed, he could not help support the family. Mrs. Y barely made ends meet by working at a low-paying job. Mr. Y would take money from her purse, and the household was constantly subjected to threatening phone calls from creditors. Mrs. Y moved with their children to a different apartment, but she could not get social welfare assistance until she was divorced. Her husband would not agree to divorce, and he would not attend mediation.

Financial instability is a problematic ground for divorce. It could fit into the fifth ground for divorce which allows divorce for grave reasons making continuity of the marriage difficult.[49] However, it is a difficult argument to make without clear evidence.[50] Also, Mrs. Y could not afford to litigate. The mediators

48. These two cases were reported and contrasted in my dissertation. *See* Bryant, *supra* note 20, at 354-60.

49. CIVIL CODE § 770, ¶1(5) (Japan).

50. "Grave reasons" making continuity of the marriage difficult have been found in cases of extreme difficulty such as severe physical abuse, criminal convic-

suggest that she file for marital support. Even if Mr. Y did not come to mediation, the judge could order a certain amount of support.[51] If he did not pay, Mrs. Y could eventually use that as a reason for divorce under the fifth ground of Civil Code Section 770. Failure to provide spousal support, when proved, can be a ground for divorce for "grave reasons" because it is violative of the Civil Code requirement of mutual spousal support.[52]

B. Mrs. W

Mrs. W left her husband because she was tired of his absence. Mr. W, a long-distance trucker, was rarely home. As she told the mediators, "this was no way to spend her only lifetime." She moved into her parents' home so that her parents could help her look after the couple's children. Then she started working part-time at a small coffee shop in her neighborhood.[53] Mr. W tried to starve her into compliance with his demand that she and the children live separately with him; he refused to contribute any support to her or to their children. Mrs. W filed for divorce because she, like Mrs. Y, had to be divorced in order to receive social welfare support. Mr. W attended all sessions of mediation, but he steadfastly refused to agree to divorce. The mediators clearly thought that he was to be pitied for having such a bad wife.

The mediators did not explain the pathway of filing first for spousal support so that Mrs. W might ultimately get a divorce. They told Mrs. W that there was nothing she could do to get a divorce because Mr. W had done nothing wrong. They told her to resume living with her husband so that she could get financial support from him.

When I asked the mediators why they did not explain the spousal support avenue to divorce, they replied that they were unaware of such a legal possibility. They thought that Mrs. W

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tion of the spouse contesting the divorce, or affliction with Alzheimer's (which is not an "irremediable mental illness" qualifying the spouse for divorce under Civil Code § 770.4). I describe the circumstances under which this ground has been approved thus far in Bryant, *supra* note 38, at 411 and in Bryant, *supra* note 32, at 75.

51. The judge cannot adjudicate the divorce dispute itself, which is an Ordinary Mediation case. However, marital support disputes are classified as Class B cases in which the court *must* resolve the dispute with a court order if the parties cannot reach agreement during mediation. Accordingly, the judge could order a fixed amount of monthly support to be paid by the husband to the wife, even without participation in the proceedings by husband. The court could rely on financial records secured by a court investigator and the wife and children's budgetary needs. *See supra* note 25 for a description of the different classifications of cases and their procedural consequences.

52. Civil Code § 760.

53. Employment in a *sunakku* (the Japanese translation for the English "snack shop") is not considered appropriate for reputable women.

should not be encouraged to get a divorce based on their view that, as mediators, they should not promote divorce or be part of an increase in such irresponsible wives.

If Mrs. W had had different mediators, if she had consulted with a lawyer, if she had studied the law for herself, there might have been a different outcome. Perhaps, after unsuccessful mediation, Mrs. W did consult with an attorney. However, Mrs. W was not encouraged at the time of mediation to see a lawyer, and, for financial or philosophical reasons, she went through mediation on her own even though it was clear that the mediators did not understand or support her point of view.

Ultimately, what would happen if "such irresponsible" women as Mrs. W were "encouraged" to divorce? One possibility is that the concept of marriage might change to incorporate such ideals as shared interests and shared time together. The concept of acceptable reasons for divorce might change. If individuals are already filing such divorce petitions, it is a signal that these views already exist within the society. In that sense, the family court would not be a change agent by introducing new family forms; the family court would be a change agent by virtue of giving recognition and support to the family forms and definitions that already exist in the broader society. Change that is already occurring could be thoughtfully facilitated through dispute resolution and democratic processes of legislation since both possibilities currently exist in Japan. If, for example, so many people choose divorce that society is burdened with the costs of supporting their children, then that new reality could be addressed in a variety of ways such as educational guidance that increases the odds of long-term partner selection or restructuring welfare monies and programs so that more single-parent families can be accommodated for less overall cost to society. The family court could be a useful barometer of and a gradual but powerful avenue for social change.

VII. MEDIATION AND LEGISLATION

While there are disadvantages to disputants in requiring mediation and the failure to provide or support other dispute resolution fora, two possible advantages could be the use of family court resolutions to promote the gradual development of alternative family structures in Japanese society and the complementary use of mediated agreements to guide developments in family law. As the family court system is administered now, mediated resolutions are not published, and there is little possibility of including data derived from mediation in legislative drafting. Indeed, currently only judges and court clerks have access to the files as a

whole. If family court records were kept by mediators who recorded all matters that arise, if those records were reviewed with an eye to their meaning for society and values about the family, then the suffering of each family as it searches for a new way to construct its future could be used by the Ministry of Justice to draft new legislation or to revise old legislation in conformity with trends emerging from the records. Both examples of visitation and wives' request for 50% property division are applicable in this regard.[54]

The following two examples illustrate how even more wide-ranging the impact of family court mediation could be. The first has to do with taxation strategies in Japan. In many ways the Japanese tax system promotes the image of a family in which the husband supports his dependant wife and children with his (exclusively) earned income.[55] The following is but one example. During the course of the marriage the husband may be in complete agreement that his wife deserves 50% of the assets, but, if she is not working outside the home, the husband would have to pay gift tax if he "gives" his wife a 50% ownership interest.[56] For tax reasons only, the couple may keep sole title in the husband's name, but it will not be convenient for the husband to remember this when the subject of divorce arises. If the tax laws did not burden couples with the need to place the property in the husband's name alone, despite their agreement that the property belonged to both, then the couple's choice to put the property in one person's name or both persons' names would be more indicative of their intent at the time title was taken. Divorce disputes

54. This is not to say that family court records should be the only basis for legal analysis. Only families in distress enter family court. A large number of families never pass through family court mediation. However, the prerequisite of mediation for most types of litigation and the unavailability of other options means that the family court client population has some representative features. Moreover, considering the Japanese government's penchant for surveys, the issues emerging in family court disputes could become a basis for future surveys which would test the reliability of the trends that surface in mediation.

55. Probably the most significant way in which the tax system, in concert with wage structures for women, promotes the idea of one wage-earner responsible for his dependents is the provision that severely limits the wage-earning capacity of a dependent without loss of dependent status. Feminist attorneys, such as Kinko Yoshida, argue that such a limited ceiling results in women accepting jobs and employers offering jobs with remuneration calculated with respect to retaining women's dependent status. A wife or dependent daughter who wants to work must be able to earn enough to offset the disadvantage to the family of the loss of the benefits associated with dependent tax status *and* the costs of the tax applied to the newly independent tax filer. *See* Bryant, *For the Sake of the Country, for the Sake of the Family: The Oppressive Impact of Family Registration on Women and Minorities in Japan*, 39(1) UCLA L. REV. 109, 157 & n. 150 (1991).

56. Income earned by one spouse is legally considered to be the property of that spouse alone. CIVIL CODE § 762.

about wives' entitlement to 50% of the property should be examined from the perspective of whether legal impediments prevent couples from taking title in a form that reflects their true concepts of ownership. Of course, there may have been a dispute during the marriage as to the wife's "entitlement," a dispute that is subsequently played out at the time of divorce. However, the present tax structure disguises those situations in which the couple does agree as to the wife's co-ownership.

The second example concerns legal regulations affecting financial institutions that extend credit to customers through credit cards. In many current family disputes, there is a major problem with credit card debt. There is inadequate reporting on credit card statements as to the item purchased or to the identity of the purchasers. The amount of cash easily obtained through use of a card, combined with high interest rates, increases the possibility of large amounts of unspecified debt. The presumption is that individual credit card activity is strictly a matter between the financial institution and that individual. However, it is well known that financial institutions readily extend credit to young people based on the belief that they will be able to extract payment from the parents if not from the debtor. In some cases, indebtedness drives couples to divorce.

While financial institutions cannot be blamed exclusively for misuse of credit, they could be required to provide sufficient information such that couples can more readily sort out expenditures in the context of their divorce. More importantly, the ready availability of credit coupled with lack of adequate reporting and regulation is resulting in both greater fragility of marriage and greater difficulty in resolving disputes. This is also a factor in other family court disputes such as dissolution of adoption and division of estates upon death. A closer examination of those cases would provide concrete proposals for more responsible business activity on the part of the credit card companies. In turn, that regulation would reinforce the idea that effects on families are important variables in legal regulation.[57]

57. In fact, the Japanese have already seen the direct relationship between lending institutions' reluctance to give individuals loans, the growth of high interest rate loan shark business, and family "suicide" in which the overwhelmed debtor takes the life of all family members. KAREL VAN WOLFREN, THE ENIGMA OF JAPANESE POWER 131 (1989).

VIII. "PRIVACY" AS AN OBSTACLE TO THE USE OF FAMILY COURT MEDIATION TO REFORM THE LAW

Officials in the Family Courts division of the Supreme Court stated that the main reason for failure to give researchers or Ministry of Justice bureaucrats access to court mediation records is the privacy of the disputants. However, it is difficult to understand the argument of "privacy" in this context. First, other policies based on privacy and restraint on governmental action in Japan suggest that the central privacy issue is avoidance of unreasonable, abusive interference by government and not privacy in some abstract sense. For example, filing tax returns requires divulging "private" information, but no one is suggesting that taxes cannot be collected because of privacy concerns. Similarly, research, which would benefit everyone including the clients, could be conducted in the family court while protecting the privacy of individuals, whose disputes happened to be the focus of research.[58]

The second reason that the argument of "privacy" seems suspect is that there are plenty of times when client "privacy" is violated by the court system. Questioning by the mediators is extremely wide-ranging, often involving questions that do not bear on the problem brought to the family court by the petitioner.[59] Although clients are told that their secrets will not be divulged to "outsiders," there is little apparent reining in of questioning out of concern about some general right to privacy.

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58. This argument seemed particularly implausible to me because I was given permission to conduct research in the family court, including examination of unredacted files and observations of entire mediated disputes, on condition that I follow certain privacy-protection measures. I do not think that Japanese court officials are concerned primarily with privacy issues. Rather, it might well be that the costs of structuring research in settings that must guarantee confidentiality to the disputants are greater and more difficult to bear than are the perceived advantages of having such research conducted. Japanese court officials seems to think that there are already enough avenues for improvement without adding a problematic avenue like research conducted by non-participants in the process.

59. While some questioning beyond the scope of the petition can be helpful in uncovering problems and solutions the clients have not considered, even mediators and judges recognize that there is a serious problem with extraneous questioning by mediators. The fact that this is a problem is particularly puzzling because mediators generally prefer to reach resolution as quickly as possible. The puzzle may be explained by a lack of training in interviewing and working with clients and from a lack of appreciation for the clients' privacy. Clients are accorded privacy in the sense that personal information is not divulged outside of the mediation room, but their privacy concerns *inside* the mediation room are not recognized.

IX. CONCLUSION

As family court mediation is practiced and utilized today in Japan, it plays a very limited role in the recognition of family patterns that exist in Japanese society. In fact, family court mediation may actually reduce the patterns available for family dispute resolution. Resolutions reached in the family court reinforce images of the family considered acceptable to those the Supreme Court of Japan has placed in the role of mediators.

In this Article, I have given examples of ways in which mediation could be used in dispute resolution and in legislation to increase recognition of values held by members of Japanese society. Some might claim that mediation does ultimately result in the recognition of social trends, as the case of increasing visitation agreements indicates. However, such change is quite slow and incomplete as long as the Ministry of Justice does not also have access to this information concerning mediation results while drafting or revising legislation.

The Supreme Court's main stated objection to the use of mediation for these purposes is the privacy of the disputants, but it is also possible that dispute resolution as a process is conceptualized wholly separately from legal recognition of social trends. In an attempt to individualize the process for each case, the fact that each case (and its resolution or lack of resolution) has unavoidable implications for the definition of family in society is lost. There is also a strong, abiding trust in the system as it exists because it appears from descriptions in official literature and from ease of access to be consumer-responsive.

This confidence has begun deteriorating as clients are becoming more conscious of and participatory in the process. They are retaining attorneys more frequently and firing them when the attorneys fail to press for issues they care about. They are also more vocal about dissatisfactions with mediators they encounter.

Nevertheless, there is also a strong sense that social change results in instability which, in turn, results in societal vulnerability. Accordingly, neither the Supreme Court, nor the Ministry of Justice, nor the public has been active in seeking change in the services provided or increasing the options in Japanese society for family dispute resolution so that change can be facilitated. At this point, the perceived benefit of stability outweighs the cost to individuals that their chosen form of intimate association may not be recognized as an appropriate family structure in Japanese society.