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# Legal Culture and Commercial Arbitration in the United States and Japan

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*In this paper, a conceptual model of legal culture based on Ehrlich's "living law" theory and Cole's social-cultural explanation can explain the low utilization rates of arbitration of Japan and the high utilization rates of arbitration in the United States, simultaneously. This model highlights the clash between social norms and legal provisions in Japan. Japan has developed a two-tiered system of dispute resolution. At the official level, Japanese people accept the legal system imposed by the outside world. But, at a deeper level, they utilize diverse forms of informal dispute resolution mechanisms, such as reconcilement and conciliation, reflecting their own social norms. In contrast, there is no conflict between social norms and legal provisions in United States. This study may show that there are distinctions between American-style arbitration and Japanese-style arbitration, reflecting their own respective social norms. The question of reconciliation between the American style of arbitration and the Japanese style of arbitration can be resolved by an international arbitrator.*

Key Words : Legal Culture, Arbitration, Eugen Ehrlich, United States, Japan

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# I. Introduction

Japan is characterized by low arbitration rates as well as low litigation rates. In contrast, the United States is characterized by high arbitration rates as well as the highest litigation rates in the modern world. Many scholars in the West and East have studied this contrast. Kawashima(1963) addresses this issue from the cultural perspective in his seminal paper.[1] Since then, a series of literature including Kim and Lawson(1979) and Tanaka(1985) has explained the low litigation rates of Japan by appealing to unique elements of Japanese culture. On the other hand, Haley(1978, 1982, 2002)[2] and Ramseyer(1985, 1988)[3]have discussed this topic from the institutional perspective. Haley(1982) argues that one of the primary reasons for Japan's low litigation rates is the paucity of judges and lawyers in Japan compared with other industrialized countries like the United States and Germany.[4] Ginsburg and Hoetker(2006) show that the increase of the litigation rate in Japan during the post-war period can be regarded as the product of post-war procedural reform and bar innovation.[5]

Both the Culturalist and Institutionalist camps have limitations in explaining both the low utilization rates of arbitration and litigation of Japan. Culturalists can explain the low level of Japanese litigiousness by appealing to the Japanese

1) Kawashima, Takeyoshi, "Dispute Resolution in Contemporary Japan" in A. von Mehren (ed), *The Legal System and the Law's Processes*, Harvard University Press, Cambridge, 1963. pp.41-72.

2) Haley, John, "The Myth of the Reluctant Litigant," *Journal of Japanese Studies*, Vol.4, 1978, pp.359-380. Haley, John, "Sheathing the Sword of Justice in Japan: An Essay on Law without Sanctions," *Journal of Japanese Studies*, Vol. 8, 1982, pp.265-281. Haley, John, "Litigation in Japan: A New Look at Old Problems," *Willamette Journal of International Law and Dispute Resolution*, Vol.10, 2002, pp.121-142.

3) Rameyer, Mark, "The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan," *Yale Law Journal*, Vol.94, 1985, pp.604-645. Rameyer, Mark, "Reluctant Litigant Revisited: Rationality and Dispute Resolution in Japan," *Journal of Japanese Studies*, Vol.14, 1988, pp.111-123.

4) With less than two-thirds of Japan's population, Germany has nearly six times as many judges as Japan (approximately 15,500 to 2,700). There are also nearly three times as many private attorneys in Germany today as in Japan (approximately 28,800 to 10,000). Haley, John(1982), p.274.

5) Ginsburg Tom and Glenn Hoetker, "The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation," *Journal of Legal Studies*, Vol.35, 2006, pp.31-57.

cultural characteristics of favoring harmony over competition. But this theory has difficulty explaining the low level of arbitration in Japan, in the sense that if the Japanese do not employ litigation, they are expected to choose arbitration within the framework of litigation and arbitration. Institutionalists can explain Japanese low litigiousness by appealing to the scarcity of Japanese lawyers and judges. But Cole(2007) points out that this explanation is limited in the sense that the shortcomings of Japanese arbitration law is not sufficient to fully explain low Japanese arbitration rates. The weak predictability of arbitral awards is not solely a problem with regard to Japan, even though Haley points out the weak predictability of arbitration as a reason for the low level of arbitration.[6] Moreover, both camps only focus on dispute resolution in Japan. A "more general" theory is needed to explain the current status of commercial arbitration in the United States, as well as in Japanese society.

Eugen Ehrlich's "living law" theory(1922, 2009) highlights the dynamic interaction between law and society. This idea has pragmatic value for the explanation of law and arbitration in Japan and the United States[7], since both countries share a common element that their laws were imported from the outside world relatively early in their history. In this case, the clash between foreign-based law and the established social order is inevitable. However, differing attitudes of Japanese and American people toward the law might result in different consequences. The purpose of this paper is to provide an alternative explanation for the low utilization rates of litigation and arbitration of Japan, compared with the high utilization rates of litigation and arbitration of the United States from the perspective of legal culture. First, this paper constructs a conceptual model of legal culture based on Ehrlich's "living law" theory[8] and Cole's social-cultural explanation.[9] Second, the contrasting phenomena of

6) Cole, Tony, "Commercial Arbitration in Japan: Contributions To the Debate on "Japanese Non-Litigiousness," *New York University Journal of International Law and Policy*, Vol.40, Fall 2007, pp.29-114.

7) Ehrlich, Eugen, "The Sociology of Law," *Harvard Law Review*, Vol.36, 1922, pp. 130-145. Ehrlich, Eugen, *Fundamental Principles of the Sociology of Law,* Transaction Publishers, 2009.

8) Cole(2007), pp.29-114.

9) Professor Tamanaha criticizes the vagueness of the concept of "living law", even though he supports the dynamic interaction between law and society in Ehrlich's works. Tamanaha, Z.

litigation and arbitration of the United States and Japan are explained by appealing to the interaction between the social norms and legal provisions of each society, following the line of Cole's social-cultural explanation.[10] Third, the differences and common features of commercial arbitration between the United States and Japan in the contemporary setting are discussed.

# Ⅱ. Legal Culture and Dispute Resolution

## 1. A Conceptual Model of Legal Culture

To explain the phenomenon of the low litigation and arbitration rates of Japan and the high litigation and arbitration rates of the United States, a conceptual model of dispute resolution can be developed based on the "living law" theory of Ehrlich(1922).[11] Kawashima(1963) shares common ground with Ehrlich's "living law" theory.[12] In recent times, there has been a series of works that highlight Ehrlich's contributions in the area of the dynamic relationship between law and society. Likhovski(2003) and Tamanaha(2011) claim that Ehrlich's "living law" theory is suitable for a pluralistic setting in which there is a clash between official law and the norms of social life that are actually followed.[13] Cole[14] explains the low litigation rate of Japan using the framework of Ehrlich's "living law" theory(1922). Following Cole(2007) and Ehrlich(1922, 2009), a conceptual model to explain the contrasting phenomenon surrounding the utilization rates of litigation and arbitration in the United States and Japan is constructed. In order

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Brian, "A Vision of Social-Legal Change: Rescuing Ehrlich from "Living Law"," *Law & Social Inquiry*, Vol.36, No.1, Winter 2011, pp.297-318.

10) Cole(2007), pp.29-114.

11) Ehrlich(1922), pp. 130-145.

12) Kawashima(1963). pp.41-72.

13) Ehrlich was born to a Jewish family in Czernowiz, the capital city of Bukovina, one of the eastern provinces of the Austro-Hungarian Empire. Bukovina was situated between Russia, Romania, Hungary, and Galicia. Early twentieth century, Bukovina was a place inhabited by a strange mixture of races. In 1910, there were approximately 800,000 people living in the province, which was populated by Armenians, Gypsies, Hungarians, Poles, Russians, and Slovaks. Likhovski, Assaf, "Czernowiz, Lincoln, Jerusalem, and the Comparative History of American Jurisprudence," *Theoretical Inquires in Law*, Vol.4, July 2003, p.639.

14) Cole(2007), pp.29-114.

to do this, Cole's explanation of living law theory to a model incorporating the interactions of legal provisions and social norms is extended.

For the understanding Ehrlich's "living law" theory and Cole's social-cultural explanation, the distinction between what Ehrlich terms a "law" and a "legal provision" must be clarified. The former are those social norms that actually control ordinary social interactions, while the latter are instructions framed in words addressed to courts as to how to decide legal cases. In Ehrlich's view, the term "law" is properly applied not just to the pronouncements of legislators and judges, but also to the social norms that control ordinary interactions. In Ehrlich's view, "law" arises immediately from society itself in the form of a spontaneous ordering of social relations, marriage, family associations, possessions, contracts, and inheritance.[15] Legal provisions, Ehrlich notes, are often isolated from the realities of everyday social interactions, although they are derivative forms of law.[16] Ehrlich provides several reasons why legal provisions cannot possibly cover the entire "law." First, judicial decisions, the origin of "legal provisions," flow only from those cases which are brought before a court. But only a very few matters come before a court because most affairs work themselves out without any dispute. But even if a dispute arises, it is often settled in a friendly manner.[17] Moreover, only the decisions of the highest courts operate to create legal provisions and many kinds of disputes, in which only negligible sums are involved, never reach courts. In these cases, there are no legal provisions. Finally legal provisions are naturally lacking for new legal situations, because it necessarily takes some time until a sufficient number of legal disputes reach the point of judicial decisions.[18]

The brilliance of Ehrlich's theory is rooted in his explanation of the dynamic interaction between law and society.[19] According to Ehrlich, the social order is

15) Ehrlich(1922), p.136. Ehrlich put it differently in the same vein. "The great mass of law originates with social institutions come into being and develops in the living present as the natural offspring of society itself." Ehrlich(1922), p.144.

16) Ehrlich(1922), p.144.

17) The parties have reached a compromise or they have renounced claims because they dreaded the costs in time and money. Ehrlich(1922), p.141.

18) Ehrlich(1922), p.141.

19) Tamanaha(2011) support this view in that the uniqueness of Ehrlich is his explanation of dynamic interaction between law and society, although the concept of living law is already

not fixed and unchangeable. It is in a constant flux. Old institutions disappear, new ones come into existence, and those which remain change their content constantly.[20] New aspects of the social order also imply new conflicts of interest and new types of disputes, which call for new decisions and new "legal provisions."[21] In Ehrlich's account, legal provisions themselves are ultimately derivative of the social norms embodied in living law. Judicial decisions, of course, only emerge from concrete cases, and hence are inherently dependent on social interactions, which are governed by social norms.

<Table 1> A Conceptual Model of Legal Culture

| | United States | Japan |
|---|---|---|
| Legal Provisions | • The common law of Great Britain<br>• The Federal Arbitration Act<br>• The Uniform Arbitration Act | • German law<br>• Japanese Civil Law<br>• Japanese arbitration law |
| Social Norms | • Christian values<br>• The Rule of God<br>• The Rule of Law<br>• Universalism | • Confucian values<br>• Shinto<br>• Contextual logic<br>• Particularism |

In this section, a conceptual model of legal culture based on Eugen Ehrlich's "living law" theory is developed. "Legal provisions" and "social norms" are

found in his contemporaries such as Gierke and Tonnies. Professor Tamanaha traces the origin of "living law" to Gierke and Tonnies. Ferdinand Tonnies, a pioneering sociologist, sets out the contrast between Gemeinschaft(community) and Gesellschaft(civil society). Community is a natural organic unity grounded in the family and village, whereas, Society is an artificial, mechanical unity of rational individuals. According to Tonnies, anything which is in agreement with the inner character of a community relationship constitutes it's law and will be respected as the true essential will of all those bound together in it. Similarly, Gierke used the label "social law" to refer to the organically generated inner ordering of associations. Ehrlich(2009) also writes "The inner character of the associations is determined by legal norms." Tamanaha, Z. Brian, "A Vision of Social-Legal Change: Rescuing Ehrlich from "Living Law"," *Law & Social Inquiry*, Vol.36, No.1, Winter, 2011, p.312.

20) "The family of today is not the family in which we spent our youth. Commerce and life have changed." Ehrlich(2009), p.392.

21) This work is being done by means of the Legal Provisions of judicial and juristic law. Ehrlich(1922), p.140.

adopted by this paper as the two pillars of this model of legal culture, following Ehrlich. In the category of major sources of the legal provisions of the United States, the Federal Arbitration Act(FAA), as well as Anglo-American common law, is included, since the identification of the sources of the differences of arbitration and litigation rates of the United States and Japan are focused on. In the category of major sources of the legal provisions of Japan, Japanese arbitration law[22] as well as Japanese Civil Law is included. In addition, German law is included, since Japanese Civil Law was derived from German Law during the Meiji Restoration.

The social norms of this paper's model emphasize the cultural aspects of the social norms of each society to illustrate the differences of the social norms of the United States and Japan. In this model, the core social norms of the United States are Christianity and the Rule of Law, whereas those of Japan are Confucianism and contextual logic. In the case of the United States, Christianity can be chosen as a social norm of the United States, since the first immigrants to North America were Christian refugees from England and the primary ethnic group of the United States is immigrants from the European continent, among whom the major religion is Christianity. The Rule of God is the essential concept of Christian values and Universalism means that only the unifying principle or "truth" of Christian values dominates all nations[23]. The Rule of Law is a well known characteristic of the United States.

In contrast, Confucian values are a law of motion in Japanese society. A major reason to choose Confucian values as a social norm in Japan is that they are still influential in modern Japan,[24] although they have foreign origins. Confucian

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22) Japan had not the independent Code of arbitration. Japanese arbitration law was the part of Civil Law of Japan which was same as German Civil Law.

23) "And you shall know the truth, and the truth shall make you free." John, 8:32, *The Holy Bible, Korean and English,* Korean Bible Society 1987.

24) Dollinger, Mark, J., "Confucian Ethics and Japanese Management Practices," *Journal of Business Ethics*, 1988, pp.575-584. Tanaka, Hideo, "The Role of Law in Japanese Society: Comparisons with the West," *University of British Columbia Law Review*, Vol.19, No.2, 1985, p.383. "The family plays the central role in the traditional Japanese group consciousness. Social relationships are modelled on family relationships, even in emotional content. A business firm is still often felt to be analogous to a family, and family ideals therefore colour the field of labour relations." see Kim and Lawson (1979), p.499.

values became modified and embedded in Japanese society through a naturalization process during Tokugawa period. Many Tokugawa Confucians sought to make an equation between the Confucian way of the sages and what they called the way of the kami, or Shinto.[25] In addition, Shinto, the ancient religious heritage of Japan, is included to compare with the Rule of God in Christianity. Shinto is Japan's indigenous pantheistic faith, a faith which is intuitively linked with nature and the regular natural cycle of birth, growth, change, and death.[26] The contextual logic of Japanese is chosen to compare with the Rule of Law, which is a core concept of the United States. Particularism is emphasized as a Japanese peculiarity by Kawashima(1963)[27] and is derivative of contextual logic, which is chosen to compare with the Universalism of the United States.[28] Now, what is the result of interaction between the legal provisions and social norms of the United States and Japan, respectively, can be examined.

## 2. Social Norms of the United States and Japan

### (1) Harmony and Particularism in Japan

One of the dominant sources of the values of Japanese society is Confucianism. In Confucianism, there is no concern for matters after death: it only focuses on this world. Confucianism is not concerned with God or divine intervention in

25) For example, Hayashi Razan (1583-1657) links Confucian ideas and Shinto at various levels. He identifies kami, the central spiritual entity of Shinto, with the central metaphysical concepts of Sung Confucianism, principle(li) and mind(hsin). Patrons of Tokugawa Confucians remained intensely aware of their identity as Japanese and of the foreign origin of the creed to which they adhered. For this reason, they were animated by a strong impulse to detach Confucianism from its Chinese context. Nakai, W. Kate, "The Naturalization of Confucianism in Tokugawa Japan: The Problem of Sinocentrism," *Harvard Journal of Asiatic Studies*, Vol.40, No.1, 1980, p.160. p.162.

26) Kim, Chin and Craig, M. Lawson, "The Law of the Subtle Mind: The Traditional Japanese Conception of Law," *International and Comparative Law Quarterly*, Vol.28, No.3, 1979, p.493. Shinto is the only religion that is not be introduced from outside world. In contrast, Buddhism and Confucianism were introduced from outside world.

27) Kawashima(1963). pp.41-72.

28) Parker, Richard, "Law and Language in Japan and in the United States," *Osaka University Law Review*, Vol.34, 1987, p.52.

human affairs. Confucianism only focuses on humans and the maintenance of human relationships across a spectrum of status in this world.[29] For the maintenance of peaceful relationships with others, Confucianism teaches 'harmony' instead of 'competition.'[30]It also teaches 'endurance' instead of 'challenge' to sustain long term relationships with other members of society. Confucianism suggests behavioral rules for members of society to follow. However, the social category of relationships within Confucianism is confined only to the relationships of a person with their espouse, children, friends, elders, and king. It implies that there are no concrete behavioral rules outside of those five categories of relationships. Therefore it is possible that behavioral rules can be determined by contextual logic outside of those of five categories. Since Japanese people tend to act not as isolated individuals but as part of a context, a network of roles and group memberships,[31] contextual logic or particularism determines Japanese behavior in concrete cases, as shown by Kawashima(1963 ).[32] For this reason, Parker(1987) argues that, in everyday life situations, Japanese people feel compelled to act in socially appropriate ways with socially appropriate feelings, rather than follow principles articulated in abstract terms.[33]

### (2) The Rule of Law and Universalism in the United States

The dominant value of Universalism in the United States is derived from Christianity. Western society, including the United States, has a long tradition of believing that human beings should accept the Rule of God as the behavioral rule of society. According to this idea, there is an unchangeable Rule of God that people should observe. From the Christian point of view, the world can

29) One of Confucius's students asked Confucius of the other world. Confucius replied that I am not concerned with the other world and he said that I focus only on this world.
30) Many scholars point out the harmony as a core value of Japanese mind. see Kawashima(1963), Kim and Lawson(1979), and Tanaka(1985).
31) A relational actor is established when relationship with other actors are objectified emphasizing the co-existentiality between the relationships and people. Hamaguchi, Esyun, "A Contextual Model of the Japanese: Toward a Methodological Innovation in Japanese Studies," *Journal of Japanese Studies*, Vol.11, 1985, p.300.
32) Kawashima(1963), pp.41-72.
33) Parker(1987), p.52.

only be truly comprehended from God's point of view. Prophets, scientists, and philosophers are valued to the degree in which they espouse what is "objectively true," that is, to describe the world from God's point of view.[34] The Gospel of Christianity is the one and only one truth that is to be accepted by all nations. In contrast to the monotheism of the United States, a large number of gods are worshipped in the Shinto of Japan.

Law holds a particularly privileged place in Western society and thinking. When there was a paradigm shift due to the scientific revolution in the seventeenth century, the world view based on religion was shaken by scientific discoveries. Law was particularly well situated at the time to fill this void and provided a means of social organization. Having rejected other forms of rule, including authoritarianism, monarchy, and arbitrary despotism, the notion of rule by impartial law was a pleasing ideal.[35] As a part of Western society, the United States shares this view of law. In addition, law plays an important role in the coordination of the entire society, which consists of diverse ethnic groups in the United States. Under the Rule of Law, every citizen is treated equally by courts and administration, irrespective of background.

## 3. Interaction between Social Norms and Legal Provisions

### (1) The Non-Litigiousness of Japan

Based on this paper's model of legal culture, it is found that there have been no intimate interactions between social norms and official "legal provisions" in Japan. In other words, there has been a series of disjunctions between law and social norms in Japanese history since "legal provisions" were imposed by the outside world. In Edo-era village life, Shogunate law was not only drawn from

34) Parker(1987), p.69.

35) "When the Roman Catholic Church lost its power over increasingly significant parts of the population. Western society, stripped of it's guiding religion by the scientific discoveries flowing from the Enlightenment and the Protestant Reformation, looked to other forms of social organization and authority." Sheehy, Benedict, "Fundamentally Conflicting Views of the Rule of Law in China and the West and Implications for Commercial Disputes," *Northwestern Journal of International Law and Business*, Vol.26, Winter 2006, p.248.

the realities of social life but did not even attempt to alter them. In the Meiji era, alterations to the legal system arose from a wholesale adoption of foreign law selected by legal officials. In turn, the legal restructuring that occurred after the World War Ⅱ was again the imposition of foreign law on the basis of power.[36]

The social order of Tokugawa Japan was characterized by unconditional loyalty to one's superiors and the notion that one should be content with one's place in society and these concepts were supported by Confucianism.[37] Bringing law suits was therefore discouraged within the society. Moreover, Japanese emotional dislike for law is common place. Resort to law carries the shameful implication that the plaintiff believes his opponent is an unworthy or an abnormal person with whom mutual understanding cannot be reached through ordinary discussion.[38]

On the other hand, societal views of individual network members also explain the Japanese logical dislike for law. If the individual is seen as an isolated entity, a consistent model of punishment is to isolate rather than reintegrate or restore a relationship. But if an individual is seen as operating within networks and contexts, it is appropriate to restore their network and attempt reintegratio n.[39] In the comparison of Japanese and Americans, Hamilton et. al(1988)'s empirical results are consistent with the view that Japanese seem to assume that there are bonds to be restored between offender and victim, as if the individuals exists in a network of interlocking others.[40]

Faced with disjunction between legal provisions and social norms, Japanese law, in a Kawashima's terminology, resembles a denka no hoto sword, a treasured symbol of force, morally revered, but not to be used.[41] Law has symbolic power, but it is incapable of resolving the disputes to which it is

36) Cole(2007), p.76.
37) Tanaka(1985), p.383.
38) Japan has been called a "shame culture", Kim and Lawson(1979), p.503.
39) Hamilton, Lee, J. Sanders, Y. Hosoi, Z. Ishimura, N. Matsubara, H. Nishimura, N. Tomita, and K. Tokoro, "Punishment and the Individual in the United States and Japan," *Law & Society Review*, Vol.22, 1988, p.304.
40) Hamilton, et. al(1988), p.305.
41) Kim and Lawson(1979), p.509.

supposedly addressed, since it does not reflect social norms.[42] The social norms of dispute resolution are conciliation, mediation, and compromise, which are congenial to the Confucian spirit.[43] This paper's model of legal culture predicts Japanese non-litigiousness, since appeal to law as a means of resolving disputes would be disfavored as the imposed legal provisions would simply not reflect the social norms underlying the disputes.

(2) The Litigiousness of the United States

In the case of the United States, there is no conflict between social norms and legal provisions, since the Rule of Law is one of the primary social norms of dispute resolution in the United States, although much of the content of American law was borrowed from Great Britain. Law plays the essential role of coordinating the whole society which consists of diverse ethnic groups. Each ethnic group has its own cultural background and here is no unifying culture among the various ethnic groups of Europeans, Africans, and Asians who make up American society. In this situation, the Rule of Law itself is a social norm, since it guarantees the equal treatment of disputants before courts irrespective of race. Furthermore, the Rule of Law is congenial to Christianity, another social norm since Christianity's view of the world as a theater of struggle between light and darkness is reminiscent of the adversarial nature of court proceedings.[44] There is no logical inconsistency between the Rule of God and the Rule of Law in this respect.

The basis of the legal provisions of the Unites States is Anglo-American common law. Anglo-American common law developed in the United States, even though its legal provisions were imported from Great Britain. Since the initial settlement of what would become the United States was predominantly English, there was no conflict between legal provisions and settlers in the early period of settlement. Nowadays, the case law of the United States has replaced the case

42) Cole(2007), p.76.

43) Kim and Lawson(1979), p.507. Kawashima(1963). pp.41−72.

44) The contrast of light and darkness, is a central theme of modern culture of United States. For example, remind a series of Star Wars, famous fantasy movies in 20th century.

law of England in deciding the verdict in the court. As time has gone by, the case law of the United States has incorporated cases related to disputes occurring in the United States. Accordingly, there is no clash between legal provision and social reality in the United States. This paper's model of legal culture predicts the litigiousness of the United States, since appeal to law as a means of resolving disputes is favored as legal provisions reflect the social norms underlying the disputes.

# Ⅲ. Commercial Arbitration of the United States and Japan

## 1. Commercial Arbitration in Japan

### (1) A Dichotomized Dispute Resolution System

Japanese history suggests that there have been several major invasions from the outside world into Japanese territory. One of the famous examples of this is the invasion of a Mongolian army into the Japanese islands in the 13th century. At that time, the troops of the Mongolian empire of China invaded Japan, although they did not conquer Japan.[45] In the nineteenth century, the coming of an American fleet to Japan resulted in the dissolution of the Tokugawa government. In these situations, Japanese people tended to show dualistic attitudes in order to protect their territories. On the one hand, the Japanese tried to maintain peaceful relationships with outsiders during these periods of tumultuous historical change. On the other hand, however, they did submit to outsiders in any real sense.

45) First invasion was conducted by allied troops of Mongol and Korea dynasties in 1274 AD and Second invasion was conducted by allied troops of Mongol and Korea dynasties in 1281 AD. The storm destroyed allied fleet of Mongol and Korea dynasties. Subsequently, Mongol and Korea pulled the troops out of Japanese islands. Kubilai Kahn, emperor of Mongolian empire in Beijing ordered Korea government to build ships and Mongolian troops departs a port of Korean peninsula to Japanese islands.

These dualistic attitudes toward the outside world have their roots in a longstanding aspect of Japanese culture: the dichotomy between *tatemae* and *honne*.[46] *Tatemae* can be understood as the expression of one's commitment or compliance to the demands of social norms, while *honne* may be understood as the expression of one's sense of frustration, unwillingness, or the feeling that the demands of the group are unreasonable or impractical.[47] In other words, *tatemae* is an outward expression while *honne* is an internal feeling. Faced with shock from the outside world, Japanese people tend to adjust themselves to a new environment through declaring *tatemae* to weaken hostility from the outside world.[48] Nevertheless, their *honne* is such that they do not surrender to the outside world in any real sense.

Analogous to the dichotomy of *honne* and *tatemae*, historically Japanese village dwellers adopted a dichotomized dispute resolution system. That is, at the official level, there was a well-defined Shogunate law system imposed by the Tokugawa government. But, at an underlying level, village dwellers utilized an informal dispute resolution system developed in the Edo period. For example, village dwellers utilized the *naisai* system in which a third party intervened and settled disputes among village dwellers or inter-village disputes. In this informal system, the appointed third party could be a village chief, Buddhist monk, or official innkeeper.[49] Since the third party was a man of high moral repute,

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46) Japanese describe a person's stated reasons or opinions as tatemae, and his real intention, motive or feeling as honne. Tatemae is that which one can show or tell others, while honne is that which one should not or had better not tell others. Wagatsuma, Hiroshi and Arthur Rosett, "The Implications of Apology: Law and Culture in Japan and the United States," *Law & Society Review*, Vol.20, 1986, p.465

47) Wagatsuma and Rosett(1986), p.466.

48) In connection of this, Wagatsuma and Rosett(1986) have drawn attention to the role of apology in the United States and Japan. They note that the sincerity of an apology is likely to have different connotations in two countries. Americans are more likely to stress the wholeheartedness of the apology, while Japanese emphasize the offender's submission to the normative order for the restoration of the relationship between offender and victim. Americans attach greater significance and legal consequence to the perceptions of autonomy, thus making apology important as an expression of self. The act of apology must accordingly spring from internal motivations, not from the request of external authority. In contrast, the Japanese concept of apology attaches primary significance to the act as an acknowledgement of group hierarchy and harmony.

49) An, Sung-Hoon and Okazaka, Mayumi, "A Study on the NAISAI System: Traditional

disputes among village dwellers were resolved by effectively by a third party.

In modern Japan, there remain diverse alternative dispute resolution systems: reconcilement, conciliation, court-annexed mediation(shotei), consultation with a police officer,[50] and arbitration. Tanase(1990), in his study of automobile accidents, shows that the primary dispute resolution mechanism is consultation even in modern Japan[51]. Out of the 958,188 traffic accidents he examined, 836,391 accidents were resolved by consultation by insurance companies, police officers, and the Traffic Accident Consultation Center[52]. Japanese firms are heavily influenced by administrative guidance.[53] Even in international commercial arbitration, Japanese firms follow domestic practices of arbitration, although they do include arbitration clauses in their contracts.[54]

### (2) A Hybrid Form of Arbitration and Naturalization

As for Japanese dispute resolution, there are two stylized facts of the unpopularity of arbitration and conciliatory-type arbitration. First, the low utilization rates of arbitration and litigation in Japan should be noted. Instead, Japanese people prefer conciliation-type resolution. Several pieces of empirical research show the unpopularity of commercial arbitration among Japanese corporations. In a survey conducted by the JCAA, 51 percent of a total of 669 companies replied that the most desirable way to settle a commercial dispute is

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Alternative Dispute Resolution(ADR) Methods in the Edo Period," *Korean Journal of Victimology*, Vol.20, No.1, 2012, p.247.

50) There is a long tradition of police intervention in disputes between citizens. Police officers act as mediators on the basis of their authority. With their authority and psychological dominance, particulary under the authoritarian regime of old Constitution, police mediators were by and large effective and efficient. Kawahsima(1963), p.55.

51) Tanase, Takao, "The Management of Disputes: Automobile Accident Compensation in Japan," *Law & Society Review*, Vol.24, 1990, pp.651-686.

52) 449,297 accidents are resolved though the consultation by insurance companies. 229,441 accidents are resolved through the consultation by police offices. 157,653 accidents are resolved with the help of Traffic Accident Consultation Center. Tanase(1990), p.662.

53) Young, Michael, K., "Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan," *Columbia Law Review*, Vol.84, May 1984, pp.923-983.

54) Ragan, Charles, R., "Arbitration in Japan: Caveat Foreign Drafter and Other Lessons," *Arbitration International*, Vol.7, No.2, pp.93-119.

by *wakai*[55] achieved by *hanashi-ai*(consultation).[56] Forty eight percent stated that they would choose from among *wakai,* litigation, *chotei,* and arbitration, depending upon the nature and amount of the claim.[57]

Second, the most distinctive feature of Japanese commercial arbitration compared with Western-style arbitration is that it connotes an element of conciliation within the framework of commercial arbitration as several experts, both foreign and Japanese, have pointed out.[58] Ragan(1991), a foreign attorney, remarks that when Japanese authorities speak about arbitration, they talk glowingly about "amicable texture."[59] The arbitral procedure with which he has specific experience in Japan is settlement or reconciliation.[60] Sato(2005), a professor at Nagoya University, recognizes that with respect to the existing practice of international arbitration in Japan, the arbitrator virtually dictates the conciliation method.[61] Tashiro(1995), an arbitration practitioner, argues in defense of Japanese style arbitration that what the parties try to do is to reserve an opportunity to negotiate even after they are involved in arbitration.[62]

Faced with the low utilization rate of arbitration, two kinds of explanations have been suggested. The Culturalist view is that the Japanese try to avoid any adversarial method to settle a dispute because they hate conflicts and love harmony. On the other hand, Haley represents the Institutionalist views that arbitration is unpopular as an alternative to litigation in Japan because while the court system may be slow and expensive, it is no more so than arbitration.[63] Moreover, courts have the benefit of being both highly predictable and highly

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55) wakai means that compromise and settlement or amicable solution, Nomura, Yoshiaki, "Some Aspects of the Use of Commercial Arbitration by Japanese Corporations," *Osaka University Law Review*, 1987, p.56.
56) The core notion of hanashi-ai is to sit down and talk things in a friendly manner.
57) Nomura(1987), p.58.
58) Tashiro, Kenji, "Conciliation or Mediation during the Arbitration Process, A Japanese View," *Journal of International Arbitration*, Vol.12, 1995, pp.119-133.
59) Ragan(1991), p.108.
60) Ragan(1991), p.109.
61) Sato, Yasunobu, "The New Arbitration Law in Japan: Will It Cause Changes in Japanese Conciliatory Arbitration Practices?," *Journal of International Arbitration,* Vol.22, No. 2, 2005, p.141.
62) Tashiro(1995), p.121.
63) Haley(2002), p.127.

respected.[64] Cole criticizes Haley in that he significantly underestimates the ability parties have to secure predictability in arbitration. Since even in situations in which prior awards are not available for examination, conclusions can be drawn regarding how a proposed arbitrator will approach the central issue of a dispute through significant background research of arbitrators.[65]

An alternative explanation based on this paper's model of legal culture is as follows. For many years Japanese arbitration was regulated by the Japanese Code of Civil Procedure(CCP), enacted in 1890, and Japan had no independent arbitration law, much like Germany.[66] As a matter of fact, the Japanese CCP was modeled after the German Code of Civil Procedure. Accordingly, so-called "Japanese arbitration law" did not reflect the social norms of Japanese society. The social norms of Japan include the informal settlement of disputes. The social norms of dispute resolution favor a more harmonious reconciliation of the interests of all parties-what the Japanese call a 'full and round solution'[67] which is deeply embedded in Confucian and Buddhist thought.[68] Faced with imposed arbitration law, the first reaction was that Japanese people simply did not use arbitration. This explains the low utilization rate of arbitration in Japan.

Moreover, Japanese people try to naturalize arbitration by changing the adversarial content of commercial arbitration into a more amicable form which reflects the social norms of Japanese society. As a result, Japanese arbitration includes an element of conciliation, while the form of arbitration remains. In 2003, Japan enacted a new arbitration law in order to reflect international arbitration trends. Nevertheless, Article 38(4) still provides for attempts by arbitrators to make the parties settle their dispute. In practical terms, this attempt is equivalent to mediation or conciliation.[69] According to Tashiro(1995), a Japanese certified public accountant who works in an international accounting

64) Public opinion polls show that trust in the judiciary was three times as great as trust in religious institutions or the self-defense forces, Haley(2002), pp.139-140.
65) Cole(2007), p.99.
66) Sato(2005), p.142.
67) Kim and Lawson(1979), p.501.
68) The famous statue of Buddha in Sokkuram Cave of Korea, shows the full and round image of Buddha. It surpasses the logic of right and wrong.
69) "an arbitral tribunal or one or more arbitrators designated by it may attempt to settle the civil dispute subjects to the arbitral proceedings, if consented to by the parties."

company with colleagues from other countries, "It does not matter where they are from to work with, but it really matters what personality he has."[70] All these findings seem to show that social norms are still effective, through the naturalization process of foreign-based legal provisions in Japan.

## 2. Commercial Arbitration in the United States

With the help of the pro-arbitration policies of the Supreme Court of the United States, arbitration in the United States has extended its territory to diverse areas such as antitrust, labor disputes, bankruptcy, consumer claims, family law disputes, and intellectual property.[71] This widespread of arbitration has emerged from the soil of United States, endogenously. One of the main characteristics of American commercial arbitration is the initiating role of businessmen in the legislation of legal provisions. First, the enactment of the Federal Arbitration Act(FAA), 1925, was initiated by entrepreneurs to meet the demand for a neutral arbitral forum within society in the age of railroads. Historically, United States courts had refused to enforce arbitration agreements, guarding their dispute resolution monopoly.[72] However, as economic growth accelerated in the age of railroads, the business activities expanded beyond the territory of a single state and merchants began to engage in more inter-state commerce. When parties began to enter into contracts with people whom they did not know and who resided in distant jurisdictions whose courts might reasonably be feared as xenophobic, well-advised parties could sometimes make deals if both were assured of a neutral arbitral forum.[73]

The second major group that was important in determining the need for arbitration was international businessmen who participated in foreign trade. Apart from the enhanced possibility of delay inherent in transnational law suits,

70) Tashiro(1995), p.132.
71) Mclaughlin, Joseph, "Arbitrability: Current Trends in the United States," *Albany Law Review*, Vol.59, 1996, pp.915-940.
72) Mclaughlin(1996), p.906.
73) Carrington, D. Paul and Paul Haagen, "Contract and Jurisdiction," *Supreme Court Review*, 1996, p.340.

resort to a formal legal system poses uncertainty and relative unpredictability of results for at least one of the parties involved. Faced with such uncertainty of litigation, any affected trade group is apt to develop its own set of substantive rules of standards, which finally take the form of commercial arbitration.[74] The Ehrlich's "living law" theory explains the proliferation of arbitration in the United States. Ehrlich says, "wherever modern large-scale industry has been introduced, it has given rise to countless new kinds of contracts, real rights, rights of neighbors, forms of succession, and has influenced even the family law."[75] Accelerating economic growth and international trade connote the advent of commercial arbitration as an alternative to a formal legal system.

Furthermore, the common law system of the United States has an element in common with international commercial arbitration in the area of fact-finding. A common law system is a law system in which the parties are jointly responsible for the taking of evidence through discovery.[76] On the other hand, a civil law system is a law system in which parties only bear the burden of proof of their own case and do not have the responsibility to find evidence. Nowadays, international commercial arbitration usually adopts a limited discovery process to find evidence. Accordingly, this legal norm of the common law tradition of the United States is congenial to international commercial arbitration. Since there is no conflict between the social need for arbitration and the legal provisions of the Federal Arbitration Act in the area of arbitration, this paper's conceptual model of legal culture predicts that commercial arbitration would be widely utilized in the United States.

## Ⅳ. Discussion

One of the interesting phenomena of the 21st century is the change of the composition of social norms in the United States and Japan. Hamamura(2012) finds that these two countries experience cultures that become more

74) Mentschikoff, Sola, "Commercial Arbitration," *Columbia Law Review*, Vol.61, May 1961, p.850.
75) Ehrlich(2009), p.391.
76) Vercauteren, Laurent, "The Taking of Documentary Evidence in International Arbitration," *American Review of International Arbitration*, Vol.23, 2012, p.344.

individualistic over time as their economies grow.[77] But he also finds that trust of others shows a diverging pattern between the two countries: Although the level of trust declined among Americans, the same pattern did not emerge in Japan.[78] Individualism can be classified into two sub-groups in order to differentiate the effect of individualism on the two countries. Let us call the American individualism "strong" individualism and the Japanese individualism "weak" individualism, reflecting the divergence of the individualism of the two countries. In Japan, individualism is not a longstanding element of Japanese tradition, but rather a mixture of individualism and collectivism generated by the economic growth of modern Japan.[79] In contrast, American individualism can be regarded as being present from the birth of that nation.

In the case of the United States, it is expected that the advent of "strong" individualism has intensified the existing Rule of Law in this paper's conceptual model of legal culture, since the individual who pursues success[80] shows a more competitive attitude towards others. Nowadays, Americans tend to rely more on the Rule of Law than before, as Christian values have weakened in the face of the secularization of religion and the immigration of ethnically diverse peoples with heterogeneous cultures over the course of the past several decades.[81]

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77) In both countries, the average household has become smaller and urban population has increased, In the United States, obedience is less important in child socialization today. Similarly, in Japan,, following tradition has become less important over time. Hamamura, Takeshi, "Are Cultures Becoming Individualistic? A Cross-Temporal Comparison of Individualism and Collectivism in the United States and Japan," *Personality and Social Psychology Review*, Vol.16, No.1, 2012, p.14.

78) Hamamura(2012), p.16.

79) East Asian countries with rapid economic growth have witnessed the similar phenomena of mixture of individualism and collectivism. For example, the social norm of Singapore is also regarded as the mixture of individualism and collectivism. Chang, Weining, Wing K. Wong and Jessie, B. Koh, "Chinese Values in Singapore: Traditional and Modern," *Asian Journal of Social Psychology*, Vol.6, 2003, p.26.

80) with the constant advances in technology, the competency of a modern workforce demands constant updating of skills and knowledge base. In other words, the success of a modern workforce necessitates hard work and an achievement-oriented mind-set in employees. Hamamura(2012), p.15.

81) The divergence of individualism between the United States and Japan is due to the relative cultural homogeneity. Although in the United States, the proportion of foreign-born citizens increased in the past several decades, In Japan, such a proportion has remained small and

<Table 2> Revised Model of Legal Culture

| | United States | Japan |
|---|---|---|
| Legal Provisions | • Revised Uniform Arbitration Act(2000)<br>• Revised Code of Ethics for Arbitrators of AAA-ABA(2004) | • New Japanese Arbitration Law(2003)<br>• New Rules of JCAA(2004) |
| Social Norms | • "Strong" Individualism<br>• Rule of Law | • "weak" Individualism<br>• Confucian values |

On the other hand, the advent of "weak" individualism is expected to weaken Confucian values of harmony in Japan, since the competitive nature of individualism is in conflict with the harmonious nature of Confucianism. At the same time, Shinto, one of pillars of social norms of Japan, is expected to play a minor role in Japanese culture, since Hamamura(2012) finds that following tradition has become less important over time as individualism has accelerated. Nevertheless, he also finds that unlike Americans, Japanese people still maintain a level of trust of others. This implies that Confucian values have an influential impact on the Japanese relationships with others, even after individualism became one of the social norms.

Our Revised Model of Legal Culture based on Ehrlich and Cole's insights, predicts that if the social norms change, then the legal provisions will subsequently change. Now it can be examined whether there have been corresponding changes of legal provisions in the United States and Japan following change in their social norms.[82] In the United States, the economic growth has weakened Christian values and intensified individualism. American people are increasingly dependent on the Rule of Law as more immigrants with diverse cultural backgrounds arrive in America. Similarly, economic growth has weakened Confucian values and other traditional values such as Shinto in Japan.

New legal provisions of the two countries can be compared in order to search

largely unchanged over time. Hamamura(2012), p. 16.

82) We use the concept of "composition of social norm", since we do not preclude the possibility that the social norm consists of multiple objects.

for evidence of the predictions of this paper's model. In the 21st century, there have been changes in the legal provisions of arbitration in the two countries. Among them[83], the 2004 Revised Code of Ethics for arbitrators and the New Japanese Arbitration Law are noticeably related to the topic at hand. According to Meyerson and Townsend(2004), the Revised Code of Ethics of the American Arbitration Association(AAA) calls for the application of a presumption of neutrality to all arbitrators, including party-appointed arbitrators. By contrast, the 1977 Ethics Code presumed that party-appointed arbitrators would not be neutral.[84] The 2004 Revised Code of Ethics intensifies the impartiality of all arbitrators and the objectivity of arbitral awards. It ultimately reflects an axiom of the Rule of Law, the so-called "equal treatment of parties." Faced with the increasing cultural heterogeneity of American society, the Rule of Law is an effective coordinating mechanism of American society.

On the other hand, as remarked upon earlier, the New Japanese Arbitration Act, promulgated in 2003, retains a provision allowing for attempts at settlement that allows for the arbitrator to use their initiative to attempt to settle disputes using conciliation during arbitration proceedings, even though this enactment was based on the 1985 UNCITRAL Model Law.[85] However, attitudes of this sort on the part of Japanese legislators are not a new phenomenon. Faced with the dissolution of the social structure upon which the political regime had been based since the Meiji Restoration, what the Japanese government did was reinstitute chotei in the early part of the 20th century. According to Kawashima(1963), the reinstitution of chotei was mean to replace the informal mediators of the past who were mostly village elders with mediation committees, consisting of laymen and a judge and to have parties reach agreement under the psychological pressure derived from the "halo" of a state court.[86] Furthermore,

83) RUAA is designed to recognize the significant changes in arbitral practices and process, Pravetti, Francis, J., "Why the States Should Enact the Revised Uniform Arbitration Act," *Pepperdine Dispute Resolution Law Journal*, Vol.3, 2003, p.447.

84) Meyerson, Bruce and John, M. Townsend, "Revised Code of Ethics for Commercial Arbitrators Explained: Both the AAA and the ABA House of Delegates Have Approved the Revised Code," *Dispute Resolution Journal,* Vol.59, 2004, pp.10−16.

85) Nagata, Mari, "Some Practical Issues Concerning International Arbitration in Japan," *Osaka University Law Review*, No.60, 2013, p.2.

86) During World War Ⅰ, the industrialization and urbanization of Japan developed rapidly

administrative guidance as a consensual and informal dispute resolution mechanism has been established as a routine in the modern Japanese business environment. Administrative guidance occurs when administrators take action with no coercive legal effect that encourages regulated parties to act in a specific way in order to realize administrative aims.[87] From all these phenomena, it can be presumed that the social norm of harmony is deeply rooted in Japanese culture and underlies legislation even in modern Japan.

This discussion shows that the evolution of the legal provisions of the two countries reflect the core values of the social norms of the two countries. In other words, the core values of the social norms of each country have a persistent impact on legal provisions, even if there are changes in the legal provisions, reflecting change in social norms. In this respect, this paper arrives at a different viewpoint from that derived from this paper's version of Ehrlich's living law theory. Ehrlich's theory predicts that if the social norms change, then new legal provisions emerge, reflecting the change in social norms.

On the other hand, the findings of this paper suggest that the core values of social norms, i.e. the substantive element of a society, are maintained within new legal provisions, after changes in social norms. However, new legal provisions reflect the changes in social norms. The inner part of a new legal provision connotes the core values of the social norms of a society. The history of Japanese legislation shows that Japanese culture tries to protect the core values of social norms when faced with exogenous shocks from the outside world. The reinstitution of shotei in the early part of the 20th century reflects this attitude of transplanting the core values of village-type mediation into the soil of industrialized society. From the analysis of dynamic relationships between the legal provisions and social norms of the two countries, it can be identified that the core values of the social norms of Japan are Confucian values, whereas the core value of the social norms of the United States is the Rule of Law.

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and upset the traditional social structure. In such a time of social unrest, the trust in those traditionally in positions of authority was weakened. Kawashima(1963), pp.53-54.

87) Young(1984), p.923.

# Ⅴ. Conclusion

In the United States, commercial arbitration has become the main dispute resolution mechanism owing to the pro-arbitration policy of the Supreme Court of the United States. In contrast, Japan does not show a comparable popularity of commercial arbitration. This paper constructs a model of legal culture which emphasized the interaction between social norms and legal provisions. It can be shown that this conceptual model of legal culture based on Erlich's "living law" theory and Cole's social-cultural explanation, can explain the low utilization rates of arbitration and litigation in Japan. Similarly, this conceptual model of legal culture also explains the high utilization rates of arbitration and litigation in the United States, simultaneously. This paper has shown that the Japanese have developed a two tiered system of dispute resolution. At the official level, Japanese people respect the legal system imposed by outside world. But, at the unofficial level, they have utilized diverse informal dispute resolution mechanisms, such as shotei, reconcilement, and conciliation, where the origin of these forms of informal dispute resolution goes back to the Tokugawa Edo period.[88]

Furthermore, this study seems to show that there are two kinds of arbitration: American style arbitration and Japanese style arbitration. American style arbitration emphasizes party autonomy, whereas, Japanese style arbitration, persistently and implicitly, does not relinquish the initiative role of the arbitrator in arbitration proceedings. The remaining question is whether the difference between Japanese style arbitration and American style arbitration will persist or vanish in the future. The answer depends on the role of international arbitrators. In recent times, the international rules of arbitration confer on the arbitrator a more active role in managing and conducting the proceedings.[89] Unlike domestic arbitration, international commercial arbitration presupposes an

88) An, Sung-Hoon and Okazaka, Mayumi, "A Study on the NAISAI System: Traditional Alternative Dispute Resolution(ADR) Methods in the Edo Period," *Korean Journal of Victimology*, Vol. 20, No.1, 2012, pp.237-260.

89) Bernardini, Piero, "The Role of the International Arbitrator," *Arbitration International*, Vol. 20, No. 2, 2004, p.118.

encounter between distinct cultures. Accordingly, the question of reconciliation among American and Japanese style arbitration systems will be resolved by the role of international arbitrators through discretionary measures in the area of arbitration proceedings.

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