Reactive Instruments of Social Governance

Edited by
ALEXANDER BRUNS
and MASABUMI SUZUKI

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Mohr Siebeck

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Preface

This volume contains contributions to a symposium of scholars from the Nagoya Law School and the Faculty of Law of the Albert-Ludwigs-Universität Freiburg on the topic "Reactive Instruments of Social Governance". It completes together with Volume 20 of the Freiburger Rechtswissenschaftliche Abhandlungen the documentation of the results of a joint research project funded by the Nagoya Institute of Advanced Research (IAR) and the Freiburg Institute for Advanced Studies (FRIAS). With the social governance by law and the interplay between substantive legal standards and procedural enforcement the Symposium addressed a topic of both outstanding academic and practical importance. The relationship of preventive and reactive regulatory instruments is a key element for the analysis and understanding of a legal system. Practically all modern legal systems implement a combination of prevention and reaction. Prevention aims at anticipatory avoidance of unwelcome results, whereas reaction is designed to compensate and maybe deter.

In this major field the contributions to the symposium aim at comparative and international research with a focus on the Japanese and German legal cultures in their respective international settings, especially in reference to the European Union, the United States of America and Asia. The Editors wish to express their gratitude for the excellent professional support by Dr. Stefan Thönissen, LL.M. (Yale), Institute for German and Foreign Civil Procedural Law, University of Freiburg.

Freiburg and Nagoya, May 2019 The Editors

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Dispute Resolution using Expert Knowledge in Japan

Miyuki Watanabe

I. Introduction

Concerning social governance, the judiciary plays an important role mainly in ex-post control. Although judges are law specialists, they are generalists in other fields.[1] They do not have the expertise required for finding facts in litigated cases requiring related knowledge (e.g., cases related to medical affairs, construction, and intellectual property rights). However, to try and judge such specific cases properly and quickly, the limit of a judge's capability needs to be reinforced. Expert knowledge should be acquired appropriately at each stage of a lawsuit, and it is essential that this specialized knowledge is reflected in the fact finding. Today, litigation is increasingly becoming highly specialized, rendering the acquisition of expert knowledge even more important for the smooth administration of lawsuits requiring such knowledge.

II. Participation of an expert in civil proceedings

1. Positioning an expert and appointment

The positioning of an expert who participates in civil proceedings is (a) a chairperson of the procedure as a trial body or a member of a panel or (b) a third person who offers expert information to the trial body. Regarding (a), the presence of a lay judge who has expert knowledge or a judge with technical qualification is naturally assumed, though in Japan such systems have not been introduced. Thus, expert testimony in civil proceedings comes under the scope of (b). An institution or any other entity may be consulted also to obtain an expert

[1] The "expertise" in legal dispute resolution can be divided into the following three categories: 1. Legal expertise: legal knowledge and ability of material law and procedural law required to resolve disputes, 2. Sector-specific expertise: special knowledge and experience in a specific field in the case, 3. Procedural expertise: the technique and ability to promote negotiation and communication of parties and to conduct proper proceedings. Iwao Sato, *"ADR no Senmonsei; Rodosinpanseido wo Sozai to shite"* [Specialization of ADR; Based on the Labour Conciliation System], 10 Journal of Japanese Arbitration and ADR, 2015, p. 13.

opinion as an aspect of the commission of expert testimony (Japanese Civil Procedure [JCP] § 218) or the commission of an examination (JCP § 186).[2]

Generally speaking, in Germany, a large amount of expert testimony is presented through court-appointed expert witnesses, while in the United States, expert witnesses are generally appointed and sponsored by the parties in a dispute. In Japan, like the German system, the expert witness is supposed to be, in a sense, an arm of the court, rather than a witness or representative for a particular party.[3] Because taking evidence ex officio is generally prohibited in Japan after the reform of 1948, a court may not conduct the expert testimony on its own motion.[4] A party who requests expert testimony prepays the cost for that expert testimony.

2. Method

Expert witnesses may offer their opinion in writing or orally. Traditionally, expert testimony in Japan is in writing by a single expert. Considering the burden of expert witnesses, oral expert testimony by several experts would be desirable, but in practice, because of the shortage of human resources, such a method is sometimes difficult to accomplish. In some district courts in Japan, however, a conference-style expert testimony is conducted particularly in medical cases.

3. Procedural stage in which an expert participates

An expert witness participates in civil proceedings in the following stages: (a) the taking of evidence, (b) disposition for explanation, (c) preliminary proceedings – arrangement of issues and evidence or conciliation. Presently, preliminary proceedings are recognized as an important process for a prompt and satisfying litigation. Specialized information is required to clarify the matters related to the litigation, not only at the evidence collection stage but also during preliminary proceedings.

4. Expert knowledge to be offered

The knowledge offered by experts in the litigation is (a) specialized knowledge and experience to be applied to the case concerning the established facts, i.e., to imply the existence of disputed facts from other facts or the results of collection

[2] Commission of expert testimony is conducted at the discretion of a judge. It is supposed to be an exception to the rule of prohibition of examination of evidence by the court's own authority.

[3] Parties may propose and present reports and expert testimony in their briefs and pleadings and as a form of documentary evidence at hearings for the reception of evidence.

[4] The provision which accepts taking evidence ex officio was deleted by the amendment of the Code of Civil Procedure in 1948.

of evidence, and (b) specialized knowledge and experience in a broader sense. The knowledge in (a) includes the report of the result acquired by applying expert empirical rules to concrete facts in dispute. The knowledge in (b) includes an explanation of the meaning of a party's claim to help the judge's understanding, and an explanation of the extent to which an expert's opinion is accepted in a specific field. The former is provided by the means of the expert testimony at the expense of the parties, while the latter is provided in a simpler procedural system via a technical advisor.[5]

5. Binding effect of an expert's opinion

In principle an expert opinion has no binding effect. Only judges can find facts and evaluate the value of evidence freely. However, the opinion of an expert could have a binding effect. For example, some special laws adopt the substantial evidence rule, which accepts an expert's opinion as binding (e.g., Radio Act § 99).[6] Such laws require experts to find facts. It might also be said that an arbitration agreement to obtain expert testimony deprives a judge of the examination power concerning the content of the subject matter of the expert testimony.

III. Japan's traditional system and recent reform

1. Recommendations of the Justice Reform Council (2001)

The Recommendations of the Justice Reform Council were submitted on June 12, 2001, as a comprehensive reform proposal for a justice system to support Japan in the 21st century.[7] The Justice Reform Council was established under the Cabinet in July 1999, for the purposes of "clarifying the role to be played by justice in Japanese society in the 21st century and examining and deliberating

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[5] Also in the case of (1) other system may be used, in a case parties resign their rights to be heard on a full understanding, or there are other methods with procedural guarantees or the guarantee of validity of the contents. Etsuko Sugiyama, *Minji-sosho to Senmonka* [Civil Procedure and Experts], (Yuhikaku, 2007), pp. 356–357.

[6] Radio Act § 99 (Binding Effect of Fact Finding) : (1) With respect to the litigation under Article 97, the lawful findings of the Radio Regulatory Council shall be binding on the court when there is substantial evidence to prove that the fact exists. (2) Evaluation of the evidence prescribed in the preceding paragraph shall be left to the discretion of the court.

The substantial evidence rule is that the fact authorized by the administrative committee binds a court in action for revocation of administrative disposition, when there is substantial evidence proving that. See Hiromi Naya, *"Jisshitsuteki-Shoko no Hosoku – Shiho-shinsa ni okeru Jijitsu nintei no Igi ni tsuite"* [Meaning of Fact Findings with Substantial Evidence Rule], Yoshimitsu Aoyama etc. ed., *Minji-soshoho – Riron no Aratana Kochiku (Ge)* [New Establishment of Theories of Civil Procedure], (Yuhikaku, 2001), p. 265 f.

[7] See Tetsuro Kitao, Morio Takeshita, Yukiko Hasebe, *"Riyo shiyasui Shiho-seido · Minji Shiho"* [Judicial system and Civil Justice easy to access], Jurist vol. 1208, 2001, p. 91.

fundamental measures necessary for the realization of a justice system that is easy for the people to utilize, participation by the people in the justice system, achievement of a legal profession as it should be and strengthening the functions thereof, and other reforms of the justice system, as well as improvements in the infrastructure of that system" (Article 2, Paragraph 1 of the Law Concerning Establishment of the Justice System Reform Council).

Especially regarding the handling of cases requiring specialized knowledge, the Recommendations state the following: "With scientific technological innovation and the complication and internationalization of social and economic relationships, among civil disputes, the number of litigation cases requiring specialized knowledge (cases related to intellectual property rights, medical affairs, construction, financial affairs, etc.) has been continuously increasing. If suitable cooperation by experts cannot be obtained at civil actions related to these disputes, not only it is impossible to come to a proper judgment but procedures frequently are delayed".[8] Compared with normal civil cases, cases requiring specialized knowledge need more time to try and adjudicate. With the aim of reducing the duration of proceedings for cases requiring specialized knowledge by about half, in addition to the measures related to reinforcement and the speeding up of civil trials, the following measures were implemented: introduction of the expert commissioner (technical advisor) system, improvement of the court-appointed expert witness system, and strengthening of the legal profession's technical expertise. Of these points, the reform of the court-appointed expert witness system and the expert commissioner system are considered in this paper.[9]

2. Reforming the Expert Testimony System

Expert testimony is a kind of evidence collection, in which the opinions of court-appointed expert witnesses become evidentiary materials (JCP § 215 (1)). Some problems concerning expert testimony are the difficulty of the appointment of expert witnesses (it takes a long time to find suitable expert witnesses for cases and to have them agree to give their expert opinion); delays in litigation (its preparation takes a long time);[10] and the difficulty of evaluation and adoption of the expert opinion.

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[8] The recommendations pointed out that for labour-related cases, decisions must be made based on the actual conditions of each workplace, company, or type of industry, and, in order to properly and promptly process these cases, specialized knowledge becomes necessary.

[9] As another important reform, the Intellectual Property High Court in Tokyo and the labour conciliation system were established.

[10] Shiho-Kenshujyo, *Senmon-teki na Chiken wo Hitsuyo to suru Minjisosho no Unei* [Administration of Civil Proceedings to require expertized knowledge], (Hoso-kai, 2000), p. 14 f., Masato Monguchi *ed., Minjishokoho-taikei* vol. 5 [Outline of rules of civil evidence], (Seirin-Shoin, 2005), p. 52 f. (Junji Maeda).

Recommendations of the Judicial System Reform Council state that "the court-appointed expert witness system should be improved through measures including making the process of selecting a court-appointed expert witness smoother by improving the list of names of candidates, coordinating with organizations of experts, and newly establishing commissions for litigation related to medical affairs and for litigation related to construction, preparations for which are currently being undertaken by the Supreme Court".[11] This Recommendation influenced the reform of the Code of Civil Procedure in 2003.

First, the method of questioning expert witnesses was revised so that it is considered part of their opinion statement from a neutral and fair point of view, and the provisions on the cross-examination of witnesses are not applied mutatis mutandis. The method of cross-examination of expert testimony has some problems, i.e., expert witnesses cannot merely state their opinions about matters of expert testimony, which leads to offensive and personal questions about their ability or aptitude as expert witnesses.[12]

The court may consult with the parties and expert witness concerning the content of the matters for expert testimony and other matters necessary for it (Rules of Civil Procedure [RCP] § 129-2). Where the court has had expert witnesses state their opinions, when it finds it necessary to clarify the content of the opinions or confirm the grounds thereof, upon petition or by its own authority, may have the expert witness state additional opinions (JCP § 215 (2)). Where the court has expert witnesses state their opinions orally, it may ask questions of the expert witness after the expert has stated an opinion. The questioning set forth shall be conducted by the presiding judge, the party who has requested the expert testimony and the other party, in that order (JCP § 215-2). Questions asked to an expert witness shall be on matters necessary for clarifying the content of the opinions of the expert witness or for confirming the grounds therefore, and are asked specifically insofar as possible (RCP § 132-4 (1)(2)). Questions that insult or confuse the expert witness are prohibited (RCP § 132-4 (3)). The statements of expert witnesses may be made through communication via audio and visual transmission (JCP § 215-3).

Moreover, as a devise of the method of expert testimony in litigation requiring specialized knowledge,[13] the system of expert opinion for the calculation of damages in intellectual property law cases was introduced (e.g., Patent Act § 105-2).

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[11] Council for Judicial System Reform, *Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the 21st Century*, 2001, p. 20f.

[12] *Ichimon-itto Heisei15nen Kaisei Minjisosho-ho* [Q&A 2003 Amending Code of Civil Procedure], (Shoji-Homu, 2003), p. 59 etc.

[13] Monguchi, supra, p. 58.

3. Technical Advisor System

Before the 2003 amendment, there were no measures to utilize experts in legal proceedings other than an expert witness or a research law clerk, who conducts the research necessary for proceedings and deciding cases (limited to cases concerning intellectual property or tax in a District Court).[14] Therefore, the forms of involvement of experts were very limited. In the case of litigation requiring specialized knowledge, it is desirable to obtain the involvement of experts from an early stage of the proceedings,[15] and thus, the technical advisor system was established by the amendment of the Code of Civil Procedure in 2003 and introduced into practice in April 2004 (JCP § 92-2 f.).

This system aims at achieving higher quality court proceedings and judgments in specialized fields of law in which scientific and technical matters are often disputed. Under this system, experts who have a wealth of knowledge in relevant scientific fields are asked to participate in court proceedings as technical advisors. They provide judges and parties, from the viewpoint of a fair and neutral advisor, with explanations on the technical matters involved in the lawsuit. These explanations help judges obtain a better understanding of the technical aspects and narrow down the legal and factual issues of the case.

Technical advisors participate primarily at three stages of litigation: First, in the process of deliberating the necessary matters concerning the arrangement of issues or evidence or the progress of court proceedings, in order to clarify the matters related to the suit or ensure the smooth progress of court proceedings (JCP § 92-2 (1)). Second, in the process of conducting the examination of evidence, in order to clarify the matters related to the suit or the gist of the result of the examination of evidence. In this case, in order to have a technical advisor give an explanation on the date for the examination of a witness or a party directly or the date for the questioning of an expert witness, the presiding judge, with the consent of the party, may permit the technical advisor to ask questions directly of the witness, the party, or the expert witness with regard to the matters necessary for clarifying the matters related to the suit or the gist of the result of the examination of evidence (JCP § 92-2 (2)). Third, with the consent of the parties, the court may make a technical advisor participate in the proceed-

[14] Court Act § 57.

[15] Especially in the contraction-related litigation, judges submit some cases conciliation for acquiring the expertized opinions (Civil Conciliation Act § 8 (1): Civil conciliation commissioners may state their opinions based on their expert knowledge and experience). After the 2003 reform, this method is not supposed to desirable due to the establishment of the system of the Expert Commissioner. However it is still supposed to be effective in contraction-related cases. See Kiyotaka Kono, "*Kentikukankei-sosho-to no Shinri no Genjyo to Kadai ni tsuite*" [Current situation and problems in Construction-related Litigation], Minso-Zasshi vol. 58, 2012, p. 170.

ings so as to hear the explanation based on expert knowledge on a date of attempting a settlement in which both parties are able to attend (JCP § 92-2 (3)).

Issues concerning the litigation may not be adjudicated by technical advisors. Judges use their opinions only as a reference, and it is not assumed that the court acquires its final impression for judgments from that.[16] The participation of the technical advisor is therefore not recommended when there are sharp differences in opinion within parties about issues; in such cases, precise and strict expert testimony is required. The court shall give the parties an opportunity to state their opinions on the explanation given by a technical advisor (RCP § 34-5).

According to the practice of medical-affair litigations in Osaka District Court,[17] use of a technical advisor is primarily at the outset of cases in the early stages of preliminary proceedings. In addition to that, the technical advisor can participate in the procedure to choose suitable and various expert witnesses after obtaining evidence.

The use of the technical advisor is not necessarily frequent.[18] Reasons for not using technical advisors include the following: the parties may not ask them for their opinion, the explanation is not recognized as evidence, parties are opposed to accepting the technical advisor, and difficulties in securing human resources to be the technical advisor. Further, technical advisors do not have the same authority as expert witnesses for conducting investigations (See RCP § 34-6).

In cases relating to intellectual property at a High Court or District Court, the court may have a judicial research official in charge of conducting an examination of a trial and a judicial decision (JCP § 92-8, 92-9). A judicial research official is a regular court staff who gives explanations and provides wide knowledge about issues.[19]

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[16] Particularly with respect to cases related to medical affairs, technical advisors should be fair and neutral from the standpoint of both patients as claimants and doctor, because the technical advisors are in general doctors as well as defendants. Thus, they may give only an explanation, not opinions. However it is difficult to distinguish between explanation and opinion.

[17] Yumiko Tokuoka, *"Senmonteki-Chiken wo yosuru Sosho ni okeru Senmoniin no Katsuyo ni tsuite no Kosatu"* [Consideration about the use of expert commissioners in lawsuits requiring specialized knowledge], Minso-Zasshi vol. 57, 2011, p. 197.

[18] According to Tokuoka, The number of use cases in 2011 was 6.6% in medical affairs, 16.7% in contract affairs.

[19] Judicial research officials in intellectual property cases generally are ex-examiners of the Japan Patent Office or patent attorneys.

IV. Recent Problems

1. Theoretical Problems

a) Possibility of the Expert Testimony Ex Officio

On the one hand, expert witnesses support the allegations and evidence of parties, and, on the other hand, they are the support body of the courts. From a comparative viewpoint, many countries are open to the expert testimony ex officio;[20] however, the examination of evidence by the court's own authority is generally prohibited in Japan. The opinion against the expert testimony ex officio pointed out that evidence collection should be conducted with a party's initiative and the entire dependence on expert witnesses should be avoided. Additionally, there was disagreement as to the burden of procedural cost of expert testimony. Therefore, the expert testimony ex officio system was not reformed.[21]

In legal interpretation, however, the possibility of the expert testimony ex officio is still disputed. Especially when a court needs to acquire expert knowledge promptly, expert testimony ex officio might be required, even though both parties do not request expert testimony, fearing the burden of high procedural costs or the emotional repulsion.[22] We need to consider how the positioning of an expert witness is understood, who bears the cost, and how much expert testimony is required compared with the use of other methods, such as the use of a technical advisor.

b) Distinguishing between the Technical Advisor and Expert Witness

A technical advisor gives an explanation; an expert witness states an opinion. It is not always easy to distinguish between these. Parties often use a technical advisor to avoid the burden of the cost of the expert testimony. We could consider countermeasures such as expert testimony ex officio (where parties share the cost or the State bears some or all costs). However, if such a system would be introduced, the parties would depend entirely on courts. The parties themselves would appoint the expert and submit the opinion if the party-initiative principle would be thoroughly carried out.[23]

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[20] Federal Rules of Evidence § 706 (a) prescribes that the court may appoint any expert that the parties agree on and any of its own choosing.

[21] Houmusho Minjikyoku Sanjikan-sitsu ed., *"Minjisoshoutetsuduki ni kansuru Kento-jiko"* [Discussion topics about Civil Proceedings], *Minjisoshoutetsuduki no Kento Kadai* [Discussion topics about Civil Proceedings], NBL extra vol. 23, 1991, Shoji-homu, pp. 38–39.

[22] Hiroshi Shimizu, *"Kaishaku-ron to shiteno Shokkenkantei no Kahi ni tsuite"* [Possibility of the Expert Testimony ex officio as Legal Interpretation], Minso-Zasshi vol. 62, 2016, p. 165.

[23] *Etsuko Sugiyama, "Minjisosho tetsuzuki ni okeru Senmonka no Kanyo"* [Participation of the Experts in Civil Procedure], 87 Houritsu Jiho vol. 8, 2015, p. 27.