

Jogelméleti Szemle 2017/3. szám

TARTALOM

Tanulmányok

Chum Chandarin: Transitional Justice in Cambodia: Whose goals to achieve?	2
Cservák Csaba: Az alapjogok (és az Alaptörvény) érvényesüléséről, alkalmazhatóságáról	15
Dorogi Zsolt – Legeza Dénes: A zárszámadási jog kialakulása és első országgyűlési alkalmazása	26
Dúl János: A közös veszélyben elhunyt társasági tagok utáni jogutódlás rendezése.....	38
Kaprinay Eszter: Az őrizetbe vétel és előzetes letartóztatás általános, valamint fiatalkorú terheltekre vonatkozó speciális feltételei és dilemmái	51

Szemle

Bérces Viktor – Domokos Andrea A családon belüli erőszak szankcionálásának büntetőjogi lehetőségeiről	77
Kakuk Gabriella: A menekültek okozta veszélyek és kihívások, avagy a terrorista biztos, hogy menekült?	86
Szalai András: Alapjog az ölésre? A jogos védelem alkotmányos keretei	92

Brevis

Hamza, Gábor: Antonio Salieri, Maestro di Ferenc (Francesco) Liszt	100
--	-----

Államtudomány és kultúra: szemelvények Japán aktuális jogi problémáiból

Szmodis Jenő: Az államelmélet kulturális meghatározottságáról, különös tekintettel a japán állam- és jogtudományi gondolkodásra.....	102
Hayato Hirata: Balance of Various Values in the Conciliation	112
Kanichi Hayashi: The Local Political System and Symbolic Politics in Japan	118
Osamu Okazaki: Modernization and the Japanese Habitual Employment Practice	124
Tamio Mitoma: Japanese Behavioral Patterns and Groupthink	134

Balance of Various Values in the Conciliation

I. Civil conciliation in Japan

In Japan, there is an Act on Promotion of Use of Alternative Dispute Resolution (Act No. 151 of December 1, 2004). The system of the ADR is used by this ADR Act. In this report, I would like to focus on the civil mediation that is one of the ADR. When I explain Civil mediation a little more in details, the court brokered civil mediation is called "Civil Conciliation" and it's distinguished from the private initiative civil mediation.

The following rule stipulates the purpose of this act.

Article 1 of the ADR Act (Act No. 151 of 2004) provides that, "Owing to the changes in the social and economic climate at home and abroad, alternative dispute resolution (procedures for resolution of a civil dispute between parties who seek, with the involvement of a fair third party, a resolution without using litigation; the same shall apply hereinafter) has become an important means of achieving prompt dispute resolution based on the specialized expertise of a third party and in accordance with the actual facts of the dispute. Bearing such in mind, the purpose of the Act on Promotion of Use of Alternative Dispute Resolution is to provide for the basic concepts of the Act and for the responsibilities of the government and other entities; and to establish a certification system and set special rules on nullification of prescription and other matters so as to make alternative dispute resolution procedures easier to utilize, thereby enabling parties to a dispute to choose the most suitable method for resolving a dispute with the aim of appropriate realization of the rights and interests of the people".

The following rule stipulates the basic principle.

Article 3 of the ADR Act provides that, "(1) Alternative dispute resolution procedures shall, as legal procedures for settling disputes, be executed in a fair and appropriate manner while respecting the voluntary efforts of the parties to the dispute for dispute resolution, and be aimed at achieving prompt dispute resolution based on specialized expertise and in accordance with the actual facts of the dispute. (2) Persons involved in the alternative dispute resolution procedures shall, in compliance with the basic concepts set forth in the preceding paragraph, strive to cooperate and collaborate with one another".

II. Overview of the civil conciliation procedure

The civil conciliation is operated based on the Civil Conciliation Act (Act No. 222 of 1951). According to the Civil Conciliation Act, the civil conciliation can be classified in (1) General Civil Conciliation, (2) Conciliation on Disputes over Building Lots and Buildings, (3) Conciliation on Agricultural Disputes, (4) Conciliation on Commercial Disputes, (5) Conciliation on Disputes over Mining Pollution, (6) Conciliation on Disputes over Traffic Accidents (7) Conciliation on Disputes over Pollution, etc., (8) Special Conciliation.

About the purpose of this act, there is a following rule. Article 1 of the Civil Conciliation Act (Act No. 222 of 1951) provides that, "The purpose of this Act is to achieve resolution of disputes over civil affairs based on a compromise between the parties and in accordance with the rules of reason and the circumstances of the disputes."

¹ Prof. Dr. iur., Asahi University

The following rules stipulate the role of the conciliation committee.

Article 5 of the Civil Conciliation Act provides that, “(1) The court shall conduct conciliation by a conciliation committee; provided, however, that when the court finds it appropriate, conciliation may be conducted by a judge alone. (2) The court shall, upon the petition of a party, conduct conciliation by a conciliation committee, notwithstanding the provisions of the proviso to the preceding paragraph.”

Article 6 of the Civil Conciliation Act provides that, “A conciliation committee shall be composed of a chief conciliator and two or more civil conciliation commissioners”.

Article 8 of the Civil Conciliation Act provides that, “(1) Civil conciliation commissioners shall participate in the conciliation conducted by the conciliation committee, and they shall, as ordered by the court, with regard to other conciliation cases, state opinions based on their expert knowledge and experience, hear opinions from the persons concerned with the case for the resolution of the dispute as commissioned to do so, and perform other necessary affairs as specified by the Supreme Court in order to process conciliation cases.”

The following rules exist at the final stage of the civil conciliation.

Article 14 of the Civil Conciliation Act provides that, “Where there is no likelihood of any agreement to be reached between the parties or where the conciliation committee finds that the agreement reached is inappropriate, and if the court does not make an order set forth in Article 17, the conciliation committee may close the case, considering that conciliation is unsuccessful.”

Article 16 of the Civil Conciliation Act provides that, “When an agreement is reached between the parties at conciliation and it is entered in a record, conciliation becomes successful, and such entry shall have the same effect as a judicial settlement.”

Article 17 of the Civil Conciliation Act provides that, “Where conciliation conducted by the conciliation committee is unlikely to be successful, and when the court finds it appropriate, the court may, by its own authority and to an extent that does not run counter to the objects of the petitions of both parties, make a necessary order for resolution of the case by hearing the opinions of the civil conciliation commissioners composing said conciliation committee, giving consideration to equity in the interest of both parties, and taking into account all relevant circumstances. Through said order, the court may order payment of money, delivery of an object, or any other provision of economic benefits.”

Article 18 of the Civil Conciliation Act provides that, “(1) A party or any interested person may make an objection against the order set forth in the preceding Article. The period for making such objection shall be two weeks from the day on which the party receives the notice of the order.”

In this way, the civil conciliation is intended to resolve disputes over civil affairs in accordance with the rules of the reason and the circumstances of the disputes by a compromise between the parties.

III. Norms of civil conciliation

As previously mentioned, the civil conciliation is intended to resolve disputes over civil affairs in accordance with the rules of the reason and the circumstances of the disputes by a compromise between the parties. Because of this, the norm that should depend in civil conciliation is the rules of reason.

The following are examples of the basic values in the civil conciliation.

(1) Resolution of disputes over civil affairs in accordance with the rules of reason and the circumstances of the disputes.

The ADR system called civil conciliation is not our country's original, but civil and family conciliation are common at the following points. Both systems are common to the point of planning resolution of disputes in accordance with the rules of reason and the circumstances of the disputes by a compromise between the parties.

A. The rules of reason as standards of dispute resolution

As a dispute solution norm, dispute solution standards include various things such as judicial precedents, theories, rules of reason, solution approach of settlement in a suit, mediation and arbitration, technical judgment, custom, law of natural, etc..

B. The rules of reason as a fundamental value system

The rules of reason is an abstract and contains many definitions and synonyms such as: "natural Justice," "ex aequo et bono," "ultima ratio legis," "gesundes Rechtsgefühl oder Rechtsempfinden."

IV. Structure of the fundamental value system in the base of the civil conciliation

The considerable values in the civil conciliation can be organized as follows:

(1) Justice

Value called the justice is regarded as important part in the conciliation. Our legal system consists on the common idea to be based on justice and to plan fair solutions not only in the Civil Procedure Law, but also the Civil Conciliation Act.

(2) Logic (Legal inference and value judgment)

Legal inference and the value judgment have a profound meaning in the conciliation. In the conciliation practice, the solution criteria of a traffic accident are applied with modifications, and legal inference and value judgment are really made for granted.

(3) Judgment criteria

The legal value is the most important part of the criteria in the conciliation.

(4) Exclusion of arbitrariness

In the conciliation, exclusion of arbitrariness is considered that it is more basic for justice than mere equality. The justice demands concretization and the transparency of the criterion, and the criterion requires exclusion of arbitrariness. It can be classified with the exclusion of arbitrariness in "equity," "spirit of harmony," "efficiency," "rationality of dispute resolution," "fairness," "equality" and "appropriation."

(5) Equity

When it is not proper to just apply the law, the principle of equity considers the individuality of each case and keeps the balance according to the morality, makes modifications and it is deeply-committed to the specific justice.

(6) A spirit of harmony

"Harmony" has a very deep meaning. The means of the law is an argument and persuasion to premise "harmony." It prescribed that the Seventeen-Article Constitution (year 604) considered being the Japanese first constitution should depend on an argument not military power about the solution of the dispute in a clear provision. "The spirit of harmony" can be classified in "agreement," "The trust deserves protection," and "general dispute solution."

A. Agreement

The value called agreement is led by the spirit of harmony, and how this spirit of harmony develops in the conciliation practice. In the basic value system in the background of the legal proposition, "the conciliation is a peaceful dispute solution by the compromise and agreements between the parties," it may be said that spirit of harmony exists. The value of agreement branches out into three value: "specific justice," "respect for intent of the parties," "flexibility of the solution."

(a) Specific justice

In practice, every law does not fully match with the social progress. Each law cannot appropriately support various modern disputes that occur in the society. When lawyers solve disputes in accordance with the circumstances of the disputes, the legal value called the specific justice is taken firstly into consideration.

(b) Respect of intention of the parties

A Conciliation Committee aims at the agreement in deference to the free will of the parties. The Conciliation Committee should persuade the parties to lead it to the voluntary agreement.

(c) Flexibility of dispute resolution

A Conciliation Committee can establish content of the dispute resolution freely to be based on an agreement of the parties. In the conciliation, the conciliation committee can plan equity and proper resolution in line with the fact of individual cases concretely.

B. Trust deserves protection

The conciliation must be carried out based on trust and the cooperation of conciliators and both parties. To that end, conciliators must have good faith in deference to the parties. The abuse of right is included in this legal value.

(a) Abuse of right

When a party negotiates insincerely and abuses the procedure of conciliation, the prohibition of abuse of right plays the most important position in the conciliation.

C. Holistic dispute resolution

The holistic dispute resolution is the resolution that both parties and experts and the public opinion can be convinced, and is led by the spirit of harmony. The legal value called holistic dispute resolution can be classified into "balance" and "profit."

(a) Balance

When there is an obvious difference in power between the parties, it is necessary to lodge a claim in order this difference to be nullified in order to guarantee equal opportunity.

(b) Profit

Profit can be classified in general profit and economic profit.

(7) Efficiency

The value that an alternate method makes much of in civil conciliation is this effectiveness. Conciliators are there to take every claim seriously and the circumstances of a party individually from the situation in support of an alternate method. The conciliators are there to grasp the true intention from a party and promote a resolution from this standpoint. In Europe and America, conciliators adopted part of alternate method, and in Japan, conciliators showed a stronger intention to solve using advantage of the both alternate and same sitting method on a case-by-case basis. "Simplified, prompt and inexpensive dispute settlement" is led by the value of effectiveness.

A. Simplified, prompt and inexpensive dispute settlement

In conciliation practice, it may be said that temporarily quick cheapness characteristics of the resolution is given priority in comparison with a trial.

(8) Rationality of dispute resolution

The conciliation system should be utilized enough to solve various kinds of disputes in the everyday life rationally and reasonably.

(9) Fairness

The legal value of the fairness occupies the important position in not only the case in the trial but also the conciliation.

A. Neutrality

Some legal propositions that "the remark contents of the opposite party must be heard equally" and "No judge can judge oneself" are included in legal value of neutrality. Conciliators must be neutral and impartial in the conciliation practice.

B. Impartiality

Conciliators must be neutral and impartial in the conciliation practice. Legal value called impartiality in the conciliation can be defined as a judgment and impartial fairness. It is concerned with "fairness" and "neutrality".

(10) Equality

The legal value called equality falls into "When it is suspicious you should divvy up equally," and "You should carve-up by lot elsewhere when there is not a method."

(11) Appropriation

In the civil conciliation, it goes without saying that value called appropriation is also important.

A. Hunt for the truth

The truth of the case must be grasped well enough to get the resolution according to the fact of the case. It is common with legal value called appropriation.

V. Conclusion

In the civil conciliation, adjustment between several values is required. Several values to be considered are as mentioned above. Specifically, they are as follows: (1) Justice, (2) Legal inference and value judgment, (3) Judgment criteria, (4) Exclusion of arbitrariness, (5) Equity, (6) A spirit of harmony, (7) Efficiency, (8) Rationality of dispute resolution, (9) Fairness, (10) Equality, (11) Appropriation. The most important thing is the balance between these values.

Reference

[1] Japanese Law Translation Database System (Copyright © 2017 Ministry of Justice, Japan. All Rights Reserved.)

Act on Promotion of Use of Alternative Dispute Resolution (Law number: Act No. 151 of 2004, Amendment: Act No. 50 of 2006, Dictionary Ver. 1.0, Translation date: April 1, 2009)

Civil Conciliation Act (Law number: Act No. 222 of 1951, Amendment: Act No. 152 of 2004, Dictionary Ver. 5.0, Translation date: December 16, 2010)

Code of Civil Procedure (Law number: Act No. 109 of 1996, Amendment: Act No. 109 of 2006, Dictionary Ver. 3.0, Translation date: April 1, 2009)

[2] General Secretariat of the Supreme Court of Japan, Civil Affairs Bureau(ed.), *Commentary on the Civil Conciliation Act*, Civil Procedure Document No. 98 (1970), p.6

[3] Hayato HIRATA, A Systematization of Background Knowledge of the Fair and Equitable Principle, Hajime Yoshino (ed.), *Research on Development of Legal Expert System-Clarification of Legal Knowledge Structure and Implementation of Legal Reasoning-*, Study Report 1998 (written by English), pp.74-89

[4] Hayato HIRATA, Legal Hermeneutic Study of Good Faith in terms of Rhetorical Topical Thinking, *Nagoya University Journal of Law and Politics* No.207 (2005), pp.47-94

[5] Hayato HIRATA, On the way of civil conciliation — the conflict between the legal gap type and law-oriented type, *Reality and Theory of the ADR II*, Takeshi Kojima (ed.), Chuo University Publication Association, (2005), pp.179-213

[6] Hayato HIRATA, *The Principle of Good Faith and What Underlies the Principle*, (Seibundo, 2006)

[7] Hayato HIRATA, On the Legal Value Function in Judgments—Utilization to Legal Education to Promote Creative Legal Minds, the Final Report, *the Report on the Research Results supported by Grant-in-Aid for Specially Promoted Research "Research on Development of Legal Education Methods to Promote Creative Legal Minds-Towards the Science of Law Creation 2002-2006,"* (2007 written by English), pp.267-281

[8] Hayato HIRATA, Legal Value Judgment in Dispute Resolution, *the Festschrift of Dr. Takeshi Kojima's 70th Birthday, Principles and Policies of Civil Justice [the second volume]* (Shouji Houmu, 2008), pp.183-211

[9] Hayato HIRATA, The Reframing Detection Focused Attention on Topic Flow, *Business Management Law* No.17 (Japan Association of Business Management Law, 2015, written by English), pp.85-96