

Some Theoretical Problems Concerning the Sentencing under the Lay - Judge System in Japan*

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I . Introduction

This thesis aims, first of all, at presenting, how sentencing under the lay-judge system¹⁾ has operated since its inception, and then points out some theoretical problems in relation to sentencing by lay-judges pursuant to the

* This thesis summarizes the presentation I gave in the 16th World Congress of the International Society for Criminology, which was held on the August 5-9, 2011 in Kobe, Japan. Our session was titled “Recent Trends and Issues in Japanese Sentencing System”. The organizer was Prof. Yuji Shirotsita (Hokkaido University), and the two other presentations were “Tendency of Japanese Sentencing Observed with Statistics Data” by Prof. Toru Kojima (Aichi University) and “The Analysis of the Quantitative Criterion Discriminating the Sentencies of the Death Penalty and the Life Imprisonment with Labor in Recent Murder Cases by Prof. Kazuhiro Watanabe (University of Toyama). I present Prof. Obata and Prof. Miyagi with this thesis, taking the opportunity of their resignation.

Sentencing Theory in Japan.

Whether the punishment under the lay-judge system has changed from that under the professional-judge system, has not yet been statistically clarified²⁾. This problem will have to be verified in detail after there are a numerous number of cases to compare. As Table 1 indicates, there have already been 2,099 cases for two years that were tried under the lay judge system. These are the three most crimes, but even the most frequent crime, that is robbery causing injury, has only over 500 cases. For this reason I cannot reply only on official statistics, but must base my remarks on what I see as the prominent and recent tendencies I have observed. Certainly sentencing by lay judges has resulted in important changes from the past³⁾. Thereafter, I will give a few brief comments on some problems of this new tendency from point of view of the sentencing theory in Japan. The following Part II pertains to the former features of the sentencing in the trial, and in Part III I will give an account of the differences of sentencing under the lay judge system. In Part IV, I will examine the problems of the above mentioned new tendency as it pertains to the length of sentences or punishment theory in Japan, apart from criticizing the lay judge system itself.

1) The lay judge (saiban-in) system started on May 21, 2009. In this system the ordinary citizens who have been randomly selected from eligible voters participate in trials only for the most serious of criminal cases like homicide etc. The trial court consists of three professional judges and six lay judges. They determine not only fact-finding (whether the defendant is guilty or not), but also sentencing. Lay judges serve not in a certain term, but only in one case.

2) We can obtain information and some statistics about the present state of lay judge trials by the home page of the Supreme Court. I made the Tables 1 – 3.1 below on the ground of the data between May 2009 and March 2011 obtained from materials of the Supreme Court. See [Table 1].

3) It is generally said, that defendants are more severely sentenced especially for sexual offenses. Apart from the punishments, some important changes have occurred, for example, in the way of reasons and grounds of sentencing in decisions. See below for further details.

【Table 1】 2009.03 ~ 2011.03

Crimes	Finally pronounced persons	guilty	partly guilty	not guilty	Other*
Total	2,099	2,053	2	5	39
Robbery Causing Injury	523	513	—	—	10
Homicide	478	469	—	1	8
Arson of Inhabited Buildings	194	181	1	—	2

*Other: dismissal of prosecution, transfer

II . Sentencing Practice before the Lay Judge System

In this Part, I will explain some distinctive characteristics of the sentencing practice by professional judges, in order to compare that by lay judges with it later. First, professional judges observe what is called “Sentencing Quota”⁴⁾. That means there has been a tradition among judges regarding the sentencing of criminal defendants. Judges can and should consider all the circumstances of each case in detail and determine a correct and proper amount of punishment in every view of retribution, rehabilitation and deterrence and so on. This tradition is not written down anywhere nor described at all in anyway, and in this regard, this tradition is, so to speak, like a black box, which nobody except a judge can verify and determine. Only judges can understand this non - written tradition, and

4) Sentencing had long been held only in hand of judges and prosecutors. Because the statutory penalties of the Japanese Penal Code are very wide (that of homicide § 199 Japanese PC is “death penalty or imprisonment with work for life or for a definite term of not less than 5 years”), which is one of its characteristics, the role played by judges have been even more important. It is said, that they possess the Sentencing Quota in common with themselves. Based on this practice, in other words, their experiences, they can reach the concrete sentencing, so to speak, by intuition. According to the Sentencing Quota, standardized equal sentencing without big differences is to be realized overall in Japan.

because it is said, that judges can reach a right and just punishment⁵⁾ by intuition according to the tradition.

The second characteristic is, in connection with the first one, that the reasoning described in a decision is very difficult to find the real consideration of the judge on the ground of. One of the representative examples of reasoning is a very long and complex with a detailed story of the case itself and the defendant, beginning with his birth and ending the circumstances after the crime, for example. But it doesn't always give any detailed account, on which ground the judge principally estimate the punishment, which weight each factor had, whether each factor is aggravating or mitigating. Another of the representative examples is "the aggravating factors are …, and the mitigating factors are …". In this case, we, also researchers, cannot understand, which factor the judges found important. In this way it was almost impossible for researchers to do research in sentencing factors.

This practice has been significantly changed regarding some points of the lay judge trial. But lay judges only participate in certain serious criminal cases. Therefore, it can be said that sentencing are now divided into two ways, that is, sentencing by professional judges according to the sentencing Quota, on one hand, and sentencing by lay judges who don't know it, on the other hand. The tradition of sentencing also still remains for a majority of criminal cases tried only a professional judge or judges.

Ⅲ. Sentencing Practice by Lay Judges

Some new changes of the sentencing practice by lay judges⁶⁾ are very

5) At least in the postwar days, the retributive perspective has always been predominant among lawyers and ordinary people in Japan, even though its meaning is sometimes understood quite differently.

remarkable. It is clearly different from those by professional judges concerning some points. The past sentencing practice, that is, consideration of all various sentencing circumstances, very long reasoning, complicated consideration by judges like a black box, was made possible due mainly to the length of a given trial. It often took some years, and in extreme cases more than 10 years to complete a trial. Certainly one of the main aims of the recent reform of our judicial system was to make trials more rapid or speedy. A trial by lay judges only lasts 3 or 4 days on average now⁷⁾. Consequently evidence not only on guilt of an offense, but also on its sentencing has to be strictly selected and regulated, and not all evidence considered, but only the evidence that has be carefully selected should be brought forward on trial. Trial judges can no longer describe a long story regarding sentencing factors. Lay judges shall confer with each other and the three professional judges about the proper decision to be rendered in a given case. Therefore the evidence on which they can base their decision during deliberations is much more limited. In the decision they make it clear, what they took into consideration or what they didn't attach importance to. Moreover some decision denied the importance of a sentencing factor. We never saw this before in the former judge only style of reasoning. Apparently the stated reasoning of a sentence by lay judges has gotten shorter, more precise and easier to read and understand for the ordinary people, and at the same time also for researchers. Further analysis of the said reasoning are necessary and its result will lead to the development of Japanese jurisprudence.

6) The information below was obtained mainly from the research by the Japan Federation of Bar Associations.

7) *See* [Table 2].

【Table 2】
total; 1,949 cases, average; 4.4 days



IV. Criteria for Sentencing — Retribution and Proportionality between a Crime and a Punishment

In Part IV, I limit the discussion to only two problems, although there are a lot of theoretical and actual problems about sentencing practice these days. The first problem is what should be the leading criterion of sentencing.

The second problem is whether the sentencing tradition, what is called, “Sentencing Quota” should continue to play a role. I shall now discuss them in turn.

The first problem is quite basic and general in the sentencing theory. Up until now lawyers have laid weight on the “principle of responsibility”. It is derived from the German law⁸⁾, while at the same time we also speak of the “proportionality between a crime and a punishment”, which is known especially as a feature of the Angle - American law⁹⁾. A question arises as to whether these two criteria are identical with each other, whether they should be answered using

8) The German Law has constantly given a lot of great influences on our jurisprudence since the prewar days, including that the Japanese Penal Code was inherited from the Prussian Law.

9) The influences from the Anglo - American Law are new especially after the Second World War.

comparative law. Other various issues should be examined which accompanying these principles, that is, their grounds, contents, effects, and application etc. These problems remain as a matter to be discussed further and against a new and developing backdrop.

The second problem has provoked a controversy these days. That is: Should lay judges also obey the tradition of sentencing among professional judges? The point of this problem is as follows; we have introduced the lay judge system, by reason that we need democracy in our judicial system and also the common sense of the ordinary people, in order to pass appropriate judgment. Then should sentencing also be democratized and should lay judges decide sentences as they like? As time is limited, I have to give up treating various opinions about this point. I will instead present only my personal conclusion. That is, without obeying the tradition, lay judges should not base their decision concerning proportionality by relying on what happened in other similar cases.

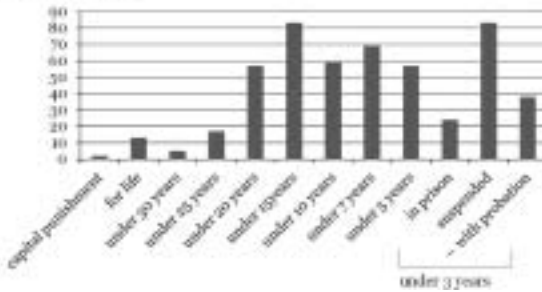
The sentencing practice by lay judges agrees in part with my opinion and disagrees in part. In the former aspect, the computer search system, what is called, “sentencing data base” is available for each court to confer about sentencing. This system was constructed by the Supreme Court and is nationwide in Japan, but it isn’t open to the public. When searching key words, for example, the term “one or two victims”, “with or without a weapon”, and so on, are input into the search, one can see both in a graph and in a table, to how punishment is determined in similar cases. Speaking of the latter aspect, some statistics indicate that sentencing by lay judges seems very chaotic¹⁰⁾ and it has done damage to the proportionality of punishment. It means that lay judges are not ready to follow the tradition.

10) See [Table 3 - 1] and [3 - 2].

【Table 3-1】
homicide

total of guilty: 469

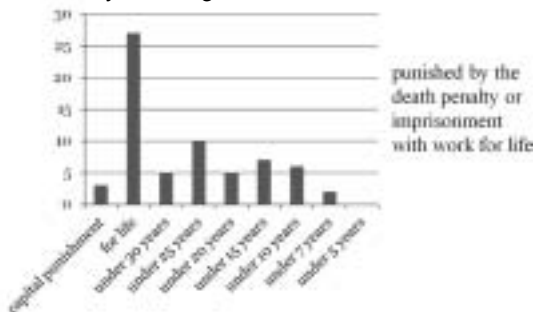
punished by the death penalty or imprisonment
with work for life or for a definite term of
not less than 5 years



【Table 3-2】

Robbery Causing Death

total of guilty: 65



V. Get-Tough-Tendency in Lay judges?

I will give only a brief comment in this Part. It would be premature to analyze the sentencing practice in the lay judge system statistically, because it is only two years since the lay judge system began. It is surely an assignment for us in the future. However, suppose that a get-tough-tendency in recent trials is supported by statistics, but it isn't necessarily due to the lay judge system itself, as we had some important reform in the Criminal Procedure Law. For example, a victim can give his opinion in the court. Not to mention, several reasons, combined with

the lay judge system, could lead to a certain tendency of the criminal justice.

Nevertheless we have gotten an impression, that well - known cases, as in the newspapers, are bipolarized, that is, serious crimes are punished with a severe sentence, like sexual offenses, on the one hand, and when lay judges feel sympathy toward an accused, they tend to granted a stay of execution with probation, in spite of a serious crime, on the other hand. For example, it is the case, in which the accused kill his or her father or mother, who had been ill in bed and whom the accused had been fatigue as a result of nursing him for a long time.

VI. Conclusion

Anyway we will have to keep our eyes open for the future, regarding how things go in the lay judge trials to come. There will certainly be a lot of materials to be examined. Then we will have to struggle further with the theoretical problems on sentencing, based on the practice in the lay judge trials. We will obtain a lot of productive results both for researchers and for the practice.