

# Lay Judge System and Social Bias

– Japanese lay judge system can be free from the influence of prejudice on the mental disorders?<sup>1)</sup>

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## Abstract

This paper aims to indicate a problem in Japan's lay judge system and to suggest the importance of support for lay judges to avoid the influence of social bias in court decisions.

The Japanese lay judge system was created in 2004 and it became effective in 2009, in order to “promote the citizens’ understanding of and enhance trust in the judicial system.” But after its creation, some problems of this system have become clearer.

Here, we trace the case of a woman murdered by her brother who suffered from attention deficit hyperactivity disorder (ADHD). In this case the defendant was sentenced to 20 years imprisonment over the public prosecutor’s demand by Osaka District Court with a panel of lay judges. The judgment was based on a misunderstanding by lay judges sustained with social bias toward mental disabilities and a conviction the lack of information on social welfare assistance for the people with

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1) This paper is a manuscript of the presentation at XVIII ISA World Congress of Sociology 2014, Yokohama, in the session of sociology of law (chair: Professor Ii Takayuki, Sensyu University) .

In recent 2 years, the cases of murder of the persons with mental or intellectual disabilities have happened one after another; the case of murder by the ancient helper that the lives of 19 persons with intellectual disabilities have lost, on the reason of “unnecessity of the person with intellectual or mental disabilities” and “necessity” of “euthanasia of the people who cannot communicate”

mental disorders. This judgment indicates the necessity of more support for lay judges.

## Introduction

Good sense is the best distributed thing in the world:  
for everyone thinks himself so well endowed with it that  
even those who are the hardest please in everything else  
do not usually desire more of it that they possess.

-Descartes, *Discourse on the method*<sup>2)</sup>

Should Court respect the judgment of lay judge when the lay judges had not enough knowledge concerning to a specific psychological conditions or a disorder caused by mental disabilities?

For long time, Japanese people have been used to the law institution that the law system and the judgment of Court are constraint to citizens. It had seemed difficult to imagine that a lay judge can participate in the procedure to drafting a law or to make a judgment of the Court. Creation of lay judge system changed the relation between Court and people. It has made a chance to rethinking the decision of Court as the result of our decision.

However, after the creation of Act on criminal trials with the participation of Saiban-in in 2004 and the first practice in 2009, some problems of this system have been progressively appeared. There are some criminal cases that lay judges demanded harsher punishment than the demand of public prosecutor<sup>3)</sup>. For example, the Report on the Court Practice with Saiban-in, indicates that the demands on harsher sentencing by the lay judges are few except for the sexual violence cases. But in the famous case of

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(Sagamihara Jiken), a case of a daughter being left to die after the neglect by her parents (Neyagawa Jiken), and so on. The case in this paper might be seen the case in past, but regarding these recent cases, in order to rethinking our biased point of view and the lack of the social acceptance of the people with difficulties, it might be reflected what happened on the court concerning this case on the criminal with mental disease.

2) translated by J. Cottingham, R. Stoothoff, D. Murdoch, *The Philosophical writing of Descartes*, Volume I, Cambridge U.P., 1985, p.111/AT-VI, p.1-2

3) Evaluation Report on the practice of Trial judge system, Supreme Court, 2012 (「裁判員裁判実施状況の検証報告書」, 最高裁判所事務総局 [http://www.saibanin.courts.go.jp/topics/09\\_12\\_05-10jissi\\_jyoukyou.html](http://www.saibanin.courts.go.jp/topics/09_12_05-10jissi_jyoukyou.html))

murder with sexual abuse of housewife and her child, called Hikari-shi Boshi Jiken, the Supreme Court admitted the judgement of the High Court with the death penalty, being pushed by the demand of society's voice. There are several reasons about the harsher punishment; the outdated articles which created under the constitutional monarchy before the end of Second War II, the change of view on the human rights, especially the rights of women, the social demand to consider the sentiment and the damage of the victim and people concerned, the influence of the social norm and prejudice on lay judges, and so on.

Here, in order to clarify the necessity of recognition on an social based prejudice and of support to lay judge, I trace a judgment of Osaka District Court concerning to a murder caused by a man with attention deficit hyperactivity disorder (ADHD). In this case, the Court made a judgment of 20 years of imprisonment beyond the demand of the public prosecutor. The judgment is derived from the misunderstanding that the society has not any institution or facility where accepts an ex-convict with mental disabilities. The judgment based on the lack of knowledge concerning to ADHD makes us to notice the necessity of the support for the lay judges when the specific information is needed to examine the case.

## **1. The case and judgment of the murder by a man of ADHD in Osaka**

### **1. Case and judgment**

The case of murder by a man with ADHD happened at early afternoon of July 25, 2011. The man has been social withdrawal for 30 years from 19 years old until the case. He had been a target of school bullying by his classmates and he had complained to his parents to relocate to another school area where he has never seen the children. But his parents didn't accept his demand and made their first daughter, the future victim, to leave from their house with their second daughter. His educational experience terminated at the fifth year of elementary school and he has not had any relationship with others except for his family.

When he was 20 years old, his father was died and his auditory hallucination had developed. He had deprived a part of the salary of his mother and made her to go the elder sister in order to demand money. He had suffered the compulsive idea of suicide and asked her to give him a PC in order to seek some information about it. But his sister

provided a computer in occasion disconnected to Internet and it had increased his angry against her.

When his mother had to hospitalized in 2008, his elder sister came to his house and delivered foods and the commodities. His sister, who decided his mother's hospitalization, left a message to him that he must pay by his own money for buying his foods and other things. He doubted that his sister stopped to help him and revenged him. He attacked with a knife his sister at several times and made her to die because of hemorrhagic shock.

The Osaka District Court made a judgment of 20 years of imprisonment more than the demand of the public procurator. The Court counts these points as the reason of this judgment:

1. cruelty of his attacks to his own sister who had aided him for long time and who tried to escape from him,
2. demand of his family to make him never release from the prison and to never see him,
3. his sufficient faculty of reasoning at the moment of the fact and the nature of planning on killing his sister, although his attitude and his misunderstanding on his family came from ADHD that ought to be considered,
4. as the conclusion, considering lack of the acceptance of the people with ADHD in this society and his family's reject to take care for him, the Court decided the 20 years of imprisonment in order to make deep reflection being under long detention.

The accused dissatisfied and demanded the reverse of this decision to the second instance because the Court had not a correct understanding on the symptom of this mental disorder.

The High Court of Osaka examined the sentence of 20 years imprisonment of the first instance, reversed the original sentence and rendered the sentence of 14 years.

The reasons of the judgment of the Court are :

1. the original judgment had been examined the question of law in considering the nature of crime and there are not any ground to permit a custody as the prevention at the sake for society,

2. the judgment of the first instance can be approved because his reason at the time is clear and he understands well his culpability of murder,
3. but the sentence of 20 years of imprisonment is not acceptable because the absence of social understanding on ADHD cannot justify the demand of harsher instance in the category of the crime of murder.

The High Court did not admit that the judgment had been written with the view of discrimination of the ADHD, saying that the sentence was not against the principle of reliability. The judges indicated that the problem of the first instance's judgment is related to the assessment of the culpability.

July 22, 2013, The Supreme Court rejected the final appeal of the accused and the sentence of 14 years' penal servitude is binding.

## 2. Lay judge system and the sentence without the extenuating circumstances

As soon as the reveal of the first instance of this case, the protestations against this judgment has published by Association of Bar of Osaka, Associations of Psychiatrist and several Associations of the Mental Disease, especially Association of the Patients of Autism. Concerning to Association of Bar of Osaka, the president announced that the judgment has two grave issues, that is, the judgment is against the principle of reliability and secondly, it encourages the prejudice and the discrimination against the developmental disorder. He pointed out that the conclusion based on a lack of understanding of developmental disorder and the aim of Act on support for persons with developmental disabilities (Act No.164 of December 10, 2004)<sup>4)</sup>.

Mikio Sato, journalist with the experience of teacher in the school of children with mental disorders, has written on this case in the series on the monthly journal Sekai, interviewing the defense council and the other layers of Osaka Bar Association, the psychoanalyst of the crimes, the psychiatrist specialized on mental disorders and other persons concerned.

This case was the object of the lay judge system called Saiban-in system. Act on

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4) Comment of President against the judgment of Osaka District Court on the case of the murder of sister by a man with developmental disorder, August 7, 2012, Osaka Bar Association, [http://www.osakaben.or.jp/web/03\\_speak/kanri/db/info/2012/2012\\_5021d6f2e13e7\\_0.pdf](http://www.osakaben.or.jp/web/03_speak/kanri/db/info/2012/2012_5021d6f2e13e7_0.pdf)

criminal trials with participation of lay judges, Saiban-in of Act No.63 of 2004, prescribes the cases applied to this system: case of homicide, a heavy injury causing death to victim which falls the death penalty, or life imprisonment with or without work. The explication in the site of Supreme Court of Japan says that “certain types of serious crimes in which there is strong public interest, such as homicides, robbery causing death or injury, arson of inhabited buildings, and kidnapping for ransom”<sup>5)</sup>.

One of the most distinctive features of Japanese lay judge system is in the point that lay judges join the panel and determine the sentence with the professional judges. Generally, in the similar court system as like that of France or of Germany, the lay judges discuss with the professionals at the step of the fact finding, but they don't join the panel of making a sentence. But in Japanese system, the lay judges are demanded to participate in the important step of criminal procedure: fact finding, application of laws and regulations and sentencing. The panel is composed by 6 lay judges and 3 professional judges including a presiding judge (paragraph 2 of art.2). This composition of members of panel signifies that when a presupposed sentence of lay judges is far from that of judges, the judgment of the lay judges should be adopted.

Sato interviewed the defense council, Yamane Mutsuhiro, and reported that lay judges had not interrogated him at the court. According to Yamane, there were the several characteristic responses of the Asperger disorder but that the words of the accused gave an unfavorable impression to the people without special knowledge on it. He showed to Mr. SATO an impressive dialogue.

Judge : What is the thing that you want to do now?

Accused: Being liberated from the all obligations as soon as the trial is over.

Judge : If you are not accused and at liberty in this moment, what you want to do?

Accused: I don't want to dispute a case of supposition<sup>6)</sup>.

Asperger disorder of the accused was never looked out before the procedure of the fact finding of the public prosecutors. They demanded a confinement pending expert

5) Supreme Court of Japan: [http://www.courts.go.jp/english/judicial\\_sys/criminal\\_contents/criminal\\_text/index.html#07](http://www.courts.go.jp/english/judicial_sys/criminal_contents/criminal_text/index.html#07)

6) SATO Mikio, Understanding on the developmental disorder and the lay judge system (発達障害への理解と裁判員裁判), *Journal Sekai* No.236, August 2013, Iwanami-shoten, p.237

evaluation for three months and at this occasion, his Asperger disorder is diagnosed.

### 3. The ground of the sentence of first sentence and another possibility of judgment

The first moment that the murder had happened, media didn't pay attention on this case. But as soon as the appeals of protest had been appeared by the associations of the people with developmental disorders and autistic disorder, Osaka Bar Association and other societies, media started to treat this case from the perceptive of the lack of support to the people with mental disorders. The fact that he and his family have not had any support from the administration and community for 30 years and that his Asperger disorder had not looked out until the examination of mental condition by the public prosecutor, has drawn their attention.

In these days, there were some affairs caused by the person with developmental disorders. In the affair of Neyagawa Central elementary school, Osaka, February 14, 2005, a young man, ex-student of it, killed a teacher who tried to make him out of the school and injured another teacher and a staff.

This case was attracted the social attention, because it was the examination of mental condition that the fact was clarified that the criminal has a pervasive developmental disorder. Sentencing was difficult because of his developmental disorder, although the Juveniles Act with the intention of the protection of minors and their rehabilitation is applied on it.

Recognizing the particular nature of a person with this disorder, Japanese government enacted the Act on medical care and treatment for persons who has caused serious cases under the condition of insanity<sup>7)</sup>. This act is made in order to rehabilitation of the criminal with mental disorder. The object of this act is the criminal who was under insanity or diminished capacity when he or she had harmed other person. Instead of demanding his or her responsibility of act, this act regulates the procedure aiming at the guarantee of his or her medical care, the prevention of the crime and his or her rehabilitation in this society (art.1).

But in Osaka case, it seems not to examine the possibility of application of this act. The lay judges had not interrogated to the accused and seemed to judge along with the

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7) 心神喪失等の状態で重大な他害行為を行った者の医療及び観察等に関する法律, 平成15年7月16日法律第110号.

impression of his responses. Addition to this impression, the demand of his family to never release him made an atmosphere to demand harsher punishment by the reason of the lack of the welfare system and of the social reception of the people with pervasive developmental disorders.

According to Mr. Sato, Mr. Yamane, defense council, expected to the lay judges an appropriate understanding on Asperger disorder but they seemed no to have any apprehension on this disorder by the thinking that “concerning to the formation of motive, his situations may form the psychological condition to do the crime”.

## **2. When Court judgment admits the social prejudices**

### 1. Social acceptance of the patients of mental disorders

In these days, it seems that people have progressively lost tolerance toward the pervasive developmental disorder. This impairment is recognized as a disability at the occasion of enacting Services and Supports for Persons with Disabilities Act at November 7, 2005. This act seems to be a double-edged sword – these acts aim to protect the human rights and lives of the person with disabilities (we must add that this act has hidden another aim of reducing the budget of social welfare), because the recognition in the laws caused a reason to exclude the people giving a stigma.

As soon as the characteristic of this mental disorder has come to be known, exclusion of the children and the adults with this disorder has appeared. One reason of the obstacle of the persons with pervasive mental disorder concerning to social integration is derived from the fact that structure of the Japanese society cannot make a place of the conduct and the characteristic behavior of this disorder; people are demanded to “understand” the atmosphere of the reunion and to conduct along with the context of the situation, but the person with this impairment cannot understand the implicit rule of communication. Because of the conflict from misunderstanding on him or her, exclusion of the person with these disorders tends to be justified.

The opinion survey on the person with disability published at September 24, 2012<sup>8)</sup>, shows that eyes on the person concerned have not been tolerant. The policy of government on the society of symbiosis has not been known for 40.2% (people who

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8) Number of the research object is 3000 pers. of Japanese nationality. And the valid responses is 1913 pers., 63.8%. Two phase random sampling.

had heard the words is 21.2%) of the survey respondents. Concerning to the social understanding of the person with pervasive mental disorders, 33.6% of the survey respondents admit but there are 59.9% of them who respond that it is not enough. But it does not signify that the many people thinks the necessity of positive social acceptance. People they think they don't or cannot want to support them but it is necessary to discuss between the people concerned and to announce it<sup>9)</sup>. We must add 46.1% of response for the point of view that the special support means or causes the discrimination to the person concerned<sup>10)</sup>.

Actually, the special support schools and classes which have the special curriculums for the students with disability and a teacher takes charge of 6 or 8 students in a class<sup>11)</sup>, are demanded year by year.

But on the other hand, when the person with the pervasive mental disorder lost the chance to look out his/her disorders, they can have few support concerning to his/her disabilities.

Returning to the case of Osaka, his ADHD has been looked out in the proceeding of criminal procedure and with the case, it is clarified that there the accused and his family had not benefited any social welfare services including special education and medical care. In other words, the accused and his family had isolated from any administrative care system and also the local community. As the result, his family cannot understand the causes of his behaviors and his thinking and they have left him in his room being scared by his violence.

But the situation of the accused and his family didn't make a reason of petition for commutation of sentence. Professor Ogata Ayumi indicates that the judgment of Osaka District Court referred to the actual situation of the support system of the pervasive mental disorders, but that the court didn't recognize a positive ground but a negative one<sup>12)</sup>.

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9) 「障害に関する世論調査」 「障害者に対する施策について」 <http://www8.cao.go.jp/survey/h24/h24-shougai/2-3.html>

10) Table 15. on the rational support and the discrimination : <http://www8.cao.go.jp/survey/h24/h24-shougai/2-3.html>

11) On the special support school, Ministry of education, culture, sports science and technology Japan : [http://www.mext.go.jp/a\\_menu/shotou/tokubetu/007.htm](http://www.mext.go.jp/a_menu/shotou/tokubetu/007.htm)

12) Ayumi OGATA, *Judgement of Criminal Responsibility and sentencing of the developmentally*

## 2. The insufficient information and sentencing

The professionals on working groups concerning to creation of judicial system and others tend to think that the citizen understand well what is the human rights, the justice of procedure or fundamental notions which are composed for our democratic lives. But reflecting on ourselves, we know well in our ordinary life that we have very few knowledge which we hadn't had a chance to access. Concerning to Osaka case, we can imagine with our experience that lay judges and professional judges failed to reach a correct understanding on Asperger disorder and its characteristic of the communication, which made an impression that the accused didn't reflected and that it is difficult to make him live ensemble in the community.

So we can notice two phases of creating their misunderstanding on the accused, that is:

- the lack of the information on Asperger disorder, especially the characteristic of this disorder and the social support,
- the lay judges' insufficient understanding on the meaning of criminal proceeding and of the principle of protection of the accused, including that of the externation of the demand of the victim's family.

From the appeals and the articles, the great part of the reason on misunderstanding in this case seems to appear in the former phase. If the judges knew well that the person with this disorder can only respond literally to only question on which people ask him/her, they could make other way of interrogations. Concerning to the sentence, they might apply other act, especially Act on medical care and treatment for persons who has caused serious cases under the condition of insanity. But unfortunately, it seems not to offer the necessary supplemental information on Asperger disease and on the possible acts to apply on this case.

## 3. The judgment and social bias: distance between "folk" understanding and the professional knowledge

Concerning to the Osaka case, Mr. Sato, journalist, indicates that the lay judges had not posed any interrogation to the accused in the court. The lay judges seem to make

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*disabled*, Cyukyo Lawyer, Vol.19, September 2013, Law Institute of Cyukyo University, p.14 : [http://www.chukyo-u.ac.jp/educate/law-school/chukyolawyer/data/vol019/01\\_Ogata.pdf](http://www.chukyo-u.ac.jp/educate/law-school/chukyolawyer/data/vol019/01_Ogata.pdf)

a judgment by the examination with the Defense Council, the public procurer and the judges. We can presume the discussion of the panel : when one of lay judges had insisted on impossibility of his reclaim and necessity of hearing the voice of the victim's family, they tend to choose the heavier sentence ; when judges and the public procurer didn't present the applicable acts and laws, lay judges might not know any possible sentencing out of the way which the professionals indicated.

So we can look out some of the problem of Japanese lay judge system caused by inequality on quality and quantity of legal knowledge between ordinary people and judicial professionals. It is difficult for ordinary people to differentiate the sentencing from personal moral sentiment.

Atiq indicates that the "folk" understanding on free will and freedom is different from the notion of the free will in judicial court system. Studying the researches and analyses on death penalty and jurors, he points out that People "who have a strong belief in free will are inclined to support harsher penalties for criminals, and tend to unreasonably discount such underlying causes of crime as social deprivation and genetically impaired impulse control". He calls this tendency as "free will effect"<sup>13)</sup> .

So in order to modify the judicial system, we must count the way to compensate for the shortage of knowledge of lay judges, premising that they might have another understanding on the underlying notions of fundamental human rights and justice. Concerning to Osaka case, if the lay judges had had a chance to study the characteristic of communication of person with Asperger disorder and the social welfare of mental disorder, they might not demand the sentence for longer penal servitude.

## Conclusion

Everyone has mostly conscience, kindness and sense of justice, as Descartes says. The lay judges of Osaka case might have conscience and sense of fairness, and they may not suspect if their judgment was affected by the social bias on mental disorder lacking careful consideration on underlying cause of the accused including the characteristic of

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13) Emad H. Atiq, *How folk beliefs about free will influence sentencing: a new target for the neuro-determinist critics of criminal law*, in *New Criminal Law Review*, Vol.16, No.3, summer 2013, University of California Press, p.474

communication of Asperger disorder.

Descartes indicates that “the power of judging well of distinguishing the true from the false, which we call good sense or reason, is naturally equal to in all men”. After his methodical doubt in order to looking out truth on which all of us can surely accept, he reaches the famous thesis *Cogito ergo sum*. His cogito becomes the base of the notion of person which is developed to the notion of autonomy in modern democratic society. The lay judge system is sustained by the confidence that all the citizens have autonomy and conscience and can think beyond the social bias.

But we know well that a limit of ability of thinking exists – we cannot think about what we don't have any information. There are many occurrences because of the lack of the knowledge on mental disorders; not only the sentences biased by social norm but also the cases occurred one after another that the persons with mental disorders are killed after the confinement by their families<sup>14)</sup>. As long as the strong social bias exists, we may make a judgement affected by it.

Osaka case demands us the meaning of criminal sentence – does the criminal procedure function as social exclusion in order to protect our society or as social inclusion in order to rehabilitation of the criminal? In order to prevent a misunderstanding on criminal circumstances, it is important to provide information on the underlying situations of each case, including the social welfare and the applicable laws.

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14) 33 years old woman in dead has been found in December 26, 2017 after the confinement and the neglect for 17 years by her parents (Neyagawa confinement case, see the news site of Asahi Shinbun: <http://www.asahi.com/ajw/articles/AJ201712260022.html>).

42 years old man with the disabilities, who has been confined in a small cage by his parents, has been found in January 17, 2018, by the case worker of the administration. of Mita. see the site of Japan Times: <https://www.japantimes.co.jp/news/2018/04/07/national/father-arrested-confining-mentally-ill-son-cage-20-years/>

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