Capital Jury Instructions in Japan

Kazuyuki HORI
(Kyoto Bar Association)

[**Keywords**] Capital case, jury instruction, lay judge trial, duty of cofidentiality, sentencing

Introduction

In this article, I analyze the jury instructions for the capital cases in Japan from the viewpoint of protocols (assessment guides) of the American Bar Association (ABA).

Abstract of ABA's assessment guides

Firstly, in order to clarify the instructions so that juries will not misunderstand, the guides stipulate

1. Instructions should be evaluated, revised and monitored.
2. Jurors should receive written copies of "court instructions".
3. Trial courts should explain the legal terminology to the jurors.

Secondly in order to clarify how to apply the law, how to evaluate the evidence or factors and reach a decision, the guides stipulate

4. Trial courts should explain applicable law or examine parole practices to clarify jurors' understanding of alternative

punishments or sentences.

5. Trial courts should not place limits on a juror's ability to give full consideration to any evidence for mitigating factors.
6. Trial courts should instruct jurors that a juror may return a life sentence, if he/she does not believe that the defendant should receive the death penalty.
7. Trial courts should make clear that the weighing process should not be conducted by determining by a number of aggravating and mitigating factors.

Current Situation in Japan

1. Lay judge trial

Capital cases have to be tried by three professional judges and six lay judges since so-called lay judge trial was introduced in 2009.

The Japanese lay judge trial is slightly different from the jury trial in US or UK because:

a. Professional judges take part in not only the trial (open to the public) but also the deliberation (not open to the public).
b. The verdict can be reached by majority, not necessarily unanimity.
c. Proceedings are not bifurcated (into guilt and penal phases).

2. Lay judge instruction

Actually the presiding judge verbally instructs lay judges after

the lay judge selection before the opening of the trial pursuant to the lay judge trial rule (article 36) as follows.

a. Fact-finding should be based on evidence. therefore privately-acquired knowledge or the mass media reports should not be taken into consideration (Japanese mass media tend to report serious criminal cases, as if claiming such crimes are heinous and brutal and suspects are sure to be guilty, therefore they deserve to die. Thus sometimes lay judges are so contaminated by such reports that they could have prejudice against defendants and the instruction could not get rid of it).

b. The prosecutor bears the burden of proof and has to prove the defendant guilty beyond the reasonable doubt.

3. Duty of confidentiality

The foregoing rule is the only regulation about the instruction. However it is not only simple and general but also does not require the instruction to be given in the open court. Hence it is very hard to know how jay judges are instructed during the actual deliberation.

Moreover the lay judge Law (article 108) stipulates that the lay judge is subject to be punished with up to six months imprisonment or fine of ¥500,000 if he/she leaks the information acquired in the course of performing the duty such as how they reached the verdict, opinion of each judge, number of votes either for or against the verdict during the deliberation.

Although the said law dose not specifically prohibits lay judges

from how they were instructed by the presiding judge, it makes them reluctant to publicize whatever happened during the trial, thus makes us hard to know whether the presiding judge instructs appropriately.

4. No instruction

It is needless to say there should be law or rule that guarantees that professional judges appropriately instruct lay judges during the deliberation.

However because of simple and general regulation, no requirement of openness to the public or written instruction, and strict duty of confidentiality, most of actual instructions are hidden in the darkness.

Hence it is no exaggeration to say we have no concept or system of what the ABA calls "jury instruction".

5. Sentencing

1) Supreme court ruling

The supreme court of Japan ruled on Feb. 3, 2015 that

a. The death penalty is the ultimate punishment.

b. Therefore in light of fairness and equity, sentencing of capital cases should be proportional with the similar judicial precedents.

Namely in imposing the death penalty judges put priority on the range or scope inferred or established by the precedents, from which the sentence should not deviate in principle.

2) Actual Sentencing

In practice, during the deliberation lay judges are given a list of judicial precedents (ryoukei-hyou), classified by charged offense, number of victim (s), principal or not, motive, weapon, insanity or not, criminal record and so on (As a matter of course defense counsels can and should obtain this list before the trial begins to come up with the defense strategy.).

Firstly the general range of sentence is induced by the factors closely related to crime itself such as manner of the crime, motive, number of victim (s) and so on (Hanjou). And the final sentence is reached by considering other factors such as the history of defendant, the extent of remorse and so on (Ippan joujou, the court tends to put more priority on "Hanjou" than "Ippan joujou.").

Lay judges are able to examine any evidence as long as it bears admissibility and credibility. However sometimes trial courts replace terrifying evidence such as the pictures of murder victims with illustrations of them because such evidence might be too shocking for lay judges who have hardly seen such gruesome materials before.

Conclusion

1) The instruction is not required to be evaluated, revised, monitored.

Accordingly Japan is not in compliance.

2) Lay judges are not required to be given written copies of

instructions.

Accordingly Japan is not in compliance.

3) We are not sure whether or how the presiding judge answers lay judges' questions during the deliberation.

Accordingly we do not have sufficient information.

4) Trial courts are required neither to instruct jurors on available alternative punishments nor to examine parole practices.

Accordingly Japan is not in compliance.

5) Lay judges are able to examine any evidence as long as it bears admissibility and credibility but we do not know how lay judges are instructed about the way of weighing or evaluating the evidence.

Accordingly we do not have sufficient information.

6) The supreme court rules sentencing of capital cases should be proportional to similar judicial precedents, not based on judges' belief or sympathy.

Accordingly Japan is not in compliance.

7) We do not determine the sentence by a number of aggravating and mitigating factors.

Accordingly Japan is in compliance.