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Special Feature Article

Change in Psychiatric Evaluation after Enforcement of the Saiban-in (Citizen-judge) System

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Abstract

Ten years have passed since the Act on Criminal Trials with the Participation of Saiban-in (Citizen-judges) was enforced. In Saiban-in trials, the trial procedure changes greatly such as the necessity of pretrial conferences prior to the first trial date, daily opening of court hearings, and thorough orality. In addition, implementation of psychiatric examinations of criminal responsibility significantly changes. Examinations at the request of the court are carried out during the pretrial conference procedure. As there is a demand for simplification of psychiatric reports, a format for psychiatric reports has been proposed and psychiatric reports based on this format have increased. However, due to thorough orality, the psychiatric examiner reports his/her conclusion at the appraisers' interrogation. Although the number of criminal responsibility appraisals has increased, that by psychiatrists who have insufficient skills has also increased. A new debate over criminal responsibility has been introduced by Saiban-in trials, and issues from the viewpoint of psychiatry are discussed.

Keywords : saiban-in (citizen-judge) system, psychiatric examination, criminal responsibility, forensic psychiatry

Introduction

The Saiban-in system is a system under which Saiban-ins; lay judges chosen from the public for each case, participate in hearings along with judges in certain criminal trials. The "Act on Criminal Trials with the Participation of Saiban-in" (hereinafter referred to as the "Saiban-in' Trial Act") was enacted on May 21, 2004, came into effect on May 21, 2009, and entered its 10th year in May 2019. According to the statistics of the Supreme Court¹⁴), the number of persons subject to saiban-in trials from the start of the system to August 31, 2020 was 13,305, including 12,905 guilty, 122 not guilty, 12 transferred to family court, and 266 others (dismissal, dismissal of prosecution, transfer, etc.), for a conviction rate of 97.0%. 74,975 people were appointed as Saiban-ins, the average trial period was 9.3 months, the average actual trial period was 8.3 days, and the average number of court sessions was 4.5. Various discussions, including those for and against the saiban-in system, have been held since before the system was established, and these discussions continue to this day. However, 10 years after the implementation of the system, the system itself seems to have taken root.

I. The Influence of Changes in the Trial by Saiban-in on the Implementation of psychiatric examinations of criminal responsibility

In saiban-in trials in which the general public participates, there have been major changes in the way hearings are conducted in the courtroom. In a saiban-in trial, pre-trial proceedings are always held, in which the issues are arranged in advance by both parties, a trial plan is prepared, and the trial is conducted according to the plan. In principle, no new requests for evidence can be made after the pretrial proceedings are over. The trial is held almost consecutively (i.e., on consecutive days), and the oral system is thoroughly implemented "a trial that can be seen and heard with the eyes and ears".

With the change in the proceedings in saiban-in trials, a different change is required in the procedures and reporting of the results of criminal responsibility appraisals conducted at the request of the court. The Supreme Court¹³) has summarized the implementation of psychiatric evaluation in such saiban-in trials as follows.

In order to realize an easy-to-

understand trial in which the conclusion of psychiatric examiner can be correctly understood by the Saiban-ins, especially in the case of court-appointed psychiatric examiner, the format has been established in which the psychiatric examiner first orally reports (presents) the main points of his or her conclusion, followed by questioning by the parties and the court, instead of an endless question and answer session. In addition, the practice of holding a conference (meeting) in advance between the psychiatric examiner and judges, prosecutors, and defense counsels regarding the method of reporting has taken root.

The following is a discussion of the impact of the changes in the trial process in saiban-in trials on the implementation of criminal responsibility appraisals.

1. Timing of Psychiatric Examinations

- Handling of Psychiatric Report

In a saiban-in trial, the criminal responsibility appraisals are, in principle, conducted during the pretrial proceedings. At this stage, the evidence is not examined at all, and the judges involved in the pretrial proceedings do not examine the specifics of the evidence submitted by both parties. In other words, the defendant's statements and eyewitness testimony, which should be used as basic data for psychiatric

evaluation, have not been examined in court, and the psychiatric examiner, will conduct psychiatric evaluation without having determined the objective facts of the crime, which is the premise of the evaluation. Therefore, it was anticipated that a problem would arise as to what kind of materials should be provided to the psychiatric examiner. In practice after the implementation of the Saiban-in Trial Act, in most cases, disputed evidence is provided to the psychiatric examiner, including the arguments of the prosecutor and defense counsel.

In cases where both sides are in dispute about the manner of the crime, it was suggested that psychiatric opinions be sought after assuming a number of different scenarios. However, in the author's limited experience, the legal viewpoint is often not meaningful from a psychiatric viewpoint.

2. Reporting Appraisal Results - Easy to Understand Reporting-

Article 51 of the Saiban-in Trial Act stipulates that "judges, public prosecutors and defense counsels must endeavor to make proceedings prompt and comprehensible so that saiban-in may carry out their duties fully while avoiding imposing excessive burden on said saiban-in." This provision, entitled "Consideration of the Burden on Saiban-in," is an effort provision for

judges, prosecutors, and defense, not for psychiatric examiners. However, "easy-to-understand" is also required of psychiatric examiners who report the results of psychiatric examinations at trial. The easy-to-understand reporting of the results of psychiatric examinations required of psychiatric examiners in saiban-in trials is to explain the findings obtained through psychiatric analysis in an easy-to-understand manner so that non-specialists can understand them. The clarity here does not simply mean that the terminology is simplified to make it easy to understand. It means to explain logically the existence, degree, and mechanism of the influence of the respondent's mental disorder on the criminal act, based on the psychiatric findings obtained in the psychiatric evaluation²).

Judicial research conducted in the preparatory stage of the saiban-in system¹⁵) suggested that "if an expert opinion of conventional length is prepared, it may also be used as evidence, and in such a case, there is a possibility that the saiban-in may be confused" and "Even though detailed notes may be prepared as the expert witness's own notes or memorandum, it is appropriate to keep it to one concise document as a written opinion." The following measures were taken: proposal of a simple and concise form of

psychiatric evaluation in preparation for adoption as evidence, publication of an easy-to-understand glossary of psychiatric concepts and terminology,⁷⁾⁹) and conferences with psychiatric examiners, judges, prosecutors, and defense using pre-conference, and examination of expert witnesses using PowerPoint presentations.

As a standard format for the psychiatric reports in preparation for the admissible evidence, the MHLW Research Group⁶) presented the format of the psychiatric reports form with a frame and a separate sheet of paper. In addition, the Study Group on Mental Appraisal of the Supreme Public Prosecutors Office published "Examples of Mental Appraisal Report Forms under the Saiban-in Trial Act" based on the forms presented by the MHLW Research Group. Although there were some critical opinions⁸) about these forms, in practice, the number of psychiatric expert opinion forms using these separate forms seems to have increased considerably. In actual trials, however, the psychiatric reports itself is rarely used as evidence, and the results of the psychiatric examinations are reported by the presentation by the psychiatric examiners. There is no longer any need to be particular about the format or volume of the psychiatric reports submitted to the court.

II. Status of Implementation and Issues of Psychiatric Examinations in Saiban-in Trials

What is the status of implementation of psychiatric evaluation in saiban-in trials? The number of court-issued letters of detention for expert testimony¹¹⁾ was 213 in 2005 (including 192 suspects, same hereafter), but it rapidly increased to 277 (242) in 2008, 390 (353) in 2009, and 520 (483) in 2010 with the start of the saiban-in system, and has recently been as high as 633 (558) in 2017 and 605 (537) in 2018. Of course, not all of these cases can be attributed to the retention of expert testimony for psychiatric evaluation, but the number of pre-indictment commissioned expert testimony increased sharply. The figure shows the number of cases in which pretrial appraisals based on Article 50 of the Saiban-in Trial Act were conducted in cases in which judgments were rendered from 2010 to 2018, as well as the annual change in the percentage of pretrial appraisals conducted for cases subject to saiban-in trial¹²⁾. As shown in the figure, at the beginning of the saiban-in system, the court did not allow pretrial appraisals (reappraisals) in cases where there were pre-prosecution commissioned appraisals, unless there were very special circumstances. Recently, the number of

cases in which the court allows pretrial appraisals to be conducted at the request of defense counsel has been increasing, and the number and rate of pretrial appraisals conducted has increased. Is the response of psychiatrists to this increase in the number of expert testimony sufficient? Even from the author's narrow experience, there are many cases in which psychiatric report that lacks essential information as a psychiatric report, or where psychiatrically inappropriate presentations are made during expert witness interviews. In order to provide high-quality psychiatric report, the psychiatric examiner is expected to have the following four skills: (1) accurately make a psychiatric diagnosis, (2) analyze information obtained through case records and interviews and reconstruct the mental state of the examinee at the time of the crime, (3) analyze the impact of mental disorders on the crime, and (4) explain the results of the psychiatric examinations in a logical and easy-to-understand manner²⁾. The Japanese Society of Psychiatry and Neurology currently holds training sessions on the theme of criminal psychiatric evaluation under the auspices of the Committee on Forensic Psychiatry. Japanese Society of Forensic Mental Health has been enhancing training and education on

criminal psychiatric evaluation by holding workshops on criminal psychiatric evaluation and implementing a system of certified psychiatric experts by the association. However, compared to other countries, the training and education system for criminal psychiatric evaluation in Japan is still insufficient. It is necessary to improve such training and education systems in the future.

III. Impact of the Discussion on Criminal Responsibility Appraisals triggered by the Saiban-in System

In saiban-in trials in which ordinary citizens participate as saiban-ins, criminal responsibility is positioned as one of the difficult legal concepts, and was discussed as one of the major issues in the judicial research¹⁵⁾ that was conducted as preparatory work for the saiban-in system. In addition, with the implementation of the Saiban-in Trial Act and the "Act on Medical Care and Treatment for Persons Who Have Caused Serious Cases Under the Condition of Insanity", there has been a new debate over what criminal responsibility is, how it should be determined and judged, and how the roles of psychiatrists and judges should be divided in the determination of criminal responsibility. The discussion in the legal community can be summarized as follows: The

discussion in the legal community can be summarized as follows: "With regard to the issue of competency, the court reflected on the traditional practice of requiring psychiatrists to provide expert opinion up to the legal judgment part, and increased awareness of the division of roles between psychiatrists and the court. As a result, the court began to clearly communicate what matters the court wanted the psychiatrist's opinion on (e.g., the mechanism of influence of the mental disorder on the offense) and asked him/her to explain that part in plain language at the trial¹⁶⁾." In other words, criminal responsibility is a legal concept, and its judgment is the exclusive prerogative of lawyers, not psychiatrists. This view itself is a reaffirmation of what has been said in the past,⁵⁾ and the author has no objection to it. However, some of the recent discussions on criminal responsibility opinions are somewhat questionable, so I will discuss them below.

1. What is the "influence of biological factors on psychological factors?"

The Supreme Court has held¹⁰⁾ that "The diagnosis of the presence or absence and degree of mental disorder as a biological factor, as well as the presence or absence and degree of its effect on the psychological factor, is the essence of clinical psychiatry." In other

words, The Supreme Court has made it clear that it is the duty of the psychiatric examiner to give an opinion from a psychiatric standpoint not only on the biological factors, but also on the existence, extent, and mechanism of "the influence of the biological factors on the psychological factors. In recent criminal responsibility appraisals, psychiatrists have been asked to give an opinion on the "influence of the mental disorder on the criminal act," but there seems to be a slight difference in what is meant by "the influence of the biological factors on the psychological factors" and "the influence of the mental disorder on the criminal act."

The psychological factor is the ability to make legal judgments, which consists of the cognitive capacity and the volitional capacity. Not only criminal responsibility, but in general, the capacity to make judgments is a dimensional phenomenon that is measured as a continuous quantity from the standpoint of psychiatry³). Whatever the type of mental disorder, it is difficult to completely deny the influence of mental disorder when comparing a person diagnosed with a mental disorder with a normal person who has not received such a diagnosis. However, the requirement of "significantly" (diminished state) in judging criminal responsibility is an evaluation based on a value standard

(normative judgment by a judge), and does not mean a mere deviation from normal by the average standard used in psychiatry. In the context of criminal responsibility, the impact of the mental disorder must be of such a degree that it affects the legal capacity to judge the appraisee. Thus, "the effect of the biological factor on the psychological factor" is not simply "the effect of the mental disorder on the offense" but rather "the effect of the mental disorder on the legal decision-making capacity of the appraisee at the time of the offense." It would more accurately reflect the intent of the precedent to consider "the effect of the mental disorder on the judgment and behavior of the appraisee at the time of the offense."

2. About "Mechanisms"

In the beginning, the commissioned item for criminal responsibility appraisal was often the "existence or non-existence and degree of influence" of the mental disorder on the criminal act. Later, it was changed to "presence/absence, degree, and mechanism (manner)," and recently, it is often simply stated as "mechanism (manner). I can understand to some extent the desire of legal professionals to request psychiatrists to provide opinions on "mechanism" rather than "degree." However, it does not seem to

the author⁴⁾ that it is possible to elucidate the "mechanism" of the effects of mental disorders in all cases, nor does it seem possible to analyze the effects on psychological factors if the "mechanism" cannot be elucidated. For example, in the case of the catatonic state, it is difficult to elucidate the specific "mechanism," and the presence of the catatonic state itself is a finding that at least suggests a significant impairment of judgment. In addition, what exactly is the "mechanism" of arson or shoplifting by people diagnosed with borderline personality disorder or kleptomania? In these cases, the arson or shoplifting is not a symptom of a mental disorder, but the repetition of such behavior is the reason for the diagnosis of a mental disorder, and it would mean that causality is reversed. From the standpoint of psychiatry, the recent trend of the legal circles to uniformly demand the elucidation of the "mechanism" without taking into consideration the characteristics of each case is cause for concern.

3. The Significance of Diagnosing Mental Disorders

I am concerned about the recent trend to emphasize the elucidation of "mechanism" because I feel that the significance of diagnosing mental disorders, which is a biological component, has been downplayed in

recent discussions. In psychiatry, for each diagnosis name of a mental disorder, there is knowledge about the symptoms and changes in the condition of the disorder and the effects of the symptoms and changes in the condition of the disorder on a person's mental functioning (consciousness, reality testing, judgment, behavior, and others). In order to analyze the effects on psychological factors, it is necessary to utilize these findings in clinical psychiatry, but a prerequisite for this is an accurate diagnosis of the mental disorder. Only when the diagnosis name of mental disorder is accurate, it is possible to infer the judgmental capacity at a specific point in the past with some evidence from the standpoint of psychiatry⁴⁾. The psychiatrist who conducts a criminal competency evaluation must not forget the importance of the psychiatric diagnosis.

4. Methods of Explaining Criminal Responsibility

Judicial research¹⁵⁾ conducted during the preparatory stage of the saiban-in system showed that, in schizophrenia cases where the key point in determining competency of responsibility is whether or not the offense was directly controlled by delusions, a method of explanation that is easy for the saiban-in to understand is to consider the perspective of

"whether the defendant committed the crime because of his/her mental disorder" or "whether the defendant committed the crime because of his/her original personality (pre-sickness personality)." In addition, judicial research conducted after the implementation of the Saiban-in Trial Act¹⁶) proposed analyzing the defendant's behavior before and after the offense from the perspective of "original personality/personality" and "symptoms of mental disorder (illness)" as "an explanation of the mechanism of how mental functions (including normal parts), symptoms, and pathology affected the criminal behavior." In all of the judicial studies, the analysis and explanation of the mechanism is based on the dichotomy of comparing and balancing the normal part and the abnormal part. In fact, this dichotomous method of judgment seems to be easy to understand and to be comprehensible to judges.

In Japan, however, criminal responsibility is determined by the trichotomy of insanity, diminished capacity, and full responsibility. If the issue is whether the defendant is insane or fully responsible, or whether the defendant is mentally deficient or fully responsible, the dichotomy can be explained from the relatively simple viewpoint of whether the defendant has a mental disorder (illness) or not, which

may be easy for saiban-ins to understand. However, in cases where the issue is whether the defendant is insane or has diminished capacity, it is assumed that the defendant has a mental disorder (illness) in both cases. The difference between the two is the degree of influence of the mental disorder, and even if explanations are devised, it does not seem to be easy for saiban-ins to fully understand the content of the explanation and make a judgment.

The author has experienced a saiban-in trial in which the issue was whether the defendant was insane or had diminished capacity. During the questioning of the expert witness, I reported the results of the expert opinion without mentioning the degree of judgmental capacity, but the verdict was that the defendant was not guilty by reason of insanity, in contrast to the result of the pre-indictment opinion, which I considered equivalent to diminished capacity. Later, a mock questioning of the expert witness was conducted on this case with the participation of a mock saiban-ins, and the mock saiban-ins' decision was that of full responsibility. The mock saiban-ins only participated in the mock expert witness examination, and the amount of information about the case differed significantly from that of the trial saiban-ins, who also participated in

scenes other than the expert witness examination and made a judgment after deliberating with the judge, making it impossible to simply compare their judgments. The defendant in this case went to trial while his treatment was still suspended, and his words and actions due to the effects of his schizophrenia symptoms were apparent in court. It is the author's impression that whether or not the saiban-in was able to actually witness the defendant's words and actions in court had a considerable impact on the difference between the two judgments.

Although it is not necessarily appropriate to elaborate on this with a single example, in cases where the issue is whether the defendant is insane or has diminished capacity, the impression that the judge receives from the defendant's words and actions in the courtroom may have a significant impact on the judge's judgment. The judge may decide as follows: If the judge is convinced of the defendant's illness, the defendant is insane. If the judge is not sufficiently convinced of the defendant's illness, the defendant has diminished capacity. If the judge is not sufficiently convinced at all of the defendant's illness, the defendant is fully responsible.

Prior to the start of the saiban-in system, there was concern expressed that the saiban-in trials involving

ordinary citizens would result in harsher punishments due to insufficient understanding of responsibility and mental disability. Looking at the judgments after the implementation of the Saiban-in Trial Act, there are cases in which insanity was found in cases in which insanity would not have been found in a conventional trial, and there are cases in which full responsibility was found even though both parties agreed that the defendant had diminished capacity. Although it does not seem necessarily appropriate to criticize that the saiban-in trials have led to harsher punishments, it does seem possible to point out the possibility of a different blurring in the judgment of competency than in the past. This may be due to the influence of the dichotomized explanation of the capacity for liability, which is based on the comparative balance between the normal and abnormal parts of the case.

Conclusion

Considering that the system of immunity from liability and mental disability is not only a matter of jurisprudence or psychiatry, but also a system that has been established based on the consensus of society in general¹⁾, it is of great significance that the saiban-in system reflects the sense of the general public in the judgment of the competency of the accused.

Psychiatrists need to accurately diagnose the mental disorder of the examinee, analyze the impact of the mental disorder on the examinee's judgment and behavior at the time of the crime, and provide a logical and easy-to-understand explanation of the results to gain the understanding of the saiban-in.

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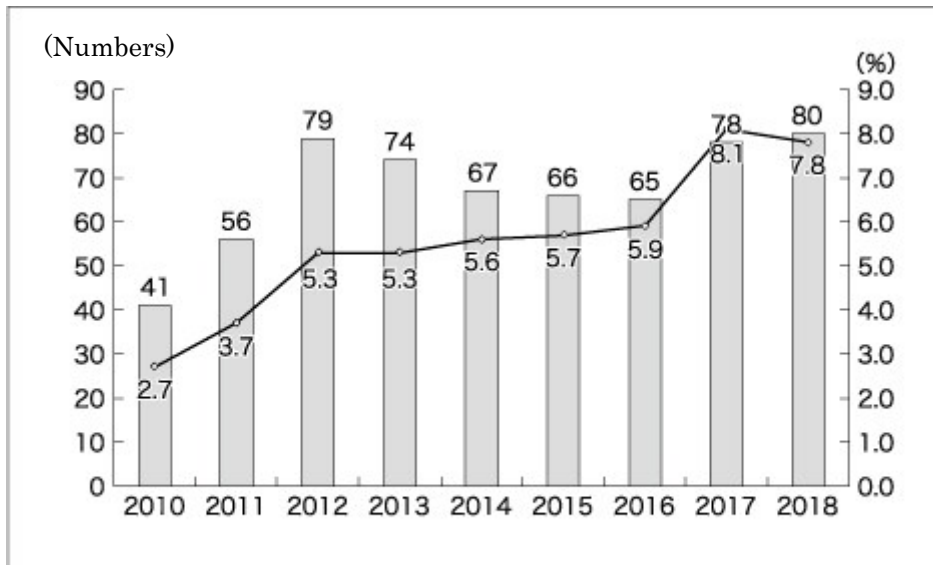


図 公判前鑑定（裁判員裁判法 50 条）の実施状況
(文献 12 より作成)

Pre-trial appraisals (Article 50 of the Saiban-in Trial Act)
(Compiled from Reference 12)