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Theme Session

“Fairness and Due Process in Japan’s Death Penalty: Global Perspectives”

Sentencing Standards for Death Penalty Cases:

Did the Japanese Supreme Court Kill

the Legitimacy of the Death Penalty?

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Sentencing Standards for Death Penalty Cases:

Did the Japanese Supreme Court Kill
the Legitimacy of the Death Penalty?

Kenji NAGATA

Associate Professor of Criminal Policy
at Kansai University

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1. Acts and judgments concerning the death penalty in Japan

The death penalty is both sentenced
and executed in Japan.

However, there are no provisions in
Japan that stipulate sentencing standards
between the death penalty and a
sentence of life imprisonment.

2

1. Acts and judgments concerning the death penalty in Japan

In 1983, the Supreme Court made the first holding regarding sentencing standards for the death penalty in *the Nagayama case*.

⇒See p. 1.

3

1. Acts and judgments concerning the death penalty in Japan

The holding by the Supreme Court in the *Nagayama case* has been called “*the Nagayama Standards*.”

4

1. Acts and judgments concerning the death penalty in Japan

The decision amounted to an enumeration of general standards.

However, the Court did not make clear any method of applying these factors nor did it make clear any mutual relationships between the factors.

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2. Sentencing standards for death penalty cases

Between 1983 and the end of 2012, there have been a total of 171 death penalty decisions that were affirmed by the Supreme Court after its ruling in *the Nagayama case*.

6

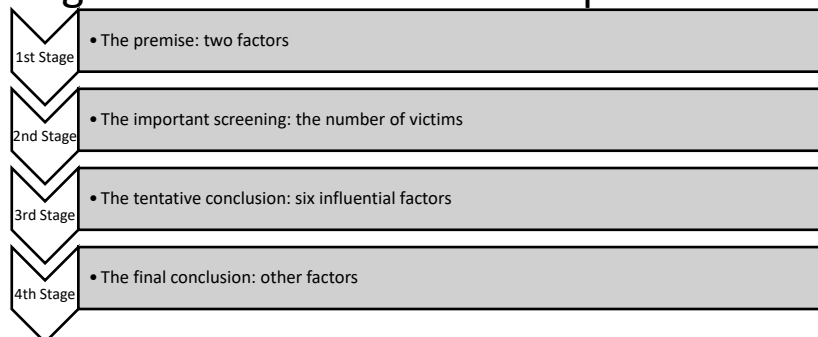
2. Sentencing standards for death penalty cases

The *Nagayama Standards* and the later 171 cases have created semi-structured sentencing standards for death penalty cases.

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2. Sentencing standards for death penalty cases

I believe that the structure consists of **four** stages. ⇒ See p. 2 Table 1.



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2. Sentencing standards for death penalty cases

(1) The first stage

The first stage is the premise for the death penalty.

We must take into account two factors of the premise:

- ① the public prosecutor demanding the death penalty, and
- ② the death of at least one victim as the result of the crimes committed with the intent to kill.

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2. Sentencing standards for death penalty cases

When there are both factors in a case, we go to the next stage.

On the other hand, when there is no factor or only one factor, a court avoids imposing the death penalty sentence.

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2. Sentencing standards for death penalty cases

(2) The second stage

The second stage is the important screening for the death penalty.

The factor considered at this stage is the number of victims intentionally killed.

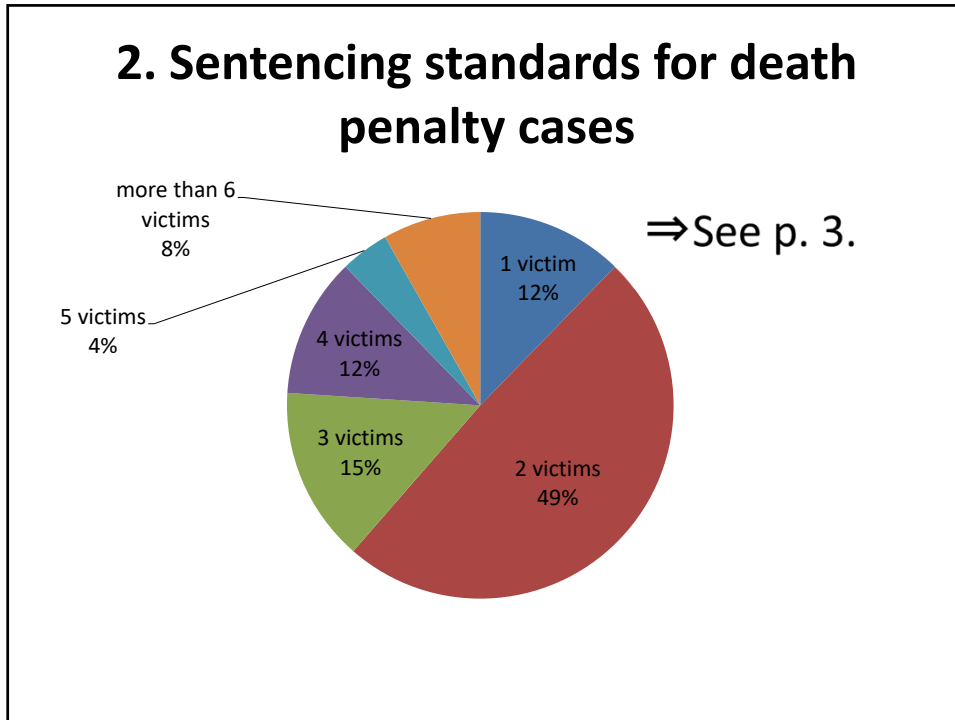
11

2. Sentencing standards for death penalty cases

When three or more victims are intentionally killed, a court usually sentences a defendant to the death penalty.

To the contrary, in cases involving one or two victims, we must take into account other factors that are identified in the next stage.

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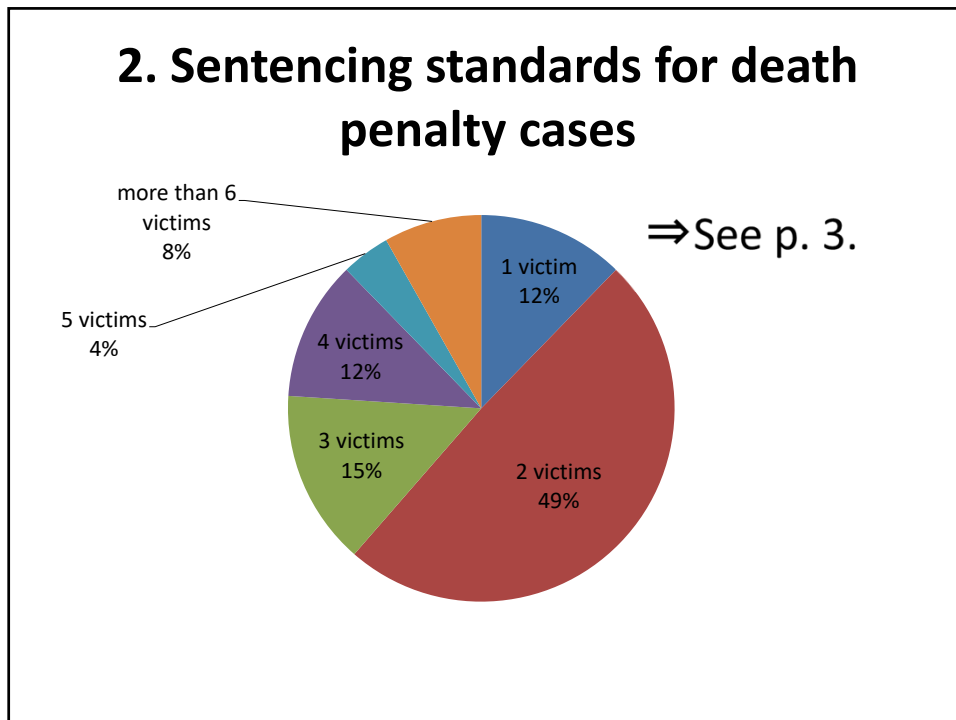
13

2. Sentencing standards for death penalty cases

Table 2 shows that the number of cases involving one and two victims amount to more than 60 percent of the total of 171 decisions.

⇒ See p. 3.

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2. Sentencing standards for death penalty cases

(3) The third stage

In the third stage, we can reach a tentative conclusion.

In determining whether the death penalty is appropriate or not, a court focuses on the acts and results of committed crimes rather than on factors relating to the defendant.

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2. Sentencing standards for death penalty cases

(3) The third stage

Concretely, we must judge the decision on the basis of **SIX** influential factors.

- (a) the nature and objective of crimes,
- (b) criminal records involving a homicide,
- (c) multiple homicides on separate occasions,
- (d) leadership in complicity,
- (e) the premeditation of the homicides, and
- (f) sexual harm.

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2. Sentencing standards for death penalty cases

Courts pay special attention to (e) the premeditation of the homicides.

⇒See p. 3.

The premeditation of homicides greatly increases the amount of the defendant's liability.

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2. Sentencing standards for death penalty cases

In a case involving two victims, it is likely the court will impose the death penalty when there is a high level of premeditation for the intentional killing.

On the other hand, in cases where there are one or two victims, a court avoids imposing the death penalty when there is no premeditation or a low level of premeditation.

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2. Sentencing standards for death penalty cases

(4) The fourth stage

In the fourth stage, courts take into account various factors.

If the third stage's tentative conclusion is inappropriate, a court can modify the conclusion based upon factors identified at the fourth stage.

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2. Sentencing standards for death penalty cases

However, these factors are much less influential than factors concerning the acts and results of crimes.

Thus, in practice, courts seldom change the tentative conclusion at this stage, and the tentative conclusion usually becomes the final conclusion.

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3. The trend: Is the *Hikari City* case a change or exception?

According to my analysis of decisions for death penalty cases, the present standards utilized by the Supreme Court were first implemented around 1973.

However, many scholars and jurists (especially public prosecutors) have claimed that the 2006 decision in *the Hikari City case* changed sentencing standards for death penalty cases by making them tougher.

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3. The trend: Is the *Hikari City* case a change or exception?

In the *Hikari City* case, the defendant, who was eighteen years old, intentionally killed two victims—a woman and her child.

A sentence of life imprisonment was suitable from the viewpoint of the *Nagayama Standards* because there was no premeditation of intentionally killing.

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3. The trend: Is the *Hikari City* case a change or exception?

However, the Supreme Court reversed and remanded the case to the high court, implying that the death penalty was appropriate in this case.

In 2008, the high court sentenced the defendant to death, and the decision became final and binding in the Supreme Court in 2012.

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3. The trend: Is the *Hikari City* case a change or exception?

Did the *Hikari City* case change the *Nagayama Standards*?

The answer is “No.”

I believe that the *Hikari City* case is an exception.

There are three reasons. ⇒See pp. 6-8.

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4. The crisis of the death penalty in Japan

Sentencing has to be fair and just.

Therefore, sentencing standards for the death penalty cases must be consistent.

If courts alter their standards in each cases, sentencing becomes a lottery or a gamble.

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4. The crisis of the death penalty in Japan

In 2009, Japan adopted lay judge system (in Japanese, *Saiban-in Seido*).

Because it is difficult for lay judges to comprehend sentencing standards for death penalty cases accurately, they might reach an incorrect conclusion.

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4. The crisis of the death penalty in Japan

The *Hikari City* case of 2006 resulted in sentencing standards for death penalty cases being dramatically inconsistent.

The mischief of the *Hikari City* case remains even today.

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4. The crisis of the death penalty in Japan

Inappropriate sentencing for death penalty cases leads to an inconsistency of the death penalty itself.

Producing such a situation is the Supreme Court's fault.

To my regret, the Supreme Court itself killed the legitimacy of the death penalty.

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4. The crisis of the death penalty in Japan

The Supreme Court created "the crisis of the death penalty" in Japan.

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Sentencing Standards for Death Penalty Cases:

Did the Japanese Supreme Court Kill the Legitimacy of the Death Penalty?

Kenji NAGATA *

1. Acts and judgments concerning the death penalty in Japan
2. Sentencing standards for death penalty cases
3. The trend: Is the *Hikari City* case a change or exception?
4. The crisis of the death penalty in Japan

1. Acts and judgments concerning the death penalty in Japan

In Japan, there are twelve types of crimes identified in the Penal Code and five types of crimes in other criminal Acts that provide for the death penalty as a statutory penalty. Furthermore, the death penalty is both sentenced and executed within the country. The Penal Code regulates that the death penalty shall be executed by hanging at a penal institution (section 11 (1) the Penal Code). In 1948, the Supreme Court held that the death penalty executed by hanging was constitutional.¹

However, there are no provisions in Japan that stipulate sentencing standards between the death penalty and a sentence of life imprisonment.² In fact, there are not even any provisions that make clear general sentencing standards.

In 1983, the Supreme Court made the first holding regarding sentencing standards for the death penalty in the *Nagayama* case.³

Under the present legal system which retains the death penalty, in taking account of various circumstances such as the nature of crimes, the inducement, the measure—especially the persistency and cruelty of the method of intentionally killing—, the seriousness of the result—especially the number of victims—, the feeling of the bereaved family, the impact on community, the defendant's age, criminal records and circumstances after committing crimes, the infliction of the death penalty may be allowed when defendant's liability is considered extremely serious and the death penalty is regarded as inevitable from the viewpoint of general prevention as well as proportionality between crimes and punishment.

The holding by the Supreme Court in the *Nagayama* case has been called “the *Nagayama Standards*.” The decision amounted to an enumeration of general standards. However, the Court did not make clear any method of applying these factors nor did it make clear any mutual relationships between the factors. This paper will analyze sentencing standards for death penalty cases in Japan.

* Associate Professor of Criminal Policy at Kansai University, author of *GHQ Bunsho ga Kataru Nihon no Shikei Shikko [Japan's Execution of the Death Penalty in the GHQ Documents]* (Gendai Jinbunsha, 2013), author of *Wakariyasui Keibatu no Hanashi [Punishments in Japan]* (Kansai University Press, 2012), and author of *Shikei Sentaku Kijun no Kenkyu [Study on Sentencing Standards between the Death Penalty and Life Imprisonment in Japan]* (Kansai University Press, 2010).

¹ *The Supreme Court, March 12, 1948, 2(3) The Saikosaibansho Keiji Hanreishu 191.*

² In Japan an inmate who is sentenced to life imprisonment can be supervised upon release (section 28 of the Penal Code). However, since 2000 or thereabout, few inmates have been placed on supervised release after life imprisonment incarceration. Therefore, life imprisonment in Japan changes into a real “life imprisonment.”

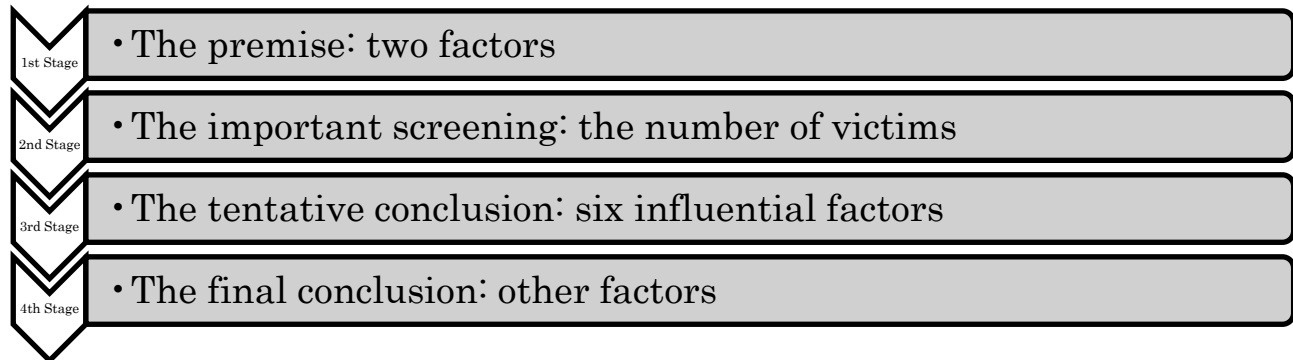
³ *The Supreme Court, July 8, 1983, 37(6) The Saikosaibansho Keiji Hanreishu 609.*

2. Sentencing standards for death penalty cases

Between 1983 and the end of 2012, there have been a total of 171 death penalty decisions that were affirmed by the Supreme Court after its ruling in *the Nagayama case* (including cases in which there were multiple defendants).

The *Nagayama Standards* and the later 171 cases have created semi-structured sentencing standards for death penalty cases. I believe that the structure consists of four stages (Table 1).

[Table 1] The four stages of structured sentencing standards for death penalty cases



(1) The first stage

The first stage is the premise for the death penalty. We must take into account two factors of the premise: the public prosecutor demanding the death penalty, and the death of at least one victim as the result of the crimes committed with the intent to kill.

There have been no death penalty sentences handed down in cases in which the public prosecutor has not demanded the death penalty or in cases in which no victims lost their lives as the result of crimes that were committed with the intent to kill. These suggest that both factors are included in the premise for the sentence of the death penalty.

Thus, when there are both factors in a case, we go to the next stage. On the other hand, when there is no factor or only one factor, a court avoids imposing the death penalty sentence.

(2) The second stage

The second stage is the important screening for the death penalty. The factor considered at this stage is the number of victims intentionally killed.

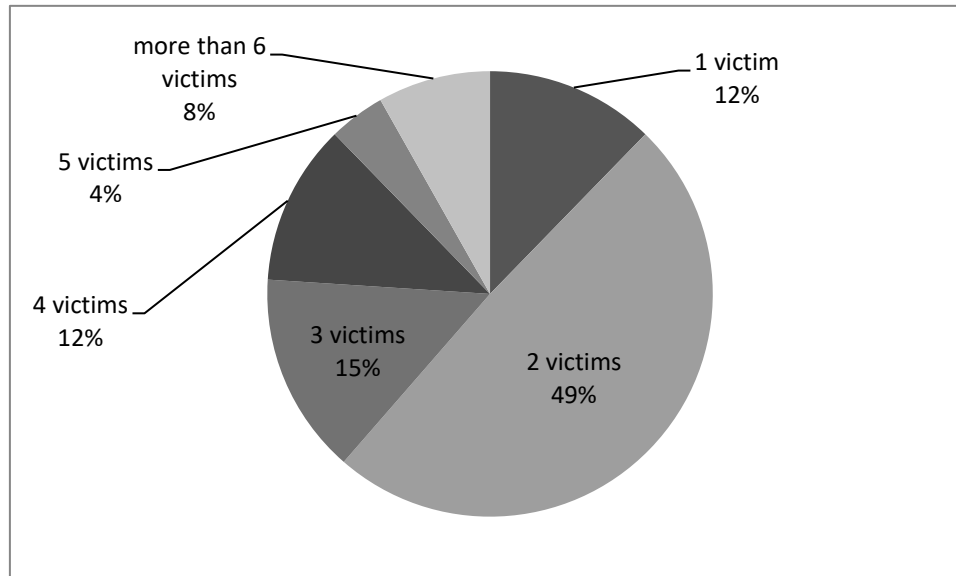
In Japan, as the number of victims increases, the greater the sentence for a defendant. When three or more victims are intentionally killed, a court usually sentences a defendant to the death penalty. To the contrary, in cases involving one or two victims, we must take into account other factors that are identified in the next stage.

Listing these cases with respect to the factor provides us with Figure 1 and Table 2. Table 2 shows that the number of cases involving one and two victims amount to more than 60 percent of the total of 171 decisions.

[Figure 1] The Number of Intentionally Killed Victims and the Number of Death Penalty Cases 1983–2012

Number of Intentionally Killed Victims	1	2	3	4	5	6	8	10	12	14	16	19	20	25	26
Number of Cases	21	84	25	20	7	2	2	1	2	1	1	2	1	1	1

[Table 2] The Number of Intentionally Killed Victims and the Ratio of the Number of Death Penalty Cases 1983-2012



(3) The third stage

In the third stage, we can reach a tentative conclusion. In determining whether the death penalty is appropriate or not, a court focuses on the acts and results of committed crimes rather than on factors relating to the defendant. Concretely, we must judge the decision on the basis of following six influential factors:

- (a) the nature and objective of crimes,
- (b) criminal records involving a homicide,
- (c) multiple homicides on separate occasions,
- (d) leadership in complicity,
- (e) the premeditation of the homicides, and
- (f) sexual harm.

(a) *The nature and objective of crimes.* In deciding the death penalty, the objective of the crimes affects the nature of crimes. Therefore, in practice, courts pay special attention to the objective. Concretely, the death penalty is usually sentenced when ransom money is an objective of the crime—even when only one victim is intentionally killed. The same is true of homicide with the goal of collecting insurance money. In cases that involve other objectives including personal gain, there is a trend toward the death penalty when two or more victims lose their lives, and other exacerbating factors, such as the ones considered below, are involved.

(b) *Criminal records involving a homicide.* It is extremely likely that a death penalty will be imposed if the defendant has a criminal record involving homicide. Notably, there is the type of case in which courts always impose the death penalty sentence. Such cases include those where a defendant was handed a sentence of life imprisonment after committing a crime in which he intentionally killed one person; after serving time and being placed on a supervised release, he/she commits a new crime in which one or more persons was intentionally killed (a case in which there is a total of two victims intentionally killed). Even though there is only a single victim killed in the crime the second time, courts always sentence the defendant to the death penalty. This is because it is easy to infer more serious criminal tendencies from cases where a total of two victims are intentionally killed on separate occasions.

(c) *Multiple homicides on separate occasions.* The death penalty is more likely to be imposed in a case where multiple victims are intentionally killed on separate occasions than in a case where multiple victims are intentionally killed on the same occasion. This is because we

perceive a defendant's greater criminal tendencies that are similar to (b) criminal records involving a homicide.

(d) *Leadership in complicity*. Leadership in complicity is not a factor identified in the *Nagayama Standards*, but it is an influential factor. In complicity cases, courts are likely to sentence a defendant to the death penalty when a defendant exercises leadership in committing crimes. Even if the role is not one of leadership, courts are still likely to impose the death penalty in cases where the defendant has a role equivalent to that of an accomplice or where the defendant played an important role. Conversely, if the defendant is in a subordinate position with respect to the accomplices, a court avoids imposing the death penalty.

(e) *The premeditation of the homicides*. Premeditation is not a factor identified in the *Nagayama Standards* but it is also an influential factor. The premeditation of homicides greatly increases the amount of the defendant's liability. In a case involving two victims, it is likely the court will impose the death penalty when there is a high level of premeditation for the intentional killing. On the other hand, in cases where there are one or two victims, a court avoids imposing the death penalty when there is no premeditation or a low level of premeditation.

(f) *Sexual harm*. Sexual harm is not a factor identified in the *Nagayama Standards*, but it is also an influential factor. When a defendant brings about sexual harm against the victim, although the main objective of the crime is not sexual, a court estimates that the amount of the defendant's liability is much greater. Thus, for example, intentionally killing after committing a robbery for some money with sexual harm tends to lead to the death penalty.

(4) The fourth stage

In the fourth stage, courts take into account various factors. Examples include:

- (A) the reason behind the formulation of the inducement,
- (B) the persistency and cruelty of the method of intentionally killing,
- (C) the feelings of the bereaved family or families,
- (D) the impact on the community,
- (E) the defendant's age (including the fact the defendant is a juvenile),
- (F) the defendant's circumstances (including such factors as the feelings of remorse, developmental history, living circumstances before committing the crimes, and the estimated likelihood of reformation or correction).

If the third stage's tentative conclusion is inappropriate, a court can modify the conclusion based upon factors identified at the fourth stage.

However, these factors are much less influential than factors concerning the acts and results of crimes. Thus, in practice, courts seldom change the tentative conclusion at this stage, and the tentative conclusion usually becomes the final conclusion.

Mass media in Japan often misunderstands, above all, the influences of (E) and (F) upon deciding whether the death penalty is appropriate. For example, when a court avoids imposing the death penalty in a juvenile case, some newspapers and TV news programs point out or criticize the fact that being juvenile should require the court to sentence the juvenile to life imprisonment. However, this analysis is false. As mentioned above, courts focus on the acts and results of crimes in deciding the death penalty. When a court avoids sentencing a person to the death penalty it is because there are no influential factors, such as (e)—the premeditation of homicide. A defendant's age and a defendant's circumstances are less influential factors.

3. The trend: Is the *Hikari City* case a change or exception?

In Japan, sentencing standards for death penalty cases have changed several times since the

end of World War because it has been thought that death penalty standards were tough and needed to be more lenient. According to my analysis of decisions for death penalty cases, the present standards utilized by the Supreme Court were first implemented around 1973—approximately ten years before the *Nagayama Standards* were identified. As mentioned above, the *Nagayama Standards* and the later 171 cases have created the four stages of semi-structured sentencing standards for death penalty cases.

However, many scholars and jurists—especially public prosecutors—have claimed that the 2006 decision in the *Hikari City* case⁴ changed sentencing standards for death penalty cases by making them tougher.

In the *Hikari City* case, the defendant, who was eighteen years old, intentionally killed two victims—a woman and her child. He then engaged in sexual intercourse with the body of the dead woman. According to the finding of the Supreme Court, he did not premeditate both homicides even though he slightly intended to commit rape. On the basis of such a finding, the district court and the high court avoided sentencing the defendant to the death penalty. A sentence of life imprisonment was suitable from the viewpoint of the *Nagayama Standards* because there was no premeditation of intentionally killing in spite of the accompanying slight premeditation to commit rape. Even though the defendant was an adult, the appropriate sentencing was not the death penalty but a life imprisonment.

However, the public prosecutor appealed the case to the Supreme Court, seeking the death penalty. To our surprise, the Supreme Court reversed and remanded the case to the high court, implying that the death penalty was appropriate in this case. In 2008, the Hiroshima high court sentenced the defendant to death, and the decision became final and binding in the Supreme Court in 2012. Did the *Hikari City* case change the *Nagayama Standards*? The answer is “No.” I believe that the *Hikari City* case is an exception. There are three reasons.

The first reason is concerned with the proceeding of the change of a judicial precedent. Section 10 No. 3 of the Court Act stipulates that, if the Supreme Court changes a judicial precedent, the holding must be given by the Grand Bench that constitutes all fifteen judges. However, the Supreme Court decisions in the *Hikari City* cases in 2006 and 2012 were decided by the five members seated as a petty bench. Thus, the decision did not change the precedent of the *Nagayama Standards*.

The second reason is related to the publication of the decision in law reports. There are four cases which the Supreme Court reversed high court decisions regarding the imposition of the death penalty between the end of World War and the decision in the *Hikari City* case.⁵ Its holdings of all four cases appeared in *The Saikosaibansho Keiji Hanreishu (The Keishu)* which is one of the most authoritative law reports in Japan. The Supreme Court edited the law reports and published those holdings it considered very important. If the *Hikari City* case changed the *Nagayama Standards*, the Supreme Court would have published the holding in these law reports. However, the decision of the *Hikari City* case was published in another law report—*The Saikosaibansho Saibanshu Keiji (The Saibanshukei)*. All the death penalty cases' holdings other than those published in *The Saikosaibansho Keiji Hanreishu* have usually appeared in the latter law reports, implying that such holdings are less significant as precedent. It is thought that the Supreme Court treats the *Hikari City* case as not newly created sentencing standards but as an exceptional deviation.

⁴ *The Supreme Court, June 20, 2006, 289 The Saikosaibansho Saibanshu Keiji 383.*

⁵ *The Supreme Court, June 4, 1953, 7(6) The Saikosaibansho Keiji Hanreishu 1251* (The decision of the death penalty was reversed and the court rendered the judgment for the case; a life imprisonment.); *The Supreme Court, July 8, 1983* (the *Nagayama* case); *The Supreme Court, September 20, 1996, 50(8) The Saikosaibansho Keiji Hanreishu 571* (The decision of the death penalty was reversed and the court rendered the judgment for the case; a life imprisonment); *The Supreme Court, December 10, 1999, 53(9) The Saikosaibansho Keiji Hanreishu 1160* (The decision of a life imprisonment was reversed and remanded; the death penalty became final and binding in 2007).

The third reason concerns prosecutors' appeals. There have been more than ten cases where the public prosecutors have appealed to the Supreme Court to seek the death penalty following the *Hikari City* case holding in 2006. In all twelve cases,⁶ the Supreme Court has decided that life imprisonments imposed by the high courts were appropriate. Some cases were more serious than the *Hikari City* case. For example, there was a case in which a defendant premeditated the murder of two victims to collect ransom money. According to the *Nagayama Standards*, the court had the option to impose the death penalty. Although the Akita district court sentenced the defendant to death,⁷ the Sendai high court, Akita branch, revised the death sentence to a life imprisonment sentence on the grounds that the defendant's level of premeditation to murder was low,⁸ and the Supreme Court approved the conclusion.⁹ Notably, while this case's defendant had premeditation to murder, the *Hikari City* case defendant had no premeditation to kill intentionally. How do we explain such opposite sentencing? The most persuasive explanation is that the decision of the *Hikari City* case was a deviation from the *Nagayama Standards*.

In consideration of the above, the decision of the court in the *Hikari City* case has never made the *Nagayama Standards* change.

4. The crisis of the death penalty in Japan

Sentencing has to be fair and just. Therefore, sentencing standards for the death penalty cases must be consistent. If courts alter their standards in each case, sentencing becomes a lottery or a gamble.

In 2009, Japan adopted lay judge system (*Saiban-in Seido*).¹⁰ Because it is difficult for lay judges to comprehend sentencing standards for death penalty cases accurately, they might reach an incorrect conclusion.¹¹

As mentioned above, the *Hikari City* case of 2006 resulted in sentencing standards for death penalty cases being dramatically inconsistent. Although the Supreme Court has made an effort to stabilize its standards after its decision of 2006 (see above the second and third reason in chapter 3), the mischief of the *Hikari City* case remains even today.

Inappropriate sentencing for death penalty cases leads to an inconsistency of the death penalty itself. Producing such a situation is the Supreme Court's fault. To my regret, the Supreme Court itself killed the legitimacy of the death penalty. Ironically, the Supreme Court, which held that the death penalty was constitutional, created "the crisis of the death penalty" in Japan.

⁶ *The Supreme Court, February 20, 2008, 1999 The Hanrei Jiho 157 (dissent by two judges); The Supreme Court, April 20, 2008, 294 The Saikosaibansho Saibanshu Keiji 149; The Supreme Court, September 29, 2008, 1281 The Hanrei Times 175; The Supreme Court, November 4, 2008, 295 The Saikosaibansho Saibanshu Keiji 239; The Supreme Court, January 14, 2009, 1295 The Hanrei Times 188; The Supreme Court, December 17, 2009, 299 The Saikosaibansho Saibanshu Keiji 1275; The Supreme Court, December 12, 2011, 2144 The Hanrei Jiho 153 (dissent by one judge); The Supreme Court, January 16, 2012, 2151 The Hanrei Jiho 120; The Supreme Court, July 11, 2012, 308 The Saikosaibansho Saibanshu Keiji 91; The Supreme Court, December 3, 2012, 309 The Saikosaibansho Saibanshu Keiji 1 (dissent by one judge); The Supreme Court, December 17, 2012, 309 The Saikosaibansho Saibanshu Keiji 213; The Supreme Court, November 11, 2013 (forthcoming).*

⁷ *Akita district court, September 22, 2004 (no publication in law reports).*

⁸ *Sendai high court Akita branch, November 29, 2005 (no publication in law reports).*

⁹ *The Supreme Court, January 14, 2009.*

¹⁰ A district court consists of three professional judges and six lay judges based on the principle of the lay judge system (section 2 (2) the Act on the Lay Judge's Participation in Criminal Trials). Professional judges and lay judges work together in both finding and sentencing (section 6 (1) the Act).

¹¹ *For example, Okayama district court, February 14, 2013 (no publication in law reports).* This case's defendant intentionally killed a woman following the commission of robbery and rape. According to the *Nagayama Standards*, life imprisonment could be appropriate. However, the decision became final and binding without an appellate review.

Sentencing Standards for Death Penalty Cases:

Did the Japanese Supreme Court Kill the Legitimacy for the Death Penalty?

関西大学法学部准教授 永田憲史

1 現行法と判例

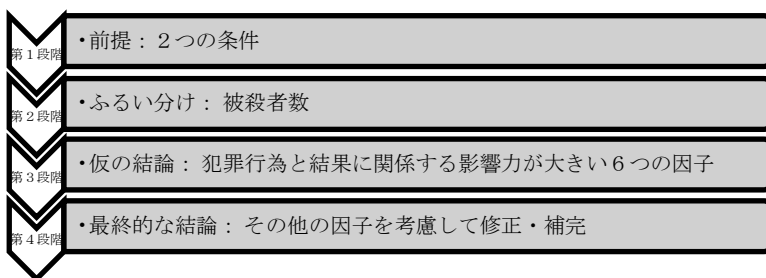
判例は死刑を合憲とする(最大判昭23年3月12日刑集2巻3号191頁)

死刑選択基準・一般的な量刑基準について明示した条文なし

永山事件第一次上告審判決(最判昭58年7月8日刑集37巻6号609頁)

「死刑制度を存置する現行法制の下では、犯行の罪質、動機、態様ことに殺害の手段方法の執拗性・残虐性、結果の重大性ことに殺害された被害者の数、遺族の被害感情、社会的影響、犯人の年齢、前科、犯行後の情状等各般の情状を併せ考察したとき、その罪責が誠に重大であつて、罪刑の均衡の見地からも一般予防の見地からも極刑がやむをえないと認められる場合には、死刑の選択も許されるものといわなければならない」(永山基準)

2 死刑選択基準



(1)第1段階:前提

①検察官の死刑の求刑、②行為者による故意の殺害

(2)第2段階:ふるい分け

被殺者数

(3)第3段階:仮の結論

犯罪行為と結果に関する影響力が大きい因子を考慮して判断

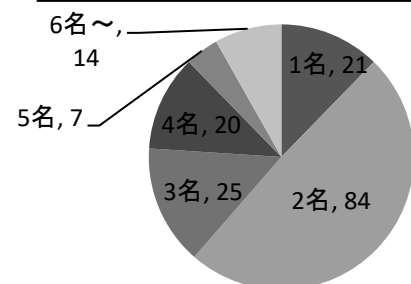
(a)犯行の罪質・目的、(b)殺害を伴う前科、(c)殺害の非一回性、
(d)共犯における主導性、(e)殺害の計画性、(f)性被害

(4)第4段階:最終的な結論

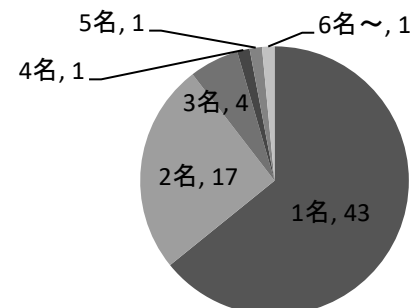
その他の因子を考慮して修正・補完

(A)動機の形成原因、(B)殺害方法の執拗性・残虐性、(C)遺族の被害感情、
(D)社会的影響、(E)行為者の年齢(少年であることを含む)、
(F)主観的事情(反省悔悟、生育歴、従前の社会生活の状況、改善可能性)など

最高裁で確定した昭和58年～平成24年の死刑判決(被殺者数別)



最高裁で確定した昭和40年代の死刑判決(被殺者数別)



3 死刑選択基準の動向：光市事件判決は変化か例外か？

昭和48年頃以降、死刑選択に関する相場や基準はごく一部の事件を除いて安定的
永山基準は死刑を相当とする罪責の量や個別の量刑因子に対する評価に関する具体的実質的な
意味を有する死刑選択基準に関する判例

光市母子殺害事件第一次上告審判決(最判平18年6月20日裁判集刑289号383頁)は例外
性被害は伴うものの、殺害の計画性がなく、無期懲役が相当とされてきた事案

その後に死刑を求めて検察官によりなされた上告事件を最高裁は全て棄却

最決平20年2月20日判時1999号157頁(2名の裁判官の反対意見)

最決平20年4月21日裁判集刑294号149頁

最決平20年9月29日判タ1281号175頁

最決平20年11月4日裁判集刑295号239頁

最決平21年1月14日判タ1295号188頁

最決平21年12月17日裁判集刑299号1275頁

最決平23年12月12日判時2144号153頁(1名の裁判官の反対意見)

最決平24年1月16日判時2151号120頁

最決平24年7月11日裁判集刑308号91頁

最決平24年12月3日裁判集刑309号1頁(1名の裁判官の反対意見)

最決平24年12月17日裁判集刑309号213頁

最決平25年11月11日裁判集刑掲載見込み

4 死刑選択基準から見る日本の死刑の行方

死刑選択基準が不安定になれば、死刑選択が「ギャンブル化」・「籤引き化」

光市事件第一次上告審判決が死刑選択基準を不安定化

…最高裁は検察官上告事件を相次いで棄却して安定化を図るも、光市事件の影響を払拭でき
ていない

…「手を抜いたツケを当面払い続けなければならない状況」

裁判員裁判が死刑選択の不安定化の傾向を加速しかねない

→量刑上の誤判のリスクが高まる →死刑制度を動揺させる

→死刑制度の正統性を毀損しかねない

…死刑を合憲としてきた最高裁自身によって、「日本の死刑の危機」が創り出された

【関連拙著】

①『死刑選択基準の研究』(関西大学出版部、2010)

②『わかりやすい刑罰のはなし——死刑・懲役・罰金——』(関西大学出版部、2012)

③『GHQ文書が語る日本の死刑執行——公文書から迫る絞首刑の実態——』(現代人文社、2013)

Sentencing Standards for Death Penalty Cases:

Did the Japanese Supreme Court Kill the Legitimacy of the Death Penalty?

Kenji NAGATA

Thank you for introducing me.
Ladies and gentlemen, good afternoon.

My name is Kenji Nagata.
I am associate professor at Kansai University.

I prepare for the English version paper as well as the Japanese ones. For Japanese speakers, please see page 23 and 24.

My theme is “Sentencing Standards for Death Penalty Cases.

The death penalty is both sentenced and executed within Japan. However, there are no provisions in Japan that stipulate sentencing standards between the death penalty and a sentence of life imprisonment.

In 1983, the Supreme Court made the first holding regarding sentencing standards for the death penalty in the *Nagayama* case. Please see page 1.

The holding by the Supreme Court in the *Nagayama* case has been called “the *Nagayama Standards*.” The decision amounted to an enumeration of general standards. However, the Court did not make clear any method of applying these factors nor did it make clear any mutual relationships between the factors. This presentation will analyze sentencing standards for death penalty cases in Japan.

2. Sentencing standards for death penalty cases

Between 1983 and the end of 2012, there have been a total of 171 death penalty decisions that were affirmed by the Supreme Court after its ruling in *the Nagayama case*.

The *Nagayama Standards* and the later 171 cases have created semi-structured sentencing standards for death penalty cases. I believe that the structure consists of four stages. Please see page 2 Table 1.

(1) The first stage

The first stage is the premise for the death penalty. We must take into account two factors of the premise: the public prosecutor demanding the death penalty, and the death of at least one victim as the result of the crimes committed with the intent to kill.

When there are both factors in a case, we go to the next stage. On the other hand, when there is no factor or only one factor, a court avoids imposing the death penalty sentence.

(2) The second stage

The second stage is the important screening for the death penalty. The factor considered at this stage is the number of victims intentionally killed.

When three or more victims are intentionally killed, a court usually sentences a defendant to the death penalty. To the contrary, in cases involving one or two victims, we must take into account other factors that are identified in the next stage.

Please see Figure 1 and Table 2.

Table 2 shows that the number of cases involving one and two victims amount to more than 60 percent of the total of 171 decisions.

(3) The third stage

In the third stage, we can reach a tentative conclusion. In determining whether the death penalty is appropriate or not, a court focuses on the acts and results of committed crimes rather than on

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factors relating to the defendant. Concretely, we must judge the decision on the basis of six influential factors. Please see page 4, small (a) to small (f).

Courts pay special attention to small (e) the premeditation of the homicides. The premeditation of homicides greatly increases the amount of the defendant's liability. In a case involving two victims, it is likely the court will impose the death penalty when there is a high level of premeditation for the intentional killing. On the other hand, in cases where there are one or two victims, a court avoids imposing the death penalty when there is no premeditation or a low level of premeditation.

(4) The fourth stage

In the fourth stage, courts take into account various factors.

If the third stage's tentative conclusion is inappropriate, a court can modify the conclusion based upon factors identified at the fourth stage.

However, these factors are much less influential than factors concerning the acts and results of crimes. Thus, in practice, courts seldom change the tentative conclusion at this stage, and the tentative conclusion usually becomes the final conclusion.

3. The trend: Is the *Hikari City* case a change or exception?

According to my analysis of decisions for death penalty cases, the present standards utilized by the Supreme Court were first implemented around 1973.

However, many scholars and jurists—especially public prosecutors—have claimed that the 2006 decision in the *Hikari City* case changed sentencing standards for death penalty cases by making them tougher.

In the *Hikari City* case, the defendant, who was eighteen years old, intentionally killed two victims—a woman and her child. A sentence of life imprisonment was suitable from the viewpoint of the *Nagayama*

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Standards because there was no premeditation of intentionally killing.

However, the Supreme Court reversed and remanded the case to the high court, implying that the death penalty was appropriate in this case. In 2008, the high court sentenced the defendant to death, and the decision became final and binding in the Supreme Court in 2012.

Did the *Hikari City* case change the *Nagayama Standards*? The answer is “No.” I believe that the *Hikari City* case is an exception. There are three reasons. Please see page 6 to page 8.

4. The crisis of the death penalty in Japan

Sentencing has to be fair and just. Therefore, sentencing standards for the death penalty cases must be consistent. If courts alter their standards in each case, sentencing becomes a lottery or a gamble.

In 2009, Japan adopted lay judge system (in Japanese, *Saiban-in Seido*). Because it is difficult for lay judges to comprehend sentencing standards for death penalty cases accurately, they tend to reach an incorrect conclusion.

The *Hikari City* case of 2006 resulted in sentencing standards for death penalty cases being dramatically inconsistent. The mischief of the *Hikari City* case remains even today.

Inappropriate sentencing for death penalty cases leads to an inconsistency of the death penalty itself. Producing such a situation is the Supreme Court's fault. To our regret, the Supreme Court itself killed the legitimacy of the death penalty. The Supreme Court created "the crisis of the death penalty" in Japan.

Thank you for your attention.