

BOOK REVIEWS

A Novel Perspective on the Contributions of Legal Outsiders in Japanese Criminal Justice (Won an Honorary Mention by the 2020 ALSA Distinguished Book Award Committee)

Lay and Expert Contributions to Japanese Criminal Justice. By Erik Herber. London: Routledge, 2019. 206 pp. Hardcover \$140.00
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Erik Herber's latest book, *Lay and Expert Contributions to Japanese Criminal Justice*, provides us with a novel perspective on the recent drastic reform of the Japanese criminal proceedings, including the introduction of the victim participation system and the lay-judge (*sai-ban-in*) system. The author focuses on the roles and contributions of non-legal professionals in Japanese criminal justice and in particular on the recent social and legal changes that either gave birth to or affected the roles played by these "outsiders." In this book review, first, the reviewer introduces the book in brief; second, examines "legal outsider" or "lay (individuals)" as the key concept of the book; and third, suggests the possible ways for promoting the development of the research in the book.

This book has six chapters in addition to an introduction and conclusion. Chapter 1 outlines the developments that have led to legal outsiders' new or changed roles, while Chapters 2 to 6 each focus on the contributions of a particular legal outsider. The author starts Chapter 1 with a famous quote by Ryuichi Hirano, a Japanese prominent professor of criminal procedure, whose pessimist diagnosis of Japanese criminal justice in the 1980s triggered the introduction of the Japanese lay-judge system. The author then examines the Justice System Reform Council, which recommended a set of various judicial reforms in 2001. He also considers the problem of Japanese-style penal populism, asserting that this growing movement changed the role of crime victims and created the possibility of lay judges' punitive sentencing decisions.

Regarding mentally disturbed offenders, in Chapter 2, the author examines the role of forensic psychiatrists in the process of establishing suspects' criminal responsibility. He reviews an argument on criminal responsibility in Japanese criminal law and illustrates the scheme of the 2005 Medical Treatment and Observation Act (so-called *Iryou Kansatsu Hou*). Under this Act, forensic psychiatrists, responding to a prosecutors' request, provide an evaluation of a suspect at the pre-trial stage that prosecutors follow by and large when they make a decision on the suspect's criminal responsibility. As regards repeat offenders who often lack social connections and are poor or mentally disturbed, the author addresses the role of social workers in providing support for such offenders in Chapter 3. At the criminal justice stage, social workers can offer support for such offenders and facilitate their diversion from prison when possible. However, the effect of social workers' advice on the actual decisions by the legal professionals remains unclear because their contribution is incorporated into the discretionary judgment of prosecutors and judges.

In Chapter 4, the author looks into the new role of crime victims and its impact on court proceedings. Although the purposes of criminal justice have always been truth findings, retribution, and special and general deterrence, a new concern has now been added by the

introduction of victim participation—victims’ recovery. The author examines how victim participation affects the process, practice, and influence on the sentence judgment by lay judges, concluding that the participation contributes therapeutic effects for victims’ wellbeing while at the same time presenting the risk of secondary victimization and interference of defendants’ activity at court.

The contribution of forensic scientists to criminal justice is addressed in Chapter 5, starting with the *Ashikaga* case, in which the DNA evidence not only led to a false guilty judgment for the defendant, but also later proved the innocence of the defendant. As for scientific evidence, professional judges may inevitably rely on forensic scientists’ expertise but correctly evaluate the evidence based on their own perceived ability (but it may be different for lay judges).

Although the author touches upon the role of lay judges in the criminal trial in other chapters, he highlights it in Chapter 6, focusing especially on how lay judges go about deciding on a defendant’s sentence. After analyzing sentencing statistics, the author concludes that overall sentencing trends are stable and not clearly affected by either penal populism, reforms allowing for the imposing of stricter sentences, or the introduction of the lay-judge system.

The reviewer will next examine some of the key concepts of this book. As seen above, the author zooms in on the roles of several actors who are not legal specialists in criminal justice, which was heavily dominated by legal specialists before the judicial reform. Those on whom the author focuses in this book are forensic psychiatrists, social workers, crime victims, forensic scientists, and lay judges. The author lumps such actors all together as “legal outsiders” and defines them as “persons without legal training or background” (p. 1). The author tackles the various types of legal outsiders’ involvements together in Japanese criminal justice, describing each in detail in this book. The meaning of each involvement is quite different, however, and each relationship with legal insiders is also different. Although the author tries to repeat the characteristics of the various involvements of the legal outsiders in the book’s conclusion, similarities and differences among the various legal outsiders’ activities do not seem to be clearly described. The reviewer would like to learn more about the author’s view based on a comparison to more clearly reveal the meaning of involvement of the legal outsiders as well as the remaining problems in Japanese criminal justice.

Pertaining to the diversity of the involvement of legal outsiders, the reviewer thinks it necessary for readers to pay attention to one of the key concepts as well as the words of the title of this book—“lay.” Readers perhaps may understand forensic psychiatrists, social workers, crime victims, forensic scientists, and lay judges as lay, but the reviewer argues that it is not appropriate to literally see all of legal outsiders as such. Actually, a citizen who serves as a lay judge must be absolutely lay; as proof of this, legal professionals (like professional judges, prosecutors, and attorneys) cannot serve as lay judges. In other words, being lay is a requirement for serving as a lay judge.

Conversely, forensic psychiatrists, social workers, and forensic scientists are not legal professionals (in this sense, it is correct to refer to them as lay), but specialists in their own field (on this point, they should be called as a scientific or welfare expert). Therefore, the involvement of these three legal outsiders is quite distinguished from lay judges’ participation. As for the crime victims, their participation in criminal proceedings is obviously different from other involvements. People related to the case cannot serve as a lay judge because they are prohibited by law to do so, and they tend not to be involved in the case as a scientific or welfare expert because of their professional ethics. By contrast, crime victims can participate in the case as someone very relevant to it, and consequently their position is not neutral in the criminal proceedings. Now, the legal outsiders’ involvements

described in this book are separated into three types: involvements of experts (but not legal experts), participation of the person having relation to the case, and participation of the obvious layperson. Because the characteristic features of each involvement is quite different, the reviewer thinks it more necessary to compare them based on their features.

Lastly, because the reviewer hopes that the author will continue to study the Japanese justice system, the reviewer would like to suggest two possible ways for promoting the development of research in the book.

The first idea is to include independent lay participation in criminal proceedings. The author slightly touches on the fact that Japan had a jury system from 1928 through to 1943, under which system a jury composed of 12 lay jurors could handle serious crimes in principle, hear the evidence at court, and deliver a guilty or not-guilty verdict, independently of professional judges (p. 13). This suspended jury system is quite different from the ongoing lay-judge system in that it allowed laypeople to make a judicial decision independently of legal professionals. The author also only marginally refers to the Prosecution Review Commissions system (p. 93), under which a commission composed of laypeople can review the non-indictment judgment by the prosecutors, deliberate the case, and make a recommendation for the mandatory prosecution (beyond prosecutors' discretionary judgment), independently of legal professionals. The author might be intentionally avoiding specifically examining these independent lay participations in this book because the author's aim is not to explore lay participation itself, but more to closely scrutinize the co-operative contribution by lay and expert. The reviewer believes however that comparative study between the co-operative judgment by lay and expert and the judgment by lay independently of experts is useful for deepening the author's study. Looking at the participation system, which lacks the expert's contribution, would more vividly reveal the meaning of lay participation as well as the significance of the experts' presence in criminal justice.

Another idea for possible further study is comparing lay and expert contributions to criminal proceedings with those to civil proceedings. Because the author's main research interests are crime and criminal justice, he may want to explore solely criminal justice and not detour into civil justice research. Nevertheless, the reviewer thinks studying civil proceedings would greatly contribute to the literature on the roles of laypeople in criminal justice. As for lay and expert contribution to judicial proceedings in Japan, there are some remarkable systems in civil justice: civil conciliation commissioner (*minji choutei iin*), domestic relations conciliation commissioner (*kaji choutei iin*), judicial commissioner for summary court (*shihou iin*), counsellor for family court (*san'yo-in*), technical adviser (*senmon iin*), and labour tribunal member (*roudou shimpun-in*). The first four legal outsiders have a long history and rich practices of involvement in civil proceedings; they are therefore worthy of research. In addition, these involvements are diverse, including non-legal experts and laypeople, and it would therefore be possible to engage further comparative study. The latter two involvements are introduced based on the recommendation of the Justice System Reform Council, so they must be attractive research subjects for the author, who is interested in the drastic social and legal change in Japan. It is not easy to embark on a new field of research, but the reviewer believes the author has strong research ability already proven in this book.

This book review was originally written in December 2019. The reviewer sincerely prays that the author's soul may rest in peace.

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