Using Equity Reasons to evaluate Mitigating Circumstances
——An Explanation of Sentencing Principles——

Shin Matsuzawa[1]

1. Preface

Many "soft" factors are considered in the process of sentencing, and they can be separated into two large groups; the first is the factors surrounding the severity of the criminal conduct itself, and the second is the circumstances surrounding the perpetrator. The second group is usually regarded, at least in Japan, as something based on general prevention or special prevention.

The same could be said for the *Spilraumteorie* of German theories[2], which Japanese law frequently references[3]. Briefly explained, *Spilraumteorie* is a theory which suggests that the standard by which penalties are determined is indicated within a specific scope, and within that scope, mitigating circumstances (especially those that satisfy general and special prevention) must be considered.

However, *Spilraumteorie* is inevitably a theory that is lacking in the clarification of sentencing standards. The first reason is because of the premise of *Spilraumteorie*; it is based upon the volatility of the sentencing standard. In a way, it is a contradiction to call this a "standard." Secondly, the details about the consideration of prevention methods is very vague. From the perspective of criminology theories, nothing has been empirically tested to prove this as a reputable theory. Since this is an unproven theory, making it a standard equates any discussion using this theory as something based on impression. We seek to know the extent to

---

[1] Ph. D., Professor of Criminal Law, Waseda University, Tokyo.
[2] Bruns (1985) s. 105 ff.
[3] See, Shiroshita (2010) p. 243.

which a sentence can influence prevention, but achieving that is impossible without concrete data.

What is really in need are the two of the following theories; first, a theory that allows sentencing (proportionate to the gravity of the crime) to be judged within a certain scope, and second, a theory that does not consider prevention in sentencing.

Theories that include both of these already exist in Anglo-American Law; a sentencing theory based on the principle of proportionality. I believe sentencing theories based on the principle of proportionality to be the most effective, even when compared with all other existing theories (this theory has been refined and reconstructed by Andreas von Hirsch[4] etc.).

So the question is, if we were to utilize the principle of proportionality, does that mean that keeping penalties proportionate to the crime becomes the sole sentencing standard? If this were to be true, I believe the sentencing will become too rigid. For instance, is it acceptable to equate a situation where compensation is possible with one where it is impossible? Is it acceptable to consider a situation where the defendant shows remorse, the same as one where none is shown? Is it acceptable to treat a first offender with the same consideration as a repeated offender? The consequences are endless.

In this case, it becomes necessary to consider the circumstances of these people with a more practical approach in sentencing.

However, another problem arises. Where is the basis that makes the consideration of these circumstances possible, when the principle of proportionality fundamentally rejects the consideration of prevention? If this remains unsolved, it will possibly render the principle of proportionality to a theory "that is looks great on paper but not practical" no matter how superior the principle itself makes itself out to be.

2. Which factors are important in sentencing?

It could be safely assumed that similar circumstances are considered in sentencing processes in any country. It is easy to simply call this "common sense." However it is necessary to theoretically analyze the true

[4] For example, v Hirsch (2017).

implications within these circumstances.

Let us look at what types of circumstances could potentially exist:

- Existing criminal records
- The defendant's age and health
- The defendant's degree of remorse or admission
- When the defendant is largely disadvantaged by his or her own doings
- When the defendant is already subject to other societal punishments
- When some time has already passed from the date of the criminal act

The inclination to consider these circumstances is most likely shared between all countries. The real problem is, why these are able to become the foundation of sentencing principles.

As said before, in many cases in Japan and Germany, the above problems has been assessed from the viewpoints of general prevention and special prevention; but is it really appropriate to explain this problem from a prevention-based view?

In evaluating this problem, let us say that it is possible to explain the above circumstances from the perspective of the principle of proportionality, or that it is more appropriate to explain these form perspectives other than prevention. In other words, it is possible to make practical and appropriate sentencing without considering prevention, and it is possible to make this a rationale for sentencing. If it were that these were indeed possible, it could be predicted that the result would be that there is no room for *Spilraumteorie*.

3. Humanity - a fundamental viewpoint

The Swedish legal system has already solved the problems we face[5]. Swedish criminal law provides provisions for sentencing standards that are based on the principle of proportionality (BrB chap. 29. art. 1, 2.), and as a principle to practically adjust the achieved results, there are also provisions that lessen the severity of sentencing for individual cases. These provisions are said to be rooted from "equity reasons."

As a fundamental rule, Swedish criminal law proportionally penalizes criminals based on the penal value ("*strafvärde*") of their crime. After sentencing, these penalties are readjusted by the above "equity reasons."

---

[5] Cf. v Hirsch & Jareborg (2009).

According to Nils Jareborg and Josef Zila, equity reasons are formulated from justice[6]. Some examples of justice are humanity, respect, sympathy, acceptance an its values[7].

What become interesting is the relationship between humanity and the principle of proportionality. These questions arise because, if we were to formally carry through the principle of proportionality, it seems as if there is no space for the consideration of humanity.

In 2015, Jack Ågren published a detailed research report on the above relationship[8]. According to Ågren, the foundation upon which the principle of proportionality stands is the realization of justice, and hence the consideration of "equity reasons," which is consistent with justice, does not clash with the fundamental structure of the principle of proportionality, but it allows for further development. If the principle of proportionality is derived from the fundamental principle of the realization of justice, it should not contradict "equity reasons" as this i also derived from the same fundamental principle.

Adding on to what Nils Jareborg and Josef Zila has already proposed, Ågren sought to make a more detailed explanation of humanity[9]. In other words, the concept of "humanity" is unique to Swedish law, and is also a key concept in explaining "equity reasons. However, the word "humanity" makes an impression consistent with the generally accepted meaning of it, despite its ties with the criminal jurisprudence world, and for these reasons some people are not enthusiastic about theoretically including this concept in penal theories. In contrary to these opinions, "humanity" became a fundamental principle in Swedish criminal law after its reform in 1864. To this day, it is a comprehensive principle in penal theories and is regarded as an important authority. Ågren asserts that "humanity" is an understanding of others and others' situations and implies acceptance and dignity. It exists in many forms in order to achieve the goals of acceptance and dignity.

With these viewpoints in mind, I would like to closely examine the above circumstances in the next chapter.

---

[6] Jareborg & Zila (2007) p. 129.
[7] About these ideas, see, Jareborg & Zila (2007) p. 91 ff.
[8] Ågren (2013).
[9] Ågren (2013) s. 86 f.

4. Existing criminal records

A sentence is usually more severe when the defendant has a criminal record. This is a strong factor that is backed by a strong sense of conviction, since it is a result that naturally comes with the sentiments of the general public. Take this for an example; let us say we are disciplining child. Generally we are more forgiving when the child makes a certain mistake for the first time, and let them go; the second time, we may make them write a letter of apology; from the third time and onwards, we may stop their monthly allowance.

These actions are generally accepted as a normal way to discipline a child, but it is difficult to justify them from the principle of proportionality. The principle of proportionality calls for penalties that are proportional to the severity of the crime committed, and it is common to think that as long as the crime is the same, the same penalty will be placed regardless of how many times it has been committed. In Sweden, where sentencing provisions are based on the principle of proportionality, it is said that the defendants' criminal records are not really considered in the process of sentencing(there are, however, provisions that allow to "add-on" the severity of penalties; ref. BrB chap. 29, art. 4.). Special prevention provides a simpler explanation; in other words, repeated offenders have dangerous personalities, or are people who need to be heavily penalized in order to stop them from repeating the offense(s)and thus the demand for special prevention is high which leads to heavier penalties.

It is possible to explain this situation through the principle of proportionality as well. The crime, for which the defendant is to be punished, not only includes the wrongness of the crime, but also the gravity of responsibility and blameworthiness. If one were to have more blame, it is appropriate to regard the crime as graver than it was before.

There is another explanation through this principle. If the consequences after the third offense is more severe than after the second offense, the second after the first, it can be said that the consequences after the first offense is lighter than after the second offense and the same applies for the second and third. In other words, the if penalty proportionate to the crime should be based on the third offense, but by lessening the intensity of the intensity from the third to second, second to

first, we could claim that we are treating the defendant with humanity. We could say that criminal records do not necessarily increase the intensity of penalties, but it may serve as a circumstance that alleviates, in part, the intensity of the penalty.

The special prevention explanation is unnecessary if it were acceptable to think in this way. Again, the special prevention explanation is appealing, but there is no objective data to allow to measure the intensity of the penalty that will prevent the defendant from committing further crimes or repeating them. Everything is determined through subjectivity, or feeling. Additionally, even if we were to consistently double the intensity of the penalty every time a crime is repeated, that still does not make it a component of special prevention. The requirements of special prevention differs from every case and cannot be dependent upon a consistent rule like above. Special prevention can only be justified through the principle of proportionality.

5. The defendant's degree of remorse or admission

(1) Preventative measures to localize damage and damage compensation

How much remorse a defendant shows is an important factor in sentencing. More specifically, such remorse is shown through measures to prevent further damage and how much damage compensation is offered. In Japan, in order for these circumstances to be considered, there are three types of justifications; (a) it is explained through responsibility, (b) it is explained through prevention, or (c) it is explained through a third party independent form responsibility or prevention. Since option (b) is not compatible with the premise of the principle of proportionality, let us start with the explanation for option (a).

Ågren explains his theory from option (a)[10]. He claims that actions to prevent further damage from a certain crime is deserving of a lighter penalty, and therefore the level of blame towards the defendant is also lightened. The premise for this claim is that the principle of proportionality is interpreted more broadly to include factors that are outside the scope of the consequences of the crime in question. With this explanation in hand,

[10] Ågren (2013) s. 138 ff.

whether the post-crime activities had the effect of reviving or repairing damages becomes a very important factor and whether the offender had regret or remorse and other moral emotions becomes irrelevant.

Ågren's theory seems like it is trying to revise the interpretation of a criminal act itself. If it were so, the prevention of the harmful effects of crime becomes an obsolete explanation, since this does not affect the penal value of a premise that requires a completed criminal act. However, Ågren's theory probably does not deal with these explanations. What he was trying to say is, even if the prevention of the harmful effect of crime is executed, this does not change the penal value of an already committed crime, but by the defendant executing these actions, it lessens the need to give a culpability sentence proportionate to the penal value of the crime. In other words, if the offender's criminal acts were interpreted broadly (including the time immediately before and after the crime itself), the penalty that seems appropriate to the penal values loses its proportionality.

Ågren's theory deftly steers away from having to explain special prevention, which is rejected by the principle of proportionality. However, it is quite questionable; (1) Does the fact that remorse, regret and other moral emotions are not considered a viable result that could be accepted? (2) Is not not true that no matter what theoretical structure is used, making the defendant's behavior (including those immediately before and after the crime) and the penalty proportionate to each other is not something that is included in the definition of proportionality in the principle of proportionality?

Truthfully, question (2) requires Option (c) (explained through a third party independent form responsibility or prevention). Namely, these kind of circumstances are consistent with the goals of criminal policy. In the case of criminal theory in continental law, it may be explained that *Strafbarkeit* and *Strafwürdigkeit* will both disappear.

(2) Surrender

A sentence becomes lighter if an offender surrenders or admits his or her crime(s). Ågren gives the same explanation[11] as above, for the justification of this case.

---

[11] Ågren (2013) s. 158.

In Japan, there is a legal provision that accepts surrender as a circumstance to be considered to lighten a penalty. Its justification can be proven through policy and the lessening of culpability, but, as with Ågren, it is most appropriate to say that the blameworthiness is lightened. From this, *Strafbarkeit* and *Strafwürdigkeit* also deceased in intensity.

Subsequently, if provisions like Japan were placed, where a penalty will be lightened if one surrenders, it could be predicted that more people will admit to their crimes in hopes of a lightened penalty. In this sense, it is possible to justify these circumstances being included in provisions as a general considerations through the rationality of criminal policy. With these provisions, the efficiency of the prevention of further harmful effects by crime and criminal legislation will undoubtedly be addressed, and for this reason, the assertion that the advantages of these policies will be reflected in sentencing and subsequently seek to achieve the realization of these advantages is plausible as an example of justification to include these circumstances as a determining factor of sentencing.

6. When the defendant is largely disadvantaged by his or her own doings

A characteristic example of the defendant largely disadvantaged by his or her own doings is when one is severely injured(physically). It is possible, in this case, for the inflicted injuries to be personal responsibility. However, in the long run, comparing those who actually got injured versus those who did not, it is clear the the former tends to be regarded as a harsher consequence. In reality, these types of circumstances are interpreted as a sentencing factor in most cases.

Ågren, from the viewpoint of the former, bring up "humanity" as its justification[12]. Humanity should be understood as a moral philosophy and fundamentally calls for respect for the individual that is stresses the value of the independent individual. It does not imply that anyone should not be rejected from the concept of "humanity." Generally, there are no criticism towards the claims that protect the victim's rights, but the offender is as human as the victim is and should be respected as a human being as well.

In Japan, severe physical injuries tend to influence a sentencing to be

[12] Ågren (2013) s. 107 ff.

of a lighter degree. Again, there are three types of justifications; (a) it is explained through responsibility, (b) it is explained through prevention, or (c) it is explained through a third party independent form responsibility or prevention. Swedish criminal law theorists including Ågren may be categorized to take the perspective of option (c).

Yuji Shiroshita, who takes option (b), criticizes that "implementing viewpoints other than 'responsibility' and 'prevention' as the foundation of sentencing factors must be carefully considered, as it translates to the acceptance of the new penal theory that is nearly equivalent in prominence with existing penal theories regarding the justification of penalties."[13] However, it is possible to consider humanity (as part of justice) without clashing with the principle of proportionality, since the very root of the principle of proportionality is the realization of justice. It is possible to theoretically and logically explain the mitigation of the sentence in the case of the defendant being subject to disadvantages.

7. The defendant's age, health, and occupation

If the defendant is of old age and/or in poor health, these are usually considered mitigating circumstances in sentencing. In Japan, old age is an advantageous factor because special prevention includes the protection of the elderly and the same applies to poor health because it may exacerbate the suffering in prison or require consideration of treatment and these are factors of special prevention. In both cases, concluding that they are advantageous because they are part of special prevention is questionable as an explanation, since the goals of special prevention is reformation and rehabilitation.

Ågren analyzes old age and poor health as categories for defendants, but should be mitigating circumstances from the perspective of humanity[14]. Compared with those who are younger and healthier, those who are of old age and poor health will experience more suffering even with the same penalty, and therefore should mitigate the penalty for humane reasons.

---

[13] Shiroshita (2009) p. 74 f.
[14] Ågren (2013) s. 129.

8. When the defendant is already subject to other societal punishments

In many cases, being already subject to other societal punishments is considered in sentencing, such as when one is laid off of a job.

Ågren claims that this holds a double-layered personality to it and should be implemented for the sake of humanity[15].

In Japan, many interpret this as independent of responsibility and prevention. For example, many stand for the neutral adjustment principle with neutral values and argue that by receiving a certain type of punishment, the need for retributive penalties is clearly diminished.

These explanations, which can be inferred from previous ones, is consistent with the principle of proportionality. Explaining this circumstances from prevention is impossible.

The neutral adjustment principle can be said to have a background with a similar structure with the principle of proportionality which seeks to readjust disproportionate sentencing, and for the latter, explanations based on the principle of proportionality functions properly as with the case of Ågren's explanations.

9. When some time has already passed from the date of the criminal act

When there has been a ridiculously long time since the occurrence of the actual crime, this may become a mitigating circumstance.

Ågren divides this circumstance into two types of situations[16]; firstly, when there has been a long time between the actual occurrence of the crime and the start of lawsuit, and secondly, when there has been a long time between the start of lawsuit and the conclusion of the lawsuit. The former case calls for mitigation because the necessity for penal diminishes as the penal value diminishes, and the latter does because it should be considered an "equity reason" for the stability of the law.

In Japan, there has not been much discussion regarding the elapse of time, but it has been a topic of research. Its relationship with the statute of

---

[15] Ågren (2013) s. 212 ff.
[16] Ågren (2013) s. 274.

limitation, its decreased influence on society, and its influence on the defendant have been discussed, but these cases cannot be explained through prevention. Similar to Swedish law, this is appropriate and can be explained without associating it with prevention and placing the principle of proportionality at its foundation.

10. Conclusion

The principle of proportionality as a premise for equity reasons seems like a drastic claim similar to the "an eye for an eye" retribution and the absolute retributive theory, since it does not consider prevention and emphasizes penalties that is proportionate to the criminal act. However, the principle of proportionality is based on penalties consistent with formal justice (or penalties equivalent with penal value, as said in Sweden) and rejects subjective prevention theories that do not have any room for empirical testing, and by utilizing "equity reasons" based on "humanity" for revision, it enables the realization of penalties that is consistent with justice and is theoretically and practically a theory that is much more distinguished than Spilraumteorie.

Further, the principle of proportionality is an easier concept to be understood by the general public, and may be instrumental in explaining sentencing standards to lay judges by professional judges. It also does not utilize prevention, which is a concept that lacks in empirical evidence, and thus avoids the unnecessary an inconclusive debate about the degree of sentencing that will definitively prevent future crimes.

In Sweden, its criminal law stabilized after its provisions were revised by lay judges' sentencing standards which were based on the principle of proportionality and equity reasons. There is great value in considering this method for future reference in countries where there are problems surrounding how sentencing standards should be set with the participation of lay judges.

There is a clear difference between Sweden and Japan, in that Swedish law has a provision where it verbalizes the principle of proportionality whereas Japan does not. In Sweden, sentencing inconsistent with the principle of proportionality is seen as illegal, but in Japan, even if the principle of proportionality was implemented, it would only be regarded as another example of interpretation. However, I believe there is great value

in familiarizing the principle of proportionality by suggesting to utilize a new standard for interpretation at the same time as showing and explaining to the judges the reality by organizing and pursuing the theoretical foundation of the principles of interpretation, even where there are no existing written provisions.

References:

-*Ashworth, Andrew & Roberts, Julian*(Ed.), Principled Sentencing, 3. ed., 2009.
-*Bruns, Hans-Jürgen*, Das Recht der Strafzumessung, 2. Aufl., 1985.
-*von Hirsch, Andreas*, Deserved Criminal Sentences, 2017.
-*von Hirsch, Andrew & Jareborg, Nils*, The Swedish Sentencing Law, : in *von Hirsch, Andrew,*
-*Jareborg, Nils & Zila, Josef*, Straffrättens Påfjoldslära, 3. uppl., 2007.
-*Shiroshita, Yuji*, Ryokeiriron No Gendaitekikadai[Present Issues on Sentencing Theory], enlatged ed., 2009.
-*Shiroshita, Yuji*, Current Trends and Issues in Japanese Sentencing, Federal Sentencing Reporter vol. 22 no. 4 pp. 243-248., 2010.
-*Ågren, Jack*, Billighetsskälen i BrB 29: 5, 2013.