

The Right to Appeal under Article 14(5) of the ICCPR and New Judgments of Conviction Rendered by the Courts of Second Instance

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I Introduction

(1) The current Japanese Code of Criminal Procedure (hereafter referred to as CCP) was promulgated in 1948, following the establishment of the new Constitution of Japan after World War II in 1947. Although the CCP is said to be a hybrid of the Continental European and Anglo-American legal systems¹⁾, the CCP features of the Continental European legal systems, such as the prosecutor's appeal, can be strongly seen in the appeal stage of the CCP.

In Japanese criminal justice, new judgments are rendered by the court of second instance after reversing judgments of the courts of first instance, using the proviso of Article 400 of the CCP.

New judgments by the court of second instance include new judgments of both conviction and acquittal. The accused convicted with new judgments of conviction in the courts of second instance can lodge a final appeal on the grounds of violations of the Constitution or conflicts of judicial precedents (Article 405 of the CCP). However, they cannot lodge a final appeal on the grounds of an error in fact-finding and a violation of laws.

(2) On the other hand, Japan ratified the International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR or Covenant) with no reservation to Article 14(5) of the ICCPR, which guarantees the right to have one's conviction and sentence reviewed.

Does the "conviction" in Article 14(5) of the ICCPR apply to a conviction imposed on appeal? Do not new judgments of conviction in Japanese criminal justice violate Article 14 (5) of the ICCPR? This article aims to discuss these problems. During my discussion, I will refer to the response of European countries to Article 14(5) of the ICCPR, because new judgments in Japan are explained to have their origin in the Continental European legal system.

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1) Supreme Court of Japan, Outline of Criminal Justice in JAPAN 2023, p. 4. https://www.courts.go.jp/english/vc-files/courts-en/Material/Outline_of_Criminal_Justice_in_JAPAN_2023.pdf

(3) In Japanese criminal justice, new judgments in the second instance are rendered after appeals of the prosecutor and the accused. In the case of a prosecutor's appeal, new judgments of conviction are rendered after quashing an acquittal or a conviction with light sentences. In the case of the accused's appeal, new judgments of conviction are rendered as another conviction after quashing a conviction by changing the count within facts charged, adding new evidence, or changing the evaluation of the evidence. Although there are many problems in new judgments of conviction, I will focus my discussion on new judgments of conviction rendered by the courts of second instance. I will also discuss this with the case of the prosecutor's appeal against an acquittal in mind.

II New judgments of conviction under Article 14(5) of the ICCPR

(1) Article 14(5) of the ICCPR

1) The ICCPR was adopted by the United Nations on December 16, 1966, and entered into force on March 23, 1976. The ICCPR guarantees the right to appeal with the following articles²⁾:

Article 14 (5.) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

2) Article 14(5) of the ICCPR cannot be found in the Commission on Human Rights draft of the Covenant. This was based on the motion of an Israeli representative in a discussion of the Third Committee of the United Nations in 1959³⁾. After an amendment by a Ceylonese representative, the Third Committee and General Assembly of the United Nations adopted this motion in 1966, and it became the ICCPR.

In the Third Committee, the Israeli representative expressed his concern about trials being conducted in accordance with the principles formulated in Article 14 of the ICCPR⁴⁾, and the Ceylonese representative referred to dealing with a miscarriage of justice before it was too late⁵⁾.

(2) The response of European countries to Article 14(5) of the ICCPR

1) As the European Convention on Human Rights (hereinafter referred to as ECHR)

2) United Nations Treaty Collection, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, UNITED NATIONS 1967, https://treaties.un.org/doc/treaties/1976/03/19760323%2006-17%20am/ch_iv_04.pdf

3) William A. Schabas, Manfred Nowak's Commentary on Covenant on Civil and Political Rights:3rd Revision (Publisher N. P. Engel, 2019) § 116, p. 415.

4) General Assembly, 14th session, official records, 3rd committee, 961st meeting, Thursday, 19 November 1959, New York, § 14.

5) General Assembly, 14th session, official records, 3rd committee, 964th meeting, Monday, 23 November 1959, New York, § 31.

was signed in 1950 and came into force in 1953, the Committee of Ministers of the Council of Europe was aware that problems might arise from the coexistence of the European Convention on Human Rights and the United Nations Covenants and instructed the Committee of Experts on Human Rights to investigate those problems in October 1967,⁶⁾

In 1969 the Committee of Experts submitted a report to the Committee of Ministers regarding those problems. The report is titled “HUMAN RIGHTS, Problems arising from the coexistence of the United Nations Covenants on Human Rights and the European Convention on Human Rights, Differences as regards the Rights Guaranteed”. The report is called Doc. H (70) 7 and § 144 of Doc. H (70) 7 states. as follows⁷⁾:

144. The implications of this provision may be very far-reaching. It might require a third degree of jurisdiction if a person acquitted in the first instance is convicted by a higher tribunal. Moreover, there are some cases in which a convicted person does not have a right to his conviction or sentence being reviewed by a higher tribunal according to law, e.g. for certain petty offences, or if the person concerned has pleaded guilty, or if the highest court is competent in the first instance (e.g. high treason, corruption of highly-placed Government officials). It is also not clear whether such a review procedure must allow for the judicial review of both the law and the facts; in the practice of judicial review prevailing in various Member States of the Council of Europe there is provision only for review on a point of law (for example in the case of trial by jury).

By the word of “a third degree of jurisdiction”, it suggested the necessity of an appeal to a conviction imposed by an appeal court following acquittal by a lower court.

2) Following the suggestion⁸⁾, some countries, such as Austria, Belgium, Luxemburg, and the Federal Republic of Germany submitted reservations to Article 14(5) of the ICCPR. For example, the reservation of the Federal Republic of Germany in 1973 is as follows⁹⁾:

3. Article 14(5) of the Covenant shall be applied in such manner that(a) a further appeal does not have to be instituted in all cases solely on the grounds the accused person - having been acquitted by the lower court - was convicted for the first time in the proceedings concerned by the appellate court.

6) Council of Europe (European Treaty Series - No. 117), Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (1984), § 1. (Introduction).

7) Committee of Experts on Human Rights, HUMAN RIGHTS Problems arising from the co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights, Council of Europe (1969) pp. 39-40. Available <https://rm.coe.int/native/09000016804da113>

8) Manfred Nowak, U.N. Covenant on Civil and Political Rights. CCPR Commentary: 2nd Revision (Publisher N. P. Engel, 2005) § 86 at p. 351. And then, see Williams Schabas, *supra* note 3. § 152. 153 at pp. 431, 432.

9) United Nations, Treaty Series volume. 999, pp. 293 – 294.

The situation of the German reservation to Article 14 (5) of the ICCPR was described in the initial reports of States parties due in 1977 as follows¹⁰⁾:

(k) Paragraph 5

Everyone convicted of a crime in the Federal Republic of Germany has under Art. 14 (5) of the Covenant, the right to his conviction and sentence being reviewed by a higher court. judgments passed by a judge sitting alone in a criminal matter or “by a court composed of professional and lay judges (Schoffengericht) (both at the Local Court (Amtsgericht)) can “be challenged” by lodging an appeal (Berufung) which will lead to retrial” before the Criminal Chamber of the-Regional Court (Landgericht) (Sections 312 and 323 of the Code of Criminal Procedure; Section 74(3) of the Judicature Act); the judgments passed by this latter court can then be challenged by lodging a petition for review (Revision). judgments passed by a Criminal Chamber or by a Higher Regional Court (Oberlandesgericht) as court of first instance can only be challenged by lodging a petition for review. This will lead to a review of the impugned judgment on points of law only (Sections 333 and 337 of the Code of Criminal Procedure). In such a case it may happen that an accused who in the first instance was wholly or partly acquitted will be convicted by the court of review on the basis of a petition for review lodged by the public prosecutor (Section 354 (l) of the Code of Criminal Procedure. The Federal Republic of Germany, therefore, made a reservation in respect of Art. 14 (5) of the Covenant to the effect that a further remedy need not be made available solely on the ground that the accused was first convicted in the appeal proceedings.

3) Based on Doc. H70(7), the Council of Europe adopted Protocol No. 7 to the ECHR, which contains Article 2 as follows¹¹⁾:

Article 2 – Right of appeal in criminal matters

1 Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2 This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Article 2 of Protocol No. 7 admits three exceptions (§ 2 (2)) and the modalities for the

10) CCPR_C_1_Add.18, pp. 20-21.

11) The Council of Europe (European Treaty Series- No. 117), Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, (Headings of articles are added, and text is amended according to the provisions of Protocol No. 11 (ETS No. 155) as from its entry into force on 1 November 1998). <https://rm.coe.int/168007a082>.

exercise of the right and the grounds to determine that the scope of the review includes both points of fact and law or be confined to points of law¹²⁾.

4) Judgments of the European Court of Human Rights invoke the third exception of Article 2(2) of Protocol No. 7 to the ECHR to deal with cases where the appeal court imposes a sanction not imposed by the first-instance tribunal (*Fortum Oil And Gas Oy v. Finland* (dec.), 2002) and where the appeal court examined the alleged alteration of the charge (*Landgren v. Finland* (dec.), 2009)¹³⁾.

(3) Article 14(5) of the ICCPR in the Human Rights Committee

1) The Human Rights Committee¹⁴⁾ (hereinafter referred to as HRC) requested a review of the highest court's judgment¹⁵⁾ and the first appeal court's judgment¹⁶⁾.

2) The HRC clarified with § 47 of the General Comment no. 32¹⁷⁾ about an appeal to a conviction imposed by an appeal court as follows:

47. Article 14, paragraph 5, is violated not only if the decision by the court of first instance is final, but also where a conviction imposed by an appeal court or a court of final instance, following acquittal by a lower court, according to domestic law, cannot be reviewed by a higher court. Where the highest court of a country acts as first and only instance, the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such

12) The Council of Europe, supra note 6. § 18, and The Council of Europe, Guide on Article 2 of Protocol No. 7 to the European Convention on Human Rights, Right of appeal in criminal matters (Updated on 31 August 2024), § 16, § 17.

13) European Court of Human Rights, supra note 12. Guide on Article 2 of Protocol No. 7 to the Convention. § 37.

14) The Human Rights Committee is established under Article 28 of the ICCPR, which can monitor the implementation of the International Covenant on Civil and Political Rights by its State parties. In accordance with Rules 76 and 77 of its Rules of procedures, the HRC may adopt general comments on specific topics addressing aspects of the Covenant or its Optional Protocols to assist States parties in fulfilling their obligations under the Covenant and its Optional Protocols.

15) The HRC recognized a violation of Article 14(5) in *Terrón v Spain*, Communication No. 1073/2002, Views 2004. In the case, the accused was tried by the Supreme Court for forging of a private document and sentenced on 6 October 1994 to two years' imprisonment in 1994 because of his position as a member of the Regional Assembly. The HR described that "although the State party's legislation provides in certain circumstances for the trial of an individual, because of his position, by a higher court than would normally be the case, this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a court".

16) The HRC recognized a violation of Article 14(5) in *Gomariz Valera v. Spain*, Communication No. 1095/2002, Views 2002. In the case, a company lodged a complaint against the author for misappropriation and the judge of criminal court acquitted the author. The company lodged an appeal, and on 16 September 1996, the Provincial High Court sentenced the author to five months imprisonment in 1996. It was considered that an amparo application before the Constitutional Court would have been futile.

17) UN. Human Rights Committee (90th sess. : 2007), General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial (CCPR/C/GC/32 23 August 2007). Hereinafter referred to as General comment no. 32.

a system is incompatible with the Covenant, unless the State party concerned has made a reservation to this effect.

Article 14(5) is violated in a case where a conviction imposed by an appeal court, following acquittal by a lower court, cannot be reviewed by a higher court.

3) The HRC also clarified with § 48 of the General Comment no. 32 about a review under article 14(5) of the ICCPR as follows:

48. The right to have one's conviction and sentence reviewed by a higher tribunal established under article 14, paragraph 5, imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case. A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant. However, article 14, paragraph 5 does not require a full retrial or a "hearing", as long as the tribunal carrying out the review can look at the factual dimensions of the case. Thus, for instance, where a higher instance court looks at the allegations against a convicted person in great detail, considers the evidence submitted at the trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case, the Covenant is not violated.

The expression "according to law" in this provision is not intended to leave the very existence of the right of review to the discretion of the State parties (§ 45 of the General Comment no. 32) and that "the right to have his conviction and sentence reviewed by a higher tribunal" established under article 14(5) of the ICCPR imposes on the State party a duty to review substantively, as pointed out above, both on the basis of sufficiency of the evidence and of the law. A procedure that shows review only as a matter of discretion does not suffice¹⁸⁾.

4) Furthermore, in 2022, the HRC confirmed in *D. Jaddoe v. Netherlands* case that the right to have one's conviction and sentence reviewed by a higher tribunal imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law¹⁹⁾.

18) Paul. M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Publisher Cambridge University Press, 2020) p. 419.

19) *D. Jaddoe v. the Netherlands*, Communication No. 3256/2018, Views 2022. § 11.3. In the case, the author of the communication was prosecuted for two murders in the Netherlands. The court of first instance convicted the author for the first murder and acquitted him for the second. By contrast, the Court of Appeal convicted the author for both murders. The author submitted an appeal to the Supreme Court. The Supreme Court dismissed the author's appeal because the argued grounds could not lead to cassation. Then the author communicated to the HRC. The HRC considers that the Supreme Court did not properly assess the sufficiency of the facts and the incriminating evidence that supported the author's conviction for a second murder on appeal, (§ 11.6).

(4) Although international criminal tribunals are not tribunals of the state parties of the ICCPR, the right to appeal and Article 14(g) of ICCPR are respected.

1) When the secretary-general of the United Nations proposed an Appeals Chamber of the International Criminal Tribunals for the former Yugoslavia in 1993, he described the right of appeal as follows²⁰⁾:

§ 116 The secretary-general is of the view that the right of appeal should be provided for under statute. Such a right is a fundamental element of individual civil and political rights and has, inter alia, been incorporated in the International Covenant on Civil and Political Rights. For this reason, the secretary-general of the United Nations Has proposed that there should be an Appeals Chamber.

2) International Criminal Tribunal for the former Yugoslavia (hereinafter referred to as ICTY) amended the RULES OF PROCEDURE AND EVIDENCE to provide Appeals Chamber of five Judges as assigned by the President of the ICTY²¹⁾. This amendment is understood²²⁾ as following the case of Milan Vujin, who was Former Counsel for Duško Tadić, and was found in Contempt of the Tribunal²³⁾.

3) In some International Criminal Tribunals, Judge Fausto Pocar dissented frequently on a conviction imposed by an appeal court citing Article 14(5) of the ICCPR²⁴⁾.

4) The International Criminal Court (hereinafter referred to as ICC) has an appeal chamber system rendering a new judgment of conviction, but there is no appeal against a new judgment of conviction of an appeal chamber. Regarding this, a report of the International Bar Association admits that a single-level appeal process potentially raises fair trial issues through the possibility that a person whose acquittal is reversed or amended and replaced with a conviction by an appeals chamber would have no avenue to seek a review of the conviction by a higher tribunal²⁵⁾.

(5) So, to summarize, although the opinion remains that Article 14(5) merely establishes the principle of two-level criminal proceedings²⁶⁾, the HRC's interpretation of Article 14(5),

20) REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808(1993), S/25704, § 116.

21) Rule 77 of the ICTY Rules of Procedure and Evidence.

22) See, DISSENTING OPINION OF JUDGE POCAR at p.3 in Rutaganda v. Prosecutor (ICTR-96-3/A). Appeal Judgment, 26 May 2003.

23) See, Prosecutor v. Duško Tadić, Case (No. IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 27 Feb. 2001, p. 3.

24) For example, see supra note 22, Dissenting opinion of Judge Pocar in Rutaganda v. Prosecutor (ICTR-96-3/A) Appeal Judgment, 26 May 2003.

25) IBA, ICC & ICL Programme Reports ; Remedying international injustice: appeals, retrials and revisions of judgments in international criminal law (an ICL Perspectives series),(2022). <https://www.ibanet.org/document?id=IBA-ICL-Perspectives-Remedying-International-Injustice>, p.35 (1.8.3 Reversing or amending an acquittal decision).

26) William A. Schabas, supra note 3. § 125, at p.421.

that Article 14(5) is violated where a conviction imposed by an appeal court, following acquittal by a lower court, cannot be reviewed by a higher court, has eliminated any doubt that an accused's right to appeal against conviction also entails the right to appeal conviction entered for the first time on appeal²⁷⁾. Moreover, the General Comment no. 32 § 48. as above mentioned, states that the right of Article 14(5) imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law.

III New judgments of conviction in the Japanese criminal justice system

(1) History of the appeal system in the Japanese criminal justice

1) Modernization of the Japanese legal system began with the Meiji Restoration (1868). The first modernization model of the Japanese legal system was the Continental European legal system, referred to as civil law. In the criminal justice system, the government established Chizaiho in 1880, a criminal procedure law modeled after the French Code of Criminal Procedure. The Chizaiho (1880) was revised in 1890 to the Code of Criminal Procedure (1890). The Code of Criminal Procedure (1890) was replaced by the Code of Criminal Procedure (1992)²⁸⁾, which was influenced by German law. Thus, the Code of Criminal Procedure from the Meiji Restoration onward is said to have been fully based on the Continental European legal system²⁹⁾.

After World War II, a new postwar Constitution was established in 1946, and the Supreme Court was vested with the power of judicial review and became the top judicial body based on the principle of the separation of powers. The Anglo-American legal system, which belongs to the common law, was introduced to the Japanese criminal justice. The current CCP was legislated in line with the principles of the new Postwar Constitution (1946) and replaced the Code of Criminal Procedure (1922)³⁰⁾. The CCP is frequently said to be a hybrid of the Continental European and Anglo-American legal systems³¹⁾. However, the prosecutor's appeal system remains, and the Continental European legal system was maintained in appeal³²⁾.

27) Magali Maystre, "Right to appeal", in Carter, Linda; Pocar, Fausto (eds), "International Criminal Procedure: the interface of civil law and common law legal systems" (Edward Elgar, 2013) p. 192 , particularly at p. 194.

28) Under the Code of Criminal Procedure (1922), Jury Law was enacted(1923), and the Jury system was carried out for prescribed cases(1928~1943).

29) Supreme Court of Japan, *supra* note 1. at p. 4.

30) Before the enactment of CCP, Special Law of Criminal Matters concerning wartime (1942) was abolished (1946), and Law of the Temporary Adjustment of the Code of Criminal Procedure pursuant to the Enforcement of the Constitution of Japan was enacted (1947).

31) Supreme Court of Japan, *supra* note 1. at p. 4.

32) On the other hand, Act on Criminal Trials with the Participation of Saiban-in was enacted (2004), and Saiban-in system has been in place for prescribed cases since May 21, 2009, in which the general ↗

2) The appeal system of the Chizaiho (1880) was limited to allowing only an appeal to a police offense or a misdemeanor, while an appeal to a felony was not allowed. A first appeal court (Koso) for a police offense and a misdemeanor can approve or reverse a judgment in the first instance. Then, in case of reversing the judgments, the first appeal court (Koso) should render a judgment, including being guilty (Articles 344 and 368), though the grounds of the final appeal (Jokoku) were limited to breaches of laws (Article 410).

The appeal system of the Chizaiho (1880) was altered by the Code of Criminal Procedure (1890) which allowed the first appeal (Koso) and the final appeal (Jokoku) for every kind of crime. The appeal system in Japan, thus, became a so-called three-tiered judicial system: the first instance, the second Instance (the first appeal; Koso), and the third instance (the final appeal; Jokoku). In the Code of Criminal Procedure (1890), the court of second instance (the first appeal; Koso) rendered a judgment of conviction like the court of first instance (see Article 258 (1)), while the grounds for the final appeal (Jokoku) was limited to breaches of laws (Article 268 (1)).

The appeal system in Japan was again changed by the Code of Criminal Procedure (1922) as follows³³⁾:

Art.376. Recourse may be taken either by the public prosecutor or the accused.

Art.401. With the exception of the cases mentioned in the foregoing Article and Art. 402, the Court of Appeal shall give an entirely fresh decision in the case.

When the Court of First Instance illegally ground itself competent, it shall give a decision in first instance”

Art.409. With the exception of the cases contemplated in Articles 412 to 415 second appeal may be lodged only on the ground of the decision attached being in violation of laws or ordinances.

Art.414. Should there be obvious (manifest) reason to suspect a serious misjudgment of the facts, this may be a ground for second appeal.

In the Code of Criminal Procedure (1922), the second (final) appeal(Jokoku) was allowed not only on the grounds of the violation of laws or ordinances (Article 409) but also on the grounds of “reason to suspect a serious misjudgment of the facts” (Article 414), while the Court of Second instance(the first appeal) “shall give an entirely fresh decision in the case” (Article 401(1)).

(2) Current appeal in Japanese criminal justice

1) The appeal system under the current CCP

(a) In Japan, the following five types of courts construct the three-tiered judicial

↘ public participates in the trial and judgment in criminal cases.

33) These translations are cited from “CODE OF CRIMINAL PROCEDURE Law No. 75 of the year 1922”, D’1.1.1.2-4., Diplomatic Archives of the Ministry of Foreign Affairs of Japan.

system: the Supreme Court, High Courts, District Courts, Family Courts, and Summary Courts. In criminal matters, District Courts, Family Courts, and Summary Courts are courts of first instance. High Courts are courts of second instance, and there are 8 courts in Japan. High courts have jurisdiction over first appeals against the judgments of courts of first instance. The Supreme Court is the final (third instance) court and has jurisdiction over final (second) appeals against the judgments of the courts of second instance.

(b) Public prosecutors or the accused may appeal (Article 351(1)) in the first and final appeal. The first appeal to the court of second instance (High Court) is allowed on the following grounds.

“a violation of laws and regulations” (Articles 377, 378, and 379)

“an error in the application of laws and regulations” (Article 380)

“a sentence is unreasonable” (Article 381)

“an error in the finding of facts” (Article 382)

When the court of second instance (High Court) reverses the judgment of the court of first instance, it shall render a judgment as follows³⁴⁾:

Article 400 When the court of second instance reverses the judgment of the court of first instance on grounds other than those set forth in the preceding two articles, a judgment shall be rendered to remand the case to the court of first instance, or to transfer the case to a court which is equal to the court of first instance; provided, however, that the court of second instance may render an additional judgment on the case when it finds that it possible to do so based on the case records and the evidence examined by the court of first and second instances.

Although the court of second instance, in principle, remands the case to the court of first instance (the main clause of Article 400), it may render an “additional judgment” when it finds that it is possible to do so based on the case records and the evidence examined by the court of first and second instances (the proviso of Article 400). The “additional judgment” is the new judgment in this article because the “additional judgment” is rendered by the court of second instance (High Court) after reversing the judgment of the court of first instance.

(c) The grounds for the final appeal against a judgment of the court of second instance to the Supreme Court are limited to violation of the Constitution or judicial precedents (Article 405). However the Supreme Court may accept a case that is deemed to involve important matters relating to the interpretation of laws and regulations (Article 406) and, even in the absence of grounds as prescribed by Article 405, may render a judgment to

³⁴⁾ Hereinafter, the translation of the CCP into English is based on Code of Criminal Procedure ((Part III~) (Tentative translation)) by Japanese Law Translation (<https://www.japaneselawtranslation.go.jp/en/laws/view/3740>).

reverse the judgment of the court of first or second instance, on any of the following grounds such as an erroneous finding of a material fact when it deems that not doing so would clearly be contrary to justice (Article 411). Regarding these powers of the Supreme Court, Articles 405, 406, and 411 of the CCP are as follows:

Article 405 A final appeal may be filed against a high court judgment of first or second instance because:

- (i) There is a violation of the Constitution or an error in the interpretation of the Constitution;
- (ii) A determination has been rendered that conflicts with a Supreme Court precedent; or
- (iii) In the event that there is no Supreme court precedent, a determination has been rendered that conflicts with a precedent of the former Supreme Court (daishin'in) or a high court that was the court of the final appellate instance, or that conflicts with a precedent of a high court that was the court of second instance at a time after the enforcement date of this Act.

Article 406 The Supreme Court, as the final appellate instance, may accept a case that is deemed to involve important matters relating to the interpretation of laws and regulations pursuant to the Rules of Court, only before the judgment on the case has become final and binding, even if it is not a case in which a final appeal may be filed pursuant to the preceding Article.

Article 411 Even in absence of grounds as prescribed in the items of Article 405, the final appellate court may render a judgment to reverse the judgment of the court of first or second instance, on any of the following grounds when it deems that not doing so would clearly be contrary to justice:

- (i) There is a violation of laws and regulations which would have affected the judgment.
- (ii) The degree of punishment is seriously unfair;
- (iii) There is an erroneous finding of a material fact which would have affected the judgment.;
- (iv) There are grounds to request a retrial;
- (v) There was abolition or a change of punishment or a general pardon was granted after the judgment was rendered.

2) The Constitution of Japan (1947) and new judgments of conviction

The Constitution of Japan (1947) established that no person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law (Article 31.) and provided the right to the right of access to the courts (Article 32.) and the right to a speedy and public trial by an impartial tribunal (Article 37).

However, the Japanese Supreme Court recognized that the limitation of grounds for final appeal by the Temporary Measure Law of Criminal Procedure (1947) is not against the

Constitution³⁵⁾. Furthermore, the Japanese Supreme Court decided that it is not against the Constitution for a second instance court to render a new judgment of conviction using the proviso of Article 400 of the CCP, even if the avenue to seek a final appeal to the Supreme Court is closed³⁶⁾.

3) New judgments of conviction rendered by the courts of second instance in practice

Under the judicial precedents of the Supreme Court, many new judgments of conviction are rendered by the courts of second instance. The current situation of new judgments of conviction in practice can be found in the following statistical data presented at the end of this article.

Table 1³⁷⁾ is data regarding the “Reasons for Reversals by Courts of Second Instance”. It shows that the “Number of reversals” is less than 10 percent of the “Number of the accused” (that appealed), and that the “own judgment” is a large majority of judgments of courts of second instance after reversing the judgments of the courts of first instance. The “own judgment” in Table 1 means the “additional judgment” by the proviso of Article 400 of the CCP, which is also the “new judgment” in this article.

The “own judgment” in Table 1 contains both judgment of conviction and acquittal because the “own judgment” means the “additional judgment” in the CCP Article 400, that is, the new judgment in this article. The “additional judgment” is rendered both after the prosecutor’s appeal and after the accused’s appeal, and is also rendered for the accused or against the accused.

Table 2³⁸⁾ is data regarding “Dispositions by the Supreme Court”. From Table 2, it is confirmed that most of the final appeals are dismissed by the Supreme Court. and that “own judgment” is also rendered in the final appeal by the Supreme Court.

Table 3³⁹⁾ is data regarding “the accused appealed by a public prosecutor and settled in the first appeal”. It shows that not a few accused were newly found guilty by the second instance (first appeal) in the “own judgment”, and more accused were sentenced more seriously in the second instance (first appeal).

The “newly found guilty” in “own judgments” (Table 1) contains “newly found guilty” after both the prosecutor’s appeal (Table 3) and the accused’s appeal. After the prosecutor’s appeal, new judgments of conviction are rendered following quashing the acquittal or light

35) Judgment of the Grand Bench of the Supreme Court on March 10, 1948, Supreme Court Cases Reports Compilation Criminal (Kei-shu) Vol. 2, No. 3, p. 175.

36) Judgment of the Second Petty Bench of the Supreme Court on December 17, 1965, Supreme Court Judgements Collection Criminal (Saiban-shu Keiji) No. 157, p. 445.

37) Table 1. is cited from the “Supreme Court of Japan, supra note 1, at p. 9 (from “Table 1. Reasons for Reversals by Courts of Second Instance”).

38) Table 2. is cited from the “Supreme Court of Japan, supra note 1, at p. 10 (from “Table 2 Dispositions by the Supreme Court”).

39) Table 3. is cited from” Prosecution statistics (23-00-62) (in Japanese), https://www.e-stat.go.jp/stat-search/files?stat_infid=000040204172.

sentences. After the accused's appeal, new judgments of conviction are also rendered for the accused or against the accused. The former are convictions with lighter sentences, and the latter are convictions and sentences following quashing conviction or too heavy sentences instead of acquittals or lighter sentences with changing count within facts charged, adding new evidence, or changing evaluation of evidence.

IV New judgments of conviction in Japanese criminal justice and Article 14(5) of the ICCPR

(1) Japanese Ratification of the ICCPR with No Reservation to Article 14(5)

1) Article 14(5) of the ICCPR entails the right to appeal a conviction imposed by the courts of second instance. That right to appeal under Article 14(5) of the ICCPR, as mentioned above, requires a substantive review of the conviction and sentence on the basis of sufficiency of the evidence and of the law.

Japan signed and ratified the ICCPR in 1978 and 1979, respectively. Japan did not make a reservation to Article 14(5) of the ICCPR above-mentioned, although it made a reservation to Article 22(2) of the ICCPR⁴⁰⁾.

2) Regarding Article 14(5) of the ICCPR, the Japanese government explained its attitude through the following Japanese Second periodic reports of States parties due in 1986⁴¹⁾:

5. In regard to paragraph 5, the Code of Criminal Procedure gives the accused the right of appeal (Article 351), and the accused may lodge Koso appeal to a High Court against a judgment rendered in the first instance to receive retrial (Article 372 of the Code, Article 16 of the Court Organization Law). The grounds of Koso appeal include errors in findings (Article 382 of the Code), improper or unjust determination of penalty (Article 381), misapplication of laws and regulations (Article 380) and violation of law or ordinance of procedure (Article 379). Therefore, the right provided for in Article 14, paragraph 5 is fully guaranteed. The Code of Criminal Procedure further recognizes the right of the accused to lodge Jokoku appeal to the Supreme Court on the grounds of violation of the Constitution or violation of judicial precedents (Article 405 et seq.).

However, "the right of the accused to lodge a final appeal (Jokoku) to the Supreme Court" is limited "on the grounds of violation of the Constitution or violation of judicial precedents (Article 405 et seq.)" and, in practice, the accused cannot make a final appeal

40) Centre for Civil and Political Rights (CCPR), Reservations and declarations made by State parties of the International Covenant on Civil and Political Rights (ICCPR) (as of 31 March 2017), https://ccprcentre.org/files/media/List_of_ICCPR_reservations.pdf.

41) CCPR/C/42/Add.4, p. 17.

against new judgments of conviction rendered by the courts of second instance on the grounds of an error in fact-finding and non-compliance with procedural law in the trial procedure, etc.

(2) Article 14(5) of the ICCPR for Japanese appeal system

1) As mentioned above, the word “conviction” of Article 14(5) of the ICCPR contains a conviction imposed for the first time by an appeal court (General Comment no. 32 § 47). Article 14(5) of the ICCPR also requires reviewing substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, (General comment no. 32 § 48).

2) New judgments of conviction in Japanese criminal practice, correspond to a “conviction” imposed by an appeal court at General Comment 32 § 47. Therefore, the accused of the new judgment of conviction in Japanese criminal justice has the right to his new judgment of conviction being reviewed by a higher tribunal according to law, and the right to his new judgment of conviction being reviewed requires to be reviewed substantively his new judgment of conviction both on the basis of sufficiency of the evidence and of the law in the same way as the ICCPR. The appeal to the new judgment of conviction is also the final appeal to the Supreme Court because the new judgment of conviction is the judgment by courts of second instance.

3) However, the accused of the new judgment of conviction cannot file an appeal on the grounds of an error in the fact-finding and non-compliance with procedural law in the trial procedure, etc., because the grounds for the final appeal are limited to a violation of the Constitution or a violation of judicial precedents (Article 405 of the CCP). Furthermore, both the power of the Supreme Court to accept a case (Article 406 of the CCP) and to reverse any judgment (Article 411) are the discretionary powers, and the latter power of the Supreme Court (Article 411) is the power relating to the interpretation of laws and regulations (Article 406 of the CCP). Consequently, Japanese criminal justice does not provide such a sufficient review by a higher tribunal (Supreme Court) to the new judgment of conviction by courts of second instances as a review required by Article 14(5) of the ICCPR. The accused of the new judgment of conviction has no right to have his new judgment of conviction reviewed by a higher tribunal.

Therefore, rendering a new judgment of conviction by the courts of second instance under Article 405 of the CCP results in a violation of Article 14(5) of the ICCPR. To avoid this, the court of second instance cannot render a new judgment of conviction using the proviso of Article 400 of the CCP, but the court should render a judgment to remand the case to the court of first instance in accordance with the main clause of Article 400 of the CCP.

(3) Hierarchical authority model of appeal

The court of appeals traditionally pronounced its own judgment⁴²⁾.

This particularly looks so at the courts of Continental European countries, which are civil law systems. Although the grounds of the final appeal are limited to points of law, the court of second instance renders its judgment including conviction, that is own judgment, in civil law countries. (Furthermore, the highest court may render a judgment of conviction as the court of first or second instance.) In this case, the judgment by the court of second instance cannot be reviewed on the point of fact by the highest court because the highest court is the so-called Cassation in civil law countries, which does not review the point of fact.

Those structures regarding appeal systems in civil law countries may be understood as a hierarchical authority model⁴³⁾ from the viewpoint of comparative law. The hierarchical authority model concerning criminal procedure in civil law was appraised as useful for comparative analysis of the right to appeal⁴⁴⁾. Particularly, I think, the hierarchical authority model is useful for understanding why a new judgment of conviction is allowed without appeal on a point of fact in civil law countries.

The response of European countries to Article 14(5) of the ICCPR suggests and presupposes that the appeal systems of the member states of the Council of Europe, which are understood as the countries of the appeal systems of the hierarchical authority model, are different from those of Article 14(5) of the ICCPR. In the ICCPR, the accused's right to appeal against conviction of the Article 14(5) of the ICCPR may entail the right to appeal conviction imposed for the first time by the first appeal. Thus, many European countries have submitted reservations to Article 14(5) of the ICCPR.

Japan has ratified the ICCPR with no reservation to Article 14(5). Although the CCP might maintain civil law systems in the appeal stage in general, it should change its attitude toward appeals against a new judgment of conviction. Article 2 (2) of the ICCPR requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees, where there are inconsistencies between domestic law and the Covenant⁴⁵⁾.

(4) Substantive reasons to change Japanese attitude

In addition to a violation of the ICCPR, there are other substantive reasons for the Japanese criminal justice system to change its attitude toward the appeal against the new

42) Edited by Darryl K. Brown, Jenia I. Turner, and Bettina Weisser, *The Oxford Handbook of Criminal Process*, Oxford University Press (2019), at p. 948.

43) Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 *YALE L.J.* pp. 480-544 (1975), particularly at p. 483.

44) Peter D. Marshall, *A Comparative Analysis of the Right To Appeal*, 22 *Duke Journal of Comparative & International Law* 1-46 (2011), particularly at p. 14.

45) General comment no. 31 (80), *The nature of the general legal obligation imposed on States Parties to the Covenant*: adopted on 29 March 2004 (2187th meeting) § 13, at p. 5.

judgment of conviction.

Firstly, it is difficult to find a way to ensure the appropriateness of new judgments of conviction rendered by the courts of second instance, on the other hand, the appropriateness of judgments of conviction rendered by the first instance is ensured through the review by the court of the second instance. This is an inequality regarding not only ensuring the appropriateness of a new judgment of conviction by the court of higher instance but also an inequality regarding an opportunity to challenge the ground of execution of punishment, including the death penalty.

Secondly, a new judgment of conviction without a fact-finding appeal is difficult to co-exist with the principle of prohibition of double jeopardy.

The Japanese Constitution provides that no person shall be held criminally liable for an act that was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy (Article 39). The Supreme Court recognized that the prosecutor's appeal does not violate Article 39 of the Constitution and said that only one jeopardy exists in any stage of litigation⁴⁶⁾.

However, the jeopardy of the first instance is not the same as the jeopardy of the second instance. There is a difference regarding the appeal. The former has an appeal for fact-finding, and the latter has not. It is necessary to guarantee an appeal against fact-finding of the second instance (first appeal) to keep "one jeopardy theory" for the prosecutor's appeal system.

Thirdly, the CCP adopts a review as a structure of the first appeal (Koso). It is a natural consequence of the review as the structure of the first appeal (Koso) to remand or transfer the case to the lower court after reversing a judgment of the first instance⁴⁷⁾. Although a few rational grounds are put forward to support the Japanese practice of the new judgment, such as the so-called judicial economy (about time) and a thorough examination of the trial record and the recorded or new evidence, those grounds look too general for cases of new judgments. They would not be suitable for the grounds of a new judgment of conviction.

(5) Japan's obligations as a member state of the ICCPR

As a member state of the ICCPR, Japan is obliged to respect the ICCPR rights and to ensure them. Therefore, Japanese courts of second instance should put an end to rendering an "own judgment" of conviction in accordance with Article 14(5) of the ICCPR.

According to General Comment no. 31 to the ICCPR (2004)⁴⁸⁾, all branches of

46) Judgment of the Grand Bench of the Supreme Court on November 8, 1950, Supreme Court Cases Reports Compilation Criminal (Kei-shu) Vol. 4, No. 11, p. 2215.

47) Makoto Mitsui, Tadashi Sakamaki (Translated by Takeshi Matsuda, Jun Kojima, Yasuhiro Miyaki, Sean McGinty, Giorgio Fabio Colombo) (Publisher Yuhikaku, 2024) particularly p. 268, p. 270.

48) HRC, *supra* note 45, General Comment no. 31, § 4, at p. 2.

government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party.

V Conclusion

(1) The word “conviction” in Article 14(5) of the ICCPR contains a conviction imposed on appeal. A new judgment of conviction rendered by the second instance in the Japanese criminal justice corresponds to a conviction imposed on appeal in Article 14(5) of the ICCPR as a judgment of the first appeal.

(2) Therefore, Article 14(5) of the ICCPR requires the Japanese criminal justice to substantively review a new judgment of conviction rendered by the courts of second instance (High Court, first appeal) both on the basis of sufficiency of the evidence and of the law.

(3) However, the Japanese criminal justice system does not provide a sufficient review by a higher tribunal for a new judgment of conviction under Article 405 of the CCP. Therefore, rendering a new judgment of conviction by the courts of second instance using the proviso of Article 400 of The CCP under Article 405 constitutes a violation of Article 14(5) of the ICCPR. The first appeal (High Court) should not render a new judgment of conviction using the proviso of Article 400 but render a judgment to remand the case to the court of first instance in accordance with the provision of the main clause of Article 400.

(4) However, it is not easy for the accused convicted with a new judgment of conviction by a court of second instance to lodge a final appeal to the Supreme Court because the grounds of the final appeal to the Supreme Court are, as mentioned above, limited to a violation of the Constitution and judicial precedents under Article 405 of CCP. It is necessary to identify the violation of Article 14(5) of the ICCPR as a violation of a certain article in the Japanese Constitution⁴⁹⁾.

49) Furthermore, Japan has not signed the First Optional Protocol to the ICCPR, which provides Individual communication mechanisms.

Table 1. Reasons for Reversals by Courts of Second Instance (note 37)

Classification Year	Number of the accused (A)	Number of reversals (B)	Due to inappropriate sentencing					Due to errors in fact finding					Due to errors in application of law					Others		
			Total (C)	Own judgment	Remanded or transferred	% (C/B)	% (C/A)	Total (D)	Own judgment	Remanded or transferred	% (D/B)	% (D/A)	Total (E)	Own judgment	Remanded or transferred	% (E/B)	% (E/A)	Total number (F)	% (F/B)	% (F/A)
2017	6,098	587	111	111	-	18.9	1.8	79	76	3	13.5	1.3	54	43	11	9.2	0.9	361	61.5	5.9
2018	5,710	576	95	95	-	16.5	1.7	98	81	17	17.0	1.7	56	45	11	9.7	1.0	352	61.1	6.2
2019	5,828	530	70	69	1	13.2	1.2	66	58	8	12.5	1.1	40	35	5	7.5	0.7	372	70.2	6.4
2020	5,332	507	65	65	-	12.8	1.2	74	61	13	14.6	1.4	33	22	11	6.5	0.6	352	69.4	6.6
2021	5,331	513	58	58	-	11.3	1.1	71	65	6	13.8	1.3	38	30	8	7.4	0.7	358	69.8	6.7

(Note) Cases for which judgments were reversed based on multiple grounds are recorded in multiple appropriate columns.

Table 2. Dispositions by the Supreme Court (note 38)

Classification Year	Number of the accused (A)	Dismissal of appeal			Percentage dismissed % (B/A)	Reversal					Percentage reversed % (C/A)	Withdrawal of appeal	Dismissal of prosecution and others
		by judgment	by decision	Total (B)		Total (C)	Own judgment			Remanded or Transferred			
							Guilty	Not guilty	Dismissal for judicial bar				
2017	2,106	5	1,771	1,776	84.3	1	-	1	-	-	0.0	327	2
2018	1,993	2	1,700	1,702	85.4	6	4	1	-	1	0.3	280	5
2019	2,091	5	1,737	1,742	83.3	3	3	-	-	-	0.1	338	8
2020	1,881	5	1,513	1,518	80.7	3	-	-	-	3	0.2	354	6
2021	1,852	2	1,576	1,578	85.2	3	1	-	-	2	0.2	263	8

(Note) Special appeals to the court of the last resort and extraordinary appeals to the court of the last resort are not included.

Table 3. The accused appealed by a prosecutor and settled in the first appeal (note 39)

year	Number of the accused appealed and settled	Reversal					dismissal of appeal	others
		own judgement of the court of second instance				remanded or transferred		
		Total	newly found guilty	sentenced more serious	others			
2019	93	42	10	15	17	6	31	14
2020	97	55	22	20	13	13	19	10
2021	65	35	12	10	13	5	13	12
2022	64	31	9	11	11	8	14	11
2023	58	31	7	10	14	7	15	5