

Evidence Law in Japan and Australia: Principles, Practice and Reform

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I. JAPAN'S LAY ASSESSOR (*SAIBAN-IN*) SYSTEM AND EVIDENCE LAW

Japan is set to introduce a lay participation system called the *saiban-in* system in serious criminal cases by May 2009. This is not the same as a jury system, but instead involves three professional judges and six lay-judges deliberating together on verdict and sentence.

With the new system near at hand, many changes have already been made to the criminal justice system. For example, the new Criminal Procedure Act and Criminal Procedure Regulations have been in force since 2005. These instruments require the court to have intensive court sessions on a daily basis; set new criteria for the discovery of prosecution evidence to the defence; and create a new process called the “pre-trial conference.”¹ This law reform is aimed at overcoming defects in the conventional criminal justice system – one such defect is a continuous delay in trials, another is the complexity of hearings.²

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1 This is a conference hosted by the court, held prior to the trial, where each party can discuss preliminary issues such as the admissibility of evidence. The court may make rulings on the admissibility of evidence and, if required, the court may also examine witnesses to establish certain facts forming the basis for admissibility.

2 Delays in criminal trials are particularly serious, and although most criminal cases are finalized within 3 months, the average length of a serious criminal trial (in which future lay assessors will be involved) is about 8 months with an average of 5.7 sessions: SUPREME COURT OF JAPAN, ‘Statistics of 2003’ (2003) < <http://www.saibanin.courts.go.jp/shiryō/pdf/13.pdf>>.

To create a speedy and comprehensible trial, it is essential to alter the conventional way of practice itself. In Japan's conventional criminal justice system, conventional practice is much oriented toward the ascertainment of a complete, detailed picture of the case, including the background of the offence, or the motives of the offenders. This practice reflects the public desire to know the actual circumstances of the crime, but at the same time it brings significant delay and complexity to criminal procedure. Prosecutors generally produce volumes of very detailed documentary evidence, and the courts tend to admit evidence even if it is removed from the main issue – the guilt or innocence of the defendant. With the introduction of the lay assessor system, however, it will be essential to focus on the central issues in dispute, disregard collateral issues, select the “best evidence” and exclude any irrelevant evidence.

When looking at jury trials and the law of evidence in Australia, there is a significant difference between Australia and Japan in views regarding the tribunal of fact, and the understanding of what can or should be presented to the tribunal. Bearing in mind that the Australian jury system is fundamentally different from the Japanese *saiban-in* system, it is worth thinking what this difference means. In this article, I focus on the law of evidence to conduct a comparative analysis between Australia and Japan.

II. EVIDENCE LAW IN JAPAN

First, let me give a brief overview of current evidence law in Japan.

1. *Statutory Rules*

Evidence law in Japan is not a piece of individual legislation, but is codified as a part of a body of procedural legislation. There are separate rules of evidence for the civil and criminal systems in Japan, and criminal evidence law is provided in Chapter 3, Part 2 of the Criminal Procedure Act.³ Some important rules are also contained in the Constitution.⁴

Article 317 of the Criminal Procedure Act declares that all facts must be established on the basis of evidence. Here “evidence” means “admissible evidence”, and it is necessary that the evidence is examined in a proper way and in accordance with the law. Article 318 of the Act provides that the assessment of probative value or weight of evidence should be decided by the judges. These are the principal doctrines of Japanese evidence law.

3 *Keiji soshô-hô*, Law No. 131/1949.

4 *Nihon-koku kenpô*, 1947, Arts 31-38. Article 37(2) ensures the right of the defendant to cross-examine all witnesses.

a) *Involuntary confession rule*

Article 38(2) of the Constitution provides that evidence of a confession or an admission is not admissible if it was made under compulsion, torture, threat, or after prolonged detention. Article 319(1) of the Criminal Procedure Act also declares that the court cannot use a confession or admission made by a defendant, if it is feared that it was not made voluntarily. Article 322(1) contains one of the hearsay exceptions applying to signed, written statements made by defendants and requires that the confession or admission be made voluntarily. This is to prevent any illegal or inadequate conduct by the investigative authority during the investigation period, and to ensure that evidence of confessions or admissions is reliable and more truthful.

In a decision about the admissibility of a confession or admission, the courts generally examine the circumstances under which the confession or admission was made, and try not to examine the evidence in the confession itself. In practice, the process of deciding admissibility and that of assessing the reliability of a confession or admission are often interrelated.

b) *Corroboration rule*

The corroboration rule states that the court cannot convict a defendant without evidence to corroborate his or her confession or admission.⁵ This rule prohibits the court from relying too heavily on evidence of confessions, and aims to prevent miscarriages of justice.

c) *Hearsay rule*

Article 320(1) of the Criminal Procedure Act provides that hearsay evidence is not admissible unless it satisfies one of the hearsay exceptions provided in Articles 321–328. The Japanese hearsay principle is similar to the hearsay rule codified in the Australian Evidence Act,⁶ although some differences can be found in its exceptions to the hearsay rule.

The hearsay rule is at the heart of the statutory rules of evidence. The rationales behind the rule are as follows:

- (a) the credibility of the declarant or the declarant's observations cannot be cross-examined by the opponent; and
- (b) the witness giving hearsay evidence may not repeat the declarant's statement accurately.

The hearsay rule does not apply if the evidence is used for a non-hearsay purpose, that is, to establish a person's mental state or the existence of the representation itself.

⁵ Constitution, Art. 38 para. 3; Criminal Procedure Act, Art. 319 para. 2.

⁶ Evidence Act 1995 (Cth), s. 59.

A witness's prior statement is admissible if it is used for the purpose of establishing credibility,⁷ but the tribunal cannot use that prior statement as evidence of the facts asserted in it.

Hearsay exceptions can be classified into two categories: (a) consent by the defendant, and (b) other exceptions prescribed by the law. In practice, in Japan the defendant gives consent to documentary evidence which he or she did not challenge at an earlier stage of the trial, and that evidence is admitted straightaway. But if the defendant does not consent to the evidence being admitted, the prosecution bears the onus of proving that the evidence satisfies one of the hearsay exceptions. One common hearsay exception provides that a signed written statement containing a prior representation of a person other than the defendant and recorded by investigating prosecutor, is admissible if:

- (a) the person is not available to give evidence; or
- (b) the evidence given by the person in court is substantially different from the prior representation.⁸

This, however, will only be admissible if there is a good reason to rely on the previous representation rather than the representation in court.

Because of the quasi-judicial nature of the prosecution, the law sets different criteria for admissibility of evidence recorded by the investigating prosecutor to those criteria applying to evidence recorded by the police officer. This hearsay exception, particularly the second condition, is frequently used by the prosecution and always disputed in practice. The interpretations of "substantially different" and "good reason" are key elements in the application of this section.

2. *Test of Relevance*

Despite the importance of statutory rules, the most fundamental rule in determining admissibility of evidence is that of "relevance". The requirement of relevance is not contained in the legislation but is instead considered a matter of axiom. Relevance is divided into logical relevance and legal relevance. Logical relevance is the requirement that evidence must have some logical connection to the case.⁹ This is a threshold test for admissibility and hence even a small connection would satisfy the standard of logical relevance. Legal relevance relates to the legal consideration of whether the court should use particular evidence or not, and the statutory rules for admissibility of evidence form part of the test for legal relevance. In addition, courts have also developed some rules in precedents. The most common example is the exclusionary rule for illegally obtained evidence. The precedent states that the court should not use evidence

7 Criminal Procedure Act, Art. 328.

8 Criminal Procedure Act, Art. 321 para. 1 no. 2.

9 The meaning of "relevance" is quite similar to section 55 of the Evidence Act; i.e. the evidence must be capable of affecting, directly or indirectly, the probability of the existence of a fact in issue.

that is obtained as a result of serious misconduct on the part of investigators and the like, on the ground that such evidence has no legal relevance to the case. The courts have also developed the rule that evidence of the criminal record of a defendant may not be used unless it has significant probative value, that is, to establish the “modus operandi” of the offence or the mental state of the defendant (but this is permissible only after all physical elements of the crime have been established).

III. JAPAN’S CURRENT EVIDENCE LAW AND THE LAY ASSESSOR SYSTEM

Although there are the several exclusionary rules of evidence mentioned above, evidence law in Japan is rather relaxed. By virtue of Article 318 of the Criminal Procedure Act, the assessment of evidence is left mainly to the discretion of the tribunal of fact, namely judges. Judges may also exercise extensive discretion in determining the admissibility of evidence. Arguably, the law grants judges such wide discretion with the view that it will facilitate the “search for truth.” However, the courts are often criticized for their tendency to interpret hearsay exceptions too broadly and their readiness to allow many out-of-court statements (including confessions or admissions of the defendant) into evidence. Although courts are still cautious to admit hearsay evidence without examining the declarant (and depriving the other party of the opportunity to cross-examine the declarant¹⁰), it is arguable that they are not reluctant to admit out-of-court statements once the other party has cross-examined the declarant. The criteria for the voluntariness of confessions or admissions are not that rigid either, although the circumstances which might have affected voluntariness are to be taken into account when weighing the evidence. In quite a few cases, the courts did not exclude illegally obtained evidence although they acknowledged that the investigation method was illegal.

In the conventional Japanese system, where the tribunal of fact consists only of professional judges and those judges decide upon admissibility of evidence, there may be a tendency to keep as much material as possible available for consideration, rather than to exclude it. It is even considered acceptable to first admit evidence and subsequently to give it a proper assessment, rather than to take such drastic measures as to exclude evidence from the outset.

Japanese law and practice is based on the assumption that judges are capable of assessing evidence precisely, rationally, and without bias. Professional judges are supposed to polish such skills through training and experience, and by giving detailed reasons for judgments, they try to maintain public trust in the judiciary. But, on the other hand, justice and fairness in such a system depend greatly on the proper exercise of discretion by judges.

10 Constitution, Art. 37 para. 2.

“The criminal justice system in Japan is a system with perfect precision” – this is an ironic remark about the conventional law and practice. Here “precision” refers to successfully convicting every guilty person and acquiring a very detailed account of the actual circumstances of the offence. In order to do so, the courts have fossilized the rules of evidence, the prosecution relies too much on documentary evidence, and judges would make judgements based on thousands of pages of documentary evidences read in their chambers.

Obviously, such system will no longer work when lay judges are introduced to the Japanese criminal justice system.

IV. THE AUSTRALIAN EVIDENCE ACT¹¹

Australian evidence law has developed separately in each jurisdiction, but now the Commonwealth courts, New South Wales, the Australian Capital Territory and Tasmania operate under the Uniform Evidence Acts.¹² Although some rules are not altered from common law principles, many are newly introduced or changed by recommendation of the Australian Law Reform Commission (ALRC). The Commission conducted a review of evidence law by considering a number of laws and court decisions in various jurisdictions, as well as psychological research and other data. In working towards the draft legislation, the Commission also consulted various legal bodies, academics, practitioners and other interested parties.

Although the Act applies to both civil and criminal matters, and in both jury and non-jury trials, it is said that the jury system greatly influenced the drafting of the Act.

1. *Exclusionary Rules*

From a Japanese perspective, what is most remarkable about the Evidence Act is that it contains very detailed rules for the admissibility of evidence. If evidence is highly unreliable or unfairly prejudicial, the Act excludes that evidence rather than leaving it to the discretion of the tribunal of fact.

The general criteria for excluding evidence are codified in section 135 and 137 of the Act. Section 135 grants the courts a general discretion to exclude evidence on the ground that its probative value is substantially outweighed by the danger that the evidence might (a) be unfairly prejudicial; (b) be misleading or confusing; or (c) cause or result in undue waste of time. Section 137 provides that in a criminal trial, the court

11 Evidence Act 1995 (Cth) (hereinafter ‘Evidence Act’). See, generally J. HUNTER / C. CAMERON / T. HENNING, *Litigation II: Evidence and Criminal Process* (7th ed., Sydney 2005); J. ANDERSON / J. HUNTER / N.S.C. WILLIAMS, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (Sydney 2002).

12 Evidence Act 1995 (Cth); Evidence Act 1995 (NSW); Evidence Act 2001 (Tas).

must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant. Section 137 is a mandatory exclusion rule and only applies in criminal proceedings. As the difference between the terms of these provisions indicates, the onus on the party seeking exclusion under section 135 is heavier than under section 137. The discretionary rules are considered a codification of the common law principle. Under the provisions, the courts must balance the desirability of admitting the evidence and the necessity of excluding it.

In addition, the Act also categorises certain forms of evidence and provides separate exclusionary rules for each category. A good example is the rule for identification evidence,¹³ which applies only in criminal proceedings.¹⁴ In principle, the Act requires an identification parade to be held before identification evidence is given, and renders inadmissible any identification evidence adduced by the prosecution which does not comply with this rule, subject to certain exceptional conditions. Picture identification is permitted in only limited circumstances, and also must be done in a proper way.

The rule reflects common law concerns about identification evidence.

One obvious problem with identification evidence is that it is difficult to secure the accuracy of witness identification for a variety of reasons (for instance, the 'vagaries of human perception and recollection' such as memory distortion and suggestibility; in addition to factors such as stress, rapidity of events, or bad lighting at the time of the initial identification itself). However, the most significant difficulty with identification evidence is that – in contrast with other categories of oral testimony – the confidence or apparent credibility of an eyewitness do not necessarily correlate with the degree of accuracy of this person's identification.¹⁵

In common law, it is recognized that an identification parade makes visual identification evidence more reliable. Under the Evidence Act, the common law preference for identification parades has become a requirement for admissibility.

In a similar way, common law points out the problem of picture identification. In addition to the issue of reliability of identification using two-dimensional pictures, another criticism of picture identification is that the police have photographs of the accused in their possession and this suggests to a witness and/or the tribunal of fact that the accused 'has a criminal record, perhaps even a propensity to commit a crime of the kind with which he/she is charged' (the so-called 'rogue's gallery effect').¹⁶ The Evidence Act renders picture identification evidence inadmissible if the pictures used suggest that they are pictures of persons in police custody.¹⁷

13 Evidence Act 1995 (Cth), (Parts 3-9, ss 113-116).

14 *Ibid.*, s 113.

15 AUSTRALIAN LAW REFORM COMMISSION, ALRC Report 102: Uniform Evidence Law (Sydney 2005), [hereinafter ALRC Report 102], [13.5]; ALRC Report 26: Evidence (Interim) (Volume 1) (Sydney 1985) [hereinafter ALRC Report 26], [420]–[421].

16 ALRC Report 102, [13.6]; ALRC Report 26, [435].

17 Evidence Act 1995 (Cth), s115(2).

Rules for identification evidence constitute a significant departure from common law principles. They reflect not only a restrictive position in admitting evidence, but also an intention to limit judges' discretion in determining admissibility of evidence. Despite criticism that the rules are too rigid or impracticable, the rule for identification evidence has been adopted in most jurisdictions implementing the Uniform Evidence Acts¹⁸ and has significantly altered police practice.

Although Japan shares the view that eyewitness identification evidence has inherent defects in terms of reliability, it would not be discussed as a matter of admissibility.

2. *Section 60*

In Japan a prior statement which is relevant for a non-hearsay purpose (for example, credibility) is admissible only for that purpose, and the tribunal cannot use it for a hearsay purpose. This is the court's interpretation and considered to be consistent with the hearsay principle. Although it is arguable whether the tribunal is affected by the facts asserted in the prior statement, it is considered that lay judges are able to make such distinction between these two uses.

Section 60 of the Evidence Act, on the other hand, allows a previous representation to be admitted for a hearsay purpose, if it is relevant for both a non-hearsay and hearsay purpose. This provision enables hearsay evidence such as a prior consistent or inconsistent statement of a witness to be used to prove the truth of its contents, if it has both hearsay and non-hearsay relevance. In common law, such evidence is admissible only for non-hearsay purposes, and trial judges are obliged to give directions to limit the usage of the evidence. But the common law position is criticized on the ground that it is extremely difficult, if not impossible, to make the required distinction between use of the evidence for a hearsay purpose and non-hearsay purpose.

From a Japanese perspective, section 60 seems contradictory to the hearsay principle. The recent discussion surrounding the application of section 60 to the factual basis of an expert opinion shows one aspect of this contradiction. To give an extreme example, under this section, a party could call a doctor as an expert witness to establish the existence of facts told to that doctor during a consultation. Even though a trial judge still has discretion to limit the use of evidence under section 136, section 60 could possibly be used as a by-pass to enable the admission of hearsay evidence to prove its content without any good reason or reasonable limitation.

But, on the other hand, it is really questionable that the tribunal of fact (whether judges or lay people) is able to make a clear distinction between the use of evidence for a hearsay and non-hearsay purpose. The Evidence Act has done away with the assumption that such a distinction can be made easily or at all, whereas Japanese law maintains that both judges and lay people can make the distinction.

18 S. 114 (regulating the identification parade requirements) and s. 115 (outlining the conditions for the use of police photographs) are not adopted in the Evidence Act 2001 (Tas).

3. *Evidentiary Determination – Voir Dire*

One other issue being discussed in Japan is whether lay assessors should be involved in the procedure to decide the admissibility of evidence, particularly in relation to the admissibility of admissions or confessions and the exclusion of illegally obtained evidence. It is widely believed that lay assessors, together with professional judges, should determine the facts which constitute the basis for admissibility of evidence, because such facts are also relevant to the weight of the evidence, which is a matter for the tribunal of fact. It is also argued that judges should not obtain any additional knowledge in the absence of lay assessors, since judges are supposed to be equal to lay assessors as members of the tribunal.

Under the Evidence Act, on the contrary, voir dire hearings are to be held in the absence of the jury unless the court otherwise orders. Section 189 of the Act particularly prohibits a jury being present at a voir dire hearing if the preliminary questions are about admissibility of evidence of admissions or confessions, or the exclusion of illegally obtained evidence.

Section 189 complies with the general rule that the trial judge (not the jury) should determine whether a fact exists, when the existence of the fact is a condition precedent to the admissibility of evidence. The ALRC Report¹⁹ states the rationale for the rule in enabling prejudicial or unreliable material to be kept from the jury, save time and minimize the complexity of the jury's task. The Report also says;

If the tribunal of fact is present during a hearing to decide whether to admit an item of evidence, a number of consequences may follow. Firstly, the very evidence whose admissibility is disputed may be revealed to the tribunal during the hearing. If the evidence is not admitted, the tribunal will be faced with the difficult task of ignoring it and may be prejudiced or misled. In addition, the tribunal may hear material which, while relevant to the question of admissibility, is not relevant to the issues in the trial and again, may prejudice or mislead. Further, the tribunal may hear material which, while relevant and admissible on the question of admissibility would be excluded for policy reasons in the trial proper.²⁰

The operation under section 189 is possible only when the body who decides the admissibility of evidence is independent of the tribunal of fact; when a judge is sitting by him or herself, it is difficult to avoid such dangers as mentioned above. But as far as jury trials are concerned, this is consistent with the concept adopted throughout the Act; the Act does not rely on the assumption that members of the tribunal of fact can surely and precisely ignore evidence revealed to them in the voir dire hearing.

19 ALRC Report 26, [1032].

20 ALRC Report 26, [1035].

V. THE UNDERLYING CONCEPT OF THE UNIFORM EVIDENCE ACTS

Compared to the law of evidence in Japan, it is obvious that the Uniform Evidence Acts are much more restrictive in admitting evidence, and consequently the discretion of the tribunal in assessing the admissibility of evidence is quite limited. The Act is designed to scrutinize various kinds of evidence carefully, to screen and filter out any unreliable or unfairly prejudicial evidence, and to select only highly probative and less distracting evidence. The Act provides very detailed rules, and the terms used in it are also clearly defined, so that the discretion of judges in deciding admissibility of evidence is fairly limited as well.

The following citation provides a fundamental idea of how the law of evidence is developed.

When we have said (1) that, without any exception, nothing which is not, or is not supposed to be, logically relevant is admissible; and (2) that, subject to many exceptions and qualifications, whatever is logically relevant is admissible; it is obvious that, in reality there are tests of admissibility other than logical relevancy. Some things are rejected as being of too slight a significance, or as having too conjectural and remote a connection; others, as being dangerous, in their effect on the jury and likely to be misused or overestimated by that body; others, as being impolitic, or unsafe on public ground; others, on the bare ground of precedent. It is this sort of thing, as I said before, – the rejection on one or another practical ground, of what is really probative, – which is the characteristic thing in the law of evidence; stamping it as the child of the jury system.²¹

To oversimplify the matter, the law of evidence can be viewed as a “child of the jury” – that is, rules of evidence have developed from a distrust of the jury’s ability to assess evidence properly; rules of evidence are there to shelter the jury from evidence which could be misused or misestimated by them. Although the Commission rejects this analogy, its report acknowledges that the significance of jury trials for the rules of evidence must be considered.²²

I would not say that the ability of jurors in assessing evidence is inferior to that of judges, but twelve ordinary people sitting in the jury box would remind everyone of the fact that the tribunal consists of human beings – they might easily be biased by inappropriate evidence, might make too much of unreliable evidence, or cannot easily ignore evidentiary material once they have seen it. This is also the case even if professional judges alone constitute the tribunal of fact. There is always a risk of miscarriage of justice. By assuming that the tribunal of fact is frail and vulnerable, the Evidence Act sets a high standard for admissibility of evidence. The Act does not require any difficult task of the tribunal such as ignoring evidence it has already seen, or using evidence only

21 J.B. THAYER, *A Preliminary Treatise on Evidence at the Common Law* (Boston 1898), 266; ALRC Report 26, [51]; HUNTER / CAMERON / HENNING, *supra* note 11, [15.5].

22 ALRC Report 26, [49].

in limited ways. In so doing, the Act serves as a “safeguard” which minimizes the risk of miscarriage of justice and wrongful conviction. Particularly because of the structure of a jury trial, where no reasons are provided for the verdict and there is no means of checking the process of deliberation, it is necessary to exclude any dubious evidences beforehand, based on discussions between parties. Discussion of the admissibility of evidence and exclusion of any doubtful evidence brings clarity and transparency to the process. It also brings stability to the judicial system and its decisions. In this aspect, the law of evidence serves a purpose in fulfilment of the right to a fair trial.

VI. PERSPECTIVES ON EVIDENCE LAW IN JAPAN

For now, there is no movement to change the law of evidence in Japan, and it is even considered inappropriate to limit the discretion of lay assessors. This might be considered a logical consequence in a sense; there is no justification to limit the discretion of lay assessors in assessing evidence, an area in which professional judges have exercised their discretion over the ages – Japan is introducing the *saiban-in* system because of a need for the life experience or common sense of the public in judicial decisions, and thus, it should not be concluded that the ability of lay judges in assessing evidences is less than that of judges.

However, the real issue is not the actual ability of the lay judges but how to ensure the fairness, transparency and certainty of the trial. From my perspective, the introduction of a lay participation system has one symbolic meaning – acknowledgement of the fact that the tribunal (including judges and lay people) consists of human beings. And I have a view that we should no longer maintain a system based on the assumption that the tribunal of fact is always rational, objective and precise.

It is true that the current system is useful to ascertain that a particular event happened in the past; generally speaking, the more material will be available to the tribunal, the more precise and truthful the judgement will be. And some would also argue that since judges are still members of the tribunal, judges can protect lay assessors from any misuse of evidence by explaining the inherent defects of certain evidence during deliberations. But I wonder whether it would really be a fair system if judges are supposed to “control” lay assessors in the deliberation room, behind a closed door. It will instead be necessary to make each step clear, based on a discussion between the parties, and minimize the uncertainty of the tribunal. The purpose of the criminal trial is not only to search for the truth, but also to ensure procedural fairness and transparency.

I would not say that the Evidence Act is ideal legislation, nor would I advocate the introduction of similar legislation in the Japanese criminal justice system. The difficulty of the Japanese system is that the body deciding upon admissibility of evidence is not clearly divided from the tribunal of fact. But the approach of the Evidence Act mentioned above is worth consideration. Under the new *saiban-in* system, it is highly likely that

the court will receive many more challenges to the admissibility of evidence on the basis of its prejudicial effect on lay assessors. The question is how the courts should react to these challenges. Although no legislative change has been made to the current evidence law, the courts are still able to interpret the meaning of "legal relevance" from a different point of view. I am of the view that Japan should implement a system of discussions over the admissibility of evidence, and exclude dubious, unfairly prejudicial and less probative evidence on the basis of these discussions. It makes the process more clear and fair than to consider the admissibility of such evidence at the final deliberation stage and instruct the lay judges in the absence of the parties. By doing so, the task of the lay assessors will be more simple, and the argument to be determined by the lay assessors narrower. This would not be inconsistent with the democratic foundations of the system and would facilitate free discussion among the lay assessors.

ZUSAMMENFASSUNG

Japan wird bis Mai 2009 ein System der Laienbeteiligung (saiban-in seido) bei schwerwiegenden Strafrechtsfällen einführen. In den saiban-in Senaten werden drei Berufsrichter und sechs Laienrichter gemeinsam über die Schuldfrage und die Strafzumessung entscheiden. Die Einführung dieses Laienbeteiligungssystems, das in seiner Ausgestaltung einzigartig ist und erstmals seit 50 Jahren wieder Laienrichter an der japanischen Rechtsprechung beteiligt, hat Auswirkungen auf eine Reihe weiterer Gebiete. Der wichtigste betroffene Bereich ist wohl das Beweisrecht, das bestimmt, welche Beweise Laienrichter bei ihrer Entscheidung berücksichtigen dürfen, und das daher großen Einfluß auf den Ausgang der Prozesse haben wird, die mit der Beteiligung von Laien geführt werden.

Anhand einer rechtsvergleichenden Analyse des japanischen und australischen Rechts untersucht der Artikel mögliche Wege zur Reform des geltenden Beweisrechts in Japan. Er gibt einen Überblick über die wichtigsten Regelungen in beiden Ländern und arbeitet Gemeinsamkeiten und Unterschiede zwischen ihnen heraus. Der Beitrag geht weiter auf mögliche Auswirkungen ein, die das geltende Beweisrecht auf das neue Laienbeteiligungssystem in Japan haben könnte. Zugleich wird der Einfluß des australischen Uniform Evidence Acts auf das australische Jury-System untersucht. Die Einführung einer ähnlichen gesetzlichen Regelung wie des australischen Evidence Acts in Japan wird nicht befürwortet. Vielmehr wird der Schluß gezogen, daß Laienrichtern in demselben Maße wie Berufsrichtern zugestanden werden sollte, Beweise zu bewerten, da das saiban-in System in Japan ja gerade eingeführt wurde, um den „gesunden Menschenverstand“ der Allgemeinheit in richterliche Entscheidungsprozesse einzubringen.

Zukünftigen Herausforderungen im Bereich des Beweisrechts sollte dadurch begegnet werden, daß vor der eigentlichen Entscheidungsfindung gemeinsame Beratungen eingeführt werden, um so die Laienrichter möglichst umfassend zu beteiligen und gleichzeitig das Verfahren transparent und fair zu gestalten. (Übersetzung durch die Red.)