

Changes to the Japanese Criminal Justice System

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On 21 May 2009 Japan introduced an interesting new model for the involvement of lay people in the courts. In Japanese, it is known as *saiban'in seido*. In August 2009, the Japanese media covered the first *saiban'in* trial with enormous attention. There has since been considerable coverage of subsequent trials.

The *saiban'in* system is a new initiative developed as part of broader legal reforms aimed at delivering better justice and a more democratic society.

Essentially, *saiban'in seido* is a jury – except in the proposed Japanese model, the jury is made up of three judges and six lay people who deliberate together not only on verdict, but on sentence. Physically, this jury will sit close to the accused, and members will

be able to ask questions of the accused and witnesses during the trial.

Early development of Japanese law

Japanese law underwent considerable change after the Meiji Restoration in 1868 when the Emperor was restored to political power. Much of Japanese law was then transplanted from Western countries. Japanese statute law today is based on the six codes or *roppo*. They were the Criminal Code of 1880, the Constitution of the Empire of Japan of 1889, the Commercial Code, Criminal Procedure Act and Civil Procedure Act of 1890, and the Civil Code (1896 and 1898).

Jury law was first introduced to

Japan in 1923 by the then Prime Minister Kato Tomosaburo (born of a samurai family and prior to becoming the 21st Prime Minister he was a career officer in the Imperial Japanese Navy). The jury system was not used very often, and the law was suspended in 1943 as WW2 intensified.

After WW2, the Meiji Era Constitution of 1889 was replaced by the new Constitution of Japan (1947) during the reign of the late Showa Emperor. The new Constitution adopted the American common law system, overturned the former divine authority of the Emperor and (by article 9) renounced war and the military.

The Criminal Procedural Act was radically changed toward the adoption of an adversarial system.

The new quasi-jury system

The Japanese Judicial Reform Council set up in 1999 proposed a number of reforms to increase lay participation in the criminal justice system. Those reforms were accepted and endorsed by the Japanese Diet (Parliament) in 2004. There was a long lead up to the introduction on 21 May 2009 of the Act on Participation of *Saiban'in* in Criminal Trials to allow for comment, education and mock public trials.

The *saiban'in seido* or quasi-jury system has the stated goals

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of judicial transparency, public education, preservation of justice and increased credibility in the criminal justice system. To achieve these goals Japan will need to increase transparency by eliminating punitive measures against lay judges for exercising their freedom of speech to discuss criminal trials after their conclusion, improve the rights of suspects and defendants at the interview stage (*kashika* or recording of interviews, currently not compulsory but being examined by the Diet) and limit the active participation of victims or victims' families to the sentencing phase of criminal proceedings.

Another challenge to the *saiban'in* system is the fact that Japan retains the death penalty. There is a great deal of obscurity that remains in the appeal process and implementation of executions. Retention of the death penalty is beyond the scope of this article but imposition of such penalty is likely to cause certain discomfort to lay judges.

Saiban'in proceedings are conducted for serious crimes such as homicide (murder), robbery causing death or injury, arson of inhabited buildings and kidnapping for ransom.

The *saiban'in* system is equivalent to the collaborative court system adopted in Germany (Schoffengericht) and France in that lay judges and professional judges form a panel. However, these systems differ from each

other in that in the Japanese system, *saiban'in* will be engaged in fact finding and sentencing, while questions of law are left within the exclusive authority of the judges. There are similarities with the jury systems of the United States, the United Kingdom and other common law jurisdictions in that juries are selected at random from among people on the electoral register. The difference with the *saiban'in* system to the collaborative court

arguing with colleagues are not the norm in Japan. One of the concerns is that the professional judges will dominate the lay judges' deliberations. The lay and professional judges are subject to lifetime confidentiality obligations. There was "anonymous" participation in the press conferences held after the first two trials in August 2009 (names of lay judges were not disclosed, however their faces were shown on national television).

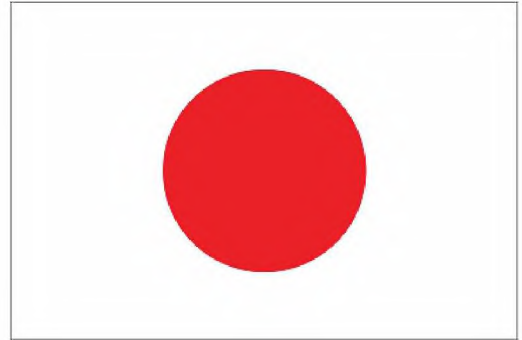
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system and the common law jury system is that *saiban'in* form a panel (as represented in the diagram and the model view) with professional judges and deliberate and make decisions together both on guilt and on the sentence.

In the five year lead up to the introduction of the *saiban'in seido* there has been long and varied criticism of the new system. Expressing strong opinions in public, questioning authority and

Many Japanese citizens support the concept but do not themselves wish to be chosen as a member of the quasi-jury system.

There is a clear need for re-education of public prosecutors and defence counsel who will now be addressing not only professional judges but also lay persons. Judges addressing counsel will need to keep in mind that the 6 lay members of the 9 person panel will also need to understand the legal concepts



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which judges and counsel may take for granted. Advocates and judges alike will be required to rely less on written documents couched in dense legalese and more on oral argument and submissions in easily understood language. Criminal trials are likely to be reduced in duration. Prior to the introduction of the *saiban'in seido*, trials extended over months and in some cases years.

The selection of lay judges is commenced in autumn of each year. To be eligible a person must be a minimum of 20 years of age and on the electoral roll. Jurors must have completed a secondary level education. Politicians and lawyers are excluded. Lists of

eligible *saiban'in* for the region will go to the courts. Applications can be made on certain specified grounds for exclusion from the nominated panel.

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What does the future hold?

It will be interesting to monitor the development of this new system. Will the inclusion of lay members in the fact finding and sentencing

of those found guilty be an incentive for professional judges (Japan's judiciary is a career bureaucracy and the judicial selection process would be alien to Australian judges) to exercise more freedom in their decisions? Will Japanese judges exercise more or less autonomy as a result of this inclusion of members of the public? There are many questions which will only be answered with the passage of time.

Japan has a very high conviction rate in criminal trials. Professional judges may find that inclusion of lay judges in their midst may assist in explaining acquittals or harsh or lenient sentences. In common law jury systems the finding of guilt is the domain of the jury itself. In that respect judges do not make that decision. In Japan, the inclusion of lay judges is likely to provide the professional judges with greater certainty that the decision is more inclined to be accepted by the public. The input of everyday views and ideas of average citizens to the process of the Japanese criminal justice system will potentially render the decisions more acceptable to the general public. †

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