

It's impossible to judge whether Chinese courts' move towards citizen participation is achieving its aim, writes **Jerome A. Cohen**

The jury's out

To what extent should ordinary people decide the guilt and punishment of alleged criminals? Is criminal justice too serious to be left to career judges? Trial by a jury of one's peers is one of the most fundamental rights of citizens of the

common law world, including Hong Kong. In the words of the United States Supreme Court, it is thought "necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority". Similar concerns have led continental European countries to establish a variety of institutions for allowing representatives of the community, although unschooled in law, to share decision-making responsibility for criminal cases with professional judges.

To be sure, common law juries and European-style mixed tribunals of judges and laymen have long had their critics and could benefit from reform.

Many countries have not adopted any form of community participation in

It does seem to offer ... a new instrument for enhancing legitimacy by creating the appearance of 'judicial democracy'

criminal trials. Others have abandoned jury trials or restricted their operation in practice. Russia, for example, has many ways of curtailing resort to its jury trials, especially in politically sensitive cases. Singapore abolished criminal juries after then prime minister Lee Kuan Yew became dissatisfied with their verdicts. Germany's mixed tribunals only handle limited types of criminal cases, and Americans manage to sustain their cherished jury system because most criminal cases are disposed of through plea bargaining that avoids trial.

The countries of Northeast Asia have traditionally regarded significant popular participation in the administration of criminal justice as incompatible with national political-legal culture.

Yet, in recent years, a desire to enhance public trust in the judiciary has increased their interest. Since 2008, South Korea has been experimenting with a distinctive "citizen participation trial" in which a jury's non-binding verdict greatly influences the

court's judgment. In Japan, since 2009, mixed courts of three judges and six laymen actually decide serious criminal cases. Taiwan has just begun to discuss a suggestion for non-binding court consultation of "trial observers".

At least part of mainland China has caught the fever of popular participation in criminal justice. In late 2007, the 17th Communist Party congress, to support its efforts to promote social "harmony" and "stability", placed renewed emphasis on resolving disputes through "people's mediation" and less formal court processes.

Shortly afterwards, the courts of Henan (河南) province's 100 million people, led by colourful High Court chief judge Zhang Liyong, began to experiment with what the court calls "the people's jury system". This is different from the system of "people's assessors" that China imported almost half a century ago with the rest of the Soviet legal system.

Under that system, one or two people's assessors, who in theory have the same voting power as judges, often sit with one or more judges to form the three-person tribunal that decides both guilt and punishment in many first-instance criminal trials. Yet, just as in the Soviet Union, despite intermittent government efforts to bolster what is supposed to be a mixed court, people's assessors have failed to play an independent role. According to Zhang, his "people's jury" is superior to the assessor system and also better suited to China than either the Anglo-American jury or the European mixed court.

The Henan "people's jury" has been used on a limited basis in many "grass roots" and intermediate provincial courts as well as the High Court, and mostly for criminal matters. The criminal cases chosen generally involve "sensitive", important or difficult matters, including the death penalty, that are likely to have an impact on social "harmony". Local government and Communist Party officials often take part in case selection.

Once a case is picked, the court will randomly choose seven to nine "jurors", but possibly as many as 13, from a large jury pool assembled by local officials from reliable village, township and city residents. Jurors selected usually come from the place where the alleged crime was committed. They have no legal background and are supposed to represent different

occupations, sexes, ages (23 to 70) and ethnicities. The court's political office gives final approval for each juror.

Jurors attend the court hearing and, at its conclusion, give the court their views about both the facts and the appropriate sentence. They are not expected to opine on legal questions and need not reach a unanimous opinion. The court, which may consist of a panel of three judges, or include one or two people's assessors, is required to seriously consider the jurors' opinions and, if it does not adopt them, to inform the jurors of the reasons for not doing so. Those reasons, however, will not appear in the court judgment but only in "internal" documents.

Thus, the Henan jury, which has also been the subject of experiments in a few other provinces, functions only in an advisory capacity. It seems similar in this respect to its South Korean "citizen participation" counterpart and to the laymen who would "observe the trial" according to the recent proposal of Taiwan's judicial branch.

As Zhang conceded in an interview

rebutting domestic criticism of his innovation, "in a country that lacks the jury tradition, it would be dangerous to allow the masses to decide the facts of a case by themselves". Apparently, even carefully chosen members of the masses cannot be relied on as much as carefully controlled judges.

Without empirical research, it is impossible to state whether this experiment offers Chinese criminal defendants any greater protection.

It does seem to offer, as the Henan Communist Party website claimed last year, a new instrument for enhancing official legitimacy by creating the appearance of "judicial democracy" that gives the masses the rights to understand, participate in, express themselves through and ostensibly supervise the administration of justice.

Jerome A. Cohen is professor and co-director of the US-Asia Law Institute at NYU School of Law and adjunct senior fellow for Asia at the Council on Foreign Relations. See also www.usasialaw.org

