

# Justice of peers

**Jerome A. Cohen** says the legal systems on both sides of the Taiwan Strait could benefit from studying South Korea's experiments in consultative juries that aim to raise public confidence in the courts

**W**hat role, if any, should ordinary citizens play in determining guilt and punishment in criminal cases? Some Chinese courts, dissatisfied with the mixed tribunals of one judge and two lay assessors that hear many of their cases, have been experimenting with so-called people's juries whom they consult before making decisions. Taiwan's judicial branch recently announced that it would soon seek legislative approval for pilot projects for its own, as yet undetailed, version of a consultative jury.

Both sides of the Taiwan strait can benefit from studying the unique consultative jury system that South Korea has implemented since 2008. It is an imaginative, if tentative, effort to adapt to Korean circumstances features of both the common law jury and the continental European mixed tribunal of professional judges and laymen that Japan established in 2009.

Like most of East Asia, Korea seemed an unlikely candidate for any type of popular participation in judicial decision-making. Yet, despite authoritarian traditions, South Korea's dramatic transformation from dictatorship to democracy in the late 1980s brought strong demands for democratising the administration of justice. In 1999, president Kim Dae-jung appointed a committee that recommended citizen participation in the courts. In 2007, the National Assembly promulgated the Act on Citizen Participation in Criminal Trials, which launched a five-year period of experimentation with a consultative jury. This avoided the constitutional problem that would have arisen had the ultimate decision-making authority of judges been infringed.

After reviewing the results of this experiment, a more permanent system of popular participation is to be installed.

Supporters of Korea's experiment hope to enhance public confidence in the legitimacy and credibility of courts that were considered autocratic, secretive, frequently corrupt and always under the influence of official and business elites. They expect jury trials to bolster broader reforms designed to end Korea's inquisitorial "paper trials" that have largely focused on court confirmation of pretrial testimony and other government evidence, with little opportunity for meaningful defence. Their goal is to create open, adversarial hearings featuring in-court testimony subject to cross-examination before impartial professional and lay adjudicators in an equal contest between prosecution and defence.

Thus far, the Korean jury affects only a small number of cases. It applies solely to specified, mostly serious offences, excluding white-collar offences such as fraud and embezzlement. Moreover, judges have the discretion to preclude use of juries in cases they deem inappropriate, and defendants can choose to be tried by

judges alone. Juries are randomly selected, but certain professions are exempt or disqualified from serving, and prospective jurors are examined in court by prosecution and defence, who can each reject a few without giving reasons and exclude others for cause.

In principle, juries deliberate independently, without judicial intervention, and their verdicts must be unanimous. At the request of the majority of jurors, however, they may discuss the case with the presiding judge before voting. If jurors cannot reach a unanimous verdict on their first vote, they must hear the views of the presiding judge, after which they may decide by simple majority. The presiding judge also gives jurors guidelines regarding sentencing. Jury determinations on guilt and sentencing are not legally binding on judges, but must be included in the trial record, and the court must explain to the defendant any discrepancy between the court's decision and the jury's.

While it is premature at this point to evaluate the Korean experiment, a number of circumstances can be noted preliminarily. The much heavier burden on judicial resources that many thought would be imposed on the courts has not materialised. Indeed, the number of jury trials has been much lower than expected. Courts often exclude complicated cases – most jury trials conclude in a day – and most defendants

choose bench trials. As expected, attracting and compelling juror participation have proved difficult. Yet most who serve come away with a favourable experience, and have been more diverse in age and occupation than anticipated.

Trial courts accept jury verdicts regarding guilt in more than 90 per cent of the cases, and jury sentencing recommendations even more. The percentage of court judgments reversed on appeal is proving to be substantially lower for jury trials than for other criminal cases. Significantly, jury trials have resulted in an unusually high acquittal rate – 8.8 per cent in one study and 10 per cent in another, roughly three times the acquittal rate for non-jury criminal trials. Further evaluation will require greater and more comprehensive data, and interpreting its implications will be subtle and challenging.

Yet some things already seem clear. Korea's jury system appears to be here to stay, if only in



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its non-binding capacity. The categories of applicable criminal cases are likely to expand, including fraud and embezzlement, so that cases will increase. Criteria for allowing potential jurors to be excused from duty will probably be clarified, as will standards for allowing judges to exclude cases from jury trial.

If, as some reformers advocate, jury verdicts are to become binding, a constitutional amendment or Constitutional Court interpretation may be necessary, and there is the added issue whether criminal defendants should be granted a constitutional right to trial by jury, so that this opportunity is no longer limited to cases prescribed by legislation and permitted by judges.

The South Korean experiment offers a fertile field for study. Law reformers on the mainland and in Taiwan will have many questions about how the system works and why. Many observers are waiting to see whether Korea will take steps to authorise ordinary citizens to make binding decisions about guilt and sentencing.

Jerome A. Cohen is professor and co-director of the US-Asia Law Institute at NYU School of Law and adjunct senior fellow at the Council on Foreign Relations. See also [www.usialaw.org](http://www.usialaw.org). Research papers by Jae-in Yoo and Hyun-kyung Kim made important contributions to this article

