People's court

Jerome A. Cohen and Mizuki Koshimoto say Japan's introduction of lay assessors into some criminal trials is improving the judicial system and could prove a useful model for other Asian jurisdictions

As mainland China, Taiwan and South Korea consider how ordinary citizens can best take part in deciding serious criminal cases, they should study the Japanese model. In 2009, Japan introduced a system that provides for six laymen to join three professional judges in adjudicating issues of guilt and punishment. Thus far, this system appears to be successful.

Many Japanese feared the worst when the idea was first proposed – laymen might be too emotional, partisan and untrained to analyse complex situations. From 1928 to 1943, Japan unsuccessfully experimented with an optional "consultative" criminal jury, which most defendants spurned. Subsequently, conservative experts and much of the public continued to think that justice was better left to judges and prosecutors. Because of the traditional Japanese belief that "officials know best", some commentators said, laymen could not resist the opinions of judges, and their participation would be a sham.

Yet, to stimulate recovery from Japan's financial crisis, in the 1990s the government launched a deregulation policy designed to restrict official power. Coincidentally, popular confidence in judicial professionals began to erode. Criminal trials were increasingly criticised as slow and hard to understand. Courts were also accused of being too lenient to juveniles and indifferent to victims. Some believed that judges enjoyed too cosy a relationship with prosecutors and failed to allow defendants and their counsel a fair hearing.

The tipping point was widespread anger over the courts' handling of the prosecution of terrorists who launched the 1995 sarin gas attacks in Tokyo subways. Many victims said "the criminal trials do not represent our feelings at all". The media and the government endorsed popular participation as a way of injecting public opinion into trials and enhancing public understanding. Reformers hoped to make trials quicker, fairer and more intelligible and deserving of public confidence, and restricting judges' powers fitted nicely into the new deregulation policy.

Finally, in 2004, Japan's legislature concurred that justice is too serious to be left to professionals alone and adopted the Act Concerning Participation of Lay Assessors in Criminal Trials. This act applies to certain serious crimes including murder, rape, robbery involving injury and arson of inhabited buildings, with no opportunity for either the court or the accused to choose a trial adjudicated exclusively by professionals.

Under the new system, "lay assessors" are initially chosen at random for every new case, rather than selected via recommendations to serve for a fixed period in multiple cases, as in Germany, France and Italy. Assessors and judges have equal powers in deciding both guilt and punishment. Decisions are made by majority vote, so long as one judge votes with the majority.

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The new system has benefited from important procedural innovations. A pre-trial hearing enables judges, prosecutors and defence lawyers to meet, before assessors have been selected, to clarify trial arrangements and determine the major issues and evidence to be considered. A second significant innovation requires assessor trials to be conducted on consecutive days, rather than in sessions often widely separated in time. A third reform allows victims or their representatives to question witnesses and defendants and to express their opinions on guilt and sentencing. Assessors can also ask questions. Finally, to promote fairness and equality in sentencing, Japan's Supreme Court provides the new panels, the prosecutors and the defence with databases disclosing how similar offenders were punished by mixed tribunals.

Now that roughly 2,500 cases have been tried under the new system, preliminary trends have emerged. Trials are concluded faster, and both judges and assessors seem to be adapting well to the challenges of co-operation. Emotions and partisanship appear to be less of a problem than anticipated.

The previous conviction rate for prosecuted cases, over 99 per cent, has not noticeably diminished, especially since prosecutors seem more cautious than ever in bringing indictments. In sentencing, the mixed tribunals appear only modestly freer than previous courts from the custom of generally sentencing the accused to 80 per cent of whatever punishment prosecutors requested. Yet they now give more nuanced consideration to the circumstances of each case. One clear difference is that more defendants now receive suspended sentences, and these defendants are much more often concurrently sentenced to probation programmes stressing rehabilitation.

Perhaps the most significant developments are the subtlest. Prosecutors have reportedly become more careful in reviewing defendants' pre-trial confessions to police and taking account of evidence favourable to defendants. The Supreme Public Prosecutors Office recently announced that, in cases subject to lay assessor trials, it is planning to have the entire interrogation of the accused videotaped, and that prosecutors should respect the results of such trials as much as possible.

Most fascinatingly, judge-assessor arrangements have breathed new life into Japan's adversarial trial by emphasising the oral testimony of witnesses in court, including their cross-examination, instead of maintaining the tradition of judges focusing on review of the pre-trial dossier. Although there are still few acquittals, both judges and assessors give the impression that mixed tribunals are more open-minded than professional courts and more sceptical of pre-trial confessions.

Many issues remain unresolved. Should the scope of crimes subject to mixed trials be expanded? Do defendants have a constitutional right to choose the type of trial? Should assessors receive special preparation for difficult cases, such as those involving insanity? How should the new panels apply the presumption of innocence? What about the administrative burdens, time and expense of selecting fresh assessors for every case? Do assessors really resist the knowledge and prestige of judges?

Japan's version of the mixed tribunal is off to an impressive start and may make the merely "consultative" juries practised in South Korea, experimented with in mainland China and contemplated in Taiwan look timid by comparison. Are those East Asian jurisdictions underestimating their ordinary citizens?

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. Mizuki Koshimoto is a Tokyo and New York lawyer and a 2010 recipient of NYU Law School's LLM degree. See also www.usasialaw.org