

# Open to debate

**Jerome A. Cohen and Yu-Jie Chen** assess Taiwan's proposal for laymen to deliberate with judges – after criticism that court decisions were out of touch with society – to try to make the process more transparent

**A**re criminal trials too important to be decided by professional judges alone? That question is increasingly being asked – and answered – in various northeast Asian jurisdictions. South Korea has used non-binding “consultative” juries since 2008. The following year, Japan instituted “mixed tribunals” composed of three judges and six laymen to decide both guilt and punishment. Even some courts in mainland China, which has long authorised one or two Soviet-style “people’s assessors” to join judges in decision-making, have recently been experimenting with consultative “people’s juries”. Now Taiwan is considering an official proposal for five laymen to sit with and advise three judges in serious criminal trials.

This is not the first time that the island’s judicial branch, the Judicial Yuan, has suggested citizen participation in criminal cases. Its previous attempts to introduce “lay assessors” date back to 1987, when martial law was lifted. Yet, those plans called for assessors to share decision-making power with judges, which raised constitutional doubts about authorising citizens with no security of life tenure to act as judges while depriving defendants of their right to trial by professional judges alone. Last October, however, the newly appointed leaders of the Judicial Yuan introduced this effort in response to public anger at recently exposed judicial corruption and at court decisions that were condemned as too lenient to child molesters and out of touch with common sense.

This new lay assessors system is a distinctive blend of various features already familiar to Taiwan’s neighbours. Like Japan’s lay assessors, Taiwan’s citizens, after hearing the case together with professional judges, will deliberate with the judges. Yet, unlike Japanese counterparts, they will have no voting power. Their views will only be “consultative”, like South Korea’s jury.

According to the plan, after the legislature’s approval, this new system will operate in two district courts beginning in 2013. The experiment will initially be limited to cases in which the first instance court might mete out the death penalty or a life sentence. The defendant will have no right to choose trial by professional judges alone, and his fate will be determined by the judges after they consult the assessors.

As in Japan, assessors will be selected randomly for each case but some may then be excluded by prosecutors and defence lawyers. Also as in Japan, assessors will not attend pre-trial hearings. Nor will assessors have access to pre-trial case files. At trial, they may question witnesses and defendants with the approval of the presiding judge. During their post-trial deliberation, assessors will give judges their opinions on facts, application of law and sentencing, but only judges will decide. Judges will, however, be expected to take the assessors’ majority opinion into account and, if they dis-

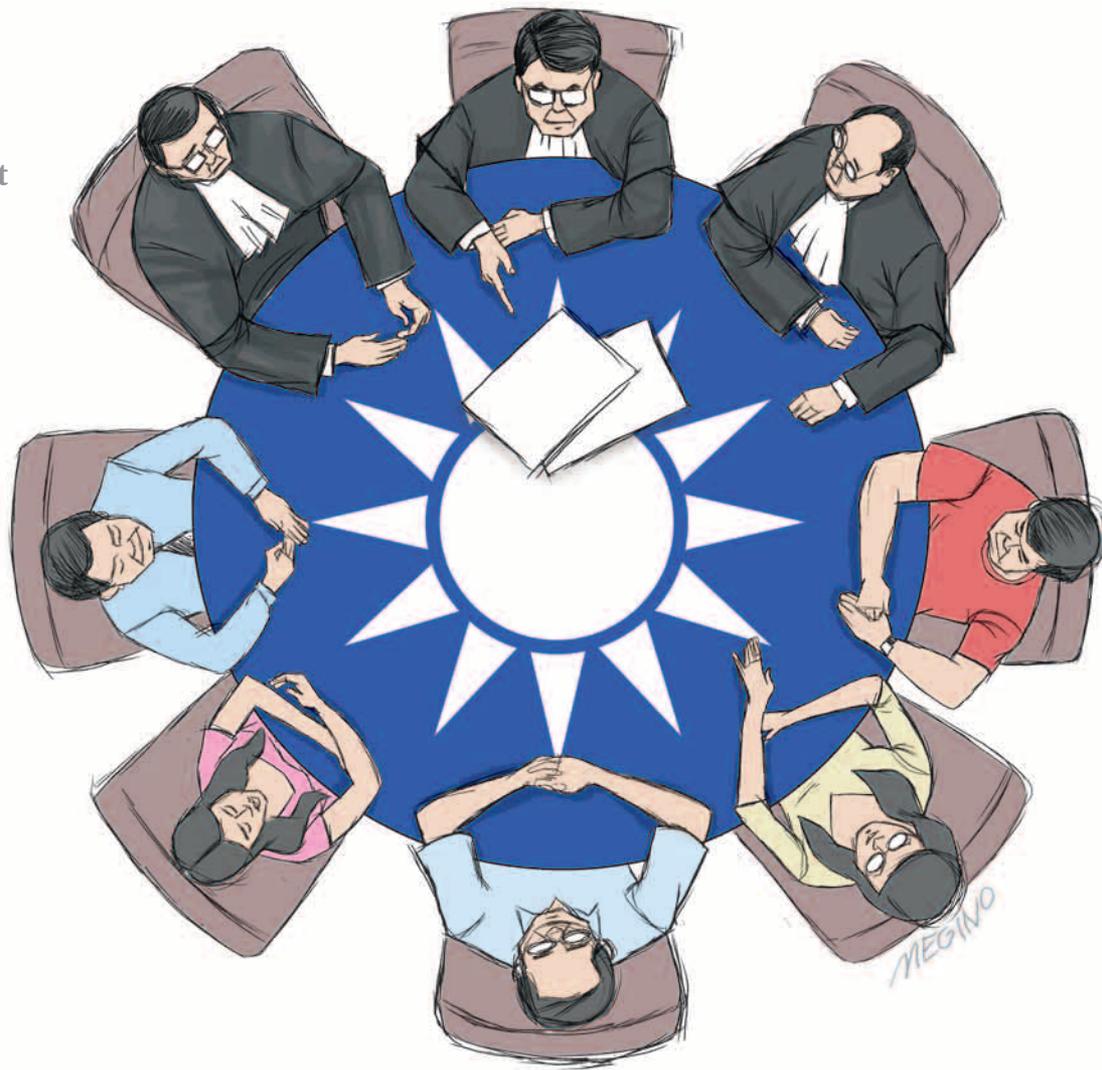
agree, to state why in their judgment. After three years, Taiwan will evaluate the experiment.

Like Japan and South Korea, Taiwan’s motivation in undertaking this reform is mainly to increase the legitimacy of the judicial system by democratising adjudication. Citizen participation also promises to increase transparency and popular understanding of the judicial process. Thus far, in both Japan and South Korea, although many citizens were initially reluctant to take part in criminal trials, their countries’ experiments have, by and large, met with a favourable response from the public.

Moreover, in both countries, citizen participation has given new importance to open court hearings and strengthened their adversarial nature. Especially valuable for defence counsel is the chance to cross-examine prosecution witnesses and present evidence and arguments before representatives of the broader commu-



**The greatest challenge in Taiwan’s polarised society will arise in politically sensitive cases**



nity. This should be good news for Taiwan’s struggle to implement the adversarial system that it launched in 2002 to promote greater fairness and accuracy in criminal trials.

The Judicial Yuan’s proposal will probably be enacted. Yet, not surprisingly, given Taiwan’s vibrant democracy, some experts and civic groups criticise the assessors’ lack of power to decide cases. They claim the judiciary wants to retain its decision-making monopoly. They also argue that the benefits of popular participation in first instance trials will be seriously diminished by failure to reform procedures in higher, second instance courts, where cases can be tried again, without any popular participation. Critics maintain that the Judicial Yuan should have fostered more public debate before presenting its proposal.

The greatest challenge confronting any type of citizen participation in criminal trials in Taiwan’s acutely polarised society will arise in politically sensitive cases. Will popular participation enhance the legitimacy of the judiciary’s handling of such cases or add fuel to the fire? In some quarters, recent prosecutions of former president Chen Shui-bian and other political figures, and the current indictment of former president Lee Teng-hui, have deepened scepticism about the impartiality of the judiciary. What might happen if such cases are tried

before a Japanese-style mixed tribunal, an American-type jury or even the Judicial Yuan’s consultative panel? The question suggests that, in the debate ahead, the devil will be in the details of selecting assessors and regulating their interaction with judges.

Whatever the difficulties, one positive sign is that a recent poll showed that Taiwanese citizens welcome the opportunity to participate in criminal trials. Over 70 per cent said they would be willing to try cases together with judges.

Ironically, slightly over half the judges surveyed disapproved of the proposal. Judges, of course, are understandably concerned about increased workloads and popular pressures interfering with independent professional decision-making. In addition, some caution that, because assessors will merely advise, the new system will only amount to democratic window-dressing. Can the Judicial Yuan address the concerns of judges and persuade them to implement this reform? The stakes are high for democracy and justice.

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