LAY PARTICIPATION IN CHINA

By
ZHUOYU WANG

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To my beloved family: Shurong Tan, my mother; Kanghua Wang, my father, Xiyu Wang and Mei Gang, my younger brothers, and also to my fiancé, Cecily Xi Li who endured my bad temper during the writing of this thesis, and to all the victims who suffered the horrible earthquake in my hometown on 12th May 2008.

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China attempted to introduce the jury system from England for the first time in its history in 1906, while I started my Ph.D research on lay participation in China at the University of Birmingham in 2005 – exactly one century later. In spite of this coincidence, in any case my period of study in the United Kingdom, where the modern jury system originated, has been an unforgettable and invaluable experience for me. Besides obtaining the opportunity to gain access to both historic and the latest academic material with regard to my research topic, material which is not accessible in China, I have also established contacts with a number of leading scholars specializing in this academic field, something which has been very helpful for the completion of my Ph.D project, and will be helpful for my research in the future. In the meantime; however, I have to admit that giving up my well-paid job at a Chinese court and conducting a Ph.D study at a British law school, using my second language, for over four years, has been difficult for me, not only because of the difference between the academic way of life in England and that in China, but also the financial problems, the language barrier and homesickness. I would never have been able to complete my studies in this country without the kind help of many people. I want them all to know how sincerely I appreciate their kind assistance.

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20. The Criminal Justice Act 2003 (Britain);
21. The Act Concerning Participation of Lay Assessors in Criminal Trials 2004 (Japan);
22. The Tribunals, Courts and Enforcement Act 2007 (Britain).

Table of Abbreviations

CCP: The Chinese Communist Party
ICCPR--The International Covenant on Civil and Political Rights
JFBA-- The Japanese Federation of Bar Associations
LAA 2004: The Lay Assessor Act 2004
P. R. China -- The People's Republic of China
PRALA 2005-- The Provisional Regulation of Administration of Lay Assessors 2005
RDHCS: The Research Department of the High Court of S Province
RSEALA 2004--The Regulation of Selecting, Examining and Appointing Lay Assessors on 13th December 2004
SCC: the Supreme Court of China
SCNPCC: The Standing Committee of the National People's Congress of China
TCEA 2007--The Tribunals, Court and Enforcement Act 2007

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Introduction

1. The Definition of Lay Participation

"Conceptual clarification is…an indispensable precursor to meaningful normative discussion and debate".[1] At the outset of this thesis it is necessary to formulate a definition of lay participation. While there is no universal definition of lay participation,[2] borrowing Jackson and Kovalev's interpretations, the term could be defined as "the participation of citizens who are non-professional judges in making decisions in…trials".[3] Jackson and Kovalev further interpret that: "Lay, or non-professional, judges can deliberate and reach the verdict independently like jurors and lay magistrates in the common-law tradition, or together with professional judges like lay assessors in the continental European tradition."[4] Following this definition, lay participation in this thesis then "refers to all forms of non-professional adjudicators"[5] participating in trials and making decisions.

2. Aims of the Study

About two decades ago, McCabe, facing decreasing interest in research concerning

[1] Paul Roberts, "Comparative Criminal Justice Goes Global", *Oxford Journal of Legal Studies*, Vol.28, No.2, 2008, at 382.
[2] For example, Lempert believes that lay participation in the academic field of researching administration of justice indicates "official citizen participation in judging the legal implications of allegedly untoward behavior", see Richard O. Lempert, "The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research", *Cornell International Law Journal*, Vol.40, 2007, at 482.
[3] John D. Jackson & Nikolay P. Kovalev, "Lay Adjudication and Human Rights in Europe", *The Columbia Journal of European Law*, No.1 of Vol.13, 2006/2007, at 84.
[4] *Ibid*.
[5] *Ibid.*

the jury system, questioned whether jury research was dead.[6] However, if it was true that jury related research experienced a decline during a certain period of the twentieth century, it appears that research into the jury trial and other forms of lay participation has been reinvigorated over the past two decades. As a matter of fact, the recent developments of lay participation across the world reveals a preservation, reform and revival of the system, which has not only demonstratively reaffirmed the rationalities of lay participation, but has also generated a considerable body of literature concerning the ways in which different forms of lay participation actually work in practice, as well as the legal and political functions of lay participation.[7] As Vidmar observes, "the topic of lay participation is an important one, and has been gaining attention in various parts of the world."[8] Likewise, Lempert suggested recently that "[t]he global spread of juries and related institutions has opened new vistas for research…into institutions that involve ordinary citizens in legal decision-making."[9]

Although it appears that "[l]ay input into legal decisions is a research frontier",[10] the area of lay participation in China[11] is far from being a well-researched academic domain, at least in terms of the availability of literature in English.[12] As a matter of fact, lay participation in mainland China predominantly takes the form of lay assessors who

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[6] Sarah McCabe, "*Is Jury Research Dead?*", Mark Findlay and Peter Duff (ed.), *The Jury Under Attack,* (Butterworths, London, Sydney 1988), at 38.

[7] See the subsequent Chapter 1 for details.

[8] Neil Vidmar, "Juries and Lay Assessors in the Commonwealth: A Contemporary Survey", *Criminal Law Forum,* Vol. 13, No.4, 2002, at 386.

[9] *Supra* note 2

[10] *Ibid.*

[11] The scope of this thesis in confined to analysing and discussing the situation of lay people's participation in judicial decision making in the People's Republic of China (also traditionally called "Mainland China"). The special areas of Taiwan, Macao, Hong Kong that have separate and different legal systems are beyond the scope of the thesis.

[12] According to my research, there have been only a few English articles published over the last two decades which discuss the situation of lay participation in China, these being: Yue Ma, "Lay Participation in Criminal Trials: A Comparative Perspective", *International Criminal Justice Review*, Vol.8, 1998, at 74-94; and Landsman and Zhang in their co-authored paper, see Stephan Landsman and Jing Zhang, "Lay Participation Comes to Japanese and Chinese Courts", *UCLA Pacific Basin Law Journal*, Vol.25, 2007-2008, at 179-227.

sit jointly with professional judges in mixed tribunals to adjudicate on criminal, civil and administrative cases. Chinese lay assessors are on an equal footing with their professional colleagues. In other words, they must participate in all of the decision-making of the mixed tribunal, including not only factual issues but also legal ones. To many Western scholars and practitioners alike, the logistics of how this form of lay participation has operated in China over the years remains a mystery. Although there are some similarities between China's mixed tribunal system and its counterpart in other jurisdictions, China's has unique characteristics in this regard, such as the court-dominated selection of lay assessors, not ensuring a majority position for lay assessors in mixed tribunals, and limiting the case categories under which lay assessors can be used.[13] Hans has offered criticism that "despite an extensive body of scholarship on the functioning of the jury system, there is limited scholarly work on how alternative methods of using laypersons in legal decision-making operate in practice."[14] Anderson and Nolan further suggest that "research on the functioning of mixed courts is a relatively small part of jury literature."[15] This highlights the need for a comprehensive and critical examination of the mixed tribunal system in China, in order to enrich the body of research into lay participation worldwide. Moreover, in light of the fact that "the global spread of juries and related institutions has opened new vistas for research", "there are scholars around the world who believe that the time is ripe for coordinated cross-national research into institutions that involve ordinary citizens in legal decision-making".[16] However, little has been written in English on the situation

[13] See Chapter 3 for details.
[14] Valerie P. Hans, "Lay Participation in Legal Decision Making", *Law & Policy*, Vol.25, No.2, 2003, at 83-84.
[15] Kent Anderson and Mark Nolan, "Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Mixed Tribunal System (saiban-in seido) from Domestic Historical and International Psychological Perspective", *Vanderbilt Journal of Transnational Law*, Vol. 37, 2004, at 982.
[16] *Supra* note 2.

regarding lay participation in China, a country which is home to almost one-quarter of the world's population, and this has created a barrier for those comparative lawyers unable to read Chinese literature who wish to research the topic. This creates a further need for a comprehensive review of lay participation in China, in order to provide a relatively rounded report to which international comparative jurists and practitioners can make reference.

On the other hand, in contrast with the scarce research concerning lay participation in China in Western countries, this issue has recently generated rather heated debate among Chinese scholars. From the 1980s until the promulgation of The Lay Assessor Act in 2004 (The LAA 2004), the mixed tribunal system, as the sole approach for Chinese people to participate in the administration of justice after 1949, when the People's Republic of China was established by the Chinese Communist Party, has faced a withdrawal of legislative support, coupled with only a sparing and problematic use in practice.[17] For example, Chinese lay assessors, though possessing powers and rights which are equal to those of professional judges,[18] never function as effective participants and counterweight to the latter,[19] have been widely and trenchantly criticized for their very passive attitudes and very limited contributions during trials.[20] In the past decade, in response to a decline in the mixed tribunal system and to the Chinese authorities' attempt to re-invigorate it by enacting The LAA 2004, a number of scholarly materials on lay participation in China have surfaced, and three schools of thought can be identified from these.

The opponents of lay participation openly advocate strong opposition to the mixed tribunal system and have even gone so far as to totally object to lay participation in

[17] See Chapter 3 for detailed discussions.
[18] See Stephen C. Thaman, "The Resurrection of Trial by Jury in Russia", *Stanford Journal of International Law*, Vol.31, 1995, at 67.
[19] See *ibid.*
[20] See Chapter 3 for detailed discussions.

China, for three principal reasons: the worldwide decline in lay participation, the absence of an historical tradition, and the current unsuccessful experimentation with the mixed tribunal system. For instance, Chen advocates abolishing the mixed tribunal system and lay participation in China from the perspective that lay participation has been and is declining worldwide.[21] Shen states that the mixed tribunal should be abolished since the tradition of lay participation has not been present historically in China.[22] Likewise, Zhang and Zhou throw doubts on preserving lay participation in China, on the grounds that Chinese citizens may lack the traditional desire to participate in government and politics.[23] Wei further attacks lay judges' participation in adjudication on the premise that it conflicts with China's culture and tradition because Chinese civilians, who historically have an extreme reverence for professional authority, would rather accept an incorrect decision by a professional judge than a correct judgment by a lay decision-maker.[24] Moreover, some scholars such as Yu and Cheng suggest that since the employment of lay assessors in mixed tribunals has proved largely unsuccessful, they should be dismissed and replaced by professional judges and that lay participation in China should be suspended.[25]

The supporters of jury, on the other hand, have embraced the view that lay participation should be preserved in China, but suggest that the mixed tribunal should be replaced without delay by an alternative such as a jury system, since tribunals have

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[21] See Chen Guiming, *Litigation Justice and the Procedural Safeguards*, (The Fazhi Press of China, Beijing, 1996), at 36.

[22] Shen Jungui, "A Negative Observation about the Mixed Tribunal System in China", *Chinese Lawyers*, No.4, 1999, at 14; see also Wang Limin, *A Study o*n *Judicial Reforms in China* (The Publishing House of Law, Beijing 2000), at 388-389.

[23] Zhang Demiao and Zhou Youyong, "Conditions and Methods of Realising Judicial Fairness in China Today", *Jurisprudence Review*, No.1, 1999, at 2.

[24] Wei Min, "Shall the Mixed tribunal System Be Suspended: The Developmental Direction of the Mixed Tribunal System, *Gansu Social Sciences*, Vol.4, 2001, at 31and 32.

[25] Yu Hanping, "Should China Abolish Lay Participation?", *Legal Review*, No.1, 1989, at 52-54; Cheng Chunhua, "The Abolishment of Lay Participation in China", see the official website of the Civil-Law Research Association of China, at http://www.civillaw.com.cn/article/default.asp?id=21800, last visited on 4 November 2009.

proved ineffective. For instance, Hu supports sweeping reforms such as abandoning the current mixed tribunal system and replacing it with a jury system[26], a view upheld by other scholars who support juries.[27]

The advocates of lay assessors claim that the role of lay assessors in China should be preserved, but also urge substantial reform. For example, He, the noted Chinese criminal justice scholar, asserts that, balancing the pros and cons of the mixed tribunal, it should be preserved whilst recognising that reforms need to be initiated in order to reconstruct it.[28] Ding and Sun, inspired by the workings of the jury system, propose that the duty on China's lay assessors to decide on legal issues should be removed.[29] Other proponents of the mixed tribunal system present a series of arguments in favour of its continuation, such as its role in safeguarding justice in judicial proceedings, preventing corruption in the judicial arena and improving the efficiency, transparency, independence, democratisation and legitimacy of the judiciary as a whole.[30]

It appears that the views of all three schools may have merits. In terms of the administration of justice in some democracies, "there has been a trend towards

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[26] Hu Yuhong, "The People's Law Court and the Mixed Tribunal System – The Judicial Democracy in the Views of Classic Authors, *Tribune of Political Sciences and Law* (*Journal of China University of Political Sciences and Law*), Volume 23, No.4, 2005, at155.

[27] See, for example, Chen Shaolin, "The Ideas of Improving China's Mixed Tribunal System", *Legal Review*, No.4 of 2005, at 78-83; Zhang Pinze, "The Mixed Tribunal System and the Reform of Criminal Trial Mode in China", *Journal of the Central Institute of the Political-Legal Management Cadres*, Vol.2, 1999, at 14-17; Yang Ming and Zhang Hao, "Shall China Introduce a Jury System?", *Journal of Liaoning University (Philosophy and Social Sciences)*, Vol. 4, 2005, at 152-156.

[28] He Jiahong, "A Historical and Comparative Study of the Mixed Tribunal System in China", *Jurist*s, No.3, 1999, at 78.

[29] Ding Yisheng and Sun Lijuan, "A Comparative Study on the Applicable Area of the Chinese Mixed Tribunal System and Its Counterparts in the Western Countries", *Jurisprudence*, Vol.11, 2001, at 3.

[30] See, for example, Zuo Weimin and Yin Yaoshan, "The Mixed Tribunal System in China: A Comparison, Reconsideration and Forecast", *Social Sciences Study*, Vol.2, 2001, at 88; Shi Ying, "The Contemporary Destiny of the Mixed Tribunal System: Ideas Inspired by the Interrelationship Between Justice and Democracy", *Journal of Liaoning University*, Vol.6, 1999, at 55-56; Xie Youping and Wan Yi, "The Judicial Impartiality and Civilian Participation: A Theoretical Study on the Mixed Tribunal System", *Journal of Gansu Institute of Political Sciences and Law*, Vol.4, 2003, at 12; Ding and Sun, *ibid*, at 9.

replacing amateurs with professionals in the twentieth century".[31] For instance, in England where the modern jury originated, juries have been nearly abandoned in civil cases while their use in criminal cases becomes increasingly sparing due to the sustained growth of criminal trials and the government's growing interest in efficiency and crime control.[32] It is also true that in the past Chinese citizens were excluded from the royal courts, which were entirely under the sway of the emperors.[33] In light of this, the three reasons given by the opponents of lay participation for abolishing lay participation in China are not unreasonable at all. Meanwhile, the jury supporters' proposal to replace the problematic mixed tribunal system with the classic jury seems forward-looking and inspirational, while the lay assessor advocates' view of preserving but reforming the current mixed tribunal system appears conservative, but more compatible with the Chinese Government's latest move toward extending the use of lay assessors, rather than introducing the jury trial, as embodied by the promulgation of The LAA 2004. To sum up, the controversies among Chinese scholars are perplexing, whilst deciding which school is correct and clarifying the prospects for lay participation in China are likely to be a fascinating issues with both academic and practical significance.

Considering the context alluded to above, the impetus for creating this thesis mainly comes in response to two factors. On the one hand, taking into account the fact that academic projects on lay participation in China written in English have been very scarce, this thesis, conducting as it does a comparatively full review of lay participation in China, can be expected to enrich the body of work in this area and provide international comparative lawyers with referential literature about how the most

[31] Irving F. Reichert, "The Magistrates' Courts: Lay Cornerstone of English Justice", *Judicature*, Vol.57, 1973-1974, at 138.
[32] Sally Lloyd-Bostock and Cheryl Thomas, "Decline of the 'Little Parliament': Juries and Jury Reform in England and Wales", *Law and Contemporary Problems*, Vol. 62, at 7-8.
[33] See Chapter 2 for details.

populous country in the world has employed lay participation and what the prospects for its future are. On the other hand, this thesis attempts to, within the framework of the worldwide development of lay participation, comprehensively study the history, status quo and prospects for lay participation in China, in order to respond to the views of the three schools of Chinese scholars and clarify which one is correct.

In 1905, China, for the first time in its history, initiated an experiment involving the introduction the modern form of lay participation, a jury system, from England, although this effort quickly faded.[34] Exactly one century later, the Chinese Communist Party, on 1st May 2005, decided to formally resuscitate the form of lay participation in China today: the mixed tribunal system, by implementing The LAA 2004[35], and on 1st October of the same year, I started my Ph.D research on lay participation in China. These coincidences might add some extra weight to the implications of this thesis.

3. Methodology

This thesis is by and large a library-based research, and the materials to which this thesis makes reference mainly include articles, books, cases and some online documents. In order to support an exploration of the position of lay participation in China today, in Chapter 4, I conducted a field study in China between December 2006 and June 2007, with two categories of information collected, including: (1) data gathered from both official and restricted-circulation sources such as archives, libraries and websites, and (2) original empirical data gathered through a questionnaire survey across nine courts.[36]

Some characteristics of the judicial system in China are unique. This thesis therefore has struggled to find and create English equivalents for some of the Chinese

[34] See Chapter 2 for details.
[35] See Chapter 3 for details.
[36] See Chapter 4 for more details about the methodology of this fieldwork.

expressions, so I have made reference to a range of English literature created by both Western and Chinese scholars, in order to seek a balance between the different terminologies used, and in order to realise both technical accuracy and colloquial familiarity. However, there is still a possibility that some terminology in this thesis is imperfect or maybe even a little convoluted. In terms of translating some of the statutes and articles written in Chinese, I have made every effort to find the official English versions. Where no official translation was available, my rationale has been to follow the original text as strictly as possible. However, this does not mean that a word-for-word method of translation has been adopted, but rather, where a meta-phrase may confuse English native speakers, eloquence and ease of understanding has been given priority over strict accuracy. However, given that there may be inaccuracies, I take full responsibility for any that do occur.

4. A Brief Introduction to China's Court System

Before discussing an institution that is subordinate to China's judicial administration system, it seems necessary to embark on a very brief introduction of the judicial system itself, in order to provide a more understandable context for non-Chinese readers. As a matter of fact, in the People's Republic of China (or P. R. China, founded by the Chinese Communist Party in 1949), "judiciary" or "judicial organs", under the widest linguistic dimension, comprises courts, public prosecutors' offices, the police and judicial administrative departments (normally called the Justice Department or Bureau, set up on a city and provincial basis, which is in charge of the local Bar and prisons under the administration of the local government). In contrast, in its narrowest sense, a reference to China's judiciary means only the country's court

system,[37] which is actually composed of a four-tier hierarchy, namely: (1) the local court (or 'basic-level court'), which is established on a county or urban-district basis, (2) the regional court (or 'intermediate court'), which is established in various metropolitan centres and administrative regions, (3) the provincial high court, which is established in various provinces and in four large metropolitan centres including Beijing, Shanghai, Tianjin and Chongqing, and (4) the Supreme Court, which is situated in Beijing.[38] The adjudicative bodies in Chinese courts come in three forms: (1) the single-judge panel (normally seen in the local courts and only applicable to minor criminal offences and simple civil disputes), (2) the all-judge tribunal composed of between three and seven judges (three in the local and regional courts, and three to seven in the provincial high courts and the Supreme Court), and (3) the mixed tribunal composed of judges and lay assessors of three to seven people (three in the local and regional courts, and three to seven in the provincial high courts and the Supreme Court; for judges to outnumber lay assessors in a mixed tribunal is lawful).[39] In China there is no other form of lay participation, such as the jury trial or lay magistracy.

5. Structure of the Study

This thesis is comprised of the following chapters. To respond to the argument that lay participation has lost its vitality and is dying out as a practice worldwide and therefore China's return to a lay participation system is unlikely to be a good choice, Chapter 1 of this thesis firstly outlines the situation of lay participation worldwide

[37] See Guo Chengwei and Song Yinghui (eds.), *A Study on the Contemporary Judicial Systems* (The Legal Publishing House, Beijing, 2002), at 1-2.
[38] See Article 2 of The Organizational Act of Chinese Courts 1983.
[39] See Article 46 of The Act of Administrative Procedure 1989, Article 40 and 41 of The Act of Civil Procedure 1991, Article 62 and 147 of The Act of Criminal Procedure 1996 and Article 3 of The Lay Assessor Act 2004.

because, only after understanding the global position in terms of lay participation, can the thesis properly evaluate the current situation and prospective development of the system in China in an informed and correctly oriented way. Chapter 2 will set out the historical background to the growth of lay participation in China, by recounting the various forms of and experiments with lay participation throughout China's history, attempting to both verify the authenticity of the allegations insisted by the opponents of lay participation that China lacks an historical tradition in lay participation, and present a relatively comprehensive review of lay participation in China from an historical perspective. Chapters 3 and 4 will study the status quo of the sole form of lay participation in China today, the mixed tribunal system, which was formally established by the CCP on mainland China in 1949. As well as briefly reviewing the vicissitudes of the mixed tribunal system and its role at different stages, Chapter 3 will more importantly provide detail on the achievements and unresolved weaknesses of the newly enacted Lay Assessor Act 2004; while Chapter 4, to strengthen the theoretical analysis from Chapter 3, will, based on fieldwork conducted in China, further empirically assess the practical situation of the mixed tribunal system after the reforms initiated by the promulgation of The LAA 2004. To further clarify whether China should continue with lay participation, Chapter 5 will look into the contributions that lay participation could potentially make to Chinese society and concludes, by virtue of combining the arguments from the previous four chapters, whether lay participation deserves a place in modern China. In light of this conclusion and taking into account the fact that the specific form of lay participation that a country chooses is linked to the historical, political, and social context thereof,[40] Chapter 6 will analyse the current political and social context in China, a context which may exercise constraints on the

[40] See *supra* note 14, at 88.

scope and future development of lay participation in this country, and will then offer some proposals in regard to the prospective orientation of developing lay participation in China, from a realistic perspective.

Chapter 1

Lay Participation: A System Facing Worldwide Decline?

1.1 Introduction

The Lay Assessor Act of China 2004 (the LAA 2004) met with objections from the very beginning. Opponents of lay participation suggested that the system conflicts with the modern trend for judicial professionalization and so has been in worldwide decline. China's move toward resuscitating lay participation by activating the mixed tribunal system was therefore said to be at odds with mainstream legal development and so would be unadvisable.[1]

Such an allegation challenges the rationality of China's move toward encouraging lay participation on the basis that it has lost vitality globally. This is not a groundless allegation. The jury trial, the most classic representative of lay participation in the Anglo-American system of criminal justice, has been in a steady retreat and is no longer enshrined as a "sacred cow".[2] It has become limited to only serious criminal offences in almost all commonwealth countries[3] and has even been abolished altogether in some.[4] Where lay participation is retained, research often points to its lack of significance and its limited impact on decisions. For example,

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[1] See e.g. Chen Guiming, *Litigation Justice and the Procedural Safeguards*, (The Fazhi Press of China, Beijing, 1996), at 36; Yin Fucheng, "The Questionable Mixed Tribunal System in China ", *Journal of the Industrial University of Inner-Mongolia*, Vol.13, No.1, 2004, at 72-75.

[2] See David Corker, "Trying Fraud Cases Without Juries", *Criminal Law Review*, April 2002, at 284.

[3] See generally Neil Vidmar (ed.), *World Jury Systems* (Oxford University Press, 2000); Neil Vidmar, "Juries and Lay Assessors in the Commonwealth: a Contemporary Survey", *Criminal Law Forum*,Vol.13, No.4, 2002, at 392-400.

[4] See e.g. Neil Vidmar, "Juries and Lay Assessors in the Commonwealth: a Contemporary Survey", *Criminal Law Forum*,Vol.13, No.4, 2002, at 391-397.

several studies on the mixed tribunal system which has been widely used in civil-law countries have almost unanimously reported the impotence and limited contribution of lay judges.[5] Furthermore, according to Skyrme, the lay magistracy has lost most of its significant roles in some jurisdictions.[6] However, is such evidence really sufficient to justify the conclusion that lay participation is overwhelmingly in decline?

Despite the generalization that lay participation is declining while judicial professionalization rises, there have been, remarkably, some opposite moves.[7] Besides China, a number of other countries have recently introduced or reintroduced the jury or the mixed tribunal system.[8] Moreover, even in those countries where the jury has been sparingly used, it would be incorrect to conclude that lay participation has been declining altogether. In England and Wales, for example, lay magistrates

[5] A variety of studies imply that lay assessors are perceived as neither active nor crucial participants in the mixed courts. For a list of the literature, see Sanja Kutnjak Ivkovic, "An Inside View: Professional Judges' and Lay Judges' Support for Mixed Tribunals", *Law & Policy*, Vol.25, No.2, 2003, at 101. Further, more recent investigations in Russia, Croatia, Germany, and Sweden, have also documented the above allegation. See Stefan Machura, "Fairness, Justice, and Legitimacy: Experiences of People's Judges in South Russia", *Law & Policy*, Vol.25, No.2, 2003, at 125; Sanja Kutnjak Ivkovic, "Mixed Tribunals in Croatia", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 71; Arnd Koch, "C.J.A Mittermaier and the 19th Century Debate about Juries and Mixed Courts", *International Review of Penal Law*, *Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 353; Walter Perron, "Lay Participation in Germany", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 193; Stefan Machura, "Interaction between Lay Assessors and Professional Judges in German Mixed Courts", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 457; Christian Diesen, "The Advantages and Disadvantages of Lay Judges from a Swedish Perspective", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 363.

[6] According to Skyrme, this has happened in Scotland, Northern Ireland, Australia, Canada, New Zealand, and the islands of the Caribbean; lay magistracy has even been abolished in Ireland. See Thomas Skyrme, *The Changing Image of the Magistracy*, (2nd edition, Macmillan Press, London 1983), at 214-223.

[7] See Valerie P. Hans, "Lay Participation in Legal Decision Making", *Law & Policy*, Vol.25, No.2, 2003, at 87.

[8] See more detailed discussion below.

handle over 90% of criminal cases,[9] and various administrative tribunals involving lay adjudicators decide on a large number of civil disputes annually,[10] despite of the sparing use of jury trials. Such marked reversals of the trend complicate the panorama of lay participation.

In light of the information above, it appears that the current worldwide position of lay participation is far from clear-cut. Before discussing China's specific issues, it therefore necessary to briefly look into the recent development of lay participation to clarify whether it is overcoming its previously overwhelming and irreversible decline. If it is true that lay participation is dying out, China's return to lay participation will be a mistake and so any subsequent research into boosting such lay participation in China will be inadvisable. In other words, only after the global position of lay participation is understood, can this thesis evaluating the current practice and prospective development of lay participation in China be correctly oriented.

This chapter will be divided into five Sections. The first four look into the different modern models of lay participation one by one, including the sparingly-used classic jury in the world's established democracies, the problematic mixed tribunals in various civil-law countries, the effective lay magistracy in England and other countries, and the important administrative tribunals in the United Kingdom. Each part not only briefly describes the ebb and flow of each model of lay participation, but also presents an analysis followed by a forecast as to prospective development. In response to the growth of lay participation in diverse countries experiencing transition from authoritarianism to democracy, the fifth section discusses this trend, analyzing

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[9] Sean Enright and James Morton, *Taking Liberties: The Criminal Jury in the 1990s*, (Weidenfeld and Nicolson, London 1990), at 2, quoted from John Hostettler, *The Criminal Jury Old and New: Jury Power From Early Times to the Present Day* (Waterside Press, Sheffield, 2004), at 13.

[10] Gary Slapper and David Kelly, *The English Legal System* (Tenth Edition) (Routledge-Cavendish, London 2009), at 393-394.

the common context and reasons accountable for this growth, and its inspirations. Based on the five sections, the conclusion summarizes the general developmental trend of lay participation worldwide.

1.2 The jury's demise in established democracies

It is remarkable that the jury trial, the classic model of lay participation, has been experiencing decline in the world's established democracies through the past decades, a fact regarded by some Chinese scholars as the most convincing evidence of the decline of lay participation worldwide.[11] By contrast, however, some authors in China propose the introduction of juries into this country to replace the current mixed tribunal system.[12] It is necessary to briefly analyze the current situation of the classic jury in the world's leading democracies in an attempt to clarify the developmental trend of this system.[13]

1.2.1 Widely existing but sparingly used jury system

The jury trial currently exists in a number of leading Western countries such as

[11] See e.g. *supra* note 1.

[12] See e.g. Hu Yuhong, "The People's Law Court and the Mixed Tribunal System – The Judicial Democracy in the Views of Classic Authors, *Tribune of Political Sciences and Law* (*Journal of China University of Political Sciences and Law*), Vol. 23, No.4, 2005, at 155; Chen Shaolin, "The Ideas of Improving China's Mixed Tribunal", *Law Review*, No.4 of 2005, at 78-83; Zhang Pinze, "The Mixed Tribunal System and the Reform of Criminal Trial Mode in China", *Journal of the Central Institute of the Political-Legal Management Cadres*, Vol.2, 1999, at 14-17; Yang Ming and Zhang Hao, "Shall China Introduce a Jury System?", *Journal of Liaoning University (Philosophy and Social Sciences)*, Vol. 4, 2005, at 152-156.

[13] To save length of our research, the criminal jury will be taken as the example.

England and Wales,[14] the United States,[15] Australia,[16] New Zealand,[17] Canada,[18] and Scotland.[19] It also exists in other western democracies such as Denmark, [20] Belgium,[21] Norway,[22] Switzerland,[23] Austria,[24] and Malta.[25] In addition, over forty other countries and dependencies around the globe, albeit to different extents, also preserve the jury trial.[26] Remarkably, however, both England and United States along with many other common law countries have witnessed a decline in jury trials.

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[14] Catherine Elliott and Frances Quinn, *English Legal System* (Pearson Education Limited, Harlow, 2000), at 149.

[15] See Gregory E. Mize and Paula Hannaford-Agor, "Jury Trial Innovations Across America: How We Are Teaching and Learning From Each Other", *Journal of Court Innovation*, Vol.1, 2008, at 229.

[16] See Michael Chesterman, "Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy", Neil Vidmar (ed.), *The World Jury System* (Oxford University Press, Oxford, 2000), at 125-165.

[17] Neil Cameron, Susan Potter, and Warren Young, "The New Zealand Jury: Towards Reform, Neil J. Vidmar (ed.), *World Jury Systems* (Oxford University Press, Oxford, 2000), at 167- 210.

[18] Neil J. Vidmar, "The Canadian Criminal Jury", Neil J. Vidmar (ed.), *World Jury Systems* (Oxford University Press, Oxford, 2000), at 211-248.

[19] Peter Duff, "The Scottish Criminal Jury: A Very Peculiar Institution", Neil Vidmar (ed.), *The World Jury System* (Oxford University Press, Oxford, 2000), at 249-281.

[20] See Stanley Anderson, "Lay Judges and Jurors in Denmark", *The American Journal of Comparative Law*, Vol. 38, 1990, at 839-864.

[21] Philip Traest, "The Jury in Belgium", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 27.

[22] See Neil J. Vidmar, "A Historical and Comparative Perspective On the Common Law Jury", Neil Vidmar (ed.), *The World Jury System* (Oxford University Press, Oxford, 2000), at 3.

[23] *Ibid.*

[24] John D. Jackson & Nikolay P. Kovalev, "Lay Adjudication and Human Rights in Europe", *The Columbia Journal of European Law*, No.1 of Vol.13, 2006/2007, at 95.

[25] *Ibid.*

[26] *Supra* note 22; and Edmundo Hendler, "Lay Participation in Argentina: Old History, Recent Experience", *Southwestern Journal of Law&Trade in the Americas*, Vol.15, 2008, at 4.

1.2.1.1 Eroding province of the jury trial[27]

In England and Wales, the jurisdiction of magistrates' courts has been increasingly expanded,[28] with summary offences including gradually wider categories of crime.[29] The Criminal Justice Act in 1977 deprived defendants accused of public order offences and criminal damage below £200 of the right to jury trial. *The Criminal Justice Act* of 1988 extended the jurisdiction of magistrates' courts to include wider offences such as taking a car without the owner's consent and common assault and battery. The vast province of magistrates' courts can be illustrated by the fact that magistrates today now deal with some 97% of criminal cases.[30] Recently, the right to trial by jury has even been limited in certain categories of the most serious crimes. The jury trial in complex fraud cases, for example, has now been strictly

[27] To save length of our research, the situation of the criminal jury in various countries will be taken as the example.

[28] Criminal offences in England and Wales fall into one of three categories. "Summary offences", i.e. the least serious offences, are tried only in the magistrates' courts where juries are not used. The most serious crimes are "indictable only" and must be adjudicated in the Crown Court where jury trials are available but only applicable to defendants who plead not guilty. Between these two extremes are so-called "triable either way" cases which can be tried in either the magistrates' courts or the Crown Court, granting the magistrates and the defendant the right to opt for trial in the Crown Court or not. Similarly, if either party elects a trial in the Crown Court whilst the accused pleads not guilty, the case will be tried by a jury. It is remarkable that over the past decades, the lines between the different categories of criminal offences have been substantially adjusted, effectively eroding the province of jury trials. See Sally Lloyd-Bostock and Cheryl Thomas, "Decline of the 'Little Parliament': Juries and Jury Reform in England and Wales", *Law and Contemporary Problems*, Vol. 62, 1999, at 15.

[29] The Criminal Justice Act in 1977 deprived defendants accused of some public order offence and criminal damage below £200 of the right to choose trial by jury. The Criminal Justice Act of 1988 extended the jurisdiction of magistrates' courts to include wider offences such as taking and driving away a car without the owner's consent and common assault and battery. In 1998, the Government published a consultation paper proposing to remove the right to jury trial for additional offences such as some categories of theft. See John Hostettler, *The Criminal Jury Old and New: Jury Power From Early Times to the Present Day* (Waterside Press, Sheffield, 2004), at 127; and *ibid*, at 16-17.

[30] *Supra* note 9.

circumscribed and subjected to the discretion of the judges under S.43 of the Criminal Justice Act 2003 which provides that in long or complex fraud cases, judge-only trials may be allowed in particular circumstances.

The United States has been the major venue where the criminal jury is used, accounting for the majority of all criminal jury trials in today's world.[31] However, the jury trial is also in retreat in this country. The criminal jury in American was never without opposition. Yet it is only during the last decades that the opposition has begun to win out. Evidence suggests that courts now try to encourage guilty pleas, thereby reducing the instances of jury trial which is believed more expensive, lengthier and responsible for the congestion of courts.[32] As a result, most criminal cases now do not go to jury trial. In New York, for instance, the felony arrest charges reaching trial have now declined to about 2 per cent of all felony arrests.[33]

Besides the leading common law countries such as England and the United States, the deflated power of the jury has been evident in other common law countries as well. New Zealand, for example, has similarly sparing use of criminal juries to England,[34] while in New South Wales in Australia, less than 1 percent of criminal cases are brought to juries.[35] In Northern Ireland, professional Diplock courts replaced juries in 1973 in cases involving terrorism crimes.[36] The jury trial has therefore failed to flourish and the official policies on jury trials in criminal cases

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[31] See Harry Kalven and Hans Zeisel, *The American Jury* (Phoenix Edition) (The University of Chicago Press, Ltd., London 1971), at 12-13.
[32] Hans Zeisel, "Jury Research in the United States", Nigel Walker and Annette Pearson (ed.), *The British Jury System* (The Institute of Criminology, Cambridge, 1975), at 41.
[33] *Ibid*.
[34] *Supra* note 17, at 203.
[35] *Supra* note 16, at 131.
[36] John D. Jackson, Katie Quinn, and Tom O' Malley, "The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past", Neil Vidmar (ed.), *The World Jury System* (Oxford University Press, Oxford, 2000), at 290.

have become decidedly abolitionism in modern Ireland since it cannot be entrenched in the local culture.[37]

1.2.1.2 Changes to the jury's traditional model

In England, besides the jury's increasingly limited case range, there have been also the structural changes on the part of the jury.[38] Historically, juries should produce unanimous verdicts, but in 1967 majority verdicts were introduced of ten to two (or nine to one if the jury has been reduced during the trail) to address the problem of hung juries and consequent re-trials.[39] Other changes may include the disappearance of the peremptory challenge. Up to seven peremptory challenges were reaffirmed by Juries Act 1974; the number was reduced to three in 1977 and abolished totally in 1988, with only challenges for cause being preserved.[40]

Due to cost-cutting and efficiency concerns, the traditional mode of jury trial has been experiencing substantial changes as well in America. According to a study in 2007, seven states have started to use the downsized jury in felony trials and thirty-three in misdemeanor trials.[41] The principle that jury verdicts should be unanimous can be dated back to the fourteenth century, if not before.[42] It has,

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[37] *Ibid*.
[38] See Mark Findlay and Peter Duff, "The Politics of Jury Reform", Mark Findlay and Peter Duff (ed.), *The Jury Under Attack* (Butterworths, London, Sydney 1988), at 209.
[39] *Supra* note 14, at 158.
[40] Peter Thornton, "Trial by jury: 50 years of change", *Criminal Law Review*, September, 2004, at 694.
[41] G. Thomas Munsterman and Paula L. Hannaford, "Reshaping the Bedrock of Democracy: American Jury Reform During the Last 30 Years", *The Judge's Journal*, Vol. 36, 1997, at 7; see also Richard O. Lempert, "The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research", *Cornell International Law Journal*, Vol.40, 2007, at 477.
[42] See Landsman, "The Civil Jury in America", *Law and Contemporary Problems*,

however, been limited in the name of avoiding hung juries to improve efficiency in various jurisdictions. According to Munsterman and Hannaford's study in 1997, Oregon and Lousiana have permitted non-unanimous verdicts in felony criminal trials while Oklahoma has permitted them for misdemeanor trials.[43]

Remarkably, moves towards a smaller jury or majority verdicts have been found in many jurisdictions where the jury trial has been preserved, such as Scotland,[44] New Zealand,[45] Australia,[46] and a number of common-wealth jurisdictions.[47]

1.2.2 Reasons for the jury's demise

It is arguable that the basic functions of lay participation have two intertwined threads. The first is the decision-making function: lay people, as temporary adjudicators, directly participate in the judicial proceedings to make decisions independently or in association with the professional judge(s); the second is the political/democratic function such as: allowing lay judges from the community to

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Vol.62, 1999, at 302; see also *supra* note 28, at 8.

[43] Munsterman and Hannaford, *supra* note 41, at 8; also see Landsman, *ibid*.

[44] Scotland is probably the first jurisdiction where majority rule has been accepted. By the end of 18th century, the simple majority verdict was sufficient for a valid verdict in order to avoid a hung jury. See *supra* note 19, at 269.

[45] New Zealand Law Commission has also stated its provisional view that if the current hung juries crisis cannot be overcome, it will recommend introducing majority verdicts. See *supra* note 17, at 202.

[46] That a criminal jury verdict must be unanimous is maintained and reinforced in only three Australian jurisdictions, namely New South Wales, Queensland, and the Australian Capital Territory. In the other five major Australian jurisdictions, majority verdicts are authorized by the statute subject to significant limitations. See *supra* note 16, at 153.

[47] According to Neil Vidmar's survey, among 35 common-wealth jurisdictions which have preserved the jury trial, most of them apply juries to serious criminal offences only whilst at least 16 use downsized juries composed of 7 or 9 jurors and 21 allow majority verdicts. For more details, see *supra* note 4.

dispense justice embodies the spirit of direct democracy,[48] and protects against potential arbitrary justice under the control of the state,[49] and "the corruption and partiality of the judges"[50] etc. However, it appears that both of these two functions have been questioned in modern established democracies.

1.2.2.1 The questioned decision-making function of the jury

The alleged disadvantages of the jury as an adjudicative body fall under six main headings: the questionable competence of the jury, diligence, rationality, leniency, efficiency and economy.

Attacks on juries' competence have been based on the argument that the complexity of criminal and civil cases today is so high that a group of randomly chosen lay people are unlikely to fully understand the evidentiary and legal issues.[51]

On one hand, even proponents of the jury admit that the complexity of a case may occasionally chanllenge the jury's collective competence;[52] and that increasing and increasingly complicated scientific issues have been further tax the jury's competence.[53] Some research, on the other hand, "highlighted the very real difficulties a jury has in digesting facts, filtering out irrelevant material, and analysing

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[48] See more discussion below.

[49] John Hostettler, *The Criminal Jury Old and New: Jury Power From Early Times to the Present Day* (Waterside Press, Sheffield, 2004), at 145.

[50] Sir Partick Devlin, Blackstone Lecture, Oxford, 18 November 1978, quoted from *ibid*, at 154.

[51] Valerie P. Hans, "U.S. Jury Reform: The Active Jury and the Adversarial Ideal", *Saint Louis University Public Law Review*, Vol.21, 2002, at 86.

[52] See William Young, "Summing Up to Juries in Criminal Cases - What Jury Research Says about Current Rules and Practice", *Criminal Law Review*, Oct, 2003, at 672

[53] See Robert D. Myers, Ronald S. Reinstein, and Gordon M. Griller, "Complex Scientific Evidence and the Jury", *Judicature*, Vol. 83, 1999-2000, at 152.

evidence".[54] Moreover, there have been horror stories where jurors without the experience and knowledge necessary to evaluate complicated evidence simply chosen to ignore it.[55] In addition, empirical research reveals that jurors may misunderstand the law, which can influence their deliberations.[56]

The jury has been under attack for not only its alleged incompetence but also bias and irrationality.[57] Lord Woolf opined that 'the variety of prejudices that jurors can have are almost unlimited'.[58] Ferguson also observed that in criminal cases, "a juror may be biased due to a dislike of the accused's class, accent, habits, occupation, or physical characteristics"; and "prejudice may have been fostered by pre-trial publicity, adverse to the accused".[59]

Misconduct by the jury, such as jurors' horse-trading over the verdict for returning to their work more quickly[60] and jurors abstaining from voting[61], have

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[54] John Carruthers, "Are Juries Safe?", *Scottish Law Times*, Vol.25, 2001, at 220. For example, questions are raised about whether a criminal jury can properly evaluate complex evidentiary questions, such as those presented in insanity defenses or scientific evidence in sexual assault cases; and the role of juries in high-tech civil cases has raised "sparked extensive scholarly debate and increasing skepticism". See Neil J. Vidmar, "Empirical Research and the Issue of Jury Competence", *Law & Contemporary Problems,* Vol.52, 1989, at 2 and Kimberly A. Moore, "Judges, Juries, and Patent Cases: An Empirical Peek Inside the Black Box", *Michigan Law Review*, Vol.99, 2000-2001, at 365.

[55] Valerie P. Hans, "The Jury's Response to Business and Corporate Wrongdoing", *Law & Contemporary Problems*, Vol.52, 1989, at 177.

[56] For example, a study in New Zealand indicates that fundamental misunderstandings about the law occurred during deliberation in 35 out of the 48 trials. See Jenny McEwan, "Evidence, Jury Trials and Witness Protection - the Auld Review of the English Criminal Courts", *International Journal of Evidence & Proof*, Vol.6, No.3, 2002, at 173. Moreover, mock jury studies and interviews with actual jurors after trials in America indicate that jurors often misunderstand the law that the court has told them to apply. See Robert F. Forston, "Sense and Non-Sense: Jury Trial Communication", Brigham Young University Law Review, 1975, at 601 and 606.

[57] *Supra* note 38, at 209.

[58] *R* v *Abdroikov* [2005] EWCA Crim 1986, [2005] 4 All ER 869 at [29].

[59] Pamela R. Ferguson, "The Criminal Jury in England and Scotland: The Confidentiality Principle and the Investigation of Impropriety", *International Journal of Evidence & Proof*, Vol. 10, No. 3, 2006, at 192.

[60] [2002] EWCA Crim 1236, quoted from *supra* note 59, at 195.

occasionally been revealed. "The knowledge that jurors are effectively unaccountable for their behaviour in reaching a verdict does little to encourage jury propriety".[62] These "horror stories" have further justified the government's decision to place further circumscription on the province of juries.

It has been widely recognized that jury trials are generally more lenient since, by contrast to their professional colleagues, jurors are generally more inclined to acquit.[63] For example, in England, forty percent of contested trials before a jury resulted in acquittal;[64] another survey in England indicated that "cases in which judges would have acquitted, but in which the jury convicted, were 'very rare', but estimates of the number of cases in which the jury acquitted but the judge would have convicted varied from 3 to 10 per cent".[65]

Packer categorized the different criminal processes into two models: the Due

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[61] [2005] UKHL 12, [2005] 1 WLR 704, quoted from *ibid*. .

[62] *Supra* note 59, at 196.

[63] See Harry Kalven and Hans Zeisel, (1966), at 157, quoted from Stephan Landsman and Jing Zhang, "Lay Participation Comes to Japanese and Chinese Courts", *UCLA Pacific Basin Law Journal*, Vol.25, 2007-2008, at191.

[64] Julie Vennard, for example, found that in a sample of offences triable either way, the chances of acquittal were significantly higher in the Crown Court with jury trials applied than in the magistrates' court without juries. See Julie Vennard, "The Outcome of Contested Trials", *in* David Moxon ed., *Managing Criminal Justice* (1985), at 126, 129-31, quoted from *supra* note 28, at 15.

[65] W. R. Cornish, *The Jury* (Allen Lane The Penguin Press, London, 1968), at 22. American juries are inclined to acquit in close cases whilst their professional counterparts opted to convict as well. See generally Landsman and Zhang, *supra* note 12, at 191. Jurors' tendency towards acquittal has also been noted in Russia since its recent introduction of a jury system, see Inga Markovitz, "Exporting Law Reform-But Will It Travel?", *Cornell International Law Journal*, Vol.37, 2004, at 107. For another vivid example, the history of Japanese criminal justice has seen long-standing judge-directed inquisitorial courts since the Tokugawa era, whilst the acquittal rate has been as exceedingly low as 1% or so; however, between 1928 and 1943 when Japan was adopting a jury system, the acquittal rate in jury cases reached 15.4%, the astounding peak through this country's history, see Landsman and Zhang, *supra* note 12, at181. For more details about juries' acquittal rate, see Michael Zander, "Juries Decisions and Acquittal Rates", Nigel Walker and Annette Pearson (ed.), *The British Jury System* (The Institute of Criminology, Cambridge, 1975), at 31-37.

Process Model and the Crime Control Model.[66] Baldwin and McConville suggested in 1981 that the English system fell into the latter model.[67] This conclusion has recently been verified by Padfield who points out that Baldwin and McConville's concerns are "as valid today as they were then (or is the situation significantly worse)".[68] Tonry suggests that the Unite States has adopted the same crime-control policies and politics as well during the past quarter of a century.[69] According to Packer, the high rate of apprehension and conviction is required in order to operate the crime control model successfully.[70] It appears that the criminal jury's comparatively high acquittal rates threaten this ideal and inevitably disturbs some politicians on the basis that many criminals are set free by the jury, though the question that might be asked is not how many guilty defendants are set free by juries but how many innocent defendants are convicted by judges.[71]

"[T]he 1980s saw the 'ascendancy of economy' over efficiency and effectiveness, resulting in a 'managerial myopia' and concerns over short-term managerial innovation at the expense of a long-term focus. Much of the Government's agenda for reform has been inspired by the 'three Es' – economy, efficiency and effectiveness".[72] The requirements of 'economy' and 'efficiency' may not be labeled 'Ought ', nor are they to be taken in that sense, since the introduction of managerialism into the justice system itself has been widely criticized.[73]

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[66] Packer H, *The Limits of the Criminal Sanction* (Oxford University Press, Oxford, 1968), at 153.
[67] Nicola Padfield, *Text and Materials On the Criminal Justice Process* (Fourth Edition) (Oxford University Press, Oxford, 2008), at 10.
[68] *Ibid*.
[69] Tonry, M, *Punishment and Politics: Evidence and emulation in the making of English crime control policy*, (Willan Publishing, Cullompton, 2004), at 22.
[70] See *supra* note 66, at 158.
[71] *Supra* note 49, at 136.
[72] *Supra* note 67, at 7.
[73] See Jones Carol, "Auditing Criminal Justice", *The British Journal of Criminology*,

Nonetheless, there has been trend towards shifting the ideal of rational justice and 'rule of law' to 'managerial justice'.[74] In this context, both 'efficiency' and 'economy' may represent what many governments practically expect or request from the justice system.

Moreover, the criminal control model seeks the speedy criminal procedure at the cost of less resources.[75] As Packer summarized, that "[t]he [crime control] model that will operate successfully must be an administrative, almost managerial model" to realize the three "Es".[76] In response to such requests, in practice, "government business plans, or the annual reports of key criminal justice agencies … see key performance indicators and measures of success, which put great emphasis on financial and time saving".[77]

It appears that jury trials conflict with the three "Es". Research reveals that the jury trial normally takes more time and money than the single-judge panel.[78] For example, while a contested case tried in an English magistrates' court costs £1,500, the estimated cost will be £13,500 if the case goes to the Crown Court and is tried by a jury.[79] Research also indicates that professional judges may be more efficient than juries.[80]

Vol.33, 1999, at 199, quoted from *supra* note 67, at 29.

[74] See *ibid*.

[75] See *supra* note 38, at 210.

[76] *Supra* note 66, at 159.

[77] *Supra* note 67, at 7.

[78] See T.M. Honess, M. Levi and E.A. Charman, "Juror Competence in Serious Frauds Since Roskill: A Research-based Assessment", *Journal of Financial Crime*, Vol.11, No.1, 2003, at 18.

[79] Catherine Elliott & Frances Quinn, *English Legal System* (2nd edition, 1998), at 137, quoted from *supra* note 28, at 16.

[80] For example, as suggested by Taskier, "the typical bench trail usually has an earlier trial date than a jury trial. It is also goes faster (where uninterrupted). Judges don't need quite the same patient coddling and teaching as a jury. There is no lengthy voir dire and jury selection, no jury instructions, no verdict forms, and no notes from the jury to be pondered and cryptically answered. Basic issues that must be explained for

The jury's disadvantages in terms of economy and efficiency have raised diverse criticisms. Critics, for example, claim that: "the law and lawyers have contrived to make jury trial so expensive and lengthy, compared with the very speedy affair it was in Blackstone's day, that it is a luxury we cannot afford".[81]

1.2.2.2 The jury's waning political/democratic function

Historically, the jury "is seen by many people as of cardinal importance in society since, despite its flaws, it enables accused persons to be judged fairly".[82] In England, for example, juries expressed the popular will in ordeals, distinguished between unpremeditated killing and murder, refused the imposition of the death penalty for non-violent theft under the 'Bloody Code', set free political offenders against the arbitrary Government,[83] and worked as a deterrence to the professional judges' corruption and partiality. Likewise, the jury trial, in the history of the United States, has been appreciated as a bulwark against the British royal tyranny.[84]

However, while the jury trial did historically play a part in preventing political abuse of the courts in some countries, that type of abuse is now extremely uncommon in the world's established democracies.[85] In England, for example, "justice may be

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a jury can take but a moment for an experienced judge. Exhibits can be prepared in advance for the judge." See Paul R. Taskier, "Judge or Jury?", *Litigation*, Vol. 24, No. 1, 1997-1998, at 20.

[81] Penny Darbyshire, "An Essay on the Importance and Neglect of the Magistracy", *Criminal Law Review*, Sep 1997, at 628. For other criticisms, see e.g. Vidmar, *supra* note 54, at 2; and Roger W. Kirst, "Finding A Role for the Civil Jury in Modern Litigation", *Judicature*, Vol. 69, 1985-1986, at 333.

[82] *Supra* note 49, at145.

[83] *Ibid*.

[84] See Landsman, *supra* note 42, at 288.

[85] Cornish, *supra* note 65, at 127.

more just now and more thorough".[86] Lord Devlin also pointed out, "[experience] in the courts shows that judges today are generally much more fair-minded than 50 years ago, and certainty exhibit nothing of the judicial tyranny of many in earlier times".[87] The practical opportunities for the jury to represent the public to fight against an undemocratic government have become increasingly small.

To sum up, the jury's political/democratic function of protecting against judicial tyranny are now more like a sheathed sword, which has symbolic deterrent power but less opportunity to be drawn out in established common-law democracies. The jury's waning significance in fighting against injustice and tyranny in the modern democracies, in return, accelerates its demise.

1.2.3 The jury trial – doomed to decline?

As discussed above, there are multiple reasons for the jury's demise in modern established democracies. However, is it safe to conclude, based on these reasons, that the jury trial is doomed to irreparable decline? Fortunately, research has presented solid justifications in favour of the jury's continuance.

1.2.3.1 The jury – a qualified adjudicative body

As seen above, a series of attacks on the jury's competence, rationality, diligence, leniency, economy and efficiency form the main foundation of its demise in some western democracies. However, research, bolstered by empirical materials, has

[86] *Supra* note 40, at 690.
[87] Sir Partick Devlin, Blackstone Lecture, Oxford, 18 November 1978, quoted from *supra* note 49, at 154.

refuted these attacks.

First of all, research to date addresses the issue of jury competence in three ways: (1) the jury's ability to decision making is generally sound; (2) the jury's occasional incompetence should be largely attributed to the problematic "trial management" rather than jurors' lack of wisdom; and (3) there still is great potential to improve the jury's competence to acclimatize itself to the increasing complexity of modern trials.

-- Generally sound ability of the jury

Numerous arguments have been made against the jury's competence. It seems that some of them "do not hold up well when confronted with empirical evidence".[88]

Kalven and Zeisel's Chicago Jury Project found that judges and juries agreed with each other in 78 percent of cases, whilst the jury favored the defendant and the plaintiff evenly in the cases of disagreement. Where a disagreement occurred, the jury was approximately six times as likely to favor the defendant as the prosecution. Kalven and Zeisel found that disagreements between judges and juries were mainly because of the different set of values that the juries applied in deciding the case rather than the jury's failure to comprehend the evidence. In terms of awarding damages, the jury averagely awarded about 20 percent higher than what the judge normally did. Kalven and Zeisel concluded that this revealed that the jury, on the whole, was competent in making appropriate decisions.[89] Besides, a series of other empirical projects have verified juries' ability to understand both facts and evidence.[90]

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[88] Richard O. Lempert, "Citizen Participation In Judicial Decision Making: Juries, Lay Judges and Japan", *Saint Louis-Warsaw Transatlantic Law Journal*, Vol.2001-2002, at 7.

[89] *Supra* note 15, at 190.

[90] See, for example, Mario Nigro, "The Influence of Judicial Discretion on the Decline of Civil Jury Trials in Ontario", *Advocates Quarterly*, Vol.24, 2001, at 351; Neil J. Vidmar and Shari Seidman Diamond, "Juries and Expert Evidence", *Brooklyn Law Review*, Vol.66, 2000-2001, at 1180; Neil J. Vidmar and Regina A. Schuller, "Juries and Expert Evidence: Social Framework Testimony", *Law & Contemporary*

-- Reasons for the jury's occasional incompetence

It is undeniable that jurors may encounter difficulties in trials. However, research has shown that it may not be fair to attribute these difficulties to ignorance.

The empirical study conducted by the Center for Criminology at Middlesex University in England revealed that more than half of jurors participating in the study did not fully understand what was happening in court, many were uncertain about "reasonable doubt", how to ask the judge a question and whether they were allowed to take notes.[91] Likewise, research in New Zealand suggests that the occasional incompetence of juries, such as misunderstanding the laws, could be attributed not only to the varying educational backgrounds of jurors, but also to the deficient way in which the jurors are prepared for their court duties and in which the facts and the law are presented to them.[92] In addition, research in America indicates that it is the jury-unfriendly trial process rather than the fact-finding quality of jurors themselves that should be blamed for the alleged incompetence of some jurors.[93] In short, it is

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Problems, Vol.52 1989, at 176; and Lloyd-Bostock and Thomas, *supra* note 42, at 40.

[91] *Supra* note 40, at 689-690.

[92] See *supra* note 17, at 203. Another study in New Zealand verified this finding by revealing that fundamental misunderstandings about the law occurred in deliberation in 35 out of the 48 trials, but the judge's failure to provide adequate and understandable (e.g. using plain language rather than legal jargons) information about basic legal terms may be responsible for such misunderstandings. See McEwan, *supra* note 56, at 173. Further, William Young pointed out that "many practical aspects of the criminal trial process rest on unrealistically high assessments of juries' powers of analysis, comprehension and recall"; "jurors are unlikely to have had experience in breaking down complex factual controversies into issues of manageable size"; and "all of this requires input from the judge". See *supra* note 52, at 689.

[93] For example, jurors are often instructed on the law in language so complex that even a law student would have difficulty in understanding it and in many U.S. courts, jurors are further handicapped because they only hear the instructions on the law and do not receive written copies of them. See Robert P. Charrow and Veda R. Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions", *Columbia Law Review*, Vol.79, 1979, at 1306; and Anne Bowen Poulin, "The Jury: The Criminal Justice System's Different Voice", *University of Cincinnati Law Review*, Vol.62, 1994, at1377, and 1411-1419. Linder also observed that: "Jurors often are bewildered by the procedures involved with their service. They are required

arguable that "the 'problem' that needs addressing is not the ability of jurors to cope but rather investigation and prosecution practices and trial management".[94]

-- The potential to improve the jury's competence

Research indicates that it is unfair to criticize juries themselves for incompetently perform their adjudicative duties,[95] as there are systematic deficiencies on the part of the trial process itself which have blockaded the juries from performing their duties appropriately.[96] If jurors are expected to perform their court duties in a more satisfactory way, it seems that there is much to be done to make jurors fully understand their function and be devoted to the process.[97] In practice, a number of countries have undertaken measures to reform the trial process to facilitate jurors' effective participation. These reform measures include allowing jurors to present judges with written questions, allowing jurors' note-taking, permitting jurors to discuss the case during the trial, providing jurors with extra instructions before the start of a trial, supplying jurors a written copy of instructions, and rewriting instructions in plain English etc.[98]

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to follow rules that accommodate the admission of evidence or lawyers' conduct rather than the jurors' needs or behavioral factors. While listening to days or weeks of conflicting evidence, they are directed not to discuss the case or ask questions. They are then locked in a room with instructions that are often confusing and told to reach a decision". See Rex K. Linder, "President's Page: A Time for Jury Innovation", *Defense Counsel Journal*, Vol.65, 1998, at 455.

[94] Stephen Wooler's report on the Jubilee Line case reinforces these arguments, see Sally Lloyd-Bostock, "The Jubilee Line Jurors: Does Their Experience Strengthen the Argument for Judge-only Trial in Long and Complex Fraud Cases?", *Criminal Law Review*, 2007, at 272.

[95] Phoebe C. Ellsworth, "Are Twelve Heads Better Than One?", *Law & Contemporary Problems*, Vol.52, 1989, at 224.

[96] See *ibid*.

[97] See *supra* note 40, at 690.

[98] See Landsman, *supra* note 42, at 298-300. For example, allowing jurors to take note and send questions to the trial judge have been adopted in England and Wales, see Bostock and Thomas, *supra* note 42, at 34; between 2004 and 2006 the National Center for State Courts of America conducted three related studies of jury practices in state and federal courts throughout the United States. Combined, the studies make up

Although some of these measures have been controversial,[99] it is widely acknowledged that jurors can function better with more appropriate help and it is also necessary to provide juries with more assistances.[100] Moreover, a series of studies have proved that more active participation in trial proceedings and provision of tools such as notes and pre-instructions could significantly improve jurors' competence.[101] For example, it has been proved that pre-instructed jurors recalled more probative (case-related) facts and fewer non-probative statements than post-instructed jurors.[102] Research also suggests that jury aides such as note taking and discussion amongst jurors can enhance juror comprehension and result in more legally appropriate decisions.[103]

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the *State-of-the-States Survey of Jury Improvement Efforts,* a first-ever effort to survey the entire field of jury issues and practices from state and local jury reform and improvement efforts to in-court use of tools aimed at improving juror comprehension and participation – including note-taking, juror questions and providing jurors with written instructions, see *supra* note 15, at 189. For the reforms in America, also see Juan Castaneda, "The Jury's Dilemma: Playing God in Solving the Problems Lurking in America's Courtrooms", *Defence Counsel Journal*, Vol.72, 2005, at 388; Burkhard Schafer and Olav K. Wiegand, "Incompetent, Prejudiced and Lawless? A Gestalt-psychological Perspective on Fact Finding in Law as Learning", *Law, Probability & Risk*, Vol.3, No.2, 2004, at 98.

[99] For example, there have been concerns that the more active role of the jury in the trial process may bring the adversary system more in line with Europe's inquisitorial approach, see *supra* note 51, at 96, and Landsman, *supra* note 42, at 298.

[100] See Judyth W. Pendell, "Enhancing Juror Effectiveness: An Insurer's Perspective", *Law & Contemporary Problems*, Vol.52, 1989, at 312.

[101] See, for example, Shari Seidman Diamond, Neil J. Vidmar, Mary Rose, Leslie Ellis, and Beth Murphy, "Inside the Jury Room: Evaluating Juror Discussions During Trial", *Judicature*, Vol.87, 2003-2004, at 54-59; J. Donald Cowan, Jr. Thomas M. Crisham, Michael B. Keating, Gael Mahony, Debra E. Pole, Michael A. Pope, William W. Schwarzer, and John R. Wester, "What Attorneys Think of Jury Trial Innovations", 192 *Judicature,* Vol. 86, No. 4, 2003, at 192; and James P. Levine and Steven Zeidman, "The Miracle of Jury Reform in New York", *Judicature* Vol. 88, No. 4, 2005, at 178; Larry Heuer and Steven Penrod, "Increasing Juror Participation in Trials Through Note Taking and Question Asking", *Judicature,* Vol.79, No.5, 1996, at 262.

[102] Cowan, Crisham, Keating, Mahony, Pole, Pope, Schwarzer, and Wester, *supra* note 101, at 187.

[103] See *supra* note 94, at 259; and Lynne ForsterLee and Irwin A. Horowitz, "The Effects of JURY-AID Innovations on Juror Performance in Complex Civil Trials",

"The central argument for seeking alternatives to jury trial has not been the burden on jurors but rather concern about their competence".[104] However, if jurors are generally able to perform their duties well and their occasional incompetence derives not from their intelligence but largely from "the shortcomings in our investigation and trial process"[105] which could be substantially improved, the argument for seeking alternative to replace jury trial needs to be reconsidered.

Opponents of the jury attack jurors' alleged irrationality and prejudice. However, it appears that empirical studies do not support this allegation. Research in America reveals that "the majority of jurors appeared to understand what was expected of them and most performed without undue influence from extraneous factors".[106] In England, Baldwin and McConville's research indicates that "the verdicts of juries are influenced much more by the weight of the evidence presented in court, tempered by consideration of 'equity' in a particular case, than by any variations in the prejudices, attitudes or background of individual members of the jury".[107] Moreover, juror biases in civil cases have gained little significant support from research to date.[108]

Judicature, Vol.86, No. 4, 2003, at 184.

[104] *Supra* note 94, at 258.

[105] Bruce Houlder, "The Importance of Preserving the Jury System and the Right of Election for Trial", *Criminal Law Review*, Dec 1997, at 879.

[106] Carol J. Mills and Wayne E. Bohannon, "Juror Characteristics: To What Extent Are They Related to Jury Verdicts", *Judicature*, Vol.64, 1980-1981, at 31.

[107] John Baldwin and Michael McConville, "Does the Composition of An English Jury Affect Its Verdict?", *Judicature*, Vol.64, 1980-1981, at 31.

[108] For example, research lends support to the reality that in either personal injury, medical malpractice or product liability cases, there was no bias in favour of either plaintiff or defendant on the part of the jury. See generally Valerie P. Hans, *Business on Trial: The Civil Jury and Corporate Responsibility* (New Haven, London, Yale University Press, 2000); Harry Kalven, Jr., "The Jury, the Law, and the Personal Injury Damage Award", *Ohio State Law Journal*, Vol.19, 1958, at 158 and 178, quoted from *supra* note 88, at 4. Even in patent cases involving complex technical issues, the study indicated that "complaints about jury bias and incompetency are unfounded"; and "juries seem as 'accurate' in their decision making as judges are, as measured by appellate affirmation rate". See Moore, *supra* note 94, at 368. In addition, in response to criticism that the jury, out of bias, awards excessive damages to

Responding to the attacks on jurors' questioned diligence in performing their duties, diverse research demonstrates that "juries are generally diligent, and, if given the right assistance, are usually collectively willing and able to determine cases on the evidence and in accordance with the law as laid down by the judge".[109] According to Penny Darbyshire and her colleagues' research for Lord Justice Auld's Review and more recently Roger Matthews and his colleagues' interviews of 361 discharged jurors in 5 Greater London courts, "jurors generally consider jury trial important, derive satisfaction from jury service, and take their task as jurors very seriously".[110]

A survey conducted in New Zealand in 1999 indicates that the majority of jurors perform their duties conscientiously by referring to the evidence and directions they are given.[111] Moreover, this survey also suggests individual emotions of jurors are normally overridden by the collective decision-making, which indicates that the jury generally performs in the way it has been expected to.[112]

As concluded by William Young, in light of a series of empirical research in England and Wales, Canada, New Zealand and Australia, "the strength of the jury system lies in the collective understanding, recall and diligence of the jury as a whole and that in most (but not all) cases, inadequacy, misunderstanding, predisposition or prejudice on the part of individual jurors do not adversely impact on the ultimate

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individual plaintiffs in tort litigation involving individuals *versus* companies, the result of a study on the civil jury in Canada indicates that judges tend to award less damages than juries do, but that the awards of juries remain within appropriate ranges. See W. A. Bogart, "Guardian of Civil Rights … Medieval Relic: The Civil Jury in Canada", *Law and Contemporary Problems*, Vol.62, 1999, at 317.

[109] *Supra* note 52, at 689.

[110] *Supra* note 94, at 258.

[111] New Zealand Law Commission, "Juries in Criminal Trials: Part 2", *Preliminary Paper*, No. 37, 1999, available at www.lawcom.govt.nz, quoted from McEwan, *supra* note 56, at 168.

[112] *Supra* note 56, at 171.

determination".[113]

The jury's comparatively high acquittal rates may be unwelcome due to their incompatibility with crime control policy. However, research has revealed various reasons that justify the jury's alleged leniency.

First, Bankowski challenged the attacks on the jury's higher acquittal rates on the basis of the coherence theory of truth and the methodology applied by the critics who question the jury's acquittals. According to Bankowski's coherence theory of truth, "truth is particular to, and constructed within, specific modes of life and the 'truth' of one mode cannot be judged against the 'truth' of another".[114] Based on this theory, the "truth" believed by a policeman that "he did it" does not necessarily lead the jury to find their "lay truth" that "he is guilty".[115] Bankowski also observed that a series of empirical studies[116] unanimously indicated that legal experts, mainly lawyers or judges, have rather frequently questioned the juries' verdicts. However, Bankowski contended that it might not be a perfect methodology to commission a lawyer who "accepts the prevailing courtroom norms of legal rationality and who is willingly incorporated into the social order of the courtroom and the trial" to appraise whether juries' acquittal rates are too high or too low.[117]

Second, according to Kalven and Zeisel, the comparatively higher acquittal rates of the jury could be interpreted as jurors applying a more stringent standard about what is beyond a reasonable doubt.[118] Likewise, Lempert suggests that jurors' leniency bias may not necessarily conflict with the law's standards whilst, contrarily,

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[113] *Supra* note 52, at 671.
[114] Zenon Bankowski, "The Jury and Reality", Mark Findlay and Peter Duff (ed.), *The Jury Under Attack*, (Butterworths Pty Limited, London, 1988), at 8.
[115] *Ibid*.
[116] *Ibid*.
[117] *Ibid*, at 21.
[118] See Harry Kalven and Hans Zeisel, *The American Jury* (University of Chicago Press, Chicago, 1986), at 58-59.

professional judges may subconsciously embrace a presumption of guilt other than a presumption of innocence as they see mainly guilty defendants.[119]

Third, in an attempt to interpret the high acquittal rates of juries in England, Cornish commented that:

> *"It must be remembered that some 85 per cent of prosecutions for indictable offences are siphoned off into Magistrates' Court, and of the rest, nearly two-thirds end in pleas of guilty. Juries are left to deal with the remaining small proportion, and it would be not unreasonable to expect those that remain to include many of the cases in which there is some real element of doubt concerning the accused's guilt".*[120]

Fourth, Vidmar contended that there is no data to show that jury acquittal rates are unreasonably high.[121] Freeman directly points out that to ask whether too many defendants having been acquitted by the jury is almost meaningless.[122]

Based on these arguments, it seems unpersuasive to blame the jury simply for their comparatively higher acquittal rates.

As seen above, another premise on which the jury was attacked is its lack of efficiency and cost-effectiveness. However, scholars have offered counterarguments to justify these aspects of the jury.

First, as Lempert pointed out, cost concern cannot be used to illegitimate the application of juries since the cost of operating a jury system is trivial when compared to other investments. For example, the cost of the civil jury system in America nationwide was only approximately equal to that of buying two jet fighters and the

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[119] See *supra* note 88, at 4.
[120] Cornish, *supra* note 65, at150.
[121] Neil J. Vidmar, Sara Sun Beale, Mary Rose and Laura F. Donnelly, "Should We Rush to Reform the Criminal Jury", *Judicature*, Vol.80, No.6, 1997, at 286.
[122] See *supra* note 38, at 221.

overall cost of both the civil and criminal jury system in 1986 was only one-sixtieth of the cost of a new space shuttle.[123] This argument directly challenges the government's moves toward limiting the use of the jury trial in order to save money.

Second, as discussed above, it is in the context of the rise of "managerial justice" addressing the "Three Es" that the jury trial has been facing its demise; however, there is a rejection of administrative efficiency as the prime value of the judicial process.[124] Critics have pointed out that some delays are unavoidable and necessary for seeking justice.[125] Moreover, proponents of the due process model argue that the protection of the factually innocent deserves the loss in efficiency.[126] The due process model requests further "strands" which also adversely affect efficiency, such as the need to maintain civil liberties and the necessity of preventing the abuse of administrative or executive powers.[127] In short, in spite of either the crime control model or the due process model, it is arguable that "[s]omewhere the balance has to be struck between fairness and thoroughness without sacrificing justice to expediency or cost considerations".[128]

Third, as criticized by Bankowski, although it might seem reasonable to limit or remove jury trials to save time and money, when looking at it further, the concerns relating to economy and efficiency are no more than the politicians' value choices when confronting the conflict between the efficiency embraced by the legal experts and the democracy enshrined by the lay people.[129] A government may favour the idea

123 *Supra* note 88, at 6.
124 *Supra* note 38, at 226.
125 See *supra* note 67, at 8.
126 See *supra* note 38, at 210.
127 See Packer 1968, at 164.
128 *Supra* note 40, at 690.
129 See *supra* note 114, at 22.

of efficiency rather than democracy.[130] When the subject matter changes, for example, to "national security", politicians may prefer as many jet fighters as possible, at all costs, in either time or money. "This is how in practice the rule of law works and what a system of organization based on it means".[131]

1.2.3.2. The important political/democratic function of the jury

As mentioned above, the jury trial has two intertwined functions: the judicial decision-making function on one hand and the political/democratic function on the other. While the jury's political/democratic function historically played an important role in fighting against judicial tyranny, this role is less critical in modern democracies with a more reliable judicial system, which may provide a reason for the jury's demise in some countries. The political/democratic function of the jury is by no means an uncontroversial issue. Rather, the arguments about the positives and negatives of the jury, including its political/democratic role, have involved some of the great names of political and legal philosophy.[132] Some classic authors' arguments have been recently reviewed and developed by modern scholars, indicating that the jury's political/democratic function is still considered important today.

An essential dispute over the democratic role of the jury centers on whether "direct democracy" as embodied in the jury should be supported? "Indeed, much of the structure of representative government supports and reinforces the idea of the

[130] See *ibid*.
[131] *Ibid*.
[132] The bibliography on praises and blames of jury has been extraordinarily tremendous, for a sampling list, see Harry Kalven and Hans Zeisel, *The American Jury,* (University of Chicago Press, Chicago, 1970), at 4

citizen as a passive player".[133] However, proponents of direct democracy contend that it would be groundless for people "to be entrusted with electing their governments and making laws but not with how to apply them".[134] Moreover, some scholars maintain that the people's appeal to direct democracy deserves support in light of concern over human rights.[135] Whether civic direct participation in justice should be supported or not is largely an ideological issue, which would continue "both to attract and to repel us precisely because it exposes the full range of democratic vices and virtues".[136] It seems certain, however, that the following merits of allowing jurors randomly selected from the community to make judicial decisions are hard to be denied.

-- To ensure judicial independence

Probably the most important characteristic of the jury is that it is "a randomly chosen and representative sample of the community".[137] "[I]ts impartiality and its independence from the State are bolstered by the fact that it represents a randomly selected cross-section of the populace".[138] Such a characteristic, coupled with the jury's immediate dismissal after each verdict, gives the jury its unique independence. In contrast to the jury's independence from political pressure, "[p]olitical pressure might be put upon the courts either through a deliberate directive from the government to the judges, or because the judges have a general sympathy with the

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[133] Anna Coote and Deborah Mattinson, *Twelve Good Neighbours: The Citizen As Juror* (The Fabian Society, London, 1997), at 1.
[134] Carmen Gleadow, "Spain's Return to Trial by Jury: Theoretical Foundations and Practical Results", *Saint Louis-Warsaw Transatlantic Law Journal*, Vol.2001-2002, at 57.
[135] See *supra* note 24, at 90.
[136] Jeffery Abramson, *We, the Jury: The Jury System and the Ideal of Democracy*, (Basic Books, New York, 1994), at 1 and 2.
[137] Peter Duff, "The Hong Kong Jury: A Microcosm of Society?", *International & Comparative Law Quarterly*, Vol.39, No.4, 1990, at 882.
[138] *Ibid*.

government".[139] As Baldwin and McConville caution: "although serious criticism might be leveled against the jury on the grounds of arbitrariness, prejudice and the like, one may nevertheless state with confidence that the very unpredictability of the institution is the surest evidence of its genuine independence".[140]

As Cornish observed, concern regarding the jury's independence may arise even in modern established democracies most obviously in criminal offences with political implications such as sedition, treason, riot and unlawful assembly.[141] He adds that "[g]iven that the state is entitled to suppress conduct which is seriously prejudicial to itself or to the peace of its citizens generally, one might still expect a jury truly concerned with protection of individual liberty to make a stand in two situations: where the state appears to be prosecuting for a political offence on a basis of unreliable evidence; and where it is necessary to extend the law so as to bring the accused within its prohibitions".[142]

-- To display the legitimacy of government

Besides the jury's preventive role in repelling potential political pressures to ensure the impartiality of the decision making,[143] the wide social cross-section of jurors also has the legitimisation function.[144] "Seeing justice done is equally as important to most people as an elusive certainty in the correctness of the conviction or acquittal. Any judgment by a cross-section of society is far more satisfactory than a system of justice that depends on the State for the selection of its fact-finders as well

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[139] Cornish, *supra* note 65, at 127.
[140] John Baldwin and Michael McConville, *Jury Trials* (Clarendon Press, Oxford, 1979), at 131.
[141] See Cornish, *supra* note 65, at 127.
[142] *Ibid*. For the jury's merits in independence, see *supra* note 31, at 8.
[143] See *supra* note 38, at 226.
[144] See Mark Findlay and Peter Duff, *The Jury Under Attack* (Butterworths, London, Sydney 1988), at 7.

as its investigator, prosecutor and sentencer".[145]

The jury's proponents contend that the jury's role in legitimising criminal justice makes sense not only to the public but also to defendants. "A conviction by a jury is usually something that even a convicted defendant can live with, however he may resent it. He feels he has a better chance of being understood by a jury and that there is some justice in that. The decision of a less representative tribunal may ultimately do little to rehabilitate an offender and may serve to increase his sense of separateness from society in general".[146] Moreover, jury trial can effectively impact those who participate in the judicial process,[147] such as jurors themselves. Empirical studies have shown that most of jurors changed their opinions on the justice system favorably.[148]

In short, it can be argued that "[m]eaningful jury input into criminal justice is a leading indicator of the genuine legitimacy of our government",[149] since the jury demonstrates that within the criminal justice system respect is paid to the people's will, genuine judicial independence, the "rule of law", and "due process".[150]

1.2.4 The jury's prospects in established democracies

Seemingly, almost each reason given for the demise of the jury trial in the established democracies can be countered by research to date suggesting that the jury has a qualified and, via further reforms, could be a better adjudicative body whilst its political/democratic function today and plays an important role. However, will such

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145 *Supra* note 105, at 881.
146 *Ibid*.
147 See *ibid*.
148 See e.g. *supra* note 26, at 28.
149 David J. Saari, "The Criminal Jury Faces Future Shock", *Judicature*, Vol. 57, 1973-1974, at 13.
150 *Supra* note 38, at 226.

favourable research promote a bright future for the jury trial?

It is unpersuasive to contend that democratic governments have failed to notice that the above research is favourable to the jury and mistakenly enacted laws to suppress its use. As observed by Stephen Daniels, the attacks and reforms on juries should be understood as "an integral part of a concerted campaign aimed at the enactment of substantial changes" in the entire justice system that would benefit certain interest groups, rather than be "understood and evaluated in a political vacuum".[151] He specifically added that "[t]he political strategy underlying the attacks on jury competence undercuts the substance of such criticisms".[152] Baldwin and McConville also observed: "[i]t is clear that arguments about the retention or the abolition of the jury are at base, political in nature."[153] In the context that the jury trial is too inextricably linked with value judgments and policy choice of politicians,[154] "[t]ailoring the jury's role is a never ending process of balancing inherently conflicting policies",[155] such as politicians' choice of preferring "crime control" or "due process", and of whether to allow the people not only to "join in the Big Conversation", but also to "make the Big Decision".[156] When this has been understood, it is unsurprising that the jury trial has been facing its demise, irrespective of the largely favorable outcomes of academic research detailed above. As long as there is political distaste against juries,[157] there will be more moves towards

[151] Stephen Daniels, "The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-building", *Law & Contemporary Problems*, Vol.52, 1989, at 309.
[152] *Ibid*.
[153] *Supra* note 140, at 19.
[154] *Supra* note 31, at 9.
[155] Kirst, *supra* note 81, at 338.
[156] *Supra* note 40, at 696.
[157] See *supra* note 40, at 697.

repressing the jury, probably based upon inadequate evidence.[158]

To make it more specific, in any jurisdiction which is "increasingly developing a … justice system operated by technicians and administered by professionals whose major concerns are efficiency, cost and expedition",[159] "[t]here will be continued pressure for 'modernisation' of the jury, primarily founded upon the values emphasized by the crime control model of criminal justice and backed by the 'law and order' lobby, and various reforms will be suggested. Some of these will be adopted and by this means the role of the jury will be further limited".[160] On the contrary, when the policy makers' value judgment become more inclined to "due process", it is not impossible that the situation will reverse. It has been reported, for example, that the Supreme Court of America has "worked aggressively in recent decades to increase (or perhaps restore) the status of the jury in the criminal justice system", and "these themes have grown even stronger in the last decade".[161]

Another factor which politicians must consider is that the total removal of the jury trial would have to confront the public's diffuse support for the jury. For example, two recent surveys in England and Wales reveal that the public widely supports the jury system. One 2002 survey found that over 80 per cent of the public trusted a jury to come to the right decision and that trial by jury is fairer than being tried by a judge. The other in 2003 reveals that: not only white but also non-white members of the public highly trust the jury system.[162] Citizens' supports for the jury trial have also

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158 See *ibid*.
159 *Supra* note 38, at 224.
160 *Ibid*.
161 Kevin K. Washburn, "Restoring the Grand Jury", *Fordham Law Review*, Vol.76, 2007-2008, at 2362.
162 Cheryl Thomas, "Exposing the Myths of Jury Service", *Criminal Law Review*, No. 6, 2008, at 417-418.

been verified by research in other countries as well.[163] In short, the jury trial will likely continue to confront its ebb and flow with the changing "political discourse"[164] which, however, cannot totally ignore the people's will.

1.3 Mixed Tribunals – An Ineffective Model of Lay Participation?

Besides the classic jury, the mixed tribunal system in which lay assessors and professional judges sit side by side to making judicial decisions is another representative and influential model of civic participation in the administration of justice prevalent in quite a number of countries with civil-law tradition. This system has also been adopted by China as its almost exclusive model of lay participation.[165] However, it has been widely reported in many countries that lay assessors perform their duties too passively to make substantial contributions to judicial decision making. Could this be regarded as another sign of the overwhelming decline of lay participation as some Chinese scholars have alleged?[166]

1.3.1 A widely used model of lay participation

The mixed tribunal system is actually a variation of the jury. France first introduced the English jury system but found it unable to produce "uniformly

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[163] See, for example, Shari Seidman Diamond, "What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors", Robert E. Litan (ed.), Verdict*: Assessing the Civil Jury System* (Brookings Institution, Washington, D.C., 1993), at 282 and 285; *supra* note 88, at 10; and Sanja Kutnjak Ivkovic, "An Inside View: Professional Judges' and Lay Judges' Support for Mixed Tribunals", *Law & Policy*, Vol.25, No.2, 2003, at 98-100.

[164] *Supra* note 38, at 225.

[165] See Chapter 3 for more discussions.

[166] See e.g. *supra* note 1.

satisfactory results".[167] In 1943, the criminal jury was abolished and replaced by a new institution: "nine laymen (later reduced to seven), still called jurors, were required to sit together with three judges as one bench to decide questions of guilt and punishment jointly".[168]

Germany experienced similar change. In 1924, as the replacement for the criminal jury, a lay assessor court, namely Schoffengerichte, composed of three judges and six lay assessors, was established to adjudicate the most serious criminal offences; and a smaller version comprising one judge in association with two lay assessors was created to decide on the medium-range offences.[169] In Germany, lay assessors with rights and tasks equal to judges, can sit together with judges to participate in almost all criminal trials in local, district, and high courts.[170]

Likewise, a number of other countries have also introduced mixed tribunals in various forms.[171] According to Jackson and Kovalev's recent comprehensive review, these countries include Norway, Finland, Demark, Italy, Austria, Hungary, Sweden, Switzerland, Portugal, Iceland, Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Macedonia, Poland, Serbia, Slovakia, Slovenia, Ukraine and Greece.[172] Neil Vidmar's

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[167] Cornish, *supra* note 65, at 269.
[168] *Ibid*.
[169] *Ibid*.
[170] In order to save judicial cost, at the lowest level court of first instance, the Amtsgericht, lay judges are excluded from trials of minor offences with a maximum expected punishment of two years imprisonment. These cases are decided by a single professional judge. See Walter Perron, "Lay Participation in Germany", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 181.
[171] According to Jackson and Kovalev, there could be three different models on the part of mixed tribunals, "the German collaborative court model", "the French collaborative court model" and "the expert assessor collaborative court model". See *supra* note 24, at 96-99.
[172] See *supra* note 24, at 97 and 98; for Norway's situation, see also Asbjorn Strandbakken, "Lay Participation in Norway", *International Review of Penal Law* ", *(Vol. 72),* (Érès, Ramonville Sainte Agne 2001) at 225-251; for Finland's situation, see also Heikki Pihlajamaki, "From Compurgators to Mixed Courts: Reflections on the Historical Development of Finnish Evidence Law and Court Structure",

comprehensive research reveals that lay assessors exist in many Commonwealth countries in other continents.[173]

1.3.2 The questionable effectiveness of mixed tribunals

Like other models of lay participation, the mixed tribunal aims to introduce the community's voices into the judicial process. However, research suggest that, in practice, mixed tribunals in diverse countries confront "substantial difficulties" in achieving this objective mainly due to the two reasons: lay assessors' widely-reported impotence in performing their adjudicative duties on one hand, and the problematic representativeness of lay assessors which makes them unable to represent the community.[174]

1.3.2.1 Do lay assessors effectively participate in trials?

In mixed tribunals, lay assessors sit side by side with professional judges and

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International Review of Penal Law (Vol. 72), (Érès, Ramonville Sainte Agne 2001), at 159-174; and for Denmark's situation, see also Peter Garde, "The Danish Jury", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 87-120.

[173] For example, in the South Pacific area, the jury has disappeared in Tuvalu, Solomon Islands, Vanuatu, Samoa, and Fiji. However, lay assessors have been introduced and survived for a long time in these jurisdictions, in spite of the fact that lay assessors' participation in the criminal process is restrained in some instances. In many African countries lay assessors are used in criminal cases, though the application of lay assessors is subject to certain limitations such as being only applicable for capital cases in the High Court (in Kenya), lay assessors' verdicts are not binding (in Kenya, Tanzania and Uganda), lay assessors only decide on matters of custom (in Lesotho), lay assessors participate in an advisory capacity (in Botswana.) and lay assessors determine questions of fact only (in Zimbabwe). See *supra* note 4 at 392-400.

[174] Stephan Landsman and Jing Zhang, "Lay Participation Comes to Japanese and Chinese Courts", *UCLA Pacific Basin Law Journal*, Vol.25, 2007-2008, at 190.

normally have equivalent duties and powers. However, research in diverse countries has found that lay assessors act very passively in the trials, infrequently: asking questions during trials, making comments of merit, reading case files, disagreeing with professional judges, and exercising their rights to outvote judges.[175]

1.3.2.2 Do lay assessors effectively represent the community?

The problematic representativeness of lay assessors forms another criticism of the mixed tribunal system. In Norway, for example, the composition of lay assessors indicates "clear overrepresentation of middle-class citizens" and "significant underrepresentation of lower-class citizens".[176] According to Jackson and Kovalev, lay assessors in Denmark, Sweden, Germany and Norway are politically active members from the community, whilst in Finland, certain social groups such as pensioners and students are overrepresented.[177] The limited representativeness of lay assessors directly raises concerns about whether they truly represent the community.

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[175] See Sanja Kutnjak Ivkovic, "Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals", *Cornell International Law Journal*, Vol. 40, 2007, at 440-448; Christian Diesen, "Lay Participation in Sweden--a Short Introduction", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 363. For more discussions about the lay assessors' passiveness in these countries, see also e.g. *supra* note 174, at 194; Lars Molin*,* "Some Information about the Role of Lay Assessors in Swedish Courts"*,* Nigel Walker and Annette Pearson (ed.), *The British Jury System*. (The Institute of Criminology, Cambridge, 1975), at 87; Emilie Taman, "Lay Participation in Criminal Justice: Enhancing Justice System Legitimacy in Post-conflicting States", *Dalhousie Journal of Legal Study*, Vol.12, 2003, at 52; Maria Los, "The Myth of Popular Justice Under Communism: A Comparative View of the USSR and Poland", *Justice Quarterly*, Vol.2, No.4, December 1985, at 447.

[176] Ivkovic, *ibid*, at 445.

[177] *Supra* note 24, at 102.

1.3.3 Reasons for the mixed tribunal's ineffectiveness

As seen above, the mixed tribunal is an important model of civic participation in justice which has been widely used in numerous countries. However, where lay assessors are neither able to represent the communities they come from nor able to effectively participate in trials, this model will inevitably fail to affect true lay participation. So what are the reasons for these weaknesses? It appears that both the impotence and narrow representativeness of lay assessors should be attributed to problematic trial management and imperfect institutional design in legislation.

1.3.3.1 Lay assessors' participation under the sway of judges

Empirical research from Russian and Croatia indicates that professional judges' attitudes toward mixed tribunals can substantially impact lay assessors' effective participation. Professional judges who are enthusiastic about mixed tribunals are likely to facilitate lay assessors' participation and *vice versa.*[178] This rule has also been testified to by the studies conducted in Germany. In practice, judges could exert impact on lay assessors' participation by the following means.

-- To command lay assessors' cognitive tools

First of all, lay assessors' knowledge of cases may be largely subject to professional judges' cooperation. The presiding judge of a mixed tribunal normally has to be a professional judge who conducts various trial activities including directing

[178] See Stefan Machura, "Fairness, Justice, and Legitimacy: Experiences of People's Judges in South Russia", *Law & Policy*, Vol.25, No.2, 2003, at125-127; *supra* note 7, at 89.

the lay assessors' participation.[179] In practice, presiding judges are committed to provide lay assessors with varied cognitive tools to help the latter to understand cases, such as giving lay assessors oral or written instructions, answering their questions, and allowing them to get access to investigative dossiers etc.

However, it seems that in some countries the judges are not active in performing their duties in this regard. Research in Poland, for example, indicates that some professional judges neither provide the lay assessors with any relevant case information nor explain legal issues to them.[180] Likewise, Stefan Machura's study in Russia reveals that professional judges actually "frame the participation" of the lay assessors. He observed that if the professional judge(s) in a mixed tribunal understand(s) the position of the lay assessors by granting the latter enough opportunities for questions, the lay assessors may perform more actively in the trial, and *vice versa*.[181] In addition, research in Germany indicates that "criminal trial outcomes are powerfully influenced by the dossiers prepared by prosecutors".[182] However, it has been reported that these case dossiers are provided only to the professional judges[183] and the lay assessors are rarely given enough time and opportunity to study these case dossiers.[184]

Without sufficient cognitive tools to comprehend cases well, lay assessors would be unlikely to effectively participate in trials.

-- To control lay assessors' participative opportunities

Second, contrary to the deliberation process in the jury system where the judge is

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[179] See Stefan Machura, "Interaction between Lay Assessors and Professional Judges in German Mixed Courts", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 457.
[180] Los, *supra* note 175, at 453.
[181] *Supra* note 178, at 146-147.
[182] *Supra* note 174, at195.
[183] *Ibid*.
[184] See *supra* note 179, at 452.

excluded, the professional judge in a mixed tribunal participates in and virtually chairs the deliberation. Research indicates that the extent to which lay assessors can contribute to the decision making largely depends on the "deliberation atmosphere" which the professional judges create.[185] For example, lay assessors "need more time to understand a case compared with professional judges who are legally educated and already have had similar cases earlier in their careers".[186] However, whether the lay assessors in a mixed tribunal will be granted "more time" largely depends upon the judges' patience and will.[187] Research in Russia reveals that an "authoritative judge" could silence the lay assessors by simply not leaving them enough deliberation time.[188] Moreover, as a Russian judge has revealed, "a real, professional judge first asks the lay assessors their opinions, then deliberations [between the lay assessors and the judge] begin. But, if the judge really wants to convict the defendant, the judge will speak first and convince the lay assessors".[189]

-- To affect lay assessors' participative enthusiasm

Third, although they may avoid directly violating the law to deprive the lay assessors of their participative opportunities, judges can practically adversely affect the lay assessors' participative enthusiasm to indirectly hold back the latter's participation. In Germany, for example, lay assessors often complain that they are asked by the presiding judge: "are there any questions?" in a tone which makes it more than clear that such questions are not welcome.[190] Polish research indicates that professional judges rarely gave their lay colleagues any directives to stimulate the

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185 *Supra* note 178, at 125.
186 *Ibid*.
187 *Ibid*, at 195.
188 *Ibid*, at 125.
189 Duncan Deville, "Combating Russia Organized Crime: Russia's Fledgling Jury System on Trial", *George Washington Journal of International Law and Economics*, Vol.32, 1999-2000, at 81.
190 *Supra* note 178, at 127.

latter to participate in the deliberations actively.[191]

In short, the research above reveals that the extent to which lay assessors can effectively participate in trials depends upon not only their own enthusiasm and competence, but also professional judges' cooperative willingness to facilitate lay assessors' participation. It would be an important issue in prospective reforms to protect against professional judges' improprieties in trial management which impede lay assessors' effective participation.

1.3.3.2 Lay assessors' passive obedience determined by institutional design

As discussed above, lay assessors may hesitate to disagree with professional judges or to outvote them.[192] Lay assessors' deference to judges could be attributed to, *inter alia,* three reasons deriving from problematic institutional design.

-- Judges' higher managerial status provided by law

"Procedural rules provide the professional judges with a more active trial role".[193] As mentioned above, the presiding judge of a mixed tribunal normally has to be a professional judge who conducts various trial activities including chairing the court session and the deliberation, and directing the lay assessors' activities.[194] These procedural rules effectively raise professional judges to a position of leadership in spite of the law stating that lay assessors and judges are equals. As a rule of thumb, lay assessors may respect this leadership and thus cultivate their deference to judges.

-- Lay assessors' obedience to judges due to reasoned verdicts

"[A]n additional factor that propels the professional judge into a leadership

[191] Los, *supra* note 175, at 453.
[192] Ivkovic, *supra* note 175, at 447-448.
[193] *Ibid*, at 447.
[194] See *supra* note 179, at 457.

position is the legalistic nature of the decision".[195] In contrast to the jury's secret and general verdicts without giving reasons, the verdict of a mixed tribunal has to elaborate the reasons on which the verdict has been based.[196] Furthermore, the verdict is appealable upon the request of the defendant.[197] These two factors determine that decisions of mixed tribunals must be made as per the existing law,[198] otherwise they may be overturned by the appeal courts. This need to base verdicts on existing legal rules allows professional judges to further consolidate their leading position in mixed tribunals, since it is they, as legalists, who are more able to apply various legal rules and interpret the legal reasoning in each verdict. In other words, to produce the reasoned verdict required by the law, the mixed tribunal has to technically rely on the professional judge(s). In this context, professional judges become "'first among equals' during legal decision-making because of their specific status characteristics, such as legal education and experience in deciding legal cases".[199]

-- Unattainable independence of lay assessors

The procedure used to assign lay assessors' duties in some countries is not conducive to ensuring the independence of lay assessors. For example, in Russia, "each lay assessor reports to the same courtroom … for the term of his service (which can last months)" and "[n]aturally, he develops relationships with the judges and prosecutors who appear regularly there",[200] "similar to the way grand jurors in the United States are sometimes accused of being beholden to the prosecutor they see regularly".[201] This relationship may make lay assessors reluctant to challenge the

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195 *Supra* note 175, at 448.
196 *Supra* note 24, at 116.
197 *Ibid*, at 117.
198 See Ivkovic, *supra* note 175, at 448.
199 *Ibid*.
200 *Supra* note 189, at 81.
201 *Ibid*, at 81-82.

professional judges and increase their passive obedience.

As summarized by Ivkovic, "[t]he professional judges' active role mandated by procedural law…and their higher status in the tribunal all contribute to an atmosphere in which the professional judges' voice commands."[202]

-- The small number of lay assessors

The existing research indicates that the small number of lay assessors in a mixed tribunal might be another factor of affecting their effective participation. For example, a classic *Schöffen* court in Germany is composed of one professional judge and two lay assessors.[203] In many other countries such as Croatia and Norway, the model of 1(judge) +2 (lay assessors) has been applied in composing a mixed tribunal.[204] Kalven and Zeisel's research in 1966 found that in American juries a lone holdout virtually never hangs a jury because the pressure to capitulate and comply with the majority is too strong. Stefan Machura suggests that this particular finding is applicable for mixed tribunals as well as other sorts of small group process. According to him, there is limited likelihood that any one of these two lay assessors would stand up to the professionals with whom they work.[205]

-- The incompetence of lay assessors

Lay assessors in mixed tribunals decide on both questions of fact and questions of law. It may be argued that "in order to fulfil their adjudication duties effectively, independently, and equally with professional judges, they should have an opportunity to become familiar with major concepts of substantial and procedural law before they

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[202] Ivkovic, *supra* note 175, at 448.
[203] Cornish, *supra* note 65, at 269.
[204] Sanja Kutnjak Ivkovic, "Mixed Tribunals in Croatia", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at63; and Strandbakken, *supra* note 212, at 225.
[205] See *supra* note 179, at 452.

commence their duty".[206] However, a number of countries do not provide any training for lay assessors.[207] Due to lay assessors' lack of legal knowledge,[208] professional judge may easily dominate in courtrooms when it comes to questions of law[209] and lay assessors have to defer to their professional colleagues.

1.3.4 The prospects for mixed tribunals

For the above reasons, notwithstanding that lay judges may outnumber judges and could legally dominate the decisions,[210] the majority of lay judges seldom trumps the minority of professional judges[211] by virtue of professional judges' control over lay assessors' effective participation, lay assessors' deference to judges due to the latter's superiority in legal knowledge and managerial status, and lay assessors' weak voice due to their small number and incompetence in deciding on questions of law. It seems that some of the weaknesses of mixed tribunals are embedded into the very nature of tribunals – "the mingling of lay and law-trained judges within a single decision-making body" [212] where professional judges dominate not only administratively but also technically. Thus, what are the prospects for the mixed tribunal? Will the mixed tribunal's weaknesses lead to its continuing decline or even abolition? It appears that the prospects for mixed tribunals will depend upon, *inter alia*, three factors that follow.

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206 *Supra* note 24, at 108.
207 *Ibid*, at 107.
208 See Ivkovic, *supra* note 175, at 441.
209 See *supra* note 24, at 108.
210 See *supra* note 86.
211 See *ibid*.
212 *Supra* note 51, at 86.

1.3.4.1 The potential to improve the mixed tribunal system

As seen above, it appears that some weaknesses of mixed tribunals are associated with "the mingling of lay and law-trained judges within a single decision-making body". However, it could be argued that these weaknesses are not unconquerable.

First, the extent to which the assessors in a mixed tribunal can effectively participate in the trial largely depends upon the cooperation of the professional judges in the mixed tribunal, since the latter are commissioned to preside over trial processes. It may be argued that in order to improve lay assessors' independence and check on judges' improprieties, an extra position – "lay assessors' clerks (legal counsel)" could be established in mixed tribunals. Lay assessors' clerks would be selected from lawyers favoring lay participation and be independent from the courts where they work. Their duties would be: to provide legal advices to lay assessors when the latter confront any questions of law to protect against professional judges' passivism in perform such duties; on the other hand, to oversee professional judges' other improprieties in impeding lay assessors' participation such as refusal to awarding sufficient deliberation time.

Secondly, since reasoned verdicts allow professional judges to further consolidate their dominance in mixed tribunals because of their legal knowledge, one possible measure against this dominance, borrowing from the jury trial, would be not to require mixed tribunals to render reasoned judgments. Meanwhile, where the mixed tribunal produces a guilty verdict, the judges who agree with the guilty verdict could help the lay assessors craft the decision; or where the judge disagrees, the lay assessor's clerk could assist the lay assessors in drafting the decision, with the professional judges' dissents attached.

Thirdly, to avoid long-term cooperation between professional judges and lay assessors, requesting lay assessors to serve for a number of years without the prohibition of re-election, as Germany does,[213] should be reconsidered. On the contrary, terms of service for lay assessors could be limited to a single trial (as adopted by France, Portugal and Switzerland[214]) or to a few days per annum for one or two years (e.g. five days per annum for two years in Denmark[215]). Moreover, the French model of mixed tribunals adopts the secret ballot rule. In other words, "lay judges have the freedom to express their final decision on the defendant's guilt according to their convictions and anonymously from the professionals, as well as from one another".[216] It may be argued that this secret ballot could eliminate lay assessors' hesitation at challenging professional judges.

Fourthly, to improve lay assessors' competence to decide on questions of law, besides providing them with clerks, Jackson and Kovalev suggest "it is important that lay judges are given some training to prepare them for this task". They add that "such training could include specific lectures on evidence, criminal law, and criminal procedures by legal experts".[217]

Fifthly, in response to the weak voice of lay assessors in mixed tribunals, there are possibilities for reform. For example, Japan has recently introduced a mixed tribunal system under which the proportion between lay assessors and judges has been increased to 4:1 and 6:3.[218] Besides increasing the lay assessors' number in a mixed

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213 *Supra* note 24, at 106.
214 *Ibid*.
215 *Ibid*.
216 *Ibid*, at 115.
217 *Ibid*, at 108.
218 Hiroshi Fukurai, "The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participation Experience in Japan and the U.S.", *Cornell International Law Journal*, Vol.40, 2007, at 323; and Kent Anderson and Emma Saint, "Japan's Quasi-Jury

tribunal, the French law attempts to increases the weight of lay voice by providing that at least fifty-five percent of the lay assessors should vote for a conviction. These methods are expected to stimulate lay assessors to influence the verdict.[219] In addition, empirical data suggests that non-unanimous juries do not function as well as their unanimous counterparts, since "majority rule juries virtually always cease serious deliberations once they have reached the required majority for decision".[220] Jackson and Kovalev suggest that "the need for unanimity becomes greater the smaller the size of the jury".[221] To substantially add weight to lay voice, unanimous verdicts for conviction may be another effective method. Where each lay assessor's vote has a substantial impact on the trial outcome, her sense of responsibility might increase and stimulate more active participation.

1.3.4.2 Political/democratic functions of lay assessors

Besides the potential to reform the mixed tribunal system, any alterations to the system must take into account its democratic/political functions.

First, contrary to professional judges, lay assessors are free from organizational restrictions and only sit in court temporarily. They therefore are not as vulnerable to the state's direct influence and control as professional judges who hold their standing positions at the courts and receive their incomes from the state. Second, lay assessors from the community could help with overseeing judicial proceedings and deterring professional judges from overt arbitrariness, corruption or bias. Third, by participating

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(Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials", *Asian-Pacific Law & Policy Journal*, Vol. 6, Issue 1,Winter 2005, at 233.

[219] *Supra* note 24, at 115.

[220] See Landsman, *supra* note 42, at 303.

[221] *Supra* note 24, at 114.

in trials, lay assessors witness the whole judicial process. Their firsthand experience of the fairness of the courts may educate them and promote the legitimacy of the judiciary. Finally, the presence of lay assessors in trials may help to make the atmosphere of the courtrooms more relaxed since the litigants could communicate with lay assessors in layman's terms rather than legal jargon.[222]

The political functions above add weight that justifies the preservation of lay assessors rather than their abolition. As reviewed by Ivkovic, "[w]hile most authors who have written about mixed tribunals discuss negative characteristics of trials by mixed tribunals, they all agree that the political function of mixed tribunals is considerably more important, and that this function by itself justifies retaining the system".[223]

1.3.4.3 Support for mixed tribunals

In spite of the acute attacks on the impotence of lay assessors, empirical research reveals that the mixed tribunal system obtains diffuse support in various countries.

The studies of Casper/Zeisel, Klausa and Rennig in Germany in 1990s demonstrate that professional judges, lay assessors, and the public positively evaluated the current state of lay participation. Only a few German scholars objected to the mixed tribunal system and called for its abolition.[224] According to the research findings in Sweden,[225] Denmark,[226] and Croatia,[227] the mixed tribunal system has

[222] For a summary of the comments on the mixed tribunal's functions, see Ivkovic, *supra* note 163, at 95-97, and *supra* note 175, at 445.
[223] Ivkovic, *supra* note 175, at 444.
[224] *Supra* note 170, at 194.
[225] See Christian Diesen, "Lay Participation in Sweden--a Short Introduction", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 313.

received relatively diffuse supports by citizens.

Taking into account all the above three factors, mixed tribunals, embedded in the justice system of various countries for decades, would be unlikely to decline toward abolition or replacement by "professional jurists" with "absolute decision-making power".[228] Moreover, one extra function of mixed tribunals is in saving money by cutting the number of professional judges,[229] since otherwise more professional judges would be needed to take the position of lay assessors.

1.4 Effective Lay Magistracy

While the aforementioned factors, such as the jury's demise and the passivity of lay assessors, form evidence more or less to support the allegation that lay participation is facing worldwide decline, counterevidence challenging this is found in other models of lay participation, such as lay magistracy and administrative tribunals still playing considerable roles in judicial decision making in some countries, and in lay participation experiencing a rise in a number of transitional countries. The following three sections will look at this.

1.4.1 Lay Magistracy -- Backbone of British criminal justice

Lay magistrates in Britain can be traced back to the Justice of the Peace Act

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[226] See Garde, *supra* note 172.
[227] *Supra* note 204, at 73-76.
[228] Jonathan H. Siegelbaum, "The Right Amount of Rights: Calibrating Criminal Law and Procedure in Post-Communist Central and Eastern Europe", *Boston University International Law Journal*, Vol.20, 2002, at 84.
[229] *Supra* note 174, at195.

1361.[230] They do not have to have any legal qualifications, though they undertake a training process covering the practical skills involved in performing their duties.[231] Candidates for lay magistrates are usually nominated to the local Advisory Committee by local political parties, voluntary groups, trade unions and other organizations, as well as by personal application.[232] As the backbone of the English criminal justice system, approximately 30, 000 lay magistrates hear about 97 per cent of criminal cases.[233] An estimated 1.74 million defendants appeared before magistrates' courts in 2007.[234] It was suggested that if the situation were otherwise the criminal justice system would choke on its volume of work.[235]

The widely acknowledged advantages of lay magistrates include their comparatively low costs, weight of numbers and local knowledge to ensure fair decision making.[236] For example, it was said that replacing lay magistrates with professional judges would produce an estimated expense of £100 million a year in paying the latter's salaries alone.[237] Magistrates usually sit in threes, which by contrast to a single judge sitting alone, is more likely to ensure a balanced view, impartiality and appropriateness of decision making. Furthermore, a lay magistrate must live within 15 miles of the court in which he sits,[238] making him more familiar with local life than a professional judge and capable of judging cases according to the

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[230] Bryan Gibson, *Introduction to the Magistrates' Court and Glossary of Words, Phrases and Abbreviations*, (Waterside Press, Winchester, 2nd edition 1995), at 12.
[231] See generally *supra* note 10, at 237.
[232] *Supra* note 14, at 179.
[233] *Supra* note 9.
[234] Ministry of Justice, *Judicial and Court Statistics 2007*, September 2008, at 135.
[235] *Supra* note 49, at13.
[236] *Supra* note 14, at 184-185.
[237] *Ibid*, at 185.
[238] *Ibid*, at 179.

local particulars.[239]

1.4.2 Prospects for lay magistrates in the U.K.

"The future of the magistracy is a sensitive topic"[240] and the following factors have to be taken into account.

1.4.2.1 The economic advantages of lay magistrates

The results of Morgan and Russell's report were largely in favour of lay magistrates. In addition to the fragmentary estimations such as replacing lay magistrates with professional judges producing an estimated expense of £100 million a year in paying the judges' salaries alone,[241] and the estimation of the Home Office Research and Planning Unit that the costs of a contested trial by lay magistrates is £1,500 and a guilty plea case is only £500 compared to costs rising to £13,500 and £2,500 in the Crown Court, Morgan and Russell conducted a more detailed study comparing the costs between lay and stipendiary magistrates, indicating that the costs of an appearance before lay magistrates is £52.10 whereas £61.78 before stipendiary magistrates. They also revealed that stipendiaries can cost more when considering factors such as their more stringent sentences that may increase

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239 *Ibid*, at 185.
240 Ian Dennis, "Judging Magistrates", *Criminal Law Review,* Feb 2001, at 72.
241 *Supra* note 14, at 185.

costs for the Prison Service.[242] "The cost of the justice system is a frequent preoccupation of governments".[243] For such reasons, lay magistrates continue to be appreciated by the British Government.

1.4.2.2 The progress which has been made by reforms

The lay magistracy has not been immune from attacks which mainly concern its inconsistency,[244] bias towards the police,[245] selective background,[246] and

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[242] For detailed discussion about cost of lay and stipendiary magistrates, see Rod Morgan and Neil Russell, "The Judiciary in the Magistrates' Courts", http://www.homeoffice.gov.uk/rds/pdfs/occ-judiciary.pdf, at 83-98, last visited on 27 December 2008.

[243] *Supra* note 49, at 135.

[244] Inconsistency in the decision-making of different lay magistrates' benches is noticeable in the different sentences ordered and the awards of legal aid given out. Critics point out that in contrast to professional judges in the Crown Court, whose conduct is closely controlled by the Court of Appeal, different benches of lay magistrates may make different decisions on crimes committed in similar circumstances by offenders with similar backgrounds. See *supra* note 14, at 185-186.

[245] It is also widely acknowledged that some lay magistrates may have an automatic tendency to believe police evidence due to their frequent presence in the same court as the police officers. See *supra* note 14, at 186.

[246] The background of lay magistrates has attracted much criticism in terms of their class, age, political beliefs and race. Sir Thomas Skyrme's research found that only 8.2 per cent of magistrates were manual workers whilst most lay magistrates were middle-aged or older, with few young magistrates appointed. Official data revealed in 1995 indicated that Conservative supporters occupied a high proportion of magistrate seats, with those voting for Labour taking few. Furthermore, the under-representation of certain races such as black people and Asians in the magistrate pool used to be serious. See *supra* note 14, 180-181. For more discussions about the imbalanced composition of lay magistrates, see, for example, John Baldwin, "The Social Composition of the Magistracy", *British Journal of Criminology*, Vol. 16, No.2, April 1976, at 171-174; and James Dignan and Arnold Wynne, "A Microcosm of The Local Community: Reflections on the Composition of the Magistracy in a Petty Sessional Division in the North Midlands", *British Journal of Criminology*, Vol.37, No.2, Spring 1997, at 184-197; *supra* note 31, at 138-144; Elizabeth Burney, *J. P. Magistrate, Court and Community*, (Hutchinson, London, 1979), at 11; Penny Darbyshire, "For the New Lord Chancellor - Some Causes for Concern about Magistrates", *Criminal Law Review*, Dec 1997, at 862.

inefficiency.[247] However, reformative measures and further studies have been undertaken to address the above attacks on lay magistrates. For example, it is suggested that more detailed and regularly updated guidelines, more training and supervision by the higher courts could improve the consistency of lay magistrates' judgments.[248] Furthermore, in response to the limited representativeness of lay magistrates, there have been a series of reforms,[249] some of which have at least partially taken effect. As Lord Falconer declared in 2003, "the ethnic make up of the magistracy countrywide is close to the national average for cultural representation per head of population",[250] though there are still concerns as to class mix and regional variations in age and ethnicity which await being addressed.[251] Providing lay magistrates can be really competent adjudicators and reflect the composition of a multicultural and multiracial society, a criminal justice system involving participation

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[247] According to Morgan and Russell's report in 2000, stipendiary magistrates are more efficient than their lay colleagues. Andrew Sanders, for example, even proposed in his report entitled *Community Justice*, the replacement of panels composed of lay justices purely by mixed tribunals comprising stipendiary magistrates in association with two lay magistrates. See *supra* note 242, at xiii and *supra* note 10, at 243; for more attacks on the lay magistracy system, see, for example, Penny Darbyshire, "A Comment on the Powers of Magistrates' Clerks", *Criminal Law Review*, May, 1999, at 377-386.

[248] *Supra* note 14, at 189.

[249] There have been moves to widen the cross-section of lay magistrates over the past few decades, in order to realize the objective of 'trial by one's peers' and to further legitimise this model of lay participation. As early as 1968, a loss of earnings allowance was introduced to encourage the involvement of the working class. The Employment Rights Act 1996 obliged employers to permit their employees to serve as magistrates for such time as was reasonable. In March 1999, the Lord Chancellor's Department initiated a campaign to enroll candidates from wider range of backgrounds and occupations, especially ethnic minorities, which obtained diffuse support from adverts in the mass media. This campaign was followed by two further schemes to widen the social spectrum of magistrates, *Judiciary for All* in 2001 and the 'National Strategy for the Recruitment of Lay Magistrates' in 2003. See *supra* note 14, at 239-240.

[250] *Supra* note 10, at 241.

[251] See *ibid*, and *supra* note 242, at 114-116; and Peter J. Seago, "The Development of the Professional Magistracy in England and Wales", *Criminal Law Review*, Aug, 2000, at 646.

by lay justices will be significantly legimitised and probably win widespread public support.

1.4.2.3 The entrenched tradition of lay justice

It seems that the growing numbers and status of stipendiary magistrates and the increasing magisterial powers of justices' clerks may indicate "a marked shift towards the professionalisation of the magistracy".[252] However, the lay magistracy is an ancient tradition, premised on people's will for voluntary public service, the ideal of local people dispensing local justice,[253] and "an awareness of the dangers of allowing single judges to sit and administer justice unaided in the criminal courts".[254] This tradition also accords with the government policy encouraging *active citizens* in an *active community.*[255] Taking into account the above, as Morgan and Russell suggested, "the nature and balance of the contribution made by lay and stipendiary magistrates could be altered so as better to satisfy … different considerations without prejudicing the integrity of a system founded on strong traditions and widely supported",[256] whilst "that could only be done, in the short-term at least, by continuing to make extensive use of lay magistrates".[257]

1.4.3 Lay magistrates in other countries

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[252] Seago, *ibid*, at 632.
[253] *Supra* note 242, at 117; for lay magistrates' role in representing and understanding the locality and its customs and values, see also Seago, *ibid*, at 649.
[254] *Supra* note 14, at 264.
[255] *Supra* note 242, at 117.
[256] *Ibid*.
[257] *Ibid*.

Lay magistrates have been employed to deal with summary matters by many other Common Law jurisdictions, although their sentencing powers are limited to financial or other community-based penalties. [258] A lay magistrate sitting alone has been used in Scotland for judging minor criminal matters as well as in New Zealand for preliminary hearings. In some sparsely populated areas of Australia, lay magistrates also sit alone to deal with minor matters.[259] The English lay magistrate model was in wide use in the US, though salaried professional judges gradually took over lay magistrates' jurisdiction. The Federal Magistrate's Act of 1968 actually removed lay magistrates from federal courts, but paid lay judges, in some states, still preserve their offices by sitting alone to judge minor civil cases and non-custodial criminal offences.[260] Moreover, lay judges also sit as panels in Scotland. In New Zealand, fully trained and salaried lay magistrates have been introduced to sit in panels of two to try non-custodial cases, according to the *District Court Amendment Act 1998* which replicates its counterparts in other South Pacific states such as Western Samoa, Tonga and the Cook Islands in an attempt to respond to the overrepresentation of Maori and other ethnic minority members amongst defendants and make the criminal justice system representative of a multi-ethnic society.[261]

1.5 Administrative tribunals in the U.K.

Beside the lay magistracy, lay people in England participate in judicial decision

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[258] *Ibid*, at 110.
[259] *Ibid*, at 101-102.
[260] Leslie G. Foschio, "A History of the Development of the Office of United States Commissioner and Magistrate Judge System", *The Federal Courts Law Review*, Vol. 1, 2006, at 613.
[261] See generally *supra* note 242, at 101-102.

making via administrative tribunals as well.

1.5.1 Another important model of lay participation

The history of tribunals can be dated back to as early as 1799.[262] However, their significant growth in Britain occurred after the World War II when the Government more often intervened in people's lives to extend various social benefits to a wider constituency. The supply/withdrawal of welfare benefits, by its nature, is largely discretionary so that it can easily bring about complex controversies concerning people's varied rights to education, employment, and medical care etc. Taking into account the vast workload and expertise involved in these potential disputes, various tribunals were therefore established and experienced fast development.[263] Up to the beginning of this millennium, there were almost 70 different types of administrative tribunals in the U.K. coupled with domestic tribunals dealing with disputes within particular professions.[264] The various tribunals decide almost one million cases each year, six times the contested civil caseloads handled by the county court and the High Court combined.[265]

The element of lay involvement in tribunals is apparent. Tribunals comprise usually of three members, two of whom are lay adjudicators, sitting with the legally trained chair. In spite of their non-lawyer nature, they are actually not 'lay' at all in terms of their expertise with regard to the disputes in question. They could, for

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[262] *Supra* note 14, at 368

[263] *Ibid*, at 368-369; *supra* note 10, at 394.

[264] A.W. Bradley, "The Tribunals Maze", *Public Law*, Sum, 2002, at 201-202; see also Trevor Buck, "Precedent in Tribunals and the Development of Principles", *Civil Justice Quarterly*, Vol. 25, Oct 2006, at 460.

[265] *Supra* note 10, at 393-394.

example, be doctors in the Medical Appeal Tribunal. Now that lay adjudicators of tribunals have specialized knowledge regarding the disputes, they are able to play an active role in decision-making with the advice of the legally-trained chairperson.[266] Although it was controversial whether the nature of tribunals is administrative or adjudicatory,[267] *the Tribunals, Courts and Enforcement Act 2007* "confirms the place of tribunals as part of the judicial system, rather than as an appendage of the administration".[268] Furthermore, tribunals' position as equivalent to a court has been practically upheld by the judicial precedent *Pickering v Liverpool Daily Post and Echo Newspaper* where the tribunal's proceedings were held to subject to the law of contempt.[269]

1.5.2 Tribunals under attack

Like all other methods of lay participation, the tribunal system has encountered criticisms, mostly pointing to their questionable independence, procedural fairness and representativeness.

1.5.2.1 The questioned independence of tribunals

As Sir Andrew Leggatt pointed out, a central problem of tribunals was the unguaranteed independence of administrative tribunals from their sponsoring

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[266] *Supra* note 10, at 395.
[267] See Genevra Richardson and Hazel Genn, "Tribunals in Transition: Resolution or Adjudication?", *Public Law*, Spr, 2007, at 117; Legislative Comment, "The implementation of The Tribunals, Courts and Enforcement Act 2007", *Journal of Planning & Environment Law*, No.7,2008, at 948.
[268] Robert Carnwath, "Tribunals Justice – A New Start", *Public Law*, Jan 2009, at 51.
[269] [1991] 2 WLR 513, CA, quoted from *supra* note 10, at 394.

departments since where a Department of State provides funds and other facilities and appoints some of its members, the tribunal can hardly realize its independence in practice and guarantee its impartial position to adjudicate cases.[270]

1.5.2.2 The questioned procedural fairness of tribunals

Other concerns look at whether 'due process' or procedural fairness can be ensured in tribunal proceedings. For example, one criticism involved the lack of uniformity with regard to appeals from tribunals since different provisions of the statues under which various tribunals operate established dissimilar appeal rules, granting or depriving claimants of rights of appeal and providing for different appeal bodies such as a further tribunal, a minister or a court of law. Moreover, another attack on tribunal proceedings is the absence of publicity, which may raise concerns with respect to the transparency of cases of public importance. An additional procedural issue is that with chairpersons of tribunals being lawyers, tribunal proceedings have become increasingly formal, creating more difficulties for lay members to represent them effectively. In response to this, the subject of the complaint may employ legal representation, which may threaten equality where the complainant cannot afford representation.

1.5.2.3 The questioned representativeness of tribunals

Furthermore, it was established that the members of many tribunals were drawn disproportionately from professionals and managers, the elderly and males, the

[270] *Supra* note 10, at 399-340.

so-called "stage army of pluralists" who were involved in a wide range of social, political and voluntary agencies, or even magistrates or councilors.[271] This raises concerns with regard to whether the tribunal system offers a fair opportunity for each citizen to participate in decision making.

1.5.3 Reforms to tribunals and their prospects

In response to the condemnations above, Sir Andrew Leggatt initiated an all-sided review of the tribunal system as whole. According to his report, *the Tribunals, Court and Enforcement Act 2007* (TCEA 2007) introduces a series of reforms. For example, to rectify the problem that different Departments of State provide administrative support for their affiliated tribunals which potentially affects independence, the Act (apart from allowing the Employment and Asylum and Immigration tribunals to remain independent) subsumes all tribunals to create a new unified system composed of two tiers – the First-tier Tribunal and the Upper Tribunal, which take over the jurisdiction of existing tribunals. A decision made by the First-tier tribunal is appealable to the Upper Tribunal whilst the latter's decision can be appealed to a court of law, which should resolve the lack of uniformity of appeal rules.[272]

The effectiveness of the reforms initiated by TCEA 2007 remains to be seen. However, various tribunals will hopefully continue to play an important role in

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[271] Sheila Hill and John Baldwin, "Tribunal Membership: the Role of Local Politics in Recruitment to Local Valuation Panels in England and Wales", *Civil Justice Quarterly*, Vol.6, Apr 1987, at 134, 137 and 138; for the problematic representativeness of tribunal members, see also Adrian Webb and Michael Sayers, "Franks Revisited: A Model of the Ideal Tribunal", *Civil Justice Quarterly*, Vol.9, Jan 1990, at 40.

[272] Richard W. Whitecross, "Self-representation in Tribunal Hearings: A Comparative Study", *Employment Law Bulletin*, Vol. 70, Dec 2005, at 5.

dispute resolution, since besides the above moves toward improvements in the independence and impartiality of tribunals, it has been widely acknowledged that compared with ordinary courts, tribunals have obvious advantages. First, in spite of certain tribunals (e.g. the employment tribunal) confronting escalating caseloads and struggling with efficiency,[273] tribunals are generally quicker to hear cases compared with the congested court system. Second, dispute resolution via tribunal is cost-effective and less intimidating for disputing parties, without having to involve professional judges, courts' infrastructure, legal representation, strict court procedures, and court fees. Third, as pointed out above, lay members of tribunals may have particular expertise in disputed fields, creating a better prospect of resolving disputes effectively and appropriately based on specialized insight, by contrast to an adjudicatory body composed exclusively of professional judge(s) with only legal expertise. Fourth, access to tribunals could be easier than getting a case filed in the ordinary courts. In addition, unlike tribunals, litigation could create greater public attention, which is undesirable for the disputing parties seeking to protect their privacy.[274]

In short, although research has suggested that "the choice between tribunals and courts has been influenced by the interplay of various factors" including "political considerations",[275] tribunals will be unlikely to face abolition in Britain since it appears that they are compatible with the modern justice principles of "three Es".

1.6 The Growth of Lay Participation in the 'Transitional' Regimes

[273] *Supra* note 10, at 399.
[274] See generally *supra* note 10, 399-340; and *supra* note 14 at 371-372.
[275] Hill and Baldwin, *supra* note 272, at 131.

By contrast to the marked decline of certain models of lay participation in some established democracies, it is remarkable that there are proposals to introduce or resuscitate lay participation in a number of countries experiencing the transition from authoritarianism to democracy, which creates two opposing trends in the use of lay participation worldwide.

1.6.1 Increasing interest in lay participation

1.6.1.1 The jury's reinstatement in Russia

Trial by jury was first introduced into Russia during Alexander II's judicial reforms in 1864. Despite the subsequent legislative attempts to remove political and press crimes from the jury's jurisdiction, it survived almost half century until its abolition by Bolsheviks in 1917.[276] As early as in 1989, Gorbachev suggested the reintroduction of the jury trial, together with adversarial criminal procedure.[277] With the collapse of the authoritarian Soviet Union, on 16 July 1993, a jury system was reintroduced in post-communist Russia to establish "a more democratic, less state-dominated justice system".[278] The Constitution of the Russia Federation adopted on December 12, 1993 also formalized trial by jury. By the end of 2004, the criminal

[276] Stephan C. Thaman, "Europe's New Jury Systems: The Cases of Spain and Russia", *Law & Contemporary Problems,* Spring 1999*,* at 237*;* Marina Nemytina, "Trial by Jury: A Western or A Peculiarly Russian Model", *International Review of Penal Law (Vol. 72)*, (Érès, Ramonville Sainte Agne 2001), at 365; and Steven R. Plotkin, "The Jury Trial in Russia", *Tulane Journal of International & Comparative Law*, Vol.2, 1994, at 1.
[277] Stephen C. Thaman, "The Resurrection of Trial by Jury in Russia", *Stanford Journal of International Law*, 1995, Vol.31, at 70.
[278] *Supra* note 88, at 14

jury has been introduced nationwide in Russia, except for Chechnya.[279]

1.6.1.2 Japan's introduction of a new twin system of lay participation

Japan first introduced the criminal jury in 1928 to detract from a totalitarianism regime,[280] but the system was abolished in 1943.[281] In 2004, the Japanese government enacted the *Act Concerning Participation of Lay Assessors in Criminal Trials*, which created a new mixed tribunal system (or "quasi-jury"), indicating the "return to an affirmative role for common citizens in determining the culpability of their peers".[282] By May 2009, Japan had started to implement this new mixed tribunal.[283]

1.6.1.3 The reintroduction of the jury in Spain

The Code of Criminal Procedure of 1872 and the *Law on the Jury* of 1888 established jury trials in Spain. Juries were actually implemented between 1888 and 1923, and then again between 1931 and 1936 after suspension by the Primo de Rivera dictatorship.[284] In 1995, the Spanish government revived criminal juries by enacting

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[279] *Supra* note 178, at 125.

[280] See Takashi Maruta, "The Criminal Jury System in Imperial Japan and the Contemporary Argument for its Reintroduction", *International Review of Penal Law (Vol. 72)* (Vol. 72) (Érès, Ramonville Sainte Agne 2001), at 215; *supra* note 88, at 1; for more details about the implementation of the jury trial during this period of time, see Sabrina Shizue McKenna, "Proposal for Judicial Reform in Japan: An Overview", *Asian-Pacific Law & Policy Journal*, Vol.2, Issue 2, Spring 2001, at 129; and Meryll Dean, "Trial by Jury: A Force for Change in Japan", *International and Comparative Law Quarterly*, Vol.44, 1995, at 382-388.

[281] Fukurai, *supra* note 218, at 321.

[282] Anderson and Saint, *supra* note 218, at 233.

[283] Arne F. Soldwedel, "Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants", *Vanderbilt Journal of Transactional Law*, Vol.41, 2008, at 1422.

[284] Thaman, *supra* note 276, at 237; *supra* note 134, at 58.

the 1995 *Spanish Jury Law*,[285] after their absence for almost 60 years.[286] Since May 1996, criminal juries started to be applied in practice.[287]

1.6.1.4 New developments to lay participation in Argentina

Despite the *Argentine Constitution 1893* mandating the jury trial, it has not yet been established.[288] Since the beginning of the 1990s, Argentina has initiated criminal justice reforms aimed at suppressing the inquisitorial features of the justice system and introducing an adversarial model for proceedings. Lay assessors were expected to be neutral arbitrators and desirable alternatives to replace the "investigating judges". Since 1991, Cordoba province in Argentina first introduced a mixed tribunal system. [289] Moreover, since 2004, a series of attempts to introduce the Anglo-American jury system have been conducted by the federal government of Argentina. Within five years, all crimes punishable by a maximum of eight years imprisonment would hopefully be tried by juries.[290]

1.6.1.5 Growing trend in other transitional countries

Besides the aforementioned countries, there are proposals to introduce or

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[285] Thaman, *ibid*.
[286] *Supra* note 134, at 57; and Jorge A. Vargas, "Jury Trial in Spain: A Description and Analysis of the 1995 Organic Act and A Preliminary Appraisal of the Barcelona Trial", *New York Law School Journal of International & Comparative Law*, Vol.18, 1998-1999, at 181.
[287] Stephen C. Thaman, "Spain Returns to Trial by Jury", *Hastings International & Comparative Law Review*, Vol.21, 1997-1998, at 241.
[288] Edmundo S. Hendler, "Lay Participation in the Judicial Process: the Situation in Argentina", *Saint Louis-Warsaw Transatlantic Law Journal*, 2001-2002, at 81.
[289] *Supra* note 26, at 13-15.
[290] *Ibid*, at 15-16.

resuscitate lay participation in a number of other post-authoritarian countries.

Following Russia's introduction of the jury trail, Uzbekistan has started to experiment with the jury.[291] Furthermore, other members of the post-communist group such as Azerbaijan, Georgia and Ukraine, will very possibly introduce the classic jury system.[292] Besides Japan, the trend of resuscitating lay participation has been sweeping across other Asian nations such as South Korea,[293] Thailand,[294] and Taiwan.[295] Following Argentina's moves toward resuscitating jury trial, other Latin-American countries, such as Mexico,[296] Venezuela,[297] and Bolivia,[298] have also

[291] See *supra* note 178, at 123-150; Nemytina, *supra* note 276, at 365-370; Thaman, *supra* note 276, at 233-260.

[292] *Supra* note 24, at 120.

[293] In 2005, the Ministry of Defense of South Korea announced that it would introduce a military jury system in its army, in an attempt to "increase public trust in military tribunals". Since 2007, South Korea has initiated a five-year pilot program to experiment with public participation in trials. Although the final format for lay participation will not be determined by 2012, it might be more akin to the Anglo-American classical jury system. See Fukurai, *supra* note 218, at 316 and Eric Seo, "Creating the Right Mentality: Dealing with the Problem of Juror Delinquency in the New South Korea Lay Participation System", *Vanderbilt Journal of Transnational Law*, Vol.40, 2007, at 265-266.

[294] Lay assessors with career professions have been recently introduced into the Intellectual Property and World Trade Court, Labor Courts, and Juvenile and Family Courts in Thailand, as a result of "the growing influence of western ideas about law". See Frank Munger, "Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand", *Cornell International Law Journal*, Vol.40, 2007, at 464.

[295] In Taiwan, legal reformers are seeking greater access for ordinary citizens in the legislative process. See Hiroshi Fukurai and Zhuoyu Wang, "Civic Participatory Systems in Law in Japan and China"; the article presented at the LSA annual conference at Berlin 2007, material with the author.

[296] Mexico had a long history of jury trials prior to the end of its revolution in 1929. However, since then, nearly all criminal cases have been decided not by juries but by judges, in spite of Mexico's Constitution which prescribes a jury trial (Article 20, Section 7). However, the Supreme Court of Mexico has recently drafted an initiative to revive jury trials and introduce adversarial proceedings in criminal cases. See *ibid*.

[297] The Criminal Procedure Law 1897 in Venezuela introduced the jury, but this law was abolished in 1915. Remarkably, The Organic Criminal Procedure Code enacted in 1999, endeavoured "to replace the old inquisitorial system with an adversarial one" and introduced a nine-member jury to adjudicate criminal cases punishable by imprisonment of more than sixteen years, and a mixed tribunal system composed of one professional judge and two lay assessors to decide on criminal cases punishable by imprisonment of above four years. Although jury trials have been suspended since

undertaken measures to boost lay participation.

1.6.2 Reasons for the growth in lay participation

Jurisdictions where the jury trial or other alternative forms of lay participation have been introduced or resuscitated share common political features and can be generalized as "transitional societies". All of the countries have experienced the dictatorships prior to their moves toward reviving lay participation. Russia, Uzbekistan, Azerbaijan, Georgia and Ukraine, all belonged to the so-called Soviet Bloc and experienced one-party rule by the communists until 1991 when the Soviet Union collapsed.[299] Until the late 1970s when guerrilla forces supported by Soviet Union withdrew from Latin America, military rule was prevalent in this continent.[300] Japan had long experienced the Liberal Domestic Party's one-party domination.[301] Both South Africa and South Korea have experienced authoritarian rule as well before their resuscitation of lay participation.[302] Moreover, from 1936 to 1995, Spain experienced General Franco's "controlling measures".[303] When authoritarian rule ended in these countries, they initiated a wave of political transition, aiming at the

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2001, the mixed tribunal is still being used. See *supra* note 26, at 7.

[298] In an attempt to "change a lengthy tradition of inquisitorial practice", The Criminal Procedure Code 1999 in Bolivia introduced a mixed tribunal composed of two professional judges and three lay assessors to decide criminal cases punishable by imprisonment of more than four years. This code came into force in 2001 and is the first experiment with lay participation in Bolivia. See *ibid*, at 8.

[299] *Supra* note 88, at 14; see *supra* note 178, at 123-150; Nemytina, *supra* note 276, at 365-370; Thaman, *supra* note 276, at 233-260; *supra* note 24, at 120.

[300] Ruti Teitel, "Law and Politics of Contemporary Transitional Justice", *Cornell International Law Journal*, Vol.38, 2005, at 839.

[301] Lempert, *supra* note 41, at 480.

[302] *Ibid*.

[303] *Supra* note 134, at 57 and 64.

accelerated democratization and wider liberalization.[304] It is in the process of demoractic transition[305] that those countries have revived or newly introduced lay participation.

This common context produces some common reasons for their growing interest in lay participation. Anderson and Nolan suggest that these reasons could be classified into three categories: to promote a more democratic society, to produce better justice, and miscellaneous other reasons.[306]

1.6.2.1 To promote a more democratic society

"In the minds of some [formerly authoritarian or one-party dominating regimes], juries and democracy went together".[307] This rationale that lay participation promotes democracy may intertwine, *inter alia*, two threads. First is the idea of direct democracy which could be illustrated from two aspects. On one hand, democracy can be defined as government by the people, exercised either directly or through elected representatives.[308] Judicial decision making, which is related to the award or deprivation of citizens' property, freedom or even life, is an important act or process of national governing, especially the control and administration of public interest in a country. To grant this governing power directly to individual citizens rather than elected representatives embodies the spirit of direct democracy – making just

[304] *Supra* note 300.
[305] See Alberto Szekely, "Democracy, Judicial Reform, the Rule of Law, and Environmental Justice in Mexico", *Houston Journal of International Law*, Vol. 21, 1998-1999, at 394.
[306] Kent Anderson and Mark Nolan, "Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (saiban-in seido) from Domestic Historical and International Psychological Perspective", *Vanderbilt Journal of Transnational Law*, Vol.37, 2004, at 941.
[307] Lempert, *supra* note 41, at 480.
[308] See, for example, *supra* note 24, at 90.

decisions directly by the people. On the other hand, in the process of applying specific legal rules to specific cases, common citizens who participate in the proceedings are effectively granted opportunities to "voice consent or dissent with those norms devised in other political forums such as Parliament".[309] The jurors in some countries may even nullify unpopular laws. Lay judges' scrutiny of laws may be regarded as another form of direct government by the people – screening unjust laws directly by the people. The second is the democratic education of the general population. Via making judicial decisions or voicing their views on legal norms, the citizens called for court duty will "learn about and become interested in the judicial system" and probably then other governmental affairs. To sum up, most of these transitional countries favor lay participation since they believe that it promotes "grassroots democratic involvement" and develops "a greater democratic consciousness in the general population".[310]

-- To encourage direct civic involvement in government

It appears that the policy of "allowing greater political freedom"[311] paved the way for rapid growth of lay participation in those countries confronting the political transition from authoritarianism to democracy. As observed by Lempert, the reintroduction of jury trials in Russia and Spain is "not just a move toward a more democratic, less state-dominated justice system, but is also a symbol of each country's aspirations for freer, more democratic government".[312] Hans also points out that these experiments with reintroducing juries "underscore the current-day search for ways of give citizens more of a say in the operation of their societies".[313] Likewise, the revival

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[309] *Supra* note 306, at 944.
[310] *Ibid*.
[311] *Supra* note 228, at 83.
[312] *Supra* note 88, at 14.
[313] *Supra* note 7; for more details about Russia's reform of democratization, see

of lay participation in some Latin-American countries is due to the "urgent task of engaging Latin American citizens in the political decision-making process" to "restore a fundamental human right to the disadvantaged of Latin America, one which frequently had been silently trampled".[314] The introduction of lay participation in Thailand directly reflects the social changes in this country, such as "deepening liberal democratic values",[315] the increasing public demand for "participatory representative institutions of governance" and "the transparent rule of law".[316] The Japanese government expects that the introduction of lay participation will "promote a more democratic society by engaging the public and providing an alternative political forum".[317]

-- To strengthen citizens' democratic consciousness

The democratic nature of lay participation can be seen not only as "a sign of democracy" but also as "a school of citizenship".[318] Those countries with growing interest in lay participation expect that it will not only democratize their regimes and legal systems but also inspire the citizens' democratic consciousness. For example, although Japan established a democratic regime after World War II, "in Japanese society of the 21st century, it is incumbent on the people to break out of the excessive dependency on the state that accompanies the traditional consciousness of being

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Послание Федеральному Собранию Российской Федераций [Z], see http://www.rodina.ru/point/show/?id=107, quoted from Pang Dapeng, "Problems and Solutions of Russia's Developmental Path", *Teaching and Studies*, No.12, 2005, at 45.

[314] Mariana D. Hernandez Crespo, "A Systemic Perspective of ADR in Latin America: Enhancing the Shadow of the Law Through Citizen Participation", *Cardozo Journal of Conflict Resolution*, Vol.10, 2008, at 129.

[315] *Supra* note 294, at 466.

[316] *Ibid*.

[317] *Supra* note 306, at 946; for more details for the political reform in Japan, see Setsuo Miyazawa, "The Politics of Judicial Reform in Japan: The Rule of Law at Last", *Asian-Pacific Law & Policy Journal*, Vol.2, Issue 2, Spring 2001, at 97-99.

[318] Julio Perez Gil, "Private Interests Seeking Punishment: Prosecution Brought by Private Individuals and Groups in Spain", *Law & Policy*, Vol.25, 2003, at 162.

governed objects, develop public consciousness within themselves, and become more actively involved in public affairs".[319] Likewise, "[l]ife under communism bred a sense of loneliness, a distrust of one's neighbors, a Hobbesian kind of disengagement from public life. Retreat into the privacy of one's self and one's family was safer than venturing into the public square".[320] To inspire citizens' democratic consciousness was a critical commitment of the post-communist governments.

It appears that the revival of lay participation has occurred in company with the resurgence of democracy[321] in those countries which have been committed to free themselves from totalitarian pasts.[322] At least, lay participation has been used to flaunt those countries' moves "from more authoritarian to more open and democratic regimes".[323] When the desire for democracy has been extend to the judicial systems, it "lent new significance to pre-existing mechanisms providing for lay participation".[324]

1.6.2.2 To produce 'better' justice

Besides concerns with displaying the democratic foundations of their regimes, it seems that these countries have resuscitated lay participation in an attempt to produce a better form of justice.

-- Protection against state tyranny

"[P]olitically motivated criminal punishment has long been a central instrument

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[319] *Supra* note 306, at 943-944.
[320] A. E. Dick Howard, "After Communism: Devolution in Central and Eastern Europe", *South Texas Law Review*, Vol.40, 1999, at 684.
[321] See Lempert, *supra* note 41, at 481.
[322] See Stephan Landsman, "Commentary: Dispatches from the Front: Lay Participation in Legal Processes and the Development of Democracy", *Law & Policy*, Vol.25, 2003, at 173.
[323] *Supra* note 300, at 839.
[324] *Supra* note 322.

of authoritarian control".[325] According to Lempert's study, Russia, Spain, South Africa, South Korea and Japan, all confronted this problem of judicial arbitrariness.[326] "While the example of Western Europe makes it clear that juries are not essential to democratic governance, they are antithetical to rigid authoritarian rule".[327] Needless to say, to disperse the power of making judicial decisions to a group of jurors randomly selected from the community may substantially undermine the state's authoritarian control over justice, which, in contrast, would have easily reached into professional judges via political and administrative affection. In light of this, it is unsurprising that moves toward civic participation in justice have occurred in the post-authoritarianism countries which are trying to establish a criminal justice institution antithetical to authoritarian justice to prevent judicial arbitrariness and party control.[328]

-- To check judicial corruption

Ivkovic notes that, "[t]he level of public support is especially crucial in countries in transition that are emerging from the legacy of communist regimes and are unaccustomed to public accountability". He adds, "[c]orruption of public officials and widely shared perceptions about its extent are serious threats to the integrity of public officials that diminish the level of public support for both the institutions and the leaders".[329] It seems that in some transitional countries, corruption also infects the judiciary. For example, Russia reports prevalent corruption in diverse fields including the judiciary.[330] Confronting such problems, transitional regimes hope that lay judges,

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[325] Lempert, *supra* note 41, at 480.
[326] *Ibid*; Thaman, *supra* note 276, at 239; and Ivkovic, *supra* note 175, at 431.
[327] *Supra* note 41, at 480.
[328] See Lempert, *supra* note 41, at 480; Thaman, *supra* note 276, at 239; and Ivkovic, *supra* note 175, at 431.
[329] Ivkovic, *supra* note 163, at 94.
[330] *Supra* note 189, at 105; see also См. Баринов Л. Больше чем криминал:

representing the community, can "watch the fairness of the trials"[331] and "serve as a deterrent safeguard"[332] to "check on state corruption".[333]

-- To realize the transition from inquisitorial justice to adversarial justice

The classical adversarial trial by jury has developed a series of modern notions, such as the presumption of innocence, to ensure procedural fairness in criminal proceedings. However, most of the aforementioned transitional countries including Russia,[334] Spain,[335] Japan,[336] Argentina,[337] South Korea,[338] Mexico,[339] Venezuela,[340] and Bolivia,[341] adopted the inquisitorial model of justice during their authoritarian era.

Inquisitorial criminal justice is considered incompatible with advanced procedural notions. For example, practices in some transitional countries indicate that professional judges with inquisitorial duty may have bias in favour of police and prosecutors and can easily impair "the equality of arms".[342] Furthermore, in some countries, the dossiers presented by the prosecutors before the trial might substantially affect the professional judges and subsequent oral testimony is rendered worthless.[343]

Коррупция в России переросла в угрозу национальным интересам, Независимая Газета, 7 Сентября, 2001, quoted from Pang Dapeng, The Adjustments and Problems of Russia's Developmental Path, *Teaching and Studies*, No.12, 2005, at 50.

331 *Supra* note 178, at 146-147.

332 Ivkovic, *supra* note 175, at 432.

333 *Supra* note 189, at 110.

334 *Supra* note 228, at 89; and Thaman, *supra* note 276, at 243.

335 *Supra* note 134, at 64.

336 Dean, *supra* note 280, at 390.

337 *Supra* note 26, at 13-14.

338 Seo, *supra* note 293, at 267.

339 *Supra* note 295.

340 *Supra* note 26, at 7.

341 *Supra* note 26, at 8.

342 This situation has been reported in diverse countries such as Russia, Spain and Japan, see e.g. *supra* note 287, at 270; Thaman, *supra* note 276, at 235; *supra* note 306, at 943.

343 A number of countries such as Japan, Spain and South Korea reported this problem, see e.g. Dean, *supra* note 280, at 399; *supra* note 287, at 411; and Seo,

In response to such procedural unfairness, a number of countries have undertaken reform by establishing an adversarial model, with the jury trial being introduced by some. This can explain why "the reappearance of juries has mostly occurred in the inquisitorial soil".[344] These jurisdictions expect that to increase 'adversaliaziation' of the criminal procedure may benefit the quality of justice.[345]

-- To legitimise the justice system

It appears that most of the countries with growing interest in lay participation have been confronting a crisis in legitimacy in justice. For example, in Japan, there were "concerns about public disenchantment with an elite judicial corps viewed as out of touch with ordinary life and the judiciary's mishandling of a series of cases that have resulted in miscarriages of justice".[346]

Besides factors such as corruption and procedural unfairness which may affect the legitimacy of justice, some countries believe that the very independence of the judiciary often makes them sometimes isolated from the community and unpopular.[347] By contrast, "[c]itizen participation, through juries or lay judges, may … increase legitimacy under the right conditions",[348] since "it is the stamp of public approval that comes with a jury verdict, which serves to make credible the actions of the state".[349] Effectively, lay participation helps "close the gap between judicial independence and popular legitimacy".[350] For this reason, some countries decided to encourage civic participation in their justice systems. For example, the Japanese reforms seek "to

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supra note 293, at 267.

[344] Thaman, *supra* note 276, at 259.

[345] *Supra* note 287, at 411.

[346] *Supra* note 174, at 180; for more details about the miscarriages of justice in Japan, see 187-188 of the paper above.

[347] *Supra* note 294, at 466.

[348] *Ibid*, at 461.

[349] *Supra* note 189, at 110.

[350] *Supra* note 294, at 466.

devote plentiful resources in a way that brings a remote judicial system closer to the people, responds to their expectations, and earns their trust"[351]. Democratisation and legitimisation of the criminal justice process have also been the primary rationale for South Africa to introduce a mixed tribunal system.[352]

1.6.2.3 Miscellaneous other reasons

A number of scholars in such countries as Japan, Korea and Russia have received their legal education in the United States. Some of them returned to their home countries with admiration of the American models of legal procedure including the jury. They, especially those taking the key judicial positions, have been exerting significant influence in their home countries' introduction of lay participation.[353]

1.6.3 Inspiration from lay participation in transitional countries

It appears that "[a]lthough the broad picture is one of declining lay participation and increasing professionalization of legal decision making, there have been some surprising moves in the opposite direction".[354] Where, therefore, does the growing interest in encouraging lay participation in a number of transitional countries leave us? Besides calling our attention to the fact that "[d]emocratic urges are popping up all over and among even the humblest citizens",[355] we should also draw attention to the

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[351] For more discussion about the reasons for Japan's revival of lay participation, see Joseph P. Nadeau, "Judicial Reform in Japan", *The Judges' Journal*, Vol. 44, 2005, at 35.
[352] Ivkovic, *supra* note 175, at 431.
[353] Lempert, *supra* note 41, at 479.
[354] *Supra* note 7.
[355] *Supra* note 322, at 177.

"new energy and expectations in traditional settings [of lay participation]".[356]

It is still unsafe to conclude that lay participation can definitely work well to boost the judicial reforms aimed at democratisation and liberalisation in these transitional societies. For example, in Spain, the well-known case of Mikel Otegi shocked the Spanish public and gave rise to concerns about whether the newly-introduced jury trial could survive in a multi-ethnic society.[357] By contrast, sources do indicate that the introduction of lay participation in some transitional countries has produced more or less positive effects. For example, the newly-introduced lay participation through mixed tribunals in Argentina has acquired diffuse supports from the people.[358] Although in most of the cases, the mixed tribunals reached unanimous verdict, the citizens' awareness of participating in judical process and commitment to legal decision-making have been increasing.[359] Moreover, in spite of the fact that jury trials in Russia have been criticized by certain governors, mass media and representatives of law enforcement who believe that some verdicts rendered by juries that were too mild and over scrupulous about accusatory evidence[360], the re-adoption of the jury has positively influenced legal theory and practice. On one hand, the lenience of jurors has mitigated the asperity of the *Criminal Law 1996*. On the other hand, some adversarial procedures and ideas have been applied to traditional inquisitorial proceedings.[361]

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[356] *Ibid*.
[357] Mikel Otegi, a young Basque nationalist, murdered two Basque policemen and was acquitted on March 7, 1997, on the grounds of diminished capacity caused by intoxication and uncontrollable rage provoked by alleged previous police harassment. For more details about this case, see Thaman, *supra* note 276, at 236.
[358] See *supra* note 26, at 29.
[359] See *supra* note 26, at 8.
[360] Sergey A. Pashin, "The Reasons for Reintroducing Trial by Jury in Russia", *International Review of Penal Law (Vol. 72)* (Érès, Ramonville Sainte Agne 2001), at 257.
[361] *Ibid*, at 253.

As Thaman suggested, "[t]he reappearance of juries on the inquisitorial soil…is an important phenomenon".[362] He added that "[i]t breathes life into the overly written, overly bureaucratic structure of European criminal jurisprudence and makes European jurists rethink the procedural and substantive tenets upon which their criminal justice systems are based."[363] This inspiration may be applied to diverse transitional countries other than Europe. The successful resuscitation of lay participation in these countries may encourage reforms in other countries aiming for domocratisation and liberalisation in their justice systems.

1.7 Conclusion

The recent developments in lay participation across the world have generated a considerable body of literature concerned with the ways in which different forms of lay participation work in practice and the legal and political functions of lay participation. It would be impractical to exhaustively discuss them all. However, by conducting a brief review, it appears that the current situation of lay participation globally is mixed indeed.

It is undeniable that certain models of lay participation such as the jury trial and the mixed tribunal system have been facing marked decline in scope and effectiveness. However, the jury's demise largely derives from political reasons rather than from the system's convincing inherent irrationality, and almost any ineffective practices of the jury and the mixed tribunal have great potential to be corrected. Moreover, the jury still plays a considerable role in trying serious crimes in diverse countries[364] and

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362 Thaman, *supra* note 276, at 259.
363 *Ibid*.
364 *Supra* note 14, at 149.

mixed tribunals are preserved in many others. Combining the facts of the still effective lay magistracy and administrative tribunals, especially the robust rise of lay participation in a number of transitional countries, it is no more than an illusory image that lay participation has lost its vitality and is in irreversible global decline. Rather, it appears that different models of lay participation ebb and flow in different countries with their "own distinctive political, cultural and jurisprudential heritage".[365]

Besides clarifying the current situation of lay participation in the world, it can be argued, by incorporating all the above information, that the destiny of lay participation may depend on, *inter alia*, the following factors.

1.7.1 The government's value choices

It can be argued that the ebb and flow of lay participation in a country largely depends upon the value choices of the government. Where the government seeks democratization and liberalization for its regime and wishes to build this ideal into its justice system, lay participation may be given great support, and *vice versa*. For example, according to Lempert, the revival of the jury trial in some transitional countries "is not just a move toward a more democratic, less state-dominated justice system, but is also a symbol of each country's aspirations for freer, more democratic government"; while the continuing demise of the jury trial in some common-law countries such as England, is "a sign of that country's centralization of governmental power and an increasingly efficiency-oriented bureaucracy".[366]

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[365] Paul Roberts, "Comparative Criminal Justice Goes Global", *Oxford Journal of Legal Studies*, Vol.28, No.2, 2008, at 384.

[366] *Supra* note 88, at 14. Sally Lloyd-Bostock and Cheryl Thomas also suggest that "to seek sound justification for reform in terms of the jury's rationality, competence, or efficiency may be to miss the point. Many commentators have stressed the

Besides the government's value choice in terms of ideology, the destiny of lay participation may swing like a pendulum with the government's changing value judgment in choosing the specific model of justice, such as the "crime control" or "due process". Where the former dominates, the government, with "a heightened political concern about court efficiency and delays",[367] could prefer to streamline criminal proceedings and encourage "a more intricate meshing of criminal justice agencies",[368] aimed at "producing more convictions and cutting costs".[369] Making inroads into lay participation therefore will be favoured by the government,[370] since lay participants representing the community rather than the government may become an unwelcome hurdle, especially taking into account their potentially higher costs, lower efficiency and leniency in conviction.[371] By contrast, when the model of "due process" prevails, civic participation which increases further supervisory strands in the judicial process may be given more importance to better maintain civil liberties and prevent the abuse of administrative or executive powers.[372]

"Generally speaking, in the modern democratic state, proponents of crime control values rarely launch a full frontal attack on the values of due process. Lipservice, at least, must be paid to formal legal rationality".[373] Meanwhile, the particular difficulty facing those who wish to remove lay participation as a whole is

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importance of understanding the jury in terms of politics and the organisation of power". See Lloyd-Bostock and Thomas, *supra* note 42 at 40.

[367] Seago, *supra* note 251, at 632.

[368] *Supra* note 67, at 28.

[369] *Supra* note 49, at 153.

[370] See *ibid*, at 131.

[371] For above for this inclination of jurors; and a similar trend has also been reported by some jurisdictions with mixed tribunals applied in Poland, see Stanislaw Pomorski, "Lay Judges in the Polish Criminal Courts: A Legal and Empirical Description", *Case Western Reserve Journal of International Law*, Vol. 7, 1975, at 206, quoted from *supra* note 174, at 191-192.

[372] See Packer 1968, at 164.

[373] *Supra* note 38, at 225.

that "the institution is seen as having immense symbolic importance",[374] and it "demonstrates that within the criminal justice system respect is paid to the 'rule of law', or 'due process'".[375] In light of this, "there are few signs that the demise of the laity in justice, even if recommended, would be politically acceptable".[376] In those transitional countries anxious to flaunt their newly-established democratic regimes, "due process" might be prized more to exhibit the emphasized civil liberties in the judicial proceedings, creating advantageous opportunities for lay participation's growth.

1.7.2 The effectiveness of lay participation itself

As mentioned above, lay participation could be defined as lay adjudicators who, representing the community, participate in judicial decision making to dispense justice and realize direct democracy. Lay participation is therefore expected to achieve three functions: (1) participation of the community represented by lay participants, (2) judicial decision making by lay participants, and (3) direct democracy in judicial area by lay participants. However, all of the models of lay participation, as seen above, have experienced diverse attacks which could be divided into three categories and leveled against its three expected functions: attacks on the decision-making function of lay participation, attacks on the political/democratic function of lay participation, and attacks on the community-representing function of lay participants.

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374 *Supra* note 38, at 226.
375 *Ibid*.
376 Seago, *supra* note 251, at 651.

1.7.2.1 The decision-making function of lay participation

There have been many arguments given against lay participants' competence in making correct decisions. It seems that there are three threads to guard the decision-making function of lay participation.

First, some attacks "do not hold up well when confronted with empirical evidence".[377] For example, "perhaps the strongest argument in favor of juries is that, at least when they are asked to find facts, citizens serving as jurors usually do a good job".[378] The comparative leniency of lay participants[379] may conflict with the government's ideal of crime control, but there is no data to suggest that this leniency is wrong. In response to those attacks on lay participants' incompetence, an additional argument is that "every part of our criminal justice system – judges, prosecutors, police – has been under attack as being corrupt or incompetent".[380] There has been little empirical evidence verifying that lay participants are less capable of fact finding and decision making compared with a single professional judge or a few professional judges.[381] Before identifying a convincing alternative to replace lay participation, it would be unreasonable to remove the system.

Second, all humans and human institutions make mistakes.[382] It cannot be denied

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377 *Supra* note 88, at 7; see also *supra* note 162, at 416-417.
378 *Supra* note 88, at 7
379 See e.g. Los, *supra* note 175, at 455.
380 John T. Burke and Francis P. Smith, "Jury of Twelve – No Accident", *Insurance Counsel Journal*, Vol. 42, 1975, at 213.
381 See, for example, Sally Lloyd-Bostock and Cheryl Thomos, "Juries and Reform in England and Wales", Neil Vidmar (ed.), *The World Jury System* (Oxford University Press, Oxford, 2000), at 90; Neil J. Vidmar, "The Performance of American Civil Jury: An Empirical Perspective", *Arizona Law Review*, Vol. 40, 1998, at 849; T. M. Honess, M. Levi, and E. A. Charman, "Juror Competence in Processing Complex Information: Implications from a Simulation of the Maxwell Trial", *Criminal Law Review*, Nov 1998, at 763.
382 *Supra* note 88, at 13

that lay participants' comprehension may have been chanllenged by increasingly lengthy and complex cases.[383] In response to this, there could be two potential remedies: to exert greater control over lay decision making, and to design techniques to improve lay participants' comprehension.[384] It could be argued that only undertaking the first remedy would be inadvisable since research has proved that lay participants' incompetence could be largely attributable to exogenous reasons such as the faulted procedural design in terms of trial administration rather than their own insipience. For example, a jury is only as good as the material put before it,[385] whist the material often comprises "convoluted and technical language, the dry and abstract presentation of the law, and the hard-to-understand jury instructions etc";[386] the absence of or insufficient training should be at least partly responsible for lay assessors' poor legal knowledge.

Third, research has revealed that there is still great potential to "improve" or "modernise" lay participation via various changes.[387] For example, providing jurors with more cognitive facilities and assistance by "turning courtrooms into classrooms",[388] may be effective at reorientating and updating juries in a context of increased caseloads and case complexity. Besides continuous refinements, the specific model(s) of lay participation may need radical overhauls. For example, to stimulate lay assessors' participation in mixed tribunals, substantial reforms may need to be adopted to eliminate their exclusive reliance on judges, strengthen both their administrative and technical independence, and significantly add weight to their voting rights, all of which would reduce judges' control over lay assessors and may

383 See Munsterman and Hannaford, *supra* note 41, at 8.
384 *Ibid*.
385 *Supra* note 40, at 699.
386 See *supra* note 15, at 190-191.
387 *Supra* note 38, at 211.
388 *Supra* note 53, at 152.

invoke politicians' careful scrutiny.

1.7.2.2 The political/democratic function of lay participation

The basic justification for citizen participation is that "government is based on 'the consent of the governed' and that all citizens should have the opportunity to participate in the governmental decisions that affect their lives".[389] This theory itself could be controversial and raise ideological contests with regard to whether "direct democracy" is necessary and better than representative democracy in the judicial area. Moreover, the political function of certain models of lay participation, for example, to "allow popular 'justice' by jury nullification to defeat any unpopular national law", which was historically important in some democracies, has been gradually waning.[390] Some democratic countries today do not employ lay participation in judicial decision making whatsoever.[391] In spite of all the above, however, it is widely acknowledged even in the established democracies that "there is a perceived political danger in leaving legal decision making exclusively to a narrow, professionally trained elite",[392] which "hint at the enduring attractions of lay participation in the law",[393] so long as lay participation continues to exercise its long-standing right to reach a verdict not only based on conscience, against the letter of the law, but also occasionally in defiance of government.[394]

Furthermore, "[t]he lay participation/community conscience symbolism is

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[389] Florence R. Rubin, "Citizen Participation in the State Courts", *The Justice System Journal*, Vol. 10, No.3, 1985, at 295.
[390] *Supra* note 81, at 333.
[391] *Supra* note 242, at 100.
[392] *Supra* note 7.
[393] *Ibid*.
[394] See Lloyd-Bostock and Thomas, *supra* note 42, at 40.

perhaps the most influential and powerful of all the threads of jury ideology".[395] The justice system needs a contact point with the community,[396] in an attempt to promote its legitimisation.[397] Where lay participants are "in some way representative of the community",[398] "the power of 'community symbolism' is difficult to ignore".[399]

Some potential political/democratic functions of lay participation seem even more attractive to those transitional countries in the process of establishing their democratic regimes, such as: the people's sovereignty of directly deciding public affairs (direct democracy); preventing state repression and safeguarding judicial independence; educating the public and cultivating their ideologies of democracy and justice; promoting the legitimacy of the judiciary; realizing rule of law and protecting human rights; preventing professional judges from being arbitrary, corrupt or biased; bridging the gap between the legal formalism and the civic communities.[400] Although some of them are controversial indeed, they form enduring attractions for transitional countries experimenting with varied democratic tools.

1.7.2.3 The representativeness of lay participants

"[L]ay participation…is often seen as a way to strengthen democracy or to

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[395] *Supra* note 144, at 4.
[396] Quoted from Ric Simmons, "Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?", *Boston University Law Review*, Vol. 82, Feb 1999, at 75.
[397] See *supra* note 15, at 190.
[398] *supra* note 144, at 3.
[399] *Ibid*.
[400] See *supra* note 132, at 4; or more recent commentaries, see generally Valerie P. Hans and Neil J. Vidmar, *Judging the Jury* (Perseus Books, Cambridge, 1986); Jeffery Abramson, *We, the Jury: the Jury System and the Ideal of Democracy*, (Basic Books, New York 1994); James Gobert: *Justice, Democracy and the Jury,* (Ashgate Publishing Ltd., Dartmouth, 1997); Neil J. Vidmar (ed.), *World Jury Systems* (Oxford University Press, Oxford, 2000); *supra* note 24, at 87-93; Ivkovic, *supra* note 163, at 95-97; and Seago, *supra* note 251, at 651.

legitimate justice".[401] It is generally accepted that a group of ordinary lay participants, if genuinely representative the community, giving judgement on the facts of cases realize the tenet of 'trial by one's peers' and legitimise judicial proceedings.[402] However, the mixed tribunal system, lay magistracy and administrative tribunals all confront the same problem of whether lay adjudicators can really represent the community. Besides, in spite of the extended qualifications of jurors,[403] it appears that in practice, certain social spectrums have been under-represented in juries. In England, for example, it has been reported that in juries, "there still appears to be an under-representation of women and ethnic minorities";[404] in the United States, white and middle-class citizens tend to occupy most of the seats of the juries whilst black Americans, by contrast, are seriously under-represented.[405] Lempert contended that:

> *This imbalance has the effect of not only undermining the legitimacy of a given proceeding for an individual black accused, for example, but of undermining the institution of the jury to the black community at large. This challenge to the institutional legitimacy of the jury may, over time, contribute to lack of confidence in the wider criminal justice process for that*

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401 *Supra* note 319, at 151.

402 See *supra* note10, at 285.

403 In England, prior to 1974, for example, only those between 21 and 60 years of age who were on the register of electors and owed certain assets were qualified to be summoned as jurors, whereas since April 1974, the property limits have been abolished and the age range has been increased to between 18 and 65 under Section 25 of The Criminal Justice Act 1972. Some categories of persons are entitled to be excused as of right while others are ineligible to serve; persons ineligible include those connected with the administration of law and justice; clergymen; members of any religious order in a monastery and persons suffering from mental illness. See Edward Clarke, "The Selection of Juries, Qualification for Service and the Right of Challenge", Nigel Walker and Annette Pearson (ed.). *The British Jury System*, (The Institute of Criminology, Cambridge, 1975), at 46-47.

404 Lloyd-Bostock and Thomas, *supra* note 42, at 21.

405 Lempert, *supra* note 41, at 38.

community.[406]

Lempert's theory may be actually applicable to all models of lay participation. The fundamental lack of congruence between lay participants and the community may significantly affect public confidence in the fact that lay arbitrators represent the public themselves and so undermine the legitimacy of the system.

In response to this problem, there have been varied moves towards improving the representativeness of lay participants in various models of lay participation including the jury and lay magistracy. For example, besides the aforementioned changes to the imbalanced composition of lay magistrates in England, in response to the problem that certain social spectrums have been under-represented in juries because of their avoidance of the jury duty,[407] "making the juror's experience less onerous" to encourage people to actively participate in trials has been adopted by some countries. In America, a one day/one trial system has been widely established, whereby no juror serves for more than one day or one trial; in some states, jurors' pay has been substantially increased; and the voir dire process has been simplified and its length has thus been largely shortened etc.[408] It is foreseeable that more juror-friendly administrative reforms might be initiated to attract more enthusiastic participation by the public to realize the "fair cross-section" of jurors.[409]

To sum up, each function of lay participation, legal, political, or community-representing, would experience continuing scrutiny and reform.

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406 *Ibid*.

407 See, for example, Robert Walters and Mark Curriden, "A Jury of One's Peers? Investigating Underrepresentation in Jury Venires", *Judges Journal*, Vol.43, 2004, at 17.

408 See, for example, David E. Kasunic, "One Day/One Trial: A Major Improvement in the Jury System", *Judicature*, Vol.67, 1983-1984, at 79.

409 Hiroshi Fukurai and Edgar W. Bulter, "Organization, Labor Force, and Jury Representation: Economic Excuse and Jury Participation", *Jurimetrics Journal*, Vol.32, 1991-1992, at 50.

Resources for lay participation are, and will continue to be, limited. "It will be vital to ensure that the resources at present in the system are working as hard and effectively as they can to achieve high standards of service".[410] However, as long as these functions are still considerable and cannot be replaced by other alternative institutions, lay participation deserves its continuance.

1.7.3 Civic support

As seen above, both the jury and the mixed tribunal system have received widespread public support. Any model of lay participation involves amateurs who may not be welcome by the government since they introduce the community's voice into important judicial decision-makings. However, so long as these amateurs, as a disinterested adjudicative body independent of the government, are competent to represent the community, sift material, weigh up the evidence, assess people, and serve as a democratic and educative "bridge" between the public and the courts,[411] they would continue to be give "high marks" by the public.[412] Public opinion in support of "the continuance of a fundamentally lay and local system" will carry some weight to protect against this system's arbitrary abolishment by the government.[413]

"The dilemma of whether justice should be administered by highly formalized and professional legal bodies or by informal peer proceedings" has been bothering "both western industrial democracies and developing societies".[414] They "have been

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[410] Peter W. Ferguson, "The Modern Criminal Jury", *Scottish Law Times*, Vol. 35, 2008, at 231.
[411] Seago, *supra* note 251, at 650.
[412] *Supra* note 41, at 478-479.
[413] *Supra* note 49, at 151.
[414] Los, *supra* note 175, at 447.

struggling for years with the issue and have had mixed results".[415] Some models of lay participation, in some countries, have shrunk in scale and application; others still thrive in spite of frequent innovations. It is unlikely that this dilemma will disappear in the future,[416] taking into account pairs of unresolved paradoxes and intertwined threads: democratization or centralization of judicial power, "crime control" or "due process" in criminal justice, imperfect lay participation but unavailable alternative to it, and undeniable weaknesses of lay participation but unremitting efforts to improve this system etc. In light of this fact, the allegation that China's moves toward resuscitating lay participation collides with the global decline of lay participation proves to be too simplistic to be advisable. On the contrary, as a transitional country expecting a more democratic society and better justice,[417] it is time, to situate China's experience of lay participation firmly within the latest developmental framework of lay participation globally so as to correctly scrutinize China's current situation[418] and find out what lessons China can borrow from other countries.[419] For example, China's recent move towards resuscitating lay assessors may indicate Chinese government's value choice of appreciating lay participation which may deserve a position in China if this system could achieve its effectiveness and obtain civic supports in this country.[420]

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415 *Ibid*.
416 *Ibid*.
417 See Chapter 5 for more discussion.
418 See Chapter 3 and 4 for more discussion.
419 See Chapter 5 for more discussion.
420 See Chapter 6 for more discussion.

Chapter 2

A Historical Overview of Lay Participation in China

2.1 Introduction

The prevalent view among China's academic community is that lay participation did not exist in China until the Chinese Communist Party introduced the role of 'lay assessor' into its legislative framework early in the 1930s.[1] In addition to this denial of the existence of lay participation in China's history, some scholars further base their objection to the modern growth of lay participation on the argument that such a system has been historically absent in China, and is at odds with the traditional culture in the country. Indeed, Zhang and Zhou contend that Chinese people have been historically "so devoid of the tradition and consciousness in participating in politics" that this provides little soil for the recognition of lay participation in China even today.[2] Wei adds that lay participation hardly has a promising future in China because: on the one hand, modern forms of lay participation, either juries or lay assessors, are "incompatible with Chinese tradition", and that civilians have been in "idolatry to professional authority", so that they "would rather accept incorrect decisions by professional judges than correct judgments by lay judges"; and on the other hand, Chinese citizens may

[1] See, for example, Zhang Junxia, "A Brief Discussion about the Mixed Tribunal System in China", *Journal of Hebei Polytechnic College (Edition of Social Sciences)*, Vol.6, No.3, 2006, at 56; Zhang Guangjie and Wang Chingting, "The History, Context, Theory and Law: An Analysis of the Mixed Tribunal System in China from Four Perspectives", *Journal of the Nanjing Industrial College (Edition of Social Sciences)*, No.2, 2005, at 18-19; Zheng Haorong, "Reforms of the China's Mixed Tribunal System", *The Legal Application (Journal of the Training College of Chinese Judges)*, Vol.178, No.1, 2001, at 42; Jiang An, "China's Mixed Tribunal System and Its Judicial Reform", *Legal Sciences Review*, Vol.98, No.6, 1999, at 79.

[2] Zhang Demiao and Zhou Youyong, "Conditions and Methods of Realising Judicial Fairness in China Today", *Jurisprudence Review*, No.1, 1999, at 2.

resist serving as lay adjudicators, to "judge and punish their neighbours", because this conflicts with their traditional culture of "preserving harmony between neighbours and peace of the local community".[3]

Historians recognize that China's 'ancient' history can be traced back to the 21st century BC when the first slave regime, the Xia Dynasty, was established and, further, that it ended in 1840 when the Opium Wars broke out. The contemporary history of China is therefore seen as the period after 1840.[4] In actuality, there is evidence, though scattered and fragmentary it may be, which indicates that lay participation did play a part in China's ancient history. As Justice Oliver Wendell Holmes suggests, the basis of law is neither logic nor reasoning, but human experience instead.[5] If lay participation did exist in China's past, it would be advisable to review its history, in order to look into how each variety of lay participation operated, evolved, functioned and exerted an influence on society. This may help clarify whether Chinese society does indeed lack the tradition of civic participation in legal decision making, and has a culture incompatible with lay participation; all of which may help us to better understand the status quo and the potential prospects for lay participation in this country.

This chapter is divided into four sections. Part 2.2 looks at the so-called 'Three Deliberations' during the slavery dynasty: Zhou (1046 AD – 256 AD), a system under which important legal cases were presented to a city assembly for civilians to deliberate and vote upon. Section 2.3 studies lay participation in feudal China (221 BC – 1911 AD), looking at the prevalent 'clan justice', which involved the wide involvement of

[3] Wei Min, "Shall the Mixed tribunal System Be Suspended: The Developmental Direction of the Mixed Tribunal System, *Gansu Social Sciences*, Vol.4, 2001, at 31 and 32.
[4] See Wang Yumin, *An Introduction of China's History and Geography – Vol. I* (The People's Education Press, Beijing, 1985), at 3.
[5] See Oliver Wendell Holmes, *The Common Law*, (Macmillan, London, 1882), at 1.

lay judges, and China's experiment with the modern jury trial. Section 2.4 reviews the various forms of lay participation that existed under the Nationalist Government regime (1912 – 1949), including a mixed tribunal system which existed in name only, a distorted jury system for suppressing political dissidents, and the commercial arbitration courts which virtually played the role of first-instance trials for commercial cases. Section 2.5 discusses the predecessor to the current lay assessor system in China, the so-called 'People's Lay Assessor System' created by the Chinese Community Party during its revolutionary era.

2.2. The 'Three Deliberations' During the Zhou Dynasty (1046 AD – 256 AD)

Academic literature indicates that the democratic politics of regimes built upon slavery actually gave birth to public participation in legal decision making, for some ancient western civilizations. The ancient city-state of Athens developed the so-called *Heliaea of the Thesmothetae* (meaning "Assembly as a Court") after the Solon Reforms (594 BC) and so had a legal system that included an adjudicative body similar to the modern grand jury, composed of 500 civilians.[6] Similarly, in ancient Rome in 450 BC there was the practice of entrusting 30 to 40 civilians to form a jury to handle criminal cases.[7] Whilst the existence of these examples of lay participation in ancient western democracies has long been recognised, lay participation during China's Zhou Dynasty has largely been ignored. However, this Chinese form of lay participation was known as 'Three Deliberations'.

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[6] Vincent Farenga, *Citizen and Self in Ancient Greece: Individuals Performing Justice and the Law* (Cambridge University Publishing House, New York, 2006), at 318; and Chen *supra* note 27, at 41.

[7] Wang Yizhen, *The Civil Procedure Laws of Foreign Countries*, (The Beijing University Press, Beijing 1990), at 44.

2.2.1 Features of the 'Three Deliberations'

'Three Deliberations' was actually a special judicial process involving lay participation initiated by judges (the *Xiao Sikou* and *Si Ci*) of the Supreme Court and was applicable to complicated criminal cases and those potentially involving capital punishment.[8] According to the noted historian and expert on the Zhou Dynasty, Jia, where a judge encountered difficulties in either (1) measuring the penalty, (2) fact-finding, (3) recognising mitigating circumstances, or (4) applying the law, the case would be submitted to the Supreme Court where the 'Three Deliberations' process would be applied.[9] According to Zheng, another expert studying the history of the Zhou Dynasty, the process was implemented for all offences potentially incurring capital punishment. As Zheng stated, "the defendant would not be executed unless the 'Three Deliberations' process convicted him and sentenced him to death."[10]

Any case with the 'Three Deliberations' process applied to it was presided over by a judge of the Supreme Court, and involved a jury composed of ministers, officials and civilians, to decide on factual and legal issues.[11] Jia describes the working process of the 'Three Deliberations' process as: "ministers, officials in association with civilians sat on the left, right and front side of the courtroom respectively, hearing the trial and after due deliberation voting in a sequence of ministers first, officials second and civilians last to make a judgement". Since the jury was composed of jurors from three different classes, the case was said to have been thrice deliberated. This is why the

[8] Zhang Jinfan, *The History of China's Judicial Systems* (The Press of the People's Courts, Beijing, 2004), at 3-4.
[9] *Ibid*, at 3.
[10] Gao Chao and Ma Jianshi, *The Interpretation of Historical Records of Criminal Laws in Past Chinese Dynasties* (The People's Press of Jilin, Changchun 1994), at 140.
[11] *Supra* note 8, at 3 and 4.

process was known as the 'Three Deliberations'. Zheng further clarifies that a 'Three Deliberations' jury had jurisdiction over "conviction, acquittal, penalty measurement, commutation and pardon".[12] It therefore appears that a jury involved in the 'Three Deliberations' had a much wider jurisdiction, including as it did law application, than did a regular jury.

Jia also states that those eligible to be 'Three Deliberations' participants had to be educated ministers of noble descent, incumbent officials and civilians of good morality.

Unfortunately, the available literature recording this special judicial process is at best scattered and fragmentary, omitting as it does a few of its important characteristics, such as the respective number of participating ministers, officials and civilians, and their proportion, the specific selection process for these jurors, and the decision-making and voting principles.[13] However, in light of the above, an adjudicative body analogous to a jury can be said to have existed in China's ancient history. Furthermore, according to *Rites of the Zhou Dynasty*,[14] the classic text published approximately two thousand years ago and recording the history of the Zhou Dynasty, the 'Three Deliberations' process was adopted in the 11th century BC, even earlier than *Heliaea of the Thesmothetae* in ancient Athens, or the jury in ancient Rome.[15]

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[12] Cao Shujun, "A Study on the Judicial System of the Zhou Dynasty of China", *Legal Sciences Review*, Vol.5 of 1927, at 232.

[13] Other materials discussing the 'Three Deliberations' include, for example, Zhang Demei, *The Exploration and Choice – A Study on the Legal Transplantation in the Late Period of Time of the Ching Dynasty* (The Tsing Hwa University Press, Beijing 2003) at 288, and Chen Gang, *100 Years' Evolvement of the Civil Procedure Law of China*, (The Fazhi Publishing House of China, Beijing 2004), at 462.

[14] Other translations may be "Zhou Li" or "Zhou Rites".

[15] See Zhou Gongdan, *The Rites of the Zhou Dynasty – Justice and Judge [Qiu Guan]*, published in the East Han Dynasty (25 AD – 220 AD), quoted from Yang Tianyu, *The Interpretation and Commentary of Rites in the Zhou Dynasty* (The Ancient-Literature Press of Shanghai, Shanghai 2007), at 112.

2.2.2 Reasons for the Emergence of the 'Three Deliberations'

As the first known form of lay participation in China's history, the development of the 'Three Deliberations' was by no means haphazard, but instead was a result of the particular social-political context in the country at that time.

First of all, statutory law had not come into being yet, since during the Zhou Dynasty common law dominated. The uncertainty of common law enhanced the complexity of legal application and decision making. Seeking advice from well-educated officials and tapping the intelligence of the masses was a practical solution to overcome these difficulties in judicial practice, especially in terms of complicated cases and cases with far-reaching social implications.[16]

Secondly, the Zhou Dynasty followed the system of *seigneur* politics, under which various lords were tasked with establishing a number of manors over which they had domain and in which they exercised both administrative and judicial powers.[17] In an attempt to centralize judicial power, the central government required these lords to submit complicated cases and those cases potentially incurring capital punishment, to the Supreme Court. To legitimise this centralization, the 'Three Deliberations' was invented to demonstrate that all the complicated and important cases would be collectively decided by diverse stratums, rather than through autocratic justice.[18]

Thirdly, the prevalence of the 'Three Deliberations' tallied with the idea of 'kingcraft' as enshrined by the Zhou Dynasty; that of "Merciful Ruling, Virtue and Prudential Punishment Infliction."[19] According to Wang, this idea involved several

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[16] Zhen Qin and Zhen Ding, *The Textbook of the Chinese Legal History* (The Law Publishing House, Beijing 1998), at 57.
[17] *Ibid*, at 58.
[18] *Supra* note 12, at 232.
[19] Wang Jilun, *The 'Merciful Virtue and Prudential Punishment'* (The Youshi Cultural

doctrines. "Merciful Ruling Virtue" indicated that (1) governors should exhibit due diligence in ruling the country and improve their virtue by strictly disciplining themselves and avoiding misgovernment, and that (2) they ought to show their mercy by observing public opinion, favouring and enriching the people. "Prudential Punishment Infliction" implied that (1) each offence had individual unique circumstances and should be carefully analysed and treated, and that (2) punishment should be reasonable and moderate rather than cruel.[20] The process of 'Three Deliberations' introduced civilian participation into justice, introducing in fact the principle of "observing public opinion". By incorporating the knowledge and intelligence of ministers, officials and common people, the 'Three Deliberations' satisfied the principle that each case "should be carefully analysed and treated" as well. In addition, the collective decision making helped to prevent inappropriate and cruel punishment.

2.2.3 Its Functions and Impacts

As mentioned above, the available literature on 'Three Deliberations', no doubt due to the historical period in which it occurred, is too fragmentary to present a full evaluation of its function. Based on the scattered material available, however, it appears that the 'Three Deliberations' played a substantial role in history of the Zhou Dynasty.

First, it helped to legitimise judicial proceedings. *Rites of the Zhou Dynasty* records that: "by taking into account public opinion, 'Three Deliberations' can produce advisable verdicts and sentences satisfying both upper and lower social hierarchies".[21]

Enterprise Corporation Ltd, Taipei 1990), at 225.

[20] *Ibid.*

[21] See *supra* note 15, at 114.

The use of 'Three Deliberations' ensured quality and impartiality of justice, as well as introduced diverse voices and intelligence into the legal system, and as Jia comments, "without 'Three Deliberations' deciding conviction, commutation and pardon, injustice might occur due to decision-making in parochial outlook."[22] Further, 'Three Deliberations' brought democracy to the judiciary. Jia comments that the 'Three Deliberations' "embodied decision making by the community and delivered public wills."[23] The eminent theorist Su Shi also highly commends the institution of 'Three Deliberations', as it "made the lower hierarchies of the community involved and their voices heard [in the judicial process]."[24]

As the first form of lay participation in China's history, the democratic elements of 'Three Deliberations' have long impressed legal scholars. Shen Jiaben, the noted jurisprudent and Chairman of the Committee of Legal Reform of China in the beginning of 20th century, likened 'Three Deliberations' to the classic jury, making the famous suggestion that "'Three Deliberations'…accords with the theory of 'execution by peers' advocated by Mencius and the jurisdiction of the Western jury. Today, both the West and East apply jury which is actually a counterpart of a Chinese ancient institution."[25] In referring to the 'Three Deliberations' process, Shen was attempting to persuade the Emperor to introduce the jury system into China, to modernize and democratize the judicial system.[26]

Shen did not make a detailed comparison between the ancient 'Three

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[22] Jia Gongyan and Zheng Xuan, *The Annotation of Etiquettes in the Zhou Dynasty* (The Chunghwa Press, Beijing 1980), at 34.
[23] *Ibid.*
[24] Su Shi, "Ode of the 'Three Deliberations' Which Seeks the Public Wills", *Collected Works of Su Shi –Vol. I* (The Chunghwa Press, Beijing 2008), at 197.
[25] Guo Chengwei, *A Study on the Codification of the Criminal Procedure in the Late Period of Time of the Ching Dynasty and the Initial Stage of the Republic of China* (The Press of the Police College of China, Beijing, 2006), at 252.
[26] See below for more details.

Deliberations' and the modern jury that prevails in Anglo-American jurisdictions. However, he recognised that the admittance of common people to the judicial decision-making process engendered democratic spirit. Collective decision-making among diverse hierarchies of citizens, including ordinary civilians, demonstrated a respect of public opinion, while applying 'Three Deliberations' to all complicated and serious cases demonstrated prudential and humane judicial practice. Taken individually as well as collectively, these factors demonstrate that 'Three Deliberations' was comparable to the modern idea of the jury.

'Three Deliberations' remained popular until the breakdown of the Zhou Dynasty and the formation of the Qin Dynasty in 221 BC. The latter abolished the slavery regime and established the first united feudal country in China.[27] Since this change in governmental style resulted in the disappearance of the specific socio-political context that had fostered public participation in justice, 'Three Deliberations' was not transferred to the new judicial system.

2.3 Lay Participation in Feudal China (221 BC – 1911 AD)

The Qin Dynasty ended in 206 BC. Since then, more than ten dynasties followed one after another until 1911 when the last, the Ching Dynasty, was overthrown.[28] During this feudal era, spanning over two thousand years, lay participation in China was mainly embodied as the popular practice of "clan justice", throughout the feudal period and up to the experiment with the jury trials at the beginning of 20th century.

[27] *Supra* note 8, at 3 and 4.
[28] A supreme court was almost established in each dynasty, having different names though, see *supra* note 8, at 50, 87, 194,271,306-310, and 389-398.

2.3.1 The Prevalent "Clan Justice"

2.3.1.1 The Context of "Clan Justice": Royal Justice with Lay Participation Excluded

An independent judicial system was never established in feudal China, since local governors at different levels appointed by the Emperor, in addition to handling administrative affairs, also acted as judges. Effectively, county governors, eparchy governors and provincial governors, acted as the first, second and third layers of judicial practice respectively, and they, in association with the Supreme Court normally established at the central government level,[29] constituted the royal judicial system that had the statutory jurisdiction to decide on any civil and criminal cases.[30] At every level of the royal justice system, lay participation was entirely absent due to particular social-political reasons.

-- The Emperor's Emphasis on an Absolute Control over Justice

The imperial monocracy established by the Qin Dynasty was continued by the subsequent dynasties. The traditional dynastic governments generally engaged in rule through autocracy and absolutism, until the overthrow of the Ching Dynasty in 1911.[31] At the core of the imperial autocracy was the Government, headed by the Emperor and comprised exclusively of his followers, which exercised unlimited power over legislation, justice and administration. In terms of judicial power, all judges, from the county level to the Supreme Court were appointed directly by the Emperor himself and were unconditionally bound by his leadership, in an attempt to ensure the Emperor's

[29] *Ibid,* at 13,50-51,85-89; 86-89;194-197;270-272;306-315;389-398.
[30] *Ibid,* at 51, 89, 273, and 400.
[31] M.Ulric Killion, "Post-WTO China and Independent Judicial Review", *Houston Journal of International Law*, Vol. 26, No.3, 2004, at 522.

absolute control over justice.[32] Sima, the noted Chinese historian, notes the ambition of Chinese Emperors to remain the sole legal authority: "all cases under the sun, big or small whatsoever, subject to the royal decision".[33] It therefore seems unimaginable that the Emperor would permit civilian participation in royal courts and the associated sharing of power that would prevent the administration of justice from being his exclusive domain.

-- The Illiterate Citizens Justifying the Absence of Lay Participation

The Emperor's control over education and knowledge provided a significant barrier to the use of lay participation. Chinese Emperors believed that well-educated citizens would be harder to control due to their enlightened and forward-looking thoughts whereas, in contrast, illiterate and uneducated citizens were more likely to be submissive. Due to this belief, free education was unavailable throughout China's feudal history.[34] A number of private schools (the so-called *Si Shu*) had been set up but were only available to the few rich people able to afford the fees[35]. This lack of educational opportunities resulted in a very high rate of illiteracy in China. For example, until 1949 (38 years after the end of the last feudal dynasty), approximately 90% of the national population was illiterate.[36] The existence of an overwhelmingly illiterate population justified the Emperors' distrust of lay participation, since a judge, especially one serving in the royal judicial system, had to be able to read and write if he was to be able to adjudicate wisely on important and complicated cases.

-- The Elitist Politics at Odds with Lay Participation

In parallel to this policy of limiting education was the existence of an elitism

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[32] *Supra* note 8, at 2.
[33] *Ibid,* at 3.
[34] Guo Bingwen, *The History of Educational Systems in China* (The Educational Press of Fujian, Fuzhou, 2007), at 9.
[35] *Ibid*, at 21.
[36] *Ibid*, at 63.

which was entrenched in the form of the 'royal examination', used for anyone seeking selection for an official post (the so-called *Ke Jew Examination*). Every candidate had to get through several rounds of examinations before he could be appointed a position in any of China's administrative, judicial, legislative or even military departments. The examinations tested not only the candidates' knowledge and skills but, more importantly, their loyalty to the Emperor.[37] It was through these examinations that the Emperor selected knowledgeable and loyal servants to help him with the administration of the country. Such strict examinations ensured that all of the officials were drawn from the minority well-educated section of the population. Given that the overwhelming majority of the population were illiterate, the officials were 'elite' indeed, at least in terms of their educational background. Bureaucrats holding various government positions gradually grew an officialdom, where their shared backgrounds of good education and examination success were commonly appreciated, eventually engendering an elitist form of politics.

A by-product of this elitism was that common people were generally seen as being inferior and were often referred to using derogatory terms such as "stupid people", "grass people" or "base-bred people".[38] This sense of superiority exhibited by the bureaucrats meant that they would never risk breaking up their elite organisation through the admittance of common people to the mechanisms of justice. In such circumstances, any modern form of lay participation, such as the jury, one that "represents a basic democratic belief in the intelligence of its citizenry to decide and to

[37] For detailed discussion about the royal examination for official selection in ancient China, see Wang Bingzhao and Xuyong, *Studies on China's "Ke Jew" System* (The Hebei People's Publishing House, Shijiazhuang, 2002).
[38] Shi Zhisheng and Xu Jianxin, *A Study on Social Hierarchies in Ancient Countries* (The Social Sciences Publishing House of China, Beijing, 2003), at 9 and 24.

rule",[39] would be considered to infringe upon the incumbent system of elitist politics.

--The "Disciplinarian" Ideal of Confucianism Repelling Lay Participation

To fully understand the common people's exclusion from the royal justice system, it is important to bear in mind the influence of Confucianism.

Traditional China was characterized throughout almost its entire feudal history by a remarkably close and enduring relationship between the imperial dictatorship and the philosophy of Confucianism. As a matter of fact, the original doctrine of Confucianism emphasises the desirability of balance and harmony in the community and between individuals, and encourages people to reform imperfect societies. However, Confucianism was modified during the Han Dynasty (206 BC to 207 AD) to fit in with the existing feudal monocracy.[40] New Confucianism advocated the inherent hierarchy in China's society which began with the Emperor and extended downward to the common people. Being subordinate to this hierarchy, each citizen was asked to fulfil his or her responsibility to preserve the order and harmony of the community and to maintain the ideal "disciplinarian" society.[41]

Confucianism certainly granted the different classes different responsibilities. The Emperor and his officials, classified as the supreme and upper classes, assumed the "responsibilities" of national administration while the common people, classified as the lower classes, were liable for respecting and submitting unconditionally to government.[42] In other words, according to Confucianism, the social position of the

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[39] Rita James Simon, *The Jury and the Defense of Insanity* (Little, Brown and Company, London, 1967), at 4 and 5.

[40] *Supra* note 31.

[41] Thomas B. Stephens, *Order and Discipline in China: the Shanghai Mixed Court 1911-1927* (University of Washington Publishing House, Washington 1992), at viii.

[42] See, for example, Robert H. Lin, "On the Nature of Criminal Law and the Problems of Corruption in the People's Republic of China: Some Theoretical Considerations", *New York Law School Journal of International and Comparative Law*, Vol.10, No.1, 1989, at 7-8.

common people could be "enriched with such doctrines as unconditional loyalty to Emperor and State".[43] In light of the obedience and disciplinarian philosophy of Confucianism, there was neither a place for law in the Latin sense of the term, nor for private legal rights as guaranteed by law, and there were only duties and mutual compromises governed by the ideas of order, responsibility, hierarchy and harmony.[44] In this case, "it is unimaginable that citizenry who were supposed to be disciplined by the Emperor were entitled to participate in royal government and share national power."[45]

2.3.1.2 Clan Justice Coexisting with Royal Justice

As seen above, royal justice totally excluded lay participation. However, it is remarkable that China experienced the coexistence of two forms of justice – royal justice and clan justice during its feudal era. In contrast to royal justice, with lay participation excluded, various clan courts formed a parallel hierarchy of justice and did involve lay participants.

-- Features of Clan Justice

The clan, consisting of a number of families tracing their decent from a common ancestor, was the traditional social unit in rural China. The origins of the clans can be traced back to remote antiquity, when productivity was too low to enable a single person or family to survive the harsh conditions, and so families claiming a common ancestor lived in a village together for safety and collectively worked the land. In an attempt to stabilize clan order, various clans developed a system of customary law and

[43] S*upra* note 31.
[44] *Supra* note 41.
[45] Zhang Jinfan, *The Legal History of the Ching Dynasty* (The Law Publishing House, Beijing, 1994), at 703.

established their own courts to dispense justice inside clans. The exact number of clan courts in China was too vast to accurately calculate. According to Zhang's investigation, in Jiangxi Province alone (there were eighteen provinces in China then[46]), 8994 clan courts had been established by 1764,[47] a fact that illustrates well the prosperity of clan justice.[48] The clan courts had the following features:

(1) Dominated by Lay People

Clan courts were established within each clan and were staffed by clan members who served in their judicial positions on a part-time basis.[49]

The Yu clan (note - all clan members had Yu as their common family name) in Huanshan County of Anhui Province, for example, enacted its own clan law, and providing that: "the clan court shall be composed of one chieftain, three assessors, three supervisors and ten bailiffs"; "the chieftain, assessors, and supervisors shall all be elected by the clan assembly from the reputable, just, honest candidates"; "the bailiffs are to be served in turn by male clan members aged between 20 and 50 on an annual basis"; and "when the court opens, the chieftain presides, the assessors adjudicate, the supervisors oversee, and the bailiffs execute".[50] As another example, the Zhao clan in Zhenjiang County, Jiangsu Province, had approximately 200 members during the late 17th century. Its clan court was headed by a general chieftain presiding over the trials and assisted by eight deputy chieftains and four assessors drawn from the wise and just villagers, to adjudicate the cases jointly, plus four villagers serving as the bailiffs in charge of court order and execution. All of the staff of the clan court were elected by

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[46] For China's geography at that time, see, for example, N. Ginsburg (ed.), *The Pattern of Asia* (Englewood Cliffs, New Jersey, 1958), at 155-238.
[47] *Supra* note 45, at 118.
[48] See below for more discussion about the clan justice.
[49] See Li Jiaofa, "The Clan Justice in Ancient China", *Legal and Commercial Studies*, Vol.4, 2002, at 135.
[50] *Ibid,* at 144.

the clan assembly.[51]

It appears that clan courts, though staffed by lay clan members, featured specific roles and working practices. The usual trial venues for the clan courts were the clan temples where all other important clan public affairs, such as worship and assembly, took place.[52] Perhaps remarkably, similar prosecution mechanisms existed within some of the clans. When a criminal offence occurred, the father or elder brother of the suspect was liable for reporting to the clan court and initiating a prosecution, otherwise they would be charged with concealment.[53] In addition, in terms of civil disputes, the procedure was very flexible. A clan court, for example, could on its own initiative summon the parties in dispute to mediate the issue before they instituted litigation.[54] It is clear that the entire procedure of clan justice was dominated by lay people and excluded professional roles entirely.

(2) Wide Jurisdiction

A clan court normally had jurisdiction over any civil disputes between clan members, as well as over a wide range of criminal offences committed within the clan (for example, incest, extramarital liaisons, gambling, theft, robbery and bodily injury), except those very serious crimes (such as manslaughter, political offences, offences involving the members of other clans, and offences with far-reaching social implications) which had to be brought before the County Governor to apply for royal justice.[55] Further, clan courts had the judicial power to impose a series of punishments,

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[51] *Supra* note 45, at 118.
[52] Gao Qicai and Luo Chang, "A Study on Patriarchal Judicial Systems in the Ancient Chinese Society", *Journal of Huazhong Normal University (Humanities and Social Sciences)*, Vol. 45, No.1, 2006, at 86.
[53] See *supra* note 49, at 139.
[54] See Li Jiaofa, *ibid*, at 143; and *supra* 52, at 86.
[55] See Li, *ibid*, at 138.

including reprimand, forfeiture, 'stripe'[56], expulsion from the clan, or even capital punishment (executed in various ways, such as forced suicide, burial alive and drowning).[57]

(3) Recognition by the Royal Government

As mentioned above, county governors were theoretically the statutory first instance for any civil and criminal cases, including those occurring inside clans,[58] a fact seemingly in conflict with the jurisdiction of clan justice. In reality, however, each feudal dynasty in China's history acquiesced to, or at least publicly acknowledged the validity of, clan justice.[59] So, on one hand, none of the feudal dynasties forbade the clan courts from adjudicating on internal cases, effectively acquiescing to their judicial power, but on the other hand, the validity of clan justice was openly acknowledged by the Government in two ways. First, the clans were allowed to submit their customary law, including court rulings, to the Government for approval and recording. The Government was pleased to do so as long as the clan law did not conflict with national interests. Decisions made by clan courts with reference to clan law became legitimate legal decision once they had obtained formal ratification by the Government.[60] Secondly, it was traditional in feudal China for the Royal Government to collect representative judicial precedents in order to compile law reports to guide subsequent judicial practice. Remarkably, these law reports often contained decisions made by the

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[56] A stroke from a whip, rod, etc.

[57] For more discussions about the punitive power of clan justice, see Xu Yangjie, *The Historical Review of the Clan System in the Song Dynasty and Ming Dynasty* (The Chunghwa Publishing House, Shanghai, 1995), at 224-225; Fei Chengkang, "The Punishment of the Family Law", *Politics and Law*, No.5, 1992; Zhu Yong, *A Study on the Clan Law in the Ching Dynasty* (The Educational Press of Hunan Province, 1987), at 98; and Liu Liming, *The Contract, Ordeal and Gamble* (The People's Press of Sichuan, Chengdu 1993), at 15.

[58] *Supra* note 8, at 51, 89, 273, and 400.

[59] *Supra* note 52, at 85.

[60] Shi Fengyi, *Clans and People's Statuses in Ancient China* (The Press of Social Sciences Literature, Beijing, 1999), at 52-58.

clan courts, a fact that demonstrates the Government's ratification of the clans' law and their justice.[61] For these two reasons, in spite of the county governors still statutorily holding jurisdiction over cases occurring inside clans, the *de facto* jurisdiction over these cases can be seen to have been executed by clan courts, resulting in the coexistence of clan justice and royal justice.

-- Why the Door was Open to Lay Participation at the Grassroots Level

Clan courts held significant judicial power, as evidenced by their legitimate jurisdiction over a wide variety of cases and their implementation of various forms of punishment. According to Sprinkle, the clan courts could be categorized as "the lowest level in the court hierarchy".[62] Meanwhile, as mentioned above, each position in a clan court was staffed by a clan member who had neither administrative nor political affiliation with the Royal Government. The entire judicial procedure was totally dominated by lay people rather than professional judges. In light of this, it would be justifiable to conclude that clan justice demonstrated a particular form of civic participation in the judiciary. It appears that the approach to lay participation differed greatly between the approach of the royal judicial system and that of clan justice. Lay participation was entirely excluded by royal justice whilst the various clan courts were dominated by lay people – the clan members themselves. This practice was apparently incompatible within the context of judicial power monopolized by the Royal Government. The reasoning behind the imperial monocracy's tolerance of the existence of clan justice thus becomes an interesting issue.

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[61] Chen Keyun, "The Consolidated Clan Rule in the Towns and Villages of Hui County in Ming Dynasty and Ching Dynasty", *Studies on China's History*, No.3, 1995, at 47-55; Zhen Ding, "The Clan System and China's Traditional Legal Culture", *The Legists,* No.2, 2002*,* at 22-23.

[62] S. Sprinkle, *An Introductive Study on the Legal System of the Ching Dynasty – An Analysis from the Sociological Perspective* (translated by Zhang Shoudong, The Press of the College of Political Sciences & Law, Beijing, 2000), at 120.

(1) Clan justice under the Control of the Royal Government

Although the clan courts were allowed to decide a wide range of cases, royal justice still held jurisdiction over the most serious cases, such as political offences, those which potentially endangered the regime. For example, although clan justice operated alongside royal justice in deciding on cases inside clans, all the serious cases, such as political offences, the complicated cases involving more than one clan, and cases appealed from clan courts, were still subject to the jurisdiction of royal justice.[63] Meanwhile, despite clan courts seemingly being officially approved to decide cases within the clans, the Royal Government never actually enacted any statutes to specifically legitimise the clan courts' jurisdiction.[64] Without statutory legitimisation, the clan courts were merely an expedient measure for delivering judicial power at a lower level, whilst the County Governors were statutorily still the legitimate first instance for any civil and criminal cases.[65] In this way, whenever the Government wanted it, royal justice could be triggered to immediately take over the clan court's jurisdiction and issue a decision. Besides, decisions made by clan courts had no judicial finality and were reviewable based upon appeal. In this way, any undesirable judgments made by clan justice could be reversed by royal justice, so, effectively, even clan justice was subject to the strict control of the Royal Government.

(2) The Result of the Governmental Recognition of Clan Laws

The Government sought to maintain the clan economy (as the economic basis of the nation) by recognizing clan justice and ensuring the loyalty of clan members. As mentioned above, a clan needed to unite each family and all individual members into a cohesive group to guarantee the productivity and survival of the clan. China was

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[63] See *supra* note 49, at 138.
[64] *Ibid*, at 141.
[65] *Supra* note 8, at 51, 89, 273, and 400.

comprised of numerous clans. The clan-based natural economy thus represented the foundation of the national economy. After centuries of evolution, the clans had all developed their own customary law to adjust and regulate behaviours of clan members, and to stabilize clan order. Being fully aware of the importance of the clan economy as the primary source of the national revenue, the Government paid close attention to the security and stability of clans. Compared with enacting statutory law to incorporate and replace diverse customary laws of various clans, the Government's recognition and acceptance of these customary laws were a more convenient and realistic solution. Given that clan customary laws had been accepted by the Government, clan justice which executed them was hence acknowledged.[66]

(3) In Consideration of Saving Judicial Resources

In the national administrative hierarchy of feudal China, the lowest level was the county. There were 1587 counties during the Han Dynasty, 1573 during the Tang Dynasty, 1135 during the Song Dynasty, 1385 during the Ming Dynasty and 1300 during the Ching Dynasty. During the Han Dynasty, there were 60 million people in China, while this number rose to 400 million during the Ching Dynasty.[67] Given these national population numbers, each county might have been home to thousands of citizens. As mentioned above, in each county, there was only one governor who was tasked with both administrative and judicial duties, and thus could be expected to be extremely overworked. However, it seems that these county governors were not crushed by their workloads, mainly due to their being largely "indebted to clan courts that remedied the shortage of judicial staff in grass-root governments".[68] The role of clan justice in helping the Royal Government to save judicial resources was appreciated and

[66] See *supra* note 8, at 128-132.
[67] Fan Shuzhi, *Exploring the Cities and Towns of South-eastern China in Ming and Ching Dynasties,* (The Publishing House of Fudan University, Shanghai, 1990), at 5.
[68] *Supra* note 52, at 84.

was in no small part the reason behind its official recognition.

(4) To Legitimise the Imperial Regime

The origins of the clans in China can be traced back to 3160 BC, much earlier than the establishment of the first feudal dynasty, the Qin dynasty, in 221 BC.[69] After centuries of growth and development, some clans had a large number of members and great influence in the local community. With a county governor and a few administrative staff in place at the local level, it would have been unwise for the Emperor to arbitrarily exert power and thus risk offending these influential clans. Placating the clans by granting them conditional autonomy, including judicial power, over internal affairs, was a more advisable method of imposing and legitimising the imperial regime.[70]

(5) The Compatibility of Clan Laws with the Imperial Regime

In an attempt to secure the survival of clans, clan laws rarely challenged royal authority nor disobeyed national interest. On the contrary, clan law normally vindicated the imperial regime. For example, the customary law of the Chen clan in Yimen County provided that "taxes are critical requisites for the government and nation which shall be duly and fully paid irrespective of any difficulties". Likewise, the customary law of the Wu clan in Shanyin County provided that "full payment of taxes is the principal duty of each family and shall be well planned and duly completed; any violation will be brought to the [clan] temple to measure punishment without remission".[71] By enacting such laws, the clan justice system endeared itself to the imperial regime and helped to guarantee its continuing existence.

-- Significance and Impact of Clan Justice

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[69] Zhang Yanxiu, *The Marriage, Family, Clan and Civilization* (The Press of Social Sciences of China, Beijing 2007), at 9.
[70] *Supra* note 52, at 85.
[71] See *supra* note 49, at 143.

(1) A Democratic Symbol in Ancient China

Besides helping to stabilize clan order, remedying the shortage of judicial staff and legitimising the royal regime which, as mentioned above, were all beneficial to the Government, clan justice also resulted in the existence of an element of democracy in judicial proceedings. The lay judges of a clan court were normally elected by the clan members.[72] The clan court of the Yu clan in Huanshan County of Anhui Province, for example, was composed of one chieftain as presiding judge, three assessors, three supervisors and ten bailiffs. The chieftain, assessors and supervisors were all elected by the clan assembly, while the role of the bailiffs was fulfilled by male clan members aged between twenty and 50 in turn, on an annual base.[73] Furthermore, as well as being elected by clan members, lay judges in clan courts could be impeached or dismissed by clan members as well. For example, the law of the Yao clan in Ancheng County provided that: "any chieftain presiding over the clan court can be dismissed by the clan assembly via ballot for his confirmed slothfulness and injustice".[74] Meanwhile, democracy was also found in the decision making process of clan justice. For example, the clan court of the Yu clan in Huanshan County of Anhui Province applied the voting principle of simple majority to decision making.[75] The law of the Xing clan in Hefei City of Anhui Province provided for a clan assembly with the participation of all clan members and that voting by all the attendants should be applied to decide on any important case.[76] These provisions demonstrate a democratic model of justice for all.

According to Zhang and Zhou, Chinese people in feudal times were "so devoid of democratic tradition and consciousness of participating in politics" that this provides

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[72] *Ibid*, at 135.
[73] *Ibid*, at 144.
[74] *Ibid*, at 139.
[75] *Ibid,* at 144.
[76] *Supra* note 52, at 85.

little fertile ground for the recognition of lay participation in China even today.[77] They did not define the meaning of the word "politics" in their argument, and so it could be argued that the "politics" they mention refers only to governmental activities that, as mentioned above, bordered on the repressive and autocratic. On the other hand, however, you have the idea that Thomas P. O'Neill, long-time Speaker of the House in the U.S. Congress, once articulated, that "all politics is local".[78] When considering the politics of the local community, the politics of the clan,[79] the argument of Zhang and Zhou can be questioned since clan members frequently and fully accessed public affairs inside clans. From this perspective, it seems that Chinese people have had a long tradition of participating in democracy and politics, at the grassroots level at least.

(2) A Symbol Indicating Chinese Citizens' Receptiveness to Lay Justice

In addition to some legal scholars throwing doubt on the democratic tradition and consciousness of the Chinese citizenry, others totally oppose pushing lay participation in China, due to the Chinese people's supposed resistance to lay decision-making. Wei, for example, questions the feasibility of building lay participation in China, on the premise that the modern forms of lay participation, such as either the jury or lay assessor, are "incompatible with Chinese tradition", effectively suggesting that Chinese civilians have been so accustomed to the tradition of "idolatry to professional authority" that they "would rather accept incorrect decisions by professional judges than correct judgments by lay judges" and that they are not willing to "judge and punish their neighbours" since this may break their traditional culture of "preserving harmony between neighbours and peace of the local community".[80] Again, this argument

[77] *Supra* note 2, at 2.
[78] Thomas P. O'neill and Gary Hymel, *All Politics is Local: And Other Rules of the Game* (Bob Adams, Inc., Holbrook, 1995), at xv.
[79] Zhu, *supra* note 57, at 66.
[80] *Supra* note 3, at 31 and 32.

conflicts with the documented and historically important role clan justice has had in effectively resolving disputes.

As mentioned above, clan courts were granted *de facto* jurisdiction over most of the civil and criminal cases inside clans. Any decision made by a clan court was open to appeal to the local County Governor.[81] For example, the Chen clan law in Yimen County provided that "any dispute between the clan members, big or small, shall be brought to the clan court for a decision. Any irresolvable issue can then be appealed to the local government".[82] However, according to Li's research, the decisions made by the clan courts were rarely appealed by the case parties.[83] The lay judges of the clan courts, despite having neither professional legal education nor official appointment, imposed their authority well. They firstly "established their convincingness with their prestige"[84] since the lay judges of the various clan courts were all directly elected by the clan members from their respectable and trustworthy peers, through a democratic process.[85] Moreover, lay judges, living together with the case parties in the same community and "understanding the circumstances [of the case] and the feelings [of the parties], were able to mitigate conflict and resolve disputes by appeasing the parties".[86]

The idea that the system of clan justice was effective in resolving disputes and putting down conflicts is verified by the fact that Chinese people historically and voluntarily obeyed lay decision making rather than demonstrating "idolatry to professional authority"[87] so long as the lay authority was judged trustworthy. Based on

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[81] *Supra* note 49, at 142.
[82] *Ibid*, at 143.
[83] *Ibid*, at 142.
[84] Chen Hongmou, "The Letter to Jingsu Puyuan Yang", *Classis Works of the Royal Dynasty*, Vol.5 of 1898, quoted from *supra* note 52, at 84.
[85] *Supra* note 49, at 135.
[86] Zhang Haishan, "The People's Communities", *Classis Works of the Royal Dynasties*, Vol.58 of 1898, quoted from *supra* note 52, at 84.
[87] *Supra* note 3, at 31.

the above, it appears that Wei did not base his argument upon a sound understanding of historical practices. It would be logical for people to worship professional authorities because of their special knowledge and skills, and this may justify the first part of Wei's idea of the people's "idolatry to professional authority". However, this does not necessarily mean that Chinese people have traditionally placed exclusive trust in professional judges for legal decision-making, especially when considered against the longstanding tradition of clan justice, where lay judges dominated and their decisions were predominantly accepted.

Further, all of the judges serving at clan courts were clan members, peers and neighbours of the case parties, a fact which, in association with the lengthy history of clan justice, challenges Wei's argument of Chinese civilians' unwillingness to "judge and punish their neighbours".[88] Wei further argues that judging and, in particular, dispensing punishments to neighbours resulted in a level of offence and disharmony that conflicted with the prevalent Confucian idea of preserving community unity and the relationships between each individual.[89] However, in light of the successful practice of clan justice, it seems that if a decision was made by a group of impartial and trustworthy peers of the parties involved and took into account "the circumstances [of the case] and the feelings [of the parties]",[90] it was far more likely to appease the parties, than to offend them and disrupt the harmony of the community.

Clan justice was prevalent until its abolition by the Chinese Communist Party in 1949, when the People's Republic of China was established and the centralization of judicial power followed. However, the Communists, inspired by the far-reaching influence of clan justice, preserved the mediation function of clan justice by

[88] *Ibid*, at 32.
[89] *Supra* note 3, at 32.
[90] *Supra* note 86, at 84.

establishing 'the People's Mediation Committee' in each village, where a clan normally dwells. The working mechanism of clan justice has been largely passed on. In each People's Mediation Committee, the reputable and just villagers, normally elected by the villagers, are seated on a part-time base to mediate disputes inside the village.[91] In 1998, there were 9.8 million mediation committees with 9.17 million mediators in China, and 5.27 million cases successfully resolved,[92] a figure almost equal to the caseload of 5.72 milion cases received by all of the law courts in China in the same year.[93] Seemingly, lay people have continued to play a significant role in dispute resolution in China. This again verifies that idea that, in terms of legal decision making, Chinese people do not necessarily appreciate professional authority as "the entire Chinese society submits to concrete authorities".[94]

2.3.2 The Aborted Attempt to Introduce Juries

2.3.2.1 Context of the Jury Experiment

The decade 1902 to 1911 saw the fall of the last feudal dynasty and a movement towards reform and legislation. Actually, since the mid-nineteenth century, a number of

[91] Yu Yuhe and Liu Zhisong, "The People's Mediation Committee System and Its Redesign in China: A Subsidiary Discussion on the Crime Prevention Function of the Civilian Mediation", *Journal of Zhejiang University (Edition of Humanities and Social Sciences)*, Vol.37, No.2, 2007, at 36. For details about the mediation system in China, see, for example, Qiang Shigong, *The Mediation, Legal System and Modernity* (The Fazhi Press, Beijing 2001).

[92] He Bing, "The Reconstruction of Civil Mediation Organizations in China", *China's Justice,* No.2, 2004, at 24.

[93] See The Supreme Court of China, "The Working Report of the Supreme Court of China 1999", at the official website of the Court, see http://www.court.gov.cn/work/200302120013.htm, last visited on 20 Dec 2008.

[94] E. Alabaster, "Dips into An Imperial Law Officer's Compendium", *Monumenta Serica*, 1936, Vol.II, at 426-436, quoted from *supra* note 522, at 120.

western "powers" had invaded China with varying levels of success. Some forced the Ching Government to sign a series of unequal treaties, whilst others went so far as to proclaim their consular jurisdiction due to the unpalatable existence of cruel punishments and the absence of human rights in China, a fact that caused much embarrassment for the Ching authorities.[95] England, the United States, Japan and other countries promised to abandon their consular jurisdiction as long as China would undertake legal reforms to modernize its judicial system, abolish cruel punishments and restore human rights. Bowing to this pressure, the Ching Government committed to initiate a package of reforms to modernize its legal system, borrowing ideas and practices from the western democracies.[96]

In 1905, the Committee of Legal Reform chaired by Shen Jiaben and Wu Tingfang sent a delegation to Japan to conduct a feasibility study for introducing Japanese law. "Interestingly, at that time, Japan was treated as a western country and believed that it had successfully learned the legal system from western countries."[97] Shen and Wu specifically stated that Japan was selected as their model since "as a neighbouring country in Asia, Japan has the situation and language similar to China's, which will significantly facilitate us to borrow and introduce its law; since the very beginning of Japan's legal reform, it commissioned the officials to go to France, Britain and Germany to study the advanced legal systems of the European countries, through which a series of modernized statutes combining the virtues of various western jurisdictions have been promulgated".[98] In 1906, the Committee of Legal Reform presented The Code of Criminal and Civil Procedures (Draft) which copied almost exactly its

[95] Laifan Lin, "Judicial Independence in Japan: A Re-investigation for China", *Columbia Journal of Asian Law*, Vol.13, No.2, 1999, at 188.
[96] *Ibid.*
[97] *Ibid.*
[98] Zhang Guohua and Li Liangui, *The Preliminary Chronicle of Shen Jiaben* (The Publishing House of Beijing University, Beijing, 1989), at 106.

Japanese counterpart.[99]

Remarkably, The Code of Criminal and Civil Procedures 1906 (Draft) embodied 27 articles (from Article 208 to Article 234) that introduced a jury system and specified the relevant mechanisms, such as jurors' selection, summons, deferrals and exemptions, challenges, instruction and deliberation.[100] The jury to be established under this draft code exhibited a few particular features. First, the jury was to be applied to both criminal and civil cases.[101] Secondly, those qualified to be jurors were to be drawn from the narrow pool of the wealthy and respectable citizens, retired officials or ex-service officers, businessmen, school teachers and landlords; while common citizens were to be excluded[102]. Third, the proposed criminal and civil jury was composed of twelve and six jurors respectively,[103] while fourthly, in terms of decision-making, the simple majority principle was to be applied to all civil disputes and common criminal cases, with unanimity required for serious offences, those potentially incurring the death penalty.[104]

In reality, the criminal procedure law of Japan at that time had not yet introduced a jury system.[105] It is thus interesting that the Chinese legislators attempted to insert an Anglo-American style jury system into this Japanese influenced draft code. Incorporating the jury system into the code was actually advocated by Wu Tingfan, the Deputy Chairman of the Committee of Legal Reform, who had studied in the UK for

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[99] *Supra* note 25, at 252.
[100] See Article 213, 214, 210, 215, 221, 219, 225, 226, 232, 233, and 231 respectively.
[101] Article 209 of The Act of Criminal and Civil Procedures 1906 (Draft).
[102] Article 213 of The Act of Criminal and Civil Procedures 1906 (Draft).
[103] Article 218 of The Act of Criminal and Civil Procedures 1906 (Draft).
[104] Article 230 of The Act of Criminal and Civil Procedures 1906 (Draft).
[105] Japan did not promulgated jury act until 1923 and jury was applied in trials since 1928. See Li Chunlei, *A Study on the Evolution of Criminal Procedures in Contemporary China* (The Press of Beijing University, Beijing 2004), at 178.

years and qualified as a barrister.[106] In an attempt to obtain support from the supreme ruler, Wu and Shen delivered a special plea to persuade the Emperor to approve the draft code. In their plea the jury system was particularly commended:

> *"After carefully comparing and reviewing the legal systems of Europe and America, there are two traditional systems that are prevalent in various Western counties that should be urgently introduced – one is the jury and the other is the lawyer – both of which have been absent in the current legal system and are critical for rescuing China from humiliating exterritorial measures."*[107]

Seemingly, the reformers expected the jury to be one of the methods through which China's judicial system could be modernized, as well as accepted by the western countries.

2.3.2.2 Abolition and Impact of the Jury Experiment

The Code of Criminal and Civil Procedures 1906 (Draft) was forwarded to various superior officials and local governors for examination. However, the feedback that was received was by and large critical and negative. The overwhelming opinion was that the draft code "dramatically conflicted with the Chinese legal tradition and [its application] would be unrealistic".[108] Actually, the real reason behind the code's negative reception was that the local governors were unwilling to see the judicial power that had been monopolized by them and their ancestors for thousands of years, shared by common people.[109] Confronted with such strong objections, the Ching Government declined to implement the draft code and returned it to the Committee of Legal Reform for

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106 *Supra* note 25, at 252.
107 *Ibid.*
108 *Ibid.*
109 See *supra* note 105, at 55-56.

reconsideration. On 24th January 1911, the Committee came up with The Code of Criminal Procedure (Draft). This new Code lacked any provisions for the implementation of a jury system and, in fact, totally excluded lay participation.[110] The brave attempt to introduce juries into China was thus aborted.

"Institutions flaunted during the legislative reforms of the Ching Dynasty were scarcely unimpaired".[111] The unsuccessful bid to introduce the jury into China is further evidence of the Ching Government's hesitation to accept the widespread use of lay participation. In spite of its failure, the jury experiment "has far-reaching influence in the legal history of China".[112] It shocked the conservative bureaucrats with its eye-opening, modern perspective, and left "indelible footmarks in the history of China".[113] Guo, the noted scholar specialising in studying China's legal history, points out that "the criminal justice reform in the Republic of China (1912-1949) followed the footmarks of the Ching Dynasty" and even "the reform in China today has been largely its inheritance and development".[114] In 1927, the Republic of China, absorbing the lesson of the aborted jury experiment, issued The Lay Assessor Act 1927 that abandoned the jury and replaced it with the role of continental lay assessors. This post of continental lay assessors would later inspire the Chinese Communist Party to establish the "people's lay assessor institution", one that is still in use today.[115]

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[110] *Supra* note 25, at 266-267.
[111] *Supra* note 95, at 189.
[112] *Ibid.*
[113] *Ibid*, at 185-201.
[114] *Supra* note 25, at 405.
[115] Xie Zhenming, *The Legislative History of the Republic of China* (The Press of the College of Political Sciences & Law of China, Beijing 2000), at 1014; and see more discussion below.

2.4 Lay Participation under the Nationalist Government（1912 – 1949）

A widespread public desire for a new governmental regime and order eventually resulted in a revolution in October of 1911 and the ousting of the imperial dictatorship. The Chinese Nationalist Party (the 'Kuomintang') seized power and ruled the Republic of China until 1949 when it lost the civil war to the Chinese Communist Party and was driven out of mainland China to Taiwan. During the four decades of Nationalist Government rule, lay participation continued to exist in China.

2.4.1 A Mixed Tribunal System Existing in Name

The modernization and reform of the Chinese legal system through the transplanting of Western laws started during the late period of the Ching Dynasty and continued during the tenure of the subsequent Nationalist Government. In 1927, The Lay Assessor Act, which borrowed the mixed tribunal system from Germany, was enacted.[116] In light of the Act, Chinese courts at all levels adopted mixed tribunals to decide both civil and criminal cases. Each mixed tribunal was to be composed of one professional judge and two lay assessors, with the latter having the jurisdiction to decide on both factual and legal issues, just as a professional judge did.[117]

During the 38 years of the Nationalists' rule, they were continually forced to fight a number of political opponents. Between 1915 and 1916, one formidable warlord attempted to found a new dynasty while, in 1917, another sought to restore the Ching

[116] See Song Shijie, *A Study on Chinese Criminal Trial Systems* (The Fazhi Press of China, Beijing, 2005), at 247.
[117] See Shang Daigui, "The Historical Evolvement and Development of China's Mixed Tribunal System", *The Explorations (Qiu Suo)*, No.6, 2002, at 215; and *ibid*.

Government. Once the Nationalists had succeeded in putting down these two rebellions, a number of provincial governors initiated a series of internal wars lasting for around another decade, in an attempt to establish local autocracies independent of the Central Government.[118] Through cooperation with the Communists, the Nationalists defeated the provincial governors and consolidated nationwide power in 1927. However, that same year, cooperation between the Communists and the Nationalists broke down and decades of civil war between these two parties followed, until 1949. Stability and order during the Nationalist regime was shaken, not only by civil wars, but also by the 1931 to 1945 war the aim of which was to expel Japanese invaders.[119] In spite of the Nationalists' attempts to introduce aspects of the modern, Western legal systems into China, it seems that "over much of the country, the government's writ did not run; in war-time conditions, corruption and arbitrary military justice were more common than orderly judicial procedure".[120] Before the Chinese people had the chance to get to understand and accept the brand-new laws and judicial systems imported from the West, "law schools were being evacuated, courts burned, and the centres of government moved away"[121] during the uninterrupted wars. In light of these events, The Lay Assessor Act 1927, though enacted throughout China, was largely suspended.[122] In spite of this, however, the Act is still notable as the first statutory instrument to introduce lay assessors into China. More importantly, the Act inspired the Chinese

[118] See Roscoe Pound, "Law and Courts in China: Progress in the Administration of Justice", *American Bar Association Journal*, Vol. 34, April 1948, at 273.
[119] For more details of the history, see Chen Zhiping, *The Revolutionary History of China* (The Publishing House of the Institute of Political Sciences & Law of China, Beijing, 2006), chapter4 and 5, at 93-146.
[120] Lungsheng Tao, "Reform of the Criminal Process in Nationalist China", *The American Journal of Comparative Law*, Vol.19 of 1971, at 752.
[121] *Ibid.*
[122] *Supra* note 116, at 247.

Communist Party to establish their counterpart, the mixed tribunal system, in 1932.[123] After the Communists seized power nationally, this system continued to be preserved, and still survives today.[124]

2.4.2 The Commercial Arbitration Court – the *De Facto* First Instance for Commercial Cases

Commercial arbitration, as an alternative dispute resolution applicable to commercial cases, seems beyond the scope of the administration of justice. However, commercial arbitration during the Nationalist Government had some unique facets that resulted in it being the actual first instance of commercial cases.

2.4.2.1 Context of the Introduction of Commercial Arbitration

The Ching Government actually introduced commercial arbitration in 1904, by enacting *The Brief Regulation of Chambers of Commerce*. Article 15 of the Regulation stated that a merchant could submit the commercial dispute to the chairman of the local chamber of commerce, who should then summon the directors of the chamber to arbitrate the dispute in due course. In accordance with the Regulations, a number of chambers of commerce were constituted in various Chinese cities. Some, in big cities such as Shanghai, Tianjin, Suzhou and Chengdu, even specially recruited "a group of influential merchants, well versed in local trading customs and conventions, to compose a court of arbitration".[125] Documentary evidence indicates that these lay arbitrators

[123] *Supra* note 115, at 1014; and see more discussion below.
[124] See further details in Chapter 3.
[125] Fu Haiyan,"The Commercial Arbitration: the Social Resources in the Judicial

played a significant role in resolving commercial disputes. Taking the Chamber of Commerce of Suzhou as an example, between 1905 and 1906 the arbitration court received approximately 70 cases and over 70% were successfully resolved, while from 1905 to 1911 more than 380 cases were handled.[126]

After the establishment of the Nationalist Government, greater importance was attached to commercial arbitration, due to the unsuccessful court reforms. The court reforms, as part of a package of legal reforms during the late Ching Dynasty, were initiated in 1906.[127] Before that, as mentioned above, there had been no independent court system in China, as all cases were subject to the jurisdiction of various local governors holding both administrative and judicial powers at the same time. However, this reform was interrupted by the start of the Nationalist revolution in 1911. Soon after the Nationalists established their regime, the modernization and reform of the court system was placed on the agenda again and a four-level court hierarchy was established: the primary court, the regional court, and a high court situated in each county, metropolitan city and province respectively, with the Supreme Court located in the capital city. However, these reforms encountered insurmountable difficulties in practice.

Various local governments reported that they were unable to afford the establishment of the local court system due to a shortage of both funds and legal

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Reform – Dispute Resolution and the Commercial Arbitration Affiliated to the Chambers of Commerce in the Beginning Era of the Kuomintang Regime", See the official website of the Legal History Society of China, at: http://www.law-culture.com/showNews.asp?id=8464, last visited on 23 Nov 2008; Roy M. Lockenour, "The Chinese Court System", *Temple Law Quarterly*, No.5,1930-1931, at 258.

[126] Zhu Ying, *The Society and Country in the Transitional Time – A Historical Observation Based on the Chambers of Commerce in Contemporary China* (The Publishing House of the Normal University of Central China, Wuhan 1997), at 297-298; and Ma Min, *The Ma Min's Self-selected Articles* (The Publishing House of the Normal University of Central China, Wuhan 1999), at 285-286.

[127] *Supra* note 8, at 482.

professionals. For example, in Jiangsu Province alone, there were approximately 400 counties and cities, and the same amount of courts needed to meet the requirements of the reform scheme. However, "in 1903, the law schools were opened in this very old continent for the first time in its history".[128] Up to 1910, there had been only two law schools in China.[129] As Cheng Dequan, the Governor of Jiangsu Province complained, "the qualified [judge] candidates have been exhausted whilst the budget [for establishing the court system] has got no assured source".[130]

By the end of 1912, only 89 primary courts and 26 regional courts had been established throughout China, far from the numbers required by the reform scheme.[131] Being aware of the impracticability of the reforms, on 16th March 1913, 34 provincial governors jointly proposed to the Central Government that the establishment of regional courts and primary courts be suspended. One year later, the Nationalist Government accepted this proposal and enacted *The Regulation of County Governors Administering Judicial Affairs 1914 (Provisional)* and *The Procedural Regulation of County Governors Adjudicating Cases 1914 (Provisional)* acts. According to these, all regional courts and primary courts were cancelled, as county governors regained the judicial power they had enjoyed during the feudal era.[132] Judicial professionalism and independence was thus stymied by reality in China.

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[128] See Sam Hanson: "The Chinese Century: An American Judges Observations of the Chinese Legal Systems", *William Mitchell Law Review*, Vol. 28, 2001-2002, at 246.

[129] For details of China's legal education during this period of time, see Yao Qi, "Chinese Law Schools during the Late Period of Time of the Ching Dynasty and the Initial Stage of the Republic of China", *The Journal of the Normal University of Eastern China* (Edition of Educational Sciences), Vol.24, No.3, 2006, at 81-90.

[130] The news report, "Governor Chen's Critical Comments on the Judicial Organizations of Jiangsu Province", *Shen Daily*, 22 June 1913, at 6.

[131] Lin Minde, "Judicial Reforms during the Late Period of Time of the Ching Dynasty and the Initial Stage of the Republic China", *The Historical Journal of the Taipei Normal University*, Vol.26, June 1998, at 157.

[132] See The Chinese Government, *The Government Bulletin,* No. 687, dated 6 April 1914.

Invasion by western countries after the late nineteenth century had brought to China advanced scientific techniques and had largely stimulated the industry and commerce of the country.[133] This rapid commercial development was accompanied by a rising number of commercial disputes, which bothered local governors tasked with both administration and justice, so much so that "the government had to rely heavily on the social resources to resolve disputes."[134] These conditions resulted in commercial arbitration, which had been introduced during the Ching Dynasty, being preserved and further developed by the Nationalist Government.

2.4.2.2 Actual First Instance for Commercial Cases

On 28th January 1913, The Regulation of Arbitration Courts (amended on 28th July 1913 and 19th November 1914) bill was enacted, according to which, each chamber of commerce had to establish an arbitration court.[135] On 8th September 1914, the Government also enacted The Detailed Working Regulation of Arbitration Courts.[136] In accordance with these two regulations, each arbitration court consisted of one chairman, nine to twenty arbitrators selected from reputable merchants in the local business community, two to six investigators and two to six clerks and writers.[137] The chairman and arbitrators were "elected by ballot for two-year terms, and receive[d] a nominal salary".[138] Most remarkably, arbitration courts had the jurisdiction to arbitrate two kinds of case: (1) cases petitioned by disputing parties, and (2) cases rendered by

[133] See Zhu, *supra* note 126, at 297.
[134] Fu, *supra* note 125.
[135] Ruan Xiang (ed.), *China Yearbooks* (Vol. I) (The Commerce Publishing House, Shanghai 1928), at 1579.
[136] *Ibid,* at 1581.
[137] Fu, *supra* note 125.
[138] *Lockenour, supra* note 125, at 258.

local governors. In light of this regulation, when a local governor received a commercial litigation instituted by the plaintiff directly, without arbitration in advance, he could persuade (in practice, force) the parties to reach an arbitration agreement and then remand the case to the arbitration court.[139] For example, between 1914 and 1917, 31.7% of the cases handled by the arbitration court affiliated to the chamber of commerce in Suzhou City were directed there by the local governors.[140] Commercial arbitration thus became almost compulsory rather than an optional proceeding. Also in light of The Detailed Working Regulation of Arbitration Courts, either of the parties could appeal the arbitration decision to the local governor within a stated time limit, otherwise it became effective and had judicial enforceability.[141] Due to the compulsory nature and enforceability of commercial arbitration, it differed from other forms of alternative dispute resolution (ARD) for commercial cases, and was instead the first real legal action dominated by lay judges, as the arbitrators were drawn from local merchants.

2.4.2.3 Functions and Impact

Documentary evidence indicates that when the official judicial system did not function well, commercial arbitration, involving as it the participation of lay people, became an alternative and effective option for resolving disputes and restoring justice. On the one hand, and in contrast with local governors who "were never natives of the place where they held office, and so were ignorant of local customs and therefore

[139] Fu, *supra* note 125.
[140] See Zhu, *supra* note 126, at 297-298; and Ma, *supra* note 126, at 285-286. Please note that many governmental archives recording history of this era are fragmentary probably due to the damages of the unceasing wars.
[141] Fu, *supra* note 125.

unable to give a fair decision based on these customs",[142] lay arbitrators were "well versed in local customs and usages"[143] and so were able to make more appropriate decisions. On the other hand, injustice in the judicial area was rampant as "the officials were more interested in the fee than in a just decision".[144] Lay arbitrators, as peers of the parties in dispute, were all elected from the ranks of reputable merchants and served on a two-year basis, ensuring their incorruptibility and impartiality. This accounted for the fact that "although the decisions of these courts are not binding, yet the parties very seldom appeal".[145]

Limited information illustrating the operation of these arbitration courts in China survives. By 1915, there were 57 arbitration courts in the whole country whilst by 1934, 33 more had been established.[146] In terms of their caseloads, the arbitration court of Suzhou City, for example, handled at least 60 cases per year between 1914 and 1917.[147] Seemingly, the arbitration courts contributed greatly to the resolution of commercial disputes and to the conservation of judicial resources. Fu suggests that "the government relied heavily on arbitration courts in resolving disputes and alleviating local governors' caseloads."[148] The important role of the arbitration courts has also been recognised by Lockenour who points out that the arbitration courts "might with accuracy be considered a part of the Chinese court system" because "literally thousands of cases were decided every year in China by these courts".[149]

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142 Lockenour, *supra* note 125.
143 *Ibid.*
144 *Ibid*.
145 *Ibid.*
146 *Supra* note 135, at 1575.
147 See Zhu, *supra* note 126, at 297-298; and Ma, *supra* note 126, at 285-286.
148 Fu, *supra* note 125.
149 Lockenour, *supra* note 125, at 258.

2.5 The Mixed Tribunal System under the Communist Regime (1930 – 1949)

By the end of 1920s, the Chinese Communist Party had occupied remote regions (the so-called "Revolutionary Bases" or "Soviet Areas") of China and established its regime (the so-called "Red Regime" or "Soviet Regime").[150] When implementing their legal system, the Communists incorporated "Soviet Russian and Mongolian legal rules into traditional Ching law, Republic of China [the Nationalist Government] legislation, and Japanese and European law and procedure, as well as innovations within the Chinese revolutionary movement itself".[151] In 1932, The Composition and Working Regulation of the Ministry of Justice (Provisional) was enacted and a mixed tribunal system was introduced. In light of the Regulation, any court tribunal had to be comprised of one judge and two lay assessors; mixed tribunals were to be applied in all common criminal and civil cases; lay assessors were to be nominated by various associations of common people, such as farmers' guilds and labour unions and each citizen with the right to vote could be nominated; during the period they were in place, lay assessors were paid by their employer as normal; a lay assessor had the equivalent power of a professional judge, that is, he or she decided on both factual and legal issues; and a simple majority rule applied in decision-making.[152]

2.5.1 Implementation and Context

[150] *Supra* note 8, at 566.
[151] Marc Rosenberg, "The Chinese Legal System Made Easy: A Survey of the Structure of Government, Creation of Legislation, and the Judicial System Under the Constitution and Major Statutes of the People's Republic of China", *University of Miami International & Comparative Law Review*, Vol.9, 2000-2001, at 229.
[152] *Supra* note 8, at 566.

Little information survives regarding the implementation of the mixed tribunal system under the Communist Government between 1932 and 1949 but it seems that the introduction of lay assessors during this period occurred in three phases.

After the Communists established their regime, their first important task was to legitimise their rule. In terms of the judicial system, they invented a slogan of "justice of the people" in an attempt to win support from the public, and the mixed tribunal system was believed to be "an important measure" to help maintain popular support.[153] In this context, from the enactment of The Organisational and Operational Regulation of the Ministry of Justice 1932 (Provisional) to the end of 1934, when the Communists lost an important battle and were driven out of most of their territory by the Nationalist army, the mixed tribunal system was said to "exhibit the people's nature of justice."[154]

The Communists gradually restored their forces between 1937 and 1945, as the Nationalist Government was occupied with the war against the Japanese. In various regions occupied by the Communists, the mixed tribunal system was re-adopted to "unite the people" and "consolidate the regime".[155] A noteworthy feature of this system during this period was that different regions enacted different regulations to engender diverse practices. For example, in some regions, the lay assessors were nominated by the masses through associations such as farmer's guilds and labour unions; whilst in others, the lay assessors were directly selected by the courts themselves, or elected by the public. Meanwhile, in some regions lay assessors served on a fixed tenure base and were summoned to participate in trials in turn; while in other places, cases involving farmers, workers, civil servants, soldiers or marriage disputes were adjudicated upon by the specific lay assessors temporarily designated by the farmer's guild, labour unions,

153 *Ibid*, at 572.
154 *Ibid.*
155 *Ibid,* at 588.

the Government, the army or women's associations.[156]

The war against Japan ended in 1945 with the ending of World War II. The civil war between the Nationalists and Communists then broke out again, lasting until 1949, when the latter won and occupied the whole of the Chinese mainland. During the war, once the Communists seized a territory they established their regime immediately, in order to consolidate their reign. The mixed tribunal system, as a tool enabling "justice of the people", was instituted in each area.[157]

2.5.2 Functions and Impact

Due to the lack of material recording details of the implementation of the mixed tribunal system, it is impractical to evaluate the extent to which the institution helped to realize "justice of the people".[158] However, in light of the fact that it was fully implemented by the Communists, the institution seems to have helped "consolidate the regime".[159] No doubt due to its legitimising function, the mixed tribunal system was preserved by the Communists when the People's Republic of China was founded in 1949 and it continues to be in force up to the present day.[160]

2.6 Conclusion

Contrary to the prevalent view that lay participation had been absent in China until

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156 *Ibid.*
157 *Ibid,* at 605.
158 *Ibid,* at 572.
159 *Ibid,* at 572 and 588.
160 See the subsequent chapter for more discussion.

the mixed tribunal system was introduced by the Communists during the 1930s, it has actually existed in various forms for thousands of years, and throughout the country's history. Although civic participation in legal cases at the royal courthouses was absent in feudal China, due to the imperial monocracy, restricted educational provision, elitism, Confucian obedience and disciplinarian philosophy, lay people were in fact allowed to dispense justice in other ways, such as at the jury-like 'Three Deliberations'. Also, clan justice existed, an activity dominated by lay judges, and commercial arbitration courts sat, the court of first-instance for commercial disputes. These can all be considered as alternative forms of lay participation, since they involved civic participation in judicial decision-making. Meanwhile, since the beginning of the last century, China has been trying to introduce modern forms of lay participation taken from various western democracies, including an experiment with the Anglo-American jury and an attempt to recreate the mixed tribunal system from Germany. In reality, it seems that Chinese society has never been without lay participation in one form or another.

Some legal scholars expand their arguments to suggest that it would be difficult to implement lay participation in China, since civilians lack the tradition of participating in politics and accepting lay decision-making. Again, this argument conflicts with the history of lay participation in China. The 'Three Deliberations' process specifically allowed members of the public to participate in deciding complicated and important cases, whilst the clan justice system that was prevalent for thousands of years endorsed Chinese civilians' devotion to politics within the local community. Moreover, the available materials unanimously indicate that the different forms of lay participation in China's history, whether the 'Three Deliberations', clan justice or the commercial arbitration courts, were met with support rather than resistance from both citizens and the legislature. It is therefore questionable to oppose lay participation in China on the

grounds that people have traditionally been unreceptive to it.

Besides being well adapted to the particular social-political context, as indicated by the documentary evidence, the survival and popularity of these forms of lay participation in China can also be attributed to the recognised virtues of the practice. By introducing the participation of common people from the "lower social hierarchies",[161] a judicial proceeding became legitimate, as "it embodied decision making by the community and delivered public wills."[162] The collective decision making of the peers from the same community, those who understood "local customs",[163] "the circumstances [of the case] and the feelings [of the parties],[164] demonstrated the intelligence of the masses and helped to ensured a just decision was reached. The different forms of lay participation, whether the public election of lay judges or majority rule in terms of deliberation and voting, engendered a democratic spirit among the people. Meanwhile, lay people's participation helped to resolve disputes, which significantly alleviated the caseloads of the professional judges and thus whittled down judicial costs. In addition, and in contrast to the corruption of professional judges as frequently reported throughout China's history,[165] little evidence has been found to indicate corruption among lay participants, a fact which further serves to verify the greater inclination towards justice and the impartiality of lay judges.

It is undeniable that China, when compared with some western democracies, has a shorter history of implementing modern forms of lay participation, such as the jury. Nonetheless, in light of the above overview, it can be concluded that China does have a

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[161] See *supra* note 15, at 114.
[162] *Supra* note 22, at 34.
[163] Lockenour, *supra* note 125.
[164] *Supra* note 86, at 84.
[165] For more details about judicial corruption during China's history, see Sun Shaobin, *A Study on Judicial Corruption in China and the Possible Solutions* (The Qunzhong Press, Beijing 2006), section 3 of chapter 1, at 17-29.

tradition of civic participation in the judiciary, and that the different forms of lay participation have played a significant role in the legal system. It would therefore be somewhat arbitrary to call for the abolition of lay participation in China based on historical and traditional factors.

Chapter 3

Lay Participation in China Today: Shadow or Substance (I)

-- Evolution of the Current Mixed Tribunal System and a Theoretical Study on its Recent Reform

3.1 Introduction

As mentioned previously, opponents have based their objection to the preservation of lay participation in China on three arguments: (1) the system has by and large lost its vitality in the world, (2) the traditional culture required to help develop and maintain this system has been absent in China, and (3) the experimentation with lay participation in China today, the mixed tribunal system, has proved to be ineffective over the past half century or so. The previous two chapters demonstrated that lay participation is still very much alive today, both from a worldwide perspective and based on its presence and popularity in China over time, a fact which challenges the first two arguments that lay participation is in decline worldwide and is at odds with China's traditional culture.

However, though the first two arguments against lay participation have been proved to be questionable, over the last two chapters, it remains uncertain whether the third argument is justified or not. In order to fully understand the situation regarding lay participation in China, it is necessary to study its current status, something I will explore in this and the next chapter. Section 3.2 of this chapter briefly reviews the organic development of the mixed tribunal system – the exclusive form of lay participation in China today, from its establishment in 1949 and up to the 1990s when it suffered a dramatic decline, and will clarify the context within which The Lay Assessor Act 2004 (The LAA 2004), an Act which has attempted to resuscitate the mixed

tribunal system, came into being. Although it seems at first sight that The LAA 2004 shows the Chinese Government's willingness to continue with lay participation in China, a number of questions are still valid, for example, as the only method open for Chinese citizens to participate in the judicial process, can the reformed mixed tribunal system demonstrate its legitimacy when the judiciary is so dominated by CCP allies? Can lay participation's objectives be achieved, that is, to boost the public's democratic participation in justice; and, can Chinese lay assessors, regulated by the new Act, move beyond the passivism that has overshadowed their function for so long? In response to these questions, Part 3.3 will critically examines the reform measures brought about by The LAA 2004 and will discuss their pros and cons, based on a theoretical analysis, which will be further verified and strengthened by the empirical study presented in the next chapter.

3.2 Fluctuating Development between 1949 and 2004

As suggested in the previous chapter, in an attempt to emphasise the democratic nature of the Communist regime, and inspired by their political opponents the Nationalist Party, who instituted a mixed tribunal system similar to that used in Germany, the CCP introduced their own counterpart in the 1930s which was largely borrowed from the Soviet model.[1] The civil war between the CCP and the Nationalist Party entered its final stage in 1949. With the Communists seizing the majority of China's territory, they started to develop a new regime: the People's Republic of China (P. R. China). In September 1949, one month before the formal foundation of P. R.

[1] Wang Kanghan, "A Brief Review of the Improvements of the Mixed Tribunal System", see article published on the official website of the Supreme Court of China: http://www.hicourt.gov.cn/theory/artilce_list.asp?id=2853&l_class=3, last visited on 13 Oct 2008.

China, the CCP introduced a provisional constitutional law, *The Republic Charter 1949,* which set down their theories of government. It is remarkable that the mixed tribunal system, listed as a basic judicial tenet, was stipulated within this law. Over the sixty years since then, this system has experienced a turbulent history that can be divided into four phases.

3.2.1 Preliminary Development and the First Peak (1949 – 1966)

3.2.1.1 General Situation

It appears that the CCP attached great importance to the mixed tribunal system during the two decades following the establishment of the new regime, as evidenced by the creation of a series of laws and regulations in the 1950s and 1960s to bolster its effective implementation. Article 75 of *The Republic Charter 1949* elevated the use of lay assessors to a constitutional principle by providing that "courts apply lay assessors to adjudicate cases in accordance with law". Conforming to this mandate, The Organisational Regulation of Chinese Courts 1951 (Provisional), The Constitutional Law 1954, The Organisational Act of Chinese Courts 1954, The Supreme Court's Notice of Incorporating the Selection of Lay Assessors into the General Election 1963, coupled with a variety of guiding regulations enacted in the mid 1950s,[2] jointly established the legislative foundation to implement the mixed tribunal system, although

[2] See, for example, The Justice Ministry's Reply to the Inquiry that Whether Lay Assessors Are Entitled to Perform Judge's Duties Temporarily (1956), The Supreme Court's Reply to the Inquiry that Whether A Civil Case Deliberated by the Mixed Tribunal Already Shall Be Re-deliberated If the Case Has Been Conciliated by the Judge Alone (1957), The Justice Ministry's Reply to the Inquiry that Whether A Lay Assessors Can Conciliate Cases Alone (1957), and The Supreme Court's Reply to the Inquiry that Whether Lay Assessors Can Preside Over Court Conciliations Alone (1957).

there was still no special and integrated lay assessor code.

In light of these aforementioned laws and regulations, the mixed tribunal system in China at that time exhibited the following features: all first-instance cases had to go through lay assessment in principle, except for "simple civil cases, minor criminal cases and cases otherwise prescribed by law",[3] allowing the jurisdiction of China's lay assessors to reach its historically widest scope.[4] In the meantime, Article 6 of The Organisational Regulation of Chinese Courts 1951 (Provisional) granted lay assessors a jurisdiction equal to professional judges, save for the ability to act as the presiding judge on a mixed tribunal. Furthermore, *The* Supreme Court's Notice of Incorporating the Selection of Lay Assessors into the General Election 1963 clarified the selection process for lay assessors, so that each court had to independently select and nominate lay assessor candidates from the local community and generate a short list of nominees, with the local electorate then using the short list submitted by the court to decide on who should be appointed as a lay assessor. The tenure of each lay assessor was two years without any restraint on reappointment.

There have been very few (either scholarly or official) documents that portray an integrated picture of how the mixed tribunal system operated during the 1950s and 1960s. It seems that the institution enjoyed prosperity in the mid-1950s, as evidenced by the total number of lay assessors at that time, which reached a peak of about 200,000 (approximately 0.05% of the national population then) in 1956,[5] which was nearly four times the number in 2008: 55,681[6] (amounting to only 0.0004% of the national

[3] See Article 8 of The Organisational Act of Chinese Courts 1954.
[4] See further details below.
[5] See The Regulation of the Quota, Tenure and Selection of Lay Assessors, promulgated by the Ministry of Justice on 21 July 1956.
[6] The Statistical Office of the Supreme Court of China, "Lay Assessors in the Last Three Years – An Investigation of the Implementation of the Mixed Tribunal System", *The People's Court Daily*, 6 May 2008.

population[7]). Meanwhile, as indicated by a number of historical archives held by local governments, the lay assessors were widely used to adjudicate in criminal cases. For example, the archives of Chongming County of Shanghai City reveal that in 1956, 121 out of 162 criminal cases (74.69%) adjudicated by the county court employed the mixed tribunals with participation of lay assessors, whilst 154 out of 276 (55.8%) civil cases were handled in the same way. Each mixed tribunal employed by this court was composed of one judge and two lay assessors.[8] The archives from Taihu County of Jiangsu Province show that, from October 1955 to April 1956, 86% of the criminal cases subject to the jurisdiction of the county court used mixed tribunals as did all the 95 criminal cases decided by the court from May 1956 to November 1956.[9]

3.2.1.2 Reasons for Wide Use of Lay Participation

The exact reasons why lay participation was championed by the CCP during the first decade after the establishment of the new regime have not been officially revealed. However, based on the social-political context then, it is possible to understand their reasoning.

Despite the CCP announcing the nationwide establishment of its regime in 1949, the civil war against the Nationalist Party did not actually end until the mid 1950s. Even in the areas where the Communist Government had been instituted, battles against the

[7] The National Statistical Bureau of China, "The Statistical Bulletin of National Economy and Social Development in China in 2008", available at the official website of China's government, http://finance.people.com.cn/GB/8876392.html, last visited on 5 March 2008.

[8] The Chongming County Government, "Historical Archives of the Chongming County", available on the official website of the Chongming County Government, at http://www.shtong.gov.cn/node2/node4/node2250/node4426/node16052/node62096/index.html, last visited on 19 September 2008.

[9] See the historical archive on the official website of the Taihu County Government, at http://www.thx.gov.cn/mysite.php?u=dzb&Id=2493, last visited on 19 September 2008.

remaining armed forces of the Nationalist Party broke out from time to time.[10] Effectively, before the mid 1950s, the CCP was not yet firmly entrenched in China and so the party sought methods to secure and legitimise its rule over the country, including in the judicial domain. In light of the fact that the CCP continued to openly deride the despotism of its opponent: the Nationalist Party,[11] it was anxious to promote the democratic nature of its own regime. In terms of the judicial domain, the Communists invented a slogan – 'the people's justice' - utilising a suggestion made by Dong Biwu (the Chief Justice of the Supreme Court of China at that time) of "approaching the community, serving the community, regularising the community and securing the community".[12] The mixed tribunal system, involving as it did "justice as executed by the community",[13] seemed to fit well within this concept of "the people's justice".

On the other hand, before 1952, the judges appointed by the Nationalist Government had been initially largely retained after the CCP took over the national power, as the party was unable to build its own court system and foster Communist judges overnight. However, around mid-1952, a nationwide campaign to "reform the legal system" was launched by the CCP Government. The judges who served the old regime were proclaimed to lack "ideological and political purity and a proper class-consciousness". They were therefore by and large dismissed or even accused of a

[10] See the official report, "The Situation of the Initial Stage of the P. R. China and the First Conference of the 'United League'", see the official website of the Committee of the Political Consultancy, at http://cppcc.people.com.cn/GB/34961/56107/56109/56117/3919169.html, last visited on 16 September 2008.

[11] See, for example, Yang Tianshi, "The Preface of 'The History of the Kuomintang'", *Study Times*, 16 September 2008, at 16.

[12] Dong Biwu, *The Collected Edition of Legal and Political Articles of Dong Biwu* (The Law Publishing House, Beijing, 1986), at 229.

[13] See Xu Ershuang, "Values of the Mixed tribunal System in China", see the article on the official website of the Supreme Court of China, at http://www.hicourt.gov.cn/theory/artilce_list.asp?id=2785&l_class=7, last visited on 16 September 2008.

"counter-revolutionary" offence and imprisoned. Communist cadres and other activists with "proper political attitudes and social status" were instead installed into the courts.[14] However, it was unrealistic to staff all the courts with Communists, those who had had a legal education only in the short term, although many demobilized soldiers, workers, and other people politically affiliated to the CCP had been appointed as judges after a short period of legal training.[15] From 1949 to 1956, China's courts handled approximately 6,000,000 criminal cases and 8,500,000 civil cases. The conflict between the shortage of eligible judges and this huge caseload proved severe.[16] In this context, lay participation was therefore seen as one of the remedies and the lay assessors were expected to "introduce new blood into the judicial organs" to help with the overstocked caseloads.[17]

3.2.1.3 Genuine Democratic Participation by the People?

Despite its growth, the mixed tribunal system appeared to be more a political token than an efficacious mechanism to implement substantial lay participation, since the jurisdiction of the lay assessors was strictly circumscribed.

In the first place, lay assessors, as stated above, were only involved in

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[14] See Stanley B. Lubman, *Bird in a Cage – Legal Reform in China after Mao* (Stanford University Press, Stanford, 1999), at 47 and 48.

[15] See, for example, Shi Liang, "A Report about Completely Reforming and Mobilizing Chinese Courts of All Levels", *Xin Hua Monthly*, September 1952, at 33.

[16] See *supra* note12, at 228.

[17] See He Bin, "Concepts and Definitions of Justice during the Initial Stage of the P. R. China", see the author's blog at http://qzone.qq.com/blog/622007831-1215610437, last visited on 19 September 2008; for the situation of the shortage of judges, see, for example, The Harbin City Government of Heilongjiang Province, "Historical Archives of Harbin City of Heilongjiang Province", available at the local government's official website, at http://dqw.harbin.gov.cn/ http://218.10.232.41:8080/was40/detail?record=90&channelid=42961&presearchword, last visited on 19 September 2008.

first-instance trials, all the judgments of which, according to Article 11 of The Organisational Act of Chinese Courts 1954, were open to appeal by either the defendants or the public prosecutors, effectively making the lay decision-making devoid of finality.

Secondly, all the lay assessors were selected by the courts rather than randomly drawn from a general list of the citizens. Given that China's courts were all under the political and administrative leadership of the CCP,[18] the representativeness of the lay assessors was certainly open to question. I have been unsuccessful in unearthing statistical data indicating the composition of the lay assessors at that time, though it appears that "political accountability" was given much importance in the selection of lay assessors. As a matter of fact, before 1954, lay assessors were basically selected by the courts from mass associations, such as those unions of workers with close political relationship with the CCP or the local garrisons commanded directly by the CCP.[19] For example, according to Ding Xiuxiang, who served as a lay assessor between 1956 and 1957, he was appointed due to his "clean personal history" and his "upholding the country and the CCP".[20] In another example, the historical archives of Li Jing County of Shandong Province indicate that the lay assessors serving at the county court were all selected by the court from governmental departments such as the Women Association, the Organisational Department, the Department of Discipline Examination and the Civil Department.[21] Such overly emphasized political accountability apparently prejudiced

[18] See more details below.

[19] He Jiahong, "A Historical and Comparative Study of the Mixed Tribunal System in China", *Jurist*s, No.3, 1999, at 78.

[20] Ding Xiuxiang, "The Committee of the Political Consultancy Nominating Me to Be a Lay Assessor", Ding's memoirist published at the official website of the Committee of the Political Consultancy of the Pudong District of Shanghai City, see http://www.pdzx.gov.cn/infoAction.do?method=detail&news_id=3614, last visited on 17 September 2008.

[21] See The Li Jing County Government, "Historical Archives of Li Jing County",

courts' impartiality in selecting lay assessors, undermining the virtue of lay participation and making it a privilege of political activists in favor of the CCP, rather than a right to be equally exercised by all common people.

To sum up, it appears that the application of lay assessors at this stage was under the strict oversight of the ruling party, who appreciated its merits as a method of political propaganda and of handling the extremely heavy caseload of the courts.

3.2.2 Abdicant Courts but Surviving Lay Assessors (1966-1978)

China was thrown into turbulence and lawlessness over the decade of the Cultural Revolution from 1966 to 1976. Under the anarchist doctrine that all forms of government are oppressive, undesirable and abolishable, the slogan *"Smashing the Police, Public Prosecutors and Courts"* became prevalent. The entire judicial system, including the courts, was accordingly subverted, with all the judges dismissed.[22] A popular opinion in China's academia is that during the Cultural Revolution the lay assessors retreated with the breakdown of the court system.[23] This actually was not the case.

When the CCP realized that the extreme anarchism was endangering its regime, it

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available at the local government's official website, at http://www.lijin.gov.cn/Detail.aspx?k=5345, last visited on 17 September 2008.

[22] See, for example, *supra* note 8; the historical archive on the official website of the Harbin City of Heilongjiang Province on the official website of the Harbin Municipal Government, at http://dqw.harbin.gov.cn/ http://218.10.232.41:8080/was40/detail?record=90&channelid=42961&presearchword, last visited on 19 September 2008.

[23] See, for example, Yang Kai, "The Institutional Reconstruction: An Analysis and Discussion about Reforms and Improvements of the Mixed Tribunal System", see article on the united official website of China's courts, at http://www.chinacourt.org/html/article/200410/28/136592.shtml, last visited on 18 September 2008; Lin Wei, "Values of the Mixed Tribunal System in China", see the article on the official website of the Qingtian County Court, at http://www.qtfy.gov.cn/show.asp?id=1348, last visited on 19 September 2008.

commissioned the army to institute a military government and take over national power, including justice.[24] The disappearance of courts did not result in the end of lawsuits. On the contrary, confronting the dismissal of professional judges, the military government had to struggle with heavy caseloads. For example, according to the official statistics, there were approximately 1.2 million criminal cases filed during the decade of the Cultural Revolution.[25] In some regions, the military government readopted lay assessors to help with the caseloads, although these lay participants were known as 'community representatives' rather than lay assessors. According to some archives preserved by the local governments, criminal cases, in absence of the law courts, were adjudicated by special mixed tribunals composed of the temporary judges appointed by the military governments, in association with "the community representatives" nominated by the local community.[26] The scattered and fragmentary records from this turbulent period make it unrealistic to look into the specific selection process of these 'community representatives' and the concrete working mechanism of these special 'mixed tribunals'. However, lay assessors certainly did not die out during this era.

3.2.3 Transitory Rise (1978 – 1982)

[24] See, for example, The Resolution of Concentrating Force to Actualize the Task of Supporting the Leftists, Farmers, Workers, Military Governance and Military Training" 1967, promulgated by the CCP Headquarters on 19 March 1967; *supra* note 9; *supra* note 22; and The Wuhan City Government of Hubei Province, "Historical Archives of Wuhan City", available at the official website of the local government, at http://www.whfz.gov.cn/shownews.asp?id=43395, last visited on 19 September 2008.

[25] Cui Shengyuan, "The 4th Special Report in Memory of the 30th Anniversary of the 'Reform & Open' Policy – My Memory of the 8th Nationwide Conference on the Work of the People's Justice", see *The People's Court Daily*, 7 June 2008.

[26] See, for example, "Historical Dossiers of Jiangsu Province – Chapter of Justice", at the official website of the Government of Jiangsu Province, at http://www.jssdfz.gov.cn/dfz/detail?templet=detail5.jsp&id=18&searchword=ID=1197425369593 AND 陪审 AND XML_ID=18, last visited on 18 September 2008.

The death of Mao Tse Tung in 1976 marked the conclusion of the disastrous Cultural Revolution and was followed by the rise of a more open leader, Deng Xiaoping, to the position of CCP Chairman. The Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party, held in December 1978, was epoch-making in the legal history of China. At this meeting, "Restoring Democracy and the Legal System" was declared to be a major goal of the Party. According to the new party line, the entire judicial system was to be returned to the format it has been in prior to 1966. The mixed tribunal system was accordingly resurrected by legislation.

The Constitutional Law 1978 restored lay assessors' participation in justice as an essential judicial principle.[27] The Organisational Act of Chinese Courts 1979, as its predecessor The Organisational Act of Chinese Courts 1954, re-demarcated the jurisdiction of lay assessors to first-instance trials only, except for simple civil cases and minor criminal cases with the one-judge tribunal applicable and the cases otherwise provided by law.[28] Another remarkable milestone in the history of lay participation in P. R. China is that The Act of Criminal Procedure 1979 for the first time specifically fixed the quantitative dominance of lay assessors in mixed tribunals, in contrast with the previous practice where the laws remained silent on the exact proportion of judges to lay assessors in mixed tribunals, notwithstanding the fact that lay assessors in practice outnumbered the judges on occasion.[29] Article 105 of this Act provided that a first-instance case in a basic-level court or intermediate court should be adjudicated by a mixed tribunal composed of one judge and two lay assessors, except for cases launched by private prosecution and minor criminal offences, which should both be

[27] See subsection 2 of Article 41 of The Constitutional Law 1978.
[28] Article 9 of The Organisational Act of Chinese Courts 1979.
[29] See, for example, *supra* note 8.

adjudicated by a lone judge; a first-instance case in provincial high courts or the Supreme Court should be adjudicated by a mixed tribunal with the participation of one to three judges and two to four lay assessors. This attempt to use lay assessors in first-instance cases and confirm the quantitative dominance of lay assessors in mixed tribunals resulted in lay participation in China reaching its highest level yet.

The revival of the mixed tribunal system after those turbulent times occurred for three reasons. As well as the desire to return to the customary practices used before the Cultural Revolution, to legitimate the regime was again of the utmost importance for the CCP after the Cultural Revolution, which caused much dissatisfaction due to its undemocratic nature and caused huge suffering for the Chinese people.[30] Meanwhile, a shortage of professional judges troubled Chinese justice again after the Cultural Revolution. As a matter of fact, all the judges in China were dismissed and some were even banished to rural areas or factories to receive so-called "thoughts rehabilitation" during the Cultural Revolution.[31] In the meantime, almost all of the law schools in China were closed during this decade and did not reopen until 1977, resulting in a sharp decrease in the number of law graduates.[32] Due to these two factors, China again suffered a shortage of judges at the end of 1970s.[33] The slogan "the people's justice" was therefore recalled to encourage lay participation and in order to assist short-handed courts.[34]

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[30] The Research Department of the Party History of the CCP Headquarters, *The Brief History of the Chinese Communist Party* (The Publishing House of the CCP History, Beijing 2001), at 93.
[31] *Supra* note 22.
[32] See Zhang Liang, "Tasks and Purposes of the Legal Education in China", *Legal Daily*, 31 August 2008.
[33] *Supra* note 22.
[34] Xie Hongfei, "The People's Justice and Justice by the People", He Yongjun (ed.), *The Discontinuity and Continuity – The Construction of Chinese Courts (1978-2005)*, (The Publishing House of Social Sciences, Beijing 2008), at 1.

3.2.4 Durative Decline (1982 – 2004)

Unfortunately, the re-emphasis on lay participation did not last long and was disrupted by the professionalization of judges soon thereafter. Deng Xiaoping, the Chairman of the CCP as he then was, brought forward a party policy entitled the 'Four Modernisations' at the beginning of the 1980s, which included the modernisation of industry, agriculture, science and technology, and of national defence. In response to this, the Chinese authorities initiated reforms to improve the quality of governmental staff at the beginning of the 1980s. "Youthfulness, Knowledgeability and Professionalisation" were advocated as necessary characteristics for government officials, as they were believed crucial to the goal of the Four Modernisations policy.[35] Conforming to this reform, as supported by the ruling party, elitism and professionalism were addressed in the judicial domain as well.[36] Lay participation seemingly conflicted with this trend - towards an exclusively professional judiciary, and so was no longer deemed necessary or even desirable.

3.2.4.1 Legislative Regression

The participation of lay assessors in the judicial process was firstly removed from the constitutional mandates by The Constitutional Law 1982. The legislative decline came not alone but in pairs. The Act of Civil Procedure 1982 (Provisional) made the mixed tribunal optional and at the discretion of each court, providing instead that

[35] See Deng Xiaoping, *Selected Articles of Deng Xiaoping (Vol. II)*, (The People's Publishing House, Beijing 2001) at 326.

[36] Hu Yuhong, "The People's Law Court and the Mixed Tribunal System – The Judicial Democracy in the Views of Classic Authors, *Tribune of Political Sciences and Law* (*Journal of China University of Political Sciences and Law*), Volume 23, No.4, 2005, at 155.

“first-instance civil cases shall be adjudicated by the collegial panel composed of either judges exclusively or of lay assessors and judges, except for simple civil cases, to be adjudicated by single-judge tribunals”. The Organisation Act of Chinese Courts 1983 further generalised the flexible application of lay assessors to a wider dimension. Subsection 2 of Article 10 of this Act stated that all first-instance cases should be adjudicated by the collegial panel composed of either judges exclusively, or of judges and lay assessors, and simple civil cases, minor criminal cases and cases otherwise provided by law should be adjudicated by the single-judge panel. In addition, The Act of Administrative Procedure 1989, The Act of Civil Procedure 1991 and The Act of Criminal Procedure 1996, all remained in line with The Organisational Act of Chinese Courts 1983.

Besides a substantial decrease in the jurisdiction of lay assessors, the quantitative dominance of lay assessors in mixed tribunals was also forced to yield to the will of the courts. In contrast to The Act of Criminal Procedure 1979, which called for a majority lay assessors in mixed tribunals, The Act of Criminal Procedure 1996 made a remarkable amendment such that first-instance cases in basic-level courts and regional intermediate courts should be adjudicated by a panel composed of either three judges or of a three-member-mixture of judges and lay assessors, first-instance cases in provincial high courts or at the Supreme Court should be adjudicated by a collegial panel composed of three, five or seven judges, or of a three-member, five-member or seven-member mixture of judges and lay assessors. In other words, a three-member mixed tribunal, in light of this Code, might be composed of two judges in association with one lay assessor, or two lay assessors together with one judge, instead of the compulsorily two lay assessors and one judge as stipulated by The Act of Criminal Procedure 1979; likewise, a five-member or seven-member mixed tribunal would be

valid, even with only one lay assessor present.

Additionally, The Act of Civil Procedure 1982 (Provisional), The Organisational Act of Chinese Courts 1983, The Act of Civil Procedure 1991 and The Act of Criminal Procedure 1996 all unanimously reiterated the same standpoint – restricting the jurisdiction of lay assessors to first-instance cases and making any lay decision made by a mixed tribunal reviewable, and thus lacking finality.

3.2.4.2 Problematic Practice

Aside from the desire for legislative regression, it seems that the mixed tribunal system had proved problematic in practice.

-- Total Suspension or Sporadic Use

The legislative withdrawal of lay assessment was also accompanied by the decreasing application of lay assessors in practice. Since the mixed tribunal had been downgraded to optional and dependent upon each court's will, a number of courts actually ceased to use it entirely from the mid-1980s. For instance, two out of seven basic-level courts in Yangzhou City had suspended the use of lay assessors by 2005.[37] In another example, 83% of the first-instance cases in Jiangsu Province between 1981 and 1983 were adjudicated by mixed tribunal, but in contrast, the proportion dropped to 72% between 1984 and 1987. Since 1988, there have been no further reports regarding the use of lay assessors in this province.[38] It has also been noted by a number of academic publications and official materials that the mixed tribunal system has been in

[37] See the news report, "The Brief Implemental Situation of the Mixed Tribunal System in Various Courts in Yangzhou City"*, The People's Court Daily*, 24 April 2006.
[38] See *supra* note 26.

very limited use since the mid-1980s.[39]

In addition to its suspension in some courts, in more recent years lay participation has been excluded outside of specific court levels and case categories. According to Wei and Wang's study, in terms of civil or administrative cases, the mixed tribunal has been basically applied exclusively in the lower courts, such as the local courts and regional intermediate courts, whilst the provincial high courts have never employed the mixed tribunal in any first-instance trial until 1999, despite the fact that legislatively it has been applicable to any first-instance cases, whatever the court level.[40]

-- Poor Benefits for Lay Assessors

Subsection 1 of Article 39 of The Organisational Act of Chinese Courts 1983 provides that the courts are liable to pay appropriate subsidies to lay assessors, whilst leaving the specific payment amount blank. In practice, some lay assessors are paid very humble sums. According to an official newsletter, a basic-level court in Beijing City only pays a daily subsidy of RMB 1.6 Yuan (approximately sixteen UK pence) to each lay assessor, at a time when this sum was insufficient even to buy a day-return bus ticket. It has been reported that the lack of benefits directly undermines the enthusiasm and commitment of some lay assessors.[41]

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[39] See, for example, Wei Min, "Shall the Mixed tribunal System Be Suspended: The Developmental Direction of the Mixed Tribunal System", *Gansu Social Sciences*, Vol.4, 2001, at 31 and 32; Wang Minyuan, "The Mixed Tribunal System and Its Improvements", *Legal Studies,* Vol. 4, 1999, at 31; and the news report, "Foundations of Reforming the Setting of Lay Assessors' Function", *China Daily*, 4 Dec 1999.

[40] See Wei Min, "The Reform Direction of China's Mixed Tribunal System from the Perspective of Sino-American Comparison", *Social Sciences*, No.11, 2001, at 35; and Wang, *ibid*, at 31.

[41] See Ding Yisheng and Sun Lijuan, "A Comparative Study on the Applicable Area of the Chinese Mixed Tribunal System and Its Counterparts in the Western Countries", *Jurisprudence*, Vol.11, 2001, at 12; the news report, "Lay Assessors Accompany rather than Adjudicate and Full-time Lay Assessors Need to be Removed", at the official news website of Chinese government", see http://news.xinhuanet.com/legal/2004-04/02/content_1398688.htm, last visited on 2 March 2009; this reality has been reported as well by the Pengzhou Court of Sichuan

It would be unfair to merely blame the courts for their economy. As a matter of fact, China's courts have always been far from financially independent. The budget of each court in China has to be approved and the funds are appropriated by the Finance Department of the local government.[42] It has been reported that a number of local governments have stopped providing funds to the courts for maintaining lay assessors since the law no longer compulsorily requested the application of mixed tribunals. After losing this financial support, some courts have had to use lay assessors sparingly and have been unable to pay them generous subsidies.[43]

-- Appearance of 'Full-Time' and 'Long-Serving' Lay Assessors

'Long-serving' and 'full-time' lay assessors have been two remarkably abused practices, involving lay people who have served at courts for many years or even on a full-time basis.

(1) The Prevalence of 'Full-Time' and 'Long-Serving' Lay Assessors

In fact, irrespective of the decline in use of lay assessors, the conflict between the workload and a shortage of professional judges was never resolved in China during the 1980s and 1990s. For example, in 1978, there were approximately 70,000 judges in China and this number doubled to 156,000 in 1998.[44] In contrast, the caseload for all China's courts increased ten-fold over the same two decades, starting from

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Province and the Jingjiang Court of Jiangsu Province, *see* Wang Dide, "An Analysis of the Operational Situation of the Mixed Tribunal System in the Pengzhou Court", available at the official website of the Pengzhou Court of Sichuan Province: http://www.pzfy.org/Article/gzdt/qkfy/200608/977.html, last visited on 14 December 2007; and Gao Yujun, "Problems with Using Lay Assessors and the Possible Solutions", available at the official website of the Jingjiang Court of Jiangsu Province: http://www.jsfy.gov.cn/cps/site/jsfy/lilunyanjiu/dc_content_a2007110830351.htm, last visited on 14 December 2007.

[42] See further discussion in Chapter 5.

[43] *Supra* note 39, at 32.

[44] See Wang Limin, *A Study on Judicial Reforms in China* (The Publishing House of Law, Beijing 2000), at 31; see also Yu Jun, "Do Easterners Really Hate Lawsuits? – An Analysis of the Low Litigation Rate in Contemporary China and Japan", *Social Scientists*, No.3, 2000, at 78.

approximately 500,000 in 1978 and reaching 5.39 million by 1998.[45] Suffering from this high workload, plus the fact that simple civil cases and minor criminal offences had to be adjudicated by a single-judge panel according to the procedural laws then,[46] some courts complained that the collegial panel of three judges was by no means an economical form of manpower use and could not ease the courts' workload. The use of mixed tribunals with lay judges, though not demanded by the law, was therefore preserved by some courts essentially for the sake of alleviating their workload, since lay assessors were able to replace judges as tribunal members.[47] Driven by this desire to spread their caseload between more people, rather than by a wish to encourage lay participation itself, it seems that the courts' practice of using lay assessors substantially distorted what was originally intended in law.

Some of China's courts reemployed the same lay assessors for years or even decades.[48] For example, Jiang Shifeng served at the Court of Xingguo County of Jiangxi Province for thirteen years from 1993 to 2006, and participated in 720 cases in total;[49] Ma Hao was appointed as a lay assessor by the Court of Fengtai District in

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[45] See Xu Qianfei, "An Evaluation and Analysis of Chinese Judges' Quality", *People's Justice*, Vol.9, 2001, at 9.

[46] See Article 40 of The Act of Civil Procedure 1991 and Article 174 of The Act of Criminal Procedure 1996.

[47] See, for example, Cui Hailin and Wang Zhi, "A Survey Report on the Working Situation of Lay Assessors in Shangqiu City", see the official website of China's courts, at http://www.chinacourt.org/html/article/200806/06/306182.shtml, last visited on 26 September 2008.

[48] See, for example, Xiao Yang, "The Speech on the First Conference of Chinese Lay Assessors", see the official united website of China's courts at http://www.chinacourt.org/html/article/200709/03/262886.shtml, last visited on 28 September 2008, or the official website of the Chinese Communist Party of China, at http://cpc.people.com.cn/BIG5/64093/64094/6210478.html, last visited on 28 September 2008.

[49] See the news letter, "The Story about An Excellent Lay Assessor – Jiang Shifeng", at the united official website of China's courts at http://gzzy.chinacourt.org/public/detail.php?id=8417, last visited on 28 September 2008.

Beijing in 1994 and participated in over 2000 trials up until 2nd January 2004.[50] What is worse, some courts chose to recruit unemployed people or pensioners as lay assessors and allocated heavy caseloads to them, effectively transforming them into full-time court employees. Sun Bozong, for example, was employed as a lay assessor by the Court of Shapingba District of Chongqing City in 1998 after he became unemployed due to the bankruptcy of his company. Until 2005, he lived on his income from the court. During this seven-year period, he participated in approximately ten cases each month whilst the highest number was five cases within one week, an even heavier workload than some of the professional judges in the same court. Because he needed to participate in trials, one after another, he had to work at the court all day long during weekdays.[51] A more radical practice was reported by the Court of Wuhou District in Chengdu, Sichuan Province, where eight lay assessors were appointed in 2003 and were requested to work at the court four days a week within their two-year tenure. The court in return paid them monthly wages. It was admitted by the court that "the majority of the eight lay assessors were pensioners".[52] As documentary evidence has revealed, this phenomena of full-time lay assessors and lay assessors serving for many years was rather popular across the whole country.[53]

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[50] See the newsletter, "Shall the Mixed Tribunal System Turn Left or Right?", at the official website of China's governmental organisations, at http://www.chinaorg.cn/lrrd/01_lldt/2004-03/09/content_5019503.htm, last visited on 28 September 2008.

[51] See the newsletter, "Lay Assessors Pay out Both Labour and Money and Proceed Difficultly – the Phenomenon of Unbalanced Allocation of Caseloads Is Prominent", see the official news website of Chinese authority, at http://news.xinhuanet.com/politics/2005-11/14/content_3776737.htm, last visited on 27 September 2008.

[52] The court did not reveal the exact number of the pensioner lay assessors. See the newsletter, "Shall the Mixed Tribunal System Turn Left or Right?", at the official website of China's governmental organisations, at http://www.chinaorg.cn/lrrd/01_lldt/2004-03/09/content_5019503.htm, last visited on 28 September 2008.

[53] *Supra* note 39, at 33.

(2) Reasons for the Appearance of 'Full-Time' and Long-Serving Lay Assessors

As well as the distorted intentions behind the use of full-time lay assessors, there existed a series of deep-seated reasons responsible for their occurrence.

First, the term "selection of lay assessors", in China's judicial practice actually involved two parts: (1) each court "selected" the lay assessors from the local community to form a lay assessor pool for its use, whilst each lay assessor had to serve on the basis of a fixed tenure which was normally two years, prior to The Lay Assessor Act 2004, and (2) when a mixed tribunal needed to be formed, the court "selected" a specific lay assessor from the pool and designated him or her to participate in the trial.[54] Before The Lay Assessor Act 2004, Article 38 of The Organizational Act of Chinese Courts 1983 provided that lay assessors should be elected by local electorates. However, this provision was largely abandoned and, in practice, it became the norm that many courts made their own choices and (rather than randomly from a general list of the citizens such as the electoral register, as some common-law jurisdictions do[55]) selected the lay assessors from the local community, without any checks.[56] In other words, the courts had total freedom to decide who was selected.[57]

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[54] See Huang Suying, "A Brief Analysis of Problems of the Mixed Tribunal System and Possible Solutions", the official website of China's courts, at http://www.chinacourt.org/html/article/200807/22/313160.shtml, last visited on 3 March 2009.

[55] R. Gwynedd Parry, "Random Selection, Linguistic Rights and the Jury Trial in Wales", *Criminal Law Review*, Oct 2002, at 807.

[56] The Supreme Court of China, "The Interpretation of the Draft of The Lay Assessor Act 2004", this Interpretation, together with the Draft of Lay Assessors Act 2004, was submitted to the Standing Committee of the Chinese People's Congress for the latter's reference and deliberation on 2 April 2004, available at the official news website of China's government: http://www.people.com.cn/GB/14576/28320/32776/32780/2445485.html, last visited on 3 March 2009; and *supra* note 39, at 33.

[57] For example, an official report from the Supreme Court of China revealed that before *The LAA 2004*, 41.5% of the lay assessors were directly selected by the courts while 23.7% were nominated by the relevant organisations and appointed by the courts after reporting to the corresponding standing committees of the local People's

Secondly, unlike in some common-law countries where refusal to attend court for jury service without a lawful excuse may be classed as contempt of court, there was no punishment for such behavior in China. In the absence of such a compelling reason to attend, coupled with the humble subsidies, it was common for lay assessors in employment to be reluctant to perform their duties in court. Some of them even chose to evade court service by regularly asking for exemption or deferral.[58] In this case, some courts, having the unbounded discretion of selecting lay assessors, gave up recruiting those lay assessors who were in employment, and instead exclusively selected those pensioners and other unemployed people who were more responsive and available.

Thirdly, in contrast to some countries where the workload of each lay assessor was strictly circumscribed, (for example, Russian lay assessors serves no more than two weeks per year, whilst each German lay assessor serves only eight times each year at the criminal court of Bochum, and four times in Frankfurt.[59]), there was no such limitation in Chinese law. This left the courts free to overuse a lay assessor if they so wished.

Fourthly, given that some local governments refused to provide funds for maintaining lay assessors, then in an attempt to axe expenses involved in selecting,

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Congresses, with few lay assessors elected by the local electorates. See the Supreme Court of China, "The Interpretation of the Draft of The Lay Assessor Act 2004", this Interpretation, together with the Draft of Lay Assessors Act 2004, was submitted to the Standing Committee of the Chinese People's Congress for the latter's reference and deliberation on 2 April 2004, available at the official news website of China's government: http://www.people.com.cn/GB/14576/28320/32776/32780/2445485.html, last visited on 3 March 2009.

[58] See the newsletter, "Lay Assessors Pay Out Both Labour and Money and Proceed Difficultly – the Phenomenon of Unbalanced Allocation of Caseloads Is Prominent", see the official news website of Chinese authority, at http://news.xinhuanet.com/politics/2005-11/14/content_3776737.htm, last visited on 27 September 2008.

[59] Stefan Machura, "Fairness, Justice, and Legitimacy: Experiences of People's Judges in South Russia", *Law & Policy*, Vol.25, No.2, 2003, at 128 and 134.

training and managing lay assessors, some courts endeavored to limit the number of lay assessors and allocated the entire workload to a few people, rather than retain a large pool of them.

Due to the above four reasons, courts sometimes recruited only a few pensioners or other unemployed people, then allocated massive caseloads to them, effectively transforming them into full-time court employees, such as what happened to Sun Bozhong.

The practice of having long-serving lay assessors can be attributed to the problematic legislation and also to absence of financial support. According to The Supreme Court's Notice of Incorporating the Selection of Lay Assessors into the General Election 1963, the tenure of each lay assessor was normally two years, without the limitation of reappointment. Needless to say, dismissing the old lay assessors and selecting new recruits every two years was much less convenient than simply reappointing the old assessors. In the meantime, training new lay assessors was expensive and so was highly undesirable, especially since the Government placed ever greater financial restrictions on the courts. In these circumstances, some courts were inclined to reuse the same lay assessors and refused to replace them with new blood for many years. As indicated by the case of Sun Bozhong, the phenomena of both full-time and long-serving lay assessors was concurrent and linked.

(3) The Adverse Impacts of 'Full-Time' and Long-Serving Lay Assessors

Notwithstanding the fact that these full-time and long-serving lay assessors were commended by some courts for their contribution to the overloaded caseload,[60] they

[60] See, for example, Xiao Yang, "The Speech on the First Conference of Chinese Lay Assessors", see the official united website of China's courts at http://www.chinacourt.org/html/article/200709/03/262886.shtml, last visited on 28 September 2008, or the official website of the Chinese Communist Party of China, at http://cpc.people.com.cn/BIG5/64093/64094/6210478.html, last visited on 28

also brought with them various problems.

The full-time lay assessors endangered the representativeness of lay assessors. As mentioned above, to ensure the responsiveness and availability of lay assessors, some courts preferred to select pensioners and the unemployed. This may have undermined the cross-sectional nature of the lay assessor pool. What is worse, the pool may have not changed for years or even decades, due to the endless reappointment of certain assessors.

One of the merits of lay participation, one that has been widely acknowledged, is that, in contrast to case-hardened judges, lay assessors are normally more sensitive, responsive and patient in trials, because they "are selected for a period of several years and are only occasionally summoned to the courts to serve on a particular day".[61] Rarely entering into the courtroom, each trial could be a whole new story for them.[62] However, after having assumed a heavy caseload, one equivalent to that of a judge, and after serving for years or even decades, the lay assessor will probably act "out of routine", like a judge, with his or her sensitivity and enthusiasm eroded.[63]

Another value of the mixed tribunal is the check and balance function of lay participants. Lay assessors are expected to prevent potential injustice handed out by both judges and courts, entities that are "bound by organisational restrictions" and thus "susceptible to the state's direct influence."[64] In contrast, a lay participant from the community, and without administrative affiliation to the court, may be free of these "organisational restrictions". However, where a lay assessor works full-time and lives on the income from the court, a financial bondage is likely to be established. With the

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September 2008.

[61] Sanja Kutnjak Ivkovic, "An Inside View: Professional Judges' and Lay Judges' Support for Mixed Tribunals", *Law & Policy*, Vol.25, No.2, 2003, at 95.

[62] *Ibid*, at 96.

[63] *Ibid.*

[64] *Ibid*, at 95.

risk of losing a good income, the lay assessor may have to bend his or her behaviour to satisfy the court, his employer, and become "susceptible to" the court's (and indirectly the State's) "direct influence".

Meanwhile, the check function of lay participants also embodies the idea that they, as an independent party representing the community, enter into the courtroom and the judge's chamber to oversee the judicial proceedings and prevent potential misconduct by the judge. For the successful realisation of this function, the independence and impartiality of the lay participants is necessary. However, once the lay assessors work together with their professional colleagues on a day-to-day basis, for several years, they might gradually form alliances which may counteract any potential role as an independent check. It has been revealed that after Russian lay assessors report to the same courtroom for a long period of time, they may be inclined to "became dedicated to their respective judge."[65] In the USA, grand juries are also said to "become dedicated to a prosecutor with whom they regularly work."[66] Likewise, it has been reported in China that concerns such as "maintenance of human relationship", "office politics" and "face saving" can hold back the lay assessors from impeaching their professional colleagues, even when they have found the latter's conduct to be akin to lawbreaking.[67]

In addition, acting as a lay assessor and participating in the administration of justice is the right of each Chinese citizen. The prejudice in favour of pensioners and the unemployed in the selection of lay assessors resulted in a deprivation of the rights of

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[65] John C. Coughenour "Reflections on Russia's Revival of Trial by Jury: History Demands That We Ask Difficult Questions Regarding Terror Trials, Procedures to Combat Terrorism, and Our Federal Sentencing Regime", *Seattle University Law Review*, Vol.26, 2002-2003, at 406.

[66] *Ibid.*

[67] The newsletter, "Shall Lay Assessors Work Full-time", see the on-line news report of the website of the official TV station of China, at http://www1.cctv.com/news/china/20040105/101426.shtml, last visited on 28 September 2008.

other citizens. Unlimited reappointment of these assessors served to worsen the situation.

-- The Passivism of Lay Assessors

A judicial adage, popular in China in the 1980s and 1990s, is that "Lay assessors accompany [judges] rather than adjudicate [cases]", and this captures succinctly and accurately the very inactive role of the lay assessors.[68]

On one hand, lay assessors were said to remain silent like puppets during trials and deliberations.[69] On the other hand, lay assessors were sometimes criticised for their "passive obedience to the judge in the deliberation, which has transformed the deliberation into the judge's speech instead of the group discussion of the mixed tribunal".[70] In an investigation into the deliberation records of a sample of 50 cases, the lay assessors said nothing but "yes, I agree" in 42 (84%) cases; whilst in the other eight (16%) of cases, the lay assessors totally agreed with the judges, presenting only some supplementary ideas.[71]

This passivism on the part of the lay assessors can be attributed to a series of reasons beyond that of their inappropriate compensation as mentioned above.

The first possible reason was that the lay assessors encountered practical difficulties in performing their duties. As revealed in a report of the Supreme Court of

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[68] See, for example, the newsletter, "China Will Renovate the Mixed Tribunal System and Resolve the Problem of 'Accompanying Rather Than Adjudicating'", available at the official news websites of Chinese government: http://news.xinhuanet.com/legal/2004-04/02/content_1398688.htm, last visited on 15 Oct 2008; and the newsletter, "Zhao Weizhong: From 'Not Adjudicating But Accompanying' to 'Not Only Accompanying But Adjudicating'", at the official website of China's courts: http://www.chinacourt.org/html/article/200701/08/229756.shtml, last visited on 15 Oct 2008.

[69] Newsletter, "The Mixed Tribunal System Faces Four Difficulties", *Legal Daily*, 8 May 2008.

[70] He Bing, "Merits of the Mixed Tribunal System", *The People's Court Daily*, 25 April 2005.

[71] *Ibid.*

China, 51.8% of the lay assessors serving at the courts of Shanghai City admitted that they always had problems in understanding the specific legal points of the cases.[72] Needless to say, a lay assessor cannot be expected to participate fully and effectively in a trial if they lack a clear understanding of the case itself.

The problem of insufficient instruction being given to the lay assessors seems to have been another reason for their inactivity. Before the promulgation of The Lay Assessor Act 2004, only subsection 2 of Article 38 of The Organisational Act of Chinese Courts 1983 stipulated that a lay assessor had the same jurisdiction and duties as a judge, except for when acting as the presiding judge in a mixed tribunal. However, except for this provision, there was no other law or regulation to specify the duties and rights of lay assessors in detail. Besides, according to Zhao and Du's investigation, numerous courts did little to instruct the lay assessors what to do and not to do in practice. Without knowing their specific duties and rights, the lay assessors may have chosen to remain silent or follow the judge's lead.[73]

In addition, as stated above, punishments such as contempt of court were not established in China, so there were insufficient restrictions upon the behavior of lay assessors. The penalties that could be imposed for a lay assessor's impropriety, such as evading court service and sleeping during the trial, included only warnings, criticism or at most suspension. These were, of course, far less of a deterrent than a charge of contempt of court would be. Furthermore, being suspended lay assessment might actually have been what the lay assessor who failed in their duties was hoping for.

As mentioned above, the tenure of lay assessors in China was two years without a

[72] Newsletter, "The Mixed Tribunal System Faces Four Difficulties", *Legal Daily*, 8 May 2008.
[73] Zhao Xingwu and Du Hui, "The Investigation of the Implemental Situation of the Mixed tribunal system in the Courts of Nanjing City", *The People's Court Daily*, 23 May 2006.

reappointment restriction, nor a restriction on workload. Where a lay assessor assumed a heavy caseload and kept working for years (for example Ma Hao who participated in 2000 trials within ten years.[74]), it would have been highly unlikely that his or her enthusiasm would not have diminished over time. As Shen Deyong, the then Vice Chief-Justice of the Supreme Court of China, pointed out, "overwork undermined the participant interests of the lay assessors which have already been affected by their poor subsidies".[75]

3.3 The Lay Assessor Act 2004 -- Real Change or Rhetoric?

In light of the above discussion, it can be seen that the mixed tribunal system in China experienced an unsteady evolution after 1949. Further, all of the norms regulating lay assessors were scattered across provisional regulations and varying laws regarding court organisation and judicial proceedings, rather than in a special and integrated statute. Over the last two decades of the twentieth century, the application of lay assessors was in a state of continuous decline, a decline accompanied by very inconsistent practices. For this reason, and as mentioned in the introduction of the thesis, since the late 1990s there has been some controversy regarding the continuance of the mixed tribunal system, and even lay participation as a whole in China, and three schools have thus surfaced, first those who advocate the entire suspension of lay participation, those who wish to replace lay assessors with juries, and those who wish to preserve lay assessment but improve the mixed tribunal process. However, it is striking that at the beginning of the new millennium, the first special act regulating the application of lay assessors, The Lay Assessor Act 2004, was enacted and came into

[74] See *supra* note 52.
[75] See *supra* note 58.

force on 1st May 2005, just a century after China's first experiment at introducing the jury in 1906. This seems to signal that in the maelstrom of controversies about lay assessors and lay participation, the Chinese authorities, neither embracing the full abolition of the mixed tribunal system, nor initiating revolutionary reform by replacing it with the jury, have taken a moderate path by adhering to the renaissance of the mixed tribunal system. However, it is debatable as to how far the Act has actually secured the future of the institution, or even successfully addressed the perceived problems. To fully understand this Act, its particular context must be reviewed.

3.3.1 The Context of Enacting The LAA 2004: Legitimacy Crisis for the Judiciary

On 8th May 1999, the Supreme Court of China submitted The Motion on Reforming the Mixed Tribunal System to the Chinese People's Congress for deliberation. The official materials published by the Chinese authorities, besides going some way to admitting the ineffectiveness of the old system, did not specify any other reason for reviving lay assessors, but instead unanimously presented well-used arguments such as the need to: democratise the judiciary, enhance the people's oversight over the judiciary, and improve the impartiality of the judiciary.[76] Without further study, it is impossible to conclude whether the Chinese authorities, via The LAA

[76] See, for example, Xiao Yang (the Chief Justice of the Supreme Court of China then), "Insisting on Innovating the Mixed Tribunal System and Enhancing Judicial Impartiality", *The People's Daily*, 5 June 1999; and see the Supreme Court of China, "The Interpretation of the Draft of The Lay Assessor Act 2004", this Interpretation, together with the Draft of Lay Assessors Act 2004, was submitted to the Standing Committee of the Chinese People's Congress for the latter's reference and deliberation on 2 April 2004, available at the official news website of China's government: http://www.people.com.cn/GB/14576/28320/32776/32780/2445485.html, last visited on 3 March 2009.

2004, genuinely intends to render more democracy to the civilians and increase openness and justice in the judicial arena. However, in light of the above discussion, the misuses of lay assessment have become so obvious as to attract acute academic criticism, which certainly might have discomposed China's authorities. Meanwhile, it is clearly true that enhancing the legitimacy of the judicial system has become critical to China's leaders since the end of last century.

3.3.1.1 Legitimacy Crisis Domestically

Ivkovic observes that: "the level of public support is especially crucial in countries in transition that are emerging from the legacy of communist regimes and are unaccustomed to public accountability. Corruption of public officials and widely shared perceptions about its extent are serious threats to the integrity of public officials that diminish the level of public support for both the institutions and the leaders."[77] Unfortunately, this appeared to be the case for China at the end of last millennium.

China's transition from a planned economy to a market one has caused a rush for money across all walks of life, something which even judicial organs have been unable to escape from. For instance, 438 cases of miscarriage of justice were found and 460 judicial officials were punished for corruption in Heilongjiang Province alone, between 1993 and 1996.[78] An official report published by the Supreme Court of China illustrates that from 1998 to 2004, about 8,000 judges and other court employees (accounting for approximately 2.7% of the entire court staff) were punished for lawbreaking

[77] *Supra* note 61, at 94.
[78] Liu Junhai, "The Legal Reforms in China", Jean Jacques Dethier (ed.), *Governance, Decentralization and Reform in China, India and Russia* (Kluwer Academic Publishers, Boston 2000), at 395.

behaviour.[79] This level of corruption can sow seeds for social and political tension, can threaten the very fabric of a society, and undermine the effectiveness of a state, plus the political legitimacy of a government. Corruption in the judicial domain may even be more critically damaging than in other governmental apparatuses, because of the very nature and function of the judiciary. Courts are the direct law enforcement apparatus of a state, and it is through courts that a state can deprive its citizens of liberty, property and even life. Judicial corruption might turn the rule of law into the rule of individuals pursuing their own private interests, which may largely destroy public confidence in the judiciary's ability to implement law, weakening the viability and effectiveness of a legal system and finally destabilizing the social order. These theories have been verified by a series of social surveys in China. As one of the leading media sources in China, *The News Weekly of China* conducted a survey among 504 citizens in 2001, generally inquiring of the respondents' evaluations of four legal occupations, including lawyers, public prosecutors, the police and judges. The survey found that 59.7%, 22.6%, 8.9%, and 8.7% marked "satisfactory" against the above four legal professions, respectively.[80] Disturbingly, Chinese judges were ranked at the bottom of the list, with only 8.7% of the respondents seeing them as "satisfactory". This negative image of China's judges can be testified to by another, larger investigation initiated by the Zero Investigation Company in Beijing. For this investigation, 5,679 respondents residing in the four metropolitan cities of Beijing, Shanghai, Guangzhou and Wuhan participated. Of these, 40.7% gave negative evaluations of Chinese judges, coupled with a burst of criticisms

[79] Xiao Yang, "The Working Report of the Supreme Court of China 2005", available at http://www.legaldaily.com.cn/bm/2005-03/18/content_197161.htm, last visited on 14 Dec 2007.

[80] Zhang Jingping, "Chinese Judges Encounter the Crisis of Public Trust", *China News Weekly*, No.44 of 2001, available at the official news website of Chinese government http://news.xinhuanet.com/world/2001-11/28/content_137242.htm, last visited on 14 Dec 2007.

as to their disorder, incompetence, injustice and bureaucracy.[81]

Aside from the CCP monopoly on coercion and military force, a crucial factor in determining the prolonged rule and survival of the Party is the level of popular support it maintains. It seems, however, that rampant corruption within the judiciary has repeatedly scarred the image of the CCP, and the instances of corruption mentioned above and injustice in the judicial system as a whole have had a quite debilitating effect on the Party's legitimacy. The corruption in the judicial realm apparently has shocked the supreme hierarchy of this country. President Jiang Zemin (who was also the Chairman of the CCP then) stated that "the [corruption] problem has seriously besmirched the image of our judicial staff and damaged the reputation of the [Chinese] Communist Party and the Government."[82]

3.3.1.2 Legitimacy Crisis Internationally

Apart from the widespread crisis in public trust faced by the courts, China's entry into the WTO in 2001 has brought with it another big challenge to the judicial system of the country. Foreign investors have criticized China's current justice system, saying that it is not able to satisfy the needs of foreign enterprises trying to do business or expand their business in the country. The criticisms that these foreign investors have raised include: (1) that the CCP remains supreme in China, not the law; (2) the lack of trained judges; and (3) the level of corruption.[83] According to Oster, "China's economy

[81] He Weifang, "Court Reforms and Judicial Independence in China – An Observer's Insight and Speculations", available at the official website of the Organisation of Elections in China, at http://www.chinaelections.org/NewsInfo.asp?NewsID=106989, last visited on 14 Dec 2007.
[82] Jiang Zemin (The President of the P. R. China then), "The Speech at the National Conference on Political and Legal Affairs in Beijing", *People's Daily*, 26 Dec 1997.
[83] See Zou Keyuan, "Judicial Reform in China: Recent Developments and Future

will not mature until there is a judicial system that produces a modicum of accountability among government and party officials."[84] Although the CCP often resists criticisms from the West on the grounds of national particularities, it has recognised that in the interests of economic prosperity, the international view of China's judicial system must be rehabilitated.[85]

Further international political pressure for China to legitimise its judicial system has come from its impending commitment to the International Covenant on Civil and Political Rights (ICCPR), which China signed in 1998, though there has been reluctance to ratify the Covenant since current judicial practice may not satisfy its specific provisions. For instance, Article 14(1) of the ICCPR provides that: "all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The CCP's control over the judiciary[86] and the ubiquitous corruption in the judicial domain, have made it impossible for China to deliver "a competent, independent and impartial" justice system. Needless to say, China's evasion of the commitments imposed by the ICCPR are seen from an international perspective as an acknowledgment of the illegitimacy of its justice system.[87]

Understanding that a dysfunctional judicial system may severely undermine the legitimacy of its governance, the CCP brought forward the policy of "pushing judicial

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Prospects", *International Lawyer*, Vol.36, No.3, 2002, at 1042.

[84] Shai Oster, "Jiang's Biggest Gamble", *Asia Week*, 19 Oct 2001, at 34.

[85] The Chinese authority has started to address the impacts of China's entry to WTO on the judicial reform in this country, see, for example, Guan Baoquan, "China's Entry into WTO and Its Innovations in the Judge System, *People's Judicature*, No.12, 2000, at 29-32.

[86] See further discussion below. Also see Chapter 5 for more discussion.

[87] Protection of human rights in China has been widely and acutely criticised by the West, see, for example, Guo Luoji, "A Human Rights Critique of the Chinese Legal System", *Harvard Human Rights Journal*, Vol. 9, 1996, at 1-14.

reform" in its Fifteenth Party Plenary Meeting in 1999.[88] Conforming to this party line, the Supreme Court of China presented the much-anticipated "Five-year Guidelines of Reform", which claimed to "establish a fair, open, efficient, trustworthy, and sound judicial system" and in which the revival of the mixed tribunal system was placed on the agenda.[89]

3.3.1.3 Why Reformed Mixed Tribunal rather than Jury?

Given the criticism of China's judicial system, both domestically and internationally, it would seem to be the wrong time to adopt the ideal of abandoning the mixed tribunal system which, despite its failings, has been the only process to indicate that the common people's voices are not totally excluded from the judicial process. Further, involving citizens in justice should enhance the openness and trustworthiness of the judiciary, which would in turn satisfy the aims of "the Five-year Guideline of Reform". Moreover, facing increasingly unscrupulous judicial corruption, it seems true that the Chinese authorities need to have ordinary people in the courtroom to help with "overseeing the judiciary",[90] in an attempt to "discipline the judges to execute law seriously and handle cases impartially".[91] In a word, there exists an inherent impetus to preserve lay participation in China. On the other hand, as mentioned above, some right wing scholars have advocated the introduction of a jury system into China, though

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[88] See, for example, Guo Chengwei and Song Yinghui (eds.), *A Study on the Contemporary Judicial Systems* (The Legal Publishing House, Beijing, 2002), at 423-438.

[89] See, for example, The Supreme Court of China, "The 3rd Five-year Reform Plan of Chinese Courts (2009-2013)", available at the official news website of the Chinese Government, see http://news.xinhuanet.com/legal/2009-03/26/content_11074127_4.htm, last visited on 10 Nov 2009.

[90] The Supreme Court of China, *supra* note 76.

[91] *Ibid.*

official documents have not responded favourably to this proposal. However, traditionally the CCP realizes its dominance over the judiciary via politically controlling the judges.[92] As a matter of fact, the majority of the professional judges in China are CCP members who are believed to have so-called "political accountability".[93] The introduction of juries would result in the devolution of a substantial amount of power in deciding guilt or innocence, to the common people. This would dramatically challenge the CCP's dominant position in the judiciary and thus be too radical to be acceptable. Incorporating these concerns, the idea of reforming the current mixed tribunal system to a moderate degree would seem to be the most desirable solution.

3.3.2 Assessing The LAA 2004

On 28th August 2004, approximately five years since the Supreme Court of China submitted The Motion of Reforming the Mixed tribunal system to the Chinese People's Congress, The LAA 2004 was enacted. It was officially claimed that the Act heralded the beginning of a new era for judicial democratisation in China. For example, Xiao Yang, the Chief Justice of the Supreme Court of China as he then was, declared that "lay assessors' participation in adjudicating cases, fully manifesting the judicial

[92] See more details in Chapter 5.

[93] The proportion of the judges politically affiliated to the CCP in the whole China has not been officially revealed. It nevertheless has been a prevalent phenomenon that CCP members have occupied most of the judge seats in China. For instance, I randomly looked over the official websites of three courts -- the Changzhou Intermediate Court, the Dehua County Court and the Xiamen Intermediate Court, where 83%, 80% and even 100% of the judges are politically affiliated to the CCP respectively. *See* the official websites of the three local governments, available at: www.jsczfy.gov.cn/plus/view.php?aid=15671, www.dhjgdj.gov.cn/news/show_dj_04.asp?id=634, and www.xmcourt.gov.cn/ShowArticle.asp?ArticleID=1149, last visited on 14 December 2007.

democracy of socialism in our country, is an important aspect of the people's involvement in the national administration".[94] The academic community in China also enthusiastically welcomed the reforms brought by the Act. According to Xiao, "the renewed [lay assessor] institution contributes to assure impartiality and democracy of the judiciary and deter judicial corruption".[95] This positive evaluation has been reinforced by numerous reports and comments from the mass media.[96] But is the new Act substantial or symbolic? The following sections will analyse the pros and cons of The LAA 2004 and present a conclusion.

3.3.2.1 Major Changes Brought in by The LAA 2004

The LAA 2004 contains only twenty principled articles relating to lay assessors and remains ambiguous about some issues. As a remedy, the Supreme Court of China, in association with the Ministry of Justice, promulgated The Regulation of Selecting, Examining and Appointing Lay Assessors on 13th December 2004 (The RSEALA 2004)

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[94] Xiao Yang (The Chief Justice of the Supreme Court of China then), "The Interpretations of the Motion of Deliberating 'the Resolution of Reforming the Mixed Tribunal System'", quoted in Xu Xiaoqin, "A Review of the Mixed Tribunal System in China", available at the united official website of China's court http://www.chinacourt.org/html/article/200505/11/161087.shtml, last visited on 14 December 2007.

[95] Xiao Tiancun, "The Reconstruction of the Mixed Tribunal System in the Context of Chinese Judges' Professionalization", *Journal of Yunnan University (Law Edition),* No.3 of 2005, at 122-123; for similar discussion, also see, for example, Zhao Xinghui, "The Reform of the Mixed Tribunal System: Establishing the 'Mixed Model' of the People's Participation in Justice", *Journal of Southwest University of Political Sciences & Law*, Vol.6 of 2005, at 88-94; Wang Yanhui, "An Analysis of the Mixed Tribunal System from the Constitutional Perspective", *Journal of Gansu Lianhe University (Social Sciences)*, Vol.22, No.4, September 2006, at 88-91; Li Chaoling and Zhong Hong, "The Value Review and Institutional Repair of the Mixed Tribunal System in China", *Legal System & Society*, No. 4, 2006, at 167-168.

[96] See, for example, the news reports titled "27,000 Lay Assessors Will Take Their Posts to Try Cases with Judges Since 1st May" and "The People's Lay Assessors", respectively on *The People's Daily*, 24 April 2005 and 17 August 2005.

while the Supreme Court of China promulgated The Provisional Regulation of Administration of Lay Assessors 2005 (The PRALA 2005) on 6th January 2005. These three legal documents embody the major changes discussed below.

-- Encouraging the Use of Lay Assessors

The Organisational Act of Chinese Courts 1983 placed the decision to use a mixed tribunal under the jurisdiction of each individual court in China, by providing that "cases of first instance shall be adjudicated by a collegial panel composed of judges or of judges and lay assessors; simple civil cases, minor criminal cases and cases otherwise prescribed by law shall be adjudicated by a single judge".[97] As a result, the use of lay assessors declined during the 1980s and 1990s. The LAA 2004 appears to promote the use of lay assessors by specifically providing two circumstances where a mixed tribunal must be used, unless otherwise provided by law and for those cases to be decided by summary procedure with a judge seated alone, as follows:[98] (1) first-instance criminal, civil and administrative cases with far-reaching social implications, and (2) any case in which the litigants request the application of a mixed tribunal. This provision seems significant in two respects. First, in contrast to the previous exclusive jurisdiction of the courts to initiate a mixed tribunal, this provision specifically requests the courts to employ mixed tribunals in particular cases, likely causing the courts to use lay assessors more regularly. Secondly, for the first time since the foundation of P. R. China, the litigants are entitled to apply for the use of mixed tribunals. This could be seen as a move by China towards principles of justice such as

[97] Article 10 of The Organisational Act of Chinese Courts 1983, emphasis added.

[98] In China, simple civil litigations and minor criminal offences can be handled with the summary procedures where a single judge sits alone and applies the simplified procedures (for example, the litigants are allowed to be summoned by telephone by the judge in a civil case), *see* Article 142-146 of The Act of Civil Procedure 1991, and Article 174-179 of The Act of Criminal Procedure 1996.

"each citizen has the right to be judged by his peers".[99] Of all the major changes embodied in The LAA 2004, none are more fundamental than the above two.

-- Promoting the Quality of Lay Assessors by Addressing Education and Training Needs

Subsection 1 of Article 38 of The Organisational Act of Chinese Courts 1983 simply provided that any qualified voter on the electoral register aged above 23 could serve as a lay assessor, except for those deprived of the political rights due to their criminal offences, regardless of educational achievement. Without a limitation on educational level, it was reported that some courts even hired illiterate citizens to act as lay assessors, simply to fill vacancies in collegial tribunals.[100] Some scholarly materials suggested at the time that the education level of the lay assessors was in part to be blamed for their incompetence.[101] The Chinese authorities, when considering the reform, also held that "because lay assessors have the jurisdiction equal to judges, their educational eligibility should not be much lower than that of judges; otherwise they may be unlikely to perform the duties well due to their unsound quality and ability."[102] To address these problems, Article 4 of The LAA 2004 specifically sets forth the educational eligibility level, and situates it at a higher level than before by requiring the lay assessors to have at least a college diploma.

No nationally applicable rules to regulate the training of lay assessors existed before The LAA 2004. Each court managed the training of lay assessors at its own discretion. Due to the shortage of funds and manpower, a number of courts were found largely to ignore the training of the lay assessors, which was believed to contribute to

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[99] *Supra* note 61, at 98.
[100] *Supra* note 58.
[101] See, for example, Shen Jungui, "A Negative Observation about the Mixed Tribunal System in China", *Chinese Lawyers*, No.4, 1999, at 14.
[102] The Supreme Court of China, *supra* note 76.

their frequently reported incompetence and inactivity.[103] In response to this, Article 15 of The LAA 2004 specifically assigns the responsibility of training lay assessors to each individual court, as well as the local government's Department of Justice at the same level. However, this one article does not specify the details as to how to execute the training. As a remedy for this, Article 10-14 of The RSEALA 2004 specifically commission each court to train the lay assessors and specifies that the training should involve legal knowledge, court rules, judicial moralities and disciplines. Since the courts are assigned the duty of training lay assessors, The PRALA 2005 promulgated by the Supreme Court of China establishes a whole chapter in which 8 articles are set out to further regulate the execution of this training.

Clearly, the previous incompetence of lay assessors is expected to be overcome by enhanced educational eligibility and the provision of adequate training.

-- Specifying Selection Procedures for Lay Assessors

As stated above, prior to The LAA 2004, the courts were largely dominant in selecting lay assessors from the community. Chaotic practices grew up, such as the exclusive recruitment of pensioners and the unemployed as lay assessors. Meanwhile, there was no regulation as to how the courts should allocate the workload to each lay assessor, leaving the courts free to over-use one specific lay assessor and transform him or her into a full-time court employee. The LAA 2004 intends to resolve these problems by setting forth three articles.

Articles 7 and 8 lay down a four-step process for selecting lay assessors. First, each court individually decides the number of the lay assessors it actually needs, followed by a process of approval by the standing committee of the local People's Congress at the same level. Secondly, Article 8 sets-out three methods for each court to

[103] See, for example, *supra* note 101, at 13.

use to identify candidates: (1) "self-nomination", where a citizen who wants to be selected as a lay assessor is allowed to nominate himself/herself to the local court, (2) "employer-nomination" where employers are encouraged to nominate their employees to the courts for lay assessor selection, after obtaining the employees' agreement, and (3) "nomination by grassroot organisation" where various "grassroot organisations"[104] are permitted to nominate local residents to the courts as lay assessor candidates, after securing the consent of the nominees. These three nomination methods are intended to yield enough candidates for the courts' selection. Third, these candidates are to be screened by each court jointly with the local government's Department of Justice, so that a shortlist of suitable candidates can be produced, and fourthly, the candidates on the shortlist are appointed by the Standing Committee of the local People's Congress at the same level. This four-step process prescribed by The LAA 2004 attempts to provide a clear routine and involve more parties, such as the Standing Committee of the local People's Congress, and the Department of Justice of the local government level, to oversee the selection of lay assessors. In this way, courts are expected to help prevent discriminatory selection in favour of specific groups, such as pensioners or the unemployed.

Further, Article 14 of The LAA 2004 provides that each court shall produce a roster of lay assessors and "randomly select" the specific lay assessor from the roster, then designate him or her to each specific case. This should serve to prevent the

[104] To control and regulate the community from the very grassroot level, Chinese authorities have respectively established the so-called "The Committee of Urban Residents" in each town and city and "The Committee of Villagers" in each village of China since 1954. These two "committees" are often called "grassroots organisations" or "grassroots mass organisations". "The Committee of Urban Residents" and "The Committee of Villagers" are respectively established in each block of a town, city and each village, enjoying the jurisdiction to tackle some local administrative affairs. See The Organisational Act of Urban Residents' Committees 1998 and The Organisational Act of Villagers' Committees 1998.

previous practice where some courts kept summoning one or several lay assessors repeatedly, then commissioned them all the workloads, eventually transforming them into the full-time court workers.

-- Promoting the Welfare of Lay Assessors

The LAA 2004 attempts to improve the benefits provided to lay assessors in three ways. First, Article 18 mandates that the courts will compensate lay assessors for their travel and accommodation expenses. Second, it is reaffirmed that employers of the lay assessors are forbidden to reduce or covertly reduce the assessors' salaries, bonuses and other benefits during the period of their court service. Thirdly, Article 18 provides that any lay assessor without employment shall be paid an allowance calculated on the basis of multiplying that assessor's serving days, with the average daily income of local workers over the last year. Article 14 of The RSEALA 2004 adds that lay assessors shall also be paid allowances and stipends during their training process.

-- Addressing Local Governments' Financial Support

As discussed above, each of China's courts is financially dependent upon the local government. During the two decades prior to The LAA 2004, some courts complained that their budgets for maintaining the lay assessors had been slashed or even totally rejected by the local governments, so that they had to reduce or discontinue the use of lay assessors.[105] To address these complaints, Article 19 of The LAA 2004 prompts local governments to provide adequate financial support, specifying that each court is permitted to place the potential expenses for employing lay assessors into its normal annual budget, which should then be approved and duly provided for by the local

[105] For example, The Court of Yuzhong District of Chongqing City and The Court of Jinshi County of Hunan Province have revealed this reality; see *supra* note 58; and the news report, "The Court of Jinshi County Emhpasizing the Application of Lay Assessors", at the official website of the Court of Jinshi County, at http://zjfy.changde.gov.cn/zjfy/93731278484301414 4/20061010/165606.html, last visited on 14 December 2007.

government.

3.3.2.2 Substantial Reform or Redesigned Political Token?

In light of the changes discussed above, it seems that The LAA 2004 does introduce measures to address some of the defects of the old system and so is a departure from the previously vague attitude towards the mixed tribunal system. It is particularly striking that The LAA 2004 urges the courts to adopt lay assessors in cases with far-reaching social implications, grants defendants the right of selecting to be tried by mixed tribunals, and establishes a clearer process for lay assessor selection. These factors appear to demonstrate that the CCP is moving towards the abandonment of its absolute monopoly over justice, by shifting towards the use of a greater lay input into judicial decision making. However, before coming to this conclusion, more intensive analysis of The LAA 2004 needs to be undertaken.

-- Democracy or Meritocracy

It is generally agreed that lay participation is not only a legal but also a political/democratic system whereby citizens have democratic opportunities to become involved in justice – one of the most important of public affairs.[106] Aristotle embraced the belief that sharing in the administration of justice should be a feature of citizenship and one of the particular features of democracy is indeed that "all men should sit in judgment, or that judges selected out of all should judge in all matters, or in most, or in the greatest and most important."[107] If participation in justice is to be enshrined as an

[106] See, for example, Jeffery Abramson, *We, the Jury: The Jury System and the Ideal of Democracy*, (Basic Books, New York, 1994), at 1-2; and Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, Chicago1986), at 25 and 26.

[107] John D. Jackson & Nikolay P. Kovalev, "Lay Adjudication and Human Rights in

essential democratic right deriving from citizenship, it ought, at least theoretically, to be granted to the majority of citizens or "all men" as stated by Aristotle, since "democracy…envisages rule by all of the people."[108] Acknowledging this, the first paragraph of The LAA 2004 states that the enactment of this Act aims to "ensure that citizens lawfully participate in the judiciary". However, the subsequent provisions and the Act's subsequent implementation seem to have departed from this declared legislative purpose.

The LAA 2004 systematically encourages elitism in lay assessors. As mentioned above, according to Article 4, the educational level of each lay assessor should not be lower than college diploma level. According to the statistical data of the fifth national census, only 4.27% of the population aged above 25 have college diplomas or a higher education level. In other words, 95.73% of the citizenry in China in theory lose the opportunity to become a lay assessor if Article 4 is strictly implemented.[109] Appreciating that the required educational eligibility could be hard to reach in practice, The RSEALA 2004 makes a concession, providing that the educational eligibility may be lowered for elderly candidates. Apparently, this concession only applies to a very specific group.

Smooth running of trials certainly demands that lay assessors have basic abilities such as literacy. The LAA 2004 may have been driven by practical motives to address the educational level of lay assessors, but a question mark arises as to whether this justifies granting the well-educated minority the privilege of participating in justice, whilst denying the vast majority of people the equivalent right. In principle, the people

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Europe", *The Columbia Journal of European Law*, No.1 of Vol.13, 2006/2007, at 88.

[108] James Gobert, *Justice, Democracy and the Jury* (Ashgate Publishing Ltd., Dartmouth 1997), at 99.

[109] See the official website of the National Bureau of Statistics of China, at http://www.stats.gov.cn/tjsj/ndsj/renkoupucha/2000pucha/html/t0401.htm, last visited on 5 April, 2009.

retain political power through two basic means in a democracy: "representative democracy" whereby the people elect the representatives to manage public affairs, and "direct democracy" where the citizenry are directly involved in public decision-making. In theory, there should be equal political opportunity for citizens under both approaches.[110] Lay participation is apparently an instance of the latter case. However, where the great majority of citizens are deprived of the right of access, it is unsafe to conclude that the use of lay participation serves a democratic function. Indeed, it could be argued that this particular example of lay participation more closely resembles a meritocracy or aristocracy, discriminating in favour of an elite minority.

Furthermore, the educational criteria set out in The LAA 2004 also appear to conflict with China's own constitutional doctrines. Subsection 2 of Article 33 of The Constitutional Law of China 1982 provides that the citizenry of the People's Republic of China are equal before laws. Article 34 further mandates that each citizen aged above 18 has the right to voting and stand for election regardless of their ethnic group, race, gender, occupation, family background, religion, education (emphasis added), property status and length of residence. The only exception is those deprived of political rights due to criminal offences. The LAA 2004 belongs to normal law, under which all the citizenry should at least theoretically be "equal". Furthermore, it can be argued that the right of "standing for election" should be an integrated right, embodying being elected or selected to participate in the administration of national affairs including the judicial matters. Yet the Act explicitly excludes the great majority of the Chinese population on the grounds of inadequate education.

As stated above, it appears that the Chinese authorities expect that the enhanced educational requirements will improve the ability of lay assessors. However, it is

[110] *Supra* note 108, at 88.

questionable whether this solution will effectively resolve the incompetence of lay assessors.[111] Without sufficient empirical evidence, it would be unreliable to conclude that a lay person with a university degree, compared with his or her peer with a high school diploma, would be significantly more competent in participating in trials, especially since neither have received a legal education. In other words, it is arguable that setting an overly high educational eligibility level at the cost of sacrificing the right of most citizens to participate is arbitrary rather than useful.

-- Problematic Selection of Lay Assessors

As mentioned above, Articles 7 and 8 of The LAA 2004 provide for the selection process of lay assessors, as follows: (1) each court individually decides the number of lay assessors and reports to the Standing Committee of the local People's Congress for approval, (2) each court identifies the lay assessor candidates, through self-nomination by an individual citizen or from a nomination by the candidate's employer or "grassroot organisation", (3) the nominated candidates are to be scrutinized by each court in association with the Department of Justice of the local government, who will form a shortlist, and then (4) this shortlist will be approved by the Standing Committee of the local People's Congress. This four-stage process involves three different national organs: the court, the local government's Department of Justice and the Standing Committee of the local People's Congress. In an attempt to further clarify their respective jurisdictions, Article 5 of The PRALA 2005 provides a quota of lay assessors for each court by articulating that the number of lay assessors at a court should be no less than one-half of the judges and no more than the total of the judges. Article 13 of The PRALA 2005 specifies that "each court should firstly screen the lay assessor candidates and produce a preliminary shortlist, together with the personal information

[111] See Chapter 4 for further discussion.

materials of each candidate, to be submitted to the Department of Justice of the local government for the latter's advice" (emphasis added). Apparently, the Department of Justice is excluded from the screening process and its role is circumscribed to that of an advisor rather than decision-maker. However, it is questionable that the Department of Justice takes this advisory job seriously, since the lay assessors work neither for the Department's own use nor in its own interests. Moreover, even if the task is taken seriously, The PRALA 2005 does not specify on the basis of what criteria exactly the Department of Justice should "advise". To further confirm the decisive position of courts, Article 14 of The PRALA 2005 states that "taking into account the advice of the Department of Justice of the local government and within the quota, each court decides the final shortlist." Article 16 adds that "the final shortlist shall be approved by the court at the next higher level that only rechecks the eligibility qualification of each lay assessor". In addition, Article 17 provides that the final shortlist shall be submitted to the Standing Committee of the local People's Congress for appointment. This might actually be simply a final rubber-stamp of the process rather than an effective check, for the same reasons as apply to the Department of Justice.

In light of above, it is unpersuasive to argue that a democratic and open process for selecting lay assessors has been established in China since The LAA 2004 was propagated, for the reasons outlined below:

(1) Genuine Opportunity for Participation or 'Ornament' of Limited Accessibility

Article 5 of The PRALA 2005 sets forth the quota of lay assessors at each court as one-half of or one-to-one with the judges at the same court. In light of this, lay assessors in China can never outnumber judges. Actually, as a minority among legal professionals, the number of judges is always very small, and so, circumscribed by this

quota, lay assessors in China are likely to remain a minority as well. By May 2008, there were 55,681 lay assessors in China,[112] whilst the national population then was approximately 1.3 billion[113]. The percentage of lay assessors was therefore approximately 0.0004% of the total population, so there was, in effect, only one lay assessor for every 25,000 Chinese people. It therefore seems that the likelihood of a Chinese citizen being called-up is as small as winning the lotto. However, different from the lotto, which occurs regularly, according to Article 9 of The LAA 2004, the tenure of China's lay assessors is five years, implying that this 'lotto game' will not reopen for another five years. What is worse, looking through The LAA 2004, The RSEALA 2004 and The PRALA 2005, there is no prohibition on the reappointment of lay assessors. It is therefore legislatively possible that a citizen will get no chance to be selected as a lay assessor, even after five years of waiting. In light of this tiny probability of being selected, acting as a lay assessor in China is more of an 'ornamental' opportunity than a realistic option for the common people.

(2) Problematic "Nomination" Model for Identifying Candidates

In contrast with the procedures in other countries, such as that of compiling lists of prospective jurors from the electoral registers in England, Wales and the United States,[114] Article 8 of The LAA 2004 provides that candidates for lay assessment be identified, either by self-nomination or by nomination from employers or a grassroots organisation. This "nomination" model is based upon the premise that the candidates

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[112] The Statistical Office of the Supreme Court of China, "Lay Assessors in the Last Three Years – An Investigation of the Implementation of the Mixed Tribunal System", *The People's Court Daily*, 6 May 2008.

[113] The National Statistical Bureau of China, "The Statistical Bulletin of National Economy and Social Development in China in 2008", available at the official website of China's government, http://finance.people.com.cn/GB/8876392.html, last visited on 5 March 2008.

[114] *Supra* note 108, at 102; see also R. Gwynedd Parry, "Random Selection, Linguistic Rights and the Jury Trial in Wales", *Criminal Law Review*, Oct 2002, at 807.

have the enthusiasm to nominate themselves and that employers or grassroots organisations are willing to nominate their employees or members. This dependence upon volunteering and nomination causes various problems. First, The LAA 2004 provides for a five year tenure for each lay assessor and renders no limit to the maximum workload he or she can assume each year, which may scare away potential volunteers and lead to insufficient candidates. Secondly, it is questionable as to whether self-nomination can ensure diversity and representativeness in lay assessors, since probably only those who want to uphold the mixed tribunal system and also have sufficient spare time to take an extra court job, may be interested in nominating themselves. It is therefore much less likely for a person in full employment to nominate themselves, because once appointed, they will have to serve for five years and will have to respond to the court's summons at any time. For this reason, the role of lay assessor seems more suitable for those without jobs such as the unemployed and pensioners, since they at least have more free time. However, where most of the nominated candidates are jobless, the level of diversity and representativeness of the lay assessors is at risk. Thirdly, in terms of nomination by employers, it is unlikely that an employer will be so unselfish as to lend its employees to the courts, whilst still having to pay them wages, and this point may, in actuality, largely nullify the likelihood of nomination by employers.

Randomly selecting prospective jurors from a very general list of citizens such as the electoral register is widely acknowledged to have at least three democratic advantages. First, it helps to ensure the diversity and representativeness of the jury, since theoretically almost every citizen can be called and as a result a jury may be comprised of citizens from diverse social spectrums. Secondly, random selection protects against unfair priority being given to certain groups, which in turn promotes

democracy and fairness of the selection process. Thirdly, random selection combined with a mandatory summons makes citizens' participation in justice not only a democratic right, but also an obligation under which those summoned are liable not only for realizing a defendant's right to be judged by his peers but also for receiving democracy education.[115] The nomination method adopted by The LAA 2004, coupled with the above-mentioned requirement in terms of the lay assessors' educational level, is apt to restrict the breadth of candidates and to change the court service into an avocation enjoyed only by well-educated volunteers who feel happy to be nominated, rather than a democratic right and social responsibility enjoyed and assumed by all of the citizenry.

(3) Courts' Dominance without Substantial Check

As mentioned above, The PRALA 2005 delivers *de facto* the substantive power of selecting lay assessors to the courts, whilst the input given by the Department of Justice and the final appointment by the Standing Committee of the local People's Congresses, are largely a formality. A concern arising from this, is whether the selection procedure under the sway of the courts and without effective checks and balances can really guarantee an open and fair process. It would be naive to suppose that the Chinese authorities do not understand the virtues of randomly selecting lay assessors from a very general citizen list such as the electoral register. On the contrary, it is arguable that the courts are deliberately commissioned with the substantial administrative power of screening lay assessors, for the very purpose of ensuring the ruling party can oversee the selection of lay assessors.

As a matter of fact, the CCP has established its own network within the judicial

[115] See Gobert, *supra* note 108, at 102-103; Parry *ibid,* at 686; and *supra* note 98, at 190.

organs. According to the CCP Charter,[116] each court has established a so-called CCP Committee whose chairperson has to be the Chief Justice of the court; and the deputy chairperson and other committee members are normally the vice chief justice and the leading judges in the court respectively. The Party Committee is subject to the leadership of the Superior Committee and this hierarchical administration extends upward to the CCP headquarters. It is through the Party Committee in each court that the CCP has actually exercised its dominance over the courts, through the use of manpower and policy control, for example: (1) only those judges politically affiliated to the CCP and with sound political accountability will gain a seat on the Committee, whilst admittance to the Committee implies better career prospects since any promotion inside the court has to be approved by the Chief Justice (that is, the chairperson of the Committee) and any promotion to a superior court must be agreed by the Chief Justice, and (2) via the network that has been established at each court, the CCP headquarters is able to convey and execute its policies in various courts since, through controlling the career prospects of each judge, the CCP has little fear of its policy execution being frustrated. Once this is understood, it is no wonder that The LAA 2004 gives substantial powers to the courts to select lay assessors: the CCP can make the selection under close supervision by steering the various courts. In contrast, it will lose this control by adopting random selection from sources such as the electoral register.

(4) Converted "Random Selection" of Lay Assessors

Article 14 of The LAA 2004 provides that each court shall produce a working roster of the lay assessors and "randomly select" the specific lay assessor from its list, designating him or her to each specific mixed tribunal. This article, *prima facie*, introduces the "random selection" of lay assessors. However, this 'randomness' is very

[116] *See* Article 46 of The Charter of Chinese Communist Party; see Chapter 5 for more discussion.

different from that applied to the juror selection process in common-law countries. As discussed above, randomness in juror selection, coupled with the very comprehensive list of candidates, aims to ensure that the overwhelming majority of citizens are endowed with an equal opportunity to democratically participate in justice, so as to avoid potential bias and influence that may lead to partiality and discrimination. Article 14 is seemingly not designed to achieve similar objectives, since the stated "randomness" is not a random selection of lay assessors from the common people, but rather a random designation of incumbent lay assessors to specific cases.

The 'random selection' set out in Article 14, according to the official interpretation of the Supreme Court of China, is expected to prevent the courts from ignoring the roster and repeatedly use the same lay assessors, effectively creating full-time lay assessors.[117] However, this article does not set forth a specific method for implementing the random selection, for example, by computer or lot. Without any check and balance, it is impossible to say that the courts will not try to and be able to evade this provision in the interests of their own expediency.

-- Substantial Participants or Insignificant Outsiders

Article 1 of The LAA 2004 empowers lay assessors to decide both factual and legal issues and theoretically places lay assessors in a position equivalent to judges in mixed tribunals, with the only prohibition being that a lay assessor may not be appointed as the presiding judge in a mixed tribunal. However, the territory of lay assessors is actually fairly strictly limited in the following ways.

(1) Lay Decision-making without Finality

Article 1 of The LAA 2004 provides that lay assessors have equal jurisdiction with judges, while Article 2 of the Act immediately circumscribes mixed tribunals to be only

[117] The Supreme Court of China, *supra* note 76.

applicable in first-instance cases. Further, according to Article 180 and 181 of The Act of Criminal Procedure 1996, a decision made by the collegial tribunal of first-instance in China (either all-judge or a mixed tribunal) is open to appeal, initiated either by the defendant or the public prosecutor. Article 186 of the Act further specifies that the court of appeal "shall conduct a complete review of the facts determined and the application of law in the judgment of first instance and shall not be limited by the scope of appeal". In other words, the court of appeal may confirm, reverse or vary any part of the appealed first-instance decision, including the sentence, whether or not that has been appealed against. More remarkably, Article 190 provides that where a second instance has been triggered upon a defendant's appeal, the judgement made by the court of appeal can never increase the punishment imposed by the trial court; though this limit is not applicable if the appeal has been launched by the public prosecutor.[118] In other words, it is legislatively valid that the court of appeal overturns the acquittal made by a mixed tribunal of first instance, or increases the sentence handed-down by a mixed tribunal of first instance, as long as the public prosecutor has raised this appeal. With such a substantial power of appeal, even if a mixed tribunal makes a judgment in favour of the defendant in the first instance, the public prosecutor can extend an overzealous prosecution to the second instance where, without lay participation, the first-instance judgement may be overturned by a panel of judges. According to Article 197 of The Act of Criminal Procedure 1996, a two-tier trial system is applied in criminal cases in China. According to this, a decision made by the court of appeal, with lay participation excluded, is final. In light of the fact that the lay decision-making framework is highly vulnerable to appeal, and so has no finality at all, it is hard to conclude that lay input is on solid ground and genuinely significant.

[118] See Article 190 of The Act of Criminal Procedure 1996.

It seems that although the public prosecutor and the defendant are both entitled to initiate an appeal, their respective appeal rights are very different. There has been no legitimate reason offered as to why such a substantial appeal right (the jargon actually is "right of protest complaint" in contrast to the "appeal right" of the defendant according to China's procedural laws[119]) has been given to the public prosecutor. Exactly as in the courts, the CCP has also established its Party Committee in each of the local public prosecutors' offices. A Public Prosecutor does not have to be a CCP member, but it is a good idea for him or her to be so, since promotion is in the hands of the Chief Public Prosecutor, who is certainly a Party member. For example, if two candidates compete for the same position, the Chief Public Prosecutor will normally favour the one who is his or her political peer and has sound political accountability. With Public Prosecutors as part of its leadership structure, it is desirable for the CCP to hand them a strong right of appeal, something which might be significant where an 'unsatisfactory' decision given by a trial court conflicts with its political interests, though this happens very rarely.

(2) Minority Position of Lay Assessors

Article 3 of The LAA 2004 indirectly legitimises judges' predominance in mixed tribunals by providing that "the proportion of lay assessors in a mixed tribunal shall not be less than one third". It is noteworthy that the principle of voting applied in each collegial tribunal is simple a majority in China.[120] When the lay assessors are in a minority position, it is impossible for them to dominate decision-making when outnumbered by judges. As a rule-of-thumb, the ratio of professional judges to lay assessors is extremely important in the courtroom. "When lay persons are in a minority,

[119] See Article 180 and 181 of The Act of Criminal Procedure 1996.
[120] See Article 148 of The Act of Criminal Procedure 1996 and Article 43 of The Act of Civil Procedure 2007.

their influence diminishes".[121] According to the current procedural laws in China, a collegial tribunal in both civil and criminal cases is normally composed of three adjudicators.[122] Where a mixed court is composed of only one lay assessor and two professional judges and the latter two hold the same view, it is questionable whether a single lay assessor would be confident enough to challenge his or her professional allies with technical, psychological and, more importantly, quantitative issues.

-- Will the 'Puppets' Return?

The passivism of the lay assessors which, as stated above, might be attributed to their incompetence and inappropriate checks on their impropriety, has raised widespread criticism, something which has apparently concerned the Chinese authorities.[123] The LAA 2004, coupled with The RSEALA 2004 and The PRALA 2005 include a number of few measures that attempt to resolve this problem, such as improving educational eligibility, addressing training issues and providing specific punishments for lay assessors. Besides the uncertainty over whether the overly emphasized educational level of lay assessors can *pro rata* enhance their competence and consequently catalyze their activity, it is also open to question as to what extent the fragmentary training standards contained in The LAA 2004, The RSEALA 2004 and The PRALA 2005 are able to resolve the entrenched incompetence and subsequent passivism of lay assessors. Likewise, it is debatable whether the specific but still inappropriate punishments can produce a substantial deterrence to impropriety by lay assessors.

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[121] See Stefan Machura, "Interaction between Lay Assessors and Professional Judges in German Mixed Courts", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 465.

[122] See Article 147 of The Act of Criminal Procedure 1996 and Article 40 and 41 of The Act of Civil Procedure 2007.

[123] See, for example, The Supreme Court of China, *supra* note 76.

(1) Can Specific Training Create Competent Lay Assessors?

The PRALA 2005 promulgated by the Supreme Court of China embodies a total of eight articles which set out the training framework for lay assessors, the aim being to improve their competence. Besides employing six articles to outline the training contents, undertakings and other administrative affairs, it is striking that Article 20 and 26 provide that before being installed, each lay assessor should receive preliminary training of no less than 24 hours, whilst regular training of no less than sixteen hours per year being compulsory for each lay assessor during their five-year tenure. However, in spite of these provisions, it is self-evident that from these specified hours of training, lay assessors cannot hope to be transformed into adjudicators as competent as professional judges, who have had years or decades of legal education and practice, especially in terms of their ability to resolve legal problems. It is therefore doubtful that the incompetence of lay assessors, especially in terms of understanding legal issues, will be overcome. It is notable that in the past, lay assessors in Russia who assumed the exact same duties as their Chinese counterparts, also demonstrated incompetence in tackling legal issues. To resolve this problem, Russian legal scholars in the 1950s and 1960s advocated commissioning lay assessors only for the purpose of fact finding and deciding on guilt.[124] Likewise, prior to The LAA 2004, Chinese scholars proposed similar reforms so that lay assessors would be exempted from decisions on legal application.[125] It is arguable whether allowing a lay person to decide on legal issues is the inherent weakness of a mixed tribunal system, a weakness which could have been carefully considered when framing the reform scheme.[126] However, the Chinese authorities apparently turned a blind eye to this issue.

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[124] Stephen C. Thaman, "The Resurrection of Trial by Jury in Russia", *Stanford Journal of International Law*, Vol.31, 1995, at 68.
[125] *Supra* note 41, at 3.
[126] See further discussion in Chapter 6.

It seems that the current laws and regulations intend to frame a very ideal position where a lay person with a degree in anything other than law, after attending legal lectures for a week or so, is able to effectively participate in the trial in an even-handed way, such as revealing the facts, screening the evidence, tackling the legal disputes presented by both parties, and even arguing with the professional judges to defend his or her own legal theories, and to even prevail occasionally. Meanwhile, he or she must be good at criminal, civil or even administrative law, since he or she may be requested to participate in criminal, civil or even administrative cases according to Article 2 of *LAA 2004*.

(2) No Stringent Check on the Impropriety of Lay Assessors as yet

As stated above, before The LAA 2004, there was no law handed-down as to the punishments given to lay assessors. Practical measures such as oral warnings, the leveling of criticism and blacklisting, used in order to stop the use of particular lay assessors, were not enough of a deterrent to hold back some lay assessors' from deliberately failing in their duties. To address this problem, The LAA 2004 includes Article 17, which sets forth punishments for lay assessors. According to this Article, where a lay assessor evades court service without a valid reason and affects the trial, the Chief Justice of the court can request the Standing Committee of the local People's Congress to dismiss him or her. There are at least two weaknesses in this provision. First, this punishment is only applicable in circumstances where the lay assessor illegally evades his or her duty, and ignores other improprieties such as sleeping during the trial etc. Secondly, dismissal might be exactly what the lay assessor evading his or her duty wants. This punishment may not only be ineffective in deterring absentee lay assessors, but may actually encourage them, since evasion will incur nothing but the desired outcome of terminating their court service.

(3) Does the Lengthy Tenure and Unlimited Workload Undermine the Enthusiasm of Lay Assessors?

As mentioned above, overwork was one reason responsible for the passivism of the lay assessors in the past.[127] However, it is striking that The LAA 2004 extends the tenure of lay assessors from the original two years to the current five years, whilst it also renders no limitation on the caseload each lay assessor may encounter, such as serving a set number of days annually, or a maximum case load, leaving the door wide-open for the overuse of particular lay assessors and the erosion of their enthusiasm. Remarkably, the tenure of lay assessors in Russia in the past was five years as well.[128] Here, it was revealed that after the lay assessors had reported to the same courtroom for a long time, they "became dedicated to their respective judge in the same way grand juries are said to become dedicated to a prosecutor with whom they regularly work."[129] This dedication was also believed to be responsible for the Russian lay assessors' "simply nodding in agreement with the judge".[130] What is worse, The LAA 2004 does not circumscribe the reappointment of lay assessors. After working with the same judge for quite a few years, it is hard to say that the lay assessors in China will not become "dedicated to" the judges as well.

-- Will Full-Time and Long-Serving Lay Assessors Recur?

As discussed above, the occurrence of full-time lay assessors could be attributed to a series of interrelated facts: (1) poor benefits and the absence of appropriate punishment which encouraged some lay assessors to evade their court duties, (2) to

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[127] *Supra* note 58.
[128] Steven R. Plotkin, "The Jury Trial in Russia", *Tulane Journal of International & Comparative Law*, Vol.2, 1994, at 2.
[129] John C. Coughenour "Reflections on Russia's Revival of Trial by Jury: History Demands That We Ask Difficult Questions Regarding Terror Trials, Procedures to Combat Terrorism, and Our Federal Sentencing Regime", *Seattle University Law Review*, Vol.26, 2002-2003, at 406.
[130] *Ibid.*

ensure the availability of lay assessors, some courts had unchecked powers to select lay assessors, exclusively selecting the unemployed and pensioners, (3) without a sufficient budget for maintaining many lay assessors, some courts employed only a few lay assessors and assigned them very heavy workloads, since there was no absolute prescription as to the maximum workload of each lay assessor. The combined result of the above factors was a situation where a lay assessor assumed a caseload equal to that of a judge and worked at the court on a full-time basis. Unfortunately, however, The LAA 2004 does not appear to have resolved the majority of the above problems, such as inappropriate punishments, the unlimited workload of lay assessors, and the courts' unbounded power in terms of selecting lay assessors. It cannot be said that a court will not, for its administrative expediency, fall back on the old routine, since full-time lay assessors have some advantages, such as their availability, responsiveness and experience, having participated in more cases.

In addition, without an established restriction on re-appointing lay assessors after each five-year tenure, the practice of long-serving lay assessors will probably continue. Compared with recruiting and training fresh blood every five years, simply reappointing the old hands who with their long experience can perform their duties more efficiently and competently must definitely seem convenient and cost-effective.

3.4 Conclusion

It appears that, after its nationwide establishment in 1949, the mixed tribunal system in China was more of an instrument for resolving the shortage of judges and propagandising the legitimacy of the regime, than a facility devised to genuinely realize democratisation of the judiciary. Subjecting lay assessors to strict control was enshrined

as an essential judicial principle, realized through a series of mechanisms, such as: (1) for the sake of ensuring political accountability of lay assessors, the lay assessor selection process was under the control of courts, in turn subject to the leadership of the CCP, and (2) lay participation was circumscribed to first-instance cases only, whilst any decision made by mixed tribunals had the potential to be completely overturned by the second-instance trial, where lay participation was excluded. Moreover, the 1980s and 1990s saw a further decline in the interest of the Chinese authorities in lay participation, as witnessed by the increasing legislative circumscription on the application of lay assessment, including that: (1) the power to trigger a mixed tribunal was exclusively retained by the courts after 1983, and (2) the majority position of lay assessors in criminal mixed tribunals was acknowledged in 1979, but then abolished in 1996.

Besides the strict controls and gradual legislative withdrawal, all of the laws regulating lay assessors were scattered across a series of acts and regulations prior to introduction of The LAA 2004. Their inherent indeterminacy and inappropriateness, coupled with the authorities' declining interest in lay participation, resulted in a series of interrelated problems in practice through the final two decades of the last century, including a shortage of financial support for the use of lay assessment, a decreasing use of mixed tribunals, poor benefits provided for the lay assessors, serious passivism on the part of the lay assessors, and the appearance of full-time and long-serving assessors. These misuses of the system resulted in diffuse criticism from the academic community. Even though the Chinese authorities could ignore the academic criticism, they did envisage a crisis in trust in the judiciary, from both domestic and international observers, and this became increasingly critical in the 1990s, threatening the stability of the regime. It seems that there was a desperate need to initiate judicial reform to salvage the legitimacy of the judiciary, and in this context, the first Act specifically aimed at

regulating the use of lay assessors, The LAA 2004, was promulgated to revive the mixed tribunal system, a system that had been effective in flaunting "the people's justice" since the revolutionary era.

There is no denying that there are some significant breakthroughs in The LAA 2004, not only in addressing the defendant's right to be judged by a mixed tribunal, but also in its attempts to apply lay assessors to cases with far-reaching implications and promote their training and welfare. However, these innovations cannot overshadow the remaining unresolved problems.

The LAA 2004 still places lay participation under close political control in three ways. First, the selection process for lay assessors is largely under the control of the courts, as steered by the CCP, in order to assure their political accountability. Secondly, the courts are given the discretionary jurisdiction of deciding the ratio of professional judges to lay assessors in a mixed tribunal, usually placing lay assessors in the minority position, and in this system the lay voice cannot prevail over the professional judges, who are very probably CCP members also. Thirdly, mixed tribunals are still only applicable to first-instance cases and any decision made by a mixed tribunal can be appealed by the public prosecutor (who is normally politically affiliated to the CCP) to the courts of appeal, which are also overseen by the CCP and can fully overturn the first-instance judgement. Seemingly, when compared with the past, the circumscriptions on lay participation have not been substantially reduced by The LAA 2004. Therefore, one cannot be too optimistic that the new Act will significantly encourage lay participation, nor depoliticize and democratise the judiciary in China. On the contrary, it seems that the Act has steered clear of reallocating judicial power to the people; rather, the CCP has leant in the direction of safeguarding the judiciary's dominance. The LAA 2004 is not a real change of direction but rather a subtle variance

on a theme of judicial instrumentalism, as embraced by the ruling party. In this context, it is questionable that the reformed mixed tribunal system will give people real "involvement in the national administration" [131], or "assure…democracy of the judiciary". [132]

Not only does The LAA 2004 raise questions with respect to how the political interests of the ruling party overwhelm democracy in the judicial arena, but also in terms of a series of inherent defects in the revived mixed tribunal system, namely: (1) The candidates qualified to be lay assessors are basically limited to those who have received a higher education other than the 'common citizens', leading to lay participation in China being the privilege of an elite minority, instead of democracy for the *populus,* (2) the accessibility of lay participation is further restricted due to the very small quota of lay assessors and the five-year tenure often coupled with a potentially unlimited reappointment, all of which make the probability of being selected as a lay assessor as small as winning the lotto, (3) it is questionable whether identifying lay assessor candidates from a group of volunteers is effective and can ensure representativeness, (4) the revived institution intends to resolve the passivism of lay assessors; however, this problem might be entrenched through a series of weaknesses in the institution, such as the lengthy tenure, unlimited reappointment, unresolved incompetence, inappropriate punishments and the small potential numbers of lay assessors, (5) the lengthy tenure, unlimited reappointment and workload of lay

[131] Xiao Yang (The Chief Justice of the Supreme Court of China then), "The Interpretations of the Motion of Deliberating 'the Resolution of Reforming the Mixed Tribunal System'", quoted in Xu Xiaoqin, "A Review of the Mixed Tribunal System in China", available at the united official website of China's court http://www.chinacourt.org/html/article/200505/11/161087.shtml, last visited on 14 December 2007.

[132] Xiao Tiancun, "The Reconstruction of the Mixed Tribunal System in the Context of Chinese Judges' Professionalization", *Journal of Yunnan University (Law Edition),* No.3 of 2005, at 122 and 123.

assessors, in association with the unchecked power of courts in terms of selecting them and designating them to specific cases, will probably revive the practice of having full-time and long-serving lay assessors.

To sum up, the mixed tribunal system, as revived by The LAA 2004, enshrines the ruling party's supremacy rather than truly embracing democracy and prioritising the rights of individuals over party interests in the administration of justice, making the institution similar to its old counterpart. Far from being a significant move towards genuine lay participation, the modern lay assessor can be said to be a political token, one which is meant to enhance the legitimacy of the judiciary. Meanwhile, a series of weaknesses that afflicted the old system seemingly remain, since the new Act brings illusory rather than real reforms. To be sure, my discussions thus far have leaned toward theoretical analysis. To reveal the practical situation with regard to how the mixed tribunal system operates under the new Act, field work should be carried out, and to this end, the next chapter will make an attempt in this regard, and will present the relevant findings.

Chapter 4

Lay Participation in China Today: Shadow or Substance (II)

Empirical Research on the Implementation of Recent Reforms of the Mixed Tribunal System

4.1 Introduction

As revealed in the last chapter, the revived mixed tribunal system is by no means perfect, but raises further questions, not only in terms of whether the authenticity of lay participation has been sacrificed to facilitate control over the judiciary by the Chinese Communist Party (the CCP), but also with regard to various practical concerns revealed. First, does the selection process for lay assessors, under the control of the courts, ensure the appropriate diversity and representativeness of lay assessors? Secondly, does the much-anticipated mechanism for randomly designating lay assessors to cases, a mechanism that is subject to the unchecked administration of the courts, stop the notorious situation of full-time lay assessors evolving? Third, can the 'common' people, simply via improved educational eligibility and less fragmented training, be transformed into competent lay assessors responsible for deciding on questions of both fact and law? Fourth, will the long-term passivism and limited influence of lay assessors continue to be entrenched due to unresolved institutional weaknesses, such as their untested competence and a lack of checks on their improprieties? Based on theoretical analysis and the previous experience of lay participation in China, the last chapter presented a far from optimistic scenario.

To be sure, as well as carrying out a theoretical analysis, it is imperative to review what empirical evidence reveals with regard to these questions and the way in which

the reformed mixed tribunal system has operated in practice, in order to present an accurate picture regarding this exclusive form of lay participation in China today. However, "despite the actual widespread use across…countries, existing empirical studies on mixed tribunals are relatively rare"[1], a picture that holds true in China as well. Since 1st May 2005, when the much-anticipated LAA 2004 came into force, neither the Chinese authorities nor the academic community has published any systematic study to empirically evaluate the practical situation of the mixed tribunal system since the reforms. Meanwhile, it is striking that official propaganda material has been recently released to commend The LAA 2004 for the changes it has brought to China, claiming (1) lay assessors have worked effectively since The LAA 2004, and (2) lay assessors have been carefully selected and represent the community from which they come.[2] These positive official conclusions contrast with the scepticism I described in the last chapter; however, they are not premised on relevant empirical evidence. For example, the claim for the alleged representativeness of lay assessors does not quote any actual statistics, such as the gender distribution, education levels, occupations, or political beliefs of those within the lay assessor pool. An empirical study would therefore seem to be both desirable and necessary.

In this context, between December 2006 and June 2007 I conducted fieldwork in China, in order to survey how the mixed tribunal system has been operating in practice since The LAA 2004 came into force, drawing particular attention to the following issues: (1) whether the courts have embraced the new Act and have abandoned previous

[1] Sanja Kutnjak Ivkovic, "An Inside View: Professional Judges' and Lay Judges' Support for Mixed Tribunals", *Law & Policy*, Vol.25, No.2, 2003, at 101.

[2] See, for example, the news report, "Implementing *The LAA 2004* and Carrying out the Mixed Tribunal System", *The People's Court Daily*, 21 April 2005; news report, "Interpreting the Working Report of the Supreme Court of China: Realising the Openness of Trials and Enhancing the Transparency of Judicial Process", at the official website of the China's central government, see http://www.gov.cn/2008lh/content_915415.htm, last visited on 24 March 2008.

practices, those now viewed as inappropriate, particularly given that their discretional jurisdiction has been largely preserved by the Act, (2) whether the selection of lay assessors with a higher educational level, together with some limited training has, as envisaged in the new Act, produced lay assessors competent to perform their dual role of both fact-finding and applying the law, (3) whether lay assessors recruited since 2004 have escaped the role of "puppet", one that trapped their predecessors, and thus have been able to effectively participate in judicial decision–making, and (4) whether the various legal actors involved in mixed tribunals, that is, judges and lay assessors, in practice uphold the reformed system. This chapter will report on my fieldwork, with three sections incorporated. Section 4.2 interprets the methodologies applied during the fieldwork, Section 4.3 illustrates the major findings of the field project and covers the critical analysis, and Section 4.4 presents a conclusion.

4.2 Methodology

Two sets of information were collected: (1) data was gathered from both official and restricted-circulation sources, in archives, libraries and from websites, and (2) original empirical data was gathered through a questionnaire survey across nine courts.

4.2.1 Scope and Methods: Practical Considerations

The methodology and scope of the study were constrained by practical limitations. The study was conducted by me, a self-financed lone researcher with limited time, and these time and resource constraints precluded a participant observation study, since "a

study based on participant observation usually requires at least two years".[3] Extensive interviews with court participants were similarly impractical and the scale and range of the questionnaire study restricted.

The scope of the study was also limited by statutory restrictions. Some parties to the procedure, such as defence counsels, public prosecutors and defendants, are not permitted access to deliberations: these are open only to judges and lay assessors. To explore the inner workings of mixed tribunals, the insiders themselves, that is the judges and lay assessors, were therefore selected as the target population to be investigated.

In order to produce results that could be generalized, I explored the possibility of drawing a random sample from all the judges and lay assessors in China. According to Oppenheim, in principle, "a representative sample of any population should be drawn that every member of that population has a specified non-zero probability of being included in the sample. Usually, this means that every member of the population has a statistically equal chance of being selected".[4] The best way of ensuring this, is by means of a completely random sample.[5] In 2000, there were approximately 250,000 judges practicing in China,[6] and 55,681 lay assessors had been appointed up to 2006.[7]

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[3] Patrick McNeill, *Research Methods* (Routledge, London 1990), at 124.

[4] A. N. Oppenheim, *Questionnaire Design, Interviewing and Attitude Measurement* (Continuum, London, 1992), at 39.

[5] *Ibid*, at 40.

[6] See the news report, "Lay Assessors Have Adjudicated 644,723 Cases in More Than Two Years", see the official website of Chinese courts, at http://www.chinacourt.org/html/article/200709/04/263019.shtml, last visited on 2 June 2008.

[7] Chen Jianqing and Wang Ning, "Research on the Reform of the Judge System in China", see the official website of the Intermediate Court of Jinhua City, at Chen Jianqing and Wang Ning, "A Study on Reforms of the Chinese Judge System", see the official website of the Intermediate Court of Jinhua City, at http://www.jhcourt.cn/wenhua/lunwen_detail.asp?id=112, last visited on 2 June 2008. (Please note: the exact number of judges in China has not been revealed by the Chinese Supreme Court).

After contacting the relevant departments, I was informed that list of names and contact details of these two groups would not be given to an individual for reasons of confidentiality. It was therefore not possible for me to draw a random sample from national lists of judges and lay assessors.

Sampling on a court-by-court basis via a random selection of courts presented a possible alternative method. However, access to and co-operation with China's courts is extremely difficult to obtain, principally because information about the internal operations of the courts is officially classified. Restrictions apply, in particular where information could be regarded as "politically sensitive information". The Supreme Court of China enacted and circulated The Regulation for Safeguarding the Confidentiality of the Judicial Affairs on 5th September 1990, and Article 1 provides that "court staff shall not reveal any classified information to their relatives, friends, acquaintances or other outsiders."[8] In light of this Regulation, various courts have constituted detailed and strict rules to ensure the confidentiality of classified information. For example, Article 9 of The Secret-Protection Rules of the Intermediate Court of Jinchang District of Jiangsu Province, provides that "any statistical data on the court shall not be publicized unless an approval has been obtained in advance", and Article 10 adds that "any department or employee of the court shall not accept any external interview or present, in the name of the court, any public speech unless approved in advance."[9] Perhaps not surprisingly, when I inquired of some courts

[8] See http://www.shnotary.com/lawex/lawex.aspx?lawid=11806, last visited on 2 March 2008.

[9] See The Intermediate Court of Jinchang District of Jiangsu Province, "Confidentiality Rules of the Intermediate Court of Jinchang District of Jiangsu Province", at the official website of the court: http://fy.jinchang.gov.cn/index_Article_Content.asp?fID_ArticleContent=1016, last visited on 2 March 2008; similar provisions can be found in the internal rules of other courts, see, for example, The Court of Leishan County of Guizhou Province, "Confidentiality Rules of the Court of Leishan County of Guizhou Province", at the

regarding the possibility of conducting a survey, as a researcher from a British academic institution, they almost unanimously showed hesitation. When further informed that the survey findings might be published, all either refused or put me off.

Confronting these frustrations and the limitation in time and funds, I had to adapt the project to take advantage of the opportunities that arose through my personal contacts in the Research Department at the High Court of S Province (RDHCS). The results are therefore illustrative and exploratory. They cannot be generalized beyond the courts concerned. However, given the practical constraints, this was the only means I had to carry out the study.

4.2.2 Procedure: A Compromise between Quality and Feasibility

4.2.2.1 Sampling and Questionnaire Administration

I asked the RDHCS to approve the circulation of the questionnaires in my own name and under my own administration. This request was rejected, probably because the RDHCS remained reluctant to see a survey in respect of a "politically sensitive" subject, especially one conducted without its close supervision. In addition, RDHCS warned me that, even with its approval, the response rate was likely to be low if the survey was conducted in my name, since respondents may be unwilling to cooperate with a stranger from a foreign institution. After further discussion, RDHCS agreed to cooperate with me and distribute the questionnaire, but insisted that the questionnaire

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official website of the court: http://www.gzlsfy.org/typenews.asp?id=73, last visited on 2 March 2008; and The Intermediate Court of Jiyuan City of Henan Province, "Confidentiality Rules of the Intermediate Court of Jiyuan City of Henan Province", at the official website of the court: http://www.jyzy.org/show.aspx?id=260&cid=36, last visited on 2 March 2008.

survey would be in the name of the RDHCS, though the specific questions would be formulated by me and scrutinized by RDHCS. RDHCS, for the sake of closely monitoring the survey, said they would distribute and administrate the questionnaires, and all of the questionnaires returned to the RDHCS would be delivered to me, but it would preserve the right to copy and use them. As an additional condition, I had to assure the anonymity of the data obtained in the survey, when using it.

Once the basic mode of the survey was confirmed, the focus returned to the specific sampling procedure to be used. Again, a compromise was needed between the ideal and the feasible. Random sampling among the provincial population of judges and lay assessors would have produced a sample scattered across a number of courts in the Province. There are over 200 courts in S Province, a territory double the size of the United Kingdom. Using this proposed sampling method would have meant the RDHSC had to circulate the questionnaires by mail among hundreds of individual respondents at widely dispersed addresses, with a significant administrative burden in terms of distributing, tracking and collecting the questionnaires. Furthermore, the response rate from a postal survey was likely to be low. Direct random sampling was therefore ruled out by the RDHSC. However, "sampling requires compromises between theoretical sampling requirements and practical limitations such as time and costs."[10] The RDHSC suggested cluster sampling a few courts in the Province. Taking into account the fact that a small-scale survey in only a few courts could not satisfy my requirements, the RDHSC provided me with the classified reports of two investigations conducted by the Intermediate Court of C City in S Province and the High Court of S Province in 2006. In the absence of a better alternative, I accepted this suggestion.

Following negotiation with the RDHSC, random sampling across nine courts was

[10] *Supra* note 4, at 43.

permitted. In contrast to direct sampling from judges and lay assessors in the Province, court-based sampling alleviated the administrative burden on the RDHSC. Each court in China has a research department in charge of internal research, surveys and statistical tasks. Research departments in smaller courts are subject to the leadership of their counterparts in larger courts. All of the research departments in the courts of S Province are subject to the leadership of the RDHSC, so the RDHSC simply forwarded the questionnaires to the research departments of the sampled courts, together with an instruction as to how the questionnaires should be circulated and administered. The workload of administering the questionnaires was therefore partly transferred to the individual research departments of the sampled courts. Finally, the questionnaires were distributed to 63 professional judges serving at the nine sampled courts, and 172 questionnaires were delivered to all of the lay assessors serving at the nine courts.

4.2.2.2 Developing the Questionnaires

A number of empirical studies on mixed tribunals have been conducted in other jurisdictions.[11] These provided a starting point for my questionnaires, but could not simply be translated and adopted.[12] Notwithstanding the similarities between China's system and its counterparts in other countries, each jurisdiction has unique characteristics and legal institutions with far-reaching political and democratic implications. As well as being inspired by previous surveys in other jurisdictions, the formulation of the questionnaires drew on fifteen exploratory interviews with the judges,

[11] See, for example, a series of research materials on mixed tribunals in Croatia, Germany, and Sweden, see generally *International Review of Penal Law (Vol. 72)* (Érès, Ramonville Sainte Agne 2001).

[12] Translation is in itself fraught with difficulty: "the translation of questionnaires from one language to another is akin to entering a series of minefields". See *supra* note 4, at 48.

lay assessors and administrative staff of the courts, together with two internal questionnaire surveys conducted by the Intermediate Court of C City of S Province and the High Court of S Province in 2006. The questionnaires were piloted at two courts before being finalized.

-- The Judges' Questionnaire

The judges' questionnaire consisted of four question modules.[13] The first module explored how the courts have carried out the mixed tribunal system in practice, given that The LAA 2004 gives them wide discretion. The second module requested judges to evaluate the performance of lay assessors during trials. The third module asked judges' opinions about the mixed tribunal system, and the fourth module contained a series of demographic questions about the respondents. This was at the end of the questionnaire, and was followed by a blank area for respondents to add any further comments.

-- The Lay Assessors' Questionnaire

The questionnaire for lay assessors was similarly comprised four modules. The first explored how, in the experience of the lay assessors, the courts have exercised their discretion in implementing mixed tribunals. The second asked lay assessors about their own participation in trials, while the third asked about their attitudes towards the institution. The final question asked the lay assessors to provide their demographic information, followed again by a blank space for any further comments.

The majority of the questions in the two questionnaires were closed questions that offered the respondents choices of alternative replies in Likert-type multi-item ordinal scales. Some questions were repeated in the two questionnaires, allowing answers by judges and lay assessors to be compared.

[13] See the Appendix I and II for a copy of the survey questions for judges and lay assessors respectively.

4.2.3 Reliability, Validity and Sources of Bias

In trying to assess how well a questionnaire does its job, the concepts of reliability and validity have to be introduced.[14] Validity indicates "the degree to which an instrument measures what it is supposed or intended to measure";[15] or in other words, "the respondent telling us the truth",[16] or "whether the data collected is a true picture of what is being studied".[17] Reliability "refers to the purity and consistency of a measure".[18] As seen above, circumscribed by the practical situation, a small-scale questionnaire survey among a few courts inside S Province and in the name of the provincial high court was my only available approach. It, however, has to be admitted that the restraints upon my survey may have invited the danger of bias and possible errors, issues that had the potential to undermine its validity and reliability.

"The respondent may conjure up an image or a stereotype of the organisation which sent the questionnaire and of the kind of person who might be asking these questions".[19] In other words, "the respondents will interact with the questionnaires and may 'project' some kind of person or organisation 'behind' the questions, and this may bias their responses".[20] My survey, initiated in a superior court's name, did have this potential problem. Since The LAA 2004 came into effect in 2005, the Chinese authorities have been urging its implementation nationwide. At the end of 2006, the Supreme Court of China even sent ten special panels to various local courts to inspect

[14] *Supra* note 4, at 144.
[15] *Ibid*, at 160.
[16] *Ibid*, at 144.
[17] *Supra* note 3, at 15.
[18] *Supra* note 4, at 145.
[19] *Ibid*, at 103.
[20] *Ibid.*

the enforcement of the new Act.[21] Furthermore, in 2007, the first nationwide conference of lay assessors was held in Beijing. At this conference, Luo Gan, the Chairman of the Politics and Law Committee of the Chinese Communist Party, reemphasized the need to "boost the mixed tribunal system" in China.[22] Since both the Supreme Court of China and the ruling party had previously declared support for the mixed tribunal system, some participants of the survey might have "conjure[d] up an image" that the survey too was initiated by an upholder of the mixed tribunal system, because the organizer of the survey was a superior court that was supposed to follow the lead of the ruling party and the Supreme Court. This might have inclined some respondents, both judges and lay assessor, to express opinions in support of the institution, and they might have therefore hesitated to report opposing views, especially if they did not fully trust that their views would remain completely anonymous.[23]

More generally, Oppenheim suggests that answers to factual questions can be biased by the wish to present oneself in a favourable light: "some people will claim that they read more than they do, bathe more often than is strictly true and fill more pipes from an ounce of tobacco than would seem likely".[24] Similar influences might have operated in our survey, especially since the Chinese authorities have encouraged the revival of the mixed tribunal system. Respondents might have over-claimed "good"

[21] See the news report, "Ten Inspection Teams Will Be Designated by the Supreme Court to Examine the Five Tasks", see the united official website of the courts in China, at: http://www.chinacourt.org/public/detail.php?id=212063, last visited on 2 March 2008.

[22] See the news report, "Luo Gan Emphasized at the First Nationwide Conference of Lay Assessors: Endeavouring to Construct the Mixed Tribunal System with Chinese Characteristic and Promoting Judicial Democracy and Democratic Politics of Socialism", at the official website of the Chinese government: http://www.gov.cn/ldhd/2007-09/03/content_735698.htm, last visited on 2 March 2008.

[23] *Supra* note 4, at 181.

[24] *Supra* note 4, at 138-139.

performances and under-reported less desirable behaviours in the courtroom.[25]

In response to the above concerns, some preventive measures were adopted when developing the questionnaires. Notices in writing were sent to the nine sampled courts together with the questionnaires, emphasizing the neutral attitude of the survey organizer and mandating the courts to encourage the responding judges and lay assessors to answer the questionnaires honestly. Each questionnaire embodied a short introduction which again clarified the neutral standpoint of the survey organizer. Further, some questions were repeated across the two questionnaires, creating the possibility, albeit limited, to cross-check the accuracy of information provided by the two groups.[26] Additionally, confidentiality and anonymity were promised in the introduction part of the two questionnaires to stimulate the frankness of respondents.[27]

The two sets of questionnaires comprised mainly factual questions. Respondents were used as informants and asked to report past events experienced by them. The method inevitably relies on respondents' willingness and accuracy. In terms of either questionnaire or interview design "the skills…can only get us half-way, at best: from the researcher to the respondent and back. The second half- from the respondent to the required information and back – is entirely up to the respondent's ability and willingness to retrieve."[28] "It seems almost inevitable that major problems of factual validity will remain."[29]

To sum up, circumscribed by the practical situation, it would have been impractical to provide an accurate panoramic overview of the operation of the mixed tribunal system in China. However, "there are times when a 'quick and dirty' approach

[25] See further details below.
[26] See, for example, *supra* note 4, at 145.
[27] See, for example, *ibid*, at 105.
[28] *Ibid*, at 147.
[29] *Ibid.*

is the only way open to us."[30] In this particular context, I could only expect the survey, in association with the statistical data, as revealed by secondary sources, to provide a rough sketch of the operating institution of the mixed tribunal system in S Province. Generalisation with regards to its operation in the rest of China remains a matter of speculation.

4.2.4 Advantages of Conducting a Survey under an Official Name

It seems that the official name of my survey brought both advantages and disadvantages. "If the respondents believe that their responses will have a direct influence on policy, the questionnaires will often be completed successfully."[31] As a matter of fact, all the provincial high courts in china are entitled to submit reform proposals to the Supreme Court if they find any legal problems in practice. The latter then may enact provisional judicial regulations to rectify these problems or render motions to the legislative body to propose amendments of old laws or enactment of new laws.[32] The official name of our survey and the potentiality of the high court using the findings of the survey suggested the superior court approval and appreciation of the institution, therefore encouraging the respondents to treat the survey seriously.

The high response rate of my survey can probably be regarded as evidence of this. In Kutnjak Ivkovic and Stefan Machura's empirical studies on the mixed tribunals in Croatia and Russia, they both commissioned clerks of the participant courts to distribute and collect the questionnaires.[33] Though this method was reported as being successful

[30] *Ibid,* at 229.
[31] *Supra* note 4, at 105.
[32] Subsection 3 of Article 10 of The Rules of Judicial Regulations 1997 promulgated by the Supreme Court of China" on 1 July 1997 and amended on 23 March 2007.
[33] Stefan Machura, "Interaction between Lay Assessors and Professional Judges in

in their studies, it is noteworthy that the response rates were comparatively low. Machura, for example, reported 37% on average in his research, and the lowest 18% due to the reasons such as the poor organisation of the court clerks.[34] In contrast, in my survey the questionnaires were distributed to 63 professional judges serving at the nine sampled courts and 49 responded, giving a response rate of 77.8%. In all, 172 questionnaires were delivered to all of the lay assessors serving at the nine courts and 104 valid questionnaires were received,[35] gaining a response rate of 60.5%.

4.3 Data and Discussion

The results of the survey are presented and discussed in six sections: 4.3.1, 4.3.2, 4.3.3, 4.3.4, 4.3.5 and 4.3.6. These sections relate to each of the six questions about the operation of the mixed tribunal system: (1) have the courts been appropriately exercising their discretion in selecting lay assessors? (2) have the courts been using lay assessors appropriately to avoid "full-time lay assessors" developing? (3) have the lay assessors become fully competent in performing their adjudicative duties? (4) have the lay assessors been effectively participating in decision making? (5) have the judges been supporting the revived mixed tribunal system, and (6) have the lay assessors been pleased with their court duties? In each section, data will be presented first, followed by the relevant discussion.

German Mixed Courts", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 132.

[34] *Ibid*, at 133.

[35] See below for further details.

4.3.1 Have the Courts Been Appropriately Exercising Their Discretion in Selecting Lay Assessors?

As discussed in the preceding chapter, The LAA 2004 and subsequent regulations grant courts substantial discretion in implementing the mixed tribunal system. The selection of lay assessors is largely under the control of the courts; the advisory power of the Department of Justice and the final appointment by the Standing Committee of the local People's Congress are largely a formality. A concern arising from the unchecked power of the courts in selecting lay assessors is whether the selection process will produce the appropriate lay assessors. The survey investigated the extent to which lay assessors are representative of the population from which they are drawn. Data from the survey was compared with statistics from the National Bureau of China. The results were also compared with findings from the two internal surveys conducted by the Intermediate Court of C City of S Province among 21 local courts in 2006 and by the High Court of S Province among all the courts in S Province in the same year.

4.3.1.1 Gender Composition

The gender of the lay assessors was investigated using Question 31 in the Questionnaire for Lay Assessors (See Appendix II). As displayed in Figure 1 below, out of 104 responding lay assessors, 67.31% (70) were male whilst females only occupied 32.69% (34): less than one half that of the male lay assessors. According to the statistical data of the fifth national census revealed by the National Bureau of Statistics of China, males comprised 51.53% of the national population up to 2000, and in S

Province the percentage of males was 51.69%.[36] In light of this data, the females are obviously under-represented in the lay assessor pool.

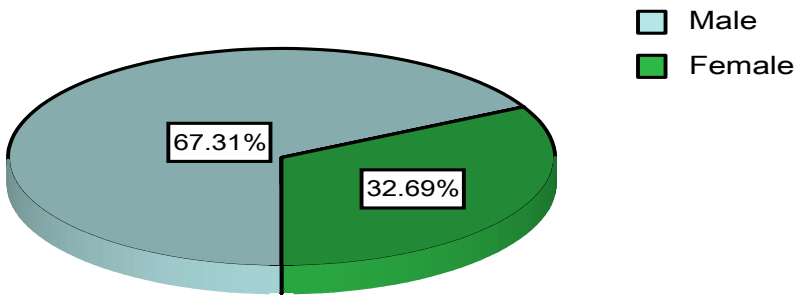

Figure 1: Gender Distribution of Lay Assessors

Males were similarly found to be over-represented in the lay assessor pool by an internal survey conducted by the Intermediate Court of C City of S Province among 21 local courts in 2006, where, among all of the 398 lay assessors in 21 courts, 248 were male, representing 64.32% of the total.[37]

4.3.1.2 Occupational Distribution

Question 28 in the Lay Assessor Questionnaire surveyed the occupational

[36] See the official website of the National Bureau of Statistics of China, at http://www.stats.gov.cn/tjsj/ndsj/renkoupucha/2000pucha/html/t0301.htm, last visited on 2 March 2008.

[37] The Project Team of the Intermediate Court of C City, "The Present Reality and Realistic Resolution – An Empirical Survey and Analysis of the Implementation of the Mixed Tribunal System", unpublished internal-circulated research report of the Intermediate Court of C City, at 2, file with the author. (The real name of the courts is omitted here for the sake of confidentiality.)

distribution of the lay assessors (See Appendix II). As shown in Figure 2 below, among the 104 responses, nearly one third (32.69%, 34) were civil servants working at Government departments; 27.88% (29) worked in public service functions such as hospitals and educational institutions, which in China are sponsored and administrated by the Government; 13.46% (14) were employed by profit-making enterprises, and 18.27% (19), 4.81% (5) and 0.96% (1) were pensioners, self-employed and farmers respectively, with 4.81% (5) engaged in other occupations.

According to the statistical data of the fifth national census revealed by the National Bureau of Statistics of China in 2000, only 0.80% of the population of S Province were civil servants.[38] My findings therefore, where civil servants made up 32.69% of the lay assessor pool, suggest that civil servants are extremely over-represented in mixed tribunals. The statistical data of the fifth national census did not revealed the proportion of people employed by Government undertakings in S Province. However, until the end of 2005, there were 1.25 million Government undertakings across the whole country, with approximately 30.35 million employees, amounting to approximately 2.3% of the national population.[39] The 27.88% found in the lay assessor pool in my survey suggests they are greatly over-represented as well. According to the same fifth national census, approximately 0.26% of the population of S Province were pensioners.[40] When looking at the proportion found within the lay

[38] Zhang Yuling, "How Many Civil Servants Does China Need? — An Interview with Wang Jian", *Guang Ming Daily,* 27 February 2006, at http://www.gmw.cn/01gmrb/2006-02/27/content_379861.htm, last visited on 3 December 2007.

[39] Peng Yong and Tang Yaoguo, "Reforms of Government-sponsored Enterprises of Public-service in China: The Return to Their Original Roles of Public-service", see the official website of "China Elections & Governance", at http://www.chinaelections.org/NewsInfo.asp?NewsID=102801, last visited on 15 July 2008.

[40] See the official website of the National Bureau of Statistics of China, at http://www.stats.gov.cn/TJGB/RKPCGB/qgrkpcgb/t20060316_402310923.htm, last

assessor pool, 18.27%, they would also seem to occupy too many seats. In contrast to these over-representations, it seems that there is a massive under-representation of farmers, since in the census they occupied 72.91% of the total population in S Province, but only made up 0.96% of the seats in the lay assessor pool in my survey.[41]

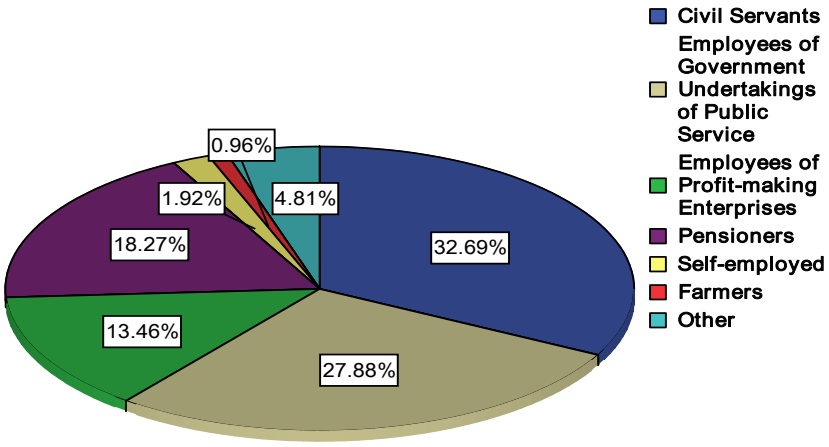

Figure 2: Occupational Distribution of Lay Assessors

The over-representation of civil servants was also revealed by an internal survey of the Intermediate Court of C City of S Province in 2006. Among 398 lay assessors sampled in 21 courts across S Province, there were 152 civil servants, amounting to 38.19% of the total.[42] Further, the High Court of S Province conducted an internal investigation as to the implementation of the mixed tribunal system in 2006. According to its report, in August 2006 there was a total of 2,122 lay assessors in S Province. Of these, 1,029 were civil servants and 402 were employees of Government undertakings,

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visited on 5 April 5, 2009.

[41] See the official website of the National Bureau of Statistics of China, at http://www.stats.gov.cn/tjsj/ndsj/renkoupucha/2000pucha/html/t0107c.htm, last visited on 8 April 2009.

[42] *Supra* note 37, at 2.

taking-up 51.5% and 18.9% of the total number respectively.[43] The survey data and these other sources of statistical data unanimously show an over-representation of this section of the population.

As discussed by Chapter 3, The LAA 2004, for the sake of assuring the political accountability of lay assessors, sets the selection process for lay assessors under the jurisdiction of the courts that are in essence steered by the CCP. In light of the statistical data above, it appears that the courts have helped achieve this objective quite well. Civil servants, administratively affiliated to the CCP Government and thus with the desired accountability, irrespective of their minority position among the national and provincial population, have been given preference by the courts during the selection of lay assessors. Likewise, all of the public service Government undertakings in China are under the direct sponsorship and control of the CCP Government; therefore their employees, probably with an equally trustworthy accountability, have been given a similar preferential opportunity to be chosen as lay assessors.

4.3.1.3 Political Affiliation

The political affiliation of lay assessors was probed by Question 29 in the Questionnaire for Lay Assessors (See Appendix II). Figure 3 below displays that almost three-quarters (73.08%, 76) of the lay assessors were CCP members, almost triple the number of non-CCP lay assessors. The Central Organizational Department of the CCP would not reveal the number of CCP members in S Province, but did reveal that there

[43] The High Court of S Province, "An Investigation Report about the Implementation of the Mixed Tribunal System in S Province", unpublished internal-circulated document of the High Court of S Province, file with the author, at 3 and 4. (The real name of the courts is omitted here for the sake of confidentiality.)

were 72,391,000 CCP members in China in 2006,[44] accounting for only 5.54% of the national population. In light of this statistical data, the CCP members seem extremely over-represented in the lay assessor pool.

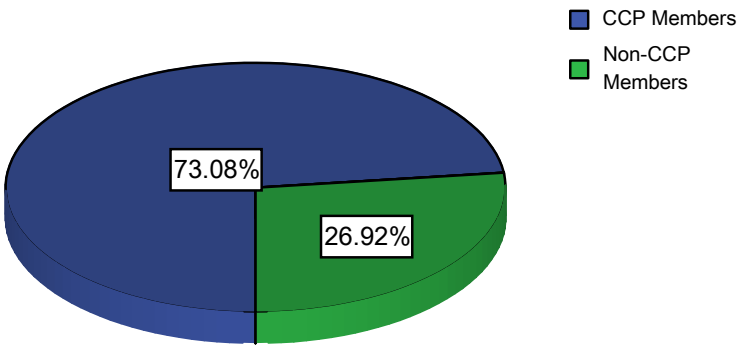

Figure 3: Political Affiliation of Lay Assessors

This over-representation of CCP members in the lay assessor pool was also found by an internal survey carried out by the Intermediate Court of C City in S Province in 2006. Among all of the 398 lay assessors across 21 courts: 265 (66.58%), were politically affiliated to the CCP.[45]

4.3.1.4 Educational Level

The educational level of lay assessors was investigated using Question 35 in the Questionnaire for Lay Assessors (See Appendix II). As illustrated by Figure 4 below, only 6% (6) of the lay assessors had an educational level lower than a college diploma, 94% (88) had a college diploma or higher educational level, with 60% (60) holding

[44] See the official website of the Chinese Communist Party, at http://cpc.people.com.cn/GB/78779/86328/86927/5986458.html, last visited on 7 April 2009. (The CCP has not revealed the amount of its party members in S Province.)
[45] *Supra* note 37, at 2.

university degrees (54%, 2%, 3% and 1% holding a bachelor's degree, postgraduate diploma, master's degree and even Ph.D, respectively). In stark contrast, up to 2005, only 3.4% of the population of S Province had an educational level up to college diploma level or above.[46] Therefore, compared with the proportion of 94.0% found in the lay assessor pool in my survey, they are extremely over-represented.

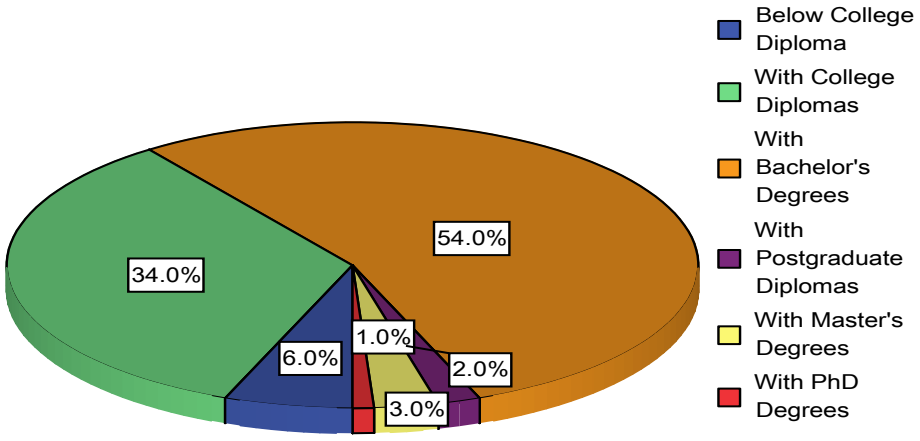

Figure 4: Educational Level of Lay Assessors

Likewise, an internal survey conducted by the Intermediate Court of C City of S Province in 2006 obtained a similar outcome: among 398 lay assessors in 21 courts in S Province, 359 (90.2%) had college diplomas or university degrees/diplomas.[47] Moreover, an internal investigation by the High Court of S Province in 2006 indicated that among all of the 2,122 lay assessors in S Province up to August 2006, there were

[46] The statistical data was from the official website of the Government of S Province; for the sake of anonymity, as requested, the source is omitted herewith.
[47] *Supra* note 37, at 2.

1891 lay assessors with college diplomas or higher degrees/diplomas, making up 89.11% of the total.[48]

4.3.1.5 Graduate Qualifications

Question 35 in the Questionnaire for Lay Assessors (See Appendix II) also explored the subject of whether lay assessors had studied in college or university. Figure 5 below shows a surprising outcome: out of 83 lay assessors who specified their graduate qualifications, 29 (34.94%) had obtained a degree or diploma in law and 48 (57.83%) had obtained degrees or diplomas in other majors. Six (7.23%) admitted that they had not received a higher education at all, so the question probing their graduate qualifications was therefore not applicable.

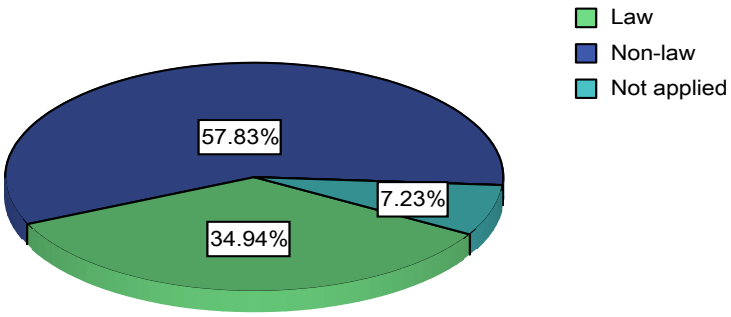

Figure 5: Graduate Qualifications of Lay Assessors

A similar finding was reported by an internal survey of the Intermediate Court of C City of S Province in 2006. Among all of the 398 lay assessors across 21 courts in S

[48] *Supra* note 43, at 3 and 4.

Province, 137 were law school graduates, amounting to 34.42% of the total.[49]

4.3.1.6 Discussion

In light of the statistical data above, covering six areas including gender, occupation, political beliefs, educational level and diploma/degree subjects of the lay assessors, it would be unsafe to conclude that the courts exercise their discretion in a fair and appropriate manner when selecting lay assessors.

-- Sacrificing the Merits of Lay Participation to Enshrine Political Accountability

As discussed in the previous chapter, The LAA 2004 places the lay assessor selection process firmly under the control of the courts, though guided by the CCP - probably for the sake of assuring the political accountability of the lay assessors. For example, Luo Gan, the Chairperson of the CCP Central Committee of Politics and Law, specially pointed out that "when building the mixed tribunal system with Chinese particularities…the appropriate political inclination of lay assessors must be assured."[50] The statistical data above indicates that the courts put this objective into practice quite well. Civil servants who are administratively affiliated to the CCP Government are requested to uphold the CCP party line,[51] and thus have "appropriate political inclination", irrespective of their minority position in the population, and are given preferential treatment by the courts during the selection process for lay assessors. Likewise, all of the public service government undertakings in China come under the direct sponsorship and control of the CCP Government. Their employees, in effect with

[49] *Supra* note 37, at 2.
[50] See *supra* note 22.
[51] See Article 4 of The Act of Chinese Civil Servants 2005.

equally trustworthy accountability, are given a similar preferential opportunity to become lay assessors. Further, to strictly execute the CCP party line, and assure the political accountability of lay assessors, the courts, during the selection process, even, without disguising the fact, favour those CCP members who demonstrate the most unswerving supports for the party line,[52] leading to the domination by communists of the lay assessor pool.

As mentioned in the preceding chapter, an important value of lay participation is the check and balance function it brings. Lay judges are able to oversee and check any potential injustice meted out by professional judges, who are "bound by organisational restrictions" of courts that are a part of the national apparatus and thus "susceptible to the state's direct influence."[53] In contrast, a lay judge from the community, and without administrative affiliation to the State may be free of these "organisational restrictions". However, where a lay assessor works for the Government and lives on an income provided by it, he may bend to the interests of his employer, that is the Government, and also become "susceptible to the state's direct influence". This concern may arise especially where a case involves a matter of Government interest.

-- Sacrificing the Merits of Lay Participation for Elitism

Article 4 of The LAA 2004 provides that the minimum educational requirement for a lay assessor is a college diploma. According to the statistical data of the fifth national census in 2006, only 4.27% of the population aged above 25 had a college diploma or had reached a higher education level at that time. In other words, 95.73% of the citizenry in China lose the opportunity of becoming lay assessors if Article 4 is strictly enforced.[54] Acknowledging this conflict, The Regulation of Selecting,

[52] See Article 3 of The Charter of the Chinese Communist Party.
[53] *Supra* note 1, at 95.
[54] See the official website of the National Bureau of Statistics of China, at

Examining and Appointing Lay Assessors promulgated by the Supreme Court of China and the Justice Ministry on 13th December 2004, made a concession by giving the courts discretion to ease the educational eligibility of lay assessors under two circumstances: (1) in those regions where it is difficult to implement this educational eligibility, and (2) for those elderly candidates with a lower educational level, but good reputation.[55] This concession intentionally gives the courts, especially those located in rural areas where the residents generally have a comparatively lower educational level, discretion to recruit those lay assessors whose educational level does not reach college diploma. As a matter of fact, S Province is a province based on agriculture and has a large rural area. Among the nine courts sampled in my survey, six are situated in rural areas. However, the above statistical data illustrates that the majority of the lay assessors are still male, well-educated and middle-aged.

As a matter of fact, with elitism within lay assessment legislatively encouraged by The LAA 2004, which prescribes a high educational eligibility which is out of step with the generally low educational level of the national population as a whole, the Chinese authorities would seem to appreciate such elitism. Cao Jianming, a former Vice Chief Justice of the Supreme Court of China, declared that: "when selecting lay assessors, the courts should give priority to the citizens with good educational background, social achievements, reputable personalities and sufficient legal knowledge."[56] Driven by these reasons, it is no wonder that the courts intentionally push the elitism of lay

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http://www.stats.gov.cn/tjsj/ndsj/renkoupucha/2000pucha/html/t0401.htm, last visited on 5 April, 2009.

[55] See Article 2 of *The Regulation of Selecting, Training and Examining Lay Assessors,* promulgated by the Supreme Court of China and the Justice Ministry of China on 13 December 2004.

[56] Cao Jianming (the Deputy Chief Justice of the Supreme Court of China then), "Completing the Supplemental Selection and Replacement of Lay Assessors Well and Duly", at the united official website of China's courts, at http://www.chinacourt.org/public/detail.php?id=263084, last visited on 14 December 2007.

assessors. For example, the report of the internal survey conducted by the Intermediate Court of C City of S Province in 2006, commended the elitism of lay assessors and even flaunted the fact that 90.2% of lay assessors in the 21 courts at that time had an education level higher than college diploma, and that 86.93% had professional qualifications in such subjects as medicine and engineering.[57] However, in spite of such acclaim, the elitism of lay assessors can bring a variety of problems.

First, one of the democratic merits of lay participation is that lay judges from a wide cross-section of society allow the input of community values, morals, norms and customs into the judicial process, ensuring decision-making represents the people's voice. However, where the lay assessor pool is dominated by male, middle-aged and well-educated state employees, it might be transformed into an elite club which represents the voice of the minority of upper class citizens, rather than that of the community.

Secondly, as discussed in the previous chapter, in China the quota of lay assessors in each court is limited and cannot be over the quota of judges in the same court. Another democratic concern arising from the over-representation of this specific social spectrum in the Chinese lay assessor pool, is that their occupancy of an excessive number of lay assessor seats means other people's chances of being selected are small, and thus they are being illegally deprived of their right to participate in the administration of justice. For example, where farmers, who occupy over 70% of the population, only obtain less than 1% of the seats in the lay assessor pool, it is disingenuous to claim that the opportunity to participate in the administration of justice is non-discriminatory and fair to all of the common people.

Thirdly, lay people's participation in the judiciary is expected to play an

[57] *Supra* note 37, at 2.

educational function, one which has been portrayed by some scholars as a "democratic school" where common people can foster the idea of participating in politics and democracy.[58] However, the very narrow cross-section of people within the lay assessor pool has the potential to impair this function, due to the very selective nature of the "students" in this "democratic school".

-- Sacrificing the Merits of Lay Participation to Professionalize Lay Assessors

Both my questionnaire and the internal survey conducted by the Intermediate Court of C City of S Province in 2006 reveal that over one-third of the lay assessors were law school graduates. Apart from following the above-mentioned instructions from the high-ranking officials that "when selecting lay assessors, the courts should give priority to the citizens with…sufficient legal knowledge",[59] the overemphasis on the legal education of lay assessors is probably related to the tradition of regarding lay assessors simply as helpers to cope with the caseload.

As discussed in Chapter 3, from the very beginning of the mixed tribunal system being established in China, it has been given two essential functions: legitimising the judicial process and providing the courts with extra pairs of hands. The re-employment of lay assessors by some courts during the 1980s and 1990s also could be attributed to their role in helping with an escalating caseload. Driven by this customary, pragmatic thinking, the courts today may even feel happy to see that a lay assessor has a degree in law and thus is competent to efficiently perform his court duties, without the court having to tackle any training issues or disturb the judge in his or her instructions, thus delaying the trial process.

Although lay assessors with law degrees and diplomas may alleviate the training

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[58] Valerie P. Hans and Neil Vidmar, *Judging the Jury* (Plenum Press, New York 1986), at 249.

[59] *Supra* note 56.

and instruction burden of the courts and the judges, the professionalization of lay assessors might cause other, serious problems.

Needless to say, if the proportion of the population with a higher education represents a minority of less than 5% within China, then those with a law degree or diploma will be an even greater minority. While this tiny minority occupies a strong one-third of the quota of lay assessors, it is unfair on other social spectrums, since their opportunity to participate in the administration is usurped.

Further, as a form of lay participation, the mixed tribunal system helps introduce lay voices and public feelings into the courtroom, incorporating community values into the judicial decision-making process and counteracting the case-hardened adjudication of judges.[60] However, when a lay assessor is a lawyer, his or her "lay" status would seem to be in doubt since he or she is more akin to a part-time judge representing the values of legal professionals, rather than those of lay people. Where these "part-time professional judges" pervade in the lay assessor pool, the objective of the mixed tribunal system, to encourage lay participation, is largely compromised. This over-emphasis on the legal educational background of lay assessors has also occurred in many other courts in China.[61] The growing trend towards recruiting law graduates to serve as lay assessors has attracted the attention of the Supreme Court of China. Xiao Yang, the former Chief Justice of the Supreme Court of China previously warned that "a lay assessor should not be requested to have the high level of legal knowledge;

[60] See, for example, Duncan Deville, "Combating Russia Organized Crime: Russia's Fledgling Jury System on Trial", *George Washington Journal of International Law and Economics*, Vol.32, 1999-2000, at 81.

[61] See, for example, Xiao Yang, "The Speech on the First Conference of Chinese Lay Assessors", see the official united website of China's courts at http://www.chinacourt.org/html/article/200709/03/262886.shtml, last visited on 28 September 2008, or the official website of the Chinese Communist Party of China, at http://cpc.people.com.cn/BIG5/64093/64094/6210478.html, last visited on 28 September 2008.

otherwise the original objective of the mixed tribunal system cannot be achieved."[62]

To sum up, in contrast to the annual working report of the Supreme Court of China in 2008, that pointed out that "since 1st May 2005, various Chinese courts… have selected totally 55,681 lay assessors with [a] wide representativeness", my survey in S Province indicates that the representativeness of lay assessors is still by and large problematic.

4.3.2 Has the Presence of Full-Time Lay Assessors been Eliminated?

As the preceding chapter discussed, The LAA 2004 establishes a so-called "random selection" of lay assessors, which is actually a method of randomly selecting each lay assessor from the working rota, and designating him or her to a specific case. In the meantime, however, the law commissions the courts themselves to execute this random selection and neglects to specify how to ensure such randomness, practically granting the courts an opportunity to evade this provision completely. Further, neither The LAA 2004 nor the subsequent two regulations impose any maximum limit on the workload of a lay assessor. When a court, by circumventing the random selection process, repeatedly summons a specific lay assessor and allocates him too much work, the 'full-time' lay assessor may be reborn. Our survey has attempted to probe this concern.

4.3.2.1 Have the Courts Insisted on the Random Selection of Lay Assessors?

Question 5 in my Questionnaire for Judges (See Appendix I) asked the judges

[62] *Ibid*.

whether their courts had been selecting each lay assessor randomly from the working rota and designating them to a specific case. Surprisingly, only 10.4% (5) of the respondents reported that their courts had been strict in doing this in each case, whilst 22.9% (11) confessed that their courts had not done this as yet.

The internal survey conducted by the Intermediate Court of C City of S Province in 2006 presents an even more negative picture. The survey report states that "the random selection of lay assessors has not been strictly carried out yet in the 21 courts".[63] A report published by the official website of China's courts indicated a similar negative situation. Up to September 2007, 937 courts had strictly implemented the random selection of lay assessors in practice, accounting for only 31.8% of the total number of courts in China.[64]

4.3.2.2 Have the Courts been Distributing Reasonable Caseloads to the Lay Assessors

With random selection abandoned, a court will effectively have the opportunity to select a lay assessor from the working rota and allocate him or her a workload at its own discretion, and this might lead to an imbalanced workload allocation among lay assessors.

Question 33 in the Questionnaire for Lay Assessors (See Appendix II) probed the caseload of lay assessors. As illustrated by Figure 6 below, from May 2005 when The LAA 2004 came into effect, to May 2007 when my survey was conducted, a weak

[63] *Supra* note 37, at 8.

[64] The news report, "56,000 Lay Assessors Participating in Cases via Random Selection", see the united official website of China's courts at: http://www.chinacourt.org/html/article/200709/03/262877.shtml, last visited on 12 April 2009.

one-third (33) of lay assessors had handled more than 50 cases, whilst in contrast, about one-fifth (22) had adjudicated on less than ten cases, and with 8.65% (nine) even below five. Further, my survey found that among the 104 responding lay assessors, there were nineteen pensioners and sixteen of them (84.2%) had participated in more than 50 cases.

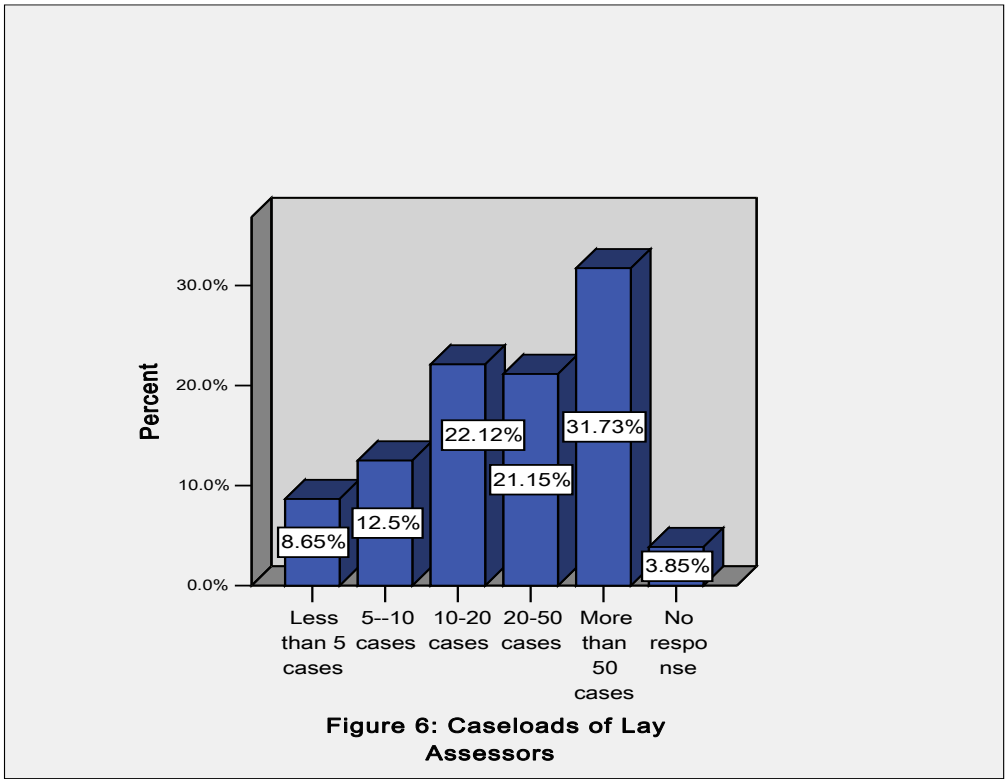

Figure 6: Caseloads of Lay Assessors

The internal survey conducted by the Intermediate Court of C City in 2006 reported an even more radical workload imbalance among lay assessors. Within the nine months from 1st May 2005 to 1st February 2006, and among 398 lay assessors serving at 21 courts, eight (2%) of lay assessors had participated in over 100 cases, whilst 59 (14.8%) had not participated in any cases at all.[65]

[65] *Supra* note 37, at 8.

4.3.2.3 Discussion

As discussed in the previous chapter, The LAA 2004 expects a random selection of lay assessors to realize an even allocation of workload between lay assessors, in order to prevent the courts from summoning specific lay assessors repeatedly and transforming them into full-time court workers. It seems, however, that this institutional design has not been strictly adhered to in practice. The courts have evaded random selection as a process and thus have failed to allocate an appropriate workload among lay assessors.

-- Why has Random Selection been Suspended?

In order to ensure the effectiveness of the random selection process for jurors, in 2000, England established a specific administrative body, the Jury Central Summoning Bureau, which is independent of the courts, to operate a computer system to execute the selection of jurors.[66] In contrast, Article 14 of The LAA 2004 allows the courts to execute random selection, prescribing no third-party to oversee its execution, though it is the courts themselves who will use the lay assessors. This institutional design has already granted the courts an opportunity to carry out 'random selection' at their own free will. Further, the inherent ambiguity of Article 14 has at least three weaknesses. According to the internal survey of the Intermediate Court of C City of S Province, the courts, when enforcing random selection, feel confused about: (1) which department or person of a court shall be liable for the execution of the random selection, (2) how to ensure the randomness, by computer or lot, or using other solutions, and (3) who shall oversee execution of the process.[67] These ambiguities provide the courts with further

[66] Penny Darbyshire, "What Case We Learn From Published Jury Research? Findings for the Criminal Courts Review", *Criminal Law Review*, Dec 2001, at 974.
[67] *Supra* note 37, at 9.

excuses to evade the random selection process.

On the other hand, it appears that some courts have encountered practical difficulties in exercising random selection. The internal survey by the High Court of S Province in 2006 disclosed that "the conflict between the employment of some lay assessors and their court duties is very prominent", and "some lay assessors who had been randomly selected from the working rota often asked for exemption or deferral of their court duties and caused the delay of the judicial process".[68] When this happens on a frequent basis, the court may lose patience with the process and replace random selection with manual selection, in order to avoid selecting unreliable lay assessors who are often busy with their employment.

-- The Re-birth of Full-Time Lay Assessors

As seen from the above survey data, among 104 lay assessors, nineteen were found to be pensioners, whilst sixteen of them (84.2%) had participated in more than 50 cases over two years. It is certainly not a coincidence that these pensioners assumed heavier workloads. A more reasonable explanation is that the courts, with random selection suspended, purposefully summon pensioners more frequently and assign them larger caseloads, due to their unemployed status, which increases their availability and responsiveness to court summons. The internal survey of the Intermediate Court of C City of S Province reveals more obviously the return of full-time lay assessors. Within the space of nine months, from 1st May 2005 to 1st February 2006, eight lay assessors participated in over 100 cases. In the previous chapter, to highlight the incidence of full-time lay assessors, I used Sun Bozhong, who participated in approximately ten cases each month, as an example.[69] Remarkably, each of these eight lay assessors

[68] *Supra* note 43, at 15.

[69] See the newsletter, "Lay Assessors Pay Out Both Labour and Money and Proceed Difficultly – the Phenomenon of Unbalanced Allocation of Caseloads Is Prominent",

assumed an even heavier caseload than Sun.

The above discussion illustrates how the courts have exercised their discretion within the process of implementing the revived mixed tribunal system. It appears that the situation is not satisfactory. First, the lay assessor pool is dominated by communists and the well-educated, ensuring the political accountability and elitist nature of lay assessors. Secondly, it seems that lay assessors are employed by the courts not to introduce democratic participation by the people into important cases with far-reaching social implications, but to increase the number of people used with professional knowledge, in order to tackle the escalating caseload, which in return has added to the elitist nature of the pool, as it is full of law graduates and other professionals. Thirdly, the much-anticipated "random selection" of lay assessors has been easily evaded by the courts and their manual selection has caused a great workload imbalance and given rise to the reoccurrence of full-time lay assessors.

4.3.3 Have Lay Assessors Become Really Competent?

As stated in the last chapter, the 1980s and 1990s saw great passivity among lay assessors, which was believed to be partly attributable to their incompetence.[70] The LAA 2004, in association with The Regulation of Selecting, Examining and Appointing Lay Assessors 2004 and The Provisional Regulation of Administration of Lay

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see the official news website of Chinese authority, at http://news.xinhuanet.com/politics/2005-11/14/content_3776737.htm, last visited on 27 September 2008.

[70] See The Supreme Court of China, "The Interpretation of the Draft of The Lay Assessor Act 2004", this Interpretation, together with the Draft of Lay Assessors Act 2004, was submitted to the Standing Committee of the Chinese People's Congress for the latter's reference and deliberation on 2 April 2004, available at the official news website of China's government: http://www.people.com.cn/GB/14576/28320/32776/32780/2445485.html, last visited on 3 March 2009.

Assessors 2005, has adopted a number of measures in an attempt to resolve this problem, such as improving the educational requirements for lay assessors and providing training. However, in the preceding chapter, based upon a theoretical analysis, I questioned the effectiveness of these solutions. To verify this analysis, my questionnaire survey employed a number of variables to briefly investigate the competence of lay assessors under The LAA 2004.

4.3.3.1 The judges' General Opinions on the Competence of Lay Assessors

Question 12 in the Questionnaire for Judges (see Appendix I) asked judges whether they felt satisfied with the competence of lay assessors. The responses were fairly positive, albeit only 2% (1) of the judges presented a completely positive answer: "satisfactory", the overwhelming majority (73.5%) came up with a moderately positive answer: "somewhat satisfactory", whilst only 12.3% delivered negative evaluations by answering "somewhat unsatisfactory" (8.2%), or "unsatisfactory" (4.1%).

4.3.3.2 The Competence of Lay Assessors in Terms of Understanding Case Facts

To further probe the competence of lay assessors, the Questionnaire for Judges (see Appendix I) employed Questions 9-(3), 9-(4) and 9-(5) to request judges on their observations with regard to the frequency that lay assessors' had difficulty in tackling factual, evidentiary and legal problems during deliberations. To cross-check the judges' reports, Questions 5-(8), 5-(9) and 5-(10) in the Questionnaire for Lay Assessors (see Appendix II) asked the lay assessors to report their own views on the frequency that

they encountered difficulties in understanding factual, evidentiary and legal questions of their cases. The results are shown in the Table 1 below.

Table 1: Perceived Competence of Lay Assessors

Question	Self-reports from Lay Assessors Themselves					Reports from Judges				
	Uncertain	Often	Occasionally	Rarely	Never	Uncertain	Often	Occasionally	Rarely	Never
1. How often do lay assessors not yet understand factual issues in a case when deliberation begins?	--	--	9.6% (10)	51.9% (54)	38.5% (40)	8.3% (4)	8.3% (4)	70.8% (34)	12.5% (6)	--
2. How often do lay assessors not yet understand evidentiary issues in a case when deliberation begins?	--	12.6% (13)	56.3% (58)	31.1% (32)	--	8.3% (4)	25.0% (12)	47.9% (23)	18.8% (9)	--
3. How often do lay assessors not yet understand legal issues in a case when deliberation begins?	--	16.3% (17)	41.3% (43)	34.6% (36)	7.7% (8)	10.4% (5)	25.0% (12)	54.2% (26)	10.4% (5)	--

Variable 1 in Table 1 indicates the frequency that lay assessors encountered

difficulties in understanding factual questions. It seems that the lay assessors themselves were quite confident in their fact-finding competence: 9.6% (10) admitted that they only "occasionally" confronted difficulty in understanding fact questions, 51.9% (54) reported "rarely", and 38.5% (40) claimed "never". In contrast, the responses from the judges were more negative, although over 80% of the judges reported a relatively low number of times that their lay colleagues had difficulty in understanding the factual issues of a case: 70.8% (34) and 12.4% (6) claiming "occasionally" and "rarely" respectively, and with 8.3% (4) acknowledging that the lay assessors were "often" unable to understand factual issues of cases.

4.3.3.3 The Competence of Lay Assessors in Respect of Understanding Evidentiary Issues

Variable 2 in Table 1 indicates the frequency that the lay assessors confronted difficulties in comprehending the evidentiary issues of cases. In all, 12.6% (13) of the lay assessors confessed that they "often" had problems in this regard, whilst 56.3% (58) claimed "occasionally" and 31.1% (32) reported "rarely". Again, the evaluation of the judges seems more negative: almost double the number of judges (25%, 12) acknowledged that their lay colleagues "often" had difficulty in understanding evidential issues, followed by 47.9% (23) and 18.8% (9) reporting "occasionally" and "rarely" respectively.

4.3.3.4 The Competence of Lay Assessors in Respect of Applying Law

Article 1 of The LAA 2004 grants lay assessors in China exactly the same duty as

that of judges, including the duty to apply law to make judgments. Variable 3 in Table 1 demonstrates whether the lay assessors were able to perform this duty, something which might prove difficult for lay people without a legal education. Compared with no lay assessors reporting they "often" have difficulty in understanding the factual questions of cases, 16.3% (17) admitted that they "often" face problems applying the law. In contrast to only 9.6% (10) reporting that they "occasionally" have difficulty in comprehending the facts of a case, this percentage rose sharply to 41.3% (43) when inquiring about difficulties in applying the law. While over 90% of the lay assessors acknowledging that they "rarely" or "never" have problems grasping case facts, only slightly over 40% (44) reported the same low frequencies in terms of legal application. Responses from the judges were more negative: 25% (12) of the judges reported that their lay fellows "often" became confused about law application, 54.2% (26) acknowledged this happened "occasionally", and only 10.4% (5) admitted it happened "rarely".

4.3.3.5 Discussion

The statistical data above demonstrates four key features, as discussed below:

-- The Prima Facie Self-contradictory Evaluations from the Judges

As illustrated by the three variables in Table 1, in terms of the fact finding competence of lay assessors as well as their ability to evaluate evidence or apply the law, the evaluations of the judges, when compared with the evaluations of the lay assessors themselves, were more negative. In contrast, however, approximately three-quarters of the judges, when asked for their general opinions about the lay assessors' competence, though in varying degrees, expressed their satisfaction with the

competence of their lay colleagues. It therefore appears that a self-contradiction existed therein, which might be attributed to two factors, as discussed below:

First, Oppenheim points out that "people often prefer not to say negative, unpleasant or critical things unless they have specific complaints. They tend to say that most things are 'all right', and present a rather bland façade."[71] When inquired about their personal feelings as to the competence of lay assessors, some judges might have been affected by this "barrier of politeness", giving positive answers.

Secondly, the theory of "Status Characteristics" developed by Berger and his colleagues could serve as another factor accountable for the judges' tolerant attitudes towards the competence or otherwise of lay assessors. "In a nutshell, the expectation is that neither the lay judges' own expectations nor the professional judges' expectations of the lay judges' contributions – their frequency and importance – would be as high as the expectations concerning professional judges' contributions."[72] Driven by the relatively low expectation as to the competence of lay assessors, even if judges "have always been sceptical of the lay judges' ability to evaluate evidences and apply the law",[73] they might be inclined to hold back their querulous voice.

-- More Negative Evaluations from the Judges

As seen above, in contrast to the self-evaluations of the lay assessors as to their competence at understanding factual, evidential and legal issues, the corresponding evaluations from the judges were more negative, which might be ascribed to the following:

It is common for "two observers or two participants [to experience]…the same

[71] *Supra* note 4, at 212.
[72] *Supra* note 1, at 107 and 108.
[73] *Ibid*, at 107.

action may yet report differently on it".[74] For example, a range of field studies indicate that respondents may see themselves more positively when inquired about issues such as their driving skills, ethics, managerial prowess, productivity and health.[75] Ivkovic, in his research on mixed tribunals, found that "lay judges may tend to overestimate their own ability to participate, as well as the frequency and importance of their own participation."[76] He specially conceptualized these behaviours as "self-serving bias",[77] which might be applicable to the situation in China, in which the lay assessors evaluate their competence to participate in trials in a more positive way.

-- "Occasionally" became the Most Welcome Answer

As illustrated by the Bar Chart 3, most of the lay assessors participating in my survey had performed their court duties for two to three years or even longer. It therefore was unrealistic to request them to remember their working situation during the previous few years with any degree of accuracy, for example, in how many cases they had encountered difficulties tackling factual or legal problems. Likert-type multiple-item ordinal scales, ranging from a high frequency such as "often" to a low frequency such as "never", were adopted in the questionnaires for selection by the respondents. Remarkably, as indicated by the Table 1, the answer "occasionally", indicating a moderate frequency, was the answer most frequently selected by the respondents.

Oppenheim points out that "when asked for a numerical estimate, people tend to choose a figure near the average or near the middle of a series".[78] This might be the case in my survey. Compared with the answers "in each case" and "often", that were

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[74] *Supra* note 4, at 146.
[75] *Ibid*.
[76] *Supra* note 1, at 107.
[77] *Ibid.*
[78] *Supra* note 4, at 125.

placed above "occasionally" to indicate high frequencies, and "rarely" and "never" which were placed below to indicate lower frequencies, the answer "occasionally" was exactly in the middle of the answer range, to indicate a moderate or average frequency. For the above-mentioned "self-serving bias", even if a lay assessor "often" encountered difficulties during the trials, he may have been unwilling to acknowledge his incompetence and thus turned to the less uncompromising answer, "occasionally". In addition, where a lay assessor "rarely" had difficulty in performing his court duty, he or she probably holds a modest or conservative attitude, and so was inclined to choose the more secure and average answer "occasionally", rather than the more clear-cut "rarely".

-- Recruits under the New Act not as Competent as Expected

In light of Table 1 above, the lay assessors displayed a comparatively stronger ability to understand factual questions of the cases; none of the lay assessors themselves and only 8.3% of the judges reported a high frequency of occasions where the lay assessors encountered difficulties in understanding factual issues of the cases. When it came to the more complex duties, such as evaluating the evidence and applying the law, both the lay assessors and the judges presented a much more negative evaluation: the majority of the lay assessors and judges both reported a high or medium frequency of times when the lay assessors confronted problems. Further, it is noteworthy that, as indicated by Figure 5 above, over one-third (34.94%) of the respondents in my survey were law school graduates with professional, legal training, so they may have already substantially promoted the average competence of those lay assessors participating in my survey. Taking into account this important factor and the frequent difficulties that the lay assessors encountered when evaluating evidence and applying the law, it would seem to be questionable as to whether The LAA 2004 has given rise to really competent lay assessors.

As discussed in the preceding chapter, The LAA 2004 expects to substantially improve the competence of lay assessor by enhancing their educational eligibility and providing them with fragmentary training. It seems that these two measures have not successfully transformed lay people into adjudicators as competent as professional judges, especially in terms of their ability to evaluate evidence and resolve legal problems. Question 19 in the Questionnaire for Judges (see Appendix I) inquired of the judges whether they found the competence of the lay assessors with higher education better than those without it. Remarkably, over half (56.3%, 27) gave a negative answer by saying "not apparently" (12.5%, 6), or "not very apparently" (43.8%, 21); whilst slightly over one-third presented a more positive view by stating "somewhat apparently" (35.4%, 17) and "apparently" (2.1%, 1). As seen in the last chapter, the very high educational eligibility of lay assessors has precluded over 95% of the Chinese people of their right to participate in the administration of justice, though the results of this reform seem to be far from convincing.

4.3.4 Have the Lay Assessors Participated Effectively in Decision Making?

The preceding chapter revealed that in the 1980s and 1990s, lay assessors behaved very passively and were reported to have often remained silent like puppets during trials and deliberations.[79] Since the end of the 1990s, the old inquisitorial trial mode has been replaced by a new adversarial one, one that requests public prosecutors and defence counsels to be active speakers during trials, whilst the presiding judge of a mixed tribunal is only required to speak occasionally to conduct the trial, and other members

[79] Newsletter, "The Mixed Tribunal System Faces Four Difficulties", *Legal Daily*, 8 May 2008.

of the tribunal only need to concentrate on listening.[80] However, in contrast to their passive role during trials, lay assessors are not supposed to be passive during deliberations. On the contrary, they are meant to actively participate in deliberations and thus affect judicial decision making with their lay voice, exactly the legislative objective of The LAA 2004.[81] My survey therefore formulated a number of variables to explore whether lay assessors in China under the new Act have been effectively participating in deliberations and affecting decision making, or have continued to be passive.

4.3.4.1 Have Lay Assessors Participated Effectively During Deliberations and Exerted their Influence

To measure whether lay assessors recruited under The LAA 2004 have effectively participated in deliberations and exerted their influence upon decision making, Questions 5-(12), 5-(13) and 5-(17) in the Questionnaire for Lay Assessors (see Appendix II) asked the lay assessors to report upon the frequency with which they presented arguments in general, with regard to a defendant's conviction and with regard to the defendant's penalty during deliberations. Again, to cross-check the lay assessors' self-reports, Questions 9-(11), 9-(13) and 10 in the Questionnaire for Judges (see Appendix I) also asked judges to report their observations with regard to these aspects. The results are shown in Table 2 below.

[80] He Bing, "Merits of the Mixed Tribunal System", *The People's Court Daily*, 25 April 2005.
[81] See preamble of The LAA 2004.

Table 2: Performance of Lay Assessors in Deliberations

Variables	Self-reports from Lay Assessors				Reports from Judges			
	Often	Occasionally	Rarely	Never	Often	Occasionally	Rarely	Never
1. How often have lay assessors presented dissents in deliberations?	3.8% (4)	71.2% (74)	20.2% (21)	4.8% (5)	14.6% (7)	45.8% (22)	39.6% (19)	--
2. How often have lay assessors dissented from judges about penalty of defendants?	3.9% (4)	59.2% (61)	23.3% (24)	13.6% (14)	14.6% (7)	41.7% (20)	39.6% (19)	4.2% (2)
3. How often have lay assessors dissented from judges about conviction of defendants?	--	--	25.2% (26)	74.8% (77)	--	--	51.0% (25)	49.0% (24)

Variable 1 in Table 2 explored whether the lay assessors liked to act as dissidents during deliberations. Only 14.6% (7) of the judges admitted that their lay colleagues "often" contributed a different voice; 45.8% (22) answered "occasionally"; and 39.6% (19) reported "rarely". Self-evaluations from the lay assessors themselves were not positive in this regard either: only 3.8% (4) of the respondents claimed that they "often" expressed dissent, though 71.2% (74) claimed "occasionally", whilst 20.2% (21) reported "rarely" and 4.8% (5) answered "never".

Variable 2 and 3 in the Table 2 further explored what kind of different opinions the lay assessors normally presented. A domain where disputes often occur in collegial tribunals is agreeing the penalty which should be applied to a defendant, since The Criminal Code of China 1997 delivers considerable discretionary power to judges in this regard. It has been reported that the same offences with very comparable

circumstances may be handed very different penalties in China.[82] Variable 2 surveyed whether the lay assessors ever proposed different penalities from the judges'. Remarkably, over one-third (36.9%, 38) of the lay assessors confessed that they had "never" or "rarely" done so whilst 43.8% (21) of the judges reported the same. Further, variable 3 explored whether the lay assessors ever dissented as to whether a defendant should be convicted or not. Approximately three-quarters of the lay assessors denied that they had ever done so, whilst about one-half of the judges claimed that they had never seen their lay colleagues dissent before.

The limited contribution of lay assessors to the decision making process has was also verified by the internal survey conducted by the Intermediate Court of C City of S Province in 2006. That report revealed that "it was widely admitted by the judges participating in our interviews that the lay assessors [of the 21 courts] in most cases repeated the judges', especially the presiding judges' opinions rather than presented their own dissent."[83]

4.3.4.2 Discussion

The three variables in Table 2 roughly explore the performance of the lay assessors in deliberations. It appears that the lay assessors' opinions, as to the penalty or conviction handed to the defendants, were not so often different from those of the professional judges. As Machura states, "if there was a non-controversial decision in the majority of cases, this does not speak against lay participation since the day-to-day

[82] Jian Guang, "The Discretionary Power of Chinese Judges Shall Not Be Inappropriately Big", *Commercial Perspective of China*, 23 Sep 2004.
[83] *Supra* note 37, at 8-9.

routine of trials consists of more obvious cases."[84] In the meantime, however, it is arguable that the factors below might have been responsible, at least in part, for the seeming passivism of the lay assessors during deliberations.

-- Lay Voices Probably Silenced by Lay Assessors' Incompetence

The unresolved lack of competence of lay assessors may more or less counteract their voice, because "better knowledge by lay judges pays off in the form of increased influence",[85] and *vice versa.* It would be unimaginable for a lay assessor to effectively participate in deliberation and decision making if he cannot fully understand the evidentiary and legal issues of the case.

-- Lay Voices Probably Silenced by Judges' Authority

Further, it appears that the dominant status of professional judges in mixed tribunals might serve as another factor to prevent lay voices from being heard. Question 17 in the Questionnaire for Lay Assessors (see Appendix II) asked the lay assessors whether they agreed with the opinion that "lay assessors should defer to judges' opinions during deliberations since the latter has better legal knowledge and professional skills". Slightly less than 60% of the lay assessors expressed the opposite thought and replied "disagree" 57.7% (60) and 3.8% (4) answered "strongly disagree". In contrast, more than 20% approved of this proposition by responding "strongly agree" (4.8%, 5) and "agree" (16.3%, 17), with 17.3% (18) stating "uncertain". Driven by this deference to judges, lay assessors may feel reluctant to present and defend their different opinions, in spite of "theoretically possessing rights and powers equal to those of the judge".[86] Likewise, findings in both Croatia and Russia also disclose that

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[84] *Supra* note 33, at 144.
[85] *Ibid*, at 145.
[86] Stephen C. Thaman, "The Resurrection of Trial by Jury in Russia", *Stanford Journal of International Law*, Vol.31, 1995, at 67.

"integrated decision making tribunals may silence lay voices",[87] because professional judges in mixed tribunals "appear as an authority because of knowledge of law and judicial routines and because of the judge's status in the hierarchy of the court system".[88] It seems my findings accord with this theory.

-- Lay Voices Probably Silenced by Lay Assessors' Minority Position

As suggested by Landsman, when "the number of lay judges is small", "there is limited likelihood that any one of them will stand up to the professionals with whom they work".[89] Also, according to Kalven and Zeisel's findings in the USA, a juror's lone stand rarely hangs a jury, because his or her absolute minority is too great; thus making him or her less courageous in challenging the majority.[90] Landsman carries forward an analogy to this research and suggests that "this particular finding rings true for the mixed tribunal as well as other sorts of small group processes".

As mentioned in the last chapter, Article 3 of The LAA 2004 legitimises the minority position of lay assessors in mixed tribunals by articulating that "the proportion of lay assessors in a mixed tribunal shall not be less than one third". According to current criminal procedural law in China, a collegial tribunal adjudicating criminal cases is normally composed of three members.[91] Where a mixed court is composed of only one lay assessor and two professional judges, the lay minority has to confront the professional majority. Under this circumstance, it would be unlikely for a single lay assessor to become a "popular counterforce" to challenge the professional members

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[87] Valerie P. Hans, "Lay Participation in Legal Decision Making", *Law & Policy*, Vol.25, No.2, 2003, at 89.
[88] *Supra* note 33, at 143.
[89] Stephan Landsman, "Commentary: Dispatches from the Front: Lay Participation in Legal Processes and the Development of Democracy", *Law & Policy*, Vol.25, 2003, at 176.
[90] *Ibid*, at 174.
[91] See Article 147 of The Act of Criminal Procedure 1996.

with technical, psychological and more importantly, quantitative issues.[92]

To further verify these ideas, Question 25 of the Questionnaire for Lay Assessors (see Appendix II) inquired of the lay assessors as to whether they would feel more encouraged to participate in deliberations if they obtained a quantitative dominance in the mixed tribunal. Less than one-quarter (24.5%, 25) stated "disagree" to this, whilst over a half stated "agree" (52.0%, 53), followed by 20.6% (21) claiming "not sure" and 2.9% (3) saying "strongly agree". It seems that the proportionate split between professional judges and lay assessors can make sense in mixed tribunals.

Xiao Yang, a former Chief Justice of the Supreme Court of China, released a statement at the first nationwide conference of lay assessors on 4th September 2007, in which he stated that "the participant enthusiasm of lay assessors has been fully triggered" and "lay assessors have been expressing their opinions as to either fact finding or law application without hesitation".[93] However, in light of my survey, this proposal appears somewhat doubtful, since it is unconvincing to say there are only isolated instances of passivism among lay assessors, and that these should not be taken as the norm.

4.3.5 Have Judges Supported the Revived Mixed Tribunal System?

A series of studies in other jurisdictions have discovered that judges' attitudes towards the mixed tribunal system can affect the effective participation of lay

[92] *Supra* note 86, at 67.

[93] See the news report, "Lay Assessors Have Adjudicated 644,723 Cases in More Than Two Years", see the official website of Chinese courts, at http://www.chinacourt.org/html/article/200709/04/263019.shtml, last visited on 2 June 2008.

assessors.[94] For example, according to Machura's research in Russia, judges may frame the participation of lay assessors by deciding how much to grant them the opportunity of questioning or the time to deliberate. If judges are willing to do so, their lay colleagues can be "more active in the deliberation" and "the chances are higher that the lay assessor will be successful with an opinion which differs from that of the presiding judge".[95] Likewise, research in Germany indicated that judges' behaviour can be decisive for the German *Schöffen's* participation and influence.[96] As indicated in the previous chapter, the mixed tribunal system in China experienced decades of decline before The LAA 2004. The institution was suspended or misused in a number of regions and drew criticism as a result. It is therefore uncertain whether the institution, revived though it is, will be able to obtain widespread support from Chinese judges. Taking into account the factors above, in association with China's particular historical context, the support of judges is likely to become a critical issue for the current mixed tribunal system in China. In an attempt to survey this issue, Questions 14, 20, 21, 22 and 23 of the Questionnaire for Judges (see Appendix I), by taking into account China's particular situation that lay assessors were regarded as 'extra' court staff and used as a minority on mixed tribunals in the 1980s and 1990s,[97] covered five variables. The outcomes of the five questions are presented by Table 3 below.

[94] *Supra* note 33, at 125-127; *supra* note 87, at 89; also see Stefan Machura, "Interaction between Lay Assessors and Professional Judges in German Mixed Courts", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 452.
[95] *Supra* note 33, at 144.
[96] *Ibid.*
[97] See Chapter 3 for more discussion.

Table 3: Judges' Attitudes toward the Mixed Tribunal System

Question	Opinions from Judges					
	Strongly Agree	**Agree**	**Neutral**	**Disagree**	**Strongly Disagree**	**Not sure**
1. Do you agree that the mixed tribunal system should be preserved in China?	2.1% (1)	68.8% (33)	10.4% (5)	12.5 (6)	2.1% (1)	4.2% (2)
2. Do you agree with the opinion that "One of the most important values of lay assessors is that they will alleviate the shortage of professional judges"?	12.2% (6)	55.1% (27)	18.4% (9)	12.2% (6)	2.0% (1)	--
3. Do you agree with the opinion that "It is desirable that lay assessors have a diploma or a degree in law"?	10.2% (5)	73.5% (36)	12.2% (6)	2.0% (1)	2.0% (1)	--
4. Excluding the consideration that lay assessors can alleviate the shortage of professional judges, do you prefer that collegial tribunals exclude lay assessors and exclusively comprise professional judges?	--	42.9% (21)	22.4% (11)	32.7% (16)	--	2.0% (1)
5. Do you agree with the opinion that "In order to ensure the effectiveness of lay participation, lay assessors should outnumber judges in mixed tribunals"?	4.2% (2)	16.7% (8)	29.2% (14)	43.8% (21)	6.3% (3)	--

4.3.5.1 Judges' General Attitudes Toward the Institution

Variable 1 in Table 3 generally explores whether the judges agreed that the mixed tribunal system should be preserved in China. The overwhelming majority of the responding judges seemed to support the institution by answering "strongly agree" (2.1%, 1) and "agree" (68.8%, 33), whilst only 14.6% manifested their opposition by

replying "disagree" (12.5%, 6) and "strongly disagree" (2.1%, 1), and with 10.4% (5) holding a neutral standpoint and 4.2% (2) saying they were "uncertain".

According to Oppenheim, "attitude scales rely for their effectiveness on the cooperation and frankness of the respondent."[98] When analyzing the judges' attitudes towards the mixed tribunal system, we must especially bear in mind, as observed by Oppenheim, the phenomenon of "response set", which stems from "social desirability" of the judges, that is "the tendency to reply 'agree' to items that the respondents believe reflect socially desirable attitudes, in order to show themselves in a better light."[99] In terms of my survey, the "response set" driven by "social desirability" might be expressed in attitudes that favour the mixed tribunal system, stemming from the respondents' belief that, in the context of The LAA 2004, upholding the existence of the mixed tribunal is the "socially desirable attitude" to reveal. In order to penetrate this possible "response set", Oppenheim suggests that when measuring an important attitude, sets of questions or attitude scales rather than just a single question should be employed.[100] The survey therefore included variables 2, 3, 4 and 5 in an attempt to explore the real attitudes of judges towards the mixed tribunal system.

4.3.5.2 Do Judges Appreciate Lay Assessors for Alleviating the Shortage of Judges?

Variable 2 in Table 3 shows whether the judges agreed with the proposition that "One of the most important values of lay assessors is that they will alleviate the shortage of professional judges". Remarkably, the majority of the judges said they

[98] *Supra* note 4, at 210.
[99] *Ibid*, at 181.
[100] *Ibid,* at 147.

"strongly agree" (12.2%, 6) and "agree" (55.1%, 27), whilst only 14.2% (7) of the judges opposed this proposition by saying "disagree" (12.2%, 6) and "strongly disagree" (2.0%, 1), with 18.4% (9) taking a neutral standpoint.

Variable 3 inquired into the opinion of the judges regarding the proposition that "It is desirable that lay assessors have a diploma or a degree in law". Surprisingly, 83.7% (41) of the responding judges presented the favourable opinion, replying "strongly agree" (10.2%, 5) or "agree" (73.5%, 36).

Variable 4 further asked the judges whether, excluding the consideration that lay assessors can alleviate the shortage of professional judges, they would prefer all collegial tribunals to exclude lay assessors and be composed only of professional judges. As seen above, only 14.6% of the responding judges opposed the preservation of the mixed tribunal system in China, whilst (42.9%, 21) agreed that lay assessors should be excluded from courtrooms when excluding the consideration that lay assessors can alleviate the shortage of professional judges; though 69.3% of the judges manifested their support towards the mixed tribunal system, only 32.7% (16) still appreciated it if it has not helped alleviate the shortage of judges. In addition, 22.4% (11) held a neutral position and 2% (1) replied "uncertain".

4.3.5.3 Do Judges Prefer the Lay Assessors' Minority Position?

As revealed in the last chapter, The LAA 2004 legitimises the minority position of lay assessors in mixed tribunals. In other words, in Chinese practice, it is lawful for a mixed tribunal to be composed of two professional judges and only one lay assessor. To further explore to what extent judges support lay participation, Variable 5 in Table 3 shows whether the judges agreed that lay assessors should outnumber them in mixed

tribunals. Impressively, despite 70.9% of the judges stating a favourable attitude towards the mixed tribunal system, only 20.9% (10) did not mind losing their quantitative dominance by replying "strongly agree" (4.2%, 2) or "agree" (16.7%, 8), whilst half (50.1%, 24) of the judges were resistant to this idea and answered "disagree" (43.8%, 21) or "strongly disagree" (6.3%, 3), and 29.2% (14) showed a neutral attitude.

4.3.5.4 Discussion

As discussed in Chapter 3, the conflict between the high workload and shortage of professional judges has been a long-standing problem confronted by many courts in China. The mixed tribunal, compared with the collegial tribunal composed exclusively of judges, has therefore been appreciated by some judges, essentially because lay assessors can replace judges as members of collegial tribunals.[101] In other words, lay assessors are welcome for the sake of spreading the caseload of judges between more people, rather than the wish to encourage lay participation. Probably to address this misuse, the preamble of The LAA 2004 specifically clarifies that the legislative purpose of the Act is to actualize the people's democratic participation in the administration of justice. To remind the courts of moving away from the customary misuse of the tribunals, Xiao Yang, the Chief Justice of the Supreme Court of China, emphasized that "although lay assessors may practically help to resolve the shortage of judges…this use shall not be regarded as the major function of the mixed tribunal system."[102] However, in spite of this emphasis, the courts in China have actually struggled with a heavy

[101] See, for example, See, for example, Cui Hailin and Wang Zhi, "A Survey Report on the Working Situation of Lay Assessors in Shangqiu City", see the official website of China's courts, at http://www.chinacourt.org/html/article/200806/06/306182.shtml, last visited on 26 September 2008.
[102] *Supra* note 61.

caseload and shortage of judges.[103] It therefore remains questionable as to whether the customary misuse of lay assessors can be totally eliminated in practice. In light of Variables 2, 3 and 4 in Table 3 above, it seems that many judges welcome lay assessors, only for the more utilitarian and self-interested consideration that lay participants are able to increase the number of court staff and thus alleviate judges' caseloads. When this value disappears, lay assessors may become unpopular, although Variable 1 seemingly indicates that the majority of the judges uphold the mixed tribunal system. Moreover, Variable 5 indicates that the majority of those judges who uphold the mixed tribunal system premise their support on the condition that lay participation does not threaten their control over the courtroom.

According to the statistical data above, it seems that although the majority of judges seemingly uphold the mixed tribunal system, they premise their support largely based upon the lay assessors' ability to help with their caseloads, and that they do no harm to their dominant position in the courtroom. When these two premises disappear, their support might be reversed. This conditional support of judges raises at least two problems, as explored below.

On the one hand, the over-emphasis on lay assessors' function in helping with their caseload may lead judges to prefer those lay assessors who are competent at working efficiently and independently, rather than those who trouble the judges, asking them to spend time instructing them and hence slowing down the progress of trials. Probably driven by this perception, many judges appreciate lay assessors with a diploma or degree in law. As a result, as revealed by Figure 5, over one-third of the lay assessors who participated in my survey were law school graduates, since the judges lean toward law graduates who affect their courts in a positive way. It seems that the

[103] *Ibid.*

judges' conditional support for the mixed tribunal system has distorted its implementation in practice.

On the other hand, Article 3 of The LAA 2004 only prescribes that the proportion of lay assessors in a mixed tribunal shall not be less than one-third, granting courts the discretion to determine the exact proportion of lay assessors. However, the resistance of judges to lay assessors' quantitative dominance in mixed tribunals may mean that the courts staffed by these judges may strictly limit lay assessors to a minority position, in order to ensure the judges' dominance. As discussed in the preceding chapter, "when lay persons are in a minority, their influence diminishes".[104]

4.3.6 Attitudes of Lay Assessors towards their Tenure and Caseload

Chapter 3 questioned whether the lengthy tenure of five years and unlimited workload would bother lay assessors and undermine their enthusiasm. The Questionnaire for Lay Assessors therefore explored the attitudes of lay assessors towards their tenure and caseload.

4.3.6.1 Are Lay Assessors Satisfied with their Tenure

Question 32 of the Questionnaire for Lay Assessors (see Appendix II) investigated the serving period for lay assessors. As illustrated in Figure 7 below, the overwhelming majority (88.9%, 80) of the lay assessors had served for two or three years up until May 2007 when my survey was conducted. Question 6 inquired whether the lay assessors

[104] See Stefan Machura, "Interaction between Lay Assessors and Professional Judges in German Mixed Courts", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 465.

were willing to continue their court service, and for this only 4.8% (5) of the lay assessors showed a resistance to their court duty, by replying "not very willing" (3.8%, 4) and "unwilling" (1.0%, 1). In contrast, the overwhelming majority (92.3%, 96) rendered positive answers, replying "very willing" (39.4%, 41) or "willing" (52.9%, 55), with 2.9% (3) holding a neutral standpoint. Question 15 further explored the lay assessors' attitudes towards their five-year tenure. Again, I received very favourable replies: only 5.8% (6) of the lay assessors complained that the length of the tenure was "too long"; 71.2% (74) held that it was "reasonable", whilst 10.6% (11) even thought that it was "short". A neutral attitude was held by 11.5% (12).

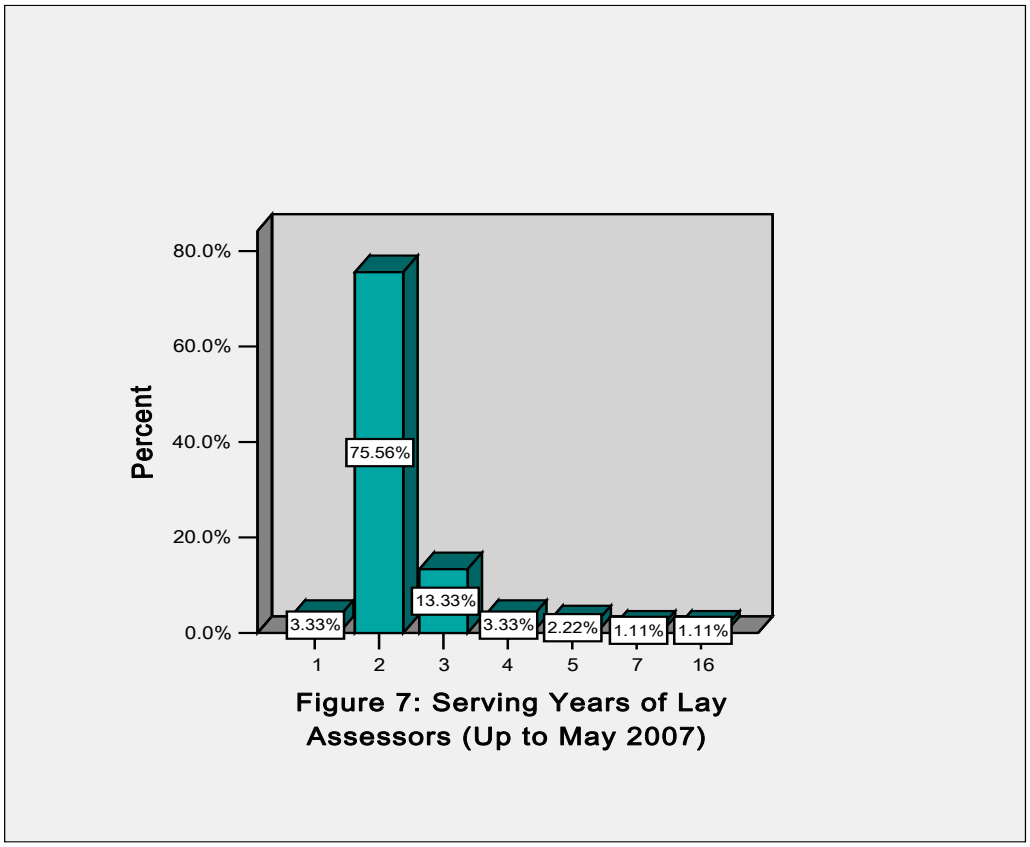

Figure 7: Serving Years of Lay Assessors (Up to May 2007)

4.3.6.2 Are Lay Assessors Satisfied with their Caseloads

As indicated by Figure 6 above, within the two years from May 2005 when The

LAA 2004 came into effect, and up until May 2007 when my survey was conducted, the overwhelming majority (75%) of the lay assessors had participated in over ten cases: 22.12% had participated in ten to twenty cases, 21.15% had taken part in twenty to 50 cases, and 31.73% had even served more than 50 cases. However, when Question 16 of the Questionnaire for Lay Assessors (see Appendix II) inquired about the lay assessors' attitudes towards their caseloads, only 2.9% (3) of the lay assessors complained that their caseloads were "heavy" (1.9%, 2) or "somewhat heavy" (1%, 1); 65.4% (68) rated their caseloads as "reasonable"; and 26.0% (27) and 5.8% (6) respectively opined that their caseloads were "somewhat easy" and "easy".

4.3.6.3 Discussion

As mentioned above, "attitude scales rely for their effectiveness on the cooperation and frankness of the respondent."[105] If the lay assessors participating in my survey answered the questions frankly rather than being affected by the official name of the survey and only pretending to uphold the mixed tribunal system, it seems that the overwhelming majority of them enjoyed their court job. This discovery can be supported by findings in other countries whereby, "once they have been lay judges, men and women apparently like the work".[106]

4.4 Conclusion

The preceding chapter, on the basis of critical analyses, questioned whether the revived mixed tribunal system can work effectively and especially raised a few

[105] *Supra* note 4, at 210.
[106] *Supra* note 33, at 133.

practical concerns, including whether the courts can appropriately exercise their discretion as to the selection, use and administration of lay assessors, whether the incompetence of lay assessors can be successfully tackled via the requirement for an enhanced educational level and the implementation of training, and whether lay assessors can effectively participate in trials and affect decision making. To be sure, the last chapter was based on untested assumptions which awaited verification by the empirical evidence presented in this chapter.

However, carrying out a single-handed, self-financed and short-term survey on a politically sensitive subject, in a country without open access to academic research and criticism, set substantial constraints on the design of my research. The design of the survey was so circumscribed by the practical situation, that I had to adopt time- and cost-efficient questionnaires, and also cooperate with an official body, and an ideal simple sampling technique carried out on a nationwide scale, was replaced by a more realistic cluster-sampling survey undertaken locally in S Province. In the context that the Chinese authorities have been trying to revive the mixed tribunal system and have flaunted the progress already made, a survey in the name of an official body might have made respondents believe that upholding the institution was a "socially desirable attitude" to take,[107] and thus might have concealed their negative voices. In spite of this concern, however, the respondents participating in our survey still reported a variety of practical problems, partly verifying the analyses presented in the previous chapter. If there was an expectation that The LAA 2004 would move China towards common people's effective participation in the administration of justice, thus democratizing the judicial process, then the practical situation revealed by my survey stands in stark contrast to such expectations.

[107] *Supra* note 4, at 181.

It seems that the opportunity to participate in justice is far removed from most Chinese citizens. The educational eligibility imposed by The LAA 2004 plays a significant role in creating a very skewed lay assessor representation, through the exclusion of a large proportion of prospective lay assessors who do not have a higher education. In addition, another practice that has seriously compounded this representation problem is that Chinese courts, to ensure the political accountability of lay assessors, have preferentially recruited government employees and CCP members during the process of selecting lay assessors, leaving the lay assessor pool dominated by these political activists. The LAA 2004 declares that the mixed tribunal system aims to introduce democratic civic participation into the administration of justice. However, at least in terms of the composition of the lay assessor pool, it is not certain that this objective has been practically achieved, because Chinese lay assessors are not representative of the general population, but largely well-educated activists, politically affiliated to the CCP and the Government. Meanwhile, by utilizing lay assessors merely to handle the overloaded docket, rather than to democratise juridical proceedings, has given rise to distorted practices such as specially recruiting law graduates to serve as lay assessors in order to enhance working efficiency, further adding to the problem of skewed representation and conflicting with the original intention of encouraging lay participation.

Another striking finding of my survey was that the so-called “random selection of lay assessors”, a process which is meant to randomly designate each lay assessor to a specific case in order to prevent the courts from using certain lay assessors repeatedly and turning them into a full-time court employees, has been easily circumvented by the courts and has not taken hold within actual court practice. This failure, in association with the unlimited caseload of lay assessors, has engendered the re-occurring practice

whereby a lay assessor is allocated a very heavy caseload and acts like a full-time court worker.

Moreover, although the revived institution has substantially improved the educational eligibility of lay assessors at the cost of depriving the overwhelming majority of Chinese citizenry the right to be appointed, it is yet to be seen whether lay assessors have been transformed into competent judges who are able to handle both fact-finding and application of the law, in light of the fact that they have frequently struggled with evidentiary and legal problems in trials.

In addition, it is also questionable as to whether the passiveness of lay assessors during deliberations has been totally eliminated by the revived system. Probably due to their incompetence, psychological obedience to judges and minority position, it seems that the lay assessors have neither very vigorously participated in deliberations, nor affected decision making. Hans points out that "if we want to protect and promote the community's voice, it seems critical to ensure a certain degree of separation and independence between the legally trained decision maker and the lay participant."[108] Inspired by this theory and our findings, it would seem appropriate to conduct more intensive studies on the behaviour and psychology of lay assessors in China, and to reconsider the current working mechanisms in mixed tribunals.

Also, according to Hans, judges' attitudes toward lay participation can influence the very functioning of the mixed tribunal system.[109] However, as shown by my survey, it seems that Chinese judges only welcome lay assessors on the condition that they help tackle the overloaded dockets, but at the same time do not jeopardize the judges' quantitative dominance in mixed tribunals. These self-centred considerations, rather than sincere support for lay participation as an activity, have distorted the

[108] *Supra* note 87, at 90.
[109] *Ibid,* at 88.

implementation of the institution, for example, by only recruiting law graduates to serve as lay assessors, in order to accelerate judicial proceedings, and minimize the proportion of lay assessors and to ensure the dominance of judges, at the cost of undermining the significance and influence of lay participation.

In contrast with the judges' conditional supports for lay participation, the lay assessors themselves, irrespective of their lengthy tenure, heavy workload and unsatisfactory benefits, manifest their clear-cut appreciation of their court duty, probably verifying the opinion that "laymen are far more enthusiastic about citizen participation, suggesting that democratic stirrings may be making some headway among the populace but are not being warmly embraced by professionals."[110]

To sum up, according to my survey, one cannot expect the revived institution to mark a turning point and to bring about sweeping changes to China's legal system. A series of observable problems that impacted upon the old system have yet to be eliminated successfully through the new Act, which has been characterized by the inappropriate selection and use of lay assessors and their lack of competence, activity and influence during deliberations. In light of the stored-up problems revealed by my survey, there is room for scepticism with regard to those assertive and positive official reports mentioned in the beginning of this chapter, which highlight the representativeness of lay assessment and the lay assessor's improved ability to discharge their court duties revealing them to be no more than convenient rhetoric and political propaganda. To be sure, based on a small-scale questionnaire survey that collected data locally in an official name, this chapter cannot give a fully precise and rounded picture as to how the reformed mixed tribunal system is working in China.

[110] Stephan Landsman, "Commentary: Dispatches from the Front: Lay Participation in Legal Processes and the Development of Democracy", *Law & Policy*, Vol.25, 2003, at 175.

However, in association with some second-hand material, it can be expected to serve as exploratory research with regard to some unresolved problems in practice, and can provide ideas and an impetus for further empirical studies on lay participation in China today.

Chapter 5

Should China Continue with Lay Participation?

The Potential Value of Lay Participation in Transitional China

5.1 Introduction

As demonstrated in Chapters 1 and 2, it is possible to challenge the allegation that the revival of lay participation in China is inappropriate because historically the country has no cultural basis for civic legal participation, and also because the use of lay participation is in decline worldwide. However, in spite of the historical reality which shows that China has in fact never stopped practicing and experimenting with diverse forms of lay participation, and that lay participation has not completely lost its vitality on a worldwide scale, it is undeniable that the information presented in Chapters 3 and 4, based on theoretical and empirical analysis, confirm the fact that the mixed tribunal system, as the main instance of lay participation in China today, faces problems in practice, despite recent innovations. As mentioned previously, opponents have based their objections to lay participation in China on three counts: the declining trend in lay participation worldwide, the lack of historical tradition in China and the unsuccessful use of mixed tribunals. It appears that although the first two arguments can be challenged, the detractors have, at the very least, partly won the third argument. Given such a context, should China continue its recent move towards reforming and resuscitating lay participation? Before answering this question, it is necessary to speculate whether lay participation has a potential value in transitional China.

As discussed in Chapter 1, a number of those countries that have demonstrated a growing interest in resuscitating lay participation, have also experienced a transition

from authoritarianism to democracy. These countries include some post-communist states such as Russia, Uzbekistan, Azerbaijan, Georgia and Ukraine. Likewise, following the collapse of the former Soviet Union and the Communist bloc at the end of the 1980s, and as one of the successor countries to the former Soviet Union, China has entered the post-communist era and so must confront the related social transition as well.[1]

Since 1992 the market economy has gradually taken root in China.[2] With the rapid rise of the market economy, the relationship between individual citizens and the Chinese Government has undergone tremendous change. The Government's autocratic role, one established during the Communist era when most citizens had few personal assets and a generally weak understanding of human rights, has steadily eroded, and China has since evolved into a much more rights-oriented society than it was ten or twenty years ago, as Chinese citizens have gradually realized the importance of protecting the increased number of personal assets obtained under the market economy.[3] Also, during this economic rise, a new power bloc, the bourgeoisie, has come into being in China, and they have critical demands in terms of the recognition and protection of their private property,[4] especially when they realize that absolute

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[1] John C. Reitz, "Export of the Rule of Law", *Transactional Law & Contemporary Problems*, Vol.13, 2003, at 432.

[2] Sun Zhongqin, *From "Plan" to "Market": The Study on China's Economic Transition* (The Shehui Press of China, Beijing, 2009), at 3.

[3] See, for example, Xia Yong, *The Era Envisaging Rights: A Study on Chinese Citizens' Rights* (The Press of Social Sciences Literature, Beijing 2007), at 39; and Xu Xianming, "Human Rights -- The Essence of Rule of Law", originally published at the official website of China courts, 16 Sep 2002, see http://jwjc.ujn.edu.cn/construct/article/fzdzdsrq.htm, last visited on 27 Dec 2009.

[4] In March 2003, for example, the All-China Industrial and Commercial Alliance, the officially recognized national chamber of commerce and virtually the whole political association of China's burgeoning bourgeoisie, for the third time proposed to amend the Constitution of China to add a provision on the protection of private property (the same proposal was presented as well in 1998 and 2002). See the news report, "The Third Proposal about Amending the Constitutional Law to Include Provision of Protecting

power without checks and balances engenders corruption and that the corruption of senior government officials has begun to take the form of abusing their powers to seize profits from local businesses.[5] As one scholar points out, the rising market economy in China requires a new type of government with the following features: "its functions must be limited; its conduct must be in compliance with the laws; its centralized power must be fragmented, based on self-rule; its operation must be institutionalised and open to the public; and its legitimacy must be based on popular elections or laws".[6] Weidong Ji, a specialist in Chinese law, calls this an opportunity for an "historical compromise" in China, meaning that the Chinese Government, ruled by the Chinese Communist Party (CCP), to avoid the risk of its demise via a bottom-up revolution, will have to make a gradual and painstaking top-down reform, accepting what it has historically regarded as fundamentally "bourgeois" or "Western" concepts, such as democratization and liberalization.[7] In response to these requests, the Chinese Government has already amended the Constitution, adding a provision that "the People's Republic of China governs the country according to law to establish a socialist country of rule-of-law".[8] Moreover, the CCP, in 2004, vowed to establish a "Harmonious Society of Socialism" that features, along with other attributes, democracy, rule of law, fairness and justice.[9]

A transitional society "refers to a major political transformation, such as regime

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Private Properties", *The People's Daily*, 3 Mar 2003.

[5] The Chinese Academy of Sciences (CAS) and Tsinghua University's Studies of National Affaires Centre, "Ten Megatrends about the Corruption of Chinese Senior Officials: A Survey Report on Features and Transformation of Senior Officials' Corruption in China Between 1978 and 2002", *China Economic Times*, 2 Jun 2003.

[6] See Mao Shoulong, "The Road Toward Constitutionalism: Starting from the Respect for the Constitution", *Nanfang Weekend*, 13 Mar 2003, website version, see http://www.nanfangdaily.com.cn/zm/20030313/, last visited on 29 December 2009.

[7] *Ibid.*

[8] See Subsection 1 of Article 5 of The Constitutional Law of China 1999.

[9] See the editorial, "A Basic Task of Building Socialism with Chinese Characteristics – Penetratingly Understanding the Momentous Significance of Building a Socialist Harmonious Society", *Seeking Truth* (the CCP's official newspaper), 1 Mar 2005.

change from authoritarian or repressive rule to democratic or electoral rule, or a transition from conflict to peace or stability".[10] In light of the growing demands for democratisation following the rapid growth of the market economy, it appears that Chinese society, where the legacy of totalitarian Communism such as the CCP's single-party rule has not been totally removed, must inevitably confront the transition from authoritarianism to democracy. As Hans points out, "the social and political context affects the functioning of lay participation".[11] So what contributions could lay participation make to China's transitional society? "The study of Chinese jurisprudence…may be of assistance in understanding the judicial problems now confronting China".[12] This chapter will, by looking at the status quo of China's justice system along with its unique peculiarities, discuss the potential role lay participation might play in transforming "a dysfunctional and confusing judicial system into a coherent system based on the rule of law".[13]

Rather than attempt to cover every facet, this chapter will be selective in exploring those values essential to lay participation working effectively in China's transitional society. Borrowing Anderson and Nolan's method of classifying the functions of lay participation,[14] the main body of this chapter will be divided into two parts. The first looks at the value of lay participation in producing better justice, while the second

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[10] Dana Michael Hollywood, "The Search for Post-Conflict Justice in Iraq: A Comparative Study of Transitional Justice Mechanisms and Their Applicability to Post-Saddam Iraq", *Brook Journal of International Law*, Vol. 33, 2007-2008, at 64.

[11] Valerie P. Hans, "Lay Participation in Legal Decision Making", *Law & Policy*, Vol.25, No.2, 2003, at 87.

[12] M.Ulric Killion, "Post-WTO China and Independent Judicial Review", *Houston Journal of International Law*, Vol. 26, No.3, 2004, at 522.

[13] J. David Yeager, "The Human Rights Chamber for Bosnia and Herzegovina – A Case Study in Transitional Justice", *International Legal Perspectives*, Vol.14, 2004, at 53.

[14] Kent Anderson and Mark Nolan, "Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Mixed Tribunal System (saiban-in seido) from Domestic Historical and International Psychological Perspective", *Vanderbilt Journal of Transnational Law*, Vol. 37, 2004, at 941.

discusses its potential function in terms of promoting a more democratic society.

5.2 Producing Better Justice

The potential role of lay participation in creating better justice in China embodies four aspects: to improve judicial independence, to reduce the level of corruption within the judiciary, to alleviate court congestion, and to balance the severity of criminal justice.

5.2.1 To Promote Judicial independence

First of all, lay participation may play a significant role in enhancing judicial independence in China.

5.2.1.1 Factors Undermining Judicial Independence

"In short, judicial independence can be generally defined in terms of freedom – indeed responsibility – to rule based on the facts and the law, and thus free from undue external restraints".[15] The Constitutional Law of China, as amended in 2004, enshrines the principle of judicial independence by specifically providing that "the courts exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organs, public organization or

[15] Brian K. Landsberg, "The Role of Judicial Independence", *Pacific McGeorge Global Business & Development Law Journal*, Vol.19, 2006, at 335. For more discussion about the definition of judicial independence, see this article at 331-335.

individual".[16] However, judicial independence has not been practically realized in China, as there is still a "blurring of the line between the state and the ruling party" and "the judiciary…is typically cowed, as part of the one-sided grip on power".[17] In practice, judicial independence has often been undermined by, *inter alia*, the factors below.

-- Judges Subject to the Control of the CCP

In contrast to the system in England, where "appointments of [judges] are made on professional merit alone, assessed as objectively as possible" and "party political considerations have long been completely banished",[18] under China's current law, the selection, promotion and removal of Chinese judges largely remain under the control of the CCP.

On one hand, in contrast to some common-law countries where law-school graduates first work as lawyers and the experienced and outstanding ones might then be selected as professional judges,[19] in civil law countries, there is normally a career judiciary and "most judges are recruited for the ordinary courts soon after university graduation and specifically trained for a judicial life".[20] This is the case in China, where law-school graduates are employed by courts of all levels directly after their graduation. They normally start their legal career at the courts as a judge's secretary, clerk or recorder. After years of service and having successfully passed the National Bar

[16] See Article 126 of The Constitutional Law of China, amended in 2004.
[17] Cynthia Alkon, "The Cookie Cutter Syndrome: Legal Reform Assistance under Post-Communist Democratization Programs", *Journal of Dispute Resolution*, Vol. 2002, Issue 2, 2002, at 343-344.
[18] Thomas Legg, "Judges for the New Century", *Public Law*, Spr 2001, at 65.
[19] Catherine Elliott and Frances Quinn, *English Legal System* (Pearson Education Limited, Harlow, 2000), at100.
[20] Michael Kirby, "Judicial Dissent -- Common Law and Civil Law Traditions", *Law Quarterly Review*, Vol.123, Jul 2007, at 388-389.

Examination, they can then be appointed as professional judges.[21] Moreover, much like governmental departments, each court in China is organized on a hierarchical basis, as follows: (1) each court is divided into different specialist divisions such as the criminal, civil and administrative division, where the judges are normally seated in a fixed position to handle different categories of cases, (2) each division has its "head-justice" and "vice head-justice" who are in charge of administrative affairs and oversee the other staff in the division, (3) each court has its "chief justice (court president)" and "vice chief justices (vice court presidents)" who manage the whole court, and (4) all common judges and other employees of the court are subject to the leadership of these division (vice) head-justices and (vice) chief justices, who are selected from those experienced and skilled common judges of the court. As a result, the successful career of a law-school graduate working in a Chinese court means being appointed as a professional judge and then being promoted to the position of head-justice or chief justice; the more rapidly, the better. However, according to Article 11 of The Act of Chinese Judges 1995 (amended in 2001), each judge, (vice) head-justice, vice chief justice of all levels of courts in China, shall be nominated by the chief justice of each individual court and then be appointed by the corresponding local Standing Committee of the People's Congress, although the latter procedure is no more than a rubber stamp.[22] In other words, each judge's appointment and promotion are largely controlled

[21] According to subsection 6 of Article 9 of The Act of Chinese Judges 1995 (amended in 2001), law-school graduates with bachelor's degree, master's degree and doctoral degree, could be appointed as judges after working at the court for two years and one years respectively; and the law-school graduates with a bachelor's degree, master's and doctoral degree could be appointed as judges of the provincial high courts and the Supreme Court after working at the courts for three and two years respectively. Article 12 of The Act of Chinese Judges 1995 (amended in 2001) provides that a judge shall pass the National Bar Examination before his or her appointment.

[22] The People's Congress and its standing committee of all levels are virtually under the control the CCP as well. See Marie Seong-Hak Kim, "A Distant Premise: Judicial Independence in the People's Republic of China", *Korean Journal of Comparative Law*,

by the chief justice of the court where the judge serves.

As stated in Chapter 3, the CCP has established a Party Committee in each court and the chairperson of the Committee is appointed by the Superior Party Committee which extends hierarchically upward to CCP headquarters. The chief justice of each court has to be staffed by the chairperson of the Party Committee thereat.[23] The CCP thus, via the hands of the chief justices who are virtually appointed by it, is able to exercise control over the judiciary by affecting the careers of all Chinese judges.

On the other hand, Chapter 8 of The Act of Chinese Judges 1995 (amended in 2001) establishes an annual assessment of Chinese judges. Article 40 of this Act further provides that a judge will be removed from his/her post if the result of his/her annual assessment is rated as "disqualified" for two successive years. Article 48 further provides that each court institutes its own Committee of the Examination and Appraisal of Judges, in order to manage the judges' annual assessment, while Article 49 adds that the chief justice of a court chairs this Committee. Moreover, this Act does not specifically spell out the standards of defining a "disqualified" judge. The removal of a judge is hence largely based on the discretion of the Committee, and subject to the leadership of the chief justice who is politically affiliated to and virtually appointed by the CCP. "Arbitrary and opaque procedures for disciplining and removing judges could easily undermine the independence of the courts",[24] and it appears that this is the case in China.

-- Judges Vulnerable to Interference from Local Governments

Different from the English practice where local authorities recoup 80% of the net

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Vol. 24, 1996, at 33.

[23] See Article 46 of The Charter of Chinese Communist Party; and see Chapter 6 for more discussion.

[24] Charles Manga Fombad, "A Preliminary Assessment of the Prospects for Judicial Independence in Post -1990 African Constitutions", *Public Law*, Sum 2007, at 248.

costs expended by local magistrates' courts from the Lord Chancellor's Department in the form of a specific grant,[25] a particular feature in China is that each court is entirely financed by its corresponding local government. In practice, each court presents its annual budget report to the local government for the latter's approval and from where all the expenses of a court, including the judges' salaries and benefits, are drawn.[26] Controlling the courts' finances "gives local politicians substantial leverage over the judges".[27] If the judges of a court refuse to yield to instructions from the local government, the latter might subvert the approval process of the budget report submitted by the court. For example, reported practices include instances where local governments have delayed the payment of money to the courts and even refused to finance some items listed in the courts' budget reports.[28] "Without adequate resources, it is unlikely that a judiciary can function with any degree of independence and impartiality".[29] As Nicholson points out, "the preparation of judicial estimates by anyone not acting under the direction of the judiciary and the exercise of control by the government over the way in which the courts expend the funds granted to them necessarily poses a potential threat to judicial independence".[30]

-- Judges under the Sway of their Political Beliefs

As stated above, the CCP has recently sworn to establish a "harmonious society"

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[25] Gary Slapper and David Kelly, *The English Legal System* (Tenth Edition) (Routledge-Cavendish, London 2009), at 142.

[26] Laifan Lin, "Judicial Independence in Japan: A Re-investigation for China", *Columbia Journal of Asian Law*, Vol.13, No.2, 1999, at 198. For more discussions about the courts' financial dependence upon the local governments, see Xia, *supra* note 870, at 179-250.

[27] Stephan Landsman and Jing Zhang, "Lay Participation Comes to Japanese and Chinese Courts", *UCLA Pacific Basin Law Journal*, Vol.25, 2007-2008, at 199.

[28] Wei Min, "Shall the Mixed tribunal System Be Suspended: The Developmental Direction of the Mixed Tribunal System, *Gansu Social Sciences*, Vol.4, 2001, at 31 and 32.

[29] *Supra* note 24, at 239.

[30] *Ibid.*

featuring democracy, rule of law, fairness and justice.[31] "The Rule of Law and the principles of equity, objectivity, and fairness dictate the need for a judiciary free to make decisions without regard to political influence, fleeting public opinion, or special interests".[32] If the CCP chooses to seriously execute this policy of establishing a "harmonious society", it might gradually have to release its strict control over the judiciary to ensure judicial independence in the future. However, even if substantial reforms are undertaken to abolish the aforesaid mechanisms, which are designed to subject judges to CCP and local government 'guidance', such as the judges' careers and the court budgets being dominated by the party and local governments, the fact remains that 95% of Chinese judges are members of the CCP "who are carefully selected for being politically loyal to the Party line",[33] something that the CCP has intentionally fostered throughout its 60-year rule.[34] This situation is unlikely to change for decades to come, until these judges' retirement.

Different from some democracies such as the United States, where "judges are constrained from political activity" and "even judges who are elected typically are constrained from partisan political activity",[35] China does not have any similar prohibitions. In direct contrast, according to the CCP Charter, each judge politically affiliated to the Party shall "strictly observe and execute the party's guidelines and policies".[36] "Common sense and the available research suggest that judges are at least

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[31] *Supra* note 9.
[32] Julie A. Robinson, "Judicial Independence: The Need for Education About the Role of the Judiciary", *Washburn Law Journal*, Vol.46, 2006-2007, at 544.
[33] Xin Ren, *The Legal Tradition and Traditional Law: The Law, State and Social Control in China*, (1997), at 60, quoted in Zou Keyuan, "Judicial Reform in China: Recent Developments and Future Prospects", *International Lawyer*, Vol.36, No.3, 2002, at 1036.
[34] *Supra* note 27, at 210.
[35] Julie A. Robinson, "Judicial Independence: The Need for Education About the Role of the Judiciary", *Washburn Law Journal*, Vol.46, 2006-2007, at 539.
[36] See Article 3 of The Charter of the CCP; and Zou Keyuan, "Judicial Reform in

potentially influenced by a mixture of two motives – a desire for personal benefit, including pecuniary gain, career advancement, social standing and recognition on [the] one hand, and policy preferences…on the other".[37] Policy preference may include "preferences about particular legal rules as well as broader, more 'political' preferences".[38] Research in the United States has demonstrated that "a judge's party affiliation may have a feedback, reinforcement loop which impacts on his value system and in turn determines his decisional propensities."[39] Jerome Cohen also points out that "the membership of [Chinese] judges in the [Chinese] Communist Party means that their judgements are significantly influenced by party policy".[40] Therefore, so long as most of Chinese judges are politically affiliated to and brainwashed by the CCP, they may be inclined to devotion to or be biased in support of the party, affected by the party organization and policies, even if institutional arrangements and financial arrangements for "keeping the positions and the salaries of judges beyond the reach of external forces"[41] may become a reality in the future with the progression of democratisation and the rule of law.

China: Recent Developments and Future Prospects", *International Lawyer*, Vol.36, No.3, 2002, at 1049.

[37] Daniel Brinks, "Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?", *Texas International Law Journal*, Vol.40, 2004-2005, at 602.

[38] *Ibid*, at 603.

[39] Stuart S. Nagel, "The Relationship Between the Political and Ethnic Affiliation of Judges, and Their Decision-Making", Glendon Schubert (et al.), *Judicial Behaviour: A Reader in the Theory and Research* (Rand McNally, Chicago, 1964), at 246.

[40] See Jerome A. Cohen, "Reforming China's Civil Procedure: Judging the Courts", *American Journal of Comparative Law*, Vol.45, 1997, at 794-795 and 797.

[41] Sandra Day O' Connor, "Vindicating the Rule of Law: The Role of the Judiciary", *Chinese Journal of International Law*, Vol.2, 2003, at 3.

5.2.1.2 Interference in Judicial Independence: "Telephone Justice" in China

With their established political and financial control over the judiciary, the CCP and local governments can easily interfere in each individual case in practice, as illustrated by so-called "telephone justice". Telephone justice, in which judges abstain from ruling until they receive telephone instructions from the state authorities such as the Communist Party, has been reported from a number of countries, such as the former Soviet Union,[42] Brazil and Bolivia.[43] A similar practice is not scarce in China. The CCP and local governmental authorities can use their power over judges' careers and court budgets to exercise pressure on the courts, especially in cases where the CCP and the Government's own interests are involved, ensuring the decision made is in their favour.[44] The standard practice is that in a case where the CCP's interests are involved, the Party may, via telephone or some other form of communication, "issue instructions or less formal suggestions highly likely to determine the outcome of the matter".[45] The CCP's interference is "less direct and prescriptive for cases which are not politically sensitive",[46] but in sensitive trials, the party could still issue instructions to "authorizes judges to create legal fictions to secure politically acceptable outcomes".[47] Moreover, in a recent survey, Chinese judges acknowledged that they have confronted illegal interference from local governments when they handle cases involving the interests of

[42] Michael B. Hyman, "The Judiciary's Role in Preserving Democracy", *Judges Journal*, Vol.47, 2008, at 22; and Duncan Deville, "Combating Russia Organized Crime: Russia's Fledgling Jury System on Trial", *George Washington Journal of International Law and Economics*, Vol.32, 1999-2000, at 77.
[43] *Supra* note 37, at 599.
[44] *Supra* note 27, at 202.
[45] *Ibid*, at 199.
[46] John Gillespie, "Rethinking the Role of Judicial Independence in Socialist-transforming East Asia", *International & Comparative Law Quarterly*, Vol.56, No.4, 2007, at 852.
[47] *Ibid*.

these local governments, or even governmental departments.[48]

"The traditional view has been that there is no system of promotion of judges, on the grounds that holders of judicial office might allow their promotion prospects to affect their decision-making".[49] This view has been proved to be justified in China. I once worked as a law clerk and then as a judge at a local court in China for five years, but never saw or heard of a case where a judge disobeyed the 'instruction' from the CCP or local government, although occasionally some judges did voice their complaints. It seems that, after taking into account their career prospects, the "temptation is naturally great for the judges to defer [to] the Party's will, rather than administering justice independently according to law".[50]

5.2.1.3 The Role of Lay Participation in Improving the Independence of the Judiciary

According to the UN Basic Principles on the Judiciary, "it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary"; the judiciary shall decide matters "without any restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect from any quarter of for any reasons"; the method for selecting judges should be free of "improper motives", and judges should be suspended or removed only for actions that make them

[48] Gao Qicai (*et al*.), "Procedure, Judges and Adjudicating Impartiality", *Chinese Legal Science*, No.8, 2000, at 9, quoted in Zou Keyuan, "Judicial Reform in China: Recent Developments and Future Prospects", *International Lawyer*, Vol.36, No.3, 2002, at 1047-1048.
[49] *Supra* note 19, at102.
[50] Marie Seong-Hak Kim, "A Distant Premise: Judicial Independence in the People's Republic of China", *Korean Journal of Comparative Law*, Vol. 24, 1996, at 37.

unable to discharge their duties.[51] Seemingly, China's current situation conflicts with all of these principles. A judiciary beholden to a political party and governmental leaders "would be enslaved and would thereby enslave those who come for resolution of cases and controversies".[52] As suggested by Lin, "China still needs long term effort in order to realize judicial independence".[53] In this process, China needs to "first focus on the independence of the judicial organ from other state organs, and then to putting the issue of the independence of judges' individual authority onto the historical agenda".[54] It could be argued that lay participation will help to achieve this first objective.

"The influence of politics on the judiciary has long been acknowledged",[55] even in established democracies such as the USA. In the US, "judgeships…are still a major plum of patronage and thus the political process at times interferes with selection on merits".[56] "The result of all this is a comfortable margin of preference for trial by jury among the people at large, among the Bar, and, most interestingly perhaps, also among the Bench".[57] According to Lempert, the jury plays an important role in securing the independence of the judiciary from state authorities in, *inter alia*, three respects, first:

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[51] See Article 1, 2 and 10 of the Basic Principles on the Independence of the Judiciary, G.A.Res.40/32, 7th Cong., at 59, U.N. Doc. A/CONF, 121/22.Rev. 1 (1985), quoted in "Presumed Guilty?: Criminal Justice and Human Rights in Mexico -- Reports of the Joseph R. Crowley Program in International Human Rights/Centro De Derechos Humanos Miguel Agustin Pro Juarez ("PRODH"): Joint 2000 Mission in Mexico", *Fordham International Law Journal*, Vol.24, 2000-2001, at 874.

[52] John C. Reitz, "Export of the Rule of Law", *Transactional Law & Contemporary Problems*, Vol.13, 2003, at 437.

[53] *Supra* note 26, at 200.

[54] *Ibid.*

[55] McNollgast, "Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law", *South California Law Review*, Vol. 68, 1994-1995, at 1635.

[56] Hans Zeisel, "Jury Research in the United States", Nigel Walker and Annette Pearson (ed.). *The British Jury System* (The Institute of Criminology, Cambridge, 1975), at 42; For more discussion about the politicians' control over the judges in America, see Harold R. Medina, "Improving the Administration of Justice – Evolution or Revolution", *Journal of the American Judicature Society*, Vol.47, 1963-1964, at 56.

[57] Zeisel, *ibid*, at 42.

"juries are one-shot decision-makers, concerned only with justice in a particular case", and "as such, juries interpose a non-bureaucratic element, beyond the direct control of state authorities, into criminal conviction processes",[58] secondly, jurors "do not make a career of jury duty" and this "allows jurors to return unpopular verdicts without fear of government retribution",[59] and thirdly, "jurors also work to shield judges from politics because judges cannot be held responsible for jurors' decisions, and the presence of jury trial reduces incentives to buy or pressure judges".[60] Besides the jury, other authentic and viable forms of lay participation such as lay assessors, genuinely from the community, may arguably play a similar role in strengthening the independence of the judiciary. Certainly lay participants, either jurors or lay assessors who "do not make a career of juror duty", are "beyond the direct control of state authorities", "without fear of government retribution", and "shield judges from politics" are valuable new blood with which to strengthen the independence of the judiciary, an institution currently subject to administrative and political interference from the CCP.

Moreover, in contrast to each Chinese judge's salary, including bonuses and other benefits, and having to remain within the budget of the respective court which is commonly appropriated by the local government, the participation of lay judges in the adjudication process is by no means a profitable exercise, although they do receive remuneration to cover expenditures incurred or economic losses suffered due to the performance of their court duties. Lay judges are therefore less vulnerable to manipulation by the local governments, something that judges might experience due to

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[58] Richard O. Lempert, "The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research", *Cornell International Law Journal*, Vol.40, 2007, at 481.

[59] Richard O. Lempert, "Citizen Participation In Judicial Decision Making: Juries, Lay Judges and Japan", *Saint Louis-Warsaw Transatlantic Law Journal*, Vol.2001-2002, at 8.

[60] *Supra* note 58, at 481.

economic concerns.

In addition, while CCP members occupy most of the judges' positions, they only account for 5.54 % of the total population in China.[61] If lay judges really are randomly selected from the community and genuinely represent common citizens, the proportion of lay judges politically affiliated to the CCP is therefore likely to be very small. As a whole, they, unlike professional judges with party affiliation, would thus be far less susceptible to "political preference" in favour of the CCP.

To sum up, lay judges in China, as "a group of people who are not part of the ordinary judicial bureaucracy",[62] could act "as a sort of lightning rod" for interference from both the ruling party and local governments "which otherwise might centre on more permanent judges"[63] who, in China's practice, have to be "responsive to the voice of higher authority", [64] especially in important cases with far-reaching social implications. Needless to say, "constitutionalising judicial independence in this way is certainly no guarantee that there will be no unwarranted interference by the executive within the judiciary, but it will hopefully increase the odds against such interference".[65]

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[61] See the official website of the Chinese Communist Party, at http://cpc.people.com.cn/GB/78779/86328/86927/5986458.html, last visited on 7 April 2009. The CCP has not revealed the amount of the CCP members in S Province.

[62] *Supra* note 59, at 14.

[63] Harry Kalven and Hans Zeisel, *The American Jury* (Phoenix Edition) (The University of Chicago Press, Ltd., London 1971), at 8.

[64] Lester W. Kiss, "Reviving the Criminal Jury in Japan", *Law and Contemporary Problems*, Vol.62, No.2 of 1999, 265.

[65] *Supra* note 24, at 257.

5.2.2 To Check on the Corruption of the Judiciary

5.2.2.1 Features of Judicial Corruption in China

"Yet corruption and chronic court inefficiency continue to plague the legal systems in many post-communist nations".[66] This is the case in China.[67] As mentioned in Chapter 3, China's transition from a planned to a market economy has caused a rush for money in all walks of life, something that even the judicial organs have been unable to escape from, and this has led to a huge number of corruption cases occurring within the judiciary. Between 1993 and 1997, over 17,000 Chinese judges and other court personnel were punished for corruption-related offences,[68] whilst between 1998 and 2003, the number was 7,500.[69] Among these cases involving the judiciary, two remarkable trends can be discerned.

First is an increase in the instances of corrupt senior judges.[70] Recent major cases have included, among others, Huang Songyou, the Vice Chief Justice (Vice-President) of the Supreme Court of China, Sun Xiaohong, the Chief Justice (President) of the High Court of Yunnan Province, Li Yongqing, the Vice Chief Justice (Vice President) of the Intermediate Court of Lhasa City in Tibet, and Cheng Guiqing, the Chief Justice

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[66] *Supra* note 17, at 328.

[67] For details about the entire corruption situation in China, see The Transparency International, *National Integrity System Transparency International Country Study Report -- China 2006*, at 11-12, available at http://www.transparency.org/policy_research/nis/nis_reports_by_country, last visited on 6 November 2009.

[68] *See* Huai Xiaofen and Sun Benpeng, *Research on People's Assessor System* (2005), at 155, quoted in *supra* note 27, at 201.

[69] *See* Vernon Mei-Ying Hung, "China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform", *American Journal of Comparative Law*, Vol.52, 1999, at 77, quoted in *supra* note 27, at 201.

[70] Sun Shaobin, *A Study on Judicial Corruption in China and the Possible Solutions* (The Qunzhong Press, Beijing 2006), section 3 of chapter 1, at 53.

(President) of Qiaoxi District Court, Zhang Jiakou City in Hebei Province.[71] It appears that those seeking to exploit corruption in China are gradually coming to understand that it is more cost-effective and efficient to bribe the chief justice of a court than to buy the judges individually. On the one hand, as seen above, the chief justice of a court controls virtually all of the judges of that court by dominating the appointment, promotion and removal processes, and so bribing the chief justice and using him or her as a pawn, effectively achieves the objective of influencing those judges who handle specific cases. Compared with buying one chief justice, to bribe all or the majority of judges on a collegial tribunal is more expensive and less efficient.[72]

Second is the increase in the number of corruption cases involving lawyers.[73] Compared with a litigant who only appears at the court very occasionally when his litigation occurs, an experienced lawyer may appear at the same court day after day for decades. The latter may thus have become well-acquainted with some of the judges. Coupled with their common legal background (for example they may graduate from the same law school), they can easily form a variety of personal liaisons, such being a member of the same golf club. Some lawyers even make a concerted effort to foster these personal contacts since, as a rule of thumb, a good relationship with the judges will never harm their cause.[74] Knowing of this relationship, some litigants, especially those with deep-pockets, may tempt their lawyers, or their agents, to buy the judges. In practice, some lawyers anxious to take a big cut of the bribery money, are actually

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[71] For the report about the case of Huang Songyou, see the news report, "The Vice Chief Justice of the Supreme Court – Huang Songyou Has Been Removed for Committing Bribery of 400 Million", at the official website of the CCP, at http://politics.people.com.cn/GB/41223/8247606.html, last visited on 5 November 2009; for other cases, see Zou Keyuan, "Judicial Reform in China: Recent Developments and Future Prospects", *International Lawyer*, Vol.36, No.3, 2002, at 1057.

[72] *Supra* note 70, at 53-55.

[73] *Ibid*, at 69.

[74] *Ibid*, at 70 and 71.

delighted to work as agents of corruption, while the judges may be more than willing to accept bribes from lawyers, rather than directly from litigants, due to the former two parties' mutual credibility based on a long-term personal liaison. This invisible "interest group" composed of corrupt lawyers and judges is largely responsible for boosting corruption within the judiciary in China.[75]

5.2.2.2 The Potential Role of Lay Participation in Checking Judicial Corruption

In response to the above instances of judicial corruption, it could be argued that lay participation may provide a significant check on the activity, from two standpoints.

-- The Incorruptibility of Lay Judges

As previously mentioned, a corrupt chief justice may exercise illegal influence upon specific judges who handle cases, in order to make them arrive at biased decisions, since the latter normally dare not risk their career to challenge the authority of the chief justice. However, lay judges, without such career concerns, do not have to follow the hidden rules of office politics such as obeying the chief justice's orders and thus "can only be persuaded by the facts and evidence, which could establish a powerful check on the clandestine case works in the courtrooms".[76]

It is undeniable, however, that lay judges are at similar risk of being bribed. However, if they serve at the courts only as 'one-shot' judges or for a few days each year, it would be much less possible for them to form personal contacts or even "interest groups" with corrupt lawyers. The latter's important role in bribery would thus

[75] *Ibid,* at 71.
[76] Li Shuning, "The Evaluation of China's Mixed Tribunal System and Its Reconstruction", *Gansu Social Sciences*, No.2, 2004, at 177.

be disposed of. Needless to say, the litigants may still seek to buy these unknown temporary judges, but their success rate might be lower and the exposure risk might be higher when they have to attempt to buy a number of lay judges directly in a mixed tribunal, at least compared with the situation where they only need buy a single chief justice or one or two professional judges via a "money-hunting" lawyer, who probably enjoys a good relationship with those he or she is bribing. It is interesting that, after looking through hundreds of official reports and academic articles about the corruption of the judiciary in China, I did not read even one case of a lay assessor's corruption, in contrast with the very frequent corruption stories for professional judges. This might be partial evidence of the higher level of incorruptibility of lay participants.

Moreover, it has been widely acknowledged that the jury trial is a product "designed to minimise the influence of corruptible judges by the establishment of an independent fact finding forum".[77] Taking the current criminal jury in England as an example, if the person offering a bribe wishes to acquire a direct acquittal verdict, he or she has to buy ten jurors, or at least quite a few of them, to secure their influence and to sway the others in the group. In contrast to the Chinese practice of bribing a chief justice or two judges on a three-judge bench, the former would seem to be much more difficult.[78] Furthermore, the rule that states that "a jury must not separate for any reason – not even to have a meal – once it has been instructed by the judge and has retired to the jury room to reach its verdict" may create a further deterrence to interference with jurors. In addition, limits can be placed on the availability of the jury panel, for example, "before the trial the panel of names should be available only to counsel and solicitors, with the parties having the right to see it immediately before the ballot". Probably due to the extreme difficulty involved, "the number of known cases [of trying to bribe jurors]

[77] John Carruthers, "Are Juries Safe?", *Scottish Law Times*, Vol.25, 2001, at 219.
[78] W. R. Cornish, *The Jury* (Allen Lane The Penguin Press, London, 1968), at 145.

was small" whist the successful instances were even more rarely reported.[79] If China were to introduce the jury trial, it would likely serve as a powerful deterrent against the corruption of the judiciary.

-- Lay Participants' Watching over Judges

Lay judges' presence in courtrooms can serve as watchdogs to protect against the potential for corruption among judges. As discussed in the previous chapters, it has been a phenomenon prevalent in China and other countries for lay judges in mixed tribunals to "only occasionally exert [a] direct influence on the decision".[80] However, Ivkovic argues that "the mere presence of lay judges may deter professional judges from being arbitrary, corrupt, or biased", since their presence may "compel professional judges to disclose the reasoning behind their decisions and discuss these reasons with the lay judges" and "keep professional judges 'on their toes'".[81] This argument has been verified by Doran and Glenn who observe that "the very presence of the lay members may in itself influence the stance adopted by the professional".[82] Podgorecki also points out that lay judges in mixed tribunals have "more of a watchdog role than active influence".[83] He added that "the judge cannot be unaware of the vigilant attention of his two monitors [lay judges] and must be quite conscious of the limitations imposed upon him by their very presence".[84] These arguments have also been partly

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[79] For the discussion about the jury's function in holding back corruption, see *ibid*, at 145 and 146.

[80] Sanja Kutnjak Ivkovic, "Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals", *Cornell International Law Journal*, Vol. 40, 2007, at 450.

[81] *Ibid*, at 451.

[82] S. Doran and R.Glenn, "Lay Involvement in Adjudication, Review of Criminal Justice System in Northern Ireland", *Criminal Justice Review Group Research Report*, No. 11, 2000, at 44, quoted in Rod Morgan, "Magistrates: The Future According to Auld", *Journal of Law & Society*, Vol. 29, 2002, at 322.

[83] Maria Los, "The Myth of Popular Justice Under Communism: A Comparative View of the USSR and Poland", *Justice Quarterly*, Vol.2, No.4, December 1985, at 455.

[84] *Ibid.*

verified by Xiao's recent survey in China, which indicates that "compared with sitting alone in the single-judge panel, Chinese professional judges normally pay attention to their behavior more carefully when sitting in the collegial panels with their professional colleagues seated; while they sit side by side with outsiders [lay assessors] in the mixed tribunals, they generally act even more scrupulously".[85]

It is undeniable that there are a number of complex reasons jointly accountable for judicial corruption in China, including "a lack of personal independence of the judges" and "judges' low salaries".[86] However, as Zou points out, another important reason is "the lack of institutions established to monitor the judiciary".[87] In light of the above studies in both China and other countries, it could be argued that lay input in courtrooms may play a supervisory role and put a check on judges' misbehaviour in China, as long as these lay participants are genuinely selected from the community to represent the interests of common people, rather than those of the corrupt public officials themselves.

"Judges will never win the respect and trust of the citizens if they are subject to corrupt influences",[88] while "maintaining the public's confidence in the impartiality and fairness of the judiciary is, in turn, indispensable for upholding the Rule of Law".[89] Now that lay judges can potentially check on judicial corruption, it may be advisable to sharpen their focus on those Chinese courtrooms where corruption still exists.

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[85] See Xiao Tiancun, "The Reconstruction of the Mixed Tribunal System in the Context of Chinese Judges' Professionalization", *Journal of Yunnan University (Law Edition),* No.3 of 2005, at 123.
[86] Zou, *supra* note 36, at 1057.
[87] Zou Keyuan, as a specialist in researching China's judicial system, suggests six reasons outside the judiciary and nine factors within the judiciary which have caused the corruption of the judiciary in China, see *ibid*, at 1057-1058.
[88] *Supra* note 41, at 5.
[89] *Ibid*, at 5.

5.2.3 To Mitigate Harsh Criminal Justice

In established democracies, "the need for juries to act as a check on politically repressive and overly harsh laws declined or disappeared with the adoption of increasingly just laws".[90] For example, "[Once] Americans no long[er] had unjust laws foisted on them by a foreign power across of the sea. American legislators were elected by the people. The Revolutionary power of the musket had given way to the electoral power of the ballot. The intervening power of the jury was considered to be less imperative, now that Americans were free to vote the rascals out".[91] In contrast; however, civic participation in criminal justice may still play a significant part in this regard within China, from two respects: on the one hand, to soften those overly-harsh punishments dispensed by Chinese judges, and two, to check the very high conviction rates rendered by the judges.

5.2.3.1 To Mitigate Harsh Punishments

Unlike in the United States, Chinese legislators are in practice not "elected by the people". The Standing Committee of the National People's Congress (SCNPC), as the main legislative body, is under the control of the CCP. The Chairman Board of the SCNPC is the managerial body of the SCNPC, which is composed of a few special commissions including the Legislative Commission. Remarkably, the Chairman Board of the SCNPC can decide whether a legal draft proposed by the Legislative

[90] Juan Castaneda, "The Jury's Dilemma: Playing God in Solving the Problems Lurking in America's Courtrooms", *Defence Counsel Journal*, Vol.72, 2005, at 395.
[91] *Ibid.*

Commission should be submitted to the SCNPC for a vote.[92] Perhaps even more remarkably, from 1982 to 2008, 58.5% of the members of the Chairman Board of the SCNPC were politically affiliated to the CCP on average.[93] By politically controlling this key legislative body, many laws in China embody the interests and policies of the CCP rather than those of the people. With regard to the criminal law, the CCP has been accustomed to promoting the embodiment of its policy, which is "striking crimes rigorously and quickly".[94] As a result, for example, the death penalty which "is a highly symbolic issue and a template of political power"[95] has been widely used. The Criminal Code of China 1997 prescribes 413 offences, of which there 68 carry the death penalty,[96] accounting for 16.5% of the total. "With an astounding 68 capital offenses, China perennially remains the world leader in executions".[97]

The stringent criminal law has provoked acute criticism from both the international and domestic communities.[98] However, it remains uncertain whether the CCP will give

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[92] See Article 24 of The Legislative Law of China 2000.

[93] Ji Ye, "The Organization and Power Operation of the Chairman Board of the Standing Committee of the National People's Congress"; author's thesis for a master's degree - the thesis collection of the Law School of Beijing University, available at the official website of legal information of the Law School of Beijing University, see http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=47958, last visited on 12 Nov 2009. For more discussion about the CCP's control over the National People's Congress, see, for example, *supra* note 25, at 33.

[94] Yang Chunxi, *China's Criminal Policies* (The Beijing University Press, Beijing 1994), at 84.

[95] Stefan Machura, "Fairness, Justice, and Legitimacy: Experiences of People's Judges in South Russia", *Law & Policy*, Vol.25, No.2, 2003, at 137.

[96] See Article 102, 103, 104, 108, 110, 111, 112, 115, 119, 121, 125, 127, 141, 144, 151, 153, 170, 199, 205, 206, 232, 234, 236, 239, 240, 263, 264, 295, 317, 328, 347, 358, 369, 370, 383, 386, 421, 422, 423, 424, 426, 430, 431, 433, 438, 439, and 446 of The Criminal Law of China 1997.

[97] Ryan Florio, "The [Capital] Punishment Fits the Crime: A Comparative Analysis of the Death Penalty and Proportionality in the United States of America and the People's Republic of China", *University of Miami International & Comparative Law*, Vol.16, Issue 1, 2008-2009, at 43.

[98] See, for example, Andrew Scobell, "Strung Up or Shot Down?: The Death Penalty in Hong Kong and China and Implications for Post-1997", *Case Western Reserve Journal of International Law*, Vol. 20, 1988, at 147-168; Florio, *ibid*, 43-89; Chen Xingliang,

up its longstanding policy of putting a premium on stringent criminal penalties in the near future.[99] In this context, it could be argued that lay participation may serve as a potential check.

The experiences in a number of countries have proved that "lay participation in the criminal trial has the function of mitigating excessive punishment" since lay judges' leniency and perception of equity can serve "as mitigators of the length or severity of criminal penalties".[100] This has been partly verified by China's practice. Within the past a few years, since the promulgation of The LAA 2004, a number of courts have reported many cases in which lay assessors have played a role in mitigating the punishment.

On 8th May 2005, one week after The LAA 2004 came into effect, Shwei was tried by the Local Court of Wenjiang District of Sichuan Province for making black powder without license. Shwei was a self-employed farmer dwelling in a village in Wenjiang District. Besides agricultural planting, he also made firecrackers as a part-time job, since the local villages had the custom of setting off firecrackers when holding funerals and marriage ceremonies. Shwei and his forefathers had been engaged in this business for many generations. At the beginning of 2005, the local police found 150 kilogram of black powder in Shwei's house and arrested him. Shwei confessed that he produced it

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"The Abolition of Death Penalty in China", *Criminal Law Sciences*, No.7, 2003, at 39; Qu Xinjiu, "Pushing The Abolition of Death Penalty: A Responsibility of Criminal Law Experts", *Criminal Law Sciences*, No.7, 2003, at 45.

[99] For example, the working reports of the Supreme Court of China in past five years (between 2004 and 2008) have unexceptionally emphasizing the Party's policy of "punishing crimes severely", available at the official website of the Chinese Government, see http://www.gov.cn/test/2009-03/17/content_1261386.htm, http://www.gov.cn/2008lh/content_926191.htm, http://www.gov.cn/2007lh/content_556959.htm, http://www.gov.cn/jrzg/2006-03/19/content_230762.htm, and http://www.court.gov.cn/work/200503180013.htm, last visited on 19 November 09.

[100] Edmundo Hendler, "Lay Participation in Argentina: Old History, Recent Experience", *South-western Journal of Law&Trade in the Americas*, Vol.15, 2008, at 20.

by himself as the main raw material for making firecrackers, and was therefore accused of the offence of "unlawfully making explosives", according to Article 125 of The Criminal Code of China 1997. During the trial, the presiding judge of the mixed tribunal suggested that the fact that Shwei had made a large amount of black powder should be regarded as an aggravated circumstance, and that Shwei should be sentenced to imprisonment of at least ten years, since Article 125 of The Criminal Code of China 1997 specifically provides that aggravated explosives production will carry a sentence of no less than ten years imprisonment, life imprisonment or death. In sharp contrast; however, the two lay assessors at the mixed tribunal, both from the local community, strongly opposed the judge's proposal. They argued that it had been a long-standing local custom that some villagers made firecrackers by themselves. Although Shwei had made a large amount of black powder, he neither had vicious intent, nor had known the law and deliberately broken it. Following the lay assessors' opinions, the mixed tribunal eventually convicted Shwei, but exempted his punishment and set him free, taking into account the special mitigating circumstances, that he had been making firecrackers in line with both the local custom and his ancestral business.[101]

In Shwei's case, the lay participants in the mixed tribunal apparently relied less heavily on legal doctrines and in contrast placed more emphasis on justice and equity. It appears that their interpretation of the law was far less formal and starched, and the verdict more demotic than strictly legalistic. In contrast, Shwei would very likely have been sentenced to imprisonment for at least ten year in a corrective labour camp, if the case had been decided solely by the judge and his professional colleagues. Moreover, Shwei's case also partly verifies the argument that with "a wide range of practical

[101] The duplicate copy of the judgement of the case, the file with the author; for the brief information of the case, see the news report, "The Survey on the Newly Selected Lay Assessors", *The People's Court Daily*, 24 May 2005;

experience and background[s]", a group of lay judges are "best placed to understand and appreciate a defendant's criminality and the appropriate response".[102]

Furthermore, professional judges might be less capable adjudicators in certain cases, because "they hold narrower life experiences, are disconnected from popular society, over-represent certain segments of society, and either have or develop an institutional bias in favour of prosecution or the state".[103] To sum up, this case confirms the fact that "what they [the lay assessors] lose in professionalism they gain in local knowledge. What they lose in speed they gain in the added humanity of having three quite differently constituted human beings putting their heads together".[104]

The above case in which the lay assessors contributed significantly to "soften the harshness of the formal law in particular circumstances"[105] is not unique, and has been widely reported by various courts since The LAA 2004 came into force.[106] Although lay assessors in China, as seen in Chapter 4, do not often play the role of dissidents in the courtroom, probably because most cases are too ordinary to raise their dissent, it appears that they at least on occasion, driven by their life experience, common sense, conscience or perception of equity, rise up when they believe that the law is manifestly unfair.

Lay participants' leniency has also been confirmed by Russia's recent experiment with the jury trial. Among 114 cases initially tried by juries in Russia, 102 were potentially capital cases. However, only three defendants were eventually sentenced to

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[102] *Supra* note 14, at 941-942.
[103] *Ibid*, at 942.
[104] Irving F. Reichert, "The Magistrates' Courts: Lay Cornerstone of English Justice", *Judicature*, Vol.57, 1973-1974, at 139.
[105] *Supra* note 59, at 9.
[106] For more cases about the lay assessors' function in mitigating the harshness of criminal punishment in China, also see, for example, *supra* note 968; the news report, "The Lay Assessors Who have Participated in Their First Cases: Their Opinions Were Affecting Judges", *Beijing Youth Daily*, 29 April 2005.

death, with 22, 67, 31 and eight receiving imprisonment of: no more than fifteen years, from eight to fourteen years, up to eight years and no jail time at all, respectively.[107] A number of verdicts and sentences made by the newly introduced juries in Russia "are a striking contrast to the severity of those handed down under the Soviet system".[108] This largely verifies the allegation that "given the survival of severe punishments (including the death penalty), the…jury may well be a crucial corrective tool against the abuse of state power".[109] In the context that China "remains the world leader in executions",[110] it would be advisable to preserve lay judges' leniency in courtrooms by encouraging the use of mixed tribunals, or even experimenting with the introduction of the jury trial, especially in cases involving serious offences where capital punishment may be applicable.

5.2.3.2 To Correct the Extremely High Conviction Rate

It has been a longstanding tradition that the CCP advocates very strict "crime control" to secure the stability of its regime.[111] This harsh policy still continues to cast a shadow over criminal justice. Besides the aforementioned severe penalties, another remarkable consequence of this legacy is the extremely rare instance of acquittals in China. For example, in 2005 China's courts at all levels handled 684,442 criminal cases, within which the number of cases where the defendants were acquitted amounted to

[107] Stephen C. Thaman, "The Resurrection of Trial by Jury in Russia", *Stanford Journal of International Law*, Vol.31, 1995, at 135.
[108] *Ibid*, at 64.
[109] *Ibid*, at 65.
[110] *Supra* note 97, at 43.
[111] See David W. Change, "Government and Crime Control in China: Its Relevance to U.S. Criminal Justice", *Police Studies: International Review of Police Development*, Vol.7, 1984, at 94-111.

only 2,162, leading to an extremely low acquittal rate of 0.003%.[112]

It is not convincing to attribute the extremely high conviction rate to the perfect working quality of the prosecution, but rather gives rise to concerns with regard to wrongful convictions.

The number of miscarriages of justice reflects a country's quality of justice. After looking through China's official resources, I was not able to find official statistics in this regard, statistics which might, for the Chinese Government, be too sensitive to be disclosed. However, I did find statistics regarding cases of national compensation, figures which may indirectly reflect instances of the miscarriage of justice, since according to Chapter 3 of The Law of National Compensation of China 1995, any victim of a miscarriage of justice may claim compensation from the State. Although I again failed to obtain official data, Chunlong Chen, the Chairman of the National Compensation Committee of China reveals some useful information in one of his academic articles. According to Chen, between 1995 and 2005, there were 6,968 national compensation cases in which the claimants succeeded. According to Article 21 of The Law of National Compensation of China 1995, a court where a potential miscarriage of justice has occurred should handle the victim's claim for national compensation, and if the claimant wins, that court will be liable for the resulting compensation. Chen then points out that this is the reason why the courts in China usually resist receiving and filing national compensation cases in practice, and that the actual number of filed claims should be at least 20,000 each year in his estimation. Also, according to Chen, among these claims a large proportion will have been raised by

[112] Xiao Yang (the Chief Justice and President of the Supreme Court of China, as he was then), "The Working Report for the 4th Conference of the 10th National People's Congress", see *The People's Court Daily*, 12 March 2006.

victims who were wrongly convicted.[113] If Chen's estimates are reliable, thousands of problematic convictions per year will be the resulting, very astonishing number. "Wrongful convictions are a double failure of abstract justice in a system aimed at crime control tempered by due process. Not only do the real culprits go free, as in a wrongful acquittal, defeating crime control, but there is an overwhelming loss of due process to the innocents convicted".[114]

Thaman argues that "when the application of the law gives rise to more horror than the commission of the crime – if the defendant is convicted despite his innocence, if society is not able to stand aside and trust the state to make decisions – that is the place for the jury".[115] Arguably, the jury or other alternative authentic forms of lay participation may function as a corrective mechanism to hold back the unreasonably high conviction rate in China from, among other things, the aspects outlined below.

--To Check the Judge's Bias toward Prosecution

An important reason for the very high conviction rates in China is linked to Chinese judges' bias in favour of the prosecution.

Professional judges' bias in favour of the police and the act of prosecution has been verified by judicial practice in countries such as Japan, Russia and Spain.[116] This is actually the case in China today. In the old inquisitorial criminal process, Chinese judges, as their counterparts in other communist countries did, "had to play willy-nilly the roles of investigating, charging, prosecuting, defending, and punishing

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[113] Chen Chunlong, "Right Solutions to Disputes About Miscarriage of Justice and How to Improve the National Compensation Law", see the official website of the Legal Study Institution of the Academy of Social Sciences of China, at http://www.iolaw.org.cn/showarticle.asp?id=2288, last visited on 6 November 2009.

[114] Penny Darbyshire, "The Lamp that Shows that Freedom Lives - Is It Worth the Candle?", *Criminal Law Review*, Oct 1991, at 750-751.

[115] *Supra* note 107, at 61.

[116] *Supra* note 14, at 942; Stephan C. Thaman, "Europe's New Jury Systems: The Cases of Spain and Russia", *Law & Contemporary Problems,* Spring 1999*, at* 235.

authority".[117] Since the 1990s, "there is even growing interest in adversarial criminal process in China, where the conspicuous absence of important procedural rights…has excited considerable academic criticism".[118] The new criminal justice system has freed the judges of these prosecutorial functions and has asked them to be more neutral arbiters in criminal proceedings. However, in spite of the reforms aimed at introducing more adversarial features into criminal proceedings, the criminal justice system in China "retains many vestiges of its inquisitorial past".[119]

An entrenched tradition fostered by the long-standing inquisitorial process in China, is the view that the police, prosecutors and judges are all members of the "judicial family" which is no more than a line divided into three branches, these being investigation, prosecution and trial,[120] all of which shoulder the same responsibility of "punishing crimes and ensuring social stability".[121] The historical link between judges and prosecution (police) survives and has been embodied in, among other things, three aspects in practice. First, this link is "physically manifest in buildings".[122] For example, the district court where I worked even shares the same building with the district police station and the District Public Prosecutor's Office, while the three organizations only occupy different floors. Secondly, the three professions normally have good liaisons and frequent personal communications.[123] Thirdly and more importantly, the judges

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[117] *Supra* note 107, at 130.
[118] Paul Roberts, "Comparative Criminal Justice Goes Global", *Oxford Journal of Legal Studies*, Vol.28, No.2, 2008, at 372-373.
[119] Deville, *supra* note 42, at 106.
[120] Wu Lei, *China's Judicial System* (The Press of the People's University of China, Beijing, 1997) at 64-65.
[121] Yang Chunxi, *China's Criminal Policies* (The Beijing University Press, Beijing 1994), at 84.
[122] Penny Darbyshire, "For the New Lord Chancellor - Some Causes for Concern about Magistrates", *Criminal Law Review*, Dec 1997, at 869.
[123] See the news report, "Female Employees of the Police, Prosecutor Office and Court of Rudong County Holding A Get-together",http://www.rudong.gov.cn/rudong/infodetail/?infoid=8b4366e4-efb5-45c

may be inclined to show bias in favour of the prosecutors in practice. For example, a frequently-reported practice is that where the judges realize that the evidence presented by the prosecutors is too weak to convict the defendants, the judges either adjourn the proceedings and remind the prosecutors of the need to collect more evidence rather than directly acquit the defendants, or alternatively still convict the defendants but mitigate the sentence.[124] This bias jeopardizes the principle of fair trial and is accountable for the extremely high conviction rates in China.

In contrast, "lay people…who are not subject to pressures to assimilate, and who have no personal political stake in court proceedings, will be less constrained in making judicial decisions against the police and prosecutors".[125] For example, it has been reported in Russia that before the introduction of the jury trial, "if the prosecution has done a poor job of preparing its case, the court usually sends the case back for 'further' investigation, thereby giving the prosecution two (or more) bites at the apple".[126] However, "this practice is less frequently employed when a jury is present".[127] In contrast to the long-standing inquisitorial tradition, the newly introduced jury "does not tend to swallow uncritically the testimony of police officers", which has forced prosecutors to "send back poorly investigated cases for further investigation or more realistic charging, or amend the charges during the trial to conform with the proof or with realistic expectations drawn from the evidence".[128] This has again proved the allegation that "the jury prevents liaisons between judges and the police".[129] Even in a

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9-b412-4b9cb52e5871, last visited on 4 Nov 2009.

[124] Ma Guixiang, "An Analysis on the Formalization of China's Criminal Procedure from the Perspective of 'Due Process'", *Law and Business Studies*, No.5, 2002, at 91-98; and *supra* note 41, at 129-131.

[125] *Supra* note 14, at 943.

[126] Deville, *supra* note 42, at 106.

[127] *Ibid.*

[128] Cornish, *supra* note 78, at 130.

[129] *Ibid,* at 126.

mixed tribunal, the judge will have to explain to the lay participants – the outsiders - his biased actions in favour of the prosecution such as reminding the prosecutor to withdraw the case. In contrast, it may be much easier for a judge to explain this to his professional colleagues, who probably have a similar bias. Therefore, with the participation and supervision of lay participants with "a popular perspective and common sense",[130] the fairness of the criminal justice in China would be improved, by excluding the narrow focus or prejudice growing from the "judicial family" tradition.

-- To Check Judges' Readiness to Convict

In addition, the high conviction rates in China arguably derive from Chinese judges' readiness to convict.

In spite of moves toward introducing adversarial features into the criminal justice system, the criminal courts in China cannot escape from their affection for the long-standing inquisitorial tradition. Assuming the role of "crime punisher" for decades,[131] Chinese judges have been raised with "certain attitudes and prejudices, and with time these may become deeply ingrained".[132] Besides the inclination towards believing other crime punishers such as the police and prosecution, "there may be an over-readiness to discount a defence".[133] As suggested by Cornish, "the danger of an experienced judge responding 'I've heard that one before' to a case of genuine innocence is one of the very real problems of any system of criminal justice".[134] This case-hardened problem may be even more serious in China because most "crime punishers" [judges] in this country have probably had little previous acquittal experience as a result of the aforementioned context of very high conviction rates.

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[130] *Supra* note 14, at 943.
[131] Wang Haiyan, *How Has China's Selected Its Criminal Procedure Models* (The Beijing University Press, Beijing 2008), at 121.
[132] Cornish, *supra* note 78, at 159.
[133] *Ibid.*
[134] *Ibid*, at 160.

Influenced by the perception that "most of defendants are guilty" or "it [acquittal] is not one that is regularly offered",[135] many judges would rather in practice follow the old routine, persuading the prosecutor to withdraw the case for further investigation, or mitigating the punishment, than directly acquit the defendant, especially taking into account the ruling party's policy of "crime control".

In contrast with Chinese judges' case-hardened presumption of guilt and hesitance to acquit, the cohesiveness of lay participants, either jurors or lay judges, is "limited by their part-time nature – most of their time is spent within the locality and not on the bench".[136] "Where they exist, they are the one non-bureaucratic element in the system of administering justice. The presence of decision-makers for whom cases are not routine means that each case is addressed individually with fresh eyes and is not decided on the basis of superficial resemblances to prior decided cases".[137] "This may be an important safeguard against the formation of a clique and the development of case-hardening".[138] Moreover, according to Kalven and Zeisel, jurors probably apply "a more stringent test of what it means to prove some guilty beyond a reasonable doubt".[139] "Such a bias towards leniency may be truer to the law's standards than the standards of judges who are so used to seeing mainly guilty defendants that they start

[135] For discussions about the difficulty in implementing presumption of innocence and obtaining acquittals in China's practice, see, for example, Lai Yuedong, "The Principle of Presumption of Innocence and Its Application in China's Criminal Justice", Lai's thesis for the LLM degree granted by the Institution of Political Sciences & Law of China, at 25-27, file with the author; Qiu Xinhua, "Holding A Tolerant Attitude Toward Acquittal Verdicts", *Daily of Prosecutors*, 13 August 2009; and Yao Xiaoyan, "A Study on Acquittal Verdicts in China", *Knowledge and Economy*, No.10, 2009, at 27-29.

[136] Peter J. Seago, "The Development of the Professional Magistracy in England and Wales", *Criminal Law Review*, Aug, 2000, at 648.

[137] *Supra* note 59, at 8.

[138] *Supra* note 136, at 648.

[139] Harry Kalven, JR. and Hans Zeisel, *The American Jury* (1986), at 58-59, quoted in *supra* note 59, at 4.

with a presumption of guilt other than a presumption of innocence".[140] Likewise, it is believed that "lay assessors today tend to be more tolerant [toward the accused], and less trustful of government, than judges and so less likely to convict".[141] There is reason to believe that lay participants, either jurors or lay judges who are immune to the coerciveness of repelling acquittals and presumption of guilt, may be significant in impeding the unreasonably high conviction rates in China.

For example, in spite of the findings of my fieldwork outlined in Chapter 4, that lay assessors in China not very frequently challenge professional judges with regard to the conviction of defendants, 25.2% of the lay assessors admitted that they did have this experience and almost one half (49.0%) of the judges ever witnessed this. Moreover, there have been examples, sporadic though they may be, to confirm lay assessors' "leniency". Li Junde, a lay assessor interviewed by the *China Youth Daily* in 2007 revealed his experience of acquittal. Li and the other lay assessor participated in a mixed tribunal to adjudicate a case in which two defendants were accused of "attempt to robbery". The two defendants were stopped by the police when they were smoking in the street at around two o'clock in the morning. When the police found that each of them carried a dagger, they were detained immediately. At the police station, they confessed that they intended to commit a robbery and had prepared the daggers. Based on their confessions, they were accused of "attempt to robbery". During the trial, the two defendants revoked their confessions and claimed that they were beaten by the police and forced to confess. Li and the other lay assessors, during the deliberation, convinced the professional judge to acquit the defendants, since they believed that the only evidence to justify the charge were the doubtful confessions taken whilst carrying the daggers, which did not constitute a criminal offence according to the Regulation and

[140] *Supra* note 59, at 4.
[141] Deville*, supra* note 42, at 81.

Punishment Rules of Public Security of China 1986 (amended in 1994).[142]

As discussed in Chapter 1, lay participants, either jurors or lay assessors, are empirically inclined to render more acquittals. For example, very remarkably, even in Japan which, the same as China, has reported a "…near 100% conviction rate in recent judge-tried criminal cases", experienced a significantly lower conviction rate of 84% while the country adopted the jury trial in criminal cases between 1928 and 1943.[143] In Russia, in contrast with the general acquittal rates of 1.3% in 1994 and 1.4% in 1995, the acquittal rates for jury trials between 1994 and 1997 were 18.2%, 14.3%, 19.1% and 22.9% respectively, indicating, as suggested by Thaman, the relative lenience of Russian juries "as a reaction to an excessively severe Soviet criminal justice system".[144] The inclination towards acquittal on the part of jurors or lay assessors is probably what China needs to mitigate the very high conviction rates entrenched by both Chinese judges' bias toward the police (prosecution), and their unchanged readiness to convict.

5.2.4 To Relieve Court Congestion

"Many developing countries find…that their judiciary is not consistent in its conflict resolution and that it carries a large backlog of cases, causing the erosion of individual and property rights".[145] In China this is indeed the case. The fast-developing economy and quickly increasing personal assets of citizens have brought rising instances of disputes and civil litigations. Since the 1980s, the courts at all levels in

[142] Li Junde, "My Experience of Being A Lay Assessor", China Youth Daily, 25 April 2007, available at http://zqb.cyol.com/content/2007-04/25/content_1744346.htm, last visited on 7 Dec 2009.
[143] Sabrina Shizue McKenna, "Proposal for Judicial Reform in Japan: An Overview", *Asian-Pacific Law & Policy Journal*, Vol.2, Issue 2, Spring 2001, at 130.
[144] Thaman, *supra* note 116, at 257.
[145] Maria Dakolias, "Legal and Judicial Development: The Role of Civil Society in the Reform Process", *Fordham International Law Journal,* Vol.24, 2000-2001, at 527.

China have been confronted with a "litigation explosion", "an unprecedented, dramatic upsurge of civil litigation".[146] For example, the number of cases adjudicated by all Chinese courts in 2008 was 10,711,275, 19.5 times of that in 1978.[147] The "litigation explosion" has heavily increased the courts' caseloads and caused the prevalent court congestion.[148] "Delays affect both the fairness and the efficiency of the system".[149] To handle the very crowded docket, various courts have had to increase the number of personnel. However, in contrast to the very sharp increase in caseloads, the budgets of most courts have only modestly increased.[150] The limited budget and increased numbers of court employees have led directly to poor salaries and benefits for judges in some courts, which has, as suggested by some authors, fostered an incentive towards

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[146] Stephen Daniels, "The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-buidling", *Law & Contemporary Problems*, Vol.52, 1989, at 270.

[147] See Wang Shengjun (The present Chief-Justice and President of the Supreme Court of China), "The Working Report of the Supreme Court of China for the 2nd Conference of the 11th National People's Congress", available at the official website of the Chinese Government, see http://www.gov.cn/test/2009-03/17/content_1261386.htm, last visited on 8 November 2009.

[148] See, for example, Chen Weidong, *The Judicial Reform and the Judiciary's Justice* (The Jiancha Press, Beijing, 2002), at 151-159; also see the news report, "Rescuing the Short-Handed Local Courts", available at the official website of Jiangmen City of Guangdong Province, see http://www.jiangmen.gov.cn:8080/was40/detail?record=1&channelid=59722&searchword=PROPOSALID%3D%27803%27, last visited on 9 November 2009; and news report, "Improving the Infrastructure Construction to Create a Bright Future for the Local Courts", available at the official website of the High Court of Hainan Province, see http://www.hicourt.gov.cn/theory/artilce_list.asp?id=2379, last visited on 9 November 2009.

[149] Maria Dakolias, "Legal and Judicial Development: The Role of Civil Society in the Reform Process", *Fordham International Law Journal,* Vol.24, 2000-2001, at 527.

[150] See, for example, Wang Jun and Zhou Running, "How to Realize the Courts' Financial Independence – The Proposals Based on the Empirical Study", *Financial and Trade Studies,* No.5, 2004, at 51-52; also see Wang Jiaqian, "The Establishment of the Reasonable Court Budget System", available at the united official website of China's courts, see http://www.chinacourt.org/public/detail.php?id=108891, last visited on 9 November 2009, and news report, "The Deputy of the National People's Congress in Dezhou City Proposing to Resolve the Budget Shortage of the Local Court", available at the united official website of China's courts, see http://www.chinacourt.org/public/detail.php?id=243159, last visited on 9 Nov 2009.

judicial corruption in return.[151] How to reconcile overloaded courts with the limited number of personnel and sizes of budget on offer has become a dilemma that has had to be confronted by the courts in China over recent years. Remarkably, it appears that lay participation may play an effective role in helping to alleviate this dilemma, from at least two standpoints.

5.2.4.1 Alleviating Judges' Workloads through Participation in Collegial Panels

Although some courts, as discussed in Chapter 3 and 4, have so emphasized the importance of lay assessors in alleviating the shortage of court personnel so as to engender some misuses, such as preferentially or even exclusively selecting the unemployed as lay assessors, it is undeniable that lay assessors could significantly contribute to alleviating judges' workloads.

Article 147 of The Act of Criminal Procedure 1979 (amended in 1996) and Article 40 of The Act of Civil Procedure 1991 (amended in 2007), provide that any first-instance criminal and civil case other than a simple one shall be adjudicated by collegial panels normally composed of three judges, one judge and two lay assessors, or two judges and one lay assessor. According to official statistics revealed by the Supreme Court of China, 68.13% of the first-instance criminal cases in 2006 were tried by collegial panels, while the proportion in terms of first-instance civil cases was

[151] *Supra* note 70, at 164.

28.74%.[152] If a greater proportion of first-instance cases are to be tried by collegial panels in China, the courts will need to have more professional judges if each collegial panel is to be composed of three professional judges exclusively. In contrast, where each collegial panel comprises only one judge and two lay assessors, the requested number of professional judges will be significantly reduced. On the one hand, this might alleviate the current professional judges' caseloads, since they will be liberated from the task of being seated on more collegial panels. With this saved time, the professional judges could then sit on more mixed tribunals, in association with lay assessors, and handle a bigger caseload. In other words, it could be argued that in contrast to a mixed tribunal with only one judge seated, a collegial tribunal composed of three judges is a waste of judicial resources. On the other hand, with lay assessors partially taking over judges' workloads, the courts' pressure to recruit more professional judges, at the risk of increasing the budget, might be alleviated. For example, the Supreme Court of China had revealed that between 2005 and 2009, lay assessors participated in 1,715,412 cases.[153] These millions of cases would have worsened court congestion significantly if they had been imposed on professional judges exclusively.

Needless to say, to fill the two seats in a collegial panel with lay assessors rather

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[152] Xiao Yang (the Chief Justice and President of the Supreme Court of China, as he was then), "The Working Report for the 5th Conference of the 10th National People's Congress", available at the official website of the Chinese Government, see http://www.gov.cn/2007lh/content_556959.htm, last visited on 11 Nov 2009.

[153] See Wang Shengjun (the present Chief-Justice and President of the Supreme Court of China), "The Working Report of the Supreme Court of China for the 2nd Conference of the 11th National People's Congress", available at the official website of the Chinese Government, see http://www.gov.cn/test/2009-03/17/content_1261386.htm, last visited on 8 November 2009, and Xiao Yang (the former Chief Justice and President of the Supreme Court of China), "The Working Report for the 1st Conference of the 11th National People's Congress", available at the official website of the Chinese Government, see http://www.gov.cn/2008lh/content_926191.htm, last visited on 11 Nov 2009.

than professional judges, also gives rise to concerns over the costs necessary for selecting, training, administrating and paying lay assessors. This chapter might not be the right place to conduct an intensive and systematic analysis of the economics of replacing professional judges with lay assessors, which has to be based on an in-depth survey and economic analysis. However, there is reason to believe that mixed tribunals composed of one judge and two lay assessors, compared with the counterpart of three judges, might be a less expensive option in practice. For example, the official report provided by the Intermediate Court of C City of S Province, revealed that the local courts in C City paid the lay assessors remunerations according to their finished caseloads until 2007, and that on average a lay assessor received RMB 56.7 Yuan (GBP 5.2) for participating in each criminal case.[154] In contrast, a local judge's average income for handling each criminal case in the same year was approximately RMB 270 Yuan (GBP 24.5), almost five times a lay assessor's income.[155] To be sure, besides remuneration, the cost of employing lay assessors involves the expenses of selecting, training and administrating them. However, it could be argued that similar expenses exist on the part of professional judges, who enjoy additional benefits such as housing, medical care, and pensions, which lay assessors do not enjoy.

5.2.4.2 To Alleviate Judges' Workload in Handling "Court Conciliations"

In response to the dilemma of an explosion in the number of litigations and a

[154] The Project Team of the Intermediate Court of C City, "The Present Reality and Realistic Resolution – An Empirical Survey and Analysis of the Implementation of the Mixed Tribunal System", unpublished internal-circulated research report of the Intermediate Court of C City, at 2, file with the author. (The real name of the courts is omitted here for the sake of confidentiality.)

[155] Record of an interview with the Director of the Research Department of the Intermediate Court of C City of S Province, file with the author.

shortage in the number of court personnel, it is noteworthy that some courts in China have experimented with utilizing lay participation to alleviate court congestion. For example, after The Lay Assessor Act 2004 came into effect in 2005, some courts started to commission lay assessors to preside over "court conciliation".

Court conciliation is a method of judicial decision-making with Chinese peculiarities. In any civil case, as long as the judge has not made the judgment yet, he/she may on his/her own ask the litigants to reach an agreement, and either party of the litigants may ask the judge to initiate conciliation before, during and even after the trial.[156] Different from mediation prior to litigation, once the court conciliation has reached a successful conclusion, the agreement reached by the litigants will be sanctioned by the judge, who will issue a so-called "Conciliation Writ" to record the conciliation process and the agreement.[157] Remarkably, the "Conciliation Writ" has exactly the same effect as a judgment. The litigants may thus request the court to enforce it.[158] In practice, court conciliation has, over the years, been an important method of resolving disputes and ending civil litigations prematurely in China, since it may end the litigation process more quickly and produce a result with judicial effect equivalent to a judgment. Furthermore, the Supreme Court of China also encourages court conciliation since it is believed that compared with a judgment distinguishing a "winner" and "loser", reaching a conciliation agreement between the two disputing parties may better "mitigate the conflicts" and "restore the social harmony and stableness".[159] In 2008, 58.86% (3,167,107) of all the civil cases received and filed by

[156] Article 85 of The Act of Civil Procedure 1991 (amended in 2007).
[157] Article 89 of The Act of Civil Procedure 1991 (amended in 2007).
[158] Article 89 of The Act of Civil Procedure 1991 (amended in 2007).
[159] See, for example, news report. "The Supreme Court Emphasizing the Preference for Resolving Disputes by Court Conciliation ", available at the united official website of China's courts, see http://www.chinacourt.org/html/article/200907/31/367568.shtml, last visited on 9 Nov 2009.

courts of all levels in China were handled by court conciliation.[160]

Confronting the shortage of professional judges, some courts have started to experiment with commissioning lay assessors to preside over the court conciliation process, especially since 2005 when The LAA 2004 came into force. This experiment has obtained largely positive results.

For example, some courts have found that an older, married lay assessor, compared with a young and single judge, may obtain a higher success rate in conciliating marital and family cases, since the lay assessor, with rich personal experience in marriage and family matters, can better understand the situation of the litigants and propose a more appropriate agreement which the litigants are more willing to accept.[161] Some courts have also reported that lay assessors are better at conciliating neighbourhood disputes than professional judges, because the litigants trust the lay assessors who come from the same community and know the local situation better.[162] Some courts have even suggested that lay assessors with professional knowledge can be very successful in conciliating cases with that particular area of expert knowledge involved, since the litigants respect the lay assessors for their expertise.[163] Besides the reported high efficiency of the lay assessors in conciliating cases, also according to

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[160] Wang Shengjun (the present Chief-Justice and President of the Supreme Court of China), "The Working Report of the Supreme Court of China for the 2nd Conference of the 11th National People's Congress", available at the official website of the Chinese Government, see http://www.gov.cn/test/2009-03/17/content_1261386.htm, last visited on 8 Nov 2009.

[161] See news report, "The Lay Assessors of the Gulou Court Made 100% Successful Rate in Court Conciliations", *Xuzhou Daily*, 27 May 2006.

[162] See news report, "The Changting Court Actively Employing Lay Assessors in Court Conciliations", available at the united official website of China's courts, see http://www.chinacourt.org/html/article/200904/14/352898.shtml, last visited on 9 Nov 2009.

[163] See news report, "Envisaging Lay Assessors' Advantage in Court Conciliation and Improving the Social Harmony", available at the official website of the courts in Hebei Province, see http://www.hbsfy.org/ReadNews.asp?NewsID=5995, last visited on 9 Nov 2009.

reports from a number of regional courts, employing lay assessors to handle court conciliation is more economic than commissioning judges to do the same job, since the lay assessors only collect very modest remuneration from the courts.[164] To sum up, the accumulated experience of various courts suggests that lay assessors can be competent and cost-effective personnel when helping the courts to handle civil cases using court conciliation.

However, neither The Act of Civil Procedure 1991 (amended in 2007) nor The LAA 2004 grants lay assessors the power to conciliate civil cases alone. Confronting this legislative block, in practice, although some courts allow the lay assessors to handle court conciliation alone, the "Conciliation Writs" can only be produced and issued in the name of a professional judge. The Supreme Court of China has recently drawn attention to this problem and the effectiveness of employing lay assessors to handle court conciliation, and has been considering a nationwide experiment.[165] If this experiment is successful, China might see a situation where lay assessors lawfully handle most, or even all court conciliations in the future. Taking into account the aforementioned fact that the majority of civil cases are conciliated in China, these lay

[164] See, for example, Wang Deyong, "Employing Lay Assessors in Court Conciliations to Improve the Harmony", available at the official website of the courts in Anhui Province, see http://www.ahcourt.gov.cn/gb/ahgy_2004/yzzc/yzlt/userobject1ai13913.html, last visited on 9 Nov 2009; news report, "Chenghua Court Experimenting with Conciliation by Lay Assessors in Commercial Disputes", available at the official website of the Court of Chenghua District of Chengdu City Sichuan Province, see http://cdfy.chinacourt.org/public/detail.php?id=12067, last visited on 10 Nov 2009; and news report, "Dongtai Court Proving the Effectiveness of Employing Lay Assessors to Conciliate Cases", available at the united official website of the courts in China, see http://www.chinacourt.org/html/article/200804/21/297510.shtml, last visited on 10 Nov 2009.

[165] See, for example, *supra* note 714; and Li Quan, "Making Lay Assessors Bridge the Connection Between the Judiciary and the People", available at the united official website of China's courts, see http://www.chinacourt.org/html/article/200505/16/161760.shtml, last visited on 10 Nov 2009.

participants might significantly help remedy court congestion at a relatively low cost when compared with simply increasing the number of professional judges. Furthermore, without the pressure to increase the number of judges, the courts may be able to use these saved costs to improve judges' salaries and benefits, protecting against corruption. In addition, another advantage of allowing lay assessors to handle the court conciliation process is its "flexibility in the sittings of the courts".[166] Compared with the very strict and time-consuming judicial selection procedure for recruiting professional judges, the selection of lay assessors has no such limitations. If there is court congestion, additional lay assessors may be added quickly, the only problem being the need to increase the number of lay assessors' offices.

5.3 Promoting a More Democratic Society in China

Besides the aforementioned value of producing better justice for China, the other value of lay participation is its potential to promote a more democratic Chinese society, which could be embodied in the two aspects below.

5.3.1 Providing Chinese Citizens with Direct Democracy

As discussed in Chapter 1, lay participation can promote direct democracy, as embodied through two aspects: (1) making judicial decisions with regard to granting or depriving citizens of their property, freedom or even life, is an important state-governance activity, whilst allowing individual citizens to make these decisions perfectly reflects the spirit of direct democracy, just decisions made directly by the

[166] Irving F. Reichert, "The Magistrates' Courts: Lay Cornerstone of English Justice", *Judicature*, Vol.57, 1973-1974, at 140.

people,[167] and (2) by applying specific laws to individual cases, lay judges or jurors participating in trials have the opportunity to scrutinize or even nullify legal norms as devised by the Government, an activity which could be regarded as another form of direct government by the people, with people directly screening unjust laws.[168] In China's particular political context, it appears that this direct democracy may play a more realistically important role.

Whether direct civic participation in justice and direct democracy as a whole will be supported or not, is largely a controversial ideological issue, one which will continue "both to attract and to repel us precisely because it exposes the full range of democratic vices and virtues".[169] Opponents argue that since citizens have already elected their representatives to compose the Government and to realise representative democracy, democratic rights "need not be extended to the judicial branch of the government".[170] Proponents contend that "the justification for citizen participation is the basic principle of our democracy – that government is based on 'the consent of the governed' and that all citizens should have the opportunity to participate in the governmental decisions that affect their lives".[171] However, if it is justifiable that representative democracy based on sound general elections works well in western democracies and makes direct

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[167] John D. Jackson & Nikolay P. Kovalev, "Lay Adjudication and Human Rights in Europe", *The Columbia Journal of European Law*, No.1 of Vol.13, 2006/2007, at 87-88.

[168] *Supra* note 14, at 944.

[169] Jeffery Abramson, *We, the Jury: The Jury System and the Ideal of Democracy*, (Basic Books, New York, 1994), at 1-2.

[170] See *supra* note 167, at 90.

[171] Florence R. Rubin, "Citizen Participation in the State Courts", *The Justice System Journal*, Vol. 10, No.3, 1985, at 295. For more arguments supporting the direct democracy embodied by lay participation, see, for example, Milton Seligson, "Lay Participation in South Africa from Apartheid to Majority Rule", International Review of Penal Law (Vol. 72), at 279; Jonathan H. Siegelbaum, "The Right Amount of Rights: Calibrating Criminal Law and Procedure in Post-Communist Central and Eastern Europe", *Boston University International Law Journal*, Vol.20, 2002, at 84; and Kevin K. Washburn, "Restoring the Grand Jury", *Fordham Law Review*, Vol.76, 2007-2008, at 2335.

democracy in the judicial domain unnecessary, this is actually not the case in China.

Howard portrayed the picture of elections in communist countries including China:

> *"The [communist] party decided who could stand for office. Elections were, in a sense, like white primaries in the American South in the early decades of the twentieth century – nomination being tantamount to election – except that the process in the communist system was even more rigidly controlled, leaving nothing to doubt. The party prepared lists of candidates, allowing no competition from others".*[172]

Unfortunately, China still faces this situation even today.[173] Lacking an authentic election system, the immediate consequence is that representatives of the party rather than the people occupy positions in the Government, especially key positions. As seen above, Chinese judges are appointed by those party representatives working in the Government and they are unavoidably inclined to serve the latter's interests, and Chinese legislators screened by the party can hardly resist enacting ill-judged laws where the people's interests are ignored. There is therefore no guarantee in this country that legal decisions will be made by independent judges according to just laws. According to the analysis above, lay people's direct participation in legal decision-making could play an important role in dispensing a more independent and incorruptible justice, helping realize the first value of direct democracy in the judicial

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[172] A. E. Dick Howard, "After Communism: Devolution in Central and Eastern Europe", *South Texas Law Review*, Vol.40, 1999, at 664.

[173] There have been many attacks on the ineffectiveness of China's election system, see, for example, Yuan Dayi, "Methods of Improving the Election System in China", available at the official website of the NGO – China Elections and Governance, see http://www.chinaelections.org/PrintNews.asp?NewsID=81730, last visited on 23 Nov 2009; and Zhou Pingxue, *An Empirical Study on the Reform of China's Representative System* (The Chongqing Press, Chongqing 2005), the electronic version available at the official website of the NGO – China Elections and Governance, see http://www.chinaelections.org/newsinfo.asp?newsid=99983 and http://www.chinaelections.org/newsinfo.asp?newsid=99984, last visited on 23 Nov 2009.

domain, that is, making just decisions directly by the people. Moreover, Roy Amlot, a former Chairman of the Criminal Bar Association writes, "parliament enacts and a powerful Government with a strong whip may enact harsh laws. But no jury can be forced to implement what it considers to be a harsh law. In this way a jury plays a vital part in the democratic process".[174] Lay assessors in China, as seen above, have proved to have similar merits in such regards as well, potentially being able to achieve the second goal of providing direct democracy in the judicial domain by checking unjust laws. To sum up, without a sound representative democracy, one that ensures an appropriate administration of the law, direct democracy in the judicial arena would seem critical for China.

As a matter of fact, even in western democracies, scholars have been drawing attention to "democratic traditions which are under threat"[175] and putting a premium on the direct democracy brought by the jury system, which "can be adapted to revitalize Anglo-American democratic traditions that have fallen into decline."[176] As Gobert argues:

> *Their centuries-old democratic institutions are creaking. Opinion poll after opinion poll suggests that the people have lost confidence in the government's ability to solve social problems. There is a growing sense that important decisions can no longer be left to the politicians and that the people*

[174] Roy Amlot, "Leave the Jury Alone", the paper presented at a seminar on 10 Dec 1997, at Gray's Inn, London, entitled "The Effectiveness of Juries and the Use of the Civil Courts in the Control of Crime". The seminar was chaired by the Lord Chief Justice Lord Bingham, organised by the British Academy of Forensic Sciences and jointly sponsored by the Criminal Bar Association, the Administrative Law Bar Association, and the Law Society. This sentence is quoted in Sally Lloyd-Bostock and Cheryl Thomas, "Decline of the 'Little Parliament': Juries and Jury Reform in England and Wales", *Law and Contemporary Problems*, Vol. 62, at 10.

[175] James Gobert, *Justice, Democracy and the Jury* (Ashgate Publishing Ltd., Dartmouth 1997), at 194.

[176] *Ibid,* at 200 and 201.

themselves have to assume a greater share of the responsibility for decision-making. But how are the people to become involved? The answer does not lie in the proliferation of opinion polls or demagogic "talk radio" programmes. A more effective means needs to obtain the informed and reflective judgments of responsible citizens. The jury offers a model that has proved effective in the legal context and which, with appropriate modifications, can be put to use in a social and political context.[177]

In light of the above allegation, in China, "a more complex and fast-moving society, irregular general elections are no longer an adequate means…for the people to make themselves heard."[178] "For a democracy to thrive, the people must become actively involved in its operation" and lay participation "provides a model for allowing them to reclaim their democratic heritage and play a more constructive role in government."[179] More specifically, citizens serving as lay judges or jurors may "take responsibility for government action in a more involving, immediate, and consequential way than they do as voters in free elections, that other quintessentially democratic institution".[180] With regard to this concern, it would be advisable for China, having no established representative democracy, to experiment with authentic forms of lay participation such as the jury, which, by screening unjust law or acquitting pro-democracy activists whatsoever, "is important realistically because it makes decisions that affect major institutions and that may affect you and me."[181]

In addition, according to Landsman's study in post-communist Russia, "if democracy needs to have roots in a society and is more than a technique to confirm

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[177] *Ibid*, at 194.
[178] *Ibid*, at 223.
[179] *Ibid*, at 223.
[180] *Supra* note 59, at 10.
[181] Rita James Simon, *The Jury and the Defense of Insanity* (Little, Brown and Company, London, 1967), at 5.

political elites, it calls for public participation in the administration, including the administration of law. More than that, it requires that rights of others are taken into account. All this is important for the discussion on the rule of law and the universality of human rights".[182] This theory may also be applicable to China, which has a similar communist legacy. While it remains uncertain when the CCP's hegemony in terms of the national apparatus will totally disappear, lay participation under the circumstance of a centralized administration of the law could gain substantial significance with regard to generating democracy, supporting the interests of the community, hearing the voices of the unprivileged groups and opposing the ruling party in the courtrooms.

5.3.2 To Foster Chinese People's Citizenship

As discussed in Chapter 1, besides encouraging direct democracy, the other thread of lay participation which promotes a more democratic society is its function within civic education. The claim that "direct democracy may promote civic education or civic virtue by encouraging and providing an opportunity for political participation and engagement with public life" has a long history, and has been widely acknowledged by scholars.[183] A more recent study has further confirmed that "direct democracy might perform the function of civic education and 'maturation' that once may have been performed by institutions like the jury and the militia".[184] It could be argued that the civic education function of lay participation may play an important role in helping with

[182] Stephan Landsman, "Commentary: Dispatches from the Front: Lay Participation in Legal Processes and the Development of Democracy", *Law & Policy*, Vol.25, 2003, at 174.
[183] Sherman J. Clark, "The Character of Direct Democracy", *Journal of Contemporary Legal Issues*, Vol.13, 2003-2004, at 342.
[184] See Alan Hirsch, "Direct Democracy and Civic Maturation", *Hastings Constitutional Law Quarterly*, Vol.29, 2001, at 185, and 209-217, quoted in *ibid*, at 342.

China's democratic transition.

5.3.2.1 To Enhance Chinese Citizens' Commitment to the Community

Some Chinese scholars argue that China's move towards a market economy has fostered a "money-rush" and "self-centred" consciousness which has become prevalent among Chinese civilians. Accompanying this consciousness is an indifference to public affairs and an absence of commitment to the community, moves which may impede the implementation of lay participation, whether the jury or the mixed tribunal system, as this will involve a citizen sacrificing his or her own benefits to serve the community as a whole. In order to prove this argument, they make reference to empirical evidence which shows that although The LAA 2004 provides for the self-nomination of citizens as one method of finding lay assessor candidates, there have been few such cases in practice. Taking this into account, pessimistic scholars even contend that without a history of civic voluntary participation in community affairs, lay participation must be avoided in China.[185] However, it might also be argued that it is the very absence of citizens' commitment to the community that makes the need for lay participation more vital in China, because of its educational function.

Howard argues that "a special task of post-communist societies is to build communities in which there is a concern for the common good". He adds that "in the ideal society, to be sure, individuals would have the same level of concern about the welfare of others, wherever they might live, nearby or far away."[186] "For most people, however, community begins with those who are nearest – family, of course, but also

[185] Wei Min, "Shall the Mixed tribunal System Be Suspended: The Developmental Direction of the Mixed Tribunal System, *Gansu Social Sciences*, Vol.4, 2001, at 31, 32.
[186] *Supra* note 172, at 684.

those who live close enough to be seen daily or at least frequently. On local beginnings are attachments to be a larger community built".[187] Being selected as either a lay judge or a juror to serve at the local court and to adjudicate on offences that occurred locally, may grant the citizen an opportunity to become educated about his or her commitment to the community from at least three respects.

First, by personally experiencing the whole criminal process and imposing the punishment on the offender him or herself, a lay judge or juror is taught a face-to-face lesson that any harm to the community's "common good" whether driven by an offender's "money-rush" or "self-centred" thoughts, will be punished as part of due process. In contrast, for a citizen reading trial reports in newspapers, the experience of sending his peers or even neighbours into prison is much more direct and impressive, which may strengthen a citizen's law-abiding commitment to obey community norms.

Second, sitting as a judge dispensing local justice may cultivate a citizen's perception that he is not only a passive, governed object but also an associate governor of the community. This decision-making experience, acting as an authority figure, may make citizens believe that the community belongs to them and their neighbours. Serving the community affairs to secure the common good of the community is therefore for their own good. As suggested by Edmund Burke, "to be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed to a love of our country, and to mankind."[188] To sum up, "without the spark of community at the local level, it is hard to see how a healthy spirit of civic engagement

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[187] *Ibid.*

[188] Edmund Burke, *Reflections on the Revolution in France* (2nd ed. 1790), at 68, quoted in *supra* note 172, at 684.

on the larger scene can be kindled".[189]

Third, by sitting as lay judges dispensing local justice, "citizens exercise power, yes, but not unconstrained power, and in a context where they are encouraged to understand themselves as acting on behalf of the community as a whole."[190] In other words, authentic and viable forms of lay participation "are or can be constructed in ways that encourage people to take a certain ownership and responsibility for their actions".[191] As Clark summarises, lay participation "can help construct a particular vision of citizenship – one keyed to responsibility and service, and in which there is a crucial relationship between rights and duties, and between authority and obligation".[192]

To sum up, in contrast with western democracies, "no challenge is more daunting than that of civic education [in post-communism countries]".[193] "An enduring constitutional democracy requires that ordinary citizens understand and live by the constraints and values that make possible ordered liberty. The legacy of the communist years…does not create fertile soil for civic values. There is no, one formula for their inculcation; whereas a healthy democracy at the grassroots…is surely a promising step toward that reality".[194]

5.3.2.2 To Inspire Chinese Citizens' Democratic Consciousness

"Even in democratic societies, it is important that ordinary citizens have the opportunity to deliberate together, to engage in ready debate over the issues of the day. It is such occasions that make for reflection, not only on the problems being debated,

[189] *Supra* note 172, at 684.
[190] *Supra* note 183.
[191] *Ibid.*
[192] *Ibid.*
[193] *Supra* note 172, at 688.
[194] *Ibid.*

but also on larger questions about governance, democracy, society, and the common good. The essence of citizenship is being able, not only to elect those who make the laws, but also to have one's place in open and informed discussion about how government's decisions are made".[195] As suggested by Alexis de Tocqueville, the juror

> *Takes a part in every occurrence in the place; he practices the art of government in the small sphere within his reach; he accustoms himself to those forms without which liberty can only advance by revolutions; he imbibes their spirit; he acquires a taste for order, comprehends the balance of powers, and collects clear practical notions on the nature of his duties and the extent of his rights.* [196]

Lay participation thus "becomes, in effect, a classroom, an ongoing seminar about the democratic process."[197]

In contrast with the situation in western democracies, post-communist China may be in more need of a "classroom" to teach its civilians about "the democratic process". Since 1949 when the CCP established its regime, authoritarianism has prevailed in China. Representative democracy, as mentioned above, does not come into being without an authentic election system.[198] With few opportunities to participate in democratic activities, most Chinese citizens, as pointed out by many scholars, lack "democratic consciousness".[199] As described by Howard, "life under communism bred

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[195] *Ibid*, at 683.
[196] Alexis de Tocqueville, *Democracy in America* (Henry Reeve trans., 1963), at 68, quoted in *ibid*, at 683.
[197] *Supra* note 172, at 683.
[198] For detailed discussion about China's democracy, see, for example, Bradley Klein, "Democracy Optional: China and the Developing World's Challenge to the Washington Consensus", *UCLA Pacific Basin Law Journal*, Vol.22, 2004, at 89-149; and John L. Thornton, "Long Time Coming – The Prospects for Democracy in China", *Foreign Affairs*, Vol.87, 2008, at 2-22.
[199] See, for example, Xu Boyuan, "Strengthening Chinese Citizens' Democratic Consciousness – A National Issue", available at the official news website of the

a sense of loneliness, a distrust of one's neighbours, a Hobbesian kind of disengagement from public life. Retreat into the privacy of one's self and one's family was safer than venturing into the public square".[200] Moreover, a particular problem China faces is that the overwhelming majority of the national population lives in rural areas.[201] "The mass of rural people are either smallholders, or they are tenants or landless agrarian workers. Not only do they lack material resources, but, they have historically lacked power to control their physical and social environments: they are the victims of political exclusion as well as economic repression or neglect".[202] Compared with urban residents, they may lack the consciousness of participating in democratic activities to an even greater degree.

Interestingly, it appears that my empirical study in China partly verifies the role of lay participation in educating citizens. As mentioned in Chapter 4, I circulated a questionnaire among some lay assessors serving at the courts in S Province. In these questionnaires, four questions were formulated to look into the educational effects of the lay assessor system which had been implemented in 2005, the questions formed in order to ascertain: (1) whether the lay assessors' legal knowledge had increased since their court service, (2) whether the lay assessors' legal consciousness had been strengthened after their court service, (3) whether the lay assessors were willing to

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Chinese Government, see http://news.xinhuanet.com/comments/2006-05/24/content_4592221.htm, last visited on 24 Nov 2009; and Hu Honghong, "The Definition and Implication of the Citizenship Consciousness", available at the official of the NGO – China Elections and Governance, see http://www.chinaelections.org/newsinfo.asp?newsid=116655, last visited on 24 Nov 2009.

[200] *Supra* note 172, at 684.

[201] For example, the agricultural population in China up to 2000 occupied 63.94% of the total population, see Zhang Yi, "A Data Analysis of the 5th National Census in China", available at the official website of the Chinese Government, see http://www.china.com.cn/chinese/society/89666.htm, last visited on 24 Nov 2009.

[202] James C. N. Paul, "Introduction: Law, Socialism, and the Human Right to Development in Third World Countries", *Review of Socialist Law*, Vol.7, 1981, at 237.

continue their court service; and (4) whether the lay assessors felt more interested in participating in other democratic activities. It is noteworthy that 99%, 99%, 92.3% and 89.3% of the respondents returned positive answers to the four questions respectively. My findings, that in China most lay participants after service are willing to serve again and have stronger legal and participatory consciousness, also conform to recent findings made in other countries such as Japan, the USA[203] and Russia.[204] According to E.P. Thompson's (1975) theory, the rule of law evolved over a period of centuries in England, with the local citizenry gradually becoming engaged more in governance and courtroom matters.[205] Landsman holds that "the British citizenry learned democratic habits, at least in part, by sitting on juries charged with ever greater responsibility to decide issues critical to local governance."[206] It remains to be seen whether encouraging lay participation in China will illuminate the same sort of path and develop "a greater democratic consciousness in the general population".[207] However, at least in light of my empirical survey and other countries' experience, it appears that lay participation could more or less generate this kind of development in China.

5. 4 Conclusion

The above discussion espouses the fact that transitional China, in spite of having made remarkable economic progress, still faces the legacy of totalitarian communism, embodied as a status-quo with a very problematic judicial system and an

[203] Hiroshi Fukurai, "The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participation Experience in Japan and the U.S.", *Cornell International Law Journal*, Vol.40, 2007, at 317.
[204] Deville, *supra* note 42, at 116.
[205] *Supra* note 182, at 174.
[206] *Ibid.*
[207] *Supra* note 14, at 944.

under-developed democracy. Judicial independence is undermined by the judiciary being subject to the ruling party's political affectation and by local government financial control. Citizens' right to a fair trial is thus vulnerable to the entrenched severity of criminal justice and the rampant corruption of the judiciary. The limited size of budgets and lack of personnel mean courts struggle with heavy caseloads. In addition, the long-term absence of an authentic election system deprives civilians of the opportunity to express their free-will, which, in turn, diminishes their democratic consciousness. As revealed in Chapter 1, the extent to which lay participation is critical depends upon a country's political and legal context, rather than a general assessment. It appears that lay participation, within China's particular context, may play an important role in producing better justice and promoting a more democratic society.

The theory that "a judge alone is a better creature of justice"[208] apparently does not apply in China, where judges are not be immune to exterior interference, since their careers are subject to CCP control and their salaries and benefits are under the financial sway of the local government, and for the same reason, a collegial panel composed exclusively of professional judges cannot escape a similar fate. In contrast, lay participation, by introducing the voice of the common citizen, is less likely to yield to political or financial pressure from the State, and so can serve as a shield against interference from the Party or the administrative powers.

The jury trial was "filled two centuries ago as a corrective to the corruption and partiality of the judges".[209] A number of modern transitional countries have also

[208] Peter Thornton, "Trial by jury: 50 years of change", *Criminal Law Review*, September, 2004, at 698.
[209] Sir Patrick Devlin, "Blackstone Lecture", Oxford, 18 November 1978, quoted from John Hostettler, *The Criminal Jury Old and New: Jury Power From Early Times to the Present Day* (Waterside Press, Sheffield, 2004), at 154.

resuscitated lay participation "as a check on state corruption".[210] Likewise, lay participants, as outsiders serving transitorily, can potentially curb corruption of the judiciary since they yield less to instructions from corrupt senior judges and are unlikely to be absorbed into the interest groups composed of corrupt legal professionals such as judges and lawyers. In addition, they may also serve as watchdogs to oversee judges' delinquencies.

The traditional severity of criminal justice in China has been left intact, as characterised by stringent punishments and very high conviction rates. Lay participants in the courtrooms may, out of a perception of equity, conscience or common sense, serve as a check on the execution of cruel or oppressive laws, or even repeal or modify the law itself, which Chinese judges "would have administered with exact severity, and defended with professional bigotry".[211] China's experience in employing lay assessors partly lends support to this view. Moreover, lay participants, either jurors who "come together to hear one case" or lay assessors who serve at the courts for only a short period of time each year, are "unlikely to be tainted by the sorts of predispositions judges may develop over the course of their careers".[212] This makes sense in China, where the particular "predispositions" Chinese judges have after decades of the prevailing inquisitorial process, has resulted in both their readiness to convict and their "ongoing experiences or relationships with other justice system 'regulars', such as the police and prosecutors". Their "blind faith in the ability of these other justice system actors or a need to get along with them"[213], and their "traditional guilt-confirmation

[210] Deville, *supra* note 42, at 110.
[211] Casteneda, *supra* note 90, at396.
[212] Stephan Landsman, "The Civil Jury in America", *Law and Contemporary Problems*, Vol.62, 1999, at 288.
[213] *Supra* note 59, at 8.

function"[214] has led to the overly high conviction rates in China.

Lay participation in China could serve as a way to alleviate the backlog of court cases, though "Popular participation is not necessarily an end in itself. The goal of the courts is the fair and fast resolution of matters brought for adjudication."[215] However, appropriate forms of lay participation, such as the lay magistracy and administrative tribunals used in the UK, have been proved to alleviate the caseloads of courts in an efficient and economic way. A similar reality has also been demonstrated by Chinese lay assessors' visible efficacy in sitting on collegial panels and saving the need for professional judges, and replacing judges in order to effectively handle court conciliations.

The retreat of Communism in China has "brought commitments to new ways of thinking about society".[216] "Key among those post-communist aspirations is the search for democratic government, constitutionalism, political pluralism, and the rule of law."[217] In the context of a lack of authentic representative democracy, one based on a sound election system, appropriate forms of lay participation may become "the best ways for citizens to participate directly in their government"[218] and provide Chinese civilians with an important arena to voice their political dissent. In addition, even in western democracies, scholars have emphasized the cultivation of citizens' democratic consciousness via the "democratic school" – the jury trial, "that holds the potential for reviving democracy within society and empowering the people on a wide range of

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[214] Arne F. Soldwedel, "Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants", *Vanderbilt Journal of Transactional Law*, Vol.41, 2008, at 1462.
[215] Paul Nejelski, "Judging in a Democracy: The Tension of Popular Participation", *Judicature*, Vol.61, 1977-1978, at 167.
[216] *Supra* note 172, at 683.
[217] *Ibid.*
[218] Sandra Ratcliff Daffron, "Experimenting with the Jury", *Judicature* Vol. 81, No.3, 1997, at 97.

issues of public concern."[219] In contrast, after having experienced long-term authoritarian rule, post-Communist China may even more critically require the jury or a counterpart, to realize "regular citizen participation"[220] and to enlighten and "bolster civic democratic commitments".[221] My empirical study in China also partly confirms the education function of lay participation. To sum up, viable and authentic lay participation may offer "important opportunities to nurture citizenship and grass-roots democracy."[222]

To be sure, the values of lay participation may not be certain and may not remove the faults which have plagued the judicial system in China for such a long time. For example, to enhance Chinese judges' independence and incorruptibility, they need to "be adequately compensated, with fair retirement benefits, widow's pension rights and security of tenure".[223] However, as long as lay participation can potentially "help reform an ailing and faulty system",[224] it deserves to be preserved and further experimented with in China, at least before other substantial reforms are undertaken and take root. It is worthwhile pointing out that it is the combined effect of a series of reforms which have included lay participation, rather than a reform program developed in isolation, that may better resolve the deep-seated problems plaguing China's legal system.

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[219] *Supra* note 175, at 99.
[220] S*upra* note 27, at 219.
[221] *Supra* note 57, at 481.
[222] *Supra* note 172, at 683.
[223] Tom C. Clark, "Citizens, Courts, and the Effective Administration of Justice", *Journal of the American Judicature Society*, Vol.49, 1965-1966, at 13.
[224] Meryll Dean, "Trial by Jury: A Force for Change in Japan", *International and Comparative Law Quarterly*, Vol.44, 1995, at 398.

Chapter 6 The Future for Lay Participation in China

-- Prospects and Recommendations

6.1 Introduction

As discussed in Chapter 3, Chinese scholars' opinions with regard to lay participation can be grouped into three schools. The opponents of lay participation openly oppose lay participation on three main premises, namely the declining worldwide trend, the absence of historical tradition in China and the unsuccessful practice of mixed tribunals today. The jury supporters embrace the view that lay participation should be preserved in China but believe that the problematic mixed tribunal system should be replaced with the jury trial. The advocates of lay assessors adopt the more moderate view that the mixed tribunal should be preserved but that improvements are needed. Based on the discussions in previous chapters, the opinion of the first school hardly seems justified since lay participation is neither declining worldwide nor is there an absence of an historical tradition in China. Furthermore, in spite of problems with the current mixed tribunal system, lay participation has the potential to produce better justice and promote a more democratic society in China, as discussed in Chapter 5, and therefore deserves to be preserved and further experimented with in China. Whilst the proposal to abolish lay participation altogether has proved to be inappropriate, questions as to the future developmental direction of lay participation in China have to be raised, namely: should China adopt the proposal of the second school, to replace the current mixed tribunal system with a jury system, or that of the third school, i.e. to further polish the mixed tribunal system?

This chapter attempts to answer these questions by exploring the prospects for lay

participation in China. Taking into account the fact that "the social and political context affects the functioning of lay participation",[1] Part 6.2 will first look into the current political context in China which may impact upon the reform of lay participation into the future. After the current political context has been explained and understood, Part 6.3 will present a realistic proposal for further improving the current mixed tribunal system in light of the blueprint of reforming lay participation in China, as provided by the Supreme Court of China. Part 6.4 considers a few recommendations which may be beyond the current reform agenda, but which deserve attention and research effort when formulating a model for lay participation in China further into the future.

6.2 Understanding the Current Political Context for Lay Participation

As discussed in Chapter 1, the extent to which lay participation can thrive in a country is inextricably linked to the relevant political circumstances. In China's case, this issue involves two threads.

6.2.1 An Historical Opportunity for Developing Lay Participation in China

On the one hand, as indicated in Chapter 3, China's move toward resuscitating lay participation by enacting The LAA 2004 has been mainly driven by the trust crisis which China's judicial system faced at the end of the last century. As a matter of fact, the crisis has not yet been resolved, but has in fact got worse in recent years. Since the beginning of this century, a series of large-scale riots and demonstrations unprecedented in communist China's history have broken out, signalling people's

[1] Valerie P. Hans, "Lay Participation in Legal Decision Making", *Law & Policy*, Vol.25, No.2, 2003, at 87.

extreme disappointment with the justice system.

In 2004, the local government of Hanyuan County of Sichuan Province initiated the construction of a large power station, a project which necessitated the relocation of over 100,000 local residents. Instead of reaching fair compensation agreements with the local residents, the local government arbitrarily enacted a unilateral compensation standard in June 2004, forcing the local residents to accept it and to vacate their properties quickly. The compensation standard, based on the local economic situation fourteen years previously irritated the local residents who therefore submitted a collective complaint to the local government. However, the local government ignored it and refused to reconsider the unreasonable compensation standard. Realizing that the local court was under the sway of the local government and so unable to judge the dispute fairly and independently, approximately 60,000 angry local residents initiated a demonstration which eventually turned into a riot after a violent conflict erupted between the demonstrators and the armed police. This riot was the largest since 1949 when the CCP had taken power.[2] Other similar riots and demonstrations deriving from people's doubts regarding the fairness and integrity of local courts and other judicial departments then took place include a 40-day demonstration involving thousands of workers in Xianyang City between September and October 2004,[3] a riot initiated by

[2] Although this riot is well known in China and has been named the "Hanyuan Event", the mass media in China has been prohibited from reporting it. For information about it, see personal blogs of some pro-democracy activists in China, for example, http://topic.csdn.net/t/20041101/14/3510461.html, http://news.ifeng.com/opinion/200806/0630_23_624507.shtml, and http://rechtsstaat.fyfz.cn/blog/rechtsstaat/index.aspx?blogid=142162, all last visited on 16 Dec 2009.

[3] Likewise, the mass media in China has been prohibited from reporting this demonstration, for details about this, see the website forum http://warmrian.home.sunbo.net/show_hdr.php?xname=0UREA01&dname=CQFAL01&xpos=35, last visited on 16 Dec 2009.

thousands of local residents in Wengan County on 28th June 2008,[4] and a demonstration involving the participation of over 10,000 people in Shishou City on 19th June 2009.[5] "The right to a fair trial is perhaps the most fundamental tenet of constitutional democracy and has been recognized as a universal human right. It is central to a Nation's search for social equilibrium and justice because all of the rights guaranteed by a constitution mean nothing if citizens do not have the right to a fair trial. Without securing the right to a fair trial, citizens might resort to extra means to secure their interests and protect their rights."[6] This could account for the frequent demonstrations and outbreaks of violence in China recently. When courts which "are generally the last State institution to gain power over political decision-making"[7] become unreliable, Chinese citizens have to "resort to extra means to secure their interests and protect their rights", in this case demonstrations or even riots.

"In the post-communist countries…there has been widespread consensus for … their transition towards a market economy, a democratic political system, and the rule of law".[8] This is the case in China. Whilst the transition toward a market economy has been successfully accomplished, the task of political reform, aimed at democratization and the law is likely to be more painstaking, but is something that must be done not only to legitimise and sustain the CCP regime, but also support the people's will in terms of securing their human rights. "The existence of an independent judiciary is one

[4] See, for example, http://news.163.com/08/0701/19/4FPS2U2R0001124J.html and http://www.34law.com/blog/article_6077.html, last visited on 16 December 2009.

[5] See, for example, http://news.sohu.com/20090620/n264644016.shtml, and http://www.huanqiu.com/zhuanti/china/shishou/, last visited on 16 Dec 2009.

[6] Okechukwu Oko, "Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria", *Brook Journal of International Law*, Vol.31, 2005-2006, at 12.

[7] John Gillespie, "Rethinking the Role of Judicial Independence in Socialist-transforming East Asia", *International & Comparative Law Quarterly*, Vol.56, No.4, 2007, at 869.

[8] John C. Reitz, "Export of the Rule of Law", *Transactional Law & Contemporary Problems*, Vol.13, 2003, at 448 and 449.

of the core elements of modern constitutionalism and a cornerstone of democracy and good governance".[9] These riots and demonstrations signal Chinese people's desperate desire for an independent, just and trustworthy justice system to remedy their infringed human rights and protect their property. The CCP will no longer enjoy the popular support necessary to remain in power and will see further such radical movements initiated by the people, if the Government does not initiate substantial judicial and political reform to legitimise the justice system and satisfy Chinese people's critical needs. In other words, the Party will have to choose between a top-down resolution or a bottom-up revolution.

It appears that the CCP has not turned a blind eye to the increasing numbers of riots and demonstrations which have shaken its regime. The ruling party held its 17th Nationwide Congress in October 2007, at which the supreme party and national leader, Chairman Hu Jintao, stated the CCP's basic policy for the next decade. In his report of approximately 28,000 words, Chairman Hu employed a 3000-word chapter titled "Persisting with Democracy in China" to lay down China's blueprint for political reform up to 2020. Hu specifically enshrines three supreme principles to instruct the forthcoming political reform in China, including: (1) "enlarging the people's democratic participation [in government] and ensuring China is being governed by the people", (2) "promoting democracy at [the] grass-roots level and ensuring the people enjoy more tangible democratic rights", and (3) "fulfilling the policy of rule of law and establishing a rule-of-law society".[10] In terms of either the clear-cut attitude toward democracy (for example the word democracy appears over 60 times in the report) or the report's length in addressing political reform, Hu's report is record-breaking in terms of

[9] Charles Manga Fombad, "A Preliminary Assessment of the Prospects for Judicial Independence in Post -1990 African Constitutions", *Public Law*, Sum 2007, at 234.
[10] *Ibid.*

the CCPs' history. The Chinese media even made such comments as "the CCP initiates a new era of political reform".[11] It remains to be seen to what extent the CCP will keep its promise to push political reform without hesitation, extending liberties and freedoms to its citizens, since "the legacy of Communism creates unique challenges to creating democracy and rule of law"[12] and political reform relates to "alteration of power in the foreseeable future".[13] It seems certain, however, that "ongoing reform – including political reform – appears unavoidable in states like China…".[14] To ensure the legitimacy of the regime, the Chinese authorities will have to promote democratization and liberalization, something that may provide legal reform, including lay participation, with a greater opportunity of new developments since "legal reform is always a part of democratization programs".[15]

"Public contempt for the justice system can be overcome only by providing fair and efficient machinery for the administration of justice. A fair, efficient and accessible judicial system is necessary not just to protect citizens' rights but also to consolidate and deepen the democratic process".[16] It appears that the Chinese authorities have realized this and have thus continued to place a premium on lay participation, which may make the judicial process more socially legitimate even after the promulgation of The LAA 2004. Xiao Yang, the former Chief Justice of the Supreme Court of China,

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[11] See the news report, "The CCP Initiates A New Era of Political Reform", see the official news website of the Chinese Government, at http://news.xinhuanet.com/newscenter/2007-10/17/content_6896712.htm, last visited on 15 Dec 2009.

[12] Cynthia Alkon, "The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs", *Journal of Dispute Resolution*, Vol. 2002, Issue 2, 2002, at 333.

[13] *Ibid*, at 343.

[14] Bradley Klein, "Democracy Optional: China and the Developing World's Challenge to the Washington Consensus", *UCLA Pacific Basin Law Journal*, Vol.22, 2004, at 148.

[15] *Supra* note 12, at 345.

[16] Okechukwu Oko, "Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria", *Brook Journal of International Law*, Vol.31, 2005-2006, at 20.

for example, specifically pointed out in 2006 that "insisting on and improving lay participation is indispensable for establishing democratic politics, strengthening the people's overseeing of the judiciary and securing the fairness of the [judicial] system."[17] Moreover, in September 2007, the Nationwide Conference of Lay Assessors was held in Beijing for the first time in China's history. Hundreds of lay assessors from courts of all levels attended the conference and were interviewed by the supreme leaders of the CCP and the Chief Justice of the Supreme Court of China. At this conference, Luo Gan, the Chairman of the CCP Central Committee of Politics and Law (the virtual supreme leader of the CCP who administrates the legal affairs of the country) declared that "China will make every effort to ensure the people's participation in the administration of justice both now and in the future to push judicial democratization, promote fair justice, and accelerate political reform for strengthening democracy".[18]

Certainly China's problems with the judiciary are "systemic, deeply rooted and intertwined; cosmetic and superficial changes will not work".[19] "There must be a wholesale restructuring of the justice system to cleanse the judiciary of corruption and free the judiciary from the overseeing grip of the executive".[20] However, to the context that the Chinese authorities have supported lay participation for its potential value in promoting democratization and hence the legitimacy of the judiciary, the system has an historic opportunity to grow and develop in China.

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[17] Xiao Yang, "The Speech on the First Nationwide Conference of Lay Assessors", *Law & Institution Daily*, 5 June 2006, at 1 and 4.

[18] See the news report, "Luo Gan Emphasized at the First Nationwide Conference of Lay Assessors: Endeavoring to Construct the Mixed Tribunal System with Chinese Characteristic and Promoting Judicial Democracy and Democratic Politics of Socialism", at the official website of the Chinese government: http://www.gov.cn/ldhd/2007-09/03/content_735698.htm, last visited on 2 March 2008.

[19] *Supra* note 16, at 23.

[20] *Ibid.*

6.2.2 Choosing a Realistic Method for Reforming Lay Participation in China

While "the movement from repressive regimes to democratic societies has become a worldwide phenomenon",[21] "worldwide experience suggests such [democratic] transitions are neither smooth nor easy".[22] This rule seems especially true in China with such a long history of overbearing political control over the judiciary, as discussed in Chapter 5. It must be remembered that while both domestic and international dissatisfaction with the judiciary in China has been the main impetus for resuscitating lay participation, through reform of the mixed tribunal system in 2004, the reforms embodied in The LAA 2004, as seen above, have been very conservative and have not brought forward many real changes. It is uncertain yet to what extent lay participation will "remain a peculiar appurtenance"[23] to the CCP's supremacy in the judicial domain in the future, though the Party has to respect its commitment to establish a legitimate judicial system in order to save itself. It is certain, however, that the Chinese authorities, at least at present are still reluctant to initiate sweeping reform with regard to lay participation, such as by introducing a jury system.

Luo Gan, the Chairman of the CCP Central Committee of Politics and Law, at the Nationwide Conference of Lay Assessors in 2007, specifically emphasized that "China should insist on and improve the mixed tribunal system" which "accords with China's national particularities and judicial practicalities", again implying the Chinese

[21] Dana Michael Hollywood, "The Search for Post-Conflict Justice in Iraq: A Comparative Study of Transitional Justice Mechanisms and Their Applicability to Post-Saddam Iraq", *Brook Journal of International Law*, Vol. 33, 2007-2008, at 68.
[22] Stephan Landsman, "Commentary: Dispatches from the Front: Lay Participation in Legal Processes and the Development of Democracy", *Law & Policy*, Vol.25, 2003, at 173.
[23] Stephen C. Thaman, "The Resurrection of Trial by Jury in Russia", *Stanford Journal of International Law*, Vol.31, 1995, at 138.

authorities' preference for the mixed tribunal system rather than the jury trial.[24] Moreover, in March 2009, the Supreme Court of China enacted the Third Reform Plan of Chinese Courts (2009-2013), framing the blueprint for China's judicial reform over the next five years. This Reform Plan enshrines seven principles with regard to judicial reforms in the future, and the third principle specifies that "China's judicial reforms shall be based on the national situation and avoid blindly duplicating judicial institutions and systems of foreign countries".[25] Furthermore, it is remarkable that the Third Reform Plan of Chinese Courts (2009-2013) states that its aims are "to further improve the mixed tribunal system by enlarging the cross-section of lay assessors, extending lay assessors' participant range in trials, regularizing lay assessors' activities in trials, enhancing lay assessors' administration, and improving and ensuring lay assessors' welfare and benefits".[26] It appears that Chinese authorities have realized not only the potential value of lay participation in promoting the legitimacy of the justice system and the regime, but also the unresolved weaknesses of the current mixed tribunal system. However, they have also specifically circumscribed the reforms required within lay participation, in order to continue improvements to the mixed tribunal system, further indicating that more sweeping reform, such as the introduction of a jury system, is not the first choice of the Chinese authorities.

It appears that "in addition to taking time, legal reform rarely travels a straight

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[24] *Supra* note 18.

[25] The Supreme Court of China, "The Third Reform Plan of Chinese Courts (2009-2013)", see Chinese government's official news website, at http://news.xinhuanet.com/legal/2009-03/26/content_11074127_1.htm, last visited on 15 Dec 2009.

[26] The Supreme Court of China, "The 3rd Five-year Reform Plan of Chinese Courts (2009-2013)", available at the official news website of the Chinese Government, see http://news.xinhuanet.com/legal/2009-03/26/content_11074127_4.htm, last visited on 10 Nov 2009.

road".[27] Incorporating long-standing authoritarianism and the undeniable impetus to establish a legitimate and democratized justice system, a more likely direction in the near future is that the CCP will continue to make every effort to maintain the current compromise between pushing the unavoidable political reform toward democratization and preserving the traditional systems. The extent to which lay participation is likely to flourish will depend upon the outcome of the compromise.

In terms of opting for the specific reform model which China's lay participation in the future should follow, the jury supporters, as revealed in the Introduction, has proposed a shift from the mixed tribunal system, a more collaborative model involving both citizens and professional judges, to an all-citizen jury model. To be sure, "lay assessor systems…compare poorly to juries as institutions that democratize participation in the administration of justice".[28] Although these proposals are undeniably forward-looking, taking into account China's political context above, the eventual model choice has to be adjusted to the realistic channel characterized by gradualism and facile innovations, otherwise it may face strong resistance and even rejection from the Chinese authorities. One must remember that the recent reforms initiated by The LAA 2004 rejected the proposal of introducing a jury system in China and instead replaced it with a more moderate reform, that is, extending the use of lay assessors. It would be unrealistic to expect a 180-degree shift in the Chinese authorities' attitude toward the introduction of the jury trial in the near future, since the temptation to only moderately adjust the current system rather than introduce a jury system will be strong for the authorities, as "the mixed tribunal system is a compromise"[29] and "a far

[27] *Supra* note 12, at 344.
[28] Richard O. Lempert, "Citizen Participation In Judicial Decision Making: Juries, Lay Judges and Japan", *Saint Louis-Warsaw Transatlantic Law Journal*, Vol.2001-2002, at 11.
[29] *Ibid*, at 13.

smaller step and one less disruptive to current procedures than a move to a jury system".[30] Although "to invest in a jury system is to invest in democracy",[31] it seems that the Chinese Government is not yet ready to invest to such an extent. In a word, in light of Chinese authorities' explicit appreciation of the mixed tribunal system, improving the current mixed tribunal system is the most appropriate path for reforming lay participation in China.

6.3 Improving the Mixed Tribunal System by Infusing more Democratic Elements

In spite of the many unresolved problems left by The LAA 2004, as seen above, there is irreversible momentum towards a democratic society in China. China's attempt to reform the mixed tribunal system, as embodied in this Act, and the subsequent declarations of China's superior leaders are more or less emblematic of the Chinese Government's desire to further develop lay participation in this country. How lay participation is structured and processed in the judicial system reflects "power dynamics between judge and lay people, and ultimately, the relationship between the citizens and the state".[32] To what extent the Chinese Government could tolerate lay participation, perhaps only time will tell. However, in light of the blueprint framed by the Third Reform Plan of Chinese Courts (2009-2013), that declares "further improving the mixed tribunal system by enlarging the cross-section of lay assessors, extending lay

[30] *Ibid*, at 13; for more discussions about the incompatibility of the jury trial with inquisitorial criminal procedures of civil law countries including China, see Stephan C. Thaman, "Europe's New Jury Systems: The Cases of Spain and Russia", *Law & Contemporary Problems,* Spring 1999*,* at 234-235.

[31] *Supra* note 28, at 10.

[32] Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, Chicago1986), at 25 and 26.

assessors' participant range in trials, regularizing lay assessors' activities in trials, enhancing lay assessors' administration, improving and ensuring lay assessors' welfare and benefits",[33] I recommend that consideration be given to the following reform solutions in regard of the mixed tribunal system, and in the form of gradual progress, if grassroots reform such as the introduction of a jury system is not forthcoming.

6.3.1 How to "Enlarge the Cross-section of Lay Assessors"

To grant courts greater discretion in selecting lay assessors, including hand-picking lay assessors, as initiated by The LAA 2004, has given rise to various misuses in practice, such as courts' preference for selecting the well-educated, the unemployed and political activists, something that has seriously undermined the representativeness of lay assessors as revealed in Chapter 4. In response to this, there might be three effective solutions.

6.3.1.1 Establish a Real Random Selection Process for Lay Assessors

It is generally acknowledged that the random selection of jurors is critically important to ensure the diversity and representativeness of a jury, while "a jury that is representative of the whole community is also more likely to be collegially independent and impartial, and thus more likely to render the process fair and beyond contamination and bias."[34]. It has even been alleged that "the whole essence of the jury system was

[33] The Supreme Court of China, "The Third Reform Plan of Chinese Courts (2009-2013)", see Chinese government's official news website, at http://news.xinhuanet.com/legal/2009-03/26/content_11074127_1.htm, last visited on 15 Dec 2009.

[34] R. Gwynedd Parry, "Random Selection, Linguistic Rights and the Jury Trial in

random selection".[35] Borrowing from this experience, to realize the reform objective of "enlarging the cross-section of lay assessors", the lay assessors, first of all, should be randomly selected from the community.

Besides the establishment of random selection, lay assessors should "be selected at random from sources which will furnish a representative cross-section of the community."[36] The electoral roll, according to some countries' experience,[37] is a suitable source reflecting a wide cross-section of the national population. However, it has been suggested by Western scholars that exclusive "selection from the electoral roll is a flawed system".[38] They add that "research as long ago as the 1960s, in the USA, showed electoral lists are not representative of communities and this has since been confirmed in Australia and New Zealand."[39] Borrowing from the US experience, it might be advisable to supplement the "list of registered voters and licensed drivers/identification cardholders with welfare lists, unemployment lists, and other sources".[40]

Furthermore, the actual jurisdiction of randomly selecting lay assessors should not remain within the gift of the courts themselves, in order to protect against their potential avoidance of random selection, as occurs now. "If the jury system is really to protect against future oppressors, the rules ought to provide a procedure by which Government

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Wales", *Criminal Law Review*, Oct 2002, at 807.

[35] Peter Thornton, "Trial by jury: 50 years of change", *Criminal Law Review*, September, 2004, at 125.

[36] Mary Catherine Campbell, "Black, White, and Grey: The American Jury Project and Representative Juries", *The Georgetown Journal of Legal Ethics*, Vol.18, 2004-2005, at 628.

[37] See, for example, *supra* note 35, at 686.

[38] Penny Darbyshire, "What Case We Learn From Published Jury Research? Findings for the Criminal Courts Review", *Criminal Law Review*, Dec 2001, at 972.

[39] *Ibid.*

[40] *Supra* note 36, at 629.

officials are prevented from making an unsupervised selection of jurors".[41] In terms of the specific selection method, the rule that "the more insulated juror selection processes are from authority, the more independent jurors are of judges"[42] should be followed, whist the successful experience of England could be borrowed: the Jury Central Summoning Bureau has been established there since 2001 and has "standardised the entire juror summoning process and computerised the random summoning of all jurors",[43] while "the process of computerised random summoning from the electoral lists provided by local authorities is successfully reaching an ethnically representative group of potential jurors in almost every court".[44]

6.3.1.2 Lowering the Required Educational Qualifications of Lay Assessors

As seen in Chapters 3 and 4, the current qualification requirements for enrolling lay assessors, which require them to have a college diploma, have proved unduly restrictive for those candidates with limited education and have undermined the development of a true cross-section of lay assessors. Even compared with other post-communist countries, the general education requirement for Chinese lay assessors is extremely high, for instance, in contrast with my survey finding that 94% of the lay assessors in S Province have a college diploma or higher educational level, only 8% of Russian lay assessors have received a university education while in Croatia, this

[41] W. R. Cornish, *The Jury* (Allen Lane The Penguin Press, London, 1968), at 136.
[42] Richard O. Lempert, "The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research", *Cornell International Law Journal*, Vol.40, 2007, at 483.
[43] Cheryl Thomas, "Exposing the Myths of Jury Service", *Criminal Law Review*, No. 6, 2008, at 418.
[44] *Ibid*, at 421.

percentage is only about 1%.[45] "Eliminating jurors because of their education or employment may lead to an artificial selection of the jury."[46] To avoid important segments of the society being systematically underrepresented in the lay assessor pool, the automatic exemption from lay assessor duty should be lowered to a minimum level. Borrowing other countries' experience,[47] automatic exemptions based on the education level of lay assessor candidates may be removed; Chinese citizens should be only exempted from serving as lay assessors if they are unable to read and write in Chinese.[48]

6.3.1.3 Other Necessary Changes for Coordinating the Random Selection

If a real random selection system is to be introduced in China, the current five-year tenure and unlimited workload of the lay assessors needs to be reconsidered as well. Although lay assessors' current tenure period allegedly allows them to "accumulate enough legal sophistication to achieve the self-confidence necessary to disagree with a judicial professional",[49] the current lengthy tenure and unlimited workload causes a

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[45] Sanja Kutnjak Ivkovic, "An Inside View: Professional Judges' and Lay Judges' Support for Mixed Tribunals", *Law & Policy*, Vol.25, No.2, 2003, at 109.

[46] Robert F. "Julian Judicial perspectives in Serious Fraud Cases - the Present Status of and Problems Posed by Case Management Practices, Jury Selection Rules, Juror Expertise, Plea Bargaining and Choice of Mode of Trial", *Criminal Law Review*, No. 10, 2008, at 773.

[47] For example, in England, there is no academic qualification requirement for either lay magistrates or jurors, see Catherine Elliott and Frances Quinn, *English Legal System* (Pearson Education Limited, Harlow, 2000), at 179; France only requests jurors to be able to read and write French, see, for example, Articles 255 of The Code of Criminal Procedure of France 1959.

[48] Some Chinese scholars have proposed this, see, for example, He Bing, " Merits of the Mixed Tribunal System", *The People's Court Daily*, 25 April 2005.

[49] Kent Anderson and Mark Nolan, "Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Mixed Tribunal System (saiban-in seido) from Domestic Historical and International Psychological Perspective", *Vanderbilt Journal of Transnational Law*, Vol. 37, 2004, at 974.

series of problems as well. Russia has reported that if "a lay assessor reports to the same courtroom…for the term of his service (which can last months)", "naturally, he develops relationships with the judge and prosecutor who appear regularly there".[50] Cornish also points out that "one advantage of a regularly changing membership of such a [mixed] court is that the legal chairman is constantly sitting with different laymen and so cannot rely on being able to get his own way, as he might if he constantly sat with the same group of colleagues. The chance to build up a spirit of comradeship in which everything is left to the chairman is thus avoided".[51] This might be the case in China as well. The close liaison between lay assessors and professional judges may make lay assessors, for face-saving reasons or such like, hesitate to check their professional colleagues' improprieties, or even make them become a member of the corrupt interest group as indicated in Chapter 5, eventually compromising their supervisory role in trials. Secondly, the random selection of lay assessors from a resource offering a wide cross-section, such as the electoral rolls, will create a group of lay assessors from every segment of the community, including those busy with their employment. To request them to serve for five years without limiting their workload is unlikely to ever gain their full support, and this may continue to undermine participant enthusiasm and even lead to a resistance to perform court duty. Thirdly, a lengthy tenure for lay assessors may give rise to case-hardened actors or the so-called "professional juror syndrome", whereby lay assessors, "unconsciously perhaps, compare arguments from a previous trial with the one they [are] currently hearing".[52] Thus, the potential effectiveness of lay participation, introducing fresh lay voices to

[50] Duncan Deville, "Combating Russia Organized Crime: Russia's Fledgling Jury System on Trial", *George Washington Journal of International Law and Economics*, Vol.32, 1999-2000, at 81.

[51] W. R. Cornish, *The Jury* (Allen Lane The Penguin Press, London, 1968), at 272-273.

[52] David E. Kasunic, "One Day/One Trial: A Major Improvement in the Jury System", *Judicature*, Vol.67, 1983-1984, at 80.

check the stereotypical behaviour of professional judges, will be reduced.

Many countries where the mixed tribunal system is adopted have undertaken measures to reasonably allocate lay assessors' workload. For example, in Denmark, the average frequency that a layman serves in a mixed tribunal is once or twice a year.[53] "German lay assessors at the criminal court of Bochum were found to serve eight times and in Frankfurt at the Main four times a year".[54] In Russia, lay assessors only served for fourteen days once in a year, [55] whilst in Cuba, lay assessors "are elected for terms of five years and serve a maximum of thirty days per year".[56] Japan, in a recent move toward introducing a mixed tribunal system, has established a one-time appointment system, according to which the lay assessors in a mixed tribunal are dismissed once they finish one trial.[57] In England and Wales, approximately 480,000 people (about 0.9% of the total population[58]) are summoned to serve as jurors each year by the Jury Central Summoning Bureau set up in London.[59] Compared with China's situation where 55,681 lay assessors[60] (approximately 0.0004% of the national population[61]) have to serve at least five years and are able to continue their tenure without limitation,

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[53] *Supra* note 51, at 270.

[54] Stefan Machura, "Fairness, Justice, and Legitimacy: Experiences of People's Judges in South Russia", *Law & Policy*, Vol.25, No.2, 2003, at 128.

[55] *Ibid.*

[56] Edmundo Hendler, "Lay Participation in Argentina: Old History, Recent Experience", *Southwestern Journal of Law&Trade in the Americas*, Vol.15, 2008, at 6.

[57] *Supra* note 49, at 974; also see Setsuo Miyazawa, "The Politics of Judicial Reform in Japan: The Rule of Law at Last", *Asian-Pacific Law & Policy Journal*, Vol.2, Issue 2, Spring 2001, at 120.

[58] See the data of the Census 2001 in England and Wales, available at http://www.statistics.gov.uk/census2001/pyramids/pages/727.asp, last visited on 18 Dec 2009.

[59] *Supra* note 35, at 686.

[60] The Statistical Office of the Supreme Court of China, "Lay Assessors in the Last Three Years – An Investigation of the Implementation of the Mixed Tribunal System", *The People's Court Daily*, 6 May 2008.

[61] The National Statistical Bureau of China, "The Statistical Bulletin of National Economy and Social Development in China in 2008", available at the official website of China's government, http://finance.people.com.cn/GB/8876392.html, last visited on 5 March 2008.

the British practice is apparently much more adept at allocating the opportunity to participate in trials among all its eligible citizens.

Japan's preference for a one-time appointment of lay assessors, which has been borrowed from the practice of the jury trial, is not necessarily the best solution for China. One of reasons for this may be financial, since selecting and training lay assessors is costly in terms of both money and time, so using them only once will be a waste of resources. However, too a tenure that is too lengthy and caseloads that are too heavy will be neither fair to the incumbent lay assessors who wish to finish their court service and get back to their employment as soon as possible, nor for lay assessor candidates who wish to exercise their right to participate in trials, but whose opportunity to do so is restricted by the presence of an incumbent lay assessor over a long period.

6.3.2 How to "Extend Lay Assessors' Participant Range"

The Supreme Court of China, in the Third Reform Plan of Chinese Courts (2009-2013), simply proposes to "extend lay assessors' participant range" rather than specifying how exactly this will be accomplished. In the author's opinion, at least two measures deserve to be placed on the agenda.

6.3.2.1 Ensuring Lay Assessors Can Legally Participate in More Cases

Notwithstanding Article 2 of The LAA 2004 which enables defendants to request trials by mixed tribunals, it has been reported that in practice defendants rarely do this. For example, there are seven local courts and one intermediate regional court in Dazhou

District, Sichuan Province, and the eight courts collectively employed mixed tribunals to try 643 cases between1st May 2005 and 1st May 2006. However, all of the mixed tribunals were initiated by the courts themselves at their discretion while no defendants raised their own application to be adjudicated by a mixed tribunal.[62] The report from the courts in Dazhou District of Sichuan Province does not reveal why the defendants did not exercise their right to select mixed tribunals. However, according to the survey by the Intermediate Court of C City of S Province, it seems that the defendants' failure to request trial by mixed tribunals did not arise from their dislike of lay assessors. The Intermediate Court circulated 183 questionnaires to investigate whether defendants were willing to have their cases be adjudicated by a mixed tribunal with the participation of lay assessors. In total 124 (67.8%) respondents gave a positive response and presented reasons such as "lay assessors having close contact with the local community", "lay assessors reflecting the people's voice" and "lay assessors being trustworthy".[63] Based on this, it could be speculated that the defendants tried by the eight courts in Dazhou District of Sichuan Province were probably not aware of the reformed law and their right to select a mixed tribunal with the participation of their peers.

Article 2 of The LAA 2004 also provides that even without a defendants' request, courts can adopt mixed tribunals to try cases with "comparatively far-reaching social implications". However, defining "comparatively far reaching implications" is difficult

[62] See Qiu Sufang, "An Investigative Report of the Implemental Situation of the Mixed Tribunal System", available at the governmental official website of Dazhou District of Sichuan Province, at http://www.dz818.gov.cn/zwxw/ShowArticle.asp?ArticleID=2097, last visited on 15 Dec 2007.

[63] The Project Team of the Intermediate Court of C City, "The Present Reality and Realistic Resolution – An Empirical Survey and Analysis of the Implementation of the Mixed Tribunal System", unpublished internal-circulated research report of the Intermediate Court of C City, at 2, file with the author. (The real name of the courts is omitted here for the sake of confidentiality.)

in practice, and this has left a lacuna and effectively granted courts wide discretion to decide themselves whether to adopt mixed tribunals or not.

In order to "extend lay assessors' participant range", as proposed by the Third Reform Plan of Chinese Courts (2009-2013), there are two possible solutions. On the one hand, those case categories involving "comparatively far-reaching social implications" should be specifically clarified by law. For example, it would be possible to provide that all political offences, all offences with a potential sentence of no less than five years imprisonment and all administrative disputes, have to be adjudicated by mixed tribunals, without exception. Serious criminal offences, especially political ones and administrative disputes, involve "the state benefit".[64] Under the current situation where Chinese judges are largely under the sway of the ruling party and local governments, inputting lay voices into these cases, as seen in Chapter 5, may better ensure the independence of the judiciary and protect against interventions from the party and local governments. On the other hand, in terms of other cases, the law should specifically obligate courts to inform defendants and civil litigants in written form and in a timely manner of their right to select mixed tribunals, in order to avoid a failure in their right to choose mixed tribunals, simply due to a lack of knowledge.

As discussed in Chapter 3, lay participation, such as serving as either a lay assessor or juror is not only a citizens' right, but also their responsibility. Chapter 5 has shown that in transitional China, this participation is important for educating and fostering Chinese people's citizenship, their commitment to the community and their democratic consciousness. The extended use of mixed tribunals across more cases will increase Chinese citizens' opportunities to participate in the administration of justice, and enable them to receive a greater level of citizenship education.

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[64] *Supra* note 7 at 868.

6.3.2.2 To Extend Lay Assessors' Participation in Appeal Courts

As discussed in Chapter 3, mixed tribunals in China are only applicable in first instance trials and are totally excluded from appeal courts. Furthermore, public prosecutors have the power to appeal acquittals made by the trial courts. In this case, any decision made by a mixed tribunal can be overturned by the appeal court without lay participation. Soldwedel has seriously criticized the exclusion of lay participation in appellate proceedings, and according to him,

> *Second-guessing lay judges' determinations threatens to undermine the legitimacy of citizen participation in criminal trials. At the very least, if the government's power to appeal an acquittal is to remain in place, lay judges should be allowed to participate at that level as well. This is particularly true where appellate courts opt for de novo review. Excluding lay judges from appellate proceedings would signal that the lay judges arrived at the wrong verdict the first time around, and that citizen participation is neither valid nor respected. The government's power to appeal criminal acquittals plainly undermines the authority of the lay judge system. The power to appeal criminal acquittals only enhances the government's power. It also indicates that the government does not trust lay judge panels with the power to render final decisions.* [65]

In other words, nowhere are constraints on lay participation more significant than when preventing lay judges from reaching a final decision. "The broader the questions

[65] Arne F. Soldwedel, "Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants", *Vanderbilt Journal of Transactional Law*, Vol.41, 2008, at 1472 and 1473.

entrusted to jurors and the more limited the grounds for overturning jury verdicts, the more power jurors will have *vis-à-vis* other institutions of government."[66] If Chinese authorities do not grant finality to decisions made by mixed tribunals in trials of first instance, but genuinely wish to extend lay participation, the experience of other countries such as Germany and Denmark, which extend the use of mixed tribunals to appeal courts,[67] should be followed.

6.3.2.3 To Legally Grant Lay Assessors the Jurisdiction of Presiding over Court Conciliations

As discussed in Chapter 5, some courts' use of lay assessors to conciliate on civil cases has been a great success. However, according to the current law, lay assessors actually do not have the power to conciliate civil cases alone. The current law should therefore be amended to legitimise lay assessors' status in presiding over court conciliation, which will be beneficial, not only to lawfully alleviate judges' workload, but also in the extension of lay assessors' participant range.

6.3.3 How to "Regularize Lay Assessors' Activities" and "Enhance Lay Assessors' Administration"

Disciplining lay assessors' poor behaviour by introducing a code of ethics and disciplinary rules will be critical measures to "regularize lay assessors' activities".

Although The LAA 2004 provides that lay assessors have the same powers and

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[66] *Supra* note 42, at 483.

[67] Sanja Kutnjak Ivkovic, "Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals", *Cornell International Law Journal*, Vol. 40, 2007, at 440-448.

duties as professional judges, the provision is too simple and general, and provides no guidelines to regularize and discipline lay assessors' behaviour in many areas. For example, there is no effective rule regarding the punishment of lay assessors' delinquency. Although Article 17 of The LAA 2004 provides that where a lay assessor evades court service without valid reason, and this adversely affects the trial, the Chief Justice of the court can request the Standing Committee of the local People's Congress to dismiss him or her, there are at least two weaknesses in this provision. First, this punishment is only applicable to circumstances where the lay assessor illegally refuses to show up for court service, and ignores other improprieties such as sleeping during the trial. Secondly, the punishment of dismissal might be exactly what the lay assessor evading his or her duty is hoping for. This punishment may not only be ineffective in deterring runaway lay assessors, but might actually encourage them to do so, since their evasion will incur nothing desired outcome of ending their court service. The role of an appropriate punishment in checking lay participants' misconduct has been verified by the practices carried out in several countries. For example, when Arizona increased the potential fine for absenteeism from 100 US to 500 US Dollars, the number of jurors complying with their summons doubled.[68] Borrowing from this experience, detailed and applicable discipline and punishments such as fines and detention, which may effectively prevent a spectrum of improprieties by lay assessors such as evading court duty and even passivism in trials, should be provided for by law. In addition, discipline and punishment should be applicable not only for lay assessors, but also for employers who refuse to provide time off work and ensure the income of those employees who perform lay assessor duty, since The LAA 2004 fails to provide any punishment to deter employers' from misbehaving in this way.

[68] G. Thomas Munsterman and Cary Silverman, "Jury Reforms in Arizona: The First Year", *Judges Journal*, Vol.45, 2006, at 21.

6.3.4 How to "Improve and Ensure Lay Assessors' Welfare and Benefits"

As discussed in Chapter 5, local governments financially control all courts in China. As a result, the expenses incurred when a court implements the mixed tribunal system have to be approved and appropriated by the local government. As revealed in Chapter 4, some local governments have failed to provide sufficient financial support for the courts to employ lay assessors, and as suggested in Chapter 5, local governments may affect judges' decisions by utilizing their financial control over local courts, including the provision of judges' incomes and benefits. However, with little economic interest in the court where they serve, those lay assessors immune from local government financial control may be more inclined to make a decision not welcomed by the local government, compared with those cases where the local government is involved. In this situation lay participants in courtrooms may be less welcomed by local governments, which might be one important reason why some local governments have not provided the local courts with sufficient financial support to employ lay assessors thus far. It remains uncertain whether courts in China will realize complete financial independence in the near future. However, before this becomes fact, considering the provision of partial financial independence in order to ensure the implementation of lay participation should be placed on the agenda. For example, to prevent local governments from creating financial barriers to the execution of the mixed tribunal system, the lay assessment budget for each local court should be approved by the Supreme Court of China, and the relevant expenses should also be directed by it.

6.4 Other Recommendations beyond the Third Reform Plan of Chinese Courts (2009-2013)

Besides the above recommendations for improving the mixed tribunal system, within the framework provided for by the Third Reform Plan of Chinese Courts (2009-2013), there are many other unexplored issues with regard to the reform of lay participation in China which deserve attention and study in the future. This is not the place to enter into detail, but a few points should be mentioned.

6.4.1 Further Improvements to the Mixed Tribunal System

The Third Reform Plan of Chinese Courts (2009-2013), as seen above, has circumscribed the reform of the mixed tribunal system from four respects moving forward. However, if the Chinese authorities insist on preserving the mixed tribunal system rather than introducing a jury system, borrowing from other countries' experience, more measures in addition to those mentioned above need to be implemented in order to improve the current mixed tribunal system.

6.4.1.1 Strengthening the Independence of Lay Assessors

As discussed in Chapter 1, the experiences of a number of countries have proved that the collaborative relationship between judges and lay assessors in mixed tribunals may silence lay voices. On the one hand, an "authoritative judge", presiding over mixed tribunals, "can easily silence his or her lay colleagues",[69] because he or she may refuse

[69] *Supra* note 54, at 131.

to "create the 'deliberative atmosphere' favourable to lay assessors",[70] "grant enough opportunity for questions",[71] or "give enough time to deliberate".[72] Some scholars even contend that "the deliberation should be done among the people without the judges' being present. If a judge sits there – even one, he is going to influence them…."[73] The idea that professional judges may exercise a negative impact upon lay participation has also been reported in China.[74] On the other hand, other reasons for the possible weakness of lay voices during mixed tribunals may derive also from the lay assessors themselves. There are three key stages to the process whereby lay assessors outvote professional judges during deliberations: "the lay judge forms a different opinion from that of the professional judge, the lay judge expresses the disagreement, and the lay judge must convince the majority of tribunal members to outvote the professional judge".[75] However, research indicates that lay assessors' deference to judges out of their respect for their higher procedural (judges normally preside over the judicial process) and academic (judges normally have superior legal knowledge and experience) status, may create barriers to this three-stage process. Lay assessors neither regularly disagree with judges in deliberations nor exercise their right to outvote judges, even if they disagree with them.[76] As revealed in Chapter 4, lay assessors' deference towards judges can be found in China.

Berger and his colleagues have created the "status characteristics theory" to

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[70] *Ibid.*
[71] *Ibid*, at 144.
[72] *Ibid.*
[73] Hiroshi Fukurai, "The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participation Experience in Japan and the U.S.", *Cornell International Law Journal*, Vol.40, 2007, at 353.
[74] Li Junde, "My Experience of Being A Lay Assessor", *China Youth Daily*, 25 April 2007, available at http://zqb.cyol.com/content/2007-04/25/content_1744346.htm, last visited on 7 Dec 2009.
[75] *Supra* note 67, at 448.
[76] *Ibid.*

explain interactions in small task-oriented groups. According to this theory, "individuals in task-oriented groups develop expectations about the potential contributions of group members toward the resolution of the task" while "the bases for these expectations are status characteristics, attributes whose culturally specified meaning makes them potentially relevant to the performance of the group's task".[77] Those status characteristics directly relevant to the successful completion of the task are called "specific status characteristics". Mixed tribunals aimed at making judicial decisions are task-oriented groups. In the context of mixed tribunals, specific status characteristics include knowledge and experience in legal decision-making. Professional judges with systematic legal training and a certain number of years trial experience have specific status characteristics which will have a strong impact on lay assessors' "expectations surrounding judges' ability to decide legal cases".[78] Furthermore, "an important caveat is that the professional judge's status is partially predetermined by law, which requires that presiding professional judges lead and coordinate trials."[79] Also according to "status characteristics theory", "members with high status in a group", such as the professional judges in a mixed tribunal, "will be given more opportunities to contribute, and their contributions are more likely to receive favorable reactions from other."[80] This can explain lay assessors' deference to professional judges. To sum up, "high status members in small groups, such as professional judges in mixed tribunals, are more influential than low status members"[81] such as lay assessors in mixed tribunals, while judges' influence can direct the

[77] *Ibid,* at 436.
[78] *Ibid*, at 436-437.
[79] *Ibid*, at 440.
[80] *Ibid,* at 439.
[81] *Ibid,* at 440.

resolution of disagreements between themselves and the lay assessors in their favour.[82]

Even the well-known Chicago project on jury study indicates that, "at least where the evidence is clear one way or the other in the judge's view, the jury very rarely comes to a different conclusion in those states where the judge is permitted to summarize and comment on the evidence, and does so; whereas variations between judge and jury do occur even in clear cases, if there is no summary and comment by the judge".[83] Based on these findings, it has been concluded by scholars that "separation and independence in decision-making may be essential for fully effective lay participation".[84] In terms of mixed tribunals, two methods blow could be experimented with.

--The Separation of Deliberation

A possible solution to judges' unavoidable impact on lay assessors in collaborative mixed tribunals, is to separate judges and lay assessors during the deliberations. On the one hand, separation might prevent judges from exerting an adverse affect on lay participation, such as refusing to "create the 'deliberation atmosphere' favourable to lay assessors" or giving them "…enough time to deliberate". Lay assessors, without the presence of judges and hence the psychology of deferring to them, may feel free to express their lay opinions to one another. Lempert has proposed an experiment with a new deliberation model that "requires lay judges on mixed tribunals to deliberate on their own until they reach a tentative verdict, and only then to involve the professional judge or judges in the discussion". He added that "such a system might stiffen the spines of a tribunal's lay members, and would preclude the perception of a professional

[82] *Ibid*.
[83] *Supra* note 51, at 150.
[84] *Supra* note 45, at 94.

judge's factual characterization as an 'of course' truth".[85]

-- The Creation of the Position of Lay Assessors' Clerks (Legal Counsel)

It is true that lay assessors without professional legal education and trial experience may need assistance with regard to legal issues during deliberations. In these circumstances, professional judges do play a significant role in mixed tribunals, which is one alleged advantage of mixed tribunals over juries. However, to assist lay assessors to understand legal issues, and borrowing from the experience of the lay magistracy in England, legal counsels could be employed to act as lay assessors' assistants during deliberations. Legal counsels must be independent of the courts, have no interest in the case, and only answer legal questions presented by the lay assessors. In contrast to professional judges who preside over mixed tribunals and hence attain a virtual leadership position, legal counsels do not have a similar status which lay assessors may subconsciously show deference to. Moreover, in contrast to the fact that professional judges may use the opportunity of answering lay assessors' questions to further consolidate their leadership or exercise an impact upon the lay opinions, independent legal counsels, without any interest in the case whatsoever would not have the same tendencies. To ensure legal counsels' independence and integrity, they would need to be randomly selected from a list of registered lawyers and serve on an obligatory basis.

6.4.1.2 Improving Lay Assessors' Competence

In order to ensure the effectiveness of lay participation, lay assessors should be competent enough to perform their adjudicative duties. However, as revealed in Chapter 4, Chinese the lack of competence of lay assessors has not been fully resolved by the

[85] *Supra* note 42, at 484.

recent reforms initiated by The LAA 2004; they still frequently face difficulties when resolving legal issues during trials. It seems unrealistic to expect a lay assessor, after only a short period of training, to be as knowledgeable and skilled as a professional judge, one who has obtained a law degree and had years of experience in the legal profession. It is therefore questionable to ask lay assessors to perform exactly the same adjudicative duties as professional judges, including deciding on all legal issues. It is interesting that Argentina, in a recent reform, has created a new form of mixed tribunal. Here, a mixed court is composed of three professional judges and eight lay assessors. The mixed court deliberates and decides issues of fact jointly using a majority vote system. However, only the professional judges are eligible to vote regarding issues of law and to pronounce sentences and impose punishment.[86] As a matter of fact, in the 1950s, the Soviet jurist R. D. Rakhunov, borrowing the practice of the classic jury, suggested that lay assessors should only be obliged to decide on the guilt or innocence of the defendant.[87] In addition, according to Section 48 of The Supreme Courts Act 1981 in England, two to four lay assessors sit with a professional judge in the Crown Court to adjudicate appeals against decisions coming from the magistrates' court. However, the lay assessors are only permitted to decide on questions of fact together with the judge, who will decide on questions of law alone.[88] These experiences could be taken into account in China's future reforms. By exempting them from the task of deciding on legal issues, lay assessors' competence could be improved significantly.[89]

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[86] *Supra* note 56, at 14.

[87] Stephen C. Thaman, "The Resurrection of Trial by Jury in Russia", *Stanford Journal of International Law*, Vol.31, 1995, at 68.

[88] Michael Bohlander, "Take it from me …' – The Roles of the Judge and Lay Assessors in Deciding Questions of Law in Appeals to the Crown Court", *Journal of Criminal law*, Vol.69, 2005, at 442.

[89] Some Chinese scholars also propose borrowing the routine of the jury trial and only request lay assessors to deliver factual verdicts, in an attempt to alleviate lay assessors' burden and improve their competence. See, for example, Ding Yisheng and Sun Lijuan,

6.4.1.3 Enshrining Lay Assessors' Majority Position in Mixed Tribunals

Article 3 of The LAA 2004 prescribes that the proportion of lay assessors in a mixed tribunal shall not be less than one-third, granting courts the discretion of determining the specific proportion. However, as indicated by my survey in Chapter 4, judges' resistance to see lay assessors obtain a quantitative dominance in mixed tribunals may mean that courts staffed by such judges will circumscribe lay assessors to a minority status, so as to ensure the judges' dominance, as "when lay persons are in a minority, their influence diminishes".[90] "Giving lay judges the right to outvote the professional judges establishes them as important players in the courtroom."[91] If the Chinese authorities really want to encourage lay participation, then following-on from the experiences of various countries such as France,[92] Germany,[93] Norway[94] and Finland[95] where the majority position of lay assessors has been established, lay assessors in China should be elevated to a majority position, so as to ensure at least the theoretical possibility of them outvoting judges in mixed tribunals. Otherwise, a lay

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"A Comparative Study on the Applicable Area of the Chinese Mixed Tribunal System and Its Counterparts in the Western Countries", *Jurisprudence*, Vol.11, 2001, at 13; and Hu Yuhong, "The People's Law Court and the Mixed Tribunal System – The Judicial Democracy in the Views of Classic Authors, *Tribune of Political Sciences and Law* (*Journal of China University of Political Sciences and Law*), Volume 23, No.4, 2005, at 155.

[90] Stefan Machura, "Interaction between Lay Assessors and Professional Judges in German Mixed Courts", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 465.

[91] *Supra* note 67, at 448.

[92] *Supra* note 51, at 269.

[93] *Ibid.*

[94] Asbjorn Strandbakken, "Lay Participation in Norway", *International Review of Penal Law* ", *(Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 225.

[95] Heikki Pihlajamaki, "From Compurgators to Mixed Courts: Reflections on the Historical Development of Finnish Evidence Law and Court Structure", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 159-174.

voice, no matter how loud it is, will be nothing but window-dressing.

6.4.1.4 Non-Unanimous or Unanimous Mixed Tribunal?

Reid Hastie and his colleagues found that non-unanimous juries do not function as well as unanimous ones, since majority rule juries are actually inclined to cease deliberations once they have reached the required majority for a valid decision and the smaller the size of the required majority, the faster the deliberations.[96] Jeffrey Abramson further suggests that what could be lost under a non-unanimous rule is a serious desire for genuine and effective deliberations, as well as a commitment to seek real consensus. The viewpoints of minority dissidents and their contributions might be easily marginalized or even totally ignored under a majority rule regime.[97] These arguments may be even more applicable to the mixed tribunal system in China. Where a twelve-member jury applies the majority rule of two-thirds, the minority dissidents may theoretically include up to four persons – a "team" which may still have the potential to support each other and influence the majority to change their minds, with a collective impact. In contrast, in China's three-member mixed tribunal, with the majority rule of two-thirds applied, a minority dissident is a single person who, without any support, may be less likely to struggle to change the viewpoint of the majority. As summarized by Nemeth, "unanimity rules increase the quality of the decision making process and the psychological rigor of deliberations".[98] Based upon these findings, the current non-unanimous rule for mixed tribunals in China needs to be reconsidered.

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[96] Stephan Landsman, "The Civil Jury in America", *Law and Contemporary Problems*, Vol.62, 1999, at 303.

[97] *Ibid.*

[98] C. J. Nemeth, "Dissent, Diversity and Juries", F. Butera & G. Mugny (eds.), *Social Influence in Social Reality: Promoting Individual and Social Changes* (2001), at 23, quoted in *supra* note 49, at 980.

"Determining the effect of any interaction between voting rules and court composition is important and could be determined by further analysis".[99] More detailed empirical research and experiments will be needed to look into the specific deliberation dynamics in China's mixed tribunals and to consider which deliberation and voting model will be most suitable.

6.4.1.5 Distinguishing Expert Assessors from Lay Assessors

As discussed in Chapter 4, some courts in China have been inclined to select people with professional expertise as lay assessors, a fact which has further undermined the cross-sectional nature of the lay assessor team. However, to select experts with professional knowledge and skills to be lay assessors may not necessarily be a bad thing in itself. On the contrary, lay assessors' expertise may play an important role in adjudicating cases with difficult technical questions involved. For example, regional courts in Germany, taking into account the fact that "the use of expert lay judges promotes 'real-life' decisions and thereby makes it more likely that parties will be prepared to accept judicial decisions",[100] employ a mixed tribunal composed of one professional judge and two "honorary judges" when deciding on commercial matters. These "honorary judges" are recommended by the Industry and Commerce Chambers and help the professional judge with the professional knowledge.[101] Other countries such as Croatia and Norway also have experience in employing expert lay judges on certain types of case.[102] Furthermore, as seen in Chapter 1, lay adjudicators with

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[99] *Supra* note 49, at 991.
[100] Marianne Roth, "Towards Procedural Economy: Reduction of Duration and Costs of Civil Litigation in Germany", *Civil Justice Quarterly*, Vol.20, Mar 2001, at 105.
[101] *Ibid.*
[102] *Supra* note 67, at 432.

expertise have been widely used in various administrative tribunals in the UK. Learning from these experiences, courts in China may be allowed to employ expert assessors to assist professional judges to handle cases involving issues which require expertise. However, the selection and use of expert assessors should be distinguished from that of ordinary lay assessors. Employing expert assessors in ordinary cases is a waste of human resources. More importantly, allowing discrimination to take place the process of selecting ordinary lay assessors, in favour of those candidates with expertise, will undermine common citizens' right to participate in the administration of justice. A possible solution to this problem is to create a position of "expert (blue-ribbon) assessors" whose selection, use and administration should follow a routine separate from the current *LAA 2004* model used for administrating ordinary lay assessors. In this regard, the experience of administrative tribunals in the UK, where expert assessors are widely used, could be further researched and drawn-upon.

6.4.1.6 Pushing Lay Participation by Strengthening Civic Education

Before the Japanese Government enacted The Act Concerning Participation of Quasi-jurors in Criminal Trials in May 2004, Japan had experienced over twenty years' since 1982, when "the first organized civic movement to introduce the jury trial in Japan, the *Baishin Saiban o Kangaeru Kai* ('the Research Group on Jury Trial'), was formed in Hitotsubashi, Tokyo.[103] For more than two years, various efforts had been made to influence the Government and market the jury system to the public.[104] For example, the Japanese Federation of Bar Associations (JFBA) and its local bar association members played a very active role in pushing the resuscitation of lay

[103] *Supra* note 73, at 317.
[104] *Ibid,* at 320.

participation in Japan. At the time it was said that they "have conducted many grassroots initiatives to educate citizens regarding the background and need for judicial reforms, including conducting information sessions, disseminating pamphlets, and providing information via the media".[105] When the JFBA's proposal to introduce a jury system in Japan was declined by the authorities and replaced by a mixed tribunal system, it was said that the JFBA "intends to continue its efforts to achieve future realization of these reforms and to continue its grass roots initiatives to further public awareness, understanding, and interest in these reforms".[106]

Although China does not lack an historical tradition of civic participation in dispensing justice, the mixed tribunal system in modern China, as shown in Chapter 3, has experienced a very problematic implementation, one which has undermined the reputation of the system and even may have compromised citizens' confidence in lay participation altogether. Borrowing from Japan's experience, fostering the people's enthusiasm and commitment to participate in the administration of justice through diverse educational measures and propaganda at the grassroots level, should be placed on the agenda. More organizations other than government departments, such as local bar associations and other non-governmental organisations, need to participate in the process of civic education and make a contribution. For example, on the one hand, as revealed by my fieldwork in China, many judges still hold a conservative attitude toward the use of lay assessors, and this leads to the latter's misuse. Professional judges, therefore, need to be educated so as to view citizen participation in a more positive light, as well as realize the benefits that properly structured lay involvement could bring to the currently problematic administration of justice. In this regard, "rather than fearing

[105] Sabrina Shizue McKenna, "Proposal for Judicial Reform in Japan: An Overview", *Asian-Pacific Law & Policy Journal*, Vol.2, Issue 2, Spring 2001, at 134.
[106] *Ibid*, at 150.

the public, the courts should enlist its support" since "responsible citizens do not expect to influence a judge's decisions about the facts in a case or how the law is applied" but "protecting the integrity and independence of the judiciary is important for all citizens".[107] On the other hand, citizens should be educated about their new right to be tried by their peers, thus preventing the phenomenon whereby most defendants are ignorant of this right, as happened in the courts in Dazhou District, Sichuan Province.

6.4.2 Researching the Feasibility of Further Extending the Use of Lay Assessors

Besides the aforementioned proposals for widening the use of lay assessors according to the Third Reform Plan of Chinese Courts (2009-2013), a plan that proposes to "extend lay assessors' participant range", more measures may be adopted to experiment with the further use of lay assessors, by borrowing the experiences of lay magistracy and administrative tribunals which have been widely used in the United Kingdom.

As mentioned in Chapter 5, China's courts have been struggling with overloaded dockets as a result of the limited quantity of judges and money available to them, whilst a large proportion of first-instance cases (approximately one-third of the first-instance criminal cases and over two-thirds of the first-instance civil cases in 2006[108]) have been

[107] Florence R. Rubin, "Citizen Participation in the State Courts", *The Justice System Journal*, Vol. 10, No.3, 1985, at 310.

[108] Xiao Yang (the Chief Justice and President of the Supreme Court of China, as he was then), "The Working Report for the 5th Conference of the 10th National People's Congress", available at the official website of the Chinese Government, see http://www.gov.cn/2007lh/content_556959.htm, last visited on 11 Nov 2009. For the provisions of the adjudicative bodies applicable to minor offences and simple civil cases, see Article 147 of The Criminal Procedure Law 1979 (amended in 1996) and Article 40 and 142 of The Civil Procedure Law 1991 (amended in 2007).

minor criminal offences and simple civil cases adjudicated by professional judges sitting alone in a variety of local courts. Therefore, it appears that a significant proportion of the Chinese judges' time has been spent on minor criminal offences and simple civil litigations. If this part of their workload could be allocated to lay assessors, the judges' workload would be significantly reduced. Also, according to my study in Chapter 5, in contrast to professional judges, lay assessors could be a more economical use of human resources in China. A greater use of lay assessors and replacing professional judges with lay assessors for minor offences and simple civil cases, might be a feasible solution to the dilemma of court congestion, limited court personnel and a limited budget. Moreover, in light of the discussion in Chapter 5, lay assessors in China have been proved effective at replacing professional judges to conciliate civil cases. Inspired by this experience, it might be advisable to experiment with further extension of the jurisdiction of lay assessors, to replace professional judges when adjudicating on certain categories of minor criminal offences and simple civil cases, which is comparable to what the British practice by employing lay magistrates to decide on minor offences and simple civil cases, as discussed in Chapter 1. However, how to borrow the successful experience England has obtained through employing lay magistrates and extending it to the use of Chinese lay assessors will require further study by Chinese reformers.

In accordance with Article 2 of The LAA 2004, lay assessors could be employed to sit with professional judges together when forming mixed tribunals to try administrative cases in China. However, as discussed in Chapter 3, whether lay assessors outnumber judges in mixed tribunals is currently subject to the discretion of various courts. Furthermore, although Article 2 of The LAA 2004 provides that courts shall use mixed tribunals to try administrative cases with "comparatively far-reaching

social implications", this latter category is hard to define and thus effectively grants courts substantial discretion when employing mixed tribunals. Administrative cases involve interest conflicts between the government and civilians. As a result, Chinese judges may be more vulnerable to pressure and intervention from the Government due to the reasons discussed in Chapter 5. Extending the use of lay assessors in administrative cases by providing that they shall be employed in all administrative cases, and guaranteeing their majority position on mixed tribunals will then become a potentially effective solution to the problem of the lack of independence of adjudicators. As discussed in Chapter 1, England has established an administrative tribunal system distinct from the court system, realizing a more cost-effective, speedy, less intimidating and litigant-friendly dispute resolution process for administrative disputes. In contrast, China's practice of commissioning ordinary courts to adjudicate on all administrative cases further increases the workload of judges, and worsens the problem of court congestion. How to draw upon the British experience when employing administrative tribunals to alleviate ordinary court caseloads in China deserves further research by Chinese scholars.

6.4.3 Researching the Feasibility of Introducing a Jury System in China

It has been widely acknowledged that "citizen participation in mixed tribunals lacks some of the advantages that come with citizen participation through jury systems."[109] Besides the weakness that "mixed tribunals are dominated by their professional judges",[110] in contrast with the jury trial, the disadvantages of the mixed tribunals still include (1) that lay assessors "serve for extended periods of time" and

[109] *Supra* note 28, at 11.
[110] *Ibid.*

thus "many of the advantages that accrue from the non-bureaucratic aspects of citizen involvement diminish over time",[111] (2) that unlike the jury's secret and general verdicts without having to give reasons, mixed tribunals have to make reasoned verdicts and hence lose the opportunity to nullify faulty laws, as juries have the ability to do, and that (3) different from the finality of juries' verdicts, mixed tribunals' decisions are normally open to appeal and thus become vulnerable to a second attack by a determined and possibly overzealous prosecution. However, as seen above, the proposal to introduce the jury trial into China to replace the current mixed tribunal system is strong in terms of aspiration but weak in terms of reality, since Chinese authorities refuse to support it. Taking into account the advantages of the jury trial, when the time is ripe, and with the gradual progress of democratization and liberalization in China, the country may one day experiment with the introduction of a jury system, since "the adoption of an all-layperson jury system…would create the largest chance for full participation of all jurors".[112] Taking into account the fact that "mixed courts are much cheaper than juries", then "maybe, good advice would be to have the criminal jury for the most serious cases and to have mixed courts for the less prominent constellations."[113] However, before the project to introduce a jury system in China is initiated, further research needs to be carried out.

For example, "the adoption of one adjudication arrangement as against another is so much a part of historical development and cultural tradition that any evaluation would be difficult to conduct and the lessons would be unlikely to be straightforwardly translatable. What is acceptable and works well in one environment may not in

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[111] *Ibid.*
[112] Lester W. Kiss, "Reviving the Criminal Jury in Japan", *Law and Contemporary Problems*, Vol.62, No.2 of 1999, at 275.
[113] *Supra* note 54, at 146-147.

another".[114] This theory, if justifiable, raises an issue as to whether Chinese society is culturally ready for a jury system. However, it is remarkable that Hong Kong, as a former British colony but a totally Chinese society with a traditional Chinese culture, has had a successful jury system since 1845.[115] Before introducing a jury system into mainland China, Hong Kong's jury system could be regarded as an example for further study, to reveal why and how it has been able to run well within Chinese society.

Moreover, Jearey, based upon his research on African systems, proposes that three conditions are necessary for the effective functioning of a jury system. The members of the society must be sufficiently educated to understand their responsibilities, including having the willingness to set aside prejudices that they may otherwise hold and the jurors must agree with the basic laws that they are required to enforce.[116] More recently, Lester Kiss has added three further conditions, including: (1) the culture of the society must be such that it is supportive of the idea of citizen participation in the legal system, (2) the country must be able to afford the costs of a jury system, and (3) the legal culture itself, including judges and other members of the legal profession, must support the idea of lay participation.[117] It is arguable that some of these conditions are, to a certain extent, plausible in China. The first condition as suggested by Jearey, for instance, is that the citizens of a country must be sufficiently educated to understand

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[114] For detailed discussion about cost of lay and stipendiary magistrates, see Rod Morgan and Neil Russell, "The Judiciary in the Magistrates' Courts", http://www.homeoffice.gov.uk/rds/pdfs/occ-judiciary.pdf, at 105, last visited on 27 December 2008.

[115] Peter Duff, "The Hong Kong Jury: A Microcosm of Society?", *International & Comparative Law Quarterly*, Vol.39, No.4, 1990, at 883-885; and Charlotte Pache, "The Legal System, the Courts and Law Reporting in Hong Kong", *Legal Information Management*, Vol.7, No.2, 2007, at 91-92.

[116] See J. H. Jearey, "Trial by Jury and Trail by Assessors in the Superior Courts", *Journal of African Law*, Vol.4, 1960, at 133, quoted from Neil Vidmar, "Juries and Lay Assessors in the Commonwealth: a Contemporary Survey", *Criminal Law Forum* 13, at 405.

[117] Neil Vidmar, "Juries and Lay Assessors in the Commonwealth: A Contemporary Survey", *Criminal Law Forum,* Vol. 13, No.4, 2002, at 405.

their responsibilities. However, as discussed in Chapter 5, one important role of the jury trial itself is to educate civilians and foster their commitment to citizenship, such as shouldering the social responsibility burden. It thus becomes debateable whether the jury trial should be introduced into a society only where the civilians thereof have already been educated enough to "understand their responsibilities", or alternatively, whether it is actually into a society where the civilians do not "understand their responsibilities" that the jury trial should be introduced, in order to enlighten civilians so as to "understand their responsibilities". Likewise, should we expect the culture of a society to be fully ready for "the idea of citizen participation in the legal system" before the introduction of a jury system, or alternatively that the culture of a society can be gradually changed to accept and appreciate "the idea of citizen participation in the legal system" by introducing a jury system? It seems that the *sine qua non* for introducing a jury system into a country deserves further study, to reveal when it may be feasible to introduce a jury system in China.

6.5 Conclusion

"The prospects for lay participation are bound up with globalization and progress toward democracy".[118] In China, it appears that there is both the top-down impetus to democratize and legitimise the judicial system and the regime, together with a bottom-up appeal to establish a more democratized justice system and society, which may provide China with a promising prospect for developing lay participation. In the meantime, however, Chinese authorities still value the current mixed tribunal system, one which seems "conducive to achieving a balance between democratic involvement

[118] Frank Munger, "Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand", *Cornell International Law Journal*, Vol.40, 2007, at 455.

in criminal justice on the one hand, and judicial control over lay participants on the other",[119] in spite of the system's weaknesses. We therefore cannot be too optimistic about the prospect that the Chinese authorities will introduce a jury system in the near future, as a replacement for the current mixed tribunal. Although Chinese authorities refuse to adopt a jury system, they welcome, as least seemingly, continued reform with regard to the mixed tribunal system. Following on from the gradual reform of lay participation in China, as provided for by the reform plan framed by the Third Reform Plan of Chinese Courts (2009-2013), more attention needs to be paid to the establishment of random selection for lay assessors, the extension of lay assessors' participation to more cases and to the appeal courts, the strengthening of the discipline of lay assessors, and to ensuring the financial independence of courts when employing lay assessors in the future. Besides, the mixed tribunal system in China, if aiming to provide better justice and greater levels of democracy, also needs to improve the independence and competence of lay assessors, as well as the deliberation process that takes place between lay assessors and professional judges, all of which, although beyond the framework of the Third Reform Plan of Chinese Courts (2009-2013), should be placed on the reform agenda at the next stage. In addition, in order to pave the way for further far-reaching reform, such as introducing a jury system in China, the feasibility of introducing a jury system in this country also demands future research effort.

To be sure, my recommendations above attempt to respond to the two main proposals with regard to the reform of lay participation in China, as advocated by Chinese scholars, that is: improving the current mixed tribunal system in line with the

[119] Emilie Taman, "Lay Participation in Criminal Justice: Enhancing Justice System Legitimacy in Post-conflicting States", *Dalhousie Journal of Legal Study*, Vol.12, 2003, at 46.

proposals made by conservative reformers, and introducing a jury system, as embraced by the more radical jury supporters. Besides these recommendations, many other studies regarding how to optimize lay participation in China need to be conducted, the "nuts and bolts" details of which this thesis has been unable to convey, but which may include conducting a more intensive analysis of the deliberation dynamics within mixed tribunals from a psychological research perspective, something long overdue in China,[120] conducting painstaking empirical research, including mock-trial research or modelling studies, in order to compare the effects of mixed tribunals and juries in China,[121] conducting studies about how to draw-upon the successful experiences of other forms of lay participation, those other than the mixed tribunal system and the jury trial, in Western countries,[122] and conducting research about how to have lay participation work in coordination with other judicial reforms and thus become a step towards the strengthening of judicial reform in China.

"There is no magic pill or quick road to legal and judicial reform in the post-Communist world. Bringing change to these societies, as to any society, will take time, patience, and consistency".[123] This is especially the case in terms of the reform of lay participation in China, an activity which may weaken the State's control over the

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[120] "Many jury reforms began not in trial courts, but in psychology laboratories where researchers systematically explored the implications of different jury sizes, different decision rules, … and other rules and procedures that might affect jury decision making" (see *supra* note 42, at 484). However, China's reforms have never been based on similar psychological researches.

[121] "New [trial] ways need to be found by experimentation", (See Roger W. Kirst, "Finding A Role for the Civil Jury in Modern Litigation", *Judicature*, Vol. 69, 1985-1986, at 338.), but China's reforms have rarely been based on intensive experimentations.

[122] For example, it merits discussion whether lay assessors could be employed as part of lay assessor panels to adjudicate on minor criminal offences and simple civil cases, by borrowing the experience of the lay magistracy in the UK, and whether administrative tribunals in the UK could be borrowed to adjudicate administrative litigations in China.

[123] Brian K. Landsberg, "The Role of Judicial Independence", *Pacific McGeorge Global Business & Development Law Journal*, Vol.19, 2006, at 365.

judiciary, since "transition from a system predicated on the unity of state power is a deep challenge".[124]

[124] Ruti Teitel, "Post-Communist Constitutionalism: A Transitional Perspective", *Columbia Human Rights Law Review*, Vol.26, 1994-1995, at 178.

Conclusion and Epilogue

As stated in the Introduction, the impetus for writing this thesis has come in response to two factors. On the one hand, Chinese scholars' opinions with regard to lay participation in China can be grouped into three schools. The opponents of lay participation openly oppose lay participation on three main counts: (1) the system has by and large lost its vitality worldwide, (2) the traditional culture necessary for developing the system is absent in China, and (3) experimentation with lay participation in China today, namely the mixed tribunal system, has proved ineffective over the past half-century or so. The jury supporters embrace the view that lay participation should be preserved in China, but believe that the problematic mixed tribunal system should be replaced with the jury trial. The lay assessor advocates adopt a more moderate view that the mixed tribunal system should be preserved, but that improvements are needed. The thesis has attempted, within the framework of the worldwide development of lay participation, to comprehensively study the history and status quo of, and the prospects for lay participation in China, in order to respond to the views of the three schools above. In contrast with the numerous researches carried out on the diverse approaches to lay participation in western countries, academic projects on lay participation in China, as initiated by western scholars, have been very scarce. My thesis has conducted a comparatively comprehensive review of lay participation in China, and thus presents a referential report in English to enrich and inspire academic studies in this regard.

1. The Worldwide Context: Mixed Trends but still Effective Lay Participation

China's recent move toward resuscitating the mixed tribunal system, through

enactment of The Lay Assessor Act of China 2004 (The LAA 2004) has also been criticized by those who contend that lay participation in general has in recent years experienced a worldwide decline and that the promulgation of this Act is therefore at odds with mainstream legal development and so is ill-advised. If it is true that lay participation has lost its vitality in general and is dying-out worldwide, then China's recent return to lay participation would seem to be the wrong choice, and so any subsequent research into promoting the system in China would seem to be inadvisable. In other words, only after the global position of lay participation has been analysed and understood, can we evaluate and correctly position the current practice and prospective development of the system in China. In order to ensure this took place in my thesis, I first reviewed the worldwide situation in terms of lay participation.

In general, a series of threads exist with regard to the worldwide development of lay participation up to the present day, as follows: (1) while certain forms of lay participation, such as the jury trial and lay magistracy, have faced academic criticism pointing to the incompetence, irrationality, bias or leniency of lay participants, proponents of lay participation have largely succeeded in guarding the system by developing sound arguments, and presenting empirical evidence, to prove that lay participants are generally competent, unbiased and diligent, and that other alternative adjudicative bodies such as professional judges do not necessarily decide cases differently or more competently than lay participants, (2) while certain forms of lay participation, such as juries, have experienced only a sparing use and have changed in structure due to their alleged "expensive and time consuming"[1] nature and lower conviction rates, their decline has arguably been politically driven and can be largely

[1] Sally Lloyd-Bostock and Cheryl Thomas, "Decline of the 'Little Parliament': Juries and Jury Reform in England and Wales", *Law and Contemporary Problems*, Vol. 62, Issue 2, Spring 1999, at 17.

attributed to governments' value choices in favour of "crime control" and "managerial justice", both of which "are not labelled as "Is" and "Ought", but are discussible,[2] (3) while some weaknesses of certain forms of lay participation cannot be denied, such as: the un-representativeness of jurors, lay magistrates and lay assessors, the occasional incompetence of jurors and lay assessors, and lay assessors' impotence and limited contribution, most of these can be largely attributed to problematic trial administration, something which is by no means insuperable but rather is resolvable "by modification of existing legal procedures",[3] (4) while some approaches to lay participation in law, such as the jury trial and the mixed tribunal system, have faced sparing or problematic use in practice, it is unlikely we will witness their complete removal, because of their undeniable value and also citizens' diffuse support for them, and other approaches such as lay magistracy and administrative tribunals still work well in practice, and (5) while there is a "trend towards replacing amateurs with professionals"[4] in some democracies with a withering desire for the particular functions of lay participation, such as the promotion of justice and a democratic society, a threat already established in some places, the trend has not been uniform and overwhelming, and has been intertwined with an opposing trend, embodied not only in the preservation of lay participation in a number of established democracies[5] but also the reinstatement of lay participation in

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[2] Packer H., *The Limits of the Criminal Sanction* (Oxford University Press, 1968), at 153, quoted from Nicola Padfield, *Text and Materials On the Criminal Justice Process* (Fourth Edition) (Oxford University Press, Oxford, 2008), at 32.

[3] Valerie P. Hans and Neil Vidmar, *Judging the Jury* (Plenum Press, New York 1986), at 246.

[4] Irving F. Reichert, "The Magistrates' Courts: Lay Cornerstone of English Justice", *Judicature*, Vol.57, 1973-1974, at 138.

[5] According to Skyrme, "in one way or another, a vast of amount of judicial work in the Commonwealth was, and still is, performed by non-legally qualified people. In most African and Pacific countries 90% of cases are dealt with in this way." See Thomas Skyrme, *The Changing Image of the Magistracy*, (2nd edition, Macmillan Press, London 1983), at 223. The situation of lay participation in the developing African and Asia-Pacific jurisdictions is not so clear since accessible materials are limited. However,

many transitional countries, those with relatively undeveloped political/judicial systems and with eager expectations regarding the political and democratic virtues of lay participation.

As a matter of fact, "the dilemma of whether justice should be administered by highly formalized and professional legal bodies or by informal peer proceedings" has bothered "both western industrial democracies and developing societies"[6] while they "have been struggling for years with the issue and have had mixed results".[7] Taking into account all of the above threads, it appears that my review has obtained mixed results as well, but there is definitely scope for challenging the argument that the worldwide trend in lay participation is one of universal decline. As summarized by Frank Munger recently:

> *"Today, developed democracies have institutionalized many different forms of citizen participation in governance, although they do not share all of them. Different forms of participation in governance have different origins, different effects, and depend on different clusters of perceptions and practices*

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certain forms of lay participation have been reportedly rooted in these jurisdictions and retained to help to decide various criminal charges. For example, in the South Pacific area, the jury has disappeared in Tuvalu, Solomon Islands, Vanuatu's Island, Samoa, and Fiji; however, the lay assessor system, as a substitutive system, has been introduced and survived for a long time. In African countries such as Botswana, Gambia, Ghana, Kenya, Lesotho, Mozambique, Namibia, South Africa, Tanzania, Uganda and Zambia, lay assessors or lay magistrates are employed in criminal cases, though certain limitations have been put on the application of lay assessors such as only for capital cases (in Kenya), not binding (in Kenya, Tanzania and Uganda), only on matters of custom (in Lesotho), in an advisory capacity (in Botswana.), and determining questions of fact only (in Zimbabwe). For details, see Neil Vidmar, "Juries and Lay Assessors in the Commonwealth: A Contemporary Survey", *Criminal Law Forum,* Vol. 13, No.4, 2002, at 392-400. The criminal jury in serious cases appears alive and mostly well not only in the main western countries, but also in over 40 other countries and dependencies around the globe. See Neil J. Vidmar, "A Historical and Comparative Perspective On the Common Law Jury", Neil Vidmar (ed.), *The World Jury System* (Oxford University Press, Oxford, 2000), at 3.

[6] Maria Los, "The Myth of Popular Justice Under Communism: A Comparative View of the USSR and Poland", *Justice Quarterly*, Vol.2, No.4, December 1985, at 447.

[7] *Ibid.*

to support them. Instead of a general model, there are many particular forms of participation in particular locations. Although not all of them are successful, the idea of participation remains powerful and influential because we trust it".[8]

Borrowing this argument and incorporating the threads mentioned above, especially the recent trend of introducing lay participation into transitional countries, it seems simplistic to say that lay participation is in decline worldwide. In contrast, it appears that recent developments in lay participation across the world have displayed a range of trends, from preservation, to reform and even revival of the system, and these trends reaffirm the rationalities of lay participation. Moreover, the resuscitation of lay participation in some transitional countries is a remarkable converse trend toward the increasingly sparing use of the classic jury[9] and the development of "a… justice system operated by technicians and administered by professionals whose major concerns are efficiency, cost and expedition"[10] in some established democracies. This may inspire us to look into the "new energy and expectations in traditional settings [of lay participation]"[11] by distinguishing different political contexts within which they work. For example, it appears that the jury trial is facing its demise in a number of established democracies, those which "have undergone their anti-feudal, bourgeois revolutions and have successfully established independent judiciaries".[12] In contrast with people in

[8] Frank Munger, "Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand", *Cornell International Law Journal*, Vol.40, 2007, at 461.
[9] Stephan C. Thaman, "Europe's New Jury Systems: The Cases of Spain and Russia", *Law & Contemporary Problems,* Spring 1999*,* at 237.
[10] Mark Findlay and Peter Duff, "The Politics of Jury Reform", Mark Findlay and Peter Duff (*ed.*), *The Jury Under Attack*, (Butterworths, Sydney, 1988), at 224.
[11] Stephan Landsman, "Commentary: Dispatches from the Front: Lay Participation in Legal Processes and the Development of Democracy", *Law & Policy*, Vol.25, 2003, at 177.
[12] Stephen C. Thaman, "The Resurrection of Trial by Jury in Russia", *Stanford Journal of International Law*, Vol.31, 1995, at 65.

western democracies who "have enjoyed, very substantially, the fruits of justice",[13] some transitional countries which have recently resuscitated lay participation, "much like Continental Europe in the eighteenth and nineteenth centuries", are "in the process of establishing an independent judicial system following the collapse of totalitarianism".[14] It is reasonable that these transitional countries perceive the jury system, or other similar lay participation modes, as an effective tool in this process,[15] by taking into account the historical functions of the jury trial in promoting independent and fair justice and a democratic society fighting against tyranny, as in the world's established democracies. Furthermore, it is remarkable that some transitional countries have returned positive reports in order to verify the effects of lay participation in this regard.

The recent developments in lay participation across the world have generated a considerable body of literature, which is concerned with the ways in which different forms of lay participation actually work in practice, as well as the legal and political functions of lay participation. The attempt to write-off lay participation across the world is simply over-ambitious. In light of the facts above, "the verdict should be that the people's justice is here to stay, hopefully for a few more hundred years".[16] It would be therefore arbitrary and simplistic to advocate that China's moves toward resuscitating lay participation collide with its global decline and are therefore ill-advised. On the contrary, also as a transitional country expects a more democratic society and improved justice, it is time, to situate China's experience of lay participation firmly within the global developmental framework, so as to correctly scrutinize China's current situation

[13] Henry R. Luce "The Rule of Law and the Administration of Justice", *Journal of American Judicature Society*, Vol. 45, 1961-1962, at 87.
[14] *Supra* note 12, at 65.
[15] *Ibid*.
[16] Peter Thornton, "Trial by Jury: 50 Years of Change", *Criminal Law Review*, September, 2004, at 683.

and unearth what worldwide lessons China can learn from.

2. The Historical Context: A Country with a Tradition for Lay Participation

In response to the second argument presented by the opponents of lay participation, that lay participation has been absent in China over the years, my thesis conducted a historical review with regard to the various forms of and experimentations with lay participation in China, something also necessary to fully understand lay participation in this country, one with a history of civilization covering thousands of years.

The opponents of lay participation in China argue that Chinese people have been historically devoid of the tradition and consciousness in participating in politics, display idolatry towards professional authority, and are reluctant to judge and punish their neighbours, all of which provide infertile ground for the recognition of lay participation in China today. However, my historical review tells otherwise. Looking anew at China's legal history, it seems that China's history abounds with the practice of and experimentations with lay participation. Besides the jury-like approach of the "Three Deliberations" process in ancient China, it appears that in China, from the inception of its feudal history in 221 BC to the emergence of communism in 1949, lay participation did not thoroughly eschew the civilians' participation in justice. Although the royal justice system excluded lay participation, numerous clan courts situated in villages and exclusively staffed by villagers provided a setting for local residents to resolve their disputes and to police themselves, according to clan custom or common sense, if not in law. What underpinned the popularity of clan justice was actually the legal pluralism that existed in ancient China, that is the recognition and legitimization of 'folk law' by

the state.[17] It is undeniable that sitting on clan courts to adjudicate their own disputes arguably fostered an historical tradition of Chinese people participating in local justice and politics, and accepting decision making by their peers. Moreover, after the beginning of the last century, other experimentations aimed at introducing the Anglo-American jury and the mixed tribunal system from Germany, in association with the successful introduction of commercial arbitration courts, also added to China's practice of lay participation throughout its history. The different forms of lay participation at different historical stages have exerted a significant impact upon the legal system, such as legitimising judicial proceedings, ensuring just decision-making, inspiring people's democratic spirit, alleviating the caseloads of professional judges, cutting judicial costs and promoting the incorruptibility of the judiciary. My historical review, to a certain extent, has challenged the argument advocated by the opponents of lay participation that China lacks an indigenous culture of lay participation, or that lay participation is antithetical to Chinese culture.

Besides the fact that the traditional culture in China is not so ill-suited to the idea of lay participation, it is plausible in itself whether the absence of cultural tradition could be used to justify the argument that lay participation should not be continued in China since cultural tradition of a country is arguably changeable rather than immutable, especially in the current context of speeding globalisation. Incorporating the facts above, it would be unconvincing to deny the rationality of preserving lay participation in China in the excuse of absent traditional culture.

3. The Status Quo: The Exclusive but Problematic Mixed Tribunal System

[17] Lin Duan, *Confucian Ethics and Legal Culture – A Discovery from the Sociological Perspective* (The Press of the College of Political Sciences & Law of China, Beijing, 2002), at 379.

Since 1949, when the Chinese Communist Party (CCP) seized power nationally the mixed tribunal system has become the only use of lay participation for Chinese people. As seen above, the opponents of lay participation premise their objections to the preservation of lay participation in China on the basis that the experimentation with lay participation in China today, the mixed tribunal system, has proved ineffective over the past half-century or so. It appears that although this thesis has challenged the allegations of the opponents of lay participation that lay participation is in decline worldwide and is alien to Chinese culture, they have largely won in terms of their attacks on the current lay participation framework in Chin:, the mixed tribunal system.

Before the promulgation of The LAA 2004, the mixed tribunal system in China was more of an instrument for resolving the shortage of judges and for propagandising the legitimacy of the communist regime, than a facility devised to genuinely realize democratisation within the judiciary. Subjecting lay assessors to strict control has been enshrined as an essential judicial principle, one which has been realized through a series of mechanisms such as giving the discretion to select lay assessors to courts under the leadership of the CCP, circumscribing lay participation to first-instance cases only, granting no finality to any decisions made by mixed tribunals, granting the power to trigger mixed tribunals to the courts, and refusing to enshrine the majority position of lay assessors within the tribunals themselves. Mixed-in with the strict control of lay participation are a series of interrelated, practical problems, including a shortage of financial support for the use of lay assessors, the decreasing use of mixed tribunals, the poor level of benefits provided to lay assessors, serious passivism on the part of lay assessors and the appearance of ‘full-time’ and ‘long-serving’ lay assessors. It was in this context, and in association with the crisis of trust with respect to China’s judiciary

from both domestic and international observers, that the first act to specifically regulate lay assessors, The LAA 2004 was promulgated to revive lay participation in China and improve the mixed tribunal system.

There is no denying that there are some significant breakthroughs within The LAA 2004, not only in addressing the defendant's right to be judged by a mixed tribunal, but also in its attempts to apply the use of lay assessors in cases with far-reaching implications and to promote their training and welfare. However, these innovations cannot overshadow the remaining unresolved problems. The LAA 2004 places lay participation under close political control in three ways. First, the selection process for lay assessors is still largely under the control of the courts, as steered by the CCP which ensures their political accountability. Secondly, the courts are given the discretionary jurisdiction to decide upon the proportion of professional judges and lay assessors in a mixed tribunal. Thirdly, mixed tribunals are still only applicable to first-instance cases and any decision made by a mixed tribunal can be appealed by the public prosecutor (who is normally politically affiliated to the CCP) to the Courts of Appeal, which are also overseen by the CCP and can completely overturn the first-instance judgement. It seems that the Act has steered clear of reallocating judicial power between the people and the CCP, and has leant in the direction of safeguarding the latter's dominance. The LAA 2004 is not a real change of direction but rather a subtler variant of a continuation of judicial instrumentalism, as embraced by the ruling party.

Not only does The LAA 2004 raise questions in respect of how the political interests of the ruling party overwhelm democracy in the judicial arena, but also with regard to a series of inherent defects in the revived mixed tribunal system, these being: (1) the qualifying candidates for lay assessment are basically limited to those who have received a higher education; the process excludes 'ordinary' citizens, (2) the level of

access to lay participation is further decreased due to the very small quota of lay assessors, the five-year tenure and the potentially unlimited reappointment process, (3) it is questionable whether identifying lay assessor candidates from a group of volunteers is effective and ensures the representativeness of lay assessors, (4) the passivism of lay assessors might potentially have been entrenched through a series of weaknesses in the institution, such as the lengthy tenures, unlimited reappointments, unresolved incompetence of the lay assessors, inappropriate disciplinary norms and the lay assessors' minority position on the tribunals, and (5) the lengthy tenure, unlimited reappointment process and heavy workload of lay assessors, in association with the unchecked power of courts in selecting and designating them to specific cases, will probably revive the practice of having "full-time" and "long-serving" lay assessors.

It therefore seems that the mixed tribunal system, as revived by The LAA 2004, still enshrines the ruling party's supremacy rather than truly embracing democracy and prioritising the rights of individuals over party interests in the administration of justice, making the institution similar to its old counterpart.

As well as drawing the above conclusions by utilizing a theoretical analysis, to find out in practice how the mixed tribunal system operates under the new Act, I conducted fieldwork in China. Circumscribed by limited resources and time, I was not able to complete a fully comprehensive empirical project to shed light on the reformed system. However, to scrutinize the CCP's official propaganda, which states that Chinese lay assessors have been carefully selected, have represented the community well and have worked effectively since The LAA 2004 was introduced, my fieldwork was designed to draw attention to such issues as: (1) whether the courts have embraced the new Act and abandoned their inappropriate old routines, routines which led to the un-representativeness of lay assessors, the existence of 'full-time' lay assessors, the

provision of poor benefits, and the use of lay assessors as low-cost court staff, (2) whether lay assessors with a higher educational level and fragmented training have, as expected by the new Act, become competent at performing their twin duties of both finding out the facts and applying the law, (3) whether lay assessors recruited since 2004 have escaped from being a "puppet" of the authorities, a fate which befell their predecessors, and have effectively participated in and impacted upon judicial decision-making, and (4) whether the 'insiders' of mixed tribunals, that is, the judges and lay assessors, have practically upheld the reformed system.

By incorporating data provided by the lay assessors and judges who participated in my questionnaire survey conducted in S Province, China, and the second-hand data obtained during my fieldwork in China, my thesis has attempted to make an inference with regard to some practical aspects of the mixed tribunal system in China, as resuscitated by The Lay Assessor Act 2004. However, my findings, contrary to the compliments published by the CCP official media coverage, are largely negative. First, the courts are not selecting and using lay assessors in an appropriate manner, which has led to them being far from representative of the cross-section of the community (for example, some groups such as communists, civil servants and the well-educated are significantly over-represented) and other problems have occurred such as the return of 'full-time' lay assessors. Secondly, it appears that the improved educational eligibility and training of lay assessors has been brought in at the cost of depriving the overwhelming majority of Chinese citizenry of the right to participate in trials, and has largely failed to transform lay assessors into adjudicators totally competent to handle both their fact-finding and legal application duties. Thirdly, the passiveness of lay assessors has not been totally eliminated and they neither participate very vigorously in deliberations nor affect judicial decision-making, probably due to their still unchanged

lack of competence, psychological obedience to judges and minority position. Fourthly, the judges base their support for lay assessors on the assumption that they can help them reduce the caseload, without jeopardizing the judges' quantitative dominance, leading to regular problems such as the recruitment of law graduates to serve as lay assessors, and ensuring judges have a comfortable majority in the tribunals.

It must be kept in mind that my district-wide study in S Province, China, was based on self-reported data and it is thus subject to all the problems inherent in this type of data retrieval process. However, my theoretical discussion and inferences from the modest survey have helped me to establish that, in contrast to expectations, that The LAA 2004 would reveal the authorities' "benevolence" and deliver a greater level of democracy to Chinese citizenry in the judicial field, the reformed lay assessor institution in China, in theory as well as in practice appears to have been largely unable to satisfy the demand to introduce more democracy into the courtrooms. This can be deduced from a whole series of facts, but none are more fundamental than the following: (1) the selection of lay assessors has remained a monopolistic activity under the manipulation of a number of courts, and as commanded by the governing party, and through which the majority of Chinese lay assessors are politically affiliated to the CCP or governmental organs, and thus may have strong political accountability, as is the authorities' wish, (2) lay assessors have been maintained as a minority in mixed tribunals, and (3i) lay participation is still only applied for first-instance trials, and lacks finality in terms of decision-making. Based on my findings, it might be concluded that if there was an expectation that the direction of the reformed mixed tribunal system in China would move towards the common people's effective participation in the administration of justice, democratising judicial proceedings, then the situation in practice stands in stark contrast to such an expectation. One rationale to account for the

current practice in China is probably the entrenched continuity of a totalitarian past mixed with "some signs of greater democratic aspirations".[18] In other words, the key may be the authorities' persistent hesitation to abandon their monopoly over judicial power and deliver greater democracy to the "restive" lay assessors from the community, those without any administrative or political affiliation to the CCP Government. Post-communist China is at the frontline of the struggle to push the development of democratic institutions, but the country's experience suggests that such a transition will be neither smooth nor easy.

4. The Prospects: China needs Lay Participation but a Carefully Restructured One

Among the lay participation opponents' attacks on the preservation of lay participation in China, with reasons given such as the declining trend for lay participation worldwide, the absence of an historical tradition in China and the unsuccessful practice of mixed tribunals today, then although the first two little to support them, the third argument is by and large justifiable in light of the fact that the current mixed tribunal system is plagued by a huge array of theoretical and practical problems. Given such a context, should China continue its recent moves towards reforming and resuscitating lay participation? To answer this question, the thesis speculated whether and to what extent lay participation has potential value within a transitional, modern China.

"Whatever the approach, a number of justifications for lay participation in the law have been advanced. Advocates claim many salutary effects: It improves decision

[18] *Supra* note 11, at 173.

making, reduces the effect of biased or corrupt judges, keeps the legal system in touch with community values, represents the diversity of citizen perspectives and experiences, and enhances the legal system's overall legitimacy".[19] However, as indicated above, the extent to which lay participation is valuable and critical for a country will arguably depend upon that country's particular political and legal context, rather than being a general measure. A number of transitional countries with a totalitarian tradition and comparatively less developed political and legal systems have revealed a growing interest in lay participation, and expect its potential "to promote a sense of fairness, to assure integrity in the legal system, to create and protect the independence of the court, to control the power of the courts and judges, to promote citizen participation in the administration of justice and to create respect for the administration of justice both domestically and internationally".[20] Remarkably, China shares some structural similarities with these transitional countries in terms of its legacy of totalitarian communism, embodied in the form of a very problematic judicial system and an undeveloped democracy. To be more specific, in China, judicial independence is undermined by the fact that the financial and personnel arrangements of the Chinese courts are tightly controlled by local government and the CCP; the citizens' right to a fair trial is also vulnerable to an entrenched severity within the criminal justice system and the rampant corruption of the judiciary; and the long-term absence of an authentic election system deprives civilians of opportunities to express their free-will, which, in return, undermines their democratic consciousness. In this context, my thesis has looked into whether lay participation has the potential to play an effective role in promoting fair justice and a democratic society in China, as well as it does in other

[19] Valerie P. Hans, "U.S. Jury Reform: The Active Jury and the Adversarial Ideal", *Saint Louis University Public Law Review*, Vol.21, 2002, at 85.
[20] Steven R. Plotkin, "The Jury Trial in Russia", *Tulane Journal of International & Comparative Law*, Vol.2, 1994, at 2.

transitional countries.

On the one hand, my thesis, by analysing the current Chinese judicial system and certain of the functions (though occasional or piecemeal) that Chinese lay assessors have already demonstrated in practice, reveals that lay participation could potentially produce better justice in China from three respects: (1) the lay participation process, by introducing the voice of the common citizen, is less likely to yield to political or financial pressure from the State, and might help courts to keep a distance "…from politics and other branches of government"[21] and thus improve judicial independence, something which cannot currently be ensured in China due to "the institutional and procedural constraints that had made the courts mere executors of the policies of the Communist Party",[22] (2) lay participants, as outsiders serving transitorily, could potentially curb the corruption of the judiciary, since they are less likely to yield to instructions from corrupt senior judges, and are unlikely to be absorbed into the interest groups composed of corrupt judges and lawyers, plus they would be able to monitor judges' potential delinquencies, (3) lay participation may serve as a remedy to alleviate the backlog of court cases, since, under this system, lay judges could sit on collegial panels and replace the judges to effectively handle court conciliations, and (4) lay participants, serving as a check-and-balance mechanism, may mitigate the punitive nature of criminal justice in China, such as the wide application of the death penalty, by introducing community norms and values to provide a brake on the execution of cruel or oppressive laws, as well as professional judges' readiness to convict.

Lay participation also has the potential to promote a more democratic society in China. First, with China lacking an authentic representative democracy, lay

[21] John Gillespie, "Rethinking the Role of Judicial Independence in Socialist-transforming East Asia", *International & Comparative Law Quarterly*, Vol.56, No.4, 2007, at 839.
[22] *Supra* note 14, at 63.

participation may provide the people with an opportunity to participate directly in Government. Secondly, after experiencing long-term authoritarianism, a transitional China needs to use lay participation as a vehicle to bring legal and democratic consciousness to the Chinese masses, since it is by making judicial decisions or voicing their dissidence regarding the existing legal norms, that those citizens called to perform their court duty will "learn about and become interested in the judicial system" and then probably other public affairs.[23].

To be sure, lay participation may not be a substitute for the complete overhaul of China's judicial and political system. For instance, judicial independence cannot be realized without the presence of a series of traits such as security of tenure and fiscal independence on the part of professional judges. Likewise, "democratic consolidation requires serious and continuous effort over a long period; it does not result from a single grand gesture, nor is it the task of a single administration".[24] Furthermore, it remains to be seen whether and to what extent lay participation can practically serve as "an institution capable of helping to solve the problems plaguing the administration of justice".[25] However, "a search for the best uses for laymen is likely to produce far-reaching changes on many aspects of the law and its administration that are bound to contribute to the common good".[26] In light of its potential functions in China, as outlined above, lay participation may serve as a forerunner to subsequent judicial reforms, and thus deserves to be continued and further experimented with in this

[23] Kent Anderson and Mark Nolan, "Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Mixed Tribunal System (saiban-in seido) from Domestic Historical and International Psychological Perspective", *Vanderbilt Journal of Transnational Law*, Vol. 37, 2004, at 944.

[24] Christopher J. Walker, "Toward Democratic Consolidation? The Argentine Supreme Court, Judicial Independence, and the Rule of Law", *High Court Quarterly Review*, Vol.4, 2008, at 54.

[25] *Supra* note 9, at 257.

[26] W. R. Cornish, *The Jury* (Allen Lane The Penguin Press, London, 1968), at 275.

country.

Based on the fact that lay participation has not really entered a worldwide decline, nor is there really any absence of an historical tradition with regard to lay participation in China, then in association with its potential to produce better justice and promote a more democratic society in China, the key arguments of the opponents of lay participation, who wish to abolish or curtail lay participation in China, would seem to lack justification. Although the current mixed tribunal system has an array of problems, their proposal to abolish lay participation altogether in China seems a little like 'throwing the baby out with the bathwater'. While the proposal to abolish lay participation altogether has been proved here to be inappropriate, the question of the future developmental direction of lay participation in China must be raised.

"Lay participation is not, in itself…a necessarily democratic institution."[27] As seen above, the very problematic mixed tribunal system in China today appears ill-suited to effectively realize the function of either promoting fair justice, or creating a more democratic society. While it is certain that lay participation in China today is imperfect and needs further reform, it remains to be seen whether China should adopt the proposal of the jury supporters and replace the current mixed tribunal system with a jury system, or that of the lay assessor advocates who wish to further polish the mixed tribunal system. The thesis thus firstly looked at the current political context in China, which may impact upon any lay participation reforms in the future, as "The demise or resurrection of democracy appears sometimes to lead to the introduction of lay participation in an attempt, symbolically or otherwise, to legitimate the…court system."[28] This is the case in China, where "The government must follow fair

[27] *Supra* note 11, at 173.

[28] For detailed discussion about cost of lay and stipendiary magistrates, see Rod Morgan and Neil Russell, "The Judiciary in the Magistrates' Courts",

procedures in depriving a person of life, liberty, or property".[29] Some recent practices in China have apparently violated this rule, while Chinese courts controlled by local governments have played no check and balance role in the process, which has aroused the people's outrage, leading to them pointing accusatory fingers at the ineffective judicial system. "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and non-partisanship".[30] It appears that the Chinese authorities have realized this and are expecting the contribution of lay participation to develop and grow, providing the country with a historic opportunity to develop this area. In the meantime, however, Chinese authorities still value the current mixed tribunal system and therefore there is little prospect that China will introduce a jury system in the near future to replace it. According to the latest reform plan enacted by the Chinese Government – the Third Reform Plan of Chinese Courts (2009-2013), a series of realistic recommendations aimed at improving the current mixed tribunal system include: establishing the random selection of lay assessors to resolve the problem that Chinese lay assessors "are far from being either a random or a representative section of the population",[31] abolishing the courts' discretion at initiating a mixed tribunal *ex officio*, allowing lay assessors to participate in more cases including appeal cases, better disciplining lay assessors' improprieties, and ensuring financial independence of the courts when employing lay assessors. Beyond the framework prescribed by the Third Reform Plan of Chinese Courts (2009-2013), more forward-looking proposals with regard to the reform of lay participation in China include improving the independence

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http://www.homeoffice.gov.uk/rds/pdfs/occ-judiciary.pdf, at 100, last visited on 27 December 2008.

[29] Erwin Chemnerinsky, "Toward A Practical Definition of the Rule of Law", *Judges Journal*, Vol.46, 2007, at 7.

[30] Paul L. Friedman, "Civility, Judicial Independence and the Role of the Bar in Promoting Both", *Federal Courts Law Review*, Vol.1, 2006, at 519.

[31] Penny Darbyshire, "The Lamp that Shows that Freedom Lives - Is It Worth the Candle?", *Criminal Law Review*, Oct 1991, at 746.

and competence of lay assessors, improving the deliberation dynamics between lay assessors and professional judges, and researching the feasibility of further extending the use of lay assessors and introducing a jury system in China.

5. Epilogue: To Open New Vistas for Researching Lay Participation in China

Based on the ongoing discussions taking place, it could be concluded that lay participation deserves a place in China's legal system, but needs to be carefully restructured through further reasonable and realistic reforms. Nonetheless, this thesis is far from an exhaustive piece of work and there are still many stones left unturned.

For instance, as Richard Lempert, the current President of the Law & Society Association in U.S.A., cautioned in a recent working paper, "nothing is so helpful as good empirical research and nothing can be so bad as poor research that becomes influential".[32] However, empirical research on lay participation in China has been gravely neglected thus far.[33] For example, in contrast with the United States, where "new data sets have allowed sophisticated quantitative research into jury verdict patterns" and "other research has led to and tested the results of jury reforms",[34] an important but unfinished item on the agenda for studying lay participation in China is the an intensive empirical study on the dynamics between Chinese lay assessors and

[32] See Richard Lempert, *Empirical Research for Public Policy: With Examples from Family Law and Advice on Securing Funding* (University of Michigan Law School & Public Law and Legal Theory Working Paper Series, Working Paper No. 95, June 2007), at 3, *available at* http://ssrn.com/abstract=1000700, quoted in Elizabeth Chambliss, "When Do Facts Persuade? Some Thoughts on the Market for 'Empirical Legal Studies'", *Law & Contemporary Problems*, Vol.71, 2008, at 37.

[33] Landsman and Zhang criticized this problem in their co-authored paper, see Stephan Landsman and Jing Zhang, "Lay Participation Comes to Japanese and Chinese Courts", *UCLA Pacific Basin Law Journal*, Vol.25, 2007-2008, at220.

[34] Richard O. Lempert, "The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research", *Cornell International Law Journal*, Vol.40, 2007, at 487.

judges during trials and deliberations. I readily concede that the empirical work in this thesis is no more than a preliminary attempt at conducting empirical research on lay participation in China, and that my survey may only give readers a glimpse of the mixed tribunal system in China after the recent reforms. However, the intended legacy of my thesis is to provide an empirical and theoretical framework for others to adopt or even attack, and inspire forthcoming empirical research and experimentation with regard to lay participation in China. Not only Chinese scholars, but also western jurists specialized in lay participation should be at the forefront of continuing this endeavour, though I also intend to carry out additional work in this regard. These joint, tangible efforts could have a significant impact upon the manner in which future lay participation in China will be conducted.

Moreover, "the cross-national study of juries and other institutions that provide for lay input into legal decisions is a research frontier".[35] However, comparative research with regard to lay participation is in its infancy in China, and I, who have received a legal education and acted as a judge in China and thus know the Chinese legal system well, am by no means an expert on western legal systems. The fragmentary cross-national study in this thesis is at most an attempt to provide a view from the perspective of a Chinese scholar, while to carry out studies in other, western countries should be completed by western jurists who understand the legal systems in their respective home countries much better than I do. As such, I expect this thesis to attract interest beyond. In addition, Hans states that "there are some good reasons to expect that lay participation in the legal arena will promote democracy. But we know very little about the way to maximize such a relationship. How does the social and political context affect the functioning of lay participation? What are the best approaches to

[35] *Ibid.*

including lay people as legal decision makers? Are certain methods of lay involvement better at incorporating the community's values and attitudes about justice while promoting competent decision making? Are lay people best suited to particular types of decisions, and which have the most substantial impact on justice? What are the negative consequences, if any, of lay participation in legal processes?"[36] Researching the questions alluded to above from a Chinese viewpoint and from a political and sociological perspective might be fascinating activities that deserve more academic attention in the future.

The current political context indicates that democratic desires are in the air in China. As Woodrow Wilson once wrote, "for the individual…who stands at the center of every definition of liberty, the struggle for constitutional government is a struggle for good laws, indeed, but also for intelligent, independent, and impartial courts".[37] Taking into account the potential value of lay participation in China, it is probably the time "for [a] careful exploration of the whole problem of constituting courts so as to give a reasonable share of power to ordinary laymen and to non-lawyers".[38] However, despite China having the impetus to establish a more responsive and democratized judicial system, there might be many oscillations between "continuity with a non-democratic past" and "greater democratic aspirations",[39] a fact evidenced by the conservative route undertaken by the Chinese authorities when publishing The LAA 2004.

Combining the two factors above, while this thesis has to come to a conclusion, it is certain that the political debate about lay participation in China will not be concluded

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[36] Valerie P. Hans, "Lay Participation in Legal Decision Making", *Law & Policy*, Vol.25, No.2, 2003, at 87.
[37] Woodrow Wilson, *Constitutional Government in the United States* (1908), at 17, quoted in Sandra Day O' Connor, "Vindicating the Rule of Law: The Role of the Judiciary", *Chinese Journal of International Law*, Vol.2, 2003, at 1.
[38] S*upra* note 26, at 275.
[39] *Supra* note 11, at 175.

in this country in the near future; neither will be the academic debate and research required.

Stephan Landsman and his colleagues evaluate China's recent move toward resuscitating the mixed tribunal system as follows:

> *"There is something analogous to the English jury story in Chinese developments [of lay assessors]. Over time, jurors of the middling sort in the English countryside came to be given a great deal of responsibility for making critical decisions in both civil and criminal matters. Their participation provided experience in self-governance that grew into political independence and democracy. E. P. Thompson, the great English historian of a Marxist orientation, saw in this the establishment and expansion of the rule of law. It eventually produced social attitudes stronger than the interests of the rich and powerful. These developments came about slowly and regularly suffered significant setbacks. However, the process begun in assize jury rooms paid real democratic dividends. While we cannot say that anything remotely similar is afoot in China, the conjunction of lay assessors, the need for citizen assistance in running the justice system, and the infusion of China's middling sort (with their new views about fairness and opportunity) offer prospects for improvement. China is vast and complex. There will be all sorts of reactions to the people's [lay] assessor initiative. But the potential for improvement over the present unreliable and corrupted [judicial] system deserves to be recognized, applauded, and assisted.*[40]

I could extend Landsman's evaluation to a wider scope and end the thesis by stating that, in light of China's particular political context, one that critically requires

[40] *Supra* note 33, at 221 and 222.

a reliable judicial system to secure the people's human rights, both academic and practical efforts aimed at researching, resuscitating and reforming lay participation in this transitional country with the largest population in the world, though likely taking a non-linear and piecemeal route, probably "deserve to be recognized, applauded, and assisted".

Appendix I: Translation of Questionnaire for Judges

The purposes of this questionnaire survey are to find out the pros and cons of the mixed tribunal system reformed by *the Lay Assessor Act 2004* and to provide the potential future reforms with information and references. The information you will provide therefore may offer important clues and impetus for the future development and innovations of the mixed tribunal system. You may note that this questionnaire is anonymous and will not disclose your ID information. We sincerely thank you for your kind cooperation and very important contribution.

I . Questions for judges of criminal divisions (Please put a cross in the bracket behind the answer you choose.)

1. Has the court where you work been persisting in notifying each defendant of his right to ask for a trial by a mixed tribunal?

A. Yes ( ) B. No ( ) C. Not sure ( )

2. How often have you experienced the circumstances that the defendant asked for a trial by a mixed tribunal?

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( )

3. At the court where you work, if without the application of defendants, who has been deciding on the employment of mixed tribunals?

A. The judge himself ( ) B. The Head Justice of the Criminal Division( ) C. The Department of Case Receiving and Filing ( ) D. The President of the Court ( ) E. Others (Please specify:)

4. At the court where you work, if without the application of defendants, what has been the most often reason for the initiation of mixed tribunals? (Please mark "1" behind the most often reason, "2" behind the less often reason, and "3" behind the least often reason etc.)

A. Lay assessors were needed to alleviate the shortage of professional judges ( ) B. the case had far-reaching social implications ( ) C. The expert lay assessors were needed to improve the trial quality ( ) D. Other reasons (please specify:)

5. How often has the court where you work randomly picked lay assessors from the rota?

A. Always ( ) B. Often ( ) C. Occasionally ( ) D. Rarely ( ) E. Never

( ) F. Uncertain ( )

6. How often have you encountered the circumstance that the lay assessor was absent for the trial because of his employment?

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( )

7. Has the court where you work been delivering lay assessors any materials helpful for them to understand cases before the trials (such as case abstracts, judges' notes, or trial syllabuses etc., if any)?

A. Always ( ) B. Often ( ) C. Occasionally ( ) D. Seldom ( ) E. Never ( ) F. Uncertain ( )

8. How often has the court where you work informed lay assessors of reading case dossiers before trials?

A. Always ( ) B. Often ( ) C. Occasionally ( ) D. Seldom ( ) E. Never ( ) F. Uncertain ( )

9. How often have the circumstances below occurred in trials:
(1). How often have the lay assessors read case dossiers before trials in the cases you have participated in?

A. Always ( ) B. Often ( ) C. Occasionally ( ) D. Seldom ( ) E. Never ( )

(2). How often have the lay assessors been able to understand your sum-ups before the deliberations in the cases you have participated in?

A. Always ( ) B. Often ( ) C. Occasionally ( ) D. Seldom ( ) E. Never ( ) F. Uncertain ( )
(3). How often have the lay assessors felt difficult in understanding evidential issues of the cases you have tried?

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( ) E. Uncertain ( )

(4). How often have the lay assessors felt difficult in understanding factual issues of the cases you have participated in?

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( ) E. Uncertain ( )

(5). How often have the lay assessors felt difficult in understanding legal issues of the

cases you have participated in?

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( ) E. Uncertain ( )

(6). How often have the lay assessors on their own initiative asked you any questions in the cases you have participated in?

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( )

(7). How often have the lay assessors read the trial records in the cases you have participated in?

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( ) E. Uncertain ( )

(8). How often have the lay assessors borrowed any referential materials from the court library to resolve their questions in the cases you have participated in?

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( ) E. Uncertain ( )

(9). How often have you encouraged the lay assessors to speak in deliberations in the cases you have participated in?

A. Always ( ) B. Often ( ) C. Occasionally ( ) D. Seldom ( ) E. Never ( )

(10). Have the lay assessors ever spoke actively in deliberations in the cases you have participated in?

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( )

(11). How often have the lay assessors presented any dissidents in the deliberations in the cases you participated in?

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( )

(12). How often have the lay assessors insisted on their dissidents and led the mixed tribunals unable to reach the unanimous verdicts in the cases you have participated in ?

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( )

(13). Have the lay assessors ever had dissidents about penalty measuring in the cases you have participated in?

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( )

(14). How often have the lay assessors' dissidents influenced the verdicts of the cases you have participated in?

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( )

(15). How often have you asked for the lay assessors' opinions when you were drafting the judgements ?

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( )

(16). How often have the lay assessors proposed to revise the judgments drafted by you ?

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( )

10. Have the lay assessors ever had dissidents about guilty/not guilty in the cases you have participated in?

A. Yes ( ) B. No ( )

11. Have you ever encountered the circumstance that the lay assessor had dissident about the sort of the offence of the defendant?

A. Yes ( ) B. No ( )

12. What is your general opinion about the competence of the lay assessors whom you have worked with?

A. Very satisfactory ( ) B. Satisfactory ( ) C. Unsatisfactory ( ) D. Very unsatisfactory ( ) E. Uncertain ( )

13. What is your general opinion about the activity of the lay assessors in the cases you have participated in?

A. Very active ( ) B. Active ( ) C. Relatively active ( ) D. Relatively inactive ( ) E. Inactive ( )

14. One of the most important significances of lay assessors is that they will alleviate the shortage of professional judges.

A. Strongly agree( ) B. Agree( ) C. Disagree( ) D. Strongly disagree( ) E. Neutral ( )

15. One of the most important significances of lay assessors is that lay assessors' life experience and common sense could be helpful for trials.

A. Strongly agree( ) B. Agree( ) C. Disagree( ) D. Strongly disagree( ) E. Neutral ( )

16.One of the most important significances of lay assessors is that they could improve the fairness of trials.

A. Strongly agree( ) B. Agree( ) C. Disagree( ) D. Strongly disagree( ) E. Neutral ( )

17. Generally speaking, mixed tribunals can improve the efficiency of trials.

A. Strongly agree( ) B. Agree( ) C. Disagree( ) D. Strongly disagree( ) E. Neutral ( )

18. Generally speaking, by contrast with mixed tribunals, collegial panels composed of judges exclusively can better ensure the quality of trials.

A. Strongly agree( ) B. Agree( ) C. Disagree( ) D. Strongly disagree( ) E. Neutral ( )

19. To what extent have you found that the lay assessors with higher educational level are apparently more competent than those with lower educational level.

A. Unapparently ( ) B. Not very apparently ( ) C. Apparently ( ) D. Very apparently ( ) E. Uncertain ( )

20. It would be desirable that lay assessors have diplomas or degrees in law.

A. Strongly agree( ) B. Agree( ) C. Disagree( ) D. Strongly disagree( ) E. Neutral ( )

21. If without the consideration that lay assessors can alleviate the shortage of professional judges, do you prefer that collegial tribunals exclude lay assessors and comprise professional judges exclusively?

A. Yes ( ) B. No ( ) C. Neutral ( ) D. Uncertain ( )

22. In order to ensure the effectiveness of lay participation, lay assessors should overnumber judges in mixed tribunals?

A. Strongly agree( ) B. Agree( ) C. Disagree( ) D. Strongly disagree( ) E. Neutral ( )

23. Do you agree that the mixed tribunal system should be preserved in China?

A. Strongly agree ( ) B. Agree ( ) C. Disagree ( ) D. Strongly disagree ( ) E. Neutral ( ) F. Uncertain ( )

24. A number of countries have been adopting the jury trial in criminal cases, i.e. a few citizens compose a jury to produce a verdict to decide on whether the defendant is guilty or not while the professional judge applies laws to impose the punishment. Do you agree to introduce this system in China?

A. Strongly agree ( ) B. Agree ( ) C. Disagree ( ) D. Strongly disagree ( ) E. Neutral ( ) F. Uncertain ( )

II . Demographic information

25. Your political affiliation: A. The Chinese Communist Party( ) B. Other party( ) C. Nonparty ( )

26.Your gender: A. Male_____ B. Female_____

27. You were bore in: 19 _____

28. You highest educational level is (please put a cross behind the answer you choose and specify your major):

A. Below college diploma_____

B. College diploma_____ and your major was_____

C. Bachelor's degree_____and your major was_____

D. Postgraduate diploma_____and your major was_____

E. Master's degree_____ and your major was_____

F. PhD_____ and your major was_____

29. How many years have you been appointed as a judge?

A. Below 5 years ( ) B. 5-10 years ( ) C. 10-20 years ( ) D. 20 years ( )

30. Before you were appointed as a judge, what had been your occupation or status?

A. Student( ) B. Military staff( ) C. Enterprise staff( ) D. Civil servant( ) E. Other (Please specify:)

31. How many cases do you handle approximately in each year?

A. Below100 ( ) B. 100-200 ( ) C. 200-500 ( ) D. Above 500 ( )

32. Please add any comments about the mixed tribunal system (Please use the blank overleaf to add your comments if necessary)

Appendix II: Translation of Questionnaire for Lay Assessors

The purposes of this questionnaire survey are to find out the pros and cons of the mixed tribunal system reformed by *the Lay Assessor Act 2004* and to provide the potential future reforms with information and references. The information you will provide therefore may offer important clues and impetus for the future development and innovations of the mixed tribunal system in our country. You may note that this questionnaire is anonymous and will not disclose your ID information. We sincerely thank you for your kind cooperation and very important contribution.

Ⅰ.Questions for lay assessors (Please put a cross in the bracket behind the answer you choose.)

1.How often have you experienced the circumstances as follows before the trials:
(1) The frequency that you received the referential materials about the cases (e.g. the indictment, the judges' notes, or the trial syllabuses etc., if any) before the trials:

A. In each case ( ) B. Often ( ) C. Occasionally ( ) D. Seldom ( ) E. Never ( )

(2). The frequency that the court informed you of reading the case dossiers：

A. In each case ( ) B. Often ( ) C. Occasionally ( ) D. Seldom ( ) E. Never ( )

3）The frequency that you read the case dossiers before the trials:

A. In each case ( ) B. Often ( ) C. Occasionally ( ) D. Seldom ( ) E. Never ( )

2．How many times have you received lay assessor training by far?

A. Below three-times ( ) B. 3-10 times ( ) C.10-20 times ( ) D. Above 20 times ( )

3．Do you think that the lay assessor training is useful or not?

A. Very useful( ) B. Useful( )C. Not very useful( ) D. Not useful( ) E. Uncertain ( )

4．Are you familiar with the trial procedure?

A. Familiar ( )B. Relatively familiar ( ) C. Not very familiar ( ) D. Unfamiliar ( )

5．How often have you encountered the circumstances below：

(1). The frequency that you were able to understand the judges' sum-ups before deliberation：

A. In each case（ ） B. Often（ ） C. Occasionally（ ） D. Seldom（ ） E. Never（ ）

(2). How often have you asked the judges questions in the trials：

A. Often（ ） B. Occasionally（ ） C. Seldom（ ） D. Never（ ）

(3). How often have the judges have on their own initiative helped you participate in trials by such as interpreting difficult issues in the trials:

A. Often（ ） B. Occasionally（ ） C. Seldom（ ） D. Never（ ）

(4). How often have you questioned prosecutors or defendants questions in the trials:

A. Often（ ） B. Occasionally（ ） C. Seldom（ ） D. Never（ ）

(5). How often have you read the trial records:

A. Never（ ） B. Seldom（ ） C. Occasionally（ ） D. Often（ ） E. In each case（ ）

(6). How often have you took notes in the trials：

A. Never（ ） B. Seldom（ ） C. Occasionally（ ） D. Often（ ） E. In each case（ ）

(7). How often have you got access to the library resources of the court to resolve your questions in the trials：

A. Never（ ） B. Seldom（ ） C. Occasionally（ ） D. Often（ ） E. In each case（ ）

(8). How often have you were unable to understand the evidential issues in the trials：

A. Often（ ） B. Occasionally（ ） C. Seldom（ ） D. Never（ ） E. Uncertain（ ）

(9). How often have you had totally understood the case fact before the deliberation began:

A. Always （ ） B. Often（ ） C. Occasionally（ ） D. Seldom（ ）

(10). How often have you felt confused about legal issues in trials：

A. Often（ ） B. Occasionally（ ） C. Seldom（ ） D. Never（ ） E. Uncertain（ ）

(11). How often have the judges encouraged you to present your opinions in deliberation：

A. In each case ( ) B. Often ( ) C. Occasionally ( ) D. Seldom ( ) E. Never ( )

(12). How often have you had dissidents in deliberation：

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( )

(13). How often have you had dissidents about penalty measuring in deliberation：

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( )

(14). How often have you raised debates with the judge(s) in deliberation:

A. Never ( ) B. Seldom ( ) C. Occasionally ( ) D. Often ( )

(15). How often have the judge adopted your opinions in deliberations：

A. Never ( ) B. Seldom ( ) C. Occasionally ( ) D. Often ( )

(16). Have you ever had any dissidents about the conviction of defendants？

A. Yes ( ) B. No ( )

(17).Have you ever had any dissidents about the sort of the defendant's offence？

A. Yes ( ) B. No ( )

6. Are you willing to continue your lay assessor service?

A. Very willing( ) B. Willing( ) C. Not very willing( ) D. Unwilling( ) E. Neutral ( )

7．Are you satisfied with the subsidies the court paid you?

A. Very satisfied ( ) B. Satisfied ( ) C. Not very satisfied ( ) D. Unsatisfied at all ( ) E. Neutral ( )

8．Are you satisfied with the conditions of your office provided by the court？

A. Very satisfied ( ) B. Satisfied ( ) C. Not very satisfied ( ) D. Unsatisfied at all ( ) E. Neutral ( )

9．To what extent have you felt that your status was equal with the judges in the cases

you have participated in?

A. Very equal( ) B. Equal( ) C. Not very equal( ) D. Not equal at all( ) E. Uncertain ( )

10．To what extent have you felt that you were respected by the judges in the cases you have participated in?

A. Very respected ( ) B. Respected ( ) C. Not very respected ( ) D. Not respected ( ) E. Uncertain ( )

11．In many cases, the function of lay assessors is no more than a decoration in mixed tribunals.

A. Strongly agree ( ) B. Agree ( ) C. Disagree ( ) D. Strongly disagree ( ) E. Uncertain ( )

12．To what extent has your employer been supportive of your lay assessor job? （Pensioners and the self-employed please ignore this item）

A. Very supportive( ) B. Supportive( ) C. Not very supportive( ) D. Not supportive at all ( )

13．How often has your lay assessor job conflicted with your employment? (Pensioners and the self-employed please ignore this item)

A. Often ( ) B. Occasionally ( ) C. Seldom ( )

14．Have you ever been worried about any revenge because of your lay assessor job?

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( )

15．What do you think of the 5-year tenure of lay assessors?

A. Too long ( ) B. Too short ( ) C. Appropriate ( ) D. Neutral ( ) E. Uncertain ( )

16．Do you think that your caseload is heavy or not?

A. Heavy ( ) B. Somewhat heavy ( ) C. Reasonable ( ) D. Somewhat easy ( ) E. Easy ( )

17. “Lay assessors should defer to judges’ opinions during deliberations since the latter has better legal knowledge and professional skills”.

A. Strongly agree ( ) B. Agree ( ) C. Disagree ( ) D. Strongly disagree ( ) E. Uncertain ( )

18．“Serving as lay assessors is a democratic right through which common citizens can participate in administration of national affairs"

A. Strongly agree ( ) B. Agree ( ) C. Disagree ( ) D. Strongly disagree ( ) E. Uncertain ( )

19．“Your experience of acting as a lay assessor has made you feel more interested in participating in other democratic activities”.

A. Strongly agree ( ) B. Agree ( ) C. Disagree ( ) D. Strongly disagree ( ) E. Uncertain ( )

20．“Your lay assessor experience has increased your legal knowledge”.

A. Strongly agree ( ) B. Agree ( ) C. Disagree ( ) D. Strongly disagree ( ) E. Uncertain ( )

21．“Your lay assessor experience has strengthened your legal consciousness”.

A. Strongly agree ( ) B. Agree ( ) C. Disagree ( ) D. Strongly disagree ( ) E. Uncertain ( )

22．How often have you ever talked about your lay assessor experience with others?

A. Often ( ) B. Occasionally ( ) C. Seldom ( ) D. Never ( )

23．To what extent has your trust in the judiciary been improved after serving as a lay assessor?

A. Very much improved ( ) B. Relatively improved ( ) C. No change ( ) D. Not

improved but descended ( ) E. Uncertain ( )

24．“If a lay assessor finds any misconduct of judges, she should reveal it without hesitation”.

A. It depends on( ) B. Strongly agree( ) C. Agree( ) D. Disagree( ) E. Strongly disagree ( ) F. Uncertain ( )

25．“You would feel more encouraged to participate in the deliberation if the lay assessors outnumber the judge(s) in a mixed tribunal”.

A. Strongly agree ( ) B. Agree ( ) C. Disagree ( ) D. Strongly disagree ( ) E. Uncertain ( )

26．If your intimate relative or friend committed a crime, would you be willing to see his case to be adjudicated by a mixed tribunal?

A. Very willing( ) B. Willing( ) C. Unwilling( ) D. Very unwilling( ) E. Uncertain ( ) F. Neutral ( )

27．A number of countries have been adopting the jury trial in criminal cases, i.e. a few citizens compose a jury to produce a verdict to decide on whether the defendant is guilty or not while the professional judge applies laws to impose the punishment. Do you agree to introduce this system in China?

A. Strongly agree ( ) B. Agree ( ) C. Disagree ( ) D. Strongly disagree ( ) E. Neutral ( ) F. Uncertain ( )

II．Demographic information

28．Your occupation is：

A. Civil servant( ) B. Enterprise employee( ) C. State-owned enterprise employee ( ) D. Pensioner ( ) E. Self-employed ( ) F. Farmer ( ) G. Other (Please specify:)

29．Are you a Chinese Communist Party member?

A. Yes（ ） B. No（ ）

30．Your ethnicity is：

A. Han（ ） B. Other ethnic minority（ ）

31．Your gender is:

A. Male（ ） B. Female（ ）

32．When have you started to be a lay assessor？ ___Month___Year

33．How many cases have your participated in by far？

A. Below 5（ ） B. 5-10（ ） C. 10-20（ ） D. 20-50（ ） E. Above 50（ ）

34．You were born in：19 _____

35．Your highest education level is (please put a cross behind the answer you choose and specify your major):
A Below college diploma_____
B College diploma_____ and your major was_____
C Bachelor's degree_____and your major was_____
D Postgraduate diploma_____and your major was_____
E Master's degree_____ and your major was_____
F PhD_____ and your major was_____

36．Please add any comments about the mixed tribunal system (Please use the blank overleaf to add your comments if necessary)

Bibliography

I. Books in English

1. Abramson J., *We, the Jury: The Jury System and the Ideal of Democracy*, (Basic Books, New York, 1994);
2. Baldwin J. and McConville M., *Jury Trials,* (Clarendon Press, Oxford 1979);
3. Burney E., *J. P. Magistrate, Court and Community*, (Hutchinson, London, 1979);
4. City Polytechnic of Hong Kong, *Working Paper No.1: The Jury in Hong Kong,* (The Hong Kong Jury Project, 1990);
5. Clark L. D., *The Grand Jury: The Use and Abuse of Political Power* (The New York Times Books Co., 1975);
6. Coote A. and Mattinson D., *Twelve Good Neighbours: The Citizen as Juro*r, (The Fabian Society, London 1997);
7. Cornish W. R., *The Jury* (Allen Lane The Penguin Press, London 1968);
8. Dethier J. J. (ed.), *Governance, Decentralization and Reform in China, India and Russia* (Kluwer Academic Publishers, Boston 2000);
9. Elliott C. and Quinn F., *English Legal System* (Pearson Education Limited, Harlow, 2000);
10. Enright S. and Morton J., *Taking Liberties: The Criminal Jury in the 1990s*, (Weidenfeld and Nicolson, London 1990);
11. Farenga V., *Citizen and Self in Ancient Greece: Individuals Performing Justice and the Law* (Cambridge University Press, New York 2006);
12. Feild H. S. and Bienen L. B.: *Jurors and Rape: A Study in Psychology and Law*, (Lexington Books, Lexington 1980);
13. Findlay M. and Duff P. (ed.), *The Jury Under Attack* (Butterworths, London, Sydney 1988);
14. Gibson B., *Introduction to the Magistrates' Court and Glossary of Words, Phrases and Abbreviations*, (Waterside Press, Winchester, 2nd edition 1995);
15. Ginsburg N. (ed.), *The Pattern of Asia* (Englewood Cliffs, New Jersey, 1958);
16. Gobert J., *Justice, Democracy and the Jury* (Ashgate Publishing Ltd., Dartmouth 1997);
17. Hans V. P. and Vidmar N., *Judging the Jury* (Plenum Press, New York 1986);
18. Hastie R., Penrod S. D. and Pennington N., *Inside the Jury* (Harvard University Press, London 1983);
19. Holmes O. W., *The Common Law*, (Macmillan, London, 1882);
20. Hostettler J., *The Criminal Jury Old and New: Jury Power From Early Times to the Present Day* (Waterside Press, Sheffield, 2004);
21. Jackson J. D. and Doran S., *Judge Without Jury*: *Diplock Trials in the Adversary System*, (Clarendon Press, Oxford 1995);
22. Kalven H. and Zeisel H., *The American Jury* (Phoenix Edition) (The University of Chicago Press, Ltd., London 1971);
23. Kassin S. M. and Wrightsman L. S., *The American Jury on Trial: Psychological Perspectives* (Hemisphere Publishing, London 1988);

24. Lubman S. B., *Bird in a Cage – Legal Reform in China after Mao* (Stanford University Press, Stanford, 1999);
25. McCabe S. and Purves R., *The Jury at Work* (Basil Blackwell, Oxford 1972);
26. McCabe S., *The Shadow Jury at Work* (Basil Blackwell, Oxford 1974);
27. McNeill P., *Research Methods* (Routledge, London 1990);
28. O'neill T. P. and Hymel G., *All Politics is Local: And Other Rules of the Game* (Bob Adams, Inc., Holbrook, 1995);
29. Oppenheim A. N., *Questionnaire Design, Interviewing and Attitude Measurement* (Continuum, London, 1992);
30. Packer H, *The Limits of the Criminal Sanction* (Oxford University Press, Oxford, 1968);
31. Padfield N., *Text and Materials On the Criminal Justice Process* (Fourth Edition) (Oxford University Press, Oxford, 2008);
32. Schubert G. A. (ed.), *Judicial Behavior: A Reader in the Theory and Research* (Rand McNally, Chicago 1964);
33. Shapiro M, *Courts: A Comparative and Political Analysis* (University of Chicago Press, Chicago1986);
34. Simon R. J., *The Jury and the Defense of Insanity* (Little, Brown and Company, London, 1967);
35. Skyrme T. *The Changing Image of the Magistracy*, (2nd edition, Macmillan Press, London 1983);
36. Slapper G. and Kelly D., *The English Legal System* (Tenth Edition) (Routledge-Cavendish, London 2009);
37. Stephens T. B., *Order and Discipline in China: The Shanghai Mixed Court 1911-1927* (University of Washington Press, Washington 1992);
38. Tonry M., *Punishment and Politics: Evidence and emulation in the making of English crime control policy* (Willan Publishing, Cullompton, 2004);
39. Vidmar N. (ed.), *World Jury Systems* (Oxford University Press, Oxford, 2000);;
40. Walker N. and Pearson A. (ed.), *The British Jury System* (The Institute of Criminology, Cambridge, 1975);
41. Younger R. D., *The People's Panel: The Grand Jury in the United States, 1634—1941* (American History Research Center, Brown University Press, 1963).

II. Books in Chinese

1. Chen G., *100 Years' Evolvement of the Civil Procedure Law in China*, (The Fazhi Press of China, Beijing 2004);
2. Chen G., *Litigation Justice and Procedural Safeguards*, (The Fazhi Press of China, Beijing 1996);
3. Chen Z., *The Revolutionary History of China* (The Press of the Institute of Political Sciences & Law of China, Beijing, 2006);
4. Deng X. P., *The Collection of Articles by Deng Xiaoping (Vol. II)*, (The People's Publishing House, Beijing 2001);
5. Dong B. W. *The Collected Edition of Legal and Political Articles by Dong Biwu* (The

Publishing House of Law, Beijing 1986);
6. Fan S. Z., *Particular Explorations on Cities and Towns of South-eastern China in Ming and Ching Dynasties,* (The Press of Fudan University, Shanghai 1990);
7. Gao C. and Ma J. S., *The Interpretation of Historical Records of Criminal Laws in Past Chinese Dynasties*, (The People's Press of Jilin, Changchun 1994);
8. Guo B. W, *The History of Educational Systems in China* (The Educational Press of Fujian, Fuzhou, 2007);
9. Guo C. W. and Song Y. H. (eds.), *A Study on the Contemporary Judicial Systems* (The Legal Publishing House, Beijing, 2002);
10. Guo C. W. *A Study on the Codification of the Criminal Procedure in the Late Period of Time of the Ching Dynasty and the Initial Stage of the Republic of China* (The Press of the Police College of China, Beijing, 2006);
11. Jia G. Y. and Zheng X., *The Annotation of Etiquettes in the Zhou Dynasty* (The Chunghwa Press, Beijing 1980);
12. Jiang W. and Yang R. X., *The Mechanism Reform of the Civil Litigation*, (The Publishing House of the People's Court, Beijing 1998);
13. Li C. L., *A Study on the Evolution of Criminal Procedures in Contemporary China*, (The Press of Beijing University, Beijing 2004);
14. Lin D., *Confucian Ethics and Legal Culture – A Discovery from the Sociological Perspective* (The Press of the College of Political Sciences & Law of China, Beijing, 2002);
15. Liu L. M., *The Contract, Ordeal and Gamble* (The People's Press of Sichuan, Chengdu 1993);
16. Luo Z. Y. (ed.), *A Study* on *Legal Evolutions in Modern China* (Zhengzhong Press, Taipei, 1976);
17. Ma M., *The Ma Min's Self-selected Articles* (The Publishing House of the Normal University of Central China, Wuhan 1999);
18. Qiang S. G., The *Mediation, Legal System and Modernity* (The Fazhi Press, Beijing 2001);
19. Ruan X. (ed.), *China Yearbook* (Vol. I), (The Commercial Publishing House, Shanghai 1928);
20. Sprinkle S., *An Introductive Study on the Legal System of the Ching Dynasty – An Analysis from the Sociological Perspective* (translated by Zhang S. D, the Press of the College of Political Sciences & Law, Beijing, 2000);
21. Shi F. Y., *Clans and People's Statuses in Ancient China* (The Press of Social Sciences Literature, Beijing, 1999);
22. Song S. J., *A Study on Chinese Criminal Trial Systems* (The Fazhi Press of China, Beijing, 2005);
23. Sun S. B., A *Study on Judicial Corruption in China and the Possible Solutions* (The Qunzhong Press, Beijing 2006);
24. Su S., "Ode of the 'Three Deliberations' Which Seeks the Public Wills", *Collected Works of Su Shi –Vol. I* (The Chunghwa Press, Beijing 2008);
25. Yasube T., *The Justice in Litigation Procedures* (Chinese Version, translated by Wang Y. X. and Liu R. J., the Publishing House of Chinese University of Political Sciences &

Law, 1996);
26. The Research Department of the Party History of the CCP Headquarters, *The Brief History of the Chinese Communist Party* (The Publishing House of the CCP History, Beijing 2001);
27. Wang B. Z. and Xu Y., A *Study on China's "Ke Jew" System* (The Hebei People's Press, Shijiazhuang 2002);
28. Wang H. Y., *How Has China's Selected Its Criminal Procedure Models* (The Beijing University Press, Beijing 2008);
29. Wang J. L., *The 'Merciful Virtue and Prudential Punishment'* (The Youshi Cultural Enterprise Corporation Ltd, Taipei 1990);
30. Wang L. M., *A Study o*n *Judicial Reforms in China* (The Publishing House of Law, Beijing 2000);
31. Wang Y. Z., *The Civil Procedure Laws of Foreign Countries*, (The Beijing University Press, Beijing 1990);
32. Wang Y. M., *An Introduction of China's History and Geography – Vol. I* (The People's Education Press, Beijing, 1985);
33. Wu L., *China's Judicial System* (The Press of the People's University of China, Beijing, 1997);
34. Xia Y., *The Era Envisaging Rights: A Study on Chinese Citizens' Rights* (The Press of Social Sciences Literature, Beijing 2007);
35. Xie Z. M., *The Legislative History of the Republic of China* (The Press of the College of Political Sciences & Law of China, Beijing 2000);
36. Xu Y. J., *The Historical Review of the Clan System in the Song Dynasty and Ming Dynasty* (the Chunghwa Press, Shanghai, 1995);
37. Yang C. X., *China's Criminal Policies* (The Beijing University Press, Beijing 1994);
38. Yang T. Y., *The Interpretation and Commentary of Rites in the Zhou Dynasty* (The Ancient-Literature Press of Shanghai, Shanghai 2007);
39. Zhang D. M., *The Exploration and Choice – A Study on the Legal Transplantation in the Late Period of Time of the Ching Dynasty* (The Tsing Hwa University Press, Beijing 2003);
40. Zhang G. H. and Li L. G., *The Preliminary Chronicle of Shen Jiaben* (The Publishing House of Beijing University, Beijing 1989);
41. Zhang J. F., *Traditions of Chinese Laws and Their Contemporary Transformation* (The Publishing House of Law, Beijing, 1997);
42. Zhang J. F., *The History of China's Judicial Systems* (The Press of the People's Courts, Beijing, 2004);
43. Zhang Y. X., The *Marriage, Family, Clan and Civilization* (The Press of Social Sciences of China, Beijing 2007);
44. Zhen Q. and Zhen D., *The Textbook of the Chinese Legal Histor*y (The Law Press, Beijing 1998);
45. Zhi S. and Xu J. X., A *Study on Social Hierarchies in Ancient Countries* (The Social Sciences Press of China, Beijing, 2003);
46. Zhong Q., *From the "Plan" to the "Market": A Study on China's Economic Transition* (The Shehui Press of China, Beijing, 2009);

47. Zhu Y., *The Society and Country in the Transitional Time – A Historical Observation Based on the Chambers of Commerce in Contemporary China* (The Publishing House of the Normal University of Central China, Wuhan 1997);
48. Zhu Y., *A Study on the Clan Law in the Ching Dynasty* (The Educational Press of Hunan Province, 1987).

III. Articles in English

1. Anderson K. and Nolan M., "Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (saiban-in seido) from Domestic Historical and International Psychological Perspective", *Vanderbilt Journal of Transnational Law*, Vol.37, 2004, at 935-992;
2. Anderson K. and Saint E., "Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials", *Asian-Pacific Law & Policy Journal*, Vol. 6, Issue 1, Winter 2005, at 233-284;
3. Anderson S., "Lay Judges and Jurors in Denmark", *The American Journal of Comparative Law*, Vol. 38, 1990, at 839-864;
4. Baldwin J., "The Social Composition of the Magistracy", *British Journal of Criminology*, Vol. 16, No.2, April 1976, at 171-174;
5. Baldwin J., "Handout for the Workshop of 'Doing Legal Empirical Research'", at 1, unpublished. This workshop was held by the School of Law of the University of Birmingham on 28 April 2008;
6. Baldwin J. and McConville M., "Does the Composition of An English Jury Affect Its Verdict?", *Judicature*, Vol.64, 1980-1981, at 133-139;
7. Bogart W. A., "Guardian of Civil Rights … Medieval Relic: The Civil Jury in Canada", *Law and Contemporary Problems*, Vol.62, 1999, at 305-320;
8. Bohlander M., "Take it from me …' – The Roles of the Judge and Lay Assessors in Deciding Questions of Law in Appeals to the Crown Court", *Journal of Criminal law*, Vol.69, 2005, at 442-448;
9. Bradley A.W., "The Tribunal Maze", *Public Law*, Sum 2002, at 200-202;
10. Brinks D., "Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?", *Texas International Law Journal*, Vol.40, 2004-2005, at 595-622;
11. Buck T., "Precedent in Tribunals and the Development of Principles", *Civil Justice Quarterly*, Vol. 25, Oct 2006, at 458-484;
12. Campbell M. C., "Black, White, and Grey: The American Jury Project and Representative Juries", *The Georgetown Journal of Legal Ethics*, Vol.18, 2004-2005, at 625-638;
13. Carnwath R., "Tribunals Justice – A New Start", *Public Law*, Jan 2009, at 48-69;
14. Carruthers J., "Are Juries Safe?", *Scottish Law Times*, Vol.25, 2001, at 217-221;
15. Castaneda J., "The Jury's Dilemma: Playing God in Solving the Problems Lurking in America's Courtrooms", *Defense Counsel Journal*, Vol.72, 2005, at 387-399
16. Chambliss E., "When Do Facts Persuade? Some Thoughts on the Market for 'Empirical Legal Studies'", *Law & Contemporary Problems*, Vol.71, 2008, at 17-40;

17. Change D. W., "Government and Crime Control in China: Its Relevance to U.S. Criminal Justice", *Police Studies: International Review of Police Development*, Vol.7, 1984, at 94-111;
18. Charrow R. P. and Charrow V. R., "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions", *Columbia Law Review*, Vol.79, 1979, at 1306-1374;
19. Chemnerinsky E., "Toward A Practical Definition of the Rule of Law", *Judges Journal*, Vol.46, 2007, at 4-8;
20. Clark S. J., "The Character of Direct Democracy", *Journal of Contemporary Legal Issues*, Vol.13, 2003-2004, at 341-364;
21. Clark T. C., "Citizens, Courts, and the Effective Administration of Justice", *Journal of the American Judicature Society*, Vol. 49, 1965-1966, at 6-13;
22. Cohen J. A., "Law in Political Transitions: Lessons From East Asia and the Road Ahead for China", *International Law and Politic*s, Vol.37, 2005, at 423-440;
23. Corker D., "Trying Fraud Cases Without Juries", *Criminal Law Review*, April 2002, at 283-394;
24. Coughenour J. C. "Reflections on Russia's Revival of Trial by Jury: History Demands That We Ask Difficult Questions Regarding Terror Trials, Procedures to Combat Terrorism, and Our Federal Sentencing Regime", *Seattle University Law Review*, Vol.26, 2002-2003, at 399-430;
25. Cowan J. D., Crisham T. M., Keating M. B., Mahony G., Pole D. E., Pope M. A., Schwarzer W. W., and Wester J. R., "What Attorneys Think of Jury Trial Innovations", *Judicature,* Volume 86, No. 4, 2003, at 192-199;
26. Crespo M. D. H., "A Systemic Perspective of ADR in Latin America: Enhancing the Shadow of the Law Through Citizen Participation", *Cardozo Journal of Conflict Resolution*, Vol.10, 2008, at 91-130;
27. Daffron S. R., "Experimenting with the Jury", *Judicature*, Vol. 81, No.3, November-December 1997, at 97;
28. Daniels S., "The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-buidling", *Law & Contemporary Problems*, Vol.52, 1989, at 269-310;
29. Darbyshire P., "The Lamp that Shows that Freedom Lives - Is It Worth the Candle?", *Criminal Law Review*, Oct 1991, at 740-752;
30. Darbyshire P., "An Essay on the Importance and Neglect of the Magistracy", *Criminal Law Review*, Sep 1997, at 627-643;
31. Darbyshire P., "For the New Lord Chancellor - Some Causes for Concern about Magistrates", *Criminal Law Review*, Dec 1997, at 861-874;
32. Darbyshire P., "What Case We Learn From Published Jury Research? Findings for the Criminal Courts Review", *Criminal Law Review*, Dec 2001, at 970-979;
33. Dean M., "Trial by Jury: A Force for Change in Japan", *International and Comparative Law Quarterly*, Vol.44, 1995, at 379-404;
34. Dennis I., "Judging Magistrates", *Criminal Law Review,* Feb 2001, at 71-72;
35. Deville D. "Combating Russian Organized Crime: Russia's Fledgling Jury System on Trial", *George Washington Journal of International Law and Economics*, Vol.32,

1999-2000, at 73-92;
36. Diamond S. S., Vidmar N. J., Rose M., Ellis L., and Murphy B., "Inside the Jury Room: Evaluating Juror Discussions During Trial", *Judicature*, Vol.87, 2003-2004, at 54-59;
37. Diesen C., "The Advantages and Disadvantages of Lay Judges from a Swedish Perspective", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 355-363;
38. Diesen C., "Lay Participation in Sweden--a Short Introduction", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 313-315;
39. Duff P., "The Hong Kong Jury: A Microcosm of Society?", *International & Comparative Law Quarterly*, Vol.39, No. 4, 1990, at 881-891;
40. Ellsworth P. C., "Are Twelve Heads Better Than One?", *Law & Contemporary Problems*, Vol.52, 1989, at 205-224;
41. Ferguson P. R., "The Criminal Jury in England and Scotland: The Confidentiality Principle and the Investigation of Impropriety", *International Journal of Evidence & Proof*, Vol. 10, No. 3, 2006, at 180-211;
42. Ferguson P. W., "The Modern Criminal Jury", *Scottish Law Times*, Vol. 35, 2008, at 229-236;
43. Florio R., "The [Capital] Punishment Fits the Crime: A Comparative Analysis of the Death Penalty and Proportionality in the United States of America and the People's Republic of China", *University of Miami International & Comparative Law*, Vol.16, Issue 1, 2008-2009, at 43-90;
44. Fombad C. M., "A Preliminary Assessment of the Prospects for Judicial Independence in Post -1990 African Constitutions", *Public Law*, Sum 2007, at 233-257;
45. Forster L. and Horowitz I. A., "The Effects of JURY-AID Innovations on Juror Performance in Complex Civil Trials", *Judicature*, Volume 86, No. 4, January-February 2003, at 184-191;
46. Forston R. F., "Sense and Non-Sense: Jury Trial Communication", *Brigham Young University Law Review*, 1975, at 601-638;
47. Foschio L. G., "A History of the Development of the Office of United States Commissioner and Magistrate Judge System", *The Federal Courts Law Review*, Vol. 1, 2006, at 607-624;
48. Friedman P. L., "Civility, Judicial Independence and the Role of the Bar in Promoting Both", *Federal Courts Law Review*, Vol.1, 2006, at 513-524;
49. Fukurai H. and Bulter E. W., "Organization, Labor Force, and Jury Representation: Economic Excuse and Jury Participation", *Jurimetrics Journal*, Vol.32, 1991-1992, at 49-70;
50. Fukurai H. and Wang Z. Y., "Civic Participatory Systems in Law in Japan and China"; the article presented at the LSA annual conference at Berlin 2007, material with the author;
51. Fukurai H., "The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participation Experience in Japan and the U.S.", *Cornell International Law Journal*, Vol.40, 2007, at 315-354;
52. Garde P., "The Danish Jury", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 87-120;

53. Gil J. P., "Private Interests Seeking Punishment: Prosecution Brought by Private Individuals and Groups in Spain", *Law & Policy*, Vol.25, 2003, at 151-172
54. Gillespie J., "Rethinking the Role of Judicial Independence in Socialist-transforming East Asia", *International & Comparative Law Quarterly*, Vol.56, No.4, 2007, at 83-124
55. Gleadow C., "Spain's Return to Trial by Jury: Theoretical Foundations and Practical Results", *Saint Louis-Warsaw Transatlantic Law Journal*, Vol.2001-2002, at 57-74;
56. Guo L. J., "A Human Rights Critique of the Chinese Legal System", *Harvard Human Rights Journal*, Vol. 9, 1996, at 1-14;
57. Hans V. P., "The Jury's Response to Business and Corporate Wrongdoing", *Law & Contemporary Problems*, Vol.52, 1989, at 177-204;
58. Hans V. P., "Lay Participation in Legal Decision Making", *Law & Policy*, Vol.25, No.2, 2003, at 83-92;
59. Hans V. P., "U.S. Jury Reform: The Active Jury and the Adversarial Ideal", *Saint Louis University Public Law Review*, Vol.21, 2002, at 85-98;
60. Hanson S., "The Chinese Century: An American Judges Observations of the Chinese Legal Systems", *William Mitchell Law Review*, Vol. 28, 2001-2002, at 243-254
61. Hendler E. S., "Lay Participation in the Judicial Process: the Situation in Argentina", *Saint Louis-Warsaw Transatlantic Law Journal*, 2001-2002, at 81-88;
62. Hendler E. S., "Lay Participation in Argentina: Old History, Recent Experience", *Southwestern Journal of Law & Trade in the Americas*, Vol.15, 2008, at 1-30;
63. Heuer L. and Penrod S., "Increasing Juror Participation in Trials Through Note Taking and Question Asking", *Judicature*, Vol. 79, No.5, March-April 1996, at 256-262;
64. Hill S. and Baldwin J., "Tribunal Membership: the Role of Local Politics in Recruitment to Local Valuation Panels in England and Wales", *Civil Justice Quarterly*, Vol.6, Apr 1987, at 130-141;
65. Hollywood, D. M. "The Search for Post-Conflict Justice in Iraq: A Comparative Study of Transitional Justice Mechanisms and Their Applicability to Post-Saddam Iraq", *Brook Journal of International Law*, Vol. 33, 2007-2008, at 59-124;
66. Honess T. M., Levi M. and Charman E. A., "Juror Competence in Serious Frauds Since Roskill: A Research-based Assessment", *Journal of Financial Crime*, Vol.11, No.1, 2003, at 17-27;
67. Houlder B., "The Importance of Preserving the Jury System and the Right of Election for Trial", *Criminal Law Review*, Dec 1997, at 875-881;
68. Howard A. E. D., "After Communism: Devolution in Central and Eastern Europe", *South Texas Law Review*, Vol.40, 1999, at 661-688;
69. Hyman M. B., "The Judiciary's Role in Preserving Democracy", *Judges Journal*, Vol.47, 2008, at 20-31;
70. Ivkovic S. K., "Mixed Tribunals in Croatia", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 57-85;
71. Ivkovic S. K., "Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals", *Cornell International Law Journal*, Vol. 40, 2007, at 429-545;
72. Ivkovic S. K., "An Inside View: Professional Judges' and Lay Judges' Support for Mixed Tribunals", *Law & Policy*, Vol.25, No.2, 2003, at 93-122;
73. Jackson J. D. and Kovalev N. P., "Lay Adjudication and Human Rights in Europe",

The Columbia Journal of European Law, No.1 of Vol.13, 2006/2007, at 83-124;
74. Jimeno-Bulnes M., "Lay Participation in Spain: the Jury System", *International Criminal Justice Review*, Vol. 14, 2004, at 164-185;
75. Kasunic D. E., "One Day/One Trial: A Major Improvement in the Jury System", *Judicature*, Vol.67, 1983-1984, at 78-86;
76. Killion M. U., "Post-WTO China and Independent Judicial Review", *Houston Journal of International Law*, Vol. 26, No.3, 2004, at 507-560;
77. Kim M. S., "A Distant Premise: Judicial Independence in the People's Republic of China", *Korean Journal of Comparative Law*, Vol. 24, 1996, at 17-42;
78. Kirby M., "Judicial Dissent -- Common Law and Civil Law Traditions", *Law Quarterly Review*, Vol.123, Jul 2007, at 379-400;
79. Kirst R. W., "Finding A Role for the Civil Jury in Modern Litigation", *Judicature*, Vol. 69, 1985-1986, at 333-338;
80. Kiss L. W., "Reviving the Criminal Jury in Japan", *Law and Contemporary Problems*, Vol.62, No.2 of 1999, at 261-284;
81. Koch A., "C.J.A Mittermaier and the 19th Century Debate about Juries and Mixed Courts", *International Review of Penal Law*, *Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 347-353;
82. Landsberg B. K., "The Role of Judicial Independence", *Pacific McGeorge Global Business & Development Law Journal*, Vol.19, 2006, at 331-336;
83. Landsman S., "The Civil Jury in America", *Law and Contemporary Problems*, Vol.62, 1999, at 93-110;
84. Landsman S., "Commentary: Dispatches from the Front: Lay Participation in Legal Processes and the Development of Democracy", *Law & Policy*, Vol.25, 2003, at 173-178;
85. Landsman S. and Zhang J., "Lay Participation Comes to Japanese and Chinese Courts", *UCLA Pacific Basin Law Journal*, Vol.25, 2007-2008, at 179-227;
86. Legg T., "Judges for the New century", *Public Law*, Spr 2001, at 62-76;
87. Legislative Comment, "The implementation of The Tribunals, Courts and Enforcement Act 2007", *Journal of Planning & Environment Law*, No.7, 2008, at 242-286;
88. Lempert R. O., "Citizen Participation In Judicial Decision Making: Juries, Lay Judges and Japan", *Saint Louis-Warsaw Transatlantic Law Journal*, Vol.2001-2002, at 1-14;
89. Lempert, R. O. "The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research", *Cornell International Law Journal*, Vol.40, 2007, at 477-488;
90. Levine J. P. and Zeidman S., "The Miracle of Jury Reform in New York", *Judicature*, Volume 88, Number 4, January-February 2005, at 178-184;
91. Lin L. F., "Judicial Independence in Japan: A Re-investigation for China", *Columbia Journal of Asian Law*, Vol.13, No.2, 1999, at 185-202;
92. Lin R. H., "On the Nature of Criminal Law and the Problems of Corruption in the People's Republic of China: Some Theoretical Considerations", *New York Law School Journal of International and Comparative Law*, Vol. 10, No.1, 1989, at 1-10;
93. Linder R. K., "President's Page: A Time for Jury Innovation", *Defense Counsel Journal*, Vol.65, 1998, at 5-6;

94. Lloyd-Bostock S. and Thomas C., "Decline of the 'Little Parliament': Juries and Jury Reform in England and Wales", *Law and Contemporary Problems*, Vol. 62, Spring 1999, at 7-40;
95. Lloyd-Bostock S., "The Jubilee Line Jurors: Does Their Experience Strengthen the Argument for Judge-only Trial in Long and Complex Fraud Cases?", *Criminal Law Review*, 2007, at 255-273;
96. Lockenour R. M., "The Chinese Court System", *Temple Law Quarterly*, No.5, 1930-1931, at 253-259;
97. Los M., "The Myth of Popular Justice Under Communism: A Comparative View of the USSR and Poland", *Justice Quarterly*, Vol.2, No.4, December 1985, at 447-472;
98. Luce H. R., "The Rule of Law and the Administration of Justice", *Journal of American Judicature Society*, Vol. 45, 1961-1962, at 86-92;
99. Ma Y., "Lay Participation in Criminal Trials: A Comparative Perspective", *International Criminal Justice Review*, Vol.8, 1998, at 74-94;
100. Machura S., "Interaction between Lay Assessors and Professional Judges in German Mixed Courts", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 451-479;
101. Machura S., "Fairness, Justice, and Legitimacy: Experiences of People's Judges in South Russia", *Law & Policy*, Vol.25, No.2, 2003, at 123-150;
102. Markovitz I., "Exporting Law Reform-But Will It Travel?", *Cornell International Law Journal*, Vol.37, 2004, at 95-114;
103. Maruta T., "The Criminal Jury System in Imperial Japan and the Contemporary Argument for its Reintroduction", *International Review of Penal Law (Vol. 72)* (Vol. 72) (Érès, Ramonville Sainte Agne 2001), at 215-224;
104. McEwan J., "Evidence, Jury Trials and Witness Protection - the Auld Review of the English Criminal Courts", *International Journal of Evidence & Proof*, Vol.6, No.3, 2002, at 163-177;
105. McKenna S. S., "Proposal for Judicial Reform in Japan: An Overview", *Asian-Pacific Law & Policy Journal*, Vol.2, Issue 2, Spring 2001, at 1-151;
106. McNollgast, "Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law", *South California Law Review*, Vol. 68, 1994-1995, at 1631-1684;
107. Mills C. J. and Bohannon W. E., "Juror Characteristics: To What Extent Are They Related to Jury Verdicts", *Judicature*, Vol.64, 1980-1981, at 22-31;
108. Miyazawa S., "The Politics of Judicial Reform in Japan: The Rule of Law at Last", *Asian-Pacific Law & Policy Journal*, Vol.2, Issue 2, Spring 2001, at 1-121;
109. Mize G. E. and Hannaford-Agor P., "Jury Trial Innovations Across America: How We Are Teaching and Learning From Each Other", J*ournal of Court Innovation*, Vol.1, 2008, at 189-230;
110. Moore K. A., "Judges, Juries, and Patent Cases: An Empirical Peek Inside the Black Box", *Michigan Law Review*, Vol.99, 2000-2001, at 365-409;
111. Morgan R. and Russell N., "The Judiciary in the Magistrates' Courts", http://www.homeoffice.gov.uk/rds/pdfs/occ-judiciary.pdf, last visited on 11 July, 2009;
112. Morgan R., "Magistrates: The Future According to Auld", *Journal of Law & Society*, Vol. 29, 2002, at 308-323;

113. Munger F., "Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand", *Cornell International Law Journal*, Vol.40, 2007, at 455-476;
114. Munsterman G. T. and Hannaford P. L., "Reshaping the Bedrock of Democracy: American Jury Reform During the Last 30 Years", *The Judge's Journal*, Vol. 36, 1997, at 5-12;
115. Munsterman G. T. and Silverman C., "Jury Reforms in Arizona: The First Year", *Judges Journal*, Vol.45, 2006, at 18-44;
116. Myers R. D., Reinstein R. S., and Griller G. M., "Complex Scientific Evidence and the Jury", *Judicature*, Vol. 83, 1999-2000, at 150-156;
117. Nadeau J. P., "Judicial Reform in Japan", *The Judges' Journal* Vol.44, 2005, at 34-40;
118. Nemytina M., "Trial by Jury: A Western or A Peculiarly Russian Model", international Review of Penal Law (Vol. 72), (Érès, Ramonville Sainte Agne 2001), at 365-370;
119. O' Connor S. D., "Vindicating the Rule of Law: The Role of the Judiciary", *Chinese Journal of International Law*, Vol.2, 2003, at 1-10;
120. Oko O., "Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria", *Brook Journal of International Law*, Vol.31, 2005-2006, at 9-82;
121. Oster S., "Jiang's Biggest Gamble", *Asia Week*, 19 Oct 2001;
122. Pache C. "The Legal System, the Courts and Law Reporting in Hong Kong", *Legal Information Management*, Vol.7, No.2, 2007, at 90-92;
123. Parry R. G., "Random Selection, Linguistic Rights and the Jury Trial in Wales", *Criminal Law Review*, Oct 2002, at 805-816;
124. Pashin S. A., "The Reasons for Reintroducing Trial by Jury in Russia", *International Review of Penal Law (Vol. 72)* (Érès, Ramonville Sainte Agne 2001), at 253-257;
125. Paul J. C. N., "Introduction: Law, Socialism, and the Human Right to Development in Third World Countries", *Review of Socialist Law*, Vol.7, 1981, at 235-242;
126. Pendell J. W., "Enhancing Juror Effectiveness: An Insurer's Perspective", *Law & Contemporary Problems*, Vol.52, 1989, at 311-322;
127. Perron W., "Lay Participation in Germany", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 181-195;
128. Pihlajamaki H., "From Compurgators to Mixed Courts: Reflections on the Historical Development of Finnish Evidence Law and Court Structure", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 26-29;
129. Plotkin S. R., "The Jury Trial in Russia", *Tulane Journal of International & Comparative Law*, Vol.2, 1994, at 1-22;
130. Poulin A. B., "The Jury: The Criminal Justice System's Different Voice", *University of Cincinnati Law Review*, Vol.62, 1994, at 1377-1438;
131. Pound R., "Law and Courts in China: Progress in the Administration of Justice", *American Bar Association Journal*, Vol.34, April 1948, at 273-276;
132. "Presumed Guilty?: Criminal Justice and Human Rights in Mexico -- Reports of the Joseph R. Crowley Program in International Human Rights/Centro De Derechos Humanos Miguel Agustin Pro Juarez ("PRODH"): Joint 2000 Mission in Mexico", *Fordham International Law Journal*, Vol.24, 2000-2001, at 801-888;
133. Reichert I. F., "The Magistrates' Courts: Lay Cornerstone of English Justice",

Judicature, Vol.57, 1973-1974, at 138-144;
134. Reitz J. C., "Export of the Rule of Law", *Transactional Law & Contemporary Problems*, Vol.13, 2003, at 429-486;
135. Richardson G. and Genn H., "Tribunals in Transition: Resolution or Adjudication?", *Public Law*, Spr, 2007, at 116-141;
136. Robert F. "Julian Judicial Perspectives in Serious Fraud Cases - the Present Status of and Problems Posed by Case Management Practices, Jury Selection Rules, Juror Expertise, Plea Bargaining and Choice of Mode of Trial", *Criminal Law Review*, No. 10, 2008, at 764-783;
137. Roberts P., "Comparative Criminal Justice Goes Global", *Oxford Journal of Legal Studies*, Vol.28, No.2, 2008, at 369-391;
138. Robinson J. A., "Judicial Independence: The Need for Education About the Role of the Judiciary", *Washburn Law Journal*, Vol.46, 2006-2007, at 535-545;
139. Rosenberg M., "The Chinese Legal System Made Easy: A Survey of the Structure of Government, Creation of Legislation, and the Judicial System Under the Constitution and Major Statutes of the People's Republic of China", *University of Miami International & Comparative Law Review*, Vol.9, 2000-2001, at 225-264;
140. Roth M., "Towards Procedural Economy: Reduction of Duration and Costs of Civil Litigation in Germany", *Civil Justice Quarterly*, Vol.20, Mar 2001, at 102-149;
141. Rubin F. R., "Citizen Participation in the State Courts", *The Justice System Journal*, Vol. 10, No.3, 1985, at 292-314;
142. Saari D. J., "The Criminal Jury Faces Future Shock", *Judicature*, Vol.57, 1973-1974, at 12-17;
143. Schafer B. and Wiegand O. K., "Incompetent, Prejudiced and Lawless? A Gestalt-psychological Perspective on Fact Finding in Law as Learning", *Law, Probability & Risk*, Vol.3, No.2, 2004, at 93-108;
144. Scobell A., "Strung Up or Shot Down?: The Death Penalty in Hong Kong and China and Implications for Post-1997", *Case Western Reserve Journal of International Law*, Vol. 20, 1988, at 147-168;
145. Seago P. J., "The Development of the Professional Magistracy in England and Wales", *Criminal Law Review*, Aug, 2000, at 631-651;
146. Seligson M., "Lay Participation in South Africa from Apartheid to Majority Rule", International Review of Penal Law (Vol. 72) (Érès, Ramonville Sainte Agne 2001), at 26-29;
147. Seo E., "Creating the Right Mentality: Dealing with the Problem of Juror Delinquency in the New South Korea Lay Participation System", *Vanderbilt Journal of Transnational Law*, Vol.40, 2007, at 1-22;
148. Siegelbaum J. H., "The Right Amount of Rights: Calibrating Criminal Law and Procedure in Post-Communist Central and Eastern Europe", *Boston University International Law Journal*, Vol.20, 2002, at 73-124;
149. Simmons R., "Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?", *Boston University Law Review*, Vol. 82, Feb 1999, at 1-76;
150. Soldwedel A. F., "Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants", *Vanderbilt Journal of Transactional Law*, Vol.41, 2008, at

1417-1474;
151. Strandbakken A., "Lay Participation in Norway", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 213-250;
152. Szekely A., "Democracy, Judicial Reform, the Rule of Law, and Environmental Justice in Mexico", *Houston Journal of International Law*, Vol. 21, 1998-1999, at 385-426;
153. Taman E., "Lay Participation in Criminal Justice: Enhancing Justice System Legitimacy in Post-conflicting States", *Dalhousie Journal of Legal Study*, Vol.12, 2003, at 33-62;
154. Tao L. S., "Reform of the Criminal Process in Nationalist China", *The American Journal of Comparative Law*, Vol.19, 1971, at 747-765;
155. Taskier P. R., "Judge or Jury?", *Litigation*, Vol. 24, No. 1, 1997-1998, at 20-68;
156. Teitel R., "Post-Communist Constitutionalism: A Transitional Perspective", *Columbia Human Rights Law Review*, Vol.26, 1994-1995, at 167-190;
157. Teitel R., "Law and Politics of Contemporary Transitional Justice", *Cornell International Law Journal*, Vol.38, 2005, at 837-862;
158. Thaman S. C., "The Resurrection of Trial by Jury in Russia", *Stanford Journal of International Law*, Vol.31, 1995, at 61-274;
159. Thaman S. C., "Europe's New Jury Systems: The Cases of Spain and Russia", *Law & Contemporary Problems,* Vol. 62, Issue 2, Spr 1999, at 233-260;
160. Thornton J. L., "Long Time Coming – The Prospects for Democracy in China", *Foreign Affairs*, Vol.87, 2008, at 2-22;
161. Thornton P., "Trial by Jury: 50 Years of Change", *Criminal Law Review*, Sep 2004, at 683-701;
162. Traest P., "The Jury in Belgium", *International Review of Penal Law (Vol. 72),* (Érès, Ramonville Sainte Agne 2001), at 27-50;
163. Walker C. J., "Toward Democratic Consolidation? The Argentine Supreme Court, Judicial Independence, and the Rule of Law", *High Court Quarterly Review*, Vol.4, 2008, at 54-102;
164. Walters R. and Curriden M., "A Jury of One's Peers? Investigating Underrepresentation in Jury Venires", *Judges Journal*, Vol.43, 2004, at 17-21;
165. Washburn K. K., "Restoring the Grand Jury", *Fordham Law Review*, Vol.76, 2007-2008, at 2333-2388;
166. Webb A. and Sayers M., "Franks Revisited: A Model of the Ideal Tribunal", *Civil Justice Quarterly*, Vol.9, Jan 1990, at 36-50;
167. Whitecross R. W., "Self-representation in Tribunal Hearings: A Comparative Study", *Employment Law Bulletin*, Vol. 70, Dec 2005, at 4-6;
168. Vargas J. A., "Jury Trial in Spain: A Description and Analysis of the 1995 Organic Act and A Preliminary Appraisal of the Barcelona Trial", *New York Law School Journal of International & Comparative Law*, Vol.18, 1998-1999, at 181-232;
169. Vidmar N. J., "The Performance of American Civil Jury: An Empirical Perspective", *Arizona Law Review*, Vol.40, 1998, at 849-900;
170. Vidmar N. J., "Juries and Lay Assessors in the Commonwealth: a Contemporary Survey", *Criminal Law Forum* 13, at 385-407;
171. Vidmar N. J., Beale S. S., Rose M. and Donnelly L. F., "Should We Rush to Reform

the Criminal Jury", *Judicature*, Vol.80, No.6, 1997, at 286-291;
172. Vidmar N. J., "Empirical Research and the Issue of Jury Competence", *Law & Contemporary Problems,* Vol.52, 1989, at 1-8;
173. Vidmar N. J. and Schuller R. A., "Juries and Expert Evidence: Social Framework Testimony", *Law & Contemporary Problems*, Vol.52, 1989, at 133-176;
174. Yeager J. D., "Jiang's Biggest Gamble – A Case Study in Transitional Justice", *International Legal Perspectives*, Vol.14, 2004, at 44-56;
175. Young W., "Summing Up to Juries in Criminal Cases - What Jury Research Says about Current Rules and Practice", *Criminal Law Review*, Oct, 2003, at 665-689;
176. Zou K. Y., "Judicial Reform in China: Recent Developments and Future Prospects", *International Lawyer*, Vol.36, No.3, 2002, at 1039-1062.

IV. Articles in Chinese

1. Cao Shujun, "A Study on the Judicial System of the Zhou Dynasty of China", *Legal Sciences Review*, Vol.5, 1927;
2. Chen Jianqing and Wang Ning, "A Study on Reforms of the Chinese Judge System", see the official website of the Intermediate Court of Jinhua City, at http://www.jhcourt.cn/wenhua/lunwen_detail.asp?id=112, last visited on 1 August 2009;
3. Chen Kaiqi: "How to Improve the Mixed Tribunal System in China", *Seeking Truth,* No.6, 2004;
4. Chen Keyun, "The Consolidated Clan Rule in the Towns and Villages of Hui County in Ming Dynasty and Ching Dynasty", *Studies on China's History*, No.3, 1995;
5. Chen Shaolin, "The Ideas of Improving China's Mixed TribunalMixed Tribunal System", *Law Review*, No.4 of 2005;
6. Chen Weidong and Liu Jihua: "A General Review of Academic Researches on the Criminal Procedure Law in 2003", *Jurists,* No.1 of 2004;
7. Chen Xingliang, "The Abolition of Death Penalty in China", *Criminal Law Sciences*, No.7, 2003;
8. Cheng Chunhua, "The Abolishment of Lay Participation in China", see the official website of the Civil-Law Research Association of China, at http://www.civillaw.com.cn/article/default.asp?id=21800, last visited on 4 November 2009;
9. Cui Hailin and Wang Zhi, "A Survey Report on the Working Situation of Lay Assessors in Shangqiu City", see the official website of China's courts, at http://www.chinacourt.org/html/article/200806/06/306182.shtml, last visited on 26 September 2008;
10. Cui Shengyuan, "The 4th Special Report in Memory of the 30th Anniversary of the 'Reform & Open' Policy – My Memory of the 8th Nationwide Conference on the Work of the People's Justice", see *The People's Court Daily*, 7 June 2008;
11. Ding Yisheng and Sun Lijuan, "A Comparative Study on the Applicable Area of the Chinese Mixed Tribunal System and Its Counterparts in the Western Countries", *Jurisprudence*, Vol.11, 2001;

12. Fei Chengkang, “The Punishment of the Family Law”, *Politics and Law*, No.5, 1992;
13. Fu Haiyan, “The Commercial Arbitration: the Social Resources in the Judicial Reform – Dispute Resolution and the Commercial Arbitration Affiliated to the Chambers of Commerce in the Beginning Era of the Kuomintang Regime”, See the official website of the Legal History Society of China, at: http://www.law-culture.com/showNews.asp?id=8464, last visited on 23 Nov 2008;
14. Gao Qicai and Luo Chang, “A Study on Patriarchal Judicial Systems in the Ancient Chinese Society”, *Journal of Huazhong Normal University (Humanities and Social Sciences)*, Vol. 45, No.1, 2006;
15. Gao Yan: “Models of Lay Participation under the Two Kind of Legal Systems -- From the Perspective of Comparative Legal Culture”, *The Journal of the University of Southwest Nationalities (Social Sciences)*, Vol. 26, No.6, 2005;
16. Gao Yujun, “Problems with Using Lay Assessors and the Possible Solutions”, available at the official website of the Jingjiang Court of Jiangsu Province: http://www.jsfy.gov.cn/cps/site/jsfy/lilunyanjiu/dc_content_a2007110830351.htm, last visited on 14 December 2007;
17. Guan Baoquan, “China’s Entry into WTO and Its Innovations in the Judge System, *People’s Judicature*, No.12, 2000;
18. Guo Zhe: “Improvements of the Mixed Tribunal System in China from the Perspective of Comparative Law”, *Journal of University of Southwest Nationalities* (Humanity and Social Sciences Volume), No.1 of 2006;
19. He Bin, “Values of the Mixed Tribunal System in China”, *The People’s Court Daily*, 25 April 2005;
20. He Bin, “Concepts and Definitions of Justice during the Initial Stage of the P. R. China”, see the author’s blog at http://qzone.qq.com/blog/622007831-1215610437, last visited on 19 September 2008;
21. He Bing, “The Reconstruction of Civil Mediation Organizations in China”, *Justice of China*, No.2, 2004, at 24;
22. He Jiahong, “A Historical and Comparative Study of the Mixed Tribunal System in China”, *Jurist*s, No.3, 1999;
23. He Weifang, “Court Reforms and Judicial Independence in China – An Observer’s Insight and Speculations”, available at the official website of the Organisation of Elections in China, at http://www.chinaelections.org/NewsInfo.asp?NewsID=106989, last visited on 14 Dec 2007;
24. Hu Yuhong, “The People’s Law Court and the Mixed Tribunal System – The Judicial Democracy in the Views of Classic Authors, *Tribune of Political Sciences and Law* (*Journal of China University of Political Sciences and Law*), Volume 23, No.4, 2005;
25. Huang Suying, “The Brief Analysis of the Problems of the Mixed tribunal system and the Solutions”, the official website of China’s courts, at Huang Suying, “A Brief Analysis of Problems of the Mixed Tribunal System and Possible Solutions”, the official website of China’s courts, at http://www.chinacourt.org/html/article/200807/22/313160.shtml, last visited on 3 March 2009;
26. Hu Honghong, “The Definition and Implication of the Citizenship Consciousness”,

available at the official of the NGO – China Elections and Governance, see http://www.chinaelections.org/newsinfo.asp?newsid=116655, last visited on 24 Nov 2009;
27. Ji Ye, "The Organization and Power Operation of the Chairman Board of the Standing Committee of the National People's Congress"; author's thesis for a master's degree - the thesis collection of the Law School of Beijing University, available at the official website of legal information of the Law School of Beijing University, see http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=47958, last visited on 12 Nov 2009;
28. Jian Guang, "The Discretionary Power of Chinese Judges Shall Not Be Inappropriately Big", *Commercial Perspective of China*, 23 Sep 2004;
29. Jiang An, "China's Mixed Tribunal System and Its Judicial Reform", *Legal Sciences Review*, Vol.98, No.6, 1999;
30. Lai Yuedong, "The Principle of Presumption of Innocence and Its Application in China's Criminal Justice", Lai's thesis for the LLM degree granted by the Institution of Political Sciences & Law of China, at 25-27, file with the author;
31. Li Chaoling and Zhong Hong, "The Value Review and Institutional Repair of the Mixed Tribunal System in China", *Legal System & Society*, No. 4, 2006;
32. Li Jiaofa, "The Clan Justice in Ancient China", *Legal and Commercial Studies*, Vol.4 of 2002, at 135;
33. Li Shuning, "The Evaluation of China's Mixed Tribunal System and Its Reconstruction", *Gansu Social Sciences*, No.2, 2004;
34. Lin Minde, "Judicial Reforms during the Late Period of Time of the Ching Dynasty and the Initial Stage of the Republic China", *The Historical Journal of the Taipei Normal University*, Vol.26, June 1998;
35. Lin Wei, "Values of the Mixed Tribunal System in China", see the article on the official website of the Qingtian County Court, at http://www.qtfy.gov.cn/show.asp?id=1348, last visited on 19 September 2008;
36. Long Zongzhi: "The Model Choice of the Mixed Tribunal System in China", *Journal of Sichuan University* (Philosophy and Social Sciences), No. 5, 2001;
37. Ma Guixiang, "An Analysis on the Formalization of China's Criminal Procedure from the Perspective of 'Due Process'", *Law and Business Studies*, No.5, 2002;
38. See Mao Shoulong, "The Road Toward Constitutionalism: Starting from the Respect for the Constitution", *Nanfang Weekend*, 13 Mar 2003, website version, see http://www.nanfangdaily.com.cn/zm/20030313/, last visited on 29 December 2009;
39. Pang Dapeng, "Problems and Solutions of Russia's Developmental Path", *Teaching and Studies*, No.12, 2005;
40. Peng Yong and Tang Yaoguo, "Reforms of Government-sponsored Enterprises of Public-service in China: The Return to Their Original Roles of Public-service", see the official website of "China Elections & Governance", at http://www.chinaelections.org/NewsInfo.asp?NewsID=102801, last visited on 15 July 2008;
41. Qiu Sufang, "An Investigative Report of the Implemental Situation of the Mixed Tribunal System", available at the governmental official website of Dazhou District of

Sichuan Province, at http://www.dz818.gov.cn/zwxw/ShowArticle.asp?ArticleID=2097, last visited on 15 Dec 2007;
42. Qiu Xinhua, "Holding A Tolerant Attitude Toward Acquittal Verdicts", *The Prosecutors Daily*, 13 August 2009;
43. Qu Xinjiu, "Pushing The Abolition of Death Penalty: A Responsibility of Criminal Law Experts", Criminal Law Sciences, No.7, 2003;
44. Shang Daigui, "The Historical Evolvement and Development of China's Mixed tribunal system", *The Explorations (Qiu Suo)*, No.6 of 2002;
45. Shen Jungui, "A Negative Observation about the Mixed Tribunal System in China", *Chinese Lawyers*, No.4, 1999;
46. Shi Liang, "A Report about Completely Reforming and Mobilizing Chinese Courts of All Levels", *Xin Hua Monthly*, September 1952;
47. Shi Ying, "The Contemporary Destiny of the Mixed Tribunal System: Ideas Inspired by the Interrelationship Between Justice and Democracy", *Journal of Liaoning University*, Vol.6, 1999;
48. Song Xiaohai: "The Anglo-American Jury Systems -- The Birth of the British Jury System", http://www.civillaw.com.cn/weizhang/default.asp?id=13041, last visited on 5 Nov 2008;
49. Tang Weijian, "Controversies over the Value of Anglo-American Jury Systems and the Reform of the Mixed Tribunal System in China", *Law Review of Chinese People's University,* No. 2, 2002;
50. The Chinese Academy of Sciences (CAS) and Tsinghua University's Studies of National Affaires Centre, "Ten Megatrends about the Corruption of Chinese Senior Officials: A Survey Report on Features and Transformation of Senior Officials' Corruption in China Between 1978 and 2002", *China Economic Times*, 2 Jun 2003;
51. The High Court of S Province, "An Investigation Report about the Implementation of the Mixed Tribunal System in S Province", unpublished internal-circulated document of the High Court of S Province, file with the author;
52. The Project Team of the Intermediate Court of C City, "The Present Reality and Realistic Resolution – An Empirical Survey and Analysis of the Implementation of the Mixed Tribunal System", unpublished internal-circulated research report of the Intermediate Court of C City, at 2, file with the author;
53. The Statistical Office of the Supreme Court of China, "Lay Assessors in the Last Three Years – An Investigation about the Implementation of the Mixed Tribunal System", *The People's Court Daily*, 6 May 2008;
54. Wang Kanghan, "A Brief Review of the Improvements of the Mixed Tribunal System", see article published on the official website of the Supreme Court of China: http://www.hicourt.gov.cn/theory/artilce_list.asp?id=2853&l_class=3, last visited on 13 Oct 2008;
55. Wang Minyuan, "The Mixed Tribunal System and Its Improvements", *Legal Studies,* Vol. 4, 1999;
56. Wang Yanhui, "An Analysis of the Mixed Tribunal System from the Constitutional Perspective", *Journal of Gansu Lianhe University (Social Sciences)*, Vol.22, No.4, September 2006;

57. Wei Min, "Shall the Mixed tribunal System Be Suspended: The Developmental Direction of the Mixed Tribunal System, *Gansu Social Sciences*, Vol.4, 2001;
58. Xiao Tiancun, "The Reconstruction of the Mixed Tribunal System in the Context of Chinese Judges' Professionalization", *Journal of Yunnan University (Law Edition),* No.3 of 2005;
59. Xie Hongfei, "The People's Justice and Justice by the People", He Yongjun (ed.), *The Discontinuity and Continuity – The Construction of Chinese Courts (1978-2005)*, (The Publishing House of Social Sciences, Beijing 2008);
60. Xie Youping and Wan Yi, "The Judicial Impartiality and Civilian Participation: A Theoretical Study on the Mixed Tribunal System", *Journal of Gansu Institute of Political Sciences and Law*, Vol.4, 2003;
61. Xu Boyuan, "Strengthening Chinese Citizens' Democratic Consciousness – A National Issue", available at the official news website of the Chinese Government, see http://news.xinhuanet.com/comments/2006-05/24/content_4592221.htm, last visited on 24 Nov 2009;
62. Xu Ershuang, "Values of the Mixed tribunal System in China", see the article on the official website of the Supreme Court of China, at http://www.hicourt.gov.cn/theory/artilce_list.asp?id=2785&l_class=7, last visited on 16 September 2008;
63. Xu Qianfei, "An Evaluation and Analysis of Chinese Judges' Quality", *People's Justice*, Vol.9, 2001;
64. Xu Xianming, "Human Rights -- The Essence of Rule of Law", originally published at the official website of China courts, 16 Sep 2002, see http://jwjc.ujn.edu.cn/construct/article/fzdzdsrq.htm, last visited on 27 Dec 2009;
65. Xu Xiaoqin, "A Review of the Mixed Tribunal System in China", available at the united official website of China's court http://www.chinacourt.org/html/article/200505/11/161087.shtml, last visited on 14 December 2007;
66. Yang Ming and Zhang Hao, "Shall China Introduce a Jury System?", *Journal of Liaoning University (Philosophy and Social Sciences)*, Vol. 4, 2005;
67. Yang Kai, "The Institutional Reconstruction: An Analysis and Discussion about Reforms and Improvements of the Mixed Tribunal System", see article on the united official website of China's courts, at http://www.chinacourt.org/html/article/200410/28/136592.shtml, last visited on 18 September 2008;
68. Yang Tianshi, "The Preface of 'The History of the Kuomintang'", *Study Times*, 16 September 2008;
69. Yao Qi, "Chinese Law Schools during the Late Period of Time of the Ching Dynasty and the Initial Stage of the Republic of China", *The Journal of the Normal University of Eastern China* (Edition of Educational Sciences), Vol.24, No.3, 2006;
70. Yao Xiaoyan, "A Study on Acquittal Verdicts in China", *Knowledge and Economy*, No.10, 2009;
71. Yin Fucheng and Wang Yinxia, "The Power Separation between Judges and Prosecutors", *Legal Frontline*, No.11, 2007;

72. Yin Fucheng, "The Questionable Mixed Tribunal System in China ", *Journal of the Industrial University of Inner-Mongolia*, Vol.13, No.1, 2004;
73. Yu Hanping, "Should China Abolish Lay Participation?", Law Review, No.1, 1989;
74. Yu Jun, "Do Easterners Really Hate Lawsuits? – An Analysis of the Low Litigation Rate in Contemporary China and Japan", *Social Scientists*, No.3, 2000;
75. Yu Yuhe and Liu Zhisong, "The People's Mediation Committee System and Its Redesign in China: A Subsidiary Discussion on the Crime Prevention Function of the Civilian Mediation", *Journal of Zhejiang University (Humanities and Social Sciences)*, Vol.37, No.2, 2007;
76. Yuan Dayi, "Methods of Improving the Election System in China", available at the official website of the NGO – China Elections and Governance, see http://www.chinaelections.org/PrintNews.asp?NewsID=81730, last visited on 23 Nov 2009;
77. Zhang Demiao and Zhou Youyong, "Conditions and Methods of Realising Judicial Fairness in China Today", *Jurisprudence Review*, No.1, 1999;
78. Zhang Guangjie and Wang Chingting, "The History, Context, Theory and Law: An Analysis of the Mixed Tribunal System in China from Four Perspectives", *Journal of the Nanjing Industrial College (Edition of Social Sciences)*, No.2, 2005;
79. Zhang Jingping, "Chinese Judges Encounter the Crisis of Public Trust", *China News Weekly*, No.44, 2001, available at the official news website of Chinese government http://news.xinhuanet.com/world/2001-11/28/content_137242.htm, last visited on 14 Dec 2007.
80. Zhang Junxia, "A Brief Discussion about the Mixed Tribunal System in China", *Journal of Hebei Polytechnic College (Edition of Social Sciences)*, Vol.6, No.3, 2006;
81. Zhang Liang, "Tasks and Purposes of the Legal Education in China", *Legal Daily*, 31 August 2008;
82. Zhang Pinze, "The Mixed Tribunal System and the Reform of Criminal Trial Mode in China", *Journal of the Central Institute of the Political-Legal Management Cadres*, Vol.2, 1999;
83. Zhang Yi, "The Data Analysis of the 5th National Census in China", available at the official website of the Chinese Government, see http://www.china.com.cn/chinese/society/89666.htm, last visited on 3 June 2009;
84. Zhang Yuling, "How Many Civil Servants Does China Need? — An Interview with Wang Jian", *Guang Ming Daily,* 27 February 2006, at http://www.gmw.cn/01gmrb/2006-02/27/content_379861.htm, last visited on 27 November 2009;
85. Zhao Xinghui, "The Reform of the Mixed Tribunal System: Establishing the 'Mixed Model' of the People's Participation in Justice", *Journal of Southwest University of Political Sciences & Law*, Vol.6 of 2005;
86. Zhen Ding, "The Clan System and China's Traditional Legal Culture", *The Legists,* No.2, 2002;
87. Zheng Haorong, "Reforms of the China's Mixed Tribunal System", *The Legal Application (Journal of the Training College of Chinese Judges)*, Vol.178, No.1, 2001;
88. Zhou Pingxue, *An Empirical Study on the Reform of China's Representative System*

(The Chongqing Press, Chongqing 2005), the electronic version available at the official website of the NGO – China Elections and Governance, see http://www.chinaelections.org/newsinfo.asp?newsid=99983 and http://www.chinaelections.org/newsinfo.asp?newsid=99984, last visited on 23 Nov 2009.

89. Zuo Weimin and Yin Yaoshan, "The Mixed Tribunal System in China: A Comparison, Reconsideration and Forecast", *Social Sciences Study*, Vol.2, 2001.

V. Other Materials

1. Cao J. M. (the Deputy Chief Justice of the Supreme Court of China then), "Completing the Supplemental Selection and Replacement of Lay Assessors Well and Duly", at the united official website of China's courts, at http://www.chinacourt.org/public/detail.php?id=263084, last visited on 14 December 2007;
2. Ding X. X., "The Committee of the Political Consultancy Nominating Me to Be a Lay Assessor", Ding's memoirist published at the official website of the Committee of the Political Consultancy of the Pudong District of Shanghai City, see http://www.pdzx.gov.cn/infoAction.do?method=detail&news_id=3614, last visited on 17 September 2008;
3. "Historical Dossiers of Jiangsu Province – Chapter of Justice", at the official website of the Government of Jiangsu Province, at http://www.jssdfz.gov.cn/dfz/detail?templet=detail5.jsp&id=18&searchword=ID=1197425369593 AND 陪审 AND XML_ID=18, last visited on 18 September 2008;
4. Hu J. T. (the President of China now), "The Report on the 17th Nationwide Congress of the CCP", see the official news website of Chinese government, at http://news.xinhuanet.com/newscenter/2007-10/24/content_6938568.htm, last visited on 2 Jan 2010;
5. Jiang Z. M. (the President of China as he was then), "The Speech at the National Conference on Political and Legal Affairs in Beijing", *People's Daily*, 26 Dec 1997;
6. Shi J. P., Wang Jianguo and Wang Yumin: "Lay Assessors with Scientific Advantages — Stories of Lay Assessors in the People's Court of Haidian District Beijing City", see the news report at the official website of the Supreme Court of China: http://www.court.gov.cn/news/bulletin/region/200605300010.htm, last visited on 8 August 2008
7. "The *Brief Regulation of Chambers of Commerce*", see *The Oriental Magazine*, Vol.1 of 1904;
8. The Chinese Government, *The Government Bulletin,* No. 687, dated 6 April 1914;
9. The Chongming County Government, "Historical Archives of the Chongming County", available on the official website of the Chongming County Government, at http://www.shtong.gov.cn/node2/node4/node2250/node4426/node16052/node62096/index.html, last visited on 19 September 2008;
10. The Chongming County Government, "Historical Archives of the Chongming County",

available on the official website of the Chongming County Government, at http://www.shtong.gov.cn/node2/node4/node2250/node4426/node16052/node62096/index.html, last visited on 19 September 2008;
11. The Court of Leishan County of Guizhou Province, "Confidentiality Rules of the Court of Leishan County of Guizhou Province", at the official website of the court: http://www.gzlsfy.org/typenews.asp?id=73, last visited on 2 March 2008;
12. The editorial, "A Basic Task of Building Socialism with Chinese Characteristics – Penetratingly Understanding the Momentous Significance of Building a Socialist Harmonious Socity", *Seeking Truth* (the CCP's official newspaper), 1 Mar 2005
13. The Harbin City Government of Heilongjiang Province, "Historical Archives of Harbin City of Heilongjiang Province", available at the local government's official website, at http://dqw.harbin.gov.cn/ http://218.10.232.41:8080/was40/detail?record=90&channelid=42961&presearchword, last visited on 19 September 2008;
14. The Intermediate Court of Jiyuan City of Henan Province, "Confidentiality Rules of the Intermediate Court of Jiyuan City of Henan Province", at the official website of the court: http://www.jyzy.org/show.aspx?id=260&cid=36, last visited on 2 March 2008;
15. The Intermediate Court of Jinchang District of Jiangsu Province, "Confidentiality Rules of the Intermediate Court of Jinchang District of Jiangsu Province", at the official website of the court: http://fy.jinchang.gov.cn/index_Article_Content.asp?fID_ArticleContent=1016, last visited on 2 March 2008;
16. The Li Jing County Government, "Historical Archives of Li Jing County", available at the local government's official website, at http://www.lijin.gov.cn/Detail.aspx?k=5345, last visited on 17 September 2008;
17. The National Statistical Bureau of China, "The Statistical Bulletin of National Economy and Social Development in China of 2008", available at the official website of China's government, http://finance.people.com.cn/GB/8876392.html, last visited on 5 March 2009;
18. The newsletter, "The Mixed Tribunal System Faces Four Difficulties", *Legal Daily*, 8 May 2008;
19. The newsletter, "The Story about An Excellent Lay Assessor – Jiang Shifeng", at the united official website of China's courts at http://gzzy.chinacourt.org/public/detail.php?id=8417, last visited on 28 September 2008;
20. The newsletter, "Shall the Mixed Tribunal System Turn Left or Right?", at the official website of China's governmental organisations, at http://www.chinaorg.cn/lrrd/01_lldt/2004-03/09/content_5019503.htm, last visited on 28 September 2008;
21. The newsletter, "Lay Assessors Pay Out Both Labour and Money and Proceed Difficultly – The Phenomenon of Unbalanced Allocation of Caseloads Is Prominent", see the official news website of Chinese authority, at http://news.xinhuanet.com/politics/2005-11/14/content_3776737.htm, last visited on 27 September 2008;

22. The newsletter, “Shall Lay Assessors Work Full-time”, see the on-line news report of the website of the official TV station of China, at http://www1.cctv.com/news/china/20040105/101426.shtml, last visited on 28 September 2008;
23. The newsletter, “China Will Renovate the Mixed Tribunal System and Resolve the Problem of ‘Accompanying Rather Than Adjudicating’”, available at the official news websites of Chinese government: http://news.xinhuanet.com/legal/2004-04/02/content_1398688.htm, last visited on 15 Oct 2008;
24. The newsletter, “Zhao Weizhong: From ‘Not Adjudicating But Accompanying’ to ‘Not Only Accompanying But Adjudicating’”, at the official website of China’s courts: http://www.chinacourt.org/html/article/200701/08/229756.shtml, last visited on 15 Oct 2008;
25. The news report, “The Brief Implemental Situation of the Mixed Tribunal System in Various Courts in Yangzhou City”, *The People’s Court Daily*, 24 April 2006;
26. The news report, “ Foundations of Reforming the Setting of Lay Assessors’ Function”, *China Daily*, 4 Dec 1999;
27. The news report, “Lay Assessors Accompany rather than Adjudicate and Full-time Lay Assessors Need to be Removed”, at the official news website of Chinese government, see http://news.xinhuanet.com/legal/2004-04/02/content_1398688.htm, last visited on 2 March 2009;
28. The news report, “The Court of Jinshi County Emphasizing the Application of Lay Assessors”, at the official website of the Court of Jinshi County, at http://zjfy.changde.gov.cn/zjfy/937312784843014144/20061010/165606.html, last visited on 14 December 2007;
29. The news report, “Implementing The LAA 2004 and Carrying out the Mixed Tribunal System”, *The People’s Court Daily*, 21 April 2005;
30. The news report, “Interpreting the Working Report of the Supreme Court of China: Realising the Openness of Trials and Enhancing the Transparency of Judicial Process”, at the official website of the China’s central government, see http://www.gov.cn/2008lh/content_915415.htm, last visited on 24 March 2008;
31. The news report, “Lay Assessors Have Adjudicated 644,723 Cases in More Than Two Years”, see the official website of Chinese courts, at http://www.chinacourt.org/html/article/200709/04/263019.shtml, last visited on 2 June 2008;
32. The news report, “Ten Inspection Teams Will Be Designated by the Supreme Court to Examine the Five Tasks”, see the united official website of the courts in China, at: http://www.chinacourt.org/public/detail.php?id=212063, last visited on 2 March 2008;
33. The news report, “Luo Gan Emphasized at the First Nationwide Conference of Lay Assessors: Endeavoring to Construct the Mixed Tribunal System with Chinese Characteristic and Promoting Judicial Democracy and Democratic Politics of Socialism”, at the official website of the Chinese government: http://www.gov.cn/ldhd/2007-09/03/content_735698.htm, last visited on 2 March 2008;
34. The news report, “56,000 Lay Assessors Participating in Cases via Random Selection”,

see the united official website of China's courts at: http://www.chinacourt.org/html/article/200709/03/262877.shtml, last visited on 12 April 2009;
35. The news report, "The Third Proposal about Amending the Constitutional Law to Include Provision of Protecting Private Properties", *The People's Daily*, 3 Mar 2003;
36. The news report, "The Vice Chief Justice of the Supreme Court – Huang Songyou Has Been Removed for Committing Bribery of 400 Million", at the official website of the CCP, at http://politics.people.com.cn/GB/41223/8247606.html, last visited on 5 November 2009;
37. The news report, "Female Employees of the Police, Prosecutor Office and Court of Rudong County Holding A Get-together",http://www.rudong.gov.cn/rudong/infodetail/?infoid=8b4366e4-efb5-45c9-b412-4b9cb52e5871, last visited on 4 Nov 2009;
38. The news report, "The CCP Initiates A New Era of Political Reform", see the official news website of the Chinese Government, at http://news.xinhuanet.com/newscenter/2007-10/17/content_6896712.htm, last visited on 15 Dec 2009;
39. The news report, "Focusing on the People's Lay Assessors", *Xi'an Evening's* website version at: http://www.xawb.com/gb/news/2005-05/14/content_548987.htm, last 12 March 2009;
40. The news report, "Governor Chen's Critical Comments on the Judicial Organizations of Jiangsu Province", *Shen Daily*, 22 June 1913, at 6;
41. The news report, "The Standing Committee of People's Congress of Jiangling County Requests to Realize the Five Functions of People's Assessors", see the official website of the People's Congress of Jingzhou City Hubei Province, at http://www.jzrd.gov.cn/xinxi/list.asp?id=2504, last visited on 21 August 2008;
42. The official report, "The Situation of the Initial Stage of the P. R. China and the First Conference of the 'United Line'", see the official website of the Committee of the Political Consultancy, at http://cppcc.people.com.cn/GB/34961/56107/56109/56117/3919169.html, last visited on 5 March 2008;
43. The People's Court of Donghu District Nanchang City, "The Working Report of Executing the People's Assessor Institution of the People's Court of Donghu District Nanchang City", see the official website of the court, at http://ncdhqfy.chinacourt.org/public/detail.php?id=213, last visited on 8 April 2007;
44. The Supreme Court of China, "The Working Report of the Supreme Court of China 1999", at the official website of the Court, see http://www.court.gov.cn/work/200302120013.htm, last visited on 20 Dec 2008;
45. The Supreme Court of China, "The 3rd Five-year Reform Plan of Chinese Courts (2009-2013)", available at the official news website of the Chinese Government, see http://news.xinhuanet.com/legal/2009-03/26/content_11074127_4.htm, last visited on 10 Nov 2009;
46. The Supreme Court of China, "The Third Reform Plan of Chinese Courts (2009-2013)", see Chinese government's official news website, at

http://news.xinhuanet.com/legal/2009-03/26/content_11074127_1.htm, last visited on 15 Dec 2009;

47. The Supreme Court of China, "The Working Reports of the Supreme Court of China" (2004—2008), available at the official website of the Chinese Government, see respectively http://www.gov.cn/test/2009-03/17/content_1261386.htm, http://www.gov.cn/2008lh/content_926191.htm, http://www.gov.cn/2007lh/content_556959.htm, http://www.gov.cn/jrzg/2006-03/19/content_230762.htm, and http://www.court.gov.cn/work/200503180013.htm, last visited on 19 November 2009;
48. The Taihu County Government, "Historical Archives of the Taihu County Government", available at the local government's official website, at http://www.thx.gov.cn/mysite.php?u=dzb&Id=2493, last visited on 19 September 2008;
49. The Transparency International, *National Integrity System Transparency International Country Study Report -- China 2006*, at 11-12, available at http://www.transparency.org/policy_research/nis/nis_reports_by_country, last visited on 6 November 2009;
50. The Wuhan City Government of Hubei Province, "Historical Archives of Wuhan City", available at the official website of the local government, at http://www.whfz.gov.cn/shownews.asp?id=43395, last visited on 19 September 2008;
51. Xiao Y. (the Chief Justice and President of the Supreme Court of China, as he then was), "The Working Report for the 4th Conference of the 10th National People's Congress", see *The People's Court Daily*, 12 March 2006;
52. Xiao Y. (the Chief Justice and President of the Supreme Court of China, as he then was), "The Working Report of the Supreme Court of China 2005"„ available at http://www.legaldaily.com.cn/bm/2005-03/18/content_197161.htm, last visited on 14 Dec 2007;
53. Xiao Y. (the Chief Justice and President of the Supreme Court of China, as he then was), "The Working Report for the 5th Conference of the 10th National People's Congress", available at the official website of the Chinese Government, see http://www.gov.cn/2007lh/content_556959.htm, last visited on 11 Nov 2009;
54. Xiao Y. (the Chief Justice and President of the Supreme Court of China, as he then was), "The Working Report for the 1st Conference of the 11th National People's Congress", available at the official website of the Chinese Government, see http://www.gov.cn/2008lh/content_926191.htm, last visited on 11 Nov 2009;
55. Xiao Y. (the Chief Justice and President of the Supreme Court of China, as he then was), "The Speech on the First Conference of Chinese Lay Assessors", see the official united website of China's courts at Xiao Yang, "The Speech on the First Conference of Chinese Lay Assessors", see the official united website of China's courts at http://www.chinacourt.org/html/article/200709/03/262886.shtml, last visited on 28 September 2008, or the official website of the Chinese Communist Party of China, at http://cpc.people.com.cn/BIG5/64093/64094/6210478.html, last visited on 28 September 2008;
56. Yan J. Y., "The Court of Pudong New District Newly Appoints Twenty Expert Assessors", the official website of Chinese courts, see

http://www.chinacourt.org/public/detail.php?id=205405, last visited on 29 Oct 2008;
57. Yi F. Q., "The Implementation of the Mixed Tribunal System Makes Remarkable Success in the Court of Wuhou District", available at the official website of the People's Court of Wuhou District of Chengdu City Sichuan Province, see http://www.whfy.gov.cn/shownews.asp?id=1856, last visited on 17 May 2009.