

Double Whammy: Lay Assessors as Lackeys in Chinese Courts

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Primarily drawing on in-depth interviews with lay assessors and judges in Chinese courts, this study suggests that assessors are little more than lackeys. To determine the role of lay participation in decision making across different jurisdictions, this article proposes two variables. The first is whether lay assessors are separate from, or mixed with, professional judges; the second is whether the regime is democratic or authoritarian. Viewed according to these variables, China's lay-assessor institution is subject to a double whammy: one, the superior legal knowledge of professional judges and their dominance in procedures, and two, the ultimate control of the regime over judges, who, for self-protection, firmly control lay assessors. This article advances our understanding of the operation of the Chinese lay-assessor institution, and more generally the relationship between lay participation and political regimes.

Viewed as crucial in channeling public support for the legal system,¹ lay participation in the judicial process is seen not just in

This article was presented as the keynote speech at the 2015 Conference of the European China Law Studies Association in Cologne, Germany. I am grateful for the comments of the participants. Kwai Ng, the Review's editors and anonymous reviewers provided insightful comments for earlier versions of this article. Special thanks go to the Chinese judges and lay assessors who kindly accepted my interviews.

The author acknowledges the financial support from a GRF grant from the Hong Kong Government.

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¹ First, lay participation tends to contribute to a more independent and democratic system of legal decision making (Kulcsar 1982: 34). Unlike professional judges, lay judges or assessors are not bound by organizational restrictions, and are thus less susceptible to the state's direct influence on the judicial process. The most notable example of this may be the jury system in common law jurisdictions. Second, lay judges and assessors could serve as deterrent safeguards; their mere presence in tribunals may force professional judges to articulate their opinions more explicitly and follow the procedures more closely. They thereby may deter professional judges from reaching arbitrary decisions and from corruption or bias (Borucka-Arctowa 1976: 289). Third, lay participation has the potential to bring community values into the decision-making process, and provides a forum for different social groups to state and defend their opinions (Buchholz 1986: 216; Klami & Hamalainen 1992: 16; MacCoun & Tyler 1988: 335). Their existence will allow evidence to be evaluated by people with local knowledge. They also aid equitable decisions (Klami & Hamalainen 1992), better communication between the tribunal and the litigants, and an inclination toward procedural justice (Tyler 1990: 176).

Law & Society Review, Volume 50, Number 3 (2016)
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democracies, but also in authoritarian and transitional regimes. In an effort to reform their criminal justice systems for example, Russia and Spain have incorporated jury systems since the 1990s (Thaman 1999). Mixed tribunals have also survived the end of the communist era, and are now a part of the judicial system in transitional countries such as Hungary (Kulcsar 1972, 1982), Poland (Borucka-Arctowa 1976), and the former Czechoslovakia (Krystufek 1976).

China, the largest authoritarian regime in the world, has followed a similar path. Since 2004, it has strengthened its lay assessor institution (人民陪审制度), expanding the participation of the citizenry in the administration of justice. According to a report of the Supreme People's Court in 2013, more than 71 percent of cases processed through the Normal Procedure (普通程序) involved lay assessors,² 52 percent more than in 2006. The number of lay assessors, around 87,000 in 2013, will double in two to three years (China Youth Daily 2014). The goal of strengthening the assessor institution is further emphasized in the communiqué of the Fourth Plenary of the Chinese Communist Party (2014). This strengthening attempts to reduce corruption and improve the quality of the decision-making process. It is also intended to school citizens in rule of law, and develop public confidence in the judiciary and the legal system (Landsman & Zhang 2008).

The role of lay assessors in the Chinese courts, however, is controversial. Skeptics deride lay assessors as no more than “the ears of the deaf” in the courtroom (Landsman & Zhang 2008: 211–212; Liu 2007; Yue 2001: 52; Zeng & Wang 2007; Zhang & Yu 2009). They claim that in the Chinese word for lay participation (陪审), only the first character 陪 (accompanying) is implemented, while the other part 审, (adjudication) is ignored. While the law stipulates that lay assessors are vested with the same powers as judges, the latter can manipulate decisions through their superior professional knowledge and status. Many scholars even suggest dropping the assessor institution. Advocates of the institution, however, claim that it is a milestone in the democratization of the administration of justice. From time to time, lay assessors reportedly have outvoted the professional judge in mixed tribunals. Some proponents argue that the institution, often perceived as unruly, constrains the judge's decision-making power. Based on his own experience as an expert assessor, He

² Criminal and civil cases in Chinese courts are handled by either the Normal Procedure, which requires at least three persons (judge or lay assessor) on the bench and shall be closed within six months, or the Summary Procedure (简易程序), which has to be closed within three months and adjudicated by one judge. Administrative cases, until recently, were only handled by the Normal Procedure.

Bing (2004), a law professor in Beijing, believes that the assessor institution is an antidote for a judiciary plagued by corruption and a trust crisis. Further strengthening the institution, he argues, will provide a way out for China's judicial reform.

Without solid empirical evidence however, it is hard to evaluate these arguments. Few empirical studies exist in the English literature (for some exceptions in Chinese, see Liu 2007, 2009; Zeng & Wang 2007; Zhang & Yu 2009). Yue's (2001) six-page description of the institution, published 15 years ago, remains one of the most important sources. Valerie Hans called the Chinese institution "little studied" (2008: 290). Due to the dearth of empirical data, researchers often base their analysis on legal regulations, secondary sources, and sporadic media reports (e.g., Landsman & Zhang 2008). Inevitably, their analysis is speculative. As a consequence, many basic questions remain unanswered: How are lay assessors appointed? How are they assigned specific cases? Do they get a chance to review case dossiers in advance? What happens if their opinions differ from those of the judge? What is the relationship between judges and lay assessors? Are lay assessors held responsible for the decisions they participate in making? Without answering these questions, our understanding of the operation of the institution and the Collegial Panel (合议庭), the fundamental decision-making body in Chinese courts, is limited.

This article has two goals. The first is to provide empirical evidence regarding the operation of the institution. Focusing on ordinary lay assessors rather than expert assessors, I interviewed the majority of the active lay assessors of a specific trial court and eight judges working with the assessors. Primarily drawing on these interviews, and supplementing them with both interviews with judges in other regions of China and the secondary literature, this article suggests that lay assessors are no more than judges' flunkies. Their role in the decision-making process is next to non-existent. As a result, the intended goals of the institution, by and large, are subverted.

My second goal is more theoretical. In what ways does the Chinese institution differ from other institutions of lay participation? In particular, how does it differ from other mixed tribunal institutions? Comparing the Chinese case with others, two variables are helpful in analyzing the function of lay participation in the judicial process across different jurisdictions. One is whether lay assessors are separate from, or mixed with, professional judges in making decisions. The other is whether the regime in which the lay-assessor institution is embedded is democratic or authoritarian. In authoritarian regimes such as China, independent decisions seem out of the question, as the regime reins in the judges, who in turn control the lay assessors. In this sense,

China's lay-assessor institution is extreme due to a combination of a mixed system of lay participation and total governmental control over the judiciary.

This article not only contributes scholarly understanding of the operation of the lay assessor institution and the decision-making process in Chinese courts, it also sheds light on the future of China's judicial reform. By providing a global taxonomy of lay participation, it helps make sense of the varying functioning of lay participation across jurisdictions, fueling the debate about the relationship between lay participation and political regimes more generally.

Two Variables of Lay Participation

Examining the role of lay assessors in Chinese courts provides a point of entry into a broader conversation about lay participation across different jurisdictions. Kutnjak Ivković (2007) argues that, in all mixed tribunals with lay participation, the role of the lay assessors in the decision-making process is minimal. She argues that the legal knowledge and experience of professional judges will give them an advantage, and thus curtail the role of lay assessors (2007: 437–38). Using the nullification of the jury system in Russia as an example (Thaman 2007), Lempert (2007) explores the extent to which lay assessors are able to play any meaningful role in authoritarian regimes. He argues that the authoritarian regime, wary of losing control over the decision-making process, never allows lay assessors to make independent decisions. Inspired by these two arguments, I examine two variables, and consider the role of lay assessors in different jurisdictions. One variable is whether the panel is separate from, or mixed with, professional judges. The other is whether the regime in which the lay institution is embedded is democratic or authoritarian (Fig. 1). These two possibilities highlight variations in the role of lay participation in judicial processes.

The role of lay assessors is important when two conditions are met: the regime is democratic and the decision-making process of lay participation is separate (the top left quadrant). The jury systems in most common jurisdictions exemplify this. The democratic regime in these jurisdictions allows lay assessors and the judiciary to make independent decisions, and the professional judges are happy to or even prefer to allow the lay assessors to make fact-based decisions—a difficult aspect of a case.

When the regime is democratic but the tribunals are mixed (the top right cell), lay participation's role declines, compared with the situation of the top left cell. In German and Japanese

	Separate	Mixed
Democratic	common law jurisdictions	Germany, Japan, Korea
Authoritarian	Cuba (1962-1973), Russia after 2001	China, the communist bloc before transition

Figure 1. A Typology of Lay Participation in Judicial Processes.

institutions, for example, the decision-making body consists of both professional judges and lay assessors. The role of lay judges is limited because of the superiority of professional judges' legal expertise. Lay judges' participation is minimal, and professional judges dominate the entire process (Hans 2008; Kutnjak Ivković 2007; Rennig 2001). For example, in Germany the position of the professional presiding judge is "dominant" (Machura 2001: 454). Dubbed "cooperative" by Machura (2001: 451), they rarely ask questions and contribute only modestly to the tribunal's deliberations. They typically agree with the professional judges, and when they do disagree, most often the lay judges rather than the professional judges change votes. Many verdicts are unanimous (Casper & Zeisel 1972; Rennig 2001).

Though the situation rarely occurs, an authoritarian regime could have laypeople making decisions separately (the bottom left cell). The lay assessors' role is truncated by various means. Cuba, for example, set up popular tribunals in 1962, due to its distrust of traditional legal systems and professional judges (Salas 1983). Staffed by part-time or lay judges, the tribunals acted on the basis of "collective needs and 'common sense'" (Salas 1983: 590). While the tribunals were the decision makers for their cases, their jurisdictions were limited by territorial boundaries. Moreover, political cases were handled by "revolutionary tribunals" (Salas 1983: 590; 597). Approximately ten years later, the popular tribunals were abandoned when Cuba institutionalized its judiciary (Salas 1983). Russia after 2001 offers another example. To alleviate the problems that arose as a result of mixed tribunals, the Russian Constitution made jury trials a right for citizens (Thaman 2007). When the jury seemed able to offer a relatively independent decision-making process, it soon suffered attacks from various stakeholders. As a result, there are "legal and practical factors that effectively limit the number of cases that are actually tried in the jury

court. These include limitations on the jurisdiction of the jury court, manipulation of charges to circumvent juries, and plea bargaining or waiver of the right to jury trial by the defendant” (Thaman 2007: 359). Jurors are barred from hearing relevant evidence or their verdicts, and are rejected by the trial judge or easily overturned on appeal (Lempert 2007: 485). The function of the jury has thus been minimized.

The role of lay assessors generally becomes marginal in a jurisdiction in which the regime is authoritarian and the decision-making body mixes lay judges with professional judges (the bottom right cell).³ An authoritarian regime usually exerts firm control over judges (Ginsburg & Moustafa 2008), who then dominate the mixed tribunal. The judges are held responsible for their decisions, so they are unwilling to share their power with the assessors who cannot be held responsible. The situation in Russia prior to 2001 provides evidence of the pruned role of lay assessors. They “were derisively called ‘noddors’ because they were completely dependent on the power of the professional judge. The professional judge, in turn, was completely dependent on instructions from party or other local officials” (Thaman 2007: 357). Machura (2003: 126) also asserts that “lay assessors in mixed tribunals hardly function as an independent counterbalancing force under the Soviet or Russian system.”

Given these facts, the Chinese case, as well as those in the former communist bloc, is hit by a double whammy. On one hand, the Chinese case has much in common with those mixed tribunals; judges are superior to lay assessors in terms of legal knowledge. On the other, the role of the lay-assessor institution in these countries should be understood through assessors’ relationships with the judges and ultimately the relationship between the regime and the judges. Even though the judges and the lay assessors are equal in law, the power relationship between them is lopsided. The lay assessors are, *de facto*, appointed and administered by the courts, which also determine the symbolic and economic benefits that lay assessors enjoy. This firm control over the lay assessors stems in large part from the regime’s control over the judges. Since the judges are subject to various control mechanisms by the regime (Solomon 2007), they have little reason to share decision-making

³ The role of the lay assessors was important in the early stages of the Soviet Union, when the regime used mixed tribunals to demonstrate that state power was in the hands of the workers (Pashin 2001: 253). Solomon (1996: 270; 359) also shows that, to reduce backlogs, the Soviet Union occasionally entrusted lay judges with significant roles in mixed tribunals. But these practices were ephemeral and usually occurred at a time when the formal judicial system had not been established. Ultimately, the tribunals and lay judges were an instrument of political control for the regime. For an analysis of a similar phenomenon in China, see Liu (2009: 234).

power with the lay assessors. Moreover, unlike the situation in the Soviet bloc, where the lay assessors were to control the professional judges who were members of a bourgeois class prone to false consciousness, such control in China, if any, is offset by the dominant position of the judges.

Data and Methodology

This study is based on detailed ethnographic fieldwork investigations of the operation of the assessor institution at a district court in City W, Shaanxi Province in Western China. As part of my larger study of the Chinese legal system, I visited Court W for one month in 2012. The local economy had grown during the initial stage of the reform period, but has stagnated since the 1990s; by 2012, the GDP per capita had reached only around 5,200 yuan (China Statistical Yearbook 2013). Agriculture has remained the pillar industry due to both the fertile valleys formed by the Yellow River and a climate congenial to wheat cultivation. The policy separating income and expenses (收支两条线) has never been enforced in Court W.⁴ This policy requires that the courts transfer to the local government all litigation fees received and the fines imposed on criminal defendants; the local government then allocates monies to the courts, independent of the fees and fines. The cash-strapped local government could not cover all the operating expenses of Court W, and thus allowed Court W to rely on the fees and fines for operation. As a result, the operating expenses of the assessor institution competed with other expenses of the court. Due to the inadequacies of court budgets, the budget for lay assessors was often cut, or even intercepted for other purposes.

Gaining access to the court through personal connections, I originally planned to observe the behavior of the assessors in trials and deliberations. As I began my investigations, I soon found that the assessors rarely spoke during the trials, and that few deliberations took place. Interviewing assessors and judges thus became the primary source of my data collection. After being introduced by the assessor administrator, I was able to privately interview each of the eleven assessors that visited the court during my stay. The open-ended interviews usually took place after they had finished their court sessions. I did not use a fixed set of questions. Rather, I asked them about their backgrounds, incentives to become assessors, experiences as assessors, incidents over

⁴ For the evolution of this policy, which has had a huge impact on judicial behavior, see He (2009b).

which they had confronted the judges, and relationships with the judges. I also asked their views about the practices of the assessor institution. I interviewed several of them multiple times. As a group, they were candid about their opinions regarding the institution, and especially about their relationship with the judges. The interviews lasted between half an hour and two hours.

My data collection was complemented by interviews with the assessor administrator and eight judges who had experience with the assessors. I asked why they needed assessors, how they treated assessors, and why the institution operated in this way. I also asked what factors they considered when making decisions, and the extent to which the opinions of the lay assessors counted.

As my fieldsite was located in Western China, a region with distinctive socioeconomic and demographic characteristics, I made efforts to verify whether the operational pattern I identified from this court was regionally unique or in wider use across the country. I interviewed judges with experience working with lay assessors from the provinces of Beijing, Jiangsu, Guangxi, Hainan, Henan, Hunan, Liaoning, Jilin, Zhejiang, Guangdong, and Chongqing via telephone. Each phone interview lasted half an hour to an hour. I also compared my findings to the studies of lay assessors published in Chinese, the data for which were collected from Sichuan (Liu 2007, 2009; Zhang & Yu 2009; Zuo et al. 2001) and Hubei (Zeng & Wang 2007). Despite the limitations, my data are valuable, given the paucity of sociolegal research on Chinese lay assessors.

Empirical Evidence

A lay-participation institution was in operation before the Communists took power. It was sidelined along with the judicial system during the first three decades of the People's Republic (Liu 2009). When Deng Xiaoping launched the legal reforms of the late 1970s, he did not pay much attention to the lay-participation institution (Landsman & Zhang 2008). The institution was revived after the National People's Congress's 2004 Directive, vesting the lay assessor with the rights of the judge.

What role do assessors play in the decision-making process today? An analysis of this may begin with a description of a typical day. The court had an office that administered the assessor program. When judges needed assessors for a case, they or their clerks filled out an assessor request form in the assessor's office stating the nature of the case and the proposed schedule. The administrator then called assessors from the roster.

Since most trials were held in the morning, many assessors arrived a few minutes before 9 a.m. There was no assembly room for

them, so they usually waited in the corridor or in the court library linked to the assessors' office. I noticed that a female assessor in her fifties usually arrived earlier than others and diligently cleaned the library and office. The administrator later told us that this assessor attended the highest number of trials. Other assessors seemed familiar with one another; they chatted casually about topics unrelated to the court trials. Criminal trials usually started on time, to coordinate with the detention center from which the court took the defendants, while civil trials often started late, depending on when the litigants arrived. I also saw several judges come over to the office, looking for the assessors of their previous cases to sign the deliberation minutes. When the assessors were not available, the judges left a note at the office, reminding the assessors to visit their offices later.

Just before the trials started, the judge asked the lay assessors to enter the courtroom. The judge, in his or her opening remarks, mentioned only the names of the assessors when introducing the whole tribunal to the litigation participants. The lay assessors normally did not know anything about the case in advance. While the law states that lay assessors are vested with the same rights as judges, it was clear that they did not have access to the case dossiers. Often they had not been able to learn enough about the cases, and consequently had to figure out elements while simultaneously listening to the testimony and dialogues during the trial. Unlike an American or English trial, the presentations were not designed to facilitate understanding for a layperson without knowledge of the investigative file. In criminal cases, the opening statement from the prosecutor was often hastily read aloud, which did nothing to clarify the trial for the uninformed. No copy of the charge letter from the prosecutor's office was dispatched to the assessors. In civil cases, the judges often asked both sides of the litigation to raise their points and evidence, making the process easier to understand. In both types of cases, the judges' role was dominant; despite some adversarial elements injected into the trial procedure beginning in the 1990s, the trial process has remained inquisitorial (He & Ng 2013). Nonetheless, for all the hearings that I witnessed, few judges made any effort to inform the assessors in a way that would help them understand the case. Most judges behaved as if the assessors were non-existent.

Court W had 42 people's assessors, chosen from 83 applicants. Table 1 indicates their demographic characteristics. Article 8 of the National People's Congress Directive states that assessors are to be selected from a pool of self-nominated candidates, as well as from those proposed by "the work unit or the organization at the place of the citizen's permanent residence." The assessors are to be chosen from among the members of this pool by the local courts, and confirmed by the local People's Congress (Article 7). In reality, the assessors were recommended through

Table 1. The Sociological Characteristics of Assessors in Court W

Gender	Male	10
	Female	32
Education	Master's degree or above	1
	Bachelor's degree	12
	Associate's degree	28
	Below associate's degree	1
Occupation	Cadre	13
	Worker	16
	Rural cadre	3
	Unemployed	10
Political Affiliation	Member of the Communist Party	20
	Member of the Democratic parties	4
	No party affiliation	18
Age	50 and above	10
	40–50	19
	30–40	9
	30 or below	4
Honorary Title	People's Congress Delegate	2
	Political Consultant Committee Member	2
Total		42

three channels: self-nomination, community, and the court. During early implementation of the institution, the court had to seek out assessors, due to inadequate applications. Many assessors at that time were the relatives or friends of the judges. The applications are inadequate partly because the general public knew little about the nature of the assessors' service. Several law school graduates responded, mistaking it for a full-time job.

Many assessors were selected because they had connections with the courts (Zeng & Wang 2007). While the National People's Congress Directive states that both the court and the judicial administrative branch shall jointly select the assessors before being finally approved by the local People's Congress, the court had the final say. After all, the assessors worked for the court and were financed and administered by it as well. Of course, the court also respected the recommendations of neighborhood committees and other government branches due to a close working relationship between the court and these organizations.

The law states that people's assessors are to have their expenses paid and to be provided with a stipend if they do not receive a regular salary from their employers (Article 18). In reality, the honorarium for attending each case was fixed. At the time of the fieldwork investigations, Court W provided 35 yuan for one case.⁵ The amount of the honorarium varies across regions in China, depending on the

⁵ The average daily income for urban residents in City W was approximately 60 yuan in 2012, suggesting that 35 yuan was not bad for a two-hour commitment. In 2013, the compensation for each assessor reached 70 yuan per case in the wake of the Supreme People's Court policy to strengthen the institution. As a response, the court, to reduce costs, allowed a collegiate panel to have only one assessor. My follow-up investigations suggested that this policy has barely altered the operational pattern of the institution.

required service, local living expenses, and budget availability. In a nearby city, for example, the honorarium reached 60 yuan, but involved more work for the assessors, such as compiling dossiers and delivering documents (see Zeng & Wang 2007). Although 35 yuan was not high, it was attractive for the unemployed and for retirees without family commitments. Most of the interviewed assessors took the job mainly for the honorarium. In a retired assessor's own words, "You sit back and relax on the bench for roughly two hours, and the honorarium is enough for food and fruit. Why not?"

The gender distribution shows that 76 percent of the 42 assessors were women. These numbers indicate that the lay assessor institution in the Chinese court could also be considered a female institution (Machura 2003: 133). The service is not demanding or strenuous, but carries some prestige and offers an opportunity for social connections. Most of the assessors apparently cared about the title and the symbolic political prestige.

The level of formal education among the interviewed assessors was high; only one had not received an associate's degree (大学专科) as required by the law, 29 percent held a bachelor's degree, and one even held a master's degree. At 37 percent, white-collar workers formed the biggest occupational group, followed by government officials at 31 percent. The rest of the assessors were cadres from rural areas. In terms of age, 24 percent were older than 50, and 48 percent were Party members. These numbers are consistent with the findings of Zhang and Yu (2009), who studied the situation of another district court in Sichuan province.

Disproportionate Participation

The demographic characteristics of these assessors, however, do not reveal who actually attended the cases. Although the National People's Congress Directive stipulates that the assessors shall be randomly selected for cases (Art. 14), actual participation in court hearings was concentrated in a tiny proportion of assessors, sometimes called "professional assessors" (陪审专业户; Zhang & Yu 2009: 110–13). Of the 42 lay assessors on the roster, 19 were marked "busy," "pregnant," or "sick." For the rest, the record indicated that they participated in the assessing work disproportionately (Table 2): three of them participated in more than 100 cases, while seven of them attended fewer than 20 cases.⁶

⁶ This finding is consistent with other reports. In a Sichuan district court (Zhang & Yu 2009), three assessors attended more than 100 cases and eight assessors attended more than 50 cases. The total number of cases attended by these eight assessors constituted 60.64 percent of all cases in which the lay assessors were involved. In another field investigation consisting of three weeks in a different court in a coastal area of China, we found that only one lay assessor in his early sixties had participated in each of the criminal trials throughout the period.

Table 2. Cases Involving Assessors in Court W in 2011

Cases Involving Assessors							
Cases Using Normal Procedure	Criminal Cases	Civil Cases	Administrative Cases	Total Cases	No. Attended per Assessor	Cases Attended by the Most-Frequent Assessor	Cases Attended by the Least-Frequent Assessor
775	204	488	21	713	17	139	4

The reasons for this lopsided distribution were straightforward. Some assessors were busy with work and family commitments, and therefore had a tendency to avoid service. Other assessors were retired or approaching retirement. They were enthusiastic about the honorarium, especially those who could not find a better pastime.

The court and the judges tended to use those assessors who were both available and cooperative for the sake of administrative convenience. Upon the request of the judges, the assessor administrator had to find assessors. If the court were to follow the law and select the assessors randomly, several hearings would likely have to have been postponed. This delay would have caused significant trouble for both the judges and the litigation parties. Therefore, the judges had to rely on those lay assessors who were consistently available. If an assessor was not available for a couple of cases, the administrator would stop calling him or her. I noticed that the court administrator became nervous when scheduled lay assessors failed to appear.

Availability of the assessors was thus a primary concern for the court; the assessors who were free and lived nearby were the best choices. Of course, the more they worked with the court, the more familiar they became with the court requirements, and so the more likely they were to be called in again. Clearly, several judges were familiar with some of the lay assessors and vice versa. Indeed, some judges even made explicit which assessors should be called in for a specific case, since working with them seemed pleasant and efficient. Previous cooperation or confrontation between judges and assessors was taken into account. However, the lay assessors had their own memories and consequent expectations. As will be shown, some assessors were more willing to work with those judges who respected them. Overall, lay assessors had to heed to the needs of the courts and judges to be called in frequently. As a result, a few familiar faces were always on the bench (China Youth Daily 2014).

Article 10 of the National People's Congress Directive stipulates that it is both a right and an obligation for assessors to participate in

adjudicative activities. The law outlines penalties for those who do not participate as required by the courts, including the revocation of the assessor's appointment. However, few assessors have been dismissed from duty, because initiating such a process requires the approval of the local People's Congress, which is troublesome for the court. In the next round of the selection process, the court tended to appoint only those who were available more often.

The phenomenon of disproportionate participation thus existed widely. In Court W, it persisted into 2013, when the honorarium for each case was doubled. With higher honoraria, the incentives to attend cases increased, but the pattern remained—some assessors still tended to avoid service, and the court still wanted administrative convenience.

Decoration in Trials

Through both observations and interviews, I found that few assessors raised questions during the hearing process. This result is consistent with reports published in Chinese. A survey based on 292 criminal cases finds, for example, that 98.31 percent of lay assessors did not raise any questions during hearings and, 69.49 percent did not have verbal exchanges with the adjudicating judges (China Youth Daily 2014).

The major reason behind this reluctance is that since they are denied access to the dossier in advance, and the judge makes no effort to help them in this regard, lay assessors often do not have a level of understanding that would enable them to explore alternatives to the questions that the presiding judge has raised (cf. Machura 2001: 459–60). On the other hand, lacking information about the case forces them to listen carefully to understand it; developing useful questions is difficult when one is occupied by simply trying to understand what is going on. Some assessors admitted that they barely understood the issues. The assessors were also afraid of making mistakes. Many of them believed that the hearing process was solemn, and that any mistake might stain such solemnity.

Assessors were not always taciturn, however. For civil and family cases, experienced assessors frequently participated in mediation. The formal president of the Supreme People's Court mentioned that more than 80 percent of the cases involving lay assessors are closed with settlements (China Youth Daily 2014). As I witnessed, some lay assessors started the mediation process once they had learned the issue in question, even before the formal hearing. Their goal was to facilitate the settlement through persuasion. This outcome often occurred when the judge was young. The persuasion of the older assessors was effective—they were more experienced in family issues. According to the judges,

these older assessors seemed to have special ways of using vernacular and body language to convey the purpose of the laws. Some judges envied the seamless relationship between the assessors and several litigation parties. The litigation parties also seemed more susceptible to the older assessors' suggestions. The assessors also relished this moment, becoming meaningful participants in the trial, instead of mere spectators.

Another situation in which the assessors frequently spoke occurred at the end of the criminal trial, usually during juvenile trials. An assessor in his early sixties who had participated in more than 300 cases said, "During the last stage of the trial, the judge often asks if the defendant has anything to say, and the defendant usually says nothing. I will then start educating the defendant. 'You admitted that you did these horrible things. Do you not feel contrition? Do you feel like apologizing to the victim? Your parents have worked so hard to bring you up and they attended your hearing because you committed a crime. Do you not feel guilty? You just have nothing to say? Aren't you going to take this lesson and start a new life?'"

Echoing the practice in East Germany in which lay assessors spoke to fellow factory workers or neighbors about proper socialist legal consciousness (Buchholz 1986), this preaching inside the courtroom sounded paternal. But neither the mediation efforts nor the moralistic preaching constrained the power of the judge or streamlined the trial procedures. The assessors acted to help the judges accomplish their goals—to either reach a settlement or to confirm the righteousness of the decision.

Fictional Deliberation

The deliberation process is key to evaluating the role of the assessor institution in other jurisdictions. Article 1 of the National People's Congress Directive stipulates that "people's assessors are to have the same rights as judges," and Article 11 states that the cases on which assessors sit are to be decided by the majority vote. In reality however, this process was fictional or nominal; both the interviewed judges and lay assessors stated bluntly that, in most situations, the lay assessors were only asked to sign the so-called "deliberation" minutes. The minutes were prepared by court clerks, and some statements were attributed to the lay assessors. The most commonly seen word from the assessor was "agreed." Sometimes, the assessors were asked to do "the makeup signing" (补签)—to sign the minutes after the judgment had already been announced and all the files bound. A court clerk even suggested that this was inevitable for administrative convenience; if they signed the minutes first, it would make later

changes troublesome, since high-ranking court officials might change the decisions, usually through oral instructions. To avoid contradictions between the instructions and the minutes, there was no point at which to prepare the minutes earlier. Except for cases being appealed, signing for other assessors, also known as “vicarious signing” (代签), was allowed.⁷ In other words, the decisions had been made before the assessors signed. Indeed, most assessors signed the minutes quickly, not knowing the decisions. This phenomenon was largely taken for granted and only a few lay assessors seemed embarrassed for being excluded from the decision-making process.

This phenomenon was widespread in Court W. Assessor Ge, who had participated in more than 250 cases over the past five years, had a superb edge as an assessor—he was retired and lived next door to the courthouse, and was therefore always available. When asked if he had ever been invited to participate in deliberation, he said, “No. But the judges are quite respectful. They often remind me to have a look at the minutes to see if there is anything inappropriate before signing. Occasionally they invite me to their offices for my opinions on cases, or on whether or not their language or protocol in a hearing is appropriate.”

“Have they ever taken your advice?” I asked.

“Twice.” Assessor Wan thought for a while.

One was in a theft case. The defendant had argued that the amount they had stolen was less than suggested by the police. I offered commonsensical analysis and the judge agreed. The other was in a traffic accident case. The defendant, a taxi driver, had hit a beggar and fled the scene. But she had immediately turned herself in [自首] and paid for the medical expenses. Unfortunately, the beggar died nonetheless [hereafter the *Beggar Case*]. What happened next was that her husband filed for divorce during the criminal trial period. Instead of lending her a hand, he sent their one-year old baby to her parents who lived far away. The parents took the crying baby to the hearing. What a mess! When the judge asked for my opinion on the case, I told her that a suspended sentence rather than a jailing sentence was appropriate: although the defendant had fled the scene, she had turned herself in and proactively participated in rescue efforts. Moreover, she had such a young baby. Her husband did not behave himself; he did not stand with her, but tried to

⁷ A judge from a Liaoning court said that the court used to have a personal seal for each assessor, to fulfill the signature requirement more conveniently. Interviewed on April 19, 2015.

divorce her. If the defendant were jailed, her parents might send the baby to the court. How would this mess get cleaned up? The judge was convinced and she *asked me to communicate* with the prosecutor, who was fine with my suggestion. (emphasis added)

In addition to his advantage in terms of availability, maintaining a good relationship with the judges was a key factor in Ge's frequent invitations to hearings. His philosophy was that an assessor should place himself in judges' shoes. In his own words: "I shall share their difficulties, think for them, and protect them."

Regardless, he was never asked to sit down with the judge to deliberate a case. For all the cases he had attended, he could think of only two in which his suggestions had counted. In the Beggar Case, his proposal had been accepted because his suggestions took the judge's needs into consideration—jailing the defendant would have caused further trouble for the judge. Moreover, in this case the judge needed him; since it was difficult for the judge to alter the suggested sentencing of the prosecutors, Assessor Wan was asked to convince the prosecutor. Due to the effect of status recognition (Machura 2001: 466), ironically Wan was proud of himself for being used.

While a complete lack of deliberation exists in many parts of the country, my interviews with judges suggest that in Jiangsu, Guangdong, Sichuan, and Hainan, lay assessors are sometimes invited to formally participate in deliberation after the a hearing has been completed. A major reason behind this variation is that in these provinces, the courts, buoyed by sufficient budgets from local governments, can afford higher operation expenses for the lay assessor institution. Having a formal deliberation means that an assessor has to visit the court twice for each case.⁸ The honorarium for each case in Hainan, for example, was 120 yuan, adequate for commuting expenses. In several provinces, lay assessors were only informally consulted by telephone.

Whether formal or informal, by and large the deliberation remains fictional. To avoid being outvoted by lay assessors for example, a Hainan court only invited one assessor for a collegial panel, making sure the judges remained the majority. In a Sichuan court, the judge often asked one assessor to express his or her opinion first. If the assessor's opinion happened to be different from the judge's, the judge would jump to express his

⁸ One may wonder why a deliberation cannot occur on the same day as the hearing, as in many other jurisdictions. In Chinese courts, cases often require several levels of approval from court officials which may take days or weeks. Since a deliberation with lay assessors, in most cases, is to confirm the decision, having a deliberation before such approvals have been obtained is meaningless.

opinion, to influence the second assessor (Zuo et al. 2001: 80). A Guangdong court deliberately invited two or more assessors for cases involving difficult litigants. The victims of medical malpractice cases for example, are always skeptical that the judges are biased against them (Liebman 2013); any unfavorable judgment from the courts could trigger protest. In one case related to a man who became comatose when treated by a hospital, four assessors and one judge determined the compensation. In another case in which a man in his seventies deserted his daughter three decades prior, but sued the daughter for a maintenance allowance, the court set up a panel consisting of four assessors. During the hearing, the four assessors grilled the man on why he had abandoned his daughter. Morally humiliated by the assessors, the man caved in for a settlement. The president of the Guangdong court grinned when sharing her tactics with us—letting lay assessors make the decision pacified these difficult litigants. She also mentioned that due to the related inconveniences, each year fewer than ten cases, out of more than 10,000 in the dockets of her court, were resolved by four or more assessors. Clearly the courts retained the final say on which cases would have assessor participation, and how many and which assessors to invite.

Submissive Assessors

Why are assessors willing to sign deliberation minutes without participating in the deliberation and without reading the minutes? Are they not afraid of being held responsible? Few assessors I interviewed seemed worried: the process simply meant attending the hearing, signing the minutes, and claiming an honorarium. Every decision was the judge's, and if anything, the judge was to be held responsible. This belief was reinforced, since no assessors were ever punished for signing the minutes without deliberation.

One assessor, a retired bureaucrat, offered his own reason for not worrying:

I was uncomfortable from the very beginning. But I soon figured out that, even if they place the wrong opinions in my mouth, the decisions are eventually approved by the division head, the court director, and/or the adjudication committee. How could I be held responsible if all the court officials and judges are not?

Being submissive does not mean that all the assessors were happy about the practice. When asked to comment on the view that lay assessors do not know the law and thus should not participate in deliberation, one assessor said, "Nonsense! Even if I do

not know the law, do I not understand the facts? Having been an assessor for many years, am I not able to compare the decisions? Sometimes inconsistencies exist within one case; some defendants with more serious offences are handed lighter penalties. Is that not clear? One real reason to exclude us from deliberation is corruption!”

“Why did not you report the case to the court president?” I asked. The National People’s Congress Directive states that, if an assessor disagrees with a panel’s decision, their dissenting vote shall be recorded, and the assessor can request that “the president of the court” consider submitting the case to the adjudicative committee “for discussion and decision.” “Come on!” the assessor replied. “I still want to keep this appointment for a few more years!”

While most assessors kept one eye closed to the inconsistencies detected, a few were concerned. One female assessor said, “Sitting with the judge in the hearing process, the litigation parties believe we all participate in the decision-making process. But we are only asked to sign something we are not even aware of. Our signature suggests that we made the decision. If something is wrong, we have to shoulder responsibility together with the judge. We may lose pension money for this. So I only work with the judges who at least explain to me the rationale behind their decisions. Unfortunately, only two judges in Court W do that, and that’s why I am called in less for this job.”

For those who were unhappy about being excluded from the deliberation process or being asked to sign the minutes without reading them, there was little recourse. The lay assessors were intimidated by the power and knowledge of the judges. Many of them feared that they would never be called in again should they earn a reputation for uncooperativeness. Moreover, those who were skeptical of the practice made themselves less available. Thus, the courts relied on those who never questioned the practice of the judges. For these reasons, some lay assessors tried their best to work around the schedule of the judges, and even to clean the office for the judges.

Unchallengeable Judges

Even if some judges were open to considerate, albeit different, opinions, they are much less tolerant when assessors challenged their authority, though these incidents rarely occurred. “No” was the standard answer given when judges were asked whether they had been challenged at all by lay assessors during their careers, and when assessors were asked if they had ever

challenged judges. I found only three exceptions, one from a judge and two from lay assessors.

In a property dispute (hereafter referred to as the *Property Case*), the plaintiff sold her right to buy a subsidized apartment provided by her work unit to her colleague for 10,000 yuan in 2000, which was more or less the market price. Such transactions were common in China. However, housing prices had unexpectedly tripled over the decade after the transaction. Citing a law forbidding such transactions, the plaintiff sued to invalidate the transaction. Both parties, however, agreed that they had voluntarily engaged in the transaction. It turned out that the defendant was a friend of one lay assessor on the panel adjudicating the case. The assessor then expressed her view to the judge after the hearing: the claim should be rejected, and if the plaintiff really wanted the apartment back, she should have to pay 70 percent of the current market price (30 percent as the depreciation for the decade passed). The judge, believing that the assessor had taken a favor from the defendant, was annoyed. "You are only an assessor. Why do you need to say so much?" Offended by this statement, the assessor sought the help of another male assessor. Both reported this to the division head, who ordered the judge to hold a deliberation. In the deliberation, the two assessors outvoted the judge. Several days later, the female assessor was asked to sign the deliberation minutes. As usual, she signed the minutes without first reading them. She later told us that she had been so nervous that she did not even read the minutes before signing; she was afraid that she had offended the judge. When the male assessor was asked for a signature, he was invited to the judge's office. With smiles, the judge handed him a cigarette, then politely explained to him that "the court leader" did not agree with the assessors' opinion. Surprised by this treatment and reluctant to ask who "the leader" was, the male assessor promptly signed the minutes. Only from the litigation parties did they find out that the decision still reflected the judge's opinion.

The second case concerned a judge in her early forties who vividly recalled a 1991 case from the beginning of her career as a court clerk in a dispatched tribunal. The panel for a coal transportation case (hereafter referred to as the *Coal Case*) had been composed of the tribunal head and two lay assessors from a nearby cotton factory. According to the law, a clerk's opinion did not count. However, since the clerk was the one who processed the case, the tribunal director asked her to express her views first in the deliberation. Immediately after she gave her opinion, the tribunal director expressed an opposing view. To everyone's surprise, an assessor said that he agreed with the view of the clerk. The clerk recalled, "When the assessor expressed his views,

everyone in the room was shocked. It seemed that time stood still. As soon as the assessor left the room, the division director murmured, "Isn't the assessor out of his mind?" Later on, the clerk found that, despite the deliberation outcome, the decision still followed the tribunal head's opinion.

The third case concerns an assessor who, before retirement, had been the deputy head of a district Bureau of Justice. It was a criminal case handled by a junior female judge in which a lady had allowed her extramarital boyfriend to withdraw pocket money from her debit card (hereafter referred to as the *Boyfriend Case*). Later, their relationship soured, and she realized that her boyfriend had withdrawn 80,000 yuan from her account, a large amount by local standards. The boyfriend was initially charged for fraud, but the sentence was later changed to theft. The assessor was curious about the outcome because intuitively he felt that it should not be a criminal case; rather, matters should be considered settled as long as the boyfriend returned the money. When the assessor was asked to sign the minutes as usual, he found "his" opinion was placed at the very beginning. He said to the young judge, "I did not say that," then passed the minutes back to her. The judge instantly turned pale. She stammered, with an embarrassed expression, "That...that was the decision of the court leaders; it was even reported to the adjudicative committee!" At the end of the day, the assessor still signed the minutes because he "did not want to put this lady judge on the hot seat."

All three cases, though different in particulars, suggest that judges were rarely confronted. In the Property Case, the confrontation occurred because the assessor was pressured by the litigation party with whom she had been connected. In the Boyfriend Case, the age difference between the assessor and the young female judge may have emboldened the assessor and reduced the power distance (Machura 2007) between them, making it easier for the assessor to speak out. The discrepancy between the charges and his common sense also made him wonder about the outcome. In the Coal Case, the confrontation was incidental and unexpected. These incidents occurred so rarely that the clerk recalled these details after two decades. This rarity is also why the judge asked, "Is the assessor out of his mind?" In the Property Case, the assessors themselves felt nervous after they had challenged the judge—they knew that they had strayed outside of their appropriate ambit. The young judge in the Boyfriend Case, when challenged, almost lost her composure.

Consistent with the discussions above, there was no meaningful channel for the assessors' voices to be heard, and it seemed as if the whole court system worked against them. To offend the judges would have put the assessors' jobs at risk, so they

preferred to stay quiet. The assessor who shared the Boyfriend Case with us, as well as several other cases in which he believed that the judges had not behaved properly said:

I felt incompetent as an assessor. I could take it easy if I knew nothing of these stories. But they occurred right under my nose. And there was no way for us to realize the legal right enshrined in law; nothing we can do about the judges. The official rhetoric declares that judges are supervised through various layers, including the assessors. All are futile! Few judges take us seriously. We are asked to sit on the bench first, then come back to sign the minutes. "Come on, Old Li, sign this for me!" The request sounds as natural as one from a family member; can you refuse? All these requests take place after the decision has been announced and the case dossier has been bound. It is a "make-up" signing! If we refused to sign, the judges would regard us as uncooperative.

In the Eyes of the Judges

Because the above evidence mainly comes from interviews with the assessors, judges' views may help form a more comprehensive picture of the situation. Most judges interviewed believed that the assessors were mainly present to fulfill the procedural requirements. Partly due to recent skyrocketing caseloads, the lack of judges had become a headache for both rural and urban courts. Many cases that could have been handled by one judge through the Summary Procedure were not closed on time. Once the three-month timeframe allowed by the Summary Procedure passed, the cases had to go through the Normal Procedure, which requires at least three members for the Collegial Panel. Finding three judges to form the panel could be challenging; most judges were busy with their own cases and some court divisions simply did not have enough judges. For example, the administrative law division (mainly dealing with labor cases since the court received a few administrative cases) of Court W had only three judges, including the division head. Since the division head did not handle cases in person, relying on assessors became inevitable. In rural areas, courts often lacked enough judicial staff to deliver documents and enforce judgments, given their extensive jurisdictions and scattered population; many lay assessors were therefore asked to perform the tasks of judicial clerks (Liu 2007, 2009: 241–45).

Consistent with the accounts of the assessors, few judges believed that the assessors had actually participated in the decision-making process. They rarely consulted the lay assessors while evaluating evidence or considering the capacity or

character of defendants.⁹ They believed consultation was unnecessary, since in a significant percentage of cases, assessors understood neither the laws nor the issues. To deliberate with lay assessors who could not focus on the issues did not make sense. A judge in her forties shared an experience in which two lay assessors informally expressed opinions differing from hers:

The issue was whether the landowner, a township government, had breached the contract in a lease [hereafter the *Lease Case*]. The lease's term was longer than what the law permitted, and the tenant, a wool processor, did not pay rent for several months. The real reason the government terminated the lease however, was that it had secured another tenant who was more suitable for its development plan. The township government head had talked to our court president about the case. Without knowing this background information, two lay assessors insisted that the government be held responsible for breach of contract. They had no idea of what material or anticipatory breach meant, or how to deal with a contract with unlawful elements, let alone the complicated political factors. What is the point then, of having a formal deliberation with them?

The judges also believed that it was unrealistic to have another meeting aside from the hearing date. Since many lay assessors come to court only for the honorarium, asking them to visit the court once more would defeat the purpose; the honorarium would become unattractive due to the extra commuting costs.¹⁰ Excluding deliberation from the process has thus become the standard practice, at least in Court W. Some judges said that when the National People's Congress Directive was recently promulgated, they did ask the assessors to participate in the deliberation, but they soon found it unnecessary. Another judge said, "The biggest problem is that they do not know how to evaluate evidence, let alone the application of the laws." At the same time, few judges found it necessary to make the assessors aware of the

⁹ Only one judge in Court W regularly invited lay assessors to attend deliberation and explained his decisions to them. He did this to pay "basic respect to assessors." However, he also admitted that assessors never changed his opinions on cases—their function was limited to facilitating settlements. This judge, however, was idiosyncratic in many respects. He did not care about his promotion, and had offended the court presidents in cases in which he had believed the law was on his side.

¹⁰ The assessor who attended 130 cases in 2011, the highest in Court W, did not appear in 2013 because she needed to help with her son's business after he graduated from college. This absence occurred despite the increase in compensation from 35 yuan in 2011 to 70 yuan in 2013.

outcome of the cases. Rarely did they hand the assessors a copy of the court judgment.

Since the only tasks the judges asked the assessors to do were to sit on the bench and sign the deliberation minutes, few judges believed that the assessors should or could share any responsibility. The tacit understanding was that the assessors did not enjoy substantive power, nor should they be held responsible. “We are square—we need them to fulfill procedural requirements; they come for the honorarium.” “The honorarium they receive covers little more than the commuting costs. How can we ask them to shoulder any responsibility?” Some judges believed that the quality of the assessors was too poor to be held responsible for their decisions. “Some assessors take a nap or play with cell phones during the hearings; some are more eager than the litigation parties to sign the hearing minutes so that they can leave the courthouse immediately afterward; some want to get a ride from the litigation parties; some leave the hearing before it is over. Seriously, how can this group of people be held responsible in any way?”

More fundamentally, because the judges nonetheless have to be responsible for the decisions made, they are unwilling to share their decision-making power with lay assessors. One judge said, “We have to be accountable for the decisions—we might be punished for wrongfully decided cases and our performance is assessed against other criteria, such as the appeal rate and the remand rate. How can we give up the dominant role in decision making to the lay assessors who cannot even understand the issues?”

Double Whammy

Despite widespread criticism of the assessor institution in China, advocates of the institution argue that it may represent community values in the court, deter judges from abusing power, bring the adjudicating process in line with the law, reduce corruption, and enhance the legitimacy of the regime. What light can my empirical evidence shed on these debates?

The empirical evidence provides little support for the positions of those who advocate for the institution. The selection process of assessors is designed to allow different classes of citizens to be represented in the judicial decision-making process. However, like other countries with mixed tribunals, politics and connections creep into the selection process (Kutnjak Ivković 2007). The procedural economy of the courts creates disproportionate participation; the courts only invite those who are available and cooperative.

Though the presence of assessors is meant to deter judges from arbitrarily exercising their power, my evidence suggests their presence does not make any change. It is routine for judges to put words into assessors' mouths. In most situations, lay assessors cooperate to avoid displeasing the judge. Overall, assessors are submissive and judges unchallengeable. Consequently, assessors do not even know, or bother to know, the case outcome. The same rationale applies to the expected restraints on judicial corruption; without meaningful decision-making power, assessors can do little, even if they detect wrongdoing. They therefore feel "incompetent."

Since lay assessors do not have any meaningful decision-making power, the case-handling process will not be improved simply because they are present. Their presence is meant to force the judges to explicitly express their rationale, but most assessors, especially those intimidated by the "solemn" process, are reluctant to say a word or raise a question during the hearing process. Since few assessors appreciate the subtleties of law and politics, most judges behave as if the assessors were not there. For less reticent assessors, their participation in the courtroom is limited to facilitating mediation or preaching at criminal defendants. These contributions have little to do with the supervision of the adjudicating procedure.

To what extent can the assessor institution enhance the legitimacy of the judicial system? For cases where assessors mediate, they do contribute to a positive impression of the courts. Elderly assessors, familiar with the local customs and affairs, appear to be able to communicate with the litigants effectively. Successful settlements generally enhance the litigants' confidence in the courts.

Given the limited number of this type of case however, the impact of lay assessors in this regard remains limited. Since most assessors do not raise questions during the hearing process, few unrepresented litigation parties know who they are or why they are there. A survey found that 35.8 percent of the general public has never heard of lay assessors (Zhang & Yu 2009: 158), which is why some law graduates mistake the position for a full-time job. Since lawyers understand that only the judges are the decision makers, for represented litigants, the mere presence of lay assessors hardly enhances confidence in the judicial system; if they already lack confidence in the judges, how can they trust the lay assessors, who are administered and manipulated by the courts? According to a survey, (Zhang & Yu 2009: 167), only 7.5 percent of legal professionals believe that the assessor institution functions well; 66.7 percent believe it is so-so; 25.8 percent say that it has no effect at all.

The above data and analysis suggest that lay assessors in Chinese courts are little more than lackeys. At the heart of the

debate is what role lay assessors play in the decision-making process. After all, if their role is trivial, they are unlikely to achieve other goals such as combatting corruption or boosting legitimacy. It is true that in other jurisdictions with mixed tribunals, the function of lay assessors is limited, but China's case seems extreme. What are the unique problems in China's institution?

The First Whammy

The Chinese institution exhibited problems similar to those in other mixed tribunal institutions—only more serious, due to the knowledge gap between professional judges and laypeople. As argued by Kutnjak Ivković (2007), assuming equal influence between professional judges and lay assessors in a mixed tribunal is unrealistic; the decision must be made in accordance with existing legal rules, and the decisions may be appealed by the litigation parties. This situation inevitably places judges in more influential positions due to their legal education and experience. In German courts, for example, professional judges often persuade lay judges to accept their preferred decisions (Casper & Zeisel 1972; Rennig 2001). Similar patterns exist in China. For a few exceptional judges who regularly held deliberations with the lay assessors, the major part of the deliberation was to explain the legal rules and rationales to them. This pattern could be seen in Jiangsu, Hainan, and Sichuan provinces, where formal deliberations are held. Overall, given their relatively minimal legal knowledge and training, and since many lay assessors could not follow the legal issues being discussed, they offered little legal analysis. Few judges thus bothered explaining legal terminology such as “anticipatory breach,” or elaborating on the politics behind the cases to the assessors, as shown in the Lease Case. In many cases, explanations are simplified to “this is the decision of the adjudicative committee” (the Boyfriend Case), or “the court leader did not agree with the assessor’s opinion” (the Property Case).

While lay assessors and judges were equal according to the law, their actual influence during trials and deliberations differed markedly. Procedural rules placed the judges in a more powerful position, a phenomenon widely shared in jurisdictions with mixed tribunals (Kutnjak Ivković 2007). The judge chaired the hearing process and was the dominant examiner of the witnesses (He & Ng 2013). The judge also accessed the case dossier in advance, but as in Poland and Croatia, (Kutnjak Ivković 2007: 447) assessors were denied access. Indeed, assessors were usually called upon no more than one working day before the hearing, and sometimes hours before the hearing if the originally

scheduled assessors could not make it. They consequently may not have been able to understand the issues of the case during the hearing process; some could not even keep themselves awake on the bench (China Youth Daily 2014).

The Second Whammy

The gap in legal knowledge and status between professional judges and lay assessors was only part of the explanation for the pathetic situation of lay assessors in Chinese courts. This situation must also be understood in regard to how the regime reined in judges who, in turn, controlled lay assessors (Liu 2009). The authoritarian nature of the Chinese regime determined that lay assessors could not have real independent power, however rarely they attempted to exercise it. This situation is what I call the second whammy.

Existing studies show that the regime has controlled the operation and outcome of the case handling process (He 2004; He 2012, Ng & He 2016; Peerenboom 2010; Su & He 2010). This oversight was accomplished through performance-assessment exercises, approval procedures, and institutional setups such as adjudicative committees and political-legal committees. Specifically, the responsibility systems (目标责任制), that evaluate and discipline judges with quantified measurements were launched. The performance of judges was to be adversely affected if litigants were to file a successful complaint against them. In some cases, court decisions were subject to the media's scrutiny (Liebman 2005). In addition to the general requirements specified in the Judges Law (Amended in 2001, Articles 32–35), more detailed regulations, such as measures for holding adjudicating staff responsible for incorrectly decided cases (错案追究制; Supreme People's Court 1998), have been issued, with sanctions including monetary fines and negative notations in a judge's career file (He 2009a).

A judge therefore needed to understand not just the laws, but also the informal rules and logic required to navigate the legal, political, and bureaucratic maze (He 2007; Liu 2008). It was rather difficult, if not impossible, for lay assessors equipped with little legal knowledge to appreciate all of these implicit areas of decorum. While judges had room for leeway or innovation (He 2013; Stern 2010) under specific circumstances, they knew very well where the boundaries lay. Overstepping the line could have been disastrous for their careers (Shen 2003). Should judges share their decision-making power with lay assessors who would be held responsible for the decisions deemed unacceptable by the Party? Lay assessors were not court staff, and were therefore not

subject to the courts' assessment exercise; many of them are part-time or half-retired. How can the courts hold them responsible? The jury system works well in democracies in part because jurors work to shield judges from politics, and judges cannot be held responsible for jurors' decisions (Lempert 2007). However, in China no lay assessors could shield judges from taking responsibility for decisions made in court. As a result, judges controlled lay assessors for self-protection: whether to choose them for specific cases, whether to invite them for deliberation, and ultimately what that decision was. Indeed, to explain to the assessors all these laws and informal rules was a daunting task, since many subtleties were hard to communicate (the Lease Case). Therefore, many judges eliminated deliberation and decided the cases alone. The institutional arrangement meant that in no way could lay assessors be vested with independent power in the decision-making process.

Only in these contexts can we understand the ironclad control that courts and judges had over assessors. Disproportionate participation, after all, is a result of the courts' control; they handpicked cooperative and available assessors. The judge decided whether to hold a formal deliberation and whether to accept the assessors' opinions. Assessors were given the chance to express their views only when the judges had unusual need—essentially, only when the judge needed them to facilitate settlements, deal with difficult litigants, or communicate with the prosecutor. While the law states that the dissenting opinion of lay assessors shall be recorded in the minutes, otherwise that they have the option of voicing their dissent to the court officials, these stipulations exist only on paper, since assessors' positions were at risk if they did, in fact, dissent.

This situation is also why, on the rare occasions in which lay assessors disagreed with judges, their disagreements were ignored. Here, the political dimension of the institution showed its true colors. In the Property Case, for example, the assessors were bold enough to express their dissenting opinions to the division head. Their opinions were discarded. More important, the judges did not feel embarrassed since this was the *modus operandi*. It was the assessors who felt scared and embarrassed, since they knew that they were not supposed to take the laws literally. The male assessor in the Property Case felt so flattered when the judge handed him a cigarette that he forgot to ask which court official had disagreed with him. In the Coal Case, the judge believed that the assessor was out of his mind because the assessor had taken the wrong side. Only in the Boyfriend Case did the judge seem embarrassed, and that was because she was less experienced.

In short, the informal rule trumped the formal law. As Selznick (1966) argues, unlike formal rules, informal rules have real power and control over the decision-making process. Moreover, the three aforementioned rare exceptions suggest that, even if judges were challenged, they still determined the outcome. They could explain to the assessors that the decision had been altered by the court leaders or the adjudicative committee, or they could simply change the decision, with or without altering the minutes. Each of these practices reveal a hierarchical power relationship between the judge and the lay assessors, with the judges' monopoly being the final decision-making power. They determined both the deliberation procedure and the outcome, regardless of what the assessors opined.

In Hainan, Jiangsu, Guangdong, and Sichuan, where the formality of the assessor institution was observed to a greater extent, formal deliberations and dissenting assessors were seen more often. However, several courts only invited one assessor to join two judges in the Collegial Panel, ensuring that the court retained the majority vote; others only invited assessors to deal with difficult litigants—assessors could decide the case, but only in the way the courts wanted. Changing the institutional arrangement to allow assessors to express their opinions did not really alter their marginality in the decision-making process. The courts had the final say on whether to use assessors, and if so, how many of them to use. In short, regardless of whether formal deliberation and voting exist, assessors enjoyed little power. Ultimately, this second whammy determined the fate of the assessor institution in China.

Conclusions and Implications

Primarily relying on interviews with lay assessors and judges in a basic-level court, this article cannot cover all the variations across the country. While the recruitment of lay assessors, their performance on the bench and in deliberation, and who made the final decisions were matters of fact, my interviewees might have overgeneralized on the basis of their own experiences. Personal experiences and accounts from varying sources may be contradictory. Nonetheless, several fundamental themes emerge: disproportionate participation among lay assessors, assessors' reticence during the hearing process, virtually nonexistent deliberation, and more important, the trivial role of lay assessors in these processes.

In addition to providing empirical evidence that lay assessors were decorative in Chinese courts, this article argues that the dire

situation stemmed from a double whammy. One aspect was the superior legal knowledge of professional judges and their dominance in court procedure, which has been well documented in jurisdictions across the world in countries with mixed tribunals. The other aspect is derived, ultimately, from the authority of the regime over the judges. Since the regime had firm control over the judges, the judges, for self-protection, had to exert equal control over lay assessors. Therefore, they maintained oversight of the recruitment and administration of lay assessors. There is no way for judges to share their adjudicative power with lay assessors. On the other hand, lay assessors, to secure a position, had to be submissive.

Through a typology, this article provides a framework to compare the institutions of lay participation across different jurisdictions, and make sense of the ways in which they differ. Kutnjak Ivković (2007) provides insights into the ways lay assessors' roles are curtailed in mixed tribunals. Should she have paid more attention to differences between democratic and authoritarian regimes, we may be able to appreciate more of the role of lay participation in similarly mixed tribunals but different political regimes. Further lines of inquiry for the future include how the Chinese institution differs from that of Croatia, and how two Korean institutions differ from each other, once data become available. Scholars might also compare the particularities of institutions of lay participation in China, Japan, Korea, and Taiwan that result from regional and cultural affinity (Fukurai 2007; Hans 2008; Landsman & Zhang 2008). Similar comparisons have been conducted between Russia and Spain (Thaman 1999). Each of these comparisons will become more enlightening once the lay assessor institution's relationship with the regime is articulated. Comparing the institutions in China and Russia (Thaman 2007) might also be productive, since both are under authoritarian regimes, but one is mixed and the other is separate. I hope that my study will spark further explorations of Lempert's question (2007: 479–81): Is the jury a democratic institution or an institution of democracies?

In his classic book, *The Faces of Justice and State Authority*, Damaska (1986) suggests a framework to analyze the legal procedures underpinned by differing political ideologies and attitudes toward authority. When two types of procedures, policy-implementing and conflict-solving, are conjoined with the two types of authority, hierarchical authority and coordinate authority, the resulting combinations fall into the four boxes of a two-by-two table (Damaska 1986: 181). Echoing Damaska, this article emphasizes the crucial role of the regime's political nature and government structure in comparing legal procedures. The mixed tribunal in

lay participation fits the “policy implementing” function of proceedings suggested by Damaska (1986), while the separate arrangement is suitable for “conflict solving.” On the other hand, although one cannot simply equate the “authoritarian” category in my framework with the “hierarchical” authority in Damaska’s, the two have a lot in common. The government structure and authority in most authoritarian regimes is hierarchical, while the counterpart in democratic regimes is more coordinate. Accordingly, the structure of lay participation institutions varies in step with the differing level of social control demanded by differing political regimes (Shapiro 1981).

This study also provides insights into China’s ongoing judicial reforms. Immediately after the fourth plenum of the Eighteenth Congress of the Chinese Communist Party, the Supreme People’s Court and the Ministry of Justice promulgated detailed measures to reform the institution. These measures included the random selection of lay assessors from local citizens, and for difficult and influential cases, the incorporation of set numbers of lay assessors. According to these measures, lay assessors deliberate on “factual” rather than legal aspects. These measures seem to address many existing problems, but my study strikes a cautionary chord: How random will the selection process be? How can the legal system resolve the problem of disproportionate participation? How does one define “difficult and influential”? How can one determine if a question is factual or legal? Will lay assessors also participate in appeal cases? And, ultimately, to what extent can an authoritarian regime tolerate genuine lay participation? Further research should focus on how these measures are implemented. Only when more empirical data and studies become available can these questions be satisfactorily answered.

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