

2-20-2024

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Recommended Citation

Zhiyuan Guo, *Lay Participation Reform in China: Opportunities and Challenges*, 98 Chi.-Kent L. Rev. 221 (2024).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol98/iss1/13>

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LAY PARTICIPATION REFORM IN CHINA: OPPORTUNITIES AND CHALLENGES

ZHIYUAN GUO*

INTRODUCTION

To promote a more democratic judiciary and ensure judicial independence, many countries include lay participation in their court trials. Despite differences, there are two main modes of lay participation—jury and mixed tribunal—around the world.¹ Lay participation in a particular country usually falls under one of these two modes or is a variant of either mode. In common law countries, such as the United Kingdom and the United States, a jury passively observes a trial and decides issues of fact according to a judge’s instructions, and a professional judge decides issues of law. In civil law countries, such as Germany and France, a “mixed court” or “mixed tribunal,” consisting of both professional and lay judges, hears and decides a case together. Lay judges decide issues of fact as well as issues of law together with the professional judges, and their votes carry the same weight as that of the professional judges.

The most striking distinction between a jury trial and a trial by a mixed tribunal lies in the relationship between lay judges and professional judges. Lay judges and professional judges divide responsibilities in both hearing and deciding cases in a jury trial, and they sit together to hear cases in a mixed court. Whether a country employs a jury system, or a mixed tribunal system depends on the way in which lay judges² work with professional judges—either separately or collectively.

China uses a collegial panel comprised of judges and lay assessors resembling those in civil law countries. Although the lay participation system in China is called the “People’s Assessor System” (ren min pei shen yuan 人民陪审员制度), it is a mixed tribunal similar to the German system. Lay participation has been allowed in Chinese courtrooms for

* China University of Political Science and Law. This article is supported by China National Social Science Fund (Grant number 21BFX070). The author is grateful for helpful comments by Prof. Nancy Marder.

1. See generally John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. BAR FOUND. RSCH. J. 195, 206.

2. Lay judges in this article refer to both jurors in a jury court and lay assessors in a mixed court. They do not include the non-professional judges such as magistrates in the U.K.

years. However, the legislation on lay participation in China did not achieve much improvement until the People's Assessors Law was enacted in 2018. As the first Chinese code on lay participation, the People's Assessors Law has made improvements for lay participation in many respects.³ For example, the qualifications for people's assessors became more reasonable and the selection of prospective lay assessors became more democratic by following the random selection principle. As another example, the law established a new type of tribunal for cases involving lay participation. A grand mixed tribunal consisting of three professional judges and four lay assessors is responsible for hearing major cases.⁴

China's lay participation reform has been conducted as a part of a larger project, namely, the trial-centered reform, which was raised in 2014 as the blueprint for future criminal procedure law reforms. Although Chinese scholars hold different understandings of "trial-centered" reform, the official definition is "ensuring that evidence in litigation is produced in court and, the facts of the case are ascertained in court . . . the prosecution and defense opinions are offered in court, . . . [and] the judgment results are formed in court."⁵ The trial-centered reform calls for a substantial or meaningful criminal trial (*ting shen shi zhi hua* 庭审实质化), which requires the criminal court hearing to go beyond mere formality and demand meaningful decision-making. However, China, like other countries, is also confronting difficulties in a time of crisis and change. Advances in internet technology and the spread of social media make it more difficult to shield lay assessors from external influences. The COVID-19 pandemic interrupted the course of "trial-centered reform" because an increasing number of hearings moved online.⁶ Virtual hearings present significant challenges to jury trials or trials by mixed tribunals.⁷

3. For detailed discussions, *see infra* Part. II.

4. *Zhonghua Renmin Gongheguo Renmin Peishenyuan Fa* (中华人民共和国人民陪审员法) [Law of People's Republic of China on People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 27, 2018, effective Apr. 27, 2018), art. 16 (China), *translated by* www.pkulaw.com.

5. *Yinfa Guanyu Tuijin Yi Shenpan Wei Zhongxin De Xingshi Susong Zhidu Gaige De Yijian De Tongzhi* (印发《关于推进以审判为中心的刑事诉讼制度改革的意见》的通知) [Notice on Issuing the Opinions on Advancing the Reform of the Trial-Centered Criminal Procedure System, Judicial Interpretation No. 18 [2016]] (promulgated by the Judicial Comm. Sup. People's Ct., July 20, 2016), arts. XI-XIV (China), *translated by* www.pkulaw.com.

6. *See* Weimin Zuo (左卫民), *Zhongguo Zaixian Susong Shizheng Yanjiu Yu Fazhan Zhanwang* (中国在线诉讼:实证研究与发展展望) [Online Litigation in China: Empirical Research and Development Prospect], *Bijiao Fa Yanjiu* (比较法研究) 4 *COMPAR. L. STUD.* 161, 164 (2020).

7. *See* Weimin Zuo (左卫民), *Hou Yiqing Shidai De Xianshang Susong Lu Xiang Hefang* (后疫情时代的线上诉讼: 路向何方) [Online Litigation in the Post-Epidemic Era: Where to Go], *Xiandai Faxue* (现代法学) 43 *MOD. L. SCI.* 35, 45 (2021); *see also* CHRISTINA PICCININ & SOPHIE SKLAR, *FORCED TO ADAPT: INNOVATIONS AND BEST PRACTICES REGARDING ACCESS TO JUSTICE IN CANADIAN COURTS AND ABROAD DURING COVID-19*, at 4, <https://www.osgoode.yorku.ca/wp->

In sharp contrast to the extensive literature written in English on lay participation in other countries, the Chinese lay assessor institution is “little-studied,”⁸ especially in English. A mere handful of English articles either introduce the basics of the development of the Chinese lay assessor institution,⁹ or compare it to lay participation systems in other countries.¹⁰ Of this limited literature, Professor He’s article is the only published empirical study on Chinese people’s assessor system. Clearly, more in-depth analysis on the new developments of Chinese lay assessor system and empirical studies on this topic are needed, because law-making is a matter, the implementation of the law is another.

This article proceeds in four Parts. Part I provides a historical review of the Chinese lay participation system. Part II introduces the main achievements of the 2018 People’s Assessors Law. Part III offers an in-depth reflection on the limitations and challenges of the People’s Assessors Law. Part IV concludes by suggesting future research and proposing several reforms of lay participation in China.

I. A BRIEF HISTORICAL OVERVIEW OF THE LAY PARTICIPATION SYSTEM IN CHINA

According to the existing literature, no public participation was found in the adjudicative process of Imperial China.¹¹ However, it is commonly believed that China had two opportunities to adopt a lay assessor system or a jury system from the West in the first half of the twentieth century but both attempts ended in failure.¹² In 1906, a jury system was introduced to China in the *Code of Criminal and Civil Procedure of Great Qing* (da qing xing shi min shi su song tiao li 大清刑事民事诉讼条例), but unfortunately the attempt encountered fierce opposition and the legal draft was not

content/uploads/2022/09/2022_Forced-to-Adapt-Report-AODA-Version.pdf (“Moreover, in some provinces, digital court proceedings have put jury trials on a complete hold.”).

8. Valerie P. Hans, *Jury Systems Around the World*, 4 ANN. REV. L. & SOC. SCI. 275, 290 (2008).

9. See, e.g., Liling Yue, *The Lay Assessor System in China*, 72 INT’L REV. PENAL L. 51 (2001); Wang Dexin, *Modes of Judicial Democracy and The Perspective Of China’s Assessor System*, 4 CHINA LEGAL SCI. 26 (2016); Xin He, *Double Whammy: Lay Assessors as Lackeys in Chinese Courts*, 50 LAW & SOC’Y REV. 33 (2016); Chen Xuequan & Tao Langxiao, *The New Reform of China’s Lay Assessor System*, 8 CHINA LEGAL SCI. 3 (2020).

10. See, e.g., Di Jiang, *Judicial Reform in China: New Regulations for a Lay Assessor System*, 9 PAC. RIM. L. & POL’Y J. 569 (2000); Stephen Landsman & Jing Zhang, *A Tale of Two Juries: Lay Participation Comes to Japanese and Chinese Courts*, 25 UCLA PAC. BASIN L.J. 179 (2008); Zhuoyu Wang & Hiroshi Fukurai, *Popular Legal Participation in China and Japan*, 38 INT’L J.L., CRIME & JUST. 236, 237 (2010); Andra Le Roux-Kemp, *Lay Participation in the Adjudication of Legal Disputes: A Legal-Historical and Comparative Analysis Focusing on the People’s Republic of China and Its Special Administrative Region Hong Kong*, 11 TSINGHUA CHINA L. REV. 183 (2019).

11. Jiang, *supra* note 10, at 571.

12. See Wang, *supra* note 9, at 38.

officially approved until the demise of Qing Dynasty (1644-1912 C.E).¹³ Then, in the period of 1927-1935, under the government of the Republic of China, there was legislation that introduced two types of lay participation in the trial court system: the Assessor Trial System and the Jury Trial System.¹⁴ Both were deeply influenced and controlled by the Kuomintang Party.¹⁵

The People's Assessor System derives from the judicial practice during the New Democratic Revolution (1919-1949) and is seen as part of the tradition of the people's justice.¹⁶ Some legal documents from this period contain provisions that include laymen as judicial assessors.¹⁷ When these legal documents were implemented, they marked the beginning of the People's Assessor System under the leadership of the Communist Party of China.¹⁸ The People's Assessor System was also widely used in adjudicative processes in Border Regions and Liberated Areas¹⁹ because its purpose was "more than a kind of mechanism to solve disputes, it also played an important role in class struggle, in political party struggle, and in national struggle in the field of judicial practice."²⁰

After the People's Republic of China was founded in 1949, the People's Assessor System was officially established in China.²¹ The

13. See Wang & Fukurai, *supra* note 10, at 238 ("[T]his legal draft was not formally approved by the Ching Government until after the fall of the Dynasty in 1911.").

14. See Wang, *supra* note 9, at 37 ("[T]here are two kinds of lay participation in court trial system, one is the Assessor Trial System, the other is the Jury Trial System, both being deeply influenced and controlled by the Kuomintang Party.").

15. *Id.*

16. See Wang, *supra* note 9, at 38. For People's Justice, see generally Xi Lin, *People's Justice: Socialist Law and Equity in China, 1921-1945*, 12 *FUNDAM. J. HUMS. & SOC. SCI.* 473 (2019) ("Alongside the positive laws formulated by law-makers, the emphasis was rather placed upon a flexible administration of justice, where written laws would need to be adjusted to local needs and circumstances.").

17. See Wang, *supra* note 9, at 38 (The new regime soon promulgated several legal documents, such as *Provisional Organic Regulations on the Military Tribunals*, *Provisional Organic Regulations on the Ministry of Tribunals and Regulations of Trial*, *Regulations of Judicial Proceedings*, etc.).

18. *Id.* at 38.

19. *Border Regions* refers to the base areas the revolutionary regimes led by the Communist Party established in the borders of several provinces during the War of Resistance against Japanese Aggression. *Liberated Areas* specifically refers to the areas where the Communist Party overturned Kuo Min Tang's reactionary rule and established people's regime during the War of Resistance Against Japan and the Liberation War. For a discussion of this in English, see *Second Sino-Japanese War: Stalemate*, ENCYC. BRITANNICA <https://www.britannica.com/event/Second-Sino-Japanese-War/Stalemate> [<https://perma.cc/8UGN-6FC2>] ("The scattered areas controlled by the Communist Party and its armies grew during the war until they covered large parts of north and east China. In these border regions and 'liberated areas,' the regime was popular with the people The army was also popular").

20. See Wang, *supra* note 9, at 39.

21. See Wang & Fukurai, *supra* note 10, at 238 ("[I]n 1949, the People's Republic of China's formal government (PRC) was founded, the Provisional Organic Law of Chinese Courts was then enacted, and the lay assessor system was formally introduced.").

Provisional Organization Regulations of the People's Court (1951), then The Organic Law of People's Court of People's Republic of China (1954), and the Constitution of the People's Republic of China (1954) made clear that the People's Assessor System must be exercised when people's courts adjudicate cases. However, as some Chinese scholars commented, "at that time, the People's Assessor System was more likely to play the role of political propaganda, acted as the 'seasoning' of judicial democracy, but not run as a unified mechanism in the practice of justice nationwide."²² The genuine implementation of the People's Assessor System was then interrupted by the Anti-Rightist Movement²³ and the Cultural Revolution²⁴ since the late 1950s. During the following two decades, the lay assessor system was distorted under the influence of legal nihilism,²⁵ which left many Chinese people with a poor impression of non-professional involvement in trials.²⁶

It was not until 1979, when the first Criminal Procedure Law of the People's Republic of China (CPL) was promulgated, that the importance of the People's Assessor System was recognized.²⁷ The history of the People's Assessor System can be divided into three phases since 1979: 1979-2004 (Restoring Phase), 2004-2014 (Fast Development Phase), and since 2018 (New Era after the enactment of the 2018 People's Assessors Law).

22. See Wang, *supra* note 9, at 40.

23. The Anti-Rightist Campaign, which lasted from roughly 1957 to 1959, was a campaign to purge alleged "Rightists" within the Communist Party of China (CPC) and abroad. The definition of Rightists was not always consistent, sometimes including critics to the left of the government, but officially referred to those intellectuals who appeared to favor capitalism and were against collectivization. See *Contemporary Chinese Art Timeline*, PRECEDEN, <https://www.preceden.com/timelines/243502-contemporary-chinese-art-timeline> [<https://perma.cc/3GQ2-5AJ6>]. For more information on anti-rightist campaign, see *The Anti-Rightist Movement and Its Ideological and Theoretical Consequences*, 29 CHINESE L. & GOV'T 36 (1996).

24. The Cultural Revolution, formally the Great Proletarian Cultural Revolution, was a sociopolitical movement in the People's Republic of China from 1966 until 1976. Launched by Mao Zedong, then Chairman of the Communist Party of China, its stated goal was to preserve Chinese Communism by purging remnants of capitalist and traditional elements from Chinese society and to re-impose Mao Zedong Thought (known outside China as Maoism) as the dominant ideology in the Communist Party of China. See *A Brief Overview of China's Cultural Revolution*, ENCYC. BRITANNICA, <https://www.britannica.com/story/chinas-cultural-revolution> [<https://perma.cc/MD85-QYF4>].

25. Legal nihilism is a negative attitude towards the law, legal and legal forms of organization of socio-legal relations. See V.K. Babayeva (В.К. Бабаяева). ТЕОРИЯ ГОСУДАРСТВА И ПРАВА (ТЕОРИЯ ГОСУДАРСТВА И ПРАВА) [THEORY OF STATE AND LAW] 145 (K. Babayev ed., 2003).

26. Landsman & Zhang, *supra* note 10, at 198.

27. People's Assessors System was adopted by the 1979 Criminal Procedure Law. Art.105 provided, Trials of cases of first instance in the basic and intermediate people's, courts shall be conducted by a collegial panel composed of one judge and two people's assessors, except for cases of private prosecution and other minor criminal cases which may be tried by a single judge alone.

A. 1979-2004: Restoring Lay Participation to Chinese Courts

The new chapter for China's lay assessor system was initiated by the 1979 CPL and the Organic Law of the People's Court. There was only one article in the 1979 CPL that touched on the People's Assessor System, which states:

Adjudication of cases of first instance in the basic people's courts and the intermediate people's courts shall be conducted by a collegial panel composed of one judge and two people's assessors, with the exception of cases of private prosecution and other minor criminal cases that a single judge may adjudicate independently.

Adjudication of cases of first instance in the high people's courts or the Supreme People's Court shall be conducted by a collegial panel composed of one to three judges and two to four people's assessors.²⁸

Lay assessors in China can only participate in trials of first instance cases. According to Article 105 of the CPL, "adjudication of appeals and protests in the people's courts shall be conducted by a collegial panel composed of from three to five judges."²⁹ In addition, the structure or composition of a mixed tribunal varies in practice depending on the level of the court in which the case is heard.³⁰ The mixed tribunal in basic and intermediate people's courts consists of one professional judge and two lay assessors, while the mixed tribunal in higher people's courts or the Supreme People's Court consists of one to three professional judges and two to four lay assessors.³¹ The same article in the 1979 CPL also provides that the people's assessors shall enjoy equal rights with the judges when performing their functions in the people's courts. It also granted the Chinese lay assessors equal rights (except with respect to performing the function of presiding judge)³² with professional judges in mixed tribunals.

The Organic Law of People's Courts has always been the primary legal source of the People's Assessor System since the founding of the PRC. Except for providing the structure of a mixed tribunal³³ and the equal

28. Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [The Criminal Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 1979, effective Jan.1, 1980), art. 105 (China), *translated in* 73 J. CRIM. L. & CRIMINOLOGY 171.

29. *Id.*

30. There are four levels in the people's court system of China: the basic level people's court, the intermediate people's court, the higher people's courts, and the Supreme People's Court.

31. *See* 1979 Criminal Procedure Law, art. 105.

32. *See id.* ("The chief judge or the head of a chamber shall designate one *judge* to be the presiding judge of the collegial panel." (emphasis added)).

33. Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhi Fa (中华人民共和国人民法院组织法) [The Organic Law of People's Court] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1979, effective Jan. 1, 1980), art. 10, 1979 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China),

rights of lay assessors with professional judges,³⁴ The Organic Law of the People's Courts (1979) also provides for the qualification of people's assessors. According to Article 38, citizens who have the right to vote and stand for election and have reached the age of twenty-three shall be eligible to be elected as people's assessors; however, people who have been deprived of political rights in the past are excluded.³⁵ The same law also grants people's assessors a right to financial compensation, although the compensation is, at most, supplementary.³⁶ The Organic Law of People's Court was amended several times after the issuance of the 1979 version, but the provisions for people's assessors remain almost unchanged until the 2018 amendment following the enactment of The People's Assessors Law.

In 1996, the CPL was overhauled, including the provision for mixed tribunals. According to the revised provision, when the basic level courts or intermediate courts try first-instance cases, the trials shall be conducted by a collegial panel consisting of three professional judges or the same number of judges and lay assessors.³⁷ If the first instance case is tried in the Higher Courts or the Supreme Court, the collegial panel consists of three to seven judges or the same number of judges and assessors.³⁸ A section was added to this provision that the members of a collegial panel shall be odd in number. This addition was reasonable because the cases are decided by majority votes in Chinese courts. Under the odd number requirement, there are three possible sizes of mixed tribunals in China: a three-member tribunal, five-member tribunal, or seven-member tribunal. However, the ratio of professional to lay judges was not restricted in the 1996 CPL. For example, the three-member mixed tribunal can be comprised of either one professional judge and two lay assessors, or two professional judges and one lay assessor. However, the three-member mixed tribunal, especially that composed of one professional judge and two lay assessors, was the

translated by www.pkulaw.com (“The people's courts shall adopt the collegial system in the administration of justice. Cases of first instance in the people's courts shall be tried by a collegial panel of judges or of judges and people's assessors, with the exception of simple civil cases, minor criminal cases and cases otherwise provided for by law. Appealed or contested cases in the people's courts shall be handled by a collegial panel of judges.”).

34. *Id.* art. 38 (“During the period of the exercise of their functions in the people's courts, the people's assessors shall be members of the court divisions in which they participate and shall enjoy equal rights with the judges.”).

35. *Id.*

36. *Id.* art. 39 (During the period of the exercise of their functions, the people's assessors shall continue to receive wages as usual from their regular places of employment; people's assessors who are not wage-earning shall be given reasonable allowances by the people's courts.”).

37. Zhōnghuá rénmín gònghéguó rénmín fǎyuàn zǔzhī fǎ (中华人民共和国人民法院组织法) [The Organic Law of People's Court] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1979, effective Jan. 1, 1980, amended Mar. 17, 1996), art. 147, 1996 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

38. *See id.*

most commonplace in practice. Five-member and seven-member mixed tribunals were seldom employed.³⁹

According to sporadic reports and unsystematic empirical studies, the People's Assessor System was not employed much in practice during the period from 1979 to 2004 due to a lack of operational procedures, resources, and lay assessors.⁴⁰ Even if lay assessors were employed, they "had been excluded from participation at specific court levels and limited to certain case categories."⁴¹ According to a study by Wei and Wang, in terms of civil or administrative cases, lay assessors had been used primarily in the inferior courts.⁴² They were used exclusively in local and regional courts, while the provincial high courts had never used lay assessors in any trial of first instance before 1999.⁴³ There seemed to be a huge gap between the law on the books and the law in practice in terms of lay participation in China during this period.

B. 2004-2014: Expansion of Lay Participation in Chinese Courts

A milestone legal document in the history of People's Assessor System in China is the Decision of the Standing Committee of the National People's Congress Regarding Perfecting the System of People's Assessors issued at the Eleventh Session of the Standing Committee of the Tenth National People's Congress on August 28, 2004 ("the 2004 Decision").⁴⁴ The enactment of the 2004 Decision was merely part of a bigger picture of judicial reform in China. On the one hand, problems within the Chinese judiciary, such as the low quality of judges, the lack of judicial independence, and the prevalence of judicial corruption, led to calls for reforms to improve the quality of those deciding cases and to convince the Chinese people of the justice system's legitimacy.⁴⁵ On the other hand, as the caseload kept increasing, there were needs for both greater manpower

39. These assertions came from observations and interviews with criminal judges (notes on file with author).

40. Both academic and official information indicated that the lay assessor system had been in very limited use since the mid 1980s. See Wang Minyuan, *The Chinese Jury System and Its Improvements*, 4 LEGAL STUD. 25, 31 (1999); Wei Min, "Jury" Should Be Slow: A Discussion Of The Direction Of The Jury System, 4 GANSU SOC. SCI. 31, 32 (2001).

41. Wang, *supra* note 9, at 239.

42. *Id.*

43. *Id.*

44. See Zhou Yongkun (周永坤), Renmin Peishenyuan Buyi Jingyinghua (人民陪审员不宜精英化) [People's Assessors Should not Be Elites], 10 JURIS. 9, 9 (2005) ("As the first specialized legislation on people's assessors system in China, the 2004 Decision has many merits.").

45. See Landsman & Zhang, *supra* note 10, at 180 ("For China, the problem also appears to be decreasing public faith in the judiciary. In China's case, however, the difficulty is rooted in the failings of professional judges, who are poorly trained and tainted by widespread corruption").

and more efficient adjudication.⁴⁶ The reformers turned to the lay assessor system to improve the quality of the judiciary (by addressing the problem of judicial corruption), to solve the shortage of judicial personnel, and to enhance adjudicatory speed and efficiency.

The 2004 Decision was a leap forward in the development of the People's Assessor System compared with the limited provisions before this Decision was issued. First, under Article 2 of the 2004 Decision,⁴⁷ lay assessors can serve on collegial panels in two circumstances: criminal, civil, and administrative cases with potentially great social impact and upon request of the defendant in criminal and civil cases or the plaintiff in administrative and civil cases. This provision is significant for three reasons: (1) it establishes two circumstances in which lay participation is required to address the declining use of lay assessors; (2) it grants the parties a right to request lay participation, which makes trial by mixed tribunals a right for the litigants rather than a monopoly of courts (a major change)⁴⁸; and (3) it extends the lay assessor system to include more serious cases, thus the focus of the Chinese lay participation system is shifted from simple, minor, uncontested cases to cases with relatively great social impact. Lay assessors in China will be involved in a wide array of significant cases after this shift. "Their involvement, even if it is minimal, will afford them an opportunity to observe, participate in and report on key legal matters. If they are permitted to do so, the transparency of the Chinese legal process will be dramatically increased."⁴⁹

Second, Article 4 of the Decision made changes to the qualifications of prospective people's assessors. While The Organic Law of the People's Court only provided for two qualifications for prospective people's assessors—being both eligible to vote and age twenty-three or older—the 2004 Decision has added new qualifications. According to Article 4, to serve as a people's assessor, a citizen shall not only have reached the age of twenty-three, he or she shall also uphold the Constitution of the People's Republic of China, be of good ethics, upright and decent, and be in good health. Most importantly, to serve as a people's assessor, a person shall

46. See Wang & Fukurai, *supra* note 10, at 240 ("[P]rofessional judges could no longer handle the fast-rising case overloads. Though not demanded by the law, the mixed tribunal with lay assessors was therefore preserved by some courts, essentially for alleviating the short-handed situation, as now lay assessors could replace judges and be seated as tribunal members.").

47. Quanguo Renda Changweihui Guanyu Wanshan Renmin Peishenyuan Zhidu De Jueding (全国人大常委会关于完善人民陪审员制度的决定) [Decision Regarding Perfecting the System of People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2004), art. 2, 2004 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China), translated by www.pkulaw.com.

48. See Wang & Fukurai, *supra* note 10, at 243.

49. Landsman and Zhang, *supra* note 10, at 214.

have graduated from a junior college or higher.⁵⁰ The educational requirement sparked many debates in the Chinese legal community. Most Chinese scholars criticized it as being too high a threshold because those who meet this requirement just account for less than ten percent of the population at the time when the 2004 Decision was released.⁵¹

Third, Articles 5 and 6 provide, for the first time, for the disqualification of potential people's assessors. Since there were no provisions on disqualifications before the 2004 Decision was issued, quite a few of the people's assessors had legal expertise. "[T]he program is being used to enlist law-trained individuals to help raise the quality of the trial bench."⁵² Assessors who had legal training were inconsistent with the purpose of lay participation, which was to involve ordinary people without any legal expertise.⁵³ The 2004 Decision filled this gap with two articles. Article 5 disqualifies those working in legislatures, judicial agencies, or law firms by stipulating that "no member of the standing committee of the people's congress, no functionary of the people's court, the people's procuratorate, the public security organ, the state security organ, or the judicial administrative organ and no practicing lawyer may serve as a people's assessor."⁵⁴ This provision explicitly prohibits certain occupations, such as those that require legal education or experience, from serving as lay assessors to preserve the lay element of mixed tribunal. Article 6 deprives two groups of people of the possibility of serving as a people's assessor: (1) those who have been subjected to criminal punishment; or (2) those who have been dismissed from public posts. Article 6 echoes the qualification clause that "a people's assessor shall be of good ethics, upright and decent."⁵⁵

Fourth, Articles 7 and 8 of the Decision provide for the nomination of prospective assessors. According to this provision, people's assessors are to be selected from among a pool of self-nominated candidates, as well as those proposed by "the unit where [the citizen works] or the organization at the place of [the citizen's] permanent residence."⁵⁶ Some commentators

50. See 2004 Decision Regarding Perfecting the System of People's Assessors, art.4.

51. Wang & Fukurai, *supra* note 10, at 250 ("According to the report of the National Population and Family Planning Commission of China in 2005, only 5.4% of the national population have college diplomas or higher educational levels.").

52. Landsman & Zhang, *supra* note 10, at 207.

53. Langbein, *supra* note 1, at 206, 210-211 ("Laymen bring freshness. Laymen are sometimes said to be better fact finders and law ap- pliers than professional judges, because they are closer to the affairs and experience of ordinary folk. Laymen are a force for simplification in the administration of criminal justice.").

54. See 2004 Decision Regarding Perfecting the System of People's Assessors, art.6.

55. *Id.*

56. See *id.* art.8.

thought this article set down three methods for the courts to identify candidates: self-nomination, nomination by employers, and nomination by a grass-roots organization.⁵⁷

Fifth, Article 11 has granted people's assessors more power to play a substantial role in adjudication. The cases heard by mixed tribunals are decided by majority vote, which means that when the people's assessors constitute the majority of a three-person panel (a configuration permitted by law), in theory, their votes can override that of the professional judge. If an assessor disagrees with a panel's decision, his or her dissenting vote is to be recorded and the assessor is empowered to request that "the president of the court" consider submitting the case to the adjudicative committee "for discussion and decision."⁵⁸ This provision grants the people's assessors a right to have their opinions voiced and reviewed by the adjudicative committee. Although people's assessors are unlikely to play a substantial role in the deliberation and determination of the cases, this provision was a starting point to increase the influence of people's assessors in the process of adjudication.

C. From 2014 to 2018: Entering A New Era of People's Assessors Law

The lay assessor system in China has experienced rapid development since the enactment of the 2004 Decision. A collegial panel with lay assessors has become the most frequently used adjudicative structure in criminal cases tried by ordinary procedure.⁵⁹ According to released official statistics, the lay participation rate continued to increase during the period of 2005-2013, and lay assessors participated in 71.7% of cases of first instance that were tried by ordinary procedure in the first half of 2013.⁶⁰ However, the use of mixed tribunals does not mean lay participation has played a meaningful role in Chinese courts. Lay assessors were included to address practical problems in the courts, such as the insufficient number of

57. See Wang & Fukurai, *supra* note 10, at 244.

58. See 2004 Decision Regarding Perfecting the System of People's Assessors, art.11.

59. This observation is based on unsystematic interviews with criminal judges (notes on file with author). The Criminal Procedure Law of China provides for three types of trial procedures: regular or ordinary procedure, summary procedure, and expedited trial procedure. Ordinary procedure applies to major cases in which the fact is unclear, and the defendant does not admit their guilt.

60. Zuigao Renmin Fayuan Guanyu Renmin Peishenyuan Jueding Zhixing He Renmin Peishyuan Gongzuo Qingkuang De Baogao (最高人民法院关于人民陪审员决定执行和人民陪审员工作情况的报告) [Report on Enforcement of Decisions of People's Assessors and the Work of People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 22, 2013), translated by www.pkulaw.com.

professional judges and the ever-growing caseloads.⁶¹ Therefore, the criticism of the people's assessor system during this period is not that they were not used, but rather that they had a superficial function.⁶² For example, many described lay assessors as no more than "the ears of the deaf" in the courtroom.⁶³ The focus of lay participation reform in China has shifted from putting the system into practice to making the practice meaningful.

In 2014, *The Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law* ("the Rule of Law Decision") called for reforms of the people's assessor system, including a

guarantee [of] the rights of Chinese citizens to participate in adjudication, enlarge the scope of lay participation, improve the mechanism of random selection, and enhance the public trust on the people's assessor system. Gradually convert to a system in which the people's assessors participate in the adjudication of factual issues instead of legal issues.⁶⁴

In April 2015, the Supreme People's Court and the Ministry of Justice published *The Notice on Issuing the Pilot Program on the Reform of People's Assessor System* ("2015 Notice on Pilot Program"), which set out a roadmap for a two-year reform plan.⁶⁵ The pilot program has been implemented in fifty selected courts across ten provinces for three years (2015-2018) (including one extended year).⁶⁶ The Supreme People's Court ("SPC") drafted *The Law of the People's Republic of China on People's Assessors* ("People's Assessors Law") based on the experiences and lessons from the pilot program and it was promulgated on April 27,

61. This is based on the author's observation and interviews with criminal judges (notes on file with author).

62. See Landsman & Zhang, *supra* note 10, at 211-12.

63. See He, *supra* note 9, at 734; Yue, *supra* note 9, at 52.

64. See Zhonggong Zhongyang Guanyu Quanmian Tuijian Yifa Zhiguo Zonghe Ruogan Zhongda Wenti De Jueding (中共中央关于全面推进依法治国若干重大问题的决定)[The Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law] (promulgated by the Central Committee of the Communist Party of China, Oct.23, 2014), § 4, subsec. 4. Translated by www.pkulaw.com.

65. See Quanguo Renda Changweihui Guanyu Shouquan Zai Bufen Diqu Kaizhan Renmin Peishenyuan Zhidu Gaige Shidian Gongzuo De Jueding (全国人大常委会关于授权在部分地区开展人民陪审员制度改革试点工作的决定) [Decision of the Standing Committee of the National People's Congress on Authorizing the Implementation of the Pilot Program on the Reform of the System of People's Assessors in Certain Areas] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 24, 2015), translated by www.pkulaw.com.

66. After the planned two years, the pilot was extended one year upon evaluation. See Quanguo Renda Changweihui Guanyu Yanchang Renmin Peishenyuan Zhidu Gaige Shidian Qixian De Jueding (全国人大常委会关于延长人民陪审员制度改革试点期限的决定) [Decision of the Standing Committee of the National People's Congress to Extend the Period of the Pilot Program of the People's Assessor System Reform] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 27, 2017), translated by www.pkulaw.com.

2018.⁶⁷The revised Criminal Procedure Law and Organic Law of People's Court in October 2018 were both adjusted to accommodate the new contents of the People's Assessors Law. More importantly, to protect and regulate the participation of people's assessors in trial activities in accordance with the People's Assessors Law, the SPC issued *The Interpretation on Several Issues Concerning the Application of the Law of the People's Republic of China on People's Assessors* ("SPC Interpretation on People's Assessors Law") on April 24, 2019. With the 2004 Decision repealed, the most important legal sources regulating the people's assessor system are the People's Assessors Law and the accompanying 2019 SPC Interpretation. The enactment of the People's Assessors Law in 2018 has opened a new era for China's lay participation system.

II. MAJOR ACHIEVEMENTS BY THE PEOPLE'S ASSESSORS LAW AND ITS SPC INTERPRETATION

The 2018 People's Assessors Law can be assessed according to two goals. One is the effort to improve the representativeness of lay assessors and the other is the effort to enable lay assessors to participate in a meaningful way in the adjudication of cases. This Part evaluates the new reforms from these two perspectives.

A. Reforms Improving the Representativeness of Lay Assessors in China

One problem with the operation of the People's Assessors System in China is that most cases were assigned to several "professional assessors" or "full-time assessors" who became ongoing assistants of the judges in their effort to process the caseloads.⁶⁸ Lay assessors with certain backgrounds or traits were overrepresented not only on the list of people's assessors, but also in court trials.⁶⁹This practice undermined the goal that lay assessors should come from all walks of life.⁷⁰ The 2015 pilot reform

67. Zhonghua Renmin Gongheguo Renmin Peishenyuan Fa (中华人民共和国人民陪审员法) [Law of People's Republic of China on People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 27, 2018, effective Apr. 27, 2018), *translated by* www.pkulaw.com.

68. Wang & Fukurai, *supra* note 10, at 239 ("'Long-serving' and 'full-time' lay assessors were two remarkably abusive practices involving lay people who served at the courts for many years or even on a full-time basis.").

69. *Id.* at 240 ("Some courts also chose to recruit unemployed people or pensioners as lay assessors and allocated heavy caseloads to them, effectively transforming them into full-time court employees.").

70. *Id.* at 252 ("[O]ne of the democratic merits of lay participation is that lay judges representing a wide cross-section of the society provides the input of various community values, morals, norms and customs into the judicial decision-making process.").

on people's assessors sought to improve the representativeness of lay assessors.⁷¹ Whether lay assessors are representative depends on multiple factors including the eligibility requirements, selection process, and caseload control. The 2018 People's Assessors Law made changes in all three of these areas.

1. Changes to the Eligibility Requirement

The qualifications for lay assessors in China have changed over time. The 1983 Organic Law of the People's Court simply provided that any qualified voter on the electoral register over the age of twenty-three could serve as a lay assessor, except for those deprived of their political rights due to their criminal offenses, regardless of their educational achievement.⁷² With such minimal qualifications, courts merely preferred government-friendly assessors, and this led to two extreme situations in the practice of lay participation. On the one hand, highly educated lay assessors were disproportionately overrepresented in Chinese trials because they were more cooperative and needed less training; on the other hand, courts tended to recruit incompetent (sometimes illiterate) but amenable citizens as lay assessors.⁷³ The 2004 Decision specifically sets forth the educational eligibility and places it at a high level by requiring that the lay assessors should normally have at least a junior college diploma.⁷⁴ This requirement excludes the great majority of the Chinese population on the grounds of inadequate education.⁷⁵ Although China's lay assessor institution is not supposed to be a barrier to governmental abuse, these goals will not be met

71. Zuigao Renmin Fayuan, Sifabu Guanyu Yinfa Renmin Peishenyuan Zhidu Gaige Shidian Fang'an (最高人民法院、司法部关于印发《人民陪审员制度改革试点方案》的通知) [Notice of the Supreme People's Court and the Ministry of Justice on Issuing the Pilot Program on the Reform of the People's Assessors], II.1 ("[A]ttention shall be paid to absorbing ordinary people, structure and proportion of the people from different walks of life, and absorbing the people of different industries, professions, ages, nationalities and genders, so as to reflect the various backgrounds and representativeness of people's assessors.").

72. See Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhi Fa ([中华人民共和国人民法院组织法] [Law of the People's Republic of China on the Organization of the People's Courts] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1983), art.38, translated by www.pkulaw.com.

73. See Chen & Tao, *supra* note 9, at 8 ("For efficiency, the courts typically select lay assessors from certain backgrounds, such as employees from residents' committees or village committees, retired national staff, and family members of court employees. Such persons are time-flexible and eager to receive payment for serving as lay assessors, which makes them more amenable to judges.").

74. See Quanguo Renda Changweihui Guanyu Wanshan Renmin Peishenyuan Zhidu De Jueding (全国人大常委会关于完善人民陪审员制度的决定) [Decision Regarding Perfecting the System of People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2004), art. 4, 2004 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China), translated by www.pkulaw.com.

75. See Wang & Fukurai, *supra* note 10, at 250 ("According to the report of the National population and Family Planning Commission of China in 2005, only 5.4% of the national population have college diplomas or higher educational levels.").

if only government-friendly or other elite groups are selected to participate as lay assessors in court decisions. A pool of assessors from all segments of society adds legitimacy and helps build public confidence in the adjudicative process. Therefore, lay assessors must not be limited to people with high educational levels, legal knowledge, or social status.⁷⁶

To respond to this longstanding criticism and to include more eligible prospective lay assessors, the 2018 People's Assessors Law amended the eligibility requirements to serve as a lay assessor.⁷⁷ First, the minimum age of lay assessors was increased from twenty-three to twenty-eight years old.⁷⁸ Given that mixed tribunals are also employed to hear cases with greater social impact, it is important to include mature lay assessors with richer life experiences. Another reason for increasing the minimum age for potential lay assessors is to avoid the influence of professional judges created by the age disparity. Because the minimum age for professional judges and prosecutors in China is usually twenty-eight years old after at least five years of working as assistant judges or prosecutors, the reformers hoped that lay assessors who had attained the same age would not defer to professional judges simply because of their seniority.⁷⁹

Second, the education requirement for lay assessors has been lowered from a junior college to a high school diploma. The 2004 Decision brought in an education requirement for prospective lay assessors for the first time, but the requirement of a junior college diploma generated a lot of controversy. Many criticized it as being too high a threshold because less than ten percent of the Chinese population met this criterion, which meant that most Chinese citizens were excluded from serving as lay assessors. For this reason, the People's Assessors Law lowered the educational requirement to a high school diploma to include more citizens.⁸⁰

Third, the People's Assessors Law retained the disqualification clause in the 2004 Decision and continued to exclude people with legal expertise, people with a criminal record, and those who have been discharged from public employment or who are unable to understand or express themselves adequately.⁸¹ The disqualification clause is useful to guarantee that lay assessors participate in adjudication with their common sense rather than

76. Wang & Fukurai, *supra* note 10, at 252 (“[O]ne of the democratic merits of lay participation is that lay judges representing a wide cross-section of the society provides the input of various community values, morals, norms and customs into the judicial decision-making process.”).

77. Zhonghua Renmin Gongheguo Renmin Peishenyuan Fa (中华人民共和国人民陪审员法) [Law of People's Republic of China on People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 27, 2018, effective Apr. 27, 2018), *translated by* www.pkulaw.com.

78. *Id.* art. 5.

79. Interviews with legal reformers by the author (notes on file with author).

80. 2018 Law on People's Assessors, art. 5.

81. *Id.* arts. 6–7.

their legal knowledge. The disqualification clause can also help lay assessors avoid conflicts of interest and ensure the integrity of the lay assessors.

2. Change of Subject in Charge of Selecting Lay Assessors

Selection of people's assessors used to be controlled by courts in China.⁸² Long-term court control over selection has limited lay participation in judicial work to a small group of people. Courts tended to select those who were either amenable and cooperative or well-educated and thus not in need of training.⁸³ The preference by courts generated "people's assessors in residence" or "lay judges outside of staffing." The courts' selection of lay assessors contributed to the lack of diversity of lay assessors.⁸⁴ The 2018 People's Assessors Law endows the power of selecting people's assessors to the administrative body of justice, the basic-level people's court, and the public security organ.⁸⁵ These bodies are not only responsible for randomly selecting the candidates for people's assessors, conducting qualification examinations, and soliciting opinions from candidates, but also for randomly selecting people's assessors from the list of candidates who passed the qualification examination.⁸⁶ The fact that multiple bodies select lay assessors can break the monopoly of courts in selecting people's assessors which will lead to greater diversity and representativeness of people's assessors.

3. Creating A Random Selection Process

As emphasized by *The Notice of Supreme People's Court and the Ministry of Justice on Issuing the Pilot Program on the Reform of the*

82. See *Quanguo Renda Changweihui Guanyu Wanshan Renmin Peishenyan Zhidu De Jueding* (全国人大常委会关于完善人民陪审员制度的决定) [Decision Regarding Perfecting the System of People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2004), art. 8, 2004 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China), translated by www.pkulaw.com. Although the basic level courts and the judicial administrative organs jointly examine and approve the applications of potential people's assessors, the courts recommend a list of people's assessors to the local legislature for appointment. Clearly, the courts have a controlling role in selecting people's assessors in China.

83. See Chen & Tao, *supra* note 9, at 8 ("For efficiency, the courts typically select lay assessors from certain backgrounds, such as employees from residents' committees or village committees, retired national staff, and family members of court employees. Such persons are time-flexible and eager to receive payment for serving as lay assessors, which makes them more amenable to judges.").

84. Wang & Fukurai, *supra* note 10, at 239 ("'Long-serving' and 'full-time' lay assessors were two remarkably abusive practices involving lay people who served at the courts for many years or even on a full-time basis.").

85. See *Zhonghua Renmin Gongheguo Renmin Peishenyan Fa* (中华人民共和国人民陪审员法) [Law of People's Republic of China on People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 27, 2018, effective Apr. 27, 2018), art. 9, translated by www.pkulaw.com.

86. *Id.* arts. 9–10.

System of People's Assessors on April 24, 2015 (“the 2015 Pilot Program Plan”) in selecting lay assessors, “attention shall be paid to absorbing ordinary people, structure and proportion of the people from different walks of life, and absorbing the people of different industries, professions, ages, nationalities and genders, so as to reflect the various backgrounds and representativeness of people’s assessors.”⁸⁷ In addition to enlarging the pool of candidates who are eligible for lay assessors, it is also vital to make sure that the selection process is randomized. To achieve this goal, the People’s Assessors Law establishes a three-step random selection process for lay assessors. First, the authorities⁸⁸ shall randomly select a group that is more than five times the number of the people’s assessors to be appointed⁸⁹ from the list of permanent residents under its jurisdiction. Second, the administrative body of justice and the basic-level people’s court shall randomly select and determine people’s assessors from the list of candidates of people’s assessors who have passed the qualification examination and who have not refused to take on the lay assessors’ responsibilities.⁹⁰ Then the standing committee of the people’s congress at the same level shall appoint these people’s assessors at the request of the president of basic-level people’s court.⁹¹ Third, when a mixed tribunal is to be convened, the people’s court shall randomly select and determine people’s assessors from the list of appointed people’s assessors seven days before the opening of the court session.⁹² To deal with the situation in which some lay assessors may not be able to serve on the mixed tribunal due to their health or for other good reasons, the 2019 SPC interpretation provides for alternate people’s assessors to replace those people’s assessors who cannot serve.⁹³ Alternate people’s assessors shall also be selected and

87. Zuìgāo Rénmín Fǎyuàn, Sīfǎ Bù Guānyú Yīnfā “Rénmín Péishěn Yuan Zhìdù Gǎigé Shìdiǎn Fāng'àn” De Tōngzhī (最高人民法院、司法部关于印发《人民陪审员制度改革试点方案》的通知) [The 2015 Pilot Program Plan] (promulgated by the Judicial Comm. Sup. People’s Ct., Apr. 24, 2015, effective Apr. 24, 2015), art. 2(1) (China) *translated by* www.pkulaw.com.

88. The authorities here include the administrative body of justice, basic-level people’s court and the public security organ. *See* 2018 People’s Assessors Law, arts. 9–10.

89. *Id.* art. 8 (“The quota of people’s assessors may not be lower than three times the number of judges of the people’s court.”).

90. *Id.* art. 9.

91. *Id.* art. 10.

92. *Id.* art. 19; Zuìgāo Rénmín Fǎyuàn Guānyú Shìyòng Zhōnghuá Rénmín Gōnghéguó Rénmín Péishěnyuán Fǎ Ruògān Wèntí De Jiěshì (最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的解释) [Interpretation on Application of <Law of the People’s Republic of China on People’s Assessors>, Judicial Interpretation No. 5 [2019]] (promulgated by the Judicial Comm. Sup. People’s Ct., Feb. 18, 2019, effective May 1, 2019), art. 3, *translated by* www.pkulaw.com.

93. Interpretation Concerning the People’s Assessors Law, art. 3 (“The people’s court may randomly select a certain number of alternate people’s assessors from the list of people’s assessors as required for the trial of a case, determine the order of candidates to fill the vacancy, and inform the parties.”).

determined randomly from the list of appointed people's assessors.⁹⁴ When a people's assessor with corresponding expertise is required to participate in the trial of the collegial panel, such assessor shall also be randomly selected and determined from the list of people's assessors who satisfy the professional needs according to specific case circumstances.⁹⁵ Random selection has become the primary method of selecting lay assessors. It not only conforms to the international practice, but also improves the representation of lay assessors by ensuring each candidate an equal opportunity of being selected.

However, not all people's assessors are selected randomly under the 2018 People's Assessors Law. To improve the efficiency of lay assessors' selection and to deal with emergent needs,⁹⁶ the law retains the traditional methods of selection to some extent, allowing individuals to apply for the position and allowing "the employers or the basic-level self-governing mass organizations or people's organizations" to recommend prospective people's assessors, which the authorities can approve if they satisfy the qualification examination.⁹⁷ However, to ensure that the selection process is randomized in most cases, the law requires that the people's assessors generated by traditional methods "shall not exceed one-fifth of the quota of people's assessors."⁹⁸

4. Reappointment Restriction and Annual Caseload Control

To prevent lay assessors from becoming long-serving, full-time assistants of professional judges, the People's Assessors Law prescribes a five-year tenure for people's assessors and imposes a restriction on reappointment.⁹⁹ Unlike jurors in the Anglo-American jury system, who are selected to serve in a single case, lay assessors in civil-law jurisdictions usually serve for a tenure of several years once they are selected.¹⁰⁰ Earlier regulations prescribed a two-year tenure for people's assessors,¹⁰¹ but the

94. *Id.*

95. *Id.*

96. Courts usually choose some time-flexible lay assessors as substitutes in case selected lay assessors are not promptly available. Xuequan & Langxiao, *supra* note 9, at 11.

97. The People's Assessors Law, art. 11 (China).

98. *Id.*

99. *Id.* art. 13.

100. *See, e.g.,* Gerichtsverfassungsgesetz [GVG] [Courts Constitution Act], May 9, 1975, Bundesgesetzblatt, Teil I [BGBl I] at 1077, last amended by Gesetz [G], July 30, 2009, BGBl I at 2449, § 42 (Ger.) (stating that lay assessors in Germany serve for five years).

101. Sifabu Guanyu Renmin Peishenyuan De Minge Renqi He Chansheng Banfa De Zhishi (司法部关于人民陪审员的名额、任期和产生办法的指示) [Instructions of the Ministry of Justice on the Quota, Term of Office and Method of Selection of People's Assessors] (promulgated by the Ministry of Justice, July 21, 1956), art. 3, *translated by* www.pkulaw.com.

tenure has been expanded to five years since the 2004 Decision¹⁰² for at least two reasons. First, many civil-law jurisdictions prescribe a long-term tenure for lay assessors, such as Germany.¹⁰³ The People's Assessors System in China follows German legislation in many respects, including duration of tenure.¹⁰⁴ Second, a longer tenure could avoid the trouble of identifying lay assessors because not everyone is willing to take on the lay assessor's responsibilities. Although a five-year tenure could meet the practical needs of the mixed tribunal, it gave rise to criticism from Chinese scholars. Many thought a tenure of five years was too long and would turn lay assessors into semi-professional judges.¹⁰⁵ Without a prohibition on the reappointment of people's assessors, some courts could have favorable assessors serve two, three, or more terms; they would essentially become permanent members of the court.¹⁰⁶ Although it is unfortunate that the 2018 People's Assessors Law retains the long five-year tenure for people's assessors, it is no longer possible for lay assessors to serve consecutive terms.¹⁰⁷ This modest change means that lay assessors cannot become long-serving members of the court.

More importantly, the People's Assessors Law adopts a principle of controlling the caseload of each people's assessor to avoid an inequitable distribution of cases among appointed people's assessors. Caseload control was included in the earlier regulations on the People's Assessor System. Article 2 of *The Instructions of Ministry of Justice on the Quota, Tenure and Methods of Selection*, issued by the Ministry of Justice on July 21, 1956, explicitly provides that people's assessors shall not serve at the people's court more than ten days per year.¹⁰⁸ However, the service time could be prolonged accordingly if the people's assessor's case does not

102. Quánguó Rénmín Dàibiào Dàhui Chángwù Wēiyuánhui Guānyú Wánshàn Rénmín Péishěn Uan Zhìdù De Juédìng (全国人民代表大会常务委员会关于完善人民陪审员制度的决定) [Decision Regarding Perfecting the System of People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2004), art. 9, 2004 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China).

103. GVG [Courts Constitution Act], BGBI I at 1077.

104. The People's Assessors Law, art. 13.

105. See, e.g., Haiyan Wang (汪海燕) & Wenting Tao (陶文婷), *Renmin Peishenyuan Zhidu De Jiazhi He Wanshan* (人民陪审员制度的价值和完善) [*The Values and Improvement for the People's Assessors System*], 4 *Zhongguo Yingyong Faxue* (中国应用法学) [CHINESE APPLIED LEGAL SCI.] 32, 41 (2018) (criticizing the five-year long term as a defect with Chinese People's Assessor System); Jiahong He (何家弘), *Peishen Zhidu Zongheng Lun* (陪审制度纵横论) [*On Lay Participation Systems*], 3 *JURISTS* 48, 50 (1999) (suggesting shortening the term for people's assessors).

106. Wang & Fukurai, *supra* note 10, at 240 (introducing some examples of long-serving people's assessors).

107. See The People's Assessors Law, art.13 ("The term of office of a people's assessor shall be five years. In general, a people's assessor may not be reappointed.")

108. See Sifabu Guanyu Renmin Peishenyuan De Minge Renqi He Chansheng Banfa De Zhishi (司法部关于人民陪审员的名额、任期和产生办法的指示) [Instructions of the Ministry of Justice on the Quota, Term of Office and Method of Selection of People's Assessors] (promulgated by the Ministry of Justice, July 21, 1956), art. 2, translated by www.pkulaw.com.

conclude and it is necessary for the same people's assessor to participate in the trial.¹⁰⁹ Unfortunately, subsequent legislation on lay participation did not emphasize the significance of caseload control for people's assessors. The disproportionate distribution of caseload among people's assessors in practice clearly violates the provision that people's assessors shall not serve at the court more than ten days per year, which is still in effect to date. The 2018 People's Assessors Law retained the caseload control requirement. According to the Law, the people's court shall, in light of the actual local circumstances of the jurisdiction, rationally determine the upper limit of the number of cases in which each people's assessor participates every year; this information is made available to the public.¹¹⁰ The 2019 SPC Interpretation limits the number of cases people's assessors in the intermediate and basic people's courts may adjudicate to a maximum of thirty cases per assessor.¹¹¹ These new provisions may address the problem of long-serving, full-time lay assessors because, as Langbein once argued, "[e]ach layman sits for several days per year—once a month is the pattern suggested by statute. He acquires as his term advances some general familiarity with trial procedure and the work of adjudication, although hardly enough to feel socialized into professional legal culture."¹¹²

B. Reforms Promoting Meaningful Participation of Lay Assessors in Adjudication of Cases

Perhaps the harshest criticism of the People's Assessors System in China is its nominal role or, in other words, its lack of meaningful participation in the adjudication of cases.

"Enforcing the equal power between lay assessors and professional judges will theoretically ensure the fullest participation by the lay assessors in the adjudicative process."¹¹³ However, a criticism of people's assessors is that they are unskilled, passive, and inactive.¹¹⁴ There are several reasons that Chinese lay assessors cannot play a substantial role during trials. One problem is their lack of training; another is that they are not

109. *Id.*

110. Zhonghua Renmin Gongheguo Renmin Peishenyuan Fa (中华人民共和国人民陪审员法) [P.R.C. Laws on People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 27, 2018, effective Apr. 27, 2018), art. 24 (China), translated by www.pkulaw.com.

111. Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Renmin Peishenyuan Fa Ruogan Wenti De Jieshi (最高人民法院关于适用《中华人民共和国人民陪审员法》若干问题的解释) [Interpretation on Application of the <Law of the People's Republic of China on People's Assessors>, Judicial Interpretation No. 5 [2019]] (promulgated by the Judicial Comm. Sup. People's Ct., Feb. 18, 2019, effective May 1, 2019), art. 17, translated by www.pkulaw.com.

112. Langbein, *supra* note 1, at 206.

113. Jiang, *supra* note 10, at 590.

114. See He, *supra* note 9, at 745.

given adequate instructions. In addition, there are few regulations governing their duties or guarding against improprieties, such as evading court service or dozing during the trial. These omissions help to explain the poor quality of lay participation in China.

Therefore, the primary goal of the most recent reforms of the People's Assessor System, beginning with the 2015 pilot program and including the most recent enactment of People's Assessors Law, was to promote meaningful participation of lay assessors in the adjudication of cases. According to the 2015 Pilot Program Plan, one of the main goals is to improve the way in which people's assessors participate in trials. The guideline is that people's assessors shall not sit together with professional judges without adjudication or hear a case without deliberation. To achieve these goals, the annual caseload for each people's assessor shall be assigned reasonably, and the "full time professional assessors" shall be avoided.¹¹⁵ The People's Assessors Law has several provisions to try to promote the meaningful participation of lay assessors in the adjudication of cases.

1. Sufficient Preparation

One reason that the people's assessors in China were described as the "ears of the deaf," or as "decoration in trials"¹¹⁶ is that they were unprepared to participate substantially in the adjudication. For meaningful participation, people's assessors should be better prepared before the court session, including both general preparation, such as basic legal training, and specific preparation for individual cases.

Although training has been included as an element in the legal documents pertaining to the people's assessor system for years, it was never implemented properly in practice. The training that courts provide to people's assessors depends entirely on the resources of the local courts.¹¹⁷ Thus, training varies from place to place, with little training in most places due to a lack of resources.¹¹⁸ In addition to having a general provision that people's assessors shall be trained in a planned manner and imposing an obligation upon people's assessors to participate in any training under the

115. Zuigao Renmin Fayuan Sifabu Guanyu Yinfa Renmin Peishenyuan Zhidu Gaige Shidian Fang'an De Tongzhi (最高人民法院、司法部关于印发《人民陪审员制度改革试点方案》的通知) [Notice of the Supreme People's Court and the Ministry of Justice on Issuing the Pilot Program on the Reform of the System of People's Assessors] (promulgated by the Supreme People's Court & Ministry of Justice, Apr. 24, 2015), art. 4, translated by www.pkulaw.com.

116. See He, *supra* note 9, at 745.

117. See Wang & Fukurai, *supra* note 10, at 244 ("Due to the shortage of funds and manpower, a number of courts were found largely to ignore the training of lay assessors, which was believed to contribute to the frequently reported incompetence, passivity, and inactivity of these lay assessors.").

118. *Id.*

People's Assessors Law, the SPC and the Ministry of Justice issued *The Measures for the Training, Appraisal, Rewards and Punishments for People's Assessors* on April 24, 2019 ("the 2019 Measures"), which elaborate on the training for people's assessors. For example, the 2019 Measures divide the training for people's assessors into "pre-post training and training during their term of office." It is required that the courts provide training in an organized manner and that the training meets the actual needs of the people's assessors for their participation in judicial activities.¹¹⁹ It is also noted that the content of the training "shall include political theories, assessors' functions, professional ethics of judges, trial discipline, and basic knowledge of law," and may also be tailored to the characteristics and types of cases in local courts.¹²⁰ The 2019 Measures also provide for flexibility in training by including the following contents: "[t]he training for people's assessors shall be conducted by a combination of full-time training for a specific period with in-service self-study, or may also be conducted by means of phased trainings and accumulative study hours in light of actual circumstances."¹²¹ It also encourages multiple means of training, "such as the observation of court trials, seminars on special topics, case studies, moot courts, video and computer-aided teaching and circuit teaching."¹²²

Compared to the training for jurors, which merely contains explanations as to how a case will proceed and that the jurors are to find the facts and apply the law that the judge has given them to the facts as they find them,¹²³ China's training program for people's assessors seems too extensive. The training that people's assessors can receive tries to have lay assessors learn what professional judges learn in their professional training. This is neither necessary nor reasonable. Lay assessors are valued for something other than legal expertise. They provide common-sense judgment as peers of the parties.¹²⁴ Therefore, the training program for people's assessors in China is not in line with the gist of the lay participation system and should be adjusted. A training program like that

119. Zuigāo Rénmín Fǎyuàn, Sīfǎ Bù Guānyú Yīnfā "Rénmín Péishěn Yuán Péixùn, Kǎohé, Jiǎngchéng Gōngzuò Bànfǎ" De Tōngzhī (最高人民法院、司法部关于印发《人民陪审员培训、考核、奖惩工作办法》的通知) [Notice Issuing the Measures for the Training, Appraisal, Rewards and Punishments for People's Assessors, Judicial Interpretation No. 12 [2019]] (promulgated by the Judicial Comm. Sup. People's Ct., Apr. 24, 2019), art. 9, *translated by* www.pkulaw.com.

120. *Id.*

121. *Id.* art. 14.

122. *Id.*

123. The information came from the communication with British judges and lawyers (notes on file with author).

124. Langbein, *supra* note 1, at 206, 211 ("[T]he common sense of laymen is preferable to the learning of the professional judge in evaluating credibility, or in applying community-based standards of conduct such as negligence or reckless.").

provided to jurors in Anglo-American countries will suffice to prepare Chinese lay assessors for participating in trials. People's assessors do not need much training on law. They only need to be familiar with how a case will be proceeded at trial and have basic legal knowledge. When it comes to the specialized legal terms, such as standard of proof, the professional judge(s) should give them instructions.

In addition to appropriate training, people's assessors also need to prepare, like professional judges do, to participate meaningfully in the adjudication of cases. Most lay assessors in China do not review case files prior to the court session.¹²⁵ Therefore, many lay assessors know little about the case facts or the legal issues to be decided. Even if they were asked to pose questions during trial, most of the people's assessors would be unable to perform that task.¹²⁶ The 2018 People's Assessors Law guarantees the lay assessors' right to be informed of basic information such as the cause of the case, the name or title of the parties, the place and time of the court session, and other similar matters.¹²⁷ It also grants lay assessors the right to have access to the case files before the hearing.¹²⁸ However, there is different opinion on lay assessors' rights of access to case files.¹²⁹ The concern is that lay assessors' review of case files would interfere with the ongoing trial-centered reform.¹³⁰ However, professional judges in China can review case files before the court session, so lay assessors, who are also decision-makers in the case, should be able to do so as well. Even if professional judges do not review case files beforehand, it is appropriate for lay assessors to learn about the case facts in advance so that they can fully participate in the adjudication of cases.

125. Interview with professional judges (notes on file with author); *see also* Chen & Tao, *supra* note 9, at 7 (“Did you review case documents before trials? . . . Answer Four: . . . Before trials, I seldom read the documents because of the time pressure.”).

126. *See* Wang & Fukurai, *supra* note 10, at 242 (“As revealed in a report issued by the Supreme Court of China, 51.8% of the lay assessors serving at the courts of Shanghai City admitted that they have had problems in understanding legal issues of the cases. 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.”).

127. Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Renmin Peishenyuan Fa Ruogan Wenti De Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的解释) [Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the <Law of the People's Republic of China on People's Assessors>, Judicial Interpretation No. 5 [2019]] (promulgated by the Judicial Comm. Sup. People's Ct., Apr. 24, 2019, effective May 1, 2019), art. 4, *translated by* www.pkulaw.com.

128. *Id.* art. 8.

129. *See, e.g.*, Xiaona Wei (魏晓娜), Renmin Peishenyuan Zhidu Gaige Kuangjia Neiwai De Sikao (人民陪审员制度改革: 框架内外的思考) [*Reform of the People's Assessor System: Reflections from Inside and Outside the Framework*], Neimenggu Shehui Kexue (内蒙古社会科学) 41 Inner Mongolia Soc. Sci. 119, 124 (2020).

130. *Id.*

2. Substantial Involvement in the Hearing

Unlike their counterparts on Anglo-American juries, people's assessors in Chinese courts are not required to be passive.¹³¹ Since they are given almost the same power as professional judges, they can do what professional judges do except for acting as the presiding judge. However, the performance of lay assessors in Chinese courts is more like the passive jurors in common-law jurisdictions. This might be because they lack incentive or competence, or because the professional judges intentionally ignore their role.

With sufficient preparation, lay assessors would be able to exercise their right to participate in case investigation and mediation during the trial. The People's Assessors Law emphasizes the lay assessors' right to question participants, and the duty of the presiding judge to remind people's assessors to raise questions on the issues of the case.¹³² People's assessors need to take an active part in court investigation with the guidance of the professional judge. To avoid the inappropriate influence of professional judges upon lay assessors, the People's Assessors Law explicitly states that "[t]he presiding judge shall perform the obligation of guidance or prompt related to the trial of cases, but he or she may not obstruct people's assessors' independent judgment of cases."¹³³

Having people's assessors be active participants on a panel is a challenge because they are not trained in the law as professional judges are. It should suffice that people's assessors play a substantial role in the hearing. Professional judges are the key to having people's assessors actively participate in the court hearing. There are actions that professional judges can take to encourage or discourage participation by lay assessors. The 2019 SPC Interpretation sets a good example by making it a duty for a presiding judge to remind people's assessors to raise questions about the issues in the case.¹³⁴ Professional judges should make lay assessors feel comfortable and create a collegial and cooperative atmosphere on the court so that lay assessors will play a more active role in the hearing.

131. It worth noting that jurors are less "passive" today than they once were. In some courtrooms, they can submit written questions for judges to ask of the witnesses; in a few courtrooms, they can even ask the judge questions about the instructions right after the judge has instructed them.

132. Interpretation Concerning the People's Assessors Law, arts. 10–11.

133. Zhonghua Renmin Gongheguo Renmin Peishenyuan Fa (中华人民共和国人民陪审员法) [P.R.C. Laws on People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 27, 2018, effective Apr. 27, 2018), art. 20, *translated by* www.pkulaw.com.

134. Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Renmin Peishenyuan Fa Ruogan Wenti De Jieshi (最高人民法院关于适用《中华人民共和国人民陪审员法》若干问题的解释) [Interpretation on Application of the <Law of the People's Republic of China on People's Assessors>, Judicial Interpretation No. 5 [2019]] (promulgated by the Judicial Comm. Sup. People's Ct., Feb. 18, 2019, effective May 1, 2019), art. 11, *translated by* www.pkulaw.com.

3. Adequate and Independent Contributions to the Deliberation

In addition to hearing the cases, people's assessors can play a substantial role in the deliberations. Reforms promoting substantial deliberation by the people's assessors can be found in both the People's Assessors Law and its SPC Interpretation. First, professional judges need training to provide people's assessors with the necessary knowledge on substantive law, procedural rules, and rules of evidence.¹³⁵ Second, the order of giving opinions during the deliberations should be carefully designed to avoid inappropriate influence of professional judges on the people's assessors. This is particularly important for the presiding judge, who is usually the only professional judge on a three-member mixed tribunal or the senior and most experienced professional judge on a seven-member mixed tribunal.¹³⁶ "[w]hen the collegial panel deliberates . . . people's assessors and judges shall give opinions in turn, and finally the presiding judge should give his or her opinion and summarize the opinions of the collegial panel."¹³⁷ It is important for the presiding judge to be the last one to give opinions because lay assessors tend to defer to the experienced professional judges and are reluctant to raise any dissenting opinions if the presiding judge has already expressed his or her opinion on the case.¹³⁸

Third, to facilitate the deliberation, a decision tree has been introduced to China's lay participation system. Before the 2018 People's Assessors Law, there was only one mode of lay participation in China; that is, mixed tribunals in which lay assessors hear and decide both factual and legal issues together with professional judges.¹³⁹ However, the People's

135. Zhonghua Renmin Gongheguo Renmin Peishenyuan Fa (中华人民共和国人民陪审员法) [P.R.C. Laws on People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 27, 2018, effective Apr. 27, 2018), art. 20, *translated by* www.pkulaw.com ("In the deliberation of a case by a collegial panel, the presiding judge shall make necessary interpretations and explanations to people's assessors on the fact-finding, rules of evidence, legal provisions and other matters, and issues to which attention should be paid.").

136. Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhi Fa (中华人民共和国人民法院组织法) [Organic Law of the People's Courts of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 26, 2018, effective Jan. 1, 2019), art. 30, *translated by* www.pkulaw.com ("A judge shall serve as the presiding judge of a collegial bench. When participating in the trial of a case, a president of the court or divisional chief shall serve as the presiding judge.").

137. Interpretation Concerning the People's Assessors Law, art.12.

138. See Chen & Tao, *supra* note 9, at 7. ("Question Five: Did you vote based on your own opinions in deliberations? . . . Did you ever vote against the presiding judge on the final decision?' Answer Five: In deliberations, I followed the presiding judge's opinions . . . I never voted against the judges because I believed in their professional ethics, and I was afraid that they would be annoyed by me.").

139. Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [Criminal Procedure Law of the People's Republic of China] (promulgated by Nat'l People's Cong., Mar.14, 2012, effective Jan 1, 2013), art. 178, *translated by* www.pkulaw.com.

Assessors Law introduced another mode of lay participation in which three professional judges sit with four people's assessors.¹⁴⁰ "When people's assessors participate in a seven-member collegial panel . . . they shall independently make comments on fact-finding and vote jointly with [professional] judges; and they may make comments on the application of law, but may not participate in the voting."¹⁴¹ There are concerns that sometimes it is difficult to distinguish between factual issues and legal issues.¹⁴² To address this problem, the 2019 SPC Interpretation introduces a tool resembling a decision tree.¹⁴³ When the seven-member collegial panel deliberates, the presiding judge summarizes and introduces the issues that need to be decided through deliberation and makes a list of factual issues.¹⁴⁴ The list of factual issues shall be enumerated item by item for the reference of people's assessors in court trial.¹⁴⁵ If there is controversy in making distinction between the factual issue and the legal issue, it shall be deemed as the factual issue.¹⁴⁶ Whether the list of factual issues helps to distinguish between factual and legal issues remains to be seen due to the scarcity of empirical data.

Fourth, lay assessors have the right to give dissenting opinions during deliberation, and such opinions are recorded in the deliberation transcripts.¹⁴⁷ When the mixed tribunal has "significant dissenting opinions," lay assessors or professional judges may require the case to be

140. There are two mixed tribunals under the 2018 CPL. *Zhonghua Renmin Gongheguo Xingshi Susong Fa* (中华人民共和国刑事诉讼法) [Criminal Procedure Law of the People's Republic of China] (Standing Comm. Nat'l People's Cong., Oct. 26, 2018, effective Oct. 26, 2018), art. 183, translated by www.pkulaw.com.

141. *Zhonghua Renmin Gongheguo Renmin Peishenyan Fa* (中华人民共和国人民陪审员法) [P.R.C. Laws on People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 27, 2018, effective Apr. 27, 2018), art. 22, translated by www.pkulaw.com; see also *Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Renmin Peishenyan Fa Ruogan Wenti De Jieshi* (最高人民法院关于适用《中华人民共和国人民陪审员法》若干问题的解释) [Interpretation on Application of the <Law of the People's Republic of China on People's Assessors>, Judicial Interpretation No. 5 [2019]] (promulgated by the Judicial Comm. Sup. People's Ct., Feb. 18, 2019, effective May 1, 2019), art. 13, translated by www.pkulaw.com ("People's assessors shall participate in the deliberation of the collegial panel throughout the entire process. People's assessors and judges shall vote on the issues on the determination of facts based on joint deliberation. People's assessors shall not participate in voting on the issues on the application of laws, but they may offer their opinions and record them in files.")

142. See Chen & Tao, *supra* note 9, at 23 ("The innovative introduction of the jury mode into China's lay assessor system raises the problem of how to decide the fact-law distinction in cases tried by a seven-member collegial panel . . .").

143. Interpretation Concerning the People's Assessors Law, art.13.

144. *Id.*

145. *Id.* art. 9.

146. *Id.*

147. *Zhonghua Renmin Gongheguo Renmin Peishenyan Fa* (中华人民共和国人民陪审员法) [P.R.C. Laws on People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 27, 2018, effective Apr. 27, 2018), art. 23, translated by www.pkulaw.com.

submitted to the president of the court, who can decide whether the case should be submitted to the adjudicative committee for discussion and decision.¹⁴⁸ This new provision has granted lay assessors a right to be heard by both the president of the court and the adjudicative committee. This gives people's assessors a chance to override professional judges and to affect the cases' final decisions.

III. LIMITATIONS OF THE PEOPLE'S ASSESSORS LAW AND CHALLENGES OF IMPLEMENTATION

Enacting the People's Assessors Law is simply the first step towards successful implementation of lay participation in China. Although systematic empirical data on the operation of new People's Assessors Law remains to be completed, there are concerns among academics on some issues relating to the implementation of this new law.¹⁴⁹ There are three potential problems in the implantation of this new law: 1) will the eligibility of potential lay assessors really ensure the diversity of people's assessors? 2) Is it practical to distinguish between factual issues and legal issues when lay assessors participate in the seven-member collegial panel? 3) Is China creating a new mode of lay participation that is neither a jury trial nor a mixed tribunal trial?

A. The Eligibility Requirements Cannot Guarantee the Diversity of People's Assessors

There are two main changes to the eligibility requirements for prospective people's assessors in the 2018 People's Assessors Law. The age of potential lay assessors has been increased from twenty-three to twenty-eight years old. The educational background of lay assessor candidates has been lowered from a junior college diploma to a high school diploma. Although the age threshold is much higher than that in most jurisdictions,¹⁵⁰ there is little concern about this change for its solid justifications.¹⁵¹ In contrast, the change in educational requirements is more controversial. Compared to the requirement of a junior college diploma in the 2004 Decision, a high school diploma is more reasonable. However,

148. *Id.*

149. See Le Roux-Kemp, *supra* note 10, at 255 (Whether lay participation in the legal proceedings of the People's Republic of China and its Special Administrative Region of Hong Kong truly contribute to the credibility and independence of the respective legal adjudication processes, remains questionable); Wei, *supra* note 129, at 124–25; Chen & Tao, *supra* note 9, at 15–25.

150. For example, the age for potential juror in the U.K is eighteen years old. Clive Coleman, *Jury Age Limit to Be Raised to 75 in England and Wales*, BBC NEWS (Aug. 20, 2013), <https://www.bbc.com/news/uk-23763074>.

151. For detailed discussions, see *supra* Part II.A.1.

there is still concern that this requirement will exclude a majority of the Chinese population. According to the statistics released by the seventh national demographic census, only thirty percent of the population on the mainland has an educational background beyond a high school diploma.¹⁵² Therefore, it seems the requirement of a high school diploma might still be too high.

Considering the disparity in development in the different areas of China, especially in the rural areas and remote poverty-stricken areas, the educational background of potential people's assessors is generally low. Therefore, the People's Assessors Law has not made a rigid requirement for the completion of a high school education. Instead, it provides that "persons acting as people's assessors shall generally have educational background of a senior high school or above,"¹⁵³ which implies that those who are impartial and respected in rural areas and remote poverty-stricken areas do not necessarily have a high school diploma. The Pilot Program on the Reform of the System of People's Assessors issued jointly by SPC and the Ministry of Justice in 2015 has made it clear that the education requirement should not be rigidly applied in rural and remote poor areas.¹⁵⁴ Unfortunately, neither the 2018 People's Assessors Law nor the subsequent judicial interpretations explicitly have made this clear when it should be, because if the high school diploma requirement were to be applied rigidly, the impartial and respectful person without such a diploma would have been prevented from becoming people's assessors.

B. It Is Not Practical to Distinguish Between Factual and Legal Issues During Deliberation

With the introduction of seven-member grand mixed tribunals in which the four lay assessors only vote on fact-finding matters, the difficulty of drawing a line between factual issues and legal issues has become a challenge to both practitioners and researchers.¹⁵⁵ According to some

152. NAT'L BUREAU OF STAT., BULLETIN OF THE SEVENTH NATIONAL CENSUS (NO. 6) 1 (2021) (China) (determining that 218,360,767 Chinese citizens hold a bachelor's degree or higher and 213,005,258 Chinese citizens hold high school diplomas); NAT'L BUREAU OF STAT., BULLETIN OF THE SEVENTH NATIONAL CENSUS (NO. 2) 1 (2021) (China) (determining that the total population of mainland China is 1,443,497,378).

153. See the People's Assessors Law, art. 5.

154. See Quanguo Renda Changweihui Guanyu Shouquan Zai Bufen Diqu Kaizhan Renmin Peishenyuan Zhidu Gaige Shidian Gongzuo De Jueding (全国人大常委会关于授权在部分地区开展人民陪审员制度改革试点工作的决定) [Decision of the Standing Committee of the National People's Congress on Authorizing the Implementation of the Pilot Program on the Reform of the System of People's Assessors in Certain Areas]. (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 24, 2015), art. II(1), translated by www.pkulaw.com.

155. See Wang & Tao, *supra* note 105, at 39; Chen & Tao, *supra* note 9, at 23–25.

commentators, the distinction between factual and legal matters is not so straightforward and some issues involve both findings of fact and application of laws.¹⁵⁶ Practitioners found it difficult to differentiate factual matters from legal matters when a grand mixed tribunal was convened to hear major cases.¹⁵⁷

To solve this problem, *The Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Law of the People's Republic of China on People's Assessors* provides in article 9 that,

the seven-member collegial panel shall, before the court session, produce a list of fact-finding issues, differentiate the issues on the determination of facts and the issues on the application of law according to specific case circumstances, and enumerate the facts at issue item by item for the reference of people's assessors in court trial. If the issue on the determination of facts and the issue on the application of law can hardly be differentiated, it shall be deemed as the issue on the determination of facts.¹⁵⁸

However, it is unclear who shall determine the issue in question if it is hard to be differentiated. Should the court employ this power, or should the lay assessors, or should the parties participate in making this decision?

The seven-member collegial panel shall produce a list of fact-finding issues before the court session and when deliberating about a case.¹⁵⁹ However, how should the list of fact-finding issues be prepared in judicial practice? In response to this frequently raised question from the inferior courts, the SPC and the Ministry of Justice jointly issued *The Reply on Some Issues Concerning the Implementation of the Law of the People's Republic of China on People's Assessors* in August 2020 and provided the following guidance:

The list of fact-finding issues shall be based on all the facts of a case and focus on the crucial content of the difficulties and controversies of the case. In a criminal case, facts of the criminal constitutive elements may serve as the base, and the main content shall include the facts that

156. See Chen & Tao, *supra* note 9, at 23 (“For instance, in criminal cases, the issue of whether the defendant is guilty or not guilty could be regarded by some as a simple question of fact, whereas others may consider this a legal matter because the decision-maker needs to apply the constitutive elements of a crime as written in legal codes.”).

157. Wang & Tao, *supra* note 105, at 39; Chen & Tao, *supra* note 9, at 23–25.

158. Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Renmin Peishenyuan Fa Ruogan Wenti De Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的解释) [Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the <Law of the People's Republic of China on People's Assessors>, Judicial Interpretation No. 5 [2019]] (promulgated by the Judicial Comm. Sup. People's Ct., Apr. 24, 2019, effective May 1, 2019), art.9, translated by www.pkulaw.com.

159. *Id.*

constitute a crime and facts that do not constitute a crime, as well as facts related to the circumstances of sentencing. In a civil case, the legislative facts of controversy between both parties to the case may be summarized upon the normative basis of claims of different categories of disputes. In an administrative case, facts required for reviewing the legality of administrative acts shall be included.¹⁶⁰

It remains to be seen whether this guidance can help the courts distinguish between factual and legal matters via the tool of a decision tree.

C. *China Is Creating a New Hybrid Mode of Lay Participation*

China adopted the mixed tribunal trial mode since it first introduced lay participation to Chinese trials. Lay assessors sit together with professional judges, and both are responsible for deciding guilt and sentencing issues. Although there has long been a call for introducing jury trials to China among the academics,¹⁶¹ the pilot of people's assessor system (2015-2018) tried to shift the focus of lay assessors from nominal judges to genuine factfinders.¹⁶² According to the pilot program, people's assessors no longer try the issues concerning the application of law, but only participate in the finding of facts.¹⁶³ People's assessors may offer their opinions on issues concerning the application of laws relating to the case but cannot participate in voting on them.¹⁶⁴ One reason for the change in the lay assessors' role is to maximize the advantages of people's assessors, who can make use of their experience, understanding of social conditions

160. [Zhonghua Renmin Gongheguo Renmin Peishenyuan Fa Shishi Zhong Ruogan Wenti De Dafu][中华人民共和国人民陪审员法》实施中若干问题的答复][Reply on Some Issues concerning the Implementation of the <Law of the People's Republic of China on People's Assessors>](promulgated by Supreme People's Court & Ministry of Justice, Aug.11, 2020, effective Aug.11, 2020), art. 13, *translated by* www.pkulaw.com.

161. See Jiahong He (何家弘) Peishen Zhidu Zongheng Lun (陪审制度纵横论) [*On Lay Participation System*], 3 JURISTS 48 (1999) (stating that China should get inspirations from the western jury system); Zongzhi Long (龙宗智), Lun Woguo Peishen Zhidu Moshi De Xuanze (论我国陪审制度模式的选择) [*On Choice of Lay Participation Mode in China*], 5 J. SICHUAN U. (Phil. & Soc. Sci. Ed.) 116, 131 (2001).

162. Zuigao Renmin Fayuan, Sifabu Guanyu Yinfa Renmin Peishenyuan Zhidu Gaige Shidian Fang'an (最高人民法院、司法部关于印发《人民陪审员制度改革试点方案》的通知) [Notice of the Supreme People's Court and the Ministry of Justice on Issuing the Pilot Program on the Reform of the People's Assessors] (promulgated by Supreme People's Court & Ministry of Justice, Apr. 24, 2015, effective Apr. 24, 2015), art. II.4, *translated by* pkulaw.com.

163. Zuigao Renmin Fayuan Sifabu Guanyu Yinfa Renmin Peishenyuan Zhidu Gaige Shidian Gongzuo Shishi Banfa De Tongzhi (最高人民法院、司法部关于印发《人民陪审员制度改革试点工作实施办法》的通知) [Notice of the Supreme People's Court and the Ministry of Justice on Issuing the Measures for the Implementation of the Pilot Program of the People's Assessor System Reform] (promulgated by Supreme People's Court & Ministry of Justice, May. 20, 2015, effective May. 20, 2015), art. 21, *translated by* pkulaw.com.

164. *Id.* art. 22.

and public opinions, and enhance public awareness of the judgments of people's courts.

However, the 2018 People's Assessors Law did not completely adopt the change of lay assessors' role in the pilot program. It kept the earlier three-member mixed tribunal as what it was—on a three-member mixed tribunal—where people's assessors and professional judges are jointly responsible for the fact-finding and application of the laws.¹⁶⁵ Only in seven-member mixed tribunals, with four lay assessors and three professional judges, are the lay assessors and professional judges jointly responsible for fact-finding. There, the professional judges decide the legal issues on their own.¹⁶⁶ The introduction of a seven-member grand mixed tribunal brought a new hybrid mode of lay participation to China, which is neither jury trial nor mixed tribunal trial. Whether such an innovation can enhance lay participation in China needs further empirical data.

CONCLUSION

The development of China's lay assessor system has some interesting features. First, the scope of cases in which lay assessors are involved has been enlarged and the focus of lay participation has shifted from minor cases to major and influential cases. Since the 2004 Decision, lay assessors serve on collegial panels in criminal, civil and administrative cases of first instance with "relatively significant social impact."¹⁶⁷ The 2018 People's Assessors Law adopted a seven-member mixed tribunal, which presides over the following cases of first instance:

- (1) Criminal cases with great social impact where a fixed term imprisonment of not less than ten years life imprisonment or death penalty may be sentenced.
- (2) Public welfare lawsuits filed in accordance with the Civil Procedural Law of the People's Republic of China and the Administrative Litigation Law of the People's Republic of China.
- (3) Cases involving land requisition and house demolition, ecology and environment protection, and food and drug safety, and with great social impacts.
- (4) Other cases with great social impacts.¹⁶⁸

165. . *Zhonghua Renmin Gongheguo Renmin Peishenyuan Fa* (中华人民共和国人民陪审员法) [Law of People's Republic of China on People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 27, 2018, effective Apr. 27, 2018), art.21, *translated by* www.pkulaw.com.

166. *Id.* art. 22.

167. *Quanguo Renda Changweihui Guanyu Wanshan Renmin Peishenyuan Zhidu De Jueding* (全国人大常委会关于完善人民陪审员制度的决定) [Decision Regarding Perfecting the System of People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2004), art. 2(1), 2004 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China), *translated by* www.pkulaw.com.

168. *Zhonghua Renmin Gongheguo Renmin Peishenyuan Fa* (中华人民共和国人民陪审员法) [P.R.C. Laws on People's Assessors] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 27, 2018, effective Apr. 27, 2018), art. 16, *translated by* www.pkulaw.com.

Thus, lay participation has become more critical in significant cases rather than in minor cases.

Second, it is still unclear whether it is a right of the parties or merely a monopoly of the court to increase lay assessors' participation. According to earlier commentators, the idea of having lay assessors try cases together with professional judges is recognized as the right of the public to participate in the administration of justice, not as the right of the defendant to be tried by his or her peers.¹⁶⁹ However, the 2004 Decision tried to expand the application of the lay assessors' system by increasing one circumstance; that is, lay assessors are to serve when requested to do so by the defendants in criminal cases, by either party in civil matters, or by the plaintiff in administrative cases.¹⁷⁰ This change was praised as granting the litigation parties a right to request lay participation.¹⁷¹ However, the right has been subjected to the discretion of the court in the 2018 People's Assessors Law. It provides that

[w]here the defendant to a criminal case of first instance, a plaintiff or defendant in a civil case, or a plaintiff to an administrative case files an application for people's assessors' participation in the trial in the form of the collegial panel, the people's court may decide that people's assessors and judges form a collegial panel to try the case.¹⁷²

It was held that "litigants no longer have a general right to request for their case to be adjudicated by a collegial panel."¹⁷³ In the matter of whether lay participation is needed, Chinese courts obviously have played a much more important role than the litigation parties.

Third, the focus of China's lay assessor system has shifted from the number of cases including lay participation to the quality of lay assessors' participation. As indicated in the Part I, the people's assessor system has been implemented in China for misdirected purposes for years. The law on the books explicitly provides that lay assessors can determine issues of fact as well as law and provide judgment as well as sentencing along with professional judges. In reality, however, they are no more than bodies on a mixed tribunal to compensate for the inadequate number of judicial personnel and help the courts to handle the ever-increasing caseload. The 2018 People's Assessors Law and its 2019 SPC Interpretation have made

169. See Yue, *supra* note 9, at 51.

170. Decision Regarding Perfecting the System of People's Assessors, art. 2(2).

171. See Wang & Fukurai, *supra* note 10, at 243 ("[F]or the first time since the establishment of the People's Republic of China by the CCP in 1949, the litigants are entitled to apply for the use of mixed tribunals. This could be seen as a move by China toward principles of justice such as 'each citizen has the right to be judged by his peers.'").

172. Decision Regarding Perfecting the System of People's Assessors, art. 17.

173. Le Roux-Kemp, *supra* note 10, at 228.

great progress in increasing lay assessors' meaningful participation, further reforms are underway.