



LAY PARTICIPATION IN THE CHINESE COURTS

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Executive Summary

- The role of lay assessors in the Chinese courts is widely controversial. Recent study shows several fundamental problems: disproportionate participation among lay assessors, assessors' reticence during the hearing process, and virtually nonexistent deliberation. Lay assessors thus are the decoration of the trial.
- The first whammy of lay assessors is due to a mixed tribunal institution. Similar to those in other mixed tribunal institutions, because of the knowledge and power gap between professional judges and laypeople, it is inevitably places judges in more influential positions. To secure a position, lay assessors have to be submissive.
- The second whammy of lay assessors is from the regulatory strategies on Chinese judges. The responsibility system that evaluate and discipline judges with quantified measurements, and the regulations on incorrectly decided cases have discouraged the judges to share their decision-making power with lay assessors.
- To address the first whammy, the power and responsibilities of assessors should be clarified. The courts can encourage legal scholars, lawyers, and other professionals to participate in the adjudication to fill the gap of knowledge. The litigants instead of the courts select assessors. The sufficient financial budgets should be ensured to support the system of lay assessors.
- To address the second whammy, the current performance-assessment system needs to be reformed so that judges' independent decision-making can be secured and enhanced. Without the external constraints, judges are more willing to share adjudicative power with assessors.
- 陪審員在中國法院內的作用受到廣泛爭議。近期研究發現陪審員制度的很多問題：陪審員並不是被隨機抽取參與審判的，在庭審過程中沉默不語以及沒有參與案件的討論。陪審員只是庭審的點綴裝飾而已。
- 中國陪審員制度的第一重難題是混合法庭制度。和其他國家的混合法庭制度相似，由於專業法官和陪審員的知識和權力差異，法官不可避免地更具影響力。為了保住職位，陪審員只能順從。
- 中國陪審員制度的第二重難題源於對法官的規制措施。運用定量指標評價和約束法官的目標責任制以及錯案追究制度都使法官沒有動力和陪審員分享判案的權力。
- 要解決第一重難題，應當明確陪審員的權力和責任；鼓勵法律學者、律師和其他專業人員成為陪審員以彌合知識鴻溝；讓訴訟雙方選擇陪審員而不是讓法庭選擇；應當保證有充足的財政預算以支持陪審員制度。
- 要解決第二重難題，應當改革現行的法官績效評價機制，保證和強化法官獨立審判。如果沒有外在的約束，法官將更願意和陪審員分享審判權力。

Lay Participation in the Chinese Courts

Introduction

Since 2004, China has strengthened its lay assessor institution, expanding the participation of the citizenry in the administration of justice. The assessor institution attempts to reduce corruption and boost legitimacy of the decision-making process. It is also intended to school citizens in rule of law, and develop public confidence in the judiciary and the legal system.¹

The role of lay assessors in the Chinese courts, however, is controversial. Many scholars suggest dropping the assessor institution while the advocates claim that it is a milestone in the democratization of the administration of justice. Recent study found the trivial role of lay assessors regarding to the disproportionate participation among lay assessors, assessors' reticence during the hearing process, and virtually nonexistent deliberation.

Two factors have contributed to the poor performance of lay assessors. The primary reason is the mixed tribunal institution. While the law stipulates that lay assessors are vested with the same powers as judges, the latter can manipulate decisions through their superior professional knowledge and status. On the other hand, since the judges are embedded in the particular legal, political, and bureaucratic environment,² they have little reason to share decision-making power with the lay assessors.

The role of lay assessors in Chinese court, therefore, is closely related to the mixed tribunal institution and regulatory control on judges. The measures that fail to conquer this double whammy will not be successfully implemented.

The Trivial Role of Lay Assessors

Disproportionate Participation

Although the National People's Congress Directive stipulates that the assessors shall be randomly selected for cases (Article 14), actual participation in court hearing is concentrated in a tiny proportion of assessors, sometimes called 'professional assessors' (陪審專業戶).³ Of the 42 lay assessors in a Shanxi district court, 19 are marked 'busy', 'pregnant', or 'sick'. For the rest, the record indicated that they participated in the assessing work disproportionately: three of them participated in more than 100 cases, while seven of them attended fewer than 20 cases.

In a Sichuan district court, three assessors attended more than 100 cases and eight assessors attended more than 50 cases. The total number of cases attended by these eight assessors constituted 60.64 per cent of all cases in which the lay assessors are involved.⁴ In another court in a costal area of China, only one lay assessor in his early sixties had participated in each of criminal trials throughout the period.

The phenomenon of disproportionate participation exists widely because of administrative convenience. Some assessors are busy with work and family commitments, and therefore have a tendency to avoid service. Other assessors are retired or approaching retirement. They are enthusiastic about the honorarium, especially those who cannot find a better pastime. The court and the judges also tend to use those assessors who are both available and cooperative for the sake

¹ Stephen Landsman & Jing Zhang, 'A Tale of Two Juries: Lay Participation Comes to Japanese and Chinese Courts' (2008) 25 *UCLA Pacific Basin Law Journal* 179-227.

² Peter H. Solomon, 'Courts and Judges in Authoritarian Regimes' (2007) 60(1) *World Politics* 122-145.

³ Zhang Yonghe & Yu Jia, *People's Assessor System in Wuhou District* (Beijing: Legal Press, 2008) [張永和、于嘉, 《武侯陪審》(北京: 法律出版社, 2008)].

⁴ Ibid.

of administrative convenience. If the courts are to follow the law and select the assessors randomly, several hearings will likely have to have been postponed. This delay will have caused significant trouble for both the judges and the litigation parties.

Reticence During the Hearing Process

Few assessors raise questions during the hearing process. A survey based on 292 criminal cases finds, for example, that 98.31 per cent of lay assessors did not raise any questions during hearings and, 69.49 per cent did not have verbal exchanges with the adjudicating judges.⁵

Several factors have contributed to this reluctance. Firstly, lay assessors often do not have a level of understanding that will enable them to explore alternatives to the questions that the presiding judge has raised.⁶ Secondly, lacking information about the case forces them to listen carefully in order to understand it; developing useful questions is difficult when one is occupied by simply trying to understand what is going on. Some assessors admit that they barely understood the issues. Finally, the assessors are also afraid of making mistakes. Many of them believe that the hearing process is solemn, and that any mistake may stain such solemnity.

There are two exceptions. For civil and family cases, experienced assessors frequently participate in mediation when the judges are young. Another situation in which the assessors frequently speak occur at the end of the criminal trial, usually during juvenile trials. But neither the mediation efforts nor the moralistic preaching constrain the power of the judge or streamline the trial procedures. The assessors act to help the judges accomplish their goals—to either reach a settlement or to confirm the righteousness of the decision.

Nonexistent Deliberation

In the district court in Shanxi Province, the lay assessors are often excluded from the decision-making process. The lay assessors are only asked to sign the so-called ‘deliberation’ minutes. The most commonly seen word from the assessor is ‘agreed’. Sometimes, the assessors are asked to do the ‘makeup signing’ (補簽)—to sign the minutes after the judgments have already been announced and all the files bound. Except for cases being appealed, signing for other assessors, also known as ‘vicarious signing’ (代簽), is allowed. Moreover, the lay assessors are few asked to sit down with the judge to deliberate a case. If the assessor’s opinion happens to be different from the judge’s, the judge will jump to express his opinion, to influence the second assessor.⁷

In the eyes of the lay assessors, the process simply means attending the hearing signing the minutes, signing the minutes, and claiming an honorarium. Every decision is the judge’s, and if anything, the judge is to be held responsible. This belief is reinforced, since no assessors are ever punished for signing the minutes without deliberations. Secondly, the lay assessors are intimidated by the power and knowledge of the judges. Finally, many of them fear that they will never be called in again should they earn a reputation for uncooperativeness.

In the eyes of the judges, the consultation is unnecessary since in a significant percentage of cases, assessors understand neither the laws nor the issues. The judges also believe that it is unrealistic to have another meeting aside from the hearing date. Since many lay assessors come to court only for the honorarium, asking them to visit the court once more will defeat the purpose;

⁵ Xu Xiaotong & Sun Yue, ‘How to Deal with “Presenting without Hearing” for People’s Assessors’, *China Youth Daily*, 27 March 2014 [徐霄桐、孫悅, ‘人民陪審員如何走出“陪而不審”’, 《中國青年報》, 2014年3月27日], http://zqb.cyol.com/html/2014-03/27/nw.D110000zgqnb_20140327_3-03.htm (Last accessed 4 May 2015).

⁶ Stefan Machura, ‘Interaction between Lay Assessors and Professional Judges in German Mixed Courts’ (2001) 72 *International Review of Penal Law* 451–494.

⁷ Zuo Weimin, Tang Huojian & Wu Weijun, *A Study on the Collegiate Panel* (Beijing: Legal Press, 2001) [左衛民、湯火箭、吳衛軍, 《合議制度研究》(北京: 法律出版社, 2001)].

the honorarium will become unattractive due to the extra commuting costs. More fundamentally, because the judges nonetheless have to be responsible for the decisions made, they are unwilling to share their decision-making power with lay assessors.

In Jiangsu, Guangdong, Sichuan, and Hainan, lay assessors are sometimes invited to formally participate in deliberation after a hearing has been completed. A major reason behind this variation is that in these provinces, the courts, buoyed by sufficient budgets from local governments, can afford higher operation expenses for the lay assessor institution. In several provinces, lay assessors are only informally consulted by telephone.

Reasons for Ongoing Problems

Mixed Tribunal: The Gap in Knowledge and Power

In a mixed tribunal, the decision must be made in accordance with existing legal rules, and the decisions may be appealed by the litigation parties.⁸ This situation inevitably places judges in more influential positions due to their legal education and experience. In German courts, for example, professional judges often persuade lay judges to accept their preferred decisions.⁹ For a few exceptional judges who regularly hold deliberations with the lay assessors, the major part of the deliberation is to explain the legal rules and rationales to them. This pattern can be seen in Jiangsu, Hainan, and Sichuan provinces, where formal deliberations are held. Overall, given their relatively minimal legal knowledge and training, and since many lay assessors could not follow the legal issues being discussed, they offer little legal analysis.

While lay assessors and judges are equal according to the law, their actual influence during trials and deliberations differ markedly. Procedural rules place the judges in a more powerful position, a phenomenon widely shared in jurisdictions with mixed tribunals.¹⁰ The judge chairs the hearing process and is the dominant examiner of the witnesses.¹¹ The judge also accesses the case dossier in advance, but as in Poland and Croatia,¹² assessors are denied access. Indeed, assessors are usually called upon no more than one working day before the hearing, and sometimes hours before the hearing if the originally scheduled assessors could not make it. They consequently may not have been able to understand the issues of the case during the hearing process; some could not even keep themselves awake on the bench.¹³

Regulations on Judges: Reinforcing the Trivial Role of Lay Assessors

Since the courts are embedded in particular legal, political, and bureaucratic situations, lay assessors could not have real independent power. The embedded courts have reinforced the trivial role of lay assessors in Chinese courts.

The performance-assessment exercise, approval procedures, and institutional setups such as adjudicative committees and political-legal committees have impact on the behaviors of the judges. Specifically, the responsibility systems that evaluate and discipline judges with quantified measurements are launched. The performance of judges is to be adversely affected if litigants are

⁸ Sanja Kutnjak Ivković, 'Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals' (2007) 40 *Cornell International Law Journal* 429–453.

⁹ Gerhard Casper & Hans Zeisel, 'Lay Judges in the German Criminal Courts' (1972) 1 *Journal of Legal Studies* 135–191; Christoph Rennig, 'Influence of Lay Assessors and Giving Reasons for the Judgment in German Mixed Courts' (2001) 72 *International Review of Penal Law* 481–494.

¹⁰ Kutnjak Ivković (note 8 above).

¹¹ He Xin & Ng Kwai Hang, 'Inquisitorial Adjudication and Institutional Constraints in Chinese Civil Justice' (2013) 35 *Law & Policy* 290–318.

¹² Kutnjak Ivković (note 8 above).

¹³ Xu & Sun (note 5 above).

to file a successful complaint against them. In some cases, court decisions are subject to the media's scrutiny.¹⁴ In addition to the general requirements specify in the Judges Law (Amended in 2001, Articles 32–35), more detailed regulations, such as measures for holding adjudicating staff responsible for incorrectly decided cases (錯案追究制),¹⁵ have been issued, with sanctions including monetary fines and negative notations in a judge's career file.¹⁶

Lay assessors are not court staff, and are therefore not subject to the courts' assessment exercise; many of them are part-time or half-retired. The jury system works well in other countries in part because jurors work to shield judges from politics, and judges cannot be held responsible for jurors' decisions.¹⁷ However, in China no lay assessors could shield judges from taking responsibility for decisions made in court. As a result, judges control lay assessors for self-protection; whether to choose them for specific cases, whether to invite them for deliberation, and ultimately what that decision is.

Disproportionate participation is a result of the courts' control; they handpick cooperative and available assessors. The judge decides whether to hold a formal deliberation and whether to accept the assessors' opinions. Assessors are given the chance to express their views only when the judges have unusual need—especially, only when the judge need them to facilitate settlements, deal with difficult litigants, or communicate with the prosecutor. Even if judges are challenged, they can explain to the assessors that the decision has been altered by the court leaders or the adjudicative committee, or they could simply change the decision, with or without altering the minutes.

Policy Recommendations

To conquer the first whammy, three aspects should be improved. Firstly, it is crucial to clarify the range of power and responsibilities that assessors should hold. The recent measures that lay assessors deliberate on 'factual' rather than legal aspects, as well as participate in 'difficult and influential' cases remain ambiguous. Secondly, to fill the gap in knowledge, the courts can choose assessors from legal scholars, lawyers, and other professionals. Moreover, the litigants instead of the courts select assessors. Finally, the financial budgets should be ensured to support the system of lay assessors.

To fundamentally change the status of lay assessors, the current performance assessment needs to be reformed so that judges' independent decision-making can be secured and enhanced. Without the external constraints, judges are more willing to share adjudicative power with assessors.

Conclusions and Implications

The role of lay assessors is minimal regarding to their disproportionate participation, silence during the hearing process, and absence on deliberation. The dire situation stemmed from a double whammy. One aspect is the superior legal knowledge of professional judges and their dominance in court procedure, which has been well documented in jurisdictions across the world in countries with mixed tribunals. The other aspect is derived, ultimately, from the assessment and control on judges' performance. There is no way for judges to share their adjudicative power with lay assessors. To secure a position, lay assessors have to be submissive.

¹⁴ Benjamin L. Liebman, 'Watchdog or Demagogue? The Media in the Chinese Legal System' (2005) 105 *Columbia Law Review* 1-157.

¹⁵ The Supreme People's Court, 'The Temporary Measures to Hold Adjudicating Staff Responsible for Illegally Handling Cases' (promulgated on 26 August 1998).

¹⁶ Xin He, 'Routinization of Divorce Law Practice in China: Institutional Constraints Influence on Judicial Behavior' (2009) 23 *International Journal of Law, Policy and the Family* 83-109.

¹⁷ Richard O. Lempert, 'The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research' (2007) 40 *Cornell International Law Journal* 477-488.

The double whammy of lay assessors provides insights into China's ongoing judicial reforms. Though the reform measures seem to address many existing problems, but recent study implies that any judicial reforms of lay assessors that fail to solve the double whammy are hardly to achieve success. Only when the Chinese courts fill the knowledge gap between judges and assessors and reform the existing performance-assessment exercise can the status of lay assessors are fundamentally changed.